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# COLLATERAL CONSEQUENCES OF A FELONY CONVICTION IN ILLINOIS

JOHN F. DECKER\*

When a person is charged with a serious crime, the first concern usually is the possible penal sanctions involved: imprisonment, conditional discharge, fines, and the like. However, in Illinois, many collateral consequences are possible as a result of a felony conviction. This article will summarize the additional disabilities which a person convicted of committing a felony may be required to face.

## HISTORICAL BACKGROUND

Past reactions to crime have shaped in many ways the adverse consequences imposed upon convicted persons today. A logical first step in the exploration of current disabilities which result from criminal convictions is a brief historical perspective of the development of these collateral consequences.

The early Germanic tribes imposed a penalty of outlawry on those convicted of certain serious crimes.<sup>1</sup> Under this concept, the offender was banished from the social community and deprived of all of his rights. His possessions were forfeited, his wife was considered to be a widow, and his children were considered orphans.<sup>2</sup> By violating the law, the criminal was regarded as having declared war on the community.<sup>3</sup> The community had the right to retaliate against the offender without fear of punishment, using whatever means it considered appropriate. As a result, the criminal not only lost all proprietary rights and privileges, but frequently his life.<sup>4</sup>

In the latter days of Greek and Roman civilizations, infamy was common among convicted criminals.<sup>5</sup> When a person was declared in-

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1. Damaska, *Adverse Legal Consequences of Convictions and Their Removal: A Comparative Study*, 59 J. CRIM. L.C. & P.S. 347, 350 (1968) [hereinafter referred to as Damaska]. The early Romans also imposed outlawry, but it was applied in the limited form of proclaiming a convict a treasoner. *Id.* at 350-51.

2. *Id.* at 350.

3. Special Project, *The Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV. 929, 942 (1970) [hereinafter referred to as *Collateral Consequences*].

4. *Id.*

5. Damaska, *supra* note 1, at 351.

famous, he lost all of the highly valued rights which enabled citizens to influence public affairs. Among these were the right to attend assemblies, to vote, to make speeches, to hold public office, to appear in court, and to serve in the army.<sup>6</sup> The right to serve in the army, at the time, was a high honor and a source of prestige in the community.<sup>7</sup>

Infamy, as practiced in the Roman Republic in response to criminal convictions, included other specific disabilities such as the loss of citizenship and the right to have a trade, forfeiture of property, and the loss of inheritance rights.<sup>8</sup> Thereafter, imposition of these types of penalties became common throughout Europe, and most United States jurisdictions continue today to impose a variety of specific disqualifications upon persons convicted of certain crimes,<sup>9</sup> although they are generally not as extreme as their earlier counterparts.

In medieval times, the continental countries developed the concept of civil death. When civil death was imposed, the convicted criminal experienced the same legal consequences as if he had suffered actual physical death.<sup>10</sup> The convict forfeited all political rights and familial rights, including the right to transmit property by will or intestacy. Also, the convict had his property confiscated by the government. Civil death continued to be imposed in France and the Germanic countries until the mid-nineteenth century.<sup>11</sup> A modified form of civil death is still a consequence of conviction in a few United States jurisdictions.<sup>12</sup> However, it has been declared not to exist in the absence of a statute specifically providing for it.<sup>13</sup> Five states currently have statutory variations of civil death,<sup>14</sup> but the earlier drastic penalties have been modified from the original concept in terms of what rights are forfeited.<sup>15</sup>

6. *Id.*

7. *Id.*

8. *Id.*

9. See *Collateral Consequences*, *supra* note 3, at 950. See, e.g., CONN. CONST. art. 6, § 3 (forfeiture and restoration of electoral privileges); DEL. CONST. art. V, § 2 (right to hold public office); ARIZ. REV. STAT. ANN. § 32-1683(4) (1956) (right to carry on a trade).

10. Damaska, *supra* note 1, at 351-52.

11. *Id.*

12. D. RUDENSTINE, THE RIGHTS OF EX-OFFENDERS 16 (1979).

13. See, e.g., *In re Estate of Nerac*, 35 Cal. 392 (1868); *Owens v. Owens*, 100 N.C. 240, 6 S.E. 794 (1888); *David v. Laning*, 85 Tex. 39, 19 S.W. 846 (1892).

14. ALASKA STAT. §§ 11.05.070-11.05.080 (1970); IDAHO CODE §§ 18-310 to 18-311 (1948); N.J. CIV. RIGHTS LAW §§ 79, 79a (McKinney 1976); OKLA. STAT. ANN. tit. 21, §§ 65, 66 (West 1958); R.I. GEN. LAWS § 13-6-1 (1969).

15. See, e.g., *Holmes v. King*, 216 Ala. 412, 113 So. 274 (1927) which noted that: "In general, the American Courts . . . tend to get away from the rigorous features of the common law." *Id.* at 414, 113 So. at 276. The *Holmes* court recognized the limited statutory provision regarding civil death which allowed the convict to write a will within six months after sentence. It reached this decision even though the common law would have considered the convict dead at the time of conviction for purposes of descent and distribution of the convict's property.

Moreover, in each of the jurisdictions now authorizing civil death, the disability remains in effect only during the period of the offender's imprisonment.<sup>16</sup>

The criminal law in early England reflected a concept similar to the ancient practice of outlawry, known as attainder, which was imposed on lawbreakers convicted of a felony or treason.<sup>17</sup> Attainted persons forfeited their property to the crown, and they lost many civil rights such as the right to bring suit, the right to appear in court as a witness or as a juror, and the right to hold public office.<sup>18</sup> They also suffered corruption of blood.<sup>19</sup> Attainder continued to be imposed in England until 1870.<sup>20</sup> Although the American colonies imposed certain civil disabilities under the English procedure of attainder,<sup>21</sup> attainder and its accompanying incidents of forfeiture and corruption have generally been prohibited in the United States by constitutional provisions.<sup>22</sup>

Illinois law mirrors the historical development of collateral consequences of a conviction. Although civil death has never been imposed in Illinois, the current specific disabilities which are statutorily imposed on convicted criminals in the state are rooted in the practices of infamy and attainder.

#### TERMINOLOGY

Most of the specific disabilities imposed by Illinois statutes refer to "conviction" or "felonies," or "infamous crimes" or "crimes involving moral turpitude."<sup>23</sup> An exploration of the meanings of these terms is necessary before the disabilities themselves are discussed.

In Illinois, conviction is defined by statute as "a judgment of con-

16. The Alaska statute is typical. It provides that:

A judgment of imprisonment in the penitentiary for a term less than life suspends the civil rights of the person sentenced, and forfeits all public offices and all private trusts, authority or power *during the term or duration of imprisonment.*

ALASKA STAT. § 11.05.070 (1970) (emphasis added).

17. *Collateral Consequences*, *supra* note 3, at 943.

18. *Id.*

19. *Id.* Under this doctrine, the attainted felon's blood was considered to be corrupt; he could not pass his estate on to his heirs. Land tenure was based on an implied condition of good behavior, and the felon's act was viewed as a breach of this condition. Avery v. Everett, 110 N.Y. 317, 323-24, 18 N.E. 148, 150 (1888).

20. *Collateral Consequences*, *supra* note 3, at 942.

21. S. RUBIN, *THE LAW OF CRIMINAL CORRECTION* 26 (2d ed. 1973).

22. The current Illinois constitutional provision that "[n]o conviction shall work corruption of blood or forfeiture of estate" clearly reflects this position. ILL. CONST. art. I, § 11.

23. See, e.g., ILL. REV. STAT. ch. 38, § 1005-5-5(b) (1977) which provides that:

A person convicted of a felony shall be ineligible to hold an office created by the Constitution of this state. . . .

viction or sentence entered upon a plea of guilty or upon a verdict or finding of guilty of an offense . . . ."<sup>24</sup> In practice, the meaning is not as certain. For the purpose of the Post-Conviction Hearing Act,<sup>25</sup> a defendant placed on probation is not considered to have suffered a conviction,<sup>26</sup> but a defendant who admits guilt in a probation revocation proceeding is regarded as having been convicted.<sup>27</sup> A finding of probable cause at a preliminary examination cannot be counted as a conviction, although such may occur later.<sup>28</sup> Also, a finding of guilt by a military court-martial is not considered to be the equivalent of a conviction for civil disability purposes.<sup>29</sup> Finally, when a defendant is charged with one offense, but is eventually found guilty at trial of a lesser offense included within the original charge, no conviction results on the greater offense.<sup>30</sup>

There are different interpretations as to when a conviction actually occurs. Under the Unified Code of Corrections,<sup>31</sup> conviction refers to a determination of guilt even when no formal judgment is entered.<sup>32</sup> Similarly, failure to impose a sentence does not vacate the conviction.<sup>33</sup> When the defendant appeals the verdict or finding of guilty, the judgment remains in effect until it is reversed. The pendency of an appeal does not stay the attachment of the conviction.<sup>34</sup>

Under Illinois law, a "felony" is defined as being "an offense for which a sentence to death or to a term of imprisonment in a peniten-

24. *Id.* § 2-5. The conviction concept is discussed in D. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL (1966).

25. ILL. REV. STAT. ch. 38, §§ 122-1 to 122-7 (1977).

26. *Illinois v. DuMontelle*, 71 Ill. 2d 157, 374 N.E.2d 205 (1978) (probation is considered to be in the nature of a continuance).

27. *See Illinois v. Pier*, 51 Ill. 2d 96, 281 N.E.2d 289 (1972).

28. *Illinois v. Tate*, 47 Ill. App. 3d 33, 361 N.E.2d 748 (1977).

29. *Getz v. Getz*, 332 Ill. App. 364, 75 N.E.2d 530 (1947).

30. For example, if the defendant is charged with pandering, a felony, and is convicted of the lesser included offense of soliciting for a prostitute, a misdemeanor, the solicitation conviction serves as an acquittal on the pandering charge. *See ILL. REV. STAT. ch. 38, § 3-4(a)* (1977). *See also Illinois v. Gray*, 69 Ill. 2d 44, 370 N.E.2d 797 (1977) (conviction of contempt for violation of protective order bars subsequent prosecution for aggravated battery and attempted murder arising out of the same conduct).

However, if the conviction is based on a guilty plea to the lesser offense, there is no finding—either conviction or acquittal—on the greater offense. *Illinois v. McCutcheon*, 68 Ill. 2d 101, 106, 368 N.E.2d 886, 888 (1977).

31. ILL. REV. STAT. ch. 38, §§ 1001-1008 (1977).

32. *See id.* § 1005-1-5 (1977). *See also* 1975 OP. ATT'Y GEN. NO. S-966, which indicates that a conviction refers not only to entry of a judgment, but also to the determination of guilt even if no judgment is ever entered.

33. *Illinois v. Akins*, 43 Ill. App. 3d 943, 358 N.E.2d 3 (1976) (fact that no sentence was imposed does not mean there has been no conviction).

34. *Illinois v. Bey*, 42 Ill. 2d 139, 246 N.E.2d 287 (1969).

tiary for one year or more is provided.”<sup>35</sup> Thus, incarceration for less than a year would not fall within the definition of a felony and, accordingly, would be treated as a misdemeanor. In addition, if the statute under which the conviction is obtained provides for discretionary sentencing of penitentiary imprisonment only, or fine only, or both fine and imprisonment, the offense is a misdemeanor rather than a felony.<sup>36</sup>

Infamous crimes, according to the Illinois statutes, “are the offenses of arson, bigamy, bribery, burglary, deviate sexual assault, forgery, incest or aggravated incest, indecent liberties with a child, kidnapping or aggravated kidnapping, murder, perjury, rape, robbery, sale of narcotic drugs, subordination of perjury and theft if the punishment imposed is imprisonment in the penitentiary.”<sup>37</sup> It is unclear whether this is an exhaustive list of the crimes considered to be infamous in Illinois. The Illinois Supreme Court held that whether a crime is infamous depends “not upon the common law or the court’s view of its moral aspects, but upon the statute.”<sup>38</sup> However, more recent Illinois opinions—all concerning eligibility to hold public office—indicate that the determination of what constitutes an infamous crime is open to judicial interpretation.<sup>39</sup> The standard used in these later cases has been whether the crime falls within the general classification of being inconsistent with commonly accepted principles of honesty and decency.<sup>40</sup> Under this interpretation, both felonies and misdemeanors

35. ILL. REV. STAT. ch. 38, § 2-7 (1977). For a listing of the offenses classified as felonies in Illinois, see ILL. ANN. STAT. ch. 38, Table IV (Smith-Hurd 1973) (table of classification of offenses). Under present Illinois law, the Illinois Department of Corrections has the power to designate the institutions which comprise the state penitentiary system. ILL. REV. STAT. ch. 38, § 1003-2-2(c) (1977).

36. *Illinois v. Bain*, 359 Ill. 455, 470, 195 N.E. 42, 49 (1935). The definition adopted in this case provided that a felony was “an offense punishable with death or by imprisonment in the penitentiary.” *Id.* at 470, 195 N.E. at 49. Since this differs from the current definition only in that the present code specifies imprisonment in a penitentiary for “one year or more,” the reasoning of *Bain* and its characterization of offenses as felonies or misdemeanors remains valid today. *Illinois v. Novotny*, 41 Ill. 2d 401, 403, 244 N.E.2d 182, 184 (1968).

37. ILL. REV. STAT. ch. 38, § 124-1 (1977).

38. *Illinois v. Green*, 292 Ill. 351, 356, 127 N.E. 50, 52 (1920). *Accord*, *Illinois v. Kirkpatrick*, 413 Ill. 595, 110 N.E.2d 519 (1953); *Illinois v. Russell*, 245 Ill. 268, 91 N.E. 1075 (1910); *Christie v. Illinois*, 206 Ill. 337, 69 N.E. 33 (1903).

39. *Illinois ex rel. Keenan v. McGuane*, 13 Ill. 2d 520, 150 N.E.2d 168, *cert. denied*, 358 U.S. 828 (1958) (federal income tax evasion held to be infamous); *Illinois ex rel. Ryan v. Coles*, 64 Ill. App. 3d 807, 381 N.E.2d 990 (1978) (extortion held to be infamous); *Illinois ex rel. Symonds v. Gualano*, 97 Ill. App. 2d 248, 240 N.E.2d 467 (1968) (mail fraud held to be infamous); *Illinois ex rel. Ward v. Tomek*, 54 Ill. App. 2d 197, 203 N.E.2d 744 (1964) (conspiracy to defraud township held to be infamous).

40. *Illinois ex rel. Keenan v. McGuane*, 13 Ill. 2d 520, 534, 150 N.E.2d 168, 176, *cert. denied*, 358 U.S. 828 (1958). *Accord*, *Illinois ex rel. Symonds v. Gualano*, 97 Ill. App. 2d 248, 254, 240 N.E.2d 467, 470 (1968); *Illinois ex rel. Ward v. Tomek*, 54 Ill. App. 2d 197, 202, 203 N.E.2d 744, 747 (1964).

can be classified as infamous.<sup>41</sup>

The Illinois Supreme Court has defined "moral turpitude" as "anything done knowingly contrary to justice, honesty or good morals. . . ." <sup>42</sup> This definition is quite broad and open to subjective interpretation. Some offenses which the courts have found to involve breaches of moral turpitude are fraud-related strictures,<sup>43</sup> illegal conversion by an attorney of a client's money,<sup>44</sup> illegally trafficking in narcotics,<sup>45</sup> tax evasion,<sup>46</sup> and failure to report for induction into the armed services.<sup>47</sup>

In addition to questions arising in the process of defining the terms of the disabling statutes, two other issues are often presented. It is frequently necessary to determine whether a conviction which occurred outside the jurisdiction will activate Illinois' disabling statutes. If it will, it must be resolved whether the laws of the foreign convicting jurisdiction or the disqualifying jurisdiction will be used to characterize the crime under the disqualifying statute. Under Illinois case law, specific disability provisions *are* applicable to foreign convictions<sup>48</sup> and the offender's criminal conduct is to be scrutinized by Illinois courts for characterization.<sup>49</sup>

## SPECIFIC DISABILITIES IN ILLINOIS

### *Right to Vote*

The voting franchise, one of the fundamental guarantees provided by the United States Constitution,<sup>50</sup> does not extend to protect convicted felons' access to the ballot box. In *Richardson v. Ramirez*,<sup>51</sup> the United States Supreme Court indicated that the decision of whether to

41. *Illinois ex rel. Ward v. Tomek*, 54 Ill. App. 2d 197, 200, 203 N.E.2d 744, 746 (1964).

42. *In re Needham*, 364 Ill. 65, 70, 4 N.E.2d 19, 21 (1936).

43. *In re Teitelbaum*, 13 Ill. 2d 586, 150 N.E.2d 873, *cert. denied*, 358 U.S. 881 (1958) (federal income tax evasion).

44. *In re Reiger*, 402 Ill. 483, 84 N.E.2d 439 (1949).

45. *Fortman v. Aurora Civil Serv. Comm'n*, 37 Ill. App. 3d 548, 346 N.E.2d 20 (1976).

46. *In re Revzan*, 33 Ill. 2d 197, 210 N.E.2d 519 (1965).

47. *In re Pontarelli*, 393 Ill. 310, 66 N.E.2d 83 (1946).

48. *See, e.g.*, ILL. REV. STAT. ch. 51, § 1 (1977) and notes 62-74 and accompanying text *infra* (evidence of prior convictions allowed for purposes of impeachment). *See also Illinois ex rel. Keenan v. McGuane*, 13 Ill. 2d 520, 150 N.E.2d 168, *cert. denied*, 358 U.S. 828 (1958); *Illinois ex rel. Ryan v. Coles*, 64 Ill. App. 3d 807, 881 N.E.2d 990 (1978); *Illinois v. Cordovano*, 94 Ill. App. 2d 106, 236 N.E.2d 374 (1968); *Illinois v. Trent*, 85 Ill. App. 2d 157, 228 N.E.2d 535 (1967).

49. *Illinois ex rel. Keenan v. McGuane*, 13 Ill. 2d 520, 150 N.E.2d 168, *cert. denied*, 358 U.S. 828 (1958); *Illinois v. Kirkpatrick*, 413 Ill. 595, 110 N.E.2d 519 (1953); *Illinois v. Trent*, 85 Ill. App. 2d 157, 228 N.E.2d 535 (1967).

50. *See Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966); *Reynolds v. Sims*, 377 U.S. 533 (1964).

51. 418 U.S. 24 (1974).

allow voting rights to persons who had been convicted of a felony and had completed their sentences was one within the discretion of the state legislatures.<sup>52</sup> In *Richardson*, the Court upheld a California statute which disenfranchised all persons previously convicted of an infamous crime.

Illinois has chosen to adopt both constitutional and statutory provisions disenfranchising convicts during the time they are under sentence of confinement in a jail or correctional institution.<sup>53</sup> Persons serving a sentence of periodic imprisonment or persons on conditional discharge, probation, or parole are not considered to be in confinement,<sup>54</sup> but those on furlough or on work release are and, accordingly, they may not vote.<sup>55</sup> Furthermore, the Illinois statute does not deny the franchise to those who are being held prior to trial on nonbailable offenses or who cannot raise the necessary bail.<sup>56</sup>

Although someone being held in pre-trial detention is apparently not prohibited from voting by statutory provisions, he would have difficulty in exercising his right to vote because the Illinois election statutes do not include incarcerated persons among those qualifying for absentee ballots.<sup>57</sup> An equal protection challenge to the absentee ballot statute was presented to the Supreme Court in *McDonald v. Board of Election Commissioners*.<sup>58</sup> The Court in *McDonald* found no constitutional infirmity in the statutory omission, noting that "many other classes of Illinois citizens [are] not covered by the absentee provisions, for whom voting may be extremely difficult, if not practically impossible."<sup>59</sup> The Court also indicated that the detainees had not been totally precluded from voting because:

[T]he record is barren of any indication that the State might not, for instance, possibly furnish the jails with special polling booths or facilities on election day, or provide guarded transportation to the polls themselves for certain inmates, or entertain motions for temporary reductions in bail to allow some inmates to get to the polls on their own.<sup>60</sup>

52. *Id.* at 55-56.

53. ILL. CONST. art. III, § 2; ILL. REV. STAT. ch. 38, § 1005-5-5(c) (1977).

54. 1976 OP. ATT'Y GEN. NO. S-1056.

55. ILL. REV. STAT. ch. 46, § 3-5 (1977).

56. *See McDonald v. Board of Election Comm'rs*, 394 U.S. 802, 807-08 (1969).

57. ILL. REV. STAT. ch. 46, § 19-1 to 19-4 (1977). The statute recognizes four categories of persons eligible for absentee ballots: 1) those absent from the county of their residence, 2) the physically incapacitated, 3) those unable to poll on the appointed day because of observance of religious holidays, and 4) poll watchers in foreign precincts.

58. 394 U.S. 802 (1969).

59. *Id.* at 809-10.

60. *Id.* at 808 n.6.



The appellant in *Illinois ex rel. St. George v. Woods*<sup>61</sup> took the Supreme Court's words in *McDonald* literally. While awaiting a preliminary hearing, he filed a motion for release on his own recognizance or, in the alternative, for a reduction in bail to enable him to go to the polls to vote in a primary election. When the motion was denied, he asked for the provision of polling booths or other suitable facilities in the jail. This request was also refused. The detainee subsequently filed a petition in the state court for a writ of habeas corpus, which was dismissed. On appeal, the Illinois Supreme Court did not reach the constitutional issues of denial of equal protection and due process since it ruled that appellant's claims were not jurisdictional and therefore his habeas corpus petition was not cognizable and had been properly denied.<sup>62</sup> Hence, the constitutional right of detainees to vote is still open to debate in Illinois.

### *Judicial Rights*

It is now clearly recognized that an incarcerated felon has a right of *access* to judicial remedies. In *Bounds v. Smith*,<sup>63</sup> the Supreme Court characterized the rights of access as a fundamental right emanating from the due process clause of the fourteenth amendment<sup>64</sup> and held that this right required prison officials to provide all prisoners with adequate law libraries or adequate assistance from persons trained in the law.<sup>65</sup>

While the right of access to the courts encompasses the right to bring an immediate challenge against the conviction which is the basis of the incarceration,<sup>66</sup> this right does not translate into an absolute right to appear in court to pursue any type of civil action.<sup>67</sup> Thus, while a prisoner challenging his conviction may have a right to appear in court to offer evidence in circumstances where the court reviewing his conviction believes he has not already enjoyed a full and fair fact hearing on his claim,<sup>68</sup> a prisoner's interest in making court appearances to pursue civil actions unrelated to his conviction will be balanced against the

61. 47 Ill. 2d 261, 265 N.E.2d 164 (1970).

62. *Id.* at 262, 265 N.E. at 165.

63. 430 U.S. 817 (1977).

64. *Id.* at 828.

65. *Id.* For a general discussion of prisoners' right to communicate with, and gain access to, the courts, see D. RUDOVSKY, A. BRONSTEIN & E. KOREN, *THE RIGHTS OF PRISONERS* 38-54 (1977).

66. 430 U.S. at 821-23.

67. *Moeck v. Zajackowski*, 541 F.2d 177 (7th Cir. 1976).

68. *Townsend v. Sain*, 372 U.S. 293 (1963) (federal habeas corpus claim).

government's interest in avoiding the risks and costs of such appearances.<sup>69</sup>

Although there is no specific statutory provision in Illinois providing that incarcerated persons have the capacity to litigate, the Illinois courts have recognized for some time that persons serving a sentence in any penal institution have the right to sue or be sued in Illinois courts during their confinement.<sup>70</sup> Since the Federal Rules of Civil Procedure provide that the capacity to bring suit is determined by the law of the plaintiff's domicile,<sup>71</sup> Illinois felons are also permitted to litigate in federal court. Although prisoners are not barred from bringing suit in Illinois, the statute of limitations recognizes that imprisonment can be a disability in bringing suit, and provides that the limitation is tolled by incarceration until two years after release.<sup>72</sup>

In Illinois, the convicted felon retains his right to execute legal instruments. He can make and enforce a contract<sup>73</sup> and he has the power to execute a will as long as he meets the statutory standards of capacity.<sup>74</sup>

69. As the United States Court of Appeals for the Seventh Circuit declared in *Moeck v. Zajackowski*, 541 F.2d 177 (7th Cir. 1976):

The due process requirements of the Fifth and Fourteenth Amendments, which guarantee access to the courts, do not grant a prisoner the right to attend court in order to carry on the civil proceedings which he initiates.

There are doubtless situations in which fulfillment of a fundamental interest of a prisoner so reasonably requires his being transported to a place outside the place of confinement that it must outweigh the state's interest in avoiding the risks and expense of such transportation; but we think the particular circumstances must be considered in order to identify those situations.

We suggest . . . that the determination whether a prisoner's interest in being present in court outweighs the state's relevant interests, is a *discretionary* one. Some of the relevant considerations would seem to be: How substantial is the matter at issue? How important is an early determination of the matter? Can the trial reasonably be delayed until the prisoner is released? Have possible dispositive questions of law been decided? Has the prisoner shown a probability of success? Is the testimony of the prisoner needed? If needed, will a deposition be reasonably adequate? Is the prisoner represented? If not, is his presence reasonably necessary to present his case?

*Id.* at 180-81 (emphasis added). See also *Payne v. Superior Ct.*, 17 Cal. 3d 908, 553 P.2d 565 (1976) (right to appear to *defend* civil action discretionary with trial court).

70. *McElyea v. Illinois*, 7 Ill. Ct. Cl. 69 (1932).

71. FED. R. CIV. P. 17(b).

72. ILL. REV. STAT. ch. 83, §§ 9, 22 (1977).

73. See *Collateral Consequences*, *supra* note 3, at 1030-31. Since Illinois does not have a civil death statute for convicted felons, Illinois offenders necessarily retain contractual capacity according to case law interpretations of other jurisdictions.

74. See ILL. REV. STAT. ch. 110 1/2, § 4-1 (1977) (capacity of testator defined). Cf. *Dougherty v. State Sav., Loan & Trust Co.*, 292 Ill. 147, 126 N.E. 545 (1920) (where the testator was found to be of sound mind, evidence of guilt of immoral conduct will not overturn will); *Snell v. Weldon*, 239 Ill. 279, 87 N.E. 1022 (1909) (evidence of moral delinquency of testator is not grounds for setting aside the will). Although these cases did not specifically involve criminal

Conviction of a crime does not disqualify a person from testifying as a witness in Illinois,<sup>75</sup> even if the crime was perjury.<sup>76</sup> However, evidence of the conviction may be allowed at the trial for the purpose of casting doubt on the credibility of the witness.<sup>77</sup> The trial court is not required to allow impeachment by prior conviction and, accordingly, the decision of whether to admit the evidence for impeachment purposes is within the discretion of the trial court judge.<sup>78</sup> Conviction of those crimes designated as infamous<sup>79</sup> are grounds for impeachment of the witness.<sup>80</sup> Even if the sentence is suspended, the record of the prior conviction is admissible.<sup>81</sup> This is also true if the person has been pardoned<sup>82</sup> or has an appeal of the conviction pending.<sup>83</sup>

The use of juvenile records to impeach testimony has even been allowed in certain situations.<sup>84</sup> The decision of whether to admit the record lies within the discretion of the trial court.<sup>85</sup> The Illinois Supreme Court has held that evidence of juvenile adjudications should generally be deemed inadmissible, but that the judge may allow this evidence for witnesses *other than* a criminal defendant if conviction of the offense would be admissible to impeach the credibility of an adult, and if the judge feels that the evidence is necessary for a fair determination on the issue of guilt or innocence.<sup>86</sup>

Prior to 1971, many Illinois decisions took the position that the remoteness in time of the earlier conviction had no effect on its admissibility.<sup>87</sup> In the case of *Illinois v. Montgomery*,<sup>88</sup> decided in 1971, the Illinois Supreme Court indicated that the provisions of rule 609 of the

convictions for the complained acts, these acts could have subjected the testators to criminal felony sanctions if they had been prosecuted.

75. ILL. REV. STAT. ch. 38, § 155-1 (1977); *id.* ch. 51, § 1.

76. *Simon v. Illinois*, 150 Ill. 66, 36 N.E. 1019 (1894).

77. ILL. REV. STAT. ch. 38, § 155-1 (1977); *id.* ch. 51, § 1. See generally MCCORMICK, *HANDBOOK OF THE LAW OF EVIDENCE* 84-90 (2d ed. 1972).

78. *Illinois v. Montgomery*, 47 Ill. 2d 510, 268 N.E.2d 695 (1971).

79. See notes 37-41 and accompanying text *supra* for a discussion of the definition of the term "infamous."

80. *Illinois v. Kirkpatrick*, 413 Ill. 595, 110 N.E.2d 519 (1953).

81. *Illinois v. Andrae*, 295 Ill. 445, 129 N.E. 178 (1920).

82. *Id. Compare Illinois v. Shook*, 35 Ill. 2d 597, 221 N.E.2d 290 (1966) (when a discharge of conviction is by habeas corpus, such a conviction is thereby a nullity and inadmissible for later impeachment purposes).

83. *Illinois v. Spears*, 83 Ill. App. 2d 18, 226 N.E.2d 67 (1967).

84. *Illinois v. Norwood*, 54 Ill. 2d 253, 258, 296 N.E.2d 852, 854 (1973) (disclosure of the juvenile records of the witness allowed insofar as they might be relevant to defendant's claim that the witness' testimony was attributable to lenient treatment which he had received or had been promised).

85. *Illinois v. Holsey*, 30 Ill. App. 3d 716, 332 N.E. 2d 699 (1975).

86. *Illinois v. Montgomery*, 47 Ill. 2d 510, 268 N.E. 2d 695 (1971) (Illinois Supreme Court adopts Uniform Rule of Evidence 609(d) as applicable to all future Illinois cases).

87. See, e.g., *Illinois v. Aristotle*, 131 Ill. App. 2d 175, 268 N.E. 2d 227 (1971) (twenty years);

Uniform Rules of Evidence should be followed in the future. This rule prohibits the introduction of evidence of the commission of crime for impeachment purposes if more than ten years have elapsed since conviction or release from confinement, whichever is later.<sup>89</sup>

In light of the rules governing impeachment, the criminal defendant with prior convictions is faced with a dilemma. If he takes the stand to testify in his own defense, the prosecution is at liberty to introduce evidence of prior criminality to cast doubt upon his credibility as a witness. Although limiting instructions are given to the jury regarding the purposes for which this testimony may be used, there is always a danger that the jurors may take the evidence as proof of guilt rather than as merely bearing on veracity. On the other hand, if the defendant elects not to testify on his own behalf, he risks the danger that the jury will infer guilt from his silence. There does not seem to be any satisfactory solution to the problem, so defense counsel must weigh both sides of the issue in making the decision of whether to use the defendant as a witness.

Persons with felony convictions are not barred from jury service *per se* in Illinois.<sup>90</sup> Nor is a prior conviction grounds for a juror challenge for cause.<sup>91</sup> One of the qualifications required of jurors, however, is that they be "of fair character, [and] of approved integrity . . ." <sup>92</sup> There are no reported Illinois cases at the appellate level which address the issue of whether an individual with a prior felony conviction meets the requisite character standard. Presumably, the question would have to be decided on a case-by-case basis, taking into account the particular offense and individual involved. In any event, statutes with provisions similar to Illinois' "fair character/approved integrity" criterion have survived constitutional challenges before the Supreme Court on grounds of vagueness and violation of equal protection as applied.<sup>93</sup> In addition, the Supreme Court has held that states are free to require jurors to possess "good intelligence, sound judgment and fair character"<sup>94</sup> and may bar a person from jury service if he is not an "upright"

*Illinois v. Smith*, 90 Ill. App. 2d 310, 234 N.E.2d 31 (1967), *cert. denied*, 402 U.S. 945 (1971) (twenty-two years).

88. 47 Ill. 2d 510, 268 N.E.2d 695 (1971).

89. UNIFORM RULE OF EVIDENCE § 609(b).

90. *See* ILL. REV. STAT. ch. 78, § 2 (1977) (qualifications of petit jurors) and *id.* § 4 (those exempted from jury duty).

91. *Id.* § 14 (causes for challenges of jurors).

92. *Id.* § 2.

93. *See, e.g.*, *Turner v. Fouche*, 396 U.S. 346 (1970); *Carter v. Jury Comm'n*, 396 U.S. 320 (1970).

94. *Carter v. Jury Comm'n*, 396 U.S. 320 (1970).

citizen.<sup>95</sup>

Conviction of an infamous crime precludes an individual from acting as executor of a will<sup>96</sup> and acting as an administrator of an estate.<sup>97</sup> In addition, a felony conviction is cause for removal of an executor, administrator, administrator to collect, guardian to collect, guardian, conservator, or conservator to collect.<sup>98</sup> Finally, it is possible that a prior criminal conviction could preclude a person from being a class representative in a class action proceeding.<sup>99</sup>

### *The Right to Hold Office*

A person who has been convicted of a crime also suffers a disability with respect to holding a public office. In Illinois, a person guilty of a felony or of bribery, perjury, or other infamous crime is ineligible to hold an office created by the constitution.<sup>100</sup> By statute, this disability lasts until the completion of the sentence.<sup>101</sup>

According to the Illinois statute, "office" is a term of art. The legislative intent was to include positions which involve substantive policy-making functions as opposed to those which are primarily ministerial in character.<sup>102</sup> Included within the meaning of the term are those executive, judicial, and legislative offices created by the 1970 constitution and offices of the state, units of local government, and school districts.<sup>103</sup> The disability extends to convicted persons seeking to be delegates to a constitutional convention.<sup>104</sup>

The statutes also provide for removal of a person should he be convicted during his term of office.<sup>105</sup> The position then becomes vacant due to ineligibility upon conviction of a felony or infamous crime

95. *Turner v. Fouche*, 396 U.S. 346 (1970).

96. ILL. REV. STAT. ch. 110 1/2, § 6-13 (1977).

97. *Id.* § 9-1.

98. *Id.* § 23-2.

99. *See Folding Cartons, Inc. v. American Can Co.*, 79 F.R.D. 698 (N.D. Ill. 1978).

100. ILL. CONST. art. XIII, § 1.

101. ILL. REV. STAT. ch. 38, § 1005-5-5(b) (1977).

102. ILL. CONST. art. IV, § 2(e) (Smith-Hurd 1970) (Helman & Whelan, *Constitutional Commentary*).

103. *Id.* art. XII, § 1. Under the statutes, conviction of an infamous crime also renders a person ineligible for municipal office, school district office, or aldermanic position. ILL. REV. STAT. ch. 102, § 120 (1977).

104. *Livingston v. Ogilvie*, 43 Ill. 2d 9, 250 N.E.2d 138 (1969).

105. *See* ILL. REV. STAT. ch. 46, § 25-2 (1977) which provides that:

Every elective office shall become vacant on the happening of either of the following events. . . . His conviction of an infamous crime. . . .

*See also id.* ch. 102, § 120 which provides that:

Any person holding office . . . convicted . . . of an infamous crime . . . shall be, upon conviction, ineligible to continue in such office.

and, because of policy considerations, the vacancy is to be filled according to local law, by appointment or election,<sup>106</sup> even during the pending appeal.<sup>107</sup> Absent a reversal,<sup>108</sup> the disability to hold public office continues throughout the lifetime of the individual if convicted of an infamous crime<sup>109</sup> or until completion of the sentence if convicted of a felony.<sup>110</sup> The statute provides for reinstatement of the officer for the duration of the term upon reversal of the conviction.<sup>111</sup>

### *Domestic Rights*

The loss of certain domestic rights may be triggered by a felony conviction. In Illinois, conviction of a felony is grounds for dissolution of marriage.<sup>112</sup> An individual's parental rights also can be affected by a finding of guilt. In most instances, the natural parent of a child must consent before the child can legally be adopted, but in certain instances, obtaining the parent's permission is unnecessary. An illustration of the latter situation is where the natural parent is found to be unfit.<sup>113</sup> Taken alone, a felony conviction is not grounds to warrant the adoption of a child without parental consent,<sup>114</sup> but conviction may be submitted as evidence on the subject of fitness.<sup>115</sup>

One of the requirements for being an adoptive parent in Illinois is that the person seeking to adopt be "reputable."<sup>116</sup> Cases involving the issue of whether a convicted felon possesses the requisite character traits are few, but in at least one instance the fact that an applicant to adopt a child had committed forgery was deemed to be a proper ground for the denial of his petition.<sup>117</sup>

### *Property Rights*

Forfeiture of property rights upon conviction of a crime is against the public policy of the state.<sup>118</sup> The Illinois Constitution specifically

106. *Id.* ch. 46, § 25-2.

107. Illinois *ex rel.* Taborski v. Illinois Appellate Court, 50 Ill. 2d 336, 278 N.E.2d 796 (1972); Illinois *ex rel.* Keenan v. McGuane, 13 Ill. 2d 520, 150 N.E.2d 168 (1958).

108. See ILL. REV. STAT. ch. 102, § 120 (1977).

109. Illinois *ex rel.* Symonds v. Gualano, 97 Ill. App. 2d 248, 254, 240 N.E.2d 467, 470 (1968).

110. ILL. REV. STAT. ch. 38, § 1005-5-5(b) (1977).

111. *Id.* ch. 102, § 120.

112. *Id.* ch. 40, § 401(2).

113. *Id.* § 1510.

114. Ornstead v. Kleba, 37 Ill. App. 3d 163, 166, 345 N.E.2d 714, 717 (1976).

115. Townsend v. Curtis, 15 Ill. App. 3d 209, 212, 303 N.E.2d 566, 568-69 (1973).

116. ILL. REV. STAT. ch. 40, § 1502(a) (1977).

117. *In re* Berkowitz, 88 Ill. App. 2d 1, 232 N.E.2d 72 (1967) (abstract).

118. Collins v. Metropolitan Life Ins. Co., 232 Ill. 37, 83 N.E. 542 (1907).

prohibits forfeiture of one's estate as a penalty for conviction.<sup>119</sup> The only property right affected by conviction in Illinois is the right of inheritance where the heir is convicted of murdering the decedent.<sup>120</sup> Also, a convicted murderer cannot receive insurance or annuity death benefits from his victim<sup>121</sup> nor enjoy the right of survivorship in property held in joint tenancy with his victim.<sup>122</sup>

### *Employment Opportunities*

#### Licensed Employment

Persons who have been convicted of felonies often find that their record has a negative effect on employment. In occupations where licensing is involved, engaging in a particular type of employment is considered to be a privilege granted by the state rather than a right.<sup>123</sup> Entrance to and continued participation in a licensed occupation is conditioned upon the applicant's ability to meet the criteria prescribed by the legislature.

Many fields of employment, ranging from the traditional professions of medicine<sup>124</sup> and law<sup>125</sup> to semi-skilled and unskilled trades such as barbering<sup>126</sup> and race track employment,<sup>127</sup> are subject to state licensing. In Illinois, the effect of a felony conviction differs somewhat from occupation to occupation. Conviction of a felony may be grounds for denial, suspension, or revocation of certain registration certificates if the individual has not been "sufficiently rehabilitated to warrant public trust."<sup>128</sup> Decisions as to whether an applicant has been "suffi-

119. ILL. CONST. art. I, § 11.

120. ILL. REV. STAT. ch. 110 1/2, § 2-6 (1977). A decedent's murderer shall not inherit from him or acquire any interest in the decedent's estate. Rather, the murderer is treated as if he predeceased the decedent.

121. *Bailey v. Retirement Bd.*, 51 Ill. App. 3d 433, 366 N.E.2d 966 (1977).

122. *Bradley v. Fox*, 7 Ill. 2d 106, 129 N.E.2d 699 (1955).

123. See notes 124-32 and accompanying text *infra*.

124. ILL. REV. STAT. ch. 111, § 4403 (1977).

125. *Id.* ch. 13, § 1.

126. *Id.* ch. 111, § 1601.

127. *Id.* ch. 8, § 37-15.

128. See *id.* ch. 73, § 1065.49(h) (insurance agent, broker, or solicitor); *id.* ch. 111, § 1218(f) (architect); *id.* § 1818(a) (beauty culturist and apprentice); *id.* § 2222(12) (dental surgeon, dental hygienist); *id.* § 2824(b) (embalmer); *id.* § 3027(a) (horseshoer); *id.* § 3420(3) (nurse or practical nurse); *id.* § 3814(a) (optometrist); *id.* § 4216(7) (physical therapist); *id.* § 4433(2) (physician); *id.* § 4922(f) (podiatrist); *id.* § 5124(3) (engineer); *id.* § 5316(1) (psychologist); *id.* § 6120(b) (certified short-hand reporter); *id.* § 6315(f) (social worker); *id.* § 6913(2) (veterinarian).

Conviction of a felony alone may be grounds for denial, suspension, or revocation of other registration certificates, *without* regard to the licensee's rehabilitation. See, e.g., *id.* ch. 8, § 259(e) (bull lessor); *id.* § 310(f) (petshop owner, dog dealer, kennel operator, or operator of pound or animal shelter); *id.* ch. 43, § 155 (holder of liquor license); *id.* ch. 56 1/2, § 242.2(d) (horse slaughterer, processor, breeder, and raiser); *id.* ch. 57 1/2, § 4(a) (operators of foreign exchange); *id.* ch.

ciently rehabilitated” presumably would lie with the Illinois Department of Registration and Education. This department is authorized to conduct hearings on proceedings to issue, revoke, and suspend licenses, certificates, or authorities of persons in occupations requiring registration.<sup>129</sup>

In other licensed trades or occupations, conviction alone is enough to preclude licensing or registration. Depending upon the specific type of employment involved, denial of a license may result from conviction of a felony,<sup>130</sup> a crime involving moral turpitude,<sup>131</sup> a crime involving either a felony or moral turpitude,<sup>132</sup> or simply of crime in general.<sup>133</sup>

Other fields subject to licensing make the granting of the permit conditional upon the applicant’s being “of good moral character”<sup>134</sup> or “of good business reputation.”<sup>135</sup> Evidence of a felony conviction may be considered in determining character and reputation, but conviction alone does not preclude licensing or registration.<sup>136</sup> Some statutes providing for licensing or registration require the applicant to disclose whether he has ever been convicted of a felony, but do not indicate what effect this would have on the issuance of the certificate.<sup>137</sup>

While the effect of a felony conviction on obtaining a license is admittedly uncertain because of the amount of discretion given to the Illinois Department of Registration and Education and its subsidiary committees, there are some positive signs for the ex-offender. The Illinois State Teacher Certification Board, for example, has adopted the

111, § 2813(b) (funeral director); *id.* § 3620(e) (nursing home administrator); *id.* § 4011 (reciprocal registration of pharmacists); *id.* § 4012 (pharmacist apprentice); *id.* § 5521(a) (public accountant).

129. *Id.* ch. 127, § 60(6).

130. *Id.* ch. 16, § 53 (bail bondsman); *id.* ch. 114, § 352(2) (operator of business renting safety deposit boxes, safes, vaults).

131. *Id.* ch. 16 1/2, § 255(2) (operator of financial planning and management business); *id.* ch. 32, § 360.7(4) (founder of non-profit consumer credit counseling corporation).

132. *Id.* ch. 111, § 2415(C) (polygraph examiner); *id.* § 2611(d) (private detective, unless discharged from sentence more than twenty years old).

Other licenses are similarly denied to those convicted either of a felony or crimes involving dishonesty, fraud, or misstatement. *See, e.g., id.* § 7116(7) (water well and pump installation contractors); *id.* ch. 144, § 151 (operator of private business school).

133. *Id.* ch. 8, § 37-15(c)(1) (racetrack worker).

134. *Id.* ch. 13, § 2 (attorney); *id.* ch. 16 1/2, § 255(1) (operator of financial planning and management business); *id.* ch. 95 1/2, § 6-402(a) (operator of driver training school); *id.* ch. 111, § 901 (operator of private employment agency); *id.* § 1612(b) (student barber); *id.* § 1614(b) (apprentice barber); *id.* § 1617(b) (registered barber); *id.* § 1626(d) (operator of barber school or college); *id.* § 5904 (sanitarian); *id.* § 6506(b) (structural engineer); *id.* ch. 122, § 21-1 (teacher).

135. *Id.* ch. 16 1/2, § 40(c) (community currency exchange operator); *id.* ch. 111, § 304(a) (grain dealer); *id.* § 901 (private employment agency operator).

136. *See, e.g., id.* §§ 204, 1612.

137. *Id.* ch. 34, § 6304(c) (license to operate a dance hall outside a city’s limits); *id.* § 6707 (tree expert’s license).



following rules for certification of persons who have been convicted of a felony:

- A. Each case must be reviewed separately. The type of offense involved will affect the character decision; obviously some offenses (and felonies) are of a more serious nature than others.
- B. The purpose of criminal penalties must be considered. It is the overwhelming view of experts in the various professions of the law that the purpose of criminal penalties is not only to punish, but to rehabilitate the individual. To automatically deny a person a privilege enjoyed by others is to tell that person that he will never be looked upon as being rehabilitated and that the stigma of his offense will forever be attached to him to prevent him from becoming an accepted and useful member of society. Such a drastic decision should not be taken lightly. It certainly should never be an automatic decision which does not give a person the opportunity to prove that he has overcome a defect in his past record.

Therefore, in handling application where there has been a criminal conviction on the part of the applicant, the State Teacher Certification Board will:

- 1) not automatically reject an applicant with a criminal conviction record.
- 2) take into consideration the gravity of the offense; *i.e.*, misdemeanor, felony, infamous crime together with the circumstances under which it occurred; *i.e.*, background and age of the person at the time of the offense.
- 3) allow the applicant to provide evidence of good character and rehabilitation.
- 4) render a decision as to good character by weighing the evidence of bad character (the criminal conviction) against that of good character and rehabilitation.
- 5) require a waiting period of one year from the time the sentence or probation period for the criminal offense ends before an application for certification will be considered. This will allow adequate time for determining rehabilitation on the part of the applicant.<sup>138</sup>

Because counties<sup>139</sup> and municipalities<sup>140</sup> also have the power to license

138. STATE OF ILLINOIS, OFFICE OF EDUCATION, RULES AND REGULATIONS TO GOVERN THE CERTIFICATION OF TEACHERS, Rule 12.21 (1977).

139. *See, e.g.*, ILL. REV. STAT. ch. 34, § 421 (1977) (county authority to license persons engaging in the business of providing entertainment or recreation, of accommodating house trailers, house cars or tents, or providing lodging of transients); *id.* § 6301 (county authority to license operation of dance halls or road houses).

140. *Id.* ch. 24, §§ 11-42-1 to 11-42-12 (auctioneers; private detectives and detective agencies; money changers; bankers; brokers; barbers and barber shops; keepers or owners of lumber yards, lumber storehouses, livery stables, public scales, ice cream parlors, coffee houses, florists, billiard tables, bowling alleys, and secondhand and junk stores; runners for cabs, buses, and hotels; hawkers; peddlers; cabdrivers; porters; employees of shows, places for eating and amusement, packing houses, and tanneries; breweries, garages, shops, laundries, bathing beaches, athletic contests and exhibitions carried on for gain; holders of liquor licenses).

and regulate certain occupations and activities, local ordinances should be carefully checked in specific cases.

### Public Employment

Convicted criminals face similar statutory barriers with regard to public employment.<sup>141</sup> In Illinois, the State Personnel Code provides for the rejection of candidates for civil service positions who, among other things, "have been guilty of infamous or disgraceful conduct."<sup>142</sup> Although the application form does include questions pertaining to previous convictions, the Illinois Department of Personnel has indicated that in processing the applications normally no action is taken to screen out or reject individuals with felony records.<sup>143</sup> The decision to accept or reject the individual is left to the particular agency to which the individual's name may be referred after qualifying in an open competitive examination. Standards may vary since there are no uniform guidelines, but the Illinois Department of Personnel has indicated that, except for security-type positions, individuals are not typically disqualified for previous arrest records. Specifically, with regard to felonies, the agencies presumably take into account the type of position applied for, the nature of the offense, when the offense occurred, and other relevant factors.<sup>144</sup> Illinois statutes, however, provide that criminal records automatically preclude employment as a state police officer<sup>145</sup> and may preclude employment as a deputy sheriff of a county police department or corrections officer in the Cook County sheriff's department if it is determined to be detrimental to the applicant's ability to carry out his duty.<sup>146</sup>

In the private sector, the convicted felon may also face substantial discrimination in hiring. Several studies have indicated that any prior conviction would severely limit an individual's employment opportunities.<sup>147</sup> However, a significant study, reported in 1976,<sup>148</sup> has shown that there is an increasing awareness among business executives of the

141. See notes 100-11 and accompanying text *supra* regarding elected or appointed positions of public trust.

142. ILL. REV. STAT. ch. 127, § 63b108b.4 (1977).

143. Personal correspondence from W. Peura, Manager, Division of Selection and Employment Services, State of Illinois Department of Personnel, Sept. 21, 1978 (on file with author).

144. *Id.*

145. ILL. REV. STAT. ch. 121, § 307.9 (1977).

146. *Id.* ch. 125, § 58.

147. Melichercik, *Employment Problems of Former Offenders*, 1 NAT'L PROBATION & PAROLE ASS'N J. 43 (1956); Wyle, *The Employment of Released Offenders*, 25 PROBATION 10 (1946).

148. Jensen & Giegold, *Finding Jobs for Ex-Offenders: A Study of Employers' Attitudes*, 14 AM. BUS. L.J. 195 (1976) [hereinafter referred to as Jensen & Giegold].

problems a former conviction raises in job-seeking. Of the 209 respondents to this survey, ninety-seven percent said company policy did not categorically forbid hiring convicted persons.<sup>149</sup> The dominant opinion seems to be that employing former offenders provides an opportunity to help solve the nation's crime problem without threatening the corporate structure.<sup>150</sup> While there are still informal barriers, business leaders are beginning to take the initiative in this area.<sup>151</sup>

In any event, hiring practices and policies with regard to persons with a criminal record are far from uniform. Eighty-two percent of the businesses surveyed in the 1976 study had no company-wide policy.<sup>152</sup> Most used a case-by-case approach and took into consideration the type of offense committed and its relationship to the position being sought,<sup>153</sup> the length of time that had elapsed since the offense,<sup>154</sup> and the age of the individual at the time the crime was committed.<sup>155</sup>

There have been several constitutional challenges to employer discrimination against ex-offenders, but these suits all have been decided on racial discrimination grounds. In *Gregory v. Litton Systems, Inc.*,<sup>156</sup> a federal district court held that title VII of the Civil Rights Act of 1964<sup>157</sup> prohibited employers from absolutely barring job applicants from employment on the basis of arrest records. The court declared that the company's policy resulted in racially discriminatory hiring practices because a disproportionate number of blacks were disqualified.<sup>158</sup> However, Litton was enjoined only from seeking information concerning prior arrests which did not result in conviction.

One court has gone beyond the resulting racial discrimination position<sup>159</sup> and held that a state law which absolutely barred convicted felons from civil service employment<sup>160</sup> was a violation of the equal

149. *Id.* at 203.

150. *Id.* at 197.

151. An example of this is the National Alliance of Businessmen's program to assist the ex-offender. See *NEWSWEEK*, Jan. 22, 1979, at 10.

152. Jensen & Giegold, *supra* note 148, at 202.

153. For example, hospitals are reluctant to hire persons convicted of drug-related offenses while trucking and transportation companies often reject individuals with larceny convictions. *Id.* at 203.

154. *Id.* at 204.

155. *Id.*

156. 316 F. Supp. 401 (C.D. Cal. 1970), *aff'd*, 472 F.2d 631 (9th Cir. 1972).

157. 42 U.S.C. §§ 2000e-2000e.17 (1976).

158. 316 F. Supp. at 403. *Accord*, *Green v. Missouri Pacific R.R.*, 523 F.2d 1290 (8th Cir. 1975).

159. The racial discrimination claims were dismissed by the court for failure to first exhaust administrative remedies. *Butts v. Nichols*, 381 F. Supp. 573, 577-78 (S.D. Iowa 1974).

160. IOWA CODE § 365.17(5) (1971) (renumbered and transferred to *id.* § 400.17 (1976)).

protection clause. In *Butts v. Nichols*,<sup>161</sup> the court first found that no "compelling state interest" was required to uphold the statute's constitutionality because classification based upon a criminal record is not inherently suspect.<sup>162</sup> After declaring the "rational basis" test to be the correct standard to be applied, the court stated that although "the State could logically prohibit and refuse employment in certain positions where felony conviction would directly reflect on the felon's job qualifications,"<sup>163</sup> the across-the-board prohibition did not pass constitutional muster because it was both over- and under-inclusive.<sup>164</sup> The Illinois Appellate Court for the Fifth District, in *City of Cairo v. Fair Employment Practices Commission*,<sup>165</sup> followed the reasoning of *Gregory* to find that removal of an applicant's name from an employment eligibility list solely because of his arrest record violated the racial discrimination provision of the Illinois Fair Employment Practices Act.<sup>166</sup>

In 1960, however, the Supreme Court upheld a New York statute<sup>167</sup> that automatically excluded ex-offenders from employment as officers of a waterfront labor organization. In *DeVeau v. Braisted*,<sup>168</sup> the evidence showed that the legislation was enacted after a comprehensive investigation confirmed that there was a nexus between corrupt hiring practices on the waterfront and the criminal connections of the persons doing the hiring. The Court indicated that it would sustain a blanket disability against persons with criminal convictions only when a substantial legislative finding links past criminal acts with present corruptness in a specified area.<sup>169</sup>

Further bars to ex-offender employment exist in positions which require bonding.<sup>170</sup> Many fidelity insurance companies refuse to bond

161. 381 F. Supp. 573, 578 (S.D. Iowa 1974).

162. *Id.* at 579, citing *Upshaw v. McNamara*, 435 F.2d 1188, 1190 (1st Cir. 1970). The compelling state interest, to be applied where fundamental rights or suspect classifications are involved, and the more easily satisfied rational basis test, to be used where such interests are not involved, are compared and discussed in J. NOWAK, R. ROTUNDA & J. YOUNG, *HANDBOOK ON CONSTITUTIONAL LAW* 525-27 (2d ed. 1978); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 991-1003 (1978).

163. 381 F. Supp. at 580.

164. *Accord*, *Smith v. Fussenich*, 440 F. Supp. 1077 (D. Conn. 1977).

165. 21 Ill. App. 3d 358, 365, 315 N.E.2d 344, 349 (1974).

166. ILL. REV. STAT. ch. 48, § 853(a) (1977).

167. 1953 N.Y. LAWS 882, § 8.

168. 363 U.S. 144 (1960).

169. *Id.* at 159-60.

170. In Illinois, the following trades and occupations, among others, require by law the posting of a surety bond: *see* ILL. REV. STAT. ch. 5, § 43 (1977) (manufacturers of butter and cheese); *id.* § 141 (merchants and dealers of fresh fruits and vegetables); *id.* ch. 23, § 5106 (professional fund raisers); *id.* ch. 32, § 453 (officers, employees, and agents handling funds or property of agricultural cooperatives); *id.* § 496.17 (credit union employees); *id.* § 747 (officers and employees of savings and loan institutions); *id.* § 1027 (officers and employees of development credit corpora-

persons with criminal records, and low-cost blanket bonds do not cover employees with criminal records.<sup>171</sup>

### *Pensions, Insurance, and Employment Benefits*

Public employees in many different categories lose their right to retirement benefits if they are convicted of a felony related to their employment.<sup>172</sup> However, the statutes do not operate to deprive an individual of his pension once the right has become vested, nor do they preclude the right to a refund of contributions accumulated in the fund at the time of the felony conviction.

A convicted criminal may find it impossible to obtain life insurance while he is imprisoned, and the disability often continues after he is released.<sup>173</sup> If insurance is obtained, a conviction does not generally invalidate the agreement unless specifically provided for in the policy, so that the language of the insurance contract is important. The Illinois Supreme Court has held that life insurance proceeds were recoverable even when the death resulted from the insured's own criminal activity.<sup>174</sup> However, the Illinois Insurance Code provides that "[t]he company shall be liable [on accident and health insurance policies] for any loss to which a contributing cause was the insured's commission of an attempt to commit a felony."<sup>175</sup>

Automobile insurance may also be difficult for a convicted person to obtain.<sup>176</sup> In Illinois, conviction or forfeiture of bail (within the preceding thirty-six months for any felony and certain other offenses relating to the operation of a motor vehicle) is grounds for the cancellation of the person's automobile insurance policy.<sup>177</sup> However, an insured who wishes to appeal the cancellation has a statutory right to do so.<sup>178</sup>

tions); *id.* ch. 55, § 7 (ferry operators); *id.* ch. 73, § 1065.46(a) (brokers); *id.* ch. 99, § 34 (notaries public); *id.* ch. 111, § 103 (commission merchants).

171. Lykke, *Attitude of Bonding Companies Toward Probationers and Parolees*, 21 FED. PROB. 36 (1957).

172. ILL. REV. STAT. ch. 108 1/2, § 2-156 (1977) (general assembly); *id.* 3-147 (police officers); *id.* § 4-138 (fire fighters); *id.* § 7-219 (municipal employees); *id.* § 9-235 (county employees); *id.* § 11-230 (laborers); *id.* § 12-191 (park district employees); *id.* § 13-221 (sanitary district employees); *id.* § 14-149 (state employees); *id.* § 15-187 (state university employees); *id.* § 16-199 (teachers); *id.* § 18-163 (judges); *id.* § 19-103 (house of corrections employees); *id.* § 19-203 (public library employees).

173. *Collateral Consequences*, *supra* note 3, at 1110-11.

174. *Taylor v. John Hancock Mutual Life Ins. Co.*, 11 Ill. 2d 227, 230, 142 N.E.2d 5, 7-8 (1957) (insured killed by accidental means while attempting to engage in arson).

175. ILL. REV. STAT. ch. 73, § 969.24 (1977).

176. *See generally Collateral Consequences*, *supra* note 3, at 1121-24.

177. ILL. REV. STAT. ch. 73, § 755.19(f)(5) (1977).

178. *Id.* § 755.23.

Unlike some states, Illinois does not suspend worker's compensation benefits upon conviction, but unemployment compensation is not available to any person discharged from employment because of the commission of a felony in connection with his work.<sup>179</sup>

### *Other Rights Affected by Conviction*

In addition to the other forfeitures suffered, a convicted person loses the right to possess firearms or ammunition for five years after his conviction or release,<sup>180</sup> as well as the right to enlist in the Illinois State Guard or Naval Militia.<sup>181</sup> If the conviction results from one of several offenses involving a motor vehicle, the individual's license to drive is also revoked.<sup>182</sup>

### RESTORATION OF RIGHTS AND PRIVILEGES

The restoration of civil rights in Illinois is governed primarily by the Unified Code of Corrections.<sup>183</sup> Under the statutory provisions, voting rights are restored upon release from imprisonment.<sup>184</sup> Eligibility to hold public office returns following the completion of sentence.<sup>185</sup>

With regard to the restoration of license rights and privileges, Illinois has taken a progressive position. By statutory mandate,<sup>186</sup> once an individual's prison sentence is completed, all licenses, except drivers' licenses, which were revoked or suspended because of conviction are automatically restored, unless the Illinois Department of Registration and Education can affirmatively demonstrate—after an investigation and hearing—that restoration is not in the public interest.<sup>187</sup> This provision shifts the burden of proof from the applicant to the department.

The committing court is also authorized to issue, upon discharge from incarceration, parole, probation, or anytime afterward, a certificate indicating that the individual's sentence has been satisfactorily completed and that the individual's behavior after conviction has warranted issuance of the order.<sup>188</sup> The order may be entered on motion of

179. *Id.* ch. 48, § 432c.

180. *Id.* ch. 38, §§ 83-2(a), 83-4(2)(ii).

181. *Id.* ch. 129, § 251.

182. *Id.* ch. 95 1/2, §§ 6-205(a)(1) to 6-206(a)(20).

183. *Id.* ch. 38, § 1005-5-5.

184. *Id.* § 1005-5-5(c). See notes 53-61 and accompanying text *supra*.

185. ILL. REV. STAT. ch. 38, § 1005-5-5(b) (1977). See notes 100-11 and accompanying text *supra*.

186. ILL. REV. STAT. ch. 38, § 1005-5-5(d) (1977).

187. *Id.*

188. *Id.* §§ 1005-5-5(e), (f).

the defendant, the state, or the court itself when the court believes the issuance would assist in rehabilitation and be consistent with public welfare.<sup>189</sup>

#### CONCLUSION

Only a small percentage of convicted felons are ever incarcerated. On the other hand, *every* Illinois citizen who suffers a felony conviction is subject to at least some disabilities regardless of whether a prison sentence is imposed. Freedom is definitely not the only issue involved in the final disposition of the case. Both the potential felon and his attorney should be aware of the significance of these collateral consequences which may result if there is a felony conviction.

189. *Id.* § 1005-5-5(e).