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New Approaches to the Civil Disabilities of Ex-Offenders

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NOTE

NEW APPROACHES TO THE CIVIL DISABILITIES OF EX-OFFENDERS

I. INTRODUCTION

When a person breaks the law and is convicted, he is punished by deprivation of many of the liberties and opportunities to which he has become accustomed while living as a free man. The most immediately oppressive of these deprivations is incarceration. The walls of the penitentiary narrowly prescribe the area within which he is able to move. Eventually, however, he is freed, and he may once again walk about, for the most part as he pleases. But he is not completely free—not as he was before. He finds that the state continues to restrict his freedom in many ways which do not affect his fellow citizens. These restrictions prevent him from participating in his government and prohibit his entrance into a large number of employment opportunities. Moreover, these restrictions usually are not limited in time; they are for life.

Collateral civil disabilities resulting from criminal conviction began in the ancient world and have taken many forms over the centuries. Today, the disabilities that most affect the ex-offender are automatic disqualification from a growing number of occupations, disenfranchisement, and exclusion from public office.

The Supreme Court has ruled that the fourteenth amendment does not protect the voting rights of felons from state discrimination.[1] However, the protections of the fourteenth amendment are applicable to other discriminatory measures which burden the ex-offender. Due process and equal protection arguments can be utilized to overcome the blanket disqualification of all ex-offenders from certain occupations, and they can provide a base from which to attack statutes which exclude ex-offenders from public office. It would be far better, though, if the various legislative bodies would undertake to weigh the imagined benefits of civil disabilities against the

[1] Richardson v. Ramirez, 418 U.S. 24 (1974).

harm which such disabilities promote, and then set out to balance the scales by narrowly limiting the disabling statutes.

II. BRIEF HISTORY OF CIVIL DISABILITIES FOR CONVICTION OF CRIME

The earliest examples of civil disabilities imposed for criminal wrongs can be found in the Greek and Roman civilizations. Early in their history, the Romans developed the practice of declaring as *sacer* (a state of outlawry) those convicted of serious crimes.[2] This particular disability was severe, and included loss of possessions, destruction of family rights, and the possibility of being slain with no legal sanctions to burden one's slayer.[3] For lesser crimes the Romans imposed a less severe disability, *infamia*, which was borrowed from the Athenian concept of infamy. In Athens, to be "infamous" meant loss of the rights to attend assemblies, to vote, to make speeches, to hold public office, to serve in the army, and to appear in court.[4] Given the nature of the Athenian democracy, the possession of these rights was highly valued, and their loss was a great penalty.[5] The Romans, who shared the Greeks' high regard for citizenship rights, extended the disabilities even further. In the

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[2] Damaska, *Adverse Legal Consequences of Conviction and Their Removal: A Comparative Study*, 59 J. CRIM. L.C. & P.S. 347, 350 (1968) [hereinafter cited as Damaska].

[3] This practice was also followed by the early Germanic tribes. *Id.* at 351. In Milan, as late as 1216, one could kill an outlawed person with impunity. However, by 1425, such an act was subject to a 20 lira fine in Rome. In 1531 a person who sheltered an outlawed relative in Venice could be banished. J. BRISSAUD, HISTORY OF FRENCH PRIVATE LAW 883 n.3 (1912).

[4] Damaska, *supra* note 2, at 351.

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

The electorate in Athens was a thoroughly democractic group in that it included country gentlemen, businessmen, craftsmen, farmers, and day laborers. But when Pericles declared that Athenian government was "in the hands, not of the few, but of the many," his idea of "many" differed greatly from that of more modern thinkers. Athenian democracy was premised upon the belief that policy should be made by those with experience and a personal stake in the welfare of the city. Therefore, political rights were enjoyed only by males over 18 years of age, born of Athenian parents of the citizen class. Political rights were not enjoyed by women, children, or any of the thousands of resident aliens who participated in the commercial life of Athens. When the nearly 100,000 war captives who were enslaved are taken into consideration, one finds that the number of Athenians who enjoyed political rights was only about one out of ten. W. AGARD, WHAT DEMOCRACY MEANT TO THE GREEKS 69-70 (1940).

later stages of the Empire there appeared specific disqualifications similar to modern disabilities, such as forfeiture of the right to carry on a trade.[6] The influence of these civilizations insured that variations of these schemes would appear in developing societies throughout Europe.[7]

In Britain, outlawry gained currency before the Norman Conquest.[8] The power to declare an individual an outlaw originally resided in the monarch, but was restricted by the Magna Charta to a judgment of one's peers or to the law of the land.[9] Outlawry involved the usual forfeiture of possessions, and any subject had not only the right, but the duty, to kill an outlawed criminal.[10] By the 14th century the latter provision had been ameliorated to the extent that only the sheriff held the homicidal prerogative, although a private subject who was attempting to make a lawful arrest of an outlaw could not be held responsible if he killed the outlaw in the process.[11] In practice, outlawry lapsed into disuse during the Middle Ages.[12]

Outlawry was replaced in Britain by the penal sanction of attainder. Upon conviction and judgment of death, or upon flight in a capital case, the accused was called "attaint, *attinctus*, stained, or blackened."[13] The consequences of attainder were forfeiture of property, corruption of blood, and loss of civil rights.[14]

All real interests of the attainted person escheated to the king in cases of high treason and felony.[15] The rationale for the forfeiture was given by Blackstone:

> [H]e who hath thus violated the fundamental principles of government, and broken his part of the original contract between king and people hath abandoned his connections with society, and hath no longer any right to those advantages

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[6] Damaska, *supra* note 2, at 351.

[7] *Id.*

[8] A. BABINGTON, THE POWER TO SILENCE 73 (1968).

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.* Outlawry was not officially abolished until 1938, with the Administration of Justice Act. *Id.*

[13] 4 W. BLACKSTONE, COMMENTARIES *380.

[14] *Special Project, supra* note 5, at 943. *See* Avery v. Everett, 18 N.E. 148 (N.Y. 1888).

[15] 4 W. BLACKSTONE, COMMENTARIES *381.

> which before belonged to him purely as a member of the community.[16]

In addition, it was felt that the drastic effect of forfeiture, on the prospective criminal as well as his posterity, would act as a powerful deterrent.[17]

Forfeiture of personal property occurred in cases of lesser crimes, such as petit larceny and petit treason, for which forfeiture of real property was not exacted.[18] Upon his conviction the criminal's personal property was forfeited to the king for a year and a day with the right of waste, and then to the lord of the fee.[19]

Corruption of blood involved the power to participate in the transfer of property by descent. Thus, an attainted criminal could not inherit from his ancestors, retain that which he had already inherited, or transmit property to his heirs by descent.[20] Furthermore, the heirs of one who was attainted could not inherit through him from a more remote ancestor.[21]

Forfeiture and corruption of blood were not, however, as harsh in practice as in theory. The escheat to the king or lord was dependent upon the exercise of the right, so that many attainted criminals did in fact own property and participate in the transfer of property by inheritance, though always subject to the superior right of sovereign or lord.[22]

The third aspect of attainder was the loss of civil rights known as civil death or *civiliter mortuus*.[23] One who was civilly dead could not bring an action, act as a witness in a proceeding, or "perform any legal function."[24] Further, although a civilly dead person could not sue, he could be sued, and even though he could contract, he could not enforce the agreement.[25]

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[16] *Id.* at *382.

[17] *Id.*

[18] *Id.* at *386-87.

[19] *Id.* at *384-85.

[20] *Id.* at *388.

[21] *Id.*

[22] *Special Project, supra* note 5, at 943. Forfeiture and corruption of blood were abolished in Britain by statute during the 19th century. *Id.* at 949. *See* Corruption of Blood Act of 1814, 54 Geo. 3, c. 145; Act to Abolish Forfeitures for Treason or Felony, 33 & 34 Vict., c. 23 (1870).

[23] Avery v. Everett, 18 N.E. 148, 150 (N.Y. 1888).

[24] *Id.*

[25] *Id.* at 151.

When the British colonists came to North America they brought with them the concept of attainder and incorporated it into their legal systems.[26] However, the Federal Constitution abolished forfeiture and corruption of blood as penalties for treason, except during the life of the person convicted,[27] and in the early 19th century the advent of a new philosophy of corrections[28] helped further deemphasize the elements of attainder.

Although civil death was never abolished in America, its reach was far from universal, and several early cases held that the principles of civil death would not be recognized unless there was statutory authority to support them.[29] The disabling statutes usually contained very general wording, and often referred merely to "civil death," without defining that phrase. Various decisions denied convicts the right to contract,[30] the right to inherit,[31] and the right to bring a civil suit.[32] Only a few jurisdictions currently have civil death statutes in force,[33] and

[26] S. RUBIN, THE LAW OF CRIMINAL CORRECTION § 16, at 24-25 (1963). It has been suggested that the policy behind the adoption of civil death in America was the protection of public security, rather than the punitive effect of the doctrine which was thought to justify the practice in Britain. Note, *The Effect of State Statutes on the Civil Rights of Convicts*, 47 MINN. L. REV. 835, 837 (1962-1963). It is more likely, however, that the perpetuation of the concept in America was the result of an unquestioning adoption of known practices by the colonists, who passed the legacy on to equally noncritical successors. *Special Project, supra* note 5, at 950.

[27] U.S. CONST. art. III, § 3, *See also* Fields v. Metropolitan Life Ins. Co., 249 S.W. 798 (Tenn. 1923); Note, *The Legal Status of Convicts During and After Incarceration*, 37 VA. L. REV. 105, 106 (1951).

[28] The new philosophy was based on principles of rehabilitation, rather than on retribution as in the past. *Special Project, supra* note 5, at 949.

[29] Platner v. Sherwood, 6 Johns. Ch. 118 (N.Y. 1822). *See also* Willingham v. King, 2 So. 851, 853 (Fla. 1887); Bosteder v. Duling, 213 N.W. 809, 812 (Neb. 1927); Neff v. Massachusetts Mut. Life Ins. Co., 107 N.E.2d 100, 102 (Ohio 1952); Davis v. Laning, 19 S.W. 846 (Tex. 1892). This attitude was an outgrowth of more modern policies in the field of criminal justice. Bosteder v. Duling, *supra* at 812.

[30] Williams v. Shackleford, 11 S.W. 222 (Mo. 1889).

[31] *In re* Donnelly's Estate, 58 P. 61 (Cal. 1899).

[32] New v. Smith, 84 P. 1030 (Kan. 1906).

[33] Included are: ALASKA STAT. §§ 11.05.070-.080 (1962); CAL. PENAL CODE § 2600 (West 1970) (during term of sentence); IDAHO CODE § 18-311 (1948); MO. ANN. STAT. § 222.010 (1959)(during term of sentence); N.Y. CIV. RIGHTS LAW §§ 79, 79(a) (McKinney Supp. 1975-1976); N.D. CENT. CODE § 12-06-27 (1960); OKLA. STAT. ANN. tit. 21, §§ 65-66 (1958); R.I. GEN. LAWS ANN. §§ 13-6-1 to -2 (1968); S.D. COMPILED LAWS ANN. § 23-48-35 (1967).

These statutes can have extraterritorial effect. It has been held that the New York civil death statute bars a person serving a life sentence in New Jersey from bringing suit in New York federal district court. Urbano v. News Syndicate Co., 232 F. Supp. 237 (S.D.N.Y. 1964).

the effect of such statutes is frequently diluted by their own self-limiting provisions.[34]

However, the fading importance of civil death does not mean that convicted persons regain complete freedom upon release from prison. The burden of civil death has been replaced by the imposition of an ever-expanding number of specific disabilities. For example, conviction of certain crimes is an almost universal bar to the opportunity to vote[35] or to hold public office.[36] In addition, almost every profession or occupation that is licensed by the state excludes convicted criminals by prohibiting their licensure. A convicted felon can assume with a fair degree of confidence that, from the time of his conviction, he will be barred from gainful employment in a host of areas, ranging from architecture[37] to water-well contracting.[38]

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[34] The Oregon civil death statute, ORE. REV. STAT. § 137.240 (Supp. 1974), is a good example:

(1) Conviction of a felony:

(a) Suspends all the civil and political rights of the person so convicted.

(b) Forfeits all public offices and all private trusts, authority or power during the term or duration of any imprisonment.

But then the statute goes on to make the following exceptions to its own rule:

(2) However, a person convicted of a felony may lawfully exercise all civil rights during any period of parole or probation or upon final discharge from imprisonment.

(3) The provisions of subsections (1) and (2) of this section are not intended to render a person convicted of a felony incapable of:

(a) Making a will; or

(b) Making a power of attorney; or

(c) Making and acknowledging a sale or conveyance of property; or

(d) Appearing and commencing, maintaining or defending a proceeding for child custody or dissolution of marriage; or

(e) Appearing and maintaining or defending any other cause of action while imprisoned or on release, if the action was started before the person's conviction.

(4) Nothing in this section prevents a person convicted of a felony and imprisoned as a penalty therefore from entering into a civil contract of marriage during the period of imprisonment if in the judgment of the Administrator of the Corrections Division the marriage would contribute to the person's rehabilitation and the administrator consents to the marriage.

[35] *E.g.*, CONN. CONST. amend. VII; IOWA CONST. art. 2, § 5; KY. CONST. § 145; LA. CONST. art. 8 § 6; MD. CONST. art. 1, § 2; MINN. CONST. art. 7, § 2; MISS. CONST. art. 12, § 241; MO. STAT. ANN. § 111.021 (Supp. 1975); NEV. CONST. art. 2, § 1.

[36] *E.g.*, LA. CONST. art. 8, § 6; MISS. CONST. art. 12, §§ 241, 250; NEB. REV. STAT. § 29-112 (1964); NEV. CONST. art. 2, § 1, art. 15, § 3; N.J. STAT. ANN. 2A:93-5 (1969); N.C. CONST. art. VI, § 8; OKLA. STAT. ANN. tit. 21, § 312 (1958).

[37] OKLA. STAT. tit. 59, § 45.14 (1971).

[38] MONT. REV. CODES ANN. § 66-2610 (Supp. 1974). Restrictions in Kentucky in-

III. OCCUPATIONAL DISABILITIES

The effect of disabilities imposed by the states upon ex-offenders is felt most immediately in the area of occupational regulation. These disabilities limit the ex-felon's job opportunities and, in the process, can hamper his efforts to improve his lot in life. They are generally derived from the licensing provisions of statutes which regulate certain occupations, and which deny the issuance or require the revocation of licenses under certain conditions. The conditions most burdensome to ex-felons concern the moral character of the licensee and the licensee's conviction of certain types of crime.[39]

The statutes which restrict licensure on the basis of conviction are divided into three types: (1) Those which exclude persons convicted of certain specified crimes;[40] (2) those which exclude persons convicted of crimes involving moral turpitude;[41] and (3) those which exclude persons convicted of felonies.[42] In general, the statutes which base restrictions upon the commission of crimes of moral turpitude do not distinguish between felonies and misdemeanors.[43]

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clude: KY. REV. STAT. § 311.570 (1972) (physician) [hereinafter cited as KRS]; KRS § 317.590 (barber). *But see* discussion of Harris v. Board of Barbering, Civil No. C 74-399 L(A) (W.D.Ky., June 13, 1975), *infra* part III); KRS § 313.130 (dentist); KRS § 314.091 (nurse); KRS § 315.127 (pharmacist); KRS § 316.150 (funeral director); KRS § 320.310 (optometrist); KRS § 321.350 (veterinarian); KRS § 322.050 (Supp. 1974)(engineer); KRS § 323.120 (architect); KRS § 325.340 (certified public accountant); KRS § 326.090 (opthalmic dispenser); KRS § 327.070 (physical therapist); KRS § 329.030 (detection of deception examiner); KRS § 330.110 (auctioneer); KRS § 331.080 (holder of license for independent business school); KRS § 334.120 (Supp. 1974) (hearing aid dealer); KRS § 334A.180 (Supp. 1974) (speech pathologist and audiologist).

It should be noted that the statutes are not consistent, in that some base the disqualification on conviction of any crime, others base it on conviction of any felony, and still others base it on conviction of any crime involving moral turpitude.

[39] Other requirements often include citizenship, a certain level of education and passing an examination. *See, e.g.*, ILL. ANN. STAT. ch. 91 § 58b (Supp. 1976).

[40] *E.g.*, Maine prohibits the issuance of a collection agency license to anyone who has been convicted of forgery, fraud, obtaining money under false pretenses, embezzlement, extortion, larceny, burglary, breaking and entering, robbery, criminal conspiracy to defraud, or bribery. ME. REV. STAT. ANN. tit. 32 § 575 (Supp. 1973).

[41] *E.g.*, ARK. STAT. ANN. § 72-1613 (Supp. 1973).

[42] *E.g.*, FLA. STAT. ANN. § 480.11 (1965). "Felony" is defined as a crime graver than a misdemeanor, or a crime punishable by death or imprisonment. BLACK'S LAW DICTIONARY 744 (4th ed. 1968).

[43] *E.g.*, ARK. STAT. ANN. § 72-1613 (Supp. 1973).

The requirement that a licensee be of good moral character is usually specifically mentioned in licensing statutes. In addition, however, it has been held that the character requirement is implicit in a statute mandating that those who engage in an occupation be licensed.[44] Statutes which limit licensure to those of good moral character[45] are generally more restrictive of the ex-offender's rights than statutes which only prohibit the licensing of felons, because the courts tend to find that conviction of a misdemeanor is evidence of bad character, thereby denying licensure to misdemeanants as well as to felons, who are generally held to be of bad moral character per se.

The disqualification of felons from licensed occupations can be divided into two categories: (1) Disqualification from professions in which the state's interests are strong and the need for protection against those of bad moral character is substantial,[46] and (2) disqualification from nonprofessional occupations in which the state's interests are weaker and the need for protection against those of bad moral character is less substantial.[47]

A. *Disqualification from Professional Occupations*

1. *The Legal Profession*

The courts have consistently upheld the exclusion of con-

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[44] Barton Trucking Corp. v. O'Connell, 165 N.E.2d 163, 169, 197 N.Y.S.2d 138, 148 (1959).

[45] Character is "[t]he aggregate of the moral qualities which belong to and distinguish an individual person; the general result of the one's distinguishing attributes." BLACK'S LAW DICTIONARY 294 (4th ed. 1968).

[46] *E.g.*, the legal profession. *See* Schware v. Board of Bar Examiners, 353 U.S. 232, 239 (1957).

[47] It is undoubtedly true that the photographer must possess skill. But so must the actor, the baker, the bookbinder, the bookkeeper, the carpenter, the cook, the editor, the farmer, the goldsmith, the horseshoer, the horticulturist, the jeweler, the machinist, the mechanic, the musician, the painter, the paper-hanger, the plasterer, the printer, the reporter, the silversmith, the stonecutter, the storekeeper, the tailor, the watchmaker, the wheelwright, the woodcarver and every other person successfully engaged in a definitely specialized occupation, be it called a trade, business, an art or a profession. Yet, who would maintain that the legislature would promote the general welfare by requiring a mental and moral examination preliminary to permitting individuals to engage in these vocations merely because they involve knowledge and skill?

State v. Ballance, 51 S.E.2d 731, 735-36 (N.C. 1949).

victed persons from the legal profession. The rationale for this policy was stated by the Supreme Court in *Ex Parte Wall*:[48]

> It is laid down in all the books in which the subject is treated, that a court has power to exercise a summary jurisdiction over its attorneys to compel them to act honestly towards their clients, and to punish them by fine and imprisonment for misconduct and contempts, and, in gross cases of misconduct, to strike their names from the roll. If regularly convicted of a felony, an attorney will be struck off the roll as of course, whatever the felony may be, because he is rendered infamous. If convicted of a misdemeanor which imports fraud or dishonesty, the same course will be taken. He will also be struck off the roll for gross malpractice or dishonesty in his profession . . . . Where an attorney was convicted of theft, and the crime was condoned by burning in the hand, he was nevertheless struck from the roll. "The question is," said Lord Mansfield, "whether, after the conduct of this man, it is proper that he should continue a member of a profession which should stand free from all suspicion . . . . It is not by way of punishment; but the courts in such cases exercise their discretion, whether a man whom they have formerly admitted is a proper person to be continued on the roll or not."[49]

It is hard to find fault with the argument that the legal profession should "stand free from all suspicion," and that the courts are correct in encouraging efforts toward that goal. However, the tool most often used in that pursuit is the requirement that attorneys be possessed of good moral character. The interpretation of the term "good moral character" has proved bothersome in some situations, and the standard it sets gives great leeway to the courts. For example, in *Application of Brooks*,[50] a conscientious objector who refused to report to a public service camp (thereby violating the Selective Service Act)[51] was held not to be of good moral character, and was found unfit to practice law in the state of Washington. The board of bar examiners deemed Brooks' refusal to report to the civilian camp and his acceptance of a prison sentence "unjustifiably

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[48] 107 U.S. 265 (1882).

[49] *Id.* at 273.

[50] 355 P.2d 840 (Wash. 1960).

[51] Selective Service and Training Act of 1940, ch. 720, § 11, 54 Stat. 894-95. Brooks had served 22 months of a 3 year sentence. 355 P.2d 840 (Wash. 1960).

defiant of the laws of the United States."[52] The Washington Supreme Court upheld the board's finding on the ground that the bar examiners had not acted capriciously or arbitrarily in reaching their decision.[53] Establishing its own sense of morality as a rule of law, the court stated:

> A loyal and discerning citizen is aware of his great heritage of liberty and acknowledges his duty to do his share in preserving it. Without a sense of duty, the applicant does not measure up to the standard of citizenship rightly expected of an attorney at law.[54]

Similarly, the highest court of Illinois held, in the case of an attorney whose claim to be a conscientious objector was rejected by a draft board, that conviction for failure to report for induction constituted conviction of a crime involving moral turpitude. According to the court, the conviction conclusively required disbarment.[55]

In Kentucky, attorneys have been disbarred for a variety of crimes and acts which supposedly indicate bad moral character. In *Commonwealth v. Stump*[56] a prosecuting attorney was disbarred for accepting a fee to discontinue a prosecution. Although the act in that case was clearly related to the person's fitness to practice law, the disqualifying conduct does not always bear such a distinct relationship to the person's fitness to practice. An attorney's conviction under the Harrison Anti-Narcotic Act was held conclusively to require disbarment,[57] and the Court of Appeals held that a person who was convicted of illegally selling alcoholic beverages could not be allowed to practice law.[58] As the Court stated:

> It is not necessary that the misconduct should be such as would render him liable to criminal prosecution. If it shows that he is unfit to discharge the duties of his office, is unworthy of confidence, even though the conduct is outside of his professional dealings, it is sufficient. If he is not honest, if he

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[52] *Id.* at 841.
[53] *Id.*
[54] *Id.* at 842.
[55] *In re* Pontarelli, 66 N.E.2d 83, 86 (Ill. 1946).
[56] 57 S.W.2d 524 (Ky. 1933).
[57] Commonwealth v. Porter, 46 S.W.2d 1096 (Ky. 1932).
[58] Underwood v. Commonwealth, 105 S.W. 151 (Ky. 1907).

> is not moral, if he is not of good demeanor, he may be disbarred, and should be.[59]

In *In re May*[60] the Court ruled that a person convicted of a crime should be disbarred, even if he was subsequently restored to citizenship or pardoned, and even if the statute under which he was convicted was later repealed.[61] The issue is the morality of the individual in general, without regard to whether his immorality has affected the practice of his profession in a particular instance. The criminal act, in whatever circumstances and of whatever nature, is taken as indicative of bad character which, in turn, is taken as indicative of unfitness to practice law.

The Court of Appeals has not always been consistent, however. In *Ex Parte Tenney*,[62] the Court held that one who served in the Confederate Army during the Civil War was not thereby disqualified from the practice of law in Kentucky:[63]

> The insurgent may be as capable, faithful and trustworthy, in his professional sphere, as if he had never raised an arm against his country. And we will not go beyond that circle to inquire into his personal merits or fitness for admittance to our bar.[64]

2. *The Medical Profession*

The practice of medicine, like the practice of law, is sub-

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[59] *Id.*

[60] 239 S.W.2d 95 (Ky. 1951).

[61] *Id. See also* Hughes v. State Bd. of Health, 159 S.W.2d 277 (Mo. 1942); State Bd. of Dental Examiners v. Breeland, 38 S.E.2d 644 (S.C. 1946).

[62] 63 Ky. 351 (1865).

[63] *Id.*

[64] *Id.* at 353.

> The right of revolution is natural, God-given, impressed upon our nature, written upon hearts by the finger of Omnipotence, therefore inalienable; and this is the fundamental, controlling idea of our own immortal "Declaration of Independence."
>
> An attempted but unsuccessful revolution is but a rebellion; a political offense *malum prohibitum*, but not *malum in se*. A successful revolution results in the organization of a new government, often adds a new member to the family of nations, received on terms of equality, and given an honorable position; its founders regarded as good and great men, and crowned as patriots; unsuccessful, they are rebels, subject to condign punishment: still, every other nation affords them asylum and protection.

Id. at 356 (Williams, J., concurring).

ject to state regulation, and the manner in which a criminal conviction reflects on one's moral character is important in the licensure of medical practitioners. The case which established a state's right to disqualify a convicted person from the practice of medicine is *Hawker v. New York*.[65] Hawker, who was a physician, was convicted in 1878 of performing an abortion and was sentenced to prison for 10 years.[66] In 1893, 15 years after Hawker's conviction, New York enacted a law making it a crime for a felon to practice medicine. In 1896 Hawker was indicted and convicted for illegally practicing medicine. The United States Supreme Court upheld both the statute and the conviction.[67]

In *Meyer v. Board of Medical Examiners*,[68] California suspended a physician's license to practice medicine even though the trial court set aside the physician's conviction and dismissed the prosecution following discharge of the physician from probation. The suspension was justified on the ground that dismissal of the prosecution and restoration of the offender to his rights could change neither his bad character (as conclusively evidenced by the conviction), nor the fact that he had been adjudged guilty of a crime.[69]

B. *Disqualification from Non-Professional Occupations*

The modern trend of expanding state regulation of the private sector has increased the number of occupations subject to licensing requirements. As a result, the statutory occupational obstacles facing ex-offenders are no longer limited to the traditional professions. Before the turn of the century, law and medicine were almost the only occupations which were licensed.[70] Today, states license not only attorneys, physicians and surgeons, but also various other occupations ranging from plumbers to chicken inspectors.[71] According to a Labor Depart-

[65] 170 U.S. 189 (1898).

[66] *Id.* at 190.

[67] *Id.* at 200.

[68] 206 P.2d 1085 (Cal. 1949).

[69] *Id.* at 1088. *But see* State Bd. of Registration for the Healing Arts v. Finch, 514 S.W.2d 608 (Mo. 1974), where a doctor who had murdered his wife 15 years before was allowed to take the licensing examination to practice medicine.

[70] *Special Project, supra* note 5, at 1003-04.

[71] Plumbers, KRS §§ 318.010-.990; chicken inspectors, PA. STAT. ANN. tit. 63, §§ 641-49 (1968).

ment estimate, the number of professions, skills and trades which are subject to state regulation and control of entry has doubled in the last 25 years.[72] Many of the regulated occupations, whether skilled, semi-skilled or unskilled, are statutorily denied to the convicted citizen.[73]

Likewise, the courts have acknowledged and approved statutory exclusion of former convicts from regulated occupations other than the traditional professions. Oliver Wendell Holmes summed up the stance of the law when he said: "[T]he petitioner may have a constitutional right to talk politics but he has no constitutional right to be a policeman."[74] In general, if the state chooses to regulate an occupation, the courts will uphold the regulatory scheme, even if it prohibits ex-offenders from engaging in the regulated occupation, and even if the regulated occupation is not among those which traditionally have been felt to involve a substantial state interest.[75]

Under the guise of protecting the "public health, safety, welfare, or morals," Maryland denied a license to operate a taxicab to an applicant who had been convicted of disorderly conduct.[76] The conviction arose out of the applicant's distribution of socialist papers and material.[77] The agency based its denial of the license on the applicant's record, a psychiatrist's negative impression, "the marked animosity of the applicant towards law and order, his lack of cooperation with the police

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[72] GREENE, OCCUPATIONAL LICENSING AND THE SUPPLY OF NONPROFESSIONAL MANPOWER (Manpower Research Monograph No. 11, 1969).

[73] Note, *An Application of the New Equal Protection: Expansion of Convict Property Rights*, 4 U.C.L.A.-ALAS. L. REV. 294, 321 (1975).

[74] McAuliffe v. Mayor of New Bedford, 29 N.E. 517 (Mass. 1892).

[75] Occasionally courts have struck down state regulation of activities that were not felt to involve a valid state interest. *See e.g.*, Dasch v. Jackson, 183 A. 534 (Md. 1936) (paperhangers); S.S. Kresge Co. v. Couzens, 287 N.W. 427 (Mich. 1939)(cut flower vendors); State v. Ballance, 51 S.E.2d 731 (N.C. 1949)(photographers). The Tennessee Supreme Court found that a state law regulating watchmaking did not have "any real tendency" to promote the general welfare or protect public morals, health, or safety, and was therefore invalid. Livesay v. State Bd. of Examiners in Watchmaking, 322 S.W.2d 209 (Tenn. 1959). It has also been argued that a particular regulatory scheme was intended to eliminate competition and to aid exploitation rather than to benefit the public. State v. Harris, 6 S.E.2d 854, 859-60 (N.C. 1940). The traditional response by the courts, however, has been to defer to the legislature on these questions and to interfere only in cases of clear abuse. Rosenblatt v. State Bd. of Pharmacy, 158 P.2d 199 (Cal. Ct. App. 1945).

[76] Kaufman v. Taxicab Bureau, 204 A.2d 521, 524 (Md. 1964).

[77] *Id.* at 522-23, 524.

in abating the disorders created by him, and his *convictions of crime.*'[78] According to the court, this was a sufficient basis upon which to deny the applicant the privilege of earning a living by driving a taxicab.[79]

Just as conviction of a crime only remotely related to the legal or medical professions can result in the denial of a license to practice law or medicine,[80] a person can be prohibited from engaging in a nonprofessional occupation on the basis of a criminal conviction apparently unrelated to the occupation in question. The classic example is the case in which a person who had been convicted of maintaining a house of prostitution could not obtain a license to sell secondhand goods.[81] In a less ironic case, a man who had been driving a school bus for 10 years was dismissed from further employment in that position when it was discovered that he had been convicted of a daytime breaking and entering 25 years before.[82]

In at least one case, conviction of a wife prevented her husband from obtaining a license.[83] In *Hora v. San Francisco*, Mr. Hora applied for a license to operate a massage parlor at the same location where his wife had formerly operated a massage parlor. His application was denied because the wife had been convicted of morals violations for keeping a house of ill-fame, soliciting, and engaging in lewd conduct. The evidence against the wife was to the effect that the female employees of her massage parlor believed in satisfied customers, and had put their customers' satisfaction above the law. According to the court, if the husband was granted a license to operate at the same location, the same customers, presumably expecting the same services, would frequent the massage parlor. Therefore, denial of the license was held to be reasonable.[84]

C. *The Constitutional Questions*

The police power of the state may be used to protect the

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[78] *Id.* at 524 (emphasis added).

[79] *Id.*

[80] *See* notes 56-59 and accompanying text, *supra.*

[81] Dorf v. Fielding, 197 N.Y.S.2d 280 (Sup. Ct. 1948).

[82] Thomas v. School Bd., 138 So.2d 658 (La. Ct. App. 1962).

[83] Hora v. San Francisco, 43 Cal. Rptr. 527 (Cal. Ct. App. 1965). *But see*, Roosevelt Taxi, Inc. v. Comm'r of Public Safety, 279 N.Y.S.2d 1016 (Sup. Ct. 1967).

[84] Hora v. San Francisco, 43 Cal. Rptr. 527 (Cal. Ct. App. 1965).

lives, health, and property of the citizenry and to preserve good order and public morals.[85] It is this power which allows the state to regulate trades[86] and professions.[87] As the Supreme Court said in *Crowley v. Christenson*:[88]

> It is undoubtedly true that it is the right of every citizen of the United States to pursue any lawful trade or business, under such restrictions as are imposed upon all persons of the same age, sex and condition. But the possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order and morals of the community.[89]

Although regulation of certain activities has in some cases been ruled outside the scope of the police power,[90] it is generally held that the state has wide discretion concerning the ends to be achieved and the means used, so long as no specific constitutional protection is violated.[91] Efforts to find violations of specific constitutional protections have proven unsuccessful in cases involving the occupational restrictions imposed on ex-convicts. In *Hawker v. New York*[92] a statute which disqualified felons from the practice of medicine was attacked as violative of the constitutional provisions prohibiting ex post facto laws and bills of attainder.[93] However, the constitutional prohibitions apply only if the statute is penal in nature.[94] Using the

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[85] Williamson v. Lee Optical Co., 348 U.S. 483 (1955); Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952); St. Louis & San Francisco Ry. v. Matthews, 165 U.S. 421 (1896); Boston Beer Co. v. Massachusetts, 97 U.S. 25 (1877).

[86] Schmidlinger v. Chicago, 226 U.S. 578 (1913); Gundling v. Chicago, 177 U.S. 183 (1900); Louisville v. Kuhn, 145 S.W.2d 851 (Ky. 1940).

[87] Hawker v. New York, 170 U.S. 189, 192-93 (1898). *See also* Reynolds v. Walz, 128 S.W.2d 734 (Ky. 1939); Watson v. State Comm'r of Banking, 223 A.2d 834 (Me. 1966); Schireson v. State Bd. of Medical Examiners, 28 A.2d 879 (N.J. 1942); State Bd. of Dental Examiners v. Breeland, 38 S.E.2d 644 (S.C. 1946).

[88] 137 U.S. 86 (1890).

[89] *Id.* at 89.

[90] *See, e.g.*, State v. Ballance, 51 S.E.2d 731 (N.C. 1949) (photography); Livesay v. State Bd. of Examiners in Watchmaking, 322 S.W.2d 209, 211 (Tenn. 1959)(watchmaking).

[91] Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952); Schmidlinger v. Chicago, 226 U.S. 578 (1913); Gundling v. Chicago, 177 U.S. 183 (1900).

[92] 170 U.S. 189 (1898).

[93] U.S. CONST. art. I, § 9.

[94] U.S. CONST. art. I, § 10.

standard that a statute is not penal if its purpose is not to punish but to promote some other legitimate state interest,[95] the United States Supreme Court found that New York did not seek "to further punish a criminal, but only to protect its citizens from physicians of bad character."[96] As stated by the California Supreme Court when reviewing a similar statute:

> Though not an ex post facto law, it is retrospective in so far as it determines from the past conduct of the party his fitness for the proposed business. Felons are . . . excluded from obtaining such a license, not as an additional punishment, but because the conviction of a felony is evidence of the unfitness of such persons as a class; nor can we perceive why such evidence should be more conclusive of unfitness were the act done after the passage of the ordinance than if done before.[97]

The nonpenal nature of the statutes also removes them from the constitutional prohibition of cruel and unusual punishment.[98]

The constitutional provision which has received the most attention in cases dealing with occupational disqualification of convicted persons is the due process clause of the fourteenth amendment. That a person has, in some sense, a property right in his occupation was recognized by the Supreme Court in 1889 in *Dent v. West Virginia*:[99]

> It is undoubtedly the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex and condition . . . . Here all vocations are open to every one on like conditions . . . . The interest, or, as it is sometimes termed, the estate acquired in them, that is, the right to continue their prosecution, is often of great value to the possessors, and cannot be arbitrarily

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[95] Mahler v. Eby, 264 U.S. 32 (1924); Hawker v. New York, 170 U.S. 189 (1898); Davis v. Beason, 133 U.S. 333 (1890); Murphy v. Ramsey, 114 U.S. 15 (1885).

[96] Hawker v. New York, 170 U.S. 189, 196 (1898). Justice Harlan, in his dissent, reached the opposite conclusion. *Id.* at 200-205.

[97] Foster v. Board of Police Comm'rs, 37 P. 763, 765 (Cal. 1894).

[98] *E.g.*, Ali v. Division of State Athletic Comm'n, 308 F. Supp. 11, 18 (S.D.N.Y. 1969).

[99] 129 U.S. 114 (1889). The case involved a prosecution for practicing medicine without a license. Dent had been practicing medicine for 6 years before the licensing statute was passed. The Supreme Court ruled that there was no denial of due process.

> taken from them, any more than their real or personal property can be thus taken.[100]

The Court went on to explain that any qualifications required by the state for licensure had to be "appropriate" to the profession. "It is only when [the qualifications] have no relation to such calling or profession . . . that they can operate to deprive one of his right to pursue a lawful vocation."[101] The "no relation" language used by the Court would appear to give the state much room for regulation, but *Schware v. Board of Bar Examiners*[102] puts the requirement squarely within the traditional rational connection rubric of due process: "A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualifications must have a *rational connection* with the applicant's fitness or capacity to practice law."[103]

How the rational connection standard relates to occupational disqualification based upon a criminal conviction was first dealt with in *Hawker v. New York*.[104] In ruling on the constitutionality of the New York statute which disqualified felons from the practice of medicine, the Supreme Court held that a state "may take whatever, according to the experience of mankind, reasonably tends to prove [character] and make it a test."[105] The Court then went on to say:

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[100] *Id.* at 121-22. This principle has been reaffirmed by subsequent cases. *See, e.g.*, United States v. Robel, 389 U.S. 258 (1967); Green v. McElroy, 360 U.S. 474, 492 (1959); Wieman v. Updegraff, 344 U.S. 183, 191-92 (1952); New State Ice Co. v. Liebmann, 285 U.S. 262 (1932); Meyer v. Nebraska, 262 U.S. 390 (1923); Truax v. Raich, 239 U.S. 33, 41 (1915). Justice Douglas has said:

> The right to work, I had assumed, was the most precious liberty that man possesses. Man has indeed as much right to work as he has to live, to be free, to own property. The American ideal was stated by Emerson in his essay on *Politics*, "A man has a right to be employed, to be trusted, to be loved, to be revered." It does many men little good to stay alive and free and propertied, if they cannot work. To work means to eat. It also means to live.

Barsky v. Board of Regents, 347 U.S. 442, 472 (1954)(Douglas, J., dissenting).

[101] Dent v. West Virginia, 129 U.S. 114, 122 (1889).

[102] 353 U.S. 232 (1957). Schware was denied admission to the bar for having used aliases to obtain work during the Depression, for having been a member of the Communist Party, and because he had been arrested on several occasions. *Id.* at 234-35.

[103] *Id.* at 239 (emphasis added). *See also* Douglas v. Noble, 261 U.S. 165 (1923); Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 319-20 (1866); Perrine v. Municipal Court, 488 P.2d 648, 97 Cal. Rptr. 320 (1971), *cert. denied*, 404 U.S. 1038 (1972).

[104] 170 U.S. 189 (1898).

[105] *Id.* at 195.

> It is not open to doubt that the commission of crime, the violation of the penal laws of a State, has some relation to the question of character. It is not, as a rule, the good people who commit crime. When the legislature declares that whoever has violated the criminal laws of the State shall be deemed lacking in good moral character it is not laying down an arbitrary or fanciful rule—one having no relation to the subject-matter, but is only appealing to a well recognized fact of human experience; and if it may make a violation of criminal law a test of bad character, what more conclusive evidence of the fact of such violation can there be than a conviction duly had in one of the courts of the State? The conviction is, as between the State and the defendant, an adjudication of the fact. So if the legislature enacts that one who has been convicted of crime shall no longer engage in the practice of medicine, it is simply applying the doctrine of *res judicata* and invoking the conclusive adjudication of the fact that the man has violated the criminal law, and is presumptively, therefore, a man of such bad character as to render it unsafe to trust the lives and health of citizens to his care.[106]

Under this reasoning, conviction of *any* crime could form a valid basis for a finding of bad moral character. By flatly stating that it is not "the good people who commit crime," the Court dispensed with the need for consideration of the nature or severity of the crime, the possibility of higher moral motivation for its commission, or the inadvertence of the convicted person's actions. The *Schware* case modified the standard, however, by requiring that the nature of the offense be taken into consideration when passing on an ex-offender's character.[107] The New York Court of Appeals has interpreted this to require that if the crime of which the applicant was convicted is not directly related to the character trait required for licensure, the licensing agency must look behind the conviction to determine the relevance of the applicant's acts and motives.[108]

Nevertheless, the requirement that the nature of the crime must be considered when the conviction is used as an indicator

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[106] *Id.* at 196.

[107] 353 U.S. 232, 243 (1957). There was also an indication that the passage of time since the offense would militate against a finding of bad character. *Id.* at 239. In addition, it was noted that arrest without conviction is not evidence of bad character. *Id.* at 243 n.12.

[108] Koster v. Holz, 148 N.E.2d 287, 171 N.Y.S.2d 65 (1958).

of an applicant's character did not prevent a federal court from upholding New York's denial of a boxing license to Muhammad Ali.[109] The denial was based on Ali's conviction for his refusal to submit to military induction, and the court did not feel that either Ali's professed moral beliefs or the fact that the conviction was still being appealed made the denial unreasonable.[110] Moreover, some courts have held that the fact of conviction is sufficient evidence of bad character to justify license revocation, even though the offender has been pardoned.[111]

The Supreme Court last dealt with the relationship between conviction and occupational disqualification in *DeVeau v. Braisted*.[112] A New York statute prohibiting anyone convicted of a felony from serving as an officer in a waterfront union was challenged as violative of due process. The Court upheld the disqualification despite the fact that the plaintiff had been convicted 23 years before the statute was passed. Important in the Court's decision, however, were the special circumstances which led to enactment of the questioned legislation. Justice Frankfurter, in his plurality opinion, stated that proper consideration of the case required that the statute "be placed in the context of the structure and history of the legislation."[113] The statute was passed in response to a "notoriously serious situation" on the New York and New Jersey waterfronts. There was widespread corruption and dishonesty in the unions that dominated waterfront employment. The New York State Crime Commission, which held extensive investigatory hearings, found that an important causative factor in the "appalling situation" was the presence of convicted felons in many influential waterfront positions.[114] Having noted these factors, Frankfurter said:

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[109] Ali v. Division of State Athletic Comm'n, 308 F. Supp. 11 (S.D.N.Y. 1969). The Commission's denial was later enjoined on equal protection grounds due to the Commission's history of issuing licenses to other convicted felons. Ali v. Division of State Athletic Comm'n, 316 F. Supp. 1246 (S.D.N.Y. 1970).

[110] Ali v. Division of State Athletic Comm'n, 308 F. Supp. 11, 16-17 (S.D.N.Y. 1969).

[111] Hughes v. State Bd. of Health, 159 S.W.2d 277 (Mo. 1942); State Bd. of Dental Examiners v. Breeland, 38 S.E.2d 644 (S.C. 1946).

[112] 363 U.S. 144 (1960).

[113] *Id.* at 147.

[114] *Id.*

> In disqualifying all convicted felons from union office unless executive discretion is exercised in their favor, [the statute] may well be deemed drastic legislation. But in the view of Congress and the two states involved the situation on the New York waterfront regarding the presence and influence of ex-convicts called for drastic action.[115]

It is important to note that the plurality opinion considered a flat ban on the placement of convicted felons in union offices to be a "drastic" measure.[116] It was only in light of the extraordinary corruption of the waterfront, along with the Commission's finding that the influence of ex-convicts was an important factor in that corruption, that the Court was willing to approve the legislation. As Frankfurter remarked, the Court was not going to substitute its judgment for that of Congress and the legislatures of the two states "regarding the social surgery required by a situation as gangrenous as exposure of the New York waterfront had revealed."[117]

Another due process approach which has recently been used in attacking occupational disqualification of convicted criminals is the "irrebuttable presumption" doctrine.[118] The result of a recent series of Supreme Court cases,[119] this doctrine is applied to situations in which legislation affects an individual's interest because the individual possesses a particular characteristic. That is, the characteristic is deemed to be conclusively indicative of some quality which is a proper subject of legislative control. If it is not "necessarily or universally true in fact" that the characteristic implies the existence or nonexistence of the presumed fact, the irrebuttable presumption is a violation of due process.[120] The remedy is either a change in the statute or a hearing at which the individual is granted

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[115] *Id.* at 157.

[116] *Accord*, Pordum v. Board of Regents, 491 F.2d 1281, 1287, n.14 (2d Cir. 1974), *cert. denied*, 419 U.S. 843 (1974); Carr v. Thompson, 384 F. Supp. 544, 548 (W.D.N.Y. 1974).

[117] DeVeau v. Braisted, 363 U.S. 144, 158 (1960).

[118] *See generally* Note, *The Irrebuttable Presumption Doctrine in the Supreme Court*, 87 HARV. L. REV. 1534 (1974).

[119] Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); United States Dep't of Agriculture v. Murry, 413 U.S. 508 (1973); Vlandis v. Kline, 412 U.S. 441 (1973); Stanley v. Illinois, 405 U.S. 645 (1972); Carrington v. Rash, 380 U.S. 89 (1965); *cf.* Heiner v. Donnan, 285 U.S. 312 (1932).

[120] Vlandis v. Kline, 412 U.S. 441, 452 (1973).

an opportunity to rebut the presumption[121] and an "individualized determination" is made.[122]

In the occupational disqualification cases the irrebuttable presumption is that those convicted of certain types of crimes are unfit for the regulated occupation. It would seem obvious that the presumption that all convicted felons, for example, are unfit for the practice of medicine is not "necessarily or universally true in fact."[123] Whether the conviction evidences unfitness to practice medicine would depend upon the nature of the crime. To ignore the nature of the offense and to forego consideration of an individual's possible rehabilitation and *present* good character is to presume too much and to deny the individual an individualized determination.[124]

The obstacle in the path of this reasoning is the ubiquitous *Hawker v. New York*.[125] In that case, which was decided long before the first stirrings of the irrebuttable presumption doctrine, the Supreme Court observed: "Whatever is ordinarily connected with bad character, or indicative of it, may be prescribed by the legislature as conclusive evidence thereof."[126] The Court further expounded:

> It is no answer to say that this test of character is not in all cases absolutely certain, and that sometimes it works harshly . . . . But the legislature has power in cases of this kind to make a rule of universal application, and no inquiry is permissible back of the rule to ascertain whether the fact of which the rule is made the absolute test does or does not exist.[127]

It must, of course, be seriously questioned whether this part of *Hawker* is of continuing vitality in light of the recent cases on irrebuttable presumptions.[128]

The final constitutional provision which is relevant to occupational disqualification is the equal protection clause of the fourteenth amendment. The most distinctive aspect of the

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[121] *See* Note, 87 HARV. L. REV., *supra* note 118, at 1536.
[122] Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 645 (1974).
[123] Vlandis v. Kline, 412 U.S. 441, 452 (1973).
[124] Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 645 (1974).
[125] 170 U.S. 189 (1898).
[126] *Id.* at 195.
[127] *Id.* at 197.
[128] *See* notes 151-65 and accompanying text, *infra*.

equal protection clause is that it has two standards by which state regulation may be judged. The first is the traditional or "rational connection" test whereby "[a] statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."[129] This is the test that would be applied under most circumstances. However, there is the more exacting "strict scrutiny" test that is triggered when the regulation involves a suspect classification such as race,[130] or when the regulation touches upon a fundamental right.[131] In order for a state classification to pass muster under the strict scrutiny test, it must be "necessary to promote a compelling state interest."[132] In addition, the Supreme Court has ruled that a state regulation subject to strict scrutiny must be "tailored" with "precision" in terms of accomplishing the state purpose.[133] Further, if the state has a reasonable alternative to the regulation, which places a "lesser burden on constitutionally protected activity,"[134] then the state must employ the "less drastic means"[135] to accomplish its purpose.

Obviously, when one attacks a statute's constitutionality on equal protection grounds, it is highly desirable to have the statute examined under the strict scrutiny test. Most statutory occupational disabilities are phrased in such broad language that they could not be deemed to be "tailored" with "precision"[136] in pursuing the state goal of protecting the public from those of bad character. Furthermore, an individual evaluation of each applicant would be a "less drastic means"[137] of determining character that would place a "lesser burden on consti-

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[129] McGowan v. Maryland, 366 U.S. 420, 426 (1961).

[130] McLaughlin v. Florida, 379 U.S. 184, 191-92 (1964).

[131] [W]here fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined.

Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1966). *See also* Dunn v. Blumstein, 405 U.S. 330, 336 (1972); Bullock v. Carter, 405 U.S. 134, 144 (1972); Evans v. Cornman, 398 U.S. 419, 422 (1970); Kramer v. Union Free School Dist., 395 U.S. 621, 626 (1969).

[132] Kramer v. Union Free School Dist., 395 U.S. 621, 627 (1969).

[133] *Id.* at 632.

[134] Dunn v. Blumstein, 405 U.S. 330, 343 (1972).

[135] *Id., quoting* Shelton v. Tucker, 364 U.S. 479, 488 (1960).

[136] Kramer v. Union Free School Dist., 395 U.S. 621, 632 (1969).

[137] Dunn v. Blumstein, 405 U.S. 330, 343 (1972), *quoting* Shelton v. Tucker, 364 U.S. 479, 488 (1960).

tutionally protected activity."[138]

It does not appear, however, that the stricter standard of review is available to the ex-offender who is seeking an occupational license. Ex-convicts have never been regarded as a "suspect class,"[139] nor has the right to engage in any particular occupation been deemed "fundamental" under the equal protection clause.[140] This does not mean, however, that occupational disqualifications based on conviction of crime are immune from equal protection attack; they must still bear a rational connection to a legitimate state goal.[141] In *Butts v. Nichols*[142] a federal court stated the proposition in this manner: "The relevant inquiry should focus upon whether the means utilized to carry out a legislative purpose substantially further that end."[143]

Butts involved an Iowa statute which barred convicted felons from civil service employment. The plaintiffs sought a declaration that the statute was an unconstitutional violation of equal protection, and requested that its enforcement be enjoined. The court discerned the state interest involved to be protection of the "public trust."[144] After noting that the prohibition was an across-the-board ban on employment of felons, the court held:

> Section 365.17 (5) suffers from a total lack of . . . narrowing criteria. As a result, the statute is both over and under inclusive: persons who clearly could serve the public interest are denied civil service jobs, while misdemeanants convicted of crimes indicating a lack of probity suffer no disqualification. In short, no consideration is given to the nature and seriousness of the crime in relation to the job sought. The time elapsing since the conviction, the degree of the felon's rehabilitation, and the circumstances under which the crime was committed are similarly ignored.[145]

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[138] Dunn v. Blumstein, 405 U.S. 330, 343 (1972).

[139] Upshaw v. McNamara, 435 F.2d 1188, 1190 (1st Cir. 1970).

[140] Butts v. Nichols, 381 F. Supp. 573, 579 (S.D. Iowa 1974) (three-judge court). For the view that convicts constitute a "suspect" class and that occupational licensure should be subject to a strict standard of review, *see* Note, 4 U.C.L.A.-ALAS. L. REV., *supra* note 73, at 338-40.

[141] Schware v. Board of Bar Examiners, 353 U.S. 232, 239 (1957).

[142] 381 F. Supp. 573 (S.D. Iowa 1974) (three-judge court).

[143] *Id.* at 579.

[144] *Id.* at 580.

[145] *Id.* at 581.

On this basis the court found that the statute did not have a rational relationship to a legitimate state goal, and was therefore violative of equal protection.[146]

The equal protection clause may also be used to attack the actions of the licensing agency itself, even if the statute under which the agency operates is held to be constitutionally sound. In *Ali v. Division of State Athletic Commission*[147] Muhammad Ali sued for injunctive relief from the commission's refusal to issue him a license to box in New York. The commission based its denial of the license on the fact that Ali had been convicted of refusing to submit to induction, even though Ali's action had been prompted by professed religious beliefs and the conviction was still on appeal. The commission stated that Ali's conviction was "detrimental to the best interests of boxing . . . ."[148] However, on other occasions the commission had issued licenses to boxers who had been convicted of a variety of offenses including second-degree murder, burglary, armed robbery, rape, extortion, grand larceny, sodomy, aggravated assault and battery, embezzlement, arson, fraud, and desertion from the armed forces.[149] The court, finding no rational basis for distinguishing Ali from these other boxers, declared the commission's actions unconstitutional and granted an injunction barring the commission from denying Ali a license.[150]

A recent case from the federal courts, *Harris v. Board of Barbering*,[151] is a good example of the vitality of attacks on statutes which prohibit those convicted of crime from pursuing certain occupations. It also exemplifies the manner in which equal protection and due process arguments can complement and reenforce one another.

Chester Harris was a master barber, licensed in 1958 under the proper Kentucky regulatory statute.[152] Harris worked as a barber until 1970, when he was convicted of the sale of narcotic drugs (a felony) and sentenced to 5 years in prison. A Kentucky statute required that a barber's license be revoked upon a pro-

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[146] *Id.* at 581-82.
[147] 316 F. Supp. 1246 (S.D.N.Y. 1970).
[148] *Id.* at 1247.
[149] *Id.* at 1249.
[150] *Id.* at 1253.
[151] Civil No. C 74-399 L(A)(W.D. Ky., June 13, 1975).
[152] *See* KRS § 317.450 *et seq.*

per showing that the licensee had been convicted of a felony.[153] Accordingly, the Board of Barbering revoked Harris' license in 1971, while he was in prison. Harris then brought suit in federal district court under 42 U.S.C. § 1983 to have the statute declared unconstitutional as violative of the fourteenth amendment,[154] and to enjoin its enforcement.

Harris' fourteenth amendment argument included both due process and equal protection claims. Under the due process argument, the three-judge court immediately noted that the flat prohibition against issuance of a license to one who had been convicted of a felony created an irrebuttable presumption[155] which prevented Harris from practicing his occupation.[156] Citing the recent Supreme Court cases on irrebuttable presumptions,[157] the court stated:

> These permanent, irrebuttable presumptions are held to be unconstitutional as violations of the Due Process Clause of the Constitution, because they deny the right to the person affected by the statute to have an *individualized determination* made as to his rights.[158]

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[153] KRS § 317.590(1)(a).

[154] Harris also attacked the statute under the eighth amendment prohibition of cruel and unusual punishment. Memorandum for Plaintiff at 3, Harris v. Bd. of Barbering, Civil No. C 74-399 L(A) (W.D. Ky., June 13, 1975). The court, however, did not address itself to this issue.

[155] *See* notes 118-28 and accompanying text, *supra.*

[156] The court stated that the presumption was that Harris was "forever enjoined and prohibited from pursuing his livelihood as a barber." Harris v. Bd. of Barbering, Civil No. C 74-399 L(A) at 2 (W.D. Ky., June 13, 1975). Plaintiff's counsel stated the position more precisely when he said that the presumption went to Harris' "unfitness" to practice barbering. Memorandum for Plaintiff at 2, Harris v. Bd. of Barbering, Civil No. C 74-399 L(A) (W.D. Ky., June 13, 1975). The statute did not presume that a felon was prohibited from being licensed. The statute presumed that a felon was unfit to be licensed and, therefore, prohibited the license from being issued. The defendant's argument that the statute was not a violation of due process was to the effect that good moral character is a proper and valid requirement for the licensure of barbers and that conviction of crime is conclusive proof of bad moral character. Memorandum for Defendant at 18, Harris v. Bd. of Barbering, Civil No. C 74-399 L(A) (W.D. Ky., June 13, 1975). Counsel for plaintiff was quick to point out that this argument showed precisely why the statute was unconstitutional since it relied on an irrebuttable presumption that a felon does not have good moral character. Reply Memorandum for Plaintiff at 1, Harris v. Bd. of Barbering, Civil No. C 74-399 L(A) (W.D. Ky., June 13, 1975).

[157] Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); Vlandis v. Kline, 412 U.S. 441 (1973).

[158] Harris v. Bd. of Barbering, Civil No. C 74-399 L(A) at 2 (W.D. Ky., June 13, 1975) (emphasis added).

In this case the statute prevented Harris from working as a barber, on the presumption that he was unfit, without giving him an opportunity to prove otherwise. Therefore, the statute was held unconstitutional.

The court continued a due process analysis, and examined the statute with reference to the requirement that any state-imposed qualification for engaging in an occupation have a rational connection with an applicant's fitness or capacity to practice the occupation.[159] The court found at least two reasons why the statute's across-the-board disqualification of felons did not bear a rational connection to the fitness of barbers. First, the court found that many of the crimes which Kentucky classifies as felonies bear little or no relationship to one's suitability for being a barber.[160] Second, the court stated:

> [The statute] gives no consideration to the nature and seriousness of the crime in relation to the job sought or the time elapsing since the conviction, the degree of the felon's rehabilitation, and the circumstances under which the crime was committed.[161]

The court also found the statute unconstitutional under the rational connection standard of the equal protection clause. The court held that although a state "could logically prohibit and refuse employment in certain positions where the felony conviction would directly reflect on the felon's qualification,"[162] this particular statute was not tailored in such a fashion as to insure that the felony conviction did, in fact, reflect on the felon's qualifications. There are felonies which are not relevant to barbering, and there are misdemeanors which are relevant, yet the statute includes any felony conviction as an automatic disqualification, while no misdemeanor conviction is included.

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[159] Schware v. Board of Bar Examiners, 353 U.S. 232, 239 (1957).

[160] "We note as some examples of such varieties, negligent homicide arising out of drunken driving, income tax evasion and violation of federal election laws." Harris v. Bd. of Barbering, Civil No. C 74-399 L(A) at 3 (W.D. Ky., June 13, 1975).

[161] *Id.* Note how this sentence exhibits the close relationship between the traditional rational connection rubric of due process and the more recent focus on irrebuttable presumptions. The disqualification of felons lacks the requisite rational connection to a valid state interest because it fails to take into consideration the listed factors when attempting to determine an applicant's fitness. At the same time, the listed factors include much of what would be examined in the individualized determination of the applicant's suitability required by the irrebuttable presumption cases.

[162] *Id.* at 4.

Thus, the court found the statute in violation of the equal protection clause as well as the due process clause.[163]

The court noted that although automatic disqualification of felons was unconstitutional, the board could still consider the relation between an applicant's felony conviction and his moral character, so long as the board conducted an individualized hearing to inquire into the applicant's suitability.[164] Thus, the board cannot avoid the holding in *Harris* simply by transferring to its own deliberations the automatic disqualification of felons. A felony conviction may be considered by the licensing agency only within the context of an individualized hearing on the question of the applicant's fitness.

The court went on to suggest the aspects of a conviction which should be considered by the licensing agency when making the required individualized determination on an applicant's request for a license: 1) The nature and seriousness of the crime; 2) the time elapsed since conviction; 3) the degree of rehabilitation; and 4) the circumstances under which the

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[163] *Id.* The court also mentioned another irrational aspect of Kentucky's licensing scheme: Only crimes of moral turpitude or dishonesty, and not all felonies, are the basis for automatic denial of licensure to physicians, osteopaths, dentists, chiropractors or attorneys.

> Obviously, the activities of persons in those professions have a much more substantial impact on the welfare of members of the public who utilize their services than do the activities of a barber, since in many instances, the liberty, property rights, good health or even the lives of persons dealing with them are intimately involved and affected by their capabilities. Yet there is no statute which requires immediate and permanent revocation of a license of the members of any of these professions simply on the basis of conviction of any felony.

Id.

In its defense the Board of Barbering relied heavily on Hawker v. New York, 170 U.S. 189 (1898), *see* notes 65-67 and 92-96, and accompanying text, *supra*. However, the court was of the opinion that although *Hawker* has never been overruled, it no longer has vitality. This conclusion was based on a review of the cases that followed *Hawker*, including Schware v. Board of Bar Examiners, 353 U.S. 232 (1957), which required that the nature of an offense be investigated before placing reliance on it as an indicator of an applicant's character. The court also noted that the Supreme Court had not seen fit to discuss *Hawker* in the cases striking down irrebuttable presumptions. *See* notes 118-28 and accompanying text, *supra*. Taking these considerations together, the court concluded that *Hawker* had in effect been repudiated, and was no longer controlling. Harris v. Bd. of Barbering, Civil No. C 74-399 L(A) at 5 (W.D. Ky., June 13, 1975).

Harris implies that other statutes (*see* note 37 *supra*) which automatically disqualify those convicted of crime may likewise be invalid.

[164] *Id.* at 5, 6.

crime was committed.[165] Requiring consideration of these factors in a hearing on an individual's fitness could effectively neutralize the adverse effects of a conviction and would at least give the ex-offender a chance to have the issue of his fitness determined on the merits of his case.

IV. DISENFRANCHISEMENT

A. *Historical Development*

Disqualification of convicted citizens from exercise of the franchise has recently received judicial attention.[166] The disenfranchisement of felons developed early in American history, when voting was a privilege usually extended only to those who were fortunate enough to be white, male, wealthy and Christian.[167] As one author understated the point: "The right of widespread popular political participation does not 'share in the glorious history of other democratic values.' "[168]

Traditionally, voting was viewed as a mere privilege, or at most a political right, created by and within the control of the states.[169] In the words of the Supreme Court, "the Constitution of the United States does not confer the right of suffrage upon *any one*."[170] Thus, there could be no constitutional challenge to restrictions imposed on the right to vote, unless the restriction violated some other constitutionally protected right.[171] This view prevailed for 180 years, until the Supreme Court altered its approach in *Baker v. Carr*.[172]

In *Baker*, the Court applied the equal protection clause of the fourteenth amendment to the area of voting rights, and

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[165] *Id.* at 3.

[166] *See, e.g.*, Richardson v. Ramirez, 418 U.S. 24 (1974).

[167] *See generally* Note, *The Need for Reform of Ex-Felon Disenfranchisement Laws*, 83 YALE L.J. 580, 584 (1974); *Special Project, supra* note 5, at 974; Le Clercq, *The Emerging Federally Secured Right of Political Participation*, 8 IND. L. REV. 607, 608 (1975) [hereinafter cited as Le Clercq].

[168] Le Clercq at 608 *quoting* Gangemi v. Rosengard, 207 A.2d 665, 666 (1965).

[169] *See* U.S. CONST. art. 1, § 4.

[170] Minor v. Happersett, 88 U.S. (21 Wall.) 162, 178 (1874)(emphasis added).

[171] Green v. Board of Elections, 380 F.2d 445, 449 (2d Cir. 1967) held that disenfranchisement was nonpenal, and therefore the eighth amendment was inapplicable. On the question of whether disenfrancisement is contrary to other provisions of the Constitution, *see* Note, *The Disenfranchisement of Ex-Felons: A Cruelly Excessive Punishment*, 7 SW. U.L. REV. 124 (1975).

[172] 369 U.S. 186 (1962).

held that malapportioned legislative districts violated the equal protection of voters. The application of the fourteenth amendment to the electoral process signaled recognition of the franchise as a federally protected right rather than as a mere state-provided privilege.[173] The metamorphosis of the right to vote from nonprotected privilege to protected right was apparent in other Supreme Court cases as well. For instance, in another reapportionment case the Supreme Court remarked:

> Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.[174]

The Court's efforts to protect voting rights have not been limited to reapportionment cases. In 1965 the Supreme Court stated that the right to vote is so "vital to the maintenance of democratic institutions"[175] that states could not be permitted to exclude from the state elective process persons moving into the state while on military duty.[176] In 1970, the Court held that a state could not deny the right to vote in state elections to persons living on a federal reservation.[177] In a 1973 case the Court ruled that statutes which establish unreasonably long periods during which a voter may not change party affiliation are unconstitutional.[178]

The Supreme Court's handling of state laws which conditioned the right to vote upon ownership of real property presents yet another contrast to the traditional view of voting as a privilege. For instance, in *Kramer v. Union Free School District*,[179] the state of New York made a distinction between

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[173] *See generally* Le Clercq, *supra* note 167, at 617-18. *Compare* Baker v. Carr, 369 U.S. 186 (1962) *with* Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1874).

[174] Reynolds v. Sims, 377 U.S. 533, 561-62 (1964).

[175] Carrington v. Rash, 380 U.S. 89, 94 (1965) *quoting* Schneider v. State, 308 U.S. 147, 161 (1939).

[176] Carrington v. Rash, 380 U.S. 89 (1965).

[177] Evans v. Cornman, 398 U.S. 419 (1970).

[178] Kusper v. Pontikes, 414 U.S. 51 (1973). *Cf.* Storer v. Brown, 415 U.S. 724 (1974) and Rosario v. Rockefeller, 410 U.S. 752 (1973).

[179] 395 U.S. 621 (1969).

persons who owned taxable property and those who did not.[180] New York argued that it had a legitimate interest in preventing those who were not "directly affected" from participating in the school district election.[181] The Supreme Court, "carefully and meticulously"[182] scrutinizing the statute, held it invalid. According to the Court:

> Statutes granting the franchise to residents on a selective basis always pose the danger of denying some citizens any effective voice in the governmental affairs which substantially affect their lives. Therefore, if a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest.[183]

Despite the Supreme Court's recognition of voting as a fundamental right meriting application of the strict scrutiny standard of equal protection, one group—felons—has consistently failed to benefit by the change in judicial outlook.[184] The disenfranchisement of felons is the rule, not the exception; 28 states, including Kentucky, disenfranchise felons.[185]

Although the statutes which disenfranchise felons can be accounted for as anachronisms lacking a rational basis,[186] the courts often mention one particular reason for their existence: the need to preserve "the purity of the ballot box."[187] In the words of the Alabama Supreme Court:

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[180] *Id.* Actually, persons with school age children were allowed to vote regardless of whether they owned property.

[181] *Id.*

[182] *Id.* at 626.

[183] *Id.* at 626-27.

[184] *See, e.g.*, Richardson v. Ramirez, 418 U.S. 24 (1974). *See also Special Project, supra* note 5, at 974-75 *et seq.*

[185] Note, 7 SW. U.L. REV., *supra* note 171, at 126. Section 145 of the Kentucky Constitution disenfranchises "[p]ersons convicted in any court of competent jurisdiction of treason, or felony, or bribery in an election, or of such high misdemeanor as the General Assembly may declare . . . ." In addition, idiots, insane persons, and persons who are in prison at the time of election are also disqualified. KY. CONST. § 145. The constitutionality of provisions which disenfranchise those who are in prison on election day is currently being considered. *See, e.g.*, Goosby v. Osser, 409 U.S. 512 (1973) (remanded for further proceedings).

[186] Note, 7 SW. U.L. REV., *supra* note 171, at 124-25.

[187] Washington v. State, 75 Ala. 582, 585 (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 . . . . It is proper, therefore, that this class should be denied a right, the exercise of which might sometimes hazard the welfare of communities . . . .[188]

The belief that felons pose a danger to the populace because of the likelihood that they will abuse the electoral process in order to further criminal intentions was also expressed in a leading Supreme Court case, *Davis v. Beason*.[189] A statute of the Idaho Territory required that each person who sought to register to vote take an oath stating that he was neither a bigamist nor a member of any organization which taught, advised, counseled, or encouraged the commission of bigamy or polygamy. The statute was intended to deny those of the Mormon faith the right to vote. The defendant took the oath and registered to vote even though he was a member of the Church of Jesus Christ of Latter Day Saints.[190] He was later indicted and convicted of unlawfully registering to vote. The crime which disqualified him from voting was that of belonging to an organization which advocated bigamy and polygamy.[191] According to the Supreme Court:

> Bigamy and polygamy are crimes by the laws . . . of the United States, and they are crimes by the laws of Idaho. They tend to destroy the purity of the marriage relation, to disturb the peace of families, to degrade women and to debase man. Few crimes are more pernicious to the best interests of society and receive more general or more deserved punishment.[192]

Since the Court found that bigamy was a criminal act, and that advocacy of bigamy was criminal and anti-social, it is not surprising that the Court also found that the statute, which "exclude[d] from the privilege of voting . . . those who [had] been convicted of certain offenses, and those who advocate[d]

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[188] *Id.*

[189] 133 U.S. 333 (1890).

[190] *Id.* at 334-35. The Church of Jesus Christ of Latter Day Saints is commonly known as the Mormon Church.

[191] *Id.* at 341. In that *Davis v. Beason* upholds disqualification of persons who are deemed criminals, but who have not been convicted, it is an unusual case.

[192] *Id.*

a practical resistance to the laws . . . .,"[193] was a valid legislative act.[194] The rationale applied by the Court in *Davis*, that disenfranchisement of persons who advocate criminal conduct is necessary "to prevent persons from being enabled by their votes to defeat the criminal laws of the country,"[195] is still used to uphold statutes which disenfranchise convicted persons.

In *Green v. Board of Elections*,[196] Green, who had been convicted of two felonies, sought a judgment declaring him an eligible voter.[197] The statute in question provided that no one

> convicted of a felony in a federal court of an offense of which such court has exclusive jurisdiction, shall have the right to register for a vote in any election unless he shall have been pardoned or restored to the rights of citizenship by the president of the United States.[198]

Green alleged[199] that the statute offended the equal protection clause, as well as the constitutional prohibitions against bills of attainder[200] and cruel and unusual punishments.[201] Applying the traditional rational connection test of equal protection,[202]

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[193] *Id.* at 347.

[194] Though *Davis v. Beason* was for 80 years the leading authority on disenfranchisement of convicted citizens, the arguments and the opinion dealt primarily with freedom of religion. *Id.* at 344. The Court spoke more of "the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficient progress in social and political improvement . . . ." than of disenfranchisement of convicted persons. *Id.* at 345.

[195] *Id.* at 348.

[196] 380 F.2d 445 (2d Cir. 1967). Gilbert Green was one of the defendants in the well-known case of United States v. Dennis, 183 F.2d 201 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951).

[197] Green v. Board of Elections, 380 F.2d 445, 447 (2d Cir. 1967).

[198] N.Y. ELEC. LAW § 152 (McKinney 1964) *as cited in* Green v. Board of Elections, 380 F.2d 445, 448 (2d Cir. 1967).

[199] Green v. Board of Elections, 380 F.2d 445, 449 (2d Cir. 1967). Because the plaintiff was seeking to convene a three-judge panel to rule on the constitutionality of the statute, the issue before the court was whether there was any substantial constitutional basis for his allegation.

[200] U.S. CONST. art. I, § 10 provides, *inter alia*:

> No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of credit; make any Thing but gold and silver Coin as Tender in payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

[201] U.S. CONST. amend. VIII reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

[202] 380 F.2d at 451.

the court held that this discrimination against felons was not unconstitutional:

> The early exclusion of felons from the franchise by many states could well have rested on Locke's concept, so influential at the time, that by entering into society every man "authorizes the society, or which is all one, the legislature thereof, to make laws for him as the public good of the society shall require, to the execution whereof his own assistance (as to his own decrees) is due." 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, it can scarcely be deemed unreasonable for a state to decide that perpetrators of serious crimes shall not take part in electing the legislators who make the laws, the executives who enforce these, the prosecutors who must try them for further violations, or the judges who are to consider their cases. This is especially so when account is taken of the heavy incidence of recidivism and the prevalence of organized crime.[203]

Not all courts, however, were willing to accept the necessity of disenfranchising felons. In *Otsuka v. Hite*[204] the California Supreme Court considered a state constitutional provision similar in effect to the statute which would later be at issue in *Green*, and held that the more exacting strict scrutiny standard of equal protection review should be applied to the disenfranchisement of felons. *Otsuka* involved two individuals who had been conscientious objectors during World War II. They had chosen to plead guilty to violations of the Selective Service Act[205] rather than do work which they believed was helpful to the war effort.[206] Decades later, when the two attempted to register to vote, the registrar of voters refused to register them because, according to the registrar, they had been convicted of an infamous crime and were therefore ineligible to vote under the terms of the California constitution.[207] The California Su-

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[203] *Id., quoting An Essay Concerning the True Original, Extent and End of Civil Government* ¶89 (footnote omitted).

[204] 414 P.2d 412, 51 Cal. Rptr. 284 (1966).

[205] Selective Service and Training Act of 1940, ch. 720, § 11, 54 Stat. 894-95.

[206] Otsuka v. Hite, 414 P.2d 412, 414-15, 51 Cal. Rptr. 284, 286-87 (1966).

[207] CAL. CONST. art. II, § 1 (1879) provided that "no person convicted of any

preme Court, observant of the trend evidenced by *Baker v. Carr*,[208] recognized that article I, section 2 of the United States Constitution might establish a federal right to vote[209] and thus applied the compelling state interest test to the state constitutional provision. According to the court, disenfranchisement of felons would have to be reasonably related to a compelling state interest in order to withstand attack. The court conceded that prevention of election fraud might be a compelling state interest, but held that disenfranchisement of felons was not reasonably related to that interest.[210]

The holding in *Otsuka* was contrary to the prevailing case law, for the Supreme Court had recognized the disenfranchisement of felons in *Gray v. Sanders*[211] and *Trop v. Dulles*,[212] and had upheld a similar provision in *Davis v. Beason*.[213] The California court dismissed the language in *Gray* and *Trop* which was favorable to disenfranchisement, stating that it was dicta which the court was "not compelled to accept as reasoned."[214] The language in *Davis*,[215] however, was not mere dictum, and the court had to deal with the holding in *Davis* that disenfranchisement of felons was not violative of equal protection. Consequently, the court avoided the possibility of Supreme Court review by basing its holding on the definition of the term "infamous crime," clearly a state ground of decision.[216] According to the California court, membership in a church which advocated bigamy constituted an infamous crime, while refusal to report for induction did not:

> . . . Harlan Fiske Stone, later Chief Justice, drew from the Nation's past when he declared that "both morals and sound policy require that the state should not violate the conscience of the individual. All our history gives confirmation to the

infamous crime . . . shall ever exercise the privileges of an elector . . . ." The California constitution has since been amended so as not to disqualify felons from voting.

[208] 369 U.S. 186 (1962).

[209] Otsuka v. Hite, 414 P.2d 412, 415-16, 51 Cal. Rptr. 284, 287-88 (1966). *See generally* Le Clercq, *supra* note 167.

[210] Otsuka v. Hite, 414 P.2d 412, 417, 51 Cal. Rptr. 284, 289 (1966).

[211] 372 U.S. 368, 380 (1963).

[212] 356 U.S. 86, 89 (1958).

[213] 133 U.S. 333 (1890).

[214] Otsuka v. Hite, 414 P.2d 412, 419, 51 Cal. Rptr. 284, 291 (1966).

[215] 133 U.S. 333 (1890). *See also* Murphy v. Ramsey, 114 U.S. 15 (1885).

[216] Otsuka v. Hite, 414 P.2d 412, 419, 51 Cal. Rptr. 284, 291 (1966).

> view that liberty of conscience has a moral and social value which makes it worthy of preservation at the hands of the state. So deep in its significance and vital, indeed, is it to the integrity of man's moral and spiritual nature that nothing short of the self-preservation of the state should warrant its violation; and it may well be questioned whether the state which preserves its life by a settled policy of violation of the conscience of the individual will not in fact ultimately lose it by the process." Stone, The Conscientious Objector, 21 Col. Univ. Q. 253, 269 (1919).[217]
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> In view of the foregoing, it cannot reasonably be said that plaintiffs' violation of the Selective Service Act branded them as morally corrupt and dishonest men convicted of an "infamous crime" as that phrase is used in article II, section 1, of the California Constitution.[218]

B. *Richardson v. Ramirez*

In 1973 the California Supreme Court once again faced an attack on the constitutionality of California's felon-disenfranchisement laws.[219] The case involved three felons, each of whom had been convicted, served time in jail or prison, and successfully completed parole.[220] When they applied to register to vote the registrars refused to allow them to register. The three filed a petition for a writ of mandamus in the Supreme Court of California, invoking that court's original jurisdiction.[221] The petition challenged the constitutionality of their exclusion from the electoral process on the ground that California's denial of voting rights to felons was a violation of equal protection.[222] At the time in question the California constitu-

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[217] *Id.* at 425, 51 Cal. Rptr. at 297, *quoting* United States v. Seeger 380 U.S. 163, 169-70 (1965)(footnote omitted).

[218] Otsuka v. Hite, 414 P.2d 412, 425, 51 Cal. Rptr. 284, 297 (1966).

[219] Ramirez v. Brown, 507 P.2d 1345, 107 Cal. Rptr. 137 (1973), *rev'd sub nom.* Richardson v. Ramirez, 418 U.S. 24 (1974).

[220] Richardson v. Ramirez, 418 U.S. 24, 31 (1974). Ramirez had been convicted of robbery by assault, a felony, in 1952. His parole was terminated in 1962. Respondent Lee had been convicted of heroin possession in 1955 and completed his parole in 1959. Respondent Gill had been convicted of second degree burglary and forgery and had completed his parole. *Id.* at 32 n.9.

[221] *Id.* at 32.

[222] *Id.* at 33. They also alleged that the laws were applied in a geographically non-uniform manner so as to deprive them of due process of law and "geographical" equal protection. A report by the California Secretary of State which "concluded that there was a wide variation in the county election officials' interpretation of the challenged

tion provided that laws be made to disenfranchise certain citizens, including those convicted of "high crimes,"[223] and also that:

> . . . no alien ineligible to citizenship, no idiot, no insane person, no person convicted of any infamous crime, no person hereafter convicted of the embezzlement or misappropriation of public money, and no person who shall not be able to read the Constitution in the English language and write his or her name, shall ever exercise the privileges of an elector in this state.[224]

The California Elections Code provided that:

> The county clerk shall cancel the registration . . . upon the production of a certified copy of a subsisting judgment of the conviction of the person registered of any infamous crime or of the embezzlement or misappropriation of any public money . . . .[225]

In *Ramirez v. Brown* the California court relied heavily on the reasoning of the United States Supreme Court in *Dunn v. Blumstein*.[226] In *Dunn* the Court outlined three factors which must be examined in determining whether a law violates the equal protection clause: (1) The nature of the classification, (2) the interests of the individual which are affected, and (3) the state interests which are furthered by the classification.[227] The California court recognized that equal protection analysis had evolved considerably since disenfranchisement statutes were first considered by the Supreme Court:[228] "In the light of [the]

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voting exclusions . . . ." was included with the petition. *Id.* at 33 (footnote omitted). "The parties agree that the lack of uniformity is the result of differing interpretations of the 1966 Supreme Court of California decision in Otsuka v. Hite . . . which defined 'infamous crime' as used in the California constitutional provisions." *Id.* at 33 n.12.

[223] CAL. CONST. art. XX, § 11 (1879).

[224] CAL. CONST. art. II, § 1 (1879).

[225] CAL. ELEC. CODE § 383 (West 1961).

[226] 405 U.S. 330 (1972). At issue in *Dunn* was the constitutionality of a durational residency requirement for voting. Tennessee required residence in the state for 1 year and in the county for 3 months as prerequisites for voting, though registration books were closed only 30 days before an election. Tennessee asserted that the residency requirements were necessary to insure pure elections and knowledgeable voters. The Supreme Court held that the provisions were not necessary to further a compelling state interest.

[227] *Id.* at 335.

[228] Ramirez v. Brown, 507 P.2d 1345, 1346, 107 Cal. Rptr. 137, 138, (1973), *rev'd sub nom.* Richardson v. Ramirez, 418 U.S. 24 (1974).

. . . evolution of the law of equal protection, the analysis in *Otsuka* of the constitutionality of disenfranchising persons convicted of crime appears no longer adequate."[229] The California court held that the constitutional and statutory provisions which disenfranchised felons violated equal protection:

> For the reasons stated in *Dunn*, we hold that the enforcement of modern statutes regulating the voting process and penalizing its misuse—rather than outright disfranchisement of persons convicted of crime—is today the method of preventing election fraud which is the least burdensome on the right of suffrage. It follows that such disfranchisement is not "necessary," within the meaning of *Dunn* and its predecessors, to achieve that goal. We conclude that, as applied to all ex-felons whose terms of incarceration and parole have expired, the provisions of article II and article XX, section 11, of the California Constitution denying the right of suffrage to persons convicted of crime, together with the several sections of the Elections Code implementing that disqualification . . . violate the equal protection clause of the Fourteenth Amendment.[230]

The Supreme Court of the United States granted certiorari and reversed, not on the ground that disenfranchisement of felons is not a denial of equal protection, but on the ground that section two of the fourteenth amendment specifically excludes the voting rights of felons from the protections of section one of that amendment.[231]

Section two of the fourteenth amendment reads:

> Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, *except for participa-*

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[229] *Id.* at 1353, 107 Cal. Rptr. at 145 (footnote omitted).
[230] *Id.* at 1357, 107 Cal. Rptr. at 149 (footnote omitted).
[231] Richardson v. Ramirez, 418 U.S. 24, 54-55 (1974).

> *tion in rebellion, or other crime,* the basis of the representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.[232]

The election registrar argued that the disenfrancisement of felons is expressly exempted from the section two sanction of reduced representation,[233] and that "those who framed and adopted the Fourteenth Amendment could not have intended to prohibit outright in § 1 of that Amendment that which was expressly exempted from the lesser sanction of reduced representation imposed by § 2 of the Amendment."[234]

In order to determine the meaning of the fourteenth amendment, the Supreme Court examined the legislative history of both the amendment and the reconstruction legislation passed subsequent to enactment of the amendment. According to the Supreme Court, the legislative record of the fourteenth amendment reveals that the equal protection clause was not intended by its drafters to bar the states from denying the franchise to ex-felons.[235] The Court quoted the statement made in the House of Representatives by Oregon's Representative Ephraim Eckley in support of section two of the amendment:

> Under a congressional act persons convicted of a crime against the laws of the United States, the penalty for which is imprisonment in the penitentiary, are now and always have been disenfranchised . . . . [S]uppose the mass of the people of a State are pirates, counterfeiters, or other criminals, would gentlemen be willing to repeal the laws now in force in order to give them an opportunity to land their piratical crafts and come on shore to assist in the election of a President or members of Congress because they are numerous?[236]

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[232] U.S. CONST. amend. XIV, § 2.

[233] Richardson v. Ramirez, 418 U.S. 24, 43 (1974).

[234] *Id.*

[235] *Id.* at 43-52. It is important to note that *Richardson v. Ramirez* should not be viewed as indicative of judicial acceptance of the disqualification of ex-offenders in areas other than voting. The holding was not that disenfranchisement of felons did not deny equal protection; the holding was that disenfranchisement of felons is specifically excluded from the protections of the fourteenth amendment. As the Court pointed out, the amendment contains an express sanction of the state's denial of voting rights to those convicted of crime. *Id.* at 54. There is no such sanction for the imposition of any other disability upon conviction of crime. With regard to occupational opportunities, therefore, the convicted person is fully protected by the fourteenth amendment. *See* section III. C, *supra.*

[236] 418 U.S. at 46, *citing* CONG. GLOBE, 39th Cong., 1st Sess. 2535 (1866).

Another clue to the intent of the framers of the fourteenth amendment can be found in Congressional treatment of states readmitted to the Union after the Civil War. The Reconstruction Act,[237] which established the conditions under which the former Confederate states would be allowed representation in Congress, required that each state seeking readmission adopt a state constitution by a convention. The delegates to such conventions were to be elected by:

> . . . male citizens . . . twenty-one years old and upward, of whatever race, color, or previous condition, who have been resident in said State for one year previous to the day of such election, *except such as may be disenfranchised for participation in the rebellion or for felony at common law* . . . .[238]

In addition, the statutes which readmitted these states to the Union contained the provision that all males, except those who were felons, were to be given the right to vote.[239] The Supreme Court considered this to be convincing evidence that the voting rights of felons were excluded from the protections of the fourteenth amendment:[240]

> [T]he exclusion of felons from the vote has an affirmative sanction in § 2 of the Fourteenth Amendment . . . . We hold that the understanding of those who adopted the Fourteenth Amendment, as reflected in the express language of § 2 and in the historical and judicial interpretation of the Amendment's applicability to state laws disenfranchising felons, is of controlling significance in distinguishing such laws from those other state limitations on the franchise which have been held invalid under the Equal Protection Clause by this Court . . . . [Section] 1, in dealing with voting rights as it does, could not have been meant to bar outright a form of disenfranchisement which was expressly exempted from the

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[237] Act of March 2, 1867, ch. 153, 14 Stat. 428.

[238] Act of March 2, 1867, ch. 153, § 5, 14 Stat. 428 (Reconstruction Act) *cited in* Richardson v. Ramirez, 418 U.S. 24, 49 (1974).

[239] Act of June 22, 1868, ch. 69, 15 Stat. 72 (readmitting Arkansas); Act of June 25, 1868, ch. 70, 15 Stat. 73 (readmitting North Carolina, South Carolina, Georgia, Louisiana, Alabama and Florida); Act of January 26, 1870, ch. 10, 16 Stat. 62 (readmitting Virginia); Act of Feb. 1, 1870, ch. 12, 16 Stat. 63 (readmitting Mississippi); Act of Feb. 23, 1870, ch. 19, 16 Stat. 67 (readmitting Texas); Act of March 30, 1870, ch. 39, 16 Stat. 80 (readmitting Georgia).

[240] Richardson v. Ramirez, 418 U.S. 24, 53 (1974).

> less drastic sanction of reduced representation which § 2 imposed for other forms of disenfranchisement.[241]

In a vigorous dissent, Justice Marshall argued that "the disenfranchisement of ex-felons must be measured against the requirements of the Equal Protection Clause of § 1 of the Fourteenth Amendment."[242] Rejecting the majority's conclusion that section two limited the applicability of section one with regard to felons, he contended that there was no reason for concluding that the framers of the amendment "intended by § 2 to freeze the meaning of other clauses of the Fourteenth Amendment to the conception of voting rights prevalent" when the amendment was adopted.[243] Quoting the Supreme Court's own language in *Dunn v. Blumstein*,[244] Justice Marshall wrote:

> There is no need to repeat now the labors undertaken in earlier cases to analyze [the] right to vote and to explain in detail the judicial role in reviewing state statutes that selectively distribute the franchise. In decision after decision, this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction.[245]

According to Marshall, the test that should have been applied was whether the discriminating statute was "*necessary* to promote a *compelling* state interest."[246] He did not feel that the test had been met:

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[241] *Id.* at 54-55. The Supreme Court did not reach the plaintiffs' alternative contention that the lack of uniform interpretation of the California election laws results in a denial of "geographical" equal protection. That contention had not been ruled upon by the California court, and the United States Supreme Court held that the state court should be the forum initially to consider the question. *Id.* at 55-56. Justices Marshall and Brennan dissented from the Court's holding on the grounds that the case was moot and that the constitutional analysis was incorrect because it was based on a misreading of § 2 of the fourteenth amendment. *Id.* at 56. Justice Douglas dissented on the basis that he could not say that the California decision did not rest on an independent state ground. *Id.* at 86.

[242] *Id.* at 77 (Marshall, J., dissenting).

[243] *Id.* at 76. Justice Marshall also quoted Dillenbar v. Kramer, 469 F.2d 1222 (9th Cir. 1972): "[C]onstitutional concepts of equal protection are not immutably frozen like insects trapped in Devonian amber." 418 U.S. at 76.

[244] 405 U.S. 330, 336 (1972).

[245] Richardson v. Ramirez, 418 U.S. 24, 77 (1974) (Marshall, J., dissenting), *quoting* Dunn v. Blumstein, 405 U.S. 330, 336 (1972) (citations omitted).

[246] 418 U.S. at 78, *citing* Dunn v. Blumstein, 405 U.S. 330, 337 (1972). This was the test applied by the California Supreme Court.

> I think it clear that the State has not met its burden of justifying the blanket disenfranchisement of former felons presented by this case. There is certainly no basis for asserting that ex-felons have any less interest in the democratic process than any other citizen. Like everyone else, their daily lives are deeply affected and changed by the decisions of government.[247]

Justice Marshall also responded to the oft-cited theory that the disenfranchisement of felons is necessary to prevent election fraud:[248]

> Although the State has a legitimate and, in fact, compelling interest in preventing electoral fraud, the challenged provision is not sustainable on that ground. First, the disenfranchisement provisions are patently both overinclusive and underinclusive. The provision is not limited to those who have demonstrated a marked propensity for abusing the ballot by violating election laws. Rather, it encompasses all former felons and there has been no showing that ex-felons generally are any more likely to abuse the ballot than the remainder of the population . . . . In contrast, many of those convicted of violating election laws are treated as misdemeanants and are not barred from voting at all. It seems clear that the classification here is not tailored to achieve its articulated goal, since it crudely excludes large numbers of otherwise qualified voters.[249]

Justice Marshall's contention that the disenfranchisement of felons violates equal protection is the statement of a wrong without a remedy, because, according to the majority opinion, the fourteenth amendment provides felons with no right to equal protection in the area of voting rights. *Richardson v. Ramirez* holds that the states may distinguish between those who have been convicted of felonies and those who have not, and may discriminate against the former by denying them the ballot.[250]

But voting is only one of the rights of political participa-

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[247] 418 U.S. at 78.

[248] *See generally* Note, 83 YALE L.J., *supra* note 167.

[249] Richardson v. Ramirez, 418 U.S. 24, 79 (1974) (Marshall, J., dissenting).

[250] Thus, even if one were to succeed in convincing a court that statutes which deny the franchise to convicted persons are violative of equal protection, a convicted person could not claim that constitutional protection.

tion, and disenfranchisement of felons is the only form of discrimination explicitly sanctioned by the fourteenth amendment. Whether disqualification of felons from other modes of political participation is implicitly sanctioned by the fourteenth amendment was not answered by *Ramirez*.

V. EXCLUSION FROM PUBLIC OFFICE

A. *Statutory and State Constitutional Bases*

The right to hold public office, like the right to vote, has been restricted in most states since the inception of the nation.[251] As one author observed, "the various restrictions frustrating popular participation in the political process throughout our history can be traced, almost without exception, to the qualifications established in early state constitutions."[252] It is beyond cavil that the state has a valid interest in excluding from public "office those who would impair efficiency and honesty in government operations,"[253] and, according to the courts, the laws which prohibit felons from holding public office are intended to protect the public from what has been called the "inherent danger to the body politic that a criminal may exercise the powers of government."[254]

Early state constitutions and statutes restricted public office to those who met certain conditions based upon property ownership, religion, sex, age, race and other criteria.[255] Today, although many of these conditions have been eliminated, most states continue to restrict the right to be a candidate and the right to hold public office to persons who have not been convicted of a serious crime.[256] The person convicted of a disquali-

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[251] *See generally* Le Clercq, *supra* note 167. Professor Le Clercq notes that both voting and candidacy were restricted by provisions in early state constitutions and statutes. *Id.* at 608-14.

[252] *Id.* at 609.

[253] 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).

[254] Matsen v. Kaiser, 443 P.2d 843, 845 (Wash. 1968).

[255] *See generally* Le Clercq, *supra* note 167, at 608-14.

[256] *See Special Project, supra* note 5, at 987-1001. *See also* State v. Haubrich, 83 N.W.2d 451 (Iowa 1957). The states can dictate qualifications for holding state or municipal offices, but they may not dictate the qualifications for federal offices, because the latter are set forth in the United States Constitution and laws of the United States. *In re* O'Connor, 17 N.Y.S.2d 758 (1940). *See* U.S. CONST. art. I, § 2 (qualifica-

fying crime,[257] which may be anything from murder to the illegal sale of ducks,[258] will find himself excluded from a number of public offices.[259]

What constitutes a disqualifying crime varies from one jurisdiction to another.[260] Evidence that a person has been convicted of a felony can establish a "prima facie case" that the person is ineligible to hold public office.[261] Another court ruled that "conviction of bribery, perjury, or other infamous crime should *ipso facto*, render a person ineligible to hold any public office."[262] The Kentucky Constitution states: "All persons shall be excluded from office who have been, or shall hereafter be, convicted of a felony, or of such high misdemeanor as shall be prescribed by law . . . ."[263] In Georgia, conviction of a "felony involving moral turpitude" will result in exclusion from public office,[264] while in Arkansas conviction of an "infamous crime" has the same effect.[265]

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tions of Representatives), § 3 (qualifications of Senators), § 5 (expulsion of Representatives or Senators); art. II, § 1 (qualifications of President & Vice-President), § 4 (removal of President, Vice-President, & civil officers). The Constitution does not exclude felons from holding federal office, although the fourteenth amendment excludes certain persons convicted of rebellion. U.S. CONST. amend. XIV.

[257] In general, conviction of a disqualifying crime in a criminal proceeding is required to exclude a person from holding public office. The mere determination of guilt in a civil proceeding is usually not sufficient. Lovely v. Cockrell, 35 S.W.2d 891, 892 (Ky. 1931).

[258] *See, e.g.*, State *ex rel.* Payne v. Irion, 113 So. 360 (La. 1927). *See also Special Project, supra* note 5, at 991-94.

[259] What constitutes a public office is construed very broadly. According to the Sixth Circuit, "an office is the right to exercise public employment and to take fees or emoluments thereunto belonging." Pope v. Commissioner, 138 F.2d 1006, 1009 (6th Cir. 1943). This definition generally includes everyone elected or appointed to discharge a public duty.

[260] *See Special Project, supra* note 5, at 989-97.

[261] Hogan v. Hartwell, 7 So.2d 889, 890 (Ala. 1942).

[262] Illinois *ex rel.* Keenan v. McGuane, 150 N.E.2d 168, 174 (Ill. 1958), *cert. denied*, 358 U.S. 828 (1958).

[263] KY. CONST. § 150. This constitutional mandate has, at times, prevented elected representatives of the people from holding office. For example, in City of Pineville v. Collett, 172 S.W.2d 640 (Ky. 1943), a city clerk who was convicted of manslaughter was required to surrender to the city everything relating to the office to which he had been elected. The Kentucky Court of Appeals suggested that the office of clerk could be filled temporarily by the city, pending the convicted clerk's appeal. If affirmed, the conviction would permanently disqualify the clerk from holding any public office in Kentucky. *Id.* at 642.

[264] GA. CODE ANN. § 89-101(3)(1972).

[265] ARK. CONST. art. 5, § 9.

A crime which may exclude a person from public office in one state may not result in such exclusion in another state.[266] For example, in *Commonwealth v. Shauer*,[267] the conviction of a sheriff on charges of bribing a voter before the sheriff's election to office did not disqualify him under the laws of Pennsylvania. Had the locus been Kentucky, however, the conviction would have disqualified the sheriff from holding office.[268]

In general, the conviction of a public official results in the office being automatically vacated, with no need for further hearings.[269] For those instances in which the applicable statute prescribes disqualification only upon conviction of certain types of crimes, *e.g.*, crimes involving moral turpitude, or high misdemeanors, a hearing may be required to determine if the crime of which the person has been convicted is a crime which falls within the disqualification.[270]

The two model acts dealing with exclusion from public office handle the problem in two very different ways. The Uniform Act on the Status of Convicted Persons[271] is the more liberal, providing that a convicted person shall be ineligible to hold public office only from the time of conviction and sentencing to the time of final discharge.[272] The Model Penal Code, on the other hand, provides that:

> A person holding any public office who is convicted of a crime shall forfeit his office if:
> (1) he is convicted under the laws of this State of a felony or under laws of another jurisdiction of a crime, which, if committed within this State, would be a felony; or
> (2) he is convicted of a crime involving malfeasance in such office, or dishonesty; or

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[266] *See generally Special Project, supra* note 5, at 989-97.

[267] 3 W. & S. 338 (Pa. 1842).

[268] *See* Lovely v. Cockrell, 35 S.W.2d 891 (Ky. 1931).

[269] *See* State *ex rel.* Salisbury v. Vogel, 256 N.W. 404, 407 (N.D. 1934). Due process is satisfied by the hearing which is afforded in the criminal proceeding.

[270] In one instance, a hearing was required to determine if the crime of conspiracy to demand and receive a sum of money for favorable consideration of a zoning variance involved moral turpitude. Galloway v. Township of Clark, 223 A.2d 644 (N.J. 1966).

[271] UNIFORM ACT ON THE STATUS OF CONVICTED PERSONS § 2.

[272] Adoption of the Uniform Act is hampered in many states by constitutional provisions that would require amendment prior to implementation of the Act. Only two states, Hawaii and New Hampshire, have adopted the Uniform Act, although Minnesota has a substantially similar act. HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, 951c (1974).

(3) the Constitution or a state statute other than the Code so provides.[273]

Subsection 3 of this provision incorporates by reference all other laws of the state on exclusion from office. Thus, in essence the Model Penal Code merely adds disqualifications for dishonesty and malfeasance in office, which many state statutes do not now contain.[274]

B. *Federal Constitutional Questions*

The states have inherent power to establish the qualifications for public offices and to impose the conditions and limitations under which such officials serve.[275] Thus, the states may exclude from public office those who have been convicted of crime, so long as the exclusion is not violative of the Federal Constitution. Although the Constitution provides for the tenure of a few federal officers, establishes the terms of their offices, and prescribes the procedures required to remove those officers,[276] it is silent as to whether citizens have a right to be candidates for and to hold public office.[277]

It has been argued that once a public office is attained, it is, or should have the qualities of, a property right.[278] If the right to hold public office is considered a property right, the constitutional protections against the government's taking of property apply. However, the Supreme Court has ruled that the holder of a public office has no vested property right in the

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[273] Model Penal Code § 306.2 (proposed final draft, 1962).

[274] *See Special Project, supra* note 5, at 989-97.

[275] French v. Senate, 80 P. 1031, 1033 (Cal. 1905). In the federal realm, Congress has the power to provide for the removal of inferior officers. *See, e.g.*, Myers v. United States, 272 U.S. 52, 164 (1926).

[276] *See* U.S. CONST. art. I, §§ 2, 3, 5; art. II, § 1; amend. XIV.

[277] Despite the fact that candidacy was traditionally viewed as a state right, beyond federal constitutional protection. *See generally* Le Clercq, *supra* note 167, at 615-18, there are constitutional limitations. The Supreme Court has held that "[n]o [S]tate can pass a law regulating elections that violates the Fourteenth [Amendment] . . . ." Williams v. Rhodes, 393 U.S. 23, 29 (1968).

[278] Higginbotham v. Baton Rouge, 306 U.S. 535 (1939); Sanchez v. United States, 216 U.S. 167 (1910); Taylor v. Beckham, 178 U.S. 548 (1900); Crenshaw v. United States, 134 U.S. 99 (1890); Blake v. United States, 103 U.S. 227 (1880); State *ex rel.* Nagle v. Sullivan, 40 P.2d 995 (Mont. 1935).

office[279] and that, therefore, the due process clauses of the Constitution have no application.[280]

Despite the apparent inapplicability of the due process clause of the fourteenth amendment, it is possible that the equal protection clause offers its protection to those who are excluded from public office on the basis of a criminal conviction. Even though the Supreme Court held in *Richardson v. Ramirez*[281] that section two of the fourteenth amendment expressly excludes the voting rights of felons from the protections of section one, there is no provision in the fourteenth amendment which would allow discrimination against felons in the area of eligibility for public office.[282]

In attempting to determine whether a state regulatory scheme which discriminates among groups is violative of equal protection, it is necessary to consider the nature of the state's interest and the impact of the discrimination on the individual.[283] The interest of the state must be valid and the discrimination must rationally serve that interest.[284] Furthermore, if a suspect classification or a fundamental right is involved, the state must show that the discrimination is necessary to further a compelling state interest,[285] that the statute is "tailored" with

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[279] Dodge v. Board of Educ., 302 U.S. 74 (1937); Taylor v. Beckham, 178 U.S. 548 (1900).

[280] Taylor v. Beckham, 178 U.S. 548 (1900). Although there is no property right in a public office, such a right may be hypothesized in controversies among persons claiming the office; that is, however, merely a device of judicial convenience and not an inherent right of any of the parties.

[281] 418 U.S. 24 (1974). *See* section IV B, *supra.*

[282] Section three of the fourteenth amendment does, however, disqualify certain individuals:

> 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.

On its face, this section does not apply to felons other than those who have engaged in treasonous or rebellious acts after taking an oath as a federal or state official.

[283] *See generally* B. SCHWARTZ, CONSTITUTIONAL LAW, 285-94 (1972). *See also, e.g.*, Tanner v. Little, 240 U.S. 369 (1916).

[284] *See, e.g.*, Rapid Transit Corp. v. City of New York, 303 U.S. 573, 578 (1938).

[285] Shapiro v. Thompson, 394 U.S. 618 (1969).

"precision"[286] to achieve the state goal, and that there is no "less drastic means"[287] of achieving the goal.

Three criteria are used to determine whether a group constitutes a suspect classification:[288] "(1) [T]he discreteness and insularity of the minority, (2) its susceptibility to stigmatization, and (3) the immutability of the characteristics by which the class is identified."[289] It has been argued that ex-offenders have all the hallmarks of a suspect classification:

> First, the convict is part of a *discrete and insular minority* which is politically impotent. Second, he is quite susceptible to *stigmatization,* to which his difficulty in reentering society, especially as an employee, attests. And finally, the status of being a convict is *immutable* in the same way one's natural origin has been deemed an immutable characteristic creating a suspect classification . . . .[290]

If ex-offenders do in fact constitute a suspect classification, the statutes which exclude them from public office are phrased in such broad language that they do not seem to be "tailored" with the necessary "precision"[291] in pursuing the state goal of protecting the public from those who would use the power of a public office for criminal objectives. In addition, an individualized determination of whether the ex-offender in question would pose a threat to the public welfare if appointed or elected to public office would be a "less drastic means"[292] of achieving the state goal.

Even if ex-offenders are not found to constitute a suspect classification, however, the validity of laws which exclude them from public office may fail the test of constitutionality, since it may be that their exclusion from public office does not rationally further the state's interest in preserving the integrity

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[286] Dunn v. Blumstein, 405 U.S. 330, 343 (1972).

[287] *Id., quoting* Shelton v. Tucker, 364 U.S. 479, 488 (1960).

[288] The Supreme Court has never held that ex-offenders constitute a suspect classification, but a lower federal court held that felons do *not* constitute a suspect classification. Upshaw v. McNamara, 435 F.2d 1188, 1190 (1st Cir. 1970).

[289] Note, 4 U.C.L.A.-ALAS. L. REV. *supra* note 73, at 305-06 (citations omitted). *See* Shapiro v. Thompson, 394 U.S. 618 (1969).

[290] *Id.* 333-34.

[291] Dunn v. Blumstein, 405 U.S. 330, 343 (1972).

[292] *Id., quoting* Shelton v. Tucker, 364 U.S. 479, 488 (1960).

of public office.[293] Moreover, the state's interest in rehabilitating its convicted citizens is actually thwarted by the exclusion. According to the National Advisory Commission on Criminal Justice Standards and Goals:

> [T]o reintegrate an offender into free society, the offender must retain all attributes of citizenship. In addition, his respect for law and the legal system may well depend, in some measure, on his ability to participate in that system. Mandatory denials of that participation serve no legitimate public interest.[294]

VI. CONCLUSION

The origins of state imposed disabilities for conviction of crime are obscured by the mists of antiquity. They have changed over the centuries, becoming less brutal but in many ways more pervasive. In modern America these disabilities ensure that the ex-offender is set apart as something less than his fellow citizens. Their application has been accompanied, in many cases, by irrationality and inconsistency.

The most fundamental of political rights, the right to vote, is removed from the realm of fourteenth amendment protections, where ex-offenders are concerned, by *Richardson v. Ramirez*.[295] In the area of occupational disabilities, a wide range of employment opportunities are currently closed to ex-offenders, although *Harris v. Kentucky Board of Barbering*[296] indicates that the courts are receptive to due process and equal protection attacks on such statutes, especially if the disqualifications are applied with a broad brush or are written in the conclusive terms of an irrebuttable presumption.

Evaluation of these laws, however, should not be confined to piecemeal challenges in the courts. It is time for Congress and the legislatures of the various states to reexamine the merits of civil disabilities. How important is it to the protection of the patrons of barbers, or even the clients of lawyers, that the

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[293] *See Special Project, supra* note 5, at 1175-77; notes 139-46 and accompanying text, *supra*.

[294] NATIONAL ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, CORRECTIONS, Standard 16.17 at 592 (1973)[hereinafter cited as CORRECTIONS].

[295] 418 U.S. 24 (1974).

[296] Civil No. C 74-399 L(A) (W.D. Ky., June 13, 1975).

licensed expert whom they consult should never have transgressed the laws of the state? In light of the comprehensive election laws which now abound, providing intricate safeguards and serious penalties, how much of a threat to the ballot box does an ex-offender pose?

These questions are especially appropriate when one looks at the other side of the coin—the effect on the offender. Such stringent restrictions severely hinder, if not foreclose, an ex-offender's attempts to rejoin society. As Chief Justice Burger has written: "Society has a stake in whatever may be the chance of restoring [the offender] to normal and useful life within the law."[297] Yet the state, after exacting the penalty prescribed by law, denies the ex-offender the means by which he might follow a "normal and useful life." Depriving the ex-offender of the political rights usually attendant upon citizenship hampers his efforts at reformation and may diminish his respect for a system in which he is not allowed to participate.[298] Far more serious, however, are the barriers he encounters in his efforts to enter into gainful and decent employment. "The ability of the offender to earn a livelihood may well determine his success in rejecting a life of crime. By precluding his participation in the growing number of government-regulated occupations, his readjustment is made much more difficult."[299] Unemployment may be one of the primary factors in the high rate of recidivism,[300] and the large number of regulated occupations which are closed to the ex-offender can only contribute to increased unemployment.

The ex-offender, having paid his debt to society by serving his sentence, leaves prison only to find himself a second-class citizen. No matter how far along the road to rehabilitation he may have traveled, no matter how sincere he may be in his desire to live up to society's expectations, the state often denies him the chance to demonstrate his usefulness, either to himself or to society. Such arbitrary treatment can have only an ad-

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[297] Morrissey v. Brewer, 408 U.S. 471, 484 (1972).

[298] CORRECTIONS, *supra* note 294, Standard 16.17 at 593.

[299] *Id.*

[300] Stacy, *Limitations on Denying Licensure to Ex-Offenders*, 2 CAP. U.L. REV. 1, 3 (1973).

verse effect on the rehabilitative effort. For these reasons it has been urged that, unless there is a direct and present relationship between the offense committed or the characteristics of the offender and the license or privilege sought, all provisions which deprive ex-offenders of civil rights and occupational opportunities should be repealed.[301] We concur.

Walter W. May
Larry F. Sword

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[301] CORRECTIONS, *supra* note 294, Standard 16.17 at 592. *See also* ROSCOE POUND AMERICAN TRIAL LAWYERS FOUNDATION, ANNUAL CHIEF JUSTICE EARL WARREN CONFERENCE ON ADVOCACY IN THE UNITED STATES, A PROGRAM FOR PRISON REFORM: THE FINAL REPORT 16 (1972).