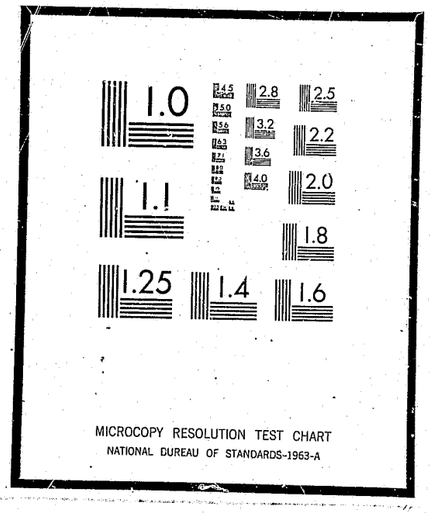

CONSTITUTIONAL CHALLENGES TO EMPLOYMENT DISABILITY STATUTES

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NATIONAL CLEARINGHOUSE ON OFFENDER EMPLOYMENT RESTRICTIONS

The National Clearinghouse on Offender Employment Restrictions, a project funded by the U.S. Department of Labor, Manpower Administration, is sponsored jointly by the American Bar Association's Commission on Correctional Facilities and Services and its Section of Criminal Justice. Since projects under Department of Labor funding are encouraged to express their own judgements freely, the views or opinions stated in this monograph do not represent the official position or policy of the Department of Labor.

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A PROJECT OF THE COMMISSION ON CORRECTIONAL FACILITIES AND SERVICES AND SECTION OF CRIMINAL JUSTICE

INTRODUCTION

A person convicted of a criminal offense often loses a number of his or her "civil rights" — rights possessed by most citizens, such as the right to vote and hold public office, to serve as a juror or testify in court. An offender may even lose his means of engaging in a livelihood by being prohibited from engaging in certain occupations whose entry is regulated by the government. He may, for example, be barred from obtaining a license to engage in a trade, profession, or other occupation, and may even be barred from employment with the government.

When these often unnecessary measures contribute to a lack of meaningful employment opportunities, they hinder the former offender's efforts at reintegration into society.

In the last four years, however, there has been a growing legislative trend to remove unwarranted statutory obstacles to employment opportunities for former offenders. There has also been a significant increase in decisions by courts limiting the authority of a governmental agency to impose arbitrary job restrictions.

The legal basis for these court decisions is the subject of this monograph. It was prepared for the National Clearinghouse on Offender Employment Restrictions as a reference source for attorneys and others who are interested in the removal of offender job restrictions.

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CONSTITUTIONAL CHALLENGES TO EMPLOYMENT DISABILITY STATUTES

The American Bar Association's National Clearinghouse on Offender Employment Restrictions has reported that throughout the United States some 2,000 laws affect employment opportunities for persons with criminal records. Some of these laws automatically disqualify a license applicant who has been convicted of a crime; other statutes allow the licensing authority unstructured discretion to deny licenses to ex-offenders, often without benefit of any opportunity for the applicant to be heard. Still other laws, perhaps the majority, allow the agency to disqualify persons lacking "good moral character," and a past record alone is virtually certain to demonstrate an applicant's lack of good moral character. National Clearinghouse on Offender Employment Restrictions, *Laws, Licenses, and the Offender's Right to Work (1973).*

These statutes are usually justified as valid exercises of a state's power to protect the public health and safety by preventing dangerous or untrustworthy persons from holding themselves out as state-approved professionals. In this age of increasing consumer protection, few would quarrel with the need for such protection, but a problem arises not from the existence of licensure, but from the wholesale manner in which current occupational licensing discriminates against the millions of persons with criminal records. By irrationally excluding these people from occupations and professions, civil disability statutes force them into second class citizenship, and continue the stigma of the prior convictions.

For example, civil disabilities statutes place severe restrictions on job placement. The ultimate result is frustration with the social system and a high potential for the individual to return to a life of crime.

Recent empirical studies have shown that steady employment is often directly related to a low recidivism rate. See, e.g., Trebach, *No. 1 Domestic Priority: New Careers for Criminals,* City Magazine, (Oct./Nov. 1970) at 18, and D. Glaser, *The Effectiveness of a Prison and Parole System,* (abr. ed. 1969). Yet, in the Task Force Report on Corrections of the President's Commission on Law Enforcement and Administration of Justice, it was found that

> . . . during the first month after release, only about 1 out of every 4 releasees was employed at least 80 percent of the time, and 3 out of 10 were unable to secure jobs. After 3 months, only about 4 out of 10 had worked at least 80 percent of the time, and nearly 2 out of 10 still had not been able to find work of any kind. *(Task Force Report: Corrections* (1967) at 32).

Civil disabilities statutes restricting employment thus perpetuate a vicious cycle with recidivism as the end result.

> The position is also self sustaining: each refusal to hire an ex-criminal contributes to a massive barrier to employment and thus encourages recidivism, which in turn justifies the next refusal to hire. Portnoy, *"Employment of Former Criminals,"* 55 Cornell L. Q. 306, 317 (1970).

The Report of the National Advisory Commission on Criminal Justice Standards and Goals, *Corrections* (1973), evidences a progressive example of the changing attitudes and policies toward ex-offenders. It calls for, among other things, the repeal of all mandatory provisions denying former offenders the right to engage in any occupation or obtain any license issued by the government by 1975. *See,* Standard 16.17. The Commission, in its commentary to the Standard, stated:

> 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. If changes are not made in regulating statutes, the problem will grow more serious. *Standards*, supra, at 593.

Economic restrictions of this broad a scope are not only unreasonable in light of their effect on rehabilitation and recidivism, but they also perpetuate the high cost of the criminal justice system to society:

> . . . any rehabilitation of an ex-prisoner through employment saves the government the cost of apprehension, trial and reimprisonment, in addition to contributing to the ex-prisoner's character and to the protection of the public. Glaser, *supra,* at 276.

Furthermore, employment restrictions often conflict with programs inside prisons. As more and more institutions begin to train their inmates for various occupations, the inmates find themselves barred from pursuing these jobs on the outside because of severe civil disability statutes; *see, e.g., Miller* v. *D.C. Board of Licenses,* 294 A. 2d 365, 370 (D.C. App. 1972):

> The Department's apparent policy of denying licenses to ex-convicts appears at cross-purpose with what other District government agencies are seeking and may frustrate entirely the legislative goal of vocational rehabilitation in our penal institutions.

These statutes also frustrate parole and other pre-release programs, long recognized as essential tools of rehabilitation.

> A traditional condition of parole is that the prisoner must have a *bona fide* job arranged before he is released from the prison. . . In practice, usually it is difficult for men still in prison to procure promises of satisfactory employment upon expectation of release. . . Consequently, some men granted parole remain in prison long after their parole date, waiting to secure a job. Glaser, *supra,* at 214.

While courts have accorded a presumption of constitutionality to licensing laws, they have acted in cases where the laws are not sufficiently related to public health or safety, or where the laws themselves violate other constitutional provisions. Since many licensing laws result from the efforts of organized lobbies which have hopes of achieving economic benefits and public recognition as professionals, their frequent assertion of a "primary" goal of public protection is questionable.

Civil disabilities laws appear to be susceptible to challenge based on three constitutional provisions — the Fourteenth Amendment's due process and equal protection clauses, and the Eight Amendment ban against cruel and unusual punishment.*

I. Due Process

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides the most flexible means of attacking disability statutes. A due process violation may generally exist if a law or administrative action unreasonably infringes upon basic liberties, and this may be so although the state has acted to protect a legitimate public interest.

A. Presumption Against Ex-Felons

Most civil disabilities statutes create a conclusive statutory presumption that the convicted criminal is unfit to exercise certain rights or privileges or to perform numerous functions.[1] This particular presumption of unfitness has not been directly attacked in the courts in this century, but in *Heiner* v. *Donnan,* 285 U.S. 312 (1932), the Supreme Court held that the failure to give a party the opportunity to prove the irrationality of a statutory presumption violates the Due Process Clause:

> This Court has held more than once that a statute creating a presumption which operates to deny a fair opportunity to rebut it violates the Due Process Clause of the Fourteenth Amendment. *Id.* at 329.

This test has been used recently in numerous situations which, by analogy, may be persuasive in challenges to presumptions against ex-offenders. In *Cleveland Board of Education* v. *LaFleur,* 414 U.S. 632, 39 L Ed. 2d 52 (1974), the Supreme Court held that a rule prohibiting pregnant teachers from working beyond a certain month in their pregnancy created a "conclusive presumption . . . neither 'necessary nor universally true', and is violative of the Due Process Clause."

Similarly, the Court has struck down presumptions that nonresident students never become residents for college tuition purposes, *Vlandis* v. *Kline,* 412 U.S. 441 (1973); that certain households with tax dependents over age eighteen are not "needy" and are therefore not eligible for food stamps, *U.S. Department of*

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* Another potential legal challenge to such employment discrimination, not discussed in this monograph is the Equal Employment Opportunity Act, 42 U.S.C. §2000 *et seq.* Under the statute, denial of jobs by public and private employers on the basis of arrest records may illegally discriminate against a minority group. The seminal case in this area is *Gregory* v. *Litton Systems Inc.*, 472 F. 2d 631 (9th Cir. 1972), *aff'g.* 316 F. Supp. 401 (C.D. Cal. 1970).

[1]The statutes obviously do not specifically say that an offender is conclusively presumed to be unreliable, but that presumption is implicit in those laws which specify conviction of a felony as grounds for denying a license. This presumption was first articulated in *Hawker* v. *New York,* 170 U.S. 189 (1898) (discussed in the text, *infra*), where the Supreme Court stated "the record of a conviction (may be) conclusive evidence of . . the absence of the requisite good character," 170 U.S. at 191. This, the Court said, "is only appealing to a well recognized fact of human experience," *Id.* 39 L Ed. 2d at 63-4.

Agriculture v. *Murry,* 413 U.S. 508 (1973); or that fathers of illegitimate children are always "unfit" to have custody of the child, *Stanley* v. *Illinois,* 405 U.S. 645 (1972).

Today there is little evidence to support presumptions that ex-felons are inherently unable to perform a task or hold a license. Indeed, it might be true that certain ex-felons are so untrustworthy and so unreliable as to warrant exclusion from certain occupations — but nothing justifies a blanket exclusion of *all* ex-offenders.

What data is available demonstrates that there is no inherent unreliability among ex-offenders. For example, pre-release work programs and half-way houses have had good success rates. The federal prison system and over one-half of the states have work release programs which have shown promising results. *See, e.g.,* 23 Vand. L. Rev. 929 at 1162; The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: *Corrections* (1967) at 11; Carpenter, *The Federal Work Release Program,* 45 Neb. L. Rev. 690 (1966). During 1967, for example, of 1,835 federal releasees on pre-release work programs, only 7.6 percent were failures and only 2 percent committed new felonies. *See,* Glaser, *The Effectiveness of a Prison and Parole System,* 285. The success of these programs demonstrates that felons' job performance abilities have little to do with the fact of their conviction. The federal government has provided money for programs which provide fidelity bonds to ex-felons so that they can qualify for positions requiring the posting of a bond, and in the program's first year of operation all of its 150 customers went claim-free, *See,* The President's Commission on Law Enforcement and Administration of Justice, *The Challenge of a Free Society,* 33 (n.5) (1967).

An interesting decision by the U.S. Court of Appeals for the Second Circuit, *Pordum* v. *Board of Regents,* 491 F. 2d 1281 (2nd Cir. 1974), provides some guidance on irrebuttable presumptions about ex-offenders. In *Pordum* a teacher convicted of a felony sought immediate restoration to his job. The court held that before the Commissioner of Education must reinstate him, a hearing to determine fitness and competency could be held. But the Court cautioned, in a lengthy footnote, that if the purpose of the hearing was only to determine that the teacher had committed a crime, the state would create the irrebuttable presumption

> that a person who has been convicted of committing a crime and who is on probation is unfit to teach in public schools, (and) it might raise serious constitutional difficulties.
>
> * * *
>
> The Commissioner's view that (conviction of a crime) is evidence of unfitness to teach is at odds with modern correctional theory. Such thinking bars persons with criminal records from many employment opportunities. 491 F. 2d at 1287, n. 14.

A federal court in Mississippi struck down another restriction which forbade the hiring of persons who were unmarried parents. In language strikingly apposite to ex-offenders, the Judge wrote:

> (the rule) conclusively presumes the parent's immorality or bad moral character from the single fact of a child born out of wedlock . . . A person could live an impeccable life, yet be barred as unfit for employment for an event, whether the result of indiscretion or not, occurring at any time in the past. *Andrews* v. *Drew Municipal School District,* 371 F. Supp. 27, 33 (N.D. Miss. 1973).

If the public has any faith left in its prisons, which are designed to release rehabilitated ex-felons into society, then these presumptions of unfitness are also contrary to the goals of corrections which we spend millions of dollars per year to achieve. At any rate, the Supreme Court requires the state, as the party imposing the disability, to establish the validity of the presumption, *See, e.g., Leary* v. *United States,* 395 U.S. 6 (1969), *Tot* v. *United States,* 319 U.S. 463 (1943), and this presumption may prove a difficult proposition to sustain.

B. Direct Relationship Requirement

A due process objection is also presented by administrative licensing boards who lack objective criteria to determine an offender's ability to perform the regulated functions. Standards are very often either non-existent, or so vague as to make it impossible for applicants and licensors to apply them. When taken in conjunction with the irrebuttable presumptions created by statutes, these standardless decisions present an insurmountable obstacle to the former offender.

In *Miller* v. *D.C. Board of Appeals and Review,* 294 A. 2d 365, 369 (D.C. App. 1972), a court recognized

> . . . the need to clarify the requirements for business licenses by adopting appropriate regulations . . .so that the danger of arbitrary administrative action based upon unarticulated and unannounced standards is removed . . .

The *Miller* decision voided an agency's refusal to issue a street vendor's license to an ex-felon who had presented unchallenged evidence of his rehabilitation. The court said:

> Unless there are some standards relating the prior conduct of an applicant to the *particular* business activity for which he seeks a license, the power to deny a license inevitably becomes an arbitrary, and therefore unlawful, exercise of judgment by one official . . . *Id.* at 369.

The court in *Miller* thus adopted a "relationship" test; it urged that standards be designed for each particular license which actually measures an applicant's ability and trustworthiness in relation to that license, allowing agencies to develop objective standards which avoid vagueness problems.

The judicial trend has long been to look to the reasonable relationship of individual decisions to the purposes of regulation in determining the constitutionality of the regulation. For example, in *Schware* v. *Board of Bar Examiners,* 353 U.S. 232 (1956), the Supreme Court reversed New Mexico's refusal to admit

Schware to the bar because of his past arrest record. The Court held that, before an individual could be denied a license, there must be a rational connection between the occupational disqualification and the applicant's fitness to perform the particular job.

> We need not enter into a discussion of whether the practice of law is a 'right' or 'privilege.' Regardless of how the State's grant of permission to engage in this occupation is characterized, it is sufficient to say that a person cannot be prevented from practicing except for valid reasons . . . any qualification must have a rational connection with the applicant's fitness or capacity to practice law. *Id.* at 239.

The *Schware* rationale appears to indicate that an automatic exclusion of an ex-felon from regulated employment without consideration of the nature of the offense violates the Due Process Clause. "In determining whether a person's character is good, the nature of the offense he committed must be taken into account." *Id.* at 243. The Court closely examined the circumstances of the acts which the State had regarded as evidence of Schware's bad moral character, including the 15 year time lapse since any questionable conduct on his part occurred, and concluded,

> In the light of petitioner's forceful showing of good moral character, the evidence upon which the State relies — the arrests for which petitioner was neither tried nor convicted, the use of an assumed name many years ago, and membership in the Communist Party during the 1930's — cannot be said to raise substantial doubts about his present good moral character. There is no evidence in the record which rationally justifies a finding that Schware was morally unfit to practice law. *Id.* at 246-7.

The "relationship" test has recently been used by the Supreme Court in a related context — employment discrimination against black persons — when it held that an *employer* has "the burden of showing that any given requirement must have a manifest relationship to the employment in question." *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433 (1971). Likewise, the use of arrest records to bar potential employees has been held to be "irrelevant to (their) suitability or qualification for employment," *Gregory* v. *Litton Systems, Inc.*, 316 F. Supp. 401, 403, (C.D.Cal. 1970), *aff'd* 472 F. 2d 631 (9th Cir. 1972).

This reasoning has begun to have an impact among other federal courts. In *Thompson* v. *Gallagher,* 489 F. 2d 443 (5th Cir. 1973), a city ordinance forbade city employment for military veterans with less than an honorable discharge. In defense to a challenge to the ordinance, the city attempted to justify its law by asserting its interest in not hiring persons with "anti-social" characteristics, 489 F. 2d at 448. The Fifth Circuit, while admitting the city's "very strong interest" in the integrity of its employees, said that such a broad, general category of persons "is too broad to be 'reasonable' when it leads to automatic dismissal from . . . employment," 489 F. 2d at 449. If the ordinance had "enumerated characteristics" to provide

employees and employers with notice and guidelines, the law "might stand in a very different light." *Id.* Without such guidelines, however, the Court concluded that the ordinance was unconstitutional.[2]

A college that withdrew federal loan funds from a student convicted of an on-campus offense was ordered to reinstate the student's loan because the offense was not one "against the institution" nor was it intended to "disrupt the institution," *Green* v. *Dumke,* 480 F. 2d 624, 630 (9th Cir. 1973). At least impliedly, then, the court was applying a direct relationship test to measure eligibility for federal aid; it plainly said that mere "pranks" are not of a sufficiently serious nature to rise to the type of crime that would end loan assistance. *See also, Pavone* v. *Louisiana State Board of Barber Examiners,* 364 F. Supp. 961 (E.D.La. 1973), where a court held unconstitutional a statute which required a special barber license to cut women's hair, on the grounds that cosmeticians' right to pursue their occupations were infringed without any relationship to public health or safety — the purposes of licensing barbers.

California courts have adhered to the need for a direct relationship between the denial of an occupational license and the reasons for that denial. Several convictions arising from civil rights demonstrations has been held not to bear "a direct relationship to petitioner's fitness to practice law," *Hallinan* v. *Committee of Bar Examiners, 65 Cal. 447, 421 P. 2d 76, 93 (1966).* A homosexual teacher could not be deprived of his teaching credentials unless it was demonstrated that such activity impaired his fitness to teach, *Morrison* v. *State Board of Education,* 1 Cal. 3d 214 (1969), and a state employee could not be fired solely because he had been convicted for possession of marijuana without evidence that there was a relationship between his job and his conviction, *Vielehr* v. *State Personnel Board,* 32 Cal. App. 3d 187 (1973).

In light of these developments, those cases upholding civil disabilities statutes can be distinguished as fitting into the narrow requirements of the relationship test.

The leading case permitting a civil disability statute to stand is *Hawker* v. *New York,* 170 U.S. 189 (1898) (See Note 1, supra). In *Hawker,* a doctor was denied permission to practice due to a past conviction for abortion. Although his present character was not considered by the Medical Board or the Court in determining his fitness to perform as a physician, the conviction in *Hawker* was for abortion, which is an offense which obviously bears a direct relationship to the specific profession. Thus, much of what the Court said about presuming poor moral character is very limited *dicta*. Also, the case is 84 years old and does not reflect almost a century of developments in constitutional law.

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[2] With regard to ex-offenders, the Court said, *in dicta,* "There has not even been a showing that the city excludes convicted felons from employment. This is not to imply that any or all of these restrictions would be valid. On that question we express no opinion." 491 F. 2d at 449.

In *Barsky* v. *Board of Regents,* 347 U.S. 442 (1954), the Supreme Court upheld a doctor's temporary six-month suspension of his license because of his contempt conviction for failure to give subpoenaed papers to the House Un-American Activities Committee. The Court, without looking at the direct relationship between the conviction and the doctor's fitness to do the work, held that this suspension did not violate due process. But, this was not a total revocation, and the Court might not have reached the same result had the suspension been longer or permanent, particularly in light of a strong dissent by three members of the Court, where they raised the relationship test:

> So far as concerns the power to grant or revoke a medical license, that means that the exercise of authority must have some rational relation to the qualifications required of a practitioner in that profession.
>
> It is one thing to recognize the freedom which the Constitution wisely leaves to the States in regulating the professions. It is quite another thing, however, to sanction a State's deprivation or partial destruction of a man's professional life on grounds having no possible relation to fitness, intellectual or moral, to pursue his profession. 347 U.S. 442 at 470. (Frankfurter, J. dissenting).

Both of these cases involved professional licenses, occupations thought to involve a high degree of public trust and confidence, and therefore their members have always been held to more stringent standards than barbers, street vendors, or real estate salesmen. For these reasons, *Barsky* and *Hawker* can also be narrowed to stand for the proposition that in professions involving a high degree of public trust, an agency may have a broader area of discretion.

In addition to professions of high public trust, a disability may be justifiable in specific occupations where a compelling showing of need for the disability exists. Thus, in *DeVeau* v. *Braisted,* 363 U.S. 144 (1960), a waterfront union member was denied a job as an officer because of a past larceny conviction. The denial was upheld because of the extensive evidence presented showing the link between ex-felons holding union office, and corruption and organized crime on the waterfront, and the case can be limited in applicability to those occupational areas where there is proof of high corruption and crime related to the particular occupation. In other words, it might be said that the agency had sustained its burden of proving the validity of the presumption against ex-felons.[3]

These distinctions are evident in *Perrine* v. *Municipal Court,* 488 P. 2d 648, 97 Cal. Rptr. 320 (1971), where the California Supreme Court invalidated a statute which made specific crimes permissible grounds

[3] The Second Circuit has said of *DeVeau* that exclusion of a class of people from certain occupations was allowed only "after a comprehensive investigation into the relationship between the class of persons excluded . . . and the evil sought to be avoided . . . where no such legislative finding is present, exclusion . . . can be justified only after a detailed and particularistic consideration of the relationship between the person involved and the purpose of the exclusion . . . " *Pordum* v. *Board of Regents,* 491 F. 2d 1281, 1287 n. 14 (2nd Cir. 1974) (internal citations omitted).

for denying a bookstore license. The court distinguished this occupation from professional occupations and required the use of a direct relationship test:

> Accordingly, standards for excluding persons from engaging in such commercial activities must bear some reasonable relationship to their qualifications to engage in those activities . . . Participants in the business of selling books require no special expertise. They are not like doctors or lawyers or school teachers, whose past convictions are often directly related to their occupational qualifications and may therefore be reasonably invoked to bar them from practicing their professions. *Id.* at 652.

In sum, the law appears clear that to justify denying a person the opportunity to pursue his or her occupation, a direct relationship must exist between the nature of the job or license sought and the reasons for denying it. While due process does not guarantee every person a job, it certainly does seem to mandate that no persons shall be arbitrarily denied occupational opportunities by governmental actions.

C. Procedural Safeguards

The necessity for proving a valid presumption against ex-felons and establishing a reasonable relationship test assumes the presence of procedural safeguards to accomplish these decisions. Indeed, in all those cases decided by the Supreme Court, *e.g., Schware, Barsky, Hawker,* proper hearings were held prior to denial of licenses, and the Court assumed, without directly deciding, that safeguards are inherent to a fair system of licensing.

The general test which the Supreme Court has evoked to determine whether due process procedures apply is, whether there is a "substantial interest" in the loss of "liberty or property" which outweighs the inconvenience to the State so that the Fourteenth Amendment's procedural safeguards come into play. *See Morrissey* v. *Brewer,* 408 U.S. 471 (1972), and *Goldberg,* v. *Kelly, 397 U.S. 254 (1970).*[4]

Traditionally, the right-privilege distinction was used to justify denials of procedural safeguards in administrative decisions. However, the distinction between right-privilege has been continually abrogated by court decisions:

> this (Supreme) Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege'. *Graham* v. *Richardson, 403 U.S. 365, 374 (1974).*

See also *Goldberg* v. *Kelly, supra, Schware* v. *Board of Bar Examiners, supra.* "Whether any procedural

[4] More recent decisions of the Supreme Court have not strayed from this analysis, *e.g., Wolff* v. *McDonnell,* 418 U.S.____ (1974). In *Mitchell* v. *W.T. Grant Co.,*____ U.S.____, 40 L Ed. 2d 406 (1974) the Court held that a debtor was not entitled to a hearing *prior* to replevin of household goods after balancing the debtor-creditor interests; however, the need for a hearing immediately after replevin continues.

protections are due depends upon the extent to which an individual will be 'condemned to suffer a grievous loss.' *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U.S. 123 at 168, (Frankfurter, J. concurring).

The *Morrissey* and *Goldberg* cases mark the highpoint of a series of cases which have found a variety of benefits to constitute "grievous loss" requiring the application of due process. In *Morrissey, supra,* the Court found that before revocation of probation or parole, due process safeguards were necessary. In *Goldberg, supra,* the Court held that welfare recipients had to be given a hearing before their benefits could be terminated. Other cases which found a loss sufficiently grievous to warrant procedural rights include the loss of a driver's license, *Bell* v. *Burson,* 402 U.S. 535 (1971); loss of the ability to purchase liquor, *Wisconsin* v. *Constantineau,* 400 U.S. 433 (1971); and garnishment of wages, *Sniadach* v. *Family Finance Corporation,* 395 U.S. 337 (1969).

To lose one's freedom to earn a living in an occupation or profession is clearly a substantial loss of liberty or property sufficient to constitute a "grievous loss" susceptible to due process safeguards. The denial of meaningful employment opportunities is as grievous a loss, if not more substantial, than the denial of benefits cited in the preceding cases. The right to work has long been thought of as one of the basic liberties of man.

> The right to work . . . 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 . . . To work means to eat. It also means to live. *Barsky* v. *Board of Regents, supra,* at 472 (Douglas, J., dissenting). *See also Allgeyer* v. *Louisiana,* 165 U.S. 578 (1897).

Denial of the right to work deprives persons of income; it may result in their becoming an economic burden on the State by putting them on welfare; it deprives them of the use of a skill or vocation which might have taken a number of years and great economic expenditures to achieve; it may force them to sell old businesses and begin new ventures when they are too old or unstable in their economic status to be successful.

Society also has a substantial interest in the availability of economic opportunities in order to promote rehabilitation and reduce recidivism.[5] The Court has continually "acknowledged the obvious fact of life that most criminal convictions do in fact entail adverse collateral legal consequences," *Sibron* v. *New York,* 392 U.S. 40, 55 (1968). In order to protect the substantial interest affected by these statutes, it is mandatory that due process standards be met.

The former offender, *before* his right to work is taken from him, is entitled to rudimentary due process

[5] Society has a stake in whatever may be the chance of restoring him to normal and useful life within the law." *Morrissey* v. *Brewer,* 408 U.S. at 484.

procedures.[6] First, there is a need for specific statutes and regulations. As has been pointed out, most civil disabilities statutes are quite vague and fail to adequately inform the ex-felon of the statutory or regulatory criteria being used to judge his desirability for the specific occupation.[7]

In *Morrissey, supra,* and the other cases mentioned the Court has concluded that notice, within a reasonable amount of time, of the reasons for denial and of the time and place of a hearing, is essential. A hearing must be afforded an ex-offender so that he may adequately meet the charges against him. At this hearing there should be the opportunity to call favorable witnesses and, if adverse witnesses exist, to have the opportunity to confront and cross-examine them.[8]

The decision to deny a license must be based solely upon the evidence presented at the hearing and must be held before an impartial board, *see Goldberg* v. *Kelly,* at 271. Too often this standard is not met by the licensing boards, as they are often composed of members of the profession who have vested interests in who is granted a license. In their effort to keep "undesirables" from entering their profession, they may look to their own prejudices or to other matters than those presented at the hearing. Recently in *Gibson* v. *Berryhill,* 411 U.S. 564 (1973), the Supreme Court stated that "It has also come to be the prevailing view that 'most of the law concerning disqualification because of interest applies with equal force to . . . administrative adjudications." *Gibson, supra,* 411 U.S. at 579. Accordingly in order to prevent such arbitrary or uninformed decisions "the decision-maker should state the reasons for his determination." *Goldberg* v. *Kelly, supra,* at page 271.

In *Raper* v. *Lucey,* 488 F. 2d 748 (1st Cir. 1973), a person with a "substantial criminal record" was denied a Massachusetts driver's license without a hearing nor any explanation as to the reasons for the denial. In an attack on the agency's lack of procedures, the Court of Appeals held that an individual had

[6] Although the preferred hearing is required *prior* to adverse administrative action, *e.g., Morrissey* v. *Brewer, Fuentes* v. *Shevin,* 407 U.S. 67 (1972), there is growing case law which, after "balancing" the nature of the interests involved, has allowed hearings to follow, relatively quickly, such actions. *See, e.g., Arnett* v. *Kennedy,* ____ U.S. ____, 40 L. Ed 2d 1 (1974) (hearing following job suspension); *Mitchell* v. *W.T. Grant Co.* ____ U.S. ____, 40 L. Ed 2d 406 (1974) (hearing following replevin of household goods by creditor); *Pordum* v. *Board of Regents,* 491 F. 2d 1281, 1284-5 (2nd Cir. 1973) (hearing following job suspension). It would thus appear that the timing of the hearing depends heavily on a particular fact situation, but these cases do nothing to reject the basic *need* for the hearing.

[7] "In order that the Board hearing may legitimately be said to be held 'in a meaningful manner' it appears necessary to inform applicants of . . . those current substantive criteria which will govern Board decisions." *Raper* v. *Lucey,* 488 F. 2d 748, 753 (1st Cir. 1973).

[8] Recently the Supreme Court held that confrontation and cross-examination was not required in prison disciplinary hearings, *Wolff* v. *McDonnell,* 418 U.S. ____ (1974). However, that conclusion rested on the Court's feeling that the exigencies and pressures in that kind of situation militated against such extensive procedures, and the case should *not* be construed as holding that confrontation is never required in other types of administrative hearings not subject to similar contingencies.

sufficient interests in a license to require a statement of reasons upon refusal to issue a license, a hearing, and publication of the agency's procedural and substantive rules. Likewise, the Seventh Circuit has required procedural due process before denying a taxicab license to a person because he had been in a mental institution some fifteen years earlier, *Freitag* v. *Carter,* 489 F. 2d 1337 (7th Cir. 1973). In *Pordum* v. *Board of Regents,* 491 F. 2d 1281, 1283-5 (2nd Cir. 1974) the Second Circuit conceded that due process was necessary in revocation of teachers' certificates, but found that the procedures employed in that case were satisfactory.

In the final analysis, the three due process arguments should be considered together. The major reason one needs fair procedures and a hearing is to have an opportunity to demonstrate that a particular agency action has no direct relationship to the general purpose it seeks to achieve, or, that even if there is a direct relationship, some mitigating circumstances exist in this particular case. Continued use of irrebuttable presumptions simply forecloses the need for hearings or direct relationship, for it presumes that there is *always* such a relationship that cannot be ameliorated. The Fourteenth Amendment plainly requires more than that.

II. Equal Protection

"Equal Protection" of the laws does *not* mean that every person must be treated exactly the same as every other person. Judicial interpretations have recognized the need, and even the desirability, for individualized treatment for different groups or persons. Thus, "equal protection" allows a class or a group of persons to be treated differently from other groups, so long as the need for such differing treatment can be rationally demonstrated.

There are two basic tests employed to determine if there is a violation of the Fourteenth Amendment's equal protection clause. The first, and more traditional, test simply looks to see if there is a rational connection between the legislative classification and the interest the state is seeking to protect, *see, e.g., McGowan* v. *Maryland,* 366 U.S. 420 (1961). However, the Court has also evolved a stricter test in instances where fundamental constitutional rights are involved. Under this stricter standard, a statutory classification can be maintained only if the state interest to be protected is a *compelling* state interest, and the restrictions on basic rights are carefully delineated in reasonably specific legislation, *see Shapiro* v. *Thompson,* 394 U.S. 618 (1969), *United States* v. *Robel,* 389 U.S. 258 (1967), and *Aptheker* v. *Secretary of State,* 378 U.S. 500 (1964).

> . . . any classification which serves to penalize the exercise of (a constitutional) right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional. *Shapiro* v. *Thompson,* 394 U.S. at 634.[9]

These tests have compelling applicability to civil disabilities statutes, which create a special group of persons, the former offenders or former felons and treat this entire group as one homogenous entity. This entity is then denied the vote, denied licenses, or denied public employment. In some particular instances, there may be compelling necessity to justify this classification, *e.g., DeVeau* v. *Braisted,* 363 U.S. 144 (1960), where a specific showing of the relationship between crime and particular union jobs justified banning ex-offenders from holding an office in waterfront unions. Few of the civil disabilities statutes, however, can be so justified, and most are, additionally, overbroad and vague.

In two recent cases, *Sugarman* v. *Dougall,* 413 U.S. 634 (1973), and *In re Griffiths,* 413 U.S. 717 (1973), the Supreme Court has dealt severe blows to statutes which place automatic employment restrictions upon broad groups. In *Sugarman, supra,* the Court invalidated a section of the New York Civil Service Law which prohibited employment of aliens in competitive civil service positions. The section violated the equal protection clause, the Court held, because its provisions were indiscriminate and had little, if any, relationship to the state's legitimate interest in establishing qualifications for public employees.[10] The exclusion of *all* aliens is an overly broad classification, falling far short of the direct relationship standard:

> While we rule that §53 is unconstitutional, we do not hold that, on the basis of an *individualized determination,* an alien may not be refused, or discharged from, public employment, even on the basis of non-citizenship, if the refusal to hire, or the discharge rests on legitimate state interests that relate to qualifications for a particular position or to the characteristics of the employee. We hold only that a flat ban on the employment of aliens in positions that have little, if any, relation to a state's legitimate interest, cannot withstand scrutiny under the Fourteenth Amendment. 413 U.S. at 646-47 (emphasis added).

In *Griffiths,* the Court held that Connecticut's exclusion of aliens from the practice of law also violated the

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[9] *See also: Dunn* v. *Blumstein,* 405 U.S. 330 (1972); *Bullock* v. *Carter,* 405 U.S. 134 (1972); *Kramer* v. *Union Free District,* 395 U.S. 621 (1969); *Cipriano* v. *City of Houma,* 395 U.S. 701 (1969).

[10] The line of demarcation between "irrebuttable presumptions", discussed earlier under the due process clause, and "unreasonable classifications" under the equal protection clause, is slender indeed. This is so because under each theory a court must compare a legislative or administrative enactment with the underlying supportive data upon which the enactment is based, to determine whether the two are mutually consistent. Thus, a law which prohibits aliens from practicing law, *cf In re Griffiths,* 413 U.S. 717 (1973), arguably creates an irrebuttable presumption that aliens are unfit to practice law, and also unreasonably classifies all aliens into a group barred from practicing law, yet neither conclusion is justified by data which shows that some aliens can be competent lawyers if given the opportunity.

A litigating attorney should properly raise both arguments in his or her initial complaint, and should anticipate overlap in these two areas. As Mr. Justice Powell has said: "If the Court . . . uses the 'irrebuttable presumption' reasoning selectively, the concept at root will be something else masquerading as a due process doctrine. That something else, of course, is the Equal Protection Clause". *Cleveland Board of Education* v. *La Fleur,* 414 U.S. 632 (1974) (Powell, J. concurring).

equal protection clause. The Court pointed out that resident aliens are an integral societal group, and before they could be excluded, the state must meet a "heavy burden of justification."

> Resident aliens, like citizens, pay taxes, support the economy, serve in the armed forces, and contribute in myriad other ways to our society. It is appropriate that a state bear a heavy burden when it deprives them of economic opportunities. 413 U.S. at 722.

The ex-offender, like the resident alien, can contribute to society in numerous ways, and the society has a further interest in his or her rehabilitation. Therefore, the state should be under a heavy burden to justify the employment restrictions placed on ex-offenders as being necessary to safeguard the particular interest involved.

Even using the less stringent rational relationship test, employment disabilities are suspect. Under this test, it is not sufficient that simply *any* reason for differentiating among classes of persons exist; rather one must look to whether the means utilized to carry out a legislative purpose substantially furthers that end, *U.S. Department of Agriculture* v. *Moreno,* 413 U.S. 528 (1973); *Reed* v. *Reed, 404 U.S. 71 (1971).* Thus although a state has an interest in regulating licenses, it must tailor its regulations to fulfill its purposes in as narrow a manner as possible. For example, a three judge federal court recently held an Iowa civil service ban on employing felony offenders unconstitutional because the statute was not reasonably calculated to achieve its purposes, *Butts* v. *Nichols,* ___ F. Supp.___ (S.D. Iowa) (#72-77-2 Sept. 4, 1974). The Court said that "no consideration is given to the nature and seriousness of the crime in relation to the job sought," *Id.* slip op. at 11, and concluded that "a totally irrational and inconsistent scheme is created which violates the Equal Protection Clause . . . "because "the class defined by (the statute) — all felons — is insufficiently related to the articulated legislative purposes of that section." *Id., slip op. at 12.*

The decision of the United States Supreme Court upholding the constitutionality of California's disfranchisement of ex-felons, *Richardson* v. Ramirez,___ U.S.___ (1974), 42 U.S.L.W. 5016 (June 24, 1974), does nothing to negate this analysis. In that case ex-felons who had been refused registration to vote filed suit in state court, challenging the constitutionality of the California prohibition on equal protection grounds. The California Supreme Court, applying the "compelling state interest" test, concluded that exclusion of all ex-felons from the franchise was unnecessary and overbroad for achieving any valid state interest, *Ramirez* v. *Brown,* 9 Cal. 3d 199, 507 P. 2d 1345 (1973).

On appeal, the Supreme Court reversed the decision on grounds completely independent from the equal

protection analysis. The Court held that Section 2 of the Fourteenth Amendment[11] is an "affirmative sanction" for excluding felons from the vote, "a sanction which was not present in the case of other restrictions on the franchise which were invalidated in (previous decisions)." *Richardson* v. *Ramirez,* ___ U.S.___ at___, 42 L.W. at 5025. Thus, the Court never reached the equal protection arguments, although the dissenters made it clear that they would affirm on those grounds.[12]

Ramirez, then, does not stand as a definitive Supreme Court test of equal protection arguments to challenges against civil disabilities, and the "compelling state interest" test remains a potent and viable constitutional challenge.

Statutory schemes which deny licenses to ex-offenders may also contain provisions which are internally inconsistent with one another, thus undercutting the state's arguments justifying the need for the disqualification. For example, in *Richardson* v. *Ramirez* the ex-felons also argued that some California counties agreed to register them, while others did not, creating a patchwork pattern of registration where voting rights depended upon the county in which one lived. The Supreme Court remanded *Ramirez* to the California courts to consider this aspect of the case, intimating that this "total lack of uniformity" may "work a separate denial of equal protection,"___ U.S.___ at___, 42 L.W. at 5025. Some civil disabilities statutes mandatorily refuse to *issue* a license to ex-felons, but do not provide automatic revocations for those who commit crimes *after* their license has been issued. In this situation the applicant who has been convicted of a felony is classified as unreliable, but a licensee who is convicted of the same felony is not similarly automatically excluded from the same profession. Likewise, an ex-felon may be excluded from some occupations but not from others, although the occupations are similar in the degree of public trust and safety involved.[13]

It is clear, then, that many civil disability statutes are inconsistent with modern constitutional law as well as with current social policy. They do not reflect narrow, precisely drawn statutes which regulate a class of persons because there is a compelling state interest making it necessary to do so. Rather, these statutes

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[11] This little-known clause discusses apportionment for federal elections, but contains a specific reference to the effect that states cannot deny the franchise to citizens "except for participation in rebellion or other crime . . . ".

[12] Justice Marshall, in dissent, concludes that "measured against the standards of this Court's modern equal protection jurisprudence, the blanket disenfranchisement of ex-felons cannot stand." 42 L.W. at 5034.

[13] A similar argument was rejected in *Pordum* v. *Board of Regents,* 491 F. 2d 1281 (2d Cir. 1974). There it was argued that a statute concerned with teachers' misconduct was deficient when compared to a statute regulating conduct in other professions, 491 F. 2d at 1286. However, the Court said that the distinctions between teaching and the other professions justified the differing legislative classifications, *Id.* Thus, a litigator should focus upon *arguably similar professions with differing standards.*

irrationally foreclose large groups of citizens from meaningful opportunities in violation of the Fourteenth Admendment.

III. Cruel and Unusual Punishment

The third constitutional argument against civil disabilities statutes can be made on the grounds of cruel and unusual punishment. The consequences of civil disabilities statutes create such excessive punishments, in addition to any time an offender may have already served in prison after criminal conviction, that they in effect continue to punish a person for his offense throughout his life.

In *Weems* v. *United States,* 217 U.S. 349 (1910), the Supreme Court held that the Eighth Amendment forbids punishment which is disproportionate to the offense. In *Weems,* numerous disabilities flowed from conviction under the statute involved, including deprivation of parental and marital authority, of the power to administer property, of the ability to travel and work freely, and an absolute disqualification from public office, voting and retirement pay. 217 U.S. at 364.

> His prison bars and chains are removed . . . but he goes from them to a perpetual limitation of his liberty. He is forever kept under the shadow of his crime . . . he is subject to tormenting regulations that, if not so tangible as iron bars and stone walls, oppress as much by their continuity, and deprive of essential liberty. 217 U.S. at 366.

Under *Weems,* oppressive civil disabilities statutes also appear to constitute excessive and continuing punishment for a judgment which has, in all other respects, been satisfied. Even before *Weems,* courts have recognized the excessive nature of civil disabilities statutes. In *People ex rel. Robinson* v. *Haug,* 68 Mich. 549, 37 N.W. 21 (1888), the Michigan Supreme Court held that the denial of permission to sell liquor for five years for failure to keep records of sales was excessive punishment in violation of the Cruel and Unusual Punishment Clause.

In *Trop* v. *Dulles,* 356 U.S. 86 (1958), the Supreme Court, in holding that loss of one's citizenship for military desertion during wartime was cruel and unusual punishment, expanded the *Weems* doctrine:

> The question is whether this penalty subjects the individual to a fate forbidden by the principle of civilized treatment guaranteed by the Eighth Amendment . . . While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards . . . The Amendment must draw its meaning from the evolving standards of a maturing society.
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> There may be involved no physical mistreatment, no primitive torture. There is instead the total destruction of the individual's status in organized society. 356 U.S. 86, at 99, 100-01.

Certainly the effects of a civil disability statute are present punishments of ex-felons similar to those in

Weems and *Trop*. Denial of employment opportunities can culminate in the destruction of a person's status in society. The ex-offender is denied the opportunity to achieve a new foothold to overcome his past crime.

Present standards of decency, as demonstrated by society's direction toward rehabilitation, support the contention that employment restrictions as they presently exist violate the "evolving standards of decency" embodied in the Eighth Amendment.

Additionally, the Eighth Amendment forbids punishment based on a person's *status* in society, rather than upon their intentional actions, *Robinson* v. *California,* 370 U.S. 660 (1962). In *Robinson,* the Supreme Court invalidated a statute which made it a crime for a person to be a drug addict, as opposed to using or selling drugs, and therefore made him a criminal solely due to his status as a user of narcotics.. Similarly, *in re Griffiths,* 413 U.S. 717 (1973), a person could not be excluded from the practice of law solely because of her "status as a resident alien."

Civil disabilities statutes extend the punishment that offenders suffer solely because of their status as former criminals. Ex-offenders, unlike the narcotic addict, can do nothing to change their previous status or condition, and their status involves no overt conduct, criminal or otherwise. However, their past conduct haunts them.

Despite the apparent strength of *Weems* and other eighth amendment cases, the argument that disability statutes violate the ban against cruel and unusual punishment appears to be the least successful of all the constitutional challenges. This is true because in *Weems* the disabilities were directly imposed by the statute as part of the defendant's original sentence — there was no question but that this was indeed "punishment." However, the typical disability statute is a separate legislative enactment whose burdens attach not as a part of the original conviction, but as a result of it. These statutes are then justified on grounds of valid regulatory police powers to protect public health and safety, and are not viewed as "punishment." If they are not punishments, then they are not prohibited by the eighth amendment, because that is applicable only to "punishments." See, e.g. *Muhammed Ali* v. *State Athletic Commission,* 308 F. Supp. 11 (S.D.N.Y. 1969).

The litigant's proper response to this position is that the disability statutes are in fact "punishment" — that one must look not only to the purpose of the enactment, but also to its *effect.* But the fact remains that this type of claim has not generally been successful, and sole reliance upon it is not advisable.

IV Conclusion

Challenging disabilities statutes is a relatively virgin area of litigation, but the methods and procedures to be employed are not unique. In many ways the questions are less factually complex, and are straightforward legal issues, argued with case law from analagous situations.

Disability statutes are remnants of an archaic mode of thought, which has now been rejected by most professionals in the criminal justice field. They do not reflect the careful weighing and balancing necessary in accommodating the public's right to protect itself from unscrupulous citizens with the ex-offender's right to "start over." These statutes are the creations of the legislatures, and ultimately those bodies must act to rectify their mistakes. But in the meantime resort to the courts remains, for most ex-offenders, the sole device for vindicating their rights.

END