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THE CHARACTER COMPONENT OF OCCUPATIONAL LICENSING LAWS: A CONTINUING BARRIER TO THE EX-FELON'S EMPLOYMENT OPPORTUNITIES

BRUCE E. MAY*

I. INTRODUCTION

In the 1980s this nation became addicted to imprisonment as a primary way of dealing with social problems and unlawful conduct.¹ The addiction has not changed in the 1990s. United States citizens are becoming increasingly frustrated by crime and violence and are looking to increased sentences and long-term imprisonment as a solution to their frustration.²

Policymakers in the United States must create and adopt rational strategies not only to protect society but also to reduce the number of prison inmates.³ Spending on corrections is the fastest growing item in state budgets.⁴ Recidivists or repeat offenders constitute a large proportion of the prison population.⁵ Reducing recidivism can operate to reduce the overall prison population thereby reducing the burdens on state and federal budgets.

Imprisonment as a method to reduce recidivism has not been effective.⁶ However, facilitating employment opportunities for ex-felons

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1. See David C. Leven, *Curing America's Addiction to Prisons*, 20 FORDHAM URB. L.J. 641, 642 (1993) (discussing the numerous adverse consequences of this nation's addiction to prisons, such as the financial burden to taxpayers, and arguing that if policymakers changed their vision and implemented constructive reforms, they could conquer an addiction that is wasting lives and billions of dollars).

2. For example, in 1994 "three strikes, you're out" legislation or similar proposals have emerged in approximately 30 states. Howard Buskirk, *California Passes a Tough Three-Strikes-You're Out Law*, CRIM. JUST. NEWSL., April 4, 1994, at 6. Three-strikes provisions generally mandate life imprisonment for offenders convicted of a serious felony if they had two or more prior convictions for such offenses. *Id.* California's three-strikes law went into effect on March 7, 1994. *Id.* A three-strikes provision is also part of the federal "Violent Crime Control and Law Enforcement Act of 1994" signed into law by President Clinton on September 13, 1994. 55 CRIM. L. REP. (BNA) 2305, 2365 (1994).

3. The nation's state and federal prison population rose 7.4% in 1993, reaching a record high of 948,881 inmates, nearly triple the level of 1980. *Prison Population Reached New High of 948,881 Last Year*, CRIM. JUST. NEWSL., June 1, 1994, at 6. As of December 31, 1993, overcrowding was estimated at between 18% and 29% above capacity in state prisons and 36% over capacity in federal institutions. *Id.*

4. State spending on prisons increased 7.7% in the 1995 fiscal year (which most states began on July 1) compared to the year before. *States Report Corrections is Fastest-Growing Budget Item*, CRIM. JUST. NEWSL., August 1, 1994, at 5. Prison spending between the fiscal year 1993 and 1994 grew by 9.7%. *Id.*

5. Leven, *supra* note 1, at 642 n.9 (noting a "study of a sample of prisoners released in 1983 from prisons in eleven states indicated that 62.5% were rearrested for a new felony or serious misdemeanor, and 41.4% were returned to prison or jail").

6. Leven, *supra* note 1, at 642.

may help to lower the recidivism rate.⁷ Research indicates that the availability of employment and involvement in crime are inversely related.⁸ A successful societal effort to decrease recidivism must couple correctional programs with a system that makes available a wide variety of employment opportunities to ex-felons upon release.⁹

State occupational licensing laws can operate to reduce the availability of employment opportunities for ex-felons. The statutory requirements for obtaining occupational licenses vary among the states and according to the type of license. Many occupational licensing laws contain a character component. Character components that are not substantially or directly related to the type of licensed occupation prevent ex-felons from pursuing gainful employment opportunities. The lack of employment opportunities contributes to an increase in recidivism.

This article examines state occupational licensing laws and the impact these laws have on the ex-felon who desires to pursue a particular business or occupation.¹⁰ Part II describes occupational licensing laws and explores the nature of licensing and the ramifications of failing to be licensed. Part III examines state occupational licensing laws¹¹ and develops an analytical framework of five categories of laws based on character components. The varying impact of each category on the ex-felon's ability to obtain an occupational license is also described. The extension of these laws to business forms, such as corporations, and the constitutional ramifications of these laws are briefly explored. Finally, Part IV suggests that in order to facilitate the employment of ex-felons

7. The author recognizes that recidivism is a complex problem comprised of multiple causes. The purpose of this article, however, is to focus on one factor that influences the overall rate of recidivism-employment opportunities.

8. Harold L. Votey, *Employment, Age, Race & Crime: A Labor Theoretic Investigation*, 7 J. QUANTITATIVE CRIMINOLOGY 123, 124-25 (1991) (reviewing the literature discussing the relationship between employment and crime and determining through an empirical study that employment opportunities can reduce the tendency to participate in crime). See also Donald R. Stacy, *Limitations on Denying Licensure to Ex-Offenders*, 2 CAP. U. L. REV. 1, 3 (1973) (noting that unemployment may be one of the primary factors in the high rate of recidivism).

9. See Josephine R. Potuto, *A Model Proposal to Avoid Ex-Offender Employment Discrimination*, 41 OHIO ST. L.J. 77, 81 (1980) (focusing on anti-discrimination provision contained in the Model Sentencing and Corrections Act). See also Jeffrey D. Meyers, Note, *County of Milwaukee v. LIRC: Levels of Abstraction and Employment Discrimination Because of Arrest or Conviction Record*, 1988 WIS. L. REV. 891, 911 (1988) (reasoning that two basic policy concerns, rehabilitation via employment and fear of recidivism, are in direct conflict). The availability of employment opportunities is of vital importance to rehabilitation efforts. *Id.* However, placing a convicted offender in virtually any job creates the risk that the ex-offender will use the job to engage in further criminal activity. *Id.*

10. Although the focus is on the ex-felon, much of the discussion also applies to the ex-misdemeanant.

11. A comprehensive review of state occupational licensing laws is beyond the scope of this article. For a comprehensive review of these laws see HUNT ET AL., *LAWS, LICENSES AND THE OFFENDER'S RIGHT TO WORK*, NATIONAL CLEARINGHOUSE ON OFFENDER EMPLOYMENT RESTRICTIONS 1973 (providing an in-depth review of state occupational licensing laws).

and thereby reduce recidivism, states must undergo a review of their licensing statutes and procedures with the dual goal of facilitating employment for the ex-felon and protecting the safety, health, and welfare of society.

II. LICENSING LAWS

A. GENERAL DISCUSSION

In our modern administrative state, the government controls valuable employment opportunities and benefits through its power to confer licenses.¹² Ordinarily, the loss of government employment benefits is not incorporated directly into a criminal defendant's sentence.¹³ Rather, the loss occurs collaterally such as through the denial or revocation of a license.¹⁴

A license is a grant of permission¹⁵ in the nature of a special privilege entitling the licensees to do something they would not ordinarily be entitled to do.¹⁶ Generally, a license is a means for the state to regulate and tax privileges and occupations and the use and disposal of property, but is not a contract¹⁷ or property right.¹⁸

Licensing laws are generally classified into two types, revenue-raising and regulatory.¹⁹ Both types impact an ex-felon intending to start a business or enter an occupation. However, regulatory licenses in the form of occupational licenses present the greatest barrier to the ex-felon. An analysis of these licenses is the focus of this article.

Generally, the purpose of a revenue-raising license is simply to raise revenue for the state.²⁰ A state imposes a fee upon issuing the license to a business or a profession under its power to tax.²¹ Issuing a

12. Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325, 1337 n.56 (1991).

13. *Id.* at 1337.

14. *Id.*

15. *Bray v. State*, 244 N.W.2d 619, 622 (Mich. Ct. App. 1976).

16. *Margola Assoc. v. City of Seattle*, 854 P.2d 23, 32 (Wash. 1993). See generally 51 Am. Jur. 2d *Licenses and Permits* § 1 (1970) (providing a general overview of license principles).

17. *City of LaGrange v. Troup County Elec. Membership Corp.*, 408 S.E.2d 708, 710 (Ga. Ct. App. 1991). See generally 53 C.J.S. *Licenses* § 3 (1987) (noting that a license is not a property right).

18. *Shady Acres Nursing Home, Inc. v. Canary*, 316 N.E.2d 481, 484 (Ohio Ct. App. 1973).

19. Regulatory licenses are sometimes referred to as "protective" or "competency" licenses. See, e.g., *Hydrotech Systems, Ltd. v. Oasis Waterpark*, 803 P.2d 370, 374 (Cal. 1991) (finding that the purpose of regulatory licensing laws is to protect the public from incompetence and dishonesty).

20. *Village of Mogadore v. Coe*, 197 N.E.2d 570, 573 (1963) (quoting BOVIER'S LAW DICTIONARY). See also *S & P Enterprises, Inc. v. City of Memphis*, 672 S.W.2d 213 (Tenn. App. 1983) (distinguishing a tax from a fee in that taxes are for raising revenue and a fee is for regulation).

21. *Richmond County Business Ass'n v. Richmond County*, 165 S.E.2d 293, 295 (Ga. 1968) (describing the distinction between a tax and a license).

revenue-raising license is generally a routine procedure; an applicant pays a fee and obtains a license.²² Generally, the state does not inquire into the background or competence of the applicant.²³ As such, issuing the license does not constitute a "stamp of approval" on the ability or competency of the licensee.

The purpose of regulatory licenses [hereinafter "occupational licenses"], however, is to protect the public interest by regulating certain activities.²⁴ A state's power to issue regulatory type licenses flows from the state's police powers with regard to the protection of the health, morals, and welfare of the public.²⁵ Under its police powers, the state has the power to require a license as a prerequisite to engaging in a business, occupation, vocation, trade, or calling.²⁶ Generally, the state's power, however, does not extend to legitimate occupations or businesses which do not involve a public interest.²⁷

An occupational license is the formal permission granted by a governmental body, generally for a fee, to a person, firm, or corporation, to legally pursue some occupation or to legally carry on some business.²⁸ Modern occupational licensing laws regulate professional as well as unskilled and semi-skilled occupations.²⁹ Typical examples of occupations regulated are: ambulance drivers, billiard room employees,

22. The fee must, however, be reasonable. *See* *Consol. City of Jacksonville v. Dusenberry*, 362 So. 2d 132, 133 (Fla. Dist. Ct. App. 1978) (finding that a \$1000.00 occupational license fee for fortune tellers, clairvoyants, and astrologists was not reasonable and therefore void).

23. A typical example of a revenue-raising license is a local business license that is granted upon submitting a fee and does not require the applicant to demonstrate any level of training, experience, or competence.

24. *Ellestad v. Swayze*, 130 P.2d 349, 353 (Wash. 1942) (determining that a state may impose reasonable conditions on licenses to protect the public). *Alexander v. Director, Dept. of Agriculture*, 444 N.E.2d 811 (Ill. App. Ct. 1983) (finding that the primary purpose of the licensing trades is the prevention of injury to the public).

25. *Rabino v. Commonwealth*, 450 A.2d 773, 775 (Pa. Commw. Ct. 1982) (finding that licensure can be imposed under the police power to protect health, safety, morals, and welfare and citing *Watson v. Morgland*, 218 U.S. 173 (1910)). *See generally* 51 Am. Jur. 2d *Licenses and Permits* § 14 (1970) (providing a general description of the states' police powers in issuing licenses).

26. *Republic Entertainment, Inc. v. Clark County Liquor and Gaming Licensing Bd.*, 672 P.2d 634, 637 (Nev. 1983) (police power of state to license businesses is exclusively legislative, but the power can be delegated to boards and commissions). *See generally* 53 C.J.S. *Licenses* § 5 (1987) (indicating that this power may be imposed on any business or profession).

27. *See, e.g., State v. Ballance*, 51 S.E.2d 731, 736 (N.C. 1949) (holding that licensing of photographers was an unreasonable restriction of a harmless occupation and had no relation to the public health, morals and safety). However, through the efforts of certain trade groups to obtain legislation favorable to their economic positions some type of "public interest" can be found in most occupations and trade callings. *See, e.g.,* Walter Gellhorn, *The Abuse of Occupational Licensing*, 44 U. CHI. L. REV. 6, 10 (1976) (resulting proliferation of occupational licensing has been criticized as not protecting the public but rather protecting the economic positions of certain occupations and in turn adversely affecting occupational mobility and economic competition).

28. *Acorn v. City of New Orleans*, 407 So. 2d 1225, 1228 (La. 1981) (citing *Ewell v. Bd of Supervisors*, 100 So. 2d 221 (La. 1958)).

29. Gellhorn, *supra* note 27.

attorneys, physicians, pharmacists, nurses, barbers, embalmers, septic tank cleaners, real estate professionals, accountants, contractors, and sellers of alcoholic beverages.³⁰

Occupational licenses generally are issued and revoked at the discretion of a governmental agency.³¹ The underlying statute that grants the agency the power to issue licenses must be reasonable and nonarbitrary in its terms and conditions and must not be in restraint of trade.³² Because the occupational license is a regulatory license designed to protect the public, the terms and conditions for issuing the license must relate to the protection of the public good.³³

Occupational licensing laws typically contain two components, a "competency component"³⁴ and a "character component."³⁵ Through training and education, ex-felons can acquire the necessary competency to be licensed in a particular occupation. However, as detailed in Part III, a felony conviction often prevents an ex-felon from satisfying the "character" requirement for obtaining a license.

B. THE IMPORTANCE OF HOLDING A VALID OCCUPATIONAL LICENSE

A valid and proper occupational license is crucial to any individual seeking to enter a regulated trade, business, or occupation. The lack of a valid license has three important ramifications.

First, many state statutes impose penalties or fines for operating without a proper license.³⁶ Statutes imposing penalties for noncompli-

30. See, HUNT ET AL., *supra* note 11, at A-1. See also *The Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV. 929, 1004 (1970) [hereinafter *Collateral Consequences*]. After examining the wide array of occupations that must be licensed, one researcher commented that virtually the only people who remain unlicensed in the United States are the clergy and university professors, presumably because they are nowhere taken seriously. See Gellhorn, *supra* note 27.

31. *Emory v. Texas State Bd. of Medical Examiners*, 748 F.2d 1023 (5th Cir. 1984) (stating that the determination of what sanctions best serve statutory policies is committed to administrative licensing agency's discretion). See generally 53 C.J.S. *Licenses* § 3 (1987) (providing information on occupational licensure).

32. *Brown v. McGarr*, 774 F.2d 777 (7th Cir. 1985) (finding that the qualifications placed on the license of a professional must be reasonably related to the profession and attainable by reasonable study or application); *Hardin v. Croom*, 157 S.W.2d 520, 521 (1942) (finding that the qualifications must not be in restraint of trade). See generally 53 C.J.S. *Licenses* § 20 (1987).

33. *Raymond W. Wineblad, P.A. v. Dept. of Registrations & Education*, 515 N.E.2d 705 (Ill. App. Ct. 1987) (allowing a state to change requirements for a license so long as the requirements bear a reasonable relationship to securing public health, safety, and welfare).

34. The competency component generally requires the applicant to demonstrate a certain level of competence before the agency will issue a license. Competency may be demonstrated through a variety of methods including education, experience, apprenticeships or other training, or by passing an examination administered by the licensing authority.

35. In the exercise of its police power to protect the health, morals, and welfare of the public, the state inquires into the moral character of the applicant.

36. The penalty may consist of an additional monetary liability, the amount of which is measured by the amount of the unpaid tax or license fee. See, e.g., CAL. BUS. & PROF. CODE § 146 (West 1990) (providing violations of licensing statutes and penalties for infractions).

ance must be strictly construed,³⁷ must not be arbitrary or capricious,³⁸ and the penalty must not be excessive.³⁹ Under some statutes an unlicensed person may also be liable to pay a specific rate of interest on unpaid fees in addition to the fines and penalties.⁴⁰ Fines and penalties can have a significant financial impact on a newly established business.

Second, violations of licensing laws can constitute either administrative⁴¹ or even criminal offenses that may be classified as misdemeanors or felonies.⁴² Such a criminal violation could have substantial ramifications for an ex-felon on probation because the criminal offense could constitute a violation of probation for which the ex-felon is returned to prison.

Third, parties cannot enforce a contract if they were not properly licensed at the time of entering into the contract.⁴³ The inability to enforce a contract includes the inability to enforce payment for work or services previously performed.⁴⁴ Without the ability to enforce a con-

37. *Wilcox v. Safley*, 766 S.W.2d 12, 13 (Ark. 1989).

38. *Arkansas State Bd. of Cosmetology v. Roberts*, 772 S.W. 2d 624 (Ark. Ct. App. 1989).

39. *Hecker v. Dept. of Consumer Affairs*, 499 N.Y.S.2d 828 (N.Y. Sup. Ct. 1986) (holding that a fine of \$4,550 imposed upon revocation of a process server's license was excessive and reducing the fine to \$500).

40. *Lexington-Layette Urban County Gov't v. Abney*, 748 S.W.2d 376 (Ky. 1988) (holding an unlicensed person liable for penalties and interest on delinquent occupational license fees).

41. See, e.g., CAL. BUS. & PROF. CODE § 148 (West 1993) (using additional statutes in conjunction with existing statutes for license violations).

42. See, e.g., CAL. BUS. & PROF. CODE § 23301 (West 1985) (providing for misdemeanor and felony charges for selling alcoholic beverages without a license). See generally 53 C.J.S. *Licenses* § 82 (1987) (discussing misdemeanor and felony classifications).

43. RESTATEMENT (SECOND) OF CONTRACTS § 181 (1973).

If a party is prohibited from doing an act because of his failure to comply with licensing, registration or similar requirement, a promise in consideration of his doing that act or of his promise to do it is unenforceable on grounds of public policy if

(a) the requirement has a regulatory purpose, and

(b) the interest in the enforcement of the promises is clearly outweighed by the public policy behind the requirement.

Id.

This rule only applies to the right of the unlicensed party to enforce the contract. See RESTATEMENT (SECOND) OF CONTRACTS § 181 cmt. d (1973).

44. See, e.g., *Hydrotech Systems, Ltd. v. Oasis Waterpark*, 803 P.2d 370 (Cal. 1991) (stating that an unlicensed subcontractor may not recover compensation for his work from either the owner of a construction project or the general contractor). The inability to enforce a contract generally relates to the failure to possess a regulatory rather than a revenue-raising license. RESTATEMENT (SECOND) OF CONTRACTS § 181 cmt. b, illus. 1 (1973).

A, an unlicensed broker, agrees to arrange a transaction for B, for which B promises to pay A \$1,000. A city ordinance requires persons arranging such transactions to be licensed as a result of paying a fee, with no inquiry into competence or responsibility. A arranges the transaction. Since the licensing requirement is designed merely to raise revenue and does not have a regulatory purpose, enforcement of B's promise is not precluded on grounds of public policy.

Id.

The general proposition that a person unlicensed under a revenue-raising license can nonetheless recover compensation is found in real estate brokerage licensing statutes. A real estate broker who is

tract, the unlicensed party has no recourse for the breach of the contract.⁴⁵

The ability to obtain an occupational license is vital to anyone seeking to enter a regulated occupation. The ex-felon's ability to obtain such a license is generally made more difficult when licensing statutes contain character components because these components often operate to exclude ex-felons from obtaining licenses.

III. EXCLUSION OF EX-FELONS FROM OCCUPATIONAL LICENSES

Occupational licensing restrictions on ex-felons are prevalent nationwide.⁴⁶ Countless federal, state, and municipal laws single out the ex-felon for possible exclusion from the majority of regulated occupations.⁴⁷ In some states virtually the only "profession" open to an ex-felon is that of burglar; the ex-felon is barred from other activities because she or he is presumed to be a person of bad moral character, regardless of the nature of the crime or its relevance to the intended occupation.⁴⁸

A definitive study of the prevalence and impact of offender employment restrictions was performed in the early 1970s when there was a growing interest in correctional reform.⁴⁹ The study⁵⁰ disclosed 1,948 separate statutory provisions that affect the licensing of persons with an arrest or conviction record.⁵¹ For example, forty-six states had statutory restrictions impacting the licensing of ex-felons as barbers, twenty-six jurisdictions denied a beautician license to an applicant convicted of a felony, twenty-four jurisdictions denied a practical nurse license to

unlicensed under a pure revenue-raising statute is not precluded from recovering compensation. *See, e.g.,* D.L. Spillman, Jr., Annotation, *Licensed Real-Estate Broker's Right to Compensation as Affected by Lack of License on the Part of Partners, Co-adventurers, Employees, or Other Associates*, 8 A.L.R. 3d 523, 526 (1966).

45. The general proposition that a person who is unlicensed under a regulatory license cannot enforce a contract is generally limited to executory contracts. The cases generally hold that once an unlicensed person has been paid in consideration for the performance of a contract, the payee is not entitled to recover back the money paid on the ground the contract was illegal because of the lack of the license. *See, e.g.,* Maurice T. Brunner, Annotation, *Recovery Back of Money Paid to Unlicensed Person Required by Law to Have Occupational or Business License or Permit to Make Contract*, 74 A.L.R. 3d 637 (1976).

46. For a thorough explanation of various forms of disabilities imposed on the employment of ex-felons see *Collateral Consequences*, *supra* note 30, at 1009-12. *See also* Note, *Civil Disabilities of Felons*, 53 VA. L. REV. 403 (1967) [hereinafter *Civil Disabilities*].

47. *See Collateral Consequences*, *supra* note 30, at 1002-1003.

48. Gellhorn, *supra* note 27, at 13.

49. HUNT ET AL., *supra* note 11.

50. The study is in need of a comprehensive update. However, the study is relied upon as there is no other authority available.

51. The average number of provisions affecting ex-felons for each state was 39. The study identified 307 occupations that required licenses by at least one state.

anyone convicted of a felony, and ten jurisdictions had restrictions impacting the licensing of ex-felons as hearing aid dealers.⁵² The restrictions and outright denials were based on the applicants' past criminal convictions.

A. THE CHARACTER COMPONENT OF OCCUPATIONAL LICENSING

Occupational licensing laws have a significant impact on the ability of an individual to pursue an occupational or business goal. The failure to obtain a proper license may not only result in the imposition of civil or criminal penalties, but may also preclude the ability to enforce a contract. Occupational licensing statutes generally consist of two components: a "competency" and "character" component. Although many ex-felons can fulfill the competency requirement of an occupational licensing law through training, experience, or education, the character component creates a more difficult obstacle for ex-felons.

The two most prevalent grounds for excluding ex-felons from obtaining occupational licenses on the basis of the character component relate to "good moral character" and "conviction of a crime."⁵³ Under many licensing laws, the possession of a felony conviction is an automatic disqualification. In other instances, the possession of a felony conviction is evidence of the lack of moral or reputable character. In still other instances, the possession of a felony conviction is an important consideration only if the conviction involves moral turpitude or relates somehow to the particular activity being licensed.

52. HUNT ET AL., *supra* note 11, at 9-12. Additional occupations in which states restricted former offenders based on a criminal conviction or lack of moral character included: accountant, artificial inseminator, architect, attorney, barber, real estate broker, chiropractor, dental hygienist, dentist, embalmer, engineer, funeral director, insurance agent, nurse, optometrist, osteopath, pharmacist, physical therapist, physician, psychologist, and veterinarian. Lesser known occupations included: astrologer, babcock test operator, butcher, cigarette dealer, dry cleaner, finger weaver, fur dealer, horseshoer, jockey, photographer, poultry technician, stevedore, taxidermist, tree surgeon, water maker, vendor, and weather person. For a comprehensive listing see HUNT ET AL., *supra* note 11, at A-1.

53. *Collateral Consequences*, *supra* note 30, at 1009-11. See also *Civil Disabilities*, *supra* note 46, at 388.

As a framework for analysis, this article classifies state occupational licensing laws into five categories.⁵⁴ These categories consist of licensing laws that:

- (1) make a criminal conviction a bar to obtaining a license ("criminal conviction" statutes);
- (2) require good moral character, good character, or moral character ("good moral character" statutes);
- (3) require reputable character ("reputable character" statutes);
- (4) require honest and trustworthy character ("honest and trustworthy" statutes);
- (5) do not specify a character requirement ("no character component" statutes).

Generally, the application of these categories to occupational licenses indicates that "criminal conviction" and "good moral character" statutes pose the greatest obstacle to the ex-felon's attempt to obtain a license. The "reputable character" and "honest and trustworthy" statutes provide somewhat less of an obstacle.⁵⁵ The "no character component" statutes will not be discussed further as the lack of a character component does not impact the ex-felon's ability to obtain the license. Also, this review of licensing laws indicates that character components may differ from state to state and from occupation to occupation. This variation among states and occupations provides an opportunity for a type of "forum" and "occupation" shopping for an individual who may have difficulty meeting the character requirements in a specific state or occupation.

1. *Criminal Conviction Statutes*

The greatest barriers to the ex-felon's job opportunities are those occupational licensing statutes that categorically exclude an applicant with a criminal conviction from obtaining a license. These statutes are of two types: those that strictly impose an absolute bar and those that allow

54. Other researchers have divided the type into a fewer number of categories. See, e.g., Note, *New Approaches to Civil Disabilities of Ex-Offenders*, 64 KY. L.J. 382 (1976) (defining the types as: (1) those which exclude persons convicted of certain specified crimes; (2) those which exclude persons convicted of crimes involving moral turpitude; and (3) those which exclude persons convicted of felonies) [hereinafter *New Approaches*]. See also HUNT ET AL, *supra* note 11, at 5 (classifying the prohibitions as: (1) Provisions which specifically refer to criminal offenses as grounds for denying a license; (2) Provisions which phrase restrictions or requirements in such a manner as to give licensing agencies wide discretion to refuse a license to an applicant, such as the requirement that the applicant possess "good moral character"; and (3) provisions which bar licensing because of offenses involving "moral turpitude").

55. However, good reputation and honest and trustworthy are more restrictive of the ex-misdemeanant's rights because courts tend to find the conviction of a misdemeanor as evidence of bad character. See *New Approaches*, *supra* note 54, at 389.

consideration of mitigating factors such as the time of conviction, subsequent conduct, rehabilitation, and the nature of the past crime.⁵⁶

Conviction statutes that impose the strict criminal conviction preclusion pose the greatest difficulty because they operate to automatically disqualify an individual regardless of mitigating considerations. For example, in Ohio a criminal conviction automatically barred an applicant from obtaining a dance hall license.⁵⁷ The applicant argued that despite two felony convictions, he possessed the good moral character necessary to operate a dance hall and obtain a license.⁵⁸ Nonetheless, the court determined that evidence of his good moral character *was not* relevant because he possessed two felony convictions and the licensing authority was simply following a rule that all felons are denied licenses.⁵⁹ To obtain a liquor license in South Dakota, the applicant must "never" have been convicted of a felony.⁶⁰ In South Dakota "never" means "never." According to the South Dakota Attorney General, twenty years of good moral character subsequent to a conviction of a felony does not qualify a person for a liquor license.⁶¹

Some criminal conviction statutes, however, do take into account mitigating considerations such as the length of time or subsequent good conduct between a criminal conviction and a license application. Time requirements vary between states and among types of licenses. For example, an applicant for a practical nurse license in South Dakota is automatically denied a license if the applicant had a felony conviction within the last five years.⁶² In Virginia, no racing horse licenses are issued to applicants convicted of a felony or crime involving moral turpitude within ten years prior to the date of application.⁶³ In Florida, a person convicted of a felony within fifteen years before an application is barred from obtaining an alcoholic beverage license.⁶⁴ "Lapse of time" and "subsequent good conduct" are also taken into consideration for a Florida real estate license.⁶⁵ These mitigating factors make it easier for an ex-felon to obtain a license.

56. The nature of the crime includes considerations such as its seriousness and whether it was a misdemeanor or felony.

57. *Darks v. City of Cincinnati*, 745 F.2d 1040, 1043 (6th Cir. 1984) (finding that pursuant to statute an applicant was automatically denied a dance hall license because he possessed two felony convictions).

58. *Id.*

59. *Id.* (emphasis added).

60. S.D. CODIFIED LAWS ANN. § 35-2-6.2 (1992).

61. 50 S.D. Op. Att'y Gen. 173 (1950).

62. S.D. CODIFIED LAWS ANN. § 36-9-49(2) (1992).

63. *Abrams v. West Virginia Racing Comm'n*, 263 S.E.2d 103, 105 (W. Va. 1980) (citing W. VA. CODE § 19-23-8(b)(3), and Rule 712 of the W. VA. RULES OF RACING).

64. 59 Fla. Op. Att'y Gen. 160 (1959).

65. FLA. STAT. § 475.17 (West Supp. 1995).

2. *Good Moral Character Statutes*

Good moral character statutes present the second greatest barrier to the ex-felon obtaining an occupational license. The primary difficulties posed with good moral character statutes are twofold. First, the nature of character is often amorphous thereby making statutory definitions of good character ambiguous and difficult to apply.⁶⁶ Second, despite the legislative and judicial ambiguity of good moral character definitions, one definition has been generally accepted by the courts and licensing agencies: if a person has committed a crime, that person lacks the requisite good character for a license.⁶⁷

In the cases of ex-felons, lack of a workable definition or guideline of good moral character is especially crucial for several reasons. First, a good moral character requirement is common to many licensing statutes. Second, without a reasonably clear legislative or judicial definition of good moral character, licensing boards and agencies can easily rely on the generally accepted definition. Third, equating a criminal conviction with the lack of good moral character essentially converts the good moral character statute into the previously discussed criminal conviction statute which automatically bars an ex-felon from obtaining a license.

Further, without adequate guidelines, different licensing agencies can apply varying interpretations of good character which can lead to inconsistent application of the same licensing statutes. An examination of good moral character statutes reveals the imprecise standards and the struggles of legislatures and courts in attempting to arrive at a concrete definition of the concept.⁶⁸

State legislatures have encountered great difficulty in defining the good moral character requirement of a licensing statute. For instance, in licensing engineers and architects, South Dakota defines "good moral character" as "such character as will enable a person to discharge the fiduciary duties of an architect, engineer or land surveyor to his client and to the public for the protection of health, safety and welfare."⁶⁹ Perhaps understanding the difficulty of defining "good moral charac-

66. Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491, 571 (1985); *Genusa v. City of Peoria*, 475 F. Supp. 1199, 1206 (C.D. Ill. 1979) (stating that the character requirement is so "imprecise as to be virtually unreviewable") (quoting *Bayside Enterprises, Inc. v. Carson*, 450 F. Supp. 696, 707 (M.D. Ky. 1978)); Monheim, *Administrative Law: Professional and Occupational Licensing*, 44 CAL. L. REV. 403, 406 (1956) (criticizing character components as being an imprecise standard on which to base the granting of a license).

67. *Collateral Consequences*, *supra* note 30, at 1010.

68. See, e.g., Comment, *Good Moral Character and Admission to the Bar: A Constitutionally Invalid Standard?*, 48 U. CIN. L. REV. 876 (1979).

69. S.D. CODIFIED LAWS ANN. § 36-18-4.1(5) (1994).

ter," Florida decided not to define "good moral character" when it was made a requirement for issuing a beverage license.⁷⁰ The decision not to define the requirement left the statute open to attack as vague and unconstitutional. Nonetheless, the Florida statute was held not to be unconstitutional for lack of definiteness in specifying the standards of "good moral character."⁷¹

On the other hand, California eliminated the problem of ambiguous definitions of good moral character by effectively eliminating character as a basis for the denial of most licenses.⁷² Prior to 1974, California denied occupational licenses based on, among other things, the conviction of a crime or the commission of any act involving dishonesty.⁷³ In 1974, California amended its licensing statute to provide that a license "shall not be denied, suspended, or revoked on the grounds of lack of good moral character or any similar ground relating to an applicant's character, reputation, personality, or habits."⁷⁴ However, the amendment only applies to evidence of bad moral character *other than* criminal convictions.⁷⁵ Further, the California statute provides that no person applying for a license "shall be required to submit to any licensing board any attestation by other persons to his good moral character."⁷⁶

In the context of professional and occupational licensing, the question of what constitutes "good moral character" has been ordinarily held to be a question of fact for the trier of fact.⁷⁷ For over 100 years, courts have struggled with the meaning of "good moral character" requirement of a licensing statutes. In 1889, a Wisconsin court interpreted the "good moral character" requirement in a statute governing admission to the bar. The court found that the term included all the elements essential to make up such a character, among those being common honesty and veracity.⁷⁸ The United States Supreme Court in 1957 recognized the ambiguity of good moral character by stating:

70. FLA. STAT. ANN. § 561.15(1) (West 1987).

71. *Zemour, Inc. v. State Division of Beverage*, 347 So. 2d 1102 (Fla. Dist. Ct. App. 1977). "[W]e doubt that the legislature could in its infinite wisdom detail each salient standard for good moral character. What constitutes good moral character is a matter to be developed by the facts, evaluated by the agency, with a judicial review of same ever available. . . ." *Id.* at 1103 (citing *White v. Beary*, 237 So. 2d 263, 265-66 (Fla. Dist. Ct. App. 1970)).

72. CAL. BUS. & PROF. CODE § 475 (West 1990 & Supp. 1995).

73. *Id.*

74. *Id.* § 475(c) (West 1993).

75. *Brandt v. Fox*, 153 Cal. Rptr. 683, 689 (Cal. Ct. App. 1979).

76. CAL. BUS. & PROF. CODE § 484 (West 1990).

77. *Albert v. Florida Dep't of Law Enforcement, Criminal Justice Standards & Training Comm'n*, 573 So. 2d 187, 188 (Fla. Dist. Ct. App. 1991); *Bachynsky v. State Dep't of Professional Regulation*, 471 So. 2d 1305 (Fla. Dist. Ct. App. 1985).

78. *In re O.*, 42 N.W. 221, 225 (Wis. 1889).

It can be defined in an almost unlimited number of ways for any definition will necessarily reflect the attitudes, experiences, and prejudices of the definer. Such a vague qualification, which is easily adapted to fit personal views and predilections, can be a dangerous instrument for arbitrary and discriminatory denial⁷⁹

In what seems to be a confusing, circular, and ill-fated attempt to remedy the legislature's inadequate definition of "moral character" under Florida's beverage licensing law,⁸⁰ a Florida court arrived at the following definition: "[Good moral character is] . . . not only the ability to distinguish between right and wrong, but the character to observe the difference; the observance of the rules of right conduct, and conduct which indicates and establishes the qualities generally acceptable to the populace for positions of trust and confidence."⁸¹

Some courts have added to the confusion by attempting to define the concept in terms of moral turpitude. Moral turpitude is generally defined as behavior that violates accepted moral standards of the community.⁸² An Alabama court circularly defined "good moral character" to practice law as "an absence of proven conduct or acts which have been historically considered manifestations of moral turpitude."⁸³ For purposes of granting a liquor license, an Illinois court defined character as "the moral quality of a person that constitutes his intrinsic nature."⁸⁴

In one California case, the court narrowed the application of the good moral character requirement by stating that any defect in good moral character must relate to fitness to engage in the licensed activity.⁸⁵ In that case, the state Department of Motor Vehicles revoked a previously issued license to sell vehicles after discovering the applicant had been convicted of child molestation.⁸⁶ Under a 1975 version of the Vehicle Code pertaining to the issuance of a vehicle salesperson's license, the Department of Motor Vehicles had authority to suspend or revoke a previously issued license even though the statute referred only to the refusal to issue a license when the Department determined that the

79. *Konigsberg v. State Bar of California*, 353 U.S. 252, 263 (1957) (footnote omitted).

80. FLA. STAT. ANN § 561.15(11) (West 1986).

81. *Zemour, Inc. v. State Division of Beverage*, 347 So. 2d 1102, 1105 (Fla. Dist. Ct. App. 1977).

82. BLACK'S LAW DICTIONARY 910 (5th ed. 1979).

83. *Reese v. Board of Comm'rs of Alabama State Bar*, 379 So. 2d 564, 569 (Ala. 1980) (quoting *Konigsberg v. State Bar of California*, 353 U.S. 252, 263 (1957)).

84. *Daley v. License Appeal Comm'n*, 211 N.E.2d 573, 576 (Ill. App. Ct. 1965).

85. *Brewer v. Department of Motor Vehicles*, 155 Cal. Rptr. 643, 647 (Cal. Ct. App. 1979).

86. *Id.* at 648.

applicant was not of good moral character.⁸⁷ However, there was no evidence that the licensee's immoral character related to his fitness to engage in the vocation of selling automobiles.⁸⁸ The revocation was overturned on the basis that a statute could constitutionally bar a person from practicing a lawful profession only for reasons related to fitness or competence to practice that profession.⁸⁹ Despite the problems with defining and applying the good moral character requirement, many states continue to use "good moral character" as a prerequisite to issuing various types of occupational licenses.

3. *Good Reputation Statutes*

Statutes that require "good reputation"⁹⁰ or "reputable character"⁹¹ rather than "good moral character" present a less demanding standard to the ex-felon because they allow somewhat for the amelioration of the past felonious wrong through subsequent good conduct and/or the rehabilitation of the ex-felon. A brief discussion of "reputation" and "character" is useful to illustrate the confusion and differences in applying the two standards.

The words "character" and "reputation" are not interchangeable. "Reputation is that by which we are known and is the total sum of how we are seen by others."⁹² It is a public definition rather than private and refers to the general opinion of a person's character.⁹³ "A 'reputable person' is one worthy of good repute or entitled to the esteem and respect of good citizens generally."⁹⁴

On the other hand, "character is what a man or woman is morally."⁹⁵ Character consists of the actual qualities which belong to an individual. One's character is made up of small circumstances, one of which is not being suspected of misconduct.⁹⁶ Character signifies reality while reputation merely signifies what is accepted as reality.⁹⁷ A person

87. *Id.* at 647.

88. *Id.*

89. *Id.*

90. *See, e.g.*, FLA. STAT. ANN. § 475.17(1)(a) (1995) (providing that the qualification for a real estate license includes having a "good reputation for fair dealing").

91. *See, e.g.*, S.D. CODIFIED LAWS ANN. § 36-21A-30 (1994) (providing that the character component for a real estate license is "reputable character"); *see also* S.D. CODIFIED LAWS ANN. § 36-21A-7 (1994) (defining "moral turpitude").

92. *Taylor v. State*, 346 A.2d 718, 720 n.3 (Md. Ct. Spec. App. 1975) (quoting SHAKESPEARE, OTHELLO, act 3, sc. iii, ln. 270).

93. *People v. Bell*, 209 N.E.2d 366, 371 (Ill. Ct. App. 1965).

94. *Jarrell v. Smith*, 360 S.W.2d 825, 826 (Tex. Civ. App. 1962) (citation omitted).

95. *Bay v. State Board of Education*, 378 P.2d 558, 561 (Or. 1963) (citations omitted).

96. *Giles v. State*, 32 S.E.2d 111, 114 (Ga. Ct. App. 1944).

97. *State v. Leabo*, 249 P. 363, 363 (Or. 1926).

may have a good character but suffer from a bad reputation.⁹⁸ It may also logically be inferred that a person may have a bad character but enjoy a good reputation.⁹⁹

Like good moral character, "good reputation" is not often defined in statutes. Perhaps this is because although reputation and character are quite conceptual attributes, "there can be no legislative definition of them that can automatically attach to or identify individuals possessing them."¹⁰⁰ Consequently, the aid of some executive or administrative agency such as a licensing board must be invoked to evaluate applicants as to their reputation.¹⁰¹

Although ex-felons may be disqualified from obtaining licenses under a good moral character statute because of criminal convictions, they may qualify under a good reputation statute. Because the ex-felon's reputation, not character, is the vital factor in meeting the license requirement, an ex-felon may have an increased ability to obtain a license. For example, if the ex-felon has lived in a community in such a way as to earn the respect of other citizens, or has at least not earned the disrespect of the community, that person would logically qualify for a license under the good reputation statutes regardless of the past conviction. In a sense, the good reputation statutes allow somewhat for the amelioration of the felonious conduct through subsequent good conduct or the rehabilitation of the ex-felon.

Unfortunately for the ex-felon, however, statutes that require only good reputation are in the minority. Further, licensing statutes requiring good reputation as a prerequisite often include a requirement for good character.¹⁰² Coupling good reputation with a good character requirement essentially elevates the statute to the good moral character level thereby making it almost impossible for the ex-felon to obtain a license.

4. *Honest and Trustworthy Statutes*

The honest and trustworthy standard is another common character component used in occupational licensing statutes. For example, Arkansas requires a real estate broker to have a good reputation for honesty,

98. *Curtice v. Dixon*, 68 A. 587, 589 (N.H. 1907).

99. Perhaps the confusion between good character and good reputation stems from the fact that although a person's character cannot actually be proven by asking a witness what kind of person the applicant is, the classic method of attempting to prove a trait of character is by proof of general reputation in the community as to that trait. See, e.g., *State v. Blake*, 249 A.2d 232, 235 (1968).

100. *Hall v. Geiger-Jones Co.*, 242 U.S. 539, 553 (1917).

101. *Id.* However, the process of evaluation in turn, may help the applicant by providing an opportunity to present evidence of good reputation.

102. See, e.g., FLA. STAT. ANN. § 475.17 (West 1991 & Supp. 1995) (specifying that an applicant for real estate license must be of "good character" and have a "good reputation").

truthfulness, and fair dealing.¹⁰³ Alabama requires an auctioneer to be of good repute, trustworthy, and honest.¹⁰⁴ In Georgia, an auctioneer is required to be trustworthy and honest.¹⁰⁵ A real estate broker in Mississippi¹⁰⁶ and a Maryland mutual insurer¹⁰⁷ are required to be honest and trustworthy while a Kentucky weighman is required to have a reputation of being an honest, trustworthy, discreet, sober, and upright man.¹⁰⁸

Several variations of the honest and trustworthy standard are used in licensing statutes. Sometimes the honest and trustworthy standard is used alone. However, honest and trustworthy is often used in conjunction with good character or good reputation.¹⁰⁹ For example, an Alabama¹¹⁰ and Kansas¹¹¹ real estate agent and an embalmer in Arizona¹¹² are required to be honest and trustworthy *and* have a good reputation.

Coupling honest and trustworthy with a good reputation or good character requirement again elevates the statute to the good moral character level thereby making it almost impossible for the ex-felon to obtain a license. However, both standards, the good reputation and the honest and trustworthy standard, present about the same degree of difficulty because they are both typically gauged by a person's reputation.

B. CHARACTER COMPONENTS OF BUSINESS FORMS

The character component of occupational licensing laws applies not only to ex-felons in their individual capacity, but can also apply to preclude the grant of a license to a business form in which the ex-felon has an ownership interest. This can preclude an ex-felon from pursuing certain businesses in association with others. For example, the disqualification for lack of good moral character is often extended to corporations and partnerships by precluding parties with a criminal conviction from having both a *direct or indirect* interest in the business obtaining a

103. ARK. CODE ANN. § 17-35-302 (Michie 1992 & Supp. 1993).

104. ALA. CODE § 34-4-21 (1991 & Supp. 1993).

105. GA. CODE ANN. § 43-6-11 (1993).

106. MISS. CODE ANN. § 73-35-9 (1989).

107. MD. CODE ANN., CORPS & ASS'NS § 6-505 (1993).

108. KY. REV. STAT. ANN. § 352.530 (1992) (making no provision for "weighwoman").

109. ILL. REV. STAT. ch. 45, para. 3-206 (1993) (providing that a nurse's aid must be honest and trustworthy and have good moral character).

110. ALA. CODE § 34-27-33 (1991 & Supp. 1994).

111. KAN. STAT. ANN. § 58-3039 (1993).

112. ARIZ. REV. STAT. ANN. § 32-1333 (1986).

license.¹¹³ State laws concerning the issuance of permits for selling alcoholic beverages illustrate the preclusion.

In California, a partnership application for an on-sale general liquor license can be denied if one of the partners is unable to qualify because that partner possesses a criminal conviction.¹¹⁴ In Minnesota, licenses for the sale of *non*-intoxicating malt liquor may not be issued to a partner of a person with prior criminal convictions.¹¹⁵ Similarly, an applicant for a liquor license in South Dakota must be of good moral character and if the licensee is "a corporation, the managing officers thereof must have like qualifications."¹¹⁶ Florida will not issue a liquor license to a corporation in which any of its officers were convicted of a felony in the past fifteen years.¹¹⁷

As the above cases indicate, licensing laws affect an ex-felon's ability to pursue an employment and business opportunity on an individual level and in association with others. Thus licensing laws can have a far reaching impact on an ex-felon's pursuit of particular employment opportunities.

C. CONSTITUTIONAL RAMIFICATIONS

The far-reaching impact that licensing laws can have on an ex-felon's ability to pursue private employment and a chosen occupation raises questions as to whether such laws violate equal protection or due process, or are unconstitutionally vague.¹¹⁸

Under equal protection analysis, governmental actions that impact a fundamental right or a suspect class generally undergo a "strict scrutiny" test and are upheld only if there is a "compelling" or "overrid-

113. *E.g.*, OHIO REV. CODE ANN. § 4303.29(A) (1989 & Supp. 1993) ("No person heretofore convicted of any felony shall receive or be permitted to retain any permit; nor shall such person have an interest, directly or indirectly, in any permit.").

114. *Coletti v. State Bd. of Equalization*, 209 P.2d 984, 986 (Cal. Dist. Ct. App. 1949).

115. *Minn. Op. Att'y. Gen.* 217-B-5 (June 8, 1953). Minnesota also precludes issuing a liquor license to a person who had a liquor license revoked during the previous five years or to any person who at the time a license was revoked owned an interest of more than five percent in the business, corporation, partnership, association, enterprise, or firm. *See* MINN. STAT. ANN. § 340A.402 (West 1990 & Supp. 1995).

116. S.D. CODIFIED LAWS ANN. § 35-2-6.2 (1992).

117. FLA. STAT. ANN. § 561.15(2) (West 1987 & Supp. 1995). However, under Florida law if a corporation has been unable to qualify for an alcoholic beverage license because *it* had been convicted of an unrelated felony conviction, the conviction will not constitute an absolute bar if the corporation has terminated its relationship with any director, officer, employee, or controlling shareholder whose action directly contributed to the conviction. *Id.* § 561.15(4).

118. *See, e.g.*, *Green v. McElroy*, 360 U.S. 474, 492 (1959) (endorsing the right to obtain employment by stating that, "The right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment.") *But see* *Barsky v. Board of Regents*, 347 U.S. 442 (1954) (holding that a six-month suspension from practice of a physician because he had been convicted of failing to produce subpoenaed papers did not violate the Constitution).

ing" legitimate state purpose.¹¹⁹ However, the pursuit of a particular occupation is not a fundamental right for purposes of equal protection.¹²⁰ Further, convicted felons are not considered a suspect class unless a state statute specifically provides for protection.¹²¹ Instead, the United States Supreme Court applies the "rational basis" test to licensing statutes.¹²² This less stringent test requires only that occupational licensing statutes bear some "rational relationship" to a conceivable legitimate state purpose.¹²³ The "rational relationship" requirement is much more difficult to challenge on equal protection grounds.

Nonetheless, constitutional challenges to statutes that involve a blanket denial of an occupational license to convicted felons have met with some success.¹²⁴ Courts have reasoned that such statutes are not reasonably related to a legitimate state purpose because some felonies are unrelated to a governmental interest in trustworthiness.¹²⁵ However, statutes that "reasonably relate" the nature of the prior conviction to the qualifications or duties of the occupation are constitutionally valid.¹²⁶

Some license applicants have unsuccessfully argued that licensing statutes violate due process by making a criminal conviction an automatic disqualification and thereby creating an irrebuttable presumption of unfitness.¹²⁷ The applicants argue that they are not given the opportuni-

119. *Horton v. Califano*, 472 F. Supp. 339, 343 (W.D. Va. 1979).

120. *Thomas v. Board of Examiners, Chicago Public Schools*, 651 F. Supp. 664, 671 (N.D. Ill. 1986). See also *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976) (holding that a Massachusetts statute making it mandatory for a uniformed police officer to retire at age 50 does not violate the Equal Protection Clause).

121. *Thomas*, 651 F. Supp. at 671. See also, *Furst v. New York City Transit Authority*, 631 F. Supp. 1331, 1336 (E.D.N.Y. 1986) (following *Murgia* in stating that because public employment is not a fundamental right and ex-felons are not a substitute class, the policy need only be rationally related to a legitimate state goal to pass scrutiny under the Equal Protection Clause).

122. *Dandridge v. Williams*, 397 U.S. 471, 485 (1970).

123. *Id.* at 487.

124. See *Brewer v. Department of Motor Vehicles*, 155 Cal. Rptr. 643 (Cal. Ct. App. 1979) (reversing the denial of a license to sell vehicles); *Furst v. New York City Transit Authority* 631 F. Supp. 1331 (E.D.N.Y. 1986) (reversing the denial of city employment to a convicted felon); *Butts v. Nichols*, 381 F. Supp. 573 (S.D. Iowa 1974) (holding that prohibiting convicted felons from occupying state civil service positions violated both Title VII of the Civil Rights Act and the Equal Protection Clause); *Newland v. Board of Governors*, 566 P.2d 254 (1977) (reversing the denial of teacher's credentials to people who have been convicted of misdemeanors).

125. *Lopez v. McMahon*, 253 Cal. Rptr. 321, 324 (Cal. Ct. App. 1988) (denying a child care license to an individual who resided with an ex-felon).

126. *Id.* at 324; *Pieri v. Fox*, 158 Cal. Rptr. 256 (1979) (refusing to deny a real estate broker's license); *Brandt v. Fox*, 153 Cal. Rptr. 683 (Cal. Ct. App. 1979) (refusing to deny a license to a real estate salesperson).

127. E.g., *Schanuel v. Anderson*, 708 F.2d 316, 318 (7th Cir. 1983). See also *Miller v. Carter*, 547 F.2d 1314, 1318 (7th Cir. 1977) (declining to say whether the irrebuttable presumption doctrine analysis was appropriate for this case), *aff'd*, 434 U.S. 356 (1978) (per curiam).

ty to present evidence of fitness and are deprived of due process.¹²⁸ However, courts have rejected this argument.

Occupational licensing statutes have also been challenged as being unconstitutionally vague. The United States Supreme Court has held that noncriminal statutes are unconstitutionally vague if "[people] of common intelligence must necessarily guess at the statute's meaning."¹²⁹ In a Montana case,¹³⁰ an individual was denied a liquor license because of a criminal conviction. The statute on which the denial was based did not specifically state that a criminal conviction was a disqualifying factor.¹³¹ The individual argued that the statute was unconstitutionally vague because it did not describe prohibited conduct sufficiently to give a person of ordinary intelligence fair notice. The Montana court disagreed and reasoned that a legislature could not be expected to detail each salient standard for "good moral character" because what constitutes good moral character is a matter to be developed by facts, evaluated by an agency, and reviewed by a court.¹³² The United States Supreme Court has also dismissed vagueness challenges to moral character requirements on the theory that "long usage" has given "well defined contours" to the moral character requirement.¹³³

The constitutional challenges to occupational licensing laws have generally not been successful. Consequently, the ex-felon remains confronted with the barrier to employment caused by licensing statutes that continue to embrace a variety of character components.

IV. REDUCING OCCUPATIONAL LICENSING BARRIERS TO THE EX-FELON

Recent legislation mandating tougher prison sentences for repeat offenders is expected to significantly increase the prison population and

128. *Darks v. City of Cincinnati*, 745 F.2d 1040, 1044 (6th Cir. 1984) (stating that as long as a classification is rationally related to legitimate state objectives, it may not be attacked on due process grounds by labeling the rule an irrebuttable presumption) (citing *Kirk v. Secretary of Health & Human Servs.*, 667 F.2d 524, 534 (6th Cir. 1981)).

129. *Broadrick v. Oklahoma*, 413 U.S. 601, 607 (1973) (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)).

130. *Broers v. Montana Dept. of Revenue*, 773 P.2d 320 (Mont. 1989).

131. *Id.* at 322-23.

132. *Id.* at 323. *But see, e.g., Genusa v. City of Peoria*, 475 F. Supp. 1199, 1206 (C.D. Ill. 1979) (finding the character requirement so imprecise as to be virtually unreviewable) (quoting *Bayside Enters., Inc. v. Carson*, 450 F. Supp. 696, 706 (M.D. Ky. 1978)); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) (finding further inconsistencies in application of the standard presents problems in providing adequate notice of what conduct constitutes lack of good character).

133. *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 401 U.S. 154, 159 (1971) (focusing on character requirements for becoming an attorney).

the cost to society.¹³⁴ States must renew their efforts to counter the expected increase in the prison population by decreasing the recidivism rate. A successful societal effort to decrease recidivism must include a system that makes available a wide variety of employment opportunities to ex-offenders upon release while protecting the safety, health, and welfare of society.¹³⁵ One method to facilitate the employment of ex-felons is for states to reduce the employment barriers caused by existing occupational licensing laws.

Legislative, administrative, and judicial actions to remove or modify restrictions on the occupational licensing of ex-felons must operate to "deconstruct" the relationship between convictions, character, and occupational licensing statutes. This "deconstruction" can be accomplished by establishing the following policy: (1) make a "direct relationship" requirement an explicit provision of occupational licensing statutes; (2) require consideration of mitigating and rehabilitative factors; and (3) counter licensing restrictions by placing occupational licensing provisions in anti-discrimination and fair employment statutes.

A. MAKE A "DIRECT RELATIONSHIP" REQUIREMENT AN EXPLICIT PROVISION OF OCCUPATIONAL LICENSING STATUTES

States should amend statutes to explicitly require that a particular license can be denied only if there is a "direct" or "substantial" relationship between a prior conviction and the occupation to be licensed. Expressly mandating a direct relationship between the employment activity and the offense committed serves the dual purpose of promoting employment opportunities and protecting the public.¹³⁶

California has implemented the direct relationship requirement in licensing statutes. Under California law, applicants for real estate and liquor licenses can be denied a license if they have been convicted of a crime or have done any act involving dishonesty, fraud, or deceit with intent to benefit themselves.¹³⁷ However, California limits those denials to circumstances where the conviction is substantially related to the qualifications, functions, or duties of the business or profession to be

134. For example, California planned 12 prisons for construction at a cost of \$3-\$4 billion prior to passing its "Three Strikes, You're Out" legislation. To allow for the increase in the number of prisoners because of the legislation, 41 new prisons will be needed by the year 2003 at an estimated construction cost of \$10.2 billion. The estimated minimum annual cost of operating the prisons in 2003 is \$6.8 billion. *Three Strikes . . . and You're In*, CAL. LAW., Aug. 1994, at 74.

135. See Potuto, *supra* note 9, at 81.

136. This approach was taken by the Special Committee to Draft the Model Sentencing and Corrections Act. See Potuto, *supra* note 9, at 88.

137. See CAL. BUS. & PROF. CODE § 481 (West 1990) (stating that various criteria should be considered in denying, suspending or revoking a license in order to ensure that the previously committed crime or act was substantially related to the qualifications of the regulated profession).

regulated.¹³⁸ This specific provision takes precedence over any other general provision that would otherwise deny a license on the basis of a criminal conviction.¹³⁹

B. REQUIRE CONSIDERATION OF MITIGATING AND REHABILITATIVE FACTORS

Legislatures, courts, and administrative agencies must consider factors that operate to mitigate a felony conviction. Optimal implementation of the mitigation requirements could be achieved by specifying mitigating factors, such as the effect of pardons and clemency, in statutes. Whether statutorily expressed or not, such mitigating factors should be considered by courts and administrative agencies.

An example of the use of mitigating factors was illustrated in a District of Columbia case regarding the suitability of ex-felons for admission to practice law. The District of Columbia court considered eleven factors for assessing rehabilitation and the moral fitness of the applicant.¹⁴⁰ These factors are general enough to be applied to an ex-felon in most occupational licensing situations. The factors are:

1. The nature and character of the offenses committed.
2. The number and duration of offenses.
3. The age and maturity of the applicant when the offenses were committed.
4. The social and historical context in which the offenses were committed.
5. The sufficiency of the punishment undergone and restitution made in connection with the offenses.
6. The grant or denial of a pardon for offenses committed.
7. The number of years that have elapsed since the last offense was committed, and the presence or absence of misconduct during that period.
8. The applicant's current attitude about the prior offenses (e.g., acceptance of responsibility for and renunciation of past wrongdoing, and remorse).
9. The applicant's candor, sincerity and full disclosure in the filings and proceedings on character and fitness.
10. The applicant's constructive activities and accomplishments subsequent to the criminal convictions.

138. *Id.*

139. *Brandt v. Fox*, 153 Cal. Rptr. 683, 686 (Cal. Ct. App. 1979).

140. *In re Daniel E. Manville*, 538 A.2d 1128, 1133 n.4 (D.C. Ct. App. 1988).

11. The opinions of character witnesses about the applicant's moral fitness.

Making no distinction between applicants who have been convicted of a felony and those who have not, the District of Columbia court stated that applicants need to prove their qualifications and fitness by a preponderance of the evidence.¹⁴¹ However, the court recognized that serious misconduct required a greater showing of rehabilitation and that in the case of extremely damning past misconduct, a showing of rehabilitation may be virtually impossible to make.¹⁴²

Evidence of a full rehabilitation should be allowed to completely overcome a disqualification for a criminal conviction. For example, California will not allow a criminal conviction to disqualify an individual for certain licenses if that individual obtains a certificate of rehabilitation.¹⁴³ Under the California law, even if the crime relates to the occupation being licensed the licensing board must consider and evaluate all competent evidence of rehabilitation.¹⁴⁴

Pardons, clemency, or convictions that have been annulled or expunged should operate to completely eliminate the effect of a prior conviction for purposes of occupational licensing laws. In California, a full pardon returns to the convicted person all the rights, privileges, and franchises of which she or he had been deprived as a consequence of that conviction.¹⁴⁵ In Florida, a full and unconditional pardon removes the absolute bar to receiving an alcoholic beverage license.¹⁴⁶ However, the licensing board can still take into account circumstances surrounding the prior conviction in determining an applicant's suitability for a license.¹⁴⁷

C. INCORPORATE OCCUPATIONAL LICENSING PROVISIONS IN ANTI-DISCRIMINATION AND FAIR EMPLOYMENT STATUTES

Wisconsin, Hawaii, and New York have anti-discrimination statutes that prohibit employment and licensing discrimination based on criminal convictions.¹⁴⁸ The "goal of [these] statutes is to reduce recidivism by

141. *Id.* at 1134 n.7.

142. *Id.*

143. CAL. PENAL CODE § 4852.01 (West 1982 & Supp. 1995).

144. CAL. BUS. & PROF. CODE § 482 (West 1990).

145. CAL. PENAL CODE § 4853 (West 1982 & Supp. 1995).

146. 59 Fla. Op. Att'y Gen. 160 (1959).

147. *G.W. Liquors of Collier, Inc. v. Department of Business Regulation*, 556 So. 2d 464, 465 (Fla. Dist. Ct. App. 1990). See also Gary L. Hall, Annotation, *Pardon as Restoring Public Office or License or Eligibility Therefor*, 58 A.L.R. 3d 1191 (1974) (summarizing various approaches taken by courts that have addressed this issue).

148. Meyers, *supra* note 9, at 895.

encouraging the gainful employment of [ex-felons] without mandating any form of favoritism toward them.”¹⁴⁹ All three states prohibit criminal record-based discrimination by *any* employer, whether public or private.¹⁵⁰ The statutes provide a mechanism for protecting the public interest and welfare by permitting a licensing agency to consider a conviction if it “substantially relates” or “directly relates” to the circumstances of the particular job.

The New York statute is unique in that it requires consideration of “specific factors” when a question arises under the “direct relationship” exception.¹⁵¹ These factors provide further guidance to a licensing agency for purposes of processing license applications by ex-felons.

These factors are the expressed public policy of encouraging the licensure and employment of convicted offenders, [and considering] the responsibilities necessarily related to the job or licensed activity, the bearing the offense(s) may have upon performance of those responsibilities, the time that has elapsed since the offense(s), the age of the person at the time the offense or offenses were committed, the seriousness of the offense(s), the efforts of the individual toward rehabilitation, and the interest of the employer in protecting the property and welfare of the employer itself, specific individuals or the general public.¹⁵²

V. CONCLUSION

The United States continues to be addicted to imprisonment as the solution to crime and violence. However, the economic and social costs of maintaining large prison populations are substantial. Recidivists make up a substantial percentage of the prison population. Research has shown that employment and the recidivism rate are inversely related. Therefore, by facilitating the employment of ex-felons, the number of recidivists will be reduced thereby reducing the overall prison population.

A proliferation in occupational licensing has resulted in a license requirement for a substantial number of skilled and unskilled employment opportunities. These occupational licenses generally contain both

149. *Id.*

150. *Id.* (finding that several other states have enacted similar legislation covering only public sector employment and licensing decisions). *See, e.g.*, MINN. STAT. § 364.03 (1988); WASH. REV. CODE § 9.96A.101-.050 (1988).

151. Meyers, *supra* note 9, at 896.

152. N.Y. CORRECT. § 753 (West 1987) (summarizing factors for licensing agencies to consider in determination).

a competency and a character component. Although the ex-felon can achieve the necessary competency level, the character component acts as a significant obstacle to obtaining a license and employment. Some states have implemented statutes and procedures to ameliorate the impact of a criminal conviction in obtaining licenses. The statutes and procedures take into consideration how the offense relates to the licensed occupation, the length of time between the conviction and the license application, and other factors showing rehabilitation. However, a substantial number of state statutes and procedures do not provide for such amelioration. In order to facilitate the employment of ex-felons and thereby reduce recidivism, states must undergo a review of their licensing statutes and procedures with the dual goal of facilitating employment for the ex-felon and protecting the safety, health, and welfare of society. In undergoing this review, states must implement changes to "deconstruct" the relationship between convictions, character, and occupational licensing statutes by a policy of giving full effect to a "direct relationship" test and by allowing consideration of mitigating and rehabilitative factors in occupational licensing statutes.