

WASHINGTON UNIVERSITY LAW QUARTERLY

Volume 1952

December, 1952

Number 4

OCCUPATIONAL LICENSING IN THE BUILDING INDUSTRY

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INTRODUCTION

Many articles have lately been written about the great increase in licensing laws in the various states,¹ some of them taking the position that such laws are unnecessary,² even harmful,³ and one writer judging them to be evidence of a return to a sort of guild system.⁴ This paper is an attempt at investigating licensing laws as they apply to the building industry, in the hope of drawing some conclusions as to their effect on the economy of that industry. The investigation starts from an assumption that the mere fact that licensing statutes are numerous is not necessarily

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1. Fellman, *A Case Study in Administrative Law—The Regulation of Barbers*, 26 WASH. U.L.Q. 213 (1941); Graves, *Professional and Occupational Restrictions*, 13 TEMP. L.Q. 334 (1939); Hanft and Hamrick, *Haphazard Regimentation under Licensing Statutes*, 17 N.C.L. REV. 1 (1938); MacChesney, *Regulation of the Personnel of Business*, 58 AM. L. REV. 1 (1924); Mitchell, *Administrative Discretion to Revoke Licenses*, 18 AUST. L.J. 130 (1944); Russ, *Many Tradesmen Required to Procure License Before Practicing Their Craft*, 69 ALBANY L. J. 280 (1907); Silverman, Bennett, and Lechliter, *Control by Licensing Over Entry Into the Market*, 8 LAW & CONTEMP. PROB. 234 (1941); Note, *Occupation Licensing in Illinois*, 9 CHI. L. REV. 694 (1942); Legis., *Recent Regulation of Useful Occupations by License Requirements*, 26 COL. L. REV. 472 (1926); Legis., *The Delegation of Discretion in Massachusetts Licensing Statutes*, 43 HARV. L. REV. 302 (1929); Legis., *Licensing of Professions and Occupations in Nebraska*, 29 NEB. L. REV. 146 (1950); Note, *Administrative Law—Procedural Due Process in Occupational License Cases—Revocation of License*, 20 NEB. L. REV. 24 (1941).

2. Fellman, *A Case Study in Administrative Law—The Regulation of Barbers*, 26 WASH. U.L.Q. 213 (1941); Silverman, Bennett, Lechliter, *Control By Licensing Over Entry Into the Market*, 8 LAW & CONTEMP. PROB. 234, 239, 240 (1941).

3. Hanft and Hamrick, *supra* note 1, at 1.

4. DELANCY, *THE LICENSING OF PROFESSIONS IN WEST VIRGINA* 155 (1938).

an objection to them, and the fact that they sometimes apply to the humbler callings does not automatically indicate their absurdity.

The statutes to be discussed are those having a regulatory, as distinguished from a taxing, function, although it is recognized that the regulatory statutes usually include an incidental tax. The distinguishing mark of such regulatory statutes is the inclusion of conditions to the acquisition of a license other than the mere payment of a fee. To some extent this distinction is arbitrary, since the payment of a fee of any size may be a substantial restriction upon entry into the trade, and in that sense be regulatory, but it is usually enacted for other purposes, and raises other problems. On the other hand some of the regulatory statutes may have incidental revenue-collecting purposes.⁵

I. ECONOMIC CONDITIONS IN THE BUILDING INDUSTRY

It is a starting point for any discussion of this industry to mention the great changes in technique which have occurred within the last fifty years, changes chiefly in tools and materials.⁶ Examples of these changes are the use of concrete and structural steel, the use of machines of all kinds, the greatly increased speed of building due to machines and to greater specialization, and the practice of delivering materials to the job in a condition ready for installation without further work. The effect of most of these changes on the building trades has been greater specialization, together with less of a demand for skill. As the range of activities which a carpenter, mason or painter must engage in is narrowed, and his work is done more with machines, the demands on his skill are less. Nevertheless, compared with workers in manufacturing industries, many of the building trades still require relatively skilled performance. The difference between 1950 and 1900 in the degree of skill required seems

5. *Becker v. Pickersgill*, 150 N.J.L. 51, 143 Atl. 859 (1928) involved a statute which the court said was both a regulation and a taxing measure. There is authority to the effect that the two functions cannot be combined in one statute, and that the measure will be unconstitutional if the fee imposed is more than enough to cover the costs of regulation. *City of Shawnee v. Reid Bros. Plumbing Co.*, 201 Okla. 592, 207 P.2d 779 (1949); 9 MCQUILLAN, *MUNICIPAL CORPORATIONS* 72-77 (3rd ed. 1950). The practical effect of this doctrine is greatly diminished by the difficulty of proving that the fee is grossly disproportionate to the sum required to pay the cost of regulation. A fee of \$25 was upheld in *State ex rel. Remick v. Clousing*, 205 Minn. 296, 285 N.W. 711 (1939).

6. HABER, *INDUSTRIAL RELATIONS IN THE BUILDING INDUSTRY* 1-48 (1930).

to be that the requirements in 1950 can be met by a much shorter period of training.

Another well known and important fact about this industry is its extreme variation in employment, the obvious reason for which is the seasonal character of the work. Other causes for this variation, however, are to be found in the customs of the industry and in the fact that buildings are usually rented in October or May, which practice increases the pressure to build just prior to those months. Also important in producing this effect are the frequent changes of jobs, which are due to the fact that most of the construction work is done by many sub-contractors who hire the men for a particular job and then let them go.⁷ In recent years, the general result of the interaction of those factors has been that during the winter months many men have been unemployed, while during the spring and summer the demand for labor exceeds the supply.⁸ This, of course, has a strong tendency to force up the hourly wage, since the men must be paid enough for about nine months of work to support them all year. Under these circumstances the hourly wage is not a good clue to the total yearly income.

The method of entry into the building trades as a workman, or a contractor, is closely connected with the licensing of the trades, and should be described in some detail to provide a basis for understanding the licensing statutes. During the nineteenth century a man became a skilled carpenter or mason by working for a contractor as a messenger boy, doing odd jobs or running errands, picking up his skill and knowledge as best he could.⁹ As the industry became more specialized and more machines were used, there was less and less need for boys to do this kind of work, and therefore fewer were being trained. The shortage of skilled workmen first became acute following World War I. It was recognized that contractors had little need for untrained men to work as apprentices, and that they were reluctant to take on such men when it was probable that the men would not

7. *Id.* at 95-126; U.S. DEPARTMENT OF LABOR, BULL. NO. 967, EMPLOYMENT OUTLOOK IN THE BUILDING TRADES, pp. 14-20 (1949).

8. U.S. DEPARTMENT OF LABOR, BULL. NO. 967, EMPLOYMENT OUTLOOK IN THE BUILDING TRADES, pp. 16-17 (1949). The extent of seasonal or periodic unemployment of course varies with the individual trade, the special trades (electricians, plumbers) suffering the least from this difficulty.

9. HABER, *op. cit. supra* note 6, at 131.

stay on, since they felt they were training someone else's labor supply. It was also recognized that the unions had a legitimate interest in keeping up the skills of their members, although accusations have been made that this interest has been so applied as to restrict the labor supply.¹⁰ An impersonal element in the situation was the effect of specialization which prevented an apprentice from getting a complete training in any one of the traditional trades, which is merely another way of saying that the broad definition of the trades which had evolved in simpler times was no longer appropriate.¹¹

As a result of the labor shortage, a systematic method of apprenticeship was developed in the 1920's, to provide skilled men in the building trades. This was done through the formation of joint labor and management committees, both local and national, for the organization and supervision of apprenticeship and training.¹² The committees agreed upon the terms of the apprenticeship contract, the length of the apprenticeship, the training to be given, the wage to be paid, and all other details of the program. Often school training was made a part of the apprenticeship program. In many states there are statutes governing apprenticeship and the apprenticeship contract.¹³ The local and national committees which operate this program are composed of representatives of trade unions and employers' organizations.

A typical, well-organized apprentice program exists in the electrical industry, under the national sponsorship of the International Brotherhood of Electrical Workers and the National Electrical Contractors Association.¹⁴ The standards of training are broadly established by the national organizations, with the local committees filling in the details. In general the requirements are that the apprentice be at least eighteen years old, and not over twenty-four, preferably with a high school education, that he must be an apprentice for five years, that he must be

10. *Id.* at 133.

11. *Id.* at 135.

12. *Id.* at 139. See U.S. DEPARTMENT OF LABOR, BULL. NO. 967, EMPLOYMENT OUTLOOK IN THE BUILDING TRADES, p. 38 (1949); U.S. DEPARTMENT OF LABOR, BUREAU OF LABOR STATISTICS, BULL. NO. 459, APPRENTICESHIP IN BUILDING CONSTRUCTION, p. 2 (1923).

13. *E.g.*, GEN. STAT. N.C. §§ 94-1 to 94-11 (1950); WIS. STAT. §§ 106.01, 106.02 (1951); MASS. ANN. LAWS c. 23, §§ 11E-11L (1944).

14. U.S. DEPARTMENT OF LABOR, BUREAU OF APPRENTICESHIP, NATIONAL APPRENTICESHIP AND TRAINING STANDARDS FOR THE ELECTRICAL INDUSTRY, *passim* (1945).

paid from 25% to 50% of the journeyman's wage, and that he should be examined from time to time. The apprentice signs an agreement with the local apprenticeship committee, and also with the employer to whom he is assigned for training. Both work and class-room instruction are given, on subjects covering a rather broad range suggested by the national organizations. The local committees are responsible for transferring the apprentice from one employer to another when one is unable to give the necessary diversity of experience. The ratio between the number of apprentices and the number of journeymen, which is the method of limiting the apprentices admitted to the trade, is left to collective bargaining.

Of course some young men still are trained in nonunion apprenticeships. The difficulties with this are that the protection of the standard indenture contract is not given, their training may be less thorough, and they may have no assurance of admission to the union when their training is completed.

The usual way of becoming a contractor is through the trade itself, since actual building experience is necessary for supervision, unless the contractor has an engineer's training, so that many contractors are ex-journeymen.¹⁵ Thus to a large extent the number of contractors is potentially limited by the number of apprentices and journeymen.

On the employer's side, this industry also exhibits many problems. Although there are some large contracting firms, much of the nation's construction work is done by the small or moderate-sized general contractor, who makes a basic contract with the owner of the premises, and then subcontracts various specialized parts of the work, such as the plumbing, the painting, or the electrical work.¹⁶ The amount of the work actually done by the general contractor's organization varies all the way from almost none, in the case of those contractors acting brokers for the job, to substantially the entire job, in the case of the large construction companies. In purchasing materials, scheduling deliveries, and planning the stages of construction the large firms are efficient, but it is easy to see how the smaller general contractor would be less efficient.¹⁷ The subcontractor is even

15. U.S. DEPARTMENT OF LABOR, BULL. NO. 967, EMPLOYMENT OUTLOOK IN THE BUILDING TRADES, pp. 24-25 (1949).

16. *Id.* at 4-8.

17. HABER, *op. cit. supra* note 6, at 57, 58.

more likely to be a relatively small operator, although here again there are some large firms in the business.¹⁸

The methods of competition in the industry are such that even a large, competently staffed contractor has some difficulty in operating efficiently, while the small individual or firm has an almost impossible task. As is well known, the usual practice, for building of any importance, is to have an architect prepare plans and specifications, on the basis of which bids are invited from contractors.¹⁹ A small contractor is then faced with the problem of estimating how much his own part of the work will cost, and with getting sub-bids from subcontractors. Since no one job is like another, the estimating may be more guess than calculation and is in large part guessing at second hand, as it is based upon the guesses of the prospective subcontractors. Further uncertainty is provided by the fact that the bid is in effect a short sale, because the contractor is making a present bid to supply materials and labor which he will have to buy in the future, at which time their cost may have changed substantially.²⁰ In recent years apparently the only change possible is upward. The effect of this uncertainty is to cause contractors to shade their bids optimistically in order to get the job, and then, when it later appears that costs will be higher than anticipated, to cut corners in various ways. Of course all contractors do not do this, but the temptation is strong, some of the less scrupulous or less well financed contractors do yield, and the result is cheating, violation of specifications, or impairment of the quality of the work.²¹ It is this problem which is often stated as the reason for the passage of licensing statutes.

II. THE PATTERN OF LICENSING STATUTES

The licensing statutes can be generally classified in two ways: (1) according to the trades licensed, or (2) by method of licensing used. The trades licensed, in order of frequency in which statutes are found, are plumbers, electricians, contractors, and a few rare ones such as tile setters, masons, public works contractors, septic tank cleaners, steamfitters, and well drillers.

18. U.S. DEPARTMENT OF LABOR, BULL. NO. 967, EMPLOYMENT OUTLOOK IN THE BUILDING TRADES, p. 6 (1949).

19. HABER, *op. cit. supra* note 6, at 68, 69.

20. *Id.* at 71.

21. *Id.* at 72.

Many of these businesses of course are not usually considered building trades, but the work done seems sufficiently similar to or connected with construction to justify including them.

The methods of licensing are two, with some minor variations. One is by state-wide statute, usually administered by a state administrative agency. The other is by municipal ordinance, pursuant to explicit statutory authority, administered either by a special municipal agency, or by one of the established branches of the municipal government.

As is shown by Appendix I, 38 states and the District of Columbia now require licenses of plumbers, 20 of these states doing so through the passage of municipal ordinances, 21 if the District of Columbia law is classed as a municipal ordinance. Eighteen states require electricians to have licenses, and of these the licensing is handled municipally in eight states. Fifteen states have laws providing for the licensing of contractors.

In compiling these figures, only those states having explicit statutes authorizing municipalities to require licenses were tabulated, so that it is possible that the figures for municipal licensing are too low, if the licensing is done under a general charter which makes no specific reference to licensing laws. The writer had no ready means of determining how many cities do require licenses pursuant to such general charters, and therefore the figures may be inaccurate to that extent.²²

III. LICENSING OF PLUMBERS

The plumbing licensing statutes vary considerably, as is only natural, among the states. Nevertheless, it is possible to discover a general form which the statutory scheme approximately follows. To outline it summarily, this form consists in the application for license to a specified board, the qualification to the satisfaction of the board, usually by examination, and the issuance of the license. The legislation also provides that working as a plumber without a license is a misdemeanor. Licenses are renewable annually without further examination.

Before discussing the statutes in detail, it should be said that

22. For example, cities in Washington apparently license plumbers under their general powers. *Tacoma v. Fox*, 158 Wash. 325, 290 Pac. 1010 (1930) holds a city ordinance constitutional, but cites no statute giving the city authority to pass such an ordinance, and a thorough search of the present Washington code has not revealed any statute. However, there was such a statute at one time, WASH. LAWS 1905, c. 66, p. 126.

the overwhelming majority of cases have held that regulation of plumbing by licensing those who engage in it is a valid exercise of the police power.²³ This trade was the earliest to be regulated in this way, the first statute being passed in 1885,²⁴ and there seem to be only two cases which have held that licensing is not a valid method of regulation,²⁵ one of those having been overruled.²⁶ This leaves only the case of *Replogle v. Little Rock*,²⁷ holding that a state or municipality cannot constitutionally require some test of competency and a license as a prerequisite to doing business as a plumber, although even there it is not entirely clear that the case might not have gone the other way if the statute had been drafted differently. The Arkansas statute had given cities of the first and second classes the authority to license plumbers, after examining them through a board consisting of two licensed master plumbers and two licensed journeymen.²⁸ This board was authorized to examine all applicants as to

23. *Marcet v. Board of Plumbers Examination and Registration of Alabama*, 249 Ala. 48, 29 So.2d 333 (1947); *State ex rel. Shirley v. Lutz*, 226 Ala. 497, 147 So. 429 (1933); *Board of Examiners v. Marchese*, 49 Ariz. 350, 66 P.2d 1035 (1937); *Aarol v. Crosby*, 48 Cal. App. 422, 192 Pac. 97 (1920); *Douglas v. People ex rel. Ruddy*, 225 Ill. 536, 80 N.E. 341 (1907); *State v. Malory*, 168 La. 742, 123 So. 310 (1929); *Commonwealth v. McCarthy*, 225 Mass. 192, 114 N.E. 287 (1916); *Ex parte Smith*, 231 Mo. 111, 132 S.W. 607 (1910); *People ex rel. Stepski v. Hartford*, 286 N.Y. 477, 36 N.E.2d 670 (1941); *Siegnious v. Rice*, 273 N.Y. 44, 6 N.E.2d 91 (1936); *People ex rel. Nechamcus v. Warden of City Prison*, 144 N.Y. 529, 39 N.E. 686 (1895); *Roach v. Druham*, 204 N.C. 587, 169 S.E. 149 (1933); *State ex rel. Bismarck v. District Court*, 64 N.D. 399, 253 N.W. 744 (1934); *Commonwealth v. Dougherty*, 156 Pa. Super. 520, 40 A.2d 902 (1945); *State ex rel. Grantham v. Memphis*, 151 Tenn. 1, 266 S.W. 1038 (1924); *Ex parte George*, 152 Tex. Crim. App. 465, 215 S.W.2d 170 (1948); *Trewitt v. City of Dallas*, 242 S.W. 1073 (Tex. Civ. App. 1922); *Rountree Corp. v. Richmond*, 188 Va. 701, 51 S.E.2d 256 (1949); *Tacoma v. Fox*, 158 Wash. 325, 290 Pac. 1010 (1930); *State ex rel. Winkler v. Benzenburg*, 101 Wis. 172, 76 N.W. 345 (1898); FREUND, *THE POLICE POWER* §§ 639, 640, 646 (1904).

24. Cal. Stat. 1885, p. 12.

25. *State ex rel. Richey v. Smith*, 42 Wash. 237, 84 Pac. 851 (1906); *Replogle v. Little Rock*, 166 Ark. 617, 267 S.W. 353 (1924).

26. *State ex rel. Richey v. Smith*, 42 Wash. 237, 84 Pac. 851 (1906) has been expressly overruled by *Tacoma v. Fox*, 158 Wash. 325, 290 Pac. 1010 (1930), although the latter case says that the Richey case had been overruled by intervening cases, citing a case which upheld the licensing of barbers, and remarking with delightful judicial savoir faire that a plumber can do more harm than a barber.

27. 166 Ark. 617, 267 S.W. 353 (1924).

28. The statute involved was apparently quite similar to the present legislation, ARK. STAT. ANN. tit. 19, §§ 3701 to 3714 (1947), which was passed in 1925, except that the membership of the board of examiners has been changed by adding two city officials. It seems that the state legislature

plumbing, house drainage, and ventilation and, if satisfied of their competency, to issue the necessary certificate. The city of Little Rock passed an implementing ordinance, and the plaintiff sued to enjoin enforcement of both statute and ordinance as unconstitutional. The court seems to have upheld this contention on two alternate grounds, though they were not stated alternately: (1) The legislation was outside the police power, since it did not have any relation to the protection of public health. (2) It gave the board of examiners the power to set "theoretical" examinations which no applicant could pass even if he were an accomplished practical plumber, and "The personal rights guaranteed by our State and Federal Constitutions cannot be taken away on theories."²⁹ In effect the court seems to be saying that the board had arbitrary power, and that therefore the statute was an instrument of monopoly which could be used to exclude honest workmen from their trade. As a matter of statutory construction it would seem that the court's position was highly doubtful, since it would not require much interpolation to read the examination requirement in the light of the statute's purpose to mean only that a reasonably fair test of the applicant's plumbing prowess could be given. It is curious that the court did not rely on the composition of the board to support its assertion that the statute would confer a monopoly on those already in the trade.

The earlier Washington case, *State ex rel. Richey v. Smith*,³⁰ is clearer in its rejection of licensing as a method of regulating plumbing. The court there said, in granting habeas corpus to release a plumber convicted for working without a license, that the legislature could not go beyond certain limits in making rules for the preservation of the health and safety of the community, and that the licensing statute had no such relation to public health as would sustain it. Since it was not within the police power, it violated the Fourteenth Amendment to the Federal Constitution. In so holding the court relied heavily on a vehement dissent by Mr. Justice Peckham in the leading New York case on this kind of legislation, *People v. Warden*.³¹ Although the majority of the New York court held that the licens-

did not take the constitutional doctrine of *Replege v. Little Rock*, 166 Ark. 617, 267 S.W. 353 (1924), very seriously.

29. 166 Ark. 617, 627, 267 S.W. 353, (1924).

30. 42 Wash. 237, 84 Pac. 851 (1906).

31. 144 N.Y. 529, 39 N.E. 686 (1895).

ing of plumbers was a proper exercise of the police power, Mr. Justice Peckham made the ingenious argument that the examination had to be either a test of practical plumbing skill, in which case it would not protect the public health, or a test of knowledge about sanitation and the science of public health, in which case the act would be invalid as requiring scientific knowledge which no mere plumber would be expected to possess. Mr. Justice Peckham went on to say in a vigorous passage:

Taking the act as a whole, . . . its purpose is to enable the employing plumbers to create a sort of guild or body among themselves, into which none is to be permitted to enter excepting as he may pass an examination, the requisites of which are not stated, and where his success or failure is to be determined by a board of which some of their own number are members. . . . It is difficult for me to see the least resemblance to a health regulation in all this.

I think the act is vicious in its purpose and that it tends directly to the creation and fostering of a monopoly.³²

It is worth noting that in both the *Richey* and the *Warden* cases the board was composed of a majority of working plumbers not connected with the state or local government other than in their capacities as members of the board.

There have been many other cases, both before and after the ones discussed, in which the courts have held that plumbing is the kind of a trade which can be regulated by means of the licensing device.³³ These cases usually begin by conceding that the right of an individual to choose an occupation and work at it is one protected by the Fourteenth Amendment to the Constitution and by similar provisions of the state constitutions. The mere statement of this proposition often calls forth eloquence from the courts, and a Texas court as late as 1922 referred to the right to work as a "natural right" and a "sacred right."³⁴ In spite of its natural and sacred attributes, however, the court had no difficulty in holding that it was subordinate to the "paramount, inherent right" of the state to impose reasonable limitations necessary for the public welfare. This court, like many others, then said that plumbing is related to public health, that

32. *Id.* at 543, 39 N.E. at 690.

33. See note 22 *supra*.

34. *Trewitt v. City of Dallas*, 242 S.W. 1073 (Tex. Civ. App., 1922). Similar language was used in *Ex parte Smith*, 231 Mo. 111, 132 S.W. 607 (1910), but the court went on to hold that the individual's natural right must be sacrificed to the good of society.

it must be done with skill for the safety of the public, and that therefore it is a proper subject for police regulation.

To ask the courts to decide whether legislation of this kind is within the state's police power is to ask the impossible. The ultimate issue, as phrased by the authorities, is whether the particular statute is reasonably appropriate to the protection of public health or safety.³⁵ Upon analysis this issue can be more clearly put in the form of two precise questions: (1) Is there sufficient public danger from faulty plumbing to justify regulation of some sort? (2) Is the licensing method of regulation effective enough as a means of eliminating this danger to be within the permissible range of legislative action? Another way of putting the second question is to ask whether the necessity of attacking the danger in this way is great enough to overbalance the desirability of preserving each individual's opportunity to become engaged in the trade without restriction.

It is not difficult to answer the first question in the affirmative, since the very prevalence of plumbing codes and similar regulation of the methods of handling water and wastes seems to show a general agreement among experts that the danger is there. Furthermore, it would be relatively easy to collect more or less objective information which would bear out this conclusion, although the courts seem to assume that such information is not necessary, and decide the question on the basis of their own general knowledge of the world, in such general terms as to justify suspicion that they do not understand the issue.³⁶

It is the second question which seems unanswerable. The extent to which the requirement of an examination and license will reduce the danger from faulty plumbing is certainly beyond the court's powers of discovery. About all the courts can then do is what they appear to be doing in the cases, namely, to speculate

35. *People ex rel. Nechamcus v. Warden of City Prison*, 144 N.Y. 529, 39 N.E. 686 (1895). FREUND, *THE POLICE POWER* § 492 (1904).

36. *People ex rel. Nechamcus v. Warden of City Prison*, 144 N.Y. 529, 39 N.E. 686 (1895) merely states, without mention of facts or evidence, that plumbing is essential to comfort and health. *Ex parte Smith*, 231 Mo. 111, 132 S.W. 607 (1910), asserts that plumbing is intimately connected with public health. It need hardly be pointed out that this does not meet the issue. It is obvious that plumbing is connected with health in the sense that the human being must have water, and waste must be carried off in a sanitary way. But the question which ought to be answered is whether faulty plumbing occurs often enough and is dangerous enough, when it does happen, to call for regulation.

that the danger will or will not be lessened.³⁷ This means that the outcome will be governed by the courts' general attitude toward legislation. The growth of judicial tolerance toward legislative experimentation in such matters³⁸ has therefore led them to hold the licensing statutes valid in the absence of reliable information on the facts. Their reasoning indicates this in its rather perfunctory statements that plumbing is related to public health, that licensing is related to plumbing, and that therefore licensing protects public health and is valid. The result of this judicial tolerance thus is the relinquishment by the courts to the legislatures of the balancing of interests, the determination of complex questions of fact, and the evaluation of methods of control in this field, to a very great extent. The same tendency is often stated by the courts themselves in terms of a presumption that the legislature's action is valid, if a state of facts might reasonably exist which would justify it.³⁹ The limits of this presumption are rather nicely set out by the cases invalidating the licensing of photographers,⁴⁰ but the plumbing cases, and the electricians' and contractors' cases, appear well within those limits. Much of the criticism of these statutes fails to recognize that they present a legislative, rather than a judicial question, for the most part.

The precise method of regulation used by licensing statutes is of course not to be overlooked in its influence on the view taken by courts of the validity of the statute as a whole. It may well be that a statute could be drafted which would largely reconcile the conflict of interests present in most such statutes, and as between individual statutes some are clearly less appropriate than others to the ends stated. The foregoing account of the broad issue of the constitutionality of licensing was separated from the details of specific statutes only for convenience, and also because of the fact that many details can be held invalid without invalidating the statute as a whole. In general it is accurate to

37. *E.g.*, *Ex parte Smith*, 231 Mo. 111, 132 S.W. 607 (1910) (certification of plumbers is some guaranty of skill and guards against unsafe work); *Douglas v. People ex rel. Ruddy*, 225 Ill. 536, 80 N.E. 341 (1907) (licensing reduces the risk from careless inspection).

38. In the federal court system this attitude is exemplified by *Nebbia v. New York*, 291 U.S. 502 (1934).

39. *Tacoma v. Fox*, 158 Wash. 325, 290 Pac. 1010 (1930).

40. This legislation has been held invalid in all states in which it has been tested. The cases are collected in Note, 7 A.L.R.2d 416 (1949).

say that the courts are somewhat more meticulous in examining the method of licensing adopted by a particular statute than when determining the validity of the system as a whole, although here again doubts are usually resolved in favor of validity.

This brings the discussion to a more detailed examination of the existing statutes. The provisions which will be discussed do not of course appear in all statutes, but they are common enough to justify looking at them closely in order to judge their efficiency in accomplishing the supposed purpose of the legislation.

Most licensing statutes classify plumbers in three groups, master plumbers, journeymen, and apprentices,⁴¹ often with a requirement that apprentices must register.⁴² Some make no provision for apprentices.⁴³ Master plumbers are those independently in business, acting as plumbing contractors.⁴⁴ The statutes often require that a master plumber have an established place of business.⁴⁵ Journeymen are defined as men competent to perform the ordinary practical work of plumbing and are distinguished from master plumbers in that they do not plan, supervise or lay out work, do not employ others, and do not engage in contracting for plumbing work but work for wages.⁴⁶ Another way of describing masters and journeymen is to call them employers and employees.⁴⁷ Apprentices are of course untrained and inexperienced men learning the trade.⁴⁸

Following the classification of those in the trade many statutes include a more or less detailed definition of plumbing. The word

41. *E.g.*, COLO. STAT. ANN. c. 126, § 22 (1935); ILL. ANN. STAT. c. 111 ½, § 116.2 (Supp. Oct. 1951); KY. REV. STAT. § 318.010 (1948); ME. REV. STAT. c. 22, § 171 (1944); N.M. STAT. ANN. c. 51, § 51-3001 (Cum. Supp. 1951); N.D. REV. CODE, § 43-1801 (1943).

42. *E.g.*, WIS. STAT. § 145.08 (1951).

43. *E.g.*, ILL. ANN. STAT. c. 111 ½, § 116.1-116.35 (Supp. Oct. 1951).

44. The Wisconsin definition is typical: "A master plumber is any person skilled in the planning, superintending and the practical installation of plumbing and familiar with the laws, rules and regulations governing the same." WIS. STAT. § 145.01 (1951).

45. *E.g.*, TEX. STAT., REV. CIV. art. 6243 (Cum. Supp. 1951).

46. The Maine statute gives the usual definition: "A 'journeyman plumber' shall mean any person who customarily performs the work of installing plumbing and drainage under the direction of a master plumber, or, not being a master plumber as herein defined, does plumbing repair work as a regular part time occupation." ME. REV. STAT. c. 22, § 171 (1944).

47. KY. REV. STAT. § 318.010 (1948).

48. "The term 'plumber's apprentice' shall mean any person other than journeyman or master plumber who is engaged as his principal occupation in learning and assisting in the installation, alteration, repair and renovating of plumbing." N.M. STAT. ANN. § 51-3001 (Cum. Supp. 1951).

is usually defined to cover work on pipes, fixtures and appliances for the conduction of water and drainage within buildings, and between buildings and the sewer service laterals and water mains in the streets, together with work on ventilation systems connected with water and sewer systems in the building.⁴⁹ It thus does not usually cover work on gas piping systems, or on steam systems, except to the extent that they are part of the water systems.⁵⁰ Various kinds of activity not ordinarily done by plumbers have been held to be within the licensing acts, such as for example the incidental plumbing necessary to connect washing machines and sinks to the water system⁵¹ and the caulk-

49. The Wisconsin statute is the most detailed: "(1) Plumbing. In this chapter, 'plumbing' means and includes: (a) All piping, fixtures, appliances and appurtenances in connection with the water supply and drainage systems within a building and to a point from three to five feet outside of the building. (b) The construction and connection of any drain or waste pipe carrying domestic sewage from a point within three to five feet outside of the foundation walls of any building with the sewer service lateral at the curb or other disposal terminal, including private domestic sewage treatment and disposal systems and the alteration of any such system, drain or waste pipe, except minor repairs to faucets, valves, pipes, appliances and removing of stoppages. (c) The water service piping from a point within 3 to 5 feet outside of the foundation walls of any building to the mains in the street, alley or other terminal and the connecting of domestic hot water storage tanks, water softeners, and water heaters with the water supply system. (d) The water pressure system other than municipal systems as provided in Chapter 144. (e) A plumbing and drainage system so designed and vent piping so installed as to keep the air within the system in free circulation and movement, and to prevent with a margin of safety unequal air pressures of such force as might blow, siphon or affect trap seals or retard the discharge from plumbing fixtures, or permit sewer air to escape into the building." Wis. STAT. § 145.01 (1951).

50. The New Mexico statute is exceptional in including gas and oil pipe: "The word 'plumbing' shall mean the installing, altering, repairing and renovating of all plumbing fixtures, fixture traps, and soil, waste, and vent pipes with their devices, appurtenances, and connections, through which water, waste, sewage, gas, oil and air are carried within or adjacent to the building or other structures in which such plumbing work is being performed." N.M. STAT. ANN. § 51-3001 (Cum. Supp. 1951).

City of Birmingham v. Allen, 251 Ala. 198, 36 S.2d 297 (1948) held that installation of short pieces of water pipe in connection with the connection of gas appliances constituted "plumbing." "Plumbing" was also held to include the work of steamfitters who tapped a water line in a factory, led the water to acid cooling tanks and from there into the drainage system. Commonwealth v. Dougherty, 156 Pa. Super. 520, 40 A.2d 902 (1945). Commonwealth v. Leswing, 135 Pa. Super. 485, 5 A.2d 809 (1939) held that an electrician violated the plumber's licensing statute by installing and connecting an electric water heater.

51. Rountree Corp. v. Richmond, 188 Va. 701, 51 S.E.2d 256 (1949). (The defendant, a corporation in the retail furniture business, was held within the licensing statute when it installed appliances for customers.) But see note 54 *infra*.

ing of joints in sewer pipe.⁵² On the other hand, many courts have refused to hold that activities not usually done by plumbers requires a license. Clearing out drains with a mechanical cutting device,⁵³ installing hot water heaters,⁵⁴ repair of boilers,⁵⁵ and the installation of water softeners⁵⁶ have all been excluded from the requirements of licensing acts, but of course the language of the statute in question is decisive in determining whether a given activity is or is not "plumbing."

Licensing statutes provide that anyone engaging in plumbing must have a license, and impose penalties of various kinds for working without a license, which is usually classified as a misdemeanor.⁵⁷ Other sanctions are provided both by statute and the courts. At least one statute provides that the enforcing agency may sue to enjoin the unlawfully working plumber.⁵⁸ It is also generally held, whether by express statutory authority or not, that persons unlawfully working without a license may not recover on contracts made by them in the course of the work, on the theory that such contracts are illegal and void.⁵⁹ This

52. *State v. Foss*, 147 Minn. 281, 180 N.W. 104 (1920).

53. *State v. Gottstein*, 206 Minn. 246, 288 N.W. 221 (1939).

54. *Bregman v. Winkler*, 120 Misc. 483, 198 N.Y. Supp. 758 (Sup. Ct. 1923); *Margolys & Co. v. Goldstein*, 96 N.Y. Supp. 185 (Sup. Ct. 1905).

55. *People v. Osborne*, 149 Misc. 676, 269 N.Y. Supp. 409 (County Ct. 1933); *Garrison v. D.C.*, 30 App. D.C. 515 (1908).

56. *State v. Harrington*, 229 Iowa 1092, 296 N.W. 221 (1941) is a strong case, since it held that a requirement that water softeners must be installed by a licensed plumber was invalid as not being related to public health. In effect this means that "plumbing" could not constitutionally be defined so as to include such work. The case is probably not in accord with the general run of authority.

57. *E.g.*, D.C. CODE §§ 2-1406, 2-1408 (1940); ILL. ANN. STAT. c. 111 ½, § 116.3 (Supp. Oct. 1951); MICH. STAT. ANN. §§ 14.455, 14.462 (1937); MONT. REV. CODES ANN. §§ 66-2401, 66-2411 (Cum. Supp. 1951); WIS. STAT. §§ 145.06, 145.12 (1951).

58. LA. REV. STAT. tit. 37, § 1373 (1950).

59. 6 WILLISTON, CONTRACTS § 1766 (Rev. ed. 1938). *Lund v. Bruffat*, 159 Wash. 89, 292 Pac. 112 (1930), noted in 26 ILL. L. REV. 347 (1931), held that there could be no recovery for work done when the plaintiff had no license at the time the contract was made. The plaintiff was not allowed to foreclose a lien for the work. The difficulty here is that at the time the contract was made and the work performed the plumbers license law was unconstitutional, under the Richey case. After the trial in this action the Richey case was overruled, and this decision therefore gives retroactive effect to the overruling. It would seem that the plaintiff here should have been able to rely for his law on the decision of the highest state court.

Barriere v. Depatie, 219 Mass. 33, 106 N.E. 572 (1914) allowed an unlicensed contractor to recover for work done, where the work was actually performed by a licensed master plumber and a licensed journeyman, both employed by the contractor for weekly wages.

means that a plumber who contracts for work in violation of the licensing statute will be entirely unable to recover for any work or materials expended on the job, on either a contract or a quasi-contract theory of liability. As a sanction this may be much more severe in many cases than a mere fine for violation of the statute.

The method of obtaining a license varies considerably but generally requires a written application and payment of an examination fee, which varies considerably in amount among the states.⁶⁰ The fee is usually larger for a master than for a journeyman. It is sometimes held that the fee must be only large enough to cover the reasonable expenses of examination and licensing, but the cases are not in agreement on the point.⁶¹ The application is quite often made on a form supplied by the examining authority, which requires the usual information such as name, address, age, place of birth, and many states may require additional statements concerning the applicant's moral character.⁶² The last requirement, however, does not seem to be general, and communications from some members of administrative boards have indicated that they think it either unnecessary or undesirable.⁶³ It would seem highly desirable to maintain as much objectivity in the qualifying process as possible, and therefore that there should be no attempt to make a character investigation of the applicant. A finding by the administering board that the applicant's character is defective in some way and that

60. In Illinois the original master's fee is \$25, the journeyman's \$15. ILL. ANN. STAT. c. 111 $\frac{1}{2}$, § 116.32 (Supp. Oct. 1951). A master's fee of \$100 under the former statute was held unreasonable and invalid by *People v. Brown*, 407 Ill. 562, 95 N.E.2d 888 (1950). In Kentucky the corresponding fees are \$25 and \$5. KY. REV. STAT. § 318.050 (1948). In Maine they are \$15 and \$3. ME. REV. STAT. c. 22, § 175, 176 (1944). In New Hampshire inflation has not yet been felt, the fee being \$1 originally, and \$.50 for renewal. N.H. REV. LAWS c. 183, § 5 (1942).

61. See note 5 *supra*.

62. D.C. CODE tit. 2, § 2-1403 (1940); MICH. STAT. ANN. tit. 14 § 14.458 (1948); PA. STAT. ANN. tit. 53, § 4071.1 (Cum. Supp. 1951); TEX. STAT., REV. CIV. art. 6243-101, § 8 (1948); UTAH CODE ANN. § 79-14-3 (1943). The New York City Municipal Civil Service Commission makes an investigation of the applicant's "moral standing in the community," although that does not seem to be required by the New York City Administrative Code. Letter dated November 27, 1951 from the Director, Examining Division, New York Municipal Civil Service Commission, to the writer. See also N.Y. City Administrative Code § 561-1.0, 816-2.0 (1938).

63. Letter from the Illinois Department of Registration and Education to the writer, dated Nov. 14, 1951. The letter indicated that a character investigation is not necessary for a trade, though it might be for one of the professions.

he is therefore not eligible for a license can hardly be reviewed by a court and may too easily become the means of making biased or unfriendly exclusions or of arbitrarily limiting the numbers to be admitted to the trade.

One requirement which is found in many states is that of a stated number of years of experience, without which the applicant is not allowed to take the examination. For instance in Wisconsin, under the regulations of the State Board of Health, a five-year apprenticeship must be served before the apprentice can take the examination for journeyman, and the journeyman must work as such for five years before being able to take the master's examination, except that if the journeyman is a graduate of a recognized trade school in Wisconsin, with two years' practical experience as apprentice, he may take the examinations after only four years as a journeyman.⁶⁴ In Colorado the apprenticeship requirement is three years, and the applicant must work as a journeyman for one additional year before being able to take the master's examination.⁶⁵ Under the statute in force in Illinois until 1951 the elapsed time required for becoming a master was from ten to eleven years, depending on whether the man had credit for college work.⁶⁶ One cannot help looking with some skepticism on such statutes, when the equivalent time for becoming eligible to take examinations for the legal profession varies between five and seven years, and for the medical profession is approximately nine years, taking the regular four year college course into account. There is a strong temptation to suspect that the explanation for excessive training requirements is not that more knowledge and experience is required to handle a plumbing job than to perform an appendectomy, but rather that the members of the plumbing trade are anxious to restrict the entry of competitors into their business. At any rate the Illinois court has held that this section of the Illinois statute is unconstitutional, as imposing requirements which are not in accord with the realities of the trade.⁶⁷ Other cases have ap-

64. Wis. Stat. §§ 145.02, (1951) (4); Rules of the Wis. Board of Health, Bureau of Plumbing and Sanitary Engineering, § 6, § 9 (9th ex., 1948).

65. COLO. STAT. ANN. c. 126, § 4 (1935); Colo. State Plumbing Code Art. XIX, § 143 (April 9, 1951).

66. *People v. Brown*, 407 Ill. 565, 95 N.E.2d 888 (1950).

67. *Id.* at 580, 95 N.E.2d at 896. The court found that the minimum time for getting instruction was not in accord with the realities of the trade, in view of the fact that plumbing is not a profession.

proved long training periods.⁶⁸ The presence of such unreasonable requirements in the statute would lend some support to the statement of Mr. Justice Peckham in the *Warden* case.⁶⁹ If, as seems to be the case, many states can protect the public health without any time-of-service requirement, it is hard to see why such very long periods are necessary for that purpose. In support of this argument is the statement of the Public Health Engineer for the Colorado Department of Public Health to the effect that an investigation of examination results in that state showed no relation between the length of apprenticeship time and the grades acquired.⁷⁰ It would also seem undeniable that such long periods of required training discourage good men from entering the trade, especially when today it is possible to earn good wages in other industries with relatively little training.⁷¹

A recent Illinois case, *People v. Brown*,⁷² raises some interesting questions about the training and experience requirements of these statutes. In reversing a conviction for working as a master plumber without a license, and holding three sections of the former Illinois statute unconstitutional, the court relied chiefly on the restrictive and monopolistic pattern of training imposed by the statute. Under it a man could learn the trade as an apprentice, or work as a journeyman plumber only when employed by, and under the direct supervision of, a licensed master

68. *Benedetto v. Kern*, 167 Misc. 831, 4 N.Y.S.2d 844 (Sup. Ct. 1938), *aff'd mem.*, 255 App. Div. 753, 7 N.Y.S.2d 227 (1st Dept. 1938), *aff'd mem.*, 279 N.Y. 798, 19 N.E.2d 92 (1939). The court here said that the requirement of the New York City administrative code, pursuant to the state statute, of ten years of experience, or, in the alternative, of three years plus an engineering degree from an approved school, before a man could become a master plumber, was not so unreasonable or arbitrary as to be an unwarranted interference with constitutional rights. The requirement of five years as a journeyman was upheld in *People ex rel. Stepski v. Hartford*, 286 N.Y. 477, 36 N.E.2d 670 (1941). On the other hand there is a dictum in *Commonwealth v. McCarthy*, 225 Mass. 192, 114 N.E. 287 (1916) to the effect that the board's requirement of three years' experience as a journeyman was invalid, but on statutory, rather than constitutional grounds.

69. *People ex rel. Nechamcus v. Warden of City Prison*, 144 N.Y. 529, 39 N.E. 686 (1895).

70. Letter from the Public Health Engineer of the Colorado Department of Public Health to the writer, dated Nov. 16, 1951, saying that the time requirement for journeyman applicants was reduced from five years to three years, and that ". . . investigation of the examination results has disclosed that there is no relation between apprenticeship time and grades acquired."

71. HABER, *op. cit. supra* note 6, at 131, 132.

72. 407 Ill. 565, 95 N.E.2d 888 (1950). See also *Sioux Falls v. Kadinger*, 50 N.W.2d 797 (S.D. 1951).

plumber. The court made three points in this connection: (1) This gave master plumbers a complete and arbitrary control over the entry of new men into the trade, since the masters had unlimited power to hire and fire whom they pleased. (2) The monopoly on instruction given to masters was unreasonable because the trade could be learned at school as well as when working for a licensed master. (3) The requirement of the employment relation between masters and all others in the trade had no relation to the purposes of the act. The first two points seem entirely valid and raise real objections. The third is of less importance, practically, since the requirement that a licensed master plumber supervise all jobs is probably unobjectionable, and in most cases the licensed master plumber will be the employer. Therefore the employment relation will generally exist between master plumbers on the one hand, and journeymen and apprentices on the other, except where the employer is a corporation. So long as the act provides for supervision by master plumbers, the elimination of the provision that journeymen and apprentices must be employed by master plumbers is thus of little practical benefit. The court does not go so far as to hold that the requirement of supervision is invalid.⁷³

The decision in the *Brown* case emphatically rejected the highly anti-competitive scheme of control over the plumbing trade set up by the Illinois act, thereby making it plain that there are some constitutional limits to the use of the licensing power in this field, and for this the court is to be congratulated. There is some evidence that this scheme of control had been quite effective in preventing the entry of new firms and individuals into the business,⁷⁴ so that the case ought to have a bene-

73. *Ex parte Davis*, 118 Ore. 693, 247 Pac. 809 (1926) supports the *Brown* case in holding that the requirement of an employer-employee relation had no relevance to the purposes of the statute. It said that it would be valid to require supervision by a master plumber, but that there is no need for the journeyman to be paid by the master who supervises him.

A Michigan case, *Hench v. Michigan State Plumbing Board*, 289 Mich. 108, 286 N.W. 176 (1939), goes so far as to say in a dictum that the requirement of supervision by a master is superfluous and invalid where journeymen are also licensed, the licensing of all plumbers being enough to protect public health.

74. A letter from the Plumbing Division, Department of Registration and Education of Illinois to the writer, dated Nov. 14, 1951, stated that the average number of persons licensed as master plumbers per year during the period from 1935 to the date of the decision in *People v. Brown* was only forty-four. The same letter states that the mortality rate of master plumbers during this period was one hundred and one per year. Thus ap-

ficial effect on the building industry. Unfortunately, other parts of the opinion leave considerable doubt about the extent to which the statute was invalid. For instance, the court seemed to say⁷⁵ that any minimum requirements for training would be invalid, because they do not take account of differences in the capacities of individuals to learn the trade. What the court probably meant here was that the periods in the statute were so long that many persons could become qualified long before the expiration of the statutory time. Further the court seemed to object to the concurrent existence of two entirely different standards of instruction, one for Chicago and one for the entire state. Under the statute⁷⁶ Chicago was given the authority to examine and license plumbers, and its license was to be good throughout the state. Likewise the state license was made good in Chicago. This same provision is contained in the new statute,⁷⁷ passed in 1951, however.

Once the would-be master or journeyman has qualified to take the examination, his difficulties are still not ended. Some statutes go to considerable lengths to set out the type of examination which shall be given,⁷⁸ but it is probably more common to find merely a statement that the administering agency shall conduct examinations, as in Kentucky;⁷⁹ or that the examinations may be in whole or in part in writing and shall cover both the theoretical and practical nature of plumbing, as in Maine.⁸⁰ Since many of the agencies which administer the examinations have been given the rule-making power by statute, advance notice of the nature of the examinations may sometimes be obtained from the agency's regulations, as in Colorado. The Colorado regulations provide that the examination will consist of

parently the statute operated to reduce the number of individuals in the business, in the face of a vast expansion in building construction. For an account of restrictive practices in the building industry in Chicago, see *Hearings before TNEC Subcommittee on Trusts, Investigation of Concentration of Economic Power*, Hearing 76th Cong., 2d Sess., No. 11, 5251, 5255 (1940).

75. *People v. Brown*, 407 Ill. 565, 580, 95 N.E.2d 888, 896 (1950).

76. ILL. REV. STAT. c. 111 1/2, § 103 (1935).

77. ILL. REV. STAT. c. 111 1/2, § 116.8 (Supp. Oct. 1951).

78. MICH. STAT. ANN. § 14.458 (1937); UTAH CODE ANN. §79-14-4 (1943) (very detailed provisions concerning content of examination).

All statutes provide that persons active in the plumbing business at the time of passage of the licensing act, or sometimes for a specified period before passage, may be licensed without examination.

79. KY. REV. STAT. § 318.040 (1948).

80. ME. REV. STAT. c. 22, § 177 (1944).

“written questions, charts, practical lead wiping and estimating and shall cover the theory, interpretation of charts, blue prints, the practice of plumbing, and may, in part, be oral.”⁸¹ It is usual also to have the examination cover the state plumbing code.⁸²

Some of the cases have restrained what are thought to be abuses of the examining procedure, by refusing to approve examinations which cover material beyond the competence of the ordinary plumber.⁸³ Other cases have gone quite far to find that the legislature has improperly delegated its authority when it has authorized an administrative board to prepare and supervise the examination of applicants, without at the same time setting standards for the examination.⁸⁴ In many of the latter cases it would appear that the standards for the examination could be easily inferred from the purposes of the statute, so that it is hard to see the value of requiring the legislature to spell out

81. Colo. State Plumbing Code, Art. XVIII, § 140 (April 9, 1951).

82. *E.g.*, N.M. STAT. ANN. §51-3008 (1941).

83. U.S. *ex rel.* Thomas v. Kerr, 5 App. D.C. 241 (1895), held that applicants for a license could not be required to show a thorough knowledge of the sciences of hygiene and sanitation. The court, at page 252, said, “All that can lawfully be required of an applicant is that he shall be possessed of such practical knowledge as that he may be able to understand the details of the plumbing regulations, to comprehend plans and drawings for work to be done, and particularly to do the work in a skillful manner, and to be competent to know when it is so done by a journeyman in his employ.”

Scully v. Hallihan, 365 Ill. 185, 6 N.E.2d 176 (1936) held the statute invalid when it required applicants for a drain layer's license to pass the plumber's examination, since their trade did not include plumbing, so that the examination was not reasonably related to the purposes of the statute.

State ex rel. Winkler v. Benzenburg, 101 Wis. 172, 76 N.W. 345 (1898) approved the Wisconsin examination as requiring only a practical knowledge of plumbing.

84. *People v. Brown*, 407 Ill. 565, 95 N.E.2d 888 (1950) held that the former Illinois statute had failed to include proper standards for the examination and had failed to impose the requirement of uniform examinations, so that applicants would have no assurance that the examinations would be on plumbing alone and would be uniform. Of course, unless the same examination be given each time, it must be conceded that no two examinations can be uniform, though they may be comparable. The necessary standards of subject matter and uniformity would seem to have been implicit in the statute here. The recent Illinois statute takes care of this problem by requiring the Board to “prepare and give uniform examinations to applicants for licenses as Master Plumbers which will test their qualifications in the planning and supervision of plumbing and the physical and mechanical installation, replacement, repair and maintenance of plumbing.” ILL. REV. STAT. c. 111 ½, § 116.10 (Supp. Oct., 1951).

Contra: State v. Stark, 100 Mont. 365, 52 P.2d 890 (1935), holding there was no improper delegation, even though the statute contained no standards, and the only clue to the nature of the examination was the presence of two plumbers on the examining board!

elaborate statements of what the examinations are to cover. Most such statements boil down in the end to a requirement that a reasonably fair examination on the applicant's knowledge of plumbing be given.

The statutes do not usually contain any provisions as to what is to constitute a passing grade, although in Colorado, the Health Department's regulations say that a grade of 75% is required to become a journeyman, and a grade of 85% to become a master.⁸⁵ In Illinois, passing is 75%, with no question below 60%.⁸⁶ So far as the writer has been able to determine, it is by no means easy to pass the plumbing examination in most states. Appendix III gives the figures obtained by writing to a number of state agencies. The proportion of passing grades ranges from a high of 92% in Illinois to a low of 10% - 15% on the written section of the New York City examination. The high figure in Illinois can be explained by the fact that relatively few persons took the examinations there, perhaps because of the very long training requirement. Seventy percent seems to be the next highest rate of passing, and that seems none too high. The remaining figures down to New York City's appear quite low. The writer has not been able to find out just how the grading is done, but here again the small number of passing grades would seem to be some evidence that the examinations, like the training requirement, are being used as a means of limiting entry into the trade and consequent competition.

There are some common minor requirements about examinations which should be mentioned. Where the licensing is statewide, statutes often provide for examinations at stated intervals in different parts of the state.⁸⁷ Notice requirements are provided, and sometimes the administering agency may give examinations at more frequent intervals.⁸⁸

It becomes quite clear as one studies the licensing scheme here that the key to the situation is the agency which administers the statute. In this respect again the statutes are not uniform, but there is one element which they all have in common, and that is that the agency which gives the examinations and

85. Colo. State Plumbing Code Art. XVIII, § 139 (April 9, 1951).

86. Ill. Proposed Rules for the 1951 Plumbing License Law, § II (4).

87. *E.g.*, N.D. REV. CODE § 43-1812 (1943).

88. Wis. Rules Governing Plumbing Apprenticeship and Licensing of Plumbers, adopted by the State Board of Health, Rule 10(a) (1948).

makes the initial determination on whether a license is to be granted always contains one or more members of the plumbing trade, and nearly always those members are in the majority. Due to the relationship between plumbing regulation and public health, the state or city board of health is often given ultimate responsibility for the administration of licensing, but even in those instances, the examinations are conducted by a board of examiners made up for the most part of practicing master and journeyman plumbers.

Examples of the organization of boards of examiners which are typical occur in Massachusetts, where the board is made up of one master plumber with ten years' continuous practical experience, one sanitary engineer, and one journeyman plumber with ten years' experience who is a wage earner;⁸⁹ in Maine where the board includes the director of the division of sanitary engineering of the bureau of health, one master plumber, and one journeyman plumber with two years' experience in the plumbing business;⁹⁰ in Wisconsin where the licensing is under the control of the State Board of Health, but where a committee of examiners is appointed by that Board, consisting of one employee of the Board, one master plumber, and one journeyman plumber, to conduct the examinations.⁹¹ It is more common to have the boards of examiners appointed by the governor of the state,⁹² or in a city licensing system, by the mayor,⁹³ but in some cases, as in Wisconsin, Kentucky,⁹⁴ and Colorado,⁹⁵ the Board of Health makes the appointment.

89. MASS. ANN. LAWS c. 13, § 36 (1952).

90. ME. REV. STAT. c. 22, § 172 (1944).

91. WIS. STAT. § 145.03 (1949).

92. *E.g.*, MICH. STAT. ANN., § 14.457 (1937) (Governor appoints two licensed master plumbers and one licensed journeyman, who serve with two state employees *ex officio*); MONT. REV. CODES ANN., § 66-2403 (Supp. 1951) (Governor appoints one licensed master, two licensed journeymen, one member at large representing the public, plus the director of the board of health's sanitary engineering division); N.M. STAT. ANN., § 51-3003 (Cum. Supp. 1951) (Governor appoints one representative of a water or gas public service corporation, one representative of the master plumbers, one representative of a nationally recognized journeymen's organization, one plumbing inspector from an incorporated municipality, and one representative expert in sanitation).

93. *E.g.*, MO. REV. STAT. § 341.040 (1949); N.H. REV. LAWS c. 183, § 3 (1942); N.Y. Gen. City Law § 40-a (1951); PA. STAT. ANN. tit. 53, § 2553 (Cum. Supp. 1951).

94. KY. REV. STAT. § 318.080 (1948).

95. COLO. STAT. ANN. c. 126, § 4 (1935).

Other methods for appointing these boards which give the organized members of the trade even more control over administration are found in Louisiana and Illinois. In Louisiana the governor appoints the State Board of Examiners of Journeymen Plumbers, which consists of the Supervisor of Plumbing of New Orleans *ex officio*, and two master and two journeymen plumbers. The law requires the governor to select the last four from lists submitted by recognized masters' and journeymen's associations,⁹⁶ which means in effect that the employers' trade association and the labor union select the Board. The situation is similar in Illinois, where the Director of the Department of Registration and Education appoints the State Board of Plumbing Examiners, consisting of one master plumber, one journeyman plumber, and one person designated by the Director, but in doing so he is required to give "due consideration" to recommendations of the Association of Illinois Master Plumbers, of the Association of Journeyman Plumbers, and of the Illinois Retail Hardware Association.⁹⁷ Somewhat similar provisions are found in New York City.⁹⁸

On the other hand some ordinances and statutes place the trade representatives in the minority on the examining boards, as was the case in *Tacoma v. Fox*,⁹⁹ where the board consisted of the commissioner of public welfare, the chief plumbing inspector, the chief examiner of the civil service commission, together with one master and one journeyman plumber. A board of this composition would seem to be less likely to act in accordance with the desires of the group being regulated and more likely to observe the interests of the general public than one made up of a majority of those in the trade.¹⁰⁰

It is a surprising fact that very few cases have dealt with the problem whether these licensing statutes, in giving so much

96. LA. REV. STAT. tit. 37, § 1361 (1950).

97. ILL. REV. STAT. c. 111 ½, § 116.9 (Supp. Oct. 1951).

98. New York City Administrative Code, §816-2.0, p. 1134, (1938) provides that the municipal civil service commission, in the preparation, conduct and rating of examinations, shall call on the plumbing industry for assistance, in the form of the services of two licensed master plumbers and one journeyman. The commission may also call on duly accredited sanitary engineers or physicians for assistance. The masters and journeymen are required to be drawn from a panel furnished by the respective trade and labor organizations.

99. 158 Wash. 325, 290 Pac. 1010 (1930).

100. A board of this kind was held competent and proper in *State ex rel. Bismarck v. District Court*, 64 N.D. 399, 253 N.W. 744 (1934).

authority to persons in the plumbing business, have invalidly delegated power to private groups. This contention was raised in one New York case, *Benedetto v. Kern*,¹⁰¹ in which the petitioner attacked the New York City Administrative Code provision allowing industry members to participate in the preparation, conduct and grading of the examination as "a fascist method of industrial control."¹⁰² The court's answer was that it was the civil service commission's examiners, not the industry representatives, who prepared, conducted, and graded the examination. The committee of the plumbing industry merely engaged in general discussions with the examiners as to the technical qualifications of plumbers, and the court said that this type of discussion was both natural and desirable. The court's reliance on the fact that the industry committee did not actually make final decisions might justify an argument that if it had, the court might have held the provision invalid, but no such decision has been found in this field.

The leading case invalidating the delegation of power to private groups to make regulations, *Carter v. Carter Coal Co.*,¹⁰³ involved a statute authorizing management and labor in certain coal mining districts to set minimum wages and maximum hours. In the famous phrase of the opinion, this was "legislative delegation in its most obnoxious form."¹⁰⁴ Yet the delegation in that case did not contain nearly as great a potentiality for harm to the minority as the delegation found in the typical licensing statute. In the *Carter Coal* case it was reasonably probable that the interests of all would be protected by the bargaining process carried on by the two opposed interests of management and labor. In the licensing statute, however, only one side is generally represented, the boards being usually composed of a majority of persons already licensed, and these persons have every motive for raising the standards for membership and limiting the number of persons admitted to the craft. To say this is not to accuse these boards of maladministration. The conflict between their interests as plumbing contractors or journeymen

101. 167 Misc. 831, 4 N.Y.S.2d 844 (Sup. Ct. 1938), *aff'd mem.*, 255 App. Div. 753, 7 N.Y.S.2d 227 (1st Dept. 1938), *aff'd mem.*, 279 N.Y. 798, 19 N.E.2d 92 (1939).

102. *Id.* at 837, 4 N.Y.S.2d at 850.

103. 298 U.S. 238 (1936).

104. *Id.* at 311.

and an impartial judgment on standards of admission to the trade cannot help but arise, and in the vast majority of these statutes there is no adequate safeguard for the interests of those seeking licenses and for the interests of the public.

Professor Jaffe, in his leading article on this general problem¹⁰⁵ points out that historically many private groups have made law, in the sense of making decisions or rules whose ultimate sanction is provided by the state, and that recognition of this fact makes the recent legislation delegating power to such groups appear less objectionable. This is quite true, but there is a clear distinction between the type of delegation to which he refers and the usual licensing statute. In nearly all the cases which he discusses, there is provided some machinery for protecting the interests of the minority, either by representation in a bargaining procedure, as in the *Carter Coal* case, or by being allowed to vote, as in the referenda and local option cases. There is no such protection in the licensing cases.

Professor Jaffee rightly suggests that the standards provided by these statutes are not adequate protection. This is nowhere clearer than in the licensing situation, since it is impossible to prescribe an examining and grading system which could not be manipulated by the persons operating it if they wished to do so. The standards actually set out reflect this in their very general statements of policy.¹⁰⁶

As a criterion of validity in this field, Professor Jaffe's article proposes the requirement of consent by an administrative officer or agency at some point in the regulatory process. Although the cases seem to support this,¹⁰⁷ it is an empty requirement for our purposes. If the master plumbers and journeymen, by virtue of their selection to an examining board, become an administrative agency of the state, then the delegation would be upheld, even though they should only work a few days a year and carry on their private business all the rest of the time. This is hardly a realistic guaranty of impartial judgment by the board.

A few cases attack this same problem from a different angle by holding that a board composed of a majority of persons engaged in the business being regulated is biased, and that its de-

105. Jaffe, *Law Making By Private Groups*, 51 HARV. L. REV. 201 (1937).

106. See p. 504 *supra*.

107. Many of the cases are collected in DAVIS, *ADMINISTRATIVE LAW*, § 21 (1951).

terminations violate the procedural requirements of due process for that reason. These cases generally involve price-fixing and rely on the fact that the boards involved have a direct pecuniary interest in the matters submitted to them.¹⁰⁸ There are cases both ways on the question.¹⁰⁹ The licensing situation is also probably distinguishable, because it would be impossible to say that any member of an examining board would be financially affected by the grant or denial of a license to a particular person, although he might very likely be so affected by the board's general policy in regard to licenses. Thus the possible bias is not nearly so clear and pervasive in the licensing cases.

At least a partial solution to the difficulty is given by the judicial review provisions found in some of the licensing statutes. Thus under the new Illinois act, all final decisions of the Director of the Department of Registration and Education, the ultimate licensing authority, are reviewable by the courts under the state Administrative Review Act.¹¹⁰ The efficacy of judicial review as a safeguard is limited by the doctrine that the administrative decision is upheld where supported by substantial evidence. Presumably the denial of a license would be considered a final decision which could be reviewed in this way, although it is conceivable that a court might hold that only revocation of an outstanding license would be reviewable. The New Mexico statute gives even more protection, by allowing an appeal to the district court, and a hearing *de novo* by that court, with the burden of proof on the party appealing.¹¹¹ So far as appears, an appeal could be taken from the denial of a license as well as from a revocation.

Judicial review of course protects against the grosser forms of abuse, but it is of relatively little value in uncovering and checking a generally restrictive attitude on the part of a licensing board. Such an attitude may have been adopted consciously

108. *Milk Marketing Board v. Johnson*, 295 Mich. 644, 295 N.W. 346 (1940) held a milk control act invalid which set up a board to determine prices whose members were in the business.

109. The following are *contra* to *Milk Marketing Board v. Johnson*, 295 Mich. 644, 295 N.W. 346 (1940): *Miami Laundry Co. v. Florida Board*, 134 Fla. 1, 13, 183 So. 759, 764 (1938) (pricefixing board in the laundry business); *Board of Supervisors v. State Milk Commission*, 191 Va. 1, 60 S.E.2d 35 (1950) (a milk control board similar to that in the Johnson case was approved).

110. ILL. ANN. STAT. c. 111 ½, § 116.28 (Supp. Oct. 1951).

111. N.M. STAT. ANN. § 51-3018 (Cum. Supp. 1951). See also MICH. STAT. ANN. § 14.461 (1937).

or unconsciously by the board, but in most cases it could not be proved by a person whose license application had been denied. It would be entirely too intangible for that. Yet the possibility that a board might act in this way would be more harmful to the public, and to applicants for licenses, than the chance that the board might favor one applicant over another. The latter chance is present with any decision-making body and can be pretty well eliminated by adequate judicial review. The former possibility affects the community more extensively, though more subtly, and can only be eliminated by the appointment of persons to examining boards who have no outside conflicting interests.

The reason usually given for appointing members of the plumbing trade to these boards is that their expert knowledge and experience is useful, even indispensable, in determining whether an applicant is qualified to engage in the trade. There is truth in this, and it is certainly important to have the licensing handled by persons intimately acquainted with the technical requirements of the business. On the other hand it would seem that sufficiently qualified persons could usually be found in the ranks of plumbing inspectors, sanitary engineers and members of boards of health to supply all the technical experience necessary, thereby reconciling the demand for an impartial board with the demand for an expert board.

A few other of the common characteristics of plumbing licensing statutes may be mentioned. They usually contain provisions for revocation by the administrative agency, upon notice, and with an opportunity to the licensee to be heard.¹¹² It is not uncommon to provide that the revocation proceeding may be initiated by private persons who must file a written complaint with the board.¹¹³ The grounds for revocation are various, the common ones being fraud or misrepresentation

112. *E.g.*, COLO. STAT. ANN. c. 126, § 8 (1935); ILL. ANN. STAT. c. 111 ½, § 116.21 (Supp. Oct. 1951); KY. REV. STAT. § 318.070 (1948); ME. REV. STAT. c. 22, § 182 (1944); MASS. GEN. LAWS c. 142, § 6 (1932); MICH. STAT. ANN. § 14.461 (1937); MINN. STAT. § 326.43 (Henderson 1949); MONT. REV. CODES ANN. § 66-2408 (Supp. 1951); NEB. REV. STAT. § 19-309 (1943); N.M. STAT. ANN. § 51-3017 (Cum. Supp. 1951); N.C. GEN. STAT. ANN. § 87-23 (1950); N.D. REV. CODE § 43-1819 (1943); ORE. COMP. LAWS ANN. § 99-1617 (1940); R.I. Pub. Laws 1945-1946 c. 1661, § 25; TENN. CODE ANN. § 7172a (Williams 1934); TEX. STAT., REV. CIV. art. 6243-101, (1948); UTAH CODE ANN. § 79-14-9 (1943); WIS. STAT. § 145.10 (1949).

113. *E.g.*, MICH. STAT. ANN. § 14.461 (1937) (board is required to investigate and hold hearings upon the written complaint of private persons).

in obtaining the license,¹¹⁴ wilful violation of statute or plumbing regulations,¹¹⁵ loaning of license,¹¹⁶ the wilful employment of an unlicensed person,¹¹⁷ and incompetence.¹¹⁸ Judicial review of revocation is generally provided for.¹¹⁹ It is common also to find that the board is authorized to issue another license a year after the revocation, so that revocation resembles suspension to some extent.¹²⁰

Where the licensing is done by municipalities, it may have the effect of limiting the mobility of labor. It easily can be seen from the general discussion of the construction industry that mobility of labor is important to the efficiency of the industry, due to the frequent shifting from one job to another which occurs as one piece of construction is completed and another begun. If men in the trades are prevented from going into another city to take a job, local labor shortages may occur there, while in nearby areas there may be local unemployment.¹²¹ Nevertheless there are still states in which a license to work in one city carries no right to work in another.¹²² The effect of

114. *E.g.*, ILL. ANN. STAT. c. 111 ½, § 116.22 (Supp. Oct. 1951); ME. REV. STAT. c. 22, § 182 (1944); MD. ANN. CODE GEN. LAWS art. 43, § 324 (1939); MICH. STAT. ANN. § 14.461 (1937); R.I. Pub. Laws 1945-1946, c. 1661, § 25; TEX. STAT., REV. CIV. art. 6243-101 (1948); WIS. STAT. § 145.10 (1949).

115. *E.g.*, ILL. ANN. STAT. c. 111 ½, § 116.22 (Supp. Oct. 1951); R.I. Pub. Laws 1945-1946 c. 1661, § 25; WIS. STAT. § 145.10 (1949) (requires two wilful violations before there can be revocation). In New Mexico the violation may be either wilful or negligent to justify revocation. N.M. STAT. ANN. § 51-3017 (Cum. Supp. 1951).

116. *E.g.*, N.D. REV. CODE § 43-1818 (1943); R.I. Pub. Laws 1945-1946, c. 1661, § 25.

117. *E.g.*, MINN. STAT. § 326.43 (Henderson 1949); R.I. Pub. Laws 1945-1946, c. 1661, § 25.

118. *E.g.*, MONT. REV. CODES ANN. § 66-2408 (Supp. 1951); TEX. STAT. REV. CIV. art. 6243-101 (1948).

119. *E.g.*, ILL. ANN. STAT. c. 111 ½, § 116.28 (Supp. Oct. 1951); MICH. STAT. ANN. § 14.455 (1937) (appeal *de novo* to the circuit court in chancery); N.M. STAT. ANN. § 51-3018 (Cum. Supp. 1951) (administrative appeal from the plumbing engineer to the Plumbing Administrative Board, and appeal from the Board to the district court, with trial *de novo* in that court); R.I. Pub. Laws 1945-1946, c. 1661, § 28.

120. *E.g.*, MINN. STAT. § 326.43 (Henderson 1949); N.D. REV. CODE § 43-1820 (1943); TEX. STAT., REV. CIV. art. 6243-101 (1948); WIS. STAT. § 145.10 (1949).

121. U.S. DEPARTMENT OF LABOR BULL. NO. 967, EMPLOYMENT OUTLOOK IN THE BUILDING TRADES (1949) 20 gives as a characteristic of employment that it is constantly changing, and advises men entering the industry that they must be prepared to travel considerable distances to work.

122. The outstanding example is New York, where a license to work as a plumber in one city gives no such right in others. N.Y. Gen. City Law § 45 (1951). The Municipal Civil Service Commission's Examining Division,

this on the labor supply is of course difficult or impossible to measure, but it would appear to be harmful, and in at least one state, Rhode Island, was the major reason for the state's shift from a local to a state-wide method of licensing.¹²³ The problem can be, and is, solved to some extent by providing that a license from one city will entitle the holder to work at his trade in all other cities of the state, as in Iowa and Missouri.¹²⁴

A similar but less acute problem exists where the licensing is state-wide. It may be desirable to have persons in the plumbing trade free to move about from state to state in search of work, where the employment opportunities are uneven, and licensing to some extent prevents this. A few states have provided for reciprocity with other states having comparable licensing laws, such as Maine,¹²⁵ Wisconsin¹²⁶ and Illinois.¹²⁷ Michigan has attempted to arrange for reciprocity but has been unsuccessful,¹²⁸ which is at least some indication that the need for it exists. So long as there are state boundaries there will of course be differences in what is considered necessary for the regulation of plumbing, but it would seem that reciprocity could be carried farther than it has been.

Nearly all the plumbing statutes give certain exemptions. Here again there is variation, but at the same time general agreement on certain activities. The licensing acts generally do not include persons working on water mains and sewers outside of buildings.¹²⁹ They also exclude work done by railroads, pipe

in a letter dated Nov. 27, 1951, stated that New York City does not recognize any license issued by other cities, counties or states.

123. Letter from the R.I. Administrator of Professional Regulation, Department of Health, to the writer, dated Nov. 14, 1951.

124. Iowa Code Ann. Sen. File 163, § 12 (Legisl. Serv. No. 4, 54th Gen. Ass., 1951) (licensee in one city may get a license in others without examination); MO. REV. STAT. ANN. § 7563 (1939). See notes 75, 76 *supra*, for the completely confused regulatory scheme in Illinois.

125. ME. REV. STAT. c. 22, § 174 (1944).

126. WIS. STAT. § 145.09 (1951).

127. ILL. ANN. STAT. c. 111 ½, § 116.19 (Supp. Oct. 1951).

128. The Michigan statute allows the state plumbing board to license without examination persons from other states having licensing requirements equivalent to Michigan's but the Director of the State Plumbing Board, in a letter to the writer dated Nov. 9, 1951, stated that they had tried to arrange for reciprocity with Illinois, Wisconsin and Minnesota, but had not been able to do so. MICH. STAT. ANN. § 14.458 (1937).

129. See note 49 *supra*. This exemption is often stated the other way around in the form of a definition of what is or is not plumbing under the statute. See N.M. STAT. ANN. § 51-3002 (Cum. Supp. 1951) (licensing not applicable to work done up to and including the meters, where part of

line companies, mining companies and oil companies on their own systems;¹³⁰ work done on farms or rural areas outside the limits of cities or villages, where there is no public water or sewer system;¹³¹ work done by a property owner in his own home (although this is by no means a universal exception).¹³² There are sometimes exemptions in favor of appliance dealers who do only enough plumbing to connect the appliance to the existing water or drainage system.¹³³ Exemptions of this kind have been upheld.¹³⁴

One different type of exemption which is frequently found in the statutes is that covering cities or towns with less than a named population. There is no unanimity as to how large a city should be before licensing should be applied. In Texas the statute does not apply in cities of less than 5,000.¹³⁵ In Montana the figure is 1,000.¹³⁶ In Louisiana it is 10,000¹³⁷ In Tennessee it is 25,000,¹³⁸ although this provision was held discriminatory and unconstitutional by *State ex rel. Grantham v. Memphis*.¹³⁹ The majority of cases hold that the classification by population is valid, usually on the ground that the smaller cities do not have complicated water and sewer systems, and that therefore the danger from defective plumbing is less in the

a system owned and operated by a public service corporation); N.H. REV. LAWS c. 183, § 9 (1942).

130. MONT. REV. CODES ANN. § 66-2411 (Cum Supp. 1951); N.M. STAT. § 51-3002 (Cum. Supp. 1951); TEX. STAT. REV. CIV. art. 6243-101, (1948).

131. ILL. ANN. STAT. c. 111 ½, § 116.2 (Supp. Oct. 1951); ME. REV. STAT. c. 22, § 184 (1944); N.M. STAT. ANN. § 51-3002 (Cum. Supp. 1951); TEX. STAT. REV. CIV. art. 6243-101 (Supp. 1951); WIS. STAT. § 145.13 (1951).

132. This exemption would not be necessary under many of the statutory definitions of master or journeyman plumber, which would exclude those merely doing incidental work on their own homes, not for compensation. See also ORE. COMP. LAWS ANN. § 99-1621 (1940); TEX. STAT. REV. CIV. art. 6243-101 (1948); WIS. STAT. § 145.13 (1951).

133. This exemption also is one which may be covered by a narrow definition of plumbing. A few states make it specific. R.I. Pub. Laws 1945-1946, c. 116, § 31 (exempts sprinkler systems and fire protection appliances). TEX. STAT. REV. CIV. art. 6243-101 (1948).

134. *Trewitt v. City of Dallas*, 242 S.W. 1073 (Tex. Civ. App., 1922); *Ex parte George*, 152 Tex. Crim. App. 465, 215 S.W.2d 170 (1945). But see cases cited in note 166, holding similar provisions invalid as applied to electricians.

135. TEX. STAT. REV. CIV. art. 6243-101 (1948).

136. MONT. REV. CODES ANN. § 66-2401 (Cum. Supp. 1951).

137. LA. REV. STAT. tit. 37 § 1376 (1950).

138. TENN. CODE ANN. § 7152 (Williams 1934).

139. 151 Tenn. 1, 266 S.W. 1038 (1924).

smaller cities.¹⁴⁰ To the uninitiated, however, there would seem to be doubt whether the plumbing found in buildings in a town of 5,000 is any less complicated than that in a city of 15,000, or that there is any less danger from defective plumbing in the smaller town. The economic effect of this type of exemption is to enable plumbing contractors in larger cities to compete for business in the smaller towns, and to exclude from competition in the larger cities plumbing firms who happen to be located in small towns, thereby giving an unfair competitive advantage to the city firms.

Partnerships and corporations must of necessity be treated differently under these licensing statutes. The usual provision is that a partnership may qualify to do business as a master plumber by having one active partner who has a master plumber's license.¹⁴¹ Likewise a corporation may qualify when one of its officers gets a license.¹⁴² The requirement is also frequently

140. *State ex rel. Shirley v. Lutz*, 226 Ala. 497, 147 So. 429 (1933) (exclusion of counties under 100,000 population held valid, as a legislative, not a judicial question); *Douglas v. People ex rel. Ruddy*, 225 Ill. 536, 80 N.E. 341 (1907) (exclusion of cities under 5,000 population valid since the smaller cities do not have complicated sewer systems, and little use for complex plumbing in buildings); *State v. Malory*, 168 La. 742, 123 So. 310 (1929) (exclusion of cities under 10,000 held reasonable and valid); *Roach v. City of Durham*, 204 N.C. 587, 169 S.E. 149 (1933) (not arbitrary to exclude cities under 3,500 population); *Trewitt v. City of Dallas*, 242 S.W. 1073 (Tex. Civ. App. 1922) (exclusion of cities under 5,000 valid).

Although the Louisiana statute excludes cities of less than 10,000 from its state licensing scheme, and that has been upheld, cities smaller than this may license plumbers, under *Town of Pineville v. Simon*, 212 La. 540, 33 So.2d 62 (1947). Aside from the kaleidoscopic pattern of licensing that this produces, it raises the interesting question of how there can be sufficient need for licensing in these cities to meet constitutional requirements when *State v. Malory*, *supra*, held they could constitutionally be excluded from the state's licensing program, because they had no need for protection against faulty plumbing.

Gregory v. Quarles, 172 Ga. 45, 157 S.E. 306 (1931) held invalid another exclusion which provided no licenses were needed for work where sewer connections had already been made, but they were required where the connections were in the process of being made. The court held this had no relation to public health.

141. The Illinois statute is typical of others. ILL. ANN. STAT. c. 111½, § 116.5 (Supp. Oct. 1951).

142. ME. REV. STAT. c. 22 §180 (1944) contains the usual type of provision: "The board may issue licenses to corporations and partnerships engaged in the plumbing business and applying therefor, provided that one or more officers or employees of any such corporation directly in charge of the business affairs of such corporation, or the members of such partnership directly in charge of the business affairs, apply for the examinations herein before provided and satisfy the board of their qualifications as master plumbers."

made that any plumbing work engaged in by the partnership or corporation must be under the direct supervision of a master plumber.¹⁴³ In at least two cases this kind of provision has been held discriminatory and invalid,¹⁴⁴ because it allows a partnership or corporation to engage in the plumbing business with only one partner or officer who is licensed, even though the other partners or officers may be entirely incompetent. In spite of their incompetence they may jointly carry on business, while the sole proprietor must always be licensed. This was held to put an unreasonable burden on the man working alone in Wisconsin and Tennessee.¹⁴⁵ As a result the Wisconsin statute was amended to require that all members of firms, and all officers of corporations must be licensed.¹⁴⁶

In one case, by inference at least, such a statutory provision has been upheld.¹⁴⁷ In many other states it has apparently been assumed that there is no discrimination, since the provisions are still in effect and unchallenged, though the more numerous cases on electricians create some doubt about the matter.¹⁴⁸

In Massachusetts the licensing law makes no provision at all for partnerships and corporations, and the court has held in *Attorney General v. Union Plumbing Co.*¹⁴⁹ that, since a partnership or corporation as such cannot take the examination, it cannot be licensed, and cannot engage in the plumbing business. The work there was being done under the direct supervision of a licensed master, who was an officer of the corporation, but the court held that did not bring it within the statute. This holding would not seem to prevent a corporation's contracting to furnish labor and materials, and then subcontracting the work to a licensed master, however.

143. *E.g.*, COLO. STAT. ANN. c. 126, § 10 (1935); ILL. ANN. STAT. c. 111 ½ § 116, 4 (Supp. Oct. 1951); N.D. REV. CODE § 43-1810 (1943); R.I. Pub. Laws 1945-1946 c. 1661, §9.

144. *State ex rel. Grantham v. Memphis*, 151 Tenn. 1, 266 S.W. 1038 (1924); *State ex rel. Winkler v. Benzenburg*, 101 Wis. 172, 76 N.W. 345 (1898).

145. *Ibid.*

146. WIS. STAT. § 145.06 (1951): "Each member or employee of a partnership or each officer or employee of a corporation engaging in the business of superintending plumbing installations shall be required to apply for and obtain a master plumber's license before engaging in the work of superintending plumbing installations."

147. *Rountree v. Richmond*, 188 Va. 701, 51 S.E.2d 256 (1949).

148. See notes 168, 169, 170 *infra*.

149. 301 Mass. 86, 16 N.E.2d 89 (1938).

IV. LICENSING OF ELECTRICIANS

The general technique for licensing electricians is much the same as that for plumbers, and most of the problems raised are similar, so that extended discussion would duplicate what has already been said.

The constitutionality of electricians' licensing statutes is based on the necessity for fire prevention, rather than public health. It is uniformly held that such statutes are within the police power.¹⁵⁰ The courts merely say, somewhat perfunctorily, that faulty electrical installations involve great danger to the public and that therefore the licensing requirements are valid. The cases do not raise the question whether the licensing statute adds any protection to the requirements of electrical permits and inspection of finished work which are found nearly everywhere.

Although a few states do require a period of experience before an applicant may take the electricians' examination, the period is usually shorter than for plumbers. For example the Idaho requirement is two years' work as an apprentice for eligibility to become a journeyman, and two years as a journeyman for eligibility to take the contractors' examination.¹⁵¹ In Massachusetts applicants for either master's or journeyman's licenses must have had only two years of experience in the installation of electrical wires, apparatus, etc., under the regulations of the State Examiners of Electricians.¹⁵² A state requiring a longer period of experience is Minnesota, where the applicant must show four years' experience for a journeyman's license, and five years' experience for a master's license.¹⁵³ Apparently

150. *City of Tucson v. Stewart*, 45 Ariz. 36, 40 P.2d 72 (1935); *Richardson v. Coker*, 188 Ga. 170, 3 S.E.2d 636 (1939); *Berry v. Chicago*, 320 Ill. 536, 151 N.E. 581 (1926); *Town of Pineville v. Vandersypen*, 212 La. 521, 33 So.2d 56 (1947); *Shreveport v. Bavse*, 166 La. 689, 117 So. 775 (1928); *Becker v. Pickersgill*, 150 N.J.L. 51, 143 Atl. 859 (1928); *Toledo v. Winters*, 21 Ohio Dec. 171 (1910); *Milwaukee v. Rissling*, 184 Wis. 517, 199 N.W. 61 (1924), *aff'd without opinion*, 271 U.S. 644 (1926).

151. IDAHO CODE ANN. tit. 54, § 54-1004 (1948). This same section requires that the applicant have "at least ten per cent (10%) technical knowledge" before he can become a master electrician. A letter from the Idaho State Electrical Board to the writer, dated Nov. 19, 1951, indicates that the administrators of this statute are in considerable doubt about what this means, and with good reason. There could hardly be a better argument for legislative drafting services than a meaningless phrase of this kind.

152. Mass. State Examiners of Electricians, Rules for Examinations (1950).

153. MINN. STAT. § 326.26 (Henderson 1949).

this does not mean that a man must remain a journeyman five years before applying for a master's license.

One leading case, *City of Tucson v. Stewart*,¹⁵⁴ deals with the propriety of these requirements of experience. The city ordinance provided that a man must be twenty-five years old, and have six years' experience as a journeyman before he could receive a master electrician's license. The court held this provision invalid, saying that the twenty-five-year age limit was not thought necessary for the professions and that there was no reason for it here. It also said that experience as a "practical electrician" was just as good as experience as a journeyman and that therefore the other requirement was also invalid. By implication, the case would seem to approve the length of the period. Even so, if the case were followed, statutes such as the Idaho act would be unconstitutional.

The method of examining here is much the same as for plumbers. The examinations cover the electrical codes, electrical theory, and usually include some practical electrical work.¹⁵⁵ One case has held that a city ordinance was unconstitutional in requiring a showing before the examining board that the applicant could reasonably be expected to complete his contracts satisfactorily.¹⁵⁶ The court conceded that the requirement of a license was within the city's police power, as a means of lessening the fire danger, but said that unless the occupation afforded a greater chance than usual for fraud or diversion of funds, a regulation aimed only at preventing breach of contract could not be sustained. This reasoning would invalidate the contractor-licensing statutes discussed below,¹⁵⁷ but the case has not been cited or relied upon in connection with those statutes.

The examination, to be constitutional, must clearly be concerned with matters related to the business of being an electrical contractor.¹⁵⁸ If the agency administering the licensing is not given at least some standards, this requirement is not fulfilled.¹⁵⁹

The statute may or may not specify the passing grade, which

154. 45 Ariz. 36, 40 P.2d 72 (1935).

155. See Mass. State Examiners of Electricians, Rules for Examinations (1950).

156. *Richardson v. Coker*, 188 Ga. 170, 3 S.E.2d 636 (1939).

157. See p. 521 *infra*.

158. *Milwaukee v. Rissling*, 184 Wis. 517, 199 N.W. 61 (1924), *aff'd without opinion*, 271 U.S. 644 (1926).

159. *Toledo v. Winters*, 21 Ohio Dec. 171 (1910).

is 70% in Massachusetts.¹⁶⁰ In one case, *State ex rel. Sill v. Examining Board*,¹⁶¹ the court upheld the denial of a license where the applicant received a mark of 74.3%, and 75% was passing, in the face of his contention that the Board, which was made up entirely of master electricians, had arbitrarily excluded him. The relator had no evidence to support his claim, and the members of the Board testified that they had no reason to exclude him. Provision for a specific passing mark may produce an aura of objectivity about the examination which will prevent claims of arbitrariness, but as most people who have given and corrected examinations would agree, the objectivity is often quite delusive. This case shows how difficult it is for an applicant to prove that the denial of his application was arbitrary.

The examination results shown by Appendix III are somewhat more uniform for electricians than for plumbers, but the proportion of those passing is still rather low. That may be in part due to the fact that the experience and training requirements are less strict for electricians.

The question of exemptions from the electricians' licensing laws has given trouble in some states. The usual exemptions cover installation and maintenance of power systems by public utilities,¹⁶² installation and maintenance of telephone, telegraph and other communication systems by public utilities,¹⁶³ work by the state through its employees,¹⁶⁴ and the replacement of lamps or fuses, or the installation of other plug-in appliances.¹⁶⁵ One case, *Berry v. Chicago*,¹⁶⁶ held that the exemption of public

160. Mass. State Examiners of Electricians, Rules for Examinations (1950).

161. 14 La. App. 17, 129 So. 427 (1930).

162. *E.g.*, IDAHO CODE ANN. tit. 54, § 54-1016 (1948); MINN. STAT. § 326.29 (Henderson 1949); N.C. GEN. STAT. § 87-43 (Cum. Supp. 1951).

163. *E.g.*, IDAHO CODE ANN. tit. 54, § 54-1016 (1948); MASS. ANN. LAWS c. 141, § 7 (Supp. 1951); N.D. REV. CODE § 43-0916 (1943); R.I. Pub. Laws 1941-1942, c. 1234, § 11.2.

164. *E.g.*, N.C. GEN. STAT ANN. § 87-43 (Cum. Supp. 1951).

165. *E.g.*, N.M. STAT. ANN. § 51-2220 (Cum. Supp. 1951); N.C. GEN. STAT. ANN. § 87-43 (Cum. Supp. 1951).

166. 320 Ill. 536, 151 N.E. 581 (1926). Two other cases are in accord. *Southeastern Electric Co. v. Atlanta*, 179 Ga. 514, 176 S.E. 400 (1934) is not properly reported, but it seems to hold that the Atlanta ordinance which required electricians to get a license, but exempted public utilities, was discriminatory and invalid, for that reason. The case is so explained by *Lamons v. Yarbrough*, 206 Ga. 50, 55 S.E.2d 551 (1949), but there is no discussion of whether the utilities might properly be exempt because supervised by other administrative agencies, or for other reasons. A similar case is *Matill v. City of Chattanooga*, 175 Tenn. 65, 132 S.W.2d 201 (1939),

utilities was discriminatory, in so far as it exempted them with respect to work done for others, since the classification thereby made had no reasonable relation to the purposes of the statute. The court said that as to work done on their own systems the utilities could properly be excepted from the legislation but that the danger to the public from the utility wires, transformers and apparatus would seem to be just as great if not greater than from the wiring in a private dwelling. The distinction may lie in the inspection and supervision of the utilities by the state public service commissions, except that those commissions do not generally purport to examine public service company personnel for technical competence. The exemption of utilities thus leaves a large and important segment of the trade outside the licensing laws without any very clear reason. The same thing is done by the plumbing statutes.¹⁶⁷

The *Berry* case also raises the question, discussed in connection with plumbers,¹⁶⁸ whether a statute is unfairly discriminatory which allows a partnership or corporation to engage in electrical contracting when only one partner or an officer is a licensed master electrician. The Chicago ordinance there involved phrased the provision in terms of an exemption, saying that firms were exempt if one member was a qualified electrician. The court held this discriminatory without much discussion of the problem. The *Tucson*¹⁶⁹ case involved the same problem and reached the same result on the ground that the ordinance was unfair to the small single proprietor, since he must get a license, while a corporation of partnership need not, so long as one member, who may be inactive, had one, or so long as a licensed man was employed. The *Tucson* case is troublesome because the hardship upon the sole proprietor seems to be the result of his financial circumstances rather than the discriminatory application of the statute, since he too could operate through a licensed employee if he could afford it. It would be analogous to argue that the license fee was unfair because not graduated

which held unconstitutional a statute requiring electrical permits of all but corporations not rendering electrical services to the general public. The court said that this distinction was arbitrary, there being no reason why a corporation should be exempted from the operation of the statute.

167. See notes 129, 134 *supra*.

168. See notes 144, 145, 147 *supra*.

169. 45 Ariz. 36, 40 P.2d 72 (1935).

according to ability to pay. A later case, *Sullivan v. Johnson*,¹⁷⁰ refuses to follow the *Tucson* decision altogether but does say that it is unfair to require the sole proprietor to employ a licensed master electrician *exclusively*, as the object of the statute could be achieved by merely requiring supervision of the work by a master electrician, without forcing each contractor to keep a master electrician in his permanent employ. The court found that the requirement of permanent employment would obviously lead to monopoly in favor of the larger firms to the injury or annihilation of the small business men, all of which was in violation of the constitution and laws of the state. It would be difficult to imagine a more unrealistic distinction than the one the court makes, since if an electrical contractor is to engage in business it will be no cheaper for him to hire a master electrician for each job, than to keep one on his permanent staff. The clear result either under the court's rule, or under the statute as construed, is that the small contractor will have to get a license himself.

The membership in electrical boards of examiners is, as in the case of the plumbing boards, drawn chiefly from the active members of the trade.¹⁷¹ Massachusetts is exceptional in this respect, the board being composed of the state fire marshal, the commissioner of education, the director of civil service, plus one master electrician with ten years' experience and one journeyman with similar experience.¹⁷² The example of Massachusetts re-

170. 189 Ga. 778, 7 S.E.2d 900 (1940).

171. *E.g.*, IDAHO CODE ANN. tit. 54, § 54-1005 (1948) (one master electrician, one journeyman, one employee of the department of law enforcement); Md. Acts 1906, c. 244, § 1 (two nominees of the electrical contractors' association, one nominee of the municipal electrical inspectors, one nominee of the association of fire underwriters, one journeyman); MINN. STAT. § 326.24 (Henderson 1949) (two suppliers of electricity in rural areas, two master electricians, two journeymen, and one electrical engineer or inspector); N.M. STAT. ANN. § 51-2203 (1941) (one representative of electric public service companies operating in the state, one electrical contractor, one representative of a nationally recognized journeyman's organization, one electrical engineer, one electrical inspector). The presence of a representative of the utilities on the New Mexico board is interesting in view of the fact that the licensing statute in that state expressly exempts the utilities. A similar provision is to be found in the Rhode Island statute. R.I. Pub. Laws 1941-1942, c. 1234, § 1 (one electrical inspector, one electrical contractor, one journeyman, the superintendent of state police, and one representative of electrical utilities).

172. MASS. ANN. LAWS, c. 13, § 32 (1952). See also N.C. GEN. STAT. ANN. § 87-39 (1949) (state electrical engineer, secretary of the state association of electrical contractors, member of the faculty from the University

futes the contention that such boards must contain a majority of members of the trade in order to get the benefit of their experience. North Dakota is another exceptional state in that its board contains representatives of consumer groups who certainly have an interest in licensing and who are usually left out of things entirely. Its board of examiners includes one farmer, one consumer representative of the rural electric cooperatives, one licensed master electrician, one licensed journeyman and one licensed movie machine operator.¹⁷³

Licensing boards for electricians therefore are more broadly representative of the whole community than the plumbers' examining boards in some states. There seems no reason why, if the electrical boards can be representative, the plumbing boards cannot, especially since plumbing is a less complex trade.

One problem arises in connection with electricians which is not present in the case of plumbers. The electrical trades are somewhat more specialized than plumbing, and there is some tendency for the statutes to take this into account. Thus the North Dakota statute provides for separate examination and licensing of movie machine operators and rural electricians.¹⁷⁴ New York City gives a special electrician's license authorizing work only on premises of the owner who employs the special electrician and not covering contract work for others than the holder's employer.¹⁷⁵ Rhode Island gives a similar license, called a limited premises license, and also gives an elevator electrician's license.¹⁷⁶ The problem of specialization becomes more important in connection with contractor licensing and will be further discussed below.

V. LICENSING OF CONTRACTORS

The statutes licensing contractors are quite different from the statutes previously considered. They were a much later development in the law, the first statute being passed in 1925, in North Carolina.¹⁷⁷ Their purpose is different, being the protection of public and building industry from the evils of "cut-

engineering school, one electrical inspector, one representative of an electrical contracting firm).

173. N.D. REV. CODE § 43-0902 (1943).

174. N.D. REV. CODE §§ 43-0901, 43-0911, 43-0914 (1943).

175. N.Y. City Administrative Code § B30-4 (Cum. Supp. 1948).

176. R.I. Pub. Laws 1941-1942, c. 1234, § 7.

177. N.C. GEN. STAT. ANN. §§ 87-1-87-13 (1949).

throat" or unethical competition,¹⁷⁸ rather than from physical harm as in the plumbing and electrical licensing. They are more inclusive in one way, since they cover all contractors, but more limited in another because they do not apply to journeymen or persons working for wages.¹⁷⁹ Finally they impose different tests of fitness, since they require not only examination, but a showing of financial responsibility and good reputation.¹⁸⁰

The purpose of the contractor licensing statutes has been said to be to provide "an effective and practical protection against the incompetent, inexperienced, unlawful, and fraudulent acts of building contractors."¹⁸¹ On that basis the statutes have been held constitutional by several cases, the one most often cited being *Hunt v. Douglas Lumber Co.*¹⁸² The court there relied upon the cases upholding the licensing of physicians to reach the conclusion that the Arizona statute was a valid exercise of the police power. One need hardly take the trouble to point out that there is sufficient difference between the two occupations to make the physicians' cases less than controlling here. The court then went on to point out that contractors often abandon contracts which look unprofitable, divert funds paid them for the satisfaction of bills for material and labor, and depart from the terms of their contracts without informing the owner, all of which causes loss to the owners of property and to employees. This paper has already pointed out that these problems do exist in the industry, due to the difficult conditions under which contracts for building are made, and to the fact that many contractors are not equipped to cope with those con-

178. A letter from the California Contractors State License Board to the writer, dated Nov. 7, 1951, stated that "The license law in California was effective as of 1929 due to the various contracting associations seeing the need of the public for protection against unscrupulous contractors and the reputation of their own industry." A letter from the Nevada State Contractors' Board to the writer, dated Nov. 19, 1951, stated "It [the statute] has done much to free the state of incapable and irresponsible craftsmen."

179. *E.g.*, ARK. STAT. ANN. tit. 71, §71-701 (Cum. Supp. 1951); CALIF. BUS. AND PROF. CODE §§ 7026, 7053 (Cum. Supp. 1951); N.C. GEN. STAT. ANN. § 87-10 (1949). *State v. Mitchell*, 217 N.C. 244, 7 S.E.2d 567 (1940) held that a journeyman plumber need not get a contractor's license.

180. *E.g.*, ALA. CODE ANN. tit. 46, § 74 (1940); ARK. STAT. ANN. tit. 71, § 71-709 (1947); CALIF. BUS. AND PROF. CODE §§ 7065-7069 (Cum. Supp. 1951); NEV. COMP. LAWS ANN. § 1474.24. (Supp. 1941); N.M. STAT. ANN. § 51-1905 (1941).

181. CAL. ADMINIS. CODE § 701 (1948).

182. 41 Ariz. 276, 17 P.2d 815 (1933).

ditions.¹⁸³ The court held that the licensing statute had a reasonable tendency to prevent these evils and was therefore calculated to protect the public welfare, since a contractor who had been required to make a showing of good character and financial responsibility would be less likely to engage in such practices. Furthermore it said that the provision for revocation of licenses for certain kinds of misconduct at least minimized the possibility that the same contractor would indulge in malpractices more than once. The *Hunt* case is weakened as a precedent by the fact that the court found an alternative ground for the decision, which makes the discussion of the constitutional question appear very much like dictum. The case is generally followed,¹⁸⁴ however, and has recently been approved in Arizona.¹⁸⁵

Of course, as applied to plumbing and electrical contractors, the licensing of contractors would be supported by the cases already cited.¹⁸⁶ The difficulty is, however, that these statutes include many other kinds of contractors, as to some of which there are cases saying licensing is unconstitutional. Thus the California statute applies to painting contractors,¹⁸⁷ and it has been held that the licensing of painters is not constitutional because the trade does not unduly endanger public health, morals or welfare.¹⁸⁸ The same is true of mason contractors,¹⁸⁹ heating contractors,¹⁹⁰ and paper hangers.¹⁹¹

There is a possibility of distinguishing the contractor-licensing statutes with respect to their purpose, which is partly, perhaps entirely, to protect against pecuniary loss rather than physical injury, resulting from fraud, breach of contract or poor work-

183. See p. 487, *supra*.

184. *Franklin v. Nat C. Goldstone Agency*, 33 Cal.2d 628, 204 P.2d 37 (1949); *Howard v. State*, 85 Cal. App.2d 361, 193 P.2d 11 (1948); *Alvarado v. Davis*, 115 Cal. App.2d 782, 6 P.2d 121 (1931); *Florida ex rel. Reynolds v. St. Petersburg*, 133 Fla. 766, 183 So. 304 (1938); *Olsen v. Reese*, 114 Utah 411, 200 P.2d 733 (1948).

185. *Northern v. Elledge*, 232 P.2d 111 (Ariz. 1951).

186. See note 23 *supra*.

187. CAL. ADMINIS. CODE § 732 (1948).

188. *Howard v. Lebby*, 197 Ky. 324, 246 S.W. 828 (1923).

189. CAL. ADMINIS. CODE § 732 (1948); *Gray v. Omaha*, 80 Neb. 526, 114 N.W. 600 (1908); *State ex rel. Sampson v. Sheridan*, 25 Wyo. 347, 170 Pac. 1 (1918).

190. CAL. ADMINIS. CODE § 732 (1948); *Harrigan & Reid Co. v. Burton*, 224 Mich. 564, 195 N.W. 60 (1923).

191. CAL. ADMINIS. CODE § 732 (1948); *Dasch v. Jackson*, 170 Md. 251, 183 Atl. 534 (1936).

manship. If this is so, it is more arguable that reputation and technical ability are relevant subjects of inquiry. In other types of business it has often been held that the prevention of fraud or dishonesty or incompetence is a valid reason for the license requirement, where there is a greater than ordinary opportunity to harm the public.¹⁹² The question then is whether, because of the practices and conditions in the building industry, there is sufficient likelihood of pecuniary loss to the public to justify licensing. The cases seem to assume that this is so, without any information, the *Hunt* case for example saying that it "... is well known to all who have the slightest acquaintance with the contracting business."¹⁹³ This assumes, of course, that the protection of the contractors themselves from shady competition would not be enough for constitutionality. No cases have been found which deal with that problem, but the assumption would seem to be valid, in view of the premise underlying cases upholding licensing, that there must exist some benefit to the general public, broadly defined, to support the legislation. The cases which uphold the constitutionality of the so-called Fair Trade Acts¹⁹⁴ might be considered authority for saying that protection of the contractors as a class from "cutthroat competition" would be enough to sustain the licensing act, since the Fair Trade Acts limited the freedom of the buyer of goods to resell them for what price he pleased, in order to prevent injury to the owner of the trade-mark, although even there the courts relied to some extent on injury to the general public.¹⁹⁵ At any rate the resale price maintenance cases would hardly be controlling authority, since the freedom infringed by the licensing statutes is more extensive and more important, so as to require a much stronger showing of corresponding benefit to sustain constitutionality.

One circumstance, not discussed by the courts, is of the greatest significance for determining the desirability, even the con-

192. *Hall v. Geiger-Jones Co.*, 242 U.S. 539 (1917) (selling of securities); *Hoblitzel v. Jenkins*, 204 Ky. 122, 263 S.W. 764 (1924) (real estate brokers); *Weer v. Page*, 155 Md. 86, 141 Atl. 518 (1928) (banking).

193. 41 *Ariz.* 276, 286, 17 P.2d 815, 819 (1933).

194. *E.g.*, CAL. BUS. AND PROF. CODE, § 16900 *et seq.* (1950). The similar Illinois statute was held constitutional in *Old Dearborn Distributing Co. v. Seagram Distillers Corp.*, 299 U.S. 183 (1936).

195. *Old Dearborn Distributing Co. v. Seagram Distillers Corp.*, 299 U.S. 183, 190 (1936).

stitutional validity, of the contractor-licensing statutes, and that is the extremely inclusive language which they contain. The California Act, for example, which has been in force for some time and has served as a model for other states,¹⁹⁶ applies to contractors who do every conceivable kind of work in, on, or around buildings, highways, excavations or structures of all kinds.¹⁹⁷ Apparently Michelangelo himself, if he had painted the Sistine Chapel in Los Angeles instead of at Rome, would have had to get an interior decorator's license.¹⁹⁸ The statute excludes only certain relatively unimportant work, the sale of finished products not fabricated into a structure, jobs costing less than \$100, and owners building for their own occupancy.¹⁹⁹ The constitutional requirement is usually stated to be that the statute's effects must be reasonably related to its purposes, or stated another way, that the statute must be reasonably calculated to accomplish its objectives. It may very well be that there is a strong likelihood of incompetence, fraud, dispersion of funds, or breach of contract among general building contractors and that this may be reduced or eliminated by the requirement of a license, but can the same be said of cabinet-makers, or electric sign manufacturers, or elevator manufacturers, or house wreckers, or landscape gardeners, or interior decorators? Yet persons in all of these businesses must get licenses in California.²⁰⁰ It

196. The Nevada statute was based on the California act. Letter from the Nevada State Contractors Board to the writer, dated Nov. 19, 1951.

197. CAL. BUS. AND PROF. CODE, § 7026 (Cum.Supp. 1951) defines "contractor" as "any person, who undertakes to or offers to undertake to or submits a bid to, or does himself or by or through others, construct, alter, repair, add to, subtract from, improve, move, wreck or demolish any building, highway, road, railroad, excavation or other structure, project, development or improvement, or to do any part thereof, including the erection of scaffolding or other structures or works in connection therewith. The term contractor includes subcontractor and specialty contractor.

198. MacIntyre v. Angel, 109 Cal. App. 2d 425, 240 P.2d 1047 (1952).

199. CAL. BUS. AND PROF. CODE, §§ 7053 to 7070 (Cum. Supp. 1951).

200. CAL. ADMINIS. CODE § 732 (1948) lists the so-called specialty contractors covered by the act according to the work they perform: boilers, hot water heating and steam fitting; cabinet and mill work; cement and concrete; electric signs; electrical (general); elevator installation; excavating, grading, trenching, paving, surfacing; flooring; glazing; house and building moving, wrecking; insulation; landscaping; lathing; masonry; ornamental metals; painting, decorating, paperhanging; plastering; plumbing; refrigeration; roofing; sewer, sewage disposal, drain, cement pipe laying; sheet metal; steel, reinforcing; structural steel; structural post control; tile; warm-air heating, ventilating, air conditioning; welding; well drilling; classified specialists.

The Arizona board's classification is equally elaborate. See Ariz. Registrar of Contractors, Instructions to Applicants for Contractor's License.

rather looks as though the probability of abuses among a limited class of persons has been made the excuse for tossing a regulatory net over a very much larger, and in many ways entirely unrelated, heterogeneous class. Here again judicial tolerance of legislative experiment has meant that the legislature's decision on the desirability and validity of such statutes has been the final one.

The administration of contractor-licensing statutes is handled by boards usually composed chiefly or entirely of practicing contractors.²⁰¹ An examination of the statutes shows that there is much less tendency to put persons on the contractor-licensing boards who are not contractors themselves than is the case with the plumbing and electrical licensing acts. The California Contractors' State License Board,²⁰² which seems to be one of the most thoroughly organized, has seven members, all of whom must be in the contracting business while in office and must have been in that business for the five years preceding their appointment. One member must be a general engineering contractor, three general building contractors, and three specialty contractors. The Board's statement of its purposes²⁰³ fails to explain why the protection of the public must be placed exclusively in the hands of the industry supposedly being regulated. It is conceivable that a member of the public, or a state official

A case upholding the California act as applied to interior decorators is *Franklin v. Nat. C. Goldstone Agency*, 33 Cal. 2d 628, 204 P.2d 37 (1949).

A recent case discusses the statute as applied to painting contractors, and concludes that it is entirely valid as a means of preventing incompetent workmanship, imposition and deception. The opinion is significant for its complete failure to mention the freedom to work which was so strongly emphasized in some of the plumbing cases. *Howard v. State*, 85 Cal. App. 2d 361, 193 P.2d 11 (1948).

201. *E.g.*, ARK. STAT. ANN. tit. 71, § 71-702 (1947) (five practicing contractors, one to be chiefly a highway contractor, one chiefly sewers and waterworks and one a building contractor); CAL. BUS. AND PROF. CODE, §§ 7001, 7002 (Cum. Supp. 1951); NEV. COMP. LAWS ANN. §§ 1474.01, 1474.02 (Supp. 1941) (all seven members to be contractors); N.M. STAT. ANN. § 51-1904 (1941) (one-building contractor, one highway contractor, one from some other classification); N.C. GEN. STAT. ANN. § 87-2 (1949) (one highway contractor, one public utility contractor, one building contractor); N.D. REV. CODE § 43-0703 (1943) (statute administered by registrar of contractors, who is secretary of state ex officio); TENN. CODE ANN. § 7182-26 (Williams 1934) (one sub-contractor and 4 general contractors); UTAH CODE ANN. § 79-5a-4 (1943) (department of registration issues licenses); VA. CODE ANN. § 54-115 (1950) (one building contractor, one public utility contractor, one highway contractor, and two others).

202. CAL. BUS. AND PROF. CODE § 7002 (Cum. Supp. 1951).

203. CAL. ADMINIS. CODE § 701 (1948).

not a contractor might be able to contribute to the achievement of the Board's purposes.

The California Board acts through, and supervises, a Registrar of contractors, to whom some of the Board's authority has been delegated, and who is a full time employee of the state.²⁰⁴ However, the responsibility for decisions of policy and for the administration of the act remains with the Board.²⁰⁵

Contractor-licensing statutes apply to persons, partnerships and corporations, all of which must obtain a license in order to do business. For some reason provisions for reciprocity between states are not found here, though the need for them would seem to be even greater than in the plumbing and electrical trades. Under most laws, the partnership or corporation must be licensed as such, even though the members also hold licenses.²⁰⁶ In order to get a license the partnership or corporation must qualify all of its responsible officers or members as to character but only its responsible managing member or officer as to experience, under the California statute.²⁰⁷ This provision might be held discriminatory and unconstitutional, under the cases dealing with similar provisions of the plumbing and electrical licensing laws.²⁰⁸

Although the statutes give the licensing boards authority to require evidence of financial responsibility, of good reputation, and also to set an examination,²⁰⁹ it appears that some states issue licenses automatically upon receipt of the proper application form and the required fee.²¹⁰ In at least three states, how-

204. CAL. BUS. AND PROF. CODE §§ 7011, 7012, 7013, 7065 (Cum.Supp. (1951)).

205. CAL. BUS. AND PROF. CODE § 7010 (Cum. Supp. 1951).

206. ARK. STAT. ANN. tit. 71, § 71-716 (1947) (one principal must be licensed and in charge); CAL. BUS. AND PROF. CODE, § 7026 (Cum.Supp. 1951); NEV. COMP. LAWS ANN. § 1474.09 (Supp. 1949); N.M. STAT. ANN. § 51-1903 (1941); TENN. CODE ANN. § 7182.39 (Williams 1934); VA. CODE ANN. § 54-113 (1950).

207. CAL. BUS. AND PROF. CODE §§ 7068, 7069, 7071 (Cum.Supp. 1951).

208. See notes 144, 168, 169, 170 *supra*.

209. *E.g.*, ARIZ. CODE ANN., § 67-2305 (Supp. 1951); ARK. STAT. ANN. tit. 71, § 71-708 (1947); CAL. BUS. AND PROF. CODE, § 7065 (Cum.Supp. 1951); NEV. COMP. LAWS, § 1474.24 (Supp. 1949); N.M. STAT. ANN. § 51-1905 (1941); N.C. GEN. STAT. ANN. § 87-10 (1950); VA. CODE ANN. § 54-129 (1950).

210. Letter from the North Dakota Secretary of State to the writer, dated Nov. 16, 1951; letter from Virginia State Registration Board for Contractors to the writer, dated Nov. 21, 1951. A letter to the writer from the Associated General Contractors of America, Inc., dated Nov. 30, 1951 referred to the practice of issuing licenses in a routine manner, so that the

ever, Arizona,²¹¹ California,²¹² and Nevada,²¹³ an investigation is made of applicants, and examinations are held for some or all classes of contractors.

The California Board seems to make the most thorough investigation of applicants. It has statutory power to require such a showing of experience and knowledge of the "building, safety, health and lien laws of the State and of the rudimentary administrative principles of the contracting business as the board deems necessary for the safety and protection of the public."²¹⁴ The applicant is also required to give a complete statement of the general nature of his business, on forms supplied by the registrar, plus other information considered necessary by the board.²¹⁵ The board by its regulations requires four years' experience within the preceding ten years as journeyman, foreman or contractor in the class of contracting for which the applicant seeks a license.²¹⁶ School training is counted but may supply no more than three years of experience. Experience in excess of the minimum is credited on the examination grade.

The California applicant is also required by statute to "possess good character,"²¹⁷ which is defined by the statute to the extent that it sets forth certain circumstances which will establish lack of good character, such as conduct which would justify revocation of a license; dishonesty, fraud, or deceit; a bad reputation for honesty and integrity; and conviction for a felony.²¹⁸ The board has further defined good character by providing in its regulations that each applicant must supply three signed references on forms prescribed by it from contractors, architects or engineers licensed in California.²¹⁹ One of these references must

licensing procedure was nothing more than a means of collecting a tax, and suggested that this did more harm than good, since it misled the public into thinking that the licensed contractor had passed a test for competence and responsibility.

211. Letter from the Arizona Registrar of Contractors to the writer, dated Nov. 2, 1951.

212. Letter from a representative of the California Registrar of Contractors to the writer, dated Nov. 7, 1951.

213. Letter from the Nevada State Contractors Board to the writer, dated Nov. 19, 1951.

214. CAL. BUS. AND PROF. CODE, § 7068 (Cum. Supp. 1951).

215. CAL. ADMINIS. CODE § 706 (1948).

216. CAL. ADMINIS. CODE § 724 (1948).

217. CAL. BUS. AND PROF. CODE, § 7069 (Cum. Supp. 1951).

218. *Ibid.*

219. CAL. ADMINIS. CODE § 709 (1948).

be from a licensed contractor in the classification in which the applicant wishes to be licensed. The least that can be said of this method of establishing "character" is that it contains unlimited potentialities for abuse without having any corresponding benefits. It places in the hands of an applicant's competitors the power to prevent his entrance into the business by refusing him a letter of recommendation. There is no reason why, if the purpose of the letter is to establish good reputation, any impartial persons in the community could not provide the necessary information about an applicant.²²⁰ No one would contend that contractors are the only competent judges of "character" in California. It is true that the form letters of reference carry also a statement about the applicant's experience, but that can be established far better by a detailed account from the applicant himself and by the examination. One can only suspect that this requirement is an exclusionary device in disguise. In fact it seems questionable whether any such general "character" evidence is worth the paper it is written on, in view of the difficulty of defining just what it is that the applicant must show.

The California act contains an important safeguard against misuse of the rather vaguely defined qualifications for a license in its provision that, if information is brought to the attention of the registrar of such a nature as to justify denying a license on the ground of lack of good character or integrity, the registrar must notify the applicant and grant a hearing in accordance with the state administrative procedure act, from the decision in which proceedings for judicial review may be taken.²²¹

The elaborate classifications found in the California and Arizona administrative regulations imply separate and different examinations for some or all of the branches of the trade. In both states all applicants must take written examinations, and for some classifications specific written examinations are

220. The New Mexico statute requires references from two reputable citizens of the county in which the applicant resides. N.M. STAT. ANN. § 51-1905 (1941). The Nevada board requires references from eight individuals, two each from engineers, from building supply firms, from banks, lending or bonding institutions, and from persons for whom the applicant has done construction work. Nevada State Contractors Board Rules, Art. II, § 1(u) (1951).

221. CAL. BUS. AND PROF. CODE, § 7073 (Cum. Supp. 1951). A similar provision is found in the New Mexico act, which provides for a decision by an advisory committee of three reputable residents of the county. N.M. STAT. ANN. § 51-1905 (1941).

given.²²² The classification and examination scheme also involves a license to engage in a particular branch of the business, although in California at least, a contractor may do work outside his classification if it is incidental or supplemental to a contract which falls within his classification.²²³ In other states apparently only a general license for all kinds of contracting is given.²²⁴ There are objectionable features to both types of statute. If a general license is given and an examination required, a contractor may be examined in fields where he possesses no knowledge and in which he has no intention of doing business.²²⁵ On the other hand an excessive classification may limit a contractor's freedom to take jobs slightly outside his field which he might be willing and competent to take if not subjected to the necessity of getting another license. This might very well lead to a limiting of competition among contractors as the classification became more rigid.

The importance of contractor-licensing statutes is diminished in some states by extensive exemptions. A fairly high cost exemption is found in many statutes²²⁶ so that smaller contractors doing relatively low-cost jobs need not be licensed. It is not unusual to find an exemption for owners building on their own property,²²⁷ although in California this exemption is limited

222. ARIZ. CODE ANN. § 67-2305 (1939); Letter from Arizona Registrar of Contractors to the writer, dated Nov. 2, 1951; CAL. ADMINIS. CODE §§ 760, 764 (1948).

223. CAL. ADMINIS. CODE § 760 (1948).

224. *E.g.*, TENN. CODE ANN. § 7182.35 (Williams 1934); UTAH CODE ANN. § 79-5a-4 (1943).

225. This difficulty is discussed in Silverman, Bennett, Lechliter, *Control by Licensing Over Entry into the Market*, 8 LAW & CONTEMP. PROB. 234, 251 (1941). The authors refer to the New Mexico statute as open to this objection, but it seems to contemplate the classification of contractors and their examination only in fields where they are competent. N.M. STAT. ANN. §§ 51-1905, 51-1917 (1941).

226. ARK. STAT. ANN. tit. 71, § 71-701 (1947) (\$10,000); N.C. GEN. STAT. ANN. § 87-1 (1950) (\$15,000); S.C. CODE ANN. § 7084-1 (1942) (\$12,500); TENN. CODE ANN. § 7182.35 (Williams 1934) (\$10,000); VA. CODE ANN. § 54-113 (1950) (\$20,000).

The cost limit is much lower in states copying the California act: ARIZ. CODE ANN. § 67-2303 (Supp. 1951) (no limit); CAL. BUS. AND PROF. CODE § 7048 (Cum. Supp. 1951) (\$100); NEV. COMP. LAWS ANN. §§ 1474.13-1474.21 (Cum. Supp. 1951) (no limit); N.M. STAT. ANN. § 51-1902 (Cum. Supp. 1951) (no limit); UTAH CODE ANN. § 79-5a-2 (1943) (\$200).

227. ARIZ. CODE ANN. § 67-2303 (Cum. Supp. 1951); CAL. BUS. AND PROF. CODE § 7044 (Cum. Supp. 1951). *Moon v. Goldstein*, 69 Cal. App. 2d 800, 158 P.2d 1004 (1945) held that an owner of property who subdivided it and put up thirty houses on it was within the licensing statute.

to cases where the owner intends to, and does occupy the property himself, and does not offer it for sale before completion. This exemption seems difficult to square with the supposed purposes of the statute, since an owner may build, live in the house a short time and then sell, without getting a license, but if he does not live in the house he must get a license or hire a licensed contractor. The possible harm to the public would be that he might do a shoddy job and sell to an unsuspecting buyer, or might not pay his laborers, but that harm can occur just as well whether he lives in the house himself or not, and the distinction made by the licensing statute has therefore little relation to the prevention of such harm.

Other exemptions frequently found are for work by public utilities,²²⁸ work incident to the discovery or production of oil,²²⁹ work by irrigation districts,²³⁰ activities of persons merely furnishing materials without incorporating them into buildings,²³¹ and persons working solely as employees for wages.²³²

As is the case with other licensing statutes, the unlicensed contractor faces not only the sanction of criminal penalties²³³ but also the likelihood that the courts will refuse to allow him to recover for work and materials,²³⁴ although in one case the Cali-

228. ARIZ. CODE ANN. § 67-2303 (Cum. Supp. 1951); CAL. BUS. AND PROF. CODE § 7042 (Cum. Supp. 1951); NEV. COMP. LAWS ANN. § 1474.15 (Supp. 1941); UTAH CODE ANN. § 79-5a-2 (1943).

229. ARIZ. CODE ANN. § 67-2303 (Cum. Supp. 1951); CAL. BUS. AND PROF. CODE § 7043 (Cum. Supp. 1951).

230. ARIZ. CODE ANN. § 67-2303 (Cum. Supp. 1951); CAL. BUS. AND PROF. CODE § 7049 (Cum. Supp. 1951); UTAH CODE ANN. § 79-5a-2 (1943).

231. ARIZ. CODE ANN. § 67-2303 (Cum. Supp. 1951); CAL. BUS. AND PROF. CODE § 7045 (Cum. Supp. 1951); NEV. COMP. LAWS ANN. § 1474-17 (Supp. 1941).

232. CAL. BUS. AND PROF. CODE § 7053 (Cum. Supp. 1951).

233. ALA. CODE ANN. tit. 46, §77 (1940); ARIZ. CODE ANN. § 67-2319 (Cum. Supp. 1951); ARK. STAT. ANN. tit. 71, § 71-713 (Cum. Supp. 1951); CAL. BUS. AND PROF. CODE §§ 7028, 7029, 7030 (Cum. Supp. 1951); NEV. COMP. LAWS ANN. § 1474.32 (Supp. 1949); N.M. STAT. § 51-1914 (1941); N.C. GEN. STAT. ANN. § 87-13 (1950); S.C. CODE ANN. § 7084-4 (1942); TENN. CODE ANN. § 7182.37 (Williams Cum. Supp. 1952); UTAH CODE ANN. § 79-5a-10 (1943); VA. CODE ANN. § 54-128 (1950).

234. Three states have specific statutory provisions on this point, ARIZ. CODE ANN. § 67-2320 (Cum. Supp. 1951); CAL. BUS. AND PROF. CODE, § 7031 (Cum. Supp. 1951); NEV. COMP. LAWS ANN. § 1474.32A (Supp. 1949), requiring that he plead and prove he was licensed as a condition to any recovery of compensation.

Several cases have dealt with the same doctrine. *Sheble v. Turner*, 46 Cal. App. 2d 762, 117 P.2d 23 (1941) (plaintiff could not enforce a contract under which he was to act as owner's agent in getting plans, mortgages and supervising construction of houses, letting subcontracts and assisting in the

fornia court seems to have tempered the operation of the statute by "construction" to some extent.²³⁵

Revocation of contractors' licenses is usually provided for, either upon the verified complaint of a private person or upon the initiative of the administrative agency.²³⁶ Some of the grounds for revocation given by the California statute, which is typical, are abandonment of a project without excuse,²³⁷ diversion of funds,²³⁸ wilful departure from or disregard of specifications,²³⁹ wilful disregard of building laws,²⁴⁰ failure to keep records required by law,²⁴¹ misrepresentation of a material fact in getting a license,²⁴² loaning one's license,²⁴³ any wilful or fraudulent act causing injury to another,²⁴⁴ wilful failure to

sale of the buildings, since plaintiff was acting as a contractor without a license); *Cash v. Blackett*, 87 Cal. App. 2d 233, 196 P.2d 585 (1948) (an unlicensed contractor could not foreclose a mechanic's lien); *Franklin v. Nat C. Goldstone Agency*, 33 Cal. 2d 628, 204 P.2d 37 (1949) (interior decorators could not recover for decorating an office without a license, even in a proceeding to confirm the award of arbitrators); *Olsen v. Reese*, 114 Utah 411, 200 P.2d 733 (1948) (plaintiff, a contractor, could not recover for his services when he did not get a license until after the contract was made, though before most of the work was done). But in *Norwood v. Judd*, 93 Cal. App. 2d 276, 209 P.2d 24 (1949) the court allowed one partner to get an accounting from another, though the firm had not had a contractor's license.

Welles v. Revercomb, 189 Va. 777, 54 S.E.2d 878 (1949) allowed an unlicensed contractor to recover, on the ground that the licensing statute was a tax, not a police regulation, but the court entirely overlooked the Virginia licensing act.

235. *Gatti v. Highland Park Builders*, 27 Cal. 2d 687, 166 P.2d 265 (1946) (partnership allowed to recover on a contract although unlicensed, when both individuals were licensed contractors, and both were members of another firm which was licensed, but as *Edmonds, J.*, dissenting, pointed out, this result was directly contrary to the literal words of the statute).

236. ALA. CODE ANN. tit. 46, § 75 (1940); ARIZ. CODE ANN. §§ 67-2312, 67-2313, 67-2314, 67-2315, 67-2316 (Cum. Supp. 1951); ARK. STAT. ANN. tit. 71, § 71-711 (Cum. Supp. 1951); CAL. BUS. AND PROF. CODE, §§ 7090, 7091, 7095, 7100, 7102 (Cum. Supp. 1951); NEV. COMP. LAWS ANN. § 1474.25 (Supp. 1949); N.M. STAT. ANN. §§ 51-1909, 51-1909a (Cum. Supp. 1951); N.C. GEN. STAT. ANN. § 87-11 (1950); S.C. CODE ANN. § 7084-3 (1942); TENN. CODE ANN. § 7182.34 (Williams Cum. Supp. 1952); UTAH CODE ANN. § 79-5a-6 (1943); VA. CODE ANN. § 54-132 (1950).

237. CAL. BUS. AND PROF. CODE § 7107 (Cum. Supp. 1951).

238. *Id.* § 7108.

239. *Id.* § 7109.

240. *Id.* § 7110. *Barry v. Contractors State License Board*, 85 Cal. App. 2d 600, 193 P.2d 979 (1948) (registrar validly revoked license for violation of the building code and could condition reissue of license on rebuilding of the defective structure).

241. CAL. BUS. AND PROF. CODE § 7111 (Cum. Supp. 1951).

242. *Id.* § 7112.

243. *Id.* §§ 7114, 7117.

244. *Id.* § 7116.

carry on a job with reasonable diligence,²⁴⁵ wilful failure to pay money due for materials or labor.²⁴⁶ The revocation procedure is governed by the state administrative procedure act,²⁴⁷ and includes a hearing before the agency²⁴⁸ and the right of judicial review.²⁴⁹

As an additional protection to the public, some of the licensing statutes provide for the giving of a bond as a condition upon the grant of the license. The bond secures the proper performance of the contractor's projects and the payment for labor and materials.²⁵⁰

There is one other type of contractor licensing statute, found only in a few western states, notably Idaho,²⁵¹ Montana²⁵² and North Dakota,²⁵³ providing for the licensing of contractors doing work for the state or its subdivisions. These statutes are administered to a considerable extent like the general contractor-licensing acts, and a showing of financial responsibility and experience must be made to the administering agency. They are really only a more formal expression of the very common requirement that before bidding on state construction jobs a contractor must "prequalify," that is, furnish information about his financial condition, his equipment, and his experience.²⁵⁴

VI. LICENSING OF OTHER TRADES

There have been scattered and sporadic attempts to obtain licensing statutes applicable to trades other than those of plumbers and electricians, but they have not been successful. Some have been held unconstitutional, such as those licensing mason contractors,²⁵⁵ painters,²⁵⁶ and paper hangers.²⁵⁷ In one instance

245. *Id.* § 7119.

246. *Id.* § 7120.

247. *Id.* § 7091.

248. CAL. GOVERNMENT CODE §§ 11503-11523 (Cum. Supp. 1951).

249. CAL. GOVERNMENT CODE § 11523 (Cum. Supp. 1951).

250. *E.g.*, NEV. COMP. LAWS ANN. § 1474.26a (Supp. 1949).

251. IDAHO CODE ANN. tit. 54, §§ 54-1901-54,1924 (1947).

252. MONT. REV. CODES ANN. §§ 84-3501-84-3512 (1947).

253. N.D. REV. CODE §§ 43-0701-43-0718 (1943).

254. This is often required by regulation of the state highway department. See also Mich. Pub. Acts 1933, Act No. 170; Ore. Laws 1931, c. 225, Wash. Sess. Laws 1937, c. 53.

255. *Gray v. Omaha*, 80 Neb. 526, 114 N.W. 600 (1908); *State ex rel. Sampson v. Sheridan*, 25 Wyo. 347, 170 Pac. 1 (1918).

256. *Howard v. Leiby*, 197 Ky. 324, 246 S.W. 828 (1923). Apparently the painters tried and failed to obtain passage of a licensing statute in Illinois. *Hearings, supra* note 74, at 5255.

257. *Dasch v. Jackson*, 170 Md. 251, 183 Atl. 534 (1936).

the licensing of plasterers was upheld on the ground that the business was "fraught with the possibility of danger to the physical well-being of the public."²⁵⁸ In any event it does not appear likely that licensing statutes will be extended to other trades, especially since the licensing of contractors has been so inclusive in some states that the demand for licensing from the employers' sector of the trades has been satisfied.

VII. CONCLUSION

A study of licensing in the building industry makes at least one fact reasonably clear: the licensing acts would neither have been passed nor upheld in the courts without both (1) recognition of the existence of certain evils in the industry and (2) the active influence of trade association and labor unions.²⁵⁹ It would be a great over-simplification to say, therefore, either that the statutes were passed solely for the protection of the public or solely as the result of lobbying by interested groups.

The evils referred to here include the danger to public health of defective plumbing and the fire danger from faulty wiring, but they also include complex economic and social facts which have probably been more significant in getting the legislation passed than considerations of health or fire-prevention. Risks to health and safety have of course been influential with the courts in their decisions on the constitutionality of these statutes, but even here they have not been indispensable, as witness the approval of contractor licensing, where no such risks are involved. The social significance of these statutes is that they make a profession out of what was formerly a trade,²⁶⁰ thereby increasing the prestige of its practitioners.

The more important effects of licensing are economic. As applied to plumbing and electrical journeymen, it prevents the influx of untrained, casual labor which might very well occur

258. State *ex rel.* Remick v. Clousing, 205 Minn. 296, 285 N.W. 711 (1939). There was testimony before the TNEC to the effect that the plasterers had attempted to get a similar statute through the Illinois legislature but had been unsuccessful. *Hearings, supra* note 74, at 5256.

259. The California act was the outcome of contractors' association activity. Letter from California Registrar of Contractors to the writer dated Nov. 7, 1951. The New Mexico plumbing licensing statute was actively sponsored by the local journeymen's union. Letter from the New Mexico Plumbing Administrative Board to the writer dated Nov. 23, 1951.

260. See Fellman, *A Case Study in Administrative Law—The Regulation of Barbers*, 26 WASH. U.L.Q. 213, 225 (1941).

without it in periods of labor shortage and high wages. In an industry which is so subject to both seasonal and cyclical fluctuation in employment, the likelihood of competition for jobs from unskilled men wishing to take advantage of the high wages is particularly great. The fact that the plumbing and electrical licensing acts, which have been the subject of legislative action for over fifty years, are usually passed in times of relative prosperity bears this out. At those times the high wages in the construction trades would naturally attract many men who, in the absence of licensing statutes, might be able to pick up enough facility in the trade in a short time to compete for jobs with those who had been working in it for years. The effect of their activities would probably be lower wages all round and inferior work. The opportunity for this competition by untrained men was increased by the decline in the degree of skill required by the trades and by the lack of an organized apprenticeship program which was not remedied until recently. A well organized system of apprenticeship is important not only as a means of recruiting men for the trade but also as a means of insuring that entry into the trade will only be via the apprenticeship. In the absence of an apprenticeship program and of complete unionization, licensing was thus hit on as a useful device for curing the evils of unrestricted competition.

As applied to contractors, plumbing, electrical and all other varieties, licensing had a similar purpose. In the conditions of the business, the small inefficient contractor was a disturbing force because of his proclivity to low bidding and all its consequences of inferior work, violation of specifications, abandonment of contracts, and sometimes bankruptcy. Licensing statutes were aimed at the elimination of this type of contractor and these types of abuse. Here again the argument is that unrestricted competition cannot be tolerated because it lowers price below what is necessary for good work, drives out responsible contractors, and produces inferior building and financial loss. This amounts to saying that contracting is such a difficult business, requires such expert knowledge and financial strength, that free entry into it is not for the best interests of the public and that competition is not an effective regulator of the market under those conditions. This is presumably what the proponents of the legislation mean when they say that they

wish to prevent unethical, fraudulent or cutthroat competition. Similar arguments have been successfully made on behalf of the resale price maintenance statutes.

That these statutes do restrict competition to some extent can hardly be denied. Various agencies of the federal government have indicated their conviction that they do.²⁶¹ The question then is whether that restriction is over-balanced by the good effects of licensing. It is the writer's opinion that it is not, and that the industry's difficulties could be removed by measures short of such a drastic limitation on the freedom to choose an occupation.²⁶² The dangers from faulty work could be largely eliminated by adequate permit and inspection schemes. Unionization and apprenticeship protect the journeymen from the competition of unskilled men. The contractors could be as well protected by a registration system as by licensing, and then entry into the business would not be so difficult and newcomers could compete on more even terms. But this opinion is of little importance, since it appears that licensing is firmly established as a means of control in the building industry.

The important question is, given the purposes of the statute,

261. *Hearings, supra* note 74, at 5150 (testimony by Thurman Arnold to the effect that licensing and registration of contractors are legislative restraints on trade). The Federal Works Administrator has made regulations covering work done by states with federal funds as follows: "No procedure or requirement shall be approved which, in the judgment of the Administrator, is designed or may operate to prevent the submission of a bid by, or the award of a contract to, any responsible contractor, whether resident or nonresident of the state wherein the work is to be performed, such as laws or regulations which require the licensing of a contractor before he may submit a bid or which prohibit the consideration of a bid submitted by a contractor not so licensed. . . ." 23 CODE FED. REGS. § 1.10(d) (1949). This regulation was made under 52 STAT. 636 (1938), 23 U.S.C. §8a (1950), providing for approval of methods of bidding only where they would "be effective in securing competition." A case holding that a license cannot be required for bidding on a federal project is *Lee Moor Contracting Co. v. Hardwicke*, 56 Ariz. 149, 106 P.2d 332 (1940).

On the other hand, a letter from the Research and Education Director, National Electrical Contractors Association, to the writer, dated Dec. 28, 1951, expresses the view that on the whole the expansion of the electrical contracting industry is not impeded by licensing and examination requirements.

262. Even the drastic licensing provisions may not be entirely adequate to their objectives. In the letter referred to *supra* note 261, the statement is made that most licensing and examination requirements are such that persons with limited experience can pass, if they have worked as electricians for any time at all, and that it has proved quite difficult to test their qualification for larger, more complicated jobs, and also to test their competence in planning, supervising, and business methods as distinguished from mere mechanical ability.

whether they may be accomplished by a licensing scheme which minimizes the impairment of economic freedom and the possibilities of abuse. The writer believes that this question can be answered in the affirmative. A great deal can be done to improve the technique of licensing. The statutes are open to the objection, which can usually be addressed to legislation in which only the members of a special class are interested, that it does not take account of the interests of all persons to be affected but only of the interests of the particular class. In order to cure this defect, the following specific changes in the licensing statutes are suggested:

(1) All licensing should be done by the states rather than municipalities, or, in the alternative, any city's license should be valid without further formality in all other places in the same state. Similarly all states should provide for reciprocal action on licenses from other states. These reforms would prevent entirely gratuitous restrictions on the mobility of the industry.

(2) The statutes should be administered by an agency in the full-time employ of the state, having no outside business interests, and responsible only to the state. Members of the trade to be licensed, if on the board at all, should be in the minority. The persons on the board should have expert knowledge of the trade with which they deal.

(3) In order to make the licensing procedure as objective as possible, all "character," or reputation tests should be abandoned. They help very little in discriminating between the fit and the unfit and are capable of abuse. Contractors could as well be licensed after presenting a statement of experience and a financial statement. The examination would still give wide discretion to the administering agency, but that appears unavoidable.

(4) Training and experience requirements should be made at least as short, probably shorter, than the apprenticeship period and of course should be uniform throughout the state.

(5) Exemptions based on the population of cities should be abandoned. All persons active in a business enterprise should be required to have a license, whether they operate in the form of a partnership or a corporation or as a sole proprietorship.

(6) In the case of contractors, the application of the licensing act should be limited to plumbers, electricians, and general contractors and builders. There appears to be no reason for requiring a license of the myriad of businesses covered by the California law. Journeymen licensing should be limited to plumbers and electricians.

It is quite possible that with these changes, or even part of them, licensing would not be acceptable to the persons affected by it, but they would seem to be the minimum necessary to protect both public and industry.

Licensing statutes are typical of the industrial organization of society common in twentieth-century America. Under them a person's status determines his rights in the most important activity of his life, his work. The status involved is membership in an industrial group and is obtained not through the accident of birth but by compliance with a statute or action of an administrative body. The importance of attaining this status makes entry into the group the point at which decisive legal control can be conveniently exercised, but its convenience should not obscure its potentialities for abuse, or prevent the adoption of necessary safeguards.

APPENDIX I

Table showing the dates on which the various states first required licenses for working in the building industry. The dates given are those on which the licensing method now used, namely state or municipal examination, was first adopted. Of course many changes may have occurred in the statutes since the dates given.

	<i>Plumbers</i>		<i>Electricians</i>		<i>Contractors</i>	<i>Others</i>
	State	City	State	City		
Ala.					1935	
Ariz.					1931	
Ark.		1925			1939	
Calif.		1885			1929	
Colo.	1917					
Conn.		1930		1937		
Del.						
D.C.		1893				
Fla.		1915				
Ga.		1937		1937		
Idaho			1947		1941	
Ill.	1897			1925		Mason contractors 1913
Ind.					1929	
Iowa		1913				
Kan.						
Ky.	1914					
La.	1924					
Me.	1937					
Md.	1910		1906			
Mass.	1893		1915			
Mich.	1929					Septic tank cleaners 1951
Minn.	1933		1905			Steamfitters 1937
Miss.						
Mo.		1903		1945		
Mont.	1951				1935	
Neb.		1901				
Nev.					1941	
N.H.		1899				
N.J.		1911				Well drillers 1947
New Mexico	1949		1939		1939	
N.Y.		1892		1937		
N.C.	1931		1937		1925	{ Tile contractors 1937
N.D.	1941		1917		1937	{ Heating contractors 1931
Ohio		1906		1906		
Okla.		1915				
Ore.	1935		1919			
Penn.		1895				
R.I.	1946		1942			
S.C.		1927			1936	
S.D.		1919		1919		
Tenn.		1915			1931	
Tex.	1947					
Utah	1937				1933	
Vt.						
Va.					1938	
Wash.			1935			
W.Va.		1937		1937		
Wis.	1931					
Wyo.		1909				

APPENDIX II

A. Statutes authorizing the licensing of plumbers:

ARK. STAT. ANN. tit. 19, §§ 3101-3714 (Supp. 1951); CAL. HEALTH AND SAFETY CODE §§ 800-811 (Supp. 1951); COLO. STAT. ANN. c. 126, §§ 1-22 (1935); CONN. REV. GEN. STAT. § 634 (1949); D.C. CODE §§ 1401-1408 (1940); FLA. STAT. ANN. §§ 469.01-469.07 (Cum. Supp. 1950); Ga. Laws 1937, No. 426, p. 748, as amended by Ga. Laws 1939, No. 229, p. 355; ILL. REV. STAT. c. 111 ½, §§ 116.1-116.35 (1951); IOWA CODE ANN. c. 368 (1949); KY. REV. STAT. §§ 318.010-318.990 (1948); LA. REV. STAT. tit. 37, §§ 1361-1376 (1950); ME. REV. STAT. c. 22, §§ 162-186 (1944); MD. ANN. CODE GEN. LAWS art. 43, §§ 318-325 (1939); MASS. GEN. LAWS c. 142, §§ 1-11 (1932), MASS. ANN. LAWS c. 13, § 36 (Cum. Supp. 1950); MICH. STAT. ANN. §§ 14.451-14.486 (Cum. Supp. 1949); MINN. STAT. §§ 326.37-326.45 (Cum. Supp. 1951); MO. REV. STAT. ANN. §§ 7560-7567, §§ 15659.1-15659.14 (Supp. Sept. 1951); MONT. REV. CODES ANN. §§ 11-2101 to 11-2111 (Cum. Supp. 1951); NEB. REV. STAT. §§ 19-301 to 19-314 (1943); N.H. REV. LAWS c. 183, §§ 1-11 (1942); N.J. STAT. ANN. tit. 26, c. 3, § 31.1e (1940), tit. 40, c. 49, § 5.1 (1940), tit. 26, c. 3C, § 2 (Supp. 1951); N.M. STAT. ANN. §§ 51-3001 to 51-3021 (Cum. Supp. 1951); N.Y. General City Law §§ 40-47, N.Y. Town Law 136(7); N.C. GEN. STAT. §§ 87-16 to 87-27 (1950); N.D. REV. CODE §§ 43-1801 to 43-1824 (1943); OHIO GEN. CODE ANN. § 3637 (1938); OKLA. STAT. tit. 11, §§ 451-458 (1951); ORE. COMP. LAWS ANN. §§ 99-1610 to 99-1623 (1940); Ore. Laws 1947, c. 331, p. 472; PA. STAT. ANN. tit. 53, §§ 2551-2558, §§ 4071-4082 (Cum. Supp. 1950); R.I. Pub. Laws 1945-1946, c. 1661, pp. 295-311, R.I. Pub. Laws 1947-1948, c. 2122, p. 984, R.I. Pub. Laws 1947-1948, c. 2136, p. 1009; S.C. CODE, §§ 7146-7151 (1942); S.D. CODE § 45.0201(64) (1942); TENN. CODE ANN. §§ 7152-7182 (Williams 1934); TEX. STAT. REV. CIV. art. 6243-101 (1948); UTAH CODE ANN. §§ 79-14-1 to 79-14-17 (1943); W.VA. CODE ANN. § 591(72) (1949); WIS. STAT. §§ 145.01-145.13 (1949); WYO. COMP. STAT. ANN. 29-313 (1945).

B. Statutes authorizing the licensing of electricians:

CONN. REV. GEN. STAT. § 3684 (1949); GA. CODE ANN. tit. 84, c. 84-1A Note (Cum. Supp. 1951), Ga. Acts Ex. Sess. 1937-1939, p. 327, Ga. Laws 1943, p. 481, Ga. Laws 1941, p. 57; IDAHO CODE ANN. tit. 54, §§ 54-1001 to 54-1018 (1948); ILL. ANN. STAT. c. 24, § 23-95 (1942); Md. Acts 1906, c. 244; MASS. ANN. LAWS c. 141, §§ 1-10, (Supp. 1951), MASS. ANN. LAWS c. 13, § 32 (Supp. 1951), MINN. STAT. §§ 326.24-326.32 (1949), Minn. Sess. Laws 1951, c. 475, c. 571; MO. REV. STAT. ANN. §§ 14942-14944 (Cum. Supp. 1950); N.M. STAT. ANN. §§ 51-2201 to 51-2219 (1941); N.Y. General City Law § 27, N.Y. Town Law § 136(7); N.C. GEN. STAT. §§ 87-39 to 87-51 (1950); N.D. REV. CODE §§ 43-0901 to 43-0923 (1943), N.D. Laws 1949, c. 287; OHIO GEN. CODE § 3637 (1938); ORE. COMP. LAWS ANN. §§ 112-609 to 112-619 (1940), Ore. Laws 1949, c. 83; R.I. Pub. Laws 1941-42, c. 1234, pp. 776-785, R.I. Pub. Laws 1943-1944, c. 1381, p. 269, R.I. Pub. Laws 1949-1950, c. 2270, pp. 370-374; S.D. CODE § 45.0201(64) (1942); WASH. REV. STAT. ANN. §§ 8307-1 to 8307-18 (1932); W.VA. CODE ANN. § 591(72) (1949).

C. Statutes authorizing the licensing of contractors:

ALA. CODE ANN. tit. 46, §§ 65-82 (1940); ARIZ. CODE ANN. §§ 67-2301 to 67-2326 (Cum. Supp. 1951); ARK. STAT. ANN. tit. 71, §§ 71-701 to 71-720 (Cum. Supp. 1951); CAL. BUS. AND PROF. CODE §§ 7000-7145 (Cum. Supp. 1951); IDAHO CODE ANN. tit. 54, §§ 54-1901 to 54-1924 (1947); IND. ANN. STAT. § 48-1408 (Burns 1950); MONT. REV. CODES ANN. §§ 84-3501 to 84-3512 (1947); NEV. COMP. LAWS §§ 1474.01-1474.35 (Supp. 1049); N.M. STAT. ANN. §§ 51-1901 to 51-1916 (1941); N.C. GEN. STAT. ANN. §§ 87-1 to 87-13 (1950); N.D. REV. CODE §§ 43-0701 to 43-0718 (1943); S.C. CODE §§ 7084-1 to 7084-7 (1942), S.C. Acts and Joint Resolutions 1949, No. 208, pp. 324, 325, 326; TENN. CODE ANN. §§ 7182.25-7182.42 (Williams 1941); UTAH

CODE ANN. §§ 79-5a-1 to 79-5a-11 (1943); VA. CODE ANN. §§ 54-113 to 54-145 (1950).

D. *Statutes authorizing the licensing of miscellaneous trades:*

ILL. ANN. STAT. c. 24, §§ 22-43 to 22-48 (1942) (mason contractors); MICH. STAT. ANN. §§ 14.434(1) -14.434(7) (Supp. Sept. 1951) (septic tank cleaners); MINN. STAT. §§ 326.46-326.52 (1949) (steamfitters); N.C. GEN. STAT. ANN. §§ 87-28 to 87-37 (1950) (tile contractors).

APPENDIX III

The following tables give some idea of how many persons pass the various examinations for license, out of those who take them. The figures were obtained through the kindness of the administrative agencies concerned, and should be considered as only approximate. They all cover a one year period, but some are actual figures for one year and others are an average. The figures for the bar examinations were taken from *The Bar Examiner* for the month of July, 1951, and relate to the 1950 bar examinations.

(1) Plumbers:			
State	Number Taking Examinations	% Passing	% Passing Bar
Colorado		51-Journeymen 80-Masters	61.5%
Illinois		92-Journeymen 91-Masters	64-March 63-September
Kentucky	300	70	54-February 62-June
Maine	115-Journeymen 118-Masters	34-Journeymen 35-Masters	59-February
Michigan	700	70	69-April 64-September
N.Y. City		10-15 (Written)* 50 (Practical)*	44-March** 50-June 51-October
New Mexico	250-Journeymen 140-Masters	40-Journeymen 30-Masters	66-May 79-August
Wisconsin	251-Journeymen 80-Masters	80-Journeymen 54-Masters	73

* In New York City both a written and practical test is given, but both must be passed, so that presumably the lower figure here is the one which controls those licensed.

** Bar examinations for New York State.

(2) Electricians:			
State	Number Taking Examinations	% Passing	% Passing Bar
Maryland	40 to 100	25-30	46-March 57-July
Massachusetts	1472-Journeymen 313-Masters	32-Journeymen 37-Masters	20-July 51-December
North Carolina	439	25	76
North Dakota	300	54	100-May 65-August

(3) Contractors: The only figures obtainable were from California.			
State	Number Taking Examinations	% Passing	% Passing Bar
California	8,043 (1949-50) 4,921 (1950-51)	64 (1949-50) 60 (1950-51)	38-April 53-October

The following proportions passed the examinations in the various specialty examinations in California: Electrical 55%; House moving 42%; Masonry 45%; Roofing 53%; Tile 48%.