



RESTRICTED ACCESS:

REDUCING OCCUPATIONAL LICENSURE AS AN OBSTACLE FOR THE FORMERLY INCARCERATED



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Introduction

Just as unemployment and lack of education are leading factors in people who turn to a life of crime, so it stands to reason that increased education and skill development would decrease recidivism; indeed, a diverse array of studies have shown this to be true.¹ Yet, in spite of the greatly increased investment in rehabilitative programs, skill development, and educational opportunities as part of the criminal justice system, unemployment rates for released prisoners are still much higher than for average citizens.²

This fact has led to increased scrutiny of the various factors that place barriers to entry in the job marketplace that are beyond released offenders' immediate control. One immediate factor has turned out to be occupational licensure – that is, government certification requirements to work in a given field. Whether through statutory blanket bans on hiring those with a criminal record (especially felons), or through poorly worded clauses that *de facto* produce the same result, licensure is among the policies most urgently in need of reform to help former prisoners regain a productive place in society.

The Scope of Occupational Licensure

Before diving into its particular impact on the formerly incarcerated, it's worth exploring the nature of licensure requirements unto themselves. The prevalence of occupational licensing is actually a relatively new phenomenon; whereas in 1950 fewer than five percent of jobs required a government certification or license, that number now stands at nearly thirty percent by some estimates.³ The majority of licensing regulations are imposed at the state level, with substantial variability between states in the number and onerousness of their requirements.⁴ Many county

1 See: Aaron Yelowitz and Christopher Bollinger, "Prison-to-Work: The Benefits of Intensive Job-Search Assistance for Former Inmates," Manhattan Institute Civic Report No. 96, Mar., 2015. <https://bit.ly/33JHxDg>; John M. Nally, et al., "The Post-Release Employment and Recidivism Among Different Types of Offenders With A Different Level of Education: A 5-Year Follow-Up Study in Indiana," Justice Policy Journal, Vol. 9, No. 1, Spring 2012. <https://bit.ly/2sHzgo>; Grant Duwe, "The Effectiveness of Education and Employment Programming for Prisoners," American Enterprise Institute, May 2018. <https://bit.ly/2RhGnpA>

2 Lucius Couloute and Daniel Kopf, "Out of Prison & Out of Work: Unemployment among formerly incarcerated people," Prison Policy Initiative Reports, July 2018. <https://www.prisonpolicy.org/reports/outofwork.html>

3 Morris M. Kleiner and Alan B. Krueger, "Analyzing the Extent and Influence of Occupational Licensing on the Labor Market," IZA Discussion Paper No. 5505, Feb., 2011. <http://ftp.iza.org/dp5505.pdf>

4 The Institute for Justice has compiled the single best resource for comparing the relative burden of licensure by state in

and municipal governments have also gotten in on the licensing frenzy, further confusing matters.

The way that licensing regulations are generally sold is that they are necessary to protect consumers against unscrupulous or incompetent business practices. This intuitively made a bit more sense when applied only to highly skilled, high-consequence fields like medicine or the practice of law, where a steep information asymmetry can exist between the consumer and the professional being hired. Now, however, a huge portion of more recent license mandates are for ordinary trades such as barbers, exterminators, manicurists, or athletic trainers (all of which, for example, require government-approved licenses in nearly every state).⁵

One indicator of the arbitrariness of these requirements noted by the Institute for Justice is that out of the 102 licensed occupations they studied, 66 of them had heavier burdens to secure a license than those for becoming an Emergency Medical Technician (EMT).⁶ It certainly should raise a question as to what great public safety risk is being mitigated by requiring your florist or interior designer to undergo a training period multiple times longer than that of the person who is entrusted with helping to save trauma patients in the back of an ambulance.

Studies on whether licensure actually increases the quality of service within an industry have generally struggled to demonstrate any significant positive impact.⁷ Meanwhile the benefit to license-bearers is more readily apparent, and it is telling that the push for more licensing regulations tends to originate from the industries to be licensed.⁸ As the great economist Milton Friedman observed, “The pressure on the legislature to license an occupation rarely comes from the members of the public who have been mulcted or in other ways abused by members of the occupation. On the contrary, the pressure invariably comes from members of the occupation itself.”⁹

Like other barriers to marketplace entry, licensure requirements have generally led to higher wages for workers in those industries – potentially up to 15 percent more.¹⁰ These benefits, however, come at a cost to consumers in the form of higher prices that may not even buy them a higher quality product. Less competition within a licensed industry also removes some of the pressure to innovate, further reducing the potential quality of service for consumers over time. More devastating is the

its “License to Work” report. Dick M. Carpenter, et al., “License to Work: A National Study of Burdens from Occupational Licensing, 2nd Edition,” The Institute for Justice, Nov. 2017. <https://bit.ly/2r12plO>

5 *Ibid*, pg. 15

6 *Ibid*, pg. 25

7 White House Issue Brief, “Occupational Licensing: A Framework for Policymakers,” July 2015, pg. 58 <https://bit.ly/35TfkV0>

8 This comports with George Stigler observation that “every industry or occupation that has enough political power to utilize the state will seek to control entry. In addition, the regulatory policy will often be so fashioned as to retard the rate of growth of new firms.” See: Stigler, “The Theory of Economic Regulation,” *The Bell Journal of Economics and Management Science*, Vol. 2, No. 1 (Spring, 1971), pp. 3-21

9 Milton Friedman, *Capitalism and Freedom*, University of Chicago Press, 1962, pg. 140

10 Morris Kleiner and Alan Kreuger, “The Prevalence and Effects of Occupational Licensing,” National Bureau of Economic Research Working Paper No. 14308, Sept., 2008. <https://www.nber.org/papers/w14308.pdf>

reduction in opportunities for employment. Labor economist Dr. Morris Kleiner estimates that at least 1.8 million fewer jobs may exist nationwide as a direct result of licensure mandates.¹¹ Kleiner further estimates that this loss of jobs and increase in costs impose over \$200 billion in annual costs to the economy and thus ultimately to consumers.¹²

The Regressive Effect of Occupational Licensure

Not only are these licensure requirements dubiously beneficial, but they also tend to be fundamentally regressive in terms of who is harmed most by the lack of access to jobs in the licensed industries. These are the sort of jobs that provide excellent opportunities for entry-level workers, those who don't have post-secondary degrees or specific technical training, to make a good living and advance themselves.

Most of these licenses are not just a matter of getting a bureaucrat's permission; they often require long training periods and excessive fees. The Institute for Justice's study of 102 commonly licensed lower-income professions found that license fees in these fields averaged over \$260, with a handful charging well over \$1,000.¹³ These licenses also required, on average, nearly a year's worth of training. This is a difficult threshold to meet for someone who needs immediate employment or who already holds a full-time job.¹⁴

Some licenses even require applicants to possess several years of college courses or even a completed college degree to qualify, thus obviously setting the barrier at the tremendous cost in time and money that entails. Requiring college experience makes more sense for, say, an engineer but seems a rather excessive requirement to be an interior designer or landscape contractor.¹⁵

Far from just posing a barrier to employment, licensure also has a direct negative impact on entrepreneurship in poorer communities that could most use an economic spark. Necessity being the mother of invention, studies have shown that the rate of entrepreneurship tends to be higher among low-income individuals than among the general population. Yet when low-income entrepreneurship rates are correlated with state occupational licensure burdens, economist Stephen Slivinski found that even

¹¹ Morris Kleiner and Evgeny Vorotnikov, "At What Cost? State and National Estimates of the Costs of Occupational Licensing," Institute for Justice, Nov., 2018. <https://bit.ly/2sJLepn>

¹² Morris Kleiner, Alan Kreuger, and Alexandre Mas, "A Proposal to Encourage States to Rationalize Occupational Licensing Practices." Proposal to the Brookings Institute's Hamilton Project, Apr. 1, 2011. Posted online at: <https://bit.ly/2YmZY9r>

¹³ Nevada charges some of the most absurd licensing fees in the nation, with 36 of the occupations surveyed requiring greater than \$1,000 in fees to apply, from interior designers to cabinet makers to garage door repairmen. *License to Work*, pp. 100-101

¹⁴ An infamous example of these restrictions in action is in African hair-braiding. Louisiana, for example, requires a specific license for this type of braiding, with 500 hours of training required. Consequently, only 47 hair braiders were licensed there in 2016. Meanwhile, neighboring Mississippi, which requires only registration, had well over a thousand. See: Angela Erickson, "Barriers to Braiding: How Job-Killing Licensing Laws Tangle Natural Hair Care in Needless Red Tape," Institute for Justice, July 2016. <https://bit.ly/2DFRmkx>

¹⁵ Morris M. Kleiner, "Reforming Occupational Licensing Policies," The Hamilton Project Discussion Paper, Discussion Paper 2015-01, Mar., 2015, Pg. 8. <https://brook.gs/2OQeXp0>

when accounting for other variables,

“...the differences in entrepreneurship rates are striking: the states that license more than 50 percent of the low-income occupations had an average entrepreneurship rate 11 percent lower than the average for all states, and the states that licensed less than a third had an average entrepreneurship rate about 11 percent higher.”¹⁶

Occupational licensure is also doubly regressive in that increased prices for services also raise an economic barrier to accessing the licensed services for low-income people. One more visible example of this is how heavy licensing burdens and regulations of child care services price poorer communities out of that market entirely.¹⁷

A License to Be Unemployed

As regressive as occupational licensure policies tend to be generally, they have proven to be a particularly steep barrier for those with a criminal record. Naturally, there are certain professions for which there are solid justifications for excluding people with certain types of criminal backgrounds. Banks may do well to avoid people with recent convictions for fraud, and child care providers should absolutely avoid hiring sex offenders. However, the screening allowances for many government-required licenses have in practice operated as a near-blanket disqualification of anyone with *any* criminal record.

A National Employment Law Project examination of the American Bar Association’s catalogue of regulations and laws affecting those with criminal backgrounds found an incredible 27,564 state occupational licensing restrictions. Of those, 12,669 served as blanket bans for licensing anyone with a felony conviction, and 6,372 for even a misdemeanor.¹⁸ Other licensure requirements can have the same result via vague requirements such as that the applicant have “good moral character,” which has sometimes been construed as disqualifying anyone with any criminal record.¹⁹

A particularly devastating effect of this is that ex-offenders in many states can go through the entire process of meeting the requirements for a license, paying for classes and passing exams, only to have the license boards reject them from practicing the profession they trained for after the fact.²⁰ Even more perverse are examples when licenses have been denied for ex-offenders who obtained job training through reentry programs while incarcerated. In a particularly galling case,

16 Stephen Slivinski, “Bootstraps Tangled in Red Tape: How Occupational Licensing Hinders Low-Income Entrepreneurship,” Goldwater Institute, Feb. 23, 2015. <https://bit.ly/2DHVXms>

17 Matthew Mitchell, “Occupational Licensing and the Poor and Disadvantaged,” Mercatus Center, Sept. 28, 2017. <https://bit.ly/2P8NWMn>

18 Michelle Natividad Rodriguez and Beth Avery, “Unlicensed & Untapped: Removing Barriers to State Occupational Licenses for People with Records,” National Employment Law Project, Apr., 2016. <https://bit.ly/2P5Ntuu>

19 White House, pg. 47

20 Institute for Justice, “Pennsylvania Fresh Start: Law Denies Women Rights to Work Because of Irrelevant Criminal Convictions,” Dec., 2018. <https://bit.ly/34NG7IX>

several California inmates received vocational training as firefighters and even risked their lives on the front lines fighting against California's record wildfires, yet were denied the EMT licenses they needed in order to become professional firefighters after their release.²¹

Yet another consequence of the expansion of licensure requirements is that the imposition of a new license mandate can end up disqualifying existing employees in the profession. An oft-cited example is a Wisconsin daycare provider who saw her license revoked because of a more than twenty-year-old conviction for welfare fraud, because the state changed its licensing laws to disqualify felons. In spite of never having any further legal trouble, and in spite of the fact that she had run her daycare for nearly a decade without any problem, the revocation of her license was upheld in Wisconsin's Supreme Court.²²

The Scale of the Problem – Criminal Records and Unemployment

To understand the scale of this problem, consider that about one in every three American adults has a criminal record, according to the FBI's databases.²³ Nearly 8 percent of adults (and 33 percent of African Americans) have been convicted of a felony.²⁴ Unemployment rates for released prisoners are more than five times higher than those for the general population, and the numbers are even worse for minority convicts, in spite of the fact that ex-offenders are statistically even more active in pursuit of work than the average person.²⁵ Meanwhile, more than 600,000 people finish their prison or jail sentences each year and head back out to face a world where their prospects for success are generally quite grim.

Even in the absence of further barriers such as having to obtain a license or certification, many employers harbor a natural fear of taking risks on employees who they feel may come with baggage. Applicants with criminal convictions have been found to be up to 50 percent less likely to get a call back from a prospective employer when compared to equally qualified applicants without a criminal record.²⁶ One academic survey of employers in the food industry – one of the industries most available to released inmates – found that nearly 67 percent would never hire someone convicted of a violent crime, 35 percent wouldn't hire someone convicted of a property crime, and 27 percent wouldn't even hire someone convicted of a drug crime.²⁷

21 Nick Sibilla, "Inmates Who Volunteer to Fight California's Largest Fires Denied Access to Jobs on Release," *USA Today*, Aug. 20, 2018. <https://bit.ly/2rPiAmc>

22 Todd Richmond, "Court Upholds Lifetime Day Care License Revocations," *The Journal Times*, July 6, 2016. <https://bit.ly/2YhtblR>

23 Note that the FBI's IIS database takes into account some arrests as well, whether or not they resulted in a conviction. Both state and private background checks are likely to dredge up simple arrest records, meaning that one does not need to be convicted of a crime to have a "record" for the purpose of an employer's search. See Marina Duane, et al., "Criminal Background Checks: Effect on Employment and Recidivism," The Urban Institute, Mar., 2017. <https://urbn.is/2LjOujg>

24 Alan Flurry, "Study Estimates U.S. Population with Felony Convictions," UGAToday, Oct. 1, 2017. <https://bit.ly/2OIRNkq>

25 Couloute and Kopf, "Out of Prison and Out of Work." <https://bit.ly/2ONv5I2>

26 Devah Pager, "The Mark of a Criminal Record," *American Journal of Sociology*, Vol. 108, No. 5, (Mar., 2003), pp. 937-75. https://scholar.harvard.edu/files/pager/files/pager_ajs.pdf

27 Scott Decker, Cassia Spohn, and Natalie Ortiz, "Criminal Stigma, Race, Gender, and Employment: An Expanded

In other words, it's tough enough to get a good job after getting out of prison without the government adding extra layers of difficulty. Being barred from better-paying employment relegates many prisoners to the most basic entry-level jobs that are not equipped or intended to provide a sustainable living. Occupational licensure in this context can logically be seen as a direct contributor to the cycle of crime – licensure directly contributes to unemployment and poverty, poverty and unemployment contribute to crime; therefore, licensure contributes to crime. Indeed, there is data to support this: a study by the Kauffman Foundation showed that states with the highest licensure burdens saw a well-above-average increase in recidivism, whereas lighter licensure burdens correlated with below-average recidivism.²⁸

Gainful Employment for Ex-Offenders Benefits Everyone

Remembering that the overwhelming majority of those who are now in prison will eventually be released, the ultimate goal of a prison sentence should be the reintegration of offenders back into society so that they never see the inside of a prison again. As Jeff Robinson of the American Civil Liberties Union was quoted asking, “If a person commits a crime, and they pay their debt to society, when does that debt end? ... Does it end when you come out of prison? Because apparently it’s just beginning when you come out of prison. And that makes no sense.”²⁹

Until recently, relatively little research had been done on specifically how well ex-offenders fare in the workforce compared to their peers. However, some recent data strongly suggests that companies can actually directly benefit from hiring ex-offenders because they tend to “have a much longer tenure and are less likely to quit their jobs voluntarily than other workers.”³⁰ This benefit is not universal; for example, the above study found that ex-offenders were far more likely than their peers to be fired from sales jobs. Nevertheless, another study of employers by the Society for Human Resource Management and the Charles Koch Institute found that a large majority of managers and HR professionals considered their employees with criminal backgrounds to be on par with or even better than other workers.³¹

Promising Advances in Licensure Reform

Attempts to reform licensure regulations often dissolve into potent examples of the problem of concentrated benefits vs. diffused costs. Those who have won their legal protection from competition – be they nurses, hair braiders, or funeral attendants

Assessment of the Consequences of Imprisonment for Employment,” Final report to the National Institute for Justice, Jan. 2014. <https://bit.ly/381rY6B>

28 Emily Fetsch, “No Bars, Unlocking the Economic Potential of the Formerly Incarcerated,” Kauffman Foundation, Nov., 2016. <https://bit.ly/2sHqZZk>

29 Ashley Nerbovig, “License to Clip: A Movement to Let the Formerly Incarcerated Cut Hair and Drive Taxis is Gaining Ground,” The Marshall Project, July 10, 2018. <https://bit.ly/2YendSS>

30 Dylan Minor, Nicola Persico, Deborah M. Weiss, “Criminal Background and Job Performance,” May 4, 2017. <https://ssrn.com/abstract=2851951>

31 SHRM/CKI Study, “Workers with Criminal Records,” May, 2018. <https://bit.ly/2sJM6KF>

- have an enormous incentive to organize and lobby in defense of their status, and tend to employ any manner of imaginative rhetoric to convince lawmakers of the incredible, graphic harm that would result without it.

Thankfully, a bipartisan conversation has been spreading about problems posed by occupational licensure, boosted by a 2015 White House report that generally sided with those calling for reform.³² An increasing number of states have passed legislation to specifically deal with licensing practices with respect to ex-convicts, using a variety of approaches.

The National Conference on State Legislatures identifies several distinct categories within the wide variety of bills states have passed to increase access to licensure:

- Requiring licensing boards to demonstrate that an applicant's criminal record is directly relevant to their potential job for it to be a valid reason for disqualification.
- Mandating that applicants be able to get a pre-judgment on whether their record disqualifies them for a license. This approach generally requires licensing boards to develop a specific list of crimes which could disqualify a candidate, which at least helps ex-offenders avoid wasting effort on getting a certification or license in a field they're likely to be rejected from based on their record alone.
- Clarifying "good moral character"-type clauses by either defining what specific crimes can be considered to violate them, or by simply doing away with that vague language altogether.³³

Just since 2015, 27 states have passed some sort of legislation to decrease barriers to occupational licensure for those with criminal records. Of those, 11 have effectively banned discrimination against past convictions that are not recent or directly relevant to the job being sought.³⁴

Of course, the best reforms would reduce licensing burdens on all prospective workers, not merely ex-offenders, and an increasing number of states have moved in that direction. Several states have also moved to tackle the problem of licensure as a barrier to mobility by recognizing occupational licenses issued by other states.³⁵ In 2019, Montana,³⁶ followed closely by Arizona³⁷ and Pennsylvania,³⁸ passed occupational license reciprocity legislation.

³² White House, <https://bit.ly/35TgC2K>

³³ Chidi Umez and Rebecca Pirious, "Barriers to Work: People with Criminal Records," National Conference of State Legislatures, July 17, 2018. <https://bit.ly/387dliv>

³⁴ Institute for Justice, "State Occupational Licensing Reforms for Workers with Criminal Records," Accessed Nov. 26, 2019. <https://bit.ly/2P99k4f>

³⁵ Daniel Vock, "Arizona Becomes the First to Recognize Out-of-State Job Licenses," Governing the States and Localities, Apr. 5, 2019. <https://www.governing.com/topics/mgmt/gov-Arizona-professional-licensing-law.html>

³⁶ Montana HB 105 (2019) <https://legiscan.com/MT/text/HB105/2019>

³⁷ Arizona HB 2569 (2019) <https://www.legiscan.com/AZ/bill/HB2569/2019>

³⁸ Pennsylvania HB 1172 (2019) <https://legiscan.com/PA/bill/HB1172/2019>

A number of states, most recently Nebraska,³⁹ have even created sunset requirements to force their legislatures to review all existing license mandates and justify their continued existence. Most recently Texas Governor Greg Abbot took an even more direct approach, ordering all state agencies to submit a plan to reduce onerous licensing barriers – including for people with criminal records in particular.⁴⁰

Political momentum is clearly moving in the direction of reducing the burden of licensure as a barrier to work for people with or without a criminal record. Both the economy and our communities can only benefit as a result.

Expungement as Part of Licensure Reform

Another long-term solution to reducing the license barrier for ex-offenders is record expungement, the practice of allowing ex-offenders to petition to have their criminal histories entirely deleted from the record. Generally, expungement is only considered after ex-offenders have gone a period of several years after release with no new criminal charges. Although this doesn't account for how offenders manage to support themselves during the several years between release and expungement, it at least provides a clearly visible light at the end of the tunnel after which their past mistakes can truly remain in the past.

Another alternative some states have adopted is to issue “certificates of rehabilitation” to offenders who have met a defined minimum standard for good behavior and improvement over time. Several states have specifically made such certificates stand as a prohibition against factoring criminal records into licensure decisions. This at least facilitates ex-offender access to licenses, although given the statistics on employer bias against any criminal background, these certificates are a much inferior solution to expungement.

Conclusion

Increased recognition of the particular barriers that occupational licensure poses to ex-offenders finding gainful employment has spurred positive changes in policy across much of the nation. Hopefully this trend will continue to expand towards a large decrease in government-mandated licensure generally, which would benefit not only the formerly incarcerated but also consumers and the economy as a whole.

39 Nebraska LB 299 (2017) https://nebraskalegislature.gov/bills/view_bill.php?DocumentID=31200

40 Emma Platoff, “Gov. Greg Abbott Orders States Agencies to Reduce Licensing Regulations, Cut Fees,” *The Texas Tribune*, Nov. 22, 2019. <https://www.texastribune.org/2019/11/22/greg-abbott-reduce-regulations-cut-fees/>