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HOW OCCUPATIONAL LICENSING LAWS HARM PUBLIC SAFETY AND THE FORMERLY INCARCERATED

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“In some states virtually the only ‘profession’ open to a once-convicted felon is that of burglar; he is barred from other activities because he is presumed to be a person of bad moral character, regardless of the nature of the felony or its relevance to his intended occupation.”¹

INTRODUCTION

Each day, occupational licensing boards decide who can and cannot receive government permission slips to work. These boards are comprised of business owners and workers in a given field—from barbers to land surveyors, florists, cosmetologists and even butter graders—all of whom enjoy the backing of government to grant or deny licenses to job applicants.² Critics across the political spectrum have objected to

CONTENTS

Introduction	1
History of Good Moral Character Provisions (GMCs)	2
Prevalence and Examples of GMCs	2
Statutory Examples and Definitions	3
Judicial Definitions	4
Constitutional Implications	5
Harmful Effects	6
Models for Reform	6
Conclusion	7
About the Author	7

this practice, which legally allows incumbent businesses to decide how much competition they will face. The traditional argument against the proliferation of licensing regimes has been an economic one: namely, that they reduce the supply of goods and services, thereby raising prices for consumers without noticeable gains in safety or quality. However, a new argument is gaining momentum that instead emphasizes *who* these boards often reject, and more specifically, that they often categorically reject formerly incarcerated people.

Various state laws explicitly deny legal work to whole swaths of Americans by barring anyone who has ever committed a felony or misdemeanor from certain employment fields.³ These blanket bans raise obvious due process concerns and have been a focal point for reform advocates and legislation. But a particularly pernicious trend targets individuals with records in a much more subtle way. Many licensing laws condition employment on “good moral character” or on a history free of “crimes of moral turpitude.” How exactly one demonstrates “good moral character,” however, is entirely undefined.

Equally elusive is broad agreement about the kinds of past infractions that constitute crimes of moral turpitude. The ambiguity inherent in good moral character provisions (GMCs) therefore makes it difficult for applicants with any sort of criminal history to know if they will be disqualified before expending substantial time and energy on a licensing application. Vague language also affords boards extensive latitude to deny otherwise qualified people for reasons that may be entirely unrelated to the responsibilities of the job.

Not only do these practices fail to increase public safety, recent research has shown that they may make communities less safe by increasing the odds that a person will

1. Walter Gellhorn, “The Abuse of Occupational Licensing,” *University of Chicago Law Review* 44:6 (Fall 1976), p. 13. <https://chicagounbound.uchicago.edu/uclrev/vol44/iss1/28>.

2. Jarrett Skorup, “The most bizarre licenses in Michigan,” *Michigan Capitol Confidential*, Nov. 21, 2017. <http://www.michigancapitolconfidential.com/the-most-bizarre-licenses-in-michigan>.

3. Michelle Natividad Rodriguez and Beth Avery, “Unlicensed & Untapped: Removing Barriers to State Occupational Licenses for People with Records,” National Law Employment Project, Apr. 26, 2016, p. 1. <http://www.nelp.org/content/uploads/Unlicensed-Untapped-Removing-Barriers-State-Occupational-Licenses.pdf>.

return to a life of crime.⁴ Further, since the Supreme Court has ruled that nebulous laws violate citizens' due process rights, vague statutory phrasing also invites constitutional concerns.⁵ Most troubling, occupational licensing laws have exploded in recent years to cover a large number of benign career fields, and character provisions are common features. In popular commentary pieces, criminal justice writers and policy analysts often highlight and object to these laws,⁶ but very little policy or academic literature specifically addresses the issues related to GMCs.

Accordingly, the present study examines the statutory language of character provisions, their varying judicial definitions and treatments, prevalence in licensing laws, potential adjudication in federal courts and their ramifications for public safety. Ultimately, the paper concludes that such provisions violate the equal protection and due process clauses of the Fifth and Fourteenth amendments, that they harm public safety and that they unfairly exclude qualified citizens from earning a living. In light of this, policymakers should look to states that have successfully changed or removed GMC laws and implement similar reforms in their own states.

HISTORY OF GOOD MORAL CHARACTER PROVISIONS (GMCS)

Although some form of moral character requirements for occupational certification date back sixteen centuries,⁷ in the American context, outside the medical and legal professions, occupations rarely required state licensure until roughly the mid-20th century.⁸ By this time, approximately five percent of jobs were licensed,⁹ averaging 25 licensing laws per state and covering trades as varied as “egg graders, guide-dog trainers,

yacht salesmen, potato growers, beekeepers, septic tank cleaners, and tree surgeons.”¹⁰ Likewise, during the same period, good moral character statutes were both common and already recognized as potentially problematic. In 1956, for instance, famed law professor Walter Gellhorn opined that “a blanket proscription of this sort seems more vindictively punitive than it does selectively preventive.”¹¹

During the spread of legally mandatory licensing to sundry occupations, courts pushed back against states that attempted to extend regulations to businesses that did not involve a public interest. For example, in 1949, a North Carolina court held that licensing photographers was an unreasonable restriction of a harmless occupation that had no relevance for public health, morals or safety.¹² Through sustained lobbying efforts, however, trade groups obtained legislation to protect their economic positions by establishing some sort of “public interest” in their trades.¹³

Consequently, licensing laws steadily increased such that, by the early 1970s, one study disclosed 1,948 separate statutory provisions that affected the licensing of persons with an arrest or conviction record.¹⁴ While the hike in licensing laws from the first two American centuries to the 1970s is impressive, it has since exploded even further. Today, at least 27,000 state occupational licensing requirements restrict those with a criminal record from acquiring a license.¹⁵

PREVALENCE AND EXAMPLES OF GMCS

The legal limits on the ability of justice-involved individuals to work is well documented. State and federal regulations restrict the formerly incarcerated from over 350 public employment occupations.¹⁶ Of the 27,000 licensing restrictions on the formerly incarcerated, over 12,000 disqualify any individual with any type of felony, over 6,000 disqualify those with misdemeanors, roughly 19,000 exclusions are permanent and over 11,000 are mandatory, which denies agencies any discretion to consider mitigating circumstances

4. Stephen Slivinski, “Turning Shackles into Bootstraps: Why Occupational Licensing Reform Is the Missing Piece of Criminal Justice Reform,” ASU Center for the Study of Economic Liberty, Nov. 7, 2016, p. 2. <https://research.wpcarey.asu.edu/economic-liberty/wp-content/uploads/2016/11/CSEL-Policy-Report-2016-01-Turning-Shackles-into-Bootstraps.pdf>.

5. *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926).

6. See e.g., “Preventing ex-convicts from working is silly,” *The Economist*, Oct. 26, 2017. <https://www.economist.com/united-states/2017/10/26/preventing-ex-convicts-from-working-is-silly>; Jared Meyer, “States Need to Give Ex-Cons A Fresh Start,” *Forbes*, Jan. 21, 2018. <https://www.forbes.com/sites/jaredmeyer/2018/01/21/states-need-to-give-ex-cons-a-fresh-start/#1ef36652fad>; and Eric Boehm, “Nebraska Just Passed a Major Occupational Licensing Reform Measure. Here’s Why It Matters,” *Reason*, Apr. 18, 2018. <https://reason.com/blog/2018/04/18/nebraska-just-passed-a-major-licensing-r>.

7. The Theodosian Code, a collection of laws issued by Roman emperors prior to 438 A.D., mandated that prospective lawyers be of “suitable character,” with praiseworthy past lives. See Deborah Rhode, “Moral Character as a Professional Credential,” *Yale Law Journal* 94:491 (January 1985), p. 493. <https://law.stanford.edu/publications/moral-character-as-a-professional-credential-3>.

8. *Ibid.*, p. 497.

9. Brad Hershbein et al., “Nearly 30 Percent of Workers in the U.S. Need a License to Perform Their Job: It Is Time to Examine Occupational Licensing Practices,” *Brookings UP FRONT Blog*, Jan. 27, 2015. <https://www.brookings.edu/blog/up-front/2015/01/27/nearly-30-percent-of-workers-in-the-u-s-need-a-license-to-perform-their-job-it-is-time-to-examine-occupational-licensing-practices>.

10. Deborah L. Rhode, “Virtue and the Law: The Good Moral Character Requirement in Occupational Licensing, Bar Regulation, and Immigration Proceedings,” *Law & Social Inquiry* (November 2017), p. 5. <https://onlinelibrary.wiley.com/doi/abs/10.1111/lsi.12332>.

11. Walter Gellhorn, *Individual Freedom and Governmental Restraints* (Louisiana State University Press, 1956), p. 138.

12. *State v. Ballance*, 51 S.E.2d 731 (N.C. 1949).

13. Gellhorn, p. 10. <https://chicagounbound.uchicago.edu/ucirev/vol44/iss1/28>.

14. Bruce May, “The Character Component of Occupational Licensing Laws: A Continuing Barrier to the Ex-Felon’s Employment Opportunities,” *Notre Dame Law Review* 71:187 (1995), p. 193. <https://heinonline.org/HOL/LandingPage?handle=hein.journals/nordak71&div=19&id=&page>.

15. Rodriguez and Avery, p. 1. <http://www.nelp.org/content/uploads/Unlicensed-Untapped-Removing-Barriers-State-Occupational-Licenses.pdf>.

16. Bill Heberton and Terry Thomas, *Criminal Records: State, Citizen and the Politics of Protection* (Avebury, 1993), p. 111.

or rehabilitation.¹⁷ While the exact number of moral character requirements is unclear, one analysis has estimated that Michigan has GMCs in about 75 percent of its licensing statutes.¹⁸ And, while this statistic seems staggering, other states may have a similarly high share of these provisions.

Recently, the National Conference of State Legislatures analyzed 34 of the most commonly licensed occupations and found that only two of these did not have good character requirements in any state.¹⁹ The field with the largest percentage of GMCs (real estate appraisers) had character requirements in 98 percent of states. Even worse, the occupations under study had promising growth projections and were all highly accessible fields (licensure did not require a four-year degree), which means that they would be ideal for those exiting the prison system with minimal skills and education levels. Certainly, a national study to determine the number of GMCs across state licensing statutes would be useful to illuminate the scope of the problem.

Statutory examples and definitions

Good moral character can mean different things in different jurisdictions, and even in different occupations within the same jurisdiction, and the precise definition is both elusive and problematic. Of particular issue, is that some laws that require it do not include a definition, either within the statute or as a direction to a separate law. In many cases, this means that if a definition exists at all, it has to be determined through case law. In Delaware, for example, a lack of good moral character disqualifies a person from being able to hold a raffle:

The Board may issue a license only after it determines that [...] The member or members of the applicant who intend to conduct the games are bona fide active members of the applicant and are persons of good moral character and have never been convicted of crimes involving moral turpitude.²⁰

Notice, too, that this law combines a prohibition of “crimes involving moral turpitude” with a good character requirement.

According to the American Bar Association, “turpitude” generally suggests a slightly more specific genre of illegal behavior that often involves fraud or dishonesty.²¹ Still, related provisions often suffer the same vagueness problems as character requirements. For example, one commentator has bemoaned that “so varied are the court decisions as to what constitutes a crime involving moral turpitude that precedent can inevitably be found, although consistency is almost totally absent.”²² Worse, some courts have attempted to define moral character *in terms of moral turpitude*. For example, an Alabama court circularly defined “good moral character” to practice law as “an absence of proven conduct or acts which have been historically considered manifestations of moral turpitude.”²³ Given the vagueness of both of these terms, using one to define the other is unlikely to provide any clarity or exactitude.

Some jurisdictions require a demonstration of good character through reference letters. For example, the city of Santa Barbara in California requires massage therapists to provide five affidavits of good moral character from local residents.²⁴ Likewise, aspiring auctioneers in Arkansas must:

Be of good reputation, trustworthy, and competent to transact the business of an auctioneer, in such a manner as to safeguard the interest of the public. In furtherance of this requirement, each applicant, shall provide two letters of reference to the Board which indicates the applicant is well-known to the individual, that he/she is of good moral character and bears a good reputation for honesty, truthfulness and integrity.²⁵

Other states include moral character definitions within their licensing statutes. In order to be of good moral character, Florida morticians must “have never demonstrated any act or nature that constitutes a lack of honesty or financial responsibility.”²⁶ Various jurisdictions cite separate defining statutes. For example, prospective well-drillers in Michigan shall: “Be of good moral character, as defined and determined pursuant to the provisions of Act No. 381 of the Public Acts of

17. Beth Avery et al., “Fair Chance Licensing Reform: Opening Pathways for People with Records to Join Licensed Professions,” National Employment Law Project, October 2017, p. 17. <http://www.nelp.org/content/uploads/Toolkit-Fair-Chance-Licensing-Reform.pdf>.

18. Thomas Hemphill and Jarrett Skorup, “The Latest on Occupational Licensing Reform,” *Regulation* 40:4 (Winter 2017-2018), p. 14. <https://object.cato.org/sites/cato.org/files/serials/files/regulation/2017/12/regulation-v40n4-7.pdf>.

19. “The National Occupational Licensing Database,” National Conference of State Legislatures, Jan. 10, 2018. <http://www.ncsl.org/research/labor-and-employment/occupational-licensing-statute-database.aspx>.

20. 16 DE Reg. 219 (Aug. 1, 2012). <https://ncccsjgjusticecenter.org/consequences/144677>.

21. American Bar Association, “User Guide Frequently Asked Questions,” *National Inventory of the Collateral Consequences of Conviction*, 2009, pp. 15-16. <https://www.nij.gov/topics/courts/documents/abacollateralconsequences-userguide.pdf>.

22. Brian Bromberger, “Rehabilitation and Occupational Licensing: A Conflict of Interests,” *William & Mary Law Review* 13:4 (1972), p. 814. <http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=2694&context=wmlr>.

23. May, p. 199. <https://heinonline.org/HOL/LandingPage?handle=hein.journals/nordak71&div=19&id=&page>. For clarity’s sake, this paper will treat turpitude and character provisions equally, but will primarily address the latter.

24. “Massage Permits,” City of Santa Barbara, 2016. <http://www.santabarbaraca.gov/business/license/massage.asp>.

25. Arkansas Auctioneer Licensing Board Rules and Regulations, 150.9.3.1. <https://ncccsjgjusticecenter.org/consequences/97137>.

26. Fla. Admin. Code r. 69K-5.002 (June 26, 2002). <https://ncccsjgjusticecenter.org/consequences/161811>.

1974, being ‘338.41 et seq. of the Michigan Compiled Laws.’²⁷ The defining statute construes good moral character as “the propensity on the part of the person to serve the public in the licensed area in a fair, honest, and open manner.”²⁸

Whether within a statute or standing alone as a separate law, language defining good moral character is obviously preferable to a GMC that does not offer a definition, particularly if courts do not subsequently define it or if they do so by adding imprecise and confusing language. In any case, even the most descriptive examples above leave plenty of room for a board’s discretion. For instance, the Florida mortician law that denies licenses to individuals that have committed “any act or nature that constitutes a lack of honesty or financial responsibility” leaves much to the imagination with respect to what, exactly, constitutes an “act.” Surely a conviction would qualify, but what about arrests or even accusations? A better framing would first define an act, and would then list examples of crimes that might demonstrate a lack of honesty or financial responsibility.

Judicial definitions

Sadly, judges often do not perform significantly better than legislators at presenting clear descriptions of good character. For example, for the purposes of granting a liquor license, an Illinois court defined character as “the moral quality of a person that constitutes his intrinsic nature.”²⁹ Such a garbled sentence should be expected from an introductory level philosophy essay, but not from an institution tasked with explaining the law. In what is perhaps the most opaque and impotent attempt to improve a legislature’s insufficient definition of “moral character,” a Florida court generously offered the following definition as:

not only the ability to distinguish between right and wrong, but the character to observe the difference; the observance of the rules of right conduct, and conduct which indicates and establishes the qualities generally acceptable to the populace for positions of trust and confidence.³⁰

If a person has the ability to distinguish between right and wrong, clearly they have the character to observe the difference—at least occasionally. But how specifically one might demonstrate this ability and character to the satisfaction of a licensing board is a mystery. It is also unclear what types of

conduct would *indicate* generally acceptable qualities to the populace, but would not *establish* them. An applicant might also benefit from a list of behaviors that are generally acceptable for positions of trust and confidence. Legislative and judicial definitions are fraught with these types of redundancies and inanities.

And while some courts take a more precise stance, detailing acts of dishonesty, fraudulence, drug or alcohol dependency as examples of bad moral behavior,³¹ they nevertheless grant licensing boards substantial discretion in making specific determinations. And, rarely do the requirements they come up with relate to the nature of the job. Of 22 California chiropractors recently disciplined for criminal offenses, for example, only four involved offenses related to chiropractic obligations.³² An analysis of the disciplinary functions of state medical licensing boards found that criminal misconduct unrelated to patient care tended to be disciplined more severely than misconduct that had a closer connection to competent medical practice.³³

Further, such complex and widespread ambiguity in GMCs effectively bans any person with past criminal behavior from joining professions or obtaining gainful employment. Law professor Bruce May notes:

[D]espite the legislative and judicial ambiguity of good moral character definitions, one definition has been generally accepted by the courts and licensing agencies: if a person has committed a crime, that person lacks the requisite good character for a license.³⁴

It is, in part, for these reasons that the Supreme Court has admonished GMCs within the context of occupational licensing and outside of it. In *US v. Mississippi*, the Court held that good moral character requirements represent, “[y]et another choice to give a registrar power to permit an applicant to vote or not depending solely on the registrar’s own whim or caprice.”³⁵ And, while it is true that the attitudes that the Supreme Court and other federal courts have taken toward the constitutionality of character provisions are inconsistent and require some clarification, recent

27. Mich. Admin. Code r. 325.1701. <https://niccc.csjusticecenter.org/consequences/114893>.

28. Mich. Admin. Code r. 338.41 (Apr. 1, 1975). [http://www.legislature.mi.gov/\(S\(in2avvelli1gv0au5julcwff3\)\)/mileg.aspx?page=getObject&objectName=mcl-338-41](http://www.legislature.mi.gov/(S(in2avvelli1gv0au5julcwff3))/mileg.aspx?page=getObject&objectName=mcl-338-41).

29. *Daley v. License Appeal Commission*, 211 N.E.2d 573, 576 (Ill. App. Ct. 1965).

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

31. Larry Craddock, “‘Good Moral Character’ as a Licensing Standard,” *Journal of the National Association of Administrative Law Judiciary* 28:2 (Fall 2008), p. 453. <https://digitalcommons.pepperdine.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1117&context=naajl>.

32. “Disciplinary Actions Fiscal Year 2015–2016,” California Board of Chiropractic Examiners, 2016. <http://www.chiro.ca.gov/enforcement/actions.shtml>.

33. Nadia Sawicki, “Character, Competence, and the Principles of Medical Discipline,” *Loyola University Chicago Journal of Health Care Law & Policy* 13:285 (2010), p. 285. <https://lawecommons.luc.edu/cgi/viewcontent.cgi?article=1001&context=facpubs>.

34. May, p. 197. <https://heinonline.org/HOL/LandingPage?handle=hein.journals/nordak71&div=19&id=8page>.

35. *United States v. Mississippi*, 380 U.S. 128 (1965).

developments indicate that the federal judiciary may apply increased scrutiny in the future.

CONSTITUTIONAL IMPLICATIONS

In 1926, *Connally v. General Construction Co.* established that a legal mandate that is phrased “in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process.”³⁶ This was an important precedent, as since that ruling, the Court has examined uses of vague standards such as “moral turpitude” or “good moral character” in the context of occupational licensing. Justice Hugo Black characterized these phrases as “unusually ambiguous,” with the potential to serve as a “dangerous instrument for arbitrary and discriminatory denial” of professional licenses.³⁷ But the Court stopped short of declaring such provisions unconstitutionally vague. Oddly, since *Connally* and Justice Black’s pronouncement in *Konigsberg v. State Bar of Cal.* some thirty years later, the Court has dismissed challenges to moral character requirements on the basis that the historical usage of these requirements has given “well-defined contours” to the phrase.³⁸ This is a puzzling development. As legal scholar Deborah Rhode argues, “surely good character is at least as elusive as other terms the Court has declared infirm, such as ‘gangsters,’ ‘sacreligious,’ ‘humane,’ and ‘credible and reliable.’”³⁹

The refusal to strike down character provisions on vagueness grounds is strange not only due to the Court’s decisions in *Connally*, *Konigsberg* and *US v. Mississippi*, but also given significant lower court decisions. One federal court, for example, ruled that the character requirement is so “imprecise as to be virtually unreviewable.”⁴⁰

So why, then, has the Court avoided striking down these types of laws? Legal analyst David Bernstein explains that both the Supreme Court and most state courts have opted to analyze “economic regulations that do not implicate the Bill of Rights under a very forgiving version of the “rational basis” test rather than using a “strict scrutiny” test.⁴¹ Whereas the rational basis standard merely requires that a statute or ordinance have a legitimate state interest and that a rational connection exists between the statute’s means and goals, strict scrutiny requires that legislation involving fun-

damental rights (like content-based speech or matters of due process) must be “narrowly tailored” to serve a “compelling” government interest. Because occupational licensing regulations do not affect a subject class, any due process claim regarding occupational licensing regulations would have to invoke economic rights as a fundamental right to receive strict scrutiny.

Thus far, however, the Court has chosen to treat occupational regulation as an economic issue rather than a due process one that would require the higher standard of review. This is because treating these types of laws as due process issues may be seen as reviving “right-of-contract” jurisprudence, which has been dead since *West Coast Hotel Co. v. Parrish* was decided in 1937.⁴²

The decision to avoid ruling against vague occupational regulations, then, appears to be more of a tactical decision to respect precedent than a constitutional stamp of approval. But Bernstein claims that recent precedent signals courts’ renewed interest in protecting the right to pursue an occupation.⁴³

In 2015, for example, the Texas Supreme Court ruled against a law that required individuals who make their living by threading eyebrows to obtain a cosmetology license, which requires costly, time-consuming training that is almost entirely irrelevant to the particular job.⁴⁴ The Court ruled that the government cannot meet the rational basis test if “the statute’s actual, real-world effect as applied to the challenging party [...] is so burdensome as to be oppressive in light of the governmental interest.”⁴⁵

Multiple federal courts have likewise invalidated occupational licensing regulations that involve clear instances of economic protectionism, holding that they do not count as a rational basis under the Fourteenth Amendment.⁴⁶ Numerous district courts have also ruled against occupational regulations on the grounds that they did not serve a legitimate government interest.⁴⁷ Moreover, recent arguments suggest that a case exists for categorizing formerly incarcerated

42. In *West Coast*, the Court upheld the constitutionality of a minimum wage law, reversing precedent from the *Lochner* era (1890-1937), which had traditionally used an “economic rights” framework to invalidate burdensome regulations on businesses.

43. Bernstein, p. 287.

44. *Patel v. Texas Department of Licensing & Regulation*, 469 S.W.3d 69 (Tex 2015).

45. *Ibid.*, 69 and 87 (Tex 2015).

46. See, e.g., *Saint Joseph Abbey v. Castille*, 712 F.3d 215, 226-27 (5th Cir. 2013); *Merrifield v. Lockyer*, 547 F.3d 978, 991-92 n.15 (9th Cir. 2008); *Craigsmiles v. Giles*, 312 F.3d 220, 222, 224 (6th Cir. 2002).

47. See, e.g., *Casket Royale, Inc. v. Mississippi*, 124 F. Supp. 2d 434, 434 (S.D. Miss. 2000); *Peachtree Caskets Direct, Inc. v. State Bd. of Funeral Serv. of Ga.*, No. Civ.1:98-CV-3084-MHS, 1999 WL 33651794, at *1 (N.D. Ga. 1999); *Cornwell v. Cal. Bd. of Barbering & Cosmetology*, 962 F. Supp. 1260, 1278 (S.D. Cal. 1997); *Santos v. City of Houston*, 852 F. Supp. 601, 608-09 (S.D. Tex. 1994).

36. *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926).

37. *Konigsberg v. State Bar of Cal.*, 353 U.S. 252, 263 (1957).

38. *Law Students Civil Rights Research Council v. Wadmond*, 401 U.S. 154, 159 (1971).

39. Rhode, p. 571. <https://law.stanford.edu/publications/moral-character-as-a-professional-credential-3>.

40. *Genusa v. City of Peoria*, 475 F. Supp. 1199, 1206 (C.D. Ill. 1979).

41. David Bernstein, “The Due Process Right to Pursue a Lawful Occupation: A Brighter Future Ahead?”, *Yale Law Journal Forum* 126:287 (December 2016), p. 287. https://www.yalelawjournal.org/pdf/BernsteinMacroedPDF_qf8werfk.pdf.

persons as a suspect class and thereby allowing for stricter scrutiny of occupational licensing regulations on due process grounds.⁴⁸

In any event, Bernstein argues that this trend “on the one hand, and the spread of costly and restrictive occupational licensing to jobs that pose minimal risk to public well-being on the other, have ignited debate over whether strict judicial deference to even the most arbitrary and abusive licensing laws is appropriate.”⁴⁹ He concludes that, while a unified Supreme Court decision may not be imminent, “a rising generation of judges, liberal and conservative [...] provide a glimmer of hope that the right to pursue a lawful occupation free from unreasonable government regulation will soon be rescued from constitutional purgatory.”⁵⁰

HARMFUL EFFECTS

Beyond their constitutional dubiousness, GMCs also carry with them harmful practical effects for the formerly incarcerated and for public safety. Scholars from Arizona State University and the Kaufmann Foundation have produced two major studies that examine the relationship between occupational licensing and recidivism rates.⁵¹ Both of these concluded that states that require licenses for a greater number of jobs experience higher rates of recidivism. Moreover, the Arizona State University study found that states with the heaviest occupational licensing burdens experienced, on average, a nine percent increase in recidivism rates from 1997 to 2007, while states with the lowest burdens — and no “good moral character” provisions — experienced almost an average three percent decline.⁵² The study ultimately concludes that: “The greater the legal restrictions to working in a state, the higher the likelihood that an ex-prisoner will be turned away from entering the labor force and will return to crime.”⁵³

Research suggests that employment plays a crucial role in reintegrating formerly incarcerated individuals and reducing

their likelihood to reoffend.⁵⁴ Accordingly, policies that make it difficult, if not outright impossible, for justice-involved people to secure stable and legal work make it exceedingly likely that they will end up back in the system. This carceral cycle, which is facilitated by onerous occupational regulations, imposes substantial costs on society in reduced public safety and increased correctional spending.

MODELS FOR REFORM

The optimal policy reform would be to remove GMC requirements and to replace them with individualized assessments, which allow boards to consider past offenses, but only if they relate to the nature of the job. What’s more, the offense cannot be the sole basis for rejection. Such assessments should also consider time elapsed since the offense occurred, mitigating circumstances and evidence of rehabilitation. The best reforms also list potentially disqualifying crimes. This proposal is not new. A 1972 review of moral character requirements for the purposes of occupational licensing established that: “real estate brokers are refused licenses if they have been convicted of forgery, false pretenses, etc., which are offenses clearly related to the profession of selling land.”⁵⁵

Indiana recently signed a bill with such a rationale into law. It eliminates vague language such as “moral character” and “moral turpitude,” requires state and local governments to explicitly list disqualifying crimes and requires that licensing boards deny licenses only to those whose offenses directly relate to the nature of the job for which they are applying.⁵⁶ The law also limits a board’s ability to disqualify applicants for nonviolent and nonsexual crimes committed more than five years ago. The Kansas legislature is considering a similar bill that would eliminate GMCs.⁵⁷

An often-floated alternative to elimination proposed by advocates of character provisions is to retain GMCs but allow applicants to receive “certificates of rehabilitation” from the state, effectively lifting statutory bars. However, these certificates are rarely issued even though all states have the power to do so, which renders this proposal far from desirable.⁵⁸

48. See, e.g., Ben Geiger, “The Case for Treating Ex-Offenders as a Suspect Class,” *California Law Review* 94:4 (July 2006). <https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1256&context=californialawreview>.

49. Bernstein, p. 303. www.yalelawjournal.com/forum/the-due-process-right-to-pursue-a-lawful-occupation.

50. *Ibid.*

51. Stephen Slivinski, “Turning Shackles into Bootstraps: Why Occupational Licensing Reform Is the Missing Piece of Criminal Justice Reform,” ASU Center for the Study of Economic Liberty, Nov. 7, 2016. <https://research.wpcarey.asu.edu/economic-liberty/wp-content/uploads/2016/11/CSEL-Policy-Report-2016-01-Turning-Shackles-into-Bootstraps.pdf>; Emily Fetsch, “No Bars: Unlocking the Economic Power of the Formerly Incarcerated,” Ewing Marion Kaufmann Foundation, November 2016. <https://www.kauffman.org/newsroom/2016/11/policy-changes-needed-to-unlock-employment-and-entrepreneurial-opportunity>.

52. Slivinski, p. 2. <https://research.wpcarey.asu.edu/economic-liberty/wp-content/uploads/2016/11/CSEL-Policy-Report-2016-01-Turning-Shackles-into-Bootstraps.pdf>.

53. *Ibid.*, p. 4.

54. Center for Law and Social Policy, “Barred from Jobs: Ex-Offenders Thwarted in Attempts to Earn a Living,” *Every Door Closed Fact Sheet Series 2*, Nov. 3, 2008, p. 3. <https://www.clasp.org/sites/default/files/public/resources-and-publications/archive/0139.pdf>.

55. Bromberger, p. 816. <http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=2694&context=wmlr>.

56. Indiana General Assembly, House Bill 1245. <https://iga.in.gov/legislative/2018/bills/house/1245#document-fc6b695e>.

57. Kansas Committee on Federal and State Affairs, Senate Bill 421. http://www.kslegislature.org/li/b2017_18/measures/documents/sb421_00_0000.pdf.

58. Slivinski, p. 11. <https://research.wpcarey.asu.edu/economic-liberty/wp-content/uploads/2016/11/CSEL-Policy-Report-2016-01-Turning-Shackles-into-Bootstraps.pdf>.

Finally, in the unlikely scenario that eliminating GMCs or adding individualized assessments is politically infeasible, a straightforward reform jurisdictions could adopt would be simply to report data. A state could appreciably enrich the policy discussion around occupational licensing and criminal justice reform by undertaking concerted efforts to provide the relevant data. Currently, data around occupational licensing board decisions are virtually nonexistent. Simply having access to statistics on applications and rejections, the demographics of accepted and rejected applicants, and the justifications for rejections would represent a substantial improvement from the status quo.

CONCLUSION

The public dialogue surrounding occupational licensing has gradually emphasized how burdensome licensing regimes affect formerly incarcerated people. Many writers on the subject rightly point to ambiguous “good moral character” requirements in licensing laws as a primary mechanism for boards to deny any person with a criminal history. That one in three Americans has a criminal record,⁵⁹ and that licensing laws have skyrocketed to cover one in three occupations, suggests that a considerable number of Americans could be unemployed simply because they have a record.⁶⁰

Moral character laws are constitutionally dubious, damaging to public safety and serve as extrajudicial penalties on justice-involved persons that violate norms of fairness. Policymakers around the country should look to states that are reforming their licensing statutes and removing GMCs. Instead, licensing laws should require that boards make individualized assessments that use past criminal conduct as a factor (and not a blanket denial) for rejection only if it relates to the responsibilities of the occupation. Boards should also factor in mitigating information, time elapsed since the triggering offense occurred and evidence of rehabilitation.

An entire class of people—who have already paid their debt to society—have historically been disinherited from the American dream, as countless laws make it nearly impossible for them to rebuild their lives with the dignity and stability that work provides. As criminal justice reform efforts turn to occupational licensing, policymakers should relax these onerous restrictions and finally help thousands of otherwise qualified Americans realize that dream.

ABOUT THE AUTHOR

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Prior to his time at R Street, he was a summer reporting fellow with the Daily Caller News Foundation, where he covered the 2016 election. He is also a contributor to *Young Voices Advocates* where he writes on criminal justice reform and the sharing economy.

59. “Americans with Criminal Records,” The Sentencing Project, 2015. <https://www.sentencingproject.org/wp-content/uploads/2015/11/Americans-with-Criminal-Records-Poverty-and-Opportunity-Profile.pdf>.

60. See, e.g., Hershbein et al. <https://www.brookings.edu/blog/up-front/2015/01/27/nearly-30-percent-of-workers-in-the-u-s-need-a-license-to-perform-their-job-it-is-time-to-examine-occupational-licensing-practices>.