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# Briefing Report

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## **Criminal Records: Civil Rights Impact on Access to Occupational Licenses-Employment in New Jersey**



**A Report of the New Jersey Advisory Committee to the  
U.S. Commission on Civil Rights**

(October 2021)

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## **The United States Commission on Civil Rights**

The U.S. Commission on Civil Rights is an independent, bipartisan agency established by Congress in 1957. It is directed to investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, sex, age, disability, or national origin, or by reason of fraudulent practices; to study and collect information relating to discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice; to appraise federal laws and policies with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice; to serve as a national clearinghouse for information with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin; to submit reports, findings, and recommendations to the President and Congress; and to issue public service announcements to discourage discrimination or denial of equal protection of the laws.

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This report is the work of the New Jersey Advisory Committee to the U.S. Commission on Civil Rights. The report relies on statements, studies, reports, articles and data provided by third parties. State Advisory Committee reports are wholly independent and reviewed by Commission staff only for legal and procedural compliance with Commission policies and procedures. Committee reports are not subject to Commission approval, fact-checking, or policy changes. The views expressed in this report, including the findings and recommendations, are those of all New Jersey Advisory Committee members, who voted for the Report at a public meeting and do not necessarily represent the views of the Commission or its individual members or of the policies of the U.S. Government.

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## Transmittal Letter

New Jersey Advisory Committee to the  
U.S. Commission on Civil Rights

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The New Jersey Advisory Committee, as part of its responsibility to advise the Commission on civil rights issues within the state, submits this report titled, *Civil Rights Impacts for Those with Criminal Records Seeking Access to Occupational Licenses in New Jersey*. The report was adopted unanimously by the Advisory Committee at a public meeting on July 16, 2021, by all of the 12 members who attended the meeting.

Sincerely,

*Lawrence S. Lustberg*

Lawrence S. Lustberg, Chair  
New Jersey Advisory Committee

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## **New Jersey Advisory Committee Members:**

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## Acknowledgments

The New Jersey Advisory Committee thanks all those who shared their expertise with the Committee members at the virtual panel briefings held in 2020 on September 24, November 18, 19, and 22, and on February 10, 2021; Erica Jedynak who proposed this topic to the Committee, as its civil rights project and chaired the Planning Workgroup whose members—Lawrence S. Lustberg, Marcia Brown, Brian Gaffney, Manuel Garcia, Erica Jedynak, Donita Judge, Pearl Park, Joan Rivitz, Saulo Santiago and John Stanley, Jr. —helped set the agenda, and identified and interviewed the expert presenters; the Drafting Team who oversaw the written report—Lawrence S. Lustberg, Erica Jedynak and Saulo Santiago; and the Commission staff persons assigned to the New Jersey Advisory Committee—Ivy Davis, Director of the Eastern Regional Office of the U.S. Commission on Civil Rights and Designated Federal Officer, and Evelyn Bohor, Program Specialist, whose assistance, guidance and support throughout this review were extraordinary and invaluable. The Committee also offers special thanks to Brittany M. Thomas, current Gibbons Fellow in Public Interest & Constitutional Law at Gibbons PC in Newark, New Jersey; Brittany, working under the supervision of Drafting Team members, provided immeasurable assistance in drafting and finalizing this Report.

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#### **Appendix 4: Documents Submitted for the Record, Including URL Addresses**

- Michelle Natividad and Beth Avery, *Unlicensed & Untapped: Removing Barriers to State Occupational Licenses for People with Records*, National Employment Law Center, (April 2016), at: <http://stage.nelp.org/wp-content/uploads/Unlicensed-Untapped-Removing-Barriers-State-Occupational-Licenses.pdf>
- The Council of State Governments—Justice Center, and National Conference of State Legislatures, *Barriers to Work: Improving Employment in Licensed Occupations for Individuals with Criminal Records*, at: [https://www.ncsl.org/Portals/1/Documents/Labor/Licensing/criminalRecords\\_v06\\_web.pdf](https://www.ncsl.org/Portals/1/Documents/Labor/Licensing/criminalRecords_v06_web.pdf)
- Office of General Counsel, U.S. Dep’t of Housing and Urban Affairs, *Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions*, (April 4, 2016), at: [https://www.hud.gov/sites/documents/HUD\\_OGCGUIDAPPFHASTANDCR.PDF](https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF)
- *At What Cost? State and National Estimates on the Economic Costs of Occupational Licensing*, Institute for Justice, (2018), at: <https://ij.org/report/at-what-cost#>
- Ian MacDougall, *Police Say Seizing Property without a Trial Keeps Crime Down. A New Study Shows They are Wrong*, Pro Publica (December 4, 2020), at: <https://www.propublica.org/article/police-say-seizing-property-without-trial-helps-keep-crime-down-a-new-study-shows-theyre-wrong>



## I. Introduction

Incarceration has exponentially increased in the United States over the last several decades.<sup>1</sup> The federal government's war on drugs is responsible for a rise in arrests, incarcerations, and changes to sentencing guidelines.<sup>2</sup> Now more than 70 million people in the United States have an arrest or criminal record and nearly 700,000 people return to our communities from incarceration every year.<sup>3</sup> In order to successfully reintegrate into society formerly incarcerated individuals require "family support, community assistance, and economic opportunities."<sup>4</sup> Pathways to stable employment are an integral part of the reintegration process not only because steady employment is a key means of preventing re-offending,<sup>5</sup> but because it also provides formerly incarcerated individuals with a sense of self-worth and roots them in their communities.<sup>6</sup> Unfortunately, formerly incarcerated people face tremendous difficulties in obtaining employment. Nearly 45% remain unemployed one year after their release from prison and those that do find employment tend to "earn less than the earnings of a full-time job at the minimum wage."<sup>7</sup>

Today, nearly 25% of all jobs require workers to obtain an occupational license prior to employment.<sup>8</sup> People with a criminal record—one-third of all American adults<sup>9</sup>—can be denied an occupational license in half of all states, regardless of whether their criminal record relates to

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<sup>1</sup> Fact Sheet, Criminal Justice Facts, The Sentencing Project (2020), at: <https://www.sentencingproject.org/criminal-justice-facts/>

<sup>2</sup> Ibid.

<sup>3</sup> Anastasia Christman and Michelle Natividad Rodriguez, *Research Supports Fair-Chance Policies*, National Employment Law Project, p.1 (August 2016), at: <https://s27147.pcdn.co/wp-content/uploads/Fair-Chance-Ban-the-Box-Research.pdf>; Craig Arnold and Jamie Dimon, *Nearly 70 Million Americans Have Criminal Records. We Must Give Them a Second Chance*, CNN Business (April 27, 2021), at: <https://www.cnn.com/2021/04/27/perspectives/second-chance-hiring-dimon/index.html>

<sup>4</sup> Christman and Natividad, *supra* note 3 at p 1.

<sup>5</sup> Nick Sibilla, *Barred from Working: A Nationwide Study of Occupational Licensing Barriers for Ex-Offenders*, Institute for Justice, p.3 (August 2020), at: <https://ij.org/wp-content/uploads/2020/08/Barred-from-Working-August-2020-Update.pdf>.

<sup>6</sup> Social Enterprises, *The Link Between Employment And Self Esteem*, Bayaud Enterprises (September 26, 2018), at: <https://bayaudenterprises.org/social-enterprises/the-link-between-employment-and-self-esteem/>.

<sup>7</sup> Adam Looney and Nicholas Turner, *Work and Opportunity Before and After Incarceration*, The Brookings Institution, p.1 (March 2018), at: [https://www.brookings.edu/wp-content/uploads/2018/03/es\\_20180314\\_looneyincarceration\\_final.pdf](https://www.brookings.edu/wp-content/uploads/2018/03/es_20180314_looneyincarceration_final.pdf); Beth Avery, Maurice Emsellem, and Han Lu, *Fair Chance Licensing Reform: Opening Pathways for People with Records to Join Licensed Professions*, National Employment Law Project, p.18 (December 2019), at: <https://s27147.pcdn.co/wp-content/uploads/FairChanceLicensing-v4-2019.pdf>

<sup>8</sup> Avery, Emsellem, Han Lu, *supra* note 7 at p, 7.

<sup>9</sup> Arnold and Dimon, *supra* note 3.

the jobs they are seeking or how long ago the convictions occurred.<sup>10</sup> Many licensing statutes contain “good moral character provisions” which require licensing boards to examine an applicant’s moral fitness prior to granting an occupational license.<sup>11</sup> These provisions often work as a bar, prohibiting ex-offenders from obtaining a license because they purportedly lack the requisite moral characteristics.<sup>12</sup> By preventing returning individuals from obtaining gainful employment, these types of provisions have been shown to increase recidivism rates.<sup>13</sup> But even before submitting an application to a licensing board, formerly incarcerated people face barriers in the occupational licensing process. Many occupational licenses require several months, and in some cases several years of training prior to obtaining the license and many carry heavy fees, which can be prohibitive for ex-offenders.<sup>14</sup>

Beyond the consequences for ex-offenders themselves, barriers to occupational licenses for formerly incarcerated people result in dramatic consequences for the entire economy. One study by the Center for Economic and Policy Research estimated that in 2014, employment barriers for the incarcerated and those with felony convictions cost the nation’s economy up to \$87 billion in annual gross domestic product, “the equivalent to the loss of 1.7 to 1.9 million workers.”<sup>15</sup> The study found that drops in the employment rate were particularly acute for Black and Hispanic men,<sup>16</sup> which is unsurprising given that minorities, particularly Black people, are overrepresented at every stage of the criminal justice system. *See supra* at 1 and notes 5-8. As discussed below, this phenomenon of disproportionate representation of Black and Hispanic people in the criminal justice system is even more profound in New Jersey.

In response to concerns over the impact of occupational licensing barriers, numerous states have enacted legislation to remove barriers to occupational licenses for formerly incarcerated people.

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<sup>10</sup> National Conference of State Legislatures, National Governors Association, and the Council of State Governments, *The State of Occupational Licensing: Research, State Policies and Trends*, p.8 (2017), at: [https://www.ncsl.org/Portals/1/HTML\\_LargeReports/occupationallicensing\\_final.htm](https://www.ncsl.org/Portals/1/HTML_LargeReports/occupationallicensing_final.htm); *See, e.g.*, Fla. Stat. Ann. § 455.213 ( Licensing boards “may consider the criminal history of an applicant for licensure under subparagraph (a)3. if such criminal history has been found to relate to good moral character”); Mich. Comp. Laws Ann. § 338.41 (“The phrase ‘good moral character’, when used as a requirement for an occupational or professional license... means the propensity on the part of an individual to serve the public in the licensed area in a fair, honest, and open manner.”)

<sup>11</sup> National Conference of State Legislatures, et al., *supra* note 10, at p.8.

<sup>12</sup> Avery, Emsellem, Han Lu, *supra* note 7 at p.10.

<sup>13</sup> Stephen Slivinski, *Turning Shackles into Bootstraps: Why Occupational Licensing Reform Is the Missing Piece of Criminal Justice Reform*, Center for the Study of Economic Liberty, p.2 (November 7, 2016), at: <https://perma.cc/8Q34-5GZR>

<sup>14</sup> National Conference of State Legislatures, National Governors Association, and the Council of State Governments, *supra* note 9, at p. 3.

<sup>15</sup> Cherrie Bucknow and Alan Barber, *The Price We Pay: Economic Costs Of Barriers To Employment For Former Prisoners and People Convicted of Felonies*, Center for Economic and Policy Research, p.2 (June 2016), at: <https://cepr.net/images/stories/reports/employment-prisoners-felonies-2016-06.pdf>.

<sup>16</sup> *Ibid.*

Some states have prohibited consideration of certain criminal records entirely, including non-conviction records and those that have been sealed or expunged or pardoned.<sup>17</sup> Others have removed good moral character provisions for certain licensing boards,<sup>18</sup> and some have required licensing agencies to justify their decisions in terms of public safety and give applicants an opportunity to appeal denials.<sup>19</sup> Although these kinds of reforms have resulted in some progress in this area, serious barriers still exist across the nation for formerly incarcerated people seeking to obtain occupational licenses. Persistent problems obtaining occupational licenses increase the likelihood of recidivism and hamper formerly incarcerated people's ability to reintegrate into the national economic system.<sup>20</sup>

The demographic composition of formerly incarcerated people is largely people of color – although the number seems to be diminishing, minorities have historically made up 60% of the prison population.<sup>21</sup> Black and Hispanic people are more likely to be arrested than White people;<sup>22</sup> in every U.S. state, Black people are incarcerated at over double the rate of White people;<sup>23</sup> and Black workers are penalized more harshly than White workers for having a record.<sup>24</sup> The New Jersey State Advisory Committee to the United States Commission on Civil Rights thus viewed

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<sup>17</sup> See, e.g., Haw. Rev. Stat. § 831-3.1 ; Iowa Code Ann. §272C.15 .

<sup>18</sup> E.g., Tex. Occ. Code § 203.404(a)(3); Tex. Occ. Code § 802.107; see also Senate Bill No. 1531 at <https://capitol.texas.gov/tlodocs/86R/billtext/html/SB01531S.htm>. (removing moral turpitude provision of licensing statute.)

<sup>19</sup> Ariz. Rev. Stat. § 13-904(E); Ariz. Rev. Stat § 41-1093.04(D).

<sup>20</sup> Slivinski, *supra* note 12.

<sup>21</sup> Fact Sheet, *Trends in U.S. Corrections*, The Sentencing Project (May 2021), at: <https://www.sentencingproject.org/wp-content/uploads/2021/07/Trends-in-US-Corrections.pdf>; Keith Humphreys and Ekow N. Yankah, *Prisons Are Getting Whiter. That's One Way Mass Incarceration Might End*, The Washington Post (February 26, 2021), at: [https://www.washingtonpost.com/outlook/prisons-are-getting-whiter-thats-one-way-mass-incarceration-might-end/2021/02/26/28db008c-7535-11eb-948d-19472e683521\\_story.html](https://www.washingtonpost.com/outlook/prisons-are-getting-whiter-thats-one-way-mass-incarceration-might-end/2021/02/26/28db008c-7535-11eb-948d-19472e683521_story.html) (noting that in 2018 White people comprised of “50% of the jail population” in the U.S.).

<sup>22</sup> Radley Balko, *There's Overwhelming Evidence That the Criminal Justice System Is Racist. Here's The Proof*, The Washington Post (June 10, 2020), at: <https://www.washingtonpost.com/graphics/2020/opinions/systemic-racism-police-evidence-criminal-justice-system/>; Besiki Kutateladze, Nancy Andirilo, Brian Johnson, and Cassia Spohn, *Cumulative Disadvantage: Examining Racial and Ethnic Disparity in Prosecution and Sentencing*, *Criminology* 52 (3), 514, 516 (2014), at: <https://repository.asu.edu/items/27095>

<sup>23</sup> Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, The Sentencing Project, p. 4 (June 14, 2016), at: <https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/>; Katharina Buchholz, *Black Incarceration Rates Are Dropping In The U.S.*, Statista (February 19, 2021) (In 2019 “the rate at which Black U.S. men” were imprisoned was “many times that of the white and more than double that of the Hispanic male population, showing huge racial discrepancies in the criminal justice system,”), at: <https://www.statista.com/chart/18376/us-incarceration-rates-by-sex-and-race-ethnic-origin/>.

<sup>24</sup> Devah Pagar, *The Mark of a Criminal Record*, *The American Journal of Sociology* Vol. 108, 937 (March 2003), at: [https://scholar.harvard.edu/files/pager/files/pager\\_ajs.pdf](https://scholar.harvard.edu/files/pager/files/pager_ajs.pdf).

this issue as one of civil rights and sought information focused on post-conviction employment barriers, and on whether occupational licenses function as an obstacle that prevents formerly incarcerated people from fully participating in society. This report focuses on those obstacles in New Jersey and proposes additional steps that should be taken to address the profound problem that they cause.

## II. New Jersey Overview

In New Jersey 21% of jobs require a license or certification.<sup>25</sup> And many of these jobs are particularly appealing to formerly incarcerated people in the state because they most often do not require a four-year college degree,<sup>26</sup> which many ex-offenders do not have.<sup>27</sup> Formerly incarcerated people are nearly twice as likely as the general public to have no high school credential at all, “more than half of formerly incarcerated people hold only a high school diploma or GED”—credentials that have diminishing value in today’s job market, and only five percent hold college degrees.<sup>28</sup> At the same time, 23% of all adults (or 1.6 million adults) in New Jersey have an arrest or conviction record that may prevent them from obtaining an occupational license.<sup>29</sup> Indeed, New Jersey licensing boards have broad discretion to deny applicants based upon their criminal record.<sup>30</sup> For example, in New Jersey there is no limitation for how long an offense can prevent workers from obtaining an occupational license thus, workers with criminal records can be precluded from obtaining an occupational license based upon offenses committed many years before the submission of their application.<sup>31</sup>

Although all formerly incarcerated people are affected by a criminal history that prevents them from obtaining an occupational license, Black New Jerseyans, are disproportionately impacted because they are overrepresented in the state’s criminal justice system in the first place. Thus, for example, in 2020, 18,477 people were incarcerated in New Jersey: of those 62% were Black, 16% were Latino and only 22% were White.<sup>32</sup> According to the most recent data, only 15.1% of New

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<sup>25</sup> Avery, Emsellem, Han Lu, *supra* note 6.

<sup>26</sup> Jonathan Haggerty, *How Occupational Licensing Laws Harm Public Safety and the Formerly Incarcerated*, R Street, Policy Study No. 143, p.3 (May 2018), at: <https://www.rstreet.org/wp-content/uploads/2018/05/Final-No.-143-for-posting.pdf>.

<sup>27</sup> Lucius Couloute, *Getting Bacon on Course: Educational Exclusion and Attainment Among Formerly Incarcerated People*, The Prison Policy Initiative (October 2018), at: <https://www.prisonpolicy.org/reports/education.html>.

<sup>28</sup> *Ibid.*

<sup>29</sup> Avery, Emsellem, and Han Lu, *supra* note 7 at p. 30.

<sup>30</sup> N.J. Admin. Code. § 12:68-1.3; N.J. Rev. Stat § 45:1-21.

<sup>31</sup> *Id.*

<sup>32</sup> New Jersey Department of Corrections, *Offender Characteristics Report*, Office of Policy and Planning (January 2020), at: [https://www.nj.gov/corrections/pdf/offender\\_statistics/2020/2020\\_EntireOffenderCharacteristics.pdf](https://www.nj.gov/corrections/pdf/offender_statistics/2020/2020_EntireOffenderCharacteristics.pdf)

Jersey's population was Black.<sup>33</sup> In New Jersey, Black people are incarcerated at over 12 times the rate of White people—the highest race disparity of any state in the nation.<sup>34</sup> Accordingly, in New Jersey in particular, any policy or practice of rejecting occupational licensing applicants due to their criminal history disproportionately harms Black people.

In recent years, New Jersey has made strides in removing barriers to access to occupational license for formerly incarcerated people. While the Committee commends New Jersey for implementing these much-needed changes, more work remains to be done. It is in this context that the Committee respectfully submits this report regarding the licensing barriers to post-conviction employment in New Jersey.

### III. Summary of Testimony

The Committee held public, virtual panel presentations on September 24, 2020, November 12, 2020, November 18, 2020, November 19, 2020, and February 10, 2021, during which it received testimony from individuals impacted by licensing barriers, as well as advocates, attorneys, scholars, and government officials. Their testimony covered a broad range of subjects, and all offered their informed perspectives related to occupational licensing. The edited transcripts of each virtual panel presentation are available at:

[https://securisync.intermedia.net/us2/s/folder?public\\_share=409J0xbKeIQ2vuMJBvQond0011ef58&id=L05KL0xpY2Vuc2luZw%3D%3D](https://securisync.intermedia.net/us2/s/folder?public_share=409J0xbKeIQ2vuMJBvQond0011ef58&id=L05KL0xpY2Vuc2luZw%3D%3D).

#### A. Barriers to Occupational Licenses

##### Training, Information, and Economic Barriers

**Stephen Slivinski**, Senior Research Fellow at the Center for the Study of Economic Liberty at the University of Arizona, an organization seeking to “become an international leader in research that effects liberty-enhancing public policy and increases public and academic awareness of the history and philosophy of economic liberty by leveraging [its] place, fusing academic research with policy engagement, and engaging globally to transform society.”<sup>35</sup> Mr. Slivinski spoke about the barriers that formerly incarcerated persons face upon reentering society and when seeking to access an occupational license. Mr. Slivinski noted that most individuals leaving prison are “generally considered low skilled” because most of them do not “have a high school diploma.”<sup>36</sup> Accordingly, he noted that a skill-based barrier exists for ex-offenders seeking to enter the labor force that forces many ex-offenders to seek out low-skilled jobs, many, of which, are heavily regulated by occupational licensing statutes.<sup>37</sup> Additionally, Mr. Slivinski noted that ex-offenders also face

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<sup>33</sup> *Quick Facts New Jersey*, United States Census Bureau, at: <https://www.census.gov/quickfacts/NJ>.

<sup>34</sup> Nellis, *supra* note 23.

<sup>35</sup> *About us*, Center for the Study of Economic Liberty, at: <https://cseel.asu.edu/about>.

<sup>36</sup> Stephen Slivinski, testimony, *Virtual Briefing Before The New Jersey Advisory Committee to the U.S. Commission on Civil Rights, September 24, 2020*, transcript, p. 9 (hereafter *Sept. 24, 2020, Virtual Briefing*).

<sup>37</sup> *Ibid.*

training barriers when seeking employment in fields that require a license.<sup>38</sup> That is, many occupational licenses require several months and in some cases several years of training prior to obtaining an occupational license, which can be very costly and thus render these licenses effectively off limits for ex-offenders, who cannot afford them, or cannot lose the time required to obtain them.<sup>39</sup> Mr. Slivinski noted that even if ex-offenders complete the mandated training requirements, they must also pay the licensing fee levied by most occupational licensing boards, which many ex-offenders cannot afford.<sup>40</sup>

**James E. McGreevey**, Former Governor of the State of New Jersey (2002-2004) and Chairman of the Board at New Jersey Reentry Corporation, spoke about the limitations of training programs offered by the Department of Corrections (DOC) as well as training barriers that formerly incarcerated people face.<sup>41</sup> According to Gov. McGreevey, many incarcerated people never touch a computer while in prison and thus when they are released “they can’t even” complete an “application for a job.”<sup>42</sup> Gov. McGreevey noted that the DOC could provide computer training, “but it doesn’t happen.”<sup>43</sup> He criticized the DOC’s programs, reporting that, for example, one formerly incarcerated person “took three electrician courses at Bayside,” a New Jersey State Prison, but “never touched a wire.”<sup>44</sup> Gov. McGreevey suggested that the DOC needed to update its occupational programming in order to ensure that the course offerings connect people to “economic opportunities.”<sup>45</sup> Given these issues he recommended that the Department of Labor oversee educational programming within New Jersey State Prisons to “create a pipeline to train people in” skills necessary to meet “threshold requirements” for occupations requiring a license.<sup>46</sup>

#### Good Moral Character Clauses

**Gov. McGreevey** also spoke about good moral character clauses and the insurmountable barriers they create for formerly incarcerated individuals seeking occupational licenses. Specifically, He expressed the belief that “character-based regulations,” i.e., regulations that require good moral character prior to receiving an occupational license, increase recidivism and lower “the ability of

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<sup>38</sup> Ibid.

<sup>39</sup> Ibid.

<sup>40</sup> Ibid.

<sup>41</sup> Governor McGreevey, testimony, *Virtual Briefing Before The New Jersey Advisory Committee to the U.S. Commission on Civil Rights November 18, 2020*, p.24 (hereafter Nov.. 24, 2020, *Virtual Briefing*).

<sup>42</sup> Ibid., 25.

<sup>43</sup> Ibid.

<sup>44</sup> Ibid.

<sup>45</sup> Ibid.

<sup>46</sup> Ibid., 24.



reentering persons to obtain meaningful employment.”<sup>47</sup> According to Gov. McGreevey, in New Jersey, 210 occupations currently require licenses that specifically cite the requirement of good moral character,<sup>48</sup> including licenses for dental hygienists, emergency medical technicians (EMTs), firefighters, plumbers, real estate brokers, and teachers.<sup>49</sup> He particularly highlighted that, ironically, “these restricted occupations are the same occupations that inmates receive training for in prison.”<sup>50</sup> Gov. McGreevey noted that the inherent vagueness surrounding good moral character requirements adds another substantial burden to formerly incarcerated applicants because they make it difficult for affected individuals to know whether they might ultimately be disqualified and thus to determine whether it is worth investing their time and resources into the certificate requirements and to the application process.<sup>51</sup> He stated that these clauses, and thus the licensing statutes in which they are contained, work to preclude people convicted of, for example, felony murder from obtaining an occupational license, despite the fact that such individuals have “the lowest rate of recidivism.”<sup>52</sup>

**Mr. Slivinski** also noted that individuals with criminal convictions face more barriers to occupational licenses than the general public because of “good moral character provisions.” According to Mr. Slivinski “good moral character provisions” in occupational licensing regulations often function as “outright prohibitions” on people with criminal records because they “allow licensing boards to be somewhat arbitrary or capricious” in how they enforce and interpret them.<sup>53</sup> That is, good moral character provisions give licensing boards “authority to reject applicants out of hand, just for having some form of criminal record.”<sup>54</sup> Mr. Slivinski noted that these laws create insurmountable barriers for ex-offenders and may accordingly increase the likelihood of recidivism.<sup>55</sup>

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<sup>47</sup> Ibid., 9. See also Rhode, Deborah L, “Virtue and the Law: The Good Moral Character Requirement in Occupational Licensing, Bar Regulation, and Immigration Proceedings,” *Law & Social Inquiry* 43, no. 03, 1027-058 (Summer 2018), at: [https://www-cdn.law.stanford.edu/wp-content/uploads/2018/09/Rhode-2018-Law\\_26\\_Social\\_Inquiry.pdf](https://www-cdn.law.stanford.edu/wp-content/uploads/2018/09/Rhode-2018-Law_26_Social_Inquiry.pdf) (noting that occupational licensing “denials are a significant contributor to unemployment, racial inequality, and recidivism.”)

<sup>48</sup> Governor McGreevey, testimony, *November 18, 2020, Virtual Briefing* p.9; “Licensed Occupations in New Jersey.” Department of Labor and Workforce Development. Accessed August 25, 2021, at: <https://www.state.nj.us/labor/lwdhome/coei/licensedOccup.html> (noting that there are currently 208 occupations requiring licensure in New Jersey.) .

<sup>49</sup> McGreevey, testimony, *Nov. 18, 2020, Virtual Briefing*, p. 9.

<sup>50</sup> Ibid.

<sup>51</sup> Ibid., 10.

<sup>52</sup> Ibid., 20.

<sup>53</sup> Slivinski testimony, *Sept. 24, 2020, Virtual Briefing*, p. 9.

<sup>54</sup> Ibid.

<sup>55</sup> Ibid., 10.

## B. Impacts of Barriers to Occupational Licenses

### Racial Disparities

**Beth Avery**, Senior Staff Attorney with the National Employment Law Project, provided an in-depth look into the racial disparities within the carceral system, the punitive aspects of incarceration, and the impact of licensing restrictions. According to Ms. Avery, in New Jersey alone, over one and a half million people have a criminal record, and nearly a 100,000 people are released from incarceration each year.<sup>56</sup> She reported that, as set forth above, based upon incarceration rates, New Jersey is plagued by the greatest racial inequality in its incarcerated population of any state in the nation. Specifically, she noted that Black people are incarcerated at 12 times the rate of White people in New Jersey.<sup>57</sup> Further, citing a study done by Devah Pager, Ms. Avery reported that Black workers are penalized more harshly than White workers for having a record,<sup>58</sup> which exacerbates the impact of mass incarceration on minority communities.<sup>59</sup> Further, Ms. Avery spoke about the impact of employment on recidivism rates, noting that employment is the single most important means of decreasing recidivism and that higher wages also translate to lower recidivism.<sup>60</sup> Ms. Avery reported that the United States economy has been “weakened” by occupational licensing barriers “because people with records could not fully participate in the labor market.”<sup>61</sup> Thus, Ms. Avery concluded that barriers to occupational licenses, which functionally work to preclude Black workers from accessing higher wage occupations, should be reduced.<sup>62</sup>

**Todd R. Clear**, Professor of Law at Rutgers University Law School and School of Criminal Justice, noted the harsh consequences of mass incarceration, particularly the increase in the number of people carrying criminal convictions and the impact on people of color. According to Prof. Clear, “the unwanted consequences of the expansion of the justice system ... has been the creation of a never-ending confinement, in which post-penalty restrictions re-impose a lack of access to regular societal goods and services in ways few people continue to see as wise.”<sup>63</sup> He recommended that the criminal justice system impose fewer blanket prohibitions and instead utilize a case-by-case approach with respect to occupational licenses in order to maximize opportunities in the communities that have been the most impacted by mass incarceration, particularly communities of color.<sup>64</sup> Further, Prof. Clear noted that while he was unaware of any

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<sup>56</sup> Avery, testimony, Nov. 18, 2020, *Virtual Briefing*, p. 5.

<sup>57</sup> Ibid.

<sup>58</sup> Pager, *supra* note 24. 7/19 Brittany Done.

<sup>59</sup> Avery, testimony, Nov. 18, 2020, *Virtual Briefing*, p. 5.

<sup>60</sup> Ibid., 6.

<sup>61</sup> Ibid., 5.

<sup>62</sup> Ibid., 8.

<sup>63</sup> Todd Clear, testimony, Nov. 12, 2020, *Virtual Briefing* p. 5.

<sup>64</sup> Ibid.



“research that speaks specifically to the question” of the gender-related impact of criminal background on occupational licensure, “so many of the jobs that women who go to prison seek are in the service sector,” and often require a license.<sup>65</sup>

**Rachel Wainer Apter**, Director of the New Jersey Division on Civil Rights and nominee to become an Associate Justice of the Supreme Court of New Jersey, first spoke about the racial disparities within the criminal justice system in New Jersey. Citing United States Department of Justice data, she reported that of the 19,786 people incarcerated in New Jersey at the end of 2016, 60.7% were Black and only 21.8% were White.<sup>66</sup> The Director also pointed out that Black people in New Jersey have historically been incarcerated at a rate more than 12 times higher than the rate of White people.<sup>67</sup> Accordingly, she noted, policies excluding job applicants with criminal histories are much more likely to harm Black and Brown people in New Jersey.<sup>68</sup> Director Wainer Apter expressed her belief that, given the overrepresentation of people of color in the criminal justice system, “protecting people with criminal records when they seek employment is a core civil rights issue, and indeed a core race discrimination issue.”<sup>69</sup>

**Patricia McKernan**, Vice-Chairman of the New Jersey Board of Social Work Examiners, testified that post-incarceration employment is crucial both for preventing recidivism and for ensuring that formerly incarcerated persons lead fulfilling productive lives. Citing a document published by the Institute for Justice, a national public interest group, Dr. McKernan noted that New Jersey requires 54 of 102 lower-income occupations to be licensed, with an average fee of \$224, which makes New Jersey the 16th highest state with respect to fees for licensure of these occupations.<sup>70</sup> Unfortunately, she noted, a past criminal history reduces the likelihood of a job offer by 50%, which in New Jersey disproportionately affects Black people because New Jersey leads the nation in racial disparity in incarceration.<sup>71</sup> According to her, today, people of color make up “37% of the U.S. population, but 67% of the prison population.”<sup>72</sup> “Overall Black people are more likely than White people to be arrested. Once arrested they're more likely to be convicted, once convicted they're more likely to face stiff sentences. Black men are six times as likely to be incarcerated as

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<sup>65</sup> Ibid., 21.

<sup>66</sup> Rachel Wainer Apter, testimony, *Feb. 20, 2021, Virtual Briefing*, p. 11; Ann Carson, *Prisoners In 2016*, U.S. Department of Justice (August 7, 2018), at: <https://bjs.ojp.gov/content/pub/pdf/p16.pdf>

<sup>67</sup> Ibid.

<sup>68</sup> Ibid.

<sup>69</sup> Ibid.

<sup>70</sup> Patricia McKernan, testimony, *Feb. 10, 2021, Virtual Briefing*, p. 6; Dick Carpenter, Lisa Kneeper, Kyle Sweetland and Jennifer McDonald, License to Work: New Jersey, Institute for Justice .at <https://ij.org/report/license-work-2/ltw-state-profiles/ltw2-new-jersey>.

<sup>71</sup> McKernan, testimony, *Feb. 10, 2021, Virtual Briefing*, p. 7.

<sup>72</sup> Ibid.

White men, and Hispanic men are more than twice as likely to be as incarcerated as non-Hispanic white men,” she testified.<sup>73</sup>

### Recidivism Rates

**Gov. McGreevey** emphasized the connection between stable employment and recidivism rates, citing a study done by the United States Sentencing Commission and the Center of Study of Economic Liberty. He indicated that individuals with stable employment were 12.8% less likely to re-offend<sup>74</sup> and that states with the most restrictive licensing burdens experienced an overall 9% increase in average three-year recidivism rates, while those states with the least restrictive licensing burdens saw those rates decline by nearly 2.5%.<sup>75</sup>

**Mr. Slivinski** described a study he conducted on the rates of recidivism in 33 states with occupational licensing regulations from 1997-2007. According to Mr. Slivinski, “those states that had the highest occupational licensing barriers, meaning the highest fees, the highest number of training hours, the largest and longest list of requirements on top of the good moral character provisions,” saw an increase in the recidivism rate of between “9% to 12%” at a time when the national rate grew between 2% to 3%.<sup>76</sup> Conversely, states with the lowest relative licensing requirements and with the least strict laws saw a decline in their recidivism rate of between 2.5% to 4%.<sup>77</sup> Relying upon this, Mr. Slivinski emphasized that licensing barriers make “it harder to reintegrate people coming out of prison back into labor markets” and expressed his believe that licensing barriers “should be reformed.”<sup>78</sup>

### Impacts on the Formerly Incarcerated

**Robert Carter**, now Director of Operations for the New Jersey Reentry Corporation, spoke about the challenges to finding employment that he faced upon re-entry into society. Mr. Carter started selling drugs at 13 years old, and using shortly thereafter, and was imprisoned at a very young age; he had multiple felony convictions.<sup>79</sup> Ultimately Mr. Carter rehabilitated himself and was released from prison in June 2008.<sup>80</sup> Upon release, Mr. Carter hoped to become a lawyer, and thus, pursued a paralegal program at a community college; however, his college informed him that, while he could enroll in the paralegal program, his criminal record would likely preclude him from ever

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<sup>73</sup> Ibid.

<sup>74</sup> McGreevey testimony, *Nov. 18, 2020, Virtual Briefing*, p. 10

<sup>75</sup> Ibid.; Slivinski, *supra* note 12.

<sup>76</sup> Slivinski, testimony, *Sept. 24, 2020, Virtual Briefing*, p. 11.

<sup>77</sup> Ibid.

<sup>78</sup> Ibid.

<sup>79</sup> Robert Carter, testimony, *Nov. 18, 2020, Virtual Briefing*, p. 13.

<sup>80</sup> Ibid.

being accepted to law school based upon good moral character concerns.<sup>81</sup> Dissuaded by this information, Mr. Carter decided to shift focus and take the civil service exam to become a firefighter in Newark, where his father had worked.<sup>82</sup> Mr. Carter noted that he did very well on the exam and was ahead of nearly all other applicants, but he was not selected to join the fire department.<sup>83</sup> Mr. Carter appealed the decision and later found out that he was precluded from working in the Newark Fire Department based upon his criminal conviction.<sup>84</sup> Specifically, Mr. Carter noted that his criminal conviction meant that he could not satisfy the fire department's good moral character clause; he had been unaware of this provision until he appealed his denial.<sup>85</sup> Mr. Carter ultimately found employment in a drug and alcohol treatment center, but only after bouncing from job to job.<sup>86</sup> Of note, Mr. Carter stated that although with his conviction he could have "become a bail bondsman" (because he was not convicted of a white-collar offense) his conviction still prevents him from securing stable housing.<sup>87</sup>

**Edwin Ortiz**, a Bricklayer Apprentice, spoke about his re-entry process and, in particular, his efforts to seek occupational licenses in New Jersey. Mr. Ortiz noted that he was released from prison in 2016 after serving 30 years for felony murder.<sup>88</sup> Upon release, Mr. Ortiz worked with the New Jersey Reentry Corporation, where he learned to use a computer in order to apply for jobs online.<sup>89</sup> Mr. Ortiz noted that while he was able to find menial jobs, he wanted to achieve more, which is why he pursued a bricklayer's apprenticeship and eventually began working as a mason.<sup>90</sup> According to Mr. Ortiz, however, he was unable to reach his full potential as a mason because his criminal conviction explicitly precluded him from obtaining a Transportation Worker Identification Credential ("TWIC") Card, which permits masons to make more money, work overtime, receive certain promotions, and work at government sites, like Newark Airport.<sup>91</sup> Mr. Ortiz noted that he was unaware of this requirement prior to pursuing a career as a mason and even if he would have been able to obtain the license, the \$100 fee may have precluded him from obtaining the license.<sup>92</sup> Further, Mr. Ortiz spoke about his brother's experience re-entering society

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<sup>81</sup> Ibid.

<sup>82</sup> Ibid.

<sup>83</sup> Ibid., 13-14.

<sup>84</sup> Ibid.

<sup>85</sup> Ibid., 13.

<sup>86</sup> Ibid.

<sup>87</sup> Ibid., 20.

<sup>88</sup> Edwin Ortiz, testimony, *Nov. 19, 2020, Virtual Briefing*, p. 9.

<sup>89</sup> Ibid., p. 10.

<sup>90</sup> Ibid.

<sup>91</sup> Ibid.

<sup>92</sup> Ibid.

and seeking licensure in New Jersey. Upon re-entry, his brother participated in the NJ-Step, an organization comprised of higher education institutions in New Jersey that partner with the state to provide college and university-level courses for all students in state custody and assists in their transition to college life upon their release.<sup>93</sup> His brother also received his bachelor's degree in criminal justice from Rutgers but was precluded from pursuing a career as a teacher because of his conviction.<sup>94</sup> According to Mr. Ortiz, formerly incarcerated people simply desire "a career" where they "can earn a decent living."<sup>95</sup>

Finally, Mr. Ortiz spoke about his experience obtaining housing with a criminal conviction. Mr. Ortiz noted that, after he was released from prison, he had no credit history or tenant history, which, when combined with his criminal record, created an insurmountable barrier in his search for affordable housing.<sup>96</sup> Mr. Ortiz reported that he repeatedly paid housing application fees, only to be turned down due to his criminal history.<sup>97</sup> At the time of Mr. Ortiz's testimony, he had been out of prison for 4 years and was still struggling to find suitable housing.<sup>98</sup>

**Eric Echevarria**, a licensed social worker, spoke about his experiences as a returning citizen as it related to licensure in New Jersey. Mr. Echevarria grew up in East Camden, New Jersey.<sup>99</sup> Both of his parents were addicted to crack cocaine and Mr. Echevarria's father was murdered in front of him when he was 11 years old.<sup>100</sup> Despite his circumstances, Mr. Echevarria noted that he was able to graduate from high school and eventually start college; however, following the murder of his younger brother, Mr. Echevarria dropped out of college, began drinking a bottle of liquor a night, and ultimately ended up in prison.<sup>101</sup> Mr. Echevarria described the difficulties he faced upon release. While incarcerated, he planned to acquire his commercial driver's license and be a truck driver, but due to his criminal record, he was turned down from multiple companies whose policies required a job applicant to be 10 years removed from prison.<sup>102</sup> Just 6 months out of prison, Mr.

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<sup>93</sup> Ibid; Tom McLaughlin, *NJ-Step Program A "Prison-To-Prosperty Pipeline" For Former Inmates*, Rutgers News (no date), at: <https://news.camden.rutgers.edu/2019/08/nj-step-program-a-prison-to-prosperty-pipeline-for-former-inmates/>.

<sup>94</sup> Ortiz, testimony, *Nov. 19, 2020, Virtual Briefing*, p. 10.

<sup>95</sup> Ibid., 19.

<sup>96</sup> Ibid., 24.

<sup>97</sup> Ibid.

<sup>98</sup> Ibid., 25.

<sup>99</sup> Eric Echevarria, testimony, *Feb. 10, 2021, Virtual Briefing*, p. 9.

<sup>100</sup> Ibid., 9-10.

<sup>101</sup> Ibid., p.10.

<sup>102</sup> Ibid., p. 9.

Echevarria began working at a burger chain to make ends meet.<sup>103</sup> Mr. Echevarria noted that he was able to go back to school and ultimately received his bachelor's degree.<sup>104</sup> He began volunteering with Dr. Patricia McKernan, who along with other mentors, encouraged him to seek his master's degree and apply for a social work license, as well as his drug and alcohol license.<sup>105</sup> According to Mr. Echevarria, he had to do more than the average applicant but his experience with both of the boards was a good one.<sup>106</sup> Mr. Echevarria noted that he was "up-front" about his prior convictions, shared his personal experiences, and assured the board that he was rehabilitated.<sup>107</sup> At the time of his testimony, Mr. Echevarria had been licensed for 10 years and employed at an addiction treatment center, where he works with formerly incarcerated men seeking licensure in fields ranging from cosmetology to heating and ventilation services.<sup>108</sup> Mr. Echevarria reported that people convicted of certain crimes "are not eligible to receive financial aid through the state of New Jersey" which he stated acts as "a barrier to getting employment."<sup>109</sup> Mr. Echevarria also expressed his belief that training for occupational licensing jobs should begin in correctional institutions, while people are still incarcerated, in order to prepare individuals so that they leave with the "skills necessary to earn a decent living."<sup>110</sup>

### C. Alternative Methods to Occupational Licensing

#### Regulatory Regimes

**Prof. Clear** also spoke about the legitimate functions of punishment in our criminal justice system and how they relate to policies that prevent the formerly incarcerated from obtaining occupational licenses. Prof. Clear began by expressing the belief, based upon his academic experience, "that the blanket denial of occupational licenses due to felony convictions is a mistaken policy."<sup>111</sup> He noted that "prohibitions on occupational licenses have the effect of extending the punitive reach of the criminal sanction" because "they turn a sanction that is limited by terms of a criminal sentence, into a penalty that lasts a lifetime."<sup>112</sup> Prof. Clear reported that criminal law scholars generally agree that there are legitimate bases for prohibiting certain people from obtaining occupational

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<sup>103</sup> Ibid.

<sup>104</sup> Ibid.

<sup>105</sup> Ibid.

<sup>106</sup> Ibid., 11.

<sup>107</sup> Ibid.

<sup>108</sup> Ibid., 16-17.

<sup>109</sup> Ibid., 36.

<sup>110</sup> Ibid., 19.

<sup>111</sup> Clear, testimony, Nov. 12, 2020, *Virtual Briefing*, p. 3.

<sup>112</sup> Ibid.

licenses, but stated that those bases are limited to two scenarios.<sup>113</sup> The first would be a prohibition on occupational licenses when it is appropriate punishment: “That is, a person, by virtue of a specific illegal conduct, forfeited the rights of the license.”<sup>114</sup> For example, it would be legitimate to prohibit “an electrician who uses his access to homes to steal from clients” from retaining access to an electrician’s license.<sup>115</sup> The second would be a prohibition on occupational licenses when “there’s a reason to believe that the person who seeks the license is likely to use it to harm others.”<sup>116</sup> For example, a sex offender would represent too great a risk to the public to be allowed to obtain a license to work in a child-care facility and “a person who has been convicted of a burglary, presents a notable risk to the public when seeking a license to create access to people’s private property.”<sup>117</sup>

**Edward Timmons**, Professor of Economics at Saint Francis University, provided a description of occupational licensing regulations and their impact on individuals with criminal records. Prof. Timmons reported that “the fraction of the U.S. workforce that is licensed has significantly grown in the past 60 years. In the 1950s, approximately 5% of workers were licensed. Today, that figure stands at 21.5%.”<sup>118</sup> Prof. Timmons acknowledged that the purpose of occupational licensing “is to protect consumers and maintain a minimum quality standard for professions.”<sup>119</sup> However, according to him, occupational regulations are, in fact, “rarely necessary for the protection of consumers,” “may reduce consumer perceptions of the quality of service,” and actually increase the prices of service.<sup>120</sup> In addition, citing a study he co-authored, Prof. Timmons reported that licensing requirements have been shown to reduce economic mobility, i.e., “the ability of someone to change their income or wealth.”<sup>121</sup> Thus, from 1993 to 2012 New Jersey “added licensing requirements for 38 occupations,” which “reduced economic mobility” in the state “by 4.3%.”<sup>122</sup> He further noted that “increases in licensing in New Jersey increased income inequality by almost 10%” and that “existing research generally suggests that minorities face greater costs from occupational licensing.”<sup>123</sup> Prof. Timmons ended his testimony by encouraging “policymakers in

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<sup>113</sup> Ibid.

<sup>114</sup> Ibid.

<sup>115</sup> Ibid.

<sup>116</sup> Ibid.

<sup>117</sup> Ibid., 3.

<sup>118</sup> Edward Timmons, testimony, *Sept. 24, 2020, Virtual Briefing*, pp. 12-13.

<sup>119</sup> Ibid., 13.

<sup>120</sup> Ibid.

<sup>121</sup> Kimberly Amadeo and Michael J. Boyle, *What Is Economic Mobility*, The Balance (February 23, 2021), at: <https://www.thebalance.com/economic-mobility-4163493>.

<sup>122</sup> Ibid.

<sup>123</sup> Ibid.

the state to reconsider the costs and benefits of occupational licensing as a policy tool to enhance consumer safety.”<sup>124</sup>

**Lee McGrath**, Managing Attorney with the Minnesota office of the Institute for Justice, an organization operating in 6 states that seeks “to limit the size and scope of government power and to ensure that all Americans have the right to control their own destinies as free and responsible members of society,”<sup>125</sup> recommended changes to New Jersey’s occupational licensing regulations. Mr. McGrath highlighted the range of occupations that require a license, pointing out that it encompasses much more than doctors and lawyers. Rather, according to Mr. McGrath, 40% of licenses in New Jersey are held by “individuals who have some college, high school, or less than high school education.”<sup>126</sup> Mr. McGrath noted that occupational license regulations are “a big part of New Jersey’s regulation of the labor markets” and offered recommendations to reform New Jersey’s occupational license laws in a way that would remove barriers to access for the formerly incarcerated, including barring licensing boards from considering certain crimes or crimes that occurred three-years before the application was submitted, eliminating good moral character clauses, which require boards to construe ambiguous terminology, and conducting case-by-case reviews of all applicants.<sup>127</sup> Mr. McGrath also noted that aspiring barbers and cosmetologists “must make an investment of \$15,000 to \$30,000” before knowing if their criminal conviction precludes them from obtaining an occupational license.”<sup>128</sup> Accordingly, Mr. McGrath recommended that licensing boards create a system whereby formerly incarcerated individuals can determine if their criminal conviction disqualifies them for licensure before they invest thousands of dollars and valuable time in training.<sup>129</sup>

More generally, Mr. McGrath discussed a regulatory model created by the Institute for Justice, which he referred to as the “inverted pyramid,” that provides regulators with guidance on when regulation is necessary and effective.<sup>130</sup> He utilized the inverted pyramid to highlight alternative regulatory regimes and to suggest that alternative regimes would be just as, if not more effective at regulating certain fields that currently require occupational licenses.<sup>131</sup> Mr. McGrath reported that the inverted pyramid starts with market forces at the very top (no governmental regulation) and ends with licensing restrictions at the very bottom (significant governmental regulation).<sup>132</sup>

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<sup>124</sup> Ibid.

<sup>125</sup> *About us*, Institute for Justice, at: <https://ij.org/about-us/>.

<sup>126</sup> Lee McGrath, testimony, *Sept. 24, 2020, Virtual Briefing*, p. 6.

<sup>127</sup> Ibid.

<sup>128</sup> Ibid.

<sup>129</sup> Ibid.

<sup>130</sup> Ibid., 7.

<sup>131</sup> Ibid., 6.

<sup>132</sup> Ibid.

According to Mr. McGrath, the top of the inverted pyramid “starts with the idea that markets do an extraordinary job of weeding out incompetence and fraud;” thus, he stated that regulators should not seek to intervene between buyers and sellers “unless there is a significant market failure.”<sup>133</sup> He noted that if regulators want to address fraud or protect consumers, there are already ample ways for New Jersey lawmakers to do so and thus suggested that there is no need to overregulate by including consumer protections clauses, i.e., clauses that require licensing boards to consider whether an applicant poses a risk to the public, in occupational licensing legislation.<sup>134</sup> Accordingly, Mr. McGrath expressed his belief that New Jersey could regulate barbers, beauticians, and cosmetologists in the same manner they regulate bartenders, food servers, and chefs, through random compliance inspections and thus could eliminate the need for occupational licenses in those professions.<sup>135</sup>

**Ms. Wainer Apter** also spoke about New Jersey laws governing employer policies with respect to applicants with criminal histories. She noted that, while employers are precluded, under the Opportunity to Compete Act, (N.J.S.A. 34:6B-11 of the New Jersey Revised Statutes) from asking about an applicant’s criminal history during the initial application process, they are allowed to explicitly reject applicants because they have a criminal history, including an arrest that did not lead to a conviction or a misdemeanor conviction that is 30 years old.<sup>136</sup> She stated that the New Jersey Law Against Discrimination (“LAD”), (N.J.S.A. sections 10:5-1—49 of the New Jersey Revised Statutes) also does not address the use of criminal history in hiring decisions, but it prohibits employment policies that result in a differential impact based upon race, religion, national origin, or any other characteristic protected class under the LAD.<sup>137</sup> The LAD prohibits employment policies that automatically exclude individuals because of one or more prior arrests without any conviction and policies that impose a blanket prohibition on any person with any criminal conviction, unless such policies are necessary to achieve a substantial and legitimate nondiscriminatory interest of the employer.<sup>138</sup> However, Director Wainer Apter noted that the LAD had its limitations and accordingly, and stated that the Division on Civil Rights believes the LAD should be amended to codify protections for applicants with criminal histories and ensure that employment policies consider each applicant’s individual circumstances by mandating a case-by-case review of every application.<sup>139</sup>

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<sup>133</sup> Ibid.

<sup>134</sup> Ibid.

<sup>135</sup> Ibid.

<sup>136</sup> Ibid., 11-12.

<sup>137</sup> Ibid., 12.

<sup>138</sup> Ibid.

<sup>139</sup> Ibid.



## Legislative Measures

**Margaret Love**, Executive Director at the Collateral Consequences Resource Center, an organization that works to “promote public engagement on the myriad issues raised by the legal restrictions and societal stigma that burden people with a criminal record long after their criminal case is closed,”<sup>140</sup> offered perspective with respect to the types of legislative measures that have been advanced throughout the United States to expand access to occupational licenses for the formerly incarcerated. “Because 20% of all jobs in the United States are available to people who have” occupational licenses, Ms. Love stated that “it is of obvious importance to the reintegration agenda to remove record-based barriers that unfairly and inefficiently restrict access to the licenses and certificates that people need to work.”<sup>141</sup> Ms. Love reported that “between 2015 and the present... more than 30 states had enacted a total of 39 laws to make it easier for qualified individuals with a criminal record to obtain licensure” and suggested that New Jersey update the Rehabilitated Convicted Offenders Act, N.J.S.A. (section 2A:168A-1 of the New Jersey Revised Statutes), which sought to ease restrictions on ex-offenders ability to obtain employment or to participate in vocational or educational rehabilitation programs, because it “remains more or less exactly as it was enacted” in 1968.<sup>142</sup>

According to Ms. Love, legislative measures taken in other states have “substituted objective standards for vague good moral character criteria that in the past allowed licensing boards to reject qualified applicants based on criminal records unrelated to job performance.” She further noted that states have “prohibited consideration of certain criminal records entirely, including non-conviction records” and “those that have been sealed or expunged or pardoned.”<sup>143</sup> Other states, she said, “have enacted general look-back provisions, prohibiting consideration of convictions more than a few years in an applicant’s past.”<sup>144</sup> Ms. Love commended several laws that “required licensing agencies to justify their decisions in terms of public safety... gave applicants an opportunity to appeal denials, and imposed oversight requirements to hold licensing agencies accountable for their performance.”<sup>145</sup> Finally, Ms. Love acknowledged that the then-proposed (and now enacted) Senate Bill No. 942 an occupational licensing bill in New Jersey contained “a few good new features,” but recommended that it be amended to explicitly prevent licensing boards from considering crimes that significantly predate a licensing application, create a process for applicants with criminal records to apply prior to investing money in training, and require licensing boards to capture data on the amount of applications they receive from individuals with a criminal record.<sup>146</sup>

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<sup>140</sup> *About us*, Collateral Consequences Resource Center, at: <https://ccresourcecenter.org/about-the-collateral-consequences-resource-center/>.

<sup>141</sup> Margaret Love, testimony, *Sept. 24, 2020, Virtual Briefing*, p. 4.

<sup>142</sup> *Ibid.* 4-5.

<sup>143</sup> *Ibid.*, 5.

<sup>144</sup> *Ibid.*

<sup>145</sup> *Ibid.*

<sup>146</sup> *Ibid.*, 28.

**New Jersey State Senator Troy Singleton (D)**, of New Jersey’s 7th Legislative District (2018-present), spoke about the importance of stable employment and described legislative measures to remove barriers to employment for the formerly incarcerated. Sen. Singleton began by expressing how valuable an occupation can be for the formerly incarcerated who want to rebuild their lives and are “willing and able to work.”<sup>147</sup> He emphasized how “work is more than just getting a paycheck each week, it’s a way for individuals to find self-worth” and expressed his belief that legislative reforms are necessary to remove “the barriers that currently exist for workers with a criminal history.”<sup>148</sup> He noted that “without meaningful work, persons with a criminal history will likely end up back in prison” due to the connection between entry into the labor force and rates of recidivism.<sup>149</sup> Sen. Singleton highlighted barriers to post-conviction employment, noting that “people with records on average are only half as likely to get a [job] call-back as those without a record. And for Black men especially with records, the impact is more severe—only one in three receive a call-back.”<sup>150</sup> Also, Sen. Singleton noted that policymakers need “data to help inform public policy” in order “to create a better runway for female ex-offenders as they make their way back into society.”<sup>151</sup>

He reported that “current law permits a board to refuse to admit a person to an examination or refuse to issue or to suspend or revoke any certificate, registration or license issued by the board upon proof that the person has been convicted of any crime or offense involving moral turpitude or relating adversely to the act regulated by the board,” which, he suggested, creates barriers for the formerly incarcerated.<sup>152</sup> Thus, Sen. Singleton provided a description of Senate Bill No. 942, legislation he introduced to reform New Jersey’s occupational licensing laws.<sup>153</sup>

According to Sen. Singleton, the then-proposed legislation would remove the good moral character clause from current law and would prevent an applicant from being disqualified from obtaining an occupation license “solely because of a prior conviction,” unless the crime “has a direct and substantial relationship to the profession or occupation regulated by the board, or is inconsistent with public safety.”<sup>154</sup> Additionally, he noted that his proposal would establish standards that must be considered when determining whether a crime meets the direct and substantial relationship standard established by the bill including: “the nature and seriousness of the crime or offense;”

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<sup>147</sup> Troy Singleton, testimony, *Nov. 12, 2020, Virtual Briefing*, p. 9.

<sup>148</sup> *Ibid.*

<sup>149</sup> *Ibid.*, 9-10.

<sup>150</sup> *Ibid.*, 10.

<sup>151</sup> *Ibid.*, 23.

<sup>152</sup> *Ibid.*, 10.

<sup>153</sup> 2021 NJ Sess. Law Serv. Ch. 81 (Senate 942) (West)

<sup>154</sup> Singleton, testimony, *Nov. 12, 2020, Virtual Briefing*, p. 11.

“the passage of time since this commission, the relationship of the crime or offense to the purpose of regulating the profession or occupation regulated by the board, any evidence of rehabilitation of the person;” and “fitness required to perform the duties and discharge the responsibilities of the profession or occupation.”<sup>155</sup> And the bill would require the Division of Consumer Affairs to maintain data concerning the number of, and reasons for, disqualification of any applicant based on the provisions of the bill.

S942 passed the full Senate unanimously on March 25, 2021, and the Assembly on March 1, 2021, and was signed into law on May 11, 2021.<sup>156</sup> The provisions of S942 eliminate the good moral character clause, only allow a licensing board to deny an ex-offender an occupational license if their crime “has a direct or substantial relationship to the activity regulated by the board or is of a nature such that certification, registration or licensure of the person would be inconsistent with public health safety or welfare,” require licensing boards provide ex-offenders with “an opportunity to be heard no later than 30 days after receiving notice of a potential disqualification,” and require “that the Director of the Division of Consumer Affairs ... obtain data concerning the number of, and reasons for, disqualification by any board, and submit a report to the Legislature.”<sup>157</sup>

**Ms. Avery** also offered recommendations developed by the National Employment Law Project to: ease restrictions on occupational licenses, including eliminating all automatic bans, leaving no exception for specific licenses; conduct a case-by-case review of every applicant with a criminal record; ensure that it is clear that any general licensing statute governing consideration of records clearly must be interpreted to supersede any statutory language applicable to individual licenses; remove vague standards, including good moral character clauses; consider an applicant’s rehabilitation and prohibiting the denial of a license if rehabilitation is demonstrated; prohibit consideration of minor offenses, such as misdemeanors, as the basis for denial of a license; prohibit consideration of non-convictions and expunged or pardoned offenses; impose look-back limits to constrain the records that licensing authorities may consider, delaying background checks until the applicant is deemed otherwise qualified for the occupation; provide clear guidance regarding what will be considered in the application process; and collect data on the resolution of applications to ensure that any reforms are, in fact, working.<sup>158</sup> Ms. Avery also identified the importance of clearly explaining the process and actual effect of expungement because many individuals are unaware that the expunged convictions will show up when a licensing agency conducts a background check.<sup>159</sup>

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<sup>155</sup> Ibid., 11.

<sup>156</sup> Ibid., 9-10. Supra note 159.

<sup>157</sup> Ibid.

<sup>158</sup> Avery, testimony, *Nov. 18, 2020, Virtual Briefing*, p. 7.

<sup>159</sup> Ibid., 16-17.

#### D. New Jersey Licensing Boards

**Janice Alvarez**, Chairperson of the New Jersey Board of Cosmetology and Hairstyling, spoke about the Board's process for reviewing applicants with criminal histories. Ms. Alvarez explained that this Board is comprised of seven members, one member with a teacher's license, three cosmetologists, one braider, and one public member.<sup>160</sup> The Board issues nine different professional licenses, seven that pertain to individuals—cosmetologists, beauticians, barbers, skin care specialists, manicurists, hair-braiders, and individuals seeking to teach in these respective trades—and two that pertain to Board licenses entities—shops and schools.<sup>161</sup> According to Ms. Alvarez, between 2019 and 2020 the Board reviewed 243 applicants in which the applicant had a criminal history.<sup>162</sup> According to Ms. Alvarez, a majority of the applicants had convictions related to substance abuse and only a small percentage involved violent offenses.<sup>163</sup> When the Board receives an application from an individual with a criminal history, the Board requests additional background documentation as well as instructions for obtaining the additional documentation.<sup>164</sup> The Board then focuses its review on the “nature and seriousness of the crime, the circumstances under which the crime occurred, the social conditions that contributed to the crime” and evidence of rehabilitation.<sup>165</sup> In most cases, the additional documentation is all that an applicant must provide, however, Ms. Alvarez noted that, in some cases, the board requests that the individual appear for an investigative inquiry.<sup>166</sup> Only 7 of the applicants between 2019 and 2020 were required to appear for an investigative inquiry. After complete review, the Board ultimately approved all 243 of the applicants with criminal histories.<sup>167</sup> Thus, Ms. Alvarez noted her belief that there are pathways available for the formerly incarcerated, particularly if they are seeking a license from her Board.<sup>168</sup> Ms. Alvarez also noted that the Board had sent representatives to a job fair for licensing at a juvenile detention center and had had preliminary discussions with a representative of the New Jersey Department of Corrections regarding the implementation of an on-site limited curriculum, whereby her Board “would offer training to individuals while they are incarcerated” but mentioned that these discussions were prior to COVID-19 and thus, as far as she knew, the program had been put on pause.<sup>169</sup>

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<sup>160</sup> Janice Alvarez, testimony, *Feb. 20, 2021, Virtual Briefing*, p. 4.

<sup>161</sup> *Ibid.*

<sup>162</sup> *Ibid.*

<sup>163</sup> *Ibid.*, 5.

<sup>164</sup> *Ibid.*

<sup>165</sup> *Ibid.*

<sup>166</sup> *Ibid.*

<sup>167</sup> *Ibid.*

<sup>168</sup> *Ibid.*

<sup>169</sup> *Ibid.*, 6.

**Dr. McKernan** also spoke about applications received by the New Jersey Board of Social Work Examiners, and particularly the 2019 applicant pool. She noted that there are 208 occupations that require licensure in New Jersey.<sup>170</sup> According to her, this Board issues three levels of licenses: certified social worker, licensed social worker, and licensed clinical social worker.<sup>171</sup> Dr. McKernan noted that in 2019 the Board issued 1,693 licenses, of which 63 went to applicants with criminal histories, mostly for drug related offenses.<sup>172</sup> She stated that the Board wants to know that applicants have taken responsibility for their criminal histories and are steering clear from the circumstances that resulted in their criminal behavior.<sup>173</sup> Dr. McKernan described barriers faced by formerly incarcerated people, specifically noting that many people do not understand the difference between an expungement and dismissal and will inadvertently claim that they have no conviction, which prompts more review by licensing boards.<sup>174</sup> She noted that in her professional experience individuals convicted of violent offenses are often the least likely to re-offend.<sup>175</sup> Ultimately, the Board only denied licenses to two applicants in 2019, one because the applicant abandoned the process upon a request to submit additional documentation and another because his criminal history made him ineligible for the license sought.<sup>176</sup> Dr. McKernan recommended programs be developed by the Department of Corrections “in consultation with the Department of Labor” to train incarcerated individuals so that they will be eligible for licensing upon release.<sup>177</sup>

**Paul Rodriguez**, Acting Director of the Division of Consumer Affairs<sup>178</sup> provided perspective on the Division, which controls over 50 professional and occupational boards that regulate more than 200 types of licenses and 70 types of businesses.<sup>179</sup> Mr. Rodriguez noted that the boards under the purview of the Division are independent bodies, whose members are appointed by the Governor and license individuals and regulated businesses.<sup>180</sup> With respect to how the boards handle applicants with criminal histories, Mr. Rodriguez reported that a “criminal conviction does not

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<sup>170</sup> McKernan, testimony, *Feb. 20, 2021, Virtual Briefing*, p. 6.

<sup>171</sup> *Ibid.*, 7.

<sup>172</sup> *Ibid.*, 8.

<sup>173</sup> *Ibid.*

<sup>174</sup> *Ibid.*, 15.

<sup>175</sup> *Ibid.*, 30.

<sup>176</sup> *Ibid.*, 8.

<sup>177</sup> *Ibid.*, 32.

<sup>178</sup> After giving his testimony to the Committee, Paul Rodriguez transitioned from the New Jersey Division of Consumer Affairs and now serves as Deputy General Counsel in the U.S. Department of Health and Human Services. Nikita Biryukov, *Rodriguez Gets Biden Administration Post*, *New Jersey Globe* (January 20, 2021), available at <https://newjerseyglobe.com/governor/rodriguez-gets-biden-administration-post/>.

<sup>179</sup> Paul Rodriguez, testimony, *Nov. 12, 2020, Virtual Briefing*, p. 6.

<sup>180</sup> *Ibid.*

make them ineligible for licensure.”<sup>181</sup> Instead, he noted, a board “looks at the nature of conviction, circumstances leading up to conviction, [and the] statutes and regulations that govern the particular license.”<sup>182</sup> Further, Mr. Rodriguez described the applicable provisions of the New Jersey Rehabilitated Convicted Offenders Act which impact board decisions, particularly noting that under the Act “a prior conviction generally cannot disqualify someone from receiving a license or certificate, unless the conviction relates adversely to the occupation,” and with respect to business licenses, the Act requires a board to consider a set of factors concerning the nature and circumstances of the offense committed.<sup>183</sup> He explained that boards “generally follow the Uniform Enforcement Act, which spells out when and how a board may choose to deny an applicant” and lists 15 bases for a denial.<sup>184</sup>

Mr. Rodriguez also emphasized that the boards must consider “the eligibility criteria” for every license it issues, which are set by statutes and generally include a good moral character requirement and often a list of potentially disqualifying offenses.<sup>185</sup> Mr. Rodriguez explained, for example, that the statute governing Certified Homemaker-Home Health Aids disqualifies any person who’s been convicted of a crime “involving danger to a person, children, dependents or people who do not have legal competence, or involving death or a controlled dangerous substance or analog.”<sup>186</sup> But he noted that “having a disqualifying conviction, does not necessarily mean that someone will not be granted a license or certification.”<sup>187</sup> Instead, Mr. Rodriguez explained that a disclosed criminal conviction will prompt the board or committee to solicit further information and the applicant will be given the opportunity to provide evidence to rebut any negative inference created by their conviction.<sup>188</sup> Finally, Mr. Rodriguez noted that while denials based upon criminal convictions are generally rare, there are a few occupations—for example, home health aides—that deny nearly 50% of the applicants with criminal convictions.<sup>189</sup>

#### **IV. Findings and Recommendations**

The Committee believes that substantial barriers currently exist that work in concert to prevent formerly incarcerated individuals from accessing occupational licenses. While not all formerly

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<sup>181</sup> Ibid.

<sup>182</sup> Ibid.

<sup>183</sup> Ibid., 6-7.

<sup>184</sup> Ibid., 7.

<sup>185</sup> Ibid. 7.

<sup>186</sup> Ibid.

<sup>187</sup> Ibid., 8.

<sup>188</sup> Ibid.

<sup>189</sup> Ibid., 16.

incarcerated people are prevented from obtaining occupational licenses, too many are unable to complete the extensive training necessary to obtain a license, pay the exorbitant cost of training and fees, and navigate the complexities of broad licensing statutes, which are too often arbitrarily applied. Moreover, far too many people of color, particularly Black people, are caught in the web of the criminal justice system and lack the opportunities necessary and the support required to successfully reintegrate into society. The Committee believes that comprehensive reform is an essential step in guaranteeing that the nearly 700,000 people who return to our communities from incarceration every year have the skills and support necessary to achieve their full potential and regain their place in society.

As noted above, on May 11, 2021, Governor Murphy signed into law Senate Bill 942, sponsored by Sen. Singleton, who testified before the Committee.<sup>190</sup> S942 removes the good moral character clause from current law and prevents an applicant from being disqualified from obtaining an occupation license solely because of a prior conviction, unless the crime “has a direct or substantial relationship to the activity regulated by the board,” or is inconsistent with public safety.<sup>191</sup> However, the bill precludes the Division of Local Government Services in the Department of Community Affairs from granting a license to “an individual who has, within the five years of preceding the submission of an application for a certificate, registration or license, been convicted of embezzlement, fraud, crimes involving public corruption, or theft” and for individuals convicted of murder or particular sex offenses, it creates “a rebuttable presumption that the crime or offense has a direct or substantial relationship to the activity regulated by the board.”<sup>192</sup> The bill also provides guidelines for licensing boards when determining whether a crime meets the direct and substantial relationship standard, which in essence, requires licensing boards to conduct a case-by-case review of each application.<sup>193</sup> The bill mandates licensing boards to hold a hearing prior to disqualifying an applicant.<sup>194</sup> Finally, the bill requires the Division of Consumer Affairs to maintain data concerning the number of, and reasons for, disqualification of any applicant based on the provisions of the bill.<sup>195</sup>

With regard to these provisions, the Committee suggests that New Jersey conduct an analysis into the necessity of these provisions, including examining the rates of recidivism for individuals convicted of embezzlement, fraud, crimes involving public corruption, theft, and murder. Should it become apparent that there is no threat to public safety, the Committee recommends that New Jersey reexamine these provisions and remove any unnecessary barriers to occupational licenses or, at the very least, consider allowing persons otherwise ineligible for these provisions, to establish their eligibility by showing that they have become rehabilitated; for example, the statute

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<sup>190</sup> Tom Davis, *Gov. Murphy Vetoes 3 NJ Bills, Signs 11 Into Law*, The Patch (May 11, 2021), available at: <https://patch.com/new-jersey/pointpleasant/gov-murphy-vetoes-3-nj-bills-signs-11-law>.

<sup>191</sup> 2021 NJ Sess. Law Serv. Ch. 81 (Senate 942) (West).

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

could be amended to contain a presumption against eligibility, but one that could be overcome by an appropriate showing of lack of danger, through evidence of rehabilitation or otherwise. That said, the Committee commends Sen. Singleton, along with the other S942 primary sponsors, and legislators from both houses of the legislature, who unanimously approved the legislation, and Gov. Murphy, who signed it without change; these public officials have thus demonstrated their dedication to improving the lot of the formerly incarcerated by removing barriers to post-conviction employment. In particular, the Committee heard extensive testimony on good moral character provisions and how they have historically functioned to prevent formerly incarcerated people from obtaining an occupational license, including through their arbitrary enforcement against persons with criminal histories. Further, numerous legal scholars and advocates spoke about the need for an individualized case-by-case review of each application because blanket policies give licensing boards too much discretion to deny applicants with criminal records. The Committee learned that a case-by-case approach provides the greatest opportunity for formerly incarcerated people to obtain an occupational license. The Committee also heard from a number of advocates who testified to the need for data collection with respect to the number of disqualifications based upon an applicant's criminal history.

S942 makes significant strides toward addressing occupational licensing barriers with respect to these areas. But that said, many barriers still exist, including prolonged training requirements, costly fees, and inadequate employment protections, some, or all, of which could, potentially, be addressed in clean-up legislation. Thus, with S942 as background, the Committee believes that the above recommendation, and those that follow, will remove at least some of the remaining barriers that prevent formerly incarcerated individuals from obtaining an occupational license in New Jersey.

Among their duties, advisory committees to the Commission are authorized to: (1) advise the Commission concerning matters related to discrimination or a denial of equal protection of the laws under the Constitution and the effect of the laws and policies of the federal government with respect to equal protection of the laws; and (2) initiate and forward advice and recommendations to the Commission upon matters that the Advisory Committee has examined.<sup>196</sup> Based upon its research and the testimony it received on this topic, the New Jersey Advisory Committee submits the following findings and recommendations for the Commission's consideration.

#### Finding 1: Educational Barriers

To obtain an occupational license, many applicants must first undergo extensive training. The Committee heard from a number of stakeholders who described the amount of training that is required to obtain an occupational licensing, which in some cases takes years to complete. The Committee also learned that, while incarcerated individuals rarely receive training in fields that require occupational licensing, even when they do, the training provided is often in fields in which they are precluded from working due to their criminal convictions. The Committee also learned that having a criminal record precludes many New Jerseyans from receiving state aid to pay for education.

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<sup>196</sup> 45 C.F.R. § 703.2 (2018).



## Recommendation 1: Establish Training Programs

The Committee recommends that the New Jersey Department of Corrections institute training programs for incarcerated individuals in fields that require an occupational license to ensure their success upon release. In particular, the Committee recommends that the DOC institute training programs in occupations that are, by virtue of their regulations, particularly accessible to formerly incarcerated individuals. The Committee recommends that the Department of Corrections work with the Department of Labor and the Division of Consumer Affairs (including the Board of Cosmetology and Hairstyling, the Board of Social Work Examiners, and other applicable state licensing agencies) to establish hour requirements, training requirements, course plans, and grading rubrics. The Committee further recommends that the Department of Corrections establish a program whereby incarcerated people can receive hands-on computer training to equip them to apply for employment upon release.

## Finding 2: Excessive Fees Dissuade Viable Applicants

The Committee heard ample testimony on the desire of formerly incarcerated people to work a decent job and make an honest living. The Committee heard from a number of advocates who identified licensing fees as a barrier for formerly incarcerated individuals seeking an occupational license. The Committee heard from formerly incarcerated people who detailed the extensive process they undertook to obtain an occupational license and explained that even if they could complete the extensive training, the licensing fees could potentially prevent them from obtaining an occupational license. The Committee also learned that New Jersey requires 54 of 102 lower-income occupations to be licensed, with an average fee of \$224, which makes New Jersey the 16th highest state with respect to fees for licensure of these occupations. Such economic hardship, however, may prevent formerly incarcerated people from earning a living and thus taking steps to reintegrate into society.

## Recommendation 2: Reduce Fees for Licensure

To encourage formerly incarcerated people to apply for occupational licenses, the Committee recommends that licensing agencies reexamine their fee requirements as applied to such applicants. Specifically, the Committee recommends that the Division of Consumer Affairs ensure that all fee requirements include provisions for adjustments, waivers, or other exceptions based upon the economic considerations of an applicant's ability to pay. The Committee recommends that licensing boards consider such alternatives as the reduction or elimination of fees for licensure, or perhaps the deferral of the payment of fees until sometime after a license is granted in order to allow applicants the opportunity to gather the necessary funds following employment. Alternatively, boards may consider tiered payment structures based upon an applicant's ability to pay.

## Finding 3: Discrimination Against Formerly Incarcerated Individuals Is a Barrier

While the Committee recognizes the great strides made toward eliminating post-conviction employment barriers, the Committee concludes that without explicit protections preventing discrimination based upon an individual's criminal history, these strides may be in vain. The

Committee heard from several experts and stakeholders who testified that individuals with criminal records are less likely to receive a call-back for a job or a job offer. The Committee also learned that without meaningful employment, the formerly incarcerated are at risk of lacking the necessary funds to secure safe, stable housing. Further, the Committee heard testimony that outlined the ways in which New Jersey law allows employers to explicitly reject applicants because they have a criminal history, including an arrest that did not lead to a conviction or a misdemeanor conviction that is 30 years old. The Committee appreciates that legitimate bases may exist for preventing workers with criminal histories from gaining employment in certain occupations; however, without legal protections, formerly incarcerated people are left without the support they need to reintegrate into society. A license is only valuable if the worker can obtain gainful employment.

### Recommendation 3: Codify Protections for Individuals with Criminal Records

Federal labor agencies as well as state agencies must work to ensure that individuals do not face discrimination when seeking employment; however, many agencies, such as the New Jersey Division of Civil Rights, are constrained by the text of their operating statutes. Therefore, the Committee recommends that the Opportunity to Compete Act<sup>197</sup> be amended to explicitly prohibit potential employers from considering arrests that did not lead to convictions, in the same way as current New Jersey law prohibits expunged convictions to be used in this way. *See* section 2C:52-27 of the New Jersey Revised Statutes (stating that, once a record is expunged in New Jersey, the offense is “deemed not to have occurred, and the petitioner may answer any questions related to their occurrence accordingly,” except in very limited circumstances). Specifically, the Committee recommends that those provisions allowing expunged convictions to be considered in making employment decisions with respect to any job in the judiciary, law enforcement, and corrections be revisited to determine whether there might be some positions in those areas in which expungements should be dispositive and allow full consideration of an employment application. Further, the Committee recommends that the New Jersey Law Against Discrimination<sup>198</sup> be modified to prohibit discrimination based upon an applicant’s criminal history unless there is a substantial relationship between the conviction and the type of employment sought.

### Finding 4: Information Gap

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<sup>197</sup> The Opportunity to Compete Act, is an act “concerning certain employment rights of persons with criminal records 2014 NJ Sess. Law Serv. Ch. 32 (Assembly 1999) (West). The Act seeks to remove “obstacles to employment for people with criminal records” in order to provide “economic and social opportunities to a large group of people living in New Jersey, increasing the productivity, health, and safety of New Jersey communities.” *Id.* “It is the intent and purpose of ‘The Opportunity to Compete Act’ to improve the economic viability, health, and security of New Jersey communities and to assist people with criminal records to reintegrate into the community, become productive members of the workforce, and to provide for their families and themselves.” *Id.*

<sup>198</sup> The New Jersey Law Against Discrimination makes it illegal for an employer to discriminate on the basis of “race, creed, color, national origin, ancestry, age, marital status, civil union status, domestic partnership status, affectional or sexual orientation, genetic information, pregnancy or breastfeeding, sex, gender identity or expression, disability or atypical hereditary cellular or blood trait of any individual, or because of the liability for service in the Armed Forces of the United States or the nationality of any individual, or because of the refusal to submit to a genetic test or make available the results of a genetic test to an employer.” N.J. Stat. Ann. § 10:5–12 (West 2021).

The Committee commends the U.S. Commission on Civil Rights for its review of the imposition of collateral consequences on people of color, including their access to occupational licenses. The Committee heard from a number of advocates who made the important point that data play an important role in policy decisions and legislative action. Without data, the Committee was told, it is difficult to ascertain the true nature of a problem and the remedy necessary to remediate the issue. The Committee learned that licensing boards are responsible for implementing their own processes with respect to applications and information collection and preservation. Thus, there was limited data available on the true impact that occupational licensing barriers present for formerly incarcerated people. Many advocates and stakeholders were unable to provide information regarding racial demographics or the gender of applicants who apply for occupational licenses. Accordingly, the Committee was forced to rely upon more general data regarding the numbers and proportions of people of color throughout the criminal justice system. More specific data, however, is important to policymakers' ability to effectively address issues like those under review here. Without reliable data, the provisions necessary to fully address the barriers formerly incarcerated people face may not be able to be ascertained.

#### Recommendation 4: Capture Race and Gender Data

The Committee recommends that New Jersey collect state-wide data regarding the effect of occupational licensing requirements on people of color, including their access to occupational licenses. S942 requires the New Jersey Division of Consumer Affairs to maintain data on the number of, and reasons for, the disqualification of applicants.<sup>199</sup> The Committee recommends that the Division of Consumer Affairs, in carrying out that mission, also capture and maintain data concerning the racial demographics and gender of applicants and those who are denied for licensure.

#### Finding 5: Process Problems

The Committee understands that formerly incarcerated people face significant barriers not only in terms of obtaining licenses, but in terms of getting the information necessary to do so. As the Committee heard from numerous individuals, vague licensing standards or board processes exacerbate a problem that is widespread. After all, the Division of Consumer Affairs oversees 50 professional and occupational boards that regulate more than 200 types of licenses and 70 types of businesses. As well, numerous advocates spoke about the need to streamline application processes in order to allow individuals with a criminal record the ability to apply for licenses prior to spending their very limited resources; the Committee learned that applicants spend a significant amount of time training for occupational licenses, only to then be denied access to such licenses as a result of their criminal records. Moreover, the Committee heard testimony from licensing board officials who noted that many applicants are unaware that their criminal record must be disclosed in an occupational licensing application, even if it was expunged or dismissed.

#### Recommendation 5: Provide More and Better Information and Expedited Processes

The Committee recommends that relevant occupational licensing guidelines be clarified, and broadly disseminated, including online, so that they can be readily obtained by any potential

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<sup>199</sup> N.J. Stat. Ann. § 45:1–21.6 (West 2021).

applicant seeking to apply for an occupational license. The Committee understands that this may be a significant undertaking and will likely increase the amount of applications reviewed by each respective board, but nonetheless believes that this recommendation will eliminate confusion and expand access to occupational licenses. The Committee also recommends that the Division of Consumer Affairs, in concert with individual licensing boards and agencies, establish an early application process for individuals with a criminal record and that the licensing boards create a worksheet with clear guidelines establishing what must be disclosed on an occupational licensing application, where to find required documentation, and who will likely be denied based upon their criminal records. The Committee recommends that licensing boards create an online platform that allows applications to be submitted electronically and to require applicants with criminal records to submit the required paperwork with the original application in order to expedite the application process and provide quicker response times for ex-offenders. Finally, the New Jersey Division on Civil Rights should issue guidance that will enable the Division of Consumer Affairs to work with the various licensing boards to develop effective strategies for eliminating barriers to occupational licenses for those with criminal records.

## **V. Conclusion**

Lawmakers, public officials, community organizations, and members of the public should work together to ensure that formerly incarcerated people are able to access employment. That requires increased coordination among government agencies and extensive data collection, as well as rigorous protections for people with criminal histories. All New Jerseyans deserve a chance to support themselves and to fully participate in their communities. It may well be that a robust discussion is called for as to whether an alternative regulatory regime, such as compliance inspections, can expand access to post-conviction employment while adequately protecting the state's interest in the health and welfare of consumers. The Committee recommends that, as part of this process, barriers to occupational licenses be reduced through increased education that prepares individuals to qualify for state licensing requirements; reduced fees for licenses; the other measures described herein, to be balanced with appropriate protections for consumers. Implementing these recommendations are essential steps toward assuring economic stability and success for formerly incarcerated people, all in the interest of a fairer, more equal and more forgiving, as well as a safer society.



**New Jersey Advisory Committee  
United States Commission on Civil Rights**

**Criminal Records: Civil Rights Impact on Access to  
Occupational Licenses in New Jersey**

**Thursday, September 24, 2020; 1:00 p.m. – 3:00 p.m.**

**Agenda**

**Welcome**

- **Lawrence S. Lustberg**, Chair, New Jersey Advisory Committee

**Virtual Panel Presentation by National Experts**

- **Margaret Love**, Executive Director Collateral Consequences Resources Center, Washington, DC
- **Lee McGrath**, Managing Attorney and Senior Legislative Counsel Institute for Justice, Minneapolis, MN
- **Stephen Slivinski**, Senior Research Fellow, Center for the Study of Economic Liberty, W.P. Cary College of Business, Arizona State University, Tempe, AZ
- **Edward Timmons**, Ph.D., Professor of Economics and Director of Knee Center for Study of Occupational Regulation, St. Francis University, Loretta, PA

**Comments from the Public**

**Closing Remarks & Adjourn**



**New Jersey Advisory Committee  
United States Commission on Civil Rights**

**Criminal Records: Civil Rights Impact on Access to  
Occupational Licenses in New Jersey**

**Thursday, Nov. 12, 2020; 3:15 pm – 4:15 p.m.**

**AGENDA**

**Welcome**

- Lawrence S. Lustberg, Chair  
New Jersey Advisory Committee

**Virtual Panel Presentation by New Jersey Experts**

- Prof. Todd Clear  
Rutgers University School of Criminal Justice  
Newark, NJ
- Paul Rodriguez, Acting Director  
Office of the Attorney General—New Jersey  
Division of Consumer Affairs  
Newark, NJ
- Sen. Troy Singleton (D)  
7<sup>th</sup> Legislative District  
Moorestown, NJ

**Comments from the Public**

**Closing Remarks & Adjourn**



**New Jersey Advisory Committee  
United States Commission on Civil Rights**

**Criminal Records: Civil Rights Impact on Access to  
Occupational Licenses in New Jersey**

**Wednesday, November 18, 2020; 2:15 pm – 4:15 pm**

**AGENDA**

**Welcome**

- Lawrence S. Lustberg, Chair  
New Jersey Advisory Committee

**Virtual Panel Presentation by New Jersey Experts**

- Beth Avery, Senior Staff Attorney  
National Employment Law Project  
Berkeley, CA
- James McGreevey, Board Chairman  
NJ Reentry Corporation  
Kearny, NJ
- Robert Carter, Returning Citizen  
Newark, NJ

**Comments from the Public**

**Closing Remarks & Adjourn**



**New Jersey Advisory Committee  
United States Commission on Civil Rights**

**Briefing: Testimonials About Asset Forfeitures  
&  
Access to Occupational Licenses in NJ**  
Thursday, November 19, 2020; 2:15 pm to 4:15 pm

**Agenda**

**Welcome**

- Lawrence A. Lustberg, Chair  
New Jersey Advisory Committee

**Virtual Panel Presentation by New Jersey Experts**

- Alexander Shalom, Senior Supervising Attorney  
ACLU of New Jersey  
Newark, NJ
- Taikeemah Neal, Resident  
Newark, NJ
- Edwin Ortiz, Returning Citizen  
Newark, NJ

**Comments from the Public**

**Closing Remarks & Adjourn**





**New Jersey Advisory Committee  
United States Commission on Civil Rights  
Criminal Records: Civil Rights Impact on Access to  
Occupational Licenses in New Jersey**

Tuesday, February 10, 2021, 1:00 pm – 3 pm

**Agenda**

**Welcome**

- Lawrence S. Lustberg, Chair  
New Jersey Advisory Committee

**Virtual Panel Presentation by New Jersey Experts**

- Janice Alvarez, Chair  
New Jersey State Board of Cosmetology and Hairstyling  
Newark, NJ
- Patricia McKernan, Vice-Chair State  
Board of Social Work Examiners  
Newark, NJ
- Eric Echevarria, Director  
Addiction Treatment Program  
Volunteers of America Delaware Valley  
Camden, NJ
- Rachel Wainer Apter, Director  
Office of the NJ Attorney General  
Division on Civil Rights  
Newark, NJ

**Comments from the Public**

**Closing Remarks & Adjourn**

**Remarks by Janice Alvarez, Board Chair  
New Jersey Board of Cosmetology and Hairstyling, N.J.  
Division of Consumer Affairs  
To  
New Jersey Advisory Committee to the U.S. Commission on Civil Rights  
Criminal Records: Access to Occupational Licenses  
(February 10, 2021)**

I. Introduction

Good afternoon. Let me begin by extending my thanks to you, Chair Lustberg, and to all the members of the Advisory Committee, for inviting me to speak to you today on the topic of criminal convictions and occupational licensing.

My name is Janice Alvarez, and I have served for ten years as the Chairperson of the New Jersey Board of Cosmetology and Hairstyling.

It is an honor to appear before this Panel to discuss the impact of criminal histories on licensure opportunities for individuals. As chair of the board, our Board will continue to help expand those opportunities, and, in doing so, we will both mitigate the risks of recidivism and provide the residents of New Jersey with a vast and diverse pool of talent from which to obtain cosmetology services.

In 2005, I accepted a nomination to serve as a Board member because I wanted to contribute to the decisions that affect the cosmetology and hairstyling industry, and hopefully be an asset to the board due to my background.

I have been a licensed cosmetologist for 47 years, and a licensed cosmetology teacher for 44 of those years. In addition, I have owned and operated four salons.

As a cosmetology educator, I became a supervising instructor at a proprietary school and a senior cosmetology instructor at a public school. I have composed curricula, and conducted workshops for educators at both proprietary and public schools, for our board as well as through the NJ Department of Education's CTE (Career and Technical Education) program. I also schedule meetings and workshops for school owners and licensing examiners regarding updates to curriculum and examination procedures.

I have been a board examiner since 1980, and I train new examiners and serve as a subject-matter expert on a continuing basis.

## II. About the Board

The New Jersey Board of Cosmetology and Hairstyling issues nine different professional licenses. Seven of these are for individuals: namely, Cosmetologist/Hairstylist, Beautician, Barber, Skin Care Specialist, Manicurist, Hair Braider, and Teacher. The remaining two pertain to Board-licensed entities, namely shops and schools. The function of the Board is to protect consumers by ensuring that those who hold Board-issued licenses are properly educated, trained and competent to practice. The Board is comprised of seven members: one member with a teacher's license (namely, myself), three cosmetologists/hairstylists, one barber, one braider, and one public member, all of whom take this responsibility seriously.

## III. The Review Process

When reviewing an application for licensure, the Board follows the requirements outlined in New Jersey's statutes and regulations. The laws and rules for cosmetology include a "good moral character" requirement, but do not set forth any specific disqualifying offenses or mandate criminal background checks. New Jersey's application process relies predominantly on the applicant's candor. Between 2019 and 2020, the Board reviewed 243 applications where the applicant had a criminal history. Of the 243 applications, the vast majority were from individuals seeking their initial licensure, and the remainder were from individuals seeking to reinstate or renew their license or seeking licensure by endorsement. The Board ultimately granted all 243 of these applications.

When an applicant discloses a criminal history, the Board staff requests the applicant provide background documentation, including arrest or investigative reports, court dispositions, and a narrative statement. The document request letter also details specific instructions for the applicant on how to obtain the requested documents and provide them to the Board. When the applicant does not respond to the letter with adequate documentation, then the Board may request additional information. Once the applicant provides the requested documentation to the Board, the application is complete and is placed on the Board's Executive Agenda for review.

A wide spectrum of past criminal offenses was reported by applicants considered in 2019 and 2020.

Breaking those down by category:

38% were controlled dangerous substance offenses, including possession, distribution, and importation;

- 24% were driving offenses involving a DWI or DUI, or a failure to report an accident or to possess the proper driving credentials;
- 13% were theft offenses, including burglary, petit larceny and shop lifting;

- 9% involved assaults, including simple, aggravated and domestic violence charges;
- 6% were applications where the existence of a criminal history was noted, but the original charges were not;
- 4% involved various types of insurance, social security, or credit card fraud;
- 2% were disorderly person offenses and ordinance violations; and,
- 1% concerned endangering the welfare of a child.

When reviewing applicants with a criminal history, the Board members collectively believe in second chances. The Board is always cognizant of its obligation to apply the eight factors set out in the New Jersey Rehabilitated Convicted Offenders Act, N.J.S.A. 2A:168A-2. Generally, the Board especially focuses its review on the nature and seriousness of the crime; the circumstances under which the crime occurred; the social conditions which may have contributed to the crime; and any evidence of rehabilitation. In particular, the Board places great weight on the applicant's narrative explanation of the offense, including whether the applicant demonstrates remorse for, and/or acceptance of responsibility for their prior behavior. The Board also takes into consideration the applicant's ability to provide documented completion or up-to-date status of court-ordered rehabilitative, financial, probationary or parole obligations, and letters of recommendation.

Most Board inquiries end – and individuals are deemed qualified – after the Board conducts its review of the initial application and documents supplied by the applicant.

If, after review, the Board still has questions about the details of the criminal offense, or the applicant's current rehabilitative status, we may ask the applicant to provide additional court documents, a more detailed narrative statement, or current reports demonstrating court-ordered rehabilitative, financial, probation or parole compliance. Alternatively, the Board might request that the applicant appear before it for an investigative inquiry.

Where more information is needed, the Board would table the application until the candidate submits the documentation as requested. If, after multiple requests, an applicant fails to provide adequate documentation, or the Board still has questions after reviewing a completed application, the Board may request that the individual appear in person for an investigative inquiry. Of the 243 applications with criminal histories reviewed by the Board between 2019 and 2020, only seven ultimately were requested to appear before the Board for an investigative hearing. All seven were granted a license.

When the Board is satisfied either on the face of the application or after investigative inquiry that it has received adequate information to make an informed decision, it almost always

grants the applicant licensure. However, in cases where the applicant has not yet satisfied court-ordered obligations, the Board will grant licensure conditionally, and require the applicant to provide the Board with periodic updates as to their compliance with court orders.

#### IV. Interagency Outreach

In 2020, the Board also engaged in interagency outreach to facilitate the licensure of those with criminal histories. Specifically, it participated in preliminary discussions with representatives of the New Jersey Department of Corrections regarding the implementation of an on-site limited curriculum. The various courses would offer training to individuals while they are incarcerated. We then sent representatives to a job fair for licensing trades at a juvenile detention center through a collaboration with the Juvenile Justice Commission.

#### V. Questions

I truly hope I have been able to provide a useful overview of the approach we take with applicants who have criminal histories. As a board, we sincerely appreciate being entrusted to safeguard the public while simultaneously serving to protect the professionalism of the beauty industry. Again, I thank you for this opportunity and look forward to your questions.

**Remarks of Rachel Wainer Apter (Revised)**  
**Director, New Jersey Division on Civil Rights**  
**Panel Briefing for NJ Advisory Committee to the**  
**U.S. Commission on Civil Rights**

Thank you, Committee Chair Lustberg and Workgroup Chair Jedynak. I am grateful for the invitation to speak to you today.

My name is Rachel Wainer Apter, and I am the director of the New Jersey Division on Civil Rights. The Division is the state agency charged with enforcing the New Jersey Law Against Discrimination, and with preventing and eliminating discrimination in employment, housing, and places of public accommodation.

I am here today to speak about why protecting people with criminal records when they seek work is a core civil rights issue and a core race discrimination issue.

That is true because of systemic racism.

Racial disparities in our criminal justice system mean that policies excluding job applicants if they have any criminal history are much more likely to harm Black and brown people in NJ.

The racial disparities in New Jersey's criminal justice system are well known.

According to the United States Department of Justice, 19,786 individuals were incarcerated in NJ at the end of 2016; 60.7% of were Black and only 21.8% were white. At the time, Black people made up only 12.9% of the population in New Jersey.

According to the Sentencing Project, New Jersey thus had "the biggest gap between black and white incarceration rates of any state in the U.S." during that year: Black people were incarcerated at a rate more than twelve times higher than white people.

NJ has made important strides in recent years towards decarceration, but these efforts will be substantially undermined if people cannot find work to support themselves after being released.

The state Legislature has thus far codified only very limited protections for individuals with criminal histories seeking employment (as opposed to a professional license).

Under the Opportunity to Compete Act, which is enforced by the Department of Labor and Workforce Development, most employers may not ask about an employment applicant's criminal record during what is known as the "initial employment application process." But the Act does not preclude employers from asking about criminal history after that—meaning after the first time the employer interviews the applicant.

And the law permits the employer to then automatically reject applicants explicitly because they have almost any criminal history, including an arrest that did not lead to a conviction or a misdemeanor conviction that is 30 years old. The only restriction is that an employer cannot

reject an applicant based on a criminal record that was expunged or erased through executive pardon. That can all be found at N.J.S.A. 34:6B-13, -14.

The LAD does not currently explicitly address the use of criminal history in hiring decisions. But it does prohibit employment policies and practices that are facially neutral, but that in practice result in a disparate impact based on race, national origin, religion, or any other protected characteristic.

Due to the enormous racial disparities in New Jersey's criminal justice system, any policy or practice of rejecting employment applicants due to criminal history will disproportionately harm Black people.

These policies and practices are therefore unlawful under the LAD unless they are necessary to achieve a substantial, legitimate, nondiscriminatory interest of the employer, such as ensuring the safety or security of other employees, customers, or property.

That is where these policies often fail. First, any policy that automatically excludes individuals because of one or more prior arrests (without any conviction) cannot show it is necessary to achieve a substantial, legitimate, nondiscriminatory interest, because the United States Supreme Court has recognized that arrest records do not constitute proof of past unlawful conduct, *see Schwane v. Bd of Bar Examiners*, 353 U.S. 232, 241 (1957), and the fact of an arrest is not a reliable basis upon which to assess the potential risk to employee or customer safety or property.

Similarly, an employer's policy or practice that imposes a blanket prohibition on any person with any criminal conviction – no matter when the conviction occurred, what the underlying conduct entailed, or what the person has done since – will be unable to meet this burden. The Eighth Circuit explicitly held that such a blanket ban violated Title VII, stating that it “could not conceive of any business necessity that would automatically place every individual convicted of any offense ... in the permanent ranks of the unemployed.” *Green v. Missouri Pacific R.R.*, 523 F.2d 1290, 1298 (8th Cir. 1975).

An employer with a more tailored policy or practice that excludes individuals with only certain types of convictions must still prove that its policy is necessary to serve a “substantial, legitimate, nondiscriminatory interest”; i.e., that its policy correctly distinguishes between criminal conduct that indicates a demonstrable risk to safety and/or property and criminal conduct that does not.

A policy or practice that fails to take into account the nature and severity of an individual's conviction, its relationship to the position being applied for, and the amount of time that has passed since the criminal conduct occurred is unlikely to satisfy this standard.

On the other hand, a policy that individually considers the nature and seriousness of the criminal offense; the age of the applicant at the time of the crime; the time which has elapsed since the crime occurred; conditions and circumstances which may have contributed to the crime; information on rehabilitation, including good conduct, treatment, schooling, or the recommendations of others; the degree to which the criminal offense would negatively impact the safety of the employer's other employees, customers, or property; and the relationship

between the criminal offense and the specific job for which the applicant has applied, would be much more likely to be upheld under the law.

DCR believes this type of protection should be explicitly codified in the LAD.

But under current law, DCR can still conduct outreach to both employers and prospective job applicants to explain the current protections based on a disparate impact analysis. We can do so through virtual trainings and panel discussions; fact sheets and social media posts; and informal outreach by working with stakeholder organizations.

And anyone who believes they have been discriminated against in employment, including based on criminal history, may of course file a complaint with DCR. We just created an online portal to allow people to more readily access justice through our office. To file a complaint go to [www.bias.njcivilrights.gov](http://www.bias.njcivilrights.gov). And to learn more about DCR go to [www.njcivilrights.gov](http://www.njcivilrights.gov).

DCR is committed to working with state and federal stakeholders to combat all forms of discrimination and bias, including the ways in which systemic racism affects those with any criminal history seeking employment.

I am happy to answer any questions you may have.



## **Testimony of Beth Avery**

National Employment Law Project

# **Barriers to N.J. Occupational Licenses Facing People with Arrest and Conviction Records**

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## **Briefing before the New Jersey Advisory Committee to the U.S. Commission on Civil Rights**

November 18, 2020

**Beth Avery**  
Senior Staff Attorney

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## INTRODUCTION

My name is Beth Avery, and I'm a senior staff attorney with the National Employment Law Project (NELP). NELP is a nonprofit law and policy organization with 50 years of experience advocating for the employment and labor rights of our nation's workers.<sup>1</sup> Specializing in the employment rights of people with arrest and conviction records, NELP has helped to lead a national movement to promote fairness in employment background checks<sup>2</sup> and occupational licensing laws.<sup>3</sup> NELP works with state, local, and grassroots allies across the country to eliminate the barriers to employment facing people with records. NELP is headquartered in New York with offices across the country. Although I work in NELP's California office, testifying here in New Jersey is of special importance to me because it is where I grew up, attended college, and began my legal career.

Thank you Chairman Lustberg, the NJ Advisory Committee, and the U.S. Commission on Civil Rights for the opportunity to testify today about the importance of removing the barriers to occupational licenses that stand in the way of New Jerseyans with arrest and conviction records. NELP refers to this area of law as "fair chance licensing" because adopting certain types of reforms can help ensure that people with records have a fair chance at licensure or certification to work in their chosen profession.

## FAIR CHANCE LICENSING & RACIAL INEQUITY

It's only logical to start with the "why." Why is this issue important and relevant to the U.S. Commission on Civil Rights? Across the country, more than 70 million people—or nearly 1 in 3 adults—have an arrest or conviction record that can show up on an employment-related background check.<sup>4</sup> More than 600,000 people re-enter their communities following a term of incarceration every year.<sup>5</sup> In New Jersey alone, over one and a half million people have a record, and nearly 10,000 people are released from incarceration each year.<sup>6</sup>

While these numbers are staggering, even more startling are the stark race disparities at every stage of the criminal legal system across the nation. The United States has the highest incarceration rate of any country,<sup>7</sup> and, in every U.S. state, Black people are incarcerated at

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<sup>1</sup> More information available at [www.nelp.org](http://www.nelp.org).

<sup>2</sup> More information available at <https://www.nelp.org/campaign/ensuring-fair-chance-to-work/>.

<sup>3</sup> More information available at <https://www.nelp.org/campaigns/fair-chance-licensing-people-records/>.

<sup>4</sup> NELP, *Research Supports Fair Chance Policies* (2016), <http://www.nelp.org/publication/research-supports-fair-chance-policies/>.

<sup>5</sup> NELP, *Fair Chance Licensing Reform: Opening Pathways for People with Records to Join Licensed Professions* 30-31 (Dec. 2019), <https://www.nelp.org/publication/fair-chance-licensing-reform-opening-pathways-for-people-with-records-to-join-licensed-professions/>.

<sup>6</sup> *Id.*

<sup>7</sup> Prison Policy Institute, "States of Incarceration: The Global Context 2018 (2018), <https://www.prisonpolicy.org/global/2018.html>.

over double the rate of white people.<sup>8</sup> Of all fifty states, New Jersey has the most racial inequity in its incarcerated population: Black people are incarcerated at twelve times the rate of white people.<sup>9</sup> All told, one in thirty-one Black men in New Jersey are incarcerated.<sup>10</sup>

It's important to note that these race disparities cannot be attributed to significantly different rates of offending. Studies demonstrate that, for example, while rates of drug usage are essentially equal among white and Black populations, arrests and convictions for drug offenses are much higher in the Black community.<sup>11</sup>

Unfortunately, the stigma of a record can destroy employment prospects, having an especially unfair impact on Black workers. When employers learn of an applicant's record, job prospects plummet. In one landmark study, the callback rate for white applicants halved from 34 to 17 percent.<sup>12</sup> Employers penalized Black applicants even more harshly, calling back only five percent of those with a conviction record, which represents a nearly two-third reduction from the callback rate for Black applicants without a record.<sup>13</sup> Notably, white applicants in the study received a higher rate of callbacks than Black applicants without a record.<sup>14</sup> Thus, not only are Black communities more impacted by mass incarceration, but Black workers are penalized more harshly than white workers for having a record.

Further limiting employment opportunities of people with records, the trend of mass incarceration intersects with another decades-long trend—the increase in occupations requiring a government-issued license or certification. According to recent data, twenty-one percent of jobs in New Jersey require a license or certification.<sup>15</sup> Most occupational licenses require a background check that can result in applicants being excluded from their

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<sup>8</sup> The Sentencing Project, *The Color of Justice: Racial and Ethnic Disparity in State Prisons* (2016), <https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons>.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* In addition, Black people across the nation are arrested at more than double the rate that would be proportional to the size of the Black population. *Compare* Fed. Bureau of Investigation, *Crime in the United States, 2016*, tbl. 21A (2017), <http://bit.ly/2gqjj4N> (noting 26.9 percent of 2016 arrests were of Black individuals), *with* U.S. Census Bureau, *QuickFacts: United States*, <http://bit.ly/2x4XU8o> (indicating that 13.3 percent of the 2016 U.S. population was Black).

<sup>11</sup> *Id.* See also The Hamilton Project, “Chart: Rates of Drug Use and Sales, by Race; Rates of Drug Related Criminal Justice Measures, by Race” (2016), [https://www.hamiltonproject.org/charts/rates\\_of\\_drug\\_use\\_and\\_sales\\_by\\_race\\_rates\\_of\\_drug\\_related\\_criminal\\_justice](https://www.hamiltonproject.org/charts/rates_of_drug_use_and_sales_by_race_rates_of_drug_related_criminal_justice).

<sup>12</sup> Devah Pager, *The Mark of a Criminal Record*, 108 Am. J. Soc. 937, 957–58 (2003)

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* Further study reveals gender implications as well: employers penalize women with records more severely than similarly situated men because women with records are viewed “as having committed two crimes—one against the law and one against social expectations of how women are supposed to behave.” Scott H. Decker, et al., *Criminal Stigma, Race, Gender & Employment* 56-57 (2014), <https://www.ncjrs.gov/pdffiles1/nij/grants/244756.pdf>.

<sup>15</sup> The White House, *Occupational Licensing: A Framework for Policymakers* (2015), [https://obamawhitehouse.archives.gov/sites/default/files/docs/licensing\\_report\\_final\\_nonembargo.pdf](https://obamawhitehouse.archives.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf). Nationwide, jobs requiring a license or certification have increased fivefold since the 1950s. *Id.*

chosen profession because of their record. Given that approximately twenty-three percent of New Jersey adults have an arrest or conviction record, the result of these trends is that a large portion of the population—disproportionately Black and Latinx—may find themselves ineligible for a large portion of jobs in the state.

This result does not serve the interests of individuals, communities, or the broader economy. Quality employment is critical to successfully rejoining one's community after incarceration: studies show that employment is the single most important influence on decreasing recidivism<sup>16</sup> and that higher wages translate to lower recidivism.<sup>17</sup> Given that nearly half of U.S. children have at least one parent with an arrest or conviction record,<sup>18</sup> families also depend on the employment of people with records. Children of color are disproportionately impacted when parents with records can't find employment; nationwide, one in nine Black children have an incarcerated parent as compared with one in fifty-seven white children.<sup>19</sup> Needlessly blocking people with records from entire professions only further deprives those children of the resources they need and the chance at economic mobility.<sup>20</sup> In addition to the harm for individual families and communities, the overall economy is weakened when people with records can't work. All told, economists estimate that the U.S. gross domestic product (GDP) was reduced by approximately \$78 to \$87 billion because people with felony records could not fully participate in the labor market.<sup>21</sup>

An occupational license has various benefits to both consumers and workers. In addition to protecting public safety and helping consumers navigate the marketplace, a license translates into increased respect for the profession and higher wages. Studies accounting for differences in education, training, and experience find that licensing results in approximately ten to 15 percent higher wages for licensed workers relative to unlicensed workers.<sup>22</sup> But neither public safety nor consumers are served when workers with records are unnecessarily excluded from licensed professions by record-related restrictions that

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<sup>16</sup> Mark T. Berg & Beth M. Huebner, *Reentry and the Ties that Bind*, 28 Just. Q. 382, 397–98 (2011) (finding nearly twice as many employed people with records avoided another incident as those without jobs).

<sup>17</sup> Christy Visser, et al., Urban Inst., *Employment after Prison* 8 (2008), <https://www.urban.org/sites/default/files/publication/32106/411778-Employment-after-Prison-A-Longitudinal-Study-of-Releasees-in-Three-States.PDF>.

<sup>18</sup> Rebecca Vallas, et al., Ctr. for Am. Progress, *Removing Barriers to Opportunity for Parents with Criminal Records and Their Children* 1 (2015), <https://cdn.americanprogress.org/wp-content/uploads/2015/12/09060720/CriminalRecords-report2.pdf>.

<sup>19</sup> Bruce Western & Becky Pettit, Pew Charitable Trusts, *Collateral Costs: Incarceration's Effect on Economic Mobility* 4 (2010), [https://www.pewtrusts.org/~media/legacy/uploadedfiles/pes\\_assets/2010/collateralcosts1pdf.pdf](https://www.pewtrusts.org/~media/legacy/uploadedfiles/pes_assets/2010/collateralcosts1pdf.pdf).

<sup>20</sup> Incarceration history more than doubles the likelihood that a man in the lowest quintile of earners will remain there twenty years later. *Id.* Black children born into the lowest quintile are already nearly twice as likely to remain there as white children. Richard V. Reeves & Christopher Pulliam, "No Room at the Top: The Stark Divide in Black and White Economic Mobility," Brookings (2019), <https://www.brookings.edu/blog/up-front/2019/02/14/no-room-at-the-top-the-stark-divide-in-black-and-white-economic-mobility/>.

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<sup>22</sup> The White House, *Occupational Licensing: A Framework for Policymakers* (2015), [https://obamawhitehouse.archives.gov/sites/default/files/docs/licensing\\_report\\_final\\_nonembargo.pdf](https://obamawhitehouse.archives.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf).

are not adequately tailored to the purpose of protecting public safety. When workers with records—again, disproportionately Black and Latinx—are needlessly barred from licensed occupations, their families are unable to benefit from higher wages in those professions.

## LICENSING BARRIERS FACING PEOPLE WITH RECORDS

Across the nation, the background check restrictions to obtain occupational licenses or certifications are overbroad and needlessly exclude many qualified people with records. For the past several years, NELP has examined the significant flaws in state occupational licensing criminal background check requirements. We’ve identified various commonalities among state laws and ten improvements from which most state licensing laws would benefit.<sup>23</sup> While I am not an expert in New Jersey licensing law, I will endeavor to highlight some New Jersey-specific information and recommendations.

### 1. Eliminate Blanket Bans

The first of these recommendations is perhaps the simplest—remove mandatory exclusions against licensing individuals with specific records, whether those blanket bans are permanent or time-limited. These hard lines sacrifice nuance and the ability to make exceptions for individual circumstances. Maine’s law provides an example of strong language: “the existence of [criminal history record] information shall not operate as an automatic bar to being licensed, registered or permitted to practice any profession, trade or occupation.”<sup>24</sup> Nevertheless, these blanket bans can be surprisingly sticky, and even otherwise positive statutory schemes unfortunately tend to include certain blanket bans for some conviction records. Any such exceptions need to be identified in New Jersey law and eliminated, as they don’t serve the public.

### 2. Individually Assess Applicants and their Records

What should replace blanket bans? NELP’s second recommendation advises case-by-case, individualized review of each applicant and their record. New Jersey’s overarching licensing law does a fairly good job of listing specific factors that a licensing authority must consider when determining whether a record is adversely related to the occupation and before denying an applicant because of his or her record.<sup>25</sup> However, there remains room for improvement.

- The language “relates adversely” could be strengthened to require, for example, a “*direct* and adverse relationship.”
- Some states require consideration of additional, helpful factors. For example, Rhode Island expressly requires consideration of “[t]he state’s legitimate interest in equal

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<sup>23</sup> See NELP, *Unlicensed & Untapped: Removing Barriers to State Occupational Licenses for People with Records* (2016), <https://www.nelp.org/publication/unlicensed-untapped-removing-barriers-state-occupational-licenses/> (detailing these recommendations and the rationale behind them as well as providing examples).

<sup>24</sup> Me. Rev. Stat. Ann. tit. 5, § 5301.

<sup>25</sup> N.J. Stat. Ann. §2A:168A-2.

access to employment for individuals who have had past contact with the criminal justice system.”<sup>26</sup>

### 3. Create Fairer, More Uniform Standards

Most state regimes include dozens of independent boards and hundreds of licensed occupations. Given the number of decision-making bodies and variety of laws, licensing laws should promote clarity and consistency. Importantly, any general licensing statute governing consideration of records must clearly supersede any statutory language applicable to individual licenses or licensing authorities to prevent exceptions from swallowing the rule. Kentucky’s overarching licensing law provides an example of strong language, making clear that it “shall prevail over any other laws, rules and regulations which purport to govern the granting, denial, renewal, suspension, or revocation of a license ... on the grounds of conviction of a crime or crimes.”<sup>27</sup>

New Jersey licensing law includes a weaker provision that applies to numerous licensing boards, thus undermining the state’s overarching licensing law: “A board may . . . refuse to issue . . . any certificate, registration or license . . . upon proof that the applicant..... [h]as been convicted of, or engaged in acts constituting, any crime or offense involving moral turpitude or relating adversely to the activity regulated by the board.”<sup>28</sup> That exception includes a vague standard, essentially creating a loophole for numerous licensing agencies. Such exceptions and alternative standards for certain licenses or licensing authorities should be removed to strengthen the overall statutory scheme.

### 4. Remove Vague Standards

Vague standards create ambiguity and grant licensing authorities unchecked discretion, which invites implicit bias into their decision making. In order to ensure that licensing boards have fair processes in place to consider applicants, broad terms such as “good moral character”<sup>29</sup> and catch-all categories such as offenses of “moral turpitude” should be removed from licensing standards. A recently adopted Kansas law ensured just that: “in no case shall non-specific terms, such as moral turpitude or good character .....be used to disqualify an individual’s application for licensure ..... ”<sup>30</sup>

### 5. Consider Evidence of Rehabilitation

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<sup>26</sup> Rhode Island S.2824 (2020).

<sup>27</sup> Ky. Rev. Stat. Ann. § 335B.060.

<sup>28</sup> N.J. Stat. Ann. § 45:1-21. *See also* N.J. Stat. Ann. § 45:1-2.1 (listing the numerous licensing authorities to which N.J. Stat. Ann. § 45:1-21 applies).

<sup>29</sup> The U.S. Supreme Court has described the term “good moral character” as “unusually ambiguous,” with the potential to serve as a “dangerous instrument for arbitrary and discriminatory denial” of a professional license. *Konigsberg v. State Bar of Cal.*, 353 U.S. 252, 263 (1957) (stopping short of declaring the “good moral character” standard unconstitutionally vague).

<sup>30</sup> Kan. Stat. Ann. § 74-120(b)(1) (adopted via H.B. 2386 (2018)).

New Jersey law requires licensing authorities to consider “[a]ny evidence of rehabilitation, including good conduct in prison or in the community, counseling or psychiatric treatment received, acquisition of additional academic or vocational schooling, successful participation in correctional work-release programs, or the recommendation of persons who have or have had the applicant under their supervision.” That statutory language can be further strengthened by prohibiting denial of a license if rehabilitation is demonstrated by satisfying specific factors. For example, Minnesota law provides that a person with a conviction record “shall not be disqualified from the employment or occupation if the person can show competent evidence of sufficient rehabilitation and present fitness to perform the duties……. Competent evidence of sufficient rehabilitation may be established by [list of specific factors].”<sup>31</sup> New Jersey statute already includes such mandatory language, but it is applicable to only very limited circumstances: “The presentation to a licensing authority of evidence of a pardon or of the expungement of a criminal conviction . . . or of a certificate……that the applicant has achieved a degree of rehabilitation indicating that his engaging in the proposed employment would not be incompatible with the welfare of society *shall preclude a licensing authority from disqualifying or discriminating against the applicant.*”<sup>32</sup> The law should be amended to expand the types of evidence of rehabilitation that preclude a licensing authority from rejecting an applicant.

## 6. Limit the Scope of the Record Inquiry

The inclusion of less relevant information on a background report—such as offenses that are old, minor, or unrelated to the occupation—can color a reviewer’s opinion of the applicant. Even if licensing boards intend to consider only recent, occupation-related offenses, their opinions may be clouded by any negative, albeit less significant, information.

As noted above, New Jersey law already prohibits consideration of pardoned or expunged convictions,<sup>33</sup> but the restrictions should be expanded to prohibit consideration of minor offenses, such as misdemeanors, summary offenses, or offenses for which no jail or prison sentence can be imposed; arrests that did not result in conviction; and old convictions by imposing a specific lookback limitation. The following are examples of other states that have embraced these limitations:

- Arkansas prohibits consideration of “misdemeanor convictions, except misdemeanor sex offenses and misdemeanors involving violence.”<sup>34</sup>
- Pennsylvania: “The following information shall not be used in consideration of an application for a license . . . :
  1. Records of arrest if there is no conviction of a crime based on the arrest.
  2. Convictions which have been, annulled, expunged or [similar].
  3. Convictions of a summary offense.
  4. Convictions for which the individual has received a pardon from the Governor.

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<sup>31</sup> Minn. Stat. § 364.03(3).

<sup>32</sup> N.J. Stat. Ann. § 2A:168A-3 (emphasis added).

<sup>33</sup> *Id.*

<sup>34</sup> Ark. Code Ann. § 17-1-103(b)(2).

5. Convictions which do not relate to the applicant's suitability for the license . . .<sup>35</sup>

- Maine prohibits consideration of convictions for which an applicant was released from the correctional system more than three years prior to submitting the license application. And "[b]eyond the 3-year period, [applicants with a conviction record] are to be considered in the same manner as applicants or licensees possessing no prior criminal record for the purposes of licensing decisions."<sup>36</sup>

## 7. Eliminate Self-Reporting & "Ban the Box"

Thirty-six states and over 150 cities and counties have banned the box for government employment.<sup>37</sup> New Jersey has done so for both private and public employment in the state.<sup>38</sup> Similarly, licensing authorities should delay background checks. By fully evaluating an applicant's professional qualifications before his or her conviction history is revealed, licensing authorities ensure that their preliminary assessment of those qualifications is objective and not unduly influenced by bias against people with records.

NELP's model fair chance licensing policy provides an example of statutory language on this point, providing that "[l]icensing applications shall not include any inquiry about an applicant's conviction history" and "[a] licensing authority shall not inquire into or consider the conviction history of an applicant for licensing until after an applicant is found to be otherwise qualified for the license."<sup>39</sup>

Given that licensing authorities run background checks, applicant self-reporting of record information should also be eliminated. Such reporting often results in a "candor trap." Discrepancies between self-disclosed information and background checks are often caused by workers misunderstanding or misremembering their own records, yet applicants unintentionally appear untruthful, which forms the basis for the denial of a license.

## 8. Provide Clear Applicant Guidance

All licensing agencies should promote transparency by providing clear guidance to applicants regarding potential disqualifications for the occupation. They should ensure that their policies and practices for reviewing conviction records are easily accessible to the public. While I am not an expert in New Jersey law, perusal of some N.J. licensing authority websites quickly revealed that a background check would be required, but less available was any guidance on what types of records would be considered as well as what standards

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<sup>35</sup> 18 Pa. Cons. Stat. Ann. §9124(b).

<sup>36</sup> Me. Rev. Stat. Ann. tit. 5, § 5303.

<sup>37</sup> NELP, *Ban the Box: U.S. Cities, Counties, and States Adopt Fair Chance Policies to Advance Employment Opportunities for People with Past Convictions* (2020), <https://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide/>.

<sup>38</sup> *Id.* at 19-20.

<sup>39</sup> See NELP, *Unlicensed & Untapped: Removing Barriers to State Occupational Licenses for People with Records* 31-34 (2016), <https://www.nelp.org/publication/unlicensed-untapped-removing-barriers-state-occupational-licenses/>.



the licensing authority would apply when determining whether any particular record is disqualifying. In addition to causing confusion, such ambiguity may have a chilling effect on potential licensees, deterring people with records from seeking an occupational license even though they might, in fact, be eligible.

A recently passed Pennsylvania law provides a positive example of statutory language requiring such applicant guidance: “Within 180 days . . . , the Department of State shall, in collaboration with the licensing boards and licensing commissions, develop a guide of best practices for an applicant with a criminal conviction to use when seeking a license, certificate, registration or permit. . . . [and] publish the guide . . . on its . . . website.”<sup>40</sup>

## 9. Require Ongoing Data Collection

Limited data exists on the number of people denied state occupational licenses because of their records. Ongoing data collection should be mandated for licensing authorities so that lawmakers can better understand current barriers and ensure that any attempted reforms make headway toward addressing them. Several states, including Illinois,<sup>41</sup> have recently enacted such data collection requirements. However, reviewers of such data should be sure to examine it skeptically. Often higher numbers of license denials are masked because individuals withdraw their applications when it becomes apparent that they will not be successful. In addition, as noted above, when applicant guidance is not clear or seems to imply that a variety of records are disqualifying, a chilling effect results; many individuals with records will not endeavor to seek education and training and then apply for the license they desire.

## 10. Provide Notice & Opportunity to Respond

Fair procedures are necessary to achieve fair outcomes. Licensing authorities should be required to provide applicants with notice of potential disqualification and an opportunity to respond *before* the application is rejected. For example, background check reports can be rife with errors, so allowing applicants the chance to verify or challenge the information is crucial. Procedures should be clear and accessible to non-attorneys. The more formal and court-like the procedures, the less applicants will attempt them without an expensive lawyer.<sup>42</sup>

## EVIDENCE THAT FAIR CHANCE LICENSING REFORMS WORK

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<sup>40</sup> Pennsylvania SB 637 (Act 53) (2020).

<sup>41</sup> Illinois S.B. 1688 (2017).

<sup>42</sup> NELP’s model fair chance licensing policy provides an example of a procedural scheme that includes written pre-denial notice and ample opportunity to respond. See NELP, *Unlicensed & Untapped: Removing Barriers to State Occupational Licenses for People with Records* 31-34 (2016), <https://www.nelp.org/publication/unlicensed-untapped-removing-barriers-state-occupational-licenses/>.

As noted above, limit data exists related to the number of people with records denied occupational licenses either before or after reforms are adopted.<sup>43</sup> However, my colleagues at NELP analyzed one data set that demonstrates the importance of removing blanket bans, particularly to workers of color. After September 11, 2001, the Transportation Security Administration (TSA) screened 1.5 million port workers for transportation worker licensing. Instead of automatic, mandatory bans, TSA allowed for waiver applications and appeals following rejection—in other words, case-by-case review. In sum, ninety percent of waivers and appeals were granted. And this review was especially beneficial to Black and Latinx applicants, who were more likely to be initially denied and then successful via appeal or waiver application.<sup>44</sup>

## GROWING MOMENTUM FOR FAIR CHANCE LICENSING REFORMS

In recent years, dozens of states have adopted reforms to their licensing laws.<sup>45</sup> To varying degrees, the new laws eliminate automatic blanket bans against people with records, expand transparency, remove vague statutory language, and adopt fairer evaluation criteria. The following chart summarizes some of the positive recent reforms:

<b>Sample of Recent Fair Chance Licensing Reforms</b>	
<i>At least seven states adopted reforms in 2020</i>	
Rhode Island (S.2824)	Limits rejections to convictions that “substantially relate” to the occupation, listing specific factors for consideration. Prohibits denial if demonstrate rehabilitation via specific factors. Limits records that may be considered. Establishes procedural protections, including applicant’s right to written explanation of intended denial and opportunity to respond before final decision.
Pennsylvania (SB 637)	Limits rejections to convictions “directly related” to the profession or where offense demonstrates substantial risk to coworkers or customers. Prohibits vague standards (e.g., “moral turpitude” or “good moral character”). Establishes procedural protections, including applicant’s opportunity to present evidence of fitness for occupation.
Idaho (SB 1351)	Limits rejections to convictions “currently relevant to the applicant’s fitness to engage in [the] profession or occupation,” listing factors for consideration. Prohibits vague standards (e.g., “moral turpitude” or “moral character”).
<i>At least nine states adopted reforms in 2019</i>	

<sup>43</sup> Reform recommendation number nine, above, proposes that data collection be mandated for licensing authorities.

<sup>44</sup> NELP, *Scorecard on the Post-9/11 Port Worker Background Checks* (2009), <http://www.nelp.org/publication/scorecard-on-the-post-911-port-worker-background-checks/>.

<sup>45</sup> For more information about recent reforms, see NELP, *Fair Chance Licensing Reform: Opening Pathways for People with Records to Join Licensed Professions* (Dec. 2019), <https://www.nelp.org/publication/fair-chance-licensing-reform-opening-pathways-for-people-with-records-to-join-licensed-professions/>. See also Collateral Consequences Resource Center, *50-State Comparison: Criminal Record in Employment & Licensing*, <https://ccresourcecenter.org/state-restoration-profiles/50-state-comparisoncomparison-of-criminal-records-in-licensing-and-employment/> (last visited Nov. 17, 2020).

North Carolina (SL 2019-91)	Prohibits denial based on conviction history unless “directly related” to the duties and responsibilities of the occupation. Unfortunately, exception for offenses that are “violent or sexual in nature.” Establishes procedural protections, including applicant’s right to written notice of intended denial and opportunity to respond before final decision.
Mississippi (SB 2781)	Prohibits denial based solely or in part on conviction history unless the offense is “directly related” to duties of occupation. Also prohibits licensing authorities from using vague, catch-all qualifications such as “moral turpitude” and “good character.”
Texas (HB 1342)	Prohibits denial based on conviction that does not “directly relate” to duties and responsibilities of occupation. Requires licensing authorities to examine correlation between the legal elements of the offense and the duties and responsibilities. Establishes procedural protections, including applicant’s right to written explanation of intended denial and opportunity to respond before final decision.
<i>At least seven states adopted reforms in 2018</i>	
Indiana (HB 1245)	Limits rejections to offenses “directly related” to occupation; requires consideration of certain factors (incl. rehabilitation); limits lookback period for most offenses; requires written notice and explanation to applicant.
Tennessee (HB 2248 & SB 2465)	Limits rejections to offenses “directly related” to occupation; requires consideration of certain factors (incl. rehabilitation); requires written notice and explanation to applicant.
Kansas (HB 2386)	Limits rejections to offenses “directly related” to occupation; no vague “moral turpitude” standards; limits lookback period for many offenses; bars consideration of arrests.
California (AB 2138)	Boards may not require applicants to self-disclose offenses; limits lookback period; limits rejections to offenses “substantially related” to occupation; bars consideration of arrests and dismissed convictions; requires written notice to applicant and data collection.
<i>At least six states adopted reforms in 2016 &amp; 2017</i>	
Louisiana (HB 519)	Requires a license be granted to an otherwise qualified applicant unless the conviction “directly relates” to the occupation. However, the law includes broad exceptions for “crime[s] of violence” and numerous licensing entities.
Kentucky (SB 120)	Bars vague “absence of good moral character” standards; requires written notice and explanation to applicant; removes certain exceptions to requirement that certain factors be considered and offense “directly relates” to occupation.
Illinois (several)	Several bills adopted, including SB 1688 (2017), HB 5973 (2016), and SB 42 (2016). Those bills include provisions requiring written notice to the applicant, consideration of certain factors (evidence of rehabilitation and mitigating circumstances), and data collection and reporting.

Georgia (SB 267)	Limits rejections to offenses “directly related” to occupation; requires consideration of certain factors (incl. rehabilitation).
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## CONCLUSION

In sum, fair chance licensing reforms are especially important to Black and Latinx workers because of the disproportionate impact of mass incarceration on these communities. Luckily, many states have embraced such reforms in recent years. However, much further progress is needed in every state, including New Jersey, which can better tailor the background check restrictions in state licensing laws in order to remove barriers that keep families of people with records from working in their chosen professions without sacrificing public safety.

Thank you for the opportunity to testify today about the importance of these reforms which impact hundreds of thousands of people working and living in New Jersey.

**Statement of Robert Carter (Returning Citizen)**  
**Before**  
**NJ Advisory Committee to USCCR**  
**November 18, 2020**

Mr. Chairman and members of the NJ Advisory Committee to the U.S. Commission on Civil Rights. Thank you for inviting me to share with you the challenges to employment that I have faced because of my criminal record.

I grew up in a supportive household. My father and uncle were Newark Fireman. I got involved in selling drugs and committing crimes by the age of 13. I started using Heroin and Cocaine by the age of 20. I have been convicted of multiple felonies.

I got clean in 2007 and came home in June of 2008. I went back to school and received my associate degree, with a 4.0 GPA. I attempted to get into Seton Hall, so that I could attend Law School. I was told I could not be admitted because, with my felony convictions, I would never be able to sit for the bar.

I moved to Newark and took the civil service exam in an attempt to become a Newark Firefighter. I scored very high in both the written and physical tests and was sitting right behind the veterans on the list to be hired. I was not hired and appealed the decision. My attorney notified me that I was not hired due to the "good moral character" clause.

I have since moved on and been fortunate to be given opportunities in both the Drug and Alcohol Treatment field as well as the Reentry field but I know so many individuals who were not as fortunate and had little to no opportunities for an career and reverted back to their old behaviors, in order to survive.

**New Jersey Advisory Committee to the US Commission on Civil Rights**

**Panel Briefing: Access to Occupational Licenses**

Remarks by Todd R. Clear, University Professor

Rutgers University Law School and School of Criminal Justice

November 12, 2020

I want to begin by thanking the U.S. Commission on Civil Rights for hosting this briefing and for inviting me to speak. Joining me on this panel are Paul Rodriguez, the Acting Director of the New Jersey Division of Consumer Affairs and Senator Troy Singleton, representing New Jersey's 7th Legislative District. I am honored to be here with them.

I base my remarks on over 40 years of academic study of the penal system and of the law under which it operates.

There is a general consensus among students of the penal system and penal law that the blanket denial of occupational licenses due to a felony conviction is a mistaken policy. New Jersey's policy of automatic disqualification for occupational licensure needs to be reformed. There are two reasons for reform today, one housed in our understanding of the legitimate functions of the criminal law; the second housed in our growing understanding of the need to reign in a system of mass incarceration that has contributed to racial injustice and community inequality.

**The penal law**

Prohibitions on occupational licensing have the effect of extending the punitive reach of the criminal sanction. They impose harms on a person who has a criminal conviction in ways that extend beyond the duration of the sentence imposed by the court. In effect, they turn a sanction that is limited by the terms of the criminal sentence—fines, fees, probation terms, and/or incarceration—into a penalty that lasts a lifetime.

It is generally accepted among students of the penal system that there are two legitimate bases for prohibiting a person from obtaining a license to practice an occupation because of a criminal conviction—an occupation that is otherwise freely available to any citizen not currently under correctional authority.

The first legitimate basis would be that the prohibition is a “deserved punishment.” That is, a person, by virtue of the specific illegal conduct, has forfeited the right to the license. This is what happens when a person currently operating under the authorization of the license uses the access or authority provided by the license to break the law (or otherwise behave unethically such that the license must be revoked). In other words, a person gives up a claim to be able to operate under a license when that person has previously abused the privileges of that license. An electrician who uses access to homes to steal from clients loses the right to retain the license that provided that access. A licensed beautician who uses access to clients' credit card information for credit card fraud loses the privilege of engaging the public as a beautician. The key characteristic of this prohibition has to do with society's need to maintain the credibility of the law of licensure. The punitive basis for licensure prohibition is straightforward: if a person

obtains a license and then uses that license to engage in illegal or unethical behavior, that person has forfeited the right to that license.

The second legitimate basis for prohibition of access to a license is “risk to the public.” In this justification, there is reason to believe that the person who seeks the license is likely to use it to harm others. A person who has victimized children represents exactly that type of risk to the public when seeking a license to work in a child-care facility. A person who has been convicted of burglary presents a notable risk to the public when seeking a license that creates access to peoples’ private property. The key to this type of prohibition is that there is something about both the license that is sought and the prior misconduct of the person seeking it that establishes a legitimate concern that granting the license would put the public at risk.

### **Situation specific analyses**

In both of these legitimate bases for denial of the opportunity to seek a license, it deserves emphasis that blanket prohibitions are generally inappropriate. From the standpoint of a deserved punishment, the question is whether the nature of the criminal act violates the foundation for a given license. If the past crime is shown to strike at the very logic underlying the rights and immunities the new license would entail, the license should not be granted. By contrast, the public risk prohibition entails a different type of analysis. It is not the criminal act, per se, that suggests prohibition, but rather the specific attributes of the actor, when assessed in light of the license sought, which make the provision of the license unwise.

This analysis suggests that access to occupational licenses turns upon a case-by-case process. After an individual with a criminal conviction applies for a license, the suitability of granting the license is determined by an assessment of the nature of previous criminal conduct, the nature and level of recidivism risk, and the characteristics of the license sought.

Some of these analyses are straightforward. It seems straightforward to reject a request of a person seeks to retain or have reinstated a license that was revoked do to illegal or unethical conduct that exploited the privileges inherent to the license. But more often of these decisions involve analysis and judgement: What is the logical connection between the person’s past criminal record and the specific privileges the license would convey? What has happened to ameliorate the risk—what time has elapsed and what rehabilitative action has the person taken?

In other words, I support the provisions of this proposed legislation as consistent with the kinds of reforms we need in our policies and procedures for occupational licenses. We need to provide greater access to occupational licenses for a wide range of past felonies and former felons; we need far fewer blanket prohibitions. We need to promote a system based on humane and considered justice that takes individuals’ circumstances into account. This law goes a long way to achieving that aim.

### **Improving justice**

There is a larger case that needs to be made for reform. Since the early 1970s, the nation has embarked on what can only be called a great punishment experiment. New Jersey has been a part of that experiment.

The number of people carrying a criminal record has grown at least fivefold. In particular, the overrepresentation of people of color—especially African Americans coming from our major cities—has created an intergenerational class burdened by criminal convictions. This is especially true for drug law convictions; especially true for young men of color who got caught up in the drug war. The unwanted consequences of the expansion of the justice system into so many of our fellow citizen's lives has been the creation of a kind of never-ending confinement, in which post-penalty restrictions reimpose a lack of access to regular societal goods and services in ways few people continue to see as wise. We have gone a far way toward ending the disastrous drug war. We have looked with dismay at the consequences of mass incarceration for children, families, and communities. We know now, from empirical evidence coming from myriad studies, that mass incarceration has exacerbated inequality and injustice.

Basic justice requires a rethinking of every aspect of that punitive regime. This law is consistent with that agenda.



**Statement of Eric Echevarria, LCSW, LCADC CCS**  
**Before**  
**NJ Advisory Committee, U.S. Commission on Civil Rights**  
**Criminal Records: Access to Occupational Licenses**  
**Wednesday, February 10, 2021**  
**(Via Video Conference)**

Good morning, my name is Eric Echevarria and I wanted to talk about some of my experiences as a returning citizen as it related to licensure in the state of New Jersey. I stand before you as a newly approved Licensed Clinical Social Worker, Licensed Clinical Alcohol and Drug Counselor and a Certified Clinical Supervisor. I am the Program Director for a program that works with other returning citizens who struggle with drug addiction, mental health issues and homelessness. I am also personally responsible for providing clinical supervision for dozens of professional staff and assisting them to getting Certifications or Clinical Licensure in the State of New Jersey. In my spare time I volunteer as a youth football coach. Licensure had allowed me to become a productive citizen and has had a tremendous positive impact on not only my family but countless others as well. 20 years ago I was prisoner #416376 in the New Jersey Department of Corrections. I was close to being paroled from East Jersey State Prison. At this time I had no idea the direction my life was headed but I did know one thing and that I was never going back to prison. If someone would have told me 20 years ago that I would be here in front of you guys making this opening statement I would have never believed it. My main concern was finding employment. I was willing to do whatever it took to get my life in order. I had made a decision that I was no longer going to allow my past to dictate my current life circumstances. However getting my life in order did not come easy and I wanted to share some of those obstacles in hopes to make it easier for those that follow my same path.

Growing up in East Camden, New Jersey it was easy to get caught up into the drug scene. Most everyone I knew was either using drugs or selling drugs. Both of my parents were addicted to crack cocaine and I watched my father get murdered in cold blood at the age of 11. Basically it was me and my younger brother and we survived by me working a series of add jobs throughout high school. Despite these obvious obstacles I was somehow able to navigate my way to graduating from Woodrow Wilson High School and going away to college to play football. One night I got a phone call in my dorm room from my mother telling me to come home because my younger brother had been murdered. Something in me had broken and I never went back to college despite pleas from my coaches and academic advisors. Instead of seeking grief counseling I drowned my sorrows in a bottle of liquor night after night until my behaviors had gotten so out of control that I ended up in prison. I don't regret anything because it may have actually saved my life and put me on track to become the man I am today. When I was released from prison I was sent to a Halfway House called Hope Hall where I first met Dr. McKernan and other social workers who provided me with hope that I could change my life around, however as

I mentioned it did not come without challenges as being incarcerated in New Jersey does nothing to prepare it's returning citizens for what they will face in society.

My big plan as a returning citizen was to acquire my CDL license and be a truck driver. This would allow me to live productively and take care of my family at the same time. However due to my criminal record I was turned down over and over from multiple companies. At this time I had spent 6 months acquiring my CDL and was in desperate need of employment. I took a job as the manager of Burger King to make ends meet. Most of the big driving companies required a person to be 10 years removed from prison before they could hire you. What was I supposed to do with the next 9 years and 6 months.

What I found out as a returning citizen that most people genuinely want to get their lives in order but resort back to criminal behaviors because very few employers are willing to give them a chance. My first experience with licensure came after I went back to school to get my bachelors degree and began working for Volunteers of America Delaware Valley under Dr. McKernan and a man named Bill Wilson who was a mentor to me. They encouraged me to get my Master's degree and apply for my social work license as well as my Drug and Alcohol license. My experience with the social work board and the drug and alcohol committee was a good one. I had to go through more than the average applicant but I understand the process. They had to ensure that I was "rehabilitated". I had to get numerous letters of recommendation from professional colleagues. I also had to explain my convictions to the board. I was completely transparent and shared many of the same personal life experiences I had with the board and they awarded me with licensure. Having been employed at the Addiction Treatment Program for 10 years now I have been able to positively contribute to hundreds of returning citizens lives and give them the same hope that someone once gave me. None of this would have been possible without the fair and equitable treatment of the Board of Social Work Examiners and the Alcohol and Drug Committee.

**Testimony of Margaret Colgate Love (Revised)**

**Collateral Consequences Resource Center**

**Before the**

**New Jersey Advisory Committee of the U.S. Commission on Civil Rights**

**Civil Rights Impacts of a Criminal Record on**

**Access to Occupational Licensing-Employment**

**September 24, 2020 (Resubmitted December 2020)**

Margaret Love, Executive Director  
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This testimony consists of two parts. The first part is the section on fair employment and occupational licensing from "The Many Roads to Reintegration," a 50-state report on restoration of rights laws issued in September 2020 by the Collateral Consequences Resource Center. This national report outlines national trends in the two areas and suggests a number of ways that New Jersey's laws governing consideration of criminal record in employment and licensing could be strengthened consistent with those trends. It includes a discussion of model laws and standards issued by the Institute for Justice and the National Employment Law Project.

The second part is a brief discussion and critique of New Jersey's existing fair employment laws and occupational licensing scheme, with some general recommendations as to how each could be improved. New Jersey did not fare particularly well in our grading of states laws dealing with consideration of criminal record in employment and occupational licensing, earning a mediocre "C" grade in both categories. This is not surprising, since New Jersey's law governing occupational licensure has undergone very little change since it was originally enacted in 1968, more than half a century ago. And, its fair employment provisions, such as they are, give little guidance or incentive to public employers, and none at all to private employers.

New Jersey has made substantial progress just in the past two years in many areas of criminal record reform, including voting rights, driver's licenses, and record relief in the form of sealing. Its laws dealing with consideration of criminal record in employment and occupational licensing are overdue for a makeover and should be next of the State's record reform agenda.

### III. FAIR EMPLOYMENT & OCCUPATIONAL LICENSING

#### Introduction

There is perhaps no more critical aspect of a reintegration agenda than removing the many unjustified and unjustifiable barriers faced by people with a criminal record in the workplace.<sup>180</sup> In an era of near-universal background checking and search engines, the “Mark of Cain” they bear will sooner or later be known to potential employers and licensing boards even if it is not called for on an initial application. Some barriers take the form of laws formally disqualifying people with certain types of convictions from certain types of jobs.

More frequently barriers result from informal employer or agency discrimination grounded in an aversion to risk and, too frequently, racial stereotypes. Whether it is securing an entry level job, moving up to management responsibilities, or being

**As between two individuals with hypothetically equal qualifications, it is easy to justify breaking the tie in favor of the person who has never been arrested.**

certified in a skilled occupation, people with a criminal record are at a disadvantage, if they are even able to compete. As between two individuals with hypothetically equal qualifications, it is easy to justify breaking the tie in favor of the person who has never been arrested.

Individualized record relief mechanisms like expungement or pardon are intended to improve employment opportunities, and they are helpful on a case-by-case basis to

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<sup>180</sup> Studies have shown that having a well-paying job has a demonstrable impact on recidivism rates for those released from prison. *See, e.g.,* Crystal Yang, *Local labor markets and criminal recidivism*, 147 J. PUB. ECONOMICS 16 (2017). Recent years have produced an extraordinary literature on the public policy importance of removing barriers to employment and licensure for those with criminal records, as a matter of economic efficiency, public safety, and fairness. *See, e.g.,* J.J. Prescott & Sonja B. Starr, *Expungement of Criminal Convictions: An Empirical Study*, 133 HARV. L. REV. 2461 (2020). The chapter on “Consequences for Employment and Earnings” from the report of the National Research Council of the National Academy of Sciences, *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES* 211-259 (Jeremy Travis and Bruce Western, eds.), remains the most thorough scientific treatment of the impact of incarceration on the life prospects of those who experience it.

those who are eligible and able to access them.<sup>181</sup> But equally important are systemic fair employment and licensing laws that impose general standards and provide for their enforcement, offering class-wide relief to individuals with a record. States have enacted an impressive number of this sort of “clean slate” law just since 2015, some building on laws enacted in an earlier period of reform in the 1970s, and others breaking new ground in regulating how employers and licensing agencies consider an applicant’s criminal record.<sup>182</sup>

In employment, one of the most striking legislative trends in the past decade is the embrace of limits on inquiry into criminal history in the early stages of the hiring process, particularly for public employment. The so-called “ban-the-box” campaign that began modestly more than 15 years ago in California has now produced new laws or executive orders in two-thirds of the states and over one hundred cities and counties. More efficient and broadly effective than after-the-fact lawsuits, ban-the-box laws now represent the primary tool for eliminating unwarranted record-based employment discrimination on a system-wide basis. They are premised on an expectation that getting to know applicants before learning about this aspect of their background is likely to lead to a fairer and more defensible hiring decision. This should be particularly true when a records check comes only after a conditional offer is made, so if it is withdrawn there is little doubt about the reason.<sup>183</sup>

Occupational licensing has also seen an acceleration of legislative efforts to limit the arbitrary rejection of qualified workers. Significant procedural and substantive reforms have been enacted in more than half the states in the last five years, making licensing authorities newly accountable for their actions and individuals newly able to obtain and practice a skill with enhanced career prospects. Following suggestions

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<sup>181</sup> Recent reforms in a few states call for automatic sealing of records on a categorical basis, legislative relief that is described in Part II of this report on Record Relief.

<sup>182</sup> The term “clean slate” is frequently used to describe the desired effect of record-sealing laws, but its definition as “an absence of existing restraints or commitments” makes it equally apt in connection with regulation imposition of unwarranted record-related restrictions in employment and occupational licensing. See OXFORD DICTIONARY OF IDIOMS 65 (John Ayto, ed., 2020), [https://www.lexico.com/definition/clean\\_slate](https://www.lexico.com/definition/clean_slate).

<sup>183</sup> One caveat that has been raised by researchers about ban-the-box strategies is that barring early inquiry into criminal record may lead employers to rely on stereotypes about which applicants are likely to have one. See generally *infra* note 202.

proposed in model laws endorsed by organizations from across the political spectrum, states have substituted objective standards for vague “good moral character” criteria, prohibited consideration of irrelevant minor offenses unrelated

**States have substituted objective standards for vague “good moral character” criteria and required licensing agencies to justify their decisions in terms of public safety**

to job performance, required licensing agencies to justify their decisions in terms of public safety, and imposed oversight requirements to hold licensing agencies accountable for their performance.

As shown in the following discussion and in the “Report Card” maps that follow the section, almost every state now has at least some law aimed at limiting record-based discrimination in employment or licensure, or

both. Enforcement of these new laws may in many cases depend on education and persuasion rather than on lawsuits and executive orders, but this may make change come sooner and have a more lasting effect. The very exercise of repeatedly having to decide the relevance of an individual’s past conduct through a transparent and accountable process is likely to result in more reliable decision-making, and a better understanding of those relatively few instances when it is legitimate to deny someone an opportunity to work based on their criminal record. We discuss the state of the law in greater detail in the following sections.

Note: Color-coded maps and a side-by-side Report Card for both employment and occupational licensing are at the end of the section.

### **A. Employment**

Few states have adopted general rules prohibiting employment discrimination based on criminal record, and the only relevant federal law depends upon being able to establish disparate impact based on race or some other protected classification.<sup>184</sup> In

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<sup>184</sup> The only national standards for employment of people with a criminal record, the 2012 EEOC Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964 tests the validity of employment policies affecting people with a criminal record in terms of their adverse effect on groups that are otherwise protected from discrimination. The EEOC has taken the position that employers may not reject applicants based on an arrest record alone and may

fact, until this century, only three states had incorporated provisions relating to a record of arrest or conviction into their general FEP law: New York (1976), Wisconsin (1981), and Hawaii (1998).<sup>185</sup> Article 23-A of New York's Corrections Law prohibits "unfair discrimination" against a convicted person by public and private employers and licensing entities. The law imposes a "direct relationship" standard defined by a multifactor test limited only by public safety considerations, which may be enforced through the courts or through the State Human Rights Law. Certificates issued by a court or the parole board may lift mandatory employment or licensing bars and are evidence of rehabilitation in discretionary decisions. Rejected applicants must be given reasons in writing.<sup>186</sup> Wisconsin's fair employment law also covers arrest or

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not impose an across-the-board exclusion of people with a conviction record. The Guidance requires individualized consideration using a multifaceted screening test that considers the nature of the person's offense, the time elapsed since it occurred, and the nature of the position. *See Love, et al., supra* note 41 § 6:5. In 2019 the Fifth Circuit invalidated the Guidance, so its legal status is no longer clear. *See Texas v. Equal Employment Opportunity Commission*, 933 F.3d 433, 451 (5th Cir. 2019) (finding that the EEOC overstepped its statutory authority in promulgating guidance on employers' use of criminal records in hiring).

<sup>185</sup> A fourth state, Connecticut, included as early as 1980 provisions addressing discrimination based on criminal record in public employment in its human rights code. *See* CONN. GEN. STAT. § 46a-80 (citing the former Sec. 4-61o which was transferred to Sec. 46a-80 in 1981). However, the state Commission on Human Rights and Opportunities evidently never regarded enforcement of these provisions as within its mandate. *See* 1994 memorandum from the Office of Legislative Research on Employment Discrimination Based on Prior Conviction of a Crime to the Connecticut General Assembly (Jan. 19, 1999), <https://www.cga.ct.gov/PS94/rpt/olr/htm/94-R-0201.htm>.

<sup>186</sup> *Compare Boone v. New York City Department of Education*, 38 N.Y.S.3d 711, 721 (N.Y. Sup. Ct. 2016) (holding that denial of security clearance for a position as a School Bus Attendant to petitioner convicted of shoplifting from her employer, without due regard to the factors set forth in Article 23-A, or petitioner's CRD, was arbitrary and capricious) *with Arrocha v. Bd. of Educ. Of City of N.Y.*, 93 N.Y.2d 361, 366 (1999) (holding that the Board of Education's determination that teaching license applicant's prior conviction for sale of cocaine came within statutory "unreasonable risk" exception to general rule that prior conviction should not place person under disability, was neither arbitrary nor capricious, where Board properly considered all statutory factors and determined that those weighing against granting license outweighed those in favor; age of conviction, applicant's positive references and educational achievements, and presumption of rehabilitation were outweighed by teacher's responsibility as role model and nature and seriousness of applicant's offense.).



conviction record, and has been broadly interpreted by the administrative agency responsible for its enforcement and the courts to require a conclusion that “a specific job provides an unacceptably high risk of recidivism for a particular employee.”<sup>187</sup>

Many other states adopted laws in the last years of the 20<sup>th</sup> century providing that a conviction could not be the “sole” reason for refusing to employ someone, and enjoined employers to consider whether a criminal record was related in some fashion to the job. Some even set out detailed criteria for determining when a “direct relationship” (or, variously, “substantial” or “reasonable” relationship) exists between a person’s criminal record and the position. These standards were sometimes sufficiently precise as to encourage rejected applicants to go to court, but the employer usually won.<sup>188</sup> Individuals rejected for employment because of a

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<sup>187</sup> See e.g. *Palmer v. Cree, Inc.*, ERD Case No. CR201502651 (LIRC, Dec. 3, 2018) (finding that lighting products company could not show that a job applicant’s convictions—for felony strangulation and suffocation, and misdemeanor battery, fourth degree sexual assault, and damage to property—were substantially related to employment as a lighting applications specialist who would have contact with the public; “Whether the crime is an upsetting one may have nothing to do with whether it is substantially related to a particular job.”); *Staten v. Holton Manor, supra*, ERD Case No. CR201303113 (LIRC, Jan. 30, 2018) (holding that skilled nursing facility could not refuse to hire based on misdemeanor theft conviction that had been expunged; permitting the employer to do so would conflict with the purpose of the statute permitting expungement, which is to permit certain persons to “wipe the slate clean of their offenses and to present themselves to the world—including future employers—unmarked by past wrongdoing.”).

<sup>188</sup> For example, Minnesota’s Criminal Rehabilitation Act of 1974 prohibits discrimination in public employment and licensing and sets out a detailed set of standards for determining whether a criminal record is “directly related” to a specific job so that it justifies adverse employment action. See MINN. STAT. § 364.03, subd. 2. Even where a crime is found to be directly related, a person may not be disqualified if the person can show “competent evidence of sufficient rehabilitation and present fitness to perform the duties of the public employment sought or the occupation for which the license is sought.” § 364.03, subd. 3. Rehabilitation may be established by a record of law-abiding conduct for one year after release from confinement, and compliance with all terms of probation or parole. The problem is that, unlike the laws enacted in Wisconsin and New York, the Minnesota law contains no enforcement mechanism, leaving aggrieved individuals to seek relief in the courts, which have tended to interpret the standard in favor of the employer. See, e.g., *Peterson v. Minneapolis City Council*, 274 N.W.2d 918 (Minn. 1979) (finding that conviction for attempted theft by trick directly related to the operation of a massage parlor); *In re Shelton*, 408 N.W.2d 594 (Minn. Ct. App. 1987) (holding that embezzlement

criminal record had somewhat better luck under federal civil rights law if they could establish a correlation between criminal record and another independently prohibited basis for adverse treatment such as race.<sup>189</sup> But for all intents and purposes until 1998 Wisconsin and New York were the only states that provided administrative remedies for record-based employment discrimination without also requiring a nexus with race or some other illegal ground.

When Hawaii extended its Fair Employment Practices law to criminal records in 1998, it was the first state to identify and address a concern about threshold

**Hawaii's 1998 fair employment law with its four-part enforcement mechanism is still a model for other states**

disqualification based on criminal background checks. Its prohibition on inquiries into an applicant's criminal record until after a conditional offer of employment has been made served as an inspiration for the "ban-the-box" campaign that began several years later in California.

In Hawaii, a conditional offer may be withdrawn only if a conviction within the most recent 10 years bears a "rational relationship to the duties and responsibilities of the position."<sup>190</sup> Its four-part enforcement mechanism is still a model for other states:

- ❖ To prohibit application-stage inquiries about criminal history
- ❖ After inquiry is made, to prohibit consideration of non-convictions and certain other records that are categorically deemed "unrelated" to qualifications
- ❖ To apply detailed standards to consideration of potentially relevant records, and

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directly related to fitness to teach; teacher with 20 years of service terminated in spite of efforts to make restitution); *In re Shelton*, 408 N.W.2d 594 (Minn. Ct. App. 1987).

<sup>189</sup> See, e.g., *Green v. Missouri Pacific Railroad Co.*, 523 Fed. 2d 1158 (8th Cir. 1975), and discussion of early EEOC practice and policies in *Love et al. supra* note 41 at § 6:4 ("Title VII - Applied to criminal records - Judicial interpretations").

<sup>190</sup> See HAW. REV. STAT. §§ 378-2.5(b), (c) (an employer may withdraw a conditional offer of employment only if a conviction within the previous 10 years "bears a rational relationship to the duties and responsibilities of the position."); Sheri-Ann S.L. Lau, *Recent Development: Employment Discrimination Because of One's Arrest and Court Record in Hawaii*, 22 U. HAW. L. REV. 709, 714-15 (2000).

- ❖ To enforce these standards and procedures through the general fair employment law.

While the ban-the-box approach pioneered by Hawaii has taken hold across the country, only three additional jurisdictions have built a comprehensive approach to “fair chance employment” around the same four-part mechanism, and of these three only two applied it to private as well as public employment. The District of Columbia was the first in this century to enact what has come to be called a “fair chance” approach to hiring people with a criminal record, regulating public employment in 2010 and a few years later extending similar rules to private organizations employing more than 10 people.<sup>191</sup> California and Nevada followed suit with similar laws in 2017, although Nevada’s extends only to public employment.

California’s Fair Employment and Housing Act (FEHA) is discussed first because it is the most extensive of the three, extending criminal history protections to both public and most private employers, delaying a background check until after an offer of conditional employment is made, and thereafter prohibiting consideration of non-conviction records, as well as convictions that have been dismissed or set aside, pardoned, or been the subject of a judicial Certificate of Rehabilitation. In all cases, employers must conduct individualized assessments to determine whether a conviction has a “direct and adverse relationship with the specific duties of the job,” notify an applicant in the event of denial and of the record relied upon (though no further reasons need be given), and allow the applicant to respond. Violations constitute an “unlawful employment practice” that may lead to administrative enforcement by the Department of Fair Employment and Housing and ultimately to court.<sup>192</sup>

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<sup>191</sup> See D.C. CODE §§ 1-620.42, 1-620.43. Public employers and private employers with 10 or more employees may not inquire into an applicant’s criminal record until after the employer has extended a conditional offer of employment, may not consider arrests or charges that are not pending and that did not result in a conviction, and may withdraw a conditional offer of employment based on an applicant’s conviction history only for a “legitimate business reason” that is “reasonable” in light of a multifactor test. The applicant may also file a complaint with the D.C. Office of Human Rights, which can bring administrative proceedings against an employer that it believes has violated the law and levy fines.

<sup>192</sup> See CAL. GOV’T CODE § 12952. It is unclear what effect the enactment of § 12952 will have on DFEH regulations, also promulgated in 2017, providing that consideration of criminal

Nevada and the District of Columbia employ essentially the same four-part approach as California and Hawaii before it, including enforcement through their general fair employment or human rights laws. While Nevada prohibits discrimination in public employment only and permits inquiry into criminal record after the first interview, it categorically prohibits consideration not only of non-conviction and sealed records, but also of misdemeanors that did not carry a prison sentence. Nevada law provides that failure to comply with its procedures is an unlawful employment practice and authorizes complaints to be filed with the Nevada Equal Rights Commission. The District's law prohibits inquiry until after a conditional offer has been made, which may be withdrawn only for a "legitimate business reason" that is "reasonable" under a multifactor test and accompanied by written reasons. The applicant may file a complaint with the D.C. Office of Human Rights (OHR), though the law does not contemplate an appeal from its Human Rights Office to the courts.

Two additional states provide for limited record-related protections through their human rights laws: Illinois<sup>193</sup> prohibits inquiries about or consideration of non-conviction records, juvenile records, or expunged or sealed records; and

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history may violate FEHA if it has "an adverse impact on individuals on a basis protected by the Act, including, but not limited to, gender, race, and national origin." CAL. CODE REGS. tit. 2 § 11017.1(d)-(g). Because the regulations are not coextensive with § 12952 and because they are rooted in a theory of liability not based *directly* on criminal history discrimination, it is possible that they may provide an alternate path to relief for some applicants disqualified due to criminal history.

<sup>193</sup> Effective January 1, 2020, the Illinois Human Rights Act prohibits inquiries about, or discrimination in employment and real estate transactions, based on "arrest record," defined as "an arrest not leading to a conviction, a juvenile record, or criminal history record information ordered expunged, sealed, or impounded." 775 ILL. COMP. STAT. ANN. 5/1-103 - 5/3-103, as amended by SB1780 (explaining how previously the law covered only employment, and only discrimination based on "the fact of an arrest" and expunged and sealed records). A claim of racial discrimination has also been sustained under this law where a criminal conviction was the articulated basis for a refusal to hire. *See Bd. of Trs. v. Knight*, 516 N.E.2d 991, 996-97 (Ill. App. Ct. 1987) (stating that no business necessity justified denial of employment as university police position to person convicted of single misdemeanor weapons charge; mitigating circumstances existed including time passed since conviction and record of responsible employment).

Massachusetts<sup>194</sup> prohibits consideration of non-convictions and some misdemeanors.

Some advocates have looked to federal civil rights law for reinforcement, but many are wary of relying on a vehicle for challenging record-based employment bars that is necessarily tethered to otherwise-prohibited discrimination based, inter alia, on race or ethnicity.<sup>195</sup>

**A large number of states have now adopted the first step of Hawaii's comprehensive approach to hiring by adopting "ban-the-box" laws**

A large number of states have now adopted the first step of Hawaii's comprehensive approach to hiring by adopting "ban-the-box" laws, and rely primarily on limiting the amount of information employers have about an applicant's criminal record until the later stages of the hiring process. These laws are premised on a hopeful expectation that if applicants are given a chance to demonstrate their job-related qualifications before their past record is revealed, employers will be willing to take a more considered look at them. By the beginning of 2020, laws or ordinances prohibiting application-stage

inquiries applied to public employment in 36 states, the District of Columbia, and over 150 cities and counties, and in many cases limited record checks until after a

<sup>194</sup> See MASS. GEN. LAWS ch. 151B, § 4(9) (It shall be an unlawful practice for an employer "to request any information . . . regarding: (i) an arrest, detention, or disposition regarding any violation of law in which no conviction resulted, or (ii) a first conviction for any of the following misdemeanors: drunkenness, simple assault, speeding, minor traffic violations, affray, or disturbance of the peace, or (iii) any conviction of a misdemeanor where the date of such conviction or the completion of any period of incarceration resulting therefrom, whichever date is later, occurred five or more years prior to the date of such application for employment or such request for information, unless such person has been convicted of any offense within five years immediately preceding the date of such application for employment or such request for information"). The law is enforced by the Massachusetts Commission against Discrimination, and procedures are set forth in MASS. GEN. LAWS ch. 151B, § 5.

<sup>195</sup> See *supra* note 183.

conditional offer of employment.<sup>196</sup> In 14 states and D.C., and 18 cities and counties, private sector employment was also affected.<sup>197</sup>

Even Congress acted in late 2019 to postpone inquiries into criminal record, until after a conditional offer is made, for federal agency employment in all three branches of government and private contractor hiring.<sup>198</sup> Effective January 2021, the federal Fair Chance Act also prohibits agency procurement officials from asking persons seeking federal contracts and grants about their criminal history, until an “apparent award” has been made.<sup>199</sup>

Many of these states also enjoin employers to base hiring decisions involving a person with a criminal record on criteria related in some fashion to the job, and in some cases set out detailed criteria for determining when a “direct relationship” (or, variously, “substantial” or “reasonable” relationship) exists between a person’s criminal record and the position.<sup>200</sup> Some also prohibit employer consideration of non-conviction records and convictions that have been expunged or sealed, or ask employers to consider “certificates of relief” issued by courts or parole boards. Colorado has built an extensive set of standards around a “ban-the-box” core, requiring justification for withdrawing a conditional offer, prohibiting consideration of non-convictions or sealed or pardoned convictions, and giving effect to judicial or administrative

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<sup>196</sup> Beth Avery, *Ban-the-Box, U.S. Cities, Counties, and States Adopt Fair Hiring Policies*, National Employment Law Project (July 2019), <https://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide/>. Since this study was published, in 2020 the Virginia legislature swelled the roll of states that prohibit inquiry in public employment. See HB 757, 2020 Leg., (VI. 2020), <https://lis.virginia.gov/cgi-bin/legp604.exe?201+sum+HB757&201+sum+HB757>.

<sup>197</sup> Avery *supra* note 195. In early 2020, the Maryland legislature overrode a veto by its governor to extend its ban-the-box law to private employers. See Guy Brenner and Caroline Guensberg, *Maryland Legislature Overrides Governor's Veto of "Ban the Box" Legislation*, X NAT'L L. REV. 214 (Feb. 2020) <https://www.natlawreview.com/article/maryland-legislature-overrides-governor-s-veto-ban-box-legislation>.

<sup>198</sup> See CCRC Staff, *Fair Chance Act advances in Congress*, (Dec. 16, 2019), <http://ccresourcecenter.org/2019/12/16/fair-chance-act-advances-in-congress/>.

<sup>199</sup> *Id.*

<sup>200</sup> See Restoration of Rights Project, *50-State Comparison: Criminal Record in Employment & Licensing*, <https://ccresourcecenter.org/state-restoration-profiles/50-state-comparisoncomparison-of-criminal-records-in-licensing-and-employment/>.



certificates of relief.<sup>201</sup> The limited information available to date on the practical effect of ban-the-box schemes suggests that they do improve job opportunities for people with a criminal record.<sup>202</sup> However, their effectiveness depends to some extent upon a willingness on the part of decision-makers to forego, at least temporarily, information about a candidate for employment that might be highly relevant to a hiring decision. In this regard, some research has indicated that limiting inquiry into criminal history may lead to employer reliance on racial or other stereotypes about who may have a criminal record.<sup>203</sup>

**Some research has indicated that limiting inquiry into criminal history may lead to employer reliance on racial or other stereotypes**

<sup>201</sup> See COLO. REV. STAT. § 24-5-101(3)(c), retaining exclusions for non-conviction records, and convictions that have been sealed, expunged or pardoned, and including for the first time convictions where “a court has issued an order of collateral relief specific to the employment sought by the applicant.” If none of the exclusions in (3)(c) apply, the agency “shall consider” the following factors in deciding whether to disqualify an applicant based on criminal record: (1) the nature of the conviction; (2) whether the conviction is “directly related” to the job; (3) the applicant’s rehabilitation and good conduct; and (4) time elapsed since conviction. *Id.* § 24-5-101(4).

<sup>202</sup> See Anastasia Christman & Michelle Rodriguez, *Research Supports Fair-Chance Laws*, National Employment Law Project (Aug.2016), <https://www.nelp.org/publication/research-supports-fair-chance-policies/>; Washington Lawyers Committee for Civil Rights and Urban Affairs, *The Collateral Consequences of Arrests and Convictions under D.C., Maryland, and Virginia Law* (2014), [http://www.washlaw.org/pdf/wlc\\_collateral\\_consequences\\_report.pdf](http://www.washlaw.org/pdf/wlc_collateral_consequences_report.pdf); D.C. Council Comm. on the Judiciary and Public Safety, Report on Bill 20-642, the ‘Fair Criminal Records Screening Amendment Act of 2014’ at 3 (May 28, 2014); Council for Court Excellence, *Unlocking Employment Opportunities for Previously Incarcerated Persons in the District of Columbia* (2011), [http://www.courtexcellence.org/uploads/publications/CCE\\_Reentry.pdf](http://www.courtexcellence.org/uploads/publications/CCE_Reentry.pdf).

<sup>203</sup> Researchers have found that ban-the-box policies may increase racial discrimination due to employers’ exaggerated impressions of racial differences in conviction outcomes, thereby artificially decreasing the number of qualified minority applicants who are given a second look. See, e.g., Amanda Agan & Sonja Starr, *Ban the Box, Criminal Records, and Racial Discrimination: A Field Experiment*, 133 QUART. J. ECON. 1, 195-235 (2018); Jennifer Doleac & Benjamin Hansen, *The Unintended Consequences of “Ban the Box”: Statistical Discrimination and Employment Outcomes When Criminal Histories Are Hidden*, 38 J. LAB. ECON. 2, 321-74 (2020),

Some states protect employers from negligent hiring liability, the primary reason cited by employers for not hiring someone with a criminal record.<sup>204</sup> Frequently such protections are triggered when an employee or applicant for employment receives some form of individualized restoration of rights, such as a pardon or judicial sealing. But some states, like Colorado, Minnesota, and New York, absolutely prohibit the use of conviction evidence in a negligent hiring civil suit. Texas prohibits negligent hiring suits except when the employer knew or should have known that an employee committed certain high-risk offenses.<sup>205</sup> Massachusetts protects employers so long as they relied on information from the state's Criminal Offender Record Information System (CORI) and reached a decision within 90 days of receiving that information.

While ban-the-box laws generally exclude specific types of employment, including employment where a background check is required by law, and are essentially toothless without standards and an enforcement mechanism, collectively they represent the single most significant advance for people with a record in the workplace in thirty years. In requiring potential employers to evaluate each applicant's circumstances as opposed to reflexively rejecting anyone who reports a record, and in some cases potentially making it expensive to withdraw an offer conditionally extended, these laws are to a considerable extent self-enforcing. In this sense, they depend for their effectiveness not so much on the threat of lawsuits to compel compliance as on marketplace efficiency.

As we will see in the following discussion, comprehensive occupational licensing reforms enacted by more than a dozen states since 2018, and partial reforms enacted by another dozen, are an equally encouraging development.

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<https://www.journals.uchicago.edu/doi/abs/10.1086/705880?af=R&mobileUi=0&>; see also Alana Semuels, *When Banning One Kind of Discrimination Results in Another*, *The Atlantic* (Aug. 4, 2016), <https://www.theatlantic.com/business/archive/2016/08/consequences-of-ban-the-box/494435/>.

<sup>204</sup> See Love, *et al.* *supra* note 41 at §§ 6:18 through 6:29.

<sup>205</sup> See Texas profile Part IV, Restoration of Rights Project. Texas also relies on strict regulation of background screeners. Screeners are required to obtain records only from a criminal justice agency and must give individuals the right to challenge their accuracy. Screeners may not publish records whose disclosure is prohibited under another state law (*e.g.*, records that have been expunged, or which are subject to an "order of nondisclosure"), and there is a civil remedy for violations.



## B. Occupational Licensing

Recent studies have shown that close to 20% of all jobs in the United States are available only to people who have been approved to compete for them by a government licensing agency.<sup>206</sup> It is therefore of obvious importance to the reintegration agenda to remove record-based barriers that unfairly and inefficiently restrict access to the licenses and certificates that people need to work in regulated occupations and professions.

In addition to the burdens imposed in time and money by engaging in the licensing process, applicants face regulatory agencies that may be inhospitable to people with a criminal record even if they are fully qualified by skill and training. Sometimes this is because the law mandates a heightened standard for those who have been convicted of a crime (if they are not excluded entirely). More frequently it is because of vague “good moral character” standards arbitrarily enforced by those with a guild mentality or moral scruples untethered to public safety or actual occupational requirements.<sup>207</sup>

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<sup>206</sup> See Morris M. Kleiner & Evgeny F. Vorotnikov, *At What Cost, State and National Estimates of the Economic Costs of Occupational Licensing*, Institute for Justice (Nov. 2018), [https://ij.org/wp-content/uploads/2018/11/Licensure\\_Report\\_WEB.pdf](https://ij.org/wp-content/uploads/2018/11/Licensure_Report_WEB.pdf); Stephen Slivinski, Center for the Study of Economic Liberty at Arizona State University, *Turning Shackles into Bootstraps: Why Occupational Licensing Reform Is the Missing Piece of Criminal Justice Reform* (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>.

<sup>207</sup> The White House issued a report in July 2015 on occupational licensing, which noted that 25 states have standards requiring some kind of relationship between a license and an applicant’s criminal history, 25 states and the District of Columbia “have no standards in place.” See White House, *Occupational Licensing: A Framework for Policymakers*, 35-36 (July 2015), [https://obamawhitehouse.archives.gov/sites/default/files/docs/licensing\\_report\\_final\\_no\\_nembargo.pdf](https://obamawhitehouse.archives.gov/sites/default/files/docs/licensing_report_final_no_nembargo.pdf). In April 2016, President Obama directed federal departments and agencies to ensure that federally-issued occupational licenses are not presumptively denied on the basis of a criminal record, and the Department of Justice announced support for technical assistance to states pursuing similar initiatives, as part of \$5 million grant solicitation focused on reentry. See White House Press Secretary, Fact Sheet: New Steps to Reduce Unnecessary Occupation Licenses that are Limiting Worker Mobility and Reducing Wages (June 17, 2016), <https://obamawhitehouse.archives.gov/the-press->

In an earlier era of reform in the 1970s, many states enacted laws intended to soften the rough edge of what had been complete exclusion of people with a criminal record from trades and professions.<sup>208</sup> Several states regulated public employers and licensing agencies together, requiring them to consider whether a conviction was “directly related” to a job or license, and whether the person was “rehabilitated.”<sup>209</sup> Some states that enacted detailed regulation of public employment and licensing prior to the 1980s have not made major changes to their licensing rules since that time.<sup>210</sup>

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[office/2016/06/17/fact-sheet-new-steps-reduce-unnecessary-occupation-licenses-are-limiting](https://www.fairemployment.org/office/2016/06/17/fact-sheet-new-steps-reduce-unnecessary-occupation-licenses-are-limiting). The extent to which reforms have been successful in the intervening two years is reflected by the fact that by mid-2020 only six states had no standards in place: Alaska, Alabama, Massachusetts, South Carolina, South Dakota, and Vermont.

<sup>208</sup> In the 1970s, with public policy favoring encouraging employment opportunities for people with a criminal record, states began to enact laws that limit denial of licenses (and public employment) due to criminal convictions. Notable enactments included those in New Jersey (1968), Colorado (1973), Washington (1973), Hawaii (1974), Minnesota (1974), New York (1976), North Dakota (1977), Pennsylvania (1979), and Wisconsin (1981). *See Love et al. supra* note 41 at § 6:16. Many of these laws did little more than prohibit outright exclusion. Colorado’s law, for example, provides that a conviction for a felony or moral turpitude offense does not “in and of itself” prevent public employment or licensure (stating that with exceptions for certain sensitive positions), but may be considered in determining a person’s “good moral character.” COLO. REV. STAT. § 24-5-101(2). Others are stronger. For example, North Dakota’s provisions prohibit denial of licensure unless there is a determination, considering a number of factors that a person is not sufficiently rehabilitated (with presumption of rehabilitation five years after completion of sentence) or the offense has a “direct bearing” on ability to serve. N.D. CENT. CODE § 12.1-33-02.1. Minnesota has not substantially amended its law since it was enacted in 1974, and it was among the five top scorers in the ratings published in 2020 by the Institute for Justice. *See infra* notes 211 and 221.

<sup>209</sup> *See, e.g.*, New Jersey’s Rehabilitated Convicted Offenders Act of 1968, N.J. STAT. ANN. § 2A:168A-1; Minnesota’s Criminal Rehabilitation Act (1974), MINN. STAT. § 364.01 *et seq.*; New Mexico’s Criminal Offender Employment Act of 1974, N.M. STAT. ANN. §§ 28-2-1 *et seq.*

<sup>210</sup> Connecticut, Minnesota, New Mexico, New Jersey, and New York still retain the earlier structure of regulating public employment and licensing together. While several of these states have since amended their laws, the licensing law adopted almost half a century ago in Minnesota has changed little since its adoption, and it got high marks in the Institute for Justice’s 2020 report. *See infra* note 211. North Dakota and Virginia also still operate under detailed licensing regulations dating from the 1980s or earlier. Pennsylvania recently

Beginning in 2013, a new era of occupational licensing reform took shape, transforming the policy landscape.<sup>211</sup> By mid-2020, more than 30 states had enacted legislation to make it easier for qualified individuals with a criminal record to obtain occupational and professional licensure and the foothold in the middle class that this promises.<sup>212</sup> The modern reforms were heavily influenced by model occupational licensing laws proposed by two national organizations with differing regulatory philosophies: The Institute for Justice (IJ), a libertarian public interest law firm,<sup>213</sup> and the National Employment Law Project (NELP), a workers' rights research and

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abandoned that structure in enacting a new chapter 31 of Title 68 to impose detailed substantive standards on its licensing agencies, though its new law still offers little by way of procedural protection for applicants with a record. *See* CCRC Staff, *Pennsylvania expands access to 255 licensed occupations for people with a record*, (July 14, 2020), <https://ccresourcecenter.org/2020/07/14/pennsylvania-expands-access-to-255-licensed-occupations-for-people-with-a-record/>.

<sup>211</sup> While licensing was not the most well-publicized type of reform during the period of 2013-2016, new laws addressed licensing in four different ways: (1) seven states excluded certain records from consideration in licensing; (2) four states expanded the benefits of certificates of relief in licensing; (3) five states imposed new standards for license denials based on criminal record; and (4) one state provided greater oversight of licensing boards. *See* Collateral Consequences Resource Center, *Four Years of Second Chance Reforms, 2013-2016* (2017), <https://ccresourcecenter.org/2017/02/08/round-up-of-recent-second-chance-legislation-2013-2016/>.

<sup>212</sup> *See* NICK SIBILLA, *Barred from Working: A Nationwide Study of Occupational Licensing Barriers for Ex-Offenders*, INSTITUTE FOR JUSTICE (May 2020), <https://ij.org/report/barred-from-working/>. At the time this report was published, three additional states had major reform bills awaiting their governor's signature, all of which were later enacted. *See* CCRC Staff, *supra* note 209.

<sup>213</sup> The Institute for Justice initially released its model law as part of its Occupational Licensing Review Act (OLRA). *See* Institute for Justice, *Model Occupational Licensing Review Law: Reforming Occupational Licensing Boards following NC Dental Board v. FTC*, (2018), <https://ij.org/activism/legislation/model-legislation/model-economic-liberty-law-1/>. Later, the provisions of OLRA relating to criminal records were revised and extended as its Collateral Consequences in Occupational Licensing Act (CCOLA) (2019), <https://ij.org/wp-content/uploads/2019/11/10-31-2019-Model-Collateral-Consequences-in-Occupational-Licensing-Act-2.pdf>.

advocacy group.<sup>214</sup> Both of these model law proposals addressed the following five key issues:

1. **What records should be considered?** Both proposals limit the kinds of records that may be considered, recommending that only recent serious convictions should be the basis of denial or other adverse action, and that non-convictions and sealed or pardoned convictions not be considered at all.
2. **What are proper criteria for denial of licensure?** Under IJ's proposal, denials must be based on evidence of public safety risk; under NELP's proposal, denials must be based on a record's "direct relationship" to the occupation, coupled with a lack of rehabilitation. Both proposals would eliminate mandatory bars to licensure and vague standards like "good moral character."
3. **At what point in the process should criminal record be considered?** The timing for considering whether a criminal record should be disqualifying differs significantly in the two proposals. Under IJ's proposal, a person may at any time petition for a "preliminary determination" whether a criminal record will be disqualifying, before investing in any training or special education, the agency must promptly respond and charge a minimal fee, and its determination is binding upon later application. Under NELP's proposal the order of decision is reversed: consideration of the record should occur only after determining the person is otherwise qualified, a variation on its "ban-the-box" approach.
4. **What procedural protections should apply in licensing decisions?** Under both proposals, procedures for decision-making are well-defined, and both

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<sup>214</sup> NELP released its Model State Law as part of a report on barriers to licensing for people with a record. See Michelle Rodriguez and Beth Avery, *Unlicensed and Untapped: Removing Barriers to State Occupational Licenses for People with Criminal Records*, National Employment Law Project (2016), <http://www.nelp.org/publication/unlicensed-untapped-removing-barriers-state-occupational-licenses>. NELP issued a report on its progress in 2018: Maurice Emsellem, Beth Avery, & Phil Hernandez, *Fair Chance Licensing Reform Takes Hold in the States*, National Employment Law Project (May 15, 2018), <https://www.nelp.org/publication/fair-chance-licensing-reform-takes-hold-states/>.

require agencies to bear the burden of showing unfitness, to issue written decisions defending denials, and to allow for appeals.

5. **How should licensing agencies be held accountable?** Both proposals require agencies to make periodic reports that will allow monitoring of compliance by the legislature or responsible executive agency.

The most ambitious and extensive licensing schemes enacted during the current reform period address each of these questions, while other states have been more selective in deciding which approaches to adopt. Between 2016 and mid-2020, 30 states enacted a total of 39 laws imposing new generally applicable obligations and limitations on licensing agencies, some states enacting multiple laws in successive years:<sup>215</sup> Arizona (2017, 2018, 2019), Arkansas (2019), California (2018), Colorado (2018), Georgia (2016), Idaho (2020), Illinois (2016, 2017), Indiana (2018, 2019), Iowa (2019, 2020), Kansas (2018), Kentucky (2017), Louisiana (2017), Maryland (2018, 2019), Massachusetts (2018), Mississippi (2019), Missouri (2020), Nebraska (2018), Nevada (2019), New Hampshire (2018), North Carolina (2019), Ohio (2019), Oklahoma (2019), Pennsylvania (2020), Rhode Island (2020) Tennessee (2016, 2018), Texas (2019), Utah (2019, 2020), West Virginia (2019, 2020), Wisconsin (2018), and Wyoming (2018).

Some of these states regulated licensing decisions state-wide for the first time,<sup>216</sup> while others expanded laws enacted during the earlier reform era in the 1970s and 80s.<sup>217</sup> Many required agencies to publish lists of disqualifying convictions and limit

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<sup>215</sup> Citations and descriptions of these laws can be found in the relevant state profiles from the Restoration of Rights Project. They are summarized in the RRP's 50-state comparison chart on employment of licensing, <https://ccresourcecenter.org/state-restoration-profiles/50-state-comparisoncomparison-of-criminal-records-in-licensing-and-employment/>, which links to a longer description of each state's law.

<sup>216</sup> The regulatory schemes enacted by Kansas and Nebraska in 2018, Mississippi, Nevada, and West Virginia in 2019, and Iowa and Idaho in 2020, fall into this first-time category. Alabama's 2019 law, modeled on the Uniform Collateral Consequences of Conviction Act, was also that state's first regulation of licensing decisions.

<sup>217</sup> For example, the laws enacted by Missouri and Pennsylvania in 2020 represented those states' first regulation of occupational licensing since 1980 and 1979, respectively. In 2019, Arkansas, Kentucky, Maryland, North Carolina, Ohio, Oklahoma, and Texas also augmented licensing laws originally enacted in the 1970s.



disqualification to convictions “directly related” to the occupation, abolished vague “moral character” criteria and emphasized public safety instead, barred consideration of non-convictions and certain other records, and required agencies to justify denials in writing and defend them on appeal. Many states also required agencies to report periodically to the legislature.<sup>218</sup> The Institute for Justice keeps a running tab of the reforms.<sup>219</sup>

The most ambitious of the new laws was the comprehensive scheme enacted by Indiana, which is strong both substantively and procedurally, and its requirements apply not only to state agencies but also to county and municipal governments that issue occupational and professional licenses and permits.<sup>220</sup> New Hampshire and Rhode Island come in a close second.<sup>221</sup> The most surprising were the

**The most surprising  
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schemes put in place in  
North Carolina and  
Mississippi**

<sup>218</sup> The provisions of each state’s law are in the Restoration of Rights Project. <https://ccresourcecenter.org/state-restoration-profiles/50-state-comparisoncomparison-of-criminal-records-in-licensing-and-employment/>.

<sup>219</sup> As of August 2020, 17 states allowed individuals to petition a licensing board at any time to determine if their criminal record would be disqualifying, 20 states had done away with vague criteria like “good moral character” for some or all licenses, 16 states had prohibited consideration of non-conviction records, 16 states had blocked licensing boards from denying people a license unless their record is “directly related” to the license, and eight states instituted new reporting requirements. See Institute for Justice, *State Occupational Licensing Reforms for Workers with Criminal Records* (last visited Aug. 1, 2020), <https://ij.org/activism/legislation/state-occupational-licensing-reforms-for-people-with-criminal-records/> (also collecting information on which states prohibit consideration of certain convictions after a stated period of time).

<sup>220</sup> Indiana’s licensing law is described at CCRC Staff, *Indiana enacts progressive new licensing law*, (April 3, 2018), <https://ccresourcecenter.org/2018/04/03/indiana-enacts-progressive-new-licensing-law/>. Indiana was the only state to achieve an “A” rating in the Institute for Justice’s May 2020 “Barred from Working” grading of state laws. See *supra* note 211. The significance of extending regulation to licenses and permits issued by counties and municipalities is underscored in Amy P. Meek, *Street Vendors, Taxicabs, and Exclusion Zones: The Impact of Collateral Consequences of Criminal Convictions at the Local Level*, 75 OHIO ST. L.J. 1 (2014).

<sup>221</sup> N.H. Rev. Stat. Ann. § 332-G, R.I. Gen. Laws § 28-5.1-14. Both states apply a “substantial relationship” standard to licensing boards under most departments of state government, and

extensive new schemes put in place in two Southern states, North Carolina and Mississippi, the first an expansion of a scheme from an earlier reform era, and the second a brand new effort by a state that previously had no law at all.<sup>222</sup> Minnesota evidently saw no need to modify a progressive set-up first enacted in 1974 and virtually unchanged since that time,<sup>223</sup> but Pennsylvania completely reworked the substantive standards intended to guide 29 licensing agencies controlling 255 licenses.<sup>224</sup> Pennsylvania, along with Maryland and Nebraska, also imposed new reporting requirements on occupational licensing boards, perhaps a prelude to more extensive procedural regulation. Alabama and Washington authorized their courts to grant exemptions from many barriers to licensure.<sup>225</sup> There are now only four states

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define it in detail. New Hampshire provides for a preliminary determination for an aspiring applicant, while Rhode Island excludes certain records from consideration (including non-convictions, misdemeanors, and felonies that are “substantially related”). Both allow applicants to establish rehabilitation by detailed standards, provides detailed procedures in the event of denial, suspension or revocation, and includes accountability standards.

<sup>222</sup> CCRC Staff, *Two southern states enact impressive licensing reforms*, (Sept. 18, 2019), <https://ccresourcecenter.org/2019/09/18/two-southern-states-enact-impressive-occupational-licensing-reforms/>. The laws enacted by these two states were rated among the five strongest by the Institute for Justice in its May 2020 *Barred from Working* study. See *supra* note 211.

<sup>223</sup> The Minnesota Criminal Rehabilitation Act (1974), Minn. Stat § 364.01 *et seq.*, prohibits discrimination in public employment and licensing. It has only been amended once since its enactment, in 2013 to add text recognizing the special circumstances of veterans. The virtues of this half-century-old law were affirmed when Minnesota was judged among the top five states in the Institute for Justice’s May 2020 “Barred from Working” grading of state laws. See *supra* note 211.

<sup>224</sup> See CCRC Staff, *supra* note 209. Pennsylvania’s licensing law, like its employment law, has strong substantive standards but almost no procedures to ensure these standards are complied with, remitting disappointed applicants to the courts. The law does require agencies to report their progress to the legislature in two years, so perhaps this will encourage compliance.

<sup>225</sup> See ALA. CODE § 12-26-5 (Occupational Licensing Order of Limited Relief); WASH. REV. CODE § 9.97.010 (Certificates of Restoration of Opportunity). Both these judicial certificates may result in removing a mandatory bar to licensure, but without a standard to guide discretionary decision-making thereafter, Alabama’s certificate appears toothless. Washington’s law otherwise imposes a “direct relationship” standard and allows only convictions within 10 years to be considered.

(Alaska, Massachusetts, South Dakota, and Vermont) that have no general law or regulations limiting how licensing boards consider an applicant’s criminal record.

In addition to these general reforms, several additional states enacted laws regulating specific occupations or addressing narrower aspects of licensure. Five states (Connecticut, Delaware, Florida, Idaho, and Iowa) loosened restrictions on barbers and cosmetologists, and Florida and Iowa facilitated licensing in construction trades taught in their prisons. Wisconsin added discrimination by occupational licensing boards to its venerable fair employment law, and Alabama passed a law allowing individuals to petition a court to remove mandatory bars to specific occupational licenses so that applicants may be considered on the merits. Texas opened health care occupations to people who may have been barred from them earlier in life.<sup>226</sup> At the time this report went to press, Michigan had pending seven bills addressing different aspects of the licensing process.

In summary, given the number of work opportunities they control, licensing agencies play a key part in any reintegration strategy aimed at giving people with a criminal record a fresh start. While the philosophies behind the bipartisan advocacy for licensing reform may vary, the practical value of its guidance to the many individuals who stand to benefit cannot be overestimated. If a “clean slate” means “an absence of existing restraints,”<sup>227</sup> lifting legal and societal barriers to licensure seems an essential part of a clean slate agenda.

**Licensing agencies  
play a key part in any  
reintegration strategy**

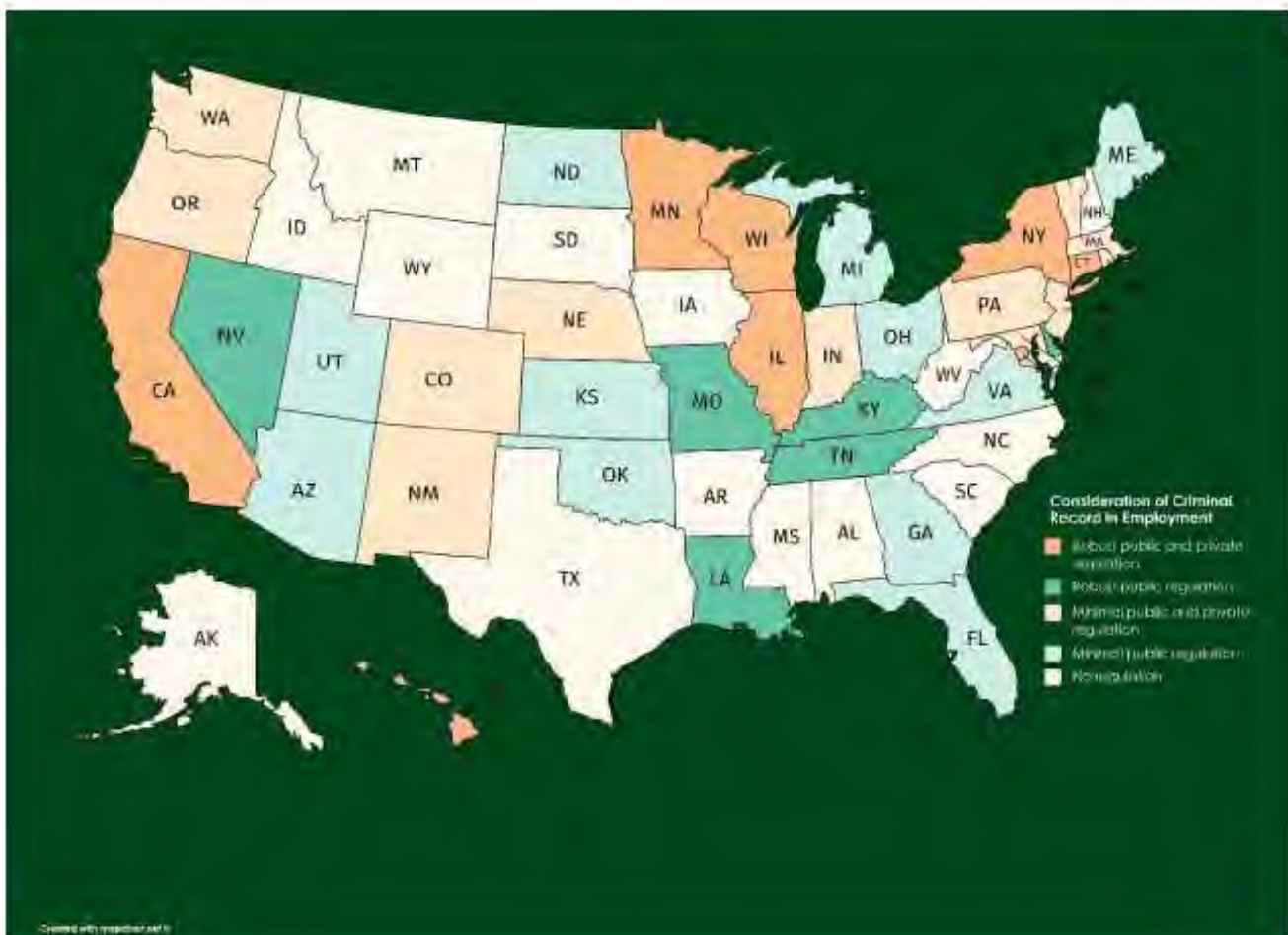
<sup>226</sup> See Collateral Consequences Resource Center, *Pathways to Reintegration: Criminal Record Reforms in 2019*, at 24, 60-61 (2020), <http://ccresourcecenter.org/wp-content/uploads/2020/02/Pathways-to-Reintegration-Criminal-Record-Reforms-in-2019.pdf>.

<sup>227</sup> See *supra* note 181.



## Report Card: Employment & Occupational Licensing

The following employment map assigns each state to one of five color-coded categories reflecting the textual strength of the law regulating how criminal record is taken account of in the employment application process. (We cannot and do not comment on how these laws operate or how they are enforced.) Grades below are based on these categories. The five categories are: 1) Orange: robust regulation of both public and private employment; 2) Green: robust regulation of public employment only; 3) Light orange: minimal regulation of both public and private employment; 4) Light green: minimal regulation of public employment only; and 5) White: no regulation of either public or private employment. In determining which laws were robust and which were minimal, consideration was given to whether a state's fair employment law extends to discrimination based on criminal record; whether a "ban-the-box" law prohibits inquiry until after a conditional offer has been made; whether clear standards determine how employers should consider a record in the employment application process; and, whether the law provides for administrative enforcement.





	Employment	Licensing
AL	F	F
AK	F	F
AZ	D	A
AR	F	B
CA	A	B
CO	C	C
CT	B	C
DE	B	C
DC	A	D
FL	D	D
GA	D	C
HI	A	C
ID	F	C
IL	B	A
IN	C	A
IA	F	A
KS	D	D
KY	B	C
LA	B	D
ME	D	C
MD	C	C
MA	C	F
MI	D	B
MN	A	A
MS	F	A
MO	B	C

	Employment	Licensing
MT	F	D
NE	D	C
NV	B	D
NH	F	A
NJ	C	C
NM	C	B
NY	A	B
NC	B	A
ND	D	B
OH	D	D
OK	D	B
OR	C	D
PA	C	C
RI	C	A
SC	F	D
SD	F	F
TN	B	B
TX	D	C
UT	D	A
VT	C	F
VA	D	C
WA	C	C
WV	F	B
WI	A	B
WY	F	C
Fed	B	F

## **How New Jersey Could Improve its Laws on Fair Employment and Occupational Licensing**

### **A. Fair Employment**

New Jersey's 2015 Opportunity to Compete Law requires most public and private employers with more than 15 employees (over a minimum of twenty calendar weeks) to delay inquiry into criminal history until after the first interview. N.J. Stat. § 34:6B-14. The law carves out exceptions, including but not limited to jobs in law enforcement and the judiciary, jobs for which criminal checks are required by law, and jobs for which lack of prior record is required for licensing or similar purposes. Beyond those narrow exclusions, employers face significant financial penalties for violating the law. In December 2017, the law was amended to explicitly prohibit inquiries into expunged records during the application process and to clarify that the law covers online applications in addition to oral and written inquiries.

However, other than barring application stage inquiry, the law sets no standards to limit or guide an employer's discretionary hiring decision once the background check has been done. The one exception to this is that a "certificate of rehabilitation" issued by a court or the parole board under N.J. Stat. § 2A:168A-7 is effective to remove most bars to public employment. A certificate evidences that "the applicant has achieved a degree of rehabilitation indicating that his engaging in the proposed employment would not be incompatible with the welfare of society," and "shall preclude a licensing authority from disqualifying or discriminating against the applicant." N.J. Stat. Ann. § 2A:168A-3. However, there is no similar provision limiting decisions by private employers.

New York's fair employment scheme is one that New Jersey could usefully consider. Like New York, it could develop standards to guide employment decisions by both public and private employers, with presumptions in favor of an applicant who meets certain specified indicia of rehabilitation. It could consider extending the effectiveness of a certificate to private employment, as New York does, with enforcement in both cases by the state human rights agency.

It could go beyond New York by imposing a "direct relationship" requirement for considering certain criminal records in hiring decisions, and bar any consideration of non-conviction records and misdemeanors as categorically deemed "unrelated" to qualifications, as Hawaii has done. The first part of this testimony contains numerous illustrations of states that have developed a progressive approach to fair employment of people with a criminal record that might appeal to New Jersey lawmakers.

New Jersey could also amend its Opportunity to Compete law to prohibit a background check until after a condition offer of employment has been made, as a number of states and the federal government have done. Like the federal government, it could extend this bar to application-stage inquiry to public contracts and grants as well.

Finally, New Jersey should take a hard look at its hoary Forfeiture Law, which provides that conviction of any crime involving dishonesty or "of a crime of the third degree or above" while employed by the government results in forfeiture of office and permanent disqualification from all public employment. Caselaw in the decades since this law was enacted suggests ways it could reasonably be modulated. For example, the law should be clarified that the disqualification provision depends upon the conviction being related, directly and specifically, to the position held.

## **B. Occupational licensing**

For more than half a century, consideration of criminal record in occupational licensing has been governed in New Jersey by the venerable but dated 1968 Rehabilitated Convicted Offenders Act. This law provides that "a person shall not be disqualified or discriminated against by any licensing authority because of any conviction for a crime, unless [the crime involves dishonesty in public service] or unless the conviction relates adversely to the occupation, trade, vocation, profession or business for which the license or certificate is sought." N.J. Stat. Ann. § 2A:168A-1. In determining that a conviction "relates adversely" to a particular occupation or trade, a licensing authority is required to explain in writing how a variety of factors relating to the seriousness and age of the offense, and the person's subsequent conduct, relate to the license or certificate sought. § 2A:168A-2. A pardon or expungement, or certificate of rehabilitation from sentencing court or parole board, "shall preclude a licensing authority from disqualifying or discriminating against the applicant." § 2A:168A-3.

It is time that this antique law has a makeover. To begin with, it should be strengthened substantively by imposing a "direct relationship" standard to allow disqualification based on criminal record, with an explicit reference to public safety as the only legitimate basis for denial. Any reliance on "moral character" should be prohibited. The law could also bar consideration of certain types of criminal records as categorically unrelated to, including at a minimum non-conviction records and misdemeanor convictions, and ideally even less serious felonies after the passage of time without further convictions.

Applicants should have greater procedural protection against agency arbitrariness. New Jersey's licensing agencies are already required to explain in writing the basis for an adverse decision, but

applicants should also have an opportunity to appeal within and outside of the agency. Agencies should also provide an opportunity for aspiring applicants to get an early read on their likelihood of success even before they invest in training, through a preliminary determination that would be binding on a later application. That too ought to be appealable and enforceable.

Finally, the law should require each licensing agency to report to the legislature annually on the number of applications received from people with a record, and the disposition of each application.

## WRITTEN TESTIMONY OF LEE McGRATH

Submitted to the New Jersey Advisory Committee to the U.S. Commission on Civil Rights for  
Overview Panel on the Collateral Consequences Impact of Occupational Licensing

Thursday, September 24, 2020  
(1:00 pm - 2:30 pm)

### **Overview**

Approximately 20 percent of Americans need a license to work,<sup>1</sup> while roughly 30 percent have a criminal record.<sup>2</sup> Together, these percentages mean that occupational licensing laws and boards are major gatekeepers to ex-offenders seeking a fresh start. Along with other collateral consequences, like losing the right to vote or access to government assistance, ex-offenders can be denied an occupational license to work simply because of their criminal past.

To shine a light on this often-overlooked barrier to re-entry, my colleague at the Institute for Justice (IJ), Nick Sibilla, published recently *Barred from Working*. It is the most comprehensive look at licensing restrictions for ex-offenders. Released this past summer and current through August 2020, the report uses 10 criteria to grade all 50 states and the District of Columbia on their legal protections for licensing applicants with criminal records.<sup>3</sup>

My testimony will first examine the shortcomings in New Jersey's law, then segue to a broader discussion of the national landscape for the collateral consequences of occupational licensing.

I then will point out that state legislators have many regulatory alternatives that can be as effective at protecting consumers as an occupational license but do not have its high costs. I will present these alternatives as part of IJ's Inverted Pyramid of Least Restrictive Regulations on page 11.

Finally, I will discuss New Jersey's unfortunate decision to license hair braiders. It is an example of capture of the legislative and regulatory process. It created a barrier to an occupation under the pretext of protecting consumers' health and safety.

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<sup>1</sup> Institute for Justice, *At What Cost? State and National Estimates of the Economic Costs of Occupational Licensing*, <https://ij.org/report/at-what-cost>

<sup>2</sup> Umez, C. & Pirius, R., *Barriers to Work: People With Criminal Records*, National Conference of State Legislatures (July 17, 2018), <https://www.ncsl.org/research/labor-and-employment/barriers-to-work-individuals-with-criminal-records.aspx>

<sup>3</sup> Sibilla, N., *Barred from Working: A Nationwide Study of Occupational Licensing Barriers for Ex-Offenders* ("Barred from Working"), Institute for Justice (June 2020), <https://ij.org/report/barred-from-working/>



## **New Jersey Law**

According to *Barred from Working*, New Jersey's protections for ex-offenders applying for occupational licenses earn a C- for its final grade and rank 30th overall.<sup>4</sup>

Under current law, no "licensing authority" (which includes state, county, and municipal agencies, boards, and departments, except law enforcement agencies<sup>5</sup>) "may disqualify or discriminate against an applicant for a license or certificate or an application for admission to a qualifying examination on the grounds that the applicant has been convicted of a crime," except if the crime "relates adversely to the occupation, trade, vocation, profession or business for which the license or certificate is sought."<sup>6</sup>

To determine if an applicant's criminal record "relates adversely" to the occupation, the licensing authority must conduct an individualized analysis with multiple factors for consideration. These include "the nature and duties of the occupation," the "nature and seriousness of the crime," the date of the crime and the age of the offender when it was committed, the circumstances surrounding the offense, including if there were any "social conditions which may have contributed to the crime," and "whether the crime was an isolated or repeated incident."

New Jersey is the only state in the nation that employs this "relates adversely" standard for considering the relationship between an applicant's offense and the license sought.<sup>7</sup>

Additionally, licensing authorities must consider if the applicant has "any evidence of rehabilitation." It includes "good conduct in prison or in the community, counseling or psychiatric treatment received, acquisition of additional academic or vocational schooling, successful participation in correctional work-release programs, or the recommendation of persons who have or have had the applicant under their supervision." Licensing authorities are required to provide applicants with written notice of their decisions.

In addition to disqualification based on adversely-related crimes, more than 35 different boards, commissions, and committees<sup>8</sup> are authorized to deny, suspend, or revoke licenses to anyone who has been convicted of "any crime or offense involving moral turpitude,"<sup>9</sup> even if those offenses are not related to the license sought.

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<sup>4</sup> See *Barred from Working*, *supra* note 3, at "State Grades," <https://ij.org/report/barred-from-working/state-grades/>

<sup>5</sup> N.J. Rev. Stat. § 2A:168A-6, <https://law.justia.com/codes/new-jersey/2019/title-2a/section-2a-168a-6/>

<sup>6</sup> N.J. Rev. Stat. § 2A:168A-2, <https://law.justia.com/codes/new-jersey/2019/title-2a/section-2a-168a-2/>

<sup>7</sup> For the purposes of the *Barred from Working* report, the strength of New Jersey's standard was ranked as in between "substantially related" and "reasonably related," the second and third-strongest tests, respectively.

<sup>8</sup> N.J. Rev. Stat. § 45:1-2.1, <https://law.justia.com/codes/new-jersey/2019/title-45/section-45-1-2-1/>

<sup>9</sup> N.J. Rev. Stat. § 45:1-21(f), <https://law.justia.com/codes/new-jersey/2019/title-45/section-45-1-21/>



One modest reform is pending in the New Jersey Legislature. S. 942,<sup>10</sup> which passed the Senate unanimously in June, repeals the provision that authorizes disqualification for “any crime or offense involving moral turpitude.” It also requires licensing authorities to track and report “the number of, and reasons for, disqualification” from licensure and “annually submit a report to the Legislature...that provide the disqualification data for each entity.” These are welcome reforms.

However, S. 942 also replaces the state’s current “relates adversely” standard with a potentially much more confusing standard. If enacted, licensing authorities could disqualify an ex-offender if his crime has a “direct or substantial relationship to the activity regulated by the entity or is of a nature such that certification, registration or licensure of the person would be inconsistent with the public’s health, safety, or welfare.”

Yet a “direct” relationship is not equivalent to a “substantial” relationship; the former is more stringent than the latter. In practice, boards may use the lower standard.

As discussed in the next section, 20 states primarily use the “directly related” standard, while the “substantially related” test is generally employed in nine states. Meanwhile, no state currently authorizes denial based on an applicant being “inconsistent with the public’s health, safety, or welfare” if granted a license, a much laxer standard that could become a major loophole that swallows reform.

A more rigorous standard is an element in New Jersey’s current law and S. 942, which state legislators should revisit. Further suggestions for reform will be addressed at the end.

### **National Landscape**

Overall, the laws in Indiana rank as the best in the nation, earning the report’s only “A” grade in *Barred from Working*. After enacting IJ’s Model Collateral Consequences in Occupational Licensing Act in 2018,<sup>11</sup> the Hoosier State only allows boards to deny licenses if a person’s criminal conviction is “specifically and directly related” to the license and after they consider any evidence of rehabilitation and the time elapsed since the crime. Indiana also blocked boards from considering arrest and expunged records as well as convictions older than five years (aside from violent or sexual felonies) and forced boards to bear the burden of proof.

In sharp contrast, five states—Alabama, Alaska, Nevada, South Dakota, and Vermont—were tied for last, receiving a zero on a 100-point scale for their utter lack of protections for felons seeking licenses.

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<sup>10</sup> S.B. 942, 219th Legis. Sess. (N.J. 2020), [https://www.njleg.state.nj.us/2020/Bills/S1000/942\\_R1.HTM](https://www.njleg.state.nj.us/2020/Bills/S1000/942_R1.HTM)

<sup>11</sup> McGrath, L. & Forbes, M., *Collateral Consequences in Occupational Licensing Act (COLA) Model Legislation*, Institute for Justice (Oct. 31, 2019), <http://www.tinyurl.com/IJ-CCOLA> or <https://ij.org/activism/legislation/model-legislation/model-collateral-consequences-reduction-act/> and H.B. 1245, Gen. Assem. 2018 Legis. Sess. (Ind. 2018), <http://iga.in.gov/legislative/2018/bills/house/1245>

Fortunately, states are increasingly taking action to ease or outright eliminate the collateral consequences from occupational licensure. Since 2015, 33 states have reformed their occupational licensing laws to make it easier for ex-offenders to find work in state-licensed fields.<sup>12</sup> Notably, out of the 12 states that merited a B- or higher in *Barred from Working*, 11 enacted reforms in the past five years. In other words, many of the best practices that have been implemented on the state level have been done so only rather recently.

One of the strongest and most necessary reforms prevents licensing boards from disqualifying an applicant based on their criminal record, unless they determine that the crime is related to the license sought. Yet today, seven states allow boards to deny licensing applicants based on any felony, even those wholly unrelated to the job.<sup>13</sup>

For the rest of the country, states drastically differ on how close the relationship between the crime and the license must be for the offense to be disqualifying. Five states merely require that a crime be related or relevant to the license sought.<sup>14</sup> South Carolina and Virginia both let boards deny licenses if they deem an ex-offender “unfit or unsuited” for the position. In four states, there must be a “reasonable” or “rational” connection between the license and the offense.<sup>15</sup> In a similar vein, boards in both Maryland and New York may deny licenses if issuing them would pose “an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.”

Seven states require a criminal record to be “substantially related” to the license.<sup>16</sup> Wisconsin also employs this standard but excludes violent crimes. Similarly, boards in Pennsylvania may only deny applicants if granting them license “would pose a substantial risk.” Finally, 16 states employ the strongest standard, requiring offenses be “directly related” to the license sought.<sup>17</sup> Another four states require a direct relationship between the crime and license, but explicitly exempt violent or sexual crimes from this test.<sup>18</sup>

To flesh out these various relationship tests, many states require boards to consider multiple factors for consideration when evaluating applicants. By far, the most common factors for

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<sup>12</sup> Institute for Justice, *State Occupational Licensing Reforms for Workers with Criminal Records*, <https://ij.org/activism/legislation/state-occupational-licensing-reforms-for-people-with-criminal-records/> <sup>13</sup> Alaska, Alabama, Massachusetts, Nevada, Ohio, South Dakota, and Vermont.

<sup>14</sup> Arkansas, Connecticut, Idaho, Maine, and Montana. In Maine, any crime “relating to” the license can be grounds for denial, except for offenses that impose less than one year in prison, which instead must “directly relate” to the job, to be disqualifying.

<sup>15</sup> Hawaii, Michigan, Nebraska, and West Virginia. In Hawaii, a crime committed within the past 10 years can only be disqualifying if it “bears a rational relationship to the duties and responsibilities of a job.” However, for older offenses, the state employs the more stringent “directly relates” standard.

<sup>16</sup> Arizona, California, Delaware, Oklahoma, Oregon, Rhode Island, and Utah.

<sup>17</sup> Colorado, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Minnesota, Mississippi, New Hampshire, New Mexico, North Dakota, Tennessee, Washington, and Wyoming.

<sup>18</sup> Louisiana, Missouri, North Carolina, and Texas.

consideration are evidence of rehabilitation (33 states) and the time elapsed since the offense was committed (30 states). In turn, those factors are followed by the age of the offender (15 states), personal testimonials (14 states), and employment history (7 states). New Jersey is also one of a handful of states, along with Georgia, Iowa, Minnesota, and Wisconsin, that oblige boards to consider whether there were any “social conditions” or other “mitigating circumstances” surrounding the offense when it was committed.

Additionally, multiple states bar boards from considering certain criminal records outright. Licensing authorities in 17 states are expressly blocked from using arrest records that did not result in a conviction (aside from active cases) as grounds for denying a license.<sup>19</sup> Another 16 states prevent boards from disqualifying on the basis of criminal records that have undergone post-conviction relief, like annulment, erasure, or expungement.<sup>20</sup> And 11 states impose a time limit for how far back a board may consider an applicant’s criminal record (aside from violent or sexual felonies).<sup>21</sup>

In addition to using (un)related crimes to disqualify applicants, states have frequently denied licenses on the grounds that an applicant with a criminal record lacks “good moral character” or has committed a “crime of moral turpitude.” These vague and arbitrary terms are often poorly defined. For instance, in Pennsylvania, courts have defined “good moral character” as a “manifestation of moral turpitude,” and have defined “moral turpitude” as “anything contrary to justice, honesty, or good morals.”<sup>22</sup>

Such a formless standard can imbue boards with nearly unlimited discretion. In June, NBC News reported that the Pennsylvania Board of Cosmetology rejected 58 applicants for lacking good moral character and found “inconsistency in how the provision is applied:” “Some women were rejected for prostitution convictions, even if they had testified that they were forced into sex work, or for decade-old drug-related crimes. Yet the board gave licenses to two people with homicide convictions after they appealed.”<sup>23</sup>

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<sup>19</sup> Arkansas, California, Colorado, Connecticut, Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, New Hampshire, New Mexico, New York, Rhode Island, Texas, Utah, and Wisconsin.

<sup>20</sup> Arkansas, California, Colorado, Connecticut, Hawaii, Illinois, Indiana, Massachusetts, Michigan, Minnesota, New Hampshire, New York, Ohio, Oklahoma, Pennsylvania, and Rhode Island.

<sup>21</sup> Maine imposes the shortest duration, blocking boards from crimes older than 3 years for non-medical licenses. (The limit rises to 10 years for medical licenses.) Arkansas, Indiana, and West Virginia all impose a 5-year limit, while Arizona, California, Maryland, and Utah set a 7-year limit. Both Massachusetts and Washington have a 10-year limit for felonies, though the limit drops to 5 years for misdemeanors in Massachusetts. Finally, Wyoming’s time limit is the lengthiest by far, allowing boards to consider records from up to 20 years prior.

<sup>22</sup> Opinion on Application for Summary Relief, *Haveman v. Bureau of Prof. & Occupational Affairs*, No. 765 M.D. 2018 (Pa. Commw. Ct. Aug. 25, 2020), <https://ij.org/wp-content/uploads/2018/12/2020.08.25-Summary-Judgment-Opinion.pdf>

<sup>23</sup> Kingkade, T. *Want to wax eyebrows in Pennsylvania? You have to be a good person. This “oppressive” law says so.* NBC News, June 22, 2020 12:20 P.M., <https://www.nbcnews.com/news/amp/ncna1231660>

Fortunately, states have begun to limit such broad terminology. In August 2020, the Commonwealth Court of Pennsylvania ruled that the Cosmetology Board’s “good moral character” requirement was “absurd,” since barbers and other salon workers (including cashiers) were not required to prove their moral character before they could work.<sup>24</sup>

Today, 15 states block boards from denying licenses to ex-offenders based on their “good character” or “moral turpitude.”<sup>25</sup> Meanwhile, another five states removed moral character requirements from many of their licenses but did not enact an overarching ban.<sup>26</sup>

Philosophers and theologians have long debated how to live ethically; it seems misguided that legislators charge a licensing board with the task of judging an individual’s moral character.

### **Due Process**

Ex-offenders applying for licenses face wildly divergent levels of protections for their right to due process. A mere four states--Indiana, Iowa, Mississippi, and Missouri--squarely place the burden of proof on licensing boards in all cases when considering whether an applicant has been sufficiently rehabilitated or has a relevant criminal record. Another three states, Kentucky, Pennsylvania, and Tennessee generally require boards to bear the burden of proof, but for certain felonies, applicants must overcome a “rebuttable presumption” that their conviction is related to the license. In all other states, the burden of proof is either borne by the applicant or is otherwise left unspecified.

Just seven states set the standard of proof required to evaluate licensing applicants with criminal records. Tennessee requires boards to render their decisions by a “preponderance of the evidence,” i.e. more likely than not. Six states--Arizona, Indiana, Iowa, Mississippi, Missouri, and New Hampshire--instead, require “clear and convincing evidence,” a more robust evidentiary standard that makes it harder for boards to deny licenses.

However, other due process protections are more common. Seventeen states have created a predetermination process that lets applicants petition boards to determine if their criminal record could be disqualifying, before they begin any costly training.<sup>27</sup> This petition process spares ex-offenders the hassle and potential deadweight loss of complying with requirements for a license they could never actually obtain. Finally, in 37 states, boards are required to provide written notice to applicants, while 32 states guarantee an applicant’s right to appeal an adverse decision.

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<sup>24</sup> Opinion on Application for Summary Relief, *Haveman v. Bureau of Prof. & Occupational Affairs*, No. 765 M.D. 2018 (Pa. Commw. Ct. Aug. 25, 2020), <https://ij.org/wp-content/uploads/2018/12/2020.08.25-Summary-Judgment-Opinion.pdf>

<sup>25</sup> Arkansas, California, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Minnesota, Mississippi, New York, North Carolina, Pennsylvania, Washington, and West Virginia.

<sup>26</sup> Delaware, Missouri, Oklahoma, Utah, and Wyoming.

<sup>27</sup> Arizona, Arkansas, Idaho, Indiana, Iowa, Mississippi, Missouri, Nebraska, New Hampshire, North Carolina, Ohio, Oklahoma, Tennessee, Texas, Utah, West Virginia, and Wisconsin.

Nine states fail to require either, which denies ex-offenders some of the most basic and fundamental safeguards for due process.<sup>28</sup>

### **Data from Other States**

Nationwide, the data on licenses granted or denied to ex-offenders is sparse. As a result, only Illinois and Maryland offer comprehensive records.

As part of a substantial overhaul of its licensing laws, in 2017, Illinois expanded its reporting requirements to nearly 200 different licenses, certifications, registrations, and other credentials. In 2018 and 2019, 2,360 people with criminal records applied for an occupational license or similar credential. Licenses were granted to 1,618 applicants in more than 90 different occupations—an acceptance rate of 68.5%. Among ex-offenders who were granted licenses, nearly half of the licenses were issued by health-related boards, while the next most popular fields were in private security and real estate.

Encouragingly, the state recorded only 25 applicants who were “denied licensure in part or whole because of a criminal conviction,” a denial rate of just over 1%. The remaining applicants had yet to complete the licensing application process or their status was otherwise unspecified. Yet people with criminal records typically accounted for a mere 1-2% of all new licensees. (Barbers were one notable exception, with ex-offenders accounting for 6% of all new licenses granted in the state.)

Maryland had even a lower proportion. Between fiscal 2014 to 2018, the state’s Division of Occupational and Professional Licensing, which oversees 21 boards, found “no record or indication...of anyone who was denied a license based solely on a criminal record.” However, out of the 613,034 license applications it received during that time, only 803 had a criminal record—barely 0.13%. (Although unlike Illinois’s reporting, which tracked decisions made after reforms were enacted, Maryland’s reporting only examined a period right before its laws were changed.)

The figures in both states are far lower than the number of Americans who have been convicted of a felony (8% in 2010)<sup>29</sup> and the proportion of American adults with a criminal record of some kind (roughly one-third of the nation). Such wide discrepancies strongly suggest that many people with criminal records are nevertheless deterred from applying for licenses.

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<sup>28</sup> Alabama, Alaska, Colorado, Idaho, Maryland, Nevada, Oregon, South Dakota, and Vermont.

<sup>29</sup> Shannon, S.K.S., et al., *The Growth, Scope, and Spatial Distribution of People with Felony Records in the United States, 1948-2010*, *Demography* 54:1795-1818 (Sept. 11, 2017), [http://users.soc.umn.edu/~uggen/Shannon\\_Uggen\\_DEM\\_2017.pdf](http://users.soc.umn.edu/~uggen/Shannon_Uggen_DEM_2017.pdf)

Stigma is certainly a factor, while in Illinois, it is quite possible that many ex-offenders were still unaware that new reforms had been implemented. But it would be a mistake to overlook burdensome licensing regimes.

After all, even in states that shield ex-offenders from the arbitrary and potentially discriminatory actions of licensing boards, applicants still need to comply with the state's requirements for licensure. Those can be incredibly onerous to obtain, especially for people with criminal records, who have fewer resources to pursue such credentials.

Research by the Institute for Justice found that the average license in lower- and moderate-income occupations require “nearly a year of education and experience, one exam, and over \$260 in fees,” while many licensing schemes are “frequently irrational.”<sup>30</sup> For instance, cosmetologists face more stringent requirements for their licenses than emergency medical technicians.

Two solutions present themselves. First, states should enact petition processes (as described earlier), which would let applicants know if their criminal record could disqualify them. This provides regulatory certainty. By receiving a clear, unambiguous response, applicants could either invest in the coursework and training, knowing that they will not be hindered by their past mistakes, or they would learn which licenses to steer clear of. (Notably, both Illinois and Maryland did not enact a predetermination petition process.)

Second, states should expand economic opportunity by reducing or repealing onerous licensing requirements. After all, the license with the lowest barriers to reentry is the one that does not exist.

### **The "Inverted Pyramid" and Alternatives to Licensure**

Repealing an occupational license does not necessarily mean eliminating all regulations for that occupation. Instead of a false binary between licensing and no licensing, there are multiple, less restrictive alternatives that can bolster economic opportunity without jeopardizing the public. To illustrate this principle, the Institute for Justice has created an “inverted pyramid,”<sup>31</sup> with market forces at the very top. With the fewest government-imposed restrictions on entry, market competition, combined with consumer reviews, reduce information asymmetries and signal quality providers.

Among government regulations, inspections are often best suited to address concerns of public health, safety, and hygiene, best exemplified by the restaurant industry. To mitigate the risk of

<sup>30</sup> Carpenter, D. M., et al. (November 2017). *License to work: A national study of burdens from occupational licensing*. Arlington, VA: Institute for Justice (2nd ed.), <https://ij.org/report/license-work-2/>

<sup>31</sup> Ross, J. (November 2017). *The Inverted Pyramid: 10 Less Restrictive Alternatives to Occupational Licensing*. Arlington, VA: Institute for Justice, <https://ij.org/report/the-inverted-pyramid/>



injuries and damage to third-parties, mandatory bonding and insurance, often used for construction contractors, should be utilized. To combat fly-by-night operations, registration requires practitioners to provide the government with their name, address, and contact information before they can work, though without any mandated training or coursework. Above licensing is government certification, which like licensing, limits the use of titles to practitioners with the credential, but unlike licensing, does not prevent people without the credential from working.

Finally, licensing lies at the bottom. As the most restrictive form of regulation, licensing should be deployed sparingly, and only when there is clear, substantiated evidence of a market failure that cannot be rectified with another regulatory option.

Precisely because it is so restrictive, licensing is particularly prone to regulatory capture by trade associations and other special interests.

### **Missed Opportunity to Free Braiders**

In 2018, the New Jersey Legislature passed a bill, A-3754, that exempted African-style natural hair braiding from the state's cosmetology license. But unlike governors in 28 states who signed complete exemption bills,<sup>32</sup> Gov. Phil Murphy did not sign the bill as the legislature passed it.

Prior to reform, aspiring braiders had to finish 1,200 hours of cosmetology classes, which could cost up to \$17,000 in tuition. Absurdly, many cosmetology schools in the state do not even teach traditional braiding techniques, which shun the harsh chemicals common in Western cosmetology. Braiders faced heavy fines and were even threatened with arrest.

Initially, the reform bill would have exempted braiders from all licensing requirements. However, in August 2018, Gov. Murphy issued a conditional veto, which effectively rewrote the bill and created a new specialty braiding license. Today, braiders have to complete 50 hours of classes (or 40 hours if they have braided professionally for at least three years) and then pass an exam to obtain a license.<sup>33</sup> In addition, licensed braiders must have a high school degree or GED, a requirement that excludes braiders in many immigrant braiders who lack those American educational credentials.

Moreover, as a license governed by the New Jersey Board of Cosmetology and Hairstyling, the braiding license is also subject to the state's collateral consequences for licensure. As a result,

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<sup>32</sup> The 28 states include California, Connecticut, Delaware, Rhode Island and Vermont. See Institute for Justice, *Braider Freedom Act* (proposing the Natural Hair Braiding Protection Act (June 6, 2018)), <https://ij.org/activism/legislation/model-legislation/model-braiding-law/>

<sup>33</sup> Sibilla, N., *New Jersey Waives Fines for Weaving Hair*, Forbes.com, Oct. 9, 2018 4:10 P.M., <https://www.forbes.com/sites/nicksibilla/2018/10/09/new-jersey-waives-fines-for-weaving-hair/>

applicants who have been convicted of a "crime involving moral turpitude" or an offense that "relates adversely" to braiding hair are still unable to obtain that license to work, despite reform.

Those barriers to reentry would have been avoided were it not for Gov. Murphy's conditional veto.

### **Recommendations**

Several common-sense reforms would promote opportunities for ex-offenders in New Jersey.

1. State lawmakers should replace the current "relates adversely" standard and only allow licensing denials based on criminal convictions "directly related" to the license sought, a much more stringent standard.
2. To exclude irrelevant records, New Jersey's boards should be barred from considering non-active arrest records, expunged records, and any conviction older than three years (aside from sexual and violent felonies).
3. Likewise, lawmakers should ban boards from using vague, ambiguous terminology like "good character," "moral turpitude" and "character or fitness" to disqualify applicants.
4. To guarantee due process, New Jersey should provide impartial hearings that could be requested by the applicant at any time--including before the applicant invests in training--and require boards to bear the burden of proof that an ex-offender would pose a genuine threat to public safety if licensed.
5. Finally, state lawmakers' reducing, or repealing New Jersey's licensing requirements would further help ex-offenders find a vocation to support themselves. After all, fewer licenses mean fewer ways for agencies to block workers—regardless of whether they have a criminal record.

We aspire for America to be the land of second chances. When prison gates open, there is little downside to public safety and great upside for ex-offenders in work. It best provides that the path ahead leads to a better life.



# Inverted Pyramid of Least Restrictive Occupational Regulations



# Occupational Licensing Review Act.

## Model Legislation

June 19, 2020

A bill for an act

relating to occupational regulations; establishing the state policy for the regulation of occupations, specifying criteria for government regulation to increase opportunities, promote competition, encourage innovation, protect consumers; establishing canons of statutory interpretation; creating a process to review criminal history to reduce offenders' disqualifications from state recognition; comply with federal and state antitrust laws; and proposing coding for new law as \_\_\_\_\_, chapter \_\_\_\_\_.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF \_\_\_\_\_:

**100.01 Policy.** For occupational regulations and their boards, it is the policy of the state that:

1. The right of an individual to pursue a lawful occupation is a fundamental right.
2. Where the state finds it is necessary to displace competition, it will use the least restrictive regulation to protect consumers from present, significant, and substantiated harms that threaten public health and safety.
3. Legislative leaders will assign the responsibility to review legislation and laws related to occupational regulations.
4. (OPTIONAL) The governor will establish an office of antitrust and active supervision of occupational boards. The office is responsible for actively supervising the state's occupational boards.

### **100.02 Definitions.**

Subdivision 1. **Scope.** For the purposes of this chapter, the words defined in this section have the meaning given.

Subd. 2. **Government certification.** "Government certification" means a voluntary, government-granted, and nontransferable recognition to an individual who meets personal qualifications related to a lawful occupation. Upon the government's initial and continuing approval, the individual may use "government certified" or "state certified" as a title. A non-certified individual also may perform the lawful occupation for compensation but may not use the title "government certified" or "state certified." In this chapter, the term "government certification" is not synonymous with "occupational license." It also is not intended to include credentials, such as those used for medical-board certification or held by a certified public accountant, that are prerequisites to working lawfully in an occupation.

Subd. 3. **Government registration.** “Government registration” means a requirement to give notice to the government that may include the individual's name and address, the individual's agent for service of process, the location of the activity to be performed, and a description of the service the individual provides. “Government registration” does not include personal qualifications and is not transferable but it may require a bond or insurance. Upon the government’s receipt of notice, the individual may use “government registered” as a title. A non-registered individual may not perform the occupation for compensation or use “government registered” as a title. In this chapter, “government registration” is not intended to be synonymous with “occupational license.” It also is not intended to include credentials, such as those held by a registered nurse, which are prerequisites to working lawfully in an occupation.

Subd. 4. **Lawful occupation.** “Lawful occupation” means a course of conduct, pursuit or profession that includes the sale of goods or services that are not themselves illegal to sell irrespective of whether the individual selling them is subject to an occupational regulation.

Subd. 5. **Least restrictive regulation.** “Least restrictive regulation” means, from least to most restrictive,

1. market competition,
2. third-party or consumer-created ratings and reviews,
3. private certification,
4. voluntary bonding or insurance,
5. specific private civil cause of action to remedy consumer harm,
6. deceptive trade practice act,<sup>1</sup>
7. mandatory disclosure of attributes of the specific good or service,<sup>2</sup>
8. regulation of the process of providing the specific good or service,<sup>3</sup>
9. regulation of the facility where the specific good or service is sold,<sup>4</sup>
10. inspection,<sup>5</sup>
11. bonding,<sup>6</sup>
12. insurance,<sup>7</sup>
13. government registration,<sup>8</sup>
14. government certification,<sup>9</sup>
15. specialty occupational certification solely for medical reimbursement,<sup>10</sup> and
16. occupational license.<sup>11</sup>

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<sup>1</sup> Deceptive trade practices acts are an effective means to protect consumers from fraud.

<sup>2</sup> Mandatory disclosures may reduce misleading or confusing attributes. Disclosures that favor certain goods or services, such as a country-of-origin label, should not be used.

<sup>3</sup> A housing/building code is an example of a regulation of a process; it may be more effective than enacting occupational licensing of tradesmen.

<sup>4</sup> A facility requirement may ensure that equipment, such as an eyewash station, is available to address accidents or emergencies.

<sup>5</sup> Periodic inspections protect consumers from unsanitary facilities.

<sup>6</sup> Requiring bonding protects against a provider’s failure to fulfill contractual obligations.

<sup>7</sup> Requiring insurance protects against a provider’s damaging a consumer or third party.

<sup>8</sup> Registering with the secretary of state or other agency protects against fly-by-night providers.

<sup>9</sup> Government certification is a voluntary signal that addresses the concern of asymmetrical information.

<sup>10</sup> Specialty certification allows for medical reimbursement without disputes over scope of practice.

Subd. 6. **Occupational license.** “Occupational license” means a nontransferable authorization in law for an individual to perform exclusively a lawful occupation for compensation based on meeting personal qualifications established by the legislature. In an occupation for which a license is required, it is illegal for an individual who does not possess a valid occupational license to perform the occupation for compensation.

Subd. 7. **Occupational regulation.** “Occupational regulation” means a statute, rule, practice, policy, or other state law that allows an individual to use an occupational title or work in a lawful occupation. It includes government registration, government certification, and occupational license. It excludes a business license, facility license, building permit, or zoning and land use regulation except to the extent those state laws regulate an individual’s personal qualifications to perform a lawful occupation.

Subd. 8. **Personal qualifications.** “Personal qualifications” mean criteria related to an individual’s personal background and characteristics. They may include one or more of the following: completion of an approved educational program, satisfactory performance on an examination, work experience, apprenticeship, other evidence of attainment of requisite knowledge and skills, passing a review of the individual’s criminal record, and completion of continuing education.

Subd. 9. **Private certification.** “Private certification” means a voluntary program in which a private organization grants nontransferable recognition to an individual who meets personal qualifications and standards relevant to performing the occupation as determined by the private organization. The individual may use a designated title of “certified” or other title conferred by the private organization.

Subd. 10. **Scope of practice.** “Scope of practice” means the procedures, actions, processes and work that an individual may perform under an occupational regulation.

Subd. 11. **Specialty occupational certification solely for medical reimbursement.** “Specialty occupational certification solely for medical reimbursement” means an authorization in law for an individual to qualify for governmental reimbursement for non-exclusive provision of new or niche medical services based on meeting personal qualifications. A private health insurer and others may recognize this credential. Notwithstanding this specialty certification, it is legal for a licensed or certified individual to provide similar services if allowed by that occupational regulation. It is also legal for an individual who does not hold this specialty certification to provide the same services for compensation, but the non-certified individual will not qualify for reimbursement from a government agency.

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<sup>11</sup> Only occupational licensing exposes board members to antitrust litigation. The 15 alternatives to licensing do not include that risk.

### **100.03 Sunrise Review of Occupational Regulations.**

Subdivision 1. **Sunrise analysis of legislation involving occupational regulations.** The Speaker of the House of Representatives, the President of the Senate and the chair each relevant committee of the Legislature will assign to the \_\_\_\_\_ staff (hereafter “staff”) the responsibility to analyze proposals and legislation (1) to create new occupational regulations or (2) modify existing occupational regulations.

*(See footnote <sup>12</sup> for a discussion of the legislature giving the responsibility to analyze occupational licenses to a staff in the legislative or executive branch. This responsibility may also be assigned to an ad hoc commission or interim study committee.)*

Subd. 2. **Sunrise reviews.** (a) The staff is responsible for reviewing legislation to enact or modify an occupational regulation to ensure compliance with the policies in section 100.01.

(b) The staff will require proponents to submit evidence of present, significant, and substantiated harms to consumers in the state. The staff also may request information from state agencies that contract with individuals in regulated occupations and others knowledgeable of the occupation, labor-market economics, or other factors, costs and benefits.

(c) The staff will determine if the proposed regulation meets the state’s policy in section 100.01(2) of using the least restrictive regulation necessary to protect consumers from present, significant, and substantiated harms.

(d) The staff’s analysis in (c) will employ a rebuttable presumption that consumers are sufficiently protected by market competition and private remedies, as listed in Section 100.02 subdivision 5 (1)-(4). The staff will give added consideration to the use of private certification programs that allow a provider to give consumers information about the provider’s knowledge, skills and association with a private certification organization.

(e) The staff may rebut the presumption in (d) if it finds both credible empirical evidence of present, significant and substantiated harm, and that consumers do not have the information and means to protect themselves against such harm. If evidence of such unmanageable harm is found, the staff will recommend the least restrictive government regulation to address the harm, as listed in Section 100.02 subdivision 5 (5)-(16).

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<sup>12</sup> There are many places in state government for legislators to give the responsibility to perform the analysis needed for Sunrise and Sunset reviews. It could be given to a subcommittee of the legislature or the legislature’s non-partisan staff. Another possibility is to give the responsibility to an agency or department in the executive branch. For example, Colorado is recognized for doing these reviews well. The state puts the responsibility to perform both reviews in the executive branch. Specifically, the responsibility is with the Colorado Office of Policy, Research & Regulatory Reform (COPRRR) in the Department of Regulatory Agencies (DORA). The key features are (1) the analysts doing the analysis are insulated to the greatest extent possible from lobbying and political pressure by industry advocates and (2) the agency or staff must issue its recommendations prior to the initial committee in the legislature voting on the proposed legislation.

(f) The staff will use the following guidelines to form its recommendation in (e). If the harm arises from:

1. contractual disputes, including pricing disputes, staff may recommend enacting a specific civil cause of action in small-claims court or district court to remedy consumer harm. This cause of action may provide for reimbursement of the attorney's fees or court costs, if a consumer's claim is successful;
2. fraud, staff may recommend strengthening powers under the state's deceptive trade practices acts or requiring disclosures that will reduce misleading attributes of the specific good or service;
3. general health and safety risks, staff may recommend enacting a regulation on the related process or requiring a facility license;
4. unclean facilities, staff may recommend requiring periodic facility inspections;
5. a provider's failure to complete a contract fully or to standards, staff may recommend requiring the provider to be bonded;
6. a lack of protection for a person who is not a party to a contract between providers and consumers, staff may recommend requiring the provider have insurance;
7. transactions with transient, out-of-state, or fly-by-night providers, staff may recommend requiring the provider register its business with the secretary of state;
8. a shortfall or imbalance in the consumer's knowledge about the good or service relative to the provider's knowledge (asymmetrical information), staff may recommend enacting government certification;
9. an inability to qualify providers of new or highly-specialized medical services for reimbursement by the state, staff may recommend enacting a specialty certification solely for medical reimbursement;
10. a systematic information shortfall in which a reasonable consumer of the service is permanently unable to distinguish between the quality of providers and there is an absence of institutions that provide guidance to consumers, staff may recommend enacting an occupational license; and
11. the need to address multiple types of harm, staff may recommend a combination of regulations. This may include a government regulation combined with a private remedy including third-party or consumer-created ratings and reviews, or private certification.

(g) The staff's analysis of the need for regulation in (e) will include the effects of legislation on opportunities for workers, consumer choices and costs, general unemployment, market competition, governmental costs, and other effects.

(h) The staff's analysis of the need for regulation in (e) also will compare the legislation to whether and how other states regulate the occupation, including the occupation's scope of practice that other states use, the personal qualifications other states require; and the penalties that other states impose for violating the occupation regulation.

(i) The staff's analysis in (e) also will include a recommendation about the proper scope of practice for the lawful occupation. The recommended scope of practice should maximize the worker's use of skills learned from formal and on-the-job training and minimize the rigidity of job classifications and the requirement of direct or indirect supervision of the worker.

(j) The staff will report its findings and recommendations to the initial and subsequent committees that will hear the legislation. The report will include recommendations addressing:

1. the type of regulation, if any;
2. the requisite personal qualifications, if any;
3. the scope of practice; and
4. penalties for violating the proposed regulation.

(k) The staff also may comment on whether and how much responsibility the legislation delegates to a licensing board to promulgate administrative rules, particularly rules relating to establishing (a) the occupation's scope of practice or (b) the personal qualifications required to work in the occupation. The comment may make legislators aware of exposure to antitrust litigation that the legislation may cause because of excessive or ambiguous delegation of authority to licensing boards to engage in administrative rulemaking.

(l) The staff shall submit its report to the chair of each relevant committee no less than nine months after the staff receives the request for analysis.

(m) The staff will make its report publicly available and post it on a state website.

Subd. 3. **Rule.** The House of Representatives and the Senate will each adopt a rule requiring a committee considering legislation to enact or modify an occupational regulation to receive the staff's analysis and recommendations in subdivision 2 prior to voting on the legislation.

Subd. 4. **Limitations.** Nothing in section 100.03 shall be construed (1) to preempt federal regulation or (2) to require a private certification organization to grant or deny private certification to any individual.

#### **100.04 Sunset Review of Occupational Licenses.**

Subd. 1. **Sunset analysis of existing occupational licenses.** (a) Starting on January 1, 20\_\_ \_\_, the Speaker of the House of Representatives, the President of the Senate and the chair of each relevant committee of the legislature will assign to the \_\_\_\_\_ staff (hereafter “staff”) the responsibility to analyze existing occupational licenses.

(b) Each relevant committee of the legislature is responsible for reviewing annually approximately 20 percent of the current occupational licenses under the committee’s jurisdiction. The committee chair will select the occupational licenses to be reviewed annually.

(c) Each relevant committee of the legislature will review all occupational licenses under the committee’s jurisdiction within the subsequent five years and will repeat such review processes in each five-year period thereafter.

Subd. 2. **Criteria.** The staff will use the criteria in section 100.03 paragraphs 2(b)-(i) to analyze existing occupational licenses. The staff also may consider research or other credible evidence whether an existing regulation directly helps consumers to avoid present, significant and recognizable harm.

Subd. 3. **Sunset reports.** (a) Starting on January 1, 20\_\_ \_\_, the staff will report annually the findings of its reviews to the Speaker of the House of Representatives, the President of the Senate, Chairs of each relevant committee, the Governor, and the Attorney General. In its report, the staff will recommend the legislature enact new legislation that:

1. repeals the occupational licenses,
2. converts the occupational licenses to less restrictive regulations in section 100.02 subdivision 5,
3. instructs the relevant licensing board or agency to promulgate revised regulations reflecting the legislature’s decision to use a less restrictive alternatives to occupational licenses;
4. changes the requisite personal qualifications of an occupational license;
5. redefines the scope of practice in an occupational license;
6. changes the penalties for violating an occupational license; or
7. reflects other recommendations to the legislature.

(b) The staff also may recommend that no new legislation is enacted.

(c) The staff will make its report publicly available and post it on a state website.



Subd. 4. **Limitations.** Nothing in section 100.04 shall be construed (1) to preempt federal regulation, (2) to authorize the staff to review the means that a private certification organization uses to issue, deny or revoke a private certification to any individual, or (3) to require a private certification organization to grant or deny private certification to any individual.

**100.05 Interpretation of Statutes and Rules.** In construing any governmental regulation of occupations, including an occupational licensing statute, rule, policy or practice, the following canons of interpretation are to govern, unless the regulation is unambiguous:

1. Occupational regulations will be construed and applied to increase economic opportunities, promote competition, and encourage innovation;
2. Any ambiguities in occupational regulations will be construed in favor of workers and aspiring workers to work; and
3. The scope of practice in occupational regulations is to be construed narrowly to avoid burdening individuals with regulatory requirements that only have an attenuated relationship to the goods and services they provide.

**100.06-A Review of a Criminal Record.**

Subdivision 1. **Fundamental right.** The right of an individual to pursue a lawful occupation is a fundamental right.

Subd. 2. **Application.** Notwithstanding any other law, a board, agency, department or other state agency (hereafter “board”) will use only this chapter to deny, diminish, suspend, revoke, withhold or otherwise limit state recognition because of a criminal conviction.

Subd. 3. **No automatic bar.** A board will not automatically bar an individual from state recognition because of a criminal record but will provide individualized consideration.

Subd. 4. **Information from a criminal record to be considered.** A board may consider only a conviction of a non-excluded crime that is a felony or violent misdemeanor.

Subd. 5. **Excluded information from a criminal record.** A board will not consider:

1. a deferred adjudication, participation in a diversion program, or an arrest not followed by a conviction;
2. a conviction for which no sentence of incarceration can be imposed;
3. a conviction that has been sealed, annulled, dismissed, expunged or pardoned;

4. a juvenile adjudication;
5. a non-violent misdemeanor; or
6. a conviction for which the individual's incarceration ended more than two years before the date of the board's consideration except for a conviction of:
  - a. a felony crime of violence pursuant to statute section \_\_\_\_\_;
  - b. a felony related to a criminal sexual act pursuant to statute section \_\_\_\_\_; or
  - c. a felony related to a criminal fraud or embezzlement pursuant to statute section \_\_\_\_\_.

Subd. 6. **Rule of lenity.** (a) Any ambiguity in an occupational regulation relating to a board's use of an individual's criminal record will be resolved in favor of the individual.

(b) The board will not use a vague term in its consideration and decision including:

1. good moral character;
2. moral turpitude; or
3. character and fitness

Subd. 7. **Included information.** The board will consider the individual's current circumstances including:

1. the age of the individual when the individual committed the offense;
2. the time since the offense;
3. the completion of the criminal sentence;
4. a certificate of rehabilitation or good conduct;
5. completion of, or active participation in, rehabilitative drug or alcohol treatment;
6. testimonials and recommendations including a progress report from the individual's probation or parole officer;
7. other evidence of rehabilitation;
8. education and training;
9. employment history;

10. employment aspirations;
11. the individual's current family responsibilities;
12. whether the individual will be bonded in the occupation; and
13. other information that the individual submitted to the board.

Subd. 8. **Hearing.** The board will hold a public hearing, should the individual request one, pursuant to section \_\_\_\_\_ of the state's administrative procedure act.

Subd. 9. **Totality of the circumstances test.** (a) The board may deny, diminish, suspend, revoke, withhold or otherwise limit state recognition only if the board determines:

1. the state has an important interest in the regulation of a lawful occupation that is directly, substantially and adversely impaired by the individual's non-excluded criminal record as mitigated by the individual's current circumstances in subdivision 7, and
2. the state's interest outweighs the individual's fundamental right to pursue a lawful occupation.

(b) The board has the burden of making its decision by clear and convincing evidence.

Subd. 10. **Appeal.** The individual may appeal the board's decision as provided for in section \_\_\_\_\_ of the state's administrative procedure act.

#### **100.06-B      Petition for Board Determination Prior to Obtaining Personal Qualifications.**

Subd. 1. **Petition.** An individual with a criminal record may petition a board at any time, including before obtaining any required personal qualifications, for a decision whether the individual's criminal record will disqualify the individual from obtaining state recognition.

Subd. 2. **Content.** The individual will include in the petition the individual's criminal record or authorize the board to obtain the individual's criminal record.

Subd. 3. **Determination.** The board will make its decision using the criteria and process in section 100.03.

Subd. 4. **Decision.** The board will issue its decision no later than 60 days after the board receives the petition or no later than 90 days after the board receives the petition if a hearing is held. The decision will be in writing and include the criminal record, findings of fact and conclusions of law.

Subd. 5. **Binding effect.** A decision concluding that state recognition should be granted or granted under certain conditions is binding on the board in any later ruling on state recognition of the petitioner unless there is a relevant, material and adverse change in the petitioner's criminal record.

Subd. 6. **Alternative advisory decision.** If the board decides that state recognition should not be granted, the board may advise the petitioners of actions the petitioner may take to remedy the disqualification.

Subd. 7. **Reapplication.** The petitioner may submit a revised petition reflecting completion of the remedial actions before a deadline the board sets in its alternative advisor decision.

Subd. 8. **Appeal.** The petitioner may appeal the board's decision as provided for in section \_\_\_\_\_ of the state's administrative procedure act.

Subd. 9. **Reapply.** The petitioner may submit a new petition to the board not before one year following a final judgment on the initial petition or upon obtaining the required personal qualifications, whichever is earlier.

Subd. 10. **Cost.** The board may charge a fee to the petitioner to recoup its costs not to exceed \$100 for each petition.

**100.06-C Reporting.** (a) The Department of \_\_\_\_\_ will establish an annual reporting requirement of the:

1. number of times that each board acted to deny, diminish, suspend, revoke, withhold or otherwise limit state recognition from a licensed individual because of a criminal conviction;
2. offenses for which each board acted in subparagraph 1;
3. number of applicants petitioning each board under section 100.04,
4. numbers of each board's approvals and denials under section 100.04,
5. offenses for which each board approved or denied petitions under section 100.04, and
6. other data the Department determines.

(b) The Department will compile and publish annually a report on a searchable public website.

**100.06-D Limitations.** (a) Nothing in this chapter shall be construed to change a board's authority to enforce other conditions of state recognition, including the personal qualifications required to obtain recognition or compliance with other regulations.

(b) Nothing in this chapter shall be construed to require a private certification organization to grant or deny private certification to any individual.

**(OPTIONAL)**

**100.07            Office of Antitrust and Active Supervision of Occupational Boards.**

Subdivision 1. **Antitrust law.** By establishing and executing the policies in section 100.01, the state intends to ensure that occupational boards and board members will avoid liability under federal antitrust laws.

Subd. 2. **Active Supervision.** To help execute the policies, the governor will establish the Office of Antitrust and Active Supervision of Occupational Boards.

Subd. 3. **Responsibility.** The office is responsible for the active supervision of the state's occupational boards to ensure compliance with section 100.01, the applicable licensing statutes, and federal and state antitrust laws. Active supervision requires the office to play a substantial role in the development of boards' rules and policies to ensure they (a) benefit predominantly consumers and (b) do not benefit unreasonably or serve merely private interests of providers who the boards regulate.

Subd. 4. **Approval.** The office will exercise control over boards' processes and substantive actions to ensure they are consistent with section 100.01, the applicable licensing statutes, and federal and state antitrust laws. The office must review, and approve or reject any proposed board rule, policy, enforcement, or other regulatory action prior to it being adopted or implemented. The office's approval must be explicit; silence or failure to act will not be deemed approval.

Subd. 5. **Personnel.** The office personnel must be independent of boards. A government or private attorney who provides general counsel to a board will not also serve in the office.

Subd. 6. **Cost Allocation.** The office may assess its costs on each board for the services of active supervision. Each board may recoup the assessment by increasing the fees paid by license holders.

**100.08            Effective date.** This chapter is effective on \_\_\_\_\_.

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**James E. McGreevey, Chairman, NJ Reentry Corporation**  
**Statement (Revised)**  
**NJ Advisory Committee to USCCR**  
**November 18, 2020**

Mr. Chairman and Members of the NJ Advisory Committee to the United States Commission on Civil Rights, I thank you on the outset for your commitment to eliminating those barriers confronted by our program participants, as they attempt to further their educational and employment advancement through occupational licensing. As everyone here recognizes, licensing restrictions have become a significant barrier to court involved persons. The testimony you will hear today reflects my experience, frustration, yet measured hope toward reform efforts. I would first express my gratitude to the Commission members assembled, as well as wise New Jersey leaders such as Senator Troy Singleton, Senate President Stephen Sweeney, and Director of Consumer Affairs Paul Rodriguez, Office of the Attorney General.

My remarks today are excerpted from the New Jersey Reentry Services Report. These remarks focus upon two major areas which are significant barriers to effective reentry. The first being the difficulty of securing a driver's license, without which a person cannot secure entrance into the building trades and apprenticeship training. The second being the "good character" requirement set forth in the present New Jersey law.

**Identification Upon Release**

*Barriers to Reentry*

First, as to Motor Vehicle Commission driver's licenses, The Fair Release and Reentry Act (FRARA) of 2009 mandates that upon release from incarceration, the New Jersey Department of Corrections (DOC) supplies every inmate with a FRARA Portfolio with documents to reenter into the community. However, the only form of identification that DOC must provide is a temporary release photo identification (ID), an insufficient form of identification that serves little use in obtaining any further documents and also fails to qualify as a point of verification for the Motor Vehicle Commission's (MVC) six-points of identification

requirement.<sup>1</sup> Most individuals leave DOC's custody without basic supporting documents that would assist in the process of obtaining their MVC Photo ID, including a social security card or birth certificate. Released individuals lack the funds, resources, and transportation to obtain these basic documents. These circumstances present a severe barrier to successful reentry and promote recidivism. A valid state-issued ID card is essential to access basic necessities to reintegrate and become self-sufficient. Without a New Jersey Motor Vehicle Commission Non-Driver or Driver Photo ID, individuals cannot apply for public assistance programs, access healthcare services, secure housing, fill prescriptions, or go before a judge. Finding legal employment is difficult, if not impossible, as most employers require a valid state ID or driver's license. If an individual finds employment, a state-issued ID is required to cash a paycheck or open a bank account.

The process of obtaining supporting documents to receive an MVC NonDriver Photo ID can be difficult and daunting for individuals incarcerated for long periods of time. Currently, DOC allows inmates to go to the MVC within the prison to obtain IDs every month. However, inmates are only permitted to go 60 days before release. Also, if he or she currently resides in a Residential Community Release Programs (RCRPs), he or she may not participate. Further, only inmates who already have birth certificates and driver's licenses are eligible for this resource, immediately disqualifying the individuals most in need of assistance to obtain identification. Although this provides a significant opportunity to those who already have these documents, it fails to assist those without the necessary documents in obtaining them.

In Maryland, officials from the DOC and MVC have developed a memorandum of understanding that streamlines the process for former inmates to receive state-issued IDs. This memorandum allows inmates to trade their prison identification cards for state issued MVC identification cards.<sup>2</sup> Also, Ohio has issued ex-offender identification cards. Upon release, an ex-offender will receive this ID card. At that time, the ex-offender could bring the ex-offender ID card to a local motor vehicle

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<sup>1</sup> Tharney, Laura C. "Memorandum: Identification Card and License to Drive." Department of Correction. February 11, 2013. <http://www.lawrev.state.nj.us/newprojects/docidPM021113.pdf>.

<sup>2</sup> Nelson, Marta, and Jennifer Trone. "Why Planning for Release Matters." Vera Institute of Justice. Accessed August 23, 2019. <https://www.vera.org/publications/why-planning-for-release-matters>.



office and exchange it for an Ohio ID or driver's license. The issuance and exchange of the ex-offender ID card program was a collaborative effort between the U.S. Probation Office for the Southern Half of Ohio including Cincinnati, Columbus and Dayton, the Ohio Department of Public Safety and the Ohio Bureau of Motor Vehicles.<sup>3</sup> A similar inter-agency agreement between the New Jersey DOC and MVC should be established that enables DOC officials to obtain inmates' MVC Non Driver's Photo ID and issue the ID's upon release. This would eliminate three barriers to obtaining the ID including (1) the need for supporting documents that most inmates do not have access to immediately upon release; (2) the fees involved with obtaining the ID and the other documents; and (3) transportation barriers in locations with inadequate public transportation as the individual does not possess a valid license.

A recent effort to ease the transition of federal prisoners back into society is the New Pathways Act. Senator Cory Booker and Representative Elijah Cummings introduced this bill to require the Bureau of Prisons to obtain identification for inmates before their release so the individual may more easily acquire needed services post-release. The Act provides guidance for the Bureau of Prisons to assist incarcerated individuals in obtaining identification such as a driver's license, birth certificate, Social Security card, photo ID, or work authorization form.<sup>4</sup>

### **Action Items**

To lower the barriers posed by lack of identification on release from prison, NJRC recommends:

1. Providing every inmate with a New Jersey Motor Vehicle Commission Driver or Non-Driver Photo ID prior to release through a memorandum of understanding or other agreement between the Department of Corrections and the Motor Vehicle Commission;
2. Amend the provision of Fair Release and Reentry Act to make these services opt-out rather than strictly voluntary.

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<sup>3</sup> "Ohio, Feds Join Forces to Create Ex-Offenders ID Card." Associated Press, February 11, 2017. <https://fox8.com/2017/02/11/ohio-feds-join-forces-to-create-ex-offenders-id-card/>.

<sup>4</sup> [https://www.booker.senate.gov/?p=press\\_release&id=902#](https://www.booker.senate.gov/?p=press_release&id=902#)

3. Adopting similar legislation to that of the New Pathways Act, mandating that the New Jersey Department of Corrections help incarcerated individuals obtain proper identification prior to their release.

### **Legal Barriers to Employment “Good Moral Character” Limits on License Eligibility**

Second, nearly one-third of the workforce enforces licensing laws that require Good Moral Character, a provision that unjustly disadvantages those previously incarcerated.<sup>5</sup> Character-based requirements for licensed occupations create significant barriers to reintegration by limiting the ability to find legal work for economic livelihood. This provision does not increase public safety; it increases recidivism and lowers the ability of reentering individuals to obtain meaningful and legal employment.<sup>6</sup>

In New Jersey, 210 occupations currently require licenses that specifically cite the requirement of Good Moral Character.<sup>7</sup> Obtaining licenses for occupations such as bus and truck drivers, cosmetologists and hair stylists, dental hygienists, emergency medical technicians (EMTs), firefighters, plumbers, real estate agents, and teachers may be difficult or impossible for individuals with criminal records. Ironically, some of these restricted occupations are the same occupations the inmate received training for in prison. The inherent vagueness surrounding the Good Moral Character requirement adds another burden to formerly incarcerated applicants because it is difficult for those individuals to predict disqualification before investing time and resources into certification requirements and applications.<sup>8</sup> The Good Moral Character licensing requirement severely

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<sup>5</sup> Rhode, Deborah L. “Virtue and the Law: The Good Moral Character Requirement in Occupational Licensing, Bar Regulation, and Immigration Proceedings.” *Law & Social Inquiry* 43, no. 03 (Summer 2018): 1027-058. Accessed August 23, 2019. doi:10.1111/lsi.12332.

<sup>6</sup> Slivinski, Stephen. “Turning Shackles into Bootstraps: Why Occupational Licensing Reform Is the Missing Piece of Criminal Justice Reform.” Center for the Study of Economic Liberty at Arizona State University, 01st ser., no. 2016 (November 7, 2016). <https://research.wpcarey.asu.edu/economic-liberty/wp-content/uploads/2016/11/CSEL-Policy-Report-2016-01-Turning-Shackles-into-Bootstraps.pdf>.

<sup>7</sup> “Licensed Occupations in New Jersey.” Department of Labor and Workforce Development. Accessed August 23, 2019. [https://www.nj.gov/labor/lwdhome/coei/Licensed\\_index.html](https://www.nj.gov/labor/lwdhome/coei/Licensed_index.html).

<sup>8</sup> Haggerty, Jonathan. “How Occupational Licensing Laws Harm Public Safety and the Formerly Incarcerated.” *R Street*. May 31, 2018. Accessed August 23, 2019. <https://www.rstreet.org/2018/05/31/how-occupational-licensing-laws-harm-public-safety-and-the-formerly-incarcerated/>.

disadvantages these individuals because licensed occupations show promising growth projections. Additionally, these occupations are otherwise highly accessible for those released from prison because many do not require four-year degrees.

### **Best Practices and Models**

The presence of a criminal record should not itself be a basis for denial of an occupational license. A study conducted by the Center for the Study of Economic Liberty analyzed the effects of occupational licensing restrictions and requirements on the three-year recidivism rate—the timeframe when formerly incarcerated individuals are most likely to re-offend.<sup>9</sup> The study concluded that states with the most restrictive licensing burdens experienced an over nine percent increase on average in the three-year recidivism rate.<sup>10</sup> However, those states with the least restrictive licensing burdens saw the rate decline by nearly two and a half percent.<sup>11</sup>

Another study conducted by the United States Sentencing Commission found that individuals with stable employment were 12.8 percent less likely to reoffend.<sup>12</sup> Gainful employment is one of the most influential factors in preventing recidivism; reducing barriers to occupational licenses is essential to the successful reentry of formerly incarcerated individuals.<sup>13</sup>

### **Action Items**

The Commission recommends two changes to licensing requirements:

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<sup>9</sup> This regression controlled for many exogenous variables, such as overall crime rate and employment climate of the state and remained significant.

<sup>10</sup> Slivinski, Stephen. “Turning Shackles into Bootstraps: Why Occupational Licensing Reform Is the Missing Piece of Criminal Justice Reform.” Center for the Study of Economic Liberty at Arizona State University, 01st ser., no. 2016 (November 7, 2016). <https://research.wpcarey.asu.edu/economic-liberty/wp-content/uploads/2016/11/CSEL-Policy-Report-2016-01-TurningShackles-into-Bootstraps.pdf>.

<sup>11</sup> Ibid.

<sup>12</sup> “Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines.” United States Sentencing Commission. May 2004. Accessed August 23, 2019, [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2004/200405\\_Recidivism\\_Criminal\\_History.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2004/200405_Recidivism_Criminal_History.pdf).

<sup>13</sup> “29th Legislature (2015-2016),” n.d. <http://www.akleg.gov/basis/Bill/Detail/29?Root=SB 91>.

1. Amend the Good Moral Character requirement for occupational licenses and replace it with individualized assessments of prior crimes as they relate to the nature and requirements of the occupation;
2. Requiring licensing boards to eliminate vague language and specifically list disqualifying crimes, those specifically related to the nature of the occupation;
3. Preventing municipalities or judges from banning individuals from employment in government services.

In conclusion, thank you for the opportunity to advocate on behalf of the women and men we are privileged to serve. We confront many obstacles on a daily basis, we ought to make every effort to remove those barriers that we have deliberately set before ourselves to encumber those who seek a Second Chance.

**Testimony to the New Jersey Advisory Committee to the  
United States Commission on Civil Rights  
By Vice Chair Patricia McKernan, DSW, LSW  
Criminal Records: Access to Occupational Licenses  
in New Jersey  
Made on Behalf of the NJ Board of Social Work Examiners  
(February 11, 2021)**

Thank you to the Committee for permitting me to testify on behalf of the New Jersey Board of Social Work Examiners on the issue of Criminal Records and Access to Occupational Licenses in NJ. I have been a social worker in the State of NJ for thirty years and have spent the bulk of my career assisting individuals leaving incarceration. I have been a board member for seven of those years and have personally deliberated over applicants for social work licensure with criminal arrests and convictions. I am pleased to share the important work that we do at the Board of Social Work to provide licensure to qualified individuals.

As you are aware, the United States has a record. Nearly one in three individuals in America has an arrest record by the age 23. Arrest records are **negatively** correlated with owning a home, high school diploma and college degree achievement, and median income. Arrest records are **positively** correlated with poverty. In 2012, the Bureau of Justice Statistics reported that 2.1 million individuals in New Jersey had a criminal record. Each year in our state, more than 200,000 individuals are arrested. As social workers, we are compelled to seek ways to improve the conditions of life in our society and alleviate or prevent sources of deprivation, distress and strain for the most vulnerable and marginalized. As social work regulators, we strive to advance safe, competent and ethical practices among our licensees. We recognize the need to welcome people from all walks of life to our profession, including those with criminal histories.

There are 208 occupations that require licensure in the State of New Jersey. The Institute for Justice's research document entitled *Licensed to Work* indexes 102 lower-income occupations for which states require licensure. New Jersey requires 54 of these 102 occupations to be licensed, at an average fee of \$224 – the 16<sup>th</sup> highest total among states. While *Licensed to Work* asserts that there is little

evidence that licensing laws better protect consumers, that has not been my experience in the context of licensing social workers.

Post-incarceration employment is crucial for individuals leaving the criminal justice system, both for preventing recidivism and for ensuring that the formerly incarcerated lead fulfilling and productive lives. Reducing barriers to employment is therefore both a public safety investment as well as a social justice imperative. The Justice Department acknowledges that a past criminal conviction of any sort reduces the likelihood of a job offer by 50%. A criminal record is also often accompanied by significant legal financial obligations and other collateral consequences, some of which I know this Committee is exploring. (I am happy to discuss some of these, such as driver's license suspension, if that is of interest to the Committee.)

All of this is compounded by the over-representation of people of color in the justice system. The Sentencing Project reports that "sentencing policies, implicit racial bias, and socioeconomic inequity contribute to racial disparities at every level of the criminal justice system. Today, people of color make up 37% of the U.S. population but 67% of the prison population. Overall, African Americans are more likely than white Americans to be arrested; once arrested, they are more likely to be convicted; and once convicted, they are more likely to face stiff sentences. Black men are six times as likely to be incarcerated as white men and Hispanic men are more than twice as likely to be incarcerated as non-Hispanic white men." New Jersey leads the nation in racial disparity in incarceration. While the national average for Black to White disparity is 5:1, New Jersey has the unenviable distinction of incarcerating Blacks at a rate of 12:1.

I would like to speak now more specifically to the role of the NJ Board of Social Work Examiners. First and foremost, the NJ Board of Social Work Examiners abides by the New Jersey Rehabilitated Convicted Offenders Act. This statute declares that it is in the public interest to assist the rehabilitation of convicted offenders by removing impediments and restriction upon their ability to obtain employment based solely upon the existence of a criminal record. The Board of Social Work does not discriminate or disqualify anyone because of any conviction for a crime, unless the conviction relates adversely to the social work role. In NJ, there are three levels of certification or licensure for social workers:

- **Certified Social Worker (C.S.W.)**- These are individuals that provide social work services, such as assessment, consultation and counseling,

planning and community organization, policy and research, administration, and client-centered advocacy.

- **Licensed Social Worker (L.S.W.)** – These are individuals that may provide all of the social work services mentioned above, plus clinical social work services when supervised by a Licensed Clinical Social Worker.
- **Licensed Clinical Social Worker (L.C.S.W.)** – These social workers may provide all of the social work and clinical social work services mentioned above and may engage in clinical supervision of individuals. LCSW is an independent license to practice.

New Jersey currently has 2,335 Certified Social Workers, 7,971 Licensed Social Workers, and 10,887 Licensed Clinical Social Workers. There are a total of 21,193 individuals governed by the Board of Social Work. For the purposes of this Committee, the Board of Social Work evaluated individuals that applied for certification or licensure for the period starting January 1, 2019 to December 31, 2019.

The Board of Social Work Examiners issued a total of 1,693 licenses and certifications in 2019. The breakdown is as follows: 663 LCSWs, 925 LSWs, and 105 CSWs.

Of the 105 individuals issued a Certification for Social Work (CSW), the Board staff flagged a total of **10 individuals** because their criminal history background check indicated past criminal history. All of these individuals were issued a CSW after Board review.

Of the 925 individuals issued a License for Social Work (LSW), the Board staff flagged a total of **46 individuals** because their criminal history background check indicated past criminal history. All 46 were ultimately granted an LSW. Only one applicant was flagged due to a criminal history and denied an LSW. That applicant was asked to submit additional documentation and subsequently abandoned the process. It should be noted this applicant was a reinstatement application, not a new applicant.

And of the 663 individuals issued a License for Clinical Social Work (LCSW), the Board staff flagged a total of **7 individuals** because their criminal history

background check indicated past criminal history. All 7 were issued an LCSW after Board review. Only one applicant was flagged due to a criminal history and denied an LCSW. The one individual who was not issued an LCSW was ineligible for that status, and was instead given the option to apply and be granted an LSW instead. The individual had past criminal history **and** discipline in another state which disqualified him from licensure by reciprocity/endorsement. This individual subsequently abandoned the application process.

In summary, 65 individuals; nearly 4% of the applications for certification or licensure, had a criminal history and all but two of those applicants were approved.

All applicants are required to answer whether they have been arrested on their application form and provide a statement related to their arrest or conviction. Overwhelmingly, applicants with criminal histories report arrests or convictions related to substance use disorder. The criminalization of addiction drives the numbers of individuals reporting arrest records. Often, applicants will cite their addiction, involvement in domestic violence (usually as victims), and bad choices in their youth as both causes of their criminal record and as guides in their decision to be a social worker. The Board carefully evaluates their statements and any letters of recommendation, considers the support systems they have, and sees their histories as opportunities to contribute the aforementioned purpose of social work; *to improve the conditions of life in our society for the most marginalized.*

In summary, I would submit:

1. While we should consider whether some occupational licenses impose an unwarranted burden, that has not been my experience in the context of social work.
2. By requiring almost every licensing board to conduct individualized assessments of prior crimes as they relate to the nature and requirements for licensure or certification, New Jersey is ahead of many states, but can and should continue to make progress.



**New Jersey Advisory Committee to the US Commission on Civil Rights  
Panel Briefing: Access to Occupational Licenses**

Remarks by Paul Rodríguez, Acting Director, NJ Division of Consumer Affairs

November 12, 2020

Thank you Chair Lustberg, and to all of members of the Advisory Committee, for inviting me to speak with you today on this important topic. It's also an honor to participate on this panel with Professor Clear, who has done so much work in this area, and Senator Troy Singleton, who has been a great partner on several matters my office works on to protect consumers and support those seeking a pathway to employment in a licensed profession. My name is Paul Rodriguez, and I am the Acting Director of the Division of Consumer Affairs. The Division is within the New Jersey Department of Law and Public Safety, under the supervision of the Attorney General.

I think it would be helpful to first provide a bit of background about the way that occupational licensing and business registration works at DCA. With help from the Division of Law, DCA handles licensing, registration, and supervision for a large number of businesses and professions statewide. Generally speaking, this happens in one of two ways:

- DCA houses over 50 professional and occupational boards and committees that regulate nearly 200 types of professional licenses, from accountants to veterinarians, plumbers to doctors and nurses, and also register approximately 70 types of businesses related to those professions. Collectively, these boards license approximately 750,000 individuals. These boards and committees are independent regulatory bodies whose members are appointed by the Governor, and consist primarily of industry practitioners and consumer representatives. While each independent board makes their own policy decisions, their work is supported by DCA staff, who among other things, process applications and provide assistance to applicants, licensees, and members of the public.
- While the boards primarily license individuals, the Division also directly registers nearly twenty types of regulated businesses, from home improvement contractors to telemarketers. Altogether, we register approximately 60,000 such businesses.

Submitted in advance of my testimony today is a copy of the list of businesses and professions that are registered and licensed by the Division and each of the independent boards and committees we support.

Whether it is a business registration or an individual license, we recognize that these are important decisions that impact lives and livelihoods, and we take them very seriously.

#### **A. Criteria Considered**

In determining whether a returning citizen can join (or re-join) a business or profession, we apply the analysis set out through a series of statutes that relate to the specific profession.

For the most part, the fact that an applicant may have a prior criminal conviction does not make them ineligible for licensure. Instead, the conviction leads the board to conduct an individualized assessment, required by law, that is based on the nature of the conviction, the facts and circumstances leading up to and since that underlying conduct, and the statutes and regulations that govern that particular license.

In New Jersey, consideration as to whether a prior conviction should impact the granting of a professional or occupational license is primarily governed by the New Jersey Rehabilitated Convicted Offenders Act (RCOA). Where it applies, the RCOA limits the impact of a prior conviction on a resident's ability to get a professional license or registration in New Jersey. Under the RCOA, a prior conviction generally cannot disqualify someone from receiving a license or certificate, unless the conviction "relates adversely to the occupation, trade, vocation, profession or business," or certain special circumstances apply—for example, if the person held public office at the time of the offense. In determining whether a conviction relates adversely to the profession or business, the RCOA requires consideration of how each of eight factors applies:

- a. The nature and duties of the business or occupation;
- b. The nature and seriousness of the crime;
- c. The circumstances under which the crime occurred;
- d. When and how long ago it happened;
- e. The person's age when they committed the act;
- f. Whether the crime was an isolated or repeated incident;

- g. The social conditions which may have contributed to the crime;
- h. Any evidence of rehabilitation, including good conduct in prison or in the community, counseling or psychiatric treatment received, acquisition of additional academic or vocational schooling, successful participation in correctional work-release programs, or the recommendation of persons who have or have had the applicant under their supervision.

In addition, the eligibility criteria for each of our approximately 200 licenses and registrations are set by one (or more) enabling statutes, and refined by regulation. Most of these statutes include a “good moral character” requirement, and some also include a list of disqualifying offenses – offenses that might disqualify an individual from holding that license or registering a business. For professional licenses issued by a board or committee, the Uniform Enforcement Act sets out additional grounds for disqualification or revocation, which I will discuss more in just a moment.

After conducting an analysis of the facts and circumstances governing each case, the factors outlined in the RCOA, and the statutes and regulations that govern each license, a license or business registration may still be granted, except in the fairly rare case that the license statute sets an absolute bar on licensure. Let me offer a few examples of how this works in practice.

## **B. Boards and Committees**

The boards and committees generally follow the Uniform Enforcement Act, which spells out when and how a board may choose to deny an applicant or revoke a license. There are fifteen bases in the law for denial, including:

- Deception or misrepresentation during the licensing process, or having otherwise engaged in false advertising or dishonesty;
- Substance abuse likely to impair their practice that is current or within the past year;
- Having been convicted of, or engaged in acts constituting, any crime or offense involving moral turpitude or relating adversely to the activity regulated by the board.

In addition to the Uniform Enforcement Act, each board or committee has its own distinct law that establishes its authority and requirements, as I described before. Many of those

laws have “good moral character” or similar requirements separate from the Uniform Enforcement Act; they may also describe certain conduct (like defrauding a client) that can disqualify someone, with or without a conviction.

As noted previously, a few of these statutes also enumerate specific convictions that must be disclosed and might disqualify individuals from obtaining licensure. For example, the law regulating certified homemaker-home health aides (CHHAs) disqualifies any person who has been convicted of a crime or offense, among others:

- involving danger to the person;
- against children, dependents, or people who do not have legal competence; or
- involving theft or a controlled dangerous substance (or analog).

But having a disqualifying conviction does not necessarily mean that someone will not be granted a license or certification. If a person applying for a CHHA certification has been convicted of one those enumerated offenses, that information will be reported on their statutorily-required background check. Applicants who disclose that they have such a conviction will receive a letter of provisional disqualification, and will then have an opportunity to provide evidence to the committee, both about whether the crime should be interpreted to be related to their work as a home health aide, or otherwise showing their rehabilitation, taking into account all of the circumstances of the offense and their life then and since. The board may then certify the applicant, despite a conviction for one of the enumerated disqualifying offenses.

In general, a disclosed criminal conviction prompts the board or committee to solicit further information from the applicant regarding the facts and circumstances surrounding the conviction. My understanding is that, for most boards and committees, it is relatively unusual for an applicant to be denied a license based on prior criminal convictions, but a board and committee is more likely to deny a license (at least for some period of time) if the conviction: 1) is disqualifying under the board’s statute or regulation; 2) relates to substance abuse and the profession involves potential access to controlled substances, though certainly evidence of treatment and recovery weighs very heavily in the person’s favor; or 3) is recent and raises concerns about suitability for that particular license.

### **C. Registered Businesses**

Registering a business with the Division is similar to getting an individual license or certification from a board or committee. DCA directly registers many different types of businesses, including home improvement contractors, health clubs and health care service firms. As with professional and occupational boards, each kind of business that registers with the Division has a statute that sets out the requirements for registration; most, but not all, have some provision relating to character or a criminal record of the principals of the business.

For example, we register tens of thousands of home improvement contractor businesses statewide. The laws that govern contractors require applicants to disclose convictions for any of a significant list of offenses. The Division may deny, suspend or revoke a registration for many of the same reasons we discussed before that apply to the boards. Consistent with the RCOA, a person may still register if they establish that they have been rehabilitated, taking into consideration all of the criteria that I laid out earlier. It is relatively uncommon for a home improvement applicant to be denied on the basis of a prior criminal history.

By contrast, the statutes governing health clubs and vehicle protection product warrantors do not include a bar for prior convictions.

### **D. Questions**

I hope with these opening comments I have been able to give you some sense of the different statutory schemes we work with, and what our process looks like in applying the law to determine whether a prior criminal conviction is pertinent to a person's ability to later get a professional license or register a business. I look forward to your questions.

**Appendix to the Testimony of Acting Director Paul Rodríguez, Division of Consumer Affairs****November 12, 2020****Boards, Committees and Commissions Supported by the Division of Consumer Affairs**

- Alcohol and Drug Counselor Committee
- Athletic Training Advisory Committee
- Audiology and Speech-Language Pathology Advisory Committee
- Board of Examiners of Electrical Contractors
- Board of Pharmacy
- Certified Homemaker-Home Health Aides
- Certified Psychoanalysts Advisory Committee
- Electrologists Advisory Committee
- Elevator, Escalator, and Moving Walkway Mechanics Licensing Board
- Fire Alarm, Burglar Alarm and Locksmith Advisory Committee
- Genetic Counselors Advisory Committee
- Hearing Aid Dispensers Examining Committee
- Home Inspection Advisory Committee
- Interior Design Examination and Evaluation Committee
- Joint Committee of Architects and Engineers
- Legalized Games of Chance Control Commission
- Licensed Landscape Architect
- Licensed Master Hearth Specialist Advisory Committee
- Midwifery Liaison Committee
- New Jersey Board of Massage and Bodywork Therapy
- New Jersey Board of Nursing
- New Jersey State Board of Accountancy
- New Jersey State Board of Acupuncture
- New Jersey State Board of Architects
- New Jersey State Board of Cosmetology and Hairstyling
- New Jersey State Board of Dentistry
- New Jersey State Board of Optometrists

- New Jersey Cemetery Board
- Occupational Therapy Advisory Council
- Orthotics and Prosthetics Board of Examiners
- Perfusionists Advisory Committee
- Physician Assistant Advisory Committee
- Professional Counselor Examiners Committee
- State Board of Creative Arts and Activities Therapies
- State Board of Examiners of Master Plumbers
- State Board of Examiners of Heating, Ventilating, Air Conditioning, and Refrigeration Contractors
- State Board of Examiners of Ophthalmic Dispensers and Ophthalmic Technicians
- State Board of Chiropractic Examiners
- State Board of Court Reporting
- State Board of Marriage and Family Therapy Examiners
- State Board of Medical Examiners
- State Board of Mortuary Science of New Jersey
- State Board of Physical Therapy Examiners
- State Board of Polysomnography
- State Board of Professional Engineers and Land Surveyors
- State Board of Professional Planners
- State Board of Psychological Examiners
- State Board of Respiratory Care
- State Board of Social Work Examiners
- State Board of Veterinary Medical Examiners
- State Real Estate Appraisers Board

#### Businesses Registered by the Office of Consumer Protection at the Division of Consumer Affairs

- Career Consulting Firms
- Career Counseling Firms/Agents
- Charitable Organizations
- Consulting Firms (Headhunters)
- Consulting/Temp Agencies

- Employment Agencies/Agents
- Entertainment Agencies/Agents
- Fantasy Sports Operators
- Health Care Service Firms
- Health Clubs
- Home Elevation Contractors
- Home Improvement Contractors
- International Labor Matching/Matchmaking Organization
- Job Listing Services
- Nurses Registry
- Public Movers & Warehousemen
- Resume Services/Agent
- Telemarketers
- Temporary Help Service Firms
- Ticket Agents
- Vehicle Product Protection Warrantors

#### Registrations with the Bureau of Securities in the Division of Consumer Affairs

- Agent
- Broker-dealer
- Investment Adviser
- Investment adviser representative
- Internet site operator

#### Registrations with the Office of Weights and Measures

- Building Materials Dealer
- Certified Weighmaster
- Installing or Repairing Weighing and/or Measuring Devices
- Selling, Trading-in, Receiving, Installing or Repairing Condemned, Rebuilt or Used Weighing or Measuring Devices





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**TESTIMONY REGARDING CIVIL ASSET FORFEITURE IN NEW JERSEY**  
**ALEXANDER SHALOM**  
**AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY**

**BEFORE THE NJ ADVISORY COMMITTEE**  
**TO THE U.S. COMMISSION ON CIVIL RIGHTS**

*November 19, 2020*

Thank you to members of the advisory committee for the opportunity to testify today regarding problems with New Jersey's civil asset forfeiture practices. For the last decade, I have been a lawyer with the American Civil Liberties Union of New Jersey (ACLU-NJ).

Founded in 1960, the ACLU-NJ is the state's leading organization dedicated to defending and advancing civil rights and liberties. We are a non-profit, non-partisan organization with more than 40,000 members and donors across New Jersey.

One of my roles at the ACLU-NJ was supervising a law fellow who was working full time representing people in civil asset forfeiture cases. You've heard her name already – Liza Weisberg. As she described the civil asset forfeiture process to me, it looks nothing like justice.

It is true, as you've heard from some of the other speakers, that in theory, civil asset forfeiture empowers law enforcement authorities to deprive individuals of the ill-gotten profits or illicit instrumentalities of crimes.

In reality, civil asset forfeiture grants law enforcement authorities effective impunity to steal from the public to enrich their departments. In 2019, Liza and the ACLU of New Jersey issued an alarming [report on the use of civil asset forfeiture](#) in our state. The report reveals that our forfeiture system is failing all New Jerseyans – and especially those in low-income communities and communities of color.

As Liza explained to me, in most of the cases she worked on, like Mr. Burdette's, claimants won their money or property back. But those cases are the exceptions – not for having winning claims but for coming forward in the first instance to put the State to its burden of proof.

Claimants challenge forfeitures in just *three percent* of cases in New Jersey. Prosecutors count on winning default judgments. Between January and June of 2016, claimants went to court in only 50 of the over 1,860 cases initiated by county prosecutors in the state. Those 1,860 cases involved more than \$5.5 million in seized cash, 234 cars, and even a home.

It is neither an accident nor a surprise that so few people fight back. Most seizures take place in heavily policed, low-income communities. Of the 10 cities with the highest frequency of seizures in New Jersey, [eight are among the poorest in the state](#), falling within the bottom quartile in median income rankings. Often, just the court filing fees are prohibitive, let alone the cost of hiring a private attorney. Public defenders in New Jersey are generally barred from representing their clients in civil matters, and most legal services providers don't offer free assistance in forfeiture cases.

Let me give you one particularly troubling example from Hudson County, where the Prosecutor's Office engaged in a particularly unfair practice. The county routinely sued dozens of unrelated people in the same civil forfeiture lawsuit, depriving them of a fair opportunity to contest the seizures. In New Jersey, cases involving less than \$15,000 are brought in the Special Civil Part of the Law Division, a court that's friendlier to people without lawyers, where it costs under \$50 to respond to a lawsuit.

Rather than use this forum, the Hudson County Prosecutor's Office waited until it has enough seizure claims to total \$15,000, and then it brought one big lawsuit in the Law Division of the Superior Court, where people have to pay \$175 to respond to a lawsuit. For example, one ACLU-NJ client had to pay \$175 to challenge a seizure of \$171.

These suits included people who had never met each other, who encountered law enforcement on different days, in different cities. It violated New Jersey court rules, and it deprived people of due process by making them pay more to challenge a forfeiture than was taken in the first place. But – until the ACLU-NJ challenged the policy – it was the routine practice in Hudson County for years.

Even without that sort of troubling practice, the combined costs of litigation, including filing fees and counsel costs, frequently exceed the value of the seized property, so mounting a challenge is a losing proposition from the start.

A claimant who can overcome these financial barriers quickly faces an uphill legal battle. The government only needs to prove by a preponderance of the evidence – i.e., “more likely than not” – that assets are linked to criminal activity in order to permanently seize them, delivering a windfall to the initiating law enforcement agency. This standard applies even if claimants are never criminally charged or criminal charges against them are dismissed.

If police stopped you on the street, took the money from your wallet, and asked you to tell them exactly where, when, and how you got every dollar, could you? When challenging the seizure of their property, claimants have to justify every cent to their name. Accordingly, claimants face the exceedingly difficult task of proving a negative: that their money was not connected to a crime.

Several of the clients Liza worked with didn’t have bank accounts, making them particularly vulnerable to cash seizures. Police and prosecutors treated their possession of a large sum of cash as if it were a guilty act in itself. But carrying a few hundred dollars at a time is neither against the law nor a smoking gun. For many, it’s a month’s rent, a week’s wages, or a loan from a family member.

Take an example of another of Liza’s clients. In a blog post she wrote, she referred to him using the pseudonym Andrew. He was stopped by police outside his home in Newark after a pair of officers had arrested someone for buying a small amount of marijuana a few blocks away. When they called for backup, the officers shared a description of the seller: a Black man in dark clothing. The responding officers determined Andrew fit that description, as did presumably dozens of other people in the neighborhood. Andrew had no drugs or paraphernalia, but he did have about \$750 with him. When we provided the prosecutor with proof that he had received a monthly Social Security payment of \$780 just five days prior, the prosecutor asked skeptically, “and then it turned into cash?” Apparently, this alchemy – the kind an ATM or bank teller performs – was more far-fetched than Andrew’s innocence.

Opportunities for reforming civil asset forfeiture are as glaring as the biases and inequities that fuel it. Critics of this practice do not all fall on one side of the political spectrum. For example, Supreme Court Justice Clarence Thomas has questioned whether its roots in English customs law are “capable of sustaining, as a constitutional matter, the contours of modern practice.” He explained that “[t]his

system—where police can seize property with limited judicial oversight and retain it for their own use—has led to egregious and well-chronicled abuses.” More troubling still, these abuses disproportionately burden low-income communities and “other groups least able to defend their interests in forfeiture proceedings.”<sup>1</sup>

Ultimately, civil asset forfeiture should end altogether. But in the meantime, decision-makers can take steps to curtail the worst abuses. New Jersey recently made great progress by mandating some transparency in the use of civil asset forfeiture. County prosecutors are now required to track and report information on seizures and forfeiture actions.

But there remain at least two reforms that should be undertaken immediately.

First, states like New Jersey can and must acknowledge that this system, for all practical purposes, operates as a form of punishment. As a result, *all* the protections afforded to criminal defendants should attach. There should be a right to counsel in every case, prosecutors should meet the criminal burden of proof “beyond a reasonable doubt,” and no forfeiture should take place absent of a criminal conviction.

Second, law enforcement should not directly profit from civil asset forfeiture. Instead, cash and proceeds from seized property should be deposited in the state general fund rather than funneled back into the coffers of the initiating agency or department. That would limit law enforcement incentives for aggressively pursuing forfeiture actions.

New Jerseyans deserve no less, and much more.

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<sup>1</sup> *Leonard v. Texas*, 137 S. Ct. 847 (2017) (Thomas, J., statement respecting the denial of certiorari).

**NJ ADVISORY COMMITTEE TO THE  
US COMMISSION ON CIVIL RIGHTS  
*PANEL BRIEFING: IMPACT OF CRIMINAL RECORDS ON CRIMINAL  
ASSET FORFEITURE; ACCESS TO OCCUPATIONAL LICENSES*  
REMARKS BY SENATOR TROY SINGLETON  
NOVEMBER 12, 2020**

**WELCOME:**

Thank you to the U.S. Commission on Civil Rights for hosting this important briefing today, and inviting me to speak on this issue.

I also want to acknowledge the other panelists here today – Todd Clear, a professor at Rutgers Newark, and Paul Rodriguez, the Acting Director of the New Jersey Division of Consumer Affairs. My team has worked with Paul and his staff closely on many issues on behalf of consumers in our state.

**DIGNITY OF WORK:**

My name is Troy Singleton, and I represent the 7<sup>th</sup> Legislative District, which includes 17 towns in Burlington County, New Jersey. Prior to joining the Senate in January 2018, I was a member of the General Assembly.

As a state legislator, a workers’ rights advocate, and simply as a human being, I believe strongly in what we call “the dignity of work.”

The dignity of work is a valuable attribute, one that should be attainable and within reach for anyone who is willing and able to work –including, and especially, those with a criminal history.

So what do we mean by dignity of work? I mean that when people have the opportunity to express themselves and be productive and contributing members of society, they can achieve their full potential. Further, dignity in work means that no occupation is considered more superior than another, regardless of whether that job requires mental labor or physical toil. Essentially, it is the view that all jobs should be respected equally because of the value that they bring to the worker, and to our collective society.

It is the idea that work is more than just getting a paycheck each week. It is way for individuals to find self-worth, be responsible, and have structure in their lives.

Which brings us to the reason we are here today – to discuss the value that work especially brings to individuals with a criminal history, and our efforts to expand their access to meaningful, sustainable work opportunities through our legislative proposal, Senate bill 942.

This legislation would require certain standards for professional and occupational boards considering applicants with criminal history records. By requiring professional boards to consider applicants who have made mistakes in the past, we are showing people that their past conviction will not be a barrier to future success. We see this as a major step forward in revolutionizing and modernizing criminal justice reform.

### **BARRIERS TO WORK:**

First, before we begin a discussion of why a legislative remedy is needed, we should discuss the barriers that currently exist for workers with a criminal history, and how this impacts recidivism.

To understand the scope of this problem, consider this statistic:

Nearly one in three U.S. adults has a record in the criminal justice system. Yes, one in three.

The three years following release from prison is the window in which ex-prisoners are mostly likely to re-offend. Successful entry into the labor force has been shown to greatly increase the chances that a prisoner will not recidivate. Yet, over 60 percent of former prisoners remain unemployed a year after rejoining society.

To put it simply – without meaningful work, persons with a criminal history will likely end up back in prison.

The Center for the Study of Economic Liberty estimates that between 1997 and 2007 the states with the heaviest occupational licensing burdens saw an average increase in the three-year, new-crime recidivism rate of over nine percent. Conversely, the states that had the lowest burdens and no such character provisions saw an average decline in that recidivism rate of nearly 2.5 percent.

Although no national data exists as to the number of people denied licenses because of criminal records, analogous data is available in the hiring context. For example, after submitting a job application, people with records on average are only half as likely to get a callback as those without a record. And for black men

with records, the impact is more severe— only one in three receive a callback. Thus, having a conviction record, particularly for people of color, is a major barrier to participation in the labor market.

## **ACCESS TO WORK**

For these reasons, we must be seeking to remove these existing barriers through Senate Bill 942. This legislation requires professional and occupational boards in the Division of Consumer Affairs, as well as other government entities, to consider whether the prior crime/ conviction has a direct or substantial relationship to the occupation regulated by the board before disqualifying them from certification, registration or licensure.

It is important to note that the Division of Consumer Affairs maintains 48 professional and occupational licensing boards that oversee and regulate more than 750,000 individuals and businesses in New Jersey. It is literally a gateway to meaningful work and new professions and trades.

Current law permits a board to refuse to admit a person to an examination or refuse to issue or to suspend or revoke any certificate, registration or license issued by the board upon proof that the person has been convicted of any crime or offense involving moral turpitude or relating adversely to the activity regulated by the board.

The bill would amend this standard of proof to delete the reference to a crime or offense involving moral turpitude, and would require that the crime or offense have a direct or substantial relationship, rather than adversely related, to the sought license or would be inconsistent with the public's health, safety, or welfare.

In addition, the bill would supplement current law to provide that no person will be disqualified from obtaining or holding any certificate, registration or license issued by a board **solely because of a prior conviction** of a crime or offense, unless the crime or offense has a direct and substantial relationship to the profession or occupation regulated by the board or is inconsistent with public safety.

The bill would establish standards the board must consider in determining whether a crime or offense meets that standard, including:

- a) the nature and seriousness of the crime or offense and the passage of time since its commission;

- b) the relationship of the crime or offense to the purposes of regulating the profession or occupation regulated by the board;
- c) any evidence of rehabilitation of the person in the period of time following the prior conviction; and
- d) the relationship of the crime or offense to the ability, capacity, and fitness required to perform the duties and discharge the responsibilities of the profession or occupation regulated by the board.

The bill would provide that a board could not disqualify a person from obtaining or holding a certificate, registration or license issued by the board because of a person's prior conviction of a crime unless it provides the person with a written notice that the board has determined that the conviction may disqualify the person, an explanation of why such determination was made, and affords the person an opportunity to be heard before the board prior to the board making a final decision on whether to disqualify the person.

The hearing would need to be held within thirty days of the notice being received by the individual. If the board's final decision is to disqualify the person, the board would be required to notify the person in writing, no later than thirty days after the hearing, as to the grounds and reasons for the disqualification, the earliest date upon which the person could reapply, and that additional evidence of rehabilitation could be considered upon reapplication.

The bill would provide that a person's prior conviction for murder or any sex offense that would qualify the person for registration under "Megan's Law," or under an equivalent statute of another state or jurisdiction, creates a rebuttable presumption that a direct or substantial relationship exists between the prior conviction and the profession or occupation regulated by the board.

Finally, the bill would require the division to obtain data concerning the number of, and reasons for, disqualification by any board pursuant to the provisions of the bill, and annually submit a report to the Legislature that provides the disqualification data for each board.

#### **TIME TO MAKE IT WORK:**

While we have been advocating for these changes for years, we have made substantial progress during this legislative session. The bill passed Senate Commerce Committee in January, was amended and passed the Senate Budget



Committee in June, and passed the full Senate on June 29, 2020. It now awaits action in the Assembly.

But there is no time like the present to get this bill across the finish line, especially when Governor Murphy signed legislation that would allow at least 2,000 prisoners to be released early due to the public health emergency. These are inmates who will need housing, social services, and of course, – job opportunities. The first wave of these folks was released last week.

They say that “politics makes strange bedfellows.” This idea of removing barriers to occupational licenses is one of those rare occasions that unite those on the opposite ends of the political and policy spectrums, showing the strength behind this idea.

For the reasons I outlined in this testimony, I firmly believe that through meaningful employment, we can reduce recidivism and provide former inmates with the dignity of work with this legislation. It is time to stop punishing individuals for past mistakes, and time to remove the barriers that stand in the way of their path to a purposeful career.

Thank you.

**Opening Statement of:**

Stephen Slivinski  
Senior Research Fellow  
Center for the Study of Economic Liberty  
Arizona State University

**Delivered to:**

New Jersey Advisory Committee to the U.S. Commission on Civil Rights

**Meeting date:**

September 24, 2020

Ladies and gentlemen of the New Jersey Advisory Committee: thank you for the opportunity to speak to you today on this very important topic.

As already stated by those testifying today, occupational licensing burdens can create a barrier to entry for many workers across a variety of skill-levels. Those burdens, however, aren't always distributed evenly. In fact, as I will suggest today, the burdens fall heaviest on those who have a criminal record.

Someone who has already served their time and hoping to get a start at a new life can actually face the highest burdens of all: licensing regulations and licensing boards who are willing – or, in some cases, required – to reject an otherwise qualified license applicant merely because they have served some time in prison or have a criminal record. This has clear implications both to the success of state re-entry programs as well as the success of criminal justice reforms broadly defined.

To see how the burdens of occupational licensing can have these impacts, let's begin with thinking about the labor market realities that those leaving prison are facing even before they start the occupational licensing process.

**Hurdle #1:** The vast majority of those released from prison have lower levels of education and little to no job skills when compared to the general population. (The analysis here focuses on males.) While 85% of the general male population (18 years and older) have achieved a high school diploma and/or completed some sort of college (including B.A. degrees or higher), a smaller percentage (around 77%) of those in prison have achieved no more than a high school education (and most of those are GEDs, likely earned while in prison).

Here we encounter the first barrier faced by many leaving prison – a skill-based barrier. If we assume that the population leaving prison has the same or similar levels of educational attainment as those who remain in prison, then we can view this as also descriptive of the general population of ex-prisoners seeking to enter the labor force. This skills-based barrier already puts them at a disadvantage in the labor market. It also suggests that they are more likely to be looking for employment largely in low-skilled jobs, many of which are in the services and construction sector. Yet, these are the same occupations that are generally the most heavily regulated by occupational licensing statutes.

**Hurdle #2:** Now assume that the worker seeking re-entry into society and the labor market needs to obtain a state-issued license for the job they wish to pursue. The second hurdle is therefore the training required by law for those positions. This could take anywhere between several months to several years in some states and for some occupations. This can also be very costly in terms of dollars spent, possibly translated to thousands of dollars in tuition and training fees.

Hurdles #1 and #2 may be overcome - not necessarily easily, but they can be overcome with hard work, loans from family members, and support from the community. Hurdle #3, however, is one that they are not able to overcome through any amount of effort because the deck is stacked against them legally.

**Hurdle #3:** Despite all of the training and success in obtaining new skills, someone who has a criminal record may still not be able to overcome the licensing barrier. The American Bar Association has cataloged an estimated 32,000 state laws specific to occupational licenses and business licenses that included provisions regarding the consideration of criminal records. Among them are state laws that have automatic rejections of applications from applicants with a criminal record. These types of laws make up one-third of the laws cataloged. (Note: the restoration of other types of civil rights and privileges are important here too - such as the ability to obtain a driver's license, for instance - but are not the focus of my main analysis.)

These laws - often called "good moral character" laws - can be specific (like the automatic rejections of applicants with criminal records) or they can be vague. The vague laws in particular give a great deal of discretion to licensing boards which have a strong incentive (and the legal power) to keep out competition from both law-abiding license applicants as well as those with criminal records. This

can create just as unbreakable a barrier as the strict laws do. From an economist's perspective, erecting such an unsurmountable barrier creates an incentive for ex-prisoners to return to a life of crime rather than to pursue formal employment, the latter of which has now been made far more costly than the option of deriving potential income through crime.

From an empirical perspective, researchers have found some patterns that are different in states that have heavy occupational licensing barriers already. Some (myself included) have gone a little further to see how these "good moral character" laws may have led to some bigger-picture trends.

The best way to test this would be to track the actual employment outcomes of cohorts of people as they leave prison. Such datasets do not exist yet, or at least not in the form or frequency that makes robust state-by-state comparisons over time possible. One thing we do have, however - recidivism (i.e., re-offense) rates — might be suitable to seeing the trends. If it is indeed the case that licensing laws wall-off gainful legal employment for those coming out of prison, then it stands to reason that we might see more of those people returning to crime instead of legal employment.

I authored or co-authored two studies on the topic between 2016 and 2019 (and another is in the works). The main focus of analysis was the three-year new crime recidivism rate in 33 states between the years of 1997 and 2007. (The source of the data was the Pew Center for the States based on their own surveys designed to mirror the Bureau of Justice Statistics surveys.) The reason the "new crime" recidivism rate was used is because it excludes "technical violations" and other factors that were very inconsistent between states. Each state, however, defines "new crime" very similarly. Additionally, the three-time frame was significant because it is both the period of time when a large portion of recidivism occurs (over 70%) and also lines up most closely with the amount of time required to obtain the training necessary to qualify for an occupational license.

Sure enough, there was a clear pattern in the states that had the heaviest licensing burdens for those coming out of prison (meaning: those burdens that required the most training, highest fees, and had the strictest "good moral character" provisions as defined by the American Bar Association in conjunction with the National Employment Law Project.) Those stricter states saw an increase in the recidivism rate between of between 9% to 12%. This was at a time when the national average 3-year new crime recidivism rate grew between 2% to 3%.

Meanwhile, the states with both the lowest relative occupational licensing requirements and the least strict (or nonexistent) “good moral character” provisions saw a decline in that recidivism rate of between 2.5% to 4%. The correlation between these licensing burdens and this recidivism rate still exists even after for adjusting for factors, such as the unemployment rate in each state and the overall crime rate. The only other factor that had the kind of expected predictive power was the unemployment rate. Or, to put it another way, one of the more reliable predictors of the recidivism rate in a state is the employment climate of state (how many jobs are available) followed closely behind by the barriers erected by state laws to keep those with criminal records from obtaining those jobs.

In conclusion, I’d like to leave you with a big-picture policy suggestion that comes naturally out of this analysis: Any substantial reform to achieve the successful re-entry of those coming out of prison should include a re-examination of occupational licensing laws that currently include “good moral character” provisions or that give licensing boards disproportionate power to decide which applicants meet that standard. One change that could be made would require a licensing board to only include criminal activity that is directly related to the license being sought. (For instance, financial fraud would automatically bar you from gaining a financial advisors license in the future, but it shouldn’t bar you from gaining a license to be a barber.)

In the end, the best reform would be to eliminate these standards altogether. The consensus on occupational licensing requirements and their real-world unconnectedness to discernible public health, safety, and quality outcomes should give lawmakers pause when considering extending them or instituting them in the first place. The safety of the public - and, just as importantly, the well-being of those who are striving for a second chance in life - are not well-served by these laws in their current form.

## OCCUPATIONAL LICENSING IS HOLDING BACK NEW JERSEY

Edward J. Timmons

*Senior Affiliated Scholar, Mercatus Center at George Mason University*

New Jersey Advisory Committee to the US Commission on Civil Rights

September 24, 2020

Chairman Lustberg and all distinguished members of the New Jersey State Advisory Committee to the US Commission on Civil Rights: thank you for inviting me to speak about the effects of occupational licensing on the citizens of New Jersey.

I am a professor of economics at Saint Francis University in Loretto, Pennsylvania, and the director of the Knee Center for the Study of Occupational Regulation, the only university-based academic center focusing solely on the topic of occupational regulation. I am also a senior affiliated scholar with the Mercatus Center at George Mason University. I have been involved with or led three federally funded grant projects exploring the issue. Most of my comments today are based on a report that I coauthored for the Archbridge Institute and my subsequent publication from last year.<sup>1</sup>

The main takeaways of my comments are the following:

1. Occupational licensing places a disproportionate burden on low-income Americans and the disadvantaged—especially individuals with a criminal record.
2. There is little to no evidence that occupational licensing helps to protect consumers. On the contrary, licensing makes services more expensive.
3. Between 1993 and 2012, New Jersey added licensing requirements for 38 low- and moderate-income occupations—7 more occupations than the national average of 31.
4. Based on my research, I estimate that this increase in regulation reduced upward economic mobility by 4.3 percent and increased income inequality by almost 10 percent for New Jersey residents.

### SOME BACKGROUND ON OCCUPATIONAL LICENSING

Occupational licensing laws establish mandatory requirements for entry into a profession. Occupational licensing, which is the strictest form of occupational regulation, is rarely necessary for the protection of

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1. Edward J. Timmons et al., *Too Much License? A Closer Look at Occupational Licensing and Economic Mobility* (Washington, DC: Archbridge Institute, 2018); Brian Meehan et al., "The Effects of Growth in Occupational Licensing on Intergenerational Mobility," *Economics Bulletin* 39, no. 2 (2019): 1516–28.

consumers. As an example, chefs and restaurant staff are not required to obtain a license to work, but this does not mean that the workers are not subject to regulation. Instead, the restaurant is subject to other regulations, including random health inspections, as well as market-based discipline, facilitated with the help of tools such as customer feedback and ratings from a variety of private sources.

The fraction of the US workforce that is licensed has significantly grown in the past 60 years. In the 1950s, approximately 5 percent of workers were licensed.<sup>2</sup> Today, that figure stands at 21.5 percent.<sup>3</sup> The expressed purpose of occupational licensing laws is to protect consumers and maintain a minimum-quality standard for professions. The existing evidence that occupational licensing fulfills this purpose is ambiguous at best.<sup>4</sup> In fact, new research indicates that licensing may reduce consumer perceptions of the quality of service.<sup>5</sup> Consumers in an online platform for home-improvement services were much more interested in online ratings than the licensing status of their service providers.<sup>6</sup> Conversely, evidence on the costs of licensing is much more conclusive. An Obama White House report notes that “the evidence on licensing’s effects on prices is unequivocal.”<sup>7</sup> Licensing is found to increase prices by anywhere from 3 to 16 percent.<sup>8</sup> In addition, licensing is found to reduce the supply of workers by 17 to 27 percent.<sup>9</sup>

## HOW GROWTH IN LICENSING HOLDS BACK NEW JERSEY CITIZENS

In research that I coauthored, my fellow investigators and I conduct a nationwide analysis of growth in occupational licensing and its effects on Americans.<sup>10</sup> We find that from 1993 to 2012, states added licensing requirements for 31 low- and moderate-income occupations on average. New Jersey added licensing requirements for 38 occupations.

Our estimates suggest that by adding more licensing requirements, New Jersey made it harder for many aspiring workers to enter the job market. Relative to the average state, greater increases in licensing in New Jersey reduced economic mobility by 4.3 percent. This means that New Jersey citizens were less likely to earn more than their parents. We also found that increases in licensing in New Jersey increased income inequality by almost 10 percent.

By erecting barriers to entry, occupational licensing reduces the number of career paths for New Jersey citizens. Although we did not measure the effect directly, the most vulnerable of New Jersey citizens are the most likely to feel the brunt of these effects. Existing research generally suggests that minorities face greater costs from occupational licensing.<sup>11</sup> Occupational licensing laws also often bar individuals

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2. Morris M. Kleiner and Alan B. Krueger, “The Prevalence and Effects of Occupational Licensing,” *British Journal of Industrial Relations* 48, no. 4 (2010): 676–87.

3. “49. Certification and Licensing Status of the Civilian Noninstitutional Population 16 Years and over by Employment Status, 2019 Annual Averages,” Bureau of Labor Statistics, last modified January 22, 2020, <https://www.bls.gov/cps/cpsaat49.htm>.

4. US Department of the Treasury, Council of Economic Advisers, and US Department of Labor, *Occupational Licensing: A Framework for Policymakers*, July 2015.

5. Darwyn Deyo, “Licensing and Service Quality: Evidence Using Yelp Consumer Reviews” (unpublished manuscript, n.d.), PDF file, <https://www.aeaweb.org/conference/2017/preliminary/paper/efy2hraQ>.

6. Chiara Farronato et al., “Consumer Protection in an Online World: An Analysis of Occupational Licensing” (NBER Working Paper No. 26601, National Bureau of Economic Research, Cambridge, MA, January 2020).

7. US Department of the Treasury, Council of Economic Advisers, and US Department of Labor, *Occupational Licensing: A Framework*.

8. US Department of the Treasury, Council of Economic Advisers, and US Department of Labor.

9. Peter Blair and Bobby Chung, “How Much of a Barrier Is Occupational Licensing,” *British Journal of Industrial Relations* 57, no. 4 (2019): 919–43.

10. Timmons et al., *Too Much License?*

11. Matthew D. Mitchell and Emma Blair, “A Lose-Lose Proposition,” *The Bridge*, March 17, 2020.

with a criminal record from obtaining a license—even if their crime has little to do with their ability to provide good quality service.<sup>12</sup>

I would encourage policymakers in the state to reconsider the costs and benefits of occupational licensing as a policy tool to enhance consumer safety. As noted, there are a number of policy alternatives—such as private certification—that fulfill the same regulatory objective and do not have the same cost. As an additional example, the National Institute for Automotive Service Excellence is a private nonprofit entity that allows auto mechanics to obtain a credential that can serve as a signal to consumers that mechanics have completed rigorous training. Occupational licensing is not the only regulatory tool available to policymakers. Instead, occupational licensing is the most expensive and cumbersome policy tool, and there is little evidence that it serves its intended purpose. Policymakers should exercise prudence and always carefully consider the costs of occupational licensing.

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12. Nick Sibilla, *Barred from Working: A Nationwide Study of Occupational Licensing Barriers for Ex-Offenders* (Arlington, VA: Institute for Justice, 2020).





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*Governor*

SHEILA Y. OLIVER  
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March 1, 2021

Lawrence S. Lustberg, Esq.  
Chair  
New Jersey Advisory Committee to the  
U.S. Commission on Civil Rights  
Attn: Ivy Davis

*By email [idavis@usccr.gov](mailto:idavis@usccr.gov)*

Dear Chair Lustberg,

I write to provide additional information in response to a question that you asked at the February 10, 2021 Advisory Committee hearing. As you recall, Janice Alvarez, the Chair of the New Jersey State Board of Cosmetology and Hairstyling, testified regarding her experience with the Board's licensing of individuals who have prior criminal convictions. Ms. Alvarez was able to share that that Board received 243 applications from individuals with criminal histories over the course of 2019 and 2020, and that the Board ultimately granted all of those applications. Later in the testimony, you inquired as to how long the Board had been tracking criminal history data for applicants; Ms. Alvarez replied that she did not know.

I write to provide a fuller answer to your question. As then-Acting Director Paul R. Rodríguez explained in his testimony before the Advisory Committee on November 12, 2020, the Boards and Committees staffed and supported by the Division of Consumer Affairs do not currently have the capacity to generate automated reports that detail the number of applications denied on the basis of an applicant's criminal history. If the Boards and Committees wish to tabulate that information, it must be done manually. In advance of the testimony by Ms. Alvarez and Dr. Patricia McKernan, Vice Chair of the Board of Social Work Examiners, we asked our staff to do that manual tabulation in this instance, to provide context for their testimony and as a courtesy to the Advisory Committee. The Division continues to assess its ability to produce meaningful data on this issue, and what upgrades or changes to our systems would be necessary to allow the Division to precisely and routinely report the number of applications denied on the basis of the applicant's prior criminal history.



Thank you for allowing the Division to supplement the record, and for your efforts to ensure equitable access to professional licenses for New Jersey residents.

Sincerely,

A handwritten signature in black ink, appearing to read "Kait Caruso".

Kaitlin A. Caruso  
Acting Director

c: Janice Alvarez  
Dr. Patricia McKernan





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MARCUS O. HICKS, ESQ.

*Commissioner*

Nov. 12, 2020

(Via electronic mail)

**TO: New Jersey Advisory Committee to the U.S. Commission on Civil Rights**

**RE: New Jersey Department of Corrections Rehabilitation and Reentry Efforts**

Dear Committee Members:

On behalf of the New Jersey Department of Corrections (NJDOC), we submit the following comments with respect to the *educational and vocational programs made available to the incarcerated population*. Please note, this is not an exhaustive list.

The New Jersey Department of Corrections (NJDOC) remains steadfast in its commitment to assist with the holistic rehabilitation of the individual in a wide variety of ways. New Jersey is among the states with the lowest recidivism rates in the nation, partly due to our comprehensive

rehabilitative and discharge efforts, as well as our vocational services, all of which are provided to help ensure that the incarcerated successfully reintegrate into society.

## **Rehabilitation**

Our rehabilitation and discharge planning efforts begin as soon as intake. Upon entry, individuals undergo a risk assessment to identify their individualized needs – substance abuse support, mental health support or other medical needs – and identify vocational or educational interests.

Through the Department’s Office of Transitional Services the Department provides a continuum of care utilizing cost-efficient, well-proven behavior science practices system-wide to increase the incarcerated’s skill-set and their motivation to demonstrate responsible, crime-free behavior.

Via intensive evidence-based programming, the incarcerated are provided with the tools necessary to become productive members of the community. Intense transition support in the pre-release phase of an offenders’ incarceration is critical to ensure his or her successful reentry into the community.

Additionally, there are a wide variety of vocational and educational programs in which individuals can participate to help them obtain the skills needed to compete in today’s job market via our Office of Educational Services. Those in our custody can apply to obtain a degree by participating in NJSTEP through which the Department partners with Rutgers University, Raritan Valley Community College and Princeton University. In 2019, 494 high school equivalency diplomas and 83 high school diplomas were awarded. In addition, approximately 7,500 industry certifications were awarded in such diverse fields as forklift, welding, landscaping and cosmetology, to name just a few. The Department incentivizes individuals to take advantage of these programs with credits applied to the remission of time off their sentences.

In 2019, we implemented a new initiative, in partnership with the Department of Labor, called the Providing Access to Community Employment (PACE), designed to eliminate socio-economic inequalities often encountered by those released from custody. The initiative prepares individuals for interviews, helps them attain pre-employment paperwork and brings employers behind the walls to interview those nearing release for job opportunities, with employment offers extended on the spot. Additionally, the Department hosts job fairs behind the walls and the Commissioner has advocated for the hiring of soon-to-be-released individuals to the Casino Commission.

Although the Department moved towards independent learning modules through hard copy packets, the pandemic has shown a light on the need for the Department to expand its technological infrastructure further to support educational and vocational efforts, mirroring remote learning capabilities in community, amidst a public health crisis requiring the need for social distancing. Licensure in certain vocations also continues to be a challenge. For example, while the Department can provide student-inmates with the necessary training to obtain a license, candidates will ultimately need to appear before the State Board of Cosmetology for final approval of their license. Certain offenses (e.g., domestic violence or child abuse) may prevent ex-offenders from earning a license. Although several legislative bills have been introduced in the New Jersey Legislature to address licensing barriers for ex-offenders, this issue has not been

eliminated. Also, certain professions continue to remain off-limits for those with felony records, including healthcare professionals and any professions associated with schools K-12.

### **Reentry**

As it pertains to our exit process, the Department has developed partnerships with federal, state and local agencies to create linkages to resources that provide support to individuals, including social services.

Individuals exiting the prison system are provided with a comprehensive information packet to aid in their successful re-integration into society including various identification documents for eligible individuals. The NJDOC issues temporary identification cards to be recognized as two points for eligible individuals to apply for and receive an MVC non-driver identification card prior to release. In 2020, reentry legislation was further amended to require (at DOC's insistence) that other, state, county municipal entities and state nonprofits be required to recognize the NJDOC ID card as an official temporary ID whenever the Motor Vehicle Commission agencies are closed during a declared public health emergency. This was done to allow released individuals to gain access to services for which they are deemed eligible for the duration of the public health emergency.

The exit process also includes providing released persons final discharge paperwork, a copy of current criminal charges, remaining account balances in the form of a debit card, and medical records summary. Where applicable, released individuals will also be provided with notification of active warrants/detainers, NJ Transit tickets (as needed) for public transportation, any necessary medical referrals and a two-week supply of medication, which during the public health pandemic was expanded to include an additional prescription and refills that in total extend to 90 days unless the provider documents clinical reasoning for not doing so. Individuals are also administered an exit health screening and COVID-19 resources including masks to help navigate the pandemic safely. Those exiting the prison system are also provided a copy of their individualized discharge assessment and plan. Individuals are assessed for medical health along with substance use disorder and referred to community programs as needed.

Discharge plans may include temporary housing assistance, a duplicate Social Security card if deemed eligible by the issuing agency, and assistance in applying for Medicaid, SNAP, and General Assistance.

The aforementioned provides a brief overview of services offered in support of rehabilitation and reentry. As you can see, a significant amount of thoughtful consideration goes into the rehabilitation and reentry process in an effort to provide the tools and resources individuals need to succeed and in support of overall public safety.

**New Jersey Advisory Committee to the  
U.S. Commission on Civil Rights**



**U.S. Commission on Civil Rights**

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For more information, please contact the Eastern Regional Office.

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