



# Justice Center

THE COUNCIL OF STATE GOVERNMENTS

# Addressing Barriers to Licensing for People with Criminal Records

August 9, 2018



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# Presenters

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*The presentation was developed by members of the Council of State Governments Justice Center staff. The statements made reflect the views of the authors, and should not be considered the official position of the Justice Center, the members of the Council of State Governments, or the funding agency supporting the work. Citations available for statistics presented in preceding slides available on CSG Justice Center web site.*



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# Occupational Licensing Project



<http://www.ncsl.org/research/labor-and-employment/occupational-licensing.aspx>

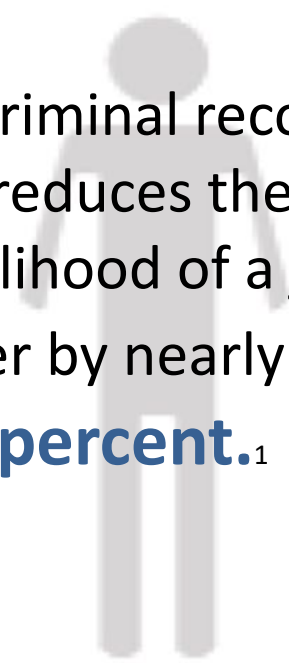


# Overview


- 01 Occupational Licensing and Collateral Consequences
- 02 Policy Options and Best Practices (NELP)
- 03 Policy Options and Best Practices cont. (IJ)



# Criminal records have a broad impact on the individual and community.



A criminal record reduces the likelihood of a job offer by nearly **50 percent**.<sup>1</sup>



In 2014, employment barriers associated with a felony (including licensing barriers) produced a loss of about **1.7 million workers**.<sup>3</sup>



The U.S. economy loses about **\$87 billion** in annual GDP when people with records can't work.<sup>2</sup>

1. Pager, Devah, *Investigating Prisoner Reentry: The Impact of Conviction Status on the Employment Prospects of Young Men* (2009)

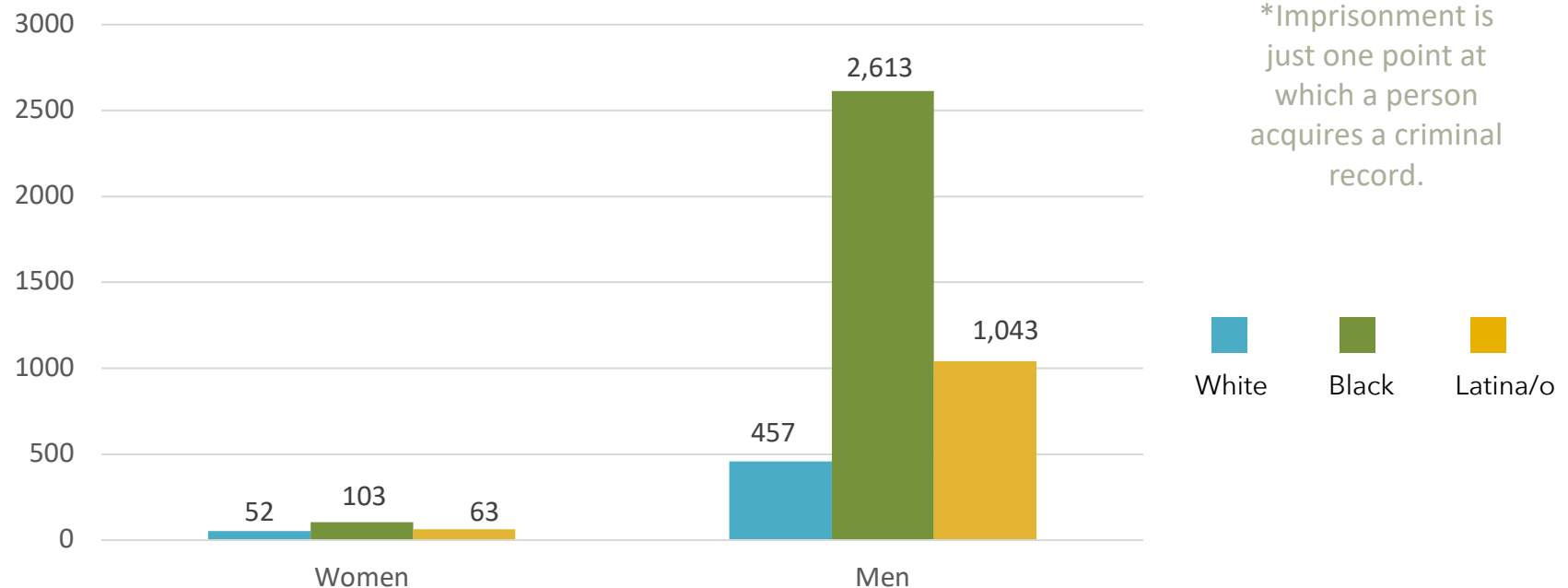
2. Schmitt, John, *Ex-offenders and the Labor Market* (2010)

3. Bucknor, C., & Barber, A. (2016); <http://cepr.net/images/stories/reports/employment-prisoners-felonies-2016-06.pdf?v=5>



# Criminal records have a greater impact on people and communities of color.

\*Rate of Imprisonment per 100,000, by Gender, Race, and Ethnicity, 2015



4. Carson, E.A. and Anderson, E. (2016). Prisoners in 2015. Washington, DC: Bureau of Justice Statistics.



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# Criminal convictions trigger various state and federal “collateral consequences.”

## NATIONAL INVENTORY OF THE COLLATERAL CONSEQUENCES OF CONVICTION

The collateral consequences of a criminal conviction—legal sanctions and restrictions imposed upon people because of their criminal record—are hard to find and harder to understand. Now it will be easier to do both. Congress directed the National Institute of Justice to collect and study collateral consequences in all U.S. jurisdictions, and NIJ selected the ABA Criminal Justice Section to perform the necessary research and analysis. The results are now being made available through this interactive tool.



Over 45,000  
collateral  
consequences in  
state and federal  
law

<https://niccc.csgjusticecenter.org>

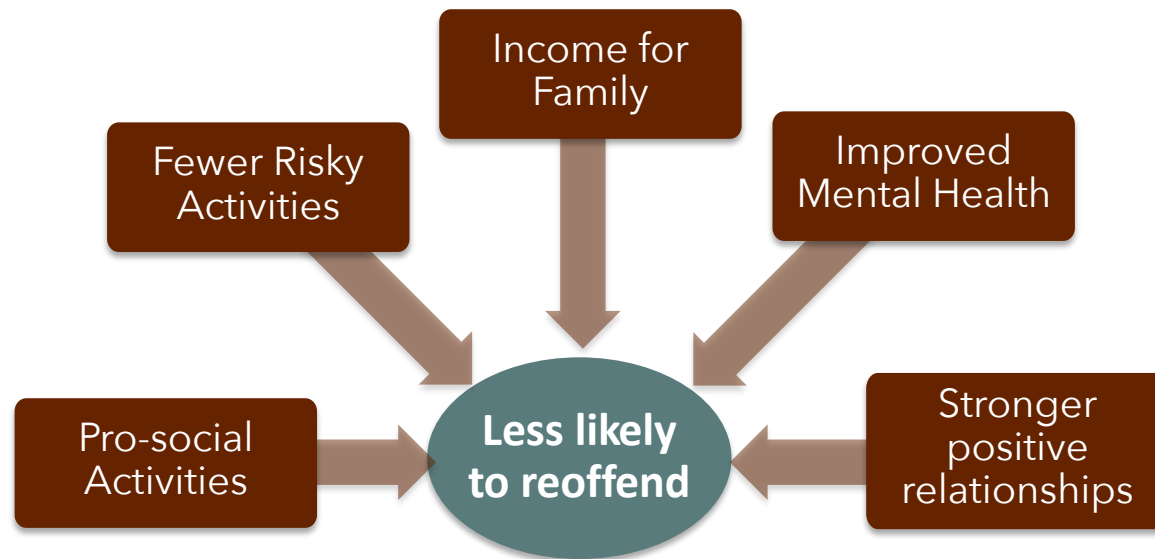


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# Employment plays an important role in successful reintegration after incarceration.



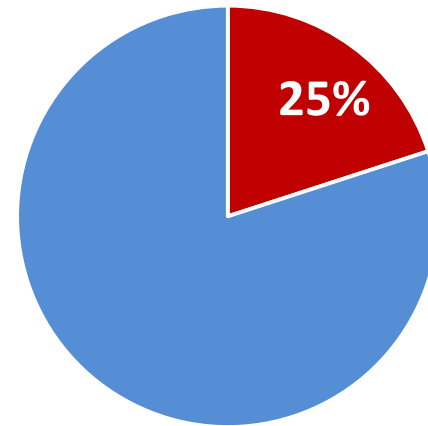
- Especially when earnings are above minimum wage
- Especially with stable jobs

5. Visser et al. *Employment after prison: A longitudinal Study of Releases in Three States*. Urban Institute, Justice Policy Center, (2008).  
<https://www.urban.org/sites/default/files/publication/32106/411778-Employment-after-Prison-A-Longitudinal-Study-of-Releasers-in-Three-States.PDF>



# A growing number of occupations require a license to practice.

More than **800 occupations** are licensed by at least one state, including personal trainers, hair braiders, interior designers, and florists.



Up to **25 percent** of the workforce (and growing) requires an occupational/professional license.

6. <https://www.hhh.umn.edu/news/professor-morris-kleiner-licensing-more-occupations-hurts-economy>

# Collateral consequences restrict licensing avenues for people with criminal convictions.

Across the 50 states and federal system, there are nearly **15,000** collateral consequences that limit occupational licensing opportunities for individuals with criminal records.

Approximately **6,000** consequences serve as blanket (mandatory) bars for certain licenses, based on certain criminal convictions.

7. <https://niccc.csgjusticecenter.org>



# States are adopting different strategies to address the treatment of criminal records in licensing decisions.

## Record Clearance

- Allow a person to remove criminal record from public viewing (seal, expunge, vacate, dismiss, set aside, shield, annul, or destroy).
- Record clearance may relieve a person from disclosing the existence of a criminal record when seeking employment.\*

\*Varies by state and clearance policies

## Occupational Licensing

EEOC Title VII: Apply the “Green” factors

- ☐ Consider nature/gravity of offense
- ☐ Consider time passed since offense
- ☐ Consider nature of the job/occupation held or sought





# Fair Chance Licensing

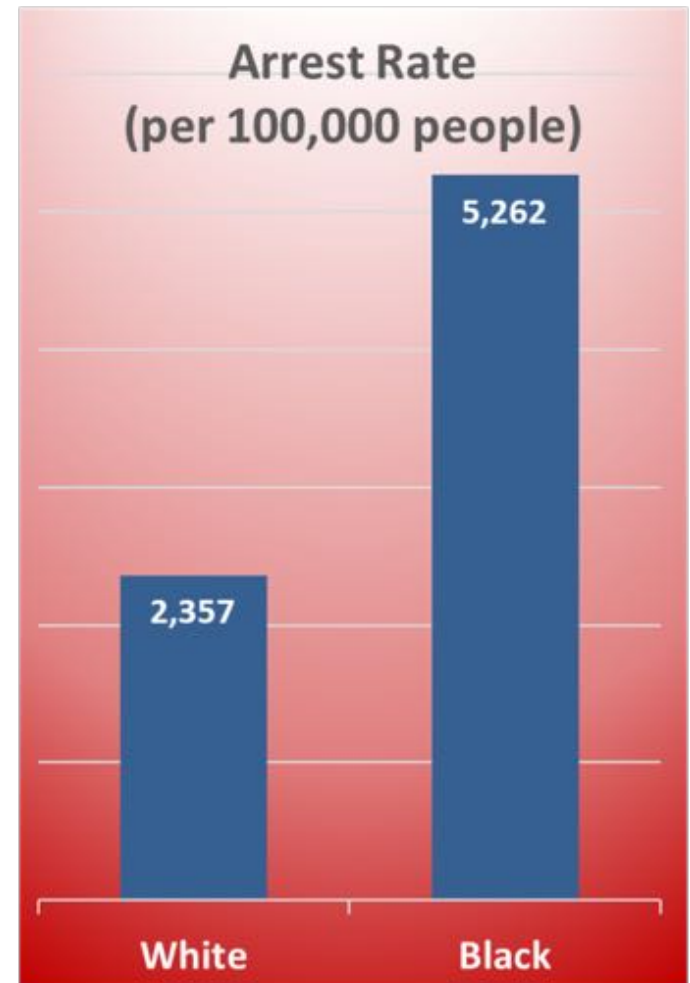
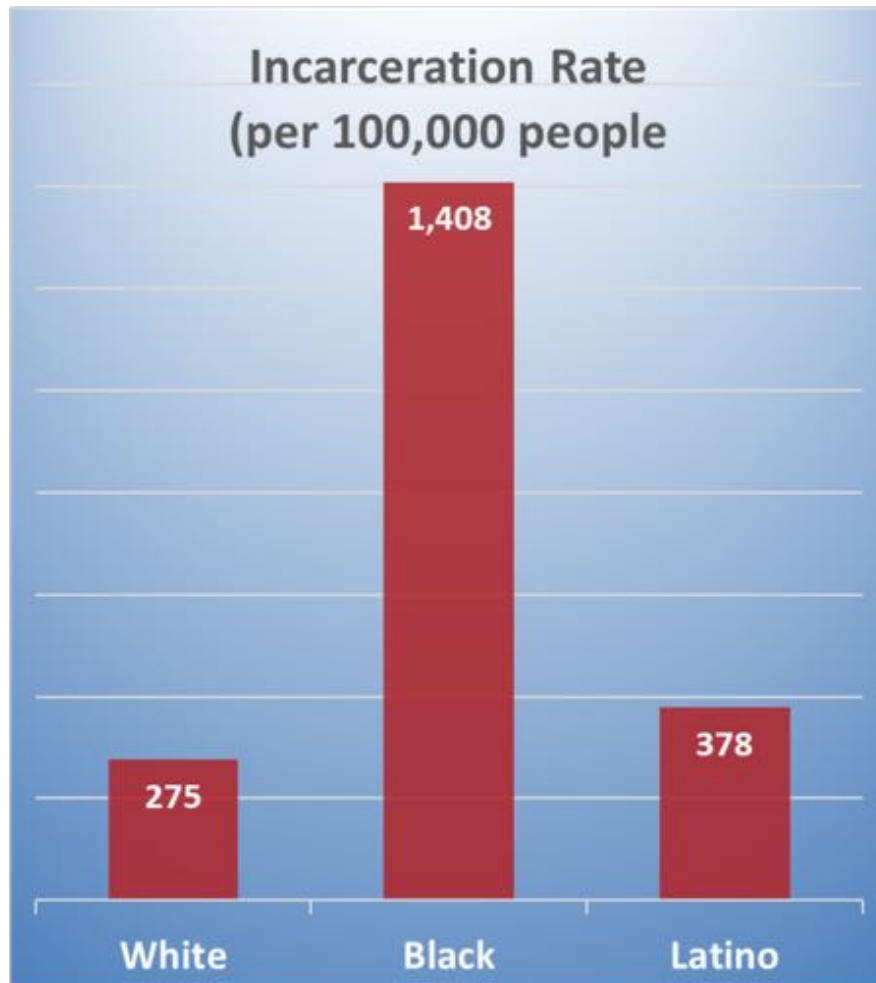
*Removing Barriers to Licensed Professions  
Facing People with Conviction Records*

August 9, 2018



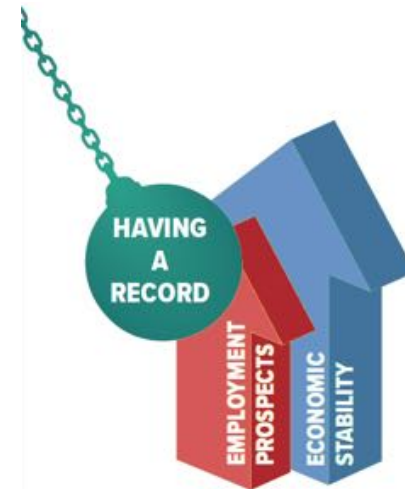
# Communities of Color Most Impacted

Severe race disparities in justice system



# Holding back our next generation

Nearly half of children have a parent with a record



Employment is the  
**#1** most important  
factor for decreasing  
recidivism.





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# Occupational Licensing Laws & Barriers

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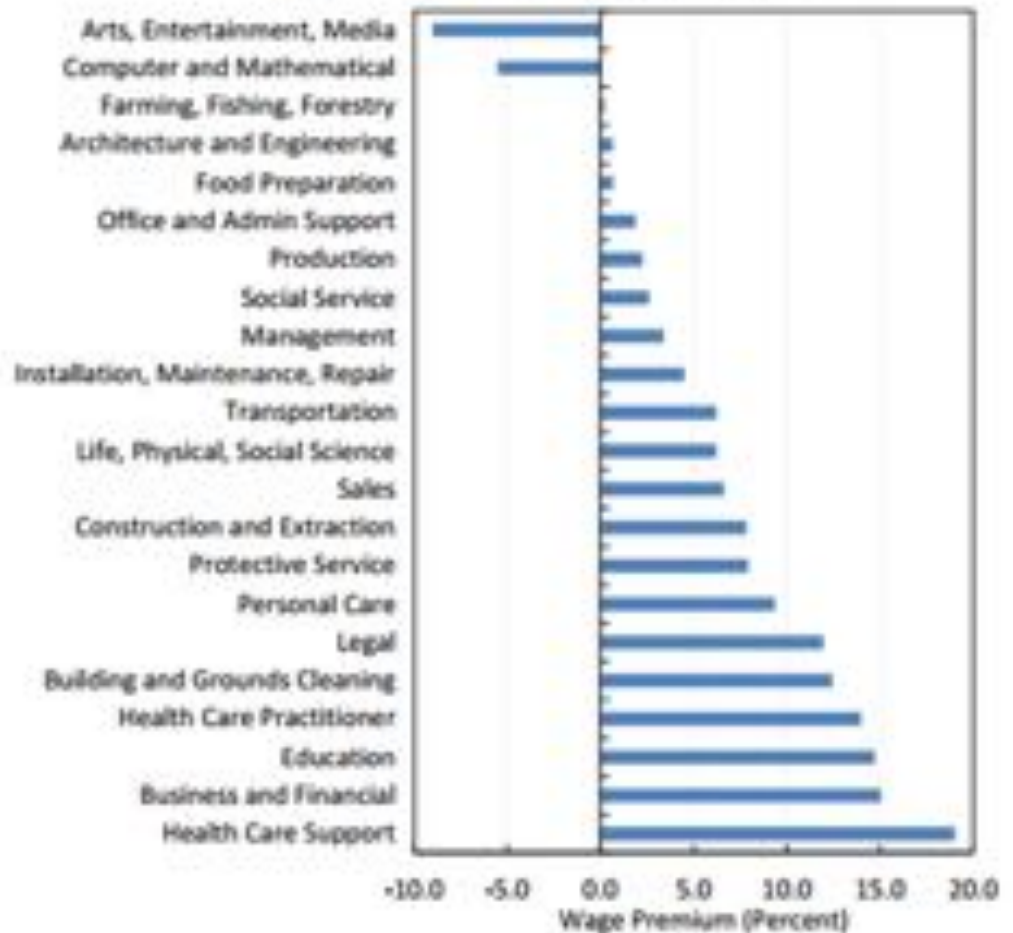


# Licensing Can Benefit Workers

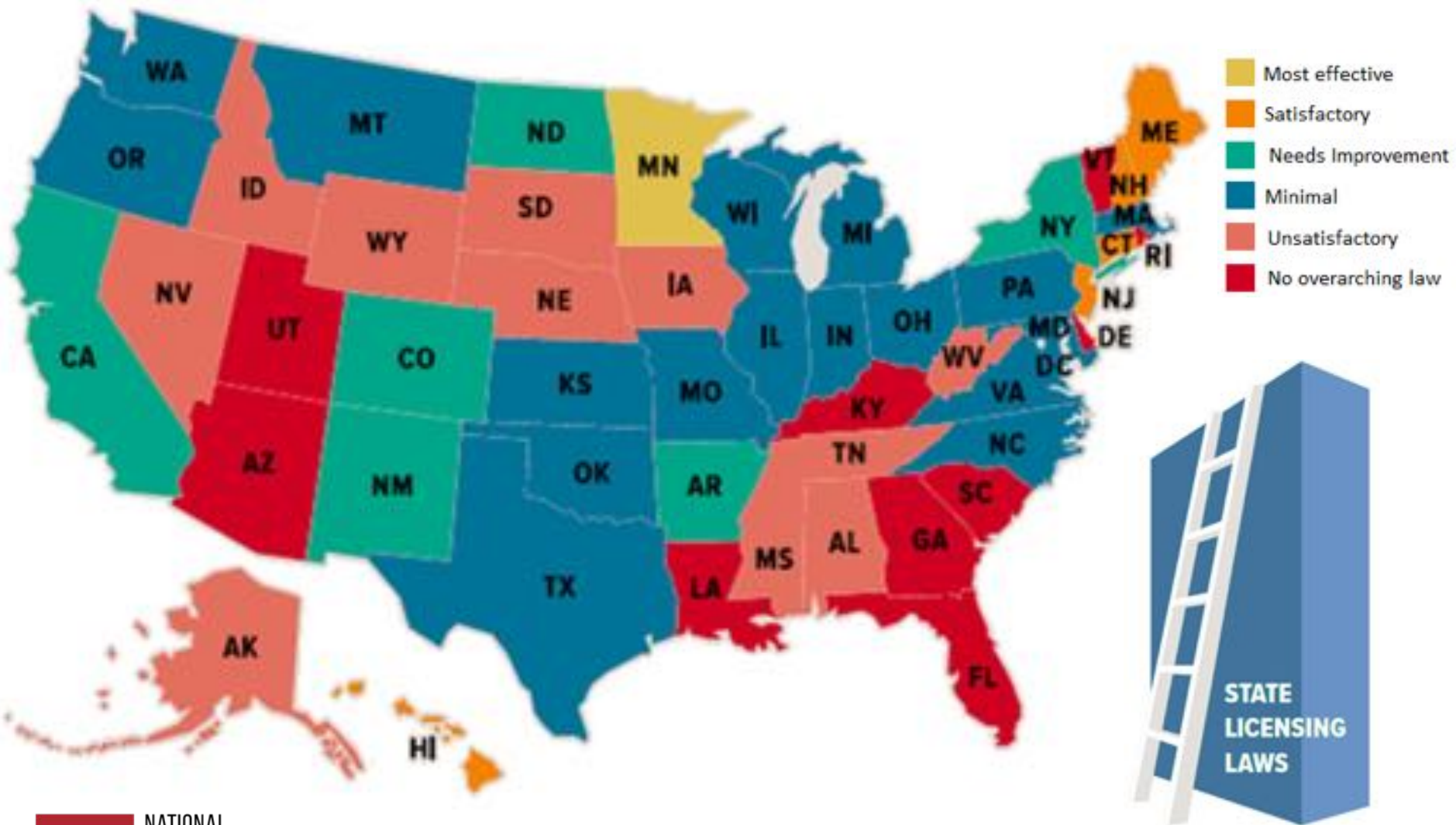
As long as they aren't unfairly excluded

- Protects public safety 
- Increased wages 
- Respect for the occupation 

Wage Effect of Licensing by Occupation



# How are the states doing overall?



# Room for Improvement

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## *10 Reform Suggestions*

Limit Scope  
of Inquiry

Delay  
Background  
Checks

No  
Blanket Bans

Case-by-Case  
Review

Clear  
Applicant  
Guidance

Data  
Collection

No Vague  
Standards

Consider  
Rehabilitation

Notice &  
Chance to  
Respond

Uniform  
Standards

# Remove Blanket Bans

## Kansas Example:

A licensing board “may consider any felony conviction of the applicant, but such a conviction shall not operate as a bar to licensure, certification or registration.”

Kan. Stat. Ann. § 74-120(a)



# Case-by-Case Review

## New Jersey Example:

Licensing authorities may disqualify an applicant **only** if the conviction “**relates adversely to the occupation**,” and they must explain how various factors “relate to the license”:

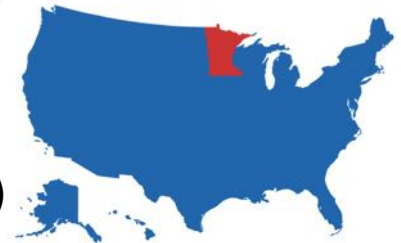
- “**Nature** and seriousness of the crime”
- “**Circumstances** under which the crime occurred”
- “**Date** of the crime”
- “**Age** of the person when the crime was committed”
- “Whether the crime was an **isolated** or repeated incident”
- “**Social conditions** which may have contributed to the crime”



# Consider Rehabilitation

## Minnesota Example:

A person with a conviction “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.”



# Limit Scope of Inquiry

## Pennsylvania Example:

“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 **expunged**.
3. Convictions of a **summary offense**.
4. Convictions for which the individual has received a **pardon** from the Governor.
5. Convictions which **do not relate** to the applicant’s suitability for the license . . . .”



# Remove Vague Standards

## Kansas Example:

“[I]n no case shall non-specific terms, such as moral turpitude or good character, . . . be used to disqualify an individual’s application for licensure”





# Delay Background Checks

## Colorado Example:

“[T]he agency shall not perform a background check until the agency determines that the applicant is a finalist”

Colo. Rev. Stat. § 24-5-101(3)(b)



# Require Ongoing Data Collection

## Illinois Example:

“[E]ach year, the Department must prepare, publicly announce, and publish a report of summary statistical information relating to new license . . . applications,” showing “at minimum”:

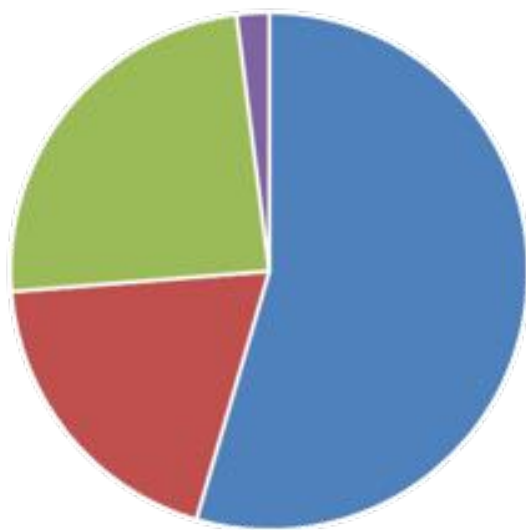
- Number of applicants (and number granted license);
- Number of applicants with a conviction record (and number granted license; denied license; and denied license because of a conviction).



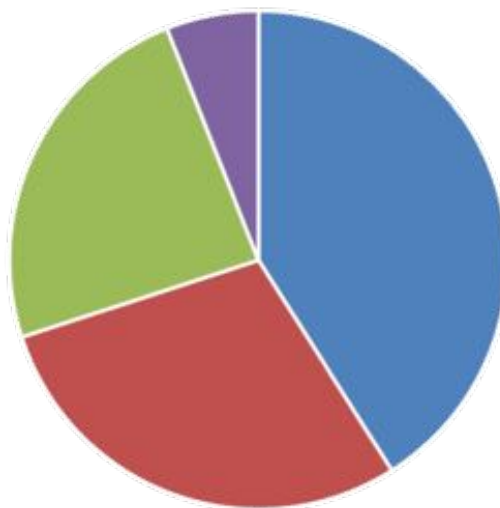
# Do these reforms work? Are they feasible?

## Post-9/11 TSA Credentialing Success Story

Waiver Applications



Appeals



■ African American ■ Latinx ■ White ■ Other

- Post-9/11 screening imposed on 1.5 million port workers.
- Case-by-case review of rehabilitation evidence and accuracy of record.
- TSA granted ~90% of waiver applications and appeals

# Sample of Ongoing Efforts

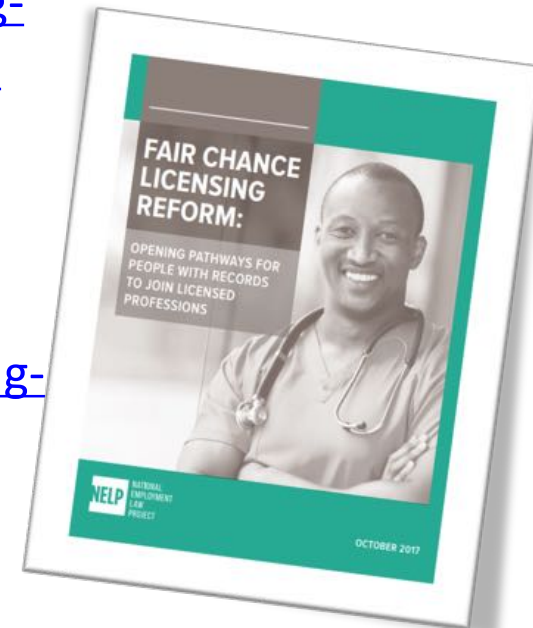
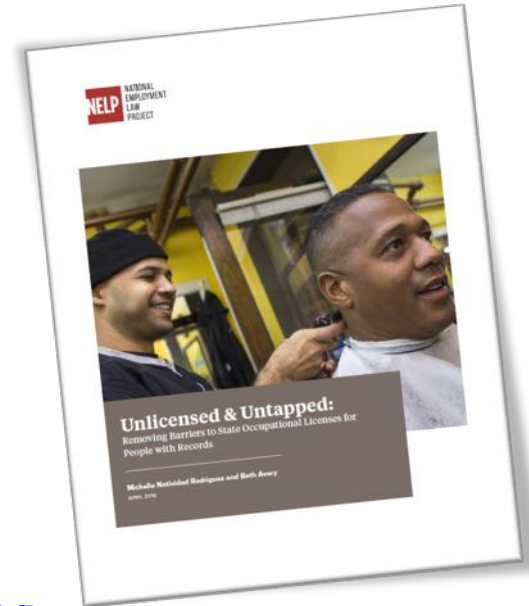
State	Bill(s)	Status	Description
California	<a href="#">AB 2138</a>	Cleared Assembly; upcoming Senate vote	Limits lookback period to 7 years; limits rejections to offenses “substantially related” to occupation; bars consideration of arrests and dismissed convictions; no self-reporting by applicant; requires written notice to applicant and data collection.
District of Columbia	<a href="#">B22-0523</a>	Introduced late 2017	Delays background check; limits rejections to offenses “directly related” to occupation; bars consideration of juvenile/non-conviction/sealed records; requires written notice to applicant, consideration of mitigating factors, and data collection.
Rhode Island	<a href="#">H.8335</a> <a href="#">S.2995</a>	Recently introduced companion bills	Limits rejections to offenses “directly related” to occupation; bars consideration of juvenile/non-conviction/sealed records; requires consideration of rehabilitation evidence; requires written notice to applicant and data collection.

# Sample of Recent Progress

Adopted 2018		Adopted 2017	
<b>Indiana</b> HB 1245	“Directly related” standard; must consider rehabilitation; limits lookback period	<b>Louisiana</b> HB 519	Limits rejections to offenses “directly related” to occupation
<b>Tennessee</b> HB 2248 & SB 2465	“Directly related” standard; written notice; must consider certain factors	<b>Kentucky</b> SB 120	Limits allowable record-based justifications for denying licenses (e.g. no “good moral character” standard)
<b>Kansas</b> HB 2386	“Directly related” standard; no vague standards; limits lookback period; no consideration of arrests	<b>Illinois</b> SB 1688	Requires applicant notice, consideration of mitigating factors, and data collection

# NELP Resources

- **Unlicensed & Untapped: Removing Barriers to State Occupational Licenses for People with Records (2016)**  
<http://nelp.org/publication/unlicensed-untapped-removing-barriers-state-occupational-licenses/>
- **Fair Chance Licensing Reform Toolkit (2017)**  
<http://www.nelp.org/publication/fair-chance-licensing-reform-opening-pathways-for-people-with-records-to-join-licensed-professions/>
- **Fair Chance Licensing Reform Takes Hold in the States (2018)**  
<https://www.nelp.org/publication/fair-chance-licensing-reform-takes-hold-states/>



# Thank You



[www.nelp.org](http://www.nelp.org)

VISIT [NELP.ORG/CAMPAIGN/ENSURING-FAIR-CHANCE-TO-WORK](http://NELP.ORG/CAMPAIGN/ENSURING-FAIR-CHANCE-TO-WORK)  
& CONNECT WITH NELP ONLINE:



# Collateral Consequences in Occupational Licenses

Presentation by:  
Lee McGrath of the Institute for Justice  
at  
Council of State Governments  
Justice Center's Webinar  
August 9, 2018



# Take Aways

- The best occupational license for a person with a criminal record is a license that does not exist.
- Features of IJ's model legislation.

# Institute for Justice (IJ)

- Advocate for fewer occupational licenses
  - Litigate and lobby
  - Original research *License to Work* (2017)
- Non-profit public-interest law firm
  - Founded 1991
  - 50 attorneys in six offices
    - Clinic at the University of Chicago law school
- Six cases before U.S. Supreme Court
  - *Kelo v. New London* (2005)—public use clause in eminent domain takings.
  - *Timbs v. Indiana* (OT 2018)—incorporating 8<sup>th</sup> Amendment's excessive fines clause against states.

# Background

- Biggest labor market institution
  - Occupational licensing: 25% of workers
  - Union representation: 11% of workers
  - Minimum wage: 3% of hourly paid workers

# Background

- Occupational licensing has high costs:
  - Increases unemployment: 1% or 3 million jobs
  - Increases consumer prices: \$200 billion/\$1,000 family p.a.
  - Reverse Robin Hood: Transfers wealth to higher classes
  - Privileges: Formal education over on-the-job training
  - Designed to allow: Regulatory capture
  - Promotes: Corporate welfare
  - Disproportionally: Affects disadvantaged/criminal record
  - Increases: Criminal recidivism

# Background

- Licensing has few benefits to consumers over reputation:
- “...most research does not find that licensing improves quality or public health and safety.”

*Occupational Licensing: A Framework for Policymakers (2015)*

*Council of Economic Advisors to President Barack Obama.*

- 19 studies assessing effect of occupational licensure on quality.
  - Common finding: neutral, mixed or unclear.
  - 3 studies: positive effect on quality.
  - 4 studies: negative effect on quality.

*State of Occupational Licensure in Wisconsin* <https://tinyurl.com/Mercatus-WI>

# Conclusion

- Licensing is a High-Cost/Low-Benefit public policy

# Alternative: Inverted Pyramid of Least Restrictive Regulation

Market Competition

Consumer-created Ratings and Review

Private Certification

Voluntary Bonding and Insurance

Private Civil Action

Deceptive Trade Practice Act

Mandatory Disclosures

Regulation of Process

Inspections

Mandatory Bonding &  
Insurance

Registration

Government  
Certification

License

# Protect Consumers by Using Least Restrictive Regulation.

## Consumer Concern

- Fraud
- Health & safety, cleanliness
- Damages to buyer or 3rd-parties (externalities)
- Fly-by-night providers
- Knowledge gap  
(Asymmetrical information)
- Government reimbursement for new medical  
niche services

## Response

- Deceptive Trade Practice/  
Mandatory Disclosures
- Inspections
- Bonding/insurance
- Registration
- Certification
- Specialty license



# Slivinski's Research

- *Turning Shackles into Bootstraps* (2016)  
Study period: 1997-2007
- States with heaviest occupational licensing burdens:  
Increase in the 3-year, new-crime recidivism rate of over 9%.
- Conversely, states with lowest burdens:  
Decline in that recidivism rate of nearly 2.5%.

## IJ's Model Collateral Consequences in Occupational Licensing Act.

- Petition at any time, including before obtaining training.
- No automatic/mandatory/permanent/blanket ban.
- Shifts burden to board to prove:
  - Past felony or violent misdemeanor “is directly, substantially and adversely related to the state's interest in protecting public safety;” and
  - Approval “will put individual in a position where he is more likely than not to reoffend and cause harm.”

## IJ's Model Collateral Consequences in Occupational Licensing Act.

- Requires boards to consider 10 factors reflecting rehabilitation.
- Excludes boards from considering:
  - Non-conviction information—deferred adjudication, diversion programs or arrests not followed by convictions;
  - Sealed, dismissed, expunged or pardoned conviction;
  - Juvenile adjudication;
  - Non-violent misdemeanor; or
  - Conviction older than 3 years.\*

# Collateral Consequences Resource Center

Post on July 19, 2018

- July 2, 2018, New Hampshire Governor Chris Sununu signed into law SB 589.
- 10<sup>th</sup> state in 2018 to approve comprehensive limits on consideration of criminal record in occupational licensing. (6 states enacted reforms in 2015-2017)
- Similar to Indiana, Kansas, Tennessee and Wisconsin.
- Process ensures people with requisite qualifications will not be unfairly denied licenses based on their records of arrests or convictions.
- Reflects the provisions of IJ's model act.

# Resources

- IJ's Model Act: [www.tinyurl.com/IJ-ccola](http://www.tinyurl.com/IJ-ccola)
- State enactments: [www.tinyurl.com/IJ-ccola-Enactments](http://www.tinyurl.com/IJ-ccola-Enactments)
- *License to Work*: [www.ij.org/report/license-work-2/](http://www.ij.org/report/license-work-2/)
- *Shackles*: [www.tinyurl.com/shackles-bootstraps](http://www.tinyurl.com/shackles-bootstraps)

# Potential Litigation

- IJ is looking for initial case to litigate
  - Challenge an automatic ban
    - Including facing retroactive ban.
  - Sympathetic client:
    - Good example: California firefighter
    - Bad example: Convicted of white-collar crime.
    - Invested in taking case to appellate courts.
- IJ does not charge its clients to represent them.

# Contact information

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# Questions?

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- **Beth Avery**, NELP, [bavery@nelp.org](mailto:bavery@nelp.org)
- **Lee McGrath**, IJ, [lmcgrath@ij.org](mailto:lmcgrath@ij.org)





# Resources

- The National Occupational Licensing Database,  
<http://www.ncsl.org/research/labor-and-employment/occupational-licensing-statute-database.aspx>
- National Inventory of Collateral Consequences of Criminal Conviction; <https://niccc.csgjusticecenter.org/>
- Clean Slate Clearinghouse;  
<https://cleanslateclearinghouse.org/>



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