



Testimony

Interim Charge on Occupational Licensing & Overcriminalization

Presented before the House Government Reform Committee

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THE PROBLEM

- According to the Workforce Commission, Texas has more than 150 licensed occupations and a new Texas Legislative Council report prepared for this Committee shows a sharp increase since the 1960s—just as the size of government has grown. Nearly a third of the Texas workforce is now licensed or in a regulated industry.
- Various bills that failed last session would have licensed auto mechanics, roofers, sheetmetal workers, journeymen, and lactation consultants. In the cases of roofers and mechanics, more well-established groups within the occupation sought licensing that would have the effect of excluding competitors and allowing them to raise prices charged to consumers. A representative of the trade group advocating the legislation licensing mechanics responded to a legislator's suggestion that a pilot licensing program first be tried in Houston, by saying that it wouldn't work because good mechanics who didn't want to deal with the paperwork would go to other parts of the state.¹
- A University of Minnesota study of occupational licensing found that "occupational licensing reduces employment growth in states that are licensed relative to those that are not regulated." States that license dietitians and nutritionists, respiratory therapists, and librarians experienced 20 percent lower employment growth in these fields.² UT-Austin Economics Professor Dan Hammermesh estimated that the "deadweight loss" to society from occupational licensing is between \$34.8 and \$41.7 billion per year.³
- Occupational licensing violations carry criminal penalties. Occupations Code Section 165.151 makes it a Class A misdemeanor (up to one year in jail) for violating "any rule" of any professional licensing board. That means boards can effectively create their own criminal offenses and licensees must read the Texas Register every week to learn the latest crime.
- Approximately 20 percent of Texans have a criminal record. Ex-offenders can be excluded from nearly every occupation either under Chapter 53 or under specific statutes governing the occupation, such as those that apply to the Private Security Board. The *Austin American-Statesman* reported that the Board in 2006 alone "cited an unacceptable criminal history to summarily deny nearly 10,000 applicants the opportunity to work in one of the 16 professions it regulates," including locksmiths and guard dog trainers.⁴ Many of these revocations involved minor misdemeanors decades ago that had no relevance to the occupation. Unlike most other occupations, an arrest without a conviction can lead to license revocation and there is no appeal to the Board or SOAH.
- Clearly, a sex offender should not be a licensed day care worker and someone who committed insurance fraud shouldn't be licensed to sell insurance. But many agencies have defined nearly all crimes as "directly related" under Chapter 53. For example, a drug possession

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offense, even a misdemeanor, is considered directly related to being a water well driller and an embalmer. Any felony prevents a person from being a vehicle inspector.

- Studies have found that individuals whose last offense occurred many years ago are very unlikely to re-offend. Researchers at the University of South Carolina and University of Maryland concluded in a 2006 longitudinal study of ex-offenders: "Our findings suggest that after approximately seven years there is little to no distinguishable difference in risk of future offending between those with an old criminal record and those without a criminal record."⁵ Moreover, most re-offending acts, and the vast majority of those committed by non-violent ex-offenders, are nonviolent.⁶ Also, most of these offenses would have had the same impact whether or not the person had an occupational license.
- Gainful employment significantly reduces criminal behavior. A study by the federal court system found that nearly 88 percent of the 624 probationers who were employed both at the start and at the end of their supervision, successfully complied with the conditions of their supervision. On the other hand, less than 37 percent of those unemployed at both stages did so.⁷ A Massachusetts study of parolees found that those employed within the first three months of leaving prison were more than seven times less likely to return to prison.⁸ A Pennsylvania study found that ex-offenders who are employed are much more likely to fulfill their restitution obligation.⁹
- Evidence also indicates that the quality of the job, both in terms of pay and satisfaction, is correlated with an ex-offender's recidivism rate. Specifically, a University of Minnesota study of ex-offenders found that a shift from food service work (with a job quality score of .57) to often-licensed skilled craft work (with a job quality score of 1.08) decreases the chance of criminal behavior by approximately 11 percent.¹⁰

THE SOLUTIONS

- Explore eliminating some licensing categories, such as bottled water operators, timekeepers, referees, talent agencies, and proprietary school employees.
- Avoid duplicative licensing of both the company and its employees. For example, both alarm companies and their salespeople and installers must be licensed. If the company has a license, they can simply be required, as part of compliance, to screen their employees.
- Create an optional bonding route in some occupations where, in lieu of annual bureaucratic oversight, the person or company could post a bond. This is well suited to occupations that are regulated in large part due to the concern that there might be fly-by-night operations where, for example, a consumer could be left with a product or system but no one to honor the warranty or service it. For instance, City of Houston regulations on itinerant vendors provide for one-time registration and posting of a bond, but no ongoing regulation. Although it is not clear whether cities should regulate peddlers, at least it is a one-time process.
- Create a sunrise process to provide for additional scrutiny before a new occupation is licensed. States such as Oregon, Arizona, and Florida have sunrise provisions in their law to ensure that proposals to license new occupations are sufficiently studied in advance.¹¹
- Require that, as part of existing sunset reviews of all agencies, any occupations regulated by that agency be reviewed to determine whether licensing is still necessary.
- Allow unlicensed individuals and companies to enter certain licensed fields if they proactively inform the prospective customer that they are not licensed.
- Require that dues and fees be lowered if the occupation brings in more revenue than it costs to regulate it.
- Require that fiscal notes for bills that involve licensing new occupations include estimated cost to the economy in fewer jobs and consumers in higher prices.
- Create a safe harbor for minor violations where licensees must be given time to come into compliance and require licensing agencies to provide notice and a deadline for licensees to comply before the case is referred to the Attorney General for prosecution or civil litigation.
- Replicate declaratory order process used by the Nursing Board in other professions that require six months or more of education/training so applicants can learn upfront whether they will be able to get a license due to criminal history, an unrecognized degree, or other barriers.
- Create more apprentice categories so people can start working immediately under someone who is licensed. Current examples include a plumbing apprentice and shampoo apprentice.

- Review initial and continuing licensing requirements to ensure they do not unnecessarily exclude qualified individuals, such as overly burdensome written exams in fields that involve manual labor. In HB 2211, last session's bill that would have licensed mechanics, mechanics would have had to pass a written exam, though many mechanics may do excellent work with their hands with little educational background and, consequently, their performance on a written exam does not accurately reflect their competency. Additionally, the 30 hours of continuing education requirement for mechanics was more than I have to complete as a lawyer.
- Market mechanisms ranging from word-of-mouth to Angie's List to the Better Business Bureau increasingly enable consumers to select qualified individuals without relying on a government stamp of approval. There are also many private and voluntary certification providers for occupations, such as the National Institute for Automotive Service Excellence, whose seal for mechanics and auto repair shops is commonly recognized. Consumers can also file cases, particularly in small claims court, if they cannot resolve their disputes with merchants and the Attorney General enforces laws against fraud.
- Create a provisional licensing scheme for nonviolent ex-offenders, similar to that which was provided for in SB 1750, which unanimously passed the Senate last session. This would give ex-offenders a positive incentive while allowing agencies to set conditions and revoke licenses without a SOAH hearing. The proposal would exclude violent offenders.
- Clarify overly broad statutory provisions such as language inadvertently added by HB 2644 last session that states, "A person may not for compensation perform or offer to perform any service with a purported health benefit that involves physical contact with a client." If enforced, this would presumably require personal trainers and yoga instructors to be licensed.★

ENDNOTES

¹ See <http://www.house.state.tx.us/fx/av/committee80/70501p27.ram>.

² See <http://www.ftc.gov/be/seminardocs/050515kleiner.pdf>.

³ Daniel Hammermesh, *Labor Demand*, Princeton, NJ: Princeton University Press (1993) Chapter 3.

⁴ Eric Dexheimer, "Locked Out of Their Livelihoods," *Austin American Statesmen* (18 Feb. 2007) http://www.criminaljusticecoalition.org/files/userfiles/Locked_out_of_their_livelihoods.pdf.

⁵ Megan C. Kurlychek, Robert Brame, Shawn D. Bushway, "Enduring Risk? Old Criminal Records and Short-Term Predictions of Criminal Involvement," <http://www.reentry.net/library.cfm?fa=download&resourceID=81140&print>.

⁶ Recidivism of Inmates Released in 1994, U.S. Department of Justice Bureau of Justice Statistics (June 2002) <http://www.ojp.usdoj.gov/bjs/pub/pdf/rpr94.pdf>.

⁷ James L. Johnson, "Sex Offenders on Federal Community Supervision: Factors that Influence Revocation," *Federal Probation* 70 (June 2006) 1, http://www.uscourts.gov/fedprob/June_2006/sexoffenderrevocation.html.

⁸ Michael E. Morrissey, "A Description of the Employment Patterns of Persons Released from Virginia's Correctional Institutes between July 1, 1998 and June 30, 2002" (Aug. 2007) http://scholar.lib.vt.edu/theses/available/etd-09082004-155317/unrestricted/Morrissey_Dissertation.pdf.

⁹ Center for Research on Criminal Justice, "Predictors and Outcomes of Restitution in Pennsylvania," Pennsylvania State University (2002) http://www.pccd.state.pa.us/pccd/lib/pccd/stats/restitution2002_execsum.pdf.

¹⁰ Christopher Uggen and Jeremy Staff, "Work as a Turning Point for Criminal Offenders," *Corrections Management Quarterly* (Fall 2001) http://www.soc.umn.edu/~uggen/Uggen_Staff_CMQ_01.pdf.

¹¹ "Occupational Regulation in Other States," Report of the Minnesota State Auditor, <http://www.auditor.leg.state.mn.us/ped/pedrep/9905apa.pdf>.

About the Author

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Levin has served as a law clerk to Judge Will Garwood on the U.S. Court of Appeals for the Fifth Circuit and Staff Attorney at the Texas Supreme Court.

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