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REHABILITATION AND OCCUPATIONAL LICENSING: A CONFLICT OF INTERESTS

BRIAN BROMBERGER*

All hope abandon ye who enter here**

To a considerable extent Dante's admonition to those who enter the regions of the damned applies equally to persons who have been convicted of criminal offenses. Such an adverse result clearly conflicts with the aims of practically all modern correctional institutions.

One of the major reasons for this conflict is that lawyers have not been as active as sociologists in an effort to ascertain and remedy those problems which confront a prior offender upon his return to society. As a result of considerable research carried out by sociologists, educational and vocational training programs are now an integral part of most correction programs. However, the failure of lawyers to be involved in similar research has resulted in the development of legal concepts which often work directly against the operation of these rehabilitation programs. This retardation manifests itself in legislation and agency regulation which prevents the prior offender from using his training.

This article examines the aims of two representative state correctional institutions and shows generally how the increase in occupational licensing, supported by judicial doctrine, works contrary to these purposes.

REHABILITATION—THEORY AND PRACTICE

Theory

The opening of the Elmira Reformatory in 18761 heralded the introduction of vocational training correctional institutions in the United States.2 The subsequent growth of these training programs reflected an awareness that prison populations are made up of a greater proportion

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** DANTE, Divina Comedia.


2. The reformatory movement began at Norfolk Island as part of the Australian penal settlements under the guidance of Captain Alexander Maconochie (1787-1860) J. BARRY, ALEXANDER MACONOCHIE AT NORFOLK ISLAND (1958)
of poorly educated persons than the population at large. For the most part, this lack of education stands as a roadblock to the individual's efforts to improve his socio-economic status, and the realization by the inmate of this impasse can present a serious impediment to rehabilitation.

Unfortunately, vocational training programs have not been the great successes that their proponents expected. Although the reasons for this lack of success are many and varied, the governmental administration of the penal system in a particular jurisdiction must shoulder a large portion of the blame.

Penal establishments are, by their very nature, a drain on the budget of any government, and attempts to make them self-sufficient have been generally unsuccessful. With most governments operating at a deficit, the question of "priorities" is of major importance. Politics continually demands a balance between good administration and voter popularity. Consequently, the improvement of penal establishments is often placed low on the list of priorities. The prison lobby has been small and relatively unsuccessful, leaving only revelation by the press of incidents of extreme brutality or deviate sexual behavior to spur public interest. The results are inevitable: poor facilities; deficient equipment; and underpaid, poorly trained staffs, unable to motivate an already reluctant class of "students."

The present Chief Justice of the United

4. Id.
5. Even our modern prison system is proceeding on a rather uncertain course because its administration is necessarily a series of compromises. On the one hand prisons are expected to punish: on the other, they are supposed to reform. All too frequently restrictive laws force prisoners to idleness despite the fact that one of their primary objectives is to teach men how to earn an honest living.

6. For a summary of administrative efficiency versus the penal function see H. Barnes & N. Teeters, supra note 1, at 462-64.
7. Id. at 536-37
8. See Friedman & Pappas, supra note 3.
9. Various accounts of the cruelty displayed by guards and prison authorities have been published. See, e.g., H. Patterson & E. Conrad, Scottsboro Boy (1950). The public hears little of what actually happens in prisons because the individual inmate has no opportunity to articulate the situation. Only when a serious error or fatality occurs does the public become aware of these problems.
10. The attitudes of many prison personnel are reflected in the response to an attempt by the Western Australian Government to encourage prison guards to attend
States was probably thinking of these problems when he reminded members of the bar that "[w]e take on a burden when we put a man behind walls and that burden is a chance to change." 11

It is not difficult to find the stated aims of government with respect to the operation of the correctional system, and Pennsylvania and Virginia are typical. In 1969-70 approximately $25 million was appropriated for use by the Department of Justice of Pennsylvania; 12 a considerable portion of this was designated for use by the various correctional institutions throughout the state. 13 The legislature, in the budget document, specifically addressed itself to the need for educational and vocational training to equip the inmate to better cope with society when he is released. This reflects the opinion that deficiencies in education and skilled work experience were among the main causes of recidivism. 14

Deeper insight into the objectives behind the appropriation of money is gleaned from the specific information that is recorded in the report of the Pennsylvania Department of Justice. Between 1964 and 1967 the various correctional institutions were responsible for the issuance of:

1. 4585 occupational certificates;
2. 594 correspondence course certificates;
3. 423 other educational certificates;
4. 1307 high school diplomas;
5. 419 eleventh grade certificates;
6. 191 tenth grade certificates; and
7. 392 eighth grade certificates. 15 The inclusion of these figures and those projected for the future in the budget document clearly indicates that the legislature desires prison officials to concentrate a short course of lectures in basic criminology before they would comply the guards demanded: (1) No compulsion, (2) no examinations, (3) overtime pay for attending, and (4) no promotional priority for those who attended. The authorities were prepared to accept the first three demands but on their refusal as to (4) the whole scheme collapsed. Interview with Mr. Williamson, Commissioner of the Fremantle Gaol, in Perth, Australia, Sept., 1968.

11. The Chief Justice went on to say: "If we deny him that, we deny his status as a human being and to deny that is to diminish our humanity and plant the seeds of future anguish for ourselves." Address by Chief Justice Warren E. Burger, 100th Anniversary of the Association of the Bar of the City of New York, reported in the N.Y. Times, Feb. 18, 1970, at 16, col. 1.


13. Of the $25 million appropriated to the Justice Department approximately $21 million was earmarked for the maintenance of correctional institutions. Id. at 92.

14. Id. at 93.

15. Id. at 94. The reference to occupational certificates does not indicate the standard of competence required before a certificate is issued.
trate as much time and effort as possible on the extension of these pro-
grams.16

It is also certain that the legislature no longer regards the training
of inmates for the semi-skilled occupations17 as the epitome of an
enlightened rehabilitation program. In appropriating funds to one in-
stitution, Camp Hill,18 the legislature went so far as to list the activities
that it wished to foster, including “higher education.”19 Innate skepti-
cism might cause such lofty ideals to be treated with the traditional
“grain of salt,” but the Annual Report submitted by the administra-
tion of Camp Hill20 indicates both the feasibility and desirability of such
programs. That the Department of Justice is carrying out the directions
of the legislature is shown by the fact that in 1967 forty-one students
were enrolled in courses at the college level.21 All the courses were
taught by regular college professors. So successful was this program that
in 1968 an agreement was made between the authorities at Camp Hill
and those of the nearby Harrisburg Area Community College22 for an
extension of this program. Courses were to be offered in social science,
English, and mathematics, and each course was to carry a value of three

16. Id.

17. An example of this is the training of dental technicians at Pencor State Correc-
tionals Institution, Philadelphia, Pennsylvania. Pencor’s dental laboratory compares favor-
ably with one of similar size in the civilian field, both as to equipment and technical
skills. All men are carefully selected on the basis of special aptitude and ability and
are equipped to construct and repair artificial dentures, both partial and full restorations.

18. The State Correctional Institution at Camp Hill is an institution for youthful
offenders which replaced the industrial school at Huntington, Pennsylvania, in June,
1937 David P. Snare, superintendent, has stated the goals of this institution in the
following terms:

It is the aim of the administration and the entire personnel to utilize all avail-
able and proven techniques in an attempt to return the offender to his
home community as an individual of wholesome character and one ready to
resume his rightful place of responsibility as a law abiding citizen.

Id. at 28.


20. See Pa. Bureau of Correction, Report of the Program of Vocational Rehabilitation
for Young Adult Offenders (1969).

21. These students represented the top quartile of the top 200 inmates who had
recently qualified through the General Educational Development Test for Secondary
Diplomas. Id. at 26.

22. The officials involved were Harry A. Snyder, Correctional Education Director,
and W A. Koehline, Dean of Instruction, Harrisburg Area Community College. Id. at
28-29.
credit hours. Eventually 100 inmates\textsuperscript{23} were officially enrolled at the College with the cost born by the correctional institution.\textsuperscript{24}

The Division of Corrections of the State of Virginia is also developing an improved educational system.\textsuperscript{25} While a high school education and vocational training have been available for some time, the availability of college courses has only recently been introduced.\textsuperscript{26} At the Bland Correctional Farm, college level courses were introduced in the fall of 1971. Although modest in scope, the mere existence of the program is indicative of the desire of the Department of Welfare and Institutions to better equip former inmates for their return to society.\textsuperscript{27}

The result of the proliferation of such schemes will certainly be that the employment potential of prior offenders will extend far beyond the range of menial occupations\textsuperscript{28} to those callings which are commonly called professions. However, the present restrictions which apply to the entry of an applicant into a particular profession may mean that the good work carried out by one agency of government will be rendered futile by another department.\textsuperscript{29}

\textit{Practice}

The inmate's "chance to change" should not be restricted to a shift in attitude of those responsible for the operation of the prisons, but the opportunity must be extended by both the government and the general population upon his return to society. Again, however, a general negative attitude prevails on the part of both governmental and private authorities, and even if the period of confinement should achieve the oft-stated aims of punishment, rehabilitation, and education,\textsuperscript{30} the prior offender still finds that he cannot say that he has "paid his debt." Frustration and apathy are inevitable when the convicted person finds that

\begin{itemize}
  \item \textsuperscript{23} In 1969 the intelligence quotient of those admitted to the program ranged between 95 and 121, with a mean of 107. \textit{Id.}
  \item \textsuperscript{24} \textit{Id.}
  \item \textsuperscript{25} Virginia Department of Welfare and Institutions, Report of the Division of Correction (Feb. 1972).
  \item \textsuperscript{26} \textit{Id.} at 20.
  \item \textsuperscript{27} The courses offered were freshman English and psychology of human relations.
  \item \textsuperscript{28} For a summary of those professions which are restricted by requirements for entry which can preclude the prior offender see the Appendix infra.
  \item \textsuperscript{29} At the governors' conference in 1951 the governor of Arkansas complained of the large number of virtually autonomous authorities in his state. He said they function with utter "lack of responsibility to the people." W Gellhorn, \textit{Individual Freedom and Governmental Restraints} (1956).
  \item \textsuperscript{30} See generally, Brett & Waller, \textit{Criminal Law} (1965).
\end{itemize}
there is considerable conflict between the aims of the correctional system and the operation of those departments of government responsible for his employment upon his release.

Two surveys of private employers, conducted 10 years apart,\(^{31}\) reveal that over 60 percent have considerable reservations about employing ex-offenders. These reservations vary from a total refusal to restricting the hiring of offenders for certain specific positions.\(^{32}\) Trade unions may deny membership,\(^{33}\) and in occupations where insurance bonding is customary, persons with criminal records are almost unemployable.\(^{34}\)

When the government acts in its capacity as an employer, suspicion manifests itself in two ways: by policy, which is in reality the attitude

\(^{31}\) J. Ryan, R. Webb & N. Mandel, Offender Employment Resource Survey for the Minnesota Department of Corrections (1966); E. Sparer, Employability and the Juvenile "Arrest" Record 5 (1956)

\(^{32}\) An attitude typical of that of most personnel procurement directors in private industry was expressed by P W Morris, Director, Personnel Department, Inland Steel Company in FED. Rep. 34 (1970). Mr. Morris wrote:

> No applicant will be denied consideration for employment solely because of a criminal record.

Criminal record will be simply one aspect in a total assessment of an applicant. It will enhance the application if the applicant is sponsored by a probation or parole officer, clergyman, social worker, or other reputable persons who have knowledge about the applicant and have a specific interest in his rehabilitation:

Applicants convicted of arson, sex offenses, narcotic offenses, or crimes of violence will not generally be given serious consideration for employment except where there are mitigating circumstances.

\(^{33}\) Friedman & Pappas, supra note 3, at 42.

\(^{34}\) James J. McFadden, former New York City Labor Commissioner, stated that a training program which graduated 550 men with records had great difficulty in finding employment for them because of denial of bond. City Job-Bonding Service Urged to Aid Ex-Convicts, N.Y. Times, Nov. 22, 1965, at 1, col. 5.

Note also the problems faced by the prior offender when he seeks credit. Nearly every application for finance includes a question relating to prior offenses. The offices of three Philadelphia banks indicated that where there is any doubt at all as to whether a loan will be approved the existence of a record will decide the issue negatively. The same banks stated that generally there is a more stringent collateral requirement for an ex-offender. Credit companies similarly regard the ex-offender as a bad risk. The problem here is particularly acute since these companies normally utilize computerized credit bureaus rather than individual credit investigations. The current programs common in the credit bureau industry do not allow for the removal of a record of an offense once it has been entered into the computer's memory bank. See Hess & Le Poole, Abuse of Record of Arrest Not Leading to Conviction, 13 CRIM. & DEL. 494, 499 (1967).
shown toward the ex-offender by the bureaucracy, and by legislation. The following examples show the need for considerable rethinking by legislatures in the area under discussion.

On May 11, 1961, Linton K. Mordecai, aged 17, was convicted of rape and robbery. There is every indication that at this stage of his life he was a most unpleasant young man. He was sentenced to 20 years imprisonment and was paroled in 1968 after having served seven years at the federal penitentiary at Lewisburg, Pennsylvania. While in prison Mordecai attended trade school, and at the time of his release he had become an extremely competent printer. He subsequently applied for a position with the federal government, only to be informed that it was not the government's practice to employ people with records such as his. He is at present earning his living as a truck driver and has given every indication that as far as he is concerned the system has functioned correctly and he has no intention of returning to a life of crime.

The second example is much more tragic. Ayle Thomas was a bus driver employed by the Evangeline Parish School Board. Article VIII, Section 6 of the Louisiana Constitution (1921) prevents the employment of persons in positions of trust or profit who have criminal records. Thomas had committed the offense of breaking and entering in 1937. After serving a prison term he was employed by the school board from 1952 until his dismissal in 1961. The stated ground for dismissal was his prior offense. Thomas contended that he had been wrongfully dismissed, and on review the Court of Appeals of Louisiana held that bus driving for a school board is a position of trust or profit,

36. Mordecai was charged with eight counts of unauthorized use of a vehicle, grand larceny, assault with intent to kill, assault with intent to rob, robbery, and two rape offenses. 252 F Supp. at 699.
37. One of the grounds for a subsequent appeal was that Lewisburg is an adult prison and while he was incarcerated there he was not segregated from the adult prisoners as is required by 18 U.S.C. § 5011 (1970) Brief for the Appellant, Mordecai v. United States, 252 F Supp. 694 (D.C. Cir. 1966).
38. Although not specifically stated in the appellate brief, one of the main reasons why there was an attempt to obtain a retroactive application of Kent v. United States, 383 U.S. 541 (1966) was the different impediments which follow a juvenile conviction as distinct from an adult conviction. Information furnished by Paul Bender, counsel for the appellant.
40. Id. at 659.
that the statute was valid legislation, that the time between the offense and the dismissal was irrelevant, and that the dismissal should stand.\textsuperscript{44}

With incidents such as these, apparently not infrequent,\textsuperscript{42} it is not surprising that there are feelings of futility and frustration among the prison population. Even if it is possible to understand the suspicions of private individuals, it is far less reasonable for government to operate on the same basis. It is disappointing that laws and regulations should operate on the presumption of failure,\textsuperscript{48} because the state affects the future of the ex-offender by, in some instances, denying him the right to vote,\textsuperscript{44} the right to hold public office,\textsuperscript{45} the right to act as a trustee,\textsuperscript{46} the right to enter various occupations,\textsuperscript{47} and even the right to be buried in certain cemeteries.\textsuperscript{48}

The responsibility of the state for the difficulty in attaining employment experienced by many ex-offenders extends to instances where it is not acting directly as employer. In many regulated occupations prior offenders are specifically excluded,\textsuperscript{49} and in others they may be excluded at the discretion of a semi-autonomous board established by the legislature to administer the particular occupation.\textsuperscript{50} The number of occupations which are controlled by regulation and are governed by administrative boards has increased substantially over the past 50 years.\textsuperscript{51} In 1955 Professor Gellhorn wrote:\textsuperscript{52}

\textsuperscript{41} Id.

\textsuperscript{42} "Those of us who deal with the daily practicalities presented by the bread and butter portions of court calendars find that, in the main, irreparable injury is done a defendant acquitted after a trial: the fact of his arrest is often sufficient to rule him out of consideration for employment." Judge Irving Ben Cooper, S.D.N.Y., \textit{quoted in} Hess & LePoole, supra note 34, at 494.

\textsuperscript{43} See, e.g., Miss. Code Ann. § 8667 (1956). "Every person who has been or shall hereafter be convicted of felony, manslaughter excepted, shall be incapable of obtaining a license to practice law; or, if already licensed, the court shall enter an order disbarring such convict."

If the disabilities are to continue after the completion of the sentence, then the obvious presumption is that the time spent either in prison or on probation or parole is not achieving its aims, especially when many of these disabilities continue indefinitely.

\textsuperscript{44} E.g., Wyo. Const. art. 6, § 6. (Unless pardoned)

\textsuperscript{45} E.g., N.C. Const. art. VI, § 8. (Unless pardoned).

\textsuperscript{46} E.g., N.D. Cent. Code § 30-11-01 (1960).

\textsuperscript{47} See Appendix infra.

\textsuperscript{48} E.g., Thompson v. Clifford, 408 F.2d 154 (D.C. Cir. 1968).

\textsuperscript{49} See note 43 supra.

\textsuperscript{50} E.g., pharmacists in West Virginia. W Va. Code Ann. § 30-5-7 (1966) (Board may revoke or refuse to issue license if convicted of a felony or any crime involving moral turpitude).

\textsuperscript{51} W. GELLHORN, supra note 29, at 110.

\textsuperscript{52} Id. at 106.
One may not be surprised to learn that pharmacists, accountants, and dentists have been reached by State laws as have sanitarians and psychologists, assayers and architects, veterinarians and librarians. But with what joy of discovery does one learn about the licensing of threshing machine operators and dealers in scrap tobacco? What of egg graders and guide dog trainers, pest controllers and yacht salesmen, tree surgeons and well diggers, tile layers and potato growers? And what of the hypertrichologists who are licensed in Connecticut where they remove excessive and unsightly hairs with the solemnity appropriate to their high sounding title?

In a single session the New Jersey legislature heard calls for licensing of bait fishing boats, beauty shops, chain stores, florists, insurance adjusters, photographers, and master plumbers; not one of these proposals was the result of a complaint from a swindled or duped citizen.

At first blush, it may appear to be surprising that there is a great desire on the part of many trade groups to place themselves under the regulatory arm of government. However, in a complex society such as exists in the United States, there seems to be a psychological need for self-identification. Few people are capable of achieving this as individuals, but many can do so by identifying themselves with some sub-group. Evidence of this phenomenon is shown by the euphemistic titles that formerly simple occupations take on once they become official. Professor Gellhorn’s hypertrichologists and the sanitation engineer (once known as the garbage man) are examples of this tendency.

Again, corresponding to “officiality,” there begins the inevitable move by the group toward an upgrading of social and economic status. For example, one can read from a licensed group statement that:

We are not laboring people. Our work requires a certain learned knowledge, and is requiring more all the time. We must be skillful in certain movements and manipulations of the hands and

53. Id. at 110.
54. Id.
55. This is to be distinguished from the formation of private guilds made under government charter.
57. “[T]hey seek the social and psychological satisfaction which they think will come from elevating a humble and honorable trade into a profession, replete with examinations, standards, boards, and a terminology smacking of the scientific.” Id. See also Fellman, The Alien’s Right to Work, 22 Minn. L. Rev. 137 (1938)
fingers. It requires a certain skillful technique in the use of delicate tools, instruments, and appliances. It requires adaptation and coordination of eye and brain, nerve and muscle. We are not laboring people. We are building a profession.\footnote{58}

What is the "joy of discovery" when it is learned that the person who carries out the highly technical process described above is the local barber?

Social and economic status improves when the group has the ability to restrict entry. Preservation of the improved status then becomes vitally important. Socially, the inevitable increase in training and schooling required for entry into the group increases the cost, thereby decreasing the number of prospective applicants\footnote{59} and reducing the number of new members. In a society whose population is steadily growing, there is a built-in increase in demand; thus the ultimate result of the process is an increase in the value of the performed service.\footnote{60}

The history of the licensing of hypertrichologists in Massachusetts\footnote{61} illustrates that potentially regulated groups do not regard the above analysis lightly. In 1954 a Massachusetts group began a campaign to have their body licensed, and a bill was introduced "for regulating the practice of electrolysis." \footnote{62} Joan Weinrib\footnote{63} was also interested in the legislation, and sought to have the jurisdiction of the existing hairdresser's board extended to cover hair removers. The legislature took no action on either proposal. In 1955 the state senate approved a petition from the Association of Electrologists Inc. for the creation of a state licensing board.\footnote{64} The house, however, received a committee

\footnote{58. Master Barber Mag., vol. 19, Apr., 1959, at 7}

\footnote{59. W. Gellhorn, supra note 29, at 110.}

\footnote{60. People v. Brown, 407 Ill. 565, 95 N.E.2d 888 (1951)}

\footnote{61. For a discussion of apprenticeship prerequisites, see Note, Restrictions of Freedom of Entry into the Building Trades, 38 Iowa L. Rev. 556 (1953).}

\footnote{62. Monaghan, supra note 56.}

\footnote{63. 1954 Mass. S. Jour. 171; 1954 Mass. H.R. Jour. 151.}

\footnote{64. 1955 Mass. S. Jour. 178.
report which suggested that the practice of removing hair could only be performed under the supervision of a physician. In 1956 the matter was again before the legislature, but no action was taken. In 1957 separate petitions were introduced in both houses, but the house committee on ways and means gave an unfavorable opinion on the proposed legislation thus defeating the bill. In 1958 new petitions were introduced. This time the house committee report was favorable and the final bill passed with ease.

Board Discretion

Assuming that the schemes at Camp Hill and Bland Farm continue to operate, that a reasonable percentage of the previously non-motivated realize their potential, and that bar associations, medical boards, barber’s boards, and other such administrative agencies continue their restrictive attitude toward prior offenders, an impasse will be reached. At present, a prior offender who possesses certain occupational skills obtained before, during, or after conviction may be prevented from using those skills, thus frustrating any chance of rehabilitation. These prohibitions come in the guise of occupational licensing legislation or regulation. Prohibitory legislation of this type generally takes one of three forms: (1) legislation which specifically refers to particular crimes; (2) legislation which refers to offenses involving moral turpitude; and (3) legislation which enables a personnel officer or administrative board to refuse permission because the applicant has not satisfactorily shown that he possesses good moral character. The relative strengths of the combatants in the potential impasse can be seen from a general survey of the attitudes of the courts toward the challenges which have been raised against various occupational licensing statutes.

69. Id. at 1412.
72. See Appendix infra.
73. See Appendix infra.
74. See note 43 supra (concerning attorneys in Mississippi)
75. See Appendix infra (concerning restrictions in the civil service)
76. See Appendix infra.
77. See Appendix infra.
The authority of the state to legislate in the field of occupational licenses has long been recognized as a proper exercise of its police power. This is a residual power which enables the state to protect the health, welfare, and morals of the populace. The exercise of the police power by the states in this area has not always been as extensive as at present, and until the end of the nineteenth century few occupations were subject to state licensing. The application of the police power to occupational licensing is of special interest not only because the courts have permitted it to be used extensively, but because the increase in regulated occupations has seriously reduced the number of employment choices available to the released prior offender.

When the use of the police power in this field has been challenged, the courts have applied stringent verbal tests, but have, at the same time, given these tests the widest possible practical application. The cases have continually stated that the police power must be used carefully, with great caution, and “only where such legislation bears a real and substantial relationship to the public health, safety, morals or some other phase of public welfare.”

78. The power of the state to provide for the general welfare of its people authorizes it to prescribe all such regulations as, in its judgment, will secure or tend to secure them against the consequences of ignorance and incapacity as well as deception and fraud. As one means to this end it has been the practice of different states, from time immemorial, to exact in many pursuits a certain degree of skill and learning upon which the community may confidently rely. The nature and extent of the qualifications required must depend primarily upon the judgment of the state as to their necessity.

79. E.g., Ex parte Mali, 56 Cal. App. 2d 635, 133 P.2d 64 (1943).
81. W. Gellhorn, supra note 29, at 106.
82. Id. The increase in state control over what were formerly regarded as ordinary occupations has produced a situation which some regard as not dissimilar to the medieval guild system. Grant, The Gild Returns to America, 4 J. Pol., 303, 458 (1942).
83. See Appendix infra.
84. Liggett Co. v. Baldridge, 278 U.S. 105, 111-12 (1928).
In *State v. Warren*, the court used typically restrictive language. It spoke of the right to earn a livelihood as a "property right" which may not be lightly affected. In the court's opinion "[r]estrictions and regulatory standards may not be applied so as to prevent individuals from truly engaging in ordinary trades and occupations in which men have immemorially engaged as a matter of common right." (Emphasis supplied) The court went even further by stating that before a statute which purports to regulate an occupation can be sustained, it must affirmatively appear that it has a real and substantive relation to one or more of the purposes with which the police power is concerned and that the occupation to be regulated must have a "substantial public interest." The legislative act also must be reasonably necessary to promote the "public good." But the limits of the police power are exceeded when the legislature undertakes by regulation to rid ordinary occupations and callings of the dishonest and morally decadent. Resort in such circumstances must be made to the criminal law. Although these phrases would appear to be used as tests, in actuality they turn out to be merely admonitions. The holding that a statute which regulated real estate brokers was a valid exercise of the police power illustrates this.

A more direct approach was taken by the Supreme Court in *Breard v. City of Alexandria*. As in *Warren*, the issue was the validity of a licensing ordinance. The City of Alexandria had passed an ordinance which prohibited peddlers or canvassers from calling on occupants of private residences without having been requested to do so. When prosecuted for a breach of this ordinance, Breard, who had been peddling books, contended that the ordinance placed an unconstitutional restriction upon a citizen's right to engage in one of the common occupations of life. Speaking for the court, Mr. Justice Reed, while rejecting

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85. 252 N.C. 690, 114 S.E.2d 660 (1960).
86. "[The] right to work and earn a livelihood is a property right that may not be denied except under the police power of the state in the public interest for reasons of health, safety, morals or public welfare." 114 S.E.2d at 663.
87. 114 S.E.2d at 662.
88. 114 S.E.2d at 664.
89. 114 S.E.2d at 692.
90. 114 S.E.2d at 693.
91. Id.
92. See Appendix infra (concerning restrictive requirements as applied to real estate brokers).
94. Justices Black and Douglas dissented, urging that the application of the ordinance
this argument, sidestepped the issue of the breadth of the police power
by holding "that even a legitimate occupation may be restricted or pro-
hibited in the public interest . . . The problem is legislative where
there are reasonable grounds for legislative action." The holding is
a judicial recognition that in society today there are few occupations
which, if carelessly performed, do not in some way effect the public
health or welfare. Presumably those which would be excluded include
those which are "one of the innocent, usual occupations in which
everybody who so wishes may indulge as a past-time or a hobby or a
vocation, without harm or injury to anybody, or to the general wel-
fare, or the public health and morals, or the peace, safety and comfort
of the people." The usefulness and extent of such a test is a matter
of pure speculation.

The rationale of the court in *Breard* would appear to be more
realistic than that of the court in *Warren*. There is little point in
denying the legislative right in theory while permitting it in practice.
A policy such as that adopted in *Breard* would be supported by those
who believe that in order to maintain a viable federalism the Supreme
Court must not act as a "State legislative watcher." Such a policy was
suggested by both Justice Brandeis and Justice Holmes in many dis-
senting opinions written earlier in this century, dissents which the
majority of the Court now seem to favor. Justice Douglas, speaking
for the majority in *Day-Brite Lighting Co. v. Missouri*, noted:

to convict a magazine salesman unconstitutionally abridged free speech guarantees. 341
U.S. at 649. Justice Black, however, added, "Of course I believe that the present
ordinance could constitutionally be applied to a 'merchant' who goes from door to door
'selling pots'" 341 U.S. at 650 n.
95. 341 U.S. at 652-33.
97. In Oklahoma watchmaking licenses have been invalidated, State ex rel. Whetsel
v. Wood, 207 Okla. 193, 248 P.2d 612 (1952), but the licensing of dry cleaning estab-
lishments has been upheld, Herrin v. Arnold, 183 Okla. 392, 82 P.2d 977 (1938).
100. Monaghan, *supra* note 56, at 163.

There is nothing that I more deprecate than the use of the Fourteenth
Amendment beyond the absolute compulsion of its words to prevent the
making of social experiments that an important part of the community de-
sires, in the insulated chambers afforded by the several states, even though
the experiment may seem futile or even noxious to me and to those whose
judgment I respect.

*Truax v. Corrigan*, 257 U.S. 312, 344 (1921) (Holmes, J., dissenting). *See also* Tyson
Our recent decisions make it plain that we do not sit as a super legislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare. The legislative power has limits but the state legislatures have constitutional authority to experiment with new techniques. They are entitled to their own standards of the public welfare: they may within broad limits control practices in the business-labor field, so long as specific constitutional prohibitions are not violated and so long as conflicts with valid and controlling federal laws are avoided.\textsuperscript{101}

Notwithstanding what has been said, the courts have refused to uphold certain legislation on the grounds that there was not even a nominal relationship to the health or safety of the public. Such legislation has been held improper in seeking to regulate watchmakers,\textsuperscript{102} florists,\textsuperscript{103} and photographers.\textsuperscript{104}

This general reaction of the courts to challenges by dissatisfied applicants to the constitutionality of particular licensing legislation has not been affected by revelations that the protection of the health, welfare, and morals of the populace was not the driving force behind the legislation. In \textit{Daniel v. Family Life Insurance Co.},\textsuperscript{105} a company had been formed to offer for sale "burial insurance."\textsuperscript{106} As a result of a lobby from other insurance companies,\textsuperscript{107} the South Carolina legislature passed an act barring the sale of insurance by undertakers.\textsuperscript{108} The trial court held that the legislation was invalid because it was not enacted "in the public interest"\textsuperscript{109} and that it "had its genesis in the desire of the existing insurance companies to eliminate the plaintiff company as a competitor."\textsuperscript{110} On appeal, the Supreme Court reversed. Justice Murphy, speaking for the Court, said:

\begin{itemize}
\item[101.] 342 U.S. 421, 423 (1952)
\item[102.] State \textit{ex rel.} Whetsel v. Wood, 207 Okla. 193, 248 P.2d 612 (1952)
\item[103.] Kresge Co. v. Couzens, 290 Mich. 185, 287 N.W. 427 (1939)
\item[104.] Sullivan v. DeCerbel, 156 Fla. 496, 23 So. 2d 571 (1945); State v. Gleason, 277 P.2d 530 (Mont. 1954); State v. Cromwell, 72 N.D. 565, 9 N.W.2d 914 (1943)
\item[105.] 336 U.S. 220 (1949).
\item[106.] The company was using undertakers to sell small policies which were designed to mature at death and pay for the cost of burial of the policy holder. \textit{Id.}
\item[107.] W. Gellhorn, \textit{supra} note 29, at 120.
\item[108.] Act of May 12, 1947, 45 S.C. Stat. 322.
\item[109.] "There is nothing to show that the interest of the public generally, as distinguished from other industrial insurance companies, requires such interference." Family Security Life Ins. Co. v. Daniel, 79 F Supp. 62, 66 (E.D.S.C. 1948).
\item[110.] 79 F Supp. at 65.
\end{itemize}
It is said that the insurance lobby obtained this statute from the South Carolina Legislature. But a judiciary must judge by results, not by the varied factors which may have determined legislators votes. We cannot undertake to search for motive in testing constitutionality.

We cannot say that South Carolina is not entitled to call the funeral insurance business an evil. Nor can we say that the statute has no relation to the elimination of those evils.\textsuperscript{111}

Professor Gellhorn suggests that judicial self-restraint is praiseworthy\textsuperscript{112} He argues that the role of the court should not be confused with that of a legislature and that in a democratic society the court should not substitute its views for those of elected representatives.\textsuperscript{113} This thesis is undoubtedly correct, but it does not take into account the pressures that can be applied to the elected representatives and the practical effect of a persistent and influential lobby.

**Delegated Authority and Discretion**

The only practical way in which a modern legislature can administer regulatory legislation is by the creation of administrative agencies, and occupational licensing is no exception.\textsuperscript{114} Just as the courts are permis-

\textsuperscript{112.} W Gellhorn, supra note 29, at 120.
\textsuperscript{113.} Id. at 121.
\textsuperscript{114.} Typical of such legislation is that which controls dentistry in the state of Kansas.

\textsuperscript{[I]n order to accomplish the purpose and to provide for the enforcement of this act, there is hereby created the Kansas dental board. Said board shall be vested with authority to carry out the purposes and enforce the provisions of this act. The board shall consist of three licensed and qualified dentists.

The powers and duties of the board are extremely wide:

Powers and duties. The board shall exercise, subject to the provisions of this act, the following powers and duties:

a) It shall adopt such rules for its government as it may deem proper.
b) Make rules for qualification and licensing of dental hygienists.
c) Make rules and regulations regarding sanitation.
d) Conduct examinations to ascertain the qualification and fitness of applicants for licenses as dentists, or certificates as specialists in dentistry.
e) Pass upon the qualifications of applicants for reciprocal licenses.
f) Prescribe rules and regulations for examination of candidates.
g) Formulate rules and regulations by which dental schools and colleges shall be approved.
h) Grant licenses, issue license certificates and renewal certificates in
sive in sustaining the proliferation of licensed callings, so are they per-
mative toward the degree of discretion that may be granted to a
licensing board.

It might be thought that a desire for a restrictive use of the police
power vis-a-vis a desire for some form of occupational regulation
would result in a compromise manifested by a limit to the discretion
given to the board. This has not been the case. *Barsky v. New York
Board of Regents* 115 is one example of the results which follow when
a court restricts its investigation to the existence of a power and treats
the application of that power as being outside its jurisdiction.

In *Barsky* a statute which gave the Board of Regents the power to
discipline a medical practitioner when he had been “convicted in a
court of competent jurisdiction either within or without this state of a
crime.” was challenged. 116 Barsky was a medical practitioner of
long standing, undoubted ability, and good reputation. He was associ-
atied with the American Anti-Fascist League which had been founded
in the late 1930’s. The Anti-Fascist League found its way onto the
Attorney General’s list, 117 and Barsky was subsequently called before
a Senate hearing and asked to produce some documents, one of which

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116. Id. at 443.
117. The general fear of communism which existed in the United States after World
War II resulted in the investigation of persons and organizations that were thought to
have or have had any connection with communism. Although it seems as though there
were relatively few actual prosecutions, the public investigation of such people as
Einstein and Oppenheimer acted on them as would a criminal prosecution. See 347
U.S. at 472 (Douglas, J., dissenting).
included a list of members of the League. Among the members were many people who had relatives living in Franco-dominated Spain, and Barsky did not wish to publicize their names for fear of reprisals. At the hearing, on the advice of counsel, he refused to produce the documents and was subsequently cited for and convicted of contempt. He served a short prison term, but when he was released the Board of Regents suspended him from practice for six months. Barsky filed suit in the district court, and the matter eventually reached the Supreme Court. The Court held, over a strong dissent, that the behavior of Barsky was not too far removed from the State's legitimate concern for professional standards, and that the action of the Board of Regents in suspending Barsky was within their delegated power. Justice Douglas, who had earlier expressed the opinion in *Day-Brite* that the Supreme Court should not act as a super legislature, thought that the Board of Regents should not possess such discretion. He implied that when the power to revoke a license is delegated the agency must at least be required to find some correlation between the offense and the actual practice of medicine. "The fact that a doctor needs a good knowledge of biology is no excuse for suspending his license because he has little knowledge of constitutional law"

Justice Frankfurter, dissenting in a separate opinion, wrote:

> It is one thing thus to recognize the freedom which the constitution wisely leaves to the states in regulating professions. It is quite another thing, however, to sanction a State's deprivation or partial destruction of a man's professional life on grounds having no possible relation to fitness, intellectual or moral, to pursue his profession.

118. Five months.
120. Chief Justice Warren with Justices Reed, Jackson, Burton, Clark, and Minton.
122. "[A]nd there appeared to be no evidence of arbitrary or capricious behavior." 347 U.S. at 444. It could be suggested that behavior which had no relation to the practice of the particular profession must necessarily be arbitrary.
124. "It does a man little good to stay alive and free and propertied, if he cannot work." 347 U.S. at 472 (Douglas, J., dissenting).
125. 347 U.S. at 473-74.
126. Id. at 475.
The administration of a licensed occupation by a board often provides the general public with a necessary service. Education and training requirements ensure that the practitioner will at least have attained a certain level of competence, and the existence of the board with its power to revoke licenses often provides the dissatisfied consumer with a more practical, speedier, and less expensive forum in which to air his complaint. There is, however, a necessary caveat: Both the judicial and legislative branches of government should not permit subordinate agencies to exercise power and discretion above that which is needed for the efficient accomplishment of their established purpose.

**Discretion and Criminal Records**

As has already been suggested, when a statute which purports to regulate an occupation is challenged, most courts have confined their consideration to an analysis of the constitutional right of the state to use the police power in the particular instance, and have not been prepared to pass judgment on the wisdom of its use. Indeed, once the power to legislate has been acknowledged most courts will sustain the challenge only if it can be shown that the use of the police power has been arbitrary and capricious. The investigatory procedure which is required in order to demonstrate that a board has acted in an arbitrary and capricious manner often places a substantial burden on the potential licensee, thus leaving the possibility of such a claim available only to the affluent.

An example of this was the New York Boxing Commission's denial of a license to Cassius Clay (Muhammed Ali) in 1967 Clay was convicted of draft evasion, and at the time he filed his application with the Commission he was free on bail pending appeal. Almost immediately

127. See Appendix mfnra.

128. As the item or service involved is likely to be relatively small in value and the complainant probably only wants it replaced or fixed, a resort to the courts with their traditional tardiness to order specific performance would not be satisfactory

129. Day-Brite Lighting Co. v. Missouri, 342 U.S. 421 (1952)

130. Id.

131. The cost of discovery for the case discussed in notes 132-39 mfnra must have been quite substantial and certainly beyond the range of the typical recently released offender. For a detailed listing of the findings, see Ali v. Division of State Athletic Comm’n, 316 F Supp. 1246, 1248-53 (S.D.N.Y. 1970).

132. Clay v. United States, 397 F.2d 901 (5th Cir. 1968); United States v Clay, 430 F.2d 165 (5th Cir. 1970). Clay’s conviction was recently overturned by the Supreme Court. United States v. Clay, 91 S. Ct. 2068 (1971)
following his conviction he was stripped of his heavyweight title, and his license to box in all states was withdrawn. He re-applied for a license in New York State where the Boxing Commission, acting under the authority granted by the legislature, refused his application. Clay had not worked in any other capacity than that of professional boxer for many years, and the denial of the license was an effective denial of his right to work. Initially, the denial was upheld by the courts as a valid exercise of the police power, but in 1970 the case was reopened. Clay argued that the only possible ground that the Commission could rely on in refusing to renew his license was that he had been convicted of a criminal offense. After considerable research, which was carried out at great expense, Clay's attorneys discovered that the Commission had issued licenses, both before and after Clay's conviction, to persons with criminal records. In fact, they were able to demonstrate a breakdown of the Commission's licensing practices. With these facts to guide them, the court was able to measure the Commission's action against some objective standard, and therefore had little difficulty in reaching the decision that there had been an arbitrary and capricious denial on the part of the Commission.

In the Clay case the court was able to make its decision by objectively examining a set of facts; more often than not, the claim of arbitrary and

133. "Heavy-weight champion of the world." The stripping of the title is relevant because of the endorsements and other forms of income which result directly therefrom.
135. N.Y. UNCONSOL. LAWS § 8910 (McKinney 1952).
136. Denial of a license to box has barred Ali from pursuing in New York his chosen trade, from which he earned his living for most of his adult years prior to 1967, with but a limited number of years remaining in which he can meet the rigorous physical standards essential to engaging in such activity. It is clear that unless preliminary relief is granted he will suffer irreparable injury.
139. If the commission in the present case had denied licenses to all applicants convicted of crimes or military offenses, plaintiff would have no valid basis for demanding that a license be issued to him. But the action of the commission in denying him a license because of his refusal to serve in the armed forces while granting licenses to hundreds of other applicants convicted of other crimes and military offenses involving moral turpitude appears on its face to be intentional, arbitrary and unreasonable discrimination against plaintiff, not even-handed administration of the law which the Fourteenth Amendment requires.
Id. at 1250.
capricious activity on behalf of a board has to be based on a more subjective analysis. This subjectivity arises because of the prevalence in licensing legislation of the power granted to the licensing board to refuse to issue a license where the applicant has committed a felony or crime involving moral turpitude\textsuperscript{140} or where the applicant fails to demonstrate that he possesses good moral character.\textsuperscript{141} It is virtually impossible to show that a licensing board has acted in an arbitrary or capricious manner when the board can point to precedent to justify its decision. For example, so varied are the court decisions as to what constitutes a crime involving moral turpitude that precedent can inevitably be found, although consistency is almost totally absent. In \textit{Tellenghast v. Edmead}\textsuperscript{142} the petty larceny conviction of an "ignorant colored girl" working as a domestic was held to be a crime involving moral turpitude, whereas in \textit{United States v. Uhl}\textsuperscript{143} the possession of a "Jimmy" which had been "adapted, designed and commonly used for the commission of crimes of burglary and larceny" was not construed to be a crime involving moral turpitude. In \textit{United States v. Day}\textsuperscript{144} assault in the second degree while intoxicated constituted a crime involving moral turpitude, whereas in \textit{United States v. Zimmerman}\textsuperscript{145} the escape of a bank robber from jail while he was awaiting trial did not. In \textit{Rousseau v. Weidin}\textsuperscript{146} a conviction for the unlawful sale of intoxicating liquor was held to be a crime involving moral turpitude, whereas in \textit{Hampton v. Wong Song}\textsuperscript{147} a conviction under the Narcotics Act was held not to be. \textit{Berlando v. Robinson}\textsuperscript{148} held that larceny or theft was a crime \textit{malum in se}, and for that reason involved moral turpitude. Then, as if to prevent any subsequent second guessing, the court added "[w]e are not here presented with a case of a father stealing a loaf of bread for his starving children or any facts of an extenuating nature whatsoever. Unmitigated larceny as thus committed by Berlando is a crime involving moral turpitude."

The difficulty that exists with a crime involving moral turpitude as

\begin{itemize}
\item \textsuperscript{140} See Appendix infra.
\item \textsuperscript{141} See Appendix infra.
\item \textsuperscript{142} 31 F.2d 81 (1st Cir. 1929).
\item \textsuperscript{143} 107 F.2d 399 (2d Cir. 1939).
\item \textsuperscript{144} 15 F.2d 391 (S.D.N.Y. 1926).
\item \textsuperscript{145} 71 F Supp. 534 (E.D. Pa. 1947).
\item \textsuperscript{146} 284 F 565 (9th Cir. 1922).
\item \textsuperscript{147} 299 F. 289 (9th Cir. 1924).
\item \textsuperscript{148} 262 F.2d 850 (7th Cir. 1959).
\item \textsuperscript{149} \textit{Id.} at 851.
\end{itemize}
the legislative standard is not eliminated when the standard is changed to require the prior offender to show that he possesses good moral character. In fact, the burden is often increased because there is a prima facie presumption that the former offender does not possess good moral character. Although the presumption is rebuttable, it appears that only in extreme cases will a court alter an administrative determination.

The wisdom of so empowering a licensing board becomes increasingly doubtful after an examination of the decisions of a thoughtful judge, such as Learned Hand, as he struggled to make the same kind of determinations. Moreover, in a relatively recent decision, the Supreme Court held that a good moral character requirement was "yet another choice to give a registrar power to permit an applicant to vote or not depending solely on the registrar's own whim or caprice."

By analogy the Supreme Court's castigation is further evidence that the courts are not compelled to permit the discretionary power of the licensing boards to continue unchecked.

**Conclusion**

The conflict between occupational licensing and rehabilitation is capable of relatively simple resolution by either the courts or the legislatures. All that seems to be required is a sensitivity to the reality that neither the licensed group nor the class traditionally excluded, prior offenders, can be looked at in isolation, and that their impact upon each other must be taken into account when legislation is considered or challenged. Even without making sweeping changes, the overall position of the ex-offender could be altered and improved. If such a change

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152. Bufalino v. Holland, 277 F.2d 270, 276 (1960). Here the applicant produced 161 affidavits and 13 witnesses in support of his plea that he possessed good moral character.
153. See Posusta v. United States, 285 F.2d 533 (2d Cir. 1961); Schmidt v. United States, 177 F.2d 450 (2d Cir. 1949); Repouille v. United States, 165 F.2d 152 (2d Cir. 1947); United States ex rel. Berlando v. Remer, 113 F.2d 429 (2d Cir. 1940); United States ex rel. Iorio v. Day, 34 F.2d 920 (2d Cir. 1929).
155. Id. at 133.
of attitude is communicated to the inmate, then the attitude of the inmate regarding his own potential might also change.

As a rule of thumb for future construction of legislative standards in licensing, it is suggested that "felony" be interpreted to include only those offenses which can reasonably be said to relate to the occupation involved. This is not an entirely new approach. For example, throughout the country real estate brokers are refused licenses if they have been convicted of forgery, false pretenses, etc., which are offenses clearly related to the profession of selling land. There is no indication that a conviction for draft evasion or smoking marijuana is sufficient to exclude a prospective land salesman. Further refinement requires that not only the type of felony be relevant, but also that the time when the felony was committed also be considered. Again, legislation has already acknowledged this principle. For example, applications for liquor and pharmacy licenses are often refused when there has been an offense within five years of the application. This indicates some acceptance by legislatures that time heals, and the judicial teaching in Silver v. Green indicates a similar recognition. The same considerations are necessary with regard to occupational licensing statutes with crime involving moral turpitude and good moral character standards. Both the crime and the individual's character should be interpreted so that they relate to the calling. As a standard, it is suggested that a more meaningful test would be "dishonorable conduct relevant to the occupation."

In the final analysis, whatever approach is taken in the future the route chosen must not be the one in which

[1] It is perfectly obvious that it constitutes the very antithesis of rehabilitation, for instead of guiding the offender back into the useful paths of society it excommunicates him and makes him literally an outcast. I can think of no more certain way in which to make a man in whom rest the seeds of antisocial behavior more likely to pursue further a career of unlawful activity than to place on him the stigma of a derelict.

At present the choices open to the ex-offender are few. There is a great need to do away with the existing barriers to his entry into the work force. This is the only way that the state's rehabilitative system

156. See Appendix infra.
157. See Appendix infra.
can have any hope of guaranteeing the prisoner a viable future as well as a tolerable present. If society re-evaluates the effectiveness of the present rehabilitation system it can aid not only the ex-offender but itself as well.

APPENDIX

The following is a cross sample of state legislation which has the effect of placing a prior offender at a disadvantage vis-à-vis the rest of the general population. As with the preceding text, the emphasis is on employment and occupational licensing. The first column indicates the activity under consideration. The next three columns include those provisions which can result in the singling out of prior offenders and the refusal to issue the license or other privilege. The relevant grounds for refusal, and the abbreviations used, are:

(a) commission of a felony (Felony)
(b) commission of a crime involving moral turpitude (Moral Turp.)
(c) proof of good moral character (G.M.C.)

The next three columns concern the revocation of the license. The categories here are almost the same—commission of a felony (Felony), commission of a crime involving moral turpitude (Moral Turp.), and an “others” column.

While the charts are extremely informative with respect to the variations in state legislation and show clearly the irrationality of the whole licensing system, they are incomplete in a few respects. They do not indicate whether or not there is to be a mandatory or discretionary refusal or revocation where there has been the commission of a felony or a crime involving moral turpitude. Of course, there is discretion where there is good moral character requirement, and in some instances there would appear to be discretion as to what offenses include moral turpitude.

Not included are the various states’ legislation on divorce, juries, or witnesses, as such legislation applies to prior offenders, although every state has provisions which deal specifically therewith. As suggested in the introduction, it was hoped that where discretion is given to a board the Appendix would include some statement of policy, but unfortunately most boards were not prepared to propose such statements.
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<td>tit 63, § 605 (A)</td>
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<td>tit 24, § 11-1109</td>
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<td>tit 37, § 132</td>
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<td>tit 60, § 1</td>
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NOTE: CONVICTS CAN VOTE IN PENNSYLVANIA ARTICLE 7 § 1

Narcotic addict
tit 63, § 666 Conviction of crime
tit 63, § 720 Forgery, etc within 5 years

This includes time keeper, etc

tit 24, § 11-1109 immorality

tit 31, § 700J-404

Felony where car is used
### West Virginia

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<th>Occupation</th>
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OCCUPATIONAL LICENSING