

## Licensing of Health Care Professionals From a Biblical Perspective

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Licensing is a large and growing governmental activity. The array of licensed occupations includes alligator hunters, quail breeders, physicians, astrologers, lawyers, photographers, psychologists and rainmakers. The number of professional groups seeking licensure status grows yearly.<sup>1,2</sup> About ten percent of the American national income is earned by licensed individuals.<sup>1</sup> Once established, licensing laws are rarely removed from the statute books. State professional associations lobby strongly for establishing and maintaining licensing laws to "protect the public" despite the lack of experimental data relating licensing to increased competence or public safety.<sup>1-5</sup> Indeed, Stanley Gross declares in his review that "the evidence reveals licensing to be a mystifying arrangement that promises protection of the public but that actually institutionalizes a lack of accountability to the public."<sup>6</sup>

Licensing is the focus of this paper and is distinguished from less restrictive activities such as public or private certification, accreditation, designation, registration or listing. Licensure is accomplished by the state through laws which regulate not only an occupational title a person may use but also his or her occupational activity. For example, a psychologist licensing law defines both who may practice psychology as well as who may use the title psychologist. Thus, the activity of people is regulated, not the actual product or end result of the activity.

The etymology of the words license and certify aid in understanding the activity control nature of licensure regulations. License is derived from a Latin word,

*licere*, meaning to be permitted. Certify is derived from the Latin *certus plus facere*, i.e., to make certain. Certifying involves simply attesting to the status of something or someone while licensing focuses on regulating an activity. The state makes lawful to restricted licensed groups certain occupational activity by licensing laws. Violators are typically punished by fine and/or prison sentence.

The negative consequences of licensure have already been quite substantial to health care professionals and their patients. Many studies<sup>8</sup> report increased fees for the same service in states that license a particular occupation, e.g., optometry, versus those that do not. Licensing limits entry into health care profession as well as access to services by the poor.<sup>9,10</sup> In Massachusetts, licensing has been used to force private practice physicians to comply with state policy.<sup>11,12</sup> Physicians who treat Medicare patients are required to accept the state's payment as total compensation or lose their license to practice medicine.

The negative consequences fail to be balanced by any substantial empirical body of data supporting the use of licensure. For example, licensing does tend to increase the credential status of practitioners but there is no relationship to the quality of service actually delivered.<sup>9,13</sup> As Gross declared, "The bulk of research and scholarship is clearly critical of licensing. I have taken it to mean that it is not just the current licensing system that is faulty, but that licensure is inherently defective. Licensing needs to be replaced by systems

that enhance self-protection and choice."

### BRIEF HISTORY

The involvement of government in medical practice is age old. The Babylonian Code of Hammurabi (2080 B.C.) fixed patient fees and stipulated certain punishments for negligence. In Greece in 300 B.C., women were barred from medical practice. An examination and licensing board existed for healers in Baghdad in 931 A.D.

The earliest licensing regulations somewhat similar to today's procedures occurred around 1200 in Paris. A chancellor conferred the *licentia docendi* on all teaching candidates examined and recommended by the majority of the masters of the Faculties of Theology, Common and Civil Law, or Medicine, or by the majority of six masters chosen from the Faculty of Arts.<sup>14</sup> New members were expected to observe the customs and obey the statutes of the guild. Those teaching without a license or not conforming to guild expectations were punished. Some of the chancellor's initial power was eventually assumed by the pope and state.

Frederick II, Emperor of the Holy Roman Empire, in 1225 wrote the first comprehensive medical practice law.<sup>1</sup> Provisions in this law included a professional examination, certain training requirements, some rules for practice, and punishment for failure to obey the law. Licensing laws became an exclusionary social tool in the 14th century. Training requirements became numerous and not directly related to occupational ability. Due to the increased expense, the poor were frequently excluded from the licensed professional group. Both those with power to license as well as those involved in university training sought to maintain an upper-class identification as a tool to maintain the monopoly. These two groups worked in tandem while espousing altruistic motives for various requirements "for the public welfare."<sup>6</sup> Post details the development of "public welfare" laws, of which licensing statutes are one type, from pagan Roman origin.<sup>14</sup>

The monopolistic power of guilds and related

professional regulations was curtailed in the later fifteenth and sixteenth century.; The growing philosophy of economic freedom, the power of independent nations, and the harmful economic effects of the monopolies resulted in the decline in licensing. Occupational regulation did not regain momentum until the nineteenth century. Unable to rely on social class system, professional groups turned to the government for the enactment of licensing laws to maintain a public confidence and occupational monopoly. Friedman details the growth in restrictive regulations and the self-serving, monopolistic interaction between medical groups, medical training facilities and medical licensing agencies.<sup>5</sup>

More and more occupations now seek licensure by the state "for public protection." The dominance of the licensed group supported by the professional group lobby and the bureaucracy that maintains the licensing statutes has rarely been successfully challenged. Historically, major changes in licensing have only occurred as the result of major social changes, e.g., invasion, exploration of the American western frontier. Licensing has generally resulted in increased state control and has been advanced in the apparent absence of a clear Biblical rationale. The primary purpose of this paper is to explore licensing of health care professionals in America from a Biblical perspective. More detail concerning history, validity problems of licensing procedures, the consequences of licensing and other issues can be found in several fine books and articles.<sup>10,11</sup>

### BIBLICAL PRINCIPLES

Christians are directed to God's revealed word for primary counsel (Ps. 73:24; 2 Tim. 3:16). While such questions as the validity of licensing exams are important, the Christian must examine relevant Biblical principles concerning the basic appropriateness of licensing. A procedure or process may be technologically feasible but sinful, e.g., elective abortions. Addressing issues of the world from the mindset of the unbeliever and using the language of the unbeliever is Biblically foolish (Prov. 26:4,5).

Individuals such as Samuel Rutherford in Lex, Rex (or The Law and the Prince) asserted that all law must be based upon Biblical principles and that all people were subject to it. An understanding of the Christian Bible as the basis for legal statutes has been challenged historically by legal positivism, a position of Roman origin.<sup>16</sup> Legal positivism is a theory of law which declares that statutes are simply the commands of a human sovereign. No conceptualization of a "higher" source of justice or right and wrong is posited.<sup>17</sup> Christians have rejected legal positivism and encouraged at least an abstract appreciation of Biblical principles in society.<sup>18,19</sup> Some have specifically advocated general Biblical principles as the best underpinning of legal statutes. Such general admonitions have been well considered in the abstract but have not of themselves led to specific legal codes/reform or even firm criteria for judging existing statutes.

God's laws in the Old and New Testaments are not simply general guidelines but are, in principle, normative for today. God's Word reveals His everlasting character and serves as a sound ideal for structuring of legal codes (Is. 33:22). This revelation is not for some simplistic and unscriptural "salvation by works." Rather, the Holy Spirit works within the heart of the born-again Christian in the process of sanctification to allow an understanding and obedience to the objective standards of God's revealed law.<sup>17</sup> (c£ Ps. 119:33-36; Rom. 9:31,32)

Many Biblical principles and passages may be cited as the basis for an appeal to God's law as normative for human legal codes. Sin itself is defined as the transgression of God's law (1 John 3:4; Rom. 7:7; Westminster Confession of Faith, Chap. VI). The perpetual moral duty of the believer is to love, love being defined as obedience to. God's law (Matt. 22:40; Rom. 13:10; 1 John 5:2,3). As Bahnsen declared, "Christ often appealed to the law of God to bolster his teaching (John 8:17), vindicate his behavior (Matt. 12:5), answer his questions (Luke 10:26), indict his opponents (John 7:19), and give concrete identity to the will of God for men (Matt. 19:17)."<sup>35</sup> Both the Hebrew (**torah**) and the Greek (**nomos**) words for law are singular. Scripture refers to all the commandments as a

unit.

All of God's law is perpetual (Ps. 119:152). Some aspects of God's law have been satisfied on earth by Christ's sacrificial death, e.g., the sacrificial laws, while other facets of God's law continue, e.g., laws against homosexuality. A more thorough discussion of the function of God's law today may be found in books and articles by Bahnsen<sup>17,21</sup>, Jordan<sup>22</sup>, and Rushdoony<sup>16,24</sup>. For the purpose of this paper, I will assume the hermeneutic of these authors is correct. For a critical look at this hermeneutic, the reader is referred to books and papers by Chismar and Rausch<sup>25</sup>, Davis<sup>26</sup>, Kline<sup>27</sup>, and Neilands.<sup>28</sup>

### BUILDING CODES

The Old Testament clearly allows some state interference with the private lives of its citizens (Ex. 21:33; Deut. 22:8). For example, Deut. 22:8 declares "When you build a new house, make a parapet around your roof so that you may not bring the guilt of bloodshed on your house if someone falls from the roof." At least two principles are evident within this passage. First, it is the product that is regulated, i.e., the construction of a parapet. Characteristics of the person building the parapet are not stipulated in any way. For example, it is not stated that the builder must be the owner of the house or that the builder must have a year of apprenticeship experience. Having an incompetent person build the parapet may subject the owner to charges of negligence in the event of injury but the decision of who will build is left to the owner, not the church or state. The state activity would be more prosecutorial than regulative. Second, the possible consequence of not abiding by the regulation is immediately severe, i.e., bloodshed. Someone may be severely injured or killed if he or she fell from the roof. Thus, this suggests that the potential damage in licensed activities should be: (a) observable to noninvolved parties and (b) obviously damaging to the injured party. Further, the priority is on the finished product, not the person who accomplished it. The law is task-oriented rather than credential-oriented.

### FREE MARKET HONESTY

Licensed activities are business transactions. Licensing laws are typically most concerned with the private practice model of service provision rather than the institutional service model which has built-in supervision within the organized hierarchy. In a free economy, a client or customer independently agrees to pay a provider for a particular service such as electrical repair or medical care.

Biblical law demands honesty in business transactions (Lev. 19:35,36; Deut. 25:13-15). Being honest, such as using accurate scales, is the responsibility of the service provider receiving the money, not the client/customer. However, although the use of dishonest standards is sin, no punishment is prescribed to be administered by civil authorities. Not all sinful activities are illegal activities requiring state intervention by statute. Indeed, the provider is to be honest primarily out of recognition of God's character, not fear of state punishment (cf. Lev. 19:36b).

The provider in this example might be subject to punishment for other crimes such as theft (Ex. 22:3) but not for being a dishonest person. Theft requires restitution to the injured party (Lev. 6:5). The enforcement of restitution may be a state function. The state need only be concerned in licensing laws with actual behavior, however, not character traits such as the ubiquitous "good moral character" requirements of licensure laws. Judgments concerning traits are the appropriate province of the church as God's body on earth (Tit. 1:6-9). Ultimately, only God can accurately judge the character or heart of a person (I Sam. 16:7).

### FREE MARKET CONTRACTS

A contract is an agreement reached by two or more parties within a voluntary association. Licensing laws influence who may offer what services and, therefore, influence contract making. The already-cited Massachusetts law even ties licensure to fixed fees for physicians.<sup>12</sup> Each party entering into a contract is to be given consideration according to Scripture (Deut. 24:14,15). Thus, payment is to be fair and timely. Individuals are to refrain from unfair economic advantage (Deut. 24:6,15). For example, usury was

forbidden (Neh. 5:10). State involvement seems limited to: (a) legal action as required when contracts are broken (Deut. 22:13-19; Rom. 13:3-5), (b) establishment of contract, evidence and court rules (Deut. 25:1-3), and (c) prohibition of contracts with illegal or immoral purposes (Deut. 22:30).

There exists no Biblical precedent for the state's regulation of legal, reasonable and voluntary contracts.<sup>29</sup> The parable of the workers in the vineyard (Matt. 20:1-15) illustrates this point well. Workers provided a service for an agreed fair wage. The fact that the owner decided to pay those who worked only one hour the same as those who worked all day was only of importance to the contracting parties. The state was not involved in regulation.<sup>30</sup> Interestingly, licensing may also violate anti-trust principles in that competition is limited by a group on a licensing board which largely has a vested interest in the growth of the occupation being licensed.

The Bible places the responsibility of business dominion on the individual or family (Matt. 20:1-15; Gen. 4:19-22), not the state. The U.S. Constitution embodies this Biblical principle in Article 1, Sec. 10 (1) by stating no state shall make a "...law impairing the obligation of contracts." Believers are even encouraged not to invoke the state's judicial power when contracts have been broken by other believers (1 Cor. 6:1-7). With unbelievable state power is invoked only as a last resort (cf. Matt. 18:15-17) and after actual damage has occurred.

### ESTABLISHMENT OF RELIGION

Licensing laws which pro voluntary contracts by competent adults have no Biblical justification and seem descended from Roman legal codes. <sup>6</sup> Post has detailed the development of "public welfare laws" of which licensing laws are one type." A basic assumption is that greater wisdom and power reside within the state rather than the church or individual citizens. However, the state has no inherent ability to determine truth (Acts 18:14-16; John 18:38) and its power is limited (Matt. 22:21; Acts 5:29). Examples of appropriate disobedience to civil authority include the midwives

refusal to obey Pharaoh (Ex. 1:15-22; 2:1-10), Rahab's refusal to obey the king's order concerning spies (Josh. 2; Heb. 11:31), Daniel's refusal to eat certain food (Dan. 1) and the refusal of the three Hebrew children to worship an idol (Dan. 3).

Licensing laws lead to the establishment of religion by encouraging the establishment of profession orthodoxy.<sup>29</sup> Licensing boards render opinions based largely upon personal and professional attitudes popular: the time.<sup>21,23</sup> Orthodoxy, however, can only legitimately be established if it rests upon a Godly foundation, e.g., John 3:16. For example, the state is now in the position of deciding whether a physician is functioning as a physician if he believes in prayer as a curative process in addition to or instead of certain medications. Whether the licensing board decides in "favor" or "against" prayer is not the point. In either case, the state thus determines "truth", a function for which it is not qualified (Acts 18:14-16; John 18:38). The Constitution protects against this unbiblical function in the well-known "establishment" clause.

### **EQUALITY OF OPPORTUNITY**

God's law is an equal opportunity normative standard. It applies both to believers and unbelievers. Paul informs his spiritual son, Timothy, in 1 Tim. 1:89a that "We know that the law is good if man uses it properly. We also know that the law is made not for good men but for lawbreakers and rebels, the ungodly and sinful..." The law's purpose is to teach people of their sinful nature and lead them to Christ by faith, for salvation comes only by faith and not acts of the law (Gal. 3:24,25). All are condemned and all may be saved by the same standard, belief in Christ as Savior (Acts 10:34,35; John 3:16).

The equality of opportunity principle exists throughout Scripture." It is an equality based upon God-given rights, not civil rights. By definition, civil rights are granted by the state and may be removed by the state. God's rights are eternal because He is eternal (Ps. 90:2, Is. 40:28) and His character does not change with time (Mal. 3:6). The forefathers of our country recognized the stability of God-given rights and based the

Declaration of Independence upon truths "endowed by their Creator", and not created by the creature. In addition, the founders wanted to protect this equality by limiting state interference in business.

Economic equality of opportunity is stipulated in the Bible. Moses declares in Deut. 10:17, "For the Lord your God is God of gods and Lord of lords, the great God, mighty and awesome, who shows no partiality and accepts no bribes." The rich or poor economic status of a person was not to influence the usual conduct of business (Deut. 15:9) or legal decision-making (Ex. 23:3). Family-to-family economic differences when a person is born are to reflect God's sovereignty and laws, not state control (John 9:1-3). Licensing laws have historically favored the rich by requiring long training periods unrelated to occupational competence.<sup>6</sup> Licensing requirements with no clear relationship to occupational competency continue to favor the rich and violate the economic equality of opportunity principle. For example, the American Psychological Association (APA) has recommended that licenses only be granted to psychologists graduating from APA-approved doctoral programs." Such programs in clinical/counseling typically require four academic years training and one year post-doctoral internship. Students must support themselves during these five years or "drop out". Some students may come from very wealthy families. Most, however, enslave themselves to the state through government loans or tax-supported graduate assistant jobs. Yet, no data exist supporting the utility of the doctoral degree in actual professional practice.

### **ABILITY DIFFERENCES**

One function of licensing laws is to recognize differences in performance. The group that is able to "pass" (possess criteria ability and characteristics) becomes the privileged licensed group while others do not. The variation of abilities among people is an essential assumption of licensing laws. Lacking the assumption, no licensing law could be even superficially justified. Scripture does recognize these differing abilities (Dan. 2:21-23). For example, Moses records that several men were particularly skilled in artistic

design and craftsmanship (Ex 31:1-6).

A practical corruption occurs in that the measured abilities may not be the delivered job performance to the client. Thus, a nurse may have shown a licensing board the ability to take the blood pressure of a cardiac patient but may not do it in practice. In addition, the state may use licensing for purposes other than recognition of certain ability levels. An example is state limitation of the number of foreign medical graduates who become physicians. Furthermore, the state lacks the requisite authority to define which abilities are the important ones in a given field. For example, the ability to identify with a patient's religious beliefs and base treatment recommendations on them may be important but unrecognized by the state, or even reason for disqualification. Demonstrated ability and actual job performance are thus different. God's word provides a role for the state in job performance after the fact, but not for licensure because of mere possession of certain abilities.

### SUMMARY AND CONCLUSION

This paper has discussed two major points relevant to the licensing of individuals in the U.S. by the government. First, the pragmatic problems of lack of psychometric validity of licensing procedure and the consequences of the laws have been briefly reviewed in addition to a brief review of the history. Second, a more detailed discussion was presented concerning six Biblical principles related to licensing. Licensing fails on several counts. The following concepts were presented:

1. Legal regulation should relate to the end product of the occupation, not unrelated credentials.
2. Legal regulation should be limited only to activities where the potential damage is serious, immediate and tangible. Poor hair styles or poorly made wills, for example, do not Biblically justify a call to license the occupation of hair stylists or lawyers.
3. Potential damage or loss should be observable to noninvolved parties.

4. Laws should be concerned with occupational behavior, not character traits.

5. Not all sinful activity is illegal activity to be punished by the state. Other Biblical institutions (church and family) may be involved in protection, punishment, and reward functions.

6. The government may not establish "truth." In this case, "truth" should not be developed through the licensing activities of state boards which develop professional orthodoxies, i.e., "religions."

7. Government function is primarily prosecutorial and punitive, not regulative.

8. The state should not interfere with moral, voluntary contracts between two or more competent persons.

9. Requirements with no clear relationship to occupational competence may favor the rich and violate the economic equality of opportunity principle.

10. God-given differences exist between people and laws may recognize these differences.

The above points in no way deny that incompetent people may work in an occupation. However, the government is not able to eliminate all risks of life including those in business transactions. Many professional/business risks such as negligence relate to the sinful heart of man (Prov. 28:19). Only God can know and change this heart, not man. To place the government in such an unbiblical position only increases economic slavery via occupational restriction and higher taxes.<sup>33,34</sup>

The government has an appropriate role in punishing wrong. For example, a plumber agrees to fix a slowly leaking pipe. He collects the fee for service but does not fix the pipe. Instead, he merely places a pail under the pipe. When confronted, he refuses to make restitution for the money and subsequently damaged materials. The state could Biblically force restitution (Rom. 13:4). Eventually, the plumber would either change his ways, be in jail, and/or go out of business.

The punishment of crimes such as the above may not currently be practical. For example, trial dates may be so far in the future that restitution would be of no practical benefit. There may need to be related changes in the legal system to be a more righteous system. Detailing changes are relevant but beyond the scope of this paper. In addition, desired changes in one aspect of the legal system need not stop reform in another respect.

The above discussion does not eliminate certification by a private agency. For instance, I may want a tooth pulled. I may choose to go to a dentist certified by Organization X. On the other hand, I may go to a dentist who is certified by nobody but has had a very successful practice for ten years. The contract choice is mine in that I may or may not consider certification important. In either case, the state does not limit my options or interfere with the health care contract. In a more exhaustive account, Gross details three rationales for regulation: "lack of information by client," "third party harm," and "society knows best."<sup>1</sup> He concludes that none merits support for the current licensing system.

God, who is our judge, lawgiver, king and savior (Is. 33:22), certainly desires no less than legal systems based upon His word which glorify Him. Christians need to prayerfully consider the points raised in this paper. Biblically-based discussion concerning licensing is lacking and is needed. If valid, the following courses of action are encouraged.

**1. Education** - Most people applying for licensure or serving in various volunteer professional groups such as examination committees have probably not considered whether licensing is actually defensible. Statements such as "Licensing is for the public good" may be accepted despite the clear lack of supporting data. Schools and other training institutions are encouraged to examine such propositions. For Christians, an encouragement to study Scriptural principles in relationship to licensing is needed. Josiah's reforms described in 2 Chronicles 34 and 35 were largely based on his and his people's understanding of God's Word over a period of several years.

**2. Refusal** - Christians should refuse to take part in voluntary licensing activities as a matter of conscience. For example, Christians are encouraged to refuse to function on state licensing boards or examination committees. Such refusal helps to confront other with a sinful system yet the person can still function in the occupation and provide for his family (1 Tim. 5:8). Historically, trying to change the system from within does not appear effective.

**3. Legislation** - Licensing processes are created by state statute. As such, they can also be eliminated by statute. As Gross declares, "Professional licensure is a house of cards that may be tumbled by the wind of consumer information and awareness."<sup>1</sup> Supporting laws eliminating licensing as well as politicians with some grasp of a Biblical underpinning of legal statutes is necessary.

Licensing laws have been found wanting in many respects. On one hand, they have been an instrument of harm to thousands by denying occupational entry or access to services. More importantly, licensing laws fail to reflect principles revealed in Scripture. Any system which fails to glorify God by reflecting His revealed will results in harm and must be opposed by Christians who revere His word. We have failed thus far to heed God's warning in Prov. 13:15 that "Good understanding wins favor, but the way of the unfaithful is hard."

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### Acknowledgements

The manuscript typing by Mrs. Harriet Pipkin is



gratefully acknowledged as well as the comments made by Pastor G. Brent Bradley and Elder John Thompson on an earlier version of the paper. All Bible quotes are taken from the New International Version translation.

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