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Barbers, Caregivers, and the “Disciplinary Subject”: Occupational Licensure for People with Criminal Justice Backgrounds in the United States

Alec C. Ewald

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**BARBERS, CAREGIVERS, AND THE
“DISCIPLINARY SUBJECT”:
OCCUPATIONAL LICENSURE FOR PEOPLE
WITH CRIMINAL JUSTICE BACKGROUNDS IN
THE UNITED STATES**

*Alec C. Ewald**

ABSTRACT

It is commonly assumed that people with criminal backgrounds are ineligible for licensed employment in the United States. This study, based on more than one hundred interviews with occupational-certification officials in states across the country, demonstrates that people with conviction histories seeking professional credentials confront an unpredictable process that resurrects and amplifies their records and often requires them to perform their rehabilitation, good character, and governability. State laws are extremely varied, complex, and sometimes opaque; application procedures expose would-be licensees to inspection and judgment by a variety of public and private actors. People with criminal backgrounds are not flatly excluded from occupational certification. Indeed, significant

* Alec Ewald is an Associate Professor in the Department of Political Science at the University of Vermont. I was very fortunate to receive comments and suggestions from Jessie Allen, John Brigham, Jack Chin, Nora Demleitner, Megan Denver, Andrew Dilts, Richard Ewald, Kathy Fox, Sarah Lageson, Margy Love, Brendan Lynch, Ellie Miller, Meg Mott, Keramet Reiter, Morgan Saunders, Jennifer Selin, Nick Sibilla, Caryn Devins Strickland, Anna Terwiel, and Alison Wilkey. Their generosity improved this Article a great deal and saved me from many mistakes. Of course, I am responsible for remaining errors of fact and interpretation. Thanks to Julia Western and Ryan Conroy for excellent research assistance in the critical early days; thanks also to Bill Falls, Dean of the College of Arts & Sciences, and Bob Taylor, former Chair of the Department of Political Science, at the University of Vermont. I am indebted to the staff of the *Fordham Urban Law Journal* for their exceptionally thorough copy-editing and cite-checking, editorial advice, and patience. My greatest debt is to the many state officials who took the time to answer the questions of a nagging, often-obtuse researcher. Please direct correspondence to Alec.Ewald@uvm.edu.

percentages of those who manage to navigate the application process do become licensed barbers and nursing assistants, according to officials and available state data. But neither licensed barbers nor nursing assistants are restored to full and equal standing. They are in a kind of liminal state, one that is uncertain and precarious. Even when they succeed, people with criminal records seeking licensure often need to navigate a process that reinforces their diminished status and their vulnerability to state authority and private power.

These findings yield new insight into the civic status created by American collateral-consequences laws. While not cast out or condemned to permanent exclusion, people with criminal histories remain marked and open to surveillance and control in the extended American carceral state. They are, in effect, disciplinary subjects. Such civil barriers are more porous than absolute, but licensure practices raise serious problems of transparency, consistency, and fairness.

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INTRODUCTION

The last fifteen years have seen a great efflorescence of research and advocacy relating to the collateral consequences of criminal convictions in the United States. Seeking to understand the ways a criminal record “restructures the rights of citizenship,”¹ scholars, reformers, and journalists have analyzed policies restricting voting,² firearms ownership,³ jury service,⁴ receipt of public benefits,⁵ military

1. Issa Kohler-Hausmann, *Misdemeanor Justice: Control Without Conviction*, 119 AM. J. SOC. 351, 355 (2013).

2. See, e.g., PIPPA HOLLOWAY, *LIVING IN INFAMY: FELON DISFRANCHISEMENT AND THE HISTORY OF AMERICAN CITIZENSHIP* (2014); Beth A. Colgan, *Wealth-Based Penal Disenfranchisement*, 72 VANDERBILT L. REV. 55 (2019); Andrew L. Shapiro, Note, *Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy*, 103 YALE L.J. 537 (1993).

3. See, e.g., Jennifer Carlson, *The Hidden Arm of the Law: Examining Administrative Justice in Gun Carry Licensing*, 51 L. & SOC’Y REV. 346 (2017).

4. See, e.g., James M. Binnall, *Summoning Criminal Desistance: Convicted Felons’ Perspectives on Jury Service*, 43 L. & SOC. INQUIRY 4 (2017).

5. See, e.g., MAGGIE MCCARTY ET AL., CONG. RESEARCH SERV., *DRUG TESTING AND CRIME-RELATED RESTRICTIONS IN TANF, SNAP, AND HOUSING ASSISTANCE*

service,⁶ access to housing,⁷ and more⁸ — a web of state and national rules that together threaten to place Americans with convictions in a “state of legal nonfreedom.”⁹

This Article sheds new light on the character of that state by examining one significant element of the collateral-consequences landscape: state occupational licensure restrictions facing people with criminal convictions. Given that hundreds of jobs across the income spectrum require governmental certification in the United States, these policies represent a major component of the legal regime controlling people with records. There is a consensus that state occupational-credential restrictions pose serious obstacles to employment, constitute “bars” and “barriers,”¹⁰ and typically impose “[b]lanket restrictions . . . with no attention to individual circumstances or qualifications of the applicant in question.”¹¹

This Article examines policies and practices governing barbers and nurse’s aides, two occupations that, for different reasons, hold particularly important places in the debate over employment

(Nov. 18, 2015); Michael Leo Owens & Adrienne R. Smith, “*Deviants*” and Democracy: Punitive Policy Designs and the Social Rights of Felons as Citizens, 40 AM. POL. RES. 531 (2012).

6. See, e.g., Jennifer Hickey Lundquist et al., *Does a Criminal Past Predict Worker Performance?: Evidence from One of America’s Largest Employers*, 96 SOC. FORCES 1039 (2018).

7. See, e.g., Douglas N. Evans et al., *Examining Housing Discrimination Across Race, Gender, and Felony History*, 2018 HOUSING STUD. 1 (2018); Leah Goodridge & Helen Strom, *Innocent Until Proven Guilty?: Examining the Constitutionality of Public Housing Evictions Based on Criminal Activity*, 8 DUKE F. FOR L. & SOC. CHANGE 1 (2016); David Thacher, *The Rise of Criminal Background Screening in Rental Housing*, 33 L. & SOC. INQUIRY 5 (2008).

8. See generally MEDA CHESNEY-LIND & MARC MAUER, *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* (2002); MARGARET COLGATE LOVE ET AL., *COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION: LAW, POLICY AND PRACTICE* (2018); Alec C. Ewald, *Collateral Consequences and the Perils of Categorical Ambiguity*, in Austin Sarat et al., *LAW AS PUNISHMENT, LAW AS REGULATION* (2011).

9. JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* 6 (2007).

10. WHITE HOUSE COUNCIL OF ECON. ADVISERS, *THE LONG-TERM DECLINE IN PRIME-AGE MALE LABOR FORCE PARTICIPATION* 35 (2016), https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160620_cea_prime_age_male_lfp.pdf [<https://perma.cc/3Z7S-8GAF>]; JEREMY TRAVIS, *Invisible Punishment: An Instrument of Social Exclusion*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 22 (Marc Mauer & Meda Chesney-Lind eds., 2002).

11. DEVAH PAGER, *MARKED: RACE, CRIME AND FINDING WORK IN AN ERA OF MASS INCARCERATION* 28, 33 (2007).

credentials.¹² Together with analysis of statutes, administrative rules, application forms, and other documents, this Article focuses on the officials most directly responsible for overseeing the certification process — the professional staff of state regulatory boards. More than seventy telephone interviews were conducted with staff at boards of nursing, departments of public health, and other bodies responsible for credentialing certified nurse’s aides in twenty states, and more than thirty interviews were conducted with barber-board officials in twenty-five states.

Unexpectedly, in most states, barber-board staff explained that in their experience, substantial majorities of applicants with conviction backgrounds successfully won licensure — including, in many states, not only misdemeanants but also people with more serious records. “We license felons every day,” one Ohio barbering official said.¹³ Of course, staff estimates of approval rates are not conclusive evidence of outcomes.¹⁴ However, there is good reason to take these reports seriously, such as the fact that several states supplied data supporting interviewee accounts.¹⁵ Meanwhile, interviews and state data made clear that many people with criminal-justice backgrounds seek to

12. This Article will use the terms “credential,” “license,” and “certification” interchangeably, as describing a state’s official grant of permission to practice an occupation. Some state authorities and professional associations insist these terms are quite different: for example, the National Registry of Emergency Medical Technicians emphasizes that “certification” pertains to any professional credential granted by a *non-governmental* organization, while “licensure” describes the *state’s* grant of the legal authority to practice a defined profession or occupation. See *Legal Differences Between Certification and Licensure*, NAT’L REGISTRY EMERGENCY MED. TECHNICIANS, https://www.nremt.org/rwd/public/document/certification_licensure [https://perma.cc/E2JV-FHNC]. The Institute for Justice, in its Model Occupational Licensing Review Act, carefully defines and distinguishes between “government certification” and “occupational license.” See MODEL OCCUPATIONAL LICENSING REVIEW ACT 1, 3 (INST. FOR JUSTICE Mar. 2019), <https://ij.org/wp-content/uploads/2019/03/03-20-2019-Occupational-Licensing-Review-Act-1.pdf> [https://perma.cc/7H93-J5BP] [hereinafter INST. FOR JUSTICE, MODEL ACT 2019]. However, because “license” and “certificate” are not used in consistent, clearly different ways across states, the terms are used interchangeably here for clarity’s sake.

13. Telephone Interview with Ohio official, Ohio State Cosmetology and Barber Bd. (Jan. 26, 2015).

14. One careful study found that employers often over-stated their willingness to hire people with backgrounds. See Sarah Esther Lageson et al., *Legal Ambiguity in Managerial Assessments of Criminal Records*, 40 L. & SOC. INQUIRY 175, 192 (2015) (pairing employer interviews with audit studies of those same employers, and determining that among many employers, the “expressed willingness to hire applicants with records is not matched by observed behavior . . .”).

15. See *infra* note 135.

work as certified nurse’s assistants. “I can tell you that we have a dedicated staff of four that deal with just applicants with criminal convictions,” said a Florida official, describing an office that handles licensing for multiple health-related occupations.¹⁶ As with barber certification, in most states where officials were able to estimate approval rates for candidates with convictions, they reported that majorities of those able to navigate the application and review process were approved. This was true in states red and blue, large and small, and not only for common misdemeanor offenses such as first-time driving under the influence or drug possession, but often for felony-level convictions as well.

It would be a grave error, however, to read these results as suggesting that Americans with criminal-justice backgrounds enter the occupational-licensure setting restored to full civic status, cleansed of stigma, and unburdened by the “negative credential”¹⁷ of a criminal conviction. An equally important conclusion of this Article is that people with conviction histories seeking licensure are in a vulnerable and precarious state. Despite leaving the grasp of the criminal law, those with criminal convictions applying for civil credentials are under a pervasive “corrective penalty.”¹⁸ Governed by a complex, deeply decentralized administrative apparatus,¹⁹ they are best described by a concept based in the work of Michel Foucault: they are “disciplinary subjects.”²⁰

The indeterminacy of state law can make it virtually impossible for a would-be caregiver or barber to evaluate their own eligibility.²¹ Not just state agencies, but also vocational schools, clinical-training sites, testing companies, and individual employers all play roles in policing potential licensees’ eligibility, creating a true archipelago of governance.²² Well beyond the background check, licensure procedures resurrect and amplify the criminal record. Applicants are often required to describe their past, sometimes in vivid, first-person detail, and to supply documents they must retrieve from courthouses

16. Telephone Interview with Fla. official, Fla. Dep’t of Health (Feb. 20, 2017).

17. See Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937, 942 (2003).

18. See MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 129–30 (1st ed. 1977).

19. See Keramet Reiter & Susan Bibler Coutin, *Crossing Borders and Criminalizing Identity: The Disintegrated Subjects of Administrative Sanctions*, 51 L. & SOC’Y REV. 567, 574 (2017).

20. See *id.* at 568; see also *infra* Section I.B.

21. See *infra* Tables 1 and 2, and *infra* Sections III.A., III.B., and III.C.

22. See *infra* Section III.C.

and correctional authorities.²³ They are regularly directed to engage in specific kinds of performance — supplying written narratives or appearing in person before a licensing board — to demonstrate their contrition, rehabilitation, and governability.²⁴

Meanwhile, many jurisdictions make decisions on the basis of the applicant’s “conduct” rather than conviction.²⁵ This can mean that actions alleged by a policeman or prosecutor, rather than behavior confirmed by courts and correctional institutions, can determine whether a person receives a license to work.²⁶ In many states, even convictions ultimately set aside or expunged may lead to denial, particularly for would-be Certified Nursing Assistants (CNAs).²⁷ Throughout the licensure process, the combination of legal indeterminacy, procedural complexity, and individualized, character-based evaluations make the discretionary decisions of “street-level”²⁸ agents critical. Despite these myriad challenges, each year many Americans with criminal histories navigate these procedures, win the approval of licensing authorities, and successfully become barbers and nursing assistants.

This picture of occupational-licensure practice significantly advances our understanding of the civic status of Americans with criminal-justice records, and the nature of “carceral citizenship.”²⁹ Critical scholarship on collateral consequences usually emphasizes the degree to which having a conviction record brings about a sharp, durable shift in legal and social status. For example, struck by the range and severity of U.S. civil sanctions, many observers — including this author — have chosen metaphors of utter deprivation such as “civil death”³⁰ to describe the degraded condition brought about by

23. See *infra* Section III.D.1.

24. See *infra* Section III.D.

25. See *infra* Section III.B.

26. See *infra* Section III.B.

27. See *infra* Section III.B.

28. On the importance of “street-level” government agents, see generally MICHAEL LIPSKY, *STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES* (1980); BERNARDO ZACKA, *WHEN THE STATE MEETS THE STREET: PUBLIC SERVICE AND MORAL AGENCY* (2017); *infra* Section I.B.

29. Reuben Jonathan Miller & Forrest Stuart, *Carceral Citizenship: Race, Rights and Responsibility in the Age of Mass Supervision*, 21 *THEORETICAL CRIMINOLOGY* 532, 533 (2017).

30. See generally Alec C. Ewald, “Civil Death”: *The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 *WIS. L. REV.* 1045 (2002). For earlier academic work on the status of “civil death,” see Harry David Saunders, *Civil Death—A New Look at an Ancient Doctrine*, 11 *WM. & MARY L. REV.* 988 (1970); for more recent work, see, e.g., Gabriel J. Chin, *The New Civil*

carrying a conviction. Potent terms such as “internal exile”³¹ suggest absolute exclusion from the rights and privileges of citizenship. Leading voices in the study of American punishment adopt the metaphor of “caste,” arguing that collateral sanctions lock people with convictions into a lifetime of subordination.³²

This Article demonstrates that while civil barriers may be more porous than absolute, they nonetheless enact a legal regime in which people with conviction backgrounds remain labeled, vulnerable, and diminished. Controlled by a murky blend of rules, individuals with conviction records are exposed to surveillance and judgment by private and public actors in a complex, contingent system that seems certain to bring about serious problems of misinformation, confusion, and differential treatment.

This is a time of significant reform in state occupational licensure law. Spurred by an emerging coalition of criminal justice reform groups and libertarian organizations, in the last three years about twenty states have changed their credentialing rules pertaining to people with conviction records.³³ Indeed, some states discussed in

Death: Rethinking Punishment in the Era of Mass Incarceration, 160 U. PA. L. REV. 1789 (2012). In her powerful dissent in *Utah v. Strieff*, U.S. Supreme Court Justice Sonia Sotomayor wrote that anyone who is arrested “will now join the 65 million Americans with an arrest record and experience the ‘civil death’ of discrimination by employers, landlords, and whoever else conducts a background check.” 136 S. Ct. 2056, 2070 (2016) (Sotomayor, J., dissenting). In *United States v. Nesbeth*, U.S. District Court Judge Frederick Block wrote that “[t]oday, the collateral consequences of a felony conviction form a new civil death;” the phrase appears some fifteen times in the opinion, in his own prose or in citations and quotations. 188 F. Supp. 3d 179, 182 (E.D.N.Y. 2016).

31. See generally KELLY SALZMANN & MARGARET COLGATE LOVE, INTERNAL EXILE: COLLATERAL CONSEQUENCES OF CONVICTION IN FEDERAL LAWS AND REGULATIONS 1 (2009); Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL’Y REV. 153, 160 (1999).

32. See MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 2 (2010); BRYAN STEVENSON, JUST MERCY: A STORY OF JUSTICE AND REDEMPTION 16 (2014); James Forman Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 101, 110 (2012); Christopher Uggen et al., *Citizenship, Democracy, and the Civic Reintegration of Criminal Offenders*, 605 ANNALS AM. ACAD. POL. & SOC. SCI. 281, 300 (2006).

33. See generally *State Occupational Licensing Reforms for Workers with Criminal Records*, INST. FOR JUST. (2018), <https://ij.org/activism/legislation/state-occupational-licensing-reforms-for-people-with-criminal-records/> [<https://perma.cc/9QQL-BHZ2>] [hereinafter *State Occupational Licensing Reforms*]; CHIDI UMEZ & REBECCA PRIUS, NAT’L CONFERENCE OF STATE LEGISLATURES, BARRIERS TO WORK: IMPROVING EMPLOYMENT IN LICENSED OCCUPATIONS FOR INDIVIDUALS WITH CRIMINAL RECORDS 7 (2018), http://www.ncsl.org/Portals/1/Documents/Labor/Licensing/criminalRecords_v06_web.

this Article changed their laws during the time the study was conducted. New laws typically provide for preliminary eligibility determinations, prohibit license denial unless the applicant's conviction is directly related to the job in question, and require state agencies to report how many applicants with criminal records were denied, and why.³⁴ The evidence accumulated in this Article certainly underscores the need for such reforms, but also demonstrates that the problems afflicting U.S. licensure law are so deep and complex that

pdf [<https://perma.cc/4JUP-5WBQ>] (summarizing legislative reforms in 2017 and 2018 in twelve states); Margaret Colgate Love, *Consideration of Criminal Records in Licensing and Employment*, RESTORATION OF RTS. PROJECT (Aug. 2018), <http://ccresourcecenter.org/state-restoration-profiles/50-state-comparison-comparison-of-criminal-records-in-licensing-and-employment/> [<https://perma.cc/LB4R-6NHT>]; LOVE ET AL., *supra* note 8 (discussing recent changes). Further impetus to state licensure reform may have come from a 2015 U.S. Supreme Court decision, *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, in which the Court held that industry-controlled credentialing boards lack state-action immunity against antitrust scrutiny. See *N.C. State Bd. of Dental Exam'rs v. Fed. Trade Comm'n*, 134 S. Ct. 1101 (2015). Meanwhile, in 2017, the Council of State Governments, National Conference of State Legislatures, and National Governors Association together launched an "Occupational Licensing Policy Learning Consortium" to support state reform efforts to address problems caused by unnecessarily-restrictive licensure practices, including barriers to employment facing people with criminal records. See *Occupational Licensing Policy Learning Consortium*, NAT'L CONF. OF ST. LEGISLATURES (Aug. 15, 2017), <http://www.ncsl.org/research/labor-and-employment/request-for-applications.aspx> [<https://perma.cc/HW5T-87PW>]. The consortium now includes eleven states. See *Occupational Licensing: Reducing Barriers to Economic Mobility and Growth: Hearing Before the Subcomm. on Higher Educ. and Workforce Dev., H. Comm. on Educ. and the Workforce*, 115th Cong. (2018) (statement of Albert Downs, Policy Specialist, National Conference of State Legislatures).

34. See LOVE ET AL., *supra* note 8. Florida's criminal-justice reform law, HB 7125, passed by the legislature in early May of 2019, received a great deal of critical national attention because it requires people with felony convictions to pay all outstanding fines, fees, and restitution before they could be restored to the franchise—despite the fall 2018 enactment of a state constitutional amendment appearing to make rights restoration automatic. However, another element of the law would enable people to apply for barber and cosmetology licenses while still in prison; prevent boards from denying applicants based on older convictions; and require boards to publish lists of crimes held to be disqualifying in recent years, among other reforms. See Andrew Wimer, *Florida Legislature Passes Fresh Start Amendment to Clear the Path to Jobs for Individuals with Criminal Records*, INST. FOR JUST. (May 3, 2019), <https://ij.org/press-release/florida-legislature-passes-fresh-start-amendment-to-clear-the-path-to-jobs-for-individuals-with-criminal-records/> [<https://perma.cc/FUY7-8Q2B>]. Notably, this bill had significant support from conservative advocacy organizations, such as the group Americans for Prosperity. See, e.g., Press Release, Ams. for Prosperity, *Florida Takes First Step Towards Justice Reforms* (May 3, 2019), <https://americansforprosperity.org/florida-takes-first-step-towards-justice-reforms/> [<https://perma.cc/289E-ZX8Z>].

statutory changes, while necessary, should be understood as a vital first step rather than a panacea.

The Article proceeds as follows: Part I reviews previous research related to occupational-licensure restrictions, and explains the study's theoretical approach and methodology. Part II outlines states' rules for licensing those with conviction records as barbers and caregivers, and reports officials' estimates of applicant success. Part III describes ways in which occupational licensure operates as an intensely disciplinary process, followed by a concluding discussion.

I. LITERATURE, THEORETICAL FRAMEWORK, AND METHODOLOGY

A. Criminal Records, Employment, and Licensure

The employment challenges that persons with criminal convictions face have drawn broad research and policy attention in the literature on collateral consequences. Some research indicates that employment is a key predictor of desistance.³⁵ In addition to work's importance for human flourishing, family welfare, and community stability, there is an intuitive connection between lawful employment and successful reentry. In his 2004 State of the Union Address, for example, President George W. Bush described the plight of a released prisoner who was unable to find work, observing that he would be "much more likely to commit crime."³⁶

Despite widespread recognition of the importance of work to reentry, and the fact that many people with criminal histories prove to be very good workers,³⁷ employers often resist hiring candidates with records.³⁸ Meanwhile, the extraordinary growth of private and public background-check databases has made having a record an "eternal" problem.³⁹ These obstacles to employment bring about immense

35. See Christopher Uggen, *Work as a Turning Point in the Life Course of Criminals: A Duration Model of Age, Employment, and Recidivism*, 65 AM. SOC. REV. 529, 542 (2000); see also PAGER, *supra* note 11, at 28.

36. George W. Bush, Address Before a Joint Session of Congress on the State of the Union (Jan. 20, 2004), <https://www.presidency.ucsb.edu/documents/address-before-joint-session-the-congress-the-state-the-union-24> [https://perma.cc/WE6B-F84Y].

37. See Kristin Bumiller, *Bad Jobs and Good Workers: The Hiring of Ex-Prisoners in a Segmented Economy*, 19 THEORETICAL CRIM. 336, 351 (2015); Lundquist et al., *supra* note 6, at 1060.

38. See Lageson *supra* note 14; Pager, *supra* note 17, at 955, 959; Christopher Uggen et al., *The Edge of Stigma: An Experimental Audit of the Effects of Low-Level Criminal Records on Employment*, 52 CRIM. 627, 637-38 (2014).

39. See generally JAMES B. JACOBS, *THE ETERNAL CRIMINAL RECORD* (2015); see also Sarah Esther Lageson, *Found Out and Opting Out: The Consequences of Online*

human and social costs, since tens of millions of Americans have criminal-justice records of some type.⁴⁰ In response, more than thirty states and more than one hundred municipalities have adopted diverse “ban the box” or “fair chance” measures, directing employers to consider a candidate’s qualifications before asking about a conviction history.⁴¹

The licensure restrictions people with criminal records face represent *state-imposed* obstacles, and have been subject to steady critical attention since at least a 1973 special project of the American Bar Association (ABA).⁴² Some estimates conclude that more than a quarter of the American workforce requires some kind of governmental certification to work,⁴³ and licensure restrictions affecting people with conviction histories appear to have “increased dramatically” in the last forty years.⁴⁴ Pointing to analyses of the ABA’s new collateral-consequences database tallying almost 30,000 licensure limits, the National Employment Law Project (NELP) calls such restrictions “a major barrier to participation in the labor

Criminal Records for Families, 665 ANNALS AM. ACAD. POL. & SOC. SCI. 127, 128 (2016); Alessandro Corda, *More Justice and Less Harm: Reinventing Access to Criminal History Records*, 60 HOW. L.J. 1, 2–3 (2016).

40. MICHELLE NATIVIDAD RODRIGUEZ & MAURICE Emsellem, 65 MILLION “NEED NOT APPLY”: THE CASE FOR REFORMING CRIMINAL BACKGROUND CHECKS FOR EMPLOYMENT, NATIONAL EMPLOYMENT LAW PROJECT 3 (2011), https://s27147.pcdn.co/wp-content/uploads/2015/03/65_Million_Need_Not_Apply1.pdf [<https://perma.cc/ZW7D-4VW5>].

41. BETH AVERY & PHIL HERNANDEZ, BAN THE BOX: U.S. CITIES, COUNTIES, AND STATES ADOPT FAIR HIRING POLICIES, NATIONAL EMPLOYMENT LAW PROJECT 1, 3 (2018), <https://s27147.pcdn.co/wp-content/uploads/Ban-the-Box-Fair-Chance-State-and-Local-Guide-September.pdf> [<https://perma.cc/UH3Y-5H5H>].

42. JAMES W. HUNT ET AL., LAWS, LICENSES AND THE OFFENDER’S RIGHT TO WORK: A STUDY OF STATE LAWS RESTRICTING THE OCCUPATIONAL LICENSING OF FORMER OFFENDERS 1, 2–3 (1973).

43. MORRIS M. KLEINER, THE HAMILTON PROJECT, REFORMING OCCUPATIONAL LICENSING POLICIES 1, 5 (2015), http://www.hamiltonproject.org/assets/legacy/files/downloads_and_links/reforming_occupational_licensing_morris_kleiner_final.pdf [<https://perma.cc/2B2P-82JN>]; MICHELLE NATIVIDAD RODRIGUEZ & BETH AVERY, NAT’L EMP’T LAW PROJECT, UNLICENSED & UNTAPPED: REMOVING BARRIERS TO STATE OCCUPATIONAL LICENSES FOR PEOPLE WITH RECORDS 1 (2016), <https://s27147.pcdn.co/wp-content/uploads/Unlicensed-Untapped-Removing-Barriers-State-Occupational-Licenses.pdf> [<https://perma.cc/3RNQ-SZQV>].

44. JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY 137 (2003); see Patricia M. Harris & Kimberly S. Keller, *Ex-Offenders Need Not Apply: The Criminal Background Check in Hiring Decisions*, 21 J. CONTEMP. CRIM. JUST. 6, 7–8 (2005).

market.”⁴⁵ Powerful individual accounts leave no doubt that for some people, such policies can have damaging effects that last for many years past the sentence.⁴⁶

Reform advocacy emphasizes the severity of typical policies, referring to “roadblocks,” “barriers,” and “blanket bans” on licensing people with records.⁴⁷ Much academic work shares this characteristic, usually describing “occupational bars,” “prohibitions,” and “legal barriers”⁴⁸ through which “ex-felons are barred from up to 800 different occupations across the United States[.]”⁴⁹ Other academic work uses more tentative terms, observing that “a felony record *can temporarily* disqualify employment in licensed or professional occupations[.]”⁵⁰ for example. But the scholarly consensus

45. RODRIGUEZ & AVERY, *supra* note 43. While most licensure occurs at the state level, the federal government limits access to some occupations. See U.S. EQUAL EMP’T OPPORTUNITY COMM’N, NO. 915.002, ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (2012), https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm [<https://perma.cc/X5XR-3ELS>]. Meanwhile, *municipal* governments also commonly license jobs such as driving a taxi, street vending, operating a dance hall, or working as a general contractor, and many employ their own restrictive policies pertaining to people with histories of criminal-justice contact. See Amy P. Meek, *Street Vendors, Taxicabs, and Exclusion Zones: The Impact of Collateral Consequences of Criminal Convictions at the Local Level*, 75 OHIO ST. L.J. 1, 1 (2014); Lahny R. Silva, *In Search of a Second Chance: Channeling BMW v. Gore and Reconsidering Occupational Licensing Restrictions*, 61 U. KAN. L. REV. 495, 496 (2012).

46. See, e.g., Beverly Harrison, *A Decades-Old Conviction Cost Me My Post-Retirement Job*, MARSHALL PROJECT (Sept. 10, 2017, 10:00 PM), https://www.themarshallproject.org/2017/09/10/a-decades-old-conviction-cost-me-my-post-retirement-job?utm_medium=email&utm_campaign=newsletter&utm_source=opening-statement&utm_term=newsletter-20170911-841#.e6hUMJHPy [<https://perma.cc/YX57-5AA8>]; Bari Weiss, *Admit this Ex-Con to the Connecticut Bar*, N.Y. TIMES (Aug. 9, 2017), <https://www.nytimes.com/2017/08/09/opinion/admit-this-ex-con-to-the-connecticut-bar.html> [<https://nyti.ms/2uGWmOO>].

47. See RODRIGUEZ & AVERY, *supra* note 43, at 6, 11; Demleitner, *supra* note 31, at 156.

48. TRAVIS, *supra* note 10, at 22; see PAGER, *supra* note 11, at 34.

49. Shawn D. Bushway & Gary Sweeten, *Abolish Lifetime Bans for Ex-Felons*, 6 CRIMINOLOGY & PUB. POL’Y 697, 698 (2007).

50. Bruce Western et al., *Black Economic Progress in the Era of Mass Imprisonment*, in INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 175 (Marc Mauer & Meda Chesney-Lind eds., 2002) (emphasis added). Referring specifically to the use of background checks by employers (rather than to licensure), Denver, Siwach, and Bushway observe that “court rulings and policy changes have forced criminal background checks to become more nuanced” in recent years. Megan Denver et al., *A New Look at the Employment and Recidivism Relationship Through the Lens of a Criminal Background Check*, 55 CRIMINOLOGY 174, 174 (2017). Notably, the leading treatise on collateral consequences law offers a

emphasizes stronger descriptive language: typical policies “forbid[] licensing boards from distributing licenses to ex-offenders,”⁵¹ “ban[] people who had been convicted from professional licensing,”⁵² and result in “[t]he exclusion of ex-offenders from vast segments of the labor market as a result of government regulation.”⁵³

Another line of criticism, brought particularly by free-market or libertarian advocates, is that while licensure law is nominally designed to ensure quality services and protect the public, it actually limits competition and drives up consumer costs.⁵⁴ In recent years, organizations such as the Texas Public Policy Foundation⁵⁵ and the Institute for Justice⁵⁶ have made common cause with progressive critics of mass punishment, advocating for significant reforms to licensure restrictions facing people with conviction records.⁵⁷

detailed and subtle account of the legal landscape governing licensure opportunities for people with conviction records. See LOVE ET AL., *supra* note 8, at §§ 6:14–17.

51. Elena Saxonhouse, *Unequal Protection: Comparing Former Felons’ Challenges to Disenfranchisement and Employment Discrimination*, 56 STAN. L. REV. 1597, 1611 (2004).

52. Corda, *supra* note 39, at 51.

53. Demleitner, *supra* note 31, at 156. Others describe policies that “in many states bar those convicted of crime from a range of occupations.” See Benjamin Levin, *Criminal Employment Law*, 39 CARDOZO L. REV. 2265, 2277 (2018); see also Harris & Keller, *supra* note 44, at 7 (“prohibit employment of ex-offenders”); Karol Lucken & Lucille Ponte, *A Just Measure of Forgiveness: Reforming Occupational Licensing Regulations for Ex-Offenders Using BFOQ Analysis*, 30 L. & POL’Y 46, 53 (2008) (“prohibit or severely limit ex-felons from a wide range of private-sector employment opportunities,” including “as barbers”). Prominent governmental publications have also characterized typical licensure policies this way. For example, in June of 2016, the Obama Administration noted that “[i]n many States, the formerly incarcerated are legally barred from a significant number of jobs by occupational licensing rules or other restrictions on the hiring of those who have been incarcerated.” WHITE HOUSE COUNCIL OF ECON. ADVISERS, *supra* note 10, at 34.

54. See MORRIS M. KLEINER, LICENSING OCCUPATIONS: ENSURING QUALITY OR RESTRICTING COMPETITION 1, 11–12 (2006); KLEINER, *supra* note 43, at 12; see also Shoshana Weissmann & C. Jarrett Dieterle, *Is It Wrong to Cut a Homeless Man’s Hair Without a License?*, WALL ST. J. (Apr. 8, 2018), <https://www.wsj.com/articles/is-it-wrong-to-cut-a-homeless-mans-hair-without-a-license-1523209162> [<https://perma.cc/8P8K-EJ9T>] (providing examples of non-licensed workers being restricted from practicing their trade and subsequently paying high fees and permitting costs).

55. See MARC LEVIN, WORKING WITH CONVICTION: CRIMINAL OFFENSES AS BARRIERS TO ENTERING LICENSED OCCUPATIONS IN TEXAS 8–13 (2007).

56. See INST. FOR JUSTICE, MODEL ACT 2019, *supra* note 12.

57. See also STEPHEN SLIVINSKI, TURNING SHACKLES INTO BOOTSTRAPS: WHY OCCUPATIONAL LICENSING REFORM IS THE MISSING PIECE OF CRIMINAL JUSTICE REFORM 1–11 (2016), <https://research.wpcarey.asu.edu/economic-liberty/wp-content/uploads/2016/11/CSEL-Policy-Report-2016-01-Turning-Shackles-into-Bootstraps.pdf> [<https://perma.cc/34B3-3WG7>].

A further focus of critical attention has been licensure laws that require “good moral character.” Since Bruce E. May’s groundbreaking 1995 study,⁵⁸ many scholars have assumed that licensure officials treat a conviction as *prima facie* evidence of deficient character, making “good character” provisions into rules that result in “flat proscriptions against all offenders,”⁵⁹ render occupational licenses “officially off-limits to ex-offenders,”⁶⁰ and function as “a substantial contributor to income inequality and a substantial barrier to rehabilitation.”⁶¹

States license hundreds of different occupations; barbering is among a few dozen that now require certification in every state.⁶² Barbering does not involve vulnerable populations, nor threaten public health and safety (that is, outside the script of *Sweeney Todd*), and state requirements for barber certification have long been a target of libertarian critics.⁶³ While the number of barbers is not large, it is an occupation open to people without advanced education, and one that confers solid status; barbershops are often hubs of sociability. Given the extraordinary impact of mass punishment on many African-American neighborhoods in the United States, it is worth noting that barbers and barbershops have long played important cultural roles in African-American communities.⁶⁴ About eighty-five percent of barbers are male.⁶⁵

58. Bruce E. May, *The Character Component of Occupational Licensing Laws: A Continuing Barrier to the Ex-Felon’s Employment Opportunities*, 71 N.D. L. REV. 187, 187 (1995).

59. PETERSILIA, *supra* note 44, at 138.

60. PAGER, *supra* note 11, at 34.

61. Deborah L. Rhode, *Virtue and the Law: The Good Moral Character Requirement in Occupational Licensing, Bar Regulation, and Immigration Proceedings*, 43 L. & SOC. INQUIRY 1027, 1028 (2018).

62. Pam Brinegar, *Professional Licensing*, in THE BOOK OF THE STATES 2005, 497 (2005), <http://www.csg.org/knowledgecenter/docs/BOS2005-ProLicensing.pdf> [<https://perma.cc/4PN8-FK22>].

63. Barbers typically must undergo hundreds of *days* in training, pass multiple exams, and pay significant licensing fees. See DICK M. CARPENTER ET AL., LICENSE TO WORK: A NATIONAL STUDY OF BURDENS FROM OCCUPATIONAL LICENSING 1, 141 (2012). A 2014 article derided barber-licensure restrictions as “the easy case,” arguing that the public is not threatened by unlicensed haircutters. See David A. Hyman & Shirely Svorny, *If Professions Are Just “Cartels By Another Name,” What Should We Do About It?*, 162 U. PA. L. REV. 101, 114–15 (2014).

64. See generally DOUGLAS W. BRISTOL, KNIGHTS OF THE RAZOR: BLACK BARBERS IN SLAVERY AND FREEDOM (2009); QUINCY MILLS, CUTTING ALONG THE COLOR LINE: BLACK BARBERS AND BARBERSHOPS IN AMERICA (2013).

65. See BUREAU OF LABOR STATISTICS, LABOR FORCE STATISTICS FROM THE CURRENT POPULATION SURVEY (2018), <https://www.bls.gov/cps/cpsaat11.htm> [<https://perma.cc/B7ST-P763>].

Barbering has had an outsized role in the debate over licensing people with records. The 1973 ABA study of ex-offender occupational limits called barbering “one of the most restricted occupations,” reporting that some forty-six states had laws “containing restrictions on the licensing of former offenders.”⁶⁶ In his remarks to a 2015 ABA conference on collateral consequences, ABA President William Hubbard twice referred to people with criminal records being “barred” from becoming barbers.⁶⁷ And a recent edition of a prominent corrections textbook notes that “[a]ll states . . . restrict former offenders from employment as barbers (even though many prisons provide training programs in barbering).”⁶⁸

The tragic, perhaps ultimately redemptive story of Marc LaCloche appears frequently in the literature. Trained to cut hair in a New York prison during the 1990s, LaCloche was denied a license upon release in 2000.⁶⁹ State law at the time, as Clyde Haberman explained in the *New York Times*, permitted license denial to persons determined to lack “good moral character,” and the Department of State decided LaCloche’s robbery record disqualified him on that ground.⁷⁰ In a tortuous sequence, LaCloche was rejected, won the credential on appeal and worked in two barbershops for five months without any problems, then had his license revoked by the New York Secretary of State in 2001.⁷¹ Mr. La Cloche appealed, was denied by an administrative law judge, and, in the course of subsequent appeal litigation, passed away.⁷² New York licensure law was revised after

66. HUNT ET AL., *supra* note 42, at 9.

67. AM. B. ASS’N, NATIONAL SUMMIT ON COLLATERAL CONSEQUENCES: CONFERENCE REPORT 11–12 (2015), https://www.americanbar.org/content/dam/aba/publications/criminaljustice/cc_national_summit_report.pdf [<https://perma.cc/8DT5-SEWC>].

68. TODD R. CLEAR ET AL., AMERICAN CORRECTIONS 453 (9th ed. 2011). Notably, however, some websites sponsored by barbering schools suggest that some states regularly certify people with conviction records. *See, e.g., Can You Get a Barber License with a Felony Conviction?*, BARBER SCHOOL, <http://www.barber-schools.org/blog/barber-license-felony-conviction> [<https://perma.cc/4JXS-8HF3>].

69. Clyde Haberman, *Ex-Inmate Denied Chair (and Clippers)*, N.Y. TIMES (Feb. 25, 2003), <https://www.nytimes.com/2003/02/25/nyregion/nyc-ex-inmate-denied-chair-and-clippers.html> [<https://nyti.ms/2m4jwy4>].

70. *Id.*

71. *See* Matter of La Cloche v. Daniels, No. 403466, 2006 N.Y. Misc. LEXIS 9379, at *3 (N.Y. Cty. Sup. Ct. June 1, 2006).

72. *See id.* at *7. In an extraordinary opinion handed down after Mr. La Cloche’s death, New York state judge Louis B. York acknowledged that while the applicant’s death required him to dismiss the case against the Department of State, “the court feels compelled to comment upon the injustice that has been committed here[.]”

his death, in a push to require licensing agencies to consider evidence of rehabilitation.⁷³ LaCloche's experience captures the legal perversities and grave human costs of employment restrictions imposed on people with criminal backgrounds. His story, featured in numerous academic and advocacy publications, sparked legal reform and has become a template by which many people describe licensure restrictions.⁷⁴

In most states, barbers are governed by a single statewide entity, and, once licensed, can work in any barbershop.⁷⁵ By contrast, people hoping to work as Certified Nursing Assistants, or Certified Nursing Aides, face a daunting level of regulatory complexity. ("Assistant" is the most commonly used term, though some states prefer "Aide."⁷⁶ This Article will employ the abbreviation "CNA.")

criticizing both the Department of State and the administrative law judge for their respective denials of Mr. La Cloche's applications. *Id.* at *8.

73. Clyde Haberman, *Ex-Inmate's Legacy: Victory over Bias and Catch-22*, N.Y. TIMES (Aug. 28, 2008), <https://www.nytimes.com/2008/08/29/nyregion/29nyc.html> [<https://nyti.ms/2zuu2oj>].

74. ROBERT D. BORUCHOWITZ ET AL., MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS 49 n.26 (2009); JEREMY TRAVIS & CHRISTY VISHER, PRISONER REENTRY AND CRIME IN AMERICA 162 (2005); Avi Brisman, *Double Whammy: Collateral Consequences of Conviction and Imprisonment for Sustainable Communities and the Environment*, 28 WM. & MARY ENVTL. L. & POL'Y REV. 423, 423–24 (2004); Ben Geiger, *The Case for Treating Ex-Offenders as a Suspect Class*, 94 CALIF. L. REV. 1191, 1202 (2006); Michael Pinard & Anthony C. Thompson, *Offender Reentry and the Collateral Consequences of Criminal Convictions: An Introduction*, 30 N.Y.U. REV. L. & SOC. CHANGE 585, 598 (2006); Jocelyn Simonson, *Rethinking "Rational Discrimination" Against Ex-Offenders*, 13 GEO. J. ON POVERTY L. & POL'Y 283, 304–05 (2006); N.Y. STATE BAR ASS'N, REPORT: SPECIAL COMMITTEE ON RE-ENTRY 28 n.146 (2016).

75. See *infra* Section II.A.

76. A few states instead award the credential to "Licensed Nursing Assistants." See, e.g., *Licensed Nursing Assistants*, VT. SECRETARY ST., <https://www.sec.state.vt.us/professional-regulation/list-of-professions/nursing/licensed-nursing-assistants.aspx> [<https://perma.cc/34ML-2AN3>] (pertaining to credentialing of Licensed Nursing Assistants in Vermont); *Nursing Assistant*, OFF. PROF. LICENSURE & CERTIFICATION, <https://www.oplc.nh.gov/nursing/nursing-assistant.htm> [<https://perma.cc/ZHU8-F6MP>] (describing Licensed Nursing Assistant credentialing in New Hampshire); *Licensed Nursing Assistant*, ARIZ. ST. BOARD NURSING, <https://www.azbn.gov/licensure-certification/licensed-nursing-assistant/> [<https://perma.cc/NRS5-2JUW>] (Arizona State Board of Nursing description of LNA and CNA credentialing). The U.S. Bureau of Labor Statistics notes that both "nursing assistants" and "nursing aides" labels are used, and this article will use the term "CNA" for both phrases interchangeably. BUREAU OF LABOR STATISTICS, NURSING ASSISTANTS AND ORDERLIES (2019), <https://www.bls.gov/ooh/healthcare/nursing-assistants.htm> [<https://perma.cc/8634-ZDCT>] (stating that "Nursing assistants, sometimes called *nursing aides*, help provide

CNAs may serve in many types of organizations. Their employer might be a huge public hospital, a small assisted-living facility, a nursing home owned by a national corporation, a state residence for the disabled, a nonprofit rehabilitation center, or a service sending aides into homes.⁷⁷ Their pay, while usually modest, is supported by combinations of fee-for-service, private-insurance, and government-program arrangements, including Medicare and Medicaid.⁷⁸ The CNA field is extensively regulated and extremely complex, with several federal statutes and hundreds of state laws directing the content of nurse-aide education, requiring background checks, mandating the creation and use of registries, and restricting the ability of people convicted of a crime to work as CNAs, either by limiting access to the credential itself or by prohibiting certain types of facilities from hiring direct-care workers with criminal records.⁷⁹

There are between two and three million nurse's aides, nursing assistants, and certified home health aides working in the United States, and the Bureau of Labor Statistics (BLS) projects the occupation to be one of the economy's fastest-growing in the next decade.⁸⁰ The work can be grueling and the pay low, but the field is open to people without college degrees (indeed, many start their training in high school vocational-education programs), offers a steady paycheck and, sometimes, modest benefits⁸¹ — in addition to

basic care for patients in hospitals and residents of long-term care facilities, such as nursing homes”).

77. See, e.g., BUREAU OF LABOR STATISTICS, NURSING ASSISTANTS AND ORDERLIES, *supra* note 76 (explaining that nursing assistants “work in nursing and residential care facilities and in hospitals”); *CNA Nurse Assistant Training & Testing*, AM. RED CROSS, <https://www.redcross.org/take-a-class/cna-training> [<https://perma.cc/NG7G-H3ZY>] (explaining that nursing assistants “provide quality care for residents in long-term care facilities, hospitals, home health care and hospice settings”).

78. See *infra* Section III.E.

79. See *infra* Table 2.

80. The Bureau of Labor Statistics groups together “Home Health Aides and Personal Care Aides,” of which it estimates there are 2.9 million—and projects 41% growth, in 2016-2026, in those fields. See BUREAU OF LAB. STAT., OCCUPATIONAL OUTLOOK HANDBOOK: HOME HEALTH AIDES AND PERSONAL CARE AIDES, <https://www.bls.gov/ooh/healthcare/home-health-aides-and-personal-care-aides.htm> [<https://perma.cc/HWL7-LDVH>]. The BLS estimates there are about 1.5 million “Nursing Assistants and Orderlies,” and projects 11% growth in the field. See BUREAU OF LABOR STATISTICS, NURSING ASSISTANTS AND ORDERLIES, *supra* note 76.

81. See, e.g., BUREAU OF LABOR STATISTICS, NURSING ASSISTANTS AND ORDERLIES, *supra* note 76 (noting 2017 median pays of \$23,210 for home health aides and \$23,100 for personal care aides); *20 Reasons to Choose a Career as a CNA*, NURSEJOURNAL.ORG, <https://nursejournal.org/certified-nursing-assistant/20-reasons->

its deep intrinsic merit. Nationally, almost ninety percent of the field is female, and almost half is African American or Latino.⁸²

Unlike barbers, caregivers serve quintessentially vulnerable populations: the ailing, the aged, and the disabled. They often do so in settings where narcotics are present; those employed as home health aides work in private homes, sometimes with clients whose vision, hearing, and mobility are impaired, and whose valuables and prescription drugs may be readily available. Here the public-safety argument for caution in certification is clear, at least on a general level, and both patient-advocacy groups⁸³ and federal agencies⁸⁴ have questioned the adequacy of existing background-check procedures.

As with barbering, authors studying the health-employment restrictions that people with conviction records face tend to describe sweeping, general bans. Some, for example, note that state laws typically require “health care providers” to “conduct background investigations to make sure they screen out ex-convicts.”⁸⁵ Others write that state laws “prohibit employers in certain professions (such as home healthcare, nursing, education, eyeglass dispensing, plumbing and barbering), from hiring ex-offenders, even when their convictions are unrelated to the job or license sought.”⁸⁶

However, there is intriguing evidence that the CNA field is not completely closed to people with conviction backgrounds. In a 2011 study of employees working in a sample of 260 Medicare-certified nursing facilities, the Office of Inspector General for the U.S. Department of Health & Human Services found that “92 percent of nursing facilities employed at least one individual with at least one criminal conviction,” nearly half employed five or more, and a total of

to-choose-a-career-as-a-cna/ [https://perma.cc/H8JM-TKPT] (explaining that “[m]ost CNAs also get very good bonuses and benefits. These include such things as health, dental and vision insurance, life insurance, disability insurance and more”).

82. PAUL OSTERMAN, WHO WILL CARE FOR US? LONG-TERM CARE AND THE LONG-TERM WORKFORCE 5 (2017).

83. See generally SARA GALANTOWICZ ET AL., AARP PUB. POL’Y INST., SAFE AT HOME? DEVELOPING EFFECTIVE CRIMINAL BACKGROUND CHECKS AND OTHER SCREENING POLICIES FOR HOME CARE WORKERS (2010), <https://assets.aarp.org/rgcenter/ppi/ltc/2009-12.pdf> [https://perma.cc/3VJT-JKKW].

84. See, e.g., SUZANNE MURRIN, U.S. DEP’T OF HEALTH & HUM. SERVS., OFFICE OF INSPECTOR GEN., OEI-07-14-00130, HOME HEALTH AGENCIES CONDUCTED BACKGROUND CHECKS OF VARYING TYPES 14 (2015), <https://oig.hhs.gov/oei/reports/oei-07-14-00130.pdf> [http://perma.cc/86XX-PT8F].

85. JEREMY TRAVIS, BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY 165 (2005).

86. Sesha Kethineni & David N. Falcone, *Employment and Ex-Offenders in the United States: Effects of Legal and Extra Legal Factors*, 54 PROB. J. 36, 42 (2007).

five percent of employees had criminal records.⁸⁷ Academic analysis of direct-access workers in nursing homes and similar facilities in New York, with a sample of more than six thousand individuals, found that almost two-thirds of applicants with conviction records were cleared to work.⁸⁸ A popular website designed to help people learn more about the field (and to market training programs) says that because of variation in state laws, “there is some hope” for people with convictions who want to work as nursing aides.⁸⁹

B. Collateral Sanctions, Civic Status, and the “Disciplinary Subject”

This study approaches licensure restriction as a legally hybrid mechanism through which Americans with records are shaped and constructed as democratic citizens. Reviewing collateral-consequences laws for the ABA, a pair of leading scholars wrote that “[w]hen a person is convicted of a crime in the United States his legal status changes forever.”⁹⁰ Whether labeled penal or civil, penalties imposed following the criminal-justice process are potent tools of subject formation,⁹¹ and represent one way individuals “are constituted within legal categories.”⁹²

87. DANIEL R. LEVINSON, NURSING FACILITIES’ EMPLOYMENT OF INDIVIDUALS WITH CRIMINAL CONVICTIONS i–ii (2011), <https://oig.hhs.gov/oei/reports/oei-07-09-00110.pdf> [<https://perma.cc/4MPC-L9L6>].

88. Denver et al., *supra* note 50, at 182.

89. *See How Can I Become a CNA if I Have Felony Convictions?*, CNA CLASSES NEAR YOU, <https://cnaclasesnearyou.com/can-become-cna-felony-convictions/> [<https://perma.cc/M9TF-DEZE>]. The site offers advice for applicants with convictions, telling them to be honest and forthcoming about their history, and to supply supporting documentation.

90. MARGARET LOVE & APRIL FRAZIER, CERTIFICATES OF REHABILITATION AND OTHER FORMS OF RELIEF FROM THE COLLATERAL CONSEQUENCES OF CONVICTION: A SURVEY OF STATE LAWS 1 (2006). The National Conference of Commissioners on Uniform State Laws has concluded that “the real work of the legal system is done not by fine or imprisonment, but by changing the legal status of convicted persons.” NAT’L CONFERENCE OF COMM’RS ON UNIF.STATE LAWS, DRAFT, AMENDMENTS TO UNIFORM COLLATERAL SANCTIONS AND DISQUALIFICATIONS ACT 4 (2010), <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=ebfe4bf1-549c-6f86-1546-b6e2ecdf4d3d&forceDialog=0> [<https://perma.cc/U956-YKSE>].

91. ANDREW DILTS, PUNISHMENT AND INCLUSION: RACE, MEMBERSHIP, AND THE LIMITS OF AMERICAN LIBERALISM 29 (2014).

92. Reiter & Coutin, *supra* note 19, at 570. Emphasizing that criminal justice contact effects a specific type of political socialization for justice-involved individuals, Lerman and Weaver have developed a theory of “custodial citizenship.” *See* AMY E. LERMAN & VESLA M. WEAVER, ARRESTING CITIZENSHIP: THE DEMOCRATIC CONSEQUENCES OF AMERICAN CRIME CONTROL 15 (2014); Vesla M. Weaver & Amy E. Lerman, *Political Consequences of the Carceral State*, 104 AM. POL. SCI. REV. 817, 818 (2010). Miller and Stuart, meanwhile, describe “carceral citizenship” as a “novel

In contrasting “juridical subjects” with “obedient subjects,” Foucault wrote that there are two distinct ways society might respond to a criminal offense: first, with a punishment that, once completed, fully “restore[s] the juridical subject of the social pact”; second, with the application of a “corrective penalty” which seeks to “shape an obedient subject.”⁹³ In this latter regime, criminal-justice contact converts individuals from responsible agents into “objects to be reshaped through discipline.”⁹⁴ A sentence may be fulfilled, correctional supervision may end, and rights may indeed be officially restored — yet the mark endures, and the disciplinary subject is not fully requalified, remaining vulnerable to control and restraint.⁹⁵ This

form of citizenship emergent” in the contemporary United States. Miller & Stuart, *supra* note 29, at 533. In putting forward the concept of a “disciplinary subject” here, I draw from these important works of scholarship, and also take a slightly different approach. Like Lerman and Weaver, I want to emphasize the diminished status of people with convictions, and the “economic and social handicaps” they can face. LERMAN & WEAVER, *supra*, at 820. Like Miller and Stuart, I want to emphasize the “restrictions and duties” accompanying a conviction record, the ways “third parties” are “empowered to manage, correct, sanction, and care for” people with criminal backgrounds, and the importance of “arbitrary enforcement” in many areas. Miller & Stuart, *supra* note 29, at 533, 536, 541. My approach here is, in a sense, narrower in that I closely scrutinize a single type of restriction as a lens on the status of people with records. It is, in a different sense, broader: for example, Miller and Stuart’s analysis of “carceral citizenship” focuses closely on those leaving prison, and the impact on specific, intensely-affected communities, and the “raced and criminalized poor.” *Id.* at 544. The licensure restrictions under study here, by contrast, may affect anyone with a history of criminal justice involvement, whether or not they experienced incarceration.

93. FOUCAULT, *supra* note 18, at 129. Beyond the criminal justice setting, scholars working in the tradition of Foucault’s “disciplinary society” have employed the concept of the “disciplinary subject” to refer to people trained to internalize and submit to a proper rationality by practices dispersed throughout modern schools, workplaces, or hospitals. *Id.* at 209; see Peter Digeiser, *The Fourth Face of Power*, 54 J. POL. 977, 994 (1992); Wendy Brown, *Wounded Attachments*, 21 POL. THEORY 390, 397 (1993); Brian C.J. Singer & Lorna Weir, *Politics and Sovereign Power: Considerations on Foucault*, 9 EUR. J. SOC. THEORY 443, 445 (2006); Claire Valier, *Criminal Detection and the Weight of the Past: Critical Notes on Foucault, Subjectivity and Preventative Control*, 5 THEORETICAL CRIMINOLOGY 425, 429 (2001). As Armando Lara-Millan has explained, such institutions are understood “as sites of the state’s productive administration of lives, in which a key objective of political power is not to subdue but to create certain types of citizens, workers, and subjects.” Armando Lara-Millan, *States as a Series of People Exchanges*, in THE MANY HANDS OF THE STATE: THEORIZING POLITICAL AUTHORITY AND SOCIAL CONTROL 81, 81 (Kimberly J. Morgan & Ann Shola Orloff eds., 2017).

94. DILTS, *supra* note 91, at 31; see also Kathryn J. Fox, *Changing Violent Minds: Discursive Correction and Resistance in the Cognitive Treatment of Violent Offenders in Prison*, 46 SOC. PROBS. 88, 89 (1999).

95. Reiter & Coutin, *supra* note 19, at 574. Foucault appears to distinguish “marks” from “signs” and “traces,” in his three modalities or technologies, by which the power to punish is exercised. See FOUCAULT, *supra* note 18, at 131. But as

is the position in which people with criminal records seeking occupational credentials in the United States find themselves.

In the United States, civil mechanisms of control restricting the activities of people with histories of criminal-justice involvement, are often legally categorized as regulatory rather than penal. But given their punitive character and effects, many authors describe civil penalties as “invisible punishments.”⁹⁶ Looking beyond “the old state institutions of police-courts-prisons” to understand modern punishment,⁹⁷ a vibrant literature examines this “shadow carceral state,”⁹⁸ its “legally hybrid” means of punishment and exclusion,⁹⁹ and the “entanglement” of civil and criminal law.¹⁰⁰ Scholarship in this vein has focused on immigration,¹⁰¹ on civil tools for policing urban disorder,¹⁰² on the proliferation of fees and other legal financial obligations,¹⁰³ and on concealed-carry firearms rights.¹⁰⁴ This study

scholars such as Pager and Kohler-Hausmann have shown, the contemporary criminal record can also serve diverse “marking” functions. PAGER, *supra* note 11, at 5 (describing the impact of the “negative credential” of a conviction record, in the employment setting, for those “marked” by a conviction); Kohler-Hausmann, *supra* note 1, at 353 (describing “marking” as “[t]he generation, maintenance, and regular use of official records about a person’s criminal justice contacts,” even for those who do not actually incur a conviction).

96. See generally INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT (Marc Mauer & Meda Chesney-Lind eds., 2002). For a strong critique of the doctrines and practices by which collateral consequences are treated as “external to the criminal justice process,” see Paul T. Crane, *Incorporating Collateral Consequences into Criminal Procedure*, 54 WAKE FOREST L. REV. 1, 1 (2019) (“[A] conviction’s collateral consequences, no matter how severe, are typically treated as irrelevant when determining whether a defendant is entitled to a particular procedural protection.”).

97. John Braithwaite, *The New Regulatory State and the Transformation of Criminology*, 40 BRIT. J. CRIMINOLOGY 222, 229 (2000). Similarly, Rose has urged us to move beyond “codes, courts, and constables.” Nikolas Rose, *Government and Control*, 40 BRIT. J. CRIMINOLOGY 321, 324 (2000).

98. Katherine Beckett & Naomi Murakawa, *Mapping the Shadow Carceral State: Toward an Institutionally Capacious Approach to Punishment*, 16 THEORETICAL CRIMINOLOGY 221, 221 (2012).

99. Katherine Beckett & Heather Evans, *Crimmigration at the Local Level: Criminal Justice Processes in the Shadow of Deportation*, 49 L. & SOC’Y REV. 241, 242 (2015).

100. Colleen F. Shanahan, *Significant Entanglements: A Framework for the Civil Consequences of Criminal Convictions*, 49 AM. CRIM. L. REV. 1387, 1415 (2012).

101. See, e.g., Juliet Stumpf, *The Cimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 376–77 (2006); Beckett & Evans, *supra* note 99.

102. See generally KATHERINE BECKETT & STEVE HERBERT, BANISHED: THE NEW SOCIAL CONTROL IN URBAN AMERICA (2011).

103. See generally ALEXES HARRIS, A POUND OF FLESH: MONETARY SANCTIONS AS PUNISHMENT FOR THE POOR (2016).

appraises occupational licensure – a quintessentially civil regulation, but one with significant impacts on people with conviction records – as one such hybrid.

C. Methodology

Excellent accounts of licensure law now exist. These include, for example, the remarkable, searchable, on-line National Inventory of Collateral Consequences of Conviction (NICCC),¹⁰⁵ the full-dress treatise on collateral consequences authored by Love, Roberts, and Logan,¹⁰⁶ detailed legal tables curated by the Collateral Consequences Resource Center,¹⁰⁷ and comprehensive advocacy publications.¹⁰⁸ Compilation and publication of the NICCC in particular brought “an end to the mystery”¹⁰⁹ regarding the extent of collateral sanctions in various jurisdictions, as one admiring review essay put it. But statutes, regulations, and judicial decisions – the “law in books”¹¹⁰ – are only the beginning. Particularly where legal texts feature ambiguity or discretion, and where procedures are unusually complicated – as is true of licensure law – the “law in action”¹¹¹ can be quite different from what texts suggest. In these settings, “street-level” government agents effectively determine what claims are legitimate, who receives goods and services, and how

104. See generally Carlson, *supra* note 3.

105. NAT'L REENTRY RESOURCE CTR., NATIONAL INVENTORY OF THE COLLATERAL CONSEQUENCES OF CONVICTION, <https://niccc.csjusticecenter.org/> [<https://perma.cc/B9D7-3DPL>].

106. LOVE ET AL., *supra* note 8.

107. *Id.* at § 2.10.

108. RODRIGUEZ & AVERY, *supra* note 43.

109. Alex Tway & Jonathan Gitlen, *Practitioner: An End to the Mystery, a New Beginning for the Debate: National Inventory of Collateral Consequences of Conviction (NICCC) Provides Complete List of Every Collateral Consequence in the Country*, 2 CRIM. L. PRAC. 15, 15 (2015).

110. Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 12 (1910).

111. *Id.* For example, the texts of many credentialing laws are ambiguous or discretionary – they *allow* a denial for criminal conviction, for example, but do not require it. See, e.g., N.C. GEN. STAT. ANN. §131E-265(b) (1995) (stating that fact of conviction alone “shall not be a bar to employment”, and requiring consideration of seven factors, including age at the time of crime, existence of a “nexus” between criminal conduct and the relevant job duties, and evidence of rehabilitation, prior to denial); ALA. CODE §34-21-25 (1965) (Board of Nursing “may also deny, revoke, or suspend any license issued by it or to otherwise discipline a licensee upon proof that the licensee: is guilty of fraud or deceit in procuring or attempting to procure a license; has been convicted of a felony; is guilty of a crime involving moral turpitude or of gross immorality that would tend to bring reproach upon the nursing profession . . .”).

citizens (those with and without conviction histories) are constituted by the state.¹¹²

For that reason, this study draws not only from a wide range of documents, but also from the accounts and understandings of state licensure officials. As an entry point into understanding credentialing practice, licensing-board officials make attractive interview subjects. Critically, staff are the public face (and voice) of policy: a person seeking information, guidance, or documents will interact with these agents. Licensing-board staff regularly work with other stakeholders such as schools, testing companies, employers, and legislators. They serve full-time, giving them a strong understanding of licensure's many complexities; they advise boards, staff meetings, and keep records, and often have long experience. While the board members usually hold ultimate credentialing authority, state rules or norms often allow staff to participate in decision-making as well.¹¹³ Finally, state officials are relatively accessible. While locating the person best able to explain policy was often time-consuming (particularly for nurse-aide licensure, and in larger states), most staff proved patient and generous in describing rules and practices.

I conducted thirty-two interviews with state barber-board staff in twenty-five jurisdictions (twenty-four states and the District of Columbia), between November 2015 and June 2016.¹¹⁴ I collected more than sixty documents pertaining to barber licensure, including statutes, regulations, application forms, and state-issued FAQ documents, some provided to me by interview subjects and others retrieved from the open web. I conducted a total of seventy-seven interviews related to CNA licensure in twenty jurisdictions, of which about sixty interviews were with state officials, and the remainder

112. See generally LIPSKY, *supra* note 28; Kitty Calavita, *The Paradoxes of Race, Class, Identity, and "Passing": Enforcing the Chinese Exclusion Acts, 1882-1910*, 25 L. & SOC. INQUIRY 1, 1 (2000); Amy E. Lerman & Joshua Page, *Does the Front Line Reflect the Party Line? The Politicization of Punishment and Prison Officers' Perspectives Towards Incarceration*, 56 BRIT. J. CRIMINOLOGY 578, 578 (2016); ZACKA, *supra* note 28, at 24. Notably, Lipsky's foundational 1980 study observed that "labels ascribed by street-level bureaucrats" can have "stigmatizing" effects on those he referred to as "ex-cons." LIPSKY, *supra* note 28, at 69.

113. See, e.g., *infra* note 163 (describing barber-credentialing policies in Indiana and North Carolina).

114. The barber-licensure jurisdictions were Alabama, Alaska, Arizona, Arkansas, California, Connecticut, Delaware, Florida, Georgia, Indiana, Iowa, Kansas, Kentucky, Maine, Mississippi, New Hampshire, New York, North Carolina, Ohio, Rhode Island, Tennessee, Texas, Vermont, Virginia, and Washington, D.C. In most states, a single interview was conducted; I interviewed more than one person in six states. For specific dates of interviews, see Appendix A.

with staff of trade associations, employers, or testing companies, between late 2016 and early 2018.¹¹⁵ The complexity of CNA licensure made multiple interviews necessary in all states. An average of about four interviews per state were conducted, with seven states involving five or more. I collected more than one hundred legal documents pertaining to CNA licensure. Sampled states were chosen to represent diversity in region, population size, partisanship, ethnographic make-up, and rural/urban mix.

Interviews were semi-structured, guided by a list of about twenty questions. Frequently, officials described procedures and rules, and told stories, in a way that answered questions out of order, as it were, or gave answers that obviated later questions. Queries began with licensure procedures generally (ascertaining the typical mode and sequence of schooling, testing, and certification in a given state, and the roles of various agencies), then moved into specifics about state eligibility rules, followed by questions about the frequency of application and successful licensure of people with conviction backgrounds, the availability of waivers, whether any recent changes

115. These jurisdictions were Alabama, Alaska, Arkansas, Arizona, California, Connecticut, Delaware, Florida, Georgia, Kansas, Kentucky, Maine, Maryland, Missouri, North Carolina, Ohio, Texas, Vermont, Virginia, and Washington, D.C. Several nursing interviews were conducted in summer 2016 and winter 2017; most were conducted in the summer of 2017, and the remainder in early 2018. Officials in seven states were interviewed on multiple dates, either for updates after legal changes or to clarify ambiguous responses. For specific dates of interviews, see Appendix B. In many states, I interviewed trade-association employees and staff at educational programs in addition to state officials. I took contemporaneous typed notes, enabling me to transcribe many statements verbatim, while paraphrasing others. Previous experience had shown that many government officials are extremely reluctant to be recorded describing the law, talking about clients or colleagues, or discussing what they consider to be sensitive matters of policy implementation. Meanwhile, the complexity of state bureaucracy meant multiple calls were often necessary, usually with transfers across various departments; in that setting, beginning each call by reading an extended disclosure of a research protocol and a recorded agreement to participate would have been cripplingly unwieldy. Contemporaneous notes, meanwhile, can serve as valuable academic source material. See, e.g., Vicki Lens, *Confronting Government After Welfare Reform: Moralists, Reformers, and Narratives of (Ir)responsibility at Administrative Fair Hearings*, 43 L. & SOC'Y REV. 563, 570 (2009); Carlson, *supra* note 3, at 357; Kohler-Hausmann, *supra* note 1, at 371 n.20. Prior to calling a given state, I conducted documentary research, reading statutes, regulations, application forms, and FAQ documents. I began each call by explaining that I was an academic conducting research, seeking to understand rules and procedures for licensure applicants with criminal records; I promised not to identify interview subjects by name in published work. I maintained detailed notes as to the dates and times of each call; all quoted statements are those for which I was sure I had captured the subject's precise language. Interviews typically lasted between ten and twenty minutes; many were followed by e-mail exchanges.

had occurred, and policy details. Most interviewees spoke at length, explaining statutes, rules, and employers' practices, and describing the quirks of parsing background checks and working with vocational schools and testing companies.

Asking state officials to describe policy has both strengths and weaknesses as a research method. State agencies are essential to the licensure-and-employment sequence, but represent only one step. Particularly for people wanting to work as CNAs, several other actors can play important roles, including schools, clinical training sites, background-check firms, and, of course, employers. As noted above, staff reports of applicant success must be interpreted with considerable caution.¹¹⁶ However, as explained below, hard data pertaining to approval of applicants with criminal histories recorded in several states was broadly consistent with interviewees' estimates.¹¹⁷

D. A Note on Language

I will use terms such as “people with conviction histories” or “people with criminal-justice backgrounds” more often than words like “ex-felon,” “criminal,” and “offender.” This choice follows the advance of “person first” language in American social discourse — as in the areas of addiction and disability — on the view that naming any person by their condition is dehumanizing.¹¹⁸ In the criminal-justice setting, stigmatizing language can have real and measurable effects.¹¹⁹

116. *See supra* note 14 and accompanying text.

117. *See, e.g., infra* Tables 1, 2, 3. *See* Telephone Interview with Alaska official, Alaska Div. of Health Care Servs. (Feb. 20, 2018) (on file with author); Telephone Interview with Conn. official, Conn. Dep't of Pub. Health (Jan. 26, 2018) (on file with author); Fla. Dep't of Health, CNA applicant data, (Mar. 14, 2018) (on file with author); Florida Department of Business and Professional Regulation, Response to Senate Bill 146: Ex Offender Report, 39–40 (2015); Telephone Interview with Kan. official, Kan. Dep't of Aging & Disability Servs. (Feb. 12, 2018) (on file with author); E-mail from official, Tex. Dep't of Licensing & Regulation (July 18, 2016) (on file with author); Virginia Board of Nursing, Data Pertaining to Board of Nursing Credentialing Applications and Denials (2017). Meanwhile, it is extremely unlikely that these responses were distorted by an unconscious desire to please the interviewer. The interviewer sought to avoid any indication of preferred policies, and the dominance of public-safety frames makes it difficult to imagine that bureaucrats would be eager to overestimate the frequency with which they certify applicants with criminal backgrounds. *See supra* note 115 (describing the author's methodology for conducting interviews).

118. MAIA SZALAVITZ, UNBROKEN BRAIN: A REVOLUTIONARY NEW WAY OF UNDERSTANDING ADDICTION ix (2016).

119. Megan Denver et al., *The Language of Stigmatization and the Mark of Violence: Experimental Evidence on the Social Construction and Use of Criminal*

However, there is also an important substantive reason to avoid overuse of “felon” and “convict” here — these terms mislead because they imply that a serious conviction is the threshold for exclusion. As explained below, not only misdemeanors but even non-conviction dispositions can trigger licensure denial. Moreover, licensure practice in many states involves scrutiny of alleged conduct, not just the specifics of a conviction.¹²⁰

II. RESULTS: APPLICATION AND APPROVAL ESTIMATES

A. “We License Felons Every Day”: Certifying Barbers

In the United States, barbers can legally do business only after they are licensed by a state board.¹²¹ Many states employ a single agency for barbering and cosmetology — the latter field comprises not only cutting and shaping hair, but also, typically, the work of estheticians, hair braiders, nail technicians, and others.¹²² Boards are usually appointed, composed mostly of practitioners from the occupation, often joined by one or more members representing the public.¹²³ As

Record Stigma, 55 CRIMINOLOGY 664, 671 (2017); *Labels Like “Felon” Are an Unfair Life Sentence*, N.Y. TIMES (May 7, 2016), <https://www.nytimes.com/2016/05/08/opinion/sunday/labels-like-felon-are-an-unfair-life-sentence.html> [<https://nyti.ms/1Tv0W7X>]; Ted Chiricos et al., *The Labeling of Convicted Felons and Its Consequences for Recidivism*, 45 CRIMINOLOGY 547, 572 (2007). However, because both legal texts and interview subjects regularly use language such as “convict,” “felon,” or “criminal,” accuracy to the material requires the occasional use of such terms here.

120. See *infra* Section III.B.

121. See DICK M. CARPENTER II ET AL., INST. FOR JUSTICE, LICENSE TO WORK: A NATIONAL STUDY OF BURDENS FROM OCCUPATIONAL LICENSING – BARBER (2019), <https://ij.org/report/license-work-2/ltw-occupation-profiles/ltw2-barber/> [<https://perma.cc/PJ49-QB4W>].

122. See, e.g., *Board of Barbering and Cosmetology*, CAL. DEP’T CONSUMER AFF., <https://www.barbercosmo.ca.gov/> [<https://perma.cc/8HC4-9LWA>]; N.H. OFF. PROF’L LICENSURE & CERTIFICATION, BOARD BARBERING COSMETOLOGY & AESTHETICS, <https://www.oplc.nh.gov/cosmetology/> [<https://perma.cc/M4N3-F4Q3>] (examples of states credentialing all such occupations through a single board); ARIZ. ST. BOARD BARBERS, <https://barberboard.az.gov/> [<https://perma.cc/57FX-SJ3F>]; KAN. BOARD BARBERING, <https://kbob.kansas.gov/> [<http://perma.cc/R2QJ-5M6U>] (states credentialing barbers separately). On the field of cosmetology, see CARPENTER II ET AL., *supra* note 121.

123. See, e.g., *About the Board*, N.H. OFF. PROF. LICENSURE & CERTIFICATION, <https://www.oplc.nh.gov/cosmetology/about.htm> [<http://perma.cc/ZKR8-EML8>] (noting that members of the Board of Barbering, Cosmetology and Aesthetics “are appointed by the Governor with approval of the Executive Council to a term of five years”); *Board Members*, KAN. BOARD BARBERS, <https://kbob.kansas.gov/board/> [<http://perma.cc/DD9W-BC34>] (listing board members and their professional experience).

explained above, interviews in almost all states were conducted with the professional staff supporting barber boards, rather than members of the boards themselves. These state employees often have years of experience, and their duties advising boards, staffing meetings, and maintaining records enable them to speak knowledgeably about board policies and practices.

After the interview subjects explained rules and typical procedures, they were asked a series of questions about the eligibility of applicants with conviction histories. Virtually no states maintain records as to what portion of barber applicants have convictions. A New Hampshire staffer said it might be ten percent of applicants¹²⁴; a Georgia official said, “you’re looking at six to thirty in a month.”¹²⁵ Most preferred not to wager percentages, but many said it was a regular occurrence, happening “sometimes” or “frequently.” “Oh, every day — I’ve got piles of them,” said a Connecticut official.¹²⁶ One state that does keep track is Texas, where an open-records request showed that about six percent of barber applicants had criminal records in two recent years (280 people with records applied in 2014, and 292 in 2015).¹²⁷

Table 1. Barber Eligibility, Application Questions, and Acceptance Estimates¹²⁸

STATE	STATUTORY OR REGULATORY REFERENCE TO EXCLUSION BASED ON CONVICTION?	APPLICATION QUESTION(S) PERTAINING TO CRIMINAL JUSTICE INVOLVEMENT?	REPORTED ACCEPTANCE PATTERNS
Alabama	Yes. May revoke or suspend for “felony or gross immorality.”	None	Staff said applicants with convictions “virtually never” denied; could not recall a rejection in ten years.

124. See Telephone Interview with N.H. official, N.H. Bd. of Barbering, Cosmetology & Esthetics (Jan. 12, 2016) (on file with author).

125. Telephone Interview with Ga. official, Ga. State Bd. of Cosmetology & Barbers (Jan. 26, 2016) (on file with author).

126. Telephone Interview with Conn. official, Conn. State Dep’t of Health (Jan. 12, 2016) (on file with author).

127. E-mail from official, Tex. Dep’t of Licensing & Regulation, to Alec C. Ewald (July 18, 2016) (on file with author).

128. This Table offers representative results, omitting a few states and some detail. For the full table, and for citations, see *infra* Appendix A.

Alaska	No	None	No restriction: "we have no authority to even ask."
Arizona	No	None	Staff said, "If they've served their time . . . then they're granted. There's really nothing in the law that says we can deny them."
Arkansas	Yes. Board "may refuse to issue" license for "conviction of a felony."	Yes. Special form, "Procedure for felony applicants to barber school."	Staffer said, "[w]e seldom have a refusal on appeal."
California	Yes. May deny if conviction "substantially related to the qualifications, functions, or duties of a barber."	Yes. Have you "been convicted of . . . a violation of any law?"	Staff said, "[r]arely are they denied — 99% of applicants with a criminal record are approved to take our exam."
Connecticut	Yes. May deny if "found guilty or convicted of an act which constitutes a felony."	Yes. "Have you ever been found guilty or convicted as a result of an act which constitutes a felony . . . ?"	Official estimated, "[i]f it was thirty [applicants with convictions in a pile], there might be one or two denials."
Delaware	Yes. Specified-offenses list <i>in regulation</i> ; statute directs Board to identify crimes "substantially related" to occupation.	Yes. "Have you ever been convicted of [or pled to] any felony, misdemeanor or any other criminal offense . . . ?"	Many granted automatically; board review for some. Waiver available, and "usually" awarded; "most of them are granted," said official.
Florida	Yes. May deny for crime which "relates to . . . a licensee's profession"; Board list names offenses.	Yes. "Have you ever been convicted or found guilty of . . . any criminal violation?"	Regulation lists about eighty <i>permitted</i> offenses; staff estimated, "probably 90% to 100%" are accepted; state report shows that between 2011 and 2015, a total of eighteen applicants were denied because of conviction record. ¹²⁹
Georgia	Yes. May deny for "any felony or any crime involving moral turpitude."	Yes. Have you "been convicted of a felony or misdemeanor?" (On apprentice application).	Official recalled two denials in eleven years. "We'll very seldom reject one. When we do, it's generally for a sex offense."

129. See FLA. DEP'T OF BUSINESS & PROF'L REGULATION, RESPONSE TO SENATE BILL 146: EX-OFFENDER REPORT 39-40 (2015) (on file with the author.) The report shows that a total of 8,691 individuals applied, between 2011 and 2015, and that eighteen were "disqualified based on criminal history." The report further shows that eight of those individuals "sought review / exemption" and were "found qualified." That appears to suggest that only ten individuals were excluded, after appeal and review.

Indiana	Yes. Board may deny an applicant for any of about fifteen listed offenses.	Yes. "Have you ever been arrested . . . entered into a . . . diversion agreement . . . been convicted of any offense, misdemeanor or felony . . . ?"	Applicants "usually" accepted, official said.
Iowa	Yes. Licensees may be disciplined for "crime related to the profession"; no reference to initial denial.	Yes. Have you "been convicted of [or pled to] . . . a felony or misdemeanor crime?"	Recalled no rejections in five years: "I've never seen [the board] deny licensure to someone with a conviction."
Kansas	Yes. Must be "of good moral character and temperate habits."	Yes. "Have you ever been convicted of any offense(s) other than minor traffic violations?"	Generally, "the only people we don't license are sex offenders."
Kentucky	Yes. Applicant must be "of good moral character and temperate habit." ¹³⁰	None	Staff said there is no restriction: "We don't know unless they tell us."
Maine	Yes. May deny <i>only</i> if "the applicant . . . has not been sufficiently rehabilitated to warrant the public trust."	Yes. "Have you ever been convicted by any court of any crime?"	Staffer estimated 98% acceptance, after review.
Mississippi	Not anymore. Law requiring "good moral character and temperate habit" expired in 2016.	Yes. On application to barber school: "Have you ever been convicted of a felony?"	Staffer recalled no rejections in eighteen years.
New Hampshire	Yes. If conviction, Board determines whether "this person is of good professional character."	Yes. "Have you ever been convicted of any felony or misdemeanor?"	Staffer recalled only two denials in recent years.
New York	Yes. "Good moral character" required; conviction "shall not automatically disqualify."	Yes. "Ever been convicted . . . of any criminal offense?"	Staffer estimated more than 90% approved.
North Carolina	Yes. May consider felony, or crime "that bears upon . . . fitness to be licensed"; automatic denial prohibited.	Yes. "Have you been convicted of a felony?"	Staffer said denial is "pretty rare," for those who go through review process, but "a significant number drop out."

130. A visitor to the Kentucky Board of Barbering's website will find, under "Laws & Regulations," a link to KRS 317.450, which still states that "good moral character and temperate habit" is required of licensees. KY. REV. STAT. ANN. § 317.450 (1960). However, in fact, that restriction is superseded by a 2017 state law stating that licensure officials cannot deny occupational credentials on the basis of "character" alone. See KY. REV. STAT. ANN. §§ 335B.020 to 335B.070 (1970); *State Occupational Licensing Reforms*, *supra* note 33 (listing Kentucky among states that "generally prevent licensing boards from using vague, moral character standards to deny licenses for ex-offenders"); UMEZ & PIRIUS, *supra* note 33, at 5, 9.

Ohio	Yes. Must be “of good moral character.”	Yes. “Have you ever been convicted of a felony?”	Staffer recalled no denials in about fourteen months; “We license felons every day.”
Rhode Island	Yes. Applicant must be “of good moral character.”	Yes. “Have you ever been convicted of a violation . . . ?”	Staffer recalled no recent denials; “it’d have to be extremely serious.”
Tennessee	Yes. Board “may refuse” for felony “that bears directly on . . . fitness to practice,” or for “immoral or unprofessional conduct.”	Yes. “Have you been convicted of a felony in the last three (3) years?”	Staff said that after change to consider only crimes within three years, “we have yet to deny anyone based on a criminal conviction”
Texas	Yes. May deny for crime that “directly relates” to occupation; agency must write guidelines identifying disqualifying offenses.	Yes. “Indicate if you have ever been convicted of, or placed on deferred adjudication for, any misdemeanor or felony”	State figures show: about 69% of applicants with records were approved in 2014, and 79% in 2015.
Vermont	Yes. May deny for “unprofessional conduct,” including “crime related to the practice of the profession or conviction of a felony, whether or not related to . . . profession.”	Yes. “Have you EVER been convicted of a crime?”	Official said, “I can’t say that I know of anyone that has been flatly denied, with no opportunity to convince the board that he or she is on the right road.”
Virginia	Yes. Statute permits denial for crime that “directly relates” to occupation. <i>Board regulation</i> lists misdemeanors of “moral turpitude” among disqualifying offenses.	“Have you ever been convicted or found guilty . . . of any <i>felony</i> ?” [or] “any <i>misdemeanor</i> ?”	One staffer said rejection rate “would probably be less than 1%”; “maybe one out of ten,” said another.
Washington, D.C.	Yes. May deny “to a person . . . who has been convicted of a crime bearing on the applicant’s fitness to practice.”	Yes. “Applicant must not have been convicted of a crime of moral turpitude which bears directly on the applicant’s fitness to be licensed.”	Staff said, “[i]t’s not too often they’re rejected — I think maybe one, last year, where the person was a sex offender.”

Officials were then asked what portion of applicants with conviction histories were approved. As Table 1 shows, while some demurred, most were emphatic and evocative in stating that licensure of people with conviction records is common. In three states, staff explained that there is no restriction at all. Politely interrupting the interviewer’s second question, for example, an Alaska official said, “we don’t have the regulatory authority to even ask”¹³¹ — there is no

131. Telephone Interview with Alaska official, Alaska Bd. of Barbers and Hairdressers (Nov. 23, 2015) (on file with author). Interestingly, the Alaska official later estimated that twenty-five percent of applicants for licensure for the board’s occupations (which included cosmetology as well as barbering) had convictions.

restriction, and no question on the application. This was also true in Arizona (“there’s really nothing in the law that says we can deny them”).¹³² Despite the fact that Kentucky law then required would-be barbers to be of “good moral character and temperate habit,” barber-board staff there reported that they neither asked about convictions nor ran background checks: “We have no way of knowing if they don’t point it out to us.”¹³³

In almost all the remaining twenty-two states surveyed, officials indicated, either with quantified estimates or narrative descriptions, that the overwhelming majority of applicants with criminal records were approved. They’re “virtually never” rejected, said an Alabama official, recalling no denials in ten years.¹³⁴ “Rarely are they denied — 99% of applicants with a criminal record are approved to take our exam,” wrote an official at the California Board of Barbering and Cosmetology in an e-mail.¹³⁵ The final rejection rate “would probably be less than one percent,” said a Virginia official, counting both those approved administratively and those admitted after board consideration.¹³⁶ “We’ll very seldom reject one. When we do, it’s generally for a sex offense,” explained a Georgia official.¹³⁷ After a 2015 statutory change, Tennessee only considers convictions within three years.¹³⁸ Since that change, an official said, “we have yet to deny anyone based on a criminal conviction,” though some are licensed on two-year probationary status.¹³⁹ A Mississippi staffer said, “we have not denied anybody so far [in this staffer’s twenty-year experience], because their crimes haven’t been the type of crimes —

When asked how they knew this without an application question, this staffer responded, “It’s a small state! And we get mail from jails.” *Id.*

132. Telephone Interview with Ariz. official, Ariz. Bd. of Barbers (Nov. 16, 2015) (on file with author). This official later said that “child molesters” would be rejected. *Id.*

133. Telephone Interview with Ky. Bd. of Barbering (Jan. 21, 2016) (on file with author). Kentucky eliminated “good character” requirements for most occupational licenses in a 2017 reform. *See supra* note 130.

134. Telephone Interview with Ala. official, Ala. Bd. of Cosmetology & Barbering (Nov. 9, 2015) (on file with author).

135. E-mail from Paul Whelan, Lead Licensing Analyst Bd. of Barbering & Cosmetology to Alec C. Ewald (Jan. 13, 2016) (on file with author).

136. Telephone Interview with Va. official, Va. Bd. for Barbers & Cosmetology (Feb. 4, 2016) (on file with author).

137. Telephone Interview with Ga. official, Ga. State Bd. of Cosmetology & Barbers (Jan. 26, 2016) (on file with author).

138. Telephone Interview with Tenn. official, Tenn. Cosmetology & Barber Exam’rs (Apr. 12, 2016) (on file with author).

139. *Id.*

mostly drug crimes, most of them are that.”¹⁴⁰ “I’ve never seen the barber board, since 2010, deny licensure to someone with a conviction,” said an Iowa official.¹⁴¹ High-approval states included jurisdictions with widely varying formal rules, including some that empower boards to deny a candidate convicted of any felony. Notably, seven featured some version of the “good moral character” requirement.¹⁴²

That is not to say the formal law does not matter. Many of these states *restrict* agencies’ ability to deny applicants, either by requiring that the offense be “substantially related” to the job in question,¹⁴³

140. Telephone Interview with Miss. official, Miss. Bd. of Barber Exam’rs (Jan. 14, 2016) (on file with author). Asked what type of offenses might lead to a denial, this official replied, “you got to look at your sex offenders, because they’re going to be working with kids.” *Id.*

141. Telephone Interview with Iowa official, Iowa Bd. of Barbering (Jan. 11, 2016) (on file with author).

142. In addition to Kentucky, the other high-approval states with “good moral character” requirements were Kansas (“the only people we don’t license are sex offenders”), Telephone Interview with Kan. official, Kan. Bd. of Barbering (Mar. 22, 2016) (on file with author), Mississippi (a staffer recalled no rejections in eighteen years), *supra* note 140, New Hampshire (denial is “pretty rare — it has to be a pretty egregious conviction”), *supra* note 125 and accompanying text; New York (an estimated ninety percent of applicants with convictions are approved), Telephone Interview with N.Y. official, N.Y. State Dep’t of State, Div. of Licensing Servs. (Feb. 18, 2018) (on file with author); Ohio (“We license felons every day”), Telephone Interview with Ohio official, Ohio State Barber Licensure Bd. (Jan. 26, 2016) (on file with author); and Rhode Island, Telephone Interview with R.I. official, R.I. Dep’t of Health (Feb. 23, 2016) (on file with author). As a New York official said, “there’s a lot that come in that have recent drug convictions, [who] we approve And they’re probably on probation, or parole. There are lot . . . that don’t have anything to do with the profession, or with moral character” *See supra* Telephone Interview with New York official. New Hampshire law, meanwhile, specifies that in making its character decision, the licensing authority must consider five factors, including time since the incident; conviction alone, the law says, “is not indicative of the person’s current character.” *See* N.H. REV. STAT. ANN. § 313-A:10 (2000) (in order to be issued a barber’s license, a person shall “Be of good professional character”); N.H. REV. STAT. ANN. § 313-A:8 (2000) (Board “shall adopt rules,” pursuant to RSA 541-A, relative to criteria for “good professional character”).

143. The laws of California, Delaware, Florida, Iowa, Texas, and Virginia all do so, in slightly different ways. *See* CAL. BUS. & PROF. § 480 (a)(3)(B) (1974) (stating that the board “may deny a license pursuant to this subdivision only if the crime or act is substantially related to the qualifications, functions, or duties of the business or profession for which application is made”); DEL. CODE ANN. tit. 24, § 5113(a)(4) (1983) (stating that denials are only permissible when the applicant has been “convicted of a crime that is substantially related to the practice of cosmetology, barbering, electrology, nail technology or aesthetics”); FLA. STAT. 455.227(1)(c) (2018) (permitting denial or disciplinary action for those “convicted or found guilty of, or entering a plea of guilty or nolo contendere to, regardless of adjudication, a crime in any jurisdiction which relates to the practice of, or the ability to practice, a licensee’s profession”); IOWA CODE § 147.55 (2008) (allowing disciplinary action for

requiring the consideration of specific factors prior to a denial,¹⁴⁴ or naming those convictions that may disqualify an applicant.¹⁴⁵ Staff in half a dozen states said they thought frequent approval of applicants with convictions was at least partly a result of such rules. For

“conviction of a crime related to the profession or occupation of the license”); TEX. OCC. § 53.021 (1999) (licensing authority may disqualify a person from receiving a license for “an offense that directly relates to the duties and responsibilities of the licensed occupation”); TEX. OCC. § 53.051 (1999) (notice required after denial for “prior conviction of a crime”); TEX. OCC. § 53.025 (1999) (licensing authority “shall issue guidelines,” explaining relationship of specific crimes to the particular license); 54.1 VA. ADMIN. CODE § 54.1-204 (2018) (applicants may not be denied “unless the criminal conviction directly relates to the occupation or profession for which the license, certificate or registration is sought”; board has authority to deny, if concludes that conviction record renders applicant “unfit or unsuited” to occupation).

144. The laws of Maine, New Hampshire, North Carolina, and New York all do so. See ME. REV. STAT. ANN. tit. 5, § 5502 (1989) (board may refuse to grant license because of criminal record, “but only if the licensing agency determines that the applicant, licensee, registrant or permit holder so convicted has not been sufficiently rehabilitated to warrant the public trust”; in case of denial, licensing agency “shall explicitly state in writing the reasons for a decision which prohibits the applicant, licensee, registrant or permit holder from practicing the profession, trade or occupation”); N.H. REV. STAT. ANN. § 313-A:10 (2000) (in order to be issued a barber’s license, a person shall “Be of good professional character”); N.H. CODE ADMIN. R. ANN. Bd. of Barbering, Cosmetology, & Esthetics § 301.02(d) (2019) (in deciding whether a person with a criminal conviction is of “good professional character,” board “shall take into consideration” factors including “[t]he length of time that has passed since the crime or disciplinary action”; list notes that “[i]nformation showing the positive answer is not indicative of the persons current character”); N.Y. CORRECT. LAW § 752 (2007) (prohibiting license denial on the basis of a conviction unless “there is a direct relationship between one or more of the previous criminal offenses and the specific license or employment sought or held by the individual” among other listed factors); N.C. GEN. STAT. ANN. § 93B-8.1 (2013) (barring automatic denial on the basis of criminal history, and requiring consideration of eight factors, including “[t]he nexus between the criminal conduct and the prospective duties of the applicant as a licensee”).

145. States including Florida, Indiana, and Ohio employ such lists. See FLA. STAT. ANN. §455.227(1) (2010); DEPARTMENT GUIDELINES FOR APPLICATIONS WITH CRIMINAL HISTORY – APPROVED BY THE BARBERS’ BOARD (Nov. 4, 2013) (listing dozens of offenses for which an applicant will routinely be approved without board review) (on file with the author); IND. CODE ANN. § 25-1-1.1-2 (2)–(5) (2010) (listing narcotics crimes for which the board “may” deny an applicant); OHIO REV. CODE ANN. § 4709.07 (2017) (“good character” provision); TENN. CODE ANN. § 62-3-121 (2015). Tennessee provides that only convictions within three years may be considered. See *Application for License*, TENN. ST. BOARD BARBER & COSMETOLOGY EXAMINERS, <https://www.tn.gov/content/dam/tn/commerce/documents/regboards/cosmo/forms/Barber-Application-To-Test.pdf> [<https://perma.cc/M9MZ-FF4U>] (asking if applicant has “been convicted of a felony in the last three (3) years”). In defining crimes “substantially related” to the occupation, Delaware’s barber-licensure law says that the Board “shall not consider a conviction where more than 10 years have elapsed since the date of conviction, if there have been no other criminal convictions in the intervening time”). See DEL. CODE ANN. tit. 24, § 5107(a)(6) (2009).

example, a North Carolina official said the board's approach ("The Board doesn't deny all felonies — it doesn't have an interest in that"¹⁴⁶) derived partly from a statute that specifically prevents a licensing authority from automatically rejecting an applicant without considering specified factors, including a connection between the offense and the occupation.¹⁴⁷ A Tennessee official explained that a change to consider only recent convictions was part of "a push in the legislature, for all industries, to help people get jobs."¹⁴⁸ In New Hampshire, a licensure staffer explained that statutory language declaring that a past conviction "is not indicative of the person's current character" was important to the board.¹⁴⁹ California officials explained that they read their state's "substantially related" requirement narrowly — that is, they considered very few offenses "substantially related" to the practice of barbering. Referring to a recent elimination of a pre-licensure waiting period, an Arkansas staffer said, "A lot of that change stems from our new governor," who had recently issued a recommendation that state policy-makers work to enhance employment opportunities for people with convictions.¹⁵⁰ In only one state — North Carolina — did a licensure official refer to the 2012 legal guidance issued by the Equal Employment Opportunity Commission (EEOC), which instructs employers that

146. Telephone Interview with N.C. official, N.C. Bd. of Barber Exam'rs (Feb. 9, 2016).

147. In order for a person with a felony conviction to be denied "there has to be some nexus with the profession, the work they're going to do," this North Carolina official explained. Telephone Interview with N.C. official, N.C. Bd. of Barber Exam'rs (Feb. 9, 2016). *See* N.C. GEN. STAT. ANN. § 131E-265(b) (1) (1995) (stating the fact of conviction alone "shall not be a bar to employment," and requires employer consideration of seven factors, including age at the time of crime, existence of a "nexus" between criminal conduct and the relevant job duties, and evidence of rehabilitation).

148. Telephone Interview with Tenn. official, Tenn. Cosmetology & Barber Exam'rs (Apr. 12, 2016).

149. Telephone Interview with N.H. official, N.H. Bd. of Barbering, Cosmetology & Esthetics (Jan. 12, 2016).

150. Similarly, a New York official emphasized the importance of New York's antidiscrimination law, which requires public and private employers alike to consider evidence of rehabilitation. *See* N.Y. CORRECT. LAW § 753 (2007) (requiring employers and licensing agencies to consider, prior to any denial, "[a]ny information produced by the person, or produced on his behalf, in regard to his rehabilitation and good conduct", among other factors). "We consider any form of rehabilitation — volunteer work, programs, [or] counseling," said the New York health-licensure official. Telephone Interview with N.Y. official, N.Y. State Dep't of State, Div. of Licensing Servs. (Feb. 18, 2016).

blanket hiring bans could place them in violation of federal antidiscrimination law.¹⁵¹

Specified-offense lists in barber licensure exist as combinations of statutory law and administrative rules. Some applicants with records are routinely approved by staff without further review; only people with certain felony-level offenses are deemed to need individualized board consideration.¹⁵² In Delaware, for example, board review is required by law *only* for conviction of listed crimes that have been deemed “substantially related” to the occupation of barbering, most of which are either violent or of a sexual nature.¹⁵³ For applicants

151. Telephone Interview with N.C. official, N.C. Bd. of Barber Exam’rs (Feb. 9, 2016). Referring to the EEOC’s guidance, this staffer said bluntly “That’s why we don’t do what the statute would let us do, which is just deny them.” Telephone Interview with N.C. official, N.C. Bd. of Barber Exam’rs (Feb. 9, 2016). The Equal Employment Opportunity Commission (EEOC) severely criticized automatic exclusions in its 2012 “guidance” document. *See* U.S. EQUAL EMP’T OPPORTUNITY COMM’N, NO. 915.002, ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 16 (2012) (stating that “[a] policy or practice requiring an automatic, across-the-board exclusion from all employment opportunities because of any criminal conduct is inconsistent with the [legal standard] because it does not focus on the dangers of particular crimes and the risks in particular positions”). *See also id.* at 24 (explaining that adopting an employment practice in order to comply with a state or local licensing rule does *not* shield an employer from Title VII liability if that “employer’s exclusionary policy or practice is *not* job related and consistent with business necessity”).

152. For example, an Indiana official said, “The Board has recently made a decision. Those with a DUI charge, with completion of all requirements set forth by the court — those and lesser charges — those can be approved by staff. Anything more than that requires review by the Board.” Telephone Interview with Ind. official, Ind. State Bd. of Cosmetology & Barber Exam’rs (Jan. 11, 2016). The Texas Department of Licensing and Regulation (TDLR) explains in its “Guidelines for License Applicants with Criminal Convictions” that decisions are based partly on whether there is a relationship between a given offense and a given license. The document lists crime types, and offers a “Reasons” narrative explaining the agency’s view of the connection. *See Guidelines for License Applicants with Criminal Convictions*, TEX. DEP’T LICENSING & REG., <https://www.tdlr.texas.gov/crimconvict.htm> [<https://perma.cc/D9AN-GSYC>]. A Texas official explained the process this way: “Whenever we get a new program [that is, a type of occupational license] assigned to us by the legislation — our enforcement division gets together with people in the profession and talks about what crimes are relevant to this profession, and why.” Telephone Interview with Tex. official, Tex. Dep’t of Licensing & Reg. (June 24, 2016).

153. *See* 24 DEL. ADMIN. CODE § 5100-18.1 (2009). Notably, while this list consists of some thirty-two offenses, Driving While Intoxicated does not appear, nor does simple possession. Those whose convictions for listed crimes are more than five years old can seek a waiver, and are “usually” successful, an official said. Telephone Interview with Del. official, Del. Bd. of Cosmetology & Barbering (Dec. 22, 2015).

with other convictions, said an official, “we issue the license without any problems.”¹⁵⁴

Florida rules, meanwhile, feature a lengthy list of *permitted* offenses.¹⁵⁵ As an official at the Florida Department of Business and Professional Regulation explained, “the Board have [sic] designated criminal offenses that, if the applicant puts that on the application and provides the paperwork — they can automatically be approved for examination. It doesn’t even have to go to the Board for review.”¹⁵⁶ (The document includes similar lists compiled for other licensed occupations.) The list contains dozens of different types of offenses, including common infractions such as DWI, narcotics possession, “selling” or “trafficking” drugs, larceny, robbery, burglary, and driving with a suspended license.¹⁵⁷ It also states that a conviction for “Possession of Alligator” will not disqualify a would-be barber.¹⁵⁸ (Florida’s criminal-justice reform law, HB 7125, passed by the legislature in early May of 2019, would enable people trained in the profession while incarcerated to apply for barber and cosmetology licenses while still in prison, among other reforms.¹⁵⁹) In Virginia, the Board for Barbers and Cosmetology’s “Criminal History Review Matrix,” based on statutes and administrative-law judgments, allows for a number of convictions to be considered (and, in most cases, approved) without board consideration.¹⁶⁰

154. Telephone Interview with Del. official, Del. Bd. of Cosmetology & Barbering (Dec. 22, 2015).

155. See E-mail from staff, Fla. Barbers’ Bd. & Bd. of Cosmetology (Jan. 7, 2016) (providing a list of approved department guidelines for applications with criminal history) (on file with author).

156. Telephone Interview with Fla. official, Fla. Barbers’ Bd. (Jan. 7, 2016).

157. See GUIDELINES FOR THE DEPARTMENT TO APPROVE APPLICATIONS WITH AFFIRMATIVE ANSWER(S) TO THE BACKGROUND QUESTIONS 7 (2015) (on file with author).

158. *Id.*

159. See *supra* note 34. The law also facilitates licensure for people trained in construction trades while incarcerated. See CS/HB 7125, 2019 Leg., at 56–57 (Fla. 2019), <https://www.flsenate.gov/Session/Bill/2019/7125/BillText/er/PDF> [<https://perma.cc/935G-HK6G>].

160. See *Application Review Matrix: Criminal History*, VA. BOARD FOR BARBERS & COSMETOLOGY (2014) (on file with author). Staff in several states said certification of misdemeanants was routine, and often occurs without individualized review. But serious offenders are sometimes licensed. For example, an Ohio official confirmed that “even an applicant who’s been convicted of drug trafficking” could be approved. “Generally, because of the time they’ve been incarcerated, it’s been six-seven years, so we give them an opportunity. I have seen [people with] drug trafficking and [even] murder [approved].” Telephone Interview with Ohio official, Ohio State Barber Licensure Bd. (Jan. 26, 2019). Notably, some officials said people convicted of some sexual offenses may be licensed, but with restrictions. “The sexual offenses, they

In a majority of states, officials said that applicants still on probation routinely seek and are awarded the barber credential.¹⁶¹ This practice offers an explicit example of a criminal-civil nexus — that is, an overlap between criminal justice supervision and the work of a civil regulatory entity. Sometimes, there is a literal, terminological overlap: in seven states, staff explained that licensure authorities will approve an applicant still under criminal justice supervision for a special probationary license.¹⁶² “At least fifty percent of the people I review [applicants with felony convictions] are still on probation with the court,” said a Connecticut official.¹⁶³ “And that doesn’t keep them from qualifying for a license. But we’re probably going to put them on probation as well.”¹⁶⁴ Additionally,

tend to require those individuals to be supervised, or [they] can’t work on children,” a New Hampshire official explained. Telephone Interview with N.H. official, N.H. Bd. of Barbering, Cosmetology & Esthetics (Jan. 12, 2016).

161. States in which staff affirmed they provide licenses to persons still on probation included California, Connecticut, Florida, Georgia, Indiana, Iowa, Kentucky, Mississippi, New Hampshire, New York, North Carolina, Ohio, Rhode Island, Tennessee, Vermont, and Virginia. See Telephone Interview with Cal. official, Cal. Bd. of Barbering & Cosmetology (Jan. 5, 2015); Telephone Interview with Conn. official, Conn. State Dep’t of Health (Jan. 12, 2016); Telephone Interview with Fla. official, Fla. Barbers’ Bd. (Jan. 7, 2016); Telephone Interview with Ga. official, Ga. State Bd. of Cosmetology & Barbers (Jan. 26, 2016); Telephone Interview with Ind. official, Ind. State Bd. of Cosmetology & Barber Exam’rs (Jan. 11, 2016); Telephone Interview with Iowa official, Iowa Bd. of Barbering (Jan. 11, 2016); Telephone Interview with Ky. official, Ky. Bd. of Barbering (Jan. 21, 2016); Telephone Interview with Miss. official, Miss. Bd. of Barber Exam’rs (Jan. 19, 2016); Telephone Interview with N.H. official, N.H. Bd. of Barbering, Cosmetology & Esthetics (Jan. 12, 2016); Telephone Interview with N.Y. official, N.Y. State Dep’t of State, Div. of Licensing Servs. (Feb. 18, 2016); Telephone Interview with N.C. official, N.C. Bd. of Barber Exam’rs (Feb. 9, 2016); Telephone Interview with Ohio official, Ohio State Barber Licensure Bd. (Jan. 26, 2019); Telephone Interview with R.I. official, R.I. Dep’t of Health (Feb. 23, 2016); Telephone Interview with Tenn. official, Tenn. Cosmetology & Barber Exam’rs (Apr. 12, 2016); Telephone Interview with Vt. official, Vt. Off. of Prof. Reg. (Jan. 5, 2015); Telephone Interview with Va. official, Va. Bd. for Barbers & Cosmetology (Feb. 4, 2016).

162. These states were Alaska, Connecticut, Florida, Georgia, Indiana, Iowa, and Tennessee. See Telephone Interview with Ala. official, Ala. Bd. of Barbers & Hairdressers (Nov. 23, 2015); Telephone Interview with Conn. Official, Conn. State Dep’t of Health (Jan. 12, 2016); Telephone Interview with Fla. official, Fla. Barbers’ Bd. (Jan. 7, 2016); Telephone Interview with Ga. official, Ga. State Bd. of Cosmetology & Barbers (Jan. 26, 2016); Telephone Interview with Ind. official, Ind. State Bd. of Cosmetology & Barber Exam’rs (Jan. 11, 2016); Telephone Interview with Iowa official, Iowa Bd. of Barbering (Jan. 11, 2016); Telephone Interview with Tenn. official, Tenn. Cosmetology & Barber Exam’rs (Apr. 12, 2016).

163. Telephone Interview with Conn. official, Conn. State Dep’t of Health (Jan. 12, 2016).

164. *Id.* The picture was similar in Georgia: “The majority of our felony cases will be on some form of probation, and a consent agreement. Once they complete it, they

probation officers are often brought into the licensure process. “I usually work with the P.O.s directly, and if they [licensure candidates] have violated anything, they let us know,” said an Iowa barber-board staffer.¹⁶⁵ In Kentucky, probation officers regularly call the barber board to confirm that their supervisees are employed.¹⁶⁶ Mississippi licensure officials ask probation officers for a letter in support of applicants with conviction records; the New Hampshire barber application specifies that such a letter is required.¹⁶⁷

Officials in ten states said barbering was taught (and, in some cases, licensed) in state prisons. Several volunteered positive evaluations of these schools, referring to their own experience in visiting programs as part of routine inspections, or to attend graduation events. “Five of our state prisons have barber colleges in them. I’m very proud of our correctional schools,” said an Ohio official.¹⁶⁸ “They are turning

have to come to us, and petition, and comply with whatever the court order said.” See Telephone Interview with Ga. official, Ga. State Bd. of Cosmetology & Barbers (Jan. 26, 2016). For North Carolina applicants with felony convictions, “usually the outcome is some sort of [consent] order, complete probation and certain requirements.” Telephone Interview with N.C. official, N.C. Bd. of Barber Exam’rs (Feb. 9, 2016). In Indiana, “usually, most of the time those with backgrounds are approved for licenses for probationary status, for the duration of their supervision.” Telephone Interview with Ind. official, Ind. State Bd. of Cosmetology & Barber Exam’rs (Jan. 11, 2016). In Iowa, “if it was recent and the person was on probation, they would review and maybe place on probation, running concurrent with their criminal probation.” Telephone Interview with Iowa official, Iowa Bd. of Barbering (Jan. 11, 2016). A Florida official, reiterating that the board hears successful appeals at every monthly meeting, said: “They will often times . . . approve them on probationary status, to run concurrent with their criminal probation.” Telephone Interview with Fla. official, Fla. Barbers’ Bd. (Jan. 7, 2016). The use of regulatory “probation” by these agencies demonstrates the way U.S. civil law sometimes “mimics” the terms of criminal law. See, e.g., Carlson, *supra* note 3, at 348.

165. Telephone Interview with Iowa official, Iowa Bd. of Barbering (Jan. 11, 2016).

166. Telephone Interview with Ky. official, Ky. Bd. of Barbering (Jan. 21, 2016).

167. Telephone Interview with Miss. official, Miss. Bd. of Barber Exam’rs (Jan. 19, 2016); see also *Questionnaire for Applicants and Licensees*, N.H. BOARD BARBERING COSMETOLOGY & ESTHETICS, <https://www.oplc.nh.gov/cosmetology/documents/exam-application.pdf> [<https://perma.cc/LGR7-TKBK>] (providing that “[i]f you are currently on probation/parole you must provide all the above plus the following: Your probation/parole officers name, mailing address, and telephone number if applicable; you must obtain a letter from your probation/parole officer stating you are in compliance with your probation/parole. If you were on probation/parole and have completed all requirements, we need a letter indicating you have met all requirements and are no longer on probation/parole.”).

168. Telephone Interview with Ohio official, Ohio State Barber Licensure Bd. (Jan. 26, 2019).

out some of our finest barbers.”¹⁶⁹ “Part of our contract with our testing vendor is to go in there and test them, [both on] the theory and the practical,” said a Tennessee official.¹⁷⁰ A Georgia official said, “We train in prison, that’s part of a rehabilitation program. If they pass, we grant the license, on a temporary basis.”¹⁷¹ An Indiana law says a license *cannot* be denied to those trained while incarcerated¹⁷² (their initial licenses are usually temporary, explained a staffer).¹⁷³ A Kansas official responded to an early interview question by saying, “Having two of our barber colleges in a penal institution — of course we get people who become barbers who have a criminal background.”

These are very different results than common references to barber licensure restrictions portray. Yet complex procedures often stand behind these high-approval outcomes. As Table 1 suggests, there is a striking disconnect between *texts* — particularly application questions — and *practices*. These differences raise serious questions about deterrent effects, legal transparency, and policy efficacy. Meanwhile, in many states candidates must navigate an onerous, subjective process and engage in significant acts of performance, including paperwork and character presentations,¹⁷⁴ in order to be certified. I discuss these disciplinary elements of barber credentialing in further detail below, in Part III.

169. *Id.* While noting that they lacked data on this point, this staffer volunteered they believed that “the recidivism rate for someone who’s come through the barber licensing program is a lot lower than for the general population.” *Id.*

170. Telephone Interview with Tenn. official, Tenn. Cosmetology & Barber Exam’rs (Apr. 12, 2016). The Tennessee official continued, “We have folks we’ve approved on death row,” said this official, adding drily, “They’re not coming out, but they’re licensed.”

171. Telephone Interview with Ga. official, Ga. State Bd. of Cosmetology & Barbers (Jan. 26, 2016). The Georgia official continued, “In eleven years, we’ve never denied a license to anyone in prison. Just about every month, we have those applications.” Florida, Mississippi, and Vermont were other states indicating barbers are trained in prison.

172. *See* IND. CODE ANN. § 25-8-3-29 (2013) (providing that “[a] person who graduates from a beauty culture school operated by a penal institution may not have the person’s license denied or revoked as a result of the acts for which the person was convicted”).

173. Telephone Interview with Ind. official, Ind. State Bd. of Cosmetology & Barber Exam’rs (Jan. 11, 2016).

174. *See infra* Section III.D.

B. Licensing Caregivers

With a credential from a state agency, a barber can hang up a shingle and practice his trade. CNA certification and employment, by contrast, presents an exceptionally complex legal landscape. A landmark study recently observed that home care delivery in the United States is “so extraordinarily complicated and piecemeal that the term ‘system’ is hardly appropriate, conveying as it does a misleading impression of order and logic.”¹⁷⁵ The same is true of nursing-assistant certification for other settings, and introducing criminal-record exclusions multiplies the complexity considerably. For example, when the National Conference of State Legislatures (NCSL) set out to detail just one element of this landscape — state background-check requirements for home care workers — it produced a 500-cell table spanning eight pages, in which the phrases “not specified” and “none specified” appear 94 times.¹⁷⁶

Several years ago, the Centers for Medicare and Medicaid Services (CMS) convened a working group to examine state eligibility rules for direct-care employees. The group reported that “disqualifying convictions and rehabilitation factors varied substantially across States.”¹⁷⁷ Despite that frank description, the report understates the diversity of state policies and practices. Focusing on formal eligibility rules misses much of the dizzying complication of nursing-assistant credentialing. CNA eligibility law in many states is composed of several pieces.¹⁷⁸ One statutory passage might empower agencies to deny initial nursing-assistant certification, while a second might

175. OSTERMAN, *supra* note 82, at xv.

176. GALANTOWICZ ET AL., *supra* note 83, at 38. A National Conference of State Legislatures (NCSL) report offering concise narrative descriptions of state background-check laws runs to twenty-four single-spaced pages. See NAT'L CONFERENCE OF ST. LEGISLATURES, SAFE AT HOME? DEVELOPING EFFECTIVE CRIMINAL BACKGROUND CHECKS AND OTHER SCREENING POLICIES FOR HOME CARE WORKERS: STATE SUMMARIES (2009), <http://www.ncsl.org/documents/health/CBCstatesum.pdf> [<https://perma.cc/5PQE-6NRQ>]. In the NELP's report on state licensure restrictions facing people with conviction histories, the appendices, which evaluate the texts of state laws in several areas of focus, are forty pages long. See RODRIGUEZ & AVERY, *supra* note 43, at 35–79.

177. AMANDA BORSKY ET AL., REPORT: CENTERS FOR MEDICARE & MEDICAID SERVICES 2 (2012), <https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/Downloads/Survey-and-Cert-Letter-13-24-Attachment-.pdf> [<https://perma.cc/W438-HCCY>]. The working group notes differences in terms of the type and severity of convictions considered; provision for temporary or permanent disqualification; categorical and case-by-case systems; and the availability of waiver or exception procedures. *Id.*

178. See *infra* Table 2 and following text.

outline a waiver procedure, and a third require employers to conduct background checks of a certain type.¹⁷⁹ Meanwhile, an administrative rule might name the specific offenses a regulatory agency has identified as obstacles to awarding the credential.¹⁸⁰ There is also significant variation in what a caregiver is certified to do, because eligibility rules can vary by the *location* of care – that is, for different types of facility. Table 2 details the legal landscape of CNA credentialing among surveyed states.

Table 2. CNA Eligibility: Qualifications and Institutional Structure¹⁸¹

STATE	ELIGIBILITY RULES	RESTRICTIONS: IMPOSED WHEN, AND BY WHOM
Alaska	Case-by-case for CNA certification (“everyone is looked at individually”); facilities face <i>different</i> rules, with permanent, three, five, and ten-year employee ineligibility for listed “barrier crimes.”	“There’s two different processes that a CNA would go through in Alaska”: Board of Nursing, for individuals; Health & Social Services, for facilities. State “variance” available for facilities wishing to hire barred individuals.
Arkansas	Long-term-care facilities may never hire a person convicted of eight specified crimes; for sixty-one other crimes, misdemeanor convictions disqualify for five years, felony convictions for ten.	Office of Long-Term Care; law focuses not on individual certification, but on <i>facilities</i> , including nursing homes and five other types. Employers also play a role: named “nonviolent” offenses do <i>not</i> disqualify as long as particular conditions are met (including “the service provider wants to hire the person”).
Arizona	CNA and LNA certification <i>split</i> in 2016. For the LNA, “any felony prevents licensure” for three years after discharge; for misdemeanors, “all are determined individually.”	AZ Board of Nursing. For CNAs, only abuse, neglect, and misuse of client funds disqualify for state certification. Among misdemeanants seeking LNA, “we try not to just straight-out deny anyone.”
California	Denial permitted for crime “substantially related” to job, but only if applicant fails to show rehabilitation, and represents “threat”; decisions made case by case.	CA Department of Public Health; individualized review. “Criminal record clearance” required; statute directs “that the conviction not operate as an automatic bar to certification.”
Connecticut	<i>No</i> exclusion from <i>registry</i> ; only those convicted of four specified felonies are barred from work in long-term care facilities; officials explained state restriction is designed to align with <i>federal</i> law.	CT Department of Public Health. Waiver of exclusion is available; in a recent year, about half of those excluded applied for waivers, and most were granted. Officials said both training programs and employers might be more restrictive than the state: “some of them have zero tolerance.”

179. *See infra* Table 2 and following text.

180. *See infra* Table 2 and following text.

181. Representative results are shown here. For full table, and for citations, see *infra* Appendix B.

Delaware	No exclusion from <i>registry</i> ; only abuse, neglect, and misuse of funds disqualify; officials explain state restriction is derived from <i>federal</i> /law.	DE Department of Health and Human Services. Recent change (removing specified-offenses system with lifetime, ten, and five year exclusion periods) was triggered by concern about compliance with EEOC rules and federal law, official said. Nursing homes and home-health agencies must complete background checks for patient-care employees.
Florida	Specified-offense lists, some with waiting periods. Discretionary for others: "each application is reviewed on its own merits."	FL Department of Health. Four full-time "processors" review applicants with records; some are approved without Board input. "Violent crimes and repeat offenders" require Board review, but <i>can</i> be licensed. "People with felonies can be licensed. The only exception is those crimes identified in the statute."
Kansas	Rules vary by facility type and "differ greatly." Facilities for disabled persons have special status — list of "prohibited offenses" is longer than for other long-term care facilities; prohibitions on work with disabled never expire, while latter do; drug felonies disqualify for work with disabled, do not in other facilities.	KS Department for Aging & Disability Services. Notably, rules apply to <i>everyone</i> who works in the facility, not just those in patient care ("that's janitors, and laundry, and dietary, and drivers").
Maryland	Entirely discretionary. Only "direct relationship" to job and "unreasonable risk" justify denial; "in the statute, there are no absolute bars to licensure."	Board of Nursing. A "pre-licensure committee" reviews materials, forwards reports to Board for decision. Six factors considered — "It's a tedious, time-consuming, non-automated process."
Missouri	Eligibility focuses on location of care. For CNAs in facilities, <i>only</i> listed "Crimes Against Persons" (CAP) disqualify; neither narcotics nor DWI included on list. Home health aides may not work with <i>any</i> conviction without obtaining a "Good Cause Waiver" (GCW).	Multiple actors. Training programs must ensure eligibility to work in clinical sites; employers must impose requirements; state Department of Health and Human Services maintains registry and Employee Disqualification List, and awards the GCW. Research showed notable disagreement as to whether <i>all</i> serious felonies, or just those on the "CAP" list, disqualify for nursing-home work.
North Carolina	No statewide legal restriction, aside from findings of abuse, neglect, or misuse of client funds. Background checks required, but conviction alone cannot bar employment — employers must consider specific factors.	Clinical-training sites and employers decide: "It would be the individual provider's policy."
Ohio	Eligibility varies: about fifty-five offenses disqualify for most facilities; different list for home health. Permanent disqualification for some offenses (including multiple theft convictions).	"Everything is initiated by the employer" — state mandates background check, but employers must impose eligibility rules. "Personal Character Standards" allow facilities to make exceptions, with eleven factors for facility managers to consider.

Texas	Specified-offense lists: about twenty-five offenses permanently bar from direct-contact work; five-year bar for seven different offenses. Drug and alcohol offenses are <i>not</i> listed. Permanent ban from certain types of facilities for burglary.	TX Department of Health and Human Services posts documents and rules, and manages the registry, but “ <i>it’s on the schools</i> ” to impose restrictions; facilities must also conduct background check. No waivers or exceptions.
Virginia	Case by case evaluation, considering circumstances. Felony or crime of “moral turpitude” is grounds for denial; policy allows approving persons with misdemeanors five years old, felonies ten years old.	VA Board of Nursing. <i>Different process</i> for facilities, with separate list of about 90 “barrier crimes” for employees. Individual certification does <i>not</i> guarantee ability to work in a licensed facility — “it’s two different processes.” Employer policies also vary, staff say.

Every state has a nurse-aide registry, usually managed by the state Board of Nursing, Department of Health, or similar agency.¹⁸² In most states, only persons eligible to start working as CNAs would be listed;¹⁸³ the state places an individual on the registry once they have satisfied schooling, testing, and criminal-background requirements, and employers check the list to make sure a person is on the registry before hiring them into a permanent position.¹⁸⁴ However, other jurisdictions structure the law differently: Rather than setting up rules under which individuals are licensed, they may direct regulations entirely at *facilities*, telling them whom they may and may not employ in direct-care positions.¹⁸⁵ For example, officials in Georgia and Ohio explained that their states rely on *employers* to enforce eligibility rules.¹⁸⁶

182. See *Nurse Aide Registries*, NAT’L COUNCIL OF ST. BOARDS OF NURSING, https://www.ncsbn.org/Directory_of_Nurse_Aide_Registries.pdf [<https://perma.cc/FB3C-GVKP>].

183. Many states’ Registry websites explain these procedures in some detail. See, e.g., *Frequently Asked Questions*, ALA. DEP’T PUB. HEALTH, [https://dph1.adph.state.al.us/NurseAideRegistry/\(S\(5wvmtk55jgpn2fam4j4yoa55\)\)/FAQ.aspx#anchor8](https://dph1.adph.state.al.us/NurseAideRegistry/(S(5wvmtk55jgpn2fam4j4yoa55))/FAQ.aspx#anchor8) [<https://perma.cc/GZ54-SW68>] (explaining, *inter alia*, that “a[]ny individual successfully completing the state approved nurse aide competency and evaluation and training program desiring to work as a nurse aide in an Alabama nursing home must first be listed in good standing on the Alabama nurse aide registry”).

184. I do not engage here with the important and common practice of *provisional employment* — whereby someone can work temporarily while a background check is under way. This widespread practice can be beneficial on all sides, particularly where the need for caregivers is acute, but can also cause problems for both workers and employers. See *generally* Denver et al., *supra* note 50, at 174 (discussing provisional employment and criminal background checks in health-care jobs in New York).

185. See *infra* note 468 (statutory citations accompanying Appendix A).

186. Both states do, however, use their Registries to identify individuals ineligible to work because they have been found responsible for acts of abuse, neglect or misappropriation of client funds. Telephone Interview with Ga. official, Ga. State

States' formal eligibility rules differ dramatically, as the first column of Table 2 shows. Some, such as Connecticut and Delaware, exclude only those convicted of a few named felonies, while others limit certification for people convicted of any one of dozens of specified offenses,¹⁸⁷ and others use case-by-case procedures almost entirely (as in California, Maryland, and Vermont).¹⁸⁸ Ten jurisdictions employ sunset periods, usually with varying waiting periods for different offenses, allowing applicants with certain types of convictions to qualify after the passage of a certain number of years.¹⁸⁹ Statutes in every category feature a mix of mandatory and discretionary language.¹⁹⁰ Officials in six states described occupation-

Bd. of Cosmetology & Barbers (Jan. 26, 2016); *Nurse Aide Registry*, OHIO DEP'T HEALTH, <https://odh.ohio.gov/wps/portal/gov/odh/know-our-programs/nurse-aide-registry/nurseaideregistry> [<https://perma.cc/8PP9-NG9P>] (explaining, *inter alia*, that the registry “also maintains records of those nurse aides who have had a finding of abuse, neglect or misappropriation of property against them”).

187. These jurisdictions were Alaska, Arkansas, Florida, Georgia, Kansas, Kentucky, Maine, Missouri, North Carolina, Ohio, Texas, Virginia, and Washington, D.C. See *infra* note 468 (statutory citations accompanying Appendix A). Such lists typically focus on sexual, violent, and theft-related offenses, but others feature oddities: a felony conviction for “Corrupting Waters,” “Unlawful interference with law enforcement horses,” or “Causing a catastrophe” will keep a person off the Maine CNA registry for ten years. See CNA Disqualifications Matrix, ME. BACKGROUND CHECK CTR., <https://backgroundcheck.maine.gov/DHHS/MBC/content/CNADisqualifications.pdf> [<https://perma.cc/VJ39-7HCH>]; ME. REV. STAT. ANN. tit. 38, § 571 (2009) (defining acts which constitute “corruption” of public waters). Neither narcotics offenses nor DWI is among Missouri’s listed “Crimes Against Persons,” but “Prohibited acts involving crops” does appear. See *Definitions: Crimes Against Persons 192.2495.6*, MO. DEP'T HEALTH & SENIOR SERVS., <https://health.mo.gov/safety/goodcausewaiver/crimes.php> [<https://perma.cc/6QR8-ATJA>].

188. See CAL. HEALTH & SAFETY CODE § 1337.9(A)(3) (2014) (specifying “intent of the Legislature” that agency “have discretion to consider a conviction, but that the conviction not operate as an automatic bar to certification”); MD. CODE ANN., CRIM. PROC. § 1-209 (2009) (identifying policy of state to “encourage the employment of nonviolent ex-offenders”; prohibiting denial of license unless “direct relationship” between conviction and license, or “unreasonable risk” would result); VT. STAT. ANN. tit. 3, § 129A (2017).

189. These jurisdictions were Alaska, Arizona, Arkansas, Florida, Georgia, Maine, Ohio, Texas, Virginia, and Washington D.C. See ALASKA ADMIN. CODE tit. 7, § 10.905 (2017); ARIZ. REV. STAT. ANN. § 36-411 (2017); ARK. CODE ANN. § 20-38-105 (2019); FL. STAT. ANN. § 408.809 (2018); GA. CODE ANN. § 31-7-351 (2001); ME. REV. STAT. ANN. tit. 22, § 1812-G (2015); OHIO REV. CODE ANN. § 3701-60-07 (2018); TEX. HEALTH & SAFETY CODE ANN. § 250.006 (2015); VA. CODE ANN. § 32.1-126.01 (West 1992); D.C. Mun. Regs. tit. 22-B, § 4705 (2019).

190. See, e.g., ARK. CODE ANN. § 20-38-105(a)(1)(c)(2) (2019) (providing that a “licensing or certifying agency shall not knowingly contract with, license, exempt from licensure, certify, or otherwise authorize a person to be a service provider if the person has pleaded guilty or nolo contendere to or has been found guilty of”

specific waiver or exception procedures available to would-be CNAs, while a few others alluded to general rights-restoration procedures.¹⁹¹

In its 2016 report on occupational licensure policy, the NELP referred to “a labyrinth of different restrictions” people with conviction records face.¹⁹² The data collected here offer no reason to question that description. However, another feature of these laws must be emphasized: in *most* states, the law does *not* formally bar most people with histories of criminal justice involvement (particularly those convicted of most misdemeanors, as well as some common felonies) from working as CNAs.¹⁹³ Indeed, interviews indicated that many people with criminal records are applying for CNA certification, and that a significant portion of them navigate the process successfully, as Table 3 shows.

Table 3. CNAs: Frequency of Applicants with Criminal Records, and Approval Estimates¹⁹⁴

STATE	ESTIMATED PORTION OF CNA APPLICANTS WITH RECORDS	ESTIMATED PORTION OF APPLICANTS WITH CONVICTIONS APPROVED OR ELIGIBLE
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specified offenses) (emphasis added); VA. CODE Ann. § 54.1-3007 (2005) (stating that the Board of Nursing “*may refuse* to admit a candidate to any examination, refuse to issue a license, certificate, or registration to any applicant” by reason of criminal conviction) (emphasis added).

191. The first group (describing eligibility-restoration procedures specific to these health occupations) was composed of Alaska, Arizona, Georgia, Kansas, and Missouri; the latter (discussing more general rights-restoration measures available in the state) included California, Connecticut, Ohio, and Florida.

192. RODRIGUEZ & AVERY, *supra* note 43, at 1.

193. *See infra* Table 2, Table 3, and portions of the text and accompanying footnotes.

194. Six states studied (Alabama, Arizona, Georgia, Kentucky, North Carolina, and Texas) are not included in this table. In these states, officials were unable to estimate how many applicants had backgrounds and how many were approved, either because of a lack of records or because of decentralized procedures in which individual employers, not state agents, were responsible for imposing restrictions. *See* Telephone Interview with Ala. official, Ala. Certified Nursing Assistant (May 31, 2017); Telephone Interview with Ariz. official, Ariz. Certified Nursing Assistant (July 7, 2017); Telephone Interview with Ga. official, Ga. Certified Nursing Assistant (June 19, 2017); Telephone Interview with Ky. official, Ky. Certified Nursing Assistant (July 10, 2017); Telephone Interview with N.C. official, N.C. Certified Nursing Assistant (Feb. 26, 2018); Telephone Interview with Tex. official, Tex. Certified Nursing Assistant (Feb. 22, 2018).

Alaska	12%, in recent state analysis of health-related occupations.	Recent state analysis showed about two-thirds of applicants with convictions were approved, official said. Of 185 applicants for a “variance” in 2017 (when facilities wish to hire barred individuals), 158 were approved.
Arkansas	Unable to estimate.	“Maybe one out of ten [offenses] is disqualifying,” majority of applicants with records are approved.
California	“Approximately 10% of [CA Department of Public Health]’s initial applicants have a criminal history.”	Unable to estimate, though staffer said: “we work with people who have convictions.” State law directs that “conviction not operate as an automatic bar to certification.”
Connecticut	12%, from 2015–2017, state figures indicate.	State figures supplied to the author show that from 2015–2017, 4,048 applicants had records. About 3% were declared ineligible; after appeals a net of 2% were denied.
Delaware	“Maybe ten percent.”	“Oh, virtually all of them [applicants with records]” are eligible, aside from those with convictions for abuse, neglect, or misuse of client funds.
Florida	10% (estimate; state figures supplied to the author indicate this is accurate).	From 2013–2015, 52% of applicants with a “criminal history” were licensed, according to state data supplied to the author (4,133 of 7,875; a total of 87,898 individuals applied).
Kansas	No CNA-specific estimate, but “roughly 20% of workers in adult care homes have some sort of criminal history.”	According to state figures, about 3% of applicants with histories were ineligible to work in Home and Community Based Services facilities; fewer than 1% of those with criminal histories were ineligible to work in long-term care facilities. Approximately 60,000 background checks conducted per year.
Maine	“Probably one out of ten.”	Estimates that if forty applicants in a typical month have backgrounds, “maybe one” is disqualified.
Maryland	“Maybe 25% . . . will have some kind of background.”	Of applicants with positive background-check results who complete the record-submission process, “99%” are approved.
Missouri	“Very common,” says official; 20% – 25%, says experienced professional outside government.	Unable to estimate. However, one staffer estimated that “maybe 80%” of applicants for the “Good Cause Waiver” were approved.
Vermont	Estimates 10–15%.	Of those supplying required documents and narrative, “probably all of them” are approved. “Because they’re misdemeanors, and they have nothing to do with the profession, and there’s no pattern [of illegal conduct].”

Virginia	About 5% of CNA applicants had records in 2016. From 2009–2016, an average of about 450 CNA applicants per year had records.	State figures show that for all nursing-related occupations, about 85% of “non-routine applications,” including those with convictions, are approved after document review. More applicants are approved after further review, possibly including an in-person hearing.
Washington, D.C.	“25% — that’s the average.”	Estimates that 97% to 99% of those with records are approved, after process (but notes that “some of them get discouraged and don’t follow through”).

As Table 3 demonstrates, officials in most states within the sample explained that substantial percentages of CNA applicants have criminal histories of some type. Notably, in six states, record-keeping enabled responses to be based on specific data.¹⁹⁵ In many jurisdictions, that probably amounts to hundreds of candidates a year; in states like Florida or California, it likely means thousands. Most states reported quite high approval rates — though, again, it must be emphasized that these estimates pertained to *those who managed to navigate the application process*, sometimes including appealing an initial denial. Officials in almost half the states surveyed indicated that, in effect, more than nine out of ten applicants with criminal histories were able to win licensure.¹⁹⁶ “We’ll have a person with pages and pages of some type of criminal charge. And they’ll be things that are not disqualifying,” said an Arkansas official.¹⁹⁷ “It’s not that many that are disqualified,” said a Maine official, noting that people convicted of “simple assault, bouncing checks, theft — misdemeanors,” were regularly approved.¹⁹⁸ A few staffers

195. These states were Alaska, California, Connecticut, Florida, Kansas, and Virginia.

196. States indicating that high percentages of those able to navigate the process were approved were Arkansas, Delaware, Kansas, Maine, Maryland, Vermont, and Washington, D.C. *See* Telephone Interview with Ark. official, Ark. Certified Nursing Assistant (July 20 and 21, 2016); Telephone Interview with Del. official, Del. Certified Nursing Assistant (June 9, 2017); Telephone Interview with Kan. official, Kan. Certified Nursing Assistant (June 9, 2017); Telephone Interview with Me. official, Me. Certified Nursing Assistant (June 2, 2017); Telephone Interview with Md. official, Md. Certified Nursing Assistant (July 26, 2016); Telephone Interview with Vt. official, Vt. Certified Nursing Assistant (Aug. 2016 and Feb. 2018); Telephone Interview with D.C. official, D.C. Certified Nursing Assistant (June 15, 2017).

197. Telephone Interview with Ark. official, Ark. Dep’t of Human Servs. (July 21, 2016).

198. Telephone Interview with Me. official, Me. Dep’t of Health & Human Servs. (June 2, 2017).

volunteered that they had encountered a general, mistaken sense that the field was closed to people with records. “People think that we have such a stringent process, that we prevent folks from getting employment. But to the contrary, we are making a level playing field,” said a Washington, D.C., official.¹⁹⁹ When asked what percentage of CNA candidates are eventually approved, a Maryland official answered, “Ninety-nine percent. And I’ll tell you, people are shocked — they say, ‘You can’t get a license.’”²⁰⁰

Officials in six states declined to offer estimates, usually pointing to a lack of records or to decentralized processes that effectively placed individual employers in charge of imposing restrictions.²⁰¹ Yet even in these states, many officials responded like the Arizona official who explained that applicants “frequently” have records, and that particularly with misdemeanants, “We try not to just straight-out deny anyone.”²⁰² In Texas, a Health and Human Services staffer reported that “we do see quite a few” applicants with drug- or alcohol-related offenses, including felonies — which, this official reiterated, are *not* among state law’s disqualifying offenses.²⁰³

State prisons are far less likely to offer training programs enabling prisoners to move towards certification as CNAs than barbers. Only two states surveyed, Missouri and Connecticut, offer CNA educational programs for some incarcerated people — but interviewees in both states praised these small programs in glowing terms. However, officials in at least fourteen states evaluated here said people still on probation can receive state certification to become nursing assistants.²⁰⁴ “Absolutely — it’s very common,” said a Maryland official.²⁰⁵ “Yes — and we get a letter from their P.O.[probation officer],” said a Vermont official.²⁰⁶ After a positive

199. Telephone Interview with D.C. official, D.C. Dep’t of Health (June 20, 2017).

200. Telephone Interview with Md. official, Md. Bd. of Nursing (July 26, 2016).

201. *See supra* note 195. These six states were Alabama, Arizona, Georgia, Kentucky, North Carolina, and Texas.

202. Telephone Interview with Ariz. official, Ariz. Bd. of Nursing (July 7, 2017).

203. Telephone Interview with Tex. official, Tex. Dep’t of Health & Human Servs. (Feb. 22, 2018); *see* Tex. Health and Safety Code, §250.006 (listing disqualifying offenses).

204. States indicating that certification of persons on probation was legal and occurred with at least some regularity were Arkansas, California, Connecticut, Delaware, Florida, Kansas, Maine, Maryland, Missouri, North Carolina, Texas, Vermont, Virginia, Washington D.C. States where officials indicated that while such a situation might be legally possible, they were not sure it occurred were Alaska, Arizona, Georgia, Ohio, and Kentucky.

205. Telephone Interview with Md. official, Md. Bd. of Nursing (July 26, 2016).

206. Telephone Interview with Vt. official, Vt. Bd. of Nursing (Aug. 2, 2016).

background check, said a Washington, D.C., staffer, it is routine to “talk with their probation officer, to get a feel of how they’re doing on probation.”²⁰⁷ Some of the nation’s most populous states were in this affirmative group. At the time research was conducted, Florida posted an informational document noting that while some candidates with convictions can be approved by staff alone, “Board appearance is always required when court ordered probation is still in effect.”²⁰⁸ A California official explained in an e-mail that “sometimes an individual with a criminal history will simultaneously go through the department’s rehabilitation review process while on formal court probation. Upon showing proof of rehabilitation, the applicant may be granted a certificate.”²⁰⁹ Officials in other states explained that as long as the person’s offense was not among the state’s disqualifying offenses — and particularly if it was a misdemeanor — probation status itself would not be an obstacle to certification.²¹⁰

III. RESULTS: DISCIPLINARY ELEMENTS OF LICENSURE

In most states surveyed, substantial majorities of candidates with conviction records who managed to complete the application process were approved to become barbers or CNAs, according to state officials. Absent corroboration, these estimates must be interpreted with caution. Nonetheless, they depict an important element of American licensure practice, one that previous literature has not captured. However, interviews and documents also revealed a second major feature of that practice: the pervasively disciplinary nature of the credentialing process.

207. Telephone Interview with D.C. official, D.C. Bd. of Nursing (June 15, 2017).

208. *See* Guidelines for Applicants with Criminal History (on file with author). However, the author’s interviews confirmed that people convicted of non-disqualifying offenses may be licensed: “If it’s not a disqualifying offense, it’s possible,” replied a Board of Nursing staffer, when asked whether people on probation were eligible for the CNA credential. *See* Telephone Interview with Fla. official, Fla. Bd. of Nursing (Feb. 20, 2017).

209. E-mail from Staff, Cal. Dep’t of Pub. Health (Aug. 10, 2017) (on file with author).

210. A few were careful to add a caveat: “They’re eligible — it’s up to the facility as to whether they want to hire you.” Telephone Interview with Mo. official, Mo. Dep’t of Health and Senior Servs. (May 30, 2017). “It would go back, again, to the clinical site.” Telephone Interview with Ky. staffer, Certified Nursing Assistant (July 10, 2017). In some states, licensure officials explained that the person’s supervision status would not be visible to staff: “It wouldn’t necessarily come to our attention.” Telephone Interview with Del. official, Del. Certified Nursing Assistant (July 10, 2017). “When we get background checks, we don’t necessarily see that part of it.” Telephone Interview with Ark. staffer, Ark. Certified Nursing Assistant (July 20, 2017).

This Part of the Article describes that disciplinary character in five sections. The first focuses on *application questions* pertaining to convictions. These queries often demand far more disclosure than the relevant law requires, for both would-be barbers and caregivers, likely deterring candidates who would be eligible and underscoring applicants' vulnerability in the face of state judgment. In the second section, I explain the central role of *conduct* as opposed to *conviction* in the licensure laws of many jurisdictions. In these states, eligibility is premised on what civil officials believe someone did — rather than what they were *convicted* of doing. Licensure agencies may turn away applicants because of the allegations of police and prosecutors, in effect disregarding the conclusions of courts. Meanwhile, the primacy of conduct means that in some states, even convictions later modified, set aside, or expunged can still disqualify.

In the third section, I sketch the *archipelago of governance* CNA applicants face. Schools, clinical training sites, multiple state agencies, and employers can all play a role in policing eligibility. This creates a deeply unsettled process made still more fraught by the entanglement of civil and criminal law in occupational-licensure practice. The fourth section describes ways the application process *resurrects and amplifies* a candidate's conviction record, often requiring them to write first-person narratives of their illegal conduct, retrieve difficult-to-acquire documents from courthouses and departments of correction, and thus "perform" and prove their governability and character.

Finally, I describe the perplexing blend of federal and state law in CNA work. The federal government does not tell states whom they may and may not credential, but several national statutes ostensibly bar people with specified convictions from providing care in major federally-funded programs such as Medicare and Medicaid. Yet in most states, officials made no mention of federal law — and authoritative secondary sources appear to disagree sharply on the precise effect of these federal measures. This uncertain mix of state and federal authority places ambiguity at the heart of CNA licensure.

A. The Application-Question Problem

We can sample licensure's legal and procedural complexity by considering one prosaic piece of the process: Whether the state's credential application form includes a query about criminal background, and, if so, what that question asks. A would-be licensee

typically arrives at this application during a process that also includes schooling, practical training, and examination.²¹¹ For CNAs in particular, therefore, the credential application is often a mid-point in the licensure process, not the first or final threshold. Yet this is an essential step, and a key document: application forms are usually readily available to the public, and here the government demands disclosure, on a signed and sworn document.²¹² The application questions can stand as a kind of synecdoche — a part representing the whole — for a process that is often opaque and, in effect, illegible.

As the preceding discussion demonstrates, states typically consider most applicants on a discretionary, case-by-case basis, excluding automatically only people with certain convictions (or no one, in the case of barber candidates in a few states). But application forms, whether for barber certification or the CNA credential, give a distinctly different impression: questions suggesting that *any* criminal justice history may affect one's eligibility are very common. In the barbering setting, twenty-two of twenty-five jurisdictions ask a criminal record question on their application.²¹³ Eleven pose some version of the “any” question: for example, Maine asks would-be barbers, “Have you ever been convicted by any court of any crime?”²¹⁴ In the barbering setting, these questions operate partly as a stand-in for background checks, which most barber-licensure

211. See, e.g., *Certified Nurse Assistant Initial Application*, CAL. DEP'T PUB. HEALTH, <https://www.cdph.ca.gov/CDPH%20Document%20Library/ControlledForms/cdph283b.pdf> [https://perma.cc/B69J-J7E5] (noting that some applicants may be “enrolling in a CNA training program,” while others may have “equivalent training” already completed); *CNA Application*, ME. DEP'T HEALTH & HUMAN SERVICES, DIVISION OF LICENSING & CERTIFICATION, <https://www.maine.gov/dhhs/dlc/cna/application-forms.html> [https://perma.cc/BF7C-8WRT] (requiring applicants to submit “A copy of your CNA Certificate of Training,” among other “Required Documentation”).

212. See, e.g., *Certified Nurse Assistant (CNA) Initial Application*, CAL. DEP'T PUB. HEALTH, <https://www.cdph.ca.gov/CDPH%20Document%20Library/ControlledForms/cdph283b.pdf> [https://perma.cc/JV9M-DSDX] (including, at signature line, the statement that “I certify under penalty and perjury under the state and federal laws that the information contained in this application and supporting documents, is true and correct”).

213. See *supra* Table 1.

214. See *supra* Table 1. An explanatory question-and-answer note on Maine's application emphasizes: “How far back do I go in answering the criminal record question? Any conviction, *ever*.” (emphasis in original). These “any” states are California, Delaware, Florida, Indiana, Kansas, Maine, New Hampshire, New York, Rhode Island, Texas, Vermont, and Virginia; for representative quotations, refer to Table 1, *supra*. All of these states, except for Vermont, include the word “any” in their question; Vermont asks, “Have you EVER been convicted of a crime?”

authorities say they rarely conduct.²¹⁵ Only a few states pose narrower queries.²¹⁶

It is striking to juxtapose these sweeping, all-inclusive queries with these same states' respective barber-eligibility laws, and with their reported procedures and standards for reviewing applicants with convictions. In virtually all of these jurisdictions, legal exclusions are *limited*: only felonies, a set of listed offenses, or crimes deemed "substantially related" to the occupation preclude certification.²¹⁷ And in almost all of them, staff report that not only misdemeanants but also people with felony convictions are approved at high percentages, many of them without individualized review. In effect, then, the most common barber-application question requires a person to disclose elements of their past that very likely would *not* prevent certification.

The same is true of CNA licensure applications in many states, though the complexity of the field adds further wrinkles. In four sampled states, there is no common statewide application document — an individual who successfully trains and tests is placed on the nurse-aide registry, then seeks employment.²¹⁸ In some states, the common application does not appear to include a criminal-record query.²¹⁹ Of course, despite the application form's silence on the matter, all nine of these jurisdictions do exclude some would-be CNAs because of their criminal histories in different ways; background checks may be conducted at varying points, and certainly occur at the time of employment.²²⁰

215. Several barber-credentialing officials interviewed made clear that they simply did not have the resources to conduct background checks on applicants. "We don't check criminal backgrounds — we don't have the capability." Telephone Interview with Ala. staffer, Ala. Bd. of Cosmetology & Barbering (Nov. 9, 2015). "A criminal background check is not required for barber It's not required, but on the application they're asked, have you been arrested They are required to give us that documentation." Telephone Interview with Del. official, Del. Bd. of Cosmetology and Barbering (Dec. 22, 2015).

216. See *supra* Table 1 for a detailed list. Tennessee, for example, now asks would-be barbers only about felony convictions within three years.

217. See, e.g., CAL. BUS. & PROF. § 7403 (1990); *supra* Table 1.

218. States with no statewide CNA application were Alabama, Kentucky, Missouri, and North Carolina.

219. See, e.g., Connecticut's "Certified Nurse Examination Application" (2016), produced by the testing company Prometric; Delaware's "Certified Nurse Examination Application" (2017) (produced by the testing company Prometric); Ohio's State Tested Nurse Aide (STNA) "Testing and Registry Application," (2015), produced by D&S Diversified Technologies.

220. See *supra* Tables 2 and 3; *infra* discussion of these states' policies and practices.

In eleven jurisdictions, the statewide application does include one or multiple queries about conviction history.²²¹ As with barbers, sweeping questions predominate: “Have you EVER been convicted of a misdemeanor or felony (convictions include ‘suspended imposition of sentence’)?” asks Alaska. California’s question: “Have you been CONVICTED, at any time, of any crime, other than a minor traffic violation?” In Vermont: “Have you EVER been convicted of a crime other than a minor traffic violation? (Driving While Intoxicated and Driving Under the Influence are not ‘minor traffic violations.’)” The emphasis is in the originals, as it is in many other states’ forms.²²² Notably, these three were among seven jurisdictions sampled where the application question might lead a reasonable observer to conclude that “any” crime could well prove a barrier to licensure — but where both the formal law and reported approval practices tell a very different tale, as indicated above in Table 3.²²³ Despite the fact that many states explicitly limit licensure denials only to certain types of crime, or only to offenses an agency deems directly related to the job, that information almost never appears on CNA application forms.²²⁴

Instead of confining application questions to disqualifying offenses, some states ask would-be barbers and caregivers about elements of their past that are extremely unlikely to prevent them from securing licensure — in effect, applicants are asked about conduct that is legally irrelevant.²²⁵ This practice may provide government agencies with an abundance of potentially discrediting information, but it

221. *See supra* Table 1, but the sentence that follows is not supported by the data found in Table 1. These jurisdictions were Alaska, Arizona, California, Florida, Maine, Maryland, Texas, Vermont, Virginia, and Washington, D.C. Of these states, Florida employs Prometric for testing while Virginia and Washington D.C. use Pearson VUE. The others administer their own competency exams.

222. *See, e.g., Application for Certified Nurse Aide by Endorsement*, ALASKA DEPT. COM., <https://www.commerce.alaska.gov/web/portals/5/pub/nua4070.pdf> [https://perma.cc/ZT48-PG9F]; *Certified Nurse Assistant (CNA) Initial Application*, CAL. DEPT. OF PUB. HEALTH, <https://www.cdph.ca.gov/CDPH%20Document%20Library/ControlledForms/cdph283b.pdf> [https://perma.cc/JV9M-DSDX].

223. *See supra* Table 3. These other jurisdictions were Alaska, Arizona, California, Maine, Maryland, Vermont, and Washington, D.C.

224. *See supra* Table 3. Florida incorporates its limited-exclusion periods into the application questions directly: there are seven questions related to criminal histories, with follow-up questions specifying sunset periods. For example, the fourth question is this: “If ‘yes’ to 1, for the felonies of the third degree under Section 893.13(6)(a), Florida Statutes, has it been more than 5 years from the date of the plea, sentence and completion of any subsequent probation?” *See Florida Application Form*, FLA. BOARD OPTOMETRY, <https://floridasoptometry.gov/forms/456-ind-prac-opt.pdf> [https://perma.cc/LP8X-J5FU].

225. *See supra* Table 3.

flouts the need for transparency and seems very likely to sow confusion, deter qualified applicants, and inflict unnecessary work on applicants and bureaucrats alike. And in many states, these yes-or-no queries are only the first of the interrogatories licensure agencies pose to applicants with criminal records, a matter I return to below.²²⁶

B. “Conduct” and Conviction

Collateral consequences are generally understood to be civil penalties accompanying a criminal conviction. In fact, however, many such restrictions are formally premised on an individual’s *conduct*, rather than the existence of a specific criminal justice disposition. The theory is that a conviction is not, in itself, the reason for exclusion — it is merely excellent evidence of someone’s past behavior, and that behavior is what justifies disqualification. Jurisprudence on this point extends at least to the nineteenth-century U.S. Supreme Court case *Hawker v. New York*, where the Court declared that “[t]he vital matter is not the conviction, but the violation of law. The former is merely the prescribed evidence of the latter.”²²⁷ Moreover, the *Hawker* Court determined that when the state considers a person’s conduct and decides, based on that conduct, to deny a privilege such as a medical license, that denial is not “punishment.”²²⁸ This lends civil disqualifications a “forward-looking, regulatory justification,”²²⁹ which helps insulate them against challenges based on the Constitution’s Ex Post Facto Clause, among other legal requirements attached to prosecutions, pleas, and punishments.²³⁰

226. See *infra* Section III.D.1.

227. *Hawker v. New York*, 170 U.S. 189, 196–97 (1898) (upholding New York’s denial of the ability to practice medicine to a man who had been convicted of the crime of performing an abortion).

228. See Gabriel J. Chin, *Are Collateral Sanctions Premised on Conduct or Conviction? The Case of Abortion Doctors*, 30 FORDHAM URB. L.J. 1685, 1692 (2002).

229. *Id.* at 1695.

230. See *id.* at 1685–86 (arguing that whether a consequence is imposed on the basis of conviction or conduct is “the single most important piece of evidence in the determination of whether a sanction is criminal or civil.”). Counterintuitive though it may seem, then, civil restrictions may well be on a *stronger* legal footing if they are not triggered by a conviction, to the extent their classification as “civil” protects them from judicial scrutiny. See *id.* (noting that if a court “classifies a sanctions as a criminal penalty rather than a regulatory measure, constitutional provisions applicable to criminal prosecution are triggered,” including Ex Post Facto Clause protections and the requirement that guilty pleas be made “knowingly, voluntarily, and intelligently”).

The premise that collateral consequences may be based on conduct appears in important contemporary sources, including the EEOC's 2012 guidance for employers related to applicants with conviction records.²³¹ Recent publications by the ABA²³² and the National Association of Criminal Defense Lawyers²³³ have also framed

231. See Equal Employment Opportunity Commission, *supra* note 45, at 1. The EEOC's 2012 guidance says that employers cannot rely *only* on an arrest record — there must be sufficient proof that the underlying conduct actually occurred. *Id.* However, the guidance also endorses the premise that hiring decisions may be based on conduct, rather than conviction. *Id.* The guidance states, “an employer may make an employment decision based on the *conduct underlying an arrest* if the conduct makes the individual unfit for the position in question.” *Id.* (emphasis added). The guidance later makes the emphasis on conduct explicitly clear: “In contrast, a conviction record will usually serve as *sufficient evidence that a person engaged in particular conduct*. In certain circumstances, however, *there may be reasons for an employer not to rely on the conviction record alone* when making an employment decision.” *Id.* (emphasis added).

232. AM. BAR ASS'N, COMMISSION ON EFFECTIVE CRIMINAL SANCTIONS, SECOND CHANCES IN THE CRIMINAL JUSTICE SYSTEM, <https://www.americanbar.org/content/dam/aba/migrated/cecs/secondchances.authcheckdam.pdf> [<https://perma.cc/S7A3-5ZK7>] (urging states and localities to put in place procedures by which judges may modify existing collateral sanctions, and notes that such a judicial order “will not preclude employers or licensing boards from considering *the conduct underlying the conviction* as a factor in discretionary employment and licensing decisions, if that conduct is substantially related to the particular employment or license sought”) (emphasis added). The ABA also referred to conduct, albeit less directly, in its landmark 2004 publication on collateral consequences, “Collateral Sanctions and Discretionary Disqualification of Convicted Persons.” See AM. BAR ASS'N, CRIMINAL JUSTICE STANDARDS COMMITTEE, ABA STANDARDS FOR CRIMINAL JUSTICE, THIRD EDITION: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS 1, Standard 19-1.2 (2004). Urging reform, the ABA suggested that states should “limit collateral sanctions imposed upon conviction to those that are specifically warranted *by the conduct constituting a particular offense*.” *Id.* (emphasis added).

233. In its 2014 “Collateral Damage” report, the NACDL defines “discretionary consequences” as “*those an agency or official is authorized but not required to impose based on conduct underlying a conviction*.” NAT'L ASS'N OF CRIM. DEF. LAW., COLLATERAL DAMAGE: AMERICA'S FAILURE TO FORGIVE OR FORGET IN THE WAR ON CRIME 19 (2014), <https://www.nacdl.org/WorkArea/DownloadAsset.aspx?id=33203&libID=33172> [<https://perma.cc/7DZ9-7WYU>] (emphasis added). That definition follows the recommendation of the ABA's 2004 report, which defines a “discretionary disqualification” as a “penalty, disability or disadvantage, however denominated, that a civil court, administrative agency, or official is authorized but not required to impose on a person convicted of an offense on grounds related to the conviction.” AM. BAR ASS'N, CRIMINAL JUSTICE STANDARDS COMMITTEE, *supra* note 232 (emphasis added). The NACDL's 2014 report also recommends that states and the federal government “develop and enforce clear relevancy standards for considering a criminal record by discretionary decision-makers, requiring them to consider the nature and gravity of the conduct underlying the conviction.” See NAT'L ASS'N OF CRIM. DEF. LAW. However, the NACDL adds that “[b]enefits and opportunities

collateral sanctions this way. Yet the matter can feel abstract, like a question primarily of interest to legal theorists, rather than a definition with real impact on individuals making their way through life after interacting with the criminal justice system.

The conduct-conviction distinction emerges as a critical element of occupational licensure. Interviews, statutes, application forms and other documents all made clear that many jurisdictions explicitly make licensure decisions on the basis of an applicant's conduct rather than their conviction; while particularly prominent in CNA credentialing, this occurs in barber licensure as well.²³⁴ As elsewhere, there was significant variation across states. Of twenty jurisdictions studied in the CNA setting, thirteen either clearly premised decision-making on conduct rather than conviction, or were ambiguous on the question; seven were a clear "no," basing denials only on convictions.²³⁵

Conduct-based consideration has two effects. First, "conduct" can become shorthand for *alleged or charged* behavior: actions described by police and prosecutors, rather than that agreed to by courts and corrections, may determine whether a person can receive an occupational license or certification. Second, in many states convictions later *set aside, modified, expunged, or sealed* may still lead to denial, because the state's view is that the conduct that *led* to the conviction is the problem, not the disposition itself.

Licensure applications often instruct candidates to supply not only conviction information, but also descriptions and documents pertaining to their arrests and court proceedings, such as police reports and charging documents.²³⁶ One reason for such requirements is that eligibility may be determined by civil agents' interpretation of these materials. "We go by what you were charged with," said an Arizona State Board of Nursing staffer, explaining

should never be denied based upon a criminal record that did not result in conviction." *Id.*

234. See *infra* Appendices A & B.

235. In seven states, evidence from statutes, interviews, and/or application questions, indicated that alleged conduct, and/or non-conviction dispositions, could clearly disqualify. These were Alabama, Arkansas, Arizona, California, Florida, Georgia, and Vermont. In six states, the answer was ambiguous, or mixed; for example, interview subjects might disagree, or an application might require disclosure of non-conviction dispositions despite their apparently non-disqualifying nature. These states were Alaska, Kentucky, Maryland, Missouri, Ohio, and Virginia. In Connecticut, Delaware, Kansas, Maine, North Carolina, Texas, and Washington, D.C., officials were adamant that only convictions were disqualifying, and no documents encountered suggested otherwise.

236. See *infra* notes 238–43 and accompanying text.

LNA-credentialing review.²³⁷ “We are going to request any police reports, any court documents, we’re going to review that.”²³⁸ In an e-mailed response to follow-up questions, a Board official reiterated this point: “The Board of Nursing does not look at just the conviction but rather the behavior. For example, you can have 10 domestic violence incidents and not have any convictions. The Board considers the behavior, not just the conviction.”²³⁹ This phenomenon was not limited to the CNA setting — many barber applications require similar documents, and officials explained similar procedures for at least some applicants: “We’ll look at the court documents to find out what the crime was, how severe,” said a Georgia barbering official.²⁴⁰

When asked whether a person charged with a crime but not convicted would be licensed, a Florida Board of Nursing official replied,

That is really a — not easy to answer. Depends what you were charged with. The Board has a lot of discretion. If you were arrested, for sexual assault or child abuse . . . even without a conviction, the Board would decide how to proceed If you were arrested for a disqualifying offense, the Board would look at the arrest report, initial filing documents, things like that.²⁴¹

A Vermont Board of Nursing official explained that when a person answers “yes” to the criminal-background question,

[W]e ask for the affidavit, for the court records, and for a personal statement. You’re kind of looking for people to take accountability. And sometimes they’ll say, “The policeman just wanted to hassle me,” or “A friend put the marijuana in my car, and I didn’t know about it.” And then you get the affidavit, which gives the other side of the story. And when you’re dealing with the public, and public protection, it’s our obligation to make sure this person is being as accurate and accountable as possible.²⁴²

237. Telephone Interview with Staff, Ariz. Bd. of Nursing (July 7, 2017).

238. Notably, this element of background-check analysis is specific to the Arizona Board of Nursing’s background-check procedures, which are separate and different from that in place for other occupations in the state. The state’s main background-checking procedure, which applies to most professions, is run by the Arizona Department of Safety’s Fingerprint Clearance Card center. *See Fingerprint Clearance Card*, ARIZ. DEP’T PUB. SAFETY, <https://www.azdps.gov/services/public/fingerprint> [<https://perma.cc/7L35-56AU>].

239. E-mail from Staff, Ariz. Bd. of Nursing (Aug. 3, 2017) (on file with author).

240. Telephone Interview with Bd. Member, Ga. State Board of Cosmetology and Barbers (Jan. 26, 2016).

241. Telephone Interview with Staff, Fla. Dep’t of Health (Feb. 20, 2017).

242. Telephone Interview with Staff, Vt. Bd. of Nursing (Aug. 2, 2016).

A Maryland Board of Nursing official offered a similar explanation. Among the documents required of some applicants, this official said,

[T]he one that's a stumbling block is the "Statement of Probable Cause." And that's what a police officer took to a prosecutor: is there substance here to charge the person? Our law says if they plead, were found guilty, or plead *nolo*, we have to see a Statement of Probable Cause for every hit on their RAP sheet.²⁴³

This official voiced a somewhat skeptical posture towards applicants. "They never want us to see that," said the official of the Statement of Probable Cause, "because their life is golden as long as they can give you . . . this very rosy story."²⁴⁴ But when you see the SPC, you see, 'Oh, you're the one that had the weapon, you're the one that went after the person.'"²⁴⁵ However, this Maryland official also explained that candidates with criminal histories who do supply documents are often successful: "And what's really important, they write their version of each crime. And we compare that to the reality of the record. And if they're truthful, and have some degree of penitence, this board is very lenient, and they'll certify almost everybody."

The second manifestation of conduct's impact on licensure procedure concerns what happens *after* a conviction. In many states, even convictions that are later modified, expunged, or sealed may lead to denial of the CNA credential. It is of note that relieved convictions may disqualify in the barbering setting as well;²⁴⁶ here the focus will be on the CNA certification context.

243. Telephone Interview with Md. official, Md. Bd. of Nursing (July 22, 2016).

244. *Id.*

245. *Id.*

246. For example, Delaware's barber application question asks: "Have you ever been convicted of or entered a plea of guilty . . . to any felony, misdemeanor or any other criminal offense, *including any offense in which you have received a pardon . . . ?*" (emphasis added). *Application for Apprenticeship*, DEL. DIV. OF PROF'L REG., BOARD COSMETOLOGY & BARBERING (2018), https://dprfiles.delaware.gov/cosmetology/Cosmo_Apprenticeship_Application.pdf [<https://perma.cc/6GKM-E67M>]. The Florida Barbers' Board warns applicants that its criminal record question applies "regardless of adjudication," and "without regard to whether you were placed on probation, had adjudication withheld, were paroled, or pardoned." *Application for License from Null and Void (Expired License)*, FLA. DEP'T BUS. & PROF'L REG., FLA. BARBERS' BOARD (2012), http://www.myfloridalicense.com/dbpr/pro/barb/documents/BAR6_Null_and_Void.pdf [<https://perma.cc/K4VW-UBKK>]. On the significance of "adjudication withheld" in Florida, see *infra* n.66 and accompanying text.

Statutes distinguish between the effects of different types of post-conviction relief in varied, perplexing ways. For example, the section of Alaska law naming “barrier crimes,” and specifying whom facilities may and may not hire, explains that the terms “convicted” and “conviction” apply “even if the conviction is formally set aside,” but “does *not* include an executive order of clemency, or a record that has been expunged by order of a court.”²⁴⁷ In Kentucky, a 2016 law enabled some types of felonies to be expunged,²⁴⁸ and a state Nurse Aide Registry staffer volunteered, “If they have something that can be expunged from the record, I suggest that. If it’s expunged, it won’t show up.”²⁴⁹

In Arkansas, however, the picture is more complicated. The regulatory document introducing a list of sixty-one named disqualifying offenses says, “long term care facilities shall not knowingly employ or hire a person who has been found guilty or has pled guilty or nolo contendere, *regardless whether the record of the offense is expunged, pardoned, or otherwise sealed*, to any of the offenses listed below.”²⁵⁰ An Arkansas official discussed this element of state law in a 2016 interview. When asked if they received applications from people with expunged convictions, this official said, “Oh yes. It’s common, but it doesn’t clear their record to work in a long-term care facility. We always feel really bad for them, because they’ll spend hundreds of dollars they probably don’t have [to get an expungement]. But that’s the law.”²⁵¹

By the time I conducted a second interview with the same official in 2018, that law had changed — expungement in Arkansas is now, in effect, defined as sealing, and most sealed convictions are no longer disqualifying.²⁵² However, the official quickly added that dispositions

247. ALASKA ADMIN. CODE tit. 7, § 10.905 (2007).

248. See KY. REV. STAT. ANN. § 431.073 (2016).

249. Telephone Interview with Ky. official, Ky. Nurse Aide Registry (July 10, 2017). On expungement, see *Record Expungement*, KY. COURT OF JUST., <https://courts.ky.gov/expungement/Pages/default.aspx> [<https://perma.cc/2TFW-D48D>].

250. *Rules and Regulations for Conducting Criminal Record Checks for Employees of Long Term Care Facilities*, ARK. DEP’T HUM. SERVS., DIV. MED. SERVS., OFF. LONG TERM CARE (2011), <http://veterans.arkansas.gov/assets/uploads/2017/02/20170208131933-rules-and-regulations-for-conducting-criminal-record-checks-for-employees-of-long-term-care-facilitiespdf.pdf> [<https://perma.cc/QDQ5-WKUX>].

251. Telephone Interview with Ark. official, Ark. Dep’t Human Servs. (July 21, 2016).

252. See Telephone Interview with Ark. official, Ark. Dep’t of Human Servs. (Jan. 30, 2018). See also ARK. CODE ANN. § 20-38-105(b), (c)(2) (2019). The language of

handed down under the state’s first-offender law, which nominally removes the conviction, *do* prevent licensure. As this official explained in 2018, “You plead guilty, and complete probationary status, community service, and then after that the conviction goes away. But those individuals are disqualified, too, because our rules say ‘conviction.’”²⁵³

In Georgia, meanwhile, a background check results in an “unsatisfactory determination” if a person seeking to work in a nursing home has a “criminal record.”²⁵⁴ The statute defines “criminal record” to include not just convictions but also “arrest, charge, and sentencing for a crime” even where the disposition is “first offender treatment without adjudication of guilt,” or “adjudication or sentence otherwise withheld.”²⁵⁵ Under Ohio law, only convictions disqualify: “Our law is ‘convictions.’ Charges are not considered,” explained an official at the Nurse Aide Registry.²⁵⁶ But as this interviewee explained, sealing a record does not ensure

the relevant section is somewhat oblique. Prior to listing sixty-one disqualifying crimes, the statute says, “As used in this section, the following criminal offenses apply to this section unless the record of the offense is expunged, pardoned, or otherwise sealed.” The following section lists twelve violent and sexual offenses, with the preceding caution that,

[b]ecause of the serious nature of the offenses and the close relationship to the type of work that is to be performed, a conviction or plea of guilty or nolo contendere for any of the offenses listed in this subsection, whether or not the record of the offense is expunged, pardoned, or otherwise sealed, shall result in permanent disqualification from employment with a service provider or licensure, exemption from licensure, certification, or other operating authority as a service provider.

Id.

253. Telephone Interview with Ark. official, Ark. Dep’t of Human Servs. (Jan. 30, 2018). See ARK. CODE ANN. § 16-93-303 (2017) (“After successful completion of probation placed on the defendant under this section, a defendant is considered as not having a felony conviction except for . . . [other situations, and] determination of criminal history.”).

254. GA. CODE ANN. § 31-7-350(8) (2013) (specifying that “‘Unsatisfactory determination’ means a written determination by a nursing home that a person for whom a record check was performed was found to have a criminal record”).

255. GA. CODE ANN. § 31-7-350(3) (2013). The term “conviction” attaches, the statute further explains, “regardless of whether an appeal of the conviction has been sought.” GA. CODE ANN. § 31-7-350(1) (2013).

256. Telephone Interview with Ohio official, Ohio Dep’t of Health (June 1, 2017). Moreover, the statute pertaining to disqualifying offenses for people working in long-term-care facilities and hospices makes clear that convictions that have been “set aside” *do not* disqualify. See OHIO ADMIN. CODE § 3701-13-05(B) (2019) (stating that if “the conviction or guilty plea has been set aside pursuant to law,” a conviction or plea “shall not prevent an applicant’s employment”).

eligibility. “Now, ‘sealed’ records here, that is often confused with expungement.” Sealed records “are still viewable for this background check, because of this vulnerable population [that is, care recipients]. And the law says sealed records can be viewed in a background check by this kind of facility.”²⁵⁷

Similarly, Virginia considers only convictions — but for would-be caregivers, not all means of relief clear a conviction. A 2015 state informational document explains this in language that seems to indicate that expungement is more potent than a pardon for licensure purposes:

Having been granted a pardon, clemency, or having civil rights restored following a felony conviction does not change the fact that a person has a criminal conviction. That conviction remains on the individual’s licensure/certification or employment record. Therefore, any criminal conviction *must* be revealed on any application for licensing or employment, *unless it has been expunged*.²⁵⁸

In some jurisdictions, while the law does not clearly state that amended convictions remain disqualifying, they must be reported.²⁵⁹ For example, a California Department of Public Health website explains, “All convictions must be reported to the CDPH *even if the*

257. Telephone Interview with Ohio official, Ohio Dep’t of Health (June 1, 2017). See OHIO REV. CODE, § 109.572 (2019); see also OHIO JUST. & POL’Y CTR., OHIO POVERTY LAW CTR., UNDERSTANDING AND SEALING CRIMINAL RECORDS IN OHIO (2011), <https://laslev.org/wp-content/uploads/2011/05/Understanding-and-Sealing-Criminal-Records-in-Ohio.pdf> [<https://perma.cc/B8NQ-83UK>] (explaining that “state law permits several types of employers, such as police departments, child-care providers, schools, and nursing homes, to see your sealed record if you apply for a job with them”).

258. *Joint Statement of the Department of Health and the Department of Health Professions on Impact of Criminal Convictions on Nursing Licensure or Certification and Employment in Virginia*, VA. DEP’T HEALTH PROFS. (2015), <https://www.dhp.virginia.gov/nursing/guidelines/90-55CriminalConvictions.doc> [<https://perma.cc/7ZZF-YBEK>] (emphasis added). By contrast, the agency that licenses would-be barbers in Virginia tells applicants “DO NOT DISCLOSE” juvenile adjudications and “Convictions pardoned, set aside, reversed, expunged, pending disposition, adjudication withheld, deferred judgment or otherwise rendered inoperative.” *Criminal Conviction Disclosure Form*, VA. DEP’T PROF. & OCCUPATIONAL REG., BOARD BARBERS & COSMETOLOGY (2015), http://www.dpor.virginia.gov/uploadedFiles/MainSite/Content/FormsandApplications/A406-01CCR-v2_10-01-2015.pdf [<https://perma.cc/HA8X-EXJA>]. Notably, this document is placed among a “Most Requested Forms” section of the Board’s website. See *Board for Barbers and Cosmetology*, VA. DEP’T PROF. & OCCUPATIONAL REG., <http://www.dpor.virginia.gov/boards/barbercosmo/> [<https://perma.cc/5G99-2JFL>].

259. For example, among sampled states, this ambiguous state of affairs obtains in Arizona, California, Florida, and Maryland.

court granted a dismissal pursuant to PC 1203.4 or any other applicable statute, with the exception of marijuana-related offenses.”²⁶⁰ Arizona’s LNA application asks if the candidate has ever had a “felony or undesignated offense pardoned, expunged, dismissed, deferred, reclassified or redesignated.”²⁶¹ If the applicant answers in the affirmative, extensive documentation must be submitted — the same documents necessary for any un-relieved felony conviction. In Maryland, the common non-conviction disposition “Probation Before Judgment” (referred to, inevitably, as a “PBJ”) must be reported.²⁶²

The testing company Prometric asks, on its Florida CNA examination application, “Have you EVER been convicted of, or

260. *Criminal Record Review*, CAL. DEP’T PUB. HEALTH, LICENSING & CERTIFICATION PROGRAM, <https://www.cdph.ca.gov/Programs/CHCQ/LCP/Pages/CriminalRecordReview.aspx> [<https://perma.cc/8XGX-N6W9>] (emphasis added). However, in an e-mailed response to questions, a California Department of Public Health official explained that state law considers “a full and unconditional pardon by the Governor, expungement/court dismissal . . . or a Certificate of Rehabilitation as proof of rehabilitation.” E-mail from Cal. official to author (Aug. 10, 2017) (on file with author). See CAL. HEALTH & SAFETY CODE § 1337.9(c) (2014) (listing several types of evidence of rehabilitation). California does not employ automatic bars, and conducts individualized “rehabilitation review” for applicants with conviction records. See CAL. HEALTH & SAFETY CODE § 1337.9(b)(2) (2014) (empowering agency to deny applicant for “[c]onviction of a crime substantially related to the qualifications, functions, and duties of a certified nurse assistant if the state department determines that the applicant or certificate holder has not adequately demonstrated that he or she has been rehabilitated and will present a threat to the health, safety, or welfare of patients”) (emphasis added); CAL. HEALTH & SAFETY CODE § 1337.9 (a)(2)(2014) (stating that it is “in the interest of public safety to assist in the rehabilitation of criminal offenders by removing impediments and restrictions upon the offenders’ ability to obtain employment or engage in a trade, occupation, or profession based solely upon the existence of a criminal record”) (emphasis added). However, the *Criminal Record Review* webpage cited above — which, it should be noted, is more clear, thorough, and accessible than what most states offer — makes no reference to these rehabilitation factors.

261. *Initial Application Instructions for Nursing Assistant for Licensed Nursing Assistant OR CNA Registry*, ARIZ. ST. BOARD NURSING (2016), <https://www.azbn.gov/media/2894/final-initial-na-lna-packet2162017-102017.pdf> [<https://perma.cc/R3G4-DYU3>].

262. Maryland law says a PBJ “is not a conviction for the purpose of any disqualification or disability imposed by law because of conviction of a crime.” MD. CODE ANN. CRIM. PROC. § 6-220 (2017). However, a Board of Nursing FAQ document makes clear that charges resulting in PBJs must be reported: “You must send documents from the local, state or federal court for each conviction or Probation Before Judgment (PBJ).” *Frequently-Asked Questions: Criminal History Records Check*, MD. BOARD NURSING <http://mbo.n.maryland.gov/Documents/FAQs%20CHRC%202.16%20REV.pdf> [<https://perma.cc/4MAL-VUCD>].

entered a plea of guilty, nolo contendere, or no contest to, a crime in any jurisdiction other than a minor traffic offense? You must include all misdemeanors and felonies *even if adjudication was withheld*.”²⁶³ The inclusion of “adjudication withheld” here is particularly significant, because under Florida law, when a person is found guilty of a felony and sentenced to probation, a judge may withhold adjudication of guilt; such a “withhold” is *not* a conviction.²⁶⁴ Assuming successful completion of probation, a person receiving this disposition does not lose civil rights, and may legally say that they have not been convicted of a felony.²⁶⁵ Defense lawyers in the state promote the “withhold” specifically for its benefits in the employment setting,²⁶⁶ and though recent legal changes have limited the list of crime types eligible, in recent years as many as half of felony probationers have received the adjudication-withheld disposition.²⁶⁷

263. *Florida Certified Nursing Assistant Application Examination Application*, PROMETRIC (2018), https://www.prometric.com/en-us/clients/nurseaide/documents/florida/FL_CNA_APP.pdf [https://perma.cc/AKM4-9ERZ] (emphasis added). The document says, “If you answered YES, please be prepared to create a typed or printed letter with arrest dates, city, state, charges and final dispositions and be prepared to send it to the Board Office upon request.” The Prometric application also asks about sealed records (“Have you EVER had any records sealed pursuant to section 943.059, F.S., or any other states applicable statute?”) and juvenile dispositions (“Have you EVER been adjudicated delinquent or have had adjudication of delinquency withheld?”). Florida statutory law pertaining to background checks and disqualifying offenses confirms the need to report adjudication-withheld dispositions. See FLA. STAT. § 408.809(4) (2018) (stating that one “must not have an arrest awaiting final disposition for, must not have been found guilty of, regardless of adjudication, or entered a plea of nolo contendere or guilty to . . . for any of the following offenses or any similar offense of another jurisdiction”).

264. See FLA. STAT. § 948.01(2) (2017).

265. See Ted Chiricos et al., *supra* note 119, 548.

266. The Florida statute does not state explicitly that a withhold removes a person’s obligation to answer “yes” when asked if they have been convicted of crime, but the websites of several Florida criminal-defense attorneys agree this is the case. See, e.g., *Withhold of Adjudication: One Free Bite at the Apple*, L. OFF. OF TIMOTHY HESSINGER (2019), <http://www.hessingerlaw.com/Articles/Withhold-of-Adjudication-One-Free-Bite-at-the-Ap.aspx> [https://perma.cc/SKB4-DRMR] (asserting that if adjudication is withheld, “The individual will not have to report a criminal history for that crime on job applications if the question on the application is phrased ‘Have you ever been convicted of a crime?’ . . . The ability to honestly say one has no criminal convictions can make all the difference in the world in a search for that perfect job.”).

267. See Chiricos et al., *supra* note 119, at 548; see also CHRISTOPHER UGGEN ET AL., THE SENTENCING PROJECT, SIX MILLION LOST VOTERS: STATE-LEVEL ESTIMATES OF FELONY DISENFRANCHISEMENT 5 n.1 (2016), <http://www.sentencingproject.org/wp-content/uploads/2016/10/6-Million-Lost-Voters.pdf> [https://perma.cc/4KG9-6RSB].

But for would-be caregivers, this disposition is treated just like a conviction, at least in the application stage.

The prominence of “conduct” is emblematic of a process in which applicants must live with uncertainty and open-ended vulnerability. Seeking licensure means being governed by ambiguous, often opaque laws, subject to deep scrutiny by civil officials (recall the “degree of penitence” the Maryland staffer said the Board hopes to witness) who may use subjective standards and wide-ranging types of criminal-justice information. Yet for those undaunted by sweeping application questions and able to navigate this process, the result is often success.²⁶⁸ Absent more data, we cannot fully understand how this comes about. Perhaps the process deters altogether many people who would fail to win the credential—while also scaring away many who *would* succeed. Or it could mean that while the practice of licensure is demanding, most candidates with conviction records are able to complete it.

Exclusionary rules premised on “conduct” result in a civil procedure that, in effect, supplements the penalty imposed by the judicial and correctional process.²⁶⁹ Indeed, when civil officials deny a license based on their reading of arrest and charging documents in cases not resulting in a conviction, it is fair to say they are *substituting* their judgment for that of the judicial process, and doing so without clear standards of evidence. While this study cannot make robust claims about the purposes behind specific rules, there is anecdotal evidence that an implicit skepticism about the plea-bargaining process appears to contribute to this practice.

Finally, conduct-based consideration has important ramifications for the ongoing campaign to alleviate collateral sanctions, whether by judicial order at the time of initial sentencing or by various means of post-conviction relief. Several measures aiming to hold offenders accountable while avoiding or ameliorating the impact of collateral consequences — such as first-offender adjudications, set-asides, expungement, or record sealing — may not, in fact, fully restore people with histories of criminal-justice involvement to licensure eligibility.

268. Note that in many of the states discussed above — including Florida, Maryland, Vermont and Virginia — officials said that most applicants with convictions who completed the process were approved for nurse’s-aide certification. See *supra* Table 3.

269. See Carlson, *supra* note 3, at 349.

C. The Licensure Archipelago

Evoking Solzhenitsyn, Foucault described a “series of institutions which, well beyond the frontiers of criminal law, constituted what one might call the carceral archipelago.”²⁷⁰ Contemporary writers argue that twenty-first century society, with its pervasive monitoring of security and risk in “private governments” and “contractual communities,” is permeated by an “archipelago of governance.”²⁷¹ This metaphor, with its dark echoes, nicely captures the regime that individuals with criminal records face as they seek occupational licensure, particularly those who want to work as CNAs. State administrative processes drive numerous elements of the extended American carceral state.²⁷² But for people with conviction records seeking to work as caregivers, the state agencies awarding the CNA credential are only one among many public and private actors empowered to inspect, evaluate, and exclude.

Officials in a few jurisdictions explained that at the point of initial entry into schooling, a person *should* be told whether their background will prevent certification: if someone will not be able to work in the field, no program should take their money or waste their time. As a Georgia official explained, “What we tell the [educational] programs is that they need to ask [potential students] if they have a background. You don’t want to accept money from someone who won’t be able to work.”²⁷³ But among surveyed states, only Texas requires schools to play that role.²⁷⁴ Elsewhere, because state laws are complex and at least partly discretionary, it appears it would be

270. FOUCAULT, *supra* note 18, at 297.

271. Clifford Shearing, *Punishment and the Changing Face of the Governance*, 3 PUNISHMENT & SOC’Y 203, 211 (2001); Rose, *supra* note 97, at 330.

272. See Carlson, *supra* note 3, at 347.

273. Telephone Interview with Ga. official, Ga. Nurse Aide Registry (June 19, 2017).

274. As the Georgia official indicated, a Georgia document pertaining to “Nurse Aide Training Programs” (NATPs) does say that “NATPs are to inform program applicants, prior to their acceptance, that adverse information on criminal background checks does hinder an individual from obtaining employment.” *Id.* See also *Policies and Procedures for Nurse Aide Training Program*, GA DEP’T COMMUNITY HEALTH, DIV. MEDICAID (2018), <https://www.mmis.georgia.gov/portal/ResourceProxy.aspx?iCProxyTo=MS1BdHRhY2htZW50cy9NYW51YWxzL051cnNlJTlWQWlkZSUyMFRyYWluaW5nJTlWUHJvZ3JhbSUyME1hbnVhbCUyMEFwcmlsJTlWmJAxOCUyMHdlYiUyMHBvcnRhC5wZGY=> [https://perma.cc/8XXV-ZM9B]. Before they may accept an enrollment fee, barber schools in North Carolina must “notify the applicant of the statutes regarding criminal convictions,” and “have the applicant sign and date the notice indicating that the applicant has been so informed.” 21 N.C. ADMIN. CODE 06F.0116 (2016).

logistically impossible — as well as legally dubious — for schools to perform that function. There are dozens of CNA training programs in most states, and hundreds in large states; some are independent, while others are hosted by community colleges, high schools, healthcare facilities, or other institutions.²⁷⁵ The complexity and indeterminacy of the law seems to put schools in an impossible position: they would err by taking in students only to see them disqualified later in the process, but would also do harm if they scare away some who *might* be approved.

Schools are closely connected to another actor that appears to play a critical early gatekeeper function: the facilities where students do clinical training. CNA schooling always involves clinical experience, often at a nursing home or hospital.²⁷⁶ Of course, these training locations need to ensure that everyone in direct contact with residents and patients meets state rules and satisfies their own institutional policies. State officials and training-program staff in several states volunteered depictions of the influence of these institutions in policing eligibility early in the credentialing process. As an experienced administrator at a North Carolina educational program explained,

We don't make the decision—it's the clinical location that makes the decision. In order to register [for schooling], students have to pay for a criminal background check. And if it's flagged, we send those flagged people, their info, over to the clinical location where they're supposed to go. And it's up to them to accept or deny.²⁷⁷

A Kentucky licensure official explained, “What I tell [applicants with conviction records] to do is call the person they're going to take the class from and tell them to check with their clinical site.”²⁷⁸

275. See, e.g., *Texas CNA Requirements and State Approved CNA Programs*, CNA CLASSES NEAR YOU (listing scores of programs), <https://cnaclasesnearvou.com/texas-cna-requirements-state-approved-cna-programs/> [<https://perma.cc/W8UG-P225>].

276. See, e.g., *State Nurse Aide Training: Program Information and Data*, U.S. DEP'T HEALTH & HUM. SERVS., OFF. INSPECTOR GEN. (2002), <https://oig.hhs.gov/oei/reports/oei-05-01-00031.pdf> [<https://perma.cc/YBQ4-TN5U>] (stating that “[f]ederal regulations require that nurse aides have no less than 75 hours of training prior to receiving their certification. At least 16 hours of a training program must be supervised practical [clinical] training”).

277. Telephone Interview with N.C. official, N.C. Dep't of Health & Human Servs. (Feb. 26, 2018).

278. Telephone Interview with Ky. official, Ky. Nurse Aide Registry (July 10, 2017). “If the [clinical site] facility decides to reject them, there is nothing we can do,” said an administrator at an Alabama community-college nursing-assistant program. Telephone Interview with Ala. school official, Lawson State Cmty. Coll. (May 26,

It is worth pausing on that comment. Clearly, its intent is to be helpful to the applicant, and training facilities have strong reasons to exercise caution when choosing to take on any applicant, criminal record or not. But at the same time, this official's suggestion captures the unstable, idiosyncratic nature of CNA governance, and the layers of vulnerability and uncertainty that would-be caregivers with backgrounds face. What appears to be occurring here is that a person the *state believes* to be eligible is told, by the state, to ask a *school* what restrictions would be in place at the *clinical site* where they would be placed should they join that educational program.

Of course, despite their importance, training sites do not supplant the state's role in awarding the credential itself. Here several complications emerge, central among them the fact that a would-be caregiver with a background may not be able to determine her eligibility until late in the process — a problem frankly acknowledged by officials in several states. As a Virginia Board of Nursing staffer explained, “We get calls like that all the time [asking about eligibility]. I can't really answer They have to apply. They are asking before they take the course. We tell them, ‘We can't tell you in advance.’”²⁷⁹ A Vermont official said, “I often get calls from [training] program administrators, and they want to know—‘If they

2017). “A lot of the facilities say, ‘run the background check.’ So we do.” Telephone Interview with Ala. school official, Lawson State Cmty. Coll. (May 26, 2017). An official at the Georgia Nurse Aide registry explained, “If they do have a record, they need to check with the nursing home—all of our candidates need to go through a nursing home, for their clinical rotation—and it's up to them to say yes or no.” Telephone Interview with Ga. official, Ga. Nurse Aide Registry (June 19, 2017). A Missouri staffer said, “The schools and the nursing homes are required to do background checks for the students. Because they can't go in and do their clinicals without that.” Telephone Interview with Mo. official, Mo. Dep't of Health and Senior Servs. (May 30, 2017). A Washington D.C. staffer said, “Some of the schools will do a background check because . . . it's required in order to go into a clinical setting.” Telephone Interview with D.C. official, D.C. Bd. of Nursing (June 15, 2017). A few officials said that clinical training programs routinely excluded people who would have been clearly *eligible* under state rules. “Some of them have zero tolerance,” said a Connecticut official. Telephone Interview with Conn. official, Conn. Dep't of Pub. Health (Jan. 9, 2018).

279. Telephone Interview with Va. staffer, Va. Bd. of Nursing (June 7, 2017). Virginia posts a document making this arrangement explicit: “Until an individual applies for licensure or certification, the Board of Nursing is unable to review, or consider for approval, an individual with a criminal conviction, history of action taken in another jurisdiction, or history of possible impairment. The Board has no jurisdiction until an application has been filed.” *Joint Statement of the Department of Health and the Department of Health Professions on Impact of Criminal Convictions on Nursing Licensure or Certification and Employment in Virginia*, *supra* note 258.

go through the program, will you license them?’ And I can’t give any opinion, because it’s on a case by case basis.”²⁸⁰

In Maryland, a state official pointed to this sequencing problem early in the interview, “Ironically, we just met with a delegate [state legislator] yesterday, who doesn’t seem to understand the process. Employers are frustrated, because they’ll pay for training—and then there’s the background check.” The official said that the lawmaker “was irate: ‘Why aren’t [schools] forced to do this background check in advance? Why aren’t we fingerprinting them in advance? People spend money, people get workforce grants [to pay for schooling]’”—only to find, later in the process, that they may not be eligible for employment.”²⁸¹

Texas, having experienced precisely this problem, requires schools to have a background check conducted “prior to allowing the individual into the class,” as a Nurse Aide Registry official explained, in order to ascertain whether students have disqualifying convictions. “We had a lot of people that were going through the training, spending their money, getting their certifications, going out there — and nobody could hire them, because of the bars to employment.” Because Texas’ exclusionary rules appear more clear-cut than those of many other states, school officials might be able to accurately advise would-be students about how their background-check results would affect their eligibility—but the law does include plenty of complications that could easily elude a busy trade-school administrator, leading to errors.²⁸² Notably, this problem has been a

280. Telephone Interview with Vt. staffer, Vt. Bd. of Nursing (Feb. 21, 2018). One authoritative source says this sequence occurs regularly, with state licensure restrictions taking effect “often after applicants have invested a great deal of time and money in training for a particular occupation.” REBECCA VALLAS & SHARON DIETRICH, ONE STRIKE AND YOU’RE OUT: HOW WE CAN ELIMINATE BARRIERS TO ECONOMIC SECURITY AND MOBILITY FOR PEOPLE WITH CRIMINAL RECORDS, CENTER FOR AMERICAN PROGRESS 36 (2014), <https://cdn.americanprogress.org/wp-content/uploads/2014/12/VallasCriminalRecordsReport.pdf> [<https://perma.cc/44JA-9Y7Z>].

281. Telephone Interview with Md. official, Md. Bd. of Nursing (July 26, 2016).

282. Texas’ Health & Safety Code includes permanent bars for about thirty listed offenses, and five-year bars for others; there are no waivers or exceptions. *See* TEX. HEALTH & SAFETY CODE ANN. § 250.006 (2015). However, the law is not without its complexities. For example, while a convicted burglar may be eligible for a *license* five years after their conviction, another section of the code says that no one convicted of burglary may *ever* work in two facility types regulated in two different sections of the code; one has to check those citations to see that these are “convalescent and nursing facilities” and assisted-living facilities. TEX. HEALTH & SAFETY CODE ANN. § 250.006(c) (2015) (specifying that “In addition to the prohibitions on employment prescribed by Subsections (a) and (b), a person for whom a facility licensed under

focus of recent reform efforts, and in the last two years several states have put in place laws allowing people with records to petition licensing boards for preliminary rulings, or “pre-qualification opinions,” on their eligibility.²⁸³

In several states, even winning the credential does not mean a person is legally eligible to work, because exclusion rules can vary by *location* of care. In other words, states may have one set of rules pertaining to individual certification, and *different* rules setting out who may work in certain types of institutions. Among the surveyed jurisdictions, this was the case in Alaska, Arkansas, Georgia, Kansas, Missouri, Ohio, Texas, Virginia, and Washington, D.C. Many states have concluded that in-home care presents special risks, and have set up different rules and procedures for home health aides than for people doing CNA work in different facilities.²⁸⁴ But the phenomenon of differing standards also extends to institutional care. For example, at the time this research was conducted, Kansas had a

Chapter 242 or 247 is entitled to obtain criminal history record information may not be employed in a facility licensed under Chapter 242 or 247 if the person has been convicted” of “burglary”). Additionally, the law explains that if a person is “placed on deferred adjudication community supervision” for a listed offense, and successfully completes that supervision, the offense is *not* disqualifying. TEX. HEALTH & SAFETY CODE ANN. § 250.006(d) (2015) (providing that “a person who is placed on deferred adjudication community supervision for an offense listed in this section, successfully completes the period of deferred adjudication community supervision, and receives a dismissal and discharge in accordance with Article 42A.111, Code of Criminal Procedure, is not considered convicted of the offense for which the person received deferred adjudication community supervision”). It is easy to imagine even a highly competent and well-intentioned CNA-school admissions staffer making errors in interpreting and applying such a law. A New Hampshire law enacted in 2018 will enable individuals to obtain a preliminary determination as to whether their record will prevent licensure. *See* S.B. 589, 2018 ALS 367th Sess. (N.H. 2018); *see also* Margaret Love, *NH Limits Denial of License Based on Criminal Records*, COLLATERAL CONSEQUENCE RESOURCE CTR. (July 10, 2018), <http://ccresourcecenter.org/2018/07/10/16794/> [<https://perma.cc/LM52-BGBE>].

283. *See* INST. FOR JUSTICE, MODEL ACT 2019, *supra* note 12 (listing ten states that now “allow ex-offenders to petition a licensing board at any time, including before enrolling in any required training, to determine if their record would be disqualifying”). Notably, seven states among those sampled in this Article now offer such preliminary determinations: Arizona, Indiana, Kansas, Kentucky, New Hampshire, Ohio, and Tennessee. *See* UMEZ & PIRIUS, *supra* note 33, at 5 (describing laws that enable a person with a criminal record to ask a licensing authority for a “pre-qualification” opinion as to their eligibility); *see also* OCCUPATIONAL LICENSING REVIEW ACT: MODEL LEGISLATION § 100.05 (INST. FOR JUSTICE Aug. 2018), <https://ij.org/wp-content/uploads/2018/11/11-14-2018-Occupational-Licensing-Review-Act-1.pdf> [<https://perma.cc/A6HU-Z2KT>] [hereinafter INST. FOR JUSTICE, MODEL ACT 2018].

284. *See* GALANTOWICZ ET AL., *supra* note 83, at Appendix B, 38–47 (listing state laws pertaining to background checks for in-home care workers).

long prohibited-offenses list, permanently barring people with certain convictions from working in any of the six different types of institutions that care for the disabled, but used a different list — with expiration periods — for those working in other long-term-care facilities.²⁸⁵ Kansas changed its rules in late 2018, such that the same list of prohibited offenses is used for all facilities.²⁸⁶ Texas law, meanwhile, says that a person convicted of burglary, among other offenses, becomes eligible to work as a caregiver five years after their conviction.²⁸⁷ However, a later section of the statute says that no one convicted of burglary may *ever* work in two facility types regulated by two different sections of the code: “convalescent and nursing facilities” and assisted-living facilities.²⁸⁸

In Alaska, Kansas, and Virginia, officials acknowledged that this arrangement could mean a person with a criminal record might win state licensure, but then be barred by a different policy or agency from caring for patients in certain facilities. “Someone may be able to get certified as a CNA, but not be able to work in a nursing home,” a Virginia official explained in an e-mail.²⁸⁹ Further complicating

285. Compare KAN. STAT. ANN. § 39-2009 (2018), with KAN. STAT. ANN. § 39-970 (2018) and KAN. STAT. ANN. § 65-5117 (2018). As a Kansas staffer wrote in an e-mail, “The current background check laws for long term care and for HCBS differ greatly in the area of prohibiting offenses.”

286. See *Criminal Record Check Program Information and Forms*, KAN. DEP’T FOR AGING & DISABILITY SERVS., <https://www.kdads.ks.gov/commissions/survey-certification-and-credentialing-commission/health-occupations-credentialing> [<https://perma.cc/SWV5-QUGV>] (explaining that the “New Prohibited Offense List is now identical for Adult Care Homes, Home Health Agencies and HCBS Providers. There are some new offenses while some previously prohibited offenses have been removed”, and “HCBS Providers will see that some prohibiting offenses are now only prohibited for six years”, among other changes).

287. See TEX. HEALTH & SAFETY CODE ANN. § 250.006 (2015) (providing that “A person may not be employed in a position the duties of which involve direct contact with a consumer in a facility or may not be employed by an individual employer before the fifth anniversary of the date the person is convicted of [. . .] an offense under Section 30.02, Penal Code (burglary)”).

288. See TEX. HEALTH & SAFETY CODE ANN. 250.006 (1993) (stating that “In addition to the prohibitions on employment prescribed by Subsections (a) and (b), a person for whom a facility licensed under Chapter 242 or 247 is entitled to obtain criminal history record information may not be employed in a facility licensed under Chapter 242 or 247 if the person has been convicted: (1) of an offense under Section 30.02, Penal Code (burglary)”).

289. E-mail from Staff, Va. Bd. of Nursing (Feb. 23, 2018) (on file with author). Indeed, Virginia puts this in writing — an on-line guidance document explains that a person convicted of any of about ninety “barrier crimes” is prohibited from working in “nursing facilities, home care organizations, hospice programs, or assisted living facilities, *whether or not the person is licensed or certified by the Board of Nursing*” (emphasis added).

matters, caregivers and the places they work may be regulated by different agencies within a single jurisdiction. In Washington, D.C., for example, the Board of Nursing and the Department of Health shared responsibility for licensing caregivers working in diverse facilities at the time interviews were conducted.²⁹⁰ In Alaska, one agency runs the Nurse Aide Registry and licenses individuals, while another administers rules for facilities.²⁹¹ Different types of facilities also require different kinds of background checks in many states.²⁹²

Individual employers, meanwhile, can and do refuse to hire people with criminal records, even after relevant state agencies have declared them fit to serve. Several interview subjects went out of their way to make this clear; most, but not all, characterized employers' practices as more restrictive than state law.²⁹³ A few state officials explained that they try to help candidates with convictions by directing them to talk with employers as early as possible. Referring to CNA applicants with criminal histories, an Ohio staffer said, "And they do [get jobs] — but it takes them longer. And I always recommend that they find an employer first." Similarly, an official with the Georgia Nurse Aide Registry said she tells prospective CNAs, "You need to do your due diligence. Why don't you just call around to some of the facilities you're interested in working with, and say 'I have this felony, and I'm interested in working with you, would you hire me?'"

These comments suggest that state agents *informally* integrate employer practices into licensure. Some jurisdictions do so *formally*. For example, several states allow waivers or exceptions for people

290. Interview with Staff, Washington, D.C. Dep't of Health ("DC Health") and Bd. of Nursing (June 14, 2017 and June 15, 2017). CNAs are now regulated by the Washington D.C. Board of Nursing, within DC Health. *See Certified Nurse Aides Licensing*, DC HEALTH, <https://dchealth.dc.gov/node/149322> [<https://perma.cc/6TMU-ZF43>].

291. *Compare Nurse Aide Registry*, ALASKA DIVISION CORPS., BUSINESS & PROF. LICENSING, <https://www.commerce.alaska.gov/web/cbpl/professionallicensing/nurseaideregistry.aspx> [<https://perma.cc/C8LR-QPF6>], with *Health Facilities Licensing & Certification*, ALASKA DEP'T HEALTH & SOC. SERVS., <http://dhss.alaska.gov/dhcs/Pages/hflc/default.aspx> [<https://perma.cc/25TK-N3LB>].

292. GALANTOWICZ ET AL., *supra* note 83, at 15.

293. "We let [eligible people with convictions] know, you may be able to take the course, but when you go into the workplace — each company is different," said one Kentucky school official. After explaining Connecticut's relatively narrow list of disqualifying offenses, for example, a staffer said, "There are a lot of places [employers] that are zero-tolerance." However, a Delaware official told a different story, saying "what we see, is that most of the time the entities that are hiring, if they see these things, and they see that they're old, a lot of them won't even worry about it and they'll just go ahead and hire them."

with conviction histories hoping to work as CNAs — and in Alaska, Arkansas, Georgia, and Ohio, those procedures all directly involve employers.²⁹⁴ In Arkansas, people convicted of some offenses may work in certain types of facilities as long as listed conditions are met, including “the service provider wants to hire the person.”²⁹⁵ A spectacularly complicated section of Ohio law says that direct care providers may hire people convicted of the “disqualifying offenses” listed in a previous section, as long as seven conditions (some of which contain multiple sub-elements) are satisfied.²⁹⁶ The seventh condition requires the administrator of a facility to determine that the “applicant’s character” makes them “unlikely to harm” people under their care; it sets out eleven factors for administrators to consider in reaching that judgment.²⁹⁷ When asked about this procedure, known as the “personal character standard” provision, a staffer at an Ohio trade association said, “Our members struggle with that rule because it is very confusing.”²⁹⁸ In Alaska, a “variance” for individuals convicted of listed “barrier crimes” can be sought by the individual or “by the provider;” the law states that a variance “becomes immediately invalid” if the individual “ceases to be associated with a provider that requested the variance.”²⁹⁹ This seems to mean that if a person granted such a variance loses her *job*, she would also lose her *license*. In Georgia, if a personal care home “would like to hire” an applicant with an otherwise-disqualifying conviction, the provider may ask the state to conduct a “fitness determination.”³⁰⁰

294. See *infra* notes 294–99.

295. See ARK. CODE ANN. § 20.38.105 (2019).

296. See OHIO ADMIN. CODE § 3701.13.06. Another section of this statute limits the negligence liability of employers who make a hire after analyzing these factors. See OHIO REV. CODE ANN. § 3712.09(C)(2)(h)(3) (2013) (providing that (3) If the program in good faith employed the individual according to the personal character standards established in rules adopted under division (F) of this section, the program shall not be found negligent solely because the individual prior to being employed had been convicted of or pleaded guilty to an offense listed or described in division (C)(1) of this section).

297. See OHIO ADMIN. CODE § 3701-13-06 (2019).

298. Interview with Staff, Ohio Assisted Living Ass’n (June 12, 2017).

299. See ALASKA ADMIN. CODE tit. 7 § 10.930 – 10.945 (2007). As an official explained, most successful applicants “do have a provider who would hire them, if they received the variance.” Interview with official, Alaska Dep’t of Health & Human Servs. (Feb. 20, 2018).

300. See *Employees of Personal Care Homes: Frequently Asked Questions*, GA. DEP’T COMMUNITY HEALTH (2018), https://dch.georgia.gov/sites/dch.georgia.gov/files/imported/vgn/images/portal/cit_1210/28/16/148814243EmployeesofPCHFAQrev62010.pdf [https://perma.cc/8RS3-SMJP].

The CNA licensure archipelago is composed of so many pieces that it is difficult to map. Schools, clinical training sites, multiple state agencies, and employers interpret state law and interact in complex ways, underscoring the precarity and vulnerability of applicants with backgrounds. And this is not an exhaustive list — in many states, people with conviction histories will need to move their applications through the hands of private testing companies and background-check firms as well.

1. *The Licensure Archipelago as Exemplifying the Entanglement of Civil and Criminal Law*

Some critical accounts have adopted the metaphor of “entanglement” to describe the messy inseparability of civil and criminal law in the extended American carceral state.³⁰¹ At the risk of mixing metaphors, the occupational-licensure archipelago offers a vivid illustration of the ways in which civil and criminal law are snarled together in the United States. Manifest in legal texts, this relationship regularly requires government employees awarding an occupational-licensing credential to immerse themselves in the ambiguities of the criminal law. For people with records, this civil-criminal entanglement adds to the burdensome uncertainty and non-transparency of seeking licensure.

As described above, many states require applicants to submit arrest and charging documents, for either the barber license or CNA certification — and civil officials (or members of their respective boards) may make credentialing decisions partly on the basis of their own reading of these police-and-prosecutor materials.³⁰² Treatment of applicants with out-of-state records also requires these civil-agency bureaucrats to interpret criminal-justice materials. Many states ask credential-seekers if they have ever been convicted, in any jurisdiction; millions of Americans move across state lines each year.³⁰³ Licensure law often says that criminal-justice involvement in

301. See Shanahan, *supra* note 100, at 1415; Alec Ewald, *Rights Restoration and the Entanglement of US Criminal and Civil Law: A Study of New York’s “Certificates of Relief,”* 51 L. & SOC. INQUIRY 5, 6 (2016); see Lynne Haney, *Incarcerated Fatherhood: The Entanglements of Child Support Debt and Mass Imprisonment*, 124 AM. J. SOC. 1, 4 (2018).

302. See *supra* Section III.B.

303. For example, the U.S. Census estimates that about sixteen million Americans moved across state lines between 2010 and 2015. See *Geographical Mobility: 2010 to 2015*, U.S. CENSUS BUREAU, tbl.1 row 7, <https://www.census.gov/data/tables/2015/demo/geographic-mobility/cps-2015-5yr.html> [<https://perma.cc/ZC6G-ZJYQ>].

another state will be treated as if it occurred in the present state, so civil authorities regularly have to determine whether a conviction in another jurisdiction had the same “elements” as a disqualifying offense in their state.³⁰⁴ “Most folks in Alaska have lived somewhere else,” a state Health Care Services official said, explaining,

It does get more difficult when you’re looking at out-of-state history, on the FBI check. What is “Assault,” in the state of Vermont? What are the elements? Assault could be third degree in Vermont, but it could be second degree, for us — and then it’s a barrier, for us.³⁰⁵

Similarly, an Arizona Board of Nursing official explained, “And then there’s a lot of them where, what Arizona would consider a misdemeanor, another state would consider a felony. So we have to go through and check”³⁰⁶

Another complication involves temporary-disqualification laws, which bar people convicted of listed crimes from licensure for a certain number of years.³⁰⁷ To apply these rules, officials must ascertain not only the precise nature of the offense, but also when to start the eligibility clock. In some jurisdictions, the waiting period does not begin until all elements of the sentence are discharged, which might include fines and fees, not just the end date of prison or probation. Ohio law, for example, says some people convicted of violent crimes only become eligible for a “personal character” exemption five years after “the applicant was fully discharged from imprisonment, probation and parole.”³⁰⁸ An Arizona nursing official explained, “As far as the felonies, it won’t even be looked at [that is, a person is flatly ineligible] until a complete discharge of three years. That’s probation, fees, classes.”³⁰⁹ Georgia law refers to criminal

304. Alaska law, for example, refers to “a crime listed in this section *or a crime with similar elements* in another jurisdiction” (emphasis added). See ALASKA ADMIN. CODE tit. 7 § 10.905 (2007).

305. Interview with Staff, Alaska Div. of Health Care Servs. (Feb. 20, 2018). State background-check rules vary generally: some run only home-state checks, others state and national searches, while others run different checks for people seeking to work in different facilities. See also GALANTOWICZ ET AL., *supra* note 83, at Appendix B, p. 48.

306. Interview with Staff, Ariz. Bd. of Nursing (July 7, 2017).

307. See *supra* Tables 1 and 2.

308. See OHIO ADMIN. CODE § 3701-13-06, “Personal character standards.”

309. Interview with Staff, Ariz. Bd. of Nursing (July 7, 2017). See also *Felony Convictions*, ARIZ. ST. BOARD NURSING, <https://www.azbn.gov/discipline-complaints/felony-convictions/> [<https://perma.cc/2ZLG-HKGT>].

proceedings which “have reached final disposition” within ten years of the date the background check is conducted.³¹⁰

But others start the ineligibility clock at the date of *conviction*. Arkansas, for example, says that a listed offense “shall not disqualify an employee or applicant for employment” if their “date of conviction” was five years prior to their application, for misdemeanors, or ten years for felonies.³¹¹ In Texas, people sentenced for a few offenses (some misdemeanors, some felonies) may work as CNAs after the fifth “anniversary” of their conviction date, as state law quaintly puts it.³¹² Maine also appears to start its eligibility clock from the date of conviction, for named offenses, as does Washington, D.C.³¹³

Florida law sets different ineligibility periods for different felony violations: some disqualify for fifteen years, some for ten, others for five.³¹⁴ Alaska’s sunset law is perhaps the most complicated. The state imposes ten, five, and three-year ineligibility periods for different “barrier crimes,” which are listed in different sections of the statute.³¹⁵ It then explains that depending on details of the charge,

310. See GA. CODE ANN. § 31-7-350 (3) (2013).

311. See *Rules and Regulations for Conducting Criminal Background Checks for Employees of Long Term Care Facilities*, ARK. DEP’T HUM. SERVS. (revised July 27, 2011), <http://veterans.arkansas.gov/assets/uploads/2017/02/20170208131933-rules-and-regulations-for-conducting-criminal-record-checks-for-employees-of-long-term-care-facilitiespdf.pdf> [<https://perma.cc/3NBF-ELWB>].

312. See TEX. HEALTH AND SAFETY CODE ANN., Title 4, subtitle B, Ch. 250, § 250.006(b) and (c).

313. See *Matrix for Disqualifying Crimes*, ME. DEP’T HEALTH & HUM. SERVS., <https://backgroundcheck.maine.gov/DHHS/MBC/content/CNADisqualifications.pdf> [<https://perma.cc/A34R-SZ2Z>]; see D.C. Municipal Regulations, Ch. 47, § 4705.1.

314. See FLA. STAT. § 456.0635 (2017) (referring to sections of the state code pertaining to crimes against public-assistance programs, fraud, and narcotics, and specifying 15, 10, and 5-year waiting-periods for licensure, depending on the degree of severity of the felony conviction). The 2017 version of Florida’s CNA application, produced by Prometric, asked, confusingly, “has it been more than 10 years from the date of the plea, sentence and completion of any subsequent probation?” (Copy on file with the author). Of course, with the exception of a time-served sentence, the date of a *plea* and the date when probation is *completed* are not the same. The current version of the application removes this confusion, though its language is still somewhat imprecise: if responding yes to the felony-conviction question, the form asks, “has it been more than 15 years before the date of this application?” See *Florida Certified Nursing Assistant Examination Application*, PROMETRIC, https://www.prometric.com/en-us/clients/nurseaide/documents/florida/fl_cna_app.pdf [<https://perma.cc/X3EP-326P>].

315. See ALASKA ADMIN. CODE tit. 7 § 10.900 (2007).

conviction, and sentence, any of *six* different starting dates may be employed.³¹⁶

Licensure law is shot through with linguistic complexities as well. Across licensure policy, one encounters state-specific criminal-law terms whose meanings are obscure or counterintuitive and which must pose significant challenges for the civil agents tasked with applying these laws. For example, Georgia requires nursing homes to determine whether a job applicant “has a criminal record;” if so, the background check results in an “unsatisfactory determination” for hiring purposes.³¹⁷ A separate section of the law defines “criminal record,” and specifies that not only convictions, but also dispositions such as first-offender treatment “without adjudication of guilt” constitute such a record.³¹⁸ In other words, for licensure purposes, a person may have a “criminal record” even if their record does not include a judicial conviction for crime.³¹⁹ In Florida’s criminal courts, a person receiving the “adjudication withheld” disposition has *not* been “convicted,” under state law.³²⁰ But such a proceeding must be reported to the Board of Nursing for would-be caregivers seeking licensure.³²¹

Arizona poses another kind of puzzle: the “undesigned offense.” A recent version of the state’s nursing-assistant application asked whether a person has been convicted of “any felony or undesigned offense.”³²² In Arizona, an “undesigned offense” is a low-grade felony that has been pled down to a misdemeanor, or re-designated as a misdemeanor “after doing six months’ probation, for example,” as a Board of Nursing official explained. “I didn’t know [what this phrase meant],” the official acknowledged, “until I had to sit here and deal with it.”³²³ Only felonies disqualify, under Arizona’s CNA-licensure law, but according to a Board of Nursing policy, an “undesigned offense” will be treated by the Board as a felony “until such time as

316. See ALASKA ADMIN. CODE tit. 7 § 10.905(i)(2007).

317. See GA. CODE ANN. § 31-7-350 (2013).

318. See GA. CODE ANN. § 31-7-350(3) (2013).

319. See *id.*

320. For further discussion of the “adjudication withheld” disposition in Florida, see *supra* note 266 and accompanying text.

321. *Id.*

322. See Initial Application Instructions for Nursing Assistant – For Licensed Nursing Assistant or CNA Registry Status if the Nursing Assistant Exam was passed before July 1, 2016, Arizona State Board of Nursing (2017). Document on file with the author. Arizona now uses different forms; they do not appear to be accessible except to people who have opened application accounts with the Board.

323. Interview with Staff, Ariz. Bd. of Nursing (July 7, 2017).

the court may actually enter an order designating the offense a misdemeanor.”³²⁴

D. Resurrecting and Amplifying the Criminal Record

1. “Please Explain Why You Committed This Crime”: Performing Governability

In their insightful study of the civic status of formerly incarcerated people, Miller and Stuart write that the criminal record “activates carceral citizenship by making the presumed ‘essence’ of the ‘offender’ *legible* to third parties”.³²⁵ In the licensure setting, criminal records often take on a specific cast. Typically, the application process does not consist of a simple check to gauge whether a candidate’s criminal record or conviction matches listed barrier crimes, though that certainly does occur.³²⁶ Instead, occupational-licensure procedures serve to *resurrect and amplify* the applicant’s conviction history. Applicants with criminal records must often write a first-person narrative recapitulating this chapter of their past, explaining what they did, why they did it, who it affected, and how the state responded.³²⁷ Additionally, applicants are often required to

324. See *Interpretation of Felony Bar Statutes*, ARIZ. BOARD NURSING, <https://www.azbn.gov/discipline-complaints/interpretation-of-felony-bar-statutes/> [<https://perma.cc/P2HF-RDBW>]. The Arizona Board of Nursing’s advisory policy statement exemplifies the criminal-civil nexus in remarkable detail. This sixteen-page memo lays out the public-safety rationale for carefully reviewing applicants’ backgrounds; explains criminal justice procedures and terminology in Arizona; sets out the investigation procedure used when applicants acknowledge a conviction record, including listing documents to be subpoenaed, setting out thirteen questions to be part of the Board’s “Investigative Analysis,” and presenting the “Disciplinary Model,” including a point system, to guide decisions. See *Guidelines for Criminal Conduct*, ARIZ. ST. BOARD NURSING (2018), <https://www.azbn.gov/documents/Substantive%20Policies/Guidelines%20for%20Criminal%20Conduct.pdf> [<https://perma.cc/HSZ8-7CAU>]. A person convicted of a “Disqualifying Offense” in Ohio, meanwhile, is not necessarily disqualified. State law names crimes that bar someone from working in long-term care facilities — but then, in a subsequent section of the law, allows for “personal character” exceptions, placing the responsibility for making those determinations on the employer. Compare OHIO ADMIN. CODE § 3701-13-05 (listing “disqualifying offenses”), with OHIO ADMIN. CODE § 3701-13-06 (discussing “personal character standards”).

325. Miller & Stuart, *supra* note 29, at 534 (emphasis in original). Miller and Stuart describe the criminal record as bringing about a kind of “translation” process; on their terms, the licensure practices described here represent a more “agentic” type of subject-making, given that the subjects in question “internalize[e] . . . and participat[e] in the process.” *Id.* at 537–38.

326. See *supra* note 314.

327. See *infra* notes 357–58.

supply arrest and charging documents, as well as disposition information from courts and corrections.³²⁸ Such records sometimes replace a state-directed background investigation (particularly in the barbering setting, where background checks are rare), or occur prior to or parallel with a state- or employer-directed record-check process (in the CNA context).³²⁹ These documentary requirements present both substantive hurdles and a place for applicants to prove their governability and character through paperwork. For some applicants with convictions, an in-person appearance before the licensing board is required — a more literal kind of performance.³³⁰

Analyzing misdemeanor practices in New York City, Issa Kohler-Hausmann shows that even following non-conviction dispositions, individuals routinely face various techniques of discipline and control.³³¹ One is “performance,” whereby an arrestee or defendant can avoid a conviction only by, for example, showing up for multiple court dates, completing community service, and participating in treatment programs.³³² Mandated performance, she writes, pursues “the disciplinary goals of normalizing and self-management;” its practices are “enactments of responsibility.”³³³ While required activities might not be formal punishments, they operate as mechanisms of social control, providing an “opportunity for defendants to prove governability . . . [and] their ability to respond to official directives,”³³⁴ as well as to show the court that they are “a manageable person.”³³⁵

Licensure procedures frequently condition receipt of this valuable government credential on mandated performances. In practice, some people with criminal histories are not evaluated simply on the basis of their offense — what they were convicted of and when. They must also demonstrate their ability to “respond to official directives,” by crafting a first-person narrative, supplying letters of reference, and retrieving hard-to-get government paperwork.³³⁶ In some cases, that

328. *See supra* notes 319–20.

329. *See infra* note 466.

330. *See infra* note 369.

331. *See* Kohler-Hausmann, *supra* note 1, at 381.

332. *See id.*

333. *Id.* at 357, 381.

334. *Id.* at 381.

335. ISSA KOHLER-HAUSMANN, *MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING* 72 (2018).

336. *See infra* notes 361–69. Some licensure officials, meanwhile, explicitly placed their work within the context of other required procedures and performances, such as completing schooling and clinical training, that would face people with criminal

means a person's ability to obtain a license will rest on whether they have the wherewithal and good fortune to happen upon the clerk or website that instructs them on how to proceed if they *cannot* obtain those documents.

Here is what California's "Disclosure Statement" requires of would-be barbers with conviction backgrounds:

Please provide details of this crime, including a complete description of the facts and circumstances that led to your conviction. You should include who participated in the crime, who the victim was; what losses were suffered; and when, where and how the crime occurred. Attach additional pages as needed.³³⁷

The form continues with this simple yet remarkable instruction: "Please explain why you committed this crime: Attach additional pages as needed."³³⁸

Such directions are common. Florida instructs would-be CNAs to "provide a written explanation for each question including the county and state of each termination or conviction, date of each termination or conviction, and copies of supporting documentation Supporting documentation includes court dispositions or agency orders where applicable."³³⁹ Alaska's CNA application tells applicants with convictions that they "must explain dates, locations and circumstances on a separate piece of paper and send supporting documents that are applicable (court charging documents, judgments and police reports for each conviction)."³⁴⁰ Among other requirements, Maryland asks CNA applicants for letters of

records. For example, after noting that people are regularly trained to become barbers while in prison, an Iowa official quickly added, "But they [still] have to go to barber school, [and train for] 2,100 hours — one of the highest of any state." Interview with Iowa official, Iowa Bd. of Barbering (Jan. 11, 2016).

337. *Disclosure Statement Regarding Criminal Pleas/Convictions*, CAL. BOARD BARBERING & COSMETOLOGY (2019), http://www.barbercosmo.ca.gov/forms_pubs/forms/disc_crimpleas.pdf [<https://perma.cc/B6YH-67AP>].

338. *Id.* One cannot help but wonder how many "additional pages" some applicants might consider attaching, as they weigh the personal, social, and historical factors comprising a "complete description" of the circumstances that led to their conviction. *Id.*

339. *Florida Certified Nursing Assistant Examination Application*, PROMETRIC (2018), https://www.prometric.com/en-us/clients/nurseaide/documents/florida/fl_cna_app.pdf [<https://perma.cc/LZ4N-4G3E>].

340. *Application for Certified Nurse Aide by Endorsement*, ALASKA DEP'T COM. COMMUNITY & ECON. DEV. (2018), <https://www.commerce.alaska.gov/web/portals/5/pub/nua4070.pdf> [<https://perma.cc/N3N9-U8K6>].

explanation for each conviction, and if appropriate, to explain any mitigating and aggravating evidence regarding the criminal conviction.³⁴¹ An application form recently used by Arizona requires, among other things, a “detailed written explanation of the details of each arrest conviction and sentence,” a “copy of the police report for each felony or undesignated offense,” a “copy of court documents indicating type of conviction, conviction date, and sentence,” and “[d]ocumentation showing absolute discharge, including the date of absolute discharge of the sentence.”³⁴²

This phenomenon is not limited to the CNA setting, as the California example above shows. Delaware asks would-be apprentice barbers about convictions, “including any offense in which you have received a pardon,” and if the applicant answers in the affirmative, requires that they “submit a signed letter of explanation and documentary of the final disposition.”³⁴³ Arkansas’s 2016 “Procedure for felony applicants to Barber School” instructed applicants to provide “a copy of the Commitment and Judgment Order or Judgment and Disposition Order for each felony,” a “copy of the Conditions of Release,” and a copy of the “Police Summary/Narrative or Police Synopsis,” as well as “four letters of recommendation signed and with a telephone number” and “the Parole officer’s name and telephone number.”³⁴⁴ Among sampled states, at least seven jurisdictions pose such questions for CNA applicants; at least six do so for would-be barbers.³⁴⁵

341. See *Frequently Asked Questions: Criminal History Records Checks*, MD. BOARD NURSING (2016), <https://mbon.maryland.gov/Documents/FAQs%20CHRC%202.16%20REV.pdf> [<https://perma.cc/B6SP-FVCL>] [hereinafter *Maryland Board of Nursing FAQs*].

342. *Initial Application Instructions for Nursing Assistant – For Licensed Nursing Assistant or CNA Registry Status if the Nursing Assistant Exam Was Passed Before July 1, 2016*, ARIZ. ST. BOARD NURSING. Arizona now uses different forms; they do not appear to be accessible except to people who have opened application accounts with the Board.

343. *Application for Apprenticeship, Instruction Sheet*, DEL. BOARD COSMETOLOGY & BARBERING (2018), https://dprfiles.delaware.gov/cosmetology/Cosmo_Apprenticeship_Application.pdf [<https://perma.cc/X6EJ-X4GY>].

344. *Procedure for Felony Applicants for Barber School*, ARK. BOARD BARBER EXAMINERS (2016) (copy on file with the author).

345. For example, Connecticut’s barber application says, in relevant part: “If you answered yes . . . please provide details in your own words in a separate notarized statement and provide supporting documentation (e.g., certified court copy with court seal affixed, complaint, answer, judgment, settlement or disposition) that will assist this office’s review.” *Barber License Application*, CONN. DEP’T PUB. HEALTH (on file with the author). New Hampshire’s reads: “If yes [to the conviction question] before the Board can review your file for approval they must have the following

Arkansas is not the only state asking for “letters of recommendation.” Criminologists note that in the desistance process, a person with “good moral standing” can serve as a “personal voucher,” and “act as a witness” to an offender’s reformed character.³⁴⁶ These “vouching” letters are required in several jurisdictions. In Missouri, would-be CNAs seeking a “Good Cause Waiver” must provide “character reference” letters, and their content matters — a state official explained: “Some of [the letters] are very generic — the generic ones are usually ignored. You want someone who can really vouch for a person. You want someone who can really get a good insight.”³⁴⁷ A Florida barbering official explained, “We can’t really advise them [on what to bring], other than to say, ‘If it were me, I might bring a letter from my probation officer, school administrator, pastor, neighbors.’”³⁴⁸

“Official paperwork,” writes one ethnographer, “is a site where disciplinary subjects come into being.”³⁴⁹ Requiring applicants to *supply* paperwork, meanwhile, can be a key “disciplinary technique,”

documents: You must obtain from the Court(s) a copy of the court charge(s), conviction(s), penalties imposed, and provide a statement from you relative to the charge(s).” *To Apply for the New Hampshire Exam Form*, N.H. DIV. HEALTH PROFESSIONS, BOARD BARBERING COSMETOLOGY & ESTHETICS, <https://www.oplc.nh.gov/cosmetology/documents/exam-application.pdf> [<https://perma.cc/9KDC-9NYR>].

346. Shadd Maruna et al., *Pygmalion in the Reintegration Process: Desistance from Crime through the Looking Glass*, 10 PSYCHOL., CRIME & L. 271, 275 (2004).

347. Interview with Mo. official, Mo. Dep’t of Health & Senior Servs. (June 13, 2017).

348. Interview with Fla. official, Fla. Barbers’ Bd. (Jan. 7, 2016). Some applicants have the person “vouching” for them accompany them to the board meeting. A North Carolina barber-board official, for example, said that sometimes a person appealing a denial will “bring in someone who might attest to the lifestyle changes . . . AA sponsors, church pastors, in some cases . . . or the instructor at the barber school.” Interview with N.C. official, N.C. Bd. of Barber Exam’rs (Feb. 9, 2016). Applicants convicted of one of Alaska’s “barrier crimes” that hope to receive a “variance” enabling them to work as CNAs, meanwhile, must submit “at least two letters of recommendation from credible persons who are aware of the individual’s background history, behavioral health problem, or domestic violence problem, and who would, despite that knowledge, recommend that a variance be granted.” ALASKA ADMIN. CODE tit. 7 § 10.930(H) (2007). Virginia requires people with criminal records seeking the CNA credential to supply “letters from employers (nursing-related if possible) concerning your work performance and reliability.” *Application for Nurse Aide Certification by Endorsement*, VA. DEP’T HEALTH PROFESSIONS, NURSE AIDE REGISTRY (2008), http://leg5.state.va.us/reg_agent/frmView.aspx?Viewid=2723c003068~14&typ=40&ac tno=003068&mime=application/msword [<https://perma.cc/628E-JB4Q>].

349. K. Drybread, *Documents of Indiscipline and Indifference: The Violence of Bureaucracy in a Brazilian Juvenile Prison*, 43 AM. ETHNOLOGIST 411, 422 (2016).

and may enable the state to “devolv[e] responsibility for accurate records from state agents to the claimant.”³⁵⁰ Carlson observed a specific cynicism among the gun-licensing bureaucrats she studied: while insisting criminal-justice paperwork be submitted, they understood the difficulty of accessing those very documents, as well as their often-poor quality.³⁵¹

Similarly, some licensure staff grasped the onerous nature of the tasks they were imposing on applicants — and understood that they were demanding documents the person might be *unable* to acquire. In Maryland, for example, a nursing-certification staffer said, “It’s difficult to get [applicants] to go back to court to get these records. They don’t want to, and nobody wants to help them.”³⁵² This official explained that most applicants do try to provide those documents, “and we will accept a statement from them on their efforts: ‘I went to Lancaster County, on this date, talked with this person, etc.’”³⁵³ Indeed, Maryland’s FAQ for applicants with convictions makes this explicit: “If the court no longer has the record(s), you must obtain and submit a letter from that court stating that record(s) are no longer available.”³⁵⁴ Virginia puts it in writing too: “If your conviction record has been destroyed by the court, please obtain a criminal background report from the State Police Department and send that to us.”³⁵⁵ Florida does as well, in an on-line document explaining the need to consult the “clerk of the court in the arresting jurisdiction” for required probation, financial sanction, and parole records: “If the records are not available, you must have a letter on court letterhead sent from the clerk of the court attesting to their unavailability.”³⁵⁶ In Vermont, an official made such a procedure

350. Carlson, *supra* note 3, at 360.

351. *Id.* at 363.

352. Interview with Md. official, Md. Bd. of Nursing (July 26, 2016).

353. *Id.*

354. *Maryland Board of Nursing FAQs, supra* note 341.

355. *Application for Nurse Aide Certification by Endorsement*, VA. DEP’T HEALTH PROFESSIONS, NURSE AIDE REGISTRY (2008), http://leg5.state.va.us/reg_agent/frmView.aspx?Viewid=2723c003068~14&typ=40&ac tno=003068&mime=application/msword [<https://perma.cc/XB4G-EVZQ>].

356. *Certified Nursing Assistant by Endorsement, Applicants with Criminal History*, FLA. BOARD NURSING, <http://floridasnursing.gov/licensing/certified-nursing-assistant-endorsement/> [<https://perma.cc/A8A5-WCGQ>]. Florida’s Barbers’ Board has a similar statement in its barber application: “If you are unable to supply this documentation [arrest reports and court records], a certified statement from the clerk of court for the relevant jurisdiction stating the status of records is required.” *Application for Initial License by Examination*, FLA. BARBERS’ BD.,

sound routine: “And [sometimes] we get a statement from the court, saying the documents aren’t available. The court clerk has to provide a written statement that the documents aren’t available.”³⁵⁷

2. *“He Was Now a Good Man Living a Legal Life”: Performing Character*

In most states under review, officials report that many people with criminal-justice histories are approved without deep, individualized scrutiny. However, some candidates with conviction records must prove their personal merit to the satisfaction of state agents not only by writing a first-person narrative, but by appearing in person before the board itself. These conversations, staff explained, can become intensely personal. Officials’ descriptions of these events — which they said typically involve a handful of people per month — were among the most fascinating elements of staff interviews.

In Florida, many applicants for the CNA credential with conviction records are approved by staff, particularly those with misdemeanors.³⁵⁸ When a Board appearance is required, a Department of Health official explained, “They’re ‘What have you learned, why do you want to work in nursing,’ and ‘maybe ask about sobriety, medical information — just to talk to them in person.’”³⁵⁹ A Washington, D.C., Board of Nursing staffer explained, “I can’t think of any that the Board has met with personally that they have said no.”³⁶⁰ The staffer continued:

You’re able to see them in person, you’re able to hear their story They’re able to explain what happened and their effort to turn around their life And I think the decision to talk with them before rejecting them is a good one.³⁶¹

An Arkansas barber-board staffer explained, “If we turn one down, we give them an opportunity to come before the Board, in person, to make their case,” and went on to give an example: “We turned one down last month, and he came before the Board today, and was conscientious and presented himself well, and they approved

http://www.myfloridalicense.com/dbpr/pro/barb/documents/BAR1_Initial_License_Based_on_Florida_Education.pdf [<https://perma.cc/J4DG-EXG8>].

357. Interview with Vt. official, Vt. Bd. of Nursing (Aug. 3, 2016).

358. See Interview with Fla. official, Fla. Dep’t of Health (Feb. 20, 2017).

359. *Id.*

360. Interview with D.C. official, D.C. Bd. of Nursing (June 15, 2017).

361. *Id.*

him to go to barber school.”³⁶² A Connecticut Department of Health official explained that some people with felony records seeking to become barbers face close, personal questions: “How long have they been clean? What are they doing to prevent relapse?”³⁶³ Most were eventually successful, this official explained, but “the more common thing is that it takes them months and months to cooperate.”³⁶⁴ A Mississippi barber-board staffer was evocative about in-person appearances:

We talk to them, and we let them tell us, “What are you here for? Tell us about what happened.” And then they just open up and tell us, and we listen, and we’ve got their background investigation, and the letters. They know they have to be honest. Some of them are nervous, and we tell them “It’s just us, you know.” It’s honesty, and them talking to us . . . [And we might ask] “Do you still hang out with the same friends you used to hang out with?”³⁶⁵

In Kansas, a denied applicant recently came before the barber board, and a staffer explained:

[Members] were convinced that in their opinion, he expressed remorse; he . . . had references to support that he was now a good man living a legal life. And they took the position that, “We believe you, and we want to help you—and we want you to get started and start making money.”³⁶⁶

That account captures well the deeply paradoxical nature of these in-person appearances. They have an indisputably disciplinary core: the person must come before a state body, respond to direct, sometimes-skeptical questions about their criminal record, and perform contrition, acceptance of blame, and personal growth. Questions can be strikingly personal, and board members’ judgments

362. Interview with Ark. official, Ark. State Bd. of Barber Exam’rs (Nov. 11, 2015).

363. Interview with Conn. official, Conn. Dep’t of Pub. Health (Jan. 12, 2016).

364. *Id.*

365. Interview with Miss. official, Miss. Bd. of Barber Exam’rs (Jan. 19, 2016). Officials in other states gave similar accounts. In Delaware, applicants whose convictions are identified as “substantially related” to barbering may be permitted to appear before the barber board and seek a waiver, by explaining “what made them get convicted, why they did it, why they’ve changed, why they’re not messing up any more They have to go before the Board, and tell their story.” Interview with Del. Official, Del. Bd. of Cosmetology & Barbering (Dec. 22, 2015). And a Vermont barber-board official explained that in order to appeal a preliminary denial, “[Applicants] would have to come before the Board and convince that ‘jury,’ if you will, that they’re on the right road and have done what they have to do.” Interview with Vt. official, Vt. Office of Prof’l Regulation (Jan. 5, 2015).

366. Interview with Kan. official, Kan. Bd. of Barbering (Mar. 22, 2016).

in distinguishing the worthy from the unworthy can be explicitly subjective.³⁶⁷ Yet with remorse and references, a person can lift the burden of their background and win the ability to practice a licensed occupation. And if we credit these officials' descriptions, many boards are genuinely supportive and sympathetic, composed of people who want to help the applicant succeed.³⁶⁸

3. "Street-Level" Decision-Making and Occupational Licensure

As the preceding sections have demonstrated, the licensure process is exceptionally complex, deeply entangled with criminal law, and, in many cases, requires individualized consideration of applicants with conviction records. In that setting, the work of government agents who socio-legal scholars sometimes call "street-level" bureaucrats – those officials who interact routinely and directly with the public – is clearly of great importance. Scholars studying such agents emphasize that while legislators and judges may write and interpret the law, in many ways policy is actually made in the daily encounters of street-level workers with their clients.³⁶⁹ The rich ethnographic literature analyzing street-level decision-making and legal consciousness within the administrative state draws on repeated, close-focus interactions with policy practitioners in a small number of settings, where legal and cultural variables vary minimally.³⁷⁰ That scholarship

367. For critical discussion of narratives of the "deserving offender" in collateral-consequences reform jurisprudence, see Nora V. Demleitner, *Judicial Challenges to the Collateral Impact of Criminal Convictions: Is True Change in the Offing?*, 90 N.Y.U. L. REV. ONLINE 150, 160-170 (2015).

368. One document captures particularly well the disciplinary nature of licensure for people with conviction histories, set against the fact that many licensure agencies genuinely strive to help candidates with records navigate the process. In addition to the example cited above – advising applicants about what to do when they try and fail to access government documents through no fault of their own – this six-page, seventeen-question FAQ instructs applicants, "It is in your best interest to provide detailed responses" to the application's demand for a precise accounting of the criminal record. The document provides examples of an "inadequate explanation" (e.g., "I was arrested, went to court, was convicted, did my time and it's over") and a "good explanation," which offers a dozen lines of detail, acknowledges responsibility for the crime, says "I really learned my lesson," and lists the documents included with the application. *Maryland Board of Nursing FAQs*, *supra* note 341.

369. See Michael Lipsky, *Street-Level Bureaucracy: Dilemmas of the Individual in Public Services*, 79 MICH. L. REV. 811, 811 (1981).

370. See generally Lens, *supra* note 115; Norma M. Riccucci, *Street-Level Bureaucrats and Intrastate Variation in the Implementation of Temporary Assistance for Needy Families Policies*, 15 J. PUB. ADMIN. & THEORY 89 (2005); STEVEN MAYNARD-MOODY & MICHAEL MUSHENO, *COPS, TEACHERS, COUNSELORS: STORIES FROM THE FRONT LINES OF PUBLIC SERVICE* (2003); FORREST STUART, *DOWN, OUT, AND UNDER ARREST: POLICING AND EVERYDAY LIFE IN SKID ROW*

demonstrates the powerful ways in which the values and behavior of public-facing bureaucrats shape legal implementation.

This study was designed to capture licensure practices across many jurisdictions, and thus did not involve the extended contact necessary for rigorous analysis of agents' ideas, values, and behavior. Interview questions, meanwhile, did not probe for the normative frameworks officials bring to licensure. Subjects were not asked, for example, whether they approved or disapproved of a given rule, nor what they believed the legislature's purpose had been in enacting it. Nonetheless, in the course of conversation, many officials offered vivid illustrative anecdotes, explanations, and normative comments — about stigmatic labels, the need to protect vulnerable people, the nature of rehabilitation, the importance of meaningful work, the benefits of training programs in correctional facilities, or employer practices and the job market, for example. Sometimes these state officials spoke of their own approach; others were characterizing the views of board members. Several themes recurred, and merit mention here.

The decision whether to license someone with a conviction history can be framed as balancing society's interest in facilitating successful re-entry with the needs of public safety.³⁷¹ Not surprisingly, many interviewed officials raised the central importance of protecting the public. This was much more common in the CNA setting, but did surface in barber-board interviews as well. As one member of the Georgia Board of Cosmetologists and Barbers explained, "We're not going to endanger the public. But we also have an obligation to help rehabilitate these people. If they're going to AA [Alcoholics Anonymous], [and if] they're straight with their probation officer," that improves their chances at licensure.³⁷² "Our objective is to keep them working so they don't have to go out and commit crimes again," this official added.³⁷³ A Connecticut Department of Health staffer

(2016); KOHLER-HAUSMANN, *supra* note 335; Carlson, *supra* note 3; ZACKA, *supra* note 112.

371. See Jennifer Leavitt, *Walking a Tightrope: Balancing Competing Public Interests in the Employment of Criminal Offenders*, 34 CONN. L. REV. 1281, 1283 (2002).

372. Interview with Ga. official, Ga. Bd. of Cosmetology & Barbers (Jan. 26, 2016).

373. *Id.* A few barber-board staff commented skeptically on the idea that public safety required severe restrictions on the availability of licenses for people with criminal records. For example, a Connecticut official said, "We have to remember the bottom line: are they going to be a threat to public health? Most of them are not going to be." Interview with Conn. official, Conn. Dep't of Pub. Health (Jan. 12, 2016). However, some interview subjects did make clear that barbering entails a certain physical intimacy. For example, in explaining the Washington, D.C. board's

struck the same note: “If they’re successful in their work they probably won’t start selling drugs again.”³⁷⁴ In Washington, D.C., a barber-board official said, “Our first mission is to protect the public. But we want people to be economically viable.”³⁷⁵

The value of enabling people to work surfaced regularly. A New Hampshire barber-board staffer, for example, explained that part of their approach was: “it’s someone’s right to earn a living, and to get that licensure.”³⁷⁶ An Indiana barbering official, commenting on high approval rates among applicants with conviction records in that state, said “Our goal is to get our people working.”³⁷⁷ In North Carolina, a barber-board official said the occupation “offers someone with other avenues closed off to them an opportunity to perform a service and make decent money — things that they wouldn’t get with another profession.”³⁷⁸

An Iowa official adopted a common refrain among barber-board staff, stating, “It’s a second-chance career,”³⁷⁹ echoed by a Mississippi barbering official who said, “We do believe in giving second chances.”³⁸⁰ A Kansas staffer said, “We like people to become barbers — we would lean toward giving people a second chance.”³⁸¹ And a Tennessee official said their cosmetology and barbering board’s attitude is, “You’ve been given this chance, you’re interested, you’ve put in the time — and here’s the light.”³⁸² A Connecticut official said that “[m]ost of the [people with convictions] we license do really well. . . . [I]t’s a rewarding profession for them. They’re so proud — they get their own shop after a couple of years, and can get a

reluctance to certify as barbers people convicted of sexual offenses, a staffer explained, “[as a barber] you have to touch people, and touch children.” Interview with D.C. official, D.C. Bd. of Barber & Cosmetology (Jan. 11, 2016).

374. Interview with Conn. official, Conn. Dep’t of Pub. Health (Jan. 12, 2016).

375. Interview with D.C. official, D.C. Bd. of Barber & Cosmetology (Jan. 11, 2016).

376. Interview with N.H. official, N.H. Bd. of Barbering, Cosmetology & Esthetics (Jan. 12, 2016).

377. Interview with Ind. official, Ind. State Bd. of Cosmetology & Barber Exam’rs (Jan. 21, 2016).

378. Interview with N.C. official, N.C. Bd. of Barber Exam’rs (Feb. 9, 2016).

379. Interview with Iowa official, Iowa Bd. of Barbering (Jan. 11, 2016).

380. Interview with Miss. official, Miss. Bd. of Barber Exam’rs (Jan. 19, 2016).

381. Interview with Kan. official, Kan. Bd. of Barbering (Mar. 22, 2016). An Alabama barber-board staffer said, “This board particularly feels that everybody deserves a second chance.” Interview with Ala. official, Ala. Bd. of Cosmetology & Barbering (Nov. 9, 2015).

382. Interview with Tenn. official, Tenn. Cosmetology & Barber Exam’rs (Apr. 12, 2016).

measure of respect, in their localities.”³⁸³ A Washington, D.C. official used distinctly sociological framing, saying that particularly among men in the city,

[O]ne in three persons have been affected by the criminal justice system, and so to disqualify one third of the population from ever working again . . . that would say a lot about the culture and the environment. Just because you were convicted of a felony doesn’t mean you’re not fit to work. It doesn’t mean that at all.³⁸⁴

Many CNA-credentialing staff spoke about the need to protect the vulnerable populations nursing assistants serve, and documents make this imperative clear as well.³⁸⁵ At the same time, CNA-licensure officials expressed sympathy and support towards people with conviction histories who are willing to commit the extensive time necessary to train, test, and apply for the CNA certification — in order to do a difficult job for which there is intense demand and low pay. “This is hard work,” said a Maryland staffer, not mincing words: “You want to be a CNA in a nursing home? You’re wiping up poop. You’re helping people who are demented And you’re making nine bucks an hour.”³⁸⁶ A Delaware official similarly noted, “We all know that CNAs don’t get paid hardly anything.”³⁸⁷ As did a Kansas official: “They don’t pay well, and it’s hard to keep people in them,” the official said of jobs in facilities for the disabled.³⁸⁸

Interviewees also spoke of the great need for CNAs in many parts of the country.³⁸⁹ One Connecticut public health official said, “I hear it all the time: ‘We don’t have enough. We don’t have enough nurses’ aides.’”³⁹⁰ A CNA instructor with broad experience in Missouri

383. Interview with Conn. official, Conn. Dep’t of Pub. Health (Jan. 12, 2016).

384. Interview with D.C. official, D.C. Bd. of Barber & Cosmetology (Jan. 11, 2016).

385. *See, e.g., Criminal Record Review*, CAL. DEP’T HEALTH (2017), <https://www.cdph.ca.gov/Programs/CHCQ/LCP/Pages/CriminalRecordReview.aspx#Report> [<https://perma.cc/37G4-C2T7>] (“The purpose of the criminal record review process is to ensure the health, safety and well-being of the elderly, and/or individuals with disabilities cared for by certified nurse assistants (CNA), home health aide (HHA), and/or direct care staff”).

386. Interview with Md. official, Md. Bd. of Nursing (July 26, 2016).

387. Interview with Del. official, Del. Dep’t of Health & Soc. Servs. (June 9, 2017).

388. Interview with Kan. official, Kan. Dep’t for Aging & Disability Servs. (Jan. 17, 2018).

389. Many parts of the U.S. do not have enough nursing assistants, and this shortfall is increasing as the “Baby Boom” generation ages. *See, e.g., GALANTOWICZ ET AL., supra* note 83, at 8; OSTERMAN, *supra* note 82, at 22–23.

390. Telephone Interview with Conn. official, Conn. Dep’t of Pub. Health (Jan. 11, 2018).

facilities said, “[T]here is such a shortage of CNAs and nurses in Missouri, and across the country . . . it’s a challenge.”³⁹¹ Referring to nursing homes, a North Carolina Department of Health and Human Services official said, “There is such a shortage, and they need people to work.”³⁹² This problem can be particularly acute in rural areas, as noted by a nursing home operator in rural Missouri: “Living in a small town, you cannot find people to do this work. McDonald’s is paying ten dollars an hour. We start out at nine or nine fifty.”³⁹³ This was echoed by a Maine official, who bluntly said, “We are in dire need of [CNAs],” speaking particularly of rural areas.³⁹⁴

These observations raise important questions beyond the scope of this Article. Given their regular contact with clinical training sites, facilities, lawmakers, and practitioners, it should not surprise us that nursing assistant credentialing agents are intensely aware of the difficulty of the job — and the pressing need for CNAs. What we do not know is whether this awareness influences how applicants with criminal justice histories are treated, either in terms of formal rules or in discretionary decisions of staff and board members. Meanwhile, it is possible that the nature of CNA work contributes to the relatively high approval rates reported for applicants with conviction histories (this could also be true of barbers). Despite its immense social value, many people might consider CNA service to be “dirty work.”³⁹⁵ Gurusami has argued that civil officials consider only certain jobs to be appropriate “rehabilitation labor:” those that are “reliable,” “recognizable,” and “redemptive.”³⁹⁶ The quotations above suggest that at least some state agents do frame these occupations in those terms.

391. Telephone Interview with Mo. official (June 13, 2017).

392. Telephone Interview with N.C. official, N.C. Dep’t of Health & Human Servs. (Feb. 26, 2018).

393. Telephone Interview with staff member, Mo. nursing home (June 13, 2017) (interviewee’s facility is affiliated with a Missouri Department of Corrections program placing some women in probationary training positions as nursing assistants).

394. Telephone Interview with Me. official, Me. Dep’t of Health & Human Servs. (June 2, 2017).

395. See generally Clare L. Stacey, *Finding Dignity in Dirty Work: The Constraints and Rewards of Low-Wage Home Care Labour*, 27 SOC. OF HEALTH & ILLNESS 831 (2005); see also OSTERMAN, *supra* note 82, at 7.

396. Susila Gurusami, *Working for Redemption: Formerly Incarcerated Black Women and Punishment in the Labor Market*, 31 GENDER & SOC’Y 433, 434 (2017).

E. The Federal Law Problem in Nursing Assistant Certification

The question of how federal law shapes the eligibility of people with criminal histories to work as CNAs adds a deep degree of legal indeterminacy to this already extremely complex and nontransparent field. The federal government does not regulate CNA licensure directly, but it does set rules that appear to bar some people from providing care in federally funded programs — particularly those in the broad family of institutions offering “long-term care,” which employ a great many CNAs.³⁹⁷ Federal programs such as Medicare and Medicaid pay for billions of dollars in CNA work.³⁹⁸ Extant secondary sources authored by experts in government,³⁹⁹ advocacy groups,⁴⁰⁰ the employment bar,⁴⁰¹ and the legal academy⁴⁰² have reviewed many of these statutes. However, the actual impact of these laws is deeply uncertain, as considerable differences emerge between

397. The term “Long-Term Care facilities” (or “LTC facilities”) comprises at least half a dozen different kinds of institutions, including “skilled nursing and nursing facilities, home health agencies, hospice and personal care providers, LTC hospitals, residential care providers . . . and intermediate care facilities for individuals with intellectual disabilities.” See *CMS National Background Check Program*, CMS.GOV, <https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/BackgroundCheck.html> [<https://perma.cc/94XL-R3LB>]; see also SUZANNE MURRIN, NATIONAL BACKGROUND CHECK PROGRAM FOR LONG-TERM-CARE EMPLOYEES: INTERIM REPORT 3 (2016), <https://oig.hhs.gov/oei/reports/oei-07-10-00420.pdf> [<https://perma.cc/SEC8-W7KJ>] (listing ten types of institutions offering long-term care).

398. Funding for long-term care is “a patchwork of different systems,” and the federal government’s role in paying for nursing assistant services is considerable. See OSTERMAN, *supra* note 82, at 16–17. The American Association of Retired Persons (AARP) recently concluded that Medicare funds about one-fifth of all long-term care in the U.S., mostly through payments for home health services received by nearly three million people each year. See GALANTOWICZ ET AL., *supra* note 83, at 7.

399. See, e.g., ALAN WHITE, EVALUATION OF THE BACKGROUND CHECK PILOT PROGRAM (2008), <https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/Reports/Downloads/White8-2008.pdf> [<https://perma.cc/BF2X-SXYL>]; LEVINSON, *supra* note 87; STUART WRIGHT, MEMORANDUM REPORT: NATIONWIDE PROGRAM FOR NATIONAL AND STATE BACKGROUND CHECKS FOR LONG-TERM CARE EMPLOYEES (2012); MURRIN, *supra* note 84; BORSKY ET AL., *supra* note 177; U.S. EQUAL EMP’T OPPORTUNITY COMM’N, *supra* note 45; MURRIN, *supra* note 397.

400. See, e.g., GALANTOWICZ ET AL., *supra* note 83.

401. See, e.g., Yvelisse Pelotte, *Medicare Employment Exclusions and Criminal Records: Good and Bad News*, COLLATERAL CONSEQUENCES RES. CTR.: COMMENTS (Jan. 5, 2016), <http://ccresourcecenter.org/2016/01/05/medicare-employment-exclusions-and-criminal-records-good-and-bad-news/#more-6820> [<https://perma.cc/3PK4-PL5R>].

402. See, e.g., Gabriel J. Chin et al., *Status as Punishment: A Critical Guide to Padilla v. Kentucky*, 25 CRIM. JUST. 21 (2010); LOVE ET AL., *supra* note 8, at § 2.10.

interviewees' accounts of the law, the plain language of federal statutes, and the legal arrangements described in some authoritative publications.

Beyond a few basic elements, it is extremely difficult to identify a consensus on what federal law says about who may serve as a CNA.⁴⁰³ All states must have their own CNA registries, and people found to have committed a few offenses specific to caregiving, whether through a civil or criminal proceeding (abuse, neglect, or mistreatment of people in their care, or misappropriation of client funds) must be “flagged” on that registry.⁴⁰⁴ Long-term care providers must check potential new hires against a federally maintained list of excluded persons, run by the Office of Inspector General (OIG) within the Department of Health & Human Services, known as the “List of Excluded Individuals and Entities,” or LEIE.⁴⁰⁵

But in most jurisdictions, staffer considerations surrounding whether people with conviction histories may train, test, and be certified and work as CNAs appear to be entirely a matter of state law. In most interviews, federal law simply never came up, while a few interviewees explicitly stated that national laws had no real impact on the work of licensure.⁴⁰⁶ “It’s all state law here, not federal,” said a Kansas official, for example. Similarly, when an Arizona official was asked via e-mail whether federal law played a role in Arizona’s CNA/LNA licensure rules, the official replied

403. See *infra* note 406 & accompanying text.

404. Some states in the sample had participated in a federally funded program supporting state development of more robust CNA registries and better state background check procedures. See generally WHITE, *supra* note 399; MURRIN, *supra* note 397.

405. See *LEIE Downloadable Databases*, U.S. DEP’T HEALTH & HUM. SERVS., https://oig.hhs.gov/exclusions/exclusions_list.asp [<https://perma.cc/LKF4-8LCT>]. The OIG posts an extensive list of the statutory authorities supporting the LEIE as well. See *Exclusion Authorities*, U.S. DEP’T HEALTH & HUMAN SERVS., <https://oig.hhs.gov/exclusions/authorities.asp> [<https://perma.cc/3457-NYX4>].

406. Some state legal documents include general references to compliance with federal requirements. A Maine law, for example, refers to “crimes identified in federal or state law that prohibit employment of an individual subject to this chapter.” See ME. REV. STAT. ANN. tit. 22, § 1812-G(6-C) (2015). In a “Provider Letter,” the Texas Health and Human Services (HHS) sent to all nursing facilities in 2017, the HHS stated that “verifying a nurse aide’s status through the [state] Employability Status Check Search system is the equivalent of using the NAR [Nurse Aide Registry] and *is considered in compliance with all applicable federal regulations and state licensure laws.*” See Letter from Texas Health and Human Services Commission to “All Nursing Facilities” 7 (Dec. 18, 2017) (on file with author) (emphasis added).

plainly, “It does not.”⁴⁰⁷ In a handful of states, however, interviewed officials emphasized that state rules had been carefully designed to comport with federal restrictions. In Delaware, for example, officials described having engaged in a careful revision of their licensure policies, including consultation with legal counsel, in order to bring these policies into compliance with federal rules.⁴⁰⁸ While the review was partly influenced by the EEOC’s 2012 guidance, Delaware officials concluded that the controlling federal law is a regulation pertaining to all programs funded by the Centers for Medicare & Medicaid Services (CMS), subtitled “Requirements for States and Long Term Care Facilities.”⁴⁰⁹

The language in this federal regulation appears clear and concise: a participating facility “must prohibit the employment of individuals with a conviction or prior employment history of child or client abuse, neglect or mistreatment.”⁴¹⁰ There is no prohibition on service by a person with any other criminal conviction. A 2011 OIG report described the federal restriction on Medicare- and Medicaid-funded nursing facility employees as consisting only of these care-related offenses — which, notably, may be either criminal or civil in nature.⁴¹¹ Officials or documents in three other surveyed states, as well as several other federal sources, pointed to this regulation as a restriction affecting who can work as a CNA.⁴¹²

407. E-mail from Ariz. official, Ariz. Bd. of Nursing, to author (Aug. 3, 2017) (on file with author).

408. Telephone Interview with Del. official, Del. Dep’t of Health & Human Servs. (June 9, 2017).

409. See 42 C.F.R. § 483.420 (2019).

410. *Id.* § 483.420(d)(1)(iii).

411. See LEVINSON, *supra* note 87, at ii (“Federal regulation prohibits Medicare and Medicaid nursing facilities from employing individuals found guilty of abusing, neglecting, or mistreating residents by a court of law, or who have had a finding entered into the State nurse aide registry concerning abuse, neglect, or mistreatment of residents or misappropriation of their property.”).

412. For example, an Alabama Department of Health official said, “Everything that we do is from Title 42, the Code of Federal Regulations, Section 483, ‘Long Term Care.’ It pertains to all of the Long-Term Care CNA programs, what the qualifications are . . . the courses, things they have to take.” Telephone Interview, Ala. official, Ala. Dep’t Pub. Health (May 31, 2017). This official, however, appeared to summarize the law incorrectly, saying that “if you’re a felon, you can’t [become a CNA].” *Id.* Neither this statute nor any other federal law I have identified includes such a direct, broad prohibition. In Missouri, officials detailing employer obligations in using the CNA registry said that no one whose registry listing includes a “Federal Indicator” may work in certain facilities. Telephone Interview with Mo. official, Mo. Dep’t of Health & Senior Servs. (May 31, 2017). As state documents explain, a federal “indicator” follows the offenses listed in this part of the federal code. See *Certified Nurse Assistant (CNA)*, MO. DEP’T HEALTH & SENIOR SERVS.,

This regulation results, Delaware staff explained, in their state law, by which “no conviction is an automatic bar, except a conviction for abuse, neglect, or misappropriation of funds, because the federal CNA regulations, and the Social Security law, have those lifetime bans.”⁴¹³ State law, in other words, is bound to those federal restrictions. Notably, as this Delaware official said, this change was made with an eye to *employment*, not just the credentialing phase: “The federal standard is that a facility that receives federal funds cannot employ someone if they have one of these offenses.”⁴¹⁴

In Connecticut, officials also described a careful, deliberative process bringing eligibility rules, background check procedures, and registry listings into compliance with federal law.⁴¹⁵ But here, a *different* federal rule was the focus — a statute featuring quite different material about CNA eligibility in federally funded programs. This was Section 1128(a) of the Social Security Act, “Exclusion of Certain Individuals and Entities from Participation in Medicare and State Health Care Programs.”⁴¹⁶ This section of the Social Security Act pertains to providers, not recipients of care,⁴¹⁷ and names four

<https://health.mo.gov/safety/cnaregistry/cna.php> [<https://perma.cc/TR44-XUXQ>]. A North Carolina CNA training official also mentioned this statute, although without a precise citation. Telephone Interview with N.C. official, N.C. Dep’t of Health & Human Servs. (Feb. 26, 2018). The text of the federal Patient Protection and Affordable Care Act of 2010 (known as the Affordable Care Act, or ACA) also refers to this provision of the Social Security Act. *See* 42 U.S.C. § 1320a-7l(6)(A) (stating that “conviction for a relevant crime” means “any Federal or State criminal conviction for — (i) any offense described in section 1128(a) of the Social Security Act (42 U.S.C. 1320a-7); or (ii) such other types of offenses as a participating State may specify for purposes of conducting the program in such State.”). The ACA also calls on states to create their own lists of disqualifying offenses. *See id.* § 1320a-7l(a)(4)(B)(vii) (directing states to, “as appropriate, specify offenses, including convictions for violent crimes, for purposes of the nationwide program”). The EEOC’s 2012 guidance refers to both the ACA and to Section 1320a-7 of the Social Security Act. *See* U.S. EQUAL EMP’T OPPORTUNITY COMM’N, *supra* note 45, at 48. The CMS’s Long Term Care Criminal Convictions Work Group 2012 report also cites Section 1128(a). *See* BORSKY ET AL., *supra* note 177, at 3.

413. Telephone Interview with Del. official, Del. Dep’t of Health & Human Servs. (June 9, 2017).

414. *Id.*

415. Telephone Interview with Conn. official, Conn. Dep’t of Public Health (Jan. 11, 2018).

416. *See* 42 U.S.C. § 1320a-7(a), (b). The preamble of the Social Security Act states that the secretary “shall exclude the following individuals and entities from participation in any Federal health care program.” *Id.* § 1320a-7(a).

417. *See Exclusions: Frequently Asked Questions*, U.S. DEP’T HEALTH & HUM. SERVS., <https://oig.hhs.gov/faqs/exclusions-faq.asp> [<https://perma.cc/C3SN-U8KY>] (“An exclusion affects only the ability to claim payment from these programs for

felonies in its “mandatory exclusion” section.⁴¹⁸ The first three exclusions are healthcare related: “program-related crimes;” “conviction relating to patient abuse;” and “felony conviction relating to health care fraud.”⁴¹⁹ The fourth cause for exclusion is a felony drug conviction: “a criminal offense consisting of a felony relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance.”⁴²⁰ Notably for the criminal justice context, this list does not include simple drug *possession* as an excluding crime. In Connecticut, ineligible offenses consist of *only* the four felonies that state officials concluded the Social Security Act identifies. That said, one staffer took care to emphasize that training programs and employers may be more restrictive than state law: “Some of them have zero tolerance.”⁴²¹

A subsequent section of the Social Security Act allows discretionary exclusion, by the Secretary or their designate, for many more offenses including misdemeanor conviction “relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance.”⁴²² The mandatory exclusion must last at least five years; the duration of discretionary exclusion is variable.⁴²³ A federal waiver may be granted for all listed crimes except patient abuse, but only with this intriguing proviso: the waiver may be granted “[if] the exclusion would impose a hardship *on beneficiaries*.”⁴²⁴ As the OIG explains, this “hardship” exemption is partly operationalized by an evaluation of where in the country the offending individual provides care.⁴²⁵ Notably, this federal statute

items or services rendered; it does not affect the ability to receive benefits under the programs.”).

418. See 42 U.S.C. § 1320a-7(a).

419. *Id.* at § 1320a-7(a)(1)–(3).

420. *Id.* at § 1320a-7(a)(4).

421. Telephone Interview with Conn. official, Conn. Dep’t of Pub. Health (Jan. 9, 2018).

422. These restrictions are to last three years, the law says, “unless the Secretary determines in accordance with published regulations that a shorter period is appropriate because of mitigating circumstances or that a longer period is appropriate because of aggravating circumstances.” 42 U.S.C. § 1320a-7(c)(3)(D).

423. See *id.* § 1320a-7(c)(3)(B) (“Subject to subparagraph (G), in the case of an exclusion under subsection (a), the minimum period of exclusion shall be not less than five years.”).

424. *Id.* (emphasis added).

425. See *Exclusions: Frequently Asked Questions*, *supra* note 417 (explaining that an excluded individual “may request a preliminary hearing if the location where services are rendered to over 50 percent of the individual’s patients at the time of the written notice is in a rural health professional shortage area or in a county with a population of less than 70,000”).

stands on the same conduct-over-conviction theory seen in some state policies, such that expungements do *not* restore eligibility — a person is considered “convicted,” the law says, when a judgment of conviction has been entered, “regardless of whether . . . the judgment of conviction . . . has been expunged.”⁴²⁶ A federal district court pointed to this text in a 2008 decision upholding the law’s application to a doctor whose conviction was dismissed and expunged after he completed an assigned diversionary program.⁴²⁷

Analyses by members of the employment bar note that Section 1128 of the Social Security Act is enforceable and binding on caregivers who receive federal funds — citing cases that sustained applications of the exclusions listed in that Section.⁴²⁸ The most clear exposition of this Section may appear in the webpages of the OIG itself, which, as aforementioned, maintains the LEIE. Health care providers, says the OIG, “need to routinely check the LEIE to ensure that new hires and current employees are not on the excluded list;” the OIG explains that its authority to exclude these individuals from participation in federally-funded care comes primarily from Section 1128 of the Social Security Act.⁴²⁹

426. See 42 U.S.C. § 1320a-7(i)(1). There is very little discussion of these measures in the literature on collateral consequences. *But see* SALZMANN ET & LOVE, *supra* note 31, at 33–34; Demleitner, *supra* note 31, at 156–57.

427. See *Gupton v. Leavitt*, 575 F. Supp. 2d 874, 877 (E.D. Tenn. 2008). I am indebted to the work of Yvelisse Pelotte for drawing this case to my attention. See Pelotte, *supra* note 401.

428. See, e.g., Pelotte, *supra* note 401; see also *Sternberg v. Secretary*, 299 F.3d 1201, 1207 (10th Cir. 2002) (upholding fifteen-year exclusion of a psychiatrist sentenced to five years in prison for defrauding a Medicare program); *Friedman v. Sebelius*, 686 F.3d 813, 832 (D.C. Cir. 2012) (remanding for reconsideration of a twelve-year exclusion based on a misdemeanor offense); *Gupton*, 575 F. Supp. 2d at 881 (upholding exclusion based on a conviction for attempted Medicare fraud, despite expungement of the conviction).

429. As the OIG explains: “OIG has the authority to exclude individuals and entities from Federally funded health care programs pursuant to section 1128 of the Social Security Act (Act) (and from Medicare and State health care programs under section 1156 of the Act) and maintains a list of all currently excluded individuals and entities called the List of Excluded Individuals/Entities (LEIE). Anyone who hires an individual or entity on the LEIE may be subject to civil monetary penalties (CMP).” See *Background Information*, OFF. INSPECTOR GEN., U.S. DEP’T HEALTH & HUM. SERVS., <https://oig.hhs.gov/exclusions/background.asp> [<https://perma.cc/3CPW-44A6>]. The effect of these exclusions is considerable, as “no payment will be made for any items or services furnished, ordered, or prescribed by an excluded individual or entity. This includes Medicare, Medicaid, and all other Federal plans and programs that provide health benefits funded directly or indirectly by the United States (other than the Federal Employees Health Benefits Plan).” See *id.* Some expert commentary lists additional federal laws barring people with convictions from employment in other caregiving settings. See, e.g., Chin et al., *supra* note 402.

Juxtaposed alongside these materials, however, are authoritative publications undercutting the idea that there is *any* meaningful federal guidance in significant parts of the CNA field. “[T]here is no federal Medicaid requirement mandating criminal background checks, often used as a screening tool, for home and community-based services (HCBS) workers,” concluded an AARP study in 2010.⁴³⁰ In a 2015 report focusing on home-health providers, the OIG said there were “no Federal laws or regulations that prohibit HHAs [Home Health Agencies] from hiring individuals who have been convicted of crimes,” nor prohibiting the hiring of those “for whom a substantiated finding concerning abuse, neglect, or misappropriation of beneficiary property has been entered into State-based registries or databases of abuse and neglect.”⁴³¹ And in a 2016 report, the OIG said the same was true of long-term care: “State laws and Federal

Meanwhile, interviewees in two jurisdictions — North Carolina and Virginia — mentioned a third source of federal rules. An official in the nursing-home licensure section of the North Carolina state government emphasized the importance of compliance with a massive appendix to a CMS “Operations Manual,” which guides CMS facility “surveys,” or inspections. Interview with Staff, N.C. Dep’t of Health & Soc. Servs. (Feb. 26, 2018). See also CTR. FOR CARE & MED. SERVS., STATE OPERATIONS MANUAL, APPENDIX PP — GUIDANCE TO SURVEYORS FOR LONG TERM CARE FACILITIES, REV. 173, 11-22-17, https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/downloads/som107ap_pp_guidelines_ltcf.pdf [<https://perma.cc/R5PT-XTW9>]. Appendix PP, which runs to more than 700 pages, appears to describe the federal employment ban in alignment with the CMS statute, *not* the Social Security Act. Facilities, the appendix explains, must not “hire an employee or engage an individual who was found guilty of abuse, neglect, exploitation, or mistreatment or misappropriation of property by a court of law.” See CTR. FOR CARE & MED. SERVS., STATE OPERATIONS MANUAL, APPENDIX PP — GUIDANCE TO SURVEYORS FOR LONG TERM CARE FACILITIES, REV. 173, 11-22-17, https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/downloads/som107ap_pp_guidelines_ltcf.pdf [<https://perma.cc/D23W-24HB>]. There is no reference to other types of conviction.

430. GALANTOWICZ ET AL., *supra* note 83, at v. The report says that “Medicaid regulations *require that states define the provider qualification standards that govern participation in their Medicaid programs.*” *Id.* at 7 (emphasis added) (citing Federal Medicaid Regulations §§ 1915(2)(B)(b)(4); 1915(2)(c)(2)(A)).

431. MURRIN, *supra* note 397, at 1. Instead, the report gives pride of place to *state* eligibility laws, saying that “as a condition of participation in Medicare, HHAs must comply with State laws. *State requirements for background checks vary in terms of what sources of information must be checked, which job positions require background checks, and what types of convictions prohibit employment.*” *Id.* at 2 (emphasis added). This statement, that there is no prohibition on hiring those found responsible of abuse or neglect, appears to be flatly contradicted in a footnote in the same report. That footnote states that under federal law, any substantiated finding must be entered into a state registry database, and that facilities may not hire someone found responsible for one of these offenses. See *id.* at 2 n.3. The result, then, would seem to be that there *is* a federal prohibition on hiring a person found responsible for these violations. See *id.*

regulations govern long-term-care providers' employment of individuals with criminal convictions. *State laws concerning what types of convictions disqualify individuals from long-term-care employment vary among States. Federal law does not address this issue . . .*"⁴³² Where such programs are funded by Medicare or Medicaid, these interpretations would seem at odds with the plain text of the statutes described above.

Certainly, many states' rules for certifying people with conviction backgrounds as CNAs vary substantially from the limits set out in Section 1128 of the Social Security Act. For example, several jurisdictions allow for the certification and employment of some people who would violate the bans enumerated in the Social Security Act, such as those convicted of drug felonies within five years, assuming they can clear a discretionary review process.⁴³³ In all the documents and discussions explaining states' criminal-restriction waivers, variances, "fitness determinations," and "personal character" exemptions, there is no mention of an exception based on hardship among *clients*. Yet at the same time, there is no question that the OIG has the authority under Section 1128 to bar certain individuals from serving in funded facilities, and in fact does so — its list is publicly available on-line, and individuals have challenged those restrictions in court, apparently with little success.⁴³⁴

Here is one attempt to reconcile these diverse sources, and to describe what appears to be an area of blended or parallel systems. For the most part, state laws and procedures govern which people with conviction histories may become certified CNAs, and also who may work in certain types of facilities or programs. States maintain their own CNA registries and have their own background-check rules, some requiring state inquiries, some mandating employer research, and some calling for both.⁴³⁵ Simultaneously, the OIG maintains its LEIE — a list now including some three thousand businesses and

432. MURRIN, *supra* note 397, at 3–4 (emphasis added). The report notes that "[f]ederal regulation does prohibit Medicare and Medicaid nursing facilities from employing individuals found guilty of abusing, neglecting, or mistreating residents by a court of law, or who have had a finding entered into the State nurse aide registry concerning abuse, neglect, or mistreatment of residents or misappropriation of their property." *Id.* at 4.

433. *See supra* Tables 2 and 3.

434. *See, e.g., Gupton*, 575 F. Supp. 2d at 877.

435. *See supra* Part III.

about sixty-seven thousand named individuals.⁴³⁶ Of particular relevance here, the title “Nurse/Nurse’s Aide” appears very frequently on the list, in the column indicating the person’s medical focus.⁴³⁷ This OIG list, however, includes only those persons who were *already employed in the field* at the time of their offense, and whose misconduct — whether resulting in a civil finding or a criminal conviction — happened to be brought to the attention of the OIG by an employer, a CMS inspector, a state agency, or a court.⁴³⁸ Any employer participating in a federal health-care program must follow state rules, but must also check that list prior to a hire.

What this dual system means is that some people who might *not* be disqualified under state law *would* be ineligible if they appeared on the OIG list. Recall that the Social Security Act empowers the OIG to exclude people convicted of drug misdemeanors, not just felonies, so this is not merely a hypothetical matter.⁴³⁹ State waiver and exception procedures would appear to have no bearing on OIG ineligibility. Under such an arrangement, some people whose offenses would make them federally *ineligible* under a plain-reading interpretation of the federal Social Security Act (such as someone convicted of a listed narcotics felony within five years) *would* be eligible, as long as the OIG had not placed them on its list (and, of course, as long as state procedures did not exclude them). In other

436. See *LEIE Downloadable Databases*, U.S. DEP’T HEALTH & HUM. SERVS., OFF. INSPECTOR GEN., https://oig.hhs.gov/exclusions/exclusions_list.asp [<https://perma.cc/7R93-33ML>].

437. *Id.*

438. Interview with staff, OIG Exclusions Branch (July 31, 2018). The OIG posts a great deal of information about the LEIE on-line, but its explanations of the LEIE process begin when the OIG “is considering excluding an individual.” See *Exclusions FAQ*, U.S. DEP’T HEALTH & HUM. SERVS., OFF. OF INSPECTOR GEN., <https://oig.hhs.gov/faqs/exclusions-faq.asp> [<https://perma.cc/MJ2A-KEQ5>]. To this author’s knowledge, there is no written account of how these referral procedures typically operate, nor how frequently they occur; OIG staff interview is the source for this list of individuals and institutions that may relay names to the OIG for inclusion on the list (employer, a CMS inspector, a state agency, or a court). The fact that only people already working as providers at the time of their conviction are included is confirmed by OIG staff. Interview with Staff, OIG Exclusions Branch (July 31, 2018). The fact is also clear from context: while there may be hundreds or even thousands of people on the list because of drug offenses (the list’s notation practices are unclear), if it were to include *everyone* convicted of these drug felonies in the U.S., it would be a much longer list indeed. *Criminal Justice Facts*, SENTENCING PROJECT, <https://www.sentencingproject.org/criminal-justice-facts/> [<https://perma.cc/2MND-WRFR>] (noting the number of people incarcerated for drug related offenses increasing from 40,900 in 1980 to 452,964 in 2017). This would also require extraordinary reporting procedures.

439. See *supra* note 424 and accompanying text.

words, the bans in the Social Security Act appear to operate *only through the OIG's list*.

These divergent accounts of the role of federal law in CNA credentialing bring one final element of profound ambiguity into CNA licensure. The murky relationship between state and federal rules evokes questions familiar to socio-legal scholars — where does the law actually reside? By which practices is it constituted? And how do citizens and institutions comply with the law in settings of legal uncertainty?⁴⁴⁰ More research here, focusing on these important questions in the maze that is CNA licensure law and practice, is sorely needed.

CONCLUSION

More than thirty years ago, Deborah L. Rhode argued that while the number of would-be lawyers denied admission to the bar by state “moral fitness” requirements was low, the policy was still harmful: it “excommunicated a diverse and changing community,” and “deterred, delayed, or harassed” far more people than it formally excluded.⁴⁴¹ Those observations, it turns out, are likely true of licensure beyond the bar. At the same time, Rhode’s comment reminds us just how much remains unknown about the workings of American occupational-credential practice, and how badly more research is needed. We need to know how many applications are denied because of an applicant’s history, or approved despite it — and which types of convictions lead to each outcome.⁴⁴² But we also need to know how many people do not apply at all, or start the process and drop out, because they believe, perhaps wrongly, that their

440. See generally Lauren B. Edelman, *Law at Work: The Endogenous Construction of Civil Rights*, in HANDBOOK OF EMPLOYMENT DISCRIMINATION RESEARCH 337–352 (2008); Sarah Esther Lageson, *Crime Data, the Internet, and Free Speech: An Evolving Legal Consciousness*, 51 L. & SOC’Y REV. 8, 16 (2017). The uncertain blend of federal and state law also demonstrates clearly the famed indeterminacy of “law in action.” Calavita, *supra* note 112, at 14.

441. Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491, 493–94 (1985). Rhode’s description of the bar-character process as “inconsistent, idiosyncratic, and needlessly intrusive” also captures the occupational-licensure systems studied here. *Id.* at 494.

442. Notably, some recent reforms have required licensing agencies to produce reports of such figures annually. See UMEZ & PIRIUS, *supra* note 33 (reporting that Arizona and Illinois, for example, now require regulatory boards to produce reports tallying numbers of applicants denied a license due to criminal history); INST. FOR JUSTICE, MODEL ACT 2019, *supra* note 12 (noting that five states have instituted such reporting requirements).

backgrounds will prevent certification.⁴⁴³ American criminal and civil restrictions are so numerous and varied, scholars of “carceral citizenship” have noted, that it is often difficult for people convicted of crime “to fulfill the obligation to obey the laws to which they are subject, to know which laws they are in violation of or to anticipate what their conviction status means from time to time or place to place.”⁴⁴⁴ Given the complexities described in this Article, that difficulty is also present in occupational licensure.

Meanwhile, there is strong suggestive evidence that misinformation is a real problem among populations with criminal convictions. For example, some people who *can* vote under their state’s laws think they are not eligible.⁴⁴⁵ Advocates studying college enrollment have

443. The AARP’s “Safe at Home” report notes that about a fifth of those subject to background checks during the study period withdrew their applications after the background check, and prior to “final fitness determination.” See GALANTOWICZ ET AL, *supra* note 83, at 12. The report concludes that “the criminal background check may have deterred applicants *who knew the results would disqualify them* from employment opportunities.” *Id.* (emphasis added). That is possible, but given the evidence assembled here, “knew” is almost certainly inaccurate; “guessed,” “assumed,” or “feared” is more likely the case, given the obscurity and complexity of state law and the fact that some of those applicants might very well have been eligible and licensed.

444. Miller & Stuart, *supra* note 29, at 541.

445. Jessie Allen, *Documentary Disenfranchisement*, 86 TUL. L. REV. 389, 463 (2011); see also David S. McCahon, *Combating Misinformation in the Ex-Felon Population: The Role Probation and Parole Agencies Can Play to Facilitate Civic Reintegration in the United States*, 63 PROBATION J., no. 1, Dec. 2015, at 6; Eli Hager, *More Ex-Prisoners Can Vote — They Just Don’t Know It*, MARSHALL PROJECT (Aug. 1, 2018), https://www.themarshallproject.org/2018/08/01/more-ex-prisoners-can-vote-they-just-don-t-know-it?utm_medium=email&utm_campaign=newsletter&utm_source=opening-statement&utm_term=newsletter-20180803-1111 [https://perma.cc/5UN8-W7LX]. Some studies suggest that government officials’ ignorance of voter-eligibility rules could be one cause of this problem. See, e.g., ALEC EWALD, THE SENTENCING PROJECT, A ‘CRAZY-QUILT’ OF TINY PIECES: STATE AND LOCAL ADMINISTRATION OF AMERICAN CRIMINAL DISENFRANCHISEMENT LAW 15–16 (2005), <http://www.sentencingproject.org/wp-content/uploads/2016/01/A-Crazy-Quilt-of-Tiny-Pieces-State-and-Local-Administration-of-American-Criminal-Disenfranchisement-Laws.pdf> [https://perma.cc/9D8E-URCL]; Amy Miller, *Voting Rights of Former Felons*, ACLU OF NEBRASKA (2016), https://www.aclunebraska.org/sites/default/files/field_documents/voting_rights_of_for-mer_felons_-_june_2016.pdf [https://perma.cc/7YUX-TKT2]; Connor Sheets, *Alabama Election Officials Remain Confused over Which Felons Should Be Able to Vote*, AL.COM (2017), https://www.al.com/news/index.ssf/2017/10/alabama_election_officials_rem.html [https://perma.cc/R4MV-KYCW]. Given that prosecutors in some states press charges and even seek prison time to punish people with conviction records who vote *before* they are eligible, abstention from the polls may be rational for individuals who are at all uncertain of their status in the franchise. See Sandra E. Garcia, *Texas*

identified high levels of “felony application attrition,” as many applicants indicating they have a criminal record drop out of the process.⁴⁴⁶ Indeed, the Center for Community Alternatives concludes that the stigmatizing effects of application questions, and the “daunting impact of supplemental procedures imposed on applicants,” have done more to close the doors of higher education than have explicitly exclusionary rules.⁴⁴⁷

Most people with convictions will not be locked out entirely, should they pursue these occupational credentials. As Nikolas Rose has argued, contemporary control strategies do not all operate as “circuits of exclusion”; governments also “regulate conduct by enmeshing individuals within circuits of inclusion.”⁴⁴⁸ It is an apt description of American licensing procedures, given that even when they succeed, people with criminal records will often find themselves subject to inspection and judgment — reminded of their past, their diminished status, and their vulnerability before the state’s authority.

Civil rules excluding people with criminal-justice histories from political, economic, and social activities have a moral dimension, but they also appear to illustrate the ways “logics of risk” have permeated modern punitive, civil-society, and private organizations.⁴⁴⁹ In one insightful essay, for example, Sandra G. Mayson contends that we should understand collateral consequences as “predictive risk regulation,” not as punishment.⁴⁵⁰ However, both in terms of formal

Woman Sentenced to 5 Years in Prison for Voter Fraud Loses Bid for New Trial, N.Y. TIMES (June 13, 2018), <https://www.nytimes.com/2018/06/13/us/texas-woman-voter-fraud.html> [<https://perma.cc/QAR7-W3W5>]; Jack Healy, *Arrested, Jailed and Charged with a Felony. For Voting*, N.Y. TIMES (Aug. 2, 2018), <https://www.nytimes.com/2018/08/02/us/arrested-voting-north-carolina.html> [<https://perma.cc/95EP-9Z4V>].

446. CTR FOR CMTY. ALTERNATIVES, *Boxed Out: Criminal History Screening and College Application Attrition*, at ii (2015), http://communityalternatives.org/pdf/publications/BoxedOut_FullReport.pdf [<https://perma.cc/77PX-CQVA>].

447. *Id.*

448. Rose, *supra* note 97, at 324. Rose’s “inclusionary circuits” take account of “strategies that seek to reaffiliate the excluded, through a principle of activity, and to reattach them to the circuits of civility,” such as policies “emphasizing the retraining of the unemployed.” *Id.* at 330. Such policies, Rose writes, often seek to bring about “responsibilization.” *Id.* at 334. Similarly, Miller and Stuart observe that “carceral citizenship” sometimes entails being “*included* in practices of supervision, correction and care” that differ from those that non-convicted citizens experience. Miller & Stuart, *supra* note 29, at 536 (emphasis in original).

449. See Shearing, *supra* note 271, at 207; see generally ULRICH BECK, *RISK SOCIETY: TOWARD A NEW MODERNITY* (1992).

450. Sandra G. Mayson, *Collateral Consequences and the Preventive State*, 91 NOTRE DAME L. REV. 301, 304 (2015).

rules and bureaucratic practices, there is great variation in state assumptions about which individuals with conviction records might pose a public danger, should they be certified to work in these occupations.⁴⁵¹ Many states do employ broad-based prohibitions, disqualifying large numbers of offenders without regard to individual circumstance, but others do not.⁴⁵²

Risk, as Pat O'Malley has argued, is "a contestable political rationality,"⁴⁵³ one which "does not in itself necessarily closes off any avenues toward optimistic risk-based programs of governance."⁴⁵⁴ In the fragmented, decentralized disciplinary network of American licensure rules, risk appears to play very different roles in different jurisdictions. Restrictions in many states seem premised on the view that most types of criminal background do not foretell danger to the public, whether in the barbershop or the nursing home. That view may contribute to credentialing exclusions barring only those offenders whose infractions are directly connected to the occupation in question, for example.⁴⁵⁵ It might also play a role in laws *prohibiting* civil agents from denying someone a license unless they conclude, through individualized analysis, that doing so would pose a

451. See *supra* Table 1 (depicting variation in state barber-eligibility laws and permitting practice); Table 2 (depicting variation in state CNA-eligibility laws); and Table 3 (depicting variation in state CNA-permitting practices).

452. *Id.*

453. Pat O'Malley, *Neoliberalism and Risk in Criminology*, in THE CRITICAL CRIMINOLOGY COMPANION 62 (Thalia Anthony & Chris Cunneen eds., 2008).

454. *Id.* at 62. Risk-driven neo-liberal penology, O'Malley writes in an on-line abstract introducing this essay, is "more open and unstable than is often imagined," and can have "highly diverse policy effects." See *Abstract: Neoliberalism and Risk in Criminology*, in THE CRITICAL CRIMINOLOGY COMPANION, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1472862 [<https://perma.cc/8898-YBMZ>]. The draconian nature of U.S. collateral sanctions have quite rightly drawn the attention of scholars, advocates, and journalists. See, e.g., ALEXANDER, *supra* note 32, at 135-57 (describing civil restrictions such as disenfranchisement, loss of access to public housing, limits on public benefits, jury-service exclusions, and employment restrictions); Laleh Ispahani, *Out of Step with the World: An Analysis of Felony Disfranchisement in the U.S. and Other Democracies*, ACLU (2006), https://www.aclu.org/sites/default/files/pdfs/votingrights/outofstep_20060525.pdf [<https://perma.cc/P7JH-TJKB>] (contrasting U.S. disenfranchisement policies with those of other democracies). An inadvertent consequence of that focus, however, may be "an orthodoxy about American punitiveness" that obscures our view of other developments, as a few scholars of American punishment have noted. See, e.g., David A. Green, *Penal Optimism and Second Chances: The Legacies of American Protestantism and the Prospects for Penal Reform*, 15 PUNISHMENT & SOC'Y 123, 124 (2013); PHILIP GOODMAN ET AL., BREAKING THE PENDULUM: THE LONG STRUGGLE OVER CRIMINAL JUSTICE 140 (2017).

455. See *supra* Tables 1 and 2.

“threat,” as in California, or “unreasonable risk,” as in Maryland.⁴⁵⁶ This was the approach adopted by the Pennsylvania Commonwealth Court when it struck down that state’s lifetime ban on nursing-home employment for people convicted of certain crimes in a 2015 decision.⁴⁵⁷ Facilities, the Pennsylvania court ruled, should be allowed to “perform individualized risk assessments and evaluate applicants with criminal records on a case-by-case basis.”⁴⁵⁸

Occupational licensure restrictions are varied, complex, and contingent. For successful applicants, of course, and for many policy purposes, discretionary rules are superior — doors that sometimes open are better than walls, and a chance at restoration is better than permanent exclusion. But such systems can also produce endemic confusion and error, and make the challenge of living within the law onerous in a different way than that implied by the image of exile. Serious questions of basic fairness arise from the dramatic differences we see across jurisdictions (*some* doors open for *some* people), from the level of obscurity and non-transparency of many licensing processes, and from the kinds of interpretive burdens placed on civil servants. As Jessie Allen writes, much of law’s constitutive power can be found “in the day-to-day textual interpretations of local officials who implement . . . personal and prosaic legal text.”⁴⁵⁹ That is certainly true here, particularly where officials and board members make case-by-case eligibility determinations; many staff appear to make genuine good-faith efforts to help applicants with convictions navigate the credentialing process.⁴⁶⁰ But when texts are as complex as those comprising the criminal-civil licensure hybrid, interpretive variation and interpretive mistakes are inevitable.

456. *See supra* Table 2.

457. *See* Peake v. Commonwealth, 132 A.3d 506 (Pa. Cmmw. Ct., Dec. 30, 2015).

458. *Id.* at 522.

459. Allen, *supra* note 445, at 464.

460. The importance of these interactions in the licensure setting calls to mind the conclusions about identity reached by the anthropologist James Clifford. In his famed 1988 ethnographic study of the Mashpee tribe, Clifford wrote that native identity resisted the “literalist epistemology” forced on it by legal disputes. JAMES CLIFFORD, THE PREDICAMENT OF CULTURE 340 (1988). Clifford concluded that we should conceive of identity “not as a boundary to be maintained but *as a nexus of relations and transactions actively engaging a subject.*” *Id.* at 344 (emphasis added). This is an apt description of the practice of licensure for people with criminal-justice backgrounds. I owe the connection to Clifford to historian Allyson Hobbs. *See* Allyson Hobbs, A CHOSEN EXILE: A HISTORY OF RACIAL PASSING IN AMERICAN LIFE 269 (2014) (arguing that for mixed-race people, racial identity sometimes has the relational character Clifford described).

Some errors will be random and idiosyncratic, but others may be patterned and systemic. “Discretion and discrimination travel together,” wrote the late William J. Stuntz.⁴⁶¹ As Lipsky observed in his foundational treatment of street-level decision-making almost forty years ago,

A criminal offense in one setting might be overlooked in another. The social construction of the client . . . is a significant process of social definition often unrelated to objective factors and therefore open to the influence of prejudice, stereotype, and ignorance as a basis for determinations.⁴⁶²

Since Lipsky wrote these words, our understanding of the nature of human observation and cognition, as well as the effects of implicit bias anchored to age, gender, race, and language, has improved considerably, and only strengthen his hypothesis. Even when government agents mean well — *particularly* when they mean well — their actions can inadvertently perpetuate existing inequalities, damaging both individuals and communities.

This is a field of variation, and we need to learn much more about the nature and shape of that variation. Great value would come from ethnographic inquiry into the lived experiences of those who have navigated the licensure application sequence, successfully or otherwise. Case studies of individual state procedures, meanwhile, would offer a deeper understanding of the complexities of licensure and employment than has been possible here. Schools are particularly worthy of study as entry points into the system: what do instructors, class content, and application forms tell students about state eligibility rules for the end-goal credential? What information do they offer about the possibility of working in particular kinds of institutions? What do schools’ contracts with clinical-training facilities specify, with regard to participants’ backgrounds?

Deeper into the process, boards’ in-person consideration of applicants with records merit attention, particularly with regard to how critical concepts such as rehabilitation, character, and risk are defined. Of course, employers are an essential piece of this puzzle, and research into hiring practices — whether of hospitals, national nursing-home chains, small independent facilities, or home-health services — would be extremely valuable. This research may also be

461. WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 4 (2011). “Discretionary justice,” Stuntz wrote, “too often amounts to discriminatory justice.” *Id.* at 5.

462. LIPSKY, *supra* note 28, at 69.

particularly challenging, because such organizations are extremely cautious about discussing these issues. This is not only because they risk reputational harm; facilities could also be in legal jeopardy if they hire ineligible individuals. States where licensure law is changing offer excellent opportunities for analysis of legislative purpose, as well as bureaucratic implementation. Experimental studies could shed light on the deterrent effects of overbroad application questions.

States themselves must play a role. As the Institute for Justice's Model Occupational Licensing Review Act suggests, all states should collect data regarding applicants with convictions and how they fare.⁴⁶³ This includes, in discretionary systems, what kinds of information demonstrate rehabilitation or the absence of a threat to the public. It is particularly important to learn more about how frequently, and for what reasons, states and employers reject candidates whose convictions have been modified or expunged. People often spend a great deal of money and effort seeking expungement, hoping to lift the stigma of a criminal record, to help them move on from their pasts, and to prevent minor transgressions from posing obstacles in their job searches.⁴⁶⁴ At least some judges awarding expungements, meanwhile, do so with the expectation that

463. INST. FOR JUSTICE, MODEL ACT 2018, *supra* note 283, Sec. 100.05, Subd. 18.

464. *See generally* Simone Ispa-Landa & Charles E. Loeffler, *Indefinite Punishment and the Criminal Record: Stigma Reports Among Expungement-Seekers in Illinois*, 54 CRIMINOLOGY 387 (2016) (finding expungement-seekers faced restricted employment, housing, and education opportunities as well as distress and ongoing stigma); Ericka B. Adams et al., *Erasing the Mark of a Criminal Past: Ex-Offenders' Expectations and Experiences with Record Clearance*, 19 PUNISHMENT & SOC'Y 23 (2017) (finding record clearance benefits ex-offenders by reducing barriers to employment and facilitating cognitive transformation); Lageson, *supra* note 14 (finding inconsistencies in hiring behavior toward applicants with criminal history); Milton Heumann et al., *Expunge-Worthy: Exploring Second Chances for Criminal Defendants*, 51 CRIM. L. BULL. 588, 604 (2015) (finding that the "primary goal" of expungement-seekers is "to improve employment opportunities"). *See also* J.J. Prescott & Sonja B. Starr, Opinion, *The Case for Expunging Criminal Records*, N.Y. TIMES (Mar. 21, 2019) (calling for expanded automatic-expungement laws and access to expungement procedures), <https://www.nytimes.com/2019/03/20/opinion/expunge-criminal-records.html> [<https://perma.cc/T8JN-NLNU>]; J.J. Prescott & Sonja B. Starr, *Expungement of Criminal Convictions: An Empirical Study* (forthcoming) (reviewing literature and recent legal changes, and finding that among relatively small number of people who received recent expungements in Michigan, very few reoffended, and average wages increased), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3353620 [<https://perma.cc/EFB2-C5VF>]. The Institute for Justice's model Occupational Licensing Review Act offers a valuable direction, specifying that licensing boards "will not consider" any conviction that "has been sealed, dismissed, expunged or pardoned." INST. FOR JUSTICE, MODEL ACT 2018, *supra* note 283, Sec. 100.05.7(2).

they are removing a barrier to employment.⁴⁶⁵ That both applicants and judges may be mistaken in their assumptions — at least when it comes to these occupational credentials, in some states — is troubling. We need to know how often this occurs, for these and other occupations.

Analyzing U.S. expungement and sealing laws, expert attorneys recently wrote, “there is remarkably little consistency among state record-closing schemes eligibility criteria are frequently so complex as to defeat the sharpest legal minds.”⁴⁶⁶ That is also a fair description of many elements of credentialing law. Legislative action bringing clarity and transparency would be welcome, but the bureaucracy need not wait. State agencies could improve their public-facing materials, such as webpages and application forms. Licensing authorities should publish, in plain language, their rules and procedures — including their standards of proof when considering evidence of alleged misconduct, such as arrest and charging documents. Civil-credentialing agencies need to protect the public, but must also strive to preserve the presumption of innocence.

465. For example, in a prominent 2016 decision, U.S. District Judge John Gleeson took extraordinary measures to try to alleviate the difficulties that one Jane Doe had experienced in securing employment. *See Doe v. United States (Doe II)*, 168 F. Supp. 3d 427, 428–29 (E.D.N.Y. 2016) (issuing federal certificate of rehabilitation in lieu of expungement); *see also* Jesse Wegman, *A Federal Judge’s New Model for Forgiveness*, N.Y. TIMES (Mar. 16, 2016), <https://www.nytimes.com/2016/03/16/opinion/a-federal-judges-new-model-for-forgiveness.html> [<https://perma.cc/ZRB6-Z5M8>] (describing Judge Gleeson’s “extraordinary 31-page opinion” and “federal certificate of rehabilitation” to the woman identified in these court records as “Jane Doe” as a “voucher of good character”). Doe struggled to keep a job in nursing; her license was suspended during her sentence, then restored. Despite the fact that her nursing license had been restored, Doe faced rejection or discriminatory treatment at several nursing agencies, except when she did not disclose her conviction or her conviction was not discovered otherwise. *See Doe II*, 168 F. Supp. 3d at 434–36. Judge Gleeson certainly understood licensure practice well enough to know that no judicial order would secure Doe’s employment. *See Demleitner, supra* note 32, at 155–56. The research described in this Article suggests that while a change in the status of her conviction might improve Doe’s chances with some employers, and in states employing discretionary procedures and considering evidence of rehabilitation, in other states, such as those emphasizing *conduct* in licensure review it would not necessarily guarantee success — particularly because she had been convicted of fraud, a crime specifically identified as disqualifying in many jurisdictions. *Id.* at 156–57. In any event, according to the *Doe* record, her difficulty getting a job resulted from the denials of private employers, not licensure authorities. *See Doe II*, 168 F. Supp. 3d at 434–36.

466. COLLATERAL CONSEQUENCES RES. CTR., SECOND CHANCE REFORMS IN 2017 1 (2017), <http://ccresourcecenter.org/wp-content/uploads/2017/12/Second-Chance-Reforms-in-2017-CCRC-Dec-2017.pdf> [<https://perma.cc/JG33-XJQS>].

To be a nursing aide, one must have enormous patience, physical stamina, and a working understanding of the body's functions and dysfunctions. Our application and credentialing processes, however, often require would-be aides to possess a different set of skills: the capacity to parse complex and counterintuitive legal terms and retrieve scattered government documents, for example, or the raw good luck to encounter a state official who can help overcome these hurdles. When they deter otherwise-qualified people from serving, occupational-certification practices may impose social costs well beyond the affected individuals themselves. Given the United States' acute need for caregivers, this is all the more reason for reform.

Without altering rules or diminishing agency authority, states could add to their on-line and print materials clear, prominent statements explaining — as a few already do — that many people with criminal convictions *are* eligible for a given state credential.⁴⁶⁷ States could require schools and private testing companies to disseminate that information as well, and agencies with the capacity for more outreach could communicate with probation officers, Offender Workforce Development Specialists, and others working in reentry. Doing so would help improve the life chances of people with criminal-justice backgrounds, and might also improve the quality of American society by providing its members with some excellent barbers and caregivers.

467. Forms could explain, for example, that “dispositions such as X, Y, and Z may prevent licensure; a waiver application is available, should you be denied. However, common dispositions like A, B, and C usually will *not* prevent licensure. More information is available here” Virginia currently makes such a statement in clear language, on a public document: “Each applicant is considered on an individual basis. There are NO criminal convictions or impairments that are an absolute bar to nursing licensure or nurse aide certification.” Memorandum, Va. Dep’t of Health Professions, Guidance Document 90-55: Joint Statement of the Department of Health and the Department of Health Professions on Impact of Criminal Convictions on Nursing Licensure or Certification and Employment in Virginia (2015), <https://www.dhp.virginia.gov/nursing/guidelines/90-55CriminalConvictions.doc> [<https://perma.cc/U265-MUQC>].

**APPENDIX A. BARBER LICENSURE:
ELIGIBILITY RULES AND REPORTED ACCEPTED PATTERNS**

STATE	STATUTORY OR REGULATORY REFERENCE TO EXCLUSION BASED ON CONVICTION?	APPLICATION QUESTION(S) PERTAINING TO CRIMINAL-JUSTICE INVOLVEMENT?	REPORTED ACCEPTANCE PATTERNS
Alabama	Yes. Board “may revoke or suspend,” for “felony or gross immorality,” or for “addict[ion][.]”	No	Applicants with convictions “virtually never” denied; cannot recall a rejection for crime in at least ten years.
Alaska	No	No	No restriction: “we have no authority to even ask.”
Arizona	No	No	“If they’ve served their time . . . then they’re granted. There’s really nothing in the law that says we can deny them.” Explains that only “child molesters” would be excluded.
Arkansas	Yes. Board “may refuse to issue” for “[c]onviction of a felony.” (Or for “[h]abitual drunkenness or habitual addiction to . . . morphine, cocaine, or other . . . drugs.”)	Yes: “HAVE YOU EVER BEEN CONVICTED OF A FELONY?”; also, special form, “Procedure for felony applicants to barber school,” which lists conditions (including “four letters of recommendation”). (Process changing in 2019 as result of new legislation.)	“We seldom have a refusal on appeal.”

STATE	STATUTORY OR REGULATORY REFERENCE TO EXCLUSION BASED ON CONVICTION?	APPLICATION QUESTION(S) PERTAINING TO CRIMINAL-JUSTICE INVOLVEMENT?	REPORTED ACCEPTANCE PATTERNS
California	Yes. May deny based on conviction, but only if “substantially related to the qualifications, functions, or duties of a barber”	Yes: “. . . been convicted of . . . a violation of any law?”; additional “Disclosure Statement” required. (Including the question “Please explain why you committed this crime: Attach additional pages as needed.”)	“Rarely are they denied – 99% of applicants with a criminal record are approved to take our exam.” “Every once in a while we do have to deny somebody.”
Connecticut	Yes. May “deny the eligibility of an applicant” who has been “found guilty or convicted . . . of an act which constitutes a felony”	Yes: “Have you ever been found guilty or convicted as a result of an act which constitutes a felony . . . ?”	“If it was thirty [applicants with convictions in a pile], there might be one or two denials.”
Delaware	Yes: specified-offenses list.	Yes: “Have you ever been convicted of or entered a plea of guilty . . . to any felony, misdemeanor or any other criminal offense, including any offense in which you have received a pardon . . . ?”	Those with older convictions may seek waiver, via appeal, and “usually” get waiver; “most of them are granted.” Board review required <i>only</i> for conviction of listed crimes “Substantially Related” to the occupation of barbering; others granted automatically.
Florida	Yes. Statute permits denial for conviction of crime “which relates to the practice of, or the ability to practice, a licensee’s profession;” board policy lists about eighty offenses for which applicants will be approved <i>without</i> Board review.	Yes. “Have you ever been convicted or found guilty of . . . any criminal violation”? (Continues, “This question applies . . . without regard to whether you were placed on probation, had adjudication withheld, were paroled, or pardoned.”)	Lengthy list of <i>permitted</i> offenses; staff estimates “probably 90 to 100%” are accepted; official state report shows more than 99% accepted, some of whom are licensed on probationary status.

STATE	STATUTORY OR REGULATORY REFERENCE TO EXCLUSION BASED ON CONVICTION?	APPLICATION QUESTION(S) PERTAINING TO CRIMINAL-JUSTICE INVOLVEMENT?	REPORTED ACCEPTANCE PATTERNS
Georgia	Yes. May deny for “any felony or of any crime involving moral turpitude.”	Yes. “. . . been convicted of a felony or misdemeanor . . . or entered a plea of guilty, nolo contendere or under the “First Offender Act . . . ?” (Barber apprentice application)	Official recalls only two denials in eleven years. “We’ll very seldom reject one. When we do, it’s generally for a sex offense.” Misdemeanants are licensed without further procedure; felonies reviewed individually. Most with felony records are placed on probation.
Indiana	Yes. Board may deny an applicant for any of about fifteen listed offenses.	Yes. “Have you ever been arrested; . . . entered into a prosecutorial diversion agreement . . . been convicted of any offense, misdemeanor or felony . . . or pled guilty to any offense . . . ?”	Applicants “usually” accepted; by statute, those trained as barbers in correctional facilities <i>cannot</i> be denied.
Iowa	No reference to <i>initial</i> denial; however, those holding licenses may be disciplined for “crime related to the profession.”	Yes. “Been convicted of, found guilty for, or entered a plea of guilty . . . to a felony or misdemeanor crime?”	Staffer recalls no rejections in five years: “I’ve never seen [the board] deny licensure to someone with a conviction.”
Kansas	Yes. Must be “of good moral character and temperate habits”	Yes: “Have you ever been convicted of any offense(s) other than minor traffic violations?”	Staff unable to estimate, but generally “the only people we don’t license are sex offenders.”
Kentucky	Yes. Applicant must be “of good moral character and temperate habit”	No.	Staff emphatic there is no restriction: “We don’t know unless they tell us.”

STATE	STATUTORY OR REGULATORY REFERENCE TO EXCLUSION BASED ON CONVICTION?	APPLICATION QUESTION(S) PERTAINING TO CRIMINAL-JUSTICE INVOLVEMENT?	REPORTED ACCEPTANCE PATTERNS
Maine	Yes. May deny because of criminal history, but “only if the licensing agency determines that the applicant . . . has not been sufficiently rehabilitated to warrant the public trust.”	Yes. “Have you ever been convicted by any court of any crime”? (Instructions re-emphasize “Any conviction, ever.”)	Staffer estimates 98% acceptance, after review.
Mississippi	Ambiguous. At time of interview, law said must be of “good moral character and temperate habits,” however, law expired in 2016.	Yes (on application to enroll in barber school). “Have you ever been convicted of a felony? If so, when and please explain.”	Staffer recalls no rejections in eighteen years.
New Hampshire	Yes. Board determines if this person is of “[g]ood professional character;” under agency rule, may consider conviction of “fraud or felony against a person,” but must also consider time passed since the incident; conviction alone “is not indicative of the person’s current character.”	Yes. “Have you ever been convicted of any felony or misdemeanor, other than a traffic violation”?	Staffer recalls only two denials in recent years.
New York	Yes. “[G]ood moral character” required; in character determination, agency “shall not automatically disqualify” because of conviction.	Yes. “Ever been convicted in this state or elsewhere or any criminal offense that is a misdemeanor or felony?” If yes, “submit a written explanation You must provide a copy of the accusatory instrument”	Staffer estimates more than 90% approved.

STATE	STATUTORY OR REGULATORY REFERENCE TO EXCLUSION BASED ON CONVICTION?	APPLICATION QUESTION(S) PERTAINING TO CRIMINAL-JUSTICE INVOLVEMENT?	REPORTED ACCEPTANCE PATTERNS
North Carolina	Yes. Agency may consider conviction of a crime “that bears upon an applicant’s or a licensee’s fitness to be licensed” or reveals “moral turpitude;” automatic denial prohibited, and agency must consider eight listed factors.	Yes. “Have you been convicted of a felony?” (Also requires applicant to sign attesting “that I have never been convicted of a felony”; later instruction says “If you have been convicted of a felony, do not sign your name or have it notarized.”)	Denial is “pretty rare,” for those who go through review process.
Ohio	Yes. Must be “of good moral character;” separate board document explains that “current policy” is to deny only those “who have been convicted of drug trafficking (or related offenses), sexual offenses, and murder/aggravated murder;” these may be considered after five years.	Yes. “Have you ever been convicted of a felony? If so, please explain.”	Staffer recalls no denials in about fourteen months; five felony crimes get closer review, under current board policy. “Five of our state prisons have barber colleges in them, so they have the opportunity We license felons every day.”
Rhode Island	Applicant must be “of good moral character[.]”	Yes. “ Have you ever been convicted of a violation . . . or entered a plea bargain to any federal, state, or local statute, regulation or ordinance”?	Staffer recalls no recent denials; “it’d have to be extremely serious” for someone to be denied.

STATE	STATUTORY OR REGULATORY REFERENCE TO EXCLUSION BASED ON CONVICTION?	APPLICATION QUESTION(S) PERTAINING TO CRIMINAL-JUSTICE INVOLVEMENT?	REPORTED ACCEPTANCE PATTERNS
Tennessee	Yes. Board “may . . . refuse” for “conviction of a felony,” or for “immoral or unprofessional conduct.”	Yes. “Have you been convicted of a felony in the last three (3) years?”	After recent change to consider only convictions within three years, “we have yet to deny anyone based on a criminal conviction;” applicants with felonies usually placed on two-year probation.
Texas	Yes. “Prior conviction of a crime” may be cause for denial; law requires agency to write guidelines to identify disqualifying offenses; names factors to be considered, and requires agency to “state the reasons a particular crime is considered to relate to a particular license.”	Yes. “Indicate if you have ever been convicted of, or placed on deferred adjudication for, any misdemeanor or felony, other than a minor traffic violation.” (“Criminal History Questionnaire” must be filled out for each conviction; form also explains how to ask the agency to evaluate your history prior to applying.)	State figures show about 69% of applicants with records were approved in 2014, and 79% approved in 2015. State publishes specified-offenses lists, varying by occupation; process involves review by Enforcement Division for certain offenses.
Vermont	Yes. Licensing boards may deny license for “unprofessional conduct,” which includes “Conviction of a crime related to the practice of the profession or conviction of a felony, whether or not related to the practice of the profession.”	Yes. “Have you EVER been convicted of a crime”? (Separate questions about fines, restitution orders, and child support.)	“I can’t say that I know of anyone that has been flatly denied, with no opportunity to convince the board that he or she is on the right road.” (Approval, for some, follows initial denial and then appeal.)

STATE	STATUTORY OR REGULATORY REFERENCE TO EXCLUSION BASED ON CONVICTION?	APPLICATION QUESTION(S) PERTAINING TO CRIMINAL-JUSTICE INVOLVEMENT?	REPORTED ACCEPTANCE PATTERNS
Virginia	Yes; regulation states “shall not have been convicted . . . of a misdemeanor or felony which directly relates to the profession of barbering, cosmetology, or nail care;” denial permitted only if “the criminal conviction directly relates to the occupation or profession.”	Yes. “Have you ever been convicted or found guilty . . . of any <i>felony</i> ;” separate question asks, “of any <i>misdemeanor</i> ”? (With links to separate “Criminal Conviction Reporting Form”)	Staffer: rejection rate “would probably be less than 1%,” says one staffer; “maybe one out of ten,” says another. State’s “Criminal History Review Matrix,” based on statutes and administrative-law judgments, allows for about two-thirds of offenders to be considered (and, in most cases, approved) without board consideration; about one-third of applicants with convictions go to board.
Washington, D.C.	No, after recent change (since initial interview). As of 2016, D.C. municipal regulations stated that Board could “deny an application for a license . . . to a person . . . who has been convicted of a crime bearing on the applicant’s fitness to practice.” However, current requirements make no reference to criminal history.	Yes. 2015 application stated that “Applicant must not have been convicted of a crime of moral turpitude which bears directly on the applicant’s fitness to be licensed.” Current application asks “Have you ever been convicted of a crime (other than minor traffic violations) not previously reported to the Board?”	“It’s not too often they’re rejected—I think maybe one, last year, where the person was a sex offender.”

Compiled Information from Appendix A, Column 2: Statutory or Regulatory Reference to Exclusion Based on Conviction?⁴⁶⁸

468. See ALA. CODE § 34-7B-10 (2013) (“Suspension or revocation of license or permit; penalties”); ALASKA STAT. ANN. § 08.13.150 (West 2000) (“Disciplinary sanctions and grounds for refusal of a license or permit”); ARIZ. REV. STAT. ANN. § 32-322 (2017) (“Barber license; application; qualifications; reciprocity”); ARIZ. REV. STAT. ANN. § 32-353 (1984) (“Grounds for refusal to issue or renew a license or disciplinary action”); ARK. CODE ANN. § 17-20-308 (2017) (“Certificate denial, suspension, etc. — Grounds”); CAL. BUS. & PROF. CODE § 7403 (West 2009) (“Revocation, suspension or denial of license; grounds for denial; statement of reasons for denial; proceedings; costs; assessment; enforcement; deposit of funds”); CONN. GEN. STAT. § 19a-14 (2018) (“Powers of department concerning regulated professions”); DEL. CODE ANN. Tit. 24, § 5107(a)(6) (West 2018) (“Qualifications of applicant; judicial review; report to Attorney General”); FLA. STAT. § 455.227(1)(c) (2017) (“Grounds for discipline; penalties; enforcement”); GA. CODE ANN. § 43-1-19 (“Refusing to grant licenses; revocation of licenses”); IND. CODE ANN. § 25-1-1.1-2 (West 2017) (“Suspension, denial, or revocation of license or certificate; conviction of certain offenses”); IND. CODE ANN. § 25-1-11-19 (2007) (“Refusal to issue license; probationary licenses”); IOWA CODE § 147.55 (2008); KAN. STAT. ANN. § 65-1812 (1939) (“Qualifications for licensure as a barber; temporary license”); KY. REV. STAT. ANN. § 317.450 (West 1960) (“Fees and qualifications for licenses and permits; annual renewal”); ME. REV. STAT. ANN. tit. 5, § 5302 (1989) (“Denial, suspension, revocation or other discipline of licensees because of criminal record”); MISS. CODE ANN. § 73-5-11 (West 12011) (“Barbering school eligibility; certificate qualifications”); MISS. CODE ANN. § 73-5-25(1)(a) (West 2011) (“Certificate or license denial, suspension, or revocation”); N.H. REV. STAT. ANN. § 313-A:10 (2007) (“Qualifications; Barbers”); N.H. REV. STAT. ANN. § 313-A:8 (2016) (“Rulemaking Authority”); N.H. BD. OF BARBERING, COSMETOLOGY & ESTHETICS, 100 BAR 301.01 (2003), http://gencourt.state.nh.us/rules/state_agencies/bar100-600.html [<https://perma.cc/ZK7G-GHC7>] (pertaining to defining “good professional character”); N.Y. GEN. BUS. LAW § 434(1)(b) (McKinney 2015) (“License after examination; application to take”); N.C. GEN. STAT. ANN. § 93B-8.1 (West 2013) (“Use of criminal history records”); N.C. GEN. STAT. ANN. § 86A-18 (West 1981) (“Disqualifications for certificate”); OHIO REV. CODE ANN. § 4709.07 (West 1992) (“License to practice barbering”); 5 R.I. GEN. LAWS ANN. § 5-10-8 (West 12013) (“Issuance of licenses — Qualifications of applicants”); TENN. CODE ANN. § 62-3-121 (West 1929); TEXAS OCC. CODE ANN. § 53.021 (West 2017) (“Authority to Revoke, Suspend, or Deny License”); TEXAS OCC. CODE ANN. § 53.051 (West 2017) (“Notice”); TEXAS OCC. CODE ANN. § 53.025 (West 2017) (“Guidelines”); TEXAS OCC. CODE ANN. § 53.0211 (West 2017) (“Licensing of Certain Applicants with Prior Criminal Convictions”); VT. STAT. ANN. tit. 3, § 129a (West 1997) (“Unprofessional Conduct”); VA. CODE ANN. § 54.1-204 (West 1988) (“Prior convictions not to abridge rights”); 18 VA. ADMIN. CODE § 41-20-280 (2003) (“Grounds for license revocation or suspension; denial of application”); D.C. Mun. Regs. tit. 17, § 17-3727 (2003); D.C. Mun. Regs. tit. 17, § 4014.2 (1988) (specifying that board could deny an applicant “who has been convicted of a crime bearing on the applicant’s fitness to practice”); “General Information for Obtaining a Barber License,” Ohio State Cosmetology & Barber Board (undated) (on file with the author); Board of Barber and Cosmetology, Occupational and Professional Licensing Administration, Washington D.C., Application Instructions and Forms for a Barber License in the District of Columbia 2 (Rev. 2015) (specifying that applicant must not have been convicted of “crime of moral turpitude which bears directly on the applicant’s fitness to be licensed”);

Compiled Information from Appendix A, Column 3: Application Question(s) Pertaining to Criminal-Justice Involvement?⁴⁶⁹

Interview with official, D.C. Board of Barber and Cosmetology (Jan. 11, 2016) (confirming that above passages were the law then in effect). *But see* D.C. Mun. Regs. tit. 17, § 17-3703 (2003) (specifying age, educational, and experiential requirements for licensure, and including no mention of conviction background); *Barbers: New License Application*, OCCUPATIONAL & PROF. LICENSING ADMIN., GOV'T DISTRICT OF COLUMBIA (2019) (asking new applicants about having been “convicted of a crime”) (on file with author).

469. Alabama: *Apprentice Application*, ALA. BOARD COSMETOLOGY & BARBERING (2017), https://aboc.alabama.gov/wp-content/uploads/2018/11/ApprenticeAppl_8.2017.pdf [<https://perma.cc/KU8A-3KQ9>]; *Personal License Renewal 2016-2020, Barber*, ALA. BOARD COSMETOLOGY & BARBERING, https://aboc.alabama.gov/wp-content/uploads/2018/11/BarberPerslRen2016-2020_11-18.pdf [<https://perma.cc/9Z78-UR42>]. Alaska: *Barber, Hairdresser and Esthetician License Application*, ALASKA DIVISION OF CORP., BUS. & PROF. LICENSING, BARBERS & HAIRDRESSERS PROGRAM (2016) (on file with author). Arizona: The application form is administered by an online system and is not publicly available, but officials there confirmed that there is no question on the application about a conviction record. Telephone Interview with Ariz. officials, Ariz. State Bd. of Barbers (May 17, 2019). Arkansas: *Application for Enrollment in a Barber School or College as a Student*, ARK. STATE BOARD BARBER EXAMINERS (2019) (on file with author). California: *Barber Application for Examination and Initial License Fee*, CAL. BOARD BARBERING & COSMETOLOGY (Rev. August 2015) (on file with author); *Disclosure Statement Regarding Criminal Pleas/Convictions*, CAL. BOARD BARBERING & COSMETOLOGY (Rev. May 2013) (on file with author). Connecticut: *Barber License Application*, CT. DEP'T PUB. HEALTH (Rev. Feb. 2013) (on file with author). Delaware: *Application for Apprenticeship*, DEL. BOARD COSMETOLOGY & BARBERING (Rev. Oct. 2018), https://dprfiles.delaware.gov/cosmetology/Cosmo_Apprenticeship_Application.pdf [<https://perma.cc/NY43-RLVJ>]; *Application for License by Reciprocity*, DEL. BOARD COSMETOLOGY & BARBERING (Rev. Nov. 2018), https://dprfiles.delaware.gov/cosmetology/Cosmo_Reciprocity_App.pdf [<https://perma.cc/9BRL-5ZTM>]. Florida: *Application for Initial License by Examination Based on Florida Education*, FLA. DEP'T BUS. & PROF. REG., FLA. BARBERS' BOARD (Aug. 2014) (on file with author). Georgia: *Application for Barber Apprentice*, GA. ST. BOARD BARBER (Rev. 2012), <http://sos.ga.gov/PLB/acrobat/Forms/08%20Barber%20Apprentice%20Application.pdf> [<https://perma.cc/ZTX9-ACS9>]. Indiana: *Application for Barber, Cosmetologist, Manicurist, Esthetician, Electrology, or Instructor License*, IND. ST. BOARD COSMETOLOGY & BARBER EXAMINERS (2013) (on file with author). Iowa: *Application for Barbering*, IOWA DEP'T PUB. HEALTH, BUREAU PROF. LICENSURE (Rev. Nov. 12, 2009), https://idph.iowa.gov/Portals/1/Files/Licensure/ba_app_form.pdf [<https://perma.cc/9BWB-DF66>]. Kansas: *Kansas Barber Examination*, Kansas Board of Barbering, (2015) (on file with author). Kentucky: The application form is administered by schools and is not publicly available, but Kentucky officials confirmed that there is no question on the application about a conviction record. Telephone Interview with Ky. official, Ky. Bd. of Barbering (Jan. 21, 2016, and May 17, 2019). Maine: *License by Examination: Aesthetician, Barber, Limited Barber, Cosmetologist, or Nail Technician*, ME. OFF. PROF. & OCCUPATIONAL REG. (Rev. Aug. 2014) (on file with author). Mississippi: *Application for Enrollment in a Barber*

College as a Student, MISS. BOARD BARBER EXAMINERS (2016), http://www.msbarberboard.com/sites/default/files/enrollment_app.pdf [<https://perma.cc/9J9A-VDJR>]. New Hampshire: *Questionnaire for Applicants and Licensees*, N.H. OFF. PROF. LICENSURE & CERTIFICATION, BOARD BARBERING COSMETOLOGY & ESTHETICS, <https://www.oplc.nh.gov/cosmetology/documents/questionnaire.pdf> [<https://perma.cc/SFK6-6LXW>]. New York: *Barber Operator Application*, N.Y. DEP'T ST., DIVISION LICENSING SERVS. (Rev. June 2015) (on file with author). North Carolina: *Application to Receive a Certificate of Registration As A Registered Barber*, N.C. BOARD BARBER EXAMINERS (on file with the author). The application form is administered by schools and is not publicly available, but Ohio officials explained that the application is the one described here. Email from Ohio official, Ohio State Cosmetology & Barber Bd. (Jan. 26, 2016) (on file with author). Rhode Island: *Instructions and Application for License as a Barber*, R.I. BOARD HAIRDRESSING & BARBERING (Rev. July 24, 2015) (on file with author). Tennessee: *Application for License*, Tenn. State Board of Cosmetology & Barber Examiners (Rev. June 2014) (on file with author). Texas: *Barber License by Examination Application*, TEX. DEP'T LICENSING & REG. (Rev. Sept. 2015) (on file with the author); *Texas Guidelines for License Applicants with Criminal Convictions*, TEX. DEP'T LICENSING & REG., <https://www.tdlr.texas.gov/crimconvict.htm> [<https://perma.cc/39AL-NX7P>]. Vermont: *Application for Limited Barbering License*, VT. BOARD BARBERS & COSMETOLOGISTS (on file with author). *Barber – Barber Instructor Examination & License Application*, VA. BOARD FOR BARBERS & COSMETOLOGY (July 1, 2015) (on file with author). Washington, D.C.: *Barbers: New License Application*, GOV'T OF D.C., OCCUPATIONAL & PROF. LICENSING ADMIN. (2019) (on file with author); *Application Instructions and Forms for a Barber License*, GOV'T OF D.C., OCCUPATIONAL & PROF. LICENSING ADMIN. (2015) (on file with author).

**Compiled Information for Appendix A, Column 4: Reported
Acceptance Patterns**⁴⁷⁰

470. Telephone Interview with Ala. official, Ala. Bd. of Cosmetology & Barbering (Nov. 9, 2015) (on file with author); Telephone Interview with Alaska official, Alaska Bd. of Barbers and Hairdressers (Nov. 23, 2015) (on file with author); Telephone Interview with Ariz. official, Ariz. Bd. of Barbers (Nov. 16, 2015) (on file with author); telephone interview with Ark. official, Ark. State Bd. of Barber Exam'rs (Nov. 11, 2015) (on file with author); E-mail from official, Cal. Bd. of Barbering & Cosmetology, to author (Jan. 13, 2016) (on file with author); Telephone Interview with Conn. official, Conn. Dep't Pub. Health (Jan. 12, 2016) (on file with author); Telephone Interview with Del. official, Del. Bd. of Cosmetology & Barbering (Dec. 22, 2015) (on file with author); Telephone Interview with Fla. official, Fla. Barbers' Bd. (Jan. 7, 2016); Telephone Interview with Ga. official, Ga. State Bd. of Cosmetology & Barbers (Jan. 26, 2016) (on file with author); Telephone Interview with Ind. official, Ind. State Bd. of Cosmetology & Barber Exam'rs (Jan. 11, 2016); Telephone Interview with Iowa official, Iowa Bd. of Barbering (Jan. 11, 2016) (on file with author); Telephone Interview with Kan. official, Kan. Bd. of Barbering (Mar. 22, 2016) (on file with author); Telephone Interview with Ky. official, Ky. Bd. of Barbering (Jan. 21, 2016); Telephone Interview with Me. official, Me. Dep't of Barbering & Cosmetology Licensing (Feb. 9, 2016); Telephone Interview with Miss. official, Miss. Bd. of Barber Exam'rs (Jan. 14, 2016) (on file with author); Telephone Interview with N.H. official, N.H. Bd. of Barbering, Cosmetology & Esthetics (Jan. 12, 2016); Telephone Interview with N.Y. official, N.Y. State Dep't of State, Div. of Licensing Servs. (Feb. 18, 2018) (on file with author); Telephone Interview with N.C. official, N.C. Bd. of Barber Exam'rs (Feb. 9, 2016); Telephone Interview with Ohio official, Ohio State Barber Licensure Bd. (Jan. 26, 2016) (on file with author); Telephone Interview with R.I. official, R.I. Dep't of Health (Feb. 23, 2016) (on file with author); Telephone Interview with Tenn. official, Tenn. Cosmetology & Barber Exam'rs (Apr. 12, 2016) (on file with author); Telephone Interview with Tex. official, Tex. Dep't of Licensing & Reg. (June 24, 2016); Telephone Interview with Vt. official, Vt. Office of Prof. Reg. (Jan. 5, 2015); Telephone Interview with Va. official, Va. Bd. for Barbers & Cosmetology (Feb. 4, 2016) (on file with author); Telephone Interview with Washington, D.C., official, Washington D.C. Bd. of Barber & Cosmetology (Jan. 11, 2016) (on file with the author).

**APPENDIX B. CERTIFIED NURSE’S AIDES:
QUALIFICATIONS AND INSTITUTIONAL STRUCTURE**

STATE	ELIGIBILITY RULES	RESTRICTIONS: IMPOSED WHEN, AND BY WHOM?
Alabama	Sources describe <i>felony-only</i> restriction, with case-by-case approach for misdemeanors; statute allows denial for felony, “crime involving moral turpitude or of gross immorality” and “unprofessional conduct.”	Unclear. “It happens through the [training] programs—we don’t do it,” state official says of the felony bar. State agency does <i>not</i> exclude, nor does testing company. School staffer says, “If the [clinical training] facility decides to reject them, there is nothing we can do.”
Alaska	Case-by-case, for can certification (“everyone is looked at individually”); but facilities face <i>different</i> rules, with permanent, ten, five, and three-year employee ineligibility for listed “barrier crimes.”	“There’s two different processes that can CNA would go through in Alaska”: Board of Nursing, for individuals; Health & Soc. Servs., for facilities. “Variance” available for facilities wishing to hire barred individuals (158 out of 185 were approved in 2017).
Arkansas	Long-term-care facilities may never hire a person convicted of eight crimes; for 61 other crimes, misdemeanors disqualify for 5 years, felonies 10.	Office of Long-Term Care; law focuses not on individual certification, but on facilities, including nursing homes and five other types. Employers also play role: named “nonviolent” offenses do <i>not</i> disqualify, if conditions met (including “the service provider wants to employ the person”).
Arizona	CNA and LNA certification <i>split</i> , in 2016; for the <i>LNA</i> , “any felony prevents licensure” for three years after discharge; for misdemeanors, “all are determined individually”; “we try not to just straight-out deny anyone.”	AZ Board of Nursing. For CNAs, only abuse, neglect, and misuse of client funds disqualify for state certification; “it then becomes an employer issue.” “Board of Fingerprinting” handles checks for most licenses, but <i>not</i> LNAs: AZ BN does its own.
California	Case by case; by statute, conviction “substantially related” to job is cause for denial, but only if fail to show rehabilitation, and present “threat” to patients.	CA Department of Public Health; “we work with people who have convictions,” in individualized review. “Criminal record clearance” required; statute empowers with “discretion to consider a conviction,” but directs “that the conviction not operate as an automatic bar to certification.”
Connecticut	<i>No</i> exclusion from <i>registry</i> , only those convicted of four felonies are barred from work in long-term care facilities; officials explain state restriction is designed to align with <i>federal</i> law.	CT DPH. Waiver of exclusion is available; in a recent year, about half applied, and most were granted. <i>Training programs</i> and <i>employers</i> may both be more restrictive than state: “some of them have zero tolerance,” says official.

Delaware	No exclusion from registry; only abuse, neglect, and misuse of client funds disqualify.	Nursing homes and home-health agencies must complete state background checks for patient-care employees. DE DHSS official explains that recent change (DE got rid of specified-offenses exclusion, which had included lifetime/10/5 years periods) was triggered by concern about compliance with federal statutory law, as well as EEOC guidance.
Florida	Specified-offense lists, some with waiting periods: "People with felonies can be licensed. The only exception is those crimes identified in the statute." Discretionary, for others: "each application is reviewed on its own merits."	FL DOH. "The Board is given a lot of discretion, except for with certain offenses that have been identified." Four full-time "processors" in DOH review applicants with records, and approve some without Board input. "Violent crimes and repeat offenders" require Board review, but <i>can</i> be licensed.
Georgia	Varies by facility type: fifteen "covered crimes" for some, and thirteen for nursing homes; "criminal record" defined precisely in state law.	"The state of Georgia leaves it up to the employer;" schools, clinical-training sites, and employers impose restrictions, <i>not</i> state agency. Agency offers "fitness determination," as kind of waiver, where a facility "would like to hire the applicant."
Kansas	Varies by facility type, and "differ greatly": "prohibited offenses" for facilities caring for disabled is longer list than for other long-term care facilities; the former never expire, while latter do; drug felonies disq. for one group, but not other.	KS Department for Aging & Disability Servs. Notably, rules apply to <i>everyone</i> who works in facilities, not just those in patient care ("that's janitors, and laundry, and dietary, and drivers").
Kentucky	Statute appears to exclude only those with named felonies, but interviews say "anyone with a felony we cannot accept;" most misds. eligible.	KY Health & Family Services; nurse aides are "SRNAs," for "State Registered Nurse Aides." Employer policies vary, as a school official noted: "We let [people with convictions] know, you may be able to take the course, but when you go into the workforce Each company is different."
Maine	"CNA Matrix" of "disqualifying offenses" include about ninety crimes; neither drug possession nor DWI among them. Disq. is for ten years, or for life if committed in a health-care setting; only sexual-offense misds. & those committed in the health-care setting disqualify.	State DHHS; those ineligible are excluded from the state registry; employers must verify applicant is on registry and listed as eligible. Separate law appears to establish <i>different</i> standards for home health aides than for CNAs generally; home aides may face ten-year disq. for any felony punishable by a three-year sentence.

Maryland	Entirely discretionary; only “direct relationship” to job and “unreasonable risk” justify denial; “in the statute, there are no absolute bars to licensure;” six factors considered, in “case by case” review.	Board of Nursing; “pre-licensure committee” reviews materials, forwards report to Board, for decision; “It’s a tedious, time-consuming, non-automated process.”
Missouri	Eligibility varies by location of care: for CNAs in facilities, only listed “Crimes Against Persons” (CAP) disq.; neither narcotics nor DWI on list. But home health aides may not work with <i>any</i> conviction (without a “Good Cause Waiver” (GCW)).	Multiple actors: training programs must ensure eligibility to work in clinical sites; employers must impose requirements; state DHSS maintains registry and Employee Disqualification List, and awards the GCW. Notable disagreement as to whether <i>all</i> serious felonies, or just those on the “CAP” list, disq. for nursing-home work.
North Carolina	No statewide legal restriction, aside from findings of abuse, neglect, or misuse of client funds.	Clinical-training sites and employers decide; “It would be the individual provider’s policy”; state officials and training-program staff believe decisions are made case-by-case.
Ohio	Eligibility varies by facility type: about fifty-five offenses disq. for most facilities; different list for home health. Permanent exclusion for some offenses (including multiple theft convictions); “Personal Character Standards” allow <i>facilities</i> to make exceptions.	OH DPH; term is “STNA” (for State-Tested Nurse Aide). “Everything is initiated by the employer;” aside from state-mandated background check, state does not deny—employers must impose eligibility rules. “Personal Character” exception specifies eleven factors for facility managers to consider.
Texas	Specified-offense lists include about twenty-five offenses which permanently bar from direct-contact work; for seven different offenses, five-year bar; burglary brings permanent ban from certain types of facilities. Drug and alcohol offenses not among listed offenses.	TX DHHS posts documents and rules, and manages the registry, but “it’s on the schools” to impose restrictions; facilities must also execute background check. No waivers or exceptions.
Vermont	Conviction of felony, or crime “related to . . . profession” grounds for denial; “it’s case by case.”	VT Office of Professional Regulation; those denied have opportunity to appeal before Board of Nursing.
Virginia	Felony or crime of “moral turpitude” is grounds for denial; all decisions are case by case, considering circumstances and “given due process;” policy allows approval for misds. five years old, felonies ten years. <i>Different process</i> for facilities, with separate list of about ninety “barrier crimes” for employees.	VA Board of Nursing; because of separate procedures, individual certification does <i>not</i> guarantee ability to work in a licensed facility: “it’s two different processes.” Employers’ hiring and personnel policies also vary.

Washington, D.C.	CNA certification, long-term care facility work and home health certification licensed through different processes, as of 2017. CNA handled case by case; in home health context, denial likely for recent, listed violent or theft-related offenses; for long-term care, seven-year bar for twenty-nine listed offenses, but DOH attorney may permit after review.	At time of interviews (2017), the D.C. Board of Nursing and D.C. DPH shared responsibility for credentialing nurse's aides. (The Board of Nursing is now part of D.C. Health, and awards the Nurse Aide and Home Health Aide credentials).
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Compiled Information for Appendix B, Column 2: Eligibility Rules⁴⁷¹

471. See ALA. CODE § 34-21-25 (2009) (“Denial, suspension, or revocation of license”); ALASKA STAT. ANN. § 08.68.334 (West 1998) (“Grounds for denial, suspension, or revocation of certificate”); ALASKA ADMIN. CODE tit. 7, § 10.905 (2007) (“Barrier Crimes”); ALASKA ADMIN. CODE tit. 7, § 10.915 (2007) (“Criminal history check”); ALASKA ADMIN. CODE tit. 7, § 10.930 (2007) (“Request for a variance”); ARIZ. REV. STAT. ANN. § 32-1645(A) (1992) (listing credential requirements for Licensed Nursing Assistants); ARIZ. REV. STAT. ANN. § 32-1645(B) (1992) (credentialing requirements for Certified Nursing Assistants); ARIZ. REV. STAT. ANN. § 36-411 (1998) (pertaining to caregivers working in residential care institutions, nursing care institutions, and home health agencies); ARK. CODE ANN. § 20-38-105(b)-(d)(1) (2009) (“Disqualification from employment — Denial or revocation — Penalties”); CAL. HEALTH & SAFETY CODE § 1337.9(a)(2) (West 1994) (stating that it is “in the interest of public safety to assist in the rehabilitation of criminal offenders by removing impediments and restrictions upon the offenders’ ability to obtain employment or engage in a trade, occupation, or profession based solely upon the existence of a criminal record”); CAL. HEALTH & SAFETY CODE § 1337.9(a)(3) (West 1994) (specifying “intent of the Legislature” that agency “have discretion to consider a conviction, but that the conviction not operate as an automatic bar to certification”); CAL. HEALTH & SAFETY CODE § 1337.9(b) (West 1994); CONN. GEN. STAT. § 19a-491c (2011) (including specification that “disqualifying offense” means those identified in *federal* law: “42 U.S.C. 1320a-7(a)(1), (2), (3) or (4) or a substantiated finding of neglect, abuse or misappropriation of property by a state or federal agency pursuant to an investigation conducted in accordance with 42 USC 1395i-3(g)(1)(C) or 42 U.S.C. 1396r(g)(1)(C)”); DEL. CODE ANN. tit. 29, § 7972 (West 2012) (pre-employment background screening for those working in long-term-care and home-health programs and facilities); DEL. ADMIN. CODE §§ 3220-1.0–3220-5.0 (2002) (“Training and Qualifications for Certified Nursing Assistants”); FLA. STAT. § 408.809 (2006) (requires background screening); FLA. STAT. § 435.04(2) (1995) (listing disqualifying offenses); GA. CODE ANN. § 31-7-350 (1995) (defining “conviction,” “crime,” and “criminal record”); GA. CODE ANN. § 31-7-351 (1995) (requiring nursing homes to conduct background checks); KAN. STAT. ANN. § 39-970 (1997) (prohibiting hiring people convicted of certain offenses to work in adult care homes); KAN. STAT. ANN. § 65-5117 (1997) (prohibiting hiring people convicted of certain offenses to work for home health services); KY. REV. STAT. ANN. § 216.789 (West 2007) (prohibiting hiring “certain felons” in long-term care facilities); ME. REV. STAT. ANN. tit. 22, § 1812-G (1991) (establishes registry; requires background checks; defines “disqualifying offense” and “non-disqualifying criminal conviction”); MD. CODE ANN., CRIM. PROC. § 1-209 (West 2009) (identifying policy of state to “encourage the employment of nonviolent ex-offenders”; prohibiting denial of license unless “direct relationship” between conviction and license, or “unreasonable risk” would result); MD. CODE ANN., HEALTH OCC. § 8-6A-07(i)(1) (West 1998) (requiring Board to consider aggravating and mitigating factors, when applicants have conviction backgrounds); MD. CODE ANN., HEALTH OCC. § 8-308(c)(1) (West 1981) (specifying six factors for board to consider, when applicant has a criminal history); MO. REV. STAT. § 192.2495.1 (1996) (requiring providers to conduct background checks; defining “criminal history;” requiring DHSS to create “employee disqualification list,” and promulgate rules for a waiver procedure); N.C. GEN. STAT. ANN. § 131E-255 (West 1991) (creating Nurse Aide Registry, and requiring inclusion of notations for crime); N.C. GEN. STAT. ANN. § 131E-265 (West 1995) (requiring nursing homes and home care agencies to conduct background checks); N.C. GEN. STAT. § 131E-265(b) (West 1995) (stating that fact of conviction alone “shall not be a

bar to employment”, and requiring consideration of seven factors, including age at the time of crime, existence of a “nexus” between criminal conduct and the relevant job duties, and evidence of rehabilitation, prior to denial); OHIO REV. CODE ANN. § 109.572 (West 1993) (requiring state criminal records check); TEX. HEALTH & SAFETY CODE ANN. § 250.001 (West 1993) (defining nurse-aide registry); TEX. HEALTH & SAFETY CODE ANN. § 250.003 (West 1993) (prohibiting employment of those convicted of listed offenses); TEX. HEALTH & SAFETY CODE ANN. § 250.006 (West 1993) (listing disqualifying offenses); TEX. HEALTH & SAFETY CODE ANN. § 250.006(c) (West 1993) (indefinitely barring employment, in certain facility types, of a person convicted of burglary); VT. STAT. ANN. tit. 3, § 129a (West 1997) (defining “unprofessional conduct” to include “[c]onviction of a crime related to the practice of the profession or conviction of a felony, whether or not related to the practice of the profession”); VT. STAT. ANN. tit. 26, § 1582 (West 1979) (empowering board to deny applicant because of “unprofessional conduct”); VA. CODE ANN. § 32.1-126.01 (West 1992) (prohibiting employment of people convicted of certain offenses, in nursing homes); VA. CODE ANN. § 32.1-162.9:1 (West 1990) (prohibiting employment of people convicted of certain offenses in licensed home care); VA. CODE ANN. § 54.1-3007 (West 1988) (empowering board to refuse to issue a license to a person convicted of “any felony or any misdemeanor involving moral turpitude”); MO.19 CSR 30-82.060 (Rules of Missouri’s Department of Health and Senior Services, on the “Good Cause Waiver”); OHIO ADMIN. CODE § 3701-13-05 (1996) (listing disqualifying offenses, and instructing direct-care providers who enforce state exclusion rules); OHIO ADMIN. CODE § 3701-13-06 (1996) (setting guidelines for “Personal Character Standards” exception); OHIO ADMIN. CODE § 3701-60-07 (1997) (naming disqualifications specific to home health agencies, for ten-year, seven-year, and five-year exclusionary periods); D.C. Mun. Regs. tit. 22-B, § 4701 (2013) (pertaining to health care facilities, community residences, and “any entity furnishing Medicaid services,” and background check requirement); D.C. Mun. Regs. tit. 17, § 9303 (2012) (requiring background checks for home health aides); D.C. Mun. Regs. tit. 17, § 9303.4 (2012) (requiring board review, prior to awarding license, if applicant has been convicted of a specified offense within seven years); D.C. Mun. Regs. tit. 22-B, § 3202.3 (2002) (stating that nursing homes may not hire people whose names appear on the registry, or those convicted of abuse of residents or others in their care); D.C. Mun. Regs. tit. 22-B, § 4705.1 (2002) (prohibiting employment of anyone convicted of named offenses, within seven years); D.C. Mun. Regs. tit. 22, § 4705.2 (2002) (allowing exceptions to the prohibition in 4705.1); D.C. Mun. Regs. tit. 29, § 3251 (1991) (pertaining to establishment of Nurse Aide Registry).

**Compiled Information for Appendix B, Column 3: Restrictions:
Imposed When, and by Whom?⁴⁷²**

472. Alabama: Telephone Interview with Staff, Ala. Cmty. Coll. CNA-Training Program (May 26, 2017); Telephone Interview with Ala. official, Ala. Dep't of Health (May 31, 2017). Alaska: Telephone Interview with Alaska official, Alaska Bd. of Nursing (Feb. 22, 2018); Telephone Interview with Alaska official, Alaska Div. of Health Care Servs. (Feb. 20, 2018). Arkansas: Telephone Interview with Ark. official, Ark. Dep't of Human Servs., Div. of Med. Servs., Office of Long-Term Care (July 21, 2016, and Jan. 30, 2018); ARK. CODE ANN. § 20-38-105(d)(3) (2019) (describing non-disqualifying offenses and conditions). Arizona: Telephone Interview with Ariz. official, Ariz. Fingerprinting Bd. (Feb. 13, 2018); E-mail from official, Ariz. State Bd. of Nursing (Aug. 3, 2017) (on file with author); Telephone Interview with Ariz. officials, Ariz. State Bd. of Nursing (July 7, 2017 and July 13, 2017). California: CAL. HEALTH & SAFETY CODE § 1337.9(A)(3) (2015); E-mail from Cal. official, Cal. Dep't of Pub. Health (Aug. 10, 2017) (on file with author); Telephone Interview with Cal. official, Cal. Dep't of Pub. Health (July 6, 2017). Connecticut: E-mail from official, Conn. Dep't of Pub. Health (Jan. 19, 2018) (on file with the author); Telephone Interview with Conn. officials, Conn. Dep't of Pub. Health (Jan. 11, 2018; Jan. 16, 2018; and Jan. 18, 2018); Telephone Interview with Conn. officials, Conn. Dep't of Pub. Health (Jan. 9, 2018) ("zero tolerance" statement about employers, and waiver-application estimate). Delaware: Telephone Interview with Del. officials, Del. Health & Soc. Servs., Div. of Long-Term Care Residents Protection (June 5, 2017 and June 6, 2017). Florida: E-mail to the author responding to public-records request, Fla. Dep't of Health (Mar. 14, 2017) (on file with the author); Telephone Interview with Fla. officials, Dep't of Health, Div. of Quality Assurance (Feb. 20, 2017). Georgia: *Employees of Personal Care Homes: Frequently Asked Questions*, *supra* note 300 (reference to "fitness determination," and provision for facility that "would like to hire the applicant"); Telephone Interview with legal staff, Ga. Healthcare Facility Regulation (HCFR), Ga. Dep't of Cmty. Health (July 7, 2017); Telephone Interview with Ga. officials, Ga. Healthcare Facility Regulation (HCFR), Ga. Dep't of Cmty. Health (June 27, 2017 and July 5, 2017); Telephone Interview with staff, Ga. Health Care Ass'n / Ga. Center for Assisted Living (June 21, 2017); Telephone Interview with Ga. official, Ga. Med. Care Found., Ga. Nurse Aide Registry, Dep't of Cmty. Health (June 19, 2017). Kansas: E-mail from Kan. official, Kan. Dep't for Aging & Disability Servs. (Feb. 12, 2018) (on file with author); Telephone Interview with Kan. official, Kan. Dep't for Aging & Disability Servs. (Jan. 17, 2018). Kentucky: Telephone Interview with Ky. officials, Nurse Aide Registry Program, Cabinet for Health & Family Servs. (July 10, 2017 and Feb. 16, 2018); Telephone Interview with Staff, Richmond, Ky., nurse aide training school (July 12, 2017) ("... each company is different" statement). Maine: ME. REV. STAT. ANN. tit. 22, §1812-G (1991) (establishes registry; requires background checks; defines "disqualifying offense" and "non-disqualifying criminal conviction"); *Maine Registry of Certified Nursing Assistants (CNA Registry)*, MAINE.GOV, <https://www.maine.gov/dhhs/dlc/cna/definitions.html> [https://perma.cc/PT3D-UQBX] (defining terms and explaining duration of disqualifications); Telephone Interview with Me. official, CNA Registry, Licensing and Regulatory Servs., Dep't of Health & Human Servs. (June 2, 2017). Maryland: Telephone Interview with Md. official, Md. Bd. of Nursing (July 26, 2016) (on file with the author). Missouri: Telephone Interview with Mo. officials, Mo. Dep't of Health & Senior Servs., SECTION FOR LONG TERM CARE (May 30, 2017; June 8, 2017; and June 14, 2017); Telephone Interview with Staff, Good Cause Waiver Div., Licensing & Regulation, Dep't of Health & Senior Servs. (June 13, 2017); Telephone

Interview, Former Facility Administrator (June 13, 2017); Telephone Interview, Staff, Mo. Ass'n of Nursing Home Adm'rs (June 8, 2017). North Carolina: Telephone Interview with Reg'l Adm'r, NC. Div. of Health Service Regulation, Health Care Personnel Educ. and Credentialing Section (Feb. 27, 2018); Telephone Interview with staff, large community-college-based CNA-training program (Feb. 26, 2018); Telephone Interview with staff, Human-Res. Dep't, Major University-Affiliated Hospital (Feb. 26, 2018) (“[I]t would be the individual provider’s policy.”); Telephone Interview with N.C. official, Center for Aide Regulation and Registration, N.C. Dep’t of Health & Human Servs. (Feb. 23, 2018). Ohio: OHIO ADMIN. CODE 3701-13-06 (1996) (setting guidelines for “Personal Character Standards” exception); *Nurse Aide Registry Frequently Asked Questions*, OHIO DEP’T HEALTH, <https://odh.ohio.gov/wps/portal/gov/odh/know-our-programs/nurse-aide-registry/resources/narfaqs> [<https://perma.cc/79C7-ULQA>] (explaining “Personal Character” exception, among other laws and regulations); Telephone Interview with Ohio official, Nurse Aide Registry, Ohio Dep’t of Health (June 1, 2017) (“Everything is initiated” statement). Texas: Telephone Interview with staff, Tex. Health Care Ass’n (nursing-home trade association) (Feb. 23, 2018); Telephone Interview with Tex. official, Nurse Aid Registry, Tex. Dep’t of Health & Human Servs. (Feb. 22, 2018) (“it’s on the schools” statement). Vermont: Telephone Interview with Vt. official, Bd. of Nursing, Office of Professional Regulation, Vt. Sec’y of State (Feb. 20, 2018) (“it’s case by case” statement); Telephone Interview with Vt. official, Bd. of Nursing, Office of Prof’l Regulation, Vt. Sec’y of State (Aug. 3, 2016). Virginia: Telephone Interview, Staff, Va. Health Care Ass’n (Nursing-Home Trade Ass’n) (Feb. 23, 2018) (“it’s two different processes” statement); E-mails from official, Va. Dep’t of Health Professions (June 30, 2017 and Feb. 23, 2018) (on file with author); Telephone Interview with Va. official, Nurse Aide Registry, Bd. of Nursing, Va. Dep’t of Health Professions (June 16, 2017 and June 28, 2017). Washington, D.C.: Telephone Interview with Washington, D.C., official, Bd. of Long-Term Care Admin., Dep’t of Health (June 20, 2017); Telephone Interview with Washington, D.C., official, Washington D.C. Bd. of Nursing (June 15, 2017).