

## Ban the Box in College Applications: A Balanced Approach

Albert H.S. Jung

Follow this and additional works at: <http://scholarship.law.cornell.edu/cjlp>

 Part of the [Law Commons](#)

---

### Recommended Citation

Jung, Albert H.S. (2016) "Ban the Box in College Applications: A Balanced Approach," *Cornell Journal of Law and Public Policy*: Vol. 26 : Iss. 1 , Article 5.

Available at: <http://scholarship.law.cornell.edu/cjlp/vol26/iss1/5>

This Note is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Journal of Law and Public Policy by an authorized editor of Scholarship@Cornell Law: A Digital Repository. For more information, please contact [jmp8@cornell.edu](mailto:jmp8@cornell.edu).

## NOTE

### “BAN THE BOX” IN COLLEGE APPLICATIONS: A BALANCED APPROACH

*H.S. Albert Jung\**

INTRODUCTION: STORIES FROM TWO SIDES .....	171
I. LEGAL BACKGROUND, DEVELOPMENT, AND CRITICISMS OF THE CURRENT ADMISSIONS POLICY REGARDING CRIMINAL HISTORY .....	175
A. <i>Current Trends and Main Criticisms Regarding the             Use of Criminal History in College Admission             Process</i> .....	175
B. <i>Federal and State Law Regarding the Use of             Criminal History in College Admission Process</i> .....	177
C. <i>The Case of the SUNY System and Its Adoption of             Criminal History Screening</i> .....	178
D. <i>The Story of Vivian Nixon and Other Ex-Offender             Applicants</i> .....	180
E. <i>The Proposed Vivian’s Law</i> .....	182
II. RELATIONSHIP BETWEEN CRIMINAL HISTORY SCREENING AND HEIGHTENED CAMPUS SAFETY .....	184
III. CRIMINAL HISTORY SCREENING AND THE CHANCE OF ADMISSION .....	188
IV. BURDENSOME ADMISSIONS PROCEDURES THAT REQUIRES MORE ATTENTION .....	192
CONCLUSION: A BALANCED APPROACH .....	194

#### INTRODUCTION: STORIES FROM TWO SIDES

Keri Blakinger, an Ivy League student, once known as the heroin “queenpin” of the campus, changed her ways while in prison and now passionately fights for the rights of ex-offenders, specifically regarding

---

\* J.D. Candidate, Cornell Law School, 2017; B.A./B.A., *Phi Beta Kappa*, University of Oregon, 2012; Managing Editor, *Cornell Journal of Law and Public Policy*, Volume 26. I would like to thank the SUNY Office of General Counsel for the internship that inspired this Note.

college<sup>1</sup> applications for ex-offenders.<sup>2</sup> Currently, many college application forms include a question about the applicant's criminal record, so colleges can request his or her criminal record when making the admission decision.<sup>3</sup> According to Blakinger, this policy prevents ex-offenders from accessing higher education because having a criminal record causes prejudice during the admission process<sup>4</sup> and ultimately lowers the chance of admission without a valid reason.<sup>5</sup> As a result, she argues that colleges should not ask for criminal records of an applicant, so more ex-offenders can access higher education, which would ultimately lower the chance of recidivism.<sup>6</sup>

Blakinger is not alone in this area; many have argued passionately for years that colleges should not ask for their applicants' criminal history.<sup>7</sup> Their main argument is that asking the question unjustifiably limits ex-offenders' access to higher education, while no empirical evidence proves that students with criminal records pose a safety risk on campus.<sup>8</sup>

However, that is only a one-sided view of the issue. In 2004, a male student at University of North Carolina Wilmington ("UNCW") sexually assaulted and killed a female student.<sup>9</sup> He had "emotional and psycho-

<sup>1</sup> In this memo, "college" and "university" are used interchangeably, referring to a higher education institution that provides four-year degree programs and are eligible to receive federal grants through Title IV of the Higher Education Act of 1965.

<sup>2</sup> Keri Blakinger, Editorial, *Heroin Addiction Sent Me to Prison. White Privilege Got Me out and to the Ivy League*, WASH. POST, Jan. 21, 2015, <https://www.washingtonpost.com/posteverything/wp/2015/01/21/heroin-addiction-sent-me-to-prison-white-privilege-got-me-out-and-to-the-ivy-league/>.

<sup>3</sup> The Common Application, a college application service that allows an applicant to apply to multiple colleges with one application, asks, "Have you ever been adjudicated guilty or convicted of a misdemeanor, felony, or other crime?" on its application form. *Counselor Guide to the Application*, THE COMMON APPLICATION, <http://recsupport.commonapp.org/FileManagement/Download/6d049c3626d84f519f507da8ce6364f1> (last visited Apr. 22, 2015). As of March 2016, more than 600 universities use the Common Application. *See Current Members*, THE COMMON APPLICATION, <http://www.commonapp.org/files/component/step/files/Common%20Application%20Member%20Institutions%20March%202016.pdf> (last visited Apr. 24, 2015).

<sup>4</sup> In this note, "admission process" refers to the entire process an applicant goes through from the decision to acquire higher education to the initial enrollment.

<sup>5</sup> Keri Blakinger, Editorial, *Why Colleges Should Admit More Ex-felons*, WASH. POST, June 21, 2015, <https://www.washingtonpost.com/posteverything/wp/2015/06/21/why-colleges-should-admit-more-ex-felons/>.

<sup>6</sup> *Id.*

<sup>7</sup> Editorial, *College Applications and Criminal Records*, N.Y. TIMES, Mar. 14, 2015, [http://www.nytimes.com/2015/03/15/opinion/sunday/college-applications-and-criminal-records.html?\\_r=0](http://www.nytimes.com/2015/03/15/opinion/sunday/college-applications-and-criminal-records.html?_r=0).

<sup>8</sup> *See* CTR. FOR COMTY. ALTS., THE USE OF CRIMINAL HISTORY RECORDS IN COLLEGE ADMISSIONS RECONSIDERED 3-4 (2010), <http://www.communityalternatives.org/pdf/Reconsidered-criminal-hist-recs-in-college-admissions.pdf> [hereinafter CCA, USE OF CRIMINAL HISTORY RECORDS].

<sup>9</sup> *Victim's Father Sues UNC Wilmington*, CAMPUS SAFETY (May 22, 2006), <http://www.campusafetymagazine.com/article/Victims-Father-Sues-UNC-Wilmington>.

logical issues as well as a history of stalking and disorderly conduct.”<sup>10</sup> Furthermore, the previous college he attended expelled him for “stalking a female student with a knife.”<sup>11</sup> Nonetheless, his father, who submitted the application form for him, did not disclose any of the previous incidents on the application form.<sup>12</sup> As a result, the father of the victim sued UNCW for negligently admitting the ex-offender without a thorough background check.<sup>13</sup> Since then, the entire University of North Carolina system has implemented criminal background checks into its admission process.<sup>14</sup>

For the victims and the colleges, incidents like this constitute a valid reason to ask applicants to disclose their criminal history, especially in the current environment where public demands for safe campuses are high.<sup>15</sup> Considering that precluding a potentially dangerous applicant may prevent harm to another individual, admitting an applicant with a criminal record without understanding the nature of the crimes he or she committed can create a significant campus security problem.<sup>16</sup> In addition, colleges argue that criminal history by itself neither automatically prevents ex-offenders from receiving an admission offer nor creates prejudice.<sup>17</sup> Colleges argue that their admission process is holistic and that they will deny admission of an otherwise qualified ex-offender only if he or she poses a significant security threat.<sup>18</sup>

Both the critics and colleges, however, are mistaken in their contradicting approaches to meet their goals, which do not necessarily conflict with each other. What the critics of the current admissions policy want is providing ex-offenders more access to higher education to prevent recidivism.<sup>19</sup> To meet this goal, the critics believe that a complete ban on criminal history screening during the application process is the solution.<sup>20</sup>

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* Interestingly, the lawsuit never reached the trial stage; whether the university settled with the father is unknown.

<sup>14</sup> Jennifer Epstein, *Probing Students' Pasts*, INSIDE HIGHER ED (July 1, 2010), <https://www.insidehighered.com/news/2010/07/01/background>.

<sup>15</sup> Scott Jaschik, *Is a Criminal Past Relevant?*, INSIDE HIGHER ED (Mar. 11, 2014), <https://www.insidehighered.com/news/2014/03/11/princeton-students-want-university-stop-asking-whether-applicants-have-criminal-past>.

<sup>16</sup> See *Student Criminal Background Checks*, NAT'L ASS'N OF COLL. & UNIV. ATT'YS. (Mar. 10, 2006), <http://www.nacua.org/nacualert/memberversion/StudentCrimBckgndChks.asp> (discussing in general criminal background check in higher education setting).

<sup>17</sup> See Jaschik, *supra* note 15.

<sup>18</sup> See *id.*

<sup>19</sup> See CCA, USE OF CRIMINAL HISTORY RECORDS, *supra* note 8, at 3 (arguing the importance of providing access to higher education for ex-offenders).

<sup>20</sup> See CTR. FOR CMTY. ALTS., BOXED OUT: CRIMINAL HISTORY SCREENING AND COLLEGE APPLICATION ATTRITION (2015), [http://communityalternatives.org/pdf/publications/BoxedOut\\_FullReport.pdf](http://communityalternatives.org/pdf/publications/BoxedOut_FullReport.pdf) [hereinafter CCA, BOXED OUT].

They, however, rely on mistaken reasoning that lack of any empirical evidence on the relationship between criminal history screening and heightened campus safety implies that no such relationship exists.<sup>21</sup> The critics also underestimate the importance of campus safety to colleges and the public. On the other hand, what colleges want is to create a safer campus environment by carefully screening ex-offender applicants to prevent any security threats they might pose.<sup>22</sup> In order to meet this goal, colleges often ignore the burdens ex-offenders have when applying to colleges.<sup>23</sup> Instead of following their contradicting approaches to the issue, they can work together and develop a balanced approach to meet their goals. This Note will suggest that the balanced approach that can meet both goals is focusing on reducing high attrition rate during the application process while removing burdensome procedures.

This Note will begin with Part I, introducing the historical and legal background of the issue, mainly using the ex-offender law of the State of New York and the admissions policy at the State University of New York (SUNY System), its main state-run public university system, as a case study.<sup>24</sup> Following the case of the SUNY System, Part I will discuss the criticisms of the current admissions policy and proposed changes in a newly proposed bill. Using the arguments in the bill, Part II and III will focus on two issues that the critics and the proponents disagree: (1) whether criminal history screening creates a safer campus environment and (2) whether criminal history screening lowers the admission chance. Part II will first demonstrate that the critics' reasoning is mistaken and that lack of any empirical evidence on the relationship between criminal history screening and heightened campus safety does not imply that no such relationship exists. Part II will then suggest that the public should allow colleges to continue criminal history screening, but preferably with felony-related screening only. Afterwards, Part III will first recognize that criminal history screening does not lower the admission chance of ex-offenders, making a distinction between the admission rate and the attrition rate. It will then identify the high attrition rate of ex-offender applications as the main issue and suggest several solutions to reduce the attrition rate, such as educating both ex-offender applicants and admission officers. Part IV will explore other burdens that an ex-offender ap-

---

<sup>21</sup> See *infra* Part II.

<sup>22</sup> See Jaschik, *supra* note 15 (arguing that criminal history screening should be allowed in the light of the public's expectation on campus safety).

<sup>23</sup> See *infra* Part IV.

<sup>24</sup> The State of New York presents an interesting case: The SUNY System created an experimental admission program for ex-offenders, then one of the program enrollees raped and murdered a student and murdered two other students. In the aftermath, the SUNY System adopted a new admissions policy to screen ex-offender applicants. Critics also heavily focus on the SUNY System. See *infra* Part I.

plicant might encounter, such as requiring inaccessible information as a part of the application. Part IV will then suggest that the critics and the proponents should focus on addressing these remediable burdens, instead of focusing on their current approaches. Finally, the last part will review the findings and suggest that both colleges and the critics should take a balanced approach and find solutions that are more practical.

## I. LEGAL BACKGROUND, DEVELOPMENT, AND CRITICISMS OF THE CURRENT ADMISSIONS POLICY REGARDING CRIMINAL HISTORY

### A. *Current Trends and Main Criticisms Regarding the Use of Criminal History in College Admission Process*

Across the United States, about 72% of schools surveyed in 2010 collected at least some sort of criminal history from their applicants.<sup>25</sup> Not much has changed since then; the majority of four-year universities still collect criminal history from their applicants. For example, over 600 universities use the Common Application<sup>26</sup> for their application process,<sup>27</sup> which requires information regarding whether an applicant has been “adjudicated guilty or convicted of a misdemeanor, felony, or other crime.”<sup>28</sup> Individual colleges cannot alter nor opt out from asking the question.<sup>29</sup> Given the widespread use of tools like the Common Application in the college admission process, we can safely assume that many ex-offenders who tried to apply for college must have encountered application forms that ask for their criminal records.<sup>30</sup> This question often discourages ex-offenders from applying in the first place.<sup>31</sup> Even when ex-offenders successfully submit an application with all the required information, including their criminal history, colleges might reject their ap-

---

<sup>25</sup> CCA, *USE OF CRIMINAL HISTORY RECORDS*, *supra* note 8, at 8.

<sup>26</sup> The Common Application is a college application service where an applicant can use one application to apply to multiple colleges. *See supra* note 3.

<sup>27</sup> *See Current Members*, THE COMMON APPLICATION, *supra* note 3.

<sup>28</sup> Jaschik, *supra* note 15.

<sup>29</sup> Colleges can only alter the last two sections of the Common Application and questions regarding criminal history are “required responses.” *See Counselor Guide to the Application*, THE COMMON APPLICATION, *supra* note 3.

<sup>30</sup> For the 2013–14 school year, the Department of Education classified 3,039 colleges as four-year Title IV colleges. Digest of Education Statistics, National Center for Education Statistics, [http://nces.ed.gov/programs/digest/d14/tables/dt14\\_317.10.asp](http://nces.ed.gov/programs/digest/d14/tables/dt14_317.10.asp) (last visited Jan. 7, 2016). This number indicates that about 1/6 of all four-year colleges used the Common Application, which is arguably a significant amount. In addition, many universities that do not use the Common Application still ask for criminal records. *See CCA, USE OF CRIMINAL HISTORY RECORDS*, *supra* note 8, at 8. Furthermore, many of the Common Application colleges include universities that are well-recognized both nationally and internationally. *See Current Members*, THE COMMON APPLICATION, *supra* note 3.

<sup>31</sup> CCA, *USE OF CRIMINAL HISTORY RECORDS*, *supra* note 8, at 24.

plication.<sup>32</sup> As a result, many organizations and individuals have been speaking against criminal history screening in the college admission process.<sup>33</sup>

One strong opponent of criminal history screening used by the majority of colleges is the Center for Community Alternatives (“CCA”), an organization that “promotes reintegrative justice and a reduced reliance on incarceration through advocacy, services and public policy development in pursuit of civil and human rights.”<sup>34</sup> The CCA has published a study in 2015 that “strongly” recommends colleges to “refrain from including the criminal history question on the application and prohibit the use of criminal history information in admissions decision making.”<sup>35</sup> Before the 2015 study, the CCA also published the previous version of the 2015 study in 2010,<sup>36</sup> which the critics of criminal history screening cited frequently.<sup>37</sup>

The main criticism present in both studies is that criminal history screening unjustifiably makes the admission process difficult to ex-offenders when no empirical evidence proves that “students with criminal records pose a security risk on campus.”<sup>38</sup> To support this criticism, the CCA presents several findings, which fall into two groups: (1) findings that show no empirical relationship exist between the current admissions policy and the safety of campus environments, and (2) findings that show problems related to the chance of admission for ex-offenders. Based on these findings, the CCA argues that colleges should stop using criminal history screening and that law should prohibit the practice to promote “one of the most effective deterrents to recidivism.”<sup>39</sup>

In addition to publishing studies on the issue, the CCA encourages legislative changes. One such example is the CCA’s support for the proposed Vivian’s Law.<sup>40</sup> The proposed law adopts the CCA’s position and

<sup>32</sup> See *id.* (“Given the sheer numbers involved, it is inevitable that otherwise qualified and deserving applicants are either being rejected or are being discouraged from applying in the first place.”).

<sup>33</sup> See CCA, *BOXED OUT*, *supra* note 20; see also Keri Blakinger, Editorial, *Why Colleges Should Admit More Ex-Felons*, WASH. POST, June 21, 2015, <https://www.washingtonpost.com/posteverything/wp/2015/06/21/why-colleges-should-admit-more-ex-felons/>.

<sup>34</sup> *Mission*, CTR. FOR CMTY. ALTS., <http://www.communityalternatives.org/about/mission.html> (last visited Nov. 24, 2015).

<sup>35</sup> CCA, *BOXED OUT*, *supra* note 20, at 51.

<sup>36</sup> CCA, *USE OF CRIMINAL HISTORY RECORDS*, *supra* note 8.

<sup>37</sup> See, e.g., Blakinger, *supra* note 5 (citing CCA’s 2010 study to argue for the ban on the use of criminal history).

<sup>38</sup> See CCA, *USE OF CRIMINAL HISTORY RECORDS*, *supra* note 8, at 3.

<sup>39</sup> CCA, *BOXED OUT*, *supra* note 20, at 38.

<sup>40</sup> See A.03363, 2015–16 Assemb., Reg. Sess. (N.Y. 2015); S.00969, 2015–16 S., Reg. Sess. (N.Y. 2015); see also CCA, *BOXED OUT*, *supra* note 20, at 51 (“[W]e support the enactment of state laws such as the proposed New York Fair Access to Education Act, S.00969 and A.03363 (2015–2016 session) that effectively bans the box from the admissions applications

aims to prohibit use or screening of criminal records except when providing counseling to the admitted ex-offenders or for other similar purposes.<sup>41</sup> Nonetheless, the current federal law and the majority of states, including New York, do not prohibit the use of criminal records explicitly.

*B. Federal and State Law Regarding the Use of Criminal History in College Admission Process*

The current federal law neither explicitly prohibits nor allows colleges to make an admission decision based on an applicant’s criminal records. As a result, both the critics and the proponents of the current admissions policy regarding criminal history usually look at the jurisprudence regarding the criminal record-based-employment-decision (“CBED”) that provides a similar setting.<sup>42</sup> Generally, Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on protected classes.<sup>43</sup> Ex-offender status, however, is not one of the protected classes.<sup>44</sup> In addition, the Supreme Court has not ruled on the legality of CBED yet. However, when employers utilize CBED as a pretense for racial discrimination, courts might consider it illegal.<sup>45</sup> For example, the Supreme Court held screening devices that are not significantly related to successful job performance and disproportionately disqualify applicants of protected classes are illegal.<sup>46</sup> Nonetheless, in the college admission process, the Supreme Court is unlikely to rule the current practice illegal unless the practice directly discriminates protected classes, considering its previous decisions that respect academic freedom.<sup>47</sup>

Although federal law is unclear on the issue of criminal records screening in the college application process, several states, such as New York, have enacted their own statutes addressing the issue. Under Article 23-A of New York Correction Law, an application “for any license or employment” cannot be denied based on the applicant’s criminal records, unless it falls under certain exceptions.<sup>48</sup> In New York, one such excep-

---

and prohibits institutions of higher education, both public and private, from using criminal history information for admissions decisions or to rescind an offer of admission.”)

<sup>41</sup> See A.03363, 2015–2016 Assemb., Reg. Sess. (N.Y. 2015).

<sup>42</sup> James Jacobs, Editorial, *When, if ever, does employment discrimination against ex-offenders violate Title VII?*, WASH. POST, Feb. 3, 2015, <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/02/03/when-if-ever-does-employment-discrimination-against-ex-offenders-violate-title-vii/>.

<sup>43</sup> 42 U.S.C. § 1983 (2012).

<sup>44</sup> *Id.*

<sup>45</sup> See Jacobs, *supra* note 42.

<sup>46</sup> *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

<sup>47</sup> See *infra* Part II.

<sup>48</sup> N.Y. CORRECT. LAW § 752 (Consol. 2015).



tion is when the employment of the applicant “would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.”<sup>49</sup> Since New York includes “any form of vocational or educational training” in the definition of employment, the use of criminal records in public college application decision falls under this law.<sup>50</sup>

As a result, public universities in New York assessed that, if needed, they could legally ask an applicant a question about his or her criminal records to determine whether the applicant would pose an unreasonable safety risk.<sup>51</sup> Based on this assessment, the SUNY System adopted criminal history screening in 1981, during the aftermath of a horrific incident that occurred the late 1970s.<sup>52</sup> The SUNY System’s adoption of criminal history screening following the incident illustrates why colleges see criminal history screening as a necessary tool.

### C. *The Case of the SUNY System and Its Adoption of Criminal History Screening*

The SUNY System is the largest comprehensive system of higher education institutions in the United States.<sup>53</sup> It has sixty-four campuses, including twenty-nine state-operated campuses, five statutory colleges, and thirty community colleges.<sup>54</sup> In 2014, the SUNY System enrolled 459,550 students,<sup>55</sup> making it the largest system in the United States based on enrollment.<sup>56</sup> As a result, the SUNY System, with the State of New York’s CBED law that covers higher education institutions, could serve as a good case study to judge the claims of both critics and proponents of criminal history screening. Furthermore, a series of events that started in 1975 makes the SUNY System an even stronger case study.

In 1975, Larry Campbell, who was incarcerated in a New York state prison for criminal possession of dangerous drugs, sought to apply to a state college education program known as Search for Education, Eleva-

<sup>49</sup> *Id.*

<sup>50</sup> N.Y. CORRECT. LAW § 750 (Consol. 2015).

<sup>51</sup> See Memorandum from the State Univ. of N.Y. Office of the Vice Chancellor for Educ. Servs. to Presidents (Aug. 14, 1981), <http://system.suny.edu/media/suny/content-assets/documents/academic-affairs/mtp/mtp81-9.pdf> [hereinafter Memorandum].

<sup>52</sup> See *id.* (discussing reasons for creating a new admissions policy).

<sup>53</sup> *History of SUNY*, STATE UNIV. OF N.Y., <http://www.suny.edu/about/history/> (last visited Nov. 22, 2015).

<sup>54</sup> *Id.*

<sup>55</sup> *SUNY Fast Facts*, STATE UNIV. OF N.Y., <http://www.suny.edu/about/fast-facts/> (last visited Nov. 22, 2015).

<sup>56</sup> *IPEDS*, NAT’L CTR. FOR EDUC. STATISTICS, <http://nces.ed.gov/ipeds/datacenter/> (last visited Nov. 22, 2015).

tion and Knowledge (SEEK)<sup>57</sup> at the State University College at Buffalo (SUNY Buffalo), one of the state-run colleges in the SUNY System.<sup>58</sup> At the time, admission criteria for SEEK did not involve an applicant’s prior criminal records or psychological history.<sup>59</sup> While the admission process did include a “Health Report and Physician’s Certificate” form, the college did not use the form to evaluate an applicant.<sup>60</sup> As a result, the school officials likely never had a chance to evaluate Campbell’s potential security threat.<sup>61</sup> Campbell eventually enrolled at SUNY Buffalo during the spring semester of 1976, and he befriended several other people, including Eiseman, a female student, Tunney, a male student, and Schostick, a male nonstudent.<sup>62</sup> Then, on June 9, 1976, Campbell raped and murdered Eiseman, murdered Tunney, and inflicted serious injuries on Schostick.<sup>63</sup> After the incident, Campbell’s estate and Schostick sued the State of New York on various grounds, including SUNY Buffalo’s breach of statutory duty in admitting a potentially dangerous person like Campbell.<sup>64</sup> The Court of Appeals of New York ruled that the college did not breach any statutory duty when it did not apply an additional admission criteria for ex-felons because it followed admission guidelines created by the SEEK statute itself.<sup>65</sup> The Court also ruled that SUNY Buffalo did not have a duty of heightened inquiry when it admitted an “ex-felon like Campbell as part of a special program” because at the time of admission Campbell was not an incarcerated felon and had finished his sentence.<sup>66</sup>

Ultimately, the Court found that SUNY did nothing wrong in this incident,<sup>67</sup> but that did not stop SUNY from changing its admissions policy.<sup>68</sup> In 1981, SUNY adopted a new ex-offender admissions policy in light of “several violent crimes committed by ex-offenders . . . on several campuses.”<sup>69</sup> Based on the unreasonable risk exception in section 753 of

---

<sup>57</sup> The State of New York created SEEK program, now known as Educational Opportunity Program within the SUNY System, in the late 1960s to aid students who have limited academic and financial resources. See *Educational Opportunity Program History*, STATE UNIV. OF N. Y., <https://www.suny.edu/attend/academics/eop/program-history/> (last visited Apr. 24, 2016).

<sup>58</sup> *Eiseman v. State*, 511 N.E.2d 1128, 1131 (N.Y. 1987).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> The Court did not explicitly entertain the issue of whether the college evaluated his risk, because it ruled that the college did not have a duty to evaluate his risk as a matter of law. See *id.* at 1136.

<sup>62</sup> *Id.* at 1132.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 1136.

<sup>66</sup> *Id.* at 1136–37.

<sup>67</sup> *Id.*

<sup>68</sup> See Memorandum, *supra* note 51, at 1.

<sup>69</sup> *Id.*

the Correction Law, the SUNY System decided to mandate its campuses to evaluate a set of criminal background information to screen ex-offender applicants.<sup>70</sup> However, the SUNY System lacks a central admissions office where it can examine applications received by individual campuses. Instead of a central admission office, a standing committee in individual campuses ultimately decides how it asks for criminal records and how it uses the acquired information.<sup>71</sup> Consequentially, many campuses in the SUNY System have been asking for an applicant's criminal records during the application process in different ways.<sup>72</sup>

This varying degree of admission practices by numerous SUNY campuses recently led to a series of heavy criticisms against practices of individual campuses and the SUNY System's policy: mainly, two studies published by the CCA, the main opponent of the college admissions policy that uses criminal records, almost exclusively focus on the SUNY System and criticized its admission policies regarding ex-offenders.<sup>73</sup> The story of Vivian Nixon, which is featured in the CCA's studies, is a good illustration of problems associated with the current admissions policy of SUNY.<sup>74</sup>

#### D. *The Story of Vivian Nixon and Other Ex-Offender Applicants*

Vivian Nixon is currently an executive director of College and Community Fellowship, an organization devoted to helping formerly incarcerated women in pursuit of higher education.<sup>75</sup> Vivian also serves on the board of directors of the Fortune Society, a not-for-profit organization that focuses primarily on helping ex-offenders become "positive, contributing members of society."<sup>76</sup> She has received many awards for

---

<sup>70</sup> See *id.* at 2–3; see also STATE UNIV. OF N.Y., *Admissions of Persons with Prior Felony Convictions or Disciplinary Dismissals* (May 11, 2001), [http://www.suny.edu/sunypp/documents.cfm?doc\\_id=342](http://www.suny.edu/sunypp/documents.cfm?doc_id=342) ("The University-wide application for undergraduate admission to campuses of the University contains a question regarding whether the applicant previously has been convicted of a felony or dismissal from an institution of higher education for disciplinary reasons. It is the policy of the University that such a question be included in applications for both undergraduate and graduate admissions, full-time and part-time, by campuses processing local applications or not participating in the Application Service Center (ASC).").

<sup>71</sup> STATE UNIV. OF N.Y., *supra* note 70 ("Campuses must utilize a standing committee to review applicants who affirm that they have either been convicted of a felony or been dismissed from a college for disciplinary reasons.").

<sup>72</sup> See *infra* Part IV.

<sup>73</sup> See generally CCA, *USE OF CRIMINAL HISTORY RECORDS*, *supra* note 8; CCA, *BOXED OUT*, *supra* note 20.

<sup>74</sup> See CCA, *BOXED OUT*, *supra* note 20, at 4.

<sup>75</sup> *Who We Are*, COLL. & CMTY. FELLOWSHIP, <http://collegeandcommunity.org/ccf/who-we-are/> (last visited Jan. 6, 2016).

<sup>76</sup> *Our Approach*, FORTUNE SOC'Y, <http://fortunesociety.org/> (last visited Jan. 6, 2016).

her work and has been continuing her service for the community.<sup>77</sup> However, her journey to this day was not easy.

In 2001, Vivian was released after serving three and one half years in prison for a drug-related felony.<sup>78</sup> Wanting to start her life anew, she applied to SUNY Old Westbury.<sup>79</sup> Like other colleges in the SUNY System following its ex-offender admissions policy,<sup>80</sup> SUNY Old Westbury asked Vivian to disclose any felony conviction and write an essay about her experience associated with the conviction.<sup>81</sup> Despite her compliance with the requests, SUNY Old Westbury denied her application based on her conviction.<sup>82</sup>

After learning about her rejection from SUNY Old Westbury, Vivian wrote a letter explaining her situation to Dr. Calvin Butts, the college’s president.<sup>83</sup> Dr. Butts ultimately overruled the admissions committee’s decision and admitted Vivian, but the offer came too late for her.<sup>84</sup> Wanting to pursue higher education as soon as possible, she had no choice but to re-enroll at Empire State College immediately, another college in the SUNY System, where she was a student before the conviction.<sup>85</sup> At Empire State College, she successfully finished her education and graduated in 2003 with a B.S. degree in Human Services Administration, and began work as a public advocate, which she continues to do.<sup>86</sup>

Based on the experiences of her and other ex-offenders, Vivian argues that criminal history screening “isn’t necessary and only serves to discourage and exclude some of the brightest and potentially most successful contributors to our society from gaining the education and credentials they need to open the doors to careers that will lead to positions of influence and leadership.”<sup>87</sup> To solve this problem, she has been sup-

---

<sup>77</sup> *Vivian Nixon*, N.Y. FOUND., <http://nyf.org/speakers/vivian-nixon/> (last visited Jan. 6, 2016).

<sup>78</sup> Blakinger, *supra* note 5.

<sup>79</sup> CCA, BOXED OUT, *supra* note 20, at 4.

<sup>80</sup> STATE UNIV. OF N.Y., *supra* note 70.

<sup>81</sup> CCA, BOXED OUT, *supra* note 20, at 4.

<sup>82</sup> *See id.*

<sup>83</sup> *Id.*

<sup>84</sup> *See id.* (“Well into her first semester, Vivian received a letter from Dr. Butts informing her that he had overruled the admissions review committee and she was accepted at Old Westbury. However, Vivian declined the offer, as she was already successfully enrolled as a student at Empire State College and also was employed.”).

<sup>85</sup> *See id.* (“With the start of the semester drawing near, Vivian could not wait for a response from Old Westbury and instead decided to re-enroll in Empire State College, where she had been a student prior to her time in prison. As a former student, she was not required to re-apply and thus did not have to disclose her felony conviction.”).

<sup>86</sup> *Reverend Vivian Nixon*, ASCEND: THE ASPEN INST., <http://ascend.aspeninstitute.org/fellows/entry/reverend-vivian-nixon> (last visited Jan. 11, 2016).

<sup>87</sup> CCA, BOXED OUT, *supra* note 20, at 4.

porting a newly proposed law that would remove criminal history screening from the college application process.<sup>88</sup>

### E. *The Proposed Vivian's Law*<sup>89</sup>

To prevent experiences similar to that of Vivian's, advocacy groups in New York are lobbying to pass a proposed law that will prohibit colleges from asking criminal history related questions during the application process.<sup>90</sup> If enacted, this new proposed Vivian's Law, named after Vivian,<sup>91</sup> will change the current admissions policy completely.<sup>92</sup>

Specifically, it would prohibit colleges in New York from making inquiries about arrests that did not result in a criminal conviction or sealed criminal records in any case.<sup>93</sup> In addition, colleges would not be able to inquire or consider any criminal records before they make admissions decisions.<sup>94</sup> Colleges can inquire and use criminal records only after they admit a student for offering supportive counseling and other services and for determining eligibility for student activities and other "aspects of campus life."<sup>95</sup>

The memo attached to the proposed bill indicates that one of the main goals of the bill is reducing recidivism of ex-offenders by providing wider educational opportunities to them.<sup>96</sup> Indeed, many studies have shown a correlation between education and the risk of recidivism. A research conducted by Federal Bureau of Prisons concluded that participation in prison education programs reduces the likelihood of

<sup>88</sup> See Editorial, *During and After Incarceration, Education Changes Lives*, N.Y. TIMES, Dec. 18, 2012, <http://www.nytimes.com/roomfordebate/2012/12/18/prison-could-be-productive/during-and-after-incarceration-education-changes-lives>.

<sup>89</sup> A.03363, 2015–16 State Assemb., Reg. Sess. (N.Y. 2015).

<sup>90</sup> See *Tap & Ban The Box*, EDUC. FROM THE INSIDE OUT COAL., <http://www.wordpress.eiocoalition.org/tappell-working-group/> (last visited Jan. 12, 2016); *ESCEA Letter Writing Campaign*, SUNY EMPIRE STATE COLLEGE EDUCATION FOR ALL, <https://esced4all.files.wordpress.com/2014/10/escea-letter-writing-campaign.pdf> (last visited Jan. 12, 2016).

<sup>91</sup> A.03363 Memo, 2015–2016 Assemb., Reg. Sess. (N.Y. 2015), [http://assembly.state.ny.us/leg/?default\\_fld=&bn=A03363&term=2015&Memo=Y](http://assembly.state.ny.us/leg/?default_fld=&bn=A03363&term=2015&Memo=Y) ("Vivian's Law, also known as The Fair Access to Education Act, is named for Vivian Nixon who experienced the devastating impact of criminal history screening in college admissions.").

<sup>92</sup> See *id.* ("The Correction Law would be amended by adding new provisions that explicitly prohibit colleges from asking about or considering applicants' past arrests and/or convictions during the application and admission decision-making process. In addition, a new subdivision would be added to section 296 of the Executive (Human Rights) Law to make it an unlawful discriminatory practice for colleges to ask about or consider prior criminal justice involvement during the application and admission decision-making process.").

<sup>93</sup> A.03363.

<sup>94</sup> *Id.* ("Colleges may not make any inquiry or consider information about an individual's past criminal conviction or convictions at any time during the application and admissions decision-making process.").

<sup>95</sup> *Id.*

<sup>96</sup> A.03363 Memo.

recidivating.<sup>97</sup> Another study focused on data from the New York State Department of Correctional Services indicates that ex-offenders who gained some type of college education in prison are much less likely to return to prison.<sup>98</sup> Based on similar data, one student note even argued that denying access to higher education could encourage recidivism.<sup>99</sup>

Another main goal of the proposed bill is reducing the current admissions policy’s disparate impact on minorities.<sup>100</sup> For the past few decades, minorities, especially black men, disproportionately outnumbered the white population in terms of incarceration rates.<sup>101</sup> While many scholars and organizations provided several possible explanations for this unfortunate trend,<sup>102</sup> the reason behind it is not relevant in this Note. The important point is that criminal history screening could unintentionally disadvantage minorities because of the disproportional minority ex-offender population.<sup>103</sup>

Although the two main goals indicated in the bill’s memo are well explained,<sup>104</sup> the memo does not provide any explanation for prohibiting colleges from any use of criminal history for security purposes except in a few limited settings. The proposed law allows colleges to “make inquiries about and consider information about the individual’s past crimi-

<sup>97</sup> See MILES D. HARER, FED. BUREAU OF PRISONS, PRISON EDUCATION PROGRAM PARTICIPATION AND RECIDIVISM: A TEST OF THE NORMALIZATION HYPOTHESIS 16 (1995), [https://www.bop.gov/resources/research\\_projects/published\\_reports/recidivism/orepredprg.pdf](https://www.bop.gov/resources/research_projects/published_reports/recidivism/orepredprg.pdf).

<sup>98</sup> See MICHELLE FINE ET AL., CHANGING MINDS: THE IMPACT OF COLLEGE IN A MAXIMUM-SECURITY PRISON 17 (Sept. 2001), [http://www.prisonpolicy.org/scans/changing\\_minds.pdf](http://www.prisonpolicy.org/scans/changing_minds.pdf). (noting that, according to the data prepared by the New York State Department of Correctional Services, ex-offenders who received some college credits or a degree while in prison returned to prison at the rate of 7.7%, while ex-offenders who did not receive any college education in prison returned at the rate of 29.9%).

<sup>99</sup> J. M. Kirby, Note, *Graham, Miller, & The Right to Hope*, 15 CUNY L. REV. 149, 161–64 (2011).

<sup>100</sup> A.03363 Memo, 2015–16 Assemb., Reg. Sess. (N.Y. 2015), [http://assembly.state.ny.us/leg/?default\\_fld=&bn=A03363&term=2015&Memo=Y](http://assembly.state.ny.us/leg/?default_fld=&bn=A03363&term=2015&Memo=Y) (“Moreover, because of the well-documented existence of racial disparities in our criminal justice system, screening applicants for past criminal justice involvement has a disparate impact on applicants of color.”).

<sup>101</sup> See generally *Jail Inmate Characteristics*, BUREAU OF JUSTICE STATISTICS, <http://www.bjs.gov/index.cfm?ty=TP&tid=122> (last visited Jan. 16, 2016) (noting a series of publications on correctional populations in the United States, including those surveying race of inmates); see also Bruce Drake, *Incarceration Gap Widens Between Whites and Blacks*, PEW RESEARCH CTR. (Sept. 6, 2013), <http://www.pewresearch.org/fact-tank/2013/09/06/incarceration-gap-between-whites-and-blacks-widens/>.

<sup>102</sup> See, e.g., Lauren J. Krivo & Ruth D. Peterson, *Extremely Disadvantaged Neighborhoods and Urban Crime*, 75 SOC. FORCES 619 (1996) (linking socioeconomic disadvantages with crime); CTR. FOR CONST. RTS., *Racial Disparity in NYPD Stops-and-Frisks* (2009), [https://ccrjustice.org/sites/default/files/assets/Report-CCR-NYPD-Stop-and-Frisk\\_3.pdf](https://ccrjustice.org/sites/default/files/assets/Report-CCR-NYPD-Stop-and-Frisk_3.pdf) (arguing that evidence supports claims against the New York City Police Department on discriminatory stop-and-frisk practices).

<sup>103</sup> See CCA, BOXED OUT, *supra* note 20, at 42.

<sup>104</sup> See A.03363 Memo, 2015–16 Assemb., Reg. Sess. (N.Y. 2015), [http://assembly.state.ny.us/leg/?default\\_fld=&bn=A03363&term=2015&Memo=Y](http://assembly.state.ny.us/leg/?default_fld=&bn=A03363&term=2015&Memo=Y).

nal conviction history for the purpose of making decisions about participation in activities and aspects of campus life associated with the individual's status as a student, including but not limited to housing" only after the individual in question has been admitted.<sup>105</sup> The kind of information a college can consider under this provision<sup>106</sup> indicates that the legislative intent is protecting certain campus communities from an ex-offender in a few limited settings where he or she could be dangerous. Nonetheless, the attached memo or relevant legislative history does not explain why the proposed bill limits the protection to only a few limited settings.<sup>107</sup>

While the inclusion of this exception is certainly better than the outright ban on the use of criminal history, the lack of legitimate justification for this broad prohibition as written in the proposed bill is troublesome, especially considering its classification of criminal history screening as discriminatory practice.<sup>108</sup> Granted, no evidence at this point indicates whether ex-offender students are more, less, or equally likely to commit a crime compared to other students.<sup>109</sup> In other words, no empirical evidence proves that criminal history screening leads to a safer campus environment.<sup>110</sup> This is one reason why advocates like the CCA support the ban on criminal history screening.<sup>111</sup>

## II. RELATIONSHIP BETWEEN CRIMINAL HISTORY SCREENING AND HEIGHTENED CAMPUS SAFETY

The CCA argues that criminal history screening does not serve the goal of making campuses safer because ex-offenders do not present significant security threats to colleges.<sup>112</sup> To support this argument, the CCA cites an unpublished research study that shows no correlation be-

---

<sup>105</sup> A.03363, 2015–16 Assemb., Reg. Sess. (N.Y. 2015), [http://assembly.state.ny.us/leg/?default\\_fld=&bn=A03363&term=2015&Memo=Y](http://assembly.state.ny.us/leg/?default_fld=&bn=A03363&term=2015&Memo=Y).

<sup>106</sup> *Id.* ("This individualized process . . . must include . . . (iii) the nature of the conviction or convictions and whether it bears a direct relationship to the activity or participation in aspects of campus life at issue; and (iv) any evidence of rehabilitation or good conduct produced by the accepted individual.").

<sup>107</sup> *See generally* A.03363 Memo, 2015–16 Assemb., Reg. Sess. (N.Y. 2015).

<sup>108</sup> *See* A.03363, 2015–16 Assemb., Reg. Sess. (N.Y. 2015), [http://assembly.state.ny.us/leg/?default\\_fld=&bn=A03363&term=2015&Memo=Y](http://assembly.state.ny.us/leg/?default_fld=&bn=A03363&term=2015&Memo=Y) ("It shall be an unlawful discriminatory practice for any college, as defined in subdivision one of section seven hundred seventy of the correction law, to make any inquiry into or consider information about an individual's past arrest or conviction history at any time during the application and admissions decision-making process or to rescind an offer of admission based upon information about an individual's arrest or conviction that occurred prior to admission.").

<sup>109</sup> However, statistics show that some ex-offenders who received higher education do go back to prison, albeit at the much less rate than those who did not. *See supra* note 98.

<sup>110</sup> *See* CCA, USE OF CRIMINAL HISTORY RECORDS, *supra* note 8, at 3.

<sup>111</sup> *See id.*

<sup>112</sup> *See* CCA, BOXED OUT, *supra* note 20, at 37–38.

tween criminal history screening and improved campus safety.<sup>113</sup> However, the study merely shows "no statistically significant difference in the rate of campus crime between institutions of higher education that explore undergraduate applicants' criminal history backgrounds and those that do not."<sup>114</sup> The critics fail to recognize that this lack of empirical evidence supporting the relationship between criminal history screening and heightened campus safety does not prove that the relationship does not exist. In other words, they assume without providing strong evidence that the admission of ex-offenders does not create more danger.<sup>115</sup> As in the cases of UNCW and SUNY Buffalo, some ex-offenders who enroll at a university without being screened for criminal history recidivate and commit a crime.<sup>116</sup> Notably, both UNCW and SUNY Buffalo adopted some form of criminal history screening after such crimes were committed.<sup>117</sup> The study does not explore the possibility that such measures taken by colleges is the factor that keeps the rate at the same level as other colleges without criminal history screening.<sup>118</sup> In other words, the study does not consider that crime rates may otherwise be higher at UNCW and SUNY Buffalo than it is currently if UNCW and SUNY Buffalo did not have criminal history screening. Furthermore, critics themselves acknowledge that this study is "the only study that has investigated the correlation between criminal history screening and improved campus safety."<sup>119</sup>

In addition to citing a single unpublished study, the CCA examines statistics related to campus crimes in its most recent study and argues that colleges are safe.<sup>120</sup> It compares the number of reported murders on campuses with the number of reported murders among the general population.<sup>121</sup> According to the statistics used in the study, only 0.1 murders are committed per 100,000 students, while about 5 murders are commit-

---

<sup>113</sup> Malgorzata J.V. Olszewska, Undergraduate Admission Application as a Campus Crime Mitigation Measure: Disclosure of Applicants' Disciplinary Background Information and Its Relationship to Campus Crime (2007) (unpublished Ed.D. dissertation, East Carolina University) (on file with Joyner Library, East Carolina University).

<sup>114</sup> CCA, *BOXED OUT*, *supra* note 20, at 37.

<sup>115</sup> See CCA, *USE OF CRIMINAL HISTORY RECORDS*, *supra* note 8; CCA, *BOXED OUT*, *supra* note 20.

<sup>116</sup> See *Eiseman v. State*, 511 N.E.2d 1128 (N.Y. 1987); *CAMPUS SAFETY*, *supra* note 9.

<sup>117</sup> See Epstein, *supra* note 14; Memorandum from the Office of the Vice Chancellor for Educ. Servs. to Presidents, *supra* note 51, at 1.

<sup>118</sup> This Note is not arguing whether ex-offender students are more, less, or equally likely to commit a crime compared to other students. This Note merely points out that no evidence currently supports any of the positions regarding the relationship between criminal history screening and the heightened campus security.

<sup>119</sup> See CCA, *USE OF CRIMINAL HISTORY RECORDS*, *supra* note 8, at 3.

<sup>120</sup> See CCA, *BOXED OUT*, *supra* note 20, at 37.

<sup>121</sup> See *id.*



ted per 100,000 Americans in general.<sup>122</sup> This indeed is a remarkable rate; in general, college students are safer than the general population, as the Department of Education concluded.<sup>123</sup>

Nonetheless, this finding does not directly support the CCA's argument that criminal history screening is unnecessary in light of the low rates of crime.<sup>124</sup> As an example, the CCA focuses on recent homicides committed on SUNY campuses and argues that those without criminal records committed the homicides.<sup>125</sup> While this example could support the CCA's findings, it also could support the previously mentioned possibility that criminal history screening is what has been preventing more homicides by ex-offenders. Currently, no one can predict with certainty what would happen with the campus crime rates if colleges were to cease criminal history screening during the admissions process.

In light of the lack of clear evidence on the relationship between criminal history screening and heightened campus security, the public should seek the best way to compromise. For critics like the CCA, the goal is reducing recidivism by providing better access to higher education to ex-offenders.<sup>126</sup> For colleges like those in the SUNY System, keeping campuses safe is an important goal.<sup>127</sup> Without strong evidence on correlation, colleges cannot simply ignore all past crimes committed by all ex-offenders who enrolled to their programs.<sup>128</sup> Examining jurisprudence on academic freedom and campus safety suggests that the compromise should involve at least some forms of criminal history screening.

In New York, the state law does not impose a duty on colleges to conduct criminal history screening or restrict ex-offenders for the safety of other students.<sup>129</sup> In fact, the New York Court of Appeals has indicated that imposing such duties are against the public policies of promoting the reintegration of ex-offenders.<sup>130</sup> Nonetheless, the New York Court of Appeals clarifies that the ruling is simply on "whether the College had a legal duty in the circumstances," not "whether a college might or even should investigate and supervise its students differently."<sup>131</sup> It

<sup>122</sup> See *id.*

<sup>123</sup> OFFICE OF POSTSECONDARY EDUC., THE INCIDENCE OF CRIME ON THE CAMPUSES OF U.S. POSTSECONDARY EDUCATION INSTITUTIONS at 5 (2001), <https://www2.ed.gov/finaid/prof/resources/finresp/ReportToCongress.pdf>.

<sup>124</sup> See CCA, BOXED OUT, *supra* note 20, at 37–38.

<sup>125</sup> See *id.*

<sup>126</sup> CCA, BOXED OUT, *supra* note 20, at 43.

<sup>127</sup> See Jaschik, *supra* note 15.

<sup>128</sup> See Memorandum from the Office of the Vice Chancellor for Educ. Servs. to Presidents, *supra* note 51, at 1 (discussing the crimes committed by admitted ex-offenders and a need for solutions).

<sup>129</sup> See *Eiseman v. State*, 511 N.E.2d 1128, 1137 (N.Y. 1987).

<sup>130</sup> See *id.* (analyzing the legislative intent to argue that imposing such duties on campuses would burden potential ex-offender applicants).

<sup>131</sup> *Id.*

ultimately gives the college in question the power to make a judgment on admitting an ex-offender.<sup>132</sup>

Furthermore, federal courts in the United States historically have given colleges more freedom concerning their operation. On the issue of the college admission process, Justice Powell wrote in the Supreme Court opinion that “[t]he freedom of a university to make its own judgments as to education includes the selection of its student body.”<sup>133</sup> This academic freedom does not include the freedom to discriminate,<sup>134</sup> but courts still give a significant benefit of the doubt to universities when judging a case alleging discrimination.<sup>135</sup> While the current admissions policy regarding an applicant’s criminal history could disproportionately affect minorities, the policy involves using criminal history to classify applicants, not racial classifications.<sup>136</sup> As a result, a college’s academic freedom to select its student body should not be invaded when no clear evidence indicates that its admissions policy directly injures potential applicants.

With the lack of clear evidence regarding the current admissions policy, colleges should be able to use some level of criminal history screening that is necessary to identify potential security risks. The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (“Clery Act”)<sup>137</sup> and a history of movement toward a safer campus environment well reflects the public’s expectation to keep colleges safe.<sup>138</sup> Consequently, preventing any potential security threat, however insignificant, is extremely important to college campuses.<sup>139</sup> Even the CCA agrees that when “there is something about the person’s criminal record that gives rise to a concern that he or she will engage in criminal activity as a student, then it is appropriate to refuse or defer admis-

<sup>132</sup> See *id.*

<sup>133</sup> *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978).

<sup>134</sup> For example, the Supreme Court declared the University of Michigan’s admissions policy unconstitutional when the policy used racial classification improperly. See *Gratz v. Bollinger*, 539 U.S. 244 (2003) (invalidating University of Michigan’s admissions policy that gave minority applicants automatic points).

<sup>135</sup> See, e.g., *Lieberman v. Gant*, 630 F.2d 60, 67 (2d Cir. 1980) (upholding a university’s decision to refuse a tenure of a female professor despite the allegation of unlawful discrimination).

<sup>136</sup> See *supra* Part I.

<sup>137</sup> 20 U.S.C. § 1092 (2012).

<sup>138</sup> See generally U.S. Dep’t of Justice, *Crime in Schools and Colleges: A Study of Offenders and Arrestees Reported via National Incident-Based Reporting System Data* (2007), <https://www.fbi.gov/about-us/cjis/ucr/nibrs/crime-in-schools-and-colleges-pdf> (discussing the background behind Clery Act and a general view on crime in educational institutions); see also Lee Gardner, *25 Years Later, Has Clery Made Campuses Safer?*, CHRON. HIGHER EDUC., Mar. 9, 2015, <http://chronicle.com/article/25-Years-Later-Has-Clery/228305> (calling for more solutions than Clery Act alone to improve campus safety).

<sup>139</sup> See Jaschik, *supra* note 15.

sion.”<sup>140</sup> Since colleges cannot make such assessments without any information, prohibiting them from evaluating an applicant’s criminal history except for a few limited purposes would greatly undermine this significant goal. Alison Kiss, the executive director of the Clery Center for Security On Campus, summarized this problem well: “If we are going to hold campuses to a standard to contribute to a safer environment for students then they should be permitted to ask that question.”<sup>141</sup>

Asking only about felony convictions is perhaps the best way to meet the goal of minimizing security risks while providing higher education opportunities to ex-offenders. Already many colleges are asking only about felony convictions on their application forms.<sup>142</sup> The CCA recommends this practice as one of the possible solutions to the problem in its previous report.<sup>143</sup> Asking about felony convictions is also important for the benefit of the public, as it can prevent certain ex-offenders from receiving inappropriate education.<sup>144</sup> For example, colleges with a child development program could exclude ex-felons previously convicted of child-pornography related charges from their program. At the same time, many ex-offenders without a felony conviction would have no additional obstacles during their application process since the application would not require them to disclose their criminal history. Furthermore, even for ex-offenders with felony convictions, disclosing their criminal history does not deprive them of their educational opportunities outright, because criminal history screening neither automatically rules out ex-offenders from admission nor hinders their chance of admission.

### III. CRIMINAL HISTORY SCREENING AND THE CHANCE OF ADMISSION

According to the CCA’s study, one of the main reasons why ex-offenders do not receive admission to SUNY is that they actually do not finish their applications when they learn that disclosure of criminal history is required and believe that colleges will use it against them.<sup>145</sup> For example, Jay Marshall, an applicant with a felony conviction, decided not to submit his application when he learned that he had to disclose

---

<sup>140</sup> CCA, *USE OF CRIMINAL HISTORY RECORDS*, *supra* note 8, at 37.

<sup>141</sup> Jaschik, *supra* note 15.

<sup>142</sup> See STATE UNIV. OF N.Y., SUNY ONLINE UNDERGRADUATE APPLICATION INSTRUCTIONS at 13 (2015), <http://www.suny.edu/appinstructions> (the SUNY System, for example, with its ApplySUNY application, already only asks about an adult felony conviction; however, not all campuses in the SUNY System use ApplySUNY).

<sup>143</sup> See CCA, *USE OF CRIMINAL HISTORY RECORDS*, *supra* note 8, at 34 (arguing that misdemeanors mostly include non-violent acts and do not have any impact on public safety).

<sup>144</sup> See *Student Criminal Background Checks*, NAT’L ASS’N OF COLL. & UNIV. ATT’YS (Mar. 10, 2006), <http://www.nacua.org/nacualert/memberversion/StudentCrimBckgndChks.asp>.

<sup>145</sup> See CCA, *BOXED OUT*, *supra* note 20, at 7–9.

information regarding the conviction.<sup>146</sup> He feared that his conviction that happened twenty-eight years ago would eventually “come back to haunt him” throughout and after the application process.<sup>147</sup>

However, colleges in general will not use an ex-offender applicant’s criminal history against him or her. In terms of the rejection rates, the CCA could not find strong evidence that criminal history screening leads to higher rejection rates.<sup>148</sup> In fact, the CCA found that six of the analyzed campuses did not reject a single ex-offender applicant who disclosed his or her felony conviction.<sup>149</sup>

In addition, at UNCW, 92% of applicants who undergo criminal background checks are cleared without further examination.<sup>150</sup> These findings clearly suggest that the review of each applicant, including ex-offenders, is holistic, as one dean of admissions suggested.<sup>151</sup>

In other words, the problem is with the attrition rates, not the rejection rates. The CCA correctly identifies that “it is the questions about criminal history records, rather than rejection by colleges, that are driving would-be college students from their goal of getting a college degree.”<sup>152</sup> Among the analyzed SUNY campuses, the number of applicants eliminated by application attrition was fifteen times higher than the number of applicants rejected by admissions review committees.<sup>153</sup> The CCA suggests that factors like a fear of automatic denial, embarrassment, and biases possibly led to the high attrition rate.<sup>154</sup>

Yet, the complete ban of criminal history screening suggested by the CCA in its newest study,<sup>155</sup> which the proposed New York bill incorporated,<sup>156</sup> is not the best solution to meet the goal of making campuses safer while creating more education opportunities. It will certainly help to reduce the attrition rates,<sup>157</sup> but as discussed previously, a complete

<sup>146</sup> See *id.* at 11.

<sup>147</sup> *Id.*

<sup>148</sup> See *id.* at 12–13.

<sup>149</sup> *Id.* at 12.

<sup>150</sup> See Epstein, *supra* note 14.

<sup>151</sup> See Jaschik, *supra* note 15 (noting Princeton University’s Dean of Admissions’ clarification that an applicant’s criminal history is just one of the factors the admission committee considers).

<sup>152</sup> CCA, *BOXED OUT*, *supra* note 20, at 13.

<sup>153</sup> See *id.*

<sup>154</sup> See *id.* at 16–20 (discussing how the criminal history question could discourage an ex-offender applicant from finishing the application).

<sup>155</sup> See *id.* at 51 (recommending all colleges refrain from including a question on criminal history).

<sup>156</sup> A. 03363, 2015–16 Assemb., Reg. Sess. (N.Y. 2015) (“Colleges may not make any inquiry or consider information about an individual’s past criminal conviction or convictions at any time during the application and admissions decision-making process.”).

<sup>157</sup> The complete ban of criminal history screening during the application process will reduce the attrition rates because applicants like Jay Marshall will no longer fear that colleges will use their criminal records against them. See *supra* Part III.

prohibition on criminal history screening could potentially compromise campus safety.<sup>158</sup> Instead, colleges could reduce the attrition rates by other means.

One possible example of such means is what University of Washington did with its application form. Concerning questions regarding criminal history, it notates:

Answers to these questions will be used primarily to decide what support students may need to succeed at the UW. Please let us know if there are any special arrangements or restrictions we need to know about in order to accommodate your attendance.<sup>159</sup>

While this notation does not rule out the possibility of using the provided information for security purposes, it could potentially help someone like Jay Marshall to submit his application without any fear.<sup>160</sup> In addition, using the provided information to help individual ex-offender students can further meet the goal of providing higher education opportunities to ex-offenders while minimizing campus security risks because they might continue to face challenges even when they successfully enroll at their desired college.<sup>161</sup>

Colleges could also do a better job at explaining how they use the provided criminal history when making an admission decision. Currently, the way in which colleges explain their ex-offender admissions policy varies from a relatively complex statement to a list of specific crimes that could trigger rejection.<sup>162</sup> For example, the SUNY System has a fairly long but detailed “frequently asked questions” webpage explaining what happens with an applicant who discloses previous felony convictions.<sup>163</sup> In addition to clarifying types of restrictions or lack

<sup>158</sup> See *supra* Part II.

<sup>159</sup> *Application for Freshman Admission & Scholarships*, UNIV. OF WASH. A10 (2015), [https://admit.washington.edu/sites/default/files/UW2015\\_FroshApp.pdf](https://admit.washington.edu/sites/default/files/UW2015_FroshApp.pdf).

<sup>160</sup> See CCA, *BOXED OUT*, *supra* note 20, at 11 (noting the story of Jay Marshall, who feared that his felony conviction disclosed during the application process would cause him embarrassment).

<sup>161</sup> For example, one case shows that a successful student who graduated with honors and admitted to an MBA program had to face continuous disciplinary probation reviews every semester throughout his undergraduate study because of his criminal record. See CCA, *USE OF CRIMINAL HISTORY RECORDS*, *supra* note 8, at 2.

<sup>162</sup> *Compare Admissions Policy for Applicants with Criminal History*, UNIV. OF COLO. BOULDER (2013), <http://www.colorado.edu/policies/admissions-policy-applicants-criminal-history> (explaining its ex-offender admissions policy with no clear application or example), *with Applying to UF with a Previous Conduct or Criminal Record*, UNIV. OF FLA., <https://www.dso.ufl.edu/sccr/record-reviews/admission-reviews/> (last visited Jan. 16, 2016) (listing possible convictions that could eventually lead to the denial of admission).

<sup>163</sup> See *Frequently Asked Questions Regarding Applicants with Previous Felony Convictions*, STATE UNIV. OF N.Y., <http://system.suny.edu/counsel/admissions-felony/> (last visited Jan. 16, 2016).

thereof in certain settings,<sup>164</sup> the webpage also clarifies what individual campuses cannot do.<sup>165</sup> While this webpage effectively explains the SUNY System’s policy, stronger assurance that having criminal records does not lead to automatic denial, combined with a direct link to the webpage on the SUNY System’s application form, could reduce the attrition rate further. This method might not be as effective as the proposed complete prohibition on criminal history screening, but it balances the interests in increasing campus security and lowering the attrition rate.

Furthermore, colleges could continue to develop fair and transparent admissions practices to lower the attrition rate. In the employment setting, employers are less likely to hire ex-offenders because of informal biases.<sup>166</sup> Some critics of the current admissions policy warn that similar informal biases exist in the college admissions process.<sup>167</sup> For instance, an admissions officer might make an uninformed decision or use inaccurate facts when reviewing an application, because he or she may not understand the complex system of criminal justice.<sup>168</sup> While little evidence shows that such informal biases hinder an ex-offender’s chance of admissions,<sup>169</sup> many ex-offenders have the perception of possible informal biases.<sup>170</sup> Colleges could try to minimize it by developing a systemized

---

<sup>164</sup> For example, it clarifies that an individual will not be denied an admission to a specific academic program that leads to a profession that requires licensure. *See id.* This could be helpful for those who fear the possibility of not being eligible for a specific license leading to rejection from the related academic program.

<sup>165</sup> Based on the choice of words, the originally intended reader of this website is probably admissions officers from individual campuses. *See id.*

<sup>166</sup> *See* Timothy Williams & Tanzina Vega, *A Plan to Cut Costs and Crime: End Hurdle to Job After Prison*, N.Y. TIMES, Oct. 23, 2014, <http://www.nytimes.com/2014/10/24/us/a-plan-to-cut-costs-and-crime-curb-bias-against-ex-convicts.html>; Jonathan Blanks, *Our Criminal Justice System Is Making It Really Hard for People to Find Jobs*, WASH. POST, Sept. 30, 2014, available at <https://www.washingtonpost.com/posteverything/wp/2014/09/30/our-criminal-justice-system-is-making-it-really-hard-for-the-poor-to-find-jobs/>.

<sup>167</sup> *See* Marsha Weissman, *The Bias of Background Checks*, INSIDE HIGHER ED (Jan. 20, 2011), [https://www.insidehighered.com/views/2011/01/20/weissman\\_urges\\_colleges\\_not\\_to\\_do\\_criminal\\_background\\_checks\\_on\\_student\\_applicants](https://www.insidehighered.com/views/2011/01/20/weissman_urges_colleges_not_to_do_criminal_background_checks_on_student_applicants) (arguing that a major complication in interpreting criminal records could lead to an arbitrary admissions decision).

<sup>168</sup> For example, two students from different states could have been convicted of the same crime as a juvenile, but their records might be different because a juvenile criminal conviction is not permanent in some states. An admissions officer might not know the difference and reject an applicant from one state based on a criminal conviction that would not have been in his or her criminal records in another state. *See id.* (using an example of a difference between juvenile and adult criminal records to illustrate a possible confusion over an applicant’s criminal history).

<sup>169</sup> *See* CCA, *BOXED OUT*, *supra* note 20, at 12–13 (finding no significant reduction in the chance of admission when an ex-offender applicant discloses his or her criminal history).

<sup>170</sup> For example, Alfreda in one of CCA’s example cases did not apply to many schools because she “did not have the financial resources to pay application fees to schools she believed would automatically reject her.” CCA, *USE OF CRIMINAL HISTORY RECORDS*, *supra* note 8, at 11; *see also* CCA, *BOXED OUT*, *supra* note 20, at 18 (“I was shocked to see the criminal history box on a college application. I had seen it on employment applications. My perception

assessment process that utilizes multiple factors when reviewing an ex-offender application.<sup>171</sup> This assessment process should be well written and transparent, so ex-offender applicants can understand the process and do not fear informal biases.<sup>172</sup> In addition, utilizing admissions officers who can make an informed decision based on this process would certainly help.<sup>173</sup>

#### IV. BURDENSOME ADMISSIONS PROCEDURES<sup>174</sup> THAT REQUIRE MORE ATTENTION

Reducing the high attrition rate by the above means, however, is not the only balanced solution that minimizes security risks while providing higher education opportunities to ex-offenders. Colleges can also focus on the solution of making admissions procedures less burdensome. Even when an ex-offender applicant understands the process and overcomes the fear associated with disclosing his or her criminal history, the admissions procedure of some colleges can still overwhelm the applicant.<sup>175</sup> In other words, making the admissions procedure less burdensome for ex-offenders is necessary to provide ex-offenders better access to higher education, if we are to continue criminal history screening.<sup>176</sup> Additionally, making admissions procedures less burdensome is a far more practical solution for colleges to adopt because clear examples show what the problems are.

SUNY colleges, for example, have different admissions procedures for ex-offenders, and some of these procedures are not particularly relevant to campus safety and could be overly burdensome.<sup>177</sup> One such procedure is asking for all prior convictions, as it could unnecessarily discourage an ex-offender from finishing the application even when he or she likely poses no security threat.<sup>178</sup> Jay Marshall, for instance, did not

---

was that whenever I filled out an application with the box on it, I didn't get the job. To me, it seemed like a tool for exclusion.”).

<sup>171</sup> CCA, USE OF CRIMINAL HISTORY RECORDS, *supra* note 8, at 37 (suggesting a systemized assessment process with important factors to consider).

<sup>172</sup> *See id.* at 33 (“A written policy will also make the process more transparent and will give notice to prospective students so that they are aware of what will be required to gain admission to the school.”).

<sup>173</sup> *See id.* at 36 (suggesting that a group of admissions officer with a broad range of expertise would help making well-informed and unbiased decisions).

<sup>174</sup> In this memo, “admissions procedures” refer to a set of procedures an applicant undergoes, such as collection and submission of his or her criminal records, which may be part of the “admission process.”

<sup>175</sup> The experience of Adrien Cadwallader shows how the procedure can easily overwhelm an ex-offender applicant. CCA, BOXED OUT, *supra* note 20, at 21–22. In his case, he was required to provide a large amount of information he could not easily access. *See id.*

<sup>176</sup> Which we should, as discussed in *supra* Part II.

<sup>177</sup> *See* CCA, BOXED OUT, *supra* note 20, at 21.

<sup>178</sup> *See id.* at 27.

finish his application to Empire State College, where he worked part-time, because he feared that his colleagues at the college might discover his record of a felony conviction that happened twenty-eight years ago.<sup>179</sup> In most cases, a single conviction that happened a long time ago is probably irrelevant to campus safety. In addition, some SUNY colleges require information that is difficult, redundant, costly, or impossible to acquire.<sup>180</sup> For example, when Adrien Cadwallader applied to SUNY New Paltz, the college directed him to obtain reports from the administrator and the psychologist at the prison he was formerly incarcerated, but the reports were impractical to access as no records were available from the prison.<sup>181</sup>

Admittedly, the SUNY System has been making changes in its admissions policy to make the procedures less burdensome. One heavily criticized procedure is that some SUNY colleges requiring ex-offenders to wait a certain amount of time after they are released from incarceration before submitting an application.<sup>182</sup> The SUNY System now clearly states that its admissions policy do not allow the procedure.<sup>183</sup> Furthermore, the SUNY System presents a plausible explanation for some criticized procedures. Namely, the SUNY System justifies the use of records from the Division of Criminal Justice Services (“DCJS”)<sup>184</sup> because it contains more accurate and detailed information than other forms of criminal background check.<sup>185</sup>

Yet, colleges like those in the SUNY System should continue to make admissions procedures less burdensome, as colleges have more resources than an average ex-offender applicant. The issue surrounding DCJS reports provide an effective illustration. One of the CCA’s criticisms regarding the SUNY System’s use of DCJS reports is that it re-

---

<sup>179</sup> *Id.* at 11.

<sup>180</sup> *See id.* at 23–25 (discussing multiple problems associated with certain types of requested information).

<sup>181</sup> *Id.* at 22.

<sup>182</sup> *Id.* at 28–29.

<sup>183</sup> *Frequently Asked Questions Regarding Applicants with Previous Felony Convictions*, STATE UNIV. OF N.Y., <http://system.suny.edu/counsel/admissions-felony/> (last visited Jan. 16, 2016). Granted, some SUNY colleges still impose a waiting period. *See* CCA, *BOXED OUT*, *supra* note 20, at 28. However, readers should note that most of these colleges are community colleges that are not directly governed by the SUNY System. Each community college is a separate legal entity and a separate board of trustee administers the individual community college, unlike the SUNY System’s state-operated colleges. *See SUNY Governance*, STATE UNIV. OF N.Y., <http://system.suny.edu/academic-affairs/suny-governance/> (last visited Jan. 17, 2015).

<sup>184</sup> CCA criticizes this practice because DCJS reports contain confidential records, though no law bans the SUNY System from using DCJS reports. *See* CCA, *BOXED OUT*, *supra* note 20, at 24–25.

<sup>185</sup> *Frequently Asked Questions Regarding Applicants with Previous Felony Convictions*, STATE UNIV. OF N.Y., <http://system.suny.edu/counsel/admissions-felony/> (last visited Jan. 16, 2016).



quires the applicant to acquire his or her DCJS report.<sup>186</sup> Currently, the New York State Office of Court Administration charges a fee of \$65.00 for generating a DCJS report.<sup>187</sup> For many ex-offenders, this fee could be costly, which is often more than the application fee they have to pay.<sup>188</sup> SUNY colleges could potentially implement a procedure like that of UNCW<sup>189</sup> and only request a DCJS report when they strongly suspect that an application warrants further review. Furthermore, the New York legislature could make this procedure easier by creating a law that allows the SUNY System to access DCJS reports for no cost when the applicant consents.

In conclusion, focusing on resolving these clearly identifiable issues is a more practical solution than attempting to prohibit criminal history screening entirely during the admission process. With the campus security concerns, removing criminal history screening from the admission process is not viable to many college officials.<sup>190</sup> Consequently, laws like the proposed bill in New York<sup>191</sup> would face strong opposition. Instead, both colleges and critics of the current policy could focus on solutions that are more practical.

#### CONCLUSION: A BALANCED APPROACH

Critics of the current college admissions policy that utilizes criminal history screening make a strong case for removing criminal history screening from the admission process. As Part I identified, the current policy limits ex-offenders from accessing higher education to a considerable degree. This Note is not questioning that finding. Certainly, both the public and ex-offenders will greatly benefit from achieving the goal of opening more paths to higher education for ex-offenders.

However, achieving that goal by completely prohibiting criminal history screening ignores the views of colleges. For many colleges, campus safety is the top priority. Granted, no evidence currently proves that colleges with criminal history screening are safer than colleges without it; nothing indicates that ex-offenders are more likely to commit a crime. In fact, campus community members without criminal history continue

---

<sup>186</sup> CCA, *BOXED OUT*, *supra* note 20, at 24–25.

<sup>187</sup> *Overview – Criminal History Record Search*, N.Y. STATE UNIFIED COURT SYS., <http://www.nycourts.gov/APPS/chrs/index.shtml> (last visited Jan. 17, 2016).

<sup>188</sup> CCA, *BOXED OUT*, *supra* note 20, at 25.

<sup>189</sup> UNCW first screens the submitted applications and orders a criminal background check only when they raise red flags, which happens with fewer than 10% of the application. See Epstein, *supra* note 14.

<sup>190</sup> See Jaschik, *supra* note 15 (quoting an admissions officer justifying criminal history screening to meet the public's expectation of safe campuses).

<sup>191</sup> A. 03363, 2015–16 Assemb., Reg. Sess. (N.Y. 2015).

to commit crime.<sup>192</sup> Yet the evidence is still inconclusive regarding the possible positive effect or lack thereof of criminal history screening. Considering the public’s expectations for campus safety, asking colleges to take the risk of jeopardizing campus safety is unreasonable unless clear evidence systematically proves that criminal history screening has no impact on campus safety.

As a result, both colleges and critics should focus on pursuing solutions that are more balanced and practical. The CCA argued that colleges should reallocate funds and resources spent on criminal history screening to solutions that are more effective.<sup>193</sup> However, a similar argument could be made against the critics. Instead of spending too many resources on prohibiting criminal history screening in the admission process, which might not even hinder the chance of admission,<sup>194</sup> it could pursue solutions that are more practical and balanced, such as the proposed Fair Access to Education Act of 2015.<sup>195</sup> The proposed act would remove marijuana-related misdemeanors from the list of offenses that make a student ineligible for Federal educational loans, grants, and work assistance.<sup>196</sup> This is a good example of a sensible solution that is unlikely to harm the campus community while providing more opportunities for ex-offenders. Practical and balanced solutions like this and others suggested in this Note could reduce the high application attrition rate, which the CCA identifies as the real reason that limits ex-offenders from accessing higher education,<sup>197</sup> as well as removing unnecessary burdens in the application process.

Stories of ex-offenders like Blakinger, who once was incarcerated but saw the light through higher education, remind us that keeping the path to higher education open for ex-offenders is important to our society. At the same time, stories of families who have lost a precious family member to the crime committed by an ex-offender enrolled at a college remind us that the safety concern exists, however rare. What society can do is listen to all of them and adopt a balanced approach that can provide higher education opportunities to ex-offenders while minimizing campus security risks.

---

<sup>192</sup> For example, a former student at SUNY Geneseo murdered two current students and then killed himself as this note was being written. Nothing indicates that he had a criminal history. See Lauren D’Avolio & Elizabeth A. Harris, *3 Dead in Murder-Suicide Near SUNY Geneseo*, N.Y. TIMES, Jan. 18, 2016, [http://www.nytimes.com/2016/01/19/nyregion/3-dead-in-murder-suicide-near-suny-geneseo.html?\\_r=0](http://www.nytimes.com/2016/01/19/nyregion/3-dead-in-murder-suicide-near-suny-geneseo.html?_r=0).

<sup>193</sup> See CCA, *BOXED OUT*, *supra* note 20, at 52 (providing college drinking prevention programs or peer learning programs as examples of more effective interventions that deserve more funds and resources).

<sup>194</sup> See *supra* Part III.

<sup>195</sup> H.R. 3561, 114th Cong. (2015).

<sup>196</sup> *Id.*

<sup>197</sup> See CCA, *BOXED OUT*, *supra* note 20, at 12–13.

