I. INTRODUCTION

Federal, state, and local public policy-makers are promoting reentry and reintegration efforts as a means to address America’s four-decade long criminal justice policies that have produced mass levels of incarceration. One such effort is collectively known as “Ban The Box” (BTB) regulations. These regulations have been implemented by numerous jurisdictions to encourage employers to consider ex-offenders as viable job applicants by preventing organizations from inquiring about criminal records on an employment application, and in some cases, delaying the time in which an employer can inquire about
criminal records until later in the hiring process.¹ This movement is gaining momentum and attempts to give job candidates an opportunity to present their qualifications before revealing their criminal history, thus, prohibiting employers from making automatic disqualifications based on an individual’s criminal history. The term derives from the criminal record question “checkbox” found on many job applications and is illustrated in Figure 1.

Figure 1. An example of the box on many application forms at the center of this controversy.

<table>
<thead>
<tr>
<th>Have you ever been convicted of a felony?</th>
<th>□ YES</th>
<th>□ NO</th>
</tr>
</thead>
<tbody>
<tr>
<td>If yes, explain:</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Despite this trend in employment-related contexts, a growing number of colleges and universities are asking about criminal history information during the student application process.² Requests for this information have increased because of several high-profile instances of

Increased concern on college campuses regarding criminal records can be linked to the murder of Jeanne Clery in 1986. Ms. Clery was a 19-year-old student killed in her Lehigh University dormitory room. In response, Congress passed the Clery Act in 1990, requiring schools to provide a public report of incidents of violence on campus. Recently, former Stanford University student Brock Turner was released from jail after serving only three months of a six-month sentence for sexual assault. California law provides for a sentence of up to six years for felony sexual assault.

This comes at a time when colleges and universities are being asked to give greater consideration to former criminals when they apply to college. Seemingly, America is moving in two opposite directions at the same time, in one direction for stricter sentencing while on the other hand, providing second chances. Although many administrators, faculty, and staff today would be in favor of giving many ex-offenders

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5 Id. at 932–33.
8 Cal. Penal Code § 220 (Deering 2010).
another chance, they are reluctant to take any risk that they feel could threaten their university or reputation.\(^{10}\) Table 1 presents data for large colleges with the highest crime rates.\(^{11}\) Despite campus violent crime rates being lower than the overall national average of 3.65 per 1,000 residents,\(^{12}\) universities need to assure parents that their children will be safe when going off to college.

Table 1: The top 10 highest reported crime rates for colleges, 2015

1) University of Illinois at Chicago

<table>
<thead>
<tr>
<th>Violent Crime Rate</th>
<th>Murders</th>
<th>Forcible Sex</th>
<th>Robbery</th>
<th>Aggravated Assault</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.59 (per 1,000)</td>
<td>1</td>
<td>21</td>
<td>16</td>
<td>96</td>
</tr>
</tbody>
</table>

2) University of California-Berkeley

<table>
<thead>
<tr>
<th>Violent Crime Rate</th>
<th>Murders</th>
<th>Forcible Sex</th>
<th>Robbery</th>
<th>Aggravated Assault</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.56 (per 1,000)</td>
<td>1</td>
<td>89</td>
<td>48</td>
<td>31</td>
</tr>
</tbody>
</table>

3) Illinois State University

<table>
<thead>
<tr>
<th>Violent Crime Rate</th>
<th>Murders</th>
<th>Forcible Sex</th>
<th>Robbery</th>
<th>Aggravated Assault</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.22 (per 1,000)</td>
<td>0</td>
<td>13</td>
<td>8</td>
<td>53</td>
</tr>
</tbody>
</table>

4) Harvard University

<table>
<thead>
<tr>
<th>Violent Crime Rate</th>
<th>Murders</th>
<th>Forcible Sex</th>
<th>Robbery</th>
<th>Aggravated Assault</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.18 (per 1,000)</td>
<td>0</td>
<td>87</td>
<td>3</td>
<td>10</td>
</tr>
</tbody>
</table>


5) University of Hawaii at Manoa
violent crime rate  
murders  forcible sex  robbery  aggravated assault
1.17 (per 1,000)  0  33  4  33

6) Penn State University
violent crime rate  
murders  forcible sex  robbery  aggravated assault
1.16 (per 1,000)  0  119  4  39

7) University of Virginia
violent crime rate  
murders  forcible sex  robbery  aggravated assault
1.12 (per 1,000)  0  71  2  6

8) Northern Arizona University
violent crime rate  
murders  forcible sex  robbery  aggravated assault
1.09 (per 1,000)  0  53  9  25

9) University of Southern California
violent crime rate  
murders  forcible sex  robbery  aggravated assault
1.06 (per 1,000)  0  80  27  25

10) University of Michigan
violent crime rate  
murders  forcible sex  robbery  aggravated assault
1.04 (per 1,000)  1  88  14  34

Two-thirds of the colleges and universities surveyed by The Center for Community Alternatives, a non-profit which focuses on juvenile and criminal justice issues, have a criminal history box on their admission application. As the law currently stands, colleges have carte blanche to discriminate against formerly incarcerated applicants without any

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formal review or appeal process.\textsuperscript{14} To address this divergence from the employment context and to present a more coherent set of policies across a number of areas, the U.S. Department of Education issued a guide requesting that schools delay asking applicants questions about their conviction record until later in the admissions process so as to minimize barriers to higher education for otherwise qualified student applicants.\textsuperscript{15} The national push for criminal justice reform, it appears, is reaching core parts of American universities.

This paper’s purpose is to review the concept of BTB in the employment context and see how it can be a model for reforming college admissions for ex-offenders. We do this first by discussing the crisis in the U.S. criminal justice system, followed by the BTB concept within the employment context where the idea was first developed and applied. We then review BTB as applied to the educational admissions process. Finally, we present a series of recommendations and conclude with a summary.

II. CRISIS IN THE U.S. CRIMINAL JUSTICE SYSTEM

Most observers agree that there is a crisis in the American criminal justice system: one of escalating caseloads, inadequate

\textsuperscript{14} Id. at 6.

funding, and jail overcrowding. Since the early 1970s, the incarceration rate has risen precipitously in the United States. America’s criminal justice system is the largest in the world and incarcerates more of its citizens than any other nation. At year-end 2014 (the most recent data available), an estimated 6,851,000 persons were supervised by adult correctional systems across the United States. This figure represented about 1 in 36 adults (or 2.8% of adults) under some form of correctional supervision. Put into perspective,

The U.S. incarcerates 693 people for every 100,000 residents, more than any other country. In fact, [America’s] rate of incarceration is more than five times higher than most of the countries in the world. Although [the] level of crime in the United States is comparable to that of other stable, internally secure, industrialized nations, the U.S. has an incarceration rate that far exceeds every other country.

19 Id.
And, while the United States only accounts for five percent of the world’s population, we house twenty-five percent of the inmate population. Each year, America spends $80 billion to keep people locked up; a disproportionate number of those incarcerated are minorities. Finally, though Latinos and African Americans comprise 29% of the U.S. population they make-up 59% of inmates in the United States.

A felony conviction can follow an individual for years after release from prison and present difficulties when applying for jobs. Substantial research indicates that this lack of employment contributes to higher recidivism rates. To counteract this effect, federal, state, and local public policy-makers have promoted reentry and reintegration efforts as a means of addressing the criminal justice policies that have produced over-criminalization and mass incarceration. If successful, these

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24 See generally Lois M. Davis et al., *Evaluating the Effectiveness of Correctional Education: A Meta-Analysis of Programs that Provide Education to Incarcerated Adults*, RAND CORP. (2013), www.rand.org/content/dam/rand/pubs/research_reports/RR200/RR266/RAND_RR266.pdf.

efforts will, more likely than not, improve society in many respects, including reducing poverty and decreasing the racial divide.26 One of the more prominent of these efforts to assist ex-offenders in obtaining employment is the BTB initiative, which calls for employers to wait until later in the interview process to ask job applicants about their criminal history.27

III. BTB IN THE EMPLOYMENT ARENA

The BTB movement (sometimes called the “Fair Chance Act”) began in 2003 when the grassroots civil rights organization All of Us or None began advocating to remove the box applicants must check on job applications to indicate whether they have a criminal record.28 The goal of BTB includes removing inquiries about criminal history from preliminary job applications, thereby encouraging employers to consider applicants based on their qualifications before their conviction history.29 In theory, BTB would also ensure that employers follow fair hiring principles such as checking whether any prior convictions are job-related.30 BTB regulations do not limit an employer’s right to

27 See AVERY & HERNANDEZ, supra note 1, at 1.
28 See id.
29 Id.
30 Id.
perform a background check as a condition of employment; they simply affect when in the application process this can be done.\textsuperscript{31}

Persons labeled as criminals carry a significant social stigma.

The [shame] associated with [having] a criminal record . . . [results] in a number of adverse consequences for individuals, including difficulty in finding a spouse, attenuating the probability of being admitted and receiving funding to attend a university, hindering a person’s ability to secure rental housing, impeding a person’s ability to vote, and engendering negative health outcomes.\textsuperscript{32}

A person with a criminal record faces greater difficulty finding employment because employers are distrustful of potential employees with convictions and believe they “lack[] relevant job skills, and [are] inclined to steal.”\textsuperscript{33} According to the United States Justice Department, between “sixty and seventy-five percent” of former inmates cannot find work in their first year out of jail.\textsuperscript{34}

Employers believe that they can mitigate “their vulnerability to civil liability by not hiring potentially dangerous employees, despite the fact that workplace violence is typically perpetrated by non-employee

\textsuperscript{31} Id.
\textsuperscript{33} Id. at 337.
strangers and that an individual with a criminal record is less apt to commit a crime in the workplace than an employee who has never been convicted.”

Studies have found that “the stigma of an arrest, criminal conviction, and incarceration in prison all act to [reduce] a person’s earnings in the labor force.” This causes a problematic cycle because unemployment tends to increase criminal activity and recidivism. It also appears that unemployment has a greater effect on repeat offending than on first-time offending. In response to such problematic situations, states and local jurisdictions have passed BTB ordinances.

IV. STATE AND LOCAL BTB REGULATIONS
Since the movement to assist former offenders reintegrating into society began, more than 150 cities and counties from across the country have instituted BTB policies, along with 30 states from coast to coast. While it is beyond the scope of this research to examine all state BTB laws, we briefly summarize the Hawaiian statute as representative of these directives.

In 1998, Hawaii became the first state to adopt a fair-chance law applicable to both public and private employment. The statute

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35 D’Ale`ssio et al., supra note 33, at 337.
36 Id. at 337–38.
37 Id. at 337–38.
39 AVERY & HERNANDEZ, supra note 1, at 1.
40 D’Ale`ssio et al., supra note 33, at 341.
prohibits employers from “inquiring into an applicant’s conviction history until after a conditional offer of employment has been made.” 41 “The offer may be withdrawn if the applicant’s conviction bears a ‘rational relationship’ to the duties and responsibilities of the position” sought. 42 Under the ordinance, “employers may only consider an employee’s conviction record within the past ten years, excluding periods of incarceration.” 43 Employees of the federal government are not within the scope of the statute. 44 There are certain employers who are expressly exempted from the statute including, “the Department of Education, counties, armed security services, certain health care facilities, and detective and security guard agencies among others.” 45

Research by D’Alessio, Stolzenberg, and Flexon found the Hawaiian ordinance increased employment for ex-offenders and simultaneously reduced recidivism for such individuals. 46 These researchers analyzed “longitudinal data drawn from the State Court Processing Statistics program dataset (1990-2004) to ascertain whether the imposition of Hawaii’s [BTB] law in 1998 improved the safety of Hawaiians by decreasing felony offending among ex-offenders in

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41 Id.
42 Id.
43 Id.
44 Id.
45 Id.
46 Id. at 347–48.
Honolulu County.” The researchers found that “Hawaii’s law substantially improved the job prospects of ex-offenders and attenuated felony offending among individuals with a prior criminal conviction.”

Even after accounting for factors commonly associated with criminal offending, D’Alessio et al.’s results show that “felony offending among those possessing a prior criminal conviction was substantially reduced in Honolulu following the implementation” of BTB. This is important because those that can find steady work are less likely to return to prison and are better equipped to assume the mainstream social roles of spouse and parent.

V. BTB AT THE FEDERAL LEVEL

The Obama Administration’s My Brother’s Keeper Task Force gave the movement a boost when it endorsed hiring practices “which give applicants a fair chance and allows employers the opportunity to judge individual job candidates on their merits as they reenter the workforce.” More recently, President Obama endorsed BTB through an order to the Office of Personnel Management directing federal

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47 Id. at 342.
48 Id. at 349.
49 Id.
agencies to bar screening out applicants before they look at their qualifications:

> It is relevant to find out whether somebody has a criminal record. We’re not suggesting ignore it . . . [w]hat we are suggesting is that when it comes to the application, give folks a chance to get through the door. Give them a chance to get in there so they can make their case.\(^52\)

The federal Equal Employment Opportunity Commission (EEOC) endorsed removing the conviction question from job applications in its 2012 guidance making clear that federal civil rights laws regulate employment decisions based on arrests and convictions.\(^53\) This guidance went on to recommend as a best practice, “that employers not ask about convictions on job applications.”\(^54\) Moreover, the EEOC referenced BTB reasoning that an “employer is more likely to objectively assess the relevance of an applicant’s conviction if it becomes known when the employer is already knowledgeable about the applicant’s qualifications and experience.”\(^55\) Furthermore, the EEOC

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\(^{54}\) Id.

\(^{55}\) Id. at 13.
initiated litigation and otherwise attempted to use its enforcement powers to reform employers’ policies in this regard.\textsuperscript{56} The 2012 EEOC Enforcement Guidance also warned employers that categorically excluding job applicants based on arrest and conviction records may well violate Title VII of the Civil Rights Act of 1964.\textsuperscript{57} The EEOC explained that neutral but broad-sweeping criminal records policies can have the effect of disproportionately screening out racial minorities, particularly African Americans and Hispanics, due to markedly higher arrest and conviction rates among these groups.\textsuperscript{58}

Additionally, BTB rules do not trump other laws specifically prohibiting employers from hiring individuals with certain criminal records. For example, “federal law excludes an individual who has been convicted of certain crimes in the previous ten years from working as a security screener or otherwise having unescorted access to the secure areas of an airport.”\textsuperscript{59} “There are equivalent restrictions under federal, state, and local laws for law enforcement officers, child care workers, bank employees, port workers, elder care workers, and other


\textsuperscript{57} EEOC, supra note 54 at 1.

\textsuperscript{58} Id. at 9.

\textsuperscript{59} Id. at 20.
occupations.”\textsuperscript{60} BTB statutes do not preempt such laws and regulations.\textsuperscript{61}

Opponents of BTB measures argue that “the law raises the stakes for potential litigation and penalties, complicates the hiring process, and erodes safety and security.”\textsuperscript{62} They argue that “employers are in the best position to assess their hiring needs” and that employers should determine “when in the hiring process criminal history information is most relevant.”\textsuperscript{63} From a risk-mitigation and due diligence perspective, employers need to be informed about job applicants’ past history. . . .”\textsuperscript{64} This knowledge is “important to maintaining a safe work environment, especially if there is a criminal past.”\textsuperscript{65} “In the interest of transparency, it is beneficial for human resources to know relevant information as early in the process as possible if the goal is to make informed decisions.”\textsuperscript{66}

With the passage of BTB statutes and their restrictions on employer criminal background checks, legislatures across the country are now voicing an aversion to employers performing criminal

\textsuperscript{60} Id.
\textsuperscript{61} Id. at 20–21.
\textsuperscript{63} Id.
\textsuperscript{64} Id.
\textsuperscript{65} Id.
\textsuperscript{66} Id.
background checks on prospective employees.\textsuperscript{67} However, with the passage of BTB regulations, “legislatures can be seen as complicating the background checks that employers can conduct.”\textsuperscript{68} This may cause employers to be liable whether they perform background checks or not because the laws create “a ‘legal minefield’ in which employers face liability for not only refusing to hire ex-offenders but also for hiring ex-offenders who later recidivate.”\textsuperscript{69}

BTB rules may also pose challenges for employers who receive large numbers of applications via the Internet.\textsuperscript{70} Some of these employers use facially neutral policies, such as a policy automatically excluding persons who have been convicted of crimes, to selectively remove undesirable applicants without having to expend time and resources determining whether such people are otherwise qualified for the job.\textsuperscript{71} These kinds of automated exclusions based on criminal records are specifically impacted by BTB policies and can no longer be used in jurisdictions that have passed an ordinance applicable to private

\textsuperscript{67} See Rhonda Smith, Employer Concerns About Liability Looms as Push for Ban The Box Policies Looms, BLOOMBERG BNA (Aug. 18, 2014), https://www.bna.com/employer-concerns-liability-n17179893943/.

\textsuperscript{68} Id.

\textsuperscript{69} Id.


\textsuperscript{71} Id.
employers and contractors. This leads to encouraging statistical discrimination based on race or other observable characteristics.\(^72\)

In sum, BTB laws are intended to prevent employers from removing job applicants from employment consideration in the initial screening process because of a past conviction or arrest before actually reviewing the applicant’s job-related qualifications.\(^73\) To this end, employers must remove any inquiry into an applicant’s criminal history at the beginning of the screening process.\(^74\) Once an employer decides to hire the applicant, the employer can then conduct a criminal background check. At that point, if an employer discovers that the applicant has been convicted of a crime, the employer should make an individualized assessment as to whether they should hire or reject the applicant for reasons that are job-related and consistent with business necessity.\(^75\) To ensure that employers are making individualized assessments of applicants, the EEOC advises that employers establish targeted screening procedures that take into consideration “the nature of the crime, the time elapsed since the offense was committed, and the

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\(^74\) *Id.*

\(^75\) EEOC, *supra* note 54, at 13.
nature of the job sought.” Waiting until later in the application process to conduct criminal background checks may cause practical concerns for employers. This includes potentially losing qualified candidates due to delays in the screening process. However, these employers should take comfort in the fact that the BTB rules are not designed to force them to hire individuals with criminal records that legitimately disqualify them from the job.

VI. BTB MOVES TO HIGHER EDUCATION

The national push for criminal justice reform is now reaching core parts of American universities. While BTB concerns have been most prevalent in the job application process, there have been recent developments in higher education regarding admissions and an applicant’s criminal history. BTB initiatives appear to be moving “beyond the box” and into colleges and universities when considering student admissions. Proponents hope that beyond the box will expand educational opportunities for ex-offenders, reduce recidivism,

76 Id. at 14.
78 EEOC, supra note 54, at 14.
81 Id.
combat the impact of mass incarceration on communities, and give ex-offenders a second chance.\textsuperscript{82} In fact, U.S. Secretary of Education John B. King Jr. stated:

\begin{quote}
We believe in second chances, and we believe in fairness. The college admissions process shouldn’t serve as a roadblock to opportunity, but should serve as a gateway to unlocking untapped potential of students. As a nation, we must work to make that commonplace. We must ensure that more people, including those who were involved in the criminal justice system in their past but paid their debt to society, have the chance at higher education opportunities that lead to successful, productive lives, and that ultimately create stronger, safer communities.\textsuperscript{83}
\end{quote}

Americans with a “criminal history are often stymied when they encounter college entry applications that ask if they have ever been convicted of crimes.”\textsuperscript{84} The process, “which often brings greater scrutiny to people who answer ‘yes,’ is driving away large numbers of


\textsuperscript{83} U.S. Dep’t of Educ., \textit{supra} note 81.

people with criminal records who present no danger to campus safety and are capable of succeeding academically.\textsuperscript{85} Indeed, a study by the Center for Community Alternatives, a nonprofit group that focuses on alternatives to incarceration, suggests that many people with convictions give up rather than complete the application process.\textsuperscript{86} The study examined the process at 60 of the 64 campuses of the State University of New York and found that nearly two-thirds of applicants who disclosed a felony and checked “yes” in the felony box never completed the higher education application process.\textsuperscript{87} In comparison, the attrition rate on applications for all applicants ranged from 4.6 to 47.5 percent across the various colleges.\textsuperscript{88} These individuals were denied access to higher education, not because of a purposeful denial of their application, but because they were driven out of the stigmatizing and daunting application process.\textsuperscript{89} It is no surprise that many students would become discouraged.

Highly troubling is the fact that a disproportionate number of the applicants that are deterred by these inquiries or rejected because of their record will be people of color because they are more likely to have had contact with the criminal justice system than their white peers.\textsuperscript{90} This

\begin{flushleft}
\textsuperscript{85} Id. \\
\textsuperscript{86} BOXED OUT, supra note 14, at 2. \\
\textsuperscript{87} Id. at 5, 9. \\
\textsuperscript{88} Id. at 7. \\
\textsuperscript{89} Id. \\
\textsuperscript{90} Id. at 14.
\end{flushleft}
results in applicant pools and classes that are far less inclusive than they could be.

This is particularly problematic because uneducated offenders are likely to be unemployed after release from prison and to become recidivist offenders. These findings strongly suggest that there is a need for enhancing an offender’s level of formal education to reduce the post-release recidivism rate. “A college degree can help offset the enormous employment barriers formerly incarcerated people typically face.” Moving questions about an individual’s criminal history to later in the college application process is likely to increase enrollment in higher education without having a negative impact on campus safety.

VII. BEYOND THE BOX RESOURCE GUIDE

The Beyond the Box Resource Guide promulgated by the U.S. Department of Education provides information for colleges and universities to help remove barriers that may prevent the estimated 70 million citizens with criminal records from pursuing

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93 BOXED OUT, supra note 14, at 37–38.
higher education. The release of this resource guide (not a law or regulation) for postsecondary institutions responds to recommendations put forth by President Obama’s My Brother’s Keeper Task Force, which was designed to eliminate unnecessary barriers to giving justice-involved individuals a second chance. Among the guide’s recommendations is that colleges consider delaying questions about criminal records until after admissions decisions to avoid the chilling effect on potential applicants of inquiring early in the application process.

A survey of postsecondary institutions found that sixty-six percent collect criminal justice information for all prospective students, and another five percent request such information only for some students.

The Common Application, a uniform application used by nearly [seven hundred] schools, has since 2006 asked whether a person has been convicted of a misdemeanor or felony, ‘or other crime.’ Some schools that use the Common Application allow applicants to opt out of disclosure, or delay criminal history inquiries until a preliminary admissions decision has been made. Other schools use their non-standard applications which may require disclosure

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94 BEYOND THE BOX, supra note 16, at 1.
96 BEYOND THE BOX, supra note 16, at 1.
of convictions, arrests, or mere allegations of misconduct.\textsuperscript{97}

One of the primary reasons offered for collecting criminal justice information is safety; however, collecting such data does not appear to have any bearing on campus crime.\textsuperscript{98} Indeed, Olszewska found that postsecondary institutions that admit students with a criminal history have no greater crime than those that do not.\textsuperscript{99} There is no significant information or conclusive research on the extent to which students with a past arrest or criminal record commit new crimes while enrolled in postsecondary institutions. Nor is there evidence that asking about an individual’s criminal justice history decreases campus crime.\textsuperscript{100}

Aside from safety, the other justifications institutions offer for collecting conviction data on admissions applications vary. There is consistency, however, in the extent to which disparities in the justice system disproportionately impact individuals of color, especially black males, and, in turn, disproportionately require students of color to

\textsuperscript{97} Joshua Gaines, \textit{Feds Nudge Colleges to Go “Beyond the Box”}, COLLATERAL CONSEQUENCES RES. CTR. (May 12, 2016), http://ccresourcecenter.org/2016/05/12/feds-nudge-colleges-to-go-beyond-the-box/.


\textsuperscript{99} BOXED OUT, supra note 14, at 37.

\textsuperscript{100} Bradley D. Custer, \textit{Why College Admissions Policies for Students with Felony Convictions Are Not Working at One University}, 88 COLL. & UNIV. 28, 30 (2013).
respond to questions about convictions.\textsuperscript{101} “Additionally, questions about criminal history create a significant risk of alienating potential applicants while also unreasonably limiting an institution’s applicant pool.”\textsuperscript{102}

The resource guide mentions other promising practices and recommendations, including:

- Transparently informing potential students as early as possible in the application process on how to respond to the inquiry about criminal pasts;
- Giving all prospective students the opportunity to explain criminal justice involvement and preparedness for postsecondary study;
- Developing a self-assessment for colleges and universities where the institutions determine whether criminal history information is necessary for admissions and if so, ensure that staff are trained on how to review criminal justice information; and
- Limiting the inquiry into criminal history as follows:


\textsuperscript{102} BEYOND THE BOX, supra note 16, at 2.
o Avoiding the use of ambiguous criminal justice terms; for example, clearly state definitions of crime (felony, misdemeanor, with other crimes requiring a definition);

o Defining what information should not be disclosed; for instance, applicants should not include juvenile offenses where the criminal record has been expunged;

o Avoiding overly broad requests about criminal history; questions regarding convictions should ask clearly whether crimes involved sexual violence or dishonesty, etc.;

o Including a time limit on criminal background data (maybe 5 to 7 years) since younger individuals are more likely to be involved in criminal activity;

o Inquiring only about convictions, not arrests since an arrest is not proof of guilt; and

o Tailoring questions to avoid unnecessarily precluding applicants from entering training
programs and employment for which they might be eligible.\textsuperscript{103}

Also, the report offers strategies for ensuring postsecondary persistence and completion for admitted students, among them:

- Providing well-informed academic and career guidance;
- Informing students of available support services;
- Recruiting peer mentors and college coaches to work with justice-involved students;
- Supporting student groups for justice-involved youths;
- Providing justice-involved students access to meaningful work opportunities;
- Incorporating student feedback when determining support services for justice-involved students;
- Offering justice-involved individuals financial aid counseling; and,
- Establishing partnerships with the community.\textsuperscript{104}

Also, the report recommends a self-assessment for colleges and universities whereby institutions determine whether criminal history information is necessary for admissions and if so, ensure that staff is trained on how to review criminal justice information.\textsuperscript{105}

\textsuperscript{103} Id.
\textsuperscript{104} Id.
\textsuperscript{105} Id.
The report is clear in its position that, ultimately, colleges and universities should weight their admission criteria against their institution’s mission.106

VIII. CONCLUSION

Campus safety is paramount in this beyond the box process. The Departments of Justice and Education remain committed to helping schools ensure a safe learning environment while also opening educational opportunities to citizens who may have been involved in the criminal justice system in the past.107 The resource guide includes a variety of recommendations on how institutions might consider campus safety and applicants’ criminal justice history without unduly discouraging or rejecting otherwise-qualified candidates.108 While there is a movement today for employers, including the federal government, to reposition questions about job applicants’ criminal history to later in the interview process in what is commonly called BTB initiatives, many colleges and universities are currently consciously and unconsciously engaged in a practice that subverts those public policy efforts and undermines development of good citizenship, public safety, democracy, the human right to education, and expands the economic and racial divide. It is both unrealistic and disingenuous to expect people who

106 INCREASING ACCESS TO HIGHER EDUCATION, supra note 102, at 19.
107 Id. at 9.
108 Id. at 22–24.
have served their sentence after a criminal conviction to live law-abiding and productive lives if they are continuously denied employment and educational opportunities.

Since the early 1960’s, both legislation and presidential executive orders barring discrimination and unfair employment practices have been introduced. Over the course of time, these unfair practices have expanded to include gender/sex, age, race, color, veteran status, disability, national origin, religion, pay, pregnancy, sexual orientation, and transgender individuals.\(^\text{109}\) Now, with the expansion of BTB laws, ex-offenders are joining these groups and are receiving workplace protection, and the same protection is being afforded to college applicants.

Some struggle with this issue because the use of criminal records involves important American values that appear to conflict. Although Americans value public safety and a safe workspace, they also carry strong convictions about second chances.\(^\text{110}\) Americans believe that a person’s past should not hold them back for life, particularly for minor


The U.S. prides itself on upholding second chances. It is not a nation of “one strike and you’re out.” A criminal record can often be a lifelong barrier to economic security and mobility, with unfavorable effects on families, communities, and the entire economy. For this reason, institutions should develop policies that guarantee individuals with criminal records an opportunity to succeed and should remove any unreasonable barriers to securing an education. Education is a key to obtaining good jobs, and research indicates that steady employment is one of the most significant predictors of successful reentry into society and contributes to a reduction in recidivism.

The overriding issue is how to protect innocent people without over-burdening ex-offenders, their families, and taxpayers by creating a perpetual unemployed or underemployed class of people. If ex-

\footnotesize
\begin{itemize}
\item \textit{Id.}
\item \textit{Id.} at 2.
\item \textit{Id.} at 34.
\item \textit{Id.} at 40.
\end{itemize}
offenders cannot secure employment, they cannot become law-abiding, taxpaying citizens. This will result in the allocation of more taxpayer money toward building prisons, and less toward schools or hospitals. The key is to develop a good balance of interests. The BTB movement appears to be successful in bringing this issue to the forefront and deserves credit for making progress toward lessening the challenges faced by ex-offenders. State and local governments have led the way and are now being followed by private companies including Walmart, Target, Starbucks, and Home Depot. Now the federal government has adopted the BTB movement as an important Civil Rights matter as related to higher education.

There are advantages and disadvantages regarding this issue, despite it being a worthy effort addressing discrimination faced by ex-offenders. Numerous groups have concluded that ensuring ex-offenders are not discriminated against in employment helps create positive outcomes for individuals and society at large. Therefore, it is in everyone’s best interests—including colleges and universities—to move beyond BTB legislation in college admissions. Problems can arise, however, when colleges conduct criminal background checks

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early in the application process. Specifically, when colleges conduct criminal background checks too early, that is, before ex-offenders had any chance to demonstrate their ability to successfully compete in higher education. Although some college and university admissions officers express genuine concern regarding BTB provisions that they perceive limits their ability to conduct criminal background checks, we hope that this review will provide administrators with sufficient guidance to effectively implement this relatively new anti-discrimination legislation.