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## A Fresh Start: The Evolving Use of Juvenile Records in College Admissions

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## A FRESH START: THE EVOLVING USE OF JUVENILE RECORDS IN COLLEGE ADMISSIONS

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Eve Rips\*

### ABSTRACT

*Questions about criminal and juvenile records in the college application process are common and frequently fail to account for the unique characteristics of juvenile justice systems. The ways in which colleges and universities ask about juvenile records often encourage applicants to disclose information in spite of statutory protections. These questions fly in the face of the public policy underlying a range of legal safeguards that are intended to help individuals with records from juvenile systems in moving forward and receiving a second chance.*

*In recent years, a series of legislative and institutional changes have begun to restrict how colleges and universities may ask about criminal and juvenile records. Four states have passed laws limiting how criminal history may be used in the admissions process. The Common Application has moved to make asking about criminal history optional, and now gives institutions more flexibility in deciding how to phrase criminal history questions. This Article presents a first-of-its-kind empirical analysis of how the more than 800 U.S. schools that use the Common Application, and schools in the first states to restrict asking about criminal history, have responded to these changes. While these reforms have affected how frequently colleges and universities ask about criminal history, they continue to leave the door open for some postsecondary institutions to push applicants to disclose juvenile records.*

*The growing movement to restrict use of criminal history in the college admissions process presents a critical opportunity to reconsider the role that postsecondary systems should play in supporting the rehabilitative goals of juvenile justice systems. To that end, this Article concludes by providing recommendations for legislative and institutional language that can more effectively ensure that individuals with juvenile records are given a true second chance and a meaningful opportunity to earn postsecondary degrees.*

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## INTRODUCTION

Colleges and universities today ask applicants about their criminal and juvenile records in dozens of legally distinct ways.<sup>1</sup> Some of the ways that postsecondary institutions ask about criminal history<sup>2</sup> would be puzzling for anyone. For example, one state flagship university asks, “[h]ave you engaged in any behavior that caused injury to any person(s) or property (including, for example, but not limited to, vandalism or behavior that led to a restraining order against you) which resulted in some form of discipline or intervention?”<sup>3</sup> Other questions, though, are puzzling because they raise a unique set of problems specific to individuals with juvenile records. Applicants with juvenile records are frequently asked to share information that may be legally protected.<sup>4</sup> An applicant who has been told by a judge that her juvenile record is an adjudication of delinquency rather than a conviction may be asked, “[h]ave you ever been convicted of a crime?”<sup>5</sup> An applicant who has been told that her record is sealed or expunged may be asked, “[h]ave you ever been arrested?”<sup>6</sup> These questions leave applicants in the difficult position of choosing whether to share protected information and risk being denied admission due to a juvenile record, or to withhold information and risk having their admission rescinded due to failure to report accurately. Today’s seventeen-year-olds are regularly asked to make decisions in the college application process that leave even seasoned criminal attorneys perplexed, and applicants often feel pressured to disclose information that may be legally protected.

This has led to a perplexing and, at times, absurd landscape. Today, an applicant from New York City with a juvenile record arising from a proceeding in New York would no longer have to worry about sharing that information if applying to an in-state school in the State University of New York system, which voluntarily stopped

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1. *Infra* Sections V.B and V.C.

2. Throughout this Article, “criminal history” and “criminal history questions” are used in referring to questions that ask about records from both adult criminal justice systems and juvenile justice systems. This is consistent with how most existing research on the topic uses the terms and with how colleges and universities often label these questions. The Article uses the phrase “criminal and juvenile records” to refer to records that stem either from adult criminal systems or from juvenile justice systems.

3. Ind. Univ. Bloomington, Application for Admission (2019) (screenshot on file with the author).

4. *See infra* Section III.A.

5. *See, e.g.*, St. Xavier Univ., Application for Admission (2019) (screenshot on file with the author).

6. *See, e.g.*, Howard Univ., Application for Admission (2019) (screenshot on file with the author).

asking criminal history questions.<sup>7</sup> Her obligation to disclose when applying to a local private school would vary tremendously based on specific question phrasing.<sup>8</sup> An applicant who grew up thirty minutes away in Connecticut, and who had a similar delinquency adjudication arising from a Connecticut proceeding, might well face criminal history questions when applying to in-state public schools.<sup>9</sup> If both applicants applied to the same school in New Jersey, which specified that “sealed records should not be disclosed,” the applicant from New York might well be protected under New York law, while the applicant from Connecticut would have to decide whether a record that was confidential, but not officially sealed, should be shared.<sup>10</sup> If the school was silent about sealed records, both applicants might be baffled.

An applicant with a record from St. Louis, where a juvenile court adjudication is not a finding of guilt, might face a very different landscape than a peer with a record from thirty minutes away in the Illinois town of East Saint Louis, where a juvenile adjudication may count as a finding of guilt.<sup>11</sup> If both applicants applied to the same school in Iowa that asks, “have you ever been adjudicated guilty of a felony or misdemeanor?,” one might need to disclose, and the other might not.

A growing advocacy movement has begun to reform how colleges and universities ask about criminal and juvenile records. In the summer of 2018, amidst growing pressure from politicians and activist groups, the Common Application—which is used in the admissions process at more than 800 U.S. colleges and universities—removed its question that asked applicants to disclose their crimi-

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7. STATE UNIV. OF N.Y., OFF. OF ENROLLMENT MGMT., DOC. NO. 3200, ADMISSION OF PERSONS WITH PRIOR FELONY CONVICTIONS (2017), [https://www.suny.edu/sunypp/documents.cfm?doc\\_id=846](https://www.suny.edu/sunypp/documents.cfm?doc_id=846) [<https://perma.cc/G6WQ-C6JD>] [hereinafter SUNY].

8. See *infra* Section III.A.

9. See, e.g., Cent. Conn. St. Univ., Application for Admission (2019) (screenshot on file with the author).

10. See N.Y. FAM. CT. ACT § 375.2 (McKinney 2017) (stating that “[i]f an action has resulted in a finding of delinquency . . . other than a finding that the respondent committed a designated felony act, the court may, in the interest of justice and upon motion of the respondent, order the sealing of appropriate records”); RIYA SHAH & LAUREN FINE, JUV. L. CTR., JUVENILE RECORDS: A NATIONAL REVIEW OF STATE LAWS ON CONFIDENTIALITY, SEALING AND EXPUNGEMENT 23 (2014) (finding that Connecticut does not have a juvenile sealing statute).

11. See MO. ANN. STAT. § 211.271(1) (West 1969) (stating that “[n]o adjudication by the juvenile court upon the status of a child shall be deemed a conviction nor shall the adjudication operate to impose any of the civil disabilities ordinarily resulting from conviction nor shall the child be found guilty or be deemed a criminal by reason of the adjudication”); 705 ILL. COMP. STAT. ANN. 405/5-620 (West 1999) (stating that “[a]fter hearing the evidence, the court shall make and note in the minutes of the proceeding a finding of whether or not the minor is guilty”).

nal history.<sup>12</sup> They attributed the decision to decreasing commonality in how postsecondary institutions think about the role of criminal history in admissions.<sup>13</sup> Instead, individual colleges and universities that use the Common Application can now decide for themselves whether to include questions on criminal history in their supplementary applications, and how to word those questions.<sup>14</sup> Additionally, between 2017 and 2020, Louisiana, Maryland, Washington, Colorado, and California became the first states to pass laws restricting the ways in which postsecondary institutions may ask applicants about their criminal history on admissions forms.<sup>15</sup> While this represents a critical step forward, these reforms have not directly addressed the ways in which juvenile records are distinct from adult criminal records.<sup>16</sup> As a result, these recent changes leave in place a confusing and unfair application process at many postsecondary institutions for applicants with juvenile records.

The movement to restrict the use of criminal history in college admissions is a recent step in the growing national advocacy effort to limit the collateral consequences of criminal convictions and juvenile adjudications.<sup>17</sup> It builds off the movement to restrict the use of criminal history in employment contexts, referred to as the movement to “ban the box,” in reference to the box many job applicants are asked to check to indicate whether they have previous convictions or delinquency adjudications.<sup>18</sup> Today almost three quarters of individuals nationally live in jurisdictions that have

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12. Alia Wong, *The Common App Will Stop Asking About Students' Criminal Histories*, THE ATLANTIC (Aug. 10, 2018), <https://www.theatlantic.com/education/archive/2018/08/common-app-criminal-history-question/567242/> [<https://perma.cc/9D7J-BPDA>].

13. Jen Davis, *Change to Criminal History Question for 2019-2020 School Year*, COMMON APP (Aug. 19, 2018), <https://www.commonapp.org/blog/change-criminal-history-question-2019-2020-application-year> [<https://perma.cc/E6QA-29JJ>].

14. *Id.*

15. LA. STAT. ANN. § 17:3152 (2017); MD. CODE ANN., EDUC. §§ 26-501–506 (West 2018); WASH. REV. CODE ANN. §§ 28B.160.010–040 (West 2018); COLO. REV. STAT. ANN. § 23-5-106.5 (West 2019); CAL. EDUC. CODE § 66024.5 (West 2020).

16. See *infra* Section III.A.

17. See, e.g., LINDA EVANS, LEGAL SERVS. FOR PRISONERS WITH CHILD., BAN THE BOX IN EMPLOYMENT: A GRASSROOTS HISTORY (2016), <https://www.prisonerswithchildren.org/wp-content/uploads/2016/10/BTB-Employment-History-Report-2016.pdf> [<https://perma.cc/J8JX-GNS7>]; RAM SUBRAMANIAN, REBECCA MORENO & SOPHIA GEBRESELASSIE, VERA INST. OF JUST., RELIEF IN SIGHT? STATES RETHINK THE COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION, 2009–2014 (2014), [https://www.vera.org/downloads/Publications/relief-in-sight-states-rethink-the-collateral-consequences-of-criminal-conviction-2009-2014/legacy\\_states-rethink-collateral-consequences-report-v4.pdf](https://www.vera.org/downloads/Publications/relief-in-sight-states-rethink-the-collateral-consequences-of-criminal-conviction-2009-2014/legacy_states-rethink-collateral-consequences-report-v4.pdf) [<https://perma.cc/3JMQ-49H8>].

18. See, e.g., EVANS, *supra* note 17; Dallan F. Flake, *Do Ban-the-Box Laws Really Work*, 104 IOWA L. REV. 1079, 1087–93 (2018).

banned the box in at least some employment contexts.<sup>19</sup> In light of both the speed at which cities and states moved to restrict the use of criminal history in employment decisions, and the success of the first five states in restricting the use of criminal history in the college admissions process,<sup>20</sup> it seems likely that the number of states restricting the use of criminal history in college admissions will continue to grow. A series of recent federal bills related to the use of criminal history in decisions about financial aid suggests the potential for national change as well.<sup>21</sup>

When postsecondary institutions erect barriers restricting access for individuals who have adult or juvenile records, the implications are far-reaching. The conventional wisdom that postsecondary degrees increase lifetime earnings is borne out by numerous studies.<sup>22</sup> Postsecondary education is also linked to other measures of financial well-being, including increased likelihood of having health insurance through employment, increased likelihood of having a retirement plan, increased job satisfaction, decreased likelihood of unemployment, decreased likelihood of living in poverty, and decreased reliance on public benefits.<sup>23</sup> Beyond that, postsecondary

19. BETH AVERY & HAN LU, NAT'L EMP. L. PROJECT, BAN THE BOX 3 (2020), <https://s27147.pcdn.co/wp-content/uploads/Ban-the-Box-Fair-Chance-State-and-Local-Guide-Oct-2020.pdf> [<https://perma.cc/DJ6H-89GF>].

20. The first five states to ban the box on college applications are Louisiana, Maryland, Washington, Colorado, and California. *See supra* note 15.

21. *See, e.g.*, SUCCESS Act, H.R. 1432, 115th Cong. (2017); Simplifying Financial Aid for Students Act, S. 3353, 115th Cong. (2018); Beyond the Box for Higher Education Act, S. 3435, 116th Cong. (2019); Restoring Education and Learning Act, S. 1074, 116th Cong. (2019). *See infra* Section IV.A.1 for additional context.

22. *See, e.g.*, Jaison R. Abel, Richard Deitz & Yaqin Su, *Do the Benefits of College Still Outweigh the Costs?*, 20 CURRENT ISSUES IN ECON. & FIN. 2014, at 1; Philip Oreopoulos & Kjell G. Salvanes, *Priceless: The Nonpecuniary Benefits of Schooling*, 25 J. ECON. PERSPS. 159, 159–60, (Winter 2011); Colm Harmon, Hessel Oosterbeek & Ian Walker, *The Returns to Education: Microeconomics*, 17 J. ECON. SURVS. 115, 115–16 (2003); ANTHONY P. CARNEVALE, STEPHEN J. ROSE & BAN CHEAH, GEORGETOWN CTR. FOR HIGHER EDUC. & THE WORKFORCE, THE COLLEGE PAYOFF: EDUCATION, OCCUPATIONS, AND LIFETIME EARNINGS 3–4 (2011), <https://1gyhoq479ufd3yna29x7ubjn-wpengine.netdna-ssl.com/wp-content/uploads/college-payoff-completed.pdf> [<https://perma.cc/E5U3-JNQW>]; INST. FOR HIGHER EDUC. POL'Y, THE INVESTMENT PAYOFF: A 50-STATE ANALYSIS OF THE PUBLIC AND PRIVATE BENEFITS OF HIGHER EDUCATION 7 (2005), <http://www.ihep.org/sites/default/files/uploads/docs/pubs/investmentpayoff.pdf> [<https://perma.cc/R9A3-L7K7>] [hereinafter IHEP]; BRAD HERSHBEIN & MELISSA KEARNEY, HAMILTON PROJECT, MAJOR DECISIONS, WHAT GRADUATES EARN OVER THEIR LIFETIMES at 1 (2014), [https://www.hamiltonproject.org/papers/major\\_decisions\\_what\\_graduates\\_earn\\_over\\_their\\_lifetimes](https://www.hamiltonproject.org/papers/major_decisions_what_graduates_earn_over_their_lifetimes) [<https://perma.cc/P8XB-R7LU>]; JENNIFER MA, MATEA PENDER & MEREDITH WELCH, THE COLL. BD., EDUCATION PAYS 2016: THE BENEFITS OF HIGHER EDUCATION FOR INDIVIDUALS AND SOCIETY at 4–5 (2016), <https://research.collegeboard.org/pdf/education-pays-2016-full-report.pdf> [<https://perma.cc/G3G7-WJCY>].

23. *See, e.g.*, PHILIP TROSTEL & MARGARET CHASE SMITH, LUMINA FOUND., IT'S NOT JUST THE MONEY: THE BENEFITS OF COLLEGE EDUCATION TO INDIVIDUALS AND TO SOCIETY (2015), <https://www.luminafoundation.org/files/resources/its-not-just-the-money.pdf> [<https://perma.cc/VSD9-F77D>] (discussing poverty, insurance, bank accounts, retirement plans, and unemployment); Oreopoulos & Salvanes, *supra* note 22 (discussing unemploy-

degrees are linked to improved health outcomes, higher rates of voting and volunteerism, increased life expectancy, and higher overall self-reported happiness.<sup>24</sup> Given the numerous benefits of postsecondary education, it is unsurprising that access to higher education is also directly linked to decreased recidivism rates.<sup>25</sup>

When colleges and universities ask about criminal history, it decreases the likelihood that justice-involved populations will enroll, both because schools will outright reject some candidates, and because the question itself chills some applicants from applying in the first place.<sup>26</sup> Because Black and Latinx populations and individuals with disabilities are overrepresented in the criminal and juvenile justice systems, questions on criminal history in the college admissions process can contribute to decreased diversity in postsecondary settings.<sup>27</sup>

This Article examines the growing movement to ban the box on undergraduate applications and argues that while the movement represents an important step forward, it has not fully addressed the unique set of issues that arise when colleges and universities inquire into juvenile records. Juvenile justice systems have built an array of protections designed to help enable youth to receive a fresh start.<sup>28</sup> Although protections for individuals with juvenile records vary tremendously by state, states generally use a distinct juvenile justice vocabulary that more closely mirrors civil systems than criminal ones. Many states also use protections such as sealing and confidentiality statutes that limit who may access juvenile records, as well as expungement statutes that are generally intended to de-

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ment and job satisfaction); IHEP, *supra* note 22 (discussing reliance on public benefits, savings, unemployment rates).

24. See, e.g., TROSTEL & SMITH, *supra* note 23 (discussing health outcomes, life expectancy, voting and civic involvement, and happiness); IHEP, *supra* note 22 (discussing voting, volunteerism, and life expectancy); Lance J. Lochner, *Non-production Benefits of Education: Crime, Health, and Good Citizenship*, 14 HANDBOOK ECON. EDUC. 183 (E. A. Hanushek, S. Machin & L. Woessmann eds., 2011) (discussing health outcomes and civic outcomes); Oreopoulos & Salvanes, *supra* note 22 (discussing self-reported happiness, health outcomes, and voting rates).

25. LOIS M. DAVIS, ROBERT BOZICK, JENNIFER L. STEELE, JESSICA SAUNDERS & JEREMY N. V. MILES, *EVALUATING THE EFFECTIVENESS OF CORRECTIONAL EDUCATION: A META-ANALYSIS OF PROGRAMS THAT PROVIDE EDUCATION TO INCARCERATED ADULTS*, RAND CORPORATION xvi (2013), [https://www.rand.org/pubs/research\\_reports/RR266.html](https://www.rand.org/pubs/research_reports/RR266.html) [<https://perma.cc/76X9-EVJB>]; CAROLINE WOLF HARLOW, BUREAU JUST. STAT., *EDUCATION AND CORRECTIONAL POPULATIONS* 10 (2014), <https://www.bjs.gov/content/pub/pdf/ecp.pdf> [<https://perma.cc/2AM5-FHEN>]; IHEP, *supra* note 22; TROSTEL & SMITH, *supra* note 23.

26. See *infra* Section I.C (discussing both outright rejections of applicants and the chilling effect caused by criminal history questions).

27. See *id.* (discussing the impact on racial diversity and on access for populations with disabilities).

28. *Infra* Section III.A.

stroy or eliminate juvenile records.<sup>29</sup> The ways in which colleges and universities continue to ask about criminal history all too frequently fail to account for these distinctive characteristics.<sup>30</sup> Allowing both public and mission-driven private postsecondary systems to ask about juvenile records contradicts the rehabilitative aims of juvenile justice systems and constitutes a failure to protect records in a space where they would make a particularly critical difference in improving life outcomes and in reducing recidivism. In order to build an approach to juvenile justice that truly supports second chances, other systems, including postsecondary education systems, must also be held responsible for liberating young adults from living in the shadows of their juvenile records.

The Article first looks at the wide range of ways that criminal history is currently used in the college admissions process and in determinations about access to resources like campus housing and financial aid. It then looks at the complicated array of state laws that affect what applicants with juvenile records are required to disclose when asked. The Article next examines changes at the national, state, and institutional levels, with a particular focus on modifications to the Common Application and on the different ways the first four states to restrict use of criminal history in college admissions have structured their legislation. The Article provides an original empirical analysis of how schools in states that have restricted use of criminal history have responded. The analysis looks at how the more than 800 U.S. schools that use the Common Application have reacted to the new discretion they have in asking about criminal history, with an emphasis on how individuals with juvenile records are impacted by these changes. Despite recent changes, both legislative carve-outs and the discretion given by the Common Application enable schools to continue to ask questions that interfere with the rehabilitative goals of juvenile justice systems and encourage applicants to share legally protected information.

The focus on juvenile records throughout is not intended to diminish the importance of also reconsidering use of adult criminal records in college admissions.<sup>31</sup> Postsecondary institutions and policy makers can and should continue to reform use of adult

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29. *Id.* (also noting that expungement laws do not always lead to records being destroyed).

30. *Id.*

31. For articles discussing use of adult criminal records in admissions more generally, see, for example, U.S. DEP'T OF EDUC., BEYOND THE BOX: INCREASING ACCESS TO HIGHER EDUCATION FOR JUSTICE-INVOLVED INDIVIDUALS (2016) [hereinafter DOE 2016]; MARSHA WEISSMAN, ALAN ROSENTHAL, ELAINE WOLF, MICHAEL MESSINA-YAUCHZY, CTR. FOR COMTY. ALTS., THE USE OF CRIMINAL HISTORY IN COLLEGE ADMISSIONS RECONSIDERED (2010).

criminal records as well. However, juvenile records merit their own discussion for three main reasons. First, there is a direct contradiction between the aims of policies designed to protect children from living in the shadows of their juvenile records, such as sealing and expungement laws, and the ways in which colleges and universities ask about criminal and juvenile records.<sup>32</sup> Second, colleges and universities are often not well-versed in the unique language and statutory protections of juvenile justice systems, and as a result are frequently confused about the implications of their own criminal history questions.<sup>33</sup> Finally, roughly two thirds of recent high school graduates enroll in postsecondary education.<sup>34</sup> These students have had more time to accumulate juvenile records than adult criminal records, making it critical to consider the role of those juvenile records in admissions. Reforms to how colleges and universities ask about juvenile records should ultimately serve as one important component of a broader conversation about reforming the use of all forms of criminal, juvenile, and school disciplinary history in admissions decisions.

Although state legislation and changes to the Common Application have made a significant difference in the frequency at which schools ask about criminal history, new laws and policies have not directly addressed concerns about how best to protect juvenile records. Indeed, none of the initial states to pass campus ban the box legislation have explicitly addressed the unique characteristics of juvenile records.<sup>35</sup> Of the more than 800 U.S. schools that use the Common Application, 54% decided to add a criminal history question back into their school supplementary application.<sup>36</sup> Many of those schools moved toward language that does less to protect sealed and expunged records than the language they were previously required to include.<sup>37</sup> Many have also added troubling questions about arrests or charges that did not lead to convictions.<sup>38</sup> To

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32. See *infra* Section III.A and Part V.

33. See *infra* Section V.B; see also Natalie J. Sokoloff & Anika Fontaine, *Systemic Barriers to Higher Education: How Colleges Respond to Applicants with Criminal Records in Maryland* (2013) (unpublished paper), <https://marylandcure.webs.com/Sokoff%20and%20Fontaine%20Systemic%20Barriers%20to%20Higher%20Education%202013.pdf> [https://perma.cc/6JYD-BHF6].

34. NAT'L CTR. FOR EDUC. STATS., TABLE 302.20 PERCENTAGE OF RECENT HIGH SCHOOL COMPLETERS ENROLLED IN COLLEGE, BY RACE/ETHNICITY: 1960 THROUGH 2017, at 222 (2018), <https://nces.ed.gov/pubs2020/2020009/pdf> [https://perma.cc/KMW7-6ELV].

35. See *infra* Section IV.B.

36. *Id.* at 155.

37. See cases cited *infra* Section V.B

38. See *infra* Appendix. For example, the Common Application included a disclaimer informing students that an applicant was "not required to answer yes to this question, or provide an explanation, if the criminal adjudication or conviction has been expunged, sealed, annulled, pardoned, destroyed, erased, impounded, or otherwise required by law or

address these concerns, this Article concludes by providing legislative and institutional recommendations to more effectively ensure that individuals with juvenile records are given the chance to move forward and to earn postsecondary degrees.

## I. BACKGROUND

This Part provides an overview of the political context leading up to the recent changes in law and policy that affect how colleges and universities may ask about criminal history. It looks first at the evolution of ban the box movements generally, and then at the reasons colleges and universities provide for why they ask about criminal history. Finally, it scrutinizes the direct impact the decision to ask about criminal history has on students.

### A. History of “Ban the Box” Movements

In the 1970s and 80s, “tough-on-crime” movements caused sharp increases in rates of arrest and conviction across the country.<sup>39</sup> As these rates increased, disparities in arrest and conviction rates by race widened.<sup>40</sup> More than seventy-seven million adults in the United States have arrest records.<sup>41</sup> In 2018, the FBI reported 10,310,960 arrests nationally.<sup>42</sup> Although juvenile arrest numbers have been decreasing for the last two decades, there were still

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ordered by a court to be kept confidential.” Many schools opted to remove this disclaimer, and now ask only, “[h]ave you ever been adjudicated guilty or convicted of a misdemeanor, felony, or other crime?” without further clarification. Similarly, while the Common Application asked only about convictions and adjudications, many schools now ask questions such as “[h]ave you ever been arrested?” or “[h]ave you ever been charged with a felony, even if adjudication was withheld?”

39. Walker Newell, *The Legacy of Nixon, Reagan, and Horton: How the Tough on Crime Movement Enabled a New Regime of Race-Influenced Employment Discrimination*, 15 BERKELEY J. AFR.-AM. L. & POL'Y 3, 4 (2013).

40. *Id.* at 11–12; see also FBI Uniform Crime Reporting Program Data, 1980–2015, BUREAU OF JUST. STAT., <https://www.bjs.gov/index.cfm?ty=datool&url=/arrests/index.cfm#> [<https://perma.cc/N59S-8LB8>] (last visited Nov. 11, 2020) (comparing arrest rates for Black and white populations from 1980 to 2015, and showing an increase in arrest rates for Black populations from 1980 through 1995, as well as stark levels of ongoing disproportionality).

41. Gary Fields & John R. Ermshwiller, *As Arrest Records Rise, Americans Find Consequences Can Last a Lifetime*, WALL ST. J. (Aug. 18, 2014), <https://www.wsj.com/articles/as-arrest-records-rise-americans-find-consequences-can-last-a-lifetime-1408415402>.

42. 2018 Crime in the United States: Table 29, Uniform Crime Reporting Program, FED. BUREAU OF INVESTIGATION, <https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/tables/table-29> [<https://perma.cc/8NVY-WAFB>].

728,280 arrests of individuals under age 18 in 2018.<sup>43</sup> Young adults today are much more likely to have criminal and juvenile records than in previous generations.<sup>44</sup> Racial disparities in the criminal justice system are stark: while only 8% of the general population has a felony conviction, roughly one in three Black men in the United States has been convicted of a felony, and Black men are five times more likely to have been to prison than the general population.<sup>45</sup> Racial disparities are even more pronounced in juvenile systems: African Americans represented 27.4% of all arrests nationally, but comprised 34.9% of juvenile arrests.<sup>46</sup>

The ban the box movement is a response to these inequities.<sup>47</sup> The movement to ban the box seeks to limit the ability of employers and other actors to ask applicants to check a box to report their own criminal history.<sup>48</sup> Although the ban the box movement is most frequently associated with protections against asking about criminal history in the hiring process, the movement also recognizes barriers related to using criminal history in decisions about housing, education, and voting.<sup>49</sup>

In 1998, Hawaii unintentionally passed the first state legislation prohibiting employers from asking about criminal history on job applications. A year earlier, the Hawaii Civil Rights Commission interpreted a state law from the 1970s that banned discrimination on the basis of one's arrest or conviction record to mean that employers could not ask about arrest and conviction history unless the inquiry fell under a statutory exception.<sup>50</sup> In response, a Hawaii state legislator introduced a bill that was originally intended to clarify that this guidance applied only to asking about arrests, and that employers should be legally protected in asking about convic-

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43. See U.S. DEP'T OF JUST. OFF. OF JUV. JUST. & DELINQ. PREVENTION, *Estimated Number of Arrests by Offense and Age Group, 2018*, (Oct. 31, 2019), [https://www.ojjdp.gov/ojstatbb/crime/ucr.asp?table\\_in=1](https://www.ojjdp.gov/ojstatbb/crime/ucr.asp?table_in=1) [<https://perma.cc/THK2-SFLF>] (listing arrest rates for 2018); U.S. DEP'T OF JUST. OFF. OF JUV. JUST. & DELINQ. PREVENTION, *Juvenile Arrest Rate Trends*, (Oct. 31, 2019), [https://www.ojjdp.gov/ojstatbb/crime/JAR\\_Display.asp?ID=qa05200&selOffenses=1](https://www.ojjdp.gov/ojstatbb/crime/JAR_Display.asp?ID=qa05200&selOffenses=1) [<https://perma.cc/ESH3-LTXV>] (showing decreasing arrest rates for individuals under the age of 18).

44. James Smith, *The Long-Term Economic Impact of Criminalization in American Childhoods*, 65 CRIME & DELINQ. 422, 422 (2019).

45. Sarah K.S. Shannon, Christopher Uggen, Jason Schnittker, Melissa Thompson, Sara Wakefield & Michael Massoglia, *The Growth, Scope, and Spatial Distribution of People with Felony Records in the United States, 1948–2010*, 54 DEMOGRAPHY 1795, 1795 (2017).

46. *2018 Crime in the United States: Table 43 – Arrests by Race and Ethnicity*, FED. BUREAU OF INVESTIGATION, <https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/tables/table-43> [<https://perma.cc/BB9V-EX7Z>] (last visited Nov. 11, 2020).

47. EVANS, *supra* note 17, at 16–17.

48. *Id.* at 8.

49. *Id.* at 8–10.

50. Sheri-Ann S.L. Lau, *Employment Discrimination Because of One's Arrest and Court Record in Hawaii*, 22 U. HAW. L. REV. 709, 714–15 (2000).

tions.<sup>51</sup> Through an ironic sequence of committee amendments, the bill went through a series of changes and ended up prohibiting employers from asking about both arrests *and* convictions until after a conditional offer of employment is made.<sup>52</sup> Hawaii's legislation helped pave the way for a larger national movement.<sup>53</sup>

In the early 2000s, the California-based All of Us or None movement first coined the term "ban the box" to refer to their work advocating for increased access to opportunity for justice-involved populations.<sup>54</sup> The All of Us or None Campaign is a project of Legal Services for Prisoners with Children, and it focuses broadly on combatting barriers to individuals attempting to reenter society after a criminal conviction, including barriers to housing, voting, and employment.<sup>55</sup> According to All of Us or None, "ban the box" is "a movement to end the discrimination faced by millions of people in the United States, returning to their communities from prison or jail and trying to put their lives back together. It is a campaign to win full restoration of people's human and civil rights."<sup>56</sup> After a successful push to remove the box asking about criminal history on public sector job applications in San Francisco, All of Us or None created a Ban the Box Toolkit that they shared with organizations across the country.<sup>57</sup>

Today, thirty-five states and the District of Columbia have passed laws that place restrictions on the ability to ask about criminal history in the hiring process, and a number of additional cities and counties have adopted similar laws at a local level.<sup>58</sup> Current laws differ tremendously in scope, varying in whether they cover all employers, or just those in the public sector, and when in the hiring process employers are first able to begin asking about criminal history.<sup>59</sup> A number of state ban the box laws include provisions that provide additional restrictions on the ways in which employers or licensing agencies may use juvenile records, records that have

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51. *Id.* at 715 n.36 (describing H.B. 3528 (Haw. 1998) (codified as amended at HAW. REV. STAT. § 378-2.5)).

52. See *id.* for an elaboration on the series of committee amendments.

53. EVANS, *supra* note 17, at 11.

54. Liam Julian, *States 'Ban the Box': Removing Barriers to Work for People with Criminal Records*, COUNCIL OF STATE GOV'TS (Nov. 2014), [http://www.csg.org/pubs/capitolideas/2014\\_nov\\_dec/BantheBox.aspx](http://www.csg.org/pubs/capitolideas/2014_nov_dec/BantheBox.aspx) [<https://perma.cc/K8U9-LXYC>].

55. EVANS, *supra* note 17, at 10.

56. *Id.* at 8.

57. *Id.* at 11.

58. AVERY & LU, *supra* note 19, at 1.

59. Jacqueline G. Kelley, *Rehabilitate, Don't Recidivate: A Reframing of the Ban the Box Debate*, 22 ROGER WILLIAMS U. L. REV. 590, 591 (2017).

been sealed or expunged, or arrests that did not lead to convictions.<sup>60</sup>

Federal agencies have adopted the reasoning, and even the language, of ban the box movements. In 2012, the U.S. Equal Employment Opportunity Commission (EEOC) found that “criminal record exclusions have a disparate impact based on race and national origin,” and therefore can be used to investigate claims of disparate treatment by race under Title VII of the Civil Rights Act of 1964.<sup>61</sup> However, one federal circuit found in 2019 that the EEOC lacked the authority to issue this guidance.<sup>62</sup> In 2016, the U.S. Department of Housing and Urban Development (HUD) found that “criminal records-based barriers to housing are likely to have a disproportionate impact on minority home seekers.”<sup>63</sup> Under HUD guidance, housing providers may only ask about criminal history if they are able to demonstrate that it is necessary to achieve a “substantial, legitimate, nondiscriminatory” interest, and that no other practice could be used that would achieve the same interest in a less discriminatory way.<sup>64</sup> Guidance from both the EEOC and HUD stressed problems with asking about arrests rather than convictions.<sup>65</sup> Both agencies also noted that criminal background checks could lead to problems with sealed or expunged records being disclosed despite statutory protections.<sup>66</sup>

Advocates across the country are continuing to push for restrictions on the use of criminal history in a number of spaces. Both the All of Us or None Campaign and the National Employment Law Project (NELP) have published best practices for asking about criminal history in the hiring process, and NELP has also

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60. See, e.g., MASS. GEN. LAWS ANN. ch. 151B § 4 (9) (West 2018) (prohibiting inquiries into arrests that did not lead to convictions; first convictions for minor misdemeanors, convictions for minor misdemeanors that are more than three years old, and records that have been sealed or expunged); CAL. LABOR CODE § 432.7(a)(1) (West 2020) (prohibiting inquiries into arrests that did not lead to convictions, juvenile adjudications, and sealed or dismissed records); MINN. STAT. ANN. § 364.04 (West 2020) (prohibiting any state entity from using arrests that didn’t lead to convictions, convictions that have been annulled or expunged, or misdemeanor convictions for which no jail sentence could be imposed).

61. U.S. EQUAL EMP. OPPORTUNITY COMM’N, OFF. OF LEGAL COUNS., PUB. NO. 915.002, CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, at 10 (2012), [https://www.eeoc.gov/laws/guidance/arrest\\_conviction.cfm](https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm) [<https://perma.cc/63EQ-BUFP>] [hereinafter EEOC].

62. *Texas v. EEOC*, 933 F.3d 433 (5th Cir. 2019). To date, other circuits have not followed suit.

63. U.S. DEP’T OF HOUSING & URB. DEV., OFF. OF GEN. COUNS., GUIDANCE ON APPLICATION OF FAIR HOUSING ACT STANDARDS TO THE USE OF CRIMINAL RECORDS BY PROVIDERS OF HOUSING AND REAL ESTATE-RELATED TRANSACTIONS 2 (2016), [https://www.hud.gov/sites/documents/HUD\\_OGCGUIDAPPFHASTANDCR.PDF](https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF) [<https://perma.cc/78HK-7AFJ>] [hereinafter HUD].

64. *Id.* at 7.

65. EEOC, *supra* note 61, at 12; HUD, *supra* note 63, at 5–6.

66. EEOC, *supra* note 61, at 13; HUD, *supra* note 63, at 6 n.29.

published model city resolutions and ordinances, a model state executive order, and model state legislation.<sup>67</sup> The NELP model state legislation prohibits employers from asking about criminal history until a conditional offer of employment has been made, and prohibits organizations responsible for occupational licensing from considering arrests that did not lead to convictions or records that have been sealed, dismissed, or expunged.<sup>68</sup> For many advocates who have seen wins nationally on banning the box in employment contexts, moving to restrict the use of criminal history on college applications has felt like a natural and strategic next step.<sup>69</sup>

### B. *Why Colleges and Universities Care*

Colleges and universities today have several reasons for asking about criminal history in the admissions process, including concerns about safety, concerns about liability, concerns about academic misconduct, and concerns about whether students can be licensed.<sup>70</sup> In a 2017 survey, 85% of college and university admissions officers thought it was appropriate to ask about criminal and disciplinary history in at least some contexts.<sup>71</sup> However, attitudes on the issue are shifting: 22% of admissions officers included in the same survey reported that their institutions were reconsidering their approach.<sup>72</sup>

In a 2016 survey of admissions officers, researchers asked institutions to rate eleven different reasons why they might ask for criminal history information on a scale from “very important” to “very unimportant.”<sup>73</sup> Institutions listed “reduce violence” as the most important reason for asking about criminal history, with 64.9% of schools that include criminal history questions ranking it as “very

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67. EVANS, *supra* note 17, at 21–29; NAT’L EMP. L. PROJECT, BEST PRACTICES AND MODEL POLICIES: CREATING A FAIR CHANCE POLICY (2015), <https://s27147.pcdn.co/wp-content/uploads/Fair-Chance-Ban-the-Box-Best-Practices-Models.pdf> [<https://perma.cc/64CW-6ZSD>].

68. NAT’L EMP. L. PROJECT, *supra* note 67, at 16–17.

69. *See, e.g.*, Telephone Interview with Caryn York, Exec. Dir., Job Opportunities Task Force (July 10, 2019) (on file with author).

70. *See* Matthew Pierce, Carol Runyan & Shrikant Bangdiwala, *The Use of Criminal History Information in College Admission Decisions*, 13 J. SCH. VIOLENCE 359 (2014).

71. SCOTT JASCHIK & DOUG LEDERMAN, INSIDE HIGHER ED & GALLUP, INC., 2017 SURVEY OF COLLEGE AND UNIVERSITY ADMISSIONS DIRECTORS 37 (2017), [https://77ee1g35qv20jqpi6gpnybj-wpengine.netdna-ssl.com/wp-content/uploads/2020/02/99-2017\\_Admissions-Directors-Survey\\_0.pdf](https://77ee1g35qv20jqpi6gpnybj-wpengine.netdna-ssl.com/wp-content/uploads/2020/02/99-2017_Admissions-Directors-Survey_0.pdf) [<https://perma.cc/2GS5-ZY3F>].

72. *Id.*

73. Pierce et al., *supra* note 70, at 365. The reasons listed were: Reduce violence, protect against liability, reduce illegal drug use, reduce nonviolent crime, reduce suicide, reduce alcohol use, reduce academic misconduct, ensure students can be licensed, improve public relations, peer institutions do it, and parents and alumni demand it.

important” and 22.8% of institutions ranking it as “somewhat important.”<sup>74</sup> Other top safety-related reasons for asking students about criminal history included reducing illegal drug use and reducing nonviolent crime.<sup>75</sup> Additional studies have also found that universities are particularly concerned about safety and about individuals who have committed violent offenses.<sup>76</sup> Opponents to legislation that would ban the box on college applications have raised safety as a top consideration.<sup>77</sup> Whether asking about criminal history does, in fact, improve campus safety continues to be a hotly-contested issue: studies on the topic are limited but generally have found no evidence to suggest that use of criminal history questions increases campus safety.<sup>78</sup>

More than three quarters of institutions that ask about criminal history also list protection against liability as a very important or somewhat important reason for requiring applicants to disclose criminal history.<sup>79</sup> Although colleges and universities express concerns about their potential liability for failure to check the criminal background of students, it remains unclear whether institutions could be held liable for negligently admitting a student. In 1990, Congress amended the Higher Education Act to include the Crime Awareness and Campus Security Act, later renamed the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act.<sup>80</sup> The Clery Act requires disclosure of information about crime on campuses but imposes no obligations on colleges or universities to screen for criminal history in the admissions process.<sup>81</sup> A 2008 study by the National Association of College and University Attorneys found that there had never been a successful negligence suit where a college or university was held liable for admitting a

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74. *Id.*

75. *Id.*

76. *See, e.g.*, Juleyka Lantigua-Williams, *When a Classmate Is a Former Inmate*, THE ATLANTIC (May 5, 2016), <https://www.theatlantic.com/politics/archive/2016/05/when-a-classmate-is-a-former-inmate/480864/> [<https://perma.cc/EGZ5-82QN>] (reporting that experts she interviewed emphasized the importance of safety precautions as a rationale); JASCHIK & LEDERMAN, *supra* note 71, at 36 (finding that 40 percent of admissions officers would favor restricting questions about history to only violent or recent offenses).

77. *See infra* Section IV.B.1–4 (providing further explanation of this opposition).

78. *See, e.g.*, Bradley D. Custer, *Why College Admissions Policies for Students with Felony Convictions Are Not Working at One Institution*, COLL. & UNIV., Summer 2013, at 28, 29; Carol W. Runyan, Matthew W. Pierce, Viswanathan Shankar & Shrikant I. Bangdiwala, *Can Student-Perpetrated College Crime Be Predicted Based on Precollege Misconduct?*, 19 INJ. PREVENTION 405, 405 (2013); *see generally* Margaret Olszewska, *Undergraduate Admission Application as a Campus Crime Mitigation Measure: Disclosure of Applicants’ Disciplinary Background Information and Its Relationship to Campus Crime* (2007) (Ed.D. thesis, East Carolina University) (on file with the East Carolina University Library system).

79. Pierce et al., *supra* note 70, at 365.

80. Clery Act, 20 U.S.C. § 1092(f).

81. *Id.*

student with a criminal background who went on to commit further criminal activity on campus.<sup>82</sup> The study left open the possibility that such a suit might be possible.<sup>83</sup>

Finally, universities also listed concerns about academic misconduct and ensuring graduates can be licensed as top priorities, with 70% of schools listing preventing academic misconduct as somewhat or very important, and two thirds of schools listing ensuring students can be licensed as a significant priority.<sup>84</sup> Opponents to laws banning the box on college admissions have been particularly vocal about concerns related to licensure, and have argued that it does not make sense to train students for specific professions that they may be ineligible for because of past criminal activity.<sup>85</sup>

### C. *The Impact on Students*

Questions about criminal history can impact student admission directly and can also indirectly chill students from submitting college applications. When criminal and juvenile records affect decision-making on admissions and financial aid, Black and Latinx applicants and applicants with disabilities are likely to be disproportionately impacted.

Colleges do not just collect criminal and juvenile history: they use it in decision-making. When asked to assess whether they would “probably or definitely not” admit individuals who had been convicted for different types of crimes, 80% of schools reported that they would likely not admit a student convicted of rape or sexual assault, 80% would likely not admit individuals convicted for physical assault, 72% would likely not admit a student who was convicted for distribution of illegal drugs other than marijuana, 70% would likely not admit a student who was convicted for illegal prescription drug distribution, and 64% would likely deny admission to individuals convicted of marijuana distribution.<sup>86</sup>

In addition to having a direct impact on admission, including questions about criminal history may also have an indirect chilling effect on the populations that choose to apply and that complete their full application. A 2009 study of the State University of New York (SUNY) system found that almost 3,000 individuals each year

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82. Darby Dickerson, *Background Checks in the University Admissions Process: An Overview of Legal and Policy Considerations*, 34 J. COLL. & UNIV. L. 419, 466 (2008).

83. *Id.*

84. Pierce et al., *supra* note 70, at 365.

85. Telephone Interview with Noel Vest, Postdoctoral Scholar, Stanford Univ., (June 20, 2019) (on file with author); Interview with Caryn York, *supra* note 69.

86. Pierce et al., *supra* note 70, at 367.

check the box indicating that they have been convicted of a felony on their application form.<sup>87</sup> Of those individuals, almost two-thirds end up never submitting their final application, in part because of a follow-up process for individuals who check the felony box.<sup>88</sup> This rate of attrition was three times higher than that for the general applicant population.<sup>89</sup> The Center for Community Alternatives in New York deemed this process “felony applicant attrition.”<sup>90</sup> The study also found that for every one applicant who was actually denied admission based on a felony conviction, fifteen applicants checked the felony box and then failed to complete the follow-up supplemental application.<sup>91</sup>

Although hard to measure, it seems probable that questions about criminal and disciplinary history negatively impact admission rates for Black and Latinx students.<sup>92</sup> When surveyed on admissions practices, admissions officers at a majority of schools indicated that they were unsure as to whether racial minorities were impacted by questions about criminal history.<sup>93</sup> However, because Black and Latinx populations are significantly overrepresented in the criminal and juvenile justice systems, researchers and advocates have consistently argued that questions about criminal justice involvement are likely to have a disproportionate impact on minority candidates.<sup>94</sup>

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87. ALAN ROSENTHAL, EMILY NAPIER, PATRICIA WARTH & MARSHA WEISSMAN, CTR. FOR CMTY ALTS., *BOXED OUT: CRIMINAL HISTORY SCREENING AND COLLEGE APPLICATION ATTRITION* v (2015), [http://communityalternatives.org/pdf/publications/BoxedOut\\_FullReport.pdf](http://communityalternatives.org/pdf/publications/BoxedOut_FullReport.pdf) [<https://perma.cc/XFV3-BBGJ>].

88. *Id.* at 9, 21.

89. *Id.* at 10.

90. *Id.* at iv.

91. *Id.* at vi.

92. Measuring impact on admissions rates by race is difficult because of challenges in separating correlation and causation in the admissions process. For example, schools that choose not to ask about criminal history may also be more likely to prioritize racial inclusivity in the admissions process in other ways.

93. Pierce et al., *supra* note 70, at 371.

94. See, e.g., DOE 2016, *supra* note 31, at 18 (“In light of the relevant data on disproportionate minority contact with the criminal justice system, . . . institutions should assess and consider whether use of CJI furthers institutional goals of creating safe, inclusive, and diverse campus communities.”); Pierce et al., *supra* note 70, at 360 (“[C]riminal screening of college applicants raises social justice concerns because Black and Hispanic applicants more often have criminal records. It is possible that the practice of criminal screening could exacerbate inequalities in college admission.” (citation omitted)); Robert Stewart & Christopher Uggen, *Criminal Records and College Admissions: A Modified Experimental Audit*, 58 *Criminology* 156, 157–58 (2020) (“The increasing scrutiny of criminal records in college admissions is especially consequential for groups most subject to the criminal justice system, particularly young Black males. In light of the historic underrepresentation of African Americans in higher education and their overrepresentation in justice-involved populations, criminal history disclosure requirements could raise additional barriers to racial progress, student learning, and democracy.” (citations omitted)); Rebecca R. Ramaswamy, Note, *Bars to Education: The Use of Criminal History Information in College Admissions*, 5 *COLUM. J. RACE & L.* 145 (2015) (arguing that use of criminal history in college admissions might be successfully challenged

Although some researchers have suggested that banning the box on employment forms could potentially result in employers being more likely to assume Black and Latinx applicants have criminal history, the only study on the topic in the context of college applications suggests similar effects are not seen in college admissions.<sup>95</sup> Researchers paired Black students and white students with similar qualification levels and had them submit applications to a range of colleges and universities. They found that relative to employment audits, there is “far less overall racial discrimination in college admission decisions and small and non-significant differences in the appraisal of Black applicants without criminal records in the presence or absence of these questions.”<sup>96</sup>

Older students, or so-called “non-traditional students,”<sup>97</sup> may also be more likely to be negatively impacted by criminal history questions. Older students have had a longer time to accumulate criminal history, and particularly to accumulate adult criminal records that cannot be sealed or expunged in the ways juvenile records can be.<sup>98</sup>

Finally, students with disabilities may also be disproportionately impacted by questions about criminal and disciplinary history on college applications. Almost one-third of state and federal prisoners have at least one disability, and four in ten jail inmates have a

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under Title VI of the Civil Rights Act because the practice has adverse effects on Black and Latinx applicants and is not an educational necessity).

95. Stewart & Uggen, *supra* note 94, at 177. The theory that employers are more likely to assume Black applicants have a criminal history when criminal history questions are removed is highly disputed. *See, e.g.*, Amanda Agan & Sonia Starr, *Ban the Box, Criminal Records, and Racial Discrimination: A Field Experiment*, 133 Q.J. ECON. 191 (2018) (finding that white applicants received disproportionately more callbacks than their Black peers after ban the box policies were implemented). *But see, e.g.*, Daniel Shoag & Stan Veuger, *No Woman No Crime: Ban the Box, Employment, and Upskilling*, (May 25, 2016) (unpublished manuscript), [https://scholar.harvard.edu/files/shoag/files/no\\_woman\\_no\\_crime.pdf](https://scholar.harvard.edu/files/shoag/files/no_woman_no_crime.pdf) [<https://perma.cc/79GB-SBU7>] (finding that bans on inquiries into criminal history increased employment of residents in high-crime neighborhoods by as much as 4%).

96. Stewart & Uggen, *supra* note 94, at 179.

97. Although “non-traditional” remains the most commonly used term to refer to students who are older or who do not represent the stereotypical image of an eighteen to twenty-two-year-old college student, the population represents an increasingly large percentage of today’s college student body. As a result, many advocates refer to this population as “new traditional” or as “today’s students.” *See, e.g.*, Stephen G. Pelletier, *Success for Adult Students*, PUB. PURPOSE, Fall 2010, at 2; LUMINA FOUND., TODAY’S STUDENT, <https://www.luminafoundation.org/todays-student> [<https://perma.cc/Y39X-ULY9>] (last visited Nov. 11, 2020). Advocates have viewed increasing college accessibility for older students as a key strategy to reaching state-level goals for postsecondary degree attainment. *See, e.g.*, “STRATEGIC PLAN FOR 2017-2020,” LUMINA FOUND., STRATEGIC PLAN FOR 2017 TO 2020, at 4–5, <https://www.luminafoundation.org/files/resources/strategic-plan-2017-to-2020-apr17.pdf> [<https://perma.cc/8F3F-F3PY>].

98. DICKERSON, *supra* note 82, at 487.

disability.<sup>99</sup> Young people with disabilities are also overrepresented in juvenile justice systems.<sup>100</sup>

When colleges and universities make decisions based on criminal history, the inequities that pervade criminal and juvenile justice systems are likely to have long-term impacts on postsecondary systems as well.

## II. CURRENT USE OF CRIMINAL AND JUVENILE RECORDS IN THE COLLEGE APPLICATION PROCESS

Colleges and universities ask for information about criminal history in a range of different ways. Today, a student's past justice involvement can show up through inquiries into criminal history during the general admissions process, admissions to campus housing, admissions to specific programs, and decisions about eligibility for financial aid.

### A. Use of Criminal History in Admissions

While estimates of the current prevalence of criminal history questions on college applications vary, studies have uniformly found that such questions are common, with estimates ranging from 61% to 74% of four-year institutions asking applicants directly about their criminal history.<sup>101</sup> Differences in estimates may be due to changes over time, but may also be partially explained by differences in survey methods and differences in the precise wording of the survey question asked.<sup>102</sup>

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99. See JENNIFER BRONSON, LAURA M. MARUSCHAK & MARCUS BERZOFKY, BUREAU OF J. STATS., *DISABILITIES AMONG PRISON AND JAIL INMATES*, 2011–12, 1 (2015).

100. Dalun Zhang, David E. Barret, Antonis Katsiyannis & Myeongsun Yoon, *Juvenile Offenders with or Without Disabilities: Risk and Patterns of Recidivism*, 21 *LEARNING & INDIVIDUAL DIFFERENCES* 12, 12 (2011).

101. See WEISSMAN ET AL., *supra* note 31, at 10 (finding that 74% of colleges require disclosure); Pierce et al., *supra* note 70, at 359 (finding that 61% of four-year colleges collect criminal justice information); Stewart & Uggen, *supra* note 94, at 180 (finding that 70% of four-year colleges require criminal history information as part of the admissions process).

102. Center for Community Alternatives partnered with the American Association of Collegiate Registrars and Admission Officers to send a survey to 3,248 member organizations, including both four-year and two-year programs, of which 273 responded. See WEISSMAN ET AL., *supra* note 31, at 7. Pierce, Runyan, and Bandiwala used a proportional random sample of 300 postsecondary institutions from the Integrated Postsecondary Education Data System (IPEDS). Their sampling included only four-year nonprofit institutions that were eligible for Title IV federal aid. Of the 300 institutions they surveyed, 124 responded, and 112 identified their institutions on the response form. See Pierce et al., *supra* note 70, at 362. Finally Stewart and Uggen looked at 1,350 applications for four-year institutions. Stewart & Uggen, *supra* note 94, at 159–60.

Colleges and universities ask about criminal history at a variety of different points in the admissions process. While most institutions require students to disclose their criminal history in an initial application, some institutions only ask a subset of applicants for criminal history, such as those who applied to a program that prepares people for jobs that are frequently unavailable to individuals with criminal or juvenile records.<sup>103</sup> Other schools only ask for criminal history from individuals who are applying to live in campus housing.<sup>104</sup> If a student does disclose a prior criminal or juvenile record, schools often follow up to ask for additional information, which could potentially include a letter of explanation, a criminal background check, copies of the applicant's official criminal record, and multiple letters of recommendation.<sup>105</sup>

Wording varies tremendously in how different institutions ask about criminal history. These differences can include whether colleges and universities ask only about criminal convictions, or also include information about arrests or charges that did not lead to conviction; whether they make it clear that sealed or expunged records should not be included; and what specific language is used to ask about juvenile adjudications.<sup>106</sup> A 2016 report from the U.S. Department of Education raised concerns about schools using potentially ambiguous or overly broad language when asking about criminal history.<sup>107</sup> Cumulatively, this leaves a complicated landscape for individuals with juvenile records.

The range of ways that schools ask about criminal involvement stands in contrast to use of criminal history on job applications. The EEOC has stated that “an arrest record standing alone may not be used to deny an employment opportunity” and that employers should set policies that are appropriate to the nature and severity of the underlying offense.<sup>108</sup> Job applications tend to focus just on convictions, not arrests, and typically limit their inquiry just to felonies.<sup>109</sup>

Studies suggest a number of trends in the types of schools that are most likely to ask about criminal history. Schools requiring self-reporting of criminal history have disproportionately low minority enrollment: as of 2016, schools that asked for criminal history information had 71% white enrollment on average, compared to

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103. WEISSMAN ET AL., *supra* note 31, at 11.

104. Dickerson, *supra* note 82 at 441–42.

105. Stewart & Uggen, *supra* note 94, at 161.

106. DOE 2016, *supra* note 31, at 22.

107. *Id.* at 22.

108. EEOC, *supra* note 61, at 12. As discussed above, the Fifth Circuit has found that the EEOC's guidance was beyond the scope of its authority.

109. Agan & Starr, *supra* note 95, at 193 n.2.

63% white enrollment at schools that did not require reporting of criminal history.<sup>110</sup> Private institutions are more likely to ask for criminal history than public programs, and suburban schools are more likely to ask for criminal history than either urban or rural programs.<sup>111</sup> Community colleges are significantly less likely to include questions about criminal history, with only 40% of two-year programs requiring applicants to self-report.<sup>112</sup>

Although less common than asking for self-reported criminal history, 20% of all schools ask for criminal background checks.<sup>113</sup> While this typically happens after a student has checked a box indicating that they have been convicted or adjudicated delinquent for a criminal or juvenile offense, 14% of the schools that conduct background checks require those checks for all students before admission. Another 14% require checks for all applicants once they have been admitted.<sup>114</sup> Of schools that conduct background checks, 28% report that they do so through contracting with a private company, 22% use an official state repository agency, 20% use a state law enforcement agency, and 24% of admissions officers report that they are unsure how background checks are conducted.<sup>115</sup>

### B. *Use of Criminal History in Financial Aid Decisions*

In addition to relying on information about criminal and disciplinary history in the admissions process, determinations about financial assistance at federal, state, and local levels are often made based on criminal history.

The Free Application for Federal Student Aid (FAFSA) is used to determine student eligibility for a range of forms of federal financial assistance, including Pell Grants, Perkins Loans, and the Federal Work-Study Program.<sup>116</sup> Students are ineligible for these

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110. Pierce et al., *supra* note 70, at 364.

111. *Id.*

112. WEISSMAN ET AL., *supra* note 31, at 10.

113. *Id.* at 12.

114. *Id.* Pierce, Runyan & Bangdiwala asked a similar question and found that out of the sixteen schools in their sample of 124 respondents that conducted background checks in some form, only one school (6.25%) did so for all applicants before admission and two schools (12.5%) conducted background checks on all admitted students. See Pierce et al., *supra* note 70, at 364. Inconsistencies here are likely the result of the small sample size in question.

115. WEISSMAN ET AL., *supra* note 31, at 12.

116. See 20 U.S.C. § 1090 (a)(1). Pell Grants, Perkins Loans, Federal Direct Loans, and Federal Work-Study are all federal need-based forms of assistance. Pell Grants are the federal government's leading form of "gift-aid" and do not need to be repaid. Perkins Loans are subsidized loans with low interest rates that require a demonstration of financial need. Federal Direct Loans are also subsidized loans but require a more limited demonstration of need. Work-study funding is provided directly to schools that participate in the federal work-

forms of federal assistance for at least one year if they report on the FAFSA that they have been convicted of drug offenses while receiving federal funds.<sup>117</sup> Congress first added this restriction in 1998, and narrowed the scope in 2006 to apply only to periods where the student was already receiving federal financial aid, thereby exempting first-time applicants from needing to disclose previous offenses.<sup>118</sup> Although the FAFSA form itself does not include clarifying language about juvenile records, federal guidance on how to complete the FAFSA explicitly instructs applicants: “Do not count any convictions that have been removed from your record or that occurred before you turned age 18, unless you were tried as an adult.”<sup>119</sup>

In addition to the drug offenses question on the FAFSA, some restrictions on federal aid eligibility apply to individuals who are currently detained. Youth who are in juvenile detention facilities are eligible for federal Pell Grants but not for federal loans for higher education, such as Perkins Loans.<sup>120</sup> Individuals who are incarcerated in federal or state adult penal institutions are ineligible for both federal loans and for Pell Grants.<sup>121</sup>

Finally, determinations about eligibility for state-level financial aid and financial assistance offered by individual colleges and universities can often turn on criminal or disciplinary history. Both

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study program. Students who qualify for work-study earn wages through part-time positions that are typically, but not always, on campus. See 20 U.S.C. §§ 1070-1987; U.S. DEP'T OF EDUC., *Types of Financial Aid*, <https://studentaid.ed.gov/sa/types> [<https://perma.cc/TH33-UGUN>] (last visited Nov. 11, 2020).

117. 20 U.S.C. § 1091 (r)(1). The period of ineligibility depends on whether the conviction was for possession or for sale of a controlled substance, and whether the conviction was for a repeat offense or not.

118. Higher Education Amendments of 1998, Pub. L. No. 105-244, 112 Stat 1581 (1998); Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat 4 (2006).

119. See *Free Application for Federal Student Aid: July 1, 2019 – June 30, 2020*, U.S. DEP'T OF EDUC., <https://studentaid.gov/sites/default/files/2019-20-fafsa.pdf> [<https://perma.cc/8FX4-Y9RY>] (last visited Nov. 11, 2020). But see U.S. DEP'T OF EDUC., OFF. OF FED. STUDENT AID, *STUDENT AID ELIGIBILITY WORKSHEET FOR QUESTION 23*, <https://ifap.ed.gov/student-aid-eligibility-worksheets/2021StudentAidEligibilityWorksheetQ23> (last visited Nov. 11, 2020).

120. Dear Colleague Letter on Federal Pell Grant Eligibility for Students Confined or Incarcerated in Locations That Are Not Federal or State Penal Institutions, Lynn B. Mahaffie, Off. of Postsecondary Educ., Dep't of Educ. (Dec. 8, 2014), <https://ifap.ed.gov/dear-colleague-letters/12-08-2014-gen-14-21-subject-federal-pell-grant-eligibility-students> [<https://perma.cc/NP6W-7VQT>] (interpreting restrictions on Pell eligibility for incarcerated individuals to apply only to federal and state penal institutions, but not to juvenile justice facilities, but finding that restrictions on Title IV student loans apply to individuals in both adult facilities and juvenile facilities).

121. 20 U.S.C. § 1091(b)(5) (specifying that “no incarcerated student is eligible to receive a loan” under Title IV of the Higher Education Act); 20 U.S.C. § 1070a(b)(6) (specifying that Pell Grants may not be awarded to anyone who “is incarcerated in any Federal or State penal institution”).

states and individual institutions are given wide leeway to decide who qualifies for state and institutional aid.<sup>122</sup>

### III. LEGAL CONSIDERATIONS IN DISCLOSING JUVENILE RECORDS ON COLLEGE APPLICATIONS

Colleges and universities today ask questions about criminal history in a stunningly broad range of ways. Different wording can have startlingly different legal implications for what individuals are responsible for disclosing, leaving a perplexing landscape for applicants to navigate. This Part looks first at the complex array of laws that impact applicants' obligations to disclose juvenile records, and then turns to the limited research that exists on how applicants understand their obligations to disclose.

#### A. Laws Impacting Obligations to Disclose

In 1899, Illinois established the first juvenile court in the nation, premised on the idea that the behavior of children is malleable, and that children need guidance and care rather than more conventional punishment.<sup>123</sup> In the years since, every state has adopted a juvenile court system that treats children in ways that are distinct from adults charged with crimes.<sup>124</sup> Juvenile justice systems are often premised on a rehabilitative ideal, under which a central aim of the system is to help the child or teenager move beyond past involvement with the law.<sup>125</sup> Juvenile systems use distinct terminology and may include sealing, expungement, and confidentiality provisions.<sup>126</sup> These protections are intended to help children and young adults receive a fresh start and avoid being followed through

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122. See generally William R. Doyle, *The Politics of Public College Tuition and State Financial Aid*, 83 J. HIGHER EDUC. 617–18 (2012).

123. JOAN GITTENS, POOR RELATIONS 105–10 (1994).

124. See Joy Radice, *The Juvenile Record Myth*, 106 GEO. L.J. 365, App. A.

125. *Kent v. U.S.*, 383 U.S. 541, 554 (1966) (“The Juvenile Court is theoretically engaged in determining the needs of the child and of society rather than adjudicating criminal conduct. The objectives are to provide measures of guidance and rehabilitation for the child and protection for society, not to fix criminal responsibility, guilt and punishment.”); see also Radice, *supra* note 124, at App. B; Barry C. Feld, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference it Makes*, 68 B.U. L. REV. 821, 824 (1988); Carrie T. Hollister, Comment, *The Impossible Predicament of Gina Grant*, 44 UCLA L. REV. 913, 918–22 (1997); Michael L. Skoglund, Note, *Private Threats, Public Stigma? Avoiding False Dichotomies in the Application of Megan’s Law to the Juvenile Justice System*, 84 MINN. L. REV. 1805, 1810–13 (2000).

126. See *infra* Section III.A.1.

life by the shadow of their juvenile justice involvement.<sup>127</sup> Today, juvenile systems have in many ways fallen short of the rehabilitative ideal.<sup>128</sup> Laws protecting juvenile records vary tremendously by state, and some afford a much greater degree of protection than others.<sup>129</sup> Although people sometimes speak of a national “juvenile justice system,” in reality, each state has its own unique system and set of rules.<sup>130</sup> When this is combined with the wide array of ways in which colleges and universities ask criminal history questions, it leads to a system in which individuals with juvenile records are asked questions that leave even seasoned attorneys baffled. It also means that applicants from different states may be treated very differently by the same college or university.

### 1. Convictions Versus Adjudications

One key source of ambiguity in questions about criminal history used on college admissions forms is whether individuals who have been adjudicated delinquent or have youthful offender status<sup>131</sup> are responsible for disclosing that information when asked only about convictions.

To distinguish the goals of juvenile systems from those of adult criminal systems, juvenile courts use a separate set of terminology, designed to resemble civil systems more closely than criminal systems.<sup>132</sup> Juvenile systems typically refer to “adjudications” and “delinquency” rather than to “convictions.”<sup>133</sup>

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127. See Skoglund, *supra* note 125, at 1812–13 (“Because juvenile court dispositions are intended to bring at-risk youth within societal norms, the juvenile system was designed to guarantee confidentiality and avoid unnecessary stigmatization through use of adult criminal labels and sanctions.”); Radice, *supra* note 124, at 369 (“The law has long recognized that the state’s role in encouraging rehabilitation includes restricting access to juvenile records. In fact, juvenile courts were the first courts to expunge or destroy records, relying on the premise that juveniles should be able to outgrow their youthful indiscretion and be given a clean slate in adulthood.”); Hollister, *supra* note 125, at 928 (“The continued commitment of the juvenile justice system to rehabilitation, however battered or bruised that commitment may be, depends on the use of effective sealed-record statutes if the principle of the clean slate for the juvenile offender is to be realized.”).

128. See Radice, *supra* note 124, at 383–88; Feld, *supra* note 125, at 903 n.398; Hollister, *supra* note 125, at 922–26; Skoglund, *supra* note 125, at 1810–15.

129. See *infra* Sections III.A.1 and III.A.2.

130. See *infra* Sections III.A.1 and III.A.2.

131. Youthful offender statutes vary significantly from state to state but typically apply to young individuals who are no longer considered juveniles. See, e.g., FLA. STAT. § 958.04 (2019); N.Y. CRIM. PROC. LAW § 720.10 (Consol. 2020).

132. See *In re Gault*, 387 U.S. 1, 50 (1967) (referring to the “civil label-of-convenience which has been attached to juvenile proceedings”); *In re Winship*, 397 U.S. 358, 365–66 (1970); BARRY FELD, *BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT* 58 (1999) [hereinafter FELD (1999)]; Radice, *supra* note 124, at 8; Jeremy W. Hochberg, Note,

Despite the initial goal of treating children in a way that is not criminal in nature, juvenile systems grew to resemble criminal systems more closely starting in the middle of the twentieth century.<sup>134</sup> Most notably, in *In re Gault* and *In re Winship*, the Supreme Court found that juvenile proceedings were quasi-criminal in nature and required many of the same protections given to adult defendants.<sup>135</sup> Despite this, the court in *Winship* was careful to make clear that “[u]se of the reasonable-doubt standard during the adjudicatory hearing will not disturb New York’s policies that a finding that a child has violated a criminal law does not constitute a criminal conviction.”<sup>136</sup>

Today, a majority of states have laws which specify that juvenile adjudications are not criminal convictions.<sup>137</sup> A number of states further specify that an adjudication is not a finding of guilt.<sup>138</sup> Many

*Should Juvenile Adjudications Count as Prior Convictions for Apprendi Purposes?*, 45 WM. & MARY L. REV. 1159, 1173 (2004).

133. See, e.g., Feld, *supra* note 125, at 826.

134. See, e.g., Radice, *supra* note 124, at 380–83.

135. *In re Gault*, 387 U.S. at 49–50 (discussing ways in which juvenile systems resemble adult criminal systems), 33–34 (discussing notice requirements), 41 (discussing right to counsel), 57 (discussing self-incrimination and confrontation); *In re Winship*, 397 U.S. at 365–67 (expanding upon the reasoning in *In re Gault* and applying the reasoning to use of the reasonable doubt standard).

136. *In re Winship*, 397 U.S. at 366.

137. See JUV. L. CTR., FAILED POLICES, FORFEITED FUTURES: A NATIONAL SCORECARD ON JUVENILE RECORDS, CONVICTION VS. ADJUDICATION, <http://juvenilerecords.jlc.org/juvenile-records/#!/category/confidentiality/confidentiality-court-records> [https://perma.cc/9HLZ-FQF8]; Joseph B. Sanborn, Jr., *Striking Out on the First Pitch in Criminal Court*, 1 BARRY L. REV. 7, 8 (2000); see also, e.g., CAL. WELF. & INST. CODE § 203 (West 2020) (“An order adjudging a minor to be a ward of the juvenile court shall not be deemed a conviction of a crime for any purpose.”); GA. CODE ANN. § 15-11-606 (West 2020) (“An order of disposition or adjudication shall not be a conviction of a crime.”); ME. REV. STAT. ANN. tit. 15, § 3310(6) (West 2020) (“An adjudication of the commission of a juvenile crime shall not be deemed a conviction of a crime.”); MISS. CODE § 43-21-561(5) (West 2020) (“No adjudication upon the status of any child shall operate to impose any of the civil disabilities ordinarily imposed on an adult because of a criminal conviction, nor shall any child be deemed a criminal by reason of adjudication, nor shall that adjudication be deemed a conviction.”); MONT. CODE ANN. § 41-5-106 (West 2019) (specifying that youth court adjudication of a defendant as delinquent is not a ‘conviction’); NEV. REV. STAT. § 62E.010 (2020) (“A child who is adjudicated pursuant to the provisions of this title is not a criminal and any adjudication is not a conviction.”).

138. See, e.g., HAW. REV. STAT. § 571-1 (2020) (“[N]o such adjudication shall impose any civil disability ordinarily resulting from conviction; no child shall be found guilty or be deemed a criminal by reason of such adjudication.”); KY. REV. STAT. § 635.040 (West 2020) (“No adjudication by a juvenile session of District Court shall be deemed a conviction, nor shall such adjudication operate to impose any of the civil disabilities ordinarily resulting from a criminal conviction, nor shall any child be found guilty or be deemed a criminal by reason of such adjudication.”); MO. REV. STAT. § 211.271(1) (West 2019) (“No adjudication by the juvenile court upon the status of a child shall be deemed a conviction nor shall the adjudication operate to impose any of the civil disabilities ordinarily resulting from conviction nor shall the child be found guilty or be deemed a criminal by reason of the adjudication.”); *In re Kevin E.*, 143 N.H. 417, 419 (1999) (“In the juvenile system, the juvenile is not tried for a crime, not convicted of a crime, not deemed to be a criminal, and no public rec-

of these laws originally stem from the Uniform Juvenile Court Act, created by the National Conference of Commissioners on Uniform State Laws in 1968.<sup>139</sup> The Uniform Juvenile Court Act includes model language that states, “[a]n order of disposition or other adjudication in a proceeding under this Act is not a conviction of crime and does not impose any civil disability ordinarily resulting from a conviction or operate to disqualify the child in any civil service application or appointment.”<sup>140</sup> States continue to pass new legislation to limit any consideration of juvenile adjudications as convictions. For example, in 2017, Illinois passed legislation which specified that “a juvenile adjudication shall never be considered a conviction.”<sup>141</sup>

Despite these statutes, the question of when, if ever, juvenile adjudications count as convictions remains complicated and is often legally ambiguous. This is highlighted by an ongoing circuit split on whether juvenile adjudications count as convictions for the purposes of sentence enhancement. In *Apprendi v. New Jersey*,<sup>142</sup> the Supreme Court held that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”<sup>143</sup> Currently, the Third and Eighth Circuits have found that juvenile adjudications may be considered prior convictions for sentence enhancement purposes, while the Ninth Circuit held that juvenile adjudications may not be so considered, because treating juvenile adjudications as convictions “ignores the significant constitutional differences between adult convictions and juvenile adjudications.”<sup>144</sup> Counting adjudications as prior convictions remains controversial, with experts continuing to raise serious concerns about the issue.<sup>145</sup>

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ord is made of his alleged offense; the determination to be made therein is not that of criminal guilt but of delinquency.”).

139. David L. Wanner, *The Uniform Juvenile Court Act*, 48 N.D. L. REV. 93, 93 (1971).

140. UNIFORM JUVENILE COURT ACT §33 (1968).

141. H.B. 3817, 100th Sess. (Ill. 2017) (enacted).

142. 530 U.S. 466 (2000).

143. *Id.* at 490; see Hochberg, *supra* note 132, at 1162 (providing further discussion of how courts have treated juvenile adjudications when considering sentence enhancements).

144. See *United States v. Tighe*, 266 F.3d 1187, 1192–93 (9th Cir. 2001). *But see* *United States v. Jones*, 332 F.3d 688 (3d Cir. 2003); *United States v. Smalley*, 294 F.3d 1030 (8th Cir. 2002).

145. Joseph I. Goldstein-Breyer, *Calling Strikes Before He Stepped to the Plate: Why Juvenile Adjudications Should Not Be Used to Enhance Subsequent Adult Sentences*, 15 BERKELEY J. CRIM. L. 65 (2010); Courtney P. Fain, Note, *What's in a Name? The Worrisome Interchange of Juvenile "Adjudications" with Criminal "Convictions"*, 49 B.C. L. REV. 495 (2008); Hochburg, *supra* note 132; Brian P. Thill, Comment, *Prior "Convictions" Under Apprendi: Why Juvenile Adjudications May Not Be Used to Increase an Offender's Sentence Exposure if They Have Not First Been Proven to a Jury Beyond a Reasonable Doubt*, 87 MARQ. L. REV. 573 (2004).

Collectively, this makes providing legal guidance on how applicants with juvenile records should answer criminal history questions that refer only to “convictions” complicated. For example, a 2013 guide for defense attorneys in New York published by the Center for Community Alternatives provides six pages of guidance on how applicants with different types of prior justice involvement should answer questions in New York alone.<sup>146</sup> For applicants who were adjudicated youthful offenders,<sup>147</sup> the guide advises that:

- When asked “[h]ave you ever been convicted of a crime,” individuals who have been adjudicated a youthful offender should answer no, based on the language in New York’s youthful offender statute.
- When asked “[h]ave you been adjudicated guilty of a crime,” individuals who have been adjudicated a youthful offender should answer no. The guide’s reasoning on this point stresses that “a Youthful Offender adjudication is comprised of a Youthful Offender finding and a Youthful Offender sentence. It is not an adjudication that one is guilty of a crime.”<sup>148</sup>

For clients who are adjudicated delinquent, the guide advises that:

- When asked “[h]ave you been convicted of a crime,” applicants should answer no, based on language from New York’s family court act.
- When asked “[h]ave you been adjudicated guilty of a crime,” applicants should also answer no, on the grounds that “the Family Court Act provides that no adjudication as a [juvenile delinquent] shall be denominated a conviction nor shall such juvenile ‘be denominated a criminal’ “ and that “Family Court Act § 380.1 (3) provides that ‘no person shall be required to divulge information pertaining to the arrest . . . or

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146. CTR. FOR CMTY. ALTS., CRIMINAL HISTORY SCREENING IN COLLEGE ADMISSIONS: A GUIDE FOR ATTORNEYS REPRESENTING COLLEGE APPLICANTS AND STUDENTS DURING AND AFTER CRIMINAL PROCEEDINGS 21–28 (2013), <http://www.communityalternatives.org/pdf/publications/Criminal-History-Screening-in-College-Admissions-AttorneyGuide-CCA-1-2013.pdf> [<https://perma.cc/3NKC-W54N>] [hereinafter GUIDE FOR ATTORNEYS].

147. New York’s Youthful Offender Statute generally applies to individuals charged with crimes alleged to have been committed when they were at least 16 years old and younger than 19. N.Y. CRIM. PROC. LAW § 720.10 (Consol. 2020). New York’s Juvenile Delinquency Statute generally applies to individuals charged with crimes alleged to have been committed when they were at least 7 years old and younger than 16. N.Y. FAM. CT. ACT § 301.2 (McKinney 2019).

148. GUIDE FOR ATTORNEYS, *supra* note 146, at 22–23.

any subsequent proceedings' regarding a juvenile delinquency proceeding."<sup>149</sup>

Their guidance throughout turns heavily on the precise wording of specific New York statutory provisions.

This is further complicated by cases where an applicant from one state applies to a postsecondary institution in another. An increasingly large percentage of public four-year students attend schools out of state: almost a quarter of public four-year students nationally attend schools in states in which they are not residents.<sup>150</sup> A postsecondary institution that asks applicants "[h]ave you ever been convicted of crime" may end up treating individuals with juvenile records very differently depending on whether the applicant's juvenile proceedings took place in a state which clearly specifies that adjudications are not convictions.

Given the confusion among legal experts on when juvenile adjudications can properly be considered convictions, many colleges and universities do not fully understand these distinctions: A 2013 initial study of Maryland schools found that a third of the colleges surveyed misreported whether juvenile records were included in their criminal history question.<sup>151</sup> Colleges that ask only about convictions may well be unclear about the underlying law and could be assuming that juvenile adjudications should also be disclosed.

## 2. Intersections with Sealing, Expungement, and Confidentiality Laws

Applicants are also faced with a separate set of questions surrounding whether to disclose information that has been sealed or expunged, or that is afforded other confidentiality protections. The Supreme Court has not held that confidentiality of juvenile records is a constitutional right, instead framing it as a state policy interest,<sup>152</sup> and states have treated the underlying policy interest in a wide range of ways. State statutes vary significantly when it comes to the expungement, sealing, and confidentiality of juvenile records.<sup>153</sup> This means that the extent to which an applicant's juvenile

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149. *Id.* at 27.

150. THE COLL. BD., TRENDS IN COLLEGE PRICING 2018, at 32, <https://research.collegeboard.org/pdf/trends-college-pricing-2018-full-report.pdf> [<https://perma.cc/8PGW-BMZ4>] (finding that 78% of students in 2016 were residents of the states in which they were enrolled, down from 83% a decade earlier).

151. Sokoloff & Fontaine, *supra* note 33, at 16–17.

152. *Davis v. Alaska*, 415 U.S. 308, 320 (1974).

153. *See infra*, pp. 245–48.

record is legally protected varies significantly based on where that applicant's record originated. It also makes it difficult for applicants to understand which box to check on many college admissions forms, and could lead applicants to disclose information that may be legally protected.

Expungement is a mechanism designed to help eligible individuals start with a blank slate, and it affords heightened protection to a record.<sup>154</sup> Under one definition, the term means “the destruction or obliteration of an individual’s criminal file by the relevant authorities in order to prevent employers, judges, police officers, and others from learning of that person’s prior criminal activities.”<sup>155</sup> Expungement, unlike sealing and confidentiality, does not just protect a record from disclosure; it also often functions as a decree that the underlying offense never occurred and changes an individual’s legal status.<sup>156</sup> In practice, expungement does not always mean that a file is fully destroyed or obliterated.<sup>157</sup> State laws approach expungement in a variety of ways (see Figure 1 below). Most states, but not all, have passed defense to perjury statutes that allow individuals who have had their records expunged to defend themselves against claims of perjury when asked about criminal history.<sup>158</sup> Some defense to perjury statutes are narrow and relate only to perjury claims specifically, while other state statutes permit individuals whose records have been expunged to answer “no” when asked about criminal history in any context.<sup>159</sup> These broader statutes make clear that individuals may not be required to disclose their records.<sup>160</sup> Four states go one step further and prohibit employers, educational institutions, and licensing boards from asking about expunged records altogether.<sup>161</sup> In states with expungement statutes that do not include a clear prohibition on inquiry,

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154. T. Markus Funk, *A Mere Youthful Indiscretion? Reexamining the Policy of Expunging Juvenile Delinquency Records*, 29 U. MICH. J.L. REFORM 885, 885–87 (1996).

155. *Id.* at 886; *see also Expungement of Record*, BLACK’S LAW DICTIONARY, 621 (11th ed. 2019) (defining expungement as “the removal of a conviction from a person’s criminal record”); Shah & Fine, *supra* note 10, at 24 (defining expungement as “the physical destruction and erasure of a juvenile record, as if it never existed”).

156. *See* Doris Del Tosto Brogan, *Expungement, Defamation, and False Light: Is What Happened Before What Really Happened or Is There a Chance for a Second Act in America?*, 49 LOY. U. CHI. L.J. 1, 19 (2017).

157. Shah & Fine, *supra* note 10, at 24–25.

158. Mitchell M. Simon, *Limiting the Use of Expunged Offenses in Bar and Law School Admission Processes: A Case for Not Creating Unnecessary Problems*, 28 NOTRE DAME J.L. ETHICS & PUB. POL’Y 79 app. C at 121–23 (2014).

159. *Id.* at 92–93.

160. *Id.* at 93.

161. *Id.* at 121–22. The four states are Maryland, Massachusetts, New Hampshire, and Virginia.

employers, government agencies, universities, licensing boards, and other similar institutions, may operate—and in fact do operate—within a statutory grey-area. These institutions argue that the plain language of the statute does not preclude these institutions from inquiring into expunged offenses; the statute merely arms the offender with a legal out for not disclosing.<sup>162</sup>

FIGURE 1: EXPUNGEMENT STATUTES BY STATE<sup>163</sup>

| Unclear statute | Destruction of record only         | Defense to perjury   | Prohibition on inquiry | No clear statutory authority |
|-----------------|------------------------------------|--|------------------------|------------------------------|
| AL, AK          | AZ, GA, IN, MN, NE, NV, PA, SC, WI | AR, CA, CO, CT, DE, FL, HI, ID, IL, IA, KS, KY, LA, ME, MI, MS, MO, NJ, NM, NC, OH, OK, OR, RI, SD, TN, TX, UT, VT, WA, WV, WY | MA, MD, HN, VA         | MT, ND, NY                   |

Sealing is “the process by which a juvenile record is made unavailable to the public, while typically still being accessible to law enforcement agencies, prosecutors, and judges.”<sup>164</sup> Here, too, state approaches vary (see Figure 2, below). As with expungement, a number of states permit individuals to answer “no” when asked about criminal history if their records have been sealed, creating a difficult conundrum for applicants.<sup>165</sup> The high-profile case of Gina Grant highlights the challenge applicants with sealed records face when asked about criminal history.<sup>166</sup> In the mid-1990s, Harvard rescinded Gina Grant’s offer of admission after finding news coverage that detailed her juvenile no contest plea on voluntary manslaughter charges.<sup>167</sup> Harvard argued that their decision was based primarily on her failure to disclose, rather than the underlying of-

162. *Id.* at 94.

163. *Id.* at 121–22.

164. Radice, *supra* note 124, at 408; see also *Seal*, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining “seal” as “to prevent access to”); Shah & Fine, *supra* note 10, at 23 (specifying sealing means “the record is unavailable to the public, but remains accessible to select individuals or agencies”).

165. Hollister, *supra* note 125, at 918.

166. *Id.* at 913–16.

167. *Id.*

fense.<sup>168</sup> Grant reported that she chose not to disclose her criminal history because she was advised by her attorneys that she was under no obligation to disclose the records once they had been sealed.<sup>169</sup>

FIGURE 2: SEALING STATUTES BY STATE<sup>170</sup>

| Juvenile record sealing allowed  | Juvenile record sealing not authorized   |
|--|--|
| AL, AK, AZ, CA, GA, IL, IN, KY, ME, MD, MA, MS, MO, MT, NE, NV, NH, NJ, NM, NY, NC, ND, OH, OK, SD, TX, VT, WA, WV, WI | AR, CO, CT, DE, FL, HI, ID, IA, KS, LA, MI, MN, OR, PA, RI, SC, TN, UT, VA, WY |

Finally, juvenile records, regardless of whether they have been sealed or expunged, are often confidential, meaning that a state limits who has access to records of juvenile proceedings.<sup>171</sup> States approach the confidentiality of juvenile records in a wide range of ways (see Figure 3, below). On one end of the state landscape, nine states prohibit public access to juvenile records entirely.<sup>172</sup> On the opposite end, seven states allow the public complete access to juvenile records, unless they have been sealed or expunged.<sup>173</sup> In the remaining thirty-three states and Washington, D.C., juvenile records are only confidential in some circumstances.<sup>174</sup> Exceptions may be made based on the seriousness of the offense, the age of the child or adolescent, and whether there were prior offenses.<sup>175</sup> Many states also make juvenile records available to some state actors, such as law enforcement and schools, and may even make records available to victims.<sup>176</sup>

168. See *id.* at 913–15. Gina Grant’s case likely drew particular attention because the victim was her mother. See *id.* Grant argued that the incident was self-defense. *Id.*

169. *Id.* at 915.

170. See Shah & Fine, *supra* note 10, at 23.

171. Radice *supra* note 124, at 399; Shah & Fine, *supra* note 10, at 12.

172. Shah & Fine, *supra* note 10, at 13.

173. *Id.* at 15.

174. *Id.* at 14.

175. *Id.* at 13.

176. *Id.* at 15–19.

FIGURE 3: PUBLIC ACCESSIBILITY OF JUVENILE RECORDS BY STATE<sup>177</sup>

| Juvenile records fully available to the public | Juvenile records accessible to the public in some cases  | Juvenile records generally protected |
|--|--|--------------------------------------|
| AZ, ID, IA, MI, MT, OR, WA                     | AL, AK, AR, CO, CT, DE, FL, GA, HI, ID, IL, IN, KS, KY, LA, ME, MD, MA, MN, MI, MO, NE, NH, NJ, OK, PA, SC, SD, TN, TX, UT, VA, WV, WI | CA, NE, NM, NY, NC, ND, OH, RI, VT   |

This complex array of state laws frequently leaves both applicants and their attorneys perplexed. The American Bar Association's Criminal Justice Section Commission on Homelessness and Poverty, Standing Committee on Legal Aid & Indigent Defendants addressed these concerns by recommending that

[c]olleges and universities should not inquire into an arrest or adjudication that has been sealed or expunged. This is necessary because of the patchwork of state and local laws requiring varying levels of protection for – or permit the disclosure of – child arrest and adjudication records.<sup>178</sup>

Questions that ask about arrests and pending charges are particularly problematic, not only because criminal and juvenile systems are built on a presumption of innocence, but also because they create a legal conundrum when it comes to whether to disclose. The Center for Community Alternatives argues that questions about arrests

are likely to be confusing to college applicants who have been arrested, but whose arrest resulted in a sealing, Youthful Offender adjudication, expungement order, etc. These individuals have often been told by the judge and/or their defense lawyer that they need not disclose these arrests. But should they elect not to disclose, and risk that the college will learn of the arrest and act adversely against them assuming that they “lied” on the application, or should they

177. See Shah & Fine, *supra* note 10, at 12–15.

178. AM. BAR ASS'N, CRIM. JUST. SECTION COMM'N ON HOMELESSNESS & POVERTY, STANDING COMM. ON LEGAL AID & INDIGENT DEFENSE, REPORT TO THE HOUSE OF DELEGATES 102A, at 6 (2010).

disclose the arrest and risk not being accepted because of the arrest?<sup>179</sup>

In their Guide for Attorneys Representing College Applicants, the Center for Community Alternatives advises that when asked about previous arrests, an individual who has youthful offender status should answer “yes,” “although the more legally correct – albeit less practical – response is to refuse to answer this question based upon the confidentiality bestowed by the Youthful Offender statute.”<sup>180</sup> Refusing to answer the question is not just impractical at many schools, but wholly impossible.<sup>181</sup> As a result, applicants are often forced to choose between lying and disclosing information that has been deemed confidential by statute or expunged altogether.

#### B. *How Current Applicants Understand Their Obligations to Disclose*

Given the complexities of state laws on juvenile record confidentiality and on whether adjudications can be considered convictions, it is unsurprising that the limited empirical research that exists on how individuals with juvenile records understand their obligations to self-report criminal history suggests that applicants are frequently puzzled. Although researchers have not directly examined over- and under-reporting of juvenile history in the undergraduate admissions context, research from the University of Iowa Law School revealed significant confusion among applicants about what information to share.<sup>182</sup>

In 2000, the University of Iowa Law School began giving newly admitted law students the chance as part of new student orientation to amend their applications to include previous offenses that they had failed to report initially on their law school applications.<sup>183</sup> The Iowa application had asked, “[h]ave you ever been charged with or convicted of any felony or misdemeanor (other than minor

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179. GUIDE FOR ATTORNEYS, *supra* note 146, at 5.

180. *Id.* at 23 (“To require disclosure of charges or an arrest by a person adjudicated a Youth Offender would undermine the statutory grant of confidentiality. College admissions officers – or at least their legal counsel – should know this. Yet they continue to ask the question knowing that practically, applicants cannot refuse to respond based upon confidentiality. This question on a college application flies in the face of the public policy of which ‘the confidentiality of information is part of the comprehensive legislative plan to relieve youth offenders of the consequences of a criminal conviction and give them a ‘second chance.’” (citation omitted)).

181. See *infra* Section V.B.

182. Linda McGuire, *Lawyering or Lying? When Law School Applicants Hide Their Criminal Histories and Other Misconduct*, 45 S. TEX. L. REV. 709, 717 (2004).

183. *Id.* at 713.

traffic violations) including juvenile charges, deferred prosecutions/judgements, and expunged convictions?” and “[h]ave you ever been dismissed or placed on probation by any school or college for either academic or disciplinary reasons?”<sup>184</sup>

Over three years, the University of Iowa Law School had fifty-nine students report new information on criminal or disciplinary history as part of orientation.<sup>185</sup> When they asked why students failed to include information initially, the Law School found that more than two-thirds of the students who amended their applications reported that they did so because they had been confused about the original question wording.<sup>186</sup> Students explained that terms in the application including “charged” and “expunged” were unclear or ambiguous to them.<sup>187</sup> Other reasons listed by students included advice not to disclose from trusted figures such as attorneys and judges, and a belief that they were not responsible for revealing sealed or expunged records.<sup>188</sup>

While more research is needed on how applicants for undergraduate admission understand their obligations to disclose their juvenile history, it seems reasonable to expect that application questions that confuse law school applicants also confuse undergraduate applicants. Both colleges and universities and state decision-makers should be deeply concerned that applicants do not understand the questions they are being asked, and that applicants may feel undue pressure to disclose protected information.

#### IV. CURRENT REFORM EFFORTS

The movement to ban the box on college applications has picked up steam quickly, with national, state, and institutional efforts happening concurrently. These efforts have mostly affected initial admissions forms, but reforms have also been proposed that would affect eligibility for financial aid and for a broader array of campus privileges. These reforms have, as a whole, addressed the use of criminal history broadly but have often not explicitly addressed juvenile records or the aspects that make juvenile systems unique.

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184. *Id.* at 713 n.7.

185. *Id.* at 716.

186. *Id.* at 717–18.

187. *Id.* at 718.

188. *Id.*

## A. *National Movements*

### 1. Federal Legislation

Federal legislative efforts to increase college access for justice-involved populations have focused on three main priorities: removing the question on the FAFSA about convictions, restoring Pell eligibility for incarcerated individuals, and encouraging colleges and universities to limit their use of criminal history questions by requiring the Department of Education to provide guidance and technical assistance.

Since 2006, the FAFSA question on prior drug convictions has applied only to individuals who were convicted while receiving federal aid.<sup>189</sup> Even with this limitation, advocates have argued that the question continues to unfairly limit access to federal aid.<sup>190</sup> The SUCCESS Act, first introduced in 2017, proposed removing the FAFSA question on drug convictions altogether.<sup>191</sup> Subsequent bills including the Simple FAFSA Act, the Simplifying Financial Aid for Students Act, and the Beyond the Box for Higher Education Act have also proposed eliminating the drug convictions question or restricting its use.<sup>192</sup>

Advocates have also moved to eliminate federal restrictions that prevent incarcerated individuals from accessing Pell Grants. The federal Restoring Education and Learning (REAL) Act, first introduced in the Senate in April of 2019, would restore Pell eligibility for currently incarcerated individuals.<sup>193</sup> Both Republican and Democratic sponsors stressed reducing recidivism as the key justification for the legislation.<sup>194</sup> Almost 70 groups have supported the bill, including the American Bar Association, the Council on Chris-

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189. Deficit Reduction Act of 2005, PL 109–171, § 8021 (2006).

190. Andrew Kreighbaum, *New Push to Drop Drug Offenses as a Barrier to Student Aid*, INSIDE HIGHER ED (Mar. 7, 2018), <https://www.insidehighered.com/news/2018/03/07/higher-ed-groups-want-end-student-aid-restrictions-applicants-drug-convictions> [https://perma.cc/LB5Y-EG2N].

191. SUCCESS Act, H.R. 1432, 115th Cong. (2017).

192. Simple FAFSA Act, H.R. 4416, 115th Cong. (2017); Simplifying Financial Aid for Students Act, S. 3353, 115th Cong. (2018); Beyond the Box for Higher Education Act, S. 1338, 116th Cong. (2019); Beyond the Box for Higher Education Act, H.R. 2563, 116th Cong. (2019).

193. Restoring Education and Learning Act, S. 1074, 116th Cong. (2019). The bill was first introduced in 2016. *See* Restoring Education and Learning Act of 2016, S. 3122, 114th Cong. (2016).

194. Senator Mike Lee (R-UT) stressed that “[t]he REAL Act is an important part of providing opportunity to federal offenders and reducing recidivism,” and Senator Dick Durbin (D-IL) stated that “[t]he REAL Act is about breaking the cycle of recidivism by increasing access to education for incarcerated individuals.” Press Release, Off. of Sen. Brian Schatz, Schatz, Lee, Durbin Introduce Bipartisan Legis. to Restore Educ. Opportunities for Those Incarcerated and Improve Pub. Safety (Apr. 9, 2019).

tian Colleges and Universities, the NAACP, and FreedomWorks.<sup>195</sup> The legislation pertains only to eligibility for Pell Grants and would not alter the ban on access to federal loans, such as Perkins Loans, for individuals who are in juvenile detention facilities or adult penal institutions.<sup>196</sup>

Finally, advocates have also championed federal reforms designed to help provide training and guidance on the use of criminal history questions on application forms. The Beyond the Box for Higher Education Act, first introduced in the Senate in 2018, would encourage colleges and universities to remove or limit their questions on criminal history.<sup>197</sup> The bill would require the Department of Education to provide colleges and universities with guidance on using criminal history questions, including guidance on best practices for asking questions in specific and narrowly-tailored ways.<sup>198</sup> It would also require the Department to provide technical assistance to colleges and universities on the use of criminal history, and to develop a repository of resources for colleges and universities designed to help ensure successful educational outcomes for justice-involved students.<sup>199</sup> Although the bill very clearly includes juvenile records, it does not directly designate additional protections for sealed, expunged, or confidential records, and it does not explicitly require training or technical assistance on the ways in which juvenile records may be distinct from adult criminal records.<sup>200</sup>

## 2. Department of Education Report

Many of the recommendations included in the Beyond the Box for Higher Education Act were initially addressed in a 2016 report from the Department of Education.<sup>201</sup> The report was aimed at providing guidance to postsecondary institutions on how best to remove barriers to admission for individuals with previous justice involvement.<sup>202</sup> The Department's guidance encouraged schools to remove criminal history questions until after making an offer of admission to avoid a chilling effect, to be transparent about how

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195. Andrew Kreighbaum, *Schatz Reintroduces Bill to Repeal Pell Ban*, INSIDE HIGHER ED (Apr. 10, 2019), <https://www.insidehighered.com/quicktakes/2019/04/10/schatz-reintroduces-bill-repeal-pell-ban> [<https://perma.cc/D6ZX-YUVY>].

196. See S. 1074; *supra* note 116 (discussing Perkins Loans).

197. S. 1338.

198. *Id.* at § 124(a)(1)–(2).

199. *Id.* at 124(a)(3)(b).

200. See S. 1338.

201. DOE 2016, *supra* note 31.

202. *Id.* at 2.

criminal history will be used, and to ask narrowly-tailored questions.<sup>203</sup> The guidance recommended avoiding the use of ambiguous criminal justice terminology, clearly defining what information should not be shared, avoiding overly broad requests, and including time limits on criminal background data.<sup>204</sup> The Department of Education also stressed that some colleges and universities “have imprecise wording on their applications, which prevents admissions personnel from knowing if, for example, ‘criminal justice involvement’ means imprisonment for felony sexual abuse, or an arrest of a juvenile for a minor offense that never resulted in a conviction.”<sup>205</sup> Their guidance recommended that “[i]t is a best practice to specify what is not required to be disclosed, such as information that may be beyond the scope of the question, including, in some cases, information regarding juvenile adjudications, or information contained in records that may have been sealed or expunged.”<sup>206</sup>

### 3. Reforming the Common Application

The Common Application is a nonprofit organization, with members at both public and private postsecondary institutions, that creates a unified application form for member schools to use in the college application process.<sup>207</sup> Students who apply to schools using the Common Application fill out one set of questions that is used at all member institutions, often informally referred to as the “common portion” of the application, and then fill out separate sets of supplementary questions for the specific individual schools they choose to apply to.<sup>208</sup> The number of schools that use the Common Application has increased annually, and their application is currently accepted at more than 900 colleges and universities in twenty different countries.<sup>209</sup> Membership in the Common Application is associated with increases in overall application rates and

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203. *Id.*

204. *Id.* at 22–23.

205. *Id.* at 4.

206. *Id.* at 22.

207. *About*, COMMON APP, <https://www.commonapp.org/about> (last visited Aug. 30, 2020). Other shared application systems exist. For example, the Coalition Application is an alternative to the Common Application that is deliberately focused on the needs of low-income students, and it is accepted at 139 colleges and universities. *FAQs*, COALITION FOR COLLEGE, <https://www.coalitionforcollegeaccess.org/faq> [<https://perma.cc/7KGQ-WM4T>] (last visited Nov. 11, 2020).

208. COMMON APP, *supra* note 207.

209. *Id.*

with “a sizeable increase in the percent students of color” who enroll in an institution.<sup>210</sup>

In 2006, the Common Application added a question on criminal history that read, “[h]ave you ever been adjudicated guilty or convicted of a misdemeanor or felony?” The Common Application later added a disclaimer that read, “[n]ote that you are not required to answer ‘yes’ to this question, or provide an explanation if the criminal adjudication or conviction has been expunged, sealed, annulled, pardoned, destroyed, erased, impounded, or otherwise required by law or ordered by a court to be kept confidential.”<sup>211</sup> The Common Application also added a question on school disciplinary history in 2006.<sup>212</sup>

In 2017, the Common Application reassessed its use of the criminal history question. It made an initial decision to continue including the question on the common portion of the application but to provide a clearer disclaimer for students that answering in the affirmative does not disqualify an applicant.<sup>213</sup>

In 2018, the Common Application again reconsidered asking about criminal history and announced their decision to remove the question about criminal history from the common portion of the application. Instead, member colleges and universities are given the option to add questions on criminal history to their individual school supplements.<sup>214</sup> Member institutions are now able to decide how to word their questions on criminal history, and they are able to remove the language previously used by the Common Application which clarified that applicants should not disclose sealed, expunged, or otherwise confidential records.<sup>215</sup>

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210. Albert Yung-Hsu Liu, Ronald G. Ehrenberg & Jesenka Mrdjenovic, *Diffusion of Common Application Membership and Admissions Outcomes at American Colleges and Universities* 18 (Nat'l Bureau of Econ. Rsch., Working Paper No. 13175, 2007).

211. Judith Scott-Clayton, *Thinking “Beyond the Box”: The Use of Criminal Records in College Admissions*, BROOKINGS INST. (Sept. 28, 2017) (emphasis omitted), <https://www.brookings.edu/research/thinking-beyond-the-box-the-use-of-criminal-records-in-college-admissions> [<https://perma.cc/B2Y5-G9WX>].

212. MARSHA WEISSMAN & EMILY NAPIER, CNTR. FOR COMTY. ALTS., EDUCATIONS SUSPENDED I (2015). The Common Application’s school discipline question read: “Has the applicant ever been found responsible for a disciplinary violation at your school from the 9th grade (or the international equivalent) forward, whether related to academic misconduct or behavioral misconduct, that resulted in a disciplinary action? These actions could include, but are not limited to: probation, suspension, removal, dismissal, or expulsion from your institution.” *Id.* at 2.

213. Scott Jaschik, *Still Asking About Crime and Discipline*, INSIDE HIGHER ED (Mar. 10, 2017), <https://www.insidehighered.com/news/2017/03/10/common-application-announces-it-will-keep-questions-criminal-background-and> [<https://perma.cc/7XZB-T22U>].

214. Davis, *supra* note 13.

215. See *infra* Section V.B (discussing different phrasings for criminal and juvenile history questions used on Common Application school supplements).

In the fall of 2020, the Common Application announced their intention to also remove the question about school discipline from the common portion of the application and, as with the criminal history question, to give individual schools discretion in deciding what, if anything, to ask.<sup>216</sup> Colleges and universities that use the Common Application continue to be able to suppress answers related to criminal history and school discipline, meaning that applicants' responses are not included in the initial application PDF file that institutions receive.<sup>217</sup>

The changes to the Common Application came after ongoing advocacy from groups including the Center for Community Alternatives and the Abolish the Box Coalition.<sup>218</sup> Their decision about the criminal history question also followed a letter written by eighteen U.S. senators that called for the Common Application to remove criminal justice involvement questions because such questions "have a disproportionate effect on students of color and low-income families, and deter exceptional applicants from completing their applications and accessing critical pathways to opportunity."<sup>219</sup>

Representatives from the Common Application attributed the change in part to a recent revision to their organizational mission which included a new focus on "access, equity, and integrity."<sup>220</sup> The Common Application also credited their decision to "continually evolving legislation at the local, state, federal, and institutional levels, as well as increasingly varied policies and practices among Common App member institutions."<sup>221</sup> Finally, the Common Application stressed that they made the change in part due to a decrease in commonality in how member institutions use criminal history, and reported that while the majority of their members would prefer to keep criminal history questions on the common section of the application, they "found variation in member pref-

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216. Lindsay McKenzie, *Common App Ditches High School Discipline Question*, INSIDE HIGHER ED (Oct. 5, 2020), [https://www.insidehighered.com/admissions/article/2020/10/05/common-app-stop-asking-students-about-their-high-school-disciplinary?mc\\_cid=5255fd7db5&mc\\_eid=fdc4905f1d](https://www.insidehighered.com/admissions/article/2020/10/05/common-app-stop-asking-students-about-their-high-school-disciplinary?mc_cid=5255fd7db5&mc_eid=fdc4905f1d) [<https://perma.cc/SGA3-8X74>].

217. *Id.*

218. Kathleen Wong, "Abolish the Box" Campaign Says Its Criminal Record Question on College Apps Needs To Go, MIC (May 19, 2016), <https://www.mic.com/articles/143827/abolish-the-box-campaign-says-its-criminal-record-question-on-college-apps-needs-to-go> [<https://perma.cc/9CLU-9A8S>].

219. Letter from Brian Schatz, Senior U.S. Sen. for Hawaii, et al., to Jenny Rickard, President, The Common Application (Feb. 22, 2018), [https://www.schatz.senate.gov/imo/media/doc/Schatz%20Ban%20the%20Box%20for%20Higher%20Ed%20Letters%20combined%20\(002\).pdf](https://www.schatz.senate.gov/imo/media/doc/Schatz%20Ban%20the%20Box%20for%20Higher%20Ed%20Letters%20combined%20(002).pdf) [<https://perma.cc/GWL7-QFLA>]. Other signatories were Sens. Durbin, Murray, Leahy, Warren, Coons, Booker, Baldwin, Harris, Cardin, Markey, Van Hollen, Cortez Matso, Duckworth, Murphy, Brown, Sanders, and Hirono.

220. Wong, *supra* note 12.

221. Davis, *supra* note 213.

erences based on institution type and other factors. For example, the majority of public institution survey respondents preferred that the question be asked at the discretion of the member.”<sup>222</sup>

On August 1, 2019, the Common Application released the first set of applications without the criminal history question included. The Common Application has committed to continue to seek feedback and to evaluate any adjustments needed moving forward.<sup>223</sup>

## B. State Legislation

The state movement to ban the box on college admissions has grown quickly, with the first five states passing bills to restrict use of criminal history in admissions between 2017 and 2020. Figure 4 on pages 262 to 263 provides an overview of the legal distinctions between each of the first four of these state laws to pass. While these state laws restrict the ways in which colleges and universities may ask about criminal history, they mostly do not address the ways in which juvenile records are unique.<sup>224</sup>

### 1. Louisiana

In 2017, Louisiana became the first state in the country to pass legislation banning relying on criminal history in college admissions. The law restricts public colleges and universities from asking about most types of criminal history in the admissions process.<sup>225</sup> The advocates responsible for the bill began conversations in 2016 about introducing legislation following a series of discussions led by the state’s Justice Reinvestment Task Force.<sup>226</sup> They modeled bill language in part off of legislation that had been introduced in Maryland, New York, and Illinois.<sup>227</sup> In moving the bill forward, ad-

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222. Scott Jaschik, *Common App Drops Criminal History Question*, INSIDE HIGHER ED (Aug. 13, 2018) <https://www.insidehighered.com/admissions/article/2018/08/13/common-application-drops-criminal-history-question-although-colleges> [https://perma.cc/P9TL-9RP9].

223. Davis, *supra* note 213.

224. See *infra* Figure 4. California’s state law, Act of Aug. 6, 2020, 2020 Cal. Legis. Serv. ch. 29 (West), codified at CAL. EDUC. CODE § 66024.5 (West 2020), passed too recently to be included in this analysis.

225. LA. STAT. ANN. § 17:3152(A) (2020).

226. Telephone Interview with Syrita Stieb-Martin, Exec. Dir., Operation Restoration and Annie Freitas, Pol’y Dir., Operation Restoration (July 1, 2019) (on file with author).

227. Interview with Syrita Stieb-Martin & Annie Freitas, *supra* note 226. The language in the states’ statutes reflects this. See H.B. 694, 2017 Leg. Sess. (Md. 2017); S. 6437, 2013-2013 Leg. Sess. (N.Y. 2013); H.B. 3142, 2017-2018 Leg. Sess. (Ill. 2017).

vocates faced a number of concerns from some postsecondary institutions and legislators. Concerns about licensing came up throughout the process, including at committee hearings.<sup>228</sup> Opponents also raised concerns related to campus safety, with a particular emphasis on preventing campus sexual assault.<sup>229</sup>

As a result of legislative negotiations, Louisiana's law continues to allow questions about criminal history in three contexts. First, the law permits schools to ask about criminal convictions for several serious offenses, including stalking, cyberstalking, rape, aggravated rape, second- and third-degree rape, sexual battery, and second-degree sexual battery.<sup>230</sup>

Second, Louisiana also leaves institutions with the discretion to inquire about criminal history with respect to financial aid and housing, although Louisiana requires institutions to consider the amount of time that has passed since the underlying offense, and whether there is evidence of rehabilitation.<sup>231</sup> Institutions are permitted to use information about criminal history to make decisions about providing supportive services and to limit participation in campus life.<sup>232</sup>

Finally, the legislation includes language that allows colleges and universities to ask about criminal history if they use a third-party application service.<sup>233</sup> Third-party applications must be "designed by a national application service, tailored for admission to a specific degree program, and used by postsecondary education institutions in multiple states."<sup>234</sup>

## 2. Maryland

In January of 2018, the Maryland legislature voted to override Governor Larry Hogan's veto on SB 543 / HB 694, which bans public colleges and universities from asking about applicants' crim-

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228. For example, Representative Polly Thomas argued that "there is a list of 39 of them [criminal offenses] that would prevent a teacher from becoming certified. Again, I will reiterate that I don't think it is appropriate to have someone go through four years or more of college and then not be able to be hired in the profession that they have been training for four years for." *Hearing on H.B. 122 Before the H. Comm. on Educ.*, 2017 Leg., Sess. (La. 2017) (statement of Rep. Polly Thomas, Member, H. Comm on Educ.).

229. Interview with Syrita Stieb-Martin and Annie Freitas, *supra* note 226.

230. LA. STAT. ANN. § 17:3152(A)(2) (2020) (citing to R.S. 14:40.2 (stalking), 40.3 (cyberstalking), 41 (rape), 42 (aggravated rape), 42.1 (second-degree rape), 43 (third-degree rape), 43.1 (sexual battery), and 43.2 (second-degree sexual battery)).

231. LA. STAT. ANN. § 17:3152(B)(2) (2020).

232. LA. STAT. ANN. § 17:3152(B) (2020).

233. *See* LA. STAT. ANN. § 17:3152(C)(2) (2020).

234. *Id.*

inal histories.<sup>235</sup> Advocates of the legislation focused on highlighting the civic mission of postsecondary institutions and on emphasizing the role of education in changing lives, rather than leading with criminal justice arguments.<sup>236</sup> Maryland remains the only state whose law applies to private institutions that receive state funding, in addition to public institutions.<sup>237</sup>

Opposition to the legislation from elected officials focused primarily on campus safety, with an emphasis on sexual assault.<sup>238</sup> In his note explaining the veto, Governor Hogan stressed that “[protecting] our citizens must be a top priority of any government[,] and Maryland’s colleges and universities must be safe communities where students are free to learn and grow.”<sup>239</sup> He also expressed strong concern that the legislation “does little to differentiate between those with a violent felony, such as a sexual assault conviction, and those with a nonviolent misdemeanor on their record,” and found that “[l]egislation barring colleges and universities from using admissions applications containing questions about misdemeanor or nonviolent convictions while still allowing questions about violent felonies would better balance opportunity with public safety.”<sup>240</sup>

Like in Louisiana, representatives from colleges and universities also stressed that because they used the Common Application, which at the time included a criminal history question, the bill would be unduly burdensome to implement because they would be required to redesign their application process from scratch.<sup>241</sup> Because of this concern, Maryland’s legislation allows colleges and universities to ask about criminal history if they use a third-party

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235. Michael Dresser, *Maryland Senate Overrides Hogan Veto of Bill Barring College Admissions from Asking About Arrests*, BALTIMORE SUN (Jan. 12, 2018, 4:25 PM), <https://www.baltimoresun.com/politics/bs-md-college-admissions-20180112-story.html>.

236. Interview with Caryn York, *supra* note 69.

237. See MD. CODE ANN., EDUC. § 26-503 (2018). See Fig. 4 *infra* at 144–46 for a comparison of states.

238. For example, in committee Delegate Barrie Ciliberti asked: “At the risk of being the skunk at the garden party . . . what happens if a student has some degree of background with a rape, assault, terrorist list, etc. . . . if an institution permits this student to come to campus with that egregious background and then that student goes ahead and commits an act of assault or rape, cannot that institution be liable for that?” *Hearing on H.B. 694 Before the H. Comm. on Appropriations*, 2018 Leg., Sess. (Md. 2017) (statement of Del. Barrie Ciliberti, Member, H. Comm on Appropriations).

239. Letter from Larry Hogan, Governor of Md., to Thomas V. Mike Miller, President of the Md. Senate, and Michael E. Busch, Speaker of the Md. House (May 26, 2017), [https://content.govdelivery.com/attachments/MDGOV/2017/05/26/file\\_attachments/822650/SB543HB694VetoLetter.pdf](https://content.govdelivery.com/attachments/MDGOV/2017/05/26/file_attachments/822650/SB543HB694VetoLetter.pdf) [<https://perma.cc/SY2E-YTHB>].

240. *Id.*

241. Schools argued that changing the Common Application is like pulling teeth. Interview with Caryn York, *supra* note 69. In fact, Maryland’s legislation was one of the factors leading to the Common Application removing its criminal history question. *Id.*

application service, defined as “an admissions application not controlled by the institution.”<sup>242</sup> Unlike in Louisiana, the exception applies to all third-party application services, including those used only in Maryland.<sup>243</sup>

As with Louisiana, Maryland’s law allows colleges and universities to ask about criminal history once an applicant has been admitted, so that the college or university can make decisions about housing and supportive services.<sup>244</sup>

### 3. Washington

In 2018, Washington became the third state to pass legislation restricting the use of criminal history in college admissions.<sup>245</sup> The advocacy effort built directly on lessons learned from advocates in Louisiana and Maryland.<sup>246</sup>

The legislation in Washington passed with minimal opposition.<sup>247</sup> One postsecondary institution remained neutral but testified to concerns about being unable to ask about violent crimes and sex offenses specifically and encouraged legislators to amend the bill.<sup>248</sup> A different legislator proposed an unsuccessful amendment that would have provided immunity from liability related to admissions decisions under the new law.<sup>249</sup>

As with Maryland, institutions can use a third-party application that asks about criminal history, including those used only in Washington.<sup>250</sup> Washington’s law requires institutions using third-party applications that ask about criminal history to post a notice on their websites specifying that they may not “unreasonably deny

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242. MD. CODE ANN., EDUC. § 26-501(d) (2018).

243. Interview with Caryn York, *supra* note 69.

244. *See* MD. CODE ANN., EDUC. § 26-504(a) (2018).

245. WASH. REV. CODE. § 28B.160.010 -28B.160.040 (2018).

246. Interview with Noel Vest, *supra* note 85.

247. S. COMM. ON HIGH EDUC. & WORKFORCE DEV., SENATE BILL REPORT SB 6582, at 1-2 (Wash. 2018), <http://lawfilesexst.leg.wa.gov/biennium/2017-18/Pdf/Bill%20Reports/Senate/6582%20SBR%20HEWD%2018.pdf> [<https://perma.cc/7627-TBVG>].

248. *Concerning the Criminal History of Applicants to Institutions of Higher Education: Hearing on S.B. 6582 Before the Sen. Comm. on Higher Educ. & Workforce Dev.*, 2018 Leg., Sess. (Wash. 2018) (statement of Becca Kenna-Schenk, Executive Director of Government Relations, Western Washington University).

249. SB 6582 - S AMD 544 would have specified that: “Each institution of higher education shall be immune from suit in law, equity, or any action under the administrative procedure act resulting from any violent crime or sex offense resulting from the institution’s admissions decisions under this chapter.” S. AMD 544, S.B. 6582, 65th Leg., Sess. (Wash. 2018) (not adopted).

250. WASH. REV. CODE § 28B.16020(2) (2018).

an applicant's admission or restrict access to campus residency based on an applicant's criminal history."<sup>251</sup>

Washington also allows schools to ask about criminal history once they determine that an applicant is qualified for admission.<sup>252</sup> Postsecondary institutions are then able to use that history in decisions about admissions or housing, but those decisions cannot be automatic or unreasonable.<sup>253</sup> Institutions are also required to develop processes for determining whether there is a relationship between criminal history and specific academic programs or campus residency programs.<sup>254</sup>

Washington is the only state that explicitly makes reference to juvenile records, by defining criminal history to include "any record about a criminal or juvenile case filed with any court."<sup>255</sup> Juvenile records and adult criminal records are treated identically under the law.<sup>256</sup>

#### 4. Colorado

In 2019, Colorado became the fourth state to ban the box on college admissions. Colorado's law went into effect on May 1, 2020.<sup>257</sup> The bill moved forward as the state was also considering banning the box in employment contexts, and the bill's sponsors and advocates working on the legislation relied on comparisons to banning the box in employment in moving the legislation forward.<sup>258</sup> Colorado is the first state to address the use of disciplinary history in addition to the use of criminal and juvenile records. Its legislation specifies that "except as authorized pursuant to any other section of law, the governing board of any state institution of higher education may not obtain the criminal history, or disciplinary history at another academic institution, of any applicant at any time prior to admitting the applicant."<sup>259</sup> Colleges may still in-

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251. *Id.*

252. WASH. REV. CODE § 28B.16030(1) (2018).

253. WASH. REV. CODE § 28B.16030(2) (2018).

254. WASH. REV. CODE § 28B.16040(1) (2018).

255. WASH. REV. CODE § 28B.160.010(2) (2018).

256. WASH. REV. CODE §§ 28B.160.010–040 (2018).

257. COLO REV. STAT. § 23-5-106.5 (2020).

258. Telephone Interview with Jamie Lynn Ray, Care Manager, Second Chance Ctr. Col. and Justin Larson, Mental Health Coordinator, Second Chance Ctr. Col. (June 19, 2019) (on file with author); *see also* *Hearing on S.B. 19-170 Before the H. Comm. on Educ.*, 72nd Gen. Assemb., Reg. Sess. (Colo. 2019) (statement of Rep. Leslie Harod, Sponsor, S.B. 19-170).

259. COL. REV. STAT. § 23-5-106.5(2)(d) (2019).

quire into school disciplinary history as related to stalking, sexual assault, and domestic violence.<sup>260</sup>

Opposition in Colorado related largely to concerns about public safety. The only school that directly opposed the legislation focused specifically on sexual assault, internet stalking, and methamphetamine production in their public testimony, and several public postsecondary institutions endorsed a proposal to add exceptions for more serious offenses.<sup>261</sup>

Colorado's law allows schools to continue to ask about convictions for assault, kidnapping, voluntary manslaughter, and murder that happened within the past five years.<sup>262</sup> Advocates initially introduced the bill without exceptions for any offenses. The five-year timeframe was the result of legislative negotiations: advocates felt that five years was a workable compromise, in part because many individuals charged with those more serious offenses are still incarcerated and not yet able to attend traditional colleges or universities five years after being convicted.<sup>263</sup>

Colorado's legislation is the only one of the first four state laws to directly address sealed records. The law requires that instructions on application forms specify that applicants need not disclose any information contained in sealed records.<sup>264</sup> This provision is due to a previously existing law in Colorado that prohibited employers, educational institutions, and state and local agencies from requiring an applicant to disclose information that has been expunged.<sup>265</sup>

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260. COL. REV. STAT. § 23-5-106.5(3)(c) (2019).

261. *Hearing on S.B. 19-170 Before the H. Comm. on Educ.*, 72nd Gen. Assemb., Reg. Sess. (Colo. 2019) (statement of Julie McKenna, Brandeberry McKenna Public Affairs on behalf of Colorado Mesa University).

262. COLO REV. STAT. § 23-5-106.5(3)(b) (2019).

263. Interview with Jamie Lynn Ray and Justin Larson, *supra* note 258; *see also Hearing on S.B. 19-170 Before the H. Comm. on Educ.*, 72nd Gen. Assemb., Reg. Sess. (Colo. 2019) (statement of Rep. Soper, Sponsor, S.B. 19-170).

264. COLO REV. STAT. § 23-5-106.5(2)(b) (2019).

265. *See* COLO REV. STAT. § 24-72-702(4) (2019). Colorado takes a unique approach under which once a record has been expunged, the court may issue an order sealing the record. COLO REV. STAT. § 24-72-702(2) (2019). This is different from how many states structure their sealing and expungement laws. *See supra* Section III.A.

**FIGURE 4: THE FIRST FOUR STATE LAWS BANNING THE BOX IN  
COLLEGE ADMISSIONS**

|  | COLORADO  | LOUISIANA   | MARYLAND  | WASHINGTON  |
|--|---|---|---|---|
| Statute  | CO ST § 23-5-106.5  | LA R.S. 17:3152   | MD EDUC § 26-501 through 506  | WA ST 28B.160.010 through .040                              |
| Effective date   | May 1, 2020   | Aug. 1, 2017  | Feb. 11, 2018   | June 7, 2018  |
| Public institutions only?                                | Public only.  | Public only.  | Both public and private.  | Public only.  |
| Reference to sealed or expunged records?                 | Notice must be provided that applicants are not required to disclose information in sealed records.   | No.   | No.   | No.   |
| Is criminal history defined to include juvenile records? | No. "Criminal history" not defined.   | No. "Criminal history" and "criminal conviction history" not defined.   | No. "Criminal history" defined to mean arrests or criminal convictions. | Explicit that "criminal history" includes juvenile records. |
| Carve-outs for serious offenses?                         | Institutions may ask about convictions for stalking, sexual assault, and domestic violence that happened at any point. They may ask about convictions related to assault, kidnapping, voluntary manslaughter, or murder from the last five years. | Institutions may ask about convictions for stalking, cyberstalking, rape, aggravated rape, second- and third-degree rape, sexual battery, and second-degree sexual battery. | None.   | None.   |
| Can institutions ask about school disciplinary history?  | No, except for disciplinary history related to stalking, sexual assault, or domestic violence.  | Yes.  | Yes.  | Yes.  |
| Liability limits?  | No.   | No.   | No.   | Proposed but not passed.                                    |

|  | COLORADO   | LOUISIANA  | MARYLAND  | WASHINGTON  |
|--|--|--|---|---|
| When may institutions begin asking about criminal history? | Institutions may inquire about an admitted applicant's criminal history when obtaining information about participating in campus life or student housing.  | After a student is admitted, schools may look at history for purposes of offering supportive counseling or services, making decisions about participation in campus life, and making secondary inquiries on financial aid, immunization, or housing. | Institutions may inquire about criminal history for purposes of making decisions about campus residency and in order to offer supportive counseling.                | After an applicant has been determined to be qualified, institutions may ask about criminal history for the purpose of making an admissions decision, restricting access to campus residency, or offering supportive counseling, but the decision may not be automatic or unreasonable. |
| Exceptions for third-party admissions forms?               | Institutions may use third-party admissions forms that ask about criminal history if the form is used in other states and tailored to a specific degree program. Applicants have the right to appeal if their admission is denied. | LSU Health Sciences Centers and School of Veterinary Medicine "and other public postsecondary institutions" may use third-party admissions forms that are tailored to a specific degree program and used in multiple states.                         | Institutions may use third-party forms that ask about criminal history if they post a notification specifying that criminal history does not disqualify applicants. | Institutions may use third-party admissions applications that ask about criminal history if an institution posts notice on its website stating that they may not automatically or unreasonably deny admission based on criminal history.  |

## 5. Other State Efforts

In August of 2020, California became the fifth state to ban the box in college admissions.<sup>266</sup> California's statutory language prohibits its colleges from asking about criminal history at any point in the admissions process but does not apply to applications for professional degrees or law enforcement basic training.<sup>267</sup> Although bills in both New York and Illinois have so far failed to advance, their proposed language helped shape bills that ultimately passed in

266. CAL. EDUC. CODE § 66024.5 (West 2020).

267. *Id.*

other states.<sup>268</sup> New York introduced the first legislation in the country that would have banned the box in college admissions in 2013, and it has introduced similar bills every session since, with legislation dying in committee each time.<sup>269</sup> New York's bill language clearly prohibits asking about arrests that did not result in convictions and asking about criminal convictions that have been sealed or expunged at any point when a student is applying or enrolled.<sup>270</sup> In Illinois, advocates have introduced ban the box measures in both the 2017–2018 legislative session and the 2019–2020 session, but their efforts have stalled out at different stages due to opposition from colleges and universities, and due to the shortened legislative session during the COVID-19 pandemic.<sup>271</sup> Like New York, Illinois's proposed legislation would prohibit asking about sealed records, expunged records, or arrests or charges that did not lead to a conviction.<sup>272</sup>

### C. Institutional Changes

In addition to reforms at the national and state level, a number of individual colleges, universities, and higher education systems have independently decided to remove their own criminal history questions. Some national membership groups for colleges and universities have picked up on the campus ban the box movement: For example, the Association of American Colleges and Universities wrote to its member colleges in 2018 urging them to drop questions about criminal justice history from their admission applications.<sup>273</sup> Leading systems that have voluntarily removed their

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268. Interview with Caryn York, *supra* note 69 (referring just to New York); Interview with Sryta Stieb-Martin & Annie Freitas, *supra* note 226 (referring both to New York and Illinois); Interview with Noel Vest, *supra* note 85 (referring just to New York).

269. S.B. 6437, 2013–2014 Leg., 237th Sess. (N.Y. 2013); S.B. 969, 2015–2016 Leg., 238th Sess. (N.Y. 2015); S.B. 3740, 2017–2018 Leg., 240th Sess. (N.Y. 2017); S.B. 809, 2019–2020 Leg., 242nd Sess. (N.Y. 2019); *see also Summary of Senate Bill S6437*, N.Y. STATE SENATE, <https://www.nysenate.gov/legislation/bills/2013/s6437/amendment/original> [<https://perma.cc/CH4Q-4AHC>] (showing that S. 6437 made it to committee but no further and providing links to webpages for S. 969, S. 3740, and S. 809 that show the same).

270. *See, e.g.*, S.B. 809, 2019–2020 Leg., 242nd Sess. (N.Y. 2019).

271. H.B. 3142, 100th Leg., Reg. Sess. (Ill. 2017); H.B. 217, 101st Leg., Reg. Sess. (Ill. 2019); S.B. 3517, 101st Leg., Reg. Sess. (Ill. 2020); Ill. H. Transcript, 94th day, 101st Leg. Reg. Sess. at 34–38 (2020) (discussing university opposition to H.B. 217); Bill Wheelhouse, *COVID-19 Impact in Both Legislation and Politics at Statehouse*, NPR ILLINOIS (May 26, 2020) <https://www.nprillinois.org/post/covid-19-impact-both-legislation-and-politics-statehouse#stream/0> [<https://perma.cc/YR4-EVUL>] (discussing Illinois's abbreviated legislative session and focus on pandemic response).

272. *See, e.g.*, S.B. 3517, 101st Leg., Reg. Sess. (Ill. 2017).

273. Lynn Pasquerella, *Expanding the American Dream: Destigmatizing Past Criminal Justice Involvement*, ASS'N AM. COLLS. & UNIVS. (May 1, 2018), <https://www.aacu.org/expanding->

criminal history questions or restricted the use of criminal history information include the State University of New York,<sup>274</sup> New York University,<sup>275</sup> and the University of Texas.<sup>276</sup> Schools that have voluntarily removed or limited use of criminal history questions have listed supporting successful reentry for ex-offenders as a motivating factor.<sup>277</sup>

## V. INSTITUTIONAL RESPONSES TO BAN THE BOX EFFORTS

This Part provides an analysis of the ways in which postsecondary institutions that use the Common Application, and colleges and universities in states that have passed legislation restricting the use of criminal history in the college admissions process, have responded to recent reform efforts. It focuses in particular on how implementation of these changes has played out for individuals with juvenile records. When the Common Application removed their question on criminal history, they cited decreasing commonality in how colleges and universities thought about the value of criminal history as a key reason motivating their choice.<sup>278</sup> State legislative hearings and surveys of colleges have also demonstrated increasing disagreement between schools in how to ask about criminal history.<sup>279</sup> Both the new discretion allowed by the Common Application and the range of exceptions and carve-outs in state legislation have allowed colleges and universities to continue to ask questions in some circumstances that encourage applicants to disclose juvenile records. Changes to the Common Application in

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american-dream-destigmatizing-past-criminal-justice-involvement [https://perma.cc/Z74T-GLWX].

274. SUNY, *supra* note 7.

275. Mike Vilensky, *NYU Narrows Criminal Past Question for Applicants*, WALL ST. J. (Aug. 1, 2016), <https://www.wsj.com/articles/nyu-narrows-criminal-past-question-for-applicants-1470024001>. NYU stopped having admissions officers review student criminal history in 2015. *Id.* If a candidate receives a positive review from an admissions officer and has checked the criminal history box, the application is then reviewed by a special committee. *Prior Criminal Convictions*, N.Y.U., <https://www.nyu.edu/admissions/undergraduate-admissions/how-to-apply/prior-criminal-conviction.html> [https://perma.cc/DT57-VC6E] (last visited Nov. 11, 2020).

276. Applicants to the University of Texas may use the ApplyTexas application or the Coalition Application, neither of which ask criminal history questions. Meghan Nguyen, *UT Admissions Does Not Discriminate Against Students with Criminal Record*, DAILY TEXAN (Sept. 27, 2018), <https://thedailytexan.com/2018/09/27/ut-admissions-does-not-discriminate-against-students-with-criminal-record> [https://perma.cc/9QC9-TY57].

277. *See, e.g.*, SUNY, *supra* note 7 (“It is in the interest of the State to facilitate the admission of individuals with previous criminal convictions because improved access to higher education can enhance public safety by reducing recidivism and facilitating successful reintegration into society.”).

278. Davis, *supra* note 13.

279. *Supra* Sections I.B and IV.B.

particular represent a potentially concerning victory because a significant number of schools have moved toward less protective wording than the language previously required to be used at all schools.

### A. Methodology

To examine the decisions individual institutions are making, this Article provides an analysis of school supplements released in 2019 for all U.S.-based schools that use the Common Application and of online application forms for all impacted four-year universities in Louisiana, Maryland, and Washington. A total of 803 school supplements to the Common Application are included in the data set, as well as eighty-two applications from schools in Louisiana, Maryland, and Washington. Only applications for first-time admission to undergraduate programs were included in the analysis; applications for transfer or for graduate admission were not considered.

Any schools that use the Common Application but that did not have an application publicly available by December 1, 2019, were excluded from the data set. Two schools in Louisiana<sup>280</sup> were excluded because they only accept applicants who have already completed some college. Four schools in Maryland<sup>281</sup> were excluded because they did not have easily accessible applications available online. When one university system used the same application form for multiple campuses, each campus was treated as its own distinct school, provided each campus had its own unique federal UnitID number.

This data was then cross-referenced with demographic data from the U.S. Department of Education's Integrated Postsecondary Education Data System (IPEDS) to obtain information about race, Pell eligibility rates,<sup>282</sup> and highest degree offered for each institu-

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280. Louisiana State University Health Sciences Center-New Orleans and Louisiana State University Health Sciences Center-Shreveport. See *Index of Degrees Offered*, LSU HEALTH SCIS. CTR.-NEW ORLEANS, <http://catalog.lsuhs.edu/content.php?catoid=11&navoid=2214> [<https://perma.cc/J6WD-LGRP>] (last visited Oct. 20, 2020) (providing links to webpages with degree requirements); see *Degrees & Programs*, LSU HEALTH SCIS. CENTER-SHREVEPORT, <https://www.lsuhs.edu/admissions/degrees-programs> (last visited Oct. 20, 2020) (providing links to webpages with degree requirements).

281. Towson University (had an online application available but requested social security information to access it), Bais HaMedrash and Mesivta of Baltimore (did not appear to have an institutional website), Ner Israel Rabbinical College (did not have an online application form accessible at the time of review), and Yeshiva College of the Nation's Capital (had a phone number to request an admissions form but not an online application).

282. Pell eligibility is a commonly used metric in discussing the extent to which postsecondary institutions reach low-income populations. Nationally, 31% of college students received Pell grants for the 2018–2019 school year. COLL. BD., TRENDS IN STUDENT AID 2019:

tion.<sup>283</sup> Two schools<sup>284</sup> were excluded from the analysis of Pell eligibility rates due to lack of Pell data for those institutions in the IPEDS system.

### B. Common Application Supplements

The 2018 decision to remove the criminal history question from the shared portion of the Common Application left individual schools with the discretion to determine whether to add a question on criminal history back into their individual school supplements.<sup>285</sup> The Common Application released the first round of applications that were affected by this decision in late summer and early fall of 2019, for admission starting in the fall of 2020. Out of 803 U.S.-based schools that used the Common Application and had school supplements available as of December 2019, 46.5% of schools (373 schools total) chose not to add questions on criminal history back in. The remaining 53.5% of schools (430 schools total) are roughly evenly split between creating their own new wording for the question and using the same wording that the Common Application previously included: 51.4% of these schools (221 in total) used new wording and 48.6% (209 total) used wording that is substantively identical to the previous wording used by the Common Application (see Figure 5, below).<sup>286</sup>

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PELL GRANTS 27–28 (2019), <https://research.collegeboard.org/pdf/trends-student-aid-2019-full-report.pdf> [<https://perma.cc/X7QD-FVAK>]. Seventy-three of Pell recipients come from households with incomes of \$30,000 or less. ANTHONY P. CARNEVALE & MARTIN VAN DER WERF, GEO. CTR. ON EDUC. & WORKFORCE, THE 20% SOLUTION: SELECTIVE COLLEGES CAN AFFORD TO ADMIT MORE PELL GRANT RECIPIENTS 8 (2017), <https://cew.georgetown.edu/wp-content/uploads/The-20-Percent-Solution-web.pdf> [<https://perma.cc/6VDU-BRUM>].

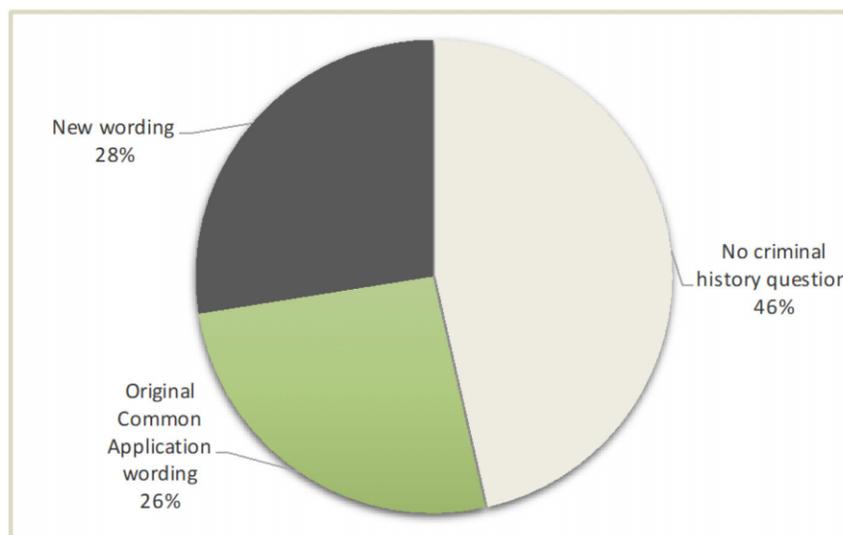
283. The IPEDS data used for this analysis is twelve-month enrollment data from 2017.

284. Charles R Drew University of Medicine & Science and Pennsylvania State University-Penn State Great Valley.

285. Davis, *supra* note 13.

286. Schools that both asked the original Common Application question and added additional questions on criminal history were classified as creating their own wording.

FIGURE 5: HOW SCHOOLS THAT USE THE COMMON APPLICATION ASK ABOUT CRIMINAL HISTORY, FALL 2019



Of the 430 schools that ask criminal history questions, colleges and universities use 137 legally distinct phrasings. Two questions are considered “legally distinct” if a reasonable attorney could counsel the same client to answer “yes” to one question asking about criminal history but “no” to the other. The Appendix lists every legally distinct phrasing from Common Application supplements used by U.S. schools in the fall of 2019. With 137 different potential phrasings for applicants to contend with, understanding how to answer criminal history questions has become an increasingly complicated endeavor. The questions asked are almost entirely framed as mandatory yes-or-no inquiries, with a follow-up short answer prompt given to applicants who check “yes.” Applicants are not permitted to skip the question—attempting not to check “yes” or “no” typically triggers a message that reads “[p]lease complete this required question.”<sup>287</sup>

For individuals with juvenile records in particular, applying to schools that use the Common Application may be more complicated than ever. Variations among questions include whether the question asks about arrests and pending charges, whether the question does anything to protect sealed and expunged records,

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287. See Screenshot of Error Message on the Common Application (Dec. 2019) (on file with the author).

and whether the question includes language specific to juvenile adjudications.<sup>288</sup>

The vast majority of schools that chose to create their own wording moved toward language that may encourage applicants to disclose information from sealed or expunged records. When the Common Application required using a criminal history question, the wording was clear that applicants should not include sealed or expunged records.<sup>289</sup> Today, of the 221 schools that use the Common Application and chose to create their own new wording for criminal history questions, 88.7%, or 196 schools total, decided not to continue with the Common Application's disclaimer, and instead removed some or all of the language clarifying that applicants should not disclose sealed and expunged records.<sup>290</sup>

The original Common Application question asked only about convictions or adjudications of guilt.<sup>291</sup> A significant portion of schools that added their own wording to the Common Application now ask about arrests or charges that are pending or that did not lead to a conviction. Of the 221 schools that wrote a new criminal history question, 41.2%, or 91 schools total, added arrests or pending charges to their question.

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288. See *infra* Appendix (providing a wide variety of examples of question wording). The Appendix sorts questions by whether they reference arrests and pending charges or ask only about convictions (compare “[h]ave you ever been arrested?” with “[h]ave you ever been convicted of a felony or misdemeanor?”); by whether the questions explicitly protect sealed and expunged records (compare “[h]ave you ever been adjudicated guilty or convicted of a felony, or other crime?” with “[h]ave you ever been found guilty or convicted of a misdemeanor or felony? Note that you are not required to answer ‘yes’ to this question, or provide an explanation, if the criminal adjudication or conviction has been expunged, sealed, annulled, pardoned, destroyed, erased, impounded, or otherwise required by law or ordered by a court to be kept confidential”); and by whether the question specifically references juvenile adjudications (compare “[h]ave you ever been adjudicated responsible for any offense as a juvenile involving violent or assaultive behavior, weapon possession, property destruction or sexually-related offenses?” with “[h]ave you ever been convicted of a crime?”).

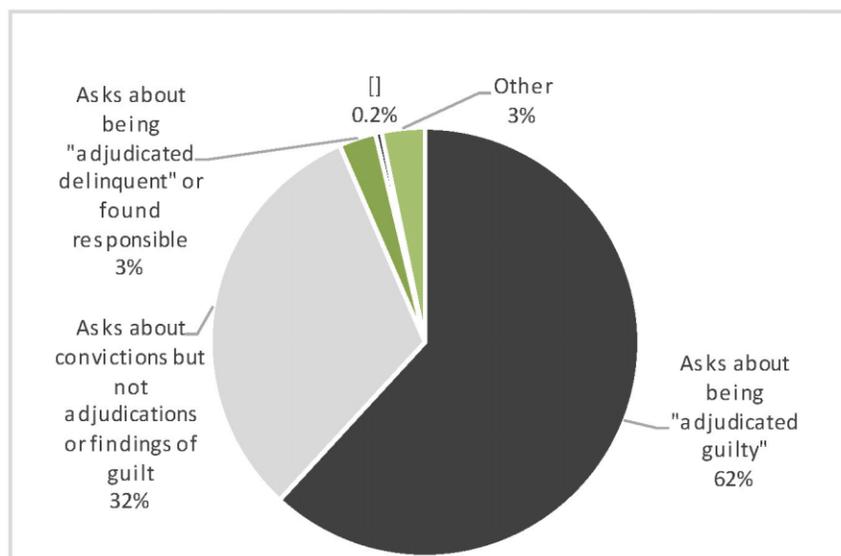
289. The Common Application previously specified “[n]ote that you are not required to answer ‘yes’ to this question, or provide an explanation, if the criminal adjudication or conviction has been expunged, sealed, annulled, pardoned, destroyed, erased, impounded, or otherwise ordered by a court to be kept confidential.” See, e.g., NAT’L JUV. DEF. CTR., YOUR JUVENILE RECORD CAN AFFECT YOUR FUTURE (2018), <https://njdc.info/wp-content/uploads/2018/04/Your-Juvenile-Record-Can-Affect-Your-Future.pdf>[<https://perma.cc/L4T9-CDXF>].

290. Many of these schools removed protections on sealed or expunged records completely, while some removed just protections on sealing but not expungement. Others asked multiple questions about criminal history and included protections on sealed and expunged records in only one of the questions. For example, Appalachian State University asks both the original Common Application question, which protects sealed and expunged records, and also asks whether applicants currently have any charges pending against them. Because those pending charges might be protected under juvenile sealing statutes, and no mention is made of what to do in that case, Appalachian state was treated as not fully protecting sealed and expunged records. Appalachian State Univ., Application for Admission (2019) (screenshot on file with the author).

291. Scott-Clayton, *supra* note 211.

Schools also vary significantly in how they ask about convictions and adjudications (see Figure 6, below). Currently, 31% of schools that use the Common Application and include criminal history questions on their school supplements ask only about convictions and are silent about juvenile adjudications. Another 62% mirror the original Common Application question by asking about being “adjudicated guilty” rather than being “adjudicated delinquent” or “having youthful offender status.” This wording leaves applicants in states that have clear statutory provisions finding that an adjudication of delinquency is not a finding of guilt in a different position than applicants from states in which a juvenile adjudication does count as a finding of guilt. Only 3% of schools ask about juvenile records in terminology that would unambiguously include juvenile proceedings.

FIGURE 6: JUVENILE ADJUDICATIONS VERSUS CRIMINAL CONVICTIONS ON SCHOOL SUPPLEMENTS TO THE COMMON APPLICATION, FALL 2019



The ways in which schools ask about criminal history strongly suggest that many schools are unclear about legal distinctions between convictions and adjudications. Many schools, for example, ask about both convictions and arrests or pending charges, without specifying that the arrests or charges must be ones that could lead

to conviction as an adult.<sup>292</sup> In states in which juvenile records do not legally count as convictions, this might suggest that applicants should disclose pending charges that could lead to adjudications, but need not disclose actual adjudications. Similarly, a number of schools ask about cases in which an applicant pleaded guilty or no contest, or was convicted.<sup>293</sup> In states in which juvenile records do not legally count as convictions, this would suggest that an applicant might be required to disclose a juvenile case in which she pled out, but not a juvenile case that ended in an adjudication of delinquency. Three schools go so far as to specify that being “convicted of a criminal offense” includes juvenile adjudications, despite those schools all being in states that have statutory provisions specifying either that juvenile adjudications shall not be considered convictions or that juvenile proceedings are not criminal proceedings.<sup>294</sup>

Although it is too soon to tell whether adding criminal history questions back in will impact the racial composition of postsecondary institutions, the schools that added criminal history questions were less diverse to begin with. Schools that decided not to add a criminal history question back in have higher African American enrollment (10.3% African American enrollment) than schools that did add criminal history questions in (8.9% African American enrollment). The same is true for Hispanic enrollment: schools that did not add criminal history questions back in have higher Hispanic enrollment (10.7%) than schools that did

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292. See, e.g., Cabrini Univ., Application for Admission (2019) (“Have you ever been convicted and/or have charges pending of any criminal offense other than a minor traffic violation?”) (screenshot on file with the author); Ga. Coll. and State Univ., Application for Admission, (2019) (“Have you ever been convicted of a crime other than a traffic offense, or are any criminal charges now pending against you?”) (screenshot on file with the author); Kent State Univ., Application for Admission (2019) (“Have you ever been convicted of a criminal offense or have charges pending against you at this time? (Other than minor traffic violations).”) (screenshot on file with the author).

293. See, e.g., Agnes Scott Coll., Application for Admission (2019) (“Have you ever been convicted of, or plead guilty or no contest to a felony or misdemeanor?”) (screenshot on file with the author); Brown Univ., Application for Admission (2019) (“Have you ever been convicted of a crime or agreed to a court-accepted plea (e.g. guilty plea, nolo contendere, Alford plea)?”) (screenshot on file with the author); Iowa State Univ., Application for Admission, (2019) (“Do you have a pending criminal charge OR have you ever been convicted of a crime, made a plea of guilty or no contest, accepted a deferred judgement, or been required to register your name and home address with a local or state law enforcement agency?”) (screenshot on file with the author).

294. See, e.g., Mich. State Univ., Application for Admission (2019) (“Have you ever been convicted of a criminal offense (including in juvenile court) other than minor traffic violations, or are there criminal charges pending against you at this time?”) (screenshot on file with the author). Michigan’s law governing juvenile court proceedings specifies that “[e]xcept as otherwise provided, proceedings under this chapter are not criminal proceedings.” MICH. COMP. LAWS § 712A.1(2).

(8.3%).<sup>295</sup> This is in line with existing research which suggests schools that ask criminal history questions are disproportionately likely to have low minority enrollment.<sup>296</sup>

Schools that chose to add criminal history questions back in were also less likely to serve low-income populations than schools that opted not to include criminal history questions. Schools that chose not to add criminal history questions reported, on average, that 35.9% of their students received federal Pell Grants, while schools that continue to ask about criminal history reported that 29.4% of students received Pell funding.<sup>297</sup>

The cause of these differences in racial composition and Pell eligibility remains unclear. The criminal history question itself does not account for the differences, as current race and Pell eligibility data reflects the former admissions process when the question was included for all schools on the shared portion of the application. Differences in sector of institution or degrees offered also do not account for race or Pell eligibility variations. While public schools have historically been less likely to ask about criminal history than private institutions, and community colleges have been less likely to ask about criminal history than four-year programs, those trends did not hold for schools using the Common Application in 2019.<sup>298</sup> Public four-year institutions were slightly more likely to add in criminal history questions than their private counterparts: 54.6% of public four-year institutions added in criminal history questions, while 52.9% of private four-year programs did. Of the six two-year institutions in the United States using the Common Application, exactly half added a criminal history question back in. This is particularly surprising given that admissions directors at private universities are more likely to report a belief that institutions should ask all applicants about all legal infractions.<sup>299</sup>

Down the road, a more complete regression analysis of a sample of schools beyond just those that use the Common Application would help in better understanding what accounts for socioeconomic differences between schools that ask about criminal history

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295. Data on the racial composition of each college or university that uses the Common Application is 2017 twelve-month enrollment data from the U.S. Department of Education's Integrated Postsecondary Education Data System (IPEDS). For more on this methodology, see *supra* Section V.A.

296. See Pierce et al., *supra* note 70, at 364.

297. Data on the Pell eligibility rates of each college or university that uses the Common Application comes from the same IPEDS data discussed *supra* in note 294.

298. See Pierce et al., *supra* note 70, at 364 (finding that private institutions are more likely to ask about criminal history than public institutions); see also WEISSMAN ET AL., *supra* note 31, at 10 (finding that four-year institutions are more likely to ask about criminal history than community colleges).

299. JASCHIK & LEDERMAN, *supra* note 71, at 37.

and those that do not. Similarly, once data on the first classes of students impacted by the changes to the Common Application becomes available, an analysis of whether there are noticeable changes in racial diversity or Pell eligibility based on whether schools added in the optional criminal history questions would help researchers gain a clearer picture of the impact of asking about criminal history on diversity at postsecondary institutions.

C. *Responses in Louisiana, Maryland, and Washington*<sup>300</sup>

For the most part, laws banning the box have been effective at getting colleges and universities to remove criminal history questions from their initial application forms. However, different statutory exceptions and carve-outs have continued to leave the door open for colleges and universities to ask about criminal history in at least some contexts—and to phrase those questions in troubling ways for individuals with juvenile records. This can impact initial admissions forms in two main ways: through carve-outs for specific offenses and through the use of third-party admissions forms.

In Louisiana, legislation allows postsecondary institutions to ask about some more serious offenses on initial application forms.<sup>301</sup> In Louisiana, three schools continue to include criminal history questions in some form, and two of those schools focus explicitly on more serious offenses as allowed under their ban the box legislation.<sup>302</sup>

Colorado, Louisiana, Maryland, and Massachusetts all allow exceptions for schools that use third-party admissions forms. Louisiana and Colorado specify that the third-party form needs to be used in multiple states.<sup>303</sup> In Maryland and Washington, however, the third-party admissions form may be one that is used solely within those states.<sup>304</sup> This has meant that in Maryland and Washington, schools continue to have the ability to circumvent restrictions on asking about criminal history by using third-party applications that they can directly influence. In Maryland, a quarter of four-year postsecondary institutions continue to ask about criminal history

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300. This subsection relies on data drawn from applications from four-year colleges and universities in Maryland, Washington, and Louisiana. See *supra* Section V.A for the methodology of this analysis. Data from Colorado and California is not included in this analysis because of their laws' later effective dates.

301. See *supra* Sections IV.B.1, 4.

302. The remaining school asks only about whether applicants are currently incarcerated.

303. See *supra* Figure 4 on pages 262–63 for further explanation.

304. See *supra* Section IV.B.2–3.

on initial applications, often in ways that are unclear about whether sealed or expunged records need to be disclosed, or that fail to distinguish juvenile adjudications from criminal convictions. Schools in Washington, on the other hand, have uniformly removed their criminal history questions. This may be in large part due to differing sociopolitical climates in Maryland and Washington when their respective bills passed: Many Maryland schools asked about criminal history before the bill passed and opposed the legislation, while Washington schools were generally already only using criminal history in limited ways, and for the most part remained neutral on the legislation.<sup>305</sup>

These two carve-outs have allowed schools in these states to continue to ask questions that encourage applicants to disclose potentially protected juvenile record information on admissions applications. As with supplements to the Common Application, many questions are unclear about distinctions between convictions and adjudications. Of the eight schools in Maryland that continue to ask about criminal history, half ask only about convictions. Just over a third also ask about being “adjudicated guilty.” No schools refer to being “adjudicated delinquent” or “found delinquent.” Of the two four-year programs in Louisiana that have chosen to ask about the more serious offenses under their statutory carve-out, both ask only about convictions and do not reference juvenile adjudications.

Schools are also able to continue asking questions in ways that are unclear about sealed, expunged, or otherwise confidential records. Of four-year schools in Maryland that ask about criminal history via third-party applications, 75% are silent about sealed and expunged records. In Louisiana, the three schools that ask about some criminal offenses do not include clarification about sealed or expunged records.<sup>306</sup>

Finally, use of third-party application forms has meant that schools continue to be able to ask about arrests or charges that did not lead to conviction. Examples from Maryland include Morgan State University, which asks, “[h]ave you ever been arrested?” and Bowie State, which asks, “[d]o you currently have any criminal charges pending, have you been arrested, or have you been convicted of a felony?”<sup>307</sup>

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305. Interview with Caryn York, *supra* note 69; Interview with Noel Vest, *supra* note 85.

306. LSU Shreveport, Online Application (2019) (on file with author); La. State Univ. & Agric. & Mech. Coll., Online Application (2019) (on file with author); Univ. of La. at Lafayette, Online Application (2019) (on file with author).

307. Morgan State Univ., Online Application (2019) (on file with author); Bowie State Univ., Freshman Application (2019) (on file with author).

## VI. POLICY RECOMMENDATIONS

Colleges and universities have many compelling reasons to reconsider the necessity of using criminal history questions in the college admissions process. The evidence showing the benefits of postsecondary education on lifetime earnings, overall wellbeing, and reduced rates of recidivism is strong, whereas studies have not demonstrated that asking about criminal or juvenile records improves campus safety.<sup>308</sup> Given the inequities in the criminal and juvenile justice systems, it seems likely that criminal history questions will contribute to inequities in access to postsecondary education.<sup>309</sup> However, even without fully restricting the use of criminal history questions altogether, colleges and universities can do more to address the unique set of concerns that apply to individuals with juvenile records.

A. *Guiding Principles*

If colleges and universities are unwilling to remove criminal history questions entirely, they still have an obligation to ensure they are intentional about what, exactly, they are asking. At a minimum, colleges and universities should ensure that records that have received legal protection remain protected and that applicants are able to understand the questions they are being asked. Taken jointly, this means that schools should avoid asking about protected records and should be explicit about telling students what they should not share.

1. Postsecondary institutions should avoid asking about arrests; pending charges; juvenile adjudications or youthful offender findings; and records that have been sealed, expunged, or otherwise protected.

For schools that are unwilling to remove criminal history questions altogether, or states that are unable to get a bill passed without negotiating some compromise, decision-makers should, at a minimum, ensure that any questions about criminal history are highly protective of juvenile records and of all records that are in-

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308. See *supra* pp. 222–23 (discussing earnings and recidivism); *supra* p. 230–31 (discussing safety).

309. See sources cited *supra* note 94 (citing to arguments that questions about criminal justice involvement are likely to impact non-white applicants disproportionately).

tended to be protected or kept confidential. This helps ensure that colleges and universities don't directly contradict the goals of, and underlying public policy considerations behind, statutes pertaining to juvenile records and to sealing and expungement. Juvenile records receive additional protection in order to help young people move beyond past justice involvement, but those protections lose much of their meaning when they are ignored by institutions that play a particularly critical role in helping young adults thrive.

2. Postsecondary institutions should avoid wording that is legally ambiguous or that would be unreasonable to ask an applicant to understand without seeking assistance from an attorney.

All too frequently, colleges and universities ask questions that are unclear about whether juvenile adjudications should be disclosed or that provide no guidance on what to do about disclosing sealed or expunged records. Ambiguous questions may speak to the fact that decision-makers within a given college or university are unclear about which sorts of records their question is intended to include.<sup>310</sup>

Questions that colleges and universities ask young people should make sense to young people. Asking applicants, many of whom have not yet received a high school diploma or reached the age of majority, to answer questions that confuse even seasoned attorneys is unfair, nonsensical, and likely to lead to a degree of arbitrariness in who checks the box.<sup>311</sup> When questions are ambiguous about disclosure of protected records, applicants are put in a difficult and troubling position. They can choose to report records that have received some form of statutory protection, despite the fact that lawmakers have often passed those protections specifically to allow individuals a fresh start. Alternatively, they can keep their records confidential but face lingering worries about whether the school might consider that to be dishonest, or even whether they might have their admission rescinded. By wording their questions more carefully, colleges and universities can avoid placing applicants in such a fundamentally unfair position.

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310. See Solokoff & Fontaine, *supra* note 33, at 16–17.

311. See *supra* Section II.A.1 for examples of questions that would fall into this category. See also *supra* Section II.A.2 for the discussion of disclosing juvenile adjudications on questions that ask only about convictions as well as the discussion of disclosing sealed records when colleges fail to include a disclaimer that sealed records need not be disclosed.

### B. *Legislative and Institutional Recommendations*

More can be done, both through legislation and within individual colleges and universities, to ensure that protected records are kept confidential and that applicants are able to understand what they are required to disclose.

#### 1. Federal Recommendations

The Beyond the Box for Higher Education Act would, if passed, encourage colleges and universities to remove or limit their questions on criminal and juvenile records, and would require the Department of Education to provide guidance and technical assistance to postsecondary institutions on best practices with respect to the use of criminal and juvenile records in the admissions process.<sup>312</sup>

This framework of providing federal guidance and recommendations can play an important role in addressing the specific set of concerns for individuals with juvenile records. Colleges and universities often struggle to understand the complex landscape of state laws that protect juvenile records.<sup>313</sup> The Beyond the Box legislation could go one step further toward addressing this concern by explicitly requiring that the guidance and technical assistance provided by the Department of Education include resources on statutory protections for juvenile records and best practices for asking criminal history questions in ways that align with existing protections.

This change could make a meaningful difference in cases where questions encouraging disclosure of protected juvenile records are the product of institutional confusion about the juvenile justice system. It would not fully address situations in which colleges and universities have a clear understanding of existing protections on juvenile records but deliberately encourage applicants to disclose juvenile history information despite that understanding.

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312. Beyond the Box for Higher Education Act, S. 3435, 116th Cong. (2019).

313. See Sokoloff & Fontaine, *supra* note 33, at 16–17; see also *supra* Section V.B (discussing ways in which question wording used by colleges and universities suggests a lack of clarity with respect to terminology used in juvenile systems).

## 2. State Recommendations

To ensure that individuals are fully protected from needing to disclose juvenile records to colleges and universities, federal guidance alone is not enough: state-level reform that more explicitly addresses juvenile records is also needed. To date, all state legislation that restricts using criminal history questions in the college admissions process allows colleges and universities to ask about criminal history in at least some contexts, such as when asking about more serious offenses, when using third-party application forms, or when asking about on-campus housing.<sup>314</sup> If state legislation continues to include these carve-outs, statutory language must, at a minimum, include clear restrictions on asking about protected records in any form and require clear disclaimers about what should and should not be disclosed.

Never-passed bills from both New York and Illinois provide compelling existing models here. The proposed ban the box legislation in New York prohibits colleges and universities from asking about arrests that did not result in a criminal conviction and about criminal convictions that have been sealed. This prohibition applies at any point during the admissions process and at any point after an applicant enrolls.<sup>315</sup> However, New York's proposed bill language repeatedly refers to adjudications and sealed or expunged records under specific provisions of the New York Criminal Code.<sup>316</sup> This would technically leave in-state applicants who have received adjudications under the applicable provisions protected but leave applicants from out of state vulnerable. Illinois's bill language would require that "[a]t no time may a college consider criminal history information that has been sealed, expunged, or impounded under applicable laws, nor may it consider information unrelated to a conviction, including, but not limited to, arrest, complaint, or indictment information that did not result in a conviction."<sup>317</sup>

Laws in some states that restrict use of criminal history in employment decisions also provide helpful models. For example, California labor law prohibits employers from asking about arrests or charges that did not lead to conviction, that resulted in a referral to a pre- or post-trial diversion program, or that led to a conviction

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314. See *supra* Section IV.B.

315. S.B. 809, 2019–2020 Leg., 242nd Sess. (N.Y. 2019).

316. See *id.* at § 772.

317. S.B. 3517, 101st Leg., Reg. Sess. (Ill. 2017).

that was judicially dismissed or sealed.<sup>318</sup> California labor law also prohibits inquiries into an “arrest, detention, processing, diversion, supervision, adjudication, or court disposition that occurred while the person was subject to the process and jurisdiction of juvenile court law.”<sup>319</sup>

These prohibitions on their own do not fully address concerns about ambiguous or unclear question wording. State legislation can also go one step beyond simply prohibiting inquiries into protected records by ensuring that questions are worded in clear and unambiguous ways. New Hampshire’s Annulment of Criminal Records statute provides a useful model of existing legislation that mandates clear question wording with respect to expungement. The statute requires that:

In any application for employment, license or other civil right or privilege, or in any appearance as a witness in any proceeding or hearing, a person may be questioned about a previous criminal record only in terms such as “Have you ever been arrested for or convicted of a crime that has not been annulled by a court?”<sup>320</sup>

State statutes that restrict using criminal history in the admissions process should not only prohibit all inquiries into protected records but should also be clear about exactly how colleges and universities should frame their questions to ensure that applicants understand that protected records can remain confidential.

Collectively, this means legislation should include three key components. First, legislation should draw from California’s labor law and prohibit asking about an adjudication or court disposition that occurred while the person was subject to the process and jurisdiction of juvenile court law at any point during the application process or while a student is enrolled. Second, legislation should include restrictions similar to those seen in bill language from New York and Illinois that would prohibit asking about criminal history information that has been sealed, expunged, or impounded under applicable laws, or information concerning an arrest, charge, or indictment that did not result in a conviction. This prohibition

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318. The statutory language reads: “An employer, whether a public agency or private individual or corporation, shall not ask an applicant for employment to disclose, through any written form or verbally, information concerning an arrest or detention that did not result in conviction, or information concerning a referral to, and participation in, any pre-trial or post-trial diversion program, or concerning a conviction that has been judicially dismissed or ordered sealed pursuant to law.” CAL. LAB. CODE § 432.7(a)(1).

319. CAL. LAB. CODE § 432.7(a)(2).

320. N.H. REV. STAT. ANN. § 651:5(X)(f) (2013).

should apply both during the application process and while a student is enrolled. Third, legislation should pull from New Hampshire's model and require that if colleges and universities ask criminal history questions, they must include clarifying language about what should not be disclosed. This could mean requiring that all schools that choose to ask about criminal history include a disclaimer stating: "You should answer 'no' if your conviction has been sealed, expunged, or impounded, or if you were arrested, charged, or indicted, but not convicted."

### 3. Institutional Recommendations

If postsecondary institutions are unwilling to remove their criminal history questions altogether, they should, at a minimum, ensure their language does not ask about records that may be legally protected and is unambiguous about important legal terminology.

The Department of Education's recommendations from 2016 provide a generally strong model here. The Department recommends clearly defining what information should not be disclosed and includes the following caveat to questions about felonies as an example:

If you have been adjudicated as a juvenile delinquent or have youthful offender status, you should respond to the felony question by checking "no." You should also answer "no" if your conviction has been sealed, expunged, or overturned, if you were arrested, but not convicted, or if your felony conviction was over 5 years ago.<sup>321</sup>

Despite the fact that the Department suggested this language in 2016, no schools that use the Common Application chose to adopt it in their supplementary applications. This was a missed opportunity on their part.

College and university responses to the changes to the Common Application and to new state ban the box laws highlight the broad range of ways that institutions today view the significance of criminal history. Despite this variation in approach, however, colleges and universities do tend to agree that criminal history should not always be a bar to admissions.<sup>322</sup> Adhering to the intent of statutes

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321. DOE 2016, *supra* note 31, at 3.

322. See, e.g., Pierce et al., *supra* note 70, at 367 (finding that only 10% of postsecondary institutions reported that they would probably or definitely not admit an applicant who had been convicted of driving under the influence, and only 20% of postsecondary institutions

designed to protect some types of records and using clear, unambiguous questions is the least the public should be asking of educational institutions.

#### CONCLUSION

Students today face an unfortunate situation. Postsecondary education has become increasingly important to an individual's financial security.<sup>323</sup> At the same time, criminal and juvenile records remain extremely common.<sup>324</sup> This means that when colleges and universities choose to ask about criminal and juvenile records, the impact is far-reaching and potentially deeply harmful.

Although states often promise individuals that their juvenile records will remain confidential or otherwise be protected, colleges and universities continue to ask questions that encourage applicants to disclose past involvement with juvenile justice systems. Changes at the state and institutional levels that restrict use of criminal history in the admissions process represent an important step forward. However, they have largely focused on *when* institutions may or may not ask criminal history questions, rather than on *how* questions should be worded in the cases where schools are still able to ask about criminal history.

Applicants today face a bewildering landscape of criminal history questions that often encourage disclosure of juvenile records that an applicant may legally be entitled to keep confidential. This is directly at odds with the public policy considerations that led to heightened protections for individuals with juvenile records. Both public and nonprofit private postsecondary institutions play a critical role in opening the door to new opportunities for their students. When colleges and universities bring juvenile history information into the admissions process, they make it harder for individuals who became involved with justice systems at a young age to move forward. Moving toward a rehabilitative ideal requires more than just reform to juvenile justice systems themselves; it also requires educational institutions to play their part in helping young people earn degrees and turn a new page in life.

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reported that they would probably or definitely not admit an applicant who was convicted of misdemeanor theft).

323. *Supra* pp. 222–23.

324. *Supra* Section I.A.

## APPENDIX

An appendix, which delineates the 137 legally distinct phrasings of criminal and juvenile history questions found on school supplements to the Common Application, can be found online at [mjlr.org](http://mjlr.org).