Boxed Out: Challenging the Use of Criminal Background Questions in Education and Employment

Keith Cunningham-Parmeter[*]

Abstract

Most colleges require applicants to disclose their criminal histories. Sweeping in scope, these admissions questions extend beyond violent crimes to include minor offenses such as shoplifting and marijuana possession. Given that students of color are arrested and punished at disproportionately high rates, colleges that require such disclosures run the risk of reinforcing underlying racial disparities.

Soon after the Supreme Court banned race-based affirmative action in college admissions, university presidents vowed to pursue race-neutral admissions strategies that would still yield diverse entering classes. Because criminal history boxes disproportionately affect students of color, removing these boxes from applications represents a race-neutral, diversity-enhancing admissions strategy. To test whether schools are actually pursuing this tactic, the Article presents original data on application questions from the "top 100" national universities during the 2024–2025 college admissions cycle. This novel dataset shows that criminal history boxes remain ubiquitous throughout college admissions. Namely, over two-thirds of schools required applicants to disclose their criminal histories and juvenile offenses.

Although colleges are just beginning to grapple with the consequences of criminal background questions, employers have dealt with this issue for decades. Most states have enacted "ban-the-box" laws, which require employers to refrain from posing criminal history questions until later stages in hiring. The Article considers how lessons from employment law can inform the development of similar policies in higher education. By banning the box in admissions, colleges can expand educational opportunities for underrepresented groups, foster inclusion, and combat the racialized consequences of conviction.

---

* Robert E. Jones Professor of Advocacy and Ethics, Lewis & Clark Law School; J.D., Stanford Law School. I am grateful for the helpful feedback that I received from Caroline Davidson, Tabrez Ebrahim, Andrew Gilden, Lois Leveen, and Juliet Stumpf. Em Atkinson, Stuart Barker, Emily Easton, Abbee Mortensen, McCabe Webb, and Sophie Webster provided outstanding research assistance for this project. I also appreciate the excellent library support that I received from Meredith Kostek. This research was supported by generous funding from Lewis & Clark Law School.

April 2026 Vol. 94 No. 2

Table of Contents

Introduction 323
I. Current Use of the Box in College Admissions . . . 331
A. Previous Studies on the Prevalence of Criminal History Questions in Higher Education 332
B. Research Questions and Methodology 334
C. Data and Analysis: Universities Continue to Extensively Use the Box 338
II. The Consequences of Asking: Applicant Attrition and Admissions Denials 344
A. Discouraging Applications 345
B. Increasing the Risk of Rejection 349
C. The Box's Outsized Impact on Protected Groups 351
III. Assessing the Legal Risks of Retaining the Box . . . 352
A. Employers' Liability for Preserving the Box: Title VII Disparate Impact 353
B. Colleges' Liability for Preserving the Box: Title VI Disparate Impact 358
1. Impact: Overrepresentation of Protected Groups in Denied Applicant Pools 360
2. Educational Necessity: Posing Broad Questions Unrelated to Campus Safety 365
3. Policy Alternative: Conditional Admission Without the Box 368
IV. Contrasting Ban-the-Box Policies at Work and School 370
A. Autonomy: Forcing Campuses to Accept Dangerous Applicants 371
B. Futility: Circumventing the Ban 375
C. Counterproductivity: Unintentionally Encouraging Race Discrimination 377
Conclusion 380
Appendix. School-Specific Mandatory Disclosures: Top 100 National Universities, 2024–2025 382

Introduction

"Have you ever been convicted of a crime?" Most colleges want to know.[1] From felony convictions to minor misdemeanors, criminal background questions on college applications cover a wide range of

[1] *See infra* Table 1 (presenting original data on the share of "top 100" national universities that posed criminal history questions during the 2024–2025 admissions cycle).

violations.[2] For example, Yale University asks applicants about their juvenile infractions, including underage drinking, marijuana possession, and curfew violations.[3] Often these queries extend beyond criminal activity to include questions about high school discipline.[4] For example, the University of Pennsylvania wants to know if applicants have ever been disciplined "from the 9th grade . . . forward."[5] And Columbia University asks applicants whether they have ever engaged in "behavioral misconduct" that resulted in "emotional harm" to others—a broad question that could apply to virtually anyone.[6]

Students of color disproportionately pay the price for these questions.[7] Given that this group is more likely to be policed, arrested, and convicted, questions on these topics unavoidably impact diverse applicants more than white candidates.[8] Likewise, well-documented disparities in school discipline mean that students of color will be forced to answer "yes" to questions about high school discipline more often than white students.[9] Notwithstanding these known discrepancies, however, colleges continue to ask candidates whether they have ever been disciplined or convicted. Today, a majority of top four-year institutions pose conviction-related questions to applicants, with private schools

---

2 Karen Bussey, Kimberly Dancy, Alyse Gray Parker, Eleanor Eckerson Peters & Mamie Voight, Inst. for Higher Educ. Pol'y, Realizing the Mission of Higher Education Through Equitable Admissions Policies 59 (2021) (reporting survey data on the collection of criminal justice information in college admissions).

3 Yale Univ., Supplemental Questions for the Common App (2024) (on file with author); *see also Juveniles and Drug Offenses*, Child Crime Prevention & Safety Ctr., https://childsafety.losangelescriminallawyer.pro/juveniles-and-drug-offenses.html [https://perma.cc/AWS3-EJC5] (last visited Dec. 16, 2025) (listing marijuana possession as a common juvenile drug infraction); Charles Puzzanchera, Sarah Hockenberry & Melissa Sickmund, Nat'l Ctr. for Juv. Just., Youth and the Juvenile Justice System 92 (2022) (discussing juvenile status offenses).

4 *See infra* Table 2 (reporting original data from the 2024–2025 admissions cycle on the share of top colleges that required applicants to disclose instances of high school discipline).

5 Univ. of Pa., Supplemental Questions for the Common App (2024) (on file with author).

6 Columbia Univ., Supplemental Questions for the Common App (2024) (on file with author).

7 *Cf.* Shelle Shimizu, *Beyond the Box: Safeguarding Employment for Arrested Employees*, 128 Yale L.J.F. 226, 231–32 (2018) (examining the impact of criminal background questions on employment opportunities for communities of color).

8 *See id.*; Alia Wong, *The Common App Will Stop Asking About Students' Criminal Histories*, Atlantic (Aug. 10, 2018), https://www.theatlantic.com/education/archive/2018/08/common-app-criminal-history-question/567242/ [https://perma.cc/7J2Q-LWJQ] (discussing how criminal histories "reflect society-wide biases").

9 *See* F. Chris Curran, *Ban the Discipline Box? How University Applications That Assess Prior School Discipline Experiences Relate to Admissions of Students Suspended in High School*, 63 Rsch. Higher Educ. 1120, 1121–23 (2022) (discussing disciplinary rates in school); Nathan Barrett, Andrew McEachin, Jonathan Mills & Jon Valant, *Discipline Disparities and Discrimination in Schools*, Brookings (Nov. 20, 2017), https://www.brookings.edu/articles/discipline-disparities-and-discrimination-in-schools/ [https://perma.cc/NAQ6-WFF4] (asserting that the existence of racial disparities in school discipline is "essentially undisputed").

asking more frequently than public schools and with very selective schools asking more frequently than less selective schools.[10] Likewise, over three-quarters of top colleges ask about high school discipline.[11]

Although criminal background questions endure in spite of their racial impact, colleges have reformed other aspects of their admissions practices for race-related reasons. Most notably, in response to the Supreme Court's decision in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* ("*SFFA v. Harvard*"),[12] which banned race-based affirmative action in higher education,[13] colleges abandoned explicit race-conscious admissions policies.[14] Concerned that this change would yield nondiverse applicant pools, some colleges responded by *also* eliminating boxes that asked about legacy status—an admissions practice that disproportionately favors white, wealthy applicants.[15] In short, universities have recently shied away from race-related admissions practices, either to comply with court mandates (i.e., affirmative action) or to promote institutional equity goals (i.e., legacy admissions). In contrast to these shifts, however, most colleges continue to ask candidates about their criminal records despite the racialized consequences of doing so.

Why have universities retained criminal background questions on their admissions forms even when such queries disproportionately affect students of color? Graduate programs such as law schools justify these questions on licensure grounds,[16] while other schools say that

---

10 *See infra* Table 1 (reporting rates of criminal conviction questions by institution type); Bussey et al., *supra* note 2, at 57 (same).

11 *See infra* Table 2 (depicting data on the prevalence of disciplinary questions during the 2024–2025 admissions cycle); *see also* Curran, *supra* note 9, at 1121 (comparing the collection of disciplinary information to the collection of criminal history information).

12 600 U.S. 181 (2023).

13 *Id.* at 214–16.

14 Hoang Pham, Imani Nokuri, Fatima Dahir & Mira Joseph, Students for Fair Admissions v. Harvard *FAQ: Navigating the Evolving Implication of the Court's Ruling*, Stan. L. Sch.: SLS Blogs (Dec. 12, 2023), https://law.stanford.edu/2023/12/12/students-for-fair-admissions-v-harvard-faq-navigating-the-evolving-implications-of-the-courts-ruling/ [https://perma.cc/XFS3-ZL3Z] (noting that the Court's decision in *SFFA v. Harvard* still allows applicants to discuss how their experience with racism has impacted them as individuals).

15 *See, e.g.*, Act of Sep. 30, 2024, 2024 Cal. Legis. Serv. ch. 1006 (West) (codified at Cal. Educ. Code § 66018.4 (West 2026)) (prohibiting California postsecondary institutions from considering legacy status in admissions); Recent Complaint, *Complaint Under Title VI of the Civil Rights Act of 1964,* Chica Project v. President & Fellows of Harvard College, 137 Harv. L. Rev. 1272, 1272–73 (2023) (discussing the U.S. Department of Education's investigation into legacy admissions at Harvard); *see also* Press Release, Nat'l Ctr. for Educ. Stat., Four-Year Colleges and Universities Report over Half of Undergraduate Students Completed Degrees Within 8 Years (Dec. 12, 2023), https://nces.ed.gov/whatsnew/press_releases/12_12_2023.asp [https://perma.cc/SEL4-XV9P] (reporting that thirty-two percent of selective four-year U.S. institutions consider legacy status in admissions).

16 *See* James M. Binnall & Lauren M. Davis, *Do They Really Ask That? A National Survey of Criminal History Inquiries on Law School Applications*, Stan. L. & Pol'y Rev. Online 3

mandatory disclosures reduce liability.[17] But among the many justifications that they cite, admissions officers most commonly list "campus safety" as the top reason for using the box.[18] Yet there is very little evidence to suggest that questions about criminal convictions—let alone juvenile records and high school discipline—actually make campuses safer.[19] Indeed, the breadth of current mandatory disclosures lacks any clear connection to school safety concerns. It is one thing to ask if you have ever been convicted of murder or sexual assault; it is quite another to ask if you were ever cited for smoking marijuana as a minor, cited for turnstile jumping, or called into the principal's office for "defiance of authority."[20] Just as the substantive reach of these queries is hard to justify, the procedures that schools use to solicit this information also seem unlikely to improve campus safety. Nearly all colleges that use the box depend on candidates to truthfully self-disclose this information on their admissions forms.[21] But given that schools rarely verify candidates' answers, these questions end up identifying only those applicants who honestly admit to prior misconduct.[22] In other words, background boxes

(Sep. 8, 2021), https://law.stanford.edu/wp-content/uploads/2021/09/32-Stan.-L.-Poly.-Rev.-Online-2.pdf [https://perma.cc/HDU9-VV6L] (reporting on use of the box in law school admissions). Although this Article focuses on admissions at four-year universities, as opposed to graduate programs, the findings presented here justify further research on the box's impact on postgraduate admissions. *See, e.g.*, David R. Marshall, *Dismantling Walls to Encourage Diversity in the Legal Profession*, N.Y. St. Bar Ass'n J., Mar./Apr. 2022, at 8, 9–13 (explaining how criminal history questions in law school admissions disproportionately harm applicants of color).

17 *See* Erin L. Castro, Estefanie Aguilar Padilla, Caisa Royer & Halie Bahr, *Criminal History in Undergraduate Admissions: A Racial Equity Analysis of Administrator Perspectives*, 61 J. Student Affs. Rsch. & Prac. 488, 497–99 (2024); Juleyka Lantigua-Williams, *'Ban the Box' Goes to College*, Atlantic (Apr. 29, 2016), https://www.theatlantic.com/politics/archive/2016/04/ban-the-box-comes-to-campus/480195/ [https://perma.cc/E52U-2ADP] (discussing college administrators' reasons for posing criminal history questions).

18 *See* Off. of Career, Tech., & Adult Educ., U.S. Dep't of Educ., Beyond the Box 21 (2023) (describing the safety rationale for using the box); Matthew W. Pierce, Carol W. Runyan & Shrikant I. Bangdiwala, *The Use of Criminal History Information in College Admissions Decisions*, 13 J. Sch. Violence 359, 359 (2014) (same).

19 *See* Castro et al., *supra* note 17, at 489 (examining whether the box promotes campus safety).

20 *See* Rebecca R. Ramaswamy, Note, *Bars to Education: The Use of Criminal History Information in College Admissions*, 5 Colum. J. Race & L. 145, 147–48 (2015) (asserting that students of color tend to receive more severe punishments for subjective offenses); Marsha Weissman, Alan Rosenthal, Patricia Warth, Elaine Wolf & Michael Messina-Yauchzy, Ctr. for Cmty. Alts., The Use of Criminal History Records in College Admissions 34 (2010) (criticizing required disclosures of minor misdemeanors).

21 *See* Terrence S. McTier Jr., *Between a Rock and a Hard Place: Navigating Institutional Barriers as a Graduate Student with a Criminal Record*, 66 Am. Behav. Scientist 1418, 1431 (2022); Robert Stewart & Christopher Uggen, *Criminal Records and College Admissions: A Modified Experimental Audit*, 58 Criminology 156, 161 (2020) (reporting that "nearly all" survey schools relied on self-reporting).

22 *See* Bussey et al., *supra* note 2, at 57 (reporting that most schools rely on self-reports).

on college applications are both overinclusive in their scope and underinclusive in the candidates whom they flag.

Despite the tenuous connection between criminal history questions and campus safety, university officials may nevertheless believe that they would "rather be safe than sorry."[23] But such a thin rationale is unlikely to satisfy growing calls on campuses for administrators to identify and eliminate systemic barriers to equity. In response to student demands on this front, many university officials and university associations have expressed rhetorical commitments to broader diversity goals.[24] For example, they have activated racial equity task forces, organized conversation circles, and written about their institution's antiracist values.[25] But after years of listening to such expressive efforts, many students feel underwhelmed by the lack of tangible progress on these topics.[26] In light of this unmet demand, removing criminal background questions from college applications represents an opportunity to substantively advance important institutional equity goals such as expanding educational access, promoting social mobility, and fostering inclusion—values that university presidents repeatedly say they care about.[27]

A budding movement in higher education known as "ban the box" would require admissions officers to refrain from asking candidates about crimes and discipline when they first apply.[28] Sometimes labeled "fair chance" rules, ban-the-box policies are not really "bans" at all.[29] Instead, ban-the-box proponents ask colleges to remove certain

---

23 *See* Lantigua-Williams, *supra* note 17 (discussing justifications for posing questions about crimes to students).

24 *See* Eve Rips, *A Fresh Start: The Evolving Use of Juvenile Records in College Admissions*, 54 U. Mich. J.L. Reform 217, 255–56 (2020) (listing rationales for removing criminal background questions from admissions forms); Lindsay McKenzie, *Words Matter for College Presidents, but So Will Actions*, Inside Higher Ed (June 7, 2020), https://www.insidehighered.com/news/2020/06/08/searching-meaningful-response-college-leaders-killing-george-floyd [https://perma.cc/N8HB-RPSY] (discussing university presidents' statements "referenc[ing] institutional commitments to diversity").

25 *See* Melissa Ezarik, *More Discussion than Action: Racial Justice on Campus*, Inside Higher Ed (May 5, 2021), https://www.insidehighered.com/news/2021/05/06/what-students-think-about-racial-justice-efforts-campus [https://perma.cc/BF3X-52SH] (examining university responses to student demands for racial justice).

26 *Id.*; Nicholas Confessore, *The University of Michigan Doubled Down on D.E.I. What Went Wrong?*, N.Y. Times (Oct. 16, 2024), https://www.nytimes.com/2024/10/16/magazine/dei-university-michigan.html [https://perma.cc/JCH8-CYFG] (describing the sentiment among some Black students at the University of Michigan that diversity efforts had been a "well-meaning failure").

27 *See* Rips, *supra* note 24, at 255 (discussing a desire among admissions officers to promote institutional values of inclusivity).

28 *See* Off. of Career, Tech., & Adult Educ., *supra* note 18, at 20–22 (explaining how banning the box can lower barriers to admission).

29 *See* Shimizu, *supra* note 7, at 227–28 (discussing the objectives of fair chance laws in the employment context).

questions from admissions forms but acknowledge that university officials can still pose narrow, safety-related questions *after* they have made conditional admissions offers.[30] In other words, the term "ban the box" really means "delay[] the disclosure."[31]

If universities were to ban the box, they would not be writing on a blank slate. Whereas institutions of higher education are just beginning to grapple with the collateral consequences of criminal history questions, bans on such queries have existed in employment law for over twenty-five years.[32] Drawing from this experience, the Article considers how workplace ban-the-box laws can inform the development of similar bans in higher education, both as a matter of law and policy.

Beginning with questions of liability, the Article explains how employment jurisprudence can help illuminate the liability risks that colleges assume by using the box. Throughout decades of litigation, employees have challenged criminal background questions on job applications by alleging that those screens placed unequal burdens on diverse applicants.[33] Title VII of the Civil Rights Act of 1964[34]—the nation's principal workplace antidiscrimination law—prohibits employment practices that are "fair in form, but discriminatory in operation."[35] Using this "disparate impact" theory, numerous courts have considered whether to hold employers liable under Title VII for using the box.[36] Although employers have successfully defeated many of these challenges,[37] courts have looked less favorably on employment practices

---

30 *See* Off. of Career, Tech., & Adult Educ., *supra* note 18, at 23 (asserting that colleges should delay their requests for criminal history information until after applicants have received conditional acceptances).

31 Lesley E. Schneider, Mike Vuolo, Sarah E. Lageson & Christopher Uggen, *Before and After Ban the Box: Who Complies with Anti-Discrimination Law?*, 47 Law & Soc. Inquiry 749, 750, 752 (2022) (explaining how ban-the-box laws "delay[] the disclosure" of criminal history information).

32 *See* Beth Avery & Han Lu, Nat'l Emp. L. Project, Ban the Box: U.S. Cities, Counties, and States Adopt Fair-Chance Policies to Advance Employment Opportunities for People with Past Convictions 2–3 (2021) (discussing workplace ban-the-box legislation); *see also* Rips, *supra* note 24, at 226–32 (providing a history of the workplace ban-the-box movement and its relationship to college admissions).

33 *See* Tammy R. Pettinato, *Employment Discrimination Against Ex-Offenders: The Promise and Limits of Title VII Disparate Impact Theory*, 98 Marq. L. Rev. 831, 842–63 (2014) (discussing the evolution of legal challenges to the box under Title VII).

34 42 U.S.C. §§ 2000e to 2000e-17.

35 Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971); *see* Keith Cunningham-Parmeter, *Discrimination by Algorithm: Employer Accountability for Biased Customer Reviews*, 70 UCLA L. Rev. 92, 96 (2023) (discussing different theories of liability under Title VII).

36 *See* Pettinato, *supra* note 33, at 842–63 (summarizing Title VII litigation over the box).

37 *Id.*; *see, e.g.*, Foxworth v. Pa. State Police, 228 F. App'x 151, 157–58 (3d Cir. 2007).

that excluded applicants for arrests or those that failed to engage in individualized assessments of applicants.[38]

Applying the foregoing lessons from employment law to higher education, the Article assesses the legal exposure that colleges face from posing wide-ranging criminal history questions on admissions forms. Just as Title VII applies to employers, Title VI of the Civil Rights Act of 1964[39] holds colleges accountable for disparate impact violations.[40] Mirroring employment law's test for disparate impact, Title VI prohibits schools from enforcing race-neutral policies that disproportionately impact students of color unless such policies are "*necessary* to meet an important educational goal."[41] Defending their use of the box, colleges could plausibly claim that knowing about an applicant's prior violent misconduct is "necessary" to ensure campus safety.[42] But as the research findings presented here show,[43] current admissions inquiries extend well beyond serious criminal offenses to include far-reaching topics such as high school discipline, misdemeanor violations, and juvenile offenses.[44] Just as employers have faced Title VII liability for posing overly broad criminal history questions,[45] universities expose themselves to Title VI liability by requiring applicants to disclose information that has nothing to do with school security or other university prerogatives.

Banning the box—and limiting subsequent inquiries to serious crimes—would not only reduce a university's Title VI exposure; it would also constitute sound admissions policy. On this question, employment law again provides valuable lessons. Critics have long debated the policy benefits of banning the box in hiring.[46] Translating this debate from employment law to higher education, the Article identifies three core

---

38 Green v. Mo. Pac. R.R. Co., 523 F.2d 1290, 1298–99 (8th Cir. 1975); Gregory v. Litton Sys., Inc., 472 F.2d 631, 632 (9th Cir. 1972); Waldon v. Cincinnati Pub. Schs., 941 F. Supp. 2d 884, 890 (S.D. Ohio 2013).

39 42 U.S.C. §§ 2000d to 2000d-7.

40 *Id.* §§ 2000d to 2000d-1; 34 C.F.R. § 100.3(b)(2) (2024); *see infra* Section III.B (outlining disparate impact's continuing relevance to Title VI, despite recent opposition to this theory of liability); *see also* Ramaswamy, *supra* note 20, at 152–54 (discussing doctrinal overlap between Title VI and Title VII).

41 Jared P. Cole, Cong. Rsch. Serv., IF12455, Race Discrimination at School: Title VI and the Department of Education's Office for Civil Rights 1–2 (2023) (emphasis added) (explaining how Title VI applies to nearly all colleges and universities).

42 *See supra* notes 17–18 and accompanying text.

43 *See infra* Tables 1–2.

44 *See infra* Figures 1–2.

45 *See, e.g.*, Gregory v. Litton Sys., Inc., 472 F.2d 631, 632 (9th Cir. 1972); Waldon v. Cincinnati Pub. Schs., 941 F. Supp. 2d 884, 890 (S.D. Ohio 2013).

46 *See* Royel M. Johnson, Rafael E. Alvarado & Kelly Ochs Rosinger, *What's the "Problem" of Considering Criminal History in College Admissions? A Critical Analysis of "Ban the Box" Policies in Louisiana and Maryland*, 92 J. Higher Educ. 704, 725–26 (2021) (examining debates over banning the box).

policy critiques that scholars of workplace ban-the-box laws have raised: futility, counterproductivity, and infringement on autonomy. Regarding concerns about futility, detractors claim that banning the box in hiring simply delays—but does not prevent—discrimination against applicants with records.[47] Distinct from the futility concern, critics also claim that workplace ban-the-box laws actually *harm* diverse applicants. According to this critique, preventing employers from learning about an applicant's criminal history causes hiring managers to discriminate against all candidates of color who "look" like criminals or fit a statistical archetype of "criminality."[48] Finally, critics assert that ban-the-box laws erode employer autonomy by forcing firms to hire applicants with records.[49]

Assessing the foregoing critiques of workplace ban-the-box rules, the Article explains why concerns about futility, counterproductivity, and autonomy carry less weight in the context of college admissions. For instance, a properly defined ban-the-box policy could minimize any infringement on institutional autonomy by delaying—but not prohibiting—targeted questions that relate directly to community safety.[50] As far as futility and counterproductivity concerns go, colleges have fewer opportunities than employers to circumvent ban-the-box rules. For example, the hiring process provides employers with multiple chances to obtain information about an applicant's background—e.g., asking about the candidate's criminal history during interviews.[51] Whereas employers can evade ban-the-box policies by hiding their discriminatory intent behind nebulous reasons such as "bad fit" or "feel," colleges tend to categorize candidates by test scores, academic records, and other discrete factors in the process of conducting "whole context" reviews of applicants.[52] Given that the college admissions process

---

47 *See* Schneider et al., *supra* note 31, at 774–78 (discussing employers' responses to ban-the-box laws).

48 *See* Judith Scott-Clayton, *Thinking "Beyond the Box": The Use of Criminal Records in College Admissions*, Brookings (Sep. 28, 2017), https://www.brookings.edu/articles/thinking-beyond-the-box-the-use-of-criminal-records-in-college-admissions/ [https://perma.cc/X786-Z6V5] (summarizing concerns over the unintended consequences of ban-the-box rules).

49 *See* Monica Scales, Case Note, *Employer Catch-22: The Paradox Between Employer Liability for Employee Criminal Acts and the Prohibition Against Ex-Convict Discrimination*, 11 Geo. Mason L. Rev. 419, 423–24, 430–32 (2002) (considering the unstated costs of ban-the-box rules).

50 *See infra* Section III.B.3.

51 *See, e.g.*, Minn. Stat. § 364.021 (2025) (barring employers from placing criminal history boxes on job applications but allowing such questions during interviews).

52 *See* Arthur L. Coleman & Jamie Lewis Keith, Understanding Holistic Review in Higher Education Admissions 12–13 (2018) (discussing admissions review processes in higher education); Michael N. Bastedo, Nicholas A. Bowman, Kristen M. Glasener & Jandi L. Kelly, *What Are We Talking About When We Talk About Holistic Review? Selective College Admissions and Its Effects on Low-SES Students*, 89 J. Higher Educ. 782, 793–95 (2018) (defining "whole context" review).

provides fewer occasions to engage in proxy discrimination, the futility and counterproductivity critiques from employment law have less relevance in the context of college admissions.

The Article proceeds in four parts. Part I presents original data on application questions from the 2024–2025 admissions cycle. Examining the application forms of every national university ranked in the "top 100,"[53] Part I identifies schools that currently require applicants to disclose misdemeanors, felonies, juvenile adjudications, sealed records, and high school disciplinary actions. Part II explains how using the box causes outsized harm to applicants of color. Not only do a higher proportion of these candidates check "yes," but studies show that doing so lowers their chances of admission[54] and increases the likelihood that they will opt out of the application process altogether.[55] Given the box's disparate impact on protected groups, Part III draws lessons from employment law to outline the liability risks that colleges assume by posing sweeping admissions questions. Part IV concludes by anticipating objections to banning the box in higher education. It explains why concerns about the policy's potential futility, counterproductivity, and infringement on autonomy apply with less force to college admissions.

Despite race-driven shifts away from other admissions practices—e.g., affirmative action and legacy preferences—boxes that ask about crimes and discipline endure. Soon after the Supreme Court announced its decision in *SFFA v. Harvard*, university officials publicly committed to embracing race-neutral admissions tools that would still yield diverse entering classes.[56] In light of these commitments, banning the box represents a unique opportunity for colleges to expand educational access, avoid liability, and foster inclusion on campus.

I. Current Use of the Box in College Admissions

To determine the prevalence of criminal history and disciplinary questions on college applications, this Part presents original data on

---

53 *See infra* Sections I.B–.C (describing research questions, methodology, and findings).

54 *See* Stewart & Uggen, *supra* note 21, at 177 (reporting rejection rates for applicants with records).

55 *See* Johnson et al., *supra* note 46, at 707–08 (examining applicant attrition rates).

56 Inside Higher Ed & Hanover Rsch., The Supreme Court and Affirmative Action: A Survey of College Presidents 5–6 (2023); Press Release, Charles F. Kettering Found., Over 100 Former College Presidents Respond to Supreme Court Decision (June 28, 2023), https://kettering.org/over-100-former-college-presidents-respond-to-supreme-court-decision/ [https://perma.cc/B398-NUSM] (discussing university presidents' response to affirmative action ban); *see also* David Brooks, *How the Ivy League Broke America*, Atlantic (Nov. 14. 2024), https://www.theatlantic.com/magazine/archive/2024/12/meritocracy-college-admissions-social-economic-segregation/680392/ [https://perma.cc/2T5G-AE5X] (discussing how colleges are increasingly looking to adopt race-neutral policies that will attract applicants from underrepresented backgrounds).

current admissions practices at prominent four-year undergraduate institutions in the United States. Reviewing application questions posed by the "top 100" national universities during the 2024–2025 admissions cycle, the study finds that questions about criminality, juvenile offenses, and high school violations were commonplace.[57] Namely, over two-thirds of schools asked about felony convictions and over three-quarters of schools required applicants to divulge information about disciplinary actions in high school.[58] Breaking down these data by institution type, the study finds that very selective schools and private schools were more likely than other schools to mandate the disclosure of high school disciplinary actions, juvenile adjudications, misdemeanors, and felonies.[59] By first detailing universities' ongoing use of the box, the Article can then consider the legal and practical problems created by the box's persistence in college admissions.

A. *Previous Studies on the Prevalence of Criminal History Questions in Higher Education*

Prior to the Supreme Court's 2023 ban on race-based affirmative action in college admissions,[60] several studies examined the popularity of criminal history boxes on college applications.[61] This Section briefly summarizes those findings and explains how they inform the research questions presented here.

In 2010, the Center for Community Alternatives ("CCA") conducted a national survey of college admissions practices.[62] Summarizing its findings, the CCA reported that sixty-six percent of responding colleges collected criminal history information from applicants, with private schools being more likely to ask such questions than public schools.[63] Four years later, Matthew Pierce, Carol Runyan, and Shrikant Bangdiwala built on the CCA study by studying the use of the box among four-year colleges and universities across the United States.[64] Presenting findings similar to those described in the CCA study, Pierce, Runyan, and Bangdiwala reported that fifty-nine percent of responding schools required all undergraduate applicants to answer criminal history questions.[65] Mirroring the CCA's earlier data, the researchers also

57 *See infra* Table 1.

58 *See infra* Tables 1–2.

59 *See infra* Figures 1–2.

60 *SFFA v. Harvard*, 600 U.S. 181, 213–16 (2023).

61 Scott-Clayton, *supra* note 48 (summarizing research on the incidence of criminal background questions on college applications).

62 Weissman et al., *supra* note 20, at i.

63 *Id.*

64 Pierce et al., *supra* note 18, at 361–63 (describing methodology).

65 *Id.* at 363.

reported that private schools were more likely than public schools to ask criminal background questions and that schools posing such questions tended to be slightly more selective.[66]

Following these earlier findings, sociologists Robert Stewart and Christopher Uggen conducted a comprehensive analysis of colleges' use of the box in 2015.[67] Reviewing applications at 1,350 four-year institutions, Stewart and Uggen reported that 71.6% of colleges, including 79.6% of private colleges and 58.1% of public colleges, posed criminal history questions.[68] Echoing data from prior studies—which found criminal history questions correlated with school selectivity—the most competitive schools in Stewart and Uggen's study were far more likely to include a box on their application forms, with 89.9% of the most selective schools asking, as compared to 64% of less selective schools.[69]

Four years after Stewart and Uggen collected their admissions data, a major shift in college admissions policy occurred. Between 2006 and 2019, the Common App—the nation's leading third-party application system—required all applicants to check a criminal history box.[70] But in 2019, after a sustained campaign by critics of the box, the Common App announced that it would stop asking applicants about their criminal histories.[71] The Common App explained that this shift would help advance "access, equity, and integrity."[72] Crucially, though, the Common App still allowed individual schools to add their own boxes to separate school supplements that candidates would nevertheless have to complete.[73]

The Common App's 2019 removal of the box from its shared form raised a pressing research question: What percentage of colleges would persist in making such inquiries by adding the criminal history question to their individual school supplements? To answer this question, law professor Eve Rips reviewed applications during the 2019–2020 admissions cycle—the first study to follow the Common App's change. Rips

66 *Id.* at 363–64.

67 Stewart & Uggen, *supra* note 21, at 159 (noting that the authors' study used application data from the 2014–2015 admissions cycle).

68 *Id.* at 160 tbl. 1.

69 *Id.*

70 *See* Rips, *supra* note 24, at 254–56.

71 *See* Bussey et al., *supra* note 2, at 57 (discussing changes to the Common App); Jen Davis, *Change to Criminal History Question for 2019–20 Application Year*, Common App (Aug. 19, 2018), https://www.commonapp.org/blog/change-criminal-history-question-2019-2020-application-year [https://perma.cc/WZD6-3H8N] (same).

72 *See* Davis, *supra* note 71 (discussing the removal of criminal history disclosures from the Common App). *See generally* Wong, *supra* note 8 (examining the Common App's reasons for eliminating the box).

73 *See* Davis, *supra* note 71.

reported that 53.5% of colleges and universities had added at least one criminal history question to their individual school supplements.[74]

In contrast to the volume of reports on colleges' use of criminal background boxes, scholars have paid less attention to the prevalence of high school discipline boxes on college applications.[75] The most robust analysis of this question occurred in 2013 and 2014 when the CCA surveyed college admissions officers nationally on this question.[76] Among responding colleges, the CCA reported that seventy-three percent of schools collected high school disciplinary information either through the Common App or through their own admissions forms.[77]

In sum, over a decade of research has highlighted the pervasiveness of criminal history boxes in college admissions. Although they differed in methodology,[78] the foregoing studies revealed certain consistent trends. Depending on the report, anywhere from 53.5%[79] to 71.6%[80] of schools historically required applicants to disclose criminal history information. Even after the Common App removed the box from its main application in 2019, the majority of schools persisted in asking these questions.[81] In terms of predictive school characteristics, previous research showed that competitive schools were more likely than other schools to place criminal history boxes on their application forms.[82] Likewise, most studies found that private schools were more likely than public schools to ask applicants for criminal history information.[83] Finally, in contrast to the fairly robust body of work on criminal history questions, scholars rarely studied the incidence of high school discipline boxes. When researchers did examine that question in 2013, they found that nearly three-quarters of colleges required applicants to divulge their school disciplinary records.[84]

---

74 Rips, *supra* note 24, at 267–72 (reporting 54.6% of public four-year institutions asked criminal background questions versus 52.9% of private schools).

75 *See* Curran, *supra* note 9, at 1121–22, 1128–29 (studying the presence of high school discipline boxes on college applications during the 2003–2004 admissions cycle).

76 *See* Marsha Weissman & Emily NaPier, Ctr. for Cmty. Alts., Education Suspended: The Use of High School Disciplinary Records in College Admissions 7–8 (2015) (summarizing research methodology).

77 *Id.* at 9.

78 *See* Rips, *supra* note 24, at 235 n.102 (discussing methodological differences between studies on the use of the box in college admissions).

79 *Id.* at 267.

80 Stewart & Uggen, *supra* note 21, at 160 tbl. 1.

81 *See* Rips, *supra* note 24, at 267.

82 *See, e.g.*, Stewart & Uggen, *supra* note 21, at 160 tbl. 1.

83 *See, e.g.*, Johnson et al., *supra* note 46, at 707 (describing how the likelihood of using the box varied by subgroup).

84 Weissman & NaPier, *supra* note 76, at 9.

B. Research Questions and Methodology

Several events that have occurred since the publication of these studies warrant an updated investigation of colleges' current use of the box.[85] First, since the summer of 2020 and continuing today, university officials have responded to student demands for racial justice by promising to enact policies that promote racial equity on campus.[86] Given the well-documented racial and economic disparities associated with high school punishment[87] and criminal conviction,[88] research is needed to determine whether college officials have curbed their use of the box.[89] Second, in light of concerns expressed by the U.S. Department of Education in 2023 over the box's uneven racialized effects, additional research is needed to determine whether colleges continue to pose criminal history questions to first-year applicants.[90] Finally, in the wake of the Supreme Court's 2023 ban on race-based affirmative action in college admissions, schools that retain criminal history boxes run the risk of exacerbating racialized gaps in admissions pools.[91] In light of this potential harm, further research is needed to determine whether most colleges continue to mandate criminal history disclosures.

---

85 In addition to the Rips report and the Stewart and Uggen study, which reviewed hundreds of actual college applications nationally, a number of smaller surveys have reported on the incidence of criminal history questions in college and graduate admissions. *See, e.g.*, Binnall & Davis, *supra* note 16, at 3 (reporting on law school applications); Matthew W. Epperson, Mario McHarris, Bethany Ulrich & Leon Sawh, *The Box in Social Work Education: Prevalence and Correlates of Criminal History Questions on MSW Applications*, 13 J. Soc'y for Soc. Work & Rsch. 581, 588 (2022) (surveying social work programs); Douglas N. Evans, Victor St. John, Jason Szkola & Shaylyn Lyons, *Regions of Discrimination: Felony Records, Race, and Expressed College Admissions Policies*, 46 J. Crime & Just. 247, 252 (2023) (surveying college admissions officers).

86 *See* Maria M. Lewis, Raquel Muñiz & Vanessa Miller, *The Politicization of Education Law and the Implications for Re-Envisioning the Law School Curriculum for Racial Justice*, 24 Rutgers Race & L. Rev. 1, 2 (2022) (discussing various institutional commitments to advancing racial equity).

87 *See* Alia Wong, *The Push for Harsher School Discipline After Parkland*, Atlantic (Mar. 23, 2018), https://www.theatlantic.com/education/archive/2018/03/harsher-school-discipline-after-parkland/556274/ [https://perma.cc/2UWR-Q6C3] (examining racial disparities in school punishment rates).

88 *See* Raj Chetty, Nathaniel Hendren, Maggie R. Jones & Sonya R. Porter, *Race and Economic Opportunity in the United States: An Intergenerational Perspective*, 135 Q.J. Econ. 711, 715–16, 744–46 (2020) (summarizing racial disparities in the criminal justice system).

89 In contrast to the present study's collection of primary data from actual college application questions, other reports have surveyed admissions officers' "expressed" practices for posing criminal history questions. *See* Castro et al., *supra* note 17, at 491; Evans et al., *supra* note 85, at 252 (using fictitious applicants to study responses from admissions officers).

90 *See* Off. of Career, Tech., & Adult Educ., *supra* note 18, at 20–25 (discussing the collateral consequences of using the box).

91 *See* Ramaswamy, *supra* note 20, at 156–57 (predicting that the box's racialized effects would "become more measurably problematic" if the Supreme Court barred race-based affirmative action).

To answer these questions, the next Section presents original data on admissions questions posed by colleges during the 2024–2025 admissions cycle. Specifically, the study examined first-time applications to the "top 100" national universities, as determined by *U.S. News & World Report*.[92] Each school's application forms were accessed either through the Common App or through the university's online admissions portal,[93] with the vast majority of schools (96.1%) accessible through the Common App.[94]

The specific focus on the "top 100" national universities presents certain limitations. For example, commentators have criticized the *U.S. News & World Report* rankings for relying on metrics that do not correlate with actual educational quality.[95] Nevertheless, as a proxy for perceived school quality that thousands of undergraduate applicants rely upon each year,[96] these rankings play an outsized role in determining institutional priorities.[97] In addition, a school's placement within the "top 100" correlates with higher rates of selectivity[98]—an admissions characteristic that previous studies have associated with an increased likelihood of using the box.[99] As seeming gatekeepers of prestige and

---

92 *Best National Universities Rankings*, U.S. NEWS & WORLD REP., https://www.usnews.com/best-colleges/rankings/national-universities [https://perma.cc/ZE4Y-6HJV] (last visited Jan. 31, 2025). *U.S. News* has changed its numerical rankings of the schools that were the subject of this study during the 2024–2025 admissions cycle. *See Best National Universities Rankings*, U.S. NEWS & WORLD REP. (2024) (on file with author).

93 *See infra* Appendix (listing results from application forms of every studied school); *see also* Rips, *supra* note 24, at 266–67 (analyzing Common App data during the 2019–2020 admissions cycle).

94 *See infra* Appendix (listing mandatory disclosures for each studied school and indicating which universities accepted applications through the Common App). Of studied schools located outside ban-the-box jurisdictions, only three—Georgetown University, Massachusetts Institute of Technology, and Yeshiva University—did *not* accept applications through the Common App. *Id.*

95 *See* L. Burke Files, Roger E. Meiners & Andrew P. Morriss, *Corruption in University Admissions and the Administrative Allocation of Scarce Goods*, 47 BYU L. REV. 1, 22–25 (2021); Matthew Sag, *Forward-Looking Academic Impact Rankings for U.S. Law Schools*, 51 FLA. ST. U. L. REV. 763, 763 (2024) (criticizing *U.S. News & World Report* for relying on inherently subjective ranking inputs).

96 *See* Michael Luca & Jonathan Smith, *Salience in Quality Disclosure: Evidence from the* U.S. News *College Rankings*, 22 J. ECON. & MGMT. STRATEGY 58, 58 (2013) (finding a one-rank improvement on the *U.S. News* rankings leads to a one percent increase in the number of applications received).

97 *See* Adam Hearn, *The Shifting Landscape of College Rankings: Insights from* US News & World Report *2021–2025*, COLL. TRANSITIONS (Oct. 14, 2024), https://www.collegetransitions.com/blog/insights-from-us-news-and-world-report/ [https://perma.cc/D3PM-JC5G] (discussing the role that rankings play in setting university policies).

98 *See* Valerie Strauss, *Why* U.S. News *May Have to Rethink How It Creates College Rankings*, WASH. POST (Sep. 14, 2022), https://www.washingtonpost.com/education/2022/09/14/usnews-rethink-famous-college-rankings/ [https://perma.cc/ARD3-DR92] (discussing the correlation between selectivity and *U.S. News* rankings).

99 *See supra* note 82 and accompanying text.

social opportunity, the colleges studied here warrant particular examination to determine whether they continue to rely on criminal history questions.[100]

Beginning with every school that fell within the "top 100"—a group that actually included 103 schools due to ties in rankings—the dataset distinguished between jurisdictions that "banned the box" in higher education (i.e., states that prohibited schools from posing criminal history questions on college applications) and those that did not.[101] During the relevant period of study (i.e., the 2024–2025 admissions cycle), three states banned the box at both public and private universities (California, Delaware, and Oregon),[102] six states banned the box at public universities only (Colorado, Louisiana, Maryland, Nebraska, Virginia, and Washington),[103] and the State University of New York had voluntarily banned the box.[104] Because schools in those jurisdictions were prohibited from posing criminal history questions, they were removed from the dataset, although overall results for every school—including ban-the-box universities—are reported in the Appendix.[105] Colleges were then grouped based on individual characteristics: private schools, public schools, and highly selective schools. Reviewing the prevalence of different admissions questions within these subgroups, the study presents findings on the percentage of private, public, and highly selective schools that required applicants to disclose instances of high school discipline, juvenile offenses, sealed records, misdemeanors, and felony convictions.[106]

---

100 *See* Brooks, *supra* note 56 (characterizing universities as "choke points of social mobility").

101 *See infra* Appendix.

102 Cal. Educ. Code § 66024.5 (West 2026); Del. Code Ann. tit. 14, §§ 9001C–9004C (2026); Or. Rev. Stat. § 350.200 (2025).

103 Colo. Rev. Stat. § 23-5-106.5 (2026); La. Stat. Ann. § 17:3152 (2026); Md. Code Ann., Educ. §§ 26-501 to -506 (LexisNexis 2026); Neb. Rev. Stat. § 85-607.01 (2024); Va. Code Ann. § 23.1-407.1 (2026); Wash. Rev. Code §§ 28B.160.010–.040 (2025); *see also* Off. of Career, Tech., & Adult Educ., *supra* note 18, at 10 (summarizing the enactment of ban-the-box legislation in different states). Minnesota recently enacted a ban-the-box law. Minn. Stat. § 135A.062 (2025). Because this law took effect in 2025, after the date of this study, Minnesota was not categorized as a ban-the-box jurisdiction. Mike Moen, *With College Application Change, MN Aims to Reduce Higher-Ed Barriers*, Pub. News Serv. (Jan. 2, 2025), https://www.publicnewsservice.org/2025-01-02/higher-education/with-college-application-change-mn-aims-to-reduce-higher-ed-barriers/a94395-1 [https://perma.cc/MU5H-4Q57] (discussing Minnesota's new ban-the-box law).

104 Enrollment Mgmt., State Univ. of N.Y., Doc. No. 3200, Admission of Persons with Prior Felony Convictions (2017), https://www.suny.edu/sunypp/documents.cfm?doc_id=846 [https://perma.cc/R6DF-S4XG].

105 *See infra* Appendix (listing "top 100" schools that operate in ban-the-box jurisdictions).

106 The study categorized schools as having posed questions in designated categories even when questions within those categories were limited in scope. For example, if a college asked candidates about violence-related "disciplinary actions" in high school, the study treated the college as having asked about high school discipline.

C. Data and Analysis: Universities Continue to Extensively Use the Box

The tables and figures below illustrate the ongoing use of criminal history and disciplinary questions in college admissions. They show that although questions about arrests were rare, the majority of colleges and universities asked about misdemeanors, felonies, and school discipline. Whereas most schools specifically counseled applicants *against* revealing sealed or expunged records, over two-thirds of schools still asked about juvenile adjudications. The implications of these results are analyzed in subsequent Parts.

TABLE 1. CRIMINAL HISTORY QUESTIONS BY INSTITUTIONAL CHARACTERISTIC

	Misdemeanors	**Felonies**
	Share of Schools Requiring Disclosure	Share of Schools Requiring Disclosure
Top 100 Schools*	66.2%	68.8%
Private Schools	74.5%	76.6%
Public Schools	53.3%	56.7%
Very Selective Schools (Avg. Acceptance Rate: 13.2%)	73.7%	76.3%
Selective Schools (Avg. Acceptance Rate: 59.7%)	59.0%	61.5%

* Dataset does not include schools operating in ban-the-box jurisdictions.

Table 1 depicts data on the prevalence of criminal history questions at the nation's "top 100" national universities during the 2024–2025 admissions cycle. Over two-thirds of schools required applicants to disclose their felony conviction histories. Except for the University of Michigan and Marquette University, every university that asked about felonies also required applicants to disclose certain misdemeanors.[107] Although some schools limited the scope of their misdemeanor questions to a subcategory of crimes or time periods, most did not. For example, like most schools, Princeton University posed a broad question about misdemeanors: "Have you ever been adjudicated guilty or convicted of a misdemeanor and/or felony?"[108] In contrast, Tufts University

107 Marquette Univ., Supplemental Questions for the Common App (2024) (on file with author); Univ. of Mich., Supplemental Questions for the Common App (2024) (on file with author); *see infra* Appendix.

108 Princeton Univ., Supplemental Questions for the Common App (2024) (on file with author).

also asked about misdemeanors but directed applicants not to disclose a "first conviction for . . . drunkenness, simple assault, speeding, minor traffic violations, affray or disturbance of the peace."[109]

Questions about arrests and pending charges were also studied and are presented in the Appendix. No university required applicants to disclose arrests only, except for Indiana University Bloomington, which asked, "Have you ever been arrested or convicted of a crime . . . that has not been expunged by a court?"[110] Questions about pending charges were more common than questions about arrests. Specifically, twenty-six percent of schools inquired about both convictions and pending charges.[111] As an illustration of this broader type of query, Yale University posed the following question: "Are there any felony or misdemeanor charges *pending* against you, or have you ever been convicted of, or pled guilty or no contest to, a felony or misdemeanor?"[112] In sum, data depicted in both Table 1 and the Appendix show that over two-thirds of universities posed criminal history questions during the relevant admissions cycle, whereas questions about arrests and pending charges were comparatively less common.

Table 2. Disciplinary Records, Juvenile Adjudications, and Sealed or Expunged Records

	High School Discipline Share of Schools Requiring Disclosure	**Juvenile Adjudications** Share of Schools Requiring Disclosure	**Sealed or Expunged Records** Share of Schools Requiring Disclosure
Top 100 Schools*	77.9%	67.5%	22.1%
Private Schools	83.0%	76.6%	21.3%
Public Schools	70.0%	53.3%	23.3%
Very Selective Schools (Avg. Acceptance Rate: 13.2%)	81.6%	76.3%	21.1%
Selective Schools (Avg. Acceptance Rate: 59.7%)	74.4%	59.0%	23.1%

* Dataset does not include schools operating in ban-the-box jurisdictions.

109 Tufts Univ., Supplemental Questions for the Common App (2024) (on file with author).

110 Ind. Univ. Bloomington, Supplemental Questions for the Common App (2024) (on file with author).

111 *See infra* Appendix.

112 *See* Yale Univ., *supra* note 3 (emphasis added).

Prior to 2019, the Common App directed applicants never to disclose expunged or sealed records.[113] But when the organization struck the criminal history question from its main form in 2019 and allowed schools to pose such questions on individual supplements, the Common App allowed schools to decide whether to (1) ask about prior crimes and (2) warn applicants against disclosing sealed records.[114] Given this history, the current study distinguished between schools that did and did not warn applicants against divulging sealed and expunged records. If a university asked about "offenses" or "convictions" but failed to warn applicants against disclosing sealed records, as the Common App had previously done, then the study categorized the school as having asked about sealed records. For example, Duke University directed applicants not "to answer 'yes' . . . if the criminal adjudication or conviction has been expunged[] [or] sealed,"[115] whereas Emory University simply asked whether "you [have] ever been found guilty or convicted of a misdemeanor or felony" without any disclaimer about sealed records.[116] As Table 2 shows, only 22.1% of schools mirrored Emory's procedures by asking about prior crimes without issuing a warning against disclosing sealed or expunged records.

Most studied schools that asked about prior offenses failed to limit the scope of their questions to adult violations. However, a few schools specified lower age limits for juvenile infractions. For example, New York University asked about offenses committed "after the age of 14,"[117] and Harvard University directed applicants to exclude misdemeanors that "occurred more than five years before your application."[118] Though schools used varied language to ask about prior juvenile misconduct, including "convictions," "offenses," "crimes," and "adjudications"—all of which have different legal meanings for minors in different states[119]—most questions failed to specify whether applicants should refrain from

113 *See* NAT'L JUV. DEF. CTR., YOUR JUVENILE RECORD CAN AFFECT YOUR FUTURE (2018), https://www.defendyouthrights.org/wp-content/uploads/2018/04/Your-Juvenile-Record-Can-Affect-Your-Future.pdf [https://perma.cc/3XCL-3A9N] (describing the Common App's previous warning against disclosing sealed or expunged records).

114 *See* Rips, *supra* note 24, at 254 (discussing the Common App's removal of the criminal history box from its shared form).

115 Duke Univ., Supplemental Questions for the Common App (2024) (on file with author).

116 Emory Univ., Supplemental Questions for the Common App (2024) (on file with author).

117 N.Y. Univ., Supplemental Questions for the Common App (2024) (on file with author).

118 Harvard Univ., Supplemental Questions for the Common App (2024) (on file with author).

119 Some states treat the processing of juvenile offenses as "adjudications" while others treat them as "convictions." Rips, *supra* note 24, at 241–44 (discussing distinctive labeling of juvenile offenses). Because college applicants may reside in either type of jurisdiction, any application question that asks about "convictions" would include juvenile offenses for applicants in states that use that label, resulting in disparate treatment across state lines. *See id.* at 244.

disclosing infractions that they committed as minors.[120] Accordingly, schools that asked about crimes were categorized as also asking about juvenile offenses unless they limited the scope of their questions to adult crimes or specifically excluded juvenile adjudications. Using this framework, Table 2 shows that over two-thirds of schools required disclosure of juvenile offenses.

Finally, Table 2 presents data on the prevalence of high school disciplinary questions in college admissions. If a school limited the scope of its question about high school misconduct to academic dishonesty or academic probation only, the study did not categorize the school as asking about high school discipline. In other words, the study distinguished between queries about academic misconduct and queries about behavioral misconduct in high school, limiting the scope of analysis to the latter type of question.

As with criminal history questions, a recent change in college admissions helps inform the current use of high school disciplinary questions. Just as the Common App removed the criminal history box from its standard form in 2019, it likewise announced the removal of the high school discipline box from its standard application in 2020, though still allowing schools to ask such questions on their individual supplements.[121] In announcing its reasons for this shift, the Common App noted that Black and Latino students were grossly overrepresented in the share of applicants who checked the school discipline box.[122] Remarkably, then, universities that pose school discipline questions today do so in the wake of the Common App's specific decision to strike the box for racial equity reasons. Despite the Common App's movement away from the school discipline box, Table 2 shows that over three-quarters of universities required applicants to disclose certain forms of high school discipline.

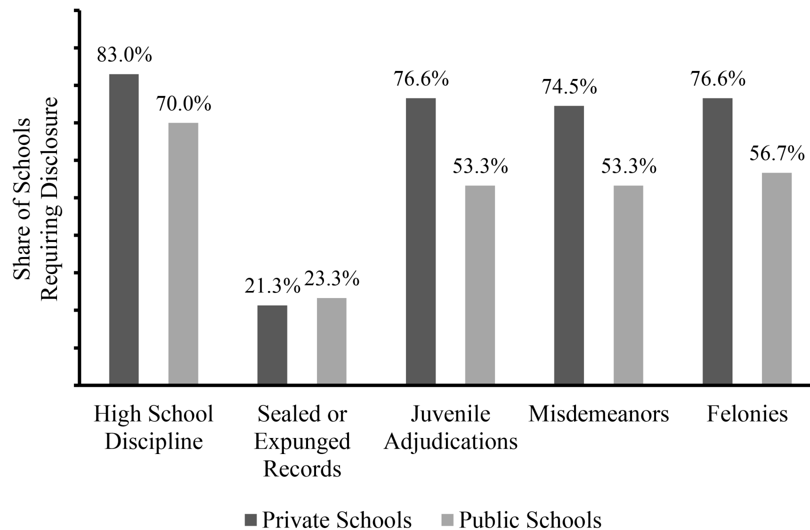
---

120 *But see* Tex. A&M Univ., Supplemental Questions for the Common App (2024) (on file with author) (specifying that applicants should not disclose "juvenile adjudications").

121 *See* Lindsay McKenzie, *Common App Ditches High School Discipline Question*, Inside Higher Ed (Oct. 4, 2020), https://www.insidehighered.com/admissions/article/2020/10/05/common-app-stop-asking-students-about-their-high-school-disciplinary [https://perma.cc/2BDJ-ZHAW] (reporting on the Common App's decision to remove the high school discipline box from its standard form).

122 *See id.*; *see also* Russell J. Skiba, Robert H. Horner, Choong-Geun Chung, M. Karega Rausch, Seth L. May & Tary Tobin, *Race Is Not Neutral: A National Investigation of African American and Latino Disproportionality in School Discipline*, 40 Sch. Psych. Rev. 85, 102 (2011) (finding "disproportionate representation of African American and Latino students in school discipline"). *But see* Off. for C.R., U.S. Dep't of Educ., 2020–21 Civil Rights Data Collection: Student Discipline and School Climate in U.S. Public Schools 8 fig. 3 (2023) (finding that the relative disciplinary rate for Latino students was lower than their share of total enrollment). This Article follows the convention of using the term "Latino" to refer to individuals who identify as Hispanic or Latino. *See* Skiba et al., *supra*, at 85 (using this convention).

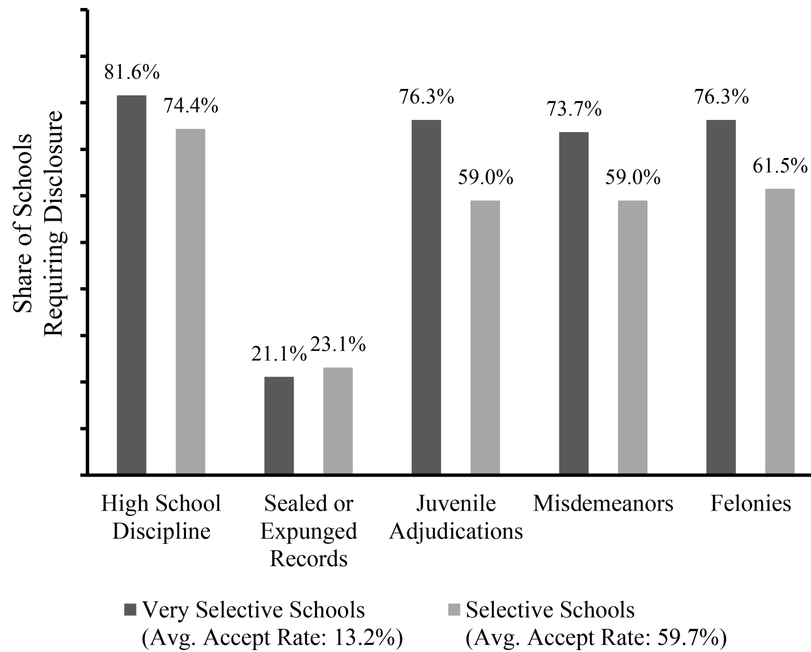
FIGURE 1. PRIVATE AND PUBLIC SCHOOLS: MANDATORY DISCLOSURES



Dividing the data by institutional category, Figure 1 reports on the prevalence of disciplinary and criminal history questions among private and public schools. Mirroring trends from earlier studies,[123] Figure 1 shows a persistent divide between school types, with roughly three-quarters of private schools posing criminal history questions, as compared to roughly half of public schools. Turning to high school discipline, Figure 1 shows that—similar to criminal history questions—private schools asked about high school discipline more frequently than public schools. In fact, the share of private universities with high school disciplinary questions (eighty-three percent) represented the highest rate of questioning for any subject in any institutional category.

123 *See supra* Section I.A (discussing previous research on the use of the box by different subgroup schools).

FIGURE 2. VERY SELECTIVE SCHOOLS: MANDATORY DISCLOSURES



In light of previous studies showing an association between a school's relative selectivity and the likelihood of posing criminal history questions,[124] Figure 2 sorts universities by their rates of acceptance.[125] Dividing the dataset in half,[126] the study labeled the top group of schools as "very selective," given their average acceptance rate of 13.2%. Schools in the bottom half of the dataset had an average acceptance rate of 59.7% and were labeled "selective."

As with prior studies of similar groupings,[127] the dataset depicted in Figure 2 shows that very selective schools were more likely than less selective schools (76.3% versus 61.5%) to include a felony box on their applications. The gap between these subgroups was even larger among schools that posed questions about juvenile adjudications: Very selective schools were much more likely to ask about juvenile offenses (76.3% versus 59%). Finally, neither subgroup was very likely to inquire about expunged records (21.1% of very selective schools versus 23.1% of selective schools).

---

124 *See supra* Section I.A.

125 Rates of acceptance were gathered from federal government data. *See College Navigator*, NAT'L CTR. FOR EDUC. STAT., https://nces.ed.gov/collegenavigator/ [https://perma.cc/HT9H-VALU] (last visited Dec. 16, 2025) (providing acceptance rates at U.S. colleges and universities).

126 Because the dataset contained an uneven number of schools, the "very selective" list contained one fewer school than the "selective" list of schools.

127 *See, e.g.*, Stewart & Uggen, *supra* note 21, at 160 tbl. 1 (using a similar convention to label schools based on their selectivity).

In sum, the foregoing tables and figures demonstrate that universities still routinely use the box in their admissions processes. The box's durability is particularly remarkable in light of the Common App's decision to eliminate questions about criminal history and school discipline from its shared form, citing concerns over racial inequities.[128] Given that 96.1% of the universities included in this study are Common App schools[129] and that the data presented here were collected after the Common App eliminated those boxes, these results show that most top universities made an affirmative decision to re-add the box to their school supplements. Given this apparent movement *toward* such questions, the following Part examines the collateral consequences of embracing the box.

II. The Consequences of Asking: Applicant Attrition and Admissions Denials

Colleges that used the box during the 2024–2025 admissions cycle frequently attempted to reassure applicants that their disclosures would not necessarily harm their chances. For example, Harvard University asked applicants about instances of high school discipline but then promised these applicants that their answers would not "automatically disqualify" them.[130] The school also said that admissions officers wanted to learn "the details of the incident from your perspective" and that they would consider the disclosed information "in the context of our whole person review."[131] Somewhat less reassuringly, Temple University told candidates that their revelations would "not *immediately* disqualify you from admission."[132] Meanwhile, some colleges with the box promised to ignore criminal history information altogether, at least during initial review stages.[133] For instance, Brown University told applicants that even though the school required candidates to check a criminal history box, Brown's admissions officers would "not consider information

128 *See* Melissa Korn, *College Common App Drops Question About Discipline, Citing Racial Disparities*, Wall St. J. (Sep. 30, 2020, at 03:30 ET), https://www.wsj.com/articles/college-common-app-drops-question-about-discipline-citing-racial-disparities-11601494201 [https://perma.cc/XGJ2-ZKHY]; McKenzie, *supra* note 121 (listing the Common App's reasons for removing the criminal history box from the organization's main form).

129 *See infra* Appendix (listing mandatory disclosures for each studied school and indicating which universities accepted applications through the Common App).

130 Harvard Univ., *supra* note 118.

131 *Id.*

132 Temple Univ., Supplemental Questions for the Common App (2024) (on file with author) (emphasis added).

133 *See* Weissman et al., *supra* note 20, at 8–9 (explaining how colleges that collect criminal history information do not always consider the information when making admissions decisions).

on criminal history during our initial round of admission application reviews."[134]

Why would colleges place criminal history boxes on applications and simultaneously pledge to disregard the disclosed information, at least during initial reviews? In Brown's case and in many others, the university described the process as follows: "Only upon selecting a pool of admitted candidates do we learn whether you have reported a criminal history, at which point we will offer you an opportunity to explain the circumstances."[135] But the logic of placing a box on an admissions form and then promising to ignore a candidate's answers assumes that many applicants with criminal records will trust Brown's admissions officers to actually ignore the details that they share. Today, despite such assurances, criminal history questions actively discourage a large number of candidates from applying.[136] Given the box's chilling effect, if universities really wanted to evaluate candidates without considering their criminal histories, they would remove the box entirely, admit qualified applicants, and *then* pose supplementary questions about prior misconduct after making conditional admissions offers.[137]

This Part explains how the box deters applicants with records from applying. Even if individuals with criminal histories overcome the box's deterrent effect and actually apply, schools reject their files at higher rates as compared to candidates with similar credentials. After considering these outcomes, this Part considers how applicants of color disproportionately feel these effects.

A. Discouraging Applications

An institution's choice to include the box on admissions forms sends a clear signal to applicants that the school will scrutinize their records and segregate their files. Several studies have considered the chilling effect that criminal history boxes and high school discipline boxes have on applicants.[138] The most comprehensive examination of this topic analyzed admissions data from the State University of New

---

134 Brown Univ., Supplemental Questions for the Common App (2024) (on file with author).

135 *Id.*

136 *See* Jordan Mayer & Justin Smith, *College Admissions and Criminal Records: The Social Construction of Risk in the University Setting*, 36 J. Crim. Just. Educ. 664, 665 (2025) (examining the box's chilling effect on applicants).

137 *See infra* Section III.B.3 (evaluating less discriminatory alternatives to the box).

138 *See* Alan Rosenthal, Emily NaPier, Patricia Warth & Marsha Weissman, Ctr. for Cmty. Alts., Boxed Out: Criminal History Screening and College Application Attrition, at ii (2015) (examining attrition rates among applicants with felonies); McKenzie, *supra* note 121 (summarizing research on attrition rates associated with the Common App's school discipline box). *But see* Curran, *supra* note 9, at 1147–48 (finding that "being in trouble" had a small impact on applicant attrition but that being suspended from school had no similar impact on application rates).

York ("SUNY") system.[139] Scrutinizing applicant outcomes at thirty different SUNY campuses, researchers compared the application attrition rates—i.e., the rate at which individuals initiate the application process but fail to complete it—of candidates with felony records versus candidates without felony convictions.[140] Reviewing 1,462 files, the study found that nearly two-thirds of applicants who checked "yes" to the felony box started a SUNY application but then never completed it.[141] Labeling this outcome the "felony application attrition rate," researchers then compared that number to the noncompletion rate of other SUNY applicants.[142] The researchers found this "general application attrition rate" was 21%, as compared to the felony application attrition rate of 62.5%.[143] Thus, candidates who checked the box were nearly three times more likely to abandon their applications.[144]

Of course, the SUNY study did not establish a definitive causal link between the presence of the box and the elevated attrition rates among applicants with felonies. Even without the box, these candidates may still have deserted their applications at higher rates. But given the extremely large gap between the general attrition rate and the felony attrition rate, it seems likely that the box played a role in causing some applicants with records to abandon the process. Indeed, the study's authors hypothesized that the startlingly high felony attrition rate at least suggested that those applicants "were driven out of the application process" by the box.[145]

Measuring the box's chilling effect on applicants through attrition rates—as the SUNY study did—probably underestimates the box's secondary effects. After all, the mere appearance of the box on applications likely dissuades many qualified candidates from even attempting to apply. Because the SUNY study focused only on applicants who had begun to fill out their application forms, it did not measure the box's chilling effect on potential applicants.[146] If applicant attrition figures included both individuals who abandoned their applications and those who never even began applying, the box's measured deterrent effects would probably be larger.

Similar to questions about criminality, questions about high school discipline also have a chilling effect on prospective applicants. In 2020,

139 *See* Rosenthal et al., *supra* note 138, at 9–10.

140 *Id.* at 6.

141 *Id.* at 9.

142 *Id.* at 6.

143 *Id.* at 10.

144 *Id.*

145 *Id.* at ii, 16 (asserting that the box causes "stigma" and "exclusion" among applicants with criminal histories).

146 *See* Johnson et al., *supra* note 46, at 716–17 (explaining how the box dissuades candidates from applying); Scott-Clayton, *supra* note 48 (same).

the Common App examined whether students who checked "yes" on the organization's school discipline box failed to complete their applications at similar rates to students who did not disclose having a high school disciplinary record.[147] Mirroring many of the SUNY researchers' findings about criminal history boxes, authors of the Common App study found that twenty-two percent of students who checked the high school discipline box failed to actually submit their applications, as compared to other students whose failure-to-complete rate was twelve percent.[148] More problematic, the Common App found that students of color were dramatically overrepresented in the group who checked "yes" to the school discipline box but then failed to submit their applications, with Black and Latino applicants representing fifty-two percent of the group despite composing only twenty-seven percent of the overall applicant pool.[149] Once again, these differences cannot be attributed directly to the box's presence. After all, students with high school disciplinary records may already abandon their college applications at higher rates than other students.[150] Nevertheless, as previously discussed, the racial disparities associated with the school discipline box caused the Common App to strike this question from its shared form.[151]

In addition to scaring off students with records, the ambiguous wording of admissions questions also creates confusion about how to answer.[152] Take, for example, the University of Chicago. The school posed the following question during the 2024–2025 admissions cycle:

> Have you ever been found responsible for a disciplinary violation (or do you have pending disciplinary charges and/or actions), at any educational institution you have attended from the 9th grade (or the international equivalent) forward, whether related to academic misconduct or behavioral misconduct, that resulted in a disciplinary action?[153]

This question provided no guidance to applicants about what types of "behavioral misconduct," "disciplinary violation[s]," or "disciplinary action[s]" the school wanted them to reveal.[154] In addition to posing unclear queries about school discipline, colleges used similarly

147 *See* McKenzie, *supra* note 121.

148 *Id.*

149 *Id.* (discussing attrition rates among candidates who apply through the Common App).

150 *See* Curran, *supra* note 9, at 1151–52 (reporting "mixed findings" on whether the high school discipline box discourages students from applying).

151 *See* McKenzie, *supra* note 121 (explaining how the Common App sought to combat racial inequities when it removed the school discipline box from the organization's shared form).

152 *See* Rips, *supra* note 24, at 249–50, 276 (examining the challenge of deciphering criminal history boxes).

153 Univ. of Chi., Supplemental Questions for the Common App (2024) (on file with author).

154 *See id.*

cryptic words to ask about prior crimes. For example, Baylor University required applicants to respond to the following prompt:

> Do you have information to share regarding criminal offenses, including juvenile offenses or delinquent conduct, other than minor traffic offenses? You will state whether you have (a) been convicted of, sentenced for, or received pretrial diversion or intervention for any crime or offense, or (b) have any pending misdemeanor, felony or other criminal charges, or matters pending before a grand jury that could result in criminal charges against you.[155]

Baylor did not clarify why the school asked separately about "crime[s]," "offense[s]," "matters," and "other criminal charges"—implying that in the minds of Baylor's admissions officers those terms have distinct meanings. For example, an applicant with a sealed juvenile record for shoplifting would not know whether to disclose this as an "offense" or whether Baylor considered it a "crime." Indeed, the vague wording of these questions can "confuse even seasoned attorneys" who practice criminal law.[156]

Adding to these ambiguities, applicants often struggle to obtain clear guidance from schools about how they should answer. To study this point, researchers recently posed as prospective applicants with felony records and sent the following email to admissions departments across the country: "To be upfront, I have a prior felony conviction from a non-violent offense. Will this affect my chances of getting accepted? I attempted to look for this info on your website but couldn't find it."[157]

Emailing 498 admissions departments, the researchers found that many admissions officers did not answer the fictitious applicant's question.[158] For those that responded, ten percent said that the school would consider felony histories as part of a "holistic review process," while another forty-nine percent gave a range of answers about "discretionary review."[159] These ambiguous answers led to a "less transparent" process for applicants, according to the study's authors.[160] Ultimately, the study highlighted the "opaqueness" of colleges' criminal history questions and the "uncertainty" over the consequences of checking the box.[161]

In sum, vague criminal history questions force applicants to choose between the risk of lowering their admissions chances by checking the

155 Baylor Univ., Supplemental Questions for the Common App (2024) (on file with author).

156 Rips, *supra* note 24, at 276–77 (calling on colleges to word their questions more carefully).

157 Evans et al., *supra* note 85, at 252.

158 *See id.* at 253–54 (reporting that fifty-eight colleges failed to respond); *see also id.* at 259 (describing the "opaqueness" of admissions policies that govern applicants with criminal records).

159 *Id.* at 256–57.

160 *Id.* at 255.

161 *Id.* at 259.

box and the risk of facing academic dishonesty charges for failing to disclose "offenses" that fall under the school's unstated definitions. At the end of the day, schools that ask such murky questions ultimately send a clear message that applicants with criminal histories need not apply.[162]

B. *Increasing the Risk of Rejection*

The presence of the box not only dissuades candidates from applying; it also lowers their chances of admission. For example, a survey of admissions directors from 300 randomly sampled colleges reported that forty-two percent of school officials stated that they would "probably or definitely not admit" an otherwise qualified candidate who was convicted of "[i]llegal prescription drug possession."[163] Another forty-five percent of admissions directors stated that they would "probably or definitely not admit" a qualified applicant who was *arrested* for marijuana distribution.[164]

Sociologists Robert Stewart and Christopher Uggen conducted the first field experiment on admissions officers' biases against applicants who checked the box.[165] As described above,[166] the researchers began their study by reviewing first-year applications at 1,350 four-year institutions, finding that 71.6% of colleges posed criminal history questions.[167] After reporting on the share of colleges that used the box, Stewart and Uggen then carried out an experimental audit to determine how often colleges discriminated against applicants who revealed their criminal histories.[168]

To do this, Stewart and Uggen sent two separate and nearly identical applications to colleges and universities across the country.[169] Although the tester applicants were otherwise equally qualified, one applicant checked the school's felony conviction box, while the other applicant did not.[170] The candidate with the criminal history disclosed a felony of robbery (such as stealing records) to some schools and a felony of burglary (such as taking an item from another's premises) to other schools.[171] To ensure that they could attribute any adverse

---

162 *See* Off. of Career, Tech., & Adult Educ., *supra* note 18, at 24–25 (explaining the need for transparent rules that govern the use of criminal background questions in college admissions).

163 Pierce et al., *supra* note 18, at 367 tbl. 2.

164 *Id.*

165 Stewart & Uggen, *supra* note 21, at 163–65 (describing the design of the authors' modified experimental audit).

166 *See supra* notes 67–69 and accompanying text.

167 Stewart & Uggen, *supra* note 21, at 160 tbl. 1.

168 *Id.* at 157.

169 *Id.* at 168.

170 *Id.*

171 *See* Scott Jaschik, *Admissions Choices*, Inside Higher Ed (Nov. 3, 2019), https://www.insidehighered.com/admissions/article/2019/11/04/study-finds-noncompetitive-colleges-

admissions decision to the candidate's criminal record—as opposed to other confounding factors—the researchers assigned slightly *better* credentials (GPA or ACT score) to the tester applicant with the felony conviction.[172]

After receiving 560 admissions decisions from 280 schools, Stewart and Uggen found that the tester applicant who checked the box was over three times more likely to be rejected at schools that posed criminal history questions as compared to the tester applicant who did not check the box.[173] Namely, 33% of schools rejected the candidate with a record as compared to 9.5% of schools that rejected the companion candidate with lower credentials.[174] Summarizing these results, Stewart and Uggen found "significant discrimination in higher education admissions," which, they observed, limited access to higher education for "the 19 million Americans with felony-level criminal records, a disproportionate proportion of whom are young Black men."[175]

As with any experimental audit, Stewart and Uggen's study had certain limitations. Because their tester applicants disclosed only convictions for certain felonies, the researchers did not investigate whether schools also discriminated against applicants who disclosed misdemeanors or school discipline records.[176] It is possible that schools have no problem admitting applicants who check those boxes, even if they discriminate against people who check the felony box.[177] If true, however, why inquire about misdemeanors and high school discipline if applicants' answers to those questions have no bearing on their admissions chances? As previously noted, after the Common App struck these questions from its standard form, most colleges in this study made the affirmative decision to re-add the school discipline box and the misdemeanor box to their supplemental applications.[178] Given colleges' persistent interest in their applicants' misdemeanors and disciplinary background, it seems unlikely that checking these boxes would have no effect on their prospects for admission.

---

more-likely-reject-applicants-who [https://perma.cc/342P-5JTT] (discussing details of how Stewart and Uggen disclosed candidates' felonies).

172 Stewart & Uggen, *supra* note 21, at 165.

173 *Id.* at 178.

174 *Id.* at 177.

175 *Id.* at 180.

176 *See id.* at 178 (emphasizing the need for future research on what effects, if any, "different criminal record types" have on admissions rates).

177 *See* Curran, *supra* note 9, at 1151 (finding "mixed results" on the question of whether checking a school discipline box lowered applicants' admissions chances).

178 *See supra* Figures 1–2 (depicting original data on the share of colleges that pose questions about misdemeanors and high school discipline).

In addition to limiting their study to the felony box, Stewart and Uggen did not examine the behavior of admissions officers at very selective schools.[179] As such, further research is needed to determine whether this subgroup of schools discriminates against applicants who check the box at the same rate as the less selective schools that were the subject of Stewart and Uggen's study. But given that very selective schools ask about juvenile offenses, misdemeanors, and felonies at higher rates than other schools,[180] it seems unlikely that this subgroup's heightened interest in these subjects would translate into *less* discrimination against applicants who check the box. Although further research can help answer these questions, Stewart and Uggen's study provides compelling evidence that admissions officers frequently discriminate against applicants who check the box.[181]

C. The Box's Outsized Impact on Protected Groups

Students of color bear the brunt of the box's exclusionary effects. Although every applicant who checks the box is subject to adverse impacts, such outcomes are more likely to disadvantage diverse applicants due to (1) the overrepresentation of these groups in the criminal justice system and (2) existing disparities in school discipline.

Studies consistently show that people of color are disproportionately surveilled, arrested, and convicted.[182] Consider these numbers: Almost eighty million Americans live with a criminal record;[183] even though Black and Latino individuals compose roughly one-third of the U.S. population, they compose roughly two-thirds of federal prisoners.[184] Indeed, racial disparities exist at all levels of the criminal justice

---

179 Stewart & Uggen, *supra* note 21, at 167 (explaining admissions practicalities that limited the study's scope to colleges that were "more competitive, competitive, [and] less competitive").

180 *See supra* Figure 2 (providing original data on the share of highly selective schools that mandated disclosures about disciplinary records and criminal histories).

181 *See* Stewart & Uggen, *supra* note 21, at 180; *see also* Jacob R. Brown & Hanno Hilbig, *Locked out of College: When Admissions Bureaucrats Do and Do Not Discriminate*, 52 Brit. J. Pol. Sci. 1436, 1444 (2022) (testing for and finding discriminatory nonresponsiveness against applicants with records among U.S. colleges and universities).

182 Mark Motivans, U.S. Dep't of Just., NCJ 307553, Federal Justice Statistics, 2022, at 10 tbl. 5 (2024); Danielle Kaeble, U.S. Dep't of Just., NCJ 308575, Probation and Parole in the United States, 2022, at 7 tbl. 7, 33 tbl. 13 (2024); *see also* The Sent'g Project, Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System (2018), https://www.sentencingproject.org/reports/report-to-the-united-nations-on-racial-disparities-in-the-u-s-criminal-justice-system/ [https://perma.cc/3Q64-XAHT] (listing data showing the overrepresentation of people of color in the criminal justice system).

183 Off. of Career, Tech., & Adult Educ., *supra* note 18, at 1.

184 *QuickFacts: United States*, U.S. Census Bureau, https://www.census.gov/quickfacts/fact/table/US [https://perma.cc/Z4GA-NH8Q] (last visited Feb. 1, 2026); Motivans, *supra* note 182, at 16 tbl. 10.

system, including arrests, charging, sentencing, time served, probation, and parole.[185]

Data on high school discipline rates also reveal unsettling racial discrepancies.[186] For example, applicants of color are more likely to check the high school discipline box on their college applications. Specifically, before announcing the removal of that question from its shared form in 2020, the Common App found that Black applicants checked the discipline box at over twice the rate of white applicants.[187] Evaluating these results, the organization explained that it removed the box from its application because the question "disproportionately impact[ed] . . . students of color."[188]

Scholars do not dispute that people of color are disciplined and imprisoned at disproportionately high rates.[189] Despite vigorous debates over the reasons for these disparities—with credible research showing that benign explanations alone cannot fully account for these racialized outcomes[190]—it is the existence of these disparities (rather than their cause) that matters for purposes of developing a legal challenge to the box.[191] Any admissions tool that relies on screening methods with racialized incongruities runs the risk of reconstituting those incongruities. As outlined below, colleges that include the box on their applications not only embrace a tool that yields racially skewed outputs, but they expose themselves to antidiscrimination claims as well.

III. Assessing the Legal Risks of Retaining the Box

The use of criminal background questions in admissions creates unique liability risks for colleges. Although there are not yet any

---

185 *See* The Sent'g Project, *supra* note 182 (examining racial disparities in the criminal justice system); Chetty et al., *supra* note 88, at 745 fig. VII; Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2025*, Prison Pol'y Initiative (Mar. 11, 2025), https://www.prisonpolicy.org/reports/pie2025.html [https://perma.cc/5JSK-KHF3] (comparing racial demographics of prison populations to demographics of the general population).

186 *See* Off. for C.R., *supra* note 122, at 7; *see also* Barrett et al., *supra* note 9 (discussing "essentially undisputed" data showing racial disparities in school discipline rates).

187 *See* Korn, *supra* note 128.

188 *Id.*

189 *See* Michelle Alexander, The New Jim Crow 6–7 (rev. ed. 2012); Ashley Nellis, The Sent'g Project, The Color of Justice: Racial and Ethnic Disparity in State Prisons 10 (2021).

190 Analyzing the causes of racial disparities in education and incarceration is beyond the scope of this Article. For consideration of these questions, see Nellis, *supra* note 189, at 10–11 (summarizing research on racial disparities in prison populations that cannot be explained by offense rates alone); Josh Rovner, The Sent'g Project, Youth Justice by the Numbers 3 (2023) (highlighting racial disparities between rates of juvenile offenses and rates of juvenile arrests); Justin D. Levinson, Huajian Cai & Danielle Young, *Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 Ohio St. J. Crim. L. 187, 190 (2010).

191 *See infra* Section III.B (outlining a liability framework for challenging colleges' use of the box based on disparate impact).

well-documented legal challenges to this practice in higher education,[192] employers have spent decades defending criminal history questions in court.[193] These employment cases provide strong analogues to the current problem because hiring processes and admissions processes share certain core similarities. For example, both colleges and employers draw from applicant pools to make admissions and hiring decisions, and both colleges and employers routinely use the box to remove qualified individuals from those applicant pools.[194] Despite the acknowledged distinctions between these two processes,[195] the legal test for challenging the use of the box in higher education mirrors liability standards in employment law.[196] As such, lessons from years of litigation over criminal history questions in employment law can inform potential legal disputes over the box in higher education.

A. *Employers' Liability for Preserving the Box: Title VII Disparate Impact*

Fearing that they might unknowingly hire dangerous job candidates, many employers have long sought to learn about applicants' criminal backgrounds.[197] Because placing criminal history boxes on employment applications can yield discriminatory results, workers and employers have spent decades litigating the propriety of these practices.[198] This litigation has focused on the box's detrimental effects on applicants of color, as opposed to applicants in general.[199]

Courts use the labels "disparate treatment" and "disparate impact" to describe Title VII's two primary methods for proving employment discrimination.[200] Whereas scholars and judges characterize "disparate

---

192 *See* H.S. Albert Jung, Note, *"Ban the Box" in College Applications: A Balanced Approach*, 26 Corn. J.L. & Pub. Pol'y 171, 177 (2016).

193 *See* Pettinato, *supra* note 33, at 842–63 (examining employment litigation over the box).

194 *See supra* notes 36–38 and accompanying text (discussing the use of the box in employment); *supra* notes 169–75 and accompanying text (discussing the use of the box in college admissions); *see also* Recent Complaint, *supra* note 15, at 1277–78 (explaining how litigation over the box in employment can inform litigation over legacy admissions boxes).

195 *See infra* Part IV (examining substantive and procedural differences between hiring and college admissions).

196 *See* N.Y. Urb. League, Inc. v. New York, 71 F.3d 1031, 1036 (2d Cir. 1995).

197 *See* Pettinato, *supra* note 33, at 846, 848–49 (discussing reasons why employers engage in criminal records discrimination).

198 *See id.* at 846–63; *see also* U.S. Equal Emp. Opportunity Comm'n, EEOC-CVG-2012-1, Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act § V (2012) (explaining how criminal history questions can run afoul of antidiscrimination protections in various ways).

199 *See* Pettinato, *supra* note 33, at 839–42 (discussing how Title VII litigation has focused on the box's impact on protected classes).

200 *See* Cunningham-Parmeter, *supra* note 35, at 119 (examining Title VII's antidiscrimination framework); *see also* Emily Gold Waldman, *The Preferred Preferences in Employment*

treatment" as a form of intentional discrimination, "disparate impact" targets an employer's use of neutral rules that cause disproportionate harm to protected groups.[201] Between these two theories of liability, plaintiffs have almost universally relied on disparate impact to challenge the legality of employment boxes because employers "neutrally" screen all candidates for criminal histories, even though this sorting system causes outsized harm to applicants of color.[202]

To establish disparate impact liability, plaintiffs must first identify a neutral workplace rule that disproportionately exposes protected groups to job losses or other adverse actions.[203] Starting with proof of "impact," courts typically compare two pools of qualified workers—one that is affected by the challenged rule and one that is not.[204] Assuming some significant gap in hiring exists between the two groups, plaintiffs must then establish a causal nexus between the challenged practice—i.e., the box—and the identified disparity in hiring outcomes.[205]

Once plaintiffs have proven their prima facie case, defendants can still avoid liability by showing that the contested rule—i.e., the box—advances an important "business necessity."[206] In essence, then, disparate impact does not categorially prohibit *all* employer screens that disproportionately harm protected groups; rather, it curbs an employer's *unjustified* use of such screens.[207] Finally, even if defendants convince courts of their rule's business justification, employers can still face

---

Discrimination Law, 97 N.C. L. Rev. 91, 97–98, 109 (2018) (outlining different contours of disparate treatment and disparate impact antidiscrimination theories).

201 *See* Cunningham-Parmeter, *supra* note 35, at 119; *see also* Noah D. Zatz, *Managing the Macaw: Third-Party Harassers, Accommodation, and the Disaggregation of Discriminatory Intent*, 109 Colum. L. Rev. 1357, 1374–75 (differentiating between theories of disparate treatment and disparate impact).

202 *See* Pettinato, *supra* note 33, at 840 (describing how "disparate impact theory provides an opportunity for challenging" employment boxes even though they are "neutral on their face"). *See generally* Joseph A. Seiner, *Disentangling Disparate Impact and Disparate Treatment: Adapting the Canadian Approach*, 25 Yale L. & Pol'y Rev. 95, 107 (2006) (asserting that many courts fail to adequately distinguish between liability theories based on disparate impact and disparate treatment).

203 42 U.S.C. § 2000e-2(k)(1)(A)(i); *see* Cunningham-Parmeter, *supra* note 35, at 119.

204 *See, e.g.*, Tsombanidis v. W. Haven Fire Dep't, 352 F.3d 565, 575–77 (2d Cir. 2003) (comparing qualified class members who experienced the adverse effects of a rule to the proportion of individuals who did not).

205 *See* Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 656–57 (1989); Mandala v. NTT Data, Inc., 975 F.3d 202, 207 (2d Cir. 2020); EEOC v. Joe's Stone Crab, Inc., 220 F.3d 1263, 1274 (11th Cir. 2000).

206 Cunningham-Parmeter, *supra* note 35, at 120 (discussing the business necessity defense).

207 *See* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 336 n.15 (1977); *see also* Roberto Concepción Jr., *Need Not Apply: The Racial Disparate Impact of Pre-Employment Criminal Background Checks*, 19 Geo. J. on Poverty L. & Pol'y 231, 235–36 (2012) (outlining the steps for proving disparate impact violations).

disparate impact liability if they refuse to adopt an equally effective, less discriminatory "alternative employment practice."[208]

Historically, plaintiffs have mounted disparate impact challenges to a wide variety of neutral employment rules, such as minimum height requirements that disparately impacted women,[209] minimum education requirements that disparately impacted Black workers,[210] Social Security questions that disparately impacted Latino employees,[211] and residency requirements that disparately impacted Black firefighters.[212] Just as plaintiffs have contested these "neutral" employment practices, they have also asserted disparate impact claims against the use of criminal history boxes on job applications. Unfortunately for candidates with records, plaintiffs have experienced only limited success with these attacks.[213] Noting the paucity of favorable decisions, scholars have critiqued judges for requiring job applicants to clear high bars to successfully challenge the box.[214]

Consider, for example, the Second Circuit's decision in *Mandala v. NTT Data, Inc.*[215] There, plaintiffs were Black software developers whose prospective employer rescinded their job offers once the company learned about their criminal convictions.[216] The logic of the plaintiffs' case was relatively straightforward: Because national crime statistics showed that Black individuals were overrepresented in the criminal justice system, any employment box that screened out people with records would disproportionately harm Black applicants.[217] Despite the cogency of the claim, however, the Second Circuit rejected the

---

208 42 U.S.C. § 2000e-2(k)(1)(A)(ii).

209 *See* Dothard v. Rawlinson, 433 U.S. 321, 331 (1977).

210 *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

211 *See* Guerrero v. Cal. Dep't of Corr. & Rehab., 701 F. App'x 613, 616–17 (9th Cir. 2017).

212 *See* NAACP v. N. Hudson Reg'l Fire & Rescue, 665 F.3d 464, 470 (3d Cir. 2011).

213 *See* Pettinato, *supra* note 33, at 842–43; *see also* Green v. Mo. Pac. R.R. Co., 523 F.2d 1290, 1292, 1298–99 (8th Cir. 1975) (holding that an employer's absolute ban on hiring applicants with criminal histories violated Title VII); Gregory v. Litton Sys., Inc., 472 F.2d 631, 632 (9th Cir. 1972) (extending Title VII liability to an employer who refused to hire an applicant with multiple arrests).

214 *See, e.g.*, Alexandra Harwin, *Title VII Challenges to Employment Discrimination Against Minority Men with Criminal Records*, 14 Berkeley J. Afr.-Am. L. & Pol'y 2, 13 (2012). For further discussion on the effects of heightened standards, see Georgia Decker, *Occupational Licensing as a Barrier for People with Criminal Records: Proposals to Improve Anti-Discrimination Law to Address Adverse Employment Impacts from the Criminal Legal System*, 49 Fordham Urb. L.J. 189, 210 (2021); Andrew Elmore, *Labor Redemption in Work Law*, 11 U.C. Irvine L. Rev. 287, 319 (2020); Johnathan J. Smith, *Banning the Box but Keeping the Discrimination?: Disparate Impact and Employers' Overreliance on Criminal Background Checks*, 49 Harv. C.R.-C.L. L. Rev. 197, 205–07 (2014).

215 975 F.3d 202 (2d Cir. 2020).

216 *Id.* at 205.

217 *Id.* at 206.

plaintiffs' Title VII challenge.[218] Stating that the overrepresentation of Black individuals in the prison population did not necessarily lead to an overrepresentation of Black software developers with records, the *Mandala* court found that the plaintiffs had failed to correctly compare relevant pools of workers.[219]

Even if plaintiffs convince courts that a significant gap exists between qualified comparator pools, they must also explain why the box created that gap. Historically, many plaintiffs have failed to establish a causal connection between an employer's use of the box and racial disparities in hiring.[220] For example, in *Foxworth v. Pennsylvania State Police*,[221] a Black applicant to a police cadet position challenged an employer's practice of excluding applicants with records.[222] Reviewing the plaintiff's disparate impact claim, the Third Circuit agreed with a lower court's finding that despite statistical evidence showing a racial disparity among police cadet recruits, the plaintiff failed to "prove that the automatic disqualification policy caused [this disparity]."[223]

Assuming that plaintiffs can establish a causal connection between an employer's rule and disparate outcomes, employers can still avoid liability by relying on a "business necessity" defense to justify their use of the box.[224] In most cases, judicial evaluations of this defense come down to whether courts believe that the box can credibly predict an employee's future threat level. For example, courts have permitted criminal background questions when those screens meaningfully "distinguish[ed] between individual applicants that do and do not pose an unacceptable level of risk."[225]

---

218 *Id.* at 212.

219 *Id.* at 211; *see also* EEOC v. Freeman, 961 F. Supp. 2d 783, 798–99 (D. Md. 2013) (dismissing a disparate impact challenge to an employer's criminal history questions due to the plaintiff's reliance on national crime statistics).

220 *See* Pettinato, *supra* note 33, at 853, 856–59 (examining the causation requirement in disparate impact litigation); *see also* EEOC v. Carolina Freight Carriers Corp., 723 F. Supp. 734, 751 (S.D. Fla. 1989) (holding that even if labor statistics pointed to racial imbalances, plaintiffs failed to prove that criminal background screens caused the imbalances).

221 402 F. Supp. 2d 523 (E.D. Pa. 2005), *aff'd*, 228 F. App'x 151 (3d Cir. 2007).

222 *Id.* at 532.

223 *Foxworth*, 228 F. App'x at 156.

224 *See* El v. Se. Pa. Transp. Auth., 479 F.3d 232, 238–42 (3d Cir. 2007) (discussing the defense in detail).

225 *Id.* at 245–48 (holding that an employer's decision to terminate a driver for his forty-year-old homicide conviction was justified by business necessity); *see also* Williams v. Carson Pirie Scott & Co., No. 92 C 5747, 1992 WL 229849, at *2 (N.D. Ill. Sep. 9, 1992) (allowing discharge of an employee with a felony record due to the "legitimate business purpose of minimizing the perceived risk of employee dishonesty").

To the extent that courts have questioned an employer's use of the box, they have paid most critical attention to overly broad inquiries.[226] For example, in *Gregory v. Litton Systems, Inc.*,[227] the Ninth Circuit considered a disparate impact claim brought by a Black sheet metal worker who was denied employment because of his arrest history.[228] Noting stark differentials in arrest rates between Black and white applicants, the Ninth Circuit identified a clear causal connection between the employer's arrest screen and the rule's disparate racial impact.[229] Rejecting the defendant's business necessity defense, the Ninth Circuit affirmed a lower court's determination that "information concerning a prospective employee's record of arrests[,] without convictions, is irrelevant to his suitability or qualification for employment."[230]

Just as employers cannot justify categorial exclusions based on arrest records, plaintiffs have occasionally succeeded in challenging categorial exclusions based on criminal convictions as well. For example, in *Waldon v. Cincinnati Public Schools*,[231] a federal court in Ohio evaluated a school district's policy that automatically dismissed employees with certain criminal records.[232] Noting that ninety percent of the excluded individuals were Black workers, the *Waldon* court rejected the school district's business necessity defense because the plaintiffs "posed no obvious risk due to their past convictions."[233] This case stands as somewhat of an exception, however. Although a handful of decisions have rejected employers' business necessity defenses, courts usually accept safety-related justifications for criminal history questions.[234]

In sum, to the extent that plaintiffs have successfully contested the use of boxes by employers, those claims have involved (1) employees with arrest records only,[235] (2) blanket bans on all applicants with records,[236] or (3) broad exclusions that failed to consider a worker's individualized mitigating factors.[237] Because the test for holding colleges

---

226 *See* Pettinato, *supra* note 33, at 875 (discussing judicial trends in assessing the box's legality).

227 472 F.2d 631 (9th Cir. 1972).

228 *Id.* at 632.

229 *See id.*; *see also* Gregory v. Litton Sys., Inc., 316 F. Supp. 401, 403 (C.D. Cal. 1970) (adding that the employer could have foreseen the discriminatory effect of its policy), *aff'd*, 472 F.2d 631.

230 *Gregory*, 316 F. Supp. at 403; *Gregory*, 472 F.2d at 632.

231 941 F. Supp. 2d 884 (S.D. Ohio 2013).

232 *Id.* at 886.

233 *Id.* at 889–90.

234 *See* Alaina Heuring, Comment, *Third Time's a Charm: The Case for Ban the Box Legislation in Idaho*, 58 Idaho L. Rev. 288, 297 (2022) (discussing how employers successfully assert the business necessity defense).

235 *Gregory*, 472 F.2d at 632.

236 *Waldon*, 941 F. Supp. 2d at 889–90.

237 Green v. Mo. Pac. R.R. Co., 523 F.2d 1290, 1298–99 (8th Cir. 1975) ("To deny job opportunities to these individuals because of some conduct which may be remote in time or does not

liable for disparate impact violations mirrors Title VII's liability framework,[238] the following Section applies the foregoing standards to college admissions. It explains how colleges' sweeping use of the box could run afoul of even these highly deferential criteria.

B. Colleges' Liability for Preserving the Box: Title VI Disparate Impact

Mirroring Title VII's rules for combatting workplace discrimination, Title VI prohibits colleges, universities, and other recipients of federal funds from utilizing racially discriminatory practices.[239] Courts have stated that the legal test for proving disparate impact under Title VI follows the same doctrinal framework as Title VII.[240] In contrast to this substantive symmetry, however, the two laws differ procedurally in their enforcement. Whereas Title VII allows for private causes of action, only the U.S. Department of Education ("ED")—not private litigants—can pursue claims for disparate impact under Title VI.[241] But even that authority was recently cast into doubt when the U.S. Department of Justice ("DOJ") rescinded its disparate impact regulations under Title VI.[242] In spite of the DOJ's move away from disparate impact, the ED still has its own distinct set of disparate impact regulations that remain precariously intact for now.[243] But given the general

significantly bear upon the particular job requirements is an unnecessarily harsh and unjust burden."); *see also* Pettinato, *supra* note 33, at 845 (discussing trends in Title VII challenges to criminal history questions on job applications).

238 *See infra* Section III.B (outlining the doctrinal overlap between Title VII claims and Title VI claims).

239 Alexander v. Sandoval, 532 U.S. 275, 278 (2001).

240 *See* Guardians Ass'n v. Civ. Serv. Comm'n, 463 U.S. 582, 592–94 (1983) (explaining how disparate impact claims under Title VII and Title VI overlap doctrinally but not remedially); *see also* N.Y. Urb. League, Inc. v. New York, 71 F.3d 1031, 1036 (2d Cir. 1995) (comparing disparate impact claims under Title VII and Title VI); Michael C. Dorf, *Race-Neutrality, Baselines, and Ideological Jujitsu After* Students for Fair Admissions, 103 Tex. L. Rev. 269, 300–01 (2024) (same).

241 *See Sandoval*, 532 U.S. at 279–81, 285–86, 293; Cristina Isabel Ceballos, David Freeman Engstrom & Daniel E. Ho, *Disparate Limbo: How Administrative Law Erased Antidiscrimination*, 131 Yale L.J. 370, 425 (2021) (explaining how *Sandoval* "effectively eliminate[d] a private right of action for disparate impact" under Title VI); Dan McCaughey, Note, *The Death of Disparate Impact Under Title VI:* Alexander v. Sandoval *and Its Effects on Private Challenges to High-Stakes Testing Programs*, 84 B.U. L. Rev. 247, 255–56, 258, 266, 274 (2004) (same).

242 Rescinding Portions of Department of Justice Title VI Regulations to Conform More Closely with the Statutory Text and to Implement Executive Order 14281, 90 Fed. Reg. 57,141 (Dec. 10, 2025) (to be codified at 28 C.F.R. pt. 42); *see also* Lauren J. Hartz, Betsy Henthorne, Mary-Claire Spurgin, Erica Turret & Katie Wynbrandt, *DOJ Eliminates Disparate-Impact Liability Under Title VI. What's Next?*, Jenner & Block (Dec. 17, 2025), https://www.jenner.com/en/news-insights/client-alerts/doj-eliminates-disparate-impact-liability-under-title-vi-whats-next [https://perma.cc/HJ3H-JM3B] (discussing the rescission of the DOJ's disparate impact regulations).

243 Hartz et al., *supra* note 242 ("The Department of Education's disparate-impact regulations, for example, are still in place, but the Department previewed in the Spring 2025 Unified

trend away from disparate impact, enforcement actions against colleges for using the box seem unlikely in the near term.

Despite the current headwinds facing disparate impact claims, however, the core antidiscrimination tools for challenging the box will still be available to future advocates. For example, Title VI itself still remains in place, as does Supreme Court case law, which assumes that federal agencies retain the power to promulgate disparate impact regulations under Title VI.[244] Finally, even though the ED's current leadership has taken a dim view of disparate impact claims, that could quickly change under a different presidential administration. For example, as recently as 2023, the ED had specifically critiqued the use of criminal history questions in college admissions and their disparate impact on applicants of color.[245] In light of these trends, changes in administration and leadership under the ED could very well bring increased legal scrutiny to colleges' use of the box in the years to come.

Although changing political administrations have approached Title VI disparate impact theories differently, courts have published relatively few decisions in this area.[246] Despite this dearth of case law, however, a few Title VI disparate impact actions have scrutinized a limited number of "neutral" school practices.[247] For example, in *Groves v. Alabama State Board of Education*,[248] prospective applicants to a teacher training program contested on disparate impact grounds an Alabama rule that used minimum ACT score cutoffs to exclude applicants.[249] Finding that Alabama's ACT cutoff led to an overrepresentation of Black candidates in the pool of denied candidates, the *Groves* court held that the defendant violated Title VI because the ACT cutoff bore "no logical let alone significant relationship to minimal competence as a teacher."[250]

More analogous to the issue at hand, in 2023, the ED opened a Title VI civil rights investigation of Harvard University's practice of

---

Agenda that it plans to rescind them."); *see also* 34 C.F.R. § 100.3(b)(2) (2025) (listing the ED's disparate impact regulations).

244 *Sandoval*, 532 U.S. at 282 ("We therefore assume for the purposes of deciding this case that the DOJ and DOT regulations proscribing activities that have a disparate impact on the basis of race are valid.").

245 *See* Off. of Career, Tech., & Adult Educ., *supra* note 18, at 20–25 (examining the racialized consequences of criminal background questions).

246 *See* Olatunde C.A. Johnson, *Lawyering That Has No Name: Title VI and the Meaning of Private Enforcement*, 66 Stan. L. Rev. 1293, 1296 (2014) (discussing Title VI enforcement).

247 *See, e.g.*, Harper v. Bd. of Regents, Ill. State Univ., 35 F. Supp. 2d 1118, 1120, 1124 (C.D. Ill. 1999) (noting that the elimination of men's soccer and wrestling teams could theoretically constitute unlawful disparate impact).

248 776 F. Supp. 1518 (M.D. Ala. 1991).

249 *Id.* at 1519.

250 *Id.* at 1530–32.

favoring legacy applicants in admissions, among other disputed practices.[251] In *Chica Project v. President & Fellows of Harvard College*,[252] the complainants alleged that Harvard's policy of preferring children of alumni disproportionately harmed diverse applicants.[253] According to the complaint, if Harvard were to abandon its legacy admissions policy, "substantially more" students of color would be admitted to the university.[254]

This Title VI challenge to legacy admissions contains a number of doctrinal similarities to the use of criminal history boxes in college admissions. In both situations, a college's "neutral" policy—i.e., criminal history box and legacy admissions box—allegedly causes outsized harm to protected groups. In both cases, schools would have to explain how such boxes meaningfully advance university interests. For example, colleges might argue that the practice of legacy admissions advances fundraising and that criminal history boxes ensure campus safety.[255] Although the outcome of this challenge to Harvard's legacy admissions practices is far from certain given the ED's recent move away from disparate impact inquiries, the complaint still offers a practical framework for understanding how advocates might contest the use of criminal history questions in the future. Considering the merits of such a challenge in greater detail, the following Sections explain why colleges would struggle to justify their current use of wide-ranging criminal background questions. Because boxes about school discipline and minor crimes cause disparate impact without meaningfully advancing university prerogatives, schools that continue to use the box expose themselves to Title VI liability.

1. Impact: Overrepresentation of Protected Groups in Denied Applicant Pools

As noted above, the most thorough field experiment on the use of the box in higher education found that colleges were over three times more likely to reject applicants with records as compared to similarly qualified applicants without records.[256] Perhaps surprisingly, that same study found that colleges rejected white applicants with records at

251 *See* Michael D. Shear & Anemona Hartocollis, *Education Dept. Opens Civil Rights Inquiry into Harvard's Legacy Admissions*, N.Y. Times (July 25, 2023), https://www.nytimes.com/2023/07/25/us/politics/harvard-admissions-civil-rights-inquiry.html [https://perma.cc/E6FZ-YRSC].

252 Complaint Under Title VI of the Civil Rights Act of 1964 at 2–3, Chica Project v. President & Fellows of Harvard Coll. (U.S. Dep't of Educ. Off. for C.R. filed July 3, 2023).

253 *See id.*

254 *Id.* at 22; *see also* Recent Complaint, *supra* note 15, at 1275 (discussing the complaint).

255 *See infra* Section III.B.2 (examining the "educational necessity" test under Title VI).

256 *See supra* notes 168–75 and accompanying text.

similar rates to Black applicants with records.[257] In other words, when comparing only candidates with criminal histories, the box harmed white applicants and Black applicants at roughly the same rate. At first glance, these numbers would seem to undermine claims of disparate impact given that schools equally discriminate against all applicants who check the box, regardless of their race. Although intuitively attractive, the foregoing characterization of the box's "neutral" effects misunderstands the nature of disparate impact. Even if universities treated all applicants with criminal histories exactly the same, diverse applicants would still disproportionately bear the brunt of the box's harms because applicants of color are overrepresented in the pool of individuals with criminal histories.[258]

To illustrate this point, consider the Supreme Court's treatment of disparate impact in an entirely different context. In the touchstone case of *Dothard v. Rawlinson*,[259] female applicants to a prison guard position challenged a prison's rule that excluded all candidates who were shorter than five feet, two inches, among other screens.[260] Before analyzing the defendant's justification for the rule—i.e., that taller guards made prisons safer—the Supreme Court evaluated whether the prison's minimum height requirement excluded more female applicants than male applicants.[261] Citing data showing that the rule excluded one percent of men and thirty-three percent of women, the Court reached the clear conclusion that women disproportionately felt the adverse effects of the prison's height restriction.[262] Crucially, the defendant in *Dothard* could not avoid disparate impact liability by claiming that it had applied its height rule evenly to all applicants—i.e., the prison excluded 100% of short men and 100% of short women. Rather, disparate impact liability existed in *Dothard* because the prison's rule excluded a higher *share* of women than men even if all applicants under five feet, two inches were treated the same way. Applying this standard to criminal history questions, because the *share* of college applicants with criminal histories is higher among candidates of color, the relative impact of the box on these applicants will be larger, even if the *rate* of criminal records discrimination is roughly proportional to white applicants.[263]

---

257 *See* Stewart & Uggen, *supra* note 21, at 172.

258 *See* Pettinato, *supra* note 33, at 840 (explaining how applicants of color can utilize disparate impact theory to challenge employers' use of the box).

259 433 U.S. 321 (1977).

260 *Id.* at 323–24.

261 *See id.* at 329.

262 *Id.* at 329–30.

263 Stewart & Uggen, *supra* note 21, at 180 (explaining how certain admissions practices disproportionately affect diverse applicants).

Individuals who challenge the box in college admissions would face a preliminary dilemma about how to define the pool of harmed individuals. As described above, the box not only injures individuals who actually submit their college applications; it also dissuades potential candidates with criminal histories from ever applying.[264] If the box scares off a disproportionate number of diverse nonapplicants, can they claim disparate impact in tandem with individuals who actually apply? This question taps into a longstanding debate in employment law over the merits of including nonapplicants in disparate impact assessments.[265] At times, the Supreme Court has rejected the notion that "a statistical showing of disproportionate impact must always be based on . . . characteristics of *actual* applicants."[266] In limited circumstances, the Court has allowed plaintiffs to include nonapplicants in the group of individuals harmed by a particular practice when a challenged workplace rule "conspicuously demonstrate[d]" a "grossly discriminatory impact."[267]

Applying this standard to college admissions, challengers might assert that admissions officers frequently discriminate against candidates with records.[268] Further, they could claim that this discrimination is conspicuous to prospective applicants, as evinced by the large share of candidates with records who abandon their applications. Assuming that they were otherwise qualified for admission, these challengers might claim that the box's chilling effect caused them not to apply.[269]

Assuming litigation over the box focused exclusively on individuals who actually applied to college, challengers would first have to compare the rejection rates of two subgroups of candidates: applicants who checked the box and applicants with similar credentials who did not check the box. If applicants of color with similar credentials were overrepresented in the denial pool, then this would give rise to an inference that checking the box caused their rejections.[270]

Based on the limited data available, it appears that admissions outcomes at some colleges would exhibit these racially skewed results. Beginning with applicant pools—as opposed to denial pools—a few studies have shown that a disproportionate number of diverse applicants check the box. For example, the SUNY study discussed above found that Black applicants composed 24.9% of all applicants to the

264 *See supra* Section II.A.

265 *See* Pauline T. Kim, *Manipulating Opportunity*, 106 VA. L. REV. 867, 908–11 (2020) (examining how courts have assessed the impact of different employment rules).

266 *Dothard*, 433 U.S. at 330 (emphasis added).

267 *Id.* at 331.

268 *See supra* Section II.B.

269 *See Dothard*, 433 U.S. at 330.

270 *See* Ramaswamy, *supra* note 20, at 156 (considering how critics could legally challenge colleges' use of the box); *see also* Elmore, *supra* note 214, at 316 (examining disparate impact's proof requirements).

Buffalo State campus but 42.3% of applicants who checked the criminal history box.[271] The gap was even wider at the Brockport campus, with Black individuals composing 17.5% of all applicants but 45.2% of applicants who checked the box.[272] Similar racial gaps exist among applicants who check the school discipline box. As noted above, before removing that box from the shared portion of its application, the Common App reported that Black and Latino applicants represented 52% of individuals who checked the school discipline box even though they represented only 27% of the overall applicant pool.[273] Moving to the 2024–2025 college admissions cycle, the data presented here show that over three-quarters of top colleges require applicants to disclose instances of high school discipline.[274] As such, schools that use a high school discipline box risk duplicating the same racially skewed results that the Common App found.

Challengers would need to prove that the overrepresentation of diverse candidates in *applicant* pools translates to an overrepresentation of otherwise qualified applicants in *denial* pools as well. Once again, the limited data available on box-caused rejections suggest that some plaintiffs could make this case. As discussed above, the main field experiment on this question showed that checking the box tripled an applicant's chances of denial as compared to other candidates with nearly identical credentials.[275] Putting the two data points together, an overrepresentation of diverse applicants who check the box combined with an elevated risk of denial for checking the box should yield an overrepresentation of diverse applicants in denial pools.

But even if challengers successfully proved that the box yielded racially skewed results, schools could still argue that the denial pool was composed of candidates with weaker academic credentials who were not qualified for admission. Again, to bring a successful disparate impact claim, challengers must establish a causal link between the challenged practice and the practice's impact on qualified candidates.[276] As such, challengers would need to prove not only that the box yielded racial disparities in denial pools but that the box caused schools to reject otherwise qualified candidates. Theoretically, proving this point would be easier at nonselective or "open admission" schools—many

---

271 *See* ROSENTHAL ET AL., *supra* note 138, at 15 tbl. 4.

272 *See id.*

273 McKenzie, *supra* note 121.

274 *See supra* Table 2.

275 *See supra* Section II.C (examining the box's outsized effects on protected groups).

276 *See supra* notes 205, 220–23 and accompanying text; 42 U.S.C. § 2000e–2(k)(1)(A)(i) (specifying that the complaining party has the burden of proving that a challenged practice causes disparate impact); NAACP v. N. Hudson Reg'l Fire & Rescue, 665 F.3d 464, 472, 479 (3d Cir. 2011) (discussing disparate impact's causation requirement).

of which still use criminal history boxes in admissions[277]—given that nearly any person with a high school degree is qualified to attend.[278] Conversely, applicants to highly selective schools might have more trouble establishing a causal connection between a school's use of the box and elevated rejection rates among diverse candidates with records, given that these schools already reject very credentialed applicants.[279] In other words, candidates would have to prove that checking "yes" on the box—as opposed to other factors—caused their rejection.

Any concerted legal attack on the box would necessarily require advocates to pore through reams of admissions data to determine (1) whether students of color who checked the box were overrepresented in denial pools and (2) whether such students were otherwise qualified for admission. Despite this daunting discovery work, challengers would at least have a discovery precedent to follow. The yearslong battle over Harvard University's affirmative action practices, culminating in the Supreme Court's 2023 decision in *SFFA v. Harvard*, provides a useful discovery model. In the course of a fifteen-day trial before the lower court, challengers in that case presented detailed data on six years' worth of admissions records at Harvard, including admissions statistics, internal reports, and dueling expert analyses.[280] Whereas the legal theory in that case focused on disparate treatment and the theory described here involves disparate impact,[281] the discovery point is the same: Concerted litigation efforts allowed determined advocates to unlock large amounts of admissions data to evaluate the effect that a challenged admissions policy had on certain applicant groups. Although opponents of criminal history boxes may disagree with the substantive outcome in *SFFA v. Harvard*, they could still embrace the discovery

277 *See* Stewart & Uggen, *supra* note 21, at 160 (reporting that 33.9% of noncompetitive colleges posed criminal history questions to applicants); Wong, *supra* note 8 (reporting that forty percent of community colleges included a box on their applications).

278 *See* Ashtian C. Holmes, The Experiences of Formerly Incarcerated Black Male Students at a Northeast Community College 8, 50 (Nov. 5, 2023) (Ph.D. dissertation, St. John's University), https://scholar.stjohns.edu/cgi/viewcontent.cgi?article=1693&context=theses_dissertations [https://perma.cc/7T3A-KGMH] (discussing firsthand experience with attending an open admission school).

279 *See* Recent Complaint, *supra* note 15, at 1277 (describing the challenge of proving that Harvard's legacy admissions policy causes disparate impact given that "tens of thousands of students . . . would still be rejected if the challenged policy were to change").

280 *See* Harvey Gee, *Unprecedented: Asian Americans, Harvard, the University of North Carolina, and the Supreme Court's Striking Down of Affirmative Action*, 51 U.C. L. Const. Q. 187, 210–11 (2024) (discussing evidence presented at trial); Vinay Harpalani, *"Bait-and-Switch": How Asian Americans Were Weaponized to Dismantle Affirmative Action*, 71 Drake L. Rev. 323, 335–36 (2024) (discussing the role of experts in *SFFA v. Harvard*).

281 *See* Harpalani, *supra* note 280, at 328–30 (discussing evidence produced during the *SFFA v. Harvard* litigation).

tactics in that case to collect and assess specific admissions information about the box's impact on diverse applicants.

2. *Educational Necessity: Posing Broad Questions Unrelated to Campus Safety*

Assuming challengers could prove the existence of the box's disparate impact, colleges could still avoid Title VI liability by arguing that their use of the box advances important institutional interests.[282] In the employment context, courts have characterized this defense as requiring defendants to "present compelling evidence of business necessity" based on "some level of empirical proof that [the] challenged hiring criteria accurately predict[s] job performance."[283] Mapping this defense from employment law onto the educational context, courts have allowed schools to raise an "educational necessity" defense in Title VI cases, which they treat like Title VII's business necessity defense.[284]

To prove educational necessity, schools would have to explain why they must ask candidates about their past crimes and discipline. Surveys have repeatedly shown that colleges overwhelmingly point to campus safety as the top reason for posing such questions.[285] Less commonly cited rationales include "licensure" and a desire to "offer additional support to students."[286]

Challengers would have a hard time objecting to the basic merits of these goals. After all, maintaining safe campuses, helping students obtain professional licenses, and providing support to at-risk applicants are tasks that fall squarely within a school's educational mission.[287] But the educational necessity defense does not allow defendants to simply recite a list of important objectives; rather, defendants must show why the impact-causing practice—i.e., the box—actually helps advance those objectives.[288] On this point, colleges would struggle to explain how their sweeping use of the box assists with actually attaining these objectives.

As to the primary rationale—i.e., campus safety—colleges today ask a number of questions that have nothing to do with school security.

---

282 C.R. Div., U.S. Dep't of Just., Title VI Legal Manual § VII.C.2, Westlaw (database updated Apr. 2021) (outlining Title VI's educational necessity requirement).

283 NAACP v. N. Hudson Reg'l Fire & Rescue, 665 F.3d 464, 477 (3d Cir. 2011) (quoting El v. Se. Pa. Transp. Auth., 479 F.3d 232, 240 (3d Cir. 2007)).

284 Bd. of Educ. v. Harris, 444 U.S. 130, 151 (1979).

285 *See* Pierce et al., *supra* note 18, at 359.

286 *See* Castro et al., *supra* note 17, at 496–99 (reporting survey results of college administrators' rationales for using the box).

287 *See* Pierce et al., *supra* note 18, at 369–71 (examining reasons why colleges solicit criminal history information).

288 *See* Elston v. Talladega Cnty. Bd. of Educ., 997 F.2d 1394, 1412–13 (11th Cir. 1993) (requiring the defendant to prove that the challenged rule was "*necessary* to meeting a goal" (emphasis added)).

Far from limiting the scope of their questions to an applicant's past violent crimes, the vast majority of colleges also ask about juvenile offenses and nonviolent misdemeanors, which can include underage drinking, smoking marijuana, dog leash violations, and littering.[289] In light of the breadth of these questions, colleges cannot plausibly assert that campus safety depends on asking about such matters.

In addition to posing overly broad questions, the procedures that schools use to screen candidates cannot reliably ascertain the level of risk that candidates pose to college communities. Criminologists emphasize that a person's chance of recidivism declines over time to the point where many offenders pose no more danger to the public than anyone else.[290] Given the difficulty that even experts have with distinguishing between fully rehabilitated and potentially threatening prior offenders, admissions officers who lack formal threat assessment training are ill equipped to identify genuinely dangerous applicants.[291]

Despite this lack of expertise, a majority of surveyed colleges that ask about criminal histories report that their admissions officers receive *no* written guidelines on how to assess candidates' answers to these questions.[292] For example, a recent case study of screening procedures at a Midwest university found that admissions officers assessed an applicant's threat level by making subjective determinations about how "extreme" an offense was.[293] Given the murkiness of such inquiries, it should come as no surprise that studies have repeatedly failed to establish a causal link between criminal background questions and improved campus safety.[294]

Whereas the use of untrained officers and broad criminal history questions gives rise to concerns about overinclusiveness—the box flags

---

289 *See supra* Tables 1–2; Weissman et al., *supra* note 20, at 23, 34 (describing misdemeanors that "do not have any impact on public safety"); *States with Littering Penalties*, Nat'l Conf. of St. Legislatures (Mar. 21, 2022), https://www.ncsl.org/environment-and-natural-resources/states-with-littering-penalties [https://perma.cc/FER9-U7D7]; Jung, *supra* note 192, at 195 (discussing marijuana-related misdemeanors).

290 *See* Concepción, *supra* note 207, at 245–46, 246 n.128 (listing variables that affect recidivism rates).

291 *See* Darby Dickerson, *Background Checks in the University Admissions Process: An Overview of Legal and Policy Considerations*, 34 J. Coll. & U.L. 419, 484–85 (2008) (examining various challenges with "predicting future dangerousness").

292 *See* Bussey et al., *supra* note 2, at 59 (reporting survey results from colleges that collect criminal history information from applicants).

293 *See* Terrence S. McTier Jr., Kaleb L. Briscoe & Tiffany J. Davis, *College Administrators' Beliefs and Perceptions of College Students with Criminal Records*, 57 J. Student Affs. Rsch. & Prac. 296, 303–05 (2020).

294 *See* Weissman et al., *supra* note 20, at 6 ("[T]here is no statistically significant difference in the rate of campus crime between institutions of higher education that explore undergraduate applicants' disciplinary background and those that do not."); *see also* Castro et al., *supra* note 17, at 494, 496 tbl. 2 (reporting that most surveyed admissions officers support using the box).

too many candidates who pose no genuine risk—current admissions procedures create problems of underinclusiveness as well. Relying entirely on candidate self-disclosure, the vast majority of colleges fail to confirm that applicants who check "no" actually have clean records.[295] Under this honor system, schools therefore identify only those candidates who honestly admit to their offenses. By definition, this system will fail to spot dangerous applicants who simply decline to reveal their criminal backgrounds. Indeed, a recent phenomenological study of graduate students with criminal histories found that many chose not to disclose their records on their admissions forms.[296] Aware that disclosure would immediately give rise to bureaucratic and costly institutional barriers, these students made the rational choice to not check the box.[297] But if the goal of criminal history questions is to ensure campus safety, current admissions practices demonstrably fail to serve that end.

Given that Title VI places the burden of proving educational necessity on schools,[298] colleges cannot argue that their background questions "might" make campuses safer. Courts have rejected "bare or 'common-sense'-based assertions of business necessity."[299] Instead, colleges must show a "manifest demonstrable relationship"[300] between the challenged policy and the identified goal. In other words, the impact-causing practice must actually be necessary.[301] In light of these demanding standards and the lack of evidence connecting the box to improvements in campus safety,[302] colleges cannot credibly claim that educational necessity depends on requiring candidates to disclose instances of high school discipline and minor misdemeanors.

To the extent that schools can justify certain questions about safety-sensitive matters (e.g., violent felony convictions) or other legitimate institutional concerns (e.g., licensure or student services), the following Section explains how schools can achieve those objectives by posing tailored questions to candidates after they have received conditional admissions offers. In fact, because Title VI requires colleges to discard impact-causing practices in favor of equally effective,

---

295 *See* Stewart & Uggen, *supra* note 21, at 161 (noting that "nearly all" colleges relied on voluntary disclosures and that schools "usually only verified affirmative criminal history responses").

296 *See* McTier, *supra* note 21, at 1429–31 (considering the ways that students navigated institutional barriers by choosing if and when to disclose their criminal records).

297 *See id.*

298 Bd. of Educ. v. Harris, 444 U.S. 130, 151 (1979).

299 El v. Se. Pa. Transp. Auth., 479 F.3d 232, 240 (3d Cir. 2007).

300 Ga. State Conf. of Branches of NAACP v. Georgia, 775 F.2d 1403, 1418 (11th Cir. 1985) (citing Dothard v. Rawlinson, 433 U.S. 321, 331 n.14 (1977)).

301 NAACP v. N. Hudson Reg'l Fire & Rescue, 665 F.3d 464, 477 (3d Cir. 2011); *see also* Elston v. Talladega Cnty. Bd. of Educ., 997 F.2d 1394, 1412–13 (11th Cir. 1993) (defining the standards schools must satisfy to establish educational necessity).

302 *See supra* notes 288–99 and accompanying text.

less discriminatory alternatives—even if the challenged practices are an educational necessity—failure to delay the box constitutes another unlawful discriminatory act.[303]

3. Policy Alternative: Conditional Admission Without the Box

Even if schools could somehow prove that certain mandatory disclosures advanced important institutional interests, Title VI still holds colleges liable when they fail to adopt an "equally effective alternative practice which results in less racial disproportionality."[304] The Supreme Court has listed "other tests or selection devices" as examples of such "alternative selection procedures" or practices.[305] Colleges today could easily modify their mandatory disclosures in a number of ways, such as (1) delaying the box, (2) limiting the scope of questions after extending conditional admissions offers, and (3) training staff on how to interpret post-offer disclosures.[306]

First, colleges could delay posing questions about criminal histories until after extending conditional admissions offers to applicants. Rather than use boxes to screen out thousands of applicants, schools could limit their assessments to a much smaller pool of provisionally admitted candidates.[307] This more tailored analysis would preserve school resources while focusing targeted attention on the particular circumstances of admitted candidates.[308] Because the pool of flagged candidates would shift from applicants to admitted students, the number of people impacted by the box would shrink as well. Although racial disparities would likely persist in this smaller pool, the absolute number of identified applicants would decrease. In other words, by changing the focus of a school's criminal history screen from applicants to admits, colleges could reduce—though not eliminate—the box's discriminatory impact.

Second, after admitting candidates, colleges could send tailored questionnaires about prior offenses that directly relate to campus safety or other institutional concerns such as licensure. Because colleges have a legitimate interest in ensuring that candidates pose no unreasonable risk to the community, it would be unrealistic to expect institutions

303 *Elston*, 997 F.2d at 1407, 1413, 1421; *see also* Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (explaining how an employer's failure to utilize less discriminatory selection criteria can give rise to disparate impact liability).

304 *Ga. State Conf.*, 775 F.2d at 1417 (explaining how the disparate impact proof requirements of Title VI mirror Title VII's requirements).

305 *Albemarle Paper Co.*, 422 U.S. at 425, 436.

306 *See* Off. of Career, Tech., & Adult Educ., *supra* note 18, at 22–26 (recommending best practices for using criminal history questions in college admissions).

307 *See* Weissman et al., *supra* note 20, at 33 (discussing benefits of delaying the box).

308 *See id.*

to ignore information about a candidate's recent violent felony conviction, for example.[309] But, colleges today go far beyond posing such targeted queries.[310] Not only should schools narrow the topics covered in these questions; they should also limit such queries to actual convictions, rather than asking about violations from venues that lack robust due process protections.[311] As reported above, during the 2024–2025 admissions cycle, twenty-six percent of schools asked applicants about "charges" or "pending charges."[312] These questions are particularly likely to exacerbate racialized harms in light of the high rate at which people of color are surveilled, disciplined, policed, and arrested.[313] By eliminating those questions altogether, schools could substantially reduce the box's racialized effects.

Finally, colleges could train their staff on the best practices for identifying bona fide threats to campus safety.[314] Rather than having admissions personnel make subjective judgements about how "extreme" a crime was,[315] colleges could utilize evidence-based models to make informed decisions about each candidate's potential threat to the community.[316] Researchers in this area recommend considering the following: the nature of the candidate's crime, the length of time since the violation, and whether the candidate was a minor at the time of the offense, among other factors.[317] Given that over half of surveyed colleges provide *no* written guidelines to admissions officers on these matters, training staff on data-based methods for assessing risk would represent a marked improvement on current practices.[318] As to a college's legitimate concerns with matters not related to campus safety—e.g., licensure or student services—schools could easily convey this information to candidates after conditionally admitting them.[319] Given that the Supreme Court has required institutions to adopt "other tests

309 *See* Jung, *supra* note 192, at 187–88 (examining the reasons for posing narrow criminal history questions).

310 *See supra* Table 1 (finding all but two of the "top 100" universities that require disclosure of felonies also require disclosure of misdemeanors).

311 *See* Rips, *supra* note 24, at 278–80 (comparing state-level recommendations for banning the box and advocating for restrictions on required disclosures).

312 *See supra* Table 2; *infra* Appendix.

313 *See supra* notes 182–85 and accompanying text; *see also* Pierce et al., *supra* note 18, at 372 (critiquing background checks that include arrest history).

314 *See* Weissman et al., *supra* note 20, at 35–37.

315 *See supra* note 293 and accompanying text.

316 *See* Off. of Career, Tech., & Adult Educ., *supra* note 18, at 22–26.

317 *Id.* at 23; *see also* U.S. Equal Emp. Opportunity Comm'n, *supra* note 198, § V.B.9 (listing factors relevant to criminal history reviews).

318 *See* Bussey et al., *supra* note 2, at 59 (reporting that fewer than half of surveyed schools that collected criminal history information provided staff with written guidance).

319 *See id.* (discussing how colleges can provide career advising to candidates with criminal histories after they have received admissions offers).

or selection devices, without a similarly undesirable racial effect,"[320] even when the challenged policy is an "educational necessity,"[321] colleges should adopt the foregoing changes to reduce the box's racialized impacts.

IV. Contrasting Ban-the-Box Policies at Work and School

In addition to reducing liability risks, banning the box would align school policies with the attitudes of most students and faculty. Indeed, large segments of campus communities oppose the widespread use of criminal history screens.[322] For example, a recent survey of college students reported that nearly eighty percent of respondents disagreed with the proposition that an "individual[] should be denied admission to universities on the basis of possessing a criminal record."[323] Likewise, a recent assessment of faculty views at public universities showed broad support for admitting individuals with criminal records.[324] Given these sentiments, large college constituencies appear ready to support admissions reforms that can help reduce stigma and foster inclusion among underrepresented groups.[325]

Fortunately, college administrators who seek to curb their institution's use of the box can learn from workplace ban-the-box rules. Just as employers have spent decades defending the box in court, states have spent decades passing regulations to remove boxes from employment applications.[326] Since Hawaii first enacted a workplace ban-the-box law in 1998, a total of thirty-seven states now require employers to refrain from asking criminal history questions on job applications.[327] Although these jurisdictions differ in their specific approaches, they all proceed from the same basic assumption that giving candidates with criminal

---

320 *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975).

321 *See* Elston v. Talladega Cnty. Bd. of Educ., 997 F.2d 1394, 1413 (11th Cir. 1993).

322 *See* Alexander L. Burton, Haley N. Puddy, Sunmin Hong, Velmer S. Burton Jr. & William T. Miller, *College Students' Attitudes Toward Denying Admission to Prospective Students with Criminal Records*, 23 J. Sch. Violence 71, 76 (2024); Molly Ott & Terrence McTier, *Should Students with Criminal Convictions Be Allowed to Participate in Higher Education? What Faculty Think*, Coll. & U., Winter 2021, at 57, 59 (reporting survey results on lack of faculty support for using the box, even when violent convictions are involved).

323 *See* Burton et al., *supra* note 322, at 78 (discussing disagreement between college students and administrators over the need to pose criminal history questions).

324 Ott & McTier, *supra* note 322, at 59 (outlining faculty sentiments on using the box).

325 *See* Burton et al., *supra* note 322, at 79 (discussing support for banning the box on campus by various groups).

326 *See* Rips, *supra* note 24, at 226–30 (summarizing the history of ban-the-box laws).

327 *See* Avery & Lu, *supra* note 32, at 9; *see also id.* at 9–28 (discussing differences among ban-the-box laws); Stewart J. D'Alessio, Lisa Stolzenberg & Jamie L. Flexon, *The Effect of Hawaii's Ban the Box Law on Repeat Offending*, 40 Am. J. Crim. Just. 336, 340–41 (2014) (summarizing the history of ban-the-box legislation).

histories a chance to sit down for interviews will improve their job prospects.[328]

Dismissing this optimistic projection, critics assert that ban-the-box rules impinge on employer autonomy by preventing firms from screening out dangerous candidates.[329] In addition, detractors point to the futility of banning the box because such restrictions simply delay the inevitable: Employers who cannot include boxes on their job applications will simply wait to discriminate against such candidates until later hiring stages.[330] Finally, critics charge that employers who lack information about an applicant's criminal history will fall back on biased assumptions about protected groups, thereby causing more discrimination against all diverse candidates whether they have criminal records or not.[331]

In sum, skeptics of workplace ban-the-box rules argue that these laws infringe on employer freedom while failing to actually expand workplace opportunities for diverse candidates. The applicability of these critiques to higher education can inform debates over banning the box in college admissions. After all, if banning the box in higher education yields the claimed unintended consequences of workplace bans, then school administrators will be less likely to adopt these changes and courts will be less likely to require them. In light of this uncertainty, the following Sections explain why critiques of workplace ban-the-box policies related to autonomy, futility, and counterproductivity lose much of their force when applied to ban-the-box policies in higher education.

A. Autonomy: Forcing Campuses to Accept Dangerous Applicants

Critics of banning the box at work claim that such policies expose companies to liability by forcing them to hire dangerous applicants with records.[332] According to this line of criticism, banning the box infringes on business autonomy by hampering employers' ability to make safe

---

328 *See* Amanda Agan & Sonja Starr, *Ban the Box, Criminal Records, and Racial Discrimination: A Field Experiment*, 133 Q.J. Econ. 191, 193 (2018) ("[Banning the box] seeks to help candidates with records to get their feet in the door."); Jennifer L. Doleac & Benjamin Hansen, *The Unintended Consequences of "Ban the Box": Statistical Discrimination and Employment Outcomes when Criminal Histories Are Hidden*, 38 J. Lab. Econ. 321, 323 (2020) (discussing the rationale for ban-the-box laws).

329 *See* Adriel Garcia, Comment, *The Kobayashi Maru of Ex-Offender Employment: Rewriting the Rules and Thinking Outside Current "Ban the Box" Legislation*, 85 Temp. L. Rev. 921, 923 (2013) (critiquing ban-the-box laws because "employers are placed in a no-win situation" between liability for hiring or not hiring ex-offenders).

330 *See* Schneider et al., *supra* note 31, at 776 (discussing the ways in which employers circumvented a ban-the-box rule).

331 *See* Agan & Starr, *supra* note 328, at 195; *supra* note 48 and accompanying text.

332 *See* Pettinato, *supra* note 33, at 843–44 (outlining employer liability concerns).

hiring decisions.[333] The tort of "negligent hiring" holds employers liable for failing to adequately screen applicants who end up harming third parties.[334] Even though courts have long recognized this cause of action, employers generally overestimate their actual legal exposure to such claims. A study of nearly every reported decision on negligent hiring found that the risk of liability was "virtually non-existent" for most companies, aside from a few safety-sensitive fields.[335]

Banning the box does not raise the already low risk of facing negligent hiring claims. States that enact such bans typically still allow employers to screen out candidates with criminal records *after* they have submitted their applications.[336] As such, to the extent that they face any exposure to negligent hiring suits, companies can practically eliminate that risk by interviewing candidates with criminal histories, making conditional job offers subject to background checks, and then revoking any offers to genuinely dangerous individuals.[337] Although an employer's ability to rescind conditional offers raises serious questions about the futility of banning the box,[338] the bans themselves do not infringe on employers' autonomy to reject unsafe candidates.

Autonomy-based critiques carry even less weight in the context of college admissions. Whereas the tort of "negligent hiring" in employment is rare, the tort of "negligent admission" in higher education is even rarer.[339] Among the few reported decisions in this area,

---

333 Carrie Valdez, Note, *Hands-Tied Hiring: How the EEOC's Individualized Assessment Is Taking Discretion Away from Employers' Use of Criminal Background Checks*, 63 Clev. St. L. Rev. 541, 555, 560 (2015) (arguing that restrictions on criminal background checks increase employers' exposure to negligent hiring claims).

334 *See, e.g.*, Bouchard v. N.Y. Archdiocese, 719 F. Supp. 2d 255, 261 (S.D.N.Y. 2010) (defining the tort of negligent hiring); Fuller v. Biggs, 532 F. Supp. 3d 371, 380 (N.D. Tex. 2021) (characterizing the tort of negligent hiring as one of direct liability).

335 Lewis Maltby & Roberta Meyers Douglas, Legal Action Ctr., Second Chance Employment: Addressing Concerns About Negligent Hiring Liability 5 (2023) (listing job categories associated with increased legal exposure to negligent hiring claims such as those that involve inherent safety risks and duties to others).

336 *See* Schneider et al., *supra* note 31, at 752 n.1 (explaining how and when typical ban-the-box laws permit inquiries into criminal history).

337 *See* Shimizu, *supra* note 7, at 234–35 (discussing how workplace ban-the-box policies "delay an employer's inquiry into an applicant's criminal record" but still allow review after an offer has been made, even in the most stringent jurisdictions).

338 *See infra* Section IV.B (considering futility critiques of ban-the-box policies).

339 *See* Estate of Butler v. Maharishi Univ. of Mgmt., 589 F. Supp. 2d 1150, 1167–70 (S.D. Iowa 2008); Brett A. Sokolow, W. Scott Lewis, James A. Keller & Audrey Daly, *College and University Liability for Violent Campus Attacks*, 34 J. Coll. & U.L. 319, 325–35 (2008) (examining theories of liability for campus violence); *id.* at 325 n.46 ("Generally, a college or university is under no duty to inquire or seek out information to identify potentially dangerous individuals."). *See generally* Cori Smith, Comment, *The Civil Rights Approach to University Negligence Liability Arising Out of Student-on-Student Misconduct*, 126 Penn. St. L. Rev. 243 (2021) (examining theories of liability for campus violence).

discussed below, courts have almost universally deferred to college administrators' decisions to admit candidates with records, except in the most egregious circumstances.[340] As such, even assuming that restricting the box would force schools to admit more candidates with criminal histories and thereby impinge on their autonomy, this would not meaningfully increase negligent admissions claims due to the deference colleges already enjoy in this area.

Consider, for example, the decision in *Korellas v. Ohio State University*.[341] In that case, a food delivery driver sued Ohio State University for negligently admitting a football player who assaulted the plaintiff-driver on campus.[342] Dismissing the case, the *Korellas* court stated that regardless of whether Ohio State had known about the football player's outstanding arrest warrant at the time of admission, the assault "was not foreseeable and that, accordingly, [Ohio State] had no duty to protect against what it could not reasonably foresee."[343] Likewise, in *Eiseman v. State*,[344] a New York court absolved a public college in New York of liability for admitting an applicant who later murdered another student.[345] Noting that the school had admitted the perpetrator under a special program for convicted students,[346] the *Eiseman* court held that the college had no duty to closely monitor the student once he arrived on campus.[347]

In contrast to most cases that have not held colleges liable for negligent admission, at least one court has actually scrutinized a school's admission of a candidate with a criminal history. In *Estate of Butler v. Maharishi University of Management*,[348] a federal court in Iowa evaluated claims brought by a murdered student's family against a university for negligently admitting a violent classmate.[349] Before the college accepted his application, the perpetrator had allegedly told an admissions officer about his prior offenses.[350] Once admitted, the student stabbed one classmate in the face, yet the school failed to notify police or campus security.[351] The violent student subsequently stabbed another classmate in the chest and killed him.[352] Reviewing the limited case

340 *See* Sokolow et al., *supra* note 339, at 325–35.
341 2004-Ohio-3817 (Ct. of Cl.).
342 *Id.* ¶¶ 2–3.
343 *Id.* ¶ 15.
344 511 N.E.2d 1128 (N.Y. 1987).
345 *Id.* at 1130.
346 *Id.* at 1131.
347 *Id.* at 1137.
348 589 F. Supp. 2d 1150 (S.D. Iowa 2008).
349 *Id.* at 1155.
350 *Id.* at 1168.
351 *Id.* at 1155.
352 *Id.*

law in this area, the *Butler* court assessed how other jurisdictions had required colleges to "take reasonable steps to protect against foreseeable acts of violence."[353] Because the record failed to indicate whether admissions officers had adequately investigated the perpetrator's "history of committing violent acts," the *Butler* court declined to dismiss the plaintiff's suit for negligent admission.[354]

In sum, courts generally do not hold schools liable for negligent admission absent extraordinary circumstances. In fairness, however, the paucity of decisions in this area does not fully answer the autonomy critique of ban-the-box rules. After all, critics might claim that so few negligent admissions cases exist precisely *because* colleges currently possess the autonomy to exclude risky candidates. Conversely, if banning the box were to constrain that autonomy, then such a shift could theoretically expose schools to numerous legal claims related to foreseeable or known harms to the campus community.[355]

Fortunately, though, implementation of ban-the-box rules would not impinge on a school's ability to continue rejecting candidates who pose bona fide, foreseeable threats. Even the strictest ban-the-box policies allow institutions to ask candidates about serious criminal convictions and, accordingly, rescind conditional offers.[356] To the extent that such bans might preclude schools from ever asking about less serious matters such as nonviolent juvenile histories, sealed records, or other minor offenses, courts have refused to hold defendants liable for failing to gather information that they could not legally access.[357] In sum, just as ban-the-box rules do not infringe on employer autonomy, colleges would still retain the freedom to exclude applicants after offering them

---

353 *Id.* at 1168 (quoting Sharkey v. Bd. of Regents of the Univ. of Neb., 615 N.W.2d 889, 902 (Neb. 2000)).

354 *Id.* at 1168–70.

355 A comprehensive analysis of legal theories that plaintiffs might assert against schools for admitting applicants with criminal histories is beyond the scope of this Article. Plaintiffs could conceivably claim that admitting an applicant with sexual assault convictions rises to the high standard of "deliberate indifference" to gender-based harms prohibited by Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–1688. *See* Williams v. Bd. of Regents of the Univ. Sys. of Ga., 477 F.3d 1282, 1296 (11th Cir. 2007) (finding the plaintiff adequately pled a "deliberate indifference" Title IX violation by university officials for recruiting and admitting a student with a long history of sexual violence without adequate supervision). Some courts might conclude that victims of on-campus violence are "tenant[s]," "invitee[s]," or share a "special relationship" with their school. *See* Oren R. Griffin, *Confronting the Evolving Safety and Security Challenge at Colleges and Universities*, 5 Pierce L. Rev. 413, 416–18 (2007); Sokolow et al., *supra* note 339, at 319–23; Theodore C. Stamatakos, Note, *The Doctrine of* In Loco Parentis*, Tort Liability and the Student-College Relationship*, 65 Ind. L.J. 471, 471–73 (1990) (examining the duty of care that colleges owe to students).

356 *See* Stewart & Uggen, *supra* note 21, at 163 (discussing how workplace ban-the-box laws delay disclosure of criminal history information).

357 *See* Dickerson, *supra* note 291, at 473–74 (examining the relationship between employer liability and ban-the-box laws).

conditional admission. Of course, maintaining this freedom raises a separate and distinct criticism: If colleges can still use safety rationales to rescind offers, do ban-the-box policies genuinely improve admissions outcomes for candidates with criminal histories?

B. *Futility: Circumventing the Ban*

Given that workplace ban-the-box laws still allow employers to reject applicants during later stages of hiring, detractors of these rules assert that many employers can simply wait to reject applicants with criminal histories.[358] In light of this opportunity to game the hiring process, prohibitions on the box might fail to meaningfully improve job opportunities for candidates with criminal backgrounds. Although many studies have shown that ban-the-box policies improve job prospects for applicants with records,[359] other research has shown that many employers respond to these restrictions by adopting symbolic measures of compliance or not complying at all.[360] For example, an examination of employers in Minnesota found that one in five businesses did not follow the state's ban-the-box law either because they did not know about the rule or because the consequences of noncompliance did not deter them.[361] Likewise, a study of California employers found that companies commonly used post-offer background checks to reject applicants.[362]

Despite evidence that some employers have found workarounds to these bans, factors unique to college admissions make such tactics less likely. In contrast to the job application process, college admissions decisions provide fewer opportunities for decision-makers to proffer subjective rationalizations that disguise their evasion of ban-the-box prohibitions.[363] For example, in reviewing written job applications, hiring managers tend to rely on inconsistent, subjective impressions of candidates.[364] Added to the subjectivity of hiring is the fact that hiring managers can still gather information about an applicant's criminal

---

358 *See* Doleac & Hansen, *supra* note 328, at 323–24 (summarizing futility critiques of employment ban-the-box policies).

359 *See* Shimizu, *supra* note 7, at 234 (listing reports that tend to show improved outcomes for job applicants with criminal histories after passage of ban-the-box legislation).

360 *See* Schneider et al., *supra* note 31, at 753–54 (examining employers' potential responses to ban-the-box laws).

361 *Id.* at 763 (explaining how some companies respond to ban-the-box rules by performing symbolic measures of compliance).

362 *See* Christopher Herring & Sandra Susan Smith, Inst. for Rsch. on Lab. and Emp., The Limits of Ban-the-Box Legislation 6 (2022).

363 *See* Stewart & Uggen, *supra* note 21, at 163 (explaining that college admissions typically involve a single admissions decision, in contrast to the multiple steps in hiring).

364 *See* Sarah Esther Lageson, Mike Vuolo & Christopher Uggen, *Legal Ambiguity in Managerial Assessments of Criminal Records*, 40 Law & Soc. Inquiry 175, 195–96 (2015) (examining factors that influence hiring decisions).

history, with or without ban-the-box rules in place. For example, such laws often allow employers to ask candidates about their criminal histories during interviews.[365] Given the vagaries of hiring and the chances to otherwise obtain a candidate's criminal history information, employers can get around bans by articulating benign reasons for rejecting applicants with records, such as "work readiness."[366]

Though college admissions determinations entail their own level of subjectivity, even "whole person" reviews of applicants tend to involve dry readings of application materials that reduce candidates down to a series of discrete attributes.[367] Such screens are far from objective, but they provide fewer opportunities than the hiring process for decision-makers to secretly gain criminal history information and then cover up their skirting of ban-the-box rules.

Not only would banning the box in college admissions focus the ex ante decision-making of university officials at the time that they review written applications; it would also be less susceptible to ex post manipulations. Recall that notwithstanding ban-the-box rules at work or at school, both employers and colleges can still rescind offers after learning about an applicant's offenses.[368] This loophole theoretically allows decision-makers to review application information without the box, provisionally hire or admit candidates, and then rescind their offers by relying on pretextual excuses.[369]

Whereas ban-the-box rules allow employers and colleges to back out of their conditional offers, the hiring process is more vulnerable to such avoidance. Employers who want to rescind job offers can list opaque reasons for the change, such as "gut feeling" or "fit," rather than honestly reveal the truth that a candidate's criminal record caused the revocation.[370] In contrast, college admissions decisions typically involve

---

365 *See* Stewart & Uggen, *supra* note 21, at 163.

366 *See* Shimizu, *supra* note 7, at 230 (discussing how employers make hiring decisions based on vague assessments).

367 *See* Bastedo et al., *supra* note 52, at 791–93 (discussing how "whole person" review involves "assigning ratings to personal characteristics"); Coleman & Keith, *supra* note 52, at 12–13 (outlining evaluative steps taken by admissions committees and emphasizing the value of "ratings scales," "decision indices," and "consistency in application of selection criteria").

368 *See* Off. of Career, Tech., & Adult Educ., *supra* note 18, at 22–25 (discussing the merits of delaying the box and then conducting an evidence-based assessment of narrowly tailored criminal history questions); *see also* Schneider et al., *supra* note 31, at 752 n.1 (explaining how ban-the-box policies defer mandatory disclosures until later stages of hiring).

369 *See, e.g.*, Cal. Gov't Code § 12952 (West 2026); Cal. Lab. Code § 432.7 (West 2026); Avery & Lu, *supra* note 32, at 9–28 (listing states that ban the box and whether they require employers to consider job relatedness).

370 *See* Schneider et al., *supra* note 31, at 776 (discussing subjective decision-making in hiring).

multiple readers who are guided by shared admissions criteria.[371] As such, once schools provisionally admit candidates, they would find it tougher to manufacture reasons for rescinding offers, given that schools document their original admissions recommendations and multiple admissions officers contribute to those recommendations.[372] In light of these structural differences between college admissions and hiring, schools are less likely to exploit the loopholes of ban-the-box rules.

C. Counterproductivity: Unintentionally Encouraging Race Discrimination

In addition to raising futility and autonomy concerns, critics assert that workplace ban-the-box rules actually disadvantage diverse applicants. According to this critique, employers deprived of information about an applicant's criminal history will resort to using race as a proxy for criminality.[373] Researchers call this "statistical discrimination" because employers assume that certain racial and ethnic groups are statistically more likely to commit crimes.[374] This form of discrimination potentially harms every member of a protected group, including those without criminal records.[375]

To examine whether banning the box leads to statistical discrimination, researchers Amanda Agan and Sonja Starr conducted a correspondence study of employers in New Jersey and New York City around the time that each jurisdiction enacted ban-the-box laws.[376] Prior to those rules taking effect, Agan and Starr sent 15,000 applications on behalf of nearly identical fictitious job seekers who posed as young men of different races.[377] They then repeated the exercise several months after the jurisdictions' ban-the-box laws took effect.[378] Comparing the percentage of employers who invited the candidates to interview, Agan and Starr found that the gap between the callback rates of white and Black candidates grew significantly after ban-the-box rules became law. Whereas the difference between the two groups' callback rates was only seven percent before banning the box, the gap jumped to forty-three

---

371 *See* COLEMAN & KEITH, *supra* note 52, at 12–13 (examining various steps in the admissions review process).

372 *See id.*

373 *See* Doleac & Hansen, *supra* note 328, at 328–29 (discussing research on whether the box causes statistical discrimination against Black applicants).

374 *Id.* at 322–23; *see also* Anya E.R. Prince & Daniel Schwarcz, *Proxy Discrimination in the Age of Artificial Intelligence and Big Data*, 105 IOWA L. REV. 1257, 1269–71 (2020) (discussing "rational" discrimination and proxy discrimination).

375 Doleac & Hansen, *supra* note 328, at 324.

376 Agan & Starr, *supra* note 328, at 197–202 (describing the field experiment's methodology).

377 *Id.* at 192.

378 *Id.*

percent afterward.[379] Although the *gap* in callback rates between applicants grew, the *overall* callback rates actually increased for both Black and white candidates.[380] But because the *relative* callback rate for white candidates increased more than sixfold, Agan and Starr hypothesized that the white applicants' outsized improvement came "at the expense of another group that faces serious employment challenges: black men."[381]

Two years after Agan and Starr reported these findings, Jennifer Doleac and Benjamin Hansen examined hiring outcomes for young, low-skilled Black and Latino male applicants before and after states banned the box.[382] Reviewing hiring data over a ten-year period and controlling for several confounding factors, the researchers reported that after passage of ban-the-box legislation, young, low-skilled Black men were 5.1% less likely to be employed and that young, low-skilled Latino men were 2.9% less likely to be employed.[383] Reviewing these results, Doleac and Hansen opined that "well-intentioned policies that remove information about racially imbalanced characteristics from job applications can do more harm than good for minority job seekers."[384]

Not all studies have yielded such disquieting results. In contrast to the foregoing reports, other scholars have found that ban-the-box laws caused only minimal or no harm to protected groups.[385] For example, a follow-up analysis of Doleac and Hansen's study criticized the findings for overestimating the racialized labor market effects of ban-the-box laws.[386] Given these conflicting results, further research is needed to determine whether ban-the-box laws actually increase the incidence of statistical discrimination.[387]

---

379 *Id.* at 195.

380 *Id.* at 203 tbl. 1.

381 *Id.* at 229.

382 Doleac & Hansen, *supra* note 328, at 324 (discussing statistical discrimination against applicants with criminal histories).

383 *Id.* at 324–25.

384 *Id.* at 329.

385 *See, e.g.*, Terry-Ann Craigie, *Ban the Box, Convictions, and Public Employment*, 58 Econ. Inquiry 425, 425–27, 441 (2020) (finding "no statistical discrimination against young low-skilled minority males"); Kihong Kim, Information Delay in Hiring: Ban-the-Box and Time-Varying Treatment Effects 23 (Jan. 13, 2023) (unpublished manuscript) (on file with author) ("Racial disparities in the wake of [ban-the-box] adoption may in turn decline over time."); *see also* Nat'l Emp. L. Project, Research Supports Fair Chance Policies 6–7 (2024) (discussing conflicting studies on the effects of ban-the-box legislation); Daniel Shoag & Stan Veuger, *Ban-the-Box Measures Help High-Crime Neighborhoods*, 64 J.L. & Econ. 85, 100–01 (2021) (finding that ban-the-box laws improved employment rates in studied high-crime neighborhoods).

386 *See* Anne Burton & David N. Wasser, *Revisiting the Unintended Consequences of Ban the Box*, J. Pub. Econ., Oct. 2025, at 1, 2.

387 *See id.* at 4 (concluding that estimates showing "unintended consequences of Ban-the-Box policies . . . are not as robust as previously believed").

Despite the possibility that workplace bans may unintentionally harm protected groups, practical differences between hiring and higher education lower the likelihood of statistical discrimination in college admissions. First, even with ban-the-box restrictions in place, the hiring process provides more opportunities for employers to ascertain the racial identities of candidates and, accordingly, engage in statistical discrimination. For example, federal law allows employers to ask applicants about their race.[388] In addition to posing direct questions about race, hiring managers might attempt to glean racial demographic information about candidates from interviews. Whereas employers typically conduct in-person interviews among finalists—giving them a chance to speculate about an applicant's racial identity—college admissions officers are less likely to physically interact with applicants.[389] This increased availability of race-related information in hiring—as compared to admissions—makes it easier for employers to use race as a proxy for criminality in jurisdictions that ban the box.

To be sure, college administrators also can attempt to discover candidates' racial identities and, accordingly, statistically discriminate. For example, a few colleges still require live interviews, and some allow candidates to include videos of themselves with their applications.[390] Admissions officers might also attempt to ascertain racial demographic information from application essays. Even though schools can no longer act upon explicit race-conscious admissions policies, the Supreme Court has said that admissions officers can still assess the individualized role that race and racism played in an applicant's life.[391] Given these other avenues for learning about an applicant's racial identity, a determined admissions officer who lacked access to criminal history information could theoretically engage in statistical discrimination against diverse applicants.

Notwithstanding concerns that ban-the-box policies could lead to statistical discrimination, initial research on this topic suggests that college officials are less likely to engage in conscious and unconscious

---

388 *Race/Color Discrimination—FAQs*, U.S. Equal Emp. Opportunity Comm'n, https://www.eeoc.gov/youth/racecolor-discrimination-faqs [https://perma.cc/NM7N-M78P] (last visited Jan. 3, 2026) ("Federal law does not prohibit employers from asking you about your race.").

389 *See* A.R. Cabral, *Are College Admissions Interviews Required?*, U.S. News & World Rep. (Sep. 25, 2024, at 08:00 ET), https://www.usnews.com/education/best-colleges/articles/are-college-admissions-interviews-required [https://perma.cc/A4AV-R98S] (reporting that seventy-two percent of colleges "neither recommend nor require admissions interviews").

390 *See id.*; Jane Karr, *Application Upload: Your Voice via Video*, N.Y. Times (Nov. 1, 2013), https://www.nytimes.com/2013/11/03/education/edlife/application-upload-your-voice-via-video.html [https://perma.cc/44NS-3TVN].

391 *SFFA v. Harvard*, 600 U.S. 181, 230 (2023) (allowing for consideration of "how race affected [the applicant's] life, be it through discrimination, inspiration, or otherwise").

acts of bias against diverse applicants as compared to employers.[392] In the employment realm, a number of audit studies have shown that race plays a large role in the minds of many hiring managers.[393] Although the same discriminatory impulses can certainly creep into colleges admissions,[394] a move toward statistical discrimination in higher education would represent a radical shift away from currently articulated institutional goals. Indeed, many colleges publicly express their commitment to enrolling diverse classes every year.[395] Given these declarations, it seems unlikely that banning the box would cause schools to abandon these goals and suddenly use race as a proxy for criminality when making admissions decisions.[396] In contrast to employment—in which some reports show that statistical discrimination increased after jurisdictions banned the box—researchers have yet to find any evidence that striking the box from college applications actually harms applicants of color.[397] In light of these differences, critiques from employment law about the unintended consequences of banning the box hold less weight in the context of college admissions.

Conclusion

Colleges continue to embrace the box despite the racialized repercussions of doing so. As the dataset reported here shows, most schools require applicants to disclose both serious felonies and minor offenses that have nothing to do with campus safety, including misdemeanors, school disciplinary actions, and juvenile records. Given that people of color are disciplined and prosecuted at higher rates, any admissions system that depends on the box will disproportionately harm diverse candidates.

The box's persistence occurs at a time when schools are still grappling with the consequences of the Supreme Court's recent ban on

---

392 *See* Stewart & Uggen, *supra* note 21, at 179 ("Relative to employment audits, we find far less overall racial discrimination in college admissions decisions . . . .").

393 *See, e.g.*, Cunningham-Parmeter, *supra* note 35, at 112–13 (discussing research showing that employers are more likely to call back diverse candidates if they "whiten[]" their resumes); Devah Pager, *The Use of Field Experiments for Studies of Employment Discrimination: Contributions, Critiques, and Directions for the Future*, 609 Annals Am. Acad. Pol. & Soc. Sci. 104, 112–13 (2007); *see also* Charles A. Sullivan, *Tortifying Employment Discrimination*, 92 B.U. L. Rev. 1431, 1470–71 (2012) (summarizing results from field studies showing racial bias in hiring).

394 *See* Ted Thornhill, *We Want Black Students, Just Not You: How White Admissions Counselors Screen Black Prospective Students*, 5 Socio. Race & Ethnicity 456, 456, 464–66 (2019) (reporting audit study results on preferences of admissions officers for "deracialized" Black candidates).

395 *See* Scott-Clayton, *supra* note 48 (distinguishing critiques of workplace ban-the-box policies from the higher education context).

396 *Id.*

397 *See* Stewart & Uggen, *supra* note 21, at 179; *see also* Johnson et al., *supra* note 46, at 725 (calling for more research on the race-based effects of banning the box in higher education).

race-based affirmative action in admissions.[398] Early data on the ramifications of that ruling reveal troubling signs: The first applicant cohort admitted to selective colleges since the Court's decision exhibited the largest percentage drop of Black and Latino students since 2010.[399] Juxtaposed against this fallout, the proliferation of criminal history boxes represents a particularly stark reminder of ongoing barriers to access in higher education.

Colleges can do better. Rather than reinforce the collateral consequences of conviction, schools could admit more candidates with criminal histories and create more pathways for underrepresented groups. Such a move would reduce a school's legal exposure while advancing oft-cited values of inclusivity. Namely, banning the box would expand educational opportunities, foster belonging, and genuinely enhance equity in higher education.

398 *See SFFA v. Harvard*, 600 U.S. 181, 214, 217–18 (2023).

399 *See* Aatish Bhatia, Ben Blatt, Francesca Paris, Alicia Parlapiano & Eve Washington, *What Happened to Enrollment at Top Colleges After Affirmative Action Ended*, N.Y. Times (Jan. 15, 2025), https://www.nytimes.com/interactive/2025/01/15/upshot/college-enrollment-race.html [https://perma.cc/QBF7-JXC4] (reporting on the racial demographics of classes admitted after *SFFA v. Harvard*).

APPENDIX. SCHOOL-SPECIFIC MANDATORY DISCLOSURES: TOP 100 NATIONAL UNIVERSITIES, 2024–2025

Yes or Requires Disclosure	■	**No or Does Not Require Disclosure**	

School	**Ban-the-Box Jurisdiction**	**Common App**	**High School Discipline**	**Juvenile Adjudications**	**Expunged Records**	**Arrests**	**Misdemeanors**	**Felonies**	**Criminal Charges**
American University		■	■	■			■	■	
Baylor University		■	■	■	■		■	■	■
Binghamton University: SUNY	■	■	■						
Boston College		■	■	■			■	■	
Boston University		■	■	■	■		■	■	
Brandeis University		■	■	■	■		■	■	■
Brown University		■	■	■	■		■	■	
California Institute of Technology	■	■							
Carnegie Mellon University		■							
Case Western Reserve University		■	■	■			■	■	

Yes or Requires Disclosure	■	No or Does Not Require Disclosure	

School	Ban-the-Box Jurisdiction	Common App	High School Discipline	Juvenile Adjudications	Expunged Records	Arrests	Misdemeanors	Felonies	Criminal Charges
Clemson University		■	■	■	■		■	■	■
Colorado School of Mines	■	■	■	■	■		■	■	■
Columbia University		■	■	■			■	■	
Cornell University		■	■	■			■	■	
Dartmouth College		■	■	■			■	■	■
Drexel University		■	■	■			■	■	
Duke University		■	■	■			■	■	
Emory University		■	■	■	■		■	■	
Florida International University		■	■	■			■	■	■
Florida State University		■	■	■			■	■	■
Fordham University		■	■	■			■	■	

Yes or Requires Disclosure	■	No or Does Not Require Disclosure	□

School	Ban-the-Box Jurisdiction	Common App	High School Discipline	Juvenile Adjudications	Expunged Records	Arrests	Misdemeanors	Felonies	Criminal Charges
George Washington University	□	■	■	■	□	□	■	■	□
Georgetown University	□	□	■	□	□	□	□	□	□
Georgia Institute of Technology	□	■	■	■	■	□	■	■	■
Gonzaga University	□	■	■	■	□	□	■	■	□
Harvard University	□	■	■	■	□	□	■	■	□
Indiana University: Bloomington	□	■	■	■	□	■	■	■	■
Johns Hopkins University	□	■	□	□	□	□	□	□	□
Lehigh University	□	■	■	■	□	□	■	■	□
Loyola Marymount University	■	■	□	□	□	□	□	□	□
Marquette University	□	■	■	■	■	□	□	■	□
Massachusetts Institute of Technology	□	□	■	□	□	□	□	□	□

Yes or Requires Disclosure	■	No or Does Not Require Disclosure	

School	Ban-the-Box Jurisdiction	Common App	High School Discipline	Juvenile Adjudications	Expunged Records	Arrests	Misdemeanors	Felonies	Criminal Charges
Michigan State University		■	■	■	■		■	■	■
New Jersey Institute of Technology		■							
New York University		■	■	■			■	■	
North Carolina State University: Raleigh		■	■	■			■	■	■
Northeastern University		■							
Northwestern University		■							
Pennsylvania State University: University Park		■							
Pepperdine University	■	■							
Princeton University		■	■	■	■		■	■	
Purdue University		■							

Yes or Requires Disclosure				■	**No or Does Not Require Disclosure**				
School	**Ban-the-Box Jurisdiction**	**Common App**	**High School Discipline**	**Juvenile Adjudications**	**Expunged Records**	**Arrests**	**Misdemeanors**	**Felonies**	**Criminal Charges**
Rensselaer Polytechnic Institute		■	■	■			■	■	
Rice University		■	■	■			■	■	
Rochester Institute of Technology		■	■	■			■	■	
Rutgers University: Camden		■	■						
Rutgers University: New Brunswick		■	■						
Rutgers University: Newark		■	■						
Santa Clara University	■	■	■	■			■	■	
Southern Methodist University		■	■	■	■		■	■	
Stanford University	■	■	■						
Stevens Institute of Technology		■	■	■			■	■	
Stony Brook University: SUNY	■	■	■						

Yes or Requires Disclosure	■	No or Does Not Require Disclosure	

School	Ban-the-Box Jurisdiction	Common App	High School Discipline	Juvenile Adjudications	Expunged Records	Arrests	Misdemeanors	Felonies	Criminal Charges
Syracuse University		■	■	■			■	■	
Temple University		■	■	■	■		■	■	
Texas A&M University: College Station		■			■		■	■	■
The Ohio State University		■							
Tufts University		■	■	■			■	■	
Tulane University		■	■	■			■	■	
UC Berkeley	■								
UC Davis	■								
UC Irvine	■								
UC Merced	■								
UC Riverside	■								

Yes or Requires Disclosure	■	**No or Does Not Require Disclosure**	

School	**Ban-the-Box Jurisdiction**	**Common App**	**High School Discipline**	**Juvenile Adjudications**	**Expunged Records**	**Arrests**	**Misdemeanors**	**Felonies**	**Criminal Charges**
UC San Diego	■								
UC Santa Barbara	■								
UC Santa Cruz	■								
UCLA	■								
University at Buffalo: SUNY	■	■	■						
University of Chicago		■	■	■			■	■	
University of Colorado Boulder	■	■	■	■			■	■	■
University of Connecticut		■	■						
University of Delaware	■	■	■						
University of Florida		■	■	■			■	■	■
University of Georgia		■	■	■	■		■	■	■

Yes or Requires Disclosure	■	No or Does Not Require Disclosure	□

School	Ban-the-Box Jurisdiction	Common App	High School Discipline	Juvenile Adjudications	Expunged Records	Arrests	Misdemeanors	Felonies	Criminal Charges
University of Illinois Chicago		■							
University of Illinois: Urbana-Champaign		■	■						
University of Iowa		■	■	■			■	■	■
University of Maryland: College Park	■	■	■						
University of Massachusetts: Amherst		■	■	■			■	■	
University of Miami		■	■	■			■	■	
University of Michigan: Ann Arbor		■	■	■				■	■
University of Minnesota: Twin Cities		■	■	■	■		■	■	■
University of North Carolina at Chapel Hill		■	■	■			■	■	■
University of Notre Dame		■	■	■			■	■	
University of Pennsylvania		■	■	■	■		■	■	

Yes or Requires Disclosure	■	No or Does Not Require Disclosure	

School	Ban-the-Box Jurisdiction	Common App	High School Discipline	Juvenile Adjudications	Expunged Records	Arrests	Misdemeanors	Felonies	Criminal Charges
University of Pittsburgh		■							
University of Rochester		■							
University of South Florida		■	■	■			■	■	■
University of Southern California	■	■	■						
University of Texas: Austin		■							
University of Virginia	■	■	■						
University of Washington	■	■							
University of Wisconsin: Madison		■							
Vanderbilt University		■							
Villanova University		■	■	■			■	■	
Virginia Tech	■	■	■						

Yes or Requires Disclosure					No or Does Not Require Disclosure				
School	**Ban-the-Box Jurisdiction**	**Common App**	**High School Discipline**	**Juvenile Adjudications**	**Expunged Records**	**Arrests**	**Misdemeanors**	**Felonies**	**Criminal Charges**
Wake Forest University									
Washington University in St. Louis									
William & Mary									
Worcester Polytechnic Institute									
Yale University									
Yeshiva University									