

BARS TO EDUCATION: THE USE OF CRIMINAL HISTORY INFORMATION IN COLLEGE ADMISSIONS

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One in four Americans has a record reflecting some form of involvement with the criminal justice system, and the law currently does very little to protect an individual from discriminatory treatment on the basis of that record. In 2010, the Center for Community Alternatives published a report that revealed a widespread practice among colleges and universities of obtaining and relying upon criminal history information in admissions proceedings. This Note asks whether, if this practice results in a racially disproportionate adverse impact on admissions decisions, there exists disparate impact liability that could be challenged by the Department of Education under Title VI of the Civil Rights Act. The Note begins by focusing on the well-documented overrepresentation of people of color in the criminal justice system and some of the post-incarceration social harms that affect this population. Next, the Note explores challenges to the use of criminal history information in the employment context—which has received much more attention than higher education—and how disparate impact frameworks in education cases have been used to challenge other practices that create disproportionate adverse effects. Finally, the Note describes the application of the disparate impact test to the practice at issue and concludes that if a prima facie case can be made, the purported educational necessity behind this practice can be achieved through less discriminatory means.

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I. INTRODUCTION

It was such a chilling effect. To think that I wanted to go to college and here, as I'm on my path to change my life, I'm still being asked these questions.

—Glenn Martin

Founder and President, JustLeadershipUSA (Incarcerated 6 years)¹

In this era of mass incarceration and tough-on-crime policies in the United States, it is becoming increasingly common for Americans to have some form of involvement with the criminal justice system. Records of this involvement can have serious implications for individuals even after they have completed their punishments. Legal scholars have extensively explored employers' use of such records in hiring decisions, and a small number of claims have been brought against this practice, with limited success.² An issue that has received less scholarly and legal attention is the prevalence of the use of criminal justice involvement screenings to inform admissions decisions for colleges and universities.³

When the Center for Community Alternatives conducted a survey of colleges and universities, a majority of the 273 respondents—sixty-six percent—reported that they collect criminal justice information from their applicants in admissions proceedings.⁴ Twenty-five percent of the responding schools reported that they impose an automatic bar to admission in at least some criminal-justice-related circumstances,⁵ and forty percent stated that they would not admit an applicant who is currently completing a term of community supervision.⁶ About thirty-three percent reported that pending misdemeanors or misdemeanor arrests can hurt an application, and eleven percent stated that they viewed “lesser-offense youthful offender adjudications” in a negative light.⁷ Based on this survey, the Center for Community Alternatives concluded that

screening of college applicants is becoming increasingly common; that people with criminal records are subjected to special admissions screening procedures; that college personnel other than admissions officials often participate in the admissions decision; that a wide range of criminal

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¹ Center for Community Alternatives, *Passport to the Future: Accessing Higher Education in an Era of Mass Incarceration*, VIMEO (2013), <http://vimeo.com/51358967>.

² See 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 (2012).

³ See CENTER FOR COMMUNITY ALTERNATIVES, *THE USE OF CRIMINAL HISTORY RECORDS IN COLLEGE ADMISSIONS: RECONSIDERED* (2010); CENTER FOR COMMUNITY ALTERNATIVES, *CLOSING THE DOORS TO HIGHER EDUCATION: ANOTHER COLLATERAL CONSEQUENCE OF A CRIMINAL CONVICTION* 4 (2008) (“Examples of state university systems that ask about criminal convictions include North Carolina, Florida and New York”).

⁴ *Id.*

⁵ *Id.* at 17 (“Convictions for a violent or sex offense are the most likely to trigger an automatic denial of admission”).

⁶ *Id.*

⁷ *Id.* at 18.

convictions and even arrests can negatively impact the admissions decision; that failure to disclose a conviction can result in rejection or expulsion; and that even after admission, students with records may be subject to special restrictions.⁸

Civil rights laws do not provide any special protection for people with criminal records, but the well-documented racial disparities within the criminal justice system create a close relationship between intentional discrimination against people with criminal justice involvement and unintentional discrimination on the basis of race.⁹ The potential legal vulnerability of this admissions practice is a race-based disparate impact claim under Title VI of the Civil Rights Act (which prohibits discrimination on the basis of race, color, or ethnicity by organizations receiving federal funding) brought by the Department of Education's (DOE) Office for Civil Rights.

This Note argues that colleges and universities that receive federal funding may be vulnerable to a race-based disparate impact claim under Title VI of the Civil Rights Act if they use records of applicants' criminal histories to inform admissions decisions. Part I draws the connection between intentional discrimination on the basis of criminal histories and unintentional discrimination on the basis of race. It explores the implications of the entrenched racial disparities within the criminal justice system as well as some of the myriad consequences of criminal justice system involvement and the role of education in overcoming their harmful effects. Part II begins with an overview of how the Equal Employment Opportunity Commission (EEOC) has used disparate impact claims under Title VII to challenge employment discrimination against people with criminal histories. The second half of Part II explores the DOE's ability to bring disparate impact claims through its Title VI authority in the context of higher education. Part III develops the disparate impact legal claim that could be brought if the DOE used the strategy that the EEOC has used in employment cases under Title VII to attack this discrimination in higher education under Title VI.

II. RACIAL IMPLICATIONS OF CRIMINAL HISTORY USE AND SOCIAL HARMS

A. The Era Of Mass Incarceration In The United States

The United States comprises just five percent of the world's population yet incarcerates almost twenty-five percent of the world's prisoners, more than any other country in the world.¹⁰ One in four adult Americans has a record reflecting some form of involvement with the criminal justice system.¹¹ Recidivism rates are as high as sixty percent, about three percent of the people in the country are under some form of correctional supervision, and black and Latino men are significantly overrepresented in prison populations.¹²

⁸ *Id.* at 21.

⁹ *Id.*; see also MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (The New Press 2012).

¹⁰ Walker Newell, *The Legacy of Nixon, Reagan, and Horton: How the Tough on Crime Movement Enabled a New Regime of Race-Influenced Employment Discrimination*, 15 BERKELEY J. AFR.-AM. L. & POL'Y 3, 4 (2013); DEFENDING JUSTICE, FACT SHEET: THE UNITED STATES VERSUS THE WORLD 1 (2010), available at <http://www.publiceye.org/defendingjustice/pdfs/factsheets/9-Fact%20Sheet%20-%20US%20vs%20World.pdf>; Center for Community Alternatives, *supra* note 1.

¹¹ MADELINE NEIGHLY & MARGARET STEVENSON, NAT'L. EMP'T. LAW PROJECT, *CRIMINAL RECORDS & EMPLOYMENT: DATA ON THE DISPROPORTIONATE IMPACT ON COMMUNITIES OF COLOR* (2009), available at <http://nelp.org/content/uploads/2015/03/CriminalRecordsImpactCommunitiesofColor.pdf>.

¹² See SUSAN STURM ET AL., *PATHWAYS OF POSSIBILITY: TRANSFORMING EDUCATION'S ROLE IN REENTRY* (2013), available at http://www.reentryeducationnetwork.org/uploads/1/2/5/3/12534585/pathways_conference_report.pdf; see also EDUCATION FROM THE INSIDE OUT, FACT SHEET: RESTORATION OF PELL GRANT ELIGIBILITY, available at http://www.eiocoalition.org/files/EIO_Pell-Grant-2013-Fact-Sheet_V4.pdf; THE PEW CTR. ON THE STATES, *ONE IN 100: BEHIND BARS IN AMERICA 2008* 6 (2008), available at http://www.pewtrusts.org/~media/legacy/uploadedfiles/wwwpewtrustsorg/reports/sentencing_and_corrections/on

Scholars and researchers have provided extensive documentation revealing that every stage of the criminal justice system is imbued with racial bias, whether deliberate or inadvertent.¹³ This disparity begins in schools and is perpetuated through racially-imbalanced policing practices and enforcement patterns, especially in the context of drug laws.

Young people of color are overrepresented in suspension rates and in-school arrest rates, dramatically increasing the likelihood that they will interact with more formal criminal justice systems in their futures; scholars have termed this phenomenon the “school-to-prison pipeline.”¹⁴ Students of color tend to be punished more often than their white peers,¹⁵ and the punishments tend to be more severe, even for minor or subjective offenses, such as “defiance of authority.”¹⁶ One example of racially disparate discipline in schools is the once-popular use of “zero tolerance” policies, which “deal out severe punishment for all offenses, no matter how minor, ostensibly in an effort to treat all offenders equally in the spirit of fairness and intolerance of rule-breaking.”¹⁷ Zero tolerance policies have been the target of criticism for a variety of reasons,¹⁸ including the disparate impact they have on students of color.¹⁹ The policies tend to be more prevalent in communities of color,²⁰ and studies have shown that black and Latino students are disciplined under these policies at higher rates than white students.²¹ Perhaps the most troubling aspect of zero-tolerance policies is that they transform

ein100pdf.pdf (analyzing data to show that 1 in 106 White men, 1 in 36 Hispanic men, and 1 in 15 Black men is behind bars).

¹³ See THE USE OF CRIMINAL HISTORY RECORDS, *supra* note 3, at 25; see also DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM (The New Press 1999); STEVEN KALOGERAS, ANNOTATED BIBLIOGRAPHY: RACIAL DISPARITIES IN THE CRIMINAL JUSTICE SYSTEM, THE SENTENCING PROJECT (2003); RICHARD C. DIETER, DEATH PENALTY INFO. CTR., THE DEATH PENALTY IN BLACK AND WHITE: WHO LIVES, WHO DIES, WHO DECIDES (1998); Andrew Golub, Bruce D. Johnson, & Eloise Dunlap, *The Race/Ethnicity Disparity in Misdemeanor Marijuana Arrests in New York City*, 6 CRIMINOLOGY & PUB. POL’Y 131 (2007); Ed A. Mufioz, David A. Lopez, & Eric Stewart, *Misdemeanor Sentencing Decisions: The Cumulative Disadvantage Effect of “Gringo Justice,”* 20 HISP. J. OF BEHAV. SCI. 298 (1998); David C. Baldus et al., *Racial Discrimination in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638 (1998).

¹⁴ See JOHANNA WALD & DANIEL J. LOSEN, DECONSTRUCTING THE SCHOOL-TO-PRISON PIPELINE: NEW DIRECTIONS FOR YOUTH DEVELOPMENT (Jossey-Bass 2003); see also RUSSELL J. SKIBA, ROBERT S. MICHAEL, & ABRA CARROLL NARDO, IND. EDUC. POL’Y CTR., THE COLOR OF DISCIPLINE: SOURCES OF RACIAL AND GENDER DISPROPORTIONALITY IN SCHOOL PUNISHMENT, POLICY RESEARCH REPORT #SRS1 (2000); Marsha Weisman, *The School-to-Prison Pipeline and Criminalizing Youth: Costs, Consequences, and Alternatives*, 6 THE LINK 6 (2008), available at <http://www.communityalternatives.org/pdf/thelink2008spring.pdf>.

¹⁵ See Adira Siman, *Challenging Zero Tolerance: Federal and State Legal Remedies for Students of Color*, 14 CORNELL J.L. & PUB. POL’Y 327, 333 (2005) (citing SKIBA ET AL., *supra* note 14, at 1-3).

¹⁶ *Id.* at 334 (citing THE ADVANCEMENT PROJECT & THE CIVIL RIGHTS PROJECT, HARVARD UNIV., OPPORTUNITIES SUSPENDED: THE DEVASTATING CONSEQUENCES OF ZERO TOLERANCE 9-13 (June 2000)).

¹⁷ Cherry Henault, *Zero Tolerance in Schools*, 30 J.L. & EDUC. 547, 547 (2001) (citing Russ Skiba & Reece Peterson, *The Dark Side of Zero Tolerance: Can Punishment Lead to Safe Schools?* 80 PHI DELTA KAPPAN 372, (1999)).

¹⁸ Siman, *supra* note 15, at 331 (“Many commentators and litigants express concern about the due process implications of zero tolerance policies. Another basis for criticism is the rigid application of policy that results in the discipline of students for seemingly harmless conduct. Anecdotal evidence of such events is plentiful. Schools have expelled or suspended students of all ages for possession of ‘weapons’ such as paper clips, nail files, and a toy ax used in a Halloween costume, drugs, including aspirin, midol, and white-out; and general misbehavior such as humming and tapping on a desk, which was classified as ‘defiance of authority.’”).

¹⁹ *Id.*; see also Henault, *supra* note 17; Avarita L. Hanson, *Have Zero Tolerance School Discipline Policies Turned into A Nightmare? The American Dream’s Promise of Equal Educational Opportunity Grounded in Brown v. Board of Education*, 9 U.C. DAVIS J. JUV. L. & POL’Y 289 (2005).

²⁰ *Id.*

²¹ See Henault, *supra* note 17, at 550 (“The Department of Education recently released figures showing that though African American children represent only 17% of public school enrollment nationally, they make up 32% of out-of-school suspensions. In contrast, white students, who make up 63% of the national enrollment, make up only 50% of the suspensions and 50% of the expulsions. Another recent study indicates that black children, especially black males,

schools “into conduits for the juvenile justice system,”²² as many schools “refer students to the criminal justice system” as part of their zero-tolerance program implementation.²³

Outside schools, heightened police activity in communities of color and racial profiling have led to more arrests for people of color and have exacerbated racial disparities in the criminal justice system.²⁴ Even as the percentage of white men in prisons has dropped in recent years,²⁵ the incarceration rate of black men continues to rise.²⁶ An estimated thirty percent of black men have a felony conviction, twelve percent between the ages of sixteen and thirty-four are incarcerated, and more than twenty-four percent are currently on probation or parole.²⁷ Black and Latino individuals are imprisoned at rates of 3,218 per 100,000 and 1,220 per 100,000, respectively, while white people are imprisoned at a rate of only 463 per 100,000.²⁸

The racialization of the criminal justice system is particularly prominent in the context of the disparate enforcement of drug laws, which contributes significantly to the overrepresentation of people of color in criminal justice statistics.²⁹ Human Rights Watch has reported soaring arrest rates for black Americans since the onset of the War on Drugs.³⁰ Sentencing disparities also account for a significant amount of drug-related criminal justice disparities among racial groups. In 1986, the U.S. Congress passed laws creating a 100 to 1 disparity in sentencing for the possession or trafficking of crack cocaine compared to trafficking—not possession—of powder cocaine.³¹ The law was motivated largely by public fervor and fear resulting from an extensive media campaign portraying crack as more dangerous and more addictive than powder cocaine,³²

receive more frequent and harsh discipline than any other minority group.”); Peter Follenweider, *Zero Tolerance: A Proper Definition*, 44 J. MARSHALL L. REV. 1107, 1119 (2011) (“Some educators further criticize ZTPs because of the disparate impact on minority students. One study shows that while African Americans make up over seventeen percent of the student population, they account for thirty-two percent of the suspensions and expulsions. Further, while white students make up sixty-three percent of the student population, they account for less than fifty percent of suspensions and expulsions. Some attorneys are convinced that racial profiling is a major factor when schools penalize students for nebulous offenses such as disrespect and defiance. The disparate impact is a direct result of school officials blindly applying ZTPs without giving consideration to the social and cultural differences at play within the student body.”) (internal citations omitted).

²² Siman, *supra* note 15, at 332.

²³ Follenweider, *supra* note 21, at 1120.

²⁴ See THE USE OF CRIMINAL HISTORY RECORDS, *supra* note 3, at 25; see also DELORES D. JONES-BROWN, THE SYSTEM IN BLACK AND WHITE: EXPLORING THE CONNECTIONS BETWEEN RACE, CRIME, AND JUSTICE (Michael W. Markowitz ed., 2000); ERIC T. SCHNEIDERMAN, NEW YORK STATE OFFICE OF THE ATTORNEY GENERAL, A REPORT ON ARRESTS ARISING FROM THE NEW YORK CITY POLICE DEPARTMENT’S STOP-AND-FRISK PRACTICES (New York State Attorney General Civil Rights Bureau 2013).

²⁵ BRUCE WESTERN, DAVID WEIMAN, & JEFFREY R. KLING, PRINCETON UNIV., THE LABOR MARKET CONSEQUENCES OF INCARCERATION (2001), available at <http://www.irs.princeton.edu/pubs/pdfs/450.pdf>.

²⁶ Newell, *supra* note 10, at 5.

²⁷ THE USE OF CRIMINAL HISTORY RECORDS, *supra* note 3, at 25; Christopher Uggen, Jeff Manza, & Melissa Thompson, *Citizenship, Democracy, and the Civic Reintegration of Criminal Offenders*, 605 ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI. 281 (2006); PAIGE M. HARRISON & ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, PRISONERS IN 2004 (2005), available at <http://www.bjs.gov/content/pub/pdf/p04.pdf>; LAUREN E. GLAZE & THOMAS P. BONCZAR, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, PROBATION AND PAROLE IN THE UNITED STATES, 2008 (2009), available at <http://www.bjs.gov/content/pub/pdf/ppus08.pdf>.

²⁸ Glaze & Bonczar, *supra* note 27.

²⁹ THE USE OF CRIMINAL HISTORY RECORDS, *supra* note 3, at 26 (“It is well documented that illegal drug use does not differ significantly for whites, blacks or Hispanics, yet 62 percent of people incarcerated for drug crimes are black. Recent research on marijuana possession arrests shows huge disparities as well.”) (internal citations omitted); see generally ALEXANDER, *supra* note 9.

³⁰ *Racially Disproportionate Drug Arrests*, HUMAN RIGHTS WATCH, <http://www.hrw.org/legacy/reports/2000/usa/Rcedrg00-05.htm> (last visited Mar. 17, 2014).

³¹ Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207.

³² ALEXANDER, *supra* note 9, at 52 (“In June 1986, *Newsweek* declared crack to be the biggest story since Vietnam/Watergate, and in August of that year, *Time* magazine termed crack ‘the issue of the year.’ Thousands of stories

though there is no empirical or scientific evidence supporting this characterization.³³ In 2010, President Obama signed a bill to reduce the disparity from 100 to 1 to 18 to 1.³⁴ While this reduction was an improvement, the imbalanced ratio continues to disproportionately impact people of color.³⁵ Furthermore, the issue of sentencing length, while important, does not address the lasting stigma of incarceration in all other aspects of a person's life.³⁶

Given the racial disparities in every aspect of the criminal justice system, some scholars have characterized the era of mass incarceration as a direct backlash against the racial progress of the Civil Rights Movement of the 1960s.³⁷ In this view, the criminal justice system is a modern tool for the subjugation of black people, not unlike slavery and the Jim Crow laws.³⁸ Researchers have found that white voters were instrumental in supporting the War on Drugs, especially white voters who demonstrated animosity toward people of color:

The War on Drugs proved popular among key white voters, particularly whites who remained resentful of black progress, civil rights enforcement, and affirmative action. Beginning in the 1970s, researchers found that racial attitudes—not crime rates or likelihood of victimization—are an important determinant of white support for “get tough on crime” and antiwelfare measures.³⁹

about the crack crisis flooded the airwaves and newsstands, and the stories had a clear racial subtext. The articles typically featured black ‘crack whores,’ ‘crack babies,’ and ‘gangbangers,’ reinforcing already prevalent racial stereotypes of black women as irresponsible, selfish ‘welfare queens,’ and black men as ‘predators’—part of an inferior and criminal subculture.” (citing Craig Reinerman & Harry Levine, *The Crack Attack: America's Latest Drug Scare, 1986-1992*, in *IMAGES OF ISSUES: TYPIFYING CONTEMPORARY SOCIAL PROBLEMS* 147 (Joel Best ed., 1995)).

³³ *Id.*

³⁴ Jim Abrams, *Congress Passes Bill to Reduce Disparity in Crack, Powder Cocaine Sentencing*, THE WASHINGTON POST, July 29, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/28/AR2010072802969.html> (“The bill also eliminates the five-year mandatory minimum for first-time possession of crack, the first time since the Nixon administration that Congress has repealed a mandatory minimum sentence. It does not apply retroactively. Eighty percent of those convicted of crack cocaine offenses are black. Under current law, possession of five grams of crack triggers a mandatory minimum five-year prison sentence. The same mandatory sentence applies to a person convicted of trafficking 500 grams of powder cocaine. The new legislation will apply the five-year term to someone with 28 grams, or an ounce, of crack.”).

³⁵ ALEXANDER, *supra* note 9, at 139 (“There should be no disparity—the ratio should be one-to-one.”).

³⁶ *Id.* (“[T]hat disparity is just the tip of the iceberg. . . . [T]his system depends primarily on the prison label, not prison time. What matters most is who gets swept into this system of control and then ushered into an undercaste. The legal rules adopted by the Supreme Court guarantee that those who find themselves locked up and permanently locked out due to the drug war are overwhelmingly black and brown.”).

³⁷ Newell, *supra* note 10, at 5; see also Loic Wacquant, *From Slavery to Mass Incarceration: Rethinking the ‘Race Question’ in the U.S.*, 13 NEW LEFT REV. 41, 41-42 (2002) (“[S]lavery and mass imprisonment are genealogically linked . . . one cannot understand the latter . . . without returning to the former as historic starting point and functional analogue.”); BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 4 (2006) (arguing that the modern trend of disparate and expanded incarceration of African Americans was a response to the racial unrest of the 1960s & 70s).

³⁸ Newell, *supra* note 10, at 10 (“Given the United States’ legacy of institutionalized racism, policies with significantly adverse effects on minority groups must be critically and closely examined. In this tradition, many analyses of the present day criminal justice system have identified its institutions as suspect. Loic Wacquant, a University of California sociologist, has argued that mass incarceration is the direct offspring of slavery and Jim Crow and cannot be understood without the context of this country’s history of subjugating African-Americans. A recent article by Dorothy Roberts, a professor at the Northwestern School of Law, similarly claims that the ‘U.S. criminal justice system has always functioned . . . to subordinate black people’ and that the system consciously ‘refashions past regimes of racial control to continue to sustain white supremacy.’ Other scholars, such as Bruce Western, a Princeton sociologist who has written extensively on incarceration, make less virulent claims about the history of today’s criminal justice regime. But even Western notes the effect that ‘anxieties and resentments of working class whites’ during the 1960s had on the policies behind the incarceration explosion.”) (internal citations omitted).

³⁹ ALEXANDER, *supra* note 9, at 54.

Due to the racial disparities within the criminal justice system, any policy that discriminates based on criminal history records will unavoidably have a race-based effect.⁴⁰ Some scholars decry the use of criminal records as a form of race-based discrimination, “serving the same function, albeit unintentionally, as the Black Codes and Jim Crow laws in earlier times.”⁴¹

B. Access To Higher Education Opportunities Is A Key Element In Successful Reentry

With the support of President Obama, the DOE has made education for people with criminal histories part of its policy agenda in furtherance of its goal that “by 2020 the US would again have the world’s highest proportion of college graduates and the most competitive workforce, and every American will complete at least one year of post-secondary education or training.”⁴² There is extensive evidence showing that education as a strategy for successful reentry is cost-effective, reduces recidivism better than any other type of intervention, reduces unemployment, and increases public safety by making people with criminal justice involvement more productive members of their communities.⁴³

People with criminal justice involvement face multiple barriers to higher education opportunities both inside and outside correctional facilities. In 1994, President Clinton signed the Violent Crime Control and Law Enforcement Act, which included a provision making incarcerated individuals ineligible to receive Pell Grants.⁴⁴ Following this enactment, most states also withdrew their financial support, ultimately reducing the number of college programs in correctional institutions nationwide from over 350 to eight.⁴⁵ Upon reentry, formerly-incarcerated individuals continue to face barriers to higher education opportunities.

Employment and housing are usually the primary priorities for people in reentry, and employment is often a requirement of parole.⁴⁶ For people with criminal histories, obtaining employment can be extremely difficult.⁴⁷ Education can seem comparably unimportant and unattainable. Financial and bureaucratic barriers to education exacerbate this problem. Applicants indicating that they have criminal justice system involvement are often required to provide complete criminal histories, authorizations for schools to access their records, and letters from their parole officers, whose helpfulness varies considerably on an individual level.⁴⁸ Combined

⁴⁰ THE USE OF CRIMINAL HISTORY RECORDS, *supra* note 3, at 25.

⁴¹ *Id.* at 4.

⁴² SUSAN STURM ET AL., *supra* note 12, at 8.

⁴³ EDUCATION FROM THE INSIDE OUT, *supra* note 12, at 1 (“For every dollar invested in correctional education programs, two dollars are saved through prevented recidivism”); Press Release, Dep’t of Justice, Justice and Education Departments Announce New Research Showing Prison Education Reduces Recidivism, Saves Money, Improves Employment (Aug. 22, 2013) (“Attorney General Eric Holder and Secretary of Education Arne Duncan today announced research findings showing that, on average, inmates who participated in correctional education programs had 43 percent lower odds of returning to prison than inmates who did not”); SUSAN STURM ET AL., *supra* note 12, at 3; Center for Community Alternatives, *supra* note 1 (“People who come into college from an experience of prison disproportionately participate in human services, community development, leadership, and public problem solving fields.”).

⁴⁴ Violent Crime Control and Law Enforcement Act, Pub. L. No. 103–322 § 20411 (1994) (“(a) IN GENERAL.— Section 401(b)(8) of the Higher Education Act of 1965 (20 U.S.C. 1070a(b)(8)) is amended to read as follows: ‘(8) No basic grant shall be awarded under this subpart to any individual who is incarcerated in any Federal or State penal institution.’”).

⁴⁵ EDUCATION FROM THE INSIDE OUT COALITION, POLICY BRIEF: RESTORATION OF PELL GRANT ELIGIBILITY, available at http://www.eiocoalition.org/files/EIO_Pell-Grant-2013-Policy-Brief_V4.pdf.

⁴⁶ THE USE OF CRIMINAL HISTORY RECORDS, *supra* note 3.

⁴⁷ Kimani Paul-Emile, *Beyond Title VII: Rethinking Race, Ex-Offender Status, and Employment Discrimination in the Information Age*, 100 VA. L. REV. 893, 913–14 (2014) (“Nine out of ten employers now inquire into the criminal history of job candidates, and research shows that the existence of a record can play a decisive role in the hiring process, reducing one’s chance of receiving a callback or job offer by almost 50%.”).

⁴⁸ Center for Community Alternatives, *supra* note 1.

with pressures to obtain employment and housing, these administrative barriers have a chilling effect on the matriculation rates of people with criminal records.⁴⁹

Finally, a number of schools impose at least some criminal-justice-related automatic bar to admission.⁵⁰ Fifteen percent of respondents to the survey administered by the Center for Community Alternatives reported that a negative recommendation from a campus security office could result in automatic denial of admission.⁵¹ An applicant who fails to disclose a criminal record that is later discovered is even more likely to be denied admission or to have his or her admission offer rescinded,⁵² and violent or sex offense convictions are the most likely to trigger automatic denial.⁵³ Some schools bar admission for people who are currently under any form of community supervision, such as parole or probation, which can sometimes extend five years, ten years, or the individual's entire lifetime.⁵⁴

III. CRIMINAL HISTORY RECORDS IN THE EMPLOYMENT CONTEXT AND DISPARATE IMPACT CLAIMS IN HIGHER EDUCATIONS

Higher education practices that disadvantage people with criminal histories have thus far not been subjected to legal review under the Civil Rights Act. If the DOE were to bring a claim against these practices, it could do so under Title VI, which provides that “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”⁵⁵ Such a lawsuit has never been attempted. *Employment* practices that disfavor individuals with criminal histories, however, have been legally challenged (by the EEOC), albeit with limited success. Employers are subject not to Title VI, but to Title VII of the Civil Rights Act, which provides, in part, that “It shall be an unlawful employment practice for an employer . . . to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin.”⁵⁶ The use of disparate impact claims against employment practices under Title VII provides a framework that could potentially translate to similar claims against federally-funded higher education institutions under Title VI.

A. The Use of Criminal Histories in Employment Decisions

Title VII of the Civil Rights Act explicitly provides that employers can violate the Act not only through practices that intentionally discriminate on the basis of race, color, religion, sex, or national origin, but also through practices that cause a disparate impact on one or more of those bases.⁵⁷ For example, an employer who engages in an employment practice that is facially race-neutral but nonetheless produces a disproportionate adverse effect on a particular racial group could be in violation of Title VII under a disparate impact claim.

⁴⁹ *Id.*

⁵⁰ THE USE OF CRIMINAL HISTORY RECORDS, *supra* note 3, at 17 (“It is noteworthy that a quarter of the schools that collect CJI from applicants report that they do not use that information as a basis for denying admission. Disclosure of a criminal record is more likely to trigger additional screening rather than automatic disqualification. Sixty-one percent report that they consider criminal justice information in the admissions decision, while *a quarter of the responding schools report that they have created at least some criminal justice-related automatic bar to admission.*”) (emphasis added).

⁵¹ *Id.* at 13.

⁵² THE USE OF CRIMINAL HISTORY RECORDS, *supra* note 3, at 19 (“Thirty-two percent of schools that consider criminal history information reported that they automatically deny admission to applicants who fail to disclose their criminal record and another 46 percent stated that they might deny admission.”).

⁵³ *Id.* at 17.

⁵⁴ *Id.* at 35 (“Barring college admission in such cases is therefore tantamount to a policy of blanket denial. Terms of supervision also vary depending on the nature of the criminal conviction.”).

⁵⁵ 42 U.S.C.A. § 2000d (West 1964).

⁵⁶ 42 U.S.C.A. § 2000e-2 (West 1964).

⁵⁷ 42 U.S.C.A. § 2000e-2(k) (West 1964).

“Recognizing the potential discriminatory consequences of pre-employment criminal background checks, the [EEOC] has had a longstanding position that criminal background check policies can have a disparate impact on racial minorities in violation of Title VII.”⁵⁸ The EEOC’s position is “that an employer’s policy or practice of excluding individuals from employment on the basis of their conviction records has an adverse impact on Blacks and Hispanics in light of statistics showing that they are convicted at a rate disproportionately greater than their representation in the population.”⁵⁹ That is, the EEOC holds that any such practice violates Title VII unless there is a demonstrated business necessity justifying the practice.⁶⁰

Because the EEOC is not a regulatory agency, it relies on courts to enforce its guidelines as law, and so far, judges have been reluctant to find employers liable under Title VII for using criminal history records to inform hiring decisions.⁶¹ The EEOC has brought a handful of Title VII disparate impact claims against employers who rely on criminal justice information as part of their hiring processes, with mixed success.⁶² Most recently, the United States District Court for the District of Maryland dismissed the EEOC’s action against an employer that engaged in this practice because the EEOC had failed to establish a prima facie disparate impact case.⁶³

Some courts have been willing to find liability under Title VII in cases of employers discriminating on the basis of criminal justice system involvement, especially when employers impose flat bans on hiring people with criminal histories or when arrest records are relied upon.⁶⁴ The Eighth Circuit notably took up the issue of absolute bans in the 1975 case of *Green v. Missouri Pacific Railroad Company* and held “that appellant-Green and all other blacks who have been summarily denied employment by MoPac on the basis of conviction records have been discriminated against on the basis of race in violation of Title VII and that the district court should enjoin MoPac’s practice of using convictions as an absolute bar to employment.”⁶⁵ The leading case in the question of reliance on arrest records is *Gregory v. Litton Systems*, holding that “any policy that disqualifies prospective employees because of having been arrested once, or more than once, discriminates in fact against [black] applicants.”⁶⁶

B. Disparate Impact Claims in Higher Education

Unlike Title VII, which explicitly provides for disparate impact claims, Title VI prohibits only intentional discrimination.⁶⁷ But the DOE has adopted regulations which prohibit practices that have the

⁵⁸ Concepción, *supra* note 2, at 239 (citing U.S. EQUAL EMP’T OPPORTUNITY COMM’N, EEOC POLICY STATEMENT ON THE ISSUE OF CONVICTION RECORDS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED, 42 U.S.C. § 2000e *et seq.*, available at <http://www.eeoc.gov/policy/docs/convict1.html>); U.S. EQUAL EMP’T OPPORTUNITY COMM’N, POLICY GUIDANCE ON THE CONSIDERATION OF ARREST RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED, 42 U.S.C. § 2000(e) (1990), available at http://www.eeoc.gov/policy/docs/arrest_records.html) (hereinafter EEOC POLICY STATEMENT).

⁵⁹ EEOC POLICY STATEMENT, *supra* note 58 (citing several EEOC decisions).

⁶⁰ *Id.*

⁶¹ Newell, *supra* note 10.

⁶² See Scott Thurm, *Employment Checks Fuel Race Complaints*, WALL ST. J., June 12, 2013, at A1.

⁶³ EEOC v. Freeman, 961 F. Supp. 2d 783 (D. Md. Aug. 9, 2013) (“As the agency responsible for investigating possible violations of the Act and enforcing anti-discrimination laws in the employment realm, the EEOC has brought this action against the Defendant, Freeman, alleging that it has implemented a hiring policy that, though facially neutral, has a discriminatory effect on African-American and male applicants.”)

⁶⁴ Newell, *supra* note 10, at 27; see also *Green v. Missouri Pac. R. Co.*, 523 F.2d 1290 (8th Cir. 1975); *Gregory v. Litton Sys.*, 316 F. Supp. 401, 403 (C.D. Cal. 1970), *modified*, 472 F.2d 631 (9th Cir. 1972); *Carter v. Gallagher*, 452 F.2d 315 (8th Cir. 1971) (holding that a conviction record cannot be an absolute bar to employment).

⁶⁵ *Green*, 523 F.2d at 1298-99.

⁶⁶ *Gregory*, 316 F. Supp. at 403.

⁶⁷ See *Alexander v. Sandoval*, 532 U.S. 275, 280 (2001).

“effect of” discriminating on the basis of race, color, or ethnicity.⁶⁸ The Supreme Court has never taken up the question of whether Title VI authorizes the DOE to enforce such disparate impact regulations. In the landmark 2001 case *Alexander v. Sandoval*, the Court held that private citizens may not bring disparate impact claims under Title VI.⁶⁹ The case had two major effects on civil rights litigation. First, it eliminated private right of action under Title VI, meaning that only federal government agencies are permitted to bring claims under its provisions. Second, it severely weakened disparate impact doctrine and strongly suggested that the Court will continue to disfavor such claims, even when they are brought by government agencies such as the DOE.⁷⁰

Some types of scholarship and admissions policies have however been subject to disparate impact claims brought by the DOE. For example, courts have struck down the use of standardized tests as the sole basis for awarding scholarship funds when there is sufficient evidence that women or students of a particular race or national origin achieve lower scores on average than male or white students.⁷¹ In *Sharif by Salabuddin v. New York State Education Department*,⁷² the United States District Court for the Southern District of New York “held that the use of standardized test scores in determining eligibility for scholarships violates Title IX if the use has a disparate impact on students of one sex and cannot be justified by educational necessity, regardless of whether the school system intended to discriminate against members of that sex.”⁷³ The court applied a burden-shifting framework similar to that used in Title VI cases (which will be discussed in Part III).⁷⁴

More recently, the NAACP Legal Defense and Educational Fund (NAACP LDF) filed a complaint with the DOE’s Office for Civil Rights alleging that eight prestigious public high schools in New York City are violating Title VI by basing their admissions decisions solely on eighth-grade students’ scores on a standardized achievement test.⁷⁵ The complaint argues that the test has a disparate impact on black and Latino applicants, who score lower on average than white and Asian students, and are therefore admitted to the high schools at lower rates.⁷⁶ The complaint further argues that the use of the test as the sole admission criterion is not justified by educational necessity because a student’s score on the test is not demonstrably predictive of their academic performance and success in high school.⁷⁷

IV. A DISPARATE IMPACT CLAIM UNDER TITLE VI OF THE CIVIL RIGHTS ACT

Because people of color are overrepresented in the criminal justice system, colleges and universities that receive federal funding may be liable under Title VI if they use criminal history records to inform admissions decisions, especially if they have policies that impose an absolute bar to admission or if they consider arrest records in their decisions.⁷⁸ Courts use a three-pronged burden-shifting framework to evaluate disparate

⁶⁸ *E.g.*, 34 C.F.R. § 100.3(b)(2) (Dept. of Education).

⁶⁹ *Alexander*, 532 U.S. 275.

⁷⁰ John R. Martin, *School Discipline and Disparate Impact*, 13 ENGAGE 30, 31 (2012).

⁷¹ *See* Elizabeth Abimbola Thomas, *Standardized Testing*, 3 GEO. J. GENDER & L. 481 (2002).

⁷² *Sharif v. N.Y. State Educ. Dep’t.*, 709 F. Supp. 345 (S.D.N.Y. 1989).

⁷³ Thomas, *supra* note 71, at 483. Thomas further suggested that a “prima facie case under Title IX [is] made when state scholarship board’s sole reliance on Scholastic Aptitude Test (SAT) scores to award scholarships disparately impacted female applicants, who had disproportionately lower scores, and state could rely instead on a combination of grade point averages and SAT scores, which achieved the same goal and was less discriminatory.” *Id.* at 483 n.10 (citing *Sharif*, 709 F. Supp. at 361-62) (.

⁷⁴ Thomas, *supra* note 71, at 483.

⁷⁵ Letter from Damon T. Hewitt, The NAACP Legal Defense and Educational Fund, to the Office for Civil Rights, U.S. Dep’t. of Educ. (Sept. 27, 2012) (on file with the NAACP Legal Defense and Educational Fund).

⁷⁶ *Id.* at 9.

⁷⁷ *Id.* at 16.

⁷⁸ *See* Darby Dickerson, *Background Checks in the University Admissions Process: An Overview of Legal and Policy Considerations*, 34 J.C. & U.L. 419, 456 (2008) (“background checks that include information related to arrests that did not lead to conviction have been shown to have a disparate impact on African Americans”); *id.* at 465 (“Colleges and universities should not ask for arrests that did not lead to conviction, other than arrests on pending charges, because using those records may lead to disparate impact claims based on race.”).

impact claims.⁷⁹ First, the plaintiff must establish a prima facie Title VI disparate impact case by showing that the practice in question has a disproportionately adverse effect on a particular racial or ethnic group.⁸⁰ Once the prima facie case is established, the burden shifts to the defendant, who must demonstrate that the policy is “required by educational necessity.”⁸¹ Finally, if the defendant shows that the policy is justified by educational necessity, the defendant can still be liable under Title VI if the plaintiff can show that there are alternative practices available that would serve that educational necessity with less of a racially disparate impact.⁸²

A. The Use of Criminal Histories in College Admissions Has a Disproportionate Adverse Effect on Black and Latino Applicants

To establish a prima facie disparate impact case against reliance on criminal justice information in admissions proceedings under Title VI, the DOE would need sufficient data showing that the use of criminal histories in college admissions has a disproportionate adverse effect on certain applicants of color. There is no “rigid mathematical threshold” for meeting this requirement.⁸³ Federal courts use “one of several forms of statistical analysis to reach reliable inferences about racial disparities in a population based on the performance of a particular sample,”⁸⁴ such as the “four-fifths” test borrowed from the employment discrimination context. Under the four-fifths test, evidence demonstrating that the selection rate for any minority group is less than four-fifths, or eighty percent, of the selection rate for the group with the highest rate is evidence of adverse impact.⁸⁵

In the employment context, courts have required that a plaintiff provide sufficient evidence that the employer’s policy of using criminal history records to inform hiring decisions does in fact have a disparate impact on racial minorities.⁸⁶ Some courts further require that the plaintiff show that there is a causal link between the employer’s policy and the racial disparity.⁸⁷ In *EEOC v. Freeman*, the court held that national statistics alone could not prove disparate impact, and that the EEOC needed to isolate a specific employment practice that had caused the alleged disparate impact.⁸⁸

⁷⁹ *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989).

⁸⁰ *Id.*; *See also* *Larry P. v. Riles* 793 F.2d 969, 982 (9th Cir. 1984); U.S. DEP’T OF JUSTICE, TITLE VI LEGAL MANUAL 49–50 (2001).

⁸¹ *Larry P.*, 793 F.2d at 982 & nn. 9–10.

⁸² *See* *Elston v. Talladega Cnty. Bd. of Educ.*, 997 F.2d 1394, 1407 (11th Cir. 1993); U.S. DEP’T OF JUSTICE, *supra* note 80.

⁸³ *Groves v. Alabama State Bd. of Educ.*, 776 F. Supp. 1518, 1526 (M.D. Ala. 1991) (citing *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994–95 (1988) (plurality)).

⁸⁴ *Id.* at 1527.

⁸⁵ *Id.* at 1526–27.

⁸⁶ Colleen K. Sanson, *Cause of Action for Violation of Title VII Resulting from Unlawful Criminal Background Checks*, 58 CAUSES OF ACTION 2D 567 (2013) (“The court in *Fletcher* held that the plaintiff failed to make the requisite showing. The plaintiff did not offer sufficient evidence that his employer’s alleged policy of terminating employees who had been convicted of sex offenses had a disparate impact on minorities. Therefore, the court granted the employer’s motion for summary judgment This case illustrates the importance of proof of a policy’s disparate impact to prevail on a disparate impact claim.”) (internal citations omitted); *Fletcher v. Berkowitz Oliver Williams Shaw & Eisenbrandt, LLP*, 537 F. Supp. 2d 1028 (W.D. Mo. 2008).

⁸⁷ Sanson, *supra* note 86 (“For example, in *Foxworth v. Pennsylvania State Police*, the plaintiff admitted on his application to be a police officer that, when he was 18, he had stolen money from his former employer. Because he was a first-time offender, the charges were dismissed and his criminal record was expunged after he successfully completed probation. However, the defendant applied its policy of automatically rejecting applicants who were involved in any criminal activity and did not offer him a position The plaintiff alleged that the policy violated Title VII and offered statistical evidence that the defendant’s employment of minorities had declined since the inception of the policy. The court noted that the plaintiff failed to demonstrate that the policy caused the decline in the employment of minorities. Based in part on this lack of evidence, the court granted the employer’s motion for summary judgment This case reveals the need for evidence of a causal link between the challenged policy and a disparity between the employment of minorities and non-minorities.”); *Foxworth v. Pennsylvania State Police*, 402 F. Supp. 2d 523 (E.D. Pa. 2005).

⁸⁸ *Freeman*, 961 F. Supp. 2d at 798–99.

One relevant inquiry involves examining the applicants that a given university denies on the basis of criminal history. If the pool of denied applicants contains significantly more black or Latino applicants than white ones, then some courts may treat that data as evidence of a racial disparity in admissions caused by reliance on criminal histories. This analysis would isolate the consideration of criminal histories as the relevant factor in the admissions decisions, potentially satisfying the standard in *EEOC v. Freeman*.⁸⁹ Given the well-documented racial disparities in arrest, conviction, and incarceration rates, it is likely that a racial disparity exists in the pool of college applicants denied admission on the basis of criminal history.⁹⁰

Additionally, some data suggest that consideration of criminal histories in admissions decisions exacerbates the racial disparities in higher education already caused by ex-offenders' ineligibility for or difficulty obtaining Pell Grants:

A GAO report determined that about 20,000 students each year were denied Pell Grants and 30,000-40,000 lost out on student loans because of this federal law. Wheelock and Uggen concluded, "Relative to Whites, racial and ethnic minorities are significantly more likely to be convicted of disqualifying drug offenses . . . and significantly more likely to require a Pell Grant to attend college. . . . It is therefore plausible that tens of thousands have been denied college funding solely on the basis of their conviction status." Thus, while screening of prospective college applicants for criminal records may appear to be race neutral, the racial disparities in the criminal justice system means this practice has the potential of having significant racially exclusionary effects.⁹¹

It may be easier to establish a *prima facie* case in the admissions context if the issue is narrowed to the use of arrest records to inform admissions decisions. Courts have been willing to find that reliance on arrest records alone necessarily results in unintentional racial discrimination.⁹² Further, arrest records are not reliable evidence of criminal behavior because "[u]nlike conviction records, which 'constitute reliable evidence that a person engaged in the conduct alleged since the criminal justice system required the highest degree of proof ('beyond a reasonable doubt') for a conviction . . . arrests alone are not reliable evidence that a person has actually committed a crime.'" ⁹³ By considering race as a relevant factor in admissions proceedings, schools may be remedying the adverse racial effects of considering criminal history in admissions proceedings—intentionally

⁸⁹ *Freeman*, 961 F. Supp. 2d. 783 (holding that the EEOC needed to isolate a specific employment practice that had caused the alleged disparate impact).

⁹⁰ For example, in the first admissions cycle (Fall 2006) in which the University of North Carolina employed its system-wide practice of conducting background checks on applicants whose applications raised red flags, 101 applicants were denied admission specifically because of the background checks. Mary Beth Marklein, *An Idea Whose Time Has Come?: Schools Increasingly Subjecting Applicants to Background Checks*, USA TODAY, Apr. 18, 2007, at 7D. It would likely be a relatively simple task to make an inquiry into the racial makeup of those 101 applicants and those similarly denied because of criminal history information in subsequent admissions cycles.

⁹¹ THE USE OF CRIMINAL HISTORY RECORDS, *supra* note 3, at 26 n.7 ("The use of a criminal record has already had an impact on the ability of low income students, many of whom are students of color, to get a college education. Until 2006, Section 484, Subsection (r) of the 1998 Amendments to the Higher Education Act of 1965 denied or delayed eligibility for financial aid to people with drug convictions.").

⁹² See, e.g., *Gregory*, 316 F. Supp. at 403.

⁹³ *Concepción*, *supra* note 2, at 241 (citing *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 241 (1957)) ("The mere fact that a [person] has been arrested has very little, if any, probative value in showing that he has engaged in misconduct.")).

or unintentionally.⁹⁴ The status of affirmative action in higher education is in a precarious state, with the Supreme Court weakening its earlier jurisprudence in the cases of *Fisher v. University of Texas* and *Schuette v. Coalition to Defend Affirmative Action*.⁹⁵ *Schuette* in particular poses a threat to affirmative action by constitutionally allowing states to prohibit its practice. If these race-based remedial policies are systematically eliminated in higher education, the racial effects of relying on applicants' criminal justice information to inform admissions decisions could become more measurably problematic.

B. The Use of Criminal Histories in College Admissions is Not an Educational Necessity

Assuming that a prima facie case is established, colleges and universities that receive federal funds and use criminal history records in admissions proceedings would need to demonstrate that the practice is "required by educational necessity."⁹⁶ Courts have broad discretion in defining the stringency of this requirement, "from a heightened deference to educational policy choices to virtually no deference to such policies."⁹⁷ In the context of reliance on standardized tests for admissions decisions, some courts have held that there must be a "manifest relationship" between the practice and the educational goal,⁹⁸ but at least one has held that a defendant fails to establish educational necessity "only if the evidence reflects that the test falls so far below acceptable and reasonable minimum standards that the test could not be reasonably understood to do what it purports to do."⁹⁹

The purported educational goal of screening applicants' criminal histories is to improve campus safety.¹⁰⁰ College campuses are generally very safe places, but a handful of high-profile, violent crimes has generated great concern about campus safety among parents and administrators. Since 1991, colleges and universities are required to track and report campus crime statistics under the Crime Awareness and Campus Security Act,¹⁰¹ commonly known as the Clery Act. The Clery Act was named after the victim of a brutal crime committed at Lehigh University.¹⁰² The Virginia Tech campus shooting also contributed to the safety-based justification for screening applicants for criminal histories.¹⁰³

⁹⁴ Affirmative action policies are those that seek to remedy the effects of past or current discrimination against a particular group, usually racial minorities or women. Affirmative action's primary purpose is anti-subordination, but it also is often presented as a means of promoting diversity in employment and education.

⁹⁵ *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013) (vacating and remanding lower court's ruling in favor of the university on the grounds that lower court did not determine that the program in question was narrowly tailored to a compelling state interest); *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623 (2014) (holding that states may legally prohibit affirmative action in public education, employment, and contracting).

⁹⁶ *Larry P.*, 793 F.2d at 982 & nn. 9-10.

⁹⁷ Jennifer C. Braceras, *Killing the Messenger: The Misuse of Disparate Impact Theory to Challenge High-Stakes Educational Tests*, 55 VAND. L. REV. 1111, 1193 (2002).

⁹⁸ See, e.g., *Ga. State Conference Branches of NAACP v. Georgia*, 775 F.2d 1403, 1418 (11th Cir. 1985) (requiring a "manifest demonstrable relationship" between the practice and the educational goal); *Larry P.*, 793 F.2d at 982 n.9 (holding that test must bear a "manifest relationship" to the educational goal); *Sharif*, 709 F. Supp. at 362 (S.D.N.Y. 1989) (requiring a "manifest relationship" between the challenged practice and the educational goal).

⁹⁹ *Richardson v. Lamar Cnty. Bd. of Educ.*, 729 F. Supp. 806, 822-23, 825 (M.D. Ala. 1989) (holding that Alabama's teacher certification test was not educationally necessary under Title VII because it failed to measure that which it claimed to measure).

¹⁰⁰ THE USE OF CRIMINAL HISTORY RECORDS, *supra* note 3.

¹⁰¹ Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, 20 U.S.C. § 1092(f) (1991) (hereinafter Clery Act).

¹⁰² THE USE OF CRIMINAL HISTORY RECORDS, *supra* note 3, at 5.

¹⁰³ *Id.* at 3. The Virginia Tech massacre was a shooting that took place on April 16, 2007 when a student shot and killed thirty-two people and wounded seventeen others before committing suicide.

Despite these fears, there is no evidence that screening applicants' criminal history records reduces campus crime or improves campus safety.¹⁰⁴ No study has established a link between having a criminal record and being more likely to commit crimes on campus.¹⁰⁵ Only one study has explored the correlation between criminal history screening and improved campus safety across multiple institutions, and the results revealed no connection between the two.¹⁰⁶ Clery Act reports indicate that college campuses are generally very safe places, and any crimes committed on campus are more likely to involve students with no criminal records.¹⁰⁷ In fact, both the Clery murder and the Virginia Tech massacre were perpetrated by students who had no criminal records when they were admitted.¹⁰⁸ The few college students who are victims of violent crimes are most often victimized off campus by strangers,¹⁰⁹ and inebriated students with no prior criminal records most often commit on-campus rapes and sexual assaults.¹¹⁰

Reverend Vivian Nixon, of College and Community Fellowship, claims, "The truth is that the person who chooses to enroll in school after incarceration is the *least* likely person to commit a crime on campus."¹¹¹ Following two on-campus student murders, a study at the University of North Carolina explored the extent to which students with criminal records commit crimes on campus and found that of all students involved in crime, only four percent had prior criminal records.¹¹² Moreover, most research and media reports on violent campus crimes contain no mention of criminal records, which suggests that students with criminal histories do not pose a particular threat to the rest of the student body.¹¹³ The logic of viewing applicants with criminal

¹⁰⁴ THE USE OF CRIMINAL HISTORY RECORDS, *supra* note 3.

¹⁰⁵ *Id.* at 32.

¹⁰⁶ *Id.* at 6; Malgorzata J. V. Olszewska, Undergraduate Admission Application as a Campus Crime Mitigation Measure: Disclosure of Applicants' Disciplinary Background Information and Its Relation to Campus Crime (2007) (unpublished dissertation for the degree of Doctor of Education, East Carolina University) (finding no statistically significant difference in the rate of campus crime between higher education institutions that collect and use applicants' disciplinary background information and those that do not).

¹⁰⁷ THE USE OF CRIMINAL HISTORY RECORDS, *supra* note 3, at 5.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* ("According to the U.S. Department of Education the overall rate of criminal homicide at colleges and universities was .07 per 100,000 students compared to a rate of 14.1 per 100,000 young adults in society-at-large. This means that college students are 200 times less likely to be the victim of a homicide than their non-student counterparts. Rape and sexual assault are the only crimes showing no statistical differences between college students and non-students; these crimes are most often committed at campus parties by inebriated students who have no prior criminal records. The U.S. Department of Education concluded that 'students on the campuses of post-secondary institutions [are] significantly safer than the nation as a whole.'") (internal citations omitted); CLOSING THE DOORS TO HIGHER EDUCATION, *supra* note 3, at 3 ("An examination of crimes committed on campus as reported by the U.S. Department of Education reveals behaviors that have long characterized the college environment. The majority of crimes are related to alcohol and drug-use, either simple violations of use of substances or other crimes that have been associated with inebriation, including what the American College Health Association (ACHA) has termed 'celebratory violence' (i.e., rioting after school sports events). Serious crimes have also been associated with alcohol abuse. The combination of alcohol abuse and hazing has resulted in serious injury or death. Alcohol abuse figures prominently in sexual assault and gang rape, where the perpetrators are often members of a fraternity or a sports organization.") (citations omitted).

¹¹¹ Center for Community Alternatives, *supra* note 1.

¹¹² CLOSING THE DOORS TO HIGHER EDUCATION, *supra* note 3, at 3 ("The Task Force on the Safety of the Campus Community (2004) found that the UNC campuses were very safe, with a crime rate for UNC campuses only one-sixth of the statewide crime rate. Between July 1, 2001 and June 30, 2004, UNC campuses with an overall enrollment of 250,000 reported a total of 1,086 campus crimes. Forty-nine percent (49%) or 532 of these crimes were committed by a student. Of the students who were involved in crime, only 21 or 4 percent were students who had a prior criminal record.")

¹¹³ *Id.* ("Bromley conducted a content analysis of articles that appeared in the Chronicle of Higher Education between 1989 and 2001 covering 33 campus related murders. While the articles reported on the circumstances of the crime and victim and perpetrator characteristics such as gender, campus status (e.g., employee, student, faculty, visitors), the criminal record of the perpetrator was not mentioned. Given the media's predilection for highlighting an offender's criminal record when such is present, the absence of such information suggests that a past criminal history was not a

records as particular threats to campus safety becomes even more suspect in cases of applicants who were arrested or committed crimes as teenagers. The “vast majority of [teenagers who commit crimes] will be one-time offenders.”¹¹⁴ Even the Supreme Court has acknowledged that teenagers are particularly prone to reckless or criminal behavior, and that behavior is not predictive of future misconduct.¹¹⁵

Many advocates argue that accepting college applicants with criminal records actually promotes public safety by reducing recidivism and unemployment through increased higher education opportunities.¹¹⁶ Formerly-incarcerated students are typically hard-working and high-achieving, with higher overall graduation rates than their peers with no criminal justice system involvement.¹¹⁷ A related argument is that denying admission to applicants with criminal records is in conflict with public educational institutions’ missions, which typically include providing broad access to educational opportunities, commonly understood to reflect a commitment to serving low-income communities of color.¹¹⁸

Additionally, criminal records are often inaccurate or misleading,¹¹⁹ so they are not reliable representations of an applicant’s personal character or history. The records frequently contain errors and sometimes report irrelevant arrest records or outdated convictions that have been expunged from the person’s

relevant factor for crime on campus.”) (citing MAX L. BROMLEY, *CAMPUS-RELATED MURDERS: A CONTENT ANALYSIS REVIEW OF NEWS ARTICLES* (2005)).

¹¹⁴ Center for Community Alternatives, *supra* note 1 (claiming that teenage brains are more prone to risk and socially-motivated behaviors, so they tend to “age out” of criminal activity).

¹¹⁵ *Roper v. Simmons*, 543 U.S. 551, 570 (2005) (“The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed.”).

¹¹⁶ *THE USE OF CRIMINAL HISTORY RECORDS*, *supra* note 3, at 30 (“There are larger social benefits associated with increases in higher education - ranging from the expansion of knowledge to helping people become better parents, more informed voters and more engaged citizens. Colleges and universities promote public safety in the larger community when they open their doors to people with criminal records who demonstrate the commitment and qualifications to pursue a college education.”) (citation omitted).

¹¹⁷ Center for Community Alternatives, *supra* note 1 (“It’s understandable that people who have no exposure to this issue, other than what they see in the media, would be afraid. If you, however, work with and study the dynamics that actually occur when formerly incarcerated people enter an institution, you get an entirely different picture . . . these are the most motivated students. They have the most to lose and the most to gain.”).

¹¹⁸ *Id.*

¹¹⁹ *THE USE OF CRIMINAL HISTORY RECORDS*, *supra* note 3, at ii (“The U.S. Department of Justice, Bureau of Justice Statistics has found that ‘inadequacies in the accuracy and completeness of criminal history records is the single most serious deficiency affecting the Nation’s criminal history record information systems’ and that ‘[m]any of the criminal history records currently circulated by the repositories are difficult to decipher, particularly by noncriminal justice users and out-of-state users.’”).

history.¹²⁰ Errors can include over-reporting,¹²¹ records based on criminal identify theft,¹²² reports containing expunged records, and clerical errors.

Campus safety is not the only justification universities could present to satisfy the educational necessity prong. Universities also need to protect their reputations and protect themselves from lawsuits in the rare instances when students commit violent acts against other students on campus, especially when the perpetrators do in fact have criminal records.¹²³ In 2004, Jessica Faulkner, a freshman at the University of North Carolina at Wilmington was drugged, raped, and killed by a fellow student, Curtis Dixon, who had a history of committing violent crimes against women.¹²⁴ Only one month later, another student, Christen Naujoks, was shot and killed by John Peck, another student who also had a criminal record.¹²⁵ UNC Wilmington did not conduct criminal background checks on either Dixon or Peck, and neither had disclosed their criminal history.¹²⁶ Faulkner's father sued UNC Wilmington, claiming that the university was negligent to admit Dixon, given his history of violence against women.¹²⁷ Following the murders, the university created a safety task force to study the issue of crime and admissions and, drawing on the task force's recommendations, adopted a system of conducting background checks on all applicants whose applications "raise red flags."¹²⁸

¹²⁰ See Concepción, *supra* note 2, at 246-47 ("For an instrument that has been afforded such weight, criminal history records are notoriously inaccurate and may include errors sufficiently serious to warrant denial of employment.") (citing CRAIG WINSTON, NAT'L. ASS'N. PROF'L. BACKGROUND SCREENER, THE NATIONAL CRIME INFORMATION CENTER: A REVIEW AND EVALUATION 6-7 (2005), available at <http://www.reentry.net/search/attachment.74268> ("Though 'all states report arrest and charge information, there is some variation in the reporting laws . . . [O]f the 174 million arrest cycles on file only 45% have dispositions . . . [O]nly 31 states require updated information to be sent to the state's repository if a person is not charged after the individual has been arrested and their fingerprints have been submitted . . . A second issue related to accuracy and content is the lack of uniformity in the criminal codes of the various states."); *id.* at 247 n.134 ("In 2008, an ABC News investigation uncovered 'dozens of lawsuits, on behalf of hundreds of people, filed in the last two years, against the major criminal records database companies, alleging that background checks contain inaccurate information about criminal convictions.'"); Scott Michels, *Advocates Complain of Background Check Errors: Dozens of Lawsuits Claim Lost Jobs from Inaccurate Criminal Records*, ABC NEWS (Oct. 13, 2008), <http://abcnews.go.com/TheLaw/story?id=6017227&page=1>).

¹²¹ *Id.* at 247 ("i.e., when a record about a different person with the same name as the applicant is reported as being a potential match for the applicant.") (citing Eric Dunn & Marina Grabchuk, *Background Checks and Social Effects: Contemporary Residential Tenant-Screening Problems in Washington State*, 9 SEATTLE J. FOR SOC. JUST. 319 (2010)).

¹²² *Id.* ("i.e., where an actual arrestee gives a false name or claims to be another actual person.").

¹²³ Marklein, *supra* note 90; see also Larry R. Wood, Jr. & Brian A. Berkley, *Criminal Conviction Background Checks: Can Employers Avoid Discrimination and Liability in the Hiring Process*, 05-3 PRIVACY & DATA SEC. (2006) ("Several courts have recognized that an employer can be liable for failing to run a criminal background check when hiring an employee who later commits a tortious act.") (citing Blair v. Defender Services, Inc., 386 F.3d 623, 629 (4th Cir. 2004); Keibler v. Cramer, 36 Pa. D. & C. 4th 193, 196-97 (1998)).

¹²⁴ Dickerson, *supra* note 78, at 435.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* at 436-39 ("The task force also recommended that the UNC System '[d]evelop reasonable and cost-effective methods to verify completeness and accuracy of applicant information.' Before a student enrolls, campus officials should 'compare applicants against the UNC expulsion/suspension database' and 'compare applicants against the National Student Clearinghouse and/or a system-wide enrollment-history database to determine if the student has attended other educational institutions that were not listed on the application.' In addition, schools should request 'long-term secondary-school suspensions and expulsions on transcripts or on transcript supplements' and '[r]equest that the North Carolina Community College System . . . report campus-based reported crimes and non-academic suspensions and expulsions on transcripts or on transcript supplements.' On a related point, the task force urged the university to develop a 'concise, behavior-related checklist that would help screen students for further scrutiny' and 'a mechanism through which campuses could request, on a case-by-case basis, criminal background checks of applicants, admitted students, and/or enrolling students.' Finally, the task force concluded that given the extremely small number of students who failed to provide accurate and truthful information [about criminal histories] and went on to commit a campus crime, the widespread and routine use of criminal background checks on all students would be neither cost-effective nor

Courts generally afford a large amount of deference to higher education institutions in identifying educational goals and determining how to achieve them.¹²⁹ A judge who is deferent to a university's decisions may not inquire into the effectiveness of screening applicants for criminal histories in increasing campus safety and instead may simply take the university at its word that the practice qualified as an educational necessity. In his *Fisher* opinion, however, Justice Kennedy held that the lower court had erred in not making a factual determination of whether the University of Texas's affirmative action plan was narrowly tailored,¹³⁰ specifying that the university "receives no deference" in this means analysis.¹³¹ This lack of deference appears to be a departure from previous affirmative action jurisprudence.¹³² If *Fisher* represents a broad weakening of universities' freedom to determine the appropriateness of certain measures that may have adverse racial effects, then it would be relatively easy for a fact-finder to determine that, based on the empirical data, discriminating against applicants with criminal records is not an appropriate means of improving campus safety.

C. There Are Alternative Practices that Would be More Effective in Promoting Campus Safety and Have Less of a Racially Disparate Impact

Even if the schools could successfully show that their use of criminal history records in admissions proceedings serves an educational necessity, they can still be liable under Title VI if there are alternative practices available that would be equally effective in improving campus safety and have less of a racial disparate impact.¹³³ Because considering criminal histories, and even disciplinary histories in general, in admissions decisions does not have a proven effect on improving campus safety,¹³⁴ identifying equally or more effective alternative methods with less racial impact should be achievable:

Sensible and proven measures to increase campus safety include education and discussion among students on campus about excessive use of alcohol, education about what constitutes healthy and consensual sexual relationships, campus-wide responses to hate crimes, and making changes to the physical environment of a college such as improving security in dormitories. Barring

significantly improve safety. However, there are specific 'triggers' that can be identified and that do warrant the need for a more thorough background check, e.g., an unexplained gap in time between high school graduation and application for admission."); Jennifer Epstein, *Colleges Consider Background Checks on Applicants*, USA TODAY, http://usatoday30.usatoday.com/news/education/2010-07-01-IHE-college-applicants-criminal-background-checks01_ST_N.htm?csp=34 (July 1, 2010, 7:21 PM).

¹²⁹ See generally *Grutter v. Bollinger*, 539 U.S. 306 (2003).

¹³⁰ Under the Equal Protection Clause of the Fourteenth Amendment, any policy that differentiates on the basis of race, including an admissions program that uses racial categories, must be narrowly tailored to achieve a compelling state interest. *Id.*

¹³¹ *Fisher*, 133 S. Ct. at 2414 ("Once the University has established that its goal of diversity is consistent with strict scrutiny, the University must prove that the means it chose to attain that diversity are narrowly tailored to its goal. On this point, the University receives no deference.").

¹³² *Grutter*, 539 U.S. at 328 ("Our holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits."); *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 (1985) ("Added to our concern for lack of standards is a reluctance to trench on the prerogatives of state and local educational institutions and our responsibility to safeguard their academic freedom, 'a special concern of the First Amendment.' If a 'federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies,' far less is it suited to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions—decisions that require 'an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decisionmaking.'") (internal citations omitted).

¹³³ *Elston*, 997 F.2d at 1407; U.S. DEP'T. OF JUSTICE, *supra* note 80, at 53.

¹³⁴ See Olszewska, *supra* note 106; see also THE USE OF CRIMINAL HISTORY RECORDS, *supra* note 3.

people with criminal records from attending college does not improve campus safety, but does undermine public safety in the larger community.¹³⁵

Another approach to identifying alternative methods of promoting campus safety is to encourage universities to tailor their use of criminal histories, emphasize individualized review of applications, and develop deliberate policies for implementation. Of the schools that reported collecting and using criminal history records in admissions proceedings in response to the survey distributed by the Center for Community Alternatives, fewer than half reported that they had written policies in place specifying how the information should be used, and only forty percent reported that they trained their staff on how to interpret the information.¹³⁶ Universities that have automatic bars in place for certain types of criminal justice information or are indelicate or inconsistent in their implementation of their policies should alter their approach to reduce the racially disparate impact.

V. ALTERNATIVE SOLUTIONS

Even if this practice cannot be effectively litigated in court under federal law, the policy arguments raised against it should help to persuade educational institutions and state legislatures of the importance of curbing or abolishing reliance on criminal history information in admissions decisions. In fact, the New York State Legislature currently has bills pending in both its houses that would “require colleges to judge an applicant on academic merit and other normal criteria and ask about run-ins with the law later.”¹³⁷ In October of 2014, New York Attorney General Eric T. Schneiderman announced agreements with St. John’s University, Dowling College, and Five Towns College “to amend their admissions policies and practices with respect to applicants’ prior contact with law enforcement. . . . [to] ensure that each school will refrain from inquiring about irrelevant information regarding contacts with the criminal justice system, including arrests that did not lead to conviction, sealed or expunged records, or pardoned records.”¹³⁸ The agreement was reached after the Attorney General’s Civil Rights Bureau reviewed information from the Center for Community Alternatives and determined that “the information solicited by the schools was overbroad and not relevant to an applicant’s fitness as a student because it did not indicate that the applicant had committed any crime.”¹³⁹

¹³⁵ *Id.* at 42.

¹³⁶ *Id.* at 16.

¹³⁷ Editorial, A Chance at College for Ex-Offenders, N.Y. TIMES, Sept. 21, 2014, *available at* <http://www.nytimes.com/2014/09/22/opinion/a-chance-at-college-for-ex-offenders.html> (“A good first step would be to remove the question from the initial college application and ask it after the applicant has been given a conditional offer of acceptance. (This would ensure that people with criminal histories are evaluated based on the same criteria as others.) Beyond that, however, colleges should not require disclosure of youthful misdemeanors like underage drinking or fare beating, which present no danger to public safety. And they should give students an opportunity to show proof of rehabilitation, like letters of recommendation, evidence of community service and so on.”).

¹³⁸ Press Release, Attorney General Eric T. Schneiderman, A.G. Schneiderman Announces Agreements With Three Higher-Education Institutions That Will Help Eliminate Barriers to Learning (Oct. 27, 2014), *available at* <http://www.ag.ny.gov/press-release/ag-schneiderman-announces-agreements-three-higher-education-institutions-will-help>.

¹³⁹ *Id.* (“Such questions disproportionately disadvantaged African-American and Hispanic men, who are more likely than white men to be stopped, detained, and arrested by police for minor misconduct. Nationally, racial and ethnic disparities in stops, detentions, and arrest rates remain substantial. In 2009, African-American males were incarcerated in state and federal prisons at close to 6.5 times the rate of non-Hispanic white males, and Hispanic males at 2.4 times the rate of non-Hispanic whites. Disqualifying college applicants based solely on information regarding stops, detentions, or other contact with the criminal justice system is inconsistent with New York State law, which bars employers from categorically denying job opportunities to candidates on the basis of a criminal conviction, and inconsistent with the state’s public policy of encouraging the employment and licensure of individuals with criminal records. The agreements also ensure that admissions staff will be properly trained in how to inquire about and evaluate criminal convictions for relevancy. Going forward, each school will consider prior convictions only to the extent that they are relevant to public safety or some aspect of the institution’s academic program.”).

While these measures indicate increased willingness to promote the interests of the people with criminal histories, the Center for Community Alternatives recommends that colleges and universities completely refrain from collecting and using criminal justice information in admissions decisions.¹⁴⁰ The Center also provides a number of secondary recommendations to mitigate the negative effects for universities that are unwilling or unable to end the use of criminal justice information completely.¹⁴¹ These secondary recommendations include (1) removing the criminal justice involvement disclosure requirement from the initial application for admission (as the New York bills propose);¹⁴² (2) limiting the disclosure requirement to certain types of convictions;¹⁴³ establishing admissions criteria that are fair and evidence-based;¹⁴⁴ basing admissions decisions on assessments that are well-informed and unbiased;¹⁴⁵ establishing procedures that are transparent and consistent with due process;¹⁴⁶ offering support and advocacy;¹⁴⁷ and evaluating the policy periodically to determine whether it is justified.¹⁴⁸

VI. CONCLUSION

Today, we have found mechanisms to filter out those who, because of their prison experience, might be most desiring of changing their lives and of quality education. And that's a tragedy. But it's one that we can fix.

—Khalil Muhammad

¹⁴⁰ THE USE OF CRIMINAL HISTORY RECORDS, *supra* note 3, at 32 (“Almost 40 percent of the colleges and universities surveyed do not use CJI in their application process and there was no indication from the survey results or other data that those campuses are any less safe than those that do use CJI. This is not surprising given what we know about the lack of any demonstrable link between campus safety and students with criminal records. There is no evidence that screening for criminal histories increases campus safety, nor is there any evidence suggesting that students with criminal records commit crimes on campus in any way or rate that differs from students without criminal records. There is, however, considerable evidence that using CJI as part of the college admissions screening process will disproportionately impact young men and women of color. There is also evidence that obtaining a college education greatly reduces the likelihood of recidivism and improves a range of life outcomes from employment, to health and mental health functioning. Because broad access to higher education is good for public safety and the economic growth and well-being of the country as a whole, colleges and universities should refrain from engaging in CJI screening.”).

¹⁴¹ *Id.* at 33.

¹⁴² *Id.* (“Limiting CJI inquiries to applicants who have been admitted ensures that those with records are considered for admission under the same criteria as all other applicants. It also reduces the likelihood that qualified and deserving individuals with criminal records will be discouraged from applying.”).

¹⁴³ *Id.* at 34 (“Only convictions for felonies, not misdemeanors or infractions Only felony convictions imposed within the past five years Only convictions for felonies that were committed after the individual’s nineteenth birthday.”).

¹⁴⁴ *Id.* at 35, 36 (“Remove barriers to admission of individuals who are under some form of community supervision Avoid policies that impose blanket denials for particular crimes Provide an opportunity to document personal growth and rehabilitation Avoid requiring applicant to produce his ‘official’ criminal history record information.”).

¹⁴⁵ *Id.* at 36, 37 (“Develop in-house expertise Perform an assessment and multi-factor analysis to determine whether a past criminal offense justifies rejection Failure to disclose should not be the grounds for automatic rescission of an offer of admission or expulsion.”).

¹⁴⁶ *Id.* at 38 (“Inform students of the reason for the withdrawal of an offer of admission Applicants should be afforded the right of appeal.”).

¹⁴⁷ *Id.* at 38 (“Provide on-campus support services for students who have criminal records Provide information and assistance when a prospective student’s chosen field bars individuals with criminal records.”).

¹⁴⁸ *Id.* at 40 (“Colleges and universities that screen for criminal records should begin to collect the data necessary to analyze whether students with a prior criminal record are any more likely to commit a criminal offense when enrolled as a student than their counterparts who do not have criminal records. There are no existing empirical data indicating that a campus is made safer by criminal history screening. If screening does not, in fact, help in the prediction of increased rates of criminal behavior, then it serves little purpose. It is both unfair and unwise to continue to screen for criminal records if it does not serve any legitimate purpose and may have adverse impact.”).

Director, Schomburg Center for Research in Black Culture¹⁴⁹

The constraints of Title VI jurisprudence allow only for narrow challenges to the practice of using criminal histories to inform admissions decisions, if anything. If a disparate impact claim is feasible, it hinges on the degree of racial disparity created by these policies. Greater disparities may be present in cases in which universities rely on arrest records, or in cases in which universities impose automatic bars to admission for certain types of criminal justice involvement.¹⁵⁰

This Note has enumerated strong policy considerations supporting the end of the use of criminal history information in college admissions decisions. First, the undeniable racial disparities in the criminal justice system reflect a history rife with racial subjugation perpetuated by mass incarceration.¹⁵¹ Second, improving access to higher education for people with criminal justice histories promotes community wellbeing by reducing recidivism, allowing individuals access to higher-paying employment opportunities, and strengthening community services through the disproportionate involvement of formerly-incarcerated individuals in human service jobs.¹⁵² Finally, allowing people with criminal justice involvement to be engaged in higher education promotes diversity, improves understanding about issues of mass incarceration, and furthers universities' missions of inclusiveness and commitment to underserved communities.¹⁵³

The Center for Community Alternatives emphasizes the importance of treating this discrimination as a civil rights issue:

[B]ecause of the enormous racial disparities found at every stage of the country's criminal justice system, policies and practices that exclude people with criminal records from institutions of higher learning are a setback to the gains earned through the long and arduous struggle of civil rights activists to open higher education to all people, regardless of race or ethnicity.¹⁵⁴

Tolerating discrimination against people with criminal justice histories in higher education, employment, housing, or any other context perpetuates racial injustice by allowing the effects of the racially-charged mass incarceration mechanism to seep into every aspect of society. Until the criminal justice system itself can be reformed to correct this injustice, advocates must eliminate and alleviate discriminatory practices where they can.

¹⁴⁹ Center for Community Alternatives, *supra* note 1.

¹⁵⁰ *See* Part IV, Section A.

¹⁵¹ *See* Part III.

¹⁵² Center for Community Alternatives, *supra* note 1.

¹⁵³ *See* Part IV, Section B.

¹⁵⁴ *Id.* at 42.