

**REPORT ON LEGISLATION BY THE  
CORRECTIONS AND COMMUNITY REENTRY COMMITTEE**

**A.3363  
S.969**

**M. of A. Peoples-Stokes  
Sen. Montgomery**

AN ACT to amend the correction and executive laws to add a new article, Article 23-B to prevent discrimination in the college admission process for individuals previously convicted of one or more criminal offenses.

**Fair Access to Education Act**

**THIS BILL IS APPROVED**

**I. INTRODUCTION**

This report is respectfully submitted by the Corrections and Community Reentry Committee (the “Committee”) of the New York City Bar Association (the “Association”). The Association is an independent, non-governmental organization of over 24,000 lawyers, law students and judges dedicated to improving the administration of justice.

The Committee supports A.3363/S.969, the Fair Access to Education Act (the “Bill”), which would amend the Correction and Executive laws to prohibit colleges from discriminating against individuals previously convicted of one or more criminal offenses to allow such individuals to fully participate in all aspects of college life. The Bill would prevent colleges from asking applicants about their criminal history, which would remove existing barriers to applying to college for people with criminal records. It would also prevent colleges from asking about arrests that did not result in a conviction or sealed convictions. On the other hand, the Bill would allow colleges to ask accepted students about their criminal history and to use that information in a limited way. The Committee believes the Bill is an important first step to increasing access to higher education for New Yorkers with criminal histories which reduces the risk of future recidivism. At the same time, the proposed legislation does not limit a college’s ability to obtain such information from a student who has been accepted.

Over the past decade, colleges and universities have increasingly included criminal history screenings and exclusionary policies in their admissions processes, even though there is no empirical evidence that students with criminal records pose a greater risk to campus safety

than students without criminal records.<sup>1</sup> For example, the State University of New York system (“SUNY”), which consists of 64 campuses with more than 465,000 students in four-year colleges, graduate schools, and community colleges, has maintained a system-wide policy of screening college applicants for past felony convictions.<sup>2</sup> In reviewing applicants who disclose a past criminal conviction, SUNY relies on Article 23-A of New York’s Correction Law to guide its decision-making process on whether applicants with a criminal record should be admitted.<sup>3</sup> Often, this process imposes an additional burden on such applicants, as they are required to supplement their college application by answering detailed questions about their criminal conviction and submitting documentation regarding their criminal history and disposition of their case.<sup>4</sup> The practical impact of this daunting and frustrating process is that applicants with a criminal record are less likely to complete the application process. These applicants are either unable to provide the required documentation or simply abandon the application process altogether.<sup>5</sup>

Notably, a growing body of research shows that post-secondary education is the most successful and cost-effective method of preventing crime, reducing recidivism, and reducing poverty.<sup>6</sup> A college education plays a critical role in developing good citizenship and creating economic and social opportunities. Indeed, “those with bachelor’s degrees, no matter the field, earn vastly more than counterparts with some college (\$1.55 million in lifetime earnings) or a high school diploma (\$1.30 million lifetime), statistics that reflect that regardless of the level of attainment or field of study, earning a four-year degree is integral to financial success later in life.”<sup>7</sup> Simply stated, post-secondary education “encourages opportunity, enhances critical thinking, and fosters better and more stable employment.”<sup>8</sup> Accordingly, a criminal conviction should not bar an individual from attaining post-secondary education and greater financial success later in life.

The Fair Access to Education Act would advance New York’s stated public policy of promoting the admission to college of individuals previously convicted of one or more criminal offenses.<sup>9</sup>

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<sup>1</sup> *Policy Brief: Ban the Box in Higher Education*, Education From the Inside Out Coalition (Sep. 24, 2014), <http://www.wordpress.eiocoalition.org/wp-content/uploads/2014/03/BtB-Policy-Brief-PDF-10-15-2.pdf> (last visited May 6, 2016).

<sup>2</sup> *Unnecessary and Counterproductive: SUNY’s Criminal History Screening Policy*, Education from the Inside Out Coalition (2014), [http://www.communityalternatives.org/pdf/homepage/FairAccessstoEducationAct\\_White%20Paper%202014.pdf](http://www.communityalternatives.org/pdf/homepage/FairAccessstoEducationAct_White%20Paper%202014.pdf) (last visited May 6, 2016).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

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

<sup>7</sup> Brian Burnsed, *How Higher Education Affects Lifetime Salary*, U.S. News & World Report (Aug. 5, 2011), <http://www.usnews.com/education/best-colleges/articles/2011/08/05/how-higher-education-affects-lifetime-salary> (last visited May 6, 2016).

<sup>8</sup> See *Policy Brief*, *supra* note 1.

<sup>9</sup> Proposed Art. 23-B § 771.

## II. THE BILL

The Fair Access to Education Act would prohibit colleges from making inquiries about arrests that did not result in a criminal conviction and criminal convictions that have been sealed.<sup>10</sup> The Bill also prohibits colleges from asking applicants whether they have a criminal record: colleges “may not make any inquiry or consider information about an individual’s past criminal conviction or convictions at any time during the application and Admissions Decision-Making Process.”<sup>11</sup> The term “colleges” includes “colleges, universities, professional and technical schools and other institutions of higher education that confer degrees” under certain subdivisions of the Education Law. The “Admissions Decision-Making Process” is defined as the submission of the application and all aspects of the application process through admission.<sup>12</sup>

The Bill does, however, permit colleges to ask about an individual’s criminal history post-acceptance. The college cannot use the information about criminal convictions to rescind an offer of acceptance, but may use it “for the purpose of making decisions about participation in activities and aspects of campus life associated with the individual’s status as a student, including but not limited to housing.”<sup>13</sup> The Bill would require colleges to develop a written “individualized process for determining whether or not there is a direct relationship between the accepted individual’s criminal conviction history and the activity or aspect of campus life at issue.”<sup>14</sup> In determining if an individual’s criminal convictions will affect his or her life on campus, the college must consider the age of the individual at the time of the conviction; the length of time that has elapsed since the conviction; the nature of the conviction and whether it bears a direct relationship to the campus related activity; and evidence of rehabilitation. The college’s individualized, written process must also provide the accepted individual an opportunity to appeal any denial or limitation of access to any activity or aspect of campus life.<sup>15</sup>

The Bill makes clear that it is not intended to impose a duty upon colleges to make inquiries into applicants’ criminal histories. Rather, if colleges elect to make such inquiries, they must consider the State’s “public policy to promote the admission to college of individuals previously convicted of one or more criminal offenses and allowing such individuals full access to all aspects of college life.”<sup>16</sup>

Finally, failure to comply with Article 23-B would be deemed an unlawful discriminatory practice as defined in Executive Law § 296 (22).

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<sup>10</sup> Proposed Art. 23-B §772.

<sup>11</sup> *Id.* at § 773.

<sup>12</sup> *See Id.* at § 770.

<sup>13</sup> Proposed Art. 23-B § 774(2).

<sup>14</sup> Proposed Art. 23-B §774(2)(B).

<sup>15</sup> Proposed Art. 23-B §774(2)(C).

<sup>16</sup> Proposed Art. 23-B §775.

### III. REASONS FOR SUPPORT

#### A. The Bill Will Allow a Greater Number of People With Criminal Histories to Attend College

The Fair Access to Education Act will remove the often insurmountable obstacles that both deter and prevent applicants with criminal histories from attending college. As noted by the Center for Community Alternatives, criminal background screening requirements in college admissions “intimidate, overwhelm, and further stigmatize even the most determined applicants,” many of whom find that “the further they proceed through the [admissions process], the more they feel that the campus is sending a message that they are not welcome.”<sup>17</sup>

Applicants who are not deterred by criminal background screening and decide to apply are then sent a letter from the individual SUNY campus where they are applying detailing the supplementary criminal history documentation they must provide in order to complete the application.<sup>18</sup> These admissions requirements vary from campus to campus and include confusing or contradictory instructions; documents that are difficult or impossible to obtain; disclosure of confidential, sealed criminal records; mandatory waiting periods; and personal interviews with campus security personnel.<sup>19</sup> Faced with these significant obstacles, a majority of New York college applicants with criminal records do not complete their admissions applications.<sup>20</sup>

SUNY provides a good example because, currently, all SUNY applications require applicants to state whether they have a felony conviction.<sup>21</sup> According to data provided by 30 of the 60 SUNY schools, out of the 2,924 applicants who check the criminal history box each year, 1,828 do not complete their application—an average application attrition rate of 62.5% for applicants who have a felony conviction.<sup>22</sup> In comparison, the overall application attrition rate for SUNY applicants is only 21%.<sup>23</sup> Moreover, out of the minority of applicants who check the box and complete their SUNY application, only 117 are rejected by admissions review committees.<sup>24</sup> Therefore, “for every one applicant rejected by admissions review committees because of a felony conviction, 15 applicants are excluded by felony application attrition.”<sup>25</sup> Checking the criminal history box, not rejection by college admissions committees, is the most

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<sup>17</sup> *Boxed Out: Criminal History Screening and College Application Attrition*, Center for Community Alternatives, 34 (2015).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 23-33.

<sup>20</sup> *Id.* at 10.

<sup>21</sup> *Id.* at 21.

<sup>22</sup> *Id.* (“two out of every three applicants who check ‘yes’ to the felony conviction question [on SUNY applications] do not complete the application process and are never considered for admission”).

<sup>23</sup> *Boxed Out*, *supra* note 16 at 10.

<sup>24</sup> *Id.* at 13.

<sup>25</sup> *Id.*

significant obstacle barring applicants with criminal histories from successfully applying to college in New York. The Bill would remove this needless barrier.

### **B. By Increasing Access to Higher Education, the Bill Will Provide Greater Economic Opportunities for Individuals With Criminal Records**

The most effective way to help individuals with criminal records become marketable employees is to increase access to higher education. As our State's business and professional services sectors continue to expand,<sup>26</sup> “the economic consequences of collateral sanctions that restrict employment opportunities will escalate for ex-offenders, their families, and their communities.”<sup>27</sup> It should therefore come as no surprise that recent economic analyses demonstrate a significant pay gap between those with and without college degrees<sup>28</sup> and that people with college degrees see enhanced employability overall.<sup>29</sup> This gap is expected to continue growing, with 65% of all jobs nationwide requiring a post-secondary education by 2020, in part due to projected growth in science, technology, engineering, and math (“STEM”) and healthcare sectors.<sup>30</sup> In short, barriers to higher education for individuals with criminal convictions “will leave them with bleak prospects for almost any type of employment, as well as with diminished earnings” and “will also leave business and industry with a shortage of human capital.”<sup>31</sup>

As noted above, asking college applicants about their criminal convictions has a chilling effect, ultimately discouraging many of them from completing college applications.<sup>32</sup> In our state's changing economy, we cannot afford to discourage higher education for such a large percentage of applicants, as education remains one of the few clear roads to “reducing recidivism, increasing upward mobility, increasing earning capacity and civic engagement, and strengthening families.”<sup>33</sup> The Fair Access to Education Act is an important opportunity to ensure that all New Yorkers have the ability to realize their potential and fully participate in our advancing economy.

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<sup>26</sup> *NYS Economy Adds 13,200 Private Sector Jobs in December 2015, Reaching New Record High*, N.Y. State Dep't of Labor (Jan. 21, 2016), <https://labor.ny.gov/stats/pressreleases/pruistat.pdf> (educational, health, professional, and business service sectors led in net job growth from Dec. 2014–Dec. 2015) (last visited May 6, 2016).

<sup>27</sup> Archer, *supra* note 4 at 538.

<sup>28</sup> David Leonhardt, *Is College Worth It? Clearly, New Data Say*, N.Y. Times (May 27, 2014), <http://www.nytimes.com/2014/05/27/upshot/is-college-worth-it-clearly-new-data-say.html> (“Americans with four-year college degrees made 98 percent more an hour on average in 2013 than people without a degree.”) (last visited May 6, 2016).

<sup>29</sup> *The Rising Cost of Not Going to College*, Pew Research Center (Feb. 11, 2014), <http://www.pewsocialtrends.org/2014/02/11/the-rising-cost-of-not-going-to-college/> (“On virtually every measure of economic well-being and career attainment—from personal earnings to job satisfaction to the share employed full time—young college graduates are outperforming their peers with less education.”) (last visited May 6, 2016).

<sup>30</sup> Anthony P. Carnevale et al., *Recovery: Job Growth And Education Requirements through 2020*, Center on Education and the Workforce at Georgetown University (2013).

<sup>31</sup> *Boxed Out*, *supra* note 16 at 45.

<sup>32</sup> *Id.* at 20.

<sup>33</sup> *Id.* at 50.

### C. Increasing Access to Education Will Reduce Recidivism Rates

Discouraging individuals with criminal records from attending college simply “undermines broad public safety by foreclosing an opportunity that has proven to be one of the most effective deterrents to recidivism.”<sup>34</sup> There is substantial evidence that both short- and long-term unemployment increases crime rates, especially for property and drug crimes.<sup>35</sup> An empirical economic study of two decades of New York City employment and crime data found that unemployment affects the rate of burglary and motor vehicle theft, while wage levels affect murder, robbery, and grand larceny rates.<sup>36</sup> In addition, those recently released from incarceration themselves identify employment as one of the essential elements to remaining crime-free.<sup>37</sup>

Our country treats participation in the labor force as a prerequisite for full participation in society. Accordingly, the impact of the denial of employment has an extremely detrimental effect on individuals with criminal records.<sup>38</sup> Improved access to education translates into greater civic participation, including a better informed citizenry and increased voting rates.<sup>39</sup>

Higher education also “better prepares citizens to make knowledgeable decisions about the political issues of the day.”<sup>40</sup> Furthermore, college graduates are twice as likely to volunteer in their communities as high school graduates.<sup>41</sup> Providing greater educational, and by extension, employment, opportunities to these individuals is one of the best ways we can prevent recidivism in the State of New York and increase civic engagement in our society.<sup>42</sup>

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<sup>34</sup> *Boxed Out*, *supra* note 16 at 38.

<sup>35</sup> See Eric D. Gould et al., *Crime Rates and Local Labor Market Opportunities in the United States: 1979-1997*, 84 *Rev. Econ. & Stat.* 45, 46 (2002) (finding that young, unskilled men are responsive to the opportunity costs of crime); Steven Raphael & Rudolph Winter-Ebmer, *Identifying the Effect of Unemployment on Crime*, 44 *J.L. & Econ.* 259 (2001) (reporting strong effect of lower unemployment on property crimes and some effect on violent crimes).

<sup>36</sup> Hope Corman & Naci Mocan, *Carrots, Sticks, and Broken Windows*, 48 *J.L. & Econ.* 235, 262 (2005).

<sup>37</sup> *What Works in Reentry Clearinghouse*, The Council of State Government, Justice Center, <https://whatworks.csgjusticecenter.org/focus-area/employment-topic> (last visited Feb. 29, 2016).

<sup>38</sup> Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 *Stan. L. & Pol’y Rev.* 153, 156–57 (1999).

<sup>39</sup> *Boxed Out*, *supra* note 16 at 47.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> Deborah Archer & Kele Williams, *Making America "The Land of Second Chances": Restoring Socioeconomic Rights for Ex-Offenders*, 30 *N.Y.U. Rev. L. & Soc. Change* 527, 538–39 (2005).

#### **D. There is No Evidence That Pre-Admission Criminal History Screening Increases Campus Safety**

Unsurprisingly, “ensuring campus safety is the most common justification for criminal history screening.”<sup>43</sup> While campus safety is rightfully of paramount concern to lawmakers, college administrators, and students, it should not come at the expense of the admissions prospects of qualified applicants with criminal records. Studies have shown that there is no evidence that criminal history screening makes campuses safer.<sup>44</sup> Furthermore, criminal background checks and pre-admission screening questions fail to accurately predict whether students are likely to commit crime on campus.<sup>45</sup> The Fair Access to Education Act will keep New York college campuses safe, while helping reduce crime rates statewide by improving access to higher education and reducing the likelihood of recidivism in communities across the State.

Apart from the absence of data linking students with criminal records with higher campus crime rates, the campus safety rationale exacerbates the deterrent effect of criminal history screening. There is a fine line between checking criminal records during the admissions process for public safety purposes and doing so as a pretext for the wholesale exclusion of individuals administrators deem undesirable. As a Florida law school dean noted in a journal article supporting records checks in admissions, “[b]y requiring criminal background checks of all admitted students, colleges and universities will *send a message about the type of students they want* and the types of behaviors they expect on campus.”<sup>46</sup>

#### **CONCLUSION**

Our nation’s highest Court sent a clear message when it held that institutions of higher education have a “compelling interest in attaining a diverse student body.”<sup>47</sup> Furthermore, the State University of New York “recognize[s] our diversity makes us stronger and smarter.... We

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<sup>43</sup> *Id.* at 37; *see also* Matthew W. Pierce et al., *The Use of Criminal History Information in College Admissions Decisions*, *J. of School Violence* 13(4), 259-376 (2014).

<sup>44</sup> *Id.* at 37; *see* Malgorzata Olszewska, *Undergraduate Admission Application as a Campus Crime Mitigation Measure: Disclosure of Applicants’ Disciplinary Background Information and It’s Relationship to Campus Crime* (2007) (unpublished Ed. D. Dissertation, East Carolina University) (on file with author) (finding no significant difference in the rate of campus crime between institutions of higher education that explore undergraduate applicants’ criminal history backgrounds and those that do not).

<sup>45</sup> Carol W. Runyan et al., *Can student-perpetrated college crime be predicted based on precollege misconduct?*, *Injury Prevention*, 19(6), 405–11 (2013) (finding that although precollege behavior is a risk factor for college misconduct, screening questions on the application are not adequate to detect which students will engage in college misconduct).

<sup>46</sup> Darby Dickerson, *Background Checks in the University Admissions Process: An Overview of Legal and Policy Considerations*, 34 *J.C. & U.L.* 419, 487 (2008) (emphasis added).

<sup>47</sup> *Grutter v. Bolinger*, 539 U.S. 306, 328 (2003) (Justice O’Connor, writing for the Court, noted that student body diversity, including a diversity of “people, cultures, ideas, and viewpoints” promotes learning outcomes, and “better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.”).

respect, encourage, and promote *all aspects* of human difference.”<sup>48</sup> In New York, where our colleges and universities celebrate student body diversity, it should come as no surprise that each student’s path to their college career is unique. Criminal history pre-screening sends the wrong message to applicants and puts obstacles on the path to college for many individuals who want to improve their lives through education. The Fair Access to Education Act would allow a greater number of applicants with criminal histories to attend college and benefit from the increased economic opportunity that results from higher education. Accordingly, the Committee endorses the Bill.

Corrections and Community Reentry Committee  
Allegra Glashausser, Chair

May 2016

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<sup>48</sup> *Academic Excellence through Diversity*, The State University of New York, <http://www.suny.edu/diversity/> (last visited Mar. 7, 2016) (emphasis added).