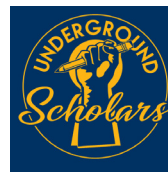


# **Criminal Background Checks in California Public Higher Education Hiring: A Closer Look From the Perspective of College Graduates With a Criminal Record**



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# Abstract

Criminal background checks (CBCs) are a recent development that have become normalized and institutionalized to decrease negligent hiring practices. Advancements in technology in the 21st century have made criminal background checks easily accessible to employers. This easy access to an individual's criminal history makes room for discrimination in the employment process regardless of applicants' qualifications. Education is supposed to increase a person's employability, which is why we see the emergence of outreach and retention programs for formerly incarcerated (FI) and system impacted students at colleges and universities. One might expect the institutions that enroll students with criminal records would also be open to employing people with a criminal record. However, while public colleges and universities are increasingly providing people with a criminal record access to education, they have not done enough to reduce barriers to employment within the university system.

This research report focuses on the employment process at public education institutions in California--the University of California (UCs), California State University (CSUs), and California Community Colleges (CCCs). The report examines hiring protocols within the policies of each type of institution, identifies shortcomings and positive aspects of the protocols, and provides a set of recommendations for institutions to making their hiring protocol more FI-friendly and inclusive.

## Key Findings

- We found that there was minimal information displayed by universities and colleges about the use of the CBC overall for employment within.
- We found that there was minimal information on the type of jobs that required a CBC for employment within the universities and colleges.
- We found that there was minimal information about the types of crimes that would preclude employment.
- We found that there was minimal information about when the background check is done relative to hiring.
- We found that there was minimal information on the potential employee criminal history search covered by the CBC.
- We found that there was minimal information on the appeals process of the CBC-based decision to not employ a person.
- We found that there was minimal information on which documentation was needed to prove rehabilitation during the appeals process of the CBC.
- We found that there was minimal information on who conducted the CBC and whether it was done by the police or another agency.
- We found that there was no information available on who was appointed and part of the appeals' board.
- We found that there was minimal information on guidelines used by the universities and colleges' adherence to the Ban the Box protocol.

# Introduction

A key obstacle to employment for the approximately 77 million American citizens who have a criminal record is the criminal background check.<sup>1</sup> Advancements in technology in the 21st century have made criminal background checks (CBC) easily accessible to employers. This easy access to an individual's criminal history makes room for discrimination in the employment process. In 2018, the National Association of Background Screeners (NABS) reported that 95% of employers surveyed used one or more types of background checks.<sup>2</sup>

A 2012 study found 69% of private employers who are not federally or state-mandated to perform criminal background checks voluntarily conducted them to screen out applicants they consider undesirable. In this environment of intensified background checks, 96% of applicants convicted of violent crimes did not receive an offer of employment, and 74% of applicants convicted of nonviolent crimes did not receive an offer of employment.<sup>3,4</sup>

Criminal background checks, combined with the rise of mass incarceration, significantly reduce employment opportunities for people with a criminal record. The resulting lack of opportunity leads to unemployment that prevents individuals with a criminal record from contributing to the nation's economic growth and earning a wage for a basic standard of living which, in turn, affects their health, well-being, and overall happiness.

Simultaneously, as the demand for an educated workforce increases, people with a criminal record are turning to higher education to increase their chances of employment. In response to the increasing number of individuals with a criminal record enrolling in institutions of higher education, Corrections-to-College programs have been instituted across California. Corrections-to-College (C2C) California is a four-year initiative created to build a network of connections from corrections to college. It implements programs in jails, prisons, and college campuses that make higher education accessible to persons with a criminal record.<sup>5</sup> The outcomes of these programs are promising, and their participants have gone on to earn college degrees and achieve success in their careers in academia and law.

One might expect the institutions that enroll students with criminal records would also be open to employing people with a criminal record. However, while public

colleges and universities are increasingly providing people with a criminal record access to education, they have not done their part to reduce barriers to employment within the university system. One obstacle is that, like other employers, they employ criminal background checks, and do not provide enough information about these background checks to applicants with a criminal record. Of the 18 million employees in California, approximately 2 million people are employed by public California colleges and universities,<sup>6</sup> making it a major employer of workers at all experience levels. Access to this major employer would benefit both those with a criminal record, and the universities.

This research report focuses on the employment process at public education institutions in California—the University of California (UCs), California State University (CSUs), and California Community Colleges (CCCs). The report examines hiring protocols within the policies of each type of institution. These policies are “recommendations,” not mandates, and university administrators have the discretion to reform these policies. Given that these policies are not mandated, this report aims to compare and contrast the recommendations of each system with the information it gives to the public and the practices it adopts. Framed through the lens of people with a criminal record and system impacted communities, we offer findings and recommendations about how public colleges and universities can reduce ambiguity and provide adequate information to applicants with a criminal record about their CBC policies.

This report demonstrates that public colleges and universities lack adequate online information pertaining to the use of criminal background checks (CBC) within their hiring practices and procedures. The ambiguity and absence of CBC information fails to inform individuals with a criminal record about their chances of employment and can discourage them from seeking work at these institutions. This is a missed opportunity for both this talented pool of applicants and for the university system.

The increasing problems stemming from mass incarceration is a critical context for this report. The report aims to motivate scholarship and discussion concerning the impact policies and legislation have on employment, education, and professional opportunities at the state level. The report highlights the importance and demand for political action to address the ambiguity

of CBC information that state colleges and universities provide while at the same time educating the public and policymakers about underlying problems related to the stigma of a criminal record.

In what follows, we offer eleven policy recommendations that will reduce the ambiguity of CBC information, and better inform applicants with a criminal record of their employment prospects.

1. Public institutions should institute a uniform statewide policy that ensures transparency in the use of CBCs;
2. Public institutions should provide uniform statewide policies, describing how CBCs can be used by public institutions and government;
3. Public institutions should update CBC protocols with guidance from community members and individuals with a criminal record and college programs;
4. Public institutions should provide a clear list of crimes that will automatically disqualify potential employees;
5. Public institutions should provide a clear statement that colleges must abide by the California law limiting CBC searches to 7 years;
6. Public institutions should implement a secure measure to inhibit searches past the 7-year CBC lawful search limit with guidance and recommendation from community members and individuals with a criminal record and college programs;
7. Public institutions should provide a list of the specific documentation that can be used to prove rehabilitation;
8. Public institutions should prohibit University police departments from conducting CBCs;
9. Public institutions should add CBC guidelines to their Equal Opportunity Statements;
10. Public institutions should consider reserving some positions for people with criminal records; and
11. Public institutions should give clear guidelines to their staff for working with applicants with criminal records (e.g. staff training, transparent procedures).

## Background and Motivation and History

The Criminal Background Check originated in the 18th century, but until the 1950s, CBCs were not a major

component of hiring processes. The widespread use of CBCs is a recent development that has become normalized and institutionalized to decrease negligent hiring practices. After 1950, cases holding employers responsible for the damages employees inflicted upon non-employees during working hours grew.<sup>7</sup> This is seen in the Court of Appeals for the District of Columbia case, *Fleming v. Bronfin et al.* (1951). In this case, an employee attacked a customer at her home while delivering her groceries. Because the employer hired the employee without contacting references or investigating the employee's background and retained the employee after learning of the employee's addiction to ethanol intoxication from vanilla extract, the appellate court held the employer responsible for the damages imposed on the customer on the basis of negligent hiring and retention.<sup>8</sup>

*Fleming v. Bronfin et al.* (1951) is one of several cases that led to the adoption of "Negligent Hiring Theory" as common law. This set the standard for subsequent cases, holding employers responsible for the harm inflicted on another by their employees due to negligent hiring. Fearful of liability lawsuits, employers began to rely on background checks.<sup>9</sup> Additionally, the US government enacted federal and state laws mandating criminal background checks for employees with direct contact with vulnerable populations such as children, the elderly, sick, or disabled individuals, and in the public sector, which employs approximately 14.5% of the workforce in the U.S..<sup>10</sup>

As of 2019, there are 2.3 million people incarcerated across the United States and approximately 650,000 incarcerated individuals are released per year.<sup>11</sup> Individuals with criminal records are not protected from employment discrimination, because criminal history is not a protected class under the U.S. Equal Employment Opportunity Commission (EEOC). With advancements in technology, criminal background checks are now easily accessible to employers. Although criminal background checks are not universally required, most employers are not comfortable hiring applicants without a criminal background check.<sup>12</sup>

The lack of protection for applicants with a criminal record does, however, disproportionately affect people in protected categories. Studies have found racial disparities between White and Black applicants with felony convictions. One study found the rate of employment callbacks for applicants with a criminal record to be 17% for Whites and 5% for Black applicants. The use of criminal background checks affects Black

applicants 40% more than White applicants.<sup>13</sup>

## Mass Incarceration

Marginalized communities are disproportionately affected by mass incarceration, which, in turn, affects their employment opportunities. There are a staggering 2.3 million people in our carceral system, and for every 100,000 people, 2,306 incarcerated people are African Americans, 996 incarcerated people are Latinos, and 336 incarcerated people are White. Asian/Pacific Islanders Americans are 6% of the U.S. population, and 9% of the prison system.<sup>14</sup>

The consequences of background checks have grown due to the growth of the criminal justice system. Institutions that have inaccessible information on hiring policies thus exclude 8 million formerly incarcerated (FI) people from the workforce and create barriers for FI college graduates who seek employment at a higher education institution.<sup>15</sup>

## California Higher Education System Hiring Policies

With the increased use of CBCs, people with a criminal record find it more difficult to find employment. Although there has been a wave of people with criminal records attending college, there is scarce information about employment barriers at higher education institutions. This report highlights descriptions of the CBC policies within California's three different public higher education systems: University of California, California State University, and California Community Colleges.

CBC policies vary across the UC, CSU, and CCC systems in their language, the accessibility of information, and their protocols. Our research team spent many hours reading through the policies to gain a better understanding of the policies. Devoting this amount of time to understanding the complexity of these distinctive application policies is not an option for the average applicant conducting their search for information. Based on the hiring policies of California higher education, we expect similar findings (lack of info/poor info) within all three of these educational systems regarding information on the use of CBCs in the hiring process.

## Accessibility of Policy Information

There is an overall lack of information regarding the use of criminal background checks in higher education institutions' hiring process. The hiring policies and information available on campus' and systems' websites are limited and difficult to find. The information cited is from each system's Human Resources hiring policies. If a prospective applicant with a criminal record cannot easily find information regarding the hiring process and use of CBCs, they are discouraged from applying. The CSU system provides the most information, requires job postings to state if a CBC is required, and is easily accessible, making it friendly to people with criminal records and more transparent. The UC system provides some information but does not clearly explain the CBC process and requires a longer search time to find information, making information inaccessible and not transparent. The CC system has the least amount of information available on their websites regarding the use of CBCs and eligibility of FI people for employment and is therefore not receptive to applicants with criminal records. The California Community College Fair Chances Hiring Policy provides guidelines for the hiring protocols that campuses utilize.

## Quality of Information Available

The information provided by institutions' websites is inaccessible and unclear. The UC system policies concerning the CBC are vague and use ambiguous language such as "The nature and gravity of the offense(s)," which does not provide concrete signals that they are receptive to hiring applicants with a criminal record. The CSU system uses language that is considered by us, people with criminal records, to be clear and receptive to hiring, with an extensive guide to how CBCs are conducted. The California Community College system is clear in its wording but non-receptive to hiring college graduates with criminal records. The information provided by the individual campuses and the CCC system regarding CBCs and their hiring process is limited and inaccessible, which is highly discouraging for people with criminal records seeking employment.

The California Community College Fair Chances Hiring Policy cites employment laws that campuses must follow, but campuses do not provide a complete review process that is fair and equitable for applicants with criminal

records. The CCC Fair Chance Hiring Policy aims to not automatically disqualify applicants with a criminal record and requires campuses to comply with employment laws (Civil Rights Act of 1964, “Ban the Box,” and California education laws) that regulate the hiring process. Title VI of the Civil Rights Act (1964) prohibits discrimination against people of color and other protected groups in hiring practices, which benefits applicants with criminal records who are disproportionately impacted by CBCs. “Ban the Box” requires CBC to be conducted at the end of the hiring process so that applicants are not immediately disqualified. California education laws limit the CCC system from hiring people with drug and sex offense convictions. All three laws require employers to consider evidence and length of rehabilitation, but do not guarantee employment.<sup>16</sup>

## CBC Process Transparency

The criminal background check process is elusive and elaborate. When an applicant submits a job application for a sensitive/critical position at a UC or CSU, they must undergo a criminal background check. Sensitive positions are generally defined as those with potential harm for children, concerns for the safety and security of people, animals, or property, or heightened risk of financial loss to the UC/CSU or individuals in the university community.<sup>17</sup> Campuses can choose to conduct a CBC themselves, through the Department of Justice (DOJ) and the Federal Bureau of Investigation (FBI) database, or hire a third-party. Applicants must sign off on the CBC and can solicit a copy of the results. If a criminal background check is conducted through the DOJ or the FBI, the university must provide applicants with a notice that has to include a copy of the Criminal Offender Record Information (CORI).<sup>18</sup> If background checks were completed through a third party vendor, the UC must provide candidates with an adverse action that needs to include the contact information of the Consumer Report Agency (CRA) that completed the background check; a statement that the CRA supplying the report did not make the decision to take the adverse action; and the candidate’s rights to dispute any discrepancies or inaccuracies in the background check results with the CRA and to get an additional free report from the reporting company within 60 days.

The University of California Human Resources office is responsible for the hiring process of all employees but does not provide any guidelines as to how they determine whether the CBCs are done in-house, through a third party vendor, or through the DOJ and

FBI.<sup>19</sup> The California State University system defers “decision makers” to conduct the hiring process without specifying who the “decision makers” are.<sup>20</sup> The California Community College system only permits the Records Custodian, who is a trained HR employee with access to DOJ criminal records and CBC reports.<sup>21</sup> For all school systems, the results of the background check are confidential unless otherwise required by law, and only the appropriate HR personnel, records custodian, decision maker(s), and background check coordinator can know the findings of the search. The hiring department will not know the results, and the information will be kept separate from the employee’s official personnel file.<sup>22</sup>

According to the UC and CSU Background Check policy, convictions that occurred more than seven years prior to the check will not be taken into consideration. Only felonies and misdemeanor convictions, active arrests, or pending criminal cases will be taken into consideration. Convictions include plea verdicts or findings of guilt, regardless of a sentence.<sup>23</sup>

If the results from the search contain information that makes the applicant ineligible for the position, the campus must provide the applicant a copy of their Criminal Offender Record Information (CORI). The applicant must be notified before a final decision is made and allowed 5 business days to appeal the results of the CORI. The decision makers will review the results of the background check and consider the nature and gravity of the crime(s) and relevance to the position sought; the number and circumstances of the offense(s); the period of time since the last conviction; whether the candidate is bonded under federal, state, or local bonding program; and the candidate’s conduct, performance and/or rehabilitation efforts since the conviction(s). Applicants will only be disqualified if the offenses will affect the person’s ability to do the job.<sup>24</sup>

If the candidate does not appeal the decision, it is up to HR’s discretion to continue the hiring process. If the university decides not to hire the candidate, the university must provide the candidate in writing the final decision of denial or disqualification. The University may, but is not required to, justify or explain the University’s reasoning for making the final denial or disqualification.<sup>25</sup>

In sum, the inconsistent availability of clear information across the California public higher education systems creates additional barriers for graduates with criminal records seeking employment at these institutions. The policies reviewed indicate the lack of information

regarding how decisions are made and by whom (UC and CSU). Obscure hiring processes in the systems' human resources policies results in non-inclusive hiring practices and procedures for applicants with criminal records (CC). Although not all institutions are problematic regarding the inclusivity of persons with criminal records in their hiring processes, we deem two of the three systems (UC and CCC) not "FI friendly" in their transparency and practices.

## Methodology

We focused on post-secondary education in California: The University of California (UCs), California State University (CSUs), and California Community Colleges (CCCs). We used primary sources and data to examine the ways in which hiring protocols at each type of institution are presented to the public. It is important to note that system-wide hiring policies are only recommendations to individual campuses, not mandates. Because these policies are not mandated, it is important to examine each campus (and community college district). We compared and contrasted the recommendations of each system with the information it gives to the public and the practices it adopts.

California is an ideal case study for this type of research given: the location of the research team, the fact that California has the highest number of public, post-secondary educational institutions, California's high population of approximately 565,000 persons with a criminal record<sup>26</sup>, the increase of FI within academia in conjunction with programs such as Underground Scholars Initiative and Project Rebound, and lastly<sup>27</sup>, California's unique role in the advent and proliferation of the prison industrial complex, the carceral state, and disenfranchisement of persons with a criminal record.<sup>28</sup>

We excluded jobs that are medically related in consideration of state licensing protocols regarding CBCs. As other organizations are pushing for the re-evaluation of licensing protocols for persons with criminal records, we focus on occupations that do not require these due to the lack of scholarship concerning this important yet overlooked avenue of employment. We specifically assess employment opportunities requiring a 4-year degree because the perspective of this study is of 4-year college graduates with criminal records who are searching for employment.

## The Research Team

This research cohort consists of undergraduate students from the University of California, Berkeley. We recruited these students through the Undergraduate Research Apprentice Program (URAP) in conjunction with the Institute for Research on Labor and Employment (IRLE), Underground Scholars Initiative (USI), and the Navigating Cal Fellowship. Highest preference for selection and recruitment of the research team was given to those with a criminal record and/or system impacted. Current knowledge and understanding of the impact of incarceration on employment has been dictated and designated by institutions and systems seeking to quantify and label the experiences of those who are most affected. The positionality of this research team as the "outsider-within" (Collins 2007: 593) thereby provides a valuable contribution to this scholarship and academia as scholars with criminal records bring a unique vantage point to research that is unprecedented and in direct conflict with discourses of larger power structures. We, as individuals with criminal records, know the answer to the research question we will be posing. As individuals with criminal records, we have been searching for meaningful employment our whole lives.

## Institutions

To highlight and explore the availability and absence of information on criminal background checks within hiring practices as it pertains to individuals with criminal records looking to gain employment at post-secondary institutions, we collected data from 169 public institutions. We collected data from the UC system consisting of 10 schools, the CSU system consisting of 23 schools, and California's community college system consisting of 113 CCs and 23 CC districts. Of these 169 post-secondary institutions, 61 of them are listed on the Corrections-to-College website as having known campus programs for individuals with criminal records. The purpose of locating schools with FI campus programs is to evaluate whether or not these schools provide better and more readily available CBC information than those campuses without such programs. We used the UC website, CSU website, and the California Community Colleges website to identify all campuses used in this study.

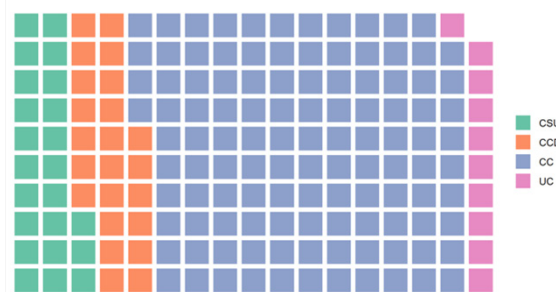
# Searching for Criminal Background Check Information

In order to accurately represent the issues faced by those who are most affected by CBCs within hiring practices, we conducted our searches from the perspective of those who have a criminal record. To gather as much information available, we conducted an internal search within each school's website with the objective of obtaining information directly from the source—what each institution is making public about their use of the CBC in their hiring practices. To complement this step, we conducted an external search through the use of Google's search engine due to the abundance of information stored in the platform's cloud. We decided to use four key terms to guide these searches: hiring, jobs, careers, and criminal background check. The purpose behind the application of these specific words is to use terms that we believe any persons with criminal records might use, including those on our research team. In each search for these individual key terms, we explored every link on the first three pages of search results. Given the experiences and positionality of our researchers, we expect that most persons with a criminal record would not go past the third page of results to find information on the usage of CBCs or eligibility of employment. Members of our FI research team felt they would not dive down "rabbit holes" for fear of losing hope of potential employment. The use of both internal/external searches and multiple search terms enabled us to exhaust the breadth of options in the pursuit of CBC information given out by said institutions.

## Coding

We looked at a total of 169 public higher educational institutions. Figure 1 provides the number of schools that exist within each system and its percentage amongst the total amount of all universities and colleges we researched. There is a total of 23 CSUs which make up 13.6% of all public universities and colleges in California. There is a total of 10 UCs which make up 5.9% of all public universities and colleges in California. There is a total of 113 CCs which make up 66.8% of all public universities and colleges in California. Finally, there are a total of 23 CCDs which make up 13.6% of all public universities and colleges in California.

Figure 1: colleges in California by type



We documented the information yielded from each school through a formatted outline and used this information to create and fill out a Google Form for data collection. Over Spring 2019, the team of 9 data collectors came to an agreement on which information we deemed to be pertinent to college graduates with criminal records seeking employment at post-secondary educational institutions. We had expertise as employment seekers who have criminal records. There are members with criminal records on our team who have searched for employment and have run into barriers with obtaining employment because of the lack of information about CBC processes, including the timeframe of the CBC and the types of crimes that exclude applicants. We also based our coding categories on knowledge gained from the literature review about FI employment barriers and organizations such as Corrections to College CA and Prison Policy Initiative that advocate for policy changes at the state and local levels.

For each campus or district, we sought out and gathered data related to 13 primary codes, with each containing its own secondary codes. We used the following codes to guide our online search:

1. Types of jobs that require a CBC;
2. Who conducts the CBC;
3. When do CBCs take place during the hiring process;
4. Time period (in years) that the CBC covers for potential employees' criminal history and what dates that time period is measured from (i.e. date of conviction, offense, discharge from parole, arrest, release?);
5. Campus police department involvement;
6. Fingerprinting procedures/process;
7. Types of conviction/offenses that will bar/flag someone from employment;
8. Who in HR has access to the criminal record;



9. Existence of an appeals process for job applicants;
10. Who evaluates the criminal background check;
11. Mention of “Ban the Box;”
12. Mention of FI populations with equal opportunity practices; and
13. Policies/procedures currently in place regarding hiring practices and the use of CBCs.

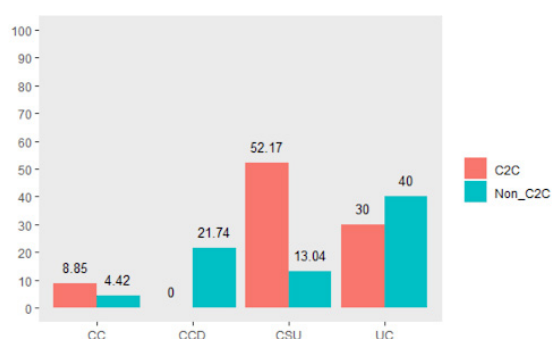
Each campus or district was coded by two coders, with discrepancies resolved by a discussion between the two coders.

We contend that these are crucial factors that directly determine the plausibility and possibility of: 1) someone who has a criminal record applying for a job, 2) receiving a response to an application, and 3) receiving an offer of employment. The need to gain more insight and understanding within this area of study has guided this exploratory approach, which intends to give a platform to a narrative that has been excluded within and outside of the academy.

## Results

Figure 2 shows the total amount of information available on the use of the criminal background check for employment by type of school. We found that only 36.9% of the CSUs have information available relating to the criminal background check. This means that the typical CSU does not provide any information to the public about the use of CBC in hiring. However, we found that CSUs with C2C programs have four times more information about the CBC than CSUs without C2C programs. Yet the proportion among campuses with C2Cs is still relatively low, at just over half.

**Figure 2: percent of institutions with any information at all by type and presence of a C2C program**



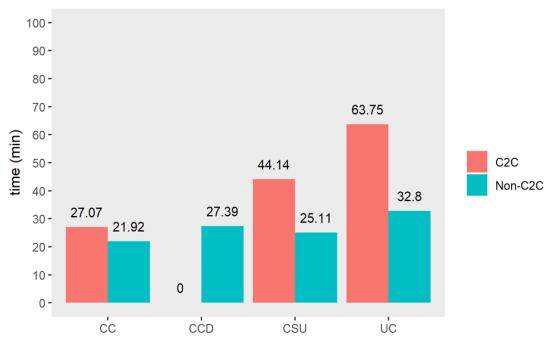
Surprisingly, fewer Community Colleges than any other school system have information regarding the use of the CBC, even though Community College is the school system with the highest contact with individuals who have criminal records. 6.1% of California Community Colleges have information available regarding the use of the CBC for employment. Community Colleges with C2C programs have twice as much information about the use of the CBC for employment— 8.8% — than the CCs without C2C programs— 4.4%.

Although the UC system has the highest number of campuses with information available regarding the use of the CBC—70%— it is still a low number and the information is vague. As we can see in Figure 2, all public higher educational systems, including the UC system, provided very low amounts of information about their use of CBCs in hiring practices.

Moreover, Figure 2 shows that 30% of UCs with C2C programs had information regarding the use of the CBC for employment as opposed to 40% of UCs without C2C programs. Besides the UC system, schools with C2C programs we examined had a higher rate of CBC information available but unexpectedly, the UCs with C2C programs had less information about the use of the CBC than the UCs without C2C programs. This means it is not guaranteed that a school will have more information about the use of the CBC if they have C2C programs on their campuses.

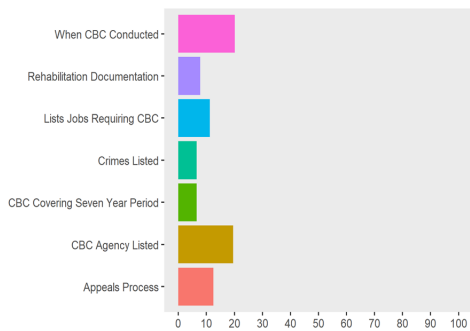
Additionally, we found that if there was any information available about the use of the CBC, it took between 21 to 63 minutes to find it and our team of student researchers with criminal records found themselves looping through endless internet rabbit holes. Figure 3 represents the average amount of time it takes to find information online regarding the use of the criminal background check for employment within each California higher educational system. On average, it took 27.5 minutes to find information related to the use of the CBC on college and university websites. To locate quality information at UC schools, it took between 32 to 63 minutes, while the same information was located in between 25 to 44 minutes at CSUs and 21 to 27 minutes at community colleges.

**Figure 3: average search time (in minutes)**



As we researched how much information was available on the use of the criminal background check and the time it took to find that information, we also found that not only the quantity of the information was scarce but the quality of the information available was also lacking. For example, the UCs make it clear that they use a CBC but leave out whether the CBC is a 7-year history search or a lifetime history search. This can have dire ramifications for college students with criminal records trying to time their education with the time from last conviction. The lack of information available and the vague descriptions of how the criminal background check would be utilized in hiring practices neglected to transparently inform individuals with criminal records about their prospects for employment within this educational system and ultimately barred them from making informed decisions about applying for employment.

**Figure 4: proportion of information per category**



There was minimal information available on:

- the types of jobs that required a CBC; only 2.7% of community colleges and 30% percent of UCs and CSUs provided information on which positions within each institution required the use of a CBC.
- the types of crimes that would preclude employment; 0% of UCs, 4.4% of Community Colleges, and 8.7% of CSUs stated which types

of crimes would prevent a person with a criminal record from being hired. In total, only 8 out of 169 schools listed the crimes that would bar an applicant from employment.

- when the background check was conducted relative to the hiring decision; only 9.7% of Community Colleges, 60% of UCs, and 60.8% of CSUs had information displayed about whether the CBC was conducted before or after the employment decision.
- how far back in time the applicant’s criminal history search was covered by the CBC; 0.8% of Community Colleges and 30% of UCs and CSUs had information available on the time covered by the CBC. Although legally an employer can only be provided with a CBC that covered seven years prior from the day the charges were filed, there was rarely any information available about the exact timeline they were considering.
- how to conduct an appeal’s process; only 6.2% of Community Colleges, 21.7% of CSUs, and 60% of UCs had information available on how to appeal an employment decision made based on the CBC.
- the needed documentation to prove rehabilitation during the appeal’s process; 2.6% of CCs, 8.7% of CSUs, and 50% of UCs listed information on how to document rehabilitation.
- who conducts the CBC; 9.7% of Community Colleges and 60% of UCs and CSUs had information available on who conducted the CBC. We did find that, out of the institutions that did have information on who conducted the CBC, it was mostly done by the police.

## Testimonies

### *Interview #1: How Uncertainty about Background Checks affects Student Career Choices*

“Jay” is a UC Berkeley student who was formerly incarcerated. Jay conducts training in various colleges on the best ways to accommodate formerly incarcerated students on campus. He hears a lot on campuses about students with criminal records choosing career paths based on which jobs they think they can get once they graduate. Students with criminal records feel a lot of uncertainty about their future, which often discourages many from pursuing an education. Since there is little information on how criminal background checks are used, many students who have dreams of working for academic institutions end up giving up on their dreams because they cannot know for sure whether the career

path they want is possible. As Jay explained,

“I mostly get my information from other people who have criminal records who went through the process before me and so I hear a lot of mixed messages. When you really don’t know, you end up disqualifying yourself from something that you really want to do. You disqualify yourself because of not knowing whether it will even be a possibility for you. That’s why it is so important to have the facts. I want to know. And I want to know from the people that are making those decisions.”

Jay further explained that this problem is an even more pressing issue for students who have been incarcerated for a long time because they do not have time to waste. They need a career path they can work towards without getting rejected in the end and having to start over.

“We really want to know so we can have options in order to decide which route to take. We have to be methodical. What are our best options? We all need and want options, and when you are not providing us options, you are limiting us. The lack of information does not encourage us to go to school to begin with. If I am a 40-year-old student, I am not gonna go into a graduate program for something I am not sure is going to pay off.”

Jay felt it was unfair that a hiring decision would only be based on the criminal background check.

“I believe I have a better chance to get the job if they get to meet me first and hear my story and base their decision on my application, my interview, my character.”

### *Interview #2: How Criminal Records Affect Applicants’ Employment Opportunity*

“Kobe” holds a master’s degree from UCLA and is formerly incarcerated. He explained that looking for a job at UCLA had been emotionally draining because the guidelines on applying with a criminal record were never clear. Kobe spent hours looking through the school’s website for information on the use of the criminal background check. In the past, that would have dissuaded him from applying even though he might have qualified for the position. He used to feel discouraged by the lack of information available for people with criminal records, and it made him feel powerless over his future.

“People like us, we feel like the system is already fixed, we never try to appeal for example. Now that I have more education, I feel more confident and maybe I would look for more guidelines and appeal a hiring decision.”

Kobe recently started working for UCLA. He attributed his hiring to the network of people he built who saw his strengths and who helped him apply for a position as a formerly incarcerated person. Kobe explained that when you have a criminal record and you are formerly incarcerated:

[Institutions] “don’t really care about giving you the jobs, they care about receiving the funding to serve us to keep us as subordinate or peer mentors, but when it comes to hiring us for jobs, they’re not looking for people with a criminal record.”

When colleges make it difficult for people with criminal records to get jobs despite their claim to valuing diversity and inclusion, it sends the message that people with criminal records should not apply.

## **Discussion**

Institutions that have inaccessible employment information about criminal background checks and hiring policies are excluding seventy to one hundred million people (Leasure and Anderson, 2016). Although there are advocates and policies attempting to address pressing issues about the criminal background check, mass incarceration and employment, there is still scarce information and resources available about employment barriers within the higher education labor market.

This study examines the use of the criminal background check and the employment process for the California State Universities (CSUs), the University of California system (UCs), the California Community Colleges (CCs), and the California Community College District schools (CCDs). The findings of this study show that, overall, these institutions provide little and vague information about the use of the criminal background check. Criminal background check policies vary across the UC, CSU, and CC systems in language, accessibility of information, and protocol. The UC system policies concerning the CBC are unclear and use ambiguous language such as “The nature and gravity of the offense(s)” which does not provide concrete signals that they are receptive to hiring individuals with a criminal record (From College Policy

Report folder). For example, “there are no cut-off dates related to offenses although per CA State law, offenses can only be reported for 7 years. However, for those academic institutions that provided CBC information, the 7-year cut-off date was never mentioned” (College Policy Report folder). Furthermore, the results show that 65.21% of CSUs, 13.1% percent of California Community Colleges, and 70% of the campuses in the UC system have information about the use of the criminal background check in the employment process. The average time to find this information is 27.5 minutes, with the UC system being the most strenuous and using nebulous language. Additionally, only 30% of UCs and CSUs provided information about specific employment positions that require a CBC, whereas only 2.65% of Community Colleges had information available.

The findings also show that there was no clear information available about how far back information on the CBC was used to determine employment. The results show that 30% of UCs and CSUs and 0.8% of Community Colleges have information available about how much time the CBC covers. Another problem with the criminal background check is that very little information is available about the agency conducting the CBC; only 60% of UCs and CSUs and 9.7% of Community Colleges had information available about what agency conducts the CBC. When information was available, the information showed that the agency conducting the majority of CBCs is a police department. Further, only 60.8% of CSUs, 60% of UCs, and 9.7% of Community Colleges had information available on the time the CBC was conducted in relation to the hiring decision. With only eight schools stating what offense forbids an applicant from employment, all other institutions fail to mention what crimes bar an individual from employment. An alarming zero percent of UCs, 8.7% of CSUs, and 4.4% of Community Colleges state what types of crimes prohibit a person with a criminal record from employment. Moreover, 22% of CSUs, 6.2% of Community Colleges, and 60% of UCs provide information about appealing decisions based on the CBC. Equally important, educational institutions also lack information about documenting rehabilitation. Fifty percent of UCs, 8.7% of CSUs, 2.6% of CCs, and 13% of CCDs listed information relevant to the documentation of rehabilitation.

Individuals with a criminal record will experience employment discrimination as criminal history is not a protected class under federal laws protected by “[t]he U.S. Equal Employment Opportunity Commission (EEOC) which is responsible for enforcing federal laws

that make it illegal to discriminate against a job applicant or an employee because of the person’s race, color, religion, sex (including pregnancy, gender identity, and sexual orientation), national origin, age (40 or older), disability or genetic information”(U.S. Equal Employment Opportunity Commission). Mass incarceration and the rise of the use of criminal background check continue to create disadvantages for people with a criminal record. The criminal background check significantly reduces the opportunity to gain access to the labor market.

The evidence in this report illustrates the insufficiency and lack of transparency regarding the criminal background check that public institutions of higher education conduct. These inadequacies have profound economic consequences for individuals with a criminal record that current policies and policy makers are failing to address. Therefore, this report recommends alternative solutions.

## Recommendations

The first recommendation is to implement a uniform statewide policy on transparency with regard to the use of CBC by public institutions and governments and uniform statewide policy on how CBCs are used by public institutions and governments. This eliminates ambiguity that different public institutions and governments create when adopting various policies that vary in language and the agency implementing such policies. Statewide transparency means that applicants with a criminal record have access to explicit universal policy statements.

Second, update CBC protocols with guidance from a review committee composed of community members, individuals with criminal records, and college programs. Guidance from system impacted communities assures communities that they are directly involved with protocols and issues that affect their lives.

Third, to reduce confusion, a committee appointed by the institutions should clearly and precisely provide a list of crimes that will automatically disqualify potential employees, thus preventing potential employees with a criminal record from moving forward with the painstaking employment process and preventing significant loss of time.

Fourth, a clear statement about colleges following the 7-year California search history law, and implementation of a secure measure to prohibit searches past the

7-years cutoff. This recommendation significantly reduces the opportunity for employers going beyond the lawful 7-year history of the criminal background check, therefore diminishing the chance that a potential employee will not be hired for a conviction past 7-years.

Fifth, university police departments should not conduct the CBC. Historically, law enforcement has had an inherent bias and prejudice towards people with criminal records and system impacted individuals. Mandating a policy for third parties to conduct CBC prevents any discrimination from law enforcement and gives potential job applicants equal footing in the employment process.

Sixth, if applicants are denied employment, the institution should provide the reason for their disqualification in writing. Currently, institutions are not mandated to provide and justification for the disqualification of an applicant, which compared to other record checks (i.e. credit checks) that are mandated to provide justifications, casts doubt on bias of the process and individuals administering it.

Seventh, institutions should provide a list of the specific documentation that can be used to prove rehabilitation. Ambiguity as to what constitutes rehabilitation signals that employers have no interest in hiring individuals with a criminal record.

Eighth, add the CBC guideline to the Equal Opportunity Statement, and consider reserving some positions for people with criminal records while adhering to guidelines for how to work with applicants with criminal records (e.g. staff training, procedures). This landmark policy would provide employers with detailed guidelines for a workforce consisting of individuals with criminal records, and, therefore contributes to the nation's economic growth and social welfare while at the same time reducing the nation's notorious incarceration rate.

The Civil Rights Laws, California's Ban the Box Law (Fair Chance Act), and California Education Laws address discrimination in particular ways but, nonetheless, do not solve all important issues pertaining to the criminal background check and employment. The Civil Rights Laws protects people of color and other marginalized groups from discrimination including employment discrimination. Title VII requires an individualized assessment of job applicants that takes into account the age of the criminal offense, nature of the offense, and how the offense is related to the specific job position.<sup>29</sup>

California's Fair Chance Act prevents certain employers

from asking an individual about their criminal history until a conditional offer of employment is made (Corrections to College California). An individual is not required to reveal any information about criminal history at the beginning of the employment process.<sup>30</sup> However, a 2016 study shows that the Fair Chance act increases discrimination because when employers don't have information about a criminal record they often assume that Blacks are more likely to have a criminal record and, therefore, discriminate against Black applicants by not giving them an opportunity of a conditional offer of employment.<sup>31</sup>

California education laws regulate community colleges systems across the state. These laws include regulations that place limitations on the hiring of people with criminal records. For example, the law restricts people with sex and drug offences from obtaining employment in academia and other staff positions. In light of such restrictions, the law also mandates that community colleges consider the rehabilitation of applicants with drug and sex offences more than five years old.<sup>32</sup> The problem with California educational laws is that its limitations are not explicit for all crimes and convictions. By the same token, with the possible exception of drug and sex offences, they have no specific guidelines or timeframe that determine rehabilitation.

Ninth, institutions should encourage and support staff who identify as formerly incarcerated and/or system impacted to create staff identity organizations of system impacted and formerly incarcerated staff members. An FI association would create a stronger network of support for fellow employees and facilitate communication and support from the association to students through mentorship and advising and from the association to the institution through policy recommendations and advising. By instituting formerly incarcerated associations on campuses, the institutions are not only recognizing the FI presence on campus, but affirming their belonging as staff, faculty, stakeholders, and leaders.

## Call to Action

We are in a moment in time, here in California, where more persons with criminal records are going back into the educational systems. From our experiences as scholars with criminal records, we see that many graduates with criminal records want to work within these systems to support the next wave of scholars with criminal records reentering society. Education without

direct paths to meaningful employment will not suffice as motivation for those reentering society because they are walking the path of higher education with years of employment uncertainty in front of them.

We ask for FI educational programs such as Project Rebound, other chapters of Underground Scholars here in California, and other programs throughout the nation to investigate and challenge the use of the CBC at their institutions. From our investigation of UC Berkeley, policies in place do not necessarily translate to positive implementation. During our ongoing investigation of UC Berkeley, the lack of transparency around the protocols of the CBC showcases why each school must be examined more closely. We ask members of our community to challenge each school to be transparent on the use of the CBC within their own institution. We

need to agitate the system and those in power to allow us into these conversations about hiring practices and policies surrounding the use of the CBC policy and their use of the CBC in higher education employment.

We ask the Formerly Incarcerated College Graduates Network and other organizations in the field to support the further collection of data on educational systems' use of the CBC for employment. We hope that organizations can support our efforts to understand and change the use of the CBC in higher education employment. We hope to see the day when scholars with a criminal record like us, who graduate, will be able to be exempt from the CBC altogether. We are scholars, and we deserve to be judged on our scholarship and not be defined by our past.

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## **About the Underground Scholars**

This research is sponsored by the Underground Scholars Research Cohort at UC Berkeley and the Institute for Research on Labor and Employment. The Berkeley Underground Scholars is a prison-to-college pipeline dedicated to the recruitment, retention, advocacy and policy of students with a criminal record at UC Berkeley and beyond. This cohort exists to educate existing and future generations about the interimbrication of race and the political economy which leads to targeting of communities for mass incarceration. This research cohort comprises scholars with criminal records who are here to control the narrative about our demographic and flip the educational viewpoint inside the classrooms. We pay homage to programs that came before us like Project Rebound, and the programs who will come after. We come from a variety of backgrounds informed by state-sanctioned violence, structural violence, and inadequate educational structures. The results of these socially toxic environments often introduced us to violence, foster systems, and carcerality more broadly. We exist to showcase that persons with a criminal record can thrive in the realm of academia.

## **About IRLE**

The Institute for Research on Labor and Employment is an interdisciplinary institute at the University of California, Berkeley that connects world-class research with policy to improve workers' lives, communities, and society. IRLE promotes better understanding of the conditions, policies, and institutions that affect the well-being of workers and their families and communities by informing public debate with hard evidence about inequality, the economy, and the nature of work.

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