

# Background Checks and the University Admissions Process

Darby Dickerson<sup>1</sup>

## A. Introduction

For several years now, institutions of higher education have grappled with the question about whether they will conduct background checks as part of their admissions process. Advocates for background checks focus on safety (both campus safety and, for particular degree programs, the safety of vulnerable groups with whom the students will work in externships or post-graduation), while opponents raise myriad concerns, ranging from student privacy to whether IHEs possess the resources and expertise to conduct checks, to dilemmas about how to proceed if a student with a criminal past is admitted.

This paper will recap general trends, identify selected legal issues related to background checks, and discuss some practicalities associated with conducting background checks in connection with the admissions process.

A caveat is that background checks will not prevent all crime or injury on campus. But they likely will prevent some, and also will impact the culture by signaling that the university is concerned about student safety and is working to create a reasonably safe learning and living environment. As with other campus-safety strategies — including community policing; mental-health counseling; alcohol, other drug, and violence prevention strategies; and mass-notification systems — background checks should be just one part of a comprehensive, environmental risk-management and campus-safety plan.

## B. General Practices and Trends

Most undergraduate programs do not have policies requiring pre-matriculation checks. Instead, the vast majority continue to rely on self-disclosure of criminal records. IHEs are, however, more likely to conduct background checks on scholarship athletes and in programs where students are likely to work with vulnerable populations, such as medicine, nursing, pharmacy, and other health professions, and less frequently in education, social work, divinity, and law. I also recommend that IHEs consider whether students in residence halls should be subject to background checks.

---

<sup>1</sup> Vice President, Dean of the College of Law, and Professor of Law, Stetson University. This paper is based in substantial measure on *Background Checks in the University Admissions Process: An Overview of Legal and Policy Considerations*, 34 J.C. & U.L. 420 (2008). For additional information, including additional citations, please consult the J.C. & U.L. article, which can be access through the NACUA website and at [www.ssrn.com](http://www.ssrn.com) (search Dickerson).

## 1. *Application questions about criminal history*

Currently, and as reflected in the recent AACRAO/CCA survey discussed in Barmack Nassarian's paper for this presentation, most public and private colleges have a mechanism in their admissions application to self-disclose a criminal record. That study also reflects that only a small percentage of public and private universities conduct any sort of background checks in connection with the admission process. Some also ask applicants whether they are registered sex offenders.<sup>2</sup>

### *News Flash*

In March 2010, Lake Michigan College enacted a policy banning sex offenders of children from taking courses on its campuses; it has indicated that sex offenders may be admitted into online courses. The College refused to allow one student to register and suspended three other students who had records of sex offenses against children. The rule originally was applied without an individual consideration. One student was later reinstated; it was reported that another student has hired a lawyer. Mary Helen Miller, *Lake Michigan College Bans Sex Offenders of Children from Its Campuses*, Chron. Higher Educ. (Mar. 3, 2010), available at <http://chronicle.com/article/Lake-Michigan-College-Bans-Sex/64474/>; Mary Helen Miller, *Lake Michigan College Reinstates One Student Suspended for Sex Offense*, Chron. Higher Educ. (Mar. 15, 2010) available at <http://chronicle.com/article/Lake-Michigan-College/64679/>.

At most schools that require self-disclosure, if an applicant answers “no” to questions related to criminal and disciplinary history, the inquiry ends; if the applicant answers “yes,” then additional explanation or documentation is required.<sup>3</sup> A majority of respondents to the AACRAO/CCA

<sup>2</sup> E.g. Amanda Dolasinski, *Three Registered Sex Offenders Accepted after University Fails to Run Background Checks*, The Lantern (Ohio State), available at <http://media.www.thelantern.com/media/storage/paper333/news/2007/11/14/Campus/Admitted-3100266.shtml> (Nov. 14, 2007).

<sup>3</sup> E.g. Robert Munoz, *Felonious OSU Applicants Only Undergo Background Check if Forth-coming with Crimes*, The Lantern (Apr. 4, 2010), available at <http://www.thelantern.com/campus/felonious-osu-applicants-only-undergo-background-check-if-forth-coming-with-crimes-1.1304630> (“The university screens only those applicants who acknowledge on their applications that they have been convicted of a felony. The university does not do a criminal record check on applicants, so only those who reveal their records are scrutinized for admission. The biggest risk for a student who does not reveal a felony on an application is that he or she will be expelled if OSU learns about the lie. Students have lied, said Andrea Goldblum, director of Student Judicial Affairs and Q9 member. ‘If exposed, typically their admission is rescinded, since it was based on falsified information.’”). Harvard University made the news in May 2010 when a former student was arrested and “pleaded not guilty in Middlesex Superior Court in Woburn yesterday to 20 counts of larceny, identity fraud, and other charges and was ordered held on \$5,000 cash bail.” Tracy Jan & Milton J. Valencia, *Trust-Based Admissions Process Leaves Elite Colleges Open to Fraud*, [http://www.boston.com/yourtown/milton/articles/2010/05/19/wheeler\\_case\\_shows\\_flaws\\_in\\_college\\_application\\_process/](http://www.boston.com/yourtown/milton/articles/2010/05/19/wheeler_case_shows_flaws_in_college_application_process/) (May 19, 2010). The student apparently falsified much of his original application materials; he was “kicked out of” Harvard after officials became suspicious about his credentials and he attempted to transfer to Yale University. A Yale admissions official saw inconsistencies in the student’s file and began verifying his credentials — many of which had been falsified. *Id.*

study indicated that they considered criminal-justice information in making admissions decision, but only a small percentage considered a criminal background as an automatic bar to admission.

Although many colleges started asking questions regarding criminal and disciplinary history before the tragedy at Virginia Tech, “admissions officers say that the murders made them more vigilant about students’ personal troubles. They say they won’t reject otherwise strong applicants because of one schoolyard fight or a beer arrest, but they may be wary of troubling patterns.”<sup>4</sup> Schools that have added questions about criminal history since Virginia Tech have done so, at least in part, because they understand they are being held to “a greater standard of accountability.”<sup>5</sup> And, as one official noted, information about criminal and disciplinary histories “is important because students come to campus not just to study, but to live together.”<sup>6</sup>

## **2. *Post-matriculation checks in connection with special programs and state licensing requirements***

In addition to asking questions related to criminal history, some universities also explain in their admissions materials that students may be required to pass background checks after they are admitted, either in connection with an internship, or before seeking licensure for some professions.

## **3. *Criminal background checks on all admitted applicants***

Very few undergraduate institutions require a criminal background check on every admitted student. In response to increased violence on campus, St. Augustine’s College, a historically black college located in Raleigh, North Carolina, required all students entering during the 1993–1994 academic year “to produce a statement from their hometown police department certifying whether they have a criminal record.”<sup>7</sup> As of December 2007, the requirement is still in place.<sup>8</sup>

---

<sup>4</sup> Larry Gordon, *Does a Pot Bust Trump a 4.0 GPA?* L.A. Times (Dec. 5, 2007), reprinted at <http://www.nacacnet.org/MemberPortal/News/newsfeed/newsarticle.htm?id=I3809593385>.

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

<sup>6</sup> Gordon, *supra* n. 4.

<sup>7</sup> B. Drummond Ayres Jr., *College Requires Applicants to Come Clean About Crime*, N.Y. Times (Sept. 3, 1993), available at <http://query.nytimes.com/gst/fullpage.html?res=9F0CE4D91F39F930A3575AC0A965958260>.

<sup>8</sup> St. Augustine’s Coll., *Prospective Students, Additional Admissions Forms, Police Record Check*, [http://www.st-aug.edu/prospective/pdfs/Police\\_Record\\_Check.pdf](http://www.st-aug.edu/prospective/pdfs/Police_Record_Check.pdf) (last visited Dec. 24, 2007).

### News Flash

“The University of Virginia plans to begin screening all students against a state law-enforcement database before each semester, The Washington Post reports. The university's president, John T. Casteen III, told the Post that he was concerned by campus officials' lack of knowledge of a prior arrest, 70 miles away, of a student who was charged this week with first-degree murder in the death of another student. Virginia's student code requires self-disclosures of any arrests or convictions, Mr. Casteen told the Post, but the alleged killer apparently did not report his prior arrest.” *U. of Virginia Plans Background Checks of All Students*, The Ticker (Chron. Higher Ed.), <http://chronicle.com/blogPost/U-of-Virginia-Plans/23783> (May 6, 2010).

It has been reported that “Virginia Tech does not support background checks for all applications going through undergraduate admissions, as proposed by University of Virginia President John Casteen.” Sarah Watson, *Tech Will Not Push for Background Checks on Prospective Students*, <http://www.collegiatetimes.com/stories/15505/tech-will-not-push-for-background-checks-on-prospective-students> (May 26, 2010).

Although slightly different, some university systems are beginning to add background check requirements for all admitted students in selected programs. On December 20, 2007, North Dakota's State Board of Higher Education approved a policy requiring fingerprint-based background checks for all system students entering in certain fields.<sup>9</sup> The majors subject to further criminal background checks are wide-ranging and include early childhood, college teaching, fire technology, psychology, legal assistant, criminal justice, forensic science, exercise and recreation studies, social work, communication disorders, speech pathology, nursing, dental hygiene, EMT paramedic technology, medical assistant, medicine, massage therapy, occupational therapy, environmental health, education, counseling, pharmacy, and law enforcement.<sup>10</sup> The Board indicated that the new policy was triggered by “recent tragic incidents on or near college campuses.”<sup>11</sup>

---

<sup>9</sup> *Board Approves Background Checks*, In-Forum, <http://www.in-forum.com/News/articles/186724> (Dec. 21, 2007); N.D. Univ. Sys., State Bd. Higher Educ., *Agendas, Agenda — Dec. 20, 2007, SBHE Agenda* at 15, <http://www.ndus.edu/uploads/document-library/1577/12-20-07-BOARD-MEETING-MATERIALS-REDUCED.PDF> (Dec. 20, 2007) [hereinafter *N.D. Agenda*].

<sup>10</sup> *NDUS Academic Programs Criminal History Background Check Required and FBI Checks Authorized — March 2008*, <http://www.ndus.edu/uploads/ndus-policies/P511.pdf>.

<sup>11</sup> *N.D. Agenda*, *supra* n. 8, at 14.

### News Flash

Some Maryland lawmakers have predicted that the General Assembly is likely to consider legislation requiring background checks on university students. Marcus Moore, *Student Background Checks Could Be on Assembly Agenda*, [http://www.gazette.net/stories/05142010/polinew200750\\_32553.php](http://www.gazette.net/stories/05142010/polinew200750_32553.php) (May 14, 2010).

#### 4. *Selective background checks*

Within just one month in 2004, the University of North Carolina Wilmington received a double shock: On May 4, freshman Jessica Faulkner was drugged, raped, and murdered in her dorm by fellow student Curtis Dixon.<sup>12</sup> Then on June 4, student Christen Naujoks was shot and killed by fellow student John Peck.<sup>13</sup> Both Dixon and Peck had criminal records, but neither disclosed his full criminal or disciplinary record when applying for admission.<sup>14</sup> At the time, UNC Wilmington did not conduct criminal background checks on any applicant for admission.<sup>15</sup>

Following his daughter Jessica's murder, John Faulkner filed two lawsuits. One complaint named Curtis Dixon's father as the defendant.<sup>16</sup> James Ellis Dixon was an administrator in the University of North Carolina system;<sup>17</sup> his son Curtis had been expelled from another UNC campus following a stalking incident in which he brandished a knife in a female student's dorm room.<sup>18</sup> Mr. Dixon allegedly completed his son's application and did not reveal this or other information about his son's past troubles. Mr. Faulkner voluntarily dismissed this lawsuit.<sup>19</sup> The

---

<sup>12</sup> Ken Little, *Father Fighting for Safer Campus*, StarNewsOnline, <http://www.starnewsonline.com/article/20070705/NEWS/707050389> (July 5, 2007). Dixon confessed to the murder, but committed suicide in December 2004 while in jail awaiting trial. *Id.*

<sup>13</sup> Little, *supra* n. 12. For additional details about Christen Naujoks' murder, see Kiara Jones, *Another UNCW Student Murdered*, The Seahawk (UNC Wilmington), available at <http://media.www.theseahawk.org/media/storage/paper287/news/2004/08/26/News/Another.Uncw.Student.Murdere-d-722867.shtml> (Aug. 26, 2004). For the UNC Wilmington Chancellor's official statement regarding the two murders, see U.N.C. Wilmington, News & Events, *Chancellor DePaolo's Talking Points About UNCW Student Deaths*, <http://appserv02.uncw.edu/news/artview.aspx?ID=1258> (June 8, 2004).

<sup>14</sup> Little, *supra* n. 12.

<sup>15</sup> *Id.*

<sup>16</sup> *Estate of Faulkner v. Dixon*, No. 06CVS6106 (Wake Co., N.C. Gen. Ct. of J., Super. Ct. Div. filed May 17, 2006).

<sup>17</sup> Little, *supra* n. 12. James Dixon had served as UNC Charlotte's executive assistant to the chancellor and assistant secretary of the Board of Trustees since 1990. Bluelineradio.com, *UNCW Fighting Crime Problem*, <http://www.bluelineradio.com/FAULKNER.html> (visited Feb. 2, 2008).

<sup>18</sup> Little, *supra* n. 12.

second suit, against the university, was submitted to the North Carolina Industrial Commission.<sup>20</sup> That suit, which was settled,<sup>21</sup> alleged that UNC Wilmington was negligent for admitting Curtis Dixon “despite a well documented history of violence against women, including incidents at other UNC campuses.”<sup>22</sup>

After the murders, but before the Faulkner lawsuits, the university created a system-wide safety task force that studied both crime and admissions practices on the 16 UNC campuses.<sup>23</sup> Among other things, the task force recommended that the UNC system add standard questions to the admissions application that address student integrity and behavior.<sup>24</sup> The applications should include “clear and consistent questions concerning disciplinary, criminal, military, and enrollment history.”<sup>25</sup> The application should also emphasize “that failing to provide complete and accurate information will constitute grounds for immediate denial of admission, withdrawal of admission, and/or withdrawal of enrollment.”<sup>26</sup> In addition, applicants should be required “to report criminal history between the date of application and the date of enrollment.”<sup>27</sup>

The task force also recommended that the UNC system “[d]evelop reasonable and cost-effective methods to verify completeness and accuracy of applicant information.”<sup>28</sup> “Before a student enrolls,” campus officials should “compare applicants against the UNC expulsion/suspension database”<sup>29</sup> 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.”<sup>30</sup> In addition, schools should

---

<sup>19</sup> Email from Eileen Goldgeier, Gen. Counsel, UNC Wilmington, to Author, Vice President & Dean, Stetson Univ. Coll. of L. (Jan. 7, 2008) (on file with Author).

<sup>20</sup> *Claim for Damages under Tort Claims Act by Estate of Jessica Lee Faulkner*, No. A19561 (N.C. Indus. Commn. filed May 17, 2006); *Est. of Faulkner v. Univ. N.C.*, No. T-TA-19561 (N.C. Indus. Commn., amend. filed Sept. 4, 2007) (copy on file with Author).

<sup>21</sup> Email from Eileen Goldgeier, *supra* n. 19.

<sup>22</sup> Scott Jaschik, *Errors of Admission?* <http://www.insidehighered.com/news/2006/05/18/suit> (May 18, 2006).

<sup>23</sup> UNC Off. of the Pres., *Task Force on the Safety of the Campus Community: Final Report* 1–2 (Dec. 14, 2004), available at [http://intranet.northcarolina.edu/docs/aa/reports/Final\\_safety\\_task\\_force\\_report.pdf](http://intranet.northcarolina.edu/docs/aa/reports/Final_safety_task_force_report.pdf) [hereinafter “*UNC Task Force*”].

<sup>24</sup> *Id.* at 6.

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

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

request “long-term secondary-school suspensions and expulsions on transcripts or on transcript supplements”<sup>31</sup> 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.”<sup>32</sup>

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”<sup>33</sup> 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.”<sup>34</sup>

Finally, the task force concluded that

given the small number of students who failed to provide accurate and truthful information [about criminal histories] and went on to commit a campus crime,<sup>[35]</sup> the widespread and routine use of criminal background checks on all students would be neither cost-effective nor 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.<sup>36</sup>

In October 2006, the University of North Carolina System, drawing heavily from the task force’s recommendations, adopted a detailed “Regulation on Student Applicant Background Checks.”<sup>37</sup> The Regulation provides that certain checks, such as cross-referencing enrollment at other UNC campuses, be conducted for all admitted applicants or all admitted applicants who indicate an intent to attend.<sup>38</sup> With limited exceptions,<sup>39</sup> the Regulation also provides that background

---

<sup>31</sup> *Id.* at 7.

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

<sup>33</sup> *Id.* The Author suggests that other “triggers” might include withdrawals or leaves of absence from another institution of higher education; suspensions or expulsions while a K–12 students; dishonorable military discharge; loss of a professional license; wildly fluctuating grades; disturbing remarks in a personal statement or in reference letters; and contradictions or inconsistencies within the candidate’s admissions materials.

<sup>34</sup> *Id.*

<sup>35</sup> The task force found that, for the three-year period July 1, 2001 through June 30, 2004, only twenty-one (out of approximately 250,000) students who committed a campus crime also had a prior criminal history; of this number, thirteen failed to disclosure their prior history on the admissions application. *Id.* at 4.

<sup>36</sup> *Id.* at 7.

<sup>37</sup> UNC, *The UNC Policy Manual: 700.5.1[R], Regulation on Student Application Background Checks*, [http://www.northcarolina.edu/content.php/legal/policymanual/uncpolicymanual\\_700\\_5\\_1\\_r.htm](http://www.northcarolina.edu/content.php/legal/policymanual/uncpolicymanual_700_5_1_r.htm) (last updated Nov. 17, 2006). The policy was effective for students who matriculate after August 1, 2007. *Id.*

<sup>38</sup> *Id.* at ¶ 1.

checks should be conducted when triggers or “red flags” are raised.<sup>40</sup> If a background check is positive, the Regulation provides guidance about how admissions officers should evaluate the data and emphasizes the importance of attempting to determine whether the applicant poses “a significant threat to campus safety.”<sup>41</sup>

Georgia College and State University has adopted a similar approach to pre-matriculation background checks. As part of its “Undergraduate Application for Admission,” the school asks, “Have you ever been convicted of a crime other than a traffic offense, or are any criminal charges now pending against you?”<sup>42</sup> In addition, the school requires applicants to consent to allow campus officials “to conduct a criminal background check and such other background investigations as the university deems appropriate in evaluating my application as a student at GCSU.”<sup>43</sup>

The GCSU background-check policy was added in 2003 or 2004 to help improve campus safety by verifying information that applicants provided in response to questions regarding criminal history.<sup>44</sup> The school felt it was important to give applicants notice about the fact that they might be subject to a check. The school conducts checks on all admitted students in some disciplines, such as nursing and education, and also conducts checks on all applicants to answer “yes” to application questions regarding criminal history. The school also conducts checks when the admissions file reveals inconsistencies or other matters of concern. In the school’s experience, the background checks often reveal additional information the applicant should have revealed.<sup>45</sup> In addition, the school has run background checks following admission when students are involved in certain types of incidents on campus. As with the pre-matriculation checks, these checks have revealed that some students were not candid on their admissions application. GSCU

---

<sup>39</sup> *Id.* at ¶ 3. “Constituent institutions are not required to perform criminal background checks on applicants who are younger than 16 years old at the time of the acceptance or on residents of North Carolina who have attained the age of 65 and are entitled to a tuition waiver under G.S. §115B-2.” *Id.*

<sup>40</sup> *Id.* In addition, the admissions application now includes six questions about criminal and disciplinary history. U.N.C. Wilmington, *Admissions, Apply*, <http://www.uncwil.edu/admissions/documents/AdmiApp2007-2008.pdf> (last visited Dec. 24, 2007).

<sup>41</sup> *Id.* at ¶ 10.

<sup>42</sup> Ga. Coll. & State Univ., *Undergraduate Application for Admission* at 10, [http://www.gcsu.edu/admissions/undergraduate/PDF/Undergrad\\_appl.pdf](http://www.gcsu.edu/admissions/undergraduate/PDF/Undergrad_appl.pdf) (last visited Dec. 24, 2007).

<sup>43</sup> *Id.*

<sup>44</sup> Telephone Interview with Paul Jones, V.P. for Institutional Research & Enrollment Mgmt., Prof. of Educ. Admin., Ga. Coll. & State Univ. (Jan. 17, 2008). GCSU had questions regarding criminal history on its admissions application before adopting the background-check policy. *Id.*

<sup>45</sup> *Id.* GSCU has a committee, that includes individuals such as legal counsel, an admissions representative, a student affairs representative, and faculty that decides how to proceed with an applicant with a criminal record. *Id.* For example, if an offer of admission is extended, the student might be placed on immediate probation. *Id.*



has exercised its authority to revoke offers of admission based on applicants' or students' failure to provide complete information.<sup>46</sup>

## 5. *Athletes*

Some colleges and universities conduct background checks on prospective student-athletes.<sup>47</sup> The University of Oklahoma, for example, runs criminal background checks on all potential recruits.<sup>48</sup> Baylor, Kansas State, and the University of Kansas screen at least some potential student-athletes.<sup>49</sup>

Factors that have led schools to implement background checks on incoming student-athletes include a number of high-profile incidents involving athletes, some of which have resulted in lawsuits against the university,<sup>50</sup> and studies concluding that athletes account for a higher percentage of crime on campus than their numbers should warrant. Because student-athletes are often hand-picked, awarded full scholarships, play in multi-million-dollar facilities financed by the university, and on the whole have higher public and campus profiles than most other students, schools that conduct background checks on student-athletes, but not all students, are likely to survive legal challenges based on selective screening.

## 6. *International students*

Most IHEs do not have specific background-check policies for international students. In light of the federal government's SEVIS program, most schools likely have determined that a separate background check is not necessary. Instead, most notify prospective international students that certain U.S. consulates may require conduct a background check before issuing a student visa.<sup>51</sup>

---

<sup>46</sup> *Id.*

<sup>47</sup> Shawn Courchesne, *Colleges Digging a Little Deeper: Screening Incoming Student Athletes an Ongoing Issue*, Hartford Courant, Feb. 4, 2007, available at <http://www.validityscreening.com/pdf/Hartford-Courant.pdf> (Feb. 4, 2007); see also *Colleges Look into Background Check Options*, USA Today, <http://www.mywire.com/pubs/USATODAY/2005/07/15/932205?&pbl=222> (July 15, 2005) (reporting that the "National Association of Collegiate Directors of Athletics believes background checks for scholarship athletes are the wave of the future, and it wants to catch that wave now.").

<sup>48</sup> Mary Beth Marklein, *'An Idea Whose Time Has Come'? Schools Increasingly Subjecting Applicants to Background Checks*, USA Today (Apr. 18, 2007), available at <http://www.usatoday.com/educate/college/arts/articles/20070415.htm>; Eddie Timanus, *Oklahoma Investigates Athletes' Backgrounds*, USA Today, (Mar. 3, 2005), available at [http://www.usatoday.com/sports/college/other/2005-03-03-oklahoma-probes\\_x.htm](http://www.usatoday.com/sports/college/other/2005-03-03-oklahoma-probes_x.htm)

<sup>49</sup> Marklein, *supra* n. 48. Baylor limits checks to transfer athletes. Todd Datz, *Background Checks on Campus*, CSO Magazine (July 2005), available at [http://www.csoonline.com/read/070105/briefing\\_background.html](http://www.csoonline.com/read/070105/briefing_background.html).

<sup>50</sup> *E.g. Crow v. State*, 271 Cal. Rptr. 349 (Cal. App. 3d Dist. 1990); *Korellas v. Ohio St. Univ.*, 2004 WL 1598666 (Ohio Ct. Cl. July 12, 2004); *Boyd v. Tex. Christian Univ.*, 8 S.W.3d 758 (Tex. App. 2000); see generally Thomas H. Sweeney, *Closing the Campus Gates — Keeping Criminals Away from the University — The Story of Student-Athlete Violence and Avoiding Institutional Liability for the Good of All*, 9 Seton Hall J. Sport L. 226 (1999).

<sup>51</sup> *E.g. Canisius College, Undergraduate Admissions, Visa Tips*, [http://www.canisius.edu/admissions/visa\\_tips.asp](http://www.canisius.edu/admissions/visa_tips.asp) (last visited Dec. 26, 2007).

## 7. *Dormitory residents*

Even if schools do not seek information about applicants' criminal histories or conduct pre-matriculation background checks on all or some students, they might seek information about the criminal pasts of dorm residents.<sup>52</sup> National statistics reveal that a significant amount of campus crime occurs in residence halls.<sup>53</sup> In addition, recent news stories reflect problems associated with students living in dorm rooms absent background checks.

The University of Akron has experienced multiple incidents regarding offenders living in campus dorms.<sup>54</sup> In 2006, the university assigned a 45-year-old undergraduate who had served prison time for robbery to live in a dorm room with a 19-year-old freshman.<sup>55</sup> Just a few weeks later, two additional students reported they were assigned to live in university housing with convicted felons.<sup>56</sup> In one situation, within minutes of moving in, a 23-year-old student told his 18-year-old roommate that he had just been released from prison after serving three years for aggravated robbery and burglary. In the other situation, a traditional-aged freshman was assigned to live with a 41-year-old student who had served time for drug trafficking and burglary; the ex-convict was removed from campus housing when he was accused of new crimes. Also, in a 2004 incident, the university assigned a 36-year-old drug informant to room with a 23-year-old law student.<sup>57</sup> Following the most recent of these incidents, the University's Board of Trustees announced that the school would begin asking student housing applicants about their criminal histories.<sup>58</sup>

---

<sup>52</sup> E.g. C. Ariz. College Off. of Residence Life, *Residence Hall License Application*, [http://www.centralaz.edu/documents/students/Residence\\_Life/licenseapp.pdf](http://www.centralaz.edu/documents/students/Residence_Life/licenseapp.pdf) (last updated July 26, 2006; Harris-Stowe State Univ., *Application for Housing*, <http://www.hssu.edu/deptdocs/17/HousingApp07.pdf> (last visited Dec. 8, 2007)).

<sup>53</sup> E.g. U.S. Dept. Educ., Off. of Postsecondary Educ., *Campus Security Data Analysis Cutting Tool Website, Summary Campus Crime and Security Statistics 2002–2004*, <http://www.ed.gov/admins/lead/safety/crime/criminaloffenses/ag-assault-04.pdf> (last visited Dec. 24, 2007) (reflecting that of 7,076 assaults reported under the Clery Act for 2004, 957 occurred within residence halls); *id.* at <http://www.ed.gov/admins/lead/safety/crime/criminaloffenses/forcible-sex-offenses-04.pdf> (reflecting that of 3,680 forcible sexual assaults reported under the Clery Act for 2004, 1,938 occurred in residence halls); *id.* at <http://www.ed.gov/admins/lead/safety/crime/criminaloffenses/burglary-04.pdf> (noting that of 39,740 burglaries reported under the Clery Act for 2004, 12,838 occurred in residence halls); *see also UNC Task Force Report*, *supra* n. 23, at 4 (reporting that “58% of campus crimes occurred inside residence halls or other campus buildings”). *But cf.* Timothy C. Hart, *Violent Victimization of College Students* 1 (Bur. Just. Spec. Rep. Dec. 2003), *available at* <http://www.ojp.usdoj.gov/bjs/abstract/vvcs02.htm> (finding that “the majority of violent crimes against college students occurred off campus”).

<sup>54</sup> *Felon in Dorm Raises Issues at Akron College*, Columbus Dispatch (Nov. 27, 2006), *available at* <http://www.columbusdispatch.com>.

<sup>55</sup> *Id.*

<sup>56</sup> Carol Biliczky, *2 More Felons in Dorms*, Beacon J., Dec. 5, 2006, *available at* <http://www.ncaabbs.com/forums/archive/index.php/thread-151619.html>.

<sup>57</sup> *Id.*

<sup>58</sup> *University of Akron Begins Asking Housing Applicants About Criminal Records*, 13 Campus Watch Newsltr. 4, (Winter 2007), *available at* <http://www.securityoncampus.org/aboutsoc/campuswatch/index.html>.

When considering whether to conduct background checks on potential dorm residents, universities should note that off-campus landlords likely will require prospective student-tenants to pass a check. Private landlords are generally free to rent to whomever they choose,<sup>59</sup> so long as they comply with the Fair Housing Act<sup>60</sup> and disability laws.<sup>61</sup> With regard to public housing,

[u]nder federal regulations currently in place, state public housing authorities may require criminal background checks of prospective and current tenants. Consequently, in a majority of states, the public housing authorities consider a person's criminal background, including an arrest that did not lead to conviction, in making individualized determinations as to an applicant's eligibility for public housing. In addition, three states immediately reject any applicant who has a criminal record.<sup>62</sup>

Landlords conduct background checks to minimize the chances of lessees not paying rent, damaging property, or injuring other tenants — all considerations that apply in the higher-education context. Therefore, background checks on residents are relevant in the campus context and would bring universities in line with a significant number of off-campus landlords.

Since the original J.C. & U.L. article was published in 2008, some schools have added background checks as part of their on-campus housing application process.<sup>63</sup>

#### **8. *Medicine, nursing, pharmacy, and other health professions***

On the whole, health-related programs have been more aggressive than others in requiring background checks for admitted students. Although some programs have implemented checks due to pressure from clinical sites and licensing boards, some have also realized the importance of protecting the campus community.

---

<sup>59</sup> Eloisa C. Rodriguez-Dod & Olympia Duhart, *Evaluating Katrina: A Snapshot of Renters' Rights Following Disasters*, 31 Nova L. Rev. 467, 479 (2007).

<sup>60</sup> “The FHA makes it unlawful for a landlord ‘[t]o refuse to rent or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.’” *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 479.

<sup>63</sup> *E.g.* Tex. Southern U., *Residential Life & Housing Frequently Asked Questions*, <http://www.tsu.edu/pages/3287.asp>; *United Tribes Technical College Housing/Dorm Rental Application*, [http://www.uttcc.edu/admissions/docs/housing\\_app.pdf](http://www.uttcc.edu/admissions/docs/housing_app.pdf); *see also* Stephanie Kuncman, *More Schools Using Checks: UCF Looks at Some Applicants, Not All*, <http://www.centralfloridafuture.com/2.10660/more-schools-using-checks-1.1420637> (updated Feb. 15, 2009) (“Almost 10 percent of colleges now require students to submit to background checks before they can live on campus to increase the safety of college housing. UCF, however, does not check a student’s background unless the student indicates a criminal history on his or her admissions application.”).

*a. Medical schools*

The trend in medical schools is to conduct background checks.<sup>64</sup> While most conduct checks on their own initiative, schools in Illinois are required to do so pursuant to state law.<sup>65</sup> In addition, the Association of American Medical Colleges (“AAMC”) has recommended that all medical schools conduct background checks and has developed its own service to facilitate that process. Medical schools most typically justify background checks on the basis that students are likely to work with vulnerable segments of society,<sup>66</sup> but many implemented checks after a 2000 murder-suicide by a University of Arkansas medical student.<sup>67</sup>

In 2004, the AAMC started studying the issue of pre-matriculation background checks.<sup>68</sup> In June 2005, the AAMC’s Executive Council approved a recommendation that “a criminal background check be completed on all applicants accepted annually to medical school entering classes.”<sup>69</sup> Then, in May 2006, the AAMC issued the “Report of the AAMC Criminal Background Check Advisory Committee,” which contains a more comprehensive analysis of the issues concerning background checks.<sup>70</sup>

After reviewing several options for a background-check system, the committee recommended that the AAMC develop its own “national, centralized system for completing and reporting on criminal background checks for potentially all AAMC-member medical schools.”<sup>71</sup> Under this system, applicants would pay a single fee for a background check, and the results would be made available to any member school.<sup>72</sup> Juvenile offenses will not be checked.<sup>73</sup> The committee also

---

<sup>64</sup> E.g. David Epstein, *New Requirement for Med Schools*, <http://www.insidehighered.com/news/2005/07/01/med> (July 1, 2005).

<sup>65</sup> 110 Ill. Comp. Stat. 57/1 to 57/99. The law took effect on December 5, 2005. In addition, a 2004 Mississippi law “requires all health care professions schools in the state, including the University of Mississippi School of Medicine, to fingerprint applicants.” Scott Harris, *Schools Implement Student Background Checks*, AAMC Rep. (July 2009), available at <http://www.aamc.org/newsroom/reporter/july09/background.htm>.

<sup>66</sup> See Whitney L.J. Howell, *Medical Schools Seek Security of Student Background Checks*, AAMC Rep., Oct. 2004, available at <http://www.aamc.org/newsroom/reporter/oct04/background.htm> (quoting James Thompson, M.D., president and CEO of the Federation of State Medical Boards: “Identifying students with criminal records before they enter medical school could prevent situations where potentially violent individuals could be given access to hospitals and lethal doses of medication.”).

<sup>67</sup> *U. Arkansas Deaths Murder-Suicide*, <http://www.cbsnews.com/stories/2000/08/28/national/main228544.shtml> (Aug. 30, 2000). The perpetrator did not have a prior criminal record. *U. Arkansas Deaths Murder-Suicide*, *supra*.

<sup>68</sup> Assn. Am. Med. Colleges, *Report of the AAMC Criminal Background Check Advisory Committee* at 1 (May 2006), available at [http://www.aamc.org/members/gsa/cbc\\_final\\_report.pdf](http://www.aamc.org/members/gsa/cbc_final_report.pdf) [hereinafter “AAMC Report”].

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 2.

<sup>72</sup> Dana Forde, *Criminal Background Checks to Become Part of Medical School Application Process*, [http://www.diverseeducation.com/artman/publish/printer\\_6602.shtml](http://www.diverseeducation.com/artman/publish/printer_6602.shtml) (Nov. 2, 2006).

recommended that schools consider the results only after making a conditional decision to admit.<sup>74</sup> Following a pilot by with 10 schools<sup>75</sup> in Fall 2008,<sup>76</sup> the system was made available to all AAMC schools in May 2009 for Fall 2010 entering classes.<sup>77</sup> “For 2009, the background check system has revealed seven felonies, 382 misdemeanors, and 67 other-than-honorable military discharges.”<sup>78</sup>

***b. Nursing programs***

As with medical schools, nursing schools are increasingly requiring pre-matriculation background checks.<sup>79</sup> Judy Farnsworth and Pamela J. Springer recently conducted a survey of 389 nursing schools; 265 responded. Of these schools, 41% did not require self-disclosure of criminal history or criminal background checks, but 38% conducted checks. Of the schools that required background checks, 25% required the check as a condition of admission. Although a few conducted background checks at the end of the program to assist students with licensure requirements, most conducted checks in connection with clinical programs. Nursing programs typically adopt checks because students work with vulnerable populations, and because many internship sponsors and state licensing boards require them.<sup>80</sup>

---

<sup>73</sup> Gina Shaw, *Criminal Background Checks for Medical Students Moving Forward*, AAMC Rep. (Sept. 2006), available at <http://www.aamc.org/newsroom/reporter/sept06/backgroundchecks.htm>.

<sup>74</sup> *AAMC Report*, *supra* n. 68, at 2 (item 3 under “Additional Recommendations”).

<sup>75</sup> Am. Med. Coll. Admissions Serv., *AAMC Background Check Service, About the AAMC-Facilitated Background Check Service*, <http://www.aamc.org/students/amcas/faq/background.htm> (last visited Dec. 26, 2007). For the types of searches to be conducted, see *id.* at <http://www.aamc.org/students/amcas/faq/backgroundsearches.htm>.

<sup>76</sup> Gina Shaw, *Applicant Criminal Background Check Moves Forward*, AAMC Rep. (May 2007), <http://www.aamc.org/newsroom/reporter/may07/background.htm>.

<sup>77</sup> Harris, *supra* n. 65. For a list of schools participating in the system for the 2011 entering classes, see American Medical College Admissions Service, *Background Check Service*, <http://www.aamc.org/students/amcas/faq/background.htm>.

<sup>78</sup> Harris, *supra* n. 65. In July 2008, it was reported that, “[t]o date, the system, which is administered by Pennsylvania-based Certiphi Screening, has conducted 2,223 background checks on medical school applicants. So far, 33 misdemeanors, 11 dishonorable military discharges, and no felonies have been detected.” Scott Harris, *AAMC Expands Criminal Background Check Testing* (July 2008), available at <http://www.aamc.org/newsroom/reporter/july08/background.htm>.

<sup>79</sup> Judy Farnsworth & Pamela J. Springer, *Background Checks for Nursing Students: What Are Schools Doing?* 27 *Nursing Educ. Perspectives* 148, 150 (May/June 2006).

<sup>80</sup> *Id.*

**c.      *Pharmacy programs***

The American Association of College Pharmacies (AACP) has been a leader in exploring the issue of student background checks. In November 2006, the Association issued a comprehensive “Report of the AACP Criminal Background Check Advisory Panel” to “introduce pharmacy colleges and schools to the important issues regarding access to, and use of, criminal records of pharmacy students.”<sup>81</sup> The report provides detailed guidance for schools about how to design a background check policy, considerations about how to conduct criminal background checks, advice about how to analyze the results of criminal background checks, and directions regarding confidentiality and proper disclosure.

**d.      *Other health professions***

Programs for other health professions, including anesthesiologist assistant, athletic training, clinical-community psychology, clinical lab sciences, dentistry, dental hygiene, health sciences, kinesiology, occupational therapy, paramedic training, physician’s assistants, radiography, respiratory therapy, sonography, and speech and language pathology may also require pre-matriculation criminal background checks. Many of these checks are driven by the fact that, to complete their degree requirements, students must participate in clinics at hospitals and other sites that are subject to the jurisdiction of the Joint Commission on Accreditation of Healthcare Organizations (“JCAHO”).<sup>82</sup> Although JCAHO itself does not require background checks, it does monitor members’ compliance with state law, regulation, and organizational policy that requires background checks.<sup>83</sup>

*News Flash*

In January 2010, the American Physical Therapy Association issued its “Criminal Background Check Report for Physical Therapist Education Programs.”  
<http://www.apta.org/AM/Template.cfm?CONTENTID=68061&TEMPLATE=/CM/ContentDisplay.cfm>.

---

<sup>81</sup> Am. Assoc. Colls. Pharm., *Report of the AACP Criminal Background Check Advisory Panel* 3 (Nov. 2006), available at <http://www.aacp.org/site/page.asp?TRACKID=www.google.com/search?q=aacp+background+check&rls=com.microsoft:e&VID=1&CID=1185&DID=6830> [hereinafter *AACP Report*]. The report likely would prove helpful to any educational institution contemplating adding or revising a policy regarding student background checks.

<sup>82</sup> Joint Commn., *Requirements for Criminal Background Checks*, <http://www.jointcommission.org/NR/exeres/A116AF30-8785-423D-90C1-89035DFCB9C8.htm> (rev. Apr. 1, 2005).

<sup>83</sup> *Id.*; see Russell Ford et al., Powerpoint Presentation, *Students with Criminal Backgrounds: Checks and Balances* slides 22–23 (NACUA June 15, 2006).

## 9. Law schools

Unlike most health professions, law schools rarely conduct pre-matriculation background checks. The American Bar Association, which accredits law schools, does not require background checks as part of the admissions process. In fact, the *Standards and Rules of Procedure for Approval of Law Schools* do not mention background checks.<sup>84</sup> On the other hand, the *Standards* do not prohibit schools from conducting background checks. In addition, the Law School Data Assembly Service (LSDAS), which serves as a clearinghouse of student information such as grades, transcripts, and letters of recommendation, does not conduct or include background check information as part of the candidate packet provided to member schools.<sup>85</sup>

Instead, law schools tend to rely on self-disclosure through application questions and honor code provisions.<sup>86</sup> At least three schools, however, expressly reserve the right to conduct background checks on applicants.<sup>87</sup>

In addition to requiring applicants to disclose criminal histories, law schools typically issue stern warnings to applicants that state boards of bar examiners will conduct a thorough character and fitness examination before an individual is permitted to practice law in the jurisdiction, and that the investigation will compare answers given on the bar application with information the student provided to the law school.<sup>88</sup> They also warn students that a felony conviction or pattern of criminal conduct may make admission to the bar difficult, if not impossible. Some, including my own school, spend time during orientation emphasizing the importance of candor on the admissions application and providing students with a window within which to amend their applications. For amendments that disclose serious crimes or a pattern of criminal conduct, law schools may revoke admission or impose other discipline.

Despite warnings, some students fail to disclose and are caught only after having graduated from the law school. Published cases provide examples of bar examiners and state courts addressing this type of issue.<sup>89</sup> In addition, through their honor codes, law schools often maintain

---

<sup>84</sup> ABA, *Standards and Rules of Procedure for Approval of Law Schools* ch. 5 (2009–2010), available at <http://www.abanet.org/legaled/standards/standards.html>.

<sup>85</sup> Law School Admissions Council, *About the LSDAS*, <http://www.lsac.org/LSAC.asp?url=/lsac/lstdas-general-information.asp> (last visited May 20, 2010).

<sup>86</sup> John S. Dzienkowski, *Character and Fitness Inquiries in Law School Admissions*, 45 S. Tex. L. Rev. 921, 927 (2004) (noting that “[e]very application surveyed in this study asks information about an applicant’s conduct relating to the criminal laws”); *id.* at 935 (discussing discipline systems).

<sup>87</sup> The schools are St. Thomas University School of Law (Florida), Stetson University College of Law (Florida), and Thomas M. Cooley Law School (Michigan).

<sup>88</sup> Dzienkowski, *supra* n. 86, at 936; see also BYU L. Sch., *Quotes from Law School Admissions Deans on Addendums*, [http://ccc.byu.edu/prelaw/PDF\\_Files/Quotes\\_from\\_Admissions\\_Deans\\_on\\_Addendums.pdf](http://ccc.byu.edu/prelaw/PDF_Files/Quotes_from_Admissions_Deans_on_Addendums.pdf) (last visited Dec. 21, 2007) (providing advice about disclosing criminal records).

<sup>89</sup> *E.g. In re Kleppin*, 768 A.2d 1010 (D.C. 2001) (individual failed to his past criminal record to two law schools); *Gagne v. Trustees of Ind. Univ.*, 692 N.E.2d 489 (Ind. App. 1998) (law school subjected student to discipline after

jurisdiction for conduct that occurred when the individual was an applicant or student; they also expressly reserve the right to take action, including revoking a diploma, when students hide their criminal pasts.<sup>90</sup> But they do not seem to be contemplating background checks as a way to avoid such late discovery of candidates' criminal records.

### **10. Other programs of study**

Other programs in which pre-matriculation background checks are most frequently required are education (especially pre-K through 12), counseling, and social work. As with health-related professions, students in these programs often perform clinical work in settings with children, the elderly, and other vulnerable populations. In addition, seminary and divinity schools often require background checks, not only to protect congregations with whom students might work, but also to uphold their schools' reputations. Although some business schools now conduct background checks on applications, those checks tend to focus on credential verification, not criminal histories.<sup>91</sup>

Since the original J.C. & U.L. article was published in 2008, some schools have now added disclaimer language indicating that a background check may be performed on any applicant.<sup>92</sup>

### **C. The Legal Landscape**

Legal issues may arise in at least four situations: (1) an applicant is denied admission because of accurate information discovered during the background check, (2) the applicant is denied admission because of inaccurate information obtained during the background check, (3) the student is admitted and later commits a crime on campus or against a member of the campus community, and (4) a student is admitted without a background check and later commits a crime on campus or against a member of the campus community. This section will outline some foundational legal concepts and then address legal issues that arise when an applicant sues, and then when an injured party sues.

---

discovering that he concealed his criminal record); *In re Dabney*, 836 N.E.2d 573 (Ohio App. 2005) (individual failed to disclose criminal record on her law-school and bar applications).

<sup>90</sup> See generally Mary Ann Connell & Donna Gurley, *The Right of Educational Institutions to Withhold or Revoke Academic Degrees*, 32 J.C. & U.L. 51 (2005).

<sup>91</sup> Francesca De Meglio, *Background Checks Are Front and Center*, Bus. Wk. (Jan. 1, 2007), available at [http://www.businessweek.com/bschools/content/jan2007/bs20070101\\_101796.htm](http://www.businessweek.com/bschools/content/jan2007/bs20070101_101796.htm); Wharton U. of Pa., *MBA Welcome, Matriculation Checklist*, <http://www.wharton.upenn.edu/mba/welcome/next/checklist.cfm> (select "Verification Process") (accessed May 25, 2010).

<sup>92</sup> E.g. Johns Hopkins U., *Johns Hopkins University Graduate Studies in Arts & Sciences and Engineering*, <http://www.grad.jhu.edu/admissions/apply/> (accessed May 20, 2010).



## ***1. Foundational concepts***

No state or federal law prohibits institutions of higher education from requiring admissions applicants or admitted students to submit, or submit to, criminal background checks. In addition, courts historically have afforded institutions of higher education great discretion in making admissions decisions.<sup>93</sup> This discretion is based at least partially on the concept of academic freedom.<sup>94</sup> Moreover, courts consistently have held that, for purposes of substantive due process, “pursuit of an education is not a fundamental right or liberty.”<sup>95</sup>

Despite courts’ historic deference to the university admissions process, the twentieth century brought legal challenges, and some constraints.<sup>96</sup> Specifically, colleges and universities now must ensure that their selection processes are not arbitrary or capricious;<sup>97</sup> must, under contract theory, abide by their published admissions standards and absent unusual circumstances, such as concealed information, honor their admissions decisions;<sup>98</sup> and must not discriminate on the basis of protected characteristics such as age, disability, citizenship, race, or sex.<sup>99</sup>

Using these basic principles, universities that conduct background checks should ensure that the students subjected to background checks are not selected in an arbitrary or capricious manner. Thus, schools may conduct checks on all students, or on all students in programs with special health and safety concerns, such as pharmacy. “Red flag” programs, like that implemented by the University of North Carolina System, would also likely survive judicial scrutiny, if the “red flags” were related to the school’s mission, or to health, safety, or other legitimate institutional interests. On the other hand, background-check policies that have a disparate impact on protected classes might be subject to challenge. For example, 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.<sup>100</sup>

---

<sup>93</sup> William A. Kaplin & Barbara A. Lee, *The Law of Higher Education*, vol. 1, § 8.2.1, 752 (4th ed., Jossey-Bass 2006); see also Elizabeth Bunting, *The Admissions Process: New Legal Questions Creep up the Ivory Tower*, 60 Educ. L. Rep. 691, 691 (1990) (opining that until the 1950’s, “a college’s decision to admit or reject an applicant was judicial no-man’s land”); J. Peter Byrne, *Academic Freedom: A “Special Concern of the First Amendment”*, 99 Yale L.J. 251, 323–327 (1989) (noting a long history of judicial deference toward university decision-making).

<sup>94</sup> *Sweezy v. New Hampshire*, 354 U.S. 234 (1957) (Frankfurter, J., concurring in result); see Derek Langhauser, *Use of Criminal Convictions in College Admissions*, 154 Ed. Law Rep. 733, 734 & n. 5 (2001) (citing additional precedent for this proposition).

<sup>95</sup> *Tobin v. Univ. Me. Sys.*, 59 F. Supp. 2d 87, 90 (D. Me. 1999) (citing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35–37 (1973)).

<sup>96</sup> Kaplin & Lee, *supra* n. 93, at § 8.2.1, 752–753.

<sup>97</sup> *Id.* at § 8.2.2.

<sup>98</sup> *Id.* at § 8.2.3.

<sup>99</sup> *Id.* at § 8.2.4.

<sup>100</sup> *AACP Report*, *supra* n. 81, at 16.

Universities should ensure that written policies regarding background checks are clear, and should adhere to those policies.<sup>101</sup> Also, if a university performs background checks after deciding to admit candidates, that school should inform the applicant that admission is subject to and conditioned on receipt of an acceptable criminal background check,<sup>102</sup> and should articulate what “acceptable” means.

## **2. Legal issues — applicant likely complainant or plaintiff**

### **a. General concepts**

Outside the background check context, several cases have upheld universities’ rights to deny or revoke admission because of a student’s criminal record, especially when the student concealed that record.<sup>103</sup> In each case, the court found the university had acted appropriately by following its policies and procedures. And in some of the cases, the court acknowledged the school’s interest in protecting its reputations, professions, and ultimate clients — the public. As Derek Langhauser, General Counsel of Maine’s public two-year college system, has summarized,

[T]he test for an institution is one of reasonableness; whether the college’s decision is not arbitrary, unreasonable or capricious; and whether it is consistent with standards of professional judgment. This may be shown by demonstrating a mere rational relationship between the nature, severity, recency of the crime; the truthfulness of the applicant; and the interests of the college.<sup>104</sup>

Translated to the background check context, courts will be more likely to rule for universities sued by rejected students when the universities abide by their written policies, provide notice and an opportunity to students with positive results to respond, and base policies on their educational missions, core values, and important priorities, including campus safety.

### **b. Anti-discrimination laws concerning prior convictions**

Although most states do not forbid discrimination based on an individual’s conviction record, fourteen states prohibit discrimination in certain circumstances, primarily employment and licensure.<sup>105</sup> Although none of these laws expressly apply to the university admissions process,

---

<sup>101</sup> *E.g. Schaer v. Brandeis Univ.*, 735 N.E.2d 373, 381 (Mass. 2000) (holding, in a student discipline case, that a university should follow its own rules, but that minor deviations will not support a cause of action in contract if the student receives basic fairness).

<sup>102</sup> Langhauser, *supra* n. 94, at 734–736 (explaining variations in law between denials and revocations of admission).

<sup>103</sup> *Martin v. Halstead*, 699 F.2d 387 (7th Cir. 1983); *Burgos v. U. Central Fla. Bd. Trustees*, 283 F. Supp. 2d 1268 (M.D. Fla. 2003); *Gagne v. Trustees U. Ill.*, 692 N.E.2d 489 (Ind. App. 1998); *see generally* Jerome W.D. Stokes & Allen W. Groves, *Rescinding Offers of Admission When Prior Criminality Is Revealed*, 105 Educ. L. Rep. 855 (1996).

<sup>104</sup> Langhauser, *supra* n. 94, at 736 (footnote omitted).

<sup>105</sup> The states are Arizona (Ariz. Rev. Stat. § 13-904(E)), Colorado (Colo. Rev. Stat. § 24-5-101), Connecticut (Conn. Gen. Stat. § 46a-80), Florida (Fla. Stat. § 112.011), Hawaii (Haw. Rev. Stat. § 378-2.5), Kansas (Kan. Stat.

schools in these jurisdictions should study these laws. Specifically, schools might be able to determine which graduates might or might not be barred from obtaining occupational licenses; they might also discern preferred procedures for notifying applicants about the results of background checks. And, based on legislative language or history, they might locate guidance about which applicants might be denied admission following a positive check. Finally, these statutes reflect legislative attitudes regarding the rehabilitation of individuals convicted of crimes, which in turn might impact universities' policies in that regard.

**c. *Statutory requirements for conducting background checks***

Both federal and some state statutes regulate how certain background checks may be conducted. The federal Fair Credit Reporting Act ("FCRA"),<sup>106</sup> for example, regulates "consumer reports." But the term "consumer report" does not include processes related to university admissions. Thus, although institutions of higher education must abide by the FCRA when conducting background checks on current or prospective employees, the law does not appear to apply to prospective students.<sup>107</sup> This view is supported by the fact that no reported cases have extended, or even discussed extending, the statute to the college admissions context.

Although the FCRA likely does not apply in the admissions context, schools would be wise to study the Act and, out of a sense of basic fairness, adopt some of its procedural safeguards. Using the FCRA as a guide, universities that conduct background checks might take the following steps:<sup>108</sup>

- ❖ Notify admissions applicants, in a separate disclosure document, that a background check will be conducted and the results considered in making the admissions decision.<sup>109</sup> The disclosure would, among other things, describe the scope of the check to be conducted.
- ❖ Obtain applicants' written consent, on a separate form, to use an outside agency to conduct the check.<sup>110</sup>

---

Ann. § 22-4710(f)), Kentucky (Ky. Rev. Stat. §§ 335B.020, 335B.070, 335B.010(4)), Louisiana (La. Rev. Stat. § 37:2950), Minnesota (Minn. Stat. § 364.03), New Mexico (N.M. Stat. §§ 28-2-3, 28-2-4, 28-2-5, 28-2-6), New York (N.Y. Exec. Law § 296(15); N.Y. Correct. Law §§ 750 to 754), Pennsylvania (18 Pa. Cons. Stat. § 9125), Washington (Wash. Rev. Code §§ 9.96A.020, 9.96A.060, 9.96A.030), and Wisconsin (Wis. Stat. § 111.335). *See generally* Advocacy Toolkits, *Standards for Hiring People with Criminal Records, Summary of State Laws*, <http://www.lac.org/toolkits/standards/standards.htm#summary> (accessed Dec. 10, 2007).

<sup>106</sup> 15 U.S.C. §§ 1681 to 1681x.

<sup>107</sup> *See AACP Report, supra* n. 81, at 13 ("Although FCRA does not explicitly include educational institutions, the applicability to colleges . . . may depend on legal interpretation and circumstances.").

<sup>108</sup> This section follows the structure in Barbara Lee, *Who Are You? Fraudulent Credentials and Background Checks in Academe*, 32 J.C. & U.L. 655, 664 (2006) (discussing background checks on faculty and /staff).

<sup>109</sup> *Cf.* 15 U.S.C. § 1681b(b)(2)(A)(i).

<sup>110</sup> *Cf.* 15 U.S.C. § 1681b(b)(3)(B)(ii).

- ❖ If the report is positive and the university is going to reject the applicant, revoke a conditional offer of admission, or make some other negative decision, provide the applicant with a copy of the report and a reasonable opportunity to respond before finalizing the negative decision under consideration.<sup>111</sup> Reports, for a variety of reasons, are not always accurate; thus, providing the candidate with a pre-decision opportunity to respond can help minimize the impact of “false positive” results.
- ❖ If the university rejects the applicant, revokes a conditional offer of admission, or makes some other negative decision, providing the candidate with written notice of that decision.<sup>112</sup> Whether a university provides an explanation of the decision is a policy decision that admissions and other officials should make in connection with counsel.

#### ***d. Juvenile records***

State law can also impact what types of information are available when a background check is conducted. Juvenile records present the greatest challenge. Specifically, depending on how states treat juvenile records, questions and background checks about juvenile offenses may not be accessible or may not be appropriate considerations in the admissions process. Sealed<sup>113</sup> and expunged<sup>114</sup> records pose particular problems. “The federal government and nearly every state have enacted some type of statute providing for either the sealing, expungement, or limited access to juvenile records.”<sup>115</sup> The primary goal underlying these statutes is to allow offenders to start anew by removing the stigma associated with a criminal record.<sup>116</sup> But state laws differ regarding “the procedure, criteria, and intended effect of sealing juvenile records.”<sup>117</sup>

Currently, no state statutes expressly prohibit educational institutions from asking admissions applicants about juvenile records, whether sealed, expunged, or otherwise. Previously, Maryland

---

<sup>111</sup> Cf. 15 U.S.C. § 1681b(b)(3)(A).

<sup>112</sup> Cf. 15 U.S.C. § 1681b(b)(3)(B)(i).

<sup>113</sup>“Sealing ‘refers to those steps taken to segregate certain records from the generality of records’ in order to ensure confidentiality.” Luz A. Carrion, *Rethinking Expungement of Juvenile Records in Massachusetts: The Case of Commonwealth v. Gavin G.*, 38 New Eng. L.J. 331, 331 (2004) (quoting *Police Commr. of Boston v. Mun. Ct. Dorchester Dist.*, 374 N.E.2d 272, 277 (Mass. 1978)).

<sup>114</sup> “[E]xpungement removes and destroys records ‘so that no trace of the information remains.’” Carrion, *supra* n. 113, at 331 (quoting *Police Commr. of Boston*, 374 N.E.2d at 277).

<sup>115</sup> Carrie Hollister, Student Author, *The Impossible Predicament of Gina Grant*, 44 UCLA L. Rev. 913, 928 (1997).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 930.

prohibited educational institutions from requiring, “in any application, interview, or otherwise,” disclosure of any information pertaining to an expunged record.”<sup>118</sup> But this provision was repealed in 2001.<sup>119</sup> Some states, however, prohibit questioning about expunged records, regardless of context. For example, a New Hampshire statute provides that, “[i]n any application for employment, license or other civil right or privilege . . . a person may be questioned about a previous criminal record only in terms such as “Have you ever been arrested for or convicted of a crime that has not been annulled by a court?”<sup>120</sup>

In addition, university officials should understand that most states authorize offenders whose records have been expunged to answer “no”<sup>121</sup> when asked whether they have a criminal history.<sup>122</sup> Some states also permit offenders to respond they do not have a criminal history if records have been sealed.<sup>123</sup> Despite these laws, some schools’ admissions applications declare that “[t]he entry of an expungement or sealing order does not relieve you of the duty to disclose the matter on this statement.”<sup>124</sup> This conflict between a state law and a school’s admissions requirement can and does confuse applicants,<sup>125</sup> particularly young adults who have been advised by their attorneys or parents that their record has been wiped clean and that they need not reveal the past offense.<sup>126</sup> This issue is complicated by the fact that, in this age of rapidly advancing technology, very little information is truly erased, meaning that information about an expunged

---

<sup>118</sup> Hollister, *supra* n. 115, at 936–937 (citing Md. Ann. Code art. 27, § 740(a) (1996)).

<sup>119</sup> Md. Acts 2001, ch. 10, §1. The *Juvenile Justice Standards Annotated* 196, 198 (Robert E. Shepherd, Jr. ed., ABA 1996) recommend that states adopt statutes that would prohibit educational institutions from “inquiring, directly or indirectly, and from seeking any information relating to whether a person has been arrested as a juvenile, charged with committing a delinquent act, adjudicated delinquent, or sentenced to a juvenile institution.”

<sup>120</sup> *E.g.* N.H. Rev. Stat. Ann. § 651:5(X)(c). (“In any application for employment, license or other civil right or privilege, or in any appearance as a witness in any proceeding or hearing, a person may be questioned about a previous criminal record only in terms such as “Have you ever been arrested for or convicted of a crime that has not been annulled by a court?””).

<sup>121</sup> One student author referred to the ability to answer “no” to criminal history questions following sealing or expunction as a “legally sanctioned lie.” Carrie Hollister, Student Author, *The Impossible Predicament of Gina Grant*, 44 UCLA L. Rev. 913, 926 (1997).

<sup>122</sup> In New Jersey, for example, the expungement statute provides that if a person is ever asked whether he or she has been arrested, convicted and/or charged with a crime, the person is to respond “no.” N.J. Stat. Ann. § 2C:52-27 (WL Current with laws through L.2007, c. 203, and J.R. No. 12); *see also* N.J. Stat. Ann. § 2C:52-15 (indicating that government agencies should respond that no record exists if asked about an individual’s expunged record). The statute also provides that another person’s disclosure of an individual’s expunged record constitutes a criminal offense. N.J. Stat. Ann. § 2C:52-30.

<sup>123</sup> *E.g.* Ohio Rev. Code Ann. § 2151.357(G) (West 2007).

<sup>124</sup> *E.g.* Univ. Toledo College of L., *Univ. Toledo L. College Admissions Form*, <https://utssl.utoledo.edu/lawforms/form.asp> (accessed Dec. 26, 2007).

<sup>125</sup> Linda McGuire, *Lawyering or Lying? When Law School Applicants Hide Their Criminal Histories and Other Misconduct*, 45 S. Tex. L. Rev. 709, 717–718 (2004).

<sup>126</sup> *See e.g.* Dzienkowski, *supra* n. 86, at 948.

or sealed juvenile record can easily surface.<sup>127</sup> In light of these competing considerations, schools should evaluate whether they will continue to request information about expunged records.

For the reasons noted above, some commentators advise against seeking such information.<sup>128</sup> And that generally is the best course, given the challenges of obtaining the information and the confusion schools can cause by requiring students to reveal information that the law deems never to have existed or not to be available. But if a school decides to seek those records, campus officials should consult with counsel and take several steps in advance. First, the university should develop a statement indicating why it needs to understand applicants' complete criminal history. Next, the university should develop a statement explaining it understands the impact of expunction and sealing laws, but still requires applicants to disclose information concerning juvenile records, even if expunged or sealed. The university should be quite clear that, although it recognizes some state laws would permit applicants to truthfully answer "no" to questions regarding criminal history, they should not, even if counsel has advised otherwise. In addition, the university should determine in advance how campus officials will handle applicants' failure to provide requested information about expunged records, and should clearly explain any negative consequences<sup>129</sup> of failing to disclose the requested information.

A related challenge is whether a school or a background-screening company will be able to access expunged or sealed juvenile records. In Missouri, for example, a court, when granting a motion to expunge a juvenile record, may order those records to be destroyed.<sup>130</sup> In other states, access to even unsealed juvenile records is severely limited; thus, background checks may not reflect those offenses.<sup>131</sup>

A final challenge relates to terminology. Universities that seek information regarding juvenile offenses should avoid using the term "conviction." Most juvenile systems use alternative language such as "adjudication" or "diversion"; thus, using the term "conviction" may confuse the applicant, and may also result in an accurate "no" answer to the question as written.<sup>132</sup>

---

<sup>127</sup> E.g. Stokes & Groves, *supra* n. 103, at 858 (explaining, in the high-profile case of Gina Grant, that newspaper clippings from the state in which her juvenile offense of manslaughter occurred were mailed anonymously to Harvard, which had admitted her, and to the *Boston Globe*, which had run stories about her success in high school); see also Laurie Mason, *Slate Not as Clean as Some Juveniles Think*, MSNBC, <http://www.msnbc.msn.com/id/22377694> (Dec. 23, 2007) (describing students' conflict about whether to report expunged juvenile offenses).

<sup>128</sup> E.g., Dzienkowski, *supra* n. 86, at 946–948.

<sup>129</sup> Depending on the circumstances, negative consequences might range from an oral or verbal reprimand, to community service, to interim suspension, to revocation of admission or expulsion.

<sup>130</sup> Mo. Stat. Ann. § 211.321(5).

<sup>131</sup> E.g. N.Y. Crim. Proc. § 720.35(2) (McKinney 2007). Some states, however, permit access to persons or organizations who have a "legitimate interest." E.g. Alaska Stat. § 47.10.092-93; Conn. Gen. Stat. Ann. § 46b-124(c) (West 2007); Nev. Rev. Stat. Ann. § 62H.030(1)–(2) (West 2007). Kansas permits disclosure of a juvenile's record to educational institutions, but does not specifically mention institutions of higher education. Kan. Stat. Ann. § 38-1608(a)(5).

<sup>132</sup> Dzienkowski, *supra* n. 86, at 946–948.

### 3. *Legal issues — injured party as complainant or plaintiff*

This section will address three tort theories under which injured individuals or their representatives might sue universities for failing to conduct a pre-matriculation background check on admitted students: negligent admission, and duties to protect or warn if a student with a criminal history is admitted.

#### a. *Negligent Admission*

It is conceivable that injured individuals might sue the university for negligent admission of a dangerous student. In the past, lawsuits alleging negligent admission typically have been filed by students who did not succeed under the school's academic program. In this variant of an educational malpractice claim, the student usually alleges that, during the admissions process, the school should have realized that he or she did not have the ability or credentials to complete the program successfully.<sup>133</sup> To date, this type of action has been unsuccessful.<sup>134</sup>

In another context, an individual injured by another student's criminal act might sue the university for negligent admission, arguing that she would not have been injured had the school more thoroughly researched the perpetrator-student's background before offering admission. Indeed, some commentators have speculated that this type of action might be viable.<sup>135</sup> And the Faulkner lawsuit (described above) against the University of North Carolina made just this type of claim. Specifically, the suit alleged that UNC Wilmington was negligent "for admitting Curtis Dixon despite a well documented history of violence against women, including incidents at other UNC campuses."<sup>136</sup> And Mr. Faulkner was not the first to make this sort of claim.<sup>137</sup>

This second version of negligent admission seems similar to negligent hiring in the employment context. Of course, because students, unlike employees, do not have an agency relationship with the university, that tort is an imperfect analogy. But a review of how courts have responded to negligent hiring claims is still instructive.

An individual injured by an employee might sue the employer for negligent hiring. Under this theory, the injured party might argue that the employer should have screened the perpetrator-

---

<sup>133</sup> *E.g. Ross v. Creighton Univ.*, 957 F.2d 410, 411–417 (7th Cir.1992).

<sup>134</sup> Indeed, more generally, educational malpractice claims have been rejected by the courts. *E.g. Watts v. Florida Intl. Univ.*, 2005 WL 3730879 \*12 (S.D. Fla. June 9, 2005); *Doe v. Yale Univ.*, 1997 WL 766845 \*1 (Conn. Super. 1997) (citing many other cases).

<sup>135</sup> *E.g. Stokes & Groves, supra* n. 103, at 862–876.

<sup>136</sup> Scott Jaschik, *Errors of Admission*, Inside Higher Educ., <http://www.insidehighered.com/news/2006/05/18/suit> (May 18, 2006).

<sup>137</sup> *See Eiseman v. State of New York*, 511 N.E.2d 1128 (N.Y. 1987) (described in detail in the 2008 J.C. & U.L. article).

employee more thoroughly.<sup>138</sup> In a nutshell, “[a]n employer hires negligently when he employs a person with known propensities, or propensities which could have been discovered [with a] reasonable investigation.”<sup>139</sup> Thus, two important questions are (1) whether an employer has a duty to conduct a criminal background check on employees, and (2) whether an employer may be held liable for injuries caused by an employee hired with a known criminal record.

As in any negligence claim, a plaintiff in a negligent hiring case must plead and prove duty, breach, actual and proximate causation, and damage.<sup>140</sup> Also, as in other negligence contexts, foreseeability — both with regard to duty and causation — is a critical concept.<sup>141</sup> Regarding duty, an employer typically “owes a duty of care to those persons the employer reasonably foresees could be harmed by an unfit employee.”<sup>142</sup>

To establish breach of this duty, the plaintiff must show that the employer failed to use reasonable care under the circumstances.<sup>143</sup> Here, the nature of the employer’s business can impact the amount of care owed a plaintiff. For example, certain employers, such as common carriers and landlords, will owe special duties to passengers and tenants, respectively.<sup>144</sup> Also, “[b]ecause an employer is only liable for negligent hiring when it knew or should have known of the employee’s propensity to engage in harmful conduct, a central question is whether an employer had a duty to investigate an applicant’s fitness for the job where required by law . . . or where the employer has some reason to question an applicant’s fitness.”<sup>145</sup>

Next, the plaintiff must establish that the employer’s breach of duty caused the injury. Here, foreseeability again plays a role; the fact-finder will determine whether the injury suffered was

---

<sup>138</sup> James R. Todd, Student Author, *“It’s Not My Problem”: How Workplace Violence and Potential Employer Liability Lead to Employment Discrimination of Ex-Convicts*, 36 Ariz. St. L.J. 725, 753 (2004).

<sup>139</sup> *Id.* (citing Terry S. Boone, *Violence in the Workplace and the new Right to Carry Gun Law — What Employers Need to Know*, 37 S. Tex. L. Rev. 873, 879 (1996) (emphasis in Todd article)).

<sup>140</sup> *Id.*; see Louis P. DiLorenzo, *An Emerging Trend in State Employment Law — Employers’ Responsibility to Conduct Employment Background Checks*, SJ079 ALI-ABA 359, 362 (2004) (available on Westlaw) (writing that “[a] negligent hiring claim can be established by showing: 1) the existence of an employer-employee relationship, 2) the employee was incompetent or unfit for the job, 3) the employer knew or could have known with reasonable effort of the incompetence or danger, 4) the act or omission caused the injury, and 5) the employer’s negligence in hiring . . . the employee directly caused the claimant’s injury”).

<sup>141</sup> In *McCain v. Florida Power Corp.*, 593 So. 2d 500, 502–503 (Fla. 1992), the court observed that courts sometimes mistakenly merge the duty-foreseeability analysis with the causation-foreseeability analysis.

<sup>142</sup> DiLorenzo, *supra* n. 140, at 362.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* Since 2003, many states have enacted laws to require employers to conduct background checks on employees, or at least certain employees, in particular industries, such as child care, education, health care, law enforcement, security services, and transportation, and in certain licensed professions like law. *Id.* at 371–374.



foreseeable based on the employee's prior bad conduct.<sup>146</sup> Two tests have emerged to evaluate foreseeability under the causation element. Some courts use the "prior similar incidents" test, which focuses primarily on whether the conduct in question was foreseeable in light of the perpetrator's past convictions.<sup>147</sup> Others use the "totality of the circumstances" test, under which the court considers not only the conviction, but other variables, including "elapsed time since conviction, mitigating factors, and number of convictions."<sup>148</sup> Under both tests, the determination of foreseeability will be intensively fact-based.

That being said, other than in a few high-risk industries, such as child care, education, health care, law enforcement, security services, transportation, and in certain licensed professions like law,<sup>149</sup> courts and legislatures have been reluctant to impose on employers a general duty to conduct pre-hiring background checks.<sup>150</sup> As one scholar noted, "a reasonable investigation 'does not generally require a criminal background check.'"<sup>151</sup> But employers cannot simply ignore "red flags" that exist on an employment application.

Commentators have noted that some courts' treatment of negligent hiring cases has had two potentially negative consequences. First, employers who are not legally required to conduct a background check — and do not — may be in a better legal position than those who do.<sup>152</sup> Second, employers will be understandably reluctant to hire most applicants with criminal records, particularly if the past bad conduct involved violence. On the first point, because background checks are now relatively easy to obtain, at a relatively low cost, we may see judicial attitudes shift in coming years. Thus, the burden of obtaining a check may be less than the probability of serious injury occurring. Also, at least some courts have found that employers have a duty to investigate "red flags" on employment applications, even absent a criminal background check.<sup>153</sup> Regarding the second point, some legislatures have responded with statutes that provide employers a presumption against negligent hiring, if the statutory requirements are followed.<sup>154</sup>

---

<sup>146</sup> *Id.* at 362.

<sup>147</sup> Todd, *supra* n. 138, at 754.

<sup>148</sup> *Id.*

<sup>149</sup> DiLorenzo, *supra* n. 140, at 371–374.

<sup>150</sup> *E.g.* *Rozzi v. Star Personnel Servs., Inc.*, 2007 WL 1531427 \*3 (Ohio App. May 29, 2007); *but cf.* *Munroe v. Universal Health Servs., Inc.*, 596 S.E.2d 604, 607 n. 4 (Ga. 2004).

<sup>151</sup> Nancy B. Sasser, "Don't Ask, Don't Tell": *Negligent Hiring Law in Virginia and the Necessity of Legislation to Protect Ex-Convicts from Employment Discrimination*, 41 U. Rich. L. Rev. 1063, 1088 (2007).

<sup>152</sup> *Id.* at 1088–1090

<sup>153</sup> *See also* Meghan Oswald, Student Author, *Private Employers or Private Investigators? A Comment on Negligently Hiring Applicants with Criminal Records in Ohio*, 72 U. Cin. L. Rev. 1771, 1790 (2004) (advising business to conduct criminal background checks if the employer notices any discrepancies or contradictions in information provided on the employment application, and in-person interview, and during reference checks).

<sup>154</sup> *Id.* at 1790–1792 (discussing statutes in Florida and Louisiana).

Another point regarding negligent hiring involves the inherent tension between an employer's duty to conduct a reasonable investigation and state laws that either forbid employers to ask certain questions about past criminal activity and/or with sealing and expunction laws. Because reasonableness and foreseeability are central to the negligence analysis, courts have ruled for the employer when an employee with a criminal record is hired but governmental regulation has prevented the employer from obtaining information about the employee's past conduct.<sup>155</sup>

It's difficult to determine how courts might approach future negligent admissions claims based on a university's failure to conduct a background check. Very likely, courts may reach different conclusions.

Relying on concepts such as academic freedom, some courts may hesitate to second-guess university admissions decisions. Others may reject the claims on a policy argument that universities do not have a duty to reject candidates who have been freed by the judicial system and/or given certain rights by the state legislature.

Still other courts may view universities more like businesses who have a duty to protect invitees, such as students and employees, from dangers that the university knew about, or should have known about.<sup>156</sup> And if a court finds that a duty exists, given the ease and relatively low cost with which background checks can now be run, a rough  $B < PL$ <sup>157</sup> analysis might well establish breach. Of course, application of a negligent admission theory does not depend on a background-check requirement. A court might determine that universities should be aware of "red flags" — contradictions, inconsistencies, and odd gaps — in an applicant's file and should conduct a more thorough application into those applicants' history. This is the approach adopted by the University of North Carolina system. In addition, a university general counsel has argued that "the sex offender registration system effectively put the university on notice of such history, . . . [and] when there is such notice, there is then a duty to inquire into the circumstances and risk presented or there is the possibility of negligence if someone on campus is injured by the registered sex offender."<sup>158</sup>

---

<sup>155</sup> An interesting question, however, is what would happen if the information should not have been available as a matter of law, but actually could have been located had a diligent search been conducted. For an example of what opposing counsel might do in this type of situation, see *Tallahassee Furniture Co. v. Harrison*, 583 So. 2d 744, 754 (Fla. 1st Dist. App. 1991).

<sup>156</sup> *E.g. Nova Southeastern Univ., Inc. v. Gross*, 758 So. 2d 86, 90 (Fla. 2000) ("There is no reason why a university may act without regard to the consequences of its actions while every other legal entity is charged with acting as a reasonably prudent person would in like or similar circumstances.").

<sup>157</sup> The  $B < PL$  test was developed by Judge Learned Hand in *United States v. Carroll Towing*, 159 F.2d 169, 173. "[I]f the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i.e., whether  $B < PL$ ." Under the formula, a defendant will have breached his duty of care — have acted unreasonably — when "the burden of avoiding the harm is less than the probability of that harm occurring, multiplied by the seriousness of the harm if it does occur." John L. Diamond et al., *Understanding Torts* 60 (3d ed., LexisNexis 2007).

<sup>158</sup> Rick D. Johnson, *Strategies: Dealing with the Campus Sexual Offender* 7 (NACUA Ann. Mtg. June 26–29, 2002) (available to NACUA members at [www.nacua.org](http://www.nacua.org)).

And finally, Congress or state legislatures may determine that the best approach is to develop a set of standards that would provide a presumption that a university was not negligent if the prescribed steps were followed.

Apart from the question of duty, the issues of breach and causation are also important to the negligent admission analysis. Even if an applicant has a criminal record, admitting that student might not breach the general duty of care, to act reasonably under the circumstances. Given the educational missions of universities, it might not be unreasonable to admit applicants whose past records are remote, who record reflects a single offense as opposed to a pattern of crime, or whose past offenses were not violent. Also, even if a student with a known past record is admitted and injures another person, the injury must relate to the alleged negligence. Thus, a plaintiff who is raped likely will not be able to establish causation if the prior offense were shoplifting; a jury likely would not find that it was foreseeable that a former shoplifter would commit a violent offense like rape.

If courts do adopt a negligent admission theory, the first place universities might see the doctrine applied is in residence halls. In the employment context, a perpetrator's proximity to potential victims can be a factor. For example, in *Or v. Edwards*,<sup>159</sup> in which a landlord gave apartment keys to a custodial worker, who murdered a tenant's child. The murdered child's estate sued the landlord for negligent selection and entrustment. The landlord had not required the perpetrator to complete an employment application and had not conducted a background check.<sup>160</sup> The perpetrator had, however, told the landlord he was on probation and had been under hospital observation.<sup>161</sup> The landlord did not know that he had been arrested for kidnapping and raping a child.<sup>162</sup> In affirming a jury verdict against the landlord, the court explained that had the landlord need not have worried about the perpetrator's fitness so long as he was used "for handyman jobs that involved little if any contact with other people."<sup>163</sup> However, the landlord's sensitivity to the worker's background should have increased significantly when he gave the worker keys, and thus access to tenants' apartments.<sup>164</sup>

Students in residence halls live in close proximity to each other and are in a home-like setting in which their normal defenses might be lowered.<sup>165</sup> In addition, and particularly for freshman and

---

<sup>159</sup> 818 N.E.2d 163 (Mass. App. 2004).

<sup>160</sup> *Id.* at 168.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 169.

<sup>164</sup> *Id.* Along the same lines, we often see background checks required by state law or company policy when adults work closely in close proximity to vulnerable populations. See Marcie A. Hamilton, *Religious Institutions, the No-Harm Doctrine, and the Public Good*, 2004 BYU L. Rev. 1099, 1165–1169.

<sup>165</sup> See John Nicoletti et al., *Violence Goes to Campus* 32–33 (Charles C. Thomas Pub. Ltd. 2001) (discussing living arrangements and trust in college dorms). [Note: A second edition of this book was published in 2009.]

transfer students, the university often makes housing assignments, and students have little say or control over who their roommates, suitemates, or hallmates will be. These facts — coupled with some courts' determination that the landlord-tenant relationship is a special relationship that would give rise to the landlord's duty to protect the tenant from the intentional torts of third parties<sup>166</sup> — may lead a court to adopt a negligent admission argument more readily in the residence hall situation than under other scenarios.

***b. Duties to Warn or Protect***

If the university knowingly admits a student with a criminal record, the next questions that arise are whether the university has a duty to warn other students about the admittee's past criminal history or to protect them from potential future criminal acts by that person.

Absent a special relationship or the power to control a third person, there is no general duty to warn others about,<sup>167</sup> or to protect them from, danger.<sup>168</sup> Control sufficient to trigger a duty generally is limited to situations such as employer-employee, jailer-inmate, and hospital-admitted in-patient.<sup>169</sup> And courts repeatedly have held that the university-student relationship is not inherently "special" as a matter of law.<sup>170</sup> But as my colleague Professor Peter F. Lake has observed,

[W]ith no hint of irony, courts continue to hold that adult college students are not in a special relationship with [an institution of higher education], except when they are. The courts appear to be saying that there is no general special relationship, but student do have specific duty-creating relationships with IHE's, some of which are legally "special." Thus, IHE's do not have "custody" over their adult students, but do have other legal relationships, some of which are technically and legally "special," given rise to a duty of reasonable care.<sup>171</sup>

---

<sup>166</sup> *E.g. Mullins v. Pine Manor College*, 449 N.E.2d 331 (1983); *Griffin v. West RS, Inc.*, 18 P.3d 558, 565 (Wash. 2001) ("A special relationship exists between a landlord and a tenant. It is difficult to distinguish between this duty and the duty owed by an innkeeper to a guest, a university to a resident student, or a business to an invitee."); *see also* Restatement (Third) of Torts: Liability for Physical Harm § 40 (Proposed Final Draft No. 1, Apr. 6, 2005) (adding employer-employee, school-K–12 student, and landlord-tenant as additional "special relationships"); *but see Rhaney v. Univ. Md. E. Shore*, 880 A.2d 357, 364–366 (Md. 2005) (refusing to characterize the university-dorm student relationship as a special relationship).

<sup>167</sup> Stokes & Groves, *supra* n. 103, at 872; *see generally* John L. Diamond et al., *Understanding Torts* 120 (3d ed. 2007).

<sup>168</sup> Diamond et al., *supra* n. 157, at 120; Restatement (Second) of Torts § 315 (1964)

<sup>169</sup> Diamond et al., *supra* n. 157, at 114–115; Restatement (Second) of Torts § 315.

<sup>170</sup> *E.g. Coghlan v. Beta Theta Pi Fraternity*, 987 P.2d 300, 312 (Idaho 1999); *Knoll v. Bd. of Regents of Univ. Neb.*, 601 N.W.2d 757, 761–764 (Neb. 1999).

<sup>171</sup> Peter F. Lake, *The Special Relationship(s) Between a College and a Student: Law and Policy Ramifications for the Post In Loco Parentis College*, 37 Idaho L. Rev. 531, 535 (2001) (footnotes omitted).

Recognizing, therefore, that the law in this area is not clear-cut, campus administrators should note courts in some circumstances have found that universities, especially in dormitory situations, owe students a duty of reasonable protection from the acts of third persons, whether students or not. While courts emphasize that universities are not insurers of students' safety, and that students must act take reasonable steps to protect themselves, universities also have a role in protecting students from danger.

In light of courts' seemingly inconsistent positions and analysis, universities who admit students with known criminal records that involve violence should assume that a court is likely to find that the university owes a duty, either to warn or protect, other students from known dangerous propensities of the admitted student. But assuming that a duty exists does not mean that liability also is assumed, because the injured student must still prove breach and causation. Still, universities that admit students with violent records should consider whether — in light of nature of the crime committed, and other circumstances, including how much time has passed since the student's release — the university should impose conditions on the student's attendance.

For an otherwise qualified student with either a pattern of violent conduct, or a recent or serious record of violence, the university might limit his attendance to distance-education courses (assuming the past misconduct or criminal activity did not involve conduct online). If the violence was directed at the opposite sex, the university might consider banning the student from on-campus housing, might assign the student to live in a single room in a single-sex, upper-class residence hall. Depending on the circumstances, other possibilities including having the student check in regularly either with student life professionals or campus security. And, if students with a records of violence are admitted, the university might also consider explaining to students generally, and without identifying specific students, that educational institutions, like society as a whole, include a diverse population, some members of which have committed past crimes. The past offender also might be counseled by a person with expertise about how and when to disclose her past history to others with whom she interacts regularly. And the university should also permit roommates and others in close and regular proximity to the past offender to move, without penalty, if they become uncomfortable with the situation.

#### **D. Policy Considerations**

Although the issue of background checks raises many policy issues, the following are among the four most frequently raised by critics:

- ❖ Cost, and the related issue of allocating scarce resources;
- ❖ Whether implementing background checks will either scare applicants with minor criminal records from applying, or deprive those with a criminal record of an opportunity to earn a post-secondary education, thus increasing their chances of recidivism;
- ❖ Whether university officials have the appropriate expertise to evaluate criminal records; and

❖ Whether background checks actually enhance campus safety

One response to the first three concerns is that many universities are already conducting background checks, whether on employees, graduate and undergraduate students admitted into certain academic programs, or on students before they can engage in clinical or other site work. Thus, universities already have experience handling these issues and do not appear to be encountering significant legal issues related to the screening process.<sup>172</sup> Indeed, in the area of background checks as a whole, there appear to be as many lawsuits by individuals injured by someone negligently screened and hired as there are by applicants rejected because of a background check.<sup>173</sup>

***1. Cost and resource allocation***

At virtually all institutions of higher education, managing costs and properly allocating scarce resources are primary concerns. With regard to pre-matriculation background checks, critics argue that the money that might be used for background checks could be better used in other important areas, such as mental-health counseling. They are also concerned about whether on-campus human resources exist to review the results of background checks.<sup>174</sup> A third argument is that any additional costs in the admissions process may hinder some students' access to higher education.

Estimates for the costs of a background check range from about \$8.00 to \$80.00. For schools that already conduct checks on students, the average range seems to be between \$30.00 and \$55.00. It is likely, though, that prices for background checks will drop as the technology improves. It is also worth noting that most schools require students to bear the cost of the check, either by paying an additional fee to the school or by paying the vendor directly.

Interestingly, it costs about the same, if not more, for applicants to take the SAT, ACT, LSAT, MCAT, and other entrance examinations. Although we should be sensitive to increasing the cost of admission, there is not a call to eliminate entrance exams based on cost.

If human resources to evaluate the results of the checks is the university's main concern, it should remember that a background-check policy likely would be phased-in. Therefore, checks would be conducted only on admitted students — so, about one-fourth of the total student body. Also, vendors could flag reports with positive results. Since only about five percent are likely to have a positive return, most schools will have a relatively small number to review.

---

<sup>172</sup> See Lee, *supra* n. 108, at 665 (indicating “that there have been few legal challenges to the use of background checks”).

<sup>173</sup> See generally Steven Frenkil & D. Frank Vinik, *Employee Background Checks: Advanced Issues* (United Educators May 24, 2006), available to members at <http://www.ue.org/membersonly/GetDocument.asp?id=799>. (2006).

<sup>174</sup> E.g. Lucien “Skip” Capone III, *The Truth About Violent Crime on Campus*, 17 Educ. L. (newsltr. of the N.C. B. Assn. Educ. L. Sec.) 1, 4 (Dec. 2004) (“Even if checks are obtained on just those [students] who have been admitted, current enrollment in the UNC system exceeds 189,000 students. The task of evaluating all of those checks would be enormous.”).

If cost to the student is the primary concern, schools and professional organizations should follow the AAMC's lead and develop methods so that students have to pay for only one criminal background check that can be sent to all institutions to which a student applies, or is admitted. This could work similarly to the SAT and ACT in that students could pay a set rate for a specific number of reports, and then could order additional reports, if needed, for an additional cost. Another alternative is for groups of schools to work together to identify a list of vendors whose reports are acceptable; a student could then contract directly with one of the acceptable vendors, pay a single fee for the check, and then have the company send the report to designated schools. Schools also do not need to require checks on all applicants; instead, they could require reports only on conditionally admitted applicants, or applicants who have actually paid a seat deposit.<sup>175</sup>

## **2. *Impact on applicants with criminal histories***

Some critics of background checks worry about the potential negative impact on otherwise qualified applicants with criminal pasts. Some argue that applicants who have committed only a single minor offense might be scared away from applying to schools that require background checks, or, in light of the extreme competition for seats at some schools, passed over because of an aberrational indiscretion. Others argue that schools should not substitute their judgment for that of the judicial system or legislature that has released the offender, or expunged her records. Still others are concerned that depriving past offenders of an education might inhibit rehabilitation or lead to increased recidivism, since education is a proven way to reduce repeat offenses.

First, universities that conduct background checks must comport with all applicable federal and state laws. At this point, no state laws prohibit universities from conducting criminal background checks on students, but some do limit the types of information sought.

Second, universities must consider the safety and welfare of all persons on campus. The balance is "between trying to keep people off our campuses who may be a threat and also maintain the openness of a college or university campus."<sup>176</sup> Thus, it may be that certain applicants should not be admitted, should not be admitted to start immediately, or should be admitted only for distance-education programs.

Third, to avoid scaring minor offenders away, schools should explain clearly in their admissions materials that most criminal convictions are not an automatic bar to admission and also explain how, and when, criminal records are considered in the admissions process.

For those concerned that universities that conduct background checks will reject all applicants with a criminal record, the evidence proves otherwise. Many institutions of higher education

---

<sup>175</sup> Schools should be sensitive to the fact that students will be worried about having a conditional admission revoked, particularly at a late date in the overall college admissions process. For this same reason, schools might also offer those placed on a wait list the opportunity to submit to the background-check process.

<sup>176</sup> Marklein, *supra* n. 48 (quoting Kemal Atkins, director for student academic affairs for the North Carolina system).

have knowingly admitted students with past criminal records, including murder,<sup>177</sup> and there is no reason to think that background checks would change that. Instead, it is more likely that colleges will tend to deny violent and repeat offenders, not simply anyone with a record.

### 3. *Evaluating criminal records*

A third concern, which relates to the second, is that university administrators do not have the expertise to evaluate criminal records. More specifically, critics contend that it is impossible even for trained experts to predict violence,<sup>178</sup> so any judgments by university officials would be merely speculative and might deprive deserving individuals of an opportunity to advance their education.<sup>179</sup>

While predicting future dangerousness is difficult, if not impossible, courts and juries do not require the decisions of admissions officials and committees to be perfect; instead, they need to be reasonable under the circumstances. It also is important to remember that university H.R. departments routinely are called upon to make similar decisions, and their exercise of discretion frequently is supported by the courts — whether sued by the denied applicant or individual injured by a hired employee — when they followed procedures and acted reasonably. Moreover, many admissions officials are already making these decisions because an increasing number of admissions applications require candidates to disclose criminal histories, or they learn about the past offenses in other ways. The addition of background checks, therefore, will change only the scope of the issue, not the nature of it.

It is important, though, that university officials reviewing and evaluating criminal records, whether obtained via background check, applicant self-disclosure, or otherwise, receive training about factors to consider and questions to ask.<sup>180</sup> In addition, they should have access to experts,

---

<sup>177</sup> *The State vs. James Hamm: Should a Convicted Murderer Be Allowed to Practice Law?* <http://www.cbsnews.com/stories/2004/10/13/60II/main649084.shtml> (Oct. 13, 2004).

<sup>178</sup> E.g. Joanne Silberner, *Nearly Impossible to Predict Violence*, <http://www.npr.org/templates/story/story.php?storyID+9706123> (Apr. 18, 2007).

<sup>179</sup> See Stokes & Groves, *supra* n. 103, at 867–868 (discussing the cases of two students with criminal pasts and noting, “The point of these divergent views is clear: if a noted law professor, a police officer, a forensic psychologist, and a basketball coach cannot agree on the degree of risk posted by an individual about whose case they have varying degrees of available facts and personal familiarity, how reasonable is it to expect an admissions officer or committee to make that same evaluation based upon a written application or brief interview[?] To do so, we must trust an admissions committee to make an *ad hoc* evaluation of a given applicant’s psychological makeup. Indeed, given that the American Psychiatric Association has acknowledged “that two out of three predictions of long-term future violence made by *psychiatrists* are wrong,” it may be dubious for a committee to try.” (Footnote omitted, emphasis in original.)).

<sup>180</sup> See Scott Jaschik, *Checking Up on Your Past*, Inside Higher Educ. <http://www.insidehighereducation.com/news/2007/11/12/background> (Nov. 12, 2007) (quoting higher-education law and policy expert Ann Franke, “Lots of schools are eager to collect the info but then not adept at using it,” she said. “Who will evaluate the information and make decisions about individuals’ suitability for employment or enrollment? What is the impact of a conviction more than 10 years old? How do you judge the relative severity of different types of crimes and plea agreements? I picked up a glossary the other day of terms commonly used in criminal background checks. Do evaluators know the difference between community service and community supervision? *Nolle prosequi* and *nolo contendere*?” (Emphasis in original.)).



whether on- or off-campus counselors, psychiatrists, or attorneys, to answer questions they may have.

Similarly, various studies have correlated the potential for recidivism with various factors, such as time since the last offense and the individual's age. Universities could arrange for training regarding these factors as well.

#### 4. *Enhancing campus safety*

The final, and ultimate, policy question is whether background checks actually will enhance campus safety. In this category, critics argue that background checks will not improve campus safety and, even worse, will foster a false sense of security. They also reason that background checks on prospective students are not likely to yield results any more meaningful than applicant self-disclosure.

Although background checks alone will not solve the issue of campus violence, at least some insurance companies believe that background-check policies can positively influence campus safety. Leta Fitch, Executive Director of the Higher Education Practice Group at Arthur J. Gallagher Risk Management Services, Inc., has noted that “[s]ome underwriters are refusing to quote rates if there is not a background check policy in place for staff and faculty. An underlying reason may be the fact that a growing number of workplace violence lawsuits has resulted in an employer’s liability from alleged negligent hiring, retention, and promotion.”<sup>181</sup> She also explains that “OSHA’s general duty clause that states that employers must provide their employees with a safe work environment, which can imply an environment free from workplace violence. Background checks can be considered part of a good-faith effort in providing a safe work environment.”<sup>182</sup> She thus concludes that “[t]here are . . . compelling reasons to have a background check policy, and given today’s litigious environment, it may be difficult to argue against not having one.”<sup>183</sup>

Critics also argue that background checks may provide a false sense of security because most people do not realize that most databases used by background screeners are incomplete. This is a valid criticism. To address this concern, universities should select a vendor that can conduct the most complete check possible, and should be aware of improvements in technology that will permit better checks in the future. Also, those responsible for admissions decisions and for campus security, which is a larger group than just campus law enforcement, should understand the limitations of the search and should, among other things, plan how they will handle future discoveries of prior undisclosed incidences. In addition, the AACCP has recommended that the criminal background check policy or student handbook include a disclaimer that a criminal background-check process does not guarantee campus safety.<sup>184</sup>

---

<sup>181</sup> Leta Finch, *Background Checks: Staff, Faculty, Students, and Volunteers* 1 (2006), available at [http://www.ajg.com/portal/server.pt/gateway/PTARGS\\_0\\_21938\\_547304\\_0\\_0\\_18/Background%20Checks.pdf](http://www.ajg.com/portal/server.pt/gateway/PTARGS_0_21938_547304_0_0_18/Background%20Checks.pdf).

<sup>182</sup> *Id.* at 2.

<sup>183</sup> *Id.* Ms. Finch’s statements reflect that insurance companies might be the group that forces change in this area.

<sup>184</sup> AACCP Report, *supra* n. 81, at 13.

Some institutions have declined to conduct criminal background because “most college-age applicants do not yet have a criminal record, and any offenses they committed as a juvenile would most likely be sealed.”<sup>185</sup> As explained earlier, it is possible for offenders to expunge or seal records and then, as a matter of law, truthfully deny a criminal record. However, not all juvenile offenders are eligible or attempt to have their records expunged or sealed.<sup>186</sup> Moreover, a significant percentage of today’s college students are non-traditional. As reported in *The Chronicle of Higher Education’s* 2005 *Almanac*, of the 17,473,000 students — graduate and undergraduate — enrolled in the nation’s college and universities, 18.1% were aged 22–24, 13.1% were 25–29, 7.5% were 30–34, 5.4% were 35–39, 4.1% were 40–44, 2.9% were 45–49, 2.1% were 50–54, and 1.8 were 55 and older.<sup>187</sup> Thus, in 2005, 8,299,675, or 47.5%, of the nation’s students were older than 21. Thus, for many campuses, background checks do have the potential to return results beyond juvenile records.

Self-disclosure, in both the university and other settings, has proven a flawed approach to discovering criminal histories. For example, a recent Florida background check of all healthcare workers discovered that 44% of individuals guilty of felonies did not reveal the infraction.<sup>188</sup> Similarly, searches at VolunteerSelect have uncovered 11,000 undisclosed criminal felony records since it was launched in 2002.<sup>189</sup> In the college context, a study at the University of Iowa’s law school found a significant percentage of students did not self-report criminal offenses, the University of Georgia found undisclosed self-offenders on its campus, and in North Carolina, two students with undisclosed criminal records murdered other UNC students.

It is important to remember that most institutions of higher education are not simply classroom facilities where students spend small portions of their day. Instead, they are more akin to cities in which students and others eat, sleep, recreate, shop, and yes, attend classes and study.<sup>190</sup> One

---

<sup>185</sup> United Educators, *Preventing Child Molestation by Student Interns*, Risk Research Bull. (UE Aug. 2005), available to subscribers at <http://www.ue.org/membersonly/getDocument.asp?id=753&date=20050822>.

<sup>186</sup> E.g. Colo. Rev. Stat. § 19-1-306 (2007) (“[A]ny person who has been adjudicated for an offense involving unlawful sexual behavior as defined in § 16-22-102(9), is not eligible to petition for an expungement of a juvenile record.”); see generally Carlton J. Snow, *Expungement and Employment Law: The Conflict between an Employer’s Need to Know About Juvenile Misdeeds and an Employee’s Need to Keep Them Secret*, 41 Wash. U. J. Urb. & Contemp. L. 3, 20–39 (1992) (discussing various expungement statutes and expungement eligibility requirements in different states).

<sup>187</sup> Chron. Higher Ed., *Almanac* (2005) (“College Enrollment by Age of Students, Fall 2005”), available to subscribers at <http://chronicle.com/weekly/almanac/2007/nation/0101502.htm>.

<sup>188</sup> Howell, *supra* n. 66.

<sup>189</sup> Bob Sullivan, *Criminal Background Checks Incomplete*, MSNBC (Apr. 12, 2005), <http://www.msnbc.msn.com/id/7467732>.

<sup>190</sup> Kristen Peters, Student Article, *Protecting the Millennial College Student*, 16 S. Cal. L. & Soc. Just. 431, 431 (2007) (quoting a former Harvard president as saying, “Indeed, modern college campuses have been called ‘Athenian city-states . . . . Where else in America can you get hotel, health club, career advice and 1,800 courses for \$90 a day?’” (Footnote omitted.)).

important goal of all educational institutions should be to create reasonably safe living and learning environments. And today's students expect just that. As one law student has explained, "Inherent in the 'bundle of services' today's students expect from colleges is a safe educational and social environment."<sup>191</sup>

In an environment in which hundreds, thousands, and sometimes tens of thousands of students are living together in a compressed area, and where significant percentages have proven tendencies to engage in high-risk behaviors, comprehensive, environmental risk-management plans are essential to maintain a healthy, safe environment. Background checks can be one part of that plan and will help universities identify individuals with dangerous propensities, or who may need additional guidance and attention. Background checks also will help set a tone for a safer campus. An old idiom says that you "reap what you sow." By requiring criminal background checks of all admitted students, colleges will send a message about the type of students they want, and the types of behaviors they expect on campus.

---

<sup>191</sup> *Id.*