

# BACKGROUND CHECKS IN THE UNIVERSITY ADMISSIONS PROCESS: AN OVERVIEW OF LEGAL AND POLICY CONSIDERATIONS

DARBY DICKERSON\*

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## INTRODUCTION

In the time since the tragedy at Virginia Tech, the primary question for college and university administrators, faculty, and students has been how to keep our campuses safe.<sup>1</sup> One debate is whether colleges and universities should require criminal background checks on prospective students.<sup>2</sup> Although this issue presents a virtual jigsaw puzzle of legal and policy considerations, the crux of the debate is illustrated by the polar positions of S. Dan Carter, Senior Vice President of Security on Campus, Inc.,<sup>3</sup> and Barmak Nassirian, Associate Executive Director, External Relations, of the American Association of Collegiate Registrars and Admissions Officers.<sup>4</sup>

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1. As one observer noted, "There's a new age of vigilance in academia." Jon Weinbach, *The Admissions Police*, WALL ST. J., Apr. 6, 2007, at W1. *Editor's Note*: This article was substantially through the editing process when the shootings at Louisiana Tech and Northern Illinois University occurred.

2. Outside the academy, the number of background checks conducted has risen each year since the September 11, 2001 attacks. Julie Carr Smyth, *Background Checks on the Rise*, CINCINNATI POST, Nov. 12, 2007, at A1 (indicating that background checks are growing at a rate of about 12% per year and that, to date during 2007, "25 million Americans have had background checks by the federal government"). See *Background Checks Are on the Rise: A Special Report on Background Screening*, HRFOCUS (New York, N.Y.), July 2007, available at [http://www.ioma.com/issues/HRF/2007\\_7/1613081-1.html](http://www.ioma.com/issues/HRF/2007_7/1613081-1.html) (reporting the results of a survey of human resources professionals, which revealed that 85.9% run criminal checks of new hires and that 3% plan to implement such checks within twelve months); Judy Greenwald, *Employers Must Exercise Caution with Background Checks*, 41 BUS. INS. 4, Apr. 30, 2007 (indicating that a 2004 survey by the Society for Human Resource Management found that 96% of respondents used some sort of background or reference check for job applicants). Within the academy, more colleges and universities have adopted a risk-management culture. See Peter F. Lake, *Private Law Continues to Come to Campus: Rights and Responsibilities Revisited*, 31 J.C. & U.L. 621, 656-58 (2005) (noting "more thorough scrutiny of new hires [and] more background checks" for employees, including faculty); Elizabeth Redden, *Criminals and Colleges in the Capital*, INSIDE HIGHER EDUC., Feb. 14, 2007, <http://www.insidehighereducation.com/news/2007/02/14/dc>. See generally Barbara Lee, *Who Are You? Fraudulent Credentials and Background Checks in Academe*, 32 J.C. & U.L. 655 (2006) (discussing background checks on faculty and staff).

3. Security on Campus, Inc. is a nonprofit organization "dedicated to safe campuses for college and university students." Sec. on Campus, Inc., About Us, <http://www.securityoncampus.org/aboutsoc/index.html> (last visited Feb. 27, 2008). The organization was co-founded in 1987 by Connie and Howard Clery, whose daughter, Jeanne, was beaten, raped, and murdered on April 5, 1986 in her dorm room at Lehigh University. The assailant was another Lehigh student. *Id.*

4. The American Association of Collegiate Registrars and Admissions Officers (AACRAO) is a voluntary nonprofit organization that consists of "more than 10,000 higher education admissions and registration professionals who represent approximately 2,500 institutions in more than 30 countries." Am. Ass'n Collegiate Registrars & Admissions Officers, About Us, <http://www.aacrao.org/about> (last visited Feb. 27, 2008).

The mission of the American Association of Collegiate Registrars and Admissions Officers (AACRAO) is to provide professional development, guidelines and voluntary standards to be used by higher education officials regarding the best practices in records management, admissions, enrollment management, administrative information technology and student services. It also provides a forum for discussion regarding policy initiation and development, interpretation and implementation at the institutional level and in the global educational community.

*Id.*

Mr. Carter argues that background checks can help promote campus safety and urges parents and students to ask whether colleges and universities conduct background checks as part of their campus safety audit.<sup>5</sup> In supporting his position, Mr. Carter notes that, “[w]hen it comes to GPAs and standardized test scores, [colleges and universities] just don’t accept the student’s word for it. They require proof from an independent source. . . . Yet when it comes to giving information for more serious matters—a criminal history for example—they require no verification.”<sup>6</sup>

Mr. Nassirian disagrees. In his view, colleges and universities should not conduct background checks or ask about applicants’ past crimes. Background checks and application questions about criminal history, he notes, “are not likely to catch the ‘next Jack the Ripper’ but are more likely to harm ‘the perfectly ordinary mischievous kid without much utility in preventing the next tragedy.’”<sup>7</sup> He also believes that the college and university admissions process is not the correct forum in which to evaluate candidates’ criminal records: “If an individual is at liberty in our society, why should that individual be denied education? What makes colleges competent to make extra-judicial judgments on people?”<sup>8</sup>

A better solution integrates aspects of both positions. With the safety of our campuses and students at stake, reasonably researching an applicant’s criminal history is prudent from both safety and liability perspectives. As Mr. Carter notes, colleges and universities do not trust applicants to report their academic credentials, such as SAT scores, without independent verification. It seems logical, therefore, that if a college or university believes it is important enough to ask about prior crimes, the institution should verify that information through a reliable, independent source. Today, many services conduct reasonably thorough background checks quickly and at affordable prices<sup>9</sup>—prices that can be borne directly by the applicant or built into the admissions fee.<sup>10</sup> Thus, for most schools, therefore, the twin obstacles of cost and human resources needed to conduct the checks have evaporated. On the other hand, statistics show that few applicants have criminal records, and even fewer have felony records.<sup>11</sup> In addition, Mr.

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5. SEC. ON CAMPUS, INC., *CAMPUS SAFETY AUDIT* (2005), available at <http://www.securityoncampus.org/students/audit.pdf>.

6. Ellen Crowley Fullerton, *Screening College Applicants for a History of Violence*, COLUMBIA NEWS SERV., Dec. 13, 2005, <http://jscms.jrn.columbia.edu/cns/2005-12-13/fullerton-collegesafety>.

7. Larry Gordon, *Does a Pot Bust Trump a 4.0 GPA?*, LA TIMES, Dec. 5, 2007, Main News, at 1.

8. Scott Jaschik, *Errors of Admission*, INSIDE HIGHER EDUC., May 18, 2006, <http://www.insidehighered.com/news/2006/05/18/suit>.

9. See *infra* Part IV.A for a discussion of costs.

10. At least in the law school context, some schools are starting to eliminate admissions fees because of the efficiencies associated with online applications. Interview with Laura Zuppo, Dir. of Admissions, Stetson Univ. Coll. of Law (Sept. 2007). Schools in this situation may consider keeping their former fee and applying it to the costs associated with background checks.

11. See, e.g., United Educators, *Preventing Child Molestation by Student Interns*, RISK RES. BULL., Aug. 2005, available at <http://www.ue.org/membersonly/getDocument.asp?id=753&date=20050822> (estimating that less than 5% of criminal background checks on student

Nassirian is correct that questions regarding past crimes scare away at least some qualified candidates who have committed only minor infractions.<sup>12</sup>

An early caveat is that background checks are not a panacea. They will not prevent all crime or injury on campus.<sup>13</sup> But they likely will prevent some crimes, and also will impact the culture by signaling that the college or 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.<sup>14</sup>

“Environmental management means moving beyond general awareness and other education programs to identify and change those factors in the physical, social, legal, and economic environments that promote or abet” the specific problem.<sup>15</sup> Environmental management, which has its roots in public health, recognizes that many factors influence health-related behavior, including

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internship applicants reveal undisclosed criminal records). *See infra* notes 80–82 and accompanying text (regarding 2007 statistics from applicants using The Common Application). *See also* UNIV. N.C., OFFICE OF THE PRES., TASK FORCE ON THE SAFETY OF THE CAMPUS COMMUNITY: FINAL REPORT 4 (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] (“Among the 250,000 individual students enrolled on a UNC campus during the three-year time period examined, only 21 who committed a campus crime also had a prior criminal history.”). *But see* AM. ASS’N OF COLLS. OF PHARMACY, REPORT OF THE AACP CRIMINAL BACKGROUND CHECK ADVISORY PANEL 14 (2006), available at [http://www.aacp.org/Docs/MainNavigation/ForStudentsApplicants/7803\\_AACPBackgroundChkRpt.pdf](http://www.aacp.org/Docs/MainNavigation/ForStudentsApplicants/7803_AACPBackgroundChkRpt.pdf) [hereinafter AACP REPORT] (noting that “as many as 1 out of 7 Americans have some form of criminal record”).

12. Gordon, *supra* note 7 (recounting the story of an Oregon teenager with a stellar academic record, but who was convicted four years earlier for shoplifting a shirt; “[the student] has only applied to universities that do not ask about such issues and he is hesitant to apply to those that do.”).

13. For example, “[a] recent search of state-by-state records found 2,570 incidents of sexual misconduct in public schools between 2001 and 2005, despite background checks of teachers being required in many states.” Smyth, *supra* note 2 (emphasis added). Also, it is well documented that high-risk alcohol use causes significant injury and death among college and university student populations. A Snapshot of Annual High-Risk College Drinking Consequences, <http://www.collegedrinkingprevention.gov/StatsSummaries/snapshot.aspx> (last visited Feb. 27, 2008) (noting, among other statistics, about 1,700 annual deaths, 599,000 unintentional injuries, and more than 696,000 assaults).

14. For general information on campus risk-management plans, see Darby Dickerson & Peter F. Lake, *A Blueprint for Collaborative Risk Management Teams*, CAMPUS ACTIVITIES PROGRAMMING, Apr. 2006, at 16; Peter F. Lake & Darby Dickerson, *Alcohol and Campus Risk Management*, CAMPUS ACTIVITIES PROGRAMMING, Oct. 2006, at 19; Darby Dickerson, *Risk Management and the Millennial Generation*, CAMPUS ACTIVITIES PROGRAMMING, Jan. 2007, at A12.

15. WILLIAM DEJONG ET AL., ENVIRONMENTAL MANAGEMENT: A COMPREHENSIVE STRATEGY FOR REDUCING ALCOHOL AND OTHER DRUG USE ON COLLEGE CAMPUSES, available at [http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content\\_storage\\_01/0000019b/80/15/ac/c0.pdf](http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/15/ac/c0.pdf); Higher Education Center, Effective Prevention, <http://www.higheredcenter.org/framework> (last visited Feb. 27, 2008).

individual factors, group factors, institutional factors, community factors, and public policy.<sup>16</sup> Thus, colleges and universities that have adopted the environmental model implement multiple strategies that impact the campus environment as a whole.<sup>17</sup> Within this context, colleges and universities should consider adding pre-matriculation student background checks as one of their campus-safety strategies.

As a legally trained university administrator, when I consider a new policy or program, I generally need answers to these questions: What is the problem? What are the possible solutions? What are other schools doing and what are the experts saying? What are the legal implications? What are the policy implications? What steps are necessary to implement and evaluate the program or policy?

Following this decision-making rubric, this article will begin by examining recent incidences of student-on-student violence. Having already identified pre-matriculation background checks as one possible solution, I will then discuss current college and university practices regarding student background checks. Next, I will explore several legal and policy issues related to student background checks and provide steps schools can follow to implement student background checks as one part of a broader environmental-management philosophy.

## I. CRIME ON CAMPUS

Unfortunately, higher education does not lack for examples of violence on campus. Although some crime is committed by individuals not associated with the college or university,<sup>18</sup> by vendors who work on campus,<sup>19</sup> and by school employees,<sup>20</sup> students are the main perpetrators.<sup>21</sup> In addition, traditional-age students are also the most at-risk for becoming a victim of violent crime on

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16. DEJONG ET AL., *supra* note 15, at 12. “The environmental management approach is intellectually grounded in the field of public health, which emphasizes the broader physical, social, cultural, and institutional forces that contribute to problems of human health.” *Id.* at 6.

17. *Id.*

18. Serial killer Ted Bundy, for example, murdered several college students. Dave Wilma, *Serial Killer Ted Bundy Dies in the Electric Chair in Florida on January 24, 1989*, HISTORYLINK.ORG, Aug. 25, 2000, [http://www.historylink.org/essays/output.cfm?file\\_id=2637](http://www.historylink.org/essays/output.cfm?file_id=2637).

19. *E.g.*, Blair v. Defender Servs., Inc., 386 F.3d 623 (4th Cir. 2004) (student assaulted by custodian employed by janitorial service hired by the university).

20. *E.g.*, Slagle v. State, 606 So. 2d 193 (Ala. Crim. App. 1992) (faculty member murdered student); Chris Cadelago, *City College Sued by Rape Victim*, CHANNELS ONLINE (Santa Barbara, Cal.), Nov. 30, 2005, <http://media.www.thechannelsonline.com/media/storage/paper669/news/2005/11/30/News/City-College.Sued.By.Rape.Victim-1116735.shtml> (student allegedly raped by campus security officer); Adam Ferrise, *Ex-Employee Arrested: Ex-Residence Life Employee, Shaun Harkness, Allegedly Installed a Camera in a Dorm Shower*, BUCHELITE (Akron, Ohio), Nov. 8, 2007, <http://media.www.buchelite.com/media/storage/paper1203/news/2007/11/08/News/ExEmployee.Arrested-3086738.shtml> (male employee installed cameras in a women’s dorm shower and stole photographs out of their dorm rooms; he was indicted on ten counts of burglary, two counts of extortion, and two counts of voyeurism).

21. JOHN NICOLETTI ET AL., VIOLENCE GOES TO COLLEGE 25 (2001) (“[M]ost campus violence experts agree that the overwhelming majority of violent incidents are perpetrated by students.”).

campus.<sup>22</sup> Three sources provide some sense about crime on campus: articles and cases about recent student-on-student violence, national campus crime statistics, and information regarding the number of convicted felons within the student body.

In addition to the Virginia Tech massacre,<sup>23</sup> below is a small sampling<sup>24</sup> of recent,<sup>25</sup> reported<sup>26</sup> student-on-student<sup>27</sup> violence on and near college and university<sup>28</sup> campuses. When available, information about the student-perpetrator's criminal history is provided.

In November 2007, a senior at the University of Pennsylvania was charged with stalking, harassment, burglary, and theft after being found in other students' rooms within his own residence hall, and after police found missing property in his room.<sup>29</sup>

In September 2007, Taylor Bradford, a University of Memphis football player,

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22. *Id.* at 33.

23. See generally VA. TECH REVIEW PANEL, MASS SHOOTINGS AT VIRGINIA TECH (2007), available at <http://www.governor.virginia.gov/TempContent/techPanelReport-docs/FullReport.pdf>.

24. Other instances can be found in the *Campus Security Watch* newsletter. SEC. ON CAMPUS, INC., CAMPUS WATCH NEWSLETTER (2007), available at <http://www.securityoncampus.org/aboutsoc/campuswatch/index.html>. In addition, the Higher Education Center for Alcohol and Other Drug Abuse and Violence Prevention provides a weekly subscription service of nationwide press clippings called "News: Alcohol, Other Drug, and Violence-Related Incidents" at <http://www.higheredcenter.org/news/incidents>, and another service called "Campus Press Watch," at <http://www.higheredcenter.org/news/campus>.

25. Violence on campus is not a new phenomenon. See generally NICOLLETTI ET AL., *supra* note 21 (recounting many instances of violence on campus over the decades).

26. See *infra* notes 53 to 55 and accompanying text regarding underreporting.

27. Students have also committed crimes against campus employees and individuals outside the college and university community. *E.g.*, Posting of Elyse Ashburn to Chronicle of Higher Education News Blog, <http://chronicle.com/news/article/3543/my-tuition-made-me-do-it> (Dec. 4, 2007) (two college students "tried to raise tuition money with two armed robberies"); *4 Dead in U. of Ariz. Shooting*, CBS NEWS, Oct. 29, 2002, <http://www.cbsnews.com/stories/2002/10/29/national/main527308.shtml> (reporting that a "failing student" fatally shot three members of the nursing faculty); *List of Deadliest Campus Shootings in United States*, FOX NEWS, Apr. 16, 2007, <http://www.foxnews.com/story/0,2933,266368,00.html> (listing the November 1, 1991 murders of five University of Iowa employees by Gang Lu, a graduate student in physics).

28. Student-on-student violence is not limited to higher education. Examples abound of violence in the K-12 context, with the best known being the massacre at Columbine High School in April 1999. See *In-Depth Specials, Columbine Report*, CNN, <http://www.cnn.com/SPECIALS/2000/columbine.cd/frameset.exclude.html> (last visited Feb. 27, 2008). See also *Infoplease.com, A Time Line of Recent Worldwide School Shootings*, <http://www.infoplease.com/ipa/A0777958.html> (last visited Feb. 27, 2008). On a positive note, "[b]etween 1992 and 2004, the rate of nonfatal crime against students ages 12-18 at school declined 62 percent." NAT'L CTR. EDUC. STATISTICS, U.S. DEP'T OF EDUC., *THE CONDITION OF EDUCATION 2007*, at 73 (2007).

29. Julie Cohn, *Senior Arrested for Stalking Mayer Females*, DAILY PENNSYLVANIAN, Nov. 28, 2007, at 1, available at <http://media.www.dailypennsylvanian.com/media/storage/paper882/news/2007/11/28/News/Senior.Arrested.For.Stalking.Mayer.Females-3119326.shtml>. Also, in March 2007, the University of Pennsylvania discovered that a twenty-five-year-old convicted child molester was taking graduate courses while commuting from his prison cell in a neighboring county. Posting of Kathy Boccella to Real Cost of Prisons Weblog, [http://realcostofprisons.org/blog/archives/2007/03/todays\\_college.html](http://realcostofprisons.org/blog/archives/2007/03/todays_college.html) (Mar. 27, 2007).

was shot and killed during an off-campus robbery attempt. Devin Jefferson, a fellow student who had past brushes with law enforcement, was among those charged with the murder.<sup>30</sup>

In September 2007, a University of Arizona freshman was charged with murdering her roommate.<sup>31</sup>

In May 2007, on the last day of final examinations, a Keene State College student shot and wounded his roommate and then killed himself in their off-campus apartment.<sup>32</sup> The assailant did not have a prior criminal record.<sup>33</sup>

In February 2007, a University of Santa Barbara soccer player was arrested for allegedly raping a fellow student at a local beach.<sup>34</sup>

In December 2006, Eastern Michigan University freshman Laura Dickinson was found dead in her dorm room.<sup>35</sup> Following initial denials by EMU officials,<sup>36</sup> police determined that Ms. Dickinson was likely raped and murdered by fellow EMU student Orange Taylor III, who admitted being in Ms. Dickinson's room around the time of her death.<sup>37</sup>

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30. Christopher Conley, *U of M Student Hatched Plot to Rob Bradford, Enlisted 3 Others, Police Say*, COM. APPEAL (Memphis, Tenn.), Oct. 9, 2007, at A1. ("Jefferson was arrested at a student dorm on campus last November on trespassing charges. It was not clear how the charges were resolved. Jefferson was also questioned in a second-degree murder last year, but released without charges, according to court records.")

31. Claire Conrad, *U. Arizona Student Killed; Roommate Charged with Murder*, DAILY WILDCAT (Tucson, Ariz.), Sept. 6, 2007, available at <http://www.uwire.com/2007/09/06/u-arizona-student-killed-roommate-charged-with-murder>.

32. *Keene State College Student Shoots Roommate, Kills Self*, FOX NEWS, May 4, 2007, <http://www.foxnews.com/story/0,2933,270066,00.html>.

33. *Id.*

34. Nikki Moore, *Authorities Arrest SB Soccer Player on Rape Charges*, DAILY NEXUS (Santa Barbara, Cal.), Feb. 21, 2007, available at <http://www.dailynexus.com/article.php?a=13332>. In November 2004, the father of a student who left the University of California, Santa Barbara after she was assaulted on campus started a website called "The Dark Side of UCSB" that, among other things, reports incidents of crime on and near campus. Andrea L. Foster, *UC-Santa Barbara Won't Challenge Web Site That Spotlights Crime on the Campus*, CHRON. HIGHER EDUC. (Wash., D.C.), Feb. 25, 2005, at A33.

35. BUTZEL LONG, P.C., THE REPORT OF THE INDEPENDENT INVESTIGATION INTO EASTERN MICHIGAN UNIVERSITY'S RESPONSE TO THE DEATH OF STUDENT LAURA DICKINSON 8 (2007), available at [http://www.emich.edu/regents/Butzel\\_Long\\_investigation/BL\\_report.pdf](http://www.emich.edu/regents/Butzel_Long_investigation/BL_report.pdf). The exact date Ms. Dickinson died is not known; she was last seen on December 12 and was found by housing and custodial employees on December 15. *Id.*

36. Sara Lipka, *Eastern Michigan U. is Found to Violate Crime-Reporting Law on Multiple Counts*, CHRON. HIGHER EDUC. (Wash., D.C.), June 13, 2007, at A25. The Department of Education fined EMU \$375,000 for violating the Clery Act in this and other situations. Marisa Schultz, *Feds Slap EMU with \$358K Fine*, DETROIT NEWS, Dec. 19, 2007, at 1A. EMU also paid Ms. Dickinson's family and estate \$2.5 million to settle claims associated with her death. Lori Higgins, *EMU to Pay Family Millions*, DETROIT FREE PRESS, Dec. 14, 2007, News, at 1. EMU's president was fired in connection with the cover-up of Ms. Dickinson's death, and the vice president for student affairs and the director of campus police both were "separat[ed] from" the university. Sara Lipka, *Regents at Eastern Michigan U. Fire President and 2 Others in Aftermath of Murder Investigations*, CHRON. HIGHER EDUC., July 17, 2007, <http://chronicle.com/daily/2007/07/2007071701n.htm>.

37. Emanuella Grinberg, *Dorm Murder Defendant Was in Woman's Room, But Didn't Kill*

In May 2006, a jury awarded the family of a slain Knox College student over \$1 million; the student was beaten to death in 1998 by another student in a college building.<sup>38</sup>

In February 2006, a male Adelphi University student was charged with the first-degree rape of a female student in an on-campus dorm room.<sup>39</sup>

In April 2006, a West Chester University of Pennsylvania student was arrested on charges related to a dormitory stabbing and a fatal off-campus shooting.<sup>40</sup> The student had a criminal record dating back more than 10 years that included robbery and drug-dealing charges.<sup>41</sup> The university did not conduct criminal background checks and did not know about the student's prior criminal record.<sup>42</sup>

In June 2003, Baylor University basketball player Carlton Dotson killed his teammate Patrick Dennehy; Dotson plead guilty to the crime and was sentenced to 35 years in prison.<sup>43</sup>

In November 2002, Morehouse College student Gregory Love was beaten by a fellow student with a baseball bat; the student claimed that Love, who is gay, "look[ed] at him in the shower."<sup>44</sup>

In January 2002, former law student Peter Odighizuwa shot and killed Appalachian School of Law Dean L. Anthony Sutin, Professor Thomas F. Blackwell, and first-year student Angela Dales; he also shot and injured three other female students.<sup>45</sup>

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*or Try to Rape Her, Lawyer Says*, COURT TV, Oct. 16, 2007, [http://www.courtstv.com/trials/taylor/101507\\_ctv.html](http://www.courtstv.com/trials/taylor/101507_ctv.html); Posting of Susan L. Oppat to MLive.com, [http://blog.mlive.com/annarbornews/2007/10/trial\\_to\\_start\\_monday\\_in\\_emu\\_k.html](http://blog.mlive.com/annarbornews/2007/10/trial_to_start_monday_in_emu_k.html) (Oct. 13, 2007) (describing Taylor's past brushes with law enforcement on campus and noting that Taylor had been banned from his dormitory "in connection with a report of a student selling marijuana" on campus). Taylor was tried in October 2007, but the judge declared a mistrial when the jury could not reach a verdict following three days of deliberation. Schultz, *supra* note 36.

38. *Knox College, IL Murder*, 12 CAMPUS WATCH NEWSLETTER 5 (2006), available at <http://www.securityoncampus.org/aboutsoc/campuswatch/v12i1.pdf>.

39. *Adelphi University-NY Rape*, 13 CAMPUS WATCH NEWSLETTER 6 (2007), available at <http://www.securityoncampus.org/aboutsoc/campuswatch/v13i1.pdf>.

40. Posting to Chron. Higher Educ. News Blog, <http://chronicle.com/news/article/332/a-reason-to-run-criminal-checks-on-would-be-students> (Apr. 25, 2006).

41. *Id.*

42. *Id.*

43. Analiz González, *Carlton Dotson Sentenced to 35 Years for Murder of Baylor Basketball Player*, ASSOC. BAPTIST PRESS, June 16, 2005, <http://www.abpnews.com/386.article>.

44. Jessica Lee Reece, *Assault Ups Fears for Homosexuals*, RED AND BLACK (Athens, Ga.), Nov. 21, 2002, <http://media.www.redandblack.com/media/storage/paper871/news/2002/11/21/News/Assault.Ups.Fears.For.Homosexuals-2581095.shtml>. Love's assailant was convicted of aggravated assault and battery and was sentenced to prison. *Love v. Morehouse Coll., Inc.*, 652 S.E.2d 624, 625 n.1 (Ga. Ct. App. 2007). Love also sued Morehouse for negligence and gross negligence, premises liability, and negligent and intentional infliction of emotional distress. *Id.* at 625. Morehouse moved to dismiss the complaint on the ground that it did not owe Love a legal duty. *Id.* Although the trial court granted that motion, the appellate court reversed. *Id.* at 627.

45. Wendy B. Davis, *The Appalachian School of Law: Tried But Still True*, 32 STETSON L. REV. 159, 159 (2002). Odighizuwa pled guilty to the murders and was sentenced to multiple life sentences. Chris Kahn, *Former Law School Student Pleads Guilty in Appalachian Slayings*, Mar. 1, 2004, <http://www.lawschool.com/appalachianguilt.htm>. Three wounded students and the



In November 2000, a Princeton University student was arrested on charges of aggravated assault, aggravated criminal sexual contact, and burglary after he allegedly entered a dorm room and assaulted a female student.<sup>46</sup> The assailant did not have a prior criminal record.<sup>47</sup>

Although this list is far from exhaustive, it reflects that serious crime occurs on campus, but that serious crime is not as prevalent on most campuses as it is in society as a whole.<sup>48</sup> Both of these anecdotal reflections are supported by national campus crime statistics.

The U.S. Department of Education maintains national campus crime statistics pursuant to the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (“Clery Act”).<sup>49</sup> Under the Clery Act, all U.S. institutions of higher education that receive federal funding must report data about crimes that occurred on their campuses during the prior calendar year.<sup>50</sup> Since 2000, the U.S. Department of Education has been charged with collecting this information.<sup>51</sup>

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family of the slain student sued the law school, arguing that the school “should have foreseen the violence because the 46-year-old Odighizuwa—who was diagnosed with paranoid schizophrenia—had a history of outbursts, threats and other disruptive behavior.” *Settlement Reached in Suits Over Law School Shooting Rampage*, Jan. 3, 2005, <http://www.law.com/jsp/article.jsp?id=1104154541130>. The school settled with the plaintiffs for one million dollars. *Id.*

46. Bill Beaver, *Student Arrested on Charges of Sexual Assault and Burglary*, DAILY PRINCETONIAN (Princeton, N.J.), Nov. 17, 2000, <http://www.dailyprincetonian.com/archives/2000/11/17/news/1820.shtml>.

47. *Id.*

48. *E.g.*, UNC TASK FORCE, *supra* note 11 (finding that crime on UNC campuses was only about one-sixth of that in the general area).

49. 20 U.S.C. § 1092(f) (2000). The law took effect on September 1, 1991. U.S. DEP’T OF EDUC., OFFICE OF POSTSECONDARY EDUC., THE HANDBOOK FOR CAMPUS CRIME REPORTING 135 (2005), *available at* <http://www.ed.gov/admins/lead/safety/handbook.pdf> [hereinafter CLERY HANDBOOK]. The Federal Bureau of Investigation also maintains national crime statistics, but the most recent collated figures combine crime on college and university campuses with crime committed at K–12 schools. *See generally* JAMES H. NOONAN & MALISSA C. VAVRA, CRIME IN SCHOOLS AND COLLEGES: A STUDY OF OFFENDERS AND ARRESTEES REPORTED VIA NATIONAL INCIDENT-BASED REPORTING SYSTEM DATA (2007), *available at* <http://www.fbi.gov/ucr/schoolviolence/2007/schoolviolence.pdf>. Figures are available by individual college and university, and by state. U.S. DEP’T JUSTICE, FBI, CRIM. JUSTICE INFO. SERVS. DIV., 2006 CRIME IN THE UNITED STATES TBL. 9 (2006), *available at* <http://www.fbi.gov/ucr/cius2006/data/documents/06tb109.xls>.

50. CLERY HANDBOOK, *supra* note 49, at 6. The reporting period is January 1 through December 31. 34 C.F.R. § 668.46 (2003). The following are the crimes a college or university must report: Criminal Homicide, Manslaughter by Negligence, Forcible Sex Offenses, Non-Forcible Sex Offenses, Robbery, Aggravated Assault, Burglary, Arson, Motor Vehicle Theft, Hate Crimes–Race, Hate Crimes–Gender, Hate Crimes–Religion, Hate Crimes–Sexual Orientation, Hate Crimes–Ethnicity, Hate Crimes–Disability, Liquor Violations/Arrests, Drug Abuse Violations/Arrests, and Weapon Law Violations/Arrests. CLERY HANDBOOK, *supra* note 49, at 38.

51. CLERY HANDBOOK, *supra* note 49, at 135. The Department makes this data available on its Campus Security Data Analysis Cutting Tool Website, which allows users to seek information about particular campuses or groups of campuses, or particular types of crime. Users also can compare specific campuses against national averages. U.S. Dep’t of Educ., Office of Postsecondary Educ., Campus Security Statistics Search Page, <http://ope.ed.gov/security/Search.asp> (last visited Feb. 27, 2008).

Although the data does not identify whether the perpetrators and victims were students, it does reflect the level of serious crime on college and university campuses.<sup>52</sup>

As a caveat, it is important to understand that the Clery Act crime data is both under-inclusive and over-inclusive. The data is under-inclusive because neither schools<sup>53</sup> nor victims<sup>54</sup> report all relevant criminal activity, particularly with regard to sexual assaults.<sup>55</sup> The data is over-inclusive because the statistics “represent alleged criminal offenses reported to campus security authorities and/or local police agencies . . . [but] do not necessarily reflect prosecutions or convictions for crime.”<sup>56</sup>

Below are the aggregate crime statistics for 2002–04, the most recent years for which data is available on the U.S. Department of Education’s website:<sup>57</sup>

**Clery Act Statistics: Criminal Offenses (2002–04)**

<i>Crime</i>	<b>2002</b>	<b>2003</b>	<b>2004</b>
<i>Aggravated Assault</i>	9,695	7,871	7,076
<i>Arson</i>	1,829	1,326	1,244
<i>Burglary</i>	51,549	42,068	39,740
<i>Forcible Sex Offenses</i>	3,902	3,842	3,680
<i>Motor Vehicle Theft</i>	22,018	15,601	13,874
<i>Negligent Manslaughter</i>	15	5	6
<i>Non-Forcible Sex Offenses</i>	801	104	38

52. See generally CLERY HANDBOOK, *supra* note 49. The data is from more than 6,400 institutions of higher education, including two-year and four-year colleges and universities, public and private institutions, and nonprofit and for-profit schools. Eric Hoover, *For the 12th Straight Year, Arrests for Alcohol Rise on College Campuses*, CHRON. HIGHER EDUC. (Wash., D.C.), June 24, 2005, at A31.

53. E.g., Puneet Kollipara, *FBI Statistics Show Crime Underreported on Many Campuses*, STUDENT LIFE (St. Louis, Mo.), Nov. 8, 2006, <http://media.www.studlife.com/media/storage/paper337/news/2006/11/08/News/Fbi-Statistics.Show.Crime.Underreported.On.Many.Campuses-2445984.shtml>; Donna Leinwand, *Campus Crime Underreported*, USA TODAY, Oct. 4, 2000, at 1A; Schultz, *supra* note 36; Zachary Seward, *FBI Stats Show Many Colleges Understate Campus Crime*, WALL ST. J., Oct. 23, 2006, at B1; Lara Turner, *Sexual Assaults, Other Campus Crime Hidden at Salem International University*, Jan. 15, 2002, <http://www.securityoncampus.org/update/news/011502.html>.

54. E.g., NAT’L ASS’N OF ATT’YS GEN., TASK FORCE ON SCHOOL AND CAMPUS SAFETY 6 (2007), available at <http://www.naag.org/assets/files/pdf/2007.TaskForceOnSchoolAndCampusSafety.pdf>; U.S. DEP’T JUST., OFF. JUSTICE PROGRAMS, NAT’L INST. JUSTICE, SEXUAL ASSAULT ON CAMPUS: WHAT COLLEGES AND UNIVERSITIES ARE DOING ABOUT IT 2–3 (2005), available at <http://www.ncjrs.gov/pdffiles1/nij/205521.pdf>; Joann Pan, *Sexual Violence: an Underreported Crime*, SPECTRUM (Buffalo, N.Y.), Nov. 27, 2007, <http://spectrum.buffalo.edu/article.php?id=34558>.

55. NICOLETTI ET AL., *supra* note 21, at 18–20, 124 (explaining why campus crimes, particularly rapes and sexual assaults, are underreported).

56. U.S. Dep’t of Educ., Office of Postsecondary Educ., Statistics Report Index, <http://ope.ed.gov/security> (last visited Feb. 27, 2008).

57. U.S. Dep’t of Educ., Office of Postsecondary Educ., Summary Campus Crime and Security Statistics 2002–2004, <http://www.ed.gov/admins/lead/safety/crime/summary.html> (last visited Feb. 27, 2008).

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## BACKGROUND CHECKS

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<i>Robbery</i>	9,367	6,768	5,915
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**Clery Act Statistics: Hate Crimes (2002–04)**

<i>Crime</i>	<b>2002</b>	<b>2003</b>	<b>2004</b>
<i>Aggravated Assault</i>	168	23	20
<i>Arson</i>	23	3	0
<i>Bodily Injury</i>	27	41	19
<i>Forcible Sex Offenses</i>	56	12	0
<i>Motor Vehicle Theft</i>	3	2	0
<i>Murder/Manslaughter</i>	12	0	0
<i>Negligent Manslaughter</i>	1	0	0
<i>Non-Forcible Sex Offenses</i>	2	0	0
<i>Robbery</i>	0	0	2

**Clery Act Statistics: Arrests (2002–04)**

<i>Crime</i>	<b>2002</b>	<b>2003</b>	<b>2004</b>
<i>Drug Arrests</i>	1,133	957	1,057
<i>Weapons Possession</i>	2	5	9
<i>Liquor Law Violations</i>	48,807	47,904	50,642

This information reflects that, with regard to violent crimes such as homicide, college and university campuses are relatively safe and seem to have become safer over time.<sup>58</sup> As one columnist explained, “When compared with virtually any metropolitan area, a student’s [chance] of dying by homicide actually decreases once he or she steps on campus. And of the homicides reported on campuses, the majority were acquaintance killings or drug deals gone bad.”<sup>59</sup>

On the other hand, FBI researchers have concluded that because “[s]chools and colleges are valued institutions that help build upon the Nation’s foundations and serve as an arena where the growth and stability of future generations begin[,] [c]rime in schools and colleges is . . . one of the most troublesome social problems

58. KATRINA BAUM & PATSY KLAUS, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: VIOLENT VICTIMIZATION OF COLLEGE STUDENTS, 1995–2002, at 1 (2005), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/vvcs02.pdf> (indicating that, while sixty-one per one thousand college and university students were victims of violence annually between 1995 and 2002, they “experienced violence at average annual rates lower than those for nonstudents in the same age group”). Some campuses are, of course, safer than others. See U.S. Dep’t of Educ., Office of Post-Secondary Educ., Campus Security Statistics Report Index, <http://www.ope.ed.gov/security/main.asp> (last visited Feb. 27, 2008) (allowing students, parents, and others to obtain crime statistics for a particular campus or group of campuses, and to compare campuses or groups of campuses).

59. James Alan Fox, Op-Ed, *Q: Are College Campuses Safe? A: Yes.*, USA TODAY, Aug. 28, 2007, at 11A. See also UNC TASK FORCE, *supra* note 11, at 3 (reporting that “the crime rate for UNC campuses is only one-sixth of the statewide crime rate and that the data clearly indicated the vast majority of UNC students will not be directly impacted by or become the victim of a violent crime while enrolled as a student on a UNC campus”).

in the Nation today.”<sup>60</sup> And both the statistics and anecdotal information above show that our students are not immune to violence, especially in residence halls.<sup>61</sup>

In addition to reporting actual crime statistics, some colleges and universities have disclosed information about convicted felons within the student body. This information does not, of course, predict future violence. But it does contribute to the overall analysis of whether background checks can impact campus safety. The University of Georgia recently found sex offenders on campus by cross-referencing a local sex-offender list with its list of enrolled students. The school found matches and also learned that most of the offenders had not disclosed their past offenses during the admissions process.<sup>62</sup> In addition, two schools in Gainesville, Florida—the University of Florida and Santa Fe Community College—have released information about the number of applicants and admitted students with disclosed criminal records.<sup>63</sup> The University of Florida reported that 197 applicants voluntarily disclosed a “criminal/conduct history.”<sup>64</sup> The school denied two applicants and requested additional information from twenty-one others.<sup>65</sup> Santa Fe Community College reported that seventy-eight applicants voluntarily disclosed felony convictions; of this number, nine were denied admission and six had decisions deferred.<sup>66</sup> Because this information is based on voluntary disclosures, the number of offenders on campuses may actually be higher than reported.

Of course, the information presented above begs the primary question: Would background checks decrease crime on campus? The answer appears to be “yes, but not completely.” While some of these student-perpetrators had criminal records that may have been discovered through a criminal background check, others, like Sueng-Hui Cho at Virginia Tech, did not have criminal histories.<sup>67</sup> Therefore, while background checks can be one tool that institutions use to improve campus safety, they are not a complete remedy. As one student journalist editorialized, “University officials have no way of protecting students from every security threat society presents, but they can and should eliminate loopholes that can be fixed

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60. NOONAN & VAVRA, *supra* note 49, at 1.

61. See *infra* Part II.A.4 (discussing background checks on dorm residents).

62. Rachel Feyre, *Student Background Checks Come into Question*, MIRROR (Fairfield, Conn.), Sept. 20, 2007, <http://media.www.fairfieldmirror.com/media/storage/paper148/news/2007/09/20/News/Student.Background.Checks.Come.Into.Question-2977985.shtml>. Virginia recently enacted a statute that requires schools to report to the Virginia State Police the following information for all applicants who are accepted for admission: (1) name; (2) social security number or other identifying number; (3) date of birth; and (4) gender, so that the names can be cross-referenced against the state sex offender registry. VA. CODE ANN. § 23-2.2:1 (2007).

63. Nathan Crabbe, *UF, SFCC Ask Applicants About Crime*, GAINESVILLE SUN, Aug. 31, 2007, <http://www.gainesville.com/article/20070831/NEWS/708310330>.

64. *Id.*

65. *Id.*

66. *Id.*

67. VA. TECH REVIEW PANEL, *supra* note 23, at 44; Monica Davey, *Gunman Showed Few Hints of Trouble*, N.Y. TIMES, Feb. 16, 2008, at A1. Although Cho did not have a criminal record, he was alleged to have stalked at least one female student at Virginia Tech. VA. TECH REVIEW PANEL, *supra* note 23, at 44.

quickly and inexpensively.”<sup>68</sup> This leads to the next question: How many colleges and universities are using this tool to help improve campus safety?

## II. CURRENT PRACTICES

Although background checks have been discussed frequently post-Virginia Tech, most undergraduate programs have not adopted policies requiring pre-matriculation checks.<sup>69</sup> This section describes current practices and trends in general undergraduate programs, with separate discussions of athletes, international students, and dormitory residents. It then explores practices in specialized programs, such as medicine, nursing, pharmacy, and other health professions, which are more apt to require pre-matriculation checks. It then shifts to law schools, which typically do not conduct checks, and briefly examines other professional courses of study, including education, social work, divinity, and business, that sometimes incorporate checks into their admissions processes.

### A. General Practices and Trends

#### 1. Application Questions About Criminal History

Today, most colleges and universities do not require prospective undergraduates to undergo a criminal background check. Post-Virginia Tech, however, many institutions have become more sensitive to the myriad risks related to the admissions process.<sup>70</sup> While more are implementing background-check policies<sup>71</sup> and some have started spot-checking information submitted by applicants,<sup>72</sup> most have opted for a middle ground that adds questions on the admissions application about criminal and disciplinary histories.<sup>73</sup> Some also ask applicants whether they

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68. Amy Hallford, *Applicants Need Background Checks*, DAILY SKIFF (Fort Worth, Tex.), Nov. 30, 2006, <http://media.www.tcdailyskiff.com/media/storage/paper792/news/2006/11/30/TheSkiffView/Applicants.Need.Background.Checks-2514099.shtml>.

69. Despite this fact, Security on Campus, Inc., in its Campus Safety Audit brochure, urges parents and potential students to ask, “Does the Admissions Office Require Background Checks on Matriculated Students?” SEC. ON CAMPUS, INC., CAMPUS SAFETY AUDIT (2005), available at <http://www.securityoncampus.org/students/audit.pdf>.

70. Gordon, *supra* note 7.

71. Mary Beth Marklein, ‘An Idea Whose Time Has Come?’ Schools Increasingly Subjecting Applicants to Background Checks, USA TODAY, Apr. 18, 2007, at 7D (reporting that Certified Background, which was conducting background checks on students for fewer than a dozen colleges and universities, now conducts checks for about 500 colleges and universities).

72. Weinbach, *supra* note 1 (indicating that some colleges and universities run internet checks and compare SAT essays, which can now be downloaded, with admissions essays; some also ask applicants to submit materials to verify information about extra-curricular activities and other experiences mentioned in the application; for example, one applicant was asked to verify information about an archeological dig in Switzerland that she featured in an essay).

73. See *infra* note 81 and accompanying text (regarding The Common Application). The University of Pittsburgh is an anomaly in that it states on its website that it generally does not ask applicants about their past criminal history:

Q: Does Pitt screen its prospective students . . . for criminal history?

A: Except for some graduate school and financial aid applications, the University of

are registered sex offenders.<sup>74</sup> At most schools that adopt this middle approach, if an applicant answers “no” to these questions, the inquiry ends;<sup>75</sup> if the applicant answers “yes,” then additional explanation or documentation is required.<sup>76</sup>

Although many colleges and universities started asking these types of questions before 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>77</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>78</sup> And, as one official

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Pittsburgh does not ask prospective students about prior criminal records

Univ. of Pittsburgh, [http://www.pitt.edu/~safety/information/crime\\_records.html](http://www.pitt.edu/~safety/information/crime_records.html) (last visited Feb. 27, 2008). The University does, however, provide warnings to and regarding registered sex offenders:

Under the federal Campus Sex Crimes Prevention Act, any person who is required to register with the commonwealth as a sex offender under Pennsylvania’s Megan’s Law requirement must notify the state if they are employed or are enrolled as a student at a college or university. The law also requires institutions of higher education to advise the campus community how to obtain information on current registered sexual offenders and [predators] residing within the campus community.

*Id.*

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

75. However, many admissions officers also obtain information about students through personal relationships cultivated with high school admissions counselors. Aaron Kessler, *UVa School May Probe Applications*, DAILY PROGRESS (Charlottesville, Va.), Apr. 30, 2007, available at [http://www.dailyprogress.com/servlet/Satellite?pagename=CDP/MGArticle/CDP\\_BasicArticle&c=MGArticle&cid=1173351007413](http://www.dailyprogress.com/servlet/Satellite?pagename=CDP/MGArticle/CDP_BasicArticle&c=MGArticle&cid=1173351007413).

76. Feyre, *supra* note 62 (quoting and paraphrasing Karen Pellegrino, Director for Admissions, Fairfield University). For an example of an admissions policy that requires applicants who disclose a criminal record to provide additional information, see Indiana University–Purdue University Indianapolis (IUPUI), Admissions, <http://enroll.iupui.edu/admissions/undergraduate/freshmen/disclosure.shtml> (last visited Feb. 27, 2008), which states:

IUPUI is committed to maintaining a safe environment for all members of the university community. As part of this commitment, the University requires applicants who have (1) been convicted of any felony or a misdemeanor such as simple battery or other convictions for behavior that resulted in injury to a person(s) or personal property or (2) who have a history of formal disciplinary action at any college or university attended to disclose this information as a mandatory step in the application process. A previous conviction or previous college disciplinary action does not automatically bar admission to the University, but does require review.

77. Gordon, *supra* note 7.

78. *Id.* See also Peter F. Lake, *Higher Education Called to Account: Colleges and the Law After Virginia Tech*, CHRON. HIGHER EDUC. (Wash., D.C.), June 29, 2007, at B6.

In the final analysis, the changes in college-safety law have been essentially changes in accountability, a trend that will accelerate in light of Virginia Tech. Higher-education law is moving, steadily, to consolidate around paradigms of reasonableness and foreseeability—which focus much more on conduct, choices, and information—and

noted, information about criminal and disciplinary histories “is important because students come to campus not just to study, but to live together.”<sup>79</sup>

In 2007, The Common Application, which is accepted by approximately 300 colleges and universities nationwide,<sup>80</sup> added the following questions:

Have you ever been found responsible for a disciplinary violation at an educational institution you have attended from 9th grade (or the international equivalent) forward, whether related to academic misconduct or behavioral misconduct, that resulted in your probation, suspension, removal, dismissal, or expulsion from the institution? Have you ever been convicted of a misdemeanor, felony, or other crime?<sup>81</sup>

Of those who used The Common Application in 2007, 2.32% (6,176 out of 266,087 applicants) indicated they had been suspended or dismissed from school, and 0.26% (692 applicants) indicated they had been convicted of a misdemeanor or felony.<sup>82</sup>

## 2. Post-Matriculation Checks in Connection with Special Programs and State Licensing Requirements

In addition to asking questions related to criminal history, some colleges and 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. The University of Maine at Augusta, for example, posts a “Responsible Admissions Policy,” which cautions applicants about these issues:

Students who are pursuing degrees leading to application for professional licensure or certification, and/or who will be participating in clinical placements, internships, or practica through their UMA program should be aware that their host facility may require a criminal background check, finger printing, or drug screening. In such situations, each student is responsible for obtaining and paying for the background check or other screening process and for delivering

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away from the concept of colleges' special status and their disengagement from students to avoid risk.

*Id.*

79. Gordon, *supra* note 7. See also *infra* note 485 and accompanying text (analogizing college and university campuses to city-states); NICOLETTI ET AL., *supra* note 21, at 30–32 (explaining how college and university settings and operations impact crime on campus).

80. The Common Application, History, <https://www.commonapp.org/CommonApp/History.aspx> (last visited Feb. 27, 2008).

81. THE COMMON APPLICATION, 2007–08 FIRST-YEAR APPLICATION (2007), <https://www.commonapp.org/CommonApp/docs/downloadforms/CommonApp2008.pdf>. See Jessica Eisenbrey, *Common Application Questions Students' Criminal Records*, REVIEW (Newark, Del.), Mar. 20, 2007, <http://media.www.udreview.com/media/storage/paper781/news/2007/03/20/News/Common.Application.Questions.Students.Criminal.Records-2781562.shtml> (exploring the reasons The Common Application added the questions and canvassing reactions to the questions from campus officials and students).

82. Marklein, *supra* note 71.

required documentation to the facility. Although the University will make reasonable efforts to place admitted students in field experiences and internships, it will be up to the host facility to determine whether a student will be allowed to work at that facility. Students should further be aware that a criminal record may jeopardize licensure by the State certification body. Students may consult the certification body corresponding to their intended occupation for more details. Successful completion of a program of study at UMA does not guarantee licensure, certification, or employment in the relevant occupation.<sup>83</sup>

### 3. Criminal Background Checks on All Admitted Applicants

Research has revealed just one undergraduate institution that requires a type of 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>84</sup> As of December 2007, the requirement is still in place.<sup>85</sup>

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<sup>86</sup> for all system students entering into certain fields.<sup>87</sup> A newspaper article describing the new policy indicates that checks will be primarily in fields that require similar checks for licensure after graduation, such as education, social work, and nursing.<sup>88</sup> The Board indicated that the new policy was triggered by “recent tragic incidents on or

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83. Univ. of Maine at Augusta, Admissions, <http://www.uma.edu/coursecatalog-admissions.html> (last visited Feb. 27, 2008). See also IDAHO STATE UNIV., FACULTY/STAFF HANDBOOK, available at [http://www.isu.edu/fs-handbook/part6/6\\_4/6\\_4o.html](http://www.isu.edu/fs-handbook/part6/6_4/6_4o.html) (last visited Feb. 27, 2008) (indicating that a “background check as a condition of admission is not a general University requirement,” but noting that some students will need to undergo checks in conditions with clinical placements, field experiences, and other similar programs and explaining why and how checks should be conducted).

84. B. Drummond Ayres Jr., *College Requires Applicants to Come Clean About Crime*, N.Y. TIMES, Sept. 3, 1993, at A14 (In the prior year, “one student was fatally shot by another, four students were held up in their dormitory room by a masked man and an 8-year-old boy was shot and wounded in a basketball game. Off campus, several students were mugged, several others were assaulted and at least one was shot.”).

85. St. Augustine's Coll., 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 Feb. 27, 2008).

86. See *infra* note 506 for more information on fingerprint-based systems.

87. *Board Approves Background Checks*, IN-FORUM (Fargo, N.D.), Dec. 21, 2007, <http://www.in-forum.com/News/articles/186724>; N.D. UNIV. SYS., STATE BD. HIGHER EDUC., MINUTES—DEC. 20, 2007 (2007), available at <http://www.ndus.edu/uploads/document-library/1603/12-20-07-MINUTES-FOR-THE-WEB.PDF> [hereinafter N.D. AGENDA].

88. *Board Approves Background Checks*, *supra* note 87.



near college campuses.”<sup>89</sup> As explained in subsections (B) and (D) below, an increasing number of schools now require pre-matriculation checks on applications in certain programs of study, especially in health-related fields and in fields in which students or graduates will work with vulnerable populations.<sup>90</sup>

#### 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>91</sup> Then on June 4, student Christen Naujoks was shot and killed by fellow student John Peck.<sup>92</sup> Both Dixon and Peck had criminal records, but neither disclosed his full criminal or disciplinary record when applying for admission.<sup>93</sup> At the time, UNC Wilmington did not conduct criminal background checks on applicants.<sup>94</sup>

Following his daughter Jessica’s murder, John Faulkner filed two lawsuits. One complaint named Curtis Dixon’s father as the defendant.<sup>95</sup> James Ellis Dixon was an administrator in the University of North Carolina system;<sup>96</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>97</sup> Mr. Dixon allegedly completed his son’s application and did not reveal this or other information about his son’s past troubles.<sup>98</sup> Mr. Faulkner voluntarily dismissed this lawsuit.<sup>99</sup> The second suit, against the university, was submitted to the North Carolina Industrial Commission.<sup>100</sup> That suit, which recently settled,<sup>101</sup> alleged that UNC Wilmington

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89. N.D. AGENDA, *supra* note 87, at 9.

90. *See infra* Parts II.B & D.

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

92. Little, *supra* note 91. For additional details about Christen Naujoks’ murder, see Kiara Jones, *Another UNCW Student Murdered*, SEAHAWK (Wilmington, N.C.), Aug. 26, 2004, available at <http://media.www.theseahawk.org/media/storage/paper287/news/2004/08/26/News/Another.Uncw.Student.Murdered-722867.shtml>. For the UNC Wilmington Chancellor’s official statement regarding the two murders, see *Chancellor DePaolo’s Talking Points About UNCW Student Deaths*, June 8, 2004, <http://appserv02.uncw.edu/news/artview.aspx?ID=1258>.

93. Little, *supra* note 91.

94. *Id.* For an article that details the discrepancies in Curtis Dixon’s application, see Carrie Van Brunt, *Dixon’s Death Ends Faulkner Trial*, SEAHAWK (Wilmington, N.C.), Jan. 6, 2005, available at <http://media.www.theseahawk.org/media/storage/paper287/news/2005/01/06/News/Dixons.Death.Ends.Faulkner.Trial-830678.shtml>.

95. Estate of Faulkner v. Dixon, No. 06CVS6106 (N.C. Sup. Ct. May 17, 2006).

96. Little, *supra* note 91. James Dixon had served as UNC Charlotte’s executive assistant to the chancellor and assistant secretary of the Board of Trustees since 1990. UNCW Fighting Crime Problem, <http://www.bluelineradio.com/FAULKNER.html> (last visited Feb. 27, 2008).

97. Little, *supra* note 91.

98. Van Brunt, *supra* note 94.

99. E-mail from Eileen Goldgeier, Gen. Counsel, Univ. of N.C. Wilmington, to Darby Dickerson, Vice President & Dean, Stetson Univ. Coll. of Law (Jan. 7, 2008) (on file with author).

100. Claim for Damages Under Tort Claims Act by Estate of Jessica Lee Faulkner, No.

was negligent for admitting Curtis Dixon “despite a well documented history of violence against women, including incidents at other UNC campuses.”<sup>102</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 sixteen UNC campuses.<sup>103</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>104</sup> The applications should include “clear and consistent questions concerning disciplinary, criminal, military, and enrollment history.”<sup>105</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>106</sup> In addition, applicants should be required “to report criminal history between the date of application and the date of enrollment.”<sup>107</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>108</sup> Before a student enrolls, campus officials should “compare applicants against the UNC expulsion/suspension database”<sup>109</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>110</sup> In addition, schools should request “long-term secondary-school suspensions and expulsions on transcripts or on transcript supplements”<sup>111</sup> and “[r]equest that the North Carolina Community College System . . . report campus-based reported crimes and

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A19561 (N.C. Indus. Comm’n May 17, 2006); Estate of Faulkner v. Univ. N.C., No. T-TA-19561 (N.C. Indus. Comm’n Sept. 4, 2007).

101. E-mail from Eileen Goldgeier, *supra* note 99.

102. Jaschik, *supra* note 8.

103. UNC TASK FORCE, *supra* note 11, at 1–2.

104. *Id.* at 6.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. UNC TASK FORCE, *supra* note 11, at 6.

The National Student Clearinghouse, a non-profit organization founded by the higher education community, streamlines the student record verification process for colleges and universities, high schools and high school districts, students and alumni, lending institutions, employers, the U.S. Department of Education and other organizations. The Clearinghouse maintains a comprehensive electronic registry of student records that provides a single, automated point-of-contact for organizations and individuals requiring timely, accurate verification of student enrollment, diploma, degree, and loan data.

Nat’l Student Clearinghouse, About Us, <http://www.studentclearinghouse.org/about/aboutus.htm> (last visited Feb. 27, 2008). According to one source, “Nearly 3,000 schools use National Student Clearinghouse to exchange and confirm details about a student’s previous college enrollment.” Patti Jones, *Increase Your Chances of Getting Accepted*, SEATTLE TIMES, Oct. 27, 2007, at J14.

111. UNC TASK FORCE, *supra* note 11, at 7.

non-academic suspensions and expulsions on transcripts or on transcript supplements.”<sup>112</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” 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>113</sup> Finally, the task force

concluded that given the extremely small number of students who failed to provide accurate and truthful information [about criminal histories] and went on to commit a campus crime, the widespread and routine use of criminal background checks on all students would be neither cost-effective nor 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>114</sup>

In October 2006, the UNC System, drawing heavily from the task force’s recommendations, adopted a detailed “Regulation on Student Applicant Background Checks.”<sup>115</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>116</sup> With limited exceptions,<sup>117</sup> the Regulation also provides that background checks should be conducted.<sup>118</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

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112. *Id.*

113. *Id.* Other “triggers” may include withdrawals or leaves of absence from another institution of higher education; suspensions or expulsions while a K–12 student; 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.

114. *Id.* The task force found that, for the three-year period from July 1, 2001 through June 30, 2004, only 21 (out of approximately 250,000) students who committed a campus crime also had a prior criminal history; of this number, 13 failed to disclose their prior history on the admissions application. *Id.* at 4.

115. UNIV. OF N.C., THE UNC POLICY MANUAL: 700.5.1[R], REGULATION ON STUDENT APPLICATION BACKGROUND CHECKS (2006), available at [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). The policy is effective for students who matriculate after August 1, 2007. *Id.* See *infra* Appendix A for the full-text of the regulation.

116. *Id.* at ¶ 1.

117. *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.”).

118. *Id.* In addition, the admissions application now includes six questions about criminal and disciplinary history. UNIV. OF N.C. WILMINGTON, APPLICATION FOR ADMISSION, (2007), available at <http://www.uncwil.edu/admissions/documents/AdmiApp2007-2008.pdf>. See *infra* Appendix B for the full-text of the campus safety questions on the application.

significant threat to campus safety.”<sup>119</sup>

When asked about the background-check policy, UNC Wilmington’s Chancellor explained, “Not even the best background checks can entirely and utterly eliminate the risk of a potentially dangerous student being enrolled. But becoming a model for campus safety is what we must aim for, to bring good from the tragedy of young lives cut so tragically short.”<sup>120</sup> The Fall 2007 admissions process marked the first system-wide use of the new system.<sup>121</sup> “Based on the checks, 101 applicants were denied admission, 30 of whom had applied to Wilmington,” where the murders had occurred.<sup>122</sup>

Georgia College and State University (“GCSU”) 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>123</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.”<sup>124</sup>

The GCSU background-check policy was added to help improve campus safety by verifying information that applicants provided in response to questions regarding criminal history.<sup>125</sup> The school felt it was important to give applicants notice about the fact that they may be subject to a check.<sup>126</sup> The school conducts checks on all admitted students in some disciplines, such as nursing and education, and also conducts checks on all applicants who answer “yes” to application questions regarding criminal history.<sup>127</sup> The school also conducts checks when the admissions file reveals inconsistencies or other matters of concern.<sup>128</sup> In the school’s experience, the background checks often reveal additional information the applicant should have revealed.<sup>129</sup> In addition, the school has run background

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119. *Id.* at ¶ 10. *See infra* Appendix A.

120. Van Brunt, *supra* note 94 (quoting Chancellor Rosemary DePaolo).

121. Some schools within the system implemented background checks and other task-force recommendations earlier. Erin France, *UNC Schools Implement Background Checks*, DAILY TARHEEL (Chapel Hill, N.C.), Aug. 29, 2005, <http://media.www.dailytarheel.com/media/storage/paper885/news/2005/08/29/StateNational/Unc-Schools.Implement.Background.Checks-1359541.shtml> (noting, among other things, that the UNC Charlotte campus had conducted “150 background checks out of 15,000 applicants” and that UNC Chapel Hill ran 19 checks on transfer students).

122. Marklein, *supra* note 71.

123. GA. COLL. & STATE UNIV., UNDERGRADUATE APPLICATION FOR ADMISSION 10 (2007), available at [http://www.gcsu.edu/admissions/undergraduate/PDF/Undergrad\\_appl.pdf](http://www.gcsu.edu/admissions/undergraduate/PDF/Undergrad_appl.pdf).

124. *Id.*

125. Telephone Interview with Paul Jones, Vice President for Institutional Res. & Enrollment Mgmt., Professor 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.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* GCSU has a committee that includes individuals such as legal counsel, an admissions representative, a student affairs representative, and faculty that decides how to

checks following admission when students are involved in certain types of incidents on campus.<sup>130</sup> As with the pre-matriculation checks, these checks have revealed that some students were not candid on their admissions application.<sup>131</sup> GCSU has exercised its authority to revoke offers of admission based on applicants' or students' failure to provide complete information.<sup>132</sup>

### 5. Athletes

Some colleges and universities conduct background checks on prospective student-athletes.<sup>133</sup> The University of Oklahoma, for example, runs criminal background checks on all potential recruits.<sup>134</sup> Baylor, Kansas State, and the University of Kansas screen at least some potential student-athletes.<sup>135</sup>

Factors that led schools to implement background checks on incoming student-athletes include a number of high-profile incidents involving athletes,<sup>136</sup> some of

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proceed with an applicant with a criminal record. *Id.* For example, if an offer of admission is extended, the student may be placed on immediate probation. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. Shawn Courchesne, *Colleges Digging a Little Deeper: Screening Incoming Student Athletes an Ongoing Issue*, HARTFORD COURANT, Feb. 4, 2007, at E12; Marklein, *supra* note 71. *See also* Andy Gardiner, *Colleges Look into Background Check Options*, USA TODAY, July 15, 2005, at C14 ("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."). "But many schools, including Florida, Florida State and South Florida, still limit that radar to asking recruits and their parents, coaches and teachers if a student has had any disciplinary problems." Greg Auman, *Background Checks Vary; Schools Fear Surprises*, ST. PETERSBURG TIMES, Mar. 6, 2005, at 1C. Some security firms cater to colleges and universities who desire to conduct background checks on student-athletes. *E.g.*, NACDA Consulting, <http://www.nacdaconsulting.com/managex/index.asp?ArticleSource=206&CatID=201> (last visited Feb. 27, 2008). One author has called for the NCAA to adopt a background-check regulation that would apply to all schools. Lindsay M. Potrafke, Comment, *Checking Up on Student-Athletes: A NCAA Regulation Requiring Criminal Background Checks*, 17 MARQ. SPORTS L. REV. 427, 436-40 (2006).

134. Marklein, *supra* note 71; Eddie Timanus, *Oklahoma Investigates Athletes' Backgrounds*, USA TODAY, Mar. 3, 2005, at 6C.

135. Marklein, *supra* note 71. Baylor limits checks to transfer athletes. Todd Datz, *Background Checks on Campus*, CSO MAGAZINE (Framingham, Mass.), July 2005, available at [http://www.csoonline.com/read/070105/briefing\\_background.html](http://www.csoonline.com/read/070105/briefing_background.html).

136. *See supra* note 43 and accompanying text (regarding Baylor basketball player Carlton Dotson). *See also* Auman, *supra* note 133 (revealing that several recruits at major Florida universities had violent criminal records). Jack Carey, *Legal Woes Big Challenge in Recruiting*, USA TODAY, Jan. 28, 2007, at 3C (recounting incidents regarding football recruits with pending criminal charges); Jesse Hyde, *Rape Allegation Stuns BYU*, DESERET MORNING NEWS (Salt Lake City, Utah), Aug. 30, 2004, at A1 (reporting an alleged rape of a seventeen-year-old girl by two BYU football players and recounting other incidents of violence involving student-athletes at other schools).

In 1995, for example, no fewer than 220 college athletes were the subject of criminal proceedings, for alleged crimes ranging from illegal gambling to manslaughter. . . . More particularly, 112 athletes were charged with sexual assault or incidents of domestic violence during 1995 and 1996. . . . The majority of the victims

which have resulted in lawsuits against the institution,<sup>137</sup> and studies concluding that athletes account for a higher percentage of crime on campus than their numbers should warrant. A study of criminal activity at Georgetown University, for instance, found that “[a]lthough varsity student-athletes make up just over 11 percent of Georgetown’s undergraduate population, they have been arrested on and around Georgetown’s campus and charged with violent assaults by D.C. prosecutors at a rate more than double that of the general student body.”<sup>138</sup> In addition, a 1995 Northeastern University study that scrutinized judicial records at ten institutions found that although male athletes comprised just over 3% of the student population, they committed 19% of sexual assaults and 35% of all domestic assaults.<sup>139</sup>

Because student-athletes are often hand-picked, awarded full scholarships, play in multimillion dollar facilities financed by the school, 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.<sup>140</sup>

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were female college students.

Jeffery Benedict, *Colleges Must Act Firmly When Scholarship Athletes Break Laws*, CHRON. HIGHER EDUC. (Wash., D.C.), May 9, 1997, at B6.

“Several studies have found male athletes to be more likely than other men on campus to commit sexual assaults.” U.S. Dep’t of Educ., Higher Educ. Ctr. for Alcohol & Other Drug Abuse & Violence Prevention, *Infofacts Resources: College Athletes and Alcohol and Other Drug Use* (2002), available at [http://www.higheredcenter.org/pubs/factsheets/fact\\_sheet3.pdf](http://www.higheredcenter.org/pubs/factsheets/fact_sheet3.pdf).

In a study of victims of sexual aggression at a large midwestern university, male athletes were greatly overrepresented among the assailants described by the women surveyed. Though men on sports teams were less than 2 percent of the total male population on campus, they made up 23 percent of the attackers in sexual assaults and 14 percent in attempted sexual assaults. At another university, an anonymous survey found that men on varsity, revenue-producing teams, such as football and basketball, self-reported higher rates of sexually abusive behavior. Gang rapes on campus are most often perpetrated by men who participate in intensive male peer groups that foster rape-supportive behaviors and attitudes. One review of 24 alleged gang rapes found that in 22 of the 24 documented cases, the perpetrators were members of intercollegiate athletic teams or fraternities.

*Id.* (internal citations omitted).

137. *E.g.*, *Crow v. State*, 271 Cal. Rptr. 349 (Cal. Ct. App. 1990); *Korellas v. Ohio St. Univ.*, No. 2001-09206, 2004 WL 1598666 (Ohio Ct. Cl. July 12, 2004); *Boyd v. Tex. Christian Univ.*, 8 S.W.3d 758 (Tex. Ct. 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).

138. Moises Mendoza, *Most Assault Charges Filed Against Athletes*, THE HOYA (Wash., D.C.), May 2, 2006, available at <http://www.thehoya.com/node/6214>. But see Jill Sederstrom, *Athletes with Criminal Record Not Common*, IOWA STATE DAILY, Dec. 9, 2002, <http://media.www.iowastatedaily.com/media/storage/paper818/news/2002/12/09/News/Athletes.With.Criminal.Record.Not.Common-1093365.shtml> (“[A]n Iowa State Daily investigation revealed a relatively low number [6.6%] of ISU student-athletes having a criminal record in Iowa.”).

139. Todd W. Crosset et al., *Male Student-Athletes Reported for Sexual Assault*, 19 J. SPORT & SOCIAL ISSUES 126, 128 (1995).

140. See Timanus, *supra* note 134. Law professor Matt Mitten, director of the National

## 6. International Students

Most institutions of higher education do not have specific background-check policies for international students. In light of the federal government's SEVIS program,<sup>141</sup> 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 a background check before issuing a visa.<sup>142</sup>

## 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 may seek information about the criminal pasts of dorm residents.<sup>143</sup> National statistics

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Sports Law Institute at Marquette, explained:

My sense is that a court would have no problem finding it's a reasonable basis that student-athletes are much more high-profile than a typical student. . . . You're seeing more lawsuits trying to hold universities liable for student-athletes' misconduct. I think the school could say, "Look, we're making a substantial investment in this student-athlete—potentially a four- or five-year scholarship—and we want to make sure he has the requisite character."

*Id.* See also Ashley Zuelke, *U. Montana Regents Call For Accountability After Arrest of Athletes*, U.S. COLL. HOCKEY ONLINE, Nov. 16, 2007, <http://www.uscho.com/collegesports/activism/uid,TUYA111620071960875/UMontanaRegentsCallForAccountabilityAfterArrestOfAthletes.html>.

141. SEVIS is a web-based program administered by U.S. Immigration and Customs Enforcement

to track and monitor schools and programs, students, exchange visitors and their dependents throughout the duration of approved participation within the U.S. education system. SEVP [Student and Exchange Visitor Program] collects, maintains and provides the information so that only legitimate foreign students or exchange visitors gain entry to the United States. The result is an easily accessible information system that provides timely information to the Department of State, U.S. Customs and Border Protection, U.S. Citizenship and Immigration Services and U.S. Immigration and Customs Enforcement.

U.S. Immigr. & Customs Enforcement, International Students and Exchange Visitor Program (SEVP), <http://www.ice.gov/sevis/index.htm> (last visited Feb. 27, 2008).

142. *E.g.*, OFF. OF INT'L AFF., UNIV. CHICAGO, FORESTALLING/SHORTENING BACKGROUND CHECKS AT CONSULAR POSTS (2006), available at [https://internationalaffairs.uchicago.edu/pdf/letter\\_for\\_background\\_checks.pdf](https://internationalaffairs.uchicago.edu/pdf/letter_for_background_checks.pdf); Canisius Coll., Undergraduate Admissions, Visa Tips, [http://www.canisius.edu/admissions/visa\\_tips.asp](http://www.canisius.edu/admissions/visa_tips.asp) (last visited Feb. 27, 2008); Stanford Univ., Bechtel Int'l Ctr., General Information on SEVIS and Immigration Issues for Stanford Faculty and Staff, <http://www.stanford.edu/dept/center/sevis/sevisqanda.html> (last visited Feb. 27, 2008) ("If students/scholars are from certain countries . . . they should be prepared for lengthy background checks before obtaining their visa. These background checks can take up to 6–8 months and there is NO guarantee that the visa will be issued after the background check.")

143. *E.g.*, CENT. ARIZ. COLL. OFF. RES. LIFE, TERMS OF LICENSE FOR USE OF RESIDENCE HALL FACILITIES, [http://www.centralaz.edu/documents/students/Residence\\_Life/licenseapp.pdf](http://www.centralaz.edu/documents/students/Residence_Life/licenseapp.pdf) (last visited Feb. 27, 2008) (requiring applicants to disclose felony and misdemeanor convictions). The terms of license state:

Applicants who have been previously convicted of a misdemeanor or felony will be required to go through an interview process and background check (including contacting your parole officer when applicable) before being admitted to the Residence

reveal that a significant amount of campus crime occurs in residence halls.<sup>144</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>145</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>146</sup> Just a few weeks later, two additional students reported they were assigned to live in university housing with convicted felons.<sup>147</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.<sup>148</sup> In the other situation, a traditional-age 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.<sup>149</sup> Also, in a 2004 incident, the university assigned a 36-year-old drug informant to room with a 23-year-old law student.<sup>150</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>151</sup>

When considering whether to conduct background checks on potential dorm

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Halls. Registered Sex Offenders must disclose their status on this application. The Director of Student Life and the Dean of Student Services . . . may impose conditions upon the student's admission into the Residence Halls. Applicants found dishonest or falsifying this section of the application will have their License Agreement cancelled and [be] immediately evicted from the halls . . . . Students convicted of criminal offenses or charged with serious or violent crimes against others while living in the halls may have their housing privileges revoked.

*Id.* See HARRIS-STOWE STATE UNIV., APPLICATION FOR HOUSING (2007), available at <http://www.hssu.edu/deptdocs/17/HousingApp07.pdf> ("Applicants who have been convicted of . . . a misdemeanor or felony may be required to go through an interview process and background check before being admitted to the Residence Hall.").

144. *E.g.*, U.S. Dep't of Educ., Off. of Postsecondary Educ., Summary Campus Crime Statistics, <http://www.ed.gov/admins/lead/safety/crime/criminaloffenses> (last visited Feb. 27, 2008) (reflecting that of 7076 assaults reported under the Clery Act for 2004, 957 occurred within residence halls, of 3680 forcible sexual assaults reported under the Clery Act for 2004, 1938 occurred in residence halls, and of 39,740 burglaries reported under the Clery Act for 2004, 12,838 occurred in residence halls). See also UNC TASK FORCE REPORT, *supra* note 11, at 4 ("58% of campus crimes occurred inside residence halls or other campus buildings.").

145. *Felon in Dorm Raises Issues at Akron College*, COLUMBUS DISPATCH, Nov. 27, 2006, at E4.

146. *Id.*

147. Carol Biliczky, *2 More Felons in Dorms*, AKRON BEACON JOURNAL (Akron, Ohio), Dec. 5, 2006.

148. *Id.*

149. *Id.*

150. *Id.*

151. *University of Akron Begins Asking Housing Applicants About Criminal Records*, 13 CAMPUS WATCH NEWSLETTER 4 (2007), available at <http://www.securityoncampus.org/aboutsoc/campuswatch/v13i1.pdf>; Univ. Akron, Housing Contract Terms and Conditions, <http://www.uakron.edu/reslife/contract.php> (last visited Feb. 27, 2008).



residents, colleges and universities should note that off-campus landlords likely will require prospective student-tenants to pass a check.<sup>152</sup> Private landlords are generally free to rent to whomever they choose,<sup>153</sup> so long as they comply with the Fair Housing Act<sup>154</sup> and disability laws.<sup>155</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>156</sup>

Landlords conduct background checks to minimize the chances of lessees not paying rent, damaging property, or injuring other tenants<sup>157</sup>—all considerations that apply in the higher-education context. Therefore, background checks on residents are relevant in the campus context and would bring colleges and universities in line with a significant number of off-campus landlords.

#### B. 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 done so because they realize the importance of protecting the campus community.

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152. See, e.g., Apartments911.com, Austin Apartments and Your Background, <http://www.apartments911.com/austinapartmentbackground.html> (last visited Feb. 27, 2008); David Henke, *From Dorm to Apartment: How to Make the Smart Switch*, MANITOU MESSENGER (Northfield, Minn.), Nov. 2, 2007, [http://fusion.stolaf.edu/messenger/print.cfm?article\\_id=3706](http://fusion.stolaf.edu/messenger/print.cfm?article_id=3706) (local landlord indicating that he runs background checks on tenants). See generally Eloisa C. Rodriguez-Dod & Olympia Duhart, *Evaluating Katrina: A Snapshot of Renters' Rights Following Disasters*, 31 NOVA L. REV. 467, 480 (2007) ("No known law exists preventing a landlord from conducting a criminal background check before renting to a prospective tenant.").

153. Rodriguez-Dod & Duhart, *supra* note 152, at 479.

154. "The FHA makes it unlawful for a landlord 'to 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.* (quoting 42 U.S.C. § 3604(a) (2000)).

155. *Id.*

156. *Id.* at 478. See generally Rudy Kleysteuber, *Tenant Screening Thirty Years Later: A Statutory Proposal to Protect Public Records*, 116 YALE L.J. 1344 (2007) (describing the increase in tenant screening measures).

157. Joe Hoover et al., *How to Conduct a Tenant Background Screening*, Apr. 1, 2007, [http://howtoinvestigate.com/articles/tenant\\_screening.htm](http://howtoinvestigate.com/articles/tenant_screening.htm).

### 1. Medical Schools

The trend in medical schools is to conduct background checks. Currently, about 25% of all medical schools require criminal background checks on admitted applicants.<sup>158</sup> While most conduct checks on their own initiative,<sup>159</sup> schools in Illinois are required to do so pursuant to state law.<sup>160</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>161</sup> but many implemented checks after a murder-suicide by a University of Arkansas medical student.<sup>162</sup>

Illinois is the only state that requires pre-matriculation background checks for medical students.<sup>163</sup> The Illinois Medical School Matriculant Criminal History

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158. Gina Shaw, *Applicant Criminal Background Check Moves Forward*, AAMC REP. (Wash., D.C.), May 2007, <http://www.aamc.org/newsroom/reporter/may07/background.htm>.

159. *E.g.*, Creighton Univ. Sch. of Med., Background Check Policy, <http://www2.creighton.edu/medschool/medicine/oma/cbc/index.php> (last visited Feb. 27, 2008); Today at the Brody School of Medicine, <http://www.ecu.edu/cs-dhs/today/aug2007.cfm> (last visited Feb. 27, 2008); Johns Hopkins Sch. Med., How to Apply, <http://www.hopkinsmedicine.org/admissions/admissions.html> (last visited Feb. 27, 2008); S. Ill. Univ. Sch. of Med., Criminal Background Check Policy, [http://www.siumed.edu/students/criminal\\_background\\_check\\_policy.pdf](http://www.siumed.edu/students/criminal_background_check_policy.pdf) (last visited Feb. 27, 2008); Univ. of Iowa Carver Coll. of Med., Criminal Background Check, <http://www.medicine.uiowa.edu/OSAC/admissions/bgcheck.htm> (last visited Feb. 27, 2008); Univ. of Med. & Dentistry of N.J., University Policy, [http://www.umdnj.edu/opmweb/Policies/HTML/AcademicAff/00-01-20-95\\_00.html](http://www.umdnj.edu/opmweb/Policies/HTML/AcademicAff/00-01-20-95_00.html) (last visited Feb. 27, 2008); Univ. of Okla. Coll. of Med., Background Checks, <http://www.medicine.ouhsc.edu/admissions/background%20checks.asp> (last visited Feb. 27, 2008); Off. of the Gen. Counsel, Univ. of Tex., Student Background Check Model Policy, <http://www.utsystem.edu/Ogc/docs/general/studentbackgroundpol.doc> (last visited Feb. 27, 2008); Univ. of Utah, Sch. of Med., Admission Policies, <http://medicine.utah.edu/admissions/policies/index.htm> (last visited Feb. 27, 2008); Univ. of Va., Criminal Background Check Requirement, <http://healthsystem.virginia.edu/internet/admissions/criminalbackground.cfm> (last visited Feb. 27, 2008). Some foreign medical schools also require background checks. *E.g.*, Univ. of Bath, Applicants and Students with Criminal Convictions, <http://www.bath.ac.uk/admissions/policy/criminalconviction.html> (last visited Feb. 27, 2008).

160. 110 ILL. COMP. STAT. 57/1–99 (2007).

161. See Whitney L.J. Howell, *Medical Schools Seek Security of Student Background Checks*, AAMC REP. (Wash., D.C.), Oct. 2004, <http://www.aamc.org/newsroom/reporter/oct04/background.htm> (“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.”).

162. In August 2000, “[a] college student who had just been dropped from a graduate program bought a box of bullets less than an hour before walking into his advisor’s office at the University of Arkansas, shooting him three times and then killing himself.” *U. Arkansas Deaths Murder-Suicide*, CBS NEWS, Aug. 30, 2000, <http://www.cbsnews.com/stories/2000/08/28/national/main228544.shtml>. See Myrle Croasdale, *More Med Students Facing Background Checks*, AM. MED. NEWS (Chi., Ill.), Nov. 7, 2005, <http://www.ama-assn.org/amednews/2005/11/07/prsd1107.htm>.

163. In 2005, the North Carolina legislature considered, but did not pass, an act to require all students at medical schools within the state to undergo a criminal background check. H.B. 1515,

Records Check Act<sup>164</sup> mandates criminal background checks for medical students in both public and private schools in Illinois.<sup>165</sup> The check, which occurs after conditional admission, is conducted by the Illinois State Police.<sup>166</sup> Schools are permitted to pass the cost of the check on to the student.<sup>167</sup> Medical schools may deny admission when the check reveals a violent felony conviction or adjudication as a sex offender.<sup>168</sup> The Act also provides immunity to medical schools from civil suits filed by a medical school applicant for decisions made pursuant to this statute.<sup>169</sup>

In 2004, the AAMC started studying the issue of pre-matriculation background checks.<sup>170</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>171</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>172</sup>

The Committee identified four rationale for requiring background checks on admitted medical students: to bolster the public's continuing trust in the medical profession; to enhance the safety and well-being of patients; to ascertain the ability of accepted applicants and enrolled medical students to eventually become licensed

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2005 Sess. (N.C. 2005), available at <http://www.ncga.state.nc.us/Sessions/2005/Bills/House/HTML/H1515v2.html>.

164. 110 ILL. COMP. STAT. 57/1-99 (2007).

165. 110 ILL. COMP. STAT. 57/10.

166. *Id.*

167. 110 ILL. COMP. STAT. 57/15. The pertinent provision provides:

The Department of State Police shall charge each requesting medical school a fee for conducting the criminal history records check under Section 10 of this Act, which shall be deposited in the State Police Services Fund and shall not exceed the cost of the inquiry. Each requesting medical school is solely responsible for payment of this fee to the Department of State Police. Each medical school may impose its own fee upon a matriculant to cover the cost of the criminal history records check at the time the matriculant submits to the criminal history records check.

*Id.*

168. 110 ILL COMP. STAT. 57/20. The statute states:

The information collected under this Act as a result of the criminal history records check must be considered by the requesting medical school in determining whether or not to officially admit a matriculant. Upon a medical school's evaluation of a matriculant's criminal history records check, a matriculant who has been convicted of a violent felony conviction or adjudicated a sex offender may be precluded from gaining official admission to that medical school; however, a violent felony conviction or an adjudication as a sex offender shall not serve as an automatic bar to official admission to a medical school located in Illinois.

*Id.*

169. 110 ILL COMP. STAT. 57/25.

170. ASS'N AM. MED. COLLEGES, REPORT OF THE AAMC CRIMINAL BACKGROUND CHECK ADVISORY COMMITTEE 1 (2006), available at [http://www.aamc.org/members/gsa/abc\\_final\\_report.pdf](http://www.aamc.org/members/gsa/abc_final_report.pdf) [hereinafter AAMC REPORT].

171. *Id.*

172. *Id.*

as physicians; and to minimize the liability of medical schools and their affiliated clinical facilities.<sup>173</sup>

It also articulated nine goals for a criminal background-check system: community ownership and involvement; equity; full disclosure; simplicity; accuracy; affordability; risk mitigation; scalability; and effectiveness.<sup>174</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>175</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>176</sup> Juvenile offenses will not be checked.<sup>177</sup> The committee also recommended that schools consider the results only after making a conditional decision to admit the applicant.<sup>178</sup> Although the AAMC initially planned to have a pilot system in place by Summer 2007, with the final system being ready to screen the 2009 entering class at all 125 AAMC schools,<sup>179</sup> the pilot is now scheduled to occur with 10 schools<sup>180</sup> in Fall 2008.<sup>181</sup>

Of the medical schools that do not currently require pre-matriculation background checks, many ask students to self-report criminal histories as part of the admissions application,<sup>182</sup> while some warn students that a criminal past may preclude them from completing academic requirements associated with clinics.<sup>183</sup> In addition, many require students to undergo background checks before advancing to clinical settings.<sup>184</sup> But within the next few years, all or most accredited medical schools will move to pre-matriculation checks.

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173. *Id.*

174. *Id.* at 2, app. B.

175. *Id.* at 2.

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

177. Gina Shaw, *Criminal Background Checks for Medical Students Moving Forward*, AAMC REP., Sept. 2006, <http://www.aamc.org/newsroom/reporter/sept06/backgroundchecks.htm>. For a discussion of the challenges associated with criminal background checks and juvenile records, see *infra* Part III.B.3.

178. AAMC REPORT, *supra* note 170, at 2.

179. Forde, *supra* note 176.

180. Am. Med. Coll. Admissions Serv., AAMC Background Check Service, <http://www.aamc.org/students/amcas/faq/background.htm> (last visited Feb. 27, 2008).

181. Shaw, *supra* note 158.

182. See, e.g., Va. Commw. Univ. Sch. of Med., Criminal Background Checks, <http://www.medschool.vcu.edu/studentactivities> (last visited Feb. 27, 2008).

183. E.g., Admissions, Univ. of Ariz. Coll. of Med., Criminal Background Checks, <http://www.admissions.medicine.arizona.edu/backgroundChecks.cfm> (last visited Feb. 27, 2008).

184. E.g., GEORGETOWN UNIV. SCH. OF MED., 2008 APPLICATION POLICIES AND PROCEDURES 2 (2008), <http://www3.georgetown.edu/som/admissions/admitdocs/2008%20Application%20Policies%20and%20Procedures-1.pdf>.

## 2. Nursing Programs

As with medical schools, nursing schools are increasingly requiring pre-matriculation background checks.<sup>185</sup> Judy Farnsworth and Pamela J. Springer recently conducted a survey of 398 nursing schools and 258 responded.<sup>186</sup> Of these schools, 41% did not require self-disclosure of criminal history or criminal background checks, but 38% conducted checks.<sup>187</sup> Of the schools that required background checks, 25% required the check as a condition of admission.<sup>188</sup> Although a few conducted background checks at the end of the program to assist students with licensure requirements,<sup>189</sup> most conducted checks in connection with clinical programs.<sup>190</sup>

Nursing programs typically adopt checks because students work with vulnerable populations and because many internship sponsors and state licensing boards require them.<sup>191</sup> In other words, the checks are primarily to benefit external constituencies and to ensure that admitted students will be eligible to complete the academic program.

## 3. 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 AACP issued a comprehensive *Report of the AACP Criminal Background Check Advisory Panel* to “introduce pharmacy colleges and schools to the important

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185. Judy Farnsworth & Pamela J. Springer, *Background Checks for Nursing Students: What Are Schools Doing?* 27 NURSING EDUC. PERSPECTIVES 148, 150 (2006). See also Charles Bradley, *Full Disclosure or Fingerprints: Standardizing the Landscape of Nursing Program Admissions Requirements*, 36 J.L. & EDUC. 573 (2007) (discussing varying approaches by nursing schools in Ohio).

186. Farnsworth & Springer, *supra* note 185, at 150.

187. *Id.*

188. *Id.* For examples of this policy type, see Boise State Univ. Nursing Dept., Background Checks, <http://nursing.boisestate.edu/admissions/backgroundchecks.asp?ID=admissions> (last visited Feb. 27, 2008); Univ. of Tex. at El Paso, Coll. of Health Scis., Policy: Background Checks and Drug Screening for Students, <http://academics.utep.edu/Portals/280/4.11.07.Final%20CoHS%20CBC%20and%20Drug%20Screen%20Policy.doc> (last visited Feb. 27, 2008).

189. Farnsworth & Springer, *supra* note 185, at 150. Ursuline College informs nursing students that they will be “subject to two thorough criminal background checks during their educational progression.” Ursuline Coll., Breen Sch. Nursing, Felony and Misdemeanor Records Checks, <http://www.ursuline.edu/academics/breen/background.pdf> (last visited Feb. 27, 2008). The first check occurs during a student’s sophomore year as a condition to entering a clinical setting; the second is required by the Ohio Board of Nursing before graduation. *Id.*

190. Farnsworth & Springer, *supra* note 185, at 150. The researchers reported that 9% conducted checks before admitting students to certain clinical sites and that 48% conducted checks as a pre-clinical requirement. *Id.* For examples of this policy type, see MONTANA STATE UNIV., COLL. NURSING, POLICY #A-36, STUDENT BACKGROUND CHECKS (2007), available at <http://www.montana.edu/wwwnu/pdf/A36.pdf>; VILLANOVA UNIV. COLL. OF NURSING, POLICY ON CRIMINAL BACKGROUND CHECK FOR MATRICULATING STUDENTS (2007), available at [http://www.villanova.edu/nursing/assets/documents/criminal\\_background\\_check\\_policy.pdf](http://www.villanova.edu/nursing/assets/documents/criminal_background_check_policy.pdf).

191. Farnsworth & Springer, *supra* note 185, at 150.

issues regarding access to, and use of, criminal records of pharmacy students.”<sup>192</sup> The report provides detailed guidance for schools about how to design a background-check policy,<sup>193</sup> considerations about how to conduct criminal background checks,<sup>194</sup> advice about how to analyze the results of criminal background checks,<sup>195</sup> and directions regarding confidentiality and proper disclosure.<sup>196</sup>

The report explains that “[p]harmacy students may be subject to criminal background checks earlier in their educational career . . . than medical school students due to the use of early experiential educational experiences required at the beginning of the curriculum versus at the end of the didactic program.”<sup>197</sup> “AACP does not encourage the use of criminal background checks for student pharmacists; but recognizes that legal, legislative, and organizational demands may force some member institutions to adopt a CBC [criminal background-check] process.”<sup>198</sup>

Despite this statement, the report proposes that AACP members adopt selected recommendations of the AAMC report, including that criminal background checks be initiated after an applicant is conditionally accepted into a program.<sup>199</sup> In 2006, the AACP surveyed member schools regarding their criminal background-check policies and practices.<sup>200</sup> Of the schools surveyed, 63.4% had a criminal background-check policy for professional pharmacy degree students;<sup>201</sup> 33.3% completed the check after the admissions offer, and another 17.4% conducted the check during the students’ first year;<sup>202</sup> 63.4% implemented background checks as a result of requirements imposed by experiential sites;<sup>203</sup> at least 37.7% indicated that students undergo multiple criminal background checks while enrolled;<sup>204</sup> and 68.1% responded that the student is responsible for paying the background-check fee, whether to the school, an outside service, or to another entity.<sup>205</sup> Thus, as with medical schools, the clear trend favors pre-matriculation checks.

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192. AACP REPORT, *supra* note 11, at 3. The report likely would prove helpful to any institution contemplating adding or revising a policy regarding student background checks.

193. *Id.* at 9–14.

194. *Id.* at 4–9.

195. *Id.* at 14–18.

196. *Id.* at 18–21.

197. *Id.* at 3.

198. *Id.*

199. *Id.* at 22.

200. *Id.* at app. E. Sixty-three institutions participated in the survey. *Id.*

201. *Id.* at 38. For examples of criminal background checks at pharmacy schools, see Thomas Jefferson Univ., Jefferson Coll. of Health Profs., Criminal Background Check and Child Abuse Clearance Letter, <http://www.jefferson.edu/jchp/CBCletter.cfm> (last visited Feb. 27, 2008); Univ. of Wash. Sch. of Pharmacy, Interview and Admission Process, <http://depts.washington.edu/pha/students/interview.html> (last visited Feb. 27, 2008).

202. AACP REPORT, *supra* note 11, at app. E.

203. *Id.*

204. *Id.* Another 12.6% indicated that the number “varies significantly,” and 15.8% answered “other” in response to the frequency question. *Id.*

205. *Id.* at 40.

#### 4. Other Health Professions

Programs for other health professions, including anesthesiologist assistant,<sup>206</sup> athletic training,<sup>207</sup> clinical-community psychology,<sup>208</sup> clinical lab sciences,<sup>209</sup> dentistry,<sup>210</sup> dental hygiene,<sup>211</sup> health sciences,<sup>212</sup> kinesiology,<sup>213</sup> occupational therapy,<sup>214</sup> paramedic training,<sup>215</sup> physician's assistants,<sup>216</sup> radiography,<sup>217</sup> respiratory therapy,<sup>218</sup> sonography,<sup>219</sup> and speech and language pathology<sup>220</sup> 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>221</sup> Although JCAHO itself does not require background checks, it

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206. *E.g.*, S. Univ., Applicant Reference Form, [http://www.southuniversity.edu/campus/pdf/AA\\_application\\_append.pdf](http://www.southuniversity.edu/campus/pdf/AA_application_append.pdf) (last visited Feb. 27, 2008).

207. *E.g.*, Univ. of Tulsa Coll. of Bus. Admin., Athletic Training—Admission Information, <http://www.cba.utulsa.edu/Depts/athletic/admissions> (last visited Feb. 27, 2008).

208. Univ. of Alaska Fairbanks, <http://psyphd.alaska.edu/approcedures.htm> (last visited Feb. 27, 2008).

209. *E.g.*, Univ. of Tex. at El Paso, Coll. of Health Scis., Policy: Background Checks and Drug Screening for Students, <http://academics.utep.edu/Portals/280/4.11.07.Final%20CoHS%20CBC%20and%20Drug%20Screen%20Policy.doc> (last visited Feb. 27, 2008).

210. F.L. JORDAN & M.L. ROWLAND, DENTAL STUDENTS PERCEPTIONS OF THE BACKGROUND CHECKS AND TECHNICAL STANDARDS (2006), *available at* [http://iadr.confex.com/iadr/2006Orld/techprogram/abstract\\_76158.htm](http://iadr.confex.com/iadr/2006Orld/techprogram/abstract_76158.htm) (presenting the results of a ten-question survey piloted to 104 first-year dental students at The Ohio State University College of Dentistry during new-student orientation; 38% responded to the survey; of this group, 70% agreed that background checks should be an admission requirement).

211. *E.g.*, Univ. of S.D., Terms of Acceptance, <http://www.usd.edu/dhyg/termsofacceptance.cfm> (last visited Feb. 27, 2008).

212. *E.g.*, HILLSBOROUGH CMTY. COLL., HEALTH SCIENCES APPLICATION 5 (2007), <http://www.hccfl.edu/depts/healthsci/files/C0422C12F2C343D0BCE7DFB56A9C15A4.pdf>.

213. *E.g.*, UNIV. OF WYO., APPLICATION FOR ADMISSION (2007), [http://uwacadweb.uwo.edu/kandh/forms/Application\\_Form\\_KHP.pdf](http://uwacadweb.uwo.edu/kandh/forms/Application_Form_KHP.pdf).

214. *E.g.*, Univ. of Kan. Med. Ctr., Application Procedures, [http://alliedhealth.kumc.edu/programs/ot/documents/PDF/otd\\_application.pdf](http://alliedhealth.kumc.edu/programs/ot/documents/PDF/otd_application.pdf) (last visited Feb. 27, 2008).

215. *E.g.*, Gulf Coast Cmty. Coll., Paramedic Program, <http://ems.gulfcoast.edu/pdf/Paramedic%20Application%20Packet.pdf> (last visited Feb. 27, 2008).

216. *E.g.*, Univ. of N.D., Applicant Information, <http://www.med.und.nodak.edu/physicianassistant/applicant.html> (last visited Feb. 27, 2008).

217. *E.g.*, Portland Cmty. Coll., Radiography Program Admission, <http://www.pcc.edu/programs/radiography/admission> (last visited Feb. 27, 2008).

218. *E.g.*, Washburn Univ. Sch. of Applied Studs., Admissions Criteria, <http://www.washburn.edu/sas/ah/rt/application.html> (last visited Feb. 27, 2008).

219. *E.g.*, George Washington Univ. Med. Ctr., Entrance Requirements, [http://www.gwumc.edu/healthsci/programs/sonography\\_bs/admissions.cfm](http://www.gwumc.edu/healthsci/programs/sonography_bs/admissions.cfm) (last visited Feb. 27, 2008).

220. OFF. OF THE GEN. COUNSEL, UNIV. OF TEX., STUDENT BACKGROUND CHECK MODEL POLICY (2005), *available at* <http://www.utsystem.edu/Ogc/docs/general/studentbackgroundpol.doc>.

221. JOINT COMM'N, REQUIREMENTS FOR CRIMINAL BACKGROUND CHECKS (2005), <http://www.jointcommission.org/NR/exeres/A116AF30-8785-423D-90C1-89035DFCB9C8.htm>.

does monitor members' compliance with state laws, regulations, and organizational policies that require background checks.<sup>222</sup>

### C. 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>223</sup> On the other hand, the *Standards* do not prohibit schools from conducting background checks.<sup>224</sup> 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>225</sup>

Instead, law schools tend to rely on self-disclosure through application questions and honor code provisions.<sup>226</sup> At least one school, however, expressly reserves the right to conduct background checks on applicants.<sup>227</sup>

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222. *Id.* See Russell Ford et al., Address at NACUA Virtual Seminar Series, Students with Criminal Backgrounds: Checks and Balances (June 15, 2006).

223. ABA, STANDARDS FOR APPROVAL OF LAW SCHOOLS 36–41 (2007), available at <http://www.abanet.org/legaled/standards/20072008StandardsWebContent/Chapter%205.pdf>.

224. *See id.*

225. Law School Admission Council, About the LSDAS, <http://www.lsac.org/Applying/lstdas-general-information.asp> (last visited Feb. 27, 2008).

226. John S. Dzienkowski, *Character and Fitness Inquiries in Law School Admissions*, 45 S. TEX. L. REV. 921, 927 (2004) ("Every application surveyed in this study asks information about an applicant's conduct relating to the criminal laws."); *Id.* at 935 (discussing discipline systems for applicants who fail to disclose accurate information).

227. THOMAS M. COOLEY LAW SCHOOL, JURIS DOCTOR APPLICATION FOR ADMISSION (2007), available at <http://www.cooley.edu/admissions/application.pdf>. The application states:

CHARACTER AND FITNESS QUESTIONS: The remaining questions require you to disclose whether you have a history of criminal or civil offenses or academic, work-related, or military disciplinary actions, whether those matters appear on your record or not. The Thomas M. Cooley Law School does not necessarily deny admission simply because an applicant has a history of criminal or civil offenses or disciplinary matters. In making admission decisions, the Law School considers the nature, number, and date of offenses in light of the requirements for participation in its programs. If you do not disclose your complete history here, regardless of your reason or state of mind, the Law School may, upon discovering your failure to disclose, subject you to discipline up to and including denial of admission, revocation of admission, suspension or dismissal after matriculation, withdrawal of certification of graduation to bar authorities, or revocation of degree. The Law School has imposed all of these sanctions. Even if the law school does not discover your history before you graduate, bar investigation and licensing authorities will do so when you apply for bar admission. These authorities will inform the law school, which may initiate disciplinary proceedings for failure to disclose. *The Thomas M. Cooley Law School reserves the right to conduct complete history checks of any applicant.* Failure to cooperate completely in this process will result in denial of the opportunity to matriculate and revocation of acceptance. (If you are not sure about the nature or ultimate disposition



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>228</sup> They also warn students that a felony conviction or pattern of criminal conduct may make admission to the bar difficult, if not impossible.<sup>229</sup> Some 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.<sup>230</sup> For amendments that disclose serious crimes or a pattern of criminal conduct, law schools may revoke admission or impose other discipline.<sup>231</sup>

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>232</sup> In addition, through their honor codes, law schools often maintain jurisdiction for conduct that occurred

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of a particular charge, you must check court records before you answer the following questions.)

*Id.*

228. Dzienkowski, *supra* note 226, at 936. *See also* Brigham Young Univ. Law 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 Feb. 27, 2008) (providing advice about disclosing criminal records).

229. *E.g.*, Univ. of Wash. Sch. of Law–Seattle., J.D. Admissions, <http://www.law.washington.edu/Admissions/Apply/JD/Default.aspx> (last visited Feb. 27, 2008).

Applicants who have been convicted of a felony or other serious crime are still eligible for admission to the University of Washington School of Law; however, because state bar associations often prohibit persons with criminal records from being admitted to the bar regardless of their degrees or training, it may be impossible for such individuals to practice in some states. Persons who have been arrested or convicted for any crime are strongly urged to inquire directly of the bar association in the jurisdiction in which they intend to practice, before applying to law school.

*Id.*

230. Clara Hogan, *Law Students Given Chance to 'Fess Up'*, DAILY IOWAN (Iowa City, Iowa), Nov. 26, 2007, <http://media.www.dailyiowan.com/media/storage/paper599/news/2007/11/26/Metro/Law-Students.Given.Chance.To.fess.Up-3115011.shtml>. *See also* Linda McGuire, *Lawyering or Lying? When Law School Applicants Hide Their Criminal Histories and Other Misconduct*, 45 S. TEX. L. REV. 709, 710–11 (2004) (noting that, at the University of Iowa College of Law, during a three-year period, 7.6–10% of students in each entering class “admitted making misrepresentations about their criminal histories and past misconduct on their applications,” but arguing “that, in most cases, a modified amnesty approach, rather than revoking admission or proceeding with misconduct, strikes the right balance in favor of teaching important professional values.”).

231. *E.g.*, Univ. of Ark. Sch. of Law., Character and Fitness, [http://law.uark.edu/pdfs/download.php/char\\_and\\_fitness.pdf?asset\\_id=869&revision=](http://law.uark.edu/pdfs/download.php/char_and_fitness.pdf?asset_id=869&revision=) (last visited Feb. 27, 2008).

232. *E.g.*, *In re Kleppin*, 768 A.2d 1010 (D.C. 2001) (individual failed to disclose his past criminal record to two law schools); *Gagne v. Trs. of Ind. Univ.*, 692 N.E.2d 489 (Ind. Ct. App. 1998) (law school subjected student to discipline after discovering that he concealed his criminal record); *In re Dabney*, 836 N.E.2d 573 (Ohio Ct. App. 2005) (individual failed to disclose criminal record on her law school and bar applications).

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>233</sup> But they do not seem to be contemplating background checks as a way to avoid such late discovery of candidates' criminal records.

#### D. Other Programs of Study

Other programs in which pre-matriculation background checks may be required include education,<sup>234</sup> counseling,<sup>235</sup> and social work.<sup>236</sup> 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 may work, but also to uphold their schools' reputations.<sup>237</sup> Although some business schools now conduct background checks

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233. *E.g.*, STETSON UNIV. COLL. OF LAW, ACADEMIC HONOR CODE §§ III, IX (2004) available at <http://www.law.stetson.edu/policies/AcademicHonorCode.pdf>. 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).

234. UTAH STATE UNIV., APPLICATION FOR ADMISSION TO THE TEACHER EDUCATION PROGRAM 2 (2007), available at [http://elementaryeducation.usu.edu/pdf/application\\_for\\_admission.pdf](http://elementaryeducation.usu.edu/pdf/application_for_admission.pdf) ("Applicants must complete an online background check at the time of application. . . . Because background checks expire after three years, some students may need to complete a background check more than once before finishing the program."); Ne. Ill. Univ., Coll. of Educ. Background Check Policy, <http://www.neiu.edu/~edudept/background.htm> (last visited Feb. 27, 2008) ("Candidates seeking admission to the College of Education after the beginning of the Spring 2004 term . . . must submit a background check."); Univ. of Alaska Anchorage, Coll. of Educ., Mandatory Background Checks, <http://coe.uaa.alaska.edu/background.cfm> (last visited Feb. 27, 2008) (explaining different types of disclosures and checks required for programs within the College of Education). See also Michael Childs, *Teacher Education Majors Subject to Background Checks*, COLUMNS CAMPUS NEWS (Athens, Ga.), Sept. 13, 1999, <http://www.uga.edu/columns/990913/campnews.html> ("[S]tudents seeking admission to teacher education status are required to undergo a criminal background check.").

235. Wesley J. Erwin & Maria Enerson Toomey, *Use of Criminal Background Checks in Counselor Education*, 44 COUNS. EDUC. & SUPERVISION 305 (2005).

236. Univ. of Wash.—Tacoma, Admissions Requirements, <http://www.tacoma.washington.edu/social/academics/msw/admission.cfm> (last visited Feb. 27, 2008).

Washington state law requires that individuals who have access to children under 16 years of age, persons with developmental disabilities and vulnerable adults such as older people disclose background information. . . . Therefore, a background check is a required part of the master of Social Work Program's admissions process. Effective for Autumn 2008, the Social Work Program will require that all newly admitted students use an on-line service, Verified Credentials INC., to obtain required background checks.

*Id.* See generally Gail M. Leedy & James E. Smith, *Felony Convictions and Program Admissions: Theoretical Perspectives to Guide Decision-Making*, J. SOC. WORK VALUES & ETHICS, Spring 2005, <http://www.socialworker.com/jswve/content/view/16/34>.

237. Brite Divinity Sch., Frequently Asked Questions, <http://www.brite.tcu.edu/admission/faqs.asp> (last visited Feb. 27, 2008) ("For those granted provisional admission to Brite, the next step is for the applicant to grant permission for the Divinity School to conduct a criminal background check and to pay the required \$20.00 fee."); Garrett-Evangelical Theological Seminary, Admissions Procedures, <http://www.garrett.edu/content.asp?C=1329> (last visited Feb.

on applications, those checks tend to focus on credential verification, not criminal histories.<sup>238</sup>

### III. THE LEGAL LANDSCAPE

The legal landscape regarding criminal background checks on prospective students can be viewed in three parts: (A) laws that impact whether background checks are permitted or required in certain situations, (B) laws that may be implicated if a school decides to conduct background checks, and (C) legal theories regarding whether an individual injured by a student may sue the college or university for failing to conduct background checks.

#### A. Whether Background Checks Are Permitted or Required

Only one published case addresses whether colleges and universities may be obliged to conduct criminal background checks on prospective students.<sup>239</sup> In addition, except for the Illinois statute that requires pre-matriculation background checks on medical students, no current state<sup>240</sup> or federal<sup>241</sup> statute requires

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27, 2008) (“A criminal background check is required of all applicants.”); Luther Seminary, Background Checks and Boundary Maintenance, [http://www.luthersem.edu/student\\_services/background\\_checks.asp](http://www.luthersem.edu/student_services/background_checks.asp) (last visited Feb. 27, 2008) (“The communities in which they learn and to which they are called need to be safe places for all persons. Luther Seminary is committed to strengthening congregations in becoming such safe places. Furthermore, Luther Seminary is committed to being a safe place itself.”).

238. Francesca Di Meglio, *Background Checks Are Front and Center*, BUS. WK., Jan. 1, 2007, [http://www.businessweek.com/bschools/content/jan2007/bs20070101\\_101796.htm](http://www.businessweek.com/bschools/content/jan2007/bs20070101_101796.htm); Aaron Kessler, *UVa School May Probe Applications*, DAILY PROGRESS (Charlottesville, Va.), Apr. 30, 2007, available at [http://www.dailyprogress.com/servlet/Satellite?pagename=CDP%2FMDArticle%2FCDP\\_BasicArticle&c=MGArticle&cid=1173351007413&path=](http://www.dailyprogress.com/servlet/Satellite?pagename=CDP%2FMDArticle%2FCDP_BasicArticle&c=MGArticle&cid=1173351007413&path=).

239. *Eiseman v. New York*, 511 N.E.2d 1128 (N.Y. 1987). See *infra* Part III.C.1 for further discussion of this case.

240. At least two states recently have considered, but failed to pass, legislation that would either require or permit institutions of higher education to conduct background checks on applicants for admission. *E.g.*, Joseph Boone, *Backgrounds of Students Could Soon Be Fair Game*, DAILY TEXAN (Austin, Tex.), Apr. 24, 2007, available at <http://media.www.dailytexanonline.com/media/storage/paper410/news/2007/04/24/TopStories/Backgrounds.Of.Students.Could.Soon.Be.Fair.Game-2876674.shtml> (noting that Texas bill would have permitted colleges and universities to conduct background checks on students); Stephen Moore, *UNC System Strongly Against Checks*, DAILY TARHEEL (Chapel Hill, N.C.), Aug. 19, 2006, available at <http://media.www.dailytarheel.com/media/storage/paper885/news/2006/08/19/StateNational/Unc-System.Strongly.Against.Checks-2221686.shtml> (discussing a North Carolina bill that would require fingerprinting and criminal background checks on all admitted students in the state’s public universities).

On a related topic, in 2006, Virginia amended its sex-offender law to require in-state colleges and universities to report to the state police the full names, genders, dates of birth, and Social Security numbers or other identifying numbers for all accepted applicants. VA. CODE ANN. § 23-2.2:1 (2007). See also Letter from LeRoy S. Rooker, Dir., Fam. Pol’y Compliance Off., to Jonathan D. Tarnow (Aug. 16, 2007), available at <http://www.ed.gov/policy/gen/guid/fpco/ferpa/library/vasexoffenderlaw081607.html> (discussing the relationship of the new Virginia requirements with FERPA).

241. *But see* 20 U.S.C. § 1091(r) (2000) (making federal financial aid recipients ineligible

institutions of higher education to conduct background checks on applicants for admission. Conversely, 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.<sup>242</sup>

The lack of specific law increases the difficulty of predicting how courts may rule if presented with the issue. And the degree of difficulty is enhanced because colleges and universities may face suit in a variety of ways. For example, a student denied admission based on a criminal background check may sue the institution. Alternatively, a person injured by a student may sue the institution if a background check was not conducted and the student had a criminal history. Indeed, the latter situation resembles the suit filed by the father of murdered UNC Wilmington student Jessica Faulkner.<sup>243</sup> Despite the dearth of specific case and statutory law, we can gain a better understanding of how courts may approach the issue by examining the impact of academic freedom and substantive due process on the college and university admissions process and by reviewing cases in which institutions have revoked or denied offers of admission based on a student's voluntarily disclosed, or concealed, criminal record.

#### 1. Academic Freedom, Substantive Due Process, and the Admissions Process

Historically, courts have afforded institutions of higher education great discretion in making admissions decisions.<sup>244</sup> This discretion is based partially on the concept of academic freedom.<sup>245</sup> As Justice Frankfurter wrote in his

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for federal aid for a predetermined period if convicted of a federal or state offense involving possession or sale of a controlled substance); U.S. DEP'T OF EDUC., STUDENT AID ELIGIBILITY WORKSHEET FOR QUESTION 31 (2008), <http://www.ifap.ed.gov/fafsa/attachments/20082009DrugWksheetAttA1120.pdf>; (drug conviction worksheet for students seeking federal financial aid). See Donna Leinwand, *Drug Convictions Costing Students Their Financial Aid*, USA TODAY, Apr. 17, 2006, at 3A.

242. In early 2007, members of the Council of the District of Columbia introduced the Human Rights for Ex-Offenders Amendment Act of 2007. The legislation, which was not enacted, sought to prohibit discrimination in Washington, D.C. based on arrest or conviction record, other than when a "rational relationship" exists between a position and a past conviction. Redden, *supra* note 2. The legislation would have applied to institutions of higher education and would have prohibited colleges and universities from asking about an applicant's criminal record on the admissions application and from considering a past criminal record if disclosed or otherwise discovered. *Id.* Arguably, the legislation would have allowed schools to make conditional offers of admission and then ask applicants to disclose criminal offenses that have occurred in the past ten years, and, regardless of timing, serious criminal offenses, such as murder, assault with a deadly weapon, and sex offenses. *Id.*

243. See *supra* notes 95–102 and accompanying text.

244. 1 WILLIAM A. KAPLIN & BARBARA A. LEE, *THE LAW OF HIGHER EDUCATION* 752 (4th ed. 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 1950s, "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, 323–27 (1989) (noting a long history of judicial deference toward college and university decision-making).

245. *Sweezy v. New Hampshire*, 354 U.S. 234 (1957) (Frankfurter, J., concurring). See

concurrency in *Sweezy v. New Hampshire*:

It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail *the four essential freedoms of a university*—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, *and who may be admitted to study*.<sup>246</sup>

In addition, courts consistently have held that, for purposes of substantive due process, “pursuit of an education is not a fundamental right or liberty.”<sup>247</sup> Moreover, applicants for admission to post-secondary, graduate, or professional schools do not have a property interest in admission.<sup>248</sup> As one university general counsel has explained:

[T]o the extent that either interest has been discussed by courts in higher education admissions cases, those courts have assumed rather than found such interests to exist for applicants. Absent a property or liberty interest, applicants do not have a procedural due process right in their application, and thus have no right to a hearing to prove their admission. Indeed, at least one court has analogized denial of admission to an academic dismissal which, unlike a disciplinary dismissal, requires no hearing and even greater judicial deference.<sup>249</sup>

Despite courts’ historic deference to the college and university admissions process, the twentieth century brought legal challenges and some constraints.<sup>250</sup> Specifically, colleges and universities now must ensure that their selection processes are not arbitrary or capricious;<sup>251</sup> must, under contract theory, abide by their published admissions standards and, absent unusual circumstances, such as concealed information, honor their admissions decisions;<sup>252</sup> and must not discriminate on the basis of protected characteristics such as age, disability, citizenship, race, or sex.<sup>253</sup>

Using these basic principles, colleges and universities that conduct background checks should ensure that 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,

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Derek Langhauser, *Use of Criminal Convictions in College Admissions*, 154 EDUC. L. REP. 733, 734, 734 n.5 (2001) (citing additional precedent for this proposition).

246. *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring) (emphasis added).

247. *Tobin v. Univ. of 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)).

248. *E.g.*, *Phelps v. Washburn Univ.*, 632 F. Supp. 455, 459 (D. Kan. 1986) (law school); *Selman v. Harv. Med. Sch.*, 494 F. Supp. 603, 619 (S.D.N.Y. 1980), *aff’d*, 636 F.2d 1024 (2d Cir. 2000) (medical school); *Szejner v. Univ. Alaska*, 944 P.2d 481, 486 (Alaska 1997) (graduate school). *See generally* Langhauser, *supra* note 245, at 734.

249. Langhauser, *supra* note 245, at 734–35 (internal citations omitted).

250. KAPLIN & LEE, *supra* note 244, at 752–53.

251. *Id.*

252. *Id.*

253. *Id.*

such as pharmacy. “Red flag” programs, like that implemented by the UNC System,<sup>254</sup> 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 may 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>255</sup>

Colleges and universities should ensure that written policies regarding background checks are clear and should adhere to those policies.<sup>256</sup> Also, if a college or 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>257</sup> and should articulate what “acceptable” means.

## 2. Cases Involving Denials or Revocations of Admission Based on Applicants’ Criminal Records

Outside the background-check context, several cases have upheld the right of colleges and universities to deny or revoke admission because of a student’s criminal record, especially when the student concealed that record.<sup>258</sup>

In *Gagne v. Trustees of the University of Indiana*,<sup>259</sup> a law school applicant answered “no” to questions asking whether he had “ever been arrested or convicted of any criminal offense other than a minor traffic violation” or had “any criminal charges pending.”<sup>260</sup> Several weeks into his first semester at the school, the dean of students learned that the student had misrepresented his criminal history.<sup>261</sup> Specifically, the student had been convicted for disorderly conduct and served a short jail term for reckless driving.<sup>262</sup> The school initiated and followed its disciplinary process and ultimately expelled the student.<sup>263</sup> The student sued, arguing both violation of due process and breach of contract. The appellate court, affirming the trial court ruling,<sup>264</sup> held that the law school had provided the student

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254. See *supra* notes 115–18 and accompanying text.

255. AACP REPORT, *supra* note 11, at 16.

256. 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). See *infra* note 454 and Appendix D for drafting suggestions.

257. Langhauser, *supra* note 245, at 734–36 (explaining variations in law between denials and revocations of admission).

258. For additional situations, see Jerome W.D. Stokes & Allen W. Groves, *Rescinding Offers of Admission When Prior Criminality Is Revealed*, 105 EDUC. L. REP. 855 (1996).

259. 692 N.E.2d 489 (Ind. Ct. App. 1998).

260. *Id.* at 491.

261. *Id.* The student also misrepresented his educational background on materials submitted to the office of career services—materials which were submitted to future employers. *Id.*

262. *Id.* at 492.

263. *Id.* at 492–93.

264. *Id.* at 493.

with notice and an opportunity to be heard and had followed its written procedures regarding discipline.<sup>265</sup> The court also held that the law school had the authority to expel the student based on his concealment of the misconduct.<sup>266</sup>

In another case, the United States Court of Appeals for the Seventh Circuit ruled in favor of the University of Wisconsin Law School, which revoked a candidate's admission when school officials learned he had lied about his criminal record.<sup>267</sup> On his application, Henry Martin answered "yes" to questions regarding whether he had a criminal record, but also indicated that he had been pardoned by the governor.<sup>268</sup> In fact, at the time of his admission, Martin was serving a ten-year prison sentence for interstate transportation of forged securities.<sup>269</sup> Martin argued that the law school violated his due process and sought to enjoin the revocation of admission.<sup>270</sup> In addition to determining that Martin had been granted sufficient process, including the opportunity to supplement and explain his original application,<sup>271</sup> the court noted that "[t]he threatened injury to the appellant—delay in beginning his law school career . . . pales before the threatened injury to the Law School and the public interest if an unsuitable candidate is admitted. . . . Both the Law School's and society's interest in producing honest lawyers is deserving of great protection."<sup>272</sup>

In *Burgos v. University of Central Florida Board of Trustees*,<sup>273</sup> an applicant was denied immediate admission, but was offered admission for a future term.<sup>274</sup> The deferral was based on the fact that the applicant had been convicted of serious drug charges, had served a prison sentence, and was still on supervised release when he applied.<sup>275</sup> The applicant sued for violation of due process under the

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265. *Id.* at 494–95.

266. *Id.* at 494–96.

267. *Martin v. Halstead*, 699 F.2d 387 (7th Cir. 1983).

268. *Id.* at 388.

269. *Id.*

270. *Id.* at 389.

271. *Id.* at 391.

272. *Id.* at 392.

273. 283 F. Supp. 2d 1268 (M.D. Fla. 2003).

274. *Id.* at 1270.

275. *Id.* In a letter from the university to the applicant, a senior admissions officer provided a detailed explanation of the admissions decision:

The decision was reached based upon several factors. Your criminal activity involved the distribution of illegal narcotics, which is of special concern to any university, especially ours. Your length of time served, the short period of time since you left prison and the time you have remaining on probation, were all considered. . . . In considering this combination of facts, the Director also took into consideration your efforts to attend Valencia Community College to pursue academic endeavors, your current compliance with your probation, and your involvement in martial arts. However, you have held no employment since your release from prison and have continued to live with your mother and step-father without any demonstration of self support. After weighing all of these facts, the Director . . . recommended that you not be offered admission for the fall 2003 term, but that you be offered admission for the fall 2004 term, assuming there are no further violations of the law.

*Id.*

federal and Florida constitutions.<sup>276</sup> The court, ruling in favor of the university, found that the applicant did not have a constitutional right to admission “for a particular term at a state university.”<sup>277</sup> It thus determined that his request for an injunction should fail and did not address the propriety of the university’s actions.<sup>278</sup>

Finally, in a recent case described in the *Chronicle of Higher Education*, the Alaska Superior Court held that the University of Alaska at Anchorage had the authority to deny “admission to its social-work program to a man who had been jailed for 20 years for killing a convenience-store clerk in a botched robbery.”<sup>279</sup> The applicant argued that his rights under an Alaska constitutional provision guaranteeing the rehabilitation of criminals had been violated.<sup>280</sup> The university rejected the applicant under the school of social work’s policy that applicants “may be rejected if they have a criminal record that leaves them ‘unfit for social-work practice.’”<sup>281</sup> The university also used an extensive process to reach its decision.<sup>282</sup> The court held that the school had not deviated from its written policy regarding the admission of felons into the social-work program and that the process used to deny the application was not arbitrary. The court also rejected the applicant’s reliance on the Alaska constitutional provision, which “extends only to prisoners who are actually serving sentences.”<sup>283</sup>

In each case above, the court found the school 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 reputation, professions, and ultimate client—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

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276. *Id.* at 1270–71.

277. *Id.* at 1271.

278. *Id.* at 1272.

279. Peter Monaghan, *Judge Upholds Univ. of Alaska’s Right to Deny Felon Admission to Social-Work Program*, CHRON. HIGHER EDUC. (Wash., D.C.), Nov. 3, 2006, at A40.

280. *Id.*

281. *Id.* The school adopted the felony policy after a student was admitted to the program but then was discovered to have had a felony conviction for the sexual abuse of a minor. Since that time, university officials have said, students have been rejected for having convictions for felonies or such misdemeanors as driving under the influence of alcohol.

*Id.*

282. The process included interviews by faculty members, votes by the social-work faculty, consideration by the university’s Academic Decision Review Committee, and review by the dean of the College of Health and Social Welfare. *Id.*

283. *Id.* The rejected applicant opted not to appeal this decision to the Alaska Supreme Court. Lisa Demer, *Murderer Ends Pursuit of Social Work Degree from UAA; ACLU: He Will Not Appeal Judge’s Decision That Sided With the University*, ANCHORAGE DAILY NEWS, Apr. 4, 2007, at B2.



the nature, severity, recency of the crime; the truthfulness of the applicant; and the interests of the college.<sup>284</sup>

Translated to the background-check context, courts will be more likely to rule for colleges and universities sued by rejected students when the institutions 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. Laws That May Be Implicated if a School Conducts Background Checks

Colleges and universities that conduct background checks on prospective students must be aware of federal and state laws that may impact (1) how criminal background checks may be used within the admissions process, (2) how checks may be conducted, and (3) what information may be available when a check is conducted. In addition, colleges and universities should understand that rejected applicants may sue the institution under various tort and discrimination theories.

##### 1. 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>285</sup> Although none of these laws expressly apply to the college and university admissions process,<sup>286</sup> schools in these jurisdictions should study these laws. Specifically, schools may be able to determine which graduates may be barred from obtaining occupational licenses; they may also discern preferred procedures for notifying applicants about the results of background checks. And, based on legislative language or history, they may locate guidance about which applicants may be denied admission following a positive check. Finally, these statutes reflect legislative attitudes regarding the rehabilitation of individuals convicted of crimes, which in turn may impact college and university policies in that regard.

Despite the fact that the New York statute is expressly limited to the employment and occupational-license contexts, a 1998 system-wide policy of the State University of New York assumed the state non-discrimination statute<sup>287</sup>

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284. Langhauser, *supra* note 245, at 736 (internal citation omitted).

285. See ARIZ. REV. STAT. ANN. § 13-904(E) (2006); COLO. REV. STAT. § 24-5-101 (2006); CONN. GEN. STAT. § 46a-80 (2004); FLA. STAT. § 112.011 (2002); HAW. REV. STAT. § 378-2.5 (2006); KAN. STAT. ANN. § 22-4710(f) (2006); KY. REV. STAT. §§ 335B.020, 335B.070, 335B.010(4) (2007); LA. REV. STAT. ANN. § 37:2950 (2007); MINN. STAT. § 364.03 (2004); N.M. STAT. §§ 28-2-3 to -6 (2007); N.Y. EXEC. LAW § 296(15) (McKinney 2005); N.Y. CORRECT. LAW §§ 750-54 (McKinney 2003); 18 PA. CONS. STAT. § 9125 (2000); WASH. REV. CODE §§ 9.96A.020, 9.96A.060, 9.96A.030 (2003); WIS. STAT. § 111.335 (2002). See also Legal Action Center, Standards for Hiring People with Criminal Records, Overview of State Laws That Ban Discrimination By Employers, [http://www.lac.org/toolkits/standards/Fourteen\\_State\\_Laws.pdf](http://www.lac.org/toolkits/standards/Fourteen_State_Laws.pdf) (last visited Feb. 27, 2008).

286. Unlike the statutes identified in *supra* note 285, the proposed Washington, D.C. legislation described in *supra* note 242 would have applied to applicants for admission.

287. N.Y. CORRECT. LAW § 751. The statute states:

applied to the admissions context and developed a procedure to evaluate applications from potential students with prior convictions.<sup>288</sup> Even if this interpretation of the state corrections law is too broad, the policy reflects how a college or university in a state with anti-discrimination legislation that protects individuals with prior convictions may draw from underlying state policy to develop admissions procedures.

## 2. Statutory Requirements for Conducting Background Checks

Both federal and some state statutes<sup>289</sup> regulate how certain background checks may be conducted. The federal Fair Credit Reporting Act (“FCRA”),<sup>290</sup> for example, regulates “consumer reports.” A “consumer report”

means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer’s credit worthiness, credit standing, credit capacity, *character, general reputation, personal characteristics*, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer’s eligibility for—(A) credit or insurance to be used primarily for personal, family, or household purposes; (B) employment purposes; or (C) any other purpose authorized under section 1681b of this title.<sup>291</sup>

None of the “other purposes” in § 1681b mention or refer to college and university admissions processes. 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>292</sup>

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The provisions of this article shall apply to any application by any person for a *license or employment* at any public or private employer, who has previously been convicted of one or more criminal offenses in this state or in any other jurisdiction, and to any *license or employment* held by any person whose conviction of one or more criminal offenses in this state or in any other jurisdiction preceded such employment or granting of a license, except where a mandatory forfeiture, disability or bar to employment is imposed by law, and has not been removed by an executive pardon, certificate of relief from disabilities or certificate of good conduct.

*Id.* (emphasis added).

288. State Univ. N.Y., Admission of Persons with Prior Felony Convictions or Disciplinary Dismissals, [http://www.suny.edu/sunypp/documents.cfm?doc\\_id=342](http://www.suny.edu/sunypp/documents.cfm?doc_id=342) (last visited Feb. 27, 2008). See *infra* Appendix C for the full-text of the admissions policy.

289. For a list of state statutes, see Lee, *supra* note 2, at 663 n.83. None of the listed statutes appear to apply to the admissions processes of educational institutions; however, a current search in your jurisdiction is advised. As discussed at *supra* note 164, Illinois has a statute that relates to background checks for medical students; that statute includes some procedural requirements. Also, as Professor Lee notes, “[i]nternational background checks may require compliance with the laws of other countries or aggregations of countries.” Lee, *supra* note 2, at 665.

290. 15 U.S.C. §§ 1681–1681x (2000 & Supp. 2003).

291. *Id.* § 1681a(d)(1) (emphasis added).

292. See AACCP REPORT, *supra* note 11, at 13 (“Although FCRA does not explicitly include educational institutions, the applicability to colleges . . . may depend on legal interpretation and circumstances.”).

This view is supported by the fact that no reported cases have extended, or even discussed extending, the statute to the college and university admissions context. In addition, the FCRA does not apply even in the employment context if the college or university conducts background checks without using third-party services<sup>293</sup> or if checks are conducted by the state police or FBI.<sup>294</sup>

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, colleges and universities that conduct background checks may take the following steps:<sup>295</sup>

1. Notify admissions applicants, in a separate disclosure document, that a background check will be conducted and the results will be considered in making the admissions decision.<sup>296</sup> The disclosure should, among other things, describe the scope of the check to be conducted.

2. Obtain applicants' written consent, on a separate form, to use an outside agency to conduct the check.<sup>297</sup>

3. If the report is positive and the college or 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>298</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.

4. If the college or university rejects the applicant, revokes a conditional offer of admission, or makes some other negative decision, provide the candidate with written notice of that decision.<sup>299</sup> Whether a college or university provides an explanation of the decision is a policy decision that admissions and other officials should make in connection with counsel.

### 3. 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

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293. Lee, *supra* note 2, at 63; Wendy L. Rosebush, *Conducting Employee Background Checks Triggers Employer Obligations Under the Fair Credit Reporting Act*, EDWARDS & ANGELL LLP LAB. & EMP. BULL. (2004), available at <http://www.eapdlaw.com/files/News/9a3565fa-1a3b-4982-a10b-d50e33d315bd/Presentation/NewsAttachment/68e8072b-46c7-430a-92ed-dae27820451b/media.191.pdf>.

294. Lee, *supra* note 2, at 664 (citing Letter from Clarke W. Brinckerhoff, Att'y, Fed. Trade Comm'n, Div. Credit Prac. Bureau of Consumer Prot., to A. Dean Pickette, Att'y, Magnum, Wall, Stoops & Warden (July 10, 1998)).

295. This section follows the structure in Lee, *supra* note 2, at 664.

296. *Cf.* 15 U.S.C. § 1681b(b)(2)(A)(i).

297. *Cf.* 15 U.S.C. § 1681b(b)(3)(B)(ii).

298. *Cf.* 15 U.S.C. § 1681b(b)(3)(A).

299. *Cf.* 15 U.S.C. § 1681b(b)(3)(B)(i).

appropriate considerations in the admissions process.

Sealed<sup>300</sup> and expunged<sup>301</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>302</sup> The primary goal underlying these statutes is to allow offenders to start anew by removing the stigma associated with a criminal record.<sup>303</sup> But state laws differ regarding “the procedure, criteria, and intended effect of sealing juvenile records.”<sup>304</sup>

Currently, no state statutes expressly prohibit educational institutions from asking admissions applicants about juvenile records, whether sealed, expunged, or otherwise. Previously, Maryland prohibited educational institutions from requiring, “in any application, interview, or otherwise, disclosure of any information pertaining to an expunged record.”<sup>305</sup> But this provision was repealed in 2001.<sup>306</sup> Some states, however, prohibit questioning about expunged records, regardless of the 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>307</sup>

In addition, college and university officials should understand that most states authorize offenders whose records have been expunged to answer “no”<sup>308</sup> when asked whether they have a criminal history.<sup>309</sup> Some states also permit offenders

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300. 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. REV. 331, 331 (2004) (quoting *Police Comm’r Boston v. Mun. Ct. Dorchester Dist.*, 374 N.E.2d 272, 277 (Mass. 1978)).

301. “[E]xpungement removes and destroys records so that no trace of the information remains.” *Id.* at 331.

302. Carrie Hollister, Comment, *The Impossible Predicament of Gina Grant*, 44 UCLA L. REV. 913, 928 (1997).

303. *Id.*

304. *Id.* at 930.

305. *Id.* at 936–37.

306. Michael L. Altman, *Standards Relating to Juvenile Records and Information Services*, in JUVENILE JUSTICE STANDARDS ANNOTATED 196, 198 (Robert E. Shepherd, Jr. ed., 1996) (recommending 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”).

307. *E.g.*, N.H. REV. STAT. ANN. § 651:5(X)(c) (2007).

308. One student author referred to the ability to answer “no” to criminal history questions following sealing or expunction as a “legally sanctioned lie.” Hollister, *supra* note 302, at 926.

309. For example, in New Jersey, 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 (West 2007). *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

to respond that they do not have a criminal history if records have been sealed.<sup>310</sup> Despite these laws, some 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>311</sup> This conflict between state law and admissions requirements can and does confuse applicants,<sup>312</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>313</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 or sealed juvenile record can easily surface.<sup>314</sup> In light of these competing considerations, schools should evaluate whether they will request information about expunged records.

For the reasons noted above, some commentators advise against seeking such information.<sup>315</sup> That generally is the best course, given the challenges of obtaining

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individual’s expunged record constitutes a criminal offense. N.J. STAT. ANN. § 2C:52-30. The Children’s Law Center of Massachusetts, Inc. advises individuals as follows: “How do I respond to employment or college applications that ask about my criminal record? A person with a juvenile record may answer ‘no record’ regarding any juvenile court cases or CHINS proceedings that are tried in juvenile court, regardless of whether or not the juvenile record is sealed.” Children’s L. Ctr. Mass., Inc., Sealing Juvenile Records, [http://www.clcm.org/sealing\\_records.htm](http://www.clcm.org/sealing_records.htm) (last visited Feb. 27, 2008). Similarly, the Western Ohio Legal Services Association has drafted a brochure on expungements that provides that “[o]nce your record is expunged nothing will show up when your record is checked. After expungement is finished, when asked about your past criminal record, you can honestly say that you have none. You can act as if the arrest and conviction never took place.” W. OHIO LEG. SERVS. ASS’N, EXPUNGEMENTS OR SEALING OF RECORDS, available at <http://www.ohiolegalservices.org/OSLSA/PublicWeb/Library/Documents/1036702580.19/wolsaexpungbroch.pdf>. See generally Michael D. Mayfield, Comment, *Revisiting Expungement: Concealing Information in the Information Age*, 1997 UTAH L. REV. 1057, 1059 (1997).

The first element of expungement is the extent to which an offender may deny the existence of his record after it has been expunged. This element is based on the premise that an offender may not be fully reintegrated into society unless he is authorized to deny with legal honesty that he ever possessed a criminal record. To this end, most states authorize offenders whose records have been expunged to respond negatively when questioned whether they have been convicted of a crime. In Colorado, for example, an offender with an expunged record is authorized to deny his criminal record ever existed to employers, educational institutions, and state government agencies. The Colorado State Bar, however, is authorized to “make further inquiries” into an expunged record if they learn about the record from an unofficial source.

*Id.* (internal citations omitted).

310. *E.g.*, OHIO REV. CODE ANN. § 2151.357(G) (West 2007).

311. *E.g.*, Univ. of Toledo Coll. of Law, Univ. of Toledo Law College Admissions Form, <https://utssl.utoledo.edu/lawforms/form.asp> (last visited Feb. 27, 2008).

312. McGuire, *supra* note 230, at 717–18, 736.

313. See, e.g., Dzienkowski, *supra* note 226, at 948.

314. *E.g.*, Stokes & Groves, *supra* note 258, 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).

315. *E.g.*, Dzienkowski, *supra* note 226, at 946–48.

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, school officials should consult with counsel and take several steps in advance. First, the institution should develop a statement indicating why it needs to understand applicants' complete criminal history. Next, the institution should develop a statement explaining that 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 institution 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 do so, even if counsel has advised otherwise. In addition, the institution should determine in advance how school officials will handle applicants' failure to provide requested information about expunged records, and should clearly explain any negative consequences<sup>316</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>317</sup> In other states, access to even unsealed juvenile records is severely limited; thus, background checks may not reflect those offenses.<sup>318</sup>

A final challenge relates to terminology. Colleges and 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>319</sup>

#### 4. Lawsuits by Applicants

In the employment context, job applicants have sued employers for torts such as defamation, negligence, and invasion of privacy, and for discrimination.<sup>320</sup> Although no reported cases have involved suits by admissions applicants rejected based on the results of a background check, schools should follow the guidance

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316. Depending on the circumstances, negative consequences may range from an oral or written reprimand, to community service, interim suspension, revocation of admission, or expulsion.

317. MO. REV. STAT. § 211.321(5) (2007).

318. *E.g.*, N.Y. CRIM. PROC. LAW § 720.35(2) (McKinney 2007). Some states, however, permit access to persons or organizations that have a "legitimate interest." *E.g.*, ALASKA STAT. § 47.10.092-93 (2006); CONN. GEN. STAT. § 46b-124(c) (2007); NEV. REV. STAT. § 62H.030(1)-(2) (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) (2000).

319. Dzienkowski, *supra* note 226, at 946-48.

320. Lee, *supra* note 2, at 665. For a case in which a prospective employee sued for discrimination regarding a detailed background questionnaire, but lost, see *Walls v. City of Petersburg*, 895 F.2d 188 (4th Cir. 1990) (finding that questionnaire, which was required of all employees, did not violate Title VII or have a disparate impact on minorities, where municipality demonstrated a compelling need and kept material confidential).

provided in similar situations.

First, colleges and universities should share the results of background checks only with individuals who have a legitimate need for that information.<sup>321</sup> In the admissions context, this may include admissions officers and certain staff members, and members of a faculty admissions committee. If a student with a criminal record is admitted, those with a legitimate interest may expand to include the director of financial aid (if a recent drug conviction is noted),<sup>322</sup> the chief of security, the chief student affairs officer, the chief residence life professional (if the student seeks to live in campus housing), and potentially state licensing boards.<sup>323</sup> Colleges and universities should educate individuals who will have access to background-check results about the sensitivity of these documents, and how to handle and store the documents in a way that will minimize inadvertent disclosure.<sup>324</sup> Colleges and universities also should advise staff members who receive the results not to share the information with others absent good and legitimate cause.

Second, colleges and universities should not ask for arrests that did not lead to conviction, other than arrests on pending charges, because using those records may lead to disparate impact claims based on race.<sup>325</sup> Also, colleges and universities should be aware that some state statutes prohibit *employers* from asking questions about most arrests that did not lead to conviction.<sup>326</sup> Further, colleges and universities should be sensitive to questions or checks that may discriminate based on a candidate's religion, ethnicity, or country of origin.<sup>327</sup>

Third, although invasion of privacy claims against employers who conduct background checks usually are not successful, to avoid invasion of privacy claims,<sup>328</sup> colleges and universities and their vendors should ask students to sign a release or consent form before conducting a background check.<sup>329</sup>

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321. See Lee, *supra* note 2, at 665.

322. See 20 U.S.C. § 1091(r)(2000) (rendering certain individuals with drug convictions ineligible for federal financial aid).

323. See, e.g., AACP REPORT, *supra* note 11, at 19. If the results of background checks will be released to outside agencies, like licensing authorities, student should be notified about that in advance; a release under FERPA also would be prudent. See *id.* at 21.

324. See generally Edward G. Phillips, *Protecting Sensitive Employee Information*, 43-FEB. TENN. B.J. 18 (2007) (discussing employer liability to employees for identity theft of information in background checks and other consumer reports).

325. Lee, *supra* note 2, at 667 n.188; Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937, 959–62 (2003) (discussing racial differences in the effect of criminal records).

326. James M. Jordan, III, *Privacy and Security in the Workplace: Employees as the Problem and Employees as the Victim*, 903 PLI/PAT 277 (2007); 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, 1068–72 (2007). See *supra* note 285 (discussing other state laws that prohibit discrimination, typically in the employment context, based on an applicant's conviction record).

327. Jo Anne Chernev Adlerstein & Camille Fraser, *Background Checks of Foreign Workers*, 12 INT'L. HUM. RTS. J. 4 (2003).

328. E.g., *Walls v. City of Petersburg*, 895 F.2d 188 (4th Cir. 1990); *Baughman v. Wal-Mart Stores, Inc.*, 592 S.E.2d 824 (W. Va. 2003).

329. STEVEN FRENKIL & D. FRANK VINIK, *EMPLOYEE BACKGROUND CHECKS: ADVANCED*

Finally, to help avoid a negligence action based on incorrect, incomplete, or inappropriate checking, the college or university should carefully select the vendor or vendors who will be conducting the checks. Because courts likely would categorize these screeners as independent contractors,<sup>330</sup> a school may not be vicariously liable for the screener's faulty checks, but it may be liable under a direct theory for negligent selection.<sup>331</sup>

### C. Third-Party Negligence Actions Against the Institution

Colleges and universities have been sued by individuals injured by students. This section will address three tort theories under which injured individuals may sue institutions of higher education 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.

#### 1. Negligent Admission

##### a. Two Iterations of the Tort

It is conceivable that injured individuals may sue an institution for negligent admission of a dangerous student. In the past, lawsuits alleging negligent admission typically have been filed by students who did not succeed in 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>332</sup> To date, this type of action has been unsuccessful.<sup>333</sup> As the United States Court of Appeals for the Seventh Circuit explained:

We believe that Illinois would reject this claim for "negligent admission" for many of the same policy reasons that counsel against recognizing a claim for educational malpractice. First, this cause of action would present difficult, if not insuperable, problems to a court attempting to define a workable duty of care. [The student] suggests that the University has a duty to admit only students who are "reasonably qualified" and able to perform academically. *However,*

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ISSUES (2006).

330. See generally DAN B. DOBBS, *THE LAW OF TORTS* 917 (2000) (describing factors a court will determine when analyzing independent contractor status).

331. RESTATEMENT (SECOND) OF TORTS § 411 (1965). See DOBBS, *supra* note 330, at 917 ("The putative general rule is that employers are not subject to vicarious liability for the torts of *carefully selected* independent contractors." (internal citations omitted) (emphasis added)); J.D. LEE & BARRY A. LINDAHL, *MODERN TORT LAW* § 8.03 (2d ed. 2002) ("An employer may be liable for the negligent acts of an independent contractor if the employer fails to exercise due care in the selection of a competent independent contractor.").

332. *E.g.*, *Ross v. Creighton Univ.*, 957 F.2d 410, 411-17 (7th Cir. 1992).

333. Indeed, more generally, educational malpractice claims have been rejected by courts. *E.g.*, *Watts v. Fla. Int'l Univ.*, No. 02-60199-CIV, 2005 WL 3730879, at \*12 (S.D. Fla. June 9, 2005), *aff'd in part, vacated in part* 495 F.3d 1289 (11th Cir. 2007); *Doe v. Yale Univ.*, No. CV 900305365S, 1997 WL 766845, at \*1 (Conn. Super. Ct. 1997).



determining who is a “reasonably qualified student” necessarily requires subjective assessments of such things as the nature and quality of the defendant institution and the intelligence and educability of the plaintiff. Such decisions are not open to ready determination in the judicial process. Second, such a cause of action might unduly interfere with a university’s admissions decisions, to the detriment of students and society as a whole. As the district court noted, if universities and colleges faced tort liability for admitting an unprepared student, schools would be encouraged to admit only those students who were certain to succeed in the institution. The opportunities of marginal students to receive an education therefore would likely be lessened. Also, the academic practice of promoting diversity by admitting students from disadvantaged backgrounds might also be jeopardized.<sup>334</sup>

In another context, an individual—particularly a student<sup>335</sup>—injured by another student’s criminal act may sue the institution 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 may be viable.<sup>336</sup> The Faulkner lawsuit against the University of North Carolina made just this type of claim.<sup>337</sup> Specifically, the suit alleged that UNC Wilmington was negligent “for admitting Dixon despite a well documented history of violence against women, including incidents at other UNC campuses.”<sup>338</sup>

Mr. Faulkner was not the first to make this sort of claim. In *Eiseman v. New York*,<sup>339</sup> the parents and estate of a murdered student sued various government entities, including the State University of New York at Buffalo, for negligence. The perpetrator-student, Larry Campbell, was previously indicted for attempted murder, attempted assault, robbery, larceny, and criminal possession of weapons and drugs; after negotiations with the prosecutor, he plead guilty to criminal possession of dangerous drugs and received a six-year prison sentence.<sup>340</sup> While incarcerated, Campbell was treated for mental disorders, including “chronic schizophrenia, paranoid type, with a schizoid, impulsive/explosive personality.”<sup>341</sup> He was determined to have “a high criminal potential, . . . a low rehabilitation potential, . . . [and] a potential for killing,” and was diagnosed “as antisocial, temperamental, belligerent, unpredictable and disruptive, with a guarded prognosis.”<sup>342</sup> However, “[i]n his day-to-day prison life, Campbell apparently was comparatively well behaved,” and was released after about three and one-half

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334. *Ross*, 957 F.2d at 415 (internal citations omitted) (emphasis added).

335. NICOLETTI ET AL., *supra* note 21, at 33 (explaining that traditional age college and university students are the most likely victims of violent crime on campus).

336. *E.g.*, Stokes & Groves, *supra* note 258, at 862–76.

337. *See supra* note 91 and accompanying text for a discussion of Jessica Faulkner’s murder.

338. Jaschik, *supra* note 8.

339. 511 N.E.2d 1128 (N.Y. 1987).

340. *Id.* at 1130.

341. *Id.*

342. *Id.* at 1130–31.

years.<sup>343</sup> While still incarcerated, Campbell applied to SUNY Buffalo under a legislatively created program for disadvantaged undergraduates.<sup>344</sup> The statutory criteria did not permit the university to consider applicants' criminal or psychological histories.<sup>345</sup> But Campbell's application did list his residence as a state prison and he also noted a prior incarceration.<sup>346</sup>

Because Campbell was a "high risk" individual, the university required him to meet twice a week with a university official, imposed a curfew, and had campus security monitor him closely.<sup>347</sup> Although his first year started relatively well, about ten months after he enrolled, Campbell raped and murdered Rhona Eiseman, murdered another student, and seriously injured a third student.<sup>348</sup> Among other claims, the plaintiffs alleged that SUNY Buffalo was negligent "in admitting [Campbell] to the College without appropriate inquiry."<sup>349</sup>

Two lower courts found the university liable for negligence:

The trial court, while acknowledging the limited scope of judicial review of college admissions decisions, concluded that liability should be predicated on the College's failure to reject or restrict Campbell because of the unreasonable risk of harm and foreseeable danger he presented: "the College's duty, simply put, was not to subject its students to an unreasonable risk of harm from the conduct of one such as Campbell whom it knew or should have known posed such a risk." The Appellate Division found a breach of statutory duty to develop criteria for eligibility, concluding that if rational criteria had been established Campbell would not have been admitted. The Appellate Division, moreover, posited the College's duty of heightened inquiry on the fact that this was "an experimental program for the admission of convicted felons."<sup>350</sup>

The New York Court of Appeals reversed.<sup>351</sup> The court determined that the university was not liable because it admitted Campbell under a special program created by the state legislature that made admission mandatory if the statutory criteria were met.<sup>352</sup> In addition, the court refused to find that the university, by participating in this special program, "undertook either a duty of heightened inquiry in admissions, or a duty to restrict his activity on campus, for the protection of other students."<sup>353</sup> The court supported its decision with policy considerations

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343. *Id.*

344. *Id.* at 1131.

345. *Id.* (The statutory criteria for admission into the program were "economic and educational—a high school diploma or its equivalent; the potential for completing a postsecondary program; and economic and educational disadvantage.").

346. *Id.*

347. *Id.* at 1132.

348. *Id.*

349. *Id.*

350. *Id.* at 1136 (internal citations omitted).

351. *Id.*

352. *Id.*

353. *Id.* The court continued:

that focused on the state legislature's desire to provide significant rehabilitation opportunities to former offenders.<sup>354</sup> Also, once admitted, the university had no duty to restrict Campbell's contacts with other students, as "[p]ublicly branding him on campus as a former convict and former drug addict would have run up against the same laws and policies that prevented discriminating against him."<sup>355</sup>

The court did caution, however, that the case was limited to the circumstances involving the legislative enactment:

[I]t is apparent that there are profound social issues underlying this case. It therefore bears emphasis that the question before us for resolution is simply whether the College had a *legal duty* in the circumstances, that requires it to respond in damages for Campbell's rape and murder of a fellow student; we do not consider whether a college might or even should investigate and supervise its students differently.<sup>356</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 institution, that tort is an imperfect analogy. But a review of how courts have responded to negligent hiring claims is still instructive.

#### b. The Negligent Hiring Analogy

An individual injured by an employee may sue the employer for negligent hiring. Under this theory, the injured party may argue that the employer should have screened the perpetrator-employee more thoroughly.<sup>357</sup> In a nutshell, "[a]n

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As noted earlier, the imposition of duty presents a question of law for the courts. While both lower courts soundly disavowed the imposition of liability on the basis of the doctrine of *in loco parentis*—concluding that colleges today in general have no legal duty to shield their students from the dangerous activity of other students—the question before us today, in essence, is whether such a duty should nonetheless be recognized when a college admits an ex-felon such as Campbell as part of a special program. As claimants recognize, we have not previously imposed such a duty, and we see no justification for doing so now.

*Id.* (internal citations omitted).

354. *Id.* at 1136–37.

355. *Id.* at 1137. The court noted the circumstances of the case:

[T]he fact that Campbell had a criminal record was apparently known on campus, even to Eiseman and Schostick. In actual fact, Campbell was diligently monitored, as both lower courts found; until his brutal explosion, there was no complaint regarding his campus behavior. No greater restriction is even suggested that might have avoided this off-campus tragedy. As the college and university *amici* cogently contend, imposing liability on the College for failing to screen out or detect potential danger signals in Campbell would hold the college to a higher duty than society's experts in making such predictions—the correction and parole officers, who in the present case have been found to have acted without negligence.

*Id.*

356. *Id.*

357. James R. Todd, Comment, "*It's Not My Problem*": How Workplace Violence and Potential Employer Liability Lead to Employment Discrimination of Ex-Convicts, 36 ARIZ. ST.

employer hires negligently when he employs a person with *known propensities*, or propensities which could have been discovered with a reasonable investigation.”<sup>358</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>359</sup> Also, as in other negligence contexts, foreseeability—both with regard to duty and causation—is a critical concept.<sup>360</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>361</sup>

To establish breach of this duty, the plaintiff must show that the employer failed to use reasonable care under the circumstances.<sup>362</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>363</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 . . .

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L.J. 725, 753 (2004).

358. *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)).

359. *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) .

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.

*Id.*

360. In *McCain v. Florida Power Corp.*, 593 So. 2d 500, 502–03 (Fla. 1992), the court observed that courts sometimes mistakenly merge the duty-foreseeability analysis with the causation-foreseeability analysis.

The duty element of negligence focuses on whether the defendant’s conduct foreseeably created a broader “zone of risk” that poses a general threat of harm to others. . . . The proximate causation element, on the other hand, is concerned with whether and to what extent the defendant’s conduct foreseeably and substantially caused the specific injury that actually occurred. In other words, the former is a minimal threshold *legal* requirement for opening the courthouse doors, whereas the latter is part of the much more specific *factual* requirement that must be proved to win the case once the courthouse doors are open. As is obvious, a defendant might be under a legal duty of care to a specific plaintiff, but still not be liable for negligence because proximate causation cannot be proven.

*Id.* (internal citation omitted).

361. DiLorenzo, *supra* note 359, at 362.

362. Todd, *supra* note 357, at 754.

363. *Id.*

. or where the employer has some reason to question an applicant's fitness.<sup>364</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 foreseeable based on the employee's prior bad conduct.<sup>365</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>366</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>367</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, K-12 education, health care, law enforcement, security services, and transportation, and in certain licensed professions like law,<sup>368</sup> courts and legislatures have been reluctant to impose on employers a general duty to conduct pre-hiring background checks.<sup>369</sup> As one scholar noted, "a reasonable investigation 'does not generally

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364. DiLorenzo, *supra* note 359, at 362. 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 371-74.

365. *Id.* at 362.

366. Todd, *supra* note 357, at 754. In *Doe v. Boys Clubs of Greater Dallas, Inc.*, 868 S.W.2d 942 (Tex. Ct. App. 1994), *aff'd*, 907 S.W.2d 472 (Tex. 1995), a volunteer at a boys club, whom the court treated as an employee for purposes of the negligent hiring analysis, sexually molested several boys he met through the club. *Id.* at 947. The victims sued the club for negligent hiring, asserting that if it had done a criminal background check, it would have found Mullens's two convictions for driving while intoxicated and would not have let him work around children. The court first determined that the club had a duty to conduct a criminal background check because of the heightened duty that applied to organizations caring for children. *Id.* at 952. Yet the court also determined that it was not foreseeable that Mullens would molest children simply because he had two convictions for driving while intoxicated. *Id.*

367. Todd, *supra* note 357, at 754.

368. DiLorenzo, *supra* note 359, at 371-74.

369. *E.g.*, *Rozzi v. Star Pers. Servs., Inc.*, No. CA2006-07-162, 2007 WL 1531427, at \*3 (Ohio Ct. App. May 29, 2007). *But see* *Munroe v. Universal Health Servs., Inc.*, 596 S.E.2d 604, 607 n.4 (Ga. 2004).

We recognize that criminal background checks of employees are statutorily-mandated only in certain industries. . . . However, while there may be no statutory requirement that employers in other businesses conduct background or criminal checks on potential employees, we reject the position that employers who fail to conduct such searches can never be found liable for negligent hiring because of this failure. Whether or not an employer's investigative efforts were sufficient to fulfill its duty of ordinary care is dependent upon the unique facts of each case. . . . Thus, while investigation of an employee's past may not be necessary when filling the position of parking lot attendant . . . a jury may find that employers who fill positions in more sensitive businesses without performing an affirmative background or criminal search on job applicants have failed to exercise ordinary care in hiring suitable employees, even absent a

require a criminal background check.”<sup>370</sup> But employers cannot simply ignore “red flags” that exist on an employment application.

In *Brimage v. City of Boston*,<sup>371</sup> for example, a former employee sued the City of Boston for negligently hiring another employee who raped her. Upon denying the City’s motion for summary judgment, the court found that the City failed to act reasonably before hiring the perpetrator.<sup>372</sup> The court noted that

had the City conducted a criminal background check, it would have been revealed that [the perpetrator] had recently served time in prison for rape, *but even without a criminal background check*, [his] resume itself reflected a long, unexplained gap in his employment history representing the time he served in prison, which should have put the City on notice to make reasonable inquiry.<sup>373</sup>

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>374</sup> Second, employers will be understandably reluctant to hire most applicants with criminal records, particularly if the past bad conduct involved violence.<sup>375</sup> 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.<sup>376</sup> Thus, the burden of obtaining a check may be less than the probability of serious injury occurring.<sup>377</sup> Also, at least some courts, like the Massachusetts court in *Brimage*, have found that employers have a duty to investigate “red flags” on employment applications, even absent a criminal background check.<sup>378</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>379</sup> In Florida, for example,

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statutory duty to conduct such background searches.

*Id.* (internal citation omitted).

370. Sasser, *supra* note 326, at 1088.

371. No. CIV.A. 97-1912, 2001 WL 69488 (Mass. Super. Ct. Jan. 24, 2001).

372. *Id.* at \*7.

373. *Id.* (emphasis added).

374. *E.g.*, Sasser, *supra* note 326, at 1088–90.

375. *E.g.*, Todd, *supra* note 357, at 754–60.

376. *See also supra* note 2 (sources describing the increase in the number of background checks conducted post-9/11).

377. *See infra* note 392 (Judge Learned Hand’s B < PL test for determining breach).

378. *See also* Meghan Oswald, Comment, *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 businesses to conduct criminal background checks if the employer notices any discrepancies or contradictions in information provided in the employment application, in-person interview, and reference checks).

379. *Id.* at 1790–92 (discussing statutes in Florida and Louisiana). *See also* Sasser, *supra* note 326, at 1090, stating:

Virginia should soften its foreseeability requirement and implement uniform standards for judging potential employees’ past convictions. Such guidelines will help employers

[i]n a civil action for the death of, or injury or damage to, a third person caused by the intentional tort of an employee, such employee's employer is presumed not to have been negligent in hiring such employee if, before hiring the employee, the employer conducted a background investigation of the prospective employee and the investigation did not reveal any information that reasonably demonstrated the unsuitability of the prospective employee for the particular work to be performed or for the employment in general.<sup>380</sup>

This background investigation must include a criminal background check by the Florida Department of Law Enforcement;<sup>381</sup> checking references and former employers "concerning the suitability of the prospective employee for employment;"<sup>382</sup> requiring the applicant

to complete a job application form that includes questions concerning whether he or she has ever been convicted of a crime, including details concerning the type of crime, the date of conviction and the penalty imposed, and whether the prospective employee has ever been a defendant in a civil action for intentional tort, including the nature of the intentional tort and the disposition of the action;<sup>383</sup>

if relevant to the job, checking the applicant's driver's license record;<sup>384</sup> and "[i]nterviewing the prospective employee."<sup>385</sup>

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>386</sup> Interestingly, this point is illustrated by the previously discussed

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make informed, individual assessments of potential employees without discouraging them from checking criminal records. Virginia's negligent hiring law would improve with decisions that help minimize discrimination against ex-convicts, by telling employers when a potential employee's criminal record matters and by setting forth factors for employers to use in individualized assessments of job applicants. These improvements would benefit public safety by helping to reduce recidivism through rehabilitation and by keeping potentially dangerous persons out of jobs in which they may pose a serious risk to the public.

380. FLA. STAT. § 768.096 (2005).

381. *Id.* § 768.096(1)(a). "The election by an employer not to conduct the investigation specified in subsection (1) does not raise any presumption that the employer failed to use reasonable care in hiring an employee." *Id.* § 768.096(3).

382. *Id.* § 768.096(1)(b).

383. *Id.* § 768.096(1)(c).

384. *Id.* § 768.096(1)(d).

385. *Id.* § 768.096(1)(e).

386. 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 may do in this type of situation, see

*Eiseman v. New York*,<sup>387</sup> which implicated a university's admission decision.<sup>388</sup>

c. The "New" Negligent Admission Theory in Higher Education

It is difficult to determine how courts may approach future negligent admissions claims based on an institution'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 college and university admissions decisions.<sup>389</sup> Others may reject the claims on a policy argument, as in *Eiseman*,<sup>390</sup> that colleges and 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 colleges and universities more like businesses that have a duty to protect invitees, such as students and employees, from dangers of which the institution knew or should have known.<sup>391</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>392</sup> analysis may establish breach. Of course,

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*Tallahassee Furniture Co. v. Harrison*, 583 So. 2d 744, 754 (Fla. Dist. Ct. App. 1991).

387. 511 N.E.2d 1128 (N.Y. 1987).

388. See *supra* notes 339–356 and accompanying text. See also Oswald, *supra* note 378, at 1794 ("Notably, though, the outright prohibition against criminal record discrimination could benefit employers as well. If an employer is forbidden by law from discriminating based upon these factors, the employer can use these requirements in its defense against a negligent hiring claim.").

389. See *supra* note 244 and accompanying text (discussion of academic freedom in the college and university admissions context). This is particularly true if the criteria or processes at issue relate to the academic program, which an admissions program arguably does. See *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 (1985), where the Court stated:

When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.

See also *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 91 (1978) (holding that a medical school's decision to dismiss a student for failure to possess the "clinical ability to perform adequately as a medical doctor . . . is by its nature more subjective and evaluative than the typical factual questions presented in the average disciplinary decision."); *id.* at 96 n.6 (Powell, J., concurring) ("University faculties must have the widest range of discretion in making judgments as to the academic performance of students and their entitlement to promotion or graduation.").

390. *Eiseman*, 511 N.E.2d 1128.

391. *E.g.*, *Nova Se. 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.").

392. The  $B < PL$  test was developed by Judge Learned Hand in *United States v. Carroll Towing*, 159 F.2d 169, 173 (2d Cir. 1947). "[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  $B < PL$ ." *Id.* 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



application of a negligent admission theory does not depend on a background-check requirement. As in *Brimage*,<sup>393</sup> courts may determine that colleges and universities should be aware of “red flags”—contradictions, inconsistencies, and odd gaps—in an applicant’s file and should conduct a more thorough investigation into the applicants’ history. This is the approach adopted by the UNC System.<sup>394</sup> 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>395</sup>

Finally, Congress or state legislatures may determine that the best approach is to develop a set of standards, similar to those found in the Florida negligent hiring statute,<sup>396</sup> that would provide a presumption that a college or 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 may not breach the general duty of care to act reasonably under the circumstances. Given the educational missions of colleges and universities, it may not be unreasonable to admit applicants whose past records are remote, whose 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 was shoplifting; a jury likely would not find that it was foreseeable that a former shoplifter would commit a violent offense.

If courts do adopt a negligent admission theory, the first place colleges and universities may 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>397</sup> 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>398</sup> The perpetrator had, however, told the landlord he was on

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occurring, multiplied by the seriousness of the harm if it does occur.” JOHN L. DIAMOND ET AL., UNDERSTANDING TORTS 60 (3d ed. 2007).

393. *Brimage v. City of Boston*, No. CIV.A. 97-1912, 2001 WL 69488, at \*7 (Mass. Super. Ct. Jan 24, 2001).

394. See *supra* note 115 and accompanying text. See also Potrafke, *supra* note 133, at 447–48 (discussing potential negligent recruitment claims in the context of university athletics).

395. RICK D. JOHNSON, STRATEGIES: DEALING WITH THE CAMPUS SEXUAL OFFENDER 7 (2002).

396. FLA. STAT. § 768.096 (2005).

397. 818 N.E.2d 163 (Mass. Ct. App. 2004).

398. *Id.* at 168.

probation and had been under hospital observation.<sup>399</sup> The landlord did not know that he had been arrested for kidnapping and raping a child.<sup>400</sup> In affirming a jury verdict against the landlord, the court explained that 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>401</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>402</sup>

Students in residence halls live in close proximity to each other and are in a home-like setting in which their normal defenses may be lowered.<sup>403</sup> In addition, and particularly for freshman and transfer students, the college or 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>404</sup>—may lead a court to adopt a negligent admission argument more readily in the residence hall situation than under other scenarios.

## 2. Duties to Warn or Protect

If the college or university knowingly admits a student with a criminal record, the next questions that arise are whether the institution 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 danger,<sup>405</sup> or to protect them from it.<sup>406</sup> Control

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399. *Id.*

400. *Id.*

401. *Id.* at 169.

402. *Id.* Along the same lines, we often see background checks required by state law or company policy when adults work 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, 1165–69 (2004). See also NICOLETTI ET AL., *supra* note 21, at 32–33 (describing recent state legislation on background checks for workers in certain fields).

403. See, NICOLETTI ET AL., *supra* note 21, at 32–33 (discussing living arrangements and trust in college dorms).

404. E.g., *Mullins v. Pine Manor Coll.*, 449 N.E.2d 331 (Mass. 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 § 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* *Rhanev v. Univ. of Md. E. Shore*, 880 A.2d 357, 364–66 (Md. 2005) (refusing to characterize the school-dorm student relationship as a special relationship).

405. *Stokes & Groves, supra* note 258, at 872. See generally DIAMOND ET AL., *supra* note 392, at 120.

406. RESTATEMENT (SECOND) OF TORTS § 315 (1965); DIAMOND ET AL., *supra* note 392, at 120. It is possible that an injured individual might invoke RESTATEMENT (SECOND) OF TORTS § 321, which provides that "[i]f the actor does an act, and subsequently realizes or should realize that it has created an unreasonable risk of causing physical harm to another, he is under a duty to

sufficient to trigger a duty generally is limited to situations such as employer-employee, jailer-inmate, and hospital-admitted in-patient.<sup>407</sup> Courts repeatedly have held that the school-student relationship is not inherently “special” as a matter of law.<sup>408</sup> But as my colleague Professor Peter F. Lake has observed,

with no hint of irony, courts continue to hold that adult college students are not in a special relationship with [an institution of higher education (“IHE”)], except when they are. The courts appear to be saying that there is no *general* special relationship, but students 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,” giving rise to a duty of reasonable care.<sup>409</sup>

Recognizing, therefore, that the law in this area is not clear-cut, administrators should note that courts in some circumstances have found that colleges and 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 colleges and universities are not insurers of students’ safety, and that students must take reasonable steps to protect themselves, colleges and universities also have a role in protecting students from danger.

A landmark case concerning an institution’s duty to protect students from dangerous persons is *Mullins v. Pine Manor College*.<sup>410</sup> In *Mullins*, an unidentified assailant raped a female student in her dorm room. Abrogating traditional common law, the Massachusetts Supreme Judicial Court held that the college had a duty to exercise reasonable care to protect students from criminal acts of third parties.<sup>411</sup> The court based this conclusion on a variety of grounds, including that criminal behavior on campus was foreseeable and that the college controlled key aspects of campus safety, such as installing a security system, hiring security guards, setting a patrol policy, and installing locks.<sup>412</sup>

In *Nero v. Kansas State University*,<sup>413</sup> the rule in *Mullins* was extended to require a university to reasonably protect students against the dangerous acts of

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exercise reasonable care to prevent the risk from taking effect.” Although some plaintiffs have attempted to use this section when injured by the criminal acts of third persons, at least some courts have expressed reservations about the sweep of Section 321 and have limited it to situations in which the defendant created a dangerous mechanical condition or “personally sets in motion a physical process that poses a risk to the plaintiff.” *Denis v. Perry*, No. CV-05-330, 2006 WL 521785, at \*2–3 & n.3 (Me. Super. Ct. Feb. 9, 2006).

407. RESTATEMENT (SECOND) OF TORTS § 315; *DIAMOND ET AL.*, *supra* note 392, at 114–15.

408. *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, 761–64 (Neb. 1999).

409. 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) (internal citations omitted).

410. 449 N.E.2d 331 (Mass. 1983).

411. *Id.* at 337.

412. *Id.* at 335.

413. 861 P.2d 768 (Kan. 1993).

other students. In *Nero*, a male student was accused of raping a female student in a co-ed residence hall on campus in which they both lived.<sup>414</sup> Following the rape accusation and pending resolution of the criminal case, the male student was reassigned to live in an all-male dorm on the other side of campus; the student also was directed not to enter any co-ed or all-female dormitories.<sup>415</sup> The student registered for spring intersession and was assigned to a co-ed residence hall, which was the only dormitory open.<sup>416</sup> A few weeks later, he sexually assaulted Shana Nero, a female resident of that dorm. Nero sued the university in negligence for failing to protect her from the sexual assault or warn her about the male student and his past conduct.<sup>417</sup> The court held that while “a university is not an insurer of the safety of its students,” it “has a duty [to use] reasonable care to protect a student against certain dangers, including criminal actions against a student by another student or a third party if the criminal act is reasonably foreseeable and within the university’s control.”<sup>418</sup> Because the university was aware of the prior rape charge, moved the perpetrator to an all-male dorm, and prohibited him from entering co-ed and all-female dorms, the court determined that the attack on Nero could have been foreseeable, and that the issue of foreseeability in this context was a jury question.<sup>419</sup>

Although a college or university may have a duty to use reasonable care to protect a student from foreseeable harm, the student must also take reasonable steps to protect himself. For example, in *Rhaney v. University of Maryland Eastern Shore*,<sup>420</sup> the court held that the university was not liable in negligence for student-on-student violence. There, Clark punched his roommate Rhaney, breaking Rhaney’s jaw.<sup>421</sup> On another occasion, the university had suspended Clark for fighting at an on-campus party; Clark also had been in one other altercation with a student.<sup>422</sup> Rhaney sued the university for, among other things, negligently failing to warn him about Clark’s dangerous tendencies, and negligently assigning Clark to be his roommate.<sup>423</sup> The court, for various reasons, found the university did not owe a duty to Rhaney. Among other things, the court indicated that, despite Clark’s past conduct, the attack on Rhaney under the circumstances was not foreseeable. Specifically, the court found that Rhaney was aware of Clark’s past violence on campus, lived with him for two months without incident, and did not request a new roommate.<sup>424</sup> In addition, the court accepted the university’s view that Clark was nothing “more than a one-time, youthful

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414. *Id.* at 771.

415. *Id.*

416. *Id.* at 772.

417. *Id.*

418. *Id.* at 780.

419. *Id.*

420. 880 A.2d 357 (Md. 2005).

421. *Id.* at 359.

422. *Id.*

423. *Id.* at 359–60.

424. *Id.* at 367–68.

offender of the student disciplinary system.”<sup>425</sup>

In light of courts’ seemingly inconsistent positions and analysis, colleges and universities that admit students with known criminal records that involve violence should assume that a court is likely to find that the institution 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.<sup>426</sup> Still, colleges and universities that admit students with violent records should consider whether—in light of the nature of the crime committed, and other circumstances, including how much time has passed since the student’s release<sup>427</sup>—the institution 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 college or university may limit his attendance to distance-education courses. If the violence was directed at the opposite sex, the college or university may consider banning the student from on-campus housing, or may 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 records of violence are admitted, the college or university may 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 may be counseled by a person with expertise about how and when to disclose the past history to others with whom the past offender interacts regularly. The college or 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.

#### IV. POLICY CONSIDERATIONS

A debate rages regarding whether colleges and universities should conduct pre-matriculation background checks on admissions applicants. Given the current lack of law directly on point, the decision whether to conduct checks is largely a policy choice for the college or university. Those who oppose or are wary of background checks typically raise four concerns: 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 college and 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 colleges and universities

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425. *Id.* at 366.

426. *See* DiLorenzo, *supra* note 359, at 362.

427. *See supra* note 366 and accompanying text (discussing the “prior similar incidents” and “totality of the circumstances” tests).

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.<sup>428</sup> Thus, colleges and universities already have experience handling these issues and do not appear to be encountering significant legal issues related to the screening process.<sup>429</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>430</sup>

#### A. 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 may be used for background checks could be better used in other important areas, such as mental-health counseling.<sup>431</sup> They are also concerned about whether on-campus human resources exist to review the results of background checks.<sup>432</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 eight<sup>433</sup> to eighty dollars.<sup>434</sup> For schools that already conduct checks on students, the average range seems to be between thirty and fifty-five dollars.<sup>435</sup> It is likely, though, that

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428. See generally 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). ("Almost every college and university has a background-check policy in place or they are considering one."). See also *infra* note 472 and accompanying text (discussing Finch's research).

429. See Lee, *supra* note 2, at 665 ("there have been few legal challenges to the use of background checks").

430. See generally FRENKIL & VINIK, *supra* note 329 (describing litigation concerning background checks, or the lack thereof).

431. E.g., BRETT A. SOKOLOW, AN OP-ED ON THE MEDIA RESPONSE TO THE VIRGINIA TECH TRAGEDY, <http://www.nchem.org/pdfs/vtech-article.pdf>. ("We should not rush to perform criminal background checks (CBCs) on all incoming students. . . . We need to spend this time, money and effort on the real problem: mental health.")

432. E.g., Lucien "Skip" Capone III, *The Truth About Violent Crime on Campus*, 17 EDUC. L. (N.C. Bar Ass'n Cary, N.C.) Dec. 2004, at 1, 4, available at [http://education.ncbar.org/Newsletters/Newsletters/Downloads\\_GetFile.aspx?id=4881](http://education.ncbar.org/Newsletters/Newsletters/Downloads_GetFile.aspx?id=4881) ("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.")

433. *Id.*

434. SOKOLOW, *supra* note 431, at 2.

435. E.g., A.T. Still Univ., Criminal Background Check, [https://www.atsu.edu/registrar/background\\_check.htm](https://www.atsu.edu/registrar/background_check.htm) (last visited Feb. 27, 2008) (\$48.50); Loyola U. Chi., Sch. Educ., Criminal Background Check for Certification, [http://www.luc.edu/education/IL\\_Cert-Background.shtml](http://www.luc.edu/education/IL_Cert-Background.shtml) (last visited Feb. 27, 2008) (\$30.00); N. Ky. Univ. Sch. of Nursing, Admissions Procedures & Requirements, <http://www.nku.edu/~nhp/Nursing/html/2ndBSN/admission.htm> (last visited Feb. 27, 2008) (\$45.00).

prices for background checks will drop as technology improves.<sup>436</sup> 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.<sup>437</sup>

Interestingly, it costs about the same, if not more, for applicants to take the SAT, ACT, LSAT, MCAT, and other entrance examinations than to pay for a background check.<sup>438</sup> Although we should be sensitive to increasing the cost of admission, there is not a call to eliminate entrance exams based on cost. Also, while researching this article, I located no reports indicating that programs that already require student background checks have lost applicants because of the check or the cost of the check.

If overall cost allocation is an institution's primary concern, it must evaluate where funds may be spent most effectively, in terms of its mission and overall campus safety. Background checks should be only part of a comprehensive environmental risk-management plan,<sup>439</sup> and other programs may take priority. When evaluating whether a school was negligent in not conducting checks, breach of the duty of care will be determined by evaluating what was reasonable under the circumstances.<sup>440</sup> If a school has only limited resources—and cannot shift the cost of background checks to students—a jury may not find a breach. However, if background checks become best practice within higher education, if the school has had problems with crime perpetrated by students with discoverable criminal histories, or if the cost of the checks is less than the probability of death or serious injury, then a jury may find a breach.<sup>441</sup> Finally, schools should consider the cost of implementing background checks against the cost of a negative verdict in one lawsuit. In the related area of negligent hiring, the average verdict against

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436. Joanna L. Krotz, You Can't Skimp on Employee Background Checks, <http://www.microsoft.com/smallbusiness/resources/management/recruiting-staffing/you-cant-skimp-on-employee-background-checks.aspx> (last visited Feb. 27, 2008).

437. Scott Jaschik, *Checking Up on Your Past*, INSIDE HIGHER EDUC., Nov. 12, 2007, <http://www.insidehighereducation.com/news/2007/11/12/background> (indicating that the majority of schools require the student to pay the fee).

438. Registration for the basic SAT is \$43. College Board, SAT, 2007–08 Fees, <http://www.collegeboard.com/student/testing/sat/calenefees/fees.html> (last visited Feb. 27, 2008). As part of this basic fee each applicant can send scores to four schools; each additional score report costs \$9.50 for regular delivery service. *Id.* The basic ACT costs \$30; the ACT that includes the writing test costs \$44.50. The ACT, 2007–2008 ACT Fees, <http://www.actstudent.org/regist/actfees.html> (last visited Feb. 27, 2008). As with the SAT, each test-taker can send a report to four schools for no extra charge; it then costs \$8.50 for each additional school, based on regular, as opposed to rush, delivery. *Id.* For those who wish to attend law school, the LSAT costs \$118; in addition, most schools require applicants to register for the Law School Data Assembly Service, which costs an additional \$109. Brigham Young Univ., How Much Does It Cost to Apply to Law School?, [http://ccc.byu.edu/prelaw/PDF\\_Files/How%20much%20does%20it%20cost%20to%20apply%20to%20law%20school.pdf](http://ccc.byu.edu/prelaw/PDF_Files/How%20much%20does%20it%20cost%20to%20apply%20to%20law%20school.pdf) (last visited Feb. 27, 2008). For prospective medical students, the MCAT currently costs \$210. ASS'N OF AM. MED. SCHS., MCAT ESSENTIALS 6 (2008), available at <http://www.aamc.org/students/mcat/mcatessentials.pdf>.

439. See *supra* notes 14–17 and accompanying text (discussing risk management and environmental management).

440. See *supra* note 284 and accompanying text.

441. See *supra* Part III.C.1.b (discussing breach in the context of negligent hiring).

employers is approximately \$2 million.<sup>442</sup>

If human resources to evaluate the results of the checks is the institution'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—about one-fourth of the total student body. Also, vendors could flag reports with positive results. Because only about five percent are likely to have a positive return,<sup>443</sup> most schools will have a relatively small number to review.

If cost to the student is the primary concern, schools and professional organizations should follow the AAMC's lead<sup>444</sup> and develop methods so that students have to pay for only one criminal background check that may 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 deposit.<sup>445</sup>

#### B. 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 minor offense may 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.<sup>446</sup> 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.<sup>447</sup> Still others are concerned that depriving past offenders of an education may inhibit rehabilitation or lead to increased recidivism, since education is a proven way to reduce repeat offenses.<sup>448</sup>

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442. ACXIAM, BACKGROUND SCREENING FOR EMPLOYMENT 9 (2007), [http://www.acxiom.com/AppFiles/Download18/AISS\\_White\\_Paper-116200723101.pdf](http://www.acxiom.com/AppFiles/Download18/AISS_White_Paper-116200723101.pdf).

443. See *supra* note 11 (noting that most background checks do not yield positive results).

444. See *supra* text accompanying notes 170–181 (discussing the AAMC developing a database that can be used by applicants at any member medical school).

445. 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 admissions process. Schools may also offer those placed on a wait list the opportunity to submit to the background-check process.

446. See *supra* note 7 and accompanying text. See also *supra* notes 375–385 and accompanying text (discussing similar concerns in the employment context).

447. See *supra* note 8 and accompanying text.

448. DANIEL KARPOWITZ & MAX KENNER, EDUCATION AS CRIME PREVENTION 4–5, available at [http://www.bard.edu/bpi/pdfs/crime\\_report.pdf](http://www.bard.edu/bpi/pdfs/crime_report.pdf); Tamar Lewin, *Inmate Education Is*



First, institutions that conduct background checks must comply with all applicable federal and state laws. At this point, no state laws prohibit colleges and universities from conducting criminal background checks on students, but some do limit the types of information sought.<sup>449</sup>

Second, institutions must consider the safety and welfare of all persons on campus.<sup>450</sup> 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>451</sup> Thus, it may be true that certain applicants should not be admitted,<sup>452</sup> should not be admitted to start immediately, or should be admitted only for distance-education programs.<sup>453</sup>

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.<sup>454</sup>

For those concerned that colleges and universities that conduct background checks will reject all applicants with a criminal record, the evidence proves otherwise. Many institutions of higher education have knowingly admitted students with past criminal records,<sup>455</sup> including murder,<sup>456</sup> and there is no reason

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*Found to Lower Risk of New Arrest*, N.Y. TIMES, Nov. 16, 2001, at A22. See also Redden, *supra* note 2 (quoting D.C. Council member Harry Thomas Jr., who explains that “education is one thing that can change the course of an individual’s life.”).

449. See *supra* note 318 and accompanying text.

450. For example, the City University of New York Graduate Center states that:

The college reserves the right to deny admission to any student if in its judgment, the presence of that student on campus poses an undue risk to the safety or security of the college or the college community. That judgment will be based on an individualized determination taking into account any information the college has about a student’s criminal record and the particular circumstances of the college, including the presence of a child care center, a public school or public school students on the campus.

The Graduate Center, CUNY—Admissions Requirements, [http://www.gc.cuny.edu/admin\\_offices/admissions/admission\\_req.htm](http://www.gc.cuny.edu/admin_offices/admissions/admission_req.htm) (last visited Feb. 27, 2008).

451. Marklein, *supra* note 71 (quoting Kemal Atkins, Director for Student Academic Affairs, UNC System).

452. See Monaghan, *supra* note 279.

453. Langara College in Vancouver, British Columbia recently barred Paul Callow from attending on-campus courses. “In the 1980s, Callow, better known as the ‘Balcony Rapist,’ brutally attacked and raped women at knife-point in the Toronto area. Eventually, Callow was arrested, convicted as a serial rapist, and given a 20-year prison sentence, which he served in full after repeatedly being denied parole.” The college indicated that it might consider allowing Callow to participate in online courses. *Rehabilitated Rapist Requests Education*, UBYSSSEY (Vancouver, B.C.), Nov. 27, 2007, at 10.

454. See, e.g., George Mason Univ. Sch. of Law, Admissions, Frequently Asked Questions, <http://www.law.gmu.edu/admissions/faq> (last visited Feb. 27, 2008). See *infra* Appendix D for the full-text of the FAQ.

455. See Crabbe, *supra* note 63.

456. *The State vs. James Hamm: Should a Convicted Murderer Be Allowed to Practice Law?*, CBS NEWS, Oct. 13, 2004 <http://www.cbsnews.com/stories/2004/10/13/60II/main649084.shtml> (ASU’s law school admitted a convicted murderer: “The admissions committee knew about his background because he had revealed his background in his application

to think that background checks would change that. Instead, as one college registrar has observed, colleges and universities will tend to deny violent and repeat offenders, not simply anyone with a record.<sup>457</sup>

### C. Evaluating Criminal Records

A third concern, which relates to the second, is that college and 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>458</sup> so any judgments by college and university officials would be merely speculative and may deprive deserving individuals of an opportunity to advance their education.<sup>459</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 correct; instead, they need to be reasonable under the circumstances.<sup>460</sup> It also is important to remember that college and university human resources departments

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in some detail. . . . [a]nd his letters of recommendation had spoken in some detail about his background. . . . [The admissions committee] finally said, ‘We think he’s well-qualified for admission to this law school.’”); Randy L. Harrington, *Proof That Rhetoric About Prisoner Rehabilitation Is a Lie*, AM. CHRON. (Beverly Hills, Cal.), May 31, 2006, <http://www.americanchronicle.com/articles/10481>.

457. Crabbe, *supra* note 63 (quoting Santa Fe Community College registrar Lynn Sullivan).

458. E.g., Joanne Silberner, *Nearly Impossible to Predict Violence*, NPR, Apr. 20, 2007, <http://www.npr.org/templates/story/story.php?storyId=9706123>.

459. See Stokes & Groves, *supra* note 258, at 867–68 (discussing the cases of two students with criminal pasts).

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 posed 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.

*Id.* (internal citation omitted).

460. See Lake, *supra* note 78. Prof. Lake stated:

As people continue to analyze what transpired at Virginia Tech, colleges around the country should be asking themselves what is foreseeable, and what reasonable efforts to provide a safe environment look like. It may be helpful to distinguish situations where a general risk exists—for instance, a risk of a riot or a general risk of violence—from those where a specific person presents risks.

Although the national dialogue about the events at Virginia Tech tends to conflate those two issues, they are distinct. Courts may ask colleges to assess foreseeability in both types of situations separately. It could be foreseeable that a shooting may take place, but not foreseeable that a particular shooter will shoot—or vice versa, or neither. What is foreseeable in turn dictates what is reasonable. It might be foolish to put an entire college on lockdown because one highly dangerous person lives on an otherwise crime-free campus; perhaps the university should instead focus on that one student.

*Id.*

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.<sup>461</sup> Moreover, many admissions officials are already making these decisions due to the increasing number of admissions applications that require candidates to disclose criminal histories and the general knowledge that admissions officials otherwise acquire. The addition of background checks, therefore, will change the scope of the issue—not the nature of it.

It is important, though, that college and 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>462</sup> In addition, they should have access to experts, whether on- or off-campus counselors, psychiatrists, or attorneys, to answer questions.

Although “[t]here are no bright line rules for evaluating negative information obtained,”<sup>463</sup> below are some considerations admission officials may use:

- How serious was the misconduct?<sup>464</sup>
- Are any state or federal laws implicated?
- Are any institutional policies implicated?
- How long ago did the misconduct occur?
- How old was the applicant at the time of the offense(s)?<sup>465</sup>
- How many offenses have occurred? Is there a pattern of misconduct?
- Did the past conduct involve violence?
- Will the misconduct prevent the applicant from completing his or her selected academic program?
- How great of a threat would the individual pose?
- What evidence exists of rehabilitation?
- Did the applicant voluntarily and accurately disclose the information (if sought on an application)?<sup>466</sup>

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461. See generally FRENKIL & VINIK, *supra* note 329; Lee, *supra* note 2.

462. See Jaschik, *supra* note 437.

Lots of schools are eager to collect the info but then not adept at using it . . . . 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*?

*Id.*

463. FRENKIL & VINIK, *supra* note 329, at 30–31.

464. Often, the crime with which the individual is charged is reduced through plea-bargain, which can make the seriousness of the offense more difficult to evaluate. See D. Frank Vinik, *Why Background Checks Matter in Academe*, CHRON. HIGHER EDUC. (Wash., D.C.), May 27, 2005, at B13 (discussing these matters in the context of sex offenders).

465. AACCP REPORT, *supra* note 11, at 15.

466. *Id.*

- Are there ways to lower any risks to an acceptable level?<sup>467</sup>

Similarly, various studies have correlated the potential for recidivism with various factors, such as time since the last offense and the individual's age.<sup>468</sup> Colleges and universities could arrange for training regarding these factors as well.

#### D. 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.<sup>469</sup> They also reason that background checks on prospective students are not likely to yield results any more meaningful than applicant self-disclosure.<sup>470</sup>

Although background checks alone will not solve the issue of campus violence,<sup>471</sup> 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:

Some 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. OSHA's general duty clause 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. There are indeed compelling reasons to have a background check policy, and given today's litigious environment, it may be difficult to argue against.<sup>472</sup>

Critics also argue that background checks may provide a false sense of security because most people do not realize that databases used by background screeners are incomplete.<sup>473</sup> This is a valid criticism. To address this concern, colleges and

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467. List developed substantially from FRENKIL & VINIK, *supra* note 329, at 30–31. See Farnsworth & Springer, *supra* note 185, at 151 (discussing how schools of social work made decisions when criminal background checks yielded positive results).

468. See generally NICOLETTI ET AL., *supra* note 21, at 66–69; Thomas R. Litwack, *Actuarial Versus Clinical Assessments of Dangerousness*, 7 PSYCHOL. PUB. POLICY & L. 409 (2001); Craig S. Schwalbe, *Risk Assessment for Juvenile Justice: A Meta-Analysis*, 31 L. & HUM. BEHAV. 449 (2007); FLA. DEP'T CORR., RECIDIVISM REPORTS (2003), <http://www.dc.state.fl.us/pub/recidivism/2003/analysis.html>.

469. Smyth, *supra* note 2.

470. See SOKOLOW, *supra* note 431.

471. See *supra* notes 14–17 and accompanying text (discussing risk management and environmental management).

472. FINCH, *supra* note 428, at 1–2. Ms. Finch's statements reflect that insurance companies might be the group that forces change in this area.

473. Bob Sullivan, *Criminal Background Checks Incomplete*, MSNBC, Apr. 12, 2005, <http://www.msnbc.msn.com/id/7467732> (“[E]xperts say the nationwide tallies are often full of

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 incidents.<sup>474</sup> 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>475</sup>

Some institutions have declined to conduct criminal background checks 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>476</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.<sup>477</sup> However, not all juvenile offenders are eligible or attempt to have their records expunged or sealed.<sup>478</sup> Moreover, a significant percentage of today’s college and university 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 colleges and universities, 18.1% were age 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>479</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 academic 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>480</sup> Similarly, searches at VolunteerSelect have uncovered 11,000 undisclosed criminal felony records since

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holes, and contain as few as 70 percent of all felony conviction records, leading in turn to a false sense of security.”).

474. See *infra* note 490 and accompanying text (noting the need for policies to deal with discoveries of undisclosed criminal histories). For example, may students be placed on an interim suspension while the matter is investigated? Ford et al., *supra* note 222, at 14. May admission be revoked? May the student forfeit tuition and fees paid to date? May the student be denied the ability to seek readmission? *Id.* at 15.

475. AACCP REPORT, *supra* note 11, at 13.

476. United Educators, *supra* note 11, at 3.

477. See *supra* notes 300–304 and accompanying text.

478. See, e.g., COLO. REV. STAT. § 19-1-306 (2005) (“Any person who has been adjudicated for an offense involving unlawful sexual behavior” 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).

479. *College Enrollment by Age of Students*, CHRON. HIGHER EDUC. ALMANAC (2005), available at <http://chronicle.com/weekly/almanac/2007/nation/0101502.htm>.

480. Howell, *supra* note 161.

it was launched in 2002.<sup>481</sup> In the college and university context, a study at the University of Iowa's law school found a significant percentage of students did not self-report criminal offenses,<sup>482</sup> the University of Georgia found undisclosed sex-offenders on its campus,<sup>483</sup> and in North Carolina, two students with undisclosed criminal records murdered other UNC students.<sup>484</sup>

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, attend classes, and study.<sup>485</sup> One 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>486</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,<sup>487</sup> 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 colleges and 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 and universities will send a message about the type of students they want and the types of behaviors they expect on campus.

## V. IMPLEMENTING BACKGROUND CHECKS

If a college or university desires to conduct background checks, it should take several steps before starting the process. First, it should develop a background-check policy. Next, in most situations, it should select a reputable screening company to conduct the checks. And third, it should determine how to evaluate

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481. Sullivan, *supra* note 473.

482. McGuire, *supra* note 230, at 710–11 (reporting that, during a three-year period, 7.6–10% of students in each entering class "admitted making misrepresentations about their criminal histories and past misconduct on their applications").

483. See *supra* note 62 and accompanying text.

484. See *supra* notes 91–114 and accompanying text.

485. Kristen Peters, Note, *Protecting the Millennial College Student*, 16 S. CAL. REV. L. & SOC. JUST. 431, 431 (2007) ("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?" (internal citation omitted)). See also NICOLETTI ET AL., *supra* note 21, at 31 (discussing the twenty-four hours a day, seven days a week operation of campuses).

486. Peters, *supra* note 485, at 431. Students surveyed for different reports typically do not oppose background checks. E.g., Ayres, *supra* note 84 (St. Augustine's College); McGuire, *supra* note 230, at 734 (University of Iowa College of Law). As an institution begins a background-check process, it should emphasize that the checks are not to punish students, but to help provide for their safety.

487. See, e.g., *supra* note 13 (statistics regarding high-risk alcohol use).

the policy in terms of process, outcomes, and impact.

#### A. Policy Development

##### 1. Overview

If an institution of higher education decides to conduct background checks on prospective students, it should start by developing a comprehensive written policy. Institutions that already have employee<sup>488</sup> or student post-matriculation<sup>489</sup> background-check policies in place may begin by reviewing those documents. Also, as the United Educators insurance company advises,

[i]n developing a policy, schools should take three important steps. First, ensure that the policy complies with applicable state and federal laws. . . . Second, communicate the policy to all current and prospective employees and . . . explain why the policy is necessary. Third, make the policy general enough to provide leeway when unforeseeable circumstances arise. For example, one of the most difficult issues is evaluating negative information discovered through background checks. This analysis needs to be performed on a case-by-case basis. Thus, the policy need not delineate every possible factor but can instead provide examples of factors that will be considered in evaluating negative information discovered through background checks.<sup>490</sup>

In addition, colleges and universities should consider following a proven model of policy development. Under one accepted model,<sup>491</sup> an institution would identify and articulate the risks to be addressed or the problems to be solved;<sup>492</sup> articulate the desired outcomes;<sup>493</sup> analyze the issues by reviewing the existing scholarly literature, including scientific literature, and by reviewing local conditions and problems;<sup>494</sup> create a collaborative team to *strategically* study,

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488. *E.g.*, Ariz. St. Univ., Reference Check and Background Verification, <http://www.asu.edu/aad/manuals/acd/acd126.html> (last visited Feb. 27, 2008); Fairleigh Dickinson Univ., Background Checks, <http://hr.fdu.edu/policies/backgroundcheck.html> (last visited Feb. 27, 2008); George Mason Univ., Criminal Background Investigations, <http://www.gmu.edu/facstaff/policy/newpolicy/2221adm.html> (last visited Feb. 27, 2008); Tenn. Theological Univ., Background Check Policy, <http://www.tntech.edu/adminpandp/perspay/pp34.htm> (last visited Feb. 27, 2008).

489. *E.g.*, Creighton Univ. Sch. of Med., Background Check Policy, <http://www2.creighton.edu/medschool/medicine/oma/cbc/index.php> (last visited Feb. 27, 2008); FLA. ST. UNIV. COLL. OF NURSING, CRIMINAL BACKGROUND CHECK (2005), *available at* <http://nursing.fsu.edu/pdf/policy/S-2%20Criminal%20Background%20Check.pdf>.

490. UNITED EDUCATORS, BACKGROUND CHECKS AT INDEPENDENT SCHOOLS 6 (2006), *available at* <http://www.ue.org/membersonly/getDocument.asp?i=817&date=20060725>.

491. See Linda Langford, Address at 27th Annual National Conference on Law & Higher Education, Clearwater Beach, Fla., Student Privacy: A Scientific Approach to Policy and Program Development (Feb. 22, 2006) (on file with author).

492. *Id.* at 21.

493. *Id.*

494. *Id.* at 15.

make recommendations, evaluate the issues, and determine a course of action;<sup>495</sup> implement the policy, which includes training and dissemination;<sup>496</sup> and develop evaluation techniques to measure policy effectiveness.<sup>497</sup>

## 2. Specific Questions

As part of the design and drafting process, the institution's collaborative, interdisciplinary team<sup>498</sup> should answer the following questions:

- Which state laws, if any, control what information can be sought in a background check or how a background check must be conducted?<sup>499</sup>
- At what point in the admissions process will background checks be conducted?<sup>500</sup>
- Which applicants will be subject to the check?<sup>501</sup>
- What will the scope of the search be in terms of time<sup>502</sup> and geography?<sup>503</sup>
- Will the search include arrests, other than pending arrests, that did not lead to conviction?<sup>504</sup>

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495. See Dickerson & Lake, *A Blueprint supra* note 14, and Lake & Dickerson, *Alcohol & Campus, supra* note 14, for additional information on collaborative teams in the risk-management context.

496. Langford, *supra* note 491, at 28.

497. *Id.*

498. See *supra* note 14 (providing information about appointing teams).

499. See *supra* notes 289–295 and accompanying text (regarding the federal Fair Credit Reporting Act).

500. A college or university could require all applicants to submit a check at the same time as other applications materials, require only conditionally-admitted students, and potentially students placed on the wait list, to submit to a background check, or might require checks only of students who accept the conditional offer and pay a seat deposit. The AACCP recommends that institutions should “only conduct criminal background checks on accepted applicants so that the results of the criminal background check are not a factor in the initial admission decision.” AACCP REPORT, *supra* note 11, at 12. Some schools, however, may determine that an applicant's criminal record should be considered along with all other factors. Also, if a student is admitted before the background check is conducted, the acceptance should be made conditional on successful completion of the check.

501. All applicants? See *supra* Part II.A. Only applicants whose files include red flags (which the school should attempt to identify in its policy, while leaving some room for unexpected situations)? See *supra* Part II.A.4; see also *infra* Appendix A (regarding the University of North Carolina system and “red flags”). Only students who apply for particular academic programs? See *supra* Part II.B–D.

502. “Most background checks look back 7–10 years.” FRENKIL & VINIK, *supra* note 329, at 32. See also 15 U.S.C. § 1681c (2000 & Supp. 2004).

503. See AACCP REPORT, *supra* note 11, at 5–9 (discussing various types of background checks, such as county, state, national, and international).

504. Asking for arrests that did not lead to conviction might have a disparate impact based on race. As a Minnesota government study explained,

[p]roblems with using arrest data for background searches . . . include: Gaps in the



- Will it include juvenile records?
- Based on the scope, what information will the applicant need to submit to enhance the chances of an accurate check (e.g., full name,<sup>505</sup> maiden name, aliases, social security number, current and past addresses, driver's license number, date of birth, place of birth, fingerprints,<sup>506</sup> etc.)?<sup>507</sup>
- Will the admissions application also ask questions about criminal history?<sup>508</sup>
- Will the college or university use a background-screening vendor?<sup>509</sup>

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disposition, especially when there is a court dismissal or acquittal that does not properly update the executive branch criminal history file; The arrest charge not reflecting the actual or final charge, because people are often charged with more serious crime to provide the prosecution with flexibility in pursuing the case; and racial and socio-economic implications in using arrest data. In most states, the typical practice is to provide only arrests under a year old that do not have a disposition. . . . In contrast, some people argue that someone is not necessarily innocent if not convicted on a charge. Plea bargains, participation in diversion programs, uncooperative witnesses, and due process issues may result in no conviction. They also note that patterns of arrests, even with no resulting charges and/or convictions, may be useful for background check purposes.

MGMT. ANALYSIS & DEV., MINN. DEP'T ADMIN., CRIMNET PROGRAM, BACKGROUND CHECKS AND EXPUNGEMENTS—RESEARCH REPORT 19 (2006).

505. *Id.* at 17–18.

Name-based searches are the most widely used because they are quicker, easier and cheaper than biometric ones. Commercial vendors claim that using two or more identifiers (name, date of birth, SSN) make name-based searches very accurate. . . .

The problems with name-based searches include that many people have the same or similar names, and the widespread use of aliases by people engaged in criminal activity. The growing problem of identity theft can also cause misidentification. These situations can produce both “false positives” and “false negatives” . . . . The FBI opposes name-based checks for non-criminal justice purposes due to inaccurate identification.

*Id.*

506. *Id.* at 16.

Fingerprint-based checks are very accurate and ensure that the appropriate record actually belongs to the fingerprinted person. Fingerprint-based checks substantially reduce instances of “false positives,” in which a person who has no record is mistaken for an individual with one. . . .

Another concern is “false negatives,” in which a person's criminal record is not found using name-based search. Fingerprint-based searches reduce the possibility for false negatives, to the extent that criminal records have associated fingerprints.

*Id.*

507. The information required may depend on the vendor, and the type and scope of search.

508. For ideas about how to phrase these questions, see McGuire, *supra* note 230, at 735–39. Wording is particularly important if the school seeks information about expunged or sealed records. *Id.* See also AACP REPORT, *supra* note 11, at 10 (suggesting categories of information the school might ask the applicant to disclose).

509. It is possible for another party to conduct the background check. See Steve Milam, *Student Criminal Background Checks*, NACUA NOTES, Mar. 10, 2006, available at

- Who will pay for the background check?<sup>510</sup>
- Will the results of the check be submitted directly to the college or university, to the student, or both?<sup>511</sup>
- Will any applicants (e.g., those who qualify for other waiver of the admissions fee, top scholarship candidates, etc.) be given fee waivers for the background check?
- If the student must order a background check directly from the vendor, by when must the results be submitted to the school for the applicant to be admitted unconditionally?<sup>512</sup>
- On a related point, will a student ever be permitted to enroll and start classes before the background-check process, including any appeal, is complete?
- What if an applicant refuses to participate in the criminal background-check process?<sup>513</sup>
- Who will review the results of the check? An admissions officer? The admissions committee? A subcommittee of the admissions committee? A separate committee? How will the school insure some level of consistency in the review process?
- Will the college or university supplement the vendor's results?<sup>514</sup>

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<http://www.nacua.org/nacualert/docs/StudentCrimBckgndChks.asp>. The FBI also conducts criminal background checks, but they can take as long as eight weeks to complete. AACR REPORT, *supra* note 11, at 7. *But see* MGMT. ANALYSIS & DEV., *supra* note 504, at 14 (“[T]he FBI data is viewed as incomplete because state repositories do not forward all case information, especially dispositions, or information on all types of crime.”).

510. Most schools require students to pay for the background check. Even when students pay, the school has a variety of options: Should the applicant pay the vendor directly? Should the applicant pay the school? Should the school add the amount of the check to tuition or another fee?

511. At a minimum, the school should receive a copy directly from the vendor to ensure the results are not altered.

512. Background checks do not take a uniform time to complete. “Many people will pass the background check quickly, while others’ backgrounds will require more research.” MGMT. ANALYSIS & DEV., *supra* note 504, at 27.

513. *See* AACR REPORT, *supra* note 11, at 14.

514. An emerging issue concerns the use of blogs, online social networks, and other internet searches to learn more about applicants. Stephanie Gottschlich, *Online Profiles a Factor in College Admissions*, DAYTON DAILY NEWS, Nov. 25, 2007, at A4; Press Release, Univ. of Mass., Colleges and Universities Using MySpace, Facebook, Blogs and Other Online Tools to Learn More About Applicants, (Sept. 20, 2007), available at [http://www.umassd.edu/communications/articles/showarticles.cfm?a\\_key=1536](http://www.umassd.edu/communications/articles/showarticles.cfm?a_key=1536); Alex Kingsbury, *Oh, No, the Dean of Admissions Googled My Website!*, U.S. NEWS.com, Nov. 28, 2005; Nicole Verardi, MySpace in College Admission, available at [http://www.nacacnet.org/MemberPortal/News/StepsNewsletter/myspace\\_students.htm](http://www.nacacnet.org/MemberPortal/News/StepsNewsletter/myspace_students.htm); Deborah Zhang, *Inappropriate Blog Use May Affect Admissions*, PALY VOICE (Palo Alto, Cal.), Sept. 25, 2006, available at [http://voice.paly.net/view\\_story.php?id=4509](http://voice.paly.net/view_story.php?id=4509). *Cf.* Robert Sprauge, *Googling Job Applicants: Incorporating Personal Information into Hiring Decisions*, 23 LAB. LAW. 19 (2007); Alan Finder, *When a Risque Online Persona Undermines a Chance for a Job*, N.Y. TIMES, June 11, 2006, §1, at 1.

- Who will be responsible for interfacing with the vendor (if any) and conducting quality-control checks on the search results?
- Will any types of crimes result in automatic disqualification?<sup>515</sup>
- How will applicants be notified of a positive result, and how long will they have to respond?
- What process will be used to determine whether an applicant with a criminal history will be admitted, and if so, subject to any special conditions?
- Should an appeals process be used? And if so, how should it work?<sup>516</sup>
- If a student with a criminal history is admitted, what notice will the student be given about matters such as the possibilities of not being able to complete a particular program of study, not being able to obtain a particular state license or certification, or needing to comply with particular rehabilitation statutes to be eligible for certain positions or licenses?<sup>517</sup>
- How will the college or university proceed if the applicant denies the history but cannot conclusively negate the information?
- If a conditionally admitted candidate is rejected based on the background check, will the college or university provide a reason?

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A recent study by the University of Massachusetts Dartmouth found that 25 percent of college admissions offices admit to using search engines such as Google, Yahoo, and MSN to research potential students and that 20 percent look for the same information on social networking sites such as Facebook and MySpace. The reality is that the percentages must be even higher because colleges and universities have little incentive to overstate their reliance on these digital dirt web searches but they have a significant incentive to understate their use due to fear of negative public relations and likely backlash from many Gen Y candidates who view information that they post to MySpace and some of the other social networking sites as somehow being private even though it is accessible through a quick Google search.

Steven Rothberg, *College Admissions Officers Using Facebook, MySpace, and Other Social Networking Sites to Block Students*, COLL. RECRUITER (Minneapolis, Minn.), Nov. 2, 2007, [http://www.collegerecruiter.com/weblog/archives/2007/11/college\\_admissi.php](http://www.collegerecruiter.com/weblog/archives/2007/11/college_admissi.php). If a college or university opts to permit these sorts of searches, it should prominently disclose this practice to applicants on the application and on the admissions webpage. Officers should also understand that information on these sources might have been created by someone other than the page owner or might not reflect actual events (e.g., altered or staged photographs).

515. See *supra* note 490 and accompanying text. But see AACP REPORT, *supra* note 11, at 15 (suggesting that schools might “compile a list of offenses that may automatically disqualify an individual from enrolling in the pharmacy degree program due to institutional, state, experiential site, or state board of pharmacy policies”). If the college or university does determine that certain crimes will disqualify a candidate, those crimes should be known to an applicant at the start of a process. MGMT. ANALYSIS & DEV., *supra* note 504, at 25.

516. See AACP REPORT, *supra* note 11, at 18–19. See also *supra* note 273 and accompanying text.

517. E.g., Kathryn L. Allen & Jerome Braun, Admission to the Bar—Character and Fitness Consideration, <http://www.gabaradmissions.org/pages/braun.html> (last visited Feb. 27, 2008).

- How recent must the check be?<sup>518</sup> For example, what if a student defers a semester after submitting to a check?
- If a student withdraws, takes a leave of absence, is suspended or expelled, or leaves the college or university for some other reason after matriculating, will another background check be a condition of readmission?
- Will there be other reasons or situations—such as participating in a clinic or externship—when students may be required to undergo additional background checks?
- Will outside groups that require a background check before a student participates in a clinic or externship accept the pre-matriculation background check?
- Who will serve as records custodian for the results?
- Who will have access to the results of the check?<sup>519</sup>
- How (hard copy and/or electronic) and where<sup>520</sup> will the results be stored?
- What steps will be necessary to ensure that the results remain confidential? On a related point, how will personally-identifiable information, such as social security numbers, be handled?
- How will the college or university respond to a data or security breach, either at the school or at the vendor?
- How long should the college or university maintain the record for applicants who are not admitted?<sup>521</sup>

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518. Nancy M. Ally et al., *Nurses' Promise to Safeguard the Public: Is It Time for Nationally Mandated Background Checks?* 7 JONA'S HEALTHCARE L., ETHICS, & REG. 119, 123 (2005).

519. See AACP REPORT, *supra* note 11, at 19–21 (discussing access by experiential sites, financial aid offices, campus security, substance-abuse counselors, residence life, state policy, and state licensing boards). See also Milam, *supra* note 509, stating that

[g]iven the sensitive nature of criminal background check information, it is imperative to place limits on who has access to the information. . . . Only a limited number of individuals should be allowed to have access to criminal background check information, and it should be strictly on a need-to-know basis. Generally, such records should not be available to individuals whose tasks involve evaluating the student's performance because of the potential prejudicial nature of the information. Moreover, under the Family Educational Rights and Privacy Act (FERPA), such records may not be shared with students, faculty, or others generally, but can be disclosed to and used by "school officials" for legitimate educational or security purposes.

(internal citations omitted).

520. Milam, *supra* note 509 ("Counsel should advise administrators to store the information in a location separate from a student's academic record, such that those with access to the student's academic record are not permitted automatic access to his or her possible criminal record.").

521. Cf. Frances M. Maloney & Ronald M. Green, *Workplace Violence and Security*, VPC0411 ALI-ABA 31 (2002) ("Further, employers should document all the information

- How will the college or university dispose of documents and ensure confidentiality?<sup>522</sup>
- To whom should questions about the policy be directed?
- How will information about the policy be distributed to internal constituencies and potential applicants?
- Who will be trained about the policy, how, and with what frequency?
- How and when will the policy be evaluated?

### 3. Other Considerations

In addition, the team or other school officials will also need to:

- Amend the application for admission to include information about criminal history and the background-check process.
- Draft a disclosure and authorization or consent form for the applicant to sign.<sup>523</sup>
- Draft language for both hard-copy and online admissions materials that explains the reasons the school has decided to conduct background checks and that explains the background-check process, including information about how positive results may be used in the process.<sup>524</sup>
- Draft template letters that can be used as part of the process (e.g., to alert an applicant about a check that yields positive results about a criminal history).<sup>525</sup>
- Evaluate whether other policies are impacted and should be modified (e.g., honor code, disclosure of post-matriculation arrests

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received when screening applicants, including keeping notes from telephone reference checks. Should an employer subsequently need to defend against a claim for negligent hiring, detailed documentation may serve to show that an employer took the proper steps to screen an applicant.”).

522. ACXIOM, *supra* note 442, at 11.

523. *E.g.*, Univ. of Med. & Dentistry of N.J., Authorization for Criminal Background Check, [http://som.umdj.edu/education/academic\\_program/undergrad/documents/Authorization.pdf](http://som.umdj.edu/education/academic_program/undergrad/documents/Authorization.pdf) (last visited Feb. 27, 2008).

524. For examples of background-check FAQs in the student post-matriculation context, see A.T. Still Univ., Criminal Background Checks, [https://www.atsu.edu/registrar/background\\_check.htm](https://www.atsu.edu/registrar/background_check.htm) (last visited Feb. 27, 2008). For examples of background-check FAQs in the employment context, see Univ. of Louisville, Criminal Background Check Frequently Asked Questions, <https://louisville.edu/hr/employment/manager/CBCFAQ.html> (last visited Feb. 27, 2008); Univ. of Cal., Berkeley, Working with Controlled Substances at UC Berkeley Background Checks—Questions & Answers (2007), <http://www.ehs.berkeley.edu/healthsafety/csbgdrckqa.pdf>.

525. See INTELICORP, PRELIMINARY NOTICE OF ADVERSE ACTION (SAMPLE) *available at* [http://www.intellicorp.net/documents/preliminary\\_notice.pdf](http://www.intellicorp.net/documents/preliminary_notice.pdf).

or convictions,<sup>526</sup> FERPA policy regarding directory information, employee manual regarding access to confidential information).

- Seek guidance from the appropriate administrator, office, or expert about whether the college or university should obtain additional insurance in connection with the background-check policy, particularly if using a screening company that disclaims responsibility for how the results are used.

#### B. Vendor Selection

Given that conducting a background check is a complex process, most experts and insurance companies recommend using a reputable vendor.<sup>527</sup> “Commercial vendors acquire publicly available information about individuals and sell it to [entities] that want to conduct background checks.”<sup>528</sup>

When selecting a vendor, start by preparing a request for proposal (RFP) that specifically describes the types of services the school needs and other expectations, such as compliance with pertinent laws, prices,<sup>529</sup> average time to complete checks,<sup>530</sup> insurance,<sup>531</sup> licensing,<sup>532</sup> secure transmission of information,<sup>533</sup> and handling of applicants’ confidential information.<sup>534</sup>

To develop the RFP, seek input from a variety of sources and perspectives on campus. For example, the team may include admissions professionals, general counsel, the provost, financial aid professionals, current student leaders, the chief technology officer, the chief security officer, a financial officer, and a student affairs representative. If the same company will be used to conduct background checks on employees, include a human resources representative. Also, librarians are often outstanding, but overlooked, sources of information and research knowledge. In addition, a school’s insurance company may provide helpful

526. *E.g.*, UNIV. VA., CRIMINAL ANALYSIS REPORT & EVALUATION FOR STUDENTS (2005), available at [www.virginia.edu/processsimplification/doc/caresfinalreport.doc](http://www.virginia.edu/processsimplification/doc/caresfinalreport.doc).

527. *E.g.*, FINCH, *supra* note 428, at 4; United Educators, *supra* note 11.

528. MGMT. ANALYSIS & DEV., *supra* note 504, at 15.

529. See Merry Mayer, *Background Checks in Focus*, HR MAGAZINE, Jan. 2002, available at <http://www.shrm.org/hrmagazine/articles/0102/0102agn-employment.asp>.

Price also can be a misleading indicator. Average background checks can cost from \$35 to \$50 for a regular employee and from \$150 to \$200 for a more senior employee, depending on how many counties need to be checked. Yet some screening firms may quote prices 20 percent to 30 percent lower, says Schneider, adding that in many cases, these firms are relying on databases alone as their research tool.

*Id.* In the RFP, indicate whether payment will come directly from the school or from the applicants, or whether you would like information on both approaches.

530. *Id.*

531. *Id.*

532. W. BARRY NIXON, COMPREHENSIVE GUIDE FOR SELECTING A BACKGROUND SCREENING FIRM 8, available at <http://www.workplaceviolence911.com/docs/Oct21SampleSuppliers.pdf>.

533. *Id.* at 10.

534. *Id.*

expertise and advice.<sup>535</sup>

As part of the RFP, ask that companies provide a representative client list, sample reports, and a summary of claims lodged against the company within at least the past five years; this summary should include information about litigation, claims settled short of litigation, and data breaches.<sup>536</sup> “Ask where their information will come from, and how they make sure it’s current. Court records, for instance, change daily.”<sup>537</sup> If they will not tell you or say that the information is proprietary, that is a danger sign.<sup>538</sup> Colleges and universities should also ask the vendor to “certify that all staff, regular, part-time and temporary, have been criminally screened at time of hire and ongoing checks are made to ensure employees continue to have acceptable work backgrounds.”<sup>539</sup>

Other important considerations include the privacy safeguards a company has in place and how the company handles sensitive information.<sup>540</sup> At least one

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535. *E.g.*, FINCH, *supra* note 428; Vinik, *supra* note 464.

536. NIXON, *supra* note 532, at 10. Also, when entering into a contract, make this sort of disclosure an ongoing requirement. *Id.*

537. Krotz, *supra* note 436. *See also* United Educators, *supra* note 11, at 5.

Schools that use background checking companies need to be aware that the industry is unregulated and that many companies charge low prices but offer outdated or inaccurate information. UE recommends that schools use one of the major national companies such as Kroll, Choice Point, or ADP. These companies have the resources to check criminal records at the county level in every state.

*Id.*

538. Krotz, *supra* note 436.

How the screening firm acquires its criminal history information is important too. There are three main methods for getting this data, and many firms use a combination of the three: using their own in-house researchers, contracting local court retrieval service companies to go to the courts for them and doing database searches.

“It’s important for the HR industry to ferret out those who use databases,” says Schneider. If a screening firm is relying on third-party databases to conduct criminal history record checks, employers should ask if the court sanctions the database and how often the material is updated, he says.

Some of the firms that rely on databases merely buy a copy of a court database and then access that one copy for up to six months without updating . . .

Using a local court retrieval service can slow the process and introduce inaccuracies because the information is going through more hands, says Mather. But with more than 3,000 counties in the United States, only the largest background screening firms can rely exclusively on their own personnel for checking criminal histories.

Mayer, *supra* note 529.

539. NIXON, *supra* note 532, at 9. The National Association of Professional Background Screeners—a nonprofit membership organization—has promulgated a Code of Conduct for employees of member companies. NAT’L ASS’N PROFL. BACKGROUND SCREENERS, CODE OF CONDUCT, available at <http://www.napbs.com/images/pdf/Code%20of%20Conduct.pdf>.

540. DIANN DANIEL, BACKGROUND CHECK BASICS (2006), available at [http://www.csoonline.com/read/110106/brf\\_pass\\_it\\_on.html](http://www.csoonline.com/read/110106/brf_pass_it_on.html) (“The agency should also offer privacy safeguards—such as encryption and masking—for a candidate’s personal information the agency delivers to you.”). *See* Bob Sullivan, *Online Job Listing an ID Theft Scam*, MSNBC, Nov. 4, 2002, <http://www.msnbc.msn.com/id/3078533>.

screening company has appointed a Chief Privacy Officer.<sup>541</sup> A related issue is whether the company and its employees will sign appropriate confidentiality and non-disclosure agreements regarding the data collected.<sup>542</sup> In addition, make sure you understand the vendor's security system, and seek input from experts on your campus, such as the chief technology officer, about whether the security controls are sufficient.<sup>543</sup>

As part of the due-diligence process, a college or university representative may also want to visit the company's physical location. Ask how many employees the vendor has.<sup>544</sup> Inquire how the vendor's employees are trained and ask for a copy of the training policy.<sup>545</sup>

It is also important to understand whether the company is financially viable:

Does the vendor have demonstrated financial stability over the last three years? Have your Controller or CPA review [the debt] ratio and outstanding debt to analyze whether they are within acceptable industry standards and do not indicate potential problems in the near term; [and the existence] of sufficient cash, credit and liquid assets to fund continued investments in technology to maintain a competitive position.<sup>546</sup>

Some vendors resell data collected from clients. Thus, ensure that "a written policy exists that states that applicant or client personal data information is never resold."<sup>547</sup> Then make certain this language is incorporated into the final contract.<sup>548</sup>

Before making a final decision, ask the company to conduct a few sample tests. For example, provide the company with names of individuals you know have criminal records and see if the company locates them.<sup>549</sup>

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541. ACXION, *supra* note 442, at 11.

542. NIXON, *supra* note 532, at 9.

Require the vendor to disclose all sub-contractors that will be used that are involved with the processing of personal identifiable information or will have access to this information and ensure that these vendors and their employees be held to same standards you have established for your employees. Require that new vendors that may be hired during the duration of the contract be held to these standards and require the vendor to either provide periodic reports verifying this procedure is being followed or to allow their processes to be audited.

*Id.* at 13–14.

543. *Id.* at 12.

544. "This question is a good way to judge the size of the company, an indicator of the kind of resources it has." United Educators, *supra* note 11, at 5.

545. NIXON, *supra* note 532, at 11.

546. *Id.* at 13.

547. *Id.*

548. *Id.*

549. Mayer, *supra* note 529. "A small study by the *Chicago Tribune* showed that one firm called InstantPeopleCheck.com missed the criminal backgrounds on all 10 people in Illinois that the newspaper gave it to check. The company was a low-end provider that charged \$9.95 per background check." FRENKIL & VINIK, *supra* note 329, at 31. Remember to either get consent from the individuals whose names you are using or use names and criminal records that already



Finally, engage counsel to either draft or review a contract with the vendor that protects the interests of the institution and its admissions applicants. In addition to more traditional contract terms, the contract should memorialize key performance expectations outlined in the RFP, and continuing obligations, such as disclosures regarding data breaches.<sup>550</sup>

### C. Review and Assessment

As with any policy or program, a college or university should develop a review and assessment process to review the policy's process, outcomes, and impact.<sup>551</sup> A college or university should evaluate whether the policy or program is achieving the goals for which it was designed, whether it is having any unexpected or unintended consequences, and whether it should be continued, modified, or ended. And when a third-party vendor is involved, that company's performance also should be regularly assessed.<sup>552</sup> Assessment should not be an afterthought. Instead, the method of assessment—including the timing of assessment, who will have access to the results of the assessment, and how those results will be used—should be established when the policy is put in place and the evaluator included in the process from the beginning, or at least the early stages.<sup>553</sup>

Below is a non-exhaustive list of topics associated with evaluating a background-check policy and procedure by reviewing files of candidates with criminal histories.

- Do differences exist between those accepted and those rejected?
- If the application also asked candidates to self-disclose criminal history, how many files contained discrepancies between the applicant and the background-check results?
- How many false positives occurred? Are patterns discernable?
- Is the school aware of any false negatives? If so, how many and are patterns discernable?
- What types of crimes were committed?
- For rejected applicants, were they admitted to other institutions?<sup>554</sup>
- For students who were admitted and who actually enrolled, did they commit additional crimes or disciplinary violations?

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are in the public domain.

550. See NIXON, *supra* note 532.

551. See generally LANA D. MURASKIN, UNDERSTANDING EVALUATION (1993), available at <http://www.ed.gov/PDFDocs/handbook.pdf>.

552. E.g., Press Release, Michigan State Univ., MSU Researchers Developing and Studying Background Check System for Care of State's Most Vulnerable Patients (Mar. 6, 2007), available at <http://newsroom.msu.edu/site/indexer/2684/content.htm>.

553. MURASKIN, *supra* note 551, at 11, 16.

554. The college or university may attempt to follow up with candidates based on permanent address information on the admissions application or check for the candidates in the National Student Clearinghouse.

- Is there evidence of disparate impact based on race or other protected characteristics?<sup>555</sup>
- Should the scope of the background check be modified?<sup>556</sup>
- How has the policy impacted the admissions pool in terms of number and quality of applicants; applicant demographics, especially regarding applicants of color and applicants from lower socio-economic groups; yield rates; and withdrawals after conditional acceptance?
- How has the cost of conducting background checks (if not borne by applicants) impacted the campus?
- How has the policy impacted the campus atmosphere?
- How has the policy impacted campus safety? Is it possible to determine whether the policy has impacted Core Survey results regarding high-risk alcohol and other drug use?<sup>557</sup>
- Have students admitted with criminal backgrounds been negatively impacted in any way (e.g., subject to taunts or harassment, asked to move from a particular residence hall)?
- Have any breaches of confidentiality, data, or security occurred?
- Has the policy caused any other unintended consequences, whether positive or negative?
- How many complaints or concerns have been submitted regarding the policy?
- By whom were they submitted (e.g., applicants, admitted students, faculty, admissions professionals, etc.)?
- Are there any patterns to the complaints or concerns?
- How did the school respond to the various complaints and concerns?
- Has litigation been threatened or filed?
- How well has the vendor performed?
- Have reports been accurate (low rates of false positives and false negatives)?
- Have reports been timely?
- Has the average time for receiving reports lengthened?
- Is the company's technology still current?<sup>558</sup>

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555. See *supra* note 255 and accompanying text (regarding the disparate impact of requesting information about arrests that did not lead to conviction).

556. See *supra* note 502 for information regarding the scope of the background check.

557. See S. Ill. Univ. Carbondale, Core Institute, <http://www.siu.edu/~coreinst> (last visited Feb. 27, 2008).

558. MGMT. ANALYSIS & DEV., *supra* note 504, at 27 (explaining that technology in this area is changing rapidly and that this rapid change requires "continual review of policies to ensure

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- Have any claims been filed against the company since the contract was signed?
- Have company representatives worked well with college and university representatives?
- Has the company worked well with applicants?
- Has the company experienced a high turnover in personnel?
- Is the company still following key policies and procedures?
- Have there been any financial disputes (e.g., payment of fees)?
- Has the company's financial position changed negatively?
- Has the company followed all provisions of the contract with the institution?

## CONCLUSION

In most segments of society, including higher education, background checks are becoming increasingly common. More colleges and universities than ever are conducting background checks on prospective students. Although background checks will not shield our campuses from violence, colleges and universities should seriously consider them as part of a comprehensive, environmental policy. No laws prohibit student background checks, and indeed some laws actually require the checks in certain situations. Therefore, for many schools, the policy considerations will tip the scale in favor of conducting background checks.

Schools that decide to conduct background checks should do so with sensitivity to the legal and policy issues involved, and to the consequences, both positive and negative, on campus culture and resources.

The bottom line is that to fulfill our missions and to provide a reasonably safe living and learning environment, we must understand who our students are. And one important dimension of a person's profile is his or her history of past offenses. As with other important information we seek from potential students, such as completion of a prior degree or scores on entrance exams, we cannot, unfortunately, rely on honest self-disclosures. Accordingly, background checks are truly "an idea whose time has come."<sup>559</sup>

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they are up to date and [reflect] current technological capacities").

559. See Marklein, *supra* note 71 (quoting Catherine Bath, Exec. Dir., Sec. on Campus, Inc.).

**Appendix A: The UNC Policy Manual: 700.5.1[R]\***

3. UNC constituent institutions will perform criminal background checks on applicants being considered for admission, applicants admitted, or applicants offered admission who have indicated their intent to attend, before the applicant matriculates, if the application and supporting materials contain one or more of the following triggers (or red flags):

- i. The application together with supporting material contains materially inconsistent answers that have not been satisfactorily explained;
- ii. The applicant answers one or more of the six criminal background/discipline questions affirmatively or submits subsequent information indicating (1) pending criminal charges, (2) acceptance of responsibility for a crime, (3) criminal convictions or (4) school disciplinary action, unless the affirmative answer or supporting material relates to a school disciplinary action that resulted from an offense that is remote in time or was insubstantial;
- iii. The application omits one or more answers without an acceptable explanation for the omission;
- iv. The application has an unexplained time period since graduation from high school during which the applicant was not, for example, enrolled in higher education, enlisted in the military, or employed fulltime; or
- v. Any other reason sufficient to the constituent institution.

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10. If an applicant has a positive criminal or disciplinary record, the constituent institution must:

A. Compare the results of the checks to the application and supplemental information supplied by the applicant to determine discrepancies. If there are no discrepancies and if the constituent institution has made an individual determination that the applicant does not pose a significant threat to campus safety, and there is no additional information indicating that a decision to admit should be modified, the applicant may be admitted or a previous decision to admit may stand.

B. If there are discrepancies, or if there is information indicating that admission decision should be further examined, the constituent institution must provide the applicant an opportunity either to demonstrate that the report of criminal, disciplinary or other relevant history was erroneous (e.g., wrong person) or to explain the discrepancy.

C. If the report is determined to be accurate and there is a discrepancy between the reported information and the application or supporting material the applicant submitted, or there is additional information that amplifies the application information or otherwise indicates that the admission should be

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\* UNIV. OF N.C., THE UNC POLICY MANUAL: 700.5.1[R], REGULATION ON STUDENT APPLICATION BACKGROUND CHECKS (2006), available at [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).

examined further:

(i) The presumption is that the admission will be denied or withdrawn if the applicant has failed accurately to disclose relevant information in response to a question on the application. The burden is on the applicant to demonstrate that the omission or misinformation was the result of an honest mistake, that it was not intended to mislead, and that the applicant should be admitted in spite of the failure to disclose;

(ii) If the failure to disclose accurate information does not result in the denial of or withdrawal of the offer of admission, but there is information that draws the decision to admit into question, before the student may matriculate, the constituent institution must make an individual determination as to whether the nature of any crime committed or other behavior disclosed, together with other available information, suggests that the applicant will pose a significant threat to campus safety. If the constituent institution determines that there is a significant threat, the admission must be denied or withdrawn. If not, the student may be admitted in accordance with the normal admission process.

**Appendix B: UNC Wilmington Application for Undergraduate Admission\*\***

**Campus Safety Questions – All Applicants Must Complete**

Your “yes” answer to one or more of the following questions will not necessarily preclude your being admitted. *However*, your failure to provide complete, accurate, and truthful information will be grounds to deny or withdraw your admission, or to dismiss you after enrollment.

For the purpose of the following six questions, “crime” or “criminal charge” refers to any crime other than a traffic-related misdemeanor or infraction. You must, however, include alcohol or drug offenses whether or not they are traffic-related.

1. Have you been convicted of a crime?
2. Have you entered a plea of guilty, a plea of no contest, a plea of nolo contendere, or an Alford plea, or have you received a deferred prosecution or prayer for judgment continued, to a criminal charge?
3. Have you otherwise accepted responsibility for the commission of a crime?
4. Do you have any criminal charges pending against you?
5. Have you ever been expelled, dismissed, suspended, placed on probation, or otherwise subject to any disciplinary sanction by any school, college, or university?
6. If you have ever served in the military, did you receive any type of discharge other than an honorable discharge?

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\*\* UNIV. OF N.C. WILMINGTON, ADMISSIONS, APPLY, (2007), *available at* <http://www.uncwil.edu/admissions/documents/AdmiApp2007-2008.pdf>.

**Appendix C: SUNY Admissions Policy\*\*\***

New York State Corrections Law [Sections 750, 752 and 753] forbids discrimination against individuals previously convicted of criminal offenses. However, University counsel advises that the law allows an institution to deny admission to an applicant based on prior criminal convictions where such admission would involve an unreasonable risk to property or would pose a risk to the safety or welfare of specific individuals or the public. Campus policy should include procuring appropriate information related to previous criminal and incarceration records and obtaining recommendations from corrections officials and, at times, current employment or educational supervisors. Campuses must utilize a standing committee to review applicants who affirm that they have either been convicted of a felony or been dismissed from a college for disciplinary reasons.

The purpose of the campus committee is to review appropriate information and decide whether an applicant with a felony conviction or disciplinary dismissal from an institution of higher education should be admitted. If admitted, the conditions of admissibility must also be decided; for example, eligibility for on-campus housing and counseling services. The committee may request the applicant to provide the following:

1. The specifics of the felony conviction or disciplinary dismissal such as background, charges filed and date of occurrence. Appropriate releases may have to be executed by the applicant for receipt of criminal history information or educational disciplinary records;
2. For applicants with felony convictions, references must be provided from the Department of Correctional Services, Division of Parole, including the name and addresses of parole officers. For those currently in parole status, the committee should obtain the conditions of parole and determine if the campus environment affords compliance. The committee should also review whether specific services will be needed for the ex-offender. Parole officials should be questioned as to whether the applicant would pose a threat to the safety of the campus community;
3. A personal interview to either clarify or verify information will be necessary.

After review of all available information, the committee must decide whether to deny admission, admit the applicant or admit the applicant with certain conditions. To clarify the lines of communication, the president of each campus should designate a campus official to act as the liaison person with the Division of Parole of the Department of Correctional Services and the local parole office

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\*\*\* State Univ. of N.Y., Admission of Persons with Prior Felony Convictions or Disciplinary Dismissals, *available at* [http://www.suny.edu/sunypp/documents.cfm?doc\\_id=342](http://www.suny.edu/sunypp/documents.cfm?doc_id=342) (last visited Feb. 27, 2008).

**Appendix D: George Mason University School of Law Admissions FAQ\*\*\*\***

Must I disclose information about prior or pending criminal, disciplinary, or academic problems in my application?

Yes. It is extremely important that you describe details of any criminal, disciplinary and/or academic actions in response to questions 18, 19, 20 or 21 of our application. Failure to disclose this information can result in serious problems, both in relation to your law school application (we have revoked acceptances in the past in cases in which we learned of the applicant's failure to disclose information) and in applying for admission to the bar in any state. State boards of bar examiners will conduct character and fitness investigations to determine if you are fit for admission to the bar. Those investigations typically include criminal background checks, as well as review of your law school application, undergraduate record and law school record. It is critically important that your disclosures of the type of information requested in our questions 18, 19, 20 and 21 be complete, truthful and consistent in your law school and bar applications.

I did some stupid things in high school and college—alcohol violations, fraternity pranks, etc. Will these past indiscretions prevent me from being admitted to law school?

Many law school applicants—and many practicing attorneys—do not have spotless pasts. We see many applicants each year who have been written up for underage drinking on campus or for silly pranks. We also see a fair number of applicants who have been arrested for driving under the influence of alcohol.

First and most important: Disclose everything about events that resulted in criminal or disciplinary actions.

Second: The fact that you were a teenager and college student who did not use perfect judgment at all times will not necessarily bar you from admission to law school or from admission to one or more state bars. In terms of admission to law school, we will consider everything in your application. If you have a DUI in your record, or if you got caught spreading toilet paper on campus, etc., it is still possible to gain admission to law school. There are individuals currently in law school who have such activities in their records.

If you have a pattern of criminal activity, or have shown a pattern of very poor judgment, that may pose a problem in gaining admission to law school and/or to the bar. If you have been convicted of one or more felonies, or have abused positions of trust in which you have been placed, you could have a problem gaining admission to law school and/or to the bar. In the past, we have contacted applicants to make them aware of problems that may lie ahead in terms of gaining bar admission, and to urge them to contact the board of bar examiners in the state in which they ultimately wish to practice. If you have serious criminal convictions in your record, and if you are an applicant we would like to admit, we may contact you to discuss your particular situation.

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\*\*\*\* George Mason Univ. Sch. of Law, Admissions, Frequently Asked Questions, <http://www.law.gmu.edu/admissions/faq> (last visited Feb. 27, 2008).

