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Jeffrey F. Levine

Alicia M. Cintron

Kristy L. McCray

LEGAL IMPLICATIONS OF CONDUCTING BACKGROUND CHECKS ON INTERCOLLEGIATE STUDENT ATHLETES

JEFFREY F. LEVINE,* ALICIA M. CINTRON,** AND KRISTY L. MCCRAY***

INTRODUCTION

College athletics is big business[1] that generates massive revenues in the hundreds of millions of dollars for some institutions.[2] Just like other industries such as film, politics, and business, college athletic departments have faced scrutiny in the #MeToo era.[3] Intercollegiate sport has faced mounting scrutiny

* Jeffrey F. Levine is an Assistant Clinical Professor of Sport Management at Drexel University's LeBow College of Business. His primary research areas include (1) legal and policy aspects of sport, and (2) non-profits in sport. Dr. Levine graduated from the University of Michigan with a bachelor's degree in Sport Management and Communications, received a Juris Doctor from Tulane University Law School with a certificate in sports law, and was awarded his doctorate in sport management at the University of Louisville, with an expertise in sport policy. Prior to academia, Dr. Levine worked in the business and legal segments of the sport industry, as well as in private law practice.

** Alicia M. Cintron, PhD, is an Assistant Professor in the School of Human Services at the University of Cincinnati in Cincinnati, Ohio. Her research primarily focuses on 1) sport facility development and urban planning, and 2) underrepresented populations in sport.

*** Kristy L. McCray, PhD, is Assistant Professor in the Department of Health and Sport Sciences at Otterbein University. Her research focuses primarily on sexual violence prevention in intercollegiate athletics.

1. Joe Nocera, *It's Business, NCAA. Pay the Players,* BLOOMBERG, Oct. 13, 2017, https://www.bloomberg.com/opinion/articles/2017-10-13/it-s-business-ncaa-pay-the-players.

2. *See* Chris Smith, *College Football's Most Valuable Teams: Texas A&M Jumps to No. 1*, FORBES, Sept. 11, 2018, https://www.forbes.com/sites/chrissmith/2018/09/11/college-footballs-most-valuable-teams/#7760a43c6c64; *see also NCAA Finances*, USA TODAY, http://sports.usatoday.com/ncaa/finances (last visited Oct. 8, 2019).

3. *See* Eliza Relman, *Women From Many Industries Speak About Sexual Abuse As Part of #MeToo*, BUS. INSIDER, Oct. 29, 2017, https://www.businessinsider.com/women-from-many-industries-speak-about-sexual-abuse-as-part-of-metoo-2017-10; *see also* David Haugh, *Column: Will College Athletics be Next For the #MeToo Movement?*, CHI. TRIB., Jan. 29, 2018, https://www.chicagotribune.com/sports/college/ct-spt-haugh-michigan-state-sexual-assault-scandals-20180129-story.html.

over how it, as a collective institution, responds to sexual assault and other crimes that take place perpetrated by student athletes.[4]

According to reports from multiple mainstream sport media outlets, instances of criminal incidents involving student athletes have become increasingly commonplace.[5] For example, Baylor University has been embroiled in a multitude of lawsuits since 2012, alleging a culture of widespread violence and sexual assault perpetrated by its football players.[6] The university has faced liability over allegations that the sexual assault claims, when raised with the athletic department, were mostly ignored by coaches, athletic personnel, and university administrators.[7] Oregon State University admitted a student athlete previously convicted of sexual violence as a minor, which drew strong rebuke from the student body and others.[8] Brenda Tracy who survived a gang rape by four Oregon university football players in 1998 only to see the ordeal result in a two-game player suspension (and no criminal repercussions), has also brought more attention to this issue by devoting her life to educating college-athletes about ending sexual violence involving college athletes, as well as changing policy to prevent sexual assault on campus.[9] Her organization, #SetTheExpectation, is "dedicated to combating sexual and physical violence through raising awareness, giving back, education and direct engagement with coaches, young men, and boys in high school and collegiate athletic programs."[10] These instances of sexual assault, in addition to resulting in serious physical and emotion trauma to victims who suffered sexual violence, led to

4. *See* Will Leitch, *The Sports World Needs its #MeToo Moment*, N.Y. MAG., June 27, 2018, http://nymag.com/daily/intelligencer/2018/06/the-sports-world-needs-its-metoo-moment.html.

5. *See* Jeff Benedict, *An Alarming Number of College Athletes Charged With Serious Crime*, SPORTS ILLUSTRATED, Sept. 8, 2010, https://www.si.com/more-sports/2010/09/08/athletes-crime; *e.g.* Paula Lavigne, *Outside the Lines: College Athletes at Major Programs Benefit From Confluence of Factors to Sometimes Avoid Criminal Charges*, ESPN (June 15, 2015), http://www.espn.com/espn/otl/story/_/id/13065247/college-athletes-major-programs-benefit-confluence-factors-somes-avoid-criminal-charges.

6. *See* Philip Ericksen, *Baylor Settles With Former Student Who Accused Football Players of Gang Rape*, WACO TRIB.-HERALD, July 13, 2018, https://www.wacotrib.com/news/courtsandtrials/baylor-settles-with-former-student-who-accused-football-players-of/article_7af8cda0-ae12-53a7-a048-efe8ed020204.html.

7. *See* Susan Ladika, *Sports and Sexual Assault*, CQ RESEARCHER (April 28, 2017), https://library.cqpress.com/cqresearcher/document.php?id=cqresrre2017042800.

8. Emily Giambalvo, *Students Ask WSU for Policy Preventing Recruitment of Athletes With History of Sexual Violence*, SEATTLE TIMES, July 17, 2017, https://www.seattletimes.com/sports/wsu-cougars/students-ask-wsu-for-policy-preventing-recruitment-of-athletes-with-history-of-sexual-violence/.

9. *See* Elliott Almond, *Woman Who Says She Was Raped by Cal Player Recalls Talking to Football Team Last Summer*, SANTA CRUZ SENTINEL, April 12, 2019, https://www.santacruzsentinel.com/2019/04/10/woman-who-says-she-was-raped-by-cal-player-recalls-talking-to-football-team-last-summer/; *see also*, Jordan Ritter Conn, *Brenda Tracy's Fight Against College Football's Rape Culture*, RINGER (Nov. 6, 2017), https://www.theringer.com/features/2017/11/6/16599528/brenda-tracy-advocate-against-college-football-rape-culture; *see also* Karen Given, *Brenda Tracy Fights Sexual Violence, One Locker Room at a Time*, WBUR (Jan. 25, 2019), https://www.wbur.org/onlyagame/2019/01/25/brenda-tracy-sexual-violence-athletes.

10. #SetTheExpectation, https://www.settheexpectation.com/mission (last visited May 25, 2019).

each institution being subject to scrutiny and increased pressure to implement a mechanism that identifies and bars student athletes with a prior history of sexual violence.[11]

As the primary governing body for college athletics, the National Collegiate Athletic Association (NCAA) has adopted a policy on and dedicated resources to its membership for combatting sexual assaults on campus.[12] In particular, the NCAA Board of Governors adopted a campus sexual violence policy in 2017, requiring student athletes, administrators, and coaches to complete annual sexual violence prevention education.[13] Despite this prevention education mandate, the NCAA has balked at adopting more significant legislation designed to combat sexual assault. Its Committee to Combat Sexual Violence disbanded in 2019, resolving only to continue following this issue.[14] This prompted eight U.S. Senators to author a letter addressed to the Commissioners of each of the NCAA's "Power Five" Conferences, prodding these leaders to take "serious and meaningful steps to address the misconduct and sexual violence within the athletics programs in your respective conferences."[15] Thus it appears that the NCAA's inaction has invited government attention.

In addition to the stress of potential government oversight, the institutions of higher education (IHEs) that comprise the NCAA still face societal pressure to implement additional policies that strategically address student athlete sexual assault on campus. Any IHEs looking to the Trump Administration for guidance may receive conflicting feedback because the Department of Education issued additional guidance that, rather than ratcheting up the duty to protect owed to the alleged victim, provided more rights to the accused.[16] Due to the conflicting feedback from the NCAA and the Trump Administration, IHEs may hesitate on

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11. *See* Ericksen, *supra* note 6; Almond, *supra* note 9; Conn, *supra* note 9; Given, *supra* note 9.

12. *See* NAT'L COLLEGIATE ATHLETIC ASS'N, (hereinafter "NCAA"), *Sexual Violence Prevention: An Athletics Tool Kit for a Healthy and Safe Culture* (2016), http://www.ncaa.org/sites/default/files/SSI_Sexual-Violence-Prevention-Tool-Kit_20161117.pdf; *see also*, NCAA, *NCAA Board of Governors Policy on Campus Sexual Violence* (2018), http://www.ncaa.org/sites/default/files/Aug2018SSI_UpdatedCampusSexual ViolencePolicy_20180905.pdf.

13. Merrit Kennedy, *NCAA Will Require Athletes and Coaches to Complete Sexual Violence Education*, NPR (Aug. 10, 2017), https://www.npr.org/sections/thetwo-way/2017/08/10/542652954/ncaa-will-require-athletes-and-coaches-to-complete-sexual-violence-education.

14. Nancy Armour, *Opinion: NCAA Drops the Ball Accepting Athletes Punished for Sexual Assault*, USA TODAY, April 4, 2019, https://www.usatoday.com/story/sports/columnist/nancy-armour/2019/04/04/ncaa-failures-accepting-athletes-punished-for-sexual-assault/3369687002/.

15. Letter from Ron Wyden et al., United States Senators, to John Swofford et al., NCAA Power Five Commissioners (Feb. 7, 2019), https://www.wyden.senate.gov/imo/media/doc/NCAA%20Letter%20to%20Power%205%20Commissioners.pdf.

16. *See* Erica L. Green, *New U.S. Sexual Misconduct Rules Bolster Rights of Accused and Protect Colleges*, N.Y. TIMES, Aug. 29, 2018, https://www.nytimes.com/2018/08/29/us/politics/devos-campus-sexual-assault.html.

implementing a policy approach responding to issues of sexual violence on their campuses and may fear ramifications once implementing a new policy.

This hesitance on the part of the NCAA and the IHEs has also led to criticism from anti-sexual assault advocates, who allege that "[e]very day, the NCAA puts women at risk…[by] allowing rapists, stalkers and domestic abusers on its member campuses or welcoming them to their athletic teams."[17] In other words, current NCAA policies are akin to doing nothing; "there are no repercussions . . . the NCAA doesn't care. If it did, it would change its rules."[18] IHEs must also balance responding to public pressure to penalize student athletes possessing a history of sexual violence with the potential legal ramifications related to denying student athletes of their right to play a sport or attend the institution. In 2017, Youngstown State University faced campus backlash after it allowed a student athlete convicted of rape as a teenager to play for its football team.[19] The school reversed its decision and prevented him from playing once the story became national news.[20] However, the student sued, alleging a lack of due process involving depriving him of the right to play;[21] an appeals court sided with the student athlete.[22] This incident illustrates the complexity this issue and potential legal ramifications that may exist for policy decisions made by IHEs.

Concerns surrounding student athlete's propensity to commit acts of sexual violence may be justified. In addition to the systematic issues at Baylor University, and the individual instances at Oregon State and Youngstown State, research has suggested a connection exists between athletic participation and sexual violence.[23] Unique characteristics associated with athletic ability such as hypermasculinity,[24] entitlement related to their position as athletes,[25]

17. Armour, *supra* note 14, at 1.

18. *Id.* at 4-5.

19. *See* Ben Kercheval, *Convicted Rapist Ma'lik Richmond Remains at Youngstown State as School Settles Suit*, CBS SPORTS.COM (Oct. 3, 2017), https://www.cbssports.com/college-football/news/convicted-rapist-malik-richmond-remains-at-youngstown-state-as-school-settles-suit/.

20. *Id.*

21. John Taylor, *Youngstown State, Ma'lik Richmond Settle Lawsuit, Allowing Convicted Rapist To Remain On Roster*, NBC SPORTS (Oct. 3, 2017), https://collegefootballtalk.nbcsports.com/2017/10/03/youngstown-state-malik-richmond-settle-lawsuit-allowing-convicted-rapist-to-remain-on-roster/.

22. Associated Press, *Ma'lik Richmond Plays for Youngstown State After Court Decision*, ESPN (Sept. 6, 2017), https://www.espn.com/college-football/story/_/id/20726418/malik-richmond-plays-youngstown-state-court-decision.

23. *See* Kristy L. McCray, *Intercollegiate Athletes and Sexual Violence: A Review of Literature and Recommendations for Future Study*, 16 TRAUMA, VIOLENCE, & ABUSE, 438 (2015).

24. *See* Eric D. Anderson, *The Maintenance of Masculinity Among the Stakeholders of Sport*, 12 SPORT MGMT. REV. 3 (2009); *see also* Christopher M. Parent, *How Sexual Assault by Football Players is Exposing Universities to Title IX Liability*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L. J., 617 (2003).

25. *See* Mary P. Koss & John A. Gaines, *The Prediction of Sexual Aggression by Alcohol Use, Athletic Participation, and Fraternity Affiliation*, 8 J. INTERPERSONAL VIOLENCE 94 (1993).

competitiveness,[26] and group mentality[27] have related to an inclination to commit acts of sexual violence. On the other hand, research has also found little to no connection between athletic participation and committing acts of sexual violence,[28] highlighting additional concern with IHEs focusing on student athletes as the major culprit of acts of sexual violence. Therefore, the research also invites IHEs to exercise caution when crafting policies.

One policy approach to combatting on-campus sexual violence is requiring prospective student athletes to submit to a criminal background check (CBC) or an informal background check.[29] Submitting to such a search is often deemed a condition of participating in that sport at the collegiate level. Various constraints influence IHEs' decision on background checks. Some IHEs have voluntarily implemented their own policy to investigate incoming student athletes. Other IHEs reside in states (e.g., California, Idaho) that have passed legislation or enacted policies requiring state universities to conduct some form of background checks on admitted student athletes. Some IHEs belong to a conference requiring certain background check procedures specifically pertaining to student athletes. This further complicates the decision-making process of the IHEs.

The Big 12 Conference, the Southeastern Conference (SEC), and the Pacific 12 Conference all maintain some form of policy restricting the recruitment of transfer athletes with a record of sexual assault or domestic violence.[30] In 2018, the SEC extended its policy to also include incoming freshman.[31] In addition, although the Big 10 Conference allows its members to individually set their own policies, Indiana University's Athletic Department passed a rule in 2015 requiring all prospective student athletes pass a CBC and internet search as a condition of participation.[32] The university also issued a statement noting, "Indiana University Athletics shall conduct an appropriate inquiry into every

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26. *See* Sandra L. Caron et al., *Athletes and Rape: Is There a Connection?*, 85 PERCEPTUAL & MOTOR SKILLS, 1379 (1997).

27. *See* Todd W. Crosset et al., *Male Student-Athletes Reported for Sexual Assault: A Survey of Campus Police Departments and Judicial Affairs Offices*, 19 J. SPORT & SOC. ISSUES 126 (1995).

28. *See* Dave Smith & Sally Stewart, *Sexual Aggression and Sports Participation*, 26 J. SPORT BEHAV., 384 (2003).

29. *See* Lindsay M. Potrafke, *Checking Up on Student-Athletes: A NCAA Regulation Requiring Criminal Background Checks*, 17 MARQ. SPORTS L. REV. 427 (2006).

30. Sarah Brown, *Big-Time Sports Programs Tighten Rules on Athletes With Sexual-Assault Records*, CHRON. HIGHER EDUC., Aug. 9, 2017, https://www.chronicle.com/article/Big-Time-Sports-Programs/240892.

31. James Crepea, *SEC Expands Serious Misconduct Policy to Include High School Signees*, OREGONIAN, June 1, 2018, https://www.al.com/sports/2018/06/sec_expands_serious_misconduct.html.

32. Zach Osterman, *New IU Policy Bans Athletes With History of Sexual or Domestic Violence*, INDIANAPOLIS STAR, April 19, 2017, https://www.indystar.com/story/sports/college/indiana/2017/04/19/indiana-hoosiers-sexual-violence-athlete-ban-fred-glass/100660758/.

prospective student-athlete's background consistent with the due diligence below prior to providing him/her athletically related aid or allowing him/her to practice or compete[.]"[33]

Other options of information gathering also exist. Instead of implementing a formal policy, similar to Indiana University, IHEs may also gather information by requiring applicants to self-disclose prior convictions on an admissions application. For instance, a streamlined admissions application accepted at over 700 IHEs known as "the Common Application" contains a self-disclosure question asking about the applicant's criminal and disciplinary history.[34] Although the Common Application vets all students, it is clear that IHEs are cognizant of prior issues students may carry into their time at university.[35] Thus, although it appears that some IHEs already use background checks to vet student athletes, a great deal of variability exists for IHEs.[36]

Conventional wisdom dictates that implementing CBCs is a prudent policy decision to mitigate IHEs' potential risk against liability for injuries or damages another person may suffer, whether direct or vicarious, because of a student athlete who commits a violent crime while enrolled as a student. Research indicates that the IHEs' position on performing background checks on student athletes is evolving.[37] Cintron, Levine, and McCray found that at least 41 Division I institutions maintained some form of background check specifically for student athletes, which is a logical response to the trend of Division I IHEs seemingly at greater risk of sexual violence on campus.[38] This finding was larger than that of Hughes, Elliott, Myers, Heard, and Nolan, who in 2016 reported only 12 out of 567 IHEs used some form of background checks on student athletes.[39] Thus, an inference of the Cintron and colleagues study may be that background checks are becoming an increasingly more popular policy approach

33. Press Release, Ind. Univ., IU Athletics Adopts Policy Barring Prospective Student-Athletes With History of Sexual Violence (April 21, 2017) (On file with Ind. Univ.), https://news.iu.edu/stories/2017/04/iub/releases/21-athletics-student-athlete-policy.html.

34. Darby Dickerson, *Background Checks in the University Admissions Process: An Overview of Legal and Policy Considerations*, 34 J.C. & U.L. 419, 433 (2008).

35. *Id.*

36. *Id.*

37. *See* Alicia M. Cintron et al., *Preventing Sexual Violence on College Campuses: An Investigation of Current Practices of Conducting Background Checks on Student Athletes*, 30 J. LEGAL ASPECTS SPORT (forthcoming 2020).

38. *Id.*; *see also* Jacquelyn D. Wiersma-Mosley & Kristen N. Jozkowski, *A Brief Report of Sexual Violence Among Universities with NCAA Division I Athletic Programs*, 9(17) BEHAV. SCI. 1, 4 (2019).

39. Stephanie F. Hughes et al., *College Athletics and Background Checks: Literature Review and Survey Results*, N. KY. UNIV. (2016), http://riskaware.com/wp-content/uploads/2015/04/College-Athletics-and-Background-Check-Policies.pdf.

within college athletic departments to mitigate instances of sexual violence on campus.[40]

Implementing formal and informal background checks may be intended as a measure to reduce a university's legal exposure. However, IHEs that choose to use some version of CBCs as a potential solution to reducing sexual violence on campus may face legal scrutiny because of such a policy. Liability possibly exists pursuant to multiple theories, in particular, a violation of a student athlete's constitutional rights and/or a claim under the theory of negligence suffered by a potential victim. Claims may exist at federal and state law, creating a potential legal minefield for IHEs seeking to proactively develop policies to address this issue.

Research suggests an increasing number of IHEs are performing background checks specifically on student athletes while not subjecting the general student population to the same. Therefore, the purpose of this paper was to explore the potential legal implications of IHEs that implement background checks solely on student athletes. Part one will discuss the potential legal issues associated with requiring student athletes to submit to a background check as a condition of admission and playing on an intercollegiate team. Part two will discuss the potential liability IHEs may face if they fail to act after a background check uncovers a student athlete's criminal act. Part three provides recommendations for IHEs to mitigate instances of sexual violence within its student body, in addition to concluding remarks.

PART ONE: LEGAL ISSUES RELATED TO BACKGROUND CHECKS AS CONDITION OF ADMISSION AND PLAY

IHEs may require that student athletes take a background check in order to be admitted and play on a specific varsity sports team. This condition may trigger certain constitutional provisions under federal or state law, meaning that such a policy would create new legal and policy challenges for the IHE. Therefore, it important to consider potential legal implications for an IHE that requires some form of background check solely for student athletes and not the entire student body.[41] If an IHE is deemed a state actor, defined and discussed below, then it may face legal scrutiny under the Fourteenth and Fourth

40. *See* Cintron et al., *supra* note 37, at 5.

41. *See* Sarah Brown, *Big-Time Sports Programs Tighten Rules on Athletes With Sexual-Assault Records*, CHRON. HIGHER EDUC., Aug. 9, 2017, https://www.chronicle.com/article/Big-Time-Sports-Programs/240892; *see also* James Crepea, *SEC Expands Serious Misconduct Policy to Include High School Signees*, OREGONIAN, June 1, 2018, https://www.al.com/sports/2018/06/sec_expands_serious_misconduct.html.

Amendments of the United States Constitution. This section discusses these potential legal theories and implications.

Constitutional Law

For public IHEs, requiring student athletes to submit to background checks may raise constitutional law considerations. For constitutional law to be applicable, state action is required. The legal theory of state action applies when discussing the liberties of citizens, specifically student athletes, in this context. All governmental entities, including public universities/colleges, are bound by state and federal law, including the United States Constitution. Traditionally, private entities that (1) enjoy a symbiotic relationship, (2) provide a function traditionally reserved to government or, (3) have an excessive entanglement with a governmental entity because of their relationship may also be imputed as a governmental entity, otherwise known as a "state actor," under the law.[42] One way a private institution may be designated as a state actor is through the receipt of federal funding, along with other considerations relating to a symbiotic relationship or excessive entanglement with government.[43] Most IHEs receive some form of state subsidy,[44] which may invite scrutiny as a state actor. However, the issue of state action is not as clear cut when considering private IHEs and, because this area of law is unsettled, this legal analysis will only apply to public IHEs.

Fourteenth Amendment.

One such right guaranteed by the United States Constitution is equal protection under the law,[45] which prohibits similarly situated individuals from being treated differently.[46] Specifically, the Equal Protection Clause of the Fourteenth Amendment states, "no State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."[47] According to the United States Supreme Court, the purpose of the Fourteenth Amendment's Equal Protection Clause "is to secure every person within a State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution

42. Indorato v. Patton, 994 F. Supp. 300, 303 (E.D. Pa. 1998).

43. Isaacs v. Bd. of Trustees of Temple Univ. of Com. Sys. of Higher Ed., 385 F. Supp. 473, 486 (E.D. Pa. 1974).

44. Kellie Woodhouse, *Study: U.S. Higher Education Receives More From Federal Than State Governments*, INSIDE HIGHER ED, June 12, 2015, https://www.insidehighered.com/news/2015/06/12/study-us-higher-education-receives-more-federal-state-governments.

45. U.S. CONST. amend. XIV, § 1.

46. *Id.*

47. *Id.*

through duly constituted agents."[48] As such, any state actor (e.g., an IHE) that purposefully treats student athletes differently than the general student population by singling them out and requiring they pass a background check as a condition of admission and participating on a team, may trigger the Equal Protection Clause of the Fourteenth Amendment. There is no consensus regarding whether student athletes are more likely to engage in sexual violence;[49] therefore, to target student athletes and not other groups within the student community, such as those who participate in Greek life, may create a basis to show that similarly situated people (e.g. students) are being treated differently (e.g. student athletes).

If a state actor intentionally interferes with a person's constitutionally guaranteed right pursuant to the Fourteenth Amendment, judicial scrutiny depends on the classification. The three levels of judicial analysis are (1) strict scrutiny, (2) intermediate scrutiny, and (3) rational basis. Strict scrutiny applies when a distinction is based on suspect classifications: differences based on a person's immutable characteristics such as race, national origin, religion, and alienage.[50] Classifications based on gender and quasi-suspect classifications, which are classes that have historically faced discrimination or are a minoritized or politically powerless group, fall under intermediate scrutiny.[51]

The final standard, which is the most relevant to the student athlete population in this context, is rational basis review. Student athletes are a class that, by virtue of their decision to play sport at the college level, may be treated differently by IHEs as opposed to some immutable characteristic of the group.[52] As long as a classification is not suspect or quasi-suspect, and does not violate a person's fundamental rights under the Constitution, a court is likely to uphold it so long as it "bears a rational relationship to a legitimate governmental objective."[53] Unlike strict and intermediate scrutiny, rational basis review means the burden of persuasion is on the party challenging a law, and there is no requirement for the classification to be narrowly tailored.[54] This is a low threshold to meet.

In instances of rational basis review, a court is likely to side with the government distinction so long as the classification does not involve a

48. Vill. of Willowbrook v. Olech, 120 S.Ct. 1073, 1075 (2000) (quoting Sioux City Bridge Co. v. Dakota Cty., Neb., 260 U.S. 441, 445 (1923) (quoting Sunday Lake Iron Co. v. Wakefield Tp., 247 U.S. 350, 352, 353 (1918)).

49. Neal B. Kimble et al., *Revealing an Empirical Understanding of Aggression and Violent Behavior in Athletics*, 15 AGGRESSION & VIOLENT BEHAV. 446 (2010).

50. Windsor v. U.S., 699 F. 3d 169 (2d Cir. 2012) *aff'd*, 570 U.S. 744, 133.

51. Evancho v. Pine-Richland Sch. Dist., 237 F. Supp. 3d 267, 288 (W.D. Pa. 2017).

52. *Id.*

53. *Windsor*, 699 F. 3d at 180 (citing Thomas v. Sullivan, 922 F.2d 132, 136 (2d Cir.1990)).

54. Hope for Families & Cmty. Serv., Inc. v. Warren, 721 F. Supp. 2d 1079, 1138 (M.D. Ala. 2010).

fundamental right and the regulation is arguably related to a legitimate role of government. For instance, in *Wasatch Equality v. Alta Ski Lifts Company*,[55] a privately-owned ski resort located on government land faced an equal protection lawsuit for its policy of prohibiting snowboarders from accessing a ski resort. The resort had a rational argument for the distinction between snowboarders versus skiers: a business model of catering to skiers.[56] The resort illustrated that banning snowboards, and not people, was rationally related to its legitimate objective.[57] Thus, the court noted that snowboarders were not a protected class or possessed a fundamental right, as the defendant prohibited snowboards, as opposed to a specific class of people.[58] The court also found the policy was rationally related to a legitimate business interest.[59]

This case showed a state actor is given a strong presumption of validity under rational basis review and a court will uphold the policy so long as there is a rational relationship between the difference of treatment and some legitimate government purpose.[60] The classification can only fail rational basis scrutiny if no rational reason for an action can be hypothesized by the state actor.[61] Student athletes, as a class, are most likely to be evaluated under rational basis. The *Wasatch Equality v. Alta Ski Lifts Company* ski resort case[62] is a reasonable, possible analogy for student athletes; this group is similar to snowboarders, and a court may be persuaded if an IHE argues it is in its business plan to treat student athletes in a specific way.

As the above illustrates, suspect and quasi-suspect distinctions made between individuals based on immutable characteristics will be met with a more rigorous amount of scrutiny.[63] However, classifications outside these realms are likely to receive a less strenuous level of review under rational basis.[64] IHEs that subject student athletes to some form of background check, while not doing the same to the general population, may trigger an equal protection claim because similarly situated individuals, students, are being treated differently. Research attempting to correlate student athletes with a higher propensity for sexual

55. Wasatch Equal. v. Alta Ski Lifts Co., 55 F. Supp. 3d 1351 (D. Utah 2014) *aff'd*, 820 F.3d 381 (10th Cir. 2016).

56. *Id.* at 1367.

57. *Id.*

58. *Id.* at 1361.

59. *Id.* at 1370.

60. Midkiff v. Adams Cty. Reg'l Water Dist., 409 F.3d 758, 770 (6th Cir. 2005).

61. Lamers Dairy Inc. v. U.S. Dep't of Agr., 379 F.3d 466, 473 (7th Cir. 2004).

62. *See* Wasatch Equal. v. Alta Ski Lifts Co., 820 F.3d 381 (10th Cir. 2016).

63. *See* Windsor v. U.S., 699 F. 3d 169 (2d Cir. 2012) *aff'd*, 570 U.S. 744, 133; *see also* Evancho v. Pine-Richland Sch. Dist., 237 F. Supp. 3d 267, 288 (W.D. Pa. 2017).

64. *See Midkiff*, 409 F.3d 758.

violence is inconsistent,[65] raising questions about whether a policy based on this proposition is a legitimate governmental purpose. This creates another avenue for challenge under the Equal Protection Clause.

A state actor's decision to treat student athletes different than the general student population, so long as the distinction is clearly based on athletic ability and not some other unalterable characteristic (e.g., race, gender), would likely be evaluated under rational basis scrutiny. In this instance, the distinction is group-based. For example, IHEs are subjecting student athletes to a background check as part of admission, but may not be doing the same for those applicants who want to become members of the university's Greek-life system. Thus, so long as the classification is based on athletic ability, and given the deference courts historically provide state actors under rational basis,[66] a court would likely uphold the policy so long as the IHE could prove a rational relationship exists between the difference of treatment and some legitimate government purpose. This is a low threshold to pass muster. In this instance, it is likely the legitimate purpose would be campus safety. So long as there is an arguable basis as to why the regulation is rationally related to a legitimate government interest, the classification will likely be upheld.[67] However, if the research in this area is inconsistent regarding student athletes' propensity to commit acts of sexual violence, a campus safety excuse may face an uphill legal battle.

Collegiate student athletes have utilized the Fourteenth Amendment to challenge IHEs in a variety of cases. Most notably, the Fourteenth Amendment has been applied in conjunction with Title IX when student athletes have been faced with gender/sex discrimination.[68] For example, in *Austin v. University of Oregon*, several male student athletes filed an equal protection challenge against the University of Oregon alleging they were being discriminated on the basis of sex.[69] The former student athletes were accused of sexually assaulting a female student and, after an administrative hearing found they violated the student conduct code, Oregon suspended them and stripped them of their scholarships.[70] Among their claims, the plaintiffs alleged that Oregon selectively punished them on the basis of gender, stating males were being selectively punished and that

65. *See* Christine A. Gidycz et al., *Predictors of Perpetration of Verbal, Physical, and Sexual Violence: A Prospective Analysis of College Men*, 8 PSYCHOL. MEN & MASCULINITY 82 (2007); *see also* Kimble et al., *supra* note 49; *see also* Belinda-Rose Young et al., *Sexual Coercion Practices Among Undergraduate Male Recreational Athletes, Intercollegiate Athletes, and Non-Athletes*, 23 VIOLENCE AGAINST WOMEN, 795 (2017).

66. *See* Midkiff v. Adams Cty. Reg'l Water Dist., 409 F.3d at 758 (6th Cir. 2005).

67. *See* Lamers Dairy Inc. v. U.S. Dep't of Agr., 379 F.3d at 473 (7th Cir. 2004).

68. *See* Austin v. Univ. of Or., 205 F. Supp. 3d 1214 (D. Or. 2016).

69. *Id.* at 1218.

70. *Id.* at 1217.

females accused of similar behavior received more lenient treatment.[71] The court ruled in favor of Oregon in this proceeding.[72]

Presently, no case has been litigated to its final merits that directly challenged the constitutionality of IHE's decision to perform background checks on student athletes under the Equal Protection Clause. However, a recently reported case may shed light on whether a court would place constitutional limitations on subjecting students to background checks. In *Powers v. St. John's University School of Law*, a New York appeals court sided with the IHE after a former student challenged its decision to rescind his admission because he was not completely truthful during the application process.[73] The court concluded that the university followed its own procedures, and they were rationally related to the school's approach of revoking admission, thus upholding the decision.[74] This case may provide a window into the possible deference a court would give to IHEs in the event of a lawsuit involving a background check.

Although the constitutionality of IHEs' decisions to perform background checks on student athletes under the Equal Protection Clause have yet to be litigated, previous cases have applied judicial scrutiny to evaluate the constitutionality of other types of IHEs' regulations involving student athletes. In *Parish v. NCAA*, a first year student athlete who had been deemed academically ineligible challenged the rule's constitutionality, as he alleged it deprived him of his protected right to participate in intercollegiate athletics.[75] The United States District Court for the Western District of Louisiana held that the rule limiting first year student athlete eligibility was rationally related to the legitimate interest of student athletes being capable of succeeding academically at the college level.[76] Further, in *Colorado Seminary v. NCAA*, several University of Denver student athletes challenged the constitutionality of the NCAA's decision to force the university to declare the plaintiffs ineligible to compete in intercollegiate athletics.[77] The United States District Court for the District of Colorado held that "student-athletes have no constitutionally protected property or liberty interest in participation in intercollegiate athletics" under the Equal Protection Clause.[78] The court also said plaintiffs should not look to the Fourteenth Amendment as an "absolute panacea" for all the injuries

71. *Id.* at 1223.
72. *Id.* at 1232.
73. *See* Powers v. St. John's Univ. Sch. of Law, 32 N.E.3d 371, 376 (N.Y. 2015).
74. *Id.* at 375-76.
75. *See* Parish v. NCAA, 361 F. Supp. 1220, 1221 (W.D. La. 1973), *aff'd*, 506 F.2d 1028 (5th Cir. 1975).
76. *Id.* at 1226.
77. *See* Colo. Seminary (Univ. of Denver) v. NCAA, 417 F. Supp. 885 (D. Colo. 1976), *aff'd*, 570 F.2d 320 (10th Cir. 1978).
78. *Id.* at 896.

that they allegedly incurred.[79] It should be noted that prior to *NCAA v. Tarkanian*,[80] the NCAA was considered a state actor.[81] Further, in *Austin v. University of Oregon*, the United States District Court for the District of Oregon ruled that plaintiff student athletes did not possess a due process right to the potential deprivation of an economic interest from a scholarship or future professional sports income.[82] Thus, in these instances, previous rational basis reviews of student athletes have seen courts deferring to the IHEs.

Fourth Amendment

Although case law has not produced a decision where a court evaluated the constitutionality of subjecting student athletes to background checks, other avenues may exist to analyze the constitutionality of this issue. According to the United States Constitution, citizens possess a right to be free from unreasonable searches and seizures.[83] This protection extends beyond criminal cases.[84] The Fourth Amendment does not prohibit all searches and seizures, only those that are unreasonable.[85] Reasonableness depends on all the circumstances surrounding the search itself.[86] The intrusion on the individual's privacy interest is balanced against the promotion of compelling governmental interests.[87] A highly intrusive background check may also be balanced against the compelling interest in a manner similar to an invasive drug test. As such, the search is subject to strict scrutiny.

Potrafke suggested that NCAA student athletes may challenge a background check by claiming it is an invasion of privacy in a similar manner as drug tests.[88] *Hernandez v. William Rainey Harper College* supported this analogy.[89] In this wrongful termination lawsuit involving a former community college baseball coach, the court noted that background checks shared relevant characteristics with required drug tests and chose to evaluate the constitutionality of a criminal

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79. *Id.* at 894.

80. *See generally* NCAA v. Tarkanian, 488 U.S. 179, 199 (1988).

81. *See* Buckton v. NCAA, 366 F. Supp. 1152, 1156 (D. Mass. 1973) (citing Curtis v. NCAA, C-71 2088 ACW (N.D. Cal. 1972)).

82. *See* Austin v. Univ. of Or., 205 F. Supp. 3d 1214, 1221-1222 (D. Or. 2016).

83. U.S. CONST. amend. IV.

84. Grady v. North Carolina, 135 S.Ct. 1368, 1371 (2015) (citing Ontario v. Quon, 560 U.S. 746, 755 (2010)).

85. Maryland v. King, 569 U.S. 435, 448 (2013).

86. Skinner v. Ry. Labor Exec. Ass'n, 489 U.S. 602, 619 (1989) (citing U.S. v. Montoya de Hernandez, 473 U.S. 531, 537 (1985)).

87. Univ. of Colo., Boulder v. Derdeyn, 511 U.S. 1070, 114 S. Ct. 1646, 128 L. Ed. 2d 366 (1994).

88. Lindsay M. Potrafke, *Checking Up on Student-Athletes: A NCAA Regulation Requiring Criminal Background Checks*, 17 MARQ. SPORTS L. REV. 427 (2006).

89. *See* Hernandez v. William Rainey Harper Coll., No. 10 C 2054, 2011 WL 5122698 (N.D. Ill. Oct. 27, 2011).

background check using criteria like that of compulsory drug testing.[90] Although *Hernandez* had elements of an employee/employer relationship, a relationship student athletes do not share with their IHE,[91] the case could be viewed as persuasive due to its relevance. Thus, there is some precedent to associate constitutional scrutiny of mandatory background checks with mandatory drug tests.

Mandatory drug tests involving student athletes have previously been scrutinized as a possible illegal search and seizure. In *O'Halloran v. University of Washington*, a student athlete challenged the constitutionality of her university's drug testing program.[92] The plaintiff claimed that the required drug testing regime violated her right to privacy and thus was an unreasonable search and seizure under the Fourth Amendment.[93] The district court initially considered the plaintiff's request for an injunction against the drug testing program.[94] It balanced the student athlete's interest in being denied an opportunity to participate in her sport as a result of not acquiescing to the required drug test against the NCAA's interest in having a student athlete evade compliance with established rules while other similar student athletes must comply.[95] The court balanced the hardships in favor of the university and the NCAA, saying other student athletes are owed equal treatment that would be undermined when it comes to drug testing in college athletics and the public interest in fostering drug free competitions in sports.[96]

In adjudicating the invasion of privacy claim, the court considered drug testing to be "searches within the meaning of the Fourth Amendment."[97] The issue was whether plaintiff had a reasonable expectation of privacy.[98] As part of its Fourth Amendment analysis, the court held that student athletes possessed a diminished expectation of privacy because the nature of taking part in a college athletic program and that guarding against drug usage in college athletics was a compelling state interest.[99] The court felt that the drug testing program protected the health and safety of student athletes, as well as the integrity of fair competition, thus serving the public interest.[100] Further, the court ruled that the

90. *Id.* at *5.

91. *See* State Comp. Ins. Fund v. Indus. Comm'n, 135 Colo. 570 (Colo. 1957); *see also* Waldrep v. Tex. Emp'rs Ins. Ass'n, 21 S.W.3d 692 (Tex. App. 2000).

92. O'Halloran v. Univ. of Wash., 679 F. Supp. 997, 998 (W.D. Wash. 1988).

93. *Id.*

94. *Id.* at 999-1000.

95. *Id.* at 1000.

96. *Id.*

97. *Id.* at 1002 (quoting Schmerber v. Cal., 384 U.S. 757, 768 (1966)).

98. *Id.* at 1005-06.

99. *Id.* at 1002.

100. *O'Halloran*, 679 F. Supp. at 1003.

means in which the program was carried out was not an unreasonable intrusion of privacy.[101] In reaching its conclusion, the court decreed,

The invasion of [the student athlete's] privacy interest by the specimen collection procedures of the drug-testing program are outweighed by the compelling interest of the University and the NCAA in protecting the health of student-athletes, reducing peer pressure and temptations to use drugs, ensuring fair competitions for the student-athletes and the public, and educating about and deterring drug abuse in sports competition.[102]

The court, in dicta, also felt that the plaintiff was not coerced into consenting to drug testing as a condition of participating in intercollegiate athletes because a student athlete could lose eligibility for a litany of other reasons (e.g., low GPA).[103]

The court's reasoning in *O'Halloran* could be incorporated into the IHEs' argument in support of requiring student athletes to submit to a background check. The court believed that protecting the health of student athletes being drug tested was a compelling state interest, just as preventing individuals who may have a violent past from arriving on campus and harming others may also serve a similar safety function. Further, the IHEs could use the *O'Halloran* court's language espousing the conclusion that student athletes possess a diminished expectation of privacy because of their role as student athletes or that requiring student athletes to endure an invasion of privacy did not qualify as coercion to complete a background check.[104] Both reasons could serve as part of an argument supporting the constitutionality of mandatory background checks solely for student athletes.

Although the O*'Halloran* court definitively sided with the IHEs regarding the constitutionality of student athlete drug testing, a case from Colorado decided three years later came to a markedly different conclusion. In *Derdeyn v. University of Colorado, Boulder*, a group of student athletes challenged the constitutionality of random drug tests conducted without suspicion.[105] The trial court enjoined the university from continuing its drug testing program, holding that it was unconstitutional; the appellate court affirmed.[106] The university appealed to the state supreme court, where it argued that student athletes had

101. *Id.* at 1005.
102. *Id.* at 1007.
103. *Id.* at 1005.
104. *Id.* at 1007.
105. Derdeyn v. Univ. of Colo., Boulder Through Regents of Univ. of Colo., 832 P.2d 1031, 1032 (Colo. App. 1991), *aff'd sub nom. Univ. of Colo., Boulder Through Regents of Univ. of Colo. v. Derdeyn*, 863 P.2d 929 (Colo. 1993).
106. *Id.*

voluntarily consented to the drug tests.[107] The supreme court disagreed, noting the drug tests were required as part of participating in intercollegiate athletics, calling it a "governmental benefit."[108] Consent to a search must be "freely given, without any duress, coercion or subtle promises or threats calculated to flaw the free and unconstrained nature of the decision."[109] The supreme court continued:

> It is clear from the record that a student will be denied the opportunity to participate in CU's intercollegiate athletic program in absence of execution of a signed consent. It is equally clear that no athletic scholarship will be available to a student who does not consent to drug testing. The pressure on a prospective student athlete to sign a consent to random, suspicionless drug testing under such circumstances is obvious.[110]

The court went on to note that denying a student athlete an opportunity to participate in the intercollegiate athletic program for not consenting to a drug test amounted to coercion, thus triggering judicial scrutiny.[111] Although the university argued that promoting integrity within its athletics program, preventing drug usage by other students who view student athletes as role models, safeguarding fair competition, and ensuring the health and safety of student athletes served as compelling state interests, the court was unpersuaded.[112] The court concluded that the university had not met its burden of explaining why its stated arguments are important *governmental* interests, which traditionally related to public safety and security.[113] Since the university failed to assert an important governmental interest, the court held that the privacy interests of the student athletes outweighed the university's interests and declared the drug testing program unconstitutional under the Fourth Amendment.[114]

These two cases were materially different regarding what qualified as a compelling state interest. Background checks may be evaluated according to the invasion of privacy standard pursuant to the analogy for searches and seizures since there was no consensus regarding whether ensuring integrity within athletic competition as well as the health and safety of student athletes constituted state interests. For *O'Halloran*, the answer to both questions were

107. *Univ. of Colorado*, 863 P.2d at 946.
108. *Id.* at 947.
109. *Id.* at 946.
110. *Id.* at 949.
111. *Id.* at 935.
112. *Univ. of Colo.*, 863 P.2d at 945.
113. *Id.* at 949.
114. *Id.* at 949-50.

an emphatic "yes,"[115] while the answer to the same two questions in the *Derdeyn* majority was an unequivocal "no."[116] Therefore, the constitutionality of this issue is ambiguous, and it is still unclear whether subjecting student athletes to background checks would be struck down. The *O'Halloran* court's ruling and rationale may aide the IHEs' arguments in the constitutionality of background checks, while *Derdeyn* serves as a rejoinder by those challenging the lawfulness of such policies.

PART TWO: LEGAL IMPLICATIONS IF IHES FAIL TO ACT AFTER CBC REVEALS CRIMINAL CONDUCT.

Since legal wiggle room may exist regarding the constitutionality singling out student athletes for a CBC, the IHEs may choose to enact such a policy. While the IHEs believe they are acting prudently by requiring a CBC and that such a measure would meet potential legal exposure, the results of the CBC may create awareness of conduct that the IHEs must act upon. Failure to promptly do so may trigger liability under several common law theories. A court may view this action as the IHEs assuming a voluntary duty to others on campus or that such a duty is part of the student/university relationship. The relationship between a student and an IHE has evolved over the years, advancing beyond in loco parentis to more commercial arrangements, which creates some ambiguity regarding potential legal implications. This section is not state specific, and is intended to serve as discussion on potential legal implications of implementing a CBC.

Common Law

Common law presents another potential area of liability for the IHEs that implement policies requiring student athletes to complete some form of background check during the recruiting process. The IHEs that maintain a policy requiring student athletes to pass a background check may create a cause of action based on a negligence theory in a number of different areas. Negligence is conduct that falls below a duty of care established by law to protect a person from unreasonable risks of harm.[117] Liability may arise when an individual is unreasonably subjected to a foreseeable risk of harm that ultimately becomes the direct cause of a person's injury.[118] In this instance, a student who is harmed by a student athlete previously vetted and accepted to a university, despite the athlete's history of violence, may have recourse under the legal theory of

115. *See* O'Halloran v. Univ. of Wash., 679 F. Supp. 997, 998 (W.D. Wash. 1988).
116. *See* Derdeyn, 832 P.2d 1031 at 1032.
117. RESTATEMENT (SECOND) OF TORTS § 282 (1979).
118. *Id.* at § 328.

negligence. Negligence is classified as either (a) an action a reasonable person should recognize as creating an unreasonable risk to another, or (b) a person's failure to act in a way that would protect another from a foreseeable risk of harm.[119] Under common law, a prima facie case of negligence includes proving the defendant owed the plaintiff some sort of duty, a breach of that duty occurred, there was a causal connection between the plaintiff's injury and the defendant's breach, and that the plaintiff indeed suffered a provable injury.[120] Thus, under the principles of negligence, if IHEs subject a potential student athlete to a background check, they may voluntarily undertake a duty of care owed to other students that the background check will identify and not permit a person with a history of sexual violence to enroll. However, if IHEs admit a student athlete who has a history of sexual violence due to a faulty background check or other issues, there may be a breach in the duty of care owed to those on campus. If a victim of sexual violence can make a direct causal connection between the breach and injury, he or she may have a common law claim for negligence. This is the inherent risk IHEs potentially face when voluntarily assuming a duty of care.

In Loco Parentis or Special Relationship.

An important element to any negligence analysis involving IHEs is duty. IHEs may possess a duty of care to protect students from foreseeable risks of harm (e.g., sexual assault) by requiring student athletes to complete a background check. Although this is the modern trend, historically, IHEs were vested with vast discretion over administrative decisions made on a university campus.[121] The immense leeway given by parents and the courts was known as the doctrine of *in loco parentis*.[122] Judges deferred to the decisions of an IHE as if the institution was the parent, so long as the rule was for the "betterment of their pupils."[123] For example, in *Gott v. Berea College*, the Kentucky Court of Appeals stated that IHEs "stand in loco parentis concerning the physical and moral welfare and mental training of the pupils," and they may make any rule that governs students in the same fashion as a parent.[124] Since IHEs were delegated the same rights as parents, it was also their job to safeguard the student's welfare, and courts traditionally deferred to the IHEs' decisions

119. *Id.* at § 284.

120. 57A Am. Jur. 2d Torts § 71 (1965).

121. Jane A. Dall, *Determining Duty in Collegiate Tort Litigation: Shifting Paradigms of the College-Student Relationship*, 29 J. C. & U. L. 485 (2003).

122. *Id.* at 488.

123. Brian Jackson, *The Lingering Legacy of in Loco Parentis: An Historical Survey and Proposal for Reform*, 44 VAND. L. REV. 1135, 1146 (1991).

124. Gott v. Berea Coll., 161 S.W. 204, 206 (1913).

involving this relationship.[125] However, according to Ramos, the relationship between students and IHEs shifted away from being paternalistic during the Civil Rights Movement of the 1960s and 1970s as students began to exercise their rights as adults.[126] For instance, in *Dixon v. Alabama State Board of Education*, the Fifth Circuit Court of Appeals declined to defer to in loco parentis as a basis for a university to discipline nine students who were deemed to be merely exercising their civil rights to demonstrate against Jim Crow laws.[127] Courts also became less likely to grant immunity to IHEs,[128] meaning schools could not use their sovereign status as a shield against suits brought by students.

With the application of in loco parentis declining, whether IHEs owed a duty of care for a student's safety became an inconsistently answered question. In *Bradshaw v. Rawlings*, for example, the Third Circuit Court of Appeals reversed a district court's ruling finding IHEs liable after an underage student became intoxicated at a school-sponsored picnic and later injured the plaintiff in a drunk-driving accident.[129] The court shifted responsibility away from the university and to the student, stating:

> The modern American college is not an insurer of the safety of its students. Whatever may have been its responsibility in an earlier era, the authoritarian role of today's college administrations has been notably diluted in recent decades. Trustees, administrators, and faculties have been required to yield to the expanding rights and privileges of their students. By constitutional amendment, written and unwritten law, and through the evolution of new customs, rights formerly possessed by college administrations have been transferred to students. College students today are no longer minors; they are now regarded as adults in almost every phase of community life.[130]

The court's ruling, in this instance, illustrated the evolving relationship between students and the role universities played in students gaining independence and

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125. Christopher Jayson Swartz, *The Revivification of In Loco Parentis Behavioral Regulation in Public Institutions of Higher Education to Combat the Obesity Epidemic*, 45(1) NEW ENG. L. REV. 101 (2010).

126. Christopher Ramos, *Adolescent Brain Development, Mental Illness, and the University-Student Relationship: Why Institutions of Higher Education Have a Special Duty-Creating Relationship With Their Students*, 24 S. CAL. REV. L. & SOC. JUST. 343, 351 (2015).

127. Dixon v. Alabama State Bd. of Ed., 294 F.2d 150, 158 (5th Cir. 1961).

128. *See* Jane A. Dall, *Determining Duty in Collegiate Tort Litigation: Shifting Paradigms of the College-Student Relationship*, 29 J. C. & U. L. 485 (2003).

129. Bradshaw v. Rawlings, 612 F.2d 135 (3d Cir. 1979).

130. *Id.* at 138-39.

maturity.[131] If IHEs no longer had an inherent duty of care by virtue of their relationships with students to be responsible for their safety, as it was evolving, running background checks on potential enrollees might be unnecessary. Such an act could, arguably, create a voluntary duty of cared owed to those on campus.

Bradshaw v. Rawlings was used as persuasive authority in *Rabel v. Illinois Wesleyan University*.[132] In this case, an intoxicated fraternity pledge left his fraternity party and traveled to a dormitory to pick up a female student.[133] When the female student met the pledge, he "forcibly grabbed [her] and threw her over his shoulder."[134] The pledge took the female student and rejoined his fraternity members, where he was run through a "gauntlet of [fraternity] members who would strike him . . . as he passed."[135] The pledge tripped while carrying the female student, ultimately causing her to suffer a serious injury.[136] Rabel, the female student, sued the university based on a number of claims, including a negligence theory of recovery.[137]

Rabel argued that Illinois Wesleyan University, through its policies such as banning alcohol, exercised a high degree of supervision over the students and thus created a special relationship with students, assuming a duty of care for the plaintiff's well-being.[138] Since this was a case of first impression in Illinois exploring whether an IHE owed a duty to protect students as a result of the institution's policies, the court looked to the *Bradshaw v. Rawlings* case for guidance.[139] Based in part on the rationale from *Bradshaw*, the court ruled in favor of the university, that no special relationship was created.[140] The *Rabel* court, reflecting the notion that an IHE's role is no longer to serve as a parent but instead to educate students, wrote, "we do not believe that the university, by its handbook, regulations, or policies voluntarily assumed or placed itself in a custodial relationship with its students."[141] Placing IHEs in the additional custodial role of assuring their students' safety "would be unrealistic . . . [i]mposing such a duty of protection would place the university in the position of an insurer of the safety of its students" (e.g., assumed or placed itself in a

131. Susan Dumont, *Campus Safety v. Freedom of Speech: An Evaluation of University Responses to Problematic Speech on Anonymous Social Media*, 11(2) J. BUS. & TECH. L. 239 (2016).

132. Rabel v. Ill. Wesleyan Univ., 514 N.E.2d 552, 559 (Ill. App. Ct. 1987).

133. *Id.* at 554.

134. *Id.* (alteration in original).

135. *Id.* (alteration in original).

136. *Id.*

137. *Id.* at 554-55.

138. Rabel, 514 N.E.2d at 556-57.

139. *Id.* at 559.

140. *Id.* at 560.

141. *Id.*

custodial relationship with its students).[142] The court's holding interpreted that the IHE no longer possessed a custodial relationship with students, and therefore did not assume a duty to protect their safety.[143]

Although *Bradshaw*[144] and *Rabel*[145] sided with IHEs, their results can be compared with *Mullins v. Pine Manor College*.[146] In *Mullins*, a first-year student was raped by an intruder after he snuck on campus and abducted the victim.[147] The Massachusetts Supreme Court found a duty existed between the college and student arising out of the "existing social values and customs," as well as the relationship between the parties.[148] In particular, Pine Manor College had a small number of security officers but did not have any supervisory standards.[149] Since the college was in the position to prevent students from being subjected to criminal acts, prudent IHEs usually exercise due care to protect their students' safety and well-being.[150] Parents, students, and the public at large still reasonably expect that IHEs will use reasonable care to protect students from foreseeable risks of harm.[151] The *Mullins* court went on to find that, by the nature of their relationship, the IHE voluntarily assumed a duty to the student.[152]

The court found that "[c]olleges generally undertake voluntarily to provide their students with protection from the criminal acts of third parties" and that the undertaking is "not gratuitous."[153] In other words, IHEs owe a duty of care to act reasonably, which may include utilizing background checks if it is reasonably prudent. University regulations and actions should reflect a duty owed to students and use reasonable care to prevent injury by third parties "whether their acts were accidental, negligent or intentional."[154] In this instance, the court found the college had a duty of care to provide adequate security, it breached its duty by failing to provide adequate security, and the breach was the proximate cause of plaintiff's injury.[155]

As *Bradshaw*, *Rabel*, and *Mullins* illustrate, moving away from in loco parentis created inconsistency as to how to deal with the relationship between students and IHEs. Navigating the legal relationship between students and IHEs

142. *Id.* at 560-61.
143. Dumont, *supra* note 131, at 245-46.
144. *Bradshaw*, 612 F.2d 135 (3d Cir. 1979).
145. Dumont, *supra* note 131.
146. Mullins v. Pine Manor Coll., 449 N.E.2d 331 (Mass. 1983).
147. *Id.* at 334.
148. *Id.* at 335 (quoting Schofield v. Merrill, 435 N.E.2d 339 (Mass. 1982)).
149. *Id.* at 334.
150. *Id.* at 337.
151. *Id.* at 336-37.
152. *Id.*
153. Mullins, 449 N.E.2d at 336.
154. *Id.* at 337 (quoting Carey v. New Yorker of Worcester, Inc., 355 Mass. 450, 452 (1969)).
155. Dumont, *supra* note 131, at 246.

became increasingly complex as courts departed from in loco parentis, but disagreed whether a special relationship existed between the parties.[156] During the 1990s, a trend developed where the liability of IHEs arose not based on alternative approaches. For example, in *Coghlan v. Beta Theta Pi Fraternity*, the Idaho Supreme Court declined to hold that a special relationship existed between the university and an underage student who was injured after becoming intoxicated, as she was an adult.[157] However, the court found the university had assumed a duty of care because university representatives were supervising the fraternity party and knew or should have known that alcohol was being served to underage students.[158] The court said, "the University defendants assumed a duty to exercise reasonable care to safeguard the underage plaintiff from the criminal acts of third persons, *i.e.*, furnishing alcohol to underage students, of which the University employees had knowledge."[159] Therefore, an affirmative act by the university – in this case having university representatives present at the party – created a duty of care to act reasonably and protect students from foreseeable risks of harm such as students engaging in underage drinking.[160] Once an IHE voluntarily undertakes a duty of care, it must do so in a reasonable manner to mitigate liability.[161] Upon voluntarily assuming a duty, the actor is bound to perform its duty in a non-negligent manner.[162]

The IHEs may face negligence liability if they affirmatively take the step of subjecting a portion of the population to a formal or informal background check. Although a university no longer sits in loco parentis with students and a court may view this group as adults who are responsible for their own decisions, voluntarily assuming a duty of care likely changes this analysis. A duty of care may arise voluntarily, and subjecting student athletes to a background check is likely to create such a duty of care, which may be breached. Thus, this voluntary action may create liability.

Premises Liability.

As the relationships between students and universities have evolved beyond in loco parentis into a more commercial arrangement, IHEs may wish to consider premises liability law as another potential general common law legal theory. The logic in using background checks is based on protecting other

156. *See generally* Bradshaw v. Rawlings, 612 F.2d 135 (3d Cir. 1979); Rabel v. Ill. Wesleyan Univ., 514 N.E.2d 552, 559 (Ill. App. Ct. 1987); Mullins v. Pine Manor Coll., 449 N.E.2d 331 (Mass. 1983).

157. Coghlan v. Beta Theta Pi Fraternity, 987 P.2d 300, 312 (Idaho 1999).

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.* at 314.

162. *Id.*

students from foreseeable risks of harm. Since literature exists suggesting that it is foreseeable that a student athlete may commit sexual violence on the student population,[163] a reasonably prudent university may seek to identify these individuals and prevent them from enrolling on the campus. This measure becomes apparent when it is considered that students pay money, or confer some other benefit to the IHEs in exchange for university-sponsored housing, thus arguably creating a landlord-tenant relationship. The following is a general discussion of potential salient issues under common law that may impact IHEs.

Premise Liability Basics.

For those living on campus, a landlord owes the tenant a duty of care to protect him or her from foreseeable risks of harm.[164] For example, in *Miller v. State*, the court ruled that a state university is held to the same standard of a private landlord when it comes to security and maintenance issues.[165] In this case, a female Stony Brook University student was sexually assaulted at knife point after the assailant gained access to her dorm.[166] The court ruled that the university possessed a duty, just like any private landlord, to maintain reasonable security measures, as it was a foreseeable risk that intruders would attempt to enter.[167] In this instance, reasonable security measures meant locking the outer doors.[168] Failing to lock the outer doors of the dormitory resulted in a breach of Stony Brook's duty of care and was the proximate cause of the student's injury.[169] However, *Miller* can be compared with *Brown v. North Carolina Wesleyan College*, another case involving a female student being abducted from campus, in which the court ruled "a landowner has no duty to protect one on his premises from criminal attack by a third person, but if such an attack is reasonably foreseeable, such a duty may arise between a landowner and his invitee."[170] These two cases thus create some ambiguity regarding whether an inherent duty of care exists for IHEs to conduct background checks on student athletes due to the landlord-tenant relationship or whether IHEs risk liability by voluntarily undertaking a duty of care through the use of background checks.

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163. *See* Alicia M. Cintron et al., *Preventing Sexual Violence on College Campuses: An Investigation of Current Practices of Conducting Background Checks on Student Athletes*, 30 J. LEGAL ASPECTS SPORT (forthcoming 2020).

164. *See* Miller v. State, 467 N.E.2d 493 (N.Y. 1984).

165. *Id.* at 497.

166. *Id.* at 494.

167. *Id.* at 497.

168. *Id.*

169. *Id.*

170. Brown v. N.C. Wesleyan Coll. Inc., 309 S.E.2d 701, 702 (N.C. Ct. App. 1983).

Students as Business Invitees.

Another legal theory for creating a duty of care is based on a student's designation as a business invitee. This argument relates to the evolution in understanding the relationship between the IHEs and students, that education is now a business as it is transactional. Students confer an economic benefit to IHEs as part of this transaction, and thus students are owed a higher duty of care by virtue of this relationship.[171] Further, students who do not live on campus or in university housing could be classified as business invitees since they are conferring a benefit to the university, whether it is money, or for those on scholarship, prestige.[172] Sokolow and his colleagues argue "[t]he duty owed by a landowner to a business invitee is more demanding than that owed by a landlord."[173] As business invitees, students only need to prove that IHEs anticipated not only likely risks of injury, but also "the possible occurrence of harm from third parties."[174] Failure to take reasonable steps to prevent such harm may lead to liability.

However, this view is not uniform. In *Doe et al. v. Baylor University*, a group of students alleged they were sexually assaulted by a fellow student, and the university failed to respond adequately.[175] The complaint alleged in part that the university failed to protect the plaintiff from foreseeable criminal acts.[176] The plaintiffs argued that a relationship existed pursuant to the student-university arrangement, creating a duty to protect invitees from foreseeable and unreasonable risks of harm involving the criminal actions of a third party that the IHE knew or had reason to know.[177] However, a federal district court applied Texas state law to hold, "there is no duty to control the conduct of third persons."[178] The court concluded the plaintiffs were unable to show that Baylor failed to provide them with safe housing, which caused the criminal assault, or that any other duty of care existed to protect the students.[179] In other words, Texas universities do not possess a duty to protect adult students from the criminal acts of other students while off campus.[180] Therefore, since no duty of care exists in Texas, there was no need for Baylor to conduct student background

171. *See* Jane A. Dall, *Determining Duty in Collegiate Tort Litigation: Shifting Paradigms of the College-Student Relationship*, 29 J. C. & U. L. 485 (2003).

172. Brett A. Sokolow et al., *College and University Liability for Violent Campus Attacks*, 34(2) J. C. & U. L. 319, 329 (2008).

173. *Id.* at 328.

174. *Id.*

175. Doe et al. v. Baylor Univ., 240 F. Supp. 3d 646, 653 (W.D. Tex. 2017).

176. *Id.* at 666.

177. *Id.*

178. *Id.*

179. *Id.* at 668.

180. *Id.*

checks.[181] Thus, whether a duty of care is owed to protect students from foreseeable risks of harm varies from state to state.[182]

If IHEs are in a jurisdiction where a business invitee relationship with students exists, the burden placed on an institution to protect business invitees may become more onerous because it extends beyond known but also possible risks of harm. For example, the court in *Hall v. District of Columbia* also found a business owes business invitees a duty of reasonable care and faces liability if it fails to protect against foreseeable risks it could have known "were being done or were about to be done."[183] *Peterson v. San Francisco Community College District* found that IHEs, acting as landlords, possessed a duty "to warn its students of known dangers posed by criminals on the campus" because the student was a business invitee.[184] The court also elaborated on a student's reasonable expectations when it comes to safety:

> In the closed environment of a school campus where students pay tuition and other fees in exchange for using the facilities, where they spend a significant portion of their time and may in fact live, they can reasonably expect that the premises will be free from physical defects and that school authorities will also exercise reasonable care to keep the campus free from conditions which increase the risk of crime.[185]

The language from *Hall* and *Peterson* suggest the modern trend when evaluating the duty of care that IHEs owe to students who enjoy business invitee status is significant. Satisfying this duty of care by protecting against third parties and risks that could have been known may be accomplished, in part, through implementing background checks. However, IHEs may still face liability if the background checks are defective, ineffective, or otherwise fail to protect students from foreseeable risks of harm.

Foreseeability.

Foreseeability of a particular danger by school authorities is a central issue in cases relating to IHE liability if a student suffers an injury.[186] In assessing whether an act was foreseeable, a court will examine the totality of the

181. *Id.*

182. *Id.*

183. Hall v. D.C., 867 F.3d 138, 149 (D.C. 2017) (quoting Grasso v. Blue Bell Waffle Shop, Inc., 164 A.2d 475, 476 (D.C. 1960)).

184. Peterson v. S.F. Cmty. Coll. Dist., 685 P.2d 1193, 1195 (Cal. 1984).

185. *Id.* at 1201.

186. *See* Allen E. Korpela, *Tort Liability of Public Schools and Institutions of Higher Learning for Injuries Caused by Acts of Fellow Student*, 36 A.L.R.3d 330 (2018).

circumstances, meaning it will take all relevant aspects into account.[187] For instance, IHEs may face liability if they had prior notice of the risk or should have reasonably foreseen the likelihood of the risk.[188] However, courts lack agreement in terms of what IHEs should reasonably foresee.[189] Nevertheless, reasonable background checks are likely to identify foreseeable risks of harm.

A case decided by the California Supreme Court, which is home to a significant number of IHEs, may offer a snapshot into how some courts will treat the relationship between student and the university. In *Regents of University of California v. Superior Court*, a plaintiff was stabbed while in a class by a student who was suffering hallucinations that led him to believe he was being continuously teased and criticized by classmates.[190] The university knew about the student's condition for a significant period of time due to other less serious incidents, and was attempting to treat him prior to the incident involving the plaintiff.[191] The plaintiff sued the university under negligence theory, alleging that it failed to protect her from the student's reasonably foreseeable conduct.[192] The university claimed no relationship leading to a duty of care existed between the school and plaintiff and, if one did exist, that it did not breach its duty.[193]

While the issue on appeal was whether such a duty existed, thus focusing on the relationship of the parties, the Supreme Court of California also discussed aspects related to foreseeability.[194] An appeals court held the university did not owe a duty to protect the plaintiff based on her status as a business invitee or a student.[195] However, the California Supreme Court disagreed, concluding since IHEs maintain superior control over students' environment and possess the ability to protect students through a variety of methods within their control, IHEs "have a special relationship with students while they are engaged in activities that are part of the school's curriculum or closely related to its delivery of educational services."[196] It further ruled that an IHE had a duty of care to protect students from a foreseeable risk of harm "in the classroom or during curricular activities" – in this case, violence perpetrated from the other student

187. Hush v. Cedar Fair, L.P., 233 F. Supp. 3d 598, 605 (N.D. Ohio 2017).

188. *See* Ferraro v. Bd. of Ed. of City of N.Y., 212 N.Y.S.2d 615 (N.Y. App. Term 1961) (*aff'd*, Ferraro v. Bd. of Ed. of City of N.Y., 14 A.D.2d 815 (1961)).

189. Korpela, *supra* note 186.

190. Regents of Univ. of Cal. v. Superior Court, 413 P.3d 656, 662 (Cal. 2018).

191. *Id.* at 660-61.

192. *Id.* at 662.

193. *Id.*

194. *See generally* Regents of Univ. of Cal. v. Super. Ct., 413 P.3d 656 (Cal. 2018).

195. *Id.* at 662.

196. *Id.* at 667.

with mental illness.[197] In dicta, the court indicated a willingness to not treat the relationship between students and the IHE as purely transactional. Students "are dependent on their college communities to provide structure, guidance, and a safe learning environment."[198] The court limited the relationship to "activities that are tied to the school's curriculum but not to student behavior over which the university has no significant degree of control."[199] Despite this language, for California, this decision may have signaled a shift away from the modern prevailing conceptualization of the student-IHE relationship described as being commercial.

Another relevant aspect of the court's opinion related to foreseeability. Although the issue was determining whether a duty of care existed, and thus the court remanded the case back to the trial court, the California Supreme Court also provided several clues for determining whether a risk was foreseeable.[200] When evaluating foreseeability, the court said its task "is not to decide whether . . . [an] injury was reasonably foreseeable in light of a *particular* defendant's conduct, but rather to evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed[.]"[201] In this instance, whether the IHE should have been on notice or whether a student posed a foreseeable risk of harm to others was case-specific, viewed in "light of all surrounding circumstances."[202] In this case, factors such as prior threats or acts of violence by the student against other victims, or observations from other members of the university community were relevant.[203]

Justice Chin's concurrence addressed several issues related to the majority's opinion.[204] The concurrence questioned whether the outer limits of the majority's holding, specifically whether it would extend the IHE duty to situations outside of the classroom.[205] The concurrence also took issue with the majority's conclusion, saying it seemed "likely to create confusion, because the majority offers no guidance as to which nonclassroom activities qualify as either 'curricular' [as well as] what factors are relevant to this determination."[206] Both of these criticisms highlight legitimate concerns stemming from *Regents of University of California v. Superior Court*, but, given the jurisdiction, the

197. *Id.* at 663.
198. *Id.* at 668.
199. *Id.* at 669.
200. *Id.* at 670.
201. *Id.* at 671 (quoting Cabral v. Ralphs Grocery Co., 248 P.3d 1170, 1175 (Cal. 2011)).
202. *Regents of Univ. of Cal.*, 413 P.3d at 630.
203. *Id.*
204. *Id.* at 675.
205. *Id.*
206. *Id.*

California Supreme Court's analysis of this issue may also be the starting point for any case evaluating whether a relationship exists between students and IHEs leading to liability under negligence for injuries suffered as a result of student-on-student violence.

The concurrence highlights issues that may arise when IHEs cannot determine which non-classroom activities qualify as curricular and thus subject to the duty of care to prevent other students from foreseeable risks of harm.[207] For example, Ma'lik Richmond was convicted of sexual assault as a teen.[208] He was admitted to Youngstown State University after his release and made the football team, only to be removed once his presence made national news.[209] If the California ruling was applied to a matter involving Richmond, it becomes muddled what elements would create a duty of care.

Negligent Admission.

One of the most relevant cases in this space occurred in 1987, where a student with a known violent history was admitted to the State University College in Buffalo, New York.[210] The student, who had served prison time for drug offenses, was able to successfully enroll in the university in a state-funded program for disadvantaged adults.[211] During his time at the institution, the student murdered two students, raping one of them, and severely injured a third.[212] The institution was sued by the families of the deceased and the survivor on the grounds of negligence in the college's role in admitting him and failing to restrict his activities based on the risk he presented.[213] Both the trial and appellate courts found in favor of the plaintiffs, stating the college breached its duty to protect the students from harm.[214] The Court of Appeals of New York, the highest court in the state, reversed the lower court's decision stating the college did not take on "either a duty of heightened inquiry in admissions, or a duty to restrict his activity on campus, for the protection of other students."[215] The court went on to state, "[c]onsistent with conditions of parole, an individual

207. *Id.*

208. *See* Ben Kercheval, *Convicted Rapist Ma'lik Richmond Remains at Youngstown State as School Settles Suit*, CBSSPORTS.COM (Oct. 3, 2017), https://www.cbssports.com/college-football/news/convicted-rapist-malik-richmond-remains-at-youngstown-state-as-school-settles-suit/.

209. *Id.*

210. Eiseman v. State, 511 N.E. 2d. 1128, 1130 (1987).

211. Bradley Dean Custer, *College Admission Policies for Ex-Offender Students: A Literature Review*, 67(2) J. CORR. EDUC. 35, 39 (2016).

212. *Id.*

213. *Eiseman*, 511 N.E. 2d. at 1132.

214. Custer, *supra* note 211, at 39.

215. *Eiseman*, 511 N.E. 2d. at 1137.

returned to freedom can frequent places of public accommodation, secure employment, and if qualified become a student."[216]

This case determined that IHEs do not have the duty to protect students from each other.[217] In addition, the act of screening prospective students to protect the student body may create additional legal liability by potentially creating contractual expectations for a safe campus.[218] Ultimately, IHEs may be establishing duty with the mere existence of the background check policy, as its purpose is to mitigate issues of violence by student athletes.

PART THREE: RECOMMENDATIONS

The purpose of this paper was to explore the potential legal implications of IHEs that implement background checks solely on student athletes to promote campus safety. As discussed, IHEs must consider the constitutionality of requiring background checks for student athletes, but not the general student body. Further, IHEs may open themselves up to common law issues regarding liability for student safety on campus due to its policy involving CBC. In light of the competing legal demands that IHEs face, it is important to consider additional means of sexual violence prevention.

Whether or not IHEs choose to implement background checks, it is critical they implement sexual violence prevention education. According to the Centers for Disease Control and Prevention, effectively preventing sexual violence requires comprehensive strategies that address each level of the social-ecological model of prevention: individual, relationship, community, and societal.[219] The social-ecological framework posits that no one single action or policy can prevent violence from occurring, and the most effective means of prevention is multi-faceted, targeting each level of the framework (i.e., individual, relationship, community, societal).[220] IHEs that implement background checks are addressing the community level by aiming to create safer campuses with fewer perpetrators. Further, having a known policy of background checks to "weed out" perpetrators may help send a message that violence against women is not acceptable, helping to change societal norms as well.[221]

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216. *Id.*

217. Custer, *supra* note 211, at 39.

218. *Id.*

219. Kathleen C. Basile et al., *STOP SV: A Technical Package to Prevent Sexual Violence*, NAT'L CTR. INJ. PREVENTION & CONTROL 1, 9 (2016), https://www.cdc.gov/violenceprevention/pdf/sv-prevention-technical-package.pdf.

220. *Id.*

221. *Id.* at 11.

It is also critical to understand more about individual risk factors for sexual violence perpetration. Some research has linked the acceptance of rape myths and poor attitudes toward women as individual risk factors for perpetration.[222] Surely, these individual attitudes are influenced by societal norms and community standards, which may be affected by known community policies requiring background checks to reduce the number of perpetrators on campus. But more effective means of changing individual attitudes and, more importantly, behavior, is through comprehensive prevention education programs. These programs are theory-driven, comprehensive (i.e., multiple interventions in multiple settings), socio-culturally relevant with sufficient dosage, and include varied teaching methods, well-trained staff, and outcome evaluation.[223] Therefore, even though IHEs may be tempted to solely implement a CBC policy as a reactionary step, a more prudent approach involves cultivating sexual violence prevention education programs.

Sexual violence prevention education programs may take the place of background checks or be part of a more nuanced strategy that does not strongly rely on background checks. Such a policy approach could mitigate the likelihood of IHEs attracting legal scrutiny or liability while also meeting its duty of care to protect students from foreseeable risks of harm. Such educational programs and other training may also avoid voluntarily establishing the IHEs' duties to others, potentially sidestepping negligence claims and related legal pitfalls. If society truly wants to prevent sexual violence, we must send a strong societal message that male privilege, domination, and sex discrimination are not valued. CBCs alone cannot accomplish this objective; it can be achieved through prevention education, which some IHEs have been implementing on an evolving basis.[224]

CONCLUSION

This article was intended to identify several potential legal theories of liability if IHEs chose to respond to issues of sexual assault involving students and student athletes through CBCs. Although conventional wisdom suggests implementing some form of background check for student athletes would

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222. *See* Elizabeth Ann Gage, *Gender Attitudes and Sexual Behaviors: Comparing Center and Marginal Athletes and Nonathletes in a Collegiate Setting*, 14(9) VIOLENCE AGAINST WOMEN, 1014-1032 (2008); *see also* Neal B. Kimble et al., *Revealing an Empirical Understanding of Aggression and Violent Behavior in Athletics*, 15 AGGRESSION & VIOLENT BEHAV. 446 (2010).

223. Maury Nation, et al. *What Works in Prevention: Principles of Effective Prevention Programs*, 58(6/7) AM. PSYCHOLOGIST, 449, 450 (2003).

224. Eilene Zimmerman, *Campuses Struggle With Approaches for Preventing Sexual Assault*, N.Y. TIMES, June 22, 2016, https://www.nytimes.com/2016/06/23/education/campuses-struggle-with-approaches-for-preventing-sexual-assault.html.

protect it from liability, constitutional law issues may lead to legal exposure. The above explained that state actors subjecting student athletes, and not the rest of the population, to background checks could violate the Fourteenth Amendment under the Equal Protection Clause or the Fourth Amendment's prohibition of illegal searches and seizures. In these instances, the state's interest would be weighed against the interest of the party whose rights are being infringed.

However, theories of liability under common law doctrines related to negligence also suggest IHEs may risk liability when implementing a background check policy. Although the relationships between IHEs and students are no longer governed by in loco parentis, negligence liability may still exist according to the relationship of the parties, landlord-tenant law, premises liability, and by virtue of the foreseeability of the risk of harm. A significant ruling from California's highest court advised the IHEs that they possess a duty of care to protect students from a foreseeable risk of harm related to the classroom as well as curricular activities.[225] Therefore, although this duty may seem ambiguous, IHEs are placed in a precarious position when it comes to protecting students from foreseeable risks of harm in the classroom as well as curricular activities.

Ultimately, the more prudent approach to campus safety for all students is through preventive education. Preventive training methods have been tested and rolled out at various IHEs, such as bystander intervention training.[226] The Centers for Disease Control and Prevention also offer evidence-based preventive programs for IHEs to utilize. Preventive education can be developed over time as a more proactive approach to combatting sexual violence on campus, with other legal and policy schema playing a supporting role to mitigate this issue.

225. *See generally* Regents of Univ. of Cal. v. Super. Ct., 413 P.3d 656 (Cal. 2018).

226. *See* Kristy McCray at al., *A Zero Tolerance Approach: Assessing the Effectiveness of Sexual Assault Prevention Education for Intercollegiate Athletes*, N. AM. SOC'Y FOR SPORT MGMT. (2018); *see also* Eilene Zimmerman, *Campuses Struggle With Approaches for Preventing Sexual Assault*, N. Y. TIMES, June 22, 2016, https://www.nytimes.com/2016/06/23/education/campuses-struggle-with-approaches-for-preventing-sexual-assault.html.