COLLEGE AND UNIVERSITY LIABILITY FOR VIOLENT CAMPUS ATTACKS

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INTRODUCTION

On April 16, 2007, an otherwise serene university campus became the scene of the deadliest shooting in U.S. history.[1] Twenty-seven students and five faculty members were killed by Seung-Hui Cho at Virginia Tech in Blacksburg, Virginia.[2] That Monday, Americans were reminded that colleges and universities, often viewed as sheltered enclaves of higher learning, are vulnerable to the brutal acts of disturbed individuals.

In the weeks and months following the tragedy, Cho was not the sole focus of the nation's interest. The administrators of Virginia Tech also came under scrutiny as questions loomed about the university's response, its efforts to identify the risk posed by Cho, and whether the violent rampage could have been prevented.[3]

While they garner intense media exposure and overshadow more commonplace

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1. John M. Broder, *32 Shot Dead in Virginia; Worst U.S. Gun Rampage*, N.Y. TIMES, Apr. 17, 2007, at A1.

2. Shaila Dewan & John M. Broder, *Rampage Gunman Was Student; Warning Lag Tied to Bad Lead*, N.Y. TIMES, Apr. 18, 2001, at A1.

3. *See, e.g.*, Duncan Adams, *Lawsuit Against Tech Could Emerge*, ROANOKE TIMES, Apr. 22, 2007, at 8; Marcus Baram, *Who's Legally Responsible? Lawsuits Are Certain but Liability Unclear*, ABC NEWS ONLINE, Apr. 28, 2007, *available at* http://abcnews.go.com/US/story?id=3060605&page=1 (last visited Feb. 17, 2008); Liza Mandy, *What Comes After*, WASH. POST, Nov. 11, 2007, at W12; Anthony J. Sebok, *Could Virginia Tech be Held Liable for Cho Seung Hui's Shootings, If an Investigation Were to Reveal It Had Been Negligent?*, FINDLAW, Apr. 24, 2007, http://writ.lp.findlaw.com/sebok/20070424.html (last visited Feb. 17, 2008).

acts of violence, mass shootings on college and university campuses are rare. Therefore, this article examines not just high visibility incidents, but those legal developments relating to a range of violent acts on college and university campuses, including suicides, individual homicides, and multiple homicides. Using the Virginia Tech tragedy as a reference point, this article assesses the potential liability of colleges and universities for incidents of campus violence and crimes, the statutory limits on liability—including governmental immunity and damage limitations—and the strategies that can be implemented to minimize campus violence and subsequent liability exposure.

I. VIOLENCE ON CAMPUS AND POTENTIAL LIABILITY FOR NEGLIGENCE

It is likely only a matter of time before lawsuits are commenced against Virginia Tech and its administrators, and there is much debate over whether the university could be held liable for deaths directly caused by Cho.[4] Indeed, the town of Blacksburg, Virginia received notice of the possible filing of lawsuits against the town and its employees in October 2007.[5] Notice of a claim against Virginia Tech or the state must be filed within one year of the shooting.[6]

In order to succeed in court, the plaintiffs must establish that Virginia Tech was negligent either in how it addressed the potential threat posed by Cho based on its knowledge of his mental state or how it responded to the events of April 16, 2007. It is unlikely that university administrators' and employees' alleged knowledge of Cho's apparent depression, violent writings and antisocial behavior made his horrific final acts foreseeable such that the university could have done something to prevent them.[7] It is equally unlikely that doing anything more, or differently, would have changed the outcome after the shootings began.

Despite this, the following section begins by discussing selected circumstances which might trigger a "duty to prevent violence" on the part of a college or university, including: (i) the special relationship theory; (ii) duties owed by a college or university based on its status as a landowner; and (iii) duties owed by campus police who undertake to render services for the protection of students. Next, the section examines how an alleged failure to honor these duties could form the basis for negligence actions against the college or university, satisfying the breach and causation prongs of the negligence inquiry. Finally, this section addresses the effect of a plaintiff's negligence in states following contributory or comparative negligence theories, including Virginia.

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4. *See* Sue Lindsey, *Lawsuits Possible from Virginia Tech Shooting*, USA TODAY, Oct. 13, 2007, *available at* http://www.usatoday.com/news/topstories/2007-10-13-2173352867_x.htm.

5. *Id.*

6. *Id.*

7. *See infra* notes 41–49 and accompanying text.

A. Finding a Duty

Establishing that the school owed a duty to protect its students may be the most significant challenge faced by a plaintiff seeking to bring a negligence action against a college or university for injury caused by a violent student.[8] Because the relationship between postsecondary schools and their students is not easily defined, courts have struggled to delineate what measures institutions must take to keep their students safe.[9] Overall, society views college and university students as independent citizens responsible for making choices that will shape their futures.[10] Does the fact that students are considered adults completely absolve colleges and universities of any legal obligation to put forth best efforts in providing a safe campus environment? Some would say it does, pointing to case precedents that seem to strongly support a "no duty" stance for college and university administrators.[11]

The initial reluctance of courts to impose a general duty of protection on colleges and universities was the result of a historical shift occurring in the mid-twentieth century. Yet, this could be in the process of reversing itself, or at least evolving toward a modern middle ground.[12] Prior to the 1960s, postsecondary schools stood *in loco parentis* to students, who were viewed as being under the control and custody of the schools.[13] The schools' status as stand-in parents to students in their custody was the obvious foundation for the existence of a duty to protect students.[14] As the anti-establishment and civil rights movements progressed, students sought greater independence and colleges and universities

8. *See* Oren R. Griffin, *Confronting the Evolving Safety and Security Challenge at Colleges and Universities*, 5 PIERCE L. REV. 413, 418 (2007) (acknowledging that the pivotal inquiry in negligence cases brought by students against colleges and universities revolves around the existence and scope of a duty).

9. *Cf.* Jane A. Dall, Note, *Determining Duty in Collegiate Tort Litigation: Shifting Paradigms of the College-Student Relationship*, 29 J.C. & U.L. 485, 485 (2003) (noting that, although tort actions against colleges and universities have increased, courts have inconsistently imposed liability).

10. *See* Griffin, *supra* note 8, at 415.

11. *See, e.g.*, Bradshaw v. Rawlings, 612 F.2d 135 (3d Cir. 1979).

12. Gary Pavela, the director of judicial programs at the University of Maryland, believes that the pendulum is swinging back "dramatically" toward a period where colleges and universities take more control over regulating students. *See* Randy Barrett & Neil Munro, *Paved With Good Intentions?*, NAT'L J., Apr. 28, 2007, at 60. Another commentator indicates that concerns about a return to the days when colleges and universities were held *in loco parentis* have been expressed for decades, but distinguishes the movement toward recognizing duties of colleges and universities as "both entirely new and familiar." *See* Peter F. Lake, *The Rise of Duty and the Fall of In Loco Parentis and Other Protective Tort Doctrines in Higher Education Law*, 64 MO. L. REV. 1, 2 (1999). In essence, Lake states that what is happening is not actually a reverse in a trend or a return to an outdated historical view of institutions' relationships with students, but rather an evolution toward a modern view that holds colleges and universities to standards to which other businesses are already held. *Id.*

13. *See* Lake, *supra* note 12, at 5; *Bradshaw*, 612 F.2d at 139.

14. *Bradshaw*, 612 F.2d at 139.

moved toward treating students as adults.[15]

Bradshaw v. Rawlings signified the death of the view that institutions owed a duty to students based solely on the existence of a custodial relationship (or *in loco parentis* status).[16] In that case, the Court of Appeals for the Third Circuit stated: "the modern American college is not an insurer of the safety of its students."[17] The *Bradshaw* court emphasized that students were determined to break free from the paternalistic bond characterizing their relationships with their schools, and the court noted that the inevitable consequence of gaining autonomy was the loss of a measure of protection.[18] Phrased with less legalese, the court in essence said: "*You got what you asked for; now live with it.*"[19]

In several cases that followed, American courts declined to impose a general duty to protect upon colleges and universities when adult students were harmed on campus.[20] This "no duty" approach seems sensible when students are harmed as a result of adult decisions to engage in potentially risky behaviors—*e.g.*, excessive consumption of alcohol[21] or jumping on a trampoline in the dark.[22] But the Virginia Tech scenario has brought a tougher question to the fore: is the "no duty" approach also sensible where innocent students are harmed by a dangerous third party?

While the broadly-recognized rule is that colleges and universities do not owe their students a general duty of protection, some courts have carefully avoided using a one-size-fits-all approach, drawing distinctions between cases that focus on a school's ability to police students' routine, adult decisions[23] and others that focus on the reasonableness of a school's efforts to protect students' physical safety from threats of violence.[24] While a school is not charged with an automatic, broad duty of protection upon a student's matriculation, certain duties can be triggered under unique circumstances. Three of the more commonly raised circumstances are: (1) a duty arising from a special relationship between the institution and an individual based on the institution's knowledge of foreseeable harm;[25] (2) a duty based on the institution's status as a landowner, business owner, or landlord;[26] and (3) the duty of the college or university and campus police to exercise reasonable care in

15. *Id.*

16. *Id.*

17. *Id.* at 138.

18. *Id.* at 139.

19. The *Bradshaw* court seemed to imply that college administrations were reluctant to give in to the dilution of their "authoritarian role" by the movement of students demanding more and more rights. *Id.* at 138–39 (emphasis added). The acknowledgment of students' success in claiming rights coupled with the refusal to preserve any general duty of protection owed to students seems like an attempt to even the score. *Id.*

20. *See, e.g.*, *id.*; Univ. of Denver v. Whitlock, 744 P.2d 54 (Colo. 1987); Beach v. Univ. of Utah, 726 P.2d 413 (Utah 1986).

21. *Beach*, 726 P.2d at 413.

22. *Whitlock*, 744 P.2d at 54.

23. *See, e.g.*, *Bradshaw*, 612 F.2d at 135; *Whitlock*, 744 P.2d at 54; *Beach*, 726 P.2d at 413.

24. *See, e.g.*, Nero v. Kan. State Univ., 861 P.2d 768, 780 (Kan. 1993).

25. *See infra* notes 41–62 and accompanying text.

26. *See infra* notes 63–86 and accompanying text.

undertaking security-related services.[27] These will be discussed in turn.

1. Duty Arising from a Special Relationship

Colleges and universities are not charged with a duty to protect their students under all circumstances, but once the school has certain knowledge about a particular student's potential to harm either himself or others, a duty may arise.[28] As discussed above, there has been a pronounced shift away from viewing colleges and universities as acting *in loco parentis*. As such, there is no solid basis for imposing a general duty based solely on the character of the relationship between the college or university and its students.[29] Section 314A of the Restatement (Second) of Torts recognizes various special relationships that create an affirmative duty of reasonable care, including the relationship between common carriers and their passengers, innkeepers and guests, and landowners and invited members of the public.[30] The relationship between colleges and universities and their students is not listed by Section 314A, but the comments to that section make it clear that the list was not intended to be exclusive, and courts have found that certain circumstances give rise to a special relationship between schools and their students.[31]

There may be an emerging trend toward recognition of a special relationship between colleges and universities and their students. In fact, Section 40 of the Proposed Restatement (Third) of Torts: Liability for Physical Harm, which has been approved for publication, lists the relationship between a school and its students as a special relationship.[32] The comments to Section 40 indicate that the special relationship status applies to primary and secondary schools and possibly to colleges and universities, as well.[33] If Section 40 is widely adopted, the former general rule "that no special relationship exists between a college and its *own* students because a college is not an insurer of the safety of its students"[34] may be replaced with a general rule that a college or university possesses a special relationship with each and every one of its students, and thus owes its students a duty of reasonable care with regard to risks that arise within the scope of the

27. *See infra* notes 87–105 and accompanying text.

28. Schieszler v. Ferrum Coll., 236 F. Supp. 2d 602, 608–10 (W.D. Va. 2002).

29. Courts have, of course, found limited exceptions to this rule, such as the relationship between an institution and its student-athletes, and where a college received repeated warnings that a student was suicidal. *See* Freeman v. Busch, 349 F.3d 582, 588 n.6 (8th Cir. 2003).

30. RESTATEMENT (SECOND) OF TORTS § 314A (1965).

31. *Id.* cmt. *b*.

32. RESTATEMENT (THIRD) OF TORTS § 40(b) (Proposed Final Draft No. 1, Apr. 6, 2005).

33. *Id.* cmt. *l*. The Restatement specifically acknowledges that the duty of K-12 schools has "been imposed on higher-education institutes, at least with regard to risks from conditions on the college's property or risks created by the acts of others on the confines of college property." *Id.*

34. *Freeman*, 349 F.3d at 587 (finding no special relationship between a student and her resident assistant which would impose a legal duty on the resident assistant to act for the student's protection). In *Freeman*, the negligence claim against the college failed because, if the plaintiff could not establish a duty on the part of the resident assistant, she could not establish a duty on the part of the college under a vicarious liability theory. *Id.* at 589.

school-student relationship.[35]

i. Special Relationships Arising From Non-Violent Activities

Many of the cases addressing whether a special relationship exists between a college or university and its students do not deal with acts of violence, but rather with students who are engaging in adult behaviors typically considered part of campus life.[36] In trying to determine whether a special relationship exists in situations where a student is harmed while engaging in social or extra-curricular activities on campus, courts consider whether the college or university exercised control or supervision over the student in a situation presenting foreseeable danger.[37] Generally, a student's private or recreational pursuits that are unrelated to education are not considered to be within the control of the college or university; in fact, administrative regulation of those pursuits runs counter to the dominant objective of fostering student growth and creating an environment in which the student will thrive educationally and personally.[38] Even so, a special relationship has been recognized when a student participates in intercollegiate sports—an activity encouraged and regulated by the school.[39] A special relationship has also been recognized when a student pledges an on-campus fraternity—particularly where the seriousness of fraternity hazing and the fact that it was taking place on college or university property were well known to the school.[40]

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35. RESTATEMENT (THIRD) OF TORTS § 40(b) (Proposed Final Draft No. 1, Apr. 6, 2005).

36. *See, e.g.*, Kleinknecht v. Gettysburg Coll., 989 F.2d 1360 (3d Cir. 1993) (negligence claim arising from a student-athlete's death during a practice session held by the college's intercollegiate lacrosse team); Bradshaw v. Rawlings, 612 F.2d 135 (3d Cir. 1979) (negligence claim arising from harm caused by a student driving after consuming alcohol at a class picnic arguably sponsored by the college); Univ. of Denver v. Whitlock, 744 P.2d 54 (Colo. 1987) (negligence claim by a student who was injured while jumping on a trampoline on the university's grounds); Furek v. Univ. of Del., 594 A.2d 506 (Del. 1991) (negligence claim arising from injuries sustained by a student who had been hazed by members of a fraternity located on university property).

37. *See Kleinknecht*, 989 F.2d at 1367; *Furek*, 594 A.2d at 522; Knoll v. Bd. of Regents of Univ. of Neb., 601 N.W.2d 757, 761–62 (Neb. 1999).

38. *See* Booker v. Lehigh Univ., 800 F. Supp. 234, 239 (E.D. Pa. 1992) (finding that where the college had adopted an alcohol policy that accorded "certain amounts of responsibility to college students as intelligent, responsible members of society," the college had no special duty to control students because "[a] college may not 'control' the behavior of its students as may have been possible in the past"); *Whitlock*, 744 P.2d at 60.

39. *See Kleinknecht*, 989 F.2d at 1367; *but cf.* Davidson v. Univ. of N.C. at Chapel Hill, 543 S.E.2d 920, 930 (N.C. Ct. App. 2001) (holding that where the university voluntarily undertook to advise and educate cheerleaders regarding safe performance of cheerleading stunts, the university owed the students a "duty of care upon which a claim of negligence may be based, independent of the duty arising from the special relationship between the parties").

40. *Furek*, 594 A.2d at 522; *Knoll*, 601 N.W.2d at 765 (holding that where the university knew of prior hazing instances, the university "owes a landowner-invitee duty to students to take reasonable steps to protect against foreseeable acts of hazing").

ii. Special Relationships Arising From Foreseeability of Violence

Where harm results from an act of violence by a student, colleges and universities typically argue that the act is an intervening and superseding cause severing the "chain of causation" and, therefore, cutting off any liability that could be imposed on the school.[41] However, if a special relationship is found to exist, the intervening and superseding cause may not negate a college or university's duty to protect students from harm posed by potentially dangerous individuals.[42] Postsecondary schools offer a wide array of services aimed at ensuring that students are psychologically and mentally able to cope with the pressures of maturation and higher education—*e.g.*, psychological and counseling services, faculty and staff advisors, and peer outreach/support groups. In some cases, a counselor or mental health professional employed by the school is in a position to know that a student is likely to commit harm to him or herself or others. The relationship between the institution's psychologist, therapist, or counselor and the student is similar to that of any mental health professional and a patient. Furthermore, it can give rise to a special relationship if the professional knows or should know that the patient poses a serious danger to others.[43]

Conversely, in cases where a student does not seek therapeutic help, other members of the campus community may have knowledge that a student is likely to act violently.[44] However, members of the campus community, and especially those who are not agents of the college or university, are under no duty to pool their knowledge or report every observation pertaining to a potentially dangerous student.[45] Similarly, administrators have no duty to seek out information held by every person affiliated with the school's programs in an effort to determine whether an individual is likely to commit a violent act.[46] Practicality and privacy concerns dictate that a college or university cannot amass all the facts necessary to understand the potential danger posed by each troubled student.[47]

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41. *See, e.g.*, Jain v. Iowa, 617 N.W.2d 293, 300 (Iowa 2000); Johnson v. Washington, 894 P.2d 1366, 1371 (Wash. Ct. App. 1995).

42. *See, e.g.*, Stanton v. Univ. of Me. Sys., 773 A.2d 1045, 1049 (Me. 2001).

43. Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334, 345 (Cal. 1976).

44. "[D]angerous people rarely show all of their symptoms to just one department or group on campus. . . . Acting independently, no department is likely to solve the problem. In short, colleges must recognize that managing an educational environment is a team effort, calling for collaboration and multilateral solutions." Peter F. Lake, *Higher Education Called to Account*, CHRON. HIGHER EDUC. (Wash., D.C.), June 29, 2007, at B6.

45. *Id.*

46. Generally, a college or university is under no duty to inquire or seek out information to identify potentially dangerous individuals. *See, e.g.*, Eiseman v. New York, 511 N.E.2d 1128 (N.Y. 1987). In *Eiseman*, the court held that a college had no special relationship with a student admitted under a special program for the admission of ex-felons, where the student had previously been identified as a potential killer. *Id.* at 1137. Because the college had no duty to inquire about the student's potential for committing violence, the college had no knowledge that would alert them to the need to protect other students. *Id.*

47. Nancy Shute, *What Went Wrong*, U.S. NEWS & WORLD REPORT, Apr. 30, 2007, at 42 (highlighting some of the difficulties colleges and universities face in identifying and treating

Even if it were feasible, ethical, or desirable to cull the collective observations made by members of the campus community about particular individuals, it is uncertain whether information obtained in that manner would pinpoint imminently foreseeable harm.[48] In fact, as is likely the case with observations made about Cho by some Virginia Tech professors and students, many of the day-to-day observations that campus community members are in a position to make, even if considered as a whole, will not be enough to make imminent harm foreseeable.[49] Reports of a student's disturbing writings, expressions of anger toward particular groups, and antisocial behavior are unlikely to trigger a duty unless the student makes statements or takes actions that clearly show intent to harm someone on campus.[50]

Another challenge faced by plaintiffs trying to assert that a college or university has a duty to act is the fact that potentially violent individuals often may not specifically identify the target of their ill-will. Mass shootings by disturbed individuals are often random and their victims are determined by chance. The court in *Tarasoff v. Regents of the University of California*[51] understood this reality. In *Tarasoff*, the court determined that the duty to warn others about threatened harm arises only when there is a specifically foreseeable person or group of persons targeted by the threat of harm.[52] At this point, a mental health professional that possesses knowledge about the dangerous person is obligated to disclose the information to potential victims.[53] Where the potentially violent person is targeting a specifically identifiable victim or group of victims, it may be relatively easy to warn or take measures to protect those persons. But where the threat appears to be directed at the world at large, the correct course of action is less clear. Of course, where a student poses an imminently foreseeable threat to a large or unidentifiable group of persons, colleges and universities may want to look beyond the mental health professional construct set forth in *Tarasoff*. If the threat is sufficiently serious, it would be reasonable to expect colleges and universities to focus their efforts on removing the potentially dangerous individual from campus, whether via mental health professionals or otherwise.

Colleges and universities can learn from recent cases involving student suicides,

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troubled students).

48. A Secret Service study conducted in 2000 found that there was no "profile" that would help identify school shooters before they acted. *Id.* at 42. Also, institutions should note that if they undertake heightened efforts to identify students based on characteristics they believe to be early warning signs, they may be, in essence, creating special relationships or assuming duties to prevent harm beyond those that they normally have.

49. Manny Fernandez & Marc Santora, *In Words and Silence, Hints of Anger and Isolation*, N.Y. TIMES, Apr. 18, 2007, at A1.

50. Counseling professionals struggle with the task of pinpointing when a student's strange behavior rises to the level of creating an imminent risk. *See* Elyse Ashburn et al., *Sounding the Alarm*, CHRON. HIGHER EDUC. (Wash., D.C.), Apr. 27, 2007, at A6. Maggie Olona, Director of the Student Counseling Service at Texas A&M University, sums up the difficulty surrounding when to act, stating, "Odd behavior is not a crime." *Id.*

51. 551 P.2d 334 (Cal. 1976).

52. *Id.* at 342–43.

53. *Id.* at 345.

where the special relationship theory has been most frequently tested. While the issue of identifying the target of potential harm does not arise in a suicide case, there are lessons that can be learned about foreseeability. *Schieszler v. Ferrum College*[54] and *Shin v. Massachusetts Institute of Technology*,[55] which were both settled out of court, involved troubled students who had made their suicidal thoughts known to someone on campus.[56] However, under the special relationship theory, it is not enough for a plaintiff to illustrate someone at the school knew a student had considered suicide or an act of violence.[57] A plaintiff must show that the college or university had specific knowledge, putting it on reasonable notice that the person would act imminently to cause harm.[58] In both *Schieszler* and *Shin*, the plaintiffs argued that the notice was clear.[59] Specifically, they alleged that: (1) administrators in each case knew that the student made repeated suicide threats; (2) each student had previously suffered self-harm; and (3) each student had been under the care of a mental health professional.[60] In *Schieszler*, the U.S. District Court for the Western District of Virginia highlighted that the dean of students required the suicidal student to sign a statement affirming that he would not harm himself.[61] The court viewed this as an admission of the administration's knowledge of an imminently foreseeable suicide attempt. Where the school knows or should know self-harm is an "imminent probability," a special relationship may be created.[62] Similarly, where the student is not suicidal, but rather exhibits behavior that should put the school on notice of an imminent probability that he or she will harm others, the school may have a special relationship and a duty to prevent harm.

iii. Special Relationship Arising From a Landowner's Duty to Maintain Safe Premises

A plaintiff pursuing a negligence action against a college or university based on the violent acts of another student may seek to establish that the school has a duty as a landowner, business owner, or landlord, to maintain safe and secure premises for its students. While this duty is applied frequently where a dangerous condition exists on the land, such duties have been extended in some cases to protect persons

54. 236 F. Supp. 2d 602 (W.D. Va. 2002).

55. No. 020403, 2005 WL 1869101 (Mass. Super. Ct. June 27, 2005).

56. *Schieszler*, 236 F. Supp. 2d at 605; *Shin*, 2005 WL 1869101, at *2.

57. *Schieszler*, 236 F. Supp. 2d at 609.

58. *Id.*

59. *Id.*; *Shin*, 2005 WL 1869101, at *12–15.

60. *Schieszler*, 236 F. Supp. 2d at 609; *Shin*, 2005 WL 1869101, at *1–4.

61. *Schieszler*, 236 F. Supp. 2d at 609.

62. *Id.* Similarly, in *Bash v. Clark Univ.*, No. 06745A, 2006 WL 4114297, at *4 (Mass. Super. Ct. Nov. 20, 2006), the court determined that an institution's knowledge of a student's alcohol and drug abuse did not trigger a special relationship giving rise to a duty to protect her from overdosing on heroin. In a second action commenced by filing an amended complaint, the court suggested that such a duty may exist if an institution had notice of "multiple incidents involving heroin." Bash v. Clark Univ., No. 200600745, 2007 WL 1418528, at *2 (Mass. Super. Ct. Apr. 5, 2007). In other words, a special relationship is not likely to arise unless and until the student's potentially harmful behaviors are overt, repeated, and clearly tied to foreseeable harm.

on the land from harm resulting from the foreseeable acts of third parties.[63]

The duty that a college or university owes as a landowner varies depending on its relationship with persons on the land. If the school is considered a landlord and the student a tenant, as may be the case where a student is harmed while in his or her residence hall room, the duty to protect from harm by third parties will not be recognized unless a physical condition in a common area contributes to the harm.[64] For example, failure to maintain working locks or to adequately monitor who is entering the building could be considered a breach of the landlord's inherent duty. Where that breach results in harm perpetrated by one who is not authorized to enter the residence hall, a plaintiff could bring a negligence action.[65]

In *Rhaney v. University of Maryland Eastern Shore*,[66] a student who was assaulted by his roommate in their shared on-campus room attempted to argue that the university, in its capacity as his landlord, owed a duty to protect him from his roommate.[67] Rhaney did not attempt to argue that any physical condition on the property contributed to the assault, but, rather, that his roommate was the dangerous condition and that the school knew the roommate had been involved in a physical fight on campus at least once before.[68] The court declined to accept the view that the roommate himself qualified as a "dangerous condition," pointing out that if it were to accept the argument, colleges and universities would be forced to take on an unworkable "floating duty" owed to every resident of the building as the roommate moved from room to room.[69]

The duty owed by a landowner to a business invitee is more demanding than that owed by a landlord.[70] The landowner has an affirmative duty to "use reasonable and ordinary care to keep the premises safe and to protect the invitee from injury caused by an unreasonable risk which the invitee, by exercising ordinary care for his own safety, will not discover."[71] Such unreasonable risks may include those posed by third persons—*e.g.*, employees of the landowner and other business invitees.[72] Unlike the special relationship theory, the landowner does not need to know that there is an "imminent probability" that a particular person will act to cause harm to a business invitee. The plaintiff only needs to prove that the business owner, as a prudent person, should have anticipated the

63. *See* Rhaney v. Univ. of Md. Eastern Shore, 880 A.2d 357, 366–67 (Md. 2005); Stanton v. Univ. of Me. Sys., 773 A.2d 1045, 1049 (Me. 2001); *see also* Peterson v. S.F. Cmty. Coll. Dist., 685 P.2d 1193 (Cal. 1984).

64. *Rhaney*, 880 A.2d at 367.

65. *See, e.g.*, Mullins v. Pine Manor Coll., 449 N.E.2d 331, 336 (Mass. 1983).

66. 880 A.2d 357 (Md. 2005).

67. *Id.* at 361–62.

68. *Id.* at 365.

69. *Id.* at 366 n.9.

70. *Id.* at 366–67.

71. *Id.* The court in *Rhaney* rejected the argument that the university and plaintiff had a business owner/invitee relationship, restricting that relationship to students when they were in the university's common areas, dining halls, and academic buildings. *Id.* at 367. *See also* RESTATEMENT (SECOND) OF TORTS § 343 (1965) (regarding Dangerous Conditions Known to or Discoverable by Possessor).

72. *Rhaney*, 880 A.2d at 367.

possible occurrence of harm from third parties and failed to take reasonable steps to prevent it—steps that could, if implemented, have prevented the harm.[73] The specific contours of this liability have been set forth in Restatement (Second) of Torts, Section 344, as follows:

> A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to: (a) discover that such acts are being done or are likely to be done; or (b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.[74]

This Restatement section has been explicitly extended to colleges and universities, which, among other things, do business with the public.[75] However, the Restatement also realizes that imposing liability for criminal activities may be too much, and limits the noted liability theory, as follows:

> The act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, unless the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime.[76]

In *Stanton v. University of Maine System*,[77] a female student was sexually assaulted by a person who accompanied her to her residence hall.[78] The court imposed a duty on the university because it held students to be business invitees.[79] Pursuant to the university's security measures, telephones providing access to the University Police 24-hour dispatch were installed inside and outside of residence hall entrances, resident assistants lived in the residence halls, and students were provided keys to the residence hall entrance and their own rooms.[80] There were no signs posted in the residence halls informing residents of who should or should not

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73. *Id.*

74. RESTATEMENT (SECOND) OF TORTS § 344 (1965).

75. *See, e.g.*, Furek v. Univ. of Del., 594 A.2d 506, 521–23 (Del. 1991); Nero v. Kan. State Univ., 861 P.2d 768, 780 (Kan. 1993). Moreover, a student may be fairly characterized as an invitee. *See id.* at 780.

76. RESTATEMENT (SECOND) OF TORTS § 448 (1965).

77. 773 A.2d 1045 (Me. 2001).

78. *Id.* at 1048.

79. *Id.* at 1049. Similarly, the court in *Williams v. Louisiana*, 786 So.2d 927 (La. Ct. App. 2001), found that "[t]he university/student relationship, where students reside as guests or patrons in a dormitory, parallels the relationship of a business and its customers." *Id.* at 932. Thus, colleges and universities have "a duty to implement reasonable measures to protect [their] students in dormitories from criminal acts when those acts are foreseeable." *Id.*

80. *Stanton*, 773 A.2d at 1048.

be allowed to enter.[81] The court found that the occurrence of a sexual assault in a student's room was foreseeable and that such foreseeability was evidenced by the security measures implemented by the university.[82] Thus, the court held that the university owed a duty to reasonably warn and advise students of steps they could take to improve their personal safety.[83]

In sum, even where there is no specific threat from a particular third person with whom the college or university has a relationship, colleges and universities could be compelled as landowners to take additional precautions to prevent harm based on a generalized knowledge that violent acts are likely to occur on campus.[84] When an intentional and horrific crime such as that committed at Virginia Tech takes place, the law generally recognizes that the proximate (and sole) cause of the harm is the shooter himself, not the school,[85] *unless* the school created the situation that allowed the shooter to engage in his criminal activity and failed to take steps to rectify that situation.[86]

2. Duty to Act Reasonably When Acting to Protect Students

Although there is no well-defined duty to provide security and law enforcement personnel on campuses,[87] there is certainly a growing expectation that such services will be provided. "[A]dequate security is an indispensable part of the bundle of services, which colleges . . . afford their students."[88] Public colleges and universities could argue that the "public duty rule" insulates them from any duty to provide police protection to particular students. Under this "public duty rule," municipalities owe no duty to provide police protection to individuals.[89] Thus, a

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81. *Id.*

82. *Id.* at 1050.

83. *Id.*

84. *See Williams*, 786 So.2d at 932 ("The university/student relationship, where students reside as guests or patrons in a dormitory, parallels the relationship of a business and its customers. Accordingly, . . . we find that a university likewise has a duty to implement reasonable measures to protect its students in dormitories from criminal acts when those acts are foreseeable.").

85. *Cf.* Brown v. N.C. Wesleyan Coll., Inc., 309 S.E.2d 701, 703 (N.C. Ct. App. 1983) (finding that where a student was abducted from campus, driven to a quarry and murdered, and evidence of other incidents of violence on campus made the abduction and murder unforeseeable, the college was not negligent because it took adequate security measures). Indeed, one judge has questioned whether any college or university could take sufficient precautions to protect students from unforeseeable, random, violent acts. Setrin v. Glassboro State Coll., 346 A.2d 102, 106 (N.J. Super. Ct. App. Div. 1975) (Botter, J., concurring) ("[I]t is fairly simple to decide how many ushers or guards suffice . . . to deal with the crush of a crowd and the risks of unintentional injury . . . but how can one know what measures will protect against the thug, the narcotic addict, the degenerate, the psychopath and the psychotic? Must the owner prevent *all* crime?").

86. RESTATEMENT (SECOND) OF TORTS § 448 (1965).

87. Peterson v. S.F. Cmty. Coll. Dist., 685 P.2d 1193, 1202 (Cal. 1984).

88. Mullins v. Pine Manor Coll., 449 N.E.2d 331, 336 (Mass. 1983).

89. Riss v. City of New York, 240 N.E.2d 860, 861 (N.Y. 1968); *see also* Martin v. Malhoyt, 830 F.2d 237, 259 (D.C. Cir. 1987) ("[O]nly where the police and the individual are in a special relationship different from that existing between police and citizens generally, can a sufficiently particularized 'duty to protect' arise rendering the officer potentially liable for a

college or university could argue that, as a public entity, it owes no special duty to protect any one student, but only owes a duty to implement procedures to protect the student body and perform those procedures non-negligently. However, where the police assist an individual, they assume a duty, and a special relationship is created such that they must act in a reasonable manner.[90]

The most likely basis for a negligence action arising from an alleged failure of campus security or campus law enforcement personnel is provided by the Restatement (Second) of Torts, Section 323, which states that one who undertakes to render services for the protection of another can be held liable for physical harm resulting from failure to exercise reasonable care in providing such services, if the harm is (1) made worse because of the failure, or (2) suffered because of the other's reliance on the undertaking.[91]

In *Mullins v. Pine Manor College*,[92] the Massachusetts Supreme Court held that the college had a duty to protect students from criminal acts of third parties.[93] It found that this duty existed because the college voluntarily provided services to protect students.[94] But, under Section 323 of the Restatement, the voluntary provision of security measures was insufficient on its own to establish liability. The plaintiff had to show that the harm was either made worse by the college's conduct or that the plaintiff suffered by relying on the undertaking of provision of security. This argument should have proved difficult because the complaint was inaction, as opposed to the affirmative undertaking of protective action, which is the common target of Section 323. However, the court held the burden to show reliance on the college's conduct could be met by arguing that prospective students visiting with their parents observed a fence around the campus, the presence of security guards, and other steps taken to ensure student safety, and relied on those measures in deciding to enroll at the college.[95] The *Mullins* opinion was rare in two respects: (1) Section 323 of the Restatement is unlikely to be applied in a situation where the conduct complained of is a failure to act,[96] and (2) modern courts are reluctant to impose a duty based on a student's reliance on an institution's vague representations about campus safety.[97]

When courts forego the Section 323 analysis, they generally find that if a college or university assumes a duty to protect its students, it must do so non-negligently.[98] In *Coghlan v. Beta Theta Pi Fraternity*,[99] Rejena Coghlan attended

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failure to act.") (citation omitted).

90. McNack v. Maryland, 920 A.2d 1097, 1108 (Md. 2007) ("[T]he 'special duty rule' is a 'modified application of the principle that although generally there is no duty in negligence terms to act for the benefit of any particular person, when one does indeed act for the benefit of another, he must act in a reasonable manner.'").

91. RESTATEMENT (SECOND) OF TORTS § 323 (1965).

92. 449 N.E.2d 331 (Mass. 1983).

93. *Mullins*, 449 N.E.2d at 336.

94. *Id.*

95. *Id.*

96. *See* Jain v. Iowa, 617 N.W.2d 293, 300 (Iowa 2000).

97. *See* Bash v. Clark Univ., No. 06745A, 2006 WL 4114297, at *7 (Mass. Super. Ct. Nov. 20, 2006).

98. *See* Booker v. Lehigh Univ., 800 F. Supp. 234, 237–38 (E.D. Pa. 1992); Coghlan v.

a fraternity party where two University of Idaho employees were present to provide supervision.[100] Coghlan became intoxicated and, after being put to bed in the third floor sleeping area of a sorority house, fell thirty feet from the third floor fire escape platform to the ground below.[101] The court found that the university had assumed a duty to exercise reasonable care by "safeguard[ing] the underage plaintiff from the criminal acts of third persons, *i.e.*, furnishing alcohol to underage students."[102]

Another convincing case for finding a voluntary assumption of duty on the part of a college or university could be made where the campus police department took some specific action in relation to an existing threat and that action induced students to rely or put them in a more dangerous position than they faced before. In *Jain v. Iowa*,[103] the court refers to a case in which a defendant communicated incorrect information about the location of a distressed vessel needing rescue.[104] The miscommunication caused some searchers to abandon their efforts, prolonging the rescue, and leading to the deaths of the ship's crew members.[105] An analogous situation would exist where a student tells a campus police officer that he has received a threat, and the officer undertakes to communicate the information to appropriate persons in the administration, causing the student to rely on the officer and forego speaking with administrators himself. If the officer fails to properly communicate the information, thereby preventing the issue from being addressed, and the student is then harmed, it is arguable that the officer's actions put the student in a more dangerous position than had he communicated the information to the appropriate persons himself.

Much has been made of the fact that Virginia Tech did not take particular measures after learning of the first murders committed in West Ambler Hall, the residence hall where Cho killed two students.[106] Questions persist about whether a campus that size could effectively be put under lockdown and why students were not immediately notified after the initial murders.[107] These questions may be misplaced, and, under Section 323, liability is unlikely. As the *Jain* case demonstrates, advising students where to go in a time of crisis, when the facts are not clear, may create more problems than it solves. What if Virginia Tech students were advised to flee their residence halls (leading them to go to class)? What if they were advised to stay in their rooms and Cho returned to West Ambler Hall? It is difficult to imagine the law imposing a duty on an institution that uses its best

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

99. 987 P.2d 300 (Idaho 1999).

100. *Id.* at 305, 312.

101. *Id.* at 305.

102. *Id.* at 312.

103. 617 N.W.2d 293 (Iowa 2000).

104. *Id.* at 300 (citing United States v. Gavagan, 280 F.2d 319 (5th Cir. 1960)).

105. *Id.*

106. Ian Urbina, *Virginia Tech Criticized for Actions in Shooting*, N.Y. TIMES, Aug. 30, 2007, at A1; *see generally*, Olivia Winslow & Melanie Lefkowitz, *Massacre at Virginia Tech: Campus Safety*, NEWSDAY, April 23, 2007, at A04.

107. Dave Lenckus, *Shootings Raise Liability Questions*, BUS. INS., Apr. 23, 2007, at 21.

efforts to gather facts before moving folks around campus during a crisis, but colleges and universities must be sensitive to this contention.

B. Establishing Breach and Causation

Although this article focuses heavily on the various duties[108] that colleges and universities should be aware of, it is important to note that a plaintiff could still face challenges in establishing two of the remaining elements of a negligence action—breach of duty and causation—in cases arising from campus violence. It is inevitable that some violent individuals will find a way to commit harmful acts despite the most diligent efforts of administrators, mental health professionals, faculty, and campus police. Even if a school is able to have a student expelled or otherwise removed, given the free and open nature of American campuses, there is no guarantee that the violent individual would not return to exact revenge. The requirement to exercise reasonable care in fulfilling a duty is not a mandate for perfection, but it does require colleges and universities to pursue an intelligent plan and quickly respond to known and suspected risks of campus violence.

1. Breach

Courts look to measures taken by a college or university to determine whether it has breached a duty to its students.[109] For example, in *Brown v. North Carolina Wesleyan College, Inc.*,[110] the court held that the murder of a non-resident student was unforeseeable, and, therefore, the college owed no duty to keep its campus safe.[111] Even if a duty had existed, the court noted that the college would not have breached it because the college had maintained adequate security staff, equipment, and procedures.[112]

Courts have hinted that they may be willing to find a duty to provide protection

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108. Until now, courts have tended to focus their analysis on whether a duty is owed to an institution's students. Courts may have been able to avoid or minimize the discussion of breach and causation because they disposed of claims largely by holding that a college or university owed no duty to students based on a special relationship. If the Third Restatement is adopted and interpreted to impose an affirmative duty on colleges and universities based on a special relationship that automatically exists between an institution and its students, courts likely will need to enhance the focus on the elements of breach and causation in order to determine whether a college or university was negligent. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 40 (Proposed Final Draft No. 1, Apr. 6, 2005), cmt. *l* (stating that, in many school cases, the facts show that there was no reasonable way to prevent the harm, so the no-duty decisions "may be an infelicitous means for expressing the conclusion that there was no negligence as a matter of law."). Moreover, even if a special relationship is recognized between colleges or universities and their students, courts may not necessarily be more inclined to find negligence. Instead, where a particular violent act can be deemed unforeseeable, they can find that there was no breach of the duty, or where the institution's fulfillment of the duty would not have prevented the violent act, they can find that causation is lacking.

109. *See* Brown v. N.C. Wesleyan Coll., Inc., 309 S.E.2d 701, 703 (N.C. Ct. App. 1983).

110. 309 S.E.2d 701 (N.C. Ct. App. 1983)

111. *Id.* at 703.

112. *Id.*

based on an institution's custom and practice.[113] Under this theory, a duty is created when "colleges of ordinary prudence customarily exercise care to protect the well-being of their residents students, including seeking to protect them against the criminal acts of third parties."[114] Using this approach, a court could look to colleges and universities as a whole in determining whether a duty to provide protection exists.[115] If such a duty existed, the court could measure the institution's conduct against the custom and practice of colleges and universities in general to determine whether the institution has breached its duty.

2. Causation

A defendant's conduct generally must be both the "cause in fact" and "proximate cause" of harm before liability is imposed.[116] The most common expression of the "cause in fact" test is the "but for" formulation: "the defendant's conduct is a cause in fact of some harm if the harm would not have occurred but for the defendant's conduct."[117] Proximate cause, on the other hand, "is a more explicitly policy-based determination of whether an actor's conduct, despite its being a cause in fact**,** is too tenuously linked to the injury to hold the actor liable."[118] To satisfy the proximate cause standard the injury must have been a reasonably foreseeable result of the actor's negligence.[119] Thus, precise foreseeability is not required. Only the degree of foreseeability that would be apparent to a reasonable person is necessary.

113. *See* Nero v. Kan. State Univ., 861 P.2d 768, 778 (Kan. 1993) (citing Mullins v. Pine Manor Coll., 449 N.E.2d 331 (Mass. 1983)).

114. *Mullins*, 449 N.E.2d at 335.

115. The custom and practice theory is used in other situations to judge an entity's conduct against the conduct of other similarly situated entities. For example, when determining whether an employer has violated a law requiring it to provide personal protection for its employees, some courts evaluate the custom and practice of the industry to determine whether the employer has acted reasonably. *See, e.g.*, Voegele Co. v. Occupational Safety & Health Review Comm'n, 625 F.2d 1075, 1078–79 (3d Cir. 1980).

116. *See, e.g.*, United States v. Robinson, 167 F.3d 824, 831 (3d Cir. 1999). *But cf.* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 29 (Proposed Final Draft No. 1, Apr. 6, 2005) ("An actor's liability is limited to those physical harms that result from the risks that made the actor's conduct tortious."). The Third Restatement proposes that "[l]imiting liability to harm arising from the risks created by the tortious conduct has the virtue of relative simplicity." *Id.* cmt. e. Thus, this test "provides a more refined analytical standard than a foreseeability standard or an amorphous direct-consequences test." *Id.*

117. United States v. Neadle, 72 F.3d 1104, 1119 (3d Cir. 1995) (Becker, J., dissenting).

118. *Id.*

119. *See* Boudreaux v. Swift Transp. Co., 402 F.3d 536, 541 (5th Cir. 2005).

C. Contributory and Comparative Negligence

In Virginia, if a plaintiff is negligent, his contributory negligence completely bars recovery.[120] However, a defendant who is guilty of willful and wanton negligence cannot rely upon the plaintiff's contributory negligence as a defense.[121] In Virginia, "[i]f a person has voluntarily assumed the risk of injury from the behavior of another, regardless of whether that behavior amounts to simple negligence, gross negligence, or willful and wanton behavior, such a person is not entitled to compensation for his injury by the tortfeasor."[122] Most other states use different "comparative negligence" structures, where the plaintiff is entitled to a share of her injury in proportion to her contributory negligence.[123]

Of course, there is no support for the argument that student victims killed at Virginia Tech voluntarily assumed the risk that they would be subjected to a mass shooting on campus. It is also unlikely that the university could show that any of Cho's victims were contributorily negligent. However, in Virginia and other states that follow a contributory negligence scheme, so long as an institution is found liable for only ordinary negligence and not for willful or wanton negligence, any failure by a student to take reasonable steps to protect his own safety could completely bar the student's recovery. In other states that follow a comparative negligence scheme, such failures by student victims could reduce their potential recovery. Although it would be difficult, colleges and universities could succeed in proving negligence by victims in rare situations—*e.g.*, where a student knows that an individual is planning to commit a violent act and fails to take precautions, such as reporting the individual, where a student does not heed a college or university's warning regarding a dangerous condition, or where a student knowingly fails to take advantage of an institution's safety procedures.

II. SOVEREIGN IMMUNITY—PROTECTION FROM NEGLIGENCE ACTIONS

This section discusses immunity of public institutions from tort liability based

120. *See, e.g.*, Wilby v. Gostel, 578 S.E.2d 796, 802 (Va. 2003) (Kinser, J., dissenting). As of 2002, only three other states besides Virginia follow the contributory negligence rule: Alabama, Maryland, and North Carolina. Gorski v. Smith, 812 A.2d 683, 700 (Pa. Super. Ct. 2002); *see also* Duval v. OM Hospitality, LLC, No. COA06-1359, 2007 N.C. App. LEXIS 2190, at *8 (N.C. Ct. App. Oct. 16, 2007) ("[A] finding of contributory negligence is a bar to recovery from a defendant for acts of ordinary negligence.").

121. Bane v. Mayes, No. CL03-245, 2004 Va. Cir. LEXIS 274, at *2 (Va. Cir. Ct. July 27, 2004). There is, however, an exception to the general rule. "When the plaintiff's contributory negligence itself amounts to willful and wanton conduct, recovery is barred." *Id.* (quoting Griffin v. Shively, 315 S.E.2d 210, 213 (Va. 1983)).

122. *Id.*

123. In Pennsylvania, for example, a plaintiff is entitled to a proportionate share of the damages when her contributory negligence does not exceed fifty percent. *See* 42 PA. CONS. STAT. § 7102(a) (2004). Other states, like Florida, allow the plaintiff to recover even if she was comparatively 99% negligent. FLA. STAT. § 768.81(2) (2006) ("[A]ny contributory fault chargeable to the claimant diminishes proportionately the amount awarded as economic and noneconomic damages for an injury attributable to the claimant's contributory fault, but does not bar recovery.").

on violent acts by students. Private colleges and universities are not immune from tort actions, and even in cases where a private institution maintains a sworn police force, it is unlikely those officers could claim governmental immunity for acts committed in their official capacities.[124] The scope of immunity can vary widely from jurisdiction to jurisdiction, and this section will highlight the level of protection afforded to public universities by various state statutes and precedents. For example, some states have waived governmental immunity for certain types of actions, such as wrongful death suits or failure to maintain safe conditions on real estate. However, the scope of waivers may be narrow, and the limitation of damages may prohibit plaintiffs from recovering enough to justify the expense and difficulty of litigation.

A. The Basis for Sovereign Immunity Protection from Suit

The Eleventh Amendment to the United States Constitution precludes judicial action against a state by another state's citizens.[125] This recognition that states should not be required to defend suits brought by citizens of other states has been broadly read as prohibiting any suit against an unconsenting state in federal court.[126] Additionally, the protection extends to state instrumentalities—*e.g.*, state agencies, officials, or other entities that serve as arms of the state.[127] While the Eleventh Amendment does not, standing alone, protect a state from suit in its own courts, states are empowered to reserve their immunity from suit and define the parameters of such immunity. They generally do so within state constitutions and statutes.[128]

State-funded colleges and universities are generally considered state instrumentalities and afforded sovereign immunity from suit in federal and state courts.[129] The test for determining whether an entity is entitled to sovereign immunity protection focuses on two factors: (1) whether the state controls the entity in question, and (2) whether the state treasury would be exposed to liability in damages if suit were brought against the entity.[130] Often, state statutes define state-affiliated colleges and universities as instrumentalities of the state and set forth requirements for how they are to be run. This is likely sufficient to show state control. Additionally, courts have held that when lawsuits against state

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124. Private police officers generally lack the protection of qualified immunity. David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1185–86 (1999); *see also* Harvard Crimson, Inc. v. President & Fellows of Harvard Coll., 840 N.E.2d 518, 523–25 (Mass. 2006) (holding that "special State police officers" used by Harvard College were not public officials for the purpose of open documents requirement).

125. U.S. CONST. amend. XI.

126. *See* Hoeffner v. Univ. of Minn., 948 F. Supp. 1380, 1384 n.5 (D. Minn. 1996).

127. *Id.* at 1384–85.

128. *See id.* at 1391.

129. *Id.* at 1385. The effect of this immunity is significant in limiting the opportunities for plaintiffs to proceed against higher education institutions. According to one report, in 2003, state colleges and universities comprised roughly 40% of the nation's degree-granting institutions, and they granted about 75% of the degrees. NATIONAL CENTER FOR EDUCATION STATISTICS, DIGEST OF EDUCATION STATISTICS 311, 327 (2005).

130. Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 47–48 (1994).

colleges and universities expose the state treasury to damages, the fact that the instiution may also receive funds from private sources is irrelevant.[131]

Private colleges and universities are not entitled to state sovereign immunity, and they can be sued in court in the same manner as any other business.[132] Even where a private school maintains sworn or deputized police officers, such officers will not be afforded the governmental immunity available to state police officers.[133] In recent years, courts have grappled with the characterization of police officers on private campuses, acknowledging that many of them carry the same qualifications and responsibilities for providing "governmental" services as state police officers.[134] However, the fact that these officers are employed by private colleges or universities weighs against finding that they are instrumentalities of the state, and it is unlikely that a court would extend sovereign immunity protection.[135]

B. Waiver of Sovereign Immunity

States typically make a broad reservation of sovereign immunity in their constitutions or statutes. As a general rule, sovereign immunity cannot be waived

131. *See, e.g.*, Hall v. Med. Coll. of Ohio, 742 F.2d 299, 304–05 (6th Cir. 1984) (holding that defendant was entitled to sovereign immunity protection because some state funds would be required to pay judgment because Ohio law provided for the commingling of private and public funds by state institutions). *But see* Kovats v. Rutgers State Univ., 822 F.2d 1303, 1308–09 (3d Cir. 1987) (holding that where a judgment can be paid exclusively out of private funds not controlled by the state, the fact that the institution receives substantial public funding does not entitle it to sovereign immunity).

132. 15A AM. JUR. 2D *Colleges and Universities* § 48 (2007). In jurisdictions where charitable institutions enjoy immunity from tort liability, however, private colleges and universities may be immune. *Id.*

133. Sklansky, *supra* note 124, at 1185–86.

134. Harvard Crimson v. President & Fellows of Harvard Coll., 840 N.E.2d 518, 523–25 (Mass. 2006) (holding that "special State police officers" used by Harvard College were not public officials for the purpose of open documents requirement); Mercer Univ. v. Barrett & Farahany, LLP, 610 S.E.2d 138, 142 (Ga. Ct. App. 2005) (holding that private universities' sworn police officers were not public officials, but stating that the "public importance of disclosing police records is just as high when the officers at issue, although not state and local police officers, are authorized to perform and often do perform the same functions as the state and local police officers. This, however, is a matter best left for the legislature to consider.").

135. *Harvard Crimson*, 840 N.E.2d at 523–25. There may be some exceptions, such as officers acting under a special statute. 71 PA. STAT. ANN. § 646 (West 2003) is one example. That section applies to Pennsylvania campus police of "all State colleges and universities, State aided or related colleges and universities and community colleges," and it specifically states that when acting in their capacity as campus police, officers will be considered state employees and afforded all rights and benefits accruing from such employment. Although this article does not address actions brought under 42 U.S.C. § 1983, it is worth noting that sworn police officers at private colleges and universities may be considered state actors for purposes of such actions. Hence, they may be entitled to qualified immunity for the performance of their job functions unless plaintiffs can show that they violated "clearly established statutory or constitutional rights of which a reasonable person would have known." Apffel v. Huddleston, 50 F. Supp. 2d 1129, 1138 (D. Utah 1999).

without a clear statutory expression of intent.[136] Courts have held that the carrying of liability insurance by a college or university is not a waiver of sovereign immunity.[137] However, removal of an action to federal court by the college or university will waive Eleventh Amendment immunity from suit in federal court.[138]

Many states have enacted statutory waivers of immunity to allow for suit in state courts under certain circumstances. Negligence actions based on campus violence can only proceed against a state college or university if the state has waived tort immunity for such an action. Even if a state has waived tort immunity, it may still reserve immunity for government entities or government employees acting within the scope of their employment to conduct functions that are considered discretionary—*i.e.*, those functions that require administrators to exercise judgment and involve the weighing of alternatives based on policy concerns.[139]

The purpose of this discretionary immunity is to protect government entities from liability for certain functions that are essential to government.[140] Courts have typically found decisions about the implementation of safety measures and the proper use of campus police forces are discretionary functions.[141] Arguably, most decisions made by administrators with respect to handling a threat of violence or a potentially violent individual could also be considered discretionary. However, some courts have held that immunity under the discretionary function exception should not be granted where a public college or university violates a clear statutory or common law duty.[142]

Waiver of sovereign immunity is frequently accomplished through a State Tort Claims Act ("TCA"). The scope and limitations on state waivers of sovereign immunity vary widely from state to state. By way of example, this section will discuss the distinct statutory waivers enacted by four states: (1) Pennsylvania; (2) California; (3) Virginia; and (4) Minnesota.

The Commonwealth of Pennsylvania only allows for a waiver of sovereign

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136. 15A AM. JUR. 2D *Colleges and Universities* § 47 (2006).

137. *Id.*; Livingston v. Regents of N.M. Coll. of Agric. & Mech. Arts, 328 P.2d 78, 80–82 (N.M. 1958); Taylor v. Nevada, 311 P.2d 733, 734 (Nev. 1957); Olson v. Univ. of N.D., 488 N.W.2d 386, 390–91 (N.D. 1992).

138. *See* Mandsager v. Univ. of N.C. at Greensboro, 269 F. Supp. 2d 662, 680 (M.D.N.C. 2003).

139. *See, e.g.*, Nero v. Kan. State Univ., 861 P.2d 768, 780–81 (Kan. 1993) (applying the discretionary function exception to the Kansas Tort Claims Act). The statutory waivers of tort immunity enacted by California and Minnesota, which are discussed in this section, also contain discretionary function exceptions. CAL. GOV'T CODE § 820.2 (West 1995); MINN. STAT. § 3.736 Subd. 3 (West 2005 & Supp. 2008).

140. *See* Gonzalez v. Univ. Sys. of N.H., No. 451217, 2005 Conn. Super. LEXIS 288, at *48–49 (Conn. Super. Ct. Jan. 28, 2005) ("It is essential, in making this calculation, to be mindful that certain essential, fundamental activities of government must remain immune from tort liability so that our government can govern." (internal quotation marks omitted)).

141. *See* Relyea v. Florida, 385 So. 2d 1378, 1381–82 (Fla. Dist. Ct. App. 1980) (superseded by statute) (applying Florida's former discretionary function exception to statutory waiver of tort immunity and stating that decisions relating to use of the campus police force are discretionary or planning functions).

142. *See Nero*, 861 P.2d at 782.

immunity in very narrow circumstances.[143] The statute provides exceptions under which actions arising from specialized activities may be brought against the state.[144] The exceptions include, but are not limited to, the state's care of highways, professional medical liability against employees of state medical facilities, and dangerous conditions on state-owned real estate.[145] Pennsylvania courts have construed the real estate exception narrowly as allowing suits where one is injured by a dangerous condition on the land itself, and the exception does not create state liability for acts by dangerous third persons on the property.[146] Because there is no general provision allowing for a negligence action, plaintiffs would be barred from recovering from a Pennsylvania state college or university based on campus violence.

California's statutory waiver of sovereign immunity is less limiting than Pennsylvania's, but does not allow ordinary negligence actions to proceed solely against the state or a state agency.[147] The statute provides that a public entity is not liable in court except for specific claims identified by the statute, but also provides that the state can be vicariously liable for harm caused by the acts and omissions of public employees.[148] Public employees are held liable in the same manner as a private person under the statute.[149] Yet, there is one very important exception that a plaintiff bringing a negligence action will need to address. Under the California statute, a public employee will not be held liable if the negligent act or omission was the result of an exercise of discretion related to his or her employment.[150] One court has held that a community college's failure to warn a student about a stairway that was obscured by overgrowth and connected to the college's parking lot, which contributed to the student being assaulted and raped in the parking lot, was not an omission stemming from discretionary action by the public employee.[151] The public employee knew of the dangerous condition and that a rape had occurred there before, and as such, the employee had a duty to act.[152] The California statute provides no explicit damage limitations, except that a public entity cannot be liable for punitive or exemplary damages.[153]

The Minnesota Tort Claims Act provides a complex scheme of exceptions and limitations that plaintiffs need to work through to determine if they can bring suit against a college or university for negligence.[154] The general rule is that the state will pay compensation for loss of property, personal injury, or death caused by acts or omissions of a state employee under circumstances where a private person

143. 42 PA. CONS. STAT. ANN. § 8522 (West 2007).
144. *Id.*
145. *Id.*
146. *See* Douglas v. Phila. Hous. Auth., 578 A.2d 1011, 1013 (Pa. Commw. Ct. 1990).
147. CAL. GOV'T CODE § 815 (West 1995).
148. *Id.* at §§ 815, 815.2.
149. *Id.* at § 820.
150. *Id.* at § 820.2.
151. Peterson v. S.F. Cmty. Coll. Dist., 685 P.2d 1193 (Cal. 1984).
152. *Id.*
153. CAL. GOV'T CODE § 818.
154. MINN. STAT. ANN. § 3.736 Subd. 1 (West 2005 & Supp. 2008).

would be liable to the claimant, whether arising out of a governmental or proprietary function.[155] There is an exclusion that bars state liability based on a loss caused by the performance of or failure to perform a discretionary duty.[156] If a plaintiff is able to overcome the bar for discretionary duties, the recovery for any single claim will be limited to between $300,000 and $500,000 depending on when the claim arose.[157] The statute also provides a cap on aggregate claims—*i.e.*, "any number of claims arising out of a single occurrence"—of $750,000.00 to $1.5 million, which would have to be divided among plaintiffs joined in an action.[158]

Finally, Virginia's Tort Claims Act provides a broad waiver of sovereign immunity.[159] The statute provides that the Commonwealth of Virginia can be held liable for money damages

> on account of damage to or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee while acting within the scope of his employment under circumstances where the Commonwealth . . . if a private person, would be liable to the claimant for such damage, loss, injury or death.[160]

There are no exceptions that would preclude a plaintiff from bringing a negligence action against the state, but it is important to note that the Virginia TCA does not allow plaintiffs to bring suit against Commonwealth agencies.[161] Therefore, a plaintiff cannot sue a college or university like Virginia Tech directly; instead it must name the Commonwealth of Virginia as the defendant.[162] The Virginia TCA does impose a fairly low limitation on damages of $100,000 for any claim.[163]

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155. *Id.*

156. *Id.* at § 3.736 Subd. 3(b). It appears Minnesota courts view the concept of discretionary duties broadly, holding in one case that a college's failure to repair a sidewalk and to warn of the dangerous condition was not actionable because the college made its decision based on economic and budgetary concerns. Christensen v. Rainy River Cmty. Coll., No. A04-5, 2004 Minn. App. LEXIS 1084, at *8 (Minn. Ct. App. Sept. 21, 2004).

157. MINN. STAT. ANN. § 3.736 Subd. 4 (West 2005 & Supp. 2008).

158. *Id.*

159. VA. CODE ANN. § 8.01-195.3 (West 2007).

160. *Id.*

161. Rectors & Visitors of the Univ. of Va. v. Carter, 591 S.E.2d 76 (Va. 2004).

162. *Id.*; VA. CODE ANN. § 8.01-195.4.

163. VA. CODE ANN. § 8.01-195.3.

III. PRIVACY CONCERNS, CONFIDENTIALITY CONCERNS, AND RECOMMENDATIONS TO MINIMIZE FUTURE VIOLENCE ON CAMPUS

With the above in mind, how should colleges and universities proceed? They face various challenges, not the least of which is reconciling the tension between students' privacy rights and the necessity of making disclosures and taking action in situations where harm is likely to befall members of the campus community. The following sections will examine the parameters of the rights to privacy and confidentiality.

A. FERPA, HIPAA and Statutory Privilege

The Family Educational Rights and Privacy Act of 1974 ("FERPA")[164] is a federal law designed to protect the privacy of eligible students' education records.[165] It applies to all schools that receive funds under any applicable program of the U.S. Department of Education.[166] Practically, this means that FERPA applies to almost all institutions of higher education in the United States. FERPA gives parents certain rights with respect to their children's education records.[167] These rights transfer to the student when he or she reaches the age of 18 or attends a school beyond the high school level.[168] Students to whom the rights have transferred are "eligible students."[169]

The Health Insurance Portability & Accountability Act of 1996 ("HIPAA")[170] amended the Internal Revenue Service Code of 1986.[171] The law was designed to ensure confidentiality and security of health data by setting and enforcing uniform standards, to improve efficiency by standardizing electronic data interchange, and to enact standardized security measures to protect confidentiality and integrity of individually identifiable health information.[172] Health data and information includes patient health, administrative, and financial information.[173]

Medical records are not "education records" according to FERPA. FERPA clearly defines "education records" as those records, files, documents, and other materials which: "(i) contain information directly related to a student; and (ii) are

164. 20 U.S.C. § 1232g (2000 & Supp. V 2005); 34 C.F.R. § 99 (2007).

165. Senator James Buckley also sponsored amendments that were enacted on December 31, 1974, and made retroactive to the original effective date of November 19, 1974. These amendments were designed to address a number of ambiguities and concerns identified by parents, students, and institutions. 120 CONG. REC. 39862–66 (1974).

166. 20 U.S.C. § 1232g (2000 & Supp. V 2005).

167. *Id.* § 1232g(1)(A).

168. *Id.* § 1232g(c).

169. FAMILY POLICY COMPLIANCE OFFICE, U.S. DEP'T OF EDUC., PARENT'S GUIDE TO THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT (2007), *available at* http://www.ed.gov/policy/gen/guid/fpco/brochures/parents.pdf.

170. Pub. L. No. 104-191, 110 Stat. 1936 (codified in scattered sections of 10 U.S.C., 29 U.S.C., and 42 U.S.C.). HIPAA is also known as the Kennedy-Kassebaum Act.

171. *Id.*

172. *Id.*

173. 42 U.S.C. § 1320d(4) (2000).

maintained by an educational agency or institution or by a person acting for such agency or institution."[174]

FERPA is equally clear in indicating that "education records" do not include:

> records on a student who is eighteen years of age or older, or is attending an institution of postsecondary education, which are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his professional or paraprofessional capacity, or assisting in that capacity, and which are made, maintained, or used only in connection with the provision of treatment to the student, and are not available to anyone other than persons providing such treatment, except that such records can be personally reviewed by a physician or other appropriate professional of the student's choice.[175]

This indicates that medical or psychological records, while subject to the confidentiality owed to any patient, are not subject to the additional protections FERPA extends to the records of a student. Institutions, and the medical and counseling/psychological professionals employed by them who are utilizing effective prevention and assessment techniques that involve the internal sharing of limited information, may believe they are in violation of FERPA, HIPAA, or their own professional standards by sharing even very limited information—*e.g.* whether or not a student attended a counseling session.[176] However, in an attempt to clarify potential conflicts between HIPAA and FERPA, the Family Policy Compliance Office ("FPCO") and the Department of Health and Human Services ("HHS") determined that education records protected by FERPA are not subject to HIPAA and medical records exempted from FERPA are not subject to HIPAA.[177]

When implementing or considering any prevention strategy regarding incidents of conduct that may be self-injurious or injurious to others, these laws, and the professional and ethical standards that govern physicians, psychiatrists, psychologists, and other counseling professionals all have provisions allowing for appropriate sharing of information in cases of emergency.[178]

FERPA does not prevent institutions from sharing information internally. Even in its most conservative interpretation,[179] the internal disclosure of information to individuals is permissive when they have a "legitimate educational interest."[180] HIPAA also allows for the sharing of information with outside entities such as family members or other persons "if the [patient] is not present, or the opportunity to agree or object to the use or disclosure cannot practicably be provided because of the individual's incapacity or an emergency circumstance," and, "in the exercise

174. 20 U.S.C. § 1232g(a)(4) (2000); *see also* 34 C.F.R. § 99.3 (2007).

175. 20 U.S.C. § 1232g(a)(4).

176. This *may* not include any diagnosis, results or content of the session.

177. *See* Family Educational Rights and Privacy Act, 60 Fed. Reg. 82,379 (Dec. 28, 2000).

178. 34 C.F.R. § 99.31(a) (2007).

179. Albeit an erroneous interpretation, it is one that has been cited by college and university officials who do not wish to disclose information to fellow administrators.

180. 34 CF.R. § 99.31(a)(1) (2007).

of professional judgment, [the treating professional] determine[s] whether the disclosure is in the best interests of the individual."[181] Counseling professionals can rely upon *Tarasoff* or other applicable state standards in these emergency situations.[182] Colleges and universities may also utilize appropriate procedures during training and orientation and/or adopt published policies that would allow for explicit or implied consent in cases where the *Tarasoff* standard may not be met.

Thus, in dealing with a situation such as the one at Virginia Tech, colleges and universities and their agents are not as hampered as they may believe in making choices about sharing information with appropriate parties. These decisions, when made properly, may indeed enable the institutions not only to better serve their immediate and peripheral constituencies, but may also serve to limit their liability.[183]

B. The Clery Act

Undoubtedly, Virginia Tech will, in the fall of 2007, report the highest incidence of crimes against persons tabulated since the Clery Act[184] was enacted in 1990. One might query, however, what role the Clery Act has in violent campus attacks, other than reporting statistics of their aftermath. The answer is that the Clery Act's timely warning requirement is potentially in play in any instance of campus violence.[185] Media pundits criticized Virginia Tech's administrators for a two-hour gap between the first shootings and the warning announcement made on the morning of the attacks.[186] The savvier talking heads even suggested that it was a failure of the timely warning requirement of the Clery Act. Time will likely prove them incorrect. As soon as Virginia Tech's administrators knew that continued harm was foreseeable, they put out alerts in a variety of formats. Let's examine what exactly is required.

At common law, the duty of property owners to warn those present in the owner's domain of all known, foreseeable dangers is an accepted tenet.[187] This duty was codified in federal law by the Clery Act, though with more limited scope. The Clery Act imposes a requirement to alert the campus community to crimes "considered by the institution to represent a [serious and continuing] threat to

181. 45 C.F.R. § 164.510(b)(3) (2006).

182. Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334, 345 (Cal. 1976) (holding that when a psychotherapist determines, or, pursuant to the standards of his profession, should determine, that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger). The discharge of such duty, depending on the nature of the case, may call for the therapist to warn the intended victim or others likely to apprise the victim of the danger, to notify the police, or to take whatever other steps are reasonably necessary under the circumstances. *Id.* at 345–46.

183. For practical applications of these suggestions, see the Conclusion *infra*.

184. 20 U.S.C. § 1092(f) (2000).

185. 20 U.S.C. § 1092(f)(3).

186. Urbina, *supra* note 106, at A1.

187. *See* RESTATEMENT (SECOND) OF TORTS §§ 334, 342–43 (1965).

students and employees."[188] To prompt the warning requirement, the crimes must have been reported to campus security authorities or local police.[189] Crimes reported to confidential sources, such as campus counselors, are exempt from the timely warning requirement.[190]

The law does not specify what is timely, but *The Handbook for Campus Crime Reporting* states that warnings should occur as soon as the pertinent information is available so that campus community members can take steps to protect themselves and ensure their safety.[191] The scope of the warning is also not specified by the law, but should be "reasonably likely to reach the entire campus community and aid in the prevention of similar crimes."[192] It should include all available information that would promote safety without compromising an ongoing investigation or the ability to apprehend a suspect. The decision to issue a warning "must be decided on a case-by-case basis in light of all the facts surrounding the crime."[193]

Concerns with FERPA were clarified in a 1996 "Dear Colleague Letter" sent to institutions of higher education by the Department of Education, noting that in cases of health or safety emergencies, it is permissible to release personally identifiable information from a student's educational records, including the identity of a student as a suspect.[194] Unlike at common law, where a failure to warn can give rise to liability in negligence, the Clery Act specifically notes that it cannot give rise to a private right of action to enforce its terms, and by its terms notes that it does not establish a standard of care.[195] The enforcing authority for Clery Act violations is the U.S. Department of Education.[196]

The best practice: Warn with as much as you can, as soon as you can, to as many as you can, with as many means as possible.

C. Prevention and Intervention Strategies

News reports following Cho's attack repeated other stories of violent killings on college and university campuses—the University of Texas tower shootings, the deaths at Kent State, and the more recent shootings at Appalachian School of Law. Cho's were not the first acts of senseless violence on an American campus, and

188. 34 C.F.R. § 668.46(e) (2007).

189. *Id.*

190. 34 C.F.R. §§ 99.31(b), 99.36 (2007).

191. OFFICE OF POSTSECONDARY EDUCATION, U.S. DEP'T OF EDUC., THE HANDBOOK FOR CAMPUS CRIME REPORTING 62, *available at* www.ed.gov/admins/lead/safety/handbook.pdf.

192. *Id.*

193. *Id.*

194. DAVID A. LONGANECKER, U.S. DEP'T OF EDUC., MAY 1996 DEAR COLLEAGUE LETTER ON CAMPUS SECURITY ISSUES (1996), *available at* http://www.ed.gov/Speeches/06-1996/coll.html.

195. 20 U.S.C. § 1092(f)(14)(A) (2000).

196. *See* 20 U.S.C. § 1092(f)(13); Security on Campus, Inc., *The Jeanne Clery Act*, http://www.securityoncampus.org/students/cleryact.html (last visited Feb. 8, 2008).

they are not likely to be the last.[197] School administrators and their advisors will be expected to learn from "Bloody Monday," and all the previous tragedies, to prevent similar occurrences going forward.

Factually, it would not take much more than a reasonably detailed advance threat to make a campus homicide or suicide foreseeable to college or university officials, thereby imposing duties accordingly. While this article suggests that anxious colleges and universities need not fear a sudden and meaningful liability shift, they should anticipate an increase in filed cases. The collateral costs and consequences of violence on the scale of Virginia Tech are enormous and likely to grow. Litigation is likely to ensue over the recent distribution of the $8.5 million Hokie Spirit Fund regarding who, how, and to what extent the families and the injured are compensated.[198] The financial costs to Virginia Tech will be significant, the effects on morale and student mental health cannot yet be known, and the media coverage has been mixed, at best, for the university and its profile. Regardless of the potential for liability, colleges and universities need to seek effective means of earlier intervention.

Rarely is this type of violence truly random and without any forewarning. Colleges and universities must attempt to become more adept at reading warning signs and responding appropriately. This does not mean to suggest a duty of monitoring every campus activity with a security camera, or a need to invest in high-cost profiling software that claims to predict which students will go over the edge. It does mean, however, that a well-functioning behavioral intervention model should be in place on each college and university campus. A team composed of some combination of representatives from the following departments should be in place: student affairs administration (preferably someone with authority over student conduct), counseling, campus law enforcement, campus women's center, human resources, disability services, housing and residence life, general counsel, and faculty.[199] This type of team, called a CARE Team at Virginia Tech[200] and a Behavioral Intervention Team at the University of South Carolina,[201] may vary in membership but should not vary in function. Its job is to be the central clearinghouse for at-risk student (and possibly staff) behavior, to make decisions about each behavioral report, to ensure follow-up and provision of support, and to track and monitor both institutional response and the progress of

197. It is with great sadness that this prediction proved true at Northern Illinois University shortly after the authors completed this article. [EDS.] *See* Susan Saulny & Monica Davey, *Gunman Slays Five in Illinois at a University*, N.Y. TIMES, Feb. 15, 2008, at A1.

198. *See* Larry Hincker, *Virginia Tech Distributes Hokie Spirit Monies to Families of Those Slain on April 16 and to Selected Others*, VIRGINIA TECH NEWS, Oct. 31, 2007, *available at* http://www.vtnews.vt.edu/story.php?relyear=2007&itemno=645.

199. For a comprehensive behavioral intervention Whitepaper, see BRETT A. SOKOLOW & STEPHANIE F. HUGHES, RISK MITIGATION THROUGH THE NCHERM BEHAVIORAL INTERVENTION AND THREAT ASSESSMENT MODEL (2008), *available at* http://www.ncherm.org/pdfs/2008-whitepaper.pdf.

200. *See* VA. TECH DEAN OF STUDENTS OFFICE, CARE TEAM MANUAL (2007), *available at* www.dos.vt.edu/documents/CareTeamManual.pdf.

201. *See* Univ. of S.C., *Behavioral Intervention Team*, www.sc.edu/BIT (last visited Feb. 27, 2008).

students and staff who come to its attention.

Part of an effective behavioral intervention model is to create on campus a widespread culture of reporting. From faculty members to residence hall housekeepers to administrative support staff, every employee should have the responsibility to report incidents of misconduct, disruption, or student distress to the care team immediately. In that way, the team acts as a funnel, taking in a wide swath of reports and issuing narrow responses specific to the needs indicated by the reported behaviors or pattern of behaviors. Each team should act in accordance with a rubric used to classify behavior and response into escalating levels of seriousness. Communication should flow effectively between the reporters and team members with a feedback loop to the reporters of actions taken by the team. Teams should be empowered to meet with students, rather than simply determining support, response, or intervention in a vacuum.

Teams should have the authority to mandate assessment of the student by a therapist, either at the campus counseling center or within the community. If the campus culture does not at present support a mandated assessment approach to student mental health crises or suicidality, use the tragedy of Virginia Tech to catalyze discussions of positive changes for how the campus will address behavioral intervention going forward. Assessment requires good communication with campus or community mental health resources who need to notify the team immediately if a student ignores the mandate or discontinues the evaluation before its completion. Reaction from the team should be swift and strong, with the threat of a conduct code violation or referral to the campus conduct office. Interim suspension authority should be vested in the team, as well.

Effective behavioral intervention models have developed common alarms that signify trouble. While one campus may simply view a student being transported to the hospital as the inevitable result of overzealous drinking, behavioral intervention teams assess each student for signs that the alcohol usage was the result of self-medicating, possible depression, or other critical condition. Behavioral intervention teams also note excessive absenteeism as an at-risk factor, and collaborate successfully with faculty to monitor and respond. Training campus faculty, staff, administrators and students on these and other signs of risk are critical.

At Virginia Tech, the killer had alarming contact with faculty, roommates, the CARE team, counselors, police, residence hall staff, parents of other students, and the office of judicial affairs.[202] Many of these were contacted multiple times, including two police reports and discussions amongst at least four faculty members.[203] When functioning well, a behavioral intervention team will know about each of these contacts, and when it does, has the best chance of seeing the whole picture. By creating a resource that can view the entire constellation of disruption, distress, and dysregulation[204] from a broader perspective unavailable to

202. VA. TECH REVIEW PANEL, MASS SHOOTINGS AT VIRGINIA TECH, 40–46 (2007), *available at* www.governor.virginia.gov/TempContent/techPanelReport.cfm.

203. *Id.*

204. Dysregulation is the disruption of cognitive, affective, behavioral, and neurophysiological processes. Jane F. Gilgun, *Overview of Emotional Dysregulation*, June 2004,

the individuals interacting with the student on campus, effective interventions can be designed and implemented.

Take note when a person being tracked by the team suddenly goes quiet. As we all know, the Virginia Tech killer dropped off the radar screen after a series of alarming incidents, and was not heard from after December 2005 until April of 2007.[205] While it may be accurate that a student who goes quiet has found support and is having his or her needs met, it may be just as true that the student has learned that acting out brings unwanted attention. We tend to give our attention to the students demanding it most loudly, when, in fact, we ought to be concerned about a sudden pattern disruption where someone who is not coping effectively becomes quiescent. As they say in England, "Mind the Gap."

CONCLUSION

While colleges and universities may, in certain circumstances, have special relationships with members of the campus community, and may assume certain legal duties voluntarily, special relationship and assumption of duty theories rarely support a cause of action in negligence against a college or university that experiences violence. Even in jurisdictions that recognize a special relationship between the institution and its students, a plaintiff would still be required to show that someone of sufficient authority at the college or university knew that imminent harm was likely to result if no action was taken. Because violence is random, and colleges and universities are not in the business of predicting threats, shootings and other violent acts are rarely foreseeable. But, where there are warning signs, a court may find that a college or university owes a duty to its students under one of the other theories discussed above. In particular, it appears likely that characterization of the school and students as landowner and invitees may become a more popular basis for arguing for the existence of a duty. Once a duty is found, the question of liability in negligence—whether the college or university met that duty with reasonable care—then becomes a question for a jury.

Sovereign immunity generally shields public colleges and universities from liability for the acts of third parties who may visit violence on the campus. Most states have statutory waivers of immunity that will apply in some circumstances, though they may be limited. Planning, communication, and prevention efforts are extremely important for minimizing future risks. The increased frequency of violent acts on the campuses of educational institutions should serve as a warning to colleges and universities to take action and implement effective strategies to prevent, to the extent possible, future atrocities like the Virginia Tech shooting.

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http://ssw.cehd.umn.edu/img/assets/5661/Conditions_Dysregulation.pdf (last visited Feb. 18, 2008).

205. VA. TECH REVIEW PANEL, *supra* note 202, at 52.