

PARTICIPATORY LAWYERING & THE IVORY TOWER: CONDUCTING A FORENSIC LAW AUDIT IN THE AFTERMATH OF VIRGINIA TECH

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The tragic events at Virginia Tech in 2007 sent a cold wind blowing through the halls of higher education institutions: a Virginia Tech student, who had fallen through the cracks of the school's mental health services and disciplinary procedures, armed himself with firearms and murdered thirty-two students and a professor before committing suicide. In the wake of that massacre, several states and individual interest groups issued reports on campus readiness for similar catastrophes. A consistent theme throughout those reports emphasized the necessity for individual institutions to review their procedures to deal with campus violence.

This Article focuses on that institutional review and the role of lawyers in assisting colleges and universities in formulating better and more comprehensive procedures for preventing campus violence in general, but with an emphasis on preventing similar catastrophes, or at worst, minimizing their devastation. The lawyer has the best opportunity to assist by participating in the process rather than either dictating its conduct or reviewing the product after the fact. Preventive lawyering and collaborating with the academy are the only successful means for adequately addressing comprehensive plans that manage the risks raised by the needs of the new consumer student and that create a campus culture that does not tolerate campus violence. Specifically, this Article summarizes how the lawyer's collaboration with the academy should neatly incorporate the academic ends of the institution with legal ends that could minimize both the harm and the costs of campus violence.

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INTRODUCTION

The magnitude of the losses suffered by victims and their families, the Virginia Tech community, and our Commonwealth is immeasurable. We have lost people of great character and intelligence who came to Virginia Tech from around our state, our nation and the world. While we can never know the full extent of the contributions they would have made had their lives not been cut short, we can say with confidence that they had already given much of themselves toward advancing knowledge and helping others.

We must now challenge ourselves to study this report carefully and make changes that will reduce the risk of future violence on our campuses. If we act in that way, we will honor the lives and sacrifices of all who suffered on that terrible day and advance the notion of service that is Virginia Tech's fundamental mission.¹

A catastrophe inevitably triggers an audit of the events leading up to the calamity for a couple of purposes: to assure that what happened will not happen again and to determine who might have been to blame. A review of the numerous reports issued in the wake of the tragedy at Virginia Polytechnic Institute and State University (Virginia Tech) reveals that lawyers must play an integral part in assisting individual colleges and universities to conduct those audits and implement the necessary policy changes. The purpose of this Article is to focus on the audit as a preventive measure in the post-Virginia Tech higher education institution, especially in smaller colleges and universities. Lawyers should not necessarily be the chief instigators of these audits nor should they perform these audits on their own. However, lawyers do have a cooperative and collaborative role to play in educating the institutional players, in assessing institutional readiness, and in formulating institutional policy to minimize, if not prevent, similar catastrophes.

The goal of such a law audit should focus not just on the campus catastrophe but on campus violence in general as the source of the catastrophic event. In the ideal situation, the audit would prompt the institution not only to update its procedures for threat assessment and emergency preparedness, but would also create an overall institutional environment that would prevent or at least reduce the causes of, and harms

1. VIRGINIA TECH REVIEW PANEL, MASS SHOOTINGS AT VIRGINIA TECH: REPORT OF THE REVIEW PANEL viii (2007), *available at* <http://www.governor.virginia.gov/TempContent/techPanelReport-docs/FullReport.pdf> [hereinafter VIRGINIA TECH REPORT]; *see also* VIRGINIA TECH, PRESIDENTIAL INTERNAL REVIEW: WORKING GROUP REPORT ON THE INTERFACE BETWEEN VIRGINIA TECH COUNSELING SERVICES, ACADEMIC AFFAIRS, JUDICIAL AFFAIRS AND LEGAL SYSTEMS (2007), *available at* http://www.vtnews.vt.edu/documents/2007-08-22_internal_communications.pdf.

from, campus violence. Lawyers should participate in this process because the law is integral to any discussion of the governance of the institution as well as of the considerations the institution must assess when dealing with the safety and security of its students.² Good lawyers are also adept at formulating policies for clients that reflect adherence to both the law and the character of the institutional client. If nothing else, lawyers are essential in assessing litigation risks of which faculty and administrators may not even be aware.

The law audit envisioned here is, at its essence, the melding of the needs, character, and talents of the institution with the unique skills of the lawyer to negotiate and counsel. The overarching goal is perhaps the essence of preventive lawyering but is better characterized here as participatory lawyering. The lawyer engaged in the law audit does not hand down edicts on firm letterhead but gets down in the trenches as a member of a task force or work group, whose responsibility to the group will be to educate herself about the educational institution and its needs, to educate the other members about the pertinent law, to assist the group in understanding and assessing risks involved in campus violence, and to be one of the guides through an audit of current procedures, with the ultimate goal of helping to create new policy for the institution.

Such a participatory role for a lawyer is often a difficult one, especially for the lawyer who is not in-house with an educational institution. Consequently, Part I of this Article discusses the practical necessity for lawyers' participation in the institutional task of addressing issues raised by campus violence and the collaboration and cooperation skills essential to participatory lawyering for a higher education institution. Part II of this Article is primarily didactic and is designed to educate about the current institutional climate that is affecting not just campus violence but also potential "plaintiffs"—victimized students—that a lawyer needs to anticipate. Part III outlines the participating lawyer's educative function on a campus violence work group, especially reviewing for the other members the risks associated with inadequate prevention and planning. One thing lawyers hate to do is to "re-invent the wheel," so previous reports and forms are excellent resources to help lawyers assist the group in creating templates for the work group's dissection of the institutional policies. Part IV guides the collaborative effort by reviewing existing post-Virginia Tech audits. Part V selects several topics that figure prominently in these existing reports and that should comprise the work group's post-Virginia Tech audit of institutional policies and procedures. And Part VI suggests the first steps that a campus must make to embrace a culture of awareness about the constituent parts of a good campus plan for stemming campus

2. See, e.g., Jay P. Heubert, *The More We Get Together: Improving Collaboration Between Educators and Their Lawyers*, 67 HARV. EDUC. REV. 531, 532 (1997).

violence. Embarking on this effort to reduce campus violence is a fundamental mission that colleges and universities ignore at their peril.

I. JOINING THE FORENSIC TEAM

Lawyers often have themselves to blame for civilians' antipathy to working with them. This dynamic is partially caused by lawyers' not wanting to work with others. Instead, they want to dominate the debate. In doing so, lawyers often talk past their clients; silence and subordinate clients; and dominate the conversation about the clients' problems.³ "Rather than a lawyer giving voice to or 'translating' for a client, . . . the lawyer is often seen as unable to hear a client's needs or to respond appropriately."⁴ It should come as no surprise then that higher education clients may not be thrilled at the prospect of lawyers' involvement in creating campus violence policy: "[T]he [Wisconsin] Governor's remarks were remarkably on target in terms of not turning these issues exclusively over to lawyers."⁵

The unfortunate aspect of the other side of the coin is that higher education administrators, and more than likely most academics, are not especially attuned to legal issues and are often less well-trained in the law and administrative matters than their public school counterparts⁶ or as occurred in the Virginia Tech tragedy, overreact to a misunderstanding of the law. Higher education attorneys, at the most, hope for university administrators to spot legal issues so that counsel can step in and give advice and guidance when needed.⁷ Large colleges and universities often have the expertise at hand with in-house counsel, which is budgeted with

3. See, e.g., Judith Resnik, Dennis E. Curtis, & Deborah R. Hensler, *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296, 379–80 (1996). This observation is broad and is not intended to paint all lawyers in such an unflattering light, especially lawyers who specialize in representing higher education clients.

4. *Id.* at 379 (citing Clark D. Cunningham, *The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298, 1300–01 (1992)).

5. WISCONSIN OFFICE OF JUSTICE ASSISTANCE & OFFICE OF THE GOVERNOR, GOVERNOR'S TASK FORCE ON CAMPUS SAFETY: FINAL REPORT 63 (2007) (quoting Dr. Gary Pavela), available at <ftp://doafp04.doa.state.wi.us/doadocs/governorstaskforcecampussafetyfinalreport.pdf> [hereinafter WISCONSIN REPORT]. Dr. Pavela is himself a lawyer, now primarily engaged in academic pursuits at University of Maryland—College Park.

6. David Schimmel & Linda Nolan, *Academic Administrators, Higher Education and the Practice of Preventive Law*, 194 EDUC. L. REP. 461, 461, 463 (2005). Academic lawyers can be just as bad as other academics at not being conversant in higher education law and its myriad issues and may be as much a hindrance as a help to the university's lawyer. See also Robert M. O'Neil, *The Lawyer and the Client in the Campus Setting: Who Is the Client, What Does the Client Expect and How May the Attorney Respond?*, 19 J.C. & U.L. 333, 340 (1993).

7. Schimmel & Nolan, *supra* note 6, at 469.

the faculty and staff expenses. Not so with small schools, which not only do not have in-house counsel but often must rely on counsel less attuned both to the general area of higher education law and to the intricate workings of the institution.⁸ Few resources exist for college and university administrators who deal with higher education legal issues, and other than the National Association of College and University Attorneys—some of whose resources are difficult to access without membership—there seems to be no one all-encompassing organization to which colleges and universities might subscribe that would give consistent legal guidance on campus violence and the law.⁹ Indeed, the Virginia Tech Task Force recommended that national higher education organizations develop information-sharing protocols, but, so far, little coordination or cooperation on these matters is evident.¹⁰ That leaves the individual institution's lawyer with the task of gathering and vetting best practices from meager and disparate resources on campus violence.

The lawyer's underlying goal is convincing the university of the need for advance planning and the implementation of risk management protocols for campus violence.¹¹ Such preventive law is the minimization of legal

8. *Id.* at 467.

9. However, one study suggests that higher education administrators would not use such associations' legal resources. *Id.* at 464. Additional member-only resources on campus safety are available at the website for the National Association of Student Personnel Administrators. See NASPA: Student Affairs Administrators in Higher Education, <http://www.naspa.org> (last visited Feb. 25, 2009).

10. VIRGINIA TECH REPORT, *supra* note 1, at 70. The Report names the American Council on Education, American Association of State Colleges and Universities, American Association of Community Colleges, National Association of State and Land Grant Universities and Colleges, National Association of Independent Colleges and Universities, Association of American Universities, and Association of Jesuit Colleges and Universities. See also Higher Education Associations, <http://www.ntlf.com/html/lib/assoc/index.htm> (last visited Feb. 25, 2009) (providing an extensive list of higher education groups compiled by the National Teaching and Learning Forum).

11. The tragic events at Columbine High School were the wakeup call to the public schools to embrace legal frameworks for dealing with dangerous students and threat assessment and campus security measures that higher education is more slowly embracing. See, e.g., HON. WILLIAM H. ERICKSON, COLUMBINE REVIEW COMM'N, THE REPORT OF GOVERNOR BILL OWENS' COLUMBINE REVIEW COMMISSION (2001), available at http://www.state.co.us/columbine/Columbine_20Report_WEB.pdf [hereinafter COLUMBINE REPORT]; ROBERT A. FEIN, BRYAN VOSSEKUIL, WILLIAM S. POLLACK, RANDY BORUM, WILLIAM MODZELESKI, & MARISA REDDY, U.S. SECRET SERV. & U.S. DEP'T OF EDUC., THREAT ASSESSMENT IN SCHOOLS: A GUIDE TO MANAGING THREATENING SITUATIONS AND TO CREATING SAFE SCHOOL CLIMATES (2004), available at <http://www.ed.gov/admins/lead/safety/threatassessmentguide.pdf> [hereinafter SECRET SERVICE GUIDE]; MARY ELLEN O'TOOLE, FBI, THE SCHOOL SHOOTER: A THREAT ASSESSMENT PERSPECTIVE (2000), available at <http://www.fbi.gov/publications/school/school2.pdf>. Higher education did not seem to be as attentive until the catastrophe of Virginia Tech, and the tragedy at Northern Illinois University served as a potent reminder. See, e.g., Ted Gregory, *6 Dead in NIU Shooting: Gunman Opens Fire in Lecture Hall, then Kills Self*, CHI. TRIB., Feb. 15,

risks.¹²

[P]reventive law works from the premise that preventing legal disputes is less costly than litigation. Furthermore, preventive law promotes a client-centered approach In preventive law, the lawyer and client engage in a joint decisionmaking process regarding legal strategies . . . [and] contemplates the client's long term goals and interests and how best to achieve them while minimizing exposure to the risk of legal difficulties.¹³

Preventive law is most successful when the "actor-at-law" recognizes that a problem requires legal counsel.¹⁴ Unfortunately, higher education is one of those actors-at-law often unable to self-diagnose. Consequently, preventive lawyering requires the lawyer's initiative to review the juxtaposition of the institution's facts with new developments in the law that may have an impact on the institution's law-creating events. This practice melds the institution's knowledge of its facts and the lawyer's knowledge of the updated law—cases, statutes, and regulations.¹⁵ The attorney does not do all the work while the client stands by. Instead, such preventive lawyering includes the client in collaboration to prevent problems.

The success of a collaboration to review and create campus violence

2008, at 1, *available at* 2008 WLNR 2984048. Admittedly, there are some distinct institutional and legal differences between public schools and higher education that make their respective approaches to student safety issues markedly different: public schools receive top-down instructions for safety from their schools; public schools are better capable of closing their campuses to outsiders; state legislatures regulate the due process and safety procedures imposed upon public schools; public schools typically have a somewhat higher level of liability for the safety of the students entrusted to their care; and the age of the student population in K–12 institutions typically range from five to eighteen years. The manner of governance is also different: school boards for K–12 institutions will more likely adopt state and federal mandates as well as invest in preventive attorney review of their policies to ensure they comply with the letter of the law whereas higher education institutions, even if they have in-house counsel, tend to want to over-think their policies, debate them, and chew on them until consensus is reached, which consensus may have little reliance on legal requirements. *See, e.g.*, DEREK BOK, *UNIVERSITIES IN THE MARKETPLACE: THE COMMERCIALIZATION OF HIGHER EDUCATION* 190 (2003). The events of the past couple of years have, assuredly, made preventive law more important to colleges and universities.

12. Bruce J. Winick, *The Expanding Scope of Preventive Law*, 3 FLA. COASTAL L.J. 189, 189 (2002) ("Through periodic legal checkups, the preventive lawyer . . . identif[ies] potential future legal dilemmas and help[s] the client to avoid them.").

13. Dennis P. Stolle, David B. Wexler, Bruce J. Winick, & Edward A. Dauer, *Integrating Preventive Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering*, 34 CAL. W. L. REV. 15, 16 (1997); *cf.* O'Neil, *supra* note 6, at 337 ("Most [college and university] issues will be resolved if the attorney sees avoidance of litigation as a primary task.").

14. Louis M. Brown, *The Law Office—A Preventive Law Laboratory*, 104 U. PA. L. REV. 940, 941–42 (1956).

15. *Id.* at 947–50.

policies depends upon the nature of the decision-making. Policymaking is not always viewed as a lawyer's strength. Lawyers are trained—and often cabin off their practices—in two particular functions: counseling the client and advocating for the client. These two functions are often seen to be strictly within the province of interpreting and explaining the law to the clients, a rather one-sided affair. But the skill for counseling is easily converted to a policymaking skill if the lawyer is willing to engage in dialogue rather than monologue, is able to talk with the client rather than at the client.

Institutional in-house counsel, who are often “treating” the entirety of the client rather than small discrete parts, are attuned to this because they are attuned to the institution and the community of interests involved:

Familiarity with the special nature of academic institutions and the way they function is a sine qua non of the university attorney's role. Universities make decisions differently, have unique personnel policies and procedures (which often appear byzantine to outsiders), and have a culture and value system unlike any other institutional client. The lawyer needs to appreciate and understand these differences as legal questions arise across the campus. There are, of course, many lawyers and firms who handle academic clients as part of their varied and general practice. Outside counsel, however, may lack the expertise that specialization brings. In such situations, universities incur a serious risk by using counsel that is unaware of the niceties of tenure, academic freedom, or student due process.¹⁶

An attorney working with a university on policymaking issues must attune herself to the institution by participating in the decision-making process,¹⁷ rather than keeping aloof in the traditional counseling function.

The participatory model that perhaps best describes the most useful decision-making process for higher education is deliberative democracy. Deliberative democracy has two primary features: dialogue based on reason and dialogue based on the public good.¹⁸ Dialogue based on reason is an engaged discussion in which the parties listen to the viewpoints of the other participants to begin shaping the policy then move toward consensus.¹⁹ “[E]xisting desires should be revisable in light of collective discussion and

16. O'Neil, *supra* note 6, at 336.

17. *Id.*

18. Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173, 205–06 (1997).

19. *Id.* at 205; see also Geoffrey Cowan & Amelia Arsenault, *Moving from Monologue to Dialogue to Collaboration: The Three Layers of Public Diplomacy*, 616 ANNALS AM. ACAD. POL. & SOC. SCI. 10, 19–20 (2008).

debate, bringing to bear alternative perspectives and additional information.”²⁰ On the other hand, dialogue based on the public good seeks outcomes for the community’s interests and not for private self-interest.²¹ Such dialogue encourages the debate of competing viewpoints while scrutinizing those viewpoints for their salience and usefulness to the endeavor.²²

[Deliberative democracy therefore] refers . . . to the understanding that in the capacity as political actors, citizen and representatives are not supposed to ask only what is in their private interest, but also what will best serve the community in general—understood as a response to the best general theory of social welfare.²³

For the lawyer to successfully negotiate the decision-making, she must ingratiate herself with the members of the institution, blending the expertise of the practitioner with that of the academic.²⁴ Collaboration in this context is a “process in which two or more persons work and play together to achieve some result or create some product in which they are jointly invested and about which they care enough to pool their strengths.”²⁵

[In this setting,] individuals adopt not a materially calculating posture but rather a richer, more emotionally nuanced *reciprocal* one. When they perceive that others are behaving cooperatively, individuals are moved by honor, altruism, and like dispositions to contribute to public good even without the inducement of material incentives.²⁶

This reciprocity requires an active participation of the parties and may come naturally to the academy: “Reciprocal exchange is in fact integral to

20. Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1549 (1988).

21. Rossi, *supra* note 18, at 206.

22. Sunstein, *supra* note 20, at 1549.

23. *Id.* at 1550.

24. Nancy Macduff & F. Ellen Netting, *Lessons Learned from a Practitioner-Academician Collaboration*, 29 NONPROFIT & VOLUNTARY SECTOR Q. 46, 48 (2000). “Collaboration” in this context should not be confused with “collaborative lawyering” as identifying lawyers collaborating in alternative dispute resolution practice. *E.g.*, Ted Schneyer, *The Organized Bar and the Collaborative Law Movement: A Study in Professional Change*, 50 ARIZ. L. REV. 289 (2008). Instead, it is probably more akin to “collaborative lawyering” as identifying lawyers collaborating for social change within communities. *E.g.*, DAVID C. CHRISLIP, *THE COLLABORATIVE LEADERSHIP FIELDBOOK: A GUIDE FOR CITIZENS AND CIVIC LEADERS* (2002); Ascanio Piomelli, *The Democratic Roots of Collaborative Lawyering*, 12 CLINICAL L. REV. 541 (2006).

25. Macduff & Netting, *supra* note 24, at 48.

26. Dan M. Kahan, *The Logic of Reciprocity: Trust, Collective Action, and Law*, 102 MICH. L. REV. 71, 71 (2003) (emphasis in original).

the structure of scholarly production.”²⁷ Such collective and, indeed, collaborative action is premised on trust.²⁸ And trust is something that lawyers have to promote actively in order to participate successfully on an institutional task force.

There are a few hurdles to such trust. First, many academics blame lawyers for the commodification of the university.²⁹ They view lawyers as engaged in the diminution of their importance as educators. Second, academics view attorneys as being “risk-averse” and out of touch with the university culture. Consequently, they want to form the policies, *then* consult lawyers: “We have to, first off, have a core sense of what we believe in, what we’re trying to accomplish as educators, define what we want to do, and then approach the lawyers.”³⁰ If the potential participants on a campus violence task force want to have the dialogue without the participation of the lawyers in that process, the stakeholders are not only less informed for engaging in the deliberative process, they may be wasting their time if the lawyer later finds the policies are legally inadequate or even unlawful. Last, as noted above, lawyers are not terribly good at participating. “[L]awyers routinely silence and subordinate their clients while purporting to tell ‘their’ stories.”³¹ Rather than engaging the client in a dialogue about the legal problem and the proposed remedies, lawyers bind themselves to their own sense of the law and have no “shared understanding” of the client’s plight or needs.³²

If a lawyer wants to participate in the success of the institutional client, she must be invested in the enterprise’s goals and success. Public education lawyers often have this community of interest because so much of what they do involves as much preventive lawyering as reactive lawyering.³³ Institutional in-house counsel, of course, has this legitimacy of working toward a mutual goal, being one of the community. Their being on the “premises” and their knowledge of the players gives them insights into the academic culture and the spirit of community on the campus.³⁴ On the other hand, outside counsel needs to learn to cultivate that academic

27. *Id.* at 90. *But see* Heubert, *supra* note 2, at 563. Reciprocity is also a keystone of the dialogue essential to deliberative democracy. Rossi, *supra* note 18, at 205 n.178.

28. Kahan, *supra* note 26, at 72.

29. *See, e.g.*, BOK, *supra* note 11, at 6.

30. WISCONSIN REPORT, *supra* note 5, at 61–62 (quoting Dr. Gary Pavela, Keynote address at the Wisconsin Governor’s Task Force on Campus Safety Public Summit (Aug. 9, 2007)).

31. Clark D. Cunningham, *The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298, 1300–01 (1992).

32. *Id.* at 1301.

33. *See, e.g.*, MICHAEL J. KAUFMAN & SHERELYN R. KAUFMAN, *EDUCATION LAW, POLICY, AND PRACTICE: CASES AND MATERIALS* 11–12 (2005).

34. Heubert, *supra* note 2, at 559.

culture and absorb the needs of the community to do the best job of collaborating with and within the institutional community, just as one might with any other corporate client.

First, a lawyer working with a college or university needs to understand that academics not only specialize in areas with which the lawyer is unfamiliar but in an institution that, despite having attended, is still a foreign experience to her. A “significant barrier [to academic-practitioner collaboration] is the inadequate socialization of practitioners and researchers in one another’s professional or organizational cultures.”³⁵ The lawyer must also acknowledge the “complex educational judgments in an area that lies primarily within the expertise of the university” and give “a degree of deference to a university’s academic decisions.”³⁶ Second, the lawyer must be prepared to learn the skills of interprofessional collaboration and participatory lawyering.³⁷ “One important attitude is a willingness to collaborate as equals. This calls upon educators and lawyers to respect one another as individuals and professionals and to avoid the hierarchical relationships that frequently exist between lawyers and their clients.”³⁸ Third, the lawyer must tap into the skills that each member of a work group might have, not just in the institutional sense but in the academic sense. “Collaboration is improved if participants are aware that each profession has critical knowledge and skills that the other profession lacks. Moreover, each professional must be aware of what the other professional does not know.”³⁹ A work group assembled for campus violence should include not just administrators, security professionals and lawyers, but also gather the expertise that certain of the professoriate would bring to the table, like sociology, psychology, geography, education, communications, business, and even the physical sciences. Each individual could be tasked to bring her expertise to the group—not unlike an expertocratic model,⁴⁰ but instead with the good of the community in mind. The community goal is to create a systemic change in the institution—one that is more attuned to the legal risks and risk management of campus

35. Macduff & Netting, *supra* note 24, at 50.

36. *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003).

37. Heubert, *supra* note 2, at 562–64.

38. *Id.* at 547.

39. *Id.*

40. See Rossi, *supra* note 18, at 196–98. Task force members of post-Virginia Tech reports hailed from several disciplines. See also CAMPUS LIFE AND SAFETY AND SECURITY TASK FORCE, OKLA. STATE REGENTS FOR HIGHER EDUC., FINAL REPORT 3–5 (2008), available at <http://www.okhighered.org/class/final-report.pdf> [hereinafter OKLAHOMA REPORT]; STATE OF ILL. CAMPUS SECURITY TASK FORCE, REPORT TO THE GOVERNOR, EXECUTIVE SUMMARY (2008), available at http://www.illinois.gov/documents/CSTF_Report_Executive_Summary.pdf [hereinafter ILLINOIS REPORT EXECUTIVE SUMMARY]; WISCONSIN REPORT, *supra* note 5, at i.

violence.⁴¹

Thus, the participating lawyer has several tasks for working successfully with a campus violence task force. On a “molecular” level, the lawyer must immerse herself into the institution and submerge the inclination to lead the discussion. On the professional level, the lawyer must do what she does best: educate the other members of the group on the law; collate and share other preventive law practices; check the institution’s existing policies; and, if necessary, help formulate new policies.⁴²

II. EXAMINING THE BODY IN SITU

“The scramble to get into college is going to be so terrible in the next few years that students are going to put up with almost anything, even an education.”⁴³

The first thing any lawyer for a higher education institution must do is become familiar with its business, its needs, its strengths, and its weakness. The only way to engage in preventive lawyering is to become intimately familiar with the institution, or, as a pathologist might do, examine the body in place before dissection. Although all attorneys have attended at least one institution of higher education and so have some sense of the business, that short period of time is insufficient to educate the lawyer about the idiosyncrasies of even that institution, not to mention the nearly innumerable legal issues the institution faces.⁴⁴ Much of the generic legal issues can be learned on the job, especially if the relationship is, or will be, long term. The same holds true for immersion into a particular institution’s culture that an attorney would not really have examined while a student: its mission, its past and future goals, and the faculty and staff. For purposes of better participating with the university in updating its campus violence policies, the astute lawyer should also understand and immerse herself in the dynamics of the potential student victims (as well as the potential student perpetrators) and their relationship to the institution, particularly as

41. See generally Jonathan Simon, *In the Place of the Parent: Risk Management and the Government of Campus Life*, 3 SOC. & LEGAL STUD. 15, 36–39 (1994). Incentives to the faculty, especially in the humanities, are the opportunity to apply their skills in the real world, to develop new research queries, and perhaps to develop consultancies in campus violence. See, e.g., William T. Bielby, *Can I Get a Witness? Challenges of Using Expert Testimony on Cognitive Bias in Employment Discrimination Litigation*, 7 EMP. RTS. & EMP. POL’Y J. 377, 397–98 (2003).

42. Beyond the scope of this Article are the concerns and considerations of the economic and ethical relationship of the attorney to the client. See generally O’Neil, *supra* note 6.

43. *The Professor*, TIME, Aug. 29, 1955, available at <http://www.time.com/time/magazine/article/0,9171,823895,00.html> (quoting Barnaby C. Keeney, former President of Brown University).

44. See WILLIAM A. KAPLIN & BARBARA A. LEE, *THE LAW OF HIGHER EDUCATION: A COMPREHENSIVE GUIDE TO LEGAL IMPLICATIONS OF ADMINISTRATIVE DECISION MAKING* (4th ed. 2007).

that relationship has evolved into a commercial business-customer relationship.

The modern college and university governance has become somewhat schizophrenic in the clash between the commercialization and commodification of colleges and universities and the traditional view that colleges and universities are cloistered halls of learning and higher intellectual thought. Unfortunately, “[u]niversities share one characteristic with compulsive gamblers and exiled royalty: there is never enough money to satisfy their desires.”⁴⁵ To satisfy that need for money, colleges and universities have long engaged in commercial practices to attract students.⁴⁶ However, since the early 1980s, colleges and universities joined the mainstream capitalistic drive to compete in the “marketplace” and became entrepreneurs.⁴⁷ Higher education institutions began to snag government and grant funding for scientific research, which in turn brought in funds from licensing rights, consulting activities, and similar academy-business joint ventures.⁴⁸

At the same time, *U.S. News & World Report* fueled the competition among colleges and universities as it published its annual rankings of colleges and universities, even their individual professional schools.⁴⁹ “Although every college president can recite the many weaknesses of these ratings, they do provide a highly visible index of success, and competition is always quickened by such measures, especially among institutions like universities whose work is too intangible to permit more reliable means of evaluation.”⁵⁰ As a consequence of all this competition, colleges and

45. BOK, *supra* note 11, at 9.

46. *Id.* at 2–3.

47. *Id.* at 3–5, 10–13. “Entrepreneurial initiative, high executive salaries, and aggressive marketing techniques are all spreading to fields of endeavor quite outside the realm of business.” *Id.* at 5. “Some [colleges and universities] have become big businesses, employing thousands and collecting millions in tuition fees, receiving grants from government and private sources, and, for a select few, raising billions in huge endowments.” STANLEY ARONOWITZ, *THE KNOWLEDGE FACTORY: DISMANTLING THE CORPORATE UNIVERSITY AND CREATING TRUE HIGHER LEARNING* 11 (2000).

48. BOK, *supra* note 11, at 11–12.

49. *Id.* at 14.

50. *Id.* The criticisms of these annual reports have generated considerable controversy in the academy and not inconsiderable scholarly attention. See, e.g., Gordon C. Chang & J.R. Osborn, *Spectacular Colleges and Spectacular Rankings: The “US News” Rankings of American “Best” Colleges*, 5 J. OF CONSUMER CULTURE 338 (2005); Symposium, *The Next Generation of Law School Rankings and Methodology*, 81 IND. L.J. 1 (2006); Stuart Rojstaczer, *College Rankings Are Mostly About Money*, SFGATE.COM (Sept. 3, 2001), <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2001/09/03/ED28864.DTL&type=printable>. Ironically, a study commissioned by *U.S. News & World Report* itself reported significant weaknesses in the methodology used in its rankings. Nat’l Opinion Research Ctr., *A Review of the Methodology for the U.S. News & World Report’s Rankings of Undergraduate Colleges and Universities*, WASH. MONTHLY, <http://www.washingtonmonthly.com/features/2000/norc.html>.

universities go to great lengths to market themselves to students and to spend inordinate sums of capital to woo the “best” students.⁵¹

As students and their parents become targets of that marketing and hence consumers of the institutional business, they also start to take seriously the business aspect of not just the choice of institution, but what the choice should offer in return: the vast majority of undergraduates view a college degree as essential to getting a job, a view that far outstrips any other reason for attending college.⁵² “[S]tudents in the 1970s and since have viewed college as an absolutely critical screening process which would determine where in the economic hierarchy they were likely to end up.”⁵³ In addition, with the rise in the number of nontraditional students—part-timers, older, or employed—came the rise of a consumer mentality in students’ relationship with the university: “[t]heir focus is on convenience, quality, service, and cost.”⁵⁴ By the 1990s, students became more acutely attuned to the buyer-seller relationship they had with the college or university, pitting their own interests against the college or university’s interests and more actively “seeking rights of choice, safety, and information,”⁵⁵ believing that they “have the same rights as consumers do with any other commercial enterprise.”⁵⁶ Increasingly, students will lodge complaints like customers at a retail store and threaten litigation if they are not satisfied.⁵⁷ Concomitant with this consumer attitude to their education is the students’ view that, just as with traditional businesses, colleges and universities have similar business duties to them for their safety on campus.⁵⁸ These safety issues are the crux of the legal education the participating lawyer must convey to the rest of an institutional campus violence task force.

III. EXTERNAL EXAMINATION AND THE PRE-EXISTING PATHOLOGY

The attorney’s role in the education of the other members of the

51. See, e.g., WESLEY SHUMAR, COLLEGE FOR SALE: A CRITIQUE OF THE COMMODIFICATION OF HIGHER EDUCATION 126–41 (1997).

52. ARTHUR LEVINE & JEANETTE S. CURETON, WHEN HOPE AND FEAR COLLIDE: A PORTRAIT OF TODAY’S COLLEGE STUDENT 115–17 (1998).

53. Simon, *supra* note 41, at 23.

54. LEVINE & CURETON, *supra* note 52, at 50.

55. *Id.* at 70.

56. *Id.* at 52.

57. *Id.* at 51.

58. Students’ attitudes about their responsibilities for their own safety may be exemplified by a recent article in a major university’s student newspaper: “It is the duty to protect the students of this university, not a favor. College kids do not always take the safety precautions necessary, and are probably more irresponsible than most when it comes to their own safety.” Dan Josephson, *Safety Improvements on Campus Unconvincing*, THE DAILY CARDINAL (Madison, Wis.), Apr. 25, 2008, available at http://www.dailycardinal.com/frontend/article/print_version/2877.

institution engaged in improving campus violence policies includes, to a great extent, teaching the teachers. The attorney has to educate the academy of the risks the institution faces in matters of campus violence so as to better formulate the necessary policies to avoid those risks. In this way, the institution becomes preventive rather than reactive to legal issues raised by campus violence. That education instructs that, as goes the student consumerism in the institution, so goes the law.

The rise of student consumerism parallels the fall of *in loco parentis* governance in higher education. Until recently, little structural change has taken its place as colleges and universities have taken a more market-oriented, *laissez faire* approach to governing student social and private lives. Unfortunately, the consumer-savvy student has also become more litigious, leaving institutions to deal with the disparate demands of the students: I am a consumer, and I want the best; however, I am unwilling to take responsibility for the costs of my actions.⁵⁹

That leaves higher education with a new consideration in running its business: the role of risk management in minimizing the harms to the students without interfering with their private lives. The modern college or university now must consider student demands for the ideal in health and safety as part of its business plan.⁶⁰ Rather than directly shaping and regulating students' lives under the *in loco parentis* model, the modern college or university must indirectly shape and regulate its students' lives as consumers. This requires the college or university to look at the scope of actors and actions on its campus and to emphasize the risks and environment to the consumers so they can make the most responsible and rational choices over health and safety issues,⁶¹ rather than submitting to the uncontrolled domination of the *laissez faire* system.⁶² In other words, colleges and universities must inculcate in their students a sense of order in matters of campus security as responsible consumers rather than either extreme of the strictures arising from the imposition of moral authority and of the anarchy of no government at all.

Hence, one major task of the lawyer participating on a campus violence task force is to assist the other members in appreciating the importance of risk management. This task can be accomplished by supplying the most recognizable rationale for creating a campus culture of responsible choices and rational consumerism: the not inconsiderable likelihood that a college or university will incur liability for the consequences of not managing the risks of campus violence, or at the very least, the costs of defending a suit by an injured student.

59. Simon, *supra* note 41, at 23–26.

60. *Id.* at 31.

61. *Id.* at 32.

62. *Id.* at 38.

The task force lawyer-participant brings the expertise to the group that educates the other members on those legal concerns,⁶³ which begins with the stark fact that courts are increasingly awarding damages to college and university students (or their families) when they are injured by violence on campus.⁶⁴ Although the statistics are contradictory, this trend is fed by reported data that reveals approximately one-third of college students have been campus crime victims⁶⁵ as well as slightly escalating campus crime and violence during the past fifteen years or so.⁶⁶ Fatal shootings on

63. STATE OF ILL. CAMPUS SECURITY TASK FORCE, REPORT TO THE GOVERNOR, 225–37 (2008), available at <http://www.ibhe.state.il.us/CampusSafety/materials/CSTFReport.pdf> [hereinafter ILLINOIS REPORT].

64. See, e.g., John Wesley Lowery, *The Legal Implications of Campus Crime for Student Affairs Professionals*, in CREATING AND MAINTAINING SAFE COLLEGE CAMPUSES: A SOURCEBOOK FOR EVALUATING AND ENHANCING SAFETY PROGRAMS 205, 213–15 (Jerlando F. L. Jackson & Melvin Cleveland Terrell eds., 2007) [hereinafter CREATING AND MAINTAINING SAFE COLLEGE CAMPUSES].

65. This figure was consistent in both 1989 and 1991 studies of 6,000 and 11,000 randomly selected undergraduates, respectively. Dorothy G. Siegel & Clarinda Harriss Raymond, *An Ecological Approach to Violent Crime on Campus*, 15 J. SECURITY ADMIN. 19, 20–21 (1992). Similar statistics existed in 1992. Bonnie S. Fisher, John J. Sloan, Francis T. Cullen, & Chungmeng Lu, *Crime in the Ivory Tower: The Level and Sources of Student Victimization*, 36 CRIMINOLOGY 671, 690 (1998).

66. According to available data gleaned from reports of postsecondary campus crime, certain criminal offenses have increased in number in the past few years. Compare NAT'L CTR. FOR EDUC. STATISTICS, CAMPUS CRIME AND SECURITY AT POSTSECONDARY EDUCATION INSTITUTIONS (1997), <http://nces.ed.gov/surveys/peqis/publications/97402/> (statistics from 1992–94), with U.S. DEP'T OF EDUC., OFFICE OF POSTSECONDARY EDUC., THE INCIDENCE OF CRIME ON THE CAMPUSES OF U.S. POSTSECONDARY EDUCATION INSTITUTIONS: A REPORT TO CONGRESS (2001), available at <http://www.ed.gov/finaid/prof/resources/finresp/ReportToCongress.pdf> [hereinafter D.O.E. 2001 REPORT TO CONGRESS], and U.S. DEP'T OF EDUC., DATA ON CAMPUS CRIME: SUMMARY CRIME STATISTICS FOR 2004–2006, <http://www.ed.gov/admins/lead/safety/criminal-04-06.pdf> (criminal offenses). According to this data, there has been a net numerical increase in violent campus crime between 1992 and 2006 although there was a slight decline between 2004 and 2006. “Violent crimes” are murder, forcible sex offenses, robbery, and aggravated assault. Part of the startling increase seems to be the doubling in the number of forcible sex offenses. However, the increase in numbers of forcible sex offenses may be a correction in reporting the types of events that constitute “forcible” offenses because reported “nonforcible sex offenses” dropped to almost nil. See also Jerlando F. L. Jackson, Melvin Cleveland Terrell, & Richie L. Heard, *The Complexity of Maintaining a Safe Campus in Higher Education: An Administrative Dilemma*, in CREATING AND MAINTAINING SAFE COLLEGE CAMPUSES, *supra* note 64, at 3, 6–7 (arguing some violent crimes on campus are in decline while others are up); KAPLIN & LEE, *supra* note 44, at 880; VIRGINIA TECH REPORT, *supra* note 1, at L1–L11 (Fatal School Shootings in the United States: 1966–2007). But see Bonnie S. Fisher, Jennifer L. Harman, Francis T. Cullen, & Michael G. Turner, *Making Campuses Safer for Students: The Clery Act as a Symbolic Legal Reform*, 32 STETSON L. REV. 61, 80–81 (2002) (suggesting that campus crime is declining); J. Fredericks Volkwein, Bruce P. Szelest, & Alan J. Lizotte, *The Relationship of Campus Crime to Campus and Student Characteristics*, 36 RES. IN HIGHER EDUC. 647 (1995) (concluding campus crime decreased between reporting years 1974 and 1992).

campus are definitely on the rise.⁶⁷ This trend is in contrast to decreasing crime statistics in the public schools for the same time period.⁶⁸ Another stark trend is the increased willingness—right or wrong—of the judiciary to hold colleges and universities accountable for taking care of their students.⁶⁹

College and university students and their families have several avenues they pursue when seeking to impose liability upon colleges and universities for injuries incurred by campus violence, but they usually choose to pursue remedies under state law.⁷⁰ The past twenty years or so have produced increasingly sophisticated methods for holding higher education institutions liable for injuries to students.⁷¹ Hence, the cautionary role a lawyer must play on a campus violence task force.

The recent successes in court occurred when the plaintiff victims, or their families, asserted that the institution has a business responsibility for the safety of its students. This business model of litigation should come as no surprise, coinciding as it does with the rise of the consumer student. One such legal route, although not usually successful to date,⁷² that seeks

67. INT'L ASS'N OF CAMPUS L. ENFORCEMENT ADMINS. SPECIAL REV. TASK FORCE, OVERVIEW OF THE VIRGINIA TECH TRAGEDY AND IMPLICATIONS FOR CAMPUS SAFETY: THE IACLEA BLUEPRINT FOR SAFER CAMPUSES 10–11 (2008), available at http://www.iaclea.org/visitors/PDFs/VT-taskforce-report_Virginia-Tech.pdf [hereinafter IACLEA BLUEPRINT]. A recent white paper from the American College Health Association suggests that campus violence decreased dramatically by 54% between 1995 and 2002. JOETTA L. CARR, AMERICAN COLL. HEALTH ASS'N, CAMPUS VIOLENCE WHITE PAPER 3 (2005). However, the statistics upon which the *Campus Violence White Paper* relied came from Katrina Baum & Patsy Klaus, Bureau of Justice Statistics, U.S. Dep't of Justice, *Violent Victimization of College Students, 1995–2002*, NCJ 206836 (2005), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/vvcs02.pdf>, which reported statistics of violent crimes against college students, wherever located, not just on campus. As that report reveals, 93% of those crimes occurred off-campus. *Id.* The *Campus Violence White Paper's* conclusions, however, and the position of the American College Health Association on campus violence are likely unaffected by this variance in evidence.

68. See NAT'L CTR. FOR EDUC. STAT. & BUREAU OF JUST. STAT., INDICATORS OF SCHOOL CRIME AND SAFETY: 2007 6–7, 10–11 (2007), <http://nces.ed.gov/pubs2008/2008021a.pdf>.

69. For example, some of the victims of the Virginia Tech murders will likely settle with the state for \$11 million; the remainder are free to pursue litigation after having filed tort claims notices. See Anita Kumar & Brigid Schulte, *Shooting Victims' Families Tentatively Back Virginia Deal*, WASH. POST, Apr. 11, 2008, available at 2008 WLNR 6742985.

70. Each state has its own common law rules of negligence, and when state colleges and universities are involved, there are statutory rules of negligence and of state-sanctioned immunities under that state's tort claims act. See generally KAPLIN & LEE, *supra* note 44, at 880–85; Brett A. Sokolow, W. Scott Lewis, James A. Keller, & Audrey Daly, *College and University Liability for Violent Campus Attacks*, 34 J.C. & U.L. 319 (2008).

71. See, e.g., Sokolow, Lewis, Keller, & Daly, *supra* note 70.

72. See, e.g., *Furek v. Univ. of Del.*, 594 A.2d 506, 517 (Del. 1991); *Shin v. Mass.*

to hold higher education institutions liable for campus violence is based on the contractual obligations undertaken by the college or university on behalf of the student and on which a student may rely in entering into the agreement to attend the school. An implied contract may arise from the pamphlets, brochures, and other documents sent to students when they are admitted to a college or university.⁷³ Additional documents, such as student handbooks and dormitory policies, might imply a contract for students' safety. These contracts, however, go both ways and may require that the student herself not have violated their provisions, such as failing to abide by contractual procedures.⁷⁴

The most successful route for holding colleges and universities liable for the safety of their students is through negligence theories.⁷⁵ In most jurisdictions, negligence consists of the elements of duty, breach, proximate cause, and injury. When it comes to asserting higher education liability, the legal focus is on the duty, if any, owed by the institution to the student. Colleges and universities are not generally considered the insurers of their students' safety,⁷⁶ and unlike the duty of supervision imposed on teachers in public schools, the duty of higher education institutions relies less on a parental role in the protection of its students because they are considered "legally responsible adults who are able to take care of themselves."⁷⁷ However, courts are still finding that universities owe a duty to their students for third-party campus violence.⁷⁸

The Restatement (Second) of Torts § 315⁷⁹ sets forth the general

Inst. of Tech., No. 020403, 2005 WL 1869101, at *6–*8 (Mass. Super. Ct. June 27, 2005).

73. *Nieswand v. Cornell Univ.*, 692 F. Supp. 1464, 1469, 1470–71 (N.D.N.Y. 1988) (holding that the parents of student who was shot to death in dormitory had created genuine issue of material fact concerning university's contractual obligation to student). These documents may create a contract between the college or university and the student for purposes of imposing appropriate disciplinary procedures. *See, e.g., Goodman v. President & Bd. of Trs.*, 135 F. Supp. 2d 40, 57 (D. Me. 2001) (student handbook).

74. *Nieswand*, 692 F. Supp. at 1471.

75. *See generally* Sharlene A. McEvoy, *Campus Insecurity: Duty, Foreseeability, and Third Party Liability*, 21 J.L. & EDUC. 137 (1992).

76. *Schieszler v. Ferrum Coll.*, 236 F. Supp. 2d 602, 610 (W.D. Va. 2002); *Kleisch v. Cleveland State Univ.*, No. 05AP-289, 2006 WL 701047, at *6 (Ohio Ct. App. Mar. 21, 2006).

77. *Furek*, 594 A.2d at 517. "The *in loco parentis* doctrine is outmoded and inconsistent with the reality of contemporary collegiate life." *Nero v. Kan. State Univ.*, 861 P.2d 768, 778 (Kan. 1993). *But see* *Jesik v. Maricopa County Cmty. Coll. Dist.*, 611 P.2d 547, 551 (Ariz. 1980) ("[A] statutory duty of adequate supervision coupled with notice imposed a specific duty to exercise reasonable care to protect the decedent [student].")

78. *See generally* Sokolow, Lewis, Keller, & Daly, *supra* note 70.

79. RESTATEMENT (SECOND) OF TORTS § 315 (1965) ("There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless (a) a special relation exists between the actor and the third person which

proposition that an actor is not liable for the safety of another from the attacks of a third party unless there is a special relationship between the actor and the victim. The most widely accepted grounds for higher education liability for the safety of its students from third-party violence arises from the special relationship between a business owner and its customers. One of the most commonly considered higher education special relationships is the university as possessor of land.⁸⁰ Courts view colleges and universities as business owners who must extend to invitees on their property—students—a degree of care to maintain the premises in a safe condition.⁸¹ A business owner has a duty to warn or protect individuals doing business on the premises—invitees—from the dangerous or criminal acts of third persons when the business owner, in the exercise of ordinary care, knows or should know that the third person presents a danger to the invitee.⁸² Thus, a university has a duty arising from this special relationship to protect its students, while they are on campus, from a third person's dangerous or criminal acts.⁸³

Another such special relationship between a college or university and a student is the landlord-tenant relationship, especially when the campus violence occurs in on-campus residences. This relationship has a slightly

imposes a duty upon the actor to control the third person's conduct, or (b) a special relation exists between the actor and the other which gives to the other a right to protection.”)

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

81. *E.g.*, *Kleisch*, 2006 WL 701047, at *3.

82. RESTATEMENT (SECOND) OF TORTS § 344 (1965) (“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.”).

83. *See, e.g.*, *Nieswand v. Cornell Univ.*, 692 F. Supp. 1464, 1467 (N.D.N.Y. 1988); *Peterson v. S.F. Cmty. Coll. Dist.*, 685 P.2d 1193, 1198 (Cal. 1984) (holding that the college had a duty of care to student assaulted in area of campus where other assaults had occurred); *Furek v. Univ. of Del.*, 594 A.2d 506, 520 (Del. 1991); *Nero v. Kan. Sate Univ.*, 861 P.2d 768, 780 (Kan. 1993); *Williams v. State*, 786 So.2d 927, 932 (La. Ct. App. 2001) (finding that the University of Louisiana at Monroe had a duty of care to a student assaulted and robbed at gunpoint in his dormitory room); *Stanton v. Univ. of Me. Sys.*, 773 A.2d 1045, 1049 (Me. 2001) (holding that the university had a duty to a student-athlete to warn her of procedures for personal safety); *Knoll v. Bd. of Regents*, 601 N.W.2d 757, 761 (Neb. 1999) (finding that the University of Nebraska owed a duty of care to a student seriously injured during a fraternity hazing incident); *Ayeni v. County of Nassau*, 794 N.Y.S.2d 412, 413 (N.Y. App. Div. 2005) (Nassau Community College); *Kleisch*, 2006 WL 701047, at *4 (finding that the university had a duty of care for a student raped in a lecture hall by a stranger); *Butch v. Univ. of Cincinnati*, 695 N.E.2d 1245, 1247 (Ohio Ct. Cl. 1997); *Johnson v. State*, 894 P.2d 1366, 1370 (Wash. Ct. App. 1995) (holding that Washington State University owed a duty of care to a student abducted and raped near her dormitory).

lower level of care than that owed by a business owner to its invitees. In some cases, the landlord's duty of reasonable care to its tenants only extends to the common areas, and the landlord must have actual knowledge of dangerous or defective conditions.⁸⁴ The college or university as landlord may not be liable for injuries incurred in the actual residential area because it is not the common area covered by the duty, nor for third-party violence because a violent third party is not generally considered a dangerous or defective condition of the premises.⁸⁵ However, a landlord college or university that fails to secure its campus buildings properly may be held liable under this special relationship.⁸⁶

A third special relationship is one that is created by the college or university itself, that of providing campus safety and security. This may well be the broadest duty imposed on a higher education institution and was first recognized in *Mullins v. Pine Manor College*.⁸⁷ In that case, the court observed that "colleges of ordinary prudence customarily exercise care to protect the well-being of their resident students, including seeking to protect them against the criminal acts of third parties."⁸⁸ Viewing campuses as a "magnet" for criminal behavior because of the congregation of young, generally unsupervised, adults—especially women—modern campuses undertake to provide security. Indeed, providing security is an indispensable business practice in running a modern college or university and is part of the financial package charged to students.⁸⁹ Both parents and students rely on that provision of security.⁹⁰ Having voluntarily assumed security as a duty, the college or university must perform that duty with due care.⁹¹ Liability inures upon the college or university if it fails to exercise due care and increases the risk of harm to the student or the student relies on campus security to keep her safe.⁹² Hence, *Mullins* created a special relationship unique to higher education institutions, imposing specific duties because of their relationship to their students.⁹³ One particular

84. *Rhaney v. Univ. of Md. Eastern Shore*, 880 A.2d 357, 364 (Md. 2005) (holding that the university owed no duty to a student punched by a fellow student while in his dormitory room).

85. *Id.* at 365–66.

86. *E.g.*, *Miller v. State*, 467 N.E.2d 493, 495 (N.Y. 1984).

87. 449 N.E.2d 331 (Mass. 1983).

88. *Id.* at 335.

89. *Id.* at 336.

90. *Id.* at 336–37.

91. *Id.* at 335–36. *But see* Volkwein, Szelest, & Lizotte, *supra* note 66, at 667 ("[I]t appears that crime on campus is relatively independent of crimes and poverty in the surrounding community. In view of the relatively low rates of campus crime, perhaps students are not viewed by criminals as 'easy targets' until they leave the campus and enter the community.").

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

93. "The instant case concerns only the distinctive relationship between colleges and their students." *Id.* at 337. *Contra* *Murrell v. Mount St. Clare Coll.*, No. 3:00-CV-

peculiarity of this duty is that the foreseeability of criminal behavior on campus is virtually proved simply by having campus security in place: “the precautions which . . . colleges take to protect their students against criminal acts of third parties would make little sense unless criminal acts were foreseeable.”⁹⁴

Related to the *Mullins* principle but more specifically reliant upon the Restatement (Second) of Torts § 323⁹⁵ is the principle that a higher education institution creates a duty when it takes direct responsibility for the safety of its students. Unlike the implicit special relationship created in *Mullins*, this relationship occurs if a college or university has direct involvement in its students’ dangerous activities. If it does, the college or university has a duty to control the situation in a non-negligent manner.⁹⁶

Not yet a duty imposed on colleges or universities but one that is looming on the horizon may be the duty to control the violent student, a duty that might be extrapolated from recent cases holding colleges and universities liable for student suicides. In 2000, the Supreme Court of Iowa determined that the University of Iowa was not liable in a wrongful death action for the suicide of a freshman.⁹⁷ In question in that case was the Restatement (Second) of Torts § 323,⁹⁸ which imposes a duty on one who “undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other’s person.”⁹⁹ Plaintiff father argued that the University had failed to exercise reasonable care after his son previously attempted suicide and University

90204, 2001 WL 1678766, at *5 (S.D. Iowa 2001) (finding that the college was not liable for acquaintance rape by a student’s guest because it had no way of knowing it had to control this individual). In *Murrell*, the court stated: “[a] college is an educational institution, not a custodian of the lives of each adult, both student and non-student, who happens to enter the boundaries of its campus.” *Id.* (citing *Univ. of Denver v. Whitlock*, 744 P.2d 54, 62 (Colo. 1987)).

94. *Mullins*, 449 N.E.2d at 337. “That a sexual assault could occur in a dormitory room on a college campus is foreseeable and that fact is evidenced in part by the security measures that the University had implemented.” *Stanton v. Univ. of Me. Sys.*, 773 A.2d 1045, 1050 (Me. 2001) (citing *Mullins*, 449 N.E.2d 331).

95. RESTATEMENT (SECOND) OF TORTS § 323 (1965) (“One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other’s person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other’s reliance upon the undertaking.”).

96. *Furek v. Univ. of Del.*, 594 A.2d 506, 520 (Del. 1991) (holding that the university policy against hazing imposed a duty on the university for the care of a fraternity pledge who was burned by lye-based oven cleaner).

97. *Jain v. State*, 617 N.W.2d 293 (Iowa 2000).

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

99. *Jain*, 617 N.W.2d at 297 (citing RESTATEMENT (SECOND) OF TORTS § 323 (1965)).

employees were aware of the attempt yet failed to pursue the matter.¹⁰⁰ The court determined that this duty could not be foisted on the University because the employees' failure to act did not increase the son's risk of suicide.¹⁰¹ However, two years later, the personal representative of another student's estate survived a motion to dismiss a cause of action because she asserted a special relationship between the College and the student sufficient to impose a duty to protect him from committing suicide.¹⁰² That special relationship arose because the student lived on campus and the College was aware that he had emotional problems. Based on the Restatement (Second) of Torts § 314A,¹⁰³ the generic principle was that a duty to protect arose from a special relationship created by the College's knowledge that the student was troubled and the facts that established his suicide were foreseeable.¹⁰⁴

In 2005, one court raised the specter of multiple grounds for university liability for a student's suicide in *Shin v. Massachusetts Institute of Technology*.¹⁰⁵ Elizabeth Shin had pre-existing mental health issues upon matriculating at MIT, mental health issues that became increasingly pronounced as her freshman and sophomore years progressed. Various MIT employees and administrators, including psychiatrists at its Mental Health Service Department, met with, treated, and counseled Shin to deal with her problems. By spring of her sophomore year, she had made numerous suicide threats for which MIT offered a variety of responses. She eventually set herself on fire in her dorm room and died.¹⁰⁶ Shin's parents filed a multi-count complaint against MIT and successfully presented triable issues of fact to overcome a motion for summary judgment filed by MIT administrators¹⁰⁷ on claims of negligence, gross negligence, wrongful death, and conscious pain and suffering.¹⁰⁸

The duty necessary to support allegations of each of these four torts was extrapolated from Restatement (Second) of Torts § 314A, recognizing a special relationship between the University and Shin arising from a "duty

100. *Id.* at 299.

101. *Id.*

102. *Schieszler v. Ferrum Coll.*, 236 F. Supp. 2d 602, 609 (W.D. Va. 2002).

103. RESTATEMENT (SECOND) OF TORTS § 314A (1965); *Schieszler*, 236 F. Supp. 2d at 606–07.

104. *Schieszler*, 236 F. Supp. 2d at 609; see generally Carrie Elizabeth Gray, Note, *The University-Student Relationship Amidst Increasing Rates of Student Suicide*, 31 LAW & PSYCHOL. REV. 137 (2007).

105. No. 020403, 2005 WL 1869101, at *1 (Mass. Super. Ct. Aug. 29, 2005).

106. *Id.* at *1–*4.

107. Shin's parents also survived summary judgment in claims against the MIT's individual medical professionals involved in the matter for claims of gross negligence. The gross negligence count averred that the medical professionals did not formulate nor enact a plan to respond to Shin's suicide threats. *Id.* at *8–*9.

108. *Id.* at *11.

to aid or protect in any relation of dependence.”¹⁰⁹ According to the court, this duty arises when an individual “reasonably could foresee that he would be expected to take affirmative action to protect the plaintiff and could anticipate harm to the plaintiff from the failure to do so.”¹¹⁰ The court then ruled that the MIT administrators—Shin’s dormitory Housemaster and the Dean of Counseling and Support Services—were well aware of Shin’s mental problems and could have foreseen that she would likely hurt herself without appropriate supervision, thereby creating a duty to exercise reasonable care to prevent harm to Shin.¹¹¹ The MIT administrators breached that duty when they failed to create an intervention plan to protect Shin from hurting herself, despite the escalation of her suicide threats.¹¹²

The *Shin* decision should be especially frightening for college and university administrators because of the natural progression by which a court could extend the duty of care that administrators may have to suicidal students to a suicidal student’s victims, as occurred in the events at Virginia Tech. If a special relationship exists between a college or university and a suicidal student to protect the student from himself, under § 314A, it is no great leap of logic to extend that to the duty to protect others from the suicidal student under Restatement (Second) of Torts § 319, which imposes a duty on those who take control of a third party with dangerous propensities.¹¹³ If a college or university undertakes to control a suicidal student who decides to take others with him, *Shin* might stand as authority for making the college or university, or at least the specific administrators, liable for harm to the suicidal student’s victims.¹¹⁴ The fluidity by which

109. *Id.* at *12 (quoting RESTATEMENT (SECOND) OF TORTS § 314A (1965)).

110. *Id.* (quoting *Irwin v. Town of Ware*, 467 N.E.2d 1292, 1300 (Mass. 1984)).

111. *Id.* at *13.

112. *Id.* at *14. Shin’s parents ultimately settled the case with MIT, both parties agreeing that her death was probably an accident. Toxicology reports indicated that she had taken a nonlethal dose of nonprescription drugs and was likely unable to respond when candles sparked the blaze. Marcella Bombardieri, *Parents Strike Settlement with MIT in Death of Daughter*, THE BOSTON GLOBE, Apr. 4, 2006, at B1, available at http://www.boston.com/news/local/articles/2006/04/04/parents_strike_settlement_with_mit_in_death_of_daughter/.

113. RESTATEMENT (SECOND) OF TORTS § 319 (1965) (“One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.”); see also RESTATEMENT (THIRD) OF TORTS § 41 (Proposed Final Draft No. 1 2007). *But see* *Nero v. Kan. State Univ.*, 861 P.2d 768, 779 (Kan. 1993) (finding that the university did not have control over student who sexually assaulted another sufficient to impose liability under § 319 simply because it had charge of his housing assignment); *Eiseman v. State*, 511 N.E.2d 1128, 1137 (N.Y. App. 1987) (holding that the state university had no duty to control student that it knew was a former convict and former drug addict and was therefore not liable for off-campus rape and murder of fellow student).

114. See Jim Castagnera, *Legal Liability for the Virginia Tech Massacre: Inquiry Questions Cho’s Mental-Health Care History*, THE GREENTREE GAZETTE, May 2007, available at <http://www.greentreegazette.com/SpecialSeries/load.aspx?art=238>. The

courts are morphing otherwise static special relationships, such as business owner-invitee and landlord-tenant, to a more generic dependency special relationship is not inconceivable: “[a]s the harm which safely may be considered foreseeable to the defendant changes with the evolving expectations of a maturing society, so change the ‘special relationships’ upon which the common law will base tort liability for the failure to take affirmative action with reasonable care.”¹¹⁵

If the duty to the student does not trap the college or university, the foreseeability of the violent act may do so.¹¹⁶ First, in relationship to danger on campus, students must be protected from physical conditions that encourage crime:

[i]n the closed environment of a school campus where students pay tuition and other fees in exchange for using the facilities, where they spend a significant portion of their time and may in fact live, they can reasonably expect that the premises will be free from physical defects and that school authorities will also exercise reasonable care to keep the campus free from conditions which increase the risk of crime.¹¹⁷

As a campus task force examines the ways to minimize harm, those physical locations that portend danger—stairwells and campus walkways without lighting, locations of earlier violence—must be dealt with.

Perhaps more important (and more unpredictable) are the acts and their actors. Regardless of how they themselves behave, students expect that campuses will exert a certain amount of control over third-party conduct. Sudden and unexpected acts are often excepted.¹¹⁸ However, harm may be foreseeable when a college or university has attempted to control the dangerous activity by providing security or otherwise attempting to regulate the conduct.¹¹⁹ A similar crime by an individual may create

Proposed Final Draft of Restatement (Third) of Torts § 41(b)(4) specifically imposes a duty of reasonable care on mental-health professionals for the safety of third persons from risks posed by their patients. RESTATEMENT (THIRD) OF TORTS § 41(b)(4) (Proposed Final Draft No. 1, 2007).

115. *Irwin v. Town of Ware*, 467 N.E.2d 1292, 1300–01 (Mass. 1984). In addition, the Proposed Final Draft of Restatement (Third) of Torts § 40 (2005), creates a specific duty between schools and students. RESTATEMENT (THIRD) OF TORTS § 41(b)(4) (Proposed Final Draft No. 1, 2007). Such a rule, if applied to higher education institutions, would have a profound impact on the liability of colleges and universities to their students for campus violence. *See* Sokolow, Lewis, Keller, & Daly, *supra* note 70, at 323–24.

116. *See* Sokolow, Lewis, Keller, & Daly, *supra* note 70, at 325–27.

117. *Peterson v. S.F. Cmty. Coll. Dist.*, 685 P.2d 1193, 1201 (Cal. 1984).

118. *E.g.*, *Luina v. Katharine Gibbs Sch. N.Y., Inc.*, 830 N.Y.S.2d 263, 264 (N.Y. App. Div. 2007) (finding that it was not foreseeable that a student would be harmed by a single punch during an altercation before class).

119. *Furek v. Univ. of Del.*, 594 A.2d 506, 521–22 (Del. 1991) (holding that the university policy regulating fraternity hazing was evidence that the student victim’s

sufficient foreseeability of the second crime to impose liability on a college or university.¹²⁰ However, the foreseeability need not be attached to a particular individual; the occurrence of similar activities may be sufficient to create foreseeability of later acts of violence.¹²¹ “[P]rior criminal activity need not involve the same suspect to make further criminal acts reasonably foreseeable for purposes of imposing a duty . . . to undertake reasonable precautionary measures.”¹²² The occurrence of similar activities sufficient to constitute a foreseeable event may require more than the *occasional* crime.¹²³ However, a general pattern of dangerous student activity in those instances when the university has control¹²⁴ is at least sufficient to go to a jury to determine foreseeability,¹²⁵ if it is not a question of law determined by the court.¹²⁶

Because of the wide variety of ways that students might be harmed by third parties on campus, colleges and universities cannot possibly plan for all eventualities. Many campuses are becoming increasingly conscious about security and safety measures and have created safety awareness programs.¹²⁷ Yet if some data are to be believed, personal crimes are on

injuries incurred from a hazing incident were foreseeable to the university).

120. A male student already accused of rape was placed in a coed dorm where he sexually assaulted his second victim. The university was aware of the previous allegation and had taken measures to prevent his contact with other coeds until the summer session when he was placed in the coed dorm. *Nero v. Kan. State Univ.*, 861 P.2d 768, 780 (Kan. 1993).

121. *Peterson*, 685 P.2d at 1201–02 (finding an assault foreseeable in location of other assaults); *Furek*, 594 A.2d at 521 (addressing similar hazing activities); *Williams v. State*, 786 So.2d 927, 932 (La. Ct. App. 2001) (holding that recent crime and violence on campus raised issue of fact as to foreseeability of four men assaulting and robbing a student in his dormitory room at gunpoint); *Sharkey v. Bd. of Regents*, 615 N.W.2d 889, 901 (Neb. 2000) (finding that other violent altercations at that campus locations were not unknown).

122. *Sharkey*, 615 N.W.2d at 901.

123. One rape occurring on campus during a four- or five-year period and in a different location was not enough to make the incident in question foreseeable in *Kleisch v. Cleveland State University*. No. 05AP-289, 2006 WL 701047, at *6 (Ohio Ct. App. Mar. 21, 2006).

124. *E.g.*, *Coghlan v. Beta Theta Pi*, 987 P.2d 300, 312 (Idaho 1999) (denying the university’s motion for summary judgment where university employees supervised student parties).

125. *Nieswand v. Cornell Univ.*, 692 F. Supp. 1464, 1468 (N.D.N.Y. 1988); *Furek*, 594 A.2d at 521–22; *Johnson v. State*, 894 P.2d 1366, 1371 (Wash. Ct. App. 1995).

126. *Knoll v. Bd. of Regents*, 601 N.W.2d 757, 764–75 (Neb. 1999).

127. The very limited literature reveals an increase in campus safety procedures in crime reporting, access to rape counseling, and increased campus lighting as well as increased security measures. These measures include increased patrols by foot or bicycle, nighttime escort, van and shuttle services; limited access to both residence halls and campus buildings; emergency phone systems; and program presentations to campus groups. LAURIE LEWIS, ELIZABETH FARRIS, & BERNIE GREENE, *CAMPUS CRIME AND SECURITY AT POSTSECONDARY EDUCATION INSTITUTIONS* 31–37 (1997), <http://nces.ed.gov/pubs/97402.pdf>; Bonnie S. Fisher, *Crime and Fear on Campus*, 539

the rise on college and university campuses. In this age of consumerism, students are less loathe to hold colleges and universities accountable for harm incurred on their business premises. Colleges and universities have, after all, been marketing themselves in competition with each other for the past two or three decades. It is therefore incumbent on the colleges and universities to understand the legal challenges they face as business owners when they put together a task force to address the campus violence issues that may be looming on their horizons.¹²⁸

IV. *HIC LOCUS EST UBI MORS GAUDET SUCCURRERE VITAE*¹²⁹

The best diagnostic tools that a lawyer can provide to a task force are reports from or about other higher education institutions, auditing their efforts to prevent campus violence and to improve their preparedness in the eventuality preventive measures do not work. Public schools and state and federal agencies engaged in these activities after the Columbine High School tragedy in 1999.¹³⁰ Eight years later, the murders at Virginia Tech finally prompted higher education and state and federal agencies to examine their own preparedness. The numerous reports generated will help other states and individual institutions learn from the past. In addition, they are templates for individual institutions to pattern the work of their own task forces, or work groups. For the individual user, these reports serve to highlight, first of all, the shortcomings of institutional preparedness. Second, they help the individual institutions formulate their own checklists of issues without having to create them from scratch. And last, the individual institution can harvest ideas from the best that others have to offer on the same issues for adaptation to their own unique institution. If nothing else, these reports are cautionary tales, especially the heart-rending report of the Virginia Tech Review Panel, from which the individual institution can judge its own preparedness for campus violence and its

ANNALS AM. ACAD. POL. & SOC. SCI. 85, 98–99 (1995). In addition, campus law enforcement has become more professionalized. See generally Kenneth J. Peak, Emmanuel P. Barthe, & Adam Garcia, *Campus Policing in America: A Twenty-Year Perspective*, 11 POLICE Q. 239 (2008). In another study, a significant number of campus law-enforcement personnel indicated that procedures and policies have improved since the passage of the Clery Act, which requires reporting of campus crime statistics. Dennis E. Gregory & Steven M. Janosik, *The Clery Act: How Effective Is It? Perceptions from the Field—The Current State of the Research and Recommendations for Improvement*, 32 STETSON L. REV. 7, 45 (2002).

128. See generally Joel Epstein, *Breaking the Code of Silence: Bystanders to Campus Violence and the Law of College and University Safety*, 32 STETSON L. REV. 91, 120–22 (2002).

129. “This is the place where Death rejoices to teach those who live.” This declaration is often posted in morgues. See Ed Friedlander, *Autopsy*, <http://www.pathguy.com/autopsy.htm> (last visited Feb. 27, 2009).

130. E.g., COLUMBINE REPORT, *supra* note 11; O’TOOLE, *supra* note 11, at 6 (report initiated in 1998); SECRET SERVICE GUIDE, *supra* note 11.

aftermath.

On April 16, 2007, a mentally ill student at Virginia Tech, in Blacksburg, Virginia, armed himself with guns and massacred thirty-two students and faculty members before turning one of the guns on himself.¹³¹ The shooter, Seung Hui Cho, was always a withdrawn child who, at one point, was diagnosed with “selective mutism.”¹³² By the eighth grade, his writings exhibited early signs of suicidal and homicidal tendencies.¹³³ After being on anti-depressants for a year, Cho was given an Individual Educational Plan (IEP) and counseling through high school, but upon matriculating at Virginia Tech, he sought out no counseling.¹³⁴ In spring of his sophomore year, he exhibited signs of depression but still sought no therapy.

By his junior year at Virginia Tech in 2005–2006, professors and fellow students took note of serious problems: he stabbed a student’s carpet with a knife; he was removed from a poetry class because of the violence in his writing and his photographing classmates from under his desk; and a couple of female students reported his “annoying” repeated contacts.¹³⁵ Observers variously notified the Division of Student Affairs, the counseling center, the health center, the Virginia Tech Police Department, the University’s Care Team, and the Office of Judicial Affairs.¹³⁶ Throughout that winter, Cho was repeatedly interviewed by the campus counseling center and eventually put into a psychiatric hospital for overnight evaluation after he sent a suicidal instant message. However, by Spring 2006, the counseling center was not treating him, and the University Care Team failed to follow up.¹³⁷ In Fall 2006, two of his professors alerted the associate dean of students about Cho’s mental problems: his behavior was increasingly angry, and he had submitted a creative writing assignment about a young man who hates the students at his school, kills them, then commits suicide.¹³⁸

From February through April 15, 2007, Cho armed himself. Ensuing investigations reveal that he went to a firing range to practice and may have rehearsed his plan by chaining the doors of Norris Hall, a classroom building on campus and the eventual site of the majority of murders.¹³⁹

131. E. A. Torriero, Jodi S. Cohen, & Rex W. Huppke, *Bloodied Campus Asks: Where Were the Warnings? At Least 33 Die in Virginia Tech Massacre*, CHI. TRIB., Apr. 17, 2007, § 1, at 1.

132. VIRGINIA TECH REPORT, *supra* note 1, at 21.

133. *Id.*

134. *Id.* at 22.

135. *Id.* at 22–23.

136. *Id.*

137. *Id.* at 23.

138. *Id.* at 23–24.

139. *Id.* at 24.

The following is a summary of events taken from the Governor's Report¹⁴⁰:

Between 7:00 a.m. and 7:15 a.m. on April 16, 2007, Cho shot and killed a female student and resident assistant at West Ambler Johnston residence hall.¹⁴¹ By 7:17 a.m., Cho returned to his own residence hall to change out of his bloody clothes.¹⁴² Virginia Tech P.D. received a report of an injured female student, and by 7:24 a.m., an officer found the bodies at West Ambler.¹⁴³ About a half hour later, Blacksburg Police Department was called in to investigate. First classes of the day began at 8:00 a.m. as usual.¹⁴⁴

The Chief of the Virginia Tech P.D. notified the University Policy Group and advised that a possible suspect to the West Ambler murders had left campus.¹⁴⁵ By that time—8:25 a.m.—the University Policy Group was deciding how to notify the campus.¹⁴⁶ Shortly thereafter, at 8:52 a.m., the Blacksburg public schools were in lock-down.¹⁴⁷ In the meantime, the Virginia Tech and Blacksburg P.D.s were tracking down the boyfriend of the slain female student as a suspect.¹⁴⁸ Second period classes at the University convened at 9:05 a.m.¹⁴⁹

Between 9:15 a.m. and 9:30 a.m., Cho chained the doors of Norris Hall while the Policy Group sent out a campus-wide email notifying of the dormitory shootings.¹⁵⁰ At 9:40 a.m., Cho began his shooting rampage in five classrooms in Norris Hall.¹⁵¹ By 9:42 a.m., both Blacksburg P.D. and Virginia Tech P.D. had received calls about the Norris Hall shootings.¹⁵² Police arrived at Norris by 9:50 a.m., at which time the University—via email and loudspeaker—notified the campus of the shootings and warned students and faculty to stay in their buildings.¹⁵³ The rampage ended when Cho killed himself at 9:51 a.m.¹⁵⁴ At 10:17 a.m., the University sent a third email that cancelled third-period classes and a fourth at 10:52 a.m. that advised that one shooter had been arrested and a second shooter was still on

140. *Id.* at 25–29.

141. *Id.* at 25.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* at 26.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* at 27.

152. *Id.*

153. *Id.* at 28.

154. *Id.*

the loose.¹⁵⁵ Cho had killed two at the residence hall, thirty at Norris Hall, and himself before it was all over.¹⁵⁶

The most comprehensive of the reports authorized after these events was the August 2007 *Mass Shootings at Virginia Tech*, submitted to Governor Timothy M. Kaine of the Commonwealth of Virginia.¹⁵⁷ This 260-page report specifically focused on the events at Virginia Tech. Other reports focused less on Virginia Tech and more on comprehensive—albeit somewhat more general—studies of the problems with campus safety, such as the report issued by the National Association of Attorneys General, *Task Force on School and Campus Safety: Report and Recommendations*.¹⁵⁸ In addition, several states initiated task forces to examine the problems of their own campuses' safety in direct response to the events at Virginia Tech.¹⁵⁹ The Virginia Tech Report is unique in its dissection of the events

155. *Id.*

156. *Id.* at 29.

157. VIRGINIA TECH REPORT, *supra* note 1.

158. NAT'L ASS'N OF ATT'YS GEN., TASK FORCE ON SCHOOL AND CAMPUS SAFETY: REPORT AND RECOMMENDATIONS (2007), available at http://www.naag.org/assets/files/pdf/NAAG_Task_Force_on_School_and_Campus_Safety.pdf [hereinafter NAAG REPORT]; see also DEP'TS OF HEALTH & HUMAN SERVICES, EDUC., AND JUSTICE, REPORT TO THE PRESIDENT ON ISSUES RAISED BY THE VIRGINIA TECH TRAGEDY (2007), available at <http://www.hhs.gov/vtreport.html> [hereinafter REPORT TO THE PRESIDENT]; IACLEA BLUEPRINT, *supra* note 67; VA. TECH SECURITY INFRASTRUCTURE WORKING GROUP, SECURITY INFRASTRUCTURE WORKING GROUP REPORT: PRESIDENTIAL WORKING PAPER (2007), available at http://www.vtnews.vt.edu/documents/2007-08-22_security_infrastructure.pdf [hereinafter VIRGINIA TECH INFRASTRUCTURE REPORT].

159. See, e.g., ILLINOIS REPORT, *supra* note 63. The Commonwealth of Kentucky initiated its task force on campus safety in 2006 but did not finish its report until after the events at Virginia Tech. GOVERNOR'S TASK FORCE ON CAMPUS SAFETY, REPORT TO THE GOVERNOR: EXAMINATION OF SAFETY AND SECURITY AT KENTUCKY'S PUBLIC AND PRIVATE POSTSECONDARY INSTITUTIONS: FINDINGS AND RECOMMENDATIONS (2007), available at <http://dpp.ky.gov/NR/rdonlyres/34C366A3-6A6C-4131-A5DA-42F462A48377/0/GovernorTaskForceReport.pdf> [hereinafter KENTUCKY REPORT]; see also GUBERNATORIAL TASK FORCE FOR UNIV. CAMPUS SAFETY, REPORT ON FINDINGS AND RECOMMENDATIONS (2007), available at <http://www.dcf.state.fl.us/campussecurity/docs/finalReport052407.pdf> [hereinafter FLORIDA REPORT]; MO. CAMPUS SECURITY TASK FORCE, SECURING OUR FUTURE: MAKING COLLEGES AND UNIVERSITIES SAFE PLACES TO LEARN AND GROW: REPORT ON FINDINGS AND RECOMMENDATIONS (2007), available at <http://dps.mo.gov/CampusSafety/GovernorsFinalReport.pdf> [hereinafter MISSOURI REPORT]; N.J. CAMPUS SECURITY TASK FORCE REPORT SUBMITTED TO GOVERNOR JON S. CORZINE (2007), available at <http://www.njhomelandsecurity.gov/pdfs/10-02-07-campus-security.pdf> [hereinafter NEW JERSEY REPORT]; OKLAHOMA REPORT, *supra* note 40; STATE OF N.M., GOVERNOR'S TASK FORCE ON CAMPUS SAFETY EMERGENCY MANAGEMENT/PUBLIC SAFETY SUBCOMMITTEE, RECOMMENDATIONS FOR ACTION: EMERGENCY PREPAREDNESS IN HIGHER EDUCATION (2007), available at <http://www.nmsupolice.com/Emergency%20Management/Final%20Subcommittee%20Recommendations.pdf> [hereinafter NEW MEXICO REPORT]; TASK FORCE ON OHIO COLLEGE CAMPUS SAFETY AND SECURITY, REPORT TO GOVERNOR TED STRICKLAND (2007), available at

of April 16, 2007, but it informed not only Virginia's analysis of its campus violence problem but also the analyses of most of the other task forces throughout the nation.

Key findings of *Mass Shootings at Virginia Tech* covered all facets of the tragedy, including Cho's mental health history,¹⁶⁰ the legality of Cho's gun purchases,¹⁶¹ and emergency medical care on-site and at the surrounding medical facilities.¹⁶² There are also recommendations for legislative action. However, the aspects of the Virginia Tech Report that are most relevant to the participating lawyer are the legal issues identified in the chronology of events—both the good things and the bad things—and the individual institution's need to take ownership of its duty to students in the matter of campus violence and to find ways of fulfilling that duty. Books could be written—and probably will be—of other palliative measures to which campuses must be attentive. But sometimes simple is better—and enough.

The Virginia Tech Report focused on several simple problems that engage the legal analysis that must be communicated to other members of an institutional task force. One of the major problems was that Cho was a walking time-bomb with problems apparent to the institution; yet he remained on campus. Thus, the Report criticized the lack of information sharing that led to ineffective or, at the end, to no intervention in Cho's mental health problems. Although privacy laws were criticized for the failure to coordinate information, the Report noted that university administrators misunderstood those privacy laws: they were not the hindrance as supposed.¹⁶³ Second, those who *did* know of the problem—the University's counseling center and Care Team—failed to provide Cho with the mental health services and other interventions that might have alleviated his problems or at least have provided him the help he needed.¹⁶⁴

Another major problem was the University's inefficient emergency plan. Although the police entities quickly responded to the calls they received about the shootings at both West Ambler and Norris Hall, Virginia Tech P.D. failed to request that the University issue an all-campus notification immediately after the West Ambler murders, and the University emergency

http://regents.ohio.gov/safetyandsecurity/CSTF-Final_Report.pdf [hereinafter OHIO REPORT]; WISCONSIN REPORT, *supra* note 5.

160. VIRGINIA TECH REPORT, *supra* note 1, at 31–52.

161. *Id.* at 71–76.

162. *Id.* at 101–22.

163. There are, however, a couple of incompatibilities between “education records” protected under the Buckley Amendment, 20 U.S.C. § 1232g (2006), and “health information” protected under HIPAA. See VIRGINIA TECH REPORT, *supra* note 1, at 2.

164. *Id.* And there was only one ineffectual effort to remove him from the campus environment. An involuntary commitment proceeding resulted in a ruling that outpatient treatment would be satisfactory, rather than commitment to a mental health facility. *Id.* at 56.

plan did not allow campus police to do so. Instead “[t]he police had to await the deliberations of the Policy Group, of which they are not a member, even when minutes count. The Policy Group had to be convened to decide whether to send a message to the university community and to structure its content.”¹⁶⁵ Two hours elapsed after the residence hall murders, during which Cho returned to Norris Hall. That failure to notify, coupled with the University’s failure to cancel classes, provided no warning to either students or faculty of imminent danger on campus.¹⁶⁶ Little analysis of higher education duties to their students is necessary to perceive the potential legal liability of that situation.

The Virginia Tech Report formulated numerous recommendations for improving safety against campus violence seized upon by ensuing reports. One recommendation was the establishment of procedures for removing *any* dangerous student from campus, not just those with mental health issues such as Cho presented.¹⁶⁷ The Report drafters also recommended that colleges and universities revisit their current student codes of conduct and student disciplinary proceedings inasmuch as Virginia Tech’s Office of Judicial Affairs had proved ineffective.¹⁶⁸ Next, colleges and universities must document and provide for emergency proceedings when a student evinces dangerous, threatening or aberrant behavior.¹⁶⁹ The college or university should also form a threat assessment team to establish the appropriate level of security for the campus, to deal with investigation, information-gathering, and case preparation for hearings, and to issue warnings.¹⁷⁰ The threat assessment team would coordinate and thereby improve information sharing about dangerous students.¹⁷¹ Last, the Report emphasized emergency preparedness protocols to deal with the dangerous student who presents himself without prior warning,¹⁷² especially the implementation of a redundant campus-alerting system.¹⁷³ These recommendations of the Report were adopted by nearly all the state reports.

However, the National Association of Attorneys General (NAAG) Report is of especial interest because, of all the post-Virginia Tech reports, it is nearly the lone voice suggesting that higher education institutions need to make some general shifts in campus culture. The NAAG Report particularly stressed that the creation of threat assessment teams is

165. *Id.* at 17.

166. *Id.* at 3.

167. *Id.* at 53–54.

168. *Id.* at 53.

169. *Id.*

170. *Id.* at 19.

171. *Id.* at 53–54.

172. The Clery Act requires public warnings be given about imminent danger on campuses. *Id.* at 19.

173. *Id.* at 18.

necessary to be more attentive to the campus population itself as a source of campus violence: “[m]ost of the perpetrators have been ‘malevolent insiders,’ students or school personnel known by the school or other students.”¹⁷⁴ In order better to assess the threats posed by such insiders, these threat assessment teams must have multiple sources of information,¹⁷⁵ including the creation of a reporting system that maintains the anonymity of students who might otherwise fear to report.¹⁷⁶ In a backhanded slap at higher education, the Attorneys General also noted that, by summer 2007, the majority of states required their public school districts to have emergency preparedness plans,¹⁷⁷ and that similar emergency preparedness plans are crucial to security on college and university campuses, with particular emphasis on upgrading, updating, and regularly testing emergency communications systems.¹⁷⁸

With the templates of these various reports, the participating lawyer can assist the organization in the tasks that an individual institution’s campus violence work group should tackle. Obviously, those institutions—especially public colleges and universities—in states with their own post-Virginia Tech reports should heed the guidance of those reports and their recommendations. However, additional assistance is available from other reports in niches that their own state did not otherwise cover, especially where state reports have a shallow treatment of campus violence. Whatever guidance is gleaned from these reports, the ultimate goal is to be able to perform an audit of the institution’s current practices and to recommend curative measures to assure the implementation of the best-suited campus violence program.

V. THE DISSECTION & THE BODY ELECTRIC¹⁷⁹

Good preventive lawyering suggests that a campus violence task force must perform an audit of its institution’s current practices, just as any other

174. NAAG REPORT, *supra* note 158, at 2.

175. *Id.* at 3–4.

176. *Id.* at 6.

177. The National Association of Attorneys General reported that thirty-eight states have such requirements, *id.* at 6, whereas the GAO report upon which they relied accounts for only thirty-two. U.S. GOV’T ACCOUNTABILITY OFF., EMERGENCY MANAGEMENT: MOST SCHOOL DISTRICTS HAVE DEVELOPED EMERGENCY MANAGEMENT PLANS, BUT WOULD BENEFIT FROM ADDITIONAL FEDERAL GUIDANCE 11, 57–58 (2007), available at <http://www.gao.gov/new.items/d07609.pdf> [hereinafter GAO EMERGENCY MANAGEMENT REPORT].

178. NAAG REPORT, *supra* note 158, at 7–8, 9–10; see also OHIO REPORT, *supra* note 159, at 134–36; see also UNIV. OF CAL., THE REPORT OF THE UNIVERSITY OF CALIFORNIA CAMPUS SECURITY TASK FORCE 8–10 (2008), available at <http://www.universityofcalifornia.edu/regents/regmeet/mar08/e2attach.pdf> [hereinafter CALIFORNIA REPORT].

179. WALT WHITMAN, LEAVES OF GRASS 77–84 (Modern Library n.d.) (1855).

good business might do.¹⁸⁰ These audits have a legal aspect to them as they focus on the management of legal matters and risks in the corporate entity. In corporations, the legal audit may focus only on the health of the company wherein the focus of the examination is its financial statements, each financial item having a legal status.¹⁸¹ But nowadays, companies engaging in preventive law also conduct a litigation audit of unavoidable lawsuits; a procedural audit that focuses on the company's business documents; and compliance audits that focus on government statutes and regulations.¹⁸² Similar procedures are appropriate for colleges and universities. Indeed, the numerous reports undertaken by the several state governments were, in many respects, just such audits of the state of health of their colleges and universities' campus safety and were done for purposes of risk management.

Like a medical checkup,¹⁸³ a law audit has a diagnostic function, trying to find hot-spots of legal problems that have arisen or will arise on a regular basis. But it also requires an assessment of compliance with new cases, statutes and regulations. In the context of campus safety and security, the audit should review the institution's policies and practices to determine whether they pose potential legal problems.¹⁸⁴ This part of the audit should then prompt a discussion whether changes need to be made and a collaborative dialogue to discuss "strategies, long- and short-term, for addressing those problems in ways that advance, or at least do not impede, the [institution's] educational priorities."¹⁸⁵

Law audits should be conducted periodically, not just on an as-needed basis. For instance, a periodic audit of Virginia Tech's campus security policies would have revealed that the University had the wrong contact information for the current Blacksburg chief of police, that its safety protocols had no provision for dealing with shooting incidents, and that its emergency preparedness plan was about two years old.¹⁸⁶

On the other hand, the as-needed audit presupposes a legal problem already exists, often too late for the institution to take preventive measures. Furthermore, postponing an audit until needed relies on the confidence that the client recognizes the legal problem in the first place, a confidence that may well be misplaced at many institutions. Under the circumstances, a post-Virginia Tech campus security audit is an as-needed audit but one that

180. ROBERT M. HARDAWAY, PREVENTIVE LAW: MATERIALS ON A NON ADVERSARIAL LEGAL PROCESS 180-99 (1997).

181. Louis M. Brown, *Legal Audit*, 38 S. CAL. L. REV. 431, 436 (1965).

182. Michael L. Goldblatt, *Legal Audits Can Help Companies Act Preventively*, in HARDAWAY, *supra* note 180, 194-97.

183. Stolle, Wexler, Winick, & Dauer, *supra* note 13, at 17; HARDAWAY, *supra* note 180, at 189-91.

184. Heubert, *supra* note 2, at 548.

185. *Id.*

186. VIRGINIA TECH REPORT, *supra* note 1, at 16-19.

the institution must periodically update. Ensuing periodic audits could be efficiently accomplished with a checklist for up-dating and fine-tuning campus safety and security procedures with or without formal intervention of a work group.¹⁸⁷

Any audit for campus security and campus violence poses numerous tasks for a work group to tackle. Each individual institution must make its own decisions on the scope of the work group's brief as well as the budgetary impact on the institution for implementing any recommendations. In addition, the institution may decide to focus specialized attention on the professionalization of campus law enforcement¹⁸⁸ and mental health treatment for mentally disturbed students.¹⁸⁹ Regardless of the recommendations eventually adopted, the audit is the first step in determining the institution's strengths and shortcomings in handling campus violence and, from there, implementing risk management mechanisms for "monitoring, accounting, sorting, channeling."¹⁹⁰ The primary topics targeted by the post-Virginia Tech reports or suggested by their findings are audits of and changes to college and university policies regarding: 1) student discipline; 2) campus information sharing; 3) threat assessment teams; 4) student mental health; 5) emergency preparedness protocols; and 6) campus police.¹⁹¹

A. Student Discipline

Regardless of whether the data show increasing or slightly decreasing campus violence, the fact remains that there appears to be institutional inattention, if not blindness, to the source of the vast majority of campus crime perpetrators—the students. One study suggests that 80% of the

187. HARDAWAY, *supra* note 180, at 191. It should be a "client checklist which is sufficiently inviting to clients, so that clients will complete it within limited time and limited necessity to search out facts. It becomes the first step in the fact finding and organizing process." *Id.*

188. *E.g.*, Jerry D. Stewart & John H. Schuh, *Exemplar Programs and Procedures: Best Practices in Public Safety*, in *CREATING AND MAINTAINING SAFE COLLEGE CAMPUSES*, *supra* note 64, at 223.

189. *E.g.*, Jeanette DiScala, Steven G. Olswang, & Carol S. Niccolls, *College and University Responses to the Emotionally or Mentally Impaired Student*, 19 J.C. & U.L. 17 (1992).

190. Simon, *supra* note 41, at 33.

191. In both the as-needed audit as well as the periodic audit dealing with these areas of concern, the participatory lawyer must be attentive not just to the case law that creates the risks around which the campus wants to manage its campus violence problems but also the affirmative burdens imposed by both state and federal statutes and regulations. In particular, the lawyer will have to become familiar with, and continually update, state and federal statutes dealing with privacy, the Clery Act, weapons possession, and due process. The Illinois Report issued in April 2008 provides an Appendix C that has a checklist of legal issues that colleges and universities could use in improving campus safety. ILLINOIS REPORT, *supra* note 63, at 226.

perpetrators are fellow students.¹⁹² Indeed, institutional residence halls are apparently more violent than institutions and even students are willing to admit.¹⁹³ Unfortunately for the goal of prevention, most violent campus crimes are impulsive rather than premeditated. However, there is a direct correlation between crime on campus—especially violent crimes—and drug and alcohol use.¹⁹⁴ Consequently, any law audit worth its salt should address the institution's current code of student conduct and its disciplinary proceedings if it hopes to have any role in lowering the occasions of violence on campus, not just the mass shootings that have recently rocked higher education.

1. Student Code of Conduct

The Virginia Tech Report, because of the hole through which Cho escaped punishment for on-campus misconduct, was most explicit about the need to audit college and university codes of conduct and enforcement proceedings:

Institutions of higher learning should review and revise their current policies related to—

- a) recognizing and assisting students in distress
- b) the student code of conduct, including enforcement
- c) judiciary proceedings for students, including enforcement
- d) university authority to appropriately intervene when it is believed a distressed student poses a danger to himself or others¹⁹⁵

Although the majority of reports address the need to better serve or, in the alternative, remove the student with mental health issues, institutions must address the discipline and removal of dangerous students in general, not just those who are in mental distress. Even without the reminder of Virginia Tech, conducting a periodic audit of a code of student conduct is

192. Fisher, Sloan, Cullen, & Lu, *supra* note 65, at 677; Siegel & Raymond, *supra* note 65, at 20.

193. Fisher, Sloan, Cullen, & Lu, *supra* note 65, at 677.

194. Siegel & Raymond, *supra* note 65, at 21–22. There also seems to be a direct correlation between drug or alcohol use and students who are crime victims. *Id.*

195. VIRGINIA TECH REPORT, *supra* note 1, at 53. Only a couple of other reports deemed removing violent students from campus a priority. For example, in Kentucky, one priority is “[d]isciplining (consistent with university policies) repeat offenders and those who engage in unacceptable behavior associated with substances.” KENTUCKY REPORT, *supra* note 159, at 16. In Illinois, a goal is “[t]he inclusion of violence and threat of violence in the student code of conduct as behavior that may result in suspension, dismissal, or expulsion and how a violation of that standard may impact enrollment and/or housing status and appeal rights.” ILLINOIS REPORT, *supra* note 63, at 226. “The student code of conduct should clearly define what behavior is unacceptable, and students should be held accountable if their conduct is a violation.” WISCONSIN REPORT, *supra* note 5, at 62.

necessary because of the evolution of student “insubordination” as well as the changes in governing statutes and regulations.

The process of drafting or re-drafting a student conduct code allows members of the academic community to evaluate what choices they believe are educationally appropriate—away from the heat of a specific incident. It may also provide a bulwark against charges of arbitrary action; for example, allegations that the school singled out one student for particularly unfair treatment or applied processes or sanctions that were inconsistent from case to case.¹⁹⁶

Gone the way of the dodo should be a code of student conduct that merely exhorts students to conduct themselves in a manner befitting the institution. In the first place, such exhortation is simply too vague to comply with due process notice requirements.¹⁹⁷ Second, it tells the consumer nothing about the kind of behavior that might constitute a violation. And third, it gives a disciplinary body, especially one run by students without an institutional memory, the wherewithal to mete out incomplete, incoherent, and uneven justice under the school’s disciplinary system.¹⁹⁸ Violent students as well as the student disciplinary board need to be given parameters to follow, and merely appending the qualifier that students must comply with state and federal laws is not specific enough.

Even in the absence of in loco parentis governance over student lives, the college or university remains an institution that must be specific about the rules of conduct. At the very least, a code of conduct is part of the educational mission of the institution.¹⁹⁹ At the most, it is a set of workplace rules that assure the safety of its consumers (although the consumers themselves may not view it that way). Ideally, it is a code of conduct instructing students to behave as members of the institution.²⁰⁰

A college or university code of conduct need not be as specific as a criminal code; however, it must be sufficiently specific to comply with due process notice and what process is due.²⁰¹ State colleges and universities are required to comply with the due process requirements of notice, reasonable explanation of charges, and opportunity for a fair hearing under

196. Edward N. Stoner II & John Wesley Lowery, *Navigating Past the “Spirit of Insubordination”: A Twenty-First Century Model Student Conduct Code with a Model Hearing Script*, 31 J.C. & U.L. 1, 11 (2004).

197. *Soglin v. Kauffman*, 418 F.2d 163, 167 (7th Cir. 1969).

198. Calling a school disciplinary procedure a “judicial” process is incorrect because courts have fairly consistently held that campus internal disciplinary proceedings are not judicial proceedings. Stoner & Lowery, *supra* note 196, at 15.

199. *Id.* at 3–5.

200. *Id.* at 11.

201. *Id.* at 15.

the Fourteenth Amendment.²⁰² Private higher education institutions are, on the other hand, governed by a more contractual agreement to afford “fundamental” or “basic” fairness to students in their disciplinary proceedings, or to at least agree not to act “arbitrarily and capriciously.”²⁰³ Although courts may be affording some deference to private institutions in the manner in which they conduct student disciplinary proceedings, there seems no principled nor institutional reason for not affording the same procedures required of public institutions.²⁰⁴ The efficiency of having the same process, familiar to most lawyers, would have little or no cost to the institution and even if it did, the benefit would certainly eliminate the litigation that ordinarily ensues. Thus, the starting point for reviewing any student code of conduct should be one that mirrors the requirements of a public college or university.

In the spirit of not reinventing the wheel, a terrific resource for reviewing a student code of conduct is the model information set out in *Navigating Past the “Spirit of Insubordination”: A Twenty-First Century Model Student Conduct Code with a Model Hearing Script (“Model Student Conduct Code”)*.²⁰⁵ That article sets out a very detailed analysis on building a code from scratch. But two specific areas are pertinent to a task force’s audit of an existing student code: defining prohibited student behavior (violations) and enforcement.

Regarding prohibited student behavior, the *Model Student Conduct Code* sets out a framework for specific offenses under a list of rules and regulations. A plethora of offenses is listed, including academic dishonesty; violation of federal, state, or local law; and the like. Similarly comprehensive lists have been formulated and used by numerous higher education institutions.²⁰⁶ However, several offenses stand out as worthy of

202. *Goss v. Lopez*, 419 U.S. 565, 574, 581 (1975); *Pugel v. Bd. of Trs.*, 378 F.3d 659, 663–64 (7th Cir. 2004); Joseph M. Landers, *Academic Student Dismissals at Public Institutions of Higher Education: When Is Academic Deference Not an Issue?*, 34 J.C. & U.L. 21, 28–39 (2007); Johanna Matloff, Note, *The New Star Chamber: An Illusion of Due Process Standards at Private University Disciplinary Hearings*, 35 SUFFOLK U.L. REV. 169, 169 (2001).

203. *E.g.*, *Havlik v. Johnson & Wales Univ.*, 509 F.3d 25, 34–35 (1st Cir. 2007) (holding that a contractual relationship between student and university includes duties of good faith and fair dealing); Jason J. Bach, *Students Have Rights, Too: The Drafting of Student Conduct Codes*, 2003 BYU EDUC. & L.J. 1, 10–11 (2003); Matloff, *supra* note 202, at 174–75; Lisa Tenerowicz, Note, *Student Misconduct at Private Colleges and Universities: A Roadmap for “Fundamental Fairness” in Disciplinary Proceedings*, 42 B.C. L. REV. 653, 657–58 (2001).

204. *E.g.*, Curtis J. Berger & Vivian Berger, *Academic Discipline: A Guide to Fair Process for the University Student*, 99 COLUM. L. REV. 289, 291 (1999); Tenerowicz, *supra* note 203, at 675–82.

205. Stoner & Lowery, *supra* note 196, at 1.

206. *See, e.g.*, IND. UNIV., CODE OF STUDENT RIGHTS, RESPONSIBILITIES, AND CONDUCT (2005), available at <http://dsa.indiana.edu/Code/Code%20of%20Student%20Rights,%20Responsibilities,%20and%20Conduct%202005.pdf> [hereinafter IU CODE

inclusion in a code of conduct to target both the violent and potentially violent student on campus.

First, any violent activity that is a violation of state or federal law should be prohibited behavior under the student conduct code.²⁰⁷ A second group of prohibited acts should include “[p]hysical abuse, verbal abuse, threats, intimidation, harassment, coercion, and/or other conduct [that] threatens or endangers the health or safety of any person.”²⁰⁸ More specific events could be listed, but these generic categories of physical and mental violence give notice to most students of the types of behavior proscribed by the conduct code and thereby warranting discipline.²⁰⁹ Third, hazing prohibitions have the potential to prevent violent behavior, and in some instances reflect the requirements of state law.²¹⁰

More amorphous standards designed to cut the incidence of campus violence—such as a student code’s aspiration to act in a socially responsible manner, perhaps based on a religious credo—may act as a positive influence at private institutions. Unfortunately, they are too vague to withstand due process requirements at public institutions.²¹¹ In fact, private institutions should combine this aspiration with a specific list of offenses if they really want to get through to their consumer students.

Any student conduct code must be distributed to every student each year. Freshmen and transfer students should be specifically advised of the individual behavior that will get them in trouble. The code should also be distributed annually to faculty, staff, and even parents. Annual distribution serves as notice for due process purposes but also advises the individual student of the behavioral standard to which she must conform. Annual

OF CONDUCT]; Purdue University, University Regulations 2008–2009, Part 5—Student Conduct, http://www.purdue.edu/univregs/pages/stu_conduct/stu_conduct.html (last visited Feb. 28, 2009); UNIV. OF NOTRE DAME, DULAC: A GUIDE TO STUDENT LIFE 2008–2009 97–204 (2008), available at <http://orlh.nd.edu/dulac/duLac%202007.pdf>.

207. Stoner & Lowery, *supra* note 196, at 29.

208. *Id.* at 27.

209. Colleges and universities will also have to decide how far to extend their student code of conduct, i.e., how much, if any, off-campus behavior should be considered a violation of college and university rules and regulations. *Id.* at 25–27. *But see* John Friedl, *Punishing Students for Non-Academic Misconduct*, 26 J.C. & U.L. 701 (2000).

As many schools expand the scope of sanctions they apply to their students’ non academic misconduct, critics protest that students fall victim to a growing wave of political correctness and a double standard that imposes a moral agenda by suspending or ignoring Constitutional safeguards that would otherwise be available in court proceedings if the students were charged with criminal misconduct.

Id. at 702.

210. Walter M. Kimbrough, *Why Students Beat Each Other: A Development Perspective for a Detrimental Crime*, in *CREATING & MAINTAINING SAFE COLLEGE CAMPUSES*, *supra* note 64, at 58, 71; Stoner & Lowery, *supra* note 196, at 28.

211. Stoner & Lowery, *supra* note 196, at 33–34 & nn. 102–03.

distribution is also an integral part of instilling a different cultural paradigm toward campus violence. Including the student conduct code in a voluminous student or faculty handbook is not realistically helpful. In the real world, nobody—faculty or students—reads those voluminous handbooks unless they are looking for something that affects their immediate lives, like the location of the nearest dining facility. Posting the code on the campus website is also of little practical value; anecdotal experience has proved how hard it is to locate the codes on some websites. Instead, the student conduct code should be a separate pamphlet distributed each year, which also includes the student disciplinary procedure.²¹² In addition, the list of offenses should be posted in easily accessible places, such as residence halls and lobbies of classroom buildings. These proactive measures may be the only way to make a campus cultural shift away from the typical reactive attitude in which the awareness of campus violence arises and lasts only a couple of weeks after a violent event.²¹³

2. The Disciplinary Process

The campus violence law audit should also re-examine the disciplinary procedures themselves to assure that they comport with due process: notice, explanation of the “charges,” and an opportunity to be heard.²¹⁴ This means that the student is entitled to have the “charges” against him reduced to writing, with an explanation “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”²¹⁵ The opportunity to be heard requires no particular form of hearing, but guidelines on the procedures should be written, both for consistency’s sake and to avoid making ad hoc decisions on difficult matters.²¹⁶

It is not enough, however, to have the procedure in writing; it must be known and understood. The procedure could be easily collated with the student conduct code for easy annual distribution. Faculty should be particularly singled out to refresh themselves about the procedures for their own edification and as a resource for student questions. In addition, each member of the campus disciplinary board should be trained (or retrained) at the beginning of each academic year so as to be familiar and fluent in the procedures.

A campus violence work force might also find it useful to review the personnel who are involved in disciplinary proceedings besides students,

212. See, e.g., IU CODE OF CONDUCT, *supra* note 206.

213. Siegel & Raymond, *supra* note 65, at 23.

214. Stoner & Lowery, *supra* note 196, at 38–54; Charles Alan Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027, 1071–74 (1969).

215. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); Stoner & Lowery, *supra* note 196, at 40.

216. Stoner & Lowery, *supra* note 196, at 44.

faculty, and administrators. Lawyers and mental health professionals are especially useful adjuncts to the process. The presence of a lawyer either on the panel or as an advisor to the proceedings assures the regularity of and consistency in the process. A mental health professional should also be in attendance, if not as a panel member then as an observer. That mental health professional would be better able than other members of the board to recognize students in mental distress, especially those who should be “diverted” from the disciplinary system into mental health counseling.²¹⁷

A final aspect of the disciplinary procedure that the audit must examine is the institutional attitude to sanctions meted out to violent students. Clearly, flexibility in the types of sanctions is useful,²¹⁸ and a one-size-fits-all formula for punishing violent students is unwise *viz.* the problems with zero-tolerance policies.²¹⁹ However, the work group must attend to a major problem with discipline and campus culture: other students are loathe to shun students who commit violent acts.²²⁰ One reason for this is that campus violence often involves crimes of impulse and alcohol use. Otherwise, student perpetrators are not problems on campus.²²¹ So other students do not view them as violent students and tend to be more forgiving of their transgressions.

In light of a student culture of alcohol consumption and campus violence with little peer accountability, the work group may have to tie the penalty and enforcement of violent campus crimes to a comprehensive alcohol program.²²² Creative ways to salvage the students while penalizing their violent behavior may entail requiring their participation in rehabilitation or similar diversionary program, such as anger management class. Furthermore, if the acceptance of drinking and campus violence is pervasive enough throughout a particular campus, violent offenders are not going to face punishment from a disciplinary board that includes student peers. Consequently, the work group might consider removing the enforcement function from the disciplinary board and resting it with an administrator.²²³

217. The mental health professional could be a professor on the faculty or an outsider but probably should not be a member of the campus counseling center. The student involved may already be involved in counseling, and a member of the counseling center might be inclined to be the student’s advocate rather than a disinterested professional charged with being neutral in the disciplinary process.

218. Stoner & Lowery, *supra* note 196, at 54–57.

219. See, e.g., Eric Blumenson & Eva S. Nilsen, *One Strike and You’re Out? Constitutional Constraints on Zero Tolerance in Public Education*, 81 WASH U. L.Q. 65 (2003).

220. Siegel & Raymond, *supra* note 65, at 25.

221. *Id.* at 23.

222. Sudakshina L. Ceglarek & Aaron Brower, *Changing the Culture of High-Risk Drinking*, in CREATING AND MAINTAINING SAFE COLLEGE CAMPUSES, *supra* note 64, at 15, 17.

223. Stoner & Lowery, *supra* note 196, at 58–59.

3. Summary Proceedings

A necessary but perhaps overlooked part of the disciplinary process that an audit should examine is the summary proceeding, a foreshortened procedure by which a student may be immediately removed from campus, pending more formal procedures. That right is usually attributed to the Supreme Court decision in *Goss v. Lopez*:²²⁴ “[s]tudents whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school.”²²⁵ Although *Goss* dealt with the temporary suspension of public school students, colleges and universities typically have similar rights under the appropriate circumstances.²²⁶ Such a summary proceeding usually entails a temporary suspension from the college or university until the full panoply of due process rights will be afforded to the student.²²⁷

In following such a procedure, the college or university must still comport with a modicum of due process by offering oral or written notice of the charges against the student, an explanation of those charges, and an opportunity to rebut the charges with his own version of events.²²⁸ However, the full formalities of due process may be reserved to a later time while the student has been removed from campus. These truncated procedures are typically vested in a school administrator, who makes the immediate decision to suspend the student for health and safety reasons pending investigation and a full hearing.²²⁹ This procedure is particularly useful in removing students for a variety of behaviors that might pose a danger to the campus: criminal offenses that might endanger other students,²³⁰ assault,²³¹ alcohol-related violations,²³² drug offenses,²³³

224. 419 U.S. 565 (1975).

225. *Id.* at 582.

226. Stoner & Lowery, *supra* note 196, at 59; Wright, *supra* note 214, at 1074–75.

227. *E.g.*, Stoner & Lowery, *supra* note 196, at 59–60.

228. *Goss*, 419 U.S. at 581; Stoner & Lowery, *supra* note 196, at 59–60; *see generally* Julie Underwood, *The 30th Anniversary of Goss v. Lopez*, 198 EDUC. L. REP. 795 (2005).

229. *See, e.g.*, *Morfit v. Univ. of S. Fla.*, 794 So.2d 655, 655 (Fla. Ct. App. 2001); *Held v. State Univ. of N.Y.*, 630 N.Y.S.2d 196, 198 (N.Y. Sup. Ct. 1995); Stoner & Lowery, *supra* note 196, at 59; DePauw University, Student Handbook: Interim Suspensions and No Contact Orders, <http://www.depauw.edu/univ/handbooks/dpuhandbooks.asp?ID=430&parentid=425> (last visited Feb. 28, 2009); Purdue University, University Regulations 2008–2009, Part 5—Student Conduct, http://www.purdue.edu/univregs/pages/stu_conduct/inv_withdraw.html (last visited Feb. 28, 2009).

230. *Ali v. Stetson Univ.*, 340 F. Supp. 2d 1320 (M.D. Fla. 2004) (addressing a student arrested for off-campus weapons offense); *Wallace v. Fla. A&M Univ.*, 433 So.2d 600 (Fla. Ct. App. 1983) (addressing a student with drug conviction for possession of cocaine on a neighboring campus). *But see Held*, 630 N.Y.S.2d at 199–200 (holding the university improperly suspended student only charged but not yet convicted of various drug offenses because no evidence of harm to the campus).

231. *Ebert v. Yeshiva Univ.*, 780 N.Y.S.2d 283 (N.Y. Sup. Ct. 2004) (concerning

harassment,²³⁴ weapons on campus,²³⁵ and cumulative disciplinary violations of a threatening and destructive nature.²³⁶

4. Weapons And Alcohol

Two additional matters related to the student conduct code should be scrutinized by the work group because of their close relationship to campus violence—weapons and alcohol. As to the first, state law will play a part in any policy dealing with weapons on campus, particularly firearms.²³⁷ Despite the unsupported premise that an armed student could stop massacres like the one that occurred at Virginia Tech, campus officials and many students oppose the introduction of weapons on campus.²³⁸ “Weapons challenge the traditional safety and security of college campuses. Families, students, staff, and visitors to campus have an expectation of safety and nonviolence.”²³⁹

Even more vehement in their determination to keep weapons off campus are campus police.²⁴⁰ This is particularly so when alcohol is introduced

student with prior disciplinary problems who struck two other students).

232. *Saliture v. Quinnipiac Univ.*, No. 3:05cv1956, 2006 WL 1668772, at *1 (D. Conn. June 6, 2006) (addressing students arrested while hosting a keg party in an off-campus residence).

233. *Flaim v. Med. Coll. of Ohio*, No. 2004-04132, 2004 WL 2521293, at *1 (Ohio Ct. Cl. Oct. 6, 2004) (addressing a medical student who pleaded guilty to felony drug offense).

234. *Nguyen v. Univ. of Louisville*, No. Civ.A. 3:04CV-457-H, 2006 WL 1005152, at *1 (W.D. Ky., Apr. 14, 2006) (addressing a student accused of a series of harassing emails and stalking).

235. *Dvoret v. Maricopa County Cmty. Coll.*, No. CIV. 03-2133 PHX VAM, 2006 WL 1600132, at *1 (D. Ariz. June 5, 2006) (addressing a student entered campus with knife and baton three days after another disgruntled student had murdered three faculty members on a nearby campus); *Centre Coll. v. Trzop*, 127 S.W.3d 562 (Ky. 2003) (addressing a student who possessed five-inch knife on campus in derogation of campus regulations).

236. *Hill v. Bd. of Trs.*, 182 F. Supp. 2d 621 (W.D. Mich. 2001) (addressing a student on probation for alcohol violations and interfering with people reporting rule infractions immediately suspended after participating in riot after university basketball team was defeated in Final Four).

237. The Supreme Court’s recent Second Amendment decision in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), still seems to reserve to the states the right to prohibit firearms in sensitive locations such as schools. *Id.* at 2816–17. Whether the Court’s use of the term “schools” embraces higher education institutions remains to be seen.

238. *E.g.*, VIRGINIA TECH REPORT, *supra* note 1, at 75; WISCONSIN REPORT, *supra* note 5, at 68–69.

239. *E.g.*, Charles Cychosz, *The Incompatibility of Weapons and College Campuses*, in CREATING AND MAINTAINING SAFE COLLEGE CAMPUSES, *supra* note 64, at 188, 202.

240. IACLEA BLUEPRINT, *supra* note 67, at 7 (“[International Association of Campus Law Enforcement Administrators] does not support the carry and concealment of weapons on a college campus, with the exception of sworn police officers in the

into the equation: “[a]nother troubling element of weapons possession is the apparent co-occurrence of weapons possession with binge drinking and drug use. The disinhibiting effect of the substances results in less influence by normal social controls.”²⁴¹ Gun ownership combined with alcohol consumption is especially vexing: “gun-owning college students are more likely than their unarmed counterparts to drink frequently and excessively and, when inebriated, to engage in activities that put themselves and others at risk for life-threatening injury, such as driving when under the influence of alcohol, vandalizing property, and having unprotected intercourse.”²⁴² For the most part, however, weapons seem to play but a small part in campus violence;²⁴³ alcohol is the bigger problem.

Alcohol abuse on campus is a prime source of campus violence.²⁴⁴ Indeed, “[f]rom the perspectives of both victims and perpetrators, the more violent crimes were associated with more frequent drug and alcohol use.”²⁴⁵ The only approaches that seem to have any impact on alcohol abuse on campus are systemic, campus-wide cultural changes.²⁴⁶ Obviously, there has to be provision for on-campus drinking in any student code of conduct: underage drinking is unlawful in all states, while in many states, drinking on state property is also unlawful. Furthermore, many private schools, especially those with religious affiliations, are philosophically opposed to drinking.

High-risk, or binge, drinking has had an especially noxious effect on campus life, especially in the incidence of violence: “[B]inge drinking . . . is a major public health challenge on college campuses that leads to a number of harmful consequences, including violence, noise complaints, vandalism, transports to detox caused by overconsumption, and sexual

conduct of their professional duties.”).

241. Cychosz, *supra* note 239, at 194. An additional concern is that the presence of weapons on campus seems to increase the “lethality of suicidal behavior.” *Id.*

242. Matthew Miller, David Hemenway, & Harry Weschler, *Guns and Gun Threats at College*, 51 J. OF AM. COLL. HEALTH 57, 63 (2002) (“[T]wo[-]thirds of students with guns at college report binge drinking.”).

243. Siegel & Raymond, *supra* note 65, at 23.

244. *Id.* at 21–22; Robert F. Marcus & Bruce Swett, *Multiple-Precursor Scenarios: Predicting and Reducing Campus Violence*, 18 J. OF INTERPERSONAL VIOLENCE 553, 567–68 (2003); Siegel & Raymond, *supra* note 65, at 22 (“[O]ver 80% of the 130 students [in this study], who had both committed and been the victim of multiple crimes since enrolling in college, reported using alcohol at the time that their most serious crime was committed.”); KENTUCKY REPORT, *supra* note 159, at 13–17.

245. Siegel & Raymond, *supra* note 65, at 22.

246. *E.g.*, Ceglarek & Brower, *supra* note 222, at 15; Simon, *supra* note 41, at 31–36. This cultural change does not anticipate the college or university’s undertaking any particular duties such as posting guards in dorms, imposing curfews, or engaging in dorm checks. However, the laissez-faire attitude struck by courts in cases such as *Tanja H. v. The Regents of the University of California*, 278 Cal. Rptr. 918, 920 (Cal. Ct. App. 1991), can no longer be the expectation of the campus that does not address alcohol and substance abuse problems.

assaults, among others.”²⁴⁷ Given that 25% of the student population has reported negative consequences from problem drinking,²⁴⁸ broader campus initiatives and partnerships will be required to ameliorate its impact on campus violence. Consequently, the campus violence work group may decide that attending to this matter warrants significant study and implementation to change the campus culture, and thereby remove at least one source of campus violence.

B. Campus Information Sharing

Information-sharing within the campus community was a major problem at Virginia Tech and the subject of much concern in most of the post-event reports.²⁴⁹ The biggest problem was that the university community with whom Cho had contact—“his professors, fellow students, campus police, the Office of Judicial Affairs, the Care Team, and the Cook Counseling Center”—did not coordinate their information about his deteriorating mental state and his increasingly unstable behavior.²⁵⁰ This lack of coordination and absence of information sharing have been blamed on the restrictions of privacy laws guarding both Cho’s education records and his mental health problems. Rather than the laws themselves, the more likely culprit was a campus-wide ignorance of how those laws work and of the nearly universal exception allowing for disclosure of private information for an emergency such as existed at Virginia Tech.

At least three types of privacy laws operate to protect the nonconsensual disclosure of private information about students. The first type, state privacy laws, are unique to each jurisdiction so a lawyer participating on a campus violence task force must educate herself about their prohibitions and exceptions, if any.²⁵¹ These state laws may implicate both the privacy

247. Ceglarek & Brower, *supra* note 222, at 15.

248. *Id.* Further, “students were under the influence of alcohol or other drugs in 13% of incidents of ethnic harassment, 46% of incidents of theft involving force or threat of force, 51% of threats of physical assault, 64% of physical assaults, 71% of forced sexual touching, and 79% of unwanted sexual intercourse.” CARR, *supra* note 67, at 8.

249. *E.g.*, Darby Dickerson, *Lessons in Collaboration: Learning from the Post-Virginia Tech Task Force Reports*, CAMPUS ACTIVITIES REPORTING, Oct. 2007, at 20, available at <http://ssrn.com/abstract=1087815>; VIRGINIA TECH REPORT, *supra* note 1, at 63–70; WISCONSIN REPORT, *supra* note 5, at 61–64.

250. VIRGINIA TECH REPORT, *supra* note 1, at 63.

251. The college and university “contract” with students may also explicitly contain a waiver of certain privacy information when it allows the institution to contact a student’s parents about disciplinary issues. *See, e.g.*, *Saliture v. Quinnipiac Univ.*, No. 3:05cv1956, 2006 WL 1668772, at *5 (D. Conn. June 6, 2006) (“Quinnipiac reserves the right to communicate with parents on any student disciplinary action taken by Quinnipiac officials.”); Purdue University, *supra* note 206, at Part 5, Section III(C)(2)(b) (“A copy of the notice of charges may be sent to the parent or guardian of the student if the student is dependent as defined in Section 152 of the Internal Revenue

of a student's education and disciplinary records and the confidentiality of mental health records. State law also may be more restrictive than federal law.²⁵²

The second type of privacy law concerns the confidentiality of mental health treatment records. Many believe that these records are governed by the Health Insurance Portability & Accountability Act of 1996 (HIPAA),²⁵³ when a student—like Cho—is being treated for mental health issues by a university clinic. HIPAA regulates the electronic release of “protected health information” by health-care providers.²⁵⁴ HIPAA and its regulations pose labyrinthine challenges to understanding HIPAA's relationship to other laws, especially its relationship to disclosure of “education records” under the Family Educational Rights and Privacy Act (FERPA).²⁵⁵ However, HIPAA does not really apply to campus counseling treatment records because it does not protect treatment records of postsecondary counseling centers that are maintained only for treatment purposes and are not otherwise disclosed.²⁵⁶ In its stead, campus counseling centers and related mental health professionals generally are prohibited from revealing mental health treatment records under both ethical obligations and state and federal medical and disability laws.²⁵⁷ On the other hand, most laws will allow disclosure of counseling information if the student threatens to harm herself or others.²⁵⁸ Consequently, a campus violence task force would do a service to its faculty and staff by having the college or university's mental health professionals explain the restrictions of their confidentiality duties

Code of 1954.”); *see also* Nancy Tribbensee, *Privacy and Confidentiality: Balancing Student Rights and Campus Safety*, 34 J.C. & U.L. 393, 409–15 (2008) (discussing duties and restrictions for parental notification concerning students in distress).

252. *See, e.g.*, Susan P. Stuart, *A Local Distinction: State Education Privacy Laws for Public Schoolchildren*, 108 W. VA. L. REV. 361 (2005).

253. 42 U.S.C. §§ 1320d–d-8 (2000); *see also* Pub. L. No. 104-191, 110 Stat. 1936 (1996).

254. *See, e.g.*, Susan P. Stuart, *Lex-Praxis of Education Informational Privacy for Public Schoolchildren*, 84 NEB. L. REV. 1158, 1182 (2006).

255. Tribbensee, *supra* note 251, at 407–08.

256. The extent of “protected health information” under HIPAA excludes “individually identifiable health information” contained in 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. 20 U.S.C. § 1232g(a)(4)(B)(iv) (2006); 45 C.F.R. § 160.103 (2008). These records are also excluded under FERPA. And HIPAA does not affect “education records” under FERPA. 45 C.F.R. § 160.103.

257. Tribbensee, *supra* note 251, at 407–08.

258. *Id.* at 406–07.

and the extent to which state law allows them to divulge dangerous activity that might threaten campus violence.²⁵⁹

Ironically, the statute that bore the brunt of the blame for lack of campus information-sharing has the lowest threshold of disclosure: FERPA.²⁶⁰ FERPA protects “education records” from nonconsensual disclosure at education institutions that receive federal funds. Education records are “those records, files, documents, and other materials which—(i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.”²⁶¹ Education records do not include those materials in the sole possession of the maker nor records of an institution’s law enforcement unit.²⁶² Education records may be shared with other members of the educational institution if they have legitimate educational interests.²⁶³ Specifically exempted nonconsensual disclosures include disciplinary records when they relate to a student’s behavior²⁶⁴ and to reports of institutional, state, and federal violations of alcohol or controlled substances laws and regulations for students under twenty-one.²⁶⁵

Regardless, health and safety matters have always trumped privacy under FERPA: nonconsensual disclosures may be made “in connection with an emergency if the knowledge of the information is necessary to protect the health or safety of the student or other individuals.”²⁶⁶ This emergency regulation is to be strictly construed,²⁶⁷ but education

259. *Id.* at 408–09.

260. 20 U.S.C. § 1232g (2006); *see generally* Stuart, *supra* note 254, at 1162–73; Tribbensee, *supra* note 251, at 395–405.

261. 20 U.S.C. § 1232g(a)(D)(4)(A). These may include records at student health centers if they are maintained for more than just treatment. *See* VIRGINIA TECH REPORT, *supra* note 1, at G-4.

262. 20 U.S.C. §§ 1232g(a)(4)(B)(i), (ii).

263. 20 U.S.C. § 1232g(b)(1).

264. 20 U.S.C. § 1232g(h).

265. 20 U.S.C. § 1232g(i).

266. 34 C.F.R. § 99.36(a) (2006); 20 U.S.C. § 1232g(b)(1)(I).

267. 34 C.F.R. § 99.36(c) (2006). The Department of Education recently proposed changes to this health and safety regulation:

The Department proposes to revise § 99.36(c) to remove the language requiring strict construction of this exception and add a provision that in making a determination under § 99.36(a), an educational agency or institution may take into account the totality of the circumstances pertaining to a threat to the safety or health of a student or other individuals. If the educational agency or institution determines that there is an articulable and significant threat to the health or safety of a student or other individuals, it may disclose information from education records to any person whose knowledge of the information is necessary to protect the health and safety of the student or other individuals. If, based on the information available at the time of the determination, there is a rational basis for the determination, the Department will not substitute its judgment for

institutions are given significant discretion in determining what is or is not an emergency that is not likely to be second-guessed unless a “reasonable college official” would not have released the information.²⁶⁸ This regulation has been interpreted to allow disclosures impelled by “concerns for a student’s welfare such as a serious eating disorder, dangerous high-risk behavior such as heavy or binge drinking, suicidal ideation or threats, or erratic and angry behaviors that others might reasonably perceive as threatening.”²⁶⁹ Regardless, if the information is not in a “record,” it can be disclosed.

That is the irony of the confusion over FERPA’s protections. Classroom observations and personal interactions with an individual are not private records under FERPA. The record in which that information might be reduced may not be disclosable, but any word-of-mouth disclosures arising from day-to-day contact with a student does not fit within the purview of FERPA. FERPA protects the privacy of student records; it does not protect student privacy per se.²⁷⁰ One of the goals, then, of a campus violence work group is to better educate the campus community about the narrow scope of FERPA’s prohibitions so as to effectuate better information sharing about dangerous or endangered students.²⁷¹

The participating lawyer must also be attentive to two bills introduced shortly after the events at Virginia Tech and now winding their way through various congressional committees. Both are designated FERPA amendments. The Senate bill is the Family Educational Rights and Privacy Act Amendments of 2008 and adds a subsection (k) to FERPA that enables campus health professionals to share treatment records with other medical professionals.²⁷² The Senate bill would also expand the emergency disclosure exception under FERPA.²⁷³ The House bill is the Mental Health Security for America’s Families in Education Act of 2007.²⁷⁴ This Act also

that of the educational agency or institution in evaluating the circumstances and making its determination.

Family Educational Rights and Privacy, 73 Fed. Reg. 15574-01, 15589 (proposed Mar. 24, 2008) (to be codified at 34 C.F.R. pt. 99).

268. *Brown v. City of Oneonta*, 858 F. Supp. 340, 344 (N.D.N.Y. 1994). Regardless, students have no enforceable privacy rights under FERPA for wrongful disclosure. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 286 (2002); see Susan P. Stuart, *Fun with Dick and Jane and Lawrence: A Primer on Education Privacy as Constitutional Liberty*, 88 MARQ. L. REV. 563, 639-40 (2004).

269. Tribbensee, *supra* note 251, at 401 (footnote omitted).

270. *Id.* at 396.

271. “For personal experiences, such disclosures may be made to appropriate persons with the expertise to provide counsel on the issues of concern without implicating FERPA.” *Id.*

272. S. 2859, 110th Cong. § 2 (2008).

273. S. 2859.

274. H.R. 2220, 110th Cong. (2007); see also John S. Gearan, Note, *When Is it OK to Tattle? The Need to Amend the Family Educational Rights and Privacy Act*, 39

adds a new subsection (k), but allows educational institutions to disclose information that “the student poses a significant risk of harm to himself or herself, or to others, including a significant risk of suicide, homicide, or assault.”²⁷⁵ Obviously, keeping abreast of these developments is crucial in formulating campus information-sharing policies.

Procedures for the centralization of information-sharing are a fundamental task of a campus violence work group: “Incidents of aberrant, dangerous, or threatening behavior must be documented and reported immediately”²⁷⁶ Mandatory reporters should include professors and resident hall staff with specific guidelines for making those reports. Students should be repeatedly educated about the need to report violent behavior, anonymously if necessary to make them feel more comfortable. In fact, the failure to report and share information may incur liability for bystanders.²⁷⁷

As one state report suggested:

Develop and support a comprehensive open reporting mechanism, “No secrets,” within the university or college. This reporting mechanism must be supported by a data collection tool that: a) allows for real time submission and acceptance of incident information as submitted by all university employees and students and b) allows the investigator to rank the reported behavior by level of severity upon initiation of any investigation or intervention. There should be a mechanism in policy that compels the [designated college or university collection group] to track and review daily all currently open and pending investigations for the addition of new information, the re-determination of acuity, and the development of action plans as related to updated information.²⁷⁸

Whatever information-sharing protocols are suggested or designed by a work group, they have two crucial tasks: First, to gather the information about particular threats or violent students before an event; and second, to share information on campus in case an event actually takes place. The latter is typically an adjunct of a good emergency preparedness program, which is discussed below. However, the collection, compilation, and collation of information of those students who pose threats of either “run-of-the-mill” campus violence or calamitous events are tasks that might be best centralized by a campus threat assessment team.²⁷⁹

SUFFOLK U. L. REV. 1023 (2006).

275. H.R. 2220, § 3.

276. VIRGINIA TECH REPORT, *supra* note 1, at 53.

277. *See* Epstein, *supra* note 128, at 100–01.

278. ILLINOIS REPORT, *supra* note 63, at 177.

279. WISCONSIN REPORT, *supra* note 5, at 61–64.

C. Threat Assessment Teams²⁸⁰

The Virginia Tech Report was adamant in its recommendation that higher education institutions create threat assessment teams.²⁸¹ Threat assessment teams are integral to “identifying, assessing, and managing individuals who might pose a risk of violence to an identified or identifiable target.”²⁸² The threat assessment team is a standing committee with the training and expertise to assess threats in a multidisciplinary approach. Members of such group should include administrators, law enforcement, mental health professionals, legal counsel, disability specialists, and student affairs officers.²⁸³ Public schools have adapted to the use of threat assessment teams for some time; higher education institutions find themselves playing catch-up.²⁸⁴

280.

All campuses have or should have some system in place for handling the discipline or judicial problems and the psychological problems of students. The issue often becomes one of insufficient coordination, inadequate information flow, and lack of a shared process The group responsible for such coordination is usually termed campus intervention team, but is equally effective by any other name

John H. Dunkle, Zachary B. Silverstein, & Scott L. Warner, *Managing Violent and Other Troubling Students: The Role of Threat Assessment Teams on Campus*, 34 J.C. & U.L. 585, 590 (2008) (quoting DEALING WITH THE BEHAVIORAL AND PSYCHOLOGICAL PROBLEMS OF STUDENTS, NEW DIRECTIONS FOR STUDENT SERVICES 9 (Ursula Delworth ed., 1989)). Some campuses may instead use a consultative case management model to collect information on and provide interventions for students who are dangerous or in distress. Tribbensee, *supra* note 251, at 415–16.

281. VIRGINIA TECH REPORT, *supra* note 1, at 19; *see also* Shane R. Jimerson Stephen E. Brock, Jennifer L. Greif, & Katherine C. Cowan, *Threat Assessment at School: A Primer for Educators*, in HELPING CHILDREN AT HOME AND SCHOOL II: HANDOUTS FOR FAMILIES AND EDUCATORS S9-49 (Andrea S. Canter, Leslie Z. Page, Mark D. Roth, Ivonne Romero, & Servio A. Carroll eds., 2004), available at http://www.nasponline.org/resources/crisis_safety/threatassess.pdf; COLUMBINE REPORT, *supra* note 11, at xvii; ILLINOIS REPORT, *supra* note 63, at 174–81.

282. SECRET SERVICE GUIDE, *supra* note 11, at 30.

283. Dunkle, Silverstein, & Warner, *supra* note 280, at 592–95, 634. Such group might also include academics in their specialty areas, such as criminal justice and psychology. *See, e.g.*, Fairleigh Dickinson University, Threat Assessment Team, <http://view.fdu.edu/default.aspx?id=3705> (last visited Feb. 28, 2009).

284. Dunkle, Silverstein, & Warner, *supra* note 280, at 589; *see, e.g.*, Los Angeles Unified School District, Threat Assessment, http://notebook.lausd.net/portal/page?_pageid=33,259504&_dad=ptl&_schema=PTL_EP (last visited Feb. 28, 2009). Several colleges and universities have implemented threat assessment teams since the Virginia Tech events, including University of Kentucky, Boston University, University of Utah, University of Illinois-Chicago, and University of Minnesota. Associated Press, *Colleges Keep Watch over Troubled Students*, MSNBC, Mar. 28, 2008, <http://www.msnbc.msn.com/id/23847510/>; Ahnalese Rushmann, *Threat-Assessment Groups Cropping Up Nationwide: Schools Are Taking More Caution With Students in Response to Virginia Tech*, MINN. DAILY, Apr. 4, 2008, available at <http://www.mndaily.com/articles/2008/04/04/72166478>. Virginia Tech appointed its Threat Assessment Team on December 10, 2007. Memorandum from Charles W.

According to the U.S. Secret Service and the U.S. Department of Education, six principles are involved in threat assessment:

Targeted violence is the end result of an understandable, and oftentimes discernible, process of thinking and behavior

Targeted violence stems from an interaction among the person, the situation, the setting, and the target

An investigative, skeptical, inquisitive mindset is critical to successful threat assessment

Effective threat assessment is based on facts, rather than characteristics or “traits.” . . .

An “integrated systems approach” should guide threat assessment investigation

The central question of a threat assessment is whether a student poses a threat, not whether the student *made* a threat.²⁸⁵

Therefore, several enumerated goals of such a group should include 1) developing policies and procedures for the group; 2) serving as campus consultants; 3) training campus members about the group’s role and the process for sharing information; 4) determining the best confluence of assessment systems for problematic students; 5) working on appropriate intervention techniques for students; 6) periodically reviewing its assessments of problematic students; 7) monitoring problematic students;²⁸⁶ and 8) assessing specific threatening events.

This last goal would give the group “vortex” responsibilities “to assess the incident(s) and information and carry out the appropriate response”:²⁸⁷ “The team should be empowered to take actions such as additional investigation, gathering background information, identification of additional dangerous warning signs, establishing a threat potential risk level (1 to 10) for a case, preparing a case for hearings (for instance, commitment hearings), and disseminating warning information.”²⁸⁸ When calamitous violence is threatened, it is usually by an avenging “insider” of whom there are “warning signs of the impending violence and frequently other persons [are] aware of the perpetrator’s intentions. The warning signs may include verbal threats, written threats, suicidal behavior, disturbing writings, self-produced videos and/or internet

Steger to All Virginia Tech Employees and Students (Jan. 31, 2008) (on file at <http://www.policies.vt.edu/policymemos/ppm251.pdf>).

285. SECRET SERVICE GUIDE, *supra* note 11, at 30–33 (emphasis in original); *see generally* O’TOOLE, *supra* note 11.

286. Dunkle, Silverstein, & Warner, *supra* note 280, at 591–92.

287. NAAG REPORT, *supra* note 158, at 3.

288. VIRGINIA TECH REPORT, *supra* note 1, at 19; *see also* ILLINOIS REPORT, *supra* note 63, at 177–78.

communications.”²⁸⁹ Of course, all threats should be taken seriously.²⁹⁰ But the team’s centralized information-sharing capacity would allow it to examine all reports carefully and thoughtfully, allowing it to evaluate the viability of a threat by examining the “specific, plausible details” of the threat; “the emotional content” of the threat; and the “precipitating stressors.”²⁹¹ This task would also require that the team’s rôle and function be highly publicized on campus for both faculty and student use.²⁹²

The group should meet regularly and not just for the purpose of identifying immediate threats. Those regular meetings should address not only issues of violence and threats but also “increased awareness, measurement, prioritization, needs assessment, causal evaluation, target hardening and early intervention.”²⁹³ The team can also offer substantive input into alleviating a culture of campus violence by creating pro-active policies to address alcohol abuse and sexual assault.²⁹⁴ Such systemic changes should embrace a coherent protocol for information gathering in

289. NAAG REPORT, *supra* note 158, at 2–3. The NAAG Report emphasized the genesis of multiple-murder events in schools and on campuses:

In virtually all the incidents of school and campus violence that have occurred in America thus far, the perpetrator or perpetrators have been what experts have identified as “avengers,” people who are responding to a real or perceived injustice and seeking vengeance. Most of the perpetrators have been “malevolent insiders,” students or school personnel known by the school or other students.

Id. at 2; see also Sarah E. Redfield, *Threats Made, Threats Posed: School and Judicial Analysis in Need of Redirection*, 2003 BYU EDUC. & L.J. 663, 712–20 (2003) (examining threat assessment strategies in public schools).

290. O’TOOLE, *supra* note 11, at 6.

291. *Id.* at 7–8. An evaluative guide from the U.S. Secret Service is invaluable to compile and assess the information about particular students of interest, evaluating such behavior as the student’s motives, communications, inappropriate interest in school attacks and weapons, and recent experiences of depression or loss. SECRET SERVICE GUIDE, *supra* note 11, at 55–57. A handy checklist might also prove useful for reporting suspicious events. See, e.g., Eleven Questions to Guide Data Collection in a Threat Assessment Inquiry, <http://www.pent.ca.gov/thr/11questions.pdf> (last visited Feb. 28, 2009); Purdue University Calumet Threat Assessment Checklist, <http://webs.calumet.purdue.edu/hr/files/2008/01/threat.pdf> (last visited Feb. 28, 2009). However, caution should be exercised to avoid turning checklists into student profiling. Legal concerns as well as the arbitrariness of profiling checklists militate against any procedure that would penalize and stigmatize students but not serve as an adequate tool for actually assessing student danger. E.g., Gayle Tronvig Carper, Merry Rhoades, & Steven Rittenmeyer, *In Search of Klebold’s Ghost: Investigating the Legal Ambiguities of Violent Student Profiling*, 174 EDUC. L. REP. 793, 807 (2003).

292. See, e.g., Fairleigh Dickinson University, *supra* note 283; West Chester University Department of Public Safety, Threat Assessment Team, <http://www.wcupa.edu/dps/emergency/ThreatAssessment.asp> (last visited Feb. 28, 2009). This publication should include the professional schools too, such as medical and law schools.

293. Fairleigh Dickinson University, *supra* note 283.

294. *Id.*

which information would then be funneled to the team after training and coordination with faculty, residence hall staff, the student disciplinary organization, and the campus counseling center.²⁹⁵ In addition, the team could implement policies that would provide appropriate support systems for students in distress, reduce bullying on campus, and embrace an “integrated systems approach” for utilizing the university’s various departments in trust and collaboration.²⁹⁶

D. Campus Mental Health

Details on how to improve mental health treatment on campuses are beyond the scope of this Article but should surely be a consideration by a campus violence work group. The problems dealing with mentally distressed and mentally disabled students were a high priority in nearly all the reports conducted after the events at Virginia Tech because the perpetrator was failed by campus mental health services.²⁹⁷ Ironically, the mentally ill student is more likely to be the victim of violence on campus than vice versa.²⁹⁸

The considered consensus is that mental health treatment on campuses is inadequate.²⁹⁹ A lawyer’s rôle in these issues requires being conversant in the federal statutes governing disabilities as well as in individual states’ laws regulating mental health treatment and involuntary commitment procedures.³⁰⁰ Clearly discernible goals for student mental health on college and university campuses include the creation and maintenance of

295. VIRGINIA TECH REPORT, *supra* note 1, at 53–54.

296. ILLINOIS REPORT, *supra* note 63, at 176–77.

297. “The Cook Counseling Center and the University’s Care Team failed to provide needed support and services to Cho during a period in late 2005 and early 2006. The system failed for lack of resources, incorrect interpretation of privacy laws, and passivity. Records of Cho’s minimal treatment at Virginia Tech’s Cook Counseling Center are missing.” VIRGINIA TECH REPORT, *supra* note 1, at 2. Several post-event reports focused on improvement to student mental health. CALIFORNIA REPORT, *supra* note 178, at 16–22; ILLINOIS REPORT, *supra* note 63, at 13–33; OKLAHOMA REPORT, *supra* note 40, at 45–50; REPORT TO THE PRESIDENT, *supra* note 158, at 14–15; WISCONSIN REPORT, *supra* note 5, at 21–24.

298. WISCONSIN REPORT, *supra* note 5, at 21.

299. *E.g.*, OKLAHOMA REPORT, *supra* note 40, at 11; WISCONSIN REPORT, *supra* note 5, at 21. Part of the problem is that more students are attending college with pre-existing mental health problems. *Id.*; CARR, *supra* note 67, at 8; Karin McAnaney, Note, *Finding the Proper Balance: Protecting Suicidal Students without Harming Universities*, 94 VA. L. REV. 197, 202 (2008). And colleges and universities in general are experiencing a serious up-tick in the number of students with psychological problems, whether pre-existing or recently emergent while on campus. *See generally* Barbara A. Lee & Gail E. Abbey, *College and University Students with Mental Disabilities: Legal and Policy Issues*, 34 J.C. & U.L. 349 (2008); McAnaney, *supra* note 299, at 202. On average, nearly three college students a day are committing suicide. McAnaney, *supra* note 299, at 202.

300. *See generally* Lee & Abbey, *supra* note 299, at 349.

on-campus counseling centers or some alternative provision through contractual agreements.³⁰¹ On-campus services should adhere to the standards of the International Association of Counseling Services.³⁰² In addition, existing campus counseling centers should develop a relationship with the nearest county or state entity.³⁰³ Peer mental health support groups are also encouraged, which could accompany an alcohol abuse network.³⁰⁴

Unfortunately, there is only so much that an individual institution can do if there is a funding problem for student services.³⁰⁵ The complicated mechanisms for starting or even upgrading campus mental health facilities may be beyond the capacity of a work group other than making recommendations. Furthermore, some of the issues involving mental health law and policy require legislative intervention, not just local planning. Nevertheless, a campus violence task force must at least address the weaknesses and strengths of its current campus mental health services.³⁰⁶

E. Emergency Preparedness

Emergency preparedness is not the same function as served by a threat assessment team. Emergency planning includes both prevention and what to do when a crisis occurs, despite the best efforts, best practices, and best threat assessment team a campus has assembled. At the very basic level, state law often requires that campuses provide emergency measures in cases of tornado, hurricane, or other such natural disasters.³⁰⁷ At the same

301. ILLINOIS REPORT, *supra* note 63, at 15–16; NEW JERSEY REPORT, *supra* note 159, at 6–9; OHIO REPORT, *supra* note 159, at 134–36; OKLAHOMA REPORT, *supra* note 40, at 14.

302. ILLINOIS REPORT, *supra* note 63, at 15–16; International Association of Counseling Services, Inc., Accreditation Standards for University and College Counseling Centers, <http://www.iacsinc.org/IACS%20STANDARDS.pdf> (last visited Feb. 28, 2009).

303. OHIO REPORT, *supra* note 159, at 2.

304. FLORIDA REPORT, *supra* note 159, at vi; OKLAHOMA REPORT, *supra* note 40, at 11; WISCONSIN REPORT, *supra* note 5, at 23.

305. OKLAHOMA REPORT, *supra* note 40, at 12.

306. Campus mental health capabilities will also be tested in the wake of disaster. VIRGINIA TECH REPORT, *supra* note 1, at 135–47. An improved organization scheme on campus may improve the delivery of services to the student body as a whole in the aftermath. *See generally* Catherine H. Stein, Craig J. Vickio, Wendy R. Fogo, & Kristen M. Abraham, *Making Connections: A Network Approach to University Disaster Preparedness*, 48 J. OF COLL. STUDENT DEV. 331 (2007).

307. *E.g.*, GAO EMERGENCY MANAGEMENT REPORT, *supra* note 177, at 11, 57–58; NAAG REPORT, *supra* note 158, at 7.

States should consider requiring that all schools and colleges, as a condition of receiving state funding, create, maintain, and update emergency management plans. These schools and colleges should be required to conduct exercises, to include lockdown drills if appropriate, no less than annually and the state should establish

time, campuses must prepare for calamitous events like the mass shootings that occurred at Virginia Tech and Northern Illinois.³⁰⁸

All colleges and universities should conduct a threat and vulnerability assessment as part of the institutional risk management strategy. The assessment should consider the full spectrum of threat (i.e., natural, criminal, terrorist, accidental, etc.) for the campus. The results of this assessment should guide the institution's application of protective measures and emergency planning assumptions.³⁰⁹

Five general principles should guide the task force when addressing emergency preparedness:

- Establish an effective planning process
- Establish cross-institutional teams to build support
- Use all-hazards planning to anticipate changing needs
- Include a crisis communications component
- Maintain a phased and progressive planning cycle³¹⁰

In addition, each emergency plan for higher education institutions should have four phases: prevention-mitigation, preparedness, response, and recovery.³¹¹ The first—prevention-mitigation—assesses safety and security in the campus environment to decrease the likelihood of the calamity's occurring or, barring that, of reducing the number of casualties.

audit mechanisms to ensure compliance with these requirements. Such exercises should involve students, faculty, staff, first responders, and other community stakeholders.

Id. at 8.

308. See generally LAWRENCE K. PETTIT, AMERICAN ASS'N OF STATE COLL. AND UNIV., EXPECTING THE UNEXPECTED: LESSONS FROM THE VIRGINIA TECH TRAGEDY (2007).

309. IACLEA BLUEPRINT, *supra* note 67, at 5; see also NEW JERSEY REPORT, *supra* note 159, at 2–4; NEW MEXICO REPORT, *supra* note 159, at 3–4; OHIO REPORT, *supra* note 159, at 134–36; VIRGINIA TECH INFRASTRUCTURE REPORT, *supra* note 158.

310. STEVE CHARVAT, COLLEGE AND UNIVERSITY DISASTER PLANNING: NEW GUIDELINES BASED ON COMMON INDUSTRY PRINCIPLES AND PRACTICE 3 (n.d.), <http://www.higheredcenter.org/files/documents/college-disaster-planning.pdf>.

Common characteristics of comprehensive emergency preparedness plans at college and university campuses include coherent organizations; ability to recognize multiple threats; capacity to assist multiple victims or targets; preventive as well as responsive measures; effective emergency communications; comprehensive on-campus training and education; and annual updating. Delight E. Champagne, *Elements of a Comprehensive Safety Plan*, in CREATING AND MAINTAINING SAFE COLLEGE CAMPUSES, *supra* note 64, at 261, 263.

311. U.S. Dep't of Educ. Emergency Response & Crisis Mgmt. Technical Assistance Ctr., *Emergency Management Planning for Institutions of Higher Education*, HELPFUL HINTS FOR SCHOOL EMERGENCY MANAGEMENT 2007, at 3, available at http://rems.ed.gov/views/documents/HH_Vol2Issue6.pdf [hereinafter HELPFUL HINTS].

Second, preparedness anticipates the implementation of protocols in campuses and constituent departments for a coordinated response to an emergency. Third, the response phase should effectively resolve or at least contain an event. Last, the recovery phase deals with the post-event services and procedures to restore operations on campus.³¹²

Specific recommendations for the Virginia Tech type of emergency entail several best practices identified by the International Association of Campus Law Enforcement Administrators. First, the campus must assess its current capabilities of dealing with all risks.³¹³ Second is the utilization of an effective communication system to notify students, faculty, and staff. A redundant system—one with both low- and high-tech capabilities—is a minimum necessity: loud speakers in conjunction with a mass-notification system, such as voice-mail, e-mail and text-messaging.³¹⁴ And the authority to send out emergency communications should be distributed among a handful of people so warnings may be issued without decision by committee.³¹⁵ Third, campuses should pattern their emergency management plans on the procedures provided by the National Incident Management System and the Department of Homeland Security, having been developed by experts for just such unexpected events.³¹⁶ Fourth, the emergency management plans must be updated both legally and practically, including conducting regular exercises for both the emergency personnel and for the campus inhabitants.³¹⁷ Fifth, campuses should strengthen their partnerships with local government agencies.³¹⁸ And last, campus police should be provided First Responder training.³¹⁹

Regardless of their efforts today, colleges and universities will become answerable for their emergency preparedness procedures if Congress amends the Higher Education Act of 1965 with the pending Virginia Tech Victims Campus Emergency Response Policy and Notification Act.³²⁰ Introduced the week before the first anniversary of the events at Virginia

312. *Id.* at 3–5.

313. IACLEA BLUEPRINT, *supra* note 67, at 5.

314. *Id.*; NAAG REPORT, *supra* note 158, at 9–10; VIRGINIA TECH REPORT, *supra* note 1, at 19. Public warning devices should also have distinguishable signals so that the campus community will be able to differentiate among warnings, such as a tornado versus a campus shooting. *Id.* at 18; *see generally* Champagne, *supra* note 310, at 268–69; CALIFORNIA REPORT, *supra* note 178, at 8–9; OKLAHOMA REPORT, *supra* note 40, at 10.

315. *See* HELPFUL HINTS, *supra* note 311, at 2; IACLEA BLUEPRINT, *supra* note 67, at 5; VIRGINIA TECH REPORT, *supra* note 1, at 19.

316. IACLEA BLUEPRINT, *supra* note 67, at 5; ILLINOIS REPORT EXECUTIVE SUMMARY, *supra* note 40, at 2.

317. IACLEA BLUEPRINT, *supra* note 67, at 5; NAAG REPORT, *supra* note 158, at 7; VIRGINIA TECH REPORT, *supra* note 1, at 19.

318. IACLEA BLUEPRINT, *supra* note 67, at 5–6.

319. *Id.* at 6.

320. H.R. 5735, 110th Cong. § 2 (2008).

Tech, this Act will add to the disclosures that higher education institutions must give students, particularly information concerning campus safety and security.³²¹ In particular, the Act would require disclosures of current emergency preparedness procedures, which must include thirty-minute campus communication capacity, annual training to students and faculty, and annual tests on these procedures.³²²

F. Campus Police

Although the Virginia Tech Report was in general laudatory toward the work of the campus police, it still made some recommendations for upgrading campus security forces in order to handle the catastrophic emergencies created by the mass shootings. Other reports similarly suggested that higher education institutions be attentive to updating and resourcing their campus security forces.³²³

The overwhelming suggestion is that higher education institutions make sure that their campus security forces have appropriate training, such as Active Shooter training³²⁴ and First Responder training.³²⁵ These would seem to at least serve as a palliative measure for similar disasters. The campus security force should also be a member of a threat assessment team. And there should be close coordination with local police agencies.³²⁶ “Understanding the concerns of both the internal and external communities and addressing problems collaboratively are key to effective policing.”³²⁷ Of course, the long-term goal would be to have accredited, full-service, sworn law enforcement agencies on campus.³²⁸ However, the practicalities of funding may be difficult even for state colleges and universities, much less private institutions. So the short-term goals should at least include better integration into the informational process on campus, educational efforts, and improved emergency preparedness.³²⁹

321. The Act would amend 20 U.S.C. § 1092(f) (2006).

322. H.R. 5735.

323. These improvements would be a natural complement to the professional evolution of campus police departments in the past twenty years. *See* Peak, Barthe, & Garcia, *supra* note 127, at 255–56.

324. CALIFORNIA REPORT, *supra* note 178, at 9–10; FLORIDA REPORT, *supra* note 159, at ix; VIRGINIA TECH REPORT, *supra* note 1, at 19–20.

325. FLORIDA REPORT, *supra* note 159, at 10–11; IACLEA BLUEPRINT, *supra* note 67, at 6; NEW MEXICO REPORT, *supra* note 159, at 5.

326. FLORIDA REPORT, *supra* note 159, at 9; NAAG REPORT, *supra* note 158, at 8; PETTIT, *supra* note 308, at 4; WISCONSIN REPORT, *supra* note 5, at 68.

327. James A. Perrotti, *The Role of the Campus Police and Security Department in the 21st Century: An Essay Based on 30 Years of Experience*, in CREATING AND MAINTAINING SAFE COLLEGE CAMPUSES, *supra* note 67, at 173, 187.

328. *E.g.*, FLORIDA REPORT, *supra* note 159, at ix; IACLEA BLUEPRINT, *supra* note 67, at 6; NEW MEXICO REPORT, *supra* note 159, at 5; WISCONSIN REPORT, *supra* note 5, at 66–68.

329. Bryan J. Reaves, Bureau of Justice Statistics, U.S. Dep’t of Justice, *Campus*

VI. RECONSTITUTION

When the task force's work is over, the enculturation of the campus is just beginning. A constant mantra throughout the post-Virginia Tech literature is that, whatever procedures and protocols a higher education institution might adopt, those procedures and protocols must be marketed, advertised, posted, practiced and drilled within the campus community.³³⁰ There is no suggestion that campuses should become armed camps or fortresses, by any means. "There is often conflict between the need for security and maintaining an open environment. Freedom of thought and expression are cherished, and many institutions of higher education have minimal controls over campus access due to their commitment to an open environment."³³¹ Nonetheless, the student consumer expects safety and security when on campus and, when things go awry, is not likely to take responsibility.

College and university campuses are safer than the country at large.³³² In fact, students are more likely to be victimized off campus than on, especially when engaged in off-campus leisure activities.³³³ One should not, however, be sanguine about that comparison of these two disparate crime rates for a couple of reasons. First, campus crime tends to be underreported.³³⁴ Second, validity and reliability of the comparison itself are questionable: Can one really compare the environment of a college or university campus with the nation at large when it comes to crime statistics? Perhaps a more accurate analysis would be to compare the campus crime rate with the surrounding neighborhood.³³⁵ Indeed, perhaps

Law Enforcement, 2004–05, NCJ 219374, at 7–8, 16–17 (2008), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cle0405.pdf>.

330. *E.g.*, MISSOURI REPORT, *supra* note 159, at 9–10. Literature on public school safety after the tragedy at Columbine High School advises that a supportive school culture is crucial to implementing effective safety procedures. *E.g.*, Ethan Heinen, Jaci Webb-Dempsey, Lucas C. Moore, Craig S. McClellan, & Cari H. Friebe, *Implementing District Safety Standards at the Site Level*, 190 NASSP BULL. 207, 215–18 (2006).

331. Perrotti, *supra* note 327, at 173–74.

332. Fisher, Hartman, Cullen, & Turner, *supra* note 66, at 80; D.O.E. 2001 REPORT TO CONGRESS, *supra* note 66, at 5, 7, 8. The D.O.E. statistics are somewhat misleading because the calculations of "on-campus" crimes were based on a narrower reporting paradigm than is currently employed, which now includes off-campus but related crimes since 1999. *Id.* at 10. After 1999, campus crime numbers were more than five times higher than the 2001 Report suggests. *Id.* at 11.

333. *See, e.g.*, Baum, *supra* note 67, at 5–6. *But see* Fisher, Sloan, Cullen, & Lu, *supra* note 65, at 692–93. Some crimes are more likely to occur on campus than off campus, especially sexual and simple assaults. *Id.*

334. Siegel & Raymond, *supra* note 65, at 19; CARR, *supra* note 67, at 383.

335. A small study of Florida's state colleges and universities reveals that the crime rate on campuses, as reported on the state's Uniform Crime Reports for 1989 and 1990, was lower than the city and county wherein the respective schools were located. Max L. Bromley, *Campus and Community Crime Rate Comparisons: A Statewide Study*, 15

the location of the campus in that neighborhood increases the crime statistics.

In addition, students and their parents typically anticipate a much safer environment than the country at large. They likely anticipate, or at least hope, that the campus will be just as safe as their own neighborhoods. Indeed, higher education institutions intend to convey the notion that campuses are idyllic oases for students to learn and grow even if they are surrounded by fences and bad neighborhoods.³³⁶ What they do not expect is that the vast majority of campus perpetrators come from within. Consequently, crime on campus is a new and startling experience for students and their parents.

Unfortunately, students are “poor guardians of themselves and their property, despite the fact that many schools require freshmen and transfer students to participate in a general crime prevention awareness program or in a program devoted to a specific topic, such as rape awareness.”³³⁷ There may be any number of reasons for this phenomenon. One of those reasons may be the consumers’ expectation that the campus will be safe and that the responsibility for that safety rests on the college or university itself, with no concomitant commitment from the students. Another reason may well be the failure of maturity and risk-taking behavior in which students engage that provoke and even invite campus violence. A third reason may be a confluence of the two, a campus culture that encourages students to feel secure without actually making them responsible for doing so.³³⁸ Both the consumers and the institutions have been complicit in not acknowledging crime on campus.³³⁹ The post-Virginia Tech campus must

J. OF SECURITY ADMIN. 49, 54 (1992). And a large-scale study of 416 higher education institutions found no crime spill-over from surrounding communities or counties. Volkwein, Szelest, & Lizotte, *supra* note 66, at 666–67. Neither study, however, appeared to compare the crime rates of the immediately surrounding neighborhoods. Bromley, *supra* note 335, at 55–56.

336. Oren R. Griffen, *Confronting the Evolving Safety and Security Challenge at Colleges and Universities*, 5 PIERCE L. REV. 413, 432 (2006–07).

337. Fisher, Sloan, Cullen, & Lu, *supra* note 65, at 680; Volkwein, Szelest, & Lizotte, *supra* note 66, at 649.

338. College and university students are being increasingly left to their own devices in matters of creating their own identities and making their own decisions with little adult intervention. As a consequence, peer influence plays a leading role in shaping their identities. Peer influence also plays a leading role in risk-taking and illegal behavior. Jean M. Low, David Williamson, & Jean Cottingham, *Predictors of University Student Lawbreaking Behaviors*, 45 J. OF COLL. STUDENT DEV. 535, 535 (2004).

339. “[T]o some extent administrators, parents, employees, and students simply [do] not want to acknowledge that problems exist[] in places that should perhaps be resistant to such social malaise.” Don Hummer, *Serious Criminality at U.S. Colleges and Universities: An Application of the Situational Perspective*, 15 CRIM. JUSTICE POL’Y REV. 391, 391 (2004). Another significant hindrance in understanding this problem is that the study of college crime is of relatively recent vintage. *E.g.*, Fisher,

alter that relationship by giving more than lip-service to occasional notices and explanations of campus violence and campus security, to both students and campus staff.

The trend toward greater information to the consumer students and parents was Congress's enactment of the Clery Act, which at the very least alerted the general public to the fact that there is crime on college campuses.³⁴⁰ The Clery Act—the Crime Awareness and Campus Security Act³⁴¹—is a 1990 amendment to the Higher Education Act of 1965 and requires colleges and universities to report annual statistics of crimes occurring on or near what is traditionally considered the “campus.”³⁴² The Act was named after Jeanne Clery, a nineteen-year-old Lehigh University student who was tortured, raped, sodomized and murdered by a fellow student who gained access to her dormitory room through propped-open doors.³⁴³ The Act was intended to increase student awareness of criminal activity on campus³⁴⁴ and thereby make the students safer.³⁴⁵ As a consequence, higher education institutions must annually report the number of incidents of murder, forcible and nonforcible sex offenses, robbery, aggravated assault, burglary, motor vehicle theft, manslaughter, and arson that occur on or adjacent to their precincts.³⁴⁶ Unfortunately, the reported

Sloan, Cullen, & Lu, *supra* note 65, at 672; MAX L. BROMLEY, CAMPUS-RELATED MURDERS: A CONTENT ANALYSIS REVIEW OF NEWS ARTICLES 12 (2005), available at http://www.dcf.state.fl.us/campusSecurity/docs/Campus_Related_Murders050907.pdf.

340. Hummer, *supra* note 339, at 392.

341. 20 U.S.C. § 1092(f) (2006).

342. *E.g.*, KAPLIN & LEE, *supra* note 44, at 885; Fisher, Hartman, Cullen, & Turner, *supra* note 66, at 61–62; Security on Campus, Inc., Clery Act Legislative History (1989–2000), http://www.securityoncampus.org/index.php?option=com_content&view=article&id=300:clery-act-legislative-history-1989-2000&catid=64:cleryact (last visited Feb. 28, 2009). Those locations are campus property (buildings and property owned and controlled by the university), non-campus property (buildings and property run by recognized student organizations and any other satellite buildings owned by the institution and used by students but not reasonably contiguous to campus), and public property (sidewalks, streets and parking facilities) adjacent to campus or other facility controlled by the institution. 20 U.S.C. § 1092(f)(6)(A). The Clery Act also acts as the all-campus warnings for ongoing crimes. *See, e.g.*, U.S. DEP'T OF EDUC., OFF. OF POSTSECONDARY EDUC., THE HANDBOOK FOR CAMPUS CRIME REPORTING 13–17 (2005), available at <http://www.ed.gov/admins/lead/safety/handbook-part-1.pdf> [hereinafter D.O.E. HANDBOOK FOR CAMPUS CRIME]; *see also* Eric Hoover & Sara Lipka, *Colleges Weigh When to Alert Students of Danger*, CHRON. OF HIGHER EDUC. (Wash., D.C.), Dec. 7, 2007, at A1.

343. Constance B. Clery, *Forward*, in CREATING AND MAINTAINING SAFE COLLEGE CAMPUSES, *supra* note 64, at ix; Howard Clery & Connie Clery, *What Jeanne Didn't Know*, http://www.securityoncampus.org/~securix0/index.php?option=com_content&view=article&id=52&Itemid=66 (last visited Feb. 28, 2009).

344. *E.g.*, Gregory & Janosik, *supra* note 127, at 7–8.

345. Fisher, Hartman, Cullen, & Turner, *supra* note 66, at 71.

346. 20 U.S.C. § 1092(f)(1)(F)(i) (2006); *see* D.O.E. HANDBOOK FOR CAMPUS CRIME, *supra* note 342, at 23–48. Some states also require colleges and universities to report campus crime statistics. KAPLIN & LEE, *supra* note 44, at 887; Fisher, *supra*

numbers indicate that campus crime is on the increase, perhaps because the manner of gathering statistics has been erratic;³⁴⁷ perhaps because colleges and universities are not doing a very good job of distributing the statistics to their students;³⁴⁸ perhaps because few students are paying attention to the published statistics;³⁴⁹ or, more troubling, perhaps because schools are not fully disclosing their crime numbers.³⁵⁰

The Clery Act is just one of several avenues that higher education institutions need use to educate and train their students about campus violence. Without that education and training, the institution will have difficulty changing the culture that breeds 80% of the perpetrators. Being forthright about crime statistics may not necessarily be a good marketing tool for colleges and universities,³⁵¹ but all the more reason to make institutional efforts to lower the statistics so as to avoid the headline-grabbing catastrophic event or wave of campus crime.³⁵²

note 127, at 96–98.

347. Fisher, Hartman, Cullen, & Turner, *supra* note 66, at 77–78.

348. *E.g.*, Gregory & Janosik, *supra* note 127, at 40–44, 46.

349. *Id.* at 46; Pamela Wilcox, Carol E. Jordan, & Adam J. Pritchard, *A Multidimensional Examination of Campus Safety: Victimization, Perceptions of Danger, Worry About Crime, and Precautionary Behavior Among College Women in the Post-Clery Era*, 53 *CRIME & DELINQ.* 219, 247 (2007).

350. *See, e.g.*, Letter from Mary E. Gust, U.S. Department of Education, to Dr. Donald Loppnow, Executive Vice President, Eastern Michigan University (Dec. 14, 2007) (on file at <http://blog.mlive.com/annarbornews/2007/12/DOE003.pdf>) (concerning Eastern Michigan's violations of the Clery Act, including efforts to conceal from the greater campus that a student was murdered and the failure to accurately report crime statistics). The U.S. Department of Education imposed a \$357,000 fine on Eastern Michigan University for its failure to report a violation of the Clery Act. Press Release, Security on Campus, Inc., Eastern Michigan University Faces Largest Ever Jeanne Clery Act Fine of \$357,000 (Dec. 18, 2007), (on file at <http://www.securityoncampus.org/update/121807.html>). Liability may attach to institutions that fail to adequately reveal crime statistics. For instance, a female student at California State University—San Diego was raped and murdered in her dorm room. Her mother's wrongful death lawsuit was allowed to proceed on several grounds, one of which was negligent misrepresentation because the university failed to warn her that there was an escalation in the number of rapes and attacks on female students, and the mother and daughter specifically relied on that misrepresentation to their detriment. *Duarte v. State*, 88 Cal. App. 3d 473 (1979); *see also* *Murrell v. Mount St. Clare Coll.*, No. 3:00-CV-90204, 2001 WL 1678766, at *6–7 (S.D. Iowa Sept. 10, 2001). Mount St. Clare College, sued in the latter case, was fined \$25,000 for failing to comply with the reporting requirements under the Clery Act. *KAPLIN & LEE, supra* note 44, at 887.

351. *See, e.g.*, Volkwein, Szelest, & Lizotte, *supra* note 66, at 648.

352. *See, e.g.*, Shaila Dewan, *Drumbeat of Shots, Broken by Pauses to Reload*, *N.Y. TIMES*, APRIL 17, 2007, at A1; Gregory, *supra* note 11; Tony Perry, *How the Police Busted a College Drug Scene: Young Cops Blended into Fraternity Houses at San Diego State and Netted 75 Students*, *L.A. TIMES*, May 7, 2008, at 1; Peter Schworm, *Violence Rattles UMass Campus: Spate of Attacks, Rowdiness, Criminal Acts in Amherst Raises Concerns*, *BOSTON GLOBE*, Feb. 21, 2008, at 1A; *Duquesne U. Shooting Victims Claim NBA Dreams Dashed in Lawsuit*, *THEPITTSBURGHCHANNEL.COM*, June 23, 2008,

Just as the Clery Act requires the publication of crime statistics, the campus violence work force must work to “market” its safety aspects. Because the Clery Act will likely be amended with the passage of the Virginia Tech Victims Act, disclosure of emergency preparedness precautions and procedures is a foregone conclusion. But these are just two aspects of the publication that should occur on campus to instill a culture of both awareness and responsibility. The campus community also must be annually reminded of the student discipline code and its attendant procedures; of the campus facilities for mental health; of the operations of the threat assessment team and its information-gathering role, perhaps including student anonymity; and of any campus-wide initiatives designed to decrease campus violence, such as sexual assaults, alcohol, drugs and weapons.³⁵³ Appropriate training protocols should be implemented for the campus community, especially for the faculty and staff.³⁵⁴ And this should include all the affiliated schools, like law schools and medical colleges. The goal is not to make the campus culture paranoid à la post-9/11 but to create educated risk managers and thereby good consumers.

VII. AND WHEN I DIE, AND WHEN I’M DEAD, DEAD AND GONE, THERE’LL
BE ONE CHILD BORN³⁵⁵

One of lawyers’ chief skills is warning of risks and trying to get the client to engage in behavior that will avoid risk. For this reason, a lawyer is critical to the process of auditing, changing and implementing procedures to address campus violence. She must be a part of policymaking, inserting herself as one with the academic vision and not on a solo mission. On the other hand, the lawyer engaged before the fact or who tries to take charge is likely to make the academic community suspicious, definitely uncooperative and perhaps thoroughly disengaged. When the lawyer is engaged after the fact, it is too late: the academic community has become too entrenched in its educational mission and views any changes the lawyer makes with resentment. Neither of these scenarios is likely to encourage an enculturation to eliminate campus violence if the adult portion of the campus community has disconnected. Indeed, the lawyer cannot enculturate without the assistance of the academic community who has to buy into the program. Perhaps more important, however, is that the academic community can put the brakes on legal efforts to saturate higher

<http://www.thepittsburghchannel.com/education/16676524/detail.html?rss=pit&psp=news> (last visited Jan. 28, 2009).

353. IACLEA BLUEPRINT, *supra* note 67, at 7.

354. For example, the rise of binge-drinking on campus may be directly related to the absence of significant interaction between students and campus adults. Siegel & Raymond, *supra* note 65, at 24.

355. Laura Nyro, *And When I Die*, as recorded by Blood Sweat & Tears, on BLOOD SWEAT & TEARS (Columbia Records 1968).

education in a culture of risk management.³⁵⁶ Academics will have a better sense of how to get the community to embrace a culture opposed to violence than will lawyers. Academics prefer carrots while lawyers seem to prefer sticks.

Ultimately, however, the progeny of a project to review and change campus policies must be embraced by the students to be effective. The fall of *in loco parentis* was surely painful for campus administrations, given the unlawful student behavior during the Vietnam years. It is ironic then that what campus violence in the 1960s and 1970s wrought in the manner of open campus governance may be shrunk because the current student population does not seem to know what to do with those freedoms. Further irony is that the academics who remember that campus violence of the 1960s and 1970s are likely those most vociferously opposed to a campus culture saturated with security measures and informers. The lawyer participating on a campus violence work force must have a deft hand in the reconstitution of the audited campus policies so as to create a viable and vibrant campus culture that reflects the institutional vitality necessary to achieve its educational goals.

356.

There is . . . a real danger in the risk-management programs of further insulating student life from the influences and provocations of the community in the name of sheltering tender subjectivities. These tendencies may form a particularly insidious link with the victimologies promulgated as one aspect of contemporary ethnic politics on campus. One feature that many risk-management techniques have in common is that of channeling people into homogeneous "risk groups." Limiting risk is often taken to mean limiting the mix of different people.

Simon, *supra* note 41, at 37.