

THE JOURNAL OF COLLEGE AND UNIVERSITY LAW

Volume 35

2009

Number 3

ARTICLES

The Elephant in the Ivory Tower: Rampages in Higher Education and the Case for Institutional Liability

Helen Hickey de Haven 503

This article considers the phenomenon of student rampage shootings in higher education, recounting seven rampages in colleges, universities, or professional schools since 1992. It supposes that there is a duty inherent in the academic enterprise to safeguard the classrooms, libraries, and other common spaces in which learning occurs. It suggests that an academic institution's failure to reduce predictable violence should create liability to the victims and a duty to mitigate their suffering. The article examines tort cases since 1980 involving institutional liability for student violence, including the only case addressing institutional liability to the victim of a rampage to have reached decision. It argues for developing an expanded model of institutional responsibility that takes into account the unique characteristics of academic life and recognizes the special nature of academic relationships.

Campus Violence: Understanding the Extraordinary Through the Ordinary

Nancy Chi Cantalupo 613

Recent mass shootings on college and university campuses have focused many on the responsibilities of colleges and universities to prevent and respond to such violence. However, in statistical terms, this type of campus violence can thankfully be considered relatively extraordinary. In contrast, the only type of campus violence that is unfortunately common enough to be characterized as "ordinary" is peer sexual assault and similar forms of campus gender-based violence. Accordingly, this article explores the scope and dynamics of both "ordinary" and "extraordinary" campus violence, discusses the law and "best practices" dealing with peer sexual violence victims' rights and the due process rights of students accused of misconduct, and contrasts the typical disciplinary responses of many schools to both the methods required by the applicable law and those advocated by the best practices literature. It concludes that understanding peer sexual violence and applying that understanding to less common forms of campus violence may help us to prevent and understand what the proper responses should be to both forms of violence.

Disability Law Issues for High Risk Students: Addressing Violence and Disruption

Laura Rothstein 691

Recent judicial attention has applied disability discrimination law (Section 504 of the Rehabilitation Act and the Americans with Disabilities Act) to higher education students with substance abuse or mental health problems. The recent violence on college and university campuses has highlighted a number of additional issues including confidentiality, privacy, duty to warn, and discipline. It is important for effective policy that administrators and policymakers begin with knowledge of the legal requirements. Disability discrimination law is one of the key areas to understand in developing these policies.

In examining these issues, it is essential to recognize that not all violent or disruptive behavior is caused by individuals with mental illness. This is important in developing sound and proactive policies, practices, and procedures preventing violence and disruption. The unintended consequences of some policies (even though they comply with disability discrimination requirements) should be considered.

The article addresses the disability discrimination laws that apply to how individuals with mental health problems are treated in various contexts where concerns about campus violence or disruption are at issue. It discusses what educators are *required* to do (legal requirements), what they *should* do (what ethically should be considered in balancing the interests of the individual with mental health challenges and others who might be affected by conduct that relates to those challenges), and what they *can* do (considering resources to assist educators responsible for providing a safe and positive learning environment for other students, faculty, and staff, and for assuring that the interests of others are appropriately balanced).

NOTES

Taxing the Great Academic Divorce

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The grant of tenure to a professor gives a promise of job security to the professor. In certain situations, however, this promise of job security is broken and tenure is terminated. In these situations, the nature of tenure rights as property rights generally determines whether termination payments are subject to employment taxes. This note examines the treatment of these payments by the Third and Sixth Circuits in contrast to the treatment by the Eighth Circuit. Resolving the circuit split will give institutions guidance in structuring both the payments and the tenure contracts.

Federal Funding and Fraud: The False Claims Act in Higher Education After *Main v. Oakland City University*

Rachel Perkins 747

For years, federal courts have granted colleges' and universities' motions to dismiss False Claims Act suits against them, narrowly construing the requirement of a false "claim" against the federal government. In 2003, the Seventh Circuit reversed this trend, holding in *Main v. Oakland City University* that the University's signed Program Participation Agreement could be viewed in conjunction with students' requests for federal student financial aid to constitute a "claim" for federal funding. A number of subsequent cases have adopted this logic, leading higher education lawyers to worry about increased college and university liability under the False Claims Act (FCA). This fear is unfounded, however, as will be explored in this note. There is no reason to anticipate a flood of qui tam suits against colleges and universities for two reasons: (1) public colleges and universities cannot be sued under the FCA and (2) the FCA requires actual fraud perpetrated against the government—not mere rule violations.

THE ELEPHANT IN THE IVORY TOWER: RAMPAGES IN HIGHER EDUCATION AND THE CASE FOR INSTITUTIONAL LIABILITY

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I. INTRODUCTION: THE ELEPHANT IN THE IVORY TOWER

On April 16, 2007, a senior at Virginia Tech University walked into a classroom building, chained the doors shut, and shot to death five professors and twenty-five of his fellow students during a nine-minute, room-by-room rampage.¹ It was the worst school shooting in United States history. Within minutes, with the sickening familiarity of a recurring nightmare, images of terrified and weeping students, bleeding bodies, and grave-faced University officials were streaming through televisions all over the country. Once again, those of us who make our lives in the academy faced, as in a mirror, the possibility that we, too, could be shot dead by one of our students. It did not cheer the reflection to be told that, months before the rampage, University Distinguished Professor Nikki Giovanni was so alarmed by the shooter that she decided to resign unless he was removed from her creative writing class.² His fellow students were so afraid of him that they quit coming to Giovanni's poetry sessions.³ To get him out of the classroom, the Chair of the English Department taught him privately; she created a distress code and stationed an assistant outside the door whenever he was with her.⁴

These are cold reminders that a little learning can be a dangerous thing. When school shootings happen, we must ask ourselves if our academic

1. Two other students were first killed in a dormitory and seventeen were wounded in the classroom building, bringing the total casualties to fifty, including the shooter, who also killed himself. *See infra* Part I.G.

3. *Killer's Manifesto: 'You Forced Me into a Corner'*, CNN, Apr. 18, 2007, <http://edition.cnn.com/2007/US/04/18/vtech.shooting/index.html>.

3. *Id.*

4. *Professor: Shooter's Writing Dripped with Anger*, CNN, Apr. 18, 2007, <http://www.cnn.com/2007/US/04/17/vtech.shooting/index.html>. The distress code was the name of a dead professor. *Id.*

sanctuaries are safe enough. Can we rely upon the keepers of our ivory towers for protection? To what extent are we on our own when a monster bent on destruction stalks the halls of ivy, disguised as one of us? This article considers the phenomenon of student rampage shootings at institutions of higher education. It supposes that there is a duty inherent in the academic enterprise to safeguard the classrooms, hallways, and other common spaces in which learning occurs. It suggests that an academic institution's failure to reduce predictable violence should create liability to the victims and a duty to mitigate their suffering. It joins the ranks of legal scholars who argue that we must develop a model of shared responsibility that better serves the fundamental purposes of higher education than the present arm's length relationship between most colleges and universities and their students. It raises questions for further study by the teachers and researchers to whom the intellectual life of the academy is entrusted.

First, why do the rampage shootings merit particular attention? Rampages by students are even more rare in colleges and universities and professional schools than they are in secondary education. There have been only seven in the United States, all since 1990. They represent only a tiny percentage of the violence on our nation's college and university campuses.⁵ Nevertheless, because they so capture the public attention, the rampages have a political impact on the development of law and social

6. National statistics on campus crimes are difficult to come by, and they are understood to be flawed by significant under-reporting by victims. One study found that only 25% of campus crimes are reported to any authority. See JOETTA L. CARR, AM. COLL. HEALTH ASS'N, CAMPUS VIOLENCE WHITE PAPER 4-5 (2005), available at http://www.acha.org/info_resources/06_Campus_Violence.pdf. No statistics are available for attacks on faculty or staff. Nor are statistics available for graduate and professional school students. Nevertheless, the following information gives some idea of the scope of violence on campuses. In 2002, there were approximately 16 million students enrolled in 4,200 colleges and universities in the United States. *Id.* at 3. In January 2005, interpreting data from the National Crime Victimization Survey, U.S. Department of Justice statisticians Katrina Baum and Patsy Klaus reported that between 1995 and 2002, about 7.9 million college and university students between ages 18 and 24 were enrolled either full- or part-time in a college or university and were the victims of approximately 479,000 crimes of violence annually, including rape, sexual assault, robbery, aggravated assault, and simple assault. KATRINA BAUM & PATSY KLAUS, U.S. DEP'T OF JUSTICE, NATIONAL CRIME VICTIMIZATION SURVEY: VIOLENT VICTIMIZATION OF COLLEGE STUDENTS, 1995-2002 3 (2005), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/vvcs02.pdf>. Except for rape and sexual assault, average annual rates were lower for these students than for non-students in the same age group for each type of violent crime measured; rates of rape and sexual assault for the 2 groups did not differ statistically. *Id.* Between 1995 and 2002 rates of violent victimization dropped by approximately 50% among both students (54%) and non-students (45%) in the 18-24 age group, but rates of aggravated assault declined only marginally on college and university campuses, and rates of rape or sexual assault did not decline in either group. *Id.* Offenders armed with guns perpetrated 9% of violent victimizations. *Id.* at 5. In 2002, there were 23 murders or non-negligent manslaughters on campuses and 2,953 aggravated assaults. CARR, *supra* note 5, at 9.

policy disproportionate to their frequency.⁶ After each rampage, a growing number in government and the academy advocated allowing students and

6. The politics of gun control are outside the scope of this article, but there is no doubt that the rampages affect the public debate over weapons on campuses. For example, the rampage shooting at the Appalachian School of Law in January 2002 was cited to justify the position of the Utah Attorney General that the University of Utah could not lawfully ban firearms on its campus, a debate the University ultimately lost in the Utah Supreme Court in 2006. *Univ. of Utah v. Shurtleff*, 144 P.3d 1109 (Utah 2006); *see, e.g.*, Ben Gose, *Dispute Over Guns at the University of Utah May Test Academic Freedom*, CHRON. HIGHER EDUC. (Wash., D.C.), Sept. 20, 2002, at A26; Eugene McCormack, *The Almanac: The 50 States & the District of Columbia*, CHRON. HIGHER EDUC. (Wash., D.C.), Sept. 20, 2002; *see also infra* text accompanying note 141. The rampage killing at Virginia Tech in April 2007 also sparked immediate public pressure upon colleges and universities to implement policies permitting firearms to be carried on campus. *See, e.g.*, Hillary Hylton, *The Gun Lobby's Counterattack*, TIME, Apr. 18, 2007, <http://www.time.com/time/nation/article/0,8599,1611939,00.html> (reporting that the gun lobby had issued a "call to arms" in response to the rampage at Virginia Tech); Moises D. Mendoza, *Having Guns on Campus Debated*, ST. PETERSBURG TIMES, Apr. 23, 2007, http://www.sptimes.com/2007/04/23/Worldandnation/Having_guns_on_campus.shtml; BRADY CENTER TO PREVENT GUN VIOLENCE, NO GUN LEFT BEHIND: THE GUN LOBBY'S CAMPAIGN TO PUSH GUNS INTO COLLEGES AND SCHOOLS v-vi (2007), *available at* <http://www.bradycampaign.org/xshare/pdf/reports/no-gun-left-behind.pdf>; OFFICE OF THE GOVERNOR OF THE COMMONWEALTH OF VIRGINIA, MASS SHOOTINGS AT VIRGINIA TECH APRIL 16, 2007: REPORT OF THE REVIEW PANEL 71-76 (2007) [hereinafter VT PANEL REPORT], *available at* <http://www.governor.virginia.gov/TempContent/techPanelReport-docs/FullReport.pdf>.

On the other hand, the rampage killing at Simon's Rock College in 1992 provoked a different public response and led, four years later, to a stricter gun control law in Massachusetts. *See infra* note 81.

Currently, thirty states ban weapons at post-secondary schools by statute. Wikipedia, *Students for Concealed Carry on Campus*, http://en.wikipedia.org/wiki/Students_for_Concealed_Carry_on_Campus (last visited May 23, 2009) [hereinafter *Students for Concealed Carry*]. Of the remaining twenty states, nineteen allow schools to adopt their own gun policies. *Id.*; *see* Brian J. Siebel, *The Case Against Guns on Campus*, 18 GEO. MASON U. CIV. RTS. L.J. 319, 322 n.19 (2008). Very few institutions of higher education in those states allow students to carry concealed firearms. *Students for Concealed Carry*, *supra* note 6. Exceptions are Colorado State University and Blue Ridge Community College in Weyers Cave, Virginia. *Id.* A survey of gun policies at 150 of the largest U.S. colleges and universities published by the Alliance for Justice in 2003 reported that all 150 restrict firearm possession by students: 82 ban guns completely; 25 require storage of firearms in an institution-sanctioned storage facility; 27 restrict possession to ROTC, rifle team, or specific educational activities; and 22 require prior authorization to bring a firearm onto campus. Siebel, *supra* note 6, at 322 n.19.

In August 2008, the International Association of Campus Law Enforcement Administrators (IACLEA) issued a position statement opposing legislative initiatives that would allow students to carry concealed weapons on college and university campuses. LISA A. SPRAGUE, INT'L ASS'N OF CAMPUS LAW ENFORCEMENT, IACLEA POSITION STATEMENT: CONCEALED CARRYING OF FIREARMS PROPOSALS ON COLLEGE CAMPUSES (2008) http://www.iaclea.org/Visitors/PDFs/ConcealedWeaponsStatement_Aug2008.pdf.

faculty to arm themselves.⁷ If we are to avoid disintegrating into individual self-help as a primary means of self-preservation, the academy must provide a more effective community response to the rampage phenomenon, based on a deeper understanding of its causes and a commitment to the civilizing values and goals of higher education. Moreover, rampages present a unique feature that bears directly on the question of institutional duty and liability. They are distinguished from other manifestations of campus violence because the killer's primary target is the institution itself.⁸ A rampage is an essentially anti-institutional crime. Most of the students, professors, deans, and support staff who are killed, wounded, or terrified in the rampage are harmed because they are associated with the institution, not because they have associated with the shooter, with whom they may have little or no personal acquaintance. This anarchic characteristic of rampages creates a useful container for discussing to what extent, if any, a college or university must confront the violence in its halls—must, that is, assume an affirmative duty to keep its individual teachers, students, and staff reasonably safe from eruptions of rage directed at and related to the corporate body.

In some of these cases it is difficult to see what more the college or university could have done either to prevent the shooting or reduce the harm to the victims. Other cases raise serious questions about the fundamental inadequacy of the institutional response to early warning signs, to the immediate peril, or to the individual and community casualties. One of the advantages of studying the rampages is that they illuminate the intricate dynamics of violence on campus and the complexity of weighing the institution's contribution to its sometimes unbearably tragic outcomes. At the same time, the rampages reveal the unique constellations of location, values, demographics, and history that constitute the culture of the academies, variables that make the academic response to campus violence, of necessity, *sui generis*—best judged by its own terms and in light of the purposes and characteristics of an educational institution,

7. After the rampage at Virginia Tech, Students for Concealed Carry on Campus was formed to support licensed concealed carry of firearms on campuses. Students for Concealed Carry, *supra* note 6. The group claims over 215 chapters on campuses and more than 25,000 members nationwide as of April 2008. *Id.* Following the rampage at the University of Northern Illinois in February 2008, law Professors Glen Reynolds (University of Tennessee) and Eugene Volokh (University of California at Los Angeles) publicly advocated allowing students and faculty to carry concealed weapons. The Hugh Hewitt Show, Glenn Reynolds and Eugene Volokh on the issue of students being allowed to carry concealed weapons on campus, <http://hughhewitt.townhall.com/talkradio/transcripts/Transcript.aspx?ContentGuid=4d7b419a-dafa-418e-9299-18188383c3db> (last visited May 23, 2009). It is estimated that 9% of postsecondary students (8% of men; 1% of women) have working firearms on campus. CARR, *supra* note 5, at 4.

8. See KATHERINE S. NEWMAN, RAMPAGE: THE SOCIAL ROOTS OF SCHOOL SHOOTINGS (2004); see also *infra* note 9; *infra* text accompanying note 16.

rather than by analogy to other social organizations, such as shopping malls or restaurants, where rampages have also occurred.⁹

There are good reasons for those of us who work in the academy to be more mindful of our collective safety, even if by such heightened attention we assume, on behalf of our employers, a legal duty to protect the safety of our students. Study of the rampage shootings tends to show, not surprisingly, that the faculty casualty rate increases the higher up the steps of the ivory tower the killer has managed to climb. Professors in professional and graduate-level programs appear to be at higher risk of being killed by their students than teachers at the secondary or undergraduate level.¹⁰ At the same time, student victimization rates decrease in graduate-level rampages; faculty in professional schools are more likely than students to be the targets of the killer's rage. Yet the faculty victim's right to recover damages from the institution for such injury is severely circumscribed by the workers' compensation laws in most states. Only a very high degree of negligence on the part of the

9. If any comparison is useful, student rampages in higher education are more like employee workplace rampages than they are like secondary school rampages, church rampages, or rampages in other locations. Like post-secondary schools, workplaces are selective communities with a set of distinguishing relationships reflecting distinctive norms of behavior. Like post-secondary school rampages, workplace rampages are situational, in the sense that "a tendency toward violence is often bred by the workplace itself." RICHARD V. DENENBERG & MARK BRAVERMAN, *THE VIOLENCE-PRONE WORKPLACE: A NEW APPROACH TO DEALING WITH HOSTILE, THREATENING, AND UNCIVIL BEHAVIOR* ix (1999). They are also anti-institutional. "Violent incidents often appear to be random acts of slaughter but upon close examination reveal a calculated attempt to decapitate the command structure of the workplace. Such assaults might be labeled 'organicides.'" *Id.* at 5; see NEWMAN, *supra* note 8, at 58.

10. In the rampages at the undergraduate institutions of Simon's Rock College, Virginia Tech, and Northern Illinois University, six of the forty-one fatalities were faculty members. In contrast, in the graduate and professional school rampages—at the University of Iowa Graduate School of Physics, the Appalachian School of Law, the University of Arizona College of Nursing, and Case Western Reserve Graduate School of Business—ten of the eighteen fatalities were faculty members.

With respect to thirteen shootings involving multiple fatalities on U.S. college and university campuses since 1990 (including but not limited to rampages), the authors of a June 2008 report to the Massachusetts Department of Higher Education wrote:

Perhaps the most striking fact pattern among campus shootings is the disproportionate involvement of graduate students as perpetrators. Of the 13 fatal mass shootings in the United States since 1990, . . . eight were committed by current or former graduate, law, or medical students, compared to three by undergraduates and two by outsiders.

APPLIED RISK MGMT., *CAMPUS BEST PRACTICES FOR MASSACHUSETTS HIGHER EDUCATION* 8 (2008), available at http://www.arm-security.com/pdf/ARM_MA_Colleges_Campus_Violence_Prevention_And_Response.pdf. This figure includes the rampage at Northern Illinois University in February 2008, in which the target was an undergraduate Geology class, but the killer was a graduate student. See *id.*

institution allows employees to seek full tort recovery, and even then employee victims may be subject to such defenses as comparative negligence or assumption of risk. To the extent that a desire to avoid expensive and demoralizing judgments at law influences the institutional safety agenda, only student victims have any serious leverage in the courts. The law of college and university liability for violent conduct on their campuses has evolved within the framework of lawsuits brought by individual student plaintiffs.¹¹ The academic institution's duties are thus seen to depend primarily upon its legal relationship with its students.

This quirk in the development of tort law leaves faculty in an ambiguous position. From the student perspective, faculty members function most often as agents and models of institutional policy, not as its victims. That view is reinforced by the strong role played by the faculty in college and university governance through much of the twentieth century. Though its collective power may be diminishing in the contemporary college or university, the faculty still has significant and often determinative influence on institutional policy, procedure, and allocation of resources. For faculty members, therefore, both institutional obligation and enlightened self-interest argue for placing a high value on the safety of academic space and

11. University lawyers and law Professors Robert Bickel and Peter Lake make the following observations about the litigation process in such cases:

Colleges and universities typically spend most of their energy on fairly predic[t]able and repeating legal questions. They usually have their own lawyers, who work in house (and out) principally for the university client. University lawyers have national organizations and several journals and publications just for them. They are a practice group with reliable institutional clients. On the other hand, student cases involving physical injury are usually handled by personal injury attorneys who may see just one university case in a lifetime. Most students never need a lawyer; the few who do are usually one time clients Students and their lawyers approach the law usually as individuals and with individuated claims. In contrast, universities and their lawyers often approach the law collectively and institutionally. A given lawsuit may have long term policy implications for a college. How the law is made and then promoted has a great deal to do with this

This fact has one very important corollary—the cases which get litigated and reported. University lawyers can look at a number of cases and choose to settle some—or all—of them. Almost invariably they will settle a bad case with bad facts and any case which can make bad or dangerous precedent

So when you read caselaw in the university field, you will likely see a highly select group of cases, and most should be university winners. These cases were more likely selected to be the appellate cases for their precedential value by university attorneys rather than by any student attorneys attempting to change a system of law. There are many cases settled that never see much, if any, light of day (some unfavorable appellate decisions are actually erased by terms of settlements, which is an overt manipulation of how the law appears).

ROBERT D. BICKEL & PETER F. LAKE, *THE RIGHTS AND RESPONSIBILITIES OF THE MODERN UNIVERSITY: WHO ASSUMES THE RISKS OF COLLEGE LIFE?* 89–90 (1999); *see, e.g., infra* note 578.

insisting that the faculty voice be heard on the matter.

Though they are still relatively uncommon, rampage shootings in higher education are happening more frequently, and they are likely to increase unless we in the academy learn from our collective history.¹² We need a new consensus about how best to keep ourselves safe without destroying the academic freedoms and pedagogical values that define us. This is no easy task. Nobody likes an alarmist, and institutions are no different in that way from individuals. Our resistance to alarm, however inevitable and even laudable it may be as a general trait, inevitably tends to make discussion of violence in academia taboo—the elephant, as it were, in the ivory tower. Yet if we do not confront what we dread, we are condemned to live, over and over, the terrifying ambush that slaughters the best and the brightest of our students and colleagues. For the sake of the social order to which as lawyers and teachers we are committed, and also for the sake of our individual and corporate well-being, we must, like the blind men with the elephant, begin to feel our way in the darkness out of which such appalling violence erupts, shedding such light as we can.

Part I of this article collects for the first time in one place detailed accounts of the seven student rampage killings in United States higher education.¹³ From these stories, it is hoped, will emerge not only the

12. A study published by *The New York Times* in April 2002 of 100 rampages in America between 1949 and 1998, including school shootings, revealed that rampage killers tend to be older than other murderers. Ford Fessenden, *They Threaten, Seethe and Unhinge, Then Kill in Quantity: Rampage Killers/Part One*, N.Y. TIMES, Apr. 9, 2000, at I1, available at <http://www.nytimes.com/2000/04/09/us/they-threaten-seethe-and-unhinge-then-kill-in-quantity.html?sec=&spon=&pagewanted=1>. The study included rampages at schools, workplaces, shopping malls, day care centers, and other community spaces. *Id.* The study included only multiple-victim killings that were not primarily domestic or connected to a robbery or gang. *Id.* Serial killers were not included, nor were those whose primary motives were political. *Id.* The study found that of the rampage killers who were over twenty-five, two-thirds had attended college and one-third had at least one college degree. *Id.* In contrast, 80% of other murderers have no more than a high school education. *Id.* The study also found that while rampages represent only about one-tenth of 1% of all killings in the United States, they have definitely been on the increase since 1990. *Id.* That five of the seven rampage shootings in higher education have occurred since the study's end-date supports its prediction that the phenomenon is on the rise and that rampage killers are far more likely than most murderers to have walked the halls of ivy at some point in their careers. *See id.*

13. Press accounts are the primary basis for most of the cases discussed in this study. No one knows better than the author how incomplete and inaccurate these accounts may be in important respects. That having been said, however, with respect especially to factors relevant to the subject at hand, the studies that follow are as complete and accurate as space, public information, and reasonable investigation permit.

In 2001, the Case Studies of School Violence Committee of the National Research Council Institute of Medicine of the National Academies issued its report on school shootings in secondary schools. With respect to the impact of media coverage on local community response, the authors concluded,

disturbed profile of the rampage killers, upon which the spotlight of public interest always shines, but, more important here, the shadowed composite face of the rampage institution, which continually evades illumination.¹⁴ Part II examines modern and contemporaneous court decisions addressing institutional liability both for outsider violence and for insider violence such as rape, fraternity hazing, and student suicide. These cases indicate that courts are increasingly prepared to hold institutions of higher education liable for the consequences of student violence on campus but have yet to develop a model of responsibility that fully comports with the fundamental values and political realities of academic life. Part II concludes with examination of the trial court's decision in *Wallace v. Halder*,¹⁵ the first negligence case by the family of a rampage victim to reach a judge on the merits, which was decided in favor of the university defendant as this article was nearing completion and which demonstrates some of the limitations of the present model.

This article is primarily a survey of a small but deadly field; it is intended as a primary resource for those who are interested in reducing or rectifying institutional violence. It does not purport to propose a full-blown model of tort liability for higher education, but does hope to demonstrate the need for one and to identify some of its essential pieces.¹⁶ It is past time for such a reassessment, and the rampages are a useful container for the discussion because they take place in academic space and in the specific context of the academic experience. Moreover, since the mass murder at Virginia Tech, more and more authorities accept that rampages are a foreseeable risk of academic life. At the same time courts are moving toward recognition that colleges and universities have a legal duty as well as a professional obligation to make academic spaces as safe as they

In the cases for which information was collected, the media coverage of the event was considered to be inaccurate by the community and turned out to be so inaccurate that the case writers could not rely on it. It is also clear that the media coverage was experienced as destructive and unhelpful to the communities and the schools.

DEADLY LESSONS: UNDERSTANDING LETHAL SCHOOL VIOLENCE 260 (Mark H. Moore, Carol V. Petrie, Anthony A Brage, & Brenda L. McLaughlin eds., 2001) [hereinafter DEADLY LESSONS]. For an analysis of the political opportunism associated with media coverage of a rampage, see Douglas Kellner, *Media Spectacle and the "Massacre at Virginia Tech"*, in *THERE IS A GUNMAN ON CAMPUS: TRAGEDY AND TERROR AT VIRGINIA TECH* 29–54 (2008).

14. There seems to be general agreement among experts that, at least for predictive purposes, "There is no accurate or useful 'profile' of students who engaged in targeted school violence." U.S. SECRET SERV. & U.S. DEP'T OF EDUC., *THE FINAL REPORT AND FINDINGS OF THE SAFE SCHOOL INITIATIVE: IMPLICATIONS FOR THE PREVENTION OF SCHOOL ATTACKS IN THE UNITED STATES* 11 (2004), available at <http://www.ed.gov/admins/lead/safety/preventingattacksreport.pdf>.

15. *Wallace v. Halder*, No. CV-06-591169 (Ohio Cir. Ct. Aug. 27, 2008).

16. The author's other work in progress includes an article on the fuller development of such a model.

reasonably can for students. If the rampages teach us anything, it is that the academy as a whole has yet to develop the institutional wisdom and foresight that such an undertaking demands. We have not yet owned up to the ways in which academic cultures sometimes ignore the legitimate safety concerns of their faculty and students, disable appropriate support services, and enable dangerous and violent student behaviors. We have not renounced the irresponsible practices of institutional self-preservation that allow us to escape moral responsibility for the disasters that follow such disorder. Yet from the rampages also emerge examples of courage and resourcefulness, of lives saved and violence avoided, of teachers and students committed to protecting the learning environment. These stories help to show us where our duty lies, and how, as academic insiders, we can imagine a new model that neither denies nor divides, but shares responsibility for community safety.

II. RAMPAGES IN THE HALLS OF IVY

A. The Shape of the Elephant

The next section of this article recalls the known events surrounding seven rampage shootings in higher education: the University of Iowa (1991), Bard College at Simon's Rock (1992), the Appalachian School of Law (2002), the University of Arizona's College of Nursing (2002), Case Western Reserve University's Weatherhead School of Management (2003), Virginia Polytechnic Institute and State University (2007), and the University of Northern Illinois (2008). Rampages are not the only multiple murders that occur on campuses, and identifying them is not an exact science by any means. These seven cases were chosen using the criteria developed by Professor Katherine S. Newman in the context of secondary school shootings. According to Dr. Newman, "rampage school shootings must: [1] take place on a school-related public stage before an audience; [2] involve multiple victims, some of whom are shot simply for their symbolic significance or at random; and [3] involve one or more shooters who are students or former students of the school."¹⁷ Dr. Newman has also concluded that rampages are never spontaneous; the killer always gives warning signs of his intentions, sometimes for months before he attacks.¹⁸

Applying Dr. Newman's criteria resulted in the exclusion of several

17. Newman, *supra* note 8, at 50; cf. Ben "Ziggy" Williamson, Note, *The Gunslinger to the Ivory Tower Came: Should Universities Have a Duty to Prevent Rampage Killings?*, 60 FLA. L. REV. 895 (2008) (using *New York Times* criteria found in Fessenden, *supra* note 12).

18. Katherine S. Newman, *Opinion: Finding Causes of Rampage Shootings Is One Thing; Preventing Them Is Another*, CHRON. HIGHER EDUC. (Wash., D.C.), Apr. 19, 2007, <http://chronicle.com/free/2007/04/2007041904n.htm>.

notable multiple murders on college and university campuses.¹⁹ On the

19. One outstanding common feature of rampages is that the victims are targeted more or less at random but essentially because they are members of the killer's academic community. This study does not, for that reason, include the 1966 murders at the University of Texas, where Charles Whitman, a student and former Marine sniper, climbed the university tower, from which vantage point he shot and killed fourteen people and wounded thirty-one before he was killed by the police. Many of the victims were passers-by not associated with the University. It does not appear that Whitman, who was suffering from an undiagnosed brain tumor, had any grievance against the school. He apparently chose the University tower only because it was the highest building and therefore the best vantage point in Austin. See Wikipedia, Charles Whitman, http://en.wikipedia.org/wiki/Charles_Whitman (last visited May 24, 2009).

Excluded for the same reason is the January 1995 rampage by Wendell Justin Williamson, a law student at the University of North Carolina, who rampaged off-campus on a street in Chapel Hill with an M-1 rifle and 600 rounds of ammunition, killing two strangers and wounding a police officer.

Excluded, too, is the shooting at San Diego University's School of Engineering in September 1996, when Frederick Martin Davidson, a master's-degree candidate, shot and killed three professors during the defense of his thesis. Davidson not only purposefully chased and killed two professors as they attempted to escape but also purposefully spared three student monitors present in the room. The killer had a known grievance against the individual victims and targeted no one at random. *Graduate Student Held in San Diego Slayings*, WASH. POST, Aug. 17, 1996, at A02. The same is true of a June 2000 murder-suicide at the University of Washington, at which Jian Chen, a resident physician, shot and killed a mentor of his, Dr. Rodger Haggitt, professor of pathology and director of anatomical pathology at the UW medical center. Excluded for the same reason is the September 2000 murder-suicide at the University of Arkansas, when graduate student James Easton Kelly shot and killed himself and his thesis advisor, Professor John Locke.

Another multiple murder occurred on February 8, 2008, at the Baton Rouge campus of Louisiana Technical College (LTC), where Latina Williams, a nursing student, took a handgun out of her purse during a lecture, shot and killed the two women sitting next to her, then shot and killed herself well before the police arrived. No connection has yet been discovered between the shooter and her victims. The police and the press are not treating this shooting as a rampage, however, they say, at least in part because the student killer's targets were so confined and because she did not fire all the rounds in her pistol. Telephone Interview by Elena Curtis with Sgt. Don Kelly, Baton Rouge Police Dep't (Nov. 20, 2008). Very little information about the shooting has been made public. The Baton Rouge shooting may fit Dr. Newman's definition, but the evidence of randomness is inconclusive. Though it has happened once in the U.S. Postal Service, it is only very rarely that a woman rampages; nor has there ever been a school rampage by an African-American. For all these reasons, the multiple murders at LTC are not included as a rampage here.

Also excluded from the incidents considered are multiple shootings by outsiders. In 1996, Jillian Robbins, a 19 year-old who was neither a student nor an employee of the school, hid in the bushes outside Pennsylvania State University's student union building and fired a high-powered rifle at passers-by, killing one student and wounding another. Wikipedia, Hetzel Union Building Shooting, http://en.wikipedia.org/wiki/Hetzel_Union_Building_shooting (last visited May 24, 2009). In another excluded incident, Douglas Pennington came to visit his two sons at Shepherd University in September 2006 and shot both of them dead before killing himself. Nor does this article include the multiple shooting deaths of students by police and national guardsmen at South Carolina State University in 1968, Kent State University in 1970, and Jackson State University in 1970.

other hand, though they meet Newman's criteria, two of the cases presented here have very little rampage content. In the University of Iowa murders in 1991, only one of the six victims, a student-employee, was shot for no reason except that she happened to be there.²⁰ At the University of Arizona College of Nursing in 2003, the killer shot three professors, none of them at random. Two of the professors, however, were killed in their classrooms in front of their students. The killer was armed with over two hundred rounds of ammunition, and he ordered two students out of the classroom by name, leading the others to believe they were all to be shot, before he had a change of heart and let them go as well.²¹

Both the casualty rate and the number of random targets were higher in the Appalachian School of Law shooting in 2002 and the Case Western Reserve shooting in 2003. At Appalachian, the killer shot the Dean, who had personally befriended him but had also just counseled him about his poor academic performance. He shot his contracts professor, who had also been a kindly personal mentor but had recently graded his exam a near-failure.²² Had he stopped there, or been stopped, his multiple murder might not have been considered a rampage, but he continued to another part of the building and opened fire on students who were milling about in the lounge area waiting for afternoon classes to start. Of the student victims, one may have personally aggrieved him but the other three, sitting with her, had not. The killer ended the rampage only when his gun was empty.²³ At Case Western, the killer came looking for known individual enemies who managed to escape. He shot, at random, a graduate student, who died, and a professor and graduate, who survived. He shot at and missed many other people, also targeted opportunistically. His rampage was deflected, but not ended, by the arrival of a police SWAT team who engaged him in a gunfight all over the building for several hours while over ninety stranded and terrified people waited to be shot or rescued. Twice wounded by police, the gunman finally surrendered when his gun jammed and he was almost out of ammunition. Only then could the dead and wounded be removed from the building.²⁴

The cases with the highest rampage content, and with the most casualties, are the undergraduate school shootings at Simon's Rock College in 1992, Virginia Tech in 2007, and Northern Illinois University in 2008. At all three schools, the student killer was hunting no individualized targets, shot indiscriminately once the rampage began, and was interrupted only by external causes: at Simon's Rock, the killer's rifle jammed; at Virginia Tech and Northern Illinois, the killer shot himself as the police

20. *See infra* Part I.B.

21. *See infra* Part I.E.

22. *See infra* Part I.D.

23. *See id.*

24. *See infra* Part I.F.

swarmed into the building.²⁵

As the following cases illustrate in various ways, the essential characteristic of rampages—the highly symbolic significance of the targeted victim—appears to be a variable with a strong correlation to institutional dysfunction.²⁶ Like unhappy families, each institution is dysfunctional in its own way, but these stories present common themes and raise common questions in need of further study.²⁷ These stories suggest

25. For reasons already discussed, this article is concerned with rampages by students in the United States. Rampages by academic employees bear mention here as well, however, because they illustrate the institutional nature of the rampage phenomenon. Though they do so even more seldom than students, employees have rampaged through all floors of the ivory tower, from the cellars to the foot of the throne. In 1976, at California State University, Fullerton, a library custodian shot nine co-workers in the library basement and first floor. Seven died. The defense later claimed that some of the employees were showing commercial pornographic movies, in which the killer, who suffered from undiagnosed paranoid schizophrenia, believed (incorrectly) that his estranged wife was being forced to appear. He was found guilty of seven counts of murder and incarcerated in a state mental hospital. See Lauren Smith, *Major Shootings on American College Campuses*, CHRON. HIGHER EDUC. (Wash., D.C.), Apr. 17, 2007, <http://chronicle.com/free/2007/04/2007041705n.htm>.

In the other case, at Concordia University in Montreal, the shooter was a member of the faculty. In August 1992, Valery Fabrikant, a fifty-two-year-old associate research professor of mechanical engineering with a long history of threatening and abusive behavior, killed four colleagues and permanently crippled a faculty secretary when he found himself losing an academic power struggle for a tenured position. Wikipedia, Valery Fabrikant, http://en.wikipedia.org/wiki/Valery_Fabrikant (last visited May 24, 2009).

The Fullerton library rampage could have happened in many non-academic workplaces. In contrast, while it has no place in this article, the Concordia case merits study because its facts are resonant with the unique features of academic culture and governance. The norms and processes that make academic institutions different from other corporate entities for purposes of tort analysis can be seen most clearly when the system goes seriously awry. That the institution in question was in Canada does not significantly color the light it sheds on the ways in which the peculiarities of academia, including its faculty selection and tenure process and its emphasis on lucrative research and publication, may contribute to disorder and violence and prevent effective crisis intervention in the face of foreseeable danger. The author recommends Morris Wolfe, *Dr. Fabrikant's Solution, Essays, New & Selected*, available at <http://www.grubstreetbooks.ca/essays/fabrikant.html> (providing a lengthy journalistic account). See also WILFRED CUDE, *THE PH. D. TRAP REVISITED* 114–129 (2001); DENENBERG & BRAVERMAN, *supra* note 9, at 65–66.

26. See, e.g., Kenneth Westhues, *Mobbing and the Virginia Tech Massacre*, <http://arts.uwaterloo.ca/~kwesthue/vtmassacre.htm> (last visited May 24, 2009). Criticizing the Virginia Tech Review Panel Report for overemphasizing the personal history of the killer, Professor Westhues argues that rampages are best explained by situational analysis: “A more truthful (and therefore more useful) explanation of the Virginia Tech murders focuses not on . . . [the killer’s] personal identity but on the interplay between who he was and how other people treated him.” *Id.*

27. As a corollary, security specialists acknowledge that there is no one-size-fits-all institutional response to school violence and that each institution needs to engage in particularized self-study and threat assessment. See, e.g., Karin Fischer & Robin Wilson, *Review Panel's Report Could Reverberate Beyond Virginia Tech and Virginia*,

that we need to evaluate the effectiveness of our institutional conflict resolution processes and may need to value more highly collaboration and communication within the academic community. They suggest that it is risky as well as unbecoming of academics to tolerate incivility and disrespect in the form of bullying, harassment, and sabotage. These stories point to the dangers of fostering or ignoring race and class divisions on campus. They reinforce the call for adequate psychological support services. They encourage us to bear in mind the participatory interests and concerns of faculty and students (and, by extension, the families of the shooters and their victims).²⁸ Most of all, these stories demand that we engage in more critical self-examination, devoting our time and resources to understanding the complex dynamics of this frightening phenomenon.

CHRON. HIGHER EDUC. (Wash., D.C.) Aug. 31, 2007, <http://chronicle.com/free/2007/08/2007083101n.htm>.

Though it is a necessary step in a continuing inquiry process, this study does not purport to establish either case-specific or generalized causal connections between institutional conditions and rampages. The cautions noted by the authors of DEADLY LESSONS, *supra* note 13, apply with equal or greater force here:

[T]he aim of the case studies was not to generate certain, scientific knowledge about the causes, consequences, and effective methods of preventing and controlling these events. It was obvious from the start that these few cases could not support such an ambitious goal. As a scientific matter, there were too few data points to allow us to decide which of many possible explanations were true and which of many plausibly effective responses would actually work. The aim instead was to use the limited experience available to develop some plausible hypotheses about causes and effective interventions and to check commonly held assumptions for their plausibility.

Id. at 17.

At the same time, however:

Case studies . . . are essential and appropriate scientific tools for use in seeking for causes and effective interventions, especially in the study of important but rare events such as . . . school shootings. Only by first carefully analyzing the patterns that exist in the unfolding of these occurrences can one gather the information needed to develop studies from which findings can be generalized.

Id. at 8.

28. “Schools where students are detached from the institution or their fellow students, schools that foster or tolerate disrespect among students, and schools that foster race or class divisions among students are at greater risk of violence.” Helen Smith, Sandra P. Thomas, & Carol McCrehan Parker, *Violence on Campus: Practical Recommendations for Legal Educators* 14 (Univ. of Tenn. Legal Studies Research Paper No. 21, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=981497 (citing MARY ELLEN. O’TOOLE, NAT. CTR. FOR THE ANALYSIS OF VIOLENT CRIME, THE SCHOOL SHOOTER: A THREAT ASSESSMENT PERSPECTIVE 16 (1999), <http://www.fbi.gov/publications/school/school2.pdf>). In a related context, Denenberg & Braverman write: “The new profile of violence . . . gives equal emphasis to physical and psychological behavior, and . . . full recognition to the significance of minor acts of violence . . . Emotional abuse is recognized by the ILO and other bodies as ‘psychological violence.’” DENENBERG & BRAVERMAN, *supra* note 9, at 7 (quoting the International Labor Organization).

B. The University of Iowa, November 1, 1991

The first rampage shooting in higher education occurred on November 1, 1991, over five years before the first secondary school rampage.²⁹ The place was the graduate school of physics and astronomy at the University of Iowa.³⁰ The shooter, Gang Lu, was a twenty-seven year-old student from the People's Republic of China who had been at the University for six years. He was one of a number of exceptional Chinese students recruited by the University's physics department chair Dwight Nicholson in the 1980's to study plasma physics.³¹ Lu completed his doctoral dissertation in April 1991 and was awarded a Ph.D. in May.³² Though he was apparently not on the University's payroll, Lu stayed on at the physics department, working in the research laboratory.³³ Nicholson, and Lu's dissertation director Christoph Goertz, wrote strong letters of recommendation on his behalf to help him find permanent employment, but they did not offer him a position in the department as they did his former roommate and academic rival Linhua Shan.³⁴

According to the contemporaneous press accounts, Lu's grievance was that his dissertation had not been nominated for the University's prestigious Spriesterbach Dissertation Prize in the spring.³⁵ Instead, Goertz and his colleague Robert Smith, also on Lu's doctoral committee, nominated the dissertation of Linhua Shan.³⁶ When Shan received the \$2,500 prize in May 1991, Lu filed a complaint with Dwight Nicholson.³⁷ At the same time, he applied for a permit to buy a firearm. He bought a revolver and started target practicing at a local shooting range.³⁸

29. See *infra* note 107, listing high school shootings 1996–2002.

30. See, e.g., JO ANN BEARD, *THE BOYS OF MY YOUTH* (1998); Michel Marriott, *Gunman in Iowa Wrote of Plans in Five Letters*, N.Y. TIMES, Nov. 3, 1991, at A26 [hereinafter Marriott, *Five Letters*]; Michel Marriott, *Iowa Gunman Was Torn by Academic Challenge*, N.Y. TIMES, Nov. 4, 1991, at A12 [hereinafter Marriott, *Academic Challenge*]; Dennis Overbye, *A Tale of Power and Intrigue in the Lab, Based on Real Life*, N.Y. TIMES, Mar. 27, 2007, at F3; Amir Efrati, *Recalling a Snowy, Blustery November Day*, DAILY IOWAN, Nov. 1, 2002, at 1A; Crockett Grabbe, *A Tree of Legacies*, <http://www.physics.uiowa.edu/~cgrabbe/writing/uimurds.html> (last visited May 24, 2009).

31. Overbye, *supra* note 30.

32. *Id.*

33. *Id.*

34. Marriott, *Five Letters*, *supra* note 30. Lu's Chinese colleagues in his dissertation program described him after the shooting as "bad-tempered." Marriott, *Academic Challenge*, *supra* note 30. One of them, who roomed with Lu and Shan, warned Shan to move out because of Lu's "temperament." *Id.*

35. Overbye, *supra* note 30.

36. *Id.*

37. *Id.*

38. Marriott, *Five Letters*, *supra* note 30; Marriott, *Academic Challenge*, *supra* note 30.

Nicholson forwarded Lu's complaint about the Spriesterbach Prize nomination to Anne Cleary, the University's Associate Vice President of Academic Affairs. The complaint remained unresolved over the summer, while Lu became increasingly desperate about his financial situation and increasingly anxious that he would have to return to China if he did not soon find a job.³⁹

In late October, five months after Lu filed his complaint, Cleary concluded that it had no merit and denied the appeal.⁴⁰ On November 1, Lu attended the weekly research discussion that Goertz and Smith held on Friday afternoons with their graduate assistants in the department's Van Allen Hall.⁴¹ Linhua Shan was there, as were at least two other students. During the meeting, Lu pulled his handgun from his jacket, and shot Goertz, Shan, and Smith.⁴² He walked downstairs and shot Nicholson. Goertz, Shan, and Nicholson died almost instantly.⁴³ After shooting Nicholson, Lu walked back upstairs.⁴⁴ Two graduate students were in the meeting room tending to Smith, who was still alive.⁴⁵ Lu ordered the students out of the room at gunpoint, then shot Goertz, Shan, and Smith again. Smith did not survive the second round.⁴⁶

Lu left Van Allen Hall and walked to an administration building, Jessup Hall, crossing two streets and a green, a distance of several blocks.⁴⁷ There he asked the receptionist, a young student named Miya Rudolfo-Sioson, to summon Vice President Cleary.⁴⁸ When Cleary came out to see what he wanted, Lu shot and killed her, and he also shot Rudolfo-Sioson in the throat.⁴⁹ Lu left Cleary's office and walked upstairs.⁵⁰ As the police

39. Marriott, *Five Letters*, *supra* note 30; Marriott, *Academic Challenge*, *supra* note 30.

40. Marriott, *Five Letters*, *supra* note 30; Marriott, *Academic Challenge*, *supra* note 30.

41. Marriott, *Five Letters*, *supra* note 30; Marriott, *Academic Challenge*, *supra* note 30.

42. Marriott, *Five Letters*, *supra* note 30; Marriott, *Academic Challenge*, *supra* note 30.

43. Marriott, *Five Letters*, *supra* note 30; Marriott, *Academic Challenge*, *supra* note 30.

44. Marriott, *Five Letters*, *supra* note 30; Marriott, *Academic Challenge*, *supra* note 30.

45. Marriott, *Five Letters*, *supra* note 30; Marriott, *Academic Challenge*, *supra* note 30.

46. Marriott, *Five Letters*, *supra* note 30; Marriott, *Academic Challenge*, *supra* note 30.

47. Marriott, *Five Letters*, *supra* note 30; Marriott, *Academic Challenge*, *supra* note 30.

48. Marriott, *Five Letters*, *supra* note 30; Marriott, *Academic Challenge*, *supra* note 30.

49. Marriott, *Five Letters*, *supra* note 30; Marriott, *Academic Challenge*, *supra* note 30.

50. Marriott, *Five Letters*, *supra* note 30; Marriott, *Academic Challenge*, *supra*

arrived and ran into the building, he stepped into an empty conference room and shot himself, fatally, in the temple. From start to finish, the rampage lasted about twelve minutes. Miya Rudolfo-Sioson survived but was permanently paralyzed.⁵¹ According to contemporary reports, Lu left letters revealing that, besides Goertz, Smith, Shan, Nicholson, and Cleary, he also intended to kill the University's president and several other school officials.⁵² Only the shooting of Miya Rudolfo-Sioson was unplanned and apparently random.

Because they were employees of the University, the deaths of Goertz, Smith, Nicholson, and Cleary were covered by state workers' compensation. Miya Rudolfo-Sioson, though a student at the University, was working through a private temp agency, through which she also received workers' compensation benefits.⁵³ Linhua Shan, Lo's rival for the prize, had been hired by the physics department, but his employment papers had not yet been processed. His widow was compensated through the University's emergency-response process.⁵⁴ Though the University community and its surviving members suffered continuing psychological trauma, no tort actions appear to have been filed as a result of the shootings.⁵⁵ This may have been due at least in part to the promptness, adequacy, and integrity of the University's response to the crisis.

The University of Iowa's effectively coordinated capacity for dealing with the aftermath of the shootings is still considered a model.⁵⁶ The

note 30.

51. An hour before the shootings, Lu posted a letter to his sister in China in which he wrote, "Modern physics is self-delusion." BEARD, *supra* note 30, at 88. He continued, "All my life I have been honest and straightforward, and I have most of all detested cunning, fawning sycophants and dishonest bureaucrats who think they are always right in everything." *Id.* Shortly before the shooting, he was also reported to have written, "It is believed that there exists no justice for little people in this world, extraordinary action has to be taken to preserve this world as a better place to live." Megan L. Eckhardt, *A Day of Anguish*, DAILY IOWAN, Nov. 1, 2001, at 1A. He told his sister that he intended to take his own life. "You should not be too sad about that," he wrote, "for at least I have found a few traveling companions to accompany me to the grave." BEARD, *supra* note 30, at 88–89.

52. Lu left four letters with acquaintances to be posted to newspapers after his rampage. Marriott, *Five Letters*, *supra* note 30; Marriott, *Academic Challenge*, *supra* note 30. The letters were turned over to the investigators after the shooting and are now in the possession of the University of Iowa, which has not yet released them. Eckhardt, *supra* note 51; Marriott, *Five Letters*, *supra* note 30; Marriott, *Academic Challenge*, *supra* note 30.

53. See *Manpower Temp. Serv. v. Sioson*, 529 N.W.2d 259 (Iowa 1995). Miya Sioson was awarded a bachelor's degree in global studies with high honors from the University of Iowa (in absentia) in December 1991.

54. See DENENBERG & BRAVERMAN, *supra* note 9, at 63.

55. For accounts of the continuing psychological effects of a rampage, see, e.g., Jennifer Cassell, *Remembering the UI's Darkest Hour*, DAILY IOWAN, Nov. 1, 1996, at 1A.

56. DENENBERG & BRAVERMAN, *supra* note 9, at 62–65.

University's crisis response team engaged in extensive outreach to the members of the academic community who were traumatized, offering psychological support services and group debriefings; it also took steps to connect publicly with the Chinese community and the family of the killer.⁵⁷ It created an Emergency Preparedness Plan and enlarged the crisis response team.⁵⁸ It familiarized the entire campus community with the emergency plan, established an e-mail communication system, and made provisions for immediate and sustained psychological support.⁵⁹ It took steps to heighten awareness of troubled individuals.⁶⁰ It adopted a policy on violence and an active anti-violence organization.⁶¹ It continues an annual commemoration of the event and uses it "to promote social and institutional change."⁶²

C. Bard College at Simon's Rock, December 14, 1992

The second United States rampage occurred a little over a year after the first, at Simon's Rock College, a small, selective liberal arts college in Great Barrington, Massachusetts. Because all of its 350 students are admitted at the end of the tenth or eleventh grade of high school, some at only fourteen years of age, Simon's Rock is in some respects more like a private boarding school than a typical college, and is far from being a modern research university like the University of Iowa. Indeed, the shooter's parents were under the impression that they were sending their son to an elite eastern prep school.⁶³ According to *The New York Times*, "Simon's Rock has a reputation for encouraging self discovery and comforting bright but young students as they come to terms with who they are."⁶⁴ Virtually all its students live in dormitories with resident directors and advisors. Firearms have always been prohibited on campus. Of his pre-admission visit to the campus with his son, later killed in the rampage, Gregory Gibson wrote,

We . . . spent some time in an indoctrination session with parents of other prospective students . . . It was . . . explained to us how closely monitored these students would be, because, after all,

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*; see *infra* text accompanying note 102.

63. GREGORY GIBSON, *GONE BOY: A WALKABOUT* 258 (2000). For a detailed account of Wayne Lo's rampage in a recent study of six high-school shooters, see Jonathan Fast, *CEREMONIAL VIOLENCE: A PSYCHOLOGICAL EXPLANATION OF SCHOOL SHOOTINGS* (2008).

64. Anthony DePalma, *Questions Outweigh Answers in Shooting Spree at College*, N.Y. TIMES, Dec. 28, 1992, at A1.

they were only high school kids and a lot was expected of them.⁶⁵

Wayne Lo, the shooter, started at Simon's Rock in 1991, a couple of months before his seventeenth birthday.⁶⁶ Although outspoken at home, Lo was shy and withdrawn at Simon's Rock, where he was insecure about his English language skills and exposed for the first time to a liberal academic institution for which he was unprepared.⁶⁷ Though his first year passed without significant incident, his teachers reported that he "needed to express himself more."⁶⁸ As his sophomore year began, he was more outgoing, but there were increasing signs of psychological disturbance.⁶⁹ Lo spent most of his time with two other students described as "perennially angry."⁷⁰ His anger intensified when one of the "gang of three" was dismissed from school for threatening behavior toward a woman student.⁷¹ He became increasingly antisocial toward others both inside and outside the classroom and increasingly confrontational with his adult dorm

65. GIBSON, *supra* note 63, at 10.

66. Born in Taiwan, Wayne Lo moved to Billings, Montana when he was 13. His father owned a restaurant, and his mother was a Suzuki violin teacher. DePalma, *supra* note 64.

67. GIBSON, *supra* note 63, at 257. The Los did not visit the campus before Wayne enrolled. *Id.*

68. *Id.*

69. *Id.* at 228. Small, sensitive, and fearful of women, Lo did not reveal to his new friends that he was a gifted and well-trained violinist who had played with the Billings, Montana orchestra. *Id.* at 226. He worked out in the weight room and played sports with an intensity out of place among his peers. *Id.* He was obsessed with being "tough." *Id.* at 226–27. His friends teased him about it. *Id.* Only slowly did they realize that his obsession was a sign of emotional disturbance. *Id.* "He really believed that stuff," one of them said, "This is a terrible thing to say, but it was almost as if Wayne did those shootings to impress his friends." *Id.* at 227.

70. *Id.* at 101. "They'd sit at a table in the corner of the dining room and glower at everyone." *Id.* "It was scary," reported one of the resident dorm advisors. *Id.* Lo's set was known as the "hardcore group" because of their fondness for heavy metal and punk rock music. DePalma, *supra* note 64. Lo's psychiatrist observed that they were politically conservative as well. GIBSON, *supra* note 63, at 210. The hardcores were described by other students as elitist and racist. Students said that Lo "was known to hate Jews, blacks and homosexuals, and to have contended that the Holocaust never happened." DePalma, *supra* note 64. During the first semester of his second year, Lo gave himself a buzz cut and shaved the initials USMC on the back of his head. *Id.*; GIBSON, *supra* note 63, at 200. Assigned to write a 10-step program on any subject, he wrote a paper calling for the extermination of persons with AIDS. DePalma, *supra* note 64. But see Samantha Henig, *Eerie Similarities*, NEWSWEEK, May 2, 2007, <http://www.newsweek.com/id/35020/page/1> where Wayne Lo is quoted as saying:

The assignment was to come up with a 10-step program for anything, so being the smart ass that I am, I wrote a paper on how to eliminate AIDS, and at the end it was calling for the extermination of all people with AIDS—you know, tongue-in-cheek satire. But that's not how the class interpreted it.

Id.

71. GIBSON, *supra* note 63, at 101. Fifteen years later, during an interview in which he compared himself to the Virginia Tech shooter Seung-Hui Cho, Wayne Lo claimed that he, too, had been accused of stalking. Henig, *supra* note 70.

advisors, Floyd and Trinka Robinson, who lived in the dormitory with their children.⁷² He boasted that he had “the power to bring the college to its knees.”⁷³

Lo’s rampage took place during the final exam period just before Christmas. On Sunday, December 13, using his mother’s credit card, Lo placed a telephone order with Classic Arms, Inc., a mail order firearms and ammunition company in North Carolina.⁷⁴ He ordered two hundred bullets, several thirty-round magazines, and a tool kit. He arranged for the package to be sent by next-day air delivery to the College.⁷⁵

On Monday morning, December 14, UPS delivered a package from Classic Arms, Inc., to Wayne Lo. When the package reached the student mail room, someone noticed the return address and alerted the Dean of the College, Bernard Rodgers.⁷⁶ Rodgers and other school officials discussed what they should do about the package for over an hour and finally concluded that the school had “no authority” to interfere with the delivery of student mail.⁷⁷

Rodgers decided that when Lo came for his package, Trinka Robinson should accompany him to his room and watch him open it.⁷⁸ At the dorm room, however, Lo refused to cooperate.⁷⁹ While officials conferred again about how best to proceed, Lo managed to unpack and hide the ammunition in his room. When Robinson returned, this time with her husband Floyd,

72. He violated school policy by remaining in his dormitory room during Thanksgiving break when he should have stayed in a special dormitory for students who were not going home for the holiday, and he had a confrontation with dorm advisor Trinka Robinson about the infraction. DePalma, *supra* note 64; Christopher Shea, *Questions in the Wake of Shooting at Simon’s Rock*, CHRON. HIGHER EDUC. (Wash., D.C.), Jan. 6, 1993, at A39.

73. Jason Zengerle, *Something Happened*, N.Y. TIMES, Oct. 24, 1999, at 742, available at <http://www.nytimes.com/1999/10/24/books/something-happened.html?sec=&spn=&pagewanted=2> (reviewing GIBSON, *supra* note 63).

74. *Id.* Classic Arms, Inc., which now advertises on the internet, specializes in assault rifles and handguns and does a large business in ammunition. Another firearms dealer, TGSCOM, Inc., operates a website used by both the Virginia Tech and the Northern Illinois rampage killers. *Company: Gunman, Virginia Tech Shooter Used Same Web Dealer*, CNN, Feb. 15, 2008, <http://www.cnn.com/2008/US/02/15/university.shooting/index.html>.

75. William Glaberson, *Man and His Son’s Slayer Unite to Ask Why*, N.Y. TIMES, Apr. 12, 2000, at A1.

76. Sharon Cotliar, *Suspicious at College Before Shooting*, N.Y. TIMES, Dec. 25, 1992, at A12.

77. DePalma, *supra* note 64. Dean Rodgers was later said to have testified, “I thought there was an issue here of privacy rights.” Glaberson, *supra* note 75.

78. Cotliar, *supra* note 74.

79. *Id.* A college rule provided that two college officials had to be present during a room search, and Lo stood on his rights. GIBSON, *supra* note 63, at 67; Cotliar, *supra* note 74. Robinson went to her own quarters next door, where she telephoned the Dean for further instructions. *Id.* He told her to go back to Lo’s room and insist on seeing the contents of the package but not to search the room. GIBSON, *supra* note 63, at 67.

Lo let them in and showed them empty ammunition magazines, a plastic rifle stock, and an empty cartridge box and convinced the Robinsons and the Dean that the package's contents were innocuous.⁸⁰

Eighteen-year-olds could buy guns in Massachusetts, and Lo had been eighteen for just over a month. As soon as he left his meeting in the Dean's office, he ordered a taxi, and had himself driven twenty miles north to Pittsfield, where he bought a semi-automatic carbine at Dave's Sporting Goods.⁸¹ He paid about \$129.00 for the weapon, which he was able to buy legally without a firearms identification card or thirty-day background check.⁸² He returned to Simon's Rock by taxi with his new rifle concealed in a guitar case.⁸³

About three hours before the shootings, Jeremy Roberts, a student in Lo's small outer circle, alerted the College that Lo had a gun and intended to use it. Roberts called campus security but got only an answering machine. He then called Trinka Robinson. Without identifying himself, he told her that Wayne Lo had a gun and would hurt someone or himself "tomorrow."⁸⁴ Mrs. Robinson called the Dean, and the Provost, Ba Win.

80. Lo had previously arranged to meet with Dean Rodgers about transferring to another school, and he kept the appointment. Glaberson, *supra* note 75. The Dean reminded Lo that firearms were prohibited on campus. *Id.* "The boy was in my office," Rodgers is reported to have said later. *Id.* "He was calm, coherent, logical, and open. He told me he understood why we were concerned. There was nothing in his demeanor to indicate that he was a dangerous person or lying to us." Cotliar, *supra* note 74. Lo claimed to college officials and employees that the cartridge box was a Christmas present for his father and that the stock and magazines were for the semiautomatic rifle he kept at home in Montana. DePalma, *supra* note 64. Wayne Lo's father did not own a gun, but no one at the college called the Los in Montana to check on his story. Glaberson, *supra* note 75.

81. DePalma, *supra* note 64. As a student whose parents lived in Montana, Lo was considered not a state resident but an out-of-state buyer. *Id.* Under Massachusetts's law at the time, out-of-state buyers were not subject to state restrictions upon gun purchases. The law changed in 1996 at least in part as a result of public reaction to Lo's rampage. Introduced six times in four years by the state representative from the rural southern Berkshire district in which Simon's Rock is located, the new statute provides that non-residents are allowed to buy shotguns or rifles in Massachusetts only if their home state also requires a background check before permitting a gun purchase. See Trudy Tynan, *New Law Targets Out-Of-State Would-Be Gun Buyers*, NEW STANDARD, Sept. 9, 1996, <http://archive.southcoasttoday.com/daily/09-96/09-09-96/a03sr020.htm>.

82. Tynan, *supra* note 81.

83. Glaberson, *supra* note 75. Some time during that afternoon, after he returned from buying the gun, Lo discarded the ten-round magazine with which the SKS came equipped and rigged it to hold the thirty-round magazines he had ordered from Classic Arms, Inc. GIBSON, *supra* note 63, at 104. He showed up for an exam at 3:00 but left early. *Id.* Later, he went to a meeting Floyd Robinson had scheduled in the dormitory, where he had an argument with Robinson. *Id.*

84. Zengerle, *supra* note 73. According to a contemporaneous account,

Officials also disclosed that at some time after 9 P.M., while Mr. Lo was at a dorm meeting, Mrs. Robinson received a death threat on the phone from a

Win came to the dorm immediately, but Floyd Robinson refused to accompany him to Wayne Lo's room, and the Provost later admitted that he was afraid of being shot if he attempted to confront Lo.⁸⁵ As one account put it, "For at least 45 minutes before the shootings, [Dean] Rodgers and [Provost] Win knew that Lo had a gun and was in his dorm, yet neither man called the police or made any effort to quietly alert the other students."⁸⁶ Instead, the Provost evacuated the Robinsons to his own house, leaving Lo and the other students alone at the dorm, and there awaited the arrival of another resident advisor (one with military training) so that the two of them could return to the dorm and question Lo. While they were waiting, the rampage began.

At about 10:15 p.m., Lo left the dorm with the rifle, which he had altered to accommodate larger bullet clips, and two hundred rounds of ammunition. He walked to the school's main entrance, where Teresa Beavers was stationed as a security officer. She was talking on the telephone to her husband when Lo pushed the rifle through the door of the guard shack and fired two shots into her abdomen.⁸⁷ He then shot a young professor, Nacunan L. Saez, who happened to be driving in.⁸⁸ Saez was shot in the head and killed within seconds.⁸⁹ His car went off the road into a snow bank.⁹⁰ Lo began to walk toward the library while students, noticing that Saez's car was off the road and thinking there had been an accident of some kind, rushed out of the building to help.⁹¹ Lo shot and killed Galen Gibson, an eighteen-year-old student, and wounded nineteen-year-old student Thomas McElderry.⁹² He then headed for one of the dormitories, where he found another group of students in the lobby discussing the gunfire they were hearing.⁹³ He shot Joshua Faber, a

young male caller. The caller stated that it was important that Mr. Robinson be told that Wayne Lo had a gun and live ammunition and was going to kill the Robinsons and their family and others the following night, Tuesday Dec. 15th, the statement from the college said.

Cotliar, *supra* note 74; see DePalma, *supra* note 64.

85. GIBSON, *supra* note 63, at 88–89, 103.

86. Charles Taylor, *Too Noble*, SALON.COM, Oct. 12, 1999, http://www.salon.com/books/feature/1999/10/12/dead_boys/index2.html (reviewing GIBSON, *supra* note 63, and BRYN FREEDMAN & WILLIAM KNOEDELSEDER, IN EDDIE'S NAME: ONE FAMILY'S TRIUMPH OVER TRAGEDY (1999)).

87. Glaberson, *supra* note 75. Claiming that she could have protected herself from harm had the College warned her that Lo might be armed and dangerous, Beavers later sued the school for triple medical costs, a remedy available under the Massachusetts workers' compensation law upon proof of gross negligence. GIBSON, *supra* note 63, at 88–89. The college settled the case. *Id.*

88. DePalma, *supra* note 64.

89. *Id.*

90. *Id.*

91. Glaberson, *supra* note 75; DePalma, *supra* note 64.

92. Glaberson, *supra* note 75; DePalma, *supra* note 64.

93. Glaberson, *supra* note 75; DePalma, *supra* note 64.

fifteen-year-old, and another student, Matthew Lee David.⁹⁴ He then walked to the student union building, called the police, and surrendered.⁹⁵ The rampage lasted less than twenty minutes.⁹⁶

Had Lo done a better job of altering his rifle or had better equipment, the death toll at Simon's Rock would probably have been much higher. The rifle jammed after firing only a few rounds every time he changed the magazine.⁹⁷ He admitted that he ended his rampage only because his rifle would no longer fire.⁹⁸

Less than a month after the shootings, *The Chronicle of Higher Education* reported:

The acknowledgment by Simon's Rock officials that they knew of the package [from Classic Arms, Inc.]—even though they didn't know it contained ammunition—increases the odds that a victim or a relative may sue the college for negligence, several legal experts say. Few experts believe such a suit would be successful, however. And Simon's Rock officials say they did all they could be expected to do. "The college acted responsibly and conscientiously, based on the information in its possession at the time," said David M. Zarnow, the college's lawyer. "The acts committed were totally unforeseeable Legal experts say that for college officials to be held liable for Mr. Lo's actions, a plaintiff would have to show that the officials should have known Mr. Lo was dangerous, and should have foreseen that the contents of the package could be lethal in his hands No court would agree that the college should have anticipated the tragedy, said Sheldon E. Steinbach, general counsel for the American Council on Education. "In the absence of turning the campus into a police state," he said, "the school exercised all the supervision they could have."⁹⁹

94. Glaberson, *supra* note 75; DePalma, *supra* note 64.

95. Glaberson, *supra* note 75; DePalma, *supra* note 64.

96. Glaberson, *supra* note 75; DePalma, *supra* note 64.

97. LEONARD BEEGHLEY, HOMICIDE: A SOCIOLOGICAL EXPLANATION 104–105 (2003).

98. Glaberson, *supra* note 75.

99. Shea, *supra* note 72; *see also* DePalma, *supra* note 64 ("I don't know what he was thinking and I don't know why he did what he did," Dean Rodgers is reported to have said. "The temptation is almost irresistible to explain what happened by blaming someone, especially Wayne Lo. What's happening now is that he is being demonized in accounts that are presenting what essentially is a caricature of this boy."); Shea, *supra* note 72 ("Mr. Rodgers and others believe that the image of Mr. Lo as a demon comes only through hindsight. People know how the story ends, he said, so they say it was heading in that direction all along.").

By Wayne Lo's account, he received divine messages to buy the gun, order the ammunition, and conduct a murderous rampage through the Simon Rock campus in December 1992. Glaberson, *supra* note 75. He never agreed with his lawyers' insanity

Despite the initial institutional response, however, troubling questions were raised in the wake of the rampage. For example, the College's security director considered security at Simon's Rock substandard well before Wayne Lo's shooting spree revealed the weakness in the College's emergency response capabilities, but College officials had rejected his proposals for improvement, and on the day of the rampage he was not involved in official discussions about Wayne Lo's activities.¹⁰⁰ Nor was he notified when College officials learned on the evening of December 14 that Wayne Lo was about to use a gun on campus, even though he was the only member of the administration who was a trained police officer and lived only five minutes away.¹⁰¹

Questions were also raised about the College's response to the victims and survivors of the shooting. Communication with the faculty and staff about the rampage and its aftermath was poor, and discussion was discouraged.¹⁰² After one telephone call breaking the news of their son's rampage, College officials had no further communication with Wayne Lo's distraught parents.¹⁰³ Wayne Lo's friend Jeremy Roberts was asked to withdraw because "there had been many complaints from parents" and school administrators felt that his continuing presence on campus would "interfere with the healing process."¹⁰⁴ Relations between the College

defense, and still does not agree that he is now or has ever been legally insane. *Id.* The jury took his word for it when they sentenced him to life in prison without parole. *Id.*

100. GIBSON, *supra* note 63, at 108. Ron Ringo, hired as security director less than six months before the shooting, had unsuccessfully proposed such standard measures as after-hours check-in procedures at the student dormitories. *Id.* at 116. He complained that when his new security measures proved unpopular, the Simon's Rock administration cut him out of the communications loop. *Id.* Irvinia Scott, a resident director, who also served as a liaison between the security director and the College administration, was consulted, but her advice went unheeded, though she openly and vehemently disagreed with the official decision to deliver the package of ammunition to Wayne Lo. *Id.* at 108–09. Scott was also critical of the slowness and reluctance with which the College administration had earlier dealt with her concerns about Wayne Lo's friend, the student stalker. *Id.*

101. *Id.* at 116. Ringo had been an MP in the U.S. Marine Corps for eleven years and a Los Angeles County police officer for ten years. *Id.* He resigned from Simon's Rock "in disgust" shortly after the rampage. *Id.* He later told Gregory Gibson that the standard operating procedure when the anonymous call came in should have been to call the police, to detain Wayne Lo, and to secure his dorm room until it could be searched for firearms. *Id.*

102. *Id.* at 102. College personnel were discouraged from visiting Teresa Beavers in the hospital. *Id.* Censorship was imposed on staff and faculty. *Id.*

103. *Id.* at 257. In contrast, after Gang Lu's shooting at the University of Iowa, officials publicly urged forgiveness, sent a message to the Lu family that they shared its sorrow, and reassured the community of Chinese students that they were in no way responsible for Lu's actions. DENENBERG & BRAVERMAN, *supra* note 9, at 63.

104. GIBSON, *supra* note 63, at 230. Jeremy Roberts, who made the anonymous call warning the College, left without revealing that he was the caller. *Id.* He felt that he was being blamed for the rampage. *Id.* The parents of another student traumatized by the shooting complained that the College did not provide sufficient psychological

administration and the victims quickly became so adversarial that the College was sued by the estate of murdered professor Nacunan Saez, by injured security guard Teresa Beavers, by wounded student Matthew David, and by the parents of murdered student Galen Gibson.¹⁰⁵ Plaintiff Gregory Gibson wrote, “Part of our anger at Simon’s Rock College, and one of the main reasons for the lawsuit, was our belief that they had failed to respect our need for the truth.”¹⁰⁶

D. Appalachian School of Law, January 16, 2002

After Simon’s Rock, there were no rampage killings in higher education for nine years.¹⁰⁷ Then, in January 2002, there was a shooting at the Appalachian School of Law (ASL), a small, freestanding law school in the mountains of southwest Virginia. The Law School was located in Grundy (population 950), the county seat of remote and isolated Buchanan County,

support for the survivors, who were reminders of “an incident that the rest of the community wanted to put behind them.” *Id.* at 77.

105. *Bard College Settles Lawsuits Over Shooting Spree at Simon’s Rock College*, CHRON. HIGHER EDUC. (Wash., D.C.), Dec. 19, 1997, <http://chronicle.com/che-data/articles.dir/art-44.dir/issue-17.dir/17a00804.htm> [hereinafter *Bard College Settles*]

106. GIBSON, *supra* note 63, at 33. All of these lawsuits appear to have been settled. On December 11, 1997, almost 5 years after its confident assessment of the College’s legal invulnerability, *The Chronicle of Higher Education* reported that Simon’s Rock had settled the student lawsuits. *Bard College Settles*, *supra* note 105. The article also reported that the estate of Professor Nacunan Saez had also sued the college, but neither that case nor a suit filed by college security guard Teresa Beavers, had been settled. *Id.* The final amount of the Gibson settlement, which was paid by the college’s insurance companies, was not disclosed. *Id.* The school’s first offer, which the family rejected, was \$250,000. GIBSON, *supra* note 63, at 42.

107. During this time, beginning in 1996, there were at least nine rampage shootings in United States secondary schools. On February 2, 1996, in Moses Lake, Washington, 14-year-old junior high school student Barry Loukaitis shot and killed an algebra teacher and two students and wounded a third. Katherine Ramsland, TruTV, School Killers, http://www.trutv.com/library/crime/serial_killers/weird/kids1/index_1.html (last visited May 24, 2009). On February 19, 1997, in Bethel, Alaska, Evan Ramsey, 16, used a 12-gauge shotgun to kill the principal and a student at his high school. *Id.* On October 1, 1997, Luke Woodham 16, killed two students and wounded seven at Pearl High School in Pearl, Mississippi. *Id.* On December 1, 1997, in West Paducah, Kentucky, Michael Carneal, 14, killed three students and wounded five at Heath High School. *Id.* On March 24, 1998, four students and one teacher were killed and ten others were wounded at Westside Middle School by students Mitchell Johnson, 13, and Andrew Golden, 11. *Id.* On April 24, 1998, 14-year-old Andrew Wurst killed a science teacher and wounded another teacher and two students at a school dance at Parker Middle School in Edinboro, Pennsylvania. *Id.* On May 21, 1998, 15-year-old Kip Kinkel shot and killed two students and wounded twenty-two others in the cafeteria of Thurston High School in Springfield, Oregon. *Id.* On April 20, 1999, Eric Harris, 18, and Dylan Klebold, 17, shot and killed twelve students and one teacher and wounded twenty-three others at Columbine High School in Littleton, Colorado; they then killed themselves, bringing the total number of dead to fifteen. *Id.* On May 20, 1999, Thomas Solomon, 15, shot six students at Heritage High School in Conyers, Georgia.

in the heart of the Central Appalachian coalfields. Founded in 1994 to provide lawyers and leaders for communities in the nation's most generally impoverished and economically depressed region, ASL admitted its first students in 1997, inviting them to "Hear Yourself Think."¹⁰⁸ It had only about 100 students and was not yet even provisionally accredited by the ABA in August 2000, when it enrolled 120 new 1Ls, the largest and most racially diverse class it had ever attracted. Among the students of the Class of '03 was Peter Odighizuwa, known at the Law School as "Peter O," who was to shoot the Dean, a law professor, and four students eighteen months later.

Very little is known about the first four decades of Peter Odighizuwa's life.¹⁰⁹ Nigerian-born, he immigrated to the United States when he was about twenty-one years old and became a naturalized citizen. Until at least 1989, he lived in Portland, Oregon, where he was employed for seven years as a Tri-Met bus driver before being terminated for cause.¹¹⁰ He moved to Ohio in the mid-90's and attended Central State University in Dayton, where he received a degree in mathematics in 1999.¹¹¹ He was married to a Nigerian-born woman, Abieyuwa, who studied pre-nursing at Sinclair Community College from 1998 until 2000.¹¹² When Odighizuwa started

108. Traci Watson, *Student Kills 3 During Shooting Spree at Law School*, USA TODAY, Jan. 17, 2002, <http://www.usatoday.com/news/nation/2002/01/16/law-school-killings.htm>. The Law School had substantial political support. Mark Warner, who was Governor of Virginia when the rampage occurred, had served on the Law School's board of trustees, and United States Senator George Allen was a trustee at the time of the shooting.

109. Immediately after the shooting, the Law School removed Odighizuwa's records from the building and turned them over to its lawyer. The following account is taken primarily from press reports and the author's notes of conversations with colleagues and Law School officials between January 17 and March 2, 2002.

110. Maxine Bernstein, *Man Held in Deaths Has Portland Tie*, OREGONIAN, Jan. 19, 2002, at E06. Tri-Met is a public transportation authority. *Id.* Odighizuwa was ordered off his bus by a Tri-Met officer on a day in May 1989. *Id.* Refusing to comply, Odighizuwa drove away with the officer in pursuit and crashed on the interstate highway on the way to the Tri-Met garage. *Id.* He was terminated for "reporting to work under the influence of drugs or alcohol, deliberate destruction of the district's property and for posing an immediate or potential danger to public safety." *Id.* Odighizuwa hired an attorney and sued Tri-Met for unlawful discharge, claiming that the Tri-Met officer tried to run him off the road, but the claim was withdrawn within ten days. *Id.*

It is not known whether Odighizuwa revealed this incident in his application to the Law School. The Law School's application form did not require disclosure of employment terminations, and it does not appear that he was charged with a criminal offense in connection with the bus incident. The application did ask about previous litigation in which the applicant had been a part and for an explanation of any circumstances that might adversely affect the applicant's admission to the Law School or to the bar.

111. Amelia Robinson, *Slayings Suspect a Grad of CSU; Man Briefly Taught at Trotwood Schools*, DAYTON DAILY NEWS, Jan. 19, 2002, at 1B.

112. *Id.*

law school, he was forty-two years old and had four young children and no money.¹¹³

He finished the two-week Law School orientation course in August and enrolled for a full load of five classes. He served as a math tutor in the ASL's mandatory community service program.¹¹⁴ At some point, he was allowed to withdraw from all but two of his classes—Contracts and Civil Procedure—and he did not take his final exam in Contracts.¹¹⁵ In Civil Procedure, the only course he completed, he made a grade in the C range. Because he had not finished all the first-semester courses in the sequenced Law School curriculum, he could not enroll for spring semester, but the Dean, Antony Sutin, encouraged him to resume his studies the following fall. Odighizuwa found a job at the local Food City, and he continued to visit classes occasionally and read regularly in the law library.¹¹⁶

Odighizuwa stood out as a singular figure both in the Law School and in the small local community. People had a hard time understanding his

113. He wanted to practice public interest law, to help the low-income, the disabled, and immigrants. *Appalachian School of Law Killer Still Haunted by Paranoia, Delusions*, ASSOCIATED PRESS, June 11, 2004, <http://www.healthyplace.com/thought-disorders/articles/appalachian-school-of-law-killer-still-haunted-by-paranoia-delusions/menu-id-64/>. [hereinafter *Delusions*]

A neighbor reported that when the Odighizuwa family arrived in Grundy, "They had nothing . . . They had mattresses on the floor." Nara Schoenberg, *Appalachian Tragedy*, CHI. TRIB., Mar. 5, 2002, at C1.

114. He had served as a substitute elementary school teacher 4 times during his undergraduate days in Ohio. Robinson, *supra* note 111.

115. On December 12, he was injured and totally destroyed his car in a single-vehicle accident. He described the accident in a letter to the unofficial student newspaper, *Res Ipsa*, for publication in its April 2001 issue. Entitled "REALITY: Letter From a Classmate," the letter concluded:

The day after the accident, [a]s my neighbor was taking me home from dropping off my children at Mountain Mission School, I asked her to stop by the church so that I could give thanks to God that I am alive. I wept and told God that this accident could have been worse had my wife and kids been with me when the accident happened.

I was under the impression that my insurance was good for 90 days but it had expired few [sic] weeks earlier and I did not remember renewal deadlines due to school and financial stresses. But to my astonishment my neighbor had organized tons of gifts, food items, and some cash donation from Grundy residents. Our basement was full of toys for our boys. Buchanan general hospital came up with state funds to pay all the past and present medical bills for the entire family and myself because we met certain income guidelines.

My busted eardrum, neck and shoulder injuries are slowly healing.

Peter O. Odighizuwa, *Reality: Letter from a Classmate*, RES IPSA, Apr. 2001, at 12 (on file with author). The editor's note in the original stated "Peter extends his thanks to the ASL community for their help. He wanted his classmates to know his story." *Id.*

116. His popular and sociable wife "Abby" had found work at the county hospital; ASL student Zeke Jackson, one of Odighizuwa's few friends, said that he did not tell his wife that he was not enrolled in school. Schoenberg, *supra* note 113.

Nigerian accent.¹¹⁷ Living in a community plagued by poverty and unemployment and attending a Law School with little financial assistance to offer, he distinguished himself by making public appeals for personal charity.¹¹⁸ Both the townspeople and the academic community responded generously.¹¹⁹ Many students, however, saw him as demanding and ungrateful. Struggling themselves, they resented his apparent preferment.¹²⁰ His personal interactions were often abrupt and suspicious, and he had several angry outbursts, particularly against women, even in his first semester.¹²¹ As time went on his behavior became more and more

117. One student reported, "The teachers would really try to help him They'd look at him closely and let him repeat himself, up to three times." Lee Mueller, *Student Held in Killings Asked for Help, Got It, Classmates Say*, LEXINGTON HERALD LEADER (Ky.), Jan. 18, 2002, <http://www.cse.unsw.edu.au/~lambert/guns/appalachian/nd/tackle/gun/114.html>. The article continued, "Mostly, these episodes appeared to make him angry . . ." *Id.*

118. Early in his first semester he brought his 4 children to a meeting of the Student Bar Association to plead for money to pay his electric bill. Later that semester, he took over the podium in his Civil Procedure class and again appealed for money. Students in the class took up a cash collection and left the money in his mailbox. Schoenberg, *supra* note 113.

119. Dean Sutin was believed to have arranged an anonymous gift of about \$1,500 so that the student could replace his car and buy food and clothes for his children. *Id.* Students also contributed to his family's support. *Id.*

120. In the October 2000 issue of *Res Ipsa*, the unofficial student newspaper, titles bestowed upon Odighizuwa in the "I Can Name That Song" column were "More" and "Macho, Macho Man." *I Can Name That Song . . .*, RES IPSA, Oct. 2000, at 4 (on file with the author). In March 2001, his title tune was "What Have U Done for Me Lately?" *I Can Name That Song . . .*, RES IPSA, Mar. 2001, at 13 (on file with the author).

At least some students, both white and African-American, believed that the institution was engaged in race-based favoritism towards Odighizuwa, which the whites resented and the African-Americans disdained. *See infra* note 161. Student Services worker Chris Clifton said after the shooting, "He was a minority, so he was admitted." RON COLEMAN, THE APPALACHIAN SCHOOL OF LAW MURDERS 9 (2005).

Odighizuwa did not identify himself as an African-American. Schoenberg, *supra* note 113. His fellow students of color reported that when he arrived in Grundy he was almost completely ignorant of the United States civil rights movement. *Id.* When his classmates organized the Law School's first chapter of the Black Law Student Association (BLSA) in 2000, he joined, but he quickly became suspicious of the few friends he had made in the organization and complained to the Dean that the BLSA president was "harassing" him with information. *Id.* After the shootings, the BLSA president sent an e-mail to the ASL community strongly disassociating BLSA from Odighizuwa and stating that Odighizuwa had not been a BLSA member since February 2001. *Id.*

121. The student victims' lawsuits alleged that in 2000 Odighizuwa "verbally assaulted and threatened female students and staff and that several students had reported they were afraid of him." Kathy Still, *Multimillion-Dollar Lawsuits Filed in Law School Shooting*, BRISTOL HERALD COURIER (Va.), Jan. 16, 2004, at A1. He also allegedly refused to sit next to women, and a woman student claimed that he shook his fist in her face during class. *Id.* Student Services worker Chris Clifton confirmed that the Professor reported the incident and had it placed in Odighizuwa's student file.

volatile. Students nicknamed him “Shooter,” and one student reported, “‘We used to sit around and talk about how Peter’s gonna shoot somebody.’”¹²² Some of them went to the Dean about their concerns.

Odighizuwa, on the other hand, felt persecuted by his fellow students and feared someone might shoot *him*, especially after he found a spent shell casing in his yard.¹²³ Shortly before he returned to the Law School to finish his first-semester courses, he bought a semi-automatic pistol in a neighboring county and started target practicing in the woods. He later told a reporter that he carried the gun to the Law School all semester “for protection.”¹²⁴

When classes resumed in the fall of 2001, Odighizuwa was back as a 1L, taking a nine-hour course load: Torts (from Professor Dale Rubin), Contracts (from Professor Thomas Blackwell), and Legal Writing (from Professor Wendy Davis).¹²⁵ His former classmates, now 2L’s and 3L’s, pegged him to incoming students as “a restart”—a code word, at ASL, for failure.¹²⁶ There were immediate signs of further trouble. Odighizuwa filed a grievance against ASL’s Director of Student Services, Vickie Keen, and her administrative assistant Chris Clifton, complaining of a conspiracy to deny him access to sources of financial aid.¹²⁷ He sent a copy of the

COLEMAN, *supra* note 120, at 20.

122. Schoenberg, *supra* note 113 (quoting ASL student Tom Wallen).

123. He called the sheriff’s department and told them that he was afraid someone was trying to kill him. The police visited his house and examined the shell but could not substantiate any actual threat to Odighizuwa. He continued to complain to county law enforcement officials until they suggested he could be charged with obstructing justice. Mueller, *supra* note 117. Odighizuwa’s friend Zeke Jackson told a similar story about the change in him after his first semester. Schoenberg, *supra* note 113. “He really started to think people were out to get him, [that they] just didn’t want to see him make it through law school.” *Id.*

After his sentencing, Odighizuwa told a reporter that he had no friends at the Law School. *Delusions*, *supra* note 113. “‘I would show up in the library and everybody would leave. They would go like this when I came around,’ Odighizuwa said, coughing and snorting vigorously. ‘Like that.’” *Id.* Odighizuwa was corroborated by others who said that a group of students, knowing him to be suspicious and hostile, enjoyed following him around pretending to take pictures of him, or pretending to take notes; that they would stop talking whenever he came by; that they would turn out the lights in the library when he was trying to study; that one of them deliberately erased his work from a computer in the law library because he shook his fist at her in class. Author’s recollection based on post-rampage oral reports.

124. *Delusions*, *supra* note 113. The gun was legally purchased. Other students besides Odighizuwa also carried firearms in their cars. *See, e.g., infra* note 142. ASL did not have a policy addressing firearms on campus, though it created one shortly after the shootings.

125. He had already passed Civil Procedure, and he did not take Property.

126. Incoming African-American student Kenneth Brown said that the first time he met Odighizuwa, “he actually came up and shook my hand and asked my name. Then, like five minutes later he came back and said, ‘You know I’m not crazy, but people tick me off sometimes.’ Out of the blue.” Mueller, *supra* note 117.

127. Before ASL was provisionally accredited by the ABA in February 2001, its

grievance by e-mail to most of the faculty. Though the Dean intervened to arrange a student loan of \$19,000.00, the grievance itself was never resolved, and as the semester continued, Odighizuwa's relationship with the Student Services staff deteriorated further. Director Keen considered him so abusive and threatening that she barred him from the office unless he was accompanied by one of the Deans or the president of the Student Bar Association.¹²⁸ Women who worked in the business office and the library complained to the Law School administration that he cursed and abused them and that they were frightened for their physical safety.¹²⁹

Law School officials and Odighizuwa's few friends were aware that he had troubles outside the Law School as well.¹³⁰ By the end of the fall semester he was deeply depressed, and his situation did not improve over the Christmas break.¹³¹

students did not qualify for federally-guaranteed student loans. Fall 2001 was the first time that Student Services had ever administered the federal loan program, for which special training is required. In most circumstances, students must be taking a full course load (considered to be twelve credit hours in a Law School) in order to qualify for a loan, and Odighizuwa was taking only nine hours. Author's recollection based on experiences at Appalachian School of Law.

128. DAVID CARIENS, JR., A QUESTION OF ACCOUNTABILITY: THE MURDER OF ANGELA DALES 35–36 (2008). “‘He was very hostile,’ [Chris] Clifton said. ‘This student had previously threatened the entire office of student services. He had even stolen his file once before.’” Rex Bowman, *Three Killed at Law School; Dean Among Dead; Students Tackle Suspect*, RICHMOND TIMES DISPATCH (Va.), Jan. 17, 2002, at A1.

129. Odighizuwa also threatened his Legal Writing professor and tried to transfer out of her class. When the Associate Dean denied the transfer, Odighizuwa filed a grievance against the Professor for treating him unfairly—a grievance he again circulated to most of the faculty. When the Associate Dean denied the grievance, Odighizuwa stopped attending the Legal Writing class. Author's recollection based on conversation with Paul Lund, Dean, Appalachian School of Law (Jan. 17, 2002).

In September Odighizuwa volunteered to tutor elementary school students in mathematics as he had before, but the (female) professor who supervised the project was convinced that his attitude and behavior were unsuitable, and the (female) director of the community service program agreed. Neither woman, however, dared tell Odighizuwa because they were afraid of how he might react. They insisted that the Associate Dean handle the matter; he assigned Odighizuwa to Professor Tom Blackwell's home-repair project instead. Author's recollection based on conversations with Professor Gail Kintzer (Jan. 17–20, 2002).

130. In September, Odighizuwa's wife charged him with domestic violence for hitting her in the face; she left him shortly after that and took the children. Schoenberg, *supra* note 113. One of his new classmates who had befriended him said that by November, he was deeply depressed. Rex Bowman, *I Was Sick. I Need Help*, RICHMOND TIMES DISPATCH (Va.), Jan. 18, 2002, at A1 (quoting ASL student Kenneth Brown); *see* COLEMAN, *supra* note 120, at 34–35.

131. There was neither a psychiatrist nor a Ph.D. psychologist in Buchanan County. Odighizuwa went to see local physician Jack Briggs during the fall for stress-related symptoms. Briggs put him on medication (the exact nature of which was never disclosed to the public). On the day of the rampage, Briggs, who was the first medical doctor at the scene, described Odighizuwa as “a time bomb waiting to go off.”

At ASL, final grades in the fall courses were not released to the students until they returned from the winter break and began spring classes. Odighizuwa had enrolled for spring semester, but when he got his grades, they were not good: a D, a D+, and an F.¹³² He apparently decided to withdraw from law school while he appealed them.¹³³ On Tuesday, January 15, when he came to school to process his withdrawal, he had a bitter altercation with Chris Clifton in Student Services, who told him that his financial aid payments would stop as soon as he withdrew and that he would have to start repaying his student loans.¹³⁴

Laurence Hammack, *Mental Test Sought for Suspect in Killings; Lawyers Ask Judge to Appoint Psychiatrist*, ROANOKE TIMES & WORLD NEWS (Va.), Jan. 30, 2002, at B1.

132. After the shooting, Chris Clifton in Student Services told reporters that Peter Odighizuwa had been dismissed for academic failure. *See, e.g.*, Bowman, *supra* note 128. The press universally reported that Odighizuwa went on a rampage because he had flunked out of the Law School. But that does not appear to have been Odighizuwa's understanding from the Law School Deans.

The following is taken from the author's notes of a conversation with Associate Dean Paul Lund on January 17, 2002, about 27 hours after the shooting:

Paul said:

Peter Odighizuwa had not been dismissed from school. Everybody's wrong about that. He was taking only three classes. He still hadn't taken Property. Tony always maintained that students should get to take the equivalent of a full semester before we dismissed them. I'm sure Peter understood that. He would have gotten his grades last Friday or Saturday, or Monday at the latest—you know he always insisted that they be mailed to his house. They weren't good—a D+, a D, and an F, and the F was in Legal Writing. I'm sure Tony counseled him that he ought to reconsider his position. But we were going to let him continue if he decided that was what he wanted to do.

Conversation with Paul Lund, Dean, Appalachian Law School (Jan. 17, 2002).

What he decided to do was to withdraw from Law School. He appeared in Paul's office on Tuesday, the day before the shooting. Paul certainly didn't try to talk him out of it. In fact, he could barely contain his relief. Peter came back to see Paul Wednesday morning at about 9:40, three and a half hours before he started killing people. He asked about the procedure for appealing his grades. Then Peter left Paul's office and sat out in the hall. Paul assumed he was waiting to see Dale [Rubin, the Torts Professor]. He sat for a long time. When Paul left for class at 10:50, he was still there. Paul went to lunch after class and didn't get back until after Peter was in custody. *Id.*

133. *See* Hammack, *supra* note 131. The student victims' lawsuit alleged that the Law School encouraged Odighizuwa to withdraw because it tarnished the Law School's image with the ABA to dismiss students of color. *Id.*

134. Clifton told reporters, "I don't think Peter knew at this time that it [the dismissal] was going to be permanent and final." Chris Kahn, *School Massacre Accused "Sick,"* THE DAILY TELEGRAPH, Jan. 19, 2002, available at <http://www.cse.unsw.edu.au/~lambert/guns/appalachian/nd/tackle/after18/byline/068.html>. Odighizuwa thought he was being treated unfairly and was angry. *Id.* He demanded to see his transcript. *Id.* The commotion was so loud that it could be heard in other offices. *Id.* After Odighizuwa stormed out of Student Services, Dean Sutin came in to see what had happened. He asked if anyone knew where Odighizuwa had gone. One of the staff is said to have responded, "Well, he's probably over at the bell tower in the courthouse with a scope." CARIENS, *supra* note 128, at 38.

The next day, January 16, he returned to the campus early in the morning.¹³⁵ He wanted to see his Professors before appealing his grades, as required by school policy. He spoke with Associate Dean Paul Lund.¹³⁶ He was seen pacing outside the door to Professor Blackwell's classroom.¹³⁷ He had a meeting with Professor Rubin that turned into an acrimonious shouting match so loud that it was overheard by students in the hallway.¹³⁸

He apparently left the Law School sometime during the morning and returned at lunchtime.¹³⁹ He carried his pistol in his pocket and two loaded eight-round ammunition clips. He went first to the Dean's office, but Tony Sutin was busy with another student. He found Tom Blackwell in his office and shot him from the doorway, hitting him at close range and killing him instantly. Bypassing two secretaries, who were frozen in terror, Odighizuwa walked back to the Dean's office and shot Tony Sutin, who died within minutes. Pausing in the stairwell to reload, he walked down to a lounge area where students were gathering for a large afternoon class. He spoke briefly with a woman classmate about a book he had borrowed, and after she went on into the classroom, he crossed the lounge to a group of four women students, only one of whom he knew, and pulled out his gun again.¹⁴⁰ He shot Angela Dales first, then Rebecca Brown, then Madeleine Short, then Stacey Beans. When his gun was empty, he went outside toward the parking lot, laid his gun down, and was tackled by two unarmed students, Todd Ross and Ted Besen, one of whom was a former police officer.¹⁴¹ He was arrested and handcuffed within minutes and taken across the street to the county jail.¹⁴²

135. Arriving at 8:00, a student saw Odighizuwa in the parking lot and told the Dean. CARIENS, *supra* note 128, at 40.

136. *See supra* note 132.

137. CARIENS, *supra* note 128, at 40.

138. The students said that Rubin was heard shouting that Odighizuwa was a "disgrace." *See* Reynolds Harding, *From Tragedy, Opportunity*, S.F. CHRON., Feb. 3, 2002, at D3. Rubin later told reporters that Odighizuwa's last comment to him was, "if you go to church, pray for me." *Id.*

139. He called the author at 11:32, leaving his home telephone number. He said he needed to meet with her about "some problems I am having with the Law School." He also went to a job interview in Vansant.

140. Angela Dales had been a student recruiter in the Student Services Office during Odighizuwa's first year. She had been in law school for only a semester. Cathy St. Clair, *Gone, But Not Forgotten*, VA. MOUNTAINEER, Jan. 19, 2002, at 6A.

141. Laurence Hammack, *Rampage Leaves 3 Dead; Suspect Is Being Held in the Buchanan County Jail on Capital Murder Charges*, ROANOKE TIMES & WORLD NEWS (Va.), Jan. 17, 2002, at A1; Laurence Hammack, Kimberly O'Brien, & Linsey Nair, *Shooting Hits Many Lives*, ROANOKE TIMES & WORLD NEWS (Va.), Jan. 20, 2002, <http://www.cse.unsw.edu.au/~lambert/guns/appalachian/nd/tackle/gun/>.

142. Ted Besen, who was a police officer in Wilmington, North Carolina, before law school, went to his car for the handcuffs after Odighizuwa was apprehended. Besen was a third year law student who had been in a second-floor classroom when a professor sounded the alarm that Odighizuwa was in the building and shooting. In the

John Briggs, a local doctor with emergency room experience, was summoned within minutes and arrived with two nurses, but no ambulances came.¹⁴³ Students quickly loaded their injured classmates onto makeshift stretchers and into SUV's and sped to the local hospital, a couple of miles away.¹⁴⁴ Angela Dales, shot three times and bleeding profusely, was eventually taken to the hospital in the funeral home's hearse because the ambulance had not arrived. She bled to death shortly after arriving in the emergency room.¹⁴⁵

Angela Dales was a Grundy native; Tony Sutin and Tom Blackwell and their families were among the best-loved both at the Law School and in the town, and the Law School itself had great symbolic and political

class with Besen were Tracy Bridges, a former sheriff's deputy from rural North Carolina, and Mikael Gross, a former alcohol law enforcement agent from Charlotte—neither of them deputized in Virginia. As they told it, Bridges and Gross helped the class exit down the back stairs and then ran to their cars for the handguns they habitually brought to the Law School. Gross also paused for a flak jacket he had brought with him. Besen, who was not armed, was the first to reach the shooter, who by then had stopped shooting and run outside through the main entrance. Once Odighizuwa was outside, Todd Ross, his tutor, persuaded him to lay down his empty gun. When Besen ran up, Odighizuwa took a swing or two. Besen and Ross tackled him as Bridges and Gross closed in. Odighizuwa was still very agitated. He kept saying, "I had to do it. I had nowhere else to go. I didn't know what else to do." Cathy St. Clair, *Grand Jury Will Hear Odighizuwa Charges: Witnesses, Victims Recount Horrors of January 2002 Day*, VA. MOUNTAINEER, Oct. 2, 2003, at 1A, 9A. Bridges and Gross held him while Besen fetched his handcuffs. The jail was only a few hundred yards away from the Law School, across the Slate Creek footbridge; Odighizuwa was incarcerated before help arrived for the wounded students. *Id.*; see, e.g., Bowman, *supra* note 128; Hammack, O'Brien, & Nair, *supra* note 141; Mueller, *supra* note 117; Jon Ostendorff, *Area Officer Helps Wrestle Law School Gunman to the Ground*, ASHEVILLE CITIZEN-TIMES (N.C.), Jan. 19, 2002, <http://www.cse.unsw.edu.au/~lambert/guns/appalachian/nd/tackle/gun/use/063.html>; Diane Suchetka, *Ex-Charlottean: I Helped Nab Suspect*, CHARLOTTE OBSERVER (N.C.), Jan. 18, 2002, <http://www.cse.unsw.edu.au/~lambert/guns/appalachian/nd/tackle/gun/use/095.html>.

The day after the shooting Bridges appeared on national television, being interviewed by Katie Couric on NBC's *Today Show*. The interview contributed to a public perception that intervention by armed students was responsible for stopping the rampage at ASL. The legend was used to justify the position of the Attorney General of Utah that public universities could not prohibit licensed students from carrying lawfully obtained firearms on campus. See *supra* note 6. Bridges did not testify at Odighizuwa's preliminary hearing. ASL is certainly a testament to the courage, resourcefulness, skills, and abilities of the student body, who kept and restored order, tended the wounded, transported their classmates to the hospital, and subdued the killer. The facts, however, as adduced at the only judicial hearing ever held on the events, do not appear to support arming students as a preventive to mass violence. See Rick Montgomery, *Rampage Report Only Part of Story, Gun Lobby Says*, Kansas City Star (Mo.), Mar. 6, 2002, at A1.

143. Hammack, *supra* note 141; Hammack, O'Brien, & Nair, *supra* note 141.

144. Hammack, *supra* note 141; Hammack, O'Brien, & Nair, *supra* note 141.

145. Hammack, *supra* note 141; Hammack, O'Brien, & Nair, *supra* note 141.

significance to the larger community.¹⁴⁶ The entire town mourned the dead. Odighizuwa was arraigned within 24 hours and immediately transported to a larger prison over 100 miles from Grundy. The town filled with reporters, and for a few days the Law School murders were international news.¹⁴⁷

After a week, the Law School reopened, students returned, and classes resumed.¹⁴⁸ Soon Law School officials were pleased to report that applications for admission had increased substantially.¹⁴⁹ Visiting the Law School two months later, the ABA site inspector reported:

The tragedy has had unexpected, beneficial consequences. It brought students, faculty, staff and the community closer together, not just in their grief but in their support for each other and for continuation of the work of the school. The event and its aftermath showed the members of the Law School community that they had the will and the ability to meet adversity. The

146. Almost all of the region's judiciary was involved in the operation of the Law School or providing externship sites for law students. Buchanan County was financially invested in the Law School, and the county appointed the majority of the Law School's trustees. Author's recollection based on experiences at Appalachian School of Law.

147. Lucius Ellsworth, the Law School's President, was attending a legislative session in Richmond on the day of the shootings. He arrived in Grundy in time for the 9:00 p.m. press briefing, accompanied by two public relations assistants, in a helicopter provided by the Governor. Cathy St. Clair, *Tragedy: Former Student Charged with 3 Counts of Capital Murder*, VA. MOUNTAINEER, Jan. 19, 2002, at 2. "We are deeply shocked and saddened by this horrific tragedy," Ellsworth said. He continued:

At this time, we find little meaning in these senseless activities. We know we can come together as the law school family in a loving, caring, supportive way. Each of us is suffering, but as a family, we can find strength to pass through this terrible dark and tragic valley.

Bowman, *supra* note 130.

The Law School focused on the contributions that the shooter's dead victims had made to the Law School's accreditation efforts and urged the community to carry on that work. On January 30, 2002, for example, the Interim Dean wrote to prospective students, "Angela, Tom, and Tony were deeply committed to ASL and to its mission, and it is in their memory that the faculty, staff, students, and trustees of ASL will carry on and build an even stronger law school community." Letter from Paul E. Lund, Interim Dean and Associate Professor, Appalachian School of Law, to Prospective Students (Jan. 30, 2002) (on file with author).

Less than a month after the shootings, another senior faculty member was quoted in *The San Francisco Chronicle*, "Fantastically, not only did we get generalized publicity, but sympathetic publicity . . . Applications have increased, interest in faculty openings is up and 'our name,' says [Dale] Rubin, 'is on the lips of everyone now.'" Harding, *supra* note 138.

148. Most of the Law School's approximately twenty African-American students left town immediately after the shootings and did not return until the Law School reopened. Author's recollection based on experiences at Appalachian School of Law.

149. Harding, *supra* note 138; *More Apply to Law School After Shootings on Its Campus*, N.Y. TIMES, Apr. 15, 2002, at A17.

tragedy brought the Law School to the nation's attention. It enlightened people outside Appalachia about the mission of the school . . .¹⁵⁰

Yet there were signs of disconnection and continuing alienation as well.¹⁵¹ As at Simon's Rock, the shooting at Appalachian left questions about the institution's role in events. There were specific questions about what action, if any, it had taken in response to reports from students, staff, and townspeople of Odighizuwa's increasingly abnormal and violent behavior in the days, weeks, and months before the rampage. There were also larger questions about the wisdom of its student retention practices, about the adequacy of its resources for dealing with problematic students, about the quality of its internal staff relations and communications, and about its response to uncivil and threatening behavior.¹⁵²

Almost two years passed. The Law School, which had only 172 students when the killings occurred, reached full capacity at 355 students.¹⁵³ Criminal proceedings against Peter Odighizuwa were delayed while he received psychiatric treatment for eighteen months.¹⁵⁴ During this time, several of the Law School's faculty and staff resigned.¹⁵⁵

150. DEAN JAY CONISON, ABA INSPECTION REPORT ON APPALACHIAN SCHOOL OF LAW MARCH 13–15 2 (2002).

151. One sign of ongoing trauma was the way in which the Law School distributed final grades in January 2003, a year after the shooting. For the first time in the Law School's brief history, grades were distributed in the Lion Lounge, the room where Peter Odighizuwa shot four students. Armed guards were present, with their holsters unsnapped. Most faculty left the building. E-mail from Amie Sloan, Law Review Editor in Chief, to ASL faculty and staff (Jan. 10, 2003 4:57 p.m.) (on file with author).

152. For example, about a year before the shooting, Angela Dales received the following e-mail from a student after her computer accidentally sent a virus to another student:

You fucking cocksucker, If you ever try to send me another virus again, I will track you down, cut your nipples off, and stick jumper cables in you and connect them to my truck. I'm not bullshittin [sic]. Maybe the sheriff will find you hanging from a tree in Longbottom.

CARIENS, *supra* note 128, at 82.

Police confirmed that the message was sent from a computer belonging to an ASL student, but neither the Law School nor the police took further action. *Id.* That same semester, students entered the law library late at night and removed the research of a student who was working on a paper on lesbians in Appalachia for the author's seminar on women's issues. The Law School never apprehended the culprits. Author's recollection based on experiences at Appalachian School of Law.

153. Cathy St. Clair, *ASL Celebrates Largest Opening Day Numbers at 371*, VA. MOUNTAINEER, Aug. 26, 2004, at A1.

154. Cathy St. Clair, *Attorneys Seek Competency Evaluation*, VA. MOUNTAINEER, June 13, 2002, at A1; Cathy St. Clair, *Two Competency Evaluations Sought: Court Orders Assessments of Accused ASL Gunman*, VA. MOUNTAINEER, June 27, 2002, at A1; Cathy St. Clair, *supra* note 120; *Odighizuwa Said to be 'Competent' to Stand Trial*, VA. MOUNTAINEER, July, 2008, at A1.

155. Chris Clifton resigned, as did the Human Resource Manager and a (female) member of the business office staff. So did the author. Author's recollection based on

On January 16, 2004, student victims Madeline Short, Stacey Beans, and Rebecca Brown sued the Law School, its President, and Professor Dale Rubin for negligence in failing to prevent the shooting.¹⁵⁶ The estate of Angela Dales sued the same defendants for wrongful death.¹⁵⁷

The lawsuits claimed that as a business owner, the Law School and the individual defendants owed a duty of reasonable care to its invitees, including students and employees.¹⁵⁸ Defendants breached that duty, the suits said, “by creating and maintaining an inherently dangerous condition upon said premises by allowing, facilitating, and perpetuating, the violent acts of Odighizuwa and other third parties.”¹⁵⁹ The lawsuits alleged that Law School officials, including the President, knew or should have known of Odighizuwa’s “erratic, irrational, bizarre, paranoid, violent, aggressive, and crazy behavior.”¹⁶⁰ The lawsuits also alleged that the Professor had actual knowledge of the shooter’s disturbed state of mind shortly before the rampage—had, in fact, exacerbated it—and failed to warn anyone of the danger.¹⁶¹

experiences at Appalachian School of Law.

156. Cathy St. Clair, *Lawsuits Seek Damages from ASL For January 2002 Shooting Incident*, VA. MOUNTAINEER, Jan. 22, 2004, at A1; Still, *supra* note 121; Kathy Still, *Suits Filed in Grundy Law School Shootings*, RICHMOND TIMES-DISPATCH (Va.), Jan. 17, 2004, at B1.

157. St. Clair, *supra* note 156; Still, *supra* note 121; Still, *supra* note 156; *see* Mot. for J., *Brown v. Appalachian Sch. of Law*, No. L04-10 (Va. Cir. Ct., Jan. 15, 2004); Mot. for J., *Short v. Appalachian Sch. of Law*, No. L04-11 (Va. Cir. Ct. Jan. 15, 2004); Mot. for J., *Beans v. Appalachian Sch. of Law*, No. L04-12 (Va. Cir. Ct., Jan. 15, 2004); Mot. for J., *Dales v. Appalachian Sch. of Law*, No. L04-13 (Va. Cir. Ct., Jan. 15, 2004).

The Dales sued because they believed that the Law School could have done more to prevent the rampage and that both the Law School and the county authorities were obstructing the family’s search for the truth. CARIENS, *supra* note 128, at 112. They also felt deliberately excluded from the Law School community, the police investigation, and the deliberations of the commonwealth attorney. *Id.* at 100–02.

158. According to the complaints, *supra* note 157, the duty was “to ensure that the Law School’s employees and/or agents acted in a reasonable manner and exercised ordinary care in the performance of their duties, including maintaining the premises in a safe and secure fashion.”

159. *E.g.*, *Dales*, No. L04-13, at ¶ 31.

160. Specifically, the complaints alleged, *inter alia*, that during a “core administrative staff” meeting a few weeks before the shooting, 3 complaints by staff were presented to the (male) President, the (male) Dean, and the (male) Associate Dean by the (female) Human Resource Manager. The President is alleged to have replied, “Oh, you women and your hormones and your women’s intuition! There is nothing for you women to be afraid of. It will be okay.” The Dean is alleged to have said that Odighizuwa “knew where his [the Dean’s] office was if there was a problem.” *Supra* note 157, at ¶19 (of all complaints).

161. The suits alleged that Professor Rubin “had a reputation . . . for being antagonistic, for riling up and provoking people, and would, on a regular basis, use profanity and obscene language in his classroom and degrading remarks towards his students.” They alleged that Rubin “engaged in verbal combat” with Odighizuwa

Scarcely a month after the civil actions were filed, over the objection of the Dales family, the Commonwealth Attorney of Buchanan County, from which the shooter was seeking a change of venue, offered him a plea bargain.¹⁶² He was sentenced to six terms of life imprisonment, plus 28 years, with no possibility of parole.¹⁶³ Less than a year after they were filed, and before discovery was completed, the civil cases settled for a million dollars, the maximum amount of the Law School's liability insurance.¹⁶⁴

E. University of Arizona College of Nursing, October 28, 2002

Established in 1957, the University of Arizona's College of Nursing (CON) in Tucson is ranked in the top six percent of nursing schools in the country by the prestigious *U.S. News & World Report*.¹⁶⁵ It offers

knowing that the student had received failing grades and was emotionally distraught, and knowing of his past and present mental problems and emotional outbursts. They alleged that Rubin had admitted foreseeing that Odighizuwa might "go and cuss Sutin out or throw a punch at him" but not that he would kill anyone. *Supra* note 157, at ¶19(v).

The complaints also alleged that the Law School, seeking ABA approval, allowed Odighizuwa to remain because it was determined to retain minority students. *See Delusions, supra* note 113.

The suits also claimed that the Law School was negligent in failing to hire security guards and personnel qualified in emergency medical response, in failing to train its staff in emergency procedures, and in failing to establish security and emergency response programs.

162. Charles Owens, *Emotions Mixed over Plea Agreement*, BLUEFIELD DAILY TELEGRAPH (W. Va.), Feb. 28, 2004, at A1.

163. Chris Kahn, *Ex-Law Student Pleads Guilty to Slayings*, WASH. POST, Feb. 27, 2004, <http://www.washingtonpost.com/wp-dyn/articles/A12357-2004Feb27.html>; Cathy St. Clair, *Pleads Guilty! ASL Gunman Gets Six Life Sentences; No Parole*, VA. MOUNTAINEER, Mar. 3, 2004, at A1. The Buchanan County Commonwealth Attorney claimed to have developed doubts that Odighizuwa was mentally competent when he committed the murders. Charles Owens, *Odighizuwa Condemned to 6 Life Sentences and 28 years*, BLUEFIELD DAILY TELEGRAPH (W. Va.), Feb. 28, 2004, at A1.

164. Cathy St. Claire, *ASL Settles 4 Lawsuits Filed After Tragedy: Dales Estate, Three Injured Students Agree to Terms*, VA. MOUNTAINEER, Jan. 6, 2005, at A1. David Carriens wrote:

The suit may be settled, but justice has not been served. The sad truth is that the charges contained in the lawsuit—charges of a toxic mix of incompetence, negligence, and bureaucratic bungling will never be heard in a court of law. The unsettling and unexplainable behavior of school, law enforcement, and elected officials will never be held up to scrutiny. The result is that the conditions and factors that make schools in Virginia unsafe will never reach the public. The mistakes committed by the Appalachian School of Law are doomed to be repeated and other young people may lose their lives on Virginia school grounds. It would be so much easier for us to find peace and move on if we knew the lessons had been heeded and the mistakes corrected.

CARIENS, *supra* note 128, at 146.

165. The University of Arizona, College of Nursing, <http://www.nursing.arizona.edu/> (last visited May 24, 2009).

baccalaureate, master's, and Ph.D. programs in nursing.¹⁶⁶ In 2002 it had about four hundred students on a university campus of more than 34,000. Robert Stewart Flores was mid-way through his fourth semester, working toward a BSN degree, when he shot and killed three women professors, two of them in front of a class of terrified students.

Flores was born in Los Angeles in 1961. The son of a police officer, he described his parents' background as "lower socio-economic class."¹⁶⁷ He enlisted in the U.S. Army when he was nineteen and remained in the military for eleven years, where he qualified as an expert marksman.¹⁶⁸ He served in a combat unit in Iraq and Saudi Arabia in 1991.¹⁶⁹ He was a gun collector.¹⁷⁰ He was married and had two children when he was discharged from the Army in 1992, with, he later wrote, no skills "that translated into the civilian job market."¹⁷¹ He moved his family to his wife's home town in Texas and enrolled in the nursing program at Angelo State Community College.¹⁷² Though he still worked part-time as a bartender, he qualified for a state-funded retraining scholarship as well as the G.I. Bill and was able to support his family while attending school full-time.¹⁷³ He completed the associate program with honors and passed the state boards to become a Licensed Practical Nurse (LPN).¹⁷⁴ The program in which he was enrolled permitted him to transfer to Angelo State University and complete a BSN in one more year, but family considerations forced him to move to Tucson instead, and he enrolled at the University of Arizona as a transfer student in the CON.¹⁷⁵

Flores' grievances against the school began to accumulate from the moment he arrived.¹⁷⁶ The CON accepted only 33 semester hours of his

166. The University of Arizona, College of Nursing, Academic Programs, <http://www.nursing.arizona.edu/academics.htm> (last visited May 24, 2009).

167. Letter from Robert S. Flores to Jane Amarie, Editor and Publisher, Arizona Daily Star, 3 (Oct. 30, 2002), reprinted at <http://cgi3.azstarnet.com/specialreport/index.html> (providing the complete version of Robert Flores' lengthy suicide letter) [hereinafter Flores Letter].

168. John M. Broder, *Arizona Gunman Chose Victims in Advance*, N.Y. TIMES, Oct. 30, 2002, <http://www.nytimes.com/2002/10/30/us/arizona-gunman-chose-victims-in-advance.html?fta=y>.

169. *Id.*

170. Sheila Calambra, *Campus Slayings*, TUCSON CITIZEN (Ariz.), Oct. 29, 2002, at 6A.

171. Flores Letter, *supra* note 167, at 5, 7-8.

172. *Id.* at 7-8.

173. *Id.* at 8.

174. *Id.*

175. *Id.* As he put it, "My wife dropped a bomb on me." *Id.* She apparently threatened to divorce him unless he moved to Tucson with her. *Id.*

176. Indeed, according to his suicide letter, they began even earlier. He claimed that he had been interested in applying to the CON when he was still in the Army, stationed in Colorado Springs, and had even driven to Tucson in hopes of discussing his situation with Law School admissions personnel, but he was told that no one had

nursing education in Texas and none of his core nursing courses, which he considered “a slap in the face.”¹⁷⁷ He had to pay higher tuition the first year as an out-of-state student, and he began to go into debt for the first time with student loans.¹⁷⁸ He had to work full time, which affected his studies.¹⁷⁹

He had other troubles as well. About a year after they moved to Tucson, his wife left him, and a month later he was in a car wreck that left him with chronic back pain from a slipped disc.¹⁸⁰ He took a year off from the University to settle his divorce and get his life back in order.¹⁸¹ When he returned, he was further aggrieved that the CON would not officially support his petition for a decrease in child support so that he would not have to work full time.¹⁸²

Flores was also estranged from the academic culture of the CON. In his suicide letter he wrote:

Once I was officially accepted in the College of Nursing I couldn't help notice the attitude that many of the instructors maintained. They sniffed at Associate Degreed Registered Nurses as they were not “Professional”. . . . The message I kept getting from the instructors was, “You're not a nurse.”¹⁸³

His suicide letter continued:

I am 41 years old and have come to the conclusion that I deserve and demand respect. I am a human being and I have worth. I had decided that I will stand up for myself and I will be assertive. What I discovered was that being a male and nontraditional student, and (shudder!), assertive was not compatible with the instructors at the College of Nursing. While the college does maintain a small minority student body it is primarily white women from upper middle class backgrounds between the ages

time to talk to him. *Id.* at 6–7. “I finally left in disgust,” he wrote, “and drove back to Colorado Springs.” *Id.* at 7.

177. *Id.* at 8 (“The College of Nursing accepted 33 semester hours and none of my core nursing classes. That was a slap in the face as they would not entertain the idea of even evaluating the classes. They just refused to accept them regardless.”).

178. *Id.* at 8–9.

179. *Id.*

180. *Id.* at 10. He was awarded the gun collection in the divorce proceeding. Calambra, *supra* note 170.

181. Flores Letter, *supra* note 167, at 8–9.

182. *Id.* at 10. Flores wrote:

When you attend the College of Nursing they brief you and let you know that it is almost impossible to work and attend classes at the same time. [T]he study load is just too great. I tried to get an official statement to that effect so I could decrease my child support while attending school. I was told that the college of nursing would not do that.

Id.

183. *Id.* at 11.

of 20 and 25. The college promotes and desires diversity but they only want their approved diversity and no other. In many ways male nursing students are “tokens.”¹⁸⁴

While Flores apparently got along well enough with employees at the V.A. Hospital in Tucson, where he worked part-time, classmates and faculty members at CON did consider him a difficult and problematic student.¹⁸⁵ One female student told the press, “He was belligerent, angry, and rude He would blow up and call [the instructors] names in class.”¹⁸⁶ Another said that he argued frequently with the instructors, demanded their full attention, and took up too much class time.¹⁸⁷ The hospital at which he took a clinical course in pediatrics complained that he was rude and disrespectful to staff and patients.¹⁸⁸ He threatened professors who challenged his behavior.¹⁸⁹ When instructor Cheryl McGaffic told him that his behavior was inappropriate and unacceptable, he replied, “I am doing better than I used to. In the past I would have bashed someone’s head against a curb.”¹⁹⁰ Recognizing that he was depressed, his instructors advised him to get treatment at the Student Health Clinic, but he rejected their advice.¹⁹¹

184. *Id.* at 11–12.

185. Jaime Holguin, *Arizona Gunman Had Threatened School*, CBS NEWS, Oct. 29, 2002, <http://www.cbsnews.com/stories/2002/10/30/national/main527553.shtml>. Conversely, a (male) co-worker at the Southeast Arizona Veteran’s Administration Hospital, who had worked with him, on and off, for 3 years, described Flores as “very nice, very intelligent, very well-spoken” and said, “I never heard anything violent period from this guy.” *Id.*

186. John M. Broder, *Student Kills 3 Instructors and Himself at U. of Arizona*, N.Y. TIMES, Oct. 29, 2002, <http://www.nytimes.com/2002/10/29/us/student-kills-3-instructors-and-himself-at-u-of-arizona.html?fta=y>. One example is illustrative. Flores sat on the front row in his classes and participated in class discussion. He frequently had his hand up. His rambling questions and commentary tended to dominate the class sessions. Scott Smallwood, *The Deadly Risk of Giving an F: Murder of 3 Professors by a Failing Student Horrifies University of Arizona*, CHRON. HIGHER EDUC. (Wash., D.C.), Nov. 15, 2002, <http://chronicle.com/free/v49/i12/12a01201.htm>.

In April 2001, Flores’ second semester at CON, he became upset that an instructor was not calling on him enough. Flores Letter, *supra* note 167, at 12. He challenged her about it in front of the class. *Id.* A few days later, when he was again not called on, he left in the middle of the class and went to the Dean’s office to complain. *Id.* Rejecting Assistant Dean Pamela Reed’s suggestion that he talk directly with the instructor again, he insisted on making a complaint in writing. *Id.* at 14. After that, by his own account, the instructor called on him, but soon the Associate Dean warned him that his questions were inappropriate and interfered with the class. *Id.* She warned him twice that he could be expelled if his conduct did not improve. *Id.*

187. Calambra, *supra* note 170.

188. Flores Letter, *supra* note 167, at 16.

189. Smallwood, *supra* note 186.

190. Devin Simmons, *Campus Heightens Awareness*, ARIZ. DAILY WILDCAT, Oct. 28, 2003, http://wc.arizona.edu/papers/97/46/01_2.html.

191. Flores Letter, *supra* note 167, at 23 (indicating he told an instructor that he could not afford to go to the Student Health Center and that he would be dismissed

As early as Flores' second semester at CON, in April 2001, instructor Melissa Goldsmith heard him say that he might "end[] it all" and might "put something [such as a bomb] under the college."¹⁹² Fearing that Flores might become dangerous, she reported the threat to the University police.¹⁹³ The police did not investigate Goldsmith's report and did not interview Flores.¹⁹⁴

Flores failed the clinical course in pediatrics during his second semester, at least in part because of his behavior, and had to repeat the course, which put him behind in the sequence of instruction.¹⁹⁵ He blamed his instructor, Robin Rogers, for not giving him a fair hearing.¹⁹⁶ A few months later, around October 2001, he told several of his classmates that he had received a permit to carry a concealed weapon in Arizona.¹⁹⁷

Flores was in his fourth semester when he started a course in intensive care taught by Barbara Monroe and Cheryl McGaffic. Cheryl McGaffic, who taught the classroom component of the intensive care course, told her husband that she felt threatened by Flores. She said that he was hostile and disruptive, had a military background, and was "very, very intimidating," but she believed it would do no good to report him to the school

from the nursing program if he was candid about what was on his mind).

192. Holguin, *supra* note 185.

193. *Id.*

194. *Id.* The police reported that an officer had called the student, left a message, and noted that he would "follow up at a later date and contact Flores." *Id.* It does not appear that any other action was taken. Flores's suicide letter does not mention any interaction with police or any University representatives at a level higher than the Assistant Dean of the CON. See Flores Letter, *supra* note 167. Press reports after the rampage agreed that there had been no follow-up, though various reasons were assigned for the failure. The University claims to have a zero-tolerance policy for threats. See, e.g., Broder, *supra* note 168 ("The police handled the matter quietly," said Andrew Daykin, chief of the University of Arizona police, and it was "deemed at the time to be resolved."); David J. Cieslak, *Campus Slayings*, TUCSON CITIZEN (Ariz.), Oct. 29, 2002, at 1A ("Daykin last night said he did not know how the threat case ended but that 'there was no follow-up required or requested at that point.'"); Gabrielle Fimbres, *Time to Grieve*, TUCSON CITIZEN (Ariz.), Oct. 29, 2002, at 1A ("Campus police said they'd been warned that Flores might be dangerous in April 2001 but could do nothing because he'd made no direct threats."); see *infra* note 214 (President Likins's comments on police report).

195. He was not able to take a full course load until he made up the course, so he had to start repaying his student loans. Flores Letter, *supra* note 167, at 16–17. He fell behind in his child support, and his financial difficulties increased. *Id.* at 17. He was afraid that his arrearage in child support would cause him to lose his LPN license and prevent him from being licensed as an RN. *Id.*

196. See *id.* at 16. A student reported overhearing him shout at Rogers, "You better watch your back if you're going to flunk me!" Smallwood, *supra* note 186.

197. See Broder, *supra* note 186. After the shooting, Flores' girlfriend of 8 months told reporters that he had always worn a handgun under his shirt. Sheryl Kornman, *Girlfriend: Flores Always Had Concealed Weapon*, TUCSON CITIZEN (Ariz.), Nov. 1, 2002, at 3A.

authorities.¹⁹⁸ Mid-way through the semester, clinical instructor Barbara Monroe told Flores that he had failed the clinical portion of the course.¹⁹⁹ Among her concerns that he was not safe to be around patients was he had twice fallen asleep in post-clinic class meetings, a factor he found particularly insulting.²⁰⁰ Because he had failed the clinical rotation, he would not be allowed to sit for the mid-term examination in the course.

On October 28, 2002, the morning of the ICU mid-term, Flores came to school at 8:30 with five handguns and over 250 rounds of ammunition in his backpack.²⁰¹ He shot and killed Robin Rogers in her office then ran upstairs to the classroom where Barbara Monroe and Cheryl McGaffic were administering the test to a room full of students.²⁰² He walked to the back of the room, where he shot Cheryl McGaffic three times in the chest at close range.²⁰³ As the students all hit the floor and crawled for cover, he walked to the front of the room and found Monroe crouched under a desk.²⁰⁴ He shot her twice.²⁰⁵ He then turned his attention to the students, ordering two friends out of the room.²⁰⁶ The others fully expected to be shot, but Flores changed his mind and told them all to leave.²⁰⁷ After the students scrambled away, Flores killed himself by a bullet to the head.

While there is evidence that Flores hated all three of the women he killed, his rage was primarily anti-institutional.²⁰⁸ The night before the shooting, calling his coming rampage “a reckoning,” he wrote, “The University is filled with too many people who are filled with hubris. They feel untouchable. Students are not given respect nor regard. It is

198. Broder, *supra* note 186.

199. Flores Letter, *supra* note 167, at 19. He had ignored several important protocols and had been too tired to keep his own patient notes as required. *Id.* at 18–19.

200. *Id.* at 19. He argued that failing the clinical would result in his dismissal from the nursing program, ruin him economically, and wreck his entire life. *Id.* 18–19. The conversation apparently ended when he heard her say, “It doesn’t matter.” *Id.* at 20. He reminded her of that comment when he shot her a few days later. Smallwood, *supra* note 186.

201. Smallwood, *supra* note 186.

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. Broder, *supra* note 186.

207. Cieslak, *supra* note 194. Tucson psychologists and the police agreed that Flores went to the CON prepared to kill students and professors alike but that something happened in the room to make him spare the students. *See, e.g.*, Gabrielle Fimbres, *UA Shootings*, TUCSON CITIZEN (Ariz.), Oct. 31, 2002, at 6A; Holguin, *supra* note 185.

208. Though Flores’ girlfriend said that he hated all three women, he did not name Cheryl McGaffic in his suicide letter as he did Robin Rogers and Barbara Monroe. Flores’s girlfriend also said “He was mad at the system,” not at the students. *UA Slayings*, TUCSON CITIZEN (Ariz.), Oct. 30, 2002, at 1A.

unfortunate but the only force that seems to get any attention from the University is economic force.”²⁰⁹ He wrote that only lawsuits would change “the face of education;” and he expected his rampage to provoke such change.²¹⁰

In that, as in many other respects, Flores was wrong. No lawsuits were filed, and it is hard to determine the extent to which his rampage “changed the face of education” at the University of Arizona. To some extent, the University minimized the anti-institutional features of the rampage. “It’s an intensely personal tragedy and trauma,” the President told the press.²¹¹ “I am personally comfortable that there is no further risk. The risk was very, very sharply focused.”²¹² He added, “I don’t believe there is any security or police force that could prevent a disaster of this type.”²¹³ He also described the University as a supportive and caring environment, greatly concerned with student depression.²¹⁴

The University quickly moved on. A year after the shootings, the campus newspaper reported that the University had discouraged discussion of the tragedy because it did not want to “dwell on the negative.”²¹⁵ Though professors and students both reported that the shootings had a continuing impact on faculty-student relations and that reports of threatening behavior more than doubled in the year after the shootings, the assistant Dean of Student Affairs commented, “I don’t know what there is to discuss They paid an enormous price.”²¹⁶ Further research is necessary to determine what steps the University took to reduce the probability of another rampage on its campus.

F. Case Western Reserve University School of Business, May 9,

209. Flores Letter, *supra* note 167, at 22.

210. *Id.*

211. *Three Professors Killed at University of Arizona*, CNN, Oct. 28, 2002, <http://archives.cnn.com/2002/US/Southwest/10/28/university.shooting/>.

212. Broder, *supra* note 186.

213. Smallwood, *supra* note 186.

214. Worried about student depression, the University noted

Mr. Flores had been identified in April 2001 as a student with possible depression, according to Peter W. Likins, the university’s president. Fearing that he could be suicidal and perhaps dangerous, university officials filed a report about him with the campus police. “Faculty and student-services people in the College of Nursing helped him through that period of difficulty,” Mr. Likins said. “He emerged feeling better and got an A in the class he was worried about.”

Meghan Rooney, *Tragic Grudge: Student Kills 3 U. of Arizona Professors*, CHRON. HIGHER EDUC. (Wash., D.C.), Nov. 8, 2001, at <http://chronicle.com/weekly/v49/i11/11a01201.htm>.

215. Alexis Blue & Erin Schmidt, *Nursing Tragedy Scars Remain*, ARIZ. DAILY WILDCAT, Oct. 28, 2003, http://wc.arizona.edu/papers/97/46/01_1.html.

216. *Id.*; Simmons, *supra* note 190.

2003

Case Western Reserve University (CWRU) in Cleveland, Ohio, is a private research university ranked in the top twenty percent of higher education institutions in the United States by the *U.S. News and World Report*.²¹⁷ Sixty percent of its 10,000 students are pursuing graduate degrees.²¹⁸ It has 2,600 faculty members and attracts over \$400 million annually in research grants.²¹⁹ Its business college, the Weatherhead School of Management, is housed in the multi-million dollar, five-story Peter B. Lewis (PBL) Building. The building—which has faculty offices, classrooms, and meeting areas on every floor—is designed to “encourage informal interaction and complement the Weatherhead School’s learner-centered curriculums.”²²⁰ It has a large central atrium and no right angles. The business school opened the PBL building for fall semester 2002. When the shooting rampage occurred there in May 2002, victims reported that the gunshots reverberating in the open spaces added to the terror, and police complained that the design, which left SWAT team officers constantly exposed, also interfered with efforts to apprehend the shooter.²²¹ Biswanath Halder, the shooter, never attended class or worked in the computer lab in the PBL building.²²² At the time of his rampage he had not been a student for over two years and was pursuing his studies at Cleveland State University.²²³

Halder was born in India in 1941. He immigrated to the United States in 1969 and became a citizen in 1980.²²⁴ He had a bachelor’s degree in electrical engineering from Calcutta University.²²⁵ He attended New York University’s Graduate School of Business in 1980 but did not complete the course because of financial difficulties.²²⁶ From 1989 to 1994, he studied mathematics, computer science, and engineering at the University of Massachusetts without completing a degree program, and he also attended

217. Wikipedia, Case Western Reserve University, Rankings, http://en.wikipedia.org/wiki/Case_Western_Reserve_University#Rankings (last visited May 25, 2009).

218. Case Western Reserve University by the Numbers, <http://www.case.edu/about/numbers.html> (last visited May 25, 2009).

219. *Id.*

220. Case Western Reserve University Weatherhead School of Management, Special Features of the Peter B. Lewis Building, <http://weatherhead.case.edu/about/facilities/lewis/facts.cfm> (last visited May 25, 2009).

221. Barb Galbincea & Mike Tobin, *Gunman Terrorizes CWRU*, PLAIN DEALER (Cleveland, Ohio), May 10, 2003, at A1.

222. *Wallace v. Halder*, No. CV-06-591169, slip op. at 11 (Ohio Cir. Ct. Aug. 27, 2008).

223. Plaintiff’s Brief at 6, 9, *Wallace*, No. CV-06-591169.

224. *See State v. Halder*, 2007-Ohio-5940, at ¶8 (Ohio Ct. App. 2007).

225. *See id.*

226. *See id.*

Boston University for a year in 1995–1996.²²⁷ He completed a master's degree in business administration in 1999 after two years at Weatherhead.²²⁸

Disabled and self-employed since 1990, Halder continued to take classes at Weatherhead after he graduated, primarily so that he could maintain his privileges in the school's computer laboratory. He needed a computer lab to launch an internet-based consulting business, the purpose of which was to help people of East Indian origin start their own businesses.²²⁹ Until August 2000, Halder spent between ten and twelve hours a day in the lab. He had frequent conflicts with computer lab employees at CWRU, who claimed that he monopolized the computers and was rude to other users.²³⁰

A court-appointed psychiatrist later reported that Halder was “one of the most isolated people I have ever examined.”²³¹ He had no contact with his family in India.²³² Between 1988 and 1992 he had been evaluated by seven social security administration doctors, five of whom diagnosed a personality disorder and two of whom diagnosed depression and

227. *See id.*

228. *See id.*

229. *See id.* at ¶10. Halder founded the Worldwide Indian Network (“WIN”) in 1991, made it operational in 1993, and started the WIN Business Council in 1995. *Id.* In 1997 he started building a homepage that consisted of well over 100 pages. He planned to launch his consulting business in 2000, by which time the WIN website contained over 1500 files and 50,000 contacts. Letter from Biswanath Halder to the Honorable John Sutula, Judge, Cuyahoga Court of Common Pleas (Feb. 13, 2003), available at <http://members.fortunecity.com/halder/20030213JS.html> [hereinafter Biswanath Halder Letter]. He expected that the consulting business would make him wealthy, serve the cause of global justice, and “have an impact of billions of dollars a year on mankind.” Scott Hiassen & John Mangels, *CWRU Shootings: Loner's Rage Burned after Ruin of Web Site*, PLAIN DEALER (Cleveland, Ohio), May 11, 2003, at A1; see Court TV, *Ohio v. Halder: Campus Shooting Trial*, (unpublished manuscript) (on file with the author).

He believed he could solve mankind's problems by narrowing the gap between the rich and the poor. *Halder*, 2007-Ohio-5940, slip op. at 4. He saw himself as socially progressive; his website contained links to organizations opposing the U.S. presence in Iraq and the Israeli occupation of Palestine. Joseph P. Tartaro, *Hindsight: Do Media Make Mistakes on Purpose or by Accident*, <http://gunweek.com/> (last visited May 24, 2009).

230. *Wallace v. Halder*, No. CV-06-591169, slip op. at 6 (Ohio Cir. Ct. Aug. 27, 2008). He insisted on occupying several computers stations at once and refused to log out when he was absent from the building. *Id.* CWRU employees revoked Halder's computer privileges once in 1999 because he had upset a female lab worker and again in November 2001 because he “harassed and disrupted other computer lab users.” Hiassen & Mangels, *supra* note 229 (quoting CWRU Associate Dean). Halder continues to deny that he ever behaved in such a manner. He maintains that he was persecuted by “master race” computer lab employees because of his “inferior race.” Biswanath Halder Letter, *supra* note 229.

231. Arthur J. Pais, *Halder Case: Into the Mind of a Killer*, REDIFF INDIA ABROAD, Jan. 19, 2006, www.rediff.com/news/2006/jan/19halder.htm.

232. *Id.*

dysthymia.²³³ In Cleveland, he lived alone in an apartment near the CWRU campus.²³⁴ He had only a few friends at the school, where he was a well-known campus figure.²³⁵ He was targeted by a group of undergraduate students who created a website named “HalderSucks.org.”²³⁶

In June 2000, a visitor (in internet slang, a “troll”)²³⁷ left a message on Halder’s WIN website:

Bizzy Halder is a moron. This guy makes a living out of creeping people out, from his fake hair to his fake teeth to his whitey tighty shorts and pants, to his shit-stained sweaters this guy is a LOON. He’s been kicked out of every lab on campus and everyone makes fun of him. So let’s not even talk about credibility. Don’t listen to a word this guy says.²³⁸

Within a month, someone destroyed over 1,100 files on the WIN website and deleted the addresses of more than 50,000 contacts.²³⁹ Halder blamed

233. *State v. Halder*, 2007-Ohio-5940, at ¶ 13 (Ohio Ct. App. 2007). His employment history was erratic and “characterized by short-term jobs where he was either terminated or quit because of personality or monetary problems.” *Id.* at ¶ 9. During the 1970’s, Halder filed several lawsuits against employers and potential employers—NCR, IBN, General Electric, and Sperry Rand among them—for racial discrimination and unfair employment practices. Hiassen & Mangels, *supra* note 229. After 1980, his primary source of income was apparently a \$600/month social security disability payment. *Id.* It is unclear how he financed his master’s degree program at Weatherhead.

234. Hiassen & Mangels, *supra* note 229.

235. *Id.* According to the picture painted of him at his murder trial, he ate lunch every day at the same time in the same student restaurant, was dirty, wore the same clothes every day, and was unfriendly and demanding. *Id.*

236. *Id.* Halder believes that HalderSucks.org was the work of one or two employees in the computer lab. Biswanath Halder Letter, *supra* note 229. The website was not discontinued until after the rampage. Some of the comments posted by Halder Sucks were “You suck so much ass what is wrong with you retard?”, “Go get a life or something . . . and stop harrasing [sic] people around you . . .” “You give people a bad name,” “People around you don’t like you, so take a hike and get out of our lives.” MSNBC.com, Messages Left on Halder’s Website, <http://www.msnbc.msn.com/id/15772440/> (last visited May 24, 2009).

237. An Internet troll “is someone who posts controversial, inflammatory, irrelevant or off-topic messages in an online community, such as an online discussion forum or chat room, with the primary intent of provoking other users into an emotional response or to generally disrupt normal on-topic discussion.” Wikipedia.org, Troll (Internet), [http://en.wikipedia.org/wiki/Troll_\(Internet\)](http://en.wikipedia.org/wiki/Troll_(Internet)) (last visited May 24, 2009).

238. Court TV, *supra* note 229; Rogers Cadenhead, *Case Western Killer Motivated by Troll*, WORKBENCH, May 12, 2003, <http://workbench.cadenhead.org/news/1236/case-western-killer-motivated-troll>.

239. *State v. Halder*, 2007-Ohio-5940, at ¶ 4 (Ohio Ct. App. 2007); Court TV, *supra* note 229. Halder’s Unix account in which the WIN website was created was a personal account housed at APK.net, an off-campus provider. The hacking was not done at CWRU or using CWRU’s computer network. Telephone Interview with Robert N. Stein, Esq. (July 31, 2008).

Shawn Miller, a CWRU employee who worked in the Weatherhead computer lab, with whom he had had many run-ins and with whom he had quarreled on the day the website was hacked.²⁴⁰ Halder never again worked in the computer lab after the destruction of his website.

Halder complained to the CWRU administration and to the campus police about the destruction. When an official in the CWRU Security Department determined that the hacking had not been accomplished from a CWRU computer, he referred the matter to the local police department. Unlike the CWRU campus authorities, the police had the authority to compel information from Halder's service provider but did not do so.²⁴¹

Undaunted, Halder continued to seek justice. He publicized the case through postings on his website and a widespread campus e-mail campaign.²⁴² He wrote to the FBI and the House and Senate Judiciary

240. Halder, 2007-Ohio-5940, at ¶ 4; Court TV, *supra* note 229.

241. MSNBC.com, The Man Behind the Crime, <http://www.msnbc.msn.com/id/15769598/> (last visited May 25, 2009). After the shooting, CWRU's Associate Vice President for Public Affairs Thomas R. ShROUT apparently told *The Chronicle of Higher Education* that an internal investigation had determined that employee tampering with Halder's website "did not happen." Dan Carnevale, *One Student Is Killed and 2 Are Wounded in Shooting Rampage at Case Western Reserve U.*, CHRON. HIGHER EDUC. (Wash., D.C.), May 12, 2002, <http://chronicle.com/daily/2003/05/2003051206n.htm>.

In 2008, defending the University in a civil action brought by the student victim of Halder's rampage, CWRU's attorneys told a longer story. In July 2000, Halder reported the hacking to the Weatherhead computer lab director, to the CWRU Manager of Network Engineering, and to the Investigator for the CWRU Security Department, Michael Goliat. Goliat determined that the WIN site was not hacked from a CWRU computer. He suspected a felony, which was outside his jurisdiction, and he did not have the authority to compel information from Halder's service provider. He referred Halder's complaint to a lieutenant in the University Circle, Ohio, police department, who also met with Halder. Lt. Serrao determined that the hacking and theft occurred at apk.net, Halder's service provider in Cleveland, and was therefore outside University Circle's jurisdiction. Serrao went with Halder to the economics crime unit of the Cleveland Police Department, which conducted a further investigation that included issuing subpoenas to companies in Washington and California to determine the identity of the person responsible for destroying the files. According to CWRU's lawyers, "The investigation ended with no charges or arrests." Brief in Support of Motion for Summary Judgment on Behalf of Defendant at 4-5, 9, *Wallace v. Halder*, No. CV-06-591169 (Ohio Cir. Ct. Aug. 27, 2008) [hereinafter Brief].

According to the trial court, the Cleveland police detective "subpoenaed information from certain out-of-state websites (based on information provided to him by Halder). However, Detective Clar received no responses and eventually terminated his investigation." *Id.* at 4; *see* Part II.D. *infra*.

242. On August 29, 2000, Halder sent an e-mail to the entire Weatherhead School of Management, writing, "In a few seconds, the evil man wiped out everything that it took my lifetime to create, . . . Now, the evil man is on his evil path to destroy Weatherhead." Hiassen & Mangels, *supra* note 229. Ohio attorney Russ Bensing recalls a similar e-mail entitled "Shawn Miller is an evil man" that Halder sent to all students and alumni of CWRU claiming that Miller had destroyed his website. Russ Bensing, *Still Crazy After All These Years*, THE BRIEFCASE, Nov. 21, 2007, <http://briefcase8.com/2007/11/21/still-crazy-after-all-these-years/>.

Committees of the United States Congress.²⁴³ In June 2001, represented by counsel, Halder sued Miller and other unknown defendants in the Cuyahoga County Court of Common Pleas.²⁴⁴ Defended by counsel hired by CWRU's insurance company, Miller also counterclaimed for defamation of character and intentional infliction of emotional distress.²⁴⁵ In March 2002, Halder's attorney withdrew because of continuing disagreements with his client.²⁴⁶ While he was arguing with his lawyer about how best to proceed with his litigation, Halder bought two

CWRU officials met with CWRU attorneys after Halder sent his spam e-mail to consider revoking his computer lab privileges but did not do so. His privileges automatically lapsed when he did not register for classes in the Fall 2000 Semester. Over a year later, however, another spam e-mail, purportedly from Halder's computer, again broadcast that Shawn Miller was an evil man who needed "to be liquidated or liquefied." *Wallace*, No. CV-06-591169, slip op. at 9. The e-mail was not in fact sent from Halder's computer, and University so determined within a few days. At this point, however, CWRU sent Halder a letter formally terminating his computer privileges at Weatherhead. *Id.*; Brief, *supra* note 241, at 7. The University, and later the court, characterized the second spam e-mail as a "spoof." *Id.* CWRU does not claim to have taken any action to discover who actually sent the e-mail.

243. *Hiassen & Mangels*, *supra* note 229.

244. *Halder v. Miller*, No. CV-01-441308 (Ohio Cir. Ct. July 18, 2003).

245. *Id.* Miller continually denied hacking the computer, and, during the civil action, denied knowing who did. After deposing him, Halder's attorney, Robert Stein, decided that Miller probably did not have the technical skill to have done the damage. However, Stein's investigation discovered the telephone number from which Halder's website had been hacked, and he was able to trace the number to the home of Janis Kaghazwala. Unbeknownst to Stein or Halder at the time, Kaghazwala was an employee of CWRU and lived with Chris Fenton, Shawn Miller's co-worker at the Weatherhead computer lab. Contrary to CWRU's later denial, see *supra* note 241, Stein believes that its authorities could have determined even more easily than a private lawyer that CWRU employees were involved, if they had treated Halder's complaint with the seriousness it merited as a suspected felony. Telephone Interview with Robert N. Stein, Esq. (July 31, 2008). Halder waived attorney-client privilege and confidentiality when he called Stein to testify as a mitigation witness in the sentencing phase of the criminal trial. *Id.*

246. *Id.* Part of the disagreement was Halder's reluctance to proceed against CWRU in addition to individual computer lab employees. He wanted to stay on good terms with the University. *Id.* Later, on March 26, 2002, representing himself, Halder moved to join Weatherhead School of Management as a defendant and attempted to compel discovery from Weatherhead. CWRU opposed both motions and both were denied. On May 21, 2002, Halder moved to join Kaghazwala. That motion was also denied. *Halder v. Miller*, No. CV-01-441308 (Ohio Cir. Ct. July 18, 2003).

During Halder's trial for murder in 2005, Miller, who admitted that he hated Halder, testified that he figured out the identity of the culprit after his deposition was taken in Halder's civil litigation and that he had revealed Chris Fenton's name to his attorney. Arthur J. Pais, *Dramatic Testimony at NRI Halder's Trial*, REDIFF INDIA ABROAD, Dec. 2, 2005, <http://us.rediff.com/news/2005/dec/02halder.htm>. At the murder trial both Kaghazwala and Fenton asserted their privilege against self-incrimination when asked about the hacking; after the trial, CWRU fired both of them. Telephone Interview with Robert N. Stein, Esq. (July 31, 2008.)

handguns.²⁴⁷

In May 2002, while he was struggling to add CWRU and other defendants to his case, Halder told one of his few confidants, CWRU law student Paul Helon, that if he lost the court battle he would “fuck those fuckers up.”²⁴⁸ Helon reported Halder’s threat to Miller; Miller reported it to his CWRU supervisor Roger Bielefield, saying “apparently Halder is interested in killing us.”²⁴⁹ Bielefield told Miller not to worry and that Halder “probably would not do anything.”²⁵⁰

Halder continued with the litigation pro se.²⁵¹ His claim was dismissed on summary judgment on September 26, 2002.²⁵² His cross-motion for summary judgment against Miller was denied.²⁵³ Under Ohio law, because Miller’s counterclaim was still pending, the dismissal of Halder’s case was not a final order, but Halder was unfamiliar with Ohio procedure and filed an appeal on October 25 that remained pending in the Ohio Court of Appeals for six months.²⁵⁴ In the meantime, in November, Miller moved in the trial court for entry of judgment on his counterclaim.²⁵⁵ Halder did not respond, and on January 16, the trial court issued an injunction ordering Halder to “remove from [his] website all references to [Defendant] Miller, including but not limited to copies of any letters or statements accusing Mr. Miller of illegally accessing [Plaintiff’s] website.”²⁵⁶ On April 29, 2003,

247. In November and December 2001, Halder bought two semi-automatic 9mm handguns. He was so unfamiliar with firearms that, the day before his attack at CWRU, he visited the store where he purchased his 9mm Ruger and asked the owner to help him reassemble it. Rob Stafford, *A Rare Look Inside a Hostage Drama, a Day-Long Siege, in which Every Decision Meant the Difference between Life and Death*, NBC NEWS, Nov. 18, 2006, <http://www.msnbc.msn.com/id/15767366/>.

248. Wallace v. Halder, No. CV-06-591169, slip op. at 9 (Ohio Cir. Ct. Aug. 27, 2008).

249. *Id.* at 9.

250. *Id.* at 10.

251. Halder v. Miller, No. CV-01-441308 (Ohio Cir. Ct. July 18, 2003).

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.*

256. Biswanth Halder Letter, *supra* note 229. Halder was also enjoined from publication of any further communications accusing Miller of tampering. *Id.* On February 13, 2003, having received a letter from Miller’s attorney threatening to have his website shut down if he did not comply with the injunction, Halder wrote the trial judge:

First of all, I have yet be to [sic] notified by the Clerk’s Office that an order was entered in my case on January 16. Upon receipt of the letter from attorney Schwartz, however, I visited the website of the Court of Common Pleas, checked the docket entries and found out that indeed you entered such an order on January 16, 2003.

The defendant made a motion for an entry of judgment and for issuing an injunction on November 8, 2002. Thereafter I talked to your law clerk, Ms Mamie Mitchell, and inquired about my options in the pending motion. After

the Court of Appeals dismissed Halder's appeal sua sponte.²⁵⁷ When Shawn Miller heard that Halder had lost his appeal, he called the Cleveland Heights Police. He later testified that he "probably" discussed the threats made by Halder.²⁵⁸

Only a few days after he learned that his appeal had been dismissed, Biswanath Halder came to Weatherhead dressed in military fatigues, a military helmet, and a flak jacket. He carried two semi-automatic pistols, 800 rounds of ammunition, and a sledge hammer. Security cameras in the building filmed everything that followed.²⁵⁹ Halder smashed a locked glass door to get into the PBL Building and opened fire near the first-floor cafeteria, killing graduate student Norman Wallace, the only fatality of the rampage.²⁶⁰ Fortunately, Halder began his rampage at 4:00 on a Friday afternoon at the end of exam week, and the building was not crowded.²⁶¹ Fortunately, too, he was not a particularly good shot, though he had been practicing at a target range.²⁶² Otherwise, there might have been many more casualties, as he fired at and missed several people during the next few minutes.²⁶³ His targets included Shawn Miller and three of his friends, who were in the basement computer lab but managed to lock themselves into a back room when Halder appeared with his guns.²⁶⁴

Hearing gunshots echoing through the open building, students, faculty, and staff ran for the exits or found other cover—behind dining tables, under desks, in closets, and in locked offices.²⁶⁵ Halder fired through the front doors at CWRU police as they approached the building, then ran upstairs to the second floor. He shot Professor Susan Helper as she stood in her office door assisting a colleague in a wheel chair to take cover; she managed to slam the door as he fired, so that the bullet had lost most of its force when it hit her in the chest.²⁶⁶ She hid in the closet in her office until rescued

consulting with you, Ms. Mitchell informed me that since the case file was currently in the Court of Appeals, the judge will not act on any motion until the case file comes back to the trial court. Hence, I did not file any papers opposing the defendant's motion. On December 12, 2002, I filed a motion in the Court of Appeals to remand the case to the trial court for an entry of judgment.

Id.

257. *Halder*, No. CV-01-441308.

258. *Wallace v. Halder*, No. CV-06-591169, slip op. at 6 (Ohio Cir. Ct. Aug. 27, 2008). He was "not sure" if he reported his concerns to CWRU. *Id.*

259. Arthur J. Pais, *Is Biswanath Halder Insane?*, REDIFF INDIA ABROAD, Mar. 24, 2005, <http://in.rediff.com/news/2005/mar/24us.htm>.

260. Stafford, *supra* note 247.

261. *Id.*

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.* Her colleague, Professor Avi Dor, was also shot at and pretended to be

hours later. Argun Saatcioglu, a graduate student, was shot in the back but managed to escape the building.²⁶⁷ Although there were no casualties after the first few minutes of the rampage, Halder managed to stand off the police for hours even after seventy SWAT troops arrived. It was 8:00 p.m. before Norman Wallace's body could be removed and 10:00 p.m. before evacuation of the building could even begin.²⁶⁸ As Halder and the police chased each other through the building, over ninety hostages remained in terror—some of them calling out on cell and office telephones, scanning the internet, or monitoring e-mail to find out what was going on.²⁶⁹ Shot twice by the police, Halder surrendered about 11:00 p.m. in a fifth floor classroom.²⁷⁰

After the shootings, focusing on Halder's personal quarrel with Miller, University officials denied that Halder had a grudge against the school.²⁷¹ At Halder's competency hearing in 2005, however, a court-appointed psychologist testified that Halder considered his rampage the University's fault "because the alleged hacker was employed by the school and Case Western had failed to bring him to justice."²⁷²

In May 2006, Norman Wallace's father sued CWRU and Halder for the wrongful death of his son based on premises liability and negligent hiring, supervision, and performance of security services.²⁷³ The decision of the Cuyahoga County Court of Common Pleas granting summary judgment to CWRU is discussed below in Part II.D.

G. Virginia Polytechnic Institute, April 16, 2007

The spectacular rampage at ASL, followed by the Arizona and CWRU rampages, raised public awareness of shootings in professional schools, but questions remained about how much the events prompted post-secondary institutions to engage in honest soul-searching in the wake of catastrophe. The second rampage in Virginia changed all that. The "Massacre at

dead until he heard Halder walk away; then he rolled his wheelchair into an office and fell on the floor in terror. *Id.*

267. *Id.*

268. Galbincea & Tobin, *supra* note 221.

269. *Id.*

270. *Id.*

271. Brian Bernbaum, *Cleveland Shooter Had Military Training*, CBS NEWS, May 11, 2003, <http://www.cbsnews.com/stories/2003/05/09/national/main553261.shtml>; Carnevale, *supra* note 241.

272. Pais, *supra* note 259. He told the psychologist that the university "wanted violence." *Id.* After two years, Halder was found competent to stand trial and was convicted on multiple criminal counts, including first degree murder. The prosecution sought the death penalty, but Halder's court-appointed defense counsel managed to convince the jury that he was too mentally-ill to justify such a sentence. He is currently serving a life sentence without possibility of parole. Stafford, *supra* note 247.

273. *Wallace v. Halder*, No. CV-06-591169 (Ohio Cir. Ct. Aug. 27, 2008).

Virginia Tech,” as it came to be called in the popular press, was the first rampage in higher education to result in official public scrutiny.²⁷⁴ Commissions appointed by the President of the United States and the Governor of Virginia investigated the rampage and issued public reports, and the University conducted an internal investigation that also resulted in public findings.²⁷⁵

Virginia Tech is a high-ranking research university in Blacksburg, Virginia, a small city in the foothills of the Appalachians.²⁷⁶ The University community identifies itself as “The Hokie Nation.” The school’s 2,600-acre campus has over one hundred buildings, including ten colleges, residence halls for 9,000 students, fraternity houses, and student health care facilities.²⁷⁷ With a full-time student population of 29,000 and over 7,100 faculty and staff, it is the commonwealth’s largest public institution of higher education, offering sixty bachelor degree programs and 140 graduate programs.²⁷⁸ It has its own fully-accredited police force, including an emergency response team, and a mutual aid agreement with the Blacksburg Police Department.²⁷⁹ According to a Commonwealth Crime Commission Report issued in 2005, its most serious crimes were rape, assault, and drug and alcohol abuse, to which it gave “an average level of attention.”²⁸⁰ In April 2007, it had an emergency response plan, including an emergency warning process that had been put in place two years before the shooting.²⁸¹ It also had an interdisciplinary “Care Team” comprised of the Dean of Student Affairs, the Director of Resident Life, the head of Judicial Affairs, representatives from Student Health, and legal counsel, which met regularly to identify and work with problematic students and make appropriate referrals and recommendations in specific

274. See VT PANEL REPORT, *supra* note 6. The 150-page report was commissioned by Governor Kaine immediately after the shooting. There are virtually no facts in the report that were not previously reported in press accounts. The most widely publicized of the three reports commissioned by public and University officials, the VT Panel Report has been criticized by Canadian sociologist Kenneth Westhues for collecting (and disclosing) insufficient information, for failing to make a systematic comparison with other school rampages, and for its “studied avoidance of situational explanations.” Westhues, *supra* note 26.

275. VT PANEL REPORT, *supra* note 6; see U.S. Dep’t of Health & Human Serv.’s, Rep. to the President [of the U.S.] on Issues Raised by the Virginia Tech Tragedy, June 13, 2007, <http://www.hhs.gov/vtreport.html> (last visited May 24, 2009); Virginia Tech Internal Review Reports: Security Infrastructure Group, *available at* http://www.vtnews.vt.edu/documents/2007-08-22_security_infrastructure.pdf, and Interface Group, *available at* http://www.vtnews.vt.edu/documents/2007-08-22_internal_communications.pdf (last visited Apr. 16, 2009).

276. VT PANEL REPORT, *supra* note 6, at 11.

277. *Id.*

278. *See id.*

279. *Id.*

280. *Id.* at 14.

281. *Id.* at 52.

cases of concern.²⁸² In the nine months before the rampage, the school had cancelled classes three times because of threats of campus violence, and Professors had received close to a dozen e-mail warning of gunmen on campus, multiple bomb threats to academic buildings, and violent physical attacks on campus.²⁸³

Seung Hui Cho, the student gunman, was a Korean native who immigrated to the United States when he was in the third grade, by which time his parents were already concerned that he was extremely withdrawn and uncommunicative in family and social circles.²⁸⁴ He learned English as a second language but never learned to read or write Korean. Both his parents worked at unskilled jobs in a dry cleaning business.²⁸⁵ They were conscientious about their children's welfare, and they followed all recommendations made by elementary and secondary school authorities concerning their son.²⁸⁶ Both of their children went to college.²⁸⁷

Cho started receiving psychotherapy (in the form of art therapy) in the seventh grade because he was abnormally shy and silent in groups and extremely isolated socially. During middle school and high school, his condition was diagnosed as "social anxiety disorder" and "selective mutism" by professional psychologists to whom the school system referred him.²⁸⁸ The secondary school system classified him as disabled by mental disorder and accommodated him by not insisting that he participate in class or engage in group projects. With that accommodation, he did well scholastically, demonstrating above average ability in mathematics and science.²⁸⁹ He was accepted at Virginia Tech at the end of his senior year

282. The VT Panel Report criticized the composition of the Care Team as insufficiently inclusive. *Id.* at 52.

283. Patricia Mooney Nickel, *There is an Unknown on Campus: From Normative to Performative Violence in Academia*, in *THERE IS A GUNMAN ON CAMPUS: TRAGEDY AND TERROR AT VIRGINIA TECH*, *supra* note 13, at 167.

284. VT PANEL REPORT, *supra* note 6, at 21.

285. *Id.*

286. *Id.* at 21–22.

287. Cho's sister went to Princeton University. N.R. Klienfield, *Before Deadly Rage, a Life Consumed by a Troubling Silence*, N.Y. TIMES, Apr. 22, 2007, <http://www.nytimes.com/2007/04/22/us/22vatech.html>.

288. VT PANEL REPORT, *supra* note 240, at 34–35. In the eighth grade, he was prescribed anti-depressants for a year after a single incident of depression following his writing of a paper for his English class in spring 1999, shortly after the Columbine high school rampage, saying that he wanted to "repeat Columbine" and discussing general thoughts of suicide and murder. *Id.* at 35. He was continually under the care of a therapist for most of his high school years. He was otherwise gentle and quiet, exhibited no violent tendencies, and was incapable of speaking above a whisper, if at all, in a group. *Id.* at 32–34. His high school classmates also recalled that he was teased and bullied because of his silences, his broken English, and his deep voice. Klienfield, *supra* note 287.

289. His grade point average was 3.5 in the Honors Program. VT PANEL REPORT, *supra* note 6, at 22.

of high school.²⁹⁰

Cho moved into a student residence hall and began classes at Virginia Tech in August 2003 intending to major in Information Business Technology.²⁹¹ He completed his freshman year with a 3.0 average.²⁹² Although he continued to be shy, silent, and isolated, he was excited about college and appeared to be adjusting well. In his second year, he moved off campus.²⁹³ Though in high school he had shown no aptitude for English or any course demanding high verbal skills, he had become enthusiastic about writing when he took a poetry course his first year from Dr. Lucinda Roy, the chair of the English Department, who advised him to take creative writing.²⁹⁴ He took several English courses in his sophomore year and spent the summer engrossed in writing a novel.²⁹⁵ He changed his major to English at the beginning of his junior year, when he also moved back on campus to a residential suite with several suite mates.²⁹⁶ It was at this point that his undistinguished and uneventful college career began to change.²⁹⁷

In the fall 2005, twenty months before the rampage, Cho enrolled in Professor Nikki Giovanni's creative writing poetry class. His behavior in class disturbed her from the beginning, and their relationship was tense.²⁹⁸ In particular, Professor Giovanni was alarmed by the rage in a piece he wrote directed at her and the other students in the class.²⁹⁹ She was also

290. He insisted upon attending Virginia Tech even though his therapist advised against it. *Id.* His high school records with respect to his psychological condition and need for special support were not transferred by the high school to the university. Once away from his family, he discontinued therapy and denied any history of psychological counseling. *Id.* at 53.

291. *Id.* at 40.

292. *Id.*

293. *Id.*

294. *Id.* at 40–41.

295. *Id.* at 41.

296. *Id.* at 41–42.

297. *Id.*

298. *Id.* at 42. He came to class wearing dark glasses and a hat that obscured his face. Each time the class met, she had to insist that he take them off. She considered him disruptive and uncooperative. Later, he took to wearing a beduin-style turban. She thought he was trying to bully her. He also refused to make changes in his writing, and when he read his work to the class, he was inaudible. *Id.*

299. *Id.* His composition, entitled “So-Called Advanced Creative Writing-Poetry,” apparently took its subject from a class discussion on eating animals. Addressing his classmates, Cho wrote

You low-life barbarians make me sick to the stomach that I wanna barf over my new shoes. If you despicable human beings who are all disgraces to [the] human race keep this up, before you know it you will turn into cannibals—eating little babies, your friends. I hope y'all burn in hell for mass murdering and eating all those little animals.

Id.

alarmed to learn that he was photographing his classmates with his cell phone, which frightened them so much that several stopped coming to class. In October Professor Giovanni asked Cho to switch to another class, but he refused. She then wrote to Dr. Roy insisting that he be removed.³⁰⁰

Dr. Roy appealed to the Dean of Students, the student counseling center, and the Dean of the College for assistance. She asked for a psychological and disciplinary review of Cho's behavior in Professor Giovanni's class.³⁰¹ Told there was no basis for action at the University level to remove him from the program, Dr. Roy had few options. She was obliged to offer Cho the equivalent of the instruction he would receive in the writing class, so she offered to "work independently" with him.³⁰² Cho was angry and depressed about being "kicked out" of the class. He told Dr. Roy that the composition was a satire, that he was "just joking" and "just making fun" of the class discussion, but he agreed to the private arrangement so long as he did not lose any credits.³⁰³ She gave him the name of a counselor but he did not agree to call the counseling center, and he did not do so until late November.³⁰⁴

From October through the end of the semester, Dr. Roy communicated with a wide network of university officials about Cho's case.³⁰⁵ Dr. Roy reported that all of his writing was now "about shooting and harming people because he's angered by their authority or their behavior."³⁰⁶ From

300. *Id.* at 42–43. Cho also wrote a letter to Dr. Roy that was angry and critical of Professor Giovanni's teaching methods. He complained that she cancelled class and that she had the students read and discuss their writing instead of instructing them. He agreed to meet with Dr. Roy, however, writing, "I know it's all my fault because of my personality . . . Being quiet, one would think, would repel attention but I seem to get more attention than I want." *Id.* at 44.

301. The Dean of Students advised that there was no specific University policy about cell phones but that a general prohibition on disruptive behavior that interfered with orderly University processes would apply. The general prohibition provided grounds for discipline if Cho did not stop taking photographs of his classmates during class. He also replied that he had shown Cho's writing to a counselor and that she "did not pick up on a specific threat." *Id.* at 43. He advised Roy to refer Cho to the counseling center and warn him that further disruption would be referred to the Office of Judicial Affairs. *Id.*

302. *Id.* at 44.

303. *Id.*

304. *Id.* at 45.

305. The Care Team considered his case at this time but, according to later reports, believed the situation was taken care of by the class change. *Id.* at 43.

306. *Id.* at 45. She continued

I have to admit that I'm still very worried about this student. He still insists on wearing highly reflective sunglasses and some responses take several minutes to elicit . . . But I am also impressed by his writing skills, and by what he knows about poetry when he opens up a little. I know he is very angry, however, and I am encouraging him to see a counselor—something he's resisted so far. Please let me . . . know if you see a problem with this approach.

that point on, violent and angry content was a consistent aspect of Cho's writing for professors in the English Department.

Among the students, too, with his return to campus living, Cho's reputation as a strange and sinister figure began to precede him, especially during that fall semester, when his behavior attracted attention outside as well as inside the classroom.³⁰⁷ He became known around campus as "The Question Mark Kid" because he often signed the class attendance roll with a question mark. Cho's suite mates invited him to several parties that fall. He went along but did not interact with anyone, and at one gathering, in a girl's dorm room, he sat on the floor stabbing the carpet with a knife. After that, the suite mates no longer suggested he accompany them.³⁰⁸

On November 27, a student who lived in West Ambler Johnson residence hall (West AJ) complained to the campus police that Cho was annoying her.³⁰⁹ A policeman came to Cho's suite to warn him to leave her alone and to advise him that the complaint would be referred to Judicial Affairs.³¹⁰ After the officer left, in a rare burst of extemporaneous speech, Cho volunteered to his suite mates that he had been playing a game: he sent the girl several text messages signed "?" and then showed up in her dorm room in his habitual dark mirrored glasses and face-obscuring hat. "I'm question mark," he told her. She "freaked out" so much that the resident advisor called the police.³¹¹

During this time, Cho was also communicating anonymously with the

Id.

For the rest of the semester, Dr. Roy encouraged Cho to read poets who would help him develop empathy and to redirect his writing away from violent themes. She saw no overt threats in his writing. She reported that gradually he opened up a little and wrote well. He made an "A" in the independent study. *Id.*

307. His suite mates stopped inviting him to eat with them in the dining hall because he never talked to them. However, after the rampage they reported that he would go to different lounges and call one of them on the telephone, identifying himself as "question mark"—Cho's twin brother—and ask to speak to himself. He posted a message to his roommate's Facebook page identifying himself as Cho's twin. *Id.* They also suspected him of writing heavy metal lyrics on the walls of the suite in the fall and in the halls of the dorm in the spring. One of them claimed to have found a large knife in Cho's desk and discarded it. *Id.* at 42, 45.

308. He told his room mates that he had an imaginary girlfriend named "Jelly," a supermodel who lived in outer space; he said she called him "Spanky" and appeared to believe that she visited him in his room. He sometimes introduced himself as "Question Mark," saying that this was the identity of a man who lived on Mars and traveled to Jupiter. He told them that he had been vacationing at Thanksgiving with Vladimir Putin, whom he had known growing up in Moscow. Klienfield, *supra* note 287.

309. VT PANEL REPORT, *supra* note 6, at 45.

310. *Id.*

311. *Id.* The student declined to press criminal charges—indeed, it is not clear with what crime Cho could have been charged. Judicial Affairs, to which Cho was told the matter would be referred, took no action. The incident was not reported to the Care Team. *Id.* at 43–44.

young woman student whose carpet he had stabbed. He sent her self-deprecating text messages and made postings to her Facebook page that she did not find threatening and did not discourage.³¹² In early December, however, she found an anonymous note on the whiteboard outside her door that alarmed her enough to call her father.³¹³ The father called a friend, the chief of police in a neighboring town, who advised that the campus police be informed.³¹⁴

On November 30, Cho called the counseling center and asked for an appointment with Dr. Betzel, the licensed clinical psychologist whom Dr. Roy had been urging him to call.³¹⁵ The appointment was scheduled for December 12.³¹⁶ Cho did not show up for the appointment but called and spoke briefly with Dr. Betzel, who made no diagnosis, no referral for services, and no further appointment.³¹⁷

On December 13, the police again met with Cho and told him to leave the second young woman alone as well.³¹⁸ Cho sent an instant message to a suite mate: "I might as well kill myself."³¹⁹ The student called the campus police. They returned and took Cho for a psychological pre-screening by a licensed clinical social worker from an off-campus community service agency, who found him mentally ill, imminently dangerous, and resistant to voluntary treatment.³²⁰ She secured a temporary detention order from a local magistrate, and Cho spent the night at St. Alban's, the local mental health facility, where he was given a single dose of anti-anxiety medication.³²¹ He had not yet been psychiatrically examined when he was seen for fifteen minutes the next morning by a licensed clinical psychologist, who evaluated him for purposes of the required court committal hearing and recommended that he be allowed to return to campus.³²² The psychiatrist who interviewed Cho later in the

312. *Id.* at 46. The VT Panel Reported that she would respond positively and ask if she was writing to Cho. He would reply, "I do not know who I am." *Id.*

313. *Id.* The note was a quotation from Shakespeare's *Romeo and Juliet*: "By a name/I know not how to tell thee who I am/My name, dear saint is hateful to myself/Because it is an enemy to thee/Had I it written, I would tear the word." *Id.*

314. *Id.*

315. *Id.* at 45–46.

316. *Id.* at 46.

317. *Id.*

318. The student who reported the communications from Cho did not wish to file criminal charges and was not told that she could complain to Judicial Affairs. Nevertheless, Judicial Affairs was informed of the incident, as were the director of Residence Life and a number of residential staff. However, the matter was not referred to the Care Team. *Id.* at 46–47.

319. *Id.* at 47.

320. *Id.*

321. *Id.*

322. The evaluator relied entirely on the prescreening report and talked to no one but Cho about the case. He did not even read the hospital record of the previous night.

morning decided that he was mentally ill but agreed he was not imminently dangerous and recommended that he be treated with counseling as an outpatient at Virginia Tech.³²³

At the commitment hearing, the special justice of the circuit court ruled that Cho presented an imminent danger to himself as a result of mental illness and ordered that he follow all recommended outpatient treatments.³²⁴ Before Cho was released, he made an appointment at the Virginia Tech student counseling center for 3:00 p.m. that afternoon. His psychiatric discharge summary was faxed to the counseling center as well, though the University later claimed not to have received it.³²⁵ When Cho showed up for his appointment at the center, he was screened for the third time and left without talking with a counselor or scheduling another appointment. There was no follow-up by the counseling center or the court.³²⁶

Thus the result of the women's concerns and Cho's suicide threat was that he endured a humiliating and perhaps frightening encounter with the police and court system, received no psychiatric treatment, and had no opportunity to defend himself in a disciplinary hearing.³²⁷ His case was not referred to the Care Team. His parents were not told about the events surrounding the committal hearing; nor were his professors in the English Department.³²⁸ He never again attempted, nor did anyone else, to invoke

He sought no collateral information and talked to no one but Cho. *Id.*

323. The VT Panel Reported that Virginia Tech's counseling services were inadequate to the demands placed on them. "The lack of outpatient providers who can develop a post-discharge treatment plan of substance is a major flaw in the current system." *Id.* at 48; *see infra* note 645.

324. Neither Cho's suite mates, nor the detaining officer, nor the pre-screening counselor, nor the independent evaluator, nor the attending psychiatrist were present at the hearing. The judge read only the evaluator's report and heard testimony only from Cho. VT PANEL REPORT, *supra* note 6, at 48.

325. *Id.*

326. *Id.* at 49.

327. Professor Kenneth Westhues argues that this chain of events is an example of "an uncommon but distinct and devastating social process called workplace mobbing," a form of group scapegoating or bullying prevalent in academia. Westhues, *supra* note 26, at 3. Dr. Westhues writes,

A common way mobbings play out is that one or a handful of voluntary participants, who typically have strong feelings about the target, call down on the target a debilitating bureaucracy, an organized array of social-control specialists who take aggressive action not from ill-will or deep conviction, but as routine performance of their job responsibilities.

Id. at 8.

328. If his professors had been told, they might not have been surprised at the unsatisfactory outcome of the police-initiated psychological evaluation process. Cho was not the first student whose violent creative writing had resulted in intervention by the head of the English Department. After Cho's rampage, former Virginia Tech student Joe Newbury, also seen by members of the faculty as potentially violent, published a twenty-page statement on the internet. He also posted a letter he wrote to

University-level assistance in coping with his mental illness. Instead, he continued to take classes in the English Department in the spring semester 2006, including another creative writing course, while his social exclusion and isolation deepened even further.³²⁹ He made no more overtures to women, and he sent no more messages to his roommates. He raised his voice again only once that we know of, when Professor Carl Bean dismissed him in mid-April from the Technical Writing Class.³³⁰ For the next two semesters, the content of his writing was the primary indicator of

Dr. Roy in April 2005. See Joe Newbury, *The Truth About the VT Shooting*, <http://truthaboutvtshooting.blogspot.com/2008/01/truth-about-vt-shooting.html> (last visited May 24, 2009). Newbury accused the faculty of singling him out for humiliation, including a physical search by police and an involuntary interrogation about the contents of his writing by two police officers and a “therapist.” *Id.* Newbury, who was separated from his wife and child at the time, also complained that the mental-health investigation initiated by the school resulted in a mandatory examination of his daughter by the state social services agency for signs of abuse. He particularly blamed Professors Robert Hicok and Carl Bean for showing his work to Dr. Roy. He wrote to Dr. Roy requesting a final grade in his creative writing classes “at no penalty.” Letter from Joe Newbury to Dr. Lucinda Roy (Apr. 13, 2005), available at http://www.priapism.org.uk/English_Dept_Letter.pdf. Placing himself in the company of Jonathan Swift, Lord Byron’s anti-hero, Dostoyevsky, Knut Hamsun, Antonin Artaud, and Mark Twain, he wrote that the faculty did not recognize “literary quality” student writing when they saw it. *Id.* He also wrote,

I have moreover resolved to rectify the current situation by whatever means that may lie in accordance with my own self-respect—a self-respect that has been sadly neglected since I entered into the practice of coddling some of your credentialed personnel, who for all their advanced training have neither a decent grasp on the full scope of literature nor any of the kind of cultivated humanity one would expect in a learned institution.

Id. (A year later, Professors Hicok and Bean both also taught Cho, see *infra* notes 329, 330).

329. Professor Robert Hicok taught him in a fiction workshop and was concerned enough about his lack of participation in class and the violent content of his writing to discuss him with Dr. Roy, but he decided he would “just deal with him.” VT PANEL REPORT, *supra* note 6, at 49. He considered Cho’s work “not very unique” or creative. *Id.* Hicok gave him a D+ in the class and never saw him again. He did not inform anyone that Cho had written a school-shooting story, see *infra* note 331, until after the rampage. VT PANEL REPORT, *supra* note 6, at 49–50.

330. Professor Bean, who taught Cho Technical Writing in the spring, considered him intelligent, manipulative, and lazy. Professor Bean required each student to write a technical essay. After Professor Bean refused to allow him to write on either the American or the Korean revolution, Cho proposed to write “an objective real-time” experience based on Macbeth as a serial killer. *Id.* at 50. In mid-April, Professor Bean told Cho that he would authorize a late drop if Cho would withdraw from the course: Cho’s work so far was not satisfactory, and his essay proposal was not acceptable. In one of his rare audible speeches, Cho argued angrily and loudly that he did not want to withdraw. Professor Bean told Cho to leave his office until “he had better control of himself.” *Id.* Cho later told Professor Bean by e-mail that he had dropped the course. A year later, on the day of his rampage, Cho mailed a letter to the English Department about his encounter with Professor Bean. The letter has not been released. Professor Bean never discussed Cho with Dr. Roy, and he was unaware that Professor Giovanni had also had problems with Cho. *Id.* at 50–51.

his state of mind.³³¹

In fall semester 2006, Cho's inward and downward spiral toward self-identity continued.³³² There was no repetition of the behavior that caused him trouble the previous year.³³³ He did not speak to his roommates.³³⁴ He went to bed early, got up early, and kept entirely to himself.³³⁵ His room was extremely neat; the only book in it was a Bible.³³⁶ His resident dorm advisor, who was expecting trouble, did not have a single problem with him.³³⁷ Yet his classmates still put a question mark beside his name. In the play-writing class, the students were very careful what they said when they discussed his work. Some students wondered aloud if he might "do something." One told a friend that he was "the kind of guy who might go on a rampage killing."³³⁸ The two plays he wrote that semester were

331. In Professor Robert Hicok's fiction workshop, he wrote a story in which the narrator was a student shooter successfully struggling to overcome his reluctance to kill. It told the story of a morning in the life of "Bud":

"who gets out of bed unusually early . . . puts on his black jeans, a strappy black vest with many pockets, a black hat, a large dark sunglasses [sic] and a flimsy jacket . . ." At school he observes "students strut inside smiling, laughing, embracing each other A few eyes glance at Bud but without the glint of recognition. I hate this! I hate all these frauds! I hate my life This is it This is when you damn people die with me . . ." He enters the nearly empty halls "and goes to an arbitrary classroom . . ." Inside "(e)veryone is smiling and laughing as if they're in heaven on-earth, something magical and enchanting about all the people's intrinsic nature that Bud will never experience." He breaks away and runs to the bathroom "I can't do this I have no moral right . . ." The story continues by relating that he is approached by a "gothic girl." He tells her "I'm nothing. I'm a loser. I can't do anything. I was going to kill every god damn person in this damn school, swear to god I was, but I . . . couldn't. I just couldn't. Damn it I hate myself!" He and the "gothic girl" drive to her home in a stolen car. "If I get stopped by a cop my life will be forever over. A stolen car, two hand guns, and a sawed off shotgun." At her house, she retrieves "a .8 caliber automatic rifle and a M16 machine gun." The story concludes with the line "You and me. We can fight to claim our deserving throne."

Id. at 50.

332. Anticipating problems, his fiction-writing teacher checked with the Dean's Office to make sure that it was safe to have him in the classroom; the Dean made "no mention that Cho was suffering from mental health issues, nor did she mention anything about police reports." David Schoetz & Ned Potter, *English Professor Went to Dean About Killer*, ABC NEWS, Apr. 20, 2007, <http://abcnews.go.com/US/story?id=3060798>. He was unresponsive to her suggestions that he go with her to counseling, but he made a B+ in her course. VT PANEL REPORT, *supra* note 6, at 51–52.

333. VT PANEL REPORT, *supra* note 6, at 51.

334. *Id.*

335. *Id.*

336. *Id.*

337. *Id.*

338. *Id.*

graphic, angry, and violent. One involved killing a teacher.³³⁹

Virginia requires gun buyers to wait thirty days between purchases. Cho bought his first handgun in February and his second in March.³⁴⁰ He bought ammunition, magazines, heavy metal chains, padlocks, cargo pants, and a hunting knife. He practiced shooting at a target range.³⁴¹ He rented a van for a month, where he could get away from campus, store his arsenal, and record himself on videotape. In early April he stopped attending most classes.³⁴² He gave his hair a military buzz cut.³⁴³ He inscribed the words “Ax Ismael” on his arm.³⁴⁴ On April 8 he rented a motel room and spent the night there making videotapes. He also appears to have rehearsed the shooting: on April 14, a teacher saw someone of his description at Norris Hall, and a student later found doors chained shut there. The next day, he made his usual Sunday call to his parents, who noticed nothing amiss.³⁴⁵

For his killing spree, Cho selected Monday, April 16, four days before the anniversary of the Columbine High School shooting.³⁴⁶ He shot his first two victims at 7:15 a.m., in the West AJ residence hall, where he had been rejected by a woman student in 2005. At West AJ, he killed a young woman who had just returned to her dorm room after a weekend away, and the Resident Advisor, whose room was next door and who presumably ran in to investigate the noise.³⁴⁷ He returned to his own room at 7:17, three minutes before the Virginia Tech police were notified that there was a disturbance of some kind at West AJ.³⁴⁸ It was over thirty minutes after the

339. Scripts and video enactments of the two plays, “Richard McBeef” and “Mr. Brownstone,” can be found on the internet. *See, e.g.*, UmmYeah.com, Cho Seung Hui’s Plays—Mr. Brownstone, http://ummyeah.com/page/Cho_SeungHuis_Plays_Mr_Brownstone (last visited May 25, 2009). Professor Ed Falco, who taught the course, described them as “juvenile with some pieces venting anger.” VT PANEL REPORT, *supra* note 6, at 51. He did not let his colleagues or the administration know about their content. After the rampage, he proposed and helped write a set of guidelines for professors in dealing with students who submit disturbing and violent work. *Id.*

340. If it had been properly recorded, the adjudication of mental illness would have prevented Cho from legally purchasing firearms under federal but not necessarily under Virginia law. VT PANEL REPORT, *supra* note 6, at 71–72.

341. *Id.* at 71.

342. *Id.* at 52.

343. Klienfield, *supra* note 287.

344. *Id.*

345. VT PANEL REPORT, *supra* note 6, at 52.

346. The videotapes and writings that he sent to the news media extolled Eric Harris and Dylan Klebold, the Columbine rampage shooters. *See infra* note 351.

347. VT PANEL REPORT, *supra* note 6, at 25.

348. *Id.* There were no witnesses to the shootings in West AJ. The police assumed that it was the result of a “domestic dispute” and that the dead girl’s boyfriend was a prime suspect. The police went looking for the boyfriend’s truck on campus, and when they did not find it, issued an alert to local law enforcement to be on the lookout. They pursued no other avenues of investigation and did not search the campus for other possible perpetrators. The police had just tracked down their suspect and tested his

two bodies were found by the police before the Office of the Executive Vice President was notified; the call “trigger[ed] a meeting of the university’s Policy Group.”³⁴⁹ While the administrators met and the police chased after the dead girl’s boyfriend, a student at nearby Radford University said to enjoy shooting, Cho changed clothes, erased his computer files, and went to the post office in Blacksburg to mail a package of pictures, writings, and videotaped messages to NBC News in New York.³⁵⁰ The package was mailed at 9:01 a.m. By 9:15 Cho was back on campus at Norris Hall, in the college of engineering.³⁵¹ By 9:30 he had

hands for gunshot residue (the test was negative) when the rampage began. *Id.* at 26.

349. *Id.* at 25. The meeting of administrators started thirty minutes after the Executive Vice President got the call. By then it was 8:25, classes had started, and no student alert had been given. The University officials decided that the double murder did not warrant cancelling classes. The Policy Group did not send a campus alert about the dormitory murders until 9:26, less than fifteen minutes before the rampage began and over two hours after the police discovered the bodies in West AJ Hall. *Id.* The first general e-mail alert read: “A shooting incident occurred at West Ambler Johnston earlier this morning. Police are on the scene and are investigating. The university community is urged to be cautious and ar [sic] asked to contact Virginia Tech police if you observe anything suspicious or with information on the case.” *Id.* at 82. At 9:50 a.m., about a minute before the rampage ended, the Policy Group sent a second e-mail alert: “A gunman is loose on campus. Stay in buildings until further notice. Stay away from all windows.” *Id.* at 96. At 10:52, the third alert was issued:

In addition to an earlier shooting today in West Ambler Johnston, there has been a multiple shooting with multiple victims in Norris Hall. Police and EMS are on the scene. Police have one shooter in custody and as part of routine police procedure, they continue to search for a second shooter. All people in university buildings are required to stay inside until further notice. All entrances to campus are closed.

Id. at 96.

350. The package contained pictures of himself holding weapons, an 1800-word writing, and video clips. The writing has never been made public. The VT Panel Report represents that it is a script of the video clips. *Id.* at 26. In another writing, found in his dorm room, Cho wrote,

Kill yourselves or you will never know how the dorky kid that [you] publicly humiliated and spat on will come behind you and slash your throats . . . Kill yourselves or you will never know the hour the little kid will come with hundreds of rounds of ammunition on his back to shoot you down.

Sari Horwitz, *Va. Tech Shooter Seen as “Collector of Injustice,”* WASH. POST, June 19, 2007, at A01, available at http://www.washingtonpost.com/wp-dyn/content/article/2007/06/18/AR2007061801732_pf.html. He thanked those who had treated him as “a ‘filthy street dog’ and an ‘ugly, little, retarded, low-life kid.’” *Id.*

In the video clips, Cho raged against hedonistic students with trust funds and a taste for alcohol. He compared himself to Christ and praised the Columbine shooters as martyrs. He said, “You have vandalized my heart, raped my soul, and torched my conscience.” Klienfield, *supra* note 287. He also said, “You had a hundred billion chances and ways to have avoided today, . . . but you decided to spill my blood. You forced me into a corner and gave me only one option. The decision was yours. Now you have blood on your hands that will never wash off.” *Id.*

351. His choice of Norris Hall for the shooting was, like his character Bud’s, apparently “arbitrary,” *see supra* note 330, in the sense that he did not attack a building

chained the doors shut from the inside at all three main entrances.³⁵² For the next eleven minutes, he moved in and out of classrooms on the second floor of the building, firing almost constantly.³⁵³ He killed Professor G.V. Loganathan and nine students and wounded three others in a graduate engineering class of fourteen students being held in Room 206.³⁵⁴ He shot a student in the hallway. He went into Room 207, an Elementary German class with twelve students attending; he killed Professor Christopher Bishop and four students and injured seven.³⁵⁵ He attempted to enter Room 205, but the eleven students in the Issues in Scientific Computing class had by then barricaded the door by lying down and holding it shut with their feet and Cho was unable to get in.³⁵⁶ He fired through the door, hitting no one.³⁵⁷ In Room 211, a French class with eighteen students present, the students and professor tried to barricade the door with a table, but Cho pushed his way in.³⁵⁸ He visited this classroom twice during the rampage, killing Professor Jocelyne Couture-Nowak and eleven students, and wounding six others.³⁵⁹ He killed Professor Kevin Granata in the hallway. In Room 204, where Professor Liviu Librescu was teaching solid mechanics to sixteen students, the professor told the students to head for the windows while he held the door shut; Cho shot and killed him through the door.³⁶⁰ Ten students escaped through the windows—a drop of nineteen feet onto grass and shrubbery; four others were shot, and one died.³⁶¹

There were about 110 students attending classes in Norris Hall at 9:00 on April 16, and there were many others in the building as well, including

in his own college, or class rooms where his estranged professors were teaching. The University-gothic style building also had the advantage of being old and easy to lock from the inside.

352. At Norris Hall, Cho posted a notice inside the main entrance that if the door chains were removed, a bomb would go off. A teacher found the note and took it to the Dean's office. They were about to call the police when the shooting began on the floor below. Several students also saw the chains but did not notify anyone in authority. One student, finding the doors chained shut, entered the building through a window and went on to class. VT PANEL REPORT, *supra* note 6, at 89–90.

353. He fired over 175 rounds. Klienfield, *supra* note 287.

354. Calls to 911 began within a minute from students in nearby classrooms, but not everyone recognized the sounds they were hearing as gunfire. One engineering student was shot when he went into the hall to investigate the noise. In another classroom, the teacher instructed the students to keep working when the noise started. VT PANEL REPORT, *supra* note 6, at 90–91.

355. *Id.* at 27.

356. *Id.*

357. *Id.*

358. *Id.*

359. *Id.* He also tried to reenter Room 207, but the students managed to hold the door shut. *Id.* at 91.

360. *Id.* at 27.

361. *Id.*

the staff of the dean's office. The courage and resourcefulness of the students and faculty in Norris Hall and the prompt arrival of the police kept the death toll of Cho's victims to twenty-nine: five professors and twenty-four students.³⁶² Another seventeen were wounded by gunshot, and ten were injured attempting to save themselves. Alerted by students with cell phones inside the building, five police officers arrived at 9:45, three minutes after they got the first call, and though they lost about five minutes trying to get into the building, they reached the second floor of Norris Hall at 9:51, just as Cho shot himself twice, fatally, in the head.³⁶³ He was found in the stairwell between the first and second floors.³⁶⁴ It is believed that he ended the rampage only when he heard one of the officers shoot the chains off the door at the main entrance with a shotgun.³⁶⁵ He still had over 200 rounds of ammunition and his guns were still functioning perfectly when he killed himself.

The University was closed for a week while the media swarmed over the campus.³⁶⁶ Before it reopened, the Associate Vice President for University Relations sent an official e-mail to faculty, students, and staff on media relations policies, sharing "the messages we think are important to convey."³⁶⁷ "We will not be defined by this event," he wrote.³⁶⁸ "Nothing in the events of last week will alter who we are and what we represent."³⁶⁹

The official reviews of the rampage essentially supported the University's determination not to redefine itself in terms of the rampage. They were all primarily concerned with recommending improvement in University-level threat assessment, security measures, and emergency response systems, not with exploring possible institutional causes of the shooting. Nevertheless, the internal working group established by Virginia

362. Of the seven faculty conducting classes, five were fatally shot. Three were standing in front of their class when Cho walked into the room, one was shot attempting to barricade a door while his students escaped out the windows, and one was shot when he came down from the third floor to investigate the noise, having evacuated his class to safety in a small locked office. *Id.* at 90–92.

363. *Id.* at 28.

364. Klienfield, *supra* note 287.

365. VT PANEL REPORT, *supra* note 6, at 28.

366. The Associated Press voted the shooting the top news story of 2007. *Virginia Tech Killings Voted Top News Story of 2007 by US Editors*, VOICE OF AMERICA, Dec. 28, 2007, <http://www.voanews.com/specialenglish/archive/2007-12/2007-12-28-voa2.cfm?moddate=2007-12-28>.

367. Nickel, *supra* note 283, at 165.

368. *Id.*

369. *Id.* "[This] statement . . . is not only obviously inaccurate, it is distinctly political" writes Virginia Tech sociology lecturer Patricia Mooney Nickel. *Id.* at 166. "The murder of thirty-two students on our campus *should* have instigated a transformation of 'who we are' and 'what we represent.' We could have done something as simple as declaring that we were now a university staunchly opposed to violence." *Id.*; see Theresa Vargas & Kameel Stanley, *Va. Tech Strove to Protect Its Image*, WASH. POST, Aug. 4, 2008, at B1.

Tech's President to examine the interface between counseling services, academic affairs, judicial affairs, and legal systems made the following important observation:

A strong, vibrant and supportive community is essential in ensuring a safe campus environment. An environment that promotes civility, works toward the acceptance of others' differences, strives to include rather than exclude and provides assistance to those in need is fundamental to a safe campus It is recommended that a more systematic approach be instituted that specifies campus-well [sic] being as a goal and ensures that the various efforts are connected.³⁷⁰

After the rampage, over 20,000 individuals and corporations gave over seven million dollars to the Hokie Spirit Memorial Fund and the Hokie Spirit Scholarship Fund established by the University. Within two months, Virginia Tech announced that it would use half the fund money to create thirty-two scholarships named for the dead victims, but a number of the families objected to exploiting the deaths for fundraising purposes, and the University decided against the plan.³⁷¹ Through an offer made in August 2007, shortly before the investigative reports of the rampage were released, the University proposed to disburse the entire contents of the funds to the victims.³⁷² The families of the murdered faculty and students, the injured students, and the students who were present in the five Norris Hall classrooms attacked by Cho, were offered compensation on a sliding scale in the form of money and tuition waivers.³⁷³ Disbursement of the Hokie

370. PRESIDENTIAL INTERNAL REVIEW WORKING GROUP REPORT ON THE INTERFACE BETWEEN VIRGINIA TECH COUNSELING SERVICES, ACADEMIC AFFAIRS, JUDICIAL AFFAIRS AND LEGAL SYSTEMS, 3 (2007), http://www.vtnews.vt.edu/documents/2007-08-22_internal_communications.pdf. This working group included one member of the Virginia Tech faculty. *Id.* at 1.

371. Tim Craig, *Virginia Tech Families to Be Offered Up to \$180,000*, WASH. POST, Aug. 16, 2007, at A1.

372. Kenneth Feinberg, a lawyer who had worked on the disbursement of the victims' fund following the terrorist attack on the World Trade Center on September 11, 2001, offered his services pro bono and ultimately persuaded Virginia Tech to disburse the entire fund to the victims and their families. *Id.*

373. The initial proposal was to offer the dead victims, including the faculty, \$150,000; to offer those students hospitalized fifteen days or more \$75,000 and tuition for one year; to offer students hospitalized between three and fourteen days \$25,000 and tuition for one year; and to offer all others either \$8,000 or tuition for one year. Martin Van der Werf, *Victims of Virginia Tech Shootings Will Be Offered More Money Than Previously Proposed*, CHRON. HIGHER EDUC. (Wash., D.C.), Aug. 16, 2007, <http://chronicle.com/daily/2007/08/2007081603n.htm>. Under the terms of the final offer, the families of the murdered victims received \$180,000; students hospitalized ten days or more received \$90,000 and free tuition for as long as they remained at the University; students hospitalized for three to nine days received \$40,000 and free tuition; and all others received free tuition or \$10,000. *Id.*

The Hokie funds continued to receive donations until the end of December 2007.

funds was not contingent on releasing legal claims against the school.

The Virginia Tort Claims Act waives sovereign immunity for personal injuries or death caused by negligent or wrongful acts or omissions of employees of the Commonwealth but has been held not to waive immunity for Commonwealth agencies such as public universities.³⁷⁴ Damages against the Commonwealth itself are capped at \$100,000.³⁷⁵ Despite these obstacles to recovery, at least twenty-two families filed notices of claims against the University by April 16, 2008, as required by the Tort Claims Act.³⁷⁶ A major impetus for the legal claims appears to have been the revelation that on the morning of the shootings, after the murders in West AJ were discovered, University officials locked down their own building while deciding not to cancel classes, alert the students and faculty, or lock down the entire campus.³⁷⁷ “‘This has nothing to do with money and everything to do with seeking the truth and complete accountability,’ said Joe Samaha, whose daughter Reema was killed.”³⁷⁸

In June 2008, a Virginia circuit court judge approved agreements

Later reports indicated that these additional funds were also disbursed to the victims and their families, so that the actual settlements ranged from \$11,500 to \$208,000. Anita Kumar, *Judge Agrees to Va. Tech Payout*, WASH. POST, June 18, 2008, at B1.

374. Sebok, *infra* note 375.

375. See Anthony J. Sebok, *Could Virginia Tech Be Held Liable for Cho Seung Hui's Shootings, If An Investigation Were to Reveal It Had Been Negligent? The Unfortunate Answer*, FINDLAW.COM, Apr. 24, 2007, <http://writ.news.findlaw.com/sebok/20070424.html>. While another provision of the state code indicates that the cap is the maximum of any liability policy maintained to insure against such negligence, Virginia Tech is not separately insured; it is covered by the Virginia Treasury Department's Division of Risk Management. See Tim Craig, *Va. Tech Victims' Families Weigh Suits Against State*, WASH. POST, Sept. 6, 2007, at B1.

376. Tim Craig, *Mediator Guiding Deal on Va. Tech*, WASH. POST, Mar. 26, 2008, at B1.

377. See Michael Sluss, *Judge Clears Tech Shooting Settlement*, ROANOKE TIMES (VA.), June 18, 2008, <http://www.roanoke.com/new/roanoke/wb/166187>.

One e-mail was sent at 9:25 a.m. by Bernadette Mondy, co-director of Tech's Department of Environmental Health and Security, to her family. Mondy wrote that there 'is an active shooter on campus' and that her office 'is in lockdown.' That was one minute before university officials sent out a campus-wide e-mail notice of the dormitory shootings.

Id.; see *supra* note 349. “‘What's unconscionable is that they protected their own, and did not protect our children,’ said Joe Samaha, whose daughter Reema was killed.” Larry O'Dell & Donna Potter, *Judge Approves \$11M Settlement in Virginia Tech Shootings*, INS. J., June 20, 2008, <http://www.insurancejournal.com/news/national/2008/06/20/91186>. “‘Not being notified although department officials locked down their building—I don't know how their consciences let them live with that,’ said [Suzanne] Grimes, who said she, like other victim families, will continue to pursue all information concerning the notification process that occurred when the shooting occurred.” Jeffrey Alderton, *Parents of Virginia Tech Shooting Victim Discuss Settlement*, CUMBERLAND TIMES-NEWS (Va.), June 20, 2008, http://www.times-news.com/local/local_story_171142332.html.

378. Kumar, *supra* note 373.

reached with respect to the wrongful death claims.³⁷⁹ Under the terms of the \$11 million settlement, in exchange for a release of all claims, families of the murdered victims received payments of \$100,000 and wounded victims received payments of up to \$100,000 and seriously wounded victims also received lifetime health coverage.³⁸⁰ In addition, a \$1.9 million fund was created to cover special needs of victims and families; a \$1.75 million fund was created for campus safety and security grants, memorial activities, and donations to charitable organizations; the Hokie Spirit Memorial Fund was reopened for donations for another five years; the families of the victims were given an opportunity to meet with the Governor and with senior university officials to discuss remedial actions at the state and University level; victims and their relatives received an overview of the state police investigation; the University was required to create and maintain an electronic archive of records related to the shootings, to which the families were to have access; and the victims' attorneys were paid over \$800,000.³⁸¹

H. Northern Illinois University, February 14, 2008

Located in DeKalb, Illinois, a college town sixty miles from Chicago, Northern Illinois University (NIU) is the second-largest public university in Illinois.³⁸² It has an enrollment of 25,000 students, ninety-five percent of whom are natives of the state. Ranked in the lower 25% of national universities by the *U.S. News & World Report*, NIU offers fifty-four undergraduate programs, seventy-four graduate programs, and twelve doctoral programs in seven degree-granting colleges.³⁸³ After the Virginia Tech shooting, it adopted an emergency alert plan for notifying students of dangerous conditions on campus. The system was tested on February 14, 2008, when a former student, Steven Kazmierczak, staged the seventh and last of the rampages considered here.

Kazmierczak was born in the United States in 1981 to white native-born parents.³⁸⁴ His father was a letter carrier; his mother was a secretary; and

379. Only the wrongful death claims required court approval. At least two families who filed wrongful death claims refused to settle. No lawsuits had yet been filed, however, when this article was completed. Sluss, *supra* note 377.

380. The release included claims against the Commonwealth of Virginia, the University, the local government, and the mental health agency involved in Cho's commitment evaluation. O'Dell & Potter, *supra* note 377.

381. Sluss, *supra* note 377.

382. Wikipedia, Northern Illinois University, http://en.wikipedia.org/wiki/Northern_Illinois_University (last visited May 25, 2009).

383. *Id.*

384. David Vann, *Portrait of the School Shooter as a Young Man*, *ESQUIRE*, Aug. 2008, <http://www.esquire.com/print-this/steven-kazmierczak-0808>. There is less reported about the NIU shooting than any other, though only Virginia Tech's casualty rate was higher. Unless otherwise noted, this account is taken from Mr. Vann's article,

he had one older sister, who attended college at the University of Illinois.³⁸⁵ He was educated in the Illinois public school system. In elementary school, he was a slightly above-average student.³⁸⁶ By the time he was in junior high school, however, he had only a few friends and appears to have been poorly socialized and socially disaffected.³⁸⁷ He liked school work but frequently cut gym classes. He and his friends amused themselves outside school by firing pellet guns at the hubcaps of passing cars and setting off Drano bombs, which landed him at the police station in 1994, when he was in the eighth grade.³⁸⁸

In high school, Steven Kazmierczak hung out with the “goths,” wearing a long black trench coat, chains, boots, and spikes.³⁸⁹ He spent more and more time with these friends in the woods not far from the high school, where they shot pellet guns, smoked marijuana, stashed sexually explicit material, and experimented with explosives.³⁹⁰ In the fall of the eleventh grade, he started spending nights at his friends’ houses and almost never went home.³⁹¹

At some point during high school, Kazmierczak was prescribed medication for bipolar disorder.³⁹² He also experienced high levels of anxiety, depression, and insomnia. In December 1996, his junior year, he planned and attempted suicide (by Tylenol overdose) and was hospitalized for a week.³⁹³ He was prescribed more medication, which made him gain

which is the only substantial factual account published about the NIU rampage. Mr. Vann teaches creative nonfiction and fiction as an assistant professor in the English Department at Florida State University. He reviewed over 1500 pages of documents, including police reports that were not otherwise released, and conducted interviews for three months before writing the article. He is writing a book about the NIU shooting. Interview by Bill Cameron, WLS 890 AM Connected to Chicago, with David Vann, (Aug. 17, 2008), <http://www.wlsam.com/sectional.asp?id=18779> [hereinafter Vann Interview].

385. Vann, *supra* note 384.

386. *Id.*

387. His schoolmates called him “fag.” *Id.*

388. The police wrote a report, but Kazmierczak was not charged as a juvenile because he expressed remorse and turned in his cohorts. After that, he had even fewer friends. *Id.*

389. His first love affair, with a girl in the group, ended in a humiliating break-up. *Id.* He continued to be sexually active in high school, and all of his long-term relationships were with women, though he also reported at least one same-sex encounter in high school. *Id.* He also engaged in “secret” sexual encounters with girls the summer he was sixteen. *Id.* In the months before his rampage, he again engaged in “secret sex” with both men and women he met through the Casual Encounters section of Craigslist, an internet outlet. *Id.* Vann suggests that Kazmierczak’s casual sexual encounters were “how he hated himself” and important to understanding the individual psychodynamics of his rampage. Vann Interview, *supra* note 384.

390. Vann, *supra* note 384.

391. *Id.*

392. *Id.*

393. *Id.*

over 150 pounds, break out in severe acne, and, according to one of his friends, act “like the personality was just sucked out of him.”³⁹⁴

At school, the “jocks” dubbed him “Suicide Steve” and “Crazy Mierczak.”³⁹⁵ In April 1997, his high school denied his parents’ request for a case-study evaluation.³⁹⁶ A week later, Kazmierczak again attempted suicide (by Ambien overdose and slitting his wrists) and was hospitalized again.³⁹⁷ During his senior year, 1997–1998, he became increasingly estranged from his family, who disapproved of his friends; his father turned one of them into the police for selling marijuana and LSD at the high school.³⁹⁸ He attempted suicide again (by Depakote overdose) in the fall and the spring semesters and was hospitalized for short periods.³⁹⁹ When he graduated from high school, he was placed in a group home for eight months because his parents had become afraid both of him and for him.⁴⁰⁰

Kazmierczak’s symptoms apparently worsened in the Thresholds residence program. He hated the group home, where he felt underestimated, and he escaped several times, but his parents always insisted that he return.⁴⁰¹ When he turned eighteen in February 1999, still under the care of a psychiatrist, he was transferred from the residential program into a single room occupancy building and helped with job placements. By the end of the year he had been fired from three retail jobs. He had problems with attendance and with his co-workers, with whom he had a hard time getting along. He was anxious, obsessive, compulsive, and emotional; he believed that his co-workers were ganging up on him; he got into arguments at work and into a fist fight with another resident at his hotel.⁴⁰²

In January 2000, against the advice of his therapists, Kazmierczak enrolled part-time in a two year community college and, without informing

394. *Id.* Other press accounts reported that Kazmierczak was “a B student with a baby face who was active in chess club, ‘Peer Helpers,’ a Japanese language program, a public service program, and the school band” Monica Davey, *Gunman Showed Few Hints of Trouble*, N.Y. TIMES, Feb. 16, 2008, <http://www.nytimes.com/2008/02/16/us/16gunman.html?partner=rssnyt&emc=rss>.

395. Vann, *supra* note 384.

396. *Id.*

397. *Id.*

398. *Id.*

399. *Id.*

400. *Id.* The Mary Hill Residence was operated by Thresholds Psychiatric Rehabilitation Centers, which claims to be the largest not-for-profit mental health service agency in the United States. See Thresholds Psychiatric Rehabilitation Centers, <http://www.thresholds.org> (last visited May 25, 2009). When he entered the group home, Kazmierczak was taking Prozac, Zyprexa, and Depakote; past medications had included Paxil, Cogentin, Risperdal, Lithium, and Cylert. Vann, *supra* note 384.

401. Vann, *supra* note 384.

402. He was taking Seroquel and Clozaril and experiencing side effects, such as bed wetting, that he found intolerable. *Id.*

his psychiatrist, began weaning himself off his medications.⁴⁰³ He stopped seeing his therapist and was discharged from the Thresholds program in June for refusing to cooperate. He also quit school without finishing the semester.⁴⁰⁴

In September 2001, he enlisted in the United States Army.⁴⁰⁵ He was given an “uncharacterized” discharge less than six months later, after military officials discovered that he had lied on his application with respect to his previous suicide attempts and mental health history.⁴⁰⁶

In August 2002, after a year and a half without psychotherapeutic medication, Kazmierczak enrolled at Northern Illinois University as a freshman, where he majored in political science and sociology.⁴⁰⁷ He moved into a dorm suite with four other male students, who dubbed him “Strange Steve.”⁴⁰⁸ He always wore long sleeves to hide his tattoos and showered in the dark.⁴⁰⁹ He ate alone in his room.⁴¹⁰ He did not go to parties, drink, or take drugs.⁴¹¹ He was fascinated with Adolf Hitler, Jeffrey Dahmer, and Ted Bundy, and he talked so much about how they committed their murders that his roommates told him to stop.⁴¹²

After a year at NIU, Kazmierczak moved to a single room, continued to apply himself diligently to his studies, and, as he had done in high school, slowly developed a small network of like-minded friends. They thought of themselves as “libertarians.”⁴¹³ During his last two years, his closest friend, “Kevin,” displayed a half-burned Bush/Cheney American flag on his door.⁴¹⁴ The two were deeply interested in *The Turner Diaries*, the methodology of the Columbine rampage, the Oklahoma City bombing, the explosion at the Branch Davidian compound in Waco, Texas, and the shoot-out at the Randy Weaver homestead in Idaho.⁴¹⁵ “Kevin” and Kazmierczak remained close friends until Kazmierczak’s death.⁴¹⁶ “Kevin” was still Kazmierczak’s confidant when Kazmierczak started

403. After he quit taking medication, he shaved his head. He carved homemade tattoos onto his skin: a large sword on his forearm, and “FTW” (Fuck the World) on the fingers of one hand. *Id.*

404. *Id.*

405. He liked the structure of Army life. He learned to shoot and was particularly proud that during his combat training he showed no emotional or psychological response to killing. *Id.*

406. *Id.*

407. *Id.*

408. *Id.*

409. *Id.*

410. *Id.*

411. *Id.*

412. *Id.*

413. *Id.* Kazmierczak’s favorite author was Frederich Nietzsche. *Id.*

414. Vann changed “Kevin’s” name to protect his privacy. *Id.*

415. *Id.*

416. *Id.*

buying guns in February 2007 and practicing at a shooting range.⁴¹⁷ “Kevin” shared Kazmierczak’s excitement about the Virginia Tech shooting in April 2007, and the two studied everything they could find about Cho’s rampage, particularly how he went about it.⁴¹⁸ “Kevin” admired the T-shirt Kazmierczak wore to his own rampage-suicide event.⁴¹⁹ “Kevin” was one of the last people to whom Kazmierczak spoke before his rampage. When he heard about the shooting at NIU, “Kevin” called Kazmierczak, laughing, and left a message: “I’ve been shot! Call me back!”⁴²⁰

Kazmierczak made other important connections at NIU than his like-minded fellow students, however. In his sophomore year, he took Introduction to Sociology in Cole Hall, Room 100, with Dr. Jim Thomas, NIU Distinguished Teaching Professor of Sociology and Criminal Justice.⁴²¹ Under Dr. Thomas’ influence, Kazmierczak helped found a chapter of the American Correctional Association on campus, in which he remained active until he left NIU.⁴²² He was also an officer in the Academic Criminal Justice Association.⁴²³ He tutored in the sociology lab.⁴²⁴ He did well in his studies.⁴²⁵ By the time he graduated, he was listed, along with two graduate students, as a co-author with Dr. Thomas on an article published in *Criminology & Public Policy*, a criminal justice periodical.⁴²⁶ At graduation in spring 2006, he won a Dean’s Award.⁴²⁷

417. Kazmierczak, who claimed from his teens to be a member of the NRA, was also opposed to Firearm Owner’s ID cards. *Id.*

418. “Kevin” later told Vann, “I think it was mostly a sociological interest . . . He was interested in what was going on in the mind of Cho, and why it was so successful, and how someone could do it, how they could pull it off.” *Id.* Kazmierczak admired Cho’s careful planning. *Id.*

419. The shirt was black with “TERRORIST” in white letters and red graphic of an AK-47 assault rifle. *Id.* “Kevin” and Kazmierczak joked about wearing it to an airport. *Id.* “Kevin” also admired Kazmierczak’s T-shirt with a picture of President Kennedy’s assassination in Dallas and the words, “I Love a Parade.” *Id.*

420. *Id.*

421. Dr. Thomas was known for his egalitarian approach to teaching and mentoring his students. Kazmierczak was initially diffident and uncomfortable with questioning and altering the power balance between student and teacher, but he overcame his scruples over time. *Id.*

422. *Id.*

423. *Id.*

424. He also met and formed an intimate relationship with a young woman with whom he continued to live until his rampage and suicide. *Id.*

425. He graduated with nearly a 3.9 grade point average. Jim Thomas, *Nietzsche at Northern: An Existential Narrative of Confronting the Abyss*, 72 SOC. PSYCHOL. Q. 109 (2000).

426. Jim Thomas, Margaret Leaf, Steve Kazmierczak, & Josh Stone, *Self-Injury in Correctional Settings: “Pathology” of Prisons or of Prisoners?*, 5 CRIMINOLOGY & PUB. POL. 193 (2006), available at <http://www.karenfranklin.com/files-KAZMIERCZAK.pdf>. At the end of the paper, Kazmierczak is described as follows:

Steve Kazmierczak is beginning graduate work at Northern Illinois

Kazmierczak entered graduate school at NIU in fall 2006 as a political science major because NIU had allowed attrition of faculty to eliminate most of its advanced courses in Sociology and Criminal Justice.⁴²⁸ He was apparently planning to pursue a law degree, but did poorly on the LSAT.⁴²⁹ He decided to become a social worker instead, and Dr. Thomas wrote a letter of recommendation to the University of Illinois in Urbana-Champaign, three hours south of NIU, where he was accepted beginning fall semester 2007.⁴³⁰

In late 2006, Kazmierczak's carefully constructed path to success began a slow switch-back toward a life he had tried to leave behind. In September, his mother died.⁴³¹ In December, while he was still living at NIU, Kazmierczak applied for a firearms permit. He began to buy guns and practice at the shooting range.⁴³² He and his college sweetheart moved to Champaign in June 2007, but they moved into separate bedrooms.⁴³³ He became increasingly anxious and worried. His obsessive and compulsive behaviors returned. He was extremely irritable, moody, and wakeful.⁴³⁴ In

University. In addition to his interests in corrections, political violence, and peace and social justice, he is co-authoring a manuscript on the role of religion in the formation of early prisons in the United States with Jim Thomas and Josh Stone. He also develops content for online education and is an executive board officer of the NIU student chapter of the American Correctional Association.

Id. at 202.

427. NIU describes the honor:

This honor is presented annually to the graduating senior majoring in political science who has achieved both a strong record of scholarship (e.g. high grade point average) and made outstanding contributions to the university community. The recipient is awarded a certificate of achievement and a check for \$150 at the department's commencement ceremony.

NIU Department of Political Science, Dean's Awards, <http://www.niu.edu/polisci/undergrad/awards.shtml#deans> (last visited May 25, 2009).

428. Vann, *supra* note 384

429. *Id.*

430. NIU did not offer a graduate degree in social work.

431. David Vann suggests that Kazmierczak's unusually close relationship with his mother in childhood and his conflicts with her in adolescence were important influences on the "secret Steve" who emerged, to the astonishment and disbelief of his friends and professors, as a rampage killer. His fascination with violent and horrific movies such as *Saw* and *Fight Club* are attributed to the fact that he often watched horror movies with his mother as a young child. *See id.*

432. In Illinois, the background check for a firearms permit goes back only five years. Kazmierczak had been out of the mental health system just over five years when he applied and received the permit. *Id.* All the guns used in the rampage were legally purchased. Later in 2007, after he started taking psychotherapeutic medication again, he wrote a paper entitled "(No) Crazy's with Guns!" suggesting that individuals on anti-psychotic medication should not be allowed to have firearms, but he did not disarm himself. *Id.*

433. *Id.*

434. *Id.*

early August 2007, he made an appointment with a psychiatrist at the University Health Center and, on the same day, bought one of the handguns he would use in his rampage six months later.⁴³⁵

The psychiatrist wrote that Kazmierczak showed signs of social anxiety and obsessive-compulsive disorder and prescribed the first anti-depressant medication Kazmierczak had taken in over six years.⁴³⁶ A month later, Kazmierczak reported to the psychiatrist that he was experiencing rapid heart rate and difficulty breathing in class, that he felt judged, and that he was constantly anxious. He was still doing well academically, however, and denied suicidal or homicidal thoughts.⁴³⁷ In late September, he reduced his course load, took part-time status at the University, and began training as a correctional officer at a nearby prison, where he learned to use a Remington 12-gauge pump-action shotgun. He dropped out of the training program in October, however, and a few days later shocked Dr. Thomas by a vicious verbal WebBoard attack on a gay graduate student at NIU.⁴³⁸

Isolated from his former friends at NIU, largely disengaged at his new University, and disappointed in his quest for socially meaningful work, Kazmierczak resumed behaviors he had abandoned after high school. He initiated promiscuous sexual encounters with both men and women. He became obsessed with a new horror movie, *Saw IV*.⁴³⁹ During the holidays he revived old family quarrels. At Christmas, he also bought himself another handgun, and a shotgun.

After the Christmas break, Kazmierczak resumed classes full time at the University, but his anxious, depressive, irritable symptoms worsened when he again stopped taking medication at the end of January.⁴⁴⁰ During the

435. *Id.*

436. He was prescribed ten milligrams of Prozac. *Id.*

437. The doctor increased the Prozac dosage and added Xanax for anxiety. *Id.* Assistant Professor Jan Carter-Black, his faculty advisor, and his other professors noticed no problems with his work and reported he was “pleasant, considerate, and flexible” at least through September, when he dropped most of his classes. *University Shooter Interested in ‘Peace and Social Justice,’* CNN.COM, Feb. 16, 2008, <http://www.cnn.com/2008/US/02/15/university.shooting.suspect/>. He discontinued the Prozac for a short while in October because it was causing acne but resumed the medication when his psychological symptoms worsened. Vann, *supra* note 384.

438. Vann, *supra* note 384.

439. At Halloween he dressed up as Jigsaw, the sadistic killer-narrator of the *Saw* films, and circulated pictures of himself to his friends. He covered his right forearm with a \$700 tattoo of Jigsaw riding a tricycle through a pool of blood and open knife wounds. In January he got another tattoo: a pentagram. *Id.*

440. *University Shooter Interested in ‘Peace and Social Justice,’ supra* note 437. He was still taking medication for anxiety and depression in early January, but on January 29, he called a recruiter for the United States Navy about enlisting. He learned that his previous discharge and use of medication were not automatically disqualifying, but that he would have to undergo psychiatric evaluation and could not be taking medication when he enlisted. Vann, *supra* note 384.

first week of February, he bought another handgun and a Remington 12-gauge shotgun, a hard-shell guitar case, extra ammunition magazines, ammunition, a knife, holsters, and the clothing he wore on his rampage.⁴⁴¹

On February 11, saying that he was going to visit his sick godfather, Kazmierczak returned to DeKalb and rented a room at the Travelodge motel. He spent the next two and a half days alone, though he spoke by telephone with his roommate, his friend “Kevin,” his father, and other friends and acquaintances.⁴⁴² He had with him a copy of Nietzsche’s *Anti-Christ*.⁴⁴³ He mailed the book to his roommate shortly before he left for the shooting.⁴⁴⁴

On the afternoon of February 14, 2008, wearing three holstered pistols under his coat and carrying his sawed-off shotgun in his guitar case, Kazmierczak drove to the NIU campus. At 3:04, he walked onto the familiar stage of Room 101 in Cole Hall and opened fire with the shotgun at students sitting in the front rows.⁴⁴⁵ He fired six rounds from the

441. The day he left Champaign to return to DeKalb and NIU, he sawed off the shotgun barrel. Vann, *supra* note 384.

442. None of them were alarmed by his conversation. *Id.* He also made several internet purchases, including an expensive wedding ring, and had them sent to his roommate as well, in time for Valentine’s Day. *Id.*

443. Professor Jim Thomas writes that Nietzsche,

the vehement critic of modernism, of Enlightenment and Christian values, of reason and of pity and caring about others represented the antithesis of Steve’s values and goals. Yet he often wore a t-shirt, originally intended as an ironic reference to the uneasy tension between good and evil faced by social workers in criminal justice, with a quote by Nietzsche printed on the back: “Whoever fights monsters should see to it that in the process he does not become a monster. And when you look long into an abyss, the abyss also looks into you.”

See Jim Thomas, *A Valentine’s Day Narrative: Confronting the Abyss* 7–8 (forthcoming 2009).

444. He sent the book using as a return address his old dorm address at NIU and the name “Robert Paulson,” a mild-mannered character in the 1999 movie *Fight Club*. Vann, *supra* note 384. As Dr. Thomas points out, in the movie, a character makes the following speech during a confrontation with his boss about a note that had been found:

Well, I gotta tell you: I’d be very, very careful who you talk to about that, because the person who wrote that . . . is dangerous. And this button-down, Oxford-cloth psycho might just snap and then stalk from office to office with an Armalite AR-10 carbine fast-powered semi-automatic weapon, pumping round after round into colleagues and co-workers. This might be someone you’ve known for years. Someone very, very close to you.

See Thomas, *supra* note 336, at 3.

Kazmierczak left no suicide note or other writing to explain his actions. Instead, like his anti-hero Cho, he erased his e-mail files, removed the SIM card from his cell phone, and removed the hard drive from his laptop computer. Vann, *supra* note 384.

445. Vann, *supra* note 384. Room 101 is an auditorium that seats 500. An oceanography class was in session. About half of the 187 enrolled students were in attendance. Most of them were on the same side of the room as the killer. See *id.*

shotgun, reloading twice in an eerie silence.⁴⁴⁶ Then he drew his handguns, descended from the stage, and walked up and down the most crowded aisle, six or seven rows deep, firing methodically at students who were still in their seats and at those attempting to escape.⁴⁴⁷ He fired forty-eight rounds with the pistols.⁴⁴⁸ He wounded both the instructor, Joe Peterson, and the teaching assistant, Brian Karpes.⁴⁴⁹ He shot primarily at women. Witnesses described his singular lack of personal engagement: he killed as though he were painting a wall.⁴⁵⁰ He killed four women and one man and injured fourteen other students. Then he climbed back up on the stage and shot himself, fatally, in the head.⁴⁵¹

The rampage lasted only two minutes and ended at 3:06 p.m., before the police arrived. Later, NIU officials praised the “speed and professionalism” of the police response. The University President said, “We had a plan in place for this sort of thing . . . [and] our University police had practiced that plan.”⁴⁵² By 3:09 classroom doors were being locked in Cole Hall and nearby buildings. By 3:20 a campus alert had been issued through the school’s website, e-mail, voice mail, and public address system and the media had been called.⁴⁵³

“The story at the moment just demonstrates that a university is an open community and that irrational acts by individuals can occur at any time,” said Sheldon Steinbach, a lawyer in the higher education practice at the Washington firm Dow Lohnes. “People often make it look like schools are oblivious to the security of their broader community and that’s just not true. It is impossible without turning the campus into a police state to secure it any further than it already is.”⁴⁵⁴

III. WHO OWNS THE ROGUE ELEPHANT?

A. The Emerging Law of Liability for Campus Violence

The rampage shootings in higher education create a field for study that has a powerful immediacy at least in part because it has not yet been tamed

446. *Id.*

447. *Id.*

448. *Id.*

449. *Id.*

450. *Id.*

451. *Id.*

452. Judy Keen, *Police: Ill. Gunman Quit Taking Meds, Became ‘Erratic,’* USA TODAY, Feb. 15, 2008, http://www.usatoday.com/news/nation/2008-02-14-shooting_N.htm.

453. *Id.*

454. Elia Powers & Elizabeth Redden, *6 Killed in Northern Illinois Shooting*, INSIDE HIGHER EDUC., Feb. 15, 2008, <http://www.insidehighered.com/news/2008/02/15/niu>; *see supra* text accompanying note 99.

by extensive judicial landscaping. This is not so much because rampages fail to raise issues of institutional negligence as because they often seem likely to succeed in raising them. In five of the seven rampages recounted here, there were student gunshot victims.⁴⁵⁵ In four of the five, those victims sued or filed notice of tort claims against the institution.⁴⁵⁶ In all but one of the cases, the school settled substantial amounts, generally in excess of \$200,000, on those who were in the line of fire. So far, it appears, the settlements are paid by the schools' insurance plans.⁴⁵⁷

Despite the high settlement rate, however, institutions of higher education generally claim that neither the nature of their relationship with students nor the nature of the educational process creates a legal duty to protect academic space from violent conduct by members of the academic community. Because they oppose the creation of a legal duty to identify or prevent violent behaviors arising in the academic context, they are also able to argue, in almost any specific case, that violence produced or exacerbated by the perpetrator's educational experience was not foreseeable.⁴⁵⁸

The academy's opposition to legal responsibility for student rampages is consistent with its position that it is ordinarily not responsible for other manifestations of campus violence, such as residence rape, personally motivated murder, fraternity hazing, and resident suicide. Nevertheless, colleges and universities have risked enough litigation about such events to produce a small and somewhat disjointed body of tort theories supporting college and university liability for student injury when the violence was foreseeable, the college or university had the power to influence the outcome, and the student victim was innocent of wrongdoing. While most

455. Although a student, Miya Rudolpho-Sioson, a casualty at the University of Iowa, was compensated as an employee. *See supra* text accompanying note 53.

456. There have been no lawsuits filed as a result of the shooting at Northern Illinois, and none are anticipated, although the statute of limitations is two years for personal injuries in Illinois. *See Legal Wrangling at VT, But Attorneys Say Lawsuits Unlikely in NIU Shootings*, NORTHWEST HERALD (Ill.), Mar. 25, 2008, http://www.nwherald.com/articles/2008/03/25/niu_shootings/doc47e972bf8a8fa540749107.txt. As a public institution, Northern Illinois is shielded from suit by sovereign immunity unless it can be shown that its failure to prevent the shooting was willful and wanton. Caleb Fleming, *No Lawsuits Expected Against NIU*, COLLEGIATE TIMES (Va.), Apr. 4, 2009, <http://www.collegiatetimes.com/stories/11092>.

457. As a public university, Virginia Tech was an exception. *See supra* note 375. The main issue regarding insurance is not whether the policy covers the rampage but whether the shooting of multiple victims is treated as a single occurrence for purposes of the policy's "per occurrence" limit. So far, the insurance companies have succeeded in limiting victim recovery by treating the shootings as single occurrences. *See, e.g.*, RLI Ins. Co. v. Simon's Rock Early Coll., 765 N.E.2d 247 (Mass App. Ct. 2002); GIBSON, *supra* note 63, at 55. The insurance settlement of the student victims' cases at Appalachian also treated the shooting as a single occurrence. *See supra* text accompanying note 164.

458. *See, e.g.*, Wallace v. Halder, No. CV-06-591169 (Ohio Cir. Ct. Aug. 27, 2008); *infra* text accompanying notes 486, 621.

of these cases can be distinguished from rampages because they involved extracurricular campus violence, rampage victims tend to allege causes of action that comport with the preexisting models. What follows is a review of the cases through which the prevailing theories have been fashioned, all of which have been decided since 1980.⁴⁵⁹

B. The Blind Men and the Elephant

1. Outsider Violence, Premises Security, and the Business Model

Tort liability expanded generally in the 1970's and 1980's.⁴⁶⁰ Cases brought against colleges and universities, however, tended to concern injuries associated with voluntary over-consumption of alcohol by students, with which judges were not, and are not, inclined to be sympathetic.⁴⁶¹ Through most of the 1980's, the courts generally shielded colleges and

459. This article does not discuss the intricate development of tort theories historically applied (and misapplied) to the realm of higher education, which has been well and thoroughly treated by others. *See, e.g.*, BICKEL & LAKE, *supra* note 11; Robert D. Bickel & Peter F. Lake, *Reconceptualizing the University's Duty to Provide a Safe Learning Environment: A Criticism of the Doctrine of In Loco Parentis and the Restatement (Second) of Torts*, 20 J.C. & U.L. 261 (1994); Elizabeth L. Grossi & Terry D. Edwards, *Student Misconduct: Historical Trends in Legislative and Judicial Decision-Making in American Universities*, 23 J.C. & U.L. 829 (1997); Peter F. Lake, *The Rise of Duty and the Fall of In Loco Parentis and Other Protective Tort Doctrines in Higher Education Law*, 64 MO. L. REV. 1 (1999); Spring J. Walton, *In Loco Parentis for the 1990s: New Liabilities*, 19 OHIO N.U.L. REV. 227 (1992).

460. *See, e.g.*, Peter H. Shuck & Daniel J. Givelber, *Tarasoff v. Regents of the University of California: The Therapist's Dilemma*, in TORTS STORIES 106–09 (Robert Rabin & Stephen D. Sugarman eds., 2003).

461. *Bradshaw v. Rawlings*, 612 F.2d 135 (3d Cir. 1979) (holding university was not liable to a student rendered quadriplegic in a car wreck when the car in which he was a passenger was driven by a student who consumed alcohol at a school-sponsored picnic); *Baldwin v. Zoradi*, 176 Cal. Rptr. 809 (Ct. App. 1981) (holding university was not liable to a student rendered quadriplegic as a result of participating in a car race when the drivers and passengers all consumed alcohol in the school dorm); *Univ. of Denver v. Whitlock*, 744 P.2d 54 (Colo. 1987) (holding university was not liable when a student consumed alcohol and was injured on a trampoline at a fraternity house); *Beach v. Univ. of Utah*, 726 P.2d 413 (Utah 1986) (holding university was not responsible when a student consumed alcohol and fell off a cliff during a university-sponsored field trip). *Cf. McClure v. Fairfield Univ.*, No. CV000159028, 2003 WL 21524786 (Conn. Super. Ct. June 19, 2003) (denying summary judgement for university where student injured in off-campus automobile accident involving alcohol over-consumption sued university for failure to provide transportation: by offering a Safe-Rides shuttle service university had assumed a responsibility for student safety and had a duty to protect students who traveled to and from parties at the beach); *Bearman v. Univ. of Notre Dame*, 453 N.E.2d 1196 (Ind. Ct. App. 1983) (holding university had a duty to protect plaintiff from injury by drunken football fan who knocked her down and broke her leg in the school parking lot after a game, when university knew alcohol was sometimes consumed to excess at tailgate parties on campus).

universities from any duty to ensure the general safety of students or to prevent their dangerous behaviors and activities. State and federal decisions usually declined as a matter of law to impose liability on a school for injuries to students by students. Instead, the law treated students as unrelated adults and the college or university essentially as an innocent bystander to student violence on its own grounds.

Professors Bickel and Lake have argued that the bystander tort models adopted by the courts, largely at the urging of colleges and universities, contributed to the disintegration of the academy's sense of itself as a whole and of its primary values:

When the college or university is an outsider to student life and safety, there is a sense of alienation and disconnectedness which breeds and replicates. Thus, the sense of an institutional system itself eroded under the bystander rules: the various processes of the "community" were independently operating variables. The very idea that a college or university is a community, still popular with faculty, also faded.⁴⁶²

During the 1980's, courts became increasingly willing to let juries hear cases in which student victims of violence claimed that the institution could have taken reasonable steps to keep them safe but failed to do so. Given the academy's arms-length legal posture toward its students, the law has tended to develop by analogy to landlord-tenant and business-invitee law, which also assume an essentially commercial relationship between the parties.⁴⁶³ The models have become "university-as-landlord" and "college-as-business-enterprise."⁴⁶⁴ Since the 1980's such models have supported a growing number of cases in which colleges and universities could be held responsible for the rape or assault of students if it could be shown that the crime was foreseeable and that the college or university did not take reasonable steps, under the circumstances, to lessen the risk of harm. Five major cases of the decade preceding the first rampage follow, illustrating the adaptation of the business model to college and university settings.

2. *Peterson v. San Francisco Community College District*⁴⁶⁵

In 1984 the California Supreme Court reinstated a negligence action brought under the state tort claims act against San Francisco Community College for the day-time attempted rape of a student on campus.⁴⁶⁶ In late

462. See BICKEL & LAKE, *supra* note 11, at 176.

463. For example, in *Furek v. University of Delaware*, 594 A.2d 506 (Del. 1991), the defendant University argued "that the student and the university operate at arms-length, with the student responsible for exercising judgment for his or her own protection when dealing with other students or student groups." *Id.* at 517.

464. See BICKEL & LAKE, *supra* note 11, at 82-83.

465. 685 P.2d 1193 (Cal. 1984).

466. *Id.*

April 1978, student Kathleen Peterson was ascending a stairway to a parking lot when her assailant jumped out from behind “unreasonably thick and untrimmed foliage and trees.”⁴⁶⁷ Attacks of the same kind had taken place in the same staircase, and the college knew it, but it had not warned the students of the danger, and it had not removed the concealing shrubbery.⁴⁶⁸

In considering the question of duty, the court began with Prosser:

[T]he question of a duty “ . . . is a shorthand statement of a conclusion, rather than an aid to analysis in itself . . . [b]ut it should be recognized that “duty” is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that a particular plaintiff is entitled to protection.” In considering whether one owes another a duty of care, several factors must be weighed including among others: “[T]he foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant’s conduct and the injury suffered, the moral blame attached to the defendant’s conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.”⁴⁶⁹

The *Peterson* court held that a public institution has a duty to exercise reasonable care in preventing foreseeable injury to its students because, under classic tort analysis, it has a special relationship to its students equivalent to the business-invitee relationship:

In the closed environment of a school campus, where students pay tuition and other fees in exchange for using the facilities, where they spend a significant portion of their time and may in fact live, they can reasonably expect that the premises will be free from physical defects and that school authorities will also exercise reasonable care to keep the campus free from conditions which increase the risk of crime.⁴⁷⁰

“[A] defendant may not escape liability,” wrote the court, “by claiming that plaintiff’s injuries were caused by a criminal agency when the basis of plaintiff’s cause of action is that the defendant created a reasonably foreseeable risk of that criminal conduct.”⁴⁷¹ Thus, it concluded, “Plaintiff

467. *Id.* at 1195.

468. *Id.*

469. *Id.* at 1196 (citations omitted).

470. *Id.* at 1201.

471. *Id.* at 1200. The court also quoted with approval Section 449 of the

is entitled to prove that the failure to warn, to trim the foliage, or to take other reasonable measures to protect her was the proximate cause of her injuries.”⁴⁷²

3. *Cutler v. Board of Regents*⁴⁷³

In the same year as *Peterson*, the Florida Court of Appeals, applying a landlord-tenant analysis, remanded the dismissal of a negligence action to permit the plaintiff to amend her complaint.⁴⁷⁴ Carron Cutler was a freshman resident in a dormitory at Florida A & M University. She was raped by three armed assailants who gained access to her room through a common area of the building.⁴⁷⁵ Her complaint alleged that University officials told her that the dormitory was safe and that no additional steps needed to be taken to secure her safety.⁴⁷⁶ At the time of the assurance, University officials were, or should have been, aware of other assaults on female University students.⁴⁷⁷ The court of appeals held that if in fact the University had recognized and assumed a duty to protect Cutler from foreseeable criminal conduct, it had a duty as her landlord to take reasonable precautions to prevent the rape.⁴⁷⁸

4. *Miller v. New York*⁴⁷⁹

Miller v. New York, a third case decided in 1984, upheld a jury verdict of liability against the State University of New York.⁴⁸⁰ Madelyn Miller was

RESTATEMENT OF TORTS: “If the realizable likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious or criminal does not prevent the actor from being liable for harm caused thereby.” *Id.* at 1197–98.

472. *Id.* at 1202. In *Johnson v. Washington*, 894 P. 2d 1366 (Wash. Ct. App. 1995), the Court of Appeals of Washington relied on a narrow premises-liability theory to uphold a cause of action against a state university for negligence allegedly resulting in the abduction and rape of a resident student by an outsider.

473. 459 So. 2d 413 (Fla Ct. App. 1984).

474. *Id.*

475. *Id.* at 414.

476. *Id.*

477. *Id.*

478. The court in *Cutler* held:

Although appellant does allege that FAMU represented to her that the university was reasonably safe and secure for the safety of female students, we are unable to infer from this allegation facts sufficient to support a cause of action for breach of an assumed duty to protect student tenants from foreseeable criminal conduct. Nevertheless, since this was appellant’s initial complaint, an opportunity to amend should have been given under the rule favoring liberality of amendments so that the merits of the case may be reached.

Id. at 415.

479. 467 N.E.2d 493 (N.Y. 1984).

480. *Id.*

a junior at SUNY Stony Brook when she was confronted in the laundry room of her dormitory at 6:00 a.m. by a man with a butcher knife, who was never identified.⁴⁸¹ The intruder blindfolded her; then shoved her out of the laundry room, through an unlocked basement door, back through another unlocked entrance to the dorm, and into an upstairs room, where, threatening to kill or mutilate her if she made a sound, he raped her twice at knife point.⁴⁸² He then took her to the parking lot and left her.⁴⁸³ It had been reported to campus security that men were seen in the bathrooms and halls of the women's dormitory. Madelyn Miller had twice complained to the dormitory manager about strangers loitering in the dormitory's common areas unaccompanied by resident students. The school newspaper had published reports of robbery, burglary, criminal trespass, and rape in the dormitories by non-students.⁴⁸⁴ The doors at all ten entrances to the dorm building were nevertheless deliberately kept open at all hours even though they were fitted with locks.⁴⁸⁵ The trial court awarded Miller \$25,000. The appellate division reversed on the theory that the public University enjoyed sovereign immunity for its failure to provide police protection. The New York Court of Appeals agreed but held that, at a minimum, the University was liable as a landlord for its failure to lock the dormitory doors when it knew that criminal intruders were foreseeable.⁴⁸⁶

5. *Jesik v. Maricopa County Community College District*⁴⁸⁷

Peterson, Cutler, and Miller all involved apparent outsider violence, and in each case the plaintiff claimed that the school's inattention to the physical security of its premises was the proximate cause of her injuries.

481. *Id.* at 494.

482. *Id.*

483. *Id.*

484. *Id.* at 495.

485. *Id.*

486. *Id.* at 497. The Court of Appeals reasoned:

A governmental entity's conduct may fall along a continuum of responsibility to individuals and society deriving from its governmental and proprietary functions. This begins with the simplest matters directly concerning a piece of property for which the entity acting as landlord has a certain duty of care, for example, the repair of steps or the maintenance of doors in an apartment building. The spectrum extends gradually out to more complex measures of safety and security for a greater area and populace, whereupon the actions increasingly, and at a certain point only, involve governmental functions, for example, the maintenance of general police and fire protection. Consequently, any issue relating to the safety or security of an individual claimant must be carefully scrutinized to determine the point along the continuum that the State's alleged negligent action falls into, either a proprietary or governmental category.

Id. at 496.

487. 611 P.2d 547 (Ariz. 1980).

Jesik v. Maricopa County Community College was the only case of the decade that clearly involved not stranger but student peer violence, and the crime had nothing to do with campus residency.⁴⁸⁸ Instead, the plaintiff complained that the school should have prevented a murder committed during student registration.⁴⁸⁹ The Arizona Supreme Court used the business model to reverse a grant of summary judgment in favor of the defendant College.⁴⁹⁰

The murder had many similarities to a rampage. Peter Jesik and Charles Doss were both students at a junior college in Phoenix.⁴⁹¹ They had a history of ill-feeling towards each other.⁴⁹² On August 22, 1973, the two students had a confrontation while they were both registering for classes at the college gymnasium.⁴⁹³ Jesik insulted Doss.⁴⁹⁴ Doss stormed out of the building threatening to get his gun and kill Jesik.⁴⁹⁵ Jesik immediately reported the threat to Scott Hilton, the campus security guard on duty in the room.⁴⁹⁶ Hilton promised to protect him but neither armed himself nor took other precautions.⁴⁹⁷ When Doss returned to the crowded gymnasium an hour later with a briefcase, Jesik pointed him out to Hilton, who again reassured him.⁴⁹⁸ Hilton spoke to Doss briefly, then walked away.⁴⁹⁹ Doss took a revolver from his briefcase, came up to Jesik from behind, and fired until the gun was empty, killing Jesik and wounding another student.⁵⁰⁰ Jesik's father sued on his own behalf and as the personal representative of his son's estate.

The appeals court held that the college had a duty to exercise the same degree of ordinary care as a business open to the public: students are invitees, and the school must make the premises reasonably safe. For liability to attach, the student-invitee must show that employees of the school knew about or created the dangerous condition.⁵⁰¹ While ordinarily a third party's deliberately wrongful act is not part of the recognizable risk, liability will be imposed if the school "realized or should have realized the likelihood that such a situation might be created, and that a third person

488. *See id.*

489. *Id.*

490. *Id.*

491. *Id.* at 548.

492. *State v. Doss*, 568 P. 2d 1054 (Ariz. 1977).

493. *Jesik*, 611 P.2d at 548; *Doss*, 568 P.2d at 1056.

494. *Doss*, 568 P.2d at 1056.

495. *Jesik*, 611 P.2d at 548; *Doss*, 568 P.2d at 1056.

496. *Jesik*, 611 P.2d at 548; *Doss*, 568 P.2d at 1056.

497. *Jesik*, 611 P.2d at 548; *Doss*, 568 P.2d at 1056.

498. *Jesik*, 611 P.2d at 548; *Doss*, 568 P.2d at 1056.

499. *Jesik*, 611 P.2d at 548; *Doss*, 568 P.2d at 1056.

500. *Jesik*, 611 P.2d at 548; *Doss*, 568 P.2d at 1056.

501. *Jesik*, 611 P.2d at 546.

might avail himself of the opportunity to commit such a tort or crime.”⁵⁰² Jesik’s wrongful death action was remanded for trial on the merits.

6. *Mullins v. Pine Manor College*⁵⁰³

Although the cases discussed so far declined to impose a general duty of care upon institutions of higher education, they did impose a duty in particular circumstances when it could be shown that the school did not act to protect the victim or a class of victims from foreseeable violence. They also agreed that when a duty existed, the criminal acts of third parties, including students, would not necessarily defeat the element of proximate causation. Another case went even further. In 1983, in *Mullins v. Pine Manor College*, the Massachusetts Supreme Judicial Court not only found institutional negligence to be a proximate cause of a student’s injury but also relied directly upon the nature of college and university life and the institution’s relationship to its students as the foundation of its duty of care.⁵⁰⁴

Defendant Pine Manor was a women’s college of 400 students.⁵⁰⁵ Its grounds were fenced, and its dormitories were arranged in quadrangles with locked gates.⁵⁰⁶ Two campus security guards were on duty at night, and there was a visitor registration and escort procedure.⁵⁰⁷ First year students like Lisa Mullins were required to live in campus dormitories.⁵⁰⁸ Early one morning in 1977, an intruder, who was never identified or apprehended, entered the grounds without being detected; broke into Lisa Mullins’ locked dorm room; walked her out of the building; and forced her out of the quadrangle through a loosely chained gate.⁵⁰⁹ He took her down a bike path to the college refectory, where the door had been left unlocked.⁵¹⁰ Once inside, he raped her.⁵¹¹ The entire crime lasted for sixty to ninety minutes, and for at least twenty minutes of that time the rapist had Lisa Mullins outside, in plain sight, on grounds being patrolled by a single, poorly supervised campus security guard.⁵¹²

502. *Id.* at 550 (quoting *Chavez v. Tolleson Elementary Sch. Dist.*, 595 P.2d 1017, 1022–23 (Ariz. Ct. App. 1979)).

503. 449 N.E.2d 331 (Mass. 1983).

504. *Id.*

505. *Id.* at 333.

506. *Id.*

507. *Id.*

508. *Id.* at 334.

509. *Id.*

510. *Id.*

511. *Id.*

512. *Id.* A second guard was stationed at the main gate of the college. Additionally, the court noted that a year before the attack, a burglary had occurred in one of the dormitory buildings; the evening before the rape, a young man had scaled the outer fence, found the quadrangle open, and walked in unchallenged; and the

In an action for negligence against the college, a jury awarded Mullins \$175,000.⁵¹³ The Massachusetts Supreme Judicial Court affirmed. It held that the College owed the student a duty of care for two principal reasons. First, wrote the court, colleges and universities ordinarily take steps to provide adequate levels of security on campus:

We think it can be said with confidence 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 [T]he college community itself has recognized its obligation to protect resident students *This recognition indicates that the imposition of a duty of care is firmly embedded in a community consensus.*⁵¹⁴

Moreover, the court found, the nature of college and university life is such that colleges and universities are in a far better position than students to assume responsibility for designing a comprehensive security plan and for maintaining a comprehensive security system.⁵¹⁵

Second, the court found that Pine Manor College had voluntarily undertaken a duty that it was obligated to discharge with due care. The undertaking was not gratuitous, since students were required to live in the dorms and ultimately charged through tuition and fees for the security provided.⁵¹⁶ Students and their parents relied on the College's security measures in selecting and enrolling in the College. Security had, in fact, been a concern of Lisa Mullin's family.⁵¹⁷ The College was therefore obligated to use reasonable care to prevent foreseeable risks of harm, and the very existence of the security precautions was evidence that the rape was not only foreseeable but actually foreseen.⁵¹⁸ Relying on "the distinctive relationship between colleges and their students," the court rejected the College's argument that in order to establish a duty, plaintiff was required to show that prior criminal acts had occurred on the campus.⁵¹⁹ Last, the court affirmed that a reasonable jury could have found the College liable on the evidence with respect to both negligence and proximate causation. The facts supported an inference that the College's security precautions failed on the night of the rape as a result of inadequate

college was only a short distance from bus and subway lines leading directly to Boston. *Id.*

513. *Id.* at 333. The trial court reduced the award to \$20,000. *Id.*

514. *Id.* at 335 (emphasis added).

515. *Id.*

516. *Id.* at 336.

517. *Id.* at 336–37.

518. The testimony of the College's vice-president that he had foreseen the risk that a student could be raped, and the testimony of the student affairs director that she warned students during orientation of the dangers of the urban area for women was also evidence that the risk of rape was actually foreseen. *Id.* at 337 n. 8.

519. *Id.* at 337.

security staffing, fencing, and locks; negligent maintenance of gate chains and doors; and negligent supervision of security guards, who failed to carry out their duties on the night of the rape. The facts also supported a finding that the College's negligence was "a substantial cause" of Lisa Mullins' ordeal of pain and terror.⁵²⁰

Of all the cases decided in the 1980's, *Mullins* provides the clearest conceptual framework for a standard of care based upon academic consensus and the unique features of academic communities. Taken together, *Mullins* and *Jesik* stand for the proposition that given the right circumstances, a college or university's negligent failure to protect students from foreseeable violence by another student will not be defeated either by the fact that the violence was committed by a "third party" or by the fact that violence of the same sort has never happened before.

C. And All Were Partly in the Right

1. Insider Violence, Institutional Control, and the Business Model

Since at least 1990, in addition to alcohol and drug abuse, peer violence on campus has manifested primarily in the hazing rituals of the fraternity houses; the rape, stalking, and bullying of women students; hate crimes based on race, ethnicity, sexual orientation, and disability; and student suicides.⁵²¹ This study suggests, and further studies may confirm, that rampages have emerged as a post-modern academic phenomenon in association with these forms of peer violence and intimidation. If so, the developing law of institutional negligence must seek a more coherent container for their relational dynamics.⁵²²

Applying business rules to situations of peer violence has the advantage of promoting a model of shared responsibility for student safety on campuses, because in specific situations colleges and universities will be held accountable for negligent disregard of foreseeable violence, just as they are in situations of outsider violence. Business models stop far short, however, of supporting community values or recognizing the fundamental power relations between college and university students and their schools. Professors Bickel and Lake argue, "A business community campus is not

520. *Id.* at 341.

521. *See* CARR, *supra* note 5.

522. Not captured in the studies of campus violence, but often present in the rampage scenarios, are incidents of malicious damage to student property by students or employees as a means of retaliation, intimidation, or incitement. Malicious destruction may be classified as a hate crime or bias incident, if directed at a member of a protected class. *See* DONALD ALTSCHILLER, HATE CRIMES: A REFERENCE HANDBOOK (2d ed. 2005); U.S. DEP'T OF JUSTICE, HATE CRIMES ON CAMPUS: THE PROBLEM AND EFFORTS TO CONFRONT IT (2001), *available at* <http://www.ncjrs.gov/pdffiles1/bja/187249.pdf>. [hereinafter HATE CRIMES ON CAMPUS].

the safest campus. It is a safer campus than a bystander campus but still facilitates some unreasonable risk because it emphasizes too much consumeristic thinking and not enough shared community thinking.”⁵²³

They go on to say:

Business rules work well to promote safety at K-Mart, but young people on campus do not *live* at K-Mart or even spend significant amounts of their lives there A consumer has little investment in making a store safer for others; every student depends on other students for safety on campus.⁵²⁴

Three cases decided since 1991 held institutions responsible for student violence on campus. Unlike the rampages, with which they are contemporaneous, each of the cases arose in an extra-curricular, residential context. *Furek v. University of Delaware*⁵²⁵ involved fraternity hazing; *Nero v. Kansas State University*⁵²⁶ involved campus rape; and *Schieszler v. Ferrum College*⁵²⁷ involved a student suicide.⁵²⁸ A fourth case, *Nova Southeastern University v. Gross*,⁵²⁹ in which a woman student was sexually assaulted off-campus, is also of interest here because it recognized that a duty of care can be based on a school’s control of an academic program even if it does not occur on the school’s property.

523. BICKEL & LAKE, *supra* note 11, at 185. In fact, they write, “Students who view themselves as consumers often assert the very radical and libertarian aspects of freedom which the bystander cases described. In short, when applied to colleges, strict business paradigms tend to polarize student conduct.” *Id.* at 184.

524. *Id.* at 185 (emphasis in original).

525. 594 A.2d 506 (Del. 1991).

526. 861 P.2d 768 (Kan. 1993).

527. 236 F. Supp. 2d 602 (W.D. Va. 2002).

528. In another recent case, *Shin v. MIT*, No. 020403, 2005 WL 1869101 (Mass. Super. Ct. June 27, 2005), the Massachusetts Superior Court ruled that the parents of an undergraduate student who died after she deliberately set herself on fire stated a cause of action for wrongful death and other negligence counts against individual medical professionals, who treated her for over a year at the University treatment center, and against individual University associate deans of students and individual campus police officers who also allegedly knew of her plans to commit suicide. The institution itself was sued under contract theories that were dismissed. *See, e.g., Eric Hoover, Judge Rules Suicide Suit Against MIT Can Proceed: Decision Allows Parents to Seek Damages from University Employees*, CHRON. HIGHER EDUC. (Wash., D.C.), Aug. 12, 2005, <http://chronicle.com/free/v51/i49/49a00101.htm>. The case settled before trial for an undisclosed amount. *See Barbara Lauren, MIT Student Suicide Case Settled Out of Court*, AACRAO TRANSCRIPT, Apr. 5, 2006, http://www.aacrao.org/transcript/index.cfm?fuseaction=show_view&doc_id=3116; *see also* Jain v. State, 617 N.W.2d 293 (Iowa 2000) (upholding summary judgment in favor of defendant University of Iowa in wrongful death action by father of undergraduate student who killed himself in a University dormitory: despite policies to the contrary, University had no duty to warn parents of student’s self-destructive behavior or suicide threats; no special relationship between the student and the University justified imposition of a legal duty of care).

529. 758 So. 2d 86 (Fla. 2000).

2. *Furek v. University of Delaware*

In 1991, the year of Gang Lu's rampage at the University of Iowa, a student burned during a fraternity hazing ritual was allowed to maintain a cause of action against the University of Delaware.⁵³⁰ Jeffrey Furek attended the University of Delaware's Newark campus on a football scholarship that included tuition, room, and board.⁵³¹ In the fall of his second year, he was invited to join the local chapter of Sigma Phi Epsilon, which was organized on campus in 1908 and occupied a fraternity building on land leased from the University.⁵³² The eight-week "brotherhood development" for pledges seeking membership included hazing that culminated in a ritual known as "Hell Night," after which the pledges were considered members of the fraternity:

After assembling across the street from the Sig Ep house, wearing only T-shirts and jeans, the pledges were ordered to crawl on their hands and knees to the fraternity house while being sprayed by a fire extinguisher. Once inside the house, . . . they were humiliated and degraded. Among other things, they were paddled, forced to do calisthenics and ordered to eat food out of a toilet.⁵³³

On Jeffrey Furek's Hell Night, he was also blindfolded and escorted to the fraternity house kitchen, where Joseph Donchez, a fellow student, poured a bottleful of lye-based oven cleaner over his back and neck.⁵³⁴ By the time Furek was allowed to take off his blindfold, the lye had caused first and second degree chemical burns on his neck and face.⁵³⁵ He required emergency medical treatment and was permanently scarred. He forfeited his football scholarship as a result of the experience and dropped out of school.⁵³⁶

The University had specific policies against hazing, as did the Sig Ep National Fraternity. The Dean of Students had issued specific guidelines for hazing behaviors that would not be tolerated on campus, including "paddling or striking . . . mental or emotional intimidation . . . [and] forced participation in humiliating games, performances, stunts or any rough practical jokes."⁵³⁷ After a student was branded with a hot coat hanger in 1977, the University issued a strongly worded letter.⁵³⁸ Further incidents of hazing were addressed by the University in 1979 and early 1980.

530. *Furek*, 594 A.2d 506.

531. *Id.* at 509.

532. *Id.*

533. *Id.*

534. *Id.* at 510.

535. *Id.*

536. *Id.*

537. *Id.*

538. *Id.*

Despite the University's public posture, however, Sig Ep and other fraternities continued regularly, routinely, and openly to engage in hazing of pledges for at least five years before Hell Night 1980, when Jeffrey Furek was scarred for life.⁵³⁹ The University's campus security apparatus was not told about the anti-hazing directives, and the campus guards never did anything to stop it.⁵⁴⁰

The case against the University and Joseph Donchez was tried in 1987. The jury awarded Jeffrey Furek \$30,000 in compensatory damages.⁵⁴¹ The jury apportioned ninety-three percent of liability to the University.⁵⁴² The trial court granted the University's motion for judgment n.o.v on the grounds that the University had no legal duty to protect Furek.⁵⁴³ The Delaware Supreme Court reversed.

The court questioned the factual and logical validity of the cases holding that students matured better without college or university supervision of their potentially dangerous activities.⁵⁴⁴ It approved and adopted the reasoning of the *Mullins* court that the duty of care arose from "the existing social values and customs" of the academic culture: "The 'consensus' duty resulted from the recognition of the unique situation created by the concentration of young people on a college campus and the ability of the university to protect its students."⁵⁴⁵ The court wrote:

[E]stablished principles of tort law provide a sufficient basis for the imposition of a duty on the University to use reasonable care to protect resident students against the dangerous acts of third parties. While we acknowledge the apparent weight of decisional authority that there is no duty on the part of a college or university to control its students based merely on the university-student relationship, where there is direct university involvement in, and knowledge of, certain dangerous practices of its students, the university cannot abandon its residual duty of control.⁵⁴⁶

539. *Id.* at 511.

540. *Id.*

541. *Id.* at 512.

542. *Id.* at 509.

543. *Id.*

544. *Id.* at 518.

545. *Id.* at 518–19. The *Furek* court also grounded the duty in RESTATEMENT (SECOND) OF TORTS § 323 and on the institution-student relationship under RESTATEMENT (SECOND) OF TORTS § 314 A. *Id.*

546. *Id.* at 519–20. The court also found that the University owed a duty based on Jeffrey Furek's status as an invitee on University property, which extends to acts of third persons that are foreseeable and subject to University control. *Id.* at 520. It is sufficient that the landowner know that the conduct is likely in general, even without any reason to suspect a particular individual. When a land owner has attempted to provide security or regulate a hazardous activity, that affirmative action is a tacit recognition that the potential for harm exists. The court did limit the University's duty to situations in which it exercises control, but it held that inviting students onto its

3. *Nero v. Kansas State University*

In 1993, the Kansas Supreme Court decided *Nero v. Kansas State University*.⁵⁴⁷ In April 1990, University student Ramon Davenport, who lived in Moore Hall, a co-ed campus dormitory, was accused of raping a woman student who lived in the same dorm.⁵⁴⁸ The University immediately moved Davenport to Marlett Hall, a men's-only dorm on the other side of the campus, and prohibited him from entering Moore Hall "in order to provide 'some physical distance'" between Davenport and his alleged victim pending resolution of the criminal charges against him.⁵⁴⁹ The University did not independently adjudicate the matter, and when Davenport was released on bond, having pled not guilty to the rape charge, he returned to campus and resumed his studies.⁵⁵⁰ At the end of the semester, he enrolled in summer school and was allowed to move to Goodnow Hall, another co-ed residence on campus and the only one open during the summer.⁵⁵¹ Shana Nero, a summer student from the University of Oklahoma, took up residence in the same building.⁵⁵²

On June 2, 1990, only a month after Davenport was charged with the first rape, he sexually assaulted Shana Nero in the basement recreation room of the building while she was watching television and doing her laundry.⁵⁵³ She filed a complaint with the University under its "Policy Prohibiting Sexual Violence," and on June 4, the University terminated Davenport's residence hall contract and ordered him to move out of Goodnow immediately.⁵⁵⁴ It banned him from all campus residence halls and dining rooms.⁵⁵⁵ It also found him guilty of violating the sexual violence policy.⁵⁵⁶

In August 1990, Davenport pleaded guilty to the rape charge in

property is an exercise of control. *Id.* at 521. In that regard, the court wrote, "The magnitude of the burden placed on the university is no greater than to require compliance with self imposed standards." *Id.* at 523.

In 1999, the Supreme Court of Nebraska reached the same result in *Knoll v. Regents of University of Nebraska*, 601 N.W.2d 757 (Neb. 1999), reversing a grant of summary judgment in favor of defendant University in a negligence action by a student victim of fraternity hazing. The court held that the University could be liable on a business-invitee theory; given previous incidents of hazing and alcohol abuse involving the same fraternity, the University owed the student victim a duty to protect. *Id.* at 762.

547. 861 P.2d 768 (Kan. 1993).

548. *Id.* at 771.

549. *Id.* (quoting Letter from Dr. Rosanne Priote, Assistant Director of Housing, to Ramon Davenport (Apr. 30, 1990)).

550. *Id.* at 771-72.

551. *Id.* at 772.

552. *Id.*

553. *Id.*

554. *Id.*

555. *Id.*

556. *Id.*

exchange for dismissal of the sexual assault charge.⁵⁵⁷ Shana Nero sued the University for damages under the state tort claims act, and she sued Davenport for assault and battery.⁵⁵⁸ She prevailed against Davenport on summary judgment, but the trial court granted summary judgment in favor of the University on her negligence claim.⁵⁵⁹ The Kansas Supreme Court reversed and remanded the case for trial on the merits.⁵⁶⁰ The court noted that the alcohol-related student injury cases provided both moral and pedagogical justifications for exonerating colleges and universities of liability as a matter of law. The court also noted that *Furek* and *Mullins* had found a limited duty of care, based at least in part on the institution-student relationship itself, to protect students from injuries caused by their peers.⁵⁶¹ The court rejected the theoretical underpinnings of all previous cases involving student peer injuries in favor of a narrowly-crafted duty of care based solely on landowner-invitee and landlord-tenant principles: “A university owes student tenants the same duty to exercise due care for their protection as a private landowner owes its tenants.”⁵⁶²

We conclude that KSU exercised its discretion to build, maintain, and operate housing units. Once that discretionary decision was made, KSU had a legal duty to use reasonable care under the circumstances in protecting the occupants of the coed housing unit from foreseeable criminal conduct while in a common area. A factual issue remains whether KSU used reasonable care in carrying out its legal duty to Shana Nero when it placed Ramon Davenport in a coed housing unit with her. A question also exists concerning a failure to warn her and a failure to institute adequate security measures to protect female students in the same housing unit based upon KSU’s knowledge of the reported sexual attack by Ramon Davenport some three weeks earlier. Whether the second attack was foreseeable to KSU and whether KSU took adequate steps under the circumstances to prevent the second attack are questions of fact, and the trial court erred in granting summary judgment.⁵⁶³

Justice Six, in a concurring and dissenting opinion, noted further: “KSU poses a rhetorical question: ‘Surely plaintiff is not suggesting that a picture or description of a student labeled “rapist” should have been posted or circulated in Goodnow Hall.’”⁵⁶⁴ The University’s rhetoric persuaded the

557. *Id.* at 772.

558. *Id.*

559. *Id.*

560. *Id.* at 782.

561. *Id.* at 777–78.

562. *Id.* at 780.

563. *Id.* at 782–83.

564. *Id.* at 783 (Six, J., concurring and dissenting).

two dissenters, one of whom was particularly contemptuous with respect to the duty to warn:

The majority opinion would have the University warn fellow students of Davenport's potential risk to them. How is this to be done? Word of mouth? Publication in the student newspaper? Flyers? Requiring Davenport to wear sandwich boards stating, "I am a rapist, beware?" Branding his forehead with the word, "Rapist"?⁵⁶⁵

On remand, however, the jury was much less dismissive of the plaintiff's arguments. After a week-long trial, it awarded Shana Nero over \$200,000.⁵⁶⁶

4. *Schieszler v. Ferrum College*

In 2002, the year of the Appalachian School of Law and University of Arizona rampages, the surviving relative of a student suicide was allowed to sue Virginia's Ferrum College for punitive damages, if it could be shown that school officials knew that the student was suicidal, had undertaken to deal with the situation, and were negligent in allowing the death to occur.⁵⁶⁷ Michael Frentzel enrolled as a freshman at Ferrum College in fall 1999. During his first semester his behavior raised unspecified "disciplinary issues" that caused the college to refuse to allow him to continue unless he enrolled in anger management counseling and disciplinary workshops conducted by the Dean of Students.⁵⁶⁸ During his second semester, on February 21, 2000, Michael Frentzel had a quarrel with his girlfriend Crystal in his dorm room. The quarrel resulted in intervention by the campus police and the dormitory resident assistant, who ordered Crystal out of the room.⁵⁶⁹ Shortly after that, Crystal received a note from Frentzel threatening to hang himself with a belt.⁵⁷⁰ She and other students reported the threats to the campus police and the R.A. Finding Frentzel in his room with the door locked and self-inflicted bruises on his head and neck, the campus police called the Dean of Students, who came to Frentzel's room and had him sign a "no-harm agreement" promising not to hurt himself.⁵⁷¹ A counselor also visited Frentzel, but the College did not place him under continuous supervision or take any other precautions to keep him from further self-injury. A day or two later, still

565. *Id.* at 789 (McFarland, J., dissenting).

566. The amount was reduced because of Nero's contributory negligence, but still amounted to over \$100,000. Telephone Interview by Elena Curtis with Roy Dickerson, Esq., Plaintiff Nero's Attorney (May 19, 2008).

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

568. *Id.* at 605.

569. *Id.*

570. *Id.*

571. *Id.*

locked in his room, Frentzel wrote to a friend, "Tell Crystal I will always love her."⁵⁷² Crystal again went to the College authorities, who refused to allow her to return to Frentzel's room but took no other action. Frentzel then wrote another note saying, "Only God can help me now,"⁵⁷³ which Crystal again reported to College officials. When the officials next visited Frentzel's dorm room on February 23, they found him dead, hanged with his belt.⁵⁷⁴

Frentzel's next of kin sued the College for negligent failure to prevent the death by taking reasonably adequate precautions.⁵⁷⁵ Exercising diversity jurisdiction in a case of first impression, the United States District Court denied the College's motion to dismiss. The court determined, "While it is unlikely that Virginia would conclude that a special relationship exists as a matter of law between colleges and universities and their students, it might find that a special relationship exists on the particular facts alleged in this case."⁵⁷⁶ That is, wrote the court, "a trier of fact could conclude that there was 'an imminent probability' that Frentzel would try to hurt himself, and that the defendants had notice of this specific harm."⁵⁷⁷ As for the College's argument that its alleged negligence was not the proximate cause of Frentzel's death, the judge ruled:

The plaintiff has alleged that the defendants had been told that Frentzel had more than once threatened to kill himself and that he had already injured himself once. Thus, the facts alleged in the complaint indicate that the risk that Frentzel would in fact take his own life was foreseeable. Although the defendants had at their disposal campus police, the College's counseling services and the resident assistant in Frentzel's dormitory, the plaintiff alleges that they took no steps to ensure that Frentzel was supervised. In addition, according to the plaintiff's amended complaint, the defendants did not contact Frentzel's guardian and refused to permit Frentzel's girlfriend to return to his room after he threatened to injure himself. Instead, the defendants left Frentzel alone. While alone, in his room, Frentzel hung himself. According to the complaint, all of these events occurred within a three-day period. In view of these alleged facts, I cannot say as a matter of law that Frentzel's suicide was not a foreseeable result of defendants' failure to ensure that Frentzel was supervised.⁵⁷⁸

572. *Id.*

573. *Id.*

574. *Id.*

575. *Id.*

576. *Id.* at 609.

577. *Id.*

578. *Id.* at 612. The case was never tried. After the trial court denied the College's motion to dismiss, the case settled for an undisclosed amount, and the discovery

5. *Nova Southeastern University v. Gross*

In 2000, the Florida Supreme Court found that a university had at least a duty to warn a student of known dangers associated with an off-campus internship.⁵⁷⁹ Although the crime occurred in a parking lot, not in a classroom, the student was there because of school academic requirements, and that was enough to support liability against the University with respect to foreseeable dangers.⁵⁸⁰

Bethany Jill Gross was a twenty-three-year-old graduate student in Nova Southeastern University's doctoral program in psychology.⁵⁸¹ She was required to complete an eleven-month practicum at a site selected from a list maintained by the University.⁵⁸² She was assigned to the Family Services Agency (FSA), located about fifteen minutes from the University.⁵⁸³ One evening when Bethany Gross was starting her car in the FSA parking lot, a stranger tapped on her car window with a gun, pointed the weapon at her head, and had her roll down the window.⁵⁸⁴ He abducted her, robbed her, and raped her.⁵⁸⁵ According to her negligence complaint against the University, Nova knew that a number of other crimes had occurred in or near the same parking lot.⁵⁸⁶

The trial court granted summary judgment in favor of the University.⁵⁸⁷ The Florida court of appeals reversed, ruling:

The relationship between Nova and Gross can be characterized in various ways, but it is essentially the relationship between an adult who pays a fee for services, the student, and the provider of those services, the private university. The service rendered is the provision of an educational experience designed to lead to a college degree. A student can certainly be said to be within the foreseeable zone of known risks engendered by the university when assigning such student to one of its mandatory and approved internship programs.⁵⁸⁸

The Florida Supreme Court agreed:

[T]he extent of the duty a school owes to its students should be

records were sealed. Telephone Interview by Elena Curtis with Arthur Strickland, Esq., Plaintiff's Attorney (Nov. 18, 2008).

579. *Nova Se. Univ., Inc. v. Gross*, 758 So. 2d 86 (Fla. 2000).

580. *Id.*

581. *Id.* at 87.

582. *Id.* at 87–88.

583. *Id.* at 88.

584. *Id.*

585. *Id.*

586. *Id.* (quoting *Gross v. Family Services Agency, Inc.*, 716 So. 2d 337, 339 (Fla. Ct. App. 1998)).

587. *Id.* at 87.

588. *Id.*

limited by the amount of control the school has over the student's conduct. Here, the practicums were a mandatory part of the curriculum that the students were required to complete in order to graduate. Nova also had the final say in assigning students to the locations where they were to do their practicums. As Nova had control over the students' conduct by requiring them to do the practicum and by assigning them to a specific location, it also assumed the Hohfeldian correlative duty of acting reasonably in making those assignments. In a case such as this one, where the university had knowledge that the internship location was unreasonably dangerous, it should be up to the jury to determine whether the university acted reasonably in assigning students to do internships at that location.⁵⁸⁹

Noting that the court of appeals ruling was supported by "fundamental principle[s] of tort law," the Florida Supreme Court specifically based its ruling not on premises liability law but on "a common law negligence theory."⁵⁹⁰ Moreover, the Court held, the duty was one of ordinary care under the circumstances, which "could include but is not necessarily limited to warning of the known dangers at this particular practicum site."⁵⁹¹ Whether the University acted reasonably in light of all the circumstances, the Court held, was a question for the jury to determine.⁵⁹²

These cases edge toward holding a school accountable, at least in damages, for violent student behavior that it should have the foresight to predict, when circumstances give it the power to influence outcomes. Delaware in *Furek*, like Massachusetts in *Mullins*, defines the duty of care in terms of the values and customs of the academic culture.⁵⁹³ In *Gross*, Florida finds the duty in the academy's control, not of its campus premises, but of its curriculum;⁵⁹⁴ *Nero* locates the duty of care in the institution's capacity as "landlord" to its residential "tenants";⁵⁹⁵ and in *Schieszler*, a Virginia federal court, sitting in diversity, confined the duty to the special circumstances of the case.⁵⁹⁶ Each court also left the foreseeability of the harm to the jury as an element of proximate cause, subject to proof at trial on the merits. In *Furek* and *Nero*, the only two cases that were actually tried, the jury found that the harm to the plaintiff was in fact foreseeable and awarded damages.

589. *Id.* at 89.

590. *Id.* at 90.

591. *Id.*

592. *Id.*

593. *Furek v. Univ. of Del.*, 594 A.2d 506, 519 (Del. 1991); *Mullins v. Pine Manor Coll.*, 449 N.E.2d 331, 337 (Mass. 1983).

594. *Gross*, 758 So.2d at 89.

595. *Nero v. Kansas State Univ.*, 861 P.2d 768, 583 (Kan. 1993).

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

In Ohio, by contrast, foreseeability of the harm alleged is a question of law for the court. The defendant fared better in the following case arising from the killing of a student at Case Western Reserve University in May 2003. *Wallace v. Halder*⁵⁹⁷ is the first judicial excursion into the causal thicket of the rampage shooting.⁵⁹⁸ It illustrates the limitations of business-model assumptions that fail to take into account the peculiarities of the academic culture in which the rampage occurs.

D. And All Were in the Wrong: Business As Usual and the CWRU Rampage

When the focus of attention is on the rampage killer, the facts related in the media and the picture painted at his trial for murder necessarily and appropriately emphasize his individual culpability and moral agency and, by implication, exonerate the institution against which he acted. Against the killer himself, the institution is allowed to identify with the victims, who are obviously not to blame. In the civil context, however, a more balanced view, from the perspective of individual students and their families, reveals that the matter is not so simple. To summarize the facts as they appear in Part I of this article, a CWRU computer lab employee deliberately hacked the website of rampage killer Biswanath Halder in July 2000, while Halder was a student in good standing at the University.⁵⁹⁹ The hacking, on this account, was the result of a staff-student conflict about the use of facilities under the control of the University and operated for the benefit of Weatherhead students, and it was malicious. It may have been part of a deliberate (and successful) campaign to drive Halder from the school. On this account, furthermore, with the exercise of reasonable diligence and with the resources at its disposal, the University could have discovered the culprits and taken appropriate action, but it failed to do so. Halder attempted to accomplish those objectives on his own, through the legal system. He failed at least in part because CWRU successfully resisted his discovery requests. During the litigation he turned against the school and began to contemplate violence. He threatened more than once that if he lost his court case he would kill those he held responsible for the hacking.⁶⁰⁰ One of Halder's threats was communicated to CWRU's employees by the law student to whom Halder made it, but, judging that

597. No. CV-06-591169 (Ohio Cir. Ct. Aug. 27, 2008).

598. It is also the first case to reach the courts in which the violence occurred in a campus space devoted to academic pursuits, as distinguished from residential space, fraternity houses, or common campus areas.

599. *See supra* Part I.F. This summary is a short version of the earlier section of this article, not of the trial court's findings. The trial court made no finding that CWRU computer lab employees hacked Halder's computer or that CWRU should have discovered that fact. *Wallace v. Halder*, No. CV-06-591169, slip op. at 20 (Ohio Cir. Ct. Aug. 27, 2008).

600. *Wallace*, No. CV-06-591169, slip op. at 9.

Halder was unlikely to “do anything,” the computer lab supervisor did not report it to CWRU officials.⁶⁰¹ Ten months later, a few days after he lost his case, Halder came to CWRU on a mission of vengeance, in the course of which he shot and killed CWRU graduate student Norman Wallace, who was in the building to confirm an academic placement.⁶⁰²

Norman Wallace was the first person shot and the only person killed in the rampage.⁶⁰³ He was thirty years old, from Youngstown, the eldest of eleven children, and the pride of his family.⁶⁰⁴ A 4.0 graduate student in business administration and the only African-American in his class, he was the president-elect of the Black MBA Student Association.⁶⁰⁵ He was immensely popular, a role model. He mentored and befriended students of all races and nationalities. He could go anywhere, on campus or off, and be welcomed.⁶⁰⁶

As the school had intended, Weatherhead students treated the PBL Building as a second home. Norman Wallace stopped by on the afternoon of May 9, 2003, to check on a summer internship. He was chatting with a friend, a student from India, near the cafeteria, when Biswanath Halder smashed through the back door, aimed straight at him, and shot him dead.⁶⁰⁷

Norman Wallace’s estate filed a wrongful death action in May 2006 against CWRU based on a premises liability theory.⁶⁰⁸ CWRU answered that Halder’s rampage was not reasonably foreseeable and that it therefore had no duty to protect Norman Wallace. The Court of Common Pleas agreed.⁶⁰⁹ Noting that in Ohio a college or university has a “special relationship” with its students by analogy to business-invitee principles, the court wrote:

Whether CWRU had a duty to protect Norman Wallace from the harm suffered in this case turns upon whether the attack upon him was reasonably foreseeable. The test for determining whether or not a criminal act is foreseeable is whether, under the

601. *Id.* at 5.

602. Lila J. Millis, *Victim Was CWRU Student Leader*, Plain Dealer (Cleveland, Ohio), May 11, 2003, <http://www.cleveland.com/cwrushootings/index.ssf?/cwrushootings/more/105264833257>.

603. Stafford, *supra* note 247.

604. *Id.*

605. Millis, *supra* note 602.

606. *Id.*

607. *Id.*

608. The estate named as co-defendants Halder, the unknown persons who sold Halder his guns, and five unknown security guards and companies responsible for guarding the PBL Building premises. The complaint also alleged that CWRU was negligent in hiring and supervising security personnel. *See* Complaint, *Wallace*, No. CV-06-591169.

609. *Wallace*, No. CV-06-591169.

totality of the circumstances, a reasonably prudent person would anticipate that injury was likely to occur. The totality of the circumstances test considers prior similar incidents, the propensity for criminal activity to occur on or near the location of the business, and the character of the business. Because criminal acts are largely unpredictable, the totality of the circumstances must be “somewhat overwhelming” in order to create a duty. Of course, in performing its review, the Court must focus on the facts and circumstances at the time in which they arose and should refrain from using the additional illumination of hindsight in performing its analysis.⁶¹⁰

The court concluded that a reasonably prudent person would not have anticipated Halder’s rampage. The court found that after the computer hacking incident and Halder’s departure from campus in August 2000, “there were no contacts between Halder and CWRU personnel”⁶¹¹ and that Halder’s only threat of violence occurred over ten months before the shooting.⁶¹² Plaintiff proffered the evidence of a security expert who stated that CWRU should have taken action to resolve the computer-hacking dispute with Halder, but the court ruled that the conclusion was outside the scope of his expertise.⁶¹³

Plaintiff argued that previous cases finding no foreseeability, and therefore no duty, involved violence by outsiders; whereas, CWRU knew, or should have known, that Halder was a potential attacker. The court disagreed:

[T]here is no doubt that CWRU considered Halder a problem. CWRU was aware that Halder was annoying to students and personnel at the Weatherhead School’s computer lab and that he was upset by the deletion of his website in June of 2000. CWRU was also aware that Halder was “on a mission” to find the culprit However, it is equally apparent that Halder had no history of violence or criminal behavior on or off campus. That before May 9, 2003, Halder had not been a student at CWRU for over two and a half years before the shooting. For approximately three years prior to the shooting . . . Halder’s response to the injustice against him . . . was through acceptable, legal channels available to him. In addition, Halder was not known to possess a gun or the means to carry out the only perceived threat in this litigation—i.e. to “fuck those fuckers up” if he lost his appeal.

610. *Id.* slip op. at 7–8 (internal citations omitted).

611. *Id.* slip op. at 10.

612. *Id.*

613. *Id.* slip op. at 11. Plaintiff proffered another expert in forensic and clinical psychology in support of its claim CWRU knew or should have known that Halder “was a pot about to boil over,” but the court excluded the report as untimely. *Id.*

Even if that statement was accompanied with a hand gesture indicating a pistol, its significance is diminished by the fact that it occurred some 10 months before the murder of Brian [sic] Wallace.⁶¹⁴

The court concluded:

Without the benefit of a hindsight analysis, the words and actions of Biswanath Halder prior to May 9, 2003, tend to be “somewhat equivocal” rather than “somewhat overwhelming” as is required to establish the foreseeability of criminal conduct in a premises liability case. Halder’s actions before May 9, 2003 are not sufficient to lead a reasonable person to foresee that, if he lost his appeal, his next course of action would be to heavily arm himself, force his way into a secure campus facility and then open fire on innocent persons.⁶¹⁵

This conclusion is flawed in several respects. First the analysis, urged by the University and adopted by the court, does not take account of the special nature of the academic enterprise, nor the nature of the risk involved. Respect for intellectual work of others is a traditional academic value about which there is a high level of consensus in the academic community. It is a necessary component of academic freedom and scholarly productivity. It is common to all academic communities, especially high-ranking research universities like CWRU.⁶¹⁶ When the college or university guards and implements such a value for the scholarly community (and, in terms of the business model, trades on it), it is to be expected that it will maintain professional standards of conduct and accountability in the computer labs where intellectual work is pursued.⁶¹⁷

614. *Id.* slip op. at 11–12.

615. *Id.*

616. CWRU’s employee ethics policy regarding conduct and intellectual honesty, adopted in January 2008, provides:

A norm of expected conduct shared by all in the university community will be governed by truthfulness, openness to new ideas, and consideration for the individual rights of others, including the right to hold and express opinions different from one’s own To safeguard the standards on which everyone depends, each employee must accept individual responsibility for behavior and work, and refrain from taking credit for the work of others. The culture of a university also requires that the rights of all be protected, particularly by those entrusted with authority for judgment of the work of others.

CWRU, Human Resources Policy Statement, <http://www.case.edu/finadmin/humres/policies/Standards/ethics.html> (last visited May 25, 2009).

617. CWRU’s employee policy on computing ethics provides:

[S]pecifically, employees are prohibited from accessing or using the internet or email and university’s computing resources, for any unlawful or unethical purposes including but not limited to violence; gambling; discriminatory, offensive, harassing statements, language or behavior; sending or soliciting sexually oriented messages or images; operating a business; or printing of

If a person's intellectual work is nevertheless deliberately destroyed, a college or university should be at least as diligent in discovering the culprits as in defending against false complaints. If it negligently fails to take appropriate action, its inattention can contribute to significant disorder and dysfunction, not least by disappointing the legitimate expectations of its students with respect to the safety of their work. Second, the analysis does not take into account the special risks of academic life. Scholars may become deeply disturbed over issues involving their intellectual work product.⁶¹⁸ In the *Wallace* litigation, the University made much of the fact that Halder had no history of violent or criminal behavior and was not known to own a gun, but the same can be said of most academic rampagers, few of whom make direct threats. Guns are easy to obtain. Every rampage killer so far has obtained his weapons quickly and lawfully. Murders that occur as a result of academic-related conflicts are most likely to occur at the institution, not at the victim's home or some other place. In a rampage, innocent people are always hurt. Given the academy's experience with violent graduate students, a reasonable jury might find that a prudent college or university should take it seriously when a student with known grievances and frustrations about the destruction of his work actually threatens to kill those responsible.⁶¹⁹ A jury might well find it imprudent of a school to let its employees treat threats by students as purely personal conflicts, with only personal safety implications.⁶²⁰ On the other

copyrighted material.

Id.

618. See, e.g., *supra* note 19 (listing examples of graduate students who kill professors as a result of thesis defense). Gang Lu believed that his dissertation had been undervalued and filed a complaint, which was denied shortly before his rampage at the University of Iowa. See *supra* Part I.B. Professor Valery Fabrikant sued two of his colleagues for stealing his research and was facing a contempt of court hearing in the litigation (which, like Halder, he was conducting pro se) when he went on a rampage at Concordia University in 1992. See *supra* note 19. Peter Odighizuwa's work was deleted from a computer in the ASL library by another student. See *supra* note 123. Such events, which are part of the academy's "history of violence," underscore that respect for intellectual work is fundamental to the safety of the academic enterprise even as well as an expression of its deepest values.

619. CWRU's employee policy on safety and security, effective January 1, 2008, provides, in part:

The university expects that all employees will share the responsibility for safety and security of themselves, fellow employees, students and guests, and maintain reasonable care when using university property. . . . The university seeks to minimize the risks to employees and students and expects each employee to act responsibly by . . . [b]eing aware of potentially violent situations and treating them conscientiously.

CWRU, Safety and Security Policy Statement, http://www.case.edu/finadmin/humres/policies/standards/saf_sec.html (last visited June 2, 2009).

620. CWRU's employee policy entitled "Deterrents to Workplace Violence," adopted January 1, 2002, before Halder's rampage, provides, inter alia: "Supervisors should notify the Department of Human Resources or office of Protective Services of

hand, it is both prudent and consistent with a school's educational mission to discourage threatening behavior.

Third, the premises liability analysis elevates location over relationship in a way that does not necessarily comport with the realities of the situation. In terms of the foreseeability of his attack on the school, the analysis adopted by the court placed far greater emphasis on the fact that Halder left campus in August 2000 than on the substantial, and increasingly negative, relationship that continued through his litigation against the University and its personnel.⁶²¹ Both Halder and Miller gave depositions in Halder's civil action. Halder was a pro se litigant for much of the case, giving him direct personal involvement with adverse University attorneys, parties, and witnesses. Halder answered interrogatories, filed motions, and wrote letters having to do with his controversy with the computer lab employees.⁶²² He also continued to live at the same address, near many CWRU students, and he discussed his case with his neighbors, CWRU law students, who in turn discussed it with other CWRU students and employees.⁶²³ CWRU wrote Halder a letter in November 2001 terminating his computer lab privileges over a spam e-mail that he did not send.⁶²⁴ In May 2002, the court defeated his motion to compel discovery and his motion to add the University as a defendant.⁶²⁵ In January 2003, at Miller's behest, the court ordered Halder to delete statements from his website—a further loss of his intellectual work—in a way that he thought involved a

all reports of potential workplace violence.” CWRU, Deterrants to Workplace Violence, <http://www.case.edu/finadmin/humres/policies/services/dwv.html> (last visited May 25, 2009). Its employee safety and security procedure, effective January 1, 2008, provides:

Any Supervisor who has any concern that workplace violence is a possible event should notify both the Human Resources Department and Protective Services. The supervisor should not make a judgement [sic] call as to the likelihood of the event but notify these departments and they will determine whether observation and/or investigation is recommended.

CWRU, Handling Safety and Security Situations, <http://www.case.edu/finadmin/humres/policies/standards/hssp.html> (last visited May 25, 2009).

621. The court also found that the computer lab had moved to the PBL Building after Halder ceased using it and found that there was “no evidence” that Halder had ever set foot in the building before the rampage. *Wallace v. Halder*, No. CV-06-591169, slip op. at 12 (Ohio Cir. Ct. Aug. 27, 2008). The significance of the finding to the foreseeability analysis is unclear, but if it is material, there would appear to be unresolved issues of fact. There has never been any question that Halder came looking for Miller on the day of the rampage. If Halder had never been in the building, how did he know where to find Miller? How did he know to bring a sledge hammer to break through the glass door? How did he know to use the back entrance, at which no security guard was posted?

622. See text accompanying *supra* notes 245–256.

623. *Wallace*, No. CV-06-591169, slip op. at 4–5.

624. See *supra* note 242.

625. See *id.*

denial of due process.⁶²⁶ In February 2003, when Miller's lawyer was insisting on his compliance with the order, Halder protested to the court that he had been misinformed about his opportunity to respond.⁶²⁷ Whether he was physically present on campus or not, the contact between Halder and his institutional enemy was substantial, ongoing, and recent. It was so substantial, in fact, that Shawn Miller called the police when he heard that Halder had lost his appeal.⁶²⁸ Surely an institution's ongoing litigious relationship with an angry former student acting pro se makes its relationship with that student considerably more "special" for duty purposes, including foreseeability of violence, than the business-as-usual relationship between an educational storehouse and its regular satisfied customers.

Next, the analysis does not confront either of the two most common institutional denominators in rampage shootings: incivility and intolerance of diversity. Professor Kenneth Westhues suggests that Halder may have been the victim of academic "cybermobbing," or some other form of protracted, concerted incivility.⁶²⁹ In addition to the hacking of his website, probably by a CWRU employee, the public reports reflect other evidence that Halder was being deliberately targeted. There was a website named "Haldersucks.org" (attributed in contemporaneous press accounts to undergraduate students) from which e-mail messages derogatory and uncivil to Halder were sent, advising him, among other things, to "take a hike and get out of our lives."⁶³⁰ The messages were apparently posted with impunity, since the website remained in existence until after the rampage.⁶³¹ In 2001, after Halder filed suit against Miller, and long after

626. See *supra* note 256.

627. See *supra* note 256.

628. Wallace, No. CV-06-591169, slip op. at 5-6.

629. See Kenneth Westhues, Thirty-Two Academic Mobbing Cases Since 2005, Feb. 2008, <http://arts.uwaterloo.ca/~kwesthue/mobnews06.htm> (last visited May 25, 2009). Professor Westhues writes,

To say that Halder was mobbed at Case Western in no way mitigates his guilt of horrific crimes, nor does it deny the disordered state of Halder's psyche, ample evidence of which was presented at trial. The simple, emp[i]rical fact remains: he was ganged up on, collectively humiliated, his life's work illegally, immorally destroyed, and this was a prelude to his crimes.

Id.

630. See *supra* note 236 and accompanying text.

631. CWRU's student policy on harassment provides:

Members of the University community are expected to respect the rights of others by refraining from any inappropriate behaviors that may negatively impact a student's experience. Harassment includes, but is not limited to, the following: 1. Conduct which intimidates, threatens, or endangers the health or safety of any person; 2. Behavior that intentionally or negligently causes physical, financial, or emotional harm to any person; and 3. Behavior that is construed as a nuisance, including, but not limited to, prank phone calls or abusing or harassing another user through electronic means.

he left the University campus, a threatening spam e-mail appeared, falsely purporting to be from Halder's CWRU computer, stating that Shawn Miller needed "to be liquidated or liquefied"—an act CWRU and the court characterized as a "spoof," though it clearly resulted in further damage to Halder's reputation, if nothing worse.⁶³² The record does not reflect whether the University attempted to discover the culprit.

That Halder sent highly uncivil spam e-mail and made a nuisance of himself in the computer lab does not disprove the point. The fact that, like his persecutors, he also largely got away with it evens no scores, especially from the perspective of Norman Wallace's family. As the preceding accounts demonstrate, virtually every rampage in higher education raises, one way or another, questions regarding institutionalized incivility. Either the rampager was bullied, harassed, targeted, shunned, humiliated; or he was himself threatening, uncivil, hostile, disrespectful; or both. That bullying and intimidation are preludes to violence is well-understood, and the potential for harm becomes even more foreseeable if race is a factor in the targeting.⁶³³ Tensions along race, ethnic, and gender lines are present in most of these rampage cases.⁶³⁴ That fact, taken together with the

CWRU, Undergraduate Student Handbook, Harrassment, <http://studentaffairs.case.edu/office/handbook/policy/university/harrassment.html> (last visited May 25, 2009).

CWRU's employee policy on professionalism provides:

Professionalism in communications and behavior is the only acceptable form of interaction on campus and in related university business settings. Every employee is expected to conduct himself/herself in a manner that is a positive reflection of the university. When differences of opinions occur, only constructive, legitimate, and respectful forms of communication are considered appropriate.

CWRU, Work environment, http://www.case.edu/finadmin/humres/policies/standards/work_env.html (last visited May 25, 2009).

632. Wallace v. Halder, No. CV-06-591169, slip op. at 9 (Ohio Cir. Ct. Aug. 27, 2008).

633. Halder's world view is that the "master race" (excluding himself) perpetually subordinates and victimizes the "inferior race" (including himself). Biswanth Halder Letter, *supra* note 229.

CWRU's employee policy on inclusion provides,

The university is a world class university that prides itself on being understanding, welcoming and supportive to all members of the university community. Therefore, valuing diversity is a key part of Case employment standards. The key principles in fostering inclusion are: [t]he ability to achieve common goals while valuing differences[;] . . . [a] better understanding of Case as a community of cultures[;] . . . [and o]n-going communications among faculty, staff & students.

CWRU, Work Environment, *supra* note 631.

634. Gang Lu, Wayne Lo, Peter Odighizuwa, Biswanath Halder, and Seung-Hui Cho were all first generation immigrants of color. Robert Flores, who was Hispanic, was one of very few men in a nursing program dominated by women. Valery Fabrikant, the Concordia University shooter in Canada, also a first-generation immigrant, was a culturally-identified Jew from Minsk, USSR. The cultural

isolation and alienation of rampagers, suggests that perhaps rampages are more likely to occur in academic cultures that fail adequately to address factors contributing to race and gender-related conflict, on the one hand, and the alienation of marginalized students on the other. It may well be that modeling and enforcing civility, diversity, and anti-violence policies creates a safer academic environment, while failing to make and enforce such policies is not only poor teaching but also negligent care, because it increases a foreseeable risk of harm.⁶³⁵

Had the *Wallace* trial court taken more of the particular circumstances of academic life into account, it might have found their totality somewhat less “equivocal” and somewhat more “overwhelming”⁶³⁶ in deciding whether CWRU ought to have foreseen the rampage, though even with a fully developed trial record, a jury might still find that CWRU could not reasonably have prevented the rampage. Experience teaches that when it comes to reducing the likelihood of a rampage, foresight involves knowing where to look, and what to look for, not only in the institutional buildings, but in the institutional culture. Reasonable care means more than ensuring that the outside doors are guarded and that “problem” students have no history of overt violence. Courts can encourage institutions of higher learning to learn from academic experience by grounding the tort analysis in factors that reflect the special nature and the special risks of academic life, making it more difficult for the institution to avoid liability for harms that were, all things considered, foreseeable.

Professors Bickel and Lake have observed:

By its nature, the law is cumbersome and sometimes forceful and reactive; law can have difficulty in times of rapid transition. Nonetheless, the law does adapt and grow. And it is very powerful in terms of both reflecting and creating images of college life. College becomes, and mirrors, what law projects. Law, like students, parents, faculty, administrators, and culture at

demographics of these shooters is in stark contrast to rampages in secondary education, where the shooters are overwhelmingly white and home-grown. *See* Gregg Barak, Jeanne Flavin, & Paul Leighton, CLASS, RACE, GENDER, AND CRIME: SOCIAL REALITIES OF JUSTICE IN AMERICA 61 (2006).

635. Secondary school rampages have been even more clearly linked to cultures of bullying and intimidation than college or university shootings. Campus civility and anti-violence standards are likely to become even more important as the post-Columbine generation, inured not only to a secondary school culture of intimidation and conformity, but also to the idea of school rampages, enters undergraduate and graduate school. A salient feature of the more recent rampages is that Cho, whom Westhues considers another potential mobbing victim, was an admirer of the Columbine High School killers. *See* VT PANEL REPORT, *supra* note 6, at 35. So was Steve Kazmierczak, who also studied Cho’s methods and emulated his careful planning. *See supra* note 418 and accompanying text.

636. *Wallace v. Halder*, No. CV-06-591169, slip op. at 12 (Ohio Cir. Ct. Aug. 27, 2008).

large, is a co-creator of and is co-created by university life. The types of universities we imagine define the parameters of acceptable risk and the extent of allocation of that risk.⁶³⁷

Study of the rampages leaves no doubt that higher education and the law which helps define it are both in transition at least with respect to the issue of campus safety. The question is, what will be the new models, and the new definitions? As it now stands, the *Wallace* decision does little to help us imagine a safer way.

IV. CONCLUSION: BEHOLD THE CASTLE-BEARING ELEPHANT

In most of the rampage stories, crossroads may be identified, at least in retrospect, at which, had the institution taken a different path, it might have experienced less violent and heartbreaking outcomes. One such juncture occurred at Virginia Tech after the bodies of Emily Hilscher and Ryan Clark were discovered at West AJ Hall in the early morning hours of April 17, 2007. In the wake of post-rampage investigation, the police and University officials were criticized for assuming, erroneously, that the double murder was in the nature of a domestic dispute, a dormitory drama. On that assumption, according to the reports, the officials locked their own doors for safety but did not think the situation warranted alarming the school community. The institution did not cancel classes. Professors in their offices were not warned for hours. It can fairly be said that had the official assumptions been correct, the murder of the two students would have been handled with minimal disruption to the University's ongoing operations. Cho's rampage at Norris Hall, in contrast, shut down the entire University for a week, and it has not been the same since. Nor has the academy as a whole.

Rampages are great tragedies, not lesser dramas, however sad and outrageous the latter may also be. Both in the participants and in the viewing audience, rampages create the powerful uprush of pity and fear and catharsis that Aristotle describes as a characteristic of tragedy. The "healing crisis" energizes the institution's capacity for remembering, revaluing, and renewing the connections between its individual parts and its central unifying principles. The rampage is a public, community-defining event, capable of transforming the institution's cultural definition of safety.⁶³⁸

In that sense, a rampage can ultimately benefit the institution—and the individual students and faculty who must live with its ways and suffer the consequences of its institutional behavior. If, however, the institution has

637. BICKEL & LAKE, *supra* note 11, at 192.

638. The University of Iowa helped establish Iowans for the Prevention of Gun Violence and still commemorates Gang Lu's rampage every year in order "to promote social and institutional change." DENENBERG & BRAVERMAN, *supra* note 9, at 64–65.

no legally recognized duty to safeguard the community, each rampage presents the danger that the host institution will not make a constructive or effective response. Institutions often resist any suggestion that they share responsibility for the disaster.⁶³⁹ Instead, true to the business model the law has helped them to imagine, they may use the energy released by the rampage to foster a business-as-usual posture. Though rampages are extremely costly to the college or university hapless enough to provide the venue for one, they also, perversely, can have positive side-effects for the institution as a whole.⁶⁴⁰ Charitable donations may pour in for victim relief.⁶⁴¹ Student applications may go up.⁶⁴² As a result, opportunities for deeper reflection and constructive change may be lost.⁶⁴³ After the rampage, the faculty may feel trapped in the ivory tower with the ghosts of dead colleagues who “paid an enormous price”⁶⁴⁴ so that the administration could “move forward” with business as usual. Faculty concerns about dangerous students may continue to be discounted or poorly handled. The institution still may not facilitate making effective, program-related assessments of students’ character and fitness for their chosen professions. Psychological support services for graduate and undergraduate students

639. Professors Bickel and Lake made the point in 1998:

Decades of legal polarization and extreme allocations of responsibility have destroyed a sense of shared responsibility. The consequences are serious for campus safety: a community which tries to deflect responsibility instead of sharing it tends to make narrowly drawn, “cover yourself” decisions that further short term interests only. Irresponsible campuses are physically dangerous places. Campuses without significant sharing of responsibility are irresponsible environments.

BICKEL & LAKE, *supra* note 11, at 189.

640. Experience with regard to positive public relations in the aftermath of rampages is accumulating. *See, e.g.,* Neal King, *Mediated Ritual on Academic Ground*, in *THERE IS A GUNMAN ON CAMPUS: TRAGEDY AND TERROR AT VIRGINIA TECH*, *supra* note 13, at 55; Wendy B. Davis, *The Appalachian School of Law: Tried But Still True*, 32 *STETSON L. REV.* 159 (2003).

641. Both Appalachian School of Law and Virginia Tech received substantial donations for victims’ compensation funds. *See* Harding, *supra* note 138 and *supra* text accompanying notes 371–375.

642. *See supra* text accompanying note 149 (ASL). Applications also rose at Virginia Tech. *Virginia Tech Reports Freshman Class Increase*, ABC 7 NEWS, May 19, 2008, <http://www.wjla.com/news/stories/0508/520930.html>.

643. As Nickel notes,

[T]he official message is clearly not one of grief, but of control: please remove yourself from your responses to the media and convey the official (authorless) response. This is distinctly antitransformational [Virginia Tech’s] version of what I experienced in Blacksburg is wrong, but it is the legitimated and official version, which discourages me from deeper reflection.

Nickel, *supra* note 283, at 167; *see* Lucinda Roy, *NO RIGHT TO REMAIN SILENT: THE TRAGEDY AT VIRGINIA TECH* (2009).

644. Blue & Schmidt, *supra* note 215.

may still be inadequate.⁶⁴⁵ Too little attention may be paid to tensions and stressors in the academic environment. The views of the faculty may be overlooked, and faculty voices may still go unheard, particularly those of women. Discussion may be discouraged, and fidelity to the institution's self-serving story may be expected.⁶⁴⁶ The administration may strengthen the locks and issue more firearms to campus police, and it may become impolitic to ask whether such measures will significantly decrease the likelihood of a rampage or whether they will operate only to confine the damage and pose a challenge to future killers.⁶⁴⁷

For many academic years now, we have placed ourselves in the inherently insupportable position of arguing that colleges and universities have no responsibility to make learning spaces safe, although we cannot possibly fulfill the fundamental goals of higher education without doing so.⁶⁴⁸ As increasingly unacceptable levels of campus violence press colleges and universities to change position, faculties have a new

645. The American College Health Association's (ACHA) 2004 survey of 47,202 students reported that 11% of women and 9% of men had seriously contemplated suicide and that 1.3% reported one or more attempts in the past school year. CARR, *supra* note 5, at 8–9. The ACHA's National College Health Assessment in spring 2006, covering over 94,000 students on 117 campuses, sounded a similar alarm: 16% of students reported that at least five times in the preceding school year they had "felt so depressed it was difficult to function" and that more than 9% had seriously considered suicide. Robert B. Smith & Dana Fleming, *Student Suicide and Colleges' Liability*, CHRON. HIGHER EDUC. (Wash., D.C.), Apr. 20, 2007, <http://chronicle.com/weekly/v53/i33/33b02401.htm>. A 2007 survey by the Association for University and College Counseling Center Directors found that colleges and universities average one counseling staffer for every 1,941 students, which is below the recommended guideline of one counselor per 1,500 students. Justin Pope, *A Year after Virginia Tech Shootings, Impact Felt on on Campus Mental Health Treatment*, ASSOC. PRESS, Apr. 13, 2008, http://www.blnz.com/news/2008/04/14/year_after_Virginia_Tech_shootings_4148.html.

646. At Virginia Tech, one tenured professor who used the rampage as an example of poor risk management in a class on business investments complained that he was publicly rebuked by the provost in front of his students. Paula Wasley, *Dispute Arises at Virginia Tech Over a Professor's Comments on the Shootings and the Provost's Response*, CHRON. HIGHER EDUC. (Wash., D.C.), Aug. 29, 2007, <http://chronicle.com/daily/2007/08/2007082901n.htm>. An adjunct professor at Emmanuel College in Boston was fired after conducting an "insensitive" classroom discussion of the Virginia Tech massacre. *Emmanuel Professor Fired over Virginia Tech Lecture*, ASSOC. PRESS, Apr. 23, 2007, http://www.boston.com/news/education/higher/articles/2007/04/23/emmanuel_professor_fired_over_virginia_tech_lecture/ (last visited May 25, 2009).

647. Some observers tend to pose the alternatives as a choice between business as usual and "turning the campus into a police state." See *supra* text accompanying note 99; *supra* text accompanying note 454. The false dilemma prevents us from examining the actual state of the police presence on campuses. Both the rampage stories and the court cases discussed above suggest that relying on police forces to maintain nonviolent conditions on campus may well be a less than effective strategy.

648. See Peter F. Lake, *Private Law Continues to Come to Campus: Rights and Responsibilities Revisited*, 31 J.C. & U.L. 621, 632–33 (2005).

opportunity to define and create safer community learning environments.⁶⁴⁹ Taken as a whole, the rampages make a strong case for recognizing the complications that race and sex diversities bring to academic life and the dangers that result when cultural incompetence and incivility are considered normal and acceptable.⁶⁵⁰ They support making the issue of psychological safety in learning spaces a higher priority.⁶⁵¹ They show the need to address the entire continuum of violence—including incivility, disrespect, intimidation, and mobbing—and actively to change the culture that tolerates it.⁶⁵² The value of keeping academic space—including our classrooms, faculty offices, libraries, and labs—reasonably safe for all participants is surely “embedded in a community consensus.”⁶⁵³ The burden of a duty to keep violence-producing factors as low as reasonably achievable is surely “no greater than to require compliance with self imposed standards.”⁶⁵⁴

The rampages also reinforce the case for acknowledging the special relationship between a college or university and its students, which makes it the primary target of the killer’s murderous rage. Experience teaches that it has not made the academy safer to keep students at arm’s length or to

649. As Professor Lake commented in response to the Virginia Tech Review Panel’s recommendations, “We want to make sure we don’t overkill We want to be careful not to completely rewrite American higher education around incidents of this type. It scares me that we’d have armed guards in the hallways and metal detectors and SWAT teams.” Fischer & Wilson, *supra* note 27.

650. See, e.g., HATE CRIMES ON CAMPUS, *supra* note 522, at 6 (noting the fear and anger generated by hate crimes and bias-motivated harassment); CARR, *supra* note 5, at 10 (noting the psychological impact of hate crimes upon ethnic minority students); *id.* at 9–10 (noting that “a continuum of disrespect toward women” is an underlying issue related to campus violence and that violence is a “learned and gendered” behavior).

651. See, e.g., Lawrence S. Krieger, *Institutional Denial About the Dark Side of Law School, and Fresh Empirical Guidance for Constructively Breaking the Silence*, 52 J. LEG. EDUC. 112 (2002); Thomas H. Benton, *Fearing Our Students*, CHRON. HIGHER EDUC. (Wash., D.C.), Dec. 14, 2007, <http://chronicle.com/weekly/v54/i16/16c00101.htm>; Courtney Leatherman, *Graduate Students’ Relations With Mentors Are Often Tense*, CHRON. HIGHER EDUC. (Wash., D.C.), Sept. 6, 1996, <http://chronicle.com/che-data/articles.dir/art-43.dir/issue-02.dir/02a01501.htm>; Gary Pavela, *Commentary: Fearing Our Students Won’t Help Them*, CHRON. HIGHER EDUC. (Wash., D.C.), Feb. 18, 2008, <http://chronicle.com/daily/2008/02/1700n.htm>; Thomas J. Scheff, *Rampage Shooting: Emotions and Relationships as Causes*, Sept. 2, 2007, <http://www.soc.ucsb.edu/faculty/scheff/main.php?id=61.html>.

Fortunately, there are signs in the legal academy that we are beginning to take steps toward creating a more peaceful and reasonable educational environment. For example, in January 2008, the newly-organized Balance in Legal Education Section of the America Association of Law Schools (AALS) held its first meeting. In January 2009, the Education Section of the AALS presented a program on campus violence at the annual AALS conference.

652. See CARR, *supra* note 5, at 10.

653. *Mullins v. Pine Manor Coll.*, 449 N.E.2d 331, 335 (Mass. 1983).

654. See *Furek v. Univ. of Del.*, 594 A.2d 506, 523 (Del. 1991).

deny that as educators we have the power to influence their values, their consciousness, their relationships, and their behaviors. Indeed, our ability to do so has kept violence on campuses relatively low in comparison to other social sectors.⁶⁵⁵ Creating reasonably safe learning environments requires the cooperation and collaboration of students as much as it requires the involvement of faculty, staff, and administrators, whose special relationship to the school has never been in question. Even the *Wallace* court, using ordinary business-invitee principles, had no difficulty recognizing that an institution has a special relationship with its students, and the substantial insurance payments to all rampage claimants but Norman Wallace reinforce that view. More important, however, in terms of the standard of reasonable care, the rampages illuminate a complex interdependency between the college or university and its students that requires a shared commitment to community safety.⁶⁵⁶ An institution that does not honor that relational reality and act to secure that shared commitment increases the risk of foreseeable violence in its student population.⁶⁵⁷

Whatever may have been true in the past, the recurrence of the rampage phenomenon over the past seventeen years makes mass violence a foreseeable danger of the academic enterprise. Moreover, because of its capacity to organize and influence the campus environment, the institution is in a much better position than the potential individual victims to recognize and forestall the possibility of large-scale community violence. The law assumes that reasonable persons, including corporate persons, learn from experience. Hindsight should become foresight. The more we know, or should know, about the conditions that contribute to violence, the more we can expect to be held accountable when any given situation ends in a rampage. Under almost any rubric of foreseeability, when a student is believed to have a loaded gun and to be threatening to use it, reasonably careful administrators do not leave a campus of young students and unarmed security guards to fend for themselves without at least calling the

655. See *supra* note 5.

656. Professors Bickel and Lake explore the concept of “the facilitator university” as a model of shared responsibility in Chapter VI of *THE RIGHTS AND RESPONSIBILITIES OF THE MODERN UNIVERSITY: WHO ASSUMES THE RISKS OF COLLEGE LIFE*, *supra* note 11.

657. Rampages result in an “upsurge in social cohesion” among college and university students, creating opportunities for building and repairing the academy’s fragmented relationships. John Gravois, *Virginia Tech Researchers Study Effects of Shootings on Their Campus*, *CHRON. HIGHER EDUC.* (Wash., D.C.), Mar 7, 2008, <http://chronicle.com/weekly/v54/i26/26a01001.htm>. Mass tributes and memorial services crowded by students are common features of the rampage aftermath. While ceremonies are certainly important, however, if the primary institutional response is to hold candlelight vigils and display the school colors, little of lasting value is accomplished.

police.⁶⁵⁸ When two students have been found shot to death in a dormitory and the killer is still at large, it is equally blameworthy for college or university officials to lock themselves in a building for over an hour, safely awaiting developments, before deciding whether to warn faculty and students of the danger.⁶⁵⁹ Given what we know about the provocative dynamics of violence in graduate and professional schools, it is perilous, if not negligent, to ignore or misinterpret credible reports of incivility, disrespect, intimidation, or threatening behavior involving individual students, and it is equally perilous to ignore signs that they are angry, depressed, or desperate with respect to their academic experience.⁶⁶⁰ When it comes to judging foreseeability, we will be asked not only how many signs there were of the coming violence but how well we paid attention, how well we understood, and how carefully we acted.

There are reasons other than safety for imagining a legal model for higher education that reflects the unique values, special relationships, and historic experience of academic life.⁶⁶¹ Facing the institutional responsibility for the rampage phenomenon, however, is not only the best way to tame the beast that lurks in our midst, endangering our cherished open spaces, it is also a way of transporting the academy as a whole into a future better adapted to the survival of its fundamental principles.

658. See *supra* text accompanying note 73 (Simon's Rock).

659. See *supra* text accompanying notes 348–349, 377 (Virginia Tech).

660. See, e.g., *supra* text accompanying notes 127–129, 160 (Appalachian School of Law).

661. For example, Professor Richard Matasar, Dean and President of New York Law School, recently wrote:

Over the last few years, . . . I have been increasingly uncomfortable with a market model as a sole governing driver. It simply fails to embrace the spirit and nature of the higher education enterprise. The market conjures up too deep a commitment to selfish ends. It inadequately captures the academic impulse: to create schools, to create knowledge, to promote individual intellectual growth in faculty and students alike. The metrics of the market sometimes get only at the financial side and do not reflect our commitment to intangible goals. Without those intangible values, we do not create proper accountability measures that ought to underlie our works and we are likely to fail over the long run.

Richard Matasar, *Defining Our Responsibilities: Being an Academic Fiduciary*, 17 J. CONTEMP. LEGAL ISSUES 67, 69 (2008).

CAMPUS VIOLENCE: UNDERSTANDING THE EXTRAORDINARY THROUGH THE ORDINARY

NANCY CHI CANTALUPO*

INTRODUCTION

The tragic events at Virginia Tech and Northern Illinois University, the two most recent mass shootings on college campuses, have focused many on the responsibilities of colleges and universities to prevent and respond to such violence. Thankfully, in statistical terms, this type of campus violence can be considered relatively extraordinary. In contrast, the only type of campus violence that is unfortunately common enough to be characterized as “ordinary” is peer sexual assault and similar forms of campus gender-based violence.

Despite their differences in frequency, there are links and commonalities between the ordinary and the extraordinary when it comes to campus violence. Most obviously, gender-based violence has played a role in some of the shootings, most starkly in the motivations of Marc Lépine, who targeted and killed fourteen women for being “feminists” in the École Polytechnique massacre¹ and less clearly in the case of Sueng Hui Cho, the

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1. See Barry Came et al., *Montreal Massacre: Railing Against Feminists, A Gunman Kills 14 Women on a Montreal Campus, Then Shoots Himself*, MACLEAN’S MAG., Dec. 18, 1989, at 14, available at <http://www.rapereliefshelter.bc.ca/dec6/macleans.html>.

Virginia Tech gunman reported for stalking women students multiple times before going on his shooting rampage.² Less obviously, similar laws and liability issues can apply to these ordinary and extraordinary forms of campus violence, and colleges and universities often react and respond to these different types of campus violence in similar ways. Both forms of violence present the question of what colleges and universities should do to protect students and other members of the campus community who are or who could become victims of violence by student peers or others to whom the institution is similarly obligated. How should the law inform campus structures and systems, and how far beyond the basic legal requirements can and should these structures go?

While it is fortunate that mass shootings are so rare, their infrequency can make them harder to analyze and understand so as to prevent future violence and respond effectively should it occur. Because sexual violence has emerged as the most common form of campus peer violence, understanding it and applying that understanding to less common forms of violence may help us to prevent and understand what the proper responses should be to both forms of violence. In addition, because peer sexual violence on college campuses happens so frequently and therefore harms so many more people, it is an important subject worthy of examination on its own and should not be forgotten in the sensationalism that often surrounds campus shootings.

For these reasons, this article explores the typical college and university responses to ordinary campus violence, what the law requires of institutions in these cases, and what best institutional practices should be both in response to the law and beyond the bottom-line legal requirements. It focuses in particular on how college and university student disciplinary systems deal with cases of peer sexual assault, compares and contrasts the typical approach with how the current law and best practices treat campus sexual violence, and considers the goals and policy objectives that animate or should animate college and university disciplinary proceedings. It argues that drawing student disciplinary procedures in peer sexual violence cases primarily from the criminal system is inappropriate for several reasons, including that the goals underlying procedures in criminal cases are largely non-applicable in the campus context. While criminal procedures are designed to protect the accused's rights, the laws that apply to campus violence are concerned mainly with victims' civil rights. Therefore, criminal procedures are actually more likely to increase liability risks for institutions as well as increase, rather than decrease, the incidence of such violence. This article concludes that student disciplinary treatments of peer violence need to be reconceived to respond to the legal and

2. VIRGINIA TECH REVIEW PANEL, MASS SHOOTINGS AT VIRGINIA TECH: REPORT OF THE REVIEW PANEL 45–47 (2007), available at <http://www.governor.virginia.gov/TempContent/techpanelreport.cfm>.

practical realities of campus sexual violence. This reconception, moreover, is both an example and a part of a larger attitude shift that needs to take place at colleges and universities regarding campus violence, including violence such as mass shootings, even though such extraordinary violence often will never be dealt with through student disciplinary systems.

Accordingly, this article first explores the scope and dynamics of both “ordinary” and “extraordinary” campus violence, with a view towards elucidating the common interests of students, the campus community, and institutions of higher education themselves in addressing both. Part II discusses recent legislation dealing with peer sexual violence, such as portions of the Clery Act and Title IX, and the enforcement of such legislation, as well as more longstanding legal precedents dealing with the due process rights of students accused of misconduct. Part III compares the responses that are legally required with “best practices” for dealing with peer sexual violence, both at the comprehensive, institution-wide level and in the specific case of student disciplinary systems. Part IV critiques the typical disciplinary responses of many schools to cases of peer sexual violence and contrasts those responses with both the methods required by the applicable law and those advocated by the best practices discussed in the previous sections. Finally, Part V concludes with recommendations for what systemic changes and resources institutions should institute to respond to both forms of violence.

I. ORDINARY AND EXTRAORDINARY VIOLENCE ON CAMPUS

Campus violence in both its ordinary and extraordinary forms is alternately surrounded by silence or sensationalism. One needs to look no further than the intense media attention paid to the Virginia Tech massacre to see the sensationalism that can occur. Yet the silence surrounding ordinary violence is much more pervasive. Neither silence nor sensationalism is likely to promote accurate and productive understandings of the problem. What is needed is an examination of the incidence and dynamics of both forms of campus violence.

A. Peer Sexual Violence

Only a few comprehensive studies on campus-based, peer sexual violence have been completed over the last couple of decades since such phenomena as “date rape” began to be discussed widely and prominently. Nevertheless, their findings and conclusions are relatively consistent,³ and

3. Although some of the studies that are cited here are somewhat old, they are included for two reasons. First, they are the most recent studies that have been completed on this topic. This is particularly true for the 2000 report, *The Sexual Victimization of College Women*, which is the last nation-wide, comprehensive study to be completed on the topic of sexual assault on college campuses. See BONNIE S.

they indicate that “[r]ape is the most common violent crime on American college campuses today.”⁴ Studies estimate that 20–25% of college women are victims⁵ of forced sex during their time in college.⁶ As many as 15% of college men may also have been forced to have sex.⁷ “College men who are raped are usually raped by other men. However, since so few men report, information is limited about the extent of the problem.”⁸ Studies on college men indicate that 6–14.9% of them “report acts that meet legal definitions for rape or attempted rape.”⁹

FISHER ET AL., THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN (2000), *infra* note 6. Second, the findings of the older studies are quite consistent with the most recent ones, including one from 2007, even when the studies have been conducted in different decades. This indicates that the findings of older studies are still valid in terms of what we see today.

4. RANA SAMPSON, U.S. DEP’T OF JUSTICE, ACQUAINTANCE RAPE OF COLLEGE STUDENTS 1 (2003), *available at* http://eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/1a/8e/e1.pdf.

5. A note about language: I will use “victim” and “survivor” interchangeably to refer to people who claim they have been victims of sexual violence. Therefore, “victim” is not a term of art used to indicate a finding of responsibility for sexual violence. I may use “accuser” when discussing the role of the victim/survivor in a disciplinary proceeding. I will use “perpetrator” or “assailant” when someone accused of sexual violence has been found responsible or in discussions where it can be assumed the person perpetrated the sexual violence, such as statistical analyses. I will use “accused” or “alleged” to indicate when I am referring to those who have been charged but not found responsible for committing sexual violence. Finally, I will use female pronouns to refer to victims because the majority of victims are women, and male pronouns to refer to perpetrators and accused students because the majority of perpetrators and accused students are men.

I use “sexual violence” instead of terms such as “sexual assault” or “rape” because in my view “sexual violence” is a broader, descriptive term that is, once again, not a term of art, and that I regard to include a wider range of actions that may not fit certain legal or readers’ definitions of “sexual assault” or “rape.” The term therefore includes “sexual assault” or “rape,” as well as other actions involving physical contact of a sexual nature that may not always fit everyone’s definition of “sexual assault” or “rape.” While I acknowledge that non-physical actions can constitute violence, including those forms of violence is outside the scope of this paper.

Finally, I use “school” and “institution” to identify either K–12 schools or higher education institutions, although I use “college,” “university,” “campus” or “higher education” to refer to the latter category of schools.

6. CAROL BOHMER & ANDREA PARROT, SEXUAL ASSAULT ON CAMPUS: THE PROBLEM AND THE SOLUTION 6 (1993); BONNIE S. FISHER ET AL., THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN 10 (2000), *available at* <http://www.ncjrs.gov/pdffiles1/nij/182369.pdf>. *But cf.* Brenda J. Benson et al., *College Women and Sexual Assault: The Role of Sex-Related Alcohol Expectancies*, 22 JOURNAL OF FAMILY VIOLENCE 341, 348 (2007) (indicating that 21% of students in a sample of 350 were victims of attempted rape, and 13% of students in the sample were victims of a completed rape).

7. BOHMER & PARROT, *supra* note 6, at 6.

8. SAMPSON, *supra* note 4, at 3 (footnote omitted).

9. David Lisak & Paul M. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 VIOLENCE AND VICTIMS 73, 73 (2002)

Studies indicate that college and university women are particularly vulnerable to sexual violence and that they often become victims of such violence shockingly early in their time at a college or university. Most victims are between the ages of fifteen and twenty-four.¹⁰

“Women ages 16 to 24 experience rape at rates four times higher than the assault rate of all women,” making the college (and high school) years the most vulnerable for women. College women are more at risk for rape and other forms of sexual assault than women the same age but not in college.¹¹

Often the victim has been drinking or been given alcohol.¹²

Sexual assaults most often happen during a victim’s first year in college, often during the first week they are on campus.¹³ In one study, 12.8% of completed rapes, 35% of attempted rapes, and 22.9% of threatened rapes took place on a date.¹⁴ Most perpetrators are known to the victim,¹⁵ including classmates and friends of the victim (70% of completed or attempted rapes) and boyfriends or ex-boyfriends (23.7% of completed rapes and 14.5% of attempted rapes).¹⁶

Studies have also looked at the characteristics of perpetrators of campus sexual violence. Almost all men,¹⁷ perpetrators share characteristics such as “macho” attitudes, high levels of anger towards women, the need to dominate women, hyper-masculinity, anti-social behavior and traits, lack of empathy, and abuse of alcohol.¹⁸ A study in 1993 found that 5–8% of college men commit rape knowing it is wrong;¹⁹ 10–15% of college men commit rape without knowing that it is wrong;²⁰ and 35% of college men indicated some likelihood that they would commit rape if they could be

10. BOHMER & PARROT, *supra* note 6, at 18.

11. SAMPSON, *supra* note 4, at 2 (quoting S. Humphrey & A. Kahn, *Fraternities, Athletic Teams and Rape: Importance of Identification with a Risky Group*, 15 J. OF INTERPERSONAL VIOLENCE 1313 (2000)).

12. *Id.* at 13.

13. BOHMER & PARROT, *supra* note 6, at 26.

14. FISHER ET AL., *supra* note 6, at 17.

15. BOHMER & PARROT, *supra* note 6, at 26. FISHER ET AL., *supra* note 6, at 17.

16. FISHER ET AL., *supra* note 6, at 19.

17. BEYOND THE CRIMINAL JUSTICE SYSTEM: USING THE LAW TO HELP RESTORE THE LIVES OF SEXUAL ASSAULT VICTIMS, A PRACTICAL GUIDE FOR ATTORNEYS AND ADVOCATES i (Jessica E. Mindlin et al. eds., 2008) available at <http://www.victimrights.org/pdf-manual/beyondthecriminaljusticesystem.pdf> [hereinafter BEYOND THE CRIMINAL JUSTICE SYSTEM].

18. BOHMER & PARROT, *supra* note 6, at 23; Lisak & Miller, *supra* note 9, at 73; see also Martin D. Schwartz et al., *Male Peer Support and a Feminist Routine Activities Theory: Understanding Sexual Assault on the College Campus*, 18 JUSTICE Q. 623, 628 (2001).

19. BOHMER & PARROT, *supra* note 6, at 21.

20. *Id.* at 6.

assured of getting away with it.²¹ A 1986 study indicated that 30% of men in general say they would commit rape and 50% would “force a woman into having sex” if they would not be caught.²² “[O]ne [1997] study found that 96 college men accounted for 187 rapes, suggesting that further research may establish that serial rapists are a common component of the acquaintance rape problem.”²³ Finally, a study published in 2002 surveyed 1882 male students at a university and found that 6.4% of self-reported acts qualified as rape or attempted rape.²⁴ Of this group, 63.3% reported committing repeat rapes²⁵ averaging about 6 rapes a piece.²⁶ In addition, these “undetected” (i.e. not arrested or prosecuted) rapists each committed an average of 14 additional acts of interpersonal violence (battery, physical and/or sexual abuse of children, and sexual assault short of rape or attempted rape),²⁷ meaning that 4% of the students in the study accounted for 28% of the violence, nearly 10 times that of non-rapists (1.41 acts of violence each)²⁸ and 3.5 times that of single-act rapists (3.98 acts of violence each).²⁹

Ninety percent or more of victims of sexual assault on college campuses do not report the assault.³⁰ Fear of hostile treatment or disbelief by legal and medical authorities prevents 24.7% of college rape victims from reporting,³¹ and studies on attitudes of law enforcement, judges, juries, and prosecutors indicate that this fear is well-founded.³² Other factors include not seeing the incidents as harmful;³³ not thinking a crime had been committed;³⁴ not thinking what had happened was serious enough to involve law enforcement;³⁵ not wanting family or others to know;³⁶ lack of proof;³⁷ embarrassment from publicity;³⁸ not wanting to get men whom

21. *Id.* at 8.

22. ROBIN WARSHAW, *I NEVER CALLED IT RAPE* 97 (1988).

23. SAMPSON, *supra* note 4, at 11.

24. Lisak & Miller, *supra* note 9, at 76.

25. *Id.* at 78.

26. *Id.* at 80.

27. *Id.* at 78.

28. *Id.*

29. *Id.* 78–80.

30. FISHER ET AL., *supra* note 6, at 24.

31. BOHMER & PARROT, *supra* note 6, at 13, 63; FISHER ET AL., *supra* note 6, at 23; WARSHAW, *supra* note 22, at 50.

32. *See* BEYOND THE CRIMINAL JUSTICE SYSTEM, *supra* note 17, at 8; *see also* Lisak & Miller, *supra* note 9, at 74.

33. FISHER ET AL., *supra* note 6, at 23.

34. *Id.*

35. *Id.*

36. *Id.* at 24.

37. *Id.*

38. BOHMER & PARROT, *supra* note 6, at 13.

victims know in trouble;³⁹ lack of faith in, or fear of, court proceedings; lack of faith in police ability to apprehend the perpetrator;⁴⁰ fear of retribution from the perpetrator;⁴¹ and belief that no one will believe them and nothing will happen to the perpetrator.⁴² Not being believed and official mishandling can increase survivor trauma.⁴³ Not reporting or telling anyone about the assault can also hurt the survivor further.⁴⁴ In contrast, both speaking with someone about the assault and reporting it can be therapeutic⁴⁵ and a necessary step to recovery.⁴⁶

The picture that these statistics paint is one of epidemic gender-based campus violence that overwhelmingly does not reach the light of day, with both the violence and the silence surrounding it having serious consequences. In addition, they suggest how the problem of sexual violence may be perpetuated, at least in part, on college and university campuses. First, one can see from the statistics a vicious cycle between the campus sexual violence and the prevention of it—or rather, the failure to prevent it. Perpetrators often commit rape because they think they won't get caught or because they actually haven't been caught. Then, because survivors often do not report the violence, perpetrators are not caught, continuing to believe they will not get caught, and continuing to rape. Second, the ages of survivors and the timing of most campus sexual violence suggest that perpetrators may select victims who are particularly vulnerable and unlikely to have the resources at their disposal to report the violence. Third, clearly institutions and their responses to the violence play a part in the cycle of non-reporting and continued violence. On the survivor's side, research indicates that the main reason campus sexual violence survivors do not report is that they do not think anyone will believe them and that various authorities, especially legal and medical authorities, will be hostile. On the perpetrator's side, some studies suggest that lack of "proper guardianship" in terms of the failure of colleges and universities to address the campus peer sexual violence problem is a key and necessary element to creating the problem in the first place.⁴⁷

39. WARSHAW, *supra* note 22, at 50.

40. BOHMER & PARROT, *supra* note 6, at 13, 63.

41. *Id.*

42. WARSHAW, *supra* note 22, at 50; *see also* BOHMER & PARROT, *supra* note 6, at 13, 63.

43. BOHMER & PARROT, *supra* note 6, at 5, 198.

44. WARSHAW, *supra* note 22, at 66.

45. BOHMER & PARROT, *supra* note 6, at 235.

46. WARSHAW, *supra* note 22, at 66.

47. Schwartz et al., *supra* note 18, at 625 (citations omitted).

B. Links Between Peer Sexual Violence and Campus Rampage Shootings

Despite the marked differences in frequency between mass shootings and peer sexual violence, there are similarities as well between these two forms of campus violence. Both ordinary and extraordinary campus violence often arise from similar circumstances, exist on the same continuum of violence, share contributing and complicating factors, and receive similar responses from institutions.

From a number of analyses of both college and university and secondary school shootings, including the examination of John Marshall Law School Professor Helen de Haven in this volume of the *Journal of College and University Law*,⁴⁸ several links between peer sexual violence and school shooting cases can be seen. First, evidence suggests that school shooting cases can themselves be cases of gender-based violence.⁴⁹ Gender-based violence is generally thought of as violence that is either directed at a particular victim because of the victim's gender or perceived gender or disproportionately impacts a particular group of people because of their gender or perceived gender.⁵⁰ The shootings that have been noted as gender-based violence are ones where the shooter has clearly targeted women or girls. These include the École Polytechnique massacre, where

48. Helen Hickey de Haven, *The Elephant in the Ivory Tower: Rampages in Higher Education and the Case for Institutional Liability*, 35 J.C. & U.L. 503 (2009).

49. See Jackson Katz, *Conversation with Philosopher on School Shootings*, THE HUFFINGTON POST, April 7, 2008, http://www.huffingtonpost.com/jackson-katz/conversation-with-philoso_b_95530.html [hereinafter Katz, *Conversation*]; Jackson Katz, *Coverage of "School Shootings" Avoids the Central Issue*, COMMONDREAMS.ORG, Oct. 11, 2006, <http://www.commondreams.org/views06/1011-36.htm> [hereinafter Katz, *Coverage*]; Michael Kimmel, Ph.D., *Manhood and Violence: The Deadliest Equation*, <http://www.nomas.org/node/106> (last visited Apr. 21, 2009).

As Professor de Haven points out, the category of "school shootings" actually has a number of subcategories, depending on types of school (secondary or post-secondary), types of shooters (students, faculty/staff, or outsiders), level of rampage-like characteristics (whether victims are targeted or random), and the country where the shooting took place. See de Haven, *supra* note 48, at nn.17–19 and accompanying text, for an account of how Professor de Haven selected the cases for her study and the cases that were excluded. Professor de Haven discusses only cases in U.S. higher educational institutions, and therefore excludes cases such as the École Polytechnique Massacre in Montreal, Canada, as well as all secondary school shootings. Because this article does not attempt any comprehensive review of school shootings of a particular subcategory and mainly draws from other analyses and commentaries on school shootings in making its comparisons to peer sexual violence, it does not eliminate commentary and analyses based on any of these subcategories.

50. See, e.g., Interactive Population Center, *Violence Against Women and Girls: Introduction*, <http://www.unfpa.org/intercenter/violence/intro.htm> (last visited Apr. 20, 2009) ("Gender-based violence is violence involving men and women, in which the female is usually the victim; and which is derived from unequal power relationships between men and women. Violence is directed specifically against a woman because she is a woman, or affects women disproportionately" (internal quotation omitted)).

Marc Lépine shot and killed fourteen women engineering students for being “feminists,”⁵¹ the Amish schoolhouse shooting, where 32-year-old Charles Carl Roberts IV killed five Amish girls and wounded six others after allowing all the boys to leave,⁵² and the Platte Canyon High School Shooting, where the 53-year-old gunman took six girls hostage, molested all, sexually assaulted at least two, and killed one before killing himself.⁵³ In addition, commentators such as Temple Law School Professor Marina Angel have suggested that many of the secondary school shootings of the 1990s, including those at Pearl, West Paducah, Jonesboro, and Columbine constitute gender-based violence. In support, Professor Angel cites evidence that the shooters in each of these cases killed mainly girls, often ones by whom they had been rejected or whom they claimed to “love.”⁵⁴ Finally, at least two of the campus shootings discussed by Professor de Haven could be seen as gender-based violence. At the University of Arizona College of Nursing, the shooter was one of a few male students at an overwhelmingly female dominated nursing college. Therefore, his targets were likely to be women, he in fact killed only women, and evidence suggested that his feelings of marginalization as a man in the woman-dominated climate of the College factored into his shooting.⁵⁵ At Northern Illinois University, the perpetrator shot mainly at women.⁵⁶

Second, even if the shootings themselves are not instances of gender-based violence, several commentators have noted that gender and gender-based violence are often contributing or complicating factors of institution shootings. Most obviously, although often not acknowledged by the media or the FBI,⁵⁷ thus far, nearly every school shooter has been a man or a boy.⁵⁸ More importantly, scholars who study gender, such as Professor

51. Came et al., *supra* note 1; *see also* Katz, *Coverage*, *supra* note 49.

52. *See Fifth Girl Dies After Amish School Shooting*, CNN, Oct. 3, 2006, <http://www.cnn.com/2006/US/10/02/amish.shooting/index.html>; *see also* Katz, *Coverage*, *supra* note 49.

53. *See* Tom Kenworthy, *Investigation of Colorado School Shooting Turns Up Letter from Gunman*, USA TODAY, Sept. 29, 2006, http://www.usatoday.com/news/nation/2006-09-29-colorado_x.htm.

54. *See* Marina Angel, *The School Shooters: Surprise! Boys Are Far More Violent than Girls and Gender Stereotypes Underlie School Violence*, 27 OHIO N.U. L. REV. 485, 493–94 (2001).

55. *See* de Haven, *supra* note 48, at n.184 and accompanying text.

56. *Id.* at nn.449–51 and accompanying text.

57. *See* Angel, *supra* note 54, at 492; *see also* Katz, *Conversation*, *supra* note 49; Katz, *Coverage*, *supra* note 49; Kimmel, *supra* note 49.

58. *See* Katz, *Conversation*, *supra* note 49; Katz, *Coverage*, *supra* note 49; Kimmel, *supra* note 49. Many commentators on the secondary school shootings have also noted that all of the boys were white. As Professor de Haven’s review of the higher education rampage shootings notes, there is more racial and ethnic diversity among the college and university shooters. In addition, Professor de Haven notes that a recent school shooting involved a woman shooter in Louisiana, but she excludes the shooting from her study due to its lack of “rampage” characteristics. *See* de Haven,

Angel and masculinity scholars, Jackson Katz, Michael Kimmel, and Douglas Kellner, all note that many of the secondary school shooters, in particular, appear to have been undergoing identity crises related to their masculinity.⁵⁹ Many were bullied, harassed, and gay-baited,⁶⁰ and reacted to being victims of this gender-based violence in hyper-masculine ways that “define[] violence as a legitimate response to a perceived humiliation”⁶¹ and use violence, especially gun violence, to establish the shooters as “real men.”⁶² Professor de Haven notes that the higher education shooters were often also harassed.⁶³ In the case of the University of Arizona, the shooter’s suicide letter indicated that he felt marginalized as a man in the woman-dominated culture and that his male “assertive[ness]” was devalued.⁶⁴

Third, gender-based violence may be a prelude or warning sign of a subsequent mass shooting. Professor Angel mentions that one of the shooters at Jonesboro shot a girl who had broken off a dating relationship because “boys don’t hit girls.”⁶⁵ Professor de Haven notes that in four of the seven rampage shootings that she analyzed the shooters were involved with some form of gender-based violence prior to the shooting. In the shooting at Bard College at Simon’s Rock, one of the shooter’s two friends was dismissed for threatening a woman student, and the shooter later claimed that he had been accused of stalking.⁶⁶ At Appalachian School of Law, the shooter was reported for engaging in verbally abusive and threatening behavior towards women students, staff, and faculty and was charged with domestic violence by his wife.⁶⁷ The shooter at University of Arizona was hostile and belligerent to his largely women faculty and classmates, as well as the woman-dominated culture of the program.⁶⁸ The Virginia Tech shooter was accused of stalking women students.⁶⁹

Finally, several commentators have noted that many of the institutions where shootings have taken place had institutional cultures that were

supra note 48, at n.19.

59. Katz, *Conversation*, *supra* note 49.

60. Angel, *supra* note 54, at 493–95; Michael Kimmel, *Profiling School Shooters and Shooters’ Schools: The Cultural Contexts of Aggrieved Entitlement and Restorative Masculinity*, in *THERE IS A GUNMAN ON CAMPUS: TRAGEDY AND TERROR AT VIRGINIA TECH* 65, 68 (Ben Agger & Timothy W. Luke eds., 2008).

61. Kimmel, *supra* note 60, at 68–69.

62. Katz, *Conversation*, *supra* note 49.

63. See de Haven, *supra* note 48, at n.633 and accompanying text.

64. *Id.* at n.162.

65. Marina Angel, *The Abusive Boys Kill Girls Just Like Abusive Men Kill Women: Explaining the Obvious*, 8 *TEMP. POL. & CIV. RTS. L. REV.* 283, 287 (1999).

66. De Haven, *supra* note 48, at n.71 and accompanying text.

67. *Id.* at nn.121, 130 and accompanying text.

68. *Id.* at nn.184–207 and accompanying text.

69. *Id.* at nn.307–313 and accompanying text.

tolerant of gender-based violence, harassment, and discrimination. Professor Angel discusses the rampant gender harassment that existed at Columbine High School, and notes that one girl got a restraining order against a football player but was obliged to get home-schooling while he continued to take classes at the school.⁷⁰ Professor de Haven indicates that a student's research on lesbians in Appalachia was maliciously erased from a school computer and a student who was killed at Appalachian School of Law received an email that addressed her as a "fucking cocksucker" and threatened to "cut your nipples off, and stick jumper cables in you and connect them to my truck" about a year prior to the shooting.⁷¹ And Virginia Tech's hostile gender climate was publicized by what is likely the most prominent U.S. college rape case ever, where Christy Brzonkala was gang-raped by two football players and took her case all the way to the U.S. Supreme Court on one claim⁷² and to the Fourth Circuit on the other claim.⁷³

Discussing both Columbine and Virginia Tech, Michael Kimmel notes that the bullying and harassment went beyond simply (in the sense of "uncomplicatedly") gender. Dr. Kimmel explicitly draws a connection between Columbine's and Virginia Tech's institutional cultures, including the obviously gendered and the either not-so-obviously gendered or not gendered aspects of these cultures. He not only links the Brzonkala case with the overall climate of Virginia Tech as "a place where difference was not valued . . . where, in fact, it was punished,"⁷⁴ he also characterizes that overall climate as similar in both schools. He relates very similar stories from both institutions. The first story is from a boy at Columbine who said

70. Angel, *supra* note 54, at 494.

71. De Haven, *supra* note 48, at n.152.

72. *United States v. Morrison*, 529 U.S. 598 (2000).

73. *Brzonkala v. Va. Polytechnic Inst. and State Univ.*, 132 F.3d 949 (4th Cir. 1997). Brzonkala prevailed in the Fourth Circuit on both claims but after a rehearing *en banc* solely on the claim based on the 1994 Violence Against Women Act, that claim was rejected. *Brzonkala v. Va. Polytechnic Inst. and State Univ.*, 169 F.3d 820 (4th Cir. 1999). That decision was appealed to the United States Supreme Court, which affirmed. *Morrison*, 529 U.S. 598. The other claim was based on Title IX of the Educational Amendments of 1972 ("Title IX"). Because Brzonkala's Title IX claim was decided before *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), now the leading case on peer sexual harassment in education, it is not discussed in Part II below. However, a brief review of the case is appropriate here. Brzonkala was raped three times by two football players, Antonio Morrison and James Landale Crawford, all three times without a condom. *Brzonkala*, 132 F.3d at 953. After Morrison raped her the second time, he told her "'You better not have any fucking diseases.' In the months following the rape, Morrison announced publicly in the dormitory's dining room that he 'liked to get girls drunk and fuck the shit out of them.'" *Id.* After Brzonkala filed a claim against the two men under Virginia Tech's Sexual Assault Policy, "another male student athlete was overheard advising Crawford that he should have 'killed the bitch.'" *Id.* at 954.

74. Kimmel, *supra* note 60, at 76.

that he would have glass bottles thrown at him from moving vehicles by other students whom he didn't know every day as he walked home from school.⁷⁵ The other is Dr. Kimmel's own story of having students from a fraternity at Virginia Tech, to whom he had just presented regarding men's roles in supporting gender equality, throw a glass beer bottle at him from the back of a pick-up truck as he was walking back to his hotel. He notes that this is the only physical harassment he has ever experienced after giving similar lectures at hundreds of schools.⁷⁶

Dr. Kimmel argues that it is not just that the student cultures at places like Columbine and Virginia Tech are climates that are hostile towards women, girls, and any men or boys who differ from the hyper-masculine elite, but that "the administration, teachers, and community colluded with" the behaviors creating those climates.⁷⁷ A boy at Columbine stated that the teachers and administrators invariably would turn a blind eye when receiving reports as to how "those who were 'different' were crushed" because "those kids [the alleged perpetrators] were their favorites."⁷⁸ Christy Brzonkala's case echoes these points. After Brzonkala prevailed in two hearings under Virginia Tech's student conduct policies, one of the football players who raped her, Morrison, was suspended for one year.⁷⁹ After the "kangaroo court"-like procedures of the second hearing did not exonerate Morrison, Virginia Tech Provost, Peggy Meszaros, reduced the charge and one year suspension to "using abusive language," a "deferred suspension," and a one-hour education session with the university's EO/AA Compliance Officer.⁸⁰ Morrison returned to campus the next year on a full athletic scholarship.⁸¹ Brzonkala never returned, since she:

[F]eared for her safety because of previous threats and Virginia Tech's treatment of Morrison. She felt that Virginia Tech's actions signaled to Morrison, as well as the student body as a whole, that the school either did not believe her or did not view

75. *Id.* at 71.

76. *Id.* at 75.

77. *Id.* at 72.

78. *Id.*

79. *Brzonkala v. Va. Polytechnic Inst. and State Univ.*, 132 F.3d 949, 954 (4th Cir. 1997). After Morrison lost both in the first hearing and in his appeal, he hired a lawyer and succeeded in convincing Virginia Tech officials into holding a second hearing, described to Brzonkala as a "technicality" to correct supposed procedural irregularities in the first hearing. *Id.* Despite this description, Brzonkala was told not only that all of the evidence she produced at the first hearing would be inadmissible for the second, but also that she would not even be allowed access to the tapes of the first hearing. *Id.* at 954-55. With insufficient notice, she was unable to produce affidavits and witnesses. *Id.* at 955. Morrison received ample and early access to evidence from the first hearing as well as more than sufficient notice in order to prepare his case. *Id.* Despite all of this, Brzonkala prevailed again at the second hearing. *Id.*

80. *Id.*

81. *Id.*

Morrison's conduct as improper Brzonkala believes and so alleges that the procedural irregularities in, as well as the ultimate outcome of, the second hearing were the result of the involvement of Head Football Coach Frank Beamer, as part of a coordinated university plan to allow Morrison to play football in 1995.⁸²

Professor de Haven's research indicates that these kinds of institutional responses are replicated at other schools. For instance, Simon's Rock cut its security director out of the administration's communications loop prior to and even during the shooting, despite his being the only trained police officer in the administration, because he had criticized the campus's security measures prior to the shooting and suggested unpopular changes.⁸³ At Appalachian School of Law, the administration is said not to have responded to prior complaints about the shooter and to have made insufficient efforts to find those responsible for the violently misogynistic e-mail and the erasing of the Appalachian lesbianism research discussed above.⁸⁴ It was alleged that three complaints against the shooter were presented to the three top administrative officials, all male, by a female administrator and were dismissed as the product of "hormones" and "female intuition."⁸⁵ At the University of Arizona, one of the professors who was shot and killed told her husband prior to the shooting that she felt threatened by the shooter but saw no point in reporting him to school authorities.⁸⁶ The shooter at Case Western Reserve University went on his rampage because of a grievance against a school employee over a hacking of the shooter's website that the shooter's attorney in the dispute said the school did not seriously investigate.⁸⁷ And, of course, Virginia Tech's failures in responding adequately to the shooter's frightening behaviors in his English classes and to the two stalking reports are well-documented.⁸⁸

Professor de Haven notes that the institutional resistance to acknowledging and responding to criticism often continues or is strengthened by a shooting. Many of the institutions she examined avoided institutional introspection after the shooting and tried to silence voices that dissented from a party-line absolving the institution of any responsibility for the violence. For instance, one of the shooter's acquaintances at Simon's Rock, who actually made an anonymous call warning the school of the potential shooting three hours before it happened, a warning that the school lost through administrative bungling, was asked to withdraw and did

82. *Id.* at 955–56.

83. De Haven, *supra* note 48, at nn.100–01 and accompanying text.

84. *Id.* at n.152 and accompanying text.

85. *Id.* at n.160 and accompanying text.

86. *Id.* at n.198 and accompanying text.

87. *Id.* at nn.239–41 and accompanying text.

88. VIRGINIA TECH REVIEW PANEL, *supra* note 2, at 41–49.

in fact withdraw from the school because he felt he was being blamed for the shooting.⁸⁹ The security director who was excluded resigned “in disgust” after the shooting, and college employees were discouraged from visiting one of the victims in the hospital.⁹⁰ Several staff and faculty also resigned from Appalachian Law School following the shooting.⁹¹ At the University of Arizona, talk of the shooting was discouraged even though reports of threatening behavior went up following the shooting.⁹²

Patricia Mooney Nickel’s account of the days following the Virginia Tech massacre echoes this resistance to introspection and change. According to that account, the campus community received seven e-mails in six days from upper administrators using some version of “We are Hokies; we will prevail,” a phrase that quickly appeared on everything from T-shirts to back windshields to signs at the dry cleaners and local Kroger’s market.⁹³ The connection to the various paraphernalia and behaviors associated with support of the Virginia Tech football team is clear from Dr. Mooney Nickel’s account. Indeed, it harkens back to what Dr. Kimmel calls “the coercive coherence of the community of Hokie Nation . . . and the sanctimoniously sadistic exclusion of anyone who doesn’t fit in to that narrowly circumscribed community,” some of the very cultural characteristics that he and others see as contributing factors to the shooter’s rampage.⁹⁴ Dr. Mooney Nickel also quotes a senior administrator’s e-mail stating, “Nothing in the events of last week will alter who we are and what we represent,” and points out that this statement was wrong in both descriptive and aspirational terms—i.e., that the massacre must have effects on the school, and, indeed, *should* have had *transformative* effects. She suggests, “We could have done something as simple as declaring that we were now a university staunchly opposed to violence.”⁹⁵ Given Christy Brzonkala and Michael Kimmel’s experiences at Virginia Tech, that would have been transformative indeed!

Thus, even when the institutional characteristics shared by schools where the shootings have occurred do not have a gendered aspect, they

89. De Haven, *supra* note 48, at n.104 and accompanying text.

90. *See id.* at nn.100–02 and accompanying text.

91. *See id.* at n.155 and accompanying text.

92. *Id.* at nn.215–16 and accompanying text.

93. *See* Patricia Mooney Nickel, *There Is an Unknown on Campus: From Normative to Performative Violence in Academia*, in *THERE IS A GUNMAN ON CAMPUS: TRAGEDY AND TERROR AT VIRGINIA TECH* 159, 161–62 (Ben Agger & Timothy W. Luke eds., 2008).

94. Kimmel, *supra* note 60, at 76. Dr. Kimmel names both Columbine and Virginia Tech “jockocracies” and argues that such schools are likely to create cultures ripe for shootings. *Id.* He notes that the administrations of such schools are “under relentless alumni pressure to maintain and build the sports programs at the expense of every other program—especially the campus counseling program that might identify and treat such deeply troubled, indeed maniacally insane, students, a bit sooner.” *Id.*

95. Nickel, *supra* note 93, at 166.

eerily reflect many of the problems with institutional responses in peer sexual violence cases, problems which will be explored in depth during the remainder of this article. Many of the cases discussed in Part II share elements with *Brzonkala* including failures to respond to and address lower levels of misconduct and behavior that negatively impacts other—usually non-dominant—members of the community; ignoring, minimizing, or retaliating against those who speak up; and generally appearing unwilling to acknowledge anything that would call the dominant school culture or management into question. In addition, evidence suggests that school shootings, gender-based violence such as peer sexual violence, and the institutional responses to both are substantially connected in that they all arise from institutional environments that are hostile to difference and that perpetuate masculinist values. They also often exist on a continuum of violence, where, depending on the institutional response, lower levels of violence can escalate or provide warning signs that can then be used to de-escalate and prevent more severe violence. Finally, the fact that school shooters can be both victims and perpetrators of gender-based violence means that each type of violence can be a contributing and complicating factor for the other.

C. Consequences of Violent Campuses

The consequences of campus shootings are obvious and easily understood: multiple, random deaths and injuries resulting from public actions with many witnesses and providing little opportunity for victim-blaming. In contrast, the overwhelmingly unreported nature of peer sexual violence can make it more difficult to see the consequences. Nevertheless, they are massive. For survivors, they include sexually transmitted diseases, for which the treatment can be an additional trauma,⁹⁶ Post Traumatic Stress Disorder (affecting one-third of victims), depression, substance abuse, and suicidal tendencies.⁹⁷ The dynamics of college campuses, where survivors continue to have numerous connections to the perpetrator, can exacerbate these problems.⁹⁸ All of these consequences can have

96. For instance,

Many victims are exposed to sexually transmitted diseases, including HIV. The trauma associated with short term care and follow-up testing and treatment is overwhelming. Some victims are prescribed HIV anti-retroviral prophylaxis treatment to prevent the contraction of HIV. The medication, which can last for up to six weeks, takes an enormous toll on victims. Side effects, including extreme nausea, chronic fatigue, and chronic headaches, can interfere with, and in many cases prohibit, daily function.

Kathryn M. Reardon, *Acquaintance Rape at Private Colleges and Universities: Providing for Victims' Educational and Civil Rights*, 38 SUFFOLK U. L. REV. 395, 398 (2005).

97. BEYOND THE CRIMINAL JUSTICE SYSTEM, *supra* note 17, at 1.

98. *Id.* at 194.

negative implications for survivors' educational experiences. One study showed that women students who have experienced sexual violence have significantly lower GPAs than those who have not.⁹⁹ Other evidence indicates that survivors are more likely to miss class, perform poorly in coursework, or leave school.¹⁰⁰

While the consequences for survivors are the most devastating, they are not the only group affected by the vicious cycle of sexual violence and non-reporting. Researchers and activists such as Men Can Stop Rape and The White Ribbon Campaign have begun examining the underlying causes of male-perpetrated violence. Many of these individuals and organizations are also the ones expressing concern about the gendered dynamics of mass shootings discussed above. Indeed, The White Ribbon Campaign was formed as an organized response to the École Polytechnique massacre.¹⁰¹ These groups are creating education and support systems that seek to prevent men and boys from becoming perpetrators and to support and to encourage the overwhelming number of men who are not perpetrators to step out of bystander roles and to model and promote healthier forms of masculinity.¹⁰²

For example, a study by four sociologists and criminologists on sexual assault on college campuses in Canada explains that "the amount and the location of crime are affected, if not caused, by three important factors: the presence of likely offenders, who are presumed to be motivated to commit the crimes; the absence of effective guardians; and the availability of suitable targets."¹⁰³ The authors go on to explain that their study indicates that on college campuses "motivated male offenders view women who drink and/or consume drugs as 'suitable targets'; further, these views are largely a function of ties and social exchanges with male peers who perpetuate and legitimate sexual assault in college dating relationships, in combination with the use of alcohol by the men themselves."¹⁰⁴ In fact, "Undergraduate men who drank two or more times a week and who had friends who gave them peer support for both emotional and physical partner abuse were more than nine times as likely to report committing sexual abuse as men reporting none of these three characteristics."¹⁰⁵ To complete the third prong of the formula,

99. Benson, *supra* note 6, at 350.

100. Reardon, *supra* note 96, at 398–99.

101. The White Ribbon Campaign, <http://www.whiteribbon.ca/> (last visited May 28, 2009).

102. Men Can Stop Rape, Inc., Who We Are, http://www.mencanstoprape.org/info-url_nocat2701/info-url_nocat.htm (last visited Apr. 21, 2009); The White Ribbon Campaign, The Campaign, http://www.whiteribbon.ca/about_us/ (last visited Apr. 21, 2009).

103. Schwartz et al., *supra* note 18, at 625 (citations omitted).

104. *Id.* at 647.

105. *Id.* at 645–46.

[C]ollege campuses too often are ‘effective-guardian-absent.’ Many campus administrators do not seriously punish men who abuse women sexually, even if they engage in extremely brutal behavior such as gang rape. Even criminal justice personnel often disregard acquaintance and/or date rapes, essentially telling men that their sexually aggressive behavior is acceptable.¹⁰⁶

In this climate, the role of male peers may actually substitute for proper guardianship:

[M]ale peer support can be regarded as a component of effective guardianship. When offenders receive either encouragement or no punishment from peers, administrators, faculty, and law enforcement officials, then effective guardianship is lacking. On the other hand, insofar as a man’s friends give no support for abuse, this absence of support may well be the beginning of effective guardianship.¹⁰⁷

The authors conclude that

[P]revention and control strategies [should target] the broader social, social psychological, and psychological forces that motivate men to sexually abuse female intimates and strangers [E]fforts based solely on self-defense and awareness campaigns for women are insufficient. The male peer support network that legitimizes rape must be attacked and dismantled before women will be truly safer on campus.¹⁰⁸

These efforts recognize that campuses with rampant gender-based violence are harmful to men, as well as to women who are not victimized. First, college women spend an enormous amount of time and energy trying to “prevent” themselves from becoming victims of sexual violence.¹⁰⁹ To the extent that schools have begun “prevention” education, as the Canadian study above indicates, many campuses focus on making women students aware of the dangers and encouraging them to take risk-reducing measures such as going, leaving, and staying with trustworthy friends at parties, not leaving their drinks unattended, and taking self-defense classes. Second, given the statistics, both men and women are likely to know and be called on to help and support friends or family who have been victimized.

106. *Id.* at 630 (citations omitted).

107. *Id.* at 646 (citations omitted).

108. *Id.* at 647.

109. The author has repeatedly co-presented with colleague Jennifer Schweer a program on campus sexual violence to students at the National Conference for College Women Student Leaders. See AAUW, 2008 Student Leadership Conference Workshops, <http://www.aauw.org/nccwsl/2008/workshops.cfm#2j> (last visited Apr. 21, 2009). When we ask how the students, who are all women, “prevent” sexual assault, we must always cut off discussion before participants have finished listing all the things they do every day to “prevent” such violence.

Providing such help and support can be acutely painful and involve secondary trauma. Third, as Men Can Stop Rape's Campus Strength Program indicates, men in particular may find themselves becoming bystanders to violence or encouragement towards violence and often do not know how to intervene.¹¹⁰ Fourth, men may also feel pressured to actually perpetrate violence by the peer support dynamics talked about in the Canadian study above or by the dictates of traditional masculinity itself.¹¹¹ Finally, as the dynamics noted above in many school shootings indicate, some men and boys who, for whatever reason, do not feel that they are sufficiently masculine may seek to assert that masculinity through catastrophic violence.

School shooters demonstrate how even perpetrators have an interest in addressing the causes and complicating factors that are involved in campus violence. These interests are present in peer sexual violence cases as well, particularly the interest in ending the vicious cycle of non-reporting and violence perpetuation. The studies above show that there may be some perpetrators who can be educated not to perpetrate. The dynamics of peer support, the possibility of some men being pressured into committing acts of violence, and the indications that some university men are not inclined to repeat offending provide some hope that proper responses can encourage some men who are currently perpetrators to have healthier relationships and lives. Because getting caught probably has some deterrent effect, even repeat perpetrators may stop the behavior if they get caught and face serious but not debilitating consequences while in school. If so, they will not face the much more injurious consequences of being caught, tried, and convicted in the criminal context.

These interests and dynamics show that there are myriad reasons for institutions to address problems of campus violence. In the wake of the Virginia Tech and Northern Illinois University shootings, this need has been acknowledged repeatedly in the case of campus shootings. Such attention has, however, been less prominently given to campus peer sexual violence, despite its epidemic frequency and the contrasting rarity of campus shootings. Yet this frequency is precisely what creates opportunities for understanding and combating campus peer sexual violence through effective institutional responses. Moreover, the connections between peer sexual violence and violence such as rampage shootings suggest that addressing the ordinary violence may simultaneously reduce the likelihood of extraordinary violence. For these

110. See MEN CAN STOP RAPE, INC., CAMPUS STRENGTH PACKAGE (2008), available at http://www.mencanstoprape.org/usr_doc/MCSR_Campus_Strength_Program.pdf.

111. See THE WHITE RIBBON CAMPAIGN, EXERCISE 1: LIFE IN A BOX: MEN SHOULD... WOMEN SHOULD... 32, available at http://www.whiteribbon.ca/educational_materials/exercise1.pdf.

reasons, from this point forward, this article focuses primarily on what institutions should do to address peer sexual violence.

II. LAWS APPLICABLE TO PEER SEXUAL VIOLENCE ON CAMPUS

Institutions of higher education should care about peer sexual violence and the cycle of non-reporting and violence, at the very least for the sake of their students. Campus peer sexual violence indicates a fundamental breakdown in our institutions' educational missions. These missions include an obligation to create a healthy environment where students can fulfill their educational goals and to educate students on personal and professional issues such as fostering healthy relationships, treating others with dignity regardless of factors such as gender, and becoming ethical professionals. Nevertheless, in some ways, institutions themselves have the least direct interest in addressing the problem because of countervailing pressures on the institution. The broad-based, comprehensive institutional change required to significantly reduce or eliminate what we now know about peer sexual violence is a resource-intensive endeavor. In addition, schools may face pressures related to image and fear of negative publicity that may influence them either to suppress reporting or at least not to encourage it.¹¹²

Such countervailing pressures might be more powerful if it were not for recent developments in the law that collectively impose serious liability on schools that ignore campus crime problems such as rampant gender-based violence. Legislation, case law, and regulatory enforcement applicable to campus crime and violence have responded to the high rate of peer sexual violence on campus by increasingly focusing on those crimes. Second, they have improved legal protections for survivors, while school action or inaction affecting other students, including alleged perpetrators, has remained at a fairly low level of liability. Third, they respond to the non-reporting problem, particularly to the indications that victims do not report because they fear the responses of institutional authorities, by attempting to regulate these responses.

A. Increased Legal Concern with Peer Sexual Violence in Schools

Peer sexual violence on college campuses is primarily addressed by several different federal legal schemas, including, in rough order of passage, Title IX of the Educational Amendments of 1972 ("Title IX"),¹¹³ the Crime Awareness and Campus Security Act of 1990, renamed the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime

112. A detailed examination of issues related to these countervailing pressures and their interactions with the law related to sexual violence on campus is beyond the scope of this article, but is a part of the author's next project.

113. 20 U.S.C. §§ 1681–88 (2006).

Statistics Act (“Clery Act”) in 1998,¹¹⁴ and the Violence Against Women Act of 2000 (“VAWA”).¹¹⁵ In any given case, there may also be other federal or state laws that apply.¹¹⁶

VAWA is relevant here only because it provides funding for grants to combat violence against women, including grants given to college and university campuses to fund programs that focus on peer sexual violence.¹¹⁷ As such, it does not create liability for institutions, but does require institutions to operate in certain ways in order to receive and retain grant funding. Therefore, VAWA will not be discussed in detail in this paper, except as grant criteria can help inform what lawmakers and regulators envision as proper responses to peer sexual violence on campus, and how violence against women experts recommend colleges and universities deal with the problem.

In fact, the addition of the campus grants to VAWA in its first reauthorization (the first Violence Against Women Act was passed in 1994),¹¹⁸ demonstrates the first phenomenon mentioned above: applicable laws have increasingly responded to the high rate of peer sexual violence on campus. This phenomenon can also be seen in the history of the Clery Act, which originally focused on requiring colleges and universities to disclose campus crime statistics, but was amended in 1992 to add “The Campus Sexual Assault Victim’s Bill of Rights.”¹¹⁹ This amendment deals specifically with the creation and communication to students of institutional programs, policies and procedures designed to prevent sexual violence and to respond to it properly once it occurs.¹²⁰

Even aside from this addition, however, enforcement of the Clery Act has often involved and focused on peer sexual violence. Since the Clery Act does not create a private right of action,¹²¹ enforcement of the Act is conducted through the Case Management Teams of the Department of Education’s regional offices (“DOE”). A private party may file a

114. 20 U.S.C. § 1092(f).

115. See GARRINE P. LANEY, VIOLENCE AGAINST WOMEN ACT: HISTORY AND FEDERAL FUNDING, 2 (Cong. Research Serv., CRS Report for Congress Order Code RL 30871, Dec. 1, 2005), available at <http://holt.house.gov/pdf/CRSonVAWADec2005.pdf>.

116. See THE EDUCATOR’S GUIDE TO CONTROLLING SEXUAL HARASSMENT, ¶¶ 330–32 (Travis Hicks ed., 2008) [hereinafter EDUCATOR’S GUIDE].

117. See U.S. Department of Justice, Office on Violence Against Women, Grants to Reduce Domestic Violence, Dating Violence, Sexual Assault, and Stalking on Campus, http://www.ovw.usdoj.gov/campus_desc.htm (last visited Apr. 22, 2009).

118. See Laney, *supra* note 115, at 2.

119. See Security on Campus, Inc., Campus Sexual Assault Victim’s Bill of Rights, http://www.securityoncampus.org/index.php?option=com_content&view=article&id=133:campus-sexual-assault-victims-bill-of-rights&catid=54:faq (last visited Apr. 21, 2009).

120. 20 U.S.C. § 1092 (f)(8) (2006).

121. 20 U.S.C. § 1092 (f)(8)(C).

complaint with the DOE, and the DOE can fine or withhold federal funding from schools that “flagrantly or intentionally” violate the Clery Act or fail to remedy their violations.¹²² According to Security on Campus, Inc., the watchdog group formed by the parents of Jeanne Clery (the slain college student after whom the Clery Act is named), four post-secondary institutions have been fined to date for violations of the Clery Act. All four cases involved failure to properly report peer sexual violence.

Probably the most visible case involving the Clery Act is the 2006 rape and murder of Laura Dickinson in her dormitory room at Eastern Michigan University (“EMU”) by a fellow student. The University initially told Dickinson’s family that her death involved “no foul play,” then informed the family over two months later of the arrest of the student since convicted of raping and murdering her.¹²³ Security on Campus, Inc. filed a complaint against EMU for violations of the Clery Act.¹²⁴ The University eventually agreed to pay \$350,000 in fines for thirteen separate violations of the Clery Act, the largest fine ever paid, and settled with Dickinson’s family for \$2.5 million.¹²⁵ The case eventually led to the President, Vice President for Student Affairs, and Director of Public Safety at EMU being fired,¹²⁶ and an estimated \$3.8 million in costs from the fines, the settlement with the Dickinson family, and “severance packages, legal fees and penalties.”¹²⁷

Before EMU, the institution that was assessed the largest fine was Salem International University (“SIU”), which was originally investigated as a result of a complaint by the local Chief of Police who suspected that the University was not meeting the reporting requirements of the Clery Act.¹²⁸ The investigation found that the University had not included in its campus

122. Security on Campus, Inc., How To File A Jeanne Clery Act Complaint, http://www.securityoncampus.org/index.php?option=com_content&view=article&id=298%3Aclerycomplaint&catid=64%3Acleryact&Itemid=60 (last visited Apr. 22, 2009).

123. Joe Menard, *EMU Slaying Probe Reopens Wounds*, THE DETROIT NEWS, May 10, 2007, <http://www.detnews.com/apps/pbcs.dll/article?AID=/20070510/METRO/705100402>; Candice Williams, *EMU Killer Denies Guilt, Gets Life*, THE DETROIT NEWS, May 8, 2008, <http://www.detnews.com/apps/pbcs.dll/article?AID=/20080508/SCHOOLS/805080340/1026>.

124. Joe Menard, *EMU Faces Federal Complaint*, THE DETROIT NEWS, Mar. 7, 2007, <http://www.detnews.com/apps/pbcs.dll/article?AID=/20070307/SCHOOLS/703070426/1026>.

125. Geoff Larcom, *Eastern Michigan University to Pay \$350,000 in Federal Fines Over Laura Dickinson Case*, THE ANN ARBOR NEWS, June 06, 2008, http://blog.mlive.com/annarbornews/2008/06/eastern_michigan_university_to.html.

126. Marisa Schultz, *EMU Murder Trial Begins Today*, THE DETROIT NEWS, Oct. 15, 2007, <http://www.detnews.com/apps/pbcs.dll/article?AID=/20071015/SCHOOLS/710150361/1026/LOCAL>.

127. Marisa Schultz, *Controversy to Cost EMU \$1M*, THE DETROIT NEWS, July 19, 2007, <http://www.detnews.com/apps/pbcs.dll/article?AID=/20070719/SCHOOLS/707190389/1003/metro>.

128. Letter from John S. Loreng to Fred Zook 2 (Dec. 17, 2001), available at <http://www.securityoncampus.org/pdf/SIUprdl.pdf> [hereinafter SIU Letter].

crime report five forcible sex offenses which DOE found had been reported to the University.¹²⁹ For this and other violations discussed in more detail below, DOE fined the school \$200,000.¹³⁰ The next highest fine was \$27,500 assessed against Miami University of Ohio (“MOH”), again for a combination of underreporting various crimes, including sex offenses and other violations related to sexual violence.¹³¹ Lastly, in 2000, Mount St. Clare College (“MSCC”) in Clinton, Iowa, was fined \$15,000, in part for two rapes that were reported to police but did not appear in the College’s reports since the perpetrators were never charged with crimes.¹³²

Finally, the evolution of the application and enforcement of Title IX has progressively included more cases regarding peer sexual violence in schools. Title IX prohibits sexual harassment in schools as a form of sex discrimination.¹³³ This includes both quid pro quo harassment and hostile environment harassment. Quid pro quo harassment involves the exchange of a benefit or avoidance of a detriment for sexual favors between a superior and an inferior in a given power structure. As such, it does not tend to be the type of harassment involved in cases of peer sexual violence, although such cases could occur, if relatively rarely. More commonly, peer sexual violence is considered a case of hostile environment sexual harassment, where the harassment is “so severe, pervasive, and objectively offensive that it effectively bars the victim’s access to an educational opportunity or benefit,”¹³⁴ due to the severity of even a single instance of sexual violence.¹³⁵

Under Title IX jurisprudence, schools may be held liable for peer sexual harassment in two ways: 1) through administrative enforcement by the

129. *Id.* at 7.

130. *Id.*; see also *supra* notes 157–58 and accompanying text.

131. Letter from Fran Susman & Gerald Sikora to James Garland, President, Miami Univ. (Sept. 11, 1997), available at http://www.securityoncampus.org/index.php?option=com_content&view=article&id=180.&Itemid=75.

132. Donna Leinwand, *Campus Crime Underreported*, USA TODAY, Oct. 4, 2000, at A1.

133. UNITED STATES DEPARTMENT OF EDUCATION, OFFICE FOR CIVIL RIGHTS, REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES 2 (2001), available at <http://www.ed.gov/offices/OCR/archives/pdf/shguide.pdf> [hereinafter REVISED GUIDANCE].

134. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 633 (1999).

135. See REVISED GUIDANCE, *supra* note 133, at 6.

The more severe the conduct, the less the need to show a repetitive series of incidents; this is particularly true if the harassment is physical. For instance, if the conduct is more severe, e.g., attempts to grab a female student’s breasts or attempts to grab any student’s genital area or buttocks, it need not be as persistent to create a hostile environment. Indeed, a single or isolated incident of sexual harassment may, if sufficiently severe, create a hostile environment.

Id.

Department of Education's Office of Civil Rights ("OCR"),¹³⁶ and 2) through private suits.¹³⁷ OCR's authority to enforce Title IX derives from the fact that schools agree to comply with Title IX in order to receive federal funds, and an institution risks that federal funding if OCR investigates, usually in response to a complaint, and finds a violation of Title IX.¹³⁸ Fortunately for schools, OCR must work with a school to achieve voluntary compliance by the school with Title IX and its regulations before taking steps to terminate a school's funding.¹³⁹ While suits brought by private individuals also derive from schools' receipt of federal funds,¹⁴⁰ in this case, such suits may result in a school having to pay significant monetary damages to a plaintiff, if the plaintiff can show that a school had "actual notice" of the harassment, but acted with "deliberate indifference" to it.¹⁴¹ Because administrative enforcement gives schools an opportunity to comply with Title IX, OCR has the discretion to define compliance more broadly than the limited standard of what constitutes "actual notice" and "deliberate indifference."¹⁴²

OCR enforcement generally takes place as a result of a complaint's being filed regarding a school's response to a sexual harassment case, which causes OCR to undertake a fairly comprehensive investigation of that school's response system.¹⁴³ This investigation often includes a close review of institutional policies and procedures, as well as the steps the school took to resolve a complaint.¹⁴⁴ It also includes a review of the school's files relating to past sexual harassment cases that required a school to respond in some way.¹⁴⁵ OCR also interviews those involved in the case, particularly relevant school personnel.¹⁴⁶ OCR cases are generally resolved through a "letter of finding" ("LOF") addressed to the school and written by OCR, which is sometimes accompanied by a "commitment to resolve" ("CTR") signed by the school.¹⁴⁷ Even when OCR does not find a school in violation of Title IX or its regulations, it may find "technical violations" in its policies or procedures and require a school to make

136. EDUCATOR'S GUIDE, *supra* note 116, at ¶ 321.

137. *Id.* at ¶ 102.

138. REVISED GUIDANCE, *supra* note 133, at 3.

139. *Id.* at 15, n.85.

140. *Id.* at 2.

141. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 661 (1999) (discussing *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 US 274 (1998)).

142. REVISED GUIDANCE, *supra* note 133, at iii.

143. *Id.* at 14.

144. *Id.*

145. U.S. Department of Education, How the Office of Civil Rights Handles Complaints, <http://www.ed.gov/about/offices/list/ocr/complaints-how.html> (last visited Apr. 22, 2009).

146. *Id.*

147. EDUCATOR'S GUIDE, *supra* note 116, at ¶ 322.

changes to those policies as directed by OCR.¹⁴⁸ Once a case is resolved, OCR takes no further action besides monitoring any agreement it may have made with the school.¹⁴⁹ On a more proactive basis, schools may look to OCR's policy guidance to determine how to comply with OCR's requirements so as to make a complaint and investigation less likely.¹⁵⁰

One survey of peer harassment cases against schools from approximately 1992 until 2008¹⁵¹ shows a steady increase in individuals bringing such cases before both OCR and courts.¹⁵² This is especially true in terms of private suits. In the period after 1999, when *Davis v. Monroe County Board of Education* held that private individuals could make claims under Title IX for peer sexual harassment,¹⁵³ the number of cases decided by courts involving claims of peer sexual harassment in education doubled in comparison to the cases during the period prior to 1999. In addition, the total number of such cases decided in the three years between 1992 and 1994 equaled the number of similar cases decided in 1995 alone. Moreover, over this period, one can see a shift between peer sexual harassment cases decided by OCR as opposed to by courts. While OCR cases resulting in a letter of finding/commitment to resolve ("LOF/CTR") are the vast majority of cases prior to 1995, by 1999 the number of cases handled by OCR as opposed to by private lawsuit is roughly equal and post-1999, peer sexual harassment claims being decided by courts outnumber those decided by OCR nearly three to one. This not only represents an increase in overall liability for schools but a trend towards the arguably more expensive version of such liability, given OCR's obligation to seek the school's voluntary compliance before sanctioning a school with fines or by withholding federal funds. Finally, of the forty Title IX court cases considered for this paper,¹⁵⁴ twenty-four resulted in a denial of the

148. See, e.g., Letter from Linda Howard-Kurent to Norman Cohen (Aug. 17, 2001), in Utah Coll. of Massage Therapy, OCR Case No. 08012022-B, at 2 [hereinafter Utah College of Massage Therapy Letter].

149. REVISED GUIDANCE, *supra* note 133, at 14.

150. See generally *id.*

151. This survey is taken from the EDUCATOR'S GUIDE, *supra* note 116, at app. IV, which contains significant sexual harassment cases and OCR letters of finding and commitments to resolve dating back to the mid-1980s. While the survey does not pretend to be absolutely comprehensive, it is one of the most comprehensive collections of information about such cases, especially the OCR investigations.

152. LOFs and CTRs are generally only available to the general public after members of the public file a Freedom of Information Act ("FOIA") request and OCR redacts the LOF/CTR, generally to eliminate the complaining student and/or victim's name. Court opinions involving claims of peer sexual harassment are more accessible, but, like most reported opinions, deal with issues presented at the appellate level. Therefore, most published court opinions deal with whether a claim under Title IX can survive a motion to dismiss or a motion for summary judgment.

153. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 632 (1999).

154. These 40 cases only include peer sexual harassment cases where the harassment constituted sexual violence according to the definition discussed in note 5,

school's motion to dismiss or for summary judgment, while the school prevailed in only sixteen.

B. "Victim-Centered" Enforcement and Encouragement of Reporting

The history and current approaches to enforcement of the Clery Act and Title IX also indicate that the laws relating to peer sexual violence on campus are increasingly protective of victims' rights. The concern with those rights is linked, moreover, to how violations of those rights may be discouraging victims from reporting, as well as not only not deterring peer sexual violence but actually encouraging it.

1. The Clery Act: No Cover-ups of Campus Crime

The Clery Act is primarily concerned with providing the public, including the campus community and those outside the community such as prospective students and their parents, with accurate information about crimes occurring on campuses. The amendment of the Clery Act to include the Campus Sexual Assault Victim's Bill of Rights is a prime example of the linkages increasingly being made between protecting victims' rights, reporting and, ultimately, preventing campus crime. This amendment requires institutions to publish policies that inform both on-campus and off-campus communities of the programs that the institution provides designed to prevent sexual violence and the procedures in place to respond to sexual violence once it occurs.¹⁵⁵ It further specifies that an institution's educational programs should raise awareness of campus sexual violence.¹⁵⁶ Also, procedures adopted to respond to such violence must include: procedures and identifiable persons to whom to report;¹⁵⁷ the right of victims to notify law enforcement and to get assistance from institution officials in doing so;¹⁵⁸ encouragement to victims and instructions as to how to preserve evidence of sexual violence;¹⁵⁹ notification to students regarding options for changing living and curricular arrangements and assistance in making those changes;¹⁶⁰ and student disciplinary procedures that explicitly treat both accuser and accused equally in terms of their abilities "to have others present" at hearings and to know the outcome of any disciplinary proceeding.¹⁶¹

above, and where the court reached the issue of deliberate indifference (as opposed to not discussing deliberate indifference because of the court's ruling on another prong of the *Davis* test).

155. 20 U.S.C. § 1092 (f)(8)(A) (2006).

156. *Id.* § 1092 (f)(8)(B)(i).

157. *Id.* § 1092 (f)(8)(B)(iii).

158. *Id.* § 1092 (f)(8)(B)(v).

159. *Id.* § 1092 (f)(8)(B)(iii).

160. *Id.* § 1092 (f)(8)(B)(vii).

161. *Id.* § 1092 (f)(8)(B)(iv)(I).

Several of the cases mentioned above, which have resulted in fines to institutions for violating the Clery Act, have involved violations of the Campus Sexual Assault Victim's Bill of Rights or general concerns about the school's failure to assist victims in reporting and getting resources. In the SIU case, for instance, DOE indicated that SIU did not regularly provide counseling and other victim support services, that "several interviewees including former employees stated that students are actively discouraged from reporting crimes to law enforcement or seeking relief through the campus judicial system,"¹⁶² and that complaints are "often met with threats, reprisals, or both."¹⁶³ Furthermore, both the institution's policies and evidence of its practice indicated that it would not make accommodations for new living and academic arrangements for victims following an assault and that survivors were inadequately informed of their rights to pursue disciplinary action against the assailant.¹⁶⁴ Similarly, in the case resulting in a fine for MOH, the institution was found to have "failed to initiate and enforce appropriate procedures for notifying both parties of the outcome of any institutional disciplinary proceeding brought alleging a sex offense."¹⁶⁵ Finally, in the MSCC case, the institution was ultimately required to "agree reluctantly to add other alleged assaults to [its] crime reports under pressure from the government."¹⁶⁶

The Clery Act is also concerned with potential victims, and therefore includes an obligation that institutions give timely warnings of "crimes considered to be a threat to other students and employees."¹⁶⁷ Although EMU was found in violation of many aspects of the Clery Act, one of the issues of deepest concern was the fact that campus police suspected that the victim's death was a rape and homicide early on in their investigation and, within two weeks of discovery of the body, identified as a suspect another student who possibly had keys to the victim's dormitory.¹⁶⁸ However, not only did EMU not warn or release any information about these suspicions to the campus community until ten weeks later, when the suspect was arrested, but the University actually told the victim's parents and issued a press release indicating that there was no "foul play" involved in the death.¹⁶⁹

162. SIU Letter, *supra* note 128, at 16.

163. *Id.*

164. *Id.* at 22.

165. Letter from S. Daniel Carter, Senior Vice President, Security on Campus, Inc., to Douglas Parrott (Oct. 7, 2004), *available at* http://www.securityoncampus.org/index.php?option=com_content&view=article&id=179.&Itemid=75.

166. Leinwand, *supra* note 132.

167. 20 U.S.C. § 1092(f)(3) (2006).

168. U.S. DEPARTMENT OF EDUCATION, FEDERAL STUDENT AID, SCHOOL PARTICIPATION TEAM—DENVER, OPE ID 00225900, PROGRAM REVIEW REPORT 6 (2007), http://www.emich.edu/DOE_report/EMU_Final_Draft.pdf.

169. *Id.* at 6–7.

Many of the cases not leading to fines under the Clery Act also deal with sexual violence,¹⁷⁰ and have also resulted in important victim-centered enforcement designed to encourage reporting. For instance, an issue quickly arose under the Clery Act as to the parameters of the portion of the Campus Sexual Assault Victim's Bill of Rights that states, "both the accuser and the accused shall be informed of the outcome of any campus disciplinary proceeding brought alleging a sexual assault."¹⁷¹ First, there was disagreement as to how this provision interacted with the Family Educational Rights and Privacy Act ("FERPA"). FERPA generally does not allow educational institutions to disclose information from a student's educational record, which could include the results of student disciplinary proceedings, to anyone besides the student unless the student gives written consent.¹⁷² Even if, as the implementing regulations for the Clery Act state, "[c]ompliance with this paragraph does not constitute a violation of the Family Educational Rights and Privacy Act (20 U.S.C. 1232g),"¹⁷³ there was a question of whether the accuser, once informed of a disciplinary procedure's outcome, could then re-disclose that information. Colleges and universities concerned about these questions sought to resolve them by requiring survivors to sign nondisclosure agreements before they were informed of the outcome of disciplinary proceedings.¹⁷⁴

170. Letter from S. Daniel Carter, Senior Vice President, Security Campus, Inc., to Rosemary K. Torpey (Aug. 19, 2004), *available at* http://www.securityoncampus.org/index.php?option=com_content&view=article&id=185; Press Release, Security on Campus, Inc., Federal Review Concludes Campus Crime Reporting Deficiencies Corrected By California State University And The University Of California Systems (Apr. 4, 2008), *available at* http://www.securityoncampus.org/index.php?option=com_content&view=article&id=215:press-release-federal-review-concludes-campus-crime-reporting-deficiencies-corrected-by-cal-state-univ-a-the-univ-of-ca-systems&catid=1:soc-news&Itemid=79; Press Release, Security on Campus, Inc., U.S. Dept. of Education Asked To Review Crime Reporting At St. Mary's College (Nov. 16, 2002), *available at* http://www.securityoncampus.org/index.php?option=com_content&view=article&id=225.&Itemid=75; Press Release, Security on Campus, Inc., U.S. Department Of Education Requires Ohio State University To Improve Campus Crime Reporting (Feb. 12, 2007), *available at* http://www.securityoncampus.org/index.php?option=com_content&view=article&id=150.+&Itemid=75.

171. 20 U.S.C. § 1092 (f)(8)(B)(iv)(II).

172. Letter from LeRoy S. Rooker to S. Daniel Carter Senior Vice President, Security Campus, Inc. (Mar. 10, 2003), *available at* <http://www.ed.gov/policy/gen/guid/fpco/ferpa/library/carter.html>.

173. 34 C.F.R. § 668.46(b)(11)(vi)(B) (2008).

174. Press Release, Security on Campus, Inc., Georgetown University Violated Rights Of Rape Victims According To Federal Review (July 27, 2004), *available at* http://www.securityoncampus.org/index.php?option=com_content&view=article&id=196:press-release-georgetown-university-violated-rights-of-rape-victims-according-to-federal-review-&catid=1:soc-news&Itemid=79; Letter from Nancy Paula Gifford, Area Case Director, U.S. Department of Education, to S. Daniel Carter, Senior Vice President, Security Campus, Inc. (Nov. 3, 2008), *available at* http://www.uvavictimsofrape.com/images/Clery_Act_Ruling.pdf.

Understandably, victims and victims' advocates objected to such measures because they compelled victims' silence.¹⁷⁵ In light of how difficult many survivors find it to come forward at all, and the reasons listed above for why they do not report, such a "gag-rule" could facilitate victim-blaming responses. In light of the typical dynamics of campus sexual violence cases, where the perpetrator and victim know each other and have a common group of acquaintances but where the alleged violence took place without any witnesses, survivors often find their credibility being judged not only in formal disciplinary processes but also informally by everyone around them.¹⁷⁶ Getting a neutral panel to find that her account of events was credible, never mind that what happened to her was wrong, can therefore be very important to a survivor. An inability to re-disclose the very finding that establishes her credibility and her assailant's culpability significantly diminishes the value of going through the process at all. Even worse, it can allow the perpetrator to exploit the victim's compelled silence by lying about the outcome to others. All in all, it sets a victim up to feel re-victimized by the system.¹⁷⁷

DOE settled the question in response to a complaint filed by Kate Dieringer and Security on Campus, Inc. In its resolution of the complaint, DOE made clear that such compelled nondisclosure agreements were illegal under the Clery Act. Under the University's policy, a student who refused to execute an agreement would be barred from receiving judicial outcomes and sanctions information. As a result, a key aim of the Clery Act—providing access to key information to be used by affected persons in their recovery process—is defeated.¹⁷⁸ Most recently, DOE has confirmed this judgment in a November 2008 letter to another university in response to a complaint regarding a similar policy. In doing so, it states that by requiring survivors of alleged sexual assaults to abide by a confidentiality policy that is inconsistent with the letter and spirit of the Clery Act, the school had violated the Clery Act.¹⁷⁹

The language of both of these letters indicates that the Clery Act and its enforcement agents are concerned both with survivors' rights, as well as how greater protection of those rights will facilitate survivors' abilities to report their cases. Cumulatively, enforcement of the Clery Act to date

175. Kate Dieringer, *Campus Injustice: A Story of Predatory Rape at Georgetown University*, http://www.securityoncampus.org/index.php?option=com_content&view=article&id=186 (last visited Apr. 22, 2009); UVA Victims of Rape, *Clery Act Violation*, <http://www.uvavictimsofrape.com/Clery%20Act%20Violation.htm> (last visited Apr. 22, 2009).

176. BEYOND THE CRIMINAL JUSTICE SYSTEM, *supra* note 17, at 194.

177. Dieringer, *supra* note 175.

178. Letter from John S. Loreng to John J. DeGioia, President, Georgetown Univ. (Apr. 18, 2003), http://www.securityoncampus.org/index.php?option=com_content&view=article&id=211 (last visited January 20, 2009).

179. UVA Victims of Rape, *supra* note 175.

suggests that both the law and the interpreters and enforcers of the law are as much if not more concerned with how colleges and universities treat survivors and with how that treatment facilitates or hinders prevention of campus crime, as they are with the underlying sexual violence.

2. Court Enforcement of Title IX: What Counts as “Deliberate Indifference”

Enforcement of Title IX by courts and OCR in peer sexual violence cases demonstrates similar concerns and approaches to those increasingly evident in the enforcement of the Clery Act. As courts have begun articulating and applying the basic parameters for school liability in private suits set forth by the Supreme Court in *Davis*, the types of institutional responses that violate Title IX are becoming more evident.¹⁸⁰ As with enforcement of the Clery Act, one sees greater concern with victims’ rights and with recognition of how victim-centered approaches can assist with reporting and prevention than with the underlying sexual violence.

Lower courts have articulated the test that *Davis* established in a variety of ways. Nevertheless, most have defined a cause of action for peer harassment that requires the plaintiff to establish that the school is a recipient of federal funding;¹⁸¹ that the sexual harassment was so severe, pervasive, and objectively offensive that it could be said to deprive the plaintiff of access to the educational opportunities or benefits provided by the school;¹⁸² that the school had actual knowledge or notice of the harassment;¹⁸³ and that the school was deliberately indifferent to the harassment.¹⁸⁴

So many schools receive federal funds of some kind that the first prong is generally not in controversy. In addition, most cases of peer sexual violence such as a sexual assault, are accepted as being “severe, pervasive, and objectively offensive” enough “to deprive the plaintiff of access to the educational opportunities or benefits provided by the school,”¹⁸⁵ even if they happen only once.¹⁸⁶ Therefore, most litigation in these cases focuses

180. Note that the cases discussed in this section draw from case law involving peer sexual violence both at secondary schools and colleges and universities, since Title IX does not draw distinctions between these two kinds of institutions. See REVISED GUIDANCE, *supra* note 133, at 2.

181. *S.S. v. Alexander*, 177 P.3d 724, 726 (Wash. Ct. App. 2008).

182. *Id.*; see also *Vance v. Spencer County Pub. Sch. Dist.*, 231 F.3d 253, 258–59 (6th Cir. 2000); *Soper v. Hoben*, 195 F.3d 845, 854 (6th Cir. 1999).

183. *Soper*, 195 F.3d at 854.

184. *Id.*

185. *Doe v. Derby Bd. of Educ.*, 451 F. Supp. 2d 438, 444 (D. Conn. 2006); *Alexander*, 177 P.3d at 737.

186. *Id.* But see *Ross v. Corp. of Mercer Univ.*, 506 F. Supp. 2d 1325, 1358 (M.D. Ga. 2007) (finding that a female student who was drugged and raped by a male student had not shown the discrimination she suffered to be severe, pervasive, or objectively

on the actual knowledge and deliberate indifference prongs. Because the deliberate indifference prong deals with proper institutional responses to peer sexual harassment, it is this prong that is of particular relevance here.

Courts have defined an institutional response as deliberately indifferent “when the defendant’s response to known discrimination is clearly unreasonable in light of the known circumstances, and when remedial action only follows after a lengthy and unjustified delay.” The deliberate indifference “must, at a minimum, cause students to undergo harassment or make them liable or vulnerable to it.”¹⁸⁷ In the case of peer sexual violence such as a sexual assault, with a few exceptions discussed at greater length below, schools are rarely held responsible for the sexual violence itself.¹⁸⁸ Instead, the focus is on the institutional response post-violence. As such, doing nothing at all is clearly unacceptable.¹⁸⁹ Schools must at least investigate claims of peer harassment,¹⁹⁰ and that investigation cannot involve merely accepting an accused student’s denial at face value and not engaging in any credibility determinations.¹⁹¹ If their investigations indicate that harassment did occur, some kind of disciplinary action is likely required.¹⁹² While it is acknowledged that victims have no right to demand any particular disciplinary or remedial action on the part of a

offensive).

187. *Doe v. Hamden Bd. of Educ.*, No. 3:06-cv-1680, 2008 U.S. Dist. LEXIS 40269, at *20–21 (D. Conn. May 19, 2008) (quoting *Hayut v. State Univ. of N.Y.*, 352 F.3d 733, 751 (2d Cir. 2003)), and *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 645 (1999)).

188. *Derby Bd. of Educ.*, 451 F. Supp. 2d at 445–46; *Ray v. Antioch Unified Sch. Dist.*, 107 F. Supp. 2d 1165, 1170 (N.D. Cal. 2000); *Alexander*, 177 P.3d at 738.

189. *S.G. v. Rockford Bd. of Educ.*, No. 08 C 50038, 2008 U.S. Dist. LEXIS 95522, at *15–16 (N.D. Ill. Nov. 24, 2008); *James v. Indep. Sch. Dist. No. 1-007*, No. CIV-07-434-M, 2008 U.S. Dist. LEXIS 82199, at *6 (W.D. Okla. Oct. 16, 2008); *Bruning v. Carroll Cmty. Sch. Dist.*, 486 F. Supp. 2d 892, 915–16 (N.D. Iowa 2007); *Derby Bd. of Educ.*, 451 F. Supp. 2d at 447–48; *Bashus v. Plattsmouth Cmty. Sch. Dist.*, No. 8:05CV300, 2006 U.S. Dist. LEXIS 56565, at *10–11 (D. Neb. Aug. 3, 2006); *Doe v. E. Haven Bd. of Educ.*, 430 F. Supp. 2d 54, 63–65 (D. Conn. 2006); *Martin v. Swartz Creek Cmty. Sch.*, 419 F. Supp. 2d 967, 974 (E.D. Mich. 2006); *Jones v. Ind. Area Sch. Dist.*, 397 F. Supp. 2d 628, 645–46 (W.D. Pa. 2005); *Theno v. Tonganoxie Unified Sch. Dist. No. 464*, 394 F. Supp. 2d 1299, 1310–11 (D. Kan. 2005); *Ray*, 107 F. Supp. 2d at 1170. *But see* *Rost v. Steamboat Springs RE-2 Sch. Dist.*, 511 F.3d 1114, 1129 (10th Cir. 2008) (McConnell, concurring in part and dissenting in part).

190. *See* *Vance v. Spencer County Pub. Sch. Dist.*, 231 F.3d 253, 259 (6th Cir. 2000); *Murrell v. Sch. Dist. No. 1*, 186 F.3d 1238 (10th Cir. 1999); *Bruning*, 486 F. Supp. 2d at 915–16; *Ross*, 506 F. Supp. 2d at 1357; *Doe v. Oyster River Coop. Sch. Dist.*, 992 F. Supp. 467, 481 (D.N.H. 1997); *Alexander*, 177 P.3d at 738.

191. *Alexander*, 177 P.3d at 740.

192. *Vance*, 231 F.3d at 262; *Hamden Bd. of Educ.*, 2008 U.S. Dist. LEXIS 40269, at *5; *Seiwert v. Spencer-Owen Cmty. Sch. Corp.*, 497 F. Supp. 2d 942, 954 (S.D. Ind. 2007); *Oyster River Coop. Sch. Dist.*, 992 F. Supp. at 481; *Alexander*, 177 P.3d at 739.

school,¹⁹³ if the particular disciplinary action taken fails to protect the victim or stop the harassment, courts may fault the school for taking inadequate disciplinary action.¹⁹⁴ Disciplining the harasser and the victim equally has been frowned upon by courts,¹⁹⁵ and when schools are aware that a response method is not achieving the goal of stopping the harassment, they may not continue using that method alone and to no avail.¹⁹⁶ Finally, unjustified delay in responding can result in a school being viewed as deliberately indifferent.¹⁹⁷

These cases and others demonstrate that courts are vigilant in responding to indications that schools are discouraging victims from reporting such violence, minimizing the violation, and/or displaying hostility toward the victim or bias in favor of the assailant. In *Doe v. Oyster River Cooperative School District*,¹⁹⁸ two girls were harassed repeatedly by a boy who exposed himself to them and touched them on their legs and breasts on the school bus and in school. When they reported the behavior, the school's guidance counselor told them not to tell their parents because it could subject the school to lawsuits.¹⁹⁹ Similarly, in *Murrell v. School District No. 1*,²⁰⁰ the school had actual knowledge that a male student repeatedly raped a student with spastic cerebral palsy, did not inform the victim's mother, and told the victim not to inform her mother.²⁰¹ In *Vance v. Spencer County Public School District*,²⁰² and *Franklin v. Gwinnett County*

193. *Fitzgerald v. Barnstable Sch. Comm.*, 504 F.3d 165, 175 (1st Cir. 2007); *Hamden Bd. of Educ.*, 2008 U.S. Dist. LEXIS, at *22; *Kelly v. Yale Univ.*, NO. 3:01-CV-1591 (JCH), 2003 U.S. Dist. LEXIS 4543, at *4 (D. Conn. Mar. 26, 2003); *Clark v. Bibb County Bd. of Educ.*, 174 F. Supp. 2d 1369, 1374 (M.D.Ga. 2001).

194. *M. v. Stamford Bd. of Educ.*, No. 3:05-CV-0177 (WWE), 2008 U.S. Dist. LEXIS 51933, at *28 (D. Conn. July 7, 2008); *Seiwert*, 497 F. Supp. 2d at 954; *Derby Bd. of Educ.*, 451 F. Supp. 2d at 447.

195. *Seiwert*, 497 F. Supp. 2d at 954; *Doe v. Erskine Coll.*, No. 8:04-23001-RBH, 2006 U.S. Dist. LEXIS 35780, at *35 (D.S.C. May 25, 2006); *Theno v. Tonganoxie Unified Sch. Dist. No. 464*, 394 F. Supp. 2d 1299, 1310-11 (D. Kan. 2005).

196. *Patterson v. Hudson Area Sch.*, No. 08-1008, 2009 U.S. App. LEXIS 25, at *32 (6th Cir. Jan. 6, 2009); *Vance*, 231 F.3d at 261; *Martin v. Swartz Creek Cmty. Sch.*, 419 F. Supp. 2d 967, 974 (E.D. Mich. 2006); *Jones v. Ind. Area Sch. Dist.*, 397 F. Supp. 2d 628, 645 (W.D. Pa. 2005); *Alexander*, 177 P.3d at 739. *But see* *Porto v. Town of Tewksbury*, 488 F.3d 67, 74 (1st Cir. 2007).

197. *Williams v. Bd. of Regents*, 477 F.3d 1282, 1289 (11th Cir. 2007); *Doe v. E. Haven Bd. of Educ.*, 200 F. App'x 46, 49 (2d Cir. 2006); *J.K. v. Ariz. Bd. of Regents*, No. CV 06-916-PHX-MHM, 2008 U.S. Dist. LEXIS 83855, at *54 (D. Ariz. Sept. 29, 2008).

198. 992 F. Supp. 467, 481 (D.N.H. 1997) (granting in part and denying in part the defendants' motion for summary judgment).

199. *Id.* at 479.

200. 186 F.3d 1238 (10th Cir. 1999).

201. *Id.* at 1248.

202. 231 F.3d 253, 259 (6th Cir. 2000) (allowing a Title IX claim against school district and a § 1983 action against principal and teacher and denying a § 1983 action against the school district).

Public School,²⁰³ the court notes the failure of the school to report peer sexual violence to law enforcement or to inform the survivor of her right to do so.²⁰⁴

With regard to minimizing and hostile behaviors, a court noted that a dean publicly characterized the sexual assault on the plaintiff in *Kelly v. Yale University*,²⁰⁵ as “not legal rape,”²⁰⁶ and in *Seiwert v. Spencer-Owen Community School Corporation*,²⁰⁷ the school told the harassment victim, in the face of death threats from other students, that “some threats aren’t as serious as others.”²⁰⁸ In *Doe v. Derby Board of Education*,²⁰⁹ the court expressed suspicion that the school’s inappropriate response to Doe’s rape was due to her assailant’s father being on the school board.²¹⁰ Likewise, in *Doe v. Erskine College*,²¹¹ school officials who were previously sympathetic became “rude” to the victim when she revealed her assailant’s name. They told her that her assailant was “very bright, very intelligent, and ‘going places,’” and resisted enforcing a judicial stay-away order because “both students . . . have a right to an education and . . . the male student had not been found guilty of any crime.”²¹² In *Patterson v. Hudson Area School*,²¹³ *Theno v. Tonganoxie Unified School District No. 464*,²¹⁴ and *Doe v. Brimfield Grade School*,²¹⁵ teachers and school officials made statements indicating that they agreed with the harassers or laughed in the face of the harassment.²¹⁶ Finally, in *S.S. v. Alexander*,²¹⁷ the court states:

S.S. has provided ample evidence to raise a jury question on the issue of the UW’s deliberate indifference. [M]inimizing the

203. 503 U.S. 60 (1992) (allowing a damages remedy under Title IX).

204. *Franklin*, 503 U.S. at 64; *Vance*, 231 F.3d at 262 (affirming a jury verdict for student in Title IX action).

205. NO. 3:01-CV-1591 (JCH), 2003 U.S. Dist. LEXIS 4543 (D. Conn. Mar. 26, 2003) (allowing a Title IX action to proceed).

206. *Id.* at *3.

207. 497 F. Supp. 2d 942 (S.D. Ind. 2007) (denying defendants’ motion for summary judgment in Title IX action).

208. *Id.* at 954.

209. 451 F. Supp. 2d 438 (D. Conn. 2006) (denying defendant’s motion for summary judgment in Title IX case).

210. *Id.* at 447.

211. No. 8:04-23001-RBH, 2006 U.S. Dist. LEXIS 35780 (D.S.C. May 25, 2006) (denying defendant’s motion for summary judgment in Title IX action).

212. *Id.* at *33–34.

213. No. 08-1008, 2009 U.S. App. LEXIS 25 (6th Cir. Jan. 6, 2009) (allowing a Title IX claim to proceed).

214. 394 F. Supp. 2d 1299 (D. Kan. 2005) (denying defendant’s motion for judgment as a matter of law in Title IX action).

215. 552 F. Supp. 2d 816 (C.D. Ill. 2008) (allowing a Title IX action to proceed).

216. *Patterson*, 2009 U.S. App. LEXIS 25, at *4; *Brimfield Grade Sch.*, 552 F. Supp. 2d at 823; *Theno*, 394 F. Supp. 2d at 1310–11.

217. 177 P.3d 724 (Wash. Ct. App. 2008) (allowing a Title IX action to proceed).

effects of her rape, . . . keeping the matter out of the public eye to avoid negative publicity, . . . discouraging S.S. from filing a police report, top administrators not notifying the UW's own police force of the report of a violent sex crime, . . . wearing S.S. down until she believed that further complaints would be futile, . . . [and] questioning her truthfulness when she expressed dissatisfaction with the results of the mediation are all claims supported by evidence in this case.²¹⁸

In addition to acknowledging the linkages between poor treatment of victims and reporting of peer sexual violence, these cases also echo the Clery Act's concern with connections between victims' rights and violence prevention. In the Campus Sexual Assault Victim's Bill of Rights, the Clery Act provides that colleges and universities must notify students of "options for, and available assistance in, changing academic and living situations after an alleged sexual assault incident, if so requested by the victim and if such changes are reasonably available."²¹⁹ While subsequent enforcement has not focused very specifically on this provision in the Clery context, Title IX case law indicates that schools will be liable for not taking steps to protect the victim from having to constantly confront her assailant while continuing with her education.²²⁰ Most importantly, these precedents demonstrate that colleges and universities particularly risk liability when their failure to protect the victim results in the victim being further harassed or retaliated against by the assailant or third parties.²²¹ As such, this line of cases focuses on another way in which a victim-centered approach is linked

218. *Id.* at 740.

219. 20 U.S.C. § 1092 (f)(8)(B)(vii) (2006).

220. *S.G. v. Rockford Bd. of Educ.*, No. 08 C 50038, 2008 U.S. Dist. LEXIS 95522, at *10 (N.D. Ill. Nov. 24, 2008); *Doe v. Hamden Bd. of Educ.*, No. 3:06-cv-1680, 2008 U.S. Dist. LEXIS 40269, at *17 (D. Conn. May 19, 2008); *Doe v. Derby Bd. of Educ.*, 451 F. Supp. 2d 438, 444 (D. Conn. 2006); *Doe v. Erskine Coll.*, No. 8:04-23001-RBH, 2006 U.S. Dist. LEXIS 35780, at *33-34 (D.S.C. May 25, 2006); *Kelly v. Yale Univ.*, NO. 3:01-CV-1591 (JCH), 2003 U.S. Dist. LEXIS 4543, at *11-12 (D. Conn. Mar. 26, 2003); *Alexander*, 177 P.3d at 742-43.

221. *Patterson*, 2009 U.S. App. LEXIS 25, at *33; *Rockford Bd. of Educ.*, 2008 U.S. Dist. LEXIS 95522, at *10, *14-15; *M. v. Stamford Bd. of Educ.*, No. 3:05-CV-0177 (WWE), 2008 U.S. Dist. LEXIS 51933, at *28 (D. Conn. July 7, 2008); *Hamden*, 2008 U.S. Dist. LEXIS 40269, at *17; *Brimfield Grade Sch.*, 552 F. Supp. 2d at 823; *James v. Indep. Sch. Dist. No. 1-007*, No. CIV-07-434-M, 2008 U.S. Dist. LEXIS 82199, at *6 (W.D. Okla. Oct. 16, 2008); *Derby Bd. of Educ.*, 451 F. Supp. 2d at 444-45; *Erskine*, 2006 U.S. Dist. LEXIS 35780, at *39; *Bashus v. Plattsmouth Cmty. Sch. Dist.*, No. 8:05CV300, 2006 U.S. Dist. LEXIS 56565, at *10-11 (D. Neb. Aug. 3, 2006); *Doe v. E. Haven Bd. of Educ.*, 200 F. App'x 46, 59-60 (2d Cir. 2006); *Martin v. Swartz Creek Cmty. Sch.*, 419 F. Supp. 2d 967, 974 (E.D. Mich. 2006); *Jones v. Ind. Area Sch. Dist.*, 397 F. Supp. 2d 628, 645-46 (W.D. Pa. 2005); *Theno*, 394 F. Supp. 2d at 1310-11. *But see* *Snethen v. Bd. of Pub. Educ.*, No. 406CV259, 2008 U.S. Dist. LEXIS 22788, at *17-21 (S.D. Ga. 2008); *C.R.K. v. U.S.D. 260 Bd. of Educ.*, 176 F. Supp. 2d 1145, 1163-65 (D. Kan. 2001).

in crucial ways to the prevention of violence such as peer sexual violence.

This court enforcement of Title IX has demonstrated a relatively clear understanding of the dynamics that often follow peer sexual violence at a school or on a campus and the implications of those dynamics for the victim's health, well-being, and ability to continue with and enjoy the benefits of her education, which is the central goal of Title IX. In *Derby*, for instance, a middle school student was raped by a high school student, where the two schools were housed in the same building.²²² The school suspended the perpetrator for 10 days and then allowed him to return to school.²²³ In finding that these actions could be judged by a jury to be deliberately indifferent to the harassment, the court stated that

Sally Doe's affidavit states that she saw Porto, Jr. many times during the school year and that the experience of seeing him "was very upsetting" and made the "school year very hard." Thus, even absent actual post-assault harassment by Porto, Jr., the fact that he and plaintiff attended school together could be found to constitute pervasive, severe, and objectively offensive harassment.²²⁴

Similarly, in *Doe v. Hamden Board of Education*,²²⁵ the victim was raped during the summer off the grounds of her high school by another student. The court stated that

A reasonable jury could conclude that Garcia's presence at school throughout the school year was harassing to Mary Doe because it exposed her to multiple encounters with him. Further encounters, of any sort, between a rape victim and her attacker could create an environment sufficiently hostile to deprive the victim of access to educational opportunities provided to her at school.²²⁶

Finally, in *S.G. v. Rockford Board of Education*,²²⁷ the plaintiff was a first-grader who was taken to a closet by another first-grader who "proceeded to sexually batter, harass and abuse her, physically and emotionally, in an aberrant sexual manner."²²⁸ When the assailant was not disciplined in any way, he continued to stalk her at the school, directing at her sexual innuendos and comments that she was "hot".²²⁹ Defendants argued that these actions were not severe enough to be actionable, but the court disagreed, stating that, while these actions "may not, standing alone,

222. *Derby Bd. of Educ.*, 451 F. Supp. 2d at 440–41.

223. *Id.* at 441.

224. *Id.* at 444 (citations omitted).

225. 2008 U.S. Dist. LEXIS 40269.

226. *Id.* at *16–17.

227. 2008 U.S. Dist. LEXIS 95522.

228. *Id.* at *2–*3 (citations omitted).

229. *Id.* at *3.

amount to actionable harassment, in light of the sexual battery alleged, those actions become much more offensive and severe. This is especially true of plaintiffs' allegation that the problem student continued to 'stalk [L.G.] on the playground and other locations'²³⁰ In all three cases, the courts noted that the victims ended up having to change schools themselves in order to avoid their assailants.²³¹

Several courts have added to this understanding by indicating that, even when a school does separate the students, *how* the school does so can reflect on whether its institutional response could qualify as deliberately indifferent. For instance, some courts have indicated that requiring a victim to change her housing, classes, or campus employment to avoid her assailant can be indicia of deliberate indifference. In *S.S.*, the plaintiff, who had a highly sought-after job as a student assistant equipment manager for the football team, was assaulted by one of the players.²³² In allowing the case to proceed to a jury on the deliberate indifference issue, the court noted that a jury could consider as evidence the university's repeated suggestion to the plaintiff that she leave her job, while her rapist would remain on the team.²³³ The *James v. Independent School District No. 1-007*²³⁴ and *Seiwert* courts criticized the schools for responding to plaintiffs' being repeatedly harassed and assaulted by taking only one action: moving the victim to a different classroom.²³⁵ While there have been cases where a

230. *Id.* at *10.

231. *See id.* at *12; *Hamden*, 2008 U.S. Dist. LEXIS 40269, at *17; *Doe v. Derby Bd. of Educ.*, 451 F. Supp. 2d 438, 445 (D. Conn. 2006). Indeed many of the plaintiffs in these cases end up leaving their schools. Besides the *Rockford Board of Education*, *Hamden*, and *Derby* plaintiffs, the *Patterson*, *Vance*, *James*, *Brimfield Grade School*, *Seiwert*, *Bruning*, and *Theno* plaintiffs all left their schools in whole or in part. *See Patterson v. Hudson Area Sch.*, No. 08-1008, 2009 U.S. App. LEXIS 25, at *12 (6th Cir. Jan. 6, 2009); *Vance v. Spencer County Pub. Sch. Dist.*, 231 F. 3d 253, 256-57 (6th Cir. 2000); *Doe v. Brimfield Grade Sch.*, 552 F. Supp. 2d 816, 820 (C.D. Ill. 2008); *Seiwert v. Spencer-Owen Cmty. Sch. Corp.*, 497 F. Supp. 2d 942, 953 (S.D. Ind. 2007); *Bruning v. Carroll Cmty. Sch. Dist.*, 486 F. Supp. 2d 892, 910-11 (N.D. Iowa 2007); *James v. Indep. Sch. Dist. No. 1-007*, No. CIV-07-434-M, 2008 U.S. Dist. LEXIS 82199, at *6 (W.D. Okla. Oct. 16, 2008); *Theno v. Tonganoxie Unified Sch. Dist. No. 464*, 394 F. Supp. 2d 1299, 1309 (D. Kan. 2005).

232. *S.S. v. Alexander*, 177 P.3d 724, 728 (Wash. Ct. App. 2008).

233. *Id.* at 740.

234. 2008 U.S. Dist. LEXIS 82199.

235. *See id.* at *6; *Seiwert*, 497 F. Supp. 2d at 954; *see also Doe v. Oyster River Coop. Sch. Dist.*, 992 F. Supp. 467, 472 (D.N.H. 1997); *Doe v. Erskine Coll.*, No. 8:04-23001-RBH, 2006 U.S. Dist. LEXIS 35780, at *30-31 (D.S.C. May 25, 2006).

While this Court acknowledges the Supreme Court's admonition in *Davis* that the deliberate indifference question is not a mere 'reasonableness standard' that transforms every school disciplinary decision into a jury question, in a case such as this, the issue seems best suited for a jury to consider the range of all known circumstances, from the District's apparently efficient response on February 26, 2004, to its earlier decision not to remove Gordon from the classroom or more closely monitor his interaction with students.

school's decision to change the victim's school or living arrangements instead of the perpetrator's has been upheld,²³⁶ courts do not appear to question changing an accused student's arrangements, even while an investigation is still ongoing.²³⁷

Finally, the court concern regarding separating the victim and accused student, even before an investigation has been completed, reflects an understanding of the harassment and retaliation that victims can face after reporting an assault, whether the harassment is from the accused perpetrator or his friends. In *Derby*, the student was harassed by her assailant's friends, who would drive by her and shout "slut" from their vehicle.²³⁸ In *Erskine*, the student was repeatedly harassed by both the accused student and his friends to such an extent that she stated that she was referred to on campus as the "rape girl,"²³⁹ and the ongoing trauma eventually led her to attempt suicide, after which she was diagnosed with Post Traumatic Stress Disorder and had to deal with a state mental hospital representative who was considering whether to institutionalize her.²⁴⁰ Similarly, in *Doe v. East Haven Board of Education*,²⁴¹ after plaintiff reported to police that two older students had assaulted her, she was subjected to five weeks of constant harassment by classmates, including being called "a slut, a liar, a bitch, a whore" and having a tennis ball thrown at her. She, too, was eventually taken to the hospital for threatening suicide.²⁴²

Furthermore, courts have expressed concern that a school's failure to respond properly to initial or repeated instances of harassment can actually

Zamora v. N. Salem Cent. Sch. Dist., 414 F. Supp. 2d 418, 425–26 (S.D.N.Y. 2006).

236. *Erskine Coll.*, 2006 U.S. Dist. LEXIS 35780, at *30–31 (finding Title IX not violated where victim of sexual touching by another student was moved to another class as soon as school officials learned of incident); see also *KF's Father v. Marriot*, No. CA 00-0215-C, 2001 U.S. Dist. LEXIS 2534, at *56 (S.D. Ala. Feb. 23, 2001).

237. *Gabrielle M. v. Park Forest-Chicago Heights*, 315 F.3d 817 (7th Cir. 2003) (involving school officials who moved harasser to another class after second incident); *Staebling v. Metro. Gov't of Nashville & Davidson County*, No. 3:07-0797, 2008 U.S. Dist. LEXIS 91519, at *32–3 (M.D.Tenn. 2008) ("Plaintiffs in this case cannot survive summary judgment because there is absolutely no evidence that Jenna was subjected to sexual harassment on the bus after this incident. Quite the contrary, the undisputed evidence is that the perpetrator was taken off the bus and ultimately sent to another school."); *Clark v. Bibb County Bd. of Educ.*, 174 F. Supp. 2d 1369, 1372 (M.D. Ga. 2001) (addressing case where both students were moved to separate classes after one touched the other's buttocks twice); *Wilson v. Beaumont Independent School Dist.*, 144 F. Supp.2d 690 (E.D. Tx. 2001) (refusing to fault teacher for physically segregating the perpetrator from the rest of the class and principal for transferring the alleged perpetrator to another school).

238. *Doe v. Derby Bd. of Educ.*, 451 F. Supp. 2d 438, 444 (D. Conn. 2006).

239. *Erskine Coll.*, 2006 U.S. Dist. LEXIS 35780, at *22.

240. *Id.*

241. 430 F. Supp. 2d 54 (D. Conn. 2006)

242. *Id.* at 59–60.

encourage the harassers. In *Derby*, for instance, in questioning why the school did not consider expelling the assailant, the court notes that the assailant was the son of a member of the board and was later expelled after he sexually assaulted a second student.²⁴³ In *Ray v. Antioch Unified School District*,²⁴⁴ the court accepted plaintiff's claim that as a consequence of the school's deliberate indifference to other students harassing plaintiff for his perceived sexual orientation and his transgendered mother, "Defendant Carr became emboldened, and assaulted and severely injured Plaintiff while on his way home from school."²⁴⁵ In *Seiwert*, after the school's failure to respond to a similar state of escalating harassment, the court went as far as to state that "the students at OVMS who were bullying S.S. could have actually construed the School Corporation's inaction as tacit approval of their behavior, prompting them to engage in even greater acts of bullying."²⁴⁶

The same concern with how school responses to peer sexual violence may actually encourage further violence is echoed by another line of Title IX cases where the facts indicate that a school's actions actually facilitate or make women vulnerable to sexual violence. For instance, in *Simpson v. University of Colorado Boulder*,²⁴⁷ the plaintiffs alleged that the University of Colorado ("CU") "sanctioned, supported, even funded"²⁴⁸ a football recruiting program where the risk of peer sexual violence occurring was so obvious that the University's failure to address it constituted deliberate indifference.²⁴⁹ In overturning the district court's denial of the university's motion for summary judgment, the Tenth Circuit found that the football coach "maintained an unsupervised player-host program to show high-school recruits 'a good time'" despite knowing generally "of the serious risk of sexual harassment and assault during college-football recruiting efforts; . . . that such assaults had indeed occurred during CU recruiting visits; . . . [and] that there had been no change in atmosphere since" the last assault.²⁵⁰

Along the same lines, in *Williams v. Board of Regents of the University System of Georgia*,²⁵¹ the plaintiff was gang-raped by three fellow students, the leader of whom was recruited by the University of Georgia ("UGA") basketball team and admitted to the University even though the coach,

243. *Derby Bd. of Educ.*, 451 F. Supp. 2d at 447–48.

244. 107 F. Supp. 2d 1165 (N.D. Cal. 2000).

245. *Id.* at 1168.

246. *Seiwert v. Spencer-Owen Cmty. Sch. Corp.*, 497 F. Supp. 2d 942, 954 (S.D. Ind. 2007).

247. 500 F.3d 1170 (10th Cir. 2007).

248. *Id.* at 1177.

249. *Id.* at 1185.

250. *Id.* at 1184.

251. 477 F.3d 1289 (11th Cir. 2007).

athletics director, and President had knowledge that he had criminal and disciplinary problems, including sexually violent behavior, resulting in his dismissal from another school and plea of no contest to misdemeanor criminal charges.²⁵² The Eleventh Circuit denied the University's motion to dismiss because this admission, combined with UGA's taking 8 months to respond to Williams's report and the University's failure "to inform student-athletes about the applicable sexual harassment policy" could show that it had been deliberately indifferent to the harassment.²⁵³

CU settled Lisa Simpson's case for \$2.5 million, paying another \$350,000 to her co-plaintiff, hired a special Title IX analyst, and fired some 13 university officials, including the President and football coach.²⁵⁴ While the exact amount of UGA's settlement with Williams has not been disclosed, it is in the six-figure range.²⁵⁵ Therefore, a number of Title IX scholars and lawyers also see hopeful signs in cases like *Simpson* and *Williams*.²⁵⁶ They retain this optimism despite criticizing the Supreme Court's actual notice and deliberate indifference standards as too strict and too vague²⁵⁷ and alleging that too many lower courts have "narrowly construed this standard and raised the bar disturbingly high for students, offering woefully little protection."²⁵⁸ These hopes that private suits for damages for Title IX violations will "equal[] out the litigation playing field, so that schools start to be equally afraid of the rape survivor suing them"²⁵⁹ appear to be bearing fruit.

3. OCR Enforcement of Title IX: Comprehensive, "Injunctive" Relief

In addition to these indications that Title IX case law is providing survivors of peer sexual violence in schools with increasingly more powerful remedies against schools that fail to respond properly, survivors

252. *Id.* at 1297.

253. *Id.* A plaintiff has prevailed in a recent, similar case against Arizona State University ("ASU"), where the perpetrator sexually assaulted a fellow student in the dormitory they shared. Although he had been expelled from a high school to college transitional summer program at ASU for various instances of misconduct, including sexual harassment, the perpetrator was allowed, after the head coach intervened, to enroll as a freshman and play on the football team. *See J.K. v. Arizona Bd. of Regents*, No. CV 06-916-PHX-MHM, 2008 U.S. Dist. LEXIS 83855 (D. Ariz. Sept. 29, 2008).

254. Diane L. Rosenfeld, *Changing Social Norms? Title IX and Legal Activism: Concluding Remarks*, 31 HARV. J.L. & GENDER 407, 418 (2008).

255. *Id.* at 420. The ASU plaintiff has settled for \$850. *See Lester Munson, Landmark Settlement in ASU Rape Case*, ESPN, Jan. 30, 2009, <http://sports.espn.go.com/espn/otl/news/story?id=3871666>.

256. *Id.* at 421.

257. *Id.* at 412.

258. Linda Wharton, *Comments from the Spring 2007 Harvard Journal of Law & Gender Conference*, 31 HARV. J.L. & GENDER 378, 387 (2008).

259. *Id.* at 384.

may also look to the administrative remedies of the Office of Civil Rights in the Department of Education. Because these two Title IX enforcement mechanisms operate differently, with different consequences for schools and different remedies for complainants/plaintiffs, they have developed somewhat different compliance standards. OCR provides basically injunctive relief to complainants in that it will direct schools to change policies, procedures, and other responses that do not comply with Title IX, and it gives schools an opportunity to comply with OCR's directives before taking any more punitive measures. Therefore, its substantive standards for what a school must do to comply are higher and more exacting.

As a result, a number of the complaints that Title IX commentators have made regarding the Supreme Court's "actual notice" and "deliberate indifference" standard can be addressed via OCR's enforcement. While this enforcement may be a less powerful "stick" against schools that respond inadequately to harassment and less likely to compensate the student survivors who complain, the relief and remedies it provides are still quite significant in terms of their abilities to change school behavior. OCR has published two editions of its *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, first in 1997²⁶⁰ and a revised version in 2001 ("*Revised Guidance*").²⁶¹ These documents, along with its LOFs/CTRs, demonstrate how OCR can reach a broader range of school action and inaction than the Title IX case law does.

For instance, some Title IX lawyers have suggested seeking a legislative override of the Supreme Court's actual knowledge requirement, in favor of a constructive knowledge approach.²⁶² This is in fact OCR's standard when it conducts an investigation of an institution's compliance²⁶³ because "OCR always provides the school with actual notice and the opportunity to take appropriate corrective action before issuing a finding of violation."²⁶⁴ In another example, some Title IX scholars and attorneys have expressed concern over the lack of definition in *Davis* and its predecessor case, *Gebser v. Lago Vista Independent School District*, as to the school officials to whom a survivor must give notice in order to meet the "actual notice" standard.²⁶⁵ On this issue, OCR's *Revised Guidance* makes clear, "A school has notice if a responsible employee 'knew, or in the exercise of reasonable care should have known,' about the harassment."²⁶⁶ The

260. *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 62 Fed. Reg. 12,034 (1997).

261. REVISED GUIDANCE, *supra* note 133.

262. Rosenfeld, *supra* note 254, at 413.

263. REVISED GUIDANCE, *supra* note 133, at 13.

264. *Id.* at iv.

265. Wharton, *supra* note 258, at 388–89.

266. REVISED GUIDANCE, *supra* note 133, at 13.

definition of “responsible employee” is quite broad, including any employee who “has the authority to take action to redress the harassment, who has the duty to report to appropriate school officials sexual harassment or any other misconduct by students or employees, or an individual who a student could reasonably believe has this authority or responsibility.”²⁶⁷ Finally, OCR makes clear the wide range of methods by which schools can receive notice, including through formal and informal grievances and complaints, through a parent contacting a school official, through a responsible employee witnessing the harassment, or even through indirect methods such as the media or flyers posted around the school.²⁶⁸

The *Revised Guidance* makes clear the comprehensiveness of OCR’s approach, as do various LOFs/CTRs issued by the office. For instance, the *Revised Guidance* gives a full page of instructions on how schools may conduct proper investigations into sexual harassment complaints, including what types of evidence should be collected and that determinations should be made based on a totality of the circumstances, with particular attention to credibility determinations.²⁶⁹ What constitutes “prompt and equitable grievance procedures” from OCR’s perspective gets over two pages.²⁷⁰ The *Revised Guidance* also gives advice on administrative methods to achieve compliance, such as training for responsible employees so they understand how to respond appropriately.²⁷¹ Moreover, it deals with specific situations that often occur in harassment cases and are of particular concern or controversy at many schools, including how to investigate and respond to a complaint if the harassed student does not want her/his name revealed²⁷² and how to handle the due process rights of the accused.²⁷³

The LOFs/CTRs also demonstrate both OCR’s comprehensive approach and give further indications to schools as to appropriate responses in certain difficult circumstances. In several investigations where OCR did not actually find enough evidence to support a violation of Title IX based on the facts alleged in the complaint, it nevertheless found violations due to its comprehensive review of the school’s policies and procedures.²⁷⁴ The most “technical” of these types of violations include failing to appoint or communicate the roles of the Title IX coordinator(s) or other personnel involved in various parts of the harassment response system;²⁷⁵ unclearly

267. *Id.*

268. *Id.*

269. *Id.* at 9.

270. *Id.* at 19–21.

271. *Id.* at 13.

272. *Id.* at 17.

273. *Id.* at 22.

274. *See, e.g.*, Utah College of Massage Therapy Letter, *supra* note 148.

275. *Id.*; Letter from Thomas J. Hibino to Roger Gilmore (Mar. 29, 1996), in Maine College of Art, OCR Case No. 01-95-2099 (on file with author) [hereinafter Maine College of Art Letter]; Letter from John E. Palomino to John D. Maguire (July 24,

articulating policies and procedures such as timeframes, investigatory steps, the informal complaint process, recordkeeping requirements and the range of remedies;²⁷⁶ and not following the school's own procedures.²⁷⁷

More substantively, OCR has found the following institutional responses to be inconsistent with or in violation of Title IX's regulations in cases involving peer sexual violence in schools:

- Total lack of policies and procedures that victims can use to complain about harassment or providing too many complicated, conflicting and burdensome complaint procedures²⁷⁸
- Failing to treat rape and sexual assault as a Title IX matter²⁷⁹
- Failing to take any steps to respond to harassment or prevent harassment from recurring²⁸⁰
- Failing to inform victims of their options for redress²⁸¹

1992), in Claremont Graduate Schools, OCR Case No. 09-92-6002 (on file with author); Letter from John E. Palomino to Karl Pister (Jun. 15, 1994), in University of California, Santa Cruz, OCR Case No. 09-93-2141 (on file with author) [hereinafter University of California, Santa Cruz Letter]; Letter from John E. Palomino to Robin Wilson (Oct. 23, 1991), in California State University, Chico, OCR Case No. 09-91-2098 (on file with author) [hereinafter California State University Letter].

276. Letter from Thomas J. Hibino to Daniel Kehoe (May 19, 1994), in Millis Public Schools, OCR Case No. 01-93-1123 (on file with author) [hereinafter Millis Public Schools Letter]; Maine College of Art Letter, *supra* note 275; Letter from Howard Kallem to Stephen W. Vescovo (Mar. 26, 2004), in Christian Brothers University, OCR Case No. 04-03-2043 (on file with author) [hereinafter Christian Brothers University Letter]; Letter from Charles R. Love to Glenn Roquemore (Jan. 28, 2003), in Irvine Valley College and the South Orange County Community College District, OCR Case No. 09-02-2105 (on file with author) [hereinafter Irvine Valley College Letter]; University of California, Santa Cruz Letter, *supra* note 275; California State University Letter, *supra* note 275; Letter from Robert E. Scott to William D. Barr (Jun. 26, 2001), in Monterey County Office of Education, OCR Case No. 09-00-1435 (on file with author) [hereinafter Monterey County Office of Education Letter].

277. Letter from Robert E. Scott to Thomas Allcock (Apr. 30, 2003), in Raymond-Knowles Union Elementary School District, OCR Case No. 09-02-1327 (on file with author).

278. Millis Public Schools Letter, *supra* note 276; Letter from John E. Palomino to Ruben Armiñana (Apr. 29, 1994), in Sonoma State University, OCR Case No. 09-93-2131 (on file with author) [hereinafter Sonoma State University Letter]; Letter from Patricia Shelton and C. Mack Hall to James C. Enochs (Dec. 10, 1993), in Modesto City Schools, OCR Case No. 09-93-1319 (on file with author) [hereinafter Modesto City Schools Letter].

279. Letter from H. Stephen Deering to Carolyn M. Getridge (Oct. 29, 1996), in Oakland Unified School District, OCR Case No. 09-96-1203-I (on file with author); Sonoma State University Letter, *supra* note 278; Modesto City Schools Letter *supra* note 278.

280. Letter from Charlene F. Furr to Jimmy D. Hattabaugh (Apr. 16, 2007), in Mansfield School District, OCR Case No. 06-06-1390 (on file with author); Letter from Cathy H. Lewis to Thomas Crawford (Apr. 16, 1993), in Academy School District, OCR Case No. 08-93-1023 (on file with author) [hereinafter Academy School District Letter].

281. Millis Public Schools Letter, *supra* note 275; Sonoma State University Letter,

- Actively discouraging victims from naming their harassers²⁸²
- Requiring victims to confront their harassers before filing a complaint²⁸³
- Failing to address victims' safety concerns²⁸⁴
- Unjustifiably delaying responses to and investigations of complaints²⁸⁵
- Deferring to criminal investigations rather than conducting an independent investigation by school officials²⁸⁶
- Inadequately investigating and/or tainting investigations through bias, lack of objectivity, or asking victims inappropriate and humiliating questions²⁸⁷
- Keeping incomplete files on investigations and not making credibility determinations regarding the victim's and harasser's stories²⁸⁸
- Providing informal complaint processes that lack timelines and other structure²⁸⁹
- Giving more procedural rights to the accused than to the accuser in a fact-finding hearing/proceeding²⁹⁰
- Prohibiting victims from being accompanied by an attorney²⁹¹
- Placing additional evidentiary burdens on sexual assault victims²⁹²
- Using a "clear and convincing evidence" instead of a "preponderance of the evidence" standard, as required by Title IX²⁹³

supra note 278.

282. Sonoma State University Letter, *supra* note 278.

283. Letter from Alan D. Hughes to Susan Whittle (Sept. 14, 2008), in Golden City R-III, OCR Case No. 07-07-1104 (on file with author).

284. Millis Public Schools Letter, *supra* note 275; University of California, Santa Cruz Letter, *supra* note 275.

285. Letter from Frankie Furr to James E. Nelson (August 5, 2005), in Richardson Independent School District, OCR Case No. 06-03-1283 (on file with author) [hereinafter Richardson Independent School District Letter]; Millis Public Schools Letter, *supra* note 276; Irvine Valley College Letter, *supra* note 276; University of California, Santa Cruz Letter, *supra* note 275.

286. Academy School District Letter, *supra* note 280; Millis Public Schools Letter, *supra* note 276.

287. Richardson Independent School District Letter, *supra* note 285; University of California, Santa Cruz Letter, *supra* note 275; Sonoma State University Letter, *supra* note 278.

288. California State University Letter, *supra* note 275.

289. Sonoma State University Letter, *supra* note 278.

290. Letter from Gary D. Jackson to Jane Jervis (Apr. 4, 1995), in The Evergreen State College, OCR Case No. 10-92-2064 (on file with author) [hereinafter Evergreen State College Letter]; University of California, Santa Cruz Letter, *supra* note 275.

291. California State University Letter, *supra* note 275.

292. Letter from Thomas J. Hibino to Lawrence H. Summers (April 1, 2003), in Harvard University, OCR Case No. 01-02-2041 (on file with author).

293. Evergreen State College Letter, *supra* note 290; Letter from Sheralyn Goldbecker to John J. DeGioia (May 5, 2004), in Georgetown University, OCR Case

- Failing to discipline students for harassment²⁹⁴
- Giving overly lenient sanctions to harassers and not providing sanctions designed to end the harassment²⁹⁵
- Failing to notify victims of outcomes and sanctions imposed on harassers and disciplining victims for re-disclosing information about disciplinary sanctions imposed on harassers²⁹⁶
- Not providing adequate training to designated employees²⁹⁷

Both the *Revised Guidance* and the LOFs/CTRs surveyed here echo insights from the Title IX case law and the Clery Act. For example, once a school has notice of harassment, it must “take immediate and appropriate steps to investigate or otherwise determine what occurred and take prompt and effective steps reasonably calculated to end any harassment, eliminate a hostile environment if one has been created, and prevent harassment from occurring again.”²⁹⁸ Schools must respond to notice of harassment in some way “whether or not the student who was harassed makes a complaint or otherwise asks the school to take action.”²⁹⁹ At the same time, institutions should take action that may compromise the victim’s confidentiality only when this is necessary “in the context of [the institution’s] responsibility to provide a safe and nondiscriminatory environment for all students.”³⁰⁰

Also like the case law, the *Revised Guidance* takes a similar “victim-centered” approach. It makes specific mention that the school may need to take interim measures during the investigation of a complaint. For example, in the case of sexual assault, a school may need to place “the students immediately in separate classes or in different housing arrangements on a campus.”³⁰¹ “Responsive measures of this type should be designed to minimize, as much as possible, the burden on the student who was harassed.”³⁰² Institutions should “take steps to prevent any

No. 11-03-2017 (on file with author) [hereinafter Georgetown University Letter].

294. Modesto City Schools Letter, *supra* note 278; Millis Public Schools Letter, *supra* note 276.

295. University of California, Santa Cruz Letter, *supra* note 275; Sonoma State University Letter, *supra* note 278.

296. Letter from Michael E. Gallgher to Conrad A. Jeffries (Dec. 1, 2005), in Schoolcraft College, OCR Case No. 15-05-2030 (on file with author); Christian Brothers University Letter, *supra* note 276; Sonoma State University Letter, *supra* note 275; California State University Letter, *supra* note 275.

297. Millis Public Schools Letter, *supra* note 276; Letter from Thomas J. Hibino to Richard Schneider (June 14, 1995), in Norwich University, OCR Case No. 01-95-2008 (on file with author); Sonoma State University Letter, *supra* note 276; Monterey County Office of Education Letter, *supra* note 276.

298. REVISED GUIDANCE, *supra* note 128, at 15.

299. *Id.* at 15.

300. *Id.* at 17.

301. *Id.* at 16.

302. *Id.*

further harassment”³⁰³ and may “be responsible for taking steps to remedy the effects of the harassment,”³⁰⁴ especially if an institution delays responding or responds inappropriately to the initial notice of harassment.³⁰⁵ Finally, institutions should remember to protect the victim, the complainant, and any witnesses from retaliation following a report of harassment.³⁰⁶

This approach is consistent with findings OCR has made in its investigations. For instance, OCR found that while Annandale Independent School District #876 had promptly investigated, responded and disciplined a teacher for harassing a student, the school had not attended to the student survivor’s emotional and educational needs.³⁰⁷ In addition, OCR cited approvingly to the University of Indiana-Bloomington’s immediate transfer of the alleged perpetrator out of the dormitory in which the victim also lived, as well as the steps it took to assist the survivor emotionally and academically after it received notice of the sexual assault.³⁰⁸

Moreover, the *Revised Guidance* and many of the LOFs/CTRs discuss in detail what constitutes “prompt and equitable grievance procedures” in these cases. As already noted, these include: notice of the policy, procedure and people responsible for enforcing it; an “adequate, reliable and impartial investigation of complaints;” “[d]esignated and reasonably prompt timeframes;” prevention of the “recurrence of any harassment;” correction of “its discriminatory effects on the complainant and others;” and provisions against retaliation.³⁰⁹ In addition, accuser and accused students must be given substantially equal procedural rights in fact-finding hearings or similar proceedings, including to an attorney or advocate if one is provided or allowed to one student in the process. Also, such hearings or proceedings must use a “preponderance of the evidence” standard, as the closest standard of proof to an even playing field. Finally, both accuser and accused, or “parties” as the *Revised Guidance* terms them,³¹⁰ have an equal right to be notified of the outcome of the complaint.

Several OCR cases have dealt with these issues. In a teacher-on-student harassment case at Evergreen State College, OCR required the College to change hearing procedures that allowed the professor but not the student an opportunity to influence the composition of the fact-finding panel and to

303. *Id.* at 17.

304. *Id.* at 15.

305. *Id.* at 17.

306. *Id.*

307. Letter from Jeffrey Turnbull to Steve Niklaus (Oct. 15, 2004), in Annandale Inded.Sch. Dist. #876, OCR Case No. 05-04-1185 (on file with author).

308. Letter from Jeffrey Turnbull to Adam Herbert (Mar. 6, 2007), in Indiana University-Bloomington, OCR Case No. 05-02-138 (on file with author).

309. REVISED GUIDANCE, *supra* note 133, at 20.

310. *See, e.g., id.* at 20, 22.

present evidence to the panel.³¹¹ OCR also required the College to change its “clear and convincing evidence” approach to a “preponderance of the evidence” standard of proof,³¹² a change that Georgetown University also agreed to make as a result of an OCR investigation.³¹³ In a case involving Christian Brothers University, OCR stated, “The focus of the entire process seems more on the accused than the accuser.”³¹⁴ At the University of California Santa Cruz, OCR found that the process focused only on the due process rights of the accused.³¹⁵ Finally, in a case at Sonoma State University, the OCR investigation revealed that, prior to being questioned about the student accusers’ allegations, the accused student was allowed to see and to rebut the factual allegations made in complainants’ reports. The accusers were not permitted a similar opportunity for rebuttal.³¹⁶

An ongoing case at The Ohio State University (“OSU”), resulting from allegations that one male student sexually assaulted two female students within weeks of each other, demonstrates the ways in which the enforcement mechanisms provided by the Clery Act and Title IX work together. The two alleged sexual assaults took place in February of 2002. The survivor of the second alleged assault sued the University in February of 2004. The University was granted summary judgment in the case in September 2006.³¹⁷ Security on Campus, Inc., filed a Clery complaint on March 29, 2004, and DOE found the University in violation of the Clery Act on December 20, 2006.³¹⁸ Not even a month before the Clery complaint was resolved, a second complaint was filed with DOE, calling on OCR to direct the University to adopt a preponderance of the evidence standard in disciplinary proceedings.³¹⁹ The resolution of the OCR complaint has not been published and, presumably, is still ongoing.

311. Evergreen State College Letter, *supra* note 290.

312. *Id.*

313. See Georgetown University Letter, *supra* note 293.

314. Christian Brothers University Letter, *supra* note 276.

315. Metroactive News and Issues, The Missing 47: UCSC’s Sexual Offense Policy, <http://www.metroactive.com/papers/cruz/11.12.98/rape1-9845.html> (last visited May 20, 2009).

316. Sonoma State University Letter, *supra* note 278.

317. Doe v. Ohio State Univ., No. 2:04-CV-0307, 2006 U.S. Dist. LEXIS 70444, at *1 (S.D. Ohio Sept. 28, 2006).

318. S. Daniel Carter, Complaint of Non-Compliance with the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, <http://www.securityoncampus.org/pdf/OSUcomplaint.pdf> (last visited May 20, 2009); Letter from John Jaros, Jr. to Karen Holbrook, President, The Ohio State University (Dec. 20, 2006), <http://www.securityoncampus.org/pdf/osufprd.pdf> (last visited May 20, 2009).

319. Press Release, Security On Campus, Inc., Ohio State University’s Handling Of Sexual Assaults Under Federal Review (Nov. 28, 2006), *available at* http://www.securityoncampus.org/index.php?option=com_content&view=article&id=158:press-release-ohio-state-universitys-handling-of-sexual-assaults-under-federal-review&catid=1:soc-news&Itemid=79.

Although the student survivor did not prevail in her private suit under Title IX,³²⁰ and the Clery Act violations were not egregious enough to result in a fine, OSU has been litigating and/or cooperating in an investigation for five years now. Even aside from monetary damages, six- and seven-figure settlements, or \$350,000 DOE fines, it is an expensive endeavor to pay the legal fees to litigate a case and to pay staff to assist in and cooperate with an investigation. Thus, there appears to be significant truth to the assertion that statutes like Title IX and the Clery Act are giving institutions incentives to pay attention to victims' rights and to encourage rather than discourage reporting.³²¹ Institutions that seek to discourage reporting and do not adopt institutional responses that protect basic victims' rights do so at their own legal and budgetary peril.

C. The Due Process Rights of the Accused

Given Title IX's and the Clery Act's requirements, institutions' responses to these cases are likely to implicate the institution's relationship with the student accused of perpetrating peer sexual violence. This is particularly true if the institution, after an investigation and determination that the report is accurate, takes disciplinary action against the student perpetrator of the violence. Because the Clery Act and Title IX require institutions to make immediate adjustments to survivors' housing and academic arrangements, stay-away orders, etc., the institution may even have to take action affecting the accused student while an investigation is ongoing and before a determination has been made as to whether the violence occurred. Fortunately for schools, the case law on how institutions must treat accused students allows schools to meet the requirements of Title IX and the Clery Act without running afoul of accused students' due process rights.

The laws applicable to institutions' powers to discipline students have long recognized that alleged perpetrators of various kinds of misconduct in school have certain due process rights, and, as indicated, peer sexual violence cases can quickly implicate those rights. Therefore, it is important to understand what the law requires in terms of a school's treatment of an alleged perpetrator in order to get a full picture of proper and legal school responses to peer sexual violence.

The accused student's due process rights, unlike the rights of survivors discussed above, are a matter mainly of case law that has been developing most intensely since the early 1960s. Schools' obligations depend on a variety of factors, including whether the institution is private or public,

320. *Doe v. Ohio State Univ. Bd. of Regents*, No. 2:04-CV-0307, 2007 U.S. Dist. LEXIS 28314, at *6 (S.D. Ohio Apr. 17, 2007).

321. Rosenfeld, *supra* note 254, at 421.

what state laws apply,³²² and what kind of disciplinary action is contemplated. All accused students have some due process rights; the variation is in “what process is due.”³²³

Disciplinary action that could result in expulsion from a public school carries the heaviest burden for the institution. Although the Supreme Court has never decided a case involving expulsion from a public institution, in *Goss v. Lopez*,³²⁴ the court considered a 10-day suspension of a group of students from a public high school. Some of the students were involved in a series of demonstrations and protests that involved some destruction of school property, but some of the suspended students claimed to be innocent bystanders and were suspended without a hearing.³²⁵ The Court decided that the students had a property interest in their free public education.³²⁶ In addition, they had a liberty interest because the schools’ charges “could seriously damage the students’ standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment.”³²⁷ Since “[t]he *Fourteenth Amendment* forbids the State to deprive any person of life, liberty, or property without due process of law,” the students were entitled to due process consisting of “*some* kind of notice and [] *some* kind of hearing.”³²⁸

The *Lopez* Court stated that “[l]onger suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures,”³²⁹ and cited approvingly to *Dixon v. Alabama State Board of Education*,³³⁰ where the Fifth Circuit Court of Appeals defined what was required for cases involving expulsion.³³¹ *Dixon* involved a group of students who were expelled from the Alabama State College for Negroes for unspecified misconduct and without a hearing but after they had all participated in a sit-in at an all-white lunch counter in Montgomery and several, possibly all, had engaged in other civil rights protests and demonstrations.³³² In overturning the district court, the Fifth Circuit set

322. Although, as noted above, there is state law variation on the victim’s side of things too. State laws establishing rights of action for survivors are *in addition to* the federal legislative schemes discussed above. In contrast, for the accused, state law is central because the accused’s due process rights may be in part or wholly determined by his contract with the institution.

323. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (discussing the meaning of due process).

324. 419 U.S. 565 (1975).

325. *Id.* at 570.

326. *Id.* at 575.

327. *Id.*

328. *Id.* at 579 (emphasis added).

329. *Id.* at 584.

330. 294 F.2d 150 (5th Cir. 1961).

331. *Goss*, 419 U.S. at 576.

332. *Dixon*, 294 F.2d at 152.

forth the requirements for due process before a state school can expel a student. First, a school must provide notice, including “a statement of the specific charges and grounds which, if proven, would justify expulsion under the regulations of the Board of Education,”³³³ and “the names of the witnesses against him and an oral or written report on the facts to which each witness testifies.”³³⁴ Second, there must be a hearing, “[t]he nature of [which] should vary depending upon the circumstances of the particular case.”³³⁵ In the case of a charge of misconduct, the hearing must “give[] the Board or the administrative authorities of the college an opportunity to hear both sides in considerable detail”³³⁶ and the charged student an opportunity to present “his own defense against the charges and to produce either oral testimony or written affidavits of witnesses in his behalf.”³³⁷

Both the Supreme Court in *Lopez* and the Fifth Circuit in *Dixon* were careful to specify that these requirements fell short of “a full-dress judicial hearing, with the right to cross-examine witnesses . . . [which] might be detrimental to the college’s educational atmosphere and impractical to carry out.”³³⁸ In *Lopez*, the Court made clear that it was not:

. . . construing the Due Process Clause to require, countrywide, that hearings in connection with short suspensions must afford the student the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify his version of the incident. Brief disciplinary suspensions are almost countless. To impose in each such case even truncated trial-type procedures might well overwhelm administrative facilities in many places and, by diverting resources, cost more than it would save in educational effectiveness. Moreover, further formalizing the suspension process and escalating its formality and adversary nature may not only make it too costly as a regular disciplinary tool but also destroy its effectiveness as part of the teaching process.³³⁹

Thus, even public institutions seeking to expel a student for misconduct have considerable flexibility and are not required to provide the full panoply of due process rights that must be provided to a criminal defendant. For private institutions, the requirements are even less onerous. While courts have reviewed private institutions for expelling or suspending students in an arbitrary and capricious manner,³⁴⁰ most courts review

333. *Id.* at 158.

334. *Id.* at 159.

335. *Id.* at 158.

336. *Id.* at 159.

337. *Id.*

338. *Id.*

339. *Goss v. Lopez*, 419 U.S. 565, 583 (1975).

340. *Ahlum v. Administrators of Tulane Educ. Fund*, 617 So. 2d 96, 100 (La. Ct.

private schools disciplinary actions under “the well settled rule that the relations between a student and a private university are a matter of contract.”³⁴¹ Therefore, private institutions are mainly bound by what they’ve promised students in the school’s own policies and procedures, and courts will review disciplinary actions according to the terms of the contract.³⁴²

In a representative selection of cases where students have challenged expulsions,³⁴³ while the plaintiff(s) are formally alleging schools’ failures to provide sufficient process, what they really appear to be doing is inviting the courts to substitute their judgments for those of schools on the merits of student disciplinary matters. Courts have steadfastly refused to do that; they upheld expulsions for a range of student behaviors about which people are likely to disagree in terms of whether they merit expulsion. These include:

- Students leaving false bomb threat notes in a school bathroom,³⁴⁴
- “Peeping” under womens’ skirts at a university library,³⁴⁵
- Smoking,³⁴⁶
- Participating in but withdrawing, prior to discovery, from a conspiracy to enter the high school with guns and shoot several students and school officials,³⁴⁷
- “Discipline problems” (which plaintiffs alleged were a pretext for retaliation against the students’ parents for objections they made to the school’s curriculum),³⁴⁸
- Drinking beer in the school parking lot,³⁴⁹
- Attempted possession of a controlled substance,³⁵⁰

App. 1993); *Coveney v. President & Trs. of the Coll. of the Holy Cross*, 445 N.E.2d 136, 137 (Mass. 1983); *Abbariao v. Hamline Univ. Sch. of Law*, 258 N.W.2d 108, 112 (Minn. 1977); *Rollins v. Cardinal Stritch Univ.*, 626 N.W.2d 464, 469 (Minn. Ct. App. 2001).

341. *Dixon*, 294 F.2d at 157.

342. *Fellheimer v. Middlebury Coll.*, 869 F. Supp. 238, 243 (D. Vt. 1994); *Centre Coll. v. Trzop*, 127 S.W.3d 562, 567 (Ky. 2003); *Schaer v. Brandeis Univ.*, 735 N.E.2d 373, 381 (Mass. 2000); *Hernandez v. Don Bosco Preparatory High*, 730 A.2d 365, 367 (N.J. 1999).

343. The cases discussed here were drawn mainly from 3-9 EDUCATION LAW § 9.09, the section on student discipline law from an education law treatise. They are not intended to be a comprehensive review of cases involving expulsion, merely to give a sense of the range of student misconduct cases in which courts have upheld expulsions.

344. *A.B. v. Slippery Rock Area Sch. Dist.*, 906 A.2d 674 (Pa. Commw. Ct. 2006).

345. *Cloud v. Trs. of Boston Univ.*, 720 F.2d 721 (1st Cir. 1983).

346. *Flint v. St. Augustine High Sch.*, 323 So. 2d 229 (La. Ct. App. 1975).

347. *Remer v. Burlington Area Sch. Dist.*, 286 F.3d 1007 (7th Cir. 2002).

348. *Gaston v. Diocese of Allentown*, 712 A.2d 757 (Pa. Super. Ct. 1998).

349. *Covington County v. G.W.*, 767 So. 2d 187, 188 (Miss. 2000).

350. *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 639 (6th Cir. 2005).

- Possession of marijuana,³⁵¹
- Possession of a pellet gun,³⁵²
- Brushing a teacher's buttocks with the back of a hand on two occasions,³⁵³
- Attacking and striking other students in the halls of the school,³⁵⁴
- Engaging in consensual sexual activity on school grounds,³⁵⁵
- Possession of a gun in a college dormitory room,³⁵⁶
- Engaging in a series of misbehavior including slashing a teacher's tires and selling illegal steroids,³⁵⁷
- Shooting a classmate in the back with a BB gun,³⁵⁸ and
- Being found by two female students in their dormitory room with two other male students and the female students' roommate, who was inebriated, unconscious, and naked from the waist down, after trying to keep the female students from entering the room.³⁵⁹

Courts so consistently resist turning student disciplinary proceedings into judicial proceedings or criminal trials that one court has described the "observation that disciplinary hearings against students and faculty are not criminal trials, and therefore need not take on many of those formalities" as so basic it is "unhelpful."³⁶⁰

Courts have stuck to reviewing process and not using process as an excuse to overturn institution actions in peer sexual violence cases as well. In one case, the court found a private college to have given inadequate notice of the charges as promised in its own policies and procedures, but gave the college an opportunity to re-hear the case using the proper charge.³⁶¹ In the rest of the cases reviewed for this paper, however, none has overturned an institution's decision to sanction a student for peer sexual violence. In contrast, they have rejected challenges to the admissibility of certain witnesses and evidence;³⁶² the right to know witnesses' identities

351. *Hammock v. Keys*, 93 F. Supp. 2d 1222, 1229 (S.D. Ala. 2000).

352. *Rogers v. Gooding Pub. Joint Sch. Dist. No. 231*, 20 P.3d 16, 18 (Idaho 2001).

353. *Brown v. Plainfield Cmty. Consol. Dist. 202*, 500 F. Supp. 2d 996, 998 (N.D. Ill. 2007).

354. *Linwood v. Bd. of Educ.*, 463 F.2d 763, 765 (7th Cir. 1972).

355. *B.S. v. Bd. of Sch. Trs.*, 255 F. Supp. 2d 891 (N.D. Ind. 2003).

356. *Centre Coll. v. Trzop*, 127 S.W.3d 562, 563 (Ky. 2003).

357. *Hernandez v. Don Bosco Preparatory High Sch.*, 730 A.2d 365 (N.J. Super. Ct. App. Div. 1999).

358. *S.K. v. Anoka-Hennepin Indep. Sch. Dist. No. 11*, 399 F. Supp. 2d 963 (D. Minn. 2005).

359. *Coveney v. President & Trs. of the Coll. of the Holy Cross*, 445 N.E.2d 136 (Mass. 1983).

360. *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 635 (6th Cir. 2005).

361. *Fellheimer v. Middlebury Coll.*, 869 F. Supp. 238, 247 (D. Vt. 1994); *see also* *Marshall v. Maguire*, 424 N.Y.S.2d 89 (N.Y. Sup. Ct. 1980).

362. *Cloud v. Trs. of Boston Univ.*, 720 F.2d 721, 724 (1st Cir. 1983); *Brands v.*

and to cross-examine them;³⁶³ and the rights to an attorney;³⁶⁴ discovery,³⁶⁵ voir dire,³⁶⁶ and appeal.³⁶⁷ They have also allowed a victim to testify behind a screen.³⁶⁸ In general, they consistently reiterate the distinction between disciplinary hearings and criminal or judicial proceedings.³⁶⁹

These cases demonstrate, moreover, that institutions may even take actions prior to notice and a hearing without running afoul of due process requirements. Indeed, *Lopez* itself acknowledges that it might be necessary for a school to act quickly and prior to notice and a hearing under certain circumstances: “Students 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. In such cases, the necessary notice and rudimentary hearing should follow as soon as practicable.”³⁷⁰ Courts have relied on this language to allow institutions to take measures protecting victims and accusers. For instance, several courts have made it clear that institutions may protect the identities of accusers and witnesses by allowing them to submit witness statements instead of appearing at the hearing.³⁷¹ In doing so, they have recognized that such measures are important to protect students who report misconduct from retaliation.³⁷² In

Sheldon Cmty. Sch., 671 F. Supp. 627, 632 (N.D. Iowa 1987); *Schaer v. Brandeis Univ.*, 735 N.E.2d 373, 381 (Mass. 2000).

363. *Gomes v. Univ. of Me. Sys.*, 365 F. Supp. 2d 6, 23 (D. Me. 2005); *B.S. v. Bd. of Sch. Trs.*, 255 F. Supp. 2d 891, 899 (N.D. Ind. 2003); *Coplin v. Conejo Valley Unified Sch. Dist.*, 903 F. Supp. 1377, 1383 (C.D. Cal. 1995).

364. *Coveney*, 445 N.E.2d at 140; *Ahlum v. Administrators of Tulane Educ. Fund*, 617 So. 2d 96, 100 (La. Ct. App. 1993).

365. *Gomes*, 365 F. Supp. 2d at 19.

366. *Id.* at 32.

367. *Id.* at 33.

368. *Cloud v. Trs. of Boston Univ.*, 720 F.2d 721, 724 (1st Cir. 1983); *Gomes*, 365 F. Supp. 2d at 29.

369. *Gomes*, 365 F. Supp. 2d at 17 (“The courts ought not to extol form over substance, and impose on educational institutions all the procedural requirements of a common law criminal trial.”); *Brands v. Sheldon Cmty. Sch.*, 671 F. Supp. 627, 632 (N.D. Iowa 1987) (“[T]he Due Process Clause does not require courtroom standards of evidence to be used in administrative hearings.”); *Granowitz v. Redlands Unified Sch. Dist.*, 129 Cal. Rptr. 2d 410, 414 (Cal. Ct. App. 2003) (“[C]ourts have consistently refused to impose stricter, adversarial, trial-like procedures and proof on public school suspension proceedings.”); *Ray v. Wilmington Coll.*, 667 N.E.2d 39, 42 (Ohio Ct. App. 1995) (“The issue here is not whether Wilmington could have provided Ray with a better hearing, nor whether the hearing satisfied the requirements of a formal trial.”); *Schaer v. Brandeis Univ.*, 735 N.E.2d 373, 381 (Mass. 2000) (“A university is not required to adhere to the standards of due process guaranteed to criminal defendants or to abide by rules of evidence adopted by courts.”).

370. *Goss v. Lopez*, 419 U.S. 565, 570 (1975).

371. *Gomes*, 365 F. Supp. 2d at 23; *B.S. v. Bd. of Sch. Trs.*, 255 F. Supp. 2d 891, 899 (N.D. Ind. 2003); *Coplin v. Conejo Valley Unified Sch. Dist.*, 903 F. Supp. 1377, 1383 (C.D. Cal. 1995).

372. *B.S.*, 255 F. Supp. 2d at 901 (“FWCS has a strong interest in protecting students who report classmate misconduct. Those students may be understandably

addition, in cases of peer sexual violence, courts have supported institutions taking immediate action and suspending or otherwise separating accused students prior to notice and a hearing.³⁷³

A volume entitled *School Violence: From Discipline to Due Process*, published in 2004 by the Section of State and Local Government Law of the American Bar Association, includes a chapter on “Student Violence and Harassment.” In it, Jeff Horner and Wade Norman conclude that

The vision of the school district defendant walking into court ensconced in an armor of protection is somewhat accurate, at least in the context of student violence cases A small chink in the armor of school district defendants has been exposed in the recent Title IX cases, but it applies only to cases of sexual harassment and requires a standard of liability extremely difficult to meet.³⁷⁴

This statement is significant for several reasons. First, it acknowledges what the review above suggests in more detail: that schools are more at risk of serious liability when they ignore the rights and needs of victims than perhaps any other group of students. Second, because the essay was published in 2004, its characterization of the “small chink” does not benefit from events since 2004. The case law and regulatory enforcement around both Title IX and the Clery Act since 2004 indicates that the chink continues to widen. Third, events like the Virginia Tech shooting are increasing, as they should, the interest and attention to victims and potential victims of school violence beyond the sexual harassment context. Finally, in light of statistics on the rate of peer sexual violence on college and university campuses (which does not even include all the other forms of sexual harassment that are likely occurring), the implication that the “chink” is small because it applies “only to cases of sexual harassment” is incorrect. All of these developments, as well as more settled case law like that in the due process context, make it clear that, if for no other reason than to avoid liability, institutions must start paying more attention to the

reluctant to come forward with information if they are faced with . . . the unsettling prospect of ostracism or even physical reprisals at the hands of their peers.”).

373. *J.S. v. Isle of Wight County Sch. Bd.*, 362 F. Supp. 2d 675, 677–78 (E.D. Va. 2005) (suspending student who sexually assaulted a younger female student in the girls restroom prior to notice and a hearing, transferred by the school to another school after an administrative hearing, and not allowed to return after the appeal hearing); *Jensen v. Reeves*, 45 F. Supp. 2d 1265, 1272 (D. Utah 1999) (“[G]iven the pattern of misbehavior and continual threat being posed by C.J. to other students, Principal Reeves may have been justified in immediately suspending C.J. without the requisite notice of the charges and opportunity to explain.”); *Brands*, 671 F. Supp. at 629 (suspending a student’s eligibility in the state wrestling tournament prior to a hearing, after he and three other males “engaged in multiple acts of sexual intercourse with a sixteen-year-old female student”).

374. Jeff Horner & Wade Norman, *Student Violence and Harassment*, in *SCHOOL VIOLENCE: FROM DISCIPLINE TO DUE PROCESS* 14 (James C. Hanks ed., 2004).

rights and needs of victims and potential victims of such violence.

III. BEST PRACTICES IN RESPONDING TO PEER SEXUAL VIOLENCE

Of course, there are more reasons to pay attention to victims and potential victims than just to avoid liability. The Title IX, Clery Act, and due process cases discussed above give a sense of the wide range of responses schools take to peer sexual violence and of what responses are legally sufficient. However, because of judicial and agency reticence with regard to interfering in the details of institutional decision-making, as well as the fact that both OCR and the court cases arise as a result of complaints, they do not necessarily tell us what responses constitute “best practices.” Even the OCR *Revised Guidance* is oriented more towards legal sufficiency and is fairly vague about the details of proper responses. Therefore, while these legal sources are helpful in defining what institutions *must* do in response to peer sexual violence, they are less helpful in telling us what they *should* do. Due to these factors, this section draws less from the legal framework and more from programmatic, empirical, and practice-oriented materials. These include materials produced by education attorneys, victims’ advocates and government agencies, such as the Office on Violence Against Women (“OVW”) in the U.S. Department of Justice, and researchers who have studied campus response systems to assess their effectiveness in responding to peer sexual violence.

A. Response Systems Generally: Elements of a Comprehensive, Victim-Centered Approach

The OVW is in fact one of the best sources of this information since it administers the grant programs authorized and funded by the Violence Against Women Act, including the Grants to Reduce Domestic Violence, Dating Violence, Sexual Assault, and Stalking on Campus.³⁷⁵ Because these grants are designed to fund the creation and improvement of campus response systems, their criteria include many best practices regarding institutional responses to peer sexual violence on campuses. These criteria indicate the following:

- Responses must be “comprehensive” and “coordinated.” Responses should therefore include the whole range of campus administration and services such as “campus victim services, campus law enforcement, health services, housing authorities, campus administration, student organizations, and disciplinary boards.” These offices should work “in partnership with community-based nonprofit victim advocacy organizations and local criminal justice or civil legal

375. U.S. Department of Justice, Office on Violence Against Women, *supra* note 117.

agencies.” This comprehensive and coordinated approach is intended “to enhance victim safety and hold offenders accountable,” as well as “demonstrate to every student that violence against women in any form will not be tolerated and sexual assault, stalking, domestic violence, and dating violence are crimes with serious legal consequences.”³⁷⁶

- Schools “must develop services and programs tailored to meet the specific needs of victims” as well as “prevention programs that seek to change the attitudes and beliefs that permit, and often encourage, such behavior.”³⁷⁷
- Schools should develop and implement:
 - Institutional abilities to “appreh[en]d, investigat[e], and adjudicat[e] persons committing domestic violence, dating violence, sexual assault, and stalking on campus;”³⁷⁸
 - “[C]ampus policies, protocols, and services that [] effectively identify and respond to these crimes,” including student conduct policies that “encourage reporting of violence against women crimes,” and make clear “that victims who come forward to report that they have been victimized will not be penalized if they violated the institution’s alcohol, substance abuse, or other policies during the violent incident;”³⁷⁹
 - Training for “campus administrators, security personnel, and personnel serving on campus disciplinary or judicial boards to more effectively identify and respond to violent crimes against women on campus,” particularly campus police and “members of campus disciplinary boards;”³⁸⁰
 - “[D]ata collection and communication systems;”³⁸¹
 - Provision of physical facilities and systems (lighting, communications, etc.);³⁸²
 - “[V]ictim service programs [which include] programs providing legal, medical, [and] psychological counseling;”³⁸³
 - Provision of “assistance and information about victims’ options on and off campus to bring disciplinary or other legal action, including assistance to victims in immigration matters” and the dissemination of information about such resources;³⁸⁴

376. *Id.*

377. *Id.*

378. *Id.*

379. *Id.*

380. *Id.*

381. *Id.*

382. *Id.*

383. *Id.*

384. *Id.*

-“[E]ducation programs for the prevention of this violence,” including “mandatory prevention and education programs about violence against women for all incoming students, working in collaboration with campus and community-based victim advocacy organizations.”³⁸⁵

Another source of best practices comes from a report commissioned and published by the National Institute of Justice of the U.S. Department of Justice’s Office of Justice Programs (“NIJ”), entitled *Sexual Assault on Campus: What Are Colleges and Universities Doing About it*.³⁸⁶ This publication is based on a longer study entitled *Campus Sexual Assault: How America’s Institutions of Higher Education Respond*,³⁸⁷ in which the authors surveyed 1015 campus sexual assault policies and talked with 1001 campus administrators. As a part of this review, they identified eight schools of those surveyed that had representative “promising practices.”³⁸⁸ These practices include having “a reader-friendly, easily accessible, and widely distributed statement of the school’s definitions and expectations regarding sexual conduct.” These policies “clearly define[] sexual misconduct,” make clear the actual circumstances of most campus sexual violence (e.g. the prevalence of non-stranger sexual assault), and provide both the survivor and those who know the survivor with steps, resources, and information about the response options that are available.³⁸⁹ Similar to OCR’s requirements, the report indicates that good sexual assault policies identify a specific person or office to contact for reports and complaints, encourage reporting and prohibit retaliation, and state the sanctions for misconduct.³⁹⁰

In addition, the report notes that all eight of these institutions have anonymous, confidential and third-party reporting. It advises that the best approaches include protocols that allow for different kinds of reporting and school responses that “allow the victim to participate in decisionmaking, to exert some control over the pace of the process, and to be in charge of making decisions as she/he moves through the campus adjudication and/or the local law enforcement system.”³⁹¹ Response protocols should be written to ensure a “victim-centered response,” including ensuring confidentiality for survivor and accused and minimizing “the need for the victim to retell the experience multiple times.”³⁹² Promising adjudication

385. *Id.*

386. HEATHER M. KARJANE ET AL., *SEXUAL ASSAULT ON CAMPUS: WHAT ARE COLLEGES AND UNIVERSITIES DOING ABOUT IT* (2006), available at <http://www.ncjrs.gov/pdffiles1/nij/205521.pdf>.

387. *Id.*

388. *Id.* at 4.

389. *Id.* at 12.

390. *Id.* at 13.

391. *Id.*

392. *Id.*

practices include offering a range of options, balancing between the rights of the accuser and accused, and, echoing both the Title IX and due process case law, remembering that such adjudications “are not criminal proceedings.”³⁹³ Finally, the report advises providing comprehensive, coordinated victims’ services,³⁹⁴ including a designated, centralized response coordinator who can “guide the victim through all aspects of the process,” coordinate “the school’s education and prevention efforts, provide staff and faculty training, . . . [and lead] a campus-wide response network.”³⁹⁵

Several of these practices are echoed by two other sources for best practices written by and drawing from the practice of attorneys at the Victim Rights Law Center (“VRLC”), which represents sexual assault victims in a range of civil and criminal proceedings, including in student disciplinary proceedings.³⁹⁶ The VRLC’s recommendations include developing comprehensive services and resources for victims with coordination between on and off campus service providers;³⁹⁷ developing clear, accessible policies and publicizing them,³⁹⁸ and making sure that policies and procedures are responsive to the realities of surviving sexual violence. Responsive policies and procedures should protect victims’ privacy and maximize their control over responses as much as possible.³⁹⁹ They should encourage and eliminate barriers to reporting⁴⁰⁰ and assist a victim in reporting to police.⁴⁰¹ Finally, they should develop interim measures to protect a victim’s safety and health prior to the conclusion of a formal complaint process.⁴⁰²

The best practices indicated here emphasize several themes. First, they indicate that schools should be looking particularly to the work of professional victims’ advocates, including attorneys, counselors, researchers, programs, and organizations, as sources for best practices. In fact, the NIJ study states, “Many field research campuses report that instituting [a designated, centralized response coordinator as the authors advise] has increased the reporting of campus sexual assault.”⁴⁰³ Likewise, OVW actually conditions funding in part on an institution’s partnering with these experts. These best practices counter a certain reluctance on the part

393. *Id.* at 14.

394. *Id.*

395. *Id.* at 132.

396. See BEYOND THE CRIMINAL JUSTICE SYSTEM, *supra* note 17, at Foreword; Reardon, *supra* note 96, at 395.

397. Reardon, *supra* note 96, at 402–04.

398. BEYOND THE CRIMINAL JUSTICE SYSTEM, *supra* note 17.

399. *Id.*

400. *Id.*

401. *Id.* at 5.

402. *Id.* at 5, 6, 9.

403. KARJANE ET AL., *supra* note 386.

of schools to draw on these advocates' expertise because of concern that they are or may appear biased. The OVW criteria and the NIJ study make clear that this concern is misplaced, and appear to agree with the court in *Gomes v. University of Maine Systems*.⁴⁰⁴ In that case, plaintiffs claimed that the chair of the hearing panel that found them responsible for sexual assaulting a classmate was biased because she served on the board of a local victims' advocacy organization. The court responded by stating:

[I]t is difficult to take seriously the Plaintiffs' claim of bias. After all, Dr. Allan's volunteer activity has been directed against sexual assault, which is a crime and a violation of the Code. There is not exactly a constituency in favor of sexual assault, and it is difficult to imagine a proper member of the Hearing Committee not firmly against it. It is another matter altogether to assert that, because someone is against sexual assault, she would be unable to be a fair and neutral judge as to whether a sexual assault had happened in the first place.⁴⁰⁵

Linked to the emphasis on partnering with and encouraging institutions to benefit from the expertise of victims' advocates, the best practices literature also emphasizes the improvement and expansion of services for survivors and other victim-centered responses. The services contemplated are clearly designed to be holistic and to give survivors as many options as possible for handling the diverse consequences and effects such violence can have on their lives. In addition, they allow the survivor to remain in control of the process as much as possible and encourage her to report the violence to someone, this generally being the first step to accessing the necessary services as well as holding the perpetrator responsible. This holistic approach is also linked to the emphasis on coordinated and comprehensive response systems.

These sources also agree that several practices are of particular importance in creating this victim-centeredness. As the VRLC states,

[T]here are common concerns that many victims share. For example, in the aftermath of an [assault], most sexual assault victims experience the need to reclaim their sense of autonomy and control. They want the right to decide whether, how, when and to whom the assault will be disclosed. They want and need safe housing, employment, access to medical care and financial stability. And, they want and deserve a legal system that validates their harms and provides a venue for criminal and civil justice. At the core, victims want and need healing and recovery.⁴⁰⁶

Given these common concerns, policies, procedures, and practices

404. 365 F. Supp. 2d 6 (D. Me. 2005).

405. *Id.* at 31–32.

406. BEYOND THE CRIMINAL JUSTICE SYSTEM, *supra* note 17, at 25.

should privilege a survivor's privacy and control over the process wherever possible.⁴⁰⁷ The NIJ study suggests that having both anonymous and confidential reporting options is one type of "victim-driven policy."⁴⁰⁸ It draws the general conclusion that "any policy or procedure that compromises or, worse, eliminates the student victim's ability to make her or his own informed choices throughout the reporting and adjudication process not only reduces reporting rates, but may also be counterproductive to the victim's healing process."⁴⁰⁹ In terms of privileging the healing process, the VRLC discusses the need for schools to respond with some interim measures, stating that these "initial steps . . . will certainly affect the victim's overall experience."⁴¹⁰ Such measures include issuing stay away orders, making new dormitory assignments, changing students' coursework and schedules, reducing their course loads, excusing absences from class, giving extensions, and offering the option to withdraw from courses or take a leave of absence.⁴¹¹ Furthermore, writing these precautions into the institution's policies and procedures can give students fair notice that the school will take these steps.⁴¹²

In addition, the NIJ study, the VRLC, and other commentators, such as Michelle Anderson, then Villanova University School of Law professor and now Dean of City University of New York School of Law, agree that institutions should be careful not to adopt policies that penalize victims and create barriers to reporting. All three particularly target policies that punish survivors for alcohol or drug use.⁴¹³ Given the prevalence of alcohol and/or drugs in most instances of campus peer sexual violence, including the use of them to coerce sex, such policies can discourage "a large majority of victims" from reporting.⁴¹⁴ This may be because victims are fearful of being sanctioned under such policies,⁴¹⁵ as there have been consequences as devastating as ending numerous female Air Force Academy cadets' careers.⁴¹⁶ However, survivors may be as much, if not more, deterred from reporting because such policies signify an overall non-victim-supportive attitude on the part of the institution. After all, such policies encourage victims not to acknowledge that the violence was a

407. Reardon, *supra* note 96, at 403; KARJANE ET AL., *supra* note 386, at 83, 85, 94.

408. KARJANE ET AL., *supra* note 386, at 93.

409. *Id.* at 81.

410. Reardon, *supra* note 96, at 405.

411. *Id.* at 403, 405.

412. *Id.* at 411.

413. KARJANE ET AL., *supra* note 386, at 81; Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, 84 B.U.L. REV. 945, 951 (2004); Reardon, *supra* note 96, at 405.

414. Reardon, *supra* note 96, at 403.

415. KARJANE ET AL., *supra* note 386, at 81.

416. Anderson, *supra* note 413, at 951.

crime,⁴¹⁷ and “promote[] the notion that [a survivor] somehow contributed to or was to blame for her rape, that she was able to control it, and that certain behaviors can nullify her consent.”⁴¹⁸

Lastly, and most relevant to the focus of the remainder of this article, all of these sources emphasize the proper treatment of violence against women as criminal misconduct that must be appropriately handled by the systems and professionals that deal with such misconduct, particularly campus police and disciplinary boards. The OVW criteria include enhanced training for police and disciplinary boards, better data collection and communication systems, and increased coordination with law enforcement and advocacy services off campus. All of these criteria are oriented towards increasing the likelihood that campuses will hold perpetrators responsible for violence against women, including peer sexual violence. This is not to say that any of these sources suggest institutions push survivors to use criminal processes off-campus rather than processes available on campus. Rather, the emphasis on training and coordination can be seen as efforts to expand victims’ options, to improve the options on campus, and to separate them from the criminal justice system.

B. Student Disciplinary Proceedings Specifically: Treating All Students with “Equal Care, Concern, Dignity, and Fairness”

Nevertheless, in many respects these sources do not give much detailed guidance as to what constitutes proper handling of violence against women by entities such as campus police and disciplinary boards, or what these entities should do in order to effectively investigate and adjudicate such cases. Certainly partnering with victims’ advocacy organizations will help bring useful expertise on violence against women and how to respond to it generally. As the courts and legislatures have acknowledged, however, colleges and universities are unique entities and environments that must and should structure their responses to such violence according to unique legal requirements and unique goals beyond requirements mandated by law. Therefore, it is helpful to consider best practices developed for student disciplinary systems in general, to assess these practices for their applicability to cases of peer sexual violence, and to take into account best practices developed in sexual violence cases in particular.

In a pamphlet published by the insurer United Educators and the National Association of College and University Attorneys, Edward N. Stoner addresses a series of issues for institutions of higher education to consider in constructing or changing their student disciplinary code and procedures. These include jurisdiction, structure, and membership of hearing boards, the structure of the sanctioning process, recordkeeping, and

417. KARJANE ET AL., *supra* note 386, at 81.

418. Reardon, *supra* note 96, at 404.

the presence of advisers and lawyers in disciplinary hearings.⁴¹⁹ This pamphlet focuses preliminarily on three related points: 1) the goals behind student conduct policies and 2) the differences between those goals and the purposes of the criminal system, which make 3) thinking about student discipline systems in terms of the criminal law inappropriate and counterproductive.⁴²⁰

Stoner characterizes the central goal of student disciplinary systems as helping “to create the best environment in which students can live and learn . . . [a]t the cornerstone [of which] is the obligation of students to treat all other members of the academic community with dignity and respect—including other students, faculty members, neighbors, and employees.”⁴²¹ He reminds college and university administrators and lawyers that this goal means that “*student victims are just as important as the student who allegedly misbehaved.*”⁴²² a principle that “is critical” to resolving “[c]ases of student-on-student violence.”⁴²³ In doing so, he points out that this principle of treating all students equally “creates a far different system than a criminal system in which the rights of a person facing jail time are superior to those of a crime victim.”⁴²⁴ Therefore, he advises that student disciplinary systems use the “‘more likely than not’ standard used in civil situations” and avoid describing student disciplinary matters with language drawn from the criminal system.⁴²⁵

Kathryn M. Reardon, drawing on her work as an attorney at the VRLC representing student survivors in disciplinary proceedings, agrees with Stoner’s core approach but disagrees with some of the details in how to attain this equality. For instance, in a related article, Stoner suggests that both accusing and accused students in disciplinary hearings be “responsible for presenting [their] information, and, therefore, advisors are not permitted to speak or to participate directly.”⁴²⁶ Reardon, on the other hand, expresses concern about the dynamics of a victim having to act as her own advocate in a hearing and to question and be questioned by her own assailant.⁴²⁷ The two agree, however, that investigations of complaints

419. EDWARD N. STONER II, REVIEWING YOUR STUDENT DISCIPLINE POLICY: A PROJECT WORTH THE INVESTMENT 12–13 (2000), available at http://eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/16/60/ab.pdf.

420. *Id.* at 7–11.

421. *Id.* at 7.

422. *Id.* (emphasis in original).

423. *Id.* at 7–8.

424. *Id.* at 7.

425. *Id.* at 10.

426. Edward N. Stoner II & John Wesley Lowery, *Navigating Past the “Spirit of Insubordination”: A Twenty-First Century Model Student Conduct Code with Model Hearing Script*, 31 J.C. & U.L. 1, 42 (2004).

427. Reardon, *supra* note 96, at 412.

should be in the hands of school officials, not in the hands of the individual students,⁴²⁸ and that if the accused student is provided an attorney/advisor or advised to get one, the accusing student should have equal rights to do so.⁴²⁹

In this sense, there is a remarkable degree of agreement between education attorneys, victims' advocates, researchers, OCR, the Clery Act, and courts. Although their motivations may vary, all of these groups and entities agree that emulating or drawing from the criminal system in addressing cases of peer sexual violence in institutions is not helpful at best and damaging or not legally sufficient at worst. All are concerned about victims' rights and recognize that schools need to be more protective of those rights. Finally, most, if not all, are committed to treating student victims and alleged perpetrators equally wherever possible, at least until a determination as to responsibility for the violence has been made.

IV. TYPICAL PRACTICES IN RESPONDING TO PEER SEXUAL VIOLENCE: THE CASE OF STUDENT DISCIPLINE

Despite this remarkable level of agreement, many student disciplinary codes and procedures retain many of the characteristics of criminal systems, which are more oriented towards the goals and concerns of the criminal law and are generally not helpful in meeting the goals and concerns of institutions, victims' advocates, or education lawmakers. Indeed, around crime in general and such issues as sexual and domestic violence in particular, the criminal justice system itself has been the intense focus of reform efforts to make it both more effective in addressing the problem of such violence and more sensitive to the civil rights of crime victims.⁴³⁰ While these efforts have been successful to an extent,⁴³¹ in many ways, they have arguably not resulted in meaningful civil rights protections for crime victims, especially sexual violence survivors, nor have they addressed the underlying problem of deterring the violence.⁴³²

Some commentators suggest that part of the reason why this effort has not made greater strides is because the goals of the criminal justice system and the goals of a survivor may be very different, especially right after the crime. As the VRLC points out, following an assault, most victims' "most

428. *Id.* at 408; Stoner & Lowery, *supra* note 426, at 39.

429. Reardon, *supra* note 96, at 411; Stoner & Lowery, *supra* note 426, at 42.

430. BEYOND THE CRIMINAL JUSTICE SYSTEM, *supra* note 17, at 7–8; Douglas Evan Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289, 289 (1999).

431. Examples of success include the passage of state and federal victims' rights statutes, state constitutional amendments protecting victims' rights, and efforts to pass a federal constitutional amendment. *See* Beloof, *supra* note 430, at 289; BEYOND THE CRIMINAL JUSTICE SYSTEM, *supra* note 17, at 21, 378–79.

432. BEYOND THE CRIMINAL JUSTICE SYSTEM, *supra* note 17, at 8; Beloof, *supra* note 430, at 326.

urgent needs include physical safety, emotional well-being, economic security, and educational stability. These needs are most acute in the first six months following an assault.”⁴³³ The VRLC adds in a footnote:

In the current dominant legal paradigm, such needs are placed at the periphery of our legal response to sexual assault, or, at worst, are conceptualized as a personal rather than legal problem. This acute disjuncture between what victims seek and what the criminal justice system offers likely accounts for some of the failures of sexual assault law reform over the last thirty years. Because the criminal justice system offers remedies such as vindication, meaning, and a sense of justice that are consistent with higher-level needs, and fails to offer solutions for more basic needs, it makes sense that many victims do not make a criminal complaint immediately after an assault.⁴³⁴

This disjuncture may also account for survivors who fail to report and engage the criminal system at all. As victims’ rights scholar Douglass Beloof comments, “The individual victim of crime can maintain complete control over the process only by avoiding the criminal process altogether through non-reporting.”⁴³⁵ Therefore, a general lack of reporting is itself a commentary by survivors as to the effectiveness of the system in addressing survivors’ needs. In discussing the reasons why a victim might “[e]xercise the veto” over reporting a crime, Beloof reiterates many of the reasons why student survivors do not report or will likely be discouraged from reporting. These reasons include

the victim’s desire to retain privacy; the victim’s concern about participating in a system that may do [her] more harm than good; the inability of the system to effectively solve many crimes . . . ; the inconvenience to the victim; the victim’s lack of participation, control, and influence in the process; or the victim’s rejection of the model of retributive justice.⁴³⁶

This review of the criminal justice system should give schools further pause in adopting the criminal model for their own responses, especially if they wish to encourage reporting of criminal acts. Nevertheless, many institutions continue to “criminalize” their disciplinary procedures. For instance, although best practices in the student disciplinary context and legal requirements under Title IX recommend or require a “preponderance of the evidence” standard of proof,⁴³⁷ many colleges and universities

433. BEYOND THE CRIMINAL JUSTICE SYSTEM, *supra* note 17, at 6.

434. *Id.* at 5.

435. Beloof, *supra* note 430, at 306.

436. *Id.*

437. Evergreen State College Letter, *supra* note 290; Georgetown University

continue to use “clear and convincing evidence” in cases of peer sexual violence and a very small group even require proof that is “beyond a reasonable doubt.”⁴³⁸ The NIJ study found that of the institutions that mention a burden of proof at all for disciplinary hearings (only 22.4% of the schools that responded), 3.3% use “beyond a reasonable doubt,” 81.4% use “preponderance of the evidence,” and 15.3% use some other standard.⁴³⁹ A separate study of sixty-four institutions conducted by Dean Anderson similarly found that many schools were silent on the standard of proof. Of those that did articulate one, a majority of schools used “preponderance of the evidence,” but a few retained a “clear and convincing evidence” requirement.⁴⁴⁰

Dean Anderson gives another example of institutional adoption of criminal procedures, this time procedures that have actually been long discredited even in the criminal justice system. Her focus is on the adoption by certain schools of doctrines of “prompt complaint,” “corroboration,” and “cautionary instructions,” doctrines that have been removed from the criminal laws of almost all states.⁴⁴¹ She uses the example of the sexual assault complaint procedures adopted by Harvard College in May 2002. These procedures required that complaints “be brought to the College in a timely manner” and be supported by “independent corroborating evidence.”⁴⁴² They also “cautioned officials against pursuing reports in which the complainant’s only evidence is her ‘credible account’ of sexual abuse.”⁴⁴³ In her survey of other schools’ policies, she found a number of other institutions that explicitly state that there is a time limit on sexual assault claims or heavily imply that non-prompt complaints may be held against a survivor.⁴⁴⁴ Although she found no institutions that explicitly required corroboration besides Harvard, she expresses concern regarding policies that are silent on the burden of proof, because they allow theories of proof like corroboration to enter into judgments in campus proceedings without there being a method to confront such illegitimate decision-making methods.⁴⁴⁵

Another approach that continues to be used in student disciplinary systems is the treatment of the victim as something less than a full party to the case. In many conduct hearings, a college or university official “prosecutes” the case. Stoner advises against using language such as

Letter, *supra* note 293.

438. KARJANE ET AL., *supra* note 386, at 122.

439. *Id.*

440. Anderson, *supra* note 413, at 1000.

441. *Id.* at 949.

442. *Id.* at 950.

443. *Id.*

444. *Id.* at 947.

445. *Id.* at 1000.

“prosecutor” in a student code of conduct.⁴⁴⁶ The issue of language aside, however, many institutions continue to have someone acting in a prosecuting function in hearings, usually a college or university official or a student.⁴⁴⁷ This means that student victims function more as “complaining witnesses”⁴⁴⁸ and the presentation of their case is not within the control of the victim or of her advocate. In the criminal system, the victim is not a party to the case,⁴⁴⁹ the prosecutor is not the victim’s advocate, and the prosecutor and victim often do not have the same interests in a case.⁴⁵⁰ Furthermore, in the criminal context, under the rule of witness sequestration, a complaining witness may not generally even remain in the courtroom beyond giving her testimony.⁴⁵¹ Because of the higher standard of proof, in order to win the case, many prosecutors will voluntarily follow this rule and exclude the victim in order to make the evidence supporting their case as unassailable as possible.

446. See Stoner, *supra* note 419, at 10.

447. See, e.g., Julie Jargon, *The War Within: As America Prepares to Invade Iraq, Female Air Force Cadets Wage Their Own Battle*, DENVER WESTWORD NEWS, Jan. 30, 2003, <http://www.westword.com/2003-01-30/news/the-war-within/> (discussing an “Article 23” proceeding used at the Air Force Academy as a hybrid civilian grand jury and preliminary hearing prior to a court martial, in which “the Air Force prosecutes the accused rapist, making the victim—who is a prosecution witness rather than a principal party—more of a bystander to the proceedings”); University of Maryland Office of Student Conduct, Description of Community Advocate, <http://studentconduct.umd.edu/usj/sjapp.html> (last visited April 14, 2009) (indicating that the “community advocate” position functions as a “student prosecutor”); Hamden-Sydney College Student Court, http://www.hsc.edu/studentlife/government/student_court.html (last visited April 14, 2009) (describing role of “Student Investigator” in student court proceedings as “moderately prosecutorial”); Oklahoma City University School of Law, Student Conduct Code, Section 3.02, http://www.okcu.edu/law/academics/academics_conduct.php (last visited April 14, 2009); Mississippi College School of Law Honor Code, Investigation and Hearing Procedures, http://www.mc.edu/law/student/honor_code.htm (last visited April 14, 2009); Washburn University School of Law, Part IV(A)(2), <http://washburnlaw.edu/policies/honorcode.php> (last visited April, 2009); Southern Methodist University Dedman School of Law Student Code of Professional Responsibility, Section 1A, <http://www2.law.smu.edu/Default.aspx?DN=80e4fa2c-04b6-4b90-99d1-34784e315b31> (last visited May 28, 2009); Georgia State University College of Law Honor Code, Section 12(2)(1), <http://law.gsu.edu/registrar/bulletin/honorcode.php> (last visited May 28, 2009).

448. BEYOND THE CRIMINAL JUSTICE SYSTEM, *supra* note 17, at 364.

449. *Id.* at 63.

450. See BEYOND THE CRIMINAL JUSTICE SYSTEM, *supra* note 17, at 81; see also Jargon, *supra* note 447 (“Major Vladimir Shifrin . . . says the prosecuting attorney represents the academy, not the victim. ‘The Air Force would be my client, and I would prosecute the case in the best interest of the government, not necessarily in the best interest of the victim . . .’”).

451. The rule on witness sequestration is an evidentiary doctrine whereby the court may exclude witnesses from the courtroom for times other than the witness’s testimony, in order to prevent witnesses’ testimonies from influencing each other and to keep witnesses from one side from colluding with each other. See 75 AM. JUR. 2D Trial §§ 176–77.

In addition to being excluded from the courtroom, in the criminal system, complaining witnesses have little control over discovery of evidence by the defendant. If they disclose information to the prosecutor, which they may have to do in order for the prosecutor to make the case, under the Brady exculpatory evidence rule,⁴⁵² the prosecutor may be required to disclose some or all of that evidence to the defendant.⁴⁵³ Even more critically, since the victim is not a party and the prosecutor is not her attorney, that relationship and information disclosed in the course of that relationship is not privileged in any way. Therefore, the victim cannot prevent it from being disclosed to the defendant either by operation of the Brady or other legal discovery rules or simply because the prosecutor has some other reason, which serves the prosecution's interests, for the disclosure. On top of all this, neither the prosecutor nor the victim has an equal right of discovery as to the defendant's case and evidence.⁴⁵⁴

All of these factors are likely to have an impact on both the ability of the hearing board to make its findings and on the victim's health and well-being. With regard to the hearing, it is commonly recognized that cases of peer sexual violence on college campuses tend to occur without third party eye witnesses to the alleged violence itself. Therefore, the determination of whether the hearing board believes the alleged victim's or the alleged perpetrator's version of events is the more credible one rides largely on the relative credibility of those two people.⁴⁵⁵ This means that the alleged victim is as much on trial as the alleged perpetrator, and the fact-finders will be looking at her version of events with the same degree of skepticism as they are looking at the alleged perpetrator's version. Despite this fact, in the criminal system, the accused assailant has all of the procedural advantages of being able, for instance, to obtain evidence such as a victim's "medical history, past alcohol or drug use, prior consensual sexual contact, or history of previous sexual assaults" to damage the victim's credibility.⁴⁵⁶ The ability to use such evidence to impact the defendant's credibility is not equally offered to the victim because she is merely a complaining witness. If she were a party to the case, as she would be in, say, a civil tort suit, she would generally have rights to open discovery of evidence in the possession of the defendant equal to those the defendant would have from her.⁴⁵⁷

452. See *Brady v. Maryland*, 373 U.S. 83 (1963).

453. See *BEYOND THE CRIMINAL JUSTICE SYSTEM*, *supra* note 17, at 21.

454. *Id.* at 370. Because the Brady rule is a constitutional right of due process requiring that the prosecution disclose any evidence tending to prove the defendant's innocence, it does not apply to the prosecution, since the state does not have due process rights, nor to the victim, who is not a party to the case. See 23 AM. JUR. 2d *Depositions and Discovery* § 280.

455. *BEYOND THE CRIMINAL JUSTICE SYSTEM*, *supra* note 17, at 47.

456. *Id.* at 41, 47.

457. FED. R. CIV. P. 26(b)(1).

In addition to its impact on the evidence presented, the imbalance resulting from the victim's non-party status can impact the fact-finder's ability to observe her demeanor and compare it to the accused's demeanor for credibility purposes. As a complaining witness, under the rule on witness sequestration, the victim is excluded from the courtroom with the exception of when she gives her testimony.⁴⁵⁸ As a party, she has a right to be present throughout the proceeding. Allowing the victim to remain in the room is arguably of most consistent benefit to the fact-finder, who has more opportunity to observe the victim as well as the accused and to draw conclusions regarding credibility based on a wider range of circumstances, reactions and behaviors. The concern animating the rule on witnesses—that a complaining witness's presence in the courtroom, where she can hear the other witness's testimony, may cause her to change her own testimony if she is recalled to the witness stand⁴⁵⁹—also gets to the issue of the reliability of her account from the fact-finder's perspective. However, the fact that the accused is also a witness who is asked to testify as to his version of the events, and he is not excluded, makes this concern less compelling.

Having the alleged victim present throughout a proceeding is of most consistent benefit to the fact-finders because fact-finders are entitled to draw inferences based on demeanor,⁴⁶⁰ and the victim cannot always be assured that they will draw the inferences that she wants them to draw. Nevertheless, there could be substantial benefits to the victim from being in the room throughout the proceeding, in terms of equalizing her status with that of the alleged assailant. Most significantly, by being present throughout the proceeding, a victim can make sure that her humanity is before the fact-finder as much as the accused's humanity is. Discrimination and unequal treatment is often enabled by dehumanizing the target of the discrimination.⁴⁶¹ The alleged victim and alleged perpetrator are more likely to be treated equally if they are both present throughout the proceeding and the fact-finders are not able to forget that both of them are real people.

The fact-finders' awareness of both the alleged victim's and alleged perpetrator's humanity also can have important, positive implications for the victim's health and well-being. It can be a difficult experience as a victim to have one's honesty and credibility called into question—to find oneself “on trial” through no fault of one's own—and this is inevitably what fact-finders in these cases have to do in order to do their jobs. But to

458. 75 AM. JUR. 2D Trial §§ 176–77.

459. *Id.*

460. 58 AM. JUR. 2D Trial §306.

461. See e.g., Stanford University, Discrimination Against Blacks Linked To Dehumanization, Study Finds, SCIENCE DAILY, Feb. 8, 2008, available at <http://www.sciencedaily.com/releases/2008/02/080207163811.htm>.

have this happen when the procedures are, in fact, inequitable, can lead victims to characterize the experience as “re-victimizing.”⁴⁶² Moreover, experiencing sexual violence is a very disempowering experience. Therefore, minimizing a survivor’s control over the process and not providing victims with advocates whose loyalty and obligation is to the survivor rather than the community or the state can also feel re-victimizing.⁴⁶³ Procedures that do not allow a survivor any control over decisions such as how her case is presented, what evidence may be protected via privilege, and whether she can remain in the room for the entire proceeding are unnecessary strains to put on her and may lead to complaints and lawsuits against the institution.⁴⁶⁴

These strains are unnecessary because many of these procedural approaches are used to advance goals that, as Edward Stoner indicates, are simply inapplicable in the student disciplinary context. Certainly precedents such as *Lopez* and its progeny characterize suspension and expulsion as deprivations of the liberty and property of students (at public institutions, where the government is involved and the Fourteenth Amendment is therefore applicable). However, as Stoner also notes and the due process precedents implicitly acknowledge, these deprivations of liberty and property are less onerous than to the sentences that can be ordered for criminal defendants, including, for sex offenses, significant jail time, and potential requirements to register as a sex offender. High standards of proof, the interest of the community/state as represented by the prosecutor, the treatment of the victim as a complaining witness, and unequal rights to discovery and disclosures of evidence are all procedural protections provided in the criminal context because the defendant could go to jail if found guilty. Given that institutions cannot send students to jail, these procedures must have a different purpose to be justified. If the goal is to treat all students, including the student victims, equally, then procedures that lead to the victim being treated unequally are unnecessary, unjustified and, given the state of the law applicable to these cases, unwise.

V. RECONCEIVING INSTITUTIONAL RESPONSES TO ORDINARY AND EXTRAORDINARY CAMPUS VIOLENCE

Cumulatively, the liabilities facing colleges and universities, the advice of experts coming from a variety of perspectives on student peer violence, the possible links between peer sexual violence and institution shootings,

462. Dieringer, *supra* note 175.

463. BEYOND THE CRIMINAL JUSTICE SYSTEM, *supra* note 17, at 224, 363.

464. See Dieringer, *supra* note 175; Security On Campus, Inc., Security On Campus Alleges Georgetown University Silences, Violates Rights Of Campus Rape Victims, http://www.securityoncampus.org/index.php?option=com_content&view=article&id=182:soc-alleges-georgetown-silence-rape-victims&catid=1:soc-news&Itemid=79 (last visited April 14, 2009).

and the disconnect between these phenomena and what colleges and universities are actually doing calls for a major reconception of our institutional responses to both “ordinary” and “extraordinary” campus violence. Although it is critically important to address both kinds of violence, the disturbing frequency of peer sexual violence adds both urgency and opportunity to the project in that case. In addition, as already stated, evidence suggests that addressing the problems in the case of peer sexual violence may well help address the problems of school shootings. For these reasons, changing and adjusting our systems related to peer sexual violence should be a top priority, and one we can use to develop approaches to apply to campus violence such as mass shootings. Therefore, this article concludes with some recommendations for how to adopt better practices that align more with what the experts advise, as well as for how to bring our institutional responses into compliance with the law. It also includes recommendations that may be particularly useful in responding to extraordinary violence.

Most critically, we need to take victims’ needs as our starting point in crafting our responses to peer sexual violence, an approach which complies with the law and with best practices. The epidemic nature of peer sexual violence on campus, the overwhelming non-reporting of this violence, and the cycle of non-reporting and violence perpetuation lead to one overwhelming conclusion: we *need* victims to come forward and report. If we even hope to address, reduce and eliminate the violence, we must keep in mind the victim’s “veto power” and what the exercise of that veto power could say about our responses and processes. The fact that 90% of campus sexual violence survivors are exercising their veto demonstrates that we are not taking their needs into sufficient consideration when crafting our responses.

Another look at Professor Beloof’s list of what non-reporting signifies generally about survivors’ views about a particular response suggests some particular steps to take in this area. That list includes “the victim’s desire to retain privacy; the victim’s concern about participating in a system that may do [her] more harm than good; the inability of the system to effectively solve many crimes . . .; the inconvenience to the victim; the victim’s lack of participation, control, and influence in the process; or the victim’s rejection of the model of retributive justice.”⁴⁶⁵ In conjunction with the case law and the advice of advocates such as the VRLC, this list suggests that institutions should provide centralized and well-known victims’ advocates, “de-criminalize” student disciplinary proceedings, and create and give survivors easy access to “interim measures.” Such measures can help institutions begin the necessary cultural shifts required to respond effectively to both ordinary violence and to extraordinary

465. Beloof, *supra* note 430, at 306.

violence.

A. Protecting Survivors' Privacy: the Importance of a Central, Well-Known Institutional Advocate

Privacy concerns and to some extent “the victim’s lack of participation, control, and influence in the process”⁴⁶⁶ suggest the need for several measures, especially since experience suggests that privacy is one of the areas over which survivors are most concerned with maintaining control.⁴⁶⁷ First, schools need to provide a central and well-known on-campus victims’ advocate and service provider. This person should be charged with assisting the victim in a comprehensive fashion that is protected at all times with a confidentiality privilege that the survivor holds and the advocate must honor. Such an advocate is central to maximizing a survivor’s privacy. Because the advocate is a centralized and well-known reporting point, if a student goes to the advocate, the student minimizes the number of times and people to whom she must tell her story. The advocate can have a student referred to her from another office, refer the student out to other on- or off-campus resources, or contact those offices on behalf of a student. Moreover, the advocate is required to keep the survivor’s story confidential, so the student need not worry about finding another appropriate confidential place to report. Finally, the advocate plays a key role in meeting many of victims’ other needs, a point which is developed in more detail below.

As the NIJ study found, privacy and a sense of control are also assisted by having multiple reporting options, including anonymous reporting, whereby a victim may note an incident “for the record” and not take any further action, but hold open the possibility of reporting more formally later.⁴⁶⁸ In addition, third parties may report violence anonymously. While it can be done in other ways, it is helpful to have a central advocate in this case as well, since having a central repository for anonymous reports makes it easier to avoid any double reporting.

A student’s decision to go through a formal complaint process, involving an investigation and a hearing, can often risk her privacy and control over disclosures. As VRLC attorney Kathryn Reardon explains, “During investigations, private facts about the occurrence of the assault and the students involved are disclosed to outside parties. College campuses are sheltered, highly social environments. Through the spread of personal information and rumors, the hostile environment is not only prolonged, but

466. *Id.*

467. BEYOND THE CRIMINAL JUSTICE SYSTEM, *supra* note 17, at 11; *see also* Reardon, *supra* note 96, at 402.

468. KARJANE ET AL., *supra* note 386, at 133.

becomes contagious.”⁴⁶⁹ Furthermore, once word gets out, the VRLC’s experience is that the community response can be “toxic,” “with some students choosing loyalty to the victim and others to the assailant.”⁴⁷⁰ In light of these dynamics, an advocate can play an important role in alerting campus authorities to the possibility of this toxic environment occurring, making sure that all information about the case is kept under lock and key, and informing any witnesses that they may not discuss the case outside of the formal proceedings.⁴⁷¹

B. Minimizing the Chances of Revictimization by the Process:
Disciplinary Procedures that Are Fair and Equitable

Proceeding down Professor Beloof’s list, to a certain extent the issues of “the victim’s concern about participating in a system that may do them more harm than good; . . . [and] the victim’s lack of participation, control, and influence in the process” collectively lead to several recommendations related to disciplinary proceedings.⁴⁷² First and foremost, student disciplinary proceedings must be “de-criminalized.” Because the central idea of a criminal proceeding is that it involves two main interests, the individual defendant’s and the state’s, it does not acknowledge or protect the rights of the victim. Criminalizing these procedures not only goes against the educational goal of creating good environments in which students live and learn, but, in the case of peer sexual violence in particular, it also puts an institution at greater risk for liability under Title IX and the Clery Act. To add insult to injury, it does not even keep up with reforms in the criminal justice system.

The first step towards de-criminalization is to change the survivor’s overall status in the proceeding. Survivors should be given full party status in disciplinary proceedings, particularly during the fact-finding stage of the proceeding. Colleges and universities should dispense with the prosecution model entirely, since a prosecutor represents the interests of the institution and thus is not structurally in a position to be victim-centered. Instead, the accuser and the accused should have equal opportunities and equal protections in presenting their cases and be able to control the presentation of those cases as much as possible. The institution’s interest is arguably sufficiently represented in such a proceeding by the hearing board fact-finders. After all, the hearing board fulfills the institution’s two main goals: to determine what happened; and, if what happened went against the rules that the institution has created to maintain a good living and learning environment, to decide how to deter such violations in the future. If there

469. Reardon, *supra* note 96, at 408.

470. BEYOND THE CRIMINAL JUSTICE SYSTEM, *supra* note 17, at 224.

471. *Id.* at 225.

472. Beloof, *supra* note 430, at 306.

is a need for the institution to have an advocate for its goals and perspective, it could be given independent party status. Since, however, the institution is unlikely to have a unique perspective that will aid fact-finding in peer sexual violence cases characterized by few or no witnesses, this status ought to be limited to the sanctioning stage of the proceeding.

Giving the accuser full party status will help ensure that accuser and accused will have substantially similar procedural rights in the proceeding. Equal rights to be present throughout the proceedings will be available to both survivor and alleged assailant because they are both parties. Should either party decide that s/he would like to have a more limited role in the process and not be present throughout the proceeding, that decision will be in that party's control.

In the case of peer sexual violence, the accuser's and accused student's rights should include a right to an advocate who can actively represent the students in the case. This is one of the rare areas where the experts disagree, with college and university attorneys such as Edward Stoner disagreeing with student victims' rights advocates like Kathryn Reardon. Stoner's model code contemplates a proceeding where both students represent themselves, whereas Reardon and her colleagues at the VRLC express concern about a survivor having to cross-examine and be cross-examined by the person she says victimized her. Stoner's model contemplates indirect questioning,⁴⁷³ so that students would not have to directly cross-examine or be cross-examined, but the VRLC's experience indicates that direct questioning may be the method more in use.⁴⁷⁴ In addition, the VRLC believes that student survivors will be deterred from using processes requiring them to be their own advocate in proceedings dealing with a traumatic experience.⁴⁷⁵ The VRLC also points out the myriad ways that an advocate can assist a student outside of the hearing itself, including with investigation, negotiating with the accused's representative and making sure the survivor's privacy is protected.⁴⁷⁶ Finally, although Stoner's model takes into consideration the case law regarding accused students' due process rights in concluding that the law does not require that institutions provide or allow a student's attorney or adviser to actively represent the student, it does not consider the effect of Title IX. As Kathryn Reardon indicates, requiring a student survivor to present her own case and allowing her accused assailant to cross-examine her, even through the hearing board, may actually perpetuate a hostile environment.⁴⁷⁷

473. Stoner & Lowery, *supra* note 426, at 43.

474. Reardon, *supra* note 96, at 412; BEYOND THE CRIMINAL JUSTICE SYSTEM, *supra* note 17, at 223.

475. *Id.*

476. BEYOND THE CRIMINAL JUSTICE SYSTEM, *supra* note 17, at 219–23.

477. *Id.* at 219–23.

There are many ways to provide both students with in-house advocates in such proceedings. For instance, students may be given the option of choosing an advocate from the campus community or bringing in their own advocate, at their own expense. The existence of an in-house victims' advocate mentioned in Section VA above can give survivors the option to ask the advocate to play this role, since presumably the advocate is already familiar with the case. However, any other member of the community may volunteer to serve the role of advocate for either student and could be trained in advance to do so. Another method could be to identify particular advocates for both the accuser and the accused and, again, to make sure that they either already have the knowledge and competence to take on this role, or to train them to do so. Again, having an in-house victims' advocate would give a college or university the option of having this person play that role.

Although colleges and universities may not have a prosecutorial-type interest in the fact-finding portion of a case of peer sexual violence, they do have some interests in the fact-finding stage. Institutions may wish to keep the adversarialness of the process to a minimum and to address the difficulties of keeping disciplinary matters private in communities with dynamics like those mentioned above. The school also generally has an interest in accurate fact-finding and optimal evidence collection, as well as avoiding a proceeding that requires a victim to ask her friends questions like "What do you remember from the night I was raped? Did you see anything unusual? Why didn't you warn me?"⁴⁷⁸ For these reasons, investigations and evidence collection should be conducted primarily by the institution. Once collected, all evidence can then be placed in a file and copies of the entire file given to both parties at the same time so they may prepare their cases for the hearing. Any witnesses or evidence not present in the file may not be considered and disputes over evidentiary matters may be directed to the school, not the other party. Such an approach to evidence collection and disclosure can also help keep aggressive/zealous advocacy tactics to a minimum and address some of the institution's concern about the possible increase in such tactics due to active participation by advocates in the proceeding.

C. Reducing Negative Educational Impact and Meeting Victims' Immediate Needs: "Interim" Measures

Returning again to Professor Beloof's list, "the victim's concern about participating in a system that may do them more harm than good; the inability of the system to effectively solve many crimes . . .; the inconvenience to the victim; . . . [and] the victim's rejection of the model of

478. Reardon, *supra* note 96, at 408.

retributive justice”⁴⁷⁹ also suggest that schools should be willing and able to take measures outside of and in addition to disciplinary proceedings. Such measures will reduce the negative educational impact that survivors experience following an assault. For instance, a college or university can help the victim alleviate the “inconvenience” of avoiding places where the assailant might be by issuing a stay away order.

Given that sexual violence victims’ needs, especially in the first 6 months following the violence, tend to be basic needs that are unlikely to be addressed through a disciplinary proceeding,⁴⁸⁰ if institutions wish to encourage reporting they must have a mechanism for addressing those immediate needs. In addition, it must be acknowledged that some—indeed, most—survivors may not wish to go through a disciplinary proceeding at all, for any or all of the reasons mentioned in the Beloof quote above, as well as a number of additional reasons. An institution’s ability to provide “interim” measures such as adjustments to courses and housing can at least meet survivors’ immediate needs, even if they have little confidence that more formal proceedings will effectively solve the crime or if they reject the system entirely.

In addition, providing interim measures, which appear to be required by law anyway, can help reassure the victim that “participating in a system will [*not*] do them more harm than good.”⁴⁸¹ If the system is both capable of addressing immediate, basic needs like coursework, housing and safety planning, and capable of addressing “higher” needs such as justice, survivors will be more likely to use it in some way and possibly even encouraged to use the mechanism of disciplinary procedures. If they do decide to pursue a disciplinary proceeding, interim measures also serve the institution’s interests more directly. Interim measures can help ensure that the health of both students is as good as possible as they go into a disciplinary proceeding, which is inevitably difficult for both students involved. From a fact-finding perspective, it adds to the reliability of the proceeding if both parties are as equally fit as possible to present evidence.

Many schools find it hard to balance between the accuser’s and accused’s rights in deciding how to structure interim measures. For instance, as the precedents in Part II above suggest, some institutions fail to separate victims and accused assailants by making alternative housing and academic arrangements, issuing stay-away orders, etc. The justification for this failure, especially when it involves requiring the accused student to make adjustments, is often that the accused student has merely been charged and that requiring him to make adjustments prior to a determination of responsibility would be unfair.⁴⁸² This attitude exists

479. Beloof, *supra* note 430, at 306.

480. See BEYOND THE CRIMINAL JUSTICE SYSTEM, *supra* note 17, at 6.

481. Beloof, *supra* note 430, at 306.

482. Kelly v. Yale Univ., NO. 3:01-CV-1591 (JCH), 2003 U.S. Dist. LEXIS 4543,

despite the mandate of the Clery Act that institutions take such measures⁴⁸³ and the guidance of OCR that the measures minimize the burden on the victim.⁴⁸⁴

This persistence is an example of schools being influenced by criminal concepts (e.g. “innocent until proven guilty”), rather than structuring their responses to “[t]reat . . . all students with *equal* care, concern, dignity, and fairness,” and remembering that “student victims are just as important as the student who allegedly misbehaved.”⁴⁸⁵ A refusal to separate the alleged victim and alleged perpetrator to avoid inconvenience to the accused, or to effect a separation only if the accuser agrees to make adjustments, no matter how onerous, is to stay focused exclusively on the needs of “the student who allegedly misbehaved” and to discount those of the victim. There is no question that in these types of circumstances, it may be impossible to treat both students absolutely equally. Someone must move and endure whatever hardships come along with the adjustment. Nevertheless, there are ways to act as reasonably and as fairly as possible given the totality of the circumstances, taking into consideration such factors as who can most afford to move (e.g. the students share a class that is a requirement for one but an elective for the other) and whose health can handle a move (i.e. if the victim is suffering from physical effects of the violence or Post Traumatic Stress Disorder, the upheaval of changing her residence may not be a viable option for her).

D. Paying Attention to Victim/Survivors: Some Suggestions for “Extraordinary” Cases

Given the connections between school shootings and gender-based violence discussed in Part I.B. above, focusing on and addressing common factors between the two types of violence may be the most effective way to address them both. Therefore, institutions must develop methods for changing school cultures that are hyper-masculine and support gender-based violence. It is critically important to this endeavor to take steps such as those already suggested to bring as much of the violence into the light of day as possible and to send a message that the institution will not tolerate such violence. However, cultural change will also require broad-based education and training on topics ranging from treating others with basic levels of civility and respect, to intervening in rape culture, to developing healthy forms of masculinity. This recommendation adds still more force to the first recommendation of having an “in-house” expert on peer sexual violence, since that person can help provide such education and training

*11–12 (D. Conn. Mar. 26, 2003).

483. 20 U.S.C. § 1092 (f)(8)(B)(vii) (2006).

484. REVISED GUIDANCE, *supra* note 133, at 16.

485. Stoner & Lowery, *supra* note 419, at 7.

and bring in or coordinate other experts to assist. Since cultural change is a big job, more than one expert would be ideal, if not necessary. For instance, creating or increasing staffing for a women's resource center, increasing the faculty in women's, men's and gender studies, and similar methods could assist in achieving this goal.

At a more mundane and perhaps more doable level, the central principle of considering the needs and rights of student victims has the potential to be as applicable to the extraordinary mass shooting context as it is to the ordinary student discipline one. For one thing, paying attention to victims has great potential to sensitize school officials to warning signs and lower-level misconduct, both committed by a potential school shooter or against the potential shooter. For another, while there may have been many attempts to profile school shooters after the shootings, applying those profiles to predict who future shooters might be is highly problematic and ripe for discrimination. Paying attention to the needs of victims gets away from focusing exclusively on the potential shooter and from the impossible task of predicting who is a shooter and who isn't prior to a shooting. Instead, paying attention to victims' needs focuses the institution on what the student has already done, not what he might do, and on the impact those actions have had on others. If Virginia Tech had taken more seriously the effect of Seung-Hui Cho's behavior in class on the other students, some of whom stopped attending class for fear of Cho,⁴⁸⁶ or if it had stopped his classmates from laughing at and telling Cho to "go back to China" when he read aloud in class,⁴⁸⁷ would Cho have slipped through the cracks as he did? While it is impossible to say for sure, it may be that if the institution had paid attention to either victim/victims,⁴⁸⁸ Cho would more likely have been caught in the campus safety-net.

This mundane point is in fact reflected in a significant subset of the Title IX cases discussed in Part II above. All of these cases involve harassment, usually of boys but sometimes of girls, on the basis of gender stereotypes and perceived homosexuality. All describe institutional conditions eerily reminiscent of Michael Kimmel's analysis of the "jockocracies" of

486. VIRGINIA TECH REVIEW PANEL, *supra* note 2, at 43.

487. Kimmel, *supra* note 60 at 73.

488. While it may seem somewhat hyperbolic to call Cho or the other students "victims" of these classroom behaviors, hostile environments are often made up of many "microinequities" that collectively add up to a serious negative impact on a student's education. See Microinequity, <http://en.wikipedia.org/wiki/Microinequity> (last visited January 20, 2009). In addition, Cho's violent reaction to his classmates certainly indicated that he felt victimized by such treatment, and some commentators suggest that he was a victim of mobbing, which involves the accumulation of numerous humiliations which, in total, can lead to a toxic environment, illness, depression, suicide, and, in rare cases, rampage shootings. See Kenneth Westhues, *Mobbing and the Virginia Tech Massacre*, <http://www.arts.uwaterloo.ca/~kwesthue/vtmassacre.htm> (last visited April 14, 2009).

Columbine and Virginia Tech.⁴⁸⁹ In each case, the plaintiff was subjected to years of escalating harassment by multiple peer harassers, beginning with verbal epithets related to being gay or effeminate and usually culminating in severe physical or sexual assaults and the plaintiff leaving the school. For example, in *Brimfield Grade School*, a male student was hit repeatedly in the testicles for nearly a year by six male classmates, a practice of “sac stabbing” resulting in the boy’s having to undergo testicular surgery. When he returned to school he was hit again, breaking open the surgical incision, after which his parents withdrew him from school.⁴⁹⁰ In *Bruning v. Carroll Community School District*, three girls were harassed by three boys with whom they were initially friends over the course of 2 years, including being continually kicked, grabbed and poked in their buttocks and genitals, bitten and spat on, scratched on the neck with staples, and given “titty twisters.” Two of the three asked to transfer to alternative schools.⁴⁹¹ In *Seiwert*, plaintiff was withdrawn after 2 years of verbal and physical abuse, including death threats.⁴⁹² In *Vance*, for nearly 3 years the plaintiff received constant requests for sexual favors and was continually sexually touched and hit with books before she finally withdrew.⁴⁹³ In *James*, the plaintiff endured three years of physical and sexual assaults before his parents home-schooled him.⁴⁹⁴ In *Patterson*, the harassment lasted four years, with plaintiff being unable to return to school after a classmate forced him into a corner and rubbed his naked penis and scrotum on plaintiff’s neck and face while another classmate made sure plaintiff could not flee.⁴⁹⁵ Lastly, in *Theno*, the plaintiff left school after six years of largely verbal abuse that may have been kept in check by the plaintiff’s, a student of Tae Kwon Do, being able to defend himself.⁴⁹⁶

More important than the similarities between the student cultures in these cases and those of Columbine and Virginia Tech are the striking similarities in the behaviors of the teachers and school officials. In *Bruning*, *James*, *Seiwert*, *Vance*, and a final case, *Martin v. Swartz Creek Community Schools*, the schools did nothing or took ineffectual actions.⁴⁹⁷

489. Kimmel, *supra* note 60, at 78.

490. *Doe v. Brimfield Grade Sch.*, 552 F. Supp. 2d 816, 820 (C.D. Ill. 2008).

491. *Bruning v. Carroll Cmty. Sch. Dist.*, 486 F. Supp. 2d 892, 902–11 (N.D. Iowa 2007).

492. *Seiwert v. Spencer–Owen Cmty. Sch. Corp.*, 497 F. Supp. 2d 942, 953 (S.D. Ind. 2007).

493. *Vance v. Spencer County Pub. Sch. Dist.*, 231 F.3d 253, 256–57 (6th Cir. 2000).

494. *James v. Indep. Sch. Dist. No. 1–007*, 2008 U.S. Dist. LEXIS 82199, *1, *6 (W.D. Okla. Oct. 16, 2008).

495. *Patterson v. Hudson Area Sch.*, 551 F.3d 438, 439–44 (6th Cir. 2009).

496. *Theno v. Tonganoxie Unified Sch. Dist. No. 464*, 394 F. Supp. 2d at 1304–06 (D. Kan. 2005).

497. *Bruning v. Carroll Cmty. Sch. Dist.*, 486 F. Supp. 2d 892, 915–6 (N.D. Iowa 2007); *James*, 2008 U.S. Dist. LEXIS 82199, at *6; *Seiwert*, 497 F. Supp. 2d at 952;

In *Patterson*, *Theno*, and *Brimfield Grade School*, teachers and school officials did more than turn a blind eye; they actually supported the harassers. In *Brimfield Grade School*, after the last incident of “sac stabbing” ruptured plaintiff’s incision, he was told by his coach to “stick up for himself” and on another occasion “to stop acting like a little girl.”⁴⁹⁸ In *Patterson*, when plaintiff was physically assaulted by a female classmate, a teacher asked him in front of the full class how it felt to be hit by a girl.⁴⁹⁹ After plaintiff was sexually assaulted, his coach informed the team in a meeting at which plaintiff was present that “they should ‘not joke around with guys who can’t take a man joke.’”⁵⁰⁰ In *Theno*, most teachers and administrators did nothing, but the football coach laughed openly at harassment that he witnessed. The plaintiff in that case was often equally or more harshly punished by the administration for fights resulting from the harassment.⁵⁰¹

The success of the plaintiffs in these cases is startling. In the review of post-*Davis* Title IX cases undertaken for this article, all of the plaintiffs from schools with cultures similar to Michael Kimmel’s characterizations of Columbine and Virginia Tech have reached a jury or the jury’s favorable verdict was allowed to stand. This success rate shows that the law is already reflecting a key recommendation of this paper: that proper responses to peer sexual violence should be developed both for their own sake and to help create proper responses to school shootings. Title IX, a statute clearly designed to benefit girls, is now giving boys who are harassed one of their best options for compelling institutions to address the student cultures that give rise to that harassment. One can only hope that this trend will encourage future victims to go to court rather than the gun store.

VI. CONCLUSION

As this article was submitted for publication, the Supreme Court had just ruled unanimously in *Fitzgerald v. Barnstable School Committee*,⁵⁰² a case involving peer sexual violence,⁵⁰³ that plaintiffs may pursue both Title IX and constitutional claims under Section 1983 against certain institutions and institution officials for sex discrimination.⁵⁰⁴ While discussion of

Vance, 231 F.3d at 262; *Martin v. Swartz Creek Cmty. Schs.*, 419 F. Supp. 2d 967, 974 (E.D. Mich. 2006).

498. *Doe v. Brimfield Grade Sch.*, 552 F. Supp. 2d 816, 823 (C.D. Ill. 2008).

499. *Patterson*, 2009 U.S. App. LEXIS 25, at *4.

500. *Id.* at *12.

501. *Theno*, 394 F. Supp. 2d at 1310–11.

502. 129 S. Ct. 788 (2009)

503. *Id.* at 792.

504. Note that the Section 1983 claims only apply to schools and officials that are state actors or entities. *Id.* at 793.

Section 1983 and this recent case is outside the scope of this paper, this decision unquestionably gives survivors of peer sexual violence another way to hold schools liable. As such, it adds to the already significant alignment between the interests of institutions, victims, third party community members, and even perpetrators to reduce such violence.

Given this alignment, schools and all campus community members should be concerned about indications of a very significant campus peer sexual violence problem, including a cycle of non-reporting and perpetuation of violence. In addition, connections and similarities between campus peer sexual violence and more unusual forms of violence such as mass shootings make addressing this problem even more urgent. Breaking the cycle by encouraging reporting should therefore be a top priority, and encouraging reporting requires us to think carefully about the needs of victims of violence. We must address those needs and take them as a starting point for our institutional responses if we wish to avoid victims using their "veto" power and rejecting our systems altogether.

Despite what we now know about campus violence and the alignment of interests in addressing and deterring that violence, many institutions and their response systems are still living in the days when student misconduct was dominated by such offenses as plagiarism. The processes created for such misconduct do not fit current problems of campus violence. Therefore, schools must change their response systems and, given the need for survivors' assistance in reporting and warning of future violence, institutions must begin the process by paying attention to survivors' rights, needs, and concerns.

DISABILITY LAW ISSUES FOR HIGH RISK STUDENTS: ADDRESSING VIOLENCE AND DISRUPTION

LAURA ROTHSTEIN*

In December 2008, a study was released in the Archives of General Psychiatry indicating that almost half of college-age students (19–25) had a psychiatric disorder in the past year.¹ Not all of these students would be “disabled” within federal discrimination law. In addition, very few will be disruptive, and even fewer will be violent.

Nonetheless, the extremely rare events at Virginia Tech, Appalachian Law School, and Northern Illinois University have created public awareness and concern about these issues. The awareness and concern are good. Overreaction and inappropriate responses (some of which may have unintended consequences of making situations worse), however, are not good.

Although some of the initial reactions to Virginia Tech were troubling—media pundits suggesting that everyone on campus should share everything with everyone about students who are troubling—later thoughtful response has brought constructive and positive guidance. This direction recognizes the importance of balancing the interests of the individual students with mental health problems with the interests of others in the community.

One of the major legal issues relevant to developing policies to respond to these concerns is disability discrimination law, including Section 504 of the Rehabilitation Act² and the Americans with Disabilities Act.³ The

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1. Carlos Blanco, Mayumi Okuda, Crystal Wright, Deborah S. Hasin, Bridget F. Grant, Shang-Min Liu, & Mark Olfson, *Mental Health of College Students and Their Non-College-Attending Peers: Results from the National Epidemiologic Study on Alcohol and Related Conditions*, 65 ARCH. GEN. PSYCHIATRY 1429, 1429 (2008), available at <http://archpsyc.ama-assn.org/cgi/content/full/65/12/1429>.

2. Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794 (2006).

3. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2000), amended by ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3533

1979 Supreme Court decision in *Southeastern Community College v. Davis*,⁴ determined that to be otherwise qualified a student with a disability must be able to carry out the essential functions of the program in spite of the disability. Since then a significant body of case law has developed. It is clear that “direct threat” is a factor in determining whether a student is otherwise qualified and institutions may take that into account.⁵

Recent judicial attention in the higher education context has applied disability discrimination law to higher education students with substance abuse and/or mental health problems.⁶ Courts have addressed questions of whether the individual meets the definition of being disabled, what accommodations are required, and whether behavior and conduct deficiencies mean that the students are not otherwise qualified. The recent violence on college and university campuses has highlighted a number of additional issues including confidentiality, privacy, duty to warn, and discipline. There are many areas where legal guidance is unclear or inconsistent. This makes it challenging for higher education administrators. Nevertheless, it is important to begin with knowledge of the legal requirements, and to develop policies that take those issues into account. Disability discrimination law is one of the key areas to understand in developing these policies.

In examining these issues, it is essential to recognize the myths and stereotypes about mental illness. Not all violent or disruptive behavior is caused by individuals with mental illness. And people with mental illness should not be presumed to be violent or disruptive.⁷ This is important in developing sound and proactive policies, practices, and procedures

(2008).

4. 442 U.S. 397 (1979). For a discussion of the history and background of this case and its impact, see Laura Rothstein, *The Story of Southeastern Community College v. Davis: The Prequel to the Television Series “ER”*, in *EDUCATION LAW STORIES* (Michael A. Olivas & Ronna Greff Schneider eds., 2008).

5. See, e.g., *Sch. Bd. v. Arline*, 480 U.S. 273 (1987) (holding a teacher is not otherwise qualified if her condition poses a direct threat to the health or safety of children attending the school); *McKenzie v. Benton*, 388 F.3d 1342 (10th Cir. 2004) (allowing a jury to consider whether sheriff’s reemployment would pose a “direct threat” to others due to the dangerous nature of law enforcement); *Robertson v. Neuromedical Ctr.*, 161 F.3d 292 (5th Cir. 1998) (holding that where doctor’s neurological condition posed a direct threat to his patients, ADA does not require an employer to accommodate where the individual poses a direct threat to others).

6. LAURA ROTHSTEIN & JULIA ROTHSTEIN, *DISABILITIES AND THE LAW* (3d ed. 2006 & Supp. 2008) [hereinafter *DISABILITIES AND THE LAW*].

7. Eric B. Elbogen & Salley C. Johnson, *Study Examines Association Between Mental Illness and Violent Behavior*, 66 *ARCHIVES OF GENERAL PSYCHIATRY* 152, 152–161 (2009), available at <http://www.medicalnewstoday.com/articles/137657.php> (indicating that violence is more common among those with mental illness only when they have other risk factors such as substance abuse, physical abuse, a recent divorce, unemployment or victimization, history of juvenile detention, or being younger, male or lower-income).

preventing violence and disruption. This article draws upon the author's previous research on these issues⁸ and focuses on the importance of developing thoughtful and careful policies that take disability issues and confidentiality into account while balancing the interests of others. The unintended consequences of some policies (even though they comply with disability discrimination requirements) should be considered. In particular the professional licensing authorities for law and medicine in most states require students and the professional school to report mental health treatment and diagnosis, which may deter at least some students from getting needed treatment.

The first part of the article addresses the disability discrimination legal mandates that apply to how individuals with mental health problems are treated in various contexts where concerns about campus violence and/or disruption are at issue. It addresses what we *must* do or what we *must not* do within the law and its current interpretations. Part II briefly provides some thoughts about what we *can* do. What resources are available to assist educators responsible for providing a safe and positive learning environment for other students, faculty, and staff, and for assuring that the interests of others (professional certification boards, employers, and individuals being served in clinical or internship settings) are appropriately balanced? Part III applies the legal limits to various points in higher education settings in focusing on what we *should* do, i.e., what ethically should we consider in balancing the interests of the individual with mental health challenges and others who might be affected by conduct that relates to those challenges?

To make this analysis less abstract, the following are three scenarios that might help to highlight a range of situations that could create a potential for disruption or violence (including self-injury).

Listless Lisa. Lisa has been coming to class late or not at all. When she comes she falls asleep often. Her assignments are late. The behavior did not occur in the first semester, and has only recently begun in the spring semester. Some of her roommates and classmates have noticed alcohol on her breath and have seen her getting drunk at social events.

Irritating Ian. Ian shows up frequently to faculty offices without appointments to ask professors questions about everything. He sends daily emails (sometimes more than one a day) to confirm the next day's

8. Laura Rothstein, *Millennials and Disability Law: Revisiting Southeastern Community College v. Davis*, 34 J.C. & U.L. 169 (2007) [hereinafter Rothstein, *Millennials and Disabilities Law*]; Laura Rothstein, *Law Students and Lawyers with Mental Health and Substance Abuse Problems: Protecting the Public and the Individual*, 69 U. PITT. L. REV. 531 (2008) [hereinafter Rothstein, *Law Students and Lawyers*]; Laura F. Rothstein, *The Employer's Duty to Accommodate Performance and Conduct Deficiencies of Individuals with Mental Impairments Under Disability Discrimination Laws*, 47 SYRACUSE L. REV. 931 (1997) [hereinafter Rothstein, *Employer's Duty to Accommodate*].

assignment or to find out if he understands the reading. He does not pick up on social cues from others and invades their physical space. In class, he often shouts out answers and sometimes ridicules or argues with other students excessively. On one occasion, he screamed an obscenity at a professor, saying the professor should be ashamed and fired for the way he was treating students.

Scary Sam. Although there was nothing in the admissions application to indicate this, Sam has a record of serious mental illness and had been hospitalized as a result of attempted suicide in the previous year. Sam's roommate just learned about this from Sam's sister, who is also a student on campus. Sam is attending law school, and is planning to enroll in the domestic violence clinic program, where under supervision he will be representing clients.

I. WHAT WE *MUST* DO—LEGAL FRAMEWORK: SECTION 504 OF THE REHABILITATION ACT AND THE AMERICANS WITH DISABILITIES ACT

A. Basic Nondiscrimination Mandate

Federal policy prohibiting discrimination on the basis of disability began in 1973 with the enactment of the Rehabilitation Act of 1973.⁹ Section 504 of the Rehabilitation Act¹⁰ (hereinafter "Section 504") prohibits programs that receive federal financial assistance from discriminating on the basis of disability against otherwise qualified individuals with disabilities. It further requires that these programs provide reasonable accommodations as part of the nondiscrimination prohibition. Because virtually all higher education institutions receive federal financial assistance through student loan programs and/or federal grants, these educational programs have been subject to Section 504 for over 35 years.

More recent extension of these mandates came with the 1990 passage of the Americans with Disabilities Act (hereinafter "ADA"),¹¹ which extends coverage to a much broader sphere. Title I of the ADA¹² applies to employers with 15 or more employees, so this affects the career services and placement offices within higher education. Title II¹³ applies to state and local governmental programs, which means that state licensing boards are covered. In addition, state and local governmentally operated higher education institutions are covered by Title II. Title III¹⁴ applies to private

9. 29 U.S.C. § 701–796 (2006).

10. 29 U.S.C. § 794 (2006).

11. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2006), *amended by* ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3533 (2008).

12. 42 U.S.C. §§ 12111–12117.

13. 42 U.S.C. §§ 12131–12165.

14. 42 U.S.C. §§ 12181–12189.

providers of twelve categories of public accommodations (including places of education as one of the specific categories). Major testing services (LSAC, MCAT, ACT, SAT, etc.) are also covered by Title III, so their testing and other services must ensure nondiscrimination and reasonable accommodations.¹⁵

B. Who Is Covered?—What Is a Disability?

Individuals claiming discriminatory treatment or failure to provide reasonable accommodation are only protected if they meet the definition of being disabled. The definitions of coverage under Section 504 and the ADA are virtually identical. Amendments to both statutes in 2008 clarified some issues of definition that had significant application to individuals with mental health problems.

The basic three-prong definition from the ADA protects individuals who have a physical or mental impairment which substantially limits one or more major life activities, have a record of such an impairment, or who are regarded as having such an impairment.¹⁶

The individual must not only meet this definition to be covered, but the individual must also be a qualified individual with a disability, which means that he or she can carry out the essential functions of the program, with or without reasonable accommodation.¹⁷ To be otherwise qualified also means that the individual must not be a direct threat to self or others.¹⁸

At first, courts rarely found that individuals with mental illness or related challenges were not considered “disabled” within the definition of the statute. Instead, courts focused on issues of whether the individuals were otherwise qualified and/or whether reasonable accommodations should be provided. As a result, cases involving students and individuals in the employment setting with mental health problems, such as eating disorders, depression, bipolar disorder, schizophrenia, and other conditions (as well as cases in other contexts) were not summarily dismissed on a basis that the

15. 42 U.S.C. § 12189.

16. 42 U.S.C. § 12102(2); *see* 29 U.S.C. § 705(21)(B) (2006). For a description of the mental disabilities that might be covered, and how these conditions manifest themselves, *see* Sande L. Buhai, *Practice Makes Perfect: Reasonable Accommodation of Law Students with Disabilities in Clinical Placements*, 36 SAN DIEGO L. REV. 137, 155–63 (1999). This discussion describes mental illness or emotional disturbance (which could include bipolar disorder/manic depression, clinical depression, schizophrenia, and anxiety disorders), epilepsy, autism, and cognitive communication disorders (including learning disabilities), alcohol and substance abuse, and autism. It describes various behaviors that can be a consequence of the condition and the fact that in some instances a condition such as a learning disability is “compounded by other psychological problems such as low self-esteem and depression.” *Id.* at 161.

17. *Se. Cmty. Coll. v. Davis*, 442 U.S. 397, 407 (1979).

18. 42 U.S.C. § 12113(b). Although this section refers only to employment, it can be expected to apply to higher education as well.

individual was not covered.

Supreme Court decisions in 1999 and 2002, however, changed that presumption. In the 1999 cases (often referred to as the *Sutton* trilogy),¹⁹ the Supreme Court narrowed coverage by holding that a determination of whether an individual is substantially limited should take into account mitigating measures, such as medication. If an individual's medication resulted in the individual not being substantially limited (as long as the individual was on the medication), then he or she was not covered. Thus, that person could not even request a reasonable accommodation that might ensure the ability to carry out the program requirements. In 2002, in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*,²⁰ the Court interpreted the definition of "major life activities" by holding that they were those that are "central to most people's daily lives."²¹

While these narrowing rulings had the greatest impact on employment, they also affected how students in higher education and applicants for professional licensing were protected. If the individual is not even considered to be a person with a disability, the individual cannot claim discrimination or denial of a reasonable accommodation, or even that the individual is otherwise qualified.

On January 1, 2009, Congressional amendments responding to these narrowed interpretations took effect. The ADA Amendments Act of 2008 (hereinafter "ADAAA") amended the definition of coverage to clarify that the intent of the ADA was to provide for broad coverage.²² The definition's amendment applies to the definition of coverage for both the ADA and the Rehabilitation Act. The ADAAA findings and purposes specifically state that the Supreme Court had narrowed the definition in a way that was not intended by Congress.²³

The definition of disability basically remains the same as noted above, but defines major life activities in the statute, where previously these were found in regulations. Major life activities continue to not be limited to the listed categories. Congress added a number of major life activities to the

19. *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999) (holding that a truck driver with correctable monocular vision was not disabled); *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516 (1999) (holding that an individual with high blood pressure controlled by medication was not disabled); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) (holding that individuals whose vision was corrected with eyeglasses or contact lenses were not disabled). The Court remanded that same day a professional licensing case in which an individual with a learning disability was disputing the denial of protection by the New York bar examining authorities. They had denied her accommodations on that basis. See *N.Y. State Bd. of Law Exam'rs v. Bartlett*, 527 U.S. 1031 (1999).

20. 534 U.S. 184 (2002).

21. *Id.* at 201.

22. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3533 (2008).

23. *Id.*

example list. Some of these additions and clarifications are significant for coverage of individuals with mental health challenges. They include “caring for oneself, performing manual tasks, seeing, hearing, *eating*, *sleeping*, walking, standing, lifting, bending, speaking, breathing, *learning*, reading, *concentrating*, *thinking*, *communicating*, and *working*.”²⁴

Congress further clarified the definition in ways that might also be important to individuals with mental health challenges. “Regarded as having such an impairment” means:

An individual meets the requirement of “being regarded as having such an impairment” if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.²⁵

Furthermore, Congress provided that “disability” should be interpreted with the following rules of construction:

(A) The definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act.

(B) The term “substantially limits” shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008.

(C) An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.

(D) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

(E) (i) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as . . . medication . . . [or] reasonable accommodations . . . [or] learned behavioral or adaptive neurological modifications.²⁶

Taken together, these amendments provide support for a finding of coverage for students with mental health challenges ranging from eating and sleep disorders and depression to bipolar disorder and paranoid schizophrenia. After the ADAAA, even those students whose medication or therapy mitigates the impairment may still be covered. This is significant in light of the December 2008 study indicating that almost half of college-age students (19–25) whether attending college or not, had a

24. ADA Amendments Act of 2008 § 4(a) (emphasis added).

25. *Id.*

26. *Id.*

psychiatric disorder in the past year.²⁷ Not all of the conditions described in the study, however, would be considered disabilities within Section 504 and the ADA. The condition must still substantially limit a major life activity. The broader definition of “major life activity” to specifically include activities such as sleeping, learning, concentrating, communicating, thinking, and working, however, makes it more likely that an individual with mental health problems would be covered.

Higher education cases had not often included defenses raised by the institutions that the individual was not “disabled,” applying the *Sutton/Toyota* limiting language. These defenses were primarily raised in employment discrimination cases.²⁸ Some recent higher education cases, however, have hinted at a trend in that direction.²⁹ The 2008 amendments will likely curb this trend.

27. Blanco, Okuda, Wright, Hasin, Grant, Liu, & Olfson, *supra* note 1, at 1429, 1433 table 2. Of this population fewer than 25% sought treatment during that time. The most prevalent conditions among college students were alcohol use (about 20%) and personality disorders (about 18%). *Id.* at 1433–35.

28. See *DISABILITIES AND THE LAW*, *supra* note 6, at § 4:9 (“*Mental Impairments*”) for citations to cases in the employment setting where mental illnesses were not covered.

29. *Marlon v. W. New England Coll.*, 124 F. App’x 15 (1st Cir. 2005) (finding a law school did not discriminate against student with carpal tunnel because of insufficient evidence as to whether student was regarded as disabled); *Swanson v. Univ. of Cincinnati*, 268 F.3d 307 (6th Cir. 2001) (finding a resident with major depression was not substantially limited in ability to perform major life activities because difficulty with concentrating was temporary and alleviated by medication; communications problems were short-term, caused by medication; and there were only a few episodes); *Davis v. Univ. of N.C.*, 263 F.3d 95 (4th Cir. 2001) (finding a student with multiple personality disorder not disabled because she was not perceived as unable to perform broad range of jobs); *McGuinness v. Univ. of N.M. Sch. of Med.*, 170 F.3d 974 (10th Cir. 1998) (holding test anxiety was not a disability for a medical student); *Morgan v. Nova Se. Univ., Inc.*, No. 07-60759 CIV, 2007 WL 2320589 (S.D. Fla. Aug. 10, 2007) (finding a student with seizure disorder not disabled because medication controlled her seizures); *Brettler v. Purdue Univ.*, 408 F. Supp. 2d 640 (N.D. Ind. 2006) (holding a vague narcoleptic condition claim not sufficient to demonstrate disability); *Dixon v. Univ. of Cincinnati*, No. 1:04-CV-558, 2005 WL 2709628 (S.D. Ohio Oct. 21, 2005) (holding a graduate student must establish that conditions of bipolar disorder, dyslexia, and attention deficit disorder substantially limit major life activities); Letter from Carroll, Office for Civil Rights, U.S. Dep’t of Educ., to Stewart Steiner, President, Genesee Cmty. Coll., 33 Nat’l Disability L. Rep. (LRP) ¶ 199 (Mar. 8, 2006) [hereinafter OCR Letter to Genesee Cmty. Coll.] (concluding a student asked to leave campus meeting by security guard did not demonstrate he was perceived as disabled); Letter from Rachel Pomerantz, Office for Civil Rights, U.S. Dep’t of Educ., to Joanne Romanzi Herne, Dir., Crouse Hosp. Sch. of Nursing, 35 Nat’l Disability L. Rep. (LRP) ¶ 125 (Apr. 4, 2006) (concluding a record did not support that university dismissed nursing school student with anxiety because she was perceived as being impaired; student dismissed because she performed unsafely). *But see Bartlett v. N.Y. State Bd. of Law Exam’rs*, 226 F.3d 69 (2d Cir. 2000) (holding a bar exam applicant with learning disability who had self accommodated was still substantially limited in major life activity of reading). For additional case citations, see *DISABILITIES AND THE LAW*, *supra* note 6, at § 3:2.

Even with the new amendments, however, students will be required to provide appropriate documentation of the disability. This documentation will need to be appropriately current, to be prepared by a qualified professional, and to identify not only the disability, but the accommodations that relate specifically to that condition.³⁰

Applying these definitional requirements to the scenarios, it is possible that Lisa has depression, resulting from a situation such as a boyfriend breakup, bad grades, or financial problems. Her drinking may exacerbate her problems. It is not certain that her condition would meet the definition of a disability, which would mean that she would not be legally entitled to protection against discrimination or to receive reasonable accommodations. There might be situations, however, where she is regarded as having an impairment.

Ian may have ADD, ADHD, or Asperger's Syndrome, or he may just be annoying. Even if he is diagnosed with one of those conditions, it is not a disability unless it is a substantial impairment to a major life activity. Sam does have a record of a serious mental illness, and would probably meet the definition of at least having a record of a disability.

C. Otherwise qualified

Having a disability is only the first step to demonstrating protection against an adverse action taken by an institution of higher education. The individual must also be otherwise qualified. That means that the individual must be able to carry out the essential requirements of the program, with or without reasonable accommodation.³¹ Institutions of higher education are given substantial deference in determining what those requirements are.

The key case establishing the standard for determining whether something is a fundamental alteration is *Wynne v. Tufts University School of Medicine*.³² The court, in addressing whether a medical school must provide multiple choice exams in an alternative format, held that the burden is on the institution to demonstrate that "relevant officials within the institution considered alternative means, their feasibility, cost and effect on the academic program, and came to a rationally justifiable conclusion that the available alternatives would result either in lowering academic standards or requiring substantial program alteration."³³ Although this is not a Supreme Court decision, the reasoning has been adopted by numerous courts in subsequent decisions.

The ADAAA incorporated judicial interpretations and the Section 504

30. See DISABILITIES AND THE LAW, *supra* note 6, at § 3:20; *supra* notes 22–26 and accompanying text.

31. See Rothstein, *supra* note 4.

32. 932 F.2d 19 (1st Cir. 1991).

33. *Id.* at 26.

regulatory language into the statutory language itself, and applied this language to both Section 504 and the ADA. The statute now provides that:

Nothing in this Act alters the provision of section 302(b)(2)(A)(ii), specifying that reasonable modifications in policies, practices, or procedures shall be required, unless an entity can demonstrate that making such modifications in policies, practices, or procedures, including academic requirements in postsecondary education, would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations involved.³⁴

This means that institutions can apply academic, attendance, honesty, behavior, and other standards to students with disabilities. Students who pose a direct threat to self or others may also be found not to be otherwise qualified.³⁵ Courts and the Office for Civil Rights have been quite consistent in upholding academic requirements even where deficiencies might relate to a mental impairment.³⁶ Additional decisions and guidance

34. ADA Amendments Act of 2008, § 6(a)(1), Pub. L. No. 110-325, 122 Stat. 3533 (2008).

35. *Mershon v. St. Louis Univ.*, 442 F.3d 1069 (8th Cir. 2006) (addressing student with disability banned from campus because of threat of violence against a professor); Letter from L. Thomas Close, Branch Chief, Compliance Enforcement Division, Office for Civil Rights, Region VIII, U.S. Dep't of Educ., to Robert C. Huddleston, President, Dixie College, 8 Nat'l Disability L. Rep. (LRP) ¶ 31 (Nov. 20, 1995) (finding no ADA/Section 504 violation in expelling a student because of stalking and harassing a professor; expulsion was not because of perceived mental disability but because she posed a threat); Letter from Michael E. Gallagher, Office for Civil Rights, U.S. Dep't of Educ., to Jean Scott, President, Marietta Coll., 31 Nat'l Disability L. Rep. (LRP) ¶ 23 (July 26, 2005) [hereinafter OCR Letter to Marietta Coll.] (concluding dismissal of student threatening suicide violated Section 504 because decision was not sufficiently based on a high probability of substantial harm); Letter from Frederick S. Head, Office for Civil Rights, U.S. Dep't of Educ., to Don LeDuc, President and Dean, Thomas M. Cooley Law Sch., 31 Nat'l Disability L. Rep. (LRP) ¶ 24 (July 26, 2005) (addressing student dismissed because of alcohol related conduct); Letter from the Office for Civil Rights, U.S. Dep't of Educ., to John Makdisi, Dean, St. Thomas Univ., Sch. of Law, 23 Nat'l Disability L. Rep. (LRP) ¶ 160 (Dec. 19, 2001) (upholding dismissal of law student with bipolar disorder who threatened to "blow up the legal writing department").

36. *See, e.g.*, *Amir v. St. Louis Univ.*, 184 F.3d 1017 (8th Cir. 1999) (refusing to grant request to change supervisors of medical student with obsessive compulsive disorder who was later dismissed for academic deficiencies because request was unreasonable); *Zukle v. Regents of the Univ. of Cal.*, 166 F.3d 1041 (9th Cir. 1999) (finding a medical student with learning disabilities did not meet academic standards); *Kaltenberger v. Ohio Coll. of Podiatric Med.*, 162 F.3d 432 (6th Cir. 1998) (finding a graduate student with ADHD did not meet academic standards); *Sherman v. Black*, 510 F. Supp. 2d 193 (E.D.N.Y. 2007) (addressing a student with depression and academic deficiencies dismissed from medical school); *Pacella v. Tufts Univ. Sch. of Dental Med.*, 66 F. Supp. 2d 234 (D. Mass. 1999) (addressing a student dismissed because of poor academic performance); Letter from Lara, Office for Civil Rights, U.S. Dep't of Educ., to Jay Gogue, Chancellor, Univ. of Houston System, President, Univ. of Houston, 32 Nat'l Disability L. Rep. (LRP) ¶ 74 (Apr. 8, 2005) (concluding Graduate

indicate support for upholding attendance requirements.³⁷ Honesty and character are often found to be valid bases for adverse actions as well.³⁸

Of particular concern for students with mental health conditions are expectations relating to behavior, including disruption, threats, suicide, and violence.³⁹ As noted in an earlier article on this topic:

Misconduct and misbehavior may make a student “not otherwise qualified,” thereby removing any need to be excused even if caused by a mental impairment or a substance abuse problem Situations where a student exhibits self destructive behaviors, such as threats of suicide, eating disorders, engaging in substance or alcohol abuse, and engaging in antisocial behaviors, are difficult situations for the college or university. While there may not be a threat to others, there can be a

School of Social Work could dismiss student with bipolar disorder who failed exam and student was not treated differently than other students); Letter from Muhammad, Office for Civil Rights, U.S. Dep’t of Educ., to Barry W. Russell, President, Midlands Technical Coll., 32 Nat’l Disability L. Rep. (LRP) ¶ 124 (OCR 2005) (deciding student’s academic performance, not bipolar disorder, was basis for dismissal since student had received poor evaluations on clinical assignments).

37. Toledo v. Sánchez, 454 F.3d 24 (1st Cir. 2006) (upholding attendance requirements for student with schizoaffective disorder).

38. Sherman v. Black, 510 F. Supp. 2d 193 (E.D.N.Y. 2007) (involving forgery of faculty initials on an official form); Bhatt v. Univ. of Vt., 958 A.2d 637 (Vt. 2008) (involving falsifying academic records). For a discussion of these cases, see discussion *infra* Part I.D.

39. Fedorov v. Bd. of Regents for the Univ. of Ga., 194 F. Supp. 2d 1378 (S.D. Ga. 2002) (concluding dental student’s drug addiction was a threat to patients); El Kouni v. Trs., 169 F. Supp. 2d 1 (D. Mass. 2001) (finding medical student disqualified because of offensive and disrupting behavior); Letter from Carolyn F. Lazaris, Office for Civil Rights, U.S. Dep’t of Educ., to Jack M. Wilson, President, Univ. of Mass. Dartmouth, 35 Nat’l Disability L. Rep. (LRP) ¶ 75 (June 13, 2006) (addressing student with disability suspended from university housing because she assaulted another student); Letter from Rhonda Raines, Office for Civil Rights, U.S. Dep’t of Educ., to Nancy L. Zimpher, President, Univ. of Cincinnati, 35 Nat’l Disability L. Rep. (LRP) ¶ 151 (Apr. 20, 2006) [hereinafter OCR Letter to Univ. of Cincinnati] (involving a student with bipolar disorder dismissed from medical school; a refusal to readmit; and an issue of whether there was objective individualized inquiry about ability continue); Letter from Robert E. Scott, Office for Civil Rights, U.S. Dep’t of Educ., to Frances L. White, President, Coll. of Marin, 35 Nat’l Disability L. Rep. (LRP) ¶ 177 (June 30, 2006) (addressing student with psychological impairment dismissed from college because of disruptive behavior who had repeatedly been warned); Letter from Denise Thompson, Office for Civil Rights, U.S. Dep’t of Educ., to Sherry L. Hoppe, President, Austin Peay State University, 36 Nat’l Disability L. Rep. (LRP) ¶ 156 (Apr. 1, 2006) (finding student dismissed for making veiled threats against professor and posting web site with profanity targeted at another professor was not denied academic adjustments and had not provided necessary documentation of paranoid personality disorder in timely manner); *see also* Kaminsky v. St. Louis Univ. Sch. of Med., No. 4:05CV1112 CDP, 2006 WL 2376232 (E.D. Mo. Aug. 16, 2006) (holding medical school did not have to rehire resident doctor with psychosis who was dismissed for unprofessional and illegal conduct even if it was related to his conditions).

disruption or interference with the educational process in the classroom or in a campus living situation. Such behavior may disturb and disrupt roommates, other students, instructors, and even patients in health care settings. For example, a roommate who feels the need to keep a constant eye on a student who is suicidal will be disrupted in the educational process. The college or university's focus should be on documenting the destructive behavior and determining the best course of action based on the exhibited behavior. One of the challenges is to identify what code of conduct or disciplinary code is being violated by such behaviors and to ensure that college and university policies that address that behavior are in place.⁴⁰

It is important to recognize that where adverse action is taken against a student with a mental impairment, it should be based on individualized and objective standards, not on prejudice and stereotypes.⁴¹ In making decisions about qualifications, it should also be noted that courts are particularly deferential to health care professional training programs because of the importance of patient safety.⁴²

With respect to Lisa, Ian, and Sam, even if they can make the case that they have disabilities, they must still be otherwise qualified. Lisa's deficiencies with respect to attendance and deadlines may mean that she is not otherwise qualified. If other students are excused from meeting these expectations, however, she might be able to demonstrate discriminatory treatment. Ian's classroom disruptions are relevant in determining qualifications. It may be necessary for the instructor to set clear boundaries and guidelines. There may be a campus disciplinary code violation because of his inappropriate obscenities and comments to the professor. Sam may be scary, but without any specific behavior or conduct, negative treatment could be problematic. The law school, however, has understandable concerns about his handling client cases, but third-hand

40. Rothstein, *Millennials and Disability Law*, *supra* note 8, at 183–84.

41. OCR Letter to Marietta Coll., *supra* note 35 (concluding dismissal of student based on concern about suicide must be based on individualized and objective assessment); Letter from Pearthree, Office for Civil Rights, U.S. Dep't of Educ., to Bernard O'Connor, President, DeSales Univ., 32 Nat'l Disability L. Rep. (LRP) ¶ 150 (Feb. 17, 2005) (concluding removal of student from campus housing based on direct threat concerns was not based on individualized and objective assessment); OCR Letter to Univ. of Cincinnati, *supra* note 39 (concluding university did not make individualized objective determination about student's ability to return to medical school after bipolar disorder was diagnosed); *see also* Complaint, Nott v. George Washington Univ., No. 05-8503 (D.C. Super. Ct. 2005), *available at* <http://www.bazelon.org/issues/education/incourt/nott/nottcomplaint.pdf> (involving student's challenge to being barred from campus and suspended after officials learned he had been hospitalized with depression).

42. For cases involving health care professionals and disabilities, see *DISABILITIES AND THE LAW*, *supra* note 6, at § 10:3.

knowledge of a past suicide attempt would make it difficult for them to act on that basis.

D. “Known” Disability

An important requirement for protection from discrimination, including receiving reasonable accommodation, is that the individual must make the disability known.⁴³ This is significant because unlike the presumption in elementary and secondary education, where the Individuals with Disabilities Education Act⁴⁴ (IDEA) requires the educational agency to be proactive in identifying students who need special education, to pay for most educational testing, and to provide extensive services, the burden in higher education is on the individual to self identify.

The individual must also provide and pay for appropriate documentation when seeking an accommodation.⁴⁵ If the institution does not know that a student has a disability, it will not be required to excuse misconduct or failure to meet essential requirements. There is, however, some precedent for requiring the disability to be a consideration as a factor in disciplinary or academic dismissal situations, but the student may have to justify why the disability was not made known sooner. For a student with a mental

43. *Shamonsky v. Saint Luke’s Sch. of Nursing*, No. 07-1606, 2008 WL 724615 (E.D. Pa. Mar. 17, 2008) (finding school was not aware of nursing student’s learning disability which was diagnosed after dismissal for poor academic performance); OCR Letter to Genessee Cmty. Coll., *supra* note 29 (concluding student who was banned from campus after security concerns did not demonstrate that security guards knew he had a disability or suspect he had one, therefore no discrimination); Letter from Ann Moretto Cramer, Office for Civil Rights, U.S. Dep’t of Educ., to Marlene Springer, President, Coll. of Staten Island, 36 Nat’l Disability L. Rep. (LRP) ¶ 131 (Nov. 1, 2006) (concluding student responsible to provide adequate notice and documentation to justify academic adjustments or auxiliary aids); Letter from Gary D. Jackson, Office for Civil Rights, U.S. Dep’t of Educ., to Chatt G. Wright, President, Haw. Pac. Univ., 30 Nat’l Disability L. Rep. (LRP) ¶ 209 (Oct. 20, 2004) (finding student with PTSD had not requested accommodations for PTSD, only back injury); Letter from Nigro, Office for Civil Rights, U.S. Dep’t of Educ., to Evelyn E. Jorgenson, President, Moberly Area Cmty. Coll., 31 Nat’l Disability L. Rep. (LRP) ¶ 178 (Feb. 18, 2005) (concluding student must give notice of request for additional time on exams); Letter from Pollar, Office for Civil Rights, U.S. Dep’t of Educ., to Lawrence Schumacher, President, Nw. Bus. Coll., 31 Nat’l Disability L. Rep. (LRP) ¶ 252 (May 21, 2005) (finding student had not requested leave of absence in writing to accommodate post traumatic stress disorder).

44. 20 U.S.C. §§ 1400–82 (2006). For the details of the IDEA, see *DISABILITIES AND THE LAW*, *supra* note 6, at 91–263.

45. *See, e.g.*, Letter from Jackson, Office for Civil Rights, U.S. Dep’t of Educ. to Mike Metke, President, Lake Washington Technical Coll., 32 Nat’l Disability L. Rep. (LRP) ¶ 125 (OCR 2005) (concluding student’s documentation of PTSD, dysthymia, and depression did not provide medical documentation of macular degeneration); Letter to Fordham University, 32 Nat’l Disability L. Rep. (LRP) ¶ 49 (OCR 2005) (concluding student had not provided documentation to justify readmission); *see generally* *DISABILITIES AND THE LAW*, *supra* note 6.

impairment, justifications may include stigma, failure to recognize the condition, denial, and fear of adverse actions.⁴⁶

An example of a case in which some of these issues were addressed is *Sherman v. Black*.⁴⁷ The case involved a medical student who was dismissed from medical school due to academic deficiencies.⁴⁸ The Department of Education's Office for Civil Rights (OCR) investigation of his complaint that he had been dismissed because of his psychiatric disability found no violation of Section 504 or the ADA.⁴⁹ In the litigation that followed, the court noted the OCR's finding that the student had not provided documentation of disabilities to justify academic adjustments.⁵⁰ The OCR finding was that he only notified the "Promotions Committee that his poor evaluations were due primarily to his having informed two faculty members that he was repeating the Medicine Clerkship."⁵¹ The documentation did not include any "explanation for his forgery of a faculty supervisor's initials on an official . . . form."⁵²

A similar situation arose in *Bhatt v. University of Vermont*.⁵³ A medical student with Tourette's Syndrome did not succeed in his claim that his expulsion violated state disability discrimination law, modeled on the ADA.⁵⁴ The state supreme court held that the expulsion was based on falsifying surgical rotation evaluations and his undergraduate record and that the medical school had dismissed him for dishonest behavior, not the disability.⁵⁵ His claim that his Tourette's Syndrome and a related obsessive-behavior disorder caused his misconduct did not persuade the court.⁵⁶ The expulsion was upheld because it was based on the misconduct that had occurred before any claim of disability or request for accommodations.⁵⁷ The court recognized the legitimate concern about the potential risk to the public where there were questions of competency, which included character issues.

Applying these standards to Lisa, Ian, and Sam, any adverse disciplinary or other action by the institution for higher education could be discriminatory if the institution knew of the disability (or perhaps regarded the student as disabled), and took the action because of that status, rather

46. For a discussion of this issue, see Rothstein, *Employer's Duty to Accommodate*, *supra* note 8.

47. 510 F. Supp. 2d 193 (E.D.N.Y. 2007).

48. *Id.* at 195.

49. *Id.*

50. *Id.*

51. *Id.* at 195–96.

52. *Id.* at 196.

53. 958 A.2d 637 (Vt. 2008).

54. *Id.* at 638.

55. *Id.* at 644.

56. *Id.*

57. *Id.*

than because of a violation of a disciplinary or behavior requirement.

E. Reasonable Accommodation

Both Section 504 and the ADA require institutions to provide reasonable accommodations.⁵⁸ The model regulations pursuant to Section 504⁵⁹ provide some guidance on this. The key case interpreting the reasonable accommodation requirement is *Wynne v. Tufts University School of Medicine*.⁶⁰ The current language under the ADAAA and its application to Section 504 and the ADA was discussed previously.

Specifically, the regulations on postsecondary education provide for academic adjustments including “changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion of degree requirements, and adaptation of the manner in which specific courses are conducted.”⁶¹ The regulations, however, specify, “Academic requirements that the recipient can demonstrate are essential to the instruction being pursued by such student or to any directly related licensing requirement will not be regarded as discriminatory”⁶² Courts and the OCR have considered a number of accommodations. These include classroom attendance,⁶³ change in length of degree requirement,⁶⁴ and class or exam scheduling modification to accommodate the effects of medication side effects or therapy sessions.⁶⁵ There has been substantial deference to the institution, so long as these requirements are applied to all students similarly situated. OCR opinions indicate deference to the institution regarding requests to waive or

58. The ADA specifically provides for reasonable accommodations in the statute and regulations. 42 U.S.C. § 12112(b)(5) (2000); 29 C.F.R. § 1630.11 (2008). The Rehabilitation Act requirements are found in case law and regulations. See 34 C.F.R. § 104.12 (2008) (employment); 34 C.F.R. § 104.44 (2008) (postsecondary institutions). For cases, see *DISABILITIES AND THE LAW*, *supra* note 6, at §§ 3:8–3:10, 4:20, 5:5–5:6.

59. OCR Nondiscrimination on the Basis of Handicap in Programs or Activities Receiving Federal Financial Assistance, 34 C.F.R. § 104 (2008).

60. 932 F.2d 19 (1st Cir. 1991).

61. OCR Academic Adjustments, 34 C.F.R. § 104.44(a) (2008).

62. *Id.*

63. See *supra* note 37 and accompanying text.

64. *Long v. Howard Univ.*, 439 F. Supp. 2d 68 (D.D.C. 2006) (denying summary judgment to student claiming refusal to allow him to return where student’s work was well beyond the period of doctoral candidacy).

65. *Constantine v. Rectors & Visitors*, 411 F.3d 474, 478 (4th Cir. 2005) (holding law student with intractable migraine syndrome requesting additional time on exam could pursue claim; no Eleventh Amendment immunity); *Toledo v. Univ. of P.R.*, No. 01-1980(SEC), 2008 WL 189561 (D.P.R. Jan. 18, 2008) (holding factual questions remained as to whether student with schizoaffective disorder who claimed that professors taunted him, urged him to quit, refused accommodations, and gave failing grades was qualified with accommodations and denying claims against professors individually).

substitute courses.⁶⁶ A change in faculty assignment has not been raised often. It may be that future cases will take guidance from the employment setting. A number of judicial decisions indicate that a change of supervisor as an accommodation is not likely to be granted.⁶⁷

Issues that have received little attention are whether the institution has an obligation to inform internship or externship placements of the need for accommodations and who bears the responsibility for funding any accommodations. One of the few cases on this issue is *Herzog v. Loyola College in Maryland, Inc.*⁶⁸ The case involved a student with attention deficit hyperactivity disorder (ADHD) who had been placed in an internship.⁶⁹ The student claimed that the college should have informed the placement supervisor of the need to provide accommodations.⁷⁰ The student had behavior deficiencies in the setting, and claimed they related to his condition.⁷¹ The funding issue is more likely to arise in a situation such as a student with a hearing impairment requiring a sign language interpreter where the placement supervisor would have to address the responsibility of providing and paying for such an accommodation. A student with a mental health problem may have other issues that relate to accommodations, such as scheduling to address side effects of medication.

One article that discusses accommodations for law students in various clinical settings (free legal clinic, judicial clerkship, and district attorney's office) provides a number of useful examples about accommodations for conditions including autism, dyslexia, and obsessive compulsive disorder.⁷²

66. See, e.g., Letter from Carroll, Office for Civil Rights, U.S. Dep't of Educ., to Russell K. Hotzler, President, N.Y. Coll. of Tech., 33 Nat'l Disability L. Rep. (LRP) ¶ 173 (Feb. 9, 2006) (concluding math requirement not waived because medical documentation did not justify exemption from demonstration calculations on assignments or exams); Letter from Shields, Office of Civil Rights, U.S. Dep't of Educ., to Anita Schonberger, Assoc. Gen. Counsel, Univ. of W. Fla., 33 Nat'l Disability L. Rep. (LRP) ¶ 25 (Apr. 1, 2005) (concluding institution does not have to waive essential course and other academic requirements); see also *Guckenberger v. Boston Univ.*, 8 F. Supp. 2d 82, 91 (D. Mass. 1998) (finding that waiving foreign language would be fundamental alteration of program). This case received substantial attention in the higher education national media and was one of the first cases addressing waiver of courses. For additional cases, see DISABILITIES AND THE LAW, *supra* note 6, at § 3:9.

67. See, e.g., *Amir v. St. Louis Univ.*, No. 4:95CV02132-DJS, 12 Nat'l Disability L. Rep. (LRP) ¶ 151 (E.D. Mo. Feb. 19, 1998) (finding unreasonable a request to change supervisors for medical student with obsessive compulsive disorder who was dismissed because of academic deficiencies), *aff'd in part and rev'd in part* 184 F.3d 1017 (8th Cir. 1999) (finding that a student was disabled under the ADA and a request for accommodations was not reasonable, but recognizing basis for claim of retaliation and remanding for further findings on that issue); see also DISABILITIES AND THE LAW, *supra* note 6, at 462 & n.41.

68. No. RDB-07-02416, 2008 WL 2622840, at *5 (D. Md. May 1, 2008).

69. *Id.* at *4.

70. *Id.* at *5.

71. *Id.* at *3-*4.

72. Buhai, *supra* note 16, at 186-94.

The article, however, does not provide guidance on how the supervising attorney would be apprised of the need for accommodations and whether the law school or the clinical setting supervisor would be responsible for any costs. This is not surprising in light of the lack of guidance on this from regulations or judicial interpretation. This issue would be of concern with respect to Sam. The institution has indirect information about his mental health problems and his past suicide attempt, but it does not have specific information about anything that could create a danger or concern for clients or others in the law school or the clinic setting.

A new issue involves “comfort animals” as an accommodation.⁷³ In 2008, the Department of Justice issued draft regulations on this issue for Title II and Title III entities, which would include most institutions of higher education.⁷⁴ These proposed regulations address a number of topics.⁷⁵ One of the major areas addressed involves service animals.⁷⁶ This can be an issue for many students with mental health problems, who seek to have an accommodation of a “psychiatric service animal” or “comfort animal.” The proposals respond to concerns about the trend in “the use of wild or exotic animals, many of which are untrained, as service animals.”⁷⁷ The current regulations define service animals as “any guide dog, signal dog, or other animal.”⁷⁸ The need for greater clarity and a response to concerns prompted the proposals. The proposals specifically note the following:

[S]ome individuals and entities have assumed that the requirement that service animals must be individually trained to do work or carry out tasks excluded all persons with mental disabilities from having services animals. Others have assumed that any person with a psychiatric condition whose pet provided comfort to him or her was covered by the ADA. The Department believes that psychiatric service animals that are trained to do work or perform a task . . . for persons whose disability is covered by the ADA are protected by the Department’s present

73. Kelly Field, *These Student Requests Are a Different Animal*, CHRON. HIGHER EDUC. (Wash., D.C.), Oct. 13, 2006, at A30. This article discusses the confused state of law regarding animals providing comfort and companionship.

74. See Nondiscrimination on the Basis of Disability in State and Local Government Services, 73 Fed. Reg. 34,466 (June 17, 2008) (to be codified at 28 C.F.R. pt. 35); Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 73 Fed. Reg. 34,508 (June 17, 2008) (to be codified at 28 C.F.R. pt. 36).

75. These topics include barrier removal standards, ticketing practices for major concerts and similar events, access in recreation facilities, use of Segways® and other power driven devices in public areas, effective video communications standards, and access in prisons. See sources cited *supra* note 74.

76. 73 Fed. Reg. at 34,472–73, 34,477–81, 34,515–16, 34,520–22.

77. *Id.* at 34,472.

78. *Id.*

regulatory approach.

Psychiatric service animals can be trained to perform a variety of tasks that assist individuals with disabilities to detect the onset of psychiatric episodes and ameliorate their effects. Tasks performed . . . may include reminding the handler to take medicine; providing safety checks, or room searches, or turning on lights for persons with Post Traumatic Stress Disorder; interrupting self-mutilation by persons with dissociative identity disorders; and keeping disoriented individuals from danger.⁷⁹

The proposed regulations provide, “Animals whose sole function is to provide emotional support, comfort, therapy, companionship, therapeutic benefits, or promote of emotional well-being are not service animals.”⁸⁰ The proposals also provide for proposed training standards,⁸¹ and exclusion of “wild animals (including nonhuman primates born in captivity), reptiles, rabbits, farm animals (including any breed of horse, miniature horse, pony, pig, or goat), ferrets, amphibians, and rodents.”⁸² They also discuss tasks, documentation, and other issues.⁸³ If these regulations are approved, this could provide greater clarity to institutions of higher education faced with the trend by some students to be allowed to have “comfort animals” on campus. In the meantime, the reasonable accommodation analysis would still apply. This would mean that the extent an animal posed a direct threat, was disruptive, affected allergies, or posed other health or safety concerns to classmates and roommates could be taken into account in determining whether a requested accommodation of such an animal would be required. The student would still be required to demonstrate the existence of an ADA or Section 504 disability and the relationship of the accommodation to that condition.

One accommodation that has received inconclusive response by the courts and OCR is whether a student must be given a second chance when the student does not meet essential requirements, including conduct expectations. As noted previously, most decisions seem to indicate that where the disability was not made known, the institution has no obligation to give a second chance.⁸⁴ But what if the student is not aware of the

79. *Id.* at 34,473.

80. *Id.* at 34,478.

81. *Id.*

82. *Id.* at 34,478.

83. *Id.* at 34,478–79.

84. *Doe v. Vanderbilt Univ.*, No. 96-5561, 1997 WL 764421 (6th Cir. Nov. 26, 1997) (holding student with manic depression need not be readmitted to medical school because dismissal based on academic deficiencies and behavior problems); *Leacock v. Temple Univ. Sch. of Med.*, No. Civ.A. 97-7850, 1998 WL 1119866 (E.D. Pa. Nov. 25, 1998) (holding medical student with learning disability did not meet academic standards to continue since student had not made known the disability during first year or before dismissal); *Tips v. Regents*, 921 F. Supp. 1515 (N.D. Tex. 1996) (holding

condition because it has not been diagnosed?⁸⁵ Or if the student is justifiably concerned about privacy and confidentiality and possible stigma? Or if the student believes the institution should have known of the need to provide accommodations but did not do so?⁸⁶ There is some indication that the institutions must at least consider the effects of the disability in evaluating the student for readmission.⁸⁷ It is possible that Lisa does not realize that her serious depression is a disability that could be the basis for an accommodation, such as a leave of absence, or scheduling classes to take into account effects of medication she might be taking. Ian may know of his diagnosis of ADD, ADHD, or Asperger's, but not think it requires any accommodation until after a dismissal for his behavior toward the professor.

In situations where the institution may be willing to readmit, the decision may be affected by whether certain requirements can be placed on the student. In situations involving mental illness, the institution may want to require the student to be under treatment or at least require the treating physician to provide some type of "fitness for attendance" documentation. From the little guidance to date, there is some indication that where the readmission is granted, requirements relating to therapy are permissible, but that these decisions should be individualized.⁸⁸ For example, in *Michael M. v. Millikin University*, a student with obsessive compulsive disorder was withdrawn from the school after a panic attack episode.⁸⁹ In a

because graduate student in psychology with learning disability did not make her learning disability known nor request accommodations, no violation of ADA or Rehabilitation Act in the dismissal); *Bhatt v. Univ. of Vt.*, 958 A.2d 637 (Vt. 2008) (finding medical student with Tourette's Syndrome had not made known the condition or requested an accommodation before his dismissal); *see generally* Rothstein, *Employer's Duty to Accommodate*, *supra* note 8.

85. *Garcia v. State Univ. of N.Y. Health Scis. Ctr. at Brooklyn*, No. CV 97-4189(RR), 2000 WL 1469551 (E.D.N.Y. Aug. 21, 2000) (finding that a student was dismissed from medical school because of unsatisfactory academic performance since dismissal occurred before diagnosis was known).

86. *Gill v. Franklin Pierce Law Ctr.*, 899 F. Supp. 850, 856 (D.N.H. 1995) (finding that law student was not otherwise qualified under Section 504; finding student had not requested any accommodations; and rejecting claim that law school should have known he needed accommodations because of post-traumatic stress syndrome resulting from being the child of alcoholic parents).

87. Letter from Kenneth A. Mines, Regional Director, Office for Civil Rights, U.S. Dep't of Educ., to John T. Richardson, President, DePaul University, 4 Nat'l Disability L. Rep. (LRP) ¶ 157 (May 18, 1993) (concluding institution must at least consider effects of disability in evaluating student for readmission).

88. *Haight v. Hawaii Pac. Univ.*, No. 95-16810, 1997 WL 330835, at *1 (9th Cir. June 16, 1997) (mem.) (holding that where an institution was aware of behavior or performance deficiencies or where reasonable questions are raised after dismissal, institutions may have discretion to make readmission subject to conditions not applied to students in the initial admission process).

89. *Student With OCD Reinstated to Class After Agreeing to Therapy*, DISABILITY COMPLIANCE BULL., Apr. 23, 1998.

settlement agreement, the reenrollment was conditioned on receiving weekly therapy and compliance with medication regimes prescribed by a psychiatrist.⁹⁰

A 2008 report by the Jed Foundation provides some general guidance on this issue. The guide, *Student Mental Health and the Law: A Resource for Institutions of Higher Education* (“Jed Report”)⁹¹ notes the differing judicial response to whether conditional readmission based on mental health treatment is allowed.⁹² The report responds to the question of the permissibility of a higher education institution to “require a student with a disability to be assessed for risk of self-harm or harm toward others.”⁹³ It suggests that institutions are “not required to rely solely on the opinion of a mental health professional regarding a student’s readiness to return to or remain in school.”⁹⁴ The opinions of other professionals that are “fair, stereotype-free, and based on reasonably reliable information from objective sources” may be considered.⁹⁵ Although the legal standards are unclear, the report suggests, “Requiring treatment for a student whose disability-related behavior violates the conduct code, but does not rise to the level of a direct threat, as a condition of remaining in school may violate disability law.”⁹⁶

A recent case highlights the difference between the educational institution’s obligation in the K–12 setting and in higher education. The case of *Tylicki v. St. Onge*,⁹⁷ involved a community college student who had been suspended for behavioral problems, including a series of violent outbursts. The student requested a “manifestation hearing,” a procedure provided for under special education (IDEA) requirements whereby the K–12 school may be required to assess whether there is a relationship between the disability and the misconduct.⁹⁸ The court noted that such a requirement is not available or reasonable under the ADA or Section 504.⁹⁹ The court held that these statutes allow discipline for misconduct, even if it is related to a covered disability.¹⁰⁰ Notwithstanding this decision, there is an indication that institutions are expected to engage in interactive

90. *Id.*

91. JED FOUNDATION, *STUDENT MENTAL HEALTH AND THE LAW: A RESOURCE FOR INSTITUTIONS OF HIGHER EDUCATION* (2008), available at http://www.jedfoundation.org/assets/Programs/Program_downloads/StudentMentalHealth_Law_2008.pdf [hereinafter JED FOUND.].

92. *Id.* at 16–17.

93. *Id.* at 16.

94. *Id.*

95. *Id.*

96. *Id.* at 17.

97. 297 Fed. App’x 65 (2d Cir. 2008).

98. *Id.* at 67.

99. *Id.*

100. *Id.*

processes to determine whether an accommodation is reasonable.¹⁰¹

II. WHAT WE CAN DO—WHAT ARE PERMISSIBLE PRACTICES?

Disability discrimination law is the focus of this article, but laws relating to privacy (which are beyond the scope of this article) should also be taken into account.¹⁰² Applying the previous discussion of legal requirements under discrimination laws, institutions should review their practices with respect to the range of activities and assess whether they comply with legal mandates.

It should be noted that in many respects the legal framework is not entirely clear, either because there is no clear statutory and/or regulatory guidance or because there has been little judicial attention to these issues to clarify what is permissible. The discussion below, therefore, should be taken as only a broad perspective of the author. Educational institution administrators should generally seek the advice of the institution's counsel in making a determination about how to handle a specific situation, particularly where complex issues of violent or disruptive students are involved. This is important not only because the institution's counsel is in the best position to know about how that institution has interpreted federal requirements, but because there may be additional state legal requirements and/or institutional policies that are also relevant. Revisions of policy should be collaborative, including the institution's counsel, campus safety administrators, student affairs administrators, disability resource office personnel, campus counseling programs, and administrators in various academic units. Programs involving professional training affecting the public (medicine, nursing, law, teaching, etc.) may have special concerns relating to certification for licensing and internship and clinic programs that should be addressed for that program.

A. Admissions

During the Virginia Tech aftermath, some of the news commentators suggested that higher education institutions should get information about students' mental health treatment from their high schools before admitting any student. While this initial response may be understandable, it is not generally advisable for a number of reasons.¹⁰³

101. See, e.g., *Cutrer v. Bd of Sup'rs*, 429 F.3d 108, 113 (5th Cir. 2005); see also *Bhatt v. Univ. of Vt.*, 958 A.2d 637 (Vt. 2008) (noting student's situation was considered in disciplinary decision making, although he had not requested accommodation before the expulsion resulting from misconduct).

102. 73 Fed. Reg. 74,806 (Dec. 9, 2008).

103. In addition to the reasons discussed in this section, it should be noted that in many instances the student may not manifest certain conditions until early adulthood, so there would be no information to obtain from the school records. Such conditions may include the pressures of college and university, personal relationship stressors,

First, asking about mental health diagnosis and treatment in the admissions process could be viewed as an impermissible preadmissions inquiry about a disability.¹⁰⁴ It is permissible to request information about past behavior and conduct, such as a criminal record or academic dishonesty or dismissal because of disruptive behavior, because those inquiries relate to conduct, not status and diagnosis.

In addition to the legal questionability of diagnosis inquiries, there are confidentiality restrictions that may limit the permissibility of a secondary school from sending such records to a college or university or for a college or university to send those records to a graduate or professional program. Although the institution could request a waiver of access to student records, a student who knows that such records could be forwarded might well be deterred from seeking treatment.

It is not unusual, however, for a student to voluntarily raise a record of mental health treatment, particularly in applying to a graduate or professional program. This information might be placed in the student's permanent student record, and if so, like all student record information, care should be taken to ensure privacy and confidentiality and compliance with FERPA and HIPAA expectations.¹⁰⁵

It is the practice in medical programs and some other health care educational programs to require the admitted student to undergo a health examination to determine fitness, because there may be essential functions that require stamina, dexterity, and other physical attributes. Such practices must still be related to the program, and they are generally post-admission practices.¹⁰⁶

The admissions process can also be an opportunity to be proactive in ensuring that students who need accommodations for their mental health problems to self identify. By sending an outreach letter to all accepted students encouraging them to request accommodations as early as possible, issues such as whether the student is entitled to accommodations, the reasonableness of the requested accommodation, and identifying the

financial issues not relevant before college or university, and the developmental onset of certain mental illnesses. Students who are enrolling in college or university several years after high school may not have such records. Student record confidentiality requirements may also prevent sharing this information. Providing this information in the ordinary course of forwarding documentation of graduation and grades could often be unduly stigmatizing.

104. 34 C.F.R. § 104.42(c) (2008); *see also* DISABILITIES AND THE LAW, *supra* note 6, at § 3:5 (referencing cases on this issue).

105. For a general overview of student record privacy issues, see JED FOUND., *supra* note 91, at 7–11.

106. *See, e.g., Doe v. N.Y. Univ.*, 666 F.2d 761, 777 (2d Cir. 1981) (upholding the refusal to readmit a student with suicidal tendencies discovered during a post-admission health examination).

appropriate resources can be addressed at an early stage.¹⁰⁷ As noted previously, institutions are only required to provide accommodations to students who make known their disabilities. Accommodations needed for conditions such as depression might include class scheduling (to address medication side effects, for example), exam accommodations, and housing requests. These requests can then be referred to the disability resource center for documentation assessment and recommendations about appropriate reasonable accommodations.

There is little guidance to date on the college or university's obligation to act on information it does have about violent conduct and whether there is liability in such cases. In one of the few cases on this issue, a student had fatally stabbed another student, and there was a claim of negligent screening. The court denied summary judgment in *Butler v. Maharishi University of Management*,¹⁰⁸ where a university might have been on inquiry notice about a student's mental health and prior history of committing violent acts and thus could have been negligent in screening him for admission.

B. The Enrolled Student

Information about mental health status and related conduct can become an issue for the enrolled student. It can be a concern where the student has self identified in the admission process or during orientation, or where a faculty or staff member or another classmate identifies concern as part of the academic or extracurricular program.¹⁰⁹ It can be of particular concern for programs where the student is involved in clinical or externship experiences, such as student teaching, law school clinics, or medical school internships. Where members of the public may be affected, it is appropriate for an institution to take appropriate precautionary measures.

Where the enrolled student has identified a need for accommodations for ongoing mental health issues, such as class scheduling for medication for depression, bipolar disorder, or other mental conditions, the institution may be concerned about possible consequences to others, including both

107. See also JED FOUND., *supra* note 91, at 20.

108. 589 F. Supp. 2d 1150, 1169–70 (S.D. Iowa 2008).

109. The Jed Foundation suggests a practice of asking enrolled students to share information about their current or past mental health history and treatment This information . . . would be collected and maintained by the health/counseling center and remain confidential This may reduce . . . the number of urgent assessments that mental health professionals may need to make. College mental health providers may also want to engage in additional outreach to those incoming students who disclose a history of more serious mental health problems such as psychiatric hospitalizations or suicide attempts.

JED FOUND., *supra* note 91, at 20 (emphasis omitted). The Report recommends consultation with legal counsel before doing this. *Id.*

safety and disruption. Classmates or others may notice behavior that raises concerns. For example, a student may notice that a roommate or another student is not attending class or eating, or that personal hygiene is a serious problem. A faculty member may notice a student who falls asleep in class on a chronic basis. Or a student may indicate to others thoughts of suicide or threatening plans that raise concerns.

Whether it is self identified or observed by members of the community, the focus should be on behavior and conduct and on taking appropriate action based on that. As noted previously, students with disabilities can be held to the same conduct standards as other students, even if the misconduct relates to a mental impairment. The condition, however, might be a mitigating factor in determining the response, such as withdrawal from the institution or return after withdrawal. Withdrawing a student because of a perception of mental illness (not because of some specific behavior or conduct) could be a violation of Section 504 or the ADA because the action might be discrimination against someone who is "regarded as" or "perceived as" disabled.

The transfer of students from one institution to another can raise issues where the transferring institution has information about the student's mental health. This scenario raises the question of whether it is legally permissible to report this information. The other question to be addressed is whether there is an ethical responsibility for the transferring institution to advise the transferee institution about the potential of a transferring student's dangerous or disruptive conduct. There is little guidance on this issue. In practice the student seeking a transfer will grant the transferring institution the right to send any information in the student's record, which could include information on misconduct and even disability status. Even without this grant of access, there is probably a privilege to disclose in this type of setting. Although there is probably no violation of disability discrimination laws or even federal privacy laws in such situations, there may still be tort claims under state law for breach of confidentiality, libel and slander, invasion of privacy, and other claims. A discussion of these issues is beyond the scope of this article, but potential liability is one of the reasons institutions should take care in how they disclose confidential student information to others.¹¹⁰

Where institutions provide career services for students and refer students to employers, it can be a concern whether the institution has an obligation to report mental health issues or troubling behavior. A prospective employer is probably not a party with a privilege to receive information under privacy laws, so only if the student has waived access to information in the student record (and where the student knows or can know that mental

110. For a general discussion of this issue and citation to cases, see *DISABILITIES AND THE LAW*, *supra* note 6, at §3:21.

health information is in the record to be shared) should information on mental health treatment or even misconduct be reported to an employer by the institution. This does not apply to clinical or externship supervisors, and the legal guidance on this is less clear.¹¹¹ Perhaps the best way to ensure that the institution can advise a clinic or externship/internship supervisor about mental health issues of concern is by ensuring that the student has given permission for such information to be provided to the supervising program.

Two issues of importance for enrolled students should be mentioned at this point. First, is that the institution should ensure that sound policies, practices and procedures are not only in place, but also that they are accessible and communicated to the students who seek access or accommodations or wish to file a complaint or grievance. Second, institutions (including their faculty and staff members) should take care not to engage in any conduct that might be viewed as retaliatory against a student who seeks accommodations or who complains about lack of access or about other discrimination. There have been a number of OCR and judicial opinions in which it was determined that while the institution had not acted on the basis of disability discrimination, the lack of clear procedures needed to be addressed. There are also cases where no discrimination has been found, but the issue of retaliation remained for the court to address.¹¹²

C. Professional Certification

Because of the unique position of trust, the process of professional certification for the legal profession involves state boards requesting that law schools provide information on character and fitness. Many require the law school to provide information about mental health treatment and diagnosis. Although these questions are controversial, many courts have upheld their legality.¹¹³ Because the law school graduate must allow access to student records, law schools that provide such information are generally privileged to provide it.

For example, if a student received mental health counseling and that information is in the student record as the basis for the law school providing an accommodation (such as a leave of absence or a reduced

111. For a general discussion of accommodation of law students in clinical settings, see Buhai, *supra* note 16. The article discusses students with mental impairments specifically. *Id.* at 155–63.

112. See generally, DISABILITIES AND THE LAW, *supra* note 6.

113. *Clark v. Va. Bd. of Bar Exam'rs*, 880 F. Supp. 430 (E.D. Va. 1995). This case provides a detailed discussion of mental health history questions and a review of the status in other jurisdictions. For an excellent overview of this issue, see Stanley Herr, *Questioning the Questionnaires: Bar Admissions and Candidates with Disabilities*, 42 VILL. L. REV. 635 (1997).

course load), the law school administrator is expected to report that status. Any honor code violations or discipline for other misconduct (such as misbehavior as a result of substance abuse) must also be reported. The law school graduate will be asked a similar question in those states, so the student will have to self-report in any case. Although there is a strong indication that requiring the reporting of treatment and diagnosis is a deterrent to getting treatment,¹¹⁴ the practice continues.

There is little dispute that reporting misconduct (even if related to a disability) is not only appropriate, but should be done because of the interest of the public. Where other professional training programs, such as medicine, nursing, teaching, and other professions licensed by the state require reporting of mental health treatment, a similar issue arises. So, from a legal perspective, such reporting is probably permissible, not only because it is probably privileged, but also because the student or graduate has granted access to the student record.

III. WHAT WE *SHOULD* DO – BALANCING THE INTERESTS OF THE INDIVIDUAL AND OTHERS

Responsible and caring institutions will consider not only what is legally required or permitted, but also what they *should* do in the interest of the student. At the same time, institutions must balance the individual student's interest with others in the community. Institutions that play a role in licensing or where students are providing clinical services under supervision must also take into account the interests of those being served by those they certify. As noted in the previous section, administrators should always consult university counsel in resolving how to handle various situations at their institution.

Institutions of higher education have traditionally taken on a role of providing a positive and nurturing environment for learning for each student. Challenges arise when the behavior or conduct of one student adversely affects the learning or safety of other students. Interests of others, such as professional licensing agencies; clinic, externships, and internship supervisors (and members of the public to whom services are provided through these programs); and prospective employers can also raise challenges. For example, if the institution is concerned that a student with depression may fail to work with clients, patients, or students (in a student teacher setting) or if there are concerns about safety or disruption, these concerns must be balanced with the interest of the student.

This balancing is not an easy task, and it is important to take into account the unintended consequences of certain policies and practices. Institutions should be encouraged not only to take into account legal

114. See Rothstein, *Law Students and Lawyers*, *supra* note 8, at 553.

requirements, but they should also take into account how to handle situations where there is no clear legal prohibition or mandate. They can also provide advocacy to encourage other institutions to reconsider their requirements when the institution is aware of negative unintended consequences. As noted above, professional licensing agencies that ask about mental health treatment and diagnosis might be encouraged by the higher education institution to reconsider those questions by providing information about the deterrent effect of such questions on seeking treatment.

A recent article that provides a very good overview of this issue is *Reevaluating Privacy and Disability Laws in the Wake of the Virginia Tech Tragedy: Considerations for Administrators and Law Makers*.¹¹⁵ The article discusses current theories of institutional liability, and concludes that one obstacle to ensuring a safe environment is the current limitations under federal privacy laws and disability law. Recognizing that it is impermissible to make preadmissions inquiries about mental health status, the article advocates a post-admission, pre-enrollment screening.¹¹⁶ The author suggests that this “would avoid the type of discrimination that the ADA is designed to prevent while still putting universities on notice as to those students who have special needs.”¹¹⁷ What the author does not recognize, however, is that while the institution of higher education perhaps would not discriminate in such a situation, the student might nonetheless be forced to submit records about counseling and treatment, which in many cases would not have been related to any conduct, performance, or behavior issues. This would still have the potential for deterring students from getting treatment before enrolling in college or university because they would be concerned about having to report that treatment. Thus, such a mandatory requirement of pre-enrollment provision of student mental health records is not a policy change that is consistent with not deterring treatment.

One of the outcomes of Virginia Tech has been a great deal of attention to developing resources for how to handle situations where students have mental health challenges. As previously noted,¹¹⁸ the Jed Report is a resource providing an excellent framework for developing institutional appropriate policies, practices, and procedures.¹¹⁹ Consistent with recommendations in this article, the Jed Report recommends consultation with trained professionals, including the institution’s legal counsel. It also

115. Mary Fletcher Peña, Comment, *Reevaluating Privacy and Disability Laws in the Wake of the Virginia Tech Tragedy: Considerations for Administrators and Lawmakers*, 87 N.C. L. REV. 305 (2008).

116. *Id.* at 345–47.

117. *Id.* at 346.

118. See *supra* text accompanying note 92.

119. See JED FOUND., *supra* note 91.

provides some tools to develop awareness and to develop or revise “policies, protocols, and procedures” suitable to the institution’s unique environment. The Jed Report provides general information about privacy and confidentiality (including FERPA, clinician-client confidentiality, and HIPAA) an overview of disability law, information on delivering mental health services,¹²⁰ and information on liability for student suicide and violence.¹²¹ A number of positive practices are provided on the following issues: campus-wide communication; developing an emergency contact notification protocol; establishing a case management team; developing a leave of absence protocol; avoiding “zero-tolerance” policies for self-harm; understanding the complexities of mandating assessment and treatment; establishing re-entry requirements; encouraging students to be proactive about their mental health; providing insurance with mental health coverage; promoting appropriate boundaries; developing a memorandum of understanding for certain situations; proactively addressing potential conflicts; reaching out to affected students; establishing and following appropriate policies and protocols.

The Jed Report is consistent with this author’s philosophy of being proactive; making individualized assessments; recognizing the importance of privacy and confidentiality, communication, training and education; and balancing interests of the student with others in the community and with the legitimate concerns of licensing agencies about safety and interests of clients and patients. This author also shares the value and benefit of the team approach and the recognition of appropriate spheres of expertise, including a recognition that informal counseling by untrained faculty and staff can delay a “student’s receipt of professional services.”¹²²

The Jed Report focuses primarily on the student and the institution of higher education. One issue not addressed in the resource is the deterrent effect of the practices of some professional licensing agencies on receiving counseling. This was discussed previously, but until this issue is addressed, students in at least some higher education programs may not seek needed mental health treatment. The result may be suicide or harm to others resulting from untreated mental illness. Even if this is not the

120. *Id.* at 20–24. This section includes how a referral should be made from a health/counseling center to a community provider; how a referral should be made from a third party to the campus health/counseling center; whether to obtain past treatment records; appropriate follow-up after a student discontinues treatment or has been discharged from a hospital; how web-based screening and counseling should be provided; appropriate supervision of peer hotlines or peer counseling services; how to transport at-risk students to a hospital; and whether mental health treatment can be provided to a minor without parental consent.

121. The resource notes that the current law is “largely inconclusive regarding such responsibility” noting that “most cases settle before the courts are afforded the opportunity to make pronouncements of law.” *Id.* at 25.

122. *Id.* at 22.

consequence, there are other harms such as withdrawing from a program, severe depression, family breakups, and other outcomes that might be alleviated if the student was not concerned about the stigma or other adverse consequence of receiving treatment.

College and university counsel and higher education administrators should not only establish, review, and update their policies, practices, and procedures relating to students with mental health problems, but they should also inform policymakers at the state level (such as professional licensing agencies) about the impact of these policies on their institutions. A collaborative approach, not only at the institutional level, but at the level of others interested in the student well being and the well being of others in the community, is critical to improving the mental health of the individual and the safety and well being of the community.

A proactive approach of providing education about troubling behavior and conduct can be valuable for the entire community, but counseling and treatment should be referred to the experts.¹²³ In addition, all students should be given information about where to receive counseling and help, particularly during stressful times such as during the exam period. Recent research indicates that although about half of college-age students have psychiatric disorders, only about 25% of those individuals sought treatment. The challenges ahead include not only developing appropriate policies, practices, and procedures to respond to dangerous and disruptive behavior by postsecondary students, but also developing effective and affordable treatments and interventions that students will take advantage of without undue concern about stigma and discrimination.

Beyond the scope of this article is the significant need for attention to the availability of mental health services. Affordability may be positively affected by the recent mental health parity legislation that mandates that insurance programs provide parity between benefits for physical disorders and mental disorders. This legislation, however, does not mandate that institutions provide mental health insurance in the first place. The unintended consequence of this legislation could be a decrease in coverage for both conditions or the elimination of student health insurance entirely. This is part of a much needed national debate on access to health care, and may be addressed through that avenue. Officials in higher education should be aware of the significant need for mental health services for student populations and take care that consideration of health care access as a budget reduction does not result in longer term problems for their communities.

The hope is that with increased awareness, understanding, and interest in these issues, the campus will become a better environment for all members of its community.

123. *Id.*

CONCLUSION

This article addresses prevention, response, and liability for situations involving students with disabilities who may raise high risk concerns. By knowing not only what is legally required and permitted, but also what are recommended as good practices, institutions can balance the interests of the students with mental health problems with the interests of other members of the community. As noted throughout, handling each situation should be individualized for that student and setting. Decisions and actions should not be based on myths and stereotypes. Each institution should develop sound policies, practices, procedures, and protocols that work for that institution and for each academic or other program within the institution. Avoiding liability is most likely when college and university counsel are involved in this planning.

Prevention planning should take into account not only legal issues, but education and communication with students (and their parents in some cases), faculty, and staff to raise awareness about high risk situations, disability rights, available services, and other information. It should also include a thoughtful approach to what mental health services can either be directly provided or facilitated to ensure a positive and safe learning environment for everyone. Many of these issues were beyond the scope of this article, but they should be part of a complete approach to handling concerns about violence and disruption on campus.

TAXING THE GREAT ACADEMIC DIVORCE

KATHRYN A. FUEHRMEYER*

INTRODUCTION

For many professors, the granting of tenure involves not only a promise of job security but also a promise of academic freedom. As Judge Posner notes, “A contract that gives a teacher the right to be employed till he retires is special, for unless he is old or rich the present value of his tenure right is probably his biggest asset.”¹ Each college or university follows its own substantive standards and procedural rules for granting tenure, which may include years of service, academic accomplishment, service to the academic community, and recommendations by faculty members and students.² Tenure conveys not merely an academic right but a constitutionally protected property right that entitles the faculty member to continued employment as well as to procedural due process during any possible dismissal action.³ Accordingly, when a college or university cancels a faculty member’s tenure contract, either voluntarily or involuntarily, the nature of tenure rights as property rights becomes critical.

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1. *Vail v. Bd. of Educ.*, 706 F.2d 1435, 1451 (7th Cir. 1983) (Posner, J., dissenting).

2.

Tenure is a form of continuing contract, designed to create a contractually enforceable institutional commitment to appointment for an indefinite term that can be terminated only for good cause in accordance with procedures specified as part of the contract of employment. The institution’s agents can specify tenure in the institution’s governing documents, faculty handbooks, collective bargaining agreements, or individual contracts of employment. The traditional basis for award of tenure is excellence in teaching, research, and service.

CONTEMPORARY ISSUES IN HIGHER EDUCATION LAW 93 (Joseph Beckham and David Dagley eds., 2005).

3. *McDaniels v. Flick*, 59 F.3d 446, 454 (3d Cir. 1995); *San Filippo v. Bongiovanni*, 961 F.2d 1125, 1134 (3d Cir. 1992); *see also* *Morris v. Clifford*, 903 F.2d 574, 576 (8th Cir. 1990) (recognizing that a tenured faculty member has a constitutionally protected property interest in continued employment).

When examining issues surrounding tenure, courts tend to give deference to academic institutions with regard to tenure decisions, provided the institution has adopted and followed specific and relevant policies with regard to tenure. In recent years, courts have attempted to establish standards for examining the tax consequences of ending tenure, either voluntarily or involuntarily. In doing so, the Third and Sixth Circuits arrived at conclusions distinct from the result in the Eighth Circuit: two circuits finding that the payments were subject to employment taxes in *University of Pittsburgh v. United States*⁴ and *Appoloni v. United States*,⁵ the other finding that the payments were not subject to employment taxes in the *North Dakota State University v. United States*.⁶ However, in examining the reasoning behind these decisions, colleges and universities can take the lessons of all three courts and apply them to their own tenure and early retirement programs.

Part I of this note gives a brief explanation of employment taxes and explores definitions which are central to the determination of what payments the Internal Revenue Code (“IRC”) subjects to employment taxes, namely, what constitutes wages. Part II examines previous guidance from the IRS and from the courts as to when payments may fall within the definition of wages, and thus be subject to employment taxes. In particular, Part II looks at the initial case in the circuit split, *Appoloni v. United States*. Part III looks at the specific case of payments being subject to employment taxes, *University of Pittsburgh*. Part IV looks at specific circumstances in which payments from the academic institution are not subject to employment taxes—*North Dakota State University*. As the other federal courts of appeals are faced with similar problems, resolving the circuit split will give colleges and universities guidance in structuring payments in the great academic divorce.

I. EMPLOYMENT TAXES

Most employers, regardless of size, are required to withhold certain taxes from employee paychecks, including federal income tax, Social Security tax, and Medicare tax. In addition, the IRC taxes employers under the Federal Unemployment Tax Act (“FUTA”).⁷

4. 507 F.3d 165 (3d Cir. 2007).

5. 450 F.3d 185 (6th Cir. 2006).

6. 255 F.3d 599 (8th Cir. 2001), *nonacq.*, 2001-2 C.B. xv. The IRS refused to acquiesce to this decision. 2001-2 C.B. xv.

7. Internal Revenue Service, What Are Employment Taxes?, <http://www.irs.gov/govt/charities/article/0,,id=128586,00.html> (last visited Apr. 3, 2009).

A. General Overview⁸

The “Social Security tax,”⁹ which was originally enacted by the Federal Insurance Contributions Act and often referred to as the “FICA” tax, is imposed by § 3101 and § 3111 of the IRC.¹⁰ It applies to employee wages up to a maximum amount of wages.¹¹ FICA tax is composed of two parts: 1) the Social Security component of old-age, survivor, and disability insurance, and 2) the Medicare and hospitalization insurance.¹² FICA tax is paid in equal parts by the employer and the employee.¹³ The employee’s half of the FICA tax is usually withheld by the employer from the wages paid to the employee, and the employer is responsible for remitting both the employee’s contribution and the employer’s contribution to the government.¹⁴ Unlike the FICA taxes, the federal unemployment tax, FUTA, is imposed exclusively on the employer under § 3301.¹⁵

8. This general overview is meant to give a basic background on the employment tax system in the United States so that the reader may better understand the remainder of the article.

9. Two separate taxes comprise the Social Security tax. The Old Age and Survivors Insurance portion comprises 5.3% while Disability Insurance comprises 0.9%, for a total withholding of 6.2%. Social Security Administration, Social Security Tax Rates, <http://www.ssa.gov/OACT/ProgData/oasdiRates.html> (last visited Apr. 3, 2009).

10. I.R.C. §§ 3101, 3111 (2000 & Supp. IV 2004 & Supp. V 2006).

11. See *infra* Part I.B. for a discussion of what constitutes wages for purposes of employment tax withholding.

12. See *supra* note 9 and accompanying text.

13. See I.R.C. §§ 3101(a) (2006), 3102 (2006).

14. *Id.* The current tax rate is 6.2% for the portion of FICA representing Social Security taxes and 1.45% for the portion representing Medicare taxes, for a total withholding of 7.65% for the employee and the employer, resulting in a total withholding of 15.3%. For 2008, the Social Security tax was capped at gross compensation of \$102,000, which results in the maximum amount of Social Security tax being paid of \$6,324.00. There is no cap on the amount of Medicare tax withheld. The limit on Social Security taxes increases with each increase in the national average wage index. Social Security Administration, Contribution and Benefit Base, <http://www.ssa.gov/OACT/COLA/cbb.html#Series> (last visited Apr. 3, 2009).

15. For calendar years 1988–2007, the FUTA rate is 6.2% of the first \$7,000 of taxable wages paid during a calendar year. Energy Independence and Security Act of 2007, Pub. L. No. 110-140, § 1501(a), 121 Stat. 1492 (2007) (extending the 0.2% FUTA surtax through 2008). For 2009 and thereafter, the rate remains to 6.2% of taxable wages due to changes implemented by the bailout packing in October 2008. See I.R.C. §§ 3301(1), (2) (2006), *amended by* Act of Oct. 3, 2008, Pub. L. No. 110-343, Div. B, Title IV, § 404(a) (122 Stat.) 3860. (West Supp. 2008); I.R.C. § 3306(b)(1) (2006), *amended by* Act of June 17, 2008, Pub. L. No. 110-245, Title I, § 115(b) (122 Stat.) 1636. (West Supp. 2008); Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, 122 Stat. 3765 (2008). See also Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 1035, 111 Stat. 788, 937 (1997). Employers may be entitled to certain credits against the unemployment taxes imposed if the employer pays contributions into a state unemployment fund. See I.R.C. § 3302 (2006).

FICA and FUTA taxes are imposed on a percentage of wages paid by the employer during the calendar year.¹⁶ Similarly, federal income tax withholding is an obligation of the employer with respect to wages received by the employee during the calendar year.¹⁷ Proper classification of any benefits conferred on an employee by an employer as wages or as non-wages is crucial for determination of employment tax withholding.

B. What Exactly Constitutes Wages?

Tax law imposes significant financial and administrative burdens on employers with respect to the payment of payroll taxes on wages earned by employees. While most people consider wages to encompass a weekly paycheck for hours worked, the tax code takes a different stance. For the purposes of tax law, identifying what constitutes wages is more a process of identifying what does not constitute wages. In identifying wages for the purposes of all three payroll taxes—income tax, FICA, and FUTA—the IRC defines “wages” in similar terms. Before listing a series of exceptions, § 3401(a) defines wages for the purposes of income tax withholding as “all remuneration (other than fees paid to a public official) for services performed by an employee for his employer, including the cash value of all remuneration (including benefits) paid in any medium other than cash.”¹⁸ Similarly, § 3121(a) defines wages for FICA tax purposes as “all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash.”¹⁹ The statute then goes on to list several exceptions. For the purposes of FUTA tax purposes, wages are defined as “all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash,”²⁰ with this expansive definition being followed by a list of exceptions. Thus, absent the applicability of one of the enumerated exceptions, any amount paid by an employer to an employee for services performed should be considered wages for federal employment tax purposes.

It is important to note that it does not matter how the wages are designated. Treasury regulations provide, “The name by which the remuneration for employment is designated is immaterial. Thus, salaries, fees, bonuses, and commissions on sales or on insurance premiums, are

16. I.R.C. § 3101(a) (2006).

17. I.R.C. § 3401(a) (2006), *amended by* Act of June 17, 2008, Pub. L. No. 110-245, Title I, §§ 105(a)(1), 115(c) (122 Stat.) 1628, 1637. (West Supp. 2008).

18. *Id.*

19. I.R.C. § 3121(a) (2006), *amended by* Act of Dec. 23, 2008, Pub. L. No. 110-458, Title I, § 108(k)(1) (122 Stat.) 5110. (West Supp. 2008).

20. I.R.C. § 3306(b) (2006), *amended by* Act of June 17, 2008, Pub. L. No. 110-245, Title I, § 115(b) (122 Stat.) 1636. (West Supp. 2008).

wages if paid as compensation for employment.”²¹ Furthermore, “the basis upon which the remuneration is paid is immaterial in determining whether the remuneration constitutes wages.”²² Courts have interpreted § 3121(a) broadly²³ finding that almost anything paid as compensation for employment constitutes wages.²⁴ In many instances, courts have found FICA and FUTA taxes applicable to unlawful termination payments for past and future earnings.²⁵ Not all payments, however, made to an employee in connection with employment have been found to be wages.²⁶

In the case of voluntary termination,²⁷ such as early retirement, whether payments are subject to FICA and FUTA taxes depends on the nature of the

21. Treas. Reg. § 31.3121(a)-1(c) (2002).

22. *Id.* at § 31.3121(a)-1(d). For example, the remuneration “may be paid on the basis of piecework, or a percentage of profits; and it may be paid hourly, daily, weekly, monthly, or annually.” *Id.*

23. *See* Soc. Sec. Bd. v. Nierotko, 327 U.S. 358 (1946) (including back pay within the definition of wages); *see also* Gerbec v. United States, 164 F.3d 1015, 1026 (6th Cir. 1999) (finding that the term wages should be interpreted broadly to include certain compensation for which no services were performed); Lane Processing Trust v. United States, 25 F.3d 662, 665 (8th Cir. 1994) (finding that distributions to employees constituted wages as they were based on factors traditionally used to determine employee compensation, including the value of services performed, the length of employment, and the employee’s prior wages); Charlotte’s Office Boutique, Inc. v. Comm’r, 121 T.C. 89, 106 (2003), *supplemented by* T.C. Memo 2004-43, *aff’d* 425 F.3d 1203 (9th Cir. 2005) (finding that a corporation’s payments which were characterized as royalties constituted wages because the shareholder performed services for the corporation which generated income for the corporation and the payments were based on the services performed).

24. *See* Sheet Metal Workers Local 141 Supplemental Unemployment Benefit Trust Fund v. United States, 64 F.3d 245, 248–50 (6th Cir. 1995) (finding that the source of payments is not dispositive in determining whether payments constitute wages and that payments to employees upon liquidation of a supplemental unemployment benefit trust fund constituted wages); Rev. Rul. 96-65, 1996-2 C.B. 6 (finding that back pay includible in gross income under § 104(a)(2) constitutes wages for FICA and FUTA purposes). *But see* Cent. Ill. Pub. Serv. Co. v. United States, 435 U.S. 21, 31 (1978) (finding lunch reimbursements did not constitute wages); Dotson v. United States, 87 F.3d 682, 690 (5th Cir. 1996) (finding that an award which compensated for loss in earning capacity, not for services performed, was not subject to taxation as “wages”); Churchill v. Star Enters., 3 F. Supp. 2d 622, 624 (E.D. Pa. 1998) (holding that an employer paying a judgment under the Family Medical Leave Act may not withhold a portion of the payment it deems to represent FICA taxes as the employee was not employed by the company during the relevant time frame).

25. *See* Gerbec, 164 F.3d at 1016 (finding that “remuneration for employment” in § 3121 should be interpreted broadly and should include certain compensation within the employer-employee relationship for which no actual services were performed).

26. *See* Cent. Ill. Pub. Serv. Co., 435 U.S. at 31 (finding that reimbursed lunch expenses that were incurred during day trips were includible in income but were not “wages” subject to withholding); Dotson, 87 F.3d at 690 (finding that an award which compensated for loss in earning capacity, not for services performed, was not subject to taxation as “wages”).

27. *See infra* Part II.B. for a discussion of dismissal payments in cases of involuntary separation from employment.

payment. If the payment is remuneration for past services, it is treated as wages and subject to employment tax.²⁸ While the IRS once took the position that payments to buy out an employee's right to future compensation could be considered the purchase of a contract right, it has since reversed this position.²⁹ Severance payments tied to an employee's salary and years of service are generally deemed to be remuneration for past service and subject to employment taxes. For instance, payments made to an employee, even in exchange for a waiver of rights to bring an employment related lawsuit, are subject to FICA taxes. Even if payments are not tied to the relinquishment of a specific claim, unlike settlement payments, these payments are usually subject to FICA.³⁰

In recent years, cases have emerged in which an educational institution paid a faculty member for the surrender of tenure rights as part of an early retirement program. While the Treasury Regulations contemplate that retirement pay constitutes wages for the purpose of FICA and FUTA,³¹ surrendering of tenure has been framed as a debate over property rights arising under the employment contract and whether the employment contract at issue creates property rights that when surrendered are not included in wages. Both the IRS and the courts have grappled with the issue of defining the boundaries of what constitutes wages in the context of relinquishment of tenure, and while no concrete boundaries have emerged, the issue seems to turn more on the contract itself. Courts have considered certain factors in determining what constitutes wages such as whether tenure was automatically given as a seniority right, whether the granting of tenure resulted in a new employment contract, and how payments were calculated upon dismissal.

II. PREVIOUS GUIDANCE

Prior to *University of Pittsburgh* and *North Dakota State University*, the IRS considered issues surrounding various payments given as part of severance, early retirement plans, and other situations surrounding the

28. IRC §§ 3401(a) (2006), *amended by* Act of June 17, 2008, Pub. L. No. 110-245, Title I, §§ 105(a)(1), 115(c) (122 Stat.) 1628, 1637. (West Supp. 2008), 3121(a)(2) (2006), *amended by* Act of Dec. 23, 2008, Pub. L. No. 110-458, Title I, § 108(k)(1) (122 Stat.) 5110. (West Supp. 2008), 3306(b) (2006), *amended by* Act of June 17, 2008, Pub. L. No. 1110-245, Title I, § 115(b) (122 Stat.) 1636. (West Supp. 2008).

29. Rev. Rul. 2004-110, 2004-2 C.B. 960.

30. *Abrahamsen v. United States*, 228 F.3d 1360, 1364-65 (Fed. Cir. 2000).

31. Treas. Reg. § 31.3401(a)-1(b)(1)(i) (2008).

In general, pensions and retired pay are wages subject to withholding. However, no withholding is required with respect to amounts paid to an employee upon retirement which are taxable as annuities under the provisions of section 72 or 403. So-called pensions awarded by one to whom no services have been rendered are mere gifts or gratuities and do not constitute wages.

Treas. Reg. § 31.3401(a)-1(b)(1)(i).

termination of employment, both voluntary and involuntary.

A. Guidance as to When Payments Are Not Subject to Employment Taxes

1. Revenue Ruling 58-301

The courts in both *University of Pittsburgh* and *North Dakota State University* examined Revenue Ruling 58-301,³² which addresses a cancellation of a five-year written employment contract. It is important to note before beginning a discussion of the particular facts of the revenue ruling that it has been superseded by Revenue Ruling 2004-110.³³ However, Revenue Ruling 58-301 applies to any payments made before January 12, 2005 and is thus still relevant to a discussion of employment tax on payments made pursuant to the relinquishment of tenure rights.³⁴

Revenue Ruling 58-301 concerned payments made to the taxpayer under a written contract providing for five years of employment.³⁵ During the second year of employment, the taxpayer and his employer agreed to cancel the employment contract.³⁶ In consideration for the taxpayer relinquishing his contract rights, the employer paid him a sum of money during the taxable year.³⁷ Guidance was requested as to whether the payments were gross income to the taxpayer in the taxable year. While the IRS found that the payments constituted gross income to the recipient in the taxable year of receipt, the IRS held that “a lump sum payment received by an employee as consideration for the cancellation of his employment contract . . . is not subject to the [FICA] tax.”³⁸ It is important to note that in issuing its decision, the IRS noted that the employee was given the payment in consideration for the “taxpayer’s relinquishment of his contract rights”³⁹ and not as payment for services rendered, severance, or another reason.

2. *Slotta v. Texas A&M University System*⁴⁰

In *Slotta v. Texas A&M University System*, the court looked at payments given to Larry Slotta made as part of a settlement pursuant to his resignation.⁴¹ Slotta sued his employer, Texas A&M University (“Texas

32. Rev. Rul. 58-301, 1958-1 C.B. 23.

33. Rev. Rul. 2004-110, 2004-2 C.B. 960.

34. *Id.*

35. Rev. Rul. 58-301, 1958-1 C.B. 23.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. No. Civ.A. G-93-92, Civ.A. G-93-125, 1994 WL 16170227 (S.D. Tex. 1994).

41. *Id.* at *1.

A&M”) asserting various constitutional and state tort claims. After a mediation session, Slotta and Texas A&M settled upon a payment of \$150,000 in exchange for which Slotta agreed to resign.⁴² Seven months after reaching the settlement, Texas A&M remitted \$125,395 to Slotta, withholding the remaining amount for income and employment taxes under the good faith belief that the amount represented “payment for the relinquishment of Slotta’s tenure rights”⁴³ and was therefore “subject to mandatory federal income and employment tax withholding.”⁴⁴ In finding that the payments were not subject to withholding, the court noted the distinctive features of tenure.

A university does not owe tenure to any non-tenured employee. The possibility of tenure is offered to attract and retain quality personnel. Although under university guidelines a young faculty member may not be eligible for tenure until a certain number of years have passed, the offer of tenure can only reasonably be considered an offer for a contract of more stable *future* employment, and not as payment for past services. When the tenure contract is breached, the professor’s damages are for lost future employment, not the loss of remuneration for services already performed. Furthermore, the fact that the contract is not generally reached through negotiation is immaterial; a contract reached through the acceptance of a unilateral offer is no less a contract than one reached after lengthy haggling.⁴⁵

In addition, the court notes that unlike in the Private Letter Ruling relied upon by Texas A&M finding that the payments were subject to

42. *Id.*

43. *Id.*

44. *Id.* In arriving at this decision, Texas A&M relied primarily upon Private Letter Ruling 86-48-027:

The tenure system of the University is designed to attract and retain professors who perform services at the desired level of proficiency, and to maintain academic freedom. Tenure is a crucial element in enabling the University to hire able professors and is a considerable incentive for them to achieve high quality performance. Because the individual’s prior performance of services for the University (or another academic institution) is the primary determinant for a grant of tenure, the grant of tenure is derived primarily from the employee’s past performance of services. Thus, the employment right surrendered by the faculty members is primarily derived from prior work performed and more closely resembles wages for FICA purposes than mere payment for surrender of a contract right. The fact that tenure is granted selectively based on prior performance, does not vitiate its origin in the performance of prior services.

Therefore, we conclude that the payments made by the University to terminate employment agreements with tenured faculty members of the University are wages for purposes of the FICA.

I.R.S. Priv. Ltr. Rul. 86-48-027 (Aug. 28, 1986).

45. *Slotta*, 1994 WL 16170227, at *2 (emphasis in original).

employment tax withholding,⁴⁶ the payments are not for services rendered. “The theory that tenure could be the payment by one university to an individual for his past services to *another* employer is simply ridiculous. The university makes the offer of tenure, like the offer of any other attractive contract, simply to entice the individual to perform future services.”⁴⁷ Slotta, as a new employee at Texas A&M did not “earn” tenure, it was part of his initial employment. However, a problem arises when tenure is granted to a professor who has been employed at the college or university, as opposed to a professor who is granted tenure with his initial employment contract at a new educational institution.

B. Guidance as to When the Payments are Subject to Employment Taxes

1. Relinquishment of Seniority Rights

In Revenue Ruling 75-44⁴⁸ the IRS addressed the case of a lump-sum payment made to a railroad employee “in recognition of his agreement to relinquish certain rights with respect to his employment acquired through prior service as an employee.”⁴⁹ The IRS distinguished payments made in Rev. Rul. 58-301 primarily on the grounds that the employee in this case acquired rights through his previous performance of services as opposed to acquiring the rights at the original negotiation of the contract which had been cancelled.

Unlike [Rev. Rul. 58-301], the present case does not involve the cancellation of an employment contract which, at the outset, bound the parties for a specific period of time. Instead, the instant case is one of an employment contract which contemplated a relation between the parties that was to continue indefinitely, but that, except as might otherwise be specially provided under certain circumstances, was generally terminable by either party without liability to the other solely for the failure to maintain the relationship for the specified period. Hence, in this case, the amount received by the employee was a lump-sum settlement for the past performance of services reflected in the employment rights he was giving up, and was money remuneration for his services.⁵⁰

Thus, the IRS found that the receipt of payment was compensation for past services and constituted wages.

46. I.R.S. Priv. Ltr. Rul. 86-48-027 (Aug. 28, 1986).

47. *Slotta*, 1994 WL 16170227, at *2 (emphasis in original).

48. Rev. Rul. 75-44, 1975-1 C.B. 15.

49. *Id.*

50. *Id.*

2. Dismissal Payments

In cases involving dismissal payments, § 31.3401(a)-1(b)(4) of the Treasury Regulations sets firm boundaries and specifically provides that for the purposes of income tax withholding (which is only one aspect of the overall tax consequences), “Any payments made by an employer to an employee on account of dismissal, that is, involuntary separation from the service of the employer, constitute wages regardless of whether the employer is legally bound by contract, statute, or otherwise to make such payments.”⁵¹ In distinguishing Rev. Rul. 58-301 in *University of Pittsburgh*,⁵² the IRS first noted Revenue Ruling 74-252⁵³ which involved payment made to an employee under the terms of a three-year contract following the involuntary termination of the employee.⁵⁴ The contract noted that the employer was permitted to terminate the employment relationship provided that the employee was paid an amount equal to six months salary.⁵⁵ In distinguishing the payments made from those in Rev. Rul. 58-301, the IRS noted,

In this case the payments were made by the company to the employee upon his involuntary separation from the service of the company and were in the nature of dismissal payments. They were made pursuant to the provisions of the contract rather than as consideration for the relinquishment of interests the employee had in his employment contract in the nature of property.⁵⁶

Thus, the IRS found that the payments also constituted wages for the purpose of FICA and FUTA based on the nature of the payments being dismissal payments.

3. Modification of Rev. Rul. 58-301

In Rev. Rul. 2004-110, the IRS modified and superseded Rev. Rul. 58-301.⁵⁷ The IRS looked at a situation in which an employee performed services under a written employment contract providing for a specified number of years of employment.⁵⁸ The contract did not provide that any payments would be made by either party if the contract was cancelled by mutual agreement.⁵⁹ The employer and employee agreed to cancel the employment contract and negotiated a payment made to the employee in

51. Treas. Reg. § 31.3401(a)-1(b)(4) (2009).

52. *Univ. of Pittsburgh v. United States*, 507 F.3d 165 (3d Cir. 2007).

53. Rev. Rul. 74-252, 1974-1 C.B. 287.

54. *Id.*

55. *Id.* at 288.

56. *Id.*

57. Rev. Rul. 2004-110, 2004-2 C.B. 960.

58. *Id.*

59. *Id.*

consideration for the employee's relinquishment of his contract rights to the remaining period of employment.⁶⁰ The IRS outlined the boundaries of employment to encompass "the establishment, maintenance, furtherance, alteration, or cancellation of the employer-employee relationship or any of the terms and conditions thereof."⁶¹ The IRS further stated, "If the employee provides clear, separate, and adequate consideration for the employer's payment that is not dependent upon the employer-employee relationship and its component terms and conditions, the payment is not wages for purposes of FICA, FUTA, or Federal income tax withholding."⁶² Thus, any payment in cancellation of the employer-employee relationship would be subject to FICA and FUTA tax:

Under the facts presented in this ruling, the employee receives the payment as consideration for canceling the remaining period of his employment contract and relinquishing his contract rights. As such, the payment is part of the compensation the employer pays as remuneration for employment. The employee does not provide clear, separate, and adequate consideration for the employer's payment that is not dependent upon the employer-employee relationship and its component terms and conditions. Thus, the payment provided by the employer to the employee is wages for purposes of FICA, FUTA, and Federal income tax withholding. *This conclusion applies regardless of the name by which the remuneration is designated or whether the employment relationship still exists at the time the payment is made.*⁶³

However, for cases arising in the future, it is important to note that the Ruling limits Rev. Rul. 58-301 to its specific facts and to any payment made before January 12, 2005.⁶⁴ Payments made before that time are subject to the previous murky standards.

60. *Id.*

61. *Id.* at 961.

62. *Id.* The employee in this instance was performing services under a written employment contract which provided for a specified number of years of service but did not provide for any payments to be made upon termination of the agreement. When the agreement was terminated prior to the expiration of the contract period, the employer and employee negotiated a payment to be made "in consideration for the employee's relinquishment of his contract rights to the remaining period of employment." *Id.* at 960. The employee did not provide any consideration for the payment independent of the employer-employee relationship.

63. *Id.* (emphasis added).

64. *Id.* Payments made before January 12, 2005 must be made in circumstances analogous to those in Rev. Rul. 58-301 and Rev. Rul. 55-520. *Id.*

4. *Appoloni*—the Initial Circuit Split

In *Appoloni v. United States*,⁶⁵ the court considered the case of public school teachers who relinquished statutory tenure rights in exchange for early retirement incentive payments. The employees were given tenure by the Dowagiac Union Public School District (“the District”) pursuant to the Michigan Teachers’ Act⁶⁶ under which “a teacher automatically earns tenure by successfully completing a probationary period.”⁶⁷ During the 2000–2001 school year, the District offered an early employee severance plan to its most senior teachers under which teachers who had at least ten years of service were able to voluntarily participate in the plan.⁶⁸ If accepted into the plan, the teachers were required to resign and to agree to a waiver providing that the teacher waived all claims against the District.⁶⁹

The court broadly interpreted the definition of wages for purposes of FICA withholding under § 3121 and found that the payments to the teachers constituted wages for the following reasons. “First, the eligibility requirements for qualifying for a payment—that a teacher served a minimum number of years—indicate the payments were for services performed rather than for the relinquishment of tenure rights.”⁷⁰ The court stated, “We have consistently held that where a payment arises out of the employment relationship, and is conditioned on a minimum number of years of service, such a payment constitutes FICA wages.”⁷¹ Under the early retirement plan, if more employees applied for the program than there were spots available, the spots were allocated to those teachers with the most years of service. Thus, in this case, “longevity—not tenure—was the key factor for determining eligibility because these early retirement payments were offered to encourage teachers at a high pay rate to retire.”⁷² Second, the court in *Appoloni* focused on the motivation behind the payments—whether the payments were made in exchange for tenure rights or whether the relinquishment of tenure rights was merely incidental to the

65. 450 F.3d 185 (6th Cir. 2006).

66. MICH. COMP. LAWS § 38.71 (1996).

67. *Appoloni*, 450 F.3d at 187.

68. *Id.*

69. *Id.* at 188.

70. *Id.* at 191.

71. *Id.*

Plaintiffs necessarily had to have tenure to be eligible for the buyout. However, longevity—not tenure—was the key factor for determining eligibility because these early retirement payments were offered to encourage teachers at a high pay rate to retire. Thus, the payments at issue in this case . . . arose out of the employment relationship, and were conditioned on a minimum number of years of service.

Id. at 192.

72. *Id.* at 192.

nature of the early retirement plan, making the relinquishment more akin to the relinquishment of rights to sue under certain employment statutes.

In this case, the school district's motivation was not to buy tenure rights—the motivation was to induce those teachers at the highest pay scales to retire early. Relinquishment of tenure rights was simply a necessary and incidental part of accepting the buyout. In other words, in order to offer the teachers a buyout, the school districts had to ask that [the teachers] give up their right to future employment—the same as with any severance package[.] Thus, especially in light of the school district's purpose in offering these severance payments, we see no reason to differentiate the relinquishment of tenure rights from the relinquishment of other benefits earned during the course of employment, like the right to bring suit, or rights associated with seniority.⁷³

If the payments are made *solely* in exchange for the relinquishment of tenure rights, the payments appear more like the purchase of property rights, and thus are less likely to be subject to employment tax. Finally, the court found that the most analogous revenue ruling was Rev. Rul. 75-44 and not Rev. Rul. 58-301, as argued by the District. The court agreed that like in Rev. Rul. 75-44 the employees “had acquired [their] relinquished employment rights though [their] previous performance of services,” thus the payments were taxable for FICA purposes.⁷⁴

II. UNIVERSITY OF PITTSBURGH

In 2007, the Third Circuit considered whether payments made by the University of Pittsburgh to certain tenured faculty members under early retirement plans constituted wages for FICA purposes.⁷⁵ Between 1982 and 1999, the University offered five successive Early Retirement Plans to tenured faculty members and administrators, as well as to non-tenured librarians whose employment contracts contained a provision providing for

73. *Id.* at 193.

74. *Id.* at 194 (citing Rev. Rul. 75-44, 1975-1 C.B. 15). The court refuted the District's argument that the payments were more analogous to those in Revenue Ruling 58-301, stating:

In Revenue Ruling 58-301, the employee was granted, at the time of employment, a *contractual right* to employment for five years. In contrast, the Plaintiffs received their statutorily-granted tenure rights after a certain requisite number of *years of service*. As previously emphasized, in Michigan, tenure is automatically granted, pursuant to a statute, after a teacher completes a probationary period. We see this case as one where the teacher earned tenure through his/her “previous performance of services.” Rev. Rul. 75-44. Thus, the most analogous revenue ruling, Revenue Ruling 75-44, also indicates that the severance payments at issue are FICA wages.

Id. (emphasis in original).

75. *Univ. of Pittsburgh v. United States*, 507 F.3d 165, 166 (3d Cir. 2007).

an “expectation of continued employment.”⁷⁶ Under all five plans, monthly payments were based on the employee’s salary at the time of retirement as well as the employee’s length of service.⁷⁷ In four of the five plans, participation was limited to employees within the groups who had attained at least ten years of service and who were between sixty-two and sixty-nine years of age. In the fifth plan, participation was limited to employees within the groups who had attained at least twelve years of service and were at least sixty years of age or employees whose sum of years of service and age equaled eighty-five.⁷⁸ To participate in the Early Retirement Plans, the University required employees who met the qualifications to sign an irrevocable Contract for Participation, and the University required employees with tenure to relinquish tenure rights.⁷⁹ The University paid two million dollars in FICA taxes on payments under the Early Retirement Plans between 1996 and 2001 but then filed claims with the IRS for refunds of these payments, which the IRS promptly denied.⁸⁰

Under the University of Pittsburgh’s tenure policy, tenure “constitutes recognition by the University that a person so identified is qualified by achievements and contributions to knowledge as to be ranked among the most worthy of the members of the faculty engaged in scholarly endeavors: research, teaching, professional training, or creative intellectual activities of other kinds.”⁸¹ It is important to note that under the University’s tenure policy, a non-tenured faculty member can serve without tenure for a maximum of seven years, at which time the faculty member can either be granted tenure or can be terminated for failing to meet the requirements for tenure.⁸² Under the tenure plan, a tenured faculty member may not be terminated without a hearing that comports with the due process standards of the Fourteenth Amendment.⁸³ In addressing the case, the University primarily relied upon Revenue Ruling 58-301,⁸⁴ while the IRS offered counterarguments using Revenue Ruling 74-252, Revenue Ruling 75-44 and Revenue Ruling 2004-110.

The court in *University of Pittsburgh* found the payments to be most analogous to those in Rev. Rul. 75-44. “First, the eligibility requirements for payments under the Plans are linked to past services at the University,

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at 167.

81. *Id.* at 166.

82. *Id.*

83. *Id.* at 166–67.

84. Rev. Rul. 58-301, 1958-1 C.B. 23.

not relinquishment of tenure.”⁸⁵ Eligibility to participate in the plans for both tenured and non-tenured employees was based on their age and years of service, which link the plans to past services for the employer, thus making the payments appear more like wages. “Second, the Plans themselves make clear that the payments were viewed as compensation for service to the University.”⁸⁶ The court noted that the plans were implemented with the goals of making room for new faculty and keeping the University competitive with its peers.⁸⁷ Also, the court noted that the University offered the plans because it wanted to provide the opportunity for faculty members to retire prior to the retirement age.⁸⁸ Third, the court stated that “even if the University made the payments *in part* to secure relinquishment of tenure rights, their main purpose was to provide for employees’ early retirement.”⁸⁹ In this way, the payments were indistinguishable from severance payments, which are usually taxed as wages.⁹⁰

The University tried to distinguish the contracts by saying that while in other cases the contracts at issue were at-will employment contracts, here “tenure is obligatory for the University, optional for the faculty member.”⁹¹ However, the court explained that the nature of the employment contract being at will or obligatory is not determinative. The focus is on the rights relinquished. “Regardless of whether an employee voluntarily ended the employment relationship, or whether the employee had a due process right to maintain his employment, the rights relinquished were gained through the employee’s past services to the employer.”⁹² Based on those factors, the court found that the tenure rights relinquished were most like the seniority rights relinquished in Rev. Rul. 75-44 as they “compensate

85. *Univ. of Pittsburgh*, 507 F.3d at 171.

86. *Id.* at 172.

87. *Id.*

88. *Id.*; *see also* *Assoc. Elec. Coop., Inc. v. United States*, 226 F.3d 1322, 1327 (Fed. Cir. 2000) (“Payments for hard work and faithful service arise directly from the employee-employer relationship and are payments which recognize the value or character of the services performed for the employer.”).

89. *Univ. of Pittsburgh*, 507 F.3d at 172 (emphasis in original).

90. *See supra* notes 23–25 and accompanying text; *see also* *Appoloni v. United States*, 450 F.3d 185, 193 (6th Cir. 2006). In that case, the court

fail[ed] to see how this is different from other severance packages just because a ‘tenure’ right was exchanged. In almost all severance packages an employee gives up something, and we have a hard time distinguishing this case from similar cases where an employee, pursuant to a severance package, gives up rights in exchange. *Courts have consistently held that severance payments for the relinquishment of rights in the course of an employment relationship are FICA wages.*

Id. (emphasis added).

91. *Univ. of Pittsburgh*, 507 F.3d at 173 (citations omitted).

92. *Id.*

employees for relinquishment of tenure rights acquired through past service.”⁹³

The dissent in *University of Pittsburgh* raised similar arguments to the court in *North Dakota State University*. The dissent based its opinion on the premise that the payments were not wages because they “were given primarily in exchange for the faculty members’ relinquishment of tenure, which is a property interest in continued employment absent cause or financial exigency.”⁹⁴ Unlike seniority rights, tenure did not resemble the rights earned through service during the employment relationship.

The University’s “tenure stream” is composed of faculty who are eligible to receive tenure and those who already have tenure. The tenure stream includes instructors, assistant professors, associate professors, and professors. Only associate professors and professors can have tenure. A faculty member without tenure can serve only for a limited time in the tenure stream—usually seven years. At the end of that period, either the faculty member receives tenure or his or her service in the tenure stream is terminated. But this “probationary” period is a prerequisite to tenure and is not analogous to the time period during which employees accrue different types of seniority rights. The University’s policies show tenure is more than a recognition of satisfactory work. Rather, the decision to grant or deny tenure depends on a myriad of qualitative factors and calls for an evaluation of each candidate’s capacity for research, teaching, and contributing to knowledge. Moreover, the University’s policy specifically imposes certain “Non-Merit Considerations,” such as financial resources, personnel needs, and curriculum demands. These latter criteria may depend not on the individual professor’s role at the University, but on extrinsic forces. Accordingly, the grant or denial of tenure cannot be viewed strictly as an evaluation of whether a professor has performed adequately during employment, as is the case with the accrual of

93. *Id.*

94. *Id.* at 175 (Scirica, J., dissenting) (citing *North Dakota State Univ. v. United States*, 255 F.3d 599 (8th Cir. 2001)). In the dissent, Justice Scirica notes the contrast between the two possible concepts of faculty tenure at the University.

Is tenure, as the Government contends, analogous to seniority rights and other benefits earned in the course of employment? Or, as the University argues, does tenure mark the beginning of a new employment relationship distinct from prior service? According to the first view, the payments at issue here were remuneration for employment and were subject to FICA tax. According to the second view, the payments were not remuneration for employment, because they were given primarily in exchange for the relinquishment of property rights the faculty received at the beginning of the tenured relationship.

Id.

seniority rights in other circumstances.⁹⁵

Based on the nature of the process by which tenure was granted at the University, the dissent found the rights to be property rights, not seniority rights. The dissent also distinguished the payments in the present case from those in *Appoloni*, “In cases like *Appoloni*, the teacher’s past satisfactory work during the probationary period may be seen as consideration for the tenure award, but not so here where the tenure decision is marked by such broad discretion and ‘Non-Merit Considerations.’”⁹⁶ Additionally, the dissent noted that tenure marked a new relationship, and thus a new contract with new rights, between the professor and the University and not merely a step in the evolvement of a continuing relationship with additional benefits. Thus, the payments for the relinquishment of these new rights were “more analogous to buy-outs of unexpired contract rights than to severance payments or payments for the relinquishment of rights of at-will employees.”⁹⁷

III. NORTH DAKOTA STATE UNIVERSITY

In *North Dakota State University v. United States*,⁹⁸ North Dakota State University (“NDSU”) offered a voluntary Early Retirement Program to tenured faculty and certain high-level administrators whose age and years of service totaled seventy.⁹⁹ “Under the Early Retirement Agreement, the employee agreed to give up any tenure, contract, and/or other employment rights, agreed not to seek employment with a North Dakota public university or college, and agreed to give up any claim against NDSU under [employment law].”¹⁰⁰ Once the employee agreed to enter into the Early Retirement Program, the employee and NDSU negotiated the payment amount, which was capped at one hundred percent of the employee’s most recent annual salary.¹⁰¹ However, the employee was not automatically entitled to one hundred percent of the employee’s most recent annual salary. “Various factors were considered in setting the retirement payment, including past performance, current salary, curriculum needs, and budget restraints. These were not the only factors considered during the negotiations; in fact, there was no restriction on the factors that could be considered.”¹⁰² In many ways, the Early Retirement Program served as a management tool to make personnel changes and “deal with budgetary

95. *Id.* at 177.

96. *Id.*

97. *Id.* at 178.

98. 255 F.3d 599 (8th Cir. 2001).

99. *Id.* at 601. During some periods of time, the sum of the age and years of service of the employee in question only had to total sixty-five. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

problems, curriculum needs, and . . . encourage individuals to terminate employment when there was insufficient cause for dismissal.”¹⁰³

At NDSU, tenure was granted to a faculty member upon recommendation by the North Dakota Board of Higher Education.¹⁰⁴ Although NDSU used a six-year tenure track, tenure was occasionally granted earlier, with some employees receiving tenure upon hire, and the probationary period could be waived in certain circumstances, such as the faculty member having tenure at another college or university.¹⁰⁵ Various factors were considered in granting tenure, including “scholarship in teaching, contribution to a discipline or profession through research, other scholarly or professional activities, and service to the institution and society.”¹⁰⁶ Once tenure was granted, the professor was granted certain rights, including the right to continuous academic year employment in the professor’s specific area.¹⁰⁷ The professor’s annual employment contract was automatically renewed each year unless the professor was terminated pursuant to the termination conditions specified in the policies under the tenure program.¹⁰⁸ A tenured faculty member could be terminated “based upon various fiscal reasons, including a demonstrably bona fide financial exigency, loss of legislative appropriations, loss of institutional or program enrollment, consolidation of academic units or program areas, or elimination of courses.”¹⁰⁹ In addition to termination of a faculty member due to the financial constraints imposed on NDSU, a tenured faculty member could be terminated for adequate cause, such as “incompetence or dishonesty in teaching, research, or other professional activities; continued or repeated unsatisfactory performance evaluations; substantial and manifest neglect of duty; conduct which substantially impaired fulfillment of responsibilities; physical or mental inabilities to perform duties; and continued violation of NDSU or [North Dakota Board of Higher Education] policies.”¹¹⁰ In addition to tenured faculty members, certain high-level administrators were eligible to participate in the Early Retirement Program. These high-level administrators also had certain employment rights, including a right to extended notice before being dismissed, the period of extended notice being determined based on the employee’s years of service.¹¹¹

103. Jon J. Jensen, *Reducing the Employment Tax Burden on Tenure Buyouts*, 80 N.D. L. REV. 11, 13 (2004).

104. *N.D. State Univ.*, 255 F.3d at 601.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 602.

While NDSU initially withheld FICA taxes from payments made under the Early Retirement Program, NDSU posed a question to the Social Security Administration as to whether payments under NDSU's Early Retirement Program constitute wages for FICA purposes. The Social Security Administration responded, stating that as described by NDSU, the program was “‘in effect, a payment to secure the release of an unexpired contract of employment,’ and as such, under the Social Security Procedure Operations Manuals, was not considered wages for purposes of determining benefit amounts or for deduction of benefits purposes.”¹¹² Based on this letter, NDSU stopped both withholding and paying FICA taxes on Early Retirement Program payments.¹¹³

The court in *North Dakota State University* addressed the very question posed to the Social Security Administration—whether the payments were subject to employment tax withholding, first asserting that tenure rights are rights which are valuable to the faculty member to whom tenure has been granted, even without a market in which to sell those rights.¹¹⁴ Next, the court addressed many of the arguments offered by the government as to why the payments should be subject to employment taxes.¹¹⁵ In distinguishing Revenue Ruling 75-44, the court noted that the tenure rights given at NDSU were not awarded simply based on years of service which would make them analogous to seniority rights.¹¹⁶

Importantly, tenure was not automatic upon completing service for a specified time period, which is a hallmark of ordinary seniority rights. Prior to an award of tenure, a professor was employed pursuant to one-year contracts for a period of time, generally six years at NDSU.¹¹⁷ The six years during which a professor taught before being granted tenure was not consideration for the grant of tenure. Rather, it was ordinarily a

112. *Id.* (citations omitted).

113. NDSU did not seek further guidance from either the Social Security Administration or the Internal Revenue Service. *Id.* at 602.

114. *Id.* at 605.

Despite the fact that tenure at a state institution is a constitutionally protected property interest and that the tenured faculty had clear contractual rights not to be terminated absent specific circumstances, the government argues that tenure rights are not contract rights that can be relinquished because the tenure rights have no economic value that can be bought and sold. We are unpersuaded by this argument. Rarely would we expect to find an employment contract that would have recognizable economic value to anyone other than the employee. Lack of a market in which to sell tenure rights does not prevent those rights from having value to the faculty member to whom tenure has been granted.

Id.

115. See *infra* Part II for a discussion of these arguments in support of finding payments to be subject to employment taxes.

116. *N.D. State Univ.*, 255 F.3d at 605–06.

117. *Id.* at 601.

prerequisite for tenure and served as a probationary period during which the University evaluated the professor to determine whether he or she had the qualities necessary to be worthy of tenure.¹¹⁸ After serving the probationary period, the professor still had to qualify for tenure through his or her scholarship, research, and service to the University and society, as “[t]he decision to award tenure rest[ed] on criteria that reflect[ed] the potential long-term contribution of the faculty member to the purposes, priorities, and resources of the institution, unit, and program.”¹¹⁹ At the end of the probationary period, the professor’s contract was either not renewed and the professor discontinued teaching at the University, or the professor was granted tenure and a lifetime appointment, as long as the grounds for removal were not triggered.¹²⁰

Based on the process of granting tenure as described by NDSU, the court found that a tenured professor experiences two successive, yet distinct, employment relationships with NDSU: the first being an at-will relationship during the probationary period and the second being the tenure relationship with NDSU.¹²¹ Thus, the rights earned under tenure were not earned from past service to University but instead represented rights established at the outset of the new employment relationship—the tenured relationship. With the granting of tenure came new rights and the protection of academic freedom. Tenure provided “a secure forum for the germination, cultivation, and exchange of ideas without fear that expression of viewpoints will result in retribution.”¹²² The value of the property rights in tenure emerged from this academic freedom. “It is this unique relationship and its accompanying rights, formed only when and if tenure is granted, that give tenure its significance and value.”¹²³ When rights were granted at the outset of the employment relationship, the rights appeared less like rights given for past services to the employer.¹²⁴

In addition to the nature of tenure as property rights given at the time the contract is negotiated, the court also looked to the manner in which payments under the early retirement plan were calculated, “Past

118. *Id.*

119. *Id.* at 606 (internal quotations omitted).

120. *Id.* at 605–06. The dissent in the *University of Pittsburgh* case addresses this same point. See *supra* note 94 and accompanying text.

121. See also *Mayberry v. Dees*, 663 F.2d 502, 516 (4th Cir. 1981) (holding that the tenure position is “a significantly different status—effectively a new job”).

122. *N.D. State Univ.*, 255 F.3d at 606.

123. *Id.*

124. Compare Rev. Rul. 75-44, 1975-1 C.B. 15, with Rev. Rul. 58-301, 1958-1 C.B. 23. It is important to note in I.R.S. General Counsel Memorandum 38,534, the IRS stated that the distinction between the two revenue rulings is viable but is one that is hard to recognize and implement. See I.R.S. Gen. Couns. Mem. 38,534 (Oct. 7, 1980); see also Mary B. Hevener & Anne G. Batter, *When Are Payments from an Employer to an Employee Not “Wages” Subject to Employment Taxes?*, 95 J. TAX’N 349, 356–57 (2001).

performance and current salary were not the only factors considered in determining the amount of the early retirement payments; in fact, there was no limit on what factors could be considered.”¹²⁵ In this sense, the payments under the early retirement plans appeared less like payments for past services or a relinquishment of seniority rights like in *University of Pittsburgh*. While the manner in which payments were calculated was not dispositive, the court “[did] not deem the inclusion of past performance and current salary as some of the factors in the decisional mix here to be controlling.”¹²⁶ This idea is further supported by the court in *Appoloni*:¹²⁷ “We have consistently held that where a payment arises out of the employment relationship, and is conditioned on a minimum number of years of service, such a payment constitutes FICA wages.”¹²⁸

Payments negotiated by faculty members under the early retirement plans were given in exchange for the relinquishment of tenure rights. Unlike the dismissal payments at issue in Revenue Ruling 74-252, the faculty members were not paid what was due to them under the terms of a previously negotiated employment contract. “They did not receive what they were entitled to under their contracts, which was continued employment absent fiscal constraints or adequate cause for termination. Rather they gave up those rights.”¹²⁹ In this sense, the payments were made in consideration for the relinquishment of valuable property rights and were thus not subject to employment taxes.

After the decision was issued by the Eighth Circuit in 2001, the IRS issued a notice stating that the Commissioner did not acquiesce in the decision.¹³⁰ This nonacquiescence was specifically “relating to whether early retirement payments that the taxpayer made to tenured faculty members are wages subject to [FICA] taxes.”¹³¹ The Action on Decision published by the IRS has specific precedential value for taxpayers, and the IRS offers the following guidance as to the meaning of nonacquiescence:

“Nonacquiescence” signifies that, although no further review was sought, the Service does not agree with the holding of the court and, generally, will not follow the decision in disposing of cases involving other taxpayers. In reference to an opinion of a circuit court of appeals, a “nonacquiescence” indicates that the Service will not follow the holding on a nationwide basis. However, the

125. *N.D. State Univ.*, 255 F.3d at 607.

126. *Id.*

127. 450 F.3d 185 (6th Cir. 2006). In this case, the court addressed the application of employment taxes to payments made to public school teachers who relinquished statutory tenure rights in exchange for early retirement incentive payments.

128. *Id.* at 191; *see also supra* note 71.

129. *N.D. State Univ.*, 255 F.3d at 607.

130. *Id.*, *nonacq.*, 2001-2 C.B. xv.

131. *Id.*

Service will recognize the precedential impact of the opinion on cases arising within the venue of the deciding circuit.¹³²

Thus, college and university administrators planning an early retirement program or any other voluntary termination program in the wake of *North Dakota State University* should be advised that the IRS will not follow the holding outside the Eighth Circuit. Relying on the holding in *North Dakota State University* will likely raise an audit flag to examiners at the IRS.¹³³

IV. ONE ADDITIONAL HURDLE

In 2007, Congress passed the Small Business and Work Opportunity Tax Act (the "Act") which amended the tax return preparer penalty provisions under § 6694 of the IRC.¹³⁴ Prior to the enactment of this legislation, the prepare penalties under § 6694 only applied to income tax returns. Section 8246 of the Act amended this provision to include preparers of all tax returns, amended returns, and claims for refund, including estate and gift tax returns, generation-skipping transfer tax returns, employment tax returns, and excise tax returns. Thus, if an individual prepares an employment tax return for a college or university after buying a professor out of tenure and does not properly report the payment, the individual could be subject to penalties under § 6694. The penalty under § 6694 is the greater of \$1,000 or 50% of the income derived with respect to each return or claim.¹³⁵

While the penalty may seem daunting, there is some good news for preparers of employment tax returns for colleges and universities. The standard under which the IRS will judge the conduct of the preparer is a reasonable belief standard.¹³⁶ In other words, the tax return preparer must reasonably believe that the tax treatment of a particular item noted on the return is more likely than not the proper tax treatment. A tax return preparer meets this standard if the preparer "analyzes the pertinent facts

132. *Id.*

133. Other academics commenting on the *North Dakota State University* decision have noted that the payments were more analogous to those in Rev. Rul. 75-44, arguing that the past performance requirement made the payments more like seniority rights in this revenue ruling as opposed to the contract rights in Revenue Ruling 58-301 which were more like property rights. Heather L. Turner, *Disparate Treatment of University Administrators' and Tenured Faculty Members' Early Retirement Payments for FICA Taxation: North Dakota State University v. United States*, 54 TAX LAW. 233, 238 (2000).

134. Small Business and Work Opportunity Tax Act of 2007, Pub. L. No. 110-28, 121 Stat. 190 (2007). The amendments made by the Act are effective for tax returns prepared after May 25, 2007.

135. I.R.C. § 6694(a)(1) (2006), amended by Act of Oct. 3, 2008, Pub. L. No. 110-343, Div. C, Title V, § 506(a), (122 Stat.) 3880. (West Supp. 2008).

136. I.R.S. Notice 2008-13, 2008-3 I.R.B. 282. This standard is in effect until further guidance is issued.

and authorities . . . and, in reliance upon that analysis, reasonably concludes in good faith that there is a greater than fifty percent likelihood that the tax treatment of the item will be upheld if challenged by the IRS.”¹³⁷ Preparers are allowed to rely upon information furnished by the taxpayer, without independent verification, provided this reliance is done in good faith. Also, a preparer may rely upon the advice or information furnished by another advisor, tax return preparer, or third party without independent verification, provided it is done in good faith.¹³⁸

Thus, a tax return preparer is not required to independently verify or review the items reported on tax returns, schedules or other third party documents to determine if the items meet the standard requiring a reasonable belief that the position would more likely than not be sustained on the merits.¹³⁹

However, the preparer cannot ignore any implications drawn from information known by or furnished to the taxpayer. Moreover, the preparer must make reasonable inquiries if information appears to be incorrect or incomplete.

In sum, while penalties now exist for preparers of employment tax returns, as long as college and university administrators exercise good faith and have a reasonable belief that the tax treatment of each item would likely be upheld, they will fall outside the parameters of § 6694.

V. CONCLUSION

For colleges or universities looking to offer an early retirement plan, or other voluntary termination program, to tenured faculty, the tax implications of that decision are likely to be found in the nature of the tenure policy at that particular academic institution and the nature and purpose of the payments given under the early retirement plan. While there is no clear and direct guidance issued by either the IRS or the Supreme Court in this area, looking to case law can give colleges and universities

137. *Id.* at 284.

138. *Id.* Good faith is defined in the following manner:

[A] tax return preparer will be found to have acted in good faith when the tax return preparer relied on the advice of a third party who is not in the same firm as the tax return preparer and who the tax return preparer had reason to believe was competent to render the advice.

Id. at 285. A preparer is not considered to act in good faith if

(i) The advice is unreasonable on its face; (ii) The tax return preparer knew or should have known that the third party advisor was not aware of all relevant facts; or (iii) The tax return preparer knew or should have known (given the nature of the tax return preparer's practice), at the time the tax return or claim for refund was prepared, that the advice was no longer reliable due to developments in the law since the time the advice was given.

Id.

139. *Id.* at 284.

some guidance.

Retirement plans subject to employment taxes will be analogous to those in *University of Pittsburgh*, with the most notable characteristics being monthly payments based on the employee's salary at the time of retirement as well as the length of service to the college or university. In addition, eligibility should be based on past service to the college or university not on relinquishment of tenure.¹⁴⁰ Moreover, plans designed to reward service to a college or university are more likely to be taxed as wages. Finally, in establishing a tenure policy, a college or university should move away from an award of tenure contingent on past performance, similar to a promotion, towards an entirely new contract.¹⁴¹

Retirement plans, and more fundamentally tenure policies, similar to those adopted by the University of Pittsburgh will more likely lead to payments being characterized as wages. Payments not solely based on criteria limited to past performance and current salary but based on a variety of factors are less likely to be considered wages for employment tax purposes. Moreover, a college or university structuring its tenure policies should follow those policies akin to the policies adopted by North Dakota State University.¹⁴² Tenure plans which look less like a promotion based

140. *Univ. of Pittsburgh v. United States*, 507 F.3d 165, 171 (3d Cir. 2007).

[E]ligibility for the Plans, for *both* tenured and non-tenured Plan participants, was based on the employee's age and years of service. These requirements link the Plan payments to past services for the employer, not the specific rights being relinquished, and weigh heavily in favor of treating the payments as wages.

Id. at 172 (emphasis in original).

141. *Id.* at 173–74. Specific provisions in the University of Pittsburgh's policy on "Appointment and Tenure" give this impression:

Academic tenure is a status accorded *members of the University faculty who have demonstrated high ability and achievement* in their dedication to growth of human knowledge. Tenure is intended to assure the University that there will be *continuity in its experienced faculty and in the functions for which they are responsible*. Promotion to tenured rank constitutes recognition by the University that a person so identified is qualified by achievements and contributions to knowledge as to be ranked *among the most worthy of the members of the faculty engaged in scholarly endeavors*.

Id. (quoting Appeal at 193–94, *Univ. of Pittsburgh v. United States*, 507 F.3d 166 (3d Cir. 2007) (No. 06-1276)) (emphasis in original).

142. *North Dakota State Univ. v. United States*, 255 F.3d 599 (8th Cir. 2001). Specifically,

Tenure was granted to a faculty member upon recommendation by NDSU to the North Dakota Board of Higher Education (the Board), which made the final tenure decision. NDSU had a tenure track of six years, during which time faculty members were evaluated annually. The six-year track was not set in stone, however, and occasionally tenure was granted earlier, even upon hire. Under NDSU and Board policy, the six-year probationary period could be waived for faculty having tenure at another university or having a record of outstanding achievement. The Board considered various factors in making tenure decisions, including scholarship in teaching, contribution to a

on service and more like a new employment contract with distinct rights will lead to termination payments that are less likely to be characterized as wages subject to employment taxes because the rights being forfeited by the faculty member appear more akin to property rights. Also, for colleges and universities looking to implement early retirement programs or “Tenure Buy-Out Programs” submitting such programs for review by the Social Security Administration, as done by North Dakota State University, might allow for the discovery of problems that could be remedied early on.

For plans designed after January 12, 2005, the college or university should follow the guidance issued by the IRS in Revenue Ruling 2004-110 as the IRS will not classify those payments as wages for employment tax purposes, provided that they are made under facts and circumstances substantially the same as those in Revenue Rulings 55-520 and 58-301. It is worthwhile to note, however, that the ruling solely mentions employment contracts and does not specifically mention tenure. Thus, for many academic institutions, submitting the plan to the Social Security Administration or IRS for guidance as North Dakota State University did might enable the institution to act with more concrete guidance.

In the end, it often comes down to a facts and circumstances analysis—a situation which is difficult to plan for. For many college and university administrators, this leads to an inequitable treatment of similarly situated persons—inequitable treatment that could best be resolved by guidance from the Supreme Court.

discipline or profession through research, other scholarly or professional activities, and service to the institution and society.

Tenure was not a right that could be demanded by a professor. Once tenure was granted, however, tenure gave the professor the right to continuous academic year employment in the specific program area for which the tenure was granted.

Id. at 601.

FEDERAL FUNDING AND FRAUD: THE FALSE CLAIMS ACT IN HIGHER EDUCATION AFTER *MAIN V. OAKLAND CITY UNIVERSITY*

RACHEL PERKINS*

I. INTRODUCTION

The False Claims Act¹ (FCA) is a federal statute that aims to “combat fraud against the federal government.”² The FCA imposes civil liability on any person, or entity, that makes a false or fraudulent claim to the government for payment.³ In order to increase the likelihood of reports of fraudulent claims, it allows private individuals, known as “relators,” to sue on behalf of the government and receive a portion of the damages.⁴

The FCA has a long history, but relators generally did not sue institutions of higher education under its provisions until fairly recently. Because many colleges and universities make claims to the federal government for student aid, these institutions are theoretically liable under the FCA if any of the requests for student aid are fraudulent. Only some colleges and universities are amenable to such qui tam actions: state colleges and universities, and, in some cases, community colleges are immune from liability under the FCA because of the Eleventh Amendment.⁵ In an FCA higher education case, an individual with knowledge that a non-state university or college made fraudulent requests for federal student aid can sue the institution on behalf of the government. If the relator is successful in proving that federal student aid was obtained

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1. 31 U.S.C. §§ 3729–3733 (2006).
2. Virginia C. Theis, Note, *Government Employees as Qui Tam Plaintiffs: Subverting the Purposes of the False Claims Act*, 28 Pub. Cont. L.J. 225, 225 (1999).
3. 31 U.S.C. § 3729.
4. 31 U.S.C. § 3730(b), (d).
5. See discussion *infra* Part II.B.

fraudulently, he is entitled to share in the award that the institution must pay the government.

At first, courts were unreceptive to claims made against colleges and universities under the FCA, often granting defendants' motions to dismiss for failure to state a claim. Courts generally focused on the requirement of a *claim* for payment, insisting that the request for money be on the same document as the falsity.⁶ Then in 2003, Judge Easterbrook of the Seventh Circuit Court of Appeals broke new ground, ruling in *Main v. Oakland City University*⁷ that an FCA suit against a private university could proceed to the merits.⁸ He reasoned that if a falsity led to a payment that the government should not have made, then the definition of "claim" should not depend on how many documents were involved.⁹ Other courts have followed suit; one even expanded on the holding.¹⁰ While the rulings may seem a logical and fair application of the law, some higher education lawyers fear that the Seventh Circuit opened a floodgate of litigation and that colleges and universities will face high litigation expenses and possible damage awards for inadvertent errors on the numerous applications for federal aid they must fill out annually.¹¹

These fears are unfounded, as the False Claims Act acts to punish only those who have intentionally perpetrated financial fraud on the government. Part I of this note will discuss the background of the FCA and explain the types of federal student aid that institutions of higher education receive. Part II will discuss the developing case law of the application of the FCA to institutions of higher education: Pre-*Main*, the *Main* holding, and Post-*Main*. Part III will argue that *Main*'s holding was limited and did not open a floodgate for litigation, and attorneys who fear otherwise are wrong.

II. BACKGROUND

A. History

The False Claims Act was passed during the Civil War at the insistence of President Abraham Lincoln.¹² During that war, private contractors profited from fraudulent sales to the government.¹³ These contractors sold things like useless rifles, rancid food, and unseaworthy ships that they re-

6. See cases cited *infra* notes 50, 68.

7. 426 F.3d 914 (7th Cir. 2005).

8. See discussion *infra* Part III.B.

9. *Id.* at 916.

10. See discussion *infra* Part III.C.

11. See discussion *infra* Part IV.

12. James W. Adams, Jr., *Proof of Violation Under the False Claims Act*, in 78 AM. JUR. 3D *Proof of Facts* 357, § 3 (2004).

13. *Id.*

painted and delivered to the Navy as newly built.¹⁴

From the beginning, the FCA's "qui tam" provisions were crucial to its enforcement. These provisions allow a private individual to sue, on behalf of the government, an entity placing fraudulent claims for payment.¹⁵ A qui tam action, representing the Latin phrase "*qui tam pro domino rege quam pro se ipso in hac parte sequitur*," means "who as well for the king as for himself sues in this matter."¹⁶ Qui tam actions trace their origin to thirteenth-century England, where individuals sued on behalf of themselves and the government in order to gain access to the reportedly more just royal courts.¹⁷ Qui tam actions allow individuals who successfully sue on behalf of the government to keep a portion of the award granted.¹⁸ When the FCA was enacted in 1863, federal and state governments had codified numerous other qui tam actions.¹⁹

The 1863 Act provided both criminal and civil penalties for persons submitting a false claim.²⁰ Civilly, persons found to have fraudulently billed the government were fined double the amount of damages the United States sustained because of the fraud, and were required to pay a \$2,000 civil penalty for each false claim.²¹ The individual who successfully tried the suit on behalf of the government (the "relator") received 50% of all damages recovered.²²

Congress amended the FCA in 1943.²³ Two major changes substantially decreased the motivation for individuals to file suit. First, relators could no longer bring an action based on evidence or information that the government knew about at the time of filing.²⁴ It did not matter whether the government intended to pursue the claim or whether the individual was the original source of the information.²⁵ Second, the relator's percentage of damages received decreased to 25% if the government did not help in the litigation, and 10% if it did.²⁶

14. *Id.*

15. 31 U.S.C. § 3730(b) (2006).

16. BLACK'S LAW DICTIONARY 1282 (8th ed. 2004).

17. Note, *The History and Development of Qui Tam*, 1972 WASH. U. L.Q. 81, 83–85 (1972).

18. *Id.* at 85.

19. Adams, *supra* note 12, § 3; *see, e.g.*, Act of Mar. 3, 1845, ch. 43, § 17, 5 Stat. 732, 738 (regarding postage); Act of June 30, 1834, ch. 161, § 27, 4 Stat. 729, 733–34 (regarding trade with Indians).

20. False Claims Act, ch. 67, §3, 12 Stat. 696, 698 (1863) (current version at 31 U.S.C. §§ 3729–3733 (2006)).

21. *Id.* § 3, 5.

22. *Id.* § 6.

23. Act of Dec. 23, 1943, ch. 377, 57 Stat. 608.

24. *Id.*

25. *See id.*

26. *Id.*

Congress, recognizing the extent of the amendments' impact and the need for greater private enforcement of the FCA, amended it again in 1986.²⁷ Congress eliminated the 1943 provision forbidding suits where the government is aware of the fraud at the time of filing, but only if the relator is an "original source" of the allegations and has direct and independent knowledge of the fraudulent activity.²⁸ The amendments also increase the civil fine for each fraudulent claim from \$2,000 to a range of \$5,000 to \$10,000.²⁹ Finally, Congress increased relators' financial motivations to file suit. Guilty parties must pay treble damages—rather than double damages—for actual loss to the government, and the relator's share increased to 25–30% if the government does not participate in the litigation, and 15–25% if it does.³⁰

B. The FCA in Suits Against Colleges and Universities

State colleges and universities are exempt from FCA liability under the Eleventh Amendment, which ordinarily prevents private citizens from suing non-consenting states or state agencies for money damages in federal court.³¹ Congress may abrogate this immunity for a particular cause of action if it uses unequivocal statutory language to do so, and if it predicates its action upon an appropriate constitutional provision.³² The Supreme Court ruled in 2000 that the FCA does not use such language, and therefore states and state agencies (including state colleges and universities) are immune from *qui tam* suits under the FCA.³³ State colleges and universities are deemed arms of the state because a judgment against one of them would have the same practical consequences to the state treasury as a judgment against the state.³⁴ Private colleges and universities receive no such immunity. Similarly, independent political subdivisions, such as

27. False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153 (codified at 31 U.S.C. §§ 3729–3733 (2006)).

28. *Id.*

29. *Id.*

30. *Id.* The 1986 amendments also: (1) define the level of *mens rea* needed to be liable for submitting a false claim to include submitting claims with deliberate ignorance or reckless disregard as to the truth of the information contained on the claim; (2) require the government or *qui tam* relator to adduce proof of the submission of a false claim by a preponderance of evidence instead of higher standards that had been imposed by courts; (3) enlarge the time within which a false claims act case may be brought; (4) mandate that the defendant pay a successful *qui tam* relator's attorney's fees; and (5) protect relators from retaliation by their employers. *Id.*

31. *Bd. of Trs. v. Garrett*, 531 U.S. 356, 363 & n.34 (2001).

32. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 55 (1996).

33. *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 782–88 (2000).

34. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 123 (1984); *United States ex rel. Diop v. Wayne County Cmty. Coll. Dist.*, 242 F. Supp. 2d 497, 526 (E.D. Mich. 2003).

cities or counties, are not protected by the Eleventh Amendment against FCA-based claims.³⁵

Community colleges present more interesting questions of immunity, because it is unclear whether they should be treated as arms of the state—because they often receive substantial amounts of money from the state—or as agents of the city or county that runs them. The Supreme Court has not reached the issue of the conditions under which a community college can receive sovereign immunity through the Eleventh Amendment. There are, however, two lower court cases dealing with the sovereign immunity of community colleges in FCA cases.

In both of these cases, the courts decided that when a verdict against the community college would significantly affect the state treasury, the college is immune from liability under the Eleventh Amendment. In *Hadley v. North Arkansas Community Technical College*,³⁶ the Eighth Circuit concluded that because the community college received nearly 75% of its revenue from state appropriations, it was an agency of the state.³⁷ The court therefore granted the community college sovereign immunity from an individual's FCA claims against it.³⁸

A federal district court in *Diop v. Wayne County Community College* found a much smaller percentage—around 35%—sufficient to invoke state agency status protection against FCA claims.³⁹ The court explained that courts must examine the college and its “powers and characteristics . . . to determine whether suit is in reality against the State. Courts typically look at the degree of local autonomy and control and most importantly, whether the funds to pay any award will be derived from the State treasury.”⁴⁰ Because this area has not been litigated frequently, nor addressed by the Supreme Court, it remains to be seen what nexus between community colleges and the state treasury is required before the college receives Eleventh Amendment protection from FCA suits.

C. Federal Funding of Higher Education

There are a number of ways in which the federal government subsidizes higher education. The primary means of such support is federal student financial aid, which is authorized by the Higher Education Act of 1965 (HEA).⁴¹ Title IV of the Higher Education Act of 1965⁴² contains many

35. *Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 125–34 (2003).

36. 76 F.3d 1437 (8th Cir. 1996).

37. *Id.* at 1440.

38. *Id.*

39. *Diop*, 242 F. Supp. 2d at 527. The court also held that the fact that the college was created by the State and subject to operational rules legislated by the State weighed in favor of sovereign immunity for the college. *Id.* at 527–28.

40. *Id.* at 527.

41. Pub. L. No. 89-329, 79 Stat. 1219 (codified as amended in scattered sections

programs, including the Federal Pell Grants,⁴³ the William D. Ford Federal Direct Loan Program,⁴⁴ the Federal Family Education Loan Program,⁴⁵ and the Federal Perkins Loan Program.⁴⁶

Federal Pell Grants are considered the foundation of federal financial aid; other federal and state forms of aid add to this basis.⁴⁷ The grants do not have to be paid back, and the government awards them only to undergraduate students.⁴⁸ The Federal Perkins Loans program provides low-interest (5%) loans to both undergraduate and graduate students with exceptional financial need.⁴⁹ Those students who do not qualify for the Perkins loans may qualify for loans under the Family Federal Education Loan Program (FFELP) or the William D. Ford Federal Direct Loan Program.⁵⁰ The titles of these federal loans are the same under both programs: students receive “Federal Stafford Loans,” and parents of the students receive “Federal PLUS Loans.”⁵¹ The Stafford Loans include both subsidized loans, where the government pays the interest while the student is in school, and unsubsidized loans, where the student will eventually be responsible for the interest payment.⁵²

Federal regulations prescribe the rules and procedures that determine whether an educational institution qualifies for funding under Title IV.⁵³ In order to participate in the Title IV programs, colleges and universities must sign a “Program Participation Agreement” (PPA) with the Secretary of Education.⁵⁴ This agreement requires that the applying institution make a

of 20 U.S.C. (2006)).

42. 20 U.S.C. §§ 1070–1099 (2006).

43. *Id.* §§ 1087a–1087j.

44. *Id.* §§ 1071–1087.

45. *Id.* §§ 1087aa–1087ii.

46. *Id.* §§ 1087aa–1087ii.

47. United States, Department of Education, Federal Student Aid: Federal Pell Grant, <http://www.studentaid.ed.gov/PORTALSWebApp/students/english/PellGrants.jsp> (last visited Apr. 20, 2009).

48. *Id.*

49. United States, Department of Education, Federal Student Aid: Campus-Based Aid, <http://www.studentaid.ed.gov/PORTALSWebApp/students/english/campusaid.jsp> (last visited Apr. 20, 2009).

50. United States, Department of Education, Federal Student Aid: Stafford Loans (FFELs and Direct Loans), <http://studentaid.ed.gov/PORTALSWebApp/students/english/studentloans.jsp> (last visited Apr. 20, 2009) [hereinafter Stafford Loans Website].

51. Because the FFELP is funded by private lending institutions, and only guaranteed by the government, courts quickly dismiss the portion of FCA lawsuits referring to fraud based on it, and it will therefore generally be excluded from the discussion. *See also infra* note 76.

52. Stafford Loans Website, *supra* note 50.

53. Institutional Eligibility Under the Higher Education Act of 1965, as Amended, 34 C.F.R. pt. 600 (2008).

54. 34 C.F.R. § 668.14 (2008).

number of promises, most of which are beyond the scope of this paper. Two of the regulations are relevant here. First, colleges and universities must be accredited to qualify for funding.⁵⁵ This is important because a recent case has held that falsifying accreditation information may be the same thing as falsifying a claim for money to the government.⁵⁶ Second, the HEA prohibits participating institutions from “provid[ing] any commission, bonus, or other incentive payment based directly or indirectly on success in securing enrollments or financial aid to any persons or entities engaged in any student recruiting or admission activities.”⁵⁷ This prohibition is presumably based on the belief that only students who actually desire to be in school should get federal funding—the government does not want to spend taxpayer dollars to enrich colleges and universities that enroll anybody, regardless of talent or desire.

Once an institution has been deemed qualified to receive federal student financial aid, the individual student requests Title IV funding through a Free Application for Federal Student Aid (FAFSA). When the student is approved, the federal government writes a check to the college or university in which the qualified student is enrolled. Because a large number of students are able to attend college only with the help of federal money, it is crucial to institutions that are struggling to keep up enrollment that they be eligible for Title IV programs. Because it is in private colleges’ and universities’ financial interest to do what they can to qualify for federal funding, the incentive develops to be less-than-honest when requesting federal financial aid. The FCA claims relating to higher education stem from falsities made on institutions’ PPA agreements, which they must have signed in order for students to submit a FAFSA. The

An institution may participate in any Title IV, HEA program, other than the LEAP and NEISP programs, only if the institution enters into a written program participation agreement with the Secretary, on a form approved by the Secretary. A program participation agreement conditions the initial and continued participation of an eligible institution in any Title IV, HEA program upon compliance with the provisions of this part, the individual program regulations, and any additional conditions specified in the program participation agreement that the Secretary requires the institution to meet.

Id. § 668.14(a)(1).

55. Accreditation is a somewhat complicated process in the United States, as it is not run through the government. The HEA requires the Secretary of Education to publish a list of nationally recognized accreditation agencies that he/she considers to be a “reliable authority” as to the quality of education or training provided by the institution. 34 C.F.R. § 600.2. These agencies use different procedures to determine whether institutions meet their criteria for accreditation. U.S. Department of Education, Financial Aid for Postsecondary Students: Accreditation in the United States, http://www.ed.gov/adms/finaid/accred/accreditation_pg2.html (last visited Apr. 20, 2009).

56. *United States v. Chapman Univ.*, No. SACV 04-1256JVSRCX, 2006 WL 1562231, at *3–4 (C.D. Cal. May 23, 2006); *see discussion infra* Part III.C.

57. 20 U.S.C. § 1094(a)(20) (2006).

conflicting case law that has developed turns on whether falsities made on forms other than the FAFSA can be the basis for fraud under the FCA.⁵⁸

III. DEVELOPING CASE LAW

Prior to 2003, most cases filed under the FCA involve health care claims, or claims relating to military expenses.⁵⁹ Beginning in 2003, however, cases of relators suing colleges and universities for fraud in requesting federal student financial aid became more common.⁶⁰ At first, these relators were unsuccessful, as courts refused to hold that institutions committed fraud under the FCA if the FAFSA itself did not contain a falsity.⁶¹ Then in 2005 Judge Easterbrook held in *Main* that fraud in the PPA is punishable under the FCA.⁶² Since *Main*, courts have followed Judge Easterbrook's logic, holding colleges and universities responsible for the information they provide the government when requesting financial aid.⁶³

A. Initial Reception of Higher Education False Claims Act Suits

1. *United States ex rel. Graves v. ITT Educational Services*⁶⁴

At first, courts were unreceptive to lawsuits brought against institutions of higher education by relators under the FCA. In *United States ex rel. Graves v. ITT Educational Services*, a federal district court in Texas refused to hold the institution liable under the FCA.⁶⁵ ITT's technical colleges participated in student financial aid programs under Title IV.⁶⁶ Under these programs, the federal government insured educational loans and made direct grants to the students enrolled at ITT.⁶⁷

58. The case opinions discussed in this article do not refer to the FAFSA by name. Instead, they refer generally to documents requesting federal student aid. However, this article will refer to the FAFSA in place of generic descriptions of requests for federal student aid.

59. See W. Jay De Veccio, *Qui Tam Actions: Some Practical Considerations*, HEALTH CARE LAW AND LITIGATION: ALI-ABA COURSE OF STUDY, Oct. 2000, at 529; see, e.g., *United States ex rel. Quinn v. Omnicare*, 382 F.3d 432 (3d Cir. 2004) (qui tam action alleging false claims submitted by Medicare-providing pharmacies), *United States ex rel. Butler v. Hughes Helicopters, Inc.*, 71 F.3d 321 (9th Cir. 1995) (qui tam action alleging false claims submitted by a defense contractor).

60. This is an observation by the author. The main cases discussed in this Note were decided within a period of 3–4 years.

61. See discussion *infra* Part III.A.

62. *United States ex rel. Main v. Oakland City Univ.*, 426 F.3d 914 (7th Cir. 2005).

63. See discussion *infra* Part III.C.

64. 284 F. Supp. 2d 487 (S.D. Tex. 2003).

65. *Id.* at 489.

66. *Id.*

67. *Id.*

Dan Graves and Susan Newman were admissions and recruitment representatives at an ITT Tech branch in California.⁶⁸ ITT certified in its Program Participation Agreement that it would follow all the applicable federal regulations, including an agreement not to pay admissions personnel on a commission-basis.⁶⁹ Graves and Newman, the relators, alleged that from 1993 until the filing of the case, “all of ITT Tech’s campuses paid its admissions [and] recruitment representatives under an ‘incentive salary structure’” in violation of federal statute.⁷⁰ The relators claimed that ITT made “claims for payment” to the federal government to receive funds under Title IV and that those claims required a valid PPA.⁷¹ The relators did not allege that ITT filed applications⁷² that were in themselves false, but instead alleged that the institution made a fraudulent “claim” by receiving Title IV funds despite knowing it was violating the PPA.⁷³

This line of reasoning is often referred to as the “false certification” theory of FCA violations; it was first adopted by the Fifth Circuit in *United States ex rel. Thompson v. Columbia/HCA Healthcare Corporation*.⁷⁴ The theory allows relators to prove a false claim if the defendant falsely certified compliance with a federal statute, regulation, or contractual term that was a prerequisite to obtaining a government benefit.⁷⁵ The theory developed through the common law and is based on the idea that there is more than one way to tell a lie—lying that a college or university is doing something required to receive funds is equally as false as lying about household income or other items on an application for funding.

The *Graves* court, however, rejected the relator’s argument, granting ITT’s motion to dismiss for failure to state a claim upon which relief may be granted.⁷⁶ The court held that ITT was not liable under the FCA, because the FAFSA was not fraudulent nor based on a “false

68. *Id.* at 490.

69. *Id.* at 491.

70. *Id.* at 490.

71. *Id.* at 490–91. These funds included FFLEP loans, Pell Grants, and Federal Direct Student Loans. *Id.*

72. See discussion *supra* note 58.

73. *Graves*, 284 F. Supp. 2d at 491.

74. 125 F.3d 899 (5th Cir. 1997).

75. *Id.* at 902. “A theory of ‘legally false’ certification differs from ‘factually false’ certification, which involves an incorrect description of goods or services provided or a request for reimbursement for goods or services never provided.” *Graves*, 284 F. Supp. 2d at 496–97. For a detailed description of the elements under the false certification theory, see *infra* notes 139–151 and accompanying text.

76. *Graves*, 284 F. Supp. 2d at 489. The court quickly dismissed any claims that were based on money paid out under FFLEP, because under FFLEP the government is not making a payment at all, but instead is guarantying a loan made by a private lender. *Id.* at 496. The rest of the case focuses on payments made to ITT under the Federal Pell Grant program.

certification.”⁷⁷ The court distinguished between “generally certifying compliance with applicable regulations and statutes governing participation in a program,” and “certifying compliance with a particular requirement that is a prerequisite to receiving or retaining payment under that program.”⁷⁸ The court, after a discussion of precedent across multiple circuits, including the Second, Fifth, and Ninth Circuits, determined that “the appropriate inquiry is whether the defendants’ certification of compliance with the regulation at issue was a condition to payment.”⁷⁹ It reasoned that the PPA merely contained a “general statement of adherence to all regulations or statutes governing participation in a program through which federal funds [were] received,”⁸⁰ and that it was insufficient as a basis of FCA liability.⁸¹

2. *United States ex rel. Gay v. Lincoln Technical Institute, Inc.*⁸²

Another federal district court in Texas issued a similar ruling six months later in *United States ex rel. Gay v. Lincoln Technical Institute, Inc.*⁸³ *Gay*’s factual circumstances were almost identical to those in *Graves*. The relators were previously admissions personnel, who alleged that Lincoln Tech violated the FCA by certifying compliance with federal regulations in order to receive Title IV funds while knowingly violating the regulation prohibiting commission-based recruiting salaries.⁸⁴

The *Gay* court ruled in favor of Lincoln Tech by granting its 12(b)(6) motion to dismiss for failure to state a claim.⁸⁵ The court ruled that the relators failed to allege a number of crucial requirements. First, the relators did not allege a cognizable “claim” under the FCA because it did not describe any specific request or demand made by Lincoln Tech for money, but instead provided only “a generic description of Lincoln’s program procedures in HEA student loan programs.”⁸⁶ The court held that there could be no actionable fraud under the FCA since the relators did not offer

77. *Graves*, 284 F. Supp. 2d. at 507–08.

78. *Id.* at 501.

79. *Id.*

80. *Id.*

81. *Id.*

82. No. Civ.A. 301CV505K, 2003 WL 22474586 (N.D. Tex. Sept. 3, 2003).

83. *Id.*

84. *Id.* at *1. The chain-of-payment was clearer in this case: Lincoln Tech executed PPAs with the Department of Education then submitted “assertion letters to its compliance auditor stating that the school complied with the requirements of participation in HEA student loan programs, including incentive compensation prohibitions.” *Id.* The court’s opinion did not specify whether the Department of Education received these assertion letters attached to the auditor’s reports or whether the information from the letters was re-stated in the reports.

85. *Id.*

86. *Id.* at *2.

any evidence that any information on the FAFSAs⁸⁷ was false or contained false statements.⁸⁸

Additionally, even if the relators alleged a “claim,” they did not allege facts sufficient to prove fraud under the false certification theory.⁸⁹ The court held that the relators failed to meet the two elements of the false certification theory: (1) that the defendant made a knowingly false certification of compliance with a statute; and (2) that the certification was a prerequisite to payment.⁹⁰ Apparently, the record lacked detailed allegations of the University’s knowledge of its false certification, so the first element was not met.⁹¹ The *Gay* court considered the lack of the first element a moot point, however, because there was no proof that the certification was a condition of payment.⁹² The court thus needed a very specific statement from the federal government conditioning payment of a particular fund to a certification that the program has been, and will continue to be, in compliance with the particular regulation prohibiting commission-based recruiting.⁹³

B. A Shift in Case Law: *United States ex rel. Main v. Oakland City University*

In October of 2005, Judge Easterbrook of the United States Court of Appeals for the Seventh Circuit delivered a surprising ruling in *United States ex rel. Main v. Oakland City University*.⁹⁴ The facts in *Main* are similar to both *Graves* and *Gay*. Jeffrey Main worked for Oakland City University, first as a recruiter, and later as the University’s Director of Admissions.⁹⁵ He claimed that he was paid on a contingent basis; when he found out that this arrangement was against federal law, he filed suit.⁹⁶ The district court, ruling the same way as the courts in *Graves* and *Gay*, dismissed the case on the pleadings.⁹⁷

87. See *supra* note 58.

88. *Gay*, 2003 WL 22474586, at *2. The court quickly dismissed any claims that were based on money paid out under FFELP. *Id.* at *2; see *supra* note 51.

89. *Gay*, 2003 WL 22474586, at *4.

90. *Id.* at *3–*4.

91. *Id.* at *4.

92. *Id.*

93. The court also quickly dismissed the relators’ claims of fraud in the inducement and the “reverse false claim” under § 3729(a)(7) of the FCA. *Id.* at *4–*5.

94. 426 F.3d 914 (7th Cir. 2005).

95. *Id.* at 916.

96. *Id.*

97. *Id.* The district court ruled that:

[E]ven wilful falsehoods in phase-one applications do not violate the Act, because the phase-one application requests a declaration of eligibility rather than an immediate payment from the Treasury. The phase-two application for grants, loans, and scholarships are covered by the Act . . . but are not false,

The court of appeals reversed.⁹⁸ Judge Easterbrook ruled that because the False Claims Act covers anyone who “knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government,”⁹⁹ the process by which Oakland City University obtained federal funds was covered under the Act.¹⁰⁰ Judge Easterbrook introduced new terminology to explain his interpretation of the statute. He reasoned,

The University “uses” its phase-one application (and the resulting certification of eligibility) when it makes (or “causes” a student to make or use) a phase-two application for payment. No more is required under the statute. The phase-two application is itself false because it represents that the student is enrolled in an eligible institution, which isn’t true. (Likely the student does not know this, however, so the phase-two application is not fraudulent.) The statute requires a causal rather than a temporal connection between fraud and payment. If a false statement is integral to a causal chain leading to payment, it is irrelevant how the federal bureaucracy has apportioned the statements among layers of paperwork.¹⁰¹

Oakland City University argued that this broader approach would make any institution liable under the FCA if it broke a promise that it had made to the government in its PPA. The court rejected the University’s argument by differentiating between a breach of promise and fraud.¹⁰² A simple breach of promise is a broken contract, which is not actionable under the FCA.¹⁰³ Fraud requires a false representation such as a promise to do something that one has no intention of doing.¹⁰⁴ Colleges and universities are not liable for simply “tripping up on a regulatory complexity,” but they are liable for knowingly making a promise on their PPA that they do not intend to keep.¹⁰⁵ The court allowed the relator to reach the merits of the case, because it found that he had sufficiently alleged a false claim within the meaning of the statute.¹⁰⁶

because they do not repeat the assurance that the University abides by the rule against paying contingent fees to recruiters.

Id.

98. *Id.* at 915.

99. 31 U.S.C. § 3729(a)(2) (2006).

100. *Main*, 426 F.3d at 916.

101. *Id.* (citation omitted).

102. *Id.* at 917.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* The Supreme Court denied certiorari in April of 2006, leaving the decision intact in *Illinois, Indiana, and Wisconsin. Oakland City Univ. v. United States ex rel. Main*, 547 U.S. 1071 (2006).

The University further argued that a violation of the incentive compensation ban usually does not result in a financial loss to the United States, because the student presumably would have enrolled in a different, eligible school, and received Title IV funding anyway.¹⁰⁷ The court rejected this argument as well, pointing out that the statute provides for penalties even if actual loss is hard to quantify.¹⁰⁸

The federal government declined to intervene, but filed an amicus curiae brief on behalf of the relators, arguing that:

[N]umerous courts have held that knowing violations of statutory or regulatory requirements are actionable under the FCA where a person's eligibility for government funds is conditioned on compliance with those requirements. In such circumstances [sic], courts have reasoned that a request for payment constitutes an "implied certification" of compliance with all program requirements, and that such a claim is therefore "false" when the prerequisites for obtaining the benefit have not been satisfied.¹⁰⁹

C. Post-*Main*: Colleges and Universities Held to a Higher Standard

Three related cases after *Main* have been decided in congruence with the Seventh Circuit precedent. Two courts have explicitly adopted Judge Easterbrook's logic, and one possibly expanded the scope of his ruling.

1. *United States v. Chapman University*¹¹⁰

The first case, *United States v. Chapman University*, was brought by three Chapman University professors.¹¹¹ This case differs factually from the three previously discussed cases because the relators in this case based their FCA claim on false statements made to an accreditation agency, rather than directly to the federal government.¹¹²

107. *Main*, 426 F.3d at 917.

108. *Id.*

109. Brief for the United States as Amicus Curiae Supporting Appellant at 19, *Main*, 426 F.3d 914 (No. 05-2016).

110. No. SACV 04-1256JVSRCX, 2006 WL 1562231 (C.D. Cal. May 23, 2006).

111. *Id.* at *11.

112. *Id.* at *2. The U.S. Justice Department did not join in the lawsuit against Chapman. It did, however, file a brief with the court supporting the relators' legal argument and opposing Chapman's request to dismiss the suit.

The university's argument "that 'no FCA claim can be maintained based on the standards of [a] private accreditation authority'" sweeps "too broadly," the government brief notes. "Numerous courts have held that where the United States makes compliance with certain requirements a condition of receiving a government benefit and a person submits a claim while not in compliance with such requirements, the claim violates the [False Claims Act] Nothing in this theory of liability requires that the substance of the federal requirement originate with the federal government, as long as the federal

Chapman University was accredited by the Western Association of Schools and Colleges (WASC).¹¹³ The relators in the case alleged that Chapman University lied to WASC and consequently to the federal government about meeting accreditation standards regarding a minimum number of classroom hours taught.¹¹⁴ Accreditation by an approved agency is required before an institution can receive financial aid under Title IV.¹¹⁵ Chapman University signed the Program Participation Agreement and thereby confirmed that it was accredited by WASC.¹¹⁶ Chapman University could not receive Title IV funds if it did not enter into a PPA with the government.¹¹⁷ With this in mind, the relators alleged that certain officials at Chapman knew that the certification that each class was being taught for 45 hours was false.¹¹⁸ Chapman University argued that none of the documents that the relators had identified constituted “false claims for payment or false certification of compliance with a condition of payment.”¹¹⁹ Chapman contended that the relators’ claim should fail “because state and federal financial tuition assistance does not depend on complete compliance with the guidelines of an accreditation agency, such as WASC, but rather depends only on being accredited by an accreditation agency.”¹²⁰ Chapman essentially argued that once they had been

government has adopted the requirement as its own, by statute, regulation, rule or contract.”

Doug Lederman, *Ever-Expanding False Claims Act*, INSIDE HIGHER ED, May 26, 2006, <http://www.insidehighered.com/news/2006/05/26/false> (quoting a brief filed on behalf of the United States) (omission and alterations in original).

113. *Chapman Univ.*, 2006 WL 1562231, at *2. The Western Association of Schools and Colleges (WASC) is “one of six regional associations that accredit public and private schools, colleges, and universities in the United States. The Western region covers institutions in California and Hawaii, the territories of Guam, American Samoa, Federated States of Micronesia, Republic of Palau, Commonwealth of the Northern Marianas Islands, the Pacific Basin, and East Asia, and areas of the Pacific and East Asia where American/International schools or colleges may apply to it for service.” Western Association of Schools and Colleges, <http://www.wascweb.org/> (last visited Apr. 20, 2009).

114. The WASC handbook provided that each class should be taught for a minimum of 45 hours. *Chapman Univ.*, 2006 WL 1562231, at *2. The relators also alleged false certification in regards to having clinical supervision in the Marriage and Family Therapy program, which is a requirement for licensing in California, but is not important for the discussion here. Similarly, the relators made a claim under unfair competition, which will not be discussed here.

115. 34 C.F.R. § 600.2 (2008).

116. *Chapman Univ.*, 2006 WL 1562231, at *6.

117. 34 C.F.R. § 668.14 (2008).

118. *Chapman Univ.*, 2006 WL 1562231, at *1. The relators alternatively argued that even if the officials did not have actual knowledge that this certification was false, they “acted with deliberate indifference and/or reckless disregard as to the truth or falsity of the claim.” *Id.*

119. *Id.* at *2.

120. *Id.*

accredited, the promises that it had made to gain accreditation had no legal implications, and further that the only way to be liable under the FCA was to lie in the actual requests for federal aid.

The court rejected Chapman's arguments and ruled that the relators' complaint was sufficient to withstand a motion to dismiss.¹²¹ The court found that *Main* was analogous and provided a "persuasive analytic framework" to analyze the case.¹²² In *Main*, the signing of the PPA (the "application to establish the institution's eligibility") constituted "phase one" of the fraud, and the submission of the FAFSAs¹²³ constituted "phase two."¹²⁴ In *Chapman University*, the submission of documents for accreditation by WASC constituted "phase-one" of the fraud.¹²⁵ The submission of the PPA and the FAFSAs constituted "phase two."¹²⁶ The court in *Chapman* shifted the signing of the PPA from being the entire "phase-one" of the fraud, to being merely a part of "phase-two." The court agreed with the relators that but for the alleged false statements contained in "phase-one," the government would not have granted Chapman certain loans and grants, and that no more was required under the FCA.¹²⁷

Chapman University tried to differentiate its case from *Main* by arguing that the fundamental difference was that its infraction was of an accreditation requirement, rather than of a statute.¹²⁸ The court rejected this argument, ruling that the question of whether or not the WASC standards have the force and effect of a statute was immaterial.¹²⁹ Chapman also contended that the pleadings were insufficient because the PPA did not require an affirmative certification of compliance with WASC accreditation requirements, the relators had not alleged when classroom instruction hour violations occurred, and the relators had not alleged how many times those violations occurred.¹³⁰ The court ruled that the complaint satisfied the pleading requirements for fraud by identifying "the who, Chapman, when, the past ten years, and what, PPAs."¹³¹ The court further held that a specific outlay of money by the government need not be identified; the allegation that the PPA affirmed accreditation and that Chapman had requested federal loans based on the PPA was sufficient.¹³²

121. *Id.* at *7.

122. *Id.* at *2.

123. *See supra* note 58.

124. United States *ex rel.* Main v. Oakland City Univ., 426 F.3d 914, 916 (7th Cir. 2005).

125. *Chapman Univ.*, 2006 WL 1562231, at *3.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at *6.

131. *Id.* at *7.

132. *Id.* The court did strike a portion of the relators' pleading which used the

2. *United States ex rel. Hendow v. University of Phoenix*¹³³

The case against the University of Phoenix was factually similar to *Graves, Gay, and Main*. In *United States ex rel. Hendow v. University of Phoenix*, the relators alleged that the University knowingly made false promises to comply with the incentive compensation ban to become eligible for Title IV funding.¹³⁴ The relators in *Hendow* alleged more outrageous behavior than had the relators in the previous cases. In *Graves, Gay, and Main*, the relators alleged that the admissions and recruiting personnel were at times receiving compensation based in part on how many students they were able to recruit. There were never any alleged schemes or elaborate plans to take money from the government. The University of Phoenix, on the other hand, purportedly had a complex compensation scheme based on sheer numbers, fake documents to provide to the government to hide such a scheme, and oral statements from the head of enrollment about how the school was intentionally deceiving the federal government.¹³⁵ After the previous, more subtle fraud cases were allowed

phrase “including, but not limited to.” Because the relators had alleged fraud, it needed to be pleaded with sufficient particularity. The court ruled that if this portion was struck, then the pleadings would be sufficient. *Id.* at *5.

133. 461 F.3d 1166 (9th Cir. 2006).

134. *Id.* at 1169.

135. *Id.*

First, relators allege[d] that the University, with full knowledge, flagrantly violate[d] the incentive compensation ban. They claim[ed] that the University “compensates enrollment counselors . . . based directly upon enrollment activities,” ranking counselors according to their number of enrollments and giving the highest-ranking counselors not only higher salaries but also benefits, incentives, and gifts. Relators allege[d] that the University also “urges enrollment counselors to enroll students without reviewing their transcripts to determine their academic qualifications to attend the university,” thus encouraging counselors to enroll students based on numbers alone. Relator Albertson, in particular, allege[d] that she was given a specific target number of students to recruit, and that upon reaching that benchmark her salary increased by more than \$50,000. Relator Hendow specifically allege[d] that she won trips and home electronics as a result of enrolling large numbers of students.

Second, relators allege[d] considerable fraud on the part of the University to mask its violation of the incentive compensation ban. They claim[ed] that the University’s head of enrollment openly brag[ged] that “[i]t’s all about the numbers. It will always be about the numbers. But we need to show the Department of Education what they want to see.” To deceive the DOE, relators allege[d], the University create[d] two separate employment files for its enrollment counselors—one “real” file containing performance reviews based on improper quantitative factors, and one “fake” file containing performance reviews based on legitimate qualitative factors. The fake file is what the DOE allegedly sees. Relators further allege[d] a series of University policy changes deliberately designed to obscure the fact that enrollment counselors are compensated on a per-student basis, such as altering pay scales to make it less obvious that they are adjusted based on the number of students

to proceed to the merits, this case seemed an obvious vehicle to keep the proverbial FCA ball rolling.

And indeed, it was. After a federal district court granted the University of Phoenix's motion to dismiss, the Ninth Circuit reversed.¹³⁶ The *Hendow* court held that claims that are actionable under the FCA should not be limited to those where the payment itself is facially false or fraudulent; "[r]ather, the False Claims Act is 'intended to reach all types of fraud, without qualification, that might result in financial loss to the [g]overnment.'"¹³⁷ The court pointed to *United States ex rel. Hopper v. Anton*'s¹³⁸ discussion of the elements that constitute a successful "false certification" in a FCA suit, articulating four elements necessary for a successful claim.¹³⁹ First, there must be a false claim: some falsity must be alleged.¹⁴⁰ Second, scienter is a vital requirement: the false claim must be "false when made,"¹⁴¹ and "it must be an intentional, palpable lie."¹⁴² Third, "the false statement or course of conduct must be material to the government's decision to pay out money."¹⁴³ In other words, the certification must have been a "prerequisite to obtaining a government benefit,"¹⁴⁴ or "the government funding must be 'conditioned' upon certifications of compliance."¹⁴⁵ The court explained that the multiple ways of restating the materiality requirement pointed to the simple question of whether the certification, statement, or course of action was "relevant to the government's decision to confer a benefit."¹⁴⁶ The fourth element requires a claim made to the government for payment.¹⁴⁷

The court elaborated on the third element, explaining that the lower court and the University of Phoenix had misinterpreted the circuit court's use of the word "certification" in several previous cases.¹⁴⁸ It ruled that the word "certification" holds no "paramount and talismanic significance" and

enrolled.

Id. Relators also alleged false claims made by the University, requesting funding under both the Pell Grant Program and guarantees under the FFELP. *Id.* at 1169–70.

136. *Id.* at 1168.

137. *Id.* at 1170 (quoting *United States v. Neifert-White Co.*, 390 U.S. 228, 232 (1968)).

138. 91 F.3d 1261, 1266 (9th Cir. 1996).

139. *Hendow*, 461 F.3d at 1171–73. The court also articulated the elements for a "promissory fraud" FCA claim, *id.* at 1173–74, but since the relators met the elements of the first claim, discussion of promissory fraud is unnecessary here.

140. *Id.* at 1171.

141. *Id.* at 1172 (quoting *Hopper*, 91 F.3d at 1267).

142. *Id.* (quoting *Hopper*, 91 F.3d at 1267).

143. *Id.*

144. *Id.* (quoting *Hopper*, 91 F.3d at 1266).

145. *Id.* (quoting *Hopper*, 91 F.3d at 1267).

146. *Id.* at 1173.

147. *Id.*

148. *Id.* at 1172.

should not be “used with technical precision, or as a term of art.”¹⁴⁹ The court said the phrase “false certification” was merely a simpler way of saying “false statement of compliance with a government regulation that is a precursor to government funding.”¹⁵⁰ Courts should not distinguish, the Ninth Circuit said, false certifications from false statements— it is the falsity of the utterance that is determinative.¹⁵¹ The court emphasized the goal of the FCA—to recover funds fraudulently obtained—and minimized the importance of technicalities that had distracted other courts.

The court accordingly found that the relators in *Hendow* alleged facts against the University of Phoenix sufficient to withstand a motion to dismiss on the pleadings.¹⁵² First, falsity was alleged, as the relators claimed that the University actually established and followed a policy of violating the incentive compensation ban with the intent to deceive the government.¹⁵³ Second, scienter was alleged, as the relators claimed that University staff openly bragged about perpetrating a fraud, and that there was a system in place to give the government “fake” documents when it was determining compliance.¹⁵⁴ Third, the relators alleged facts tending to show that the false statements made by the University were material to the government’s decision to disburse money.¹⁵⁵ The court used both statutory language and language in the PPA itself to reject the University’s argument that compliance with the incentive compensation ban was not a material element in the government’s decision whether to disburse funds.¹⁵⁶ Fourth,

149. *Id.*

150. *Id.*

151. *See id.* (“So long as the statement in question is knowingly false when made, it matters not whether it is a certification, assertion, statement, or secret handshake; False Claims liability can attach.”).

152. *Id.* at 1177–78.

153. *Id.* at 1174–75.

154. *Id.* at 1175.

155. *Id.* at 1175–77.

156. *Id.* The court’s reasoning read:

First, a federal statute states that in order to be eligible, an institution must: enter into a program participation agreement with the Secretary [of Education]. The agreement *shall condition* the initial and continuing eligibility of an institution to participate in a program *upon compliance* with the following requirements . . . [including the incentive compensation ban.]

20 U.S.C. § 1094(a) (2006) (emphasis added). Second, a federal regulation specifies:

An institution may participate in any Title IV, HEA program . . . *only if* the institution enters into a written program participation agreement with the Secretary A program participation agreement *conditions* the initial and continued participation of an eligible institution in any Title IV, HEA program *upon compliance* with the provisions of this part [such as the incentive compensation ban.]

34 C.F.R. § 668.14(a)(1) (2008) (emphasis added). Third and finally, the

the court found that the relators alleged that the University made a claim to the government for funding.¹⁵⁷ The court agreed with the Seventh Circuit that “it is irrelevant how the federal bureaucracy has apportioned the statements among layers of paperwork.”¹⁵⁸ The court concluded that “whether the false statement or course of conduct causes the government to ‘pay out money or to forfeit moneys due’” is the only significant question.¹⁵⁹

IV. PREDICTIONS AND OVERREACTIONS

Some higher education scholars and lawyers expressed two major concerns when the Seventh Circuit handed down *Main*. They feared that the ruling opened a floodgate for future litigation against colleges and universities.¹⁶⁰ They also warned that such lawsuits would break down communication lines between federal agencies and the colleges and universities that depend on their advice.¹⁶¹

Critics of the *Main* ruling are concerned that there will be a drastic increase in the number of frivolous FCA suits against colleges and universities.¹⁶² “‘Lawyers who make a living out of suing universities can have a field day with this,’ said Sheldon E. Steinbach, vice president and general counsel of the American Council on Education, the chief umbrella group for higher education.”¹⁶³ Mark Pelesh, a higher education lawyer, argues that *Main* may make colleges and universities vulnerable to a whole

program participation agreement itself states:

The execution of this Agreement [which contains a reference to the incentive compensation ban] by the Institution and the Secretary is a *prerequisite* to the Institution’s initial or continued participation in any Title IV, HEA program.

(emphasis added). All of the emphasized phrases in the above passages demonstrate that compliance with the incentive compensation ban is a necessary condition of continued eligibility and participation: compliance is a “prerequisite” to funding; funding shall occur “only if” the University complies; funding shall be “condition[ed] ... upon compliance.” These are not ambiguous exhortations of an amorphous duty. The statute, regulation, and agreement here all explicitly condition participation and payment on compliance with, among other things, the precise requirement that relators allege that the University knowingly disregarded.

Id. at 1175–76 (alterations and omissions in original).

157. *Id.* at 1177.

158. *Id.* (quoting United State *ex rel.* Main v. Oakland City Univ., 426 F.3d 914, 916 (7th Cir. 2005)).

159. *Id.* (quoting Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 788 (4th Cir. 1999)).

160. See Lederman, *supra* note 112 (quoting Mark Pelesh).

161. Doug Lederman, *Inviting a Flurry of False Claims Cases*, INSIDE HIGHER ED, Oct. 24, 2005, <http://insidehighered.com/news/2005/10/24/false>.

162. *Id.*

163. *Id.*

new species of lawsuits: FCA qui tam actions alleging knowing violations of one of the myriad requirements in the HEA and implementing regulations.¹⁶⁴ Michael B. Goldstein, a lawyer in Dow Lohnes & Albertson's higher education practice in Washington, D.C., agrees with Pelesh. Goldstein argues that *Main* opened the doors for numerous lawsuits because PPAs require schools to "commit to obeying scores if not hundreds of rules and regulations, and the court's ruling [made] it possible for an individual to bring a lawsuit seeking triple damages for all financial aid deemed to have been received as a result of a breach of those rules."¹⁶⁵

The numerous HEA regulations range from requiring the availability of employment and graduation statistics to forbidding the hiring of administrators who have a history of committing financial fraud against the government.¹⁶⁶ One of the key certifications that must be included in the PPA is certification that the institution "[h]as in operation a drug abuse prevention program that the institution has determined to be accessible to any officer, employee, or student at the institution."¹⁶⁷ Pelesh and others argue that colleges and universities will be subjected to lawsuits whenever they fail to follow any of these numerous regulations.¹⁶⁸ Pelesh contends that the danger of such litigation will be increased by the possibility of treble damages under the False Claims Act.¹⁶⁹ He believes that the lucrative amount of money that relators can win in a successful claim will increase the number of suits against colleges and universities.¹⁷⁰

Additionally, critics of *Main* fear a breakdown in communication between federal agencies and colleges and universities. For example, in

164. Mark L. Pelesh, *Tripping Up on the Paperwork*, INSIDE HIGHER ED, Nov. 4, 2005, <http://insidehighered.com/views/2005/11/04/pelesh>. "Mark L. Pelesh is executive vice president for legislative and regulatory affairs for Corinthian Colleges, Inc. He was formerly the head of the Education Law Group at Drinker Biddle & Reath in Washington, and specialized in the Higher Education Act and U.S. Department of Education regulation." *Id.*

165. Lederman, *supra* note 161. It is also interesting to consider the argument that there will be "enterprising counsel" that might even be more likely than the individuals with information needed to sue that will be encouraged to sue after *Main*. Pelesh, *supra* note 164.

166. 34 C.F.R. §§ 668.14(b)(10)(i), (18)(i) (2008).

167. 34 C.F.R. § 668.14(c)(1). Although there are no current lawsuits based on this PPA requirement, such a suit is possible, if not likely, because many schools receiving Title IV funding lack a drug abuse prevention program. Glen S. McGee, director of the Florida Higher Education Accountability Project, claims that a United States Department of Education official, "Ruth Tringo, privately acknowledged to him that most—if not all—of the hundreds of community colleges and universities that receive Title IV funding do not have a drug abuse prevention program in place." Posting of Glen S. McGee to <http://insidehighered.com/news/2006/05/26/false> (May 27, 2006, 21:20 EST)

168. Pelesh, *supra* note 164.

169. *Id.*

170. *Id.*

2002, the Deputy Secretary of Education, William D. Hansen, issued a memorandum (the Hansen memo) to the Office of Federal Student Aid.¹⁷¹ The Hansen memo set forth the Education Department's policy for enforcing violations of the incentive compensation prohibition.¹⁷² Hansen explained that violating the prohibition did not result in financial loss to the government, and so such violations would not preclude an institution from participating in Title IV programs.¹⁷³ The memo explained:

After further analysis, I have concluded that the preferable approach is to view a violation of the incentive compensation prohibition as not resulting in monetary loss to the Department [of Education]. Improper recruiting does not render a recruited student ineligible to receive student aid funds for attendance at the institution on whose behalf the recruiting is conducted. Accordingly, the Department should treat a violation of the law as a compliance matter for which remedial or punitive sanctions should be considered.¹⁷⁴

However, the Department of Justice filed a brief as amicus curiae in *Main*, contending that the allegations of the complaint, if true, demonstrated a right to recover under the False Claims Act.¹⁷⁵ Judge Easterbrook held that the amicus curiae brief represented the position of the government, and dismissed Hansen's letter as a "back-office memo."¹⁷⁶ Sheldon Steinbach questions this casual dismissal of the Hansen memo, and believes that the memo constitutes tangible guidance given by the Department of Education to colleges and universities to gauge whether they are in compliance with federal laws and rules.¹⁷⁷ Steinbach argues that *Main* undermined college and university attorneys' degree of confidence in the reliability of such guidance.¹⁷⁸ In his opinion, the case "dismantle[d] verbally the mechanism that the Department of Education uses to dispense advice, in a way that could be devastating."¹⁷⁹ Steinbach, like Goldstein, believes that lawyers for colleges and universities must "examine [the *Main*] decision closely to decide just how broad the implications were for higher education and how

171. Memorandum from William D. Hansen, Deputy Sec'y, U.S. Dep't of Educ., to Terri Shaw, Chief Operating Officer, Fed. Student Aid (Oct. 30, 2002), available at http://www.apollolegal.com/hendowDocuments/Document_17.pdf.

172. *Id.*

173. *Id.*

174. *Id.*

175. Brief for the United States as Amicus Curiae in Support of Appellant at 1-3, United States *ex rel.* Main v. Oakland City Univ., 426 F.3d 914 (7th Cir. 2005) (No. 05-2016).

176. *Main*, 426 F.3d at 917.

177. Lederman, *supra* note 161. Sheldon Steinbach is the Vice President and general counsel of the American Council on Education. *Id.*

178. *Id.*

179. *Id.*

aggressively college associations would mobilize to challenge it.”¹⁸⁰

While it may be prudent for colleges and universities to examine the *Main* ruling and anticipate possible lawsuits, there is no need for college and university associations to mobilize and challenge the ruling. For a number of reasons, the fallout of the *Main* decision will be much less drastic than Steinbach and Goldstein suggest. First, state colleges and universities are immune from liability under the FCA,¹⁸¹ eliminating a large number of possible lawsuits. It is true that community college liability or immunity is still in question at this point, but there is the chance that at least some such colleges could escape liability on Eleventh Amendment grounds, particularly if they receive a large percentage of funding from the state.¹⁸²

Moreover, critics of the *Main-Chapman-Hendow* line of cases need to remember that it is only fraudulent behavior that makes institutions liable, not “[t]ripping up on a regulatory complexity.”¹⁸³ Attorney Daniel Bartley, who represented the relators in the *Chapman* and *Hendow* cases, disagrees with those who argue that the new line of FCA cases allows institutions to be sued if they violated any of the hundreds of regulations that the government, or an accreditor, imposes on them. “This applies only where there is a material breach of a condition of payment, and it’s flagrant,” Bartley said.¹⁸⁴ “The only colleges that face trouble are those that are not obeying the law and the material accreditation standards that underlie their

180. *Id.*

181. *See supra* notes 33–34 and accompanying text.

182. *See supra* notes 37–40 and accompanying text.

183. *United States ex rel. Main v. Oakland City Univ.*, 426 F.3d 914, 917 (7th Cir. 2005). The court in *Main* explained:

To prevail in this suit [relator] must establish that the University not only knew . . . that contingent fees to recruiters are forbidden, but also planned to continue paying those fees while keeping the Department of Education in the dark. This distinction is commonplace in private law: failure to honor one’s promise is (just) breach of contract, but making a promise that one *intends* not to keep is fraud [I]f the university knew about the rule and told the Department that it would comply, while planning to do otherwise, it is exposed to penalties under the False Claims Act.

Id. The *Hendow* court adopted this approach, further elaborating:

We, too, have held that for promissory fraud to be actionable under the False Claims Act, “the promise must be false when made.” We have also noted that “[i]nnocent mistakes, mere negligent misrepresentations and differences in interpretations” are not sufficient for False Claims Act liability to attach. In short, therefore, under a promissory fraud theory, relator must allege a false or fraudulent course of conduct, made with scienter.

United States ex rel. Hendow v. Univ. of Phoenix, 461 F.3d 1166, 1174 (9th Cir. 2006) (quoting *United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1267 (9th Cir. 1996)) (alteration in original).

184. Lederman, *supra* note 112.

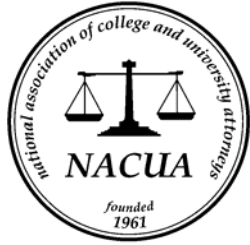
getting loans and grants.”¹⁸⁵ Critics of the recent change in the law are unable to point to any case where a college or university inadvertently, or even negligently, violated a Title IV regulation and were successfully sued under the False Claims Act. Every case discussed in this note involves alleged fraud, and there is no reason why fraud in the higher education context should not be punished as strictly or as consistently as other fraud perpetrated against the government.

V. CONCLUSION

The groundbreaking case of *United States ex rel. Main v. Oakland City University* marked a significant shift in the federal courts’ willingness to hear the merits of suits alleging false claims made by private colleges and universities to the federal government for payments under Title IV. The *Chapman University* and *University of Phoenix* cases indicate that some other federal courts agree with the logic in *Main* and are no longer going to allow any private institution of higher education to fraudulently receive money from the government by hiding behind layers of paperwork.

Although some higher education lawyers fear the repercussions of the *Main* holding, there will unlikely be a large number of suits filed. Public colleges and universities are immune from FCA suits. More importantly, courts have been distinguishing between broken promises and intentional fraud, and it is reasonable to expect them to do so in the future. FCA liability will attach only when the institution knew it was lying to the government about its past behavior or current intentions in order to get federal money. The primary effect of *Main* was to hold private institutions of higher learning as accountable as other groups that get federal financial support.

185. *Id.*



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The National Association of College and University Attorneys (NACUA), established in 1961, is the primary professional association serving the needs of attorneys representing institutions of higher education. NACUA now serves over 3,000 attorneys who represent more than 1,400 campuses and 660 institutions.

The Association's purpose is to improve the quality of legal assistance to colleges and universities by educating attorneys and administrators on legal issues in higher education. NACUA accomplishes this goal through its publications, conferences, and workshops. NACUA also operates a clearinghouse for references through which attorneys share knowledge and work products on current legal problems. With its headquarters in Washington, D.C., NACUA monitors governmental developments having significant legal implications for its member institutions, coordinates the exchange of information concerning all aspects of law affecting higher education, and cooperates with other higher education associations to provide general legal information and assistance.

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Library of Congress Catalog No. 74-642623

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