

# 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.<sup>1</sup> 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.<sup>2</sup> His fellow students were so afraid of him that they quit coming to Giovanni's poetry sessions.<sup>3</sup> 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.<sup>4</sup>

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

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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.<sup>5</sup> Nevertheless, because they so capture the public attention, the rampages have a political impact on the development of law and social

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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](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.<sup>6</sup> After each rampage, a growing number in government and the academy advocated allowing students and

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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](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](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](http://www.iaclea.org/Visitors/PDFs/ConcealedWeaponsStatement_Aug2008.pdf).

faculty to arm themselves.<sup>7</sup> 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.<sup>8</sup> 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,

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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.<sup>9</sup>

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.<sup>10</sup> 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

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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](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.<sup>11</sup> 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

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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.<sup>12</sup> 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.<sup>13</sup> From these stories, it is hoped, will emerge not only the

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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 11, 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.<sup>14</sup> 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*,<sup>15</sup> 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.<sup>16</sup> 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

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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."<sup>17</sup> 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.<sup>18</sup>

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

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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.<sup>19</sup> On the

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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](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](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.<sup>20</sup> 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.<sup>21</sup>

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.<sup>22</sup> 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.<sup>23</sup> 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.<sup>24</sup>

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

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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.<sup>25</sup>

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.<sup>26</sup> 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.<sup>27</sup> These stories suggest

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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](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).<sup>28</sup> 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.

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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](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.<sup>29</sup> The place was the graduate school of physics and astronomy at the University of Iowa.<sup>30</sup> 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.<sup>31</sup> Lu completed his doctoral dissertation in April 1991 and was awarded a Ph.D. in May.<sup>32</sup> Though he was apparently not on the University's payroll, Lu stayed on at the physics department, working in the research laboratory.<sup>33</sup> 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.<sup>34</sup>

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.<sup>35</sup> Instead, Goertz and his colleague Robert Smith, also on Lu's doctoral committee, nominated the dissertation of Linhua Shan.<sup>36</sup> When Shan received the \$2,500 prize in May 1991, Lu filed a complaint with Dwight Nicholson.<sup>37</sup> 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.<sup>38</sup>

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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.<sup>39</sup>

In late October, five months after Lu filed his complaint, Cleary concluded that it had no merit and denied the appeal.<sup>40</sup> 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.<sup>41</sup> 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.<sup>42</sup> He walked downstairs and shot Nicholson. Goertz, Shan, and Nicholson died almost instantly.<sup>43</sup> After shooting Nicholson, Lu walked back upstairs.<sup>44</sup> Two graduate students were in the meeting room tending to Smith, who was still alive.<sup>45</sup> Lu ordered the students out of the room at gunpoint, then shot Goertz, Shan, and Smith again. Smith did not survive the second round.<sup>46</sup>

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

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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.<sup>51</sup> 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.<sup>52</sup> 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.<sup>53</sup> 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.<sup>54</sup> 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.<sup>55</sup> 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.<sup>56</sup> The

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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.<sup>57</sup> It created an Emergency Preparedness Plan and enlarged the crisis response team.<sup>58</sup> 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.<sup>59</sup> It took steps to heighten awareness of troubled individuals.<sup>60</sup> It adopted a policy on violence and an active anti-violence organization.<sup>61</sup> It continues an annual commemoration of the event and uses it "to promote social and institutional change."<sup>62</sup>

### 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.<sup>63</sup> 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."<sup>64</sup> 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,

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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.<sup>65</sup>

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

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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.<sup>72</sup> He boasted that he had “the power to bring the college to its knees.”<sup>73</sup>

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.<sup>74</sup> 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.<sup>75</sup>

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.<sup>76</sup> 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.<sup>77</sup>

Rodgers decided that when Lo came for his package, Trinka Robinson should accompany him to his room and watch him open it.<sup>78</sup> At the dorm room, however, Lo refused to cooperate.<sup>79</sup> 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.<sup>80</sup>

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.<sup>81</sup> 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.<sup>82</sup> He returned to Simon's Rock by taxi with his new rifle concealed in a guitar case.<sup>83</sup>

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."<sup>84</sup> Mrs. Robinson called the Dean, and the Provost, Ba Win.

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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.<sup>85</sup> 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."<sup>86</sup> 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.<sup>87</sup> He then shot a young professor, Nacunan L. Saez, who happened to be driving in.<sup>88</sup> Saez was shot in the head and killed within seconds.<sup>89</sup> His car went off the road into a snow bank.<sup>90</sup> 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.<sup>91</sup> Lo shot and killed Galen Gibson, an eighteen-year-old student, and wounded nineteen-year-old student Thomas McElderry.<sup>92</sup> He then headed for one of the dormitories, where he found another group of students in the lobby discussing the gunfire they were hearing.<sup>93</sup> He shot Joshua Faber, a

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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. 15<sup>th</sup>, 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](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.<sup>94</sup> He then walked to the student union building, called the police, and surrendered.<sup>95</sup> The rampage lasted less than twenty minutes.<sup>96</sup>

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.<sup>97</sup> He admitted that he ended his rampage only because his rifle would no longer fire.<sup>98</sup>

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."<sup>99</sup>

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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.<sup>100</sup> 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.<sup>101</sup>

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.<sup>102</sup> After one telephone call breaking the news of their son's rampage, College officials had no further communication with Wayne Lo's distraught parents.<sup>103</sup> 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."<sup>104</sup> Relations between the College

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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.<sup>105</sup> 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.”<sup>106</sup>

#### D. Appalachian School of Law, January 16, 2002

After Simon’s Rock, there were no rampage killings in higher education for nine years.<sup>107</sup> 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,

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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](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."<sup>108</sup> 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.<sup>109</sup> 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.<sup>110</sup> 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.<sup>111</sup> He was married to a Nigerian-born woman, Abieyuwa, who studied pre-nursing at Sinclair Community College from 1998 until 2000.<sup>112</sup> When Odighizuwa started

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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.<sup>113</sup>

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.<sup>114</sup> 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.<sup>115</sup> 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.<sup>116</sup>

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

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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.<sup>117</sup> 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.<sup>118</sup> Both the townspeople and the academic community responded generously.<sup>119</sup> Many students, however, saw him as demanding and ungrateful. Struggling themselves, they resented his apparent preferment.<sup>120</sup> His personal interactions were often abrupt and suspicious, and he had several angry outbursts, particularly against women, even in his first semester.<sup>121</sup> 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.’”<sup>122</sup> 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.<sup>123</sup> 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.”<sup>124</sup>

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).<sup>125</sup> His former classmates, now 2L’s and 3L’s, pegged him to incoming students as “a restart”—a code word, at ASL, for failure.<sup>126</sup> 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.<sup>127</sup> He sent a copy of the

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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.<sup>128</sup> 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.<sup>129</sup>

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

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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.<sup>132</sup> He apparently decided to withdraw from law school while he appealed them.<sup>133</sup> 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.<sup>134</sup>

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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.<sup>135</sup> He wanted to see his Professors before appealing his grades, as required by school policy. He spoke with Associate Dean Paul Lund.<sup>136</sup> He was seen pacing outside the door to Professor Blackwell's classroom.<sup>137</sup> 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.<sup>138</sup>

He apparently left the Law School sometime during the morning and returned at lunchtime.<sup>139</sup> 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.<sup>140</sup> 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.<sup>141</sup> He was arrested and handcuffed within minutes and taken across the street to the county jail.<sup>142</sup>

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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.<sup>143</sup> Students quickly loaded their injured classmates onto makeshift stretchers and into SUV's and sped to the local hospital, a couple of miles away.<sup>144</sup> 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.<sup>145</sup>

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

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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.<sup>146</sup> 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.<sup>147</sup>

After a week, the Law School reopened, students returned, and classes resumed.<sup>148</sup> Soon Law School officials were pleased to report that applications for admission had increased substantially.<sup>149</sup> 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

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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 . . .<sup>150</sup>

Yet there were signs of disconnection and continuing alienation as well.<sup>151</sup> 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.<sup>152</sup>

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

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.<sup>156</sup> The estate of Angela Dales sued the same defendants for wrongful death.<sup>157</sup>

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.<sup>158</sup> 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.”<sup>159</sup> 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.”<sup>160</sup> 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.<sup>161</sup>

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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.<sup>162</sup> He was sentenced to six terms of life imprisonment, plus 28 years, with no possibility of parole.<sup>163</sup> 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.<sup>164</sup>

#### 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*.<sup>165</sup> It offers

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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.<sup>166</sup> 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."<sup>167</sup> 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.<sup>168</sup> He served in a combat unit in Iraq and Saudi Arabia in 1991.<sup>169</sup> He was a gun collector.<sup>170</sup> 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."<sup>171</sup> He moved his family to his wife's home town in Texas and enrolled in the nursing program at Angelo State Community College.<sup>172</sup> 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.<sup>173</sup> He completed the associate program with honors and passed the state boards to become a Licensed Practical Nurse (LPN).<sup>174</sup> 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.<sup>175</sup>

Flores' grievances against the school began to accumulate from the moment he arrived.<sup>176</sup> 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.”<sup>177</sup> 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.<sup>178</sup> He had to work full time, which affected his studies.<sup>179</sup>

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.<sup>180</sup> He took a year off from the University to settle his divorce and get his life back in order.<sup>181</sup> 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.<sup>182</sup>

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.”<sup>183</sup>

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

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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.”<sup>184</sup>

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.<sup>185</sup> One female student told the press, “He was belligerent, angry, and rude . . . . He would blow up and call [the instructors] names in class.”<sup>186</sup> Another said that he argued frequently with the instructors, demanded their full attention, and took up too much class time.<sup>187</sup> The hospital at which he took a clinical course in pediatrics complained that he was rude and disrespectful to staff and patients.<sup>188</sup> He threatened professors who challenged his behavior.<sup>189</sup> 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.”<sup>190</sup> Recognizing that he was depressed, his instructors advised him to get treatment at the Student Health Clinic, but he rejected their advice.<sup>191</sup>

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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](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."<sup>192</sup> Fearing that Flores might become dangerous, she reported the threat to the University police.<sup>193</sup> The police did not investigate Goldsmith's report and did not interview Flores.<sup>194</sup>

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.<sup>195</sup> He blamed his instructor, Robin Rogers, for not giving him a fair hearing.<sup>196</sup> 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.<sup>197</sup>

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

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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.<sup>198</sup> Mid-way through the semester, clinical instructor Barbara Monroe told Flores that he had failed the clinical portion of the course.<sup>199</sup> 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.<sup>200</sup> 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.<sup>201</sup> 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.<sup>202</sup> He walked to the back of the room, where he shot Cheryl McGaffic three times in the chest at close range.<sup>203</sup> 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.<sup>204</sup> He shot her twice.<sup>205</sup> He then turned his attention to the students, ordering two friends out of the room.<sup>206</sup> The others fully expected to be shot, but Flores changed his mind and told them all to leave.<sup>207</sup> 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.<sup>208</sup> 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.”<sup>209</sup> He wrote that only lawsuits would change “the face of education;” and he expected his rampage to provoke such change.<sup>210</sup>

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.<sup>211</sup> “I am personally comfortable that there is no further risk. The risk was very, very sharply focused.”<sup>212</sup> He added, “I don’t believe there is any security or police force that could prevent a disaster of this type.”<sup>213</sup> He also described the University as a supportive and caring environment, greatly concerned with student depression.<sup>214</sup>

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.”<sup>215</sup> 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.”<sup>216</sup> 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,

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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](http://wc.arizona.edu/papers/97/46/01_1.html).

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

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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*.<sup>217</sup> Sixty percent of its 10,000 students are pursuing graduate degrees.<sup>218</sup> It has 2,600 faculty members and attracts over \$400 million annually in research grants.<sup>219</sup> 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.”<sup>220</sup> 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.<sup>221</sup> Biswanath Halder, the shooter, never attended class or worked in the computer lab in the PBL building.<sup>222</sup> 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.<sup>223</sup>

Halder was born in India in 1941. He immigrated to the United States in 1969 and became a citizen in 1980.<sup>224</sup> He had a bachelor’s degree in electrical engineering from Calcutta University.<sup>225</sup> He attended New York University’s Graduate School of Business in 1980 but did not complete the course because of financial difficulties.<sup>226</sup> 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](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.<sup>227</sup> He completed a master's degree in business administration in 1999 after two years at Weatherhead.<sup>228</sup>

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.<sup>229</sup> 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.<sup>230</sup>

A court-appointed psychiatrist later reported that Halder was “one of the most isolated people I have ever examined.”<sup>231</sup> He had no contact with his family in India.<sup>232</sup> 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

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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](http://www.rediff.com/news/2006/jan/19halder.htm).

232. *Id.*

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

In June 2000, a visitor (in internet slang, a “troll”)<sup>237</sup> 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.<sup>238</sup>

Within a month, someone destroyed over 1,100 files on the WIN website and deleted the addresses of more than 50,000 contacts.<sup>239</sup> 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.<sup>240</sup> 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.<sup>241</sup>

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

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

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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.<sup>247</sup>

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.”<sup>248</sup> Helon reported Halder’s threat to Miller; Miller reported it to his CWRU supervisor Roger Bielefield, saying “apparently Halder is interested in killing us.”<sup>249</sup> Bielefield told Miller not to worry and that Halder “probably would not do anything.”<sup>250</sup>

Halder continued with the litigation pro se.<sup>251</sup> His claim was dismissed on summary judgment on September 26, 2002.<sup>252</sup> His cross-motion for summary judgment against Miller was denied.<sup>253</sup> 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.<sup>254</sup> In the meantime, in November, Miller moved in the trial court for entry of judgment on his counterclaim.<sup>255</sup> 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.”<sup>256</sup> On April 29, 2003,

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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.<sup>257</sup> 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.<sup>258</sup>

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.<sup>259</sup> 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.<sup>260</sup> Fortunately, Halder began his rampage at 4:00 on a Friday afternoon at the end of exam week, and the building was not crowded.<sup>261</sup> Fortunately, too, he was not a particularly good shot, though he had been practicing at a target range.<sup>262</sup> Otherwise, there might have been many more casualties, as he fired at and missed several people during the next few minutes.<sup>263</sup> 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.<sup>264</sup>

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.<sup>265</sup> 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.<sup>266</sup> She hid in the closet in her office until rescued

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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.<sup>267</sup> 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.<sup>268</sup> 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.<sup>269</sup> Shot twice by the police, Halder surrendered about 11:00 p.m. in a fifth floor classroom.<sup>270</sup>

After the shootings, focusing on Halder's personal quarrel with Miller, University officials denied that Halder had a grudge against the school.<sup>271</sup> 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."<sup>272</sup>

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.<sup>273</sup> 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

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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.<sup>274</sup> 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.<sup>275</sup>

Virginia Tech is a high-ranking research university in Blacksburg, Virginia, a small city in the foothills of the Appalachians.<sup>276</sup> 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.<sup>277</sup> 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.<sup>278</sup> It has its own fully-accredited police force, including an emergency response team, and a mutual aid agreement with the Blacksburg Police Department.<sup>279</sup> 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.”<sup>280</sup> 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.<sup>281</sup> 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

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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](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](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.<sup>282</sup> 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.<sup>283</sup>

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.<sup>284</sup> 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.<sup>285</sup> They were conscientious about their children's welfare, and they followed all recommendations made by elementary and secondary school authorities concerning their son.<sup>286</sup> Both of their children went to college.<sup>287</sup>

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.<sup>288</sup> 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.<sup>289</sup> He was accepted at Virginia Tech at the end of his senior year

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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.<sup>290</sup>

Cho moved into a student residence hall and began classes at Virginia Tech in August 2003 intending to major in Information Business Technology.<sup>291</sup> He completed his freshman year with a 3.0 average.<sup>292</sup> 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.<sup>293</sup> 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.<sup>294</sup> He took several English courses in his sophomore year and spent the summer engrossed in writing a novel.<sup>295</sup> 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.<sup>296</sup> It was at this point that his undistinguished and uneventful college career began to change.<sup>297</sup>

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.<sup>298</sup> In particular, Professor Giovanni was alarmed by the rage in a piece he wrote directed at her and the other students in the class.<sup>299</sup> 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.<sup>300</sup>

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.<sup>301</sup> 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.<sup>302</sup> 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.<sup>303</sup> 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.<sup>304</sup>

From October through the end of the semester, Dr. Roy communicated with a wide network of university officials about Cho's case.<sup>305</sup> 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."<sup>306</sup> From

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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.<sup>307</sup> 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.<sup>308</sup>

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.<sup>309</sup> 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.<sup>310</sup> 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.<sup>311</sup>

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.<sup>312</sup> In early December, however, she found an anonymous note on the whiteboard outside her door that alarmed her enough to call her father.<sup>313</sup> The father called a friend, the chief of police in a neighboring town, who advised that the campus police be informed.<sup>314</sup>

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.<sup>315</sup> The appointment was scheduled for December 12.<sup>316</sup> 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.<sup>317</sup>

On December 13, the police again met with Cho and told him to leave the second young woman alone as well.<sup>318</sup> Cho sent an instant message to a suite mate: "I might as well kill myself."<sup>319</sup> 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.<sup>320</sup> 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.<sup>321</sup> 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.<sup>322</sup> The psychiatrist who interviewed Cho later in the

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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.<sup>323</sup>

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.<sup>324</sup> 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.<sup>325</sup> 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.<sup>326</sup>

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.<sup>327</sup> 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.<sup>328</sup> He never again attempted, nor did anyone else, to invoke

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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.<sup>329</sup> 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.<sup>330</sup> For the next two semesters, the content of his writing was the primary indicator of

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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](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.<sup>331</sup>

In fall semester 2006, Cho's inward and downward spiral toward self-identity continued.<sup>332</sup> There was no repetition of the behavior that caused him trouble the previous year.<sup>333</sup> He did not speak to his roommates.<sup>334</sup> He went to bed early, got up early, and kept entirely to himself.<sup>335</sup> His room was extremely neat; the only book in it was a Bible.<sup>336</sup> His resident dorm advisor, who was expecting trouble, did not have a single problem with him.<sup>337</sup> 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."<sup>338</sup> The two plays he wrote that semester were

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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.<sup>339</sup>

Virginia requires gun buyers to wait thirty days between purchases. Cho bought his first handgun in February and his second in March.<sup>340</sup> He bought ammunition, magazines, heavy metal chains, padlocks, cargo pants, and a hunting knife. He practiced shooting at a target range.<sup>341</sup> 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.<sup>342</sup> He gave his hair a military buzz cut.<sup>343</sup> He inscribed the words “Ax Ismael” on his arm.<sup>344</sup> 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.<sup>345</sup>

For his killing spree, Cho selected Monday, April 16, four days before the anniversary of the Columbine High School shooting.<sup>346</sup> 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.<sup>347</sup> 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.<sup>348</sup> It was over thirty minutes after the

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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](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.”<sup>349</sup> 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.<sup>350</sup> 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.<sup>351</sup> By 9:30 he had

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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](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.<sup>352</sup> For the next eleven minutes, he moved in and out of classrooms on the second floor of the building, firing almost constantly.<sup>353</sup> 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.<sup>354</sup> 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.<sup>355</sup> 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.<sup>356</sup> He fired through the door, hitting no one.<sup>357</sup> 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.<sup>358</sup> He visited this classroom twice during the rampage, killing Professor Jocelyne Couture-Nowak and eleven students, and wounding six others.<sup>359</sup> 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.<sup>360</sup> Ten students escaped through the windows—a drop of nineteen feet onto grass and shrubbery; four others were shot, and one died.<sup>361</sup>

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

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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.<sup>362</sup> 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.<sup>363</sup> He was found in the stairwell between the first and second floors.<sup>364</sup> 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.<sup>365</sup> 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.<sup>366</sup> 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."<sup>367</sup> "We will not be defined by this event," he wrote.<sup>368</sup> "Nothing in the events of last week will alter who we are and what we represent."<sup>369</sup>

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.<sup>370</sup>

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.<sup>371</sup> 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.<sup>372</sup> 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.<sup>373</sup> Disbursement of the Hokie

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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](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.<sup>374</sup> Damages against the Commonwealth itself are capped at \$100,000.<sup>375</sup> 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.<sup>376</sup> 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.<sup>377</sup> “‘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.”<sup>378</sup>

In June 2008, a Virginia circuit court judge approved agreements

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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](http://www.times-news.com/local/local_story_171142332.html).

378. Kumar, *supra* note 373.

reached with respect to the wrongful death claims.<sup>379</sup> 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.<sup>380</sup> 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.<sup>381</sup>

#### 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.<sup>382</sup> 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.<sup>383</sup> 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.<sup>384</sup> His father was a letter carrier; his mother was a secretary; and

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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](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.<sup>385</sup> He was educated in the Illinois public school system. In elementary school, he was a slightly above-average student.<sup>386</sup> 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.<sup>387</sup> 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.<sup>388</sup>

In high school, Steven Kazmierczak hung out with the “goths,” wearing a long black trench coat, chains, boots, and spikes.<sup>389</sup> 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.<sup>390</sup> In the fall of the eleventh grade, he started spending nights at his friends’ houses and almost never went home.<sup>391</sup>

At some point during high school, Kazmierczak was prescribed medication for bipolar disorder.<sup>392</sup> 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.<sup>393</sup> He was prescribed more medication, which made him gain

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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.”<sup>394</sup>

At school, the “jocks” dubbed him “Suicide Steve” and “Crazy Mierczak.”<sup>395</sup> In April 1997, his high school denied his parents’ request for a case-study evaluation.<sup>396</sup> A week later, Kazmierczak again attempted suicide (by Ambien overdose and slitting his wrists) and was hospitalized again.<sup>397</sup> 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.<sup>398</sup> He attempted suicide again (by Depakote overdose) in the fall and the spring semesters and was hospitalized for short periods.<sup>399</sup> 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.<sup>400</sup>

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.<sup>401</sup> 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.<sup>402</sup>

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

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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.<sup>403</sup> 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.<sup>404</sup>

In September 2001, he enlisted in the United States Army.<sup>405</sup> 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.<sup>406</sup>

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.<sup>407</sup> He moved into a dorm suite with four other male students, who dubbed him “Strange Steve.”<sup>408</sup> He always wore long sleeves to hide his tattoos and showered in the dark.<sup>409</sup> He ate alone in his room.<sup>410</sup> He did not go to parties, drink, or take drugs.<sup>411</sup> 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.<sup>412</sup>

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.”<sup>413</sup> During his last two years, his closest friend, “Kevin,” displayed a half-burned Bush/Cheney American flag on his door.<sup>414</sup> 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.<sup>415</sup> “Kevin” and Kazmierczak remained close friends until Kazmierczak’s death.<sup>416</sup> “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.<sup>417</sup> “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.<sup>418</sup> “Kevin” admired the T-shirt Kazmierczak wore to his own rampage-suicide event.<sup>419</sup> “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!”<sup>420</sup>

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.<sup>421</sup> 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.<sup>422</sup> He was also an officer in the Academic Criminal Justice Association.<sup>423</sup> He tutored in the sociology lab.<sup>424</sup> He did well in his studies.<sup>425</sup> 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.<sup>426</sup> At graduation in spring 2006, he won a Dean’s Award.<sup>427</sup>

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.<sup>428</sup> He was apparently planning to pursue a law degree, but did poorly on the LSAT.<sup>429</sup> 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.<sup>430</sup>

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.<sup>431</sup> 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.<sup>432</sup> He and his college sweetheart moved to Champaign in June 2007, but they moved into separate bedrooms.<sup>433</sup> He became increasingly anxious and worried. His obsessive and compulsive behaviors returned. He was extremely irritable, moody, and wakeful.<sup>434</sup> In

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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.<sup>435</sup>

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.<sup>436</sup> 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.<sup>437</sup> 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.<sup>438</sup>

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*.<sup>439</sup> 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.<sup>440</sup> During the

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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.<sup>441</sup>

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.<sup>442</sup> He had with him a copy of Nietzsche’s *Anti-Christ*.<sup>443</sup> He mailed the book to his roommate shortly before he left for the shooting.<sup>444</sup>

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.<sup>445</sup> 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.<sup>446</sup> 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.<sup>447</sup> He fired forty-eight rounds with the pistols.<sup>448</sup> He wounded both the instructor, Joe Peterson, and the teaching assistant, Brian Karpes.<sup>449</sup> He shot primarily at women. Witnesses described his singular lack of personal engagement: he killed as though he were painting a wall.<sup>450</sup> 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.<sup>451</sup>

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.”<sup>452</sup> 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.<sup>453</sup>

“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.”<sup>454</sup>

### 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

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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](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.<sup>455</sup> In four of the five, those victims sued or filed notice of tort claims against the institution.<sup>456</sup> 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.<sup>457</sup>

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.<sup>458</sup>

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

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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](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.<sup>459</sup>

## 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.<sup>460</sup> 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.<sup>461</sup> Through most of the 1980's, the courts generally shielded colleges and

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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.<sup>462</sup>

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.<sup>463</sup> The models have become "university-as-landlord" and "college-as-business-enterprise."<sup>464</sup> 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*<sup>465</sup>

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.<sup>466</sup> 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.”<sup>467</sup> 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.<sup>468</sup>

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.”<sup>469</sup>

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.<sup>470</sup>

“[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.”<sup>471</sup> Thus, it concluded, “Plaintiff

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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.”<sup>472</sup>

### 3. *Cutler v. Board of Regents*<sup>473</sup>

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.<sup>474</sup> 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.<sup>475</sup> 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.<sup>476</sup> At the time of the assurance, University officials were, or should have been, aware of other assaults on female University students.<sup>477</sup> 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.<sup>478</sup>

### 4. *Miller v. New York*<sup>479</sup>

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

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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.<sup>481</sup> 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.<sup>482</sup> He then took her to the parking lot and left her.<sup>483</sup> 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.<sup>484</sup> 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.<sup>485</sup> 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.<sup>486</sup>

5. *Jesik v. Maricopa County Community College District*<sup>487</sup>

*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.

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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.<sup>488</sup> Instead, the plaintiff complained that the school should have prevented a murder committed during student registration.<sup>489</sup> The Arizona Supreme Court used the business model to reverse a grant of summary judgment in favor of the defendant College.<sup>490</sup>

The murder had many similarities to a rampage. Peter Jesik and Charles Doss were both students at a junior college in Phoenix.<sup>491</sup> They had a history of ill-feeling towards each other.<sup>492</sup> On August 22, 1973, the two students had a confrontation while they were both registering for classes at the college gymnasium.<sup>493</sup> Jesik insulted Doss.<sup>494</sup> Doss stormed out of the building threatening to get his gun and kill Jesik.<sup>495</sup> Jesik immediately reported the threat to Scott Hilton, the campus security guard on duty in the room.<sup>496</sup> Hilton promised to protect him but neither armed himself nor took other precautions.<sup>497</sup> When Doss returned to the crowded gymnasium an hour later with a briefcase, Jesik pointed him out to Hilton, who again reassured him.<sup>498</sup> Hilton spoke to Doss briefly, then walked away.<sup>499</sup> 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.<sup>500</sup> 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.<sup>501</sup> 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

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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.”<sup>502</sup> Jesik’s wrongful death action was remanded for trial on the merits.

6. *Mullins v. Pine Manor College*<sup>503</sup>

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.<sup>504</sup>

Defendant Pine Manor was a women’s college of 400 students.<sup>505</sup> Its grounds were fenced, and its dormitories were arranged in quadrangles with locked gates.<sup>506</sup> Two campus security guards were on duty at night, and there was a visitor registration and escort procedure.<sup>507</sup> First year students like Lisa Mullins were required to live in campus dormitories.<sup>508</sup> 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.<sup>509</sup> He took her down a bike path to the college refectory, where the door had been left unlocked.<sup>510</sup> Once inside, he raped her.<sup>511</sup> 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.<sup>512</sup>

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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.<sup>513</sup> 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.*<sup>514</sup>

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.<sup>515</sup>

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.<sup>516</sup> 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.<sup>517</sup> 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.<sup>518</sup> 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.<sup>519</sup> 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

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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.<sup>520</sup>

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.<sup>521</sup> 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.<sup>522</sup>

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

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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.”<sup>523</sup>

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.<sup>524</sup>

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*<sup>525</sup> involved fraternity hazing; *Nero v. Kansas State University*<sup>526</sup> involved campus rape; and *Schieszler v. Ferrum College*<sup>527</sup> involved a student suicide.<sup>528</sup> A fourth case, *Nova Southeastern University v. Gross*,<sup>529</sup> 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](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.<sup>530</sup> Jeffrey Furek attended the University of Delaware's Newark campus on a football scholarship that included tuition, room, and board.<sup>531</sup> 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.<sup>532</sup> 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.<sup>533</sup>

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.<sup>534</sup> 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.<sup>535</sup> 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.<sup>536</sup>

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."<sup>537</sup> After a student was branded with a hot coat hanger in 1977, the University issued a strongly worded letter.<sup>538</sup> Further incidents of hazing were addressed by the University in 1979 and early 1980.

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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.<sup>539</sup> The University's campus security apparatus was not told about the anti-hazing directives, and the campus guards never did anything to stop it.<sup>540</sup>

The case against the University and Joseph Donchez was tried in 1987. The jury awarded Jeffrey Furek \$30,000 in compensatory damages.<sup>541</sup> The jury apportioned ninety-three percent of liability to the University.<sup>542</sup> 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.<sup>543</sup> 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.<sup>544</sup> 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."<sup>545</sup> 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.<sup>546</sup>

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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*.<sup>547</sup> 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.<sup>548</sup> 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.<sup>549</sup> 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.<sup>550</sup> 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.<sup>551</sup> Shana Nero, a summer student from the University of Oklahoma, took up residence in the same building.<sup>552</sup>

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.<sup>553</sup> 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.<sup>554</sup> It banned him from all campus residence halls and dining rooms.<sup>555</sup> It also found him guilty of violating the sexual violence policy.<sup>556</sup>

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

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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.<sup>557</sup> Shana Nero sued the University for damages under the state tort claims act, and she sued Davenport for assault and battery.<sup>558</sup> She prevailed against Davenport on summary judgment, but the trial court granted summary judgment in favor of the University on her negligence claim.<sup>559</sup> The Kansas Supreme Court reversed and remanded the case for trial on the merits.<sup>560</sup> 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.<sup>561</sup> 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.”<sup>562</sup>

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.<sup>563</sup>

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.’”<sup>564</sup> The University’s rhetoric persuaded the

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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"?<sup>565</sup>

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.<sup>566</sup>

#### 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.<sup>567</sup> 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.<sup>568</sup> 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.<sup>569</sup> Shortly after that, Crystal received a note from Frentzel threatening to hang himself with a belt.<sup>570</sup> 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.<sup>571</sup> 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

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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."<sup>572</sup> 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,"<sup>573</sup> 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.<sup>574</sup>

Frentzel's next of kin sued the College for negligent failure to prevent the death by taking reasonably adequate precautions.<sup>575</sup> 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."<sup>576</sup> 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."<sup>577</sup> 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.<sup>578</sup>

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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.<sup>579</sup> 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.<sup>580</sup>

Bethany Jill Gross was a twenty-three-year-old graduate student in Nova Southeastern University's doctoral program in psychology.<sup>581</sup> She was required to complete an eleven-month practicum at a site selected from a list maintained by the University.<sup>582</sup> She was assigned to the Family Services Agency (FSA), located about fifteen minutes from the University.<sup>583</sup> 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.<sup>584</sup> He abducted her, robbed her, and raped her.<sup>585</sup> 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.<sup>586</sup>

The trial court granted summary judgment in favor of the University.<sup>587</sup> 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.<sup>588</sup>

The Florida Supreme Court agreed:

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

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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.<sup>589</sup>

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."<sup>590</sup> 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."<sup>591</sup> Whether the University acted reasonably in light of all the circumstances, the Court held, was a question for the jury to determine.<sup>592</sup>

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.<sup>593</sup> In *Gross*, Florida finds the duty in the academy's control, not of its campus premises, but of its curriculum;<sup>594</sup> *Nero* locates the duty of care in the institution's capacity as "landlord" to its residential "tenants";<sup>595</sup> and in *Schieszler*, a Virginia federal court, sitting in diversity, confined the duty to the special circumstances of the case.<sup>596</sup> 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.

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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*<sup>597</sup> is the first judicial excursion into the causal thicket of the rampage shooting.<sup>598</sup> 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.<sup>599</sup> 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.<sup>600</sup> One of Halder's threats was communicated to CWRU's employees by the law student to whom Halder made it, but, judging that

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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.<sup>601</sup> 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.<sup>602</sup>

Norman Wallace was the first person shot and the only person killed in the rampage.<sup>603</sup> He was thirty years old, from Youngstown, the eldest of eleven children, and the pride of his family.<sup>604</sup> 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.<sup>605</sup> 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.<sup>606</sup>

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.<sup>607</sup>

Norman Wallace’s estate filed a wrongful death action in May 2006 against CWRU based on a premises liability theory.<sup>608</sup> 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.<sup>609</sup> 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.<sup>610</sup>

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”<sup>611</sup> and that Halder’s only threat of violence occurred over ten months before the shooting.<sup>612</sup> 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.<sup>613</sup>

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.

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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.<sup>614</sup>

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.<sup>615</sup>

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.<sup>616</sup> 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.<sup>617</sup>

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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.<sup>618</sup> 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.<sup>619</sup> 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.<sup>620</sup> On the other

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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](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.<sup>621</sup> 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.<sup>622</sup> 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.<sup>623</sup> CWRU wrote Halder a letter in November 2001 terminating his computer lab privileges over a spam e-mail that he did not send.<sup>624</sup> In May 2002, the court defeated his motion to compel discovery and his motion to add the University as a defendant.<sup>625</sup> 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

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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.<sup>626</sup> 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.<sup>627</sup> 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.<sup>628</sup> 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.<sup>629</sup> 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."<sup>630</sup> The messages were apparently posted with impunity, since the website remained in existence until after the rampage.<sup>631</sup> In 2001, after Halder filed suit against Miller, and long after

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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.<sup>632</sup> 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.<sup>633</sup> Tensions along race, ethnic, and gender lines are present in most of these rampage cases.<sup>634</sup> That fact, taken together with the

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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](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.<sup>635</sup>

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”<sup>636</sup> 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

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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.<sup>637</sup>

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.<sup>638</sup>

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

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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.<sup>639</sup> 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.<sup>640</sup> Charitable donations may pour in for victim relief.<sup>641</sup> Student applications may go up.<sup>642</sup> As a result, opportunities for deeper reflection and constructive change may be lost.<sup>643</sup> After the rampage, the faculty may feel trapped in the ivory tower with the ghosts of dead colleagues who “paid an enormous price”<sup>644</sup> 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

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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.<sup>645</sup> 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.<sup>646</sup> 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.<sup>647</sup>

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.<sup>648</sup> As increasingly unacceptable levels of campus violence press colleges and universities to change position, faculties have a new

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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](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/](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.<sup>649</sup> 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.<sup>650</sup> They support making the issue of psychological safety in learning spaces a higher priority.<sup>651</sup> 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.<sup>652</sup> 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.”<sup>653</sup> 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.”<sup>654</sup>

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

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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.<sup>655</sup> 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.<sup>656</sup> 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.<sup>657</sup>

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

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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.<sup>658</sup> 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.<sup>659</sup> 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.<sup>660</sup> 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.<sup>661</sup> 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.

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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).