

# INSTITUTES OF HIGHER EDUCATION, SAFETY SWORDS, AND PRIVACY SHIELDS: RECONCILING FERPA AND THE COMMON LAW

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## INTRODUCTION

On April 16, 2007, Seung Hui Cho killed thirty-two students and faculty members at Virginia Tech, injured seventeen more, then killed himself.<sup>1</sup> Four months later, the expert panel commissioned by Virginia Governor Tim Kaine released its final report (“VT Panel Report”).<sup>2</sup> In hindsight, many individuals and institutions had information about Cho. His parents sought counseling for him and worked with his middle and secondary schools, which provided accommodations for his learning disabilities.<sup>3</sup> After he left for college in 2003, his parents visited every weekend during the first semester and called every weekend thereafter, but their son never reported any problems.<sup>4</sup> The admissions office knew that he had a GPA of 3.52 and an SAT score of 1160, but had no information about his accommodations or special needs.<sup>5</sup>

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1. See OFFICE OF THE GOVERNOR OF THE COMMONWEALTH OF VIRGINIA, MASS SHOOTINGS AT VIRGINIA TECH APRIL 16, 2007: REPORT OF THE REVIEW PANEL 1 (2007), available at <http://www.governor.virginia.gov/TempContent/techPanelReport-docs/FullReport.pdf> [hereinafter VT PANEL REPORT] (characterizing Cho as angry and disturbed).

2. *Id.* at vii–viii (describing, in foreword by Governor Kaine, how the panel was formed and its work).

3. See *id.* at 34–36 (explaining that Cho’s parents followed his elementary school’s recommendation to seek therapy for Cho and that after writing an English paper indicating “he wanted to repeat Columbine,” a psychiatrist diagnosed Cho with selective mutism and a single episode of major depression).

4. See *id.* at 40 (pointing out that Cho’s parents visited him every Sunday during the first semester and called him every Sunday during the second semester, but “he did not appear envious or angry about anything”).

5. See *id.* at 38–39 (noting that Virginia Tech does not require an essay or letter of recommendation, that “no one at the university ever became aware of [Cho’s] pre-

One of his English professors found his behavior disruptive and demanded that he be removed from her class.<sup>6</sup> Another offered to tutor him individually, encouraged him to seek counseling,<sup>7</sup> and contacted university officials, counselors, and the police.<sup>8</sup> A third English professor saw a rare side of Cho when Cho became angry after the professor advised Cho to drop his course.<sup>9</sup> Although his writings were disturbing, they revealed no specific threat to anyone's immediate safety.<sup>10</sup> The university's care team, a group of administrators from various departments, discussed that Cho was removed from the English class, but considered the problem resolved.<sup>11</sup> Cho called and visited the counseling center and was triaged several times, but counselors provided no treatment sessions nor made any diagnosis.<sup>12</sup>

In fall 2005, after complaints from two female students about messages and visits from Cho, campus police officers warned him to leave the female co-eds alone.<sup>13</sup> Following the second visit by campus police, Cho instant

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existing conditions," and that, under federal disability law, disclosing a disability is voluntary).

6. *Id.* at 41–43 (narrating that creative writing instructor Nikki Giovanni told the head of the English Department that students were not coming to class because they were afraid of Cho, that Cho had been using his cell phone during class to take pictures of students without their permission, and that she no longer wanted Cho in her class).

7. *Id.* at 43–44, 52 (describing a meeting between Cho and Dr. Frances Roy, the head of the English Department, during which Roy offered to tutor Cho privately and asked if he would talk to a counselor, in addition to requests by another English professor for Cho to contact disability and counseling services).

8. See Elyse Ashburn et al., *Dark Day in Blacksburg: Sounding the Alarm*, CHRON. HIGHER EDUC. (Wash., D.C.), Apr. 27, 2007, at A6 (noting that the professor "did everything but write it in the sky").

9. VT PANEL REPORT, *supra* note 1, at 50 (discussing how, after professor Carl Bean suggested to Cho that he drop Technical Writing, Cho argued loudly, and Bean asked him to leave his office).

10. See *id.* at 43 (excerpting an e-mail message from Dean Brown stating "I talked with a counselor . . . and shared the content of the 'poem' . . . and she did not pick up on a specific threat" and an e-mail message from the Judicial Affairs Director stating, "I agree that the content is inappropriate and alarming but doesn't contain a threat to anyone's immediate safety (thus, not actionable . . .)"); see also Ashburn et al., *supra* note 8, at A7–A8 (explaining that Cho's plays, but not his poems, had been released and that creative writing professors who were asked to read them reached different conclusions about how they would have reacted).

11. See VT PANEL REPORT, *supra* note 1, at 43 (stating that the Judicial Affairs Director recalled that Cho was discussed at the care team meeting, but that "[t]he perception was that the situation was taken care of and Cho was not discussed again by the Care Team").

12. *Id.* at 45–49 (noting that the first record of Cho contacting the Cook Counseling Center was November 30, 2005, and that he called and was triaged via phone on December 12, 2005, and in person on December 14, 2005).

13. *Id.* at 45–46 (discussing a complaint from one student after Cho text-messaged her then went to her room and said "I'm question mark," and another complaint from a second student prompted by messages sent via Facebook and posted on a white erase board outside her dorm room); see also Ashburn et al., *supra* note 8, at A10 (explaining

messed a suitemate that Cho “might as well kill [himself].”<sup>14</sup> Cho’s roommate and suitemates had observed him stabbing a carpet, found a large knife in his desk and discarded it, and witnessed him making calls pretending to be his own imaginary twin brother.<sup>15</sup> After receiving the text message in which Cho mentioned suicide, one of them reported Cho’s threat to campus police.<sup>16</sup>

Cho was taken into custody, but refused to notify his parents.<sup>17</sup> He was evaluated by a social worker from a local facility, who determined that he was mentally ill, was an imminent danger to himself or others, was not willing to be treated voluntarily, and should be involuntarily hospitalized.<sup>18</sup> Although an independent evaluator and psychiatrist found that Cho did not present an imminent danger to himself or others,<sup>19</sup> a special justice presiding over the commitment hearing, which was attended by no one who knew Cho, ruled that Cho was an imminent danger to himself and ordered outpatient treatment.<sup>20</sup> After his release, Cho reported to the on-campus counseling center and was triaged, but was neither diagnosed nor treated.<sup>21</sup> Because Cho was accepted as a “voluntary patient,” the counseling center allowed him to decide whether to make a follow-up appointment.<sup>22</sup> Cho did not return to the counseling center and continued to attend classes until two weeks before the shootings.<sup>23</sup>

These insights—gleaned from the VT Panel Report—show that with

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that complaints about harassing calls and messages are common on college campuses, but that if a student’s behavior rises to the level of harassment, police can refer the case to college administrators or make an arrest).

14. VT PANEL REPORT, *supra* note 1, at 47.

15. *Id.* at 42–45 (reporting that Cho’s suitemates found a “very large knife” in fall 2005, that they stopped socializing with him after he stabbed the carpet in a female student’s room, and that “Cho would go to different lounges and call one of the suitemates on the phone,” then “identify himself as ‘question mark’—Cho’s twin brother—and ask to speak with Seung”).

16. *Id.* at 47.

17. *Id.*

18. *See id.* at 47–49 (discussing the pre-screen evaluation).

19. *Id.* at 47–48 (noting that the independent evaluator had no hospital records available for his review, that the psychiatrist’s conclusion was based on information provided by Cho, and that the psychiatrist indicated that “privacy laws impede the gathering of collateral information”).

20. *Id.* at 47 (remarking that the hearing was not attended by anyone involved in the chain of events, such as Cho’s roommate or suitemate, the police officer, the pre-screener, the independent evaluator, or the attending psychiatrist).

21. *See id.* at 49 (reporting that the triage report is missing, that it is unclear why Cho was triaged a third time rather than receiving treatment, and that the college newspaper reported on “the diminished services provided by the counseling center”).

22. *See id.* (pointing out that Cho made no follow-up appointment, but this fact was not reported to the court, to medical professionals who assessed Cho during the involuntary hospitalization process, or to Virginia Tech officials).

23. *See* Ashburn et al., *supra* note 8, at A10 (listing changes in academic performance as one sign of student distress).

resources, months of research, and hindsight, the pieces of the puzzle begin to fit.<sup>24</sup> The resulting picture suggests that institutions of higher education (“IHEs”),<sup>25</sup> students, parents, courts, and communities need a better understanding of and approach to mental health issues and information privacy on college campuses. On the one hand, as a growing number of today’s college and university students experience serious psychological illnesses, commentators recommend public health models that emphasize information sharing.<sup>26</sup> Similarly, divergent strands of college and university tort liability are converging around foreseeability as the major determinant of duty,<sup>27</sup> so that IHEs are called upon to collect, analyze, and share information with diverse stakeholders in an effort to protect students from intentional acts of self-harm or intentional acts of harm by third parties. In fact, courts increasingly demand that IHEs do so and “have been more willing to impose a responsibility to share information in an affirmative-duty context.”<sup>28</sup> At the same time, however, the Family Educational Rights and Privacy Act of 1974 (“FERPA”)<sup>29</sup> conditions federal funding on compliance with its record keeping provisions, which restrict the information IHEs can release to third parties, including parents.<sup>30</sup> These tensions have not gone unnoticed. In fact, of the seventy recommendations the VT Panel Report makes, seven concern information privacy laws, which the panel concluded are “poorly designed to accomplish their goals” and lead to “widespread lack of understanding,

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24. *But see* Howard Kurtz, *For Virginia Tech Killer’s Twisted Video, Pause but No Rewind*, WASH. POST, Apr. 23, 2007, at C01 (describing how efforts to explain Cho’s behavior are tainted by hindsight bias, when “the sad truth is, there’s no surefire way to stop a determined suicidal killer, especially on a sprawling college campus”).

25. “Institutions of higher education,” as used in this Note, include colleges and universities. Furthermore, “college” and “university” are used synonymously here.

26. *See, e.g.*, MARY ELLEN O’TOOLE, FED. BUREAU OF INVESTIGATION, THE SCHOOL SHOOTER: A THREAT ASSESSMENT PERSPECTIVE 31 (2000), available at <http://www.fbi.gov/publications/school/school2.pdf> (explaining that school violence is “a pressing public health need which could be addressed through multidisciplinary collaboration”); Heather E. Moore, Note, *University Liability When Students Commit Suicide: Expanding the Scope of the Special Relationship*, 40 IND. L. REV. 423, 438–40 (2007) (suggesting that colleges and universities should train all personnel who have close contact with students, with the goal of identifying when a student is under distress).

27. *See* Peter F. Lake, *Higher Education Called to Account*, CHRON. HIGHER EDUC. (Wash., D.C.), June 29, 2007, at B8 (“Higher educational law is moving, steadily, to consolidate around paradigms of reasonableness and foreseeability—which focus much more on conduct, choices, and information—and away from the concept of colleges’ special status and their disengagement with students to avoid risk.”).

28. Peter F. Lake and Nancy Tribbensee, *The Emerging Crisis of College Student Suicide: Law and Policy Responses to Serious Forms of Self-Inflicted Injury*, 32 STETSON L. REV. 125, 147 (2002).

29. 20 U.S.C. § 1232g (2006).

30. *See infra* Part I.D.

[and] conflicting practice.”<sup>31</sup>

This Note argues that both FERPA and the common law contain internal tensions regarding safety and privacy that neither Congress nor the courts have adequately reconciled, and that important discrepancies regarding information sharing exist between IHEs’ practices, the common law’s demands, and FERPA’s limitations. Part I provides background on FERPA and argues that FERPA’s emergency exception is too narrow and confusing, so that IHEs default to the nondisclosure option rather than disclosing information to third parties, such as parents, when students threaten to harm themselves or others. At the same time, FERPA’s tax dependent exception operates as an overly broad bright-line rule that, coupled with FERPA’s lax enforcement mechanism, fails to adequately protect the privacy of students’ education records. Thus, FERPA’s emergency exception fails to ensure safety, while the tax dependent exception eviscerates the statute’s privacy protection.

Part II points out that, at the common law, courts have traditionally relied upon three competing strands of tort doctrines, each of which emphasizes either safety or privacy to the exclusion of the other. Thus, while the “duty” strand of premises liability uses safety as a sword and emphasizes foreseeability, the “no duty” strand of custodial relations and *in loco parentis* uses privacy as a liability shield. In the past, as the common law shifted from using safety as a sword to using privacy as a shield, FERPA responded. For example, as societal attitudes and the common law changed regarding alcohol use, Congress created a tailored exception allowing IHEs to notify parents when students violate laws or policies regarding the possession or use of controlled substances.<sup>32</sup> Currently, another such shift is occurring, and courts are beginning to develop a concept of “duty-based-on-the-facts” as part of the special relationship between IHEs and students. As IHEs adopt public health models to address mental health issues on campuses, courts are using the safety sword to impose a duty on IHEs to use reasonable care to prevent foreseeable acts of harm to and by students, including suicide. However, FERPA has yet to respond to these increasing demands that the common law places on IHEs to share and disclose information about students’ mental health.

Part III proposes ways to resolve the tensions within the common law and FERPA regarding safety and privacy, as well as ways to align the duties the common law imposes on IHEs with the limits on disclosure that FERPA requires of IHEs. In reference to the common law, this Note argues that courts should create a coherent foreseeability framework specific to the mental health and IHE context, acknowledging the limits of foreseeability—especially for college and university personnel who are not

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31. VT PANEL REPORT, *supra* note 1, at 63.

32. *See infra* Part I.D.

mental health professionals—while balancing safety and privacy concerns. Part III also argues that Congress should amend FERPA to appropriately balance safety and privacy, specifically by broadening and clarifying FERPA’s emergency exception while eliminating the tax dependent exception. Meanwhile, as these tensions within and between the common law and FERPA are resolved, the U.S. Department of Education (“U.S. Dept. of Ed.”) should make several changes regarding the guidance it provides.

This Note does not predict how future litigation related to the Virginia Tech shootings<sup>33</sup> might proceed, attempt to assess fault, or argue that such tragic events are preventable. Rather, it highlights doctrinal and statutory developments that might impact where courts draw the line between safety and privacy within the context of questions related to the Virginia Tech shootings. In exploring these questions, this Note suggests how safety and privacy, as well as the common law and FERPA, might be reconciled, thereby charting a clearer course going forward.

## I. FEDERAL EDUCATIONAL RIGHTS AND PRIVACY ACT (FERPA)

### A. Legislative History and Intent

The Federal Educational Rights and Privacy Act (“FERPA”),<sup>34</sup> Spending Clause legislation adopted in 1974, governs the maintenance and disclosure of student records.<sup>35</sup> FERPA has been criticized<sup>36</sup> and described

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33. See Duncan Adams, *Lawsuit Against Tech Could Emerge*, ROANOKE TIMES, Apr. 22, 2007, at S8, available at <http://www.roanoke.com/vtreactions/wb/114130> (reporting that a parent contemplating legal action against Virginia Tech had contacted a lawyer but that the state’s doctrine of sovereign immunity would be a hurdle and that Congress had passed a law banning civil lawsuits against gun manufacturers); *Virginia Tech Lawsuit*, WHSV.COM, Oct. 13, 2007, <http://www.wHSV.com/home/headlines/10517512.html> (reporting that a lawyer for families of twenty people killed or injured in the shootings filed notice with the Blacksburg town attorney of possible lawsuits and that the Virginia Attorney General’s Office had also received notice of a possible lawsuit on behalf of a student).

34. § 1232g; see also 34 C.F.R. §§ 99.1–99.67 (2000). Although FERPA is also referred to as the “Buckley Amendment,” this Note uses “FERPA” exclusively.

35. See §§ 1232g(a)(1)(A)–(B), (2); 1232g(b)(1)–(2) (2006); 34 C.F.R. § 99.67(a)(1), (3) (providing that the U.S. Dept. of Ed. may withhold funds or terminate eligibility to receive funds); see also *Gonzaga Univ. v. Doe*, 536 U.S. 273, 278 (2002) (“Congress enacted FERPA under its spending power to condition the receipt of federal funds on certain requirements relating to the access and disclosure of student educational records.”); Lynn M. Daggett & Dixie Snow Huefner, *Recognizing Schools’ Legitimate Educational Interests: Rethinking FERPA’s Approach to the Confidentiality of Student Discipline and Classroom Records*, 51 AM. U. L. REV. 1, 5 (2001) (“Rather than a mandate, FERPA requirements are conditions attached to the receipt of federal education funds.”).

36. See, e.g., Matthew R. Salzwedel & Jon Ericson, *Cleaning Up Buckley: How the Family Educational Rights and Privacy Act Shields Academic Corruption in College Athletics*, 2003 WIS. L. REV. 1053, 1065–66 (2003) (“But even the most

as a “congressional afterthought”<sup>37</sup> because it was introduced as a Senate floor amendment to other educational legislation and was adopted without public hearings or committee reports.<sup>38</sup> Because Congress passed FERPA as an attachment to another bill and passed subsequent amendments as parts of larger pieces of legislation, FERPA’s legislative history is limited.<sup>39</sup>

The legislative history that does exist suggests that FERPA was, generally, a reaction to the Watergate scandal that revealed the dangers of government data collection, the use of new technology such as computers to assemble and store personal data, and a study by the Russell Sage Foundation that found most schools did not have in place a records policy that addressed the privacy of student and parent information.<sup>40</sup> More specifically, by introducing the bill, Senator Buckley sought to accomplish four goals: first, to establish fair information practices, so that parents and students could have access to the information maintained about them and correct inaccuracies that could adversely affect students’ academic and employment opportunities;<sup>41</sup> second, to protect individual privacy;<sup>42</sup> third,

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cursory review reveals that the law was enacted hastily, poorly written, and from its adoption, has begged review [sic]. Not surprisingly, the initial reaction in higher education to the law was a combination of confusion, hostility, and panic.”); Alice Pickett Sparrow, *The Sociological Impact of the Family Educational Rights and Privacy Act on an Institution of Higher Education* 33 (Apr. 22, 1985) (unpublished M.A. thesis, University of Arizona) (on file with Law School Library, North Carolina Central University) (“The implementation of FERPA was plagued by confusion, misunderstanding and delay,” and efforts “to develop guidelines and regulations made it clear that the law had been too hastily put together.”).

37. Lynn M. Daggett, *Bucking Up Buckley I: Making the Federal Student Records Statute Work*, 46 CATH. U. L. REV. 617, 617 (1997) (“Although [FERPA’s] level of regulation is comprehensive, it has largely been a congressional afterthought.”).

38. *See id.*

39. *See id.* at 617–22 (pointing out that amendments to FERPA in 1979, 1990, 1992, and 1994 were “provision[s] inserted into a larger piece of legislation”); Daggett & Snow Huefner, *supra* note 35, at 5 (noting that “Congress has never written legislation focusing exclusively or primarily on student records”).

40. *See* 120 CONG. REC. 14,580 (1974) (statement of Sen. Buckley) (“In addition, the revelations coming out of [the] Watergate investigations have underscored the dangers of Government data gathering and the abuse of personal files, and have generated increased public demand for the control and elimination of such activities and abuses.”); 121 CONG. REC. 13,991 (1975) (Sen. Buckley’s Address Before the Legislative Conference of the National Congress of Parents and Teachers) (“[T]he growth of the use of computer data banks on students and individuals in general has threatened to tear away most of the few remaining veils guarding personal privacy, and to place enormous, dangerous power in the hands of the government, as well as private organizations.”); 121 CONG. REC. 13,990–91 (discussing a report by the Russell Sage Foundation that found students and parents did not know what information about them was kept in school records, had limited access to the records, and did not have a mechanism by which to challenge the accuracy of the information, while most schools did not have policies in place for protecting, sharing, or destroying such information).

41. 120 CONG. REC. 36,530 (1975) (Sen. Buckley’s Address Before the

to inform parents of, and give them the opportunity to consent to, psychological testing, research, or experimentation because schools were both implementing “ill-devised”<sup>43</sup> behavior- and value-modification programs as well as administering classroom surveys of a personal nature, the results to which parents had no access;<sup>44</sup> and fourth, the “most fundamental reason”<sup>45</sup> for introducing FERPA, to involve parents in education. Some of Senator Buckley’s remarks suggest antagonism between parents and schools, suggesting that people with “elitist and paternalistic attitudes”<sup>46</sup> had transferred too many parental rights to the state and had forgotten that “parents have the primary legal and moral responsibility for the upbringing of their children and only entrust them to the schools for basic educational purposes.”<sup>47</sup> However, he also stressed that parental involvement was essential for educational achievement,<sup>48</sup> a shared goal, and suggested that schools should form partnerships with parents rather than view parents as an intrusion.<sup>49</sup>

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Legislative Conference of the National Congress of Parents and Teachers); *see also* Diane Divoky, *Cumulative Records: Assault on Privacy*, reprinted in 120 CONG. REC. 36,530 (1974) (discussing school records suggesting that a father’s activities as a “black militant” caused his daughter to be “too challenging” and another that read: “a real sickie—absent, truant, stubborn, and very dull. Is verbal only about outside, irrelevant facts. Can barely read . . . Have fun”).

42. 121 CONG. REC. 13,991 (1975) (Sen. Buckley’s Address before the Legislative Conference of the National Congress of Parents and Teachers) (“More fundamentally, my initiation of this legislation rests on my belief that the protection of individual privacy is essential to the continued existence of a free society.”).

43. 120 CONG. REC. 14,581 (1974) (statement of Sen. Buckley) (discussing a program that sought to identify potential drug abusers among eighth-grade students and proposing that parental consent be required for special testing or programs).

44. *See* 121 CONG. REC. 13,991–92 (1975) (Sen. Buckley’s Address Before the Legislative Conference of the National Congress of Parents and Teachers) (describing the studies and explaining that this section of the bill was defeated but that “[t]he requirements of parental consent would inform parents about controversial programs, and would offer them and their children the best protection I can think of against possible educational abuses”).

45. *See id.* at 13,991 (“This brings me to the most fundamental reason for having introduced [FERPA]: and that is, my firm belief in the basic rights and responsibilities—and the importance—of parents for the welfare and the development of their children.”).

46. *See* 120 CONG. REC. 14,580 (1974) (statement of Sen. Buckley) (“Such elitist and paternalistic attitudes reflect the widening efforts of some, both in and out of Government, to diminish the rights and responsibilities of parents for the upbringing of their children, and to transfer such rights and functions to the State. . .”).

47. *See id.* at 14,581 (suggesting that some educators think they know more about the best interests of the child than the parents do and so act without regard for the beliefs and values of the parents).

48. *See* 121 CONG. REC. 13,991 (1975) (Sen. Buckley’s Address Before the Legislative Conference of the National Congress of Parents and Teachers) (discussing a study that found parental involvement may contribute more to educational achievement than intelligence, the quality of the school, or the family’s socioeconomic status).

49. *See id.* at 13,991 (noting that a school principal wrote that “[w]e are not, and



## B. Application and Requirements

FERPA applies to all educational agencies or institutions that receive federal education funds directly, via grant, or indirectly through students, such as when students are awarded federal financial aid.<sup>50</sup> Thus, nearly all private and public elementary and secondary schools, and colleges and universities, are governed by FERPA.<sup>51</sup> To comply with FERPA, education agencies must provide effective notice<sup>52</sup> to eligible students,<sup>53</sup> or to parents<sup>54</sup> if the student is under the age of eighteen, of their rights under FERPA to access and inspect education records,<sup>55</sup> challenge and amend the records to ensure their accuracy,<sup>56</sup> insist that the information within the education record not be disclosed to third parties without consent,<sup>57</sup> and file a complaint with the U.S. Dept. of Ed.'s Family Policy Compliance Office ("FPCO") if these provisions are violated.<sup>58</sup>

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never have been, committed to the development of a partnership in education with parents. The school has too often viewed parental involvement as an intrusion . . . and in that kind of relationship many real possibilities of growth are lost").

50. See 20 U.S.C. § 1232g(a)(3) (2006); 34 C.F.R. § 99.1(a)(1)–(2) (2000) (defining educational agencies and institutions in terms of funding received and services provided).

51. See § 1232g(a)(3); 34 C.F.R. § 99.1.

52. See § 1232g(2); 34 C.F.R. § 99.7(a)(2)(i)–(iv) (requiring schools to provide notice to eligible students of their rights to inspect and review education records, request that the record be amended and corrected, consent before the information in the record is released to third parties, and file a complaint).

53. See § 1232g(a)(6); 34 C.F.R. § 99.3 (defining "student"); see also § 1232g(d)–(e); 34 C.F.R. §§ 99.3, 99.5(a) (explaining that parental rights under FERPA transfer to an eligible student and defining an eligible student as one who has reached age eighteen or enrolled in a post-secondary institution). Because the focus of this publication is college and university students, the terms "student" and "adult student" refer to "eligible student" unless otherwise noted.

54. See § 1232g(e); 34 C.F.R. §§ 99.3, 99.4 (defining "parent"); see also Daggett & Snow Huefner, *supra* note 35, at 6 (explaining that "parent" is broadly defined and applies to biological parents and some caretakers).

55. See § 1232g(a)(1); 34 C.F.R. § 99.10 (discussing rights of inspection and review of education records).

56. See § 1232g(a)(2); 34 C.F.R. § 99.20–22 (granting right to request that the school amend the education record for accuracy, to have an internal hearing to challenge the accuracy of the education record, and, if the school does not amend the record, to include a statement with the education record).

57. See § 1232g(b); 34 C.F.R. § 99.30 (outlining the requirements of prior written consent, which must specify the records to be released, to whom, and for which purposes); see also Sandra L. Macklin, *Students' Rights in Indiana: Wrongful Distribution of Student Records and Potential Remedies*, 74 IND. L.J. 1321, 1335 (1999) (explaining that schools must maintain an access log when they release, without consent, non-directory information contained in education records to third parties).

58. See § 1232g(g); C.F.R. § 99.60 (discussing enforcement procedures).

### C. Education Records

FERPA applies only to education records, which must consist of some personally identifiable information (“PII”) and be created or maintained by a school, its employees, or a person acting for the school.<sup>59</sup>

Despite common confusion and misconceptions,<sup>60</sup> an “education record,” which is broadly and vaguely defined,<sup>61</sup> is not limited to academic information or information in a central or official student file. The term also includes, for example, health records that are maintained by a school and directly related to the student.<sup>62</sup> Education records also encompass student information captured via a broad range of media, such as handwritten notes and video or audio tapes.<sup>63</sup> Education records do not include classwork or homework that students use for peer grading,<sup>64</sup> or

59. See § 1232g(a)(4)(A) (defining education records as “records, files, documents, and other materials which . . . contain information directly related to a student; and . . . are maintained by an educational agency or institution or by a person acting for such agency or institution”); 34 C.F.R. § 99.3 (listing categories of PII, which include the names or addresses of the student or family members, social security numbers, personal characteristics, or other information that would make the student’s identity easy to trace).

60. See Erin M. Sayer, *Understanding the Federal Education Privacy Act (FERPA): An Analysis of FERPA Compliance, Implementation, and Related Issues at Nebraska Colleges and Universities* 168–69 (Apr. 13, 2005) (unpublished Ph.D. dissertation, University of Nebraska, Lincoln) (on file with Biddle Law Library, University of Pennsylvania School of Law) (discussing results of empirical study regarding FERPA and colleges in Nebraska, in which participants tended to equate “education record” with academic information, so that no participants recognized that health records could be education records); Sparrow, *supra* note 36, at 35–36 (1985) (discussing a 1977 study that found school personnel were uncertain as to what constituted an academic record).

61. See Robert T. Monroe, *Chalk Talk—Balancing Student Privacy With the Public’s Right to Know: Georgia Supreme Court’s Red & Black Ruling Creates Gray Area*, 23 J.L. & EDUC. 281, 284 (1994) (“[T]he statutory definition of ‘educational records’ is vague.”); see also Daggett, *supra* note 37, at 624 (stating that records are “defined quite broadly by the statute”); see generally Kent Walker, *The Costs of Privacy*, 25 HARV. J.L. & PUB. POL’Y 87, 88 (2001) (suggesting that many privacy laws tend to be overbroad and inconsistent, as well as bureaucratic and inefficient).

62. See Moore, *supra* note 26, at 448 (explaining that once a treatment record is disclosed, including to the student, it becomes part of the education record and is governed by FERPA); *FERPA, Not HIPAA, RECRUITMENT & RETENTION IN HIGHER EDUC.*, Feb. 2005, at 7 (discussing a letter from Peter K. Chan, Acting Regional Manager of the Department of Health and Human Services’ Office for Civil Rights, in which he explains that health records such as those maintained by a school clinic are education records and are governed by FERPA).

63. See § 1232g(a)(4)(A) (defining education records); 34 C.F.R. § 99.3 (noting that information may be recorded in various ways, such as handwriting, computer media, or video or audio tape).

64. See *Owasso Indep. Sch. Dist. v. Falvo*, 534 U.S. 426, 430–35 (2002) (holding that peer-graded assignments were not education records under FERPA because the assignments were not yet “maintained” by the school and student-graders were not “acting” for the school, and noting that a broad interpretation of “education record”

information that is not derived from an education record, such as what teachers or administrators overhear, personally observe, or learn from an external source such as a newspaper article.<sup>65</sup> Nor does FERPA govern, as examples, sole possession notes—documents prepared by school employees that are not accessible to anyone else,<sup>66</sup> records made by employees exclusively for their professional use,<sup>67</sup> or records created and maintained solely for law enforcement purposes by a law enforcement unit within an education agency.<sup>68</sup> Although FERPA does govern directory information, schools may nevertheless release such information without consent, as long as adult students have been notified and have not objected.<sup>69</sup>

Thus, “education records” are defined simultaneously with reference to who creates and maintains the record and for what purpose, as well as with reference to the source of the information, where the record is maintained, and who could possibly have access to the information.<sup>70</sup> For example, if a student commits a crime and that information is part of the disciplinary portion of the student’s education record maintained by college and university administrators, FERPA governs. However, if that information is instead created and maintained by a law enforcement unit solely for law

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would “impose substantial burdens on teachers across the country”); *see also* Margaret L. O’Donnell, *FERPA: Only a Piece of the Privacy Puzzle*, 29 J.C. & U.L. 679, 687–699 (2003) (discussing *Favlo* and suggesting that “the Court did not really articulate a standard that could be used by lower courts or educators to weigh future fact situations”); Salzwedel & Ericson, *supra* note 36, at 1085 (2003) (arguing that the Court’s decision in *Favlo* emphasized that FERPA is an “overly broad and heavy-handed federal law that should be interpreted reasonably to balance a student’s privacy rights against the efficient functioning of our country’s schools” and that it “is crystal clear that additional interpretation of the law is needed”).

65. *See* Daggett, *supra* note 37, at 625. *But see* 34 C.F.R. § 99.3 (explaining that oral disclosure of information contained in student records is prohibited).

66. *See* 20 U.S.C. § 1232g(a)(4)(B)(i); 34 C.F.R. § 99.3; *see also* Daggett, *supra* note 37, at 626 (describing sole possession notes as those prepared by school employees that are neither accessible nor accessed by anyone else, including other school employees, and explaining that once such notes are accessed by a third party, they are governed by FERPA).

67. *See* § 1232g(a)(4)(B)(iii).

68. *See* § 1232g(a)(4)(B)(ii); 34 C.F.R. § 99.8(a)(1) (defining law enforcement unit); 34 C.F.R. § 99.8(b)(1) (2000) (defining law enforcement records as those created and maintained by a law enforcement unit, for law enforcement purposes).

69. *See* § 1232g(a)(5)(A); 34 C.F.R. § 99.3 (defining directory information and providing an illustrative list, including the student’s name, address, phone number, e-mail address, photograph, date and place of birth, major, participation in activities, dates of attendance, grade level, and enrollment status).

70. *See* SUSAN GORN, WHAT DO I DO WHEN . . . THE ANSWER BOOK ON THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT 9:3–9:4 (1998) (explaining that what is a law enforcement record does not turn on content and that the same information could be maintained as both a law enforcement record and education record); *see also* Sayer, *supra* note 60, at 169 (explaining that health records may be considered education records, “depending on who creates and maintains the record”).

enforcement purposes, FERPA does not govern and the law enforcement agency may release the information pursuant to state law.<sup>71</sup>

#### D. Release of Information to Third Parties: Consent and Exceptions

Schools may release PII contained in education records to third parties with an adult student's consent.<sup>72</sup> Absent the student's consent, schools may, but are not required to,<sup>73</sup> release education records when permitted by numerous statutory exceptions.<sup>74</sup> As examples,<sup>75</sup> schools may release education records to university employees or officials who have a legitimate educational interest in inspecting the records,<sup>76</sup> to the student's parents if the parents claim the student as a dependent on federal income tax returns,<sup>77</sup> to parents or guardians of students under twenty-one years of age who violate a law or the school's policy regarding the possession or use

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71. See 34 C.F.R. § 99.8(b)(2) (explaining that records created by a law enforcement unit but maintained by another department are not law enforcement records and that records created and maintained by a law enforcement unit but used for purposes other than law enforcement, such as disciplinary action, are not law enforcement records); VT PANEL REPORT, *supra* note 1, at H-4 (summarizing privacy laws and guidance from the U.S. Department of Education); see also Daggett, *supra* note 37, at 627 (explaining that security-related records maintained by college and university administrators or employees other than law enforcement officials are not exempted from FERPA).

72. See § 1232g(b); 34 C.F.R. § 99.30(b) (noting that written consent should specify the records that may be disclosed, for which purposes, and to whom).

73. *But see* § 1232g(j); 8 C.F.R. § 214.1(h) (2008) (requiring that educational institutions report information concerning an F, J, or M nonimmigrant student that would ordinarily be protected by FERPA, when needed for anti-terrorism purposes and supported by a court order).

74. See Sara Lipka, *Officials Get Lecture on Privacy Laws*, 52 CHRON. HIGHER EDUC. (Wash., D.C.), Mar. 24, 2006, at A45 (discussing guidance provided by the U.S. Dept. of Ed. clarifying that colleges and universities are permitted but not required to disclose student records to parents).

75. See Daggett, *supra* note 37, at 631–37 (1997) (providing a more comprehensive discussion of exceptions to FERPA's written consent requirements); see also GORN, *supra* note 70, at 7:9–7:10 (listing thirteen exceptions to the prior written consent requirement).

76. See § 1232g(b)(1)(A); 34 C.F.R. § 99.31(a)(1) (2000); see also GORN, *supra* note 70, at 7:13–7:14, 9:5 (clarifying that school officials may determine what constitutes a "legitimate educational interest" and may disclose education records to law enforcement officials, as long as the school has designated them to be school officials with a legitimate educational interest in the information). *But see* 34 C.F.R. § 99.8(c)(2) (2000) (providing that education records disclosed to law enforcement units retain their status as education records so that restrictions on redisclosure discussed in § 99.30 apply); GORN, *supra* note 70, at 9:6–9:7 (pointing out that law enforcement units cannot disclose information from education records as they could if the information were obtained from a law enforcement record).

77. See § 1232g(b)(1)(H); 34 C.F.R. § 99.31(a)(8); see also Daggett, *supra* note 37, at 629 (mentioning that colleges and universities may disclose education records of dependent students to parents).

of alcohol or controlled substances,<sup>78</sup> and, in the case of health and safety emergencies, to “appropriate” parties where “knowledge of the information is necessary to protect the health or safety of the student or other individuals.”<sup>79</sup>

#### E. Enforcement

If a college student or a minor student’s parent discovers that a school has violated FERPA, the student’s options regarding enforcement and remedies are limited and arguably inadequate.<sup>80</sup> FERPA lacks a remedial provision, provides for no private right of action, and does not create a privacy interest that is cognizable under 42 U.S.C. § 1983.<sup>81</sup> Instead, a

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78. See § 1232g(i) (stating that an IHE may notify the parents of a student who has violated a federal, state, or local law, or institutional rule or policy regarding the use or possession of a controlled substance).

79. 34 C.F.R. § 99.36(a).

80. See *Belanger v. Nashua Sch. Dist.*, 856 F. Supp. 40, 47 (D.N.H. 1994) (“[N]either the statute nor the regulations gives an explicit remedy that would be beneficial to the plaintiff.”), *overruled by* *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002); *Krebs v. Rutgers*, 797 F. Supp. 1246, 1257 (D.N.J. 1992), *overruled by* *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002) (recognizing the “complete inadequacy of the Secretary’s regulations” and the “statute’s failure to require more complete relief for aggrieved individuals”); see also GORN, *supra* note 70, at 11:4 (suggesting that schools escape real sanctioning); Macklin, *supra* note 57, at 1321–37 (suggesting that FERPA is “effectively impotent because of its lack of enforcement mechanisms,” noting that other writers have described it as a “toothless” statute, and proposing that states augment privacy protection); O’Donnell, *supra* note 64, at 712 (discussing how Princeton University accessed a Yale University website containing applicant information and arguing that the market cannot effectively regulate information privacy in higher education because students will not stop applying to Ivy League schools even if they do not have adequate record security); D. Martin Warf, Note, *Loose Lips Won’t Sink Ships: Federal Education Rights to Privacy Act After Gonzaga v. Doe*, 25 CAMPBELL L. REV. 201, 217 (2003) (suggesting that, without the threat of lawsuits and because the FPCO acts only on complaints rather than actively seeking out violators, colleges and universities may leave cost-efficient but questionable policies in place); Sparrow, *supra* note 36, at 49–50 (describing FERPA’s enforcement scheme as “enforced self-regulation” and suggesting that the sanction of withdrawal of funds is “so disproportionate . . . that the threat lacks credibility and thus serves only as a poor incentive for institutions to correct systematic violations or unfair practices”).

81. See *Gonzaga*, 536 U.S. at 283–91 (holding, in case where a dean refused to attest to a student’s good moral character, that FERPA does not confer rights enforceable under 42 U.S.C. § 1983 in light of the absence of rights-creating language, the provision for an administrative enforcement mechanism, and an aggregate rather than individual focus); see also Daggett, *supra* note 37, at 640 (“Attempts to create a private cause of action for [FERPA] violations have been singularly unsuccessful.”). *But see* *Gonzaga*, 536 U.S. at 293–303 (2002) (Stevens, J. & Ginsburg, J., dissenting) (arguing that FERPA contains the requisite rights-creating language, the administrative review enforcement mechanism is not comprehensive, and that the majority conflated the analysis for implied rights of action with whether a federal right exists for § 1983 purposes); Annie M. Horner, Note, *Gonzaga v. Doe: The Need for Clarity in the Clear Statement Test*, 52 S.D. L. REV. 537, 556–62 (2007) (criticizing the decision in *Gonzaga*, arguing that the majority misapplied the *Dole* test while the dissent correctly

student may file a complaint with the FPCO.<sup>82</sup> Grounds for a complaint include that the school did not correct misleading or inaccurate information in the student's educational records or that the school released the educational records without authorization.<sup>83</sup> Upon receiving the complaint, the FPCO requests a written response from the school, investigates the complaint, and notifies the student and school in writing of its finding.<sup>84</sup> If the FPCO finds that a violation has occurred, it provides the school with specific guidelines and requests compliance before a stated deadline.<sup>85</sup> If the school fails to comply, the Secretary of Education may withhold funds, compel compliance via a cease-and-desist order, or terminate the school's eligibility for future funding under any applicable program.<sup>86</sup> However, the Act is designed to address policies and practices of unauthorized release rather than single unauthorized disclosures<sup>87</sup> and the FPCO has never attempted to withdraw federal funds based on FERPA violations.<sup>88</sup>

#### F. The Tax and Emergency Exceptions

The initial amendments to FERPA included exceptions allowing the nonconsensual release of information in education records to parents of dependent students and to third parties in case of a health or safety emergency.<sup>89</sup>

Under the tax dependent exception, schools may, but are not required to allow parental access to education records if the student is a dependent as

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applied the *Blessing* test).

82. See § 1232g(g); 34 C.F.R. § 99.63; see also Daggett, *supra* note 37, at 631–42 (explaining the process in detail, including the provisions for an internal hearing).

83. See § 1232g(a), (b), (g).

84. See § 1232g(f), (g); 34 C.F.R. §§ 99.65–99.66.

85. See § 1232g(f), (g); 34 C.F.R. § 99.66.

86. See § 1232g(b)(2), (f) (2006); 34 C.F.R. § 99.67(a); see also Daggett & Snow Huefner, *supra* note 35, at 11 (discussing enforcement options, noting that the federal government may also bring a civil action).

87. See § 1232g(a)(1)(A)–(B), 1232g(b)(1)–(2) (stating that funds shall not be made available under any applicable program to educational agencies or institutions that have a *policy or practice* of denying or effectively preventing the exercise of rights assured under FERPA or of permitting the release of educational records without written consent) (emphasis added); see also *Gonzaga Univ. v. Doe*, 536 U.S. 273, 288 (2002) (“FERPA’s nondisclosure provisions further speak only in terms of institutional policy and practice, not individual instances of disclosure.”) (citations omitted); Macklin, *supra* note 57, at 1326 (“[E]very court which has addressed the issue has said that FERPA protects against systematic violations only.”).

88. See Daggett, *supra* note 37, at 642 (noting no reported decisions in which the FPCO has withdrawn funds); see also Michael Arnone, *Congress Weighs Changes in Key Student-Privacy Law*, 50 CHRON. HIGHER EDUC. (Wash., D.C.), Oct. 3, 2003, at A22 (reporting that no college or university has ever been sanctioned with loss of federal funding).

89. See Kent M. Weeks, *Family-Friendly FERPA Policies: Affirming Parental Partnerships*, NEW DIRECTIONS FOR STUDENT SERVICES, July 2001, at 39, 41.

determined by the Internal Revenue Service.<sup>90</sup> Such disclosure is discretionary, so that some IHEs release information in education records after a student indicates dependent status or after the student's parents provide a copy of their federal income tax returns.<sup>91</sup> The exception does not apply to international students<sup>92</sup> or to students who are not claimed as dependents.

Congress added the emergency (or health or safety) exception to the written consent requirement when FERPA was first amended.<sup>93</sup> The exception allows IHEs to disclose PII from education records, without consent, "in connection with an emergency [to] appropriate persons if the knowledge of such information is necessary to protect the health or safety of the student or other persons."<sup>94</sup> Citing the legislative history of the provision, the FPCO notes Congress's intent to limit application of the provision to "exceptional circumstances."<sup>95</sup> Thus, the U.S. Dept. of Ed. has promulgated regulations that allow disclosure under the provision only in cases of emergency,<sup>96</sup> to appropriate parties,<sup>97</sup> when necessary to protect the health or safety of the student or other individuals.<sup>98</sup> A specific regulation emphasizes that the requirements will be "strictly construed."<sup>99</sup>

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90. *See id.* at 45 (excerpting FERPA's legislative history, illustrating that colleges were reluctant to send bills and grades home to parents).

91. *See id.* at 45–46 (explaining that many institutions did not support the release of information in this context until recently).

92. *See FERPA Questions for Lee Rooker, Director of the Family Policy Compliance Office, U.S. Department of Education, Association for Student Judicial Affairs, available at* <http://asjaonline.org/attachments/wysiwyg/525/FERPA-QUESTIONSanswered.doc>.

93. *See* 20 U.S.C. § 1232g(b)(1)(I) (2006); 34 C.F.R. §§ 99.31(a)(10), 99.36 (2000); *see also* letter from LeRoy S. Rooker, Director of the Family Compliance and Policy Office, to the University of New Mexico (Nov. 29, 2004), *available at* <http://www.ed.gov/policy/gen/guid/fpc/ferpa/library/baiseunmslc.html>.

94. Letter from LeRoy S. Rooker to the University of New Mexico, *supra* note 93, at 6.

95. *See id.* (explaining that a blanket exception for "health or safety" could result in the unneeded release of personal information, and that Congress resolved the issue by directing the Secretary of Education to promulgate regulations, with the expectation that "he will strictly limit the applicability of this exception").

96. *See id.* at 9 ("This Office will not substitute its judgment for what constitutes a true threat or emergency unless the determination appears manifestly unreasonable or irrational."); *see also* letter from LeRoy S. Rooker to the New Bremen Schools (Sept. 22, 1994), *reprinted in* VT PANEL REPORT, *supra* note 1, at G16–22 (finding that a student's statement that he wished he were dead, coupled with a threat to beat up another student and unsafe conduct constituted a health or safety emergency, but that the school violated FERPA when it later disclosed additional information to the court for the student's hearing).

97. *See* letter from LeRoy S. Rooker to the University of New Mexico, *supra* note 93, at 7 (noting that "appropriate parties" typically include law enforcement and public health officials, as well as trained medical personnel).

98. *See* 34 C.F.R. § 99.36(a).

99. *See* 34 C.F.R. § 99.36(c).

Although the FPCO previously provided four regulatory factors that schools should use to determine whether a perceived health or safety emergency warranted disclosure of PII without consent, the Secretary removed them, explaining that educational institutions should not be overburdened with the criteria and are capable of making those determinations on their own.<sup>100</sup>

Operationally, before a college or university may release non-directory PII under the emergency exception, it must determine “that a *specific situation presents imminent danger or threat* to students or other members of the community, or requires an *immediate need* for information in order to avert or diffuse serious threats to the safety or health of a student or other individuals.”<sup>101</sup> Information may then be released only to “parties who can address the specific emergency in question,”<sup>102</sup> provided that the information released is “narrowly tailored considering the immediacy and magnitude of the emergency.”<sup>103</sup> Finally, the exception is “temporally limited to the period of emergency.”<sup>104</sup>

### G. Reactions to FERPA

In addition to arguing that FERPA was poorly drafted and hastily enacted without input from relevant stakeholders,<sup>105</sup> critics also claim that it is an outdated statute<sup>106</sup> that confuses, burdens, and intrudes on the domain of IHEs<sup>107</sup> while also putting them in the middle of student-parent

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100. See letter from LeRoy S. Rooker to the New Bremen Schools, *supra* note 96, at G-21 (explaining that a school district need not “document its decision-making process in determining to disclose the records to meet a safety or health emergency” because “it is clear that the Secretary intends for educational agencies to use their good judgment and discretion in the matter”); see also GORN, *supra* note 70, at 7:33–7:34 (discussing the previous criteria in place).

101. Letter from LeRoy S. Rooker to the University of New Mexico, *supra* note 93, at 8.

102. *Id.*

103. *Id.*

104. *Id.*

105. See discussion *supra* Part I.A.

106. See Sayer, *supra* note 60, at 177–78 (noting that study participants viewed FERPA as a statute written at a time when schools kept one authoritative paper record, but that the Act had not adapted to an era of multiple electronic copies and IHEs’ use of technology).

107. See *Gonzaga Univ. v. Doe*, 536 U.S. 273, 292 (2002) (Breyer, J. & Souter, J., concurring) (“Much of the statute’s key language is broad and nonspecific” and, in reference to definitions of key terms such as “education records,” “[t]his kind of language leaves schools uncertain as to just when they can, or cannot, reveal various kinds of information”); *Owasso Indep. Sch. Dist. v. Falvo*, 534 U.S. 426, 437 (2002) (Scalia, J., concurring) (writing that “[t]he Court does not explain why respondent’s argument is not correct” and that its interpretation of “education record” seems to contradict FERPA, and is “incurably confusing”); VT PANEL REPORT, *supra* note 1, at 63 (explaining that privacy laws cause people to “default to the nondisclosure option”



conflicts,<sup>108</sup> indirectly weakens parental rights,<sup>109</sup> provides no real privacy protection because the exceptions nearly swallow the rule,<sup>110</sup> is not adequately enforced,<sup>111</sup> and provides a shield behind which universities inappropriately hide.<sup>112</sup>

In reference to one of these assertions, as the VT Panel Report indicates, FERPA does indeed confuse and burden IHEs.<sup>113</sup> In fact, both the National Education Association and National School Boards Association opposed FERPA, the latter pointing out that the intent was meritorious but that “operationally its accomplishment will generate unacceptable confusion because of the complicated legislative language and local administrative

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even when the law permits disclosure and hypothesizing that this may be due to ignorance of the law); Ira Nerken, *Backbencher: Harvard Favors Secrecy, Against Candor*, HARV. L. RECORD, Nov. 8, 1974, reprinted in 120 CONG. REC. 36,528 (1974) (reporting that Harvard faculty and administrators opposed FERPA because it was poorly drafted and ambiguous, offered colleges and universities no opportunity for input, and sent the message that academics do not have ethics or common sense, and that students would be able to see negative recommendation letters); see also Daggett, *supra* note 37, at 618, 660–62 (explaining how FERPA creates burdens for colleges and universities because of the time required for training, making disclosure decisions, maintaining the access log, and determining if FERPA conflicts with other laws, but that Congress provides no funds to help schools meet FERPA’s requirements); Sparrow, *supra* note 36, at 33 (listing common misunderstandings about FERPA).

108. See Weeks, *supra* note 89, at 42 (explaining that schools can be “caught in the middle between persons who all claim they should be the sole recipients of information”); see also Sparrow, *supra* note 36, at 87 (finding in a small scale study that staff interviewed about FERPA “experienced some conflict with other normative values especially a deeply ingrained value, parental rights”).

109. See Daggett, *supra* note 37, at 662 (“Unreasonable burdens on schools also indirectly weaken parental rights. To the extent [FERPA] imposes excessive burdens on schools which cannot be effectively enforced by parents, schools may fail to comply, compromising parental rights.”).

110. See Arnone, *supra* note 88, at A23 (quoting Barmak Nassirian, Associate Executive Director of External Relations for the American Association of Collegiate Registrars and Admissions Officers, as stating that “[a]ll added up together, [the exceptions] almost eviscerate F[ERPA] to the point of meaninglessness”).

111. See sources cited *supra* note 80.

112. See Salzwedel & Ericson, *supra* note 36, at 1061 (arguing that FERPA is a defensive shield behind which IHEs hide academic corruption in college and university athletics); Courtney Leatherman, *Universities Wield Privacy Law in Clashes with T.A. Unions*, CHRON. HIGHER EDUC. (Wash., D.C.), Oct. 27, 2000, at A12 (reporting concerns that colleges and universities were citing FERPA to justify withholding the names of teaching assistants from unions); see also VT PANEL REPORT, *supra* note 1, at 63 (hypothesizing that people “default to the nondisclosure option” because of ignorance of the law, a desire to serve an individual or organizational purpose by “hid[ing] behind the privacy law,” or a desire to minimize the risks to oneself); Weeks, *supra* note 89, at 49 (suggesting that “[t]oo many colleges hide behind [FERPA] to escape their responsibility to parents”).

113. See VT PANEL REPORT, *supra* note 1, at 63 (“The panel’s review of information privacy laws governing mental health, law enforcement, and educational records and information revealed widespread lack of understanding, conflicting practice, and laws that were poorly designed to accomplish their goals.”).

conditions.”<sup>114</sup> Although IHEs’ initial objections might have been fueled by resentment that the federal government was intruding on their domain,<sup>115</sup> their concerns appear motivated by more than a desire to use FERPA and privacy as a shield.

Instead, genuine confusion exists over the language and requirements of the Act,<sup>116</sup> and such confusion leads to conservative interpretations regarding what information schools may share,<sup>117</sup> especially in the case of a health or safety emergency.<sup>118</sup> Furthermore, although the FPCO provides

114. See 120 CONG. REC. 14,583 (1974) (discussing the National Education Association’s opposition to the amendment); 120 CONG. REC. 14,585 (1974) (reprinting a letter from the National School Boards Association).

115. See Sparrow, *supra* note 36, at 83 (concluding that the impact of FERPA on colleges and universities was slight after they “recovered from the shock of an invasion of their domain” and regulations helped to clarify confusion).

116. See sources cited *supra* note 107.

117. See *Gonzaga Univ. v. Doe*, 536 U.S. 273, 292 (2002) (Breyer, J. & Souter, J., concurring) (writing that the language of FERPA “is open to interpretations that invariably favor confidentiality almost irrespective of conflicting educational needs or the importance, or common sense, of limited disclosures in certain circumstances”); O’Donnell, *supra* note 64, at 687–99 (suggesting that lawyers are “cautious creatures” who ask “text-driven FERPA questions” and continue to advise clients to interpret the definition of “education record” broadly); see also VT PANEL REPORT, *supra* note 1, at 63 (explaining that privacy laws cause people to “default to the nondisclosure option” even when the law permits disclosure).

118. See *Brown v. City of Oneonta*, 106 F.3d 1125, 1132 (2d Cir. 1997) (noting that the “regulations merely repeat the words of the emergency exception”); *Improving the Safety and Security of Schools and Campuses in the United States: What Can be Done by the Federal Government?: Hearing Before the S. Comm. on Homeland Sec. & Govt. Affairs*, 110th Cong. 5 (2007) [hereinafter *Hearings*] (statement of Irwin Redlener, M.D., Prof. of Clinical Pub. Health & Pediatrics, Assoc. Dean for Pub. Health Preparedness & Dir. of the Nat’l Ctr. for Disaster Preparedness at Columbia Univ. Mailman Sch. of Pub. Health) (outlining federal strategies and mentioning that although FERPA allows for parental disclosure in some circumstances, schools still fear liability); U.S. DEPT. OF JUSTICE, REPORT TO THE PRESIDENT ON ISSUES RAISED BY THE VIRGINIA TECH TRAGEDY 7–8 (2007), [http://www.usdoj.gov/opa/pr/2007/June/vt\\_report\\_061307.pdf](http://www.usdoj.gov/opa/pr/2007/June/vt_report_061307.pdf) [hereinafter REPORT TO THE PRESIDENT] (noting that misunderstandings and fears about state and federal privacy laws “likely limit the transfer of information in more significant ways than is required by law” and calling for the U.S. Dept. of Ed. to develop additional guidance clarifying how information may be shared); VT PANEL REPORT, *supra* note 1, at 69 (explaining that the “strict construction” requirement is unnecessary and unhelpful, further narrows the definition of “emergency” without clarifying when an emergency exists, and “feeds the perception that nondisclosure is always a safer choice”); see also John S. Gearan, *When Is It OK to Tattle? The Need to Amend the Family Educational Rights and Privacy Act*, 39 SUFFOLK U. L. REV. 1023, 1042 (2006) (“As the law stands presently, however, the FERPA exception allowing for disclosure [to third parties such as parents] in emergencies is extremely ambiguous, and discourages notification even in dangerous and appropriate instances.”); Karin Fischer, *Report on Virginia Tech Shootings Urges Clarification of Privacy Laws*, CHRON. HIGHER EDUC. (Wash., D.C.), June 22, 2007, at A30 (quoting Michael O. Leavitt, Secretary of Health and Human Services, as stating “[p]eople don’t understand what [information about troubled students] they can share and what they can’t share”); Ann H. Franke, *When Students Kill Themselves, Colleges*

a wealth of guidance and technical assistance to IHEs regarding FERPA,<sup>119</sup> the guidance has been criticized<sup>120</sup> and the Technical Assistance Letters are ineffective because they tend to be conclusory in nature,<sup>121</sup> and are neither indexed<sup>122</sup> nor widely disseminated by the FPCO.<sup>123</sup> Thus, although FERPA's emergency exception allows IHEs to release information to third parties such as parents when a student's safety is at risk, the standard-based exception is too narrow and confusing, so that IHEs default to the nondisclosure option. At the same time, however, FERPA's tax dependent exception operates as an overly broad bright-line rule that, coupled with FERPA's lax enforcement mechanism, fails to adequately protect the privacy of students' education records.<sup>124</sup> As a result, FERPA's emergency exception fails to ensure safety while the tax dependent exception eviscerates the statute's privacy protection.

Despite FERPA's shortcomings, however, some college and university

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*May Get the Blame*, CHRON. HIGHER EDUC. (Wash., D.C.), June 25, 2004, at B18 (explaining that because colleges and universities have little guidance other than that the emergency exception will be strictly construed, they default to nondisclosure); Robert B. Smith & Dana L. Fleming, Editorial, *Student Suicide and Colleges' Liability*, CHRON. HIGHER EDUC. (Wash., D.C.), Apr. 20, 2007, at B24 (calling on Congress to amend FERPA because FERPA's emergency exception "remains largely untested in the courts, makes no specific reference to self-inflicted harms, and provides no guidance about how colleges can help protect students from themselves"); Eric Hoover, *Safety Trumps Privacy in Sharing Information About Troubled Students, Panel is Told*, CHRON. HIGHER EDUC. (Wash., D.C.), July 27, 2007, at A31 (quoting Richard J. Bonnie, law professor at the University of Virginia, as stating "[g]reater clarification about this is clearly needed").

119. See Sayer, *supra* note 60, at 62–63 (explaining that a school can write a Technical Assistance Letter to the FPCO and receive a response, that the FPCO issues Letters of Finding to parties of complaints, and the FPCO posts some letters to its website or sends them to professional organizations to distribute and reprint); see also FPCO website, <http://www.ed.gov/policy/gen/guid/fpc/index.html> (last visited Oct. 26, 2008) (offering information and training).

120. See, e.g., Sayer, *supra* note 60, at 174 (quoting participant in study as saying that, "[t]he primary problem" with FERPA is that it "really doesn't accommodate today's practices, so we are constantly sort of interpreting stuff" and the answers "don't really stick with you because they are not logical in the context of today's practices").

121. See *Falvo ex rel. Pletan v. Owasso Indep. Sch. Dist.*, 233 F.3d 1203, 1214–15 (10th Cir. 2000), *rev'd*, 534 U.S. 426 (2002), *overruled in part by Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002) ("[T]he Rooker letter and declaration are bereft of any reasoning underlying the rather conclusory opinion" and "lack sufficient reasoning, fail to account for the breadth of FERPA's language, and indicate the FPCO's somewhat cursory and purely hypothetical consideration of the issue . . .").

122. See Sayer, *supra* note 60, at 63 (citing JAMES S. ROSENFELD ET AL., *EDUCATION RECORDS: A MANUAL* 7 (1997)).

123. See *id.* at 63–64 (explaining that the FPCO posts Technical Assistance Letters to its website and distributes them to professional organizations only if the FPCO determines the letter would be useful to the educational community); see also GORN, *supra* note 70, at 11:5 (explaining that the FPCO neither automatically publishes its responses nor indexes them by subject, so that they remain largely unpublished).

124. See sources cited *supra* note 80.

administrators view FERPA positively, acknowledging that the privacy of students' records should be protected. Moreover, FERPA is not the only source of confusion. As Section II explains, divergent strands of tort liability have traditionally emphasized either safety or privacy to the exclusion of the other, so that the common law, like FERPA, has provided IHEs with little guidance on balancing the two. However, as a third strand of tort liability emerges in the mental health context, it is becoming increasingly evident that Congress should amend FERPA to keep pace with the demands that the common law places on IHEs to share and disclose information when students threaten to harm themselves or others.

## II. IHE NEGLIGENCE LIABILITY FOR THIRD-PARTY HARM AND SELF-HARM

IHEs generally have no duty to prevent third parties from physically harming students or to prevent students from harming themselves.<sup>125</sup> Instead, student-plaintiffs must establish a duty to aid or protect via statute,<sup>126</sup> via a voluntary undertaking that was negligently performed,<sup>127</sup> via custom and policy,<sup>128</sup> or via an indirect or implied duty—such as that arising from a special relationship.<sup>129</sup>

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125. See RESTATEMENT (SECOND) OF TORTS § 315 (1965) (explaining that there is “no duty to control the conduct of a third person as to prevent him from causing physical harm to another unless a special relationship exists”).

126. See *Jesik v. Maricopa Cmty. Coll. Dist.*, 611 P.2d 547, 549–51 (Ariz. 1980) (reversing summary judgment and holding that a legislative decision imposing upon school boards a duty to “provide for adequate supervision over pupils” was relevant in the determination of the duty the college owed to a student who was shot and killed by another student).

127. See, e.g., *Davidson v. Univ. of N.C. at Chapel Hill*, 543 S.E.2d 920, 929–30 (N.C. Ct. App. 2001) (reversing, remanding, and explaining that the “undertaking” theory involves an agreement such as a contract or gratuitous promise, and that the university’s testimony and conduct indicated that it voluntarily assumed the responsibility of teaching cheerleaders about safety); see also *Mullins v. Pine Manor Coll.*, 449 N.E.2d 331, 336–37 (Mass. 1983) (finding that colleges and universities “generally undertake to provide their students with protection from the criminal acts of third parties,” that such security is part of the bundle of services colleges and universities offer, and that parents and students rely upon colleges and universities to exercise reasonable care to protect students).

128. See, e.g., *Mullins*, 449 N.E.2d at 335 (stating that duty finds its “source in existing social values and customs” and, based on the testimony of an expert witness who visited eighteen area colleges and universities, finding that the duty to use reasonable care to protect resident students was “firmly embedded in a community consensus”).

129. See, e.g., *Davidson*, 543 S.E.2d at 927–28 (discussing how special relationships often involve mutual dependence and that an injured cheerleader received benefits such as transportation and physical education credits hours from the university, while the university depended on the cheerleader for benefits such as providing entertainment at sporting events); see also *Nova Southeastern Univ. v. Gross*, 758 So. 2d 86, 87–90 (Fla. 2000) (holding that when a university exerted control over a

In reference to the latter, although the Third Restatement of Torts adds the school-student relationship to the list of special relations that can give rise to duty, it notes that courts are split as to whether this duty extends beyond the K-12 context to IHEs.<sup>130</sup> In contrast to the K-12 setting, the three rationales for imposing duty based on the school-student relationship—“the temporary custody that a school has of its students, the school’s control over the school premises, and the school’s functioning in place of parents”<sup>131</sup>—have received different treatment in the college and university context.

As a result, three strands of tort doctrines have emerged, each emphasizing different factors regarding whether a duty should be imposed, as well as different types of harms, different discourses, and different results. Part II discusses each line of cases in turn: the “duty” strand of premises liability that emphasizes safety and the foreseeability of harm; the “no duty” strand of *in loco parentis* and custodial relationships that emphasizes privacy; and the evolving “duty-based-on-the-facts” strand of the legally special IHE-student relationship that emphasizes safety but has yet to develop a workable concept of foreseeability as it relates to the IHE or mental health context.<sup>132</sup> Part II then argues that the common law has used either a “safety sword” to impose a duty via foreseeability or a “privacy shield” to refuse to impose a duty on IHEs to protect students from intentional harm. As a result, and as the emerging third strand of tort doctrine reveals, the common law has yet to acknowledge the unique characteristics of IHEs, adapt concepts of foreseeability to specific risks such as those relevant to the mental health context, identify the diverse interests at stake, or balance privacy and safety concerns. Finally, Part II also points out that although FERPA has responded to changes in the common law in the past, it has yet to respond to the increased foreseeability demands that the common law imposes on IHEs in the mental health context.

#### A. Premises Liability: Safety and Foreseeability

An IHE’s legal duty to use reasonable care to prevent foreseeable student injuries from intentional acts of third parties on its premises is well

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student’s conduct by requiring her to complete an off-campus practicum and assigning her to a specific location, it assumed the Hohfeldian correlative duty to use reasonable care).

130. See RESTATEMENT (THIRD) OF TORTS § 40 cmt. 1 (Tentative Draft No. 4, 2004) (“Courts are split on whether a college owes a duty to its students. Some of the cases recognizing such a duty are less than ringing endorsements . . .”).

131. *Id.*

132. See Lake, *supra* note 27, at B6 (remarking that issues such as a “significant science-and-law debate regarding effective suicide interventions . . . have kept the law from creating a unified, consistent approach to suicide responsibility” and “will continue to confuse the public and may force lawmakers to find some solutions”).

established.<sup>133</sup> IHEs, analogized in these cases to public agencies, business owners, or landlords,<sup>134</sup> must use reasonable care to warn students of possible risks<sup>135</sup> and prevent foreseeable injuries such as rapes, assaults, and homicides in dorms, parking lots, and other areas of campus. IHEs prevent such acts by, as examples, trimming foliage, installing adequate locks on dorm doors, adopting policies that exterior doors remain locked, providing security patrols, and warning students of potential harm.<sup>136</sup>

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133. See *Stockwell v. Bd. of Trs.*, 148 P.2d 405, 406 (Cal. Ct. App. 1944) (characterizing the IHE-student relationship as that of landowner-invitee because by paying tuition and fees, the student was an invitee conferring a benefit on the university); see also ROBERT D. BICKEL & PETER F. LAKE, *THE RIGHTS AND RESPONSIBILITIES OF THE MODERN UNIVERSITY: WHO ASSUMES THE RISKS OF COLLEGE LIFE?* 109 (1999) (“As we have seen, a landowner has a duty to use reasonable care in the operation and maintenance of his premises for the protection of so called ‘invitees.’ Such a relationship is legally special.”); Lake, *supra* note 27, at B6 (“Despite the rise in crime in society in large, college security forces were typically charged with the protection of property as their principal mission up through the 1970s.”).

134. See, e.g., *Stockwell*, 148 P.2d at 405–06 (reversing nonsuit for the university and characterizing the private IHE-student relationship as that of landowner-invitee, so that the university had the duty to use reasonable care to maintain its premises in safe condition and protect invitees from injury as a result of negligence); see also *Nero v. Kansas State Univ.*, 861 P.2d 768, 779 (Kan. 1993) (“[Kansas State University] has discretion whether to furnish housing to students. Once that discretionary decision is made, the university has a duty to use reasonable care to protect its tenants.”).

135. See, e.g., *Kleisch v. Cleveland State Univ.*, No. 05AP-289, 2006 Ohio App. LEXIS 1170, at \*25 (Ohio Ct. App. Mar. 21, 2006) (noting that according to the university’s expert witness, the most important step was “to disseminate the information to students and staff so that people are aware that this occurred, and these are the things that one should watch out for”); see also *Peterson v. San Francisco Comm. Coll. Dist.*, 685 P.2d 1193, 1202 (Cal. 1984) (holding that the decision regarding whether to warn does not involve a policy decision that the state immunity provision was intended to protect); *Nero*, 861 P.2d at 781 (explaining that the duty to warn is imposed by law and is ministerial, not discretionary).

136. See *Peterson*, 685 P.2d at 1200–03 (reversing dismissal and holding a sexual assault in a parking lot was foreseeable and the college had a duty to trim the foliage, warn students, or take other action); *Furek v. Univ. of Del.*, 594 A.2d 506, 523–26 (Del. 1988) (reversing grant of judgment n.o.v. for the university and finding that a hazing injury at a fraternity house was foreseeable); *Nero*, 861 P.2d at 780–83 (reversing summary judgment for the university and holding that a sexual assault in a dorm recreation room was foreseeable and the university had a duty to warn the student, implement security measures, or take other reasonable measures); *Mullins v. Pine Manor Coll.*, 449 N.E.2d 331, 334–35 (Mass. 1983) (affirming denial of directed verdicts and judgments n.o.v., when exterior gates were low, the college used a single key system for the dorms and no deadbolts, and only two security guards were on duty when the student was raped in her dorm room); *Sharkey v. Bd. of Regents*, 615 N.W.2d 889, 900–02 (Neb. 2000) (reversing and remanding and finding that the university owed a landowner-invitee duty to the student’s husband when an assault on him by another student was reasonably foreseeable); *Miller v. New York*, 467 N.E.2d 493, 511–14 (N.Y. 1984) (reversing and holding that the university had a duty to keep exterior dorm doors locked). *But see* *Crow v. State*, 271 Cal. Rptr. 349, 358 (Cal. Ct. App. 1990) (affirming and explaining that a “dangerous condition” under statute requires a factual showing that a defect in the dorm contributed to the plaintiff’s injury,

In determining whether a duty exists in these cases, as explained below, courts have emphasized safety and foreseeability, using either a prior similar incidents or totality of the circumstances test, both of which allow courts considerable leeway<sup>137</sup> and carry implications for how IHEs share and disclose information. For example, because courts apply concepts similar to the doctrine of respondeat superior,<sup>138</sup> IHEs are expected to share information vertically and horizontally, enabling administrators to foresee and act on potential harm communicated to or observed by campus police,<sup>139</sup> resident advisors,<sup>140</sup> health center staff,<sup>141</sup> and students.<sup>142</sup> This

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rather than the act of a third party alone); *Agnes Scott Coll. v. Clark*, 616 S.E.2d 468, 469–72 (Ga. Ct. App. 2005) (reversing denial of summary judgment for the university and holding that a break-in of cars in a parking lot at night was not sufficiently similar to prior incidents to give notice that a kidnapping and rape would occur in a different parking lot during the daytime); *Gragg v. Wichita State Univ.*, 934 P.2d 121, 129–35 (Kan. 1997) (affirming grant of summary judgment for the university and holding that it was unforeseeable, as a matter of law, that the assailant would shoot the plaintiff during a fireworks display open to the public); *Doyle v. Gould*, 22 Mass. L. Rep. 373, 384–86 (Mass. Super. Ct. 2007) (granting summary judgment for the university and holding that the student’s homicide in an off-campus apartment building was not foreseeable); *Brown v. N.C. Wesleyan Coll.*, 309 S.E.2d 701, 702–04 (N.C. Ct. App. 1983) (affirming summary judgment for the college and explaining that there was no repeated course of criminal conduct, so that the abduction and murder of the plaintiff’s intestate was not foreseeable and no duty existed); *Kleisch*, 2006 Ohio App. LEXIS 1170, at \*25 (affirming judgment for university and finding that a rape in a classroom was not foreseeable, and even if it were, the university did not breach its duty).

137. See discussion *infra* Part II.A.

138. See, e.g., *Sharkey*, 615 N.W.2d at 901–02 (reasoning that the university had notice via campus security that the student had stalked two women, and via an instructor that the couple was likely to encounter the student assailant at a particular time and place, when the instructor asked the couple to meet her before class); see also *Lake*, *supra* note 27, at B6 (suggesting that colleges and universities “may have to comply with the law of agency,” which assumes that businesses “gather and synthesize . . . information” such as what employees know “in a reasonable and efficient way” and sometimes imputes to the business “virtually real-time cognition of various events”).

139. See, e.g., *Furek*, 594 A.2d at 511 (reversing grant of judgment n.o.v. for the university and noting that campus police officers had stopped pledges engaging in a prank but did not investigate the matter, which occurred days before the hazing injury at issue); *Knoll v. Bd. of Regents*, 601 N.W.2d 757, 764 (Neb. 1999) (writing that the university was aware of several incidents involving the fraternity that abducted the student-plaintiff, given that campus police officers had been called to the fraternity house on several occasions for various violations); see also *BICKEL & LAKE*, *supra* note 133, at 141 (“One caveat: what the university knows about dangers to student safety it must use reasonable care to share among its various areas of operation. Thus campus police, student affairs administrators, and others must have clear direction and must be mutually aware of action to be taken in specific situations.”).

140. See, e.g., *Miller*, 467 N.E.2d at 495 (reversing dismissal and mentioning that the student, who was raped in the dorm, had complained to her resident advisor on two previous occasions that nonresidents were loitering in the dorm).

141. See, e.g., *Furek*, 594 A.2d at 510 (reversing grant of judgment n.o.v. for the university and pointing out that the director of student health services reported previous hazing injuries to the vice president for student affairs).

section argues that by narrowly applying a totality of the circumstances test, courts can ensure that IHEs have adequate notice of harm before a duty arises, while also offering incentives for IHEs to act proactively to ensure students safety.

Finally, and as discussed in subsequent sections, the foreseeability analysis used in premises liability cases has become increasingly influential. In light of social and legislative changes regarding high-risk alcohol use in the 1980s and 1990s, for example, the “privacy” shield in the second strand of tort doctrines lost ground to safety and foreseeability. As a result, some courts have expanded the duty of IHEs based on premises liability, holding that IHEs have a duty to prevent hazing-related injuries,<sup>143</sup> even when they occur off-campus.<sup>144</sup> Most recently, courts have drawn on premises liability precedent to hold, under the third strand of tort doctrines, that the IHE-student relationship is legally special and that IHEs have a duty to prevent foreseeable student self-harm such as suicide.<sup>145</sup>

### 1. Foreseeability

In determining foreseeability, which is central to the determination of duty in these cases, courts rely on state premises liability law and use a “prior similar incidents” or “totality of the circumstances” test, the latter of which takes into account prior similar incidents, but accords them varying degrees of weight in the overall analysis.<sup>146</sup> Under the former,

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142. See, e.g., *Miller*, 467 N.E.2d at 495 (reversing dismissal of claim and noting that the student newspaper had published reports about non-students trespassing and committing burglaries, armed robberies, and rapes in dorms).

143. See *Furek*, 594 A.2d at 520–21 (affirming in part, reversing in part, and basing duty on an undertaking to render service to protect another landowner-invitee relationship).

144. See *Knoll*, 601 N.W.2d at 764–65 (reversing summary judgment and finding that the university exercised control over the off-campus fraternity house where the student was injured and had notice of prior hazing injuries that occurred after students were forcibly abducted from campus and taken to the fraternity house); see also Peter F. Lake, *The Special Relationship(s) Between a College and a Student: Law and Policy Ramifications for the Post In Loco Parentis College*, 37 IDAHO L. REV. 531, 547–48 (2001) (explaining how the expansion of colleges’ premises liability to include harm at off-campus fraternity houses illustrates that the concept of a “nuclear campus” is deteriorating, with students moving in and out of “zones of responsibility” in a “risk scape”).

145. See discussion *infra* Part II.C.

146. See also *Gragg v. Wichita State Univ.*, 934 P.2d 121, 134 (Kan. 1997) (using a totality of the circumstances test); *Sharkey v. Bd. of Regents*, 615 N.W.2d 889, 901 (Neb. 2000) (noting that prior similar instances are “particularly pertinent” to determinations of duty); *Kleisch v. Cleveland State Univ.*, No. 05AP-289, 2006 Ohio App. LEXIS 1170, at \*21 (Ohio Ct. App. Mar. 21, 2006) (noting that Ohio courts are split on whether to use a prior similar incidents or totality of the circumstances test). Compare *Agnes Scott Coll. v. Clark*, 616 S.E.2d 468, 469 (Ga. Ct. App. 2005)



foreseeability is premised upon the fact that, based on incidents that occurred in the past, a college or university had notice that similar incidents would likely occur in the future.<sup>147</sup> In fact, some courts require evidence of prior similar incidents before they will hold that a school owed a duty of care to the student-plaintiff.<sup>148</sup> In contrast, under a totality of the circumstances approach, courts consider factors in addition to prior similar incidents,<sup>149</sup> but the harm must have been foreseeable due to some combination of factors that put the college or university on notice.<sup>150</sup>

In evaluating foreseeability, whether under a prior similar incidents test or totality of the circumstances test, courts consider the existence, location, time of occurrence, frequency, and similarity of prior incidents as they relate to the plaintiff's harm. Although seemingly straightforward, this analysis varies according to how broadly or narrowly courts define the geographic area, relevant time frame, or similarity of the acts.<sup>151</sup>

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(requiring proof of prior similar incidents), *with* *Mullins v. Pine Manor Coll.*, 449 N.E.2d 331, 337 (Mass. 1983) (using a totality of the circumstances test, with prior similar incidents only one factor).

147. *See, e.g.,* *Nero v. Kansas State Univ.*, 861 P.2d 768, 780 (Kan. 1993) (“Prior similar acts committed upon invitees furnish actual or constructive notice to a landowner.”); *Brown v. N.C. Wesleyan Coll.*, 309 S.E.2d 701, 703 (N.C. Ct. App. 1983) (finding that there was no “repeated course of criminal activity” to put the college on notice).

148. *See, e.g., Clark*, 616 S.E.2d at 469 (“Since the trial court’s ruling is contrary to the Supreme Court of Georgia precedent requiring that prior similar crimes must occur before a landowner can be held liable for injuries suffered in connection with a future crime on its premises, we are constrained to reverse.”); *see also* *Mason v. Metro. Gov’t of Nashville*, 189 S.W.3d 217, 222–23 (Tenn. Ct. App. 2005) (stating, in a K-12 case involving a razor attack, that “[o]ther jurisdictions, such as New York, hold that misconduct is not to be anticipated in the absence of proof of prior misconduct” and that Tennessee also follows this approach).

149. *See, e.g., Kleisch*, 2006 Ohio App. LEXIS 1170, at \*20 (explaining that the totality of the circumstances test allows for consideration of factors such as the location and nature of the business).

150. *See Mullins*, 449 N.E.2d at 337 (affirming judgment for the student-plaintiff, explaining that the court uses a totality of the circumstances test, with prior similar incidents only one factor); *Knoll v. Bd. of Regents*, 601 N.W.2d 757, 764 (Neb. 1999) (reversing summary judgment for the university, stating that “[i]t is the totality of the circumstances, not solely the number or location of prior incidents, that must be considered in determining foreseeability”); *see also Kleisch*, 2006 Ohio App. LEXIS 1170, at \*22–23 & n.12 (explaining that “there is no danger to guard when there is no danger reasonably to be apprehended” and that the rape at issue was not foreseeable).

151. *See Mullins*, 449 N.E.2d at 337 n.12 (writing that “[t]he rule requiring evidence of prior criminal acts often leads to arbitrary results and distinctions,” that “[i]t is not clear how serious the prior acts must be to satisfy the rule,” and that “[i]t is also not clear how close in time the criminal acts must be”). *Compare* *Peterson v. San Francisco Cmty. Coll. Dist.*, 685 P.2d 1193 (Cal. 1984) (reversing dismissal and holding that the college had a duty to warn, trim foliage, or take other reasonable measures when the college had notice of frequent assaults and the plaintiff was attacked at the same stairway in the same parking lot by a perpetrator using the same modus operandi), *with* *Brown v. N.C. Wesleyan Coll.*, 309 S.E.2d 701, 703–04 (N.C.

For example, in *Kleisch v. Cleveland State University*,<sup>152</sup> a student had been raped in the women's restroom of a building on campus approximately sixteen months before the plaintiff was raped in an unlocked classroom in an adjacent building. Although a policy of keeping doors unlocked has resulted in potential liability in other cases when applied to a dorm,<sup>153</sup> the court here used a totality of the circumstances test and held that the rape in the classroom was not foreseeable.<sup>154</sup> The act was the same; however, the frequency was low, when the court referenced both a four-to-five year time span and the sixteen months that had elapsed between rapes.<sup>155</sup> Furthermore, the locations, when defined as different rooms in different buildings rather than a particular area on campus, were distinct.<sup>156</sup> Similarly, in *Gragg v. Wichita State University*,<sup>157</sup> the court, using a totality of the circumstances test, found that two fatal shootings at a fireworks display on campus were not foreseeable, given the absence of any violent acts in the event's seventeen-year history.<sup>158</sup> At the same time, however, a person had been fatally shot while attending a different on-campus event open to the public two years earlier.<sup>159</sup> Thus, though the acts were again the same, the court distinguished the two events and calculated frequency using a seventeen-year rather than a two-year time span.<sup>160</sup>

In contrast, in *Sharkey v. Board of Regents of University of Nebraska*,<sup>161</sup> the court defined the relevant geographic area as a "zone" on campus and found prior incidents of harassment to be sufficiently similar to assault.<sup>162</sup>

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Ct. App. 1983) (affirming summary judgment for the university and concluding that scattered break-ins and one attempted rape five years earlier did not suggest that the university should have foreseen that a college cheerleader would be abducted from campus after a basketball game, taken to a rock quarry, raped, and murdered).

152. 2006 Ohio App. LEXIS 1170.

153. See *Miller v. New York*, 467 N.E.2d 493, 497 (N.Y. 1984) (reversing and holding that the university had a duty to keep exterior dorm doors locked, when it had notice of likely criminal intrusions and the student-plaintiff was confronted in the laundry room by a man with a knife, blindfolded, taken out of the room through an unlocked outer door then back in via an unlocked dorm door, and raped).

154. See *Kleisch*, 2006 Ohio App. LEXIS 1170, at \*22–26.

155. See *id.* at \*23 ("Here, the evidence suggests that in the four or five years prior to plaintiff's rape, only one rape occurred" and "we cannot conclude that a rape at CSU nearly one and one-half years before plaintiff's rape is sufficient as a matter of law to give the university reason to know the plaintiff would be raped in a classroom").

156. See *id.*

157. 934 P.2d 121 (Kan. 1997).

158. See *id.* at 129–35 (affirming grant of summary judgment for the university and rejecting the plaintiff's argument that the high crime rate in the area made the shooting more foreseeable).

159. See *id.* at 127 (noting that a person was shot and killed in the parking lot at a Blacks Arts Festival two year earlier, but that this was the only violent assault at an on-campus, public event in the previous twenty-three years).

160. See *id.* at 127–35.

161. 615 N.W.2d 889 (Neb. 2000).

162. See *id.* at 896, 901 (discussing reported criminal activity in "Zone 4,"

The court held that an assault by a student on another student's husband was foreseeable, given the likelihood that stalking and harassment of female students "could escalate into violence when the harasser [was] confronted, even though [the student] had not displayed prior violent tendencies."<sup>163</sup> The law, the court explained, "does not require precision in foreseeing the exact hazard or consequences which happens: it is sufficient if what occurs is one of the kinds of consequences which might reasonably be foreseen."<sup>164</sup> Thus, given the student's "persistent pattern of harassment, an escalation into violence [was] clearly one of the consequences which may [have] reasonably be[en] foreseen from such behavior."<sup>165</sup> Similarly, other courts have imposed a duty on colleges and universities on the basis that property crimes are sufficiently similar prior incidents to provide notice of crimes of personal violence.<sup>166</sup>

Hence foreseeability, although a unifying concept in premises liability and, increasingly, in IHE negligence liability,<sup>167</sup> may be broadly or narrowly construed depending on the type of test courts use and how courts define the location, frequency, and similarity of prior incidents.

Perhaps a middle course, such as a narrowly applied totality of the circumstances test, is the best approach. While a prior similar incidents test assures fairness in that IHEs must have notice before they are required to take reasonable measures to protect students, it discourages affirmative action "until after a substantial number of one's own patrons have fallen victim to violent crimes."<sup>168</sup> In contrast, under the totality of the circumstances test, "negligence is gauged by the ability to anticipate,"<sup>169</sup> so that IHEs have incentives to take proactive measures. Furthermore, a totality of the circumstances test for general risks would be consistent with threat assessment models for identifying specific risks of school violence,

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including violent incidents during intramural sports games).

163. *See id.* at 901.

164. *See id.*

165. *See id.*

166. *See Sturbridge Partners v. Walker*, 482 S.E.2d 339, 340–41 (Ga. 1997) (overruling a decision in which a university prevailed, to the extent that it held that property crimes, such as thefts from automobiles and vandalism, were not sufficiently similar to incidents of personal violence, such as carjacking and kidnapping, to be foreseeable as a matter of law, and explaining that the question is not if the specific crime was foreseeable, but if the prior incidents were sufficiently similar to draw the defendant's attention to the condition that, if corrected, could have prevented the injury at issue). *But see Doyle v. Gould*, 22 Mass. L. Rep. 373, 384–86 (Mass. Super. Ct. 2007) (holding that four non-violent burglaries at quasi-university off-campus housing did not make the fatal shooting there foreseeable when university control of the housing was at issue and the decedent's roommates allowed the perpetrators into the apartment).

167. *See sources cited supra* note 27.

168. *Gragg v. Wichita State Univ.*, 934 P.2d 121, 134 (Kan. 1997).

169. *Kleisch v. Cleveland State Univ.*, No. 05AP-289, 2006 Ohio App. LEXIS 1170, at \*22 n.12 (Ohio Ct. App. Mar. 21, 2006)

which also use a totality of the circumstances approach.<sup>170</sup>

At the same time, however, courts should not so broadly apply the totality of the circumstances test that mere media reports of school shootings or other events that are statistically rare<sup>171</sup> make a particular event more foreseeable.<sup>172</sup> Instead, even under the totality of the circumstances test, “[r]easonable apprehension does not include anticipation of every conceivable injury,” so that the question is not whether “in this day and time” “misconduct is to be expected whenever a group of students is brought together.”<sup>173</sup> Rather, courts should focus on the underlying rationale, keeping in mind what each party could have reasonably foreseen and which parties, if any, were in a position to assess the risks and help ensure safety.<sup>174</sup>

## 2. Implications

As cases such as *Kleisch* suggest and as scholars have noted, what is foreseeable in some areas of campus, such as dorms, may not be foreseeable in others, such as classrooms.<sup>175</sup> However, such distinctions may be less important as students move through what one scholar has

170. See discussion and sources cited *infra* note 180 (explaining the difference between general and specific risks); see also O'TOOLE, *supra* note 26, at 10–14 (explaining that after a student makes a threat, those conducting the four pronged threat assessment consider the totality of the circumstances regarding the student's personality, family dynamics, school dynamics, and social dynamics).

171. See O'TOOLE, *supra* note 26, at 2–3 (explaining that homicides have been decreasing since 1993; that contrary to popular belief, there is no profile of a school shooter or checklist of characteristics that schools should use; and that “[s]eeking to predict acts that occur as rarely as school shootings is almost impossible”).

172. See Joel Epstein, *Breaking the Code of Silence: Bystanders to Campus Violence and the Law of College and University Safety*, STETSON L. REV. 91 (2002), 98–102 (discussing K-12 cases, suggesting that some courts appear willing to find acts foreseeable in light of highly publicized acts of school violence).

173. See *Mason v. Metro. Gov't of Nashville*, 189 S.W.3d 217, 222–25 (Tenn. Ct. App. 2005) (“Is it foreseeable, in this day and time, that some student somewhere might use a razor from their cosmetology kit as a weapon to assault another student at school? The answer to this question is also yes. The foreseeability standard stated in the two questions above appears to be the standard applied by the trial court; however, it is not the foreseeability standard to be applied in Tennessee.”).

174. Compare *Mullins v. Pine Manor Coll.*, 449 N.E.2d 331, 335 (1983) (“The threat of criminal acts of third parties to resident students is self-evident, and the college is the party which is in the position to take those steps which are necessary to ensure the safety of its students.”), with *Doyle v. Gould*, 22 Mass. L. Rep. 373, 374–76 (Mass. Super. Ct. 2007) (granting summary judgment to university and noting that the university “was not in the best position to take the steps necessary to ensure [the student's] safety” from a murder inside his apartment, which was privately owned and managed but rented by the university).

175. See Lake, *supra* note 27, at B7 (“Campus-violence issues often have residential and nonresidential dimensions” and “what is foreseeable and reasonable will probably differ in the two environments,” but “[d]ormitory safety policies must work in tandem with regulations of open areas on campus.”).

termed a “risk scape.”<sup>176</sup> Thus, in the wake of the Virginia Tech shootings, some safety consultants now recommend installing locks not only on dorm doors, but also on the inside of classroom doors.<sup>177</sup> Moreover, the Virginia Tech tragedy appears to have raised the security bar, with some IHEs investing in high-tech lock and communication systems,<sup>178</sup> and with organizations piloting new accreditation programs for campus security forces.<sup>179</sup>

Meanwhile, a court analyzing the foreseeability of the Virginia Tech shootings under a premises liability theory would likely ask if any prior similar incidents had taken place and, similar to *Sharkey*, if college or university personnel should have foreseen that Cho’s behavior, such as harassment of female students, would have escalated into the shootings. Courts’ approaches would vary depending on whether they use a prior similar incidents or totality of the circumstances test and how they define the geographic area, frequency, and similarity of prior acts, as well as the weight they accord to the underlying policy justifications for imposing a duty on IHEs in premises liability cases.

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176. See Lake, *supra* note 144, at 547–48 (explaining how the legal concept of a “nuclear campus” is deteriorating, with risks immigrating onto campus or originating on campus and emigrating to the larger community, with students moving in and out of “zones of responsibility” in a “risk scape”).

177. See Dena Potter, *Simple Safety Solution: Classroom Locks*, ABC NEWS, July 29, 2007, <http://abcnews.go.com/US/BacktoSchool/wireStory?id=3425934> (describing how Virginia Tech students barricaded a door to keep Cho from re-entering a classroom, and noting that while some experts recommend installing locks on the inside of classroom doors, others warn that locks may create other problems, such as when a man took several students hostage in Colorado and killed a girl).

178. See *Hearings*, *supra* note 118, (statement of David Ward, President, American Council on Education) (testifying that the colleges are installing school-wide messaging systems, “smart” cameras linked to local police, and “electronic access devices linked to a control center that can selectively lock and unlock doors, send emergency e-mail and phone messages, and trigger audio tones”).

179. See *id.* (statement of Steven J. Healy, President, International Association of Campus Law Enforcement Administrators) (testifying about a new accreditation program to recognize campus public safety agencies that adhere to high standards and reporting that four agencies are currently participating, while thirteen more have applied for accreditation); see also *Mullins v. Pine Manor Coll.*, 449 N.E.2d 331, 335 n.5 (Mass. 1983) (discussing expert witness testimony that “designing and implementing security systems on college campuses is being recognized as a separate profession”); *Kleisch v. Cleveland State Univ.*, No. 05AP-289, 2006 Ohio App. LEXIS 1170, at \*23–26 (Ohio Ct. App. Mar. 21, 2006) (illustrating the importance of using policies and practices that meet relevant standards as established by professional organizations and noting that the university’s expert witness testified that the university had acceptable standards and best practices in place); Martin Van Der Werf, *Over a Decade, College Police Have Become More Professional*, CHRON. HIGHER EDUC. (Wash., D.C.), May 4, 2007, at A18 (debunking the stereotype that campus police are glorified security guards and explaining that almost all police officers on large college campuses attend the same training academies and receive the same certification as municipal police officers).

Additionally, incidents such as the Virginia Tech shootings require courts to distinguish between general risks, such as whether it was “foreseeable that a shooting may take place,”<sup>180</sup> and specific risks, such as whether it was “foreseeable that a particular shooter will shoot.”<sup>181</sup> While the bulk of premises liability cases deal with the former, in cases such as *Sharkey* or cases in which IHEs house dangerous students who eventually harm others,<sup>182</sup> IHEs have a relationship with both the alleged student-perpetrator and student-victim. Thus, these cases are more complex, and the imposition of a duty to warn, for example, creates “a continuing predicament for university administrators”<sup>183</sup> in that IHEs must then balance one student’s privacy and due process rights with the safety of others.

Courts, however, have not addressed privacy issues while using the “safety” sword to impose a duty on IHEs in premises liability cases.<sup>184</sup> Instead, IHEs must obtain guidance from scholars, who recommend that IHEs should “responsibly prepare themselves for dangerous students on campus”<sup>185</sup> and be prepared to not only warn, but also to assess risks and act, such as by implementing abbreviated procedures for temporarily relocating students to other dorms.<sup>186</sup> In the context of the events that

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180. See Lake, *supra* note 27, at B6 (distinguishing the two and suggesting that, while “the national dialogue about the events at Virginia Tech tends to conflate these two issues,” “[c]ourts may ask colleges to assess foreseeability in both types of situations separately.”).

181. See *id.*

182. See *Crow v. State*, 222 Cal. App. 3d 192, 208–09 (Cal. Ct. App. 1990) (explaining that third party conduct alone does not constitute a dangerous condition of property and holding that an assault on a student at a beer party in a dorm room was not foreseeable when the student had assaulted a residence hall advisor six weeks prior); *Nero v. Kansas State Univ.*, 861 P.2d 768, 778 (Kan. 1993) (reversing summary judgment for the university and finding issues of material fact regarding whether the university had failed to warn the student-victim that a male student accused of rape had been relocated to the same dorm, and whether the university had instituted adequate security measures); *Rhaney v. Univ. of Md. E. Shore*, 880 A.2d 357, 366–68 (Md. 2005) (affirming reversal of jury decision for a student-plaintiff assaulted by his roommate in his dorm room, distinguishing the roommate’s previous assault in the social setting of a dining hall, and noting that the student-victim knew of the prior assault but did not request a room change).

183. *Nero*, 861 P.2d at 784 (Six, J., concurring and dissenting).

184. See *id.* at 789 (McFarland, J., concurring and dissenting) (discussing privacy as an all-or-nothing proposition, suggesting that warning students that a male student accused of rape had moved to a co-ed dorm might have required forcing the male student to wear sandwich boards stating, “I am a rapist, beware” or branding his forehead with the word “Rapist”).

185. See BICKEL & LAKE, *supra* note 133, at 142 (1999).

186. See *id.* at 140–43 (1999) (mentioning that, although colleges should not remove students automatically and permanently, many provide more process than courts require rather than using abbreviated procedures for interim housing decisions until final determinations are made). But see O’TOOLE, *supra* note 26, at 26 (“Expelling or suspending a student for making a threat must not be a substitute for a

preceded the Virginia Tech shootings, for example, after female students complain to campus security about a male student<sup>187</sup> or after a suitemate reports a peer's suicide threat, IHEs should be prepared to assess the risks of continuing the housing status quo versus temporarily relocating students.<sup>188</sup>

### B. In Loco Parentis and Custodial Relationships: Alcohol Abuse

After the Civil Rights Movement helped modify the legal relationships between IHEs and students in the 1960s, plaintiffs unsuccessfully attempted to establish duty on the grounds that an IHE either stands in loco parentis or has assumed custodial control over students by virtue of its rule-making and enforcement authority.<sup>189</sup> These cases typically involved alcohol use and courts emphasized the student's right to privacy rather than

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careful threat assessment and a considered, consistent policy of intervention. Disciplinary action alone, unaccompanied by any effort to evaluate the threat and the student's intent, may actually exacerbate the danger . . .").

187. See generally *Carpenter v. MIT*, No. 03-2660, 2005 Mass. Super. LEXIS 246, at \*2 (Mass. Super. Ct. May 17, 2005) (allowing plaintiff's motion to compel documents in a case alleging negligence in preventing a female student's suicide after she was stalked by another resident who was allowed to remain in the dorm then removed but told he could reapply to the dorm next semester); Martha Anne Kitzrow, *The Mental Health Needs of Today's College Students: Challenges and Recommendations*, NASPA J., Fall 2003, at 167, 174 (noting that the family of Trang Ho, a Harvard student stabbed to death by her roommate Sinedu Tadesse, filed suit alleging that Harvard was negligent because it failed to monitor Tadesse, failed to warn and protect Ho, and failed to maintain a "reasonably safe and secure environment").

188. See generally Epstein, *supra* note 172, at 95 (writing about privacy, safety, confidentiality, and constitutional issues involved when bystanders such as other students help colleges and universities identify who may pose a risk of harm to others).

189. See, e.g., *Bradshaw v. Rawlings*, 612 F.2d 135, 141 (3d Cir. 1979) ("We are not impressed that this regulation, in and of itself, is sufficient to place the college in a custodial relationship with its students for purposes of imposing a duty of protection in this case."); *Orr v. Brigham Young Univ.*, 960 F. Supp. 1522, 1528 (D. Utah 1994) (explaining that the student was not a custodial ward of the university by virtue of the fact that he played football); *Booker v. Lehigh Univ.*, 800 F. Supp. 234, 237-38 (E.D. Pa. 1992) (rejecting that the university acted in loco parentis when an adult student decided to consume alcohol); *Baldwin v. Zoradi*, 176 Cal. Rptr. 809, 815-16 (Cal. Ct. App. 1981) 123 (holding that the right to discipline students for drinking on campus does not give rise to a duty to enforce regulations, and explaining that universities no longer stand in loco parentis); *Univ. of Denver v. Whitlock*, 744 P.2d 54, 59-60 (Colo. 1987) (stating that the mere possession of authority to regulate student conduct does not give rise to duty and noting the demise of the doctrine of in loco parentis); *Rabel v. Ill. Wesleyan Univ.*, 514 N.E. 2d 552, 560-61 (Ill. App. Ct. 1987) (holding that the university did not voluntarily assume or place itself in a custodial relationship with student via its handbook, policies, or regulations); *Bash v. Clark Univ.*, No. 06-745A, 2006 Mass. Super. LEXIS 657, at \*12-16 (Mass. Super. Ct. Nov. 20, 2006) (imposing no duty and stating that the doctrine of in loco parentis no longer applies); *Beach v. Univ. of Utah*, 726 P.2d 413, 418 (Utah 1986) (refusing to hold that a modern university has a custodial relationship with adult students and stating that universities no longer stand in loco parentis).

foreseeability and safety as in premises liability cases. In doing so, courts suggested that imposing a duty on IHEs to secure the safety of students who are injured in alcohol-related injuries would be unrealistic.<sup>190</sup> In light of changing societal attitudes and legislation regarding alcohol use in the 1980s and 1990s, however, courts began to impose a duty to prevent hazing injuries, based on premises liability, when such injuries were foreseeable and could have been prevented by using reasonable care.<sup>191</sup> As the common law “privacy” shield yielded to foreseeability and IHEs faced more potential liability, Congress amended FERPA in 1998 to allow IHEs to notify parents when students younger than twenty-one violated laws and policies regarding the possession and use of controlled substances.<sup>192</sup>

### 1. From In Loco Parentis to the Rise of Privacy and No Duty

Before the 1960s, courts made it clear that rule-making authority as it pertained to students’ physical and moral welfare and discipline was located within the college or university.<sup>193</sup> IHEs derived this rule-making authority in several ways, including a delegation of authority from the father.<sup>194</sup> Under the doctrine of in loco parentis, the father delegated part of his parental authority to the school.<sup>195</sup> Thus, the college or university, acting in place of the father, enjoyed broad discretion to “make any rule or regulation for the government or betterment of [its] pupils that a parent

190. See discussion *infra* Part II.B.

191. See BICKEL & LAKE, *supra* note 133, at 156–57 (suggesting reasons for the switch from a “no-liability approach to student alcohol injuries,” such as shifts in social mores, changes in the law regarding “traditional bar and vendor categories,” concern about high-risk drinking on campuses, and a changes in attitudes suggesting that students were “not solely responsible for alcohol-related injuries”).

192. See source cited *supra* note 78.

193. See BICKEL & LAKE, *supra* note 133, at 28 (“As a technical legal doctrine, in loco parentis was not—ever—a liability/responsibility/duty creating norm in higher education law. In loco parentis was only a legal tool of immunity for universities when they deliberately chose to discipline students.”) (emphasis in original); see also Theodore C. Stamatakos, Note, *The Doctrine of In Loco Parentis, Tort Liability and the Student-College Relationship*, 65 IND. L.J. 471, 471–72 (1990) (explaining that misconceptions regarding in loco parentis have lead recent commentators to suggest that the doctrine was returning to university tort law).

194. See *Gott v. Berea Coll.*, 161 S.W. 204, 206 (Ky. 1913) (noting that the college’s corporate charter “shows that its authorities have a large discretion” while the court viewed rules of “institutions supported in whole, or in part, by appropriations from the public treasury” “somewhat more critically”); see also *Bd. of Educ. v. Purse*, 28 S.E. 896, 900–01 (Ga. 1897) (suggesting that the father should delegate his authority then yield to the school’s discretion so that it would “not be impeded in discharging a duty which the parent has voluntarily placed upon [it].”).

195. See 1 WILLIAM BLACKSTONE, COMMENTARIES \*453 (“[The father] may also delegate part of his parental authority, during his life, to the tutor or school master of his child; who is then *in loco parentis*, and has such a portion of the power of the parent committed to his charge, *vis.* that of restraint and correction, as may be necessary to answer the purposes for which he is employed.”).



could for the same purpose.”<sup>196</sup> Using rational basis review at most, courts articulated limits while essentially deferring to the IHE’s rule-making authority.<sup>197</sup> Hence, IHEs could forbid students from a broad range of activities implicating “private” decision making, such as eating at restaurants off-campus,<sup>198</sup> marrying,<sup>199</sup> walking the streets at midnight,<sup>200</sup> or engaging in conduct unbecoming of “a typical Syracuse girl.”<sup>201</sup>

The 1960s and the civil rights era ushered in many changes, including modifications in the legal relationships between IHEs and students.<sup>202</sup> In the 1970s, college-aged students became adults endowed with the right to vote, marry, or enter into contracts without parental consent.<sup>203</sup> At the same time, Congress enacted federal privacy laws such as FERPA that protected the confidentiality of students’ education records against disclosure to third parties such as parents. At the common law, a line of cases involving alcohol-related injuries made it clear that, as a result of these “fundamental changes in our society”<sup>204</sup> and the “dramatic reapportionment of responsibilities,”<sup>205</sup> IHEs no longer stood in loco parentis and that IHE regulation did not give rise to a custodial relationship

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196. *Gott*, 161 S.W. at 206.

197. *See* *John B. Stetson Univ. v. Hunt*, 102 So. 637, 641 (Fla. 1924) (and cases cited therein) (interpreting away conflicts, so that, in the case of malicious expulsion, “expulsions” were mere “suspensions” and the court avoided the question); *see also* *Gott*, 161 S.W. at 206 (interpreting the college’s mission broadly, so that prohibiting students from eating off-campus was reasonable in light of its mission to “furnish an education to inexperienced country, mountain boys and girls of very little means at the lowest possible cost” and “safeguard against . . . infection”).

198. *See* *Gott*, 161 S.W. at 207–08.

199. *See* *Carr v. St. John’s Univ.*, 231 N.Y.S.2d 410, 414 (N.Y. App. Div. 1962) (finding that expulsion of a student who was married in a civil ceremony and students who served as witnesses was not arbitrary and that the regulations were sufficiently clear because “Christian education and conduct” meant “Catholic education and conduct”), *rev’d* 231 N.Y.S.2d 403 (N.Y. App. Div. 1962), *aff’d*, 187 N.E.2d 18 (N.Y. 1962).

200. *See* *Gott*, 161 S.W. at 207 (“A person as a citizen has a legal right to marry or to walk the street at midnight or to board at a public hotel, yet it would be absurd to say that a college cannot forbid its students to do any of these things.”).

201. *See* *Anthony v. Syracuse Univ.*, 224 A.D. 487, 489–91 (N.Y. App. Div. 1928) (holding that, based on undisclosed rumors, a university could determine that a student’s presence was “detrimental” because she was not “a typical Syracuse girl” and expel her immediately, if doing so safeguarded the university’s “ideals of scholarship” or “moral atmosphere”), *rev’g* 223 N.Y.S. 796 (N.Y. Sup. Ct. 1927).

202. *See* *Lake*, *supra* note 144, at 534.

203. *See* U.S. CONST. amend. XXVI, § 1 (“The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.”); *see also* *Bradshaw v. Rawlings*, 612 F.2d 135, 139 (3d Cir. 1979) (listing more than ten “discrete rights not held by college students from decades past”).

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

205. *Id.*

between IHEs and students.<sup>206</sup> Of particular interest is that these cases used privacy as a liability shield or justification for imposing no duty on IHEs, rather than balancing safety and privacy, or using a reasoned cost-benefit approach that could have provided guidance to IHEs.<sup>207</sup>

In doing so, *Bradshaw v. Rawlings*<sup>208</sup> and its progeny explained that IHEs no longer acted in loco parentis because the “modern college student” was “not a child of tender years,”<sup>209</sup> but instead had obtained the legal status of an adult<sup>210</sup> and possessed rights that were “transferred” from the college or university to the student.<sup>211</sup> While colleges and universities still possessed the authority to promulgate and enforce regulations as a discretionary matter,<sup>212</sup> they had no duty to do so, and such regulations, by

206. See, e.g., *id.* at 141 (explaining that the college, by promulgating a regulation imposing sanctions on the use of alcohol by students had not “voluntarily taken custody of [the student] so as to deprive him of his normal power of self-protection”); *Orr v. Brigham Young Univ.*, 960 F. Supp. 1522, 1528 (D. Utah 1994) (explaining that the student was not a custodial ward of the university by virtue of the fact that he played football); *Booker v. Lehigh Univ.*, 800 F. Supp. 234, 237–38 (E.D. Pa. 1992) (rejecting that the university acted in loco parentis when an adult student decided to consume alcohol); *Baldwin v. Zoradi*, 176 Cal. Rptr. 809, 815–16 (Cal. Ct. App. 1981) (holding that the right to discipline students for drinking on campus does not give rise to a duty to enforce regulations, and explaining that universities no longer stand in loco parentis); *Univ. of Denver v. Whitlock*, 744 P.2d 54, 59–60 (Colo. 1987) (stating that the mere possession of authority to regulate student conduct does not give rise to duty and noting the demise of the doctrine of in loco parentis); *Rabel v. Ill. Wesleyan Univ.*, 514 N.E. 2d 552, 560–61 (Ill. App. Ct. 1987) (holding that the university did not voluntarily assume or place itself in a custodial relationship with the student via its handbook, policies, or regulations); *Bash v. Clark Univ.*, No. 06-745A, 2006 Mass. Super. LEXIS 657, at \*12–16 (Mass. Super. Ct. Nov. 20, 2006) (imposing no duty and stating that the doctrine of in loco parentis no longer applies to the IHE-student relationship in a case involving a student’s death by heroin overdose); *Beach v. Univ. of Utah*, 726 P.2d 413, 418 (Utah 1986) (refusing to hold that a modern university has a custodial relationship with adult students and stating that universities no longer stand in loco parentis).

207. See RESTATEMENT (THIRD) OF TORTS § 40, cmt. 1 (Tentative Draft No.5, 2007) (suggesting that, in these cases, “there was no reasonable way for the university to have taken precautions that would have avoided the harm, and thus the no-duty decisions may be an infelicitous means for expressing the conclusion that there was no negligence as a matter of law”); see generally Walker, *supra* note 61, at 88–89 (explaining, in the context of the regulation of personal information in the New Economy, that leaping to assertions of privacy as a nonnegotiable right preempts reasoned discussion of the benefits and individual, collective, and social costs).

208. 612 F.2d 135 (3d Cir. 1979).

209. *Id.* at 140.

210. See *id.* at 138 n.7, 140 (discussing how students “have vindicated what may be called the interest in freedom of the individual will”).

211. See *id.* at 138–40 (listing the rights to move, marry, make a will, qualify as a personal representative, serve as a guardian of the estate of a minor, wager at racetracks, register as a public accountant, practice veterinary medicine, qualify as a practical nurse, drive trucks and ambulances, perform fire-fighting duties, and qualify to vote).

212. See *Beach v. Univ. of Utah*, 726 P.2d 413, 419 n.5 (Utah 1986) (affirming

themselves, did not create a custodial relationship between IHEs and students.<sup>213</sup> College and university students were neither K-12 students<sup>214</sup> nor motorists left stranded by police officers,<sup>215</sup> but instead, adults who were as aware of the risk of alcohol-related injuries as the college or university<sup>216</sup> and capable of protecting their own self interests.<sup>217</sup> By promulgating and enforcing rules, IHEs neither deprived students of their ability to protect themselves nor created a relationship of dependence.<sup>218</sup>

The *Bradshaw* line of cases did not address foreseeability or fully analyze duty, but instead analyzed negligence,<sup>219</sup> finding that colleges and universities were not negligent as a matter of law.<sup>220</sup> In doing so, these cases relied on Prosser's proposition that duty is the result of policy

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summary judgment for the university and stating "[t]his is not to say that an institution might not choose to require of students certain standards of behavior in their personal lives and subject them to discipline for failing to meet those standards").

213. See, e.g., *Bradshaw*, 612 F.2d at 141 ("We are not impressed that this regulation, in and of itself, is sufficient to place the college in a custodial relationship with its students for purposes of imposing a duty of protection in this case.").

214. See *Baldwin v. Zoradi*, 176 Cal. Rptr. 809, 813 (Cal. Ct. App. 1981) (acknowledging that primary and secondary schools and their personnel "owe a duty to students who are on school grounds to supervise them and to enforce rules and regulations necessary for their protection" but that differences in the ages and educational levels between such students and college and university students are significant).

215. See *id.* at 815 (rejecting that the license agreement to live in the dorm created the type of dependent relationship "found in the traffic officer cases . . . or in the dangerously mental ill cases").

216. See *Univ. of Denver v. Whitlock*, 744 P.2d 54, 61 (Colo. 1987) (stating that although the university may have "superior knowledge of the nature and degree of risk involved in trampoline use" on campus, the student's own testimony indicated "that he was aware of the risk of an accident and injury of the very nature that he experienced").

217. See *Bradshaw*, 612 F.2d at 140 ("[T]he circumstances show that the students have reached the age of majority and are capable of protecting their own self interests.").

218. See *Baldwin*, 176 Cal. Rptr. at 814-16; *Whitlock*, 744 P.2d at 60-61 (noting that the university did not give the plaintiff reason to depend on the university for evaluating the safety of trampoline use); *Beach v. Univ. of Utah*, 726 P.2d 413, 419 n.5 (Utah 1986) ("Neither attendance at college nor agreement to submit to certain behavior standards makes the student less an autonomous adult or the institution more a caretaker.").

219. See, e.g., *Baldwin*, 176 Cal. Rptr. at 816 ("The question is whether the risk of harm is sufficiently high and the amount of activity needed to protect against harm sufficiently low to bring the duty into existence." (citation omitted)); *Whitlock*, 744 P.2d at 57 (Colo. 1987) (noting that the social utility of the actor's conduct was also a factor); *Bash v. Clark Univ.*, No. 06-745A, 2006 Mass. Super. LEXIS 657, at \*12 (Mass. Super. Ct. Nov. 20, 2006) ("First, courts in other jurisdictions have balanced the foreseeability of harm with what steps would be necessary to protect students.").

220. See RESTATEMENT (THIRD) OF TORTS § 40 cmt. 1 (Tentative Draft No. 5, 2007) ("The no-duty decisions may be an infelicitous means for expressing the conclusion that there was no negligence as a matter of law.").

considerations,<sup>221</sup> explaining that these policy considerations should, in turn, be connected to the individual, public, and social interests implicated.<sup>222</sup> The plaintiff's interest, the *Bradshaw* court explained, was in "remaining free from bodily injury"<sup>223</sup> while the college's interests were in the "nature of its relationship with its adult students" and in "avoiding responsibilities that it is incapable of performing."<sup>224</sup> Moreover, IHEs had an interest in fulfilling their educational missions and a duty requiring strict supervision would "produce a repressive and inhospitable environment, largely inconsistent with the objectives of a modern college education."<sup>225</sup> Thus, the court defined the educational relationship as a binary one that existed only between two parties—students and IHEs. Although cases that followed *Bradshaw* reasserted the public interest,<sup>226</sup> the discussion of parental interests largely vanished with the doctrine of *in loco parentis*.<sup>227</sup>

The *Bradshaw* line of cases also defined the interests of IHEs and those of students as being "at war"<sup>228</sup> with one another and irreconcilable, so that imposing a duty on IHEs to protect students from alcohol-related injuries would be "an impossible burden."<sup>229</sup> This conflict largely stemmed from the fact that students' new status as adults and their newly established rights, especially "the expanded right of privacy that society has come to regard as the norm in connection with the activities of college students,"<sup>230</sup> were an obstacle to the enforcement of college and university regulations.

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221. See, e.g., *Bradshaw v. Rawlings*, 612 F.2d 135, 138 (3d Cir. 1979) ("As Professor Prosser has emphasized, the statement that there is or is not a duty begs the essential question, which is whether the plaintiff's interests are entitled to legal protection against the defendant's conduct.").

222. See *id.* ("These abstract descriptions of duty cannot be helpful, however, unless they are directly related to the competing individual, public, and social interests implicated in any case.").

223. *Id.*

224. *Id.*

225. *Beach v. Univ. of Utah*, 726 P.2d 413, 419 (Utah 1986).

226. See *Baldwin v. Zoradi*, 176 Cal. Rptr. 809, 818 (Cal. Ct. App. 1981) (suggesting that although lack of supervision might harm one student, the benefits of student autonomy were in the larger public interest); see also *Univ. of Denver v. Whitlock*, 744 P.2d 54, 62 (Colo. 1987) (explaining that imposing a duty would "directly contravene the competing social policy of fostering an educational environment of student autonomy and independence").

227. See *Booker v. Lehigh Univ.*, 800 F. Supp. 234, 240 (E.D. Pa. 1002) (explaining that the court was unwilling to hold universities to a stricter standard of conduct than parents, who could not be held responsible without actually furnishing alcohol to their daughter, even though they knew she was underage).

228. *Bradshaw*, 612 F.2d at 140 ("[Students'] interests and concerns are often quite different from those of the faculty. They often have values, views, and ideologies that are at war with the ones which the college has traditionally espoused or indoctrinated.").

229. *Id.* at 142.

230. *Bash v. Clark Univ.*, No. 06-745A, 2006 Mass. Super. LEXIS 657, at \*17 (Mass. Super. Ct. Nov. 20, 2006).

Not only would it be difficult or impossible to “so police a modern university campus as to eradicate alcoholic ingestion,”<sup>231</sup> it would “require the institution to babysit each student,”<sup>232</sup> and there was no way colleges and universities could do so “except *possibly* by posting guards in each dorm room on a 24-hour, 365-day per year basis.”<sup>233</sup> Even then, such measures would conflict with “expanded rights of privacy, including, liberal . . . visiting hours.”<sup>234</sup> Thus, because students often made decisions to use alcohol or illegal substances while “in a private place”<sup>235</sup> such as their dorm rooms, students, not colleges and universities, assumed the consequences of their “risk-taking decisions [] in their private recreation.”<sup>236</sup>

The *Bradshaw* court’s reasoning has been followed in subsequent cases involving student injuries related to alcohol consumption, such as injuries resulting from an automobile accident after a drinking party in a dorm room,<sup>237</sup> from a fall from a cliff after consuming alcohol on a field-trip,<sup>238</sup> from a fall from a trampoline at a fraternity house party,<sup>239</sup> from a fall after stumbling along a path when returning home from a party,<sup>240</sup> and from being crushed after an inebriated student who was carrying the plaintiff fell on top of her.<sup>241</sup> More recently, *Bradshaw* has been cited in a case involving a student’s death from a heroin overdose.<sup>242</sup>

*Bradshaw* and its progeny present privacy as a non-negotiable right, an obstacle between students and IHEs, and a liability shield resulting in no duty for IHEs. This approach provided little guidance to colleges and universities regarding how to define and balance the benefits and individual costs, collective costs, and social costs of privacy in individual cases.<sup>243</sup>

## 2. Privacy and No Duty Yield Some Ground to Public Health

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231. *Baldwin*, 176 Cal. Rptr. at 818.

232. *Beach v. Univ. of Utah*, 726 P.2d 413, 419 (Utah 1986).

233. *Bash*, 2006 Mass. Super. LEXIS 657, at \*17 (quoting *Crow v. State*, 271 Cal. Rptr. 349, 360 (Cal. Ct. App. 1990)).

234. *Id.* at \*14 (quoting *Baldwin*, 176 Cal. Rptr. at 816).

235. *Id.* at \*14.

236. *Univ. of Denver v. Whitlock*, 744 P.2d 54, 60 (Colo. 1987).

237. *See Baldwin v. Zoradi*, 176 Cal. Rptr. 809, 816–19 (Cal. Ct. App. 1981).

238. *Beach v. Univ. of Utah*, 726 P.2d 413, 418–20 (Utah 1986).

239. *See Whitlock*, 744 P.2d at 59–62 (Colo. 1987).

240. *See Booker v. Lehigh Univ.*, 800 F. Supp. 234, 237–41 (E.D. Pa. 1992).

241. *See Rabel v. Ill. Wesleyan Univ.*, 514 N.E. 2d 552, 556–62 (Ill. App. Ct. 1987).

242. *See Bash v. Clark Univ.*, No. 06-745A, 2006 Mass. Super. LEXIS 657, at \*12–19 (Mass. Super. Ct. Nov. 20, 2006).

243. *See Lake*, *supra* note 144, at 552 (“It is entirely clear that long term experimentation with extreme libertarian views—the bystander attitude to student life—has fostered some campus cultures with unacceptably high rates of certain dangers.”).

## and Foreseeability

*Bradshaw* was decided at a time when college students consuming beer was not considered a “harm-producing act”<sup>244</sup> or “so unusual or heinous . . . as to require . . . college administrators to stamp it out.”<sup>245</sup> Indeed, all but thirteen states had a drinking age lower than twenty-one<sup>246</sup> and state laws at the time held no one but the voluntary drinker responsible for his harm,<sup>247</sup> imposing no, or only a limited, duty on social hosts serving alcohol to guests.<sup>248</sup>

In the 1980s and 1990s, however, societal attitudes changed and high-risk alcohol use and alcoholism were viewed as public health concerns, so that multiple stakeholders had a shared responsibility to address what was now seen as a harm-producing act.<sup>249</sup> As states enacted Dramshop Acts<sup>250</sup> and criminalized hazing,<sup>251</sup> a competing line of IHE cases challenged the *Bradshaw* approach to privacy and duty.<sup>252</sup> These cases, one of the first of

244. *Bradshaw v. Rawlings*, 612 F.2d 135, 142 (3d Cir. 1979) (stating that “Bradshaw does not argue that beer drinking is generally regarded as a harm-producing act, for it cannot be seriously controverted that a goodly number of citizens indulge in this activity” and noting that, unlike cigarettes and liquor, beer was still widely advertised).

245. *Baldwin v. Zoradi*, 176 Cal. Rptr. 809, 817 (Cal. Ct. App. 1981).

246. *See Bradshaw*, 612 F.2d at 142 n.33.

247. *See Lake, supra* note 27, at B6 (reviewing case law in light of the Virginia Tech shootings and offering that the question at the time was “[i]f bars, restaurants, and stores were not liable, and if office parties could soak in liquor, then why should colleges be responsible for alcohol risks among college students?”).

248. *See id.*; *see also Booker v. Lehigh Univ.*, 800 F. Supp. 234, 240 (E.D. Pa. 1992) (stating that the responsibility for compliance with state laws falls upon a social function’s host); *Baldwin*, 176 Cal. Rptr. at 817–18 (citing a statute to draw a distinction between “giving” and “furnishing” alcoholic beverages).

249. *Furek v. Univ. of Delaware*, 594 A.2d 506, 522–23 (Del. 1991) (“Even though the policy analysis of *Bradshaw* has been followed by numerous courts, the justification for following that decision has been seriously eroded by changing societal attitudes toward alcohol use and hazing.” (footnote omitted)).

250. *See Bradshaw*, 612 F.2d at 141 n.29 (discussing the state’s Dram Shop Act); *Beach v. Univ. of Utah*, 726 P.2d 413, 417 n.3 (Utah 1986) (discussing Utah law and Dramshop Act); *see also Peter F. Lake, Modern Liability Rules and Policies Regarding College Student Alcohol Injuries: Reducing High-Risk Alcohol Use Through Norms of Shared Responsibility and Environmental Management*, 53 OKLA. L. REV. 611, 614–15 (2000) (explaining that by the 1970s, states had adopted dram shop legislation pertaining to civil liability and alcohol-related injuries).

251. *See Furek*, 594 A.2d at 523 n.18 (“Many states have passed laws making hazing a criminal offense.” (citation omitted)).

252. *See id.* at 516–23 (holding that where there is “direct university involvement in, and knowledge of, certain dangerous practices of its students” such as hazing, “the law imposes upon the relationship between a university and students a duty, on the part of the university”); *Knoll v. Bd. of Regents*, 601 N.W.2d 757, 764–65 (Neb. 1999) (reversing summary judgment for the university and holding that it was foreseeable that “pledge sneaks” could result in serious harm when the plaintiff was injured when trying to escape from a window of a fraternity house after being abducted and handcuffed to a

which was *Furek v. University of Delaware*,<sup>253</sup> did not hold that IHEs acted in loco parentis or that regulation resulted in custodial control.<sup>254</sup> Instead, these cases questioned the rationale of the *Bradshaw* cases<sup>255</sup> and reframed privacy concerns as safety concerns, thereby expanding the duty of IHEs as landowners, which now included using reasonable care to prevent harm from foreseeable alcohol-related injuries.<sup>256</sup>

In rejecting the *Bradshaw* line of cases, the *Furek* line of cases defined the interest at stake as the health and safety of students—an interest shared by IHEs and students,<sup>257</sup> as well as by parents and the public. Thus, supervision by the college or university was in the best interest of the college or university and the student.<sup>258</sup> Furthermore, courts justified imposing a duty because “[t]he likelihood of injury during fraternity activities occurring on university campuses is greater than the utility of university inaction. The magnitude of the burden placed on the university is no greater than to require compliance with self imposed standards.”<sup>259</sup>

Thus, because “[d]uty 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,”<sup>260</sup> tort law responded to and reflected social expectations regarding high-risk alcohol use on college and university campuses. As a result, the no duty “privacy shield” has been pierced to some degree by the “safety sword” as some courts apply the foreseeability analysis of premises liability to previously “private” choices involving alcohol consumption.<sup>261</sup>

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toilet pipe).

253. 594 A.2d 506.

254. *Id.* at 506.

255. *See id.* at 518–23 (noting that cases rely on *Bradshaw* “without considering the factual validity of its premises or the accuracy and consistency of its logic” and that “the justification for following [*Bradshaw*] has been seriously eroded by changing societal attitudes toward alcohol use and hazing”).

256. *See id.*; *see also Knoll*, 601 N.W.2d at 761–62 (finding that the university owed the plaintiff a duty as landowner because “UNL students, such as Knoll, are clearly the University’s invitees” (citation omitted)).

257. *See Furek*, 594 A.2d at 518 (“It seems equally reasonable to conclude that university supervision of potentially dangerous student activities is not fundamentally at odds with the nature of the parties’ relationship, particularly if such supervision advances the health and safety of at least some students.”).

258. *See id.*

259. *Id.* at 523.

260. *Bradshaw v. Rawlings*, 612 F.2d 135, 138 (3d Cir. 1979) (quoting W. PROSSER, LAW OF TORTS 333 (3d ed. 1964)).

261. *See, e.g., Furek*, 594 A.2d at 510–12, 522 (finding that the jury had sufficient evidence to determine whether the plaintiff’s injury was foreseeable when campus security witnessed indications of hazing, the student health center director reported hazing injuries, and the university issued public statements regarding hazing); *see also Knoll*, 601 N.W.2d at 764 (noting that prior similar incidents need not have involved the same suspect or have occurred on the premises and finding that the harm was

In turn, as IHEs faced more potential liability,<sup>262</sup> their policies and initiatives shifted.<sup>263</sup> For example, after being held liable for a student's hazing injuries, the University of Delaware worked with the local community to reduce the illegal service of alcohol to students, instituted harsher disciplinary action, and began notifying parents when students violated alcohol policies.<sup>264</sup> In reference to the last of these, Congress amended FERPA in 1998 to permit IHEs to notify parents when students under twenty-one years old violate laws or institutional policies regarding the possession and use of alcohol and other controlled substances.<sup>265</sup> In doing so, Congress followed the recommendation of a Virginia task force reporting on the effects of binge drinking.<sup>266</sup>

In summary, as societal expectations changed regarding hazing and high-risk alcohol use, the common law responded by emphasizing safety over privacy, thereby expanding IHEs' duty based on premises liability and the foreseeability of harm.<sup>267</sup> In turn, Congress kept pace with the demands the common law placed on IHEs, creating a tailored exception allowing IHEs to notify and involve parents in order to advance a mutual interest in the student's well being.<sup>268</sup>

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foreseeable because the university exercised control over the fraternity house and had notice of fraternity abductions). *But see* *Bash v. Clark Univ.*, No. 06-745A, 2006 Mass. Super. LEXIS 657, at \*15-18 (Mass. Super. Ct. Nov. 20, 2006) (concluding that "[t]he burden of protecting against the risks associated with the illegal use of drugs is far more like the burden associated with maintaining the moral well being of students than it is like the burden of protecting the physical integrity of dormitories" (citation omitted)).

262. *See* Lake, *supra* note 250, at 617-18 (writing that, in the 1990s, courts began "to reimagine responsibility for alcohol risks in terms of shared responsibility" and showed a "willingness to expand the sphere of accountability for high-risk college drinking").

263. *See id.* at 619-23 (writing about the popularity of the environmental approach to reducing college drinking, which is rooted in public health and emphasizes shared responsibility for the physical, social, cultural, and institutional forces that affect health).

264. *See* BICKEL & LAKE, *supra* note 133, at 197 (discussing the University of Delaware program).

265. *See supra* note 78; Family Educational Rights and Policies Act, Pub. L. No. 105-244, § 952, 112 Stat. 1581, 1835 (1998).

266. *See* Weeks, *supra* note 89, at 47-48 (noting that the task force was commissioned after five alcohol-related deaths at universities in Virginia and mentioning the effects of binge drinking on others, as related to rape and violent crimes).

267. *See supra* note 262.

268. *See* Lydia Hoffman Meunier & Carolyn Reinach Wolf, *Mental Health Issues on College Campuses*, NYSBA HEALTH L. J., Spring 2006, 42, 46-47 (discussing several trends, including the "swinging of the societal pendulum back toward parental involvement" and an increase in the drinking age from age eighteen to twenty-one that contributed to the amendment).



### C. The IHE-Student Relationship as Legally Special: Mental Health

Similar to high-risk alcohol use in the 1980s and 1990s, a growing number of today's college and university students experience serious psychological disabilities and mental illnesses.<sup>269</sup> As a result, some IHEs are adopting public health models to identify and support students at risk,<sup>270</sup> while some states require that students have health insurance that meet minimum coverage standards<sup>271</sup> and are increasing funding for student mental health services.<sup>272</sup> At the same time, other IHEs argue that students' families should provide mental health care<sup>273</sup> and that IHEs cannot substitute for "residential treatment centers for students with unstable mental health problems."<sup>274</sup> Today, roughly sixty percent of

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269. See Elizabeth Fried Ellen, *Suicide Prevention on Campus*, PSYCHIATRIC TIMES, Oct. 1, 2002, available at <http://www.psychiatrictimes.com/p021001a.html> ("Today's colleges and universities also are drawing many more students who arrive on campus with diagnosed mental illnesses. Thanks to advances in medication, many students with major depression, bipolar disorder and even schizophrenia are able to attend college.").

270. See RICHARD D. KADISON & THERESA FOY DIGERONIMO, COLLEGE OF THE OVERWHELMED: THE CAMPUS MENTAL HEALTH CRISIS AND WHAT TO DO ABOUT IT 155 (2004) (discussing different arguments and points of view, explaining that eventually, "many schools must ask, 'How much is enough?'").

271. See Elizabeth F. Farrell, *A False Safety Net*, CHRON. HIGHER EDUC. (Wash., D.C.), July 21, 2006, at A30 (discussing how colleges and universities can spread risks and obtain better insurance rates by using a hard waiver policy, and how one company has established a niche market by allowing student health centers to conduct third-party billing so that they can accept students' private insurance).

272. See Moore, *supra* note 26, at 437–41 (explaining that MIT improved mental health services after settling a lawsuit and that, in addition to improving services, colleges and universities should increase the visibility of mental health centers by including them as part of freshman orientation and making sure that information is available on-line); Lyndsey Lewis, *The Campus Killings Spur States to Act to Protect Students*, CHRON. HIGHER EDUC. (Wash., D.C.), July 27, 2007, at A16 (explaining that California financed \$60 million for mental health via a one percent tax on millionaires and quoting State Senator Darrell Steinberg as stating "[t]he tragedy did bring to light the fact that, just like in a larger society, mental-health services on college campuses are not what they should be"); see also Rick DelVecchio, *Virginia Tech Massacre: Mental Health Services: State's Universities Re-examine Programs for Struggling Students*, SAN FRANCISCO CHRON., Apr. 19, 2007, at A13 (writing that studies at California campuses had revealed too few counselors and counseling session to meet student needs, with graduate students and international students particularly vulnerable). See generally, Meunier & Wolf, *supra* note 268, at 50–51 (calling for increased funding for counseling centers and providing a list of other considerations for colleges and universities).

273. See Josh Keller, *Virginia Legislature Votes to Bar Colleges from Dismissing Suicidal Students*, CHRON. HIGHER EDUC. (Wash., D.C.), Mar. 9, 2007, at A41 (noting that, regarding a matter unrelated to the Virginia Tech shootings, administrators at Washington and Lee University sent a letter to Virginia Governor Kaine stating "[i]t is the responsibility of the student's family—not the university community—to provide appropriate care").

274. KADISON & DIGERONIMO, *supra* note 270, at 155 (providing possible different

colleges and universities offer psychiatric services on campus<sup>275</sup> and on average there is only one full-time clinical mental health provider for every 1,697 students.<sup>276</sup> Moreover, most student health insurance plans do not comply with the American College Health Association's standards and do not provide adequate coverage for mental-health treatment, suicide attempts, alcohol-related injuries or even catastrophic illnesses or prescription medication.<sup>277</sup>

Just as attitudes toward high-risk alcohol use in the 1980s and 1990s shifted, societal attitudes and tort doctrines relevant to mental health issues are evolving. For example, courts no longer view suicide as a deliberate or criminal act and instead consider those who commit or attempt suicide the victims of mental illness.<sup>278</sup> As they did when attitudes toward hazing shifted, courts that impose a duty on IHEs to prevent student self-harm such as suicide emphasize safety and foreseeability. However, this duty is not premised on IHEs' status as business owners or landlords. Rather, a third doctrinal strand has emerged in which courts have found the IHE-student relationship itself sufficient, under some circumstances, to impose a duty on IHEs to prevent foreseeable acts of student self-harm, such as suicide.

This section argues that as courts recognize the IHE-student relationship is legally special and therefore impose a duty on IHEs to prevent foreseeable acts of harm, existing doctrines prove inadequate. Specifically, because courts have typically relied on safety swords and privacy shields,

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points of view).

275. See Valerie Kravets Cohen, Note, *Keeping Students Alive: Mandating On-Campus Counseling Saves Suicidal College Students' Lives and Limits Liability*, 75 *FORDHAM L. REV.* 3081, 3085 (2007) ("According to the 2005 National Survey of Counseling Center Directors, which surveyed 366 colleges and universities across the United States and Canada, 58.5% of colleges offered psychiatric services on campus, which was up 4.5% since 2004." (footnotes omitted)).

276. See *Hearings*, *supra* note 118, (statement of Russ Federman, Director of Counseling & Psychological Services at the University of Virginia) (discussing a 1996 study that revealed colleges and universities do not have adequate on-campus mental health resources).

277. See D. Blom & Stephen L. Beckley, *6 Major Challenges Facing Student Health Programs*, *CHRON. HIGHER EDUC.* (Wash., D.C.), Jan. 28, 2005, at B25 (suggesting that colleges can reduce risks by making sure that students understand the limits of campus counseling services before they enroll and requiring students to have insurance that covers mental health services and medications that the college or university does not provide); see also Farrell, *supra* note 271, at A30 (explaining that many student health insurance plans have inadequate benefit levels and numerous exclusions and limitations, so that students who experience serious illnesses are left with five- or six-figure medical bills).

278. See Lake & Tribbensee, *supra* note 28, at 146 ("[The] law has clearly moved away from a moralistic attitude regarding suicide. Suicidal individuals are now regarded as victims, not wrongdoers, reflecting a dramatic shift in the law and mental-health paradigms. This attitudinal shift alone most likely accounts for the movement in the law.").

they have yet to adapt foreseeability concepts to the IHE or mental health context, identify the competing interests at stake, or balance safety and privacy concerns. As a result, courts are increasing foreseeability demands and inappropriately expanding the scope of the special relationship to impose a duty on college and university personnel who are not mental health professionals. Finally, this section argues that, in light of both the various interests at stake and current research, neither the common law nor FERPA should impose upon IHEs a mandatory duty to notify parents when students threaten to harm themselves. However, FERPA should keep pace with IHEs' practices and the demands the common law places on IHEs by clearly permitting IHEs to contact parents and allowing them adequate leeway, especially when students threaten to harm others.

### 1. The Special Relationship: Suicide Case Law

At common law, courts traditionally considered suicide, like alcohol use, an intentional act and the sole proximate cause of the resulting harm.<sup>279</sup> However, courts no longer view suicide as a deliberate or criminal act; rather, those committing suicide are victims of mental illness.<sup>280</sup> Thus, a third party may now be held liable for another's suicide if the third party either caused the suicide or had a duty to prevent it.<sup>281</sup> Although courts have declined to find that IHEs owe a duty of care to prevent suicide or to notify parents under other tort theories,<sup>282</sup> two prominent cases illustrate that the IHE-student relationship can give rise to a duty to prevent suicide under some circumstances.

For example, in *Schieszler v. Ferrum College*,<sup>283</sup> a federal district court applying Virginia law denied the college's motion to dismiss and found that a special relationship existed between the college and the student,

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279. *See id.*

280. *See id.*

281. *See id.* at 129–30 (explaining that the first exception applies in circumstances such as when a tortious act causes a mental condition that results in an uncontrollable urge to commit suicide).

282. *See Jain v. State*, 617 N.W.2d 293, 300 (Iowa 2000) (rejecting the theory of a negligently performed voluntary undertaking because the IHE's "limited intervention . . . neither increased the risk that [the student] would commit suicide nor led him to abandon other avenues of relief from his distress"); *Bogust v. Iverson*, 102 N.W.2d 228, 233 (Wis. 1960) (concluding that, even if the defendant had secured treatment for the student, had "advised her parents of her emotional condition or . . . not suggested termination of the interviews—it would require speculation for a jury to conclude that under such circumstances [the student] would not have taken her life"); *White v. Univ. of Wyo.*, 954 P.2d 983, 987 (Wyo. 1998) (dismissing, holding that the IHE was immune from suit under statute and concluding that the individuals involved did not subject the institution to potential liability because their jobs did not include "treating or diagnosing physical or mental illness").

283. 236 F. Supp. 2d 602 (W.D. Va. 2002).

based on the facts of the particular case.<sup>284</sup> The deceased student, who had some disciplinary problems his first semester and was required to complete anger management counseling,<sup>285</sup> had an argument with his girlfriend the following semester that prompted a call to campus police and the residence life assistant.<sup>286</sup> After the student sent a note to his girlfriend indicating that he was going to hang himself, she shared the note with his resident advisor and the campus police, who responded and found him with bruises on his head.<sup>287</sup> The student signed a statement that he would not harm himself,<sup>288</sup> but continued to write notes to his peers indicating he was under distress.<sup>289</sup> Although his girlfriend relayed the messages, college personnel took no action and the student hung himself in his dorm room.<sup>290</sup>

Similarly, in *Shin v. Massachusetts Institute of Technology*,<sup>291</sup> the court found a special relationship on the basis that university medical professionals, the student's former physician, and university administrators could have reasonably foreseen that the deceased student would hurt herself without proper supervision.<sup>292</sup> As a freshman, the student was hospitalized after an overdose, at which time she admitted to engaging in cutting behavior while in high school.<sup>293</sup> After obtaining her consent, residence life staff contacted her parents, who came to visit and were advised of treatment options.<sup>294</sup> Despite the school's recommendation that the student be treated by a psychiatrist off-campus on a weekly basis, she refused and began on-campus treatment.<sup>295</sup> Over the next fourteen months, the student continued to experience difficulties,<sup>296</sup> and professors and students relayed information to residence life staff about her suicidal remarks.<sup>297</sup> Although the student continued to see psychiatrists on-campus, there was discontinuity in the care and she received several different

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284. See *id.* at 610 (restricting holding to "under the facts alleged"); see also Lake & Tribbensee, *supra* note 28, at 136 (explaining that the duty arose based on the facts of the case, not on theories that the IHE assumed a duty or exerted custodial control, and that the "case will be closely watched and could, if it stands, rewrite college-suicide law").

285. See *Schieszler*, 236 F. Supp. 2d at 605.

286. See *id.*

287. See *id.*

288. See *id.*

289. See *id.* (mentioning that the student wrote notes to a friend, stating that he would "always love [his girlfriend]" and that "only God can help me now," which were again relayed to university personnel).

290. See *id.*

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

292. See *id.* at \*13.

293. See *id.* at \*1.

294. See *id.*

295. See *id.*

296. See *id.* at \*2-\*3.

297. See *id.*

diagnoses.<sup>298</sup>

Concerned for her well-being, the university again contacted the student's parents,<sup>299</sup> but within a month, the student's condition deteriorated, her roommates and peers reported her suicidal threats,<sup>300</sup> and her medical team made an appointment for her at an out-patient treatment program off-campus and considered hospitalizing her.<sup>301</sup> In light of reports that she was erasing computer files and had threatened to kill herself the next day, administrators contacted the mental health center and were advised that she did not need to return to the center, but that the administrators should check on her, which they did via e-mail, phone, and a visit to her dorm room.<sup>302</sup> At a "deans and psychs" meeting, the care team decided to reschedule the student's appointment at the off-campus treatment center to the next day and relayed this to the student via voicemail.<sup>303</sup> Later that night, however, the fire alarm sounded and campus police found the student engulfed in flames.<sup>304</sup>

The court denied summary judgment for the university's mental-health professionals on the claim that they individually and collectively failed to coordinate the deceased student's care,<sup>305</sup> as well as for a medical professional who had not treated the student for six months but whom the court ruled might still be considered part of the "treatment team" because she was present at "deans and psychs" or care team meetings where the student was discussed.<sup>306</sup> The court also denied summary judgment for university administrators on the claim of negligence and gross negligence, concluding that they were part of the "treatment team" and failed to "formulat[e] and enact[] an immediate plan to respond to [the student's] escalating threats to commit suicide."<sup>307</sup>

Although both *Schieszler* and *Shin* settled,<sup>308</sup> the cases suggest that when students threaten self-harm, college and university personnel should closely supervise the students, as well as ensure that they receive immediate,

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298. *See id.*

299. *See id.* at \*3.

300. *See id.*

301. *See id.* at \*4.

302. *See id.* at \*5 (discussing the events and noting that during the phone conversation, Shin "accused [administrators] of wanting to send her home[:]' 'You won't have to worry about me any more'").

303. *See id.*

304. *See id.*

305. *See id.* at \*9.

306. *See id.* at \*11.

307. *Id.* at \*14.

308. *See* Cohen, *supra* note 275, at 3097-99 (writing that the \$10 million and \$27 million suits settled for undisclosed sums of money, with the *Schieszler* settlement also including an acknowledgement by the college that they shared responsibility for the student's suicide and an agreement that the institution would modify its crisis intervention and counseling policies).

adequate, coordinated counseling that responds to escalating threats.<sup>309</sup> Meanwhile, scholars and practitioners advise IHEs to provide incentives for students to disclose mental health information,<sup>310</sup> assess the campus environment for dangerous features or possible sites of suicide attempts,<sup>311</sup> and recognize that alcohol and substance abuse are major risk factors for suicide.<sup>312</sup> Additionally, as with high-risk alcohol use in the 1980s and 1990s, scholars also advise IHEs to adopt public health models, which emphasize shared responsibility for students' mental health and for preventing acts of self-harm and harm to others.<sup>313</sup>

## 2. Expansion of the Special Relationship

As IHEs adopt such recommended public health models, they must do more than formulate, communicate, and consistently implement suicide- and violence-prevention plans.<sup>314</sup> Instead, IHEs must train faculty, staff, parents, and the larger community<sup>315</sup> to recognize "leakage,"<sup>316</sup> indications of distress such as changes in behavior,<sup>317</sup> and threats,<sup>318</sup> then report them

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309. See Moore *supra* note 26, at 438 ("In *Shin*, the court emphasized the lack of coordinated effort among university personnel to address [the student's] short-term needs and to develop an effective treatment program for her.").

310. See Carrier Elizabeth Gray, Note, *The University-Student Relationship Amidst Increasing Rates of Student Suicide*, 31 LAW & PSYCHOL. REV. 137, 137-145 (discussing how Harvard has handed out free iPods to encourage students to take part in psychological screenings and how Johns Hopkins has required students who visit the campus counseling center to complete a questionnaire designed to screen for depression and suicide).

311. See Lake & Tribbensee, *supra* note 28, at 153-54 (suggesting that colleges and universities survey campuses for dangers such as tall buildings and sites of previous suicide attempts).

312. See *id.* at 154.

313. See Kitzrow, *supra* note 187, at 175 (emphasizing that everyone at colleges and universities has a role in prevention and support); Moore, *supra* note 26, at 438-40 (explaining that the goal of public health models is to prevent ineffective responses to foreseeable harm).

314. See Moore, *supra* note 26, at 438-42 (suggesting that IHEs adopt suicide prevention plans that detail a protocol for everyone on campus to follow if a student threatens self-harm, such as contacting a coordinator who then contacts the student, ensures that the student receives counseling, and follows up with the counselor, student, and possibly the student's parents).

315. See *id.* at 439-40 (explaining that IHEs should train all personnel who have close contact with students, with the goal of identifying indications that a student is under distress and taking appropriate actions).

316. See O'TOOLE, *supra* note 26, at 16-17 (explaining that "[l]eakage" occurs when a student intentionally or unintentionally reveals clues to feelings, thoughts, fantasies, attitudes, or intentions that may signal an impending violent act" and "is considered to be one of the most important clues that may precede an adolescent's violent act").

317. See Lake & Tribbensee, *supra* note 28, at 155 (2002) (listing classic signs of suicide risk, including (1) verbal expressions such as that others do not care or that life is not worth living, and (2) nonverbal indications such as giving away possessions,

to a designated coordinator or caseworker.<sup>319</sup> To facilitate the communication of leakage and threats, approximately seventy percent of IHEs utilize care teams, or groups of representatives from different departments on campus who meet to discuss students who may be experiencing psychological distress.<sup>320</sup> After learning of the care team's concerns, a case manager or coordinator then assesses the risk or threat.<sup>321</sup> Thus, as in *Shin*, care teams or "deans and psychs" meetings<sup>322</sup> can provide a way for IHEs to synthesize information, and identify students who may be at risk or pose risks to others, then to formulate and enact a plan.

Care teams, however, may fail to identify students who are at risk or, as in the case of the Virginia Tech shootings, may be "ineffective in connecting the dots or heeding the red flags."<sup>323</sup> For example, although some professors suspected that Cho was under distress, some of his peers had witnessed troubling behavior, campus police knew that he had threatened self-harm and recommended involuntary hospitalization, and officers of the court knew that he was obligated to undergo counseling, no one person or entity had all of the information.<sup>324</sup> Instead, the care team discussed Cho's difficulties in an English class, considered the matter resolved, and did not revisit his case.<sup>325</sup>

Furthermore, even when care teams do initially identify a student who is

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using drugs or alcohol, receiving poor grades, or giving less attention to personal appearance or friends). *But see* Meunier & Wolf, *supra* note 268, at 42 (explaining that students may be slow to recognize the symptoms of mental health disorders because "[m]ost symptoms . . . are probably an aspect of most students' experiences at college").

318. *See* Moore, *supra* note 26, at 442 (noting that students often make suicide threats to peers and faculty members).

319. *See supra* note 313.

320. *See* Elizabeth Bernstein, *Bucking Privacy Concerns, Cornell Acts as Watchdog*, WALL ST. J., Dec. 28, 2007, at A1 (reporting on Cornell University's program; mentioning that approximately half of colleges and universities used care teams and a quarter more added them after the Virginia Tech shootings; and explaining that therapists attend the meetings to receive information and give general advice, but not to share patient information); *see also* Lake, *supra* note 27, at B6 ("Acting independently, no department is likely to solve the problem. In short, colleges must recognize that managing an educational environment is a team effort, calling for collaboration and multilateral solutions."); O'TOOLE, *supra* note 26, at 31 ("This is a pressing public health need which could be addressed through multidisciplinary collaboration by educators, mental health professionals and law enforcement.").

321. *See* O'TOOLE, *supra* note 26, at 26 (explaining the need for and the role of a threat assessment coordinator who has the authority to act quickly and activate the school's emergency response plan).

322. *See* *Shin v. MIT*, No. 020403, 2005 WL 1869101 (Mass. Super. Ct. June 27, 2005).

323. *See* VT PANEL REPORT, *supra* note 1, at 52.

324. *See id.* at 53 (concluding that "the totality of the reports would have and should have raised alarms").

325. *See id.* at 52-53.

at risk and receive ongoing information, as in *Shin*, they might fail to recognize when the risk of harm is escalating or might fail to follow through with a coordinated action plan.<sup>326</sup> Thus, although IHEs can take several steps to increase the probable effectiveness of care teams,<sup>327</sup> they cannot foolproof their care teams or any other mechanisms designed to identify students at risk. Moreover, care teams are not without their costs and drawbacks. As examples, IHEs must train staff to ensure that their disclosures do not violate FERPA, students may resent having their behavior secretly monitored and discussed, and fewer students might receive services as IHEs reallocate resources to high-risk students.<sup>328</sup>

Especially troubling for IHEs is that when care teams do fail to connect the dots or recognize the red flags, as *Shin* and *Schieszler* illustrate, courts are expanding the scope of the special relationship to impose a duty on care team members. Traditionally, courts imposed a duty to prevent suicide only on those who exerted custodial control, such as hospitals, jails, reform schools, or mental health professionals.<sup>329</sup> In *Shin* and *Schieszler*, however, both courts expanded the scope of the special relationship, imposing a duty on college personnel who had contact with the students but who had no formal training or licensure in mental health.<sup>330</sup>

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326. See *Shin*, 2005 WL 1869101, at \*14.

327. See VT PANEL REPORT, *supra* note 1, at 52 (suggesting that entities such as the campus police department and residence life division be permanent members of the care team, that mechanisms be put in place for follow-up and review, and that at least one person on the care team be trained in threat assessment).

328. See *Ashburn et al.*, *supra* note 8, at A6 (quoting one Virginia Tech student as saying that “[students] need to go to people if they have concerns about someone” but another disagreeing and saying “[t]he problem is that you do that, it sounds like you’re asking for some sort of campus-watch program”); *Bernstein*, *supra* note 320, at A1 (pointing out that students have not protested about care teams but that administrators acknowledge that they work privately so that students “know little about them” and that, because the counseling center schedules appointments based on urgency, some students must wait up to three weeks for an appointment).

329. See *Moore*, *supra* note 26, at 428; see also *Lake & Tribbensee*, *supra* note 28, at 132–33 (writing that “[i]n discussing the duty to prevent suicide, courts typically speak of special relationships in the context of custodial care” and “have been most likely to impose duties arising from such a relationship on a jail, hospital, or reform school, and on others having actual physical custody and control over individuals”).

330. See *Moore*, *supra* note 26, at 424–25 (suggesting that “universities and non-clinical administrators are entering an era where potential liability is more expansive” and going on to suggest that the public’s perception of colleges and universities as “deep pockets,” public cynicism about charitable institutions, the demise of the charitable immunity doctrine, and a more litigious society contribute to more claims against colleges and universities). This trend is also evident in the K-12 context. As an example, school counselors who had been warned of a student’s suicide threats had a duty to use reasonable means to prevent the suicide. See *Eisel v. Bd. of Educ.*, 597 A.2d 447 (Ct. App. Md. 1991). Additionally, in the litigation following the Columbine High School shootings, the Tenth Circuit noted that the events were foreseeable to a video production teacher, government and economics teacher, a school counselor, and a disciplinary assistant principal who had, for example, viewed a video in which the



Thus, while brandishing the safety sword, courts increasingly expect educators and administrators to identify students who are at risk and to then recognize and respond to threats. Yet, even when teachers are alarmed by sentiments expressed in a student's writing, the actions they can take are limited. If mental health professionals or threat assessors determine that nothing in the writing rises to the level of an actionable threat<sup>331</sup> or, as discussed below, that harm is not imminent, FERPA's emergency exception and school policies would limit the actions that professors or administrators could take. In light of these restrictions, rather than mechanically applying tort doctrines and creating disincentives for IHEs to adopt recommended public health models, courts should adapt existing tort doctrines to the social and legal context in which IHEs must operate.

### 3. Foreseeability

Not only did the courts in *Schieszler* and *Shin* expand the scope of the special relationship, but they also increased the foreseeability demands on IHEs. They did so, however, without articulating a coherent foreseeability framework specific to the IHE or mental-health context. Instead, the court in *Schieszler* cited *Furek* for the proposition that, when a "college or university knows of the danger to its students, it has a duty to aid or protect them;"<sup>332</sup> heavily relied upon premises liability cases involving motel, skating rink, and golf course owners;<sup>333</sup> and discussed cases involving the liability of those providing custodial care.<sup>334</sup> In *Shin*, the court rejected the argument that mental health professionals must have a patient in their custody before a duty can arise<sup>335</sup> and relied on *Schieszler*, a state-premises liability case involving a college,<sup>336</sup> and a case in which a police officer did not remove an intoxicated driver from the highway and owed a duty to the

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students enacted the shootings. See *Castaldo v. Stone*, 192 F. Supp. 2d 1124, 1164–66 (D. Colo. 2001) (addressing the issue of foreseeability, but finding that the defendants' actions did not rise to the level of willful and wanton disregard required under the Colorado Governmental Immunity Act).

331. See VT PANEL REPORT, *supra* note 1, at 43 (explaining that a counselor determined that the writing did not contain a threat to anyone's immediate safety).

332. *Schieszler v. Ferrum Coll.*, 236 F. Supp. 2d 602, 608 (W.D. Va. 2002) (citing *Furek v. Univ. of Delaware*, 594 A.2d 506, 522 (Del. 1991)).

333. See *Schieszler*, 236 F. Supp. 2d at 609 (quoting *Wright v. Webb*, 362 S.E.2d 919, 922 (Va. 1987) (discussing cases and noting that, in the case of the motel, prior incidents "did not give the defendant notice of a 'specific' or 'imminent' danger")).

334. See *Schieszler*, 236 F. Supp. 2d at 607–08 (discussing cases involving a medical facility, deputy and passerby, residential facility for mentally disabled residents, and a private boarding school).

335. See *Shin v. MIT*, No. 020403, 2005 WL 1869101, at \*12 (Mass. Super. Ct. June 27, 2005) ("The law appears, however, to be working slowly toward a recognition of the duty to aid or protect in any relation of dependence . . . ." (quoting RESTATEMENT (SECOND) OF TORTS § 314A cmt. b (1965))).

336. See *id.* at \*13.

person injured as a result.<sup>337</sup>

Given the courts' reliance on premises liability cases, it is not surprising that the foreseeability analysis reaches a result similar to that of a prior-similar-incidents test, with the colleges and universities having had notice of prior similar incidents of self-harm but failing to realize that the risk of harm was escalating. Moreover, at first glance, the courts appear to have used a stringent foreseeability requirement. In both cases, college and university personnel had direct contact with the students, had identified both students as being at risk due to previous suicide attempts, and were aware that they were still under distress.<sup>338</sup> Furthermore, both courts limited the holdings to the fact that college personnel had notice that there was an "imminent probability" that the students would attempt to harm themselves.<sup>339</sup>

However, while the holdings in *Shin* and *Schieszler* appear to be limited to imminent probability, in reality, the duty imposed on IHEs is temporally broader, necessarily beginning before harm is imminent and continuing, conceivably, for as long as an at-risk student is enrolled. In *Shin*, for example, the student had made repeated threats over a fourteen-month period and, in response to her most recent threat, mental health professionals advised college and university personnel not to bring her to the counseling center, but to observe her.<sup>340</sup> Although administrators followed the advice of mental health professionals, who themselves had difficulty assessing the risk of harm, the court denied the motion for summary judgment.<sup>341</sup> Thus, the duty to monitor students who threaten self-harm arguably begins as soon as IHEs identify a student as being at risk and may continue, as the court suggested in *Shin*, for as long as the student is enrolled.

As in premises liability cases, both *Shin* and *Schieszler* also indicate that

337. *See id.* at \*12.

338. *See id.* at \*13 (basing foreseeability on the fact that administrators were aware of the student's mental health problems, had received numerous reports from students and professors including a threat to commit suicide on specific day, regularly met and communicated with the student, and attended care team meetings to discuss her care); *see also Schieszler*, 236 F. Supp. 2d at 609 (discussing foreseeability, listing facts such as that the decedent was a full-time residential student and that administrators knew the student had claimed bruises on his head were self-inflicted, had required him to attend anger-management counseling and sign a pledge not to hurt himself, and had received reports from his girlfriend of messages in which the student suggested he would kill himself).

339. *See Shin*, 2005 WL 1869101, at \*14 (Mass. Super. Ct. 2005) (imposing a duty to "enact[] an immediate plan"); *see also Schieszler*, 236 F. Supp. 2d at 609 ("[A] trier of fact could conclude that there was 'an imminent probability' that [the student] would try to hurt himself, and that the defendants had notice of this specific harm." (quoting *Wright v. Webb*, 362 S.E.2d 919, 922 (Va. 1987))).

340. *See Shin*, 2005 WL 1869101, at \*4-5.

341. *Id.* at \*15.

college personnel must foresee when the risk of harm to students is escalating. In the mental health context, however, this burden is more onerous, leaving college administrators to grapple with questions such as how to define the similarity of prior acts, and when a threat of self-harm might escalate or morph, thereby posing a risk of harm to others. Recall that, although *Shin* and *Schieszler* both involved student self-harm, in *Schieszler*, college personnel apparently initially intervened, not because the student threatened to harm himself, but because his behavior created risks for others, prompting the college to require him to complete anger management counseling.<sup>342</sup> Thus complicating foreseeability in the mental health context are unresolved questions such as if, how, and to what degree harm to self may be related to harm to others. For example, some mental health professionals recognize that assessing the likelihood of self-harm and harm to others may be conceptually related in some cases,<sup>343</sup> and scholars point out that suicide is only “the tip of an iceberg in a sea of wellness issues that includes depression, cutting, eating disorders, and social dysfunctions.”<sup>344</sup> The larger issue, some suggest, is a rise in psychological disabilities and mental illnesses, with nearly half of undergraduate students experiencing depression at least once per year that is severe enough to make daily activities difficult.<sup>345</sup>

Whether viewed narrowly as suicide and self-harm, or broadly as mental health needs, even in a case of threatened self-harm, more than the student’s individual interests are at stake. Mental illness, if left untreated, can have substantial individual,<sup>346</sup> interpersonal,<sup>347</sup> and institutional

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342. See *Schieszler*, 236 F. Supp. 2d at 605 (noting that the student was required to “enroll in anger management counseling before returning for spring semester.”).

343. See Linda C. Fentiman et al., *Current Issues in the Psychiatrist-Patient Relationship: Outpatient Civil Commitment, Psychiatric Abandonment and the Duty to Continue Treatment of Potentially Dangerous Patients—Balancing Duties to Patients and the Public*, 20 PACE L. REV. 231, 256 (2000) (stating that, “at least in a way of conceptually framing it . . . I regard [the assessment of when a patient may pose a risk of harm to others] as similar to a suicide assessment. I think you have to make an assessment about how strong you think the impulses and the likelihood to act are”). However, although this discussion addresses both suicide and school violence within the context of mental health, it is not meant to suggest that those who attempt suicide have psychiatric disorders or that such disorders themselves determine the probability someone will harm himself or others.

344. Peter F. Lake, *Private Law Continues to Come to Campus: Rights and Responsibilities Revisited*, 31 J.C. & U.L. 621, 656 (2005).

345. See Blom & Beckley, *supra* note 277, at B25 (attributing the rise, in part, to “psychotropic prescription medications that allow many students to attend college who might not have been able to in the past”); see also Farrell, *supra* note 271, at A30 (pointing out that students are like all other health-care consumers, in that they generate costs for insurers when treated for psychological illnesses).

346. See Kitzrow, *supra* note 187, at 171–72 (suggesting that the impact on the individual might include depression, isolation, and suicidal or homicidal thoughts, as well as changes in energy level, sleep patterns, appetite, concentration, memory, decision making, motivation, and self-esteem).

effects.<sup>348</sup> For example, suicides such as the fire in *Shin*<sup>349</sup> may endanger the lives of others,<sup>350</sup> and in the case of mass murders in which the gunman dies in police gunfire, some commentators have suggested that the rampage is a type of provoked suicide.<sup>351</sup> Indeed, as the Virginia Tech shootings indicate, sometimes a previous threat of self-harm ultimately results in harm to others and eventual suicide. Thus, not only should courts recognize the complexity of issues related to foreseeability such as the escalation of harm in the mental health context, but they must also identify the full range of interests at stake and recognize the relevance of other bodies of research and law, such as that pertaining to school violence.

In reference to school violence in particular and contrary to FERPA, courts and researchers addressing school violence emphasize that schools must share information, collect collateral information, and act when a student threatens to harm others—even if such harm is not yet imminent. For example, as the Tenth Circuit noted in the litigation following the Columbine High School shootings, at the time school personnel became aware of the students' violent writings, video enactments including a shooting at the school, and other information, the harm was not "imminent."<sup>352</sup> Yet, school personnel could conceivably have been held

347. See *id.* at 173 ("Students with emotional and behavioral problems have the potential to affect many other people on campus, including roommates, classmates, faculty, and staff, in terms of disruptive, disturbing, or even dangerous behavior. At the more extreme end of the continuum, there is the potential that impaired students may physically harm themselves or someone else."); see also Cohen, *supra* note 275, at 3128–29 (noting that "all instances of student suicide also create the potential for deep emotional and psychological harm to surviving witnesses" and that exposure to suicide within one's family or peer group may increase one's own risk of suicidal behavior); Meunier & Wolf, *supra* note 268, at 43 ("Students who share living space will inevitably be affected by the condition of their peers, and may find themselves in the demanding role of monitoring and counseling a peer.").

348. See Kitzrow, *supra* note 187, at 173 (discussing institutional effects such as the transition of on-campus mental health centers from a more preventive and developmental model to a clinical and crisis-management approach in order to meet the needs of growing numbers of students with serious psychological problems, as well as legal challenges related to risk management); see also Meunier & Wolf, *supra* note 268, at 44 (discussing institutional effects such as retention and graduation rates).

349. 19 No. 020403, 2005 WL 1869101 (Mass. Super. Ct. June 27, 2005).

350. See Cohen, *supra* note 275, at 3128 (stating that "[v]iolent suicides endanger not only the person trying to inflict self-harm, but also the safety of others" and providing examples of self immolation and carbon monoxide poisoning); see also sources cited *supra* note 347.

351. See Benedict Carey, *Taking a Break Between Shootings is Unusual, but Not Unheard of, Experts Say*, NY TIMES, Apr. 18, 2007, available at <http://www.nytimes.com/2007/04/18/us/18mental.html> (reporting on the Virginia Tech shootings and experts' views regarding mass murders, while warning that checklists of warning signs to detect a school shooter can be dangerous because they are overly broad and label nonviolent students as potentially dangerous).

352. See *Castaldo v. Stone*, 192 F. Supp. 2d 1124, 1172 (D. Colo. 2001) (mentioning that even the plaintiffs conceded that the harm was not "immediate and

liable if the court had been deciding the case under a negligence standard.<sup>353</sup> Similarly, under the FBI threat-assessment model, for example, once a student makes a threat<sup>354</sup> to harm others and a student or faculty member reports it to the school's trained threat assessor, the assessor should then collect information about the student's personality, family dynamics, school dynamics, and social dynamics.<sup>355</sup> Thus, even when a student makes a low-level threat, the FBI model calls for the assessor to conduct interviews with the student, his parents, and the person threatened<sup>356</sup> rather than wait for the risk of harm to become imminent.<sup>357</sup>

In summary, in addition to expanding the scope of the special relationship to include the IHE-student relationship, both *Schieszler* and *Shin* applied foreseeability concepts from premises liability cases without adapting them to the IHE or mental health context. Although the holdings appear rather limited, operationally, when a student has threatened to harm himself or others, IHEs must collect, share, and act on information long before the risk of harm becomes imminent. Moreover, recognizing that the risk of harm is escalating is more problematic in the mental health context, raising questions such as whether previous acts of self-harm are sufficiently similar to acts involving harm to others. Finally, and as the next section discusses, because threats of self-harm implicate more than individual interests, the common law must identify and balance those interests.

#### 4. Duty to Notify Parents

In addition to the lessons from *Schieszler* and *Shin*, both of which settled and so did not address whether the IHEs breached any duty they owed to the students,<sup>358</sup> commentators have also advised against voluntary

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proximate" and that the "risk must be of a limited duration, not merely that a person may act violently in the future").

353. *See id.* at 1164 (explaining that the "[p]laintiffs plead facts that suggest[ed] [the video production teacher] was at least negligent and likely reckless" but that "[a]lthough a close question," his "conduct was not willful and wanton").

354. *See O'TOOLE, supra* note 26, at 6–8 (defining a threat as "an expression of intent to do harm or act out violently against someone or something" that "can be spoken, written, or symbolic" and that may be categorized as direct, indirect, veiled, or conditional).

355. *See id.* at 10–11 (explaining that the model is designed to determine if a student "has the motivation, means, and intent to carry out the proclaimed threat" and that "the assessment is based on the totality of the circumstances known about" the student's personality and family, school, and social dynamics).

356. *See id.* at 27.

357. *See id.* at 25–26 ("The school should clearly explain what is expected of students—for example, students who know about a threat are expected to inform school authorities. The school should also make clear to parents that if their child makes a threat of any kind, they will be contacted and will be expected to provide information to help evaluate the threat.").

358. *See Cohen, supra* note 275, at 3097–99 (writing that both suits settled for undisclosed sums of money).

counseling and automatic dismissal policies, instead recommending mandatory assessment and counseling conditioned on forced withdrawal.<sup>359</sup> Some IHEs, meanwhile, are also screening and providing students with incentives to disclose mental health information,<sup>360</sup> and are using counseling waivers by which students permit counselors to share information with college administrators.<sup>361</sup> Finally, some commentators have argued that IHEs should have a mandatory duty, rather than the current discretionary choice, to notify parents when students are at risk of self-harm.<sup>362</sup>

While it is true that, in cases involving student suicide such as *Shin* and *Schieszler*, “family members will often argue that the institution should have notified them of their child’s mental health issues,”<sup>363</sup> and IHEs respond that FERPA prevents “them from picking up the phone to notify parents,”<sup>364</sup> this last suggestion is ill advised. Firstly, the arguments in favor of parental notification are often based on K-12 cases that are easily distinguishable on several grounds. Secondly, the little research that exists regarding the impact of parental notification<sup>365</sup> suggests that IHEs should decide whether to contact parents by applying a standard on a case-by-case basis<sup>366</sup> rather than using a general bright-line rule.<sup>367</sup> Thus, IHEs’

359. See *id.* at 3109–35 (writing that “merely encouraging a suicidal student to seek treatment” is futile and that automatic dismissal policies do not comply with federal law, but that mandatory counseling policies such as the Joffe model limit an IHE’s liability while saving students’ lives); see also Gray, *supra* note 310, at 147–50 (discussing cases involving New York University, George Washington University, and Hunter College and explaining that IHEs should remove a student only if he is a direct threat to the safety of himself or others and only after an opportunity to appeal the decision).

360. See Gray, *supra* note 310, at 137–45; Moore, *supra* note 26, at 443 (explaining how entrance surveys can be used as part of freshman orientation or that the health center could screen students); see also Bernstein, *supra* note 320, at A1 (reporting that Cornell University screens students who use the campus health center, for any reason, for signs of depression and that faculty members are asked to report students who have poor grades or stop attending class).

361. See Gray, *supra* note 310, at 150 (mentioning that states such as Colorado have considered legislation that would authorize campus counselors to notify others about a student who is at risk of self-harm).

362. See Gearan, *supra* note 118, at 1027, 1043–44 (writing that “Congress should amend FERPA to impose affirmative duties during an emergency thereby overriding confusing common-law precedents that leave colleges unsure about parental disclosure” and suggesting that such a duty would encourage colleges and universities to reach out to students rather than relying on privacy to insulate them from litigation).

363. *Id.*

364. *Id.*

365. See Thomas H. Baker, *Notifying Parents After a Suicide Attempt: Let’s Talk About It*, NAT’L ON-CAMPUS REP., Jan. 1, 2006, at 4 (stating “[i]t’s hard for me to be prescriptive, because there’s little research”).

366. See Gray, *supra* note 310, at 145 (discussing the pros and cons of notifying parents about a student’s suicidal ideation).

367. See generally Duncan Kennedy, *Form and Substance in Private Law*

decisions whether to contact parents when students threaten to harm themselves or others should remain discretionary, although IHEs should be clearly permitted to do so.

As scholars have pointed out, “a significant science-and-law debate regarding effective suicide interventions”<sup>368</sup> still exists, with little prescriptive guidance regarding parental notification. On one hand, notifying students’ parents might prove an inadequate way to deal with the problem for a number of reasons: it may “only increase the pressure the student feels to complete the act”;<sup>369</sup> it may cause a student who fears that an IHE may disclose the student’s counseling or treatment to parents to avoid seeking help;<sup>370</sup> and it might result in IHEs merely calling parents rather than providing students with adequate mental health services.<sup>371</sup> On the other hand, some symptoms of mental illness may impair a person’s ability to make decisions regarding needed care<sup>372</sup> and, unless a student chooses to disclose a condition that requires treatment or accommodations, the student is unlikely to receive services.<sup>373</sup> Not only are parents often in the best position to provide medical histories and coordinate care, but parental involvement may also help prevent self-harm in cases where students are motivated to spare their families the pain that a suicide would cause them.<sup>374</sup> Furthermore, the current generation of students and their parents have a different relationship than students and parents of previous

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*Adjudication*, 89 HARV. L. REV. 1685, 1687–89 (1976) (explaining that formally realizable definitions of liability offer certainty and restrain official arbitrariness in some ways but sacrifice “precision in the achievement of the objectives lying behind the rules” and that “a general rule will be more over- and under-inclusive than a particular rule”).

368. Lake, *supra* note 27, at B6.

369. Lake & Tribbensee, *supra* note 28, at 149–50; see also *Changing Parent Demands Fuel State FERPA Waiver Plan*, RECRUITMENT & RETENTION IN HIGHER EDUC., July 2005, at 3 [hereinafter *Changing Parent Demands*] (“But in some cases, a parent may be part of why the student is seeking help.” (quoting Claude Pressnell, Jr. President of Tennessee Independent Colleges and Universities Association)).

370. See *Changing Parent Demands*, *supra* note 369, at 3 (discussing how the Tennessee legislature approved a bill for a “pilot parent information program” at Middle Tennessee State University that requires colleges and universities to “provide any information about a student’s well-being, academic progress, or disciplinary status to any person who is responsible, at least in part, for the payment of the student’s tuition and fees, except with respect to information that is required to be kept confidential by federal law” and noting criticisms that such disclosure would prevent students from seeking counseling services).

371. See Cohen, *supra* note 275, at 3107.

372. Mental Health Security for America’s Families in Education Act of 2007, H.R. 2220, 110th Congress, § 2(8) (as referred to H. Comm. on Educ. and Labor, May 8, 2007).

373. See Meunier & Wolf, *supra* note 268, at 43 (explaining that students may not disclose information about a psychiatric disorder to a college, perhaps because they are not sure how the information will be shared).

374. See Gray, *supra* note 310, at 145.

generations. Students and parents now demand more parental involvement<sup>375</sup> as parents play a larger role in helping their children adjust and establish safety nets on campus.<sup>376</sup>

However, when students threaten to harm others<sup>377</sup> or when the distinction between harm to self and harm to others is blurred, IHEs should contact parents as a matter of course. As discussed in the preceding section, not only are different interests at stake, but protocols such as the FBI threat assessment model call for parental involvement when a student threatens to harm others. Thus, when the distinction is blurred, IHEs should err on the side of disclosure. In the case of the Virginia Tech shootings, for example, Cho chose not to disclose his mental health history and denied that he had previously received mental health services.<sup>378</sup> While his writings contained no actionable threat,<sup>379</sup> Cho did threaten to harm himself. The school did not notify Cho's parents about his threat, or about the fact that the school sought to involuntarily hospitalize Cho. However, Cho's parents, who had consistently obtained counseling for Cho when schools recommended it in the past, said that if the school had notified them of the complaints from professors, roommates, and female students, they "would have taken him home and made him miss a semester to get this looked at . . . but [they] just did not know . . . about anything

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375. See Meunier & Wolf, *supra* note 268, at 44 (discussing the emerging trend of "helicopter parenting" and attributing it to factors such as smaller families, new modes of communication such as cell phones and e-mail, and the increased cost and competition associated with education); *Changing Parent Demands*, *supra* note 369, at 3 ("Students in the 1970s or 1980s would have sooner swallowed ground glass than have their parents be involved in what was going on on campus. That's not the case now. Students today are quite comfortable with their parents being involved in all of the decisions they make." (quoting Robert Glenn, Vice-President of Student Affairs at Middle Tennessee State University)); Kate Stone Lombardi, *Guidance Counselor; Parents' Rights (and Wrongs)*, N.Y. TIMES, July 30, 2006, at A4, available at <http://query.nytimes.com/gst/fullpage.html?res=9902EED8163FF933A05754C0A9609C8B63> (explaining how a cottage industry provides parents with advice on finding the right balance of parental involvement and suggesting IHEs provide students and parents with information regarding their privacy policies).

376. See Lynette Clemetson, *Troubled Children: Off to College Alone, Shadowed by Mental Illness*, N.Y. TIMES, Dec. 8, 2006, at A1, available at <http://www.nytimes.com/2006/12/08/health/08Kids.html> (reporting on two families whose children, who had depression and bipolar disorder, were transitioning to college and university life and used strategies such as establishing a relationship with a suitable local mental health provider on or near campus before an emergency arose, deciding not to live alone and disclosing their conditions to roommates, scheduling telephone sessions with therapists in their hometowns, and maintaining parental communication).

377. See O'TOOLE, *supra* note 26, at 27 ("Appropriate intervention in a low level case would involve, at minimum, interviews with the student and his or her parents.").

378. See VT PANEL REPORT, *supra* note 1, at 38–39, 53.

379. See *id.* at 43 (explaining that, in fall 2005, the head of the English Department asked that Cho's writing be "evaluated from a psychological point of view" but was told that while "the content [was] inappropriate and alarming," it did not "contain a threat to anyone's immediate safety").



being wrong.”<sup>380</sup> Thus, if Cho’s parents had been notified of his suicidal threat or of others’ complaints about Cho, they may have provided missing pieces of the puzzle, such as Cho’s mental health history, and effectively intervened.

Parental notification when students pose a risk of harm to themselves or others is no panacea, however. As noted above, sometimes contacting parents might exacerbate the situation. Hence, the central question should be whether parental notification in a given case will have a “substantial and material impact on the well being of the student.”<sup>381</sup> IHEs can help students anticipate this question in advance by providing them with information regarding their privacy policies<sup>382</sup> and asking students upon enrollment whom IHEs should contact in case of emergency.<sup>383</sup> While adult students who want to involve their parents should be encouraged to do so, and while IHEs are increasingly eager to facilitate such involvement,<sup>384</sup> students should also have the option of designating an alternative emergency contact. Even if an IHE contacts parents, however, parents may deny the problem or, if they are already aware of the student’s diagnosis and difficulties, fail to intervene effectively.<sup>385</sup> For example, before the Columbine High School shootings, school personnel contacted one of the shooter’s parents, but to no avail.<sup>386</sup> Thus, some tragedies might not be prevented simply by contacting a student’s parents.<sup>387</sup> Finally,

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380. *Id.* at 49.

381. Lake & Tribbensee, *supra* note 28, at 150 (suggesting that colleges and universities will prevail in many suicide cases in which plaintiffs argue a duty to notify parents because the plaintiff will have the burden of proving breach and causation, and that in reference to causation, “the institution should not be liable for failing to notify parents who are already aware of their child’s circumstances”); *see also* Robert B. Smith & Dana L. Fleming, Point of View, *Student Suicide and Colleges’ Liability*, CHRON. HIGHER EDUC. (Wash., D.C.), Apr. 20, 2007, at B24 (calling for a change in the courtroom, so that judges do not “mechanically apply tort principles” but recognize that, despite a student’s death, the college or university may not be to blame).

382. *See* Lombardi, *supra* note 375, at A4.

383. *See* Hoover, *supra* note 118, at A39.

384. *See* Eric Hoover & Paula Wasley, *Diversity and Accountability Top the Agenda at a Student-Affairs Summit*, CHRON. HIGHER EDUC. (Wash., D.C.), Apr. 13, 2007, at A37–39 (interviewing Gary Pavela, who explains that a “seismic shift” in college and university administrators’ attitudes occurred after Congress amended FERPA to allow IHEs to notify parents when students under age twenty-one violated certain alcohol and drug policies and that his standard position is to notify parents).

385. *See* Lake & Tribbensee, *supra* note 28, at 150.

386. *See* Castaldo v. Stone, 192 F. Supp. 2d 1124, 1164–65 (D. Colo. 2001) (explaining that the English teacher contacted one of the shooter’s parents and shared his story with a school counselor who later met with him).

387. *See id.* at 1170 (stating that finding that the failure to suspend the shooters was the proximate cause of the plaintiff’s injuries would require “connecting a series of ‘if . . . then . . .’ propositions which are speculative at best,” including that it was possible to suspend the students “for submitting work with dark themes and violent images” and that they would not return to the school with loaded weapons).

parental notification should be no substitute for ensuring that students are provided with adequate mental health services.<sup>388</sup>

### III. RECOMMENDATIONS

The common law has given rise to three strands of tort doctrine in the context of IHEs' duty to use reasonable care to prevent foreseeable acts of intentional harm to students. A close analysis of this third strand reveals that existing tort doctrines prove inadequate. Rather than merely brandishing the safety sword and adopting foreseeability concepts from state premises liability cases, courts must adapt these concepts and doctrines to the IHE and mental health context. By doing so, courts can avoid inappropriately expanding the scope of the special relationship and thereby creating unrealistic foreseeability demands that are both temporal and conceptual in nature. Furthermore, after recognizing that the first two strands emphasize safety or privacy to the exclusion of the other, courts should identify and balance the interests at stake, creating dialogue between previously discordant discourses.

At the same time, as public health and the common law create new informational demands on IHEs, especially regarding disclosure to third parties such as parents, FERPA must keep pace. In contrast to the 1980s and 1990s when FERPA responded to the new demands the common law was imposing on IHEs to prevent alcohol-related injuries, FERPA contains no clear, tailored exception allowing third-party disclosures when students threaten to harm themselves or others. Instead, because FERPA's emergency exception is too narrow and confusing, IHEs default to nondisclosure when student safety is at risk rather than releasing information to third parties such as parents. Paradoxically, however, FERPA's tax dependent exception is so overly broad and its enforcement mechanism so weak that FERPA not only fails to ensure student safety, but also fails to protect student privacy. Thus, Congress should amend FERPA's emergency and tax dependent exceptions not only to fulfill FERPA's legislative intent and to resolve internal tensions between safety and privacy, but also to bridge the disconnect between the common law and FERPA.

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388. See *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334, 362 (Cal. 1976) (Clark, J., dissenting) (suggesting that the court should "rely[] upon effective treatment rather than on indiscriminate warning"), *superseded by statute*, CAL. CIV. CODE § 43.92 (West 2006); see also Cohen, *supra* note 275, at 3107 (expressing concern that colleges and universities would interpret a duty to notify parents as shifting liability, so that they would not provide mental health resources).

### A. Courts Should Adapt Foreseeability to the IHE and Mental Health Context

Foreseeability, although an emerging unifying concept in IHE negligence liability, must be appropriately applied and adapted to the IHE and mental health context. Part II suggested that courts should narrowly apply a totality of the circumstances test to determine foreseeability in premises liability cases involving IHEs. However, the wholesale application of this premises liability model of foreseeability to the mental health context is undesirable for four reasons.

Firstly, the foreseeability of specific risks in the mental health context remains the subject of debate.<sup>389</sup> Not only does “a significant science-and-law debate regarding effective suicide interventions”<sup>390</sup> still exist, but, as the majority opinion acknowledged in *Tarasoff v. Regents of the University of California*,<sup>391</sup> there is a “broad range of reasonable practice and treatment in which professional opinion and judgment may differ” regarding whether a person will resort to violence.<sup>392</sup> After acknowledging this uncertainty, the court explained that the duty to use reasonable care should turn on the applicable professional standards. That is, only after a plaintiff establishes that the therapist should have determined, per the applicable professional standards, that the patient posed a risk of serious violence to others should the therapist have a duty to use reasonable care to protect foreseeable victims.<sup>393</sup>

However, as IHEs adopt recommended practices such as care teams and provide rudimentary training for teachers and even custodians in identifying students under mental health distress,<sup>394</sup> to which professional

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389. See Ashburn et al., *supra* note 8, at A9 (interviewing the Director of Counseling and Psychological Services at Cornell University and writing that “determining who is and who isn’t an imminent risk is an inexact science”).

390. Lake, *supra* note 27, at B6.

391. 551 P.2d 334.

392. *Id.* at 345.

393. *Id.* (“In our view, however, once a therapist does in fact determine, or under applicable professional standards reasonably should have determined, that a patient poses a serious danger of violence to others, he bears a duty to exercise reasonable care to protect the foreseeable victim of that danger.”).

394. See Lake & Tribbensee, *supra* note 28, at 153–54 (describing the care team approach used by Arizona State University, which holds monthly meetings to “monitor high-risk student concerns”); Meunier & Wolf, *supra* note 268, at 50 (“There must be ongoing efforts to educate the entire campus community to recognize those struggling with psychiatric issues . . . .”); see also Ashburn et al., *supra* note 8, at A10 (writing that Colorado State University at Fort Collins holds workshops for faculty and housing staff to help them identify signs of distress and that the University of Wisconsin at Madison uses care teams to spot “issues that are bubbling up around campus”); Bernstein, *supra* note 320, at A1 (explaining that Cornell University, under FERPA’s tax dependent exception, trains personnel across campus, including handymen and custodians, to recognize potentially dangerous behavior and signs of depressions, and that an “alert team” of counselors, administrators, and campus police meet weekly to

standards should they be held? While some scholars have suggested that the risk factors for suicide “can be discerned by nonphysician health-care providers,”<sup>395</sup> at least one lawmaker has recognized that “[w]hat happens in schools and universities is [that] the burden of judgment is being placed on people who have no training, and . . . it’s an unfair burden.”<sup>396</sup> Although they lack the requisite training, because administrators are less constrained by privacy laws and professional codes of ethics than are mental health professionals, they are more likely to make decisions regarding the disclosure of information to third parties such as parents.<sup>397</sup> Thus, the second way in which courts must adapt foreseeability to the mental health context is to distinguish between various college and university personnel on the basis of their training and roles. Specifically, courts should distinguish care team members tasked with merely sharing information from mental health professionals and threat assessors tasked with diagnosing students, assessing threats, and formulating and implementing action or treatment plans.<sup>398</sup> For the former, such as the administrators in *Shin* and *Schieszler*, demands of foreseeability should be limited.<sup>399</sup> For

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discuss students who may be under distress because “each person [knows] pieces of the story but no one [sees] the whole picture”).

395. See Lake & Tribbensee, *supra* note 28, at 148–49 (arguing that “the demands of foreseeability should not be as strict” when the duty imposed requires lesser intervention, such as notifying parents, rather than preventing suicide).

396. J.J. Hermes, *Congress Mulls Change in Student-Records Law to Help Prevent Violence*, CHRON. HIGHER EDUC. (Wash., D.C.), Oct. 5, 2007, at A23 (quoting Rep. Tim Murphy of Pennsylvania, who sponsored H.R. 2220, the Mental Health Security for America’s Families in Education Act of 2007, which provides a safe harbor for college and university personnel who suspect a student is at risk, consult with a mental health professional, and then contact the student’s parents).

397. See Gray, *supra* note 310, at 151–52 (“If an institution chooses to notify parents, it might be prudent university policy for student affairs personnel to contact parents regarding their student’s health emergency . . . because FERPA often permits a more detailed disclosure than the different confidentiality rules governing campus counseling and health clinics.”); Kitzrow, *supra* note 187, at 174 (recognizing that mental health professional ethical guidelines prohibit the release of confidential information to parents unless students are in “imminent” danger of harming themselves or others); see also Ashburn et al., *supra* note 8, at A8–9 (explaining that a person’s behavior must pose an “imminent risk” before serious measures can be taken, so that concern alone does not support a “logical leap” to suspecting that the person will commit a violent act).

398. See, e.g., *Shin v. MIT*, No. 020403, 2005 WL 1869101, at \*38 (Mass. Super. Ct. June 27, 2005) (concluding that a dean and dorm housemaster were part of the student’s “treatment team”); see also Lake & Tribbensee, *supra* note 28, at 156–57 (clarifying that “only professional staff acting in their professional capacity should attempt to diagnose any student” and that action should be based solely on a student’s behavior, not a disability).

399. See *Brooks v. Logan*, 903 P.2d 73, 81–83 (Idaho 1995) (Young, J., concurring in part and dissenting in part) (arguing that absent direct evidence, courts should not hold someone who is not a mental health professional to the same standards regarding the duty to detect mental illness or the potential for suicide); *Bogust v. Iverson*, 102 N.W.2d 228, 230 (Wis. 1960) (“To hold that a teacher who has had no training,

the latter, relevant professional standards exist or are being developed.<sup>400</sup>

Thirdly, applying foreseeability concepts from state premises liability law to the IHE context has its shortcomings, including that landowner-invitee and landlord-tenant relationships do not always encompass the complexity of the IHE-student relationship or recognize the unique characteristics of IHEs.<sup>401</sup> For example, the policy justifications for imposing a duty on IHEs in the premises liability context include that IHEs know more about incidents of third-party harms and so are in a better position to assess the risks and take steps to ensure student safety, while students may not have the incentive, ability, or permission to install proper locks or implement security systems and procedures.<sup>402</sup> While this rationale holds when the duty imposed is to install locks, it falters when one realizes that students are more than one-time visitors to campus and may sometimes have superior knowledge of risks<sup>403</sup> or that colleges and universities are more than landlords in that they require students to live in dormitories and assign them roommates.<sup>404</sup> Thus, contrary to what the *Bradshaw*<sup>405</sup> line of cases rejected but what *Shin*<sup>406</sup> seems to suggest, students under psychological distress may sometimes be like motorists left

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education, or experience in medical fields is required to recognize in a student a condition, the diagnosis of which is in a specialized and technical medical field, would require a duty beyond reason.” (quoting the trial court)); *White v. Univ. of Wyo.*, 954 P.2d 983, 987 (Wyo. 1998) (holding that the university was immune from suit under the statute, and concluding that the individuals involved did not subject the institution to potential liability because their jobs did not include “treating and diagnosing physical or mental illness”).

400. See, e.g., Meunier & Wolf, *supra* note 268, at 45 (discussing accreditation standards promulgated by the International Association of Counseling Services); see also sources cited *supra* note 179.

401. See *Hearings*, *supra* note 118 (statement of Irwin Redlener, M.D.) (suggesting that no strategy will always prevent violence on campuses because of the prevalence of psychiatric disorders and the nature of schools, so that imposing strict security is antithetical to the nature, philosophy, and reality of schools).

402. See *Mullins v. Pine Manor Coll.*, 449 N.E.2d 331, 335 (Mass. 1983) (“The threat of criminal acts of third parties to resident students is self-evident, and the college is the party which is in the position to take those steps which are necessary to ensure the safety of its students.”).

403. See *BICKEL & LAKE*, *supra* note 133, at 181–84 (explaining that the pros of applying business law to the college context include that courts are familiar with such law but that the cons include that the “results are sometimes skewed and that certain rationales are not always fully appropriate for unique college environments” because “[s]tudents are not ordinary consumers buying a sandwich or shirt” and are more familiar with campus than are “one-time visitors to a theme park”).

404. See *Lake*, *supra* note 144, at 554–55 (noting that business models fail to capture that IHEs consider residence life part of their educational missions and manage dorms differently than landlords do apartment buildings).

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

406. *Shin v. MIT*, No. 020403, 2005 WL 1869101 (Mass. Super. Ct. June 27, 2005).

stranded by police officers,<sup>407</sup> in that they are incapable of protecting their own self interests. At the same time, however, IHEs are not police officers or private business owners. Courts must recognize that IHEs are public agencies with limited powers and budgets and must assume roles imposed upon them by laws such as FERPA and state privacy laws,<sup>408</sup> which restrict the information that IHEs can disclose.

Fourthly, foreseeability concepts rooted in the premises liability strand of tort doctrines emphasize safety to the exclusion of privacy, perhaps because many perpetrators are unidentified. In contrast, when IHEs have a relationship with both the alleged student-perpetrator and student-victim, they must balance one student's privacy and due process rights with the safety of others. Courts, however, have provided little guidance in this area, using either the rhetoric of "safety" for duty or "privacy" for no duty. The *Bradshaw* line of cases, for example, emphasized privacy and ignored safety when insisting that IHEs have no duty to "babysit each student."<sup>409</sup> In contrast, *Shin* and *Schieszler* emphasized safety and ignored privacy when holding that IHEs, operationally, have a duty to supervise students who threaten self-harm.<sup>410</sup> Rather than using this either-or approach, courts should discuss and distinguish such competing case law from the "safety" and "privacy" strands, thereby illuminating the underlying interests and rationale for why and when IHEs have a duty to closely monitor students.

#### B. Congress Should Broaden FERPA's Emergency Exception and Create a Safe Harbor

By amending FERPA to include a safe harbor, Congress would be helping to fulfill the legislative intent behind FERPA while addressing contemporary needs and eliminating the bias toward nondisclosure.

Senator Buckley's primary reason for introducing FERPA was to involve parents in education, and he suggested that schools should form partnerships with parents.<sup>411</sup> However, neither the common law nor FERPA has adequately resolved perceived conflicts between adult students' privacy, parental involvement in higher education, and the duties

407. See *Baldwin v. Zoradi*, 176 Cal. Rptr. 809, 818 (Cal. Ct. App. 1981) (discussing a case in which a special relationship was created via a stranded motorist's dependence on a police officer).

408. See *Peterson v. S.F. Cmty. Coll.*, 685 P.2d 1193, 1196–1202 (Cal. 1984) (considering other factors relevant to the imposition of duty on colleges, including that the college is a public agency and so might have limited power related to the risk, a certain role imposed upon it by law, and budgetary limits).

409. *Beach v. Univ. of Utah*, 726 P.2d 413, 419 (Utah 1986).

410. See *Moore*, *supra* note 26, at 450 (writing that, although duty in these cases of student suicide is not premised on the theory that IHEs act in loco parentis, if colleges have a duty to supervise students, perhaps the common law has come full circle).

411. See discussion *supra* Part I.

IHEs owe to both parents and students.<sup>412</sup> Yet, as illustrated by the amendment allowing parental notification regarding alcohol violations, in light of changes in social norms and state legislation, thoughtful, tailored exceptions to FERPA can encourage IHEs to engage parents in ways that serve the best interests of the student while still respecting the student's privacy.<sup>413</sup> Given the changing demographics of college and university students, increasing numbers of whom will require mental health services and who desire more parental involvement, coupled with the increasing demands on IHEs to share information to assess and address risks, Congress should create a safe harbor that clearly allows for—but does not require—disclosure to parents, law enforcement officers, medical professionals, or other appropriate parties when a student threatens harm to himself or others.<sup>414</sup>

Similar to the increasing alcohol-related injuries in the 1980s and 1990s, mental health needs on college and university campuses are increasing.<sup>415</sup> As the common law responds by increasing the potential liability IHEs face when students harm themselves or others, however, FERPA's emergency exception remains so confusing and restrictive that IHEs do not share information with third parties such as parents even when they could.<sup>416</sup> As it currently stands, the emergency exception is under-interpreted, vague, and too restrictive.<sup>417</sup> Few FPCO guidance letters construe or interpret the emergency exception, with the result that "the FERPA exception allowing for disclosure in emergencies is extremely ambiguous, and [it] discourages notification even in dangerous and appropriate instances."<sup>418</sup> Primarily, the exception and the accompanying regulations and guidance encourage nondisclosure because they are too restrictive in three ways. Not only must harm be imminent<sup>419</sup> before IHEs may share information with third parties

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412. See discussion *supra* Parts I, II; see also sources cited *supra* note 108.

413. See Thomas R. Baker, *State Preemption of Federal Law: The Strange Case of College Student Disciplinary Records Under FERPA*, 149 ED. LAW. REP. 283, 318 (2001) (discussing amendments to FERPA and suggesting that federal legislators will likely amend FERPA again when societal interests outweigh students' privacy rights).

414. See discussion *supra* Parts I, II; see also Weeks, *supra* note 89, at 49 (suggesting that "changing understandings of the role of parents in their student's education and in changing behaviors of students should prompt institutions to reexamine their communication policies" and that "[i]t is time for colleges and universities to adopt a less defensive approach to communicating with parents and move toward policies that are family-friendly").

415. See discussion *supra* Part I.G.; see also sources cited *supra* note 118.

416. See discussion *supra* Part I.G.

417. See VT PANEL REPORT, *supra* note 1, at 67 ("[T]he boundaries of the emergency exception have not been defined by privacy laws or cases, and these provisions may discourage disclosure in all but the most obvious cases.").

418. Gearan, *supra* note 118, at 1042.

419. Ashburn et al., *supra* note 8, at A6 ("Federal and state laws often prevent counselors from sharing a patient's records unless the patient is deemed an imminent risk.").

under the exception, but the exception is also temporally limited to the time of emergency<sup>420</sup> and is strictly construed.<sup>421</sup>

Firstly, as the cases and issues discussed throughout this Note illustrate, courts and current best practices require IHEs to share information to identify and assess threats before harm becomes imminent.<sup>422</sup> For example, teachers and other non-mental health professionals are called upon to recognize signs that students may be under distress and to regularly share that information internally, such as via care teams, to help identify risks.<sup>423</sup> Moreover, campus security officials and college and university administrators must recognize when risks of harm are escalating.<sup>424</sup> In the case of students who threaten harm to others, IHEs must then share that information externally, calling on parents to provide collateral information when assessing the threat.<sup>425</sup> Thus, the requirement that harm be imminent before IHEs can release PII in education records to third parties is not aligned with what courts or, for example, the FBI's threat assessment model require.<sup>426</sup> For this reason, and because mental health professionals cannot release information unless they deem a student to be an imminent risk,<sup>427</sup> FERPA should allow administrators to share information with certain third parties whenever a student threatens to harm himself or others, without a determination that such harm is imminent. Hence, IHEs would not doubt that they could share information with parents, mental health professionals, or law enforcement officials when a student such as Cho threatens self-harm or exhibits signs of distress.

Secondly, FPCO guidance explains that the emergency exception is "temporally limited to the period of the emergency."<sup>428</sup> However, when does the risk of student self-harm such as that in *Shin* begin and end? In

420. Letter from LeRoy S. Rooker to the University of New Mexico, *supra* note 93.

421. 34 C.F.R. § 99.36(c) (2000).

422. *Cf.* Castaldo v. Stone, 192 F. Supp. 2d 1124, 1172 (D. Colo. 2001) (mentioning that even the plaintiffs in a case regarding the Columbine High School shootings conceded that the harm was not "immediate and proximate").

423. See discussion *supra* Part II.C; see also sources cited *supra* note 394.

424. See, e.g., *Shin v. MIT*, No. 020403, 2005 WL 1869101, at \*9 (Mass. Super. Ct. June 27, 2005) (holding that the defendants had a duty to "formulat[e] and enact[] an immediate plan to respond to [the student's] escalating threats to commit suicide"); *Sharkey v. Univ. of Neb.*, 615 N.W.2d 889, 900–02 (Neb. 2000) (finding that the university owed the plaintiff-invitee a duty because it was foreseeable that harassment would escalate into assault).

425. See O'TOOLE, *supra* note 26, at 27 ("Appropriate intervention in a low level case would involve, at minimum, interviews with the student and his or her parents.").

426. See *id.*

427. See, e.g., Ashburn et al., *supra* note 8, at A6 (interviewing the directors of counseling services at Cornell University and Texas A&M University at College Station, and stating that "[f]ederal and state laws often prevent counselors from sharing a patient's records unless the patient is deemed an imminent risk").

428. Letter from LeRoy S. Rooker to the University of New Mexico, *supra* note 93.



that case, the student repeatedly threatened self-harm over a fourteen-month period.<sup>429</sup> The defendants faced potential liability precisely because they thought the emergency had ended and failed to realize that the risk of self-harm, perhaps though it had subsided for a time, was escalating.<sup>430</sup> Thus, although courts have temporally extended the duty IHEs owe to prevent student self-harm, FERPA's emergency exception has not kept pace.

Thirdly, the current regulations cite Congressional intent and explain that the emergency exception will be strictly construed.<sup>431</sup> As the VT Panel Report argues, the "strict construction" requirement further narrows the definition of "emergency" without clarifying when an emergency exists, and "feeds the perception that nondisclosure is always a safer choice."<sup>432</sup>

For these three reasons, Congress should amend the emergency exception, creating a safe harbor that clearly allows IHEs to disclose information in education records to parents, law enforcement officers, and medical professionals when a student threatens to harm himself or others. "Threat," in turn, should be defined in a way that does not require expert knowledge of another's mental processes. Instead, "threat" should be defined as words or actions that cause "reasonable apprehension of physical harm to a person."<sup>433</sup> Congress should make clear that IHEs may share information to assess threats without first determining that harm is imminent, that the exception applies as long as the threat creates reasonable apprehension of harm, and that the exception will be "reasonably" rather than "strictly" construed. By creating this safe harbor, Congress could effectively "combat any bias toward nondisclosure."<sup>434</sup>

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429. See *Shin*, 2005 WL 1869101, at \*1-\*6 (indicating that the student attempted to overdose in February 1999, expressed suicidal ideation in October 1999, confessed that she was again cutting herself in November 1999, told a teaching assistant she intended to overdose on sleeping pills in December 1999, notified counselors that she was cutting herself and did not feel safe alone in March 2000, and made several threats preceding her suicide in April 2000).

430. See *id.* at 575-78.

431. See 34 CFR § 99.36(c) (2000); see also letter from LeRoy S. Rooker to the University of New Mexico, *supra* note 93 (stating the concern that "a blanket exception for 'health or safety' could lead to unnecessary dissemination of personal information" and explaining that Congress resolved the issue by directing the Secretary of Education to promulgate regulations, with the expectation that "he will strictly limit the applicability of this exception").

432. VT PANEL REPORT, *supra* note 1, at 69.

433. Ashburn et al., *supra* note 8, at A6 (quoting from policies enacted by the University of Arizona forbidding threatening or disruptive behavior after a nursing student killed three instructors and himself in 2002; however, this publication omits "or property").

434. VT PANEL REPORT, *supra* note 1, at 68 (recommending that privacy laws be revised to include safe harbor provisions insulating persons and organizations from liability "for making a disclosure with a good faith belief that the disclosure was necessary to protect the health, safety, or welfare of the person involved or members of

Although critics of another proposed safe harbor, H.R. 2220, the Mental Health Security for America's Families in Education Act of 2007,<sup>435</sup> have argued that it is "inane" because "[i]t legalizes what is already legal"<sup>436</sup> by clarifying that FERPA allows such disclosure, Congress could eliminate gray areas that currently confuse and paralyze college and university administrators.<sup>437</sup> In addition to the Mental Health Security for America's Families in Education Act of 2007, other recent action includes proposed regulations by the U.S. Dept. of Ed. Under the proposed regulations, IHEs could "take into account the totality of the circumstances" and, if they identify "an articulable and significant threat to the health or safety of a student or other individuals," could disclose information from education records "to any person whose knowledge of the information is necessary to protect the health and safety of the student or other individuals."<sup>438</sup> Further, the language regarding strict construction would be removed and, as long as IHEs had a "rational basis for the determination, the Department [of Education] will not substitute its judgment for that of the educational agency or institution . . . ."<sup>439</sup>

The proposed rule is laudable in that it would remove the strict construction language and clarify that IHEs need only identify a rational basis—or identify an articulable and specific threat—before releasing

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the general public").

435. See H.R. 2220, 110th Congress (2007) (explaining that the bill would amend FERPA to create a safe harbor for IHEs that disclose, in good faith, confidential information to parents or guardians about dependent students who "may pose a significant risk to their own safety or well-being, or to the safety or well-being of others").

436. Arnone, *supra* note 88, at A22 (quoting Barmak Nassirian, Associate Executive Director of External Relations for the American Association of Collegiate Registrars & Admissions Officers).

437. See Lauren Stiller Rikleen, *Virginia Tech: The Challenge of Assuring Safety*, CHRON. HIGHER EDUC. (Wash., D.C.), May 11, 2007, at B14 ("Ask any campus official about how he or she responds to student complaints of harassment or stalking, and the answer will inevitably be filled with uncertainty and ambivalence. Overreact and fear a lawsuit. But the consequences from underreacting, we now know, can be catastrophic."). Unlike H.R. 2220, however, the safe harbor provision proposed here would not require written certification from a licensed mental health professional that the conduct or expression poses a significant risk of harm and that parental notification would be beneficial. Because FERPA does not currently require such certification, such a provision would "move[] communication with parents a step back." Arnone, *supra* note 88, at A22 (quoting Barmak Nassirian, Associate Executive Director of External Relations for the American Association of Collegiate Registrars & Admissions Officers). Instead, while college and university administrators should be encouraged to consult with mental health professionals and should not be unduly "burdened with defining and determining if a student is at risk," they should not be required to consult with mental health professionals before acting. H.R. 2220.

438. Family Educational Rights and Privacy, 73 Fed. Reg. 15,574, 15,589 (Mar. 24, 2008) (to be codified at 34 C.F.R. pt. 99).

439. *Id.*

information to those who need to know when a student's or other person's health or safety is at risk. However, the notice of proposed rulemaking—which mentions that routine, non-emergency disclosures are still not allowed—does not specifically address the temporal challenges that IHEs face. Thus, it is uncertain to what degree a threat must still be “imminent” and if disclosures must be limited to the duration of the emergency. Courts have temporally extended the duty IHEs owe to prevent student self-harm, for example, up to fourteen months and these temporal determinations are difficult to make in the mental health context.<sup>440</sup> Although presumably disclosure at any time would be permissible as long as there was an articulable, specific threat, given the textual changes and the fact-driven nature of totality of the circumstances tests, new questions will likely arise. For example, does “specific” require IHEs to identify a likely perpetrator, victim, method of harm, or time and place of harm? The U.S. Dept. of Ed. will need to construe this language as it applies to various fact patterns before IHEs enjoy the clarity and flexibility the new rule is supposed to provide.<sup>441</sup> Although the proposed rule is a good first step, more needs to be done to create a safe harbor that helps fulfill the legislative intent behind FERPA, combat the bias toward nondisclosure, and reconcile the duties imposed by the common law with the permissions granted by FERPA.

### C. Congress Should Eliminate the Tax Dependent Exception

Perhaps because FERPA's emergency exception is confusing and too restrictive, some IHEs rely on FERPA's tax dependent exception when implementing recommended best practices such as training personnel and students to recognize signs of student distress and report them, instituting care teams to identify students who are at risk or may pose risks to others, and notifying parents when, for example, students stop attending classes.<sup>442</sup> The tax dependent exception, which allows IHEs to release information in education records to any parent who claims the student as a tax dependent on federal income tax returns,<sup>443</sup> operates as a bright-line rule and thus puts few interpretative demands on IHEs. At the same time, however, this exception has its own weaknesses. Unlike the emergency or alcohol-

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440. See discussion *supra* Part II.C.

441. See *id.* (discussing the Virginia Tech shootings, referring to a report documenting the confusion surrounding privacy laws, and stating “the Secretary has determined that greater flexibility and deference should be afforded to administrators so they can bring appropriate resources to bear on a circumstance that threatens the health or safety of individuals”).

442. See Bernstein, *supra* note 320, at A1 (explaining that Cornell University, under FERPA's tax dependent exception, trains personnel across campus, including custodians, to recognize potentially dangerous behavior and signs of depression, and that the “alert team” has notified parents when students have stopped attending classes).

443. See discussion *supra* Part I.F.

violation exceptions, the tax dependent exception is not a narrowly-tailored exception designed to balance privacy and safety. Instead, it is both under- and over-inclusive as it relates to privacy and safety. For these reasons, after Congress amends the emergency exception, it should eliminate the tax dependent exception.

The tax dependent exception is under-inclusive in that it does not always permit IHEs to contact the parents of those who may benefit most from parental involvement. For example, traditional college and university students, those under age twenty-five and so who are most likely to be financially dependent on their parents, comprise only fifty-six percent of the current student population.<sup>444</sup> At the same time, while at least one study has found that international and graduate students need more mental health services than their peers,<sup>445</sup> the tax dependent exception is least likely to permit IHEs to contact their parents, even when it may be beneficial to the students.<sup>446</sup>

The tax dependent exception is also over-inclusive. Because IHEs may disclose information in education records to parents of dependent students at any time, for any reason, the exception could eviscerate the rule. As examples, if a misguided IHE were to use an ill-advised checklist of behaviors to identify students who may pose a risk of harm to others and then notify their parents, far too many students would be implicated.<sup>447</sup> Furthermore, by relying on the tax dependent exception, IHEs could conceivably, as in the *in loco parentis* era, notify parents merely because their daughter was engaging in conduct unbecoming to “a typical Syracuse girl.”<sup>448</sup> Yet, because FERPA creates no private right of action,<sup>449</sup> a

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444. See Kitzrow, *supra* note 187, at 165 (noting that thirty percent of undergraduates are minorities, twenty percent are foreign-born or first generation, fifty-five percent are female, and forty-four percent are over the age of twenty-five).

445. See DelVecchio, *supra* note 272, at A13 (writing that studies at California campuses revealed too few counselors and counseling sessions, with graduate students and international students particularly vulnerable).

446. ASSOCIATION FOR STUDENT JUDICIAL AFFAIRS, FERPA QUESTIONS FOR LEE ROOKER, DIRECTOR OF THE FAMILY COMPLIANCE OFFICE, U.S. DEPARTMENT OF EDUCATION, [http://asjaonline.org/attachments/wysiwyg/525/FERPAQUESTIONS answered.doc](http://asjaonline.org/attachments/wysiwyg/525/FERPAQUESTIONS%20answered.doc) (explaining that the exception does not apply to international students or students who are not dependents).

447. See O'TOOLE, *supra* note 26, at 1–2 (“This model is not a ‘profile’ of the school shooter or a checklist of danger signs pointing to the next adolescent who will bring lethal violence to a school. Those things do not exist” and “[s]uch lists, publicized by the media, can end up unfairly labeling many nonviolent students as potentially dangerous or even lethal”); see also Ashburn et al., *supra* note 8, at A6 (“‘Odd behavior is not a crime’” and “[n]ot talking to people is not a crime.” (quoting Maggie Olona, Director of Student Counseling Services at Texas A&M University)); Carey, *supra* note 351 (reporting on experts’ views regarding mass murders, while cautioning that checklists of warning signs to detect a school shooter can be dangerous because they are overly broad and label nonviolent students as potentially dangerous).

448. *Anthony v. Syracuse Univ.*, 231 N.Y.S. 435, 437 (N.Y. App. Div. 1928).

student's only remedy, besides those available under state privacy laws, is to file a complaint with the FPCO,<sup>450</sup> an action that will likely have little effect, given that an IHE does not violate FERPA until it engages in a *pattern* of FERPA violations.<sup>451</sup>

#### D. The U.S. Dept. of Ed. and FPCO Should Provide More Useful Guidance

Because IHEs must balance safety and privacy, often on a case-by-case basis, they need a rich supply of data, meaning examples of how FERPA applies to specific situations, from which they can derive accurate rules and interpretations.<sup>452</sup> Because individuals have no private right of action under FERPA,<sup>453</sup> courts are not interpreting the language or operation of, for example, the emergency exception.<sup>454</sup> As noted in Part I, while the FPCO provides a wealth of guidance and technical assistance to IHEs regarding FERPA, the Technical Assistance Letters are ineffective because they tend to be conclusory in nature and are neither indexed nor widely disseminated by the FPCO.<sup>455</sup> Thus, the FPCO should restructure Technical Assistance Letters so that readers can clearly see the Act explained, analyzed, and applied to various situations, and then publish all letters, in redacted form, making them searchable by topic using an on-line database.<sup>456</sup>

The FPCO should also create topic-based publications showing how

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449. See Daggett, *supra* note 37, at 640 (“Attempts to create a private cause of action for [FERPA] violations have been singularly unsuccessful.”).

450. See discussion *supra* Part I.E.

451. See *id.*

452. See generally MARY BETH BEAZLEY, A PRACTICAL GUIDE TO APPELLATE ADVOCACY 36 (2006) (“This concept [of abstraction ladders] is important to legal analysis because abstract reasoning helps lawyers to identify analogous authorities . . . . Very frequently, the tension in a legal argument is about whether . . . the rule applies to a narrower group that excludes a certain person, thing or event.”); Sayer, *supra* note 60, at 174–75 (using the term “situational dependence” to refer to the concept that many questions concerning FERPA do not “fit” into the guidance given and instead require college and university personnel to provide their own interpretation on a case-by-case basis).

453. See discussion *supra* Part I.E.

454. See VT PANEL REPORT, *supra* note 1, at 67 (“[T]he boundaries of the emergency exceptions have not been defined by privacy laws or cases . . . .”).

455. See discussion *supra* Part I.G.

456. See O'Donnell, *supra* note 64, at 716–17 (discussing Lawrence Lessig's work, suggesting that when using standard-based rules such as FERPA, lawmakers should identify the values and competing interests at stake and make explicit for college and university policy makers the implicit choices that are being made by action or inaction); see also Sayer, *supra* note 60, at 180 (suggesting that reading technical assistance documents posted on the FPCO website might help IHEs with situational dependence because they can refer to institutions facing similar circumstances).

FERPA applies to common hypothetical situations IHEs encounter.<sup>457</sup> The FPCO recently took a step in this direction, creating a brochure addressing common misperceptions about FERPA that were brought to light after the Virginia Tech shootings.<sup>458</sup> However, several questions remain, and others may become more pressing as IHEs institute practices such as care teams. For example, IHEs will need clear criteria to help them determine what is or is not an education record.<sup>459</sup> Conceivably, because FERPA does not govern college and university personnel's personal observations, and because education records governed by FERPA may be shared within the college or university to employees or officials with a "legitimate educational interest[]"<sup>460</sup> in inspecting the records, care team members are free to share a good deal of information without violating FERPA. Guidance, however, could eliminate gray areas, so that IHEs neither violate FERPA nor decline to share information about students internally, even when FERPA allows such disclosures.<sup>461</sup>

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457. See REPORT TO THE PRESIDENT, *supra* note 118, at 7–8 (calling for the U.S. Dept. of Ed. to develop additional guidance clarifying how information may be shared).

458. FAM. POL'Y COMPLIANCE OFF., U.S. DEP'T OF EDUC., BALANCING STUDENT PRIVACY AND SCHOOL SAFETY: A GUIDE TO THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT FOR COLLEGES AND UNIVERSITIES (2007), <http://www.ed.gov/policy/gen/guid/fpco/brochures/postsec.pdf>.

459. See *Gonzaga Univ. v. Doe*, 536 U.S. 273, 292 (2002) (Breyer, J. & Souter, J., concurring) ("Much of the statute's key language is broad and nonspecific . . . . This kind of language leaves schools uncertain as to just when they can, or cannot, reveal various kinds of information."); *Owasso Indep. Sch. Dist. v. Falvo*, 534 U.S. 426, 437 (2002) (Scalia, J., concurring) (writing that the Court's interpretation of "education records" seems to contradict FERPA, and is "incurably confusing").

460. See discussion *supra* Part I.D.

461. See discussion *supra* Part I.G.

## CONCLUSION

The common law has typically viewed safety as a sword, resulting in duty for IHEs in the premises liability context, but has viewed privacy as a shield, resulting in no duty for IHEs in the context of students' alcohol-related injuries. Discourses seldom meet and underlying interests are narrowly defined, so that current common law tort doctrines do not adequately capture the uniqueness of IHEs or the IHE-student relationship, address issues of foreseeability specific to the mental health context, or balance privacy and safety concerns.<sup>462</sup> As courts now expand the scope of the special relationship, so that the IHE-student relationship can give rise to a duty to aid or protect students from self-harm in some circumstances, IHEs face increasing potential liability when students harm themselves or others.<sup>463</sup>

In light of IHEs' expanding common law duty to share information in order to foresee harm and assist students who are at risk or pose risks to others, Congress should amend FERPA. By creating a safe harbor provision within the emergency exception and eliminating the tax dependent exception, Congress can fulfill the legislative intent behind FERPA by protecting the privacy of students' education records while also allowing IHEs to involve parents and certain other third parties in order to advance a mutual interest in the student's well being. Furthermore, by providing additional guidance, the FPCO can help ensure that IHEs accurately interpret and apply FERPA rather than defaulting to the nondisclosure option. In this way, FERPA would meet the two goals of all information privacy laws by allowing "enough information sharing to support effective intervention" while also protecting "privacy whenever possible."<sup>464</sup> Perhaps most importantly, these recommendations, by bridging current discrepancies between IHE practices, the common law, and FERPA, would help ensure that, when faced with the complex and difficult decisions implicated by the Virginia Tech shootings, IHEs will not be confused or hampered by privacy laws that are "poorly designed to accomplish their goals."<sup>465</sup>

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462. See discussion *supra* Part II.

463. See discussion *supra* Part II.C.

464. VT PANEL REPORT, *supra* note 1, at 68.

465. *Id.* at 63.

