

Chapman University Dale E. Fowler School of Law

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Can We Secure the Hallowed Halls of Academe?

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CAN WE SECURE THE HALLOWED HALLS OF ACADEME?

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I. INTRODUCTION

Once upon a time life in the Academy was casual.¹ Our colleges and universities have

¹ All I had to produce upon appointment to my first faculty position in 1972 were transcripts from the universities I attended. Social security numbers became student ID numbers at two universities, and later

weathered storms, survived natural disasters, and shown great resiliency in overcoming a myriad of challenges.²

Education is a different environ today.³ As Columbine, Virginia Tech and other tragedies highlight,⁴ we need to worry about campus security, specifically random acts of

my Massachusetts driver license number. These student ID's served only to check books out of the library. I shut the office door to protect students' privacy when they went over exams. University policies on alcohol and drugs were much more relaxed than now. Indeed, we carried a keg of beer into Memorial Stadium at Berkeley in 1966 at the NCAA Soccer Finals.

² These challenges include under-funding (*See* Denis Binder, *The Disinvestment in Public Higher Education* (2007), available at <http://ssrn.com/abstract=925709>), integration, political interference, such as during the Cold war, Ellen Schrecker, *No Ivory Tower: McCarthyism and the Universities* (Oxford University Press 1986), recessions, student demonstrations and sit-ins, Robert Cohen & Reginald E. Zelnik, *The Free Speech Movement: Reflections on Berkeley in the 1960's* (University of California Press 2002), William H. Orrick, Jr., *Shut It Down: A College in Crisis, San Francisco State College, October, 1968-April 1969: A Report to the National Commission on the Causes and Prevention of Violence* (1969), wars, and the Great Depression.

³ The potential crises facing institutions far exceed criminal activity. They can include natural risks, such as earthquakes, flooding, hurricanes, tornadoes, or severe winds. They may also confront communicable diseases, ranging from meningitis to pandemics. Food poisoning is always a risk with large food service activities. Fire is a constant threat. However, for purposes of this article, we will concentrate on criminal activity.

⁴ The first random act of mass violence on our campuses occurred in 1966 when Charles Whitman entered the observation tower on the top of the 28 story University of Texas Library Tower, and then opened fire, killing 16 and wounding 30. *Major Shootings on American Campuses*, *Chronicle of Higher Education*,

mass violence. Even before Virginia Tech, liability, criminal activity, sexual assaults and harassment,⁵ and suicides were increasing concerns on campus. Common criminal acts at the nation's colleges and universities⁶ include homicides,⁷ sexual assaults, thefts,⁸ kidnappings, arson,⁹ pranks,¹⁰ and vandalism. Many of the crimes are fueled by alcohol

April 27, 2007 at A19, col. 1 (hereinafter referred to as "*Major Shootings*"). However, this tragedy seemed an isolated anomaly for decades.

Similarly, acts of random violence by teenagers also go back decades. A teenager left his Long Beach, California house on the morning of April 24, 1965 and drove roughly 190 miles to a hill overlooking the 101 Freeway by Santa Maria, and then started shooting at passing cars. He killed three and wounded others before killing himself. *Reida v. Lund*, 96 Cal. Rptr. 102 (Ct. App. 1971).

⁵ Congress responded to the increasing reports of sexual assaults on campuses by enacting in The Violence Against Women Act, 42 U.S.C. § 13981. *See United States v. Morrison*, 120 U.S. 598 (2000).

⁶ I will normally refer to the institutions of higher education by the inclusive word "colleges."

⁷ Campus killings are not a recent phenomenon. For example, on January 21, 1961 a professor and graduate student were talking in the professor's office at Berkeley, when an intruder shot gunned to death the professor and wounded the student. Glenn Seaborg, Chancellor at Berkeley 678 (University of California 1994). Earlier in 1960 a rejected suitor shot to death his former girlfriend in the main library at Berkeley, and then wounded himself. *Id.* The assailant had previously been expelled from Berkeley because of threats he made against her. *Id.* at 503. The shooting was viewed as a "singular" act at the time. *Id.* at 504. Another shooting at Berkeley led to the famous case of *Tarasoff v. The Regents of the University of California*, 131 Cal. Rptr. 14 (1976).

⁸ Purses, backpacks, bicycles, laptops, and electronic equipment are commonly stolen.

⁹ Fires will often be in dorms and fraternities. For example, two former students pled guilty to arson and witness tampering for a dorm fire that killed three freshmen at Seton Hall on January 19, 2000. Ronald Smothers, 2 Facing Murder Charges Take Plea Deal in 2000 Fire in a Seton Hall University Dorm, *New York Times*, Nov. 16, 2006 at C22, col. 1. A common precaution is to ensure smoke detectors and sprinkler systems are operational.

or illicit drugs. Schools have been sued for alcohol induced tragedies,¹¹ and for alleged negligence in failing to take steps to prevent students from committing suicide.¹²

Urban campuses in high crime areas face high risks of campus crimes. However, criminal acts, from both within and without the campus community, occur in all types of campuses: public and private; research and non-research, urban, suburban, and rural; religious or secular, and large or small.¹³ Criminal activity is endemic in society and in higher education.

¹⁰ For example, teargas was released in a high school bathroom. Fumes traveled through the ventilation system resulting in dozens of students and employees being hospitalized and disrupting final exams. Joel Rubin, Tear Gas Disrupts O.C. High School, Los Angeles Times, June 17, 2004 at B5, col.2. A University of California at Riverside dropout phoned in a bomb threat in an attempt to cancel the commencement ceremony. Sara Lin, Drop Out Status Led to University Bomb Threat, Police Say, Los Angeles Times, June 22, 2007 at B1, col. 11.

¹¹ See e.g. *Coughlan v. Beta Theta Pi Fraternity*, 987 P.2d 300 (Idaho 1999). The college and sorority provided representatives to supervise a fraternity party. An under aged freshman coed was brought to the party, got drunk, and then brought back to her sorority house and put to bed. She subsequently fell 30 feet from the third floor fire escape landing to the ground. The theory of the case was that once defendants begin to act, they must act reasonably. See also, *Bradshaw v. Rawlings*, 612 F. 2d 135 (3rd Cir. 1979); *Beach v. University of Utah*, 726 P. 2d (Utah 1986).

¹² See e.g. *Schieszler v. Ferrum College*, 236 F.Supp. 2d 602 (D.W.Va. 2002)(cause of action stated under Virginia law); *Shin v. Massachusetts Institute of Technology*, 19 Mass. L. Rep. 293 (Mass. 2000)(no duty to inform parents of a suicide attempt)(Mass. Dist. Ct., June 27, 2005); *Jain v. State of Iowa*, 617 N.W.2d 293 (Iowa 2000).

¹³ Wayne Lo shot four persons at Simon's Rock College, killing a professor and fellow students. Anne Matthews, The Campus Crime Wave: The Ivory Tower Becomes an Armed Camp, New York Times Sunday Magazine 36 (March 7, 1993).

Colleges have responded by significantly tightening campus security over the past three decades.¹⁴ For examples, colleges have adopted zero tolerance policies for alcohol, drugs, and guns, and require electronically keyed cards for entrance into many buildings, such as dorms.

The issues facing universities today range from anticipating, and hopefully forestalling, risks on the campus to the nature and extent of the response efforts when an unfortunate event materializes. The institution should have a viable emergency action plan (EAP) in place before an incident occurs.

The prevention, mitigation, and effective response to an emergency can be divided into three stages:

Pre-incident;

Incident;

Post-incident.¹⁵

¹⁴ Violent crime rates on campuses dropped 9% from 1994 to 2004 and property crime rates decreased 30% in that period. Brian A. Reaves, Campus Law Enforcement, 2004-2005 at 10 (United States Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, Special Report 2008).

¹⁵ Post incident needs are outside the purview of this article, but they are key elements in business continuity plans. Accounting for faculty, staff, and students after a tragedy, as well as providing counseling for the survivors, family members, bystanders, and others, are common elements of post-incident planning. One of the greatest issues in the immediate aftermath and confusion of an emergency is accounting for people. Assigned reporting locations, phone numbers, and web sites can facilitate the process. OSHA regulations require plans to include procedures to account for personnel. 29 C.F.R. §1919.38(C)(4). The University of California Berkeley has initiated a people locator system, which the faculty, staff, and students can log onto, after an emergency, to post their status. Presidential Working Paper, Security

Negligence can include the initiation of reasonable steps to forestall an incident or failing to take reasonable steps to minimize the foreseeable impacts. We need to distinguish therefore between the exercise of reasonable care to forestall or minimize a reasonably foreseeable risk, versus the response to an emergency: the presence or absence of an emergency action plan (EAP),¹⁶ the quality of a plan, and adherence to the

Infrastructure Working Group Report 19 (August 17, 2007) (hereinafter referred to as “*Security Infrastructure Report*.”)

The emphasis for this article on pre and current response actions does not minimize the importance of post – incident planning. Any institution needs to resume operations. For example, while in theory a college can teach courses at a remote site, research cannot be so easily resumed, especially if the labs are wrecked, specialized equipment destroyed, critical data missing, and lab organisms killed. *Id.*

A well-understood response to disasters and tragedies is post-traumatic stress syndrome. A famous study of the psychological impact of the Buffalo Creek disaster is Kai T. Erikson, *Everything in Its Path: Destruction of Community in the Buffalo Creek Flood* (Simon and Schuster 1976). *See also Prince v. Pittston Co.*, 63 F.R.D. 28 (S.D.W.Va. 1974); Note, *Mental Distress-Summary Judgment Improper Where Plaintiffs Allege Severe Mental Distress Despite Their Absence From Location of Tortious Activity*, 63 Geo. L.J. 1179 (1975). New York mandated citywide counseling for the police department in the aftermath of 9/11. Mitchell Fink & Louis Mathias, *Never Forget: An Oral History of September 11, 2001* at 117 (2002) (Statement of New York City Chief of Police Joe Esposito).

¹⁶ The purpose of emergency action plans is to be able to respond as soon as the threat materializes. They are not the same as “business continuity plans,” whose range is much broader, including post incident recovery and rebuilding.

plan.¹⁷ We must assume that even with the greatest exercise of care, incidents cannot be prevented.¹⁸

We may not yet be able to predict, much less control, the courses of earthquakes, hurricanes, tornadoes, and similar forces of nature, but we sufficiently appreciate their risks such that reasonable steps should be taken to minimize these foreseeable risks, including the impacts. Thus, we require reasonable care in design, construction, maintenance, operations, inspections, and even perhaps warnings.

We cannot protect everyone and everything against every conceivable threat in our large, complex society.¹⁹ Possible threats are seemingly infinite, while preventative resources are limited.

Prevention and reaction are two separate steps. The primary goal should be to prevent the incident from arising in the first instance. However, even with the best of care, even exceeding reasonable care under the circumstances, structures fail,²⁰ systems

¹⁷ To a large extent, this analysis tracks an earlier article, Denis Binder, Emergency Action Plans: A Legal and Practical Blueprint “Failing to Plan is Planning to Fail”, 63 U. Pitt. L. Rev. 791 (2002) of which an extensively expanded version is available at <http://ssrn.com> abstract No. 21414.

¹⁸ *Id.* at 792.

¹⁹ If, for example, a pandemic of the magnitude of the 1919 flu epidemic strikes, the virus will rapidly spread, often before people are aware of its presence. For a discussion of the 1919 global pandemic, *see* John M. Barry, *The Great Influenza: The Epic Story of the Deadliest Plague in History* (Penguin Books 2004).

²⁰ Structures have design limits. Thus, buildings can tolerate only so much seismicity, while dams, levees, and reservoirs can withstand only so much precipitation and flooding. They will fail when the design limits are exceeded. Structures cannot be earthquake proof or impervious to hurricanes or tornados, but they should survive within their design limits.

malfunction, natural hazards materialize, and crazed individuals commit random acts of mass violence.

Even though a college may be unable to forestall an attack, the question of liability remains open. The nature and quality of an institution's response is still subject to judicial scrutiny and liability. Plans to respond to a disaster are just as critical in minimizing the resulting damages as the exercise of reasonable care to prevent the incident.

If therefore the inevitable incident occurs at an institution, prompt implementation of an EAP may minimize or mitigate the impacts, reduce reaction time, and facilitate recovery. The EAP is not designed to prevent an accident.

This article is not about campus security for traditional crimes, such as sexual assaults, but draws upon the lessons of these earlier cases for principles in the broader security arena.

II. THE DUTY OF REASONABLE CARE AND PREVENTATIVE EFFORTS

A series of cases and jury verdicts in the 1980's recognized the duty of universities to protect their students from criminal activity.²¹ This duty is based upon the reasonable foreseeability of the risk coupled with the exercise of reasonable care in responding to the risks.²²

²¹ *Mullins v. Pine Manor College*, 449 N.E. 2d 331 (Mass. 1983); *Peterson v. San Francisco City College Dist.*, 205 Cal. Rptr. 842 (1984); *Miller v. State*, 467 N.E. 2d 493 (N.Y. Ct. App. 1984); *Moskowitz v. Massachusetts Inst. Of Tech.*, 474 N.Y.S. 2d 742 (Sup. Ct., App. Div. 1984); *Nieswand v. Cornell University*, 692 F.Supp.2d 1464 (N.D.N.Y. 1988). *See also, Fazzolari v. Portland School Dist. No IJ 734 P.* 2d 1326 (Ore. 1987); *Galloway v. Bankers Trust Co.*, 420 N.W. 2d 437 (Iowa 1988).

²² *Nova Southeastern University, Inc. v. Gross*, 785 So. 2d 86 (Fla. 2000).

These cases reflect the general premise that intervening criminal acts may not supercede the negligence of an owner or occupier for failure to exercise reasonable care to reduce the threat.²³

The Supreme Judicial Court of Massachusetts affirmed a \$175,000 verdict for a sexual assault at Pine Manor College. The kidnapping and rape commenced between 4-4:30am. The college initially claimed that it had no duty to protect against criminal acts of third parties. The Court found a duty based upon: 1) established social values and customs; 2) colleges of ordinary prudence customarily exercise care to protect the well-being of resident students; and 3) the premise that once an actor voluntarily assumes a duty, it must perform the duty with due care. The court stated: “Adequate security is an indispensable part of the bundle of services” afforded students.²⁴

The court second guessed the security measures in effect at the time. The exterior gate was left unlocked, a security guard observation post lacked full visibility, and a single key system was used. Locks could be picked by credit cards since no deadbolt locks were used, and reasons existed to believe a security guard was not diligently patrolling on his assigned rounds.

²³ See e.g. *Yukon Equipment Inc. v. Fireman’s Fund Insurance Co.*, 585 P.2d 1206 (Alaska 1978). This premise often arises in imposing liability on the owners and occupiers of land for intervening criminal acts. See e. g. *Kline v. 1500 Massachusetts Ave. Apartment Corp.*, 439 F.2d 477 (D.C. Cir. 1970); *Holly v. Mt. Zion Terrace Apts.*, 382 So.2d 98 (Fla. 1980); *Trentacost v. Brussel*, 412 A.2d 436 (N.J. 1980); *Seibert v. Vic Regnier Building, Inc.*, 856 P.2d 1332 (Kan. 1993)(attack in poorly lit, underground garage); *McClung v. Delta Square Ltd. P’ship*, 937 S.W.2d 891 (Texas 1996).

²⁴ *Mullins v. Pine Manor College*, 449 N.E. 2d 331, 336 (Mass. 1983).

In *Peterson v. San Francisco Community College District*²⁵ a student was climbing a stairway in a parking lot, when an assailant in broad daylight jumped from behind “unreasonably thick and untrimmed foliage and trees” in an attempted rape. Plaintiff claimed a failure to trim the foliage, or warn students of the known dangers. The court held the property was maintained in such a way “so as to increase the risk of criminal activity.”²⁶

The school had a duty to keep the campus “free from conditions which increase the risk of crime.”²⁷ Foreseeability of the risk, coupled with prior similar incidents, created the duty.²⁸ In a New York case²⁹ a coed was raped at 6:00 am on Sunday in the laundry room of a dorm. The university failed to keep the ten outer dorm doors locked.

The risks of liability can be high for an institution. Jury verdicts 2 – 3 decades ago send a warning to any university with inadequate security.³⁰

²⁵ 205 Cal. Rptr. 842 (1984).

²⁶ *Id.* at 849.

²⁷ *Id.* at 852.

²⁸ Liability was also found in the earlier case of *Duarte v. State*, 151 Cal. Rptr. 727 (Cal. Ct. App. 1979)(coed was raped and murdered in a dorm at San Diego State).

²⁹ *Miller v. State*, 467 N.E. 2d 493 (N.Y. Ct. App. 1984).

³⁰ A University of Southern California coed won a \$1.6 million verdict against the university for failure to provide adequate security around an off campus dorm; she was raped at knife point in 1988. N.Y. Times, March 29, 1992 at 18, Col. 1. A 1975 rape of a Hastings Law student in a women’s restroom on Christmas Eve in 1975 resulted in a \$217,500 verdict for the victim. San Francisco Examiner, July 29, 1980 at B4, Col. 1. Defendant claimed it exercised reasonable security before the criminal attack. It knew of problems and other claims in the past.

The adequacy of security will normally be a question of fact.³¹ The sad reality is that, regardless of the level of security, if a tragedy has occurred, a strong argument can be made that security was inadequate.³²

So too with the response effort in an unfolding tragedy. A second – by – second breakdown in hindsight will show points at which different responses could have reduced the tragedy.

Inadequate security can be shown by a number of factors, including the absence of guards, poorly trained guards, inadequate number of guards, inadequate lighting, inadequate patrolling, and the absence or poor placement of check – in points.

Foreseeability, with the benefit of hindsight, is a very potent weapon for plaintiffs. Foreseeability is even easier with past incidents, memos in the files, and recollections of erratic behavior.

A federate statute may well facilitate a victim’s establishing prior similar circumstances. Under the Student Right-to-Know and Campus Security Act,³³ now

On the other hand, in *Nova v. University of Southern California*, 20 Cal. Rptr.2d 997 (1993), the court recognized that a general concern about security does not require preparation for the worse possible scenario, absent sufficiently specific threats.

³¹ No liability was found because the University exercised reasonable security in *Gragg v. Wichita State University*, 934 P. 2d 121 (Kan. 1997).

³² See e.g. *Lopez v. McDonald’s Co.*, 238 Cal. Rptr. 436 (Ct. App. 1985) which recognized that it is hard to determine adequate deterrence in any given situation. *Id* at 450, quoting *Gregorian v. National Convenience Stores, Inc.*, 220 Cal. Rptr. 302, 305 (Ct. App. 1985) and *7735 Hollywood Blvd. Venture v. Superior Court*, 172 Cal. Rptr. 528, 530 (Ct. App. 1981).

³³ 20 U.S.C. §1092(f). *In general*, see Bonnie S. Fisher, [Making Campuses Safer for Students: The Clery Act as a Symbolic Legal Reform](#), 32 Stetson L. Rev. 61 (2002).

known as the Jeanne Clery Act,³⁴ all colleges and university receiving federal funds must annually publish their security and crime-reporting policies,³⁵ and publicize on-campus crimes³⁶ in a timely manner.³⁷

A. RANDOM ACTS OF MASS VIOLENCE AND TERRORISM

The issue is not so clear cut in cases of random acts of violence. Rules applicable to normal, foreseeable criminal activity may be inapplicable with random acts of mass violence and terrorism. Indeed the California courts recognized as much in a series of cases.

Ann M. v. Pacific Plaza Shopping Ctr.,³⁸ an otherwise traditional landlord – tenant security case, has been very influential in subsequent mass violence cases. A tenant’s employee was sexually assaulted at a 25 store strip mall at 8:00am.

Incidents of robberies, purse snatchings, and a transient pulling down women’s pants had occurred in the past. However, the proprietor recorded instances of crimes, and

³⁴ Jeanne Clery, a freshman, was raped and murdered in her dorm room while sleeping on April 5, 1986.

³⁵ For example, the University of California reports that 478 violent crimes occurred on its campuses in 2006, including 21 rapes, 2 attempted rapes, 61 robberies, and 394 assaults. No homicides were reported. An additional 5,510 property crimes were committed. Acts of arson increased from 10 in 2005 to 15 in 2006. University of California Police Dept., Annual Reports and Crime Statistics 1, <http://www.annualreport.ucpd.ucla.edu> (viewed July 10, 2007).

³⁶ These include murder, sexual assault, robbery, assault, burglary and motor vehicle theft, and arrests for weapons possessions, and drug and alcohol offenses. 20 U.S.C. §§1092(f)(2) and 1092(f)(1).

³⁷ *Id.* at § 1092 (f)(3).

³⁸ 25 Cal. Rptr.2d 137 (1993).

had no record of these events. Both defendant and the merchant's association decided not to hire security guards to patrol the mall because of the costs.³⁹

The court recognized the duty of the landlord to "take reasonable steps to secure common areas against foreseeable criminal acts of third parties that are likely to occur in the absence of such precautionary measures."⁴⁰ However, this duty does not extend to the rape at issue in the case because no prior similar incidents had occurred. A duty will rarely, if ever, be proven in the absence of prior similar instances. The Court thereby reverted to the majority rule "of prior similar instances" to impose a duty on the landlord.⁴¹

Even if defendant had knowledge of the prior incidents, they were not sufficiently similar to the violent assault suffered by plaintiff to create the high degree of foreseeability. The Court cautioned:

[R]andom, violent crime is endemic in today's society. It is difficult, if not impossible to envision any locale open to the public where the occurrence of violent crime seems improbable.⁴²

³⁹ *Id.* at 140.

⁴⁰ *Id.* at 142.

⁴¹ The other major approach is to focus on the foreseeability of the risk through "the totality of the circumstances." *Galloway v. Bankers Trust Co.*, 420 N.W. 2d 437 (Iowa 1988) (Homosexual rape in restroom). California had followed the totality of the circumstances test for a few years, *Isaacs v. Huntington Memorial Hosp.*, 211 Cal. Rptr. 356 (1989), but reverted back to "prior similar instances" in *Ann M.*

⁴² 25 Cal. Rptr. at 145.

The court noted that the obligation to provide patrols is not well – defined. A high degree of foreseeability is a prerequisite to find the scope of a landlord’s duty includes hiring private police forces.⁴³

In *Wiener v. Southcoast Childcare Centers, Inc.*,⁴⁴ a driver intentionally drove his large Cadillac into a day care center, killing two children and injuring others. A four-foot high chain link fence enclosed the playground, located adjacent to a busy street. The fence met code requirements, but plaintiffs argued a sturdier fence could have prevented the tragedy, and that a vehicle could foreseeably leave the street and crash into the day care center.

The Court followed *Ann M.* in deciding that liability will rarely be imposed on a land owner for intervening criminal acts, absent prior similar incidents. Random acts of violence should not result in liability. The duty is to maintain land in one’s possession and control in a reasonably safe condition. The Court recognized that “it is difficult, if not impossible, in today’s society to predict when a criminal might strike.”⁴⁵ If a criminal decides upon a goal or victim, it is extremely difficult to remove every means

⁴³ *But see, Jacquelin S. v. City of New York*, 598 N.Y.S. 2d 160 (Ct. App. 1993)(common law duty imposed on landlord to install self – closing, self – locking doors and intercom system, even though majority of tenants rejected it).

⁴⁴ 12 Cal. Rptr. 3d 615 (2004). Similarly, an irate Muslim went on a shooting rampage on July 28, 2006 at a Jewish community center in Seattle. He killed one woman and wounded five. Seattle Police Detail Jewish Center Shooting, <http://www.msnbc.msn.com/id/14082298/print/1/displaymode/1098/> (visited on September 5, 2007).

⁴⁵ *Id* at 623.

for achieving that goal.⁴⁶ The brutal criminal act was viewed as so bizarre and outrageous as to be inconceivable;⁴⁷ indeed, it could not be anticipated under any circumstances.⁴⁸

Several California Appellate Courts reached similar conclusions. *In Kadish ex rel Kadish v. Jewish Community Centers of Greater Los Angeles*,⁴⁹ a rabid anti – Semite entered a day – care facility and started shooting, wounding three children, one teenager and an adult on August 10, 1999. He exited the center and subsequently killed a Filipino – American postal worker.⁵⁰

⁴⁶ *Id.*

⁴⁷ A jury subsequently convicted the assailant of two counts of homicide and seven of attempted murder. It rejected his insanity defense even though his defense presented a long history of paranoia and psychosis. He had stopped taking his medications. He stated after the tragedy that “he had been planning to get even for five years by executing innocent people.” *People v. Abrams*, 2003 WL 1795626 at 8 (Cal. Ct. App. 2003). He focused on killing as many children as he could “because that makes more news...” *Id.* He had also been a regular marijuana user. One of the experts testified that “prolonged use of marijuana destroys brain cells and can cause paranoia and psychosis.” *Id.* at 7.

⁴⁸ 12 Cal. Rptr. at 624. A New York trial court reached a different result when a Palestinian on a visa entered the 86th floor observation deck of the Empire State Building on February 23, 1997, and started shooting indiscriminately, killing one and wounding six before committing suicide. The judge held that violent criminal activity in the building’s stores and surrounding sidewalks, coupled with bomb threats to the building, raised a factual issue as to the foreseeability of a shooting on the observation deck. Plaintiffs alleged negligence in failure to install metal detectors and to search bags. *Gross v. Empire State Building Associates*, 229 N.Y.L.J., Feb. 23, 2003 at 21, col. 2 (Sup. Ct. N.Y.).

⁴⁹ 5 Cal. Rptr. 3d 394 (Ct. App. 2003).

⁵⁰ *Ileto v. Glock, Inc.*, 421 F. Supp. 2d 1274 (C.D. Cal. 2006).

He chose the community center because it lacked security precautions. It had no locks on the entry door, no security guards, and no emergency evacuation plan. Plaintiffs argued a duty existed based upon foreseeability, both on the general foreseeability of risk around the world to Jewish facilities,⁵¹ and in light of vague threats of violence.

The court found no liability. Violent criminal assaults of this nature are not reasonably foreseeable; vague threats of violence are insufficient to create a duty. They do not provide sufficient guidance to create a duty:

A general concern about security, absent a sufficiently specific threat, does not require an organization to prepare for the worst imaginable scenario.⁵²

Thus the threats were not sufficiently specific that security measures be adopted to prevent a maniac from shooting children at summer camp. This threat was unforeseeable.⁵³

The court echoed the earlier case of *Lopez v. McDonald's Corp.*,⁵⁴ which held that the unforeseeability of these unique, horrific crimes requires negligence liability to be restricted.⁵⁵ The vicious attacks of an anti-Semitic gunman were not reasonably foreseeable.⁵⁶

⁵¹ Jewish organizations referred to the summer of 1999 as the “Summer of Hate.” 5 Cal. Rptr 3d at 396.

⁵² *Id.* at 403 quoting *Ann M.*, 25 Cal. Rptr.2d at 145.

⁵³ *Id.* at 402. Vague threats are not sufficiently specific. A general concern about security does not require the adoption of security measures “to prevent a maniac from shooting children at a summer camp.” *Id.* at 403.

⁵⁴ 238 Cal. Rptr. 436 (Ct. App. 1987).

⁵⁵ 5 Cal. Rptr. 3d at 404.

⁵⁶ *Id.* at 406.

The court issued a strong caveat to liability:

Our nation's history contains accounts of hate crimes akin to the one perpetrated at the North Valley Center. In general, such crimes are foreseeable in that they will probably occur as they have in the past. Yet simply because they are foreseeable in this sense should not result in liability for the property owner when they occur. There must be more.⁵⁷

The *McDonald's* case dealt with a gunman killing 21 and wounding 11 at a McDonald's in San Ysidro, California. The Appellate Court held that the unforeseeability of the unique, horrific crime requires negligence liability to be restrained.

At first glance, plaintiffs presented a strong case of foreseeability. Several crimes had occurred previously at the restaurant, including grand theft, petty theft, robbery, vandalism, and numerous assaults and batteries. A private security consultant recommended to McDonald's corporate offices that private security guards be hired. The response was: "We don't want to spend any money. There is no problem. We don't need it anyways."⁵⁸

The assailant entered the restaurant with a semi-automatic rifle, a semi automatic pistol, and a 12 gauge shotgun. His murderous rampage ended when a police sharpshooter fatally wounded him.

The critical factor for foreseeability was that while criminal activity might well have been foreseeable at this site, the prior crimes bore no relationship to a purposeful homicide or assassination. The assailant's acts and motives were unrelated to the area's crime wave:

⁵⁷ *Id* at 404.

⁵⁸ *Id.* at 439.

Rather, the likelihood of this unprecedented murderous attack was so remote and unexpected that, as a matter of law, the general character of McDonald's nonfeasance did not facilitate its happening. Huberty's deranged and motiveless attack, apparently the worst mass killing by a single assailant in recent American history, is so unlikely to occur within the setting of modern life that a reasonably prudent business enterprise would not consider its occurrence in attempting to satisfy its general obligation to protect business invitees from reasonably foreseeable criminal conduct.⁵⁹

The question is not does a fast food restaurant food restaurant have a duty to protect patrons against criminal acts, but rather does it have a duty to protect "against once in a lifetime massacres."⁶⁰ The court listed a series of recent mass killings in

⁵⁹ *Id.* at 445.

⁶⁰ *Id.* at 441.

America.⁶¹ The problem is what measures will protect against the thug, the narcotic addict, the degenerate, the psychopath, and the psychotic.⁶²

An earlier case involved an airport bombing on August 16, 1974 in a coin operated, storage locker at LAX, killing and injuring victims. The locker was in an area accessible to the public. Plaintiffs claimed negligence against the city and airport authority for failure to take adequate safety measures.⁶³ In essence the city should have searched persons using the lockers, which were outside the security zone. The Appellate Court refused to find a duty, and hence liability, on the part of defendants for the bombing.⁶⁴

⁶¹ “The following major mass murders had been committed in the United States during recent history: (1) August 1, 1966, 16 people were killed and 31 wounded by a rifle-sniper firing from the University of Texas tower in Austin; (2) August 10, 1986, 14 postal workers were killed and six others wounded in Edmond, Oklahoma; (3) February 19, 1983, 13 Chinese-American businessmen and gambling dealers were shot dead in a Seattle Chinatown gambling club; (4) September 25, 1982 13 people were killed in a shooting rampage in Wilkes-Barre, Pennsylvania by a state prison guard; (5) September 6, 1949, 13 people were killed by a World War II veteran who went berserk in Camden, New Jersey; (6) January 1958, 11 people were killed by two individuals during a spree in Lincoln, Nebraska; (7) April 15, 1984, 10 people died in New York City’s “Palm Sunday Massacre”; and (8) July 14, 1966, eight nurses were slain in their Chicago apartment by Richard Speck. (The San Diego Union, Saturday, April 25, 1987, sec. A-8, col. 1, 2.)” *Id.* at 445, n .9. We can also add to the list the April 19, 1995 Oklahoma City bombing of the Alfred P. Murrah Federal Court House in which 168 adults and children died.

⁶² The court referred to an earlier decision, *Noble v. Los Angeles Dodgers*, 214 Cal. Rptr. 395 (Cal. Ct. App. 1985), involving assaults by intoxicated fans in a parking lot after a baseball game. 52,000 fans attended the game, and the team employed over 5 dozen security officers on the premises.

⁶³ *Moncur v. City of Los Angeles, Dept. of Airport*, 137 Cal. Rptr. 237 (Ct. App. 1977).

⁶⁴ *See also, Sigmund v. Starwood Urban Investment*, 475 F. Supp. 2d 36 (D.D.C. 2007); *Faheen v. City Planning Corp.*, 734 S.W. 2d 270 (Mo. Ct. App. 1987).

In California therefore, the test is not a vague general risk, but a specific one. The standard comes down to reasonable conduct in light of a specific, foreseeable risk. The California courts are hesitant to impose liability for failure to prevent random acts of violence.

Courts outside California have also been reticent about imposing liability upon remote parties in the chain of causation.⁶⁵ For example, courts in both New York and Oklahoma denied liability for the manufacturers of the ammonium nitrate used in the truck bombs in the 1993 World Trade Center bombing⁶⁶ and the 1995 Alfred P. Murrah Federal Office Building in Oklahoma City.⁶⁷

⁶⁵ See also *Pecan Shoppe of Springfield, Missouri, Inc. v. Tri-State Motor Transit Co.*, 573 S.W. 2d 431 (Mo. App. 1978); *Henry v. Merck & Co.*, 877 F.2d 1489 (10th Cir. 1989). *Sigmund v. Starwoods Urban Investment*, 475 F. Supp. 2d 36 (D.D.C. 2007) involved a son placing a homemade car bomb under his father's car with the intent of killing his father. His half-brother was severely injured instead. Plaintiff sued the operator of the parking garage for inadequate security. The bomb was installed in the garage. A public access was left unrepaired, stuck in an open position for weeks, allowing anyone to enter the garage after closing hours. Alternative means of access to the garage existed.

The District Court held plaintiff failed to meet the "heightened sense of foreseeability" applied in cases of intervening criminal acts of a third party. *Id.* at 38, 42. No evidence existed of previous car bombings, homicides, or assaults with an intent to kill on the premises in the five preceding years, or even within a five block radius of the garage. 59 of the 503 crimes in the neighborhood occurred in parking lots and garages, but none of the nature in this case. *Id.* at 40.

See also, *District of Columbia v. Berretta, U.S.A. Corp.*, 872 A.2d 633, 641-42 (D.C. 2005)(en banc), *Potts v. District of Columbia*, 697 A.2d 1249, 1252 (D.C. 1997). In general, see Laura DiCova Kulwicki, Comment, A Landowner's Duty to Guard Against Criminal Attack: Foreseeability and the Prior Similar Incidents Rule, 48 Ohio St. L.J. 247 (1987).

⁶⁶ *Port Authority of New York and New Jersey v. Arcadian Corp.*, 189 F.3d 305 (3rd Cir. 1999).

Similarly, while the assailants in other cases may have been influenced or charged by video games⁶⁸ or movies,⁶⁹ no duty was found on the defendants. Nor have parents been held liable.⁷⁰

Let us start with a different paradigm today: seemingly random acts of violence, the “going postal” syndrome, can occur anywhere in society, including airports,⁷¹ car washes,⁷² casinos,⁷³ churches,⁷⁴ city hall,⁷⁵ computer firms,⁷⁶ factories,⁷⁷ fast food

⁶⁷ *Gaines-Tabb v. ICI Explosives, USA, Inc.*, 160 F.3d 613 (10th Cir. 1998).

⁶⁸ *James v. Meow Media, Inc.*, 90 F.Supp.2d 798 (W.D. Ky. 2000)(14 year old killed 3 and wounded 5 on December 1, 1997 at a Paducah, Kentucky high school); *Watters v. TSR, Inc.*, 904 F.2d 378 (6th Cir. 1990)(suicide after playing Dungeons and Dragons).

⁶⁹ *Id.*

⁷⁰ *James v. Wilson*, 95 S.W.2d 875 (Ky. Ct. App. 2003).

⁷¹ On July 4, 2002 an Egyptian immigrant ran into the El Al counter at Los Angeles International Airport and opened fire, killing an El Al employee and a passenger waiting in line, and wounding three before a security guard killed him. Andrew Blankenstein & Jill Leouy, Shooting at LAX: FBI Looks for Motive in LAX Attack, Los Angeles Times, July 6, 2002, 2002 WLNR 12415843.

⁷² A fired worker shot to death five at a Dallas area car wash. Los Angeles Times, July 10, 2003 at 13, col. 3.

⁷³ For example, an estranged, unemployed painter opened fire in the New York-New York Casino in Las Vegas on July 6, 2007, wounding four. Kimi Yoshing & Ralph Vartabedian, 4 Wounded As Gunman Opens Fire in Casino on Vegas Strip, Los Angeles Times, July 7, 2007 at A10, col. 1. A month later at 1:00AM an emotionally troubled man opened fire in the Caesars Palace Casino, wounding 2. Another Shooting on Las Vegas Casino Strip, <http://www.cbsnews.com/stories/2007/08/05/national/main3134858.shtml> (last visited September 6, 2007); Four Injured in Las Vegas Shooting,

http://www.npi.com/newstrack/top_news/2007/07/06/four_injured_in_las_vegas_casino_shooting/7785/

(last visited Sept. 6, 2007). In addition, a bomb was placed in a coffee cup atop an employee's car in the Luxor Casino parking lot. The employee was killed when it exploded. Steve Friess, A Question Recurs: How Safe is Las Vegas? New York Times, Aug. 3, 2007 at A12, col. 3.

⁷⁴ On August 12, 2007 a gunman killed the pastor and two church elders and wounded five others at a First Congregational Church in Neosho, Missouri. New York Times, August 14, 2007 at A17, col.1. In 2003 coffee laced with arsenic was served to church members of a Lutheran Church in New Sweden, Maine, killing a 78 year old church elder, and sickening 15 other parishioners. The assailant subsequently committed suicide. Maine Police End Church Arsenic Investigation, http://www.foxnews.com/printer_friendly_story/0,3566,192256,00.html (last visited September 5, 2007).

⁷⁵ On July 23, 2003 a New York City councilman entered City Hall with a political opponent. The two bypassed normal security as was then the custom with elected officials. After they entered the facility, the opponent pulled out a gun and killed the councilman. CNN.com/U.S., NYC councilman killed by political rival, <HTTP://www.cnn.com/2003/us/northeast07/23/ny.shooting/index.html>.

A gunman entered the Kirkwood, Missouri City Hall on February 7, 2008, and killed five victims, including two police officers, two council members, and the public works director before police were able to kill him. Susan Saulnay & Malcolm Gay, In Missouri, City Asks What made Killer Snap, New York Times, Feb. 9, 2008 at A13, col. 1.

⁷⁶ A software tester killed 7 at a Lawrence, Massachusetts internet consulting firm. Los Angeles Times, July 10, 2003 at A13, col. 2-3.

⁷⁷ A racist employee shot five to death, including four African-Americans, and wounded nine before killing himself at a Meridian, Mississippi aerospace manufacturing facility on July 8, 2003. Scott Goli & Laine Hart, Gunman Kills 5 Co-Workers, Self, Los Angeles Times, July 9, 2003 at A14, col. 2.

restaurants,⁷⁸ gas stations,⁷⁹ government offices, housing complexes,⁸⁰ malls,⁸¹ postal facilities,⁸² Indian Reservations,⁸³ restaurants,⁸⁴ supermarkets,⁸⁵ theatres,⁸⁶ and even law firms,⁸⁷ and an Amish school,⁸⁸ as well as the Washington, D.C. Metropolitan Area.⁸⁹

⁷⁸ *Lopez v. McDonald's Corp.*, 238 Cal. Rptr. 436 (Cal. Ct. App. 1987).

⁷⁹ A customer was shot and killed at a gas station in Oakland, California. Apparently he had gotten into an altercation with another customer. Friday shooting victim Oakland resident, [HTTP://www.insidebayarea.com/portlet/article/html/fragments/print_article](http://www.insidebayarea.com/portlet/article/html/fragments/print_article). Article ID = 4764923 & site ID = (last visited Aug. 20, 2007).

⁸⁰ A janitor, dismissed in 2005, killed his former supervisor and injured two others at his Bronx Housing Project, Co-Op City. He then rode a bus and subway to surrender to security officers at the Bronx Courthouse. Cara Buckley, Ex-Worker Shoots 3 at Bronx Housing Complex, Police say, Killing One, *New York Times*, August 31, 2007 at A20, col. 1.

⁸¹ A Bosnian refugee entered the Trolley Square Mall in Salt Lake City on February 12, 2007, and killed 5 before being killed in turn by police officers. Four other victims were hospitalized. Linda Thomson, Police Identify Gunman as 18-year old Bosnian, <http://deseretnews.com/article/content/mobile/0,5223,660195221,00.html> (last visited August 27, 2007).

Shopping centers and malls pose a different security situation than colleges. Whereas campuses often seemingly have infinite entrances and exits, malls only have a few entry points, which can be sealed off.

⁸² An ex-employee, who had left her employment because of psychological problems, killed 5 at a Goleta, California postal facility. Randall C. Archibold, Ex-Employee Kills 5 Others and Herself at California Postal Plaza, *New York Times*, Feb. 1, 2006 at A13, col. 4.

⁸³ A 15-year old took his grandfather's duty belt with guns (grandfather was a tribal police officer), killed his grandparents, burst through a metal detector, and then killed five students, a teacher, and an un-armed security guard at the Red Lake High School on the Red Lake Indian Reservation (Chippewa) in Minnesota. P.J. Huffstutter & Stephanie Simon, 10 Dead After School Shooting, *Los Angeles Times*, March 22, 2005 at A1, col. 2.

B. CAMPUSES AND TRADITIONAL SECURITY MEASURES

⁸⁴ A transient burst into a Denny's restaurant in Pismo Beach, California on March 15, 2006, and shot to death a couple, followed by committing suicide. Steve Chawkins, Los Angeles Times, March 16, 2006, at A1, col. 1. On August 16, 1991 an assailant drove his pickup truck through the front window of a Luby's cafeteria in Killeen, Texas and then opened fire with a Glock 17 and Ruger P89. He killed 23 and wounded 20 before killing himself. Wikipedia, http://www.wikipedia.org/wiki/Luby's_massacre (last visited Dec. 6, 2007).

⁸⁵ An assailant entered an Albertson's supermarket on June 29, 2003 in Irvine, California. He killed two by wielding a three-foot Samurai sword before police killed him. Zaheera Wahid & Bill Rams, In Tragedy's Wake, Orange County Register, July 1, 2003 at 1, col. 1, 5, col. 1.

⁸⁶ A Muslim opened fire in an Owings Mills, Maryland theatre on June 16, 2006, killing a patron. He then placed his gun on the counter and waited for police to arrive. Hamil R. Harris, Man Dies in Theatre After Assailant Opens Fire, http://www.washingtonpost.com/wp-dyn/content/article/2006/06/17/AR2006061700725_pf.html (last visited August 27, 2007).

⁸⁷ See *Merrill v. Navegar, Inc.*, 110 Cal. Rptr. 370 (2001)(8 killed and 6 wounded at a law firm). Anger over a divorce settlement may have prompted a Baptist Deacon to shoot five people in a law office in Alexandria, Louisiana, killing two, before being killed in turn by police. Man Kills 2, Injures 3 at Law Firm Before He is Killed by Police, New York Times, Oct. 6, 2007 at A10, col. 1.

⁸⁸ On October 2, 2006, an assailant killed five Amish school girls and wounded another five in a one-room schoolhouse in Nickel Mines, Pennsylvania before killing himself. The 33 year old milk-truck driver had earlier hugged his two oldest children as they boarded a school bus. John D. Roth, Forgiveness: A Legacy of the West Nickel Mines Amish School/ Amish Grace: How Forgiveness Transcended Tragedy, Christian Century, November 13, 2007, 2007 WLNR 23123600

⁸⁹ Two assailants, collectively known as the "DC Sniper" killed ten and critically wounded three in a series of attacks over three weeks in October 2002 throughout the greater Washington, D. C. area. Beltway Sniper Attacks, Wikipedia, http://www.en.wikipedia.org/wiki/Beltway_sniper_attacks (last visited Nov. 27, 2007).

Let us also acknowledge that the university community has limited preventative and response options for increasing campus security. Large campuses of 30,000-50,000 students, thousands of faculty, staff, and administrators, and tens of thousands of doors and windows cannot be run as a barbed wire, high security prison. These campuses cannot be “shut down,” although individual units might be.

The underlying reality is that the standard methods of securing a building are ineffective in academic settings. For example, normal rules of deterrence will not apply to a “mentally unbalanced man, bent on murder and self-destruction,”⁹⁰ who went to the McDonalds unconcerned with detection.

I submit that it is perhaps even more difficult to secure a college campus against a lone gunman than against a suicide bomber. The gunman can shoot his way through a checkpoint and continue his killing ways,⁹¹ but the bomber, no matter how tragic his act, can only detonate the bomb once.

Securing a campus is different than an enclosed office or factory complex. By their very nature, universities are open centers of learning. The exchange of knowledge is not limited to enrolled students, but offered to the community through guest lecturers, visiting scholars, symposia, artistic performances, internet access, museums, library

⁹⁰ 238 Cal. Rptr. at 450.

⁹¹ For example, the presence of security guards at the San Ysidro McDonald’s would not have deterred the assailant. *Id.* at 449.

services, and graduate and job fairs, often for free. Athletic events may routinely attract 15,000 – 100,000 fans.⁹²

The normal means of providing a high level of security will often be ineffective against the mass murderer and terrorist; visitor registration, bicycle patrols, badging, armed guards, electronic key locks, emergency call boxes, escorts, lighting and lighted parking lots, metal detectors,⁹³ observation sites, shuttle buses, and video surveillance⁹⁴ may reduce the incidents of normal criminal activity, but they cannot secure the campus.

While we picture college campuses as physically defined, contained environs with more or less distinct boundaries, many large urban universities, such as NYU, Boston University, George Washington, and Pittsburgh are integrated into scores of blocks of the community. A fleeing suspect could easily blend into the surrounding neighborhood before any responders could reach the scene.

⁹² Security at athletic events is not perfect. At this point, absent special circumstances, institutions are not going to thoroughly inspect every student backpack or open clothing looking for suicide vests. However, kegs are no longer entering the stands.

⁹³ The high school shooter at Red Lake High School went through a metal detector and shot to death an unarmed security officer as he continued on his murderous path. He had previously killed his grandparents. P.J. Huffstutter & Stephanie Simon, 10 Dead After School Shooting, Los Angeles Times, March 22, 2005 at A1, col. 2. Similarly, the assailant at the Kirkwood City Center on February 7, 2008 first shot and killed a police officer in a parking lot outside the building, took the officer's revolver, and then entered the council chambers on a murderous rampage. Susan Saulnay & Malcolm Gay, In Missouri, People Ask What Made Killer Snap, New York Times, February 9, 2008 at A13, col. 1.

⁹⁴ A new, sophisticated version of video surveillance is to couple the cameras with face-recognition technology, which allows the cameras to screen for unknown or undesirable "faces." See Thomas Frank, School Security Cameras on Cutting Edge, USA Today, Nov. 2, 2007 at 1A, col. 2.

If the shooters are disgruntled, disturbed students, faculty or staff, then they already possess the badges and electronic keys for access to the dorms, classrooms, libraries and labs. The killers are often students, but at Cal State Fullerton in 1976 a deranged custodian killed 7 and injured 2.⁹⁵ With thousands of faculty, staff, and students entering and leaving classroom buildings and dormitories daily, an unauthorized person can simply move with the flow.

Most universities view violence as the antithesis of learning. Hence, campuses are often gun-free zones. Even the campus security officers are unarmed at many institutions, even if, as at a prior university I had taught at, they were off duty police officers. Their weapons had to be left in their cars. Even armed campus security cannot be at all places at all times unless the campus is to become an armed camp. A simple example illustrates this principle. Columbine High School, like many schools today, had an officer on campus at the time the killings began. He responded within a few minutes, but the murder spree had begun with the assailants moving through the building.

While gun-free environs are highly laudatory, they leave potential victims without a means to defend themselves. At Appalachian State Law School in 2002, a former law student shot to death the Dean, a professor, and a student before other students retrieved their guns and subdued the assailant.⁹⁶

⁹⁵ *Major Shootings, supra* n. 4 at A19, col. 1.

⁹⁶ Editorial, Conceal-carry was factor in stopping attack, Columbus Dispatch, May 11, 2007, 2007 WLNR 8959579. A lone gunman on December 9, 2007 shot up an evangelical missionary training school in Arvada, Colorado and then a megachurch in Colorado Springs 70 miles away, killing three. The attack ended when a security guard shot the assailant. Jeff Kass, 2 Shootings at Church Sites in Colorado Leave 4 Dead, New York Times, Dec. 20, 2007 at A16, col. 1.

Guns are often the weapon of choice, but the means of killing parallel those of society in general. For example, an Iranian-American graduate of the University of North Carolina on March 3, 2006 decided to punish the United States and “avenge the deaths of Muslims” worldwide by mowing down students on the UNC campus with his car.⁹⁷ He then called 911 to surrender. Another student threw acid into his ex-girlfriends face.⁹⁸ Knives are also convenient weapons in fights.⁹⁹

⁹⁷ UNC Grad in Court on Alleged Hit and Run,

http://www.foxnews.com/printer_friendl_story/0,3566,186946,00.html (last visited August 27, 2007).

David Attias, a student at the University of California Santa Barbara slammed his car at 70 mph at 11:00pm on February 23, 2001 into nine parked cars and mowed down five pedestrians, four of whom died. The student was psychologically disturbed and bipolar. He had stopped taking his medication and therapy, but was on trace amounts of marijuana and lidocaine at the time. In general, *see* Joan Ryan, Tragic Trial Suffused with Parents Sorrow, sfgate.com, <http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2002/04/14/in189073.dtl&type=printable> (last visited Sept. 6, 2007). A jury first found him guilty of four counts of second-degree murder, and then not-guilty a week later by reason of insanity. Verdict Highlights Difficulty of Separating the Insane From the Crazy, Santa Barbara Independent, June 27, 2002, 2002 WNLR 11681173.

⁹⁸ The Massachusetts Institute of Technology student took sulphuric acid from the chemistry lab and then threw it into his girlfriends face in her Columbia dorm room two weeks after they broke up. 26 ATLA L. Rptr. 223 (June 1983) (\$17,040,000 jury verdict); *Moskowitz v. Massachusetts Institute of Technology*, 471 N.E. 2d 463 (N.Y. Sup. Ct., App. Div. 1984).

⁹⁹ A ex-roommate fatally stabbed the other former roommate in an University of Arizona dorm room fight. Paul Giblin, Woman, 18, Dies in Fight With College Roommate, New York Times, Sept. 6, 2007 at A23, col. 1.

Escorts and lighted parking structures may reduce criminal activity, such as muggings and sexual assault, which is all to the good, but they may prove ineffective against the crazed killer.

Similarly, video surveillance may tell us what is happening in real time, and provide evidence afterwards, but they don't prevent crime.

To search thousands, perhaps tens of thousands, of students, not to mention faculty, as they repeatedly move from classroom building to classroom building, student union, dorm, library, study hall, and administrative offices, is doable, but is clearly unfeasible on a routine basis. The issue is one of convenience since courts have upheld searches of patrons entering airports,¹⁰⁰ athletic events¹⁰¹ and mass transit stations.¹⁰²

Investigative reporters and lawyers will often discover, with the benefit of hindsight, warning signs that were ignored, as with both David Attias and Cho Seung-Hui of Virginia Tech. These signs are often of psychological disturbances in the killer. What is obvious though in hindsight is often not so clear until the tragedy unfolds.

These signs are often more characteristic and reflective of those who do not in fact pose a threat to others. Considering the hormonal rages, academic

¹⁰⁰ *United States v. Edward*, 498 F. 2d 496 (2nd Cir. 1974), *United States v. Marquez*, 410 F. 2d 612 (9th Cir. 2005).

¹⁰¹ See e. g. *Johnston v. Tampa Sports Authority*, 490 F. 3d 820 (11th Cir. 2007)(pat down searches of all ticket holders focusing on the detection of IED's).

¹⁰² *McWade v. Kelly*, 460 F.3d 260 (2nd Cir. 2006)(random, suspicionless subway searches implemented after the London subway bombings).

disappointments,¹⁰³ roommate incompatibility, stress levels, and broken relationships of teenagers,¹⁰⁴ indications of abnormal behavior are common. The responses may well seem totally irrational, and hence unforeseeable.¹⁰⁵

Normal thought processes and norms of reasonable conduct do not apply to these assailants. Aside from the act itself, to intentionally mow down students with a car at North Carolina and then calmly dial 911 to turn oneself in, is inexplicable. To engage in one round of shootings, and then take time off to mail a video to a broadcasting company, prior to returning to a second, more horrific killing spree at Virginia Tech, sets a new standard of irrationality.

Nor are drug and alcohol¹⁰⁶ induced rages and accidents always individually foreseeable. The fanatic, alcohol or drug crazed maniac, and the psychologically disturbed will not be deterred by normal preventative measures.

¹⁰³ A former Iowa physics graduate student responded to losing a research prize by shooting to death three professors, an Associate Vice President for Academic Affairs,, and a staff member. Anne Matthews, *The Campus Crime Wave: The Ivory Tower Becomes an Armed Camp*, *New York Times Sunday Magazine* 36 (March 7, 1993). The three professors were his advisor, co-advisor and the chair of the physics department. A graduate student at San Diego State killed three professors while defending his thesis. *Major Shootings*, *supra* n. 4.

¹⁰⁴ A disappointed suitor shot and killed the roommate of his ex-girlfriend. *Nieswand v. Cornell University*, 692 F. Supp. 1464 (N.D. N.Y. 1988).

¹⁰⁵ For example, a university of Pennsylvania law student shot into the door of two Drexel bio-engineering students on February 1, 2007, believing them to be terrorists. Regina Medina & Simone Weichselbaum, *Law Student Suspended After “Terrorism” Shooting*, <http://www.philly.commu/dailynews/news/local/16603996.htm?template=contentModules/printstory.jsp> (last visited Feb. 2, 2007).

If a chain is only as strong as its weakest link, then preventative measures and emergency action plans may be only as effective as the weakest human element – the students. Some students will be apathetic, overly trusting, naïve, egocentric, or ignorant of risks; many may be intoxicated or on drugs at any given time.¹⁰⁷ Others will be sleep – deprived, resulting in the potential for great errors of judgment. A common security problem, that may easily defeat basic security, is to leave doors propped open.¹⁰⁸

C. PROPOSED PREVENTATIVE MEASURES

However, the academic world is not without tools to provide safety. Available options include hotlines, pre-screening, response to psychological risks, and emergency planning. These alternatives are non-traditional, but fit squarely into the changing circumstances of today. As the nature of the underlying threat has changed, so too should the response efforts. The common law’s underlying strength is its adaptability to changing circumstances.

¹⁰⁶ For example, in *Beach v. University of Utah*, 726 P.2d 413, 416 (Utah 1986) the Supreme Court of Utah stated that nothing the university personnel knew would have led them to conclude that plaintiff would be injured. See also, *Breadshaw v. Rawlings*, 612 F.2d 135 (3d Cir. 1979), *cert. denied* 446 U.S. 909 (1980) and *Baldwin v Zoradi*, 176 Cal. Rptr. 809 (Ct. App. 1981).

¹⁰⁷ That security can be lax is illustrated by the representative case of Azia Kim. Azia successfully passed herself off as a Stanford student and lived in Stanford dorms for almost an entire academic year. She even enrolled in the Army ROTC program at nearby Santa Clara University. Richard C. Paddock, Stanford Imposter Also Joined Army ROTC, *Los Angeles Times*, May 30, 2007 at B2, col. 1.

¹⁰⁸ A typical example is the tragic death of Jeanne Clery, for whom the Clery Act is named. She was killed in her Lehigh College dorm by a fellow student. Three doors with automatic locks were propped open by a student having a party. Indeed, her room was unlocked because her roommate forgot her key. *Wall Street J.*, Sept. 7, 1990 at B1, col. 5.

Background checks and emergency action plans fit squarely into fundamental principles of Tort Law. Part of the essence of negligence law is Judge Learned Hand's famous formula: the legal standard of reasonable care is a calculus of three factors: 1) The risk of an accident occurring; 2) The potential magnitude gravity of harm should the risk materialize; and 3) The availability of alternatives which would prevent the accident.¹⁰⁹ Our proposals include measures both to minimize, to the extent possible, the threat, and also the impacts.

The standard of care is a sliding, flexible concept. As the potential gravity of harm increases, so too does the applicable duty of care. Thus, the duty of reasonable care is proportional to the risk of injury.¹¹⁰ As stated by Prosser and Keeton:

[I]f the risk is an appreciable one, and the possible consequences are serious, the question is not one of mathematical probability alone. The odds may be a thousand to one that no train will arrive at the very moment that an automobile is crossing a railway track, but the risk of death is nevertheless sufficiently serious to require the driver to look for the train and the train to signal its approach.... As the gravity of the possible harm increases, the apparent

¹⁰⁹ *United States v. Carroll Towing Co.*, 159 F. 2d 169, 173 (2nd Cir. 1947).

¹¹⁰ *Albison v. Robbins & White, Inc.*, 116 A.2d 608, 612 (Me. 1955); *Willie v. Minnesota Power & Light Co.*, 250 N.W. 809, 810 – 11 (Minn. 1933). *See also Dover v. Georgia Power Co.*, 168 S.E. 117, 118 (Ga. Ct. App. 1933) (holding that due care is “in proportion to the extent of the injury which will be likely to result to third persons”); *Herro v. Board of County Rd. Comm’rs*, 118 N.W. 2d 217, 274 (Mich. 1962) (imposing a duty on a municipality undertaking a public works project to use care “proportioned to the danger of injury”); *City Water Power Co. v. City of Fergus Falls*, 128 N.W. 817, 818 (Minn. 1910) (observing that the owner is bound to exercise a degree of care in the construction and maintenance of a dam in proportion to the injuries likely to result to others if it proves insufficient); *Mackay v. Breeze*, 269 P. 1026, 1027 (Utah 1928) (“The degree of care required to prevent the escape of water is commensurate with the damage or injury that will probably result if the water does not escape”).

likelihood of its occurrence need be correspondingly less to generate a duty of precaution.¹¹¹

Eventhough normal, routine security measures may be ineffective against the random mass murderer; colleges have options available to either minimize the risk or at least its effects. Indeed, even if reasonable care has been exercised, accidents happen, crazed killers strike, and tragedies ensue, and tragedies occur. So too will random acts of mass violence. Reasonable care though extends not only to minimizing the risk of an accident, but also to mitigating its impact should an incident materialize. Colleges must plan for emergencies, ranging from criminal activity, bio-terrorism,¹¹² and random acts of violence to natural disasters, and pandemics.¹¹³

¹¹¹ W. Page Keeton, et al, Prosser & Keeton on the Law of Torts §31, at 171 (5th Ed. 1984).

¹¹² Colleges with their biology, chemistry, bio-chemistry, bio-medical, bio-engineering, and life sciences programs are vulnerable to bioterrorism. A cult in Japan released sarin, a nerve gas, in the Tokyo subway system on March 25, 1995, killing eight and injuring thousands. Lawrence K. Autman, The Poison: Nerve Gas That Killed Tokyo Subway Riders Said to Be One of the Most Lethal Known, New York Times, March 21, 1995 at A13, col. 3. On February 18, 2003 a man with a history of psychological problems attempted to commit suicide on a South Korean subway train by flicking a cigarette lighter at a container containing a flammable liquid. He survived, but hundreds perished in the resulting inferno. Only 56 victims were identified three weeks after the tragedy although 198 sets of remains had been recovered. 255 riders were classified as missing. James Brooke, Relatives in Vigil at Korean Fire Site, New York Times, March 11, 2003 at A6, col. 4.

¹¹³ One of the greatest potential risks to colleges is disease. A large mass of students, clustered together in class rooms, dormitories, and cafeterias is a veritable Petri dish for disease. Encephalitis, meningitis, and influenza are major concerns for campuses.

Even before Virginia Tech, universities were taking steps to detect undesirable activity and exclude potentially unwanted persons from the campus.

1. HOTLINES

Building upon the transparency mandates of The Sarbanes-Oxley Act of 2002,¹¹⁴ many universities, often at the initiative of trustees who have become used to SarBox in their professional careers, have adopted a commercially marketed “hotline” procedure. Under the hotline, complainants, even anonymously, may phone or email complaints of

Plans for coping with contagion may include diagnosis, which in the cases of diseases, such as SARS, is initially difficult as the symptoms mimic those of less lethal diseases, quarantine and isolation, *Holmes v. Jennison*, 39 U.S. 560, 614, 619 (1840) (Baldwin, concurring), *In Re Halko*, 54 Cal. Rptr. 661 (Ct. App. 1966) (tuberculosis), *In Re Martin*, 188 P. 2d 287 (Cal. Ct. App. 1948)(std's), treatment, *Love v. Superior Court of San Francisco*, 276 Cal. Rptr. 660 (Ct. App. 1990) (compulsory AIDS testing), vaccination, *Jacobson v. Massachusetts*, 197 U.S. 1 (1905), *McCartney v. Austin*, 293 N.Y.S. 2d 188 (Sup. Ct. 1968)(polio), *Wright v. Dewitt School Dist.*, 385 S.W. 2d 644 (Ark. 1965), compulsory x-rays, *State ex rel Holcomb v. Armstrong*, 239 P. 2d 545 (Wash. 1955), reporting and information retention requirements (*Whalen v. Roe*, 429 U.S. 589 (1977))(power to maintain computer files with names and addresses of persons receiving controlled substances with a prescription), banning public gatherings, and shutting down public transportation. Public officials may issue emergency proclamations.

In some situations, evacuation will only exacerbate the problem. For example, the safest response to a smallpox or pestilence outbreak would be to quarantine the victims to minimize the risk of contagion. Thus, the SARS epidemic during the 2002-03 winter was contained through isolation: (quarantining the victims and their close contacts, including medical workers), and infection controls in hospitals. These steps were effective because of the limited dispersion range of the virus. The key to success is the policy of “early detection, early reporting, early isolation, and early treatment.” Keith Brasher & Lawrence F. Altman, *Isolation, An Old Medical Tool, Has SARS Fading*, N. Y. Times, June 21, 2003 at A1, col. 1, p. A6, col. 4.

¹¹⁴ Pub. L. No. 107-204, 116 Stat. 745 (2002).

alleged undesirable activity. Depending upon what each individual campus includes on the reportable list, complaints could be of academic misconduct, conflicts of interest, criminal activity, financial misconduct, or sexual harassment.¹¹⁵

2. BACKGROUND CHECKS

The internet has significantly changed the availability of information. A simple Google search today can discover much about an applicant's past. Commonly utilized computer screening techniques can be used to exclude students, faculty, and staff who may pose a high risk. But they do so at the risk of violating the civil rights of innocent persons. Even when juvenile records are sealed, a Google, Yahoo, MySpace, YouTube or FaceBook search can be informative.

Colleges are increasingly requiring increased background information by applicants as a means of screening faculty, staff, administrators, and students. For example, the Common Application, currently used by over 320 colleges and universities, requires the applicant to disclose any conviction of a crime, even a misdemeanor, and any school violation leading to probation, suspension, removal, dismissal, or expulsion.

Other schools have independently adopted similar requirements. Background checks are also increasingly required for "student athletes," as universities are increasingly intolerant of inappropriate behavior by athletes.

¹¹⁵ Problems with hotlines include issues of how to respond to anonymous complaints or a series of harassing complaints, defamation, invasion of privacy, and the permanency and security of electronic files. If the complaints involve conduct or statements in the classroom, then issues of academic freedom and freedom of speech arise – the issues which were raised with the recently discredited speech codes.

These background checks are required even for faculty at some public universities, as well as for health care professionals, whether employees of a university or not.

Potential employers, including my private university, are increasingly requiring potential employees to agree to a background check. The applicant may refuse, but at the risk of being denied employment.

Criminal checks can be performed very quickly on-line. Part of the question though is what happens when something is uncovered, such as a misdemeanor marijuana conviction as an undergrad a few decades earlier, a shoplifting offense four years ago, or a more recent, but isolated, DWI? Are these simply indicative of youthful indiscretions or do they display serious problems.¹¹⁶

These searches will only provide information. The institution has to decide the role and processes involved with the disclosed information, including whether or not the applicant is informed of the unfavorable information.¹¹⁷

3. PSYCHOLOGICAL SCREENING

Psychological screening raises many questions and is by no means reliable at this time. A few cases to date raise troublesome questions about the appropriateness of a university's actions.

¹¹⁶ See e.g., *Hallinan v. Committee of Bar Examiners of the State Bar*, 55 Cal. Rptr. 228 (1966)(earlier history of frequent fights were viewed as “youthful indiscretions” not constituting “moral turpitude).

¹¹⁷ In a sense, the discovery of information is analogous to the character and fitness investigations of the Bar for applicants for admission to the Bar, but applicants clearly have substantive and procedural due process rights in these proceedings. *Id.* An absence of rights will result in scenarios similar to that of credit applicants before enactment of the Fair Credit Reporting Act of 1970, 15 U.S.C. §1681.

A process with protocols should be in place to identify those who pose a threat to themselves or others. Any Psychological screening program has three attributes:

Identification

Reporting

Helping

Upon identification, a process should exist to report these risks to the university. Reporting should be based on observable behavior. While any student, professor, administrator or staff should be able to report risky, observable activity, the reports should not be anonymous.

Finally, the institution should have a program to provide assistance to those who need help. This program, such as through the college's counseling center, should have adequate staffing, which is one of the recommendations coming out of the Virginia Tech investigations.¹¹⁸ A long waiting list should not await those in need of help.¹¹⁹ Of course, many institutions are now expelling or otherwise excluding students perceived to be at risk.¹²⁰

¹¹⁸ Presidential Internal Review, Group Report on the Interface Between Virginia Tech Counseling Services, Academic Affairs, Judicial Affairs and Legal Systems 16 (August 17, 2007)(Hereinafter referred to as "*Counseling Report*").

¹¹⁹ For example, the average waiting time for counseling services is three weeks at the University of California Irvine. The student-psychologist ratio at UCI is 2,178:1. Office of the President, University of California, Student Mental Health Committee, Final Paper, Appendices F & G (Sept. 2006) (hereinafter referred to as "*Student Mental Health Report*").

¹²⁰ See note 132-136., *infra* and accompanying text.

This three step process seems deceptively simple. The problem is that it is based upon a large amount of medical uncertainty and medical judgment calls.

Psychoanalysis is often an art rather than a science; thus psychological screening is notoriously imprecise. While psychotherapists may be liable, especially in California, for failing to warn a patient's victim that the patient posed a threat to the victim,¹²¹ such diagnoses are very imprecise. Indeed, Cho Seung-Hui, the Virginia Tech shooter, was once committed by a judge for observation, but the box checked on the commitment form was "poses a threat to himself." The "poses a threat to others" box was left unchecked.

Psychological profiling is not currently a viable option. A 2002 study sponsored by the Secret Service and Department of Education studied 37 school violence incidents

¹²¹ *Tarasoff v. Board of Regents of the University of California*, 131 Cal. Rptr. 14 (1976)(duty of reasonable care imposed on the psychotherapist to protect the intended victim when the psychotherapist is made aware of the dangers by the patient). *Tarasoff* has been followed by other jurisdictions. *Estates of Morgan v. Fairfield Family Counseling Center, FFFC*, 673 N.E.2d 1311 (Ohio 1997), *Schuster v. Altenberg*, 424 N.W.2d 159 (Wisc. 1988), *Evans v. Morehead Clinic*, 749 S.W.2d 696 (Ky. Ct. App. 1988); *Lundgren v. Fultz*, 354 N.W.2d 25 (Minn. 1984), *Peck v. Counseling Service of Addison County*, 499 A.2d 422 (Vt. 1985). *See also, Durflinger v. Articles*, 673 P. 2d 86 (Kan. 1986)(negligent release of violence-prone patient who then killed his mother and brother); *Peterson v. State*, 671 P. 2d 230 (Wash. 1983). *Contra, see Nasser v. Parker*, 455 S.E.2d 502 (Va. 1995); *King v. Smith*, 539 So. 2d 262 (Ala. 1989).

In *Moskowitz v. Massachusetts Institute of Technology*, 471 N.E.2d 463 (N.Y. Sup. Ct., App. Div. 1984), a jilted boyfriend from MIT threw lye into his ex-girlfriend's face in her Columbia dorm room. She had notified his treating psychiatric social worker of a phone threat he made to her. He had received psychiatric treatment for a week in the MIT infirmary, but the victim was not notified of the possibility of violence by her ex.

from December 1974 through May 2, 2000. It found no accurate or useful profile existed.¹²²

A fear was is that creating a profile creates two major risks. The first is that the great majority of students fitting a given profile will not in fact pose a risk of targeted violence. Thus, over-response is a foreseeable consequence of psychological profiling. On the other hand, students who pose a risk may share few, if any, characteristics of prior incidents.¹²³

Treatment for depression and other psychological disorders is not a key to violent behavior. Absent demonstrated signs of socially unacceptable/criminal behavior, a university cannot exclude students who are “weird” or “neurotic.” Indeed, to do so would result in excluding a high percent of the student body at many colleges. Counseling offices at universities often have a high patient load with antidepressants among the most commonly prescribed drugs on colleges and universities.¹²⁴ One study by the American

¹²² B. Vossekuil, et al, The Final Report and Findings of the Safe School Initiative: Implications for the Prevention of School Attacks in the United States 11 (2002). The assailants were all boys, and all but two were current students. The first recorded instance of a female assailant in such a shooting occurred on February 8, 2008 when a nursing student at Louisiana Technical College shot to death 2 fellow coeds and then killed herself. Jeremy Alford, Student Kills 2 and Herself at a Louisiana College, New York Times, Feb. 9, 2008 at A12, col. 1.

¹²³ Robert A Fein, et al, Threat Assessment in Schools: A Guide to Managing Threatening Situations and to Creating Safe School Climates 17 (2002).

¹²⁴ A 2006 survey of Counseling Center Directors reported that counseling centers saw 9% of enrolled students. Robert P. Gallagher, National Survey of Counseling Centers 2006 at 4. 16.4% of center clients are referred to psychiatric evaluation and 25% are on psychotropic medication, up from 20% in 2003 and 9% in 1994. 2,368 students were hospitalized for psychological reasons, while 8% of the clients were so

College Health Association reported that by 2006 “the rate of college students ever diagnosed with depression” was 15%. Another study found that almost ½ of all college students are so depressed that they have trouble functioning at some point.¹²⁵

Indeed, if my former university is any indication, law students account for a disproportionately high percentage of the patient count.¹²⁶ The first year is especially stressful on many students, and relationships, which lack a solid foundation, will often fail, seemingly always around exam time.

seriously impaired that they either could not remain in school or could only do so with extensive psychological/psychiatric help. *Id.* at 5.

A 2006 study at the University of California reported that ¼ of the students seeking counseling service arrived on campus already taking anti-depressants, lithium, or other psychoactive drugs. *Student Mental Health Report, supra* n. 119 at 3. Studies also show that the caseload is increasing on campuses. ” From 1995 to 2000 the students seeking counseling services rose 40% at Columbia and 50% at M.I.T. From 1996 to 2002 the increase was 55% at the University of Cincinnati. *Id.*

The Director of Counseling and Psychological Services at Stanford says his service sees about 10% of the student body each year. Tamar Lewin, *Laws Limit Colleges; Options When a Student is Mentally Ill*, *New York Times*, April 19, 2007 at A1, col. 2, A18, col. 3 (hereinafter referred to as “*Limited Options*”).

A similar national report is that about 10% of college students considered suicide and 3% complain of depression so great that it made it difficult for them to function. *U.S. News & World Reports*, April 30, 2007 at 43-44.

¹²⁵ *Student Mental Health Report, supra* n. 119 at 3.

¹²⁶ The University of California report found that graduate students are at a higher risk than undergraduates. A Berkeley study of 3,100 graduate students found 45.3% “experienced emotional or stress-related problems that significantly affected their well-being and/or academic performances.” 9.9% had considered suicide in the prescreening 12 months. *Id.* at 5 & Appendix E.

A related issue is that absent 24/7 observation, psychotherapists may be unaware that a patient has stopped taking the prescribed medications. Patients missing appointments are scarcely a rare event.

One of the major problems uncovered in the Virginia Tech tragedy is that while the assailant's weirdness and scary behavior were well known,¹²⁷ no one person at Virginia Tech "was fully aware of the extent of the concern about the individual."¹²⁸ Eventhough he was committed for observation, the consulting psychiatrist felt he did not pose a threat and recommended his release and follow up counseling. No one at Virginia Tech followed up on the counseling because they did not believe it was their responsibility.

The Internal Review recommends creation of a Threat Assessment Team, which should include a Virginia Tech Law Enforcement Officer and the Director of the Office of Services for Students with Disabilities as permanent team members.¹²⁹ The Team would build a fact-based picture of individuals who pose a risk to themselves or others,¹³⁰ and ensure follow-up services.¹³¹ This recommendation should serve as a model for other colleges.

¹²⁷ Two female students filed complaints about him, but did not press charges. His English professors were sufficiently concerned that they discussed him, and one provided special tutoring to him as well as filing a complaint about him. *Counseling Report, supra* n. 118 at 2.

¹²⁸ *Id* at 11.

¹²⁹ *Id* at 2.

¹³⁰ *Id* at 15.

¹³¹ *Id* at 2. These will include monitoring and case management to ensure the student follows the counseling and medication regimes.

A separate issue is that students with symptoms of mental illness may not seek treatment. A survey of 2,785 students at the University of Michigan revealed that 37 – 84% of the students with significant symptoms of depressive or anxiety disorder did not seek treatment even though the University offers free mental health and counseling services. 72% of the students with positive screen for major depression recognized they needed help. However, only 10% of the surveyed students received therapy. 10% also took psychotropic drugs.¹³²

In spite of its limitations, institutions are increasingly relying upon psychological screening and diagnosis to suspend or expel students who may appear to pose a risk to themselves or others. In essence, schools are adopting and enforcing mandatory-leave policies.¹³³

For example, a sophomore checked himself into George Washington Hospital at 2:00am. He was depressed, thinking of suicide. The University's response 1½ days later was to give him notice that his "endangering behavior" conduct violated the code of student conduct. Unless he withdrew while undergoing treatment, he faced suspension or expulsion. He was barred from campus.¹³⁴ His psychological distress was triggered when a close friend, who was his intended roommate for the upcoming academic year,

¹³² University of Michigan News Service, Students With Symptoms of Mental Illness Often Don't Seek Help, [http://www.ns.umich.edu/htdocs/releases/print.php?htdocs/releases/plainstory.php? ID = 5913 & html =](http://www.ns.umich.edu/htdocs/releases/print.php?htdocs/releases/plainstory.php?ID=5913) (June 26, 2007).

¹³³ *In general, see* Counseling Crisis, Inside Higher Education, March 13, 2006, <http://www.insidehighereducation.com/news/2006/03/13counseling>; Karen W. Arenson, Worried Colleges Step Up Efforts Over Suicide, New York Times, Dec. 3, 2004 at A1, col. 3-4.

¹³⁴ See *Nott v. The George Washington University*, Civil Case No. 05-8503 (D.C. Super. Ct.)

committed suicide by jumping from the dorm building.¹³⁵ The sophomore was standing outside the dorm room when the jumper committed suicide. Another student was forced to withdraw from NYU because of depression.¹³⁶

Rather than summarily excluding a student from campus, protocols should be in place to determine the appropriate course of action, such as interim suspension, administrative disenrollment, enrollment denial for medical reasons, disenrollment from a course, or student code and judicial sanctions.¹³⁷

Psychological screening is not though a simple matter. It raises issues, in addition to the uncertainty of psychological diagnosis, of privacy complications,¹³⁸ creating a lack

¹³⁵ A settlement was reached on October 31, 2006, with the terms not revealed. Daniel de Vise, GWU Settles Lawsuit Brought By Student Barred For Depression, *washingtonpost.com*, Nov. 1, 2006, http://www.washingtonpost.com/wp-dyn/content/article/2006/10/31/ar2206103101193_pf.html (last visited July 10, 2007). City University of New York (CUNY) reached a \$65,000 settlement with a student barred from her dormitory room because she was hospitalized after a suicide attempt. *Limited Options*, *supra* n. 124 at A18, col. 1.

¹³⁶ A freshman spoke about suicidal thoughts to a graduate student at the NYU Counseling Center, followed quickly by involuntary suspension. Sadia Latifi, Beyond Finger-Pointing: Addressing College Suicide, *columbiaspectator*: online edition, <http://columbiaspectator.com/?q=node/20823/print> (last visited December 30, 2007).

¹³⁷ *Counseling Report*, *supra* n. 118 at 21. Protocols may already exist for hospitalization, including involuntary hospitalization, as illustrated by the overnight commitment of Cho Seung-Hui at Virginia Tech.

¹³⁸ The Family Educational Rights and Privacy Act of 1974 (FERPA), 20 U.S.C. §1232g, bars schools from sharing, disclosing, or divulging information in a student's records without the student's authorization. FERPA's provisions of confidentiality are viewed as posing an obstacle to the release of information

of trust in the counseling center, precipitous decisions, potential adverse effects on the psyche of the student, prolonging the length and costs of higher education, and over-responding.

The great risk of suspension or expulsion is the triggering of an immediate or delayed violent response unless coupled with containment and support.¹³⁹

What is certain is that after the tragic shootings at Virginia Tech, colleges will be much more aggressive in asking potentially violent and suicidal students to leave the school, either temporarily or permanently.

III. THE RESPONSE EFFORT

The duty to anticipate, foresee and act reasonably in light of that risk, including the preparation of a viable EAP, is just a normal advance in the common law. The duty of

regarding patients and their risk. In fact, FERPA contains an exception for health and safety. The disclosure of a student's educational records to those with a need to know is allowable in situations including an immediate need to share the information to protect the health or safety of the students or others. 34 C. F. R. § 99.31 (a) (10).

Students can also waive their right to confidentiality by executing student privacy waivers, whereby institutions can share the student's records with their parents or guardians. For example, 6,000 students at Temple signed such a waiver in 2006. Elizabeth Bernstein, Families Grapple With Student privacy, Wall Street J., Sept. 20, 2007 at D1, col. 3,

The basic issue is one of balancing the safety of society with individual liberties, including those of privacy. Societal needs historically outweighed personal autonomy, with reasonable mistakes being tolerated. *See e.g. McGuire v. Amyx*, 297 S.W. 2d 968 (Mo. 1927).

¹³⁹ Robert A. Fein, et al, Threat Assessment in Schools: A Guide to Managing Threatening Situations and to Creating Safe School Campuses 64-65 (United States Secret Service and Department of Education 2002).

reasonable care includes both anticipating foreseeable risks, and taking reasonable steps to either forestall or minimize their effects should the risk materialize.

Depending upon their geographical location, colleges must content with blizzards, earthquakes, fires¹⁴⁰ and wildfires, flooding, hurricanes,¹⁴¹ ice storms, power outages,¹⁴² tornadoes, and windstorms. As Prosser & Keeton note,¹⁴³ defendants must anticipate the

¹⁴⁰ A solvent distillation fire in July 2001 caused \$3.2 million in damages, destroyed a chemistry lab, and closed a building for five days at the University of California Irvine. A fire in January 2002 destroyed 2 molecular biology labs at UC Santa Cruz. The building was closed for six weeks. Research Seismic Recovery Work Group, Office of the Vice Chancellor-*research, UC Berkeley Research Recovery Action Plan 6 (April 14, 2004)(hereinafter referred to as "Seismic Recovery Plan")*.

¹⁴¹ Hurricane rains in June 2001 flooded the Texas Medical Center Campus in Houston, Texas, resulting in \$2 billion in damages, and interrupting research for months. *Id.*

¹⁴² Columbia University and the Columbia-Presbyterian Medical Center incurred sustained power outages in July 1999. *Id.* at 7.

¹⁴³ W. Page Keeton, et al, Prosser & Keeton on the Law of Torts §44, at 304 (1984). See also, Denis Binder, Act of God? Or Act of Man?: A Reappraisal of the Act of God Defense in Tort Law, 15 Review of Litigation 1, 28-29 (1996). See e.g., *Kline v. United States*, 339 F. 2d 512, 516 (2d Cir. 1964) (finding landlord negligent for allowing ice to form in walkway causing plaintiff to slip); *Cachick v. United States*, 161 F. Supp. 15, 18 – 19 (S.D. III. 1958) (finding Government negligent for failing to secure stands at air show so that they could withstand foreseeable forces of nature); *Fairbrother v. Wiley's, Inc.*, 331 P. 2d 330, 336 – 37 (Kan. 1958) (finding department store owner negligent for failing to secure windows in store from frequent wind gusts); *Clark's Adm'r v. Kentucky Utils. Co.*, 158 S.W. 2d 134, 137 (Ky. 1941) (finding utility company negligent for electrocution, from lighting, of a child when grounding wire would have prevented accident); *A.M. Holter Hardware Co. v. Western Mortgage & Warranty Title Co.*, 149 P. 489 (Mont. 1915); *White v. Dickerson*, 105 S.E. 2d 51, 58 (N.C. 1958) (finding contractor negligent for failing to foresee effect of fog to users of bridge).

usual weather of the vicinity, including all ordinary forces of nature, and then plan accordingly.

The reasonable foreseeability of these risks creates a duty¹⁴⁴ to employ reasonable care to reduce the risks of a disaster. The duty of reasonable care extends to those foreseeably injured by the negligence, and not just those in privity of contract with the defendant.¹⁴⁵ Even inspectors, who are neither in a relationship to the victims nor

¹⁴⁴ Indeed, an OSHA guideline recognizes EAP's "should address emergencies that the employer may reasonably expect in the workplace," including fire, toxic chemical releases, hurricanes, tornadoes, blizzards, and floods. 29 C.F.R. §1910.38, Appendix to Subpart E (2002).

¹⁴⁵ See e.g. *Navajo Circle, Inc., v. Development Concepts*, 373 So. 2d 689 (Fla. Ct. App. 1979), where a condominium association and a unit owner were allowed to seek damages to the roof and the exterior walls from the architect for negligently supervising the construction and subsequent repairs of the roof, and also from the contractor for negligently constructing the roof. See also *Kristek v. Catron*, 644 P.2d 480 (Kan. App. 1982) (contractor liable to a third party); *Seiler v. Levitz Furniture Co.*, 367 A.2d 999 (Del. 1976) (liability of architect/engineer to tenant); *Heigh v. Wadsworth*, 361 P.2d 849 (Okl. 1961) (contractor liable to purchaser's tenant); *Waldor Pump & Equipment Co. v. Orr-Schelen-Meyerson & Co.*, 386 N. W.2d 375 (Minn. App. 1986); *Montijo v. Swift*, 33 Cal. Rptr. 133 (Cal. App. 1963); *Lumber Products, Inc. v. Hiriart*, 255 So.2d 783, 787 (La. Ct. App. 1971); *S.K. Whitty & Co., Inc. v. Laurence L. Lambert & Assoc.*, 576 So.2d 599 (La. Ct. App. 1991); *Evans v. Howard R. Green Co.*, 231 N.W.2d 907, 913 (Iowa 1975); *Mudgett v. Marshall*, 574 A.2d 867 (Me. 1990); *Miller v. DeWitt*, 208 N.E.2d 249, 284 (Ill. App. 1965) ("The architects may be liable for negligence in failing to exercise the ordinary skill of their profession, which results in the erection of an unsafe structure whereby anyone lawfully on the premises is injured.") In terms of measuring the potential liability to third parties, the court in *Coburn v. Lenox Homes, Inc.*, 441 A.2d 620, 624 (Conn. 1982) stated:

A duty to use care may arise from a contract, from a statute, or from circumstances under which a reasonable person, knowing what he knew or should have known, would

operating a facility, may be liable for negligence for failure to discover the problems.¹⁴⁶ Liability thus extends to any person who foreseeably is at risk through the failure to exercise reasonable care.

For example, excessive precipitation may result in the overtopping of a dam, but the duty of reasonable care may necessitate the dam owner designing the dam with an emergency spillway adequate to pass the probable maximum flood (PMF).¹⁴⁷ It may also include the preparation of an emergency action plan with provisions to warn the threatened population.¹⁴⁸

Campus emergencies involving criminal acts, suicides, and acts of mass violence and terrorism are just as foreseeable risks as forces of nature. While prevention of the

anticipate that harm of the general nature of that suffered was likely to result from the act or *failure to act*.

¹⁴⁶ See e.g. *Ingram v. Howard-Needles-Tammen & Bergendorf Corporation*, 672 P.2d 1083 (Kan. 1983); *Phillips v. United States*, 801 F. Supp. 337, 348 (D. Idaho 1992), *aff'd* 15 F.3d 1088 (9th Cir.); *Johnson v. Burley Irrigation Dist.*, 304 P. 2d 912, 915 (Idaho 1956)(existence of gophers should have been discovered through an inspection); *Ayala v. Boston Housing Authority*, 404 Mass. 689, 705 (1989); *Derosia v. Metal Products Co.*, 519 A. 2d 601 (Vt. 1986).

¹⁴⁷ *Barr v. Game, Fish & Parks Commission*, 497 P.2d 340 (Colo. Ct. App. 1972). Design plans for the Dam called for a spillway capacity of 33,000 cubic feet per second (cfs). The actual spillway, as constructed, had a 4500 cfs capacity. The probable maximum flood was 200,000 cfs, although the previously known high flow of water was 27,500 cfs. The peak of the flood that occurred was 158,000 cfs with an estimated 75,000 – 100,000 cfs passing over the top of the dam. Defendants claimed act of God as defense. The court rejected that defense, holding the defendants negligent in designing an inadequate spillway.

¹⁴⁸ *Coates v. United States*, 612 F. Supp. 592 (C.D. Ill. 1985).

incident may not always be reasonably possible, reasonable efforts should be made to minimize the foreseeable consequences.

A. EMERGENCY ACTION PLANS

Case law on emergency action planning is just beginning to develop,¹⁴⁹ but the decisions so far present a strong case for institutions to prepare EAP's for foreseeable events. In essence, these germinal cases are developing a tort of negligent failure to plan.

The consequences of failing to have an emergency action plan are shown by the failure of Lawn Lake Dam on July 15, 1982. The dam sat high up in the Rockies overlooking the resort community of Estes Park, Colorado. Between the dam and Estes Park was the smaller Cascade Dam. The dam was privately owned by the Farmers Irrigation and Ditch Company, but was located on public National Park Service land.

¹⁴⁹ See *Bluestone Emergency Design, Inc. v. Federal Energy Regulatory Commission*, 74 F.3d 1288 (D.C. Cir. 1996); *IBP, Inc. v. Iowa Employment Appeal Board*, 604 N.W.2d 307 (Iowa 1999); *Engle v. West Penn Power Co.*, 598 A.2d 290 (Pa. Super. Ct. 1991). In a few cases, the emergency action plan is simply a tangential aspect of the case. See e.g. *Avery v. City of Indianapolis*, 2000 WL 1469361 (S.D. Ind. 2000). Of course, reasonable care should be exercised in a training exercise. See *Miskovich v. Independent School Dist.* 318, 226 F. Supp. 2d 990 (D. Minn. 2002).

Of peripheral interest is *DFDS Seacruises (Bahamas) Ltd. v. United States*, 676 F.Supp. 1193 (S. D. Fla. 1987), which held the Coast Guard was not liable for failing to establish a shipboard firefighting contingency plan. The suit was brought under the Federal Torts Claim Act, 28 U.S.C. §2680(a)(1994), and thus subject to the discretionary function exception, which precludes liability when the government agency is engaged in an act of discretion. The court stated: "However desirable such contingency planning may be, decisions as to whether, where and when to expend time and resources to develop such plans are entrusted to the Coast Guard's judgment and are not reviewable" 676 F. Supp. at 1205.

The dam failed before 6:30 a.m. The Park Service was soon notified. Within 20 minutes a Ranger was dispatched to warn downstream campers.¹⁵⁰ He proceeded, in a somewhat desultory manner, to warn without a sense of urgency several, but not all, of the campers. The flood wave caused the lower dam to fail, causing extensive loss of life and property damage. The district court found several instances of negligence on the part of the government, and awarded \$480,000 to the family of a deceased camper.¹⁵¹ The court held the government had a duty to prepare an emergency action plan:

Because these national parks are outdoors and, therefore, subject to extreme and sometimes unexpected weather changes, structural failures such as the one at issue here, other flash floods, and major fires which occur, changes may be sudden and dramatic (because of acts of God or foibles of man). Therefore, the Government, in creating this relationship with citizens, also creates a duty for itself to develop orderly procedures for dealing with emergencies.¹⁵²

The Court presciently stated:

It is imperative to have a plan in place because in such situations there is little time for reflection. Priorities should be established before an emergency arises; otherwise personnel are unprepared to deal with them.¹⁵³

¹⁵⁰ *Coates v. United States*, 612 F. Supp. 592, 593 (C.D. Ill. 1985)(The breach was fortuitously noticed by a garbage truck driver on his early morning rounds).

¹⁵¹ *Id.* at 594. Plaintiff and his wife were not warned by the Ranger, but learnt second-hand that campers were being advised to evacuate. The plaintiff went to his car to get his camera and take pictures while his wife woke the children and prepared to leave. He drowned in the surging floodwaters.

¹⁵² *Id.* at 595-96.

¹⁵³ *Id.* at 596.

The court noted: “Elementary lapses, obvious with the clarity of hindsight, could have been avoided through the development of orderly procedures for warning and evacuating people in the park in the case a crisis arose.”¹⁵⁴ The court held a duty existed:

The exercise of reasonable care mandated, at a minimum, the issuance of careful and complete warnings to all of the people who were camped in or otherwise using areas of the park which were downstream from Lawn Lake Dam.¹⁵⁵

A second case arose out of Hurricane Katrina. A class action suit, arising out of an oil spill, was consolidated in January 2006. Murphy Oil had a 250,000 barrel above-ground storage tank at its Meraux Refinery in the Katrina flooded St. Bernard Parish outside New Orleans. About 25,110 barrels of crude oil escaped, some of which contaminated surrounding neighborhoods.¹⁵⁶ A critical question for the district court in determining the appropriateness of the class action suit was: “[W]hether Murphy Oil had hurricane safety plans, and whether those plans were carried out during Hurricane Katrina”¹⁵⁷

The failure to plan for emergencies is also shown by litigation involving the 1993 World Trade Center bombing.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ The Agency for Toxic Substances and Disease Registry estimated 1,800 homes and an undetermined number of other structures were affected by the spill. *Turner v. Murphy Oil USA, Inc.*, 234 F.R.D. 597, 603 (E.D. La. 2006).

¹⁵⁷ *Id.* at 604. The case went forward on theories of negligence, statutory law, absolute and strict liability under Louisiana law, nuisance, trespass, and groundwater contamination. The case was settled on September 25, 2006 for \$330 million. 37 BNA *Env't. Rptr.* 2007 (Sept. 29, 2006).

On February 26, 1993 a truck bomb exploded in the underground public parking garage of the World Trade Center, killing six, and injuring scores. The Port Authority of New York and New Jersey had earlier created a terrorist planning and intelligence section, which submitted a report in 1984. Other reports, stories, and recommendations followed. The vulnerability of the parking garage received several recommendations for improved security. These recommendations were not implemented.

Plaintiffs asserted negligence against the Port Authority.¹⁵⁸ Defendant's defenses included the lack of foreseeability of the bombing as a matter of law.¹⁵⁹

Defendant's claim that the risk was unforeseeable was viewed as a question of fact for the jury.¹⁶⁰ The duty is to provide minimal security precautions against reasonably foreseeable criminal acts.¹⁶¹ The Port Authority had a legal duty to exercise reasonable care to maintain the premises in a reasonably safe condition.¹⁶²

However, foreseeability includes both "what the landlord actually knew and what it reasonably should have known,"¹⁶³ a variation of the known or reasonably should have known standard for negligence. In light of that foreseeability, the proper level of safety measures is a question of fact. Echoing *Palsgraf*,¹⁶⁴ the Court focused the inquiry "on

¹⁵⁸ *In the Matter of the World Trade Center Bombing*, 776 N.Y.S. 2d 713 (Sup. Ct. 2004).

¹⁵⁹ *Id.* at 726.

¹⁶⁰ *Id.* at 734.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Palsgraf v. Long Island RR. Co.*, 162 N.E. 99 (N.Y. 1928).

what risks were reasonably to be perceived.”¹⁶⁵ The Port Authority’s own acts regarding the risk of a terrorist attack on the WTC demonstrates the perceived risk.¹⁶⁶

Even with modern advances in science, we are unable to prevent the occurrence of a major event, such as an earthquake, the exact path of a storm such as a hurricane or tornado, or even control the physical course of natural forces, such as floods.¹⁶⁷ However, while science may be unable to predict the timing or location of an earthquake, the precise course of a hurricane, or where a tornado may touch down, we expect builders and developers to foresee the risks, and then take reasonable steps to mitigate their impact, including design,¹⁶⁸ construction,¹⁶⁹ operations,¹⁷⁰ maintenance,¹⁷¹ and

¹⁶⁵ 776 N.Y.S.2d. at 735.

¹⁶⁶ *Id.* at 736.

¹⁶⁷ Dams, levees, reservoirs, and similar measures are not always effective in preventing floods, or overtopping.

¹⁶⁸ See e.g. *Barr v. Game, Fish and Parks Commission*, 497 P.2d 340 (Col. Ct. App. 1972), *S.K. Whitty & Co. Inc. v. Lawrence L. Lambert & Assoc.*, 576 So. 2d 599 (La. Ct. App. 1991); *Oklahoma Ry. Co. v. Boyd*, 282 P. 157, 163 (Okla. 1929). *Milton J Womack, Inc. v. House of Representatives*, 509 So. 2d 62, 67 (La. Ct. App. 1987) (holding architectural firm liable for negligently prepared plans), *writ denied*, 513 So. 2d 1208 (La. 1987).

¹⁶⁹ See e.g. *Shell v. Town of Evarts*, 178 S.W. 2d 32, 35 (Ky. 1944) (finding that the injury to the plaintiffs’ property “was the natural and to be expected result of the defendants’ negligent construction). The concept of liability for construction defects long precedes the common law, going back to the hallowed Code of Hammurabi, which provided that in the case of “a house being so carelessly built as to cause death to the owner’s son,” the builder’s son was to be put to death. Gibson B. Witherspoon, ARCHITECTS’ AND ENGINEERS’ TORT LIABILITY, 16 D.L.J. 409 (1967).

inspections.¹⁷² For example, a lightning bolt may be a force of nature, but failure to ground a utility line is a negligent act of humans.¹⁷³

The ‘second collision’ theory in automobile accidents is a further example of this rule. Liability can be imposed upon a manufacturer when a safer design of a vehicle would

¹⁷⁰ See e.g. *Gutierrez v. Rio Rancho Estates, Inc.*, 605 P.2d 1154 (N. Mex. 1980) and *Bruton v. Carolina Power and Light Co.*, 6 S.E.2d 822 (N.C. 1940).

¹⁷¹ *Curtis v. Dewey*, 475 P.2d 808 (Idaho 1970); *Hayashi v. Alameda County Flood Control and Water Conservation District*, 343 P.2d 1048 (Cal. Ct. App. 1959); *Bowling v. City of Oxford*, 148 S.E.2d 624 (N.C. 1966); *Carlson v. A&P Corrugated Box Corp.*, 72 A.2d 290 (Pa. 1950). *Webb v. Platte Valley Pub. Power & Irrigation Dist.*, 18 N.W. 2d 563 (Neb. 1945); *Little v. Price*, 397 P.2d 15 (N.M. 1964); *Glover v. Hardeman County*, 713 S.W. 2d 73 (Tenn. Ct. App. 1985). See also *Kimble v. Mackintosh Hamphill Co.*, 59 A.2d 68, 71 (Pa. 1948).

¹⁷² See e.g. *Ingram v. Howard-Needles-Tammen & Bergendoff*, 672 P.2d 1083 (Kan. 1983) (finding that inadequate inspection and maintenance constitute a breach of the duty owed foreseeable victims, citing Restatement (second) of Torts § 324A (1965)). See also *Phillips v. United States*, 801 F. Supp. 337, 348 (D. Idaho 1992) (finding that defendant owed a duty “to inspect reconstruction work to ensure that the work did not result in an unsafe condition of the road.”), *aff’d*, 15 F. 3d 1088; *Johnson v. Burley Irrigation Dist.*, 304 P.2d 912, 915 (Idaho 1956) (finding that the existence of gophers should have been discovered through an inspection).

¹⁷³ *Central Ga. Elec. Membership Corp. v. Health*, 4 S.E. 2d 700, 702 (Ga. Ct. App. 1934); *Tex – Jersey Oil Corp. v. Beck*, 292 S.W. 2d 803, 817 (Tex. Civ. App. – Texarkana 1956), *aff’d in part and rev. in part*, 305 S.W. 2d 162 (Tex. 1957) (Lightning struck storage tanks which not vapor proof, but with open holes on top). The ancient mime writer, Publilius, once wrote, “It is vain to look for a defense against lightning.” John Bartlett, *Bartlett’s Familiar Quotations* 127a (14th ed. 1968). A lightning rod solves a lot of lightning problems today.

have prevented or reduced the resulting injuries, even if the driver was intoxicated and not wearing a seatbelt.¹⁷⁴

A General Accounting Office study found that 32 states had laws or other policies requiring school districts to have EAP's. An estimated 85% of school districts required schools to engage in emergency planning.¹⁷⁵

1. IMPLEMENTATION OF THE PLAN

The response effort may be the key to minimizing the risks. Critical factors include:

Preparation of the plan;

Periodically updating and testing the plan;

Communications; and

Flexibility.

An unplanned, uncoordinated response may succeed, but the odds are against it.

A college may be caught totally unaware at the onset of an emergency. "The Fog of War" may set in. However, the response effort, guided by the EAP, should be implemented as soon as possible, preferably within minutes.

In addition, the onset of a major emergency may often be met with disbelief, followed rapidly by background noise, chatter, chaos, confusion, fear, hysteria, panic, and rumors,¹⁷⁶ and then perhaps by indecision and paralysis. A major problem, especially at

¹⁷⁴ *D'Amario v. Ford Motor Co.*, 806 So. 2d 424 (Fla. 2001); *Alomi v. Volkswagen of America, Inc.*, 766 N.E 2d 574 (N.Y. 2002).

¹⁷⁵ United States General Accounting Office, *Emergency Management: Most School Districts Have developed Emergency Management Plans, But Would Benefit from Additional Federal Guidance* 4 (GAO-07-609, June 2007).

the beginning of the emergency, is information assessment, to cut through the fog, assess the situation, prioritize the response efforts, and marshal, deploy and track critical resources.¹⁷⁷ Response efforts may often involve difficult judgment calls in rapidly unfolding, confusing scenarios where time is of the essence. An emergency action plan may facilitate these efforts.

2. UPDATING AND TESTING THE PLAN

An outdated plan may be worse than useless; it might provide a false sense of security as well as result in a waste of time during an emergency and the exercise of

¹⁷⁶ Instances of the confusion inherent in major disasters can be shown by the events of 9/11. Reporters afterwards commented on their recollections. Amy Morris in Washington, D.C. stated: “The rumors started to fly: The State Department had been car-bombed. The Old Executive Office Building had been hit. The Capitol was burning.” Tony Castrilli, also of Washington, stated: “We had reports that a car bomb had exploded at the State Department and that there was a fire at Union Station—even a report that the Gannett Tower in Arlington was burning. All this caused chaos at the news desk.” Bill Muller, a cameraman in New York City echoed these observations: “On the streets in Lower Manhattan, we weren’t getting any information from the assignment desk, so everything we learned came by word of mouth. We heard that ten planes had been hijacked and that one had hit Philadelphia, another Washington, then another, Camp David. We heard one had flown into the Sears Tower in Chicago and that California was also hit. One rumor was that the planes that had hit the towers were carrying anthrax or some other germs.” ALLISON GILBERT, *et al.*, *COVERING CATASTROPHE: BROADCAST JOURNALISTS REPORT SEPTEMBER 11* 145-146 (Bonus Books 2002).

¹⁷⁷ For example, police at Virginia Tech initially thought the first two shootings at 7:00am in a dorm were a domestic violence incident, and then spent their initial efforts tracking down and questioning the boy friend of the female victim. *Chronicle of Higher Education*, April 27, 2007 at A18, col. 2. (investigators thought it was an “isolated incident, domestic in nature”).

avoidable futile actions. The plans should be revised and updated at least annually.¹⁷⁸ A simple step is to periodically verify and update critical contact numbers.¹⁷⁹

For example, Virginia Tech discovered a lack of emergency contact numbers, especially for students. Some were missing or unreliable. The parents' information and home addresses were frequently unavailable.¹⁸⁰

Large scale, or campus wide testing may be impractical on a large campus. However, Virginia Tech recommends the use of a common alternative for planners - table top exercises.¹⁸¹

3. COMMUNICATIONS

The tragic events at Virginia Tech again raised issues of on-going communications problems for responders. They did not though play a causal role in the tragedy, but they reemerged nevertheless. Police, fire and rescue responders from the responding agencies used incompatible communications systems.¹⁸² Equipment did not always work, and some structures, significantly including Norris hall where most of the shootings occurred, had cell phone dead zones.¹⁸³

¹⁷⁸ Confidential Presidential Working Paper, Information and Communications Infrastructure:

72 (August 17, 2007).

¹⁷⁹ This requirement applies to the post-incident period as well.

¹⁸⁰ *Id* at Appendices 72.

¹⁸¹ *Id* at 28. These exercises should be annual.

¹⁸² *Id* at 2, 18. The responding agencies used incompatible VHF, UHF and 800MHz bandwidths. For example, the Blacksburg Fire Department provided the command trailer. It uses VHF, as does the Virginia Tech Police, but the Blacksburg Police use 800MHz. *Id* at 22-23.

¹⁸³ *Id* at 15.

As is often the case in a major emergency, cell phone and land lines systems were congested, resulting in forced blockages;¹⁸⁴ that is, an inability to get through. The University experienced a large volume/demand on its information technology resources.¹⁸⁵

A critical constraint for the success of an EAP is accessibility, coupled with familiarity, with the plan. The EAP should not be restricted to campus security/public safety officers. The broader community is at risk and should be informed. The campus community needs to know what to do in an emergency. A prerequisite is that they must receive timely notice of the emergency. Failure either to prepare an EAP, or to have it readily available,¹⁸⁶ may well lead to liability, and convey a message of indifference. A college's EAP is not a state secret.¹⁸⁷

Today's generation of students live on the internet.¹⁸⁸ Therefore access to the plans should be readily available on-line. As the second wave of shootings unfolded, the University increased the capacity of its web page accessibility by replacing the normal homepage with a standby, stripped down version. This alternative home page is a simple contingency step which can be easily maintained at any institution.

¹⁸⁴ *Id* at 2.

¹⁸⁵ Prior to April 14, 2007 the largest single monthly demand on the University's web site was 455 gigabytes. On April 16, 2007 it reached 432 gigabytes in one day. *Id* at 9.

¹⁸⁶ Obviously, some facilities, especially biological, chemical, or nuclear, may need secrecy because of potential security concerns, but secrecy is an enemy of effective response.

¹⁸⁷ See e.g. *Trepanier v. Ryan*, 2003 WL 21209832 (N.D. Ill. 2003).

¹⁸⁸ Sometimes excessively with laptops in the classroom.

A different compatibility issue existed in the dispatch center. Separate headphones had to be used for the 9/11 emergency calls and the radio communications with responders. The recommendation is for a single headset to monitor both.¹⁸⁹

Other problems arose in the call center established by Virginia Tech in the immediate aftermath of the tragedy. Some of the operators lacked immediate access to the needed information. In addition, as is foreseeable with any diverse student body, many of the incoming calls were not in English, which caused a communication problem.

To further convey urgent messages in the future, Virginia Tech is considering installing internal message boards in classrooms and external message boards at the entrance to the campus.¹⁹⁰

4. FLEXIBILITY

While flexibility may seem the antithesis of planning, the reality is that hardly any incident will unfold as planned. “The Fog of War” equally applies to domestic emergencies. As General Dwight Eisenhower said before D-Day: “The plan is nothing; planning is everything.” Every major emergency will be unique, and every major tragedy presents lessons for improvement. Prior lessons and a rigid EAP will not be totally applicable in any new scenario.

A different approach is to learn the lessons from prior incidents. The tragedies of Columbine and Virginia Tech have led, and will lead, to a reassessment of response efforts. The perils of strictly following a plan when it is no longer applicable are

¹⁸⁹ *Id* at 40.

¹⁹⁰ *Id* at 18.

demonstrated by the tragic shootings at Columbine High School in Littleton, Colorado on April 20, 1999.¹⁹¹ Two students, Eric Harris and Dylan Klebold, started shooting outside the school around 11:17am and then moved into the school. They committed suicide around 12:14pm, which became known to authorities by 12:30pm. The tragic toll was 12 students and one teacher killed and dozens wounded.

The first 911 calls came in at 11:21am. Law enforcement officers from throughout the area responded. A teacher, William Sanders, was wounded at 11:40am and collapsed in Science Room 3. Constant phone calls detailing the declining health status of Sanders were made to the 911 operators. Not until 4:00pm did the S.W.A.T team enter Science Room 3.

A command post, staging area, and perimeter were established early in the incident. Multiple orders were issued to not permit access to or egress from the facility; the effect was to preclude any escape or rescue efforts. The sheriff's office characterized the situation as a "hostage" situation rather than as a "high risk" situation. S.W.A.T. teams conducted a slow, methodical, room-by-room sweep with Science Room 3 in the last area reached. At that point, they ordered everyone to leave the room, including those applying pressure to the teacher's wounds. His wounds, "heretofore survivable ... became fatal."¹⁹² The case involved issues of constitutional violations, governmental immunity, and 42 U.S.C. §1983.

¹⁹¹ *Sanders v. Board of County Commissioners of the County of Jefferson, Colorado*, 192 F. Supp. 2d 1094 (D. Col. 2001).

¹⁹² *Id* at 1103.

The actions were protected during the first 75 minutes of the attack. The interests of public and officer safety outweighed the rescue needs of the students and staff.¹⁹³

Upon the awareness of the deaths of the assailant, a time to deliberate ensued. The awareness of the teacher's condition and location coupled with the affirmative actions of blocking access and rescue became a deliberate indifference to the teacher's plight.¹⁹⁴

The acts were viewed as reckless and conscience shocking.

The law suit was subsequently settled for \$1,500,000.¹⁹⁵ Response procedures changed after this tragedy.

B. LEASONS LEARNED

Some effective changes can be very low tech. For example, after Charles Whitman entered the observation tower on the top of the 28 story University of Texas Library Tower in 1966, he started firing below, killing 16 and wounding 30. The tower

¹⁹³ The tragedy was viewed as a "volatile emergency situation, the scope and nature of which was unprecedented." *Id.* at 1105.

¹⁹⁴ The Court distinguished between "emergency action and actions taken after opportunity for reflection." *Id.* at 1130. Deference was given to decisions occurring in emergency situations. Calculated indifference may shock the conscience when time to deliberate exists. *Id.* See also, *Schnurr v. Board of County Commissioners of Jefferson County*, 189 F. Supp. 2d 1105 (D. Colo. 2001)

¹⁹⁵ Karen Abbott & Charley Able, Sanders Settles Columbine Suit Daughter of Slain Teacher Agrees to \$1.5 million Questions Won't Be Answered, Rocky Mountain News, August 21, 2002 WNLR 1111818.

was closed off.¹⁹⁶ Similarly, after a suicide from Berkeley's Campanile, the tower was enclosed to prevent future jumpers.¹⁹⁷

Prior to the second round of shootings at Virginia Tech, the perpetrator chain locked the main doors to Norris Hall. Officers had to shotgun open the doors.

Recommendations in the aftermath include changing the locks and accompanying mechanism and hardware to preclude any future chaining.¹⁹⁸ In addition, the locking mechanism on the classroom doors may be changed so as to be lockable from the inside,¹⁹⁹ as well as installing computer-controlled locking systems to allow police to lock interior and exterior doors.²⁰⁰

The initial phase of an incident will often be obscured by the proverbial fog of war. Thus, in Virginia Tech initial reports were that it might have simply been a version of a domestic dispute with the assailant suffering from a broken heart with the initial victim being the girlfriend. No broader threat to the greater campus community was perceived, and campus wide warnings delayed for two hours.²⁰¹ If it was a domestic dispute, then broad warnings would have been viewed as an overreaction.

¹⁹⁶ In addition, he had killed his mother and wife the night before. *Major Shootings, supra* n. 4 at p. A19, col. 1.

¹⁹⁷ On January 4, 1961 a sophomore jumped to his death from the 307 foot tall Campanile. Glenn Seaborg, Chancellor at Berkeley 678 (University of California 1994).

¹⁹⁸ *Security Infrastructure Report, supra* n. 15 at 2, 10.

¹⁹⁹ *Id* at 10.

²⁰⁰ *Id* at 11-12.

²⁰¹ The first email went out to faculty and students at 9:26am, urging people to be cautious and report suspicious activity. Chronicle of Higher Education, April 27, 2007 at p.A8, col. 2. The initial reports of additional shooting at Norris Hall came in at 9:45am. An email was then sent out at 9:50am: "Please stay

The decision to close a campus is a momentous act – one which should not be taken casually or cavalierly. The decision seems clear cut in some circumstances, such as in advance of a pending blizzard or hurricane. However, even these scenarios may include judgment calls, such as a decision by administrators at 4:00am to close a campus because of the forecast of snow.²⁰²

Virginia Tech illustrates the dilemma of over versus under reacting. Early in the fall of the academic year, a prisoner escaped near the campus. He killed a hospital guard and a deputy sheriff. Virginia Tech responded with a limited evacuation. In the two hours after the initial shootings at Virginia Tech, the university president mused if he had overreacted during the prior incident.²⁰³

Yet, one procedure is available to all campuses today: multiple means exist to notify the campus community. These include emails, instant messaging, text messaging, website postings, pod casting, public address announcements, radio announcements, mass media, pager, personal contacts, subscriber message systems, voice mail, and dedicated cell phone calling and messaging. Reverse 911 calls were effective in the recent Southern California Wildfires to warn residents to evacuate.²⁰⁴ Information releases should be timely, accurate, and succinct.²⁰⁵

put,” and “A gunman is loose on campus. Stay in buildings until further notice. Stay away from windows.” *Id* at A9, col. 1. An email at 10:10am cancelled classes. At 10:52am another email was dispatched, stating that one shooter was in custody and the authorities were continuing to search for a second shooter.

²⁰² Such a reasonable decision may risk, in hindsight, being either an over or under reaction.

²⁰³ Special Report: The Making of a Massacre, *Newsweek*, April 30, 2007 at 22, 30.

²⁰⁴ An automated phone system, commonly referred to today as a reverse 911, was used by the city of San Diego to contact 85,792 homes, providing warning or evacuation calls, during the October 2007

A simple, but effective message might be along the lines of: “A shooting has occurred in/at [BUILDING] at [TIME]. The current location of the attacker is unknown. Please stay in place and secure your room until further notice.”

One of the lessons from Virginia Tech is that the campus community looks to the college’s web site for information. Visitors to the Virginia tech website jumped up to “150,000 unique visitors per hour” in the aftermath of the shootings.²⁰⁶

Yet, internet access is not always quick, convenient, or easy, especially when time is of the essence in an emergency or otherwise under stressful conditions. Most universities need to simplify the search process for emergencies on their web sites.

A search of the home pages²⁰⁷ of the 51 universities listed as the nation’s top 50 doctoral universities by U.S. News & World Reports,²⁰⁸ showed that only 17 had a link to emergencies, or the equivalent such as public/campus safety, on their home page.²⁰⁹ 18

wildfires. Separate calls were made by the San Diego Sheriffs Office and San Diego County to reach an additional 337,000 and 171,919 homes respectively. Steve Hyman & Duke Helfand, O.C., L.A. County Lack a Reverse – 911 System, Los Angeles Times, October 25, 2007 at B6, col. 4, 5. Reverse 911 systems are increasingly being adopted to provide timely information.

²⁰⁵ Timely warnings may, depending on the nature of the emergency, provide time to seek shelter, evacuate, or lock – down. The duty to warn should extend to all those reasonably at risk.

²⁰⁶ Scott Carlson, Emergency at Virginia Tech Shows the Power of the Web, Says Campus Officials, Chronicle of Higher Education at 28, col. 2.

²⁰⁷ The search was conducted on August 24, 2007.

²⁰⁸ 51, instead of 50, because a tie existed for the fiftieth spot (Syracuse and Tulane). U.S. News & World Reports, America’s Best Colleges, 2008 Edition (2007).

²⁰⁹ Cornell, Johns Hopkins (campus security), Carnegie Mellon (Offer to sign up for emergency alerts), Georgetown, Virginia, UCLA, Michigan (influenza), USC, Lehigh, William & Mary, Georgia Tech,

required typing in “emergency” in the search box,²¹⁰ while ten were available under the link for “current students” or the equivalent.²¹¹ At five universities, emergencies were reached by clicking “E” on an A-Z menu, and then clicking on emergency.²¹² Two universities made the emergency link available through a “quick link.”²¹³

The response to a more recent shooting at the smaller Delaware State University illustrates the value of lessons learned from Virginia Tech. The campus was effectively shut down. Within 20 minutes of the 12:54am shooting being reported to police, residence hall advisors advised students to stay in their dorm rooms. Notices were placed in the dorms and on the university’s web site by 2:40am, and at 5:00am the decision was made to cancel classes.²¹⁴

IV. CONCLUSION

We do not expect science to stop natural phenomenon, such as earthquakes, hurricanes, or tornadoes. However, we do expect that reasonable care be exercised to minimize their impacts.

Rochester, UCSD, UC Davis, Texas, Syracuse, and Tulane.

²¹⁰ Harvard, Caltech, MIT, Duke, Columbia, Chicago, Washington University, Northwestern, Vanderbilt, Tufts, Wake Forest, NYU, Boston College, Illinois, Case Western, University of Washington, and Rensselaer Poly. The Northwestern home page had on it though an emergency notice, listing the facilities closed because of storms that day.

²¹¹ Penn, Dartmouth, Emory, Notre Dame, Michigan, North Carolina, Brandeis, Wisconsin, UC Irvine, and Penn State.

²¹² Stanford, Berkeley, UC Santa Barbara, Penn State and Florida.

²¹³ Princeton and Yale.

²¹⁴ 2 shot at school; response is quick, Los Angeles Times, Sept. 22, 2007 at A15, col. 1.

So too with random acts of violence. College campuses present a “tempting target” in a country of seemingly infinite threats and targets. The variety of potential assailants, the emotional problems of students, the varied means by which they can execute their random acts of violence, the thousands of colleges, and tens of thousands of buildings on the campuses, make it difficult to prevent these crimes. Even though the specific timing, location, and means of delivery may be unforeseeable and unpreventable, we expect institutions to plan for their eventuality such that if they do occur, the college will have in place a plan which may reduce the toll through reasonable response measures. Such a plan should be an integral part of the school’s operations. The nature of any emergency will always be different, but to have in place a well-designed, tested and up-to-date emergency response plan will minimize the threat.

We also expect the institutions to take reasonable steps in advance of a tragedy, such as through background checks and psychological screening, to reduce the chances of occurrence at their institution.

We should not expect perfection in the emergency response. Just as engineering is an evolving science, often learning from the mistakes and tragedies of the past,²¹⁵ so too with emergency responses, which are still in their infancy as a practice. Reasonable care, not perfection or strict liability, is the standard.

In these ways, the duty of reasonable care to minimize a tragedy and its consequences may be fulfilled.

²¹⁵ See Henry Petroski, *To Engineer is Human: The Role of Failure in Successful Design* (St. Martin’s Press 1985).