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Eric A. Hoffman

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TAKING A BULLET: ARE COLLEGES EXPOSING THEMSELVES TO TORT LIABILITY BY ATTEMPTING TO SAVE THEIR STUDENTS?

Eric A. Hoffman*

INTRODUCTION

At 6:47 a.m. on April 16, 2007, Seung-Hui Cho lurked outside West Ambler Johnston Hall at Virginia Polytechnic Institute (Virginia Tech).[1] Fifteen minutes later, Cho started his cold-blooded killing spree.[2] He began by shooting a female student and then killing a resident assistant who responded to the sound of the gunshots.[3] Cho then returned to his residence hall across campus.[4] Over the next hour and forty-five minutes, he changed out of his bloody clothes, erased his university e-mail account, and mailed a package to NBC News containing a written diatribe and videos "express[ing] rage, resentment, and a desire to get even with [his] oppressors."[5] At approximately 9:15 a.m., ten minutes after second period classes started in Norris Hall, Cho slipped into the building and chained the exit doors shut behind him, preventing any escape.[6] At 9:40 a.m., the first gunshot rang out in Norris Hall.[7] For the next excruciating eleven minutes, Cho methodically invaded classroom after classroom, indiscriminately gunning down professors and students alike, before finally turning the gun on himself at 9:51 a.m.[8] In total,

* J.D. Candidate, Georgia State University College of Law, 2013. Assistant Dean and Director of Student Conduct, Emory University. Thanks to Dean Kelly Timmons for her immeasurable feedback and guidance, and thanks to Dennis Gregory, Ph.D. and Brett Sokolow, J.D. for their advice. Special thanks to my family—Sharon, Nathan, and Cohen—for their unending love, patience and support.

1. VA. TECH REVIEW PANEL, MASS SHOOTINGS AT VIRGINIA TECH 25 (2007), *available at* http://www.governor.virginia.gov/tempcontent/techPanelReport-docs/FullReport.pdf.
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.* at 25–26.
6. *Id.* at 26.
7. VA. TECH REVIEW PANEL, *supra* note 1, at 27.
8. *Id.* at 27–28.

Cho killed thirty-two people and wounded another seventeen[9]—forever altering not only the lives of the victims and their loved ones but also the landscape of American higher education.

Compared to the rest of the country, American universities[10] are relatively insulated from incidents of violent crime.[11] Similarly, suicide rates among college students are roughly half that of comparably aged nonstudents.[12] Although violent incidents on campuses receive significant publicity and national awareness, such occurrences have remained relatively consistent over time.[13] Despite the relative safety of America's campuses, shootings involving

9. *Id.* at 29.

10. Throughout this Note, the terms colleges, institutions, and universities are used interchangeably and include any institutions of higher education, including community colleges, two- and four-year colleges and universities.

11. The United States Department of Education reported eighteen murder deaths on college campuses in 2009. U.S. Dep't of Educ., Office of Postsecondary Educ., *Get Aggregated Data for a Group of Campuses*, THE CAMPUS SAFETY AND SECURITY DATA ANALYSIS CUTTING TOOL, http://ope.ed.gov/security/GetAggregatedData.aspx (last visited Sept. 6, 2011) (search "Location of Campus" for "Any"; then follow "Continue" hyperlink; search "Reporting Year 2009" and "Criminal Offenses—On campus"). In comparison, the Federal Bureau of Investigation (FBI) reported 13,636 murders for the entire nation. U.S. Dep't of Justice, Fed. Bureau of Investigation, *Expanded Homicide Data*, CRIME IN THE UNITED STATES: 2009, at 1, http://www2.fbi.gov/ucr/cius2009/documents/expand homicidemain.pdf (last visited Sept. 6, 2011). In 2009, over 19 million students were enrolled in America's universities, whereas according to the United States Census, the national population was approximately 308 million in 2010. NAT'L CTR. FOR EDUC. STATISTICS, PROJECTIONS OF EDUCATION STATISTICS TO 2019, at 57 tbl.20 (2011), *available at* http://nces.ed.gov/pubs2011/2011017.pdf; U.S. Census Bureau, *2010 Census Data*, U.S. CENSUS 2010, *available at* http://2010.census.gov/2010 census/data/ (last visited Oct. 8, 2012). This correlates to an approximate per capita murder rate of .089 per 100,000 college students, and approximately 4.4 murders per 100,000 people in the general U.S. population.

12. College students commit suicide "at a rate between 6.5 and 7.5 per 100,000," which is "approximately half the rate for nonstudent college-aged adults." *Campus Data: Prevalence*, SUICIDE PREVENTION RES. CTR., http://www.sprc.org/collegesanduniversities/campus-data/prevalence (last visited Sept. 6, 2011).

13. U.S. Dep't of Educ., *supra* note 11 (search "Location of Campus" for "Any"; then follow "Continue" hyperlink; search "Reporting Year 2003" and "Criminal Offenses—On campus"; then repeat for "Reporting Year 2006" and "Reporting Year 2009"); *see also* Tim Weldon, *Campus Violence and Mental Health—Protecting Students and Students' Rights a Delicate Issue*, KNOWLEDGE CENTER (Oct. 20, 2009, 12:00 AM), http://knowledgecenter.csg.org/drupal/system/files/MentalHealth-CampusSafety.pdf (reporting colleges are "less prone to violent crimes than society in general"). Between 2001 and 2009, the Department of Education reported an average of approximately eighteen murders per year on college campuses. U.S. Dep't of Educ., Office of Postsecondary Educ., *supra* note 11 (search "Location of Campus" for "Any"; then follow "Continue" hyperlink; search "Reporting Year 2003" and "Criminal Offenses—On campus"; then repeat for "Reporting Year 2006" and "Reporting Year 2009"). This data includes the anomaly of the Virginia Tech massacre where Cho murdered thirty-two people. *See id.*

multiple victims—such as at Virginia Tech[14]—nonetheless occur and are not new phenomena.[15]

Just as the terrorist attacks of September 11, 2001 led to significant scrutiny of existing procedures and prompted dramatic steps to increase national security, the Virginia Tech tragedy resulted in substantial scrutiny of university policies and procedures at the campus,[16] state,[17] and national levels.[18] Each review panel recommended changes for how colleges should prevent and respond to emergencies.[19] In response to the public outcry following Virginia

14. *See, e.g.*, John M. Broder, *MASSACRE IN VIRGINIA; 32 Shot Dead in Virginia; Worst U.S. Gun Rampage*, N.Y. TIMES, Apr. 17, 2007, at A1, *available at* http://query.nytimes.com/gst/fullpage.html?res=9F01E1D7113FF934A25757C0A9619C8B63. Also, on February 14, 2008, Northern Illinois University alumnus Steven Kazmierczak opened fire in a classroom and shot sixteen people, killing five, before committing suicide. Susan Saulny & Jeff Bailey, *Grief and Questions After Deadly Shootings*, N.Y. TIMES, Feb. 16, 2008, at A13.

15. *See* Helen Hickey de Haven, *The Elephant in the Ivory Tower: Rampages in Higher Education and the Case for Institutional Liability*, 35 J.C. & U.L. 503 (2009); *see also Major School Shootings in the United States Since 1997*, BRADY CTR. TO PREVENT GUN VIOLENCE, http://www.bradycampaign.org/xshare/pdf/school-shootings.pdf (last updated Dec. 17, 2012).

16. A study by the Midwest Higher Education Compact revealed that institutions completed internal audits of emergency procedures, campus notification systems, and campus discipline and mental health policies. *See* CHRIS RASMUSSEN & GINA JOHNSON, MIDWESTERN HIGHER EDUC. COMPACT REPORT, THE RIPPLE EFFECT OF VIRGINIA TECH: ASSESSING THE NATIONWIDE IMPACT ON CAMPUS SAFETY AND SECURITY POLICY AND PRACTICE 3 (Ann Grindland ed., 2008), *available at* http://www.mhec.org/policyresearch/052308mhecsafetyrpt_lr.pdf.

The tragedies also prompted increased discussion about gun safety, mental health issues, and student privacy. *Id.*

17. State task forces recommended improved emergency protocols, notification and response, increased funding and capacity for mental health services, improved security measures and training, and implementation of threat assessment strategies on campus. *See* VA. TECH REVIEW PANEL, *supra* note 1; *see also* FLA. GUBERNATORIAL TASK FORCE FOR UNIV. CAMPUS SAFETY, REPORT OF THE GUBERNATORIAL TASK FORCE FOR UNIVERSITY CAMPUS SAFETY (2007), *available at* http://cra20.humansci.msstate.edu/Florida%20Campus%20Violence%20Report.pdf (reporting outcome of Florida state task force review and recommendations).

18. National task forces recommended clarification of privacy laws, increased capacity for mental health services, improved emergency management procedures and communication systems, increased enforcement of gun laws, and implementation of behavioral intervention and threat assessment strategies. *See* MICHAEL O. LEAVITT, MARGARET SPELLINGS & ALBERTO R. GONZALES, REPORT TO THE PRESIDENT ON ISSUES RAISED BY THE VIRGINIA TECH TRAGEDY (2007), *available at* http://www.hhs.gov/vtreport.pdf; *see also* TASK FORCE ON SCH. AND CAMPUS SAFETY, NAT'L ASSOC. OF ATTORNEYS GEN., REPORT AND RECOMMENDATIONS (Nick Alexander ed., 2007), *available at* http://www.doj.state.or.us/hot_topics/pdf/naag_campus_safety_task_force_report.pdf.

19. Recommendations included improving campus emergency notification systems, revising emergency management plans, reviewing federal and state gun laws and privacy laws, improving mental health resources and services, and better identification of individuals who are threats to the campus community through the implementation of threat assessment or behavioral intervention practices. *See* FLA. GUBERNATORIAL TASK FORCE FOR UNIV. CAMPUS SAFETY, *supra* note 17, at 5–9; LEAVITT ET AL.,

Tech and the many subsequent recommendations by federal and state task forces, the federal government changed and clarified existing laws,[20] experts developed professional organizations and training programs for university staff members,[21] and colleges made various policy and programmatic changes.[22]

While many college administrators admit that it is nearly impossible to completely prevent violent incidents, such as student shootings and suicides,[23] campuses nationwide are attempting to prevent future incidents by implementing various proactive measures.[24] In addition to improving campus emergency notification systems, revising emergency protocols, and improving mental health

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supra note 18, at 12–15; NAT'L ASSOC. OF ATTORNEYS GEN., *supra* note 18, at 3–6; RASMUSSEN & JOHNSON, *supra* note 16, at 13–15; VA. TECH REVIEW PANEL, *supra* note 1, at 19–20, 53–54.

20. For example, the regulations implementing the Family Education Rights and Privacy Act (FERPA) were amended and clarified in late 2008. Family Educational Rights and Privacy, 73 Fed. Reg. 74,806, 74,851 (Dec. 9, 2008) (to be codified at 34 C.F.R. pt. 99). FERPA provides an exception where institutions can share personal information about a student to others "to protect the health or safety of the student or other persons." 20 U.S.C. § 1232g(b)(1)(I) (2006). As originally enacted, the law allowed disclosure to any "appropriate part[y]" but was clarified to specifically include a student's parents. Family Educational Rights and Privacy, 73 Fed. Reg. at 74,813. Additionally, where the law originally required strict construction of the exception, it was changed to only require colleges have a rational basis for the disclosure based on the information available at the time. *Id.* at 74,854. Final regulations were published in the Federal Register on December 9, 2008, and later announced in the "Dear Colleague Letter about Family Educational Rights and Privacy Act (FERPA) Final Regulations," which was issued on December 17, 2008. *See id.* at 74,806; Raymond Simon, *Dear Colleague Letter about Family Educational Rights and Privacy Act (FERPA) Final Regulations*, ED.GOV (Dec. 17, 2008), http://www2.ed.gov/policy/gen/guid/fpco/hottopics/ht12-17-08.html.

21. Sara Lipka, *Threat-Assessment Teams Get a Professional Group*, CHRON. HIGHER EDUC., Jan. 23, 2009, at A17. The National Behavioral Intervention Team Association (NaBITA) was created to "provide professional development and support to colleges, schools, and workplaces that use what the group calls 'caring prevention and intervention' to help troubled individuals and prevent violence." *Id.*; *see also* CAMPUS THREAT ASSESSMENT, http://www.campusthreatassessment.org (last visited Sept. 10, 2011) (describing threat assessment seminars and trainings provided by a consulting firm funded by a United States Department of Justice grant); SIGMA THREAT MGMT. ASSOCIATES, http://sigmatma.com (last visited Oct. 23, 2011) (describing online and in-person trainings offered by firm's staff and consultants).

22. *See* RASMUSSEN & JOHNSON, *supra* note 16.

23. Alan Finder & Sara Rimer, *Seeking Campus Security, But Gaps Likely to Persist*, N.Y. TIMES, Feb. 16, 2008, at A13. Institutions are likely unwilling and unable to install security measures found at federal courthouses and airports, such as gates, metal detectors, and fences, around open campuses. *Id.* Additionally, faculty and students are likely unwilling to sacrifice so much of their freedom in the name of security. *Id.*

24. *See* Doug Lederman, *What Changed, and Didn't, After Virginia Tech*, INSIDE HIGHER ED (May 28, 2008, 4:00 AM), http://www.insidehighered.com/news/2008/05/28/vatech; *see also* Ahnalese Rushmann, *Threat-Assessment Groups Cropping up Nationwide*, MINN. DAILY, Apr. 4, 2008, http://www.mndaily.com/2008/04/04/threat-assessment-groups-cropping-nationwide.

services, colleges have begun implementing behavioral intervention and threat assessment strategies and techniques.[25] While some institutions developed threat assessments in response to state recommendations[26] or mandates,[27] most did so voluntarily. Whatever the reason, the overwhelming majority of America's colleges and universities now use behavioral intervention and threat assessment techniques to identify and prevent violent incidents on their campuses.[28] However, the impact threat assessment teams will have on institutional tort liability and whether courts will find that institutions now owe a greater standard of care to their students and campus community as a result of these new programs remain unclear.

This Note examines the potential effect of the implementation of behavioral intervention and threat assessment teams on university liability for third-party violence and suicide. Part I provides an

25. By early 2011, the New York Times reported "more than half of the country's 4,500 colleges and universities 'acknowledge the need and have formed some capacity' to assess student threats." A.G. Sulzberger & Trip Gabriel, *Tucson Shooting Raises Questions on How to Handle Troubled Students*, N.Y. TIMES, Jan. 14, 2011, at A17. Behavioral intervention and threat assessment teams largely started in response to the tragedies at Virginia Tech and Northern Illinois University. Mary Beth Marklein, *Colleges' Watch for Killers Debated; Assessing Threats or Curbing Rights?*, USA TODAY, Jan. 14, 2011, at A1, *available at* http://usatoday30.usatoday.com/printedition/news/20110114/1awatched 14_st.art.htm.

26. FLA. GUBERNATORIAL TASK FORCE FOR UNIV. CAMPUS SAFETY, *supra* note 17, at 6–7 (recommending Florida institutions "develop a multidisciplinary crisis management team . . . to review individuals and incidents which indicate 'at risk' behavior"); *see also* UNIV. OF CAL. SEC. TASK FORCE, REPORT OF THE UNIVERSITY OF CALIFORNIA CAMPUS SECURITY TASK FORCE 31 (2008), *available at* http://www.ucop.edu/risk-services/_files/emergency/cstf_rpt.pdf (recommending colleges create an "interdisciplinary behavioral risk assessment team to address issues, problems or individuals who may pose a threat to the campus community").

27. Probably not coincidentally, both Illinois and Virginia passed laws mandating the creation of multidisciplinary teams to assess at risk students and prevent future incidents. Campus Security Enhancement Act of 2008, 110 ILL. COMP. STAT. 12/20 (West, Westlaw through Pub. Act 97-1096 of 2012 Reg. Sess.); Violence Prevention Committee; Threat Assessment Team, VA. CODE ANN.§ 23-9.2:10 (West, Westlaw through 2012 Reg. Sess. and 2012 Spec. Sess. I). Illinois requires each campus to "develop an inter-disciplinary and multi-jurisdictional campus violence prevention plan" and implement a "campus violence prevention committee and campus threat assessment team." 110 ILL. COMP. STAT. ANN. 12/20(b)(2). Virginia tasks every public college with "establish[ing] a specific threat assessment team that shall include members from law enforcement, mental health professionals, representatives of student affairs and human resources, and, if available, college or university counsel." VA. CODE ANN. § 23-9.2:10(D).

28. The New York Times reported "more than half of the country's 4,500 colleges and universities 'acknowledge the need and have formed some capacity' to assess student threats," while USA Today reported "80% of colleges nationwide have started [threat assessment teams] since the 2007 massacre at Virginia Tech." Marklein, *supra* note 25; Sulzberger & Gabriel, *supra* note 25.

overview of the history of threat assessment teams on college campuses using two high-profile examples and an examination of the general composition, responsibilities, and best practices of threat assessment teams.[29] Part II examines different theories of liability that courts have applied to college tort liability.[30] Part III suggests a standard by which courts should assess institutional liability and examines what standard of care institutions may owe their students.[31]

I. BEHAVIORAL INTERVENTION AND THREAT ASSESSMENT AT COLLEGES AND UNIVERSITIES

College behavioral intervention and threat assessment teams are multi-disciplinary teams of various university staff members that meet regularly to serve as the "central clearinghouse for at-risk student . . . behavior" and to develop and implement an appropriate institutional intervention when necessary.[32] Before the mass shooting at Virginia Tech in 2007, schools developed teams sporadically.[33] But following that tragedy, most colleges created some form of team to address "students of concern"—students who exhibit some form of alarming behavior.[34] Prior to Virginia Tech, some universities tried to identify at-risk individuals and connect them to resources to help minimize their risk to themselves or others, but the widespread use of threat assessment on college campuses is largely a new phenomenon.

29. *See* discussion *infra* Part I.

30. *See* discussion *infra* Part II.

31. *See* discussion *infra* Part III.

32. Brett A. Sokolow et al., *College and University Liability for Violent Campus Attacks*, 34 J.C. & U.L. 319, 345 (2008); *see also* John H. Dunkle, Zachary B. Silverstein & Scott L. Warner, *Managing Violent and Other Troubling Students: The Role of Threat Assessment Teams on Campus*, 34 J.C. & U.L. 585, 590 (2008) (describing the Delworth Assessment-Intervention of Student Problems Model that describes threat assessment goals of intervening with students of concern and directing students to most appropriate resources); Oren R. Griffin, *Constructing a Legal and Managerial Paradigm Applicable to the Modern-Day Safety and Security Challenge at Colleges and Universities*, 54 ST. LOUIS U. L.J. 241, 246 (2009) (advocating for colleges to implement threat assessment strategies based on Incident Command System concepts).

33. Gary Pavela, *Creating a College Threat Assessment Program: Interview with Dr. Gene Deisinger*, ASS'N FOR STUDENT JUD. AFF. LAW & POL'Y REP, Feb. 21, 2008, at § 8.7, *available at* http://www.theasca.org/attachments/wysiwyg/1/ASJA_LPR277.pdf (describing the early implementation of threat assessment strategies at Iowa State University in 1994).

34. *See supra* note 28.

A. Campus Behavioral Intervention And Threat Assessment: Examples

Threat assessment and behavioral intervention are "process[es] to identify and respond to students, faculty and staff who may pose a danger to others on campus, may pose a danger to themselves, or who may simply be struggling and in need of assistance and resources."[35] One report estimates that only 20 such teams existed prior to the Virginia Tech massacre in 2007, whereas over 1,600 exist today.[36]

1. Massachusetts Institute of Technology's "Deans and Psychs" Group

On April 10, 2000, Massachusetts Institute of Technology (MIT) sophomore Elizabeth Shin committed suicide by setting herself on fire in her residence hall room.[37] While shocking, Shin's suicide was not completely unpredictable. Warning signs of Shin's mental health issues first arose during her freshman year in February 1999 when she was hospitalized after overdosing on Tylenol with codeine.[38] Before returning to campus, Shin met with an MIT psychiatrist and developed a treatment plan.[39] After several counseling appointments at the end of her freshman year, Shin went home for the summer before returning as a sophomore.[40] In early October 1999, she expressed suicidal thoughts to a Counseling and Support Services (CSS) Dean who mandated Shin complete a mental health

35. *Threat Assessment and Management*, VIRGINIATECH (quoting GENE DEISIGNER ET AL., THE HANDBOOK FOR CAMPUS THREAT ASSESSMENT & MANAGEMENT TEAMS (2008)), http://www.threatassessment.vt.edu/ (last visited Oct. 14, 2011).

36. Marklein, *supra* note 25.

37. Cho Hyun Shin v. Mass. Inst. of Tech., No. 020403, 2005 WL 1869101, at *5–6 (Mass. Super. Ct. June 27, 2005).

38. *Id.* at *1. With Shin's consent, her MIT housemaster, Nina Davis-Mills, contacted Shin's parents to inform them of her hospitalization. *Id.*

39. *Id.* Upon recommendation from hospital staff, Shin's father arranged Elizabeth's meeting with an MIT psychiatrist. *Id.*

40. *Id.* at *2. During the spring semester of her freshman year, a Counseling and Support Services (CSS) staff member learned that Shin made at least one suicidal comment after breaking up with her boyfriend. *Id.*

assessment.[41] One month later, Shin met with another CSS Dean, Arnold Henderson, and reported intentionally cutting herself, resulting in another immediate psychiatric evaluation by MIT counselors.[42] In March 2000, MIT officials again admitted Shin for observation after learning that Shin was extremely upset and cutting herself again.[43] During her sophomore year, MIT professors, a residential housemaster, and several students all reported concerns about Shin's mental state to CSS Dean Henderson.[44]

In total, Shin saw at least six different mental health professionals at MIT, attempted suicide at least once, and threatened suicide four times.[45] MIT held regular "deans and psychs" meetings where mental health and other staff members met to discuss students of concern and develop appropriate interventions for the student and an institutional response.[46] Despite the long list of significant concerns about Shin, the "deans and psychs" group did not discuss Shin until April 10, 2000, over a year after her first suicide attempt.[47] After that meeting, MIT staff made an appointment for Shin at an off-campus facility for the following day, but Shin set herself on fire later that night.[48] The "deans and psychs" group was not a true threat assessment team, but it implemented similar strategies by attempting to identify students at risk, assess that risk, and implement appropriate strategies to avoid harm.[49] As Elizabeth Shin's suicide illustrates, despite a university's best efforts to help a student, a lack of cross-campus communication and a coordinated response can

41. *Id.*

42. *Id.*

43. *Cho Hyun Shin*, 2005 WL 1869101, at *3. MIT staff again notified Shin's parents after her admission to the school's infirmary. *Id.*

44. *Id.* at *1–4.

45. *Id.* at *1–5.

46. Brett A. Sokolow, *M.I.T.* Is *Guilty . . . of Being Nice*, NCHERM 3, http://www.ncherm.org/pdfs/MIT.pdf (last visited Oct. 26, 2011).

47. *Id.*

48. *Cho Hyun Shin*, 2005 WL 1869101, at *5–6. It is unclear and contested what treatment options the "deans and psychs" group proposed, but reportedly, they discussed immediate hospitalization, outpatient treatment at an off-campus facility, and seeking a medical withdrawal for Shin before settling on making an appointment for her the following day. *Id.*

49. *Id.* at *13. MIT held weekly "deans and psychs" meetings where students of concern were discussed with other campus medical staff. *Id.* At these meetings, the group developed a treatment plan for the referred student. *Id.*

result in a missed opportunity to prevent significant harm to a student.

2. Virginia Tech's Care Team

During his first three years on campus—long before the tragic shooting in April 2007—[50] Seung-Hui Cho exhibited warning signs that were overlooked by Virginia Tech.[51] During his first two years on campus, Cho exhibited no alarming behavior other than a roommate conflict in his freshman year.[52] However, in his junior year, several incidents occurred that alarmed university faculty, staff, and fellow students. First, Cho was removed from a poetry class after Professor Nikki Giovanni expressed concern about his violent writing.[53] In late November and early December 2005, three female students complained about Cho's online interactions with them to the police and housing staff.[54] On December 13, 2005, Cho expressed suicidal ideations and was transported to a psychiatric hospital for evaluation.[55] The next morning, Cho's evaluator at the hospital deemed him not a threat and referred him to on-campus counseling.[56] During the spring semester of 2006, two other professors expressed concerns about Cho's class performance and his violent writings.[57] In Fall 2007, during Cho's senior year, writing Professor Lisa Norris also shared her concern about Cho.[58] Norris offered to take Cho to counseling, but he declined.[59]

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50. *See supra* notes 1–9 and accompanying text.

51. *See* discussion *infra* Part I.B.

52. VA. TECH REVIEW PANEL, *supra* note 1, at 22.

53. *Id.* After this incident, Virginia Tech staff recommended Cho seek counseling, which he refused. *Id.* While the Virginia Tech Review Panel report includes other concerning behavior by Cho, conduct that was not known or knowable by the institution was omitted from this Note. *Id.*

54. *Id.* at 22–23. During this time, Cho scheduled his first appointment at the university Counseling Center but missed his appointment. *Id.* at 23.

55. *Id.*

56. *Id.*

57. One professor expressed concerns about his class performance, while another complained about his violent writings, including one where a "young man who hates the students at his school and plans to kill them and himself." *Id.*

58. Norris expressed her concern to an Associate Dean who "finds 'no mention of mental health issues or police reports.'" VA. TECH REVIEW PANEL, *supra* note 1, at 24.

59. *Id.*

According to the Virginia Tech Review Panel's Report (Governor's Report),[60] Cho exhibited no other behavior that raised any concerns until the shooting.[61] Prior to the shooting and during Cho's enrollment, Virginia Tech employed a Care Team to "identify[] and work[] with students who have problems."[62] Members included the Dean of Student Affairs and staff members from campus housing, Judicial Affairs, Student Health, and legal counsel.[63] Cho was first brought to the attention of Virginia Tech's Care Team in 2005 after acting out in Giovanni's class,[64] but the Care Team considered the situation resolved after Cho's removal from the class.[65] In fact, despite numerous other concerning incidents—three complaints by fellow students, concerns by three other professors, a suicide threat, and a psychiatric commitment—the Care Team never discussed Cho again.[66] The Governor's Report called Virginia Tech to task for not having clear channels of communication and not having the appropriate personnel on the Care Team.[67] Many people questioned and even blamed Virginia Tech for not identifying Cho's threat and preventing the tragedy. However, Virginia Tech's challenges in addressing student threats were no different than those facing most other colleges at the time. Many schools were just as ill-equipped and ill-prepared to address students of concern and threats prior to the tragedy.[68]

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60. On April 19, 2007, Virginia Governor Tim Kaine formed the Virginia Tech Review Panel to perform an independent review of the tragedy. *Id.* at vii.

61. *Id.* at 24.

62. *Id.* at 52.

63. *Id.* at 43. The Care Team included other agencies on campus, including campus police, only as needed. *Id.*

64. VA. TECH REVIEW PANEL, *supra* note 1, at 22.

65. *Id.* at 43.

66. *Id.* at 52.

67. *See id.*

68. Diane Strickland, a member of the Governor's Review Panel, described the issue as a "systemic problem throughout higher education" where "people are very very cautious in what they're willing to share." Beth Macy, *Q&A with Virginia Tech Panel Member Diane Strickland*, ROANOKE TIMES, Aug. 30, 2007, http://www.roanoke.com/vtinvestigation/wb/129959.

Another more recent example of the use of threat assessment at colleges is the case of Jared Loughner and Pima County (Ariz.) Community College (Pima). On January 8, 2011, Jared Loughner opened fire at a political event in Tuscon, Arizona, killing six people and severely injuring United States Representative Gabrielle Giffords. Marc Lacey & David M. Herszenhorn, *Congresswoman Is Shot in Rampage near Tucson*, N.Y. TIMES, Jan. 9, 2011, at A1. Loughner was a student at Pima prior to his

These examples illustrate the complexities and challenges of such incidents for colleges as institutions try to balance the needs and rights of individuals and the safety of their students and campus community. While it is unclear whether a prepared and highly-effective threat assessment team could have prevented either of these tragedies, colleges have responded to them by implementing their own teams to identify students of concern and prevent future incidents.[69]

B. Mission And Steps Of Threat Assessment And Membership Of Threat Assessment Teams

College threat assessment teams have varying degrees of authority on their respective campuses. Some can only make recommendations to other campus officials,[70] while others are granted "full authority to

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suspension in September 2010. Marc Lacey & Serge F. Kovaleski, *'Creepy,' 'Very Hostile,' 'Dark': A College Recorded Its Fears*, N.Y. TIMES, Jan. 13, 2011, at A1. While at Pima, Loughner exhibited several instances of concerning behavior including loudly arguing with a professor about a late assignment, carrying a knife in class, and talking about strapping explosives to babies during a poetry class. *Id.* In October 2009, Pima suspended Loughner after school officials found a YouTube video of him complaining that the college subjected him to torture and mind control and referring to the college as his "genocide school." Robert Anglen & Dennis Wagner, *E-mails Detail College's Struggle with Loughner*, ARIZ. REPUBLIC, May 20, 2011, at A1, *available at* http://www.azcentral.com/news/articles/20110520pimaemails0520.html.

Pima created a Student Behavior Assessment Committee (Committee) in September 2010—the same month it suspended Loughner. Lacey & Kovaleski, *supra*. The Committee is tasked with responding to threatening students and consists of the Assistant Vice-Chancellor for Student Development, an off-campus psychologist, and the chief of campus police. *Id.* A Pima spokesperson would not confirm whether the Committee discussed Loughner. *Id.* However, one news outlet reported that it had done so. Marklein, *supra* note 25. Nevertheless, Loughner posed enough of a threat to be suspended until he completed a psychiatric assessment. *Pima Community College Statement on Today's Tragic Events*, PIMACOMMUNITYCOLLEGE (Jan. 8, 2011), http://www.pima.edu/press-room/news-releases/2011/201101-loughnerjan8.html.

Despite Pima's efforts to protect its community, many questioned their actions and wondered if they could have done more to prevent the shooting; some questioned whether Pima should have sought an involuntary psychological evaluation, while others wondered whether the suspension could have been a trigger for the shooting. *See* Sulzberger & Gabriel, *supra* note 25; *see also* Anglen & Wagner, *supra* (questioning whether suspension is an appropriate response for high-risk students). *But see* Allie Grasgreen, *Could Anyone Have Done More?*, INSIDE HIGHER ED (Jan. 17, 2011, 3:00 AM), http://www.insidehighered.com/news/2011/01/17/pima_community_college_faced_challenges_with_loughner (reporting the difficulty of addressing complex psychological and safety issues in community college settings where many institutions do not have full time mental health staff members and finding Pima's system comparable to other similar institutions).

69. *See* discussion *infra* Part I.B.

70. *See, e.g.*, UNIV. OF N.C. WILMINGTON, STUDENT THREAT ASSESSMENT TEAM (STAT) MISSION,

act on behalf of the university."[71] Even without "full authority" of the institution, many teams have the ability to remove students from campus pending the outcome of a mental health evaluation.[72] Also, many experts strongly advocate for granting threat assessment teams full authority to "fully manage threatening situations and to make critical decisions."[73]

The mission and purpose of threat assessment teams differ somewhat from campus to campus but largely center around three general themes: identifying individuals of concern,[74] providing appropriate intervention,[75] and protecting the campus community.[76]

SCOPE, PROTOCOL AND MEMBERSHIP, *available at* http://uncw.edu/studentaffairs/pdc/documents/STATMissionProtocol050508.pdf (last visited Sept. 4, 2011).

71. *Frequently Asked Questions*, VIRGINIATECH THREAT ASSESSMENT TEAM, http://www.threatassessment.vt.edu/FAQ/index.html (last visited Sept. 17, 2011) (answering the question, "What authority does the team have to intervene in people's lives?").

72. *See* UNH STUDENT & ACAD. SERVICES, http://unh.edu/vpsas/sites/unh.edu.vpsas/files/media/pdf/BIT_FAQ_facultystaff.pdf (last visited Nov. 2, 2012); *see also* PIMA CMTY. COLL., STUDENT CODE OF CONDUCT (2011), *available at* http://www.pima.edu/current-students/code-of-conduct/docs/Student-Code-of-Conduct.pdf.

73. Pavela, *supra* note 33 (quoting Gene Deisinger, a leading expert on the use of threat assessment); *see also* BRETT A. SOKOLOW & W. SCOTT LEWIS, 2ND GENERATION BEHAVIORAL INTERVENTION BEST PRACTICES 4 (2009), *available at* http://www.nabita.org/docs/2009NCHERMwhitepaper.pdf (recommending teams "have the authority to invoke involuntary medical/psychological withdrawal policies").

74. *See, e.g.*, *Helping Students in Distress*, FURMAN, http://www2.furman.edu/studentlife/studentlife/StudentResources/Pages/BIT.aspx (last visited Nov. 2, 2012) (explaining a goal of "indentif[ying] students who have either experienced personal loss or failures while enrolled or who may be a danger to themselves or others within the Furman community"); *see also University of Virginia Threat Assessment Team*, U. OF VA., http://www.virginia.edu/threatassessment/ (last visited Nov. 2, 2012) (describing a philosophy of "indentify[ing] concerns in their early phases and to work constructively and collaboratively with all parties before problems escalate into violent outcomes"); UNIV. OF N.C. WILMINGTON, *supra* note 70 (listing responsibilities, including "identifying, investigating, assessing, and monitoring high risk behaviors").

75. *See Helping Students in Distress*, *supra* note 74 ("work[ing] to coordinate university resources to assist students who are at risk academically, or who exhibit maladaptive behavior or signs of emotional distress"); *see also Behavior Intervention Team*, U. OF TEX. ARLINGTON, http://www.uta.edu/bit/overview/index.php (last visited Nov. 2, 2012) (listing a mission to "[p]rovide a systematic response to students whose behavior is disruptive to themselves or the environment"); *Violence Prevention & Response on Campus*, STAN. U., http://www.stanford.edu/group/SUDPS/threat-assessment/about.shtml (last visited Nov. 2, 2012) (listing one responsibility as to "review and decide upon appropriate response strategies for selected cases").

76. *See Threat Assessment Team*, U. OF N. IOWA, http://www.uni.edu/resources/alert/critical-incidents-and-personal-threats-assistance (last visited Nov. 2, 2012) (listing a goal to "provid[e] a safe and secure environment" and allowing the team to "act, as necessary, to protect the campus community"); *see also University of Virginia Threat Assessment Team*, *supra* note 74 (citing one purpose "to help preserve the safety and security of the University"); Purpose of *University Behavioral Intervention*, WICHITA ST. U., http://webs.wichita.edu/?u=UBIT&p=/purpose/ (last visited Nov. 2, 2012)

Generally speaking, threat assessment is a way to provide early identification of students or situations that may be a risk to the community and to determine and implement an intervention to provide a safe resolution.[77] Often teams have the additional responsibilities of maintaining records of students and interventions and ongoing monitoring of concerning students.[78] Several commentators recommend this practice in their various proposed threat assessment models.[79]

Generally, colleges have discretion to develop threat assessment teams that best meet the needs of their respective communities.[80] However, in Virginia, state statute requires teams to "include representatives from student affairs, law enforcement, human resources, counseling services, residence life, and other constituencies as needed."[81] On most campuses, teams include some combination of individuals from student affairs, student conduct, campus housing, university security or police, counselors or psychologists, and academic affairs.[82] Some institutions also include

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(stating to "prevent[] individuals from harming themselves or others" as a purpose of its multidisciplinary approach); *Violence Prevention & Response on Campus*, *supra* note 75 (stating the desire to "[m]aintain a safe and secure environment").

77. Pavela, *supra* note 33. Pavela interviewed Dr. Gene Deisinger who developed one of the first collegiate threat assessment teams in the early 1990s and co-authored *The Handbook for Campus Threat Assessment & Management Teams*. GENE DEISINGER ET AL., THE HANDBOOK FOR CAMPUS THREAT ASSESSMENT & MANAGEMENT TEAMS (2008).

78. *See, e.g.*, UNH STUDENT & ACAD. SERVICES, *supra* note 72 (listing a role of "Ongoing Monitoring"); UNIV. OF N.C. WILMINGTON, *supra* note 70.

79. *See* Dunkle et al., *supra* note 32, at 602 (recommending ongoing tracking and monitoring functions for threat assessment teams); SOKOLOW & LEWIS, *supra* note 73, at 4 (recommending teams have the capacity to "have a longitudinal view of a student's behavior patterns and trends").

80. Various experts recommend that colleges develop teams based on the needs of their campus setting. *See* Brett A. Sokolow & Stephanie F. Hughes, *Risk Mitigation Through the NCHERM Behavioral Intervention And Threat Assessment Model*, NCHERM 7 (2007); *see also* Pavela, *supra* note 33 (recommending membership should "var[y] by the needs of the institution, the threats likely to be encountered, and the resources available").

81. VA. CODE ANN. § 23-9.2:10(B) (West, Westlaw through 2012 Reg. Sess. and 2012 Spec. Sess. I).

82. *See* Sokolow & Hughes, supra note 80, at 7 (suggesting teams minimally include student affairs and mental health professionals); *see also, e.g.*, *Behavior Intervention Team*, *supra* note 75 (including staff from Counseling Services, Human Resources, Mental Health, International Education, Student Conduct, Relationship Violence and Sexual Assault Prevention, Disability services, academic advising, Police, and University Housing); *Behavior Intervention Team*, WOFFORD, http://www.wofford.edu/healthservices/bit.aspx (last visited Nov. 2, 2012) (including staff from Health Services, Academic Administration, Campus Safety and Security, Residence Life, Counseling, and the

campus general counsel[83] and chaplains.[84] No matter the combination involved, these are multi-disciplinary groups of professionals with expertise in student development and behavior, law enforcement, and mental health that meet regularly to try to simultaneously serve the complex needs of individuals and protect their campus communities.

There are several different threat assessment models,[85] but the recommended steps of each model are similar—(1) quickly screen for immediate danger, (2) if no immediate danger, conduct a complete threat assessment, (3) develop and implement a threat management plan, (4) continue monitoring and modification of the plan, and (5) document resolution of the case.[86] First, teams should screen all reported threats to determine whether or not there is imminent danger to an individual or the campus community.[87] If the student poses an immediate threat, law enforcement should intervene, but if there is not an immediate threat, the team should conduct a full assessment to determine if a risk to the community or an individual exists.[88] If a threat is found, a case management or threat management plan should be developed and implemented.[89] The goal of the threat management plan is to eliminate or reduce the risk of

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Dean of Students); *Who is BIT?*, U. OF S.C., http://www.housing.sc.edu/bit/who.html (last visited Nov. 2, 2012) (including Student Conduct, University Housing, campus Law Enforcement, Student Health Services, and Counseling in the University of South Carolina's Team); *Committee Information for Threat Assessment Team*, U. OF VA., http://www.virginia.edu/threatassessment/committee.html (last visited Nov. 2, 2012) (adding Vice President of Student Affairs, General Counsel, and Faculty and Staff Assistance staff to Team at the University of Virginia).

83. *See, e.g.*, *Threat Assessment Team*, *supra* note 76 (showing University Counsel included on the University of Northern Iowa Threat Assessment Team); *Violence Prevention & Response on Campus*, *supra* note 75 (including General Counsel as well).

84. *See, e.g.*, *Behavior Intervention Team*, *supra* note 82 (adding College Chaplain as well).

85. *See* DEISINGER ET AL., *supra* note 77; Donald Challis, *Appropriate Responses of Campus Security Forces*, 17 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 169, 171 (2010); Dunkle et al., *supra* note 32; Jeffrey J. Nolan, Marisa R. Randazzo & Gene Deisinger, *Campus Threat Assessment and Management Teams: What Risk Managers Need to Know Now*, URMIA J. 110 (2011); SOKOLOW & LEWIS, *supra* note 73.

86. Nolan et al., *supra* note 85, at 111–12.

87. *Id.* at 111.

88. *Id.* During a full threat assessment, the team should gather information from any possible sources to help their decision-making. *Id.* These sources include all those within the institution—professors, housing staff, and other offices with pertinent information—as well as any information available from outside sources, such as employers, previous institutions, internet activity, friends, and family when appropriate. *Id.*

89. *Id.*

injury or violence and direct the individual to resources to address any problems he may be facing.[90] The team should continue to monitor and modify the plan for as long as the person may pose a threat.[91] Finally, the team should close the case by documenting how it was processed, including all information gathered, what evaluation they made, the rationale for the team's decision(s), the threat management plan developed, any changes to the plan, and descriptions of any monitoring conducted.[92] Because the creation of threat assessment teams is a new phenomenon on college campuses, courts' application of the law and the impact on institutional liability is unclear.

II. THEORIES OF INSTITUTIONAL LIABILITY APPLIED TO COLLEGES AND UNIVERSITIES

Courts' treatment of university liability for student injury has gone through various phases throughout history. Until the 1960s, colleges typically stood *in loco parentis*—"in the place of a parent"—to their students and generally could impose any reasonable regulation or restriction.[93] During that time, courts insulated colleges from liability using the *in loco parentis* doctrine or by finding other more proximate causes of student injury.[94] The Civil Rights Movement, student activism in the 1960s and 1970s, and changing beliefs about the nature of the college–student relationship all contributed to

90. *Id.* Threat management plans may include: continued monitoring, family or parental notification, law enforcement intervention, campus disciplinary review, development of a behavioral contract, voluntary or mandated psychological assessment, and separation from the institution. *Id.* at 112.

91. *Id.*

92. Nolan et al., *supra* note 85, at 112. The team's documentation may be important to later litigation if a tragic incident does occur. *Id.*

93. A typical case from this era is *Gott v. Berea College*, 161 S.W. 204 (Ky. 1913). Berea College policy stated that "[e]ating houses and places of amusement. . . , not controlled by the college, must not be entered by students on pain of immediate dismission." *Id.* at 205. Gott owned a local restaurant and sought an injunction against the college policy after two students were expelled for entering his restaurant. *Id.* The court denied the injunction holding that colleges can "make any rule or regulation for the government or betterment of their pupils that a parent could for the same purpose." *Id.* at 206.

94. Peter F. Lake, *The Rise of Duty and the Fall of in Loco Parentis and Other Protective Tort Doctrines in Higher Education Law*, 64 MO. L. REV. 1, 3–8 (1999). During this era, courts also insulated colleges from liability using charitable and government immunities. *Id.*

gradual destruction of *in loco parentis*.[95] The case largely credited with sounding the death knell of the *in loco parentis* doctrine is *Bradshaw v. Rawlings*[96] where the Third Circuit firmly stated, "[T]he modern American college is not an insurer of the safety of its students. Whatever may have been its responsibility in an earlier era, the authoritarian role of today's college administrations has been notably diluted in recent decades."[97]

In the 1970s and 1980s, courts began applying traditional tort law principles to America's colleges.[98] With the shift to this "bystander" era,[99] courts were willing to find an institutional duty in the areas of "premises maintenance, curricular and co-curricular safety, dormitory/residential life safety, and dangerous persons," but avoided finding schools liable when they were mere "bystanders" to student behavior, such as voluntarily consumption of drugs or alcohol.[100] The current status of the relationship between colleges and their students is in flux.[101] Without clear direction how to characterize the

95. *Id.* at 9–12. In a series of cases, courts held that college students possessed a wide range of constitutional rights that their colleges could not abridge. *Id.* at 9–10.Because of these newly granted rights, universities could no longer use *in loco parentis* to avoid liability. *Id.*

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

97. *Id.* at 138. The *Bradshaw* court held that rights previously held by colleges transferred to students through "constitutional amendment, written and unwritten law, and through the evolution of new customs." *Id.* at 138–39.

98. Lake, *supra* note 94, at 12–17. Lake refers to the 1970s and 1980s as the "bystander era" of tort liability in higher education where colleges were merely bystanders to certain uncontrollable student behavior. *Id.* at 11–12. In the "bystander era," courts found universities owed a duty in certain cases but declined to extend liability for voluntary alcohol consumption. *Id.*

99. *See generally* Robert D. Bickel & Peter F. Lake, *The Emergence of New Paradigms in Student-University Relations: From "in Loco Parentis" to Bystander to Facilitator*, 23 J.C. & U.L. 755 (1997) (describing the progression from the "in loco parentis" era to the "bystander" era to what the authors argue as the modern "facilitator" era).

100. Lake, *supra* note 94, at 12. During the "bystander era," courts began treating colleges more like businesses and applied traditional tort principles to hold schools liable in certain areas: maintaining their grounds, student safety, and dangerous persons. *Id.* However, courts found no duty when colleges "had become legal bystanders to 'uncontrollable' student alcohol use." *Id.*

101. *See* Bickel & Lake, *supra* note 99, at 789–91 (arguing for a "facilitator" model where seven factors are balanced in assessing liability and appropriate level of care); *see also* Jane A. Dall, *Determining Duty in Collegiate Tort Litigation: Shifting Paradigms of the College-Student Relationship*, 29 J.C. & U.L. 485, 519 (2003) (suggesting courts find a duty when a college fails to act or has responsibility according to its educational mission); Kristen Peters, Note, *Protecting the Millennial College Student*, 16 S. CAL. REV. L. & SOC. JUST.431, 465 (2007) (advocating for the "Millennial" model where a duty would be found based on the college–student relationship only when a student detrimentally relies on a college's action that is related to its overall mission).

relationship between colleges and their students, courts have applied various approaches—including negligent misrepresentation, breach of contract,[102] and traditional tort principles such as premises liability,[103] assumption of the duty,[104] and special relationships.[105]

A. Express Or Implied Contracts And Negligent Misrepresentation

Plaintiffs suing universities for student injuries by third-parties or student suicide regularly argue that an express or implied contract exists between the institution and the student based on promises made in recruiting, marketing, and advertising materials or from specific representations by college administrators.[106] The case against MIT by Elizabeth Shin's family is a typical example.[107] The Shins argued that representations in advertising and marketing materials created an enforceable contract to provide necessary and reasonable medical and emergency services.[108] The Shins also alleged MIT negligently misrepresented through the "advertisements, internet documents, student registration materials, and the MIT Student Handbook" that their daughter would receive adequate medical diagnosis and treatment while enrolled.[109] While the Shins did not point to any specific language to support these claims, the court examined the MIT Medical Department brochure and By-Laws.[110]

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102. *See, e.g.*, Stanton v. Univ. of Me. Sys., 773 A.2d 1045, 1051 (Me. 2001) (finding no implied contract to provide a safe and secure environment).

103. *See, e.g.*, Knoll v. Bd. of Regents, 601 N.W.2d 757 (Neb. 1999) (finding a duty to protect business invitee student from foreseeable injury), *abrogated on other grounds by* A.W. v. Lancaster Cnty. Sch. Dist. 0001, 784 N.W.2d 907 (Neb. 2010).

104. *See, e.g.*, Coghlan v. Beta Theta Pi Fraternity, 987 P.2d 300 (Idaho 1999) (finding plaintiff raised sufficient facts to show University of Idaho assumed a duty to protect).

105. *See, e.g.*, Schieszler v. Ferrum Coll., 233 F. Supp. 2d 796 (W.D. Va. 2002) (finding a special relationship between decedent student and college).

106. *See, e.g.*, Tanja H. v. Regents of the Univ. of Cal., 278 Cal. Rptr. 918 (Ct. App. 1991).

107. *See, e.g.*, Cho Hyun Shin v. Mass. Inst. of Tech., No. 020403, 2005 WL 1869101 (Mass. Super. Ct. June 27, 2005).

108. Complaint, Cho Hyun Shin v. Mass. Inst. of Tech., No. 02-0403, 2002 WL 34214754 (Mass. Super. Ct. Jan. 28, 2002).

109. *Id.*

110. *Cho Hyun Shin*, 2005 WL 1869101, at *7. The brochure provided that professionals were available to "care for your physical and psychological needs" and "also will help you maintain good health." *Id.* The By-Laws stated the Medical Department "has the responsibility to provide high quality, low barrier comprehensive health services." *Id.*

The court rejected these arguments finding the materials to be "merely 'generalized representations' of the purpose and medical services available."[111] The Shins also argued that a contract existed based on statements made by college administrators that they would inform the plaintiffs about any developments in Elizabeth's health.[112] The court rejected this argument.[113]

1. Application of Contract Theories of Liability to the Use of Threat Assessment

Regardless of the assurances and promises about safety and services communicated in marketing materials, courts have repeatedly held that except where the parties explicitly contract, marketing and promotional materials do not form the basis of a valid enforceable contract—either express or implied—to provide a safe or secure campus.[114] Similarly, when applied to threat assessment teams, courts would likely find any marketing or promotional materials detailing the purpose, responsibilities, and goals of threat assessment to be "generalized representations" that do not form the basis of an enforceable contract. The general goals of threat assessment—identifying individuals of concern, providing appropriate intervention, and protecting the campus community[115]—

111. *Id.*

112. *Id.* at *8. The court found the statement not sufficiently specific to form the basis of an enforceable promise. *Id.* The court also held that other statements alleged by the Shins were either too general or made to the decedent and not the plaintiffs. *Id.*

113. *Id.*

114. *See, e.g.*, Rogers v. Del. State Univ., 905 A.2d 747 (Del. 2006) (unpublished table decision) (finding no express contractual duty to provide off-campus security for students when placed in off-campus temporary housing by University); Rabel v. Ill. Wesleyan Univ., 514 N.E.2d 552 (Ill. App. Ct. 1987) (no duty created by representations in handbook and regulations); Stanton v. Univ. of Me. Sys., 773 A.2d 1045 (Me. 2001) (finding no implied contract to provide a safe and secure environment in exchange for living on-campus); Mahoney v. Allegheny Coll., No. AD 892-2003 (Pa. Ct. Com. Pl. Crawford County Dec. 22, 2005), http://www.theasca.org/attachments/articles/35/Allegheney%20college%20SJ%20decision.pdf (finding no implied contract based on college catalogue and handbook advertising counseling center). *But see* Estate of Butler v. Maharishi Univ. of Mgmt., 589 F. Supp. 2d 1150, 1158–66 (S.D. Iowa, 2008) (denying defendant university's motion for summary judgment on fraudulent and misrepresentation claims after student attacked and killed decedent despite school repeatedly representing itself as "a safe haven of peace, friendship, and zero crime" and "safe and violence-free").

115. *See supra* notes 74–79 and accompanying text.

are broad statements of goals and policies and would be unlikely to be found to form the basis of a valid contract between the institution and its students.[116]

B. Premises Based Liability

As institutions began to function more and more like traditional businesses and less like the small liberal arts colleges of lore,[117] courts began applying traditional premises based liability principles and finding that institutions owe their students a duty to provide a reasonably safe campus.[118] As a general rule, parties owe no duty to protect or warn others against any type of harm, but in some instances, land and business owners may owe a greater standard of care to people on their property.[119]

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116. *Compare* Mahoney v. Allegheny Coll., No. AD 892-2003 (Pa. Ct. Com. Pl. Crawford County Dec. 22, 2005), http://www.theasca.org/attachments/articles/35/Allegheney%20college%20SJ%20decision.pdf (finding no express or implied contract after plaintiffs argued that the Parent's Handbook marketed the counseling center as a place "to discuss concerns, sort out feelings, and get help making choices . . . [With a staff] dedicated to helping students address personal . . . issues" and the health center as "provid[ing] prompt treatment for medical problems . . . [And] when cases warrant, students are referred to specialists in Meadville or to the Meadville Medical Center . . . ." (internal quotation marks omitted)), *with Threat Assessment Team*, *supra* note 76 (listing a commitment to "provid[e] a safe and secure environment" and allowing the team to "act, as necessary, to protect the campus community"), *and University of Virginia Threat Assessment Team*, *supra* note 74 (including a goal "to help preserve the safety and security of the University community").

117. For example, the average institutional endowment in 2009 was over $375,000. NAT'L ASSOC. OF COLL. & UNIV. BUS. OFFICERS AND COMMONFUND INST., U.S. AND CANADIAN INSTITUTIONS LISTED BY FISCAL YEAR 2010 ENDOWMENT MARKET VALUE AND PERCENTAGE CHANGE IN ENDOWMENT MARKET VALUE FROM FY 2009 TO FY 2010, at 22 (2011) *available at* http://www.nacubo.org/Documents/research/2010NCSE_Public_Tables_Endowment_Market_Values_Final.pdf. Also, institutions began providing other business-like services on campus such as university hospitals and modern conference centers.

118. *See, e.g.*, Duarte v. State, 151 Cal. Rptr. 727 (Ct. App. 1979) (unpublished opinion).

119. RESTATEMENT (SECOND) OF TORTS § 314 (1965). For example, a landowner may owe a duty to someone injured on her property. *Id.* § 329–44. The landowner's duty to the individual depends on the person's classification as a trespasser, licensee, or invitee. *Id.* Except under certain circumstances, a landowner owes only a duty of reasonable care and a duty not to willfully injure the person. *Id.* § 333–39. However, a licensee, generally defined as a social guest, is owed a duty to warn of known hidden dangers on the property. *Id.* § 340–42. The landowner owes an invitee, someone present for a mutual benefit or business purposes, a duty to keep the property reasonably safe from harm. *Id.* § 343–44.

However, a business owner may owe a higher standard of care to individuals on the premises depending on the person's classification. *Id.* § 329–44. Specifically, a business owner has a duty to warn invitees of foreseeable dangers, including foreseeable criminal acts. *Id.* § 344.

It is important to note that the Jeanne Clery Disclosure of Campus Security Policy and Campus Crimes Statistics Act (Clery Act), 20 U.S.C. § 1092(f) (2006), requires institutions receiving federal

Courts have repeatedly found students to be business invitees on their respective campuses.[120] The housing contract between the college and the student alone has formed the basis of the business-invitee relationship in some circumstances.[121] However, if a housing contract is the only basis to find such a relationship, when a student steps outside of his residence hall, the relationship may cease.[122] Consequently, the existence of a valid housing contract is not the only way for courts to find a business-invitee relationship between a college and its students. For example, in *Peterson v. San Francisco Community College District*, the California Supreme Court found Kathleen Peterson to be a business invitee when she was assaulted in an on-campus parking garage.[123] Assuming courts will find students to be invitees, colleges still only have a duty under this doctrine to take reasonable steps to maintain a safe environment and warn of foreseeable dangers—including third-party criminal acts—within its control.[124]

However, this premises-based duty will only extend to situations where the harm is "reasonably foreseeable and within the university's control."[125] Areas found to be within the institution's control include

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funding to "make timely reports to the campus community on crimes considered to be a threat to other students and employees." *Id*. So while there may be no common law duty to warn of threats, federal law has imposed a duty in some circumstances.

120. *See, e.g.*, Vega v. Sacred Heart Univ., 836 F. Supp. 2d 58 (D. Conn. 2011); Peterson v. S.F. Cmty. Coll. Dist., 685 P.2d 1193 (Cal. 1984); Furek v. Univ. of Del., 594 A.2d 506 (Del. 1991); Stanton v. Univ. of Me. Sys., 773 A.2d 1045 (Me. 2001); Sharkey v. Bd. of Regents, 615 N.W.2d 889 (Neb. 2000), *abrogated by* A.W. v. Lancaster Cnty. Sch. Dist. 0001, 784 N.W.2d 907 (Neb. 2010); Knoll v. Bd. of Regents, 601 N.W.2d 757 (Neb. 1999), *abrogated on other grounds by A.W.*, 784 N.W.2d 907.

121. Duarte v. State, 151 Cal. Rptr. 727 (Ct. App. 1979) (unpublished opinion); *see also* Nero v. Kan. State Univ., 861 P.2d 768 (Kan. 1993); Miller v. State, 467 N.E.2d 493 (N.Y. 1984).

122. *But see* Johnson v. State, 894 P.2d 1366 (Wash. Ct. App. 1995) (finding that a business-invitee relationship based on the plaintiff's housing contract created a duty to provide reasonable care for her safety when she was trying to enter her dorm when she was assaulted).

123. *Peterson*, 685 P.2d at 1198. As a community college, it is presumed that San Francisco Community College did not offer on-campus housing to its students because community colleges are designed to be commuter schools. The court explicitly states that Peterson paid for a parking pass at the college but makes no mention of a housing contract. *Id.*

124. *Nero*, 861 P.2d at 780; *see also* Furek v. Univ. of Del., 594 A.2d 506, 520–22 (Del. 1991) (finding a duty to protect plaintiff student from acts of third parties that are both foreseeable and within university control).

125. *Nero*, 861 P.2d at 780. In *Nero*, the court reversed the lower court's grant of summary judgment for the university and found the institution owed a duty of reasonable care to the student after she was sexually assaulted in her residence hall. *Id.* The assailant was previously accused of sexually assaulting

on-campus residence halls and their vicinities,[126] parking garages,[127]academic buildings,[128] and fraternity houses.[129] Courts have also found university control where the institution merely owned the land a fraternity-owned house sat on.[130] Generally, any university owned or operated property will be found to be within the institution's control.

To create a premises-based duty, the harm must also be foreseeable. When a university has notice of criminal or harmful acts committed by a specific assailant, courts have found that future criminal acts by that individual are clearly foreseeable.[131] Courts have also found subsequent harm to be foreseeable when the college has notice of prior criminal acts by others not involved in the later act.[132] However, notice of prior acts of criminal conduct by the same person or by others is not the only factor in determining whether a

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another student and was moved from co-ed housing for the remainder of the year. *Id.* at 771. However, the only housing facility for summer school was co-ed, and the university allowed the assailant to live in the building with the defendant. *Id.* at 772. During his stay in the co-ed building, he assaulted the defendant. *Id.*

126. *Duarte*, 151 Cal. Rptr. 727; *Nero*, 861 P.2d at 780; Stanton v. Univ. of Me. Sys., 773 A.2d 1045 (Me. 2001); *Miller*, 467 N.E.2d 493; *Johnson*, 894 P.2d 1366.

127. *Peterson*, 685 P.2d at 1193.

128. Sharkey v. Bd. of Regents, 615 N.W.2d 889 (Neb. 2000), *abrogated by* A.W. v. Lancaster Cnty. Sch. Dist. 0001, 784 N.W.2d 907 (Neb. 2010).

129. Knoll v. Bd. of Regents, 601 N.W.2d 757 (Neb. 1999), *abrogated on other grounds by A.W.*, 784 N.W.2d 907.

130. Furek v. Univ. of Del., 594 A.2d 506 (Del. 1991).

131. *See Nero*, 861 P.2d at 780; *see also Sharkey*, 615 N.W.2d at 901 (finding previous accusations of stalking against student assailant made later assault of female student and stabbing her husband foreseeable); *Knoll*, 601 N.W.2d at 757 (finding unrelated acts of fraternity members, such as public intoxication, sexual assault, and fighting, to make subsequent hazing of fraternity pledges foreseeable). *But see* Rhaney v. Univ. of Md. E. Shore, 880 A.2d 357 (Md. 2005) (ruling one university disciplinary action against assailant for fighting insufficient to make subsequent assault against roommate foreseeable).

132. *Furek*, 594 A.2d at 519–20. In *Furek*, in an act of hazing, a fraternity member poured a lye-based liquid on a pledge causing severe chemical burns. *Id.* at 510. The court found the incident to be foreseeable by the institution based on past incidents of hazing by other fraternities and "common knowledge on campus that hazing occurred." *Id.* at 522; *see also Peterson*, 685 P.2d at 1201–02 (holding plaintiff's sexual assault in campus parking garage was foreseeable based on other similar assaults in the area); Duarte v. State, 151 Cal. Rptr. 727 (Ct. App. 1979) (unpublished opinion) (holding decedent's rape and murder were foreseeable based on a "chronic pattern of violent assaults, rapes and attacks"); *Knoll*, 601 N.W.2d at 764 (finding hazing by other fraternities contributed to foreseeability); Miller v. State, 467 N.E.2d 493, 514 (N.Y. 1984) (holding plaintiff's kidnapping and rape at knifepoint were foreseeable based on school newspaper accounts of other crimes). *But see* Brown v. N.C. Wesleyan Coll., Inc., 309 S.E.2d 701, 703 (N.C. Ct. App. 1983) (finding scattered crimes over a span of twenty years insufficient to make student's abduction, rape, and murder foreseeable).

later act is foreseeable.[133] The mere act of implementing safety measures has also made subsequent criminal acts foreseeable.[134]

1. Application of Premises Based Liability to the Use of Threat Assessment

The effective implementation and use of threat assessment teams on campus could increase institutional foreseeability of future criminal acts or suicide attempts. When campus community members report strange or odd behavior by a student to a central reporting group that includes law enforcement, mental health professionals and possibly legal counsel, an institution could hardly argue it did not have notice of potentially dangerous behavior. Although notice of a student acting peculiar is not equivalent of notice of past criminal acts, plaintiffs could argue that the college was aware of the student of concern and should have acted before he injured himself or others. Both plaintiffs and courts may analogize the installation of campus safety measures, where courts have found institutional liability, and the implementation of threat assessment teams, arguably a different kind of safety measure. However, several questions remain. What types of behavior will create foreseeability of subsequent criminal acts? Will a student acting oddly or speaking out in class—undoubtedly non-criminal conduct—make her later criminal conduct foreseeable? Will the unrelated threatening words or actions by one student make a later assault by a different student foreseeable? Most concerning behavior, such as a student acting out in class or acting strangely in his dormitory, would arguably not make a later violent incident foreseeable because of the overall difficulty in predicting violence.[135] But when a student attempts or threatens suicide or

133. Mullins v. Pine Manor Coll., 449 N.E.2d 331, 337 (Mass. 1983), *superseded by statute*, MASS. GEN. LAWS ch. 229, § 2 (West, Westlaw through ch. 291 of the 2012 2nd Ann. Sess.).

134. Stanton v. Univ. of Me. Sys., 773 A.2d 1045, 1050 (Me. 2001). "That a sexual assault could occur in a dormitory room on a college campus is foreseeable and that fact is evidenced in part by the security measures that the University had implemented." *Id.*; *see also Mullins*, 449 N.E.2d at 337 ("[T]he precautions which Pine Manor and other colleges take to protect their students against criminal acts of third parties would make little sense unless criminal acts were foreseeable.").

135. *See* Ben "Ziggy" Williamson, Note, *The Gunslinger to the Ivory Tower Came: Should Universities Have a Duty to Prevent Rampage Killings?*, 60 FLA. L. REV. 895, 909 (2008) (arguing that

threatens to harm others, a subsequent completed suicide or violent assault on others may be found to be reasonably foreseeable by the university, especially when they are collecting information and assessing student threats. If courts find threat assessment teams put schools on notice so that subsequent criminal behavior is foreseeable, they must determine what type of conduct would make a later violent act reasonably foreseeable.[136]

C. Voluntary Assumption Of A Duty And Reliance

An institution may also assume a duty when they render services to another person and do not exercise reasonable care in that undertaking.[137] However, those actions only create liability when the failure to provide due care increases the risk of harm[138] or is detrimentally relied upon.[139] Voluntary assumption of a duty provides another framework by which to assess institutional duty in a case of student suicide or criminal acts.[140] Some contend that colleges may be increasing their liability by creating a "holistic learning environment" by providing "services and programs that extend far beyond those associated with the traditional classroom."[141] However, courts have inconsistently applied this doctrine to institutional liability.[142]

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no professional may be able to predict future violent acts).

136. The harm must not only be foreseeable but also within an area of university control—generally held to be any university-owned property. Consequently, any harm that occurs in or on university property will likely to be found within the university's control. *See* discussion *supra* Part II.B. Therefore, if the injury occurs on campus and is found to be foreseeable, a court may find an institutional duty.

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

138. *Id.* § 323(a).

139. *Id.* § 323(b).

140. *See generally* Susanna G. Dyer, Note, *Is there a Duty?: Limiting College and University Liability for Student Suicide*, 106 MICH. L. REV. 1379 (2008). Dyer argues that courts should use the voluntary assumption of responsibility doctrine to hold colleges liable for the "substandard design and/or administration of their suicide reduction protocol" directly impacting student risk. *Id.* at 1403.

141. Joseph Beckham & Douglas Pearson, Commentary, *Negligent Liability Issues Involving Colleges and Students: Does a Holistic Learning Environment Heighten Institutional Liability?*, 175 WEST'S EDUC. LAW REP. 379, 396 (2003).

142. *Compare* Jain v. State, 617 N.W.2d 293, 300 (Iowa 2000) (finding no institutional duty because there was no evidence that the university's actions increased the risk of harm to the student or evidence of detrimental reliance), *with* Furek v. Univ. of Del., 594 A.2d 506, 520 (Del. 1991) (finding an

In *Jain v. State*, University of Iowa student Sanjay Jain committed suicide by self-inflicted carbon monoxide poisoning after running his moped in his residence hall room.[143] Jain's family argued that the university voluntarily adopted a policy of parental notification when a student exhibits self-destructive behavior and that its failure to notify them caused their son's death.[144] Jain previously reported to his resident assistant his desire to commit suicide by inhaling exhaust fumes, but the university did not contact his parents following the incident because Jain did not consent to the disclosure.[145] In a matter of first impression in the state of Iowa, the court applied the voluntary assumption of responsibility doctrine to "an allegedly preventable death by suicide."[146] In applying section 323(a) of the Restatement of Torts, the court held that section only applied when the "'defendant's actions increased the risk of harm to plaintiff'" and "'somehow put the plaintiff in a worse situation than if the defendant had never begun performance.'"[147] The court declined to find a duty to notify the parents under section 323(a) or (b) on the grounds that "no affirmative action by the [university] . . . increased th[e] risk of self-harm" and found Sanjay Jain did not rely on the parental notification policy.[148]

Courts have also declined to find that an institution assumed a duty through a negligent undertaking in other contexts as well. Simply enacting, publishing, and enforcing policies to address student behavior, such as drinking and interpersonal conduct, generally does not constitute a voluntary undertaking.[149] The Eighth Circuit also

institutional duty without requiring increase of harm or detrimental reliance).

143. *Jain*, 617 N.W.2d at 296.

144. *Id.* at 297–98. The court reported the University had an unwritten policy that states when the institution has "evidence of a suicide attempt, university officials will contact a student's parents." *Id.* at 296.

145. *Id.* at 295–96.

146. *Id.* at 299.

147. *Id.* (quoting Turbe v. Gov't of the V.I., 938 F.2d 427, 432 (3d Cir. 1991)).

148. *Id.* at 299–300.

149. *See, e.g.*, Rabel v. Ill. Wesleyan Univ., 514 N.E.2d 552 (Ill. App. Ct. 1987); *see also* Fitzpatrick v. Universal Technical Inst., Inc., No. 08-1137, 2010 WL 3239173 (E.D. Pa. Aug. 11, 2010) (finding no duty to the community based on disciplinary policy and public statements about policies); Booker v. Lehigh Univ., 800 F. Supp. 234 (E.D. Pa. 1992) (finding no assumption of duty by enacting Social Policy after party hosts did not comply with Policy).

declined to find a voluntary assumption of a duty when a college staff member observed an intoxicated female and put her in the responsibility of another student.[150] The court ruled that by leaving her with her male host, the resident assistant did nothing to take charge of the situation and therefore was not liable.[151]

However, other courts have found the university assumed a duty through its affirmative actions in various contexts. In *Furek v. University of Delaware*, the Delaware Supreme Court found the college's policy against hazing constituted an assumed duty.[152] But the court never completed the second part of the analysis—whether the plaintiff was in a worse off position or detrimentally relied—and seemed to focus its finding more on the premises liability doctrine.[153] Additionally, courts have also found an assumed duty when colleges enact various security measures,[154] advise a student organization about safety,[155] and provide a free shuttle to an off-campus location known for underage drinking.[156] While courts generally have been reluctant to impose liability for student alcohol consumption, the Idaho Supreme Court held the University of Idaho assumed a duty when it provided two staff members to oversee a fraternity party.[157] The court found that the staff knew or should have known that the

150. Freeman v. Busch, 349 F.3d 582, 588–89 (8th Cir. 2003). Restatement § 324 suggests a duty exists when someone takes control of a helpless person and creates liability when the person is injured due to failure to provide reasonable care or when the individual discontinues aid and leaves the person in a worse position. RESTATEMENT (SECOND) OF TORTS § 324 (1965). "The rule stated in this Section is an application of the one stated in § 323." *Id.* § 324 cmt. a (1965).

151. *Freeman*, 349 F.3d at 589. In *Freeman,* a female university guest was extremely intoxicated and allegedly sexually assaulted after being left in the responsibility of her friend by a student resident assistant. *Id.* at 585–86. The court ruled that the resident assistant did not take charge after telling her host to monitor her and report back if her condition worsened. *Id.* at 589.

152. Furek v. Univ. of Del., 594 A.2d 506, 520 (Del. 1991). The court reversed the lower court grant of judgment n.o.v. in favor of the university. *Id.* at 523.

153. *Id.* at 520–24.

154. Mullins v. Pine Manor Coll., 449 N.E.2d 331, 336–37 (Mass. 1983), *superseded by statute*, MASS. GEN. LAWS ch. 229, § 2 (West, Westlaw through ch. 291 of the 2012 2nd Ann. Sess.). The court reasoned a reasonable jury may determine that the plaintiff and her parents could have relied on the existence of various safety measures, including a fence around campus and the existence of security guards, when deciding to enroll at the institution. *Mullins*, 449 N.E.2d at 336–37.

155. Davidson v. Univ. of N.C. at Chapel Hill, 543 S.E.2d 920 (N.C. Ct. App. 2001). A student was severely injured in a cheerleading accident. *Id.* at 922. Because the college began to educate and advise the squad about safety, the court found it owed the plaintiff a duty. *Id.* at 930.

156. McClure v. Fairfield Univ., 35 Conn. L. Rptr. 169 (Super. Ct. 2003) (unpublished opinion).

157. Coghlan v. Beta Theta Pi, 987 P.2d 300, 312 (Idaho 1999).

student was intoxicated and needed help before she was later left unattended and fell from a fire escape.[158]

1. Application of Voluntary Assumption to the Use of Threat Assessment

In applying a voluntary assumption of duty analysis to student injuries, courts have inconsistently applied the law, sometimes strictly requiring the detrimental reliance or increase of harm requirements, and other times glossing over or flatly ignoring them.[159] For that reason, assessing the impact of threat assessment teams on institutional liability using the voluntary assumption of responsibility doctrine is difficult. Conversely, if courts applied the complete standard—a voluntary undertaking that either increases harm or causes detrimental reliance—plaintiffs have a high burden to meet to establish institutional liability.

First, courts would be unlikely to find the creation of a threat assessment team to be a voluntary assumption of responsibility.[160] Any specific action by a threat assessment team, as minimal as deciding a student is not a threat and not acting, may be considered an affirmative undertaking by a court. Courts have found colleges voluntarily assumed a duty by educating students about safety,[161] providing standard security measures,[162] and providing a shuttle service to an off-campus location.[163] Consequently, it is likely a court will also find a voluntary assumption of responsibility when a college utilizes the threat assessment process.

158. *Id.* at 312. The plaintiff Rejena Coghlan became extremely intoxicated at a campus fraternity party and fell from a fire escape after being taken back to her residence by her sorority sisters. *Id.* at 305.

159. *See supra* notes 143–58 and accompanying text.

160. Courts held that colleges did not assume a duty by enacting and implementing policies. *See supra* note 149 and accompanying text.

161. Davidson v. Univ. of N.C. at Chapel Hill, 543 S.E.2d 920 (N.C. Ct. App. 2001).

162. Mullins v. Pine Manor Coll., 449 N.E.2d 331, 336–37 (Mass. 1983), *superseded by statute*, MASS. GEN. LAWS ch. 229, § 2 (West, Westlaw through ch. 291 of the 2012 2nd Ann. Sess.).

163. McClure v. Fairfield Univ., 35 Conn. L. Rptr. 169 (Super. Ct. 2003) (unpublished opinion). In *McClure*, the court found the university owed McClure a duty after he was injured walking home from a location well known for off-campus partying. *Id.* By providing a shuttle service, the court held the university "assumed a responsibility for the safety of students while traveling between the beach area and the university campus." *Id.*

Even after showing a voluntary undertaking, a potential plaintiff must still show she was in a worse position based on the threat assessment—or the actions taken as a result—or that she detrimentally relied upon it.[164] It may be difficult for a student plaintiff to show she was in a worse position than if the university did not conduct a threat assessment or, after conducting an assessment, decided there was no threat.[165] The process of threat assessment is to identify individuals who may commit violence against themselves or others and provide resources to those individuals.[166] As a result, a plaintiff may argue that the university was negligent in identifying, assessing, or responding to a threat, which resulted in her injury, but she would be in no worse position if the university had done nothing.[167] Nevertheless, any action taken by the institution, such as referral to counseling, would likely decrease the risk of harm or have some positive effect and not increase the student's risk as compared to the college doing nothing.

Likewise, in student suicide cases, the family of the deceased student must also show their son or daughter was in a worse position than if the university did nothing—a very high burden.[168] Any attempt to help a student, whether by referring to counseling or follow-up by college staff members, would be better than doing nothing. A duty may also be found if the plaintiff can show detrimental reliance upon the university threat assessment process.[169] However, this would also be difficult to prove as students must show they "let their guard down" and neglected their own personal safety based on a belief the university could identify and eliminate all possible harm on campus.[170] A victim of third-party criminal

164. *See supra* notes 137–39 and accompanying text.

165. It would be interesting to see how a court would treat a suit by a perpetrator of violence—previously discussed by the threat assessment team—arguing the college was negligent in not preventing the violent act. This is, however, beyond the scope of this Note.

166. *See* discussion *supra* Part I.B.

167. For a discussion of the difficulties plaintiffs face in jurisdictions that actually impose the heightened risk or detrimental reliance requirements, see Jain v. State, 617 N.W.2d 293 (Iowa 2000), discussed in notes 142–47.

168. *See supra* notes 137–39 and accompanying text.

169. *See supra* note 139 and accompanying text.

170. For a discussion of reliance interests, see RESTATEMENT (SECOND) OF TORTS § 323(b) cmt. d

behavior would likewise have a very difficult time showing such detrimental reliance because it is extremely unlikely a college student would, first, know about the actions of the threat assessment team and, second, so completely ignore acting in her own personal safety to be able to show a detrimental reliance. Additionally, for the families of student suicide victims, they would also have to show they ignored acting in their child's best interests of safety and so relied on the university to safeguard their child that they did nothing.[171] Although it is possible for a court to find a college owes a duty to its students based on a voluntary undertaking analysis, it is a high burden to meet by potential plaintiffs and should only be applied in narrow factual circumstances.

D. Special Relationship Between The Institution And Its Students

Finally, a plaintiff may try to show a special relationship existed between the college and either the victim or the assailant, and consequently the institution owed the plaintiff a duty. Generally, an individual is under no duty to take any affirmative action to assist another—even if he knows the person needs help—unless a special relationship exists.[172] Litigants often unsuccessfully argue that the university–student relationship is special and should give rise to liability when a college did not prevent an injury.[173] Although no court recognizes a general special relationship between a school and all of its students, the Restatement Third of Torts lists the relationship between a "school [and] its students" as one of the enumerated special relationships.[174] And while this Restatement view has not

(1965).

171. *Id.*

172. *Id.* § 314. A common example is, if, hypothetically, you come across an infant drowning in a puddle and you could save her with little effort and risk to yourself, you are under no duty to do so. The Restatement Second of Torts provides examples of relationships that the law considers special and, therefore, create a duty of care. Some of these include common carriers, innkeepers, landowners to invitees, and any duty created by law. *Id.* § 314(A). However, this list is not exclusive and other relationships may exist that the law would consider "special." *Id.* § 314(A), cmt. c.

173. *See, e.g.*, Beach v. Univ. of Utah, 726 P.2d 413 (Utah 1986) (arguing a special relationship exists between the institution and all students).

174. RESTATEMENT (THIRD) OF TORTS § 40(b)(5) (Proposed Final Draft No. 1, 2005). Although the comments refer more to the relationship between a grade school and its students, the authors do

been generally adopted, it does show courts' increased willingness to impose a duty on colleges under this doctrine.

Courts have repeatedly held that no general special relationship exists between an institution and *all* of its students,[175] but courts have found that where a special relationship exists between the institution and one of its students—the assailant or victim—the institution owes a duty of care.[176] The seminal case in this area is *Tarasoff v. Regents of the University of California*.[177] In October 1969, Prosenjit Poddar killed Tatiana Tarasoff after previously informing a university psychologist of his intention to kill her.[178] Tarasoff's parents filed suit claiming the university owed Tarasoff and her parents a duty to warn them of Poddar's threat.[179] At the time, California law held a special relationship must exist between the university and both the victim and dangerous person to create a duty.[180] Departing from precedent, the court held that the relationship between a psychologist and a patient may be legally "special" and thus created a duty of care for the safety of both the patient and "any third person whom the doctor knows to be threatened by the patient."[181] The university argued against imposing such a duty, pointing to the inherent difficulty in predicting whether someone may become violent, when that might occur, and to whom it may be directed.[182] The court acknowledged this difficulty but maintained the duty, requiring not a

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recognize an emerging trend of finding a special relationship between colleges and their students. *Id.* § 40 cmt. *l*.

175. *See* Furek v. Univ. of Del., 594 A.2d 506, 520–24 (Del. 1991) (finding no general special relationship between the university and all students); *see also* Klobuchar v. Purdue Univ., 553 N.E.2d 169 (Ind. Ct. App. 1990) (finding no special relationship with all students); Howell v. Calvert, 1 P.3d 310 (Kan. 2000) (same); Nero v. Kansas State Univ., 861 P.2d 768 (Kan. 1993) (same); Beach v. Univ. of Utah, 726 P.2d 413 (Utah 1986) (same).

176. Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334 (Cal. 1976).

177. *Id.* at 436.

178. *Id.* at 339. Tarasoff's parents alleged that two months prior, Poddar told Dr. Lawrence Moore, a psychologist at the University of California at Berkeley, of his intention to kill Tarasoff. *Id.* Berkeley police detained Poddar but later released him on the belief he was acting rationally. *Id.* at 339–40.Tarasoff's parents further alleged that Moore's supervisor ordered no further action be taken against Poddar. *Id.* Poddar eventually went to Tarasoff's house and killed her. *Id.* at 341.

179. *Id.*

180. *Id.* at 343–44.

181. *Id.* (quoting John G. Fleming & Bruce Maximov, *The Patient or His Victim: The Therapist's Dilemma*, 62 CAL. L. REV. 1025, 1030 (1974)).

182. *Tarasoff*, 551 P.2d at 344–45.

"perfect performance" but only reasonable "skill, knowledge, and care ordinarily possessed and exercised by members of (that professional specialty) under similar circumstances."[183] The court found, under the circumstances, the university owed Tarasoff a "reasonable [duty] to protect the foreseeable victim of that danger."[184]

While *Tarasoff* establishes a special duty between medical professionals and both patients and potential victims, arguments exist both for and against applying the special relationship standard to non-clinical university staff members.[185] In applying the special relationship doctrine, courts have generally held that where a special relationship is established, the institution has a duty to protect from any foreseeable danger or harm.[186] Assuming the doctrine will apply, any assessment of institutional liability will be difficult. The *Tarasoff* court recognized that any inquiry into whether a duty exists and is met "will necessarily vary with the facts of each case."[187] Courts have found special relationships between institutions and their student athletes[188] but generally decline to find a special relationship between the institution and its students in cases involving voluntary consumption of drugs or alcohol.[189] The most applicable cases to an

183. *Id.* at 345 (citation omitted) (internal quotation marks omitted).

184. *Id*. The court recognized the difficulty of predicting violence and determining the proper way to meet the newfound duty but found the societal interest in protecting potential victims outweighs this difficulty, any potential issues of violating patient confidentiality, and unnecessarily giving warnings to victims not at risk. *Id.* at 346–48.

185. *See* Helen H. de Haven, *The Academy and the Public Peril: Mental Illness, Student Rampage, and Institutional Duty*, 37 J.C. & U.L. 267 (2011) (arguing courts should find an institutional duty regarding disturbing student behavior). *But see* Williamson, *supra* note 135, (arguing against imposing a duty to prevent rampage killings at colleges).

186. *See, e.g.*, Kleinknecht v. Gettysburg Coll., 989 F.2d 1360 (3d Cir. 1993).

187. *Tarasoff*, 551 P.2d at 345.

188. *See Kleinknecht*, 989 F.2d at 1360; *see also* Davidson v. Univ. of N.C. at Chapel Hill, 543 S.E.2d 920 (N.C. Ct. App. 2001).

189. *See* Bradshaw v. Rawlings, 612 F.2d 135 (3d. Cir. 1979) (finding no university duty for student's off-campus injury when institution was aware of student's voluntary consumption at off-campus college sponsored event); Coghlan v. Beta Theta Pi Fraternity, 987 P.2d 300 (Idaho 1999) (finding no special relationship for voluntary consumption but imposing duty based on institution's voluntary assumption of duty); Bash v. Clark Univ., 22 Mass. L. Rptr. 84 (Super. Ct. 2006) (no duty for student's voluntary drug use); Beach v. Univ. of Utah, 726 P.2d 413 (Utah 1986) (no duty for student's injury after voluntarily consuming alcohol, even after college on notice of prior incident where student became disoriented after drinking).

analysis of the impact of threat assessment on university liability are those involving student suicide and dangerous individuals on campus.

In student suicide cases, courts have inconsistently applied the special relationship doctrine. In *Shin*, the Massachusetts trial court denied the MIT administrators' motion for summary judgment and found a special relationship existed between Shin and her "treatment team."[190] The court surprisingly found that Shin's House Director, Nina Davis-Mills—who was not on the "deans and psychs" team—was part of the "treatment team."[191] Because the "team" did not create and implement an immediate plan to respond to Shin's suicidal ideations, the court found sufficient facts to defeat the administrators' motion.[192] Whether a special relationship truly existed was never determined on appeal because MIT settled the case.[193]

In *Schieszler v. Ferrum College*, a federal district court also found a special relationship existed between a college and a deceased student.[194] Michael Frentzel hanged himself with a belt in his residence hall room.[195] Earlier on the night of his suicide, Frentzel threatened to and tried to hang himself resulting in University police and administrators responding and drafting a "No-Harm Agreement."[196] While college staff spoke privately to Frentzel's girlfriend, Frentzel sent an e-mail again threatening to kill himself.[197] Despite being made aware of the threat, the university staff did not immediately respond.[198] When the group returned later, they found that Frentzel hanged himself with a belt—he died two days later as a

190. Shin v. Mass. Inst. of Tech., No. 020403, 2005 WL 1869101, at *14 (Mass. Super. Ct. June 27, 2005).

191. *Id.*

192. *Id.*

193. Eric Hoover, *In a Surprise Move, MIT Settles Closely-Watched Student Suicide Case*, CHRON. HIGHER EDUC., Apr. 14, 2006, at A41.

194. Schieszler v. Ferrum Coll., 233 F. Supp. 2d 796 (W.D. Va. 2002).

195. *Id.* at 798. Prior to his suicide, Frentzel had disciplinary problems resulting in anger management counseling. *Id.* As a result, the college required Frentzel to attend disciplinary workshops provided by college staff and anger management counseling provided by an off-campus counseling center. *Id.*

196. *Id.* In the "No-Harm Agreement," Frentzel made a promise not to harm himself. *Id.*

197. *Id.*

198. *Id.*

result.[199] In denying the college's motion to dismiss the wrongful death claim, the court found sufficient facts indicating that a special relationship existed between Frentzel and the college.[200] Like *Shin*, the finding of a special relationship was not tested on appeal as the college later settled the case.[201]

Other courts have taken a different path, declining to find a special relationship in student suicide cases.[202] In *Mahoney v. Allegheny College*, a Pennsylvania trial court declined to find a special relationship between the decedent and the college.[203] The court held the relationship between the student, Charles Mahoney IV, and non-clinician college administrators was not legally "special."[204] In assessing whether the college administrators had a duty to notify his parents or prevent Mahoney's suicide, the court found no special relationship existed based on the short duration of the relationship before Mahoney's suicide, the administrator's reliance on the advice of Mahoney's mental health counselor, and the fact that Allegheny administrators did not take any action that would prevent Mahoney from seeking professional help.[205] The court distinguished both *Shin*

199. *Id.*

200. Schieszler v. Ferrum Coll., 236 F. Supp. 2d 602, 609 (W.D. Va. 2002). Based on the college's knowledge of past disciplinary problems, a previous incident of self-harm, and multiple threats, the court found his suicide was foreseeable and created a special relationship. *Id.* The court also stated it would be "unlikely" to find a special relationship between colleges and all of their students, but a special relationship may exist based on the facts of a case. *Id.* Authors have questioned whether foreseeability alone should be sufficient to find a special relationship. Daryl J. Lapp, *The Duty Paradox: Getting It Right After a Decade of Litigation Involving the Risk of Student Suicide*, 17 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 29, 40–42 (2010).

201. *College Says Its to Blame for Suicide*, FREE LANCE-STAR (Fredericksburg, Va.), July 26, 2003, at C6.

202. In *Jain v. State*, Sanjay Jain's parents argued a special relationship existed based on the university's knowledge of their son's "mental condition or emotional state requiring medical care." Jain v. State, 617 N.W.2d 293, 297 (Iowa 2000). The Jains argued that the requirements of the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232(g) (2006), regarding disclosure of records, coupled with the university's policy of parental notification, created a special relationship. *Jain*, 617 N.W.2d at 297–98. The court did not apply the special relationship doctrine and instead declined to find a duty based on a voluntary assumption of responsibility analysis. *Id.*

203. Mahoney v. Allegheny Coll., No. AD 892-2003 (Pa. Ct. Com. Pl. Crawford County Dec. 22, 2005), http://www.theasca.org/attachments/articles/35/Allegheney%20college%20SJ%20decision.pdf.

204. *Id.* at *22.

205. *Id.* College administrators only worked with Mahoney for three or four days prior to his suicide. *Id.* While denying any liability by Mahoney's counselor, Jacquelyn Kondrot, the institution did not seek summary judgment to the plaintiff's cause of action against her. *Id.* at *2. Consequently, the court only assessed the duty of the administrators for Mahoney's death. *Id.*

and *Schieszler* on the fact that, unlike Elizabeth Shin or Michael Frentzel, Charles Mahoney "had neither engaged in nor threatened any specific acts of self-harm."[206] Courts and commentators have come to different conclusions as to whether a special relationship exists between a student and the institution after a student suicide, and any assessment of institutional liability remains a very factually driven inquiry.[207]

In cases involving third-party criminal behavior, courts have also come to different conclusions as to whether a special relationship exists. For example, in *Klobuchar v. Purdue University*, the court found no special relationship after the plaintiff's estranged husband abducted her at gunpoint on-campus and forced her to drive off-campus where he killed her.[208] The court declined to find a special relationship between the university and the killer because he had no relationship with the university and the university had no knowledge of the danger.[209] However, in the only case that resulted from the Virginia Tech tragedy (all other claims were settled by the families),[210] a Virginia trial court found a special relationship between Virginia Tech and both Cho and the victims.[211] The precedential value of this case is minimal for two reasons: (1) it comes from a state trial court, and (2) the court based its finding of a special relationship on nontraditional principles: the business invitor–invitee relationship and state statute.[212] This case is illustrative on two points: (1) it indicates courts' confusion in applying special relationship principles to the college–student relationship, and (2) it

206. *Id.* at *23.

207. *See* Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334, 345 (Cal. 1976) (stating that whether duty lies "var[ies] with the facts of each case"). *See* Ann MacLean Massie, *Suicide on Campus: The Appropriate Legal Responsibility of College Personnel*, 91 MARQ. L. REV. 625, 686 (2008) (arguing a special relationship should exist when a "college administrator has actual knowledge of a suicide attempt . . . or of other circumstances that the student is seriously suicidal . . ."). *But see* Dyer, *supra* note 140, at 1403, (arguing non-clinician administrators do not have special relationships with their students in the area of suicide); Lapp, *supra* note 200, at 33 (suggesting colleges have no legal duty to warn or protect students from foreseeable risks).

208. Klobuchar v. Purdue Univ., 553 N.E.2d 169, 170–73 (Ind. Ct. App. 1990).

209. *Id.* at 173.

210. The Associated Press, *Virginia: Deal in Shootings*, N.Y. TIMES, Apr. 11, 2008, at A19.

211. Peterson v. Commonwealth, 80 Va. Cir. 21 (2010).

212. *Id.*

suggests that courts are willing to be flexible, applying the law to find colleges owe their students a duty in certain factual situations.

1. Application of Special Relationship to the Use of Threat Assessment

Predicting how a court will apply the special relationship doctrine to threat assessment teams is difficult because of courts' inconsistent application of the doctrine. Adding to the challenge is the recognition by the *Tarasoff* court that any analysis whether a duty exists "will necessarily vary with the facts of each case."[213] Despite *Tarasoff*'s limiting the extension of a special relationship to "therapists" and the "doctor-patient" relationship[214] and multiple arguments for limiting the doctrine to medical and mental health professionals,[215] courts—through confusion or creativity—have found ways to impose liability on colleges in both student suicide and third-party criminal behavior cases.[216]

Generally, courts are likely to continue to reject arguments that a general special relationship exists between every student and the college.[217] In the case of a student suicide, the cases suggest that colleges may owe the student a duty when the institution had actual notice of suicide attempts or threats and had a reasonable opportunity to intervene. In both *Shin* and *Schieszler*, the respective universities knew of previous suicide attempts by both students and had reasonable time to take affirmative action to prevent the suicide.[218] However, where the college has no knowledge that a student may be suicidal, as in *Mahoney*, no special relationship would likely be found.

213. Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334, 345 (Cal. 1976).
214. *Id.* at 344–45.
215. *See* Dyer, *supra* note 140; Lapp, *supra* note 200; Williamson, *supra* note 135.
216. *See supra* Part II.D.
217. *See supra* notes 173–75. However, that trend may be changing as evidenced by the suggestion that a special relationship exists between a school and its students in the Restatement Third of Torts. RESTATEMENT (THIRD) OF TORTS § 40(b)(5) (Proposed Final Draft No. 1, 2005).
218. *See supra* notes 190–201 and accompanying text.

In the case of third-party criminal behavior, the existence of a special relationship between the institution and either the victim or the assailant would likely depend on what information was known or what steps were taken by the threat assessment team. In the case of a victim–university relationship, courts are likely to find a special relationship if the institution knows that a specific victim is in danger and took no steps to warn or protect that student.[219] The relationship between a college and an assailant may also create a duty to warn or protect if the threat assessment process determines a student is a threat to an individual or the community.[220] While the relationship between a threat assessment team and the assailant is not a true doctor–patient relationship, like in *Tarasoff*, courts may be willing to find a special relationship due to the inclusion of the various professionals (law enforcement, psychologists, and others) on the threat assessment team.[221] Additionally, a psychologist may discuss multiple issues with a patient while in a counseling setting, whereas a threat assessment team is acutely focused on determining whether or not a person is a threat and may be arguably better equipped to make that determination than a doctor or psychiatrist.

The legal relationship between colleges and their students has evolved over time,[222] and although courts are trying to determine the proper relationship between a college and its students, several principles have emerged. First, courts are applying traditional tort principles of premises-based liability,[223] voluntary undertakings,[224] and special relationships[225] to find institutional liability. Second, despite the growing trend of imposing liability, courts generally refuse to find a duty for voluntary risky behavior.[226] Finally, courts

219. *Tarasoff* directly spoke to this issue. The institution knew she was in danger but took no steps to warn or protect her. *Tarasoff*, 551 P.2d at 345.

220. *See supra* notes 176–84 and accompanying text.

221. *Tarasoff*, 551 P.2d at 343.

222. *See supra* notes 93–101 and accompanying text.

223. *See supra* notes 117–36 and accompanying text.

224. *See supra* notes 137–69 and accompanying text.

225. *See supra* notes 172–231 and accompanying text.

226. *See* Bradshaw v. Rawlings, 612 F.2d 135, 142 (3d Cir. 1979) (finding no duty when student injured in car accident after drinking off-campus); Bash v. Clark Univ., 22 Mass. L. Rptr. 84 (Super. Ct. 2006) (no duty for student's voluntary drug use); Beach v. Univ. of Utah, 726 P.2d 413, 419 (Utah

are showing a willingness to impose a duty on colleges for third-party criminal behavior where the institution was on notice and had a reasonable opportunity to prevent the behavior,[227] but courts are more reluctant to find a college liable in student suicide cases.[228] However the current era may be characterized, it appears that both universities and students share some responsibility for student safety.[229] And although a college is not "an insurer of the safety of its students,"[230] there does appear to be some duty to engage students about their safety and provide a base level of security to keep them safe.[231]

III. UNIVERSITY LIABILITY FOR BEHAVIORAL INTERVENTION AND THREAT ASSESSMENT

Even when trained professionals work collaboratively in a threat assessment setting, predicting if and when someone may become

1986) (no duty despite notice of prior alcohol use by plaintiff).

227. *See* Tarasoff v. Regents of the Univ. of Calif., 551 P.2d 334, 344 (Cal. 1974); Nero v. Kansas State Univ., 861 P.2d 768, 780 (Kan. 1993); Mullins v. Pine Manor Coll., 449 N.E.2d 331, 337 (Mass. 1983), *superseded by statute*, MASS. GEN. LAWS ch. 229, § 2 (West, Westlaw through ch. 291 of the 2012 2nd Ann. Sess.); Sharkey v. Bd. of Regents, 615 N.W.2d 889, 902 (Neb. 2000), *abrogated by* A.W. v. Lancaster Cnty. Sch. Dist. 0001, 784 N.W.2d 907 (Neb. 2010); Johnson v. State, 894 P.2d 1366, 1370 (Wash. Ct. App. 1995); *see also* Furek v. Univ. of Del., 594 A.2d 506, 520 (Del. 1988) (finding institutional duty when hazing was foreseeable and university took steps to stop hazing by all students); Knoll v. Bd. of Regents, 601 N.W.2d 757, 764 (Neb. 1999) (duty for foreseeable hazing in a building within university's control), *abrogated on other grounds by A.W.*, 784 N.W.2d 907.

228. *Compare* Schieszler v. Ferrum Coll., 236 F. Supp. 2d 602 (W.D. Va. 2002) (duty), *and* Shin v. Mass. Inst. of Tech., No. 020403, 2005 WL 1869101, at *13 (Mass. Super. Ct. June 27, 2005) (duty), *with* Jain v. State, 617 N.W.2d 293, 300 (Iowa 2000) (no duty), *and* Mahoney v. Allegheny Coll., No. AD 892-2003 (Pa. Ct. Com. Pl. Crawford County Dec. 22, 2005), http://www.theasca.org/attachments/articles/35/Allegheney%20college%20SJ%20decision.pdf (no duty).

229. Students are responsible for their own voluntary risky behaviors. *See supra* note 185 and accompanying text. Colleges can be also found responsible for foreseeable third-party criminal behaviors and, in some cases, student suicide. *See supra* Part II.D. Various authors also suggest that we are in an era of shared responsibility for student safety. *See* Bickel & Lake, *supra* note 99, at 790 (suggesting a "facilitator" model where universities "must minimize (and educate students about) unusual risks, particularly those which could be reduced without significantly threatening the opportunity for student development"); Peters, *supra* note 101, at 467 (suggesting colleges have a duty to "protect their students from foreseeable harm within the scope of [the] relationship, [and] students have the corresponding duty to act reasonably under the circumstances").

230. *Bradshaw*, 612 F.2d at 138.

231. *Mullins*, 449 N.E.2d at 335–36. Colleges are "not entitle[d] . . . to abandon any effort to ensure [students'] physical safety. Parents, students, and the general community still have a reasonable expectation, fostered in part by colleges themselves, that reasonable care will be exercised to protect resident students from foreseeable harm." *Id.*

violent or commit suicide is extremely difficult.[232] For that reason, when assessing whether a university owes a victim of third-party criminal behavior or suicide a duty to warn or prevent their injury, courts should be reluctant to impose liability. However, when colleges, through the use of threat assessment, have knowledge that a student or the community is in danger and have a reasonable opportunity to intervene—whether to warn of, minimize, or completely prevent the harm—courts should find institutional liability using the voluntary assumption of responsibility[233] or special relationship[234] doctrines. Because any assessment of liability will be so factually driven,[235] universities should simply assume they owe their students a duty and strive to meet it by following existing best practices for the implementation and use of threat assessment and using their reasoned best judgments when making decisions. However, due to the inherent difficulty in predicting and preventing violence and the inexperience of the judiciary in these matters, courts should give deference to colleges provided they followed best practices and used their best judgment.

A. The Impact Of Threat Assessment On Institutional Duty

In assessing whether a college owes its students a duty based on the existence or work of the threat assessment team, courts should be reluctant to impose liability except under limited circumstances. First, unless the university specifically promises or enters into a contract with students to protect them from harm, any breach of contract claims stemming from marketing and promotional materials should be dismissed.[236] As evidenced in *Shin*, courts repeatedly reject plaintiffs' claims that marketing materials or verbal statements create

232. Finder & Rimer, *supra* note 23; *see also* Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334, 345 (Cal. 1976) (highlighting the difficulty in predicting whether someone presents a real threat of violence).

233. *See supra* Part II.C.

234. *See supra* Part II.D.

235. *See Tarasoff*, 551 P.2d at 345 (noting that whether a college is liable for student injury will vary based on the facts of the case).

236. *See supra* Part II.A.1.

enforceable contracts.[237] Courts should continue to do so when analyzing resources marketing a threat assessment team because any promotional materials describing the team or its services are likely to be no more than the "'generalized representations'" rejected in *Shin*.[238] Further, when applying premises-based liability doctrines, courts should also be reluctant to find the use of threat assessment creates a duty unless the assessment made the injury foreseeable and the harm occurred on university property.[239] However, in assessing the foreseeability of a suicide or criminal act, courts should be cautious in finding foreseeability based on a student acting strangely in class or other behavior that does not lead to a reasonable conclusion that the student was a threat. Courts must determine exactly what behavior makes violence foreseeable but should avoid "Monday morning quarterbacking" and second-guessing decisions made without the benefit of hindsight and a complete set of facts uncovered through the discovery process.

Despite the limitations of applying contractual and premises-based liability doctrines to threat assessment, courts have two more appropriate legal theories to apply when analyzing institutional duty—voluntary assumption of responsibility and special relationships. Under a voluntary assumption of responsibility analysis, courts should strictly apply the complete standard requiring both an affirmative undertaking by the college and either (1) detrimental reliance by the victim or (2) the institution increasing the risk of harm based on its actions.[240] In doing so, courts should overrule or distinguish cases that found a duty by voluntary

237. Shin v. Mass. Inst. of Tech., No. 020403, 2005 WL 1869101, at *7 (Mass. Super. Ct. June 27, 2005); *see also* discussion *supra* Part II.A.

238. *Id.*; *see also* Rabel v. Ill. Wesleyan Univ., 514 N.E.2d 552, 560 (Ill. App. Ct. 1987) (finding no duty created by representations in handbook, regulations, or policies); Stanton v. Univ. of Me. Sys., 773 A.2d 1045, 1051 (Me. 2001) (finding no implied contract to provide a safe and secure environment in exchange for student contracting to live on-campus).

239. Courts regularly have found a duty for reasonably foreseeable injury that occurs within areas of university control. *See* discussion *supra* Part II.B. *See also, e.g.*, Nero v. Kan. State Univ., 861 P.2d 768, 780 (Kan. 1993) (holding university liable for on-campus sexual assault after it was aware of a previous assault by the same perpetrator).

240. *See* discussion *supra* Part II.C; *see also* Jain v. State, 617 N.W.2d 293, 297 (Iowa 2000) (requiring both affirmative action and either detrimental reliance or an increase of harm).

assumption of responsibility based solely on foreseeability of harm or the implementation of safety measures, such as policies prohibiting dangerous behavior.[241] Even if a court is unwilling to find an institutional duty based on a voluntary assumption of responsibility, a special relationship may still be found to exist between the college and either the victim or alleged assailant.

In assessing whether a special relationship exists between the college and a student suicide victim, the court's determination should depend on the stage of the threat assessment process and whether the institution provided any referrals or service to the student. Cases in which a special relationship has been found—*Shin* and *Schieszler*—involved actual university notice of the student's suicidal ideations and some minimal level of interaction between the college and the student.[242] If, through the threat assessment process, the institution does not deem the student a threat or has not yet rendered any referrals or service, no special relationship should be found to exist because there is no mutual interaction between the student and the college.[243] However, if the threat assessment team deems the student to be a risk or has actual notice of a suicide attempt or ideation and makes a referral or mandates counseling, courts should be willing to find that a special relationship exists. In that situation, the institution through the threat assessment team would have collected information, determined the student to be a risk to himself, and referred or mandated the student to professional counseling.[244] This

241. *See* Furek v. Univ. of Del., 594 A.2d 506, 520–24 (Del. 1991) (finding an assumed duty based on implementation of a university policy against hazing).

242. *See supra* notes 190–201 and accompanying text; *see also* Schieszler v. Ferrum Coll., 233 F. Supp. 2d 796 (W.D. Va. 2002) (stating university staff spoke with the victim and worked with him to draft a "statement" that he would not hurt himself); *Shin*, 2005 WL 1869101, at *1 (noting university staff had multiple interactions with the student throughout her enrollment and recommended psychiatric evaluations based on previous suicide attempts or ideations).

243. In *Mahoney v. Allegheny College*, the court declined to find a special relationship due to the student's limited interactions with college administrators who were not aware of his previous suicidal ideations. Mahoney v. Allegheny Coll., No. AD 892-2003, at *23 (Pa. Ct. Com. Pl. Crawford County Dec. 22, 2005), http://www.theasca.org/attachments/articles/35/Allegheney%20college%20SJ%20 decision.pdf.

244. The make-up of the threat assessment team may impact the assessment whether a special relationship exists. If the team does not have a counselor or psychologist or law enforcement, a court may be less willing to find the institution owed a duty to properly assess the threat of suicide. However, in those circumstances, the court may also find the institution breached its duty by not including the

interaction with the student would likely be found to meet the notice and minimal interaction that the *Shin* and *Schieszler* courts found sufficient to establish a duty.[245]

Determining whether an institution owes a duty in third-party criminal conduct cases should again depend on the stage of the threat assessment process.[246] If the college has no notice that the violent perpetrator may pose a risk, no duty should attach.[247] If a court were to impose a duty when institutions have no notice of possible danger, colleges could be found to owe a duty to all victims of violence on campus. Conversely, if a university through its threat assessment team has actual or constructive notice of a tangible threat against an individual or group, courts should find a duty to exercise reasonable care to prevent harm and protect the community. The notice can be actual, like in *Tarasoff* where Poddar made a direct threat against Tarasoff,[248] or constructive, developed through multiple sources during the threat assessment process.[249] On the other hand, when assessing whether a duty should attach, courts should carefully consider the inherent difficulty in predicting if and when an individual may become violent.[250] It can be argued that no one other than trained medical professionals, such as doctors and psychologists, should have an equal duty to warn or prevent because they do not possess the same knowledge or skill.[251] However when multi-

right personnel on the team.

245. *But see* discussion *supra* notes 143–48 and accompanying text. In *Jain*, the Iowa Supreme Court used the voluntary undertaking doctrine to determine that the university did not owe the Jains a duty and declined to assess whether a special relationship existed. In *Mahoney*, the court found no duty because Mahoney "had neither engaged in nor threatened any specific acts of self-harm," and the college only had minimal interaction (3-4 days) with him. Mahoney v. Allegheny Coll., No. AD 892-2003, at *23 (Pa. Ct. Com. Pl. Crawford County Dec. 22, 2005), http://www.theasca.org/attachments/articles/35/Allegheney%20college%20SJ%20decision.pdf.

246. For a discussion of the steps of the threat assessment process, see *supra* Part I.B.

247. *See* Klobuchar v. Purdue Univ., 553 N.E.2d 169, 171 (Ind. Ct. App. 1990) (finding no institutional duty when university did not have notice of dangerous propensities of victim's estranged husband).

248. *See supra* notes 176–84 and accompanying text; Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334, 339 (Cal. 1976).

249. *See supra* Part I.B.

250. The *Tarasoff* court recognized the difficulty of predicting when an individual may become violent. *See supra* notes 182–83 and accompanying text.

251. *See supra* Part II.D.1.

disciplinary threat assessment teams have psychologists, law enforcement, and various other professionals assessing student risk,[252] they are in a better position to identify and prevent student harm than an average school administrator and are arguably better trained and equipped to predict violence than doctors or psychiatrists.

While courts must wrestle with the facts of each case to determine if the university owed its student a duty after a suicide or violent act, colleges—who would benefit from predictability in an area of the law without one—should not simply sit back and argue that they did not owe a duty. Instead the best practice for institutions is to assume they owe their students a duty and strive to meet it.[253] Nevertheless, even assuming the college is found to have a duty, a potential plaintiff must establish the university breached that duty by not exercising reasonable care.

B. The Impact Of Threat Assessment On Breach Of Duty

To establish that an institution breached its standard of care, a potential plaintiff must show that the university deviated from an established standard of care that a reasonable institution would show in a similar situation.[254] Now that the use of behavioral intervention and threat assessment is so commonplace at America's colleges and universities,[255] if an institution did not have a threat assessment team, a court may find the college breached its duty if a violent incident occurs, the risk of which was known or knowable at the time. Once a college implements threat assessment, a court may find the institution breached its duty by showing that the college did not follow general best practices for conducting the assessment, failed to reasonably identify at-risk students, failed to properly administer the threat

252. *See supra* Part I.B.

253. In fact, one author even suggested that a university's duty of care is simply a "duty to care" about their students. BRETT A. SOKOLOW, OUR DUTY OF CARE IS A DUTY TO CARE (2006), *available at* http://www.ncherm.org/pdfs/2006-whitepaper.pdf; *see also* Nolan et al., *supra* note 85, at 108 (suggesting that due to lack of predictability how courts will rule on whether colleges owe a duty, colleges should focus more on the element of breach and meeting their standard of care).

254. Klobuchar v. Purdue Univ., 553 N.E.2d 169, 171 (Ind. Ct. App. 1990).

255. *See supra* notes 25–127 and accompanying text.

assessment process, or failed to develop a plan to address a threat.[256] To avoid liability, universities should ensure that their procedures align with best practices regarding: (1) proper membership on the team, (2) adequate training for team members, (3) regular team meetings, (4) marketing to the community, (5) collecting adequate information to conduct a threat assessment, (6) conducting an adequate and thorough threat assessment of all possible threats, (7) creating and implementing a threat management plan, and (8) record-keeping and follow-up.[257]

In evaluating an actual decision made by a threat assessment team, members should only be required to use their reasoned best judgment in assessing risk and taking steps to manage that risk. The *Tarasoff* court did not require therapists to make a "perfect performance" to meet their standard of care and only expected the psychologist to act with "that reasonable degree of skill, knowledge, and care" possessed by professionals in similar circumstances.[258] Members of a threat assessment team should not be held to a higher standard than medical professionals, especially when they may be acting on incomplete information at the time of the assessment. If a threat assessment team used its reasoned best judgment to make a determination of risk or in attempting to manage that risk, courts should be deferential to those decisions. Courts have been deferential to university decisions in academic and disciplinary settings because the members of the court did not have superior knowledge or skill in the area to question the expertise of college administrators.[259] Courts should be similarly

256. Individuals and groups established several models of threat assessment over the years. *See* DEISINGER ET AL., *supra* note 77; Dunkle et al., *supra* note 32 (describing the Delworth model); Nolan et al., *supra* note 85; Sokolow & Hughes, *supra* note 80.

257. *See supra* Part I.B. The importance of keeping records and documenting rationales for decisions cannot be overstated. If a university is sued for the purported negligent actions of its threat assessment team, university counsel will undoubtedly rely on the documentation and rationale of the team in the university's defense of that claim.

258. Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334, 345 (Cal. 1976) (citation omitted) (internal quotation marks omitted).

259. Courts have shown deference to universities in admissions, academics, and student disciplinary decisions. *See* Grutter v. Bollinger, 539 U.S. 306 (2003) (showing deference to the University of Michigan Law School's admissions process); Bd. of Curators of the Univ. of Mo. v. Horowitz, 435 U.S. 78, 92 (1978) (stating "courts are particularly ill-equipped to evaluate academic performance"); Holert v. Univ. of Chi., 751 F. Supp. 1294 (N.D. Ill. 1990) (deferring to the university's decision to expel the

deferential when a university threat assessment team uses its best judgment in assessing and responding to risk. Judges do not have the same level of training and expertise as psychologists, law enforcement, and student affairs in assessing whether someone may be a danger or as professionals working collaboratively in a threat assessment setting. However in exercising their reasoned best judgment, university officials must not use the threat assessment process as a guise for a personal agenda to rid itself of what it perceives as a troublesome student.[260]

Assessing university liability for student injury is difficult. However, courts are increasingly willing to impose a duty on institutions to provide minimal levels of safety for its students when the institution has notice of a dangerous condition and is in an equal or better position than the student to eliminate or mitigate that harm. The use of threat assessment will continue to challenge courts, and due to the lack of predictability in whether courts will impose liability, universities should assume a duty exists to all of their students and strive to meet it by implementing and using best practices for threat assessment.

CONCLUSION

In the wake of the tragic loss of student life in cases like Elizabeth Shin and at Virginia Tech, colleges began implementing behavioral intervention and threat assessment strategies to predict and prevent future harm. While there are several different threat assessment models, the basic goals are similar—identify at-risk students, refer students to resources, and prevent harm. However, courts have not yet evaluated the impact of colleges' use of threat assessment on institutional tort liability. Although which theory of liability courts

plaintiff after it found that he engaged in systematic harassment of another student). *Donaldson v. Board of Education*, 424 N.E.2d 737 (Ill. App. Ct. 1981), is a grade school case, but the court described the great deference given to schools in disciplinary matters. The *Donaldson* court stated, "Because of their expertise and their closeness to the situation[,] and because we do not want them to fear court challenges to their every act[,] school officials are given wide discretion in their disciplinary actions." *Id.* at 739.

260. *See* Barnes v. Zaccari, 669 F.3d 1295, 1306 (11th Cir. 2012).

may employ in assessing whether institutions owe a victim a duty is unclear, courts have found that colleges owe their students a duty when the institution has notice of possible harm and the present ability to intervene. For that reason, colleges should assume they owe a duty of reasonable care when they have notice that a student poses an actual risk to herself or others. However, even if courts are willing to find a duty, they should find that institutions meet their standard of care if they effectively implement threat assessment, engaging in standard best practices and using their reasoned best judgment in assessing and responding to student risk. To require colleges to do more would be to make institutions liable beyond their reasonable notice or control.