

# CAN WE SECURE THE HALLOWED HALLS OF ACADEME?

*Denis Binder\**

## INTRODUCTION

Once upon a time, life in the Academy was seemingly casual.<sup>1</sup> Education exists in a different environment today.<sup>2</sup> Our colleges and universities have weathered storms, survived natural disasters, and shown great resiliency in overcoming a myriad of challenges. Today, campuses regularly deal with crime. Violent threats to the campus community may reflect four different, but often overlapping, sources: (1) normal street crime, such as robberies, muggings, batteries, sexual assaults, and automobile thefts, which spill over onto the campus; (2) similar risks, but arising from within the campus;<sup>3</sup> (3) academic or relationship disappointments, which may initially seem random in nature, but are in fact directed at specific victims; and (4) truly random acts of mass violence. The third and fourth scenarios are often

---

\* Professor of Law, Dale E. Fowler School of Law, Chapman University. A.B., 1967, J.D., 1970, University of San Francisco; LL.M., 1971, S.J.D., 1973, University of Michigan. Professor Binder has been involved with infrastructure issues and emergency planning for over four decades.

<sup>1</sup> For example, all I had to produce upon appointment to my first faculty position in 1972 were transcripts from the universities I attended. Social security numbers became student ID numbers at two universities, and later my Massachusetts driver's license number. The student IDs served only to check books out of the library. I shut the office door to protect students' privacy when they went over exams. University policies on alcohol and drugs were much more relaxed than they are now.

<sup>2</sup> The potential crises facing institutions far exceed criminal activity; however, this Article will concentrate on criminal activity. Potential crises can include natural risks, such as earthquakes, flooding, hurricanes, tornadoes, or severe winds. *See, e.g.*, Marty Roney, *Alabama Students Sift Through Rubble*, MONTGOMERY ADVERTISER, Apr. 28, 2011, (NEWS) (describing the aftermath of a major tornado hitting the University of Alabama). Institutions may also confront communicable diseases, ranging from meningitis to pandemics. *See, e.g.*, Paul Phillips, *Drexel Student Who Died from Meningitis Reportedly Had Contact with Princeton Football Players*, DAILY PRINCETONIAN, Mar. 23, 2014, at 1 (describing how a Drexel University student who died carried the same strain of meningitis as students from Princeton, where a meningitis outbreak was ongoing). Fire is a constant threat. *See, e.g.*, Alexis Kreismer, *'After the Fire' Speakers Come to Campus*, INFORMER: U. HARTFORD, Sept. 24, 2015, at 1 (describing a presentation by survivors of a dorm fire at Seton Hall University, located in South Orange, New Jersey, in 2000).

<sup>3</sup> Sexual assault on college campuses, the major focus of the 2015 Regent University Law Review Symposium, is one example of campus crime. *See, e.g.*, Benjamin Wermund, *Study Ties Football Game Days to Rapes*, HOUS. CHRON., Jan. 5, 2016, § B, at 1 (discussing a correlation between increased rape reports, college football game days, and the importance of the game).

accompanied by suicides.<sup>4</sup> Recent tragedies, highlighted by Columbine High School,<sup>5</sup> Virginia Tech,<sup>6</sup> Sandy Hook Elementary School,<sup>7</sup> and Umpqua Community College,<sup>8</sup> demonstrate the issue of campus security.

As this series of mass campus shootings and other tragedies highlights,<sup>9</sup> we need to worry specifically about random acts of mass violence. Campus security measures to avert these threats would be easier to implement if we could identify a commonality between the incidents. The challenge is compiling a comprehensive list of incidents, even though several major sources currently exist.<sup>10</sup> Unfortunately, studies show that identifying a commonality is not possible and that threats come from a variety of sources.<sup>11</sup> Assailants of random acts of violence include students, staff, alumni and other former students, family members, and those with no known connection to the college.<sup>12</sup> Men are most often the perpetrators, but women have occasionally been assailants.<sup>13</sup> The crimes occur in classrooms, dormitories, parking lots, campus open space, and various structures.<sup>14</sup> They even spread off-

---

<sup>4</sup> Lauren Smith, *Major Shootings on American Campuses*, CHRON. HIGHER EDUC., Apr. 27, 2007, at A19.

<sup>5</sup> Two students attacked the school with guns and bombs, leaving dozens dead and wounded. *School Shooting May Have Killed as Many as 25*, WALL STREET J., Apr. 21, 1999, at A1.

<sup>6</sup> A student killed thirty-one people in a dormitory and an academic building. *At Least 31 Dead, 28 More Wounded; Shooter Is Dead*, RICHMOND TIMES DISPATCH, Apr. 16, 2007, at X-1.

<sup>7</sup> A lone gunman killed twenty-seven students and faculty members at an elementary school. Denis Hamill, *A Peaceful Town In Shock*, N.Y. DAILY NEWS, Dec. 15, 2012, at 13.

<sup>8</sup> In October 2015, numerous students were killed in a shooting at Umpqua Community College in southern Oregon. Dirk Vanderhart et al., *Gunman Attacks Oregon College*, N.Y. TIMES, Oct. 2, 2015, § A, at 1.

<sup>9</sup> One of the first generally recognized random acts of mass violence on a college campus occurred in 1966 when Charles Whitman entered the top of a twenty-seven-story tower at the University of Texas at Austin, and then opened fire, killing sixteen and wounding thirty. Smith, *supra* note 4. This tragedy seemed an isolated anomaly for decades.

<sup>10</sup> *E.g.*, RAYMOND H. THROWER ET AL., OVERVIEW OF THE VIRGINIA TECH TRAGEDY AND IMPLICATIONS FOR CAMPUS SAFETY, THE IACLEA BLUEPRINT FOR SAFER CAMPUSES 10–11 (2008), [http://www.iaclea.org/visitors/PDFs/VT-taskforce-report\\_Virginia-Tech.pdf](http://www.iaclea.org/visitors/PDFs/VT-taskforce-report_Virginia-Tech.pdf); Smith, *supra* note 4; *Rampage Killings Fast Facts*, CNN (Dec. 3, 2015), <http://www.cnn.com/2013/09/16/us/rampage-killings-fast-facts/>.

<sup>11</sup> DIANA A. DRYSDALE, U.S. SECRET SERV., WILLIAM MODZELESKI, DEPT OF EDUC., ANDRE B. SIMONS, FED. BUREAU OF INVESTIGATION, CAMPUS ATTACKS: TARGETED VIOLENCE AFFECTING INSTITUTIONS OF HIGHER EDUCATION 24–26 (2010) [hereinafter CAMPUS ATTACKS], <http://www2.ed.gov/admins/lead/safety/campus-attacks.pdf>.

<sup>12</sup> *Id.* at 16.

<sup>13</sup> *Id.* at 15.

<sup>14</sup> *Id.* at 13–14.

campus.<sup>15</sup> Most involve broken relationships and a broad category we can refer to as “academic disappointments.”<sup>16</sup> Many assailants have psychological problems, and some have been off their medications or missed counseling sessions.<sup>17</sup> Guns are the primary weapons of choice, but knives, automobiles, hammers, explosives, and other blunt objects have also been used.<sup>18</sup>

Even before the shooting at Virginia Tech, criminal activity caused increasing concerns on college campuses. Examples of criminal acts at the nation’s colleges and universities<sup>19</sup> include homicides,<sup>20</sup> sexual assaults,<sup>21</sup> thefts,<sup>22</sup> kidnappings,<sup>23</sup> arson,<sup>24</sup> pranks,<sup>25</sup> athletic and fraternity

---

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 18 (listing factors that include retaliation; response to academic stress and failure, sexual violence, dismissal or sanctions; and needing attention).

<sup>17</sup> See THROWER ET AL., *supra* note 10, at 9 (citing inconsistent treatment for the shooter’s mental problems as one causal factor in the Virginia Tech shooting).

<sup>18</sup> CAMPUS ATTACKS, *supra* note 11, at 17.

<sup>19</sup> I will normally refer to institutions of higher education by the inclusive word “colleges.” A wide variety of institutions can be included in the classification “colleges,” including universities, colleges, community colleges, and adult schools. See CAMPUS ATTACKS, *supra* note 11, at 5 (defining institutions of higher education as postsecondary institutions, including four-year and two-year colleges).

<sup>20</sup> Campus killings are not a recent phenomenon. For example, on January 18, 1961, a professor and graduate student were talking in the professor’s office at Berkeley, when John Harrison Farmer, an intruder, shotgunned to death the professor and wounded the student. GLENN T. SEABORG & RAY COLVIG, CHANCELLOR AT BERKELEY 678–79 (1994). Earlier in 1960, a rejected suitor shot to death his former girlfriend in the main library at Berkeley, and then wounded himself. *Id.* at 678. The assailant had previously been forced to withdraw from Berkeley because of threats he made against her. *Id.* at 503. The shooting was viewed as a “singular” act at the time. *Id.* at 504. Similarly, acts of violence by teenagers also go back decades: A teenager left his Long Beach home on the morning of August 24, 1965, and drove approximately 190 miles to a hill overlooking Highway 101 by Santa Maria, and then started shooting at passing cars, killing three and wounding others before killing himself. *Reida v. Lund*, 96 Cal. Rptr. 102, 103 (Ct. App. 1971).

<sup>21</sup> CAMPUS ATTACKS, *supra* note 11, at 7.

<sup>22</sup> *Id.*

<sup>23</sup> See *Relyea v. State*, 385 So. 2d 1378, 1380 (Fla. Dist. Ct. App. 1980) (describing a suit by surviving parents of two students abducted from a campus parking lot and subsequently murdered).

<sup>24</sup> For example, two former students pled guilty to arson and witness tampering for a dorm fire that killed three freshmen at Seton Hall University in New Jersey on January 19, 2000. Ronald Smothers, *2 in Plea Deal 7 Years After Fatal Seton Hall Fire*, N.Y. TIMES, Nov. 16, 2006, § A, at 1. To prevent deaths from fires, a common precaution is to ensure smoke detectors and sprinkler systems are operational. *Id.*

<sup>25</sup> For instance, tear gas was released in a high school bathroom: the fumes traveled through the ventilation system, resulting in dozens of hospitalization and disrupted final exams. Joel Rubin, *Tear Gas Disrupts High School*, L.A. TIMES, June 17, 2004, at B3. Elsewhere, a University of California at Riverside dropout phoned in a bomb threat attempting to cancel the commencement ceremony. Sara Lin, *Dropout Status Led to Bomb Threat, Police Say*, L.A. TIMES, June 22, 2007, at B1.

hazing,<sup>26</sup> vandalism,<sup>27</sup> and eco-terrorism.<sup>28</sup> Many of the crimes are fueled by alcohol or illicit drugs.<sup>29</sup> Schools have been sued for alcohol-induced tragedies<sup>30</sup> and for alleged negligence in failing to take steps to prevent students from committing suicide.<sup>31</sup> Criminal acts, committed by individuals both within and outside of the campus community, affect all types of campuses: public and private; research and non-research; urban, suburban, and rural; religious and secular; large and small.<sup>32</sup> Criminal activity is endemic in society and in higher education. Thus, no campus can be crime free. The issues facing universities today range from anticipating, and hopefully forestalling, risks on campus to the nature and extent of the response efforts when an unfortunate event materializes. Typically, colleges have responded by significantly tightening campus security.<sup>33</sup>

---

<sup>26</sup> See, e.g., *Furek v. Univ. of Del.*, 594 A.2d 506, 509 (Del. 1991) (describing a student's suit following a hazing incident); *Knoll v. Bd. of Regents*, 601 N.W.2d 757, 760 (Neb. 1999) (detailing a hazing incident of an underage pledge). Fraternities are a regular problem for universities. See *Jackson State Univ. v. Upsilon Epsilon Chapter of Omega Psi Phi Fraternity, Inc.*, 952 So. 2d 184, 185 (Miss. 2004) (describing an incident where fraternity members were involved in an altercation over spitting on a monument).

<sup>27</sup> Matt Stevens, *Rivalry High Jinks Start Up Early*, L.A. TIMES, Nov. 15, 2014, at AA3 (discussing vandalism of statues on the campuses of rival schools).

<sup>28</sup> Eco-terrorism is a risk for colleges today: for example, animal rights activists claimed to have flooded the house of a UCLA professor back in 2007. Larry Gordon, *Animal Rights Group Says It Flooded Home*, L.A. TIMES, Oct. 30, 2007, at B1; see also Richard Monastersky, *Animal Researchers' Homes Are Attacked*, CHRON. HIGHER EDUC., Mar. 7, 2008, at A1 (describing a physical assault against a researcher on the porch of his home, allegedly by animal rights activists).

<sup>29</sup> See Lindsay S. Ham & Debra A. Hope, *College Students and Problematic Drinking: A Review of the Literature*, 23 CLINICAL PSYCHOL. REV. 719, 724–25 (2003) (describing problems associated with college drinking that include criminal activity).

<sup>30</sup> See *Bradshaw v. Rawlings*, 612 F.2d 135, 136–37 (3d Cir. 1979) (describing a suit by a student injured in a car accident where the driver became intoxicated following a class picnic); *Coghlan v. Beta Theta Pi Fraternity*, 987 P.2d 300, 305, 312 (Idaho 1999) (advancing the theory that the University should have known that alcohol was being served to minors since representatives were provided to supervise the fraternity party); *Beach v. Univ. of Utah*, 726 P.2d 413, 414 (Utah 1986) (summarizing a suit of a student who was injured when she fell from a cliff while intoxicated on a university field trip).

<sup>31</sup> See, e.g., *Schieszler v. Ferrum Coll.*, 236 F. Supp. 2d 602, 605 (W.D. Va. 2002) (suit alleging the college failed to take adequate precautions to prevent a student from hurting himself); *Jain v. State*, 617 N.W.2d 293, 294 (Iowa 2000) (arguing that failure to inform parents of a student's prior suicide attempt constituted a breach of duty); *White v. Univ. of Wyo.*, 954 P.2d 983, 984–85 (Wyo. 1998) (arguing that university officials failed to adequately monitor suicidal student or notify parents of prior suicide attempt).

<sup>32</sup> Smith, *supra* note 4 (briefing incidents that have occurred at small rural colleges like Appalachian State; larger universities in rural areas, like Virginia Tech; and major universities in large urban areas, like University of Texas at Austin).

<sup>33</sup> BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, CAMPUS LAW ENFORCEMENT, 2004–05, at 2–3 (2008), <http://www.bjs.gov/content/pub/pdf/cle0405.pdf> (noting the percentage increase of full-time staff on university police forces). For example, colleges have adopted

The prevention, mitigation, and effective response to an emergency can be divided into three stages: (a) pre-incident, (b) incident, and (c) post-incident.<sup>34</sup> This Article argues for the implementation of preventative and response efforts to incidents of mass violence. Colleges should have a viable Emergency Action Plan (“EAP”) in place before an incident of mass violence occurs.<sup>35</sup> Negligence and potential liability surrounding random violence may be based on the failure to initiate reasonable care to forestall an incident or failure to take reasonable steps to minimize the foreseeable impacts.<sup>36</sup> But we need to distinguish between the exercise of reasonable care to forestall or minimize a reasonably foreseeable risk,<sup>37</sup> versus the response to an emergency: the presence or absence of an EAP, the quality of an EAP, and adherence to the EAP.<sup>38</sup> We must also assume that even with the greatest exercise of care, some incidents cannot be prevented.<sup>39</sup>

---

zero tolerance policies for alcohol, drugs, and guns and also required electronically keyed cards for entrance into many buildings, such as dorms. In fact, automated access control has become the standard on campuses around the country. THROWER ET AL., *supra* note 10, at 7. Perhaps these measures are responsible for the decrease in violent and property crime rates on college campuses. REAVES, *supra* at 10 (noting that violent crime dropped nine percent from 1994 to 2004 and property crime rates decreased thirty percent).

<sup>34</sup> Post-incident needs are outside the purview of this Article, but they are key elements in business continuity plans. Accounting for faculty, staff, and students after a tragedy, as well as providing counseling for the survivors, family members, bystanders, and others, are common elements of post-incident planning. One of the greatest issues in the immediate aftermath and confusion of an emergency is accounting for people. Assigned reporting locations, phone numbers, and websites can facilitate the process. Occupational Safety and Health Administration (“OSHA”) regulations require plans to include procedures that account for personnel. 29 C.F.R. § 1910.38(c)(4) (2015). The University of California Berkeley has a locator system where the faculty, staff, and students can post their status after an emergency. VA. TECH, SECURITY INFRASTRUCTURE WORKING GROUP REPORT: PRESIDENTIAL WORKING PAPER 19 (2007), [hereinafter SECURITY INFRASTRUCTURE REPORT], <http://cra20.humansci.msstate.edu/Security%20Infrastructure%20Working%20Group.pdf>.

The emphasis of this Article on preventative and response actions does not minimize the importance of post-incident planning; any institution needs to resume operations. For a sample checklist of post-incident actions, see Wendy B. Davis, *The Appalachian School of Law: Tried But Still True*, 32 STETSON L. REV. 159, app. at 167–70 (2002).

<sup>35</sup> Even the International Association of Campus Law Enforcement Administrators (IACLEA) recommends that institutions should develop simple EAPs to control incidents. THROWER ET AL., *supra* note 10, at 5. The National Incident Management Systems (NIMS) could serve as a framework to manage the incidents. *Id.*

<sup>36</sup> See *infra* Part I.A.

<sup>37</sup> See *infra* Part I.B.–I.D.

<sup>38</sup> See *infra* Part II. The purpose of EAPs is to be able to respond as soon as the threat materializes. Denis Binder, *Emergency Action Plans: A Legal and Practical Blueprint “Failing to Plan is Planning to Fail”*, 63 U. PITT. L. REV. 791, 791–92, 793 (2002) [hereinafter, Binder, *Emergency Action Plans*].

<sup>39</sup> See *id.* at 792 (describing the wide variety of incidents that can happen no matter how carefully organizations prepare).

We may not yet be able to predict, much less control, the courses of earthquakes, hurricanes, tornadoes, and similar forces of nature, but we sufficiently appreciate their risks such that reasonable steps should be taken to minimize these foreseeable risks, including the impacts. Some of these risks provide a period of warning, such as blizzards, hurricanes and tornadoes, while others, such as earthquakes, provide no warning at all. Care in design, construction, maintenance, operations, and inspections should be taken and even perhaps warnings issued based on the combination of foreseeable risk and potential consequences.<sup>40</sup>

The corollary applies to college campuses. While we cannot protect everyone and everything against every conceivable threat in our large, complex society, the primary goal should be to prevent incidents from arising in the first instance. Even with the best of care and even exceeding reasonable care under the circumstances, structures fail, systems malfunction, natural hazards materialize, and crazed individuals commit random acts of mass violence.<sup>41</sup>

The procedure for reacting to a disaster is just as critical in minimizing the resulting damages as the care that was exercised to prevent the incident.<sup>42</sup> Even though a school may be unable to forestall an attack, the question of liability remains.<sup>43</sup> And the nature and quality of any response might still be subject to judicial scrutiny.<sup>44</sup> If the inevitable incident occurs at an institution, prompt implementation of an

---

<sup>40</sup> See, e.g., *Hayashi v. Alameda Cty. Flood Control & Water Conservation Dist.*, 334 P.2d 1048, 1052–53 (Cal. Dist. Ct. App. 1959) (holding landowner negligent in maintaining erected structure on land, resulting in injury to another); *Barr v. Game, Fish & Parks Comm'n*, 497 P.2d 340, 343 (Colo. App. 1972) (holding dam owner liable for negligence in designing dam with inadequate emergency spillway); *Johnson v. Burley Irrigation Dist.*, 304 P.2d 912, 915 (Idaho 1956) (finding the defendant negligent for failing to take certain precautionary measures in pest removal that caused flooding); *Shell v. Town of Evarts*, 178 S.W.2d 32, 34–35 (Ky. 1944) (finding liability in faulty construction that resulted in property damage); *Gutierrez v. Rio Rancho Estates, Inc.*, 605 P.2d 1154, 1156 (N.M. 1980) (holding that the issue of whether a dam owner is liable for operating dam such that it flooded another's property is a question of negligence and not of strict liability); Binder, *Emergency Action Plans*, *supra* note 38, at 813 (concluding disaster response plans are just as important as preventative measures).

<sup>41</sup> Binder, *Emergency Action Plans*, *supra* note 38, at 792. Structures have design limits: buildings can tolerate only so much seismicity, while dams, levees, and reservoirs can withstand only so much precipitation and flooding. They will fail when design limits are exceeded. Structures cannot be earthquake-proof or impervious to hurricanes or tornadoes, but they should survive within their design limits.

<sup>42</sup> *Id.* at 813.

<sup>43</sup> See *Commonwealth v. Peterson*, 749 S.E.2d 307, 308 (Va. 2013) (describing a wrongful death suit brought by two estate administrators of victims who died in the 2007 Virginia Tech shooting).

<sup>44</sup> See *Sanders v. Bd. of Cty. Comm'rs*, 192 F. Supp. 2d 1094, 1115 (D. Colo. 2001) (scrutinizing the response of police and emergency teams in the midst of the Columbine High School Shooting).

EAP may minimize or mitigate the impacts, reduce reaction time, and facilitate recovery. Therefore, this Article is not about campus security for more traditional crimes, such as sexual assaults, but draws upon the lessons learned from these cases for principles in the broader security arena for preventative and response efforts to random acts of mass violence.

## I. THE DUTY OF REASONABLE CARE AND PREVENTATIVE EFFORTS

Schools have a duty to anticipate, foresee, and act reasonably with preventative measures in regard to random acts of mass violence.

### A. *General Duty to Protect*

A series of cases beginning in the 1980s have recognized the duty of colleges to protect their students from criminal activity.<sup>45</sup> This duty is based upon the reasonable foreseeability of the risk coupled with exercising reasonable care in responding to the risks.<sup>46</sup> Courts use several approaches in determining foreseeability that can give rise to liability. Homicides on campus by themselves will not give rise to liability on the part of the university.<sup>47</sup> As for the approaches: one option is the “totality of the circumstances” test applicable to owners and occupiers of land where all relevant circumstances surrounding the incident are considered.<sup>48</sup> This test is essentially one of the ordinary rules of negligence.<sup>49</sup> Courts using this test examine a number of factors, including the nature, conditions, and location of the land, as well as prior similar incidents, with reasonable foreseeability as the typical standard.<sup>50</sup> Another standard is that of heightened foreseeability, which is based on the idea that any crime is at least somewhat foreseeable and the law should not require landlords to become insurers against any

---

<sup>45</sup> Nieswand v. Cornell Univ., 692 F. Supp. 1464, 1469 (N.D.N.Y. 1988); Peterson v. S.F. Cmty. Coll. Dist., 685 P.2d 1193, 1194 (Cal. 1984); Mullins v. Pine Manor Coll., 449 N.E.2d 331, 335–37 (Mass. 1983); Miller v. State, 467 N.E.2d 493, 494 (N.Y. 1984).

<sup>46</sup> Delta Tau Delta v. Johnson, 712 N.E.2d 968, 973–74 (Ind. 1999); see also Peguero v. Tau Kappa Epsilon Local Chapter, 106 A.3d 565, 567 (N.J. Super. Ct. App. Div. 2015) (holding that gunfire was not a reasonably foreseeable occurrence at a fraternity party). Determining the duty of reasonable care may be a question of fact. A.W. v. Lancaster Cty. Sch. Dist. 0001, 784 N.W.2d 907, 911 (Neb. 2010).

<sup>47</sup> See Severson v. Bd. of Trs. of Purdue Univ., 777 N.E.2d 1181, 1199 (Ind. Ct. App. 2002) (holding that homicide is not a substantive due process violation because there is not a constitutional right to be protected from the violent acts of another).

<sup>48</sup> *Delta Tau Delta*, 712 N.E.2d at 973–74.

<sup>49</sup> DAN B. DOBBS, THE LAW OF TORTS 878 (2000).

<sup>50</sup> *E.g.*, Maguire v. Hilton Hotels Corp., 899 P.2d 393, 399–400 (Haw. 1995); Sharp v. W.H. Moore, Inc., 796 P.2d 506, 509 (Idaho 1990); Tenney v. Atlantic Assocs., 594 N.W.2d 11, 17 (Iowa 1999); Clohesy v. Food Circus Supermarkets, Inc., 694 A.2d 1017, 1030 (N.J. 1997); McClung v. Delta Square Ltd. P’ship, 937 S.W.2d 891, 899, 901 (Tenn. 1996).

criminal act.<sup>51</sup> The final approach primarily examines prior similar instances and has been adopted mainly by California courts.<sup>52</sup>

In light of these approaches, case law also reflects the principle that intervening criminal acts do not necessarily supersede the negligence of an owner or occupier for failure to exercise reasonable care to reduce the threat.<sup>53</sup> In one instance of foreseeability on a college campus, the Supreme Judicial Court of Massachusetts affirmed a \$175,000 verdict against the college for a sexual assault.<sup>54</sup> The college initially claimed that it had no duty to protect against criminal acts of third parties.<sup>55</sup> Yet the court found a duty based upon—(1) established social values and customs: colleges customarily exercise diligence to protect resident students' well-being; and (2) the premise that once an actor voluntarily assumes a duty, it must perform the duty with due care.<sup>56</sup> The court reasoned that “[a]dequate security is an indispensable part of the bundle of services” afforded students.<sup>57</sup> The court questioned the security measures in effect at the time.<sup>58</sup> The kidnapping and rape commenced between 4:00 and 4:30 a.m.<sup>59</sup> The exterior gate was left unlocked, a security guard observation post lacked full visibility, and a single key system was used.<sup>60</sup> Dormitory door locks could be easily picked since no deadbolt locks or chains were used, and there was no way to verify that a security guard was diligently patrolling on his assigned rounds.<sup>61</sup>

Cases of colleges failing to act reasonably in light of foreseeability span the country. In one California case, a student was climbing a stairway in a parking lot when an assailant jumped out in broad daylight from behind bushes that had been left “unreasonably thick and

---

<sup>51</sup> *Bd. of Trs. v. DiSalvo*, 974 A.2d 868, 872 (D.C. 2009).

<sup>52</sup> *Peterson v. S.F. Cmty. Coll. Dist.*, 685 P.2d 1193, 1201–02 (Cal. 1984); *infra* Part I.B.

<sup>53</sup> *See, e.g., Kline v. 1500 Mass. Ave. Apt. Corp.*, 439 F.2d 477, 478 (D.C. Cir. 1970) (holding that an apartment landlord owed a duty to tenants to protect common areas); *Holley v. Mt. Zion Terrace Apts., Inc.*, 382 So. 2d 98, 101 (Fla. Dist. Ct. App. 1980) (holding that an independent criminal act does not relieve landlord of liability when failure to prevent criminal act leads to liability); *Seibert v. Vic Regnier Builders, Inc.*, 856 P.2d 1332, 1338 (Kan. 1993) (finding that liability of a landowner for criminal acts of third parties may arise if the risk of criminal acts was reasonably foreseeable); *Trentacost v. Brussel*, 412 A.2d 436, 440–41 (N.J. 1980) (discussing that the foreseeability of harm is crucial in determining existence a duty).

<sup>54</sup> *Mullins v. Pine Manor Coll.*, 449 N.E.2d 331, 333, 334 (Mass. 1983).

<sup>55</sup> *Id.* at 334.

<sup>56</sup> *Id.* at 335–36.

<sup>57</sup> *Id.* at 336.

<sup>58</sup> *Id.* at 338.

<sup>59</sup> *Id.* at 334.

<sup>60</sup> *Id.* at 334, 338.

<sup>61</sup> *Id.* at 338.

untrimmed.”<sup>62</sup> The student claimed that the college failed to maintain the foliage or generally warn students of the known dangers.<sup>63</sup> The court agreed, finding the property was maintained in such a way “so as to increase the risk of criminal activity.”<sup>64</sup> The school had a duty to keep the campus “free from conditions which increase the risk of crime.”<sup>65</sup> Foreseeability of the risk, coupled with prior similar incidents, created the duty.<sup>66</sup>

In a New York case, a coed was raped at 6:00 a.m. on Sunday at knifepoint in a dorm.<sup>67</sup> The university failed to keep the ten entrance doors to the dorm locked and the court held this was a breach of the university’s duty and a proximate cause of the rape.<sup>68</sup> Elsewhere, the Supreme Court of Maine held that sexual assault was foreseeable in a college dorm.<sup>69</sup> The university, therefore, had a duty to reasonably caution and instruct students on actions to improve personal safety.<sup>70</sup> The Supreme Court of Florida held that a university had a duty to use reasonable care in assigning an internship to a graduate student when the school knew that the internship was at an unreasonably dangerous location.<sup>71</sup> In one Nebraska case that involved the stabbing of a man by a student who had been harassing the victim’s wife, the University of Nebraska had failed to follow up on earlier complaints against the assailant.<sup>72</sup> The Nebraska Supreme Court followed the totality of the circumstances test in holding a duty existed.<sup>73</sup> The court viewed violence as reasonably foreseeable in a harassment situation once there is confrontation.<sup>74</sup> The exact risk need not be foreseeable; it is sufficient

---

<sup>62</sup> Peterson v. S.F. Cmty. Coll. Dist., 685 P.2d 1193, 1195 (Cal. 1984).

<sup>63</sup> *Id.* at 1202.

<sup>64</sup> *Id.* at 1200.

<sup>65</sup> *Id.* at 1201.

<sup>66</sup> *Id.* at 1201–02.

<sup>67</sup> Miller v. State, 467 N.E.2d 493, 494 (N.Y. 1984).

<sup>68</sup> *Id.* at 495, 497.

<sup>69</sup> Stanton v. Univ. of Me. Sys., 773 A.2d 1045, 1050 (Me. 2001).

<sup>70</sup> *Id.*

<sup>71</sup> Nova Se. Univ., Inc. v. Gross, 758 So. 2d 86, 89 (Fla. 2000). The student was abducted, robbed, and sexually assaulted. *Id.* at 88. The internship was a mandatory practicum. *Id.* at 89.

<sup>72</sup> Sharkey v. Bd. of Regents, 615 N.W.2d 889, 893, 895 (Neb. 2000), *abrogated by* A.W. v. Lancaster Cty. Sch. Dist. 0001, 784 N.W.2d 907 (Neb. 2010).

<sup>73</sup> *Id.* at 901–02. *But see* A.W., 784 N.W.2d at 917–18 (holding that foreseeability is not a factor to consider when deciding whether a duty existed, but rather is a factor in determining negligence).

<sup>74</sup> *Sharkey*, 615 N.W.2d at 901.

that the risk be “one of the kinds of consequences which might reasonably be foreseen.”<sup>75</sup>

Finally, the Indiana Supreme Court also followed the totality of the circumstances test in holding that a fraternity owed a duty of reasonable care to a coed who was sexually assaulted in the fraternity house.<sup>76</sup> Hosts owe a duty of reasonable care under the circumstances to a guest, which includes protecting the guest from criminal acts of third parties.<sup>77</sup> “[T]he lack of prior similar incidents will not preclude a claim where the landowner knew or should have known that the criminal act was foreseeable.”<sup>78</sup>

The risks of liability can be high for an institution that does not exercise reasonable care or have preventative measures. Jury verdicts two to three decades ago send a warning to any university with inadequate security.<sup>79</sup> Response efforts in an unfolding tragedy are often subject to criticism and post-tragedy analyses will usually show points at which different responses could have mitigated or prevented the tragedy.<sup>80</sup> Inadequate security can be shown by a number of factors, including the absence of guards, poorly trained guards, inadequate number of guards, inadequate lighting, inadequate patrolling, and the absence or poor placement of checkpoints.<sup>81</sup> The adequacy of security will

---

<sup>75</sup> *Id.* As previously indicated, foreseeability is no longer part of the Nebraska test for duty, *supra* note 73. However, this case is still illustrative of the broader point that foreseeability is relevant to the liability analysis.

<sup>76</sup> *Delta Tau Delta v. Johnson*, 712 N.E.2d 968, 969–70, 973 (Ind. 1999). This case involved a couple of similar instances and a memo from the national fraternity warning about rapes and sexual assaults in fraternity houses. *Id.* at 970, 973. *But see* *Rogers v. Sigma Chi Int'l Fraternity*, 9 N.E.3d 755, 761 (Ind. Ct. App. 2014) (finding no duty to protect where an assault was held to be unforeseeable under the facts).

<sup>77</sup> *Delta Tau Delta*, 712 N.E.2d at 971, 973.

<sup>78</sup> *Id.* at 973.

<sup>79</sup> For example, a Pine Manor College student won a jury verdict of \$175,000, later reduced by the trial judge to \$20,000, against the college for failing to provide adequate security on its campus to prevent her rape. *Mullins v. Pine Manor Coll.*, 449 N.E.2d 331, 333, 338 (Mass. 1983). Additionally, a University of Southern California coed won a \$1.6 million verdict against a university for failing to adequately secure an off-campus dorm; she was raped at knife point in 1988. *University, Blamed in Rape, Is Told to Pay Victim*, N.Y. TIMES, Mar. 29, 1992, § 1, at 18. On the other hand, a court recognized that a general concern about security does not require preparation for the worst possible scenario absent sufficiently specific threats. *See* *Nola M. v. Univ. of S. Cal.*, 20 Cal. Rptr. 2d 97, 107–08 (Ct. App. 1993) (stating that because the expert witnesses's testimony failed to address specific measures that could have prevented the incident, causation was not proved even though college's security was insufficient).

<sup>80</sup> *See Mullins*, 449 N.E.2d at 338–39 (noting different points in time at which security precautions could have prevented the crime).

<sup>81</sup> *See* *Ann M. v. Pac. Plaza Shopping Ctr.*, 863 P.2d 207, 215 (Cal. 1993) (stating that whether security guards were absent is a factor to consider); *Mullins*, 449 N.E.2d at 338 (listing the deficiencies that the jury could have found in the number of guards, the placement of the guards, and the system that ensured guards were qualified).

normally be a question of fact.<sup>82</sup> The sad reality is that, regardless of the level of security, if a tragedy has occurred, a strong argument can be made that security was inadequate.<sup>83</sup>

Foreseeability, with the benefit of hindsight, is a very potent weapon for plaintiffs.<sup>84</sup> Foreseeability is even easier to demonstrate with past incidents, memos in the student's file, and recollections of erratic behavior.<sup>85</sup> Federal statutes may well facilitate a victim's ability to establish prior similar circumstances. For example, the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act ("Clery Act")<sup>86</sup> requires all colleges and universities receiving federal funds to timely report on-campus crimes<sup>87</sup> and publish their security and crime-reporting policies.<sup>88</sup>

### *B. Random Acts of Mass Violence and Terrorism*

Unlike more general crime, the issue of foreseeability is not so clear-cut in cases of random acts of violence. Rules applicable to other types of criminal activity may be inapplicable with random acts of mass violence and terrorism. Even though this should not be the case,<sup>89</sup> California courts have recognized this lack of foreseeability in a series of cases.

---

<sup>82</sup> See, e.g., *Nieswand v. Cornell Univ.*, 692 F. Supp. 1464, 1468–69 (N.D.N.Y. 1988) (holding that the issue of whether there is a duty to provide adequate security is an issue of material fact).

<sup>83</sup> See *Saelzler v. Advanced Grp.* 400, 23 P.3d 1143, 1148 (Cal. 2001) (detailing plaintiff's argument that more security guards could have prevented the assault); *Lopez v. McDonald's Corp.*, 238 Cal. Rptr. 436, 439 (Ct. App. 1987) (noting plaintiff's argument that a security guard could have prevented the massacre).

<sup>84</sup> *Ingram v. Howard–Needles–Tammen & Bergendoff*, 672 P.2d 1083, 1090–91 (Kan. 1983) (affirming jury verdict that defendant was liable for negligence because injury was foreseeable).

<sup>85</sup> See *Isaacs v. Huntington Mem'l Hosp.*, 695 P.2d 653, 663 (Cal. 1985) (holding that trial court erred in excluding evidence of prior events that could have probative value in proving foreseeability).

<sup>86</sup> 20 U.S.C. § 1092(f) (2012). Significantly, the Clery Act neither creates a private cause of action nor establishes a standard of care. § 1092(f)(14)(A).

<sup>87</sup> § 1092(f)(3). Many states have similar statutes. Bonnie S. Fisher et al., *Making Campuses Safer for Students: The Clery Act as a Symbolic Legal Reform*, 32 STETSON L. REV. 61, 62 (2002). For example, Kentucky's Michael Minger Act requires timely reporting of campus crimes. KY. REV. STAT. ANN. § 164.9481 (West, Westlaw through 2015 Reg. Sess.). As an example of noncompliance, Eastern Michigan University violated the Clery Act by failing to report the murder of a student, resulting in a \$350,000 fine, the largest since passage of the Act. Sara Lipka, *Eastern Michigan U. to Pay \$350,000 Fine for Clery Act Violation*, CHRON. HIGHER EDUC. (June 6, 2008), <http://chronicle.com/article/Eastern-Michigan-U-to-Pay/41112>.

<sup>88</sup> § 1092(f)(1) (detailing the required policy disclosures relating to topics such as off-campus student organizations, underage drinking, and emergency response).

<sup>89</sup> See *infra* Part I.C.

*Ann M. v. Pacific Plaza Shopping Center*,<sup>90</sup> an otherwise traditional landlord and tenant security case, has been very influential in subsequent mass violence cases.<sup>91</sup> The facts of the case are as follows: A tenant's employee was sexually assaulted at a store in a strip mall at 8:00 a.m.<sup>92</sup> Incidents of robberies, shoplifted items, and a transient pulling down women's pants had occurred at the mall in the past.<sup>93</sup> Although the proprietor recorded instances of crimes generally, he had no record of these particular events or other violent crimes.<sup>94</sup> Foot-patrol security guards were not hired because of prohibitive costs.<sup>95</sup>

The California Supreme Court recognized the landlord's duty to "take reasonable steps to secure common areas against foreseeable criminal acts of third parties that are likely to occur in the absence of such precautionary measures."<sup>96</sup> However, this duty did not extend to the rape at issue primarily because no prior similar incidents had occurred to create a high degree of foreseeability.<sup>97</sup> A duty will seldom be proven without prior similar instances.<sup>98</sup> The court thereby approached foreseeability through the rule of prior similar instances to decide that the landlord owed no duty to the plaintiff.<sup>99</sup> The court cautioned: "[R]andom, violent crime is endemic in today's society. It is difficult, if not impossible, to envision any locale open to the public where the occurrence of violent crime seems improbable."<sup>100</sup> The court noted that the obligation to provide patrols was not clearly established.<sup>101</sup> Finally, the court concluded that a high degree of foreseeability was necessary to find that a landlord's duty includes hiring private police forces.<sup>102</sup>

Years later, the California Supreme Court continued to follow *Ann M.* in deciding that liability will rarely be imposed on a landowner for intervening criminal acts absent prior similar incidents.<sup>103</sup> In *Wiener v.*

---

<sup>90</sup> 863 F.2d 207 (Cal. 1993).

<sup>91</sup> See, e.g., *Wiener v. Southcoast Childcare Ctrs., Inc.*, 88 P.3d 517, 525 (Cal. 2004) (applying the balancing test established by *Ann M.* to a case of mass violence); *Kadish v. Jewish Cmty. Ctrs. of Greater L.A.*, 5 Cal. Rptr. 3d 394, 400, 402 (Ct. App. 2003) (same).

<sup>92</sup> *Ann M.*, 863 P.2d at 209–10.

<sup>93</sup> *Id.* at 210.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 212.

<sup>97</sup> *Id.* at 216.

<sup>98</sup> *Id.* at 215.

<sup>99</sup> *Id.* at 215–16. The dissent argued that the prior similar incidents test applied by the majority was the wrong test because *Isaacs v. Huntington Memorial Hospital*, 695 P.2d 653 (Cal. 1989), had rejected that test and had adopted a different test. *Id.* at 216.

<sup>100</sup> *Id.* at 215.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Wiener v. Southcoast Childcare Ctrs., Inc.*, 88 P.3d 517, 525 (Cal. 2004).

*Southcoast Childcare Centers, Inc.* a driver intentionally drove his large Cadillac into a daycare center, killing two children and injuring others.<sup>104</sup> A four-foot-high fence enclosed the playground, which was located nearby a busy street.<sup>105</sup> The fence met code requirements, but it was argued that a sturdier fence could have prevented the tragedy, and that a vehicle could foreseeably leave the street and crash into the daycare center.<sup>106</sup> The court noted that random acts of violence should not result in liability.<sup>107</sup> The landowner's duty is "to maintain land in [one's] possession and control in a reasonably safe condition."<sup>108</sup> The court recognized that "it is difficult if not impossible in today's society to predict when a criminal might strike. Also, if a criminal decides on a particular goal or victim, it is extremely difficult to remove his every means for achieving that goal."<sup>109</sup> The brutal criminal act was viewed as so bizarre and outrageous as to be inconceivable;<sup>110</sup> indeed, it could not be anticipated under any circumstances.<sup>111</sup>

If proving foreseeability is difficult, California courts are also hesitant to impose liability for failure to prevent random acts of violence. In one scenario, a rabid anti-Semite entered a daycare facility and started shooting, wounding three children, one teenager, and an adult.<sup>112</sup> He exited the center and subsequently killed a postal worker.<sup>113</sup> He chose the community center because it lacked security protections;<sup>114</sup> it "had no locks on the entry door, no security guards, and no emergency evacuation plan."<sup>115</sup>

In the case arising from this incident, *Kadish v. Jewish Community Centers of Greater Los Angeles*, the plaintiffs argued that a duty existed

---

<sup>104</sup> *Id.* at 519–20.

<sup>105</sup> *Id.* at 519.

<sup>106</sup> *Id.* at 521.

<sup>107</sup> *See id.* at 522 (affirming the rule and assertion from *Ann M.*).

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 524.

<sup>110</sup> *Id.* at 525. Another example of a bizarre and outrageous act is the case of *People v. Abrams*, No. G028529, 2003 WL 1795626 (Cal. Ct. App. Apr. 4, 2003). The assailant had stopped taking his medications. *Id.* at \*4. The jury rejected the assailant's insanity defense even though a long history of paranoia and psychosis was presented. *Id.* at \*6–7. The assailant stated after the tragedy that "[h]e had been planning to 'get even' for five years by 'executing innocent people.'" *Id.* at \*5. He focused on killing as many children as possible "because that 'makes more news.'" *Id.* A jury convicted the assailant of two counts of homicide and seven counts of attempted murder. *Id.* at \*1.

<sup>111</sup> *Wiener*, 88 P.3d at 525.

<sup>112</sup> *Ileto v. Glock, Inc.*, 421 F. Supp. 2d 1274, 1279 (C.D. Cal. 2006), *aff'd*, 565 F.3d 1126, 1145 (9th Cir. 2009); *Kadish v. Jewish Cmty. Ctrs. of Greater L.A.*, 5 Cal. Rptr. 3d 394, 396 (Ct. App. 2003). These cases stem from the same incident.

<sup>113</sup> *Ileto*, 421 F. Supp. 2d at 1280.

<sup>114</sup> *Kadish*, 5 Cal. Rptr. 3d at 396.

<sup>115</sup> *Id.*

based upon foreseeability: both the general foreseeability of risk around the world to Jewish facilities and the foreseeability caused by vague threats of violence made around the time of the incident.<sup>116</sup> No liability was found.<sup>117</sup> Violent criminal assaults of this nature were not reasonably foreseeable, and ambiguous threats of violence are insufficient to create a duty.<sup>118</sup> This is because “[a] general concern about security, absent a sufficiently specific threat, does not require an organization to prepare for the worst imaginable scenario.”<sup>119</sup> The court dismissed the case on the grounds that “the violent criminal assault was not reasonably foreseeable, and imposing liability based on vague threats of violence, absent prior armed assaults or other incidents of a similar nature, would impose an unfair burden on the organization.”<sup>120</sup> The court reasoned that society does not blame a property owner when a crazed gunman strikes.<sup>121</sup> Thus, the dangers “were not sufficiently specific so as to require that security measures be adopted to prevent a maniac from shooting children at a summer camp.”<sup>122</sup> This threat was unforeseeable.<sup>123</sup>

The court’s reasoning echoed the earlier case of *Lopez v. McDonald’s Corp.*,<sup>124</sup> in which the court held that when a gunman killed twenty-one and wounded eleven at a McDonald’s in California, the unforeseeability of the crime required that negligent liability be restricted.<sup>125</sup> At first glance, the plaintiffs presented a strong case of foreseeability: several crimes had previously occurred at the restaurant, including grand theft, petty theft, robbery, vandalism, and numerous assaults and batteries.<sup>126</sup> Even a private security consultant had recommended to the McDonald’s corporate offices to hire security guards for the location.<sup>127</sup> The response

---

<sup>116</sup> *Id.* at 402–03. Because of the widespread threat of violence, Jewish organizations called the summer of 1999 a “summer of hate.” *Id.*

<sup>117</sup> *Id.* at 395.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 403.

<sup>120</sup> *Id.* at 395.

<sup>121</sup> *Id.* at 405.

<sup>122</sup> *Id.* at 403.

<sup>123</sup> *Id.* at 406. Vague threats are not sufficiently specific. The court recognized: The circumstances of Benjamin’s injury were unique, shocking and . . . unforeseeable. It remains a part of everyday life that people enter and exit unlocked, unguarded facilities operated by various organizations. Children continue to go to camp. Despite the efforts of an organization to protect individuals on its premises, a crazed bigot who has declared ‘war’ on a particular group in society may find a way to breach security measures.

*Id.*

<sup>124</sup> *Id.* at 404.

<sup>125</sup> *Lopez v. McDonald’s Corp.*, 238 Cal. Rptr. 436, 438 (Ct. App. 1987).

<sup>126</sup> *Id.* at 439.

<sup>127</sup> *Id.*

was: “We don’t want to spend any money. There is no problem, we don’t need it anyways.”<sup>128</sup> Two months later the assailant entered the restaurant with a semi-automatic rifle, a semi-automatic pistol, and a twelve-gauge shotgun.<sup>129</sup> His murderous rampage ended when a police sharpshooter fatally wounded him.<sup>130</sup>

The critical factor of foreseeability was that while general criminal activity might well have been foreseeable at this site, the prior crimes had no relationship to a purposeful homicide.<sup>131</sup> The assailant’s acts and motives were unrelated to the area’s crime wave:

Rather, the likelihood of this unprecedented murderous assault was so remote and unexpected that, as a matter of law, the general character of McDonald’s nonfeasance did not facilitate its happening. [The assailant’s] deranged and motiveless attack, apparently the worst mass killing by a single assailant in recent American history, is so unlikely to occur within the setting of modern life that a reasonably prudent business enterprise would not consider its occurrence in attempting to satisfy its general obligation to protect business invitees from reasonably foreseeable criminal conduct.<sup>132</sup>

The question was not whether a fast food restaurant had a duty to protect patrons against criminal acts, but rather whether it had a duty to protect “against once-in-a-lifetime massacres” based on the foreseeability of such an event.<sup>133</sup> The court listed a series of recent mass killings in America.<sup>134</sup> The problem is determining what measures will protect against the thug, the narcotic addict, the degenerate, the psychopath, or the psychotic.<sup>135</sup> The court was concerned that an onerous

---

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 439.

<sup>130</sup> *30 Years Since the San Ysidro McDonald’s Massacre*, CBS8 (July 18, 2014, 12:51 PM), <http://www.cbs8.com/story/26054271/30-years-since-the-san-ysidro-mc>.

<sup>131</sup> *Lopez*, 238 Cal. Rptr. at 445.

<sup>132</sup> *Id.* (citations omitted).

<sup>133</sup> *Id.* at 441.

<sup>134</sup> [T]he following major mass murders had been committed in the United States during recent history: (1) August 1, 1966, 16 people were killed and 31 wounded by a rifle-sniper firing from the University of Texas tower in Austin; (2) August 10, 1986, 14 postal workers were killed and six others wounded in Edmond, Oklahoma; (3) February 19, 1983, 13 Chinese-American businessmen and gambling dealers were shot dead in a Seattle Chinatown gambling club; (4) September 25, 1982, 13 people were killed in a shooting rampage in Wilkes-Barre, Pennsylvania by a state prison guard; (5) September 6, 1949, 13 people were killed by a World War II veteran who went berserk in Camden, New Jersey; (6) January 1958, 11 people were killed by two individuals during a spree in Lincoln, Nebraska; (7) April 15, 1984, 10 people died in New York City’s “Palm Sunday Massacre”; and (8) July 14, 1966, eight nurses were slain in their Chicago apartment by Richard Speck.

*Id.* at 447 n.9 (citations omitted).

<sup>135</sup> *Id.* at 447. In making this statement, the court referred to an earlier decision, *Noble v. Los Angeles Dodgers, Inc.*, involving assaults by intoxicated fans in a parking lot

burden would be imposed on both the restaurant and the community by trying to protect against heavily armed murderers.<sup>136</sup>

Another example of California's reluctance to impose liability in incidents of mass violence is the case of *Moncur v. City of Los Angeles*, which involved an airport bombing in a coin-operated storage locker at Los Angeles International Airport.<sup>137</sup> The locker was in an area accessible to the public.<sup>138</sup> Plaintiffs claimed negligence against the city for failing to take adequate safety measures.<sup>139</sup> They argued that the city should have searched persons using the lockers, which were outside the security zone.<sup>140</sup> Based on a lack of foreseeability and specificity in the complaints, the court refused to assign liability for the bombing.<sup>141</sup>

In California, therefore, the test for foreseeability and liability is not a vague general risk, but a specific one. The standard generally comes down to reasonable conduct in light of a specific, foreseeable risk, often based on prior similar incidents of mass violence.<sup>142</sup> It is important to note that opinions differ on this standard: for instance a federal district court in Colorado held that a mass shooting in a theatre could be foreseeable and give rise to a cause of action.<sup>143</sup> The theatre chain was aware of the risk of an active shooter for the midnight premieres of *The Dark Knight Rises* and had increased security at many theaters for the

---

after a baseball game. 214 Cal. Rptr. 395, 396 (Ct. App. 1985). While 52,000 fans attended the game, there were only sixty-nine security personnel on the premises that night. *Id.* at 398. Nevertheless, the court held that the Dodgers were not liable because no causal connection could be proven between the team's negligently inadequate security and the plaintiff's injury. *Id.* at 399.

<sup>136</sup> *Lopez*, 238 Cal. Rptr. at 447; *see also* *Thai v. Stang*, 263 Cal. Rptr. 202, 207 (Ct. App. 1989) (holding that business owners have no duty to protect against drive-by shootings because the degree of foreseeability is too low).

<sup>137</sup> *Moncur v. City of Los Angeles*, 137 Cal. Rptr. 239, 240 (Ct. App. 1977).

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 241.

<sup>141</sup> *Id.* at 243; *see also* *Faheen v. City Parking Corp.*, 734 S.W.2d 270, 271-73 (Mo. Ct. App. 1987) (using reasoning similar to *Moncur*, the court found that defendant-owners and managers of an apartment complex had no duty to protect against third-party criminal acts because they were not the insurers of an invitee's safety, crime is foreseeable in any place at any time, and the public policy considerations of fairness weighed against the existence of a duty).

<sup>142</sup> *But see* *Isaacs v. Huntington Mem'l Hosp.*, 695 P.2d 653, 659 (Cal. 1985) (adopting a totality of the circumstances approach and minimizing the importance of prior similar incidents); Laura DiCola Kulwicki, Comment, *A Landowner's Duty to Guard Against Criminal Attack: Foreseeability and the Prior Similar Incidents Rule*, 48 OHIO ST. L.J. 247, 256-58 (1987) (explaining California's shift away from strict application of the prior incidents rule to a more flexible doctrine of foreseeability focusing on the complete factual context of each case).

<sup>143</sup> *Axelrod v. Cinemark Holdings, Inc.*, 65 F. Supp. 3d 1093, 1101 (D. Colo. 2014).

showing.<sup>144</sup> California is not alone though, as courts have generally been reluctant to impose liability upon remote parties in the chain of causation.<sup>145</sup> For instance, two separate federal circuit courts denied liability for manufacturers of ammonium nitrate used in the truck bombs in both the 1993 World Trade Center bombing<sup>146</sup> and the 1995 Murrah Federal Office Building in Oklahoma City.<sup>147</sup> Similarly, while the assailants in other cases may have been influenced by video games or movies, at least one court has refused to impose a duty on these defendants.<sup>148</sup> Nor have parents of assailants typically been held liable in similar situations involving unforeseeable incidents of large-scale violence or mass shootings.<sup>149</sup> Thus, despite varying approaches nationally, foreseeability of an incident of mass violence is only triggered by specific similar instances in the State of California.

---

<sup>144</sup> *Id.* at 1102.

<sup>145</sup> For example, in *Sigmund v. Starwood Urban Investment*, a son placed a homemade car bomb under his father's car in a parking garage intending to kill him. 475 F. Supp. 2d 36, 38 (D.D.C. 2007). The plaintiff, his half-brother, was severely injured instead. *Id.* at 39. Plaintiff sued the operator of the parking garage for inadequate security. *Id.* at 37–38. A public access was left unrepaired, stuck in an open position for weeks, allowing anyone to enter the garage after closing hours. *Id.* at 39. The son claimed this access provided him with the opportunity he needed to carry out the bombing. *Id.* at 39–40. The District Court held that plaintiff failed to meet the “heightened showing of foreseeability” applied in cases of intervening criminal acts by third parties. *Id.* at 38. Although fifty-nine of the 503 crimes in the neighborhood occurred in parking lots and garages, none were of the nature in this case. *Id.* at 40. Moreover, no evidence existed of previous car bombings, homicides, or assaults with an intent to kill on the premises in the five preceding years, or even within a five block radius of the garage. *Id.* For additional cases on this topic, see for example *Henry v. Merck & Co.*, 877 F.2d 1489, 1497 (10th Cir. 1989) (noting that an employee's illegal actions must be considered in the casual chain of events); *District of Columbia v. Berretta, U.S.A., Corp.*, 872 A.2d 633, 641 (D.C. 2005) (en banc) (“Where an injury is caused by the intervening criminal act of a third party . . . liability depends upon a more heightened showing of foreseeability than would be required if the act were merely negligent.” (quoting *Potts v. District of Columbia*, 697 A.2d 1249, 1252 (D.C. 1997))); *Pecan Shoppe of Springfield, Mo., Inc. v. Tri-State Motor Transit Co.*, 573 S.W.2d 431, 438–39 (Mo. Ct. App. 1978) (refusing to find a common carrier guilty of negligence when a third party caused the criminal act).

<sup>146</sup> *Port Auth. of N.Y. & N.J. v. Arcadian Corp.*, 189 F.3d 305, 314–15 (3d Cir. 1999).

<sup>147</sup> *Gaines-Tabb v. ICI Explosives, USA, Inc.*, 160 F.3d 613, 618 (10th Cir. 1998).

<sup>148</sup> *See James v. Meow Media, Inc.*, 90 F. Supp. 2d 798, 800, 803 (W.D. Ky. 2000) (holding a video game manufacturer not liable for the boy's murderous rampage based on the lack of foreseeability even though the boy's actions were similar to a video game he regularly played).

<sup>149</sup> *James v. Wilson*, 95 S.W.3d 875, 887–88 (Ky. Ct. App. 2002) (holding that although parents can be liable for negligence for failure to control their children, the evidence was insufficient to show that the parents of a teenager who shot his classmates knew or should have known that their son was potentially violent).

### C. Campuses and Traditional Security Measures

Let us start with a different paradigm today for college campuses: the risks of random acts of violence are known and reasonably foreseeable, but not addressed by traditional security measures. Seemingly random acts of violence (the “going postal” syndrome) can occur anywhere in society: airports,<sup>150</sup> car washes,<sup>151</sup> casinos,<sup>152</sup> churches,<sup>153</sup> government facilities,<sup>154</sup> computer firms,<sup>155</sup> factories,<sup>156</sup> gas stations,<sup>157</sup> housing complexes,<sup>158</sup> malls,<sup>159</sup> postal facilities,<sup>160</sup> Native

---

<sup>150</sup> In 2002, an Egyptian immigrant ran into a ticket counter at Los Angeles International Airport and opened fire, killing an employee and a passenger waiting in line, and wounding three before a security guard killed him. Andrew Blankstein & Jill Leovy, *Shooting at LAX; FBI Looks for Motive in LAX Attack*, L.A. TIMES, July 6, 2002, at A1.

<sup>151</sup> In March 2002, a fired worker shot five people at a car wash in Dallas. Lianne Hart & Lisa Girion, *Many Warning Signs in Shooting Spree*, L.A. TIMES, July 10, 2003, at 13.

<sup>152</sup> An unemployed painter opened fire in the New York-New York Casino in Las Vegas on July 6, 2007, wounding four. Kimi Yoshino & Ralph Vartabedian, *4 Wounded As Gunman Opens Fire in Casino on Vegas Strip*, L.A. TIMES, July 7, 2007, at A10. In another attack, a bomb was placed in a coffee cup on an employee’s car in the Luxor Casino parking lot, killing the employee when it exploded. Steve Friess, *A Question Recurs: How Safe is Las Vegas?*, N.Y. TIMES, Aug. 3, 2007, § A, at 12.

<sup>153</sup> On August 12, 2007, a gunman killed the pastor and two church elders and wounded five others at a church in Missouri. Associated Press, *Murder Charges Filed in Shooting of Three Leaders of a Missouri Church*, N.Y. TIMES, Aug. 14, 2007, § A, at 15. In 2003, an assailant served coffee laced with arsenic to church members of a Lutheran Church in northern Maine, killing a church elder and ailing fifteen parishioners, then committed suicide days later. Associated Press, *Maine Police End Church Arsenic Investigation*, FOX NEWS (Apr. 19, 2006), [http://www.foxnews.com/printer\\_friendly\\_story/0,3566,192256,00.html](http://www.foxnews.com/printer_friendly_story/0,3566,192256,00.html).

<sup>154</sup> On July 23, 2003 a New York City councilman entered City Hall with a political opponent and, after bypassing normal security, the opponent pulled out a gun, killing the councilman. Michael Cooper, *Shooting at City Hall: Overview*, N.Y. TIMES, July 24, 2003, § A, at 1. Elsewhere, a gunman entered the City Hall of Kirkwood, Missouri on February 7, 2008, and killed five people before police were able to subdue him. Susan Saulny & Malcolm Gay, *In Missouri, City Asks What Made Killer Snap*, N.Y. TIMES, Feb. 9, 2008, § A, at 13.

<sup>155</sup> In December 2000, a software tester killed seven people at a Wakefield, Massachusetts internet consulting firm. Hart & Girion, *supra* note 151, at 13.

<sup>156</sup> A racist employee shot five to death in July 2003, including four African-Americans, and wounded nine before killing himself at a Meridian, Mississippi aerospace factory. *Id.*

<sup>157</sup> In early 2002, a thirty-one-year-old Oakland resident was shot in his car at a gas station. Joshunda Sanders, *The Faces Behind the Numbers*, S.F. CHRON., Dec. 29, 2002, at A20.

<sup>158</sup> In 2007, a janitor, dismissed two years earlier, killed his former boss and wounded two others at a Bronx housing project, later surrendering to security officers at the Bronx Courthouse. Cara Buckley, *Ex-Worker Shoots 3 at Co-op City, Killing Old Boss, Police Say*, N.Y. TIMES, Aug. 31, 2007, § B, at 1.

<sup>159</sup> A Bosnian refugee entered the Trolley Square Mall in Salt Lake City on February 12, 2007, and killed six, wounding four others, before being killed in turn by police officers.

American reservations,<sup>161</sup> restaurants,<sup>162</sup> supermarkets,<sup>163</sup> theatres,<sup>164</sup> law firms,<sup>165</sup> Amish schools,<sup>166</sup> and around major cities.<sup>167</sup>

Colleges are not immune, but securing a campus is different than securing an enclosed office or factory complex. By their very nature, universities are open centers of learning. The exchange of knowledge is not limited to enrolled students, but offered to the community through extension courses, guest lecturers, visiting scholars, symposia, artistic performances, Internet access, art galleries and museums, library services, and graduate and job fairs, often for free. Athletic events may routinely attract 15,000–100,000 fans.<sup>168</sup>

The college community has limited preventative and response options for increasing campus security. Some campuses have scores of

Linda Thomson, *Police Identify Gunman as 18-Year Old Bosnian*, DESERET NEWS (Feb. 13, 2007, 12:00 AM) <http://deseretnews.com/article/content/mobile/0,5223,660195221,00.html>.

<sup>160</sup> An ex-employee, who had left because of psychological problems, killed five at a Goleta, California postal facility in February 2006. Randal C. Archibold, *Ex-Employee Kills 5 Others and Herself at California Postal Plant*, N.Y. TIMES, Feb. 1, 2006, § A, at 13.

<sup>161</sup> A student took his grandfather's guns, killed his grandparents, and then swept through a metal detector at the high school on the Red Lake Indian Reservation in Minnesota, fatally shooting seven and injuring fifteen before committing suicide. P.J. Huffstutter & Stephanie Simon, *10 Dead After School Shooting*, L.A. TIMES, Mar. 22, 2005, at A1.

<sup>162</sup> A transient burst into a Denny's restaurant in Pismo Beach, California on March 15, 2006, and killed two while injuring others before committing suicide. Steve Chawkins, *Gunman Opens Fire on Denny's Patrons*, L.A. TIMES, Mar. 16, 2006, at B1. Elsewhere, an assailant drove his pickup truck through the front window of a Luby's cafeteria in Killeen, Texas and then opened fire into the restaurant, killing twenty-two and wounding twenty before killing himself. Thomas C. Hayes, *Gunman Kills 22 and Himself in Texas Cafeteria*, N.Y. TIMES, Oct. 17, 1991, § A, at 1.

<sup>163</sup> An assailant entered an Albertson's supermarket in Irvine, California and killed two with a three-foot sword before being killed by police. Zaheera Wahid & Bill Rams, *In Tragedy's Wake*, ORANGE COUNTY REG., July 1, 2003, at cover.

<sup>164</sup> A man opened fire in an Owings Mills, Maryland movie theatre on June 16, 2006, killing a patron in a showing before placing his gun on the lobby counter to wait for law enforcement. Hamil R. Harris, *Man Dies in Theatre After Assailant Opens Fire*, WASH. POST, June 18, 2006, at C05.

<sup>165</sup> Angry about a divorce settlement, a deacon shot five people in a law office in Alexandria, Louisiana before being killed by law enforcement. Associated Press, *Man Kills 2, Injures 3 at Law Firm Before He is Killed by Police*, N.Y. TIMES, Oct. 6, 2007, § A, at 12.

<sup>166</sup> An assailant killed five Amish schoolgirls and wounded another five in a one-room schoolhouse in Nickel Mines, Pennsylvania before killing himself. JOHN L. RUTH, FORGIVENESS: A LEGACY OF THE WEST NICKEL MINES AMISH SCHOOL 32 (2007).

<sup>167</sup> A sniper killed nine and critically wounded two in a series of attacks over three weeks in October 2002 throughout the greater Washington, D.C. metro area. Stephen Braun & David Willman, *Sniper Task Force Rolls on Shooting*, L.A. TIMES, Oct. 20, 2002, at 1.

<sup>168</sup> NATIONAL COLLEGIATE ATHLETICS ASSOCIATION, 2014 NATIONAL COLLEGE FOOTBALL ATTENDANCE, [http://fs.ncaa.org/Docs/stats/football\\_records/Attendance/2014.pdf](http://fs.ncaa.org/Docs/stats/football_records/Attendance/2014.pdf) (last visited Jan. 29, 2016).

buildings sprawling over acres of facilities,<sup>169</sup> tens of thousands of students, faculty, staff, administrators, and tens of thousands of doors and windows. As a result, many campuses cannot be run as a barbed-wire high-security prison. While these open campuses cannot be “shut down,” individual buildings might be.<sup>170</sup> The unfortunate reality is that most college campuses cannot be secured in a way that can guarantee to prevent a shooter from coming on campus, especially if the shooter is otherwise authorized to be on the campus and intends to commit suicide following completion of his shooting spree.<sup>171</sup> Thus, I submit that it is perhaps even more difficult to secure a college campus against a lone gunman than against a suicide bomber. The gunman can shoot his way through a checkpoint, or move from one location to another to continue his killing ways,<sup>172</sup> but the bomber, no matter how tragic his act, can only detonate the bomb once.

Moreover, the normal means of providing a high level of security will often be ineffective against the mass murderer and terrorist. Visitor registration, badging, armed guards, metal detectors, and video surveillance may reduce incidents of normal criminal activity, but they cannot secure a campus against the random attacker.<sup>173</sup> While we picture college campuses as physically defined environs with more or less distinct boundaries, many large urban universities such as New York University, Boston University, the George Washington University, and the University of Pittsburgh are integrated into scores of blocks of the community.<sup>174</sup> A fleeing suspect could easily blend into the surrounding neighborhood before any responders could reach the scene. Furthermore,

---

<sup>169</sup> SECURITY INFRASTRUCTURE REPORT, *supra* note 34, at 6–7 (describing the 4,000-acre, 262-building campus of the University of Maryland at College Park and the 1,000-plus acre, 344-building campus of the University of California at Berkeley). By way of contrast, most high schools and middle schools occupy only one main building with limited points of access.

<sup>170</sup> *Id.* at 2.

<sup>171</sup> See CAMPUS ATTACKS, *supra* note 11, at 16 (specifying that the vast majority of campus attacks are committed by students or employees); THROWER ET AL., *supra* note 10, at 10–11 (listing numerous campus shootings that ended in suicide).

<sup>172</sup> For example, Seung Hui Cho, the assailant at Virginia Tech, killed two students in a dorm before moving on to kill more in a classroom building a short time later. THROWER ET AL., *supra* note 10, at 9.

<sup>173</sup> The high school shooter on the Indian Reservation went through a metal detector and shot to death an unarmed security officer as he continued on his murderous path. Huffstutter & Simon, *supra* note 161. Similarly, the assailant at the Kirkwood City Hall first shot and killed a police officer in a parking lot outside the building, took the officer's revolver, and then entered the council chambers on a murderous rampage. Saulny & Gay, *supra* note 154.

<sup>174</sup> See *New York University Campus Map*, NYU, <http://www.nyu.edu/content/dam/nyu/advertisePublications/documents/nyu-downloadable-campus-map.pdf> (last visited Mar. 11, 2016) (showing campus location in the midst of downtown Manhattan).

if the shooters are disgruntled, disturbed students, faculty, or staff, they likely possess the means to access dorms, classrooms, libraries, and labs. For example, in 1976, a deranged custodian killed seven and injured two at California State University at Fullerton.<sup>175</sup> With thousands of faculty, staff, and students entering and leaving classroom buildings and dormitories daily, an unauthorized person can simply move with the flow.

Colleges are places of learning, and violence is arguably the antithesis of learning. Traditional security measures do not adequately address these circumstances. Campuses are often gun-free zones.<sup>176</sup> However, armed campus security cannot be at all places at all times unless the campus is to become an armed camp. Even in the smaller confines of a high school, an armed officer may be unable to respond to an incident in time to stop it: Columbine High School had an officer on campus at the time the killings began.<sup>177</sup> He responded within a few minutes, but the assailants had already entered the building.<sup>178</sup>

While gun-free environs are highly laudatory, they leave potential victims without a means to defend themselves. At Appalachian School of Law in 2002, a former law student shot to death the Dean, a professor, and a student before other students retrieved their guns and subdued him.<sup>179</sup> The International Association of Campus Law Enforcement Administrators supports the arming of campus public safety officers, but not the carrying of concealed weapons by non-public-safety officers.<sup>180</sup> Perhaps concealed-carrying would dissuade attacks, as guns are often an assailant's weapon of choice,<sup>181</sup> but the means of killing parallel those of society in general. Automobiles have been used on occasion.<sup>182</sup> Sometimes students have used poison in their attacks.<sup>183</sup> Knives are also convenient weapons in fights.<sup>184</sup>

---

<sup>175</sup> Smith, *supra* note 4.

<sup>176</sup> Will Buchanan, *Three Years After Virginia Tech Shooting, College Gun Bans Prevail*, CHRISTIAN SCI. MONITOR (Apr. 16, 2010), <http://www.csmonitor.com/USA/Education/2010/0416/Three-years-after-Virginia-Tech-shooting-college-gun-bans-prevail>.

<sup>177</sup> Sanders v. Bd. of Cty. Comm'rs, 192 F. Supp. 2d 1094, 1100 (D. Colo. 2001).

<sup>178</sup> *Id.*

<sup>179</sup> Josh White, *Law School Shooter Pleads Guilty*, WASH. POST, Feb. 28, 2004, at B03. For another example, a lone gunman on December 9, 2007 attacked an evangelical missionary training school in Arvada, Colorado and then a megachurch in Colorado Springs seventy miles away, killing three. Robert D. McFadden, *2 Shootings at Church Sites in Colorado Leave 4 Dead*, N.Y. TIMES, Dec. 20, 2007, § A, at 16. The attack ended when a security guard at the church shot the assailant. *Id.*

<sup>180</sup> THROWER ET AL., *supra* note 10, at 12.

<sup>181</sup> CAMPUS ATTACKS, *supra* note 11, at 17.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

Other traditional security measures, such as escorts and lighted parking structures, may reduce criminal activity like muggings and sexual assault, but they may prove ineffective against the crazed killer. Similarly, video surveillance may tell us what is happening in real time, and provide evidence afterwards, but they do not necessarily prevent crime.<sup>185</sup> Additionally, searching thousands, perhaps tens of thousands, of students and faculty as they repeatedly move from place to place on campus might be legal, but is clearly unfeasible on a routine basis. The issue is one of convenience and practicality rather than legality, since courts have upheld searches of patrons entering airports,<sup>186</sup> athletic events,<sup>187</sup> and mass-transit stations.<sup>188</sup>

General campus security measures often neglect individuals. Investigative reporters and lawyers will often discover, in hindsight, warning signs that were ignored, as with both David Attias at Santa Barbara<sup>189</sup> and Cho Seung-Hui of Virginia Tech.<sup>190</sup> These signs often point to psychological disturbances in the killer.<sup>191</sup> What is obvious in hindsight, though, is often not so clear until the tragedy unfolds.<sup>192</sup> For example, it may become apparent after the tragedy that the psychologically disturbed had gone off his or her medications. Additionally, these signs are often more characteristic and reflective of

---

<sup>185</sup> *Study Shows Surveillance Cameras Reduce Crime, In Some Cases*, HOMELAND SECURITY NEWS WIRE (Sept. 26, 2011), <http://www.homelandsecuritynewswire.com/study-shows-surveillance-cameras-reduce-crime-some-cases>.

<sup>186</sup> *United States v. Marquez*, 410 F.3d 612, 614 (9th Cir. 2005); *United States v. Edwards*, 498 F.2d 496, 499–500 (2d Cir. 1974).

<sup>187</sup> *Johnston v. Tampa Sports Auth.*, 530 F.3d 1320, 1322 (11th Cir. 2008).

<sup>188</sup> *MacWade v. Kelly*, 460 F.3d 260, 263 (2d Cir. 2006).

<sup>189</sup> See Joe Mozingo & Jenifer Ragland, *Other Students Saw Signs of Trouble*, L.A. TIMES, Feb. 26, 2001, at B1 (discussing conversations Attias had with classmates prior to the incident, including once claiming he was a prophet, and other erratic behavior). In 2001, Attias drove his car into a crowd of people on a street, killing four and wounding another and afterward declared himself the “angel of death.” Steve Chawkins, *David Attias, Driver Who Plowed into Crowd, to Leave Mental Hospital*, L.A. TIMES (Sept. 5, 2012), <http://articles.latimes.com/2012/sep/05/local/la-me-attias-20120905>.

<sup>190</sup> See Amy Gardner et al., *Panel: Va. Tech Failed to Respond to Cho Warning Signs*, WASH. POST (Aug. 30, 2007, 11:50 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2007/08/30/AR2007083000759.html> (discussing that Cho displayed signs of mental instability as early as childhood).

<sup>191</sup> See Matthew Lysiak, *Charleston Massacre: Mental Illness Common Thread for Mass Shootings*, NEWSWEEK (June 19, 2015, 6:17 AM), [www.newsweek.com/charleston-massacre-mental-illness-common-thread-mass-shootings-344789](http://www.newsweek.com/charleston-massacre-mental-illness-common-thread-mass-shootings-344789) (connecting the warning signs Adam Lanza displayed before the Sandy Hook tragedy with his diagnosed mental illnesses).

<sup>192</sup> See Maria Konnikova, *Is There a Link Between Mental Health and Gun Violence?*, NEW YORKER (Nov. 19, 2014), [www.newyorker.com/science/maria-konnikova/almost-link-mental-health-gun-violence](http://www.newyorker.com/science/maria-konnikova/almost-link-mental-health-gun-violence) (discussing one school-shooting assailant who was described as a popular student athlete and a “good kid” prior to the incident, but shortly after was described as “full of angst” and “anguished”).

those who do not in fact pose a threat to others. Considering the hormonal changes, academic disappointments, stress, insecurity, and broken relationships that many teenagers experience, some reclusive or rebellious reactions are understandable. Yet, when a reaction to such events escalates to mass violence, it seems totally irrational and is arguably unforeseeable.<sup>193</sup>

This is because normal thought processes and norms of reasonable conduct do not apply to these assailants. Aside from the terrible act itself, intentionally mowing down students with a car at the University of North Carolina at Chapel Hill and then calmly dialing 911 to turn oneself in<sup>194</sup> is inexplicable. Likewise, engaging in one round of shootings and then taking time off to mail a video to a broadcasting company prior to returning to a second, more horrific killing spree<sup>195</sup> sets a new standard of irrationality. Such irrational acts cannot often be reasonably foreseen and even if they are, normal preventative measures may not be enough to deter the psychologically disturbed.<sup>196</sup>

If a chain is only as strong as its weakest link, then preventative measures and EAPs may be only as effective as the weakest human element—the students. Some students will be apathetic, overly trusting, naïve, egocentric, or ignorant of risks; some may be intoxicated or on drugs.<sup>197</sup> Others will be sleep-deprived, resulting in the potential for great errors of judgment. A common security problem, which may easily

---

<sup>193</sup> For example, a University of Pennsylvania law student shot his neighbors, two Drexel University bio-engineering students, believing them to be terrorists. *Pennsylvania Law Student Accused of ‘Terrorist’ Shooting*, FOX NEWS (Feb. 2, 2007), <http://www.foxnews.com/story/2007/02/02/pennsylvania-law-school-student-accused-terrorist-shooting.html>. A former Iowa physics graduate student responded to losing a research prize by shooting and killing three professors, an associate vice president for academic affairs, and a staff member. Michel Marriott, *Gunman in Iowa Wrote of Plans in Five Letters*, N.Y. TIMES (Nov. 3, 1991), <http://www.nytimes.com/1991/11/03/us/gunman-in-iowa-wrote-of-plans-in-five-letters.html>. Additionally, a disappointed suitor shot and killed his ex-girlfriend and her roommate in their dorm room. *Nieswand v. Cornell Univ.*, 692 F. Supp. 1464, 1465–66 (N.D.N.Y. 1988).

<sup>194</sup> Brenda Goodman, *Defendant Offers Details of Jeep Attack at University*, N.Y. TIMES (Mar. 8, 2006), [http://www.nytimes.com/2006/03/08/national/08carolina.html?\\_r=0](http://www.nytimes.com/2006/03/08/national/08carolina.html?_r=0).

<sup>195</sup> M. Alex Johnson, *Gunman Sent Package to NBC News*, NBC NEWS (Apr. 19, 2007, 10:13 AM), [http://www.nbcnews.com/id/18195423/ns/us\\_news-crime\\_and\\_courts/t/gunman-sent-package-nbc-news/#.VpshSPkrJQJ](http://www.nbcnews.com/id/18195423/ns/us_news-crime_and_courts/t/gunman-sent-package-nbc-news/#.VpshSPkrJQJ).

<sup>196</sup> See *infra* Part I.D.2.

<sup>197</sup> See *Bradshaw v. Rawlings*, 612 F.2d 135, 136–37 (3d Cir. 1979) (deciding whether the college is liable for a student who became intoxicated and subsequently injured other students in his intoxicated state). The fact that college students will sometimes be deceived is illustrated by the case of Azia Kim who passed herself off as a Stanford University student and lived in the dorms for almost an entire academic year. Richard C. Paddock, *Stanford Imposter Also Joined Army ROTC*, L.A. TIMES (May 30, 2007), <http://articles.latimes.com/2007/may/30/local/me-kim30>. She even enrolled in the Army ROTC program at nearby Santa Clara University. *Id.*

defeat basic security, is when students leave doors propped open.<sup>198</sup> Simply, there are so many risks on college campuses for random acts of mass violence that mere articulation justifies the foreseeability of these incidents.

#### *D. Proposed Preventative Measures*

In response to these risks, schools should implement preventative measures, though no single approach can eliminate all the risks of random acts of mass violence. But measures can be implemented that will reduce the risks and facilitate response efforts. The academic world is not without tools to provide safety. Available options include pre-screening, response to psychological risks, and emergency planning. These alternatives are non-traditional, but fit squarely into the changing circumstances of today. As the nature of the underlying threat has changed, so too should the response efforts. Thankfully, the underlying strength of our common law legal tradition is its adaptability to changing circumstances.<sup>199</sup>

Background checks and EAPs are two measures that fit squarely into fundamental principles of tort law. Part of the essence of negligence in tort law is Judge Learned Hand's famous formula for due care.<sup>200</sup> He specified that the legal standard of reasonable care is a calculus of three factors: (1) the risk of an accident occurring; (2) the potential magnitude of harm should the risk materialize; and (3) the availability of alternatives that would prevent the accident.<sup>201</sup>

The standard of care is flexible;<sup>202</sup> the duty of care rises as the risk of injury increases.<sup>203</sup> Thus, care and risk are proportional.<sup>204</sup> It is

---

<sup>198</sup> A well-known example is the tragic death of Jeanne Clery, who was killed in her dorm room by an attacker who gained access to the building through three propped-open doors which had been outfitted with automatic locks. Beverly Beyette, *Campus Crime Crusade: Howard and Connie Clery Lost Their Daughter to a Crazy Thief; Now They're Angry and Fighting Back*, L.A. TIMES (Aug. 10, 1989), [articles.latimes.com/1989-08-10/news/vw-301\\_1\\_campus-crime-statistics](http://articles.latimes.com/1989-08-10/news/vw-301_1_campus-crime-statistics).

<sup>199</sup> *Herter v. Mullen*, 53 N.E. 700, 701–02 (N.Y. 1899).

<sup>200</sup> See Robert L. Rabin, *Past As Prelude: The Legacy Of Five Landmarks Of Twentieth-Century Injury Law For The Future Of Torts*, in *EXPLORING TORT LAW* 52, 72–73 (M. Stuart Madden ed., 2005) (discussing the context around and importance of the rule from *United States v. Carroll Towing, Co.*).

<sup>201</sup> *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947).

<sup>202</sup> See *Union Traction Co. v. Berry*, 121 N.E. 655, 658 (Ind. 1919) (explaining that the degrees of reasonable care vary based on the facts and circumstances of the individual case, and are ultimately for the jury to decide).

<sup>203</sup> See *Posecai v. Wal-Mart Stores, Inc.*, 752 So. 2d 762, 768 (La. 1999) (adopting a rule that the degree of reasonable care for businesses owners increases with the gravity of harm).

recognized that “[t]he reasonable person will exercise care commensurate with the danger.”<sup>205</sup> As the renowned Prosser and Keeton stated:

[I]f the risk is an appreciable one, and the possible consequences are serious, the question is not one of mathematical probability alone. The odds may be a thousand to one that no train will at the very moment that an automobile is crossing a railway track, but the risk of death is nevertheless sufficiently serious to require the driver to look for the train and the train to signal its approach . . . . As the gravity of the possible harm increases, the apparent likelihood of its occurrence need be correspondingly less to generate a duty of precaution.<sup>206</sup>

Even though routine security measures may be ineffective against the random mass murderer, colleges can minimize the risk of an attack, or at least its effects. Indeed, even when reasonable care has been exercised, accidents happen and tragedies like random acts of mass violence still occur.<sup>207</sup> Reasonable care extends not only to minimizing the risk of an accident, but also to mitigating the impact should an incident materialize.<sup>208</sup> Colleges must plan for all types of emergencies, including criminal activity, bio-terrorism, random acts of violence, natural disasters, and pandemics.<sup>209</sup> Preventative measures specific to the risk of acts of mass violence include background checks and psychological screenings.

### 1. Background Checks

Commonly utilized computer screening techniques can be used to exclude students, faculty, and staff who may pose a high risk,<sup>210</sup> even if

---

<sup>204</sup> See Denis Binder, *Act of God? Or Act of Man?: A Reappraisal of the Act of God Defense in Tort Law*, 15 REV. LITIG. 1, 30 n.151 (1996) [hereinafter Binder, *Act of God*] (listing cases that expressly mention proportionality).

<sup>205</sup> DOBBS, *supra* note 49, at 281. Greater risks call for greater caution. *Id.* at 349.

<sup>206</sup> W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS §31, at 171 (5th ed. 1984).

<sup>207</sup> See Associated Press, *Despite Increased Security, School Shootings Continue*, PBS NEWSHOUR (Feb. 2, 2014, 11:52 AM), [www.pbs.org/newshour/rundown/despite-increased-security-school-shootings-continue/](http://www.pbs.org/newshour/rundown/despite-increased-security-school-shootings-continue/) (noting that the increase in security measures at schools have not decreased the rate of school shootings).

<sup>208</sup> See Leon Green, *Contributory Negligence and Proximate Cause*, 6 N.C. L. REV. 3, 6 (1927) (explaining that a plaintiff must use reasonable care to mitigate his damages).

<sup>209</sup> One of the greatest potential risks to colleges is disease. A large mass of students clustered together in classrooms, dormitories, and cafeterias is a veritable Petri dish for disease. Colleges should have plans for coping with contagion, which may include diagnosis, quarantine, and evacuation.

<sup>210</sup> See Mary Beth Marklein, *‘An Idea Whose Time Has Come?’: Schools Increasingly Subjecting Applicants to Background Checks*, USA TODAY (Apr. 18, 2007), <http://usatoday30.usatoday.com/educate/college/arts/articles/20070415.htm> (reporting that campuses are using electronic databases to perform background checks on students seeking admission).

they do so at the risk of violating the civil rights of innocent persons.<sup>211</sup> Colleges are increasingly requiring more background information from applicants as a means of screening faculty, staff, administrators, and students. For example, the Common Application, currently used by hundreds of colleges and universities, requires the applicant to disclose any conviction of a crime, even a misdemeanor, and any “school violation leading to probation, suspension, removal, dismissal, or expulsion.”<sup>212</sup> Other schools have independently adopted similar requirements.<sup>213</sup> Background checks are also becoming required for “student athletes,” as universities are becoming more intolerant of inappropriate behavior by athletes.<sup>214</sup> These background checks are required even for faculty at some public universities, as well as for independent contractors.<sup>215</sup> Additionally, potential employers, including Chapman University, are increasingly requiring potential employees to agree to a background check.<sup>216</sup> The applicant may refuse, but at the risk of being denied employment.<sup>217</sup>

Often, criminal checks can be performed very quickly through computers.<sup>218</sup> The Internet has changed everything on the knowledge

---

<sup>211</sup> See Lindsay M. Potrafke, Comment, *Checking Up on Student-Athletes: A NCAA Regulation Requiring Criminal Background Checks*, 17 MARQ. SPORTS L. REV. 427, 440 (2006) (discussing the potential privacy issues of background checks for student athletes based on case law).

<sup>212</sup> Laura Pappano, *Conduct Unbecoming*, N.Y. TIMES (Apr. 22, 2007), [www.nytimes.com/2007/04/22/education/edlife/pappano.html?\\_r=0](http://www.nytimes.com/2007/04/22/education/edlife/pappano.html?_r=0).

<sup>213</sup> See, e.g., *Background Check Requirements*, MARICOPA COMMUNITY C., <http://asa.maricopa.edu/departments/healthcare-education-at-the-maricopa-community/maricopanursing-programs/background-check-requirements> (last visited Mar. 11, 2016) (requiring background checks for all applicants to the nursing program); *General Requirements*, ADVENTIST U. HEALTH SERVS., <http://www.adu.edu/admissions/general-requirements> (last visited Feb. 21, 2016) (requiring background checks for prospective students).

<sup>214</sup> Potrafke, *supra* note 211, at 427–28.

<sup>215</sup> E.g., Lindsay Holcomb, *College Will Require Background Checks for Faculty, Staff This Fall*, THE PHOENIX (Apr. 9, 2015), [swarthmorephoenix.com/2015/04/09/college-will-require-background-checks-for-faculty-staff-this-fall/](http://swarthmorephoenix.com/2015/04/09/college-will-require-background-checks-for-faculty-staff-this-fall/).

<sup>216</sup> See CHAPMAN UNIV., STUDENT EMPLOYMENT HANDBOOK 8, [https://www.chapman.edu/faculty-staff/human-resources/\\_files/student-employment-handbook.pdf](https://www.chapman.edu/faculty-staff/human-resources/_files/student-employment-handbook.pdf) (last visited Jan. 24, 2016) (noting a requirement of background checks for potential employees that may apply to students).

<sup>217</sup> See Adam Tanner, *This Woman Didn't Get Hired Because She Refused an Invasive Background Check*, FORBES (Oct. 8, 2014, 8:46 AM), <http://www.forbes.com/sites/adamtanner/2014/10/08/this-woman-didnt-get-hired-because-she-refused-an-invasive-job-background-check/#7f9de24c5623> (detailing that a professor's employment offer was withdrawn after she refused a background check).

<sup>218</sup> See Sarah Jacobsson Purewal, *How to Run an Online Background Check For Free*, PC WORLD, [www.peworld.com/article/219593/how\\_to\\_do\\_an\\_online\\_background\\_check\\_for\\_free.html](http://www.peworld.com/article/219593/how_to_do_an_online_background_check_for_free.html) (last visited Mar. 11, 2016) (listing methods by which internet users can perform background checks themselves).

front. A simple Google search today can reveal much about an applicant's past. Even when juvenile records are sealed, a computer search can be informative.<sup>219</sup> However, what happens when something is uncovered, such as a misdemeanor marijuana conviction as an undergrad a few decades earlier, a shoplifting offense four years ago, or a more recent, but isolated, driving-while-intoxicated? Are these simply indicative of youthful indiscretions or do they display serious problems?<sup>220</sup> These searches will only provide information. Ultimately, the institution has to decide the role and processes involved with the disclosed information, including whether the applicant is informed of the unfavorable information.<sup>221</sup>

## 2. Psychological Screening

An additional preventative tool is psychological screening, though it must be noted that such screening raises many questions and is by no means completely reliable. Nevertheless, a process with protocols should be in place to identify those who pose a threat to themselves or others. A precarious balance exists between the privacy rights of the individual student and the security needs of society.<sup>222</sup> Several cases raise troublesome questions about the appropriateness of a college's actions in attempting to find that balance.<sup>223</sup> Any protocol may well be tested in court, but well-thought-out protocols are more likely to survive judicial scrutiny than a seemingly arbitrary and capricious response.<sup>224</sup>

---

<sup>219</sup> Commonly used search tools today include Google, Yahoo, YouTube and Facebook. Others will undoubtedly arise with the rapid advances in technology.

<sup>220</sup> See *Hallinan v. Comm. of Bar Exam'rs*, 421 P.2d 76, 89 (Cal. 1966) (recounting a history of frequent fights that were viewed as "youthful indiscretions" and not serious character flaws).

<sup>221</sup> In a sense, the discovery of information is analogous to the character and fitness investigations of the Bar admission for applicants, but applicants clearly have substantive and procedural due process rights in these proceedings. Brendalyn Burrell-Jones, *Bar Applicants: Are Their Lives Open Books?*, 21 J. LEGAL PROF. 153, 163 (1997). For an additional example of this balance, see Fair Credit Reporting Act, 15 U.S.C. §1681(b) (2012), which explains that the purpose of the Act is to meet consumer needs for information with attention to confidentiality.

<sup>222</sup> Lesley McBain, *Balancing Student Privacy, Campus Security, and Public Safety: Issues for Campus Leaders*, PERSPECTIVES 1–2 (2008), [http://www.aascu.org/uploadedFiles/AASCU/Content/Root/PolicyAndAdvocacy/PolicyPublications/08\\_perspective\\_s\(1\).pdf](http://www.aascu.org/uploadedFiles/AASCU/Content/Root/PolicyAndAdvocacy/PolicyPublications/08_perspective_s(1).pdf).

<sup>223</sup> See *Barrett v. Claycomb*, 705 F.3d 315, 318–19 (8th Cir. 2013) (mandating a drug-testing policy for all students who attended a technical college); *R.W. v. Bd. of Regents*, 114 F. Supp. 3d 1260, 1268, 1282 (N.D. Ga. 2015) (challenging the actions of a university during a mandatory psychological screening process).

<sup>224</sup> See *Barrett*, 705 F.3d at 322–23 (holding that because the policy was detailed and the students had advance notice, the university's interest in public safety outweighed the student's privacy interest).

Any psychological screening program has three attributes: (a) identification, (b) reporting, and (c) helping. Upon identification, a process should exist to report these risks to the university. Reporting should be based on observable behavior. While any student, professor, administrator, or staff should be able to report risky, observable activity, the reports should not be anonymous. Finally, the institution should have a program to provide assistance to those who need help and this program should have adequate staffing. This is one of the recommendations that came out of the Virginia Tech tragedy.<sup>225</sup> However, many institutions are now simply expelling or otherwise excluding students perceived to be at-risk.<sup>226</sup> This three-step process seems deceptively simple. The problem is that the process is based upon a large amount of medical uncertainty and judgment calls.

Psychoanalysis is often an art rather than a science.<sup>227</sup> While psychotherapists may be liable for failing to warn a patient's victim that the patient posed a threat to the victim,<sup>228</sup> such diagnoses are very

---

<sup>225</sup> VA. TECH, WORKING GROUP REPORT ON THE INTERFACE BETWEEN VIRGINIA TECH COUNSELING SERVICES, ACADEMIC AFFAIRS, JUDICIAL AFFAIRS AND LEGAL SYSTEMS 2, 16 (2007) [hereinafter COUNSELING REPORT], [http://www.vtnews.vt.edu/documents/2007-08-22\\_internal\\_communications.pdf](http://www.vtnews.vt.edu/documents/2007-08-22_internal_communications.pdf).

<sup>226</sup> Karin McAnaney, Note, *Finding the Proper Balance: Protecting Suicidal Students Without Harming Universities*, 94 VA. L. REV. 197, 217–18 (2008).

<sup>227</sup> The imprecision of psychiatric counseling is shown by a North Carolina tragedy involving an emotionally disturbed student. In *Williamson v. Liptzin*, Wendell Williamson, a University of North Carolina law student, stopped receiving counseling and went off his medications eight months before going on a shooting spree in downtown Chapel Hill, killing two. 539 S.E.2d 313, 311–16 (N.C. Ct. App. 2000). At trial, the jury found him not guilty on grounds of insanity. *Id.* Williamson later filed suit against his psychiatrist for malpractice. *Id.* at 314–15. He had received six counseling sessions over ten weeks with a campus psychiatrist. *Id.* at 315. At the last session, the psychiatrist informed Williamson that he was leaving his position, but encouraged Williamson to continue counseling either back home or with student services. *Id.* at 315–16. He also gave Williamson a prescription for a thirty-day supply of psychiatric medication. *Id.* at 316. A jury awarded Williamson \$500,000. *Jury Awards Williamson \$500,000 in Malpractice Suit*, WRAL.com (Sept. 20, 1998), <http://www.wral.com/news/local/story/129071/>. But the court of appeals reversed, reasoning that the relationship between defendant's acts and Williamson's injuries did not satisfy the tort requirement of proximate cause. *Williamson*, 539 S.E.2d at 324.

<sup>228</sup> *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334, 340 (Cal. 1976) (imposing a duty of reasonable care on the psychotherapist to protect third parties when the psychotherapist knows the patient's risk to others).

The liability theory from *Tarasoff* has been followed by other jurisdictions. *E.g.*, *Evans v. Morehead Clinic*, 749 S.W.2d 696, 699 (Ky. Ct. App. 1988) (holding that a therapist had a duty to protect potential victims); *Estates of Morgan v. Fairfield Family Counseling Ctr.*, 673 N.E.2d 1311, 1328–29 (Ohio 1997) (holding that a psychotherapist had a duty to know the danger of a patient in outpatient therapy); *Emerich v. Phila. Ctr. for Human Dev., Inc.*, 720 A.2d 1032, 1040 (Pa. 1998) (finding a duty to protect third parties); *Peck v. Counseling Serv. of Addison Cty., Inc.*, 499 A.2d 422, 427 (Vt. 1985) (holding that where a therapist could reasonably foresee the risk his patient posed to potential victims, there was a duty to exercise reasonable care to protect the victim);

imprecise. Notably, Cho Seung-Hui, the Virginia Tech shooter, was once committed by a judge for observation and the commitment form specified that he was an imminent danger to himself or others.<sup>229</sup> Yet he was released the next day with instructions to report for counseling, which he failed to do.<sup>230</sup>

Profiling assailants of random acts of mass violence could be a solution. But, a 2002 study sponsored by the Secret Service and the Department of Education studied thirty-seven school violence episodes from December 1974 through May 2, 2000,<sup>231</sup> and found that no accurate or useful profile existed for the perpetrators of these acts of school violence.<sup>232</sup> Psychological profiling is therefore not the most reliable option. Additionally, it creates two major risks. The first is that most of the students fitting a given profile will not in fact pose a threat of violence.<sup>233</sup> The other risk is that students who do pose a threat may not share any characteristics of prior attackers and therefore go

---

Schuster v. Altenberg, 424 N.W.2d 159, 175 (Wis. 1988) (rejecting a per se rule denying liability for failing to warn once negligence and causation is established); see also Brian Ginsberg, *Tarasoff at Thirty: Victim's Knowledge Shrinks the Psychotherapist Duty to Warn and Protect*, 21 J. CONTEMP. HEALTH L. & POL'Y 1, 2 (2004) (noting that cases apply but limit *Tarasoff*, quelling controversy).

The Restatement of Torts also adopts the *Tarasoff* approach. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 41(b) (AM. LAW INST. 2015) (imposing third-party liability for mental-health professionals). The comments survey the literature since *Tarasoff* and conclude:

In sum, *Tarasoff* and its duty of care is not without costs, although they appear in retrospect to be considerably more confined than was initially predicted by the therapeutic community. More difficult to determine, as is always the case with events that are prevented from occurring, are its benefits in terms of protecting third parties from violence. Survey evidence does suggest that another benefit of *Tarasoff* is greater attention by therapists in their counseling relationships to potential violence.

*Id.* at § 41 cmt. g.

<sup>229</sup> VA. TECH REVIEW PANEL, MASS SHOOTINGS AT VIRGINIA TECH 47 (2007), <https://governor.virginia.gov/media/3772/fullreport.pdf>.

<sup>230</sup> *Id.* at 48–49.

<sup>231</sup> BRYAN VOSSEKUIL ET AL., U.S. SECRET SERV. & U.S. DEPT OF EDUC., THE FINAL REPORT AND FINDINGS OF THE SAFE SCHOOL INITIATIVE: IMPLICATIONS FOR THE PREVENTION OF SCHOOL ATTACKS IN THE UNITED STATES 3 (2004), <https://www2.ed.gov/admins/lead/safety/preventingattacksreport.pdf>.

<sup>232</sup> *Id.* at 11. The assailants in the study were all boys and all but two were current students. *Id.* at 15. However, a closer examination shows that a few attacks were by women: for example, a recent instance of a female assailant in such a shooting occurred on February 8, 2008, when a nursing student at Louisiana Technical College shot to death two fellow coeds and then killed herself. Jeremy Alford, *Student Kills 2 and Herself at a Louisiana College*, N.Y. TIMES, Feb. 9, 2008, § A, at 12.

<sup>233</sup> ROBERT A. FEIN ET AL., U.S. SECRET SERV. & U.S. DEPT OF EDUC., THREAT ASSESSMENT IN SCHOOLS: A GUIDE TO MANAGING THREATENING SITUATIONS AND TO CREATING SAFE SCHOOL CLIMATES 21 (2004), <https://www2.ed.gov/admins/lead/safety/threatassessmentguide.pdf>.

unidentified.<sup>234</sup> Thus, overreaction is a possible consequence of psychological profiling or identification.

Treatment for depression and other psychological disorders is not a key indicator of violent behavior.<sup>235</sup> Absent demonstrated signs of socially unacceptable or criminal behavior, a university should not exclude students who appear “weird” or “neurotic.” Indeed, excluding based on these characteristics of depression or anxiety could result in excluding a high percentage of the student body at many colleges.<sup>236</sup> Furthermore, the overwhelming majority of students who have emotional problems or academic disappointments, are seeking counseling, or are even “off meds” do not pose a threat to themselves or others.<sup>237</sup>

Treatment is commonplace, as counseling offices at universities often have a high patient load that is prescribed psychiatric medication.<sup>238</sup> This treatment is mostly for depression. One study by the American College Health Association reported that approximately fifteen percent of college students were diagnosed or had been diagnosed with

---

<sup>234</sup> *Id.*

<sup>235</sup> Jonathan M. Metzler & Kenneth T. MacLeish, *Mental Illness, Mass Shootings, and the Politics of American Firearms*, 105 AM. J. PUB. HEALTH 240, 241 (2015), <http://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.2014.302242>.

<sup>236</sup> See Margarita Tartakovsky, *Depression and Anxiety Among College Students*, PSYCHCENTRAL, <http://psychcentral.com/lib/depression-and-anxiety-among-college-students> (last visited Jan. 24, 2016) (noting the increase in students seeking services for anxiety disorders).

<sup>237</sup> Noam Shpancer, *Mental Health, College, and the Threat of Violence*, PSYCHOL. TODAY (July 30, 2012), <https://www.psychologytoday.com/blog/insight-therapy/201207/mental-health-college-and-the-threat-violence>.

<sup>238</sup> A 2014 study reported that counseling centers saw eleven percent of eligible students. ROBERT P. GALLAGHER, UNIV. OF PITTSBURGH, NATIONAL SURVEY OF COLLEGE COUNSELING CENTERS 4 (2014), [http://www.collegecounseling.org/wp-content/uploads/NCCCS2014\\_v2.pdf](http://www.collegecounseling.org/wp-content/uploads/NCCCS2014_v2.pdf). Fourteen percent of all patients were given psychiatric evaluations and twenty-six percent were on psychotropic medication, up from twenty percent in 2003 and nine percent in 1994. *Id.* at 5. Eight percent of the clients were so seriously impaired that they either could not remain in school or could only do so with extensive psychiatric help. *Id.*

A 2006 study at the University of California reported that a quarter of the students seeking counseling services arrived on campus already taking psychoactive drugs. STUDENT MENTAL HEALTH COMM., UNIV. OF CAL., FINAL REPORT 3 (2006) [hereinafter STUDENT HEALTH REPORT], <http://regents.universityofcalifornia.edu/regmeet/sept06/303attach.pdf>.

Studies also show that the caseload is increasing on campuses. From 1995 to 2000, the students seeking counseling services rose forty percent at Columbia University and fifty percent at M.I.T. *Id.* From 1996 to 2002, the increase was fifty-five percent at the University of Cincinnati. *Id.* The Director of Counseling and Psychological Services at Stanford says his service sees about ten percent of the student body each year. Tamar Lewin, *Laws Limit Options when a Student is Mentally Ill*, N.Y. TIMES (Apr. 19, 2007), [http://www.nytimes.com/2007/04/19/us/19protocol.html?\\_r=0](http://www.nytimes.com/2007/04/19/us/19protocol.html?_r=0).

depression.<sup>239</sup> Another study found that almost one half of all college students were so depressed that they had trouble functioning.<sup>240</sup> Indeed, if my former university is any indication, graduate students account for a disproportionately high percentage of those patients who struggle with depression.<sup>241</sup>

Despite these difficulties, a useful component of psychological screening for preventative measures is following up on student treatment and verifying attendance at appointments. This issue is related to instances of depression, and absent constant observation, psychotherapists may be unaware that a patient has stopped taking his prescribed medications; patients missing appointments are scarcely a rare event. For example, one of the major problems uncovered in the Virginia Tech tragedy was that while the assailant's weirdness and scary behavior were well known,<sup>242</sup> not one person at Virginia Tech "was fully aware of the extent of the concern about the individual."<sup>243</sup> Even though he was committed for observation, the consulting psychiatrist felt he did not pose a threat and even recommended his release and follow-up counseling.<sup>244</sup> But no one at Virginia Tech followed up on the counseling because they did not believe it was their responsibility.<sup>245</sup> In response to the resulting violent incident, an internal review recommended the creation of a threat assessment team, which required inclusion of a university law enforcement officer and someone from the Office of Services for Students with Disabilities.<sup>246</sup> The team would factually construct a picture of individuals who posed a risk to themselves or

---

<sup>239</sup> The Am. Coll. Health Assoc., *American College Health Association National College Health Assessment Spring 2006 Reference Group Data Report (Abridged)*, 55 J. AM. C. HEALTH 195, 204 (2007).

<sup>240</sup> STUDENT HEALTH REPORT, *supra* note 238, at app. E (detailing a 2003 study by the American College Health Association).

<sup>241</sup> A Berkeley study of 3,100 graduate students found that approximately fifty percent "experienced an emotional or stress-related problem that significantly affected their well-being and/or academic performance." *Id.* at 5. Almost ten percent had considered suicide in the preceding twelve months. *Id.* at app. E.

<sup>242</sup> Two female students filed complaints about Cho, but did not press charges. VA. TECH REVIEW PANEL, *supra* note 229, at 22–23. His English professors were sufficiently concerned that they discussed him. *Id.* at 22, 24.

<sup>243</sup> COUNSELING REPORT, *supra* note 225, at 11.

<sup>244</sup> VA. TECH REVIEW PANEL, *supra* note 229, at 23.

<sup>245</sup> Claire Sanderson, *April 16 Induces Change at Cook Counseling*, COLLEGIATE TIMES (Mar. 4, 2010, 12:00 AM), [http://www.collegiatetimes.com/news/virginia\\_tech/april-induces-change-at-cook-counseling/article\\_feOI0bl4-236b-56ab-al33-d29d983cc0ff.html](http://www.collegiatetimes.com/news/virginia_tech/april-induces-change-at-cook-counseling/article_feOI0bl4-236b-56ab-al33-d29d983cc0ff.html).

<sup>246</sup> COUNSELING REPORT, *supra* note 225, at 15–16 (discussing the permanent membership of the Care Team and the suggested overlap with the Threat Assessment Team).

others and ensure follow-up measures for campus safety.<sup>247</sup> This recommendation should serve as a model for other colleges.

A separate issue is that students with symptoms of mental illness may not choose to seek treatment. A survey of 2,785 students at the University of Michigan revealed that anywhere from thirty-seven to eighty-four percent of students with symptoms of depressive or anxiety disorder did not seek treatment, even though the university offered free mental health and counseling services.<sup>248</sup> While seventy-two percent of students who exhibited signs of major depression recognized they needed help, only ten percent of the surveyed students received therapy.<sup>249</sup>

In spite of its limitations and risks, institutions are increasingly relying upon psychological screening and diagnosis to suspend or expel students who may appear to pose a threat to themselves or others.<sup>250</sup> In essence, schools are adopting and enforcing mandatory-leave policies.<sup>251</sup> This is not a proper way to help students. For example, a sophomore checked himself into George Washington University Hospital at 2:00 a.m. because he was depressed and considered suicide.<sup>252</sup> The university's response was to give him notice that his "endangering behavior" violated the student conduct code and that unless he withdrew, he faced suspension or expulsion.<sup>253</sup> While in treatment, the university banned him from campus.<sup>254</sup> Similarly, another student was forced to withdraw from New York University because of depression.<sup>255</sup>

---

<sup>247</sup> *Id.* at 15–16.

<sup>248</sup> *Students With Symptoms of Mental Illness Often Don't Seek Help*, MICH. NEWS (July 30, 2007), <http://ns.umich.edu/new/releases/5913>.

<sup>249</sup> *Id.*

<sup>250</sup> See Kate J.M. Baker, *How Colleges Flunk Mental Health*, NEWSWEEK (Feb. 11, 2014, 11:13 AM), <http://www.newsweek.com/2014/02/14/how-colleges-flunk-mental-health-245492.html> (discussing the story of a student who was threatened with expulsion from her university after she intentionally cut herself in the shower).

<sup>251</sup> See Karen W. Arenson, *Worried Colleges Step Up Efforts Over Suicide*, N.Y. TIMES (Dec. 3, 2004), <http://www.nytimes.com/2004/12/03/education/worried-colleges-step-up-efforts-over-suicide.html> (discussing the methods colleges are taking to get students into treatment, including withdrawal); Rob Capriccioso, *Counseling Crisis*, INSIDE HIGHER ED (Mar. 13, 2006), <https://www.insidehighered.com/news/2006/03/13/counseling> (detailing a number of students who have been suspended or expelled after seeking treatment for mental illness).

<sup>252</sup> Susan Kinzie, *GWU Suit Prompts Questions of Liability*, WASH. POST, Mar. 10, 2006, at A01.

<sup>253</sup> *Id.*

<sup>254</sup> *Id.* A settlement on the issue was reached after the student sued but the terms were not revealed. *GWU Settles Lawsuit Brought by Student Barred for Depression*, WASH. POST (Nov. 1, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/10/31/AR2006103101193.html>.

<sup>255</sup> A freshman spoke about suicidal thoughts to a graduate student at a counseling center; the freshman was subsequently suspended involuntarily while seeking treatment.

Rather than summarily excluding a student from campus, protocols should be in place to determine the appropriate course of action, such as “Interim Suspension, Administrative Disenrollment, Enrollment Denial for Medical Reasons, Disenrollment from a Course[, as well as] Code and Judicial Sanctions.”<sup>256</sup> Suspension or expulsion also “create[s] the risk of triggering either an immediate or a delayed violent response unless . . . [they are also] coupled with containment and support.”<sup>257</sup>

The fact remains that psychological screening is not a simple matter. In addition to the uncertainty of psychological diagnosis and identification, it raises issues of privacy,<sup>258</sup> of reporting, and of helping students. Colleges struggle with the implications of students who receive treatment, fail to follow up with treatment, fail to report at all, or face an over-responding university. What is certain is that after the tragic shootings at Virginia Tech, colleges will be much more aggressive in asking potentially violent and suicidal students to leave the school, either temporarily or permanently. But if schools are to implement and respond to psychological screening, they should also have measures to ensure compliance.

## II. THE RESPONSE EFFORT

As discussed, a college’s duty to anticipate, foresee, and act reasonably in light of the many risks of campus violence includes the preparation of a viable EAP. Such preparation is just a normal advance in the duties embedded in the common law. But the duty of reasonable care includes both anticipating foreseeable risks and taking reasonable steps to either forestall or minimize their effects should the risk materialize.<sup>259</sup>

Depending upon their geographical location, colleges must contend with blizzards, earthquakes, fires and wildfires, flooding, hurricanes, ice storms, lightning, power outages, tornadoes, and windstorms. “[T]he defendant who can reasonably be expected to foresee and act upon the danger of a natural force is negligent if he fails to take that force into

---

Sadia Latifi, *Beyond Finger-Pointing: Addressing College Suicide*, COLUMB. DAILY SPECTATOR (Sept. 18, 2006, 12:00 AM), <http://columbiaspectator.com/?q=node/20823/print>.

<sup>256</sup> COUNSELING REPORT, *supra* note 225, at 21. Protocols may already exist for hospitalization, including involuntary hospitalization, as illustrated by the overnight commitment of Cho at Virginia Tech.

<sup>257</sup> FEIN ET AL., *supra* note 233, at 64–65.

<sup>258</sup> McBain, *supra* note 222, at 1 (noting the issue of disclosing students’ mental health issues and the veritable alphabet soup of federal regulations that affect campus policies and procedures).

<sup>259</sup> David W. Barnes & Rosemary McCool, *Reasonable Care in Tort Law: The Duty to Take Corrective Measures and Precautions*, 36 ARIZ. L. REV. 357, 373 (1994); Green, *supra* note 208, at 6.

account.”<sup>260</sup> The reasonable foreseeability of these occurrences creates a duty to employ reasonable care to reduce the risks of a disaster.<sup>261</sup> The duty of reasonable care extends to all who could be foreseeably injured by the negligence, and not just those in a contractual relationship with the defendant.<sup>262</sup> Liability thus extends to any person who could reasonably foresee a risk but fail to exercise reasonable care.<sup>263</sup> For example, where excessive precipitation may result in the overtopping of a dam, the duty of reasonable care may necessitate that the dam owner design the dam with an emergency spillway.<sup>264</sup> It may also include the preparation of an EAP with provisions to warn the threatened population.<sup>265</sup>

The corollary applies to violence on campus: campus emergencies involving criminal acts, suicides, and acts of mass violence and terrorism are just as foreseeable risks as forces of nature.<sup>266</sup> While prevention of the incident may not always be reasonably possible, reasonable efforts should be made to minimize the foreseeable consequences. To extrapolate the principle, one high school had a duty at a school-sponsored soccer game to “take appropriate post-injury efforts to avoid or mitigate further aggravation of his injury.”<sup>267</sup> Background checks and psychological screening may reduce internal threats from the campus community, but they do not eliminate all risks, because threats also originate from outside the institution; threats may emerge from alumni, parents, and those with no discernible link to the campus.<sup>268</sup> The wide variety of assailants and the varying venues make it difficult to

---

<sup>260</sup> DOBBS, *supra* note 49, at 365; *see also* Binder, *Act of God*, *supra* note 204, at 29 n.148 (detailing cases that find defendants liable for negligence after foreseeable forces of nature).

<sup>261</sup> Indeed, an OSHA guideline recognizes that EAPs “should address emergencies that [an] employer may reasonably expect in the workplace,” including “fire; toxic chemical releases; hurricanes; tornadoes; blizzards; [and] floods.” 29 C.F.R. § 1910.38(e) app. (2015).

<sup>262</sup> Binder, *Emergency Action Plans*, *supra* note 38, at 796 n.25 (listing cases where courts found negligence and a duty to third parties).

<sup>263</sup> *See* Barnes & McCool, *supra* note 259, at 373 (explaining that liability arises when reasonable care is not exercised with foreseeable risks).

<sup>264</sup> *See* Barr v. Game, Fish & Parks Comm’n, 497 P.2d 340, 343–44 (Colo. App. 1972) (imposing liability for faulty dam construction when a flood was foreseeable).

<sup>265</sup> *See* Coates v. United States, 612 F. Supp. 592, 595 (C.D. Ill. 1985) (finding liability for several reasons, including the absence of a plan in cases of emergencies).

<sup>266</sup> *See* Stanton v. Univ. of Me. Sys., 773 A.2d 1045, 1050 (Me. 2001) (holding a sexual assault on campus was foreseeable, demonstrated by the university’s security measures); *see also* TEXAS A&M UNIV., 12TH MAN EMERGENCY PLAYBOOK 3 (2014), <https://www.tamu.edu/emergency/documents/12thManEmergencyPlaybook.pdf> (outlining the University’s action plan for emergencies, which include an active shooter, a bomb threat, a fire, chemical spills, and natural disasters).

<sup>267</sup> *Limones v. Sch. Dist. of Lee Cty.*, 161 So. 3d 384, 391 (Fla. 2015).

<sup>268</sup> Eileen Weisenbach Keller et al., *A Model for Assessment and Mitigation of Threats on the College Campus*, 49 J. EDUC. ADMIN. 76, 76 (2011); *supra* Part I.D.

completely secure a campus in advance. The impossibility of forestalling all threats places emphasis on the response efforts, so we must therefore look to reaction times and response efforts.

#### A. *Emergency Action Plans*

Case law on emergency action planning is still developing, but court decisions so far present a strong case for institutions to prepare EAPs for foreseeable events. In essence, these germinal cases are developing a tort of negligent failure to plan.<sup>269</sup>

An example of how not to respond occurred at the Maharishi University of Management in Fairfield, Iowa. The incident began when a student attacked another student during class, stabbing him in the face and neck with a pen.<sup>270</sup> This initial attack ended when others came to the victim's aid, and the attacker was placed in the custody of a dean who took the attacker back to his apartment.<sup>271</sup> Yet the dean did not keep a vigilant watch on the attacker, as he was able to leave the apartment.<sup>272</sup> Even though the dean eventually located the attacker in the dining hall, he allowed the attacker to socialize with the other students.<sup>273</sup> Suddenly the attacker engaged another student, pulled out a knife from his coat, and stabbed the student to death.<sup>274</sup> Allowing a violence-prone student to socialize with other students after an attack was not a proper response.

Similarly, failing to have an EAP has legal consequences, as demonstrated by the failure of Lawn Lake Dam.<sup>275</sup> The dam sat in the Colorado Rocky Mountains on land owned by the National Park Service.<sup>276</sup> The dam had failed before 6:30 a.m. and within twenty minutes a ranger was sent to warn campers.<sup>277</sup> The ranger proceeded in a haphazard manner to warn some of the campers, but not all.<sup>278</sup> The flood wave resulted in loss of life and property damage.<sup>279</sup> The district

---

<sup>269</sup> See *Bluestone Energy Design, Inc. v. Fed. Energy Regulatory Comm'n*, 74 F.3d 1288, 1293 (D.C. Cir. 1996) (holding that a company could be fined for not filing an updated EAP); *Blow v. DSM Pharm., Inc.*, 678 S.E.2d 245, 249–50 (N.C. Ct. App. 2009) (noting a company's citations for an inadequate EAP though affirming the inadequacy of the plaintiff's pleadings); *Engle v. W. Penn Power Co.*, 598 A.2d 290, 296 (Pa. Super. Ct. 1991) (discussing whether an adequate flood plan existed despite public assurances).

<sup>270</sup> *Butler v. Maharishi Univ. of Mgmt.*, 460 F. Supp. 2d 1030, 1032 (S.D. Iowa 2006).

<sup>271</sup> *Id.*

<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

<sup>274</sup> *Id.*

<sup>275</sup> *Coates v. United States*, 612 F. Supp. 592, 594 (C.D. Ill. 1985).

<sup>276</sup> *Id.*

<sup>277</sup> *Id.*

<sup>278</sup> *Id.*

<sup>279</sup> See *id.* at 595 (noting the spread of the flood waters and death of Terry Coates).

court awarded \$480,000 to the family of a deceased camper because of the government's negligence.<sup>280</sup> The government had a duty to prepare an EAP as an exercise of reasonable care because, according to the court, "[i]t is imperative to have a plan in place[:] . . . in such situations there is little time for reflection. Priorities should be established before an emergency arises; otherwise personnel are unprepared to deal with them."<sup>281</sup>

In one instance of mass violence, the failure to plan for emergencies was shown by litigation involving the 1993 World Trade Center bombing.<sup>282</sup> On February 26, 1993, a truck bomb exploded in the underground public parking garage of the World Trade Center, killing six and injuring many more.<sup>283</sup> The Port Authority of New York and New Jersey had earlier created a Terrorist Planning and Intelligence Section, which submitted a report in 1984.<sup>284</sup> Other reports, stories, and recommendations followed.<sup>285</sup> In these plans, the vulnerability of the parking garage received several recommendations for improved security, but these recommendations were not implemented.<sup>286</sup> While the victims asserted negligence, the Port Authority claimed a lack of foreseeability for the bombing as a matter of law.<sup>287</sup> The court noted the existence of a duty to provide "minimal security precautions against reasonably foreseeable criminal acts by third parties."<sup>288</sup> Foreseeability comprised both "what the landlord actually knew, as well as what it reasonably should have known,"<sup>289</sup> a variation of the "known or reasonably should have known" standard for negligence. In light of that foreseeability, the proper level of safety measures was a question of fact.<sup>290</sup> The court focused the inquiry of foreseeability "on what risks were reasonably to be

---

<sup>280</sup> *Id.* at 595, 597 (finding failures in ranger presence and patrol, failure to warn campers, and failure to have a response plan for emergencies).

<sup>281</sup> *Id.* at 596. A class action over an oil spill after Hurricane Katrina also evaluated the adequacy of an EAP. *Turner v. Murphy Oil USA, Inc.*, 234 F.R.D. 597, 601, 604 (E.D. La. 2006). The case was ultimately settled for \$330 million. *\$330 Million Settlement Deal in Katrina Oil Spill*, ENVIRONMENT ON NBCNEWS.COM, [http://www.nbcnews.com/id/15004868/ns/us\\_news-environment/t/million-settlement-deal-katrina-oil-spill/#](http://www.nbcnews.com/id/15004868/ns/us_news-environment/t/million-settlement-deal-katrina-oil-spill/#). VuYGqObfS9Y (last updated Sept. 25, 2006).

<sup>282</sup> *In re World Trade Ctr. Bombing Litig.*, 776 N.Y.S.2d 713, 736 (Sup. Ct. 2004), *aff'd* *Nash v. Port Auth. of N.Y. & N.J.*, 856 N.Y.S.2d 583, 598–99 (App. Div. 2008), *rev'd on other grounds*, *In re World Trade Ctr. Bombing Litig.*, 957 N.E.2d 733, 751 (N.Y. 2011).

<sup>283</sup> *Id.* at 716.

<sup>284</sup> *Id.* at 718.

<sup>285</sup> *Id.* at 718–19.

<sup>286</sup> *Id.* at 720–21.

<sup>287</sup> *Id.* at 723–24.

<sup>288</sup> *Id.* at 734.

<sup>289</sup> *Id.*

<sup>290</sup> *Id.*

perceived.”<sup>291</sup> The Port Authority’s own acts, seeking reports and recommendations, demonstrated the perceived risk regarding a terrorist attack on the World Trade Center.<sup>292</sup> The Authority had a legal duty to exercise reasonable care to maintain the premises in a reasonably safe condition.<sup>293</sup>

The decision was affirmed on appeal.<sup>294</sup> The Port Authority did not argue that the blast was unforeseeable, but that as a governmental entity it had no legally enforceable duty to implement any of the recommendations for action.<sup>295</sup> The court viewed the Port Authority as a landlord that had a duty “to meet its basic proprietary obligation to its commercial tenants and invitees [by] reasonably . . . secur[ing] its premises, specifically its public parking garage, against foreseeable criminal intrusion.”<sup>296</sup> And it rejected the prior-similar-instances test when grounds exist “to infer that the owner was or should have been aware of a real risk.”<sup>297</sup> This risk was shown by the Authority’s own studies and reports, including a security consultation by Scotland Yard.<sup>298</sup> The relevant criterion is therefore notice, not history, especially in the case of “a distinctly higher order of magnitude than the risks typically at issue in premises security.”<sup>299</sup> The opinion essentially merged the balancing factors in Learned Hand’s famous equation with the *Palsgraf* standard of duty.<sup>300</sup>

In light of these examples, the response effort may arguably be the key to minimizing the many risks of campus violence. Critical factors include (a) preparation of the response plan; (b) periodically updating and testing the plan; (c) communication while executing the plan; and (d) flexibility when an emergency unfolds. An unplanned, uncoordinated

---

<sup>291</sup> *Id.* at 735.

<sup>292</sup> *Id.* at 736.

<sup>293</sup> *See id.* (stating that a landowner has a duty of reasonable care to maintain his premises in reasonably safe condition).

<sup>294</sup> *Nash v. Port Auth. of N.Y. & N.J.*, 856 N.Y.S.2d 583, 598–99 (App. Div. 2008), *rev’d on other grounds, In re World Trade Ctr. Bombing Litig.*, 957 N.E.2d 733, 751 (N.Y. 2011).

<sup>295</sup> *Id.* at 586–87.

<sup>296</sup> *Id.* at 587–88.

<sup>297</sup> *Id.* at 588.

<sup>298</sup> *Id.*

<sup>299</sup> *Id.* at 589.

<sup>300</sup> *Id.* at 591 (stating that the duty depends on the nature of the risk, the burden of precautions, and whether the risk was reasonably foreseeable); *see United States v. Carroll Towing Co.*, 159 F.2d 169, 170, 173 (2d Cir. 1947) (establishing that a duty exists if the probability of injury times the gravity of injury is greater than “the burden of adequate precautions”); *Palsgraf v. Long Island R.R.*, 162 N.E. 99, 100 (N.Y. 1928) (finding a duty exists if the risk is reasonably perceived).

response may succeed, but the odds are against it. The incident at Virginia Tech is illustrative and offers various examples.

### 1. Implementation of the Plan

A college may be caught totally unaware at the onset of an emergency. One of the hardest tasks in an emergency, as shown by the Virginia Tech tragedy, is to identify the nature of the threat as it is rapidly unfolding.<sup>301</sup> In addition, the onset of a major emergency may often be met with disbelief followed rapidly by chaos, confusion, panic, rumors, and then finally, indecision and paralysis.<sup>302</sup> A major problem, especially at the beginning of the emergency, is information assessment. It is crucial to cut through the fog, assess the situation, prioritize the response efforts, and marshal, deploy, and track critical resources.<sup>303</sup> Still, the response effort, guided by the EAP, should be implemented as soon as possible, preferably within minutes. Response efforts may often involve difficult judgment calls in rapidly unfolding, confusing scenarios where time is of the essence. An EAP may facilitate these efforts.

### 2. Updating the Plan

An outdated plan may be worse than useless; it might provide a false sense of security as well as result in a waste of time during an emergency and the exercise of avoidable futile actions. The plans should be revised and updated at least annually.<sup>304</sup> The ability to disseminate the plan is vital. Thus, an initial step is to periodically verify and update critical contact numbers.<sup>305</sup> For example, Virginia Tech discovered a lack of emergency contact information, especially for students—some

---

<sup>301</sup> See *Timeline: How the Virginia Tech Shootings Unfolded*, NPR (Apr. 17, 2007, 7:24 PM), <http://www.npr.org/templates/story/story.php?storyId=9636137> (detailing the emails, meetings, and responses, some conflicting, during the violence at Virginia Tech).

<sup>302</sup> See VA. TECH REVIEW PANEL, *supra* note 229, at 81, 103, 118 (stating that the response of authorities to the Virginia Tech tragedy produced misinformation, rumors, panic, and confusion).

<sup>303</sup> For example, police at Virginia Tech initially thought the first two shootings at 7:00 a.m. in a dorm were a domestic violence incident, so they spent their initial efforts tracking down and questioning an irrelevant person of interest. *Timeline: How the Virginia Tech Shootings Unfolded*, *supra* note 301.

<sup>304</sup> See VA. TECH, INFORMATION AND COMMUNICATIONS INFRASTRUCTURE: CONFIDENTIAL PRESIDENTIAL WORKING PAPER app. at 62 (2007) [hereinafter COMMUNICATIONS INFRASTRUCTURE REPORT], [http://www.vtnews.vt.edu/documents/2007-08-22\\_communications\\_infrastructure.pdf](http://www.vtnews.vt.edu/documents/2007-08-22_communications_infrastructure.pdf) (suggesting regular review and update of emergency response process to university contacts such as call centers and help desks).

<sup>305</sup> See VA. TECH REVIEW PANEL, *supra* note 229, at 15–16 (stating that Virginia Tech now encourages its students to provide their mobile phone numbers to disseminate emergency information). These emergency contacts can be utilized in the post-incident period as well.

information was missing or unreliable.<sup>306</sup> Also unavailable were the parents' contact information and home addresses.<sup>307</sup> While large-scale or campus-wide exercises may be impractical on a large campus, Virginia Tech utilizes a variety of a common alternatives such as seminars, table-top exercises, and drills for designing, planning, and executing an EAP.<sup>308</sup>

### 3. Communications

A critical constraint for the success of an EAP is accessibility, coupled with familiarity of the plan. The EAP should not be restricted to campus security and public safety officers. The broader community, as well as the campus community itself, is at risk and should be informed about what to do in an emergency. A prerequisite is that they must receive timely notice of the emergency. Failure either to prepare an EAP or to have it readily available may well lead to liability and convey a message of indifference.<sup>309</sup> A college's EAP should not be a state secret.<sup>310</sup>

As is often the case in a major emergency, cell phone and land line systems become congested, resulting in forced blockages. During the shooting, Virginia Tech experienced a large volume of calls and increased demand on its information technology resources.<sup>311</sup> Other problems arose in the call center established in the immediate aftermath of the tragedy; some of the operators lacked immediate access to the needed information to answer callers' questions.<sup>312</sup> In addition, as is possible with any diverse student body, many of the incoming calls were not in English, causing a communication problem.<sup>313</sup>

---

<sup>306</sup> COMMUNICATIONS REPORT, *supra* note 304, app. at 72.

<sup>307</sup> *Id.*

<sup>308</sup> VA. TECH, CRISIS AND EMERGENCY MANAGEMENT PLAN 24 (2012), [http://www.bov.vt.edu/minutes/12-03-26minutes/attach\\_f\\_03-26-12.pdf](http://www.bov.vt.edu/minutes/12-03-26minutes/attach_f_03-26-12.pdf).

<sup>309</sup> See *Trepanier v. Ryan*, No. 00 C 2393, 2003 WL 21209832, at \*1-2 (N.D. Ill. May 21, 2003) (noting potential liability for the Illinois Governor and Cook County officials in failing to develop an environmental emergency response plan and make it publicly available). Obviously, some facilities, especially biological, chemical, or nuclear, may need secrecy because of potential security concerns, but in general secrecy is an enemy of an effective response.

<sup>310</sup> For example, Virginia requires every public institution of higher education in the state to have an emergency management plan and certify it in writing to the Department of Emergency Management annually. VA. CODE ANN. § 23-9.2:9 (LexisNexis, LEXIS through 2015 Reg. Sess.).

<sup>311</sup> COMMUNICATIONS REPORT, *supra* note 304, at 1-2 (noting the strain on the Virginia Tech system during the emergency). Prior to April 16, 2007, the largest single *monthly* demand on the website was 455 gigabytes, and on the day of the shooting, demand reached 432 gigabytes in *one day*. *Id.* at 9.

<sup>312</sup> *Id.* app. at 79.

<sup>313</sup> *Id.* at 14.

Today's generation of students live on the internet. Therefore, access to the EAPs should be readily available online. Virginia Tech had prepared a backup, bare-bones homepage and it quickly substituted this page for the regular homepage.<sup>314</sup> This alternative homepage is a simple contingency step that can be easily maintained at any institution.

Compatibility of communication systems across emergency responders is also important. At Virginia Tech, a compatibility issue existed in the dispatch center where separate headphones had to be used for the 911 emergency calls and the radio communications with responders.<sup>315</sup> Police, fire, and rescue responders from the responding agencies used incompatible communications systems.<sup>316</sup> Further, the equipment did not always work for first responders and some structures, including Norris Hall, where most of the shootings occurred, had cell phone dead zones.<sup>317</sup> Therefore, emergency responders should use a single radio frequency, and dispatch should use a single headset to monitor both the radio frequency and phone calls.<sup>318</sup>

To better convey urgent messages in the future, Virginia Tech is considering installing internal message boards in classrooms and external message boards at the entrance to the campus.<sup>319</sup> Multiple means exist to notify the campus community. These include emails, instant messaging, text messaging, website postings, podcasting, public address announcements, radio announcements, mass media, personal contacts, subscriber message systems, voicemail, and dedicated cell phone calling and messaging. As for the latter, reverse emergency calls were effective in the 2007 Southern California wildfires to warn residents to evacuate.<sup>320</sup> Information releases should be timely, accurate,

---

<sup>314</sup> *Id.* app. at 13.

<sup>315</sup> *Id.* app. at 38.

<sup>316</sup> *Id.* app. at 21–22. The responding agencies used incompatible VHF, UHF, and 800MHz radio bandwidths. *Id.* For example, the Blacksburg Fire Department provided the command trailer and used VHF, as did the Virginia Tech Police, but the Blacksburg Police used 800MHz. *Id.* app. at 22–23.

<sup>317</sup> *Id.* app. at 43.

<sup>318</sup> The Virginia Tech. Communications Report even makes the recommendation about a single headset. *Id.* app. at 40.

<sup>319</sup> SECURITY INFRASTRUCTURE REPORT, *supra* note 34, at 32.

<sup>320</sup> Steve Hymon & Duke Helfand, *O.C., L.A. County Lack a Reverse-911 System*, L.A. TIMES (Oct. 25, 2007), <http://www.latimes.com/local/la-me-reverse25oct25-story.html>. An automated phone system, commonly referred to today as a “reverse 911,” was used by the city of San Diego to contact 85,792 homes, providing warning or evacuation calls during the wildfires. *Id.* Separate calls were made by the San Diego Sheriff's Office and San Diego County to reach an additional 337,000 and 171,919 homes respectively. *Id.* Reverse 911 systems are increasingly being adopted to provide timely information. *Id.*

and succinct.<sup>321</sup> A simple, but effective message might be along the lines of: “A shooting has occurred in or at [BUILDING] at [TIME]. The current location of the attacker is unknown. Please stay in place and secure your room until further notice.” These communication methods are just a few in a long list of measures colleges should implement.

#### 4. Flexibility

While flexibility may seem the antithesis of planning, the reality is that hardly any incident will unfold as planned. The proverbial fog of war equally applies to domestic emergencies. As President Dwight D. Eisenhower once said, “[p]lans are worthless, but planning is everything.”<sup>322</sup> A different approach is to learn lessons from prior incidents. The tragedies of Columbine and Virginia Tech have led, and will lead, to a reassessment of response efforts.

The perils of strictly following a plan when it is no longer applicable are demonstrated by the tragic shootings at Columbine High School in Colorado on April 20, 1999.<sup>323</sup> Two students, Eric Harris and Dylan Klebold, started shooting outside the school around 11:17 a.m. and then moved into the school.<sup>324</sup> They committed suicide around 12:15 p.m., which became known to authorities by 12:30 p.m.<sup>325</sup> The tragic toll was twelve students and one teacher killed, and dozens wounded.<sup>326</sup>

The first 911 calls came in at 11:21 a.m. and law enforcement officers from the area responded.<sup>327</sup> A teacher, William Sanders, was wounded at 11:40 a.m. and collapsed in Science Room Three of the high school.<sup>328</sup> Constant phone calls detailing the declining health status of Sanders were made to the emergency operators.<sup>329</sup> But not until 4:00 p.m. did the S.W.A.T. team enter Science Room Three.<sup>330</sup> Early in the incident, a command post, staging area, and perimeter had been

---

<sup>321</sup> THROWER ET AL., *supra* note 10, at 5. Timely warnings may, depending on the nature of the emergency, provide time to seek shelter, evacuate, or lockdown. The duty to warn should extend to all those reasonably at risk.

<sup>322</sup> Dwight D. Eisenhower, President, Remarks at the National Defense Executive Reserve Conference (Nov. 14, 1957) (transcript available at <http://www.presidency.ucsb.edu/ws/index.php?pid=10951&st=&st1=>).

<sup>323</sup> Sanders v. Bd. of Cty. Comm’rs, 192 F. Supp. 2d 1094, 1102–03 (D. Colo. 2001).

<sup>324</sup> *Id.* at 1100.

<sup>325</sup> *Id.* at 1102.

<sup>326</sup> *School Shootings Since Columbine High Massacre*, DENVER POST (Dec. 13, 2013, 5:50 PM), [http://www.denverpost.com/news/ci\\_24721063/school-shootings-since-columbine-high-massacre](http://www.denverpost.com/news/ci_24721063/school-shootings-since-columbine-high-massacre).

<sup>327</sup> Sanders, 192 F. Supp. 2d at 1101.

<sup>328</sup> *Id.*

<sup>329</sup> *Id.* at 1102.

<sup>330</sup> *Id.* at 1103.

established.<sup>331</sup> Multiple orders were issued to not permit access to or egress from the facility; the effect was to preclude any escape or rescue efforts.<sup>332</sup> The sheriff's office erroneously deemed the shooting as a situation involving hostages, as opposed to one of high risk.<sup>333</sup> S.W.A.T. teams conducted a methodical, room-by-room sweep with Science Room Three in the last area reached.<sup>334</sup> At that point, they ordered everyone to leave the room, including those applying pressure to the teacher's wounds—Mr. Sanders's wounds, "heretofore survivable . . . bec[a]me fatal."<sup>335</sup>

The resulting lawsuit involved issues of constitutional violations and governmental immunity.<sup>336</sup> The court decided that the actions of the first responders were protected during the first seventy-five minutes of the attack because the "interests of public and officer safety outweighed the rescue needs of the students and staff."<sup>337</sup> Upon learning of the death of the assailants, a time to make deliberate decisions ensued for the responders.<sup>338</sup> The awareness of the teacher's condition and location, coupled with the affirmative actions of blocking access and rescue, displayed a deliberate indifference to the teacher's predicament.<sup>339</sup> Such acts were viewed as reckless and conscience-shocking.<sup>340</sup> The lawsuit was subsequently settled for \$1,500,000.<sup>341</sup> Many schools' response procedures changed after this tragedy.<sup>342</sup>

---

<sup>331</sup> *Id.* at 1101, 1112.

<sup>332</sup> *Id.* at 1102–03.

<sup>333</sup> *Id.* at 1102.

<sup>334</sup> *Id.* at 1103.

<sup>335</sup> *Id.*

<sup>336</sup> *Id.* at 1103–04.

<sup>337</sup> *Id.* at 1114. The tragedy was viewed as a "volatile emergency situation the scope and nature of which was . . . unprecedented." *Ireland v. Jefferson Cty. Sheriff's Dep't*, 193 F. Supp. 2d 1201, 1221 (D. Colo. 2002).

<sup>338</sup> *Sanders*, 192 F. Supp. 2d at 1115.

<sup>339</sup> *Id.* The court distinguished between "emergency action and actions taken after opportunity for reflection," giving deference to decisions in emergency situations. *Id.* at 1114. Calculated indifference may shock the conscience when there is time to deliberate about decisions. *Id.*

<sup>340</sup> *Id.* at 1115.

<sup>341</sup> Karen Abbott & Charley Able, *Sanders Settles Columbine Suit—Daughter of Slain Teacher Agrees to \$1.5 Million Questions Won't Be Answered*, ROCKY MTN. NEWS, Aug. 21, 2002, at 4A.

<sup>342</sup> See Manny Gonzales et al., *Schools Take Steps for Security*, ROCKY MTN. NEWS, Aug. 22, 1999, at 36A (noting that after Columbine, many Colorado school districts tightened security measures). Law enforcement training has also changed since Columbine. John Ingold & Marilyn Robinson, *Columbine Transforms Police Tactics*, DENVER POST, Mar. 7, 2001, at A-08.

### B. Lessons Learned

Some effective changes to protect against random acts of mass violence can be very low-tech. For example, prior to the second round of shootings at Virginia Tech, the perpetrator chain-locked the main doors to Norris Hall; officers had to shotgun open the doors.<sup>343</sup> Recommendations in the aftermath included changing the locks and accompanying hardware to preclude any future chaining.<sup>344</sup> In addition, the locking mechanism on the classroom doors should be changed so as to be lockable from the inside, and installing computer-controlled locking systems should be installed to allow police to lock interior and exterior doors.<sup>345</sup>

The initial phase of an incident will often be obscured by the proverbial fog of war. At Virginia Tech, initial reports were that it might have simply been a version of a domestic dispute because the victim was female and was last seen with her boyfriend, who owned a gun.<sup>346</sup> No broader threat to the greater campus community was perceived, and campus-wide warnings were delayed for two hours.<sup>347</sup> If it were a domestic dispute, then broad warnings would have been viewed as an overreaction.<sup>348</sup>

The decision to close a campus is a momentous act—one which should not be taken casually or cavalierly. The decision seems clear-cut in some circumstances, such as in advance of an impending blizzard or hurricane. However, even these scenarios may include judgment calls, such as a decision by administrators at 4:00 a.m. to close a campus because of the forecast of snow.<sup>349</sup> Virginia Tech illustrates the dilemma of over- versus under-reacting. Early in the fall of the academic year, a prisoner escaped near the campus and had killed a hospital guard and a

---

<sup>343</sup> VA. TECH REVIEW PANEL, *supra* note 229, at 25, 26, 28.

<sup>344</sup> SECURITY INFRASTRUCTURE REPORT, *supra* note 34, at 2, 10.

<sup>345</sup> *Id.* at 10, 11–12.

<sup>346</sup> VA. TECH REVIEW PANEL, *supra* note 229, at 79.

<sup>347</sup> *Id.* at 2–3. The sequence went as follows: the first email went out to faculty and students at 9:26 a.m., urging people to be cautious and report suspicious activity. Associated Press, *Text of E-mails Sent to Virginia Tech Students, Staff*, SAN JOSE MERCURY NEWS (Apr. 16, 2007, 9:43 PM), [http://www.mercurynews.com/breakingnews/ci\\_5683346](http://www.mercurynews.com/breakingnews/ci_5683346). The initial reports of an additional shooting at Norris Hall came in to 911 operators at 9:45 a.m. *Id.* An email was then sent out at 9:50 a.m. with the subject line: “PLease [sic] stay put,” stating: “A gunman is loose on campus. Stay in buildings until further notice. Stay away from all windows.” *Id.* An email at 10:16 a.m. cancelled classes. *Id.* At 10:52 a.m. another email was dispatched, stating that one shooter was in custody and the authorities were continuing to search for a second shooter. *Id.*

<sup>348</sup> VA. TECH REVIEW PANEL, *supra* note 229, at 80–81.

<sup>349</sup> Such a reasonable decision may also risk being either an over- or under- reaction in hindsight.

police officer.<sup>350</sup> Virginia Tech responded to that event with a limited evacuation, and in the two hours after the initial shootings at Virginia Tech, the university president reflected about that decision.<sup>351</sup>

Another lesson from Virginia Tech is that the campus community looks to the college's website for information. Traffic on the Virginia Tech website jumped up to "150,000 unique visitors per hour" in the aftermath of the shootings.<sup>352</sup> Indeed, most universities need to simplify the search process for emergencies on their websites. Yet internet access is not always quick, convenient, or easy, especially when time is of the essence in an emergency or otherwise under stressful conditions—other means of communication need to be utilized.<sup>353</sup>

The response to a more recent shooting at the smaller Delaware State University illustrates the value of lessons learned from Virginia Tech. The campus was effectively shut down: Within twenty minutes of the 12:54 a.m. shooting being reported to police, residence hall advisors advised students to stay in their rooms.<sup>354</sup> Notices were placed in the dormitories and the university's website by 2:40 a.m., and at 5:00 a.m. the decision was made to cancel classes.<sup>355</sup> Simply, colleges need an EAP that is regularly updated and involves communication and flexibility, or face potential liability in instances of mass violence on campus.

#### CONCLUSION

While we do not expect science to stop natural phenomena—such as earthquakes, hurricanes, or tornadoes—we do expect that reasonable care be exercised to minimize their impacts. So too with random acts of violence, which have migrated to our campuses from society in general. College campuses present a "tempting target" in a country of seemingly infinite threats and targets. The variety of potential assailants, the emotional problems of students, the varied means by which they can execute their random acts of violence, the thousands of colleges, and the tens of thousands of buildings on the campuses make it difficult to prevent these crimes. Even though the specific timing, location, and means of delivery may be unforeseeable and unpreventable, we expect institutions to plan for their eventuality such that if they do occur, the college should have a plan in place which may reduce the toll through reasonable response measures. Such a plan should be an integral part of

---

<sup>350</sup> *Id.* at 80.

<sup>351</sup> *Id.*

<sup>352</sup> Scott Carlson, *Emergency at Virginia Tech Shows the Power of the Web, Says Campus Official*, CHRON. HIGHER EDUC. (Aug. 3, 2007), <http://chronicle.com/article/Emergency-at-Virginia-Tech/30901>.

<sup>353</sup> McBain, *supra* note 222, at 14; *supra* Part II.A.3.

<sup>354</sup> Associated Press, *2 Shot at School*, L.A. TIMES, Sept. 22, 2007, at A15.

<sup>355</sup> *Id.*

the school's operations. The nature of any emergency will always be different, but to have in place a well-designed, tested, and up-to-date emergency response plan will minimize the threat. We should also expect institutions to take reasonable steps in advance of a tragedy, such as through background checks and follow-up on psychological screening, to reduce the chances of occurrence at their institution.

We should not expect perfection in an emergency response. Just as engineering is an evolving science, often learning from the mistakes and tragedies of the past,<sup>356</sup> so too with the practice of emergency responses, which is still in its infancy. Reasonable care, not perfection or strict liability, is the standard. Every major emergency will be unique, and every major tragedy presents lessons for improvement, even if prior lessons may not be totally applicable in any new scenario. But in this way, the duty of reasonable care to minimize a tragedy and its consequences may be fulfilled—by securing the hallowed halls of academe.

---

<sup>356</sup> See HENRY PETROSKI, *TO ENGINEER IS HUMAN: THE ROLE OF FAILURE IN SUCCESSFUL DESIGN* xii (1985) (stating that the process of repeated trial and error is the key to understanding engineering's successes and advancements and unlocking future growth).