

**A VIEW OF CAMPUS SAFETY LAW IN HIGHER EDUCATION
AND THE MERITS OF ENTERPRISE RISK MANAGEMENT**

OREN R. GRIFFIN[†]

I. INTRODUCTION 379

II. CAMPUS SAFETY CASE LAW 381

A. Student-University Relations - The Early Years 381

B. Protecting Students and the Duty Void Created by Third-Party Action 384

C. The “Special Relationship” Element 386

III. LEGISLATIVE ACHIEVEMENTS IN THE INTEREST OF CAMPUS SAFETY 392

IV. CRAFTING EFFECTIVE CAMPUS SAFETY POLICY THROUGH THE USE OF ENTERPRISE RISK MANAGEMENT CONCEPTS 395

A. The Emergence of Enterprise Risk Management 398

V. TITLE IX’S SEXUAL ASSAULT PROVISIONS – THE NEW CAMPUS SAFETY FRONTIER 401

A. The Role of Faculty and Others in Campus Safety and Title IX Compliance 403

VI. CONCLUSION: WHAT DOES THE PRESENT REVEAL ABOUT THE FUTURE? 406

I. INTRODUCTION

Higher education institutions represent a tremendous national resource. However, just like other segments in American society, colleges and universities routinely grapple with the threat of violence or deviant behavior committed by employees, students, or unforeseeable third-parties.¹ In recent years, concerns regarding sexual assault, active-shooter incidents, and other forms of violence on college campuses have received significant attention. These events have placed increased

[†] Associate Dean for Strategic Initiatives, Mercer University School of Law. The author wishes to thank his two sons Andrew and Matthew, and his wife Theresa, for the support they provided while drafting this article. A sincere debt of gratitude also is owed to the Mercer Law School librarians Mr. John Perkins and Mr. Jim Walsh for their assistance.

1. *Professor Amy Bishop Gets Life in Prison for Alabama University Shooting*, NBC NEWS (Sept. 24, 2012, 8:48 AM), http://usnews.nbcnews.com/_news/2012/09/24/14068705-professor-amy-bishop-gets-life-in-prison-for-alabama-university (describing that Bishop shot and killed several persons at the University of Alabama Huntsville during a faculty meeting).

pressure on higher education administrators, legislators, and governmental leaders to intervene in a manner that promotes on-campus safety and public confidence in post-secondary education.² Specifically, federal and state lawmakers have supported the development of public policy and have dedicated substantial resources in an effort to safeguard the campus community. Where students, faculty, and other stakeholders look to college and university campuses as safe harbors, the campus safety challenge represents a substantial hurdle that educational institutions must navigate in the current climate.³

This Article examines several compelling concerns that characterize the scope of the law governing campus safety. First, the Article examines a select group of common law decisions regarding which obligation colleges and universities have for campus safety, particularly in the context of institutional liability that flows from negligence claims. Second, the Article reviews legislative responses intended to promote campus safety and the impact these legal initiatives may have on campus life. Third, the advent of enterprise risk management concepts and related strategies are examined as a method of improving campus security and institutional responses to catastrophic events. Fourth, the Article considers sexual assault prevention under Title IX and the role that faculty, working with student affairs administrators, may play in enhancing campus safety to prevent sexual assault on college campuses, which represents a new frontier and challenge for campus safety and security.

2. Kiera Feldman, *Sexual Assault at God's Harvard*, NEW REPUBLIC (Feb. 17, 2014), www.newrepublic.com/article/116623/sexual-assault-patrick-henry-college-grads-harvard; Jordan Friedman, *Students Express Safety Concerns Following Sex Assault Report Near Emory Campus*, AJC.COM (Feb. 21, 2014, 6:10 PM), <http://www.ajc.com/news/local/students-express-safety-concerns-following-sex-ass/ndX44>; Tiffany Walden, *UCF 'Safety Talks' Designed to Keep Students, Community Safe*, ORLANDO SENTINEL (June 19, 2015), <http://www.orlandosentinel.com/news/breaking-news/os-ucf-police-apartment-safety-talks-20150619-story.html>.

3. It is troubling to note that many critical of the work performed by administrators, lawyers, and other professionals to ensure safety and effective emergency preparedness protocols at colleges and universities are willing to take some rather risky approaches to campus security. For example, Texas lawmakers are prepared to allow students and faculty to carry concealed guns on campus. See Manny Fernandez & Dave Montgomery, *Texas Lawmakers Pass a Bill Allowing Guns at Colleges*, N.Y. TIMES (June 2, 2015), http://www.nytimes.com/2015/06/03/us/texas-lawmakers-approve-bill-allowing-guns-on-campus.html?_r=0.

II. CAMPUS SAFETY CASE LAW

The law regarding campus safety at post-secondary educational institutions significantly intertwines issues of privacy and access, due process, negligence, and liability as a result of third-party action. Because the civil liability boundaries are often tested by the choices made by college students on a daily basis, this article provides a select view of legal claims that arise as a consequence of action taken, or perhaps not taken, to keep students out of harm's way. While students should be focused on their academic studies, the reality is that for traditional students, often away from home making decisions alone of the first time, college is a time for exploration. Thus, when students are assaulted or victimized, college or university communities are often put in the difficult position of finding a way forward that almost always leads to finger-pointing and accusations of wrongdoing.⁴

For courts analyzing legal disputes in cases concerning the assessment of tort liability for alleged campus safety mishaps, negligence claims center on the following: (1) what duty, if any, was owed to the student defendants and whether the college or university satisfied its duty by providing a proper standard of care; (2) whether the college or university owed a duty of care for action taken by third parties; and (3) whether students have a "special relationship" with their college or university that creates a heightened obligation to act on behalf of a student's personal safety.

A. *Student-University Relations - The Early Years*⁵

Prior to the 1960s, institutions of higher education applied a guardian-like approach to student personnel services which imposed campus policies and practices that curtailed student activities and freedom. In college towns across America, university administrators freely restricted student activities on and off campus, as the institution deemed appropriate.⁶ Strongly influenced by the *in loco parentis*

4. Audrey Williams June, *Overseeing Sex-Assault Cases Is Now a Full-Time Job*, CHRON. HIGHER EDUC. (Oct. 31, 2014), <http://chronicle.com/article/Overseeing-Sex-Assault-Cases/149739/>.

5. See Victoria J. Dodd, *The Non-Contractual Nature of the Student-University Contractual Relationship*, 33 U. KAN. L. REV. 701, 702 (1985).

6. See *Gott v. Berea Coll.*, 161 S.W. 204, 205-207 (Ky. 1913) (A local restaurant sought an injunction to prevent enforcement of the college's rule because it would injure his business.). Finding that the college had the authority to adopt rules to protect the students, the court stated:

doctrine, this period acknowledged that the relationship between the college or university and the student would be characterized by administrative faculty supervision. Defined as "in the place of a parent," the *in loco parentis* doctrine granted educators the authority to implement rules that limited students' exposure to potential harm that may occur during the college years.⁷

Eventually the *in loco parentis* doctrine would be abandoned, in part due to the wave of social and political unrest that swept through the college campuses during the 1960s and 1970s.⁸ This period would include mass demonstrations and on-campus protests against the Vietnam War and in support of the struggle for racial and gender equity. By comparison, student affairs administrators, prior to the 1960s, exercised substantial control regarding the campus life experience and where legal disputes resulted in litigations courts were highly deferential to college and university decision-makers.⁹

Further, ground-breaking decisions such as *Tinker v. Des Moines*¹⁰ and *Dixon v. Alabama Board of Education*¹¹ showed what it meant to be a student in American higher education. The decisions also gave new meaning and altered the landscape of permissible student conduct. However, for administrators at institutions of higher education, a persistent question would be what campus safety obligations, if any, are owed to the students? Some courts have found that colleges and universities have a duty to provide reasonable care to students to ensure that adequate security systems are in place campus-wide and that facilities are properly maintained to prevent intruders from harming

College authorities stand in loco parentis concerning the physical and moral welfare and mental training of the pupils, and we are unable to see why, to that end, they may not make any rule or regulation for the government or betterment of their pupils that a parent could for the same purpose. Whether the rules or regulations are wise or their aims worthy is a matter left solely to the discretion of the authorities or parents, as the case may be, and, in the exercise of that discretion, the courts are not disposed to interfere, unless the rules and aims are unlawful or against public policy.

Id. at 206.

7. *In loco parentis*, BLACK'S LAW DICTIONARY 858 (8th ed. 2004); see also Zirkel & Reichner, *Is the In Loco Parentis Doctrine Dead?*, 15 J. L. & EDUC. 271 (1986).

8. Peter F. Lake, *Rise of Duty and the Fall of In Loco Parentis and Other Protective Tort Doctrines in Higher Education Law*, 64 MO. L. REV. 1 (1999).

9. Brian Jackson, *The Lingering Legacy of In Loco Parentis: An Historical Survey and Proposal for Reform*, 44 VAND. L. REV. 1135 (1991).

10. *Tinker v. Des Moines Indep. Com. Sch. Dist.*, 393 U.S. 503 (1969).

11. See *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150 (5th Cir. 1961) (finding that a tax supported college is required to grant students due process before expelling student from institution); see also 16 S. CAL. REV. L. & SOC. JUST., 431, 437 (2007).

members of the campus community.¹² Following the 1960s, and considering changing societal norms, the relationship between colleges and students became more dynamic viewed through a contractual lens.

Today, students are considered adult consumers, free to engage in various activities at their own discretion.¹³ Arguably, the demise of the *in loco parentis* doctrine led to divergent viewpoints that characterize the relationship between students and the modern-day college or university. One viewpoint contends that the student and university have an arms-length relationship that acknowledges that students have the same exclusive right to exercise independent judgment over their own affairs as reserved to any adult.¹⁴ The other viewpoint maintains that the university-student relationship is unique and imposes a duty on the university to exercise reasonable care to protect students from harm.¹⁵ The Florida Supreme Court addressed the university's relationship to students in *Nova Southeastern University, Inc. v. Gross* and recognized that while a university does not owe a general duty of supervision, as is common in the elementary and secondary school context, a university does have a duty to exercise ordinary care that would include an obligation to warn of known dangerous conditions to adult students.¹⁶ In this case, a twenty-three year-old graduate student, Bethany Jill Gross, was robbed and sexually assaulted as she attempted to leave an approved off-campus practicum program facility. The trial court granted summary judgment for the university, but that decision was reversed. The court found that a jury should determine whether the university acted

12. In *Mullins v. Pine Manor College*, 449 N.E.2d 331, 335-40 (Mass. 1983), the college sued for negligence following the abduction and rape of a student. The court held that a college had a duty to exercise reasonable care in providing campus security, and that the college could not abandon any effort to protect students; parents and students had a reasonable expectation that the college would provide adequate security. *Id.* The court relied on evidence that showed a deficient security system, improperly supervised security guards, faulty locks, and other findings that demonstrated that the college's failures were the substantial cause of the harm. *Id.*; see also Oren R. Griffin, *Confronting the Evolving Safety and Security Challenge at Colleges and Universities*, 5 PIERCE L. REV. 413 (2007).

13. See *Freeman v. Busch*, 349 F.3d 582, 587 (8th Cir. 2003) ("[S]ince the late 1970s, the general rule is that no special relationship exists between a college and its own students because the college is not an insurer of the safety of its students.").

14. See *Bradshaw v. Rawlings*, 612 F.2d 135 (3d Cir. 1979), *cert. denied*, 446 U.S. 909 (1980); *Beach v. University of Utah*, 726 P.2d 413 (Utah 1986) (rejecting the notion that a university has a duty to protect students from injury caused by a third party under the *in loco parentis* doctrine or under The Restatement (Second) of Torts §§ 314A, 323 (1965)).

15. See *Furek v. Univ. of Del.*, 594 A.2d 506, 516-19 (Del. 1991); see also *Mullins v. Pine Manor Coll.*, 449 N.E.2d 331, 335-40 (1983).

16. *Nova Se. Univ. v. Gross*, 758 So.2d 86, 90 (Fla. 2000).

reasonably in assigning Gross, and other students, to the practicum site that the university knew had been the location of other criminal activities.¹⁷ Put another way, the appellate court acknowledged that a material question of fact existed regarding the university's obligation to act reasonable in light of a foreseeable threat to student safety.

B. Protecting Students and the Duty Void Created by Third-Party Action

In *Furek v. University of Delaware*, the Supreme Court of Delaware found that a university could be liable for physical injuries a student sustained during a fraternity hazing incident, because the relationship between the university and student was sufficiently close and direct to impose a duty to protect the student from foreseeable dangerous activities occurring on its premises.¹⁸ Further, the court in *Furek* found that the university had a duty to use reasonable care to protect students against dangerous acts of third parties, and to regulate foreseeable dangerous activities on campus.¹⁹ The *Furek* court also recognized the “. . . unique situation created by the concentration of young people on a college campus and the ability of the university to protect its students.”²⁰ The court, however, did not hold that the university stood *in loco parentis* relative to its students, and declined to accept the university's position that the institution had no duty to protect students from foreseeable harm by third parties.²¹

In another often-cited decision, the Supreme Court of Kansas, in *Nero v. Kansas State University*, was unwilling to place a duty on universities to protect students from actions by third parties.²² In *Nero*, a female student, sexually assaulted in a coed housing unit, brought a negligence action under the university's policy prohibiting sexual violence.²³ The university knew of the perpetrator's history of sexual assault but permitted him to reside in the student housing facility without warning the student occupants. Articulating a generally applicable rule, the court noted that a university owes student tenants the same duty to exercise due care for their protection as a private landowner owes its tenants.²⁴ However, the court refused to go any further: “We hold the

17. *Id.* at 87-88.

18. *Furek*, 594 A.2d. at 522.

19. *Id.*

20. *Id.* at 519.

21. *Id.*

22. *Nero v. Kan. State Univ.*, 861 P.2d 768 (1993).

23. *Id.* at 772.

24. *Id.* at 780.

university-student relationship does not in and of itself impose a duty upon universities to protect students from the actions of fellow students or third parties. The *in loco parentis* doctrine is outmoded and inconsistent with the reality of contemporary collegiate life."²⁵

Whether colleges and universities are obligated to protect students from on-campus assaults or to warn students of individuals who may pose a threat of danger has received support in various jurisdictions.²⁶ In *Nero*, the court equated the university's obligation with that as a landlord has to an invitee. "[A] landowner has no duty to protect an invitee on the landowner's premises from a third party's criminal attack unless the attack is reasonably foreseeable."²⁷ While the trial court had granted summary judgment for the university, the Supreme Court of Kansas found that reasonable jurors could disagree about whether the sexual assault in this case was foreseeable; thus, the matter was reversed and remanded for trial.²⁸

Courts may also be unwilling to impose a heightened duty on colleges for misconduct committed by admitted students. In *Eiseman v. State of New York*, a state university student was raped and murdered by another student, an ex-felon with a history of drug and criminal conduct, who was admitted into a special program for disadvantaged persons.²⁹ Representatives for the slain students alleged, *inter alia*, that the college breached its duty to protect students from the unreasonable risk and foreseeable danger.³⁰ Understanding the significance of whether the college had a legal duty in this matter, the court held that the college breached no statutory duty when it accepted the student who committed this violent act, nor did the college take on a duty of heightened inquiry in admissions or a heightened duty to restrict the perpetrator-student's activities to protect other students.³¹ While the lower courts, and the Court of Appeals for New York, refused to resurrect the *in loco parentis* doctrine as a basis to impose liability, the salient question was whether a duty to shield students from the dangerous activity of other students should be recognized when the college admits an ex-felon to college sponsored or supported programs.³² In response, the court considered

25. *Id.* at 778.

26. *Bradshaw v. Rawlings*, 612 F.2d 135 (3rd Cir. 1979), *cert. denied*, 446 U.S. 909 (1980); *see also* *Beach v. Univ. of Utah*, 726 P.2d 413 (Utah 1986); Restatement (Second) of Torts §§ 314A, 323 (AM. LAW. INST. 1965).

27. *Nero*, 861 P.2d at 780.

28. *Id.* at 781.

29. *Eiseman v. State of N.Y.*, 511 N.E.2d 1128 (N.Y. 1987).

30. *Id.* at 1136.

31. *Id.*

32. *Id.* at 1137.

several policy considerations and found that an ex-felon's release and return to society following imprisonment was mandated by law and public policy, with the objective that the former inmate would be rehabilitated and reintegrated into society for a future of productive years.³³ Imposing a duty on the college as a result of an ex-felon's presence on campus would run contrary to legislative policy and law enacted to prevent discrimination against former convicts and former drug addicts – people trying to rebuild their lives.³⁴

C. *The "Special Relationship" Element*

While the circumstances that can result in tortious student action may vary tremendously, the general rule regarding negligence holds that colleges and universities do not owe students a duty to rescue or protect them from conditions that the institution did not create unless a special relationship is declared to exist between the student and the institution. Generally discussed in the Restatement (Second) of Torts § 314A, the special relationships have been found to arise when one assumes responsibility for another's safety or deprives another of his or her normal opportunities for self-protection.³⁵

In *DeSanto v. Youngstown State University*, Jermaine Hopkins, a student enrolled at Youngstown State University, was shot and killed following a fight and verbal altercation that began at a dance held at an off-campus pub.³⁶ The student's parents brought a negligence action alleging that the institution was liable because the campus police failed to arrest or detain a person who threatened to kill their son during the verbal altercation.³⁷ Ruling in favor of the university, the court found that

33. *Id.*

34. *Id.*; see also *Gragg v. Wichita State Univ.*, 934 P.2d 121 (Kan. 1997) (A wrongful death action wherein student was shot and killed by a street gang member on campus and court found that the university owed no duty because attack on student was unforeseeable.); *Cupples v. State*, 861 P.2d 1360, 1372 (Kan. 1993) (The court defined foreseeability as "a common-sense perception of the risks involved in certain situations and includes whatever is likely enough to happen that a reasonably prudent person would take it into account."); *Guest v. Hansen*, No. 06-cv-0500, 2007 WL 4561104, (N.D.N.Y. December 18, 2007) (granting Defendant-College's motion for summary judgment finding that College had no duty to supervise or control the conduct of its students and a guest who were killed near campus in a snowmobile accident).

35. *Cope v. Utah Valley State Coll.*, 290 P.3d 314, 323 (Utah Ct. App. 2012), *aff'd on other grounds*, 342 P.3d 243 (Utah 2014); see also W. PAGE KEETON ET AL., PROSSER AND KEETON, THE LAW OF TORTS § 56 (5th ed. 1985).

36. *DeSanto v. Youngstown State Univ.*, No. 99-08777, 2002 WL 31966960, (Ohio Ct. Cl. 2002).

37. *Id.* at *2.

university police did not owe the student a duty beyond that owed to the general public.³⁸ The court relied on the fact that the student did not seek aid or protection from the university, nor was the student injured on campus.³⁹ Moreover, the university police officers did not have the authority or duty to protect the student off-campus.⁴⁰ In rendering its decision, the court relied on the public duty rule, noting that negligent performance of a public duty gave rise to only a public injury and no private cause of action could prevail in the absence of a special relationship.⁴¹ To establish a special relationship the following elements must exist:

- 1) an assumption by the governmental entity of a duty to act on behalf of the injured party either through promises or actions; 2) knowledge on the part of the governmental agents that inaction could lead to harm; 3) some form of direct contact between the governmental agents and the injured party; and 4) the injured party's justifiable reliance on the governmental entity's affirmative undertaking.⁴²

The absence of any basis to support the existence of a special relationship between the university and the student obviously contributed to the institution's ability to mount a successful defense to the plaintiff's negligence claim. Nevertheless, the case offers a disturbing reminder of how precarious modern-day student life activities have become and the legal defenses that may be available for colleges and universities. Within hours, students can go from simply socializing with others to losing their lives.⁴³

While the court in *DeSanto* found that the university was not negligent and did not have an affirmative duty to protect the student, an unanswered question is whether more could have been done or should have been done to prevent the loss of life. And, if so, would a university police department avoid taking such action to negate the assumption of

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. See also *Conner v. Wright State Univ.*, No. 13AP-116, 2013 WL 6835270 (Ohio App. Ct. Dec. 13, 2013) (affirming University's motion for summary judgment in determining whether university police had a public duty to ensure safety of student that committed suicide through asphyxiation using helium because a special relationship could not be established between the student and the university in the absence of evidence that the student requested assistance from university police officers or justifiably relied on any affirmative action taken by the campus police).

an affirmative duty by the state university, and potentially exposing the institution to tort liability?

Numerous negligence cases have turned on whether a special relationship is extended to students in the contexts of their affiliation with a college or university. In *Freeman v. Busch*, a Simpson College student, Scott Busch, invited his nineteen-year-old ex-girlfriend, Carolyn Freeman, and two of her friends, to his dorm room for a party where the underage women consumed an unknown amount of alcohol and became inebriated.⁴⁴ Freeman became visibly intoxicated, vomited on her clothes, and was eventually carried to Busch's bedroom to lie down.⁴⁵ Busch and Freeman had sexual intercourse that same evening.⁴⁶ Busch stated that the act was consensual, but Freeman alleged that she was sexually assaulted, although she could not remember what happened the previous evening.⁴⁷

Freeman brought a negligence claim based upon the doctrine of *respondeat superior* against Simpson College, alleging that Busch and Brian Huggins, the resident assistant ("R.A.") on duty at the time of the incident, both served as university security guards. The doctrine of *respondeat superior* provides that an employer is liable for the negligent acts of its employees only if the employees' acts were within the scope of their employment.⁴⁸ However, it was undisputed in this case that "... neither Busch nor Huggins were on duty as a university security guard."⁴⁹ At best, Huggins was acting within the scope of his employment as an R.A. at the time of the alleged negligent act.⁵⁰ But there was nothing to indicate the R.A. had a duty to protect Freeman, who was the guest of a Simpson College student, or that a special relationship existed between the college and the invited guest to a party in an on-campus dorm room.⁵¹ Freeman's reliance on § 314A of the Restatement (Second) of Torts is wholly displaced by the court's recognition of the general rule "that no special relationship exists between a college and its own students because a college is not an

44. *Freeman v. Busch*, 349 F.3d 582 (8th Cir. 2003).

45. *Id.* at 585.

46. *Id.*

47. *Id.*

48. *Id.* at 587. *Respondeat superior* has been defined as "let the superior make answer." *Respondeat Superior*, BLACK'S LAW DICTIONARY 1426 (8th ed. 2004). Recognized as a form of vicarious liability, this means that under certain circumstances the employer shall be liable for the wrongful acts of the employee. See also Rochelle Rubin Weber, "Scope of Employment" Redefined: Holding Employers Vicariously Liable for Sexual Assaults Committed by Their Employees, 76 MINN. L. REV. 1513, 1541 (1992).

49. *Freeman*, 349 F.3d at 587.

50. *Id.* at 588-589.

51. *Id.*

insurer of the safety of its students.”⁵² Hence, the R.A. had no legal duty to protect Freeman in this situation.

Further, the R.A. assumed no legal duty to come to Freeman’s aid, thereby having no legal obligation under § 324 of the Restatement (Second) of Torts.⁵³ The Eighth Circuit agreed that the R.A. took no specific action to exercise custody or control over Freeman although he knew she had consumed a substantial amount of alcohol, vomited, and passed out in a dormitory room.⁵⁴ The R.A., Huggins, did not intervene or take any action over Freeman – her care was left to others.⁵⁵ As a consequence, Freeman’s negligence claim against Simpson College was dismissed and the college had no legal duty to come to her aid.⁵⁶

Other courts have found that the presence of a special relationship is dependent on whether a defendant could reasonably foresee that he or she would be expected to take action to protect the plaintiff, and could anticipate that the plaintiff would be harmed without such protective action.⁵⁷ In *Bash v. Clark University*, a female student, who resided on-campus, had a troubled freshman year plagued with poor academic performance and illegal drug use, and eventually died after being provided with heroin.⁵⁸ Thereafter, the student’s father brought a wrongful death action against Clark University, among others, alleging that the university was “. . . negligent in taking preventative steps necessary to protect Ms. Bash and for misrepresenting to Plaintiff [the father] that Ms. Bash would be provided with a safe and healthy environment while at Clark.”⁵⁹

Acknowledging that the negligence elements include duty, breach, causation, and actual damages, the Superior Court of Massachusetts recognized that, ordinarily, one does not owe a duty to rescue or protect others in the absence of a special relationship.⁶⁰ The student’s use of heroin in this case was tragic, but the court chose to find that a special relationship did not exist between the university and the student because, to do so, “would impose on university officials and staff an unreasonable

52. *Id.* at 587.

53. *Id.* at 589.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Bash v. Clark Univ.*, No. 06745A, 2006 WL 4114297, at *4 (Mass. Super. Ct. 2006).

58. *Id.* at *1.

59. *Id.*

60. *Id.* at *3.

burden that would be at odds with contemporary social values and customs."⁶¹

The court offers a provocative discussion of the law regarding whether university officials owe students a duty of care by virtue of a special relationship. Among the court's observations, as to the presence of a special relationship, the focus centered on balancing the foreseeability of the harm against the action necessary to protect the student.⁶² Despite Ms. Bash's difficulties during her freshman year, the court reasoned that it was not foreseeable that she would take her life.⁶³ There was no evidence that the student was suicidal and she had received explicit warnings from her parents about the perils of illegal drugs.⁶⁴ Furthermore, the court made a distinction between a university's responsibility to protect students from physical harm caused by criminal intruders versus the responsibility to protect the moral well-being of students that rest with parents and the students themselves.⁶⁵ To hold university officials liable for a student's voluntary, illegal drug use raises unrealistic expectations about their ability to protect students from harm. Such a duty placed on a university is unwarranted and not the type of burden a university ought to assume as the basis of a special relationship.⁶⁶

However, it is important to note that the prohibitive view regarding the presence of that "special relationship" is not absolute.⁶⁷ In *Kleinknecht v. Gettysburg College*,⁶⁸ the Court of Appeals for the Third Circuit found that a special relationship existed between the college and Drew Kleinknecht, a student-athlete on the lacrosse team who died from a heart attack during a team practice.⁶⁹ The parents of the twenty-year-old sophomore, who collapsed on the playing field and was later pronounced dead after being taken by ambulance to a local hospital, alleged that the college was negligent in its action regarding the incident.⁷⁰ Further, the parents argued that the college owed the student lacrosse player a duty of care based on the special relationship between

61. *Id.* at *4.

62. *Id.*

63. *Id.* at *5.

64. *Id.* at *4.

65. *Id.* at *6.

66. *Id.* at *5; see also *Crow v. State of Cal.*, 222 Cal. App. 3d 192, 209 (Cal. Ct. App. 1990).

67. See *Freeman v. Busch*, 349 F.3d 582, 588 n.6 (8th Cir. 2003).

68. *Kleinknecht v. Gettysburg Coll.*, 989 F.2d 1360 (3d Cir. 1993).

69. *Id.* at 1365.

70. *Id.* at 1362-64.

the college and the student.⁷¹ Among the facts that supported the court's finding that a special relationship existed between the student and Gettysburg College was that the lacrosse student was actively recruited to play lacrosse at the college, the heart attack happened when the student was participating in a lacrosse practice session, and was not under the supervision of college employees.⁷² Addressing the unique circumstances of this case, the court noted the following:

There is a distinction between a student injured while participating as an intercollegiate athlete in a sport for which he was recruited and a student injured at a college while pursuing his private interests, scholastic or otherwise. . . [T]he fact that Drew's cardiac arrest occurred during an athletic event involving an intercollegiate team of which he was a member does impose a duty of due care on a college that actively sought his participation in that sport. We cannot help but think that the College recruited Drew for its own benefit, probably thinking that his skill at lacrosse would bring favorable attention and so aid the College in attracting other students.⁷³

In light of the efforts made by the student athlete and the college that placed him on the lacrosse team, the court found that a special relationship existed that created a duty of care.⁷⁴ By implication, however, the court's opinion appears to suggest that had Drew been an ordinary student engaged in activities outside the scope of a sponsored university program, no special relationship would be found.⁷⁵

In *Schieszler v. Ferrum College*,⁷⁶ a Senior District Court Judge held that a special relationship existed between Michael Frentzel, a student who had committed suicide, and Ferrum College, where the suicide occurred on-campus and was foreseeable.⁷⁷ Here, again, the court recognized that there is no affirmative duty to protect another absent unusual circumstances or as set out under Section 314A of the Restatement (Second) of Torts (1965), which identifies a non-exclusive list of special relationships.⁷⁸ Numerous jurisdictions have been unwilling to find a special relationship between a student and a college

71. *Id.* at 1367.

72. *Id.*

73. *Id.* at 1368.

74. *Id.* at 1372.

75. *Id.*

76. *Schieszler v. Ferrum Coll.*, 236 F. Supp. 2d 602 (W.D. Va. 2002).

77. *Id.* at 609.

78. *Id.* at 606.

which created a duty to protect students based on the critical element that a college, in the vast majority of cases, is unable to foresee that a student is in danger.⁷⁹ However, the facts presented in *Ferrum College* show that Frentzel had emotional problems and that he was a danger to himself by virtue of self-inflicted bruises to his head discovered days before his death, and that he had shared messages with his girlfriend that he intended to kill himself.⁸⁰ Viewed collectively, these facts supported a special relationship finding between the student and the college because it was foreseeable that Frentzel was a danger to himself, triggering a duty to protect the student from harm.⁸¹ Further, the court's holding was supported by the observation that colleges themselves have fostered, among parents, students, and the general public, a belief that reasonable care will be taken to protect students from foreseeable harm.⁸² In the fierce competition for student tuition dollars, there can be little doubt that colleges go the extra step to market their campus as the college or university of choice.⁸³

III. LEGISLATIVE ACHIEVEMENTS IN THE INTEREST OF CAMPUS SAFETY

A diverse array of state and federal legislative enactments from numerous jurisdictions has emerged as lawmakers and governmental officials seek to respond to public concerns regarding campus shootings and incidents of sexual assault at American colleges and universities.⁸⁴

79. *Id.* at 608.

80. *Id.* at 609 (illustrating that the court was most impressed with the fact that the college asked Frentzel to sign a statement that he would not hurt himself which demonstrated that the college knew that the student was a danger to himself).

81. *Id.*

82. *Id.* at 610.

83. *Safest College Campuses*, NICHE, <https://colleges.niche.com/rankings/safest-campus/> (last visited July 6, 2015).

84. See New Jersey Campus Sexual Assault Victim's Bill of Rights Act, N.J. STAT. ANN. §§18A: 61E-1 to 6 (West 1999) (Enacted in 1994, the Act provides certain rights for victims of campus-related sexual assault that occurs on any public or independent institution of higher education.); the Kristin Smart Campus Security Act of 1998, CAL. EDUC. CODE §67381 (West 2003) (The Act was passed by California lawmakers following the disappearance of Kristin Smart in May 1996, a student at California Polytechnic State University at San Luis Obispo. The law was intended to improve coordination among agencies participating in criminal investigations at higher education institutions, and requires California postsecondary institutions receiving public funding to enter into written agreement with local law enforcement agencies regarding coordination and responsibility for investigating criminal activity on or near campus.); Oklahoma Campus Security Act, OKLA. STAT. ANN. tit 74 § 360.15 (West 2003) (the Act grants public and private institutions of higher, and public school districts, the power to

Among the most heralded efforts to promote campus safety has come with the passage of the Crime Awareness and Campus Security Act of 1990, also known as the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics (Clery Act).⁸⁵ This landmark federal law requires colleges and universities to report crimes that include murder, robbery, aggravated assault, and motor vehicle theft, and make statistical information available to the public.⁸⁶ In addition, the Campus Sexual Violence Elimination Act (“Campus SaVE Act”) was signed into law on March 7, 2013 by President Obama as part of the Violence Against Women Reauthorization Act of 2013 (“VAWA”) which amended the Clery Act.⁸⁷ The purpose of the Clery Act and the Campus SaVE Act is to increase transparency and advance reporting, responsiveness, and prevention education programs regarding incidents of sexual violence.⁸⁸ More specifically, as amended, VAWA requires institutions of higher education to report crimes of domestic violence, dating violence, stalking, and sexual assault in addition to the crimes already required under the Clery Act.⁸⁹ On October 20, 2014, the final regulations for the Violence Against Women Act amendments to the

establish jurisdictional authority of campus police departments and enter agreements with campus police departments to recognize and clarify jurisdictional boundaries.); Campus Security Enhancement Act of 2008 110 ILL. COMP. STAT. ANN. 12/1 (West 2009) (Originally enacted in 1994 and amended in 2008, requires *inter alia* that institutions of higher education institute a National Incident Management System, and a multi-jurisdictional campus violence prevention plan.); Campus Safety and Security (Michael Minger Act), KY. REV. STAT. ANN. §164.948 (West 2010) (requiring Kentucky colleges and universities to maintain a crime log, and to report crimes and security threats to the campus community); N.Y. EDUC., §§6434-6438 (McKinney 2014) (Enacted in 1999, requires colleges and universities to promptly investigate violent felonies on college campuses, file reports of missing students, and disclose crime statistics in campus catalogs.).

85. Crime Awareness and Campus Security Act of 1990, Pub. L. No. 101 – 542, 104 Stat., 2384 (codified as 20 U.S.C. §1092) (subpart of the Student Right-to-Know and Campus Security Act). The Jeanne Clery Act amended the Higher Education Act of 1965 under § 485(f). The statute, 20 U.S.C. § 1092(f), now requires that colleges and universities report and disclose campus crime statistics and comply with campus safety and security provisions as mandated by the Title IV and other Higher Education Act programs. The law is enforced by the U.S. Department of Education and applies to public and private institutions participating in the federal student financial aid programs. *Id.*

86. *Id.*

87. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 89 (2013).

88. Bert Spunberg, *Keeping on Top of University Legal Liability*, 117 PROP. & CASUALTY 360, 48 (2013).

89. 20 U.S.C. §1092 (f)(1)(F)(iii) (2013).

Clery Act were published by the Department of Education.⁹⁰ The regulations expand rights granted to victims of sexual violence and became effective in July 2015.⁹¹ For many commentators of the subject, these recent changes in the law have acknowledged a nationwide push to minimize sexual assault at American colleges and universities.⁹² For others, this expansion in the law has perhaps gone too far, too fast, leading to an alarmist view of the current campus climate that may create adjudication systems that are unfair to the accused and dismissive of due process concerns.⁹³

While the national concern regarding campus safety has triggered federal action, it is important to note that state lawmakers have not sat idle. On September 29, 2014, California legislators passed Assembly Bill No. 1433, mandating that colleges, as a condition of receiving state grant funds, report sexual assaults and other specified crimes immediately, or as soon as possible, to local law enforcement agencies without disclosing the student's identity absent his or her consent.⁹⁴ Advocates for the new law argue that the requiring campus police to notify local police once crime reports are received will increase transparency, public accountability, and have a positive impact on public safety.⁹⁵ But the law may increase the bureaucratic burdens placed on campus police officials that are sure to come with this new reporting requirement. Moreover, the law may create some operational uncertainty regarding jurisdictional authority of campus police officials and local law enforcement in responding to on-campus crime.

California Governor Jerry Brown also approved Senate Bill No. 967, which requires public colleges and universities to adopt policies concerning sexual violence.⁹⁶ More specifically, the law requires the

90. Max Lewontin, *In Rules on Campus Sexual Violence, Education Dept. Emphasizes Training*, CHRON. OF HIGHER EDUC. (Oct. 20, 2014), <http://chronicle.com/article/In-Rules-on-Campus-Sexual/149521>.

91. *Id.*

92. Janet Napolitano, "Only Yes Means Yes": *An Essay on University Policies Regarding Sexual Violence and Sexual Assault*, 33 YALE L & POL'Y REV. 387 (2015).

93. Emily Yoffe, *The Hunting Ground. The Failures of a New Documentary about Rape of College Campuses*, SLATE (Feb. 27, 2015), http://www.slate.com/articles/double_x/doublex/2015/02/the_hunting_ground_a_campus_rape_documentary_that_fails_to_provide_a_full.html.

94. CALIF. ASSEMBLY BILL NO. 1433 (2014), https://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=201320140AB1433.

95. Christopher Simmons, *California Bill to Protect Campus Crime Victims Signed Into Law—AB1433*, CAL. NEWS WIRE (OCT. 8, 2014), http://californianewswire.com/2014/10/08/CNW21437_100008.php/california-bill-to-protect-campus-crime-victims-signed-into-law-ab-1433/.

96. Bill Chappell, *California Enacts 'Yes Means Yes' Law, Defining Sexual Consent*, NPR.ORG, (Sept. 29, 2014), <http://www.npr.org/sections/thetwo->

application of an affirmative consent standard to determine whether sexual activity was preceded by a conscious and voluntary agreement to the consent.⁹⁷ The law makes clear that under the affirmative consent standard, “[l]ack of protest or resistance does not mean consent, nor does silence mean consent. Affirmative consent must be ongoing throughout a sexual activity and can be revoked at any time.”⁹⁸ Collectively, these laws represent an aggressive approach to combating sexual violence on college campuses.⁹⁹ For higher education administrators and parties to sexual assault misconduct disputes, these laws create important questions regarding prevention strategies and personal responsibility. In addition to sexual assault, as the legal landscape regarding matters such as domestic violence and dating violence takes shape within the higher education community, the challenge will be developing effective strategies and tactics throughout the educational institution that minimize risks and protects potential victims.¹⁰⁰

IV. CRAFTING EFFECTIVE CAMPUS SAFETY POLICY THROUGH THE USE OF ENTERPRISE RISK MANAGEMENT CONCEPTS

Whether colleges and universities have a duty to ensure some degree of student safety, or even a higher duty of care, the potential tort liability that can result from breaches of campus safety requires the development of policies and practices that benefit individuals and post-secondary institutions. Substantive on-campus policies should be drafted to clearly communicate campus safety objectives and minimize the risk of harm to the higher education community. However, to be effective, university attorneys, administrators, and lawmakers cannot rely solely on an understanding of legal mandates articulated by federal and state lawmakers regarding campus safety obligations, but must engage in *capacity building* and *system change* that responds to potential risks that

way/2014/09/29/352482932/california-enacts-yes-means-yes-law-defining-sexual-consent..

97. *Id.*

98. S.B. 967, 2013-2014 Cal. Leg., Reg. Sess. (2014).

99. Christopher Simmons, *Calif. Attorney General Kamala D. Harris Issues Alert on Campus Safety*, CAL. NEWS WIRE (Jan. 27, 2015), http://californianewswire.com/2015/01/27/calif-attorney-general-kamala-d-harris-issues-alert-on-campus-safety-CNW23206_103501.php/.

100. Colleen Murphy, *When a State Decides That ‘Yes Means Yes,’ What Does That Mean for Colleges*, CHRON. HIGHER EDUC. (July 22, 2015), <http://chronicle.com/article/When-a-State-Decides-That/231805/?cid=at> (discussing new laws under consideration or enacted in states including California and New York requiring affirmative consent to combat sexual violence on college campuses).

threaten the institution.¹⁰¹ While capacity building refers to the investment of material, intellectual and human resources, and system change centers on the transfer of official authority to alter the system by which certain services are provided, colleges and universities seeking to advance campus safety objectives must engage in both capacity building and system change, within a managerial framework.

Traditionally, risk management offers a sound framework that colleges and universities can use to promote campus safety and develop emergency response strategies.¹⁰² More specifically, risk management provides higher education administrators with a viable construct to evaluate, coordinate, and assess various efforts that are advanced to reduce the consequences of poor decision-making and manage risk within a zone of tolerance.¹⁰³ A core responsibility for any organization regardless of mission, profit or non-profit, involves identifying the nature and types of risks that threaten the organization.¹⁰⁴ The risk management process focuses on risk identification and assessment.¹⁰⁵ Through the work performed by risk or threat assessment teams, comprised of personnel with diverse expertise, an institution has the capacity to identify, analyze, and respond to threats that have the potential to destabilize the organization.¹⁰⁶ The assessment of probable risk and corresponding exposure to loss or injury requires consideration of treatment strategies such as shifting risk.¹⁰⁷ While risk management

101. Lorraine M. McDonnell & Richard F. Elmore, *Getting the Job Done: Alternative Policy Instruments*, 9 EDUC. EVAL. AND POL'Y ANALYSIS 133 (1987).

102. Terri Howard, *Deconstructing Disaster*, 88 AM. SCH. & UNIV. 18 (2015); Anne Lundquist and Allen Shackelford, *Responding to and Supporting Students with Disabilities: Risk Management Considerations*, 154 NEW DIRECTIONS FOR HIGHER EDUC. 65 (2011).

103. See generally E. FRANK HARRISON, *THE MANAGERIAL DECISION-MAKING PROCESS* (Boston: Houghton Mifflin 1975); H. Wayne Snider, *Risk Management: A Retrospective View*, 38 RISK MGMT. 47, 47-54 (1991).

104. See Arthur E. Parry, *Risk Assessment Is Senior Management's Responsibility*, 30 RISK MGMT. 36 (1983).

105. Russell B. Gallagher, *Risk Management: New Phase of Cost Control*, 34 HARV. BUS. REV. 5 (Sept. – Oct. 1956).

106. Kathleen C. Bailey, *Profiling an Effective Political Risk Assessment Team*, 30 RISK MGMT. 34, 34-38 (1983); John H. Dunkle et. al., *Managing Violent and Other Troubling Students: The Role of Threat Assessment Teams on Campus*, 34 J. C. & U. L. 585, 589 (2008) (citing the research from counseling psychology as a method to address students with behavioral problems); Donald Challis, *Appropriate Responses of Campus Security Forces*, 17 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 169, 178 (2010) (confirming the wide spread presence of threat assessment teams at colleges and universities); Susan S. Bendlin, *Shootings on Campus: Successful § 1983 Suits Against the School?*, 62 DRAKE L. REV. 41, 42 (2013) (discussing the limitations of threat assessment teams).

107. David A. Moss, *Risk, Responsibility, and the Role of Government*, 56 DRAKE L. REV. 541, 542 (2008).

strategies can result in certain efficiencies, higher education institutions also can avoid certain risks via a negotiated agreement or by procuring insurance. Thus, the importance of understanding the scope of a potential threat and developing cost-effective remedies is a paramount concern for institutions striving to manage risk effectively.¹⁰⁸

Another aspect of risk management is understanding the primary circumstances that lead to breaches of campus safety, and through systematic processes, determine what can be implemented to minimize the likelihood that such events may reoccur.¹⁰⁹ This analysis phase within the risk management process involves two components. First, risk analysis seeks to conduct a probative review of those variables that may expose the college or university to risk and potential liability.¹¹⁰ Secondly, the risk analysis phase determines the feasibility of proposed remedies that may be applied to reduce risk exposure.¹¹¹ The purpose of this analytical phase is to generate information on a range of contingencies available to avoid or mitigate those adverse consequences identified as probable threats to the organization or institution.¹¹²

Risk management is an ongoing process. As the risk analysis effort progresses, the next step includes identifying risk control strategies or risk treatment strategies that decision-makers may implement to manage risk.¹¹³ These strategies include actions such as risk avoidance that represents a decision to forgo particular activities or programs.¹¹⁴ Other risk treatment strategies include the assumption of certain risks while increasing the institution's capacity to respond to negative outcomes, and transferring or shifting risk through third-party agreements, and enforcing indemnity clauses in construction, service, and supply contracts.¹¹⁵ Given the uncertainty that can impact colleges and

108. Susan L. Santos, *Risk Assessment: A Tool for Risk Management*, *Environmental Science Technology*, 21 ENVTL. SCI. TECH. 239 (1987) (It is important to note that some risk assessment concepts originate from the scientific and industrial technology industries, however, the logic and rationale considered are applicable in diverse settings.).

109. Oren Griffin, & Alan B. Henkin, *Systematizing Information for Public Sector Risk Management: A Perspective from Higher Education*, *EDUC. RES. Q.*, Dec. 2000, at 21-36.

110. Terry L. Ames, Lori A. Glenn, & Leslie E. Simons, *Dating Violence: Promoting Awareness and Mitigating Risk Through Nursing Innovations*, 26 J. AM. ASS'N NURSE PRAC. 143 (2014).

111. *Id.*

112. Nanetta Bendyna, *Minimizing Loss Through Risk Assessment*, *INFOSYSTEMS*, Dec. 1984, at 66-67.

113. Lonnie Booker, Jr., *Crisis Management: Changing Times for Colleges*, J. C. ADMISSION, Issue 222, 16 (2014).

114. *Id.*

115. Janice M. Abraham, *Identifying and Managing Risk*, *NEW DIRECTIONS FOR HIGHER EDUC.*, Fall 1999, at 83-89.

universities, at times without notice, the search for strategies to assess and control risks effectively must be ongoing. This applies to the entire risk management process and should be embraced within the organization at every level to prevent liability and harm within the institution.¹¹⁶

A. *The Emergence of Enterprise Risk Management*

Enterprise risk management (“ERM”) provides colleges and universities an opportunity to apply their collective strengths to minimize risk or harm through proactive policies and practices. For campus safety advocates, the current environment for colleges and universities represents a troubling period wherein new concepts and approaches are in demand to confront the campus safety dangers at institutions of higher education.¹¹⁷ The scope of the threat is practically self-evident in the wake of numerous campus shootings experienced in recent years. Consider the following: the April 2013 shooting at New River Community College in Virginia, the June 2013 shooting at Santa Monica College in California, the active shooter incident at Purdue University in January 2014, the South Carolina State University murder of a student by gunfire, also in January 2014, and, unfortunately, several others.¹¹⁸ Moreover, mass shootings and acts of domestic terrorism, including the June 2015 massacre of nine people at a Charleston, South Carolina church and the murder of active duty military servicemen at a Tennessee recruiting facility in July 2015, have raised national concerns regarding public safety.¹¹⁹

Enterprise risk management seeks to revolutionize traditional risk management practices within the institution’s governance structure and

116. *Id.*

117. PETER LAKE, *THE RIGHTS AND RESPONSIBILITIES OF THE MODERN UNIVERSITY: THE RISE OF THE FACILITATOR UNIVERSITY* 225 (Carolina Academic Press, 2nd ed. 2013).

118. See, e.g., Ashley Fantz, Lindsey Knight & Kevin Wang, *A Closer Look: How Many Newtown-Like School Shootings since Sandy Hook?*, CNN (June 19, 2014), <http://www.cnn.com/2014/06/11/us/school-shootings-cnn-number/>; John Feinblatt, *The Number of School Shootings Since Sandy Hook is Higher Than You Think*, MSNBC (Dec. 13, 2014), <http://www.msnbc.com/msnbc/the-number-school-shootings-sandy-hook-higher-you-think>.

119. See Melanie Eversley, *9 Dead in Shooting at Black Church in Charleston, S.C.*, USA TODAY (Dec. 15, 2014), <http://www.usatoday.com/story/news/nation/2015/06/17/charleston-south-carolina-shooting/28902017/>; Matt Schiavenza & Adam Chandler, *An Attack on a U.S. Military Recruitment Facility*, ATLANTIC (July 18, 2015), <http://www.theatlantic.com/national/archive/2015/07/four-us-marines-killed-in-attacks-on-military-recruitment-offices/398786/>.

strategic systems. Borrowing from lessons learned in private industry and other disciplines, enterprise risk management strives to become a core function within the college and university campus community.¹²⁰ However, unlike many private corporations or non-profit organizations, colleges and universities are complex and diverse, and do not measure success in terms of revenue or profit.¹²¹ For academic institutions, teaching, research, scholarship, and student achievement, through the quality of the social as well as the intellectual dialogue, are indicators of success.¹²² In support of these activities, colleges and universities have exposure to risk or harm from a wide array of resources and facilities such as classrooms, dormitories or residence halls, family housing, scientific laboratories, and off-campus facilities that may support public-private ventures.¹²³ Further, the tremendous number of human resources that permeate the college campus – students, faculty, and staff – expose the institution to various risk factors as well.¹²⁴ Enterprise risk management provides an ongoing process from which to identify campus-wide risks, conduct a systematic assessment of a likely threat to the institution, and determine what actions are necessary to minimize or eliminate any potential threat that could interfere with the institution's academic program or result in harm to persons or property.¹²⁵ Thus, ERM does not radically change the traditional risk management process but is an improved and expanded version of risk management that views governance, internal controls, and risk management as interdependent.¹²⁶

While the risk management literature in higher education is arguably in the early stages of development, colleges and universities seeking to implement an ERM framework should begin by identifying the institution's risk management goals relative to the sources of risks that

120. *ERM in Higher Education*, U. RISK MGMT. & INS. ASS'N, (September 2007), http://www.des.umd.edu/risk_comm/ern/WhitePaper.pdf.

121. See John C. Scott, *Mission of the University: Medieval to Postmodern Transformations*, 77 J. OF HIGHER EDUC. 1 (2006).

122. *Id.*

123. Carol Wilson, Roxana Negoï & Anu S Bhatnagar, *University Risk Management*, INTERNAL AUDITOR (Aug. 2010).

124. Robert C. Cloud, *Legal Issues in the Community College*, NEW DIRECTIONS FOR COMMUNITY COLLEGES, Spring 2004, at 1-3.

125. Mark L. Frigo & Richard J. Anderson, *Risk Management Framework: Adapt, Don't Adopt*, 96 STRATEGIC FIN. 49 (2014) (discussing eight integrated components of COSO ERM model including identification and assessment).

126. Fernando F. Padro, *A Conceptual Framework on Establishing a Risk Management Framework Within Existing University Assessment and Evaluation Practices*, 10 SLEID E-JOURNAL 1, May 2014, at 7.

may threaten the organization.¹²⁷ Critical attention also should be given to those risks that may impact the institution pervasively as well as those problem incidents that can result in isolated or particularized harm to the institution. By identifying institutional risks early, campus decision-makers have an opportunity to emphasize the university's commitment to ERM, and build support throughout the academic and administrative structure of the institution. This could prove very helpful in winning support from faculty and others who may not appreciate their role in promoting and sustaining campus safety.

The risk identification phase is followed by analytical and evaluation processes established to determine the probability that a threat may occur within the organization.¹²⁸ Consequently, ERM dictates that as threats and opportunities for harm or injury arise, such risks are reported to decision-makers for implementation of risk treatment strategies designed to mitigate detrimental or unwelcome occurrences.¹²⁹ Further, success within any enterprise risk management scheme requires the coordination of numerous activities within the institution to anticipate and prevent negative consequences that may flow from various risks.

Enterprise risk management depends on an integrated, comprehensive process that monitors, measures, and targets critical risks that confront the organization.¹³⁰ As ERM is integrated into an institution's management structure and organizational culture, potential threats that may result from catastrophic events cannot be ignored by academic risk managers.¹³¹ Weather emergencies, active shooter incidents, and the like require comprehensive planning to effectuate timely and effective responses to crisis situations. The National Incident Management System (NIMS) or Incident Command System (ICS) provides established guidelines for emergency response efforts.¹³² ICS represents an integrated approach to managing the circumstances that

127. See generally *supra* note 80 (Examples of ERM Frameworks include COSO's Enterprise Risk Management – Integrated Framework; Australia/New Zealand Standard – Risk Management; ISO Risk Management – Draft Standard; The Combined Code and Turnbull Guidance; and A Risk Management Standard by the Federation of European Risk Management Associations (FERMA)).

128. See Frigo & Anderson, *supra* note 125.

129. Cican Simona-Lulia, *Comparative Study Between Traditional and Enterprise Risk Management – A Theoretical Approach*, 23 ANNALS OF THE UNIV. ORADEA, ECON. SCI. SERIES I, 276 (2014).

130. See Frigo & Anderson, *supra* note 122; see also *supra* note 124.

131. *Tulane's President: 'Our Plan Did Not Anticipate the Total Devastation'*, CHRON. HIGHER EDUC. (Sept. 23, 2005), <http://chronicle.com/article/Tulanes-President-Our-Plan/35314/>.

132. Donald Challis, *Appropriate Responses of Campus Security Forces*, 17 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 169, 173-73 (2010).

accompany crisis situations ensuring that resources and personnel are effectively deployed to minimize or eliminate the emergency incident.

Similar to enterprise risk management, ICS is a comprehensive management system capable of coordinating the activities of first-responders and others in emergency situations regardless of the size or scope of the incident. The primary ICS components include command, planning, operations, logistics, and finance/administration collectively functioning to support the safety professionals in emergency response operations.¹³³ For academic risk managers, implementing ERM programs and incident command systems at colleges and universities depends on navigating the complex decentralized structure of colleges and universities, as well as institutional decision-making mechanisms that are executed through shared governance. Pursuing enterprise risk management and incident command systems in higher education as a “shared effort,” consistent with an institution’s academic mission, can overcome various barriers, enhance risk awareness on college campuses, and save property and lives.¹³⁴

For higher education administrators, and state and federal lawmakers, the stakes are high. In the aftermath of recent campus shootings, are colleges and universities better prepared today to prevent the loss of life by a lone gunman or active shooter? Have state and federal laws provided the framework for effective campus safety? If not, are there synergies that lie in incident command system and risk management concepts that may be combined to advance security efforts at educational institutions? Arguably, yes. While the mission of colleges and universities remain teaching, research, and public service, the reality is that campus safety and security must become an integrated responsibility of the institution.

V. TITLE IX’S SEXUAL ASSAULT PROVISIONS – THE NEW CAMPUS SAFETY FRONTIER

It would be difficult to find another campus safety topic that rivals current concerns regarding sexual assault on U.S. college campuses and the application of Title IX of the Education Amendments of 1972 (“Title IX”) which prohibits discrimination based on sex, including sexual

133. James Parker, *Be Prepared – Safety Professionals Must Learn the Incident Command System*, 171 SAFETY & HEALTH 4, 28 (2005).

134. Paula V. Smith, *Creating a Risk-Aware Campus*. UNIV. BUS. (Mar. 2015), <http://www.universitybusiness.com/article/creating-risk-aware-campus>.

violence and harassment, in postsecondary education.¹³⁵ Unfortunately, sexual assault can also be viewed in a global context that shows growing intolerance for violence against women as evidenced by statements that United Nations Secretary General Ban Ki-moon offered related to the prevalence of gender-based crime and brutality toward women and girls across the world in countries like Nigeria, Pakistan, India, and the U.S.¹³⁶ While Title IX has been a gender-based non-discriminatory federal law for more than forty years, the current dialogue aimed at preventing sexual violence in higher education appears unprecedented in scope and intensity.

Whether college and university officials are doing enough to comply with federal and state law and are minimizing the likelihood of sexual violence on college campuses is a challenging question. Given the diverse range of people who enter colleges each day, as students, faculty, or in some other capacity, how can administrators assess an individual's propensity for criminal behavior, violence, substance abuse, or suicide? As *Eiseman* and other cases reveal, people with troubling backgrounds can become members of the campus community, admitted as students or hired as employees with the best of intentions.¹³⁷ Because the evolving legal landscape is increasing the pressure to guard against on-campus misconduct, colleges and universities may be forced to make choices that may be intrusive on college life for students and faculty. Nowhere is this pressure currently more apparent than in the sexual assault prevention arena.

But, as institutions craft an approach towards compliance with state and federal law, as well as sexual violence prevention, how will we know when success is achieved? After all the guidance materials have been drafted, after all the regulations have been updated, how will we know that change has arrived? Does the absence of the sexual assault complaint mean that a college's efforts have been fruitful? How can we measure whether colleges and universities are making the good faith

135. *Sexual Assault Reports on U.S. College Campuses Increased by 51 Percent in 10 years, Report Shows*, ASSOCIATED PRESS (June 10, 2014), http://www.pennlive.com/midstate/index.ssf/2014/06/sexual_assault_reports_on_us_c.html.

136. Julie McCarthy, *Attack on Mother in India Underscores U.N. Call for Action*, NAT'L PUB. RADIO (June 4, 2014), <http://www.npr.org/sections/thetwo-way/2014/06/04/318890896/latest-sexual-assault-in-india-underscores-u-n-chiefs-call-for-actionhe>; *UN Chief Ban Ki-Moon Zppalled by Badaun Gang-Rape Case, Demands Action*, TIMES OF INDIA (June 4, 2014), <http://timesofindia.indiatimes.com/india/UN-chief-Ban-Ki-moon-appalled-by-Badaun-gang-rape-case-demands-action/articleshow/36043470.cms>.

137. See *supra* Part I.

attempts to combat sexual violence? The on-site inspection, institutional audit, or periodic personnel training can only measure the institution's investment regarding sexual assault prevention. Perhaps the most revealing indicator will be substantial engagement by the institution's primary resource – the faculty.

A. *The Role of Faculty and Others in Campus Safety and Title IX Compliance*

The American Association of University Professors, the American Council on Education (ACE), and the Association of Governing Boards of Universities and Colleges jointly issued a statement titled the "Government of Colleges and Universities" in 1966 which, in part, stated the following:

The faculty has primary responsibility for such matter . . . and methods of instruction, research, faculty status, and those aspects of student life which relate to the educational process. . . . Budgets, personnel limitations, the time elements, and the policies of other groups, bodies, and agencies having jurisdiction over the institution may set limits to realization of faculty advice.¹³⁸

While this statement appears to set out the activities that are within the purview of the faculty, it also indicates that faculty may have limited input regarding certain institutional functions. The traditional roles for faculty at colleges and universities have focused on teaching, research, and service. Although the teaching and research components may be self-defining, the service function is diverse and may include activities on-campus and beyond the university community.¹³⁹ Also, governance, or shared governance, is among the institutional-based service activities in which both faculty and administrators contribute to the institution's policy-making process. As noted by the U.S. Supreme Court in *National Labor Relations Board v. Yeshiva University*, at some institutions faculty have managerial authority due to their involvement in academic matters such as teaching methods, grading policies and setting standards regarding admissions and graduation.¹⁴⁰ "In a very real sense, the faculty

138. AMERICAN ASS'N OF UNIV. PROFESSORS, *Statement on Government of Colleges and Universities*, AAUP.ORG (1966), <http://www.aaup.org/report/statement-government-colleges-and-universities>.

139. Adrianna Kezar, Jaime Lester & Gregory Anderson, *Challenging Stereotypes that Interfere with Effective Governance*, THOUGHT & ACTION, Fall 2006, at 121.

140. Nat'l Lab. Rel. Bd. v. Yeshiva Univ., 444 U.S. 672, 686-87 (1980).

is the university — its most productive element, its source of distinction. And faculty members are properly partners in the enterprise with areas reserved for their exclusive control.”¹⁴¹ As stakeholders in the higher education enterprise, the faculty has unique insight with regard to the student population and may have the capacity to identify threats to campus safety and security.

Whether the setting is a traditional classroom or a one-on-one conference, the contact between faculty and students create the potential for learning and disclosure. Further, the access faculty have to students may provide an early opportunity to identify those students struggling with academic stress, family problems, substance abuse, or other matters that may require assistance from healthcare or counseling professionals.¹⁴² The relationships that students build with their professors can be a source of valuable information for institutions seeking to identify students who may pose a danger to themselves or others. According to the AAUP, faculty members are more than teachers but serve as advisors and mentors, and as such, faculty members may be among the most trusted adults in a student’s life and often are the persons in whom students will confide after an assault. A faculty member may also be the first adult who detects changes in a student’s behavior that stem from a sexual assault and can encourage the student to talk about it.¹⁴³

Due to the position of trust that faculty have with the student community, professors and instructors are well-suited to contribute to the university’s campus safety function by reporting information that may indicate a campus safety threat. Some postsecondary institutions have put into effect policies that require faculty and other personnel to come forward with information that impact campus safety.¹⁴⁴ While some may believe that institutional policies requiring faculty to report sexual violence incidents will have a chilling effect on communication between

141. CLARK KERR, *THE USES OF THE UNIVERSITY* 75 (Harvard University Press 5th ed. 1995).

142. Lucinda Roy, *Communication and Counseling are Keys to Safer Campuses*, CHRON. HIGHER EDUC. (Apr. 29, 2013), <http://chronicle.com/article/CommunicationCounseling/138859/>.

143. AMERICAN ASS’N OF UNIV. PROFESSORS, *Campus Sexual Assault: Suggested Policies and Procedures* (2012), www.aaup.org/file/Sexual_Assault_Policies.pdf.

144. Colleen Flaherty, *Faculty Members Object to New Policies Making All Professors Mandatory Reporters of Sexual Assault*, INSIDE HIGHER EDUC. (Feb. 4, 2015), <https://www.insidehighered.com/news/2015/02/04/faculty-members-object-new-policies-making-all-professors-mandatory-reporters-sexual>.

professors and their students, that certainly does not diminish the role faculty can play in alerting campus officials when danger is lurking.¹⁴⁵

The U.S. Department of Education's Office of Civil Rights has issued policy guidance documents that indicated that under Title IX individuals who are responsible school employees of the school are obligated to report incidents of sexual violence to the Title IX coordinator or to the appropriate school designee.¹⁴⁶ A "responsible employee" is an individual with the authority to take action to prevent sexual violence, one who has been given the duty of reporting incidents of sexual violence, or an employee who a student reasonably believes to have such authority or duty.¹⁴⁷ The establishment of campus policies that define faculty as responsible employees begs the question as to how responsive faculty will be to an obligation to report violence. For faculty who are compelled to safeguard and not disclose information from students regarding sexual violence, an extended debate about the duty to report may simply be counterproductive. Developing collaborative methods that encourage faculty to report incidents of sexual violence may be more effective and may likely assume different forms at different colleges and universities. However, faculty, student affairs personnel, campus police officers, and others should collectively work to eradicate sexual discrimination and violence from the campus community.

Colleges and universities should prepare faculty, as well as students and staff personnel, to aid the campus safety effort. In the aftermath of the tragic Virginia Tech shooting, law enforcement officials appear to agree that campus safety requires the attention of the entire university community.

Faculty, staff, and students should be trained on how to respond to various emergencies and about the notification systems that will be used. This training should be delivered through a number of delivery options, such as in-person presentations (i.e., residential life programming; orientation sessions for students and employees), internet-based delivery, and documents.¹⁴⁸

145. *Id.*

146. U.S. DEPT. OF EDUC., *Questions and Answers on Title IX and Sexual Violence* (2014), <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

147. See 20 U.S.C.A. § 1092(f) (West 2015) (noting that under the Clery Act "campus security authorities" are required to report sexual assault and other crimes. These authorities include campus police and safety officers); see also 34 C.F.R. § 106.8 (2000).

148. Raymond H. Thrower et. al., *Overview of the Virginia Tech Tragedy and Implications for Campus Safety*, INT'L ASSOC. OF CAMPUS LAW ENFORCEMENT ADMINS. (IACLEA) SPECIAL REVIEW TASK FORCE, http://www.iaclea.org/visitors/PDFs/VT-taskforce-report_Virginia-Tech.pdf (last visited Feb. 2, 2016).

Therefore, the challenge for campus administrators, university counsel, and faculty regarding campus safety not only involve law and policy, but implementation of strategies and tactics that promotes campus safety and security.

VI. CONCLUSION: WHAT DOES THE PRESENT REVEAL ABOUT THE FUTURE?

American colleges and universities represent a tremendous global resource. These institutions seek to educate individuals, while advancing ingenuity and intellectual achievement in numerous academic and professional fields. To allow the important work of higher education to be interrupted by breaches of campus security is unacceptable for numerous reasons. Thus, colleges and universities, regardless of size, classification, or mission, should consider incorporation of the following: (1) implementation of threat assessment mechanisms that draw from existing risk management processes and embrace incident command system concepts that allow for early detection and response to emergency situations; (2) development of comprehensive recurring campus outreach efforts that invoke the attention of faculty, staff and students regarding potential threats, crime statistics, and emergency response protocol; and (3) support for state and federal legislation that clarifies jurisdictional authority and grants law enforcement personnel the discretionary power to act promptly in an emergency situation, but that also allows penalties and corrective action to be taken where discretionary power is abused by law enforcement personnel. In sum, the future objective must be to develop a legal and managerial paradigm that permits protection of college and university campuses against the modern threats without sacrificing the character of these treasured institutions of higher education.