BREAKING THE CODE OF SILENCE: BYSTANDERS TO CAMPUS VIOLENCE AND THE LAW OF COLLEGE AND UNIVERSITY SAFETY

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I. INTRODUCTION

This Article explores the evolving law of bystanders in the campus-safety context. In the college or university setting, bystanders include students, professors, and other college or university personnel who hear or see violence in the making, such as verbal and physical harassment or related conflicts that may escalate into assault or battery. Bystanders also include those persons possessing information about individuals in trouble or potentially volatile situations who, by taking appropriate steps, can help avert violence. As demonstrated in numerous media reports of recent college, university, and school[1] violence incidents, there is often substantial evidence before a violent event occurs that could have been used to prevent it.[2] Typically, bystanders with information about a potentially volatile situation do not know what to do. Taking no action runs the risk that violence will occur and individuals will be hurt. Precipitous action on a perceived threat, however, risks stigmatizing college students who might never become violent and are simply acting out.

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1. Hereinafter, the word "colleges" will encompass colleges, universities, and schools unless otherwise indicated.

2. *E.g.* Fox Butterfield, *Tips by Students Result in Arrests at 5 Schools*, N.Y. Times A20 (Mar. 8, 2001) [hereinafter Butterfield, *Tips by Students*]; Fox Butterfield, *Students, Mindful of Columbine, Break Silence to Report Threats*, N.Y. Times A1 (Feb. 10, 2001) [hereinafter Butterfield, *Students, Mindful of Columbine*].

While most attempts to prevent campus violence have focused on the perpetrator or the relationship between perpetrators and victims, it is also critical to consider the role of bystanders, whose influence in preventing, perpetuating, or escalating violence frequently has been overlooked. Often unaware of their social influence on others, bystanders frequently have provided the pivotal social sanction that serves to promote or prevent violent provocation among others. Because violent encounters among college students or between students and others who frequent the campus often occur in quasi-public locations on campus — at college athletic events, fraternity parties, in the residence halls — student-on-student violence frequently involves third-party participants or bystanders. These individuals may contribute to the violence through direct instigation, active encouragement, passive acceptance, or mere presence. On the other hand, bystanders who report or act to prevent planned or incipient acts of campus violence, may help prevent students and others from being injured or killed.

This Article will explore bystander and suspected-violent-student confidentiality, constitutional issues, and privacy issues, including lessons from the case law on how colleges might act to protect the confidentiality and safety of the bystander, the accused student, and all students. To do so, this Article will begin by answering two important, preliminary questions: Who is the bystander, and what are his or her responsibilities? Then, this Article will address the threshold issue of whether a custodial, or some other legally significant, relationship exists between a college and its students. Next, this Article will discuss federal and state causes of action dealing with campus violence. Additionally, this Article will explain the law on assessing reported threats and acting upon these threats while maintaining bystander confidentiality. Finally, to proactively help prevent campus violence and the litigation stemming from it, this Article will explore the role of legal counsel in creating violence-prevention policies for colleges, universities, and schools.

II. THE SCHOOL SHOOTINGS: AN IMPETUS FOR CHANGE

In recent years, the public has been shaken by the incidence of college violence.[3] The most extreme incidents have been the widely reported school shootings. Most colleges and universities, however, confront far more routine forms of student violence on a daily basis. These incidents range from alcohol-infused, student-on-student brawls to real and perceived threats by one student to

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3. Given this reality, there is growing concern about the level of gun ownership among college students. In *Guns at College*, a recent article in the *Journal of American College Health*, public-health researchers describe their findings from a random-sample survey of more than 15,000 undergraduate students from 130 four-year colleges. Matthew Miller, David Hemenway & Henry Wechsler, *Guns at College*, 48 J. Am. College Health 7, 7–8 (July 1999). In response to the mailed questionnaire concerning firearm possession,

> [a]pproximately 3.5% of the sampled students reported they had a working firearm at college. Students with guns were more likely to be male, White, or Native American; [to engage in high-risk or so-called "binge" drinking]; to be members of a fraternity or sorority; to live off campus; and to live with a spouse or significant other.

Id. at 7.

The researchers also found an association between having a gun and driving after engaging in excessive drinking, "being arrested for driving under the influence of alcohol, and damaging property as a result of [drinking]." *Id*. Moreover,

> students with guns were . . . more likely to be injured severely enough to require medical attention, especially for injuries occurring in fights or car crashes. Overall, students with guns at college were more likely than others to engage in activities that put themselves and others at risk for injury.

Id. at 8, 10.

Perhaps as a consequence of college-student gun ownership, *Hill v. Maryland*, 759 A.2d 1164 (Md. Spec. App. 2000), presents what appears to be an increasingly common fact pattern. One month before missing his math midterm examination, a University of Maryland student purchased a nine-millimeter handgun. *Id*. at 1168–1169. After missing his midterm, the student returned to campus for a meeting with his math teaching assistant (TA). *Id*. at 1169. The student allegedly told the TA that either the TA was going to give the student an "A" in the course or the student was going to kill the TA. *Id*. He then brandished his gun and told the TA that if the TA went to the police, he would "dismember him and dump his remains in the river." *Id*. After the student left, the TA reported the incident to his department chair, who reported it to the campus police. *Id*.

The campus police arrested the student in his car shortly thereafter, recovering the gun and ammunition in the process. *Id*. The campus police later obtained a warrant to search the student's home, which was outside the campus police department's jurisdiction, and there retrieved more ammunition and a holster. *Id*. at 1170–1171. The student moved to suppress the holster and the extra ammunition, even though the gun itself and at least one full magazine would have remained in evidence. *Id*. at 1170. The trial court denied the motion, and the Maryland Court of Special Appeals affirmed, holding that there was no requirement under Maryland law that a police officer applying for a warrant have jurisdiction in the area where the warrant was to be served. *Id*. at 1170, 1172, 1174, 1179. Had it wished to, the court theoretically could have drawn a distinction between municipal police and the campus variety, and used that theory to constrain the authority of the campus police.

do serious bodily harm to another.[4] Still, much of the recent concern for campus safety stems from the extreme, campus-shooting incidents that recently have plagued our campuses. Examples of these school shootings abound, but the recent shooting at the Appalachian Law School[5] and the shooting at Simon's Rock College of Bard[6] serve well to show the role school shootings have played in colleges' perception of campus safety and to prove the role bystanders can play in preventing campus violence.

Grundy, Virginia was a small town and a caring community with a new law school led by the best and the brightest with an outstanding commitment to public service.[7] It could not happen there. But it did, and we were all jolted upright with the truth. No college was impervious to a shooting. In fact, this shooting was quite similar to other school shootings. Once again, the suspect in a murderous, school-shooting rampage was a troubled student armed with a gun.[8]

The plaintiffs' lawyers could have a strong case based on this campus-shooting incident.[9] In Grundy, a local doctor quickly told the press that the Appalachian Law School suspect "had a reputation at the law school and around town as a troubled man."[10] "Everybody knows this guy . . . [h]e is a walking time bomb," noted the former emergency-room physician in Grundy.[11] In press accounts, others "described the suspect as an 'abrasive' [student] who would regularly have outbursts in class when he was challenged by classmates or the professor."[12] Any good trial attorney

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4. *See* Cheryl A. Presley, Philip W. Meilman & Jeffrey R. Cashin, *Weapon Carrying and Substance Abuse among College Students*, 46 J. Am. College Health 3 (July 1997) (discussing the results of a study focusing on weapons and the use of alcohol and other drugs on campus).

5. *Infra* nn. 7–12 and accompanying text.

6. *Infra* nn. 14–17 and accompanying text.

7. Frederick Kunkle & Craig Timberg, *Dean, 2 Other Fatally Shot at Rural Virginia Law School*, Wash. Post A1 (Jan. 17, 2002).

8. "A judge has ordered a psychiatric evaluation for [Peter Odighizuwa,] a former law student accused of murdering three people in a shooting rampage at the Appalachian School of Law." Associated Press, *Sanity Test Ordered in Virginia Law School Shooting Case*, Nando Times (Mar. 4, 2002) (available at <http://www.nando.net/nation/story/282740p-2543720c.html>).

9. As of this writing, no lawsuit had been filed in the shooting spree.

10. Kunkle & Timberg, *supra* n. 7, at A1.

11. *Id*.

12. *3 Persons Killed in Shooting at Virginia Law School*, York News-Times (York, Neb.) (Jan. 17, 2002) (available at <http://www.yorknewstimes.com/stories/011702/nat_0117020011.shtml>).

faced with the tragic event in Grundy would quickly recall the facts of the 1992 shootings at Simon's Rock College of Bard in Great Barrington, Massachusetts.[13] College officials at Simon's Rock appear to have known, or at least to have had every reason to know, that student Wayne Lo presented a danger to those around him.[14]

Warning signs of potential violence from the perpetrators of these school shootings have been shown to be quite common.[15] Often, someone knew something and failed to act sufficiently, if at all.[16] For example, in his book, *A Parent's Guide to Sex, Drugs and Flunking Out: Answers to the Questions Your College Student Doesn't Want You to Ask*, the Author points out the following:

> Cases such as the civil and criminal suits filed in response to the 1992 Simon's Rock College of Bard incident, in which campus administrators appear to have been negligent in handling a student prone to extremist views and violence, have exposed for the public just how wrong things can go on a campus. Just hours before student Wayne Lo went on a shooting spree killing two and wounding four others, Lo had met with and convinced the dean of students that a package Lo had received from a mail-order firearms store *did not* contain a gun or ammunition. Of course, the package *did* contain the bullets Lo used to kill and injure others later that evening. Moreover, even before Lo's UPS package from the arms company had arrived . . . college administrators were concerned about Lo, whom they knew to be an emotionally troubled eighteen-year-old prone to homophobic and other extremist [views].[17]

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13. William Glaberson, *Man and His Son's Slayer Unite to Ask Why*, N.Y. Times A1 (Apr. 12, 2000).

14. *Id*. The shootings at Grundy and Simon's Rock focus attention on the gaping holes in our strategy for keeping weapons out of the hands of those on campus who have no right to possess them. As noted, "[r]ecent articles report that guns are a growing menace on college campuses." Miller, Hemenway & Wecksler, *supra* n. 3, at 7.

15. *E.g.* Butterfield, *Tips by Students*, *supra* n. 2, at A20; Butterfield, *Students, Mindful of Columbine*, *supra* n. 2, at A1; Glaberson, *supra* n. 13, at A1; Kunkle & Timberg, *supra* n. 7, at A1.

16. *E.g.* Butterfield, *Tips by Students*, *supra* n. 2, at A20; Butterfield, *Students, Mindful of Columbine*, *supra* n. 2, at A1; Glaberson, *supra* n. 13, at A1; Kunkle & Timberg, *supra* n. 7, at A1.

17. Joel Epstein, *A Parent's Guide to Sex, Drugs, and Flunking Out: Answers to the Questions Your College Student Doesn't Want You to Ask* 141 (Hazelden 2001) (emphasis in original).

These cases, and others like them, shattered the illusion that college administrators have a handle on the risks posed by psychologically disturbed students. While easy access to guns played a role in these latest killings, the tragedy of Grundy does not rest at the foot of gun advocates alone. It also rests with the inexperience of many colleges and communities in confronting the mental-health concerns of those in their midst and in knowing when to seek help for those in desperate need.[18] Whether in Grundy or at Simon's Rock, we see it coming but are seemingly helpless to respond. Overcoming that helplessness first will require accepting that mental-health professionals as well as students and other bystanders need to be involved when students or employees present symptoms that suggest an unstable mental condition. Bystanders will need to be enlisted as the eyes and ears of the campus to help college administrators identify troubled students in their midst.[19]

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18. Like the spate of recent college-student suicides, the killings at Grundy and Simon's Rock also highlight the need for expanded counseling services at colleges, as well as specially trained law-enforcement intervention in select instances before it is too late to prevent the loss of life. Colleges and universities can turn to mental-health practice guides for assistance in creating mental-health programs. *E.g.* Meg Muckenhoupt, *Campus Mental Health Issues: Best Practices — A Guide for Colleges* (Educ. Dev. Ctr. 2000).

19. Perhaps the best illustration of the role bystanders can play in preventing student violence is the recent De Anza College incident in Cupertino, California. The De Anza incident involved a college student alleged to have planned a Columbine-style attack on the college. Butterfield, *Students, Mindful of Columbine*, *supra* n. 2, at A1. A nineteen-year-old student was arrested before carrying out the attack after another college student, working as a photo laboratory clerk in a drugstore, noticed that, in his pictures, the accused student was posing with an arsenal of guns and pipe bombs. *Id*. The concerned clerk called the police and then delayed the nineteen-year-old, who came to pick up his photos, until police arrived. *Id*. According to the police, the arrested student had planned a shooting rampage in the college cafeteria the next day. *Id*. The clerk said she had Columbine in mind when she made the call. *Id*. Al DeGuzman, the arrested student, was later found guilty of 108 counts of possessing and planning to use the weapons in the pictures and was sentenced to seven years in prison. Matthew B. Stannard, *Would-Be Bomber Gets Shorter Sentence: Man Had Planned Terror Spree at College*, S.F. Chron. A17 (Oct. 2, 2002).

Of particular note are the growing calls by some school safety advocates to nudge the norm with respect to bystander reporting of student-initiated violence. An official with the U.S. Department of Education's Safe and Drug Free Schools Program is quoted as saying, "If there is any good to come out of [the Santana High School shootings], it is that more students understand that it is important that when they hear about [another kid's] plan to carry out attacks, they tell an adult." Butterfield, *Tips by Students*, *supra* n. 2, at A20. United States and California educational officials, and others, appear to be seeking to promote a new social norm among students in particular and those in the campus and school setting in general with respect to bystander reporting of threats or other suspicious activity. For more information on promoting this new norm, see Wolfgang W. Halbig, *Breaking the Code of Silence: A School Security Expert Says Student Silence Is Our Worst*

III. THE SCHOOL SHOOTINGS AND THEIR IMPACT ON THE PUBLIC AND JUDICIAL ENVIRONMENT

As early as 1994, in recognition of the growing problem of guns on campus and the consequent shootings, the Association for Student Judicial Affairs unanimously adopted a resolution urging colleges to support tough rules and laws to keep guns off campuses.[20] Admittedly, colleges are in a difficult spot, needing to balance the privacy rights of students, faculty, and staff against legitimate campus-safety concerns. In light of occurrences like the shootings at Appalachian Law School[21] and Simon's Rock College of Bard,[22] the 1991 murder–suicide of five and the serious wounding of a sixth by a University of Iowa graduate student,[23] the 1995 murder of Harvard University Junior Trang Phuong Ho by her roommate Sinedu Tadesse, who then committed suicide,[24] the 2000 murder-suicide of a professor by a graduate student at the

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Enemy, Am. Sch. Bd. J. (Mar. 2000) (available at <http://www.asbj.com/security/contents/0300halbig.html>). Though we have yet to see such thinking endorsed by a judicial opinion, it will no doubt appear in some of the pleadings that counsel are preparing in response to the Santana High School shootings and other recent instances of school violence. In that case,

> In the aftermath of the shootings [at Santana High School], some Santee residents have suggested that Chris Reynolds [may bear] some responsibility for what happened. Reynolds, 29, live[d] with [accused killer, Andy] Williams's best friend, Josh Stevens, 15, and Josh's mother, Karen. Reynolds says that after hearing Josh and his friends joke about the threats, he confronted Williams. "I said, 'Is this something that's really going to happen?'" said Reynolds. "He said, 'No.'" Though reassured, Reynolds said he phoned Williams's father three times to alert him. "It rang off the hook," he said.

Jill Smolowe, Leslie Berestein, Maureen Harrington & J. Todd Foster, *'It's Only Me': Andy Williams, 15, Told Friends He Was Going to Shoot up His California High School, but Nobody Really Believed Him, Then the Killing Began*, People 61, 62 (May 19, 2001).

20. Jerry Crotty, Resolution, *Guns and Other Weapons on Campus* (available at <http://asja.tamu.edu/about/Resolutions/guns.htm> (1994)).

21. *Supra* nn. 7–12 and accompanying text.

22. *Supra* nn. 14–17 and accompanying text.

23. Steve Maravetz, *Remembering November 1: A University Tragedy 10 Years Later*, 39 FYI Faculty & Student News (Oct. 19, 2001) (available at <http://www.uiowa.edu/~fyi/issues2001_v39/10192001/november.html>).

24. Following their daughter's killing, the Trang Phuong Ho family "filed a suit against Harvard University, charging that the [university] took insufficient steps to prevent the killing." In their pleadings, the family alleged that "Harvard [had] ignored evidence of Tadesse's deteriorating mental condition, including a letter written to the school, and could have prevented the deaths." Ill. Tr. Laws. Assn., *Harvard Student's Family Sues School over Death*, 8 Vested Interest (Mar. 1998) (available at <http://www.iltla.com/vested/mar98/tort.html>).

University of Arkansas,[25] and a number of campus shootings that preceded the Simon's Rock shooting spree, "colleges can no longer claim that such events are unforeseeable aberrations."[26] As campus-safety advocates and more parents become aware of the occurrence of these incidents, the hope is that college administrators "will pay closer attention to danger from within and to getting help for those who may be suffering from delusional or otherwise dangerous thoughts about their classmates or the world."[27]

Goneboy: A Walkabout is an important work that exposes for the reader the naïveté with which some college administrators continue to discharge their responsibility to the college community.[28] It also pays tribute to Galen Gibson, the author's son, and other victims killed in the Simon's Rock shooting.[29] Gibson's book and other resources focused on college-student safety issues, like the Security on Campus, Inc. Web site,[30] are a wake-up call for student-affairs professionals, university legal counsel, parents, and students, demonstrating that all is not well in the ivory tower.

Even before the killings at Columbine High School in Littleton, Colorado, widely reported incidents of college violence caused many parents and others to take strong positions in the debate over school safety. With part of the public arguing for more school-safety officers, metal detectors in the schools, and zero-tolerance policies for weapons possession and threats, others reasoned that even when concerns about campus safety exist, students do not leave their constitutional rights at the campus gate.[31] Each new widely reported incident of campus violence further alters the legal and policy debate. During 2002 and 2003 alone, campus violence and speculation about the role of bystanders in reporting or acting on an expressed threat likely will reshape the law of college safety in profound ways. Because of the time it

25. U. Ark., *University to Review Response to Murder-Suicide and Study Related Academic Issues* <http://pigtrail.uark.edu/news/2000/sep00/response.html> (Sept. 11, 2000).

26. Epstein, *supra* n. 17, at 141.

27. *Id.*

28. Gregory Gibson, *Goneboy: A Walkabout* (Kodansha Intl. 1999).

29. *Id.* at x.

30. Security on Campus, Inc. <http://www.campussafety.org.>. Security on Campus, Inc. is a nonprofit organization devoted to fighting college and university campus crime. *Id.* The program was established by Connie and Howard Clery in memory of their daughter, who was killed by a fellow student at Lehigh University. *Id.*

31. *Infra* nn. 190–192 and accompanying text.

takes lawsuits to work their way through legal discovery and to final adjudication, it will be some time before this thinking is well-reflected in the case law.

A few courts considering college safety cases, however, already have been willing to take judicial notice of actual and potential violence on campus.[32] In *Commonwealth v. Milo M.*,[33] for example, the Massachusetts Supreme Judicial Court took judicial notice of the fact that, before the Worcester, Massachusetts school incident giving rise to the case, several highly publicized school shootings had occurred.[34] Thus, the student's actions and other factors in the *Milo M.* case,

> when considered in light of the 'climate of apprehension' concerning school violence in which this incident occurred, [were held to make the threatened teacher's] fear that the [student] could carry out the threat quite reasonable and justifiable.[35]

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32. *E.g. People v. Pruitt*, 662 N.E.2d 540, 546 n. 1 (Ill. App. 1st Dist. 1996) (taking judicial notice of "actual and potential violence in public schools," and noting that "[j]udges cannot ignore what everybody else knows: violence and the threat of violence are present in the public schools"); *Commonwealth v. Milo M.*, 740 N.E.2d 967, 974 (Mass. 2001); *In re B.R.*, 732 A.2d 633, 637 (Pa. Super. 1999) (noting that the trial judge "took judicial notice of the 'climate of apprehension' [existing] at the time").

33. 740 N.E.2d 967.

34. *Id*. at 974 n. 8. The court took judicial notice of the following:

> On February 2, 1996, in Moses Lake, Washington, a fourteen year old fatally shot a teacher and two students and wounded another student; on February 19, 1997, in Bethel, Alaska, a sixteen year old shot and killed his principal and a student, and wounded two other students; on October 1, 1997, in Pearl, Mississippi, a sixteen year old boy shot his mother, and then went to school and shot nine students, two fatally; on December 1, 1997, in West Paducah, Kentucky, a fourteen year old student shot and killed three students and wounded five others; on March 24, 1998, in Jonesboro, Arkansas, two boys, aged eleven and thirteen years, shot to death four girls and a teacher, and wounded ten others during a false fire alarm; on April 24, 1998, in Edinboro, Pennsylvania, a fourteen year old student was charged with fatally shooting his science teacher at an eighth grade dance; on May 19, 1998, in Fayetteville, Tennessee, an eighteen year old honor student allegedly shot his classmate to death in the parking lot of their high school; on May 21, 1998, in Springfield, Oregon, a fifteen year old boy allegedly shot and killed two of his classmates and wounded more than twenty other students; on June 15, 1998, in Richmond, Virginia, a fourteen year old allegedly wounded one teacher and one guidance counselor in a high school. This tragic trend regrettably continued after the incident at issue in this case occurred. On April 20, 1999, at Columbine High School in Littleton, Colorado, two young men fatally shot fourteen students and one teacher and wounded at least twenty-three others, before taking their own lives.

Id.

35. *Id*.

IV. ASSESSING BYSTANDER RESPONSIBILITY — WHO IS THE BYSTANDER?

The first inquiry a college administrator should ask in a bystander-to-campus-violence situation is, "Who is a bystander?" This inquiry requires the administrator to answer the question, "Am I the bystander, and, if so, what do my job and common sense require me to do to protect the safety of the campus and the public without violating the rights of the suspect student?" Similarly, "Is the bystander reporting a threat or observing a fight as an employee of the university?"[36]

The "who is the bystander?" inquiry is critical in assessing bystander responsibility from a legal standpoint because a college may be negligent for failing to exercise ordinary care with respect to student safety when it had reason to foresee the violence.[37] On a daily basis, college deans, faculty, and others on campus routinely deal with dozens of potentially volatile situations involving students. In the majority of these instances, the college administrator has no trouble differentiating between harmless threats to the public safety and threats that may require a higher level of intervention.[38] In assessing whether the college has a responsibility to act on a reported threat by one student against another, college administrators consciously or unconsciously ask about the type of violence threatened; the dispute observed; the type of information conveyed to the administrator by a bystander such as a residence hall advisor, professor, or teaching assistant; and the immediacy of the threat. Also relevant is what role, if any, the bystander can play in preventing the threatened or incipient violence. Other questions for college administrators include the following:

- What are the warning signs that may trigger bystander action to prevent violence from occurring or escalating?
- What sorts of protocols should colleges and universities have in place for conveying information about potentially

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36. This Article does not attempt to answer the question whether a student peer educator (conflict mediator) is a bystander in the college violence context.

37. Georgia A. Staton & Rachel Love, *Campus Violence: School District Liability and Students' Fourth Amendment Rights*, 37 Ariz. Atty. 14, 16 (Aug./Sept. 2000).

38. There is a great deal of debate over whether school shootings and other aberrant acts of violence can be anticipated.

dangerous situations and threats from students, faculty, and staff to campus and public law enforcement?

- What are the potential problems of acting on a student-reported threat or the witnessing of a student-on-student altercation at a campus sporting event or in the residence halls?
- What are the consequences of taking action, or of inaction, on a reported threat or witnessed altercation for the bystander, for the college, and for the student accused of threatening to act or acting out violently?
- What type of violence is threatened?
- Must a threshold level of violence be reached before the college intervenes on a bystander's report of a threat or incipient violence?
- Is a weapon involved?
- Did college personnel directly observe the alleged violence, or did a fellow student report a potential act of violence to an administrator?

Indirectly observed violence raises issues such as the failure to supervise and deliberate indifference on the part of college administrators. Directly observed acts of violence also may elicit scrutiny of a college's violence-prevention plan and its content. Potentially violent incidents reported by a student to college staff should cause deans and other administrators to assess whether the college's action or inaction constitutes deliberate indifference to student safety.[39] If a college recognized or should have recognized the likelihood that a student might take the opportunity to commit a crime or tort against another student, the college may be held liable.[40] In other words, when a student, while under the control of the college, is injured by another student or a third party, college legal counsel's inquiry should be whether the risk of harm was foreseeable or could have been prevented.

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39. Other concerns that college administrators should address include potential violations of an accused student's freedom of speech, an accused student's due-process rights, and the privacy rights of both an accused college student and a student bystander to violence or reporter of threatened violence. For a discussion of free-speech and due-process rights, see *infra* Part V(A). For more information on a university's alleged violation of a student's due-process rights under Title 42 U.S.C. Section 1983 (2000), see *Smith v. Rector and Visitors of the University of Virginia*, 115 F. Supp. 2d 680, 682–688 (W.D. Va. 2000).

40. Staton & Love, *supra* n. 37, at 16.

V. DO COLLEGES, UNIVERSITIES, AND SCHOOLS HAVE A LEGAL RELATIONSHIP WITH THEIR STUDENTS?

Another essential question in the campus-violence context is whether a custodial relationship, or some other significant legal relationship, exists between a college and its students. The Supreme Court has yet to "determine whether schools have a custodial relationship with their students sufficient to confer on [schools] the duty to protect students from injury."[41] In both the secondary and postsecondary school context, declaring that schools, school districts, colleges, and universities have such a relationship with their students would impose a much greater standard of care and potentially higher levels of liability than currently exist.[42] Most lower federal courts *have* held that "daytime attendance at a public school does not create a custodial relationship giving rise to a constitutional duty to protect students from harm, notwithstanding compulsory attendance laws."[43] In college-safety cases, the federal courts also have declined to find a "special relationship" sufficient to establish liability under federal civil-rights statutes.[44] In fact, the federal courts consistently have declined to find school systems and school officials liable pursuant to Title 42 U.S.C. Section 1983 when students are injured at the hands of third parties, including fellow students.[45]

The reluctance of federal courts to find colleges liable under either a special-relationship or custodial-relationship theory has done little to discourage student lawsuits under other legal theories when third-party acts injured students. Commonly, these lawsuits allege that the college, school, or district created the danger that caused the harm or left the student more vulnerable than he or she would otherwise have been, thus giving rise to some sort of circumstantial relationship between school and student.[46]

41. W. David Watkins & John S. Hooks, *The Legal Aspects of School Violence: Balancing School Safety with Students' Rights*, 69 Miss. L.J. 641, 658 (1999).

42. *See Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 452–454 (5th Cir. 1994) (explaining the difference between standards of liability, such as gross negligence and deliberate indifference).

43. Watkins & Hooks, *supra* n. 41, at 658.

44. *E.g. Graham v. Indep. Sch. Dist. No. 1-89*, 22 F.3d 991, 994 (10th Cir. 1994).

45. *See* Kim Brooks, Vincent Schiraldi & Jason Ziedenberg, *School House Hype: Two Years Later* 13–14 (Apr. 2000) (available at <http://www.cjcj/schoolhousehype/shh2.html>).

46. Watkins & Hooks, *supra* n. 41, at 659.

In *Johnson v. Dallas Independent School District*,[47] for example, the plaintiff was unsuccessful in seeking recovery under Section 1983 when a nonstudent trespasser shot and killed a student in a public school hallway.[48] The court's ruling in *Johnson* is instructive to school officials developing a violence-prevention policy in that the court considered whether the environment at the high school in question was dangerous. The court concluded that it was not and explained,

> If for no other reason, the presence of numerous trained adults would assure that a school cannot be as dangerous as the nocturnal condition of the high-crime neighborhood. No inference of dangerousness arises simply from the presence of student ID badges or metal detectors; such devices could have been installed prophylactically, in the absence of any prior trespasses onto campus or incidents of criminal violence. Moreover, to infer the existence of a dangerous environment — the condition of § 1983 liability — solely from the presence of measures designed to avert violence would erect a serious disincentive to their use. The law cannot so turn against its purposes; the use of security devices should be encouraged, not discouraged. There would have to be allegations at least of previous criminal conduct at Smith High School from which a trier of fact could conclude it was tantamount to a "high-crime area."
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> Second, school officials must have actually known that Smith High was dangerous to students. Actual knowledge of a serious risk of physical danger to the plaintiff has been a common feature of the state-created danger cases.[49]

The *Johnson* case "demonstrate[s] the general reluctance of courts to extend the obligations of school districts under the 'state-created-danger' theory and, more generally, the reluctance of courts to find school districts liable for injuries inflicted by third parties."[50] Given the way Santana High School,[51] and other school-shooting cases have put schools on notice that dangerous students *do* enter the schools, administrators can expect to see

47. 38 F.3d 198 (5th Cir. 1994).
48. *Id*. at 199, 204.
49. *Id*. at 201.
50. Watkins & Hooks, *supra* n. 41, at 659–660.
51. *Supra* n. 19.

considerably more litigation, if not judicial decisions, challenging the *Johnson* court's reasoning.

Increasingly, litigants are naming teachers, police, and even parents as defendants in suits alleging injury to themselves or a deceased student.[52] Following the killings at Santana High School in Santee, California, parents and fellow students appeared in the press and on television claiming that they had warned the alleged killer not to carry out an attack at the school.[53] Future litigation may therefore name these bystanders to student violence as defendants as well.

As alluded to previously, the body of law regarding college, university, and school liability for student injury due to violence is ever changing, sometimes conflicting, and likely to expand in the years to come.[54] Given the number of schools nationally and the growing public concern with school-related violence, two commonly asked questions are:

- Can colleges be sued under a negligence theory for failure to intervene to prevent a student, professor, residence-hall advisor, or other bystander from being injured?
- Did the college, fellow students, professors, residence-hall advisors, or anyone else have knowledge that the suspect was planning to carry out the crime, and did the informed person or persons act properly and in a timely fashion with regard to that information?[55]

As stated above, under current federal law, colleges do not have a constitutional requirement to be a guarantor of student safety.[56] Nonetheless, lawsuits such as those filed following the shootings at Simon's Rock,[57] in Littleton, Colorado,[58] and in Paducah, Kentucky,[59] appear to have contributed to the liability fears

52. *E.g. Kindred v. Bd. of Educ. of Memphis City Schs.*, 946 S.W.2d 47 (Tenn. App. W. Sec. 1996).

53. Smolowe et al., *supra* n. 19, at 62.

54. Epstein, *supra* n. 17, at 162–163; Watkins & Hooks, *supra* n. 41, at 641–642.

55. See the discussion of what was known before the tragic Santana High School shootings, *supra* note 19.

56. *Supra* nn. 43–47 and accompanying text.

57. Glaberson, *supra* n. 13, at A1.

58. Boulder County Ch. of the ACLU of Colo., *Safety in Schools: Are We on the Right Track?* <http://www.aclu-co.org/news/letters/paper_boulderschools2.html> (last updated Aug. 27, 2001).

59. *James v. Wilson*, 2002 Ky. App. LEXIS 770 (Apr. 19, 2002) (suit filed after Michael

of college administrators.[60] Much of the legal scrutiny has centered on the general duty of colleges to provide for the reasonable supervision of students, including the duty to take reasonable steps to protect students from the criminal acts of others.[61]

In recent years, the courts have seen lawsuits from students and their families attempting to recover from colleges, universities, and schools for violence-related injuries under both federal constitutional law[62] and state tort-law theories, including general negligence, gross negligence, strict liability, and failure to supervise.[63] The following sections will discuss in greater detail the federal and state legal causes of action under which students have sued as the result of campus-safety policies or campus violence.

A. Federal Causes of Action

Public colleges and their employees are subject to the restraints of the United States Constitution.[64] College administrators should consider specifically three provisions of the United States Constitution that commonly arise in the campus-safety context. First, issues of free speech may arise in campus-safety cases under the First Amendment of the United States Constitution.[65] Second, due-process considerations may arise under the

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Carneal opened fire on a school prayer group in 1997); Boulder County Ch. of the ACLU of Colo., *supra* n. 57.

60. Epstein, *supra* n. 17, at 141–142, 163–165; Boulder County Ch. of the ACLU of Colo., *supra* n. 58.

61. *E.g.* Robert D. Bickel & Peter F. Lake, *The Rights and Responsibilities of the Modern University: Who Assumes the Risks of College Life?* 10–13, 124–125, 136–138 (Carolina Academic Press 1999); Watkins & Hooks, *supra* n. 41, at 657–658, 662–665. Also note that the Gun-Free Schools Act of 1994 provides,

> Each State receiving Federal funds under any subchapter of this chapter shall have in effect a State law requiring local educational agencies to expel from school for a period of not less than 1 year a student who is determined to have brought a firearm to a school, or to have possessed a firearm at a school, under the jurisdiction of local educational agencies in that State, except that such State law shall allow the chief administering officer of a local educational agency to modify such expulsion requirement for a student on a case-by-case basis if such modification is in writing.

20 U.S.C. § 7151(b)(1) (Supp. 2002).

62. *E.g. Johnson*, 38 F.3d 198. For information on these legal theories, see *infra* Part V(A).

63. Watkins & Hooks, *supra* n. 41, at 662. For information on these causes of actions, see *infra* Part V(B).

64. Bruce W. Smith, *Constitutional Liability of Schools and School Officials for Student Injuries*, in *Legal Guidelines for Curbing School Violence* 33 (Natl. Sch. Bds. Assn. 1995).

65. Alan Charles Kors & Harvey A. Silvergate, *The Shadow University: The Betrayal*

Fourteenth Amendment.[66] Finally, extensive search-and-seizure matters can arise under the Fourth Amendment. Colleges are subject to liability under Section 1983 for these violations of students' constitutional rights.[67]

To begin, the bystander-to-campus-violence scenario raises complex free speech issues with respect both to student reporters of planned acts of violence and students viewed as threatening the public safety through their inflammatory remarks.[68] Student comments at campus demonstrations, in the classroom, and at other campus events that previously were viewed as commonplace manifestations of college life now may be scrutinized more carefully by deans, residence-hall staff, and professors. However, even in a post-September 11th climate, protected student speech should not be mistaken for concrete threats to the public safety.[69]

Next, those affected by campus violence or bystander reporting may claim that the college has violated their due-process rights. To demonstrate a substantive-due-process violation, claimants have asserted that "schools have a 'special relationship' with [their] students giving rise to a constitutional duty to protect them," schools that "'creat[e] the danger' of harm" are liable under

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of Liberty on America's Campuses 34 (Free Press 1998); Watkins & Hooks, *supra* n. 41, at 666–671.

66. Watkins & Hooks, *supra* n. 41, at 656–662. In relevant part, the Fourteenth Amendment reads,

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1. The Fourteenth Amendment issues raised by the incidence and prevention of campus crime will be discussed only briefly.

67. Watkins & Hooks, *supra* n. 41, at 648–656.

68. *See* Watkins & Hooks, *supra* n. 41, at 679–682 (discussing free-speech issues related to limiting hate speech).

69. For a highly critical view of campus speech codes and efforts by some campuses to clamp down on inflammatory speech, see Kors & Silvergate, *supra* note 64. Additional commentary on the restriction of campus speech can be found on the Foundation for Individual Rights in Education (FIRE) Web site at <http://www.thefire.org>. The "Issues" link on the FIRE Web site discusses the firing of tenured University of South Florida Professor Sami Al-Arian following his appearance on "The O'Reilly Factor." FIRE, *Policy Statement by the Foundation for Individual Rights in Education on the Intended Firing of Dr. Sami Al-Arian* <http://www.thefire.org/issues/uss_021502.p4p3> (accessed Aug. 23, 2002). FIRE alleges that Bill O'Reilly, the host of "The O'Reilly Factor" represented the professor "as sympathetic to (and possibly involved with) terrorist activity." *Id.* FIRE further alleges that these conclusions, based on the professor's expressed ideas, were the basis of his firing, and thus, his termination violated the First Amendment. *Id*.

the Due Process Clause, and schools are liable for "harm resulting from policies or practices manifesting a deliberate indifference to the constitutional rights of students."[70]

In the future, given the growing public concern with school safety, the manner in which college staff react to a bystander report of bullying or harassment or a planned act of violence, may, in principle, be scrutinized under a deliberate-indifference standard.[71] In such cases, when a school employee has acted within his or her official capacity, the college, university, or school could be held liable.[72] Cases involving suicide and other self-inflicted injury, such as the facts alleged by the parents of the late Elizabeth H. Shin, Massachusetts Institute of Technology class of '02, in *Shin v. Massachusetts Institute of Technology*,[73] involve one possible aspect of litigation in this area that should be of growing concern to college attorneys.[74]

Finally, and perhaps explored most extensively, is the constitutionality under the Fourth Amendment of student searches

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70. Smith, *supra* n. 64, at 33.

71. *See* Ashley Smith, *Students Hurting Students: Who Will Pay?* 34 Hous. L. Rev. 568, 579, 598–601 (1997) (explaining the deliberate-indifference standard). As the court in *Conner v. Travis County*, 209 F.3d 794, 796 (5th Cir. 2000), explained,

> Deliberate indifference is more than mere negligence. *See Rhyne v. Henderson County*, 973 F.2d 386, 392 (5th Cir. 1992) ("While the municipal policy-maker's failure to adopt a precaution can be the basis for § 1983 liability, such omission must amount to an intentional choice, not merely an unintentionally negligent oversight."); *see also Doe v. Taylor Independent Sch. Dist.*, 15 F.3d 443, 453 n.7 (5th Cir. 1994) (distinguishing "deliberate indifference" from "gross negligence" by noting that "the former is a 'heightened degree of negligence,' [whereas] the latter is a 'lesser form of intent'") (quoting *Germany v. Vance*, 868 F.2d 9, 18 n. 10 (1st Cir.1989)).

72. *See* 42 U.S.C. § 1983 (stating that most government officials are liable for depriving anyone in the United States of a Constitutional right, privilege, or immunity). For a discussion of qualified immunity in the college-administrator context, see Robert C. Cloud, *Qualified Immunity for University Administrators and Regents*, 131 West's Educ. L. Rptr. 561 (Mar. 1999). In the bystander-to-school-violence context, school administrators and district legal counsel also will want to be aware of cases in which students have alleged a Section 1983 violation for injuries directly inflicted by school personnel. *E.g. Stoneking v. Bradford Area Sch. Dist.*, 888 F.2d 720, 722 (3d Cir. 1989); *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 449–450 (5th Cir. 1994) (en banc).

73. Keith J. Winstein, *MIT's Legal Approaches Vary in Different Cases* (Apr. 5, 2002) (available at <http:// www-tech.mit.edu/V122/N16/76lawsuit.16n.html>).

74. In their suit, Ms. Shin's parents allege, in part, "that MIT violated the Massachusetts unfair and deceptive business practices and consumer fraud statute known as Chapter 93A by providing ineffective medical care which they say led to Shin's April 2000 suicide." *Id*. For more information, see Deborah Sontag, *Who Was Responsible for Elizabeth Shin?* N.Y. Times 57 (Apr. 28, 2002).

based on bystander tips.[75] The U.S. Supreme Court's ruling in *New Jersey v. T.L.O.*[76] remains paramount in student-search law. In *T.L.O.*, the court quarreled with the notion of whether a student may assert the defense of unreasonable search and seizure when a school administrator has no probable cause to suspect a student's wrongdoing.[77] T.L.O., a high school student, denied smoking in a school restroom despite her friend's admission to the contrary.[78] Solely because of the friend's admission, the school principal conducted a search of T.L.O.'s purse and discovered cigarettes and drug paraphernalia.[79] T.L.O ultimately admitted to dealing marijuana at school.[80] At trial, however, T.L.O. sought to suppress the confession and all other evidence discovered by asserting that the search was unreasonable under the Fourth Amendment.[81] The school board argued the search was necessary to maintain the safety of the school and that administrators should have to meet a threshold lower than probable cause to justify a student search.[82]

Primary to the decision was the Court's balancing of interests between a student's right to privacy and the school administrator's right to maintain order within the public school system.[83] *T.L.O.* departed from the traditional probable-cause analysis and aligned itself with the reasonable-suspicion analysis from *Terry v. Ohio*.[84] The Court's ruling allows administrators to conduct a search when a reasonable suspicion exists about student miscon-

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75. One challenge to college administrators in responding to bystander reports of a threatened or incipient act of violence is that the states themselves may insist on a more demanding standard under their own constitutions or statutes than is required by the Fourth Amendment to the U.S. Constitution. *Acton v. Veronia Sch. Dist. 47J*, 66 F.3d 217, 219 (9th Cir. 1995) (Reinhardt, J., dissenting) (stating that "[i]t is beyond question that states can interpret their constitutions to provide more protection than does the United States Constitution"), *vacated*, 515 U.S. 646 (1995).

76. 469 U.S. 325 (1985).

77. *Id*. at 327.

78. *Id*. at 328.

79. *Id*.

80. *Id*. at 329.

81. *Id*. at 329.

82. *Id*. at 331. Some courts have gone so far as to hold that school authorities are not bound by the strictures of the Fourth Amendment because schools act *in loco parentis* when dealing with students. *Id*. at 336. The Supreme Court found this rationale specious as "[s]uch reasoning is in tension with contemporary reality and the teachings of [the] Court." *Id*.

83. *Id*. at 337–343.

84. 392 U.S. 1 (1968).

duct.[85] To justify reasonable suspicion, the school administrator must demonstrate that the search was "justified at its inception."[86] Moreover, "the search must be reasonably related in scope to the circumstances which justified the interference in the first place."[87] A reasonableness standard should, the Court concluded, ensure that students' rights are being protected to the extent possible, while allowing teachers and administrators to regulate student conduct without having to fully understand the complexities of probable cause.[88]

The Supreme Court's decision in *T.L.O* is important to bystanders-to-campus-violence scenarios because the Court held that suspicion "that there were cigarettes in [a student's] purse was not an 'inchoate and unparticularized suspicion or hunch.'"[89] "[R]ather, it was the sort of 'common-sense conclusio[n] about human behavior' upon which 'practical people,' — including government officials — are entitled to rely."[90] For example, in a potential bystander situation, a teacher is informed by a student that another student is carrying a handgun. The reliability of the

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85. *T.L.O.*, 469 U.S. at 341–342. For a detailed discussion of what constitutes reasonable suspicion in the school setting, see *In re S.K.*, 647 A.2d 952 (Pa. 1994) (stating that cigarette smoke in a bathroom and one student's admission to smoking allowed a school police officer to conduct a limited search of an individual because it was reasonable for the officer to believe that cigarettes would be found on the student's person); *In re S.F.*, 607 A.2d 793 (Pa. 1992) (holding that a student's furtive conduct, including the act of quickly hiding a clear plastic bag and a wad of currency in his pocket as a school police officer approached, justified the officer's search of the student's pockets); *see generally* Joseph R. McKinney, *The Fourth Amendment and the Public Schools: Reasonable Suspicion in the 1990s*, 91 Educ. L. Rep. 455 (Aug. 1994) (providing the reasonable-suspicion analysis, including *New Jersey v. T.L.O.* and its progeny); Jason E. Yearout, Student Author, *Individualized School Searches & the Fourth Amendment: What's a School District to Do?* 10 Wm. & Mary Bill Rights J. 459 (2002) (providing an analysis on the present state of the law with respect to reasonable suspicion for student searches).

86. *T.L.O.*, 469 U.S. at 341 (quoting *Terry*, 392 U.S. at 27).

87. *Id*. Justice White's analysis provides the likely scenario in which an administrator will fulfill the reasonable suspicion test. He stated,

> Under ordinary circumstances, a search of a student by a teacher or other school official will be "justified at its inception" when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. Such a search will be permissible in its scope when the measures adopted are reasonably related to the objective of the search and are not excessively intrusive in light of the age and sex of the student and the nature of the infraction.

Id. at 341–342.

88. *Id*. at 342–343.

89. *Id.* at 346.

90. *Id*.

report as well as the credibility of the reporter may be called into question. However, even if the student were credible and his or her report reliable, the other student may not in fact possess a handgun. Under the law set forth in *T.L.O.*, however, the accuracy of the report is not necessarily important. Under *T.L.O.*, even if the teacher making the report were credible and the report itself reliable, "T.L.O. *might* not have had a pack of cigarettes with her; she might have borrowed a cigarette from someone else or have been sharing a cigarette with another student."[91] The reasonable suspicion requirement, however, "is not a requirement of absolute certainty"; instead, it is "sufficient probability, not certainty, [that] is the touchstone of reasonableness under the Fourth Amendment."[92]

B. State Causes of Action

Under state law, there are two primary legal theories that students touched by campus violence in some way may utilize in bringing a lawsuit. The first legal theory is one of negligence. Lawsuits under this theory tend to allege that the school failed to provide adequate security or that the supervision or security was negligent in acting or not acting to prevent violence.[93] The second state-law legal theory under which students may sue is strict liability.[94] The following sections will discuss lawsuits under these legal theories in more depth.

1. Failure to Provide Adequate Security/Negligent Security

Many recent state-court lawsuits against colleges, universities, and schools following the injury of a student on campus have alleged the school's failure to provide adequate security.[95] Identifying the circumstances under which school officials should recognize when a bystander's report is of a clear and imminent danger may be very difficult. For example, in *Hill v. Safford Unified*

91. *Id.* (emphasis in original).

92. *Id.*

93. *E.g. Genao v. Bd. of Educ. of the City of N.Y.*, 888 F. Supp. 501, 506 (S.D.N.Y. 1995) (discussing several New York state cases brought under the negligent-security legal theory).

94. *E.g. infra* nn. 144–148 and accompanying text.

95. *Genao*, 888 F. Supp. at 506; Landra Ewing, *When Going to School Becomes an Act of Courage: Students Need Protection from Violence*, 36 Brandeis J. Fam. L. 627, 628, 633–639 (1997).

School District,[96] a case from Arizona, one student was fatally shot by another student off campus several hours after the students had a verbal altercation at school.[97] Acting on information that the two had fought earlier that day, the school principal had investigated the fight and detained both students.[98] After taking the students' statements, the principal decided that it was not necessary to discipline the two.[99] When the principal learned of and investigated the fight, he himself became a bystander to the incident.

In affirming summary judgment in favor of the school district, the Arizona Court of Appeals ruled that the school could not have anticipated that the altercation would result in a shooting later that day.[100] Declining to find evidence that the school had failed to follow its own guidelines or failed to properly supervise the students, the court noted that

- the school was not aware that there were weapons at school;
- there was no on-going gang activity;
- the school did not know that an "after-school gathering had any gang relation[s];"
- the shooter did not display dangerous or violent tendencies;
- the deceased student never reported prior threats to the school; and
- the school did not know that the two students had "'confronted each other' at the gathering" off school grounds after hours.[101]

Contrast *Hill* with *Jesik v. Maricopa County Community College District*,[102] in which an Arizona court reversed a summary judgment in favor of a community college when the record indicated that school staff should have been aware of the potential for

96. 932 F.2d 754 (Ariz. App. Div. 2 1997).
97. *Id*. at 755–756.
98. *Id*. at 758.
99. *Id*.
100. *Id*. at 761.
101. *Id*. at 759. The record in *Hill* does suggest, however, that the school knew about rumors that the student who committed the murder had a gun in his locker. *Id*. at 756.
102. 611 P.2d 547 (Ariz. 1980). For another discussion of both *Hill* and *Jesik*, see Staton & Love, *supra* note 37, at 16–17.

violence.[103] In *Jesik*, during class registration at a community college, a nonstudent threatened a student.[104] The student reported the threats to a security guard, who assured the student that he would be protected.[105] An hour later when the shooter returned to the school carrying a briefcase, the student again contacted the security guard and pointed out the threatening individual.[106] Assured that the guard would take action, the student remained in the gym where registration was taking place.[107] The guard then approached the nonstudent and questioned him, without taking further action.[108] Following this conversation, the nonstudent drew his gun and killed the student.[109]

The outcome in these types of cases often hinges on the foreseeability of the harm to the student or third party. For example, in *Fazzolari v. Portland School District*,[110] a fifteen-year-old student rape victim successfully claimed that the school had a duty to warn students that a woman delivering newspapers before school hours had been raped on the school's property fifteen days before the student was raped.[111] In *Hall v. Board of Supervisors Southern University*,[112] the court found no duty to warn of isolated criminal activities on campus when there was "no proof that living on campus increased the hazard above the ordinary."[113]

Marshall v. Cortland Enlarged City School District[114] involved a father's negligent-supervision lawsuit following the murder of his daughter, a special-education high-school student, in a wooded area outside a Cortland, New York school.[115] Marshall, a female student, was killed during a school lunch period by Covington, a fellow special-education student and former boyfriend.[116] The de-

103. *Jesik*, 611 P.2d at 548, 551.
104. *Id*. at 548.
105. *Id*.
106. *Id*.
107. *Id*.
108. *Id*.
109. *Id*.
110. 717 P.2d 1210 (Or. App. 1986), *aff'd*, 734 P.2d 1326 (Or. 1987).
111. *Id*. at 1211, 1213.
112. 405 S.2d 1125 (La. App. 1st 1981).
113. *Id*. at 1126.
114. 697 N.Y.S.2d 395 (App. Div. 3d Dept. 1999).
115. *Id*. at 395.
116. *Id*.

ceased student's father sued the school district alleging negligent supervision.[117]

At trial, several students testified that Covington had threatened a former girlfriend during the previous school year.[118] One student also testified that he told a teacher that Covington planned to kill the former girlfriend.[119] In his pleadings, the deceased student's father claimed that the school district should have known that Covington was "dangerous and [in need of] mental health counseling and monitoring."[120] The appellate court, affirming the trial court's decision, ruled that the school district was not liable for negligent supervision.[121] The court held that, while school districts have a duty to supervise students adequately, "they are not insurers of the safety of their students."[122] To be liable for student-on-student violence, wrote the court, the school district had to have a reason to anticipate that the violence would occur.[123] Lacking specific knowledge, the school district could not have been expected to anticipate that Covington would murder Marshall.[124] The testimony about Covington threatening to kill a former girlfriend and a student telling a teacher about a specific threat did not prove the school district knew that Covington was dangerous and needed help.[125]

Spaulding v. Mingo County Board of Education[126] involved a school district's appeal of a jury verdict in favor of a sixteen-year-old female student's claim that the school district should have protected her from harassment by two other female students.[127] In *Spaulding*, the plaintiff's mother had tried to contact the school principal and others at the high school concerning the harassment.[128] When the parent was unable to get through to anyone at the school, she called the school bus driver, who agreed to monitor

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117. *Id.*
118. *Id.* at 396.
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*
126. 526 S.E.2d 525 (W. Va. 1999).
127. *Id.* at 526.
128. *Id.*

the students.[129] Following several months of escalating harassment on the bus and in the school's cafeteria, the bus driver reported the harassment to the school principal.[130] The principal and the dean of students set up a meeting between Spaulding and the two students accused of harassment.[131] According to the dean, following the meeting, Spaulding was still afraid but felt "the conflict had been resolved."[132] The next day, however, one of the harassers confronted Spaulding and proceeded to beat her until a male student intervened.[133]

Spaulding's lawsuit against the school district alleged a "[failure] to supervise its employees and students and [a failure] to prevent the battery."[134] A jury awarded Spaulding $400,000, and the school district asked the court to reduce the award to $250,000.[135] The trial court granted the reduction.[136] Following an appeal by the school district, the Supreme Court of Appeals of West Virginia affirmed on liability, while further ruling that the reduced jury verdict was not excessive.[137] In its ruling, the court noted that the school district had knowledge that Spaulding was being harassed before the attack.[138] Such knowledge, ruled the court, was relevant to the issue of whether the district acted negligently.[139]

In both *Marshall* and *Spaulding*, bystanders appear to have been aware of the harassment or alleged violent activity. In *Marshall*, fellow students, and perhaps a teacher, were aware of the threats made by Covington, yet this information was either not successfully conveyed or not successfully acted upon.[140] In *Spaulding*, the plaintiff's mother acted on the information by contacting the bus driver and attempting to contact the school principal, and the dean of students acted on the plaintiff's report of

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129. *Id*.
130. *Id*.
131. *Id*. at 526–527.
132. *Id*. at 527.
133. *Id*.
134. *Id*.
135. *Id*.
136. *Id*.
137. *Id*. at 528, 530.
138. *Id*. at 530.
139. *Id*.
140. *Marshall*, 697 N.Y.S.2d at 396.

harassment by calling a meeting between the students.[141] Unfortunately, no steps were taken to protect the plaintiff.[142]

Both *Marshall* and *Spaulding* underscore the challenge to school administrators of intervening in a constitutionally permissible manner that does not leave the student reporting the threat in harm's way. Neither case provides guidance about what steps school administrators should take to protect the bystander who reported the threatened activity.

2. Strict Liability Claims

In addition to tort actions based on state-law claims of negligent supervision and failure to supervise,[143] students have initiated suits based on strict liability. For example, *Clark v. Jesuit High School of New Orleans*[144] involved a student's unsuccessful claim that a school was strictly liable for injuries he suffered after another student shot him in the eye with a BB gun.[145] In its ruling upholding the trial court's grant of summary judgment, the Louisiana Court of Appeals found that the school could be found liable for injuries resulting from hazardous conditions on its property only when the school had "actual or constructive knowledge" of those conditions.[146] The court found that the school did not know that Clark's attacker had the BB gun.[147] The court further ruled that other factors establishing constructive knowledge were not present.[148]

VI. THREAT ASSESSMENT

To date, few federal or state courts have considered by name the bystander scenario in the college, university, or school safety context. More common are cases considering the rights of college administrators, professors, or other school officials to deal with express or implied threats to campus safety by conducting searches or acting to suspend or expel students suspected of ille-

141. *Spaulding*, 526 S.E. at 526–527.
142. *Id*. at 527.
143. *E.g. Maness v. City of N.Y.*, 607 N.Y.S.2d 325 (App. Div. 1st Dept. 1994).
144. 572 S.2d 830 (La. App. 4th 1990).
145. *Id*. at 831.
146. *Id*.
147. *Id*.
148. *Id*.

gal or dangerous activity.[149] For example, *Milo M.*, discussed briefly at the beginning of this Article, addressed the issue of acting to suspend a student based on a perceived threat.[150]

In *Milo M.*, a juvenile sketched two drawings outside of his classroom depicting scenes of violence toward his teacher.[151] Both drawings involved the juvenile pointing a handgun at his teacher while she lay in a submissive position, begging the juvenile for mercy.[152] After completing the drawings, the juvenile showed them to the teacher while exhibiting awkward and aggressive behavior.[153] Later in the day, the juvenile lingered around the teacher's car, suggesting that he was ready to carry out what the drawings depicted.[154] The school suspended the student for three days, and he was charged with making threats.[155] The juvenile contended the drawings were not conclusive proof of any intent to harm his teacher.[156]

Because the Massachusetts threat statute did not define the word "threat," the court looked to prior case law and concluded that "[t]he elements of threatening a crime include an expression of intention to inflict a crime on another and an ability to do so in circumstances that would justify apprehension on the part of the recipient of the threat."[157] Thus, the court looked at the facts and circumstances objectively to determine whether the conduct supported the charge.[158]

The court held that the juxtaposition of the juvenile's graphic illustrations, his loitering near the teacher's car after school, and the student's aggressive and defiant demeanor demonstrated his "intent to commit the threatened crime and his ability to do so," and thus rose to the level of a threat.[159] Additionally, the court

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149. *E.g. Milo M.*, 704 N.E.2d 967.
150. *Id.*; *supra* nn. 31–35 and accompanying text.
151. *Milo M.*, 740 N.E.2d at 969. The first drawing portrayed the juvenile holding a gun to the teacher's head while the teacher had "her hands clasped in front of her [while] crying and pleading 'Please don't kill me.'" *Id.* at 972. The second drawing was essentially the same as the first drawing, except the teacher was depicted as showing extreme fear. *Id.*
152. *Id.*
153. *Id.* at 969.
154. *Id.*
155. *Id.*
156. *Id.* at 970.
157. *Id.* at 969–970.
158. *Id.* at 970.
159. *Id.* at 972.

took notice of the recent surge in school violence and concluded that even a simple drawing can serve as a threat to another.[160] Based upon the facts in this case, the teacher possessed a reasonable concern of imminent violence.[161] Thus, in considering the actions of college, university, and school officials with respect to students who appear to be dangerous, perhaps in response to a bystander report, some courts will consider whether the student expressed an intent to commit the threatened crime and had an ability to do so in circumstances that would justify apprehension.

VII. BYSTANDER CONFIDENTIALITY ISSUES: TAKING ACTION BASED ON A REPORTED THREAT

Taking steps to protect the confidentiality of a fellow student who reports a plan of potential violence is extremely important. In many cases, the student planning the violence shares his plans with only one other person or a small number of people.[162] When the administrator acts upon the information, by suspension, expulsion, or search, it may be very easy for the student to identify the student–informant.[163] The student–informant may fear retaliation, especially in cases in which the student shared his plan with only a limited few.[164] As such, college and university officials should attempt to keep the information confidential.[165] The fact that information may come from "innocent victims" or "witness" bystanders, as opposed to confidential informants,[166] lessens, but

160. *Id*. at 973.

161. *Id*. at 974.

162. *Deadly Lessons: Understanding Lethal School Violence* 300 (Carol Petrie et al. eds., Natl. Acads. Press 2002) (available at http://books.nap.edu/books/0309084121/html/300.html; U.S. Secret Serv. & U.S. Dept. Educ., *The Final Report and Findings of the Safe School Initiative: Implications for the Prevention of School Attacks in the United States* ch. III, 25 (May 2002).

163. *See generally The New Jersey School Search Policy Manual* 163 (1998) (available at <http://www.state.nj.us/lps/dcj/school/chap5.pdf>).

164. *Id*.

165. *Id*. at 160. *The New Jersey School Search Manual* discusses ways to protect the confidentiality of the student–informant through evidentiary privilege. *Id*. at 160–163. In many instances, however, disclosure of the student–informant's identity may be necessary under constitutional principles such as the right to confront one's accusers. *Id*. at 162. For a more detailed discussion on the informer's privilege, consult *infra* note 183.

166. Under the Fourth Amendment to the United States Constitution, a "confidential informant" has been interpreted to refer to a person who has knowledge about someone else's criminal behavior because he or she is involved in the criminal conduct about which he or she is reporting. *The New Jersey School Search Policy Manual*, *supra* n. 163, at 155–156. "'Citizen' informants" are those who are not believed to be in any way involved in [the]

does not eliminate, the concern for unreliable information.[167] Administrators may use one of two methods to verify the truthfulness of the information.

In determining whether a school's actions based on a confidentially reported threat are legally sound, courts rely upon two tests: the two-pronged test or the totality-of-the-circumstances test.[168] Under the two-pronged test, the official must first determine the basis for the informant's knowledge.[169] This often requires the administrator to investigate and answer the question, "[H]ow does the informant know about the suspected crime or incident that he or she is reporting?"[170] After making this determination, the administrator must next consider the veracity of the bystander and the report.[171] "Absent information that a particular student informant may be untrustworthy, school officials ordinarily may accept at face value the information they supply."[172] Despite this presumption, the administrator should independently corroborate the informant's story.[173] This often requires the administrator to consider the informant's reputation for truthfulness[174] and whether the bystander is motivated to lie.[175]

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criminal activity." *Id*. at 156.

167. *Id.* at 159–160. By way of caveat, the *New Jersey School Search Policy Manual* notes that, in the school setting, few students could be likened to professional or paid informants. *Id*. at 163. Instead, student bystanders typically provide information in an impending violent act to school officials in an ad hoc manner. *Id*.

168. *Id*. at 156. The totality of the circumstances test is discussed in the United States Supreme Court case of *Illinois v. Gates*, 462 U.S. 213 (1983). *New Jersey School Search Policy Manual*, *supra* n. 163, at 156.

169. *Id*.

170. *Id.* Other questions include

> whether the informant was present during an earlier criminal event or transaction? Did the informant actually see someone using or distributing drugs or carrying a weapon? Did the informant actually see another student place drugs or a weapon into a particular locker or container?

Id. at 156–157.

171. *Id.* at 157.

172. *Id.* at 158.

173. *Id.*

174. *Id*. at 157. A school administrator may verify the informant's veracity based upon the informant's reputation and prior informant activity that has proven reliable in the past. *Id*.

175. *Id*. If the informant can provide in-depth detail about the prospective danger, administrators "are better able to determine whether informant's information is accurate." *Id*.

The other test courts use is the totality-of-the-circumstances test.[176] The totality-of-the-circumstances test is far more fluid than the rigid approach of the two-prong test.[177] Under this test, an administrator must balance the information received with the degree of reliability.[178] The totality-of-the-circumstances test provides an administrator with the ability to determine "the overall reliability of a tip" by looking to other sources of information.[179]

Irrespective of the test used, the administrator should preserve the identity of the student–informant. Protecting the identity of confidential and anonymous sources often presents problems for administrators who must find ways to act on the information without endangering the health and safety of the bystander making the report.[180] College administrators will compromise the student–informant's safety unless they are careful to protect the confidentiality of bystanders who elect to report that a violent act is likely to occur.[181] Additionally, in protecting the identity of bystanders, college administrators will increase the confidence of other students that they can come forward with information that will keep the campus safe.[182]

In some states, evidentiary privilege may allow the administrator to guarantee that the information will be a privileged communication.[183] Colleges also can spell out in their policies that the

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176. *Id.* at 156.

177. *Gates*, 462 U.S. at 230; *The New Jersey School Search Policy Manual*, *supra* n. 163, at 156.

178. *The New Jersey School Search Policy Manual*, *supra* n. 163, at 156.

179. *Id*. A school administrator may "conduct a surveillance of the suspect to see if the suspect engages in any suspicious conduct." *Id.* at 157.

180. There are many types of bystanders, including deans, residence-hall advisors, professors, and fellow students. Courts generally have held that administrators may question a student without giving a *Miranda* warning, although much of the case law is predicated on the recognition that school officials are not law-enforcement personnel or even agents of the police. *Id.* at 168 (available at <http://www.state.nj.us/lps/dcj/school/chap6.pdf>).

181. *Id.* at 160.

182. *Id*.

183. For example, New Jersey Rule of Evidence 516, the so-called "informer's privilege," is a good example of a policy to protect the safety of confidential informants and bystanders. The rule provides that

> [a] witness has a privilege to refuse to disclose the identity of a person who has furnished information purporting to disclose a violation of a provision of the laws of this State or the United States to a representative of the State or the United States or a government division thereof, charged with the duty of enforcing that provision, and evidence thereof is inadmissible, unless a judge finds that (a) the identity of the per-

the identity of a bystander who comes forward with information about a threat or violent act will be kept confidential. But stating that the administrator will not reveal the name of the bystander is misleading. For instance, the bystander may have been the only one informed of the student's threat. In this instance, the administrator may have to divulge the informant's identity.[184] Similarly, the accused student may have observed the bystander speaking with a college administrator. Anonymous hotlines staffed by trained campus-safety personnel may help colleges and universities to improve the imperfect attempt to enlist bystanders in violence prevention.[185]

VIII. THE NEED FOR LEGAL-COUNSEL INVOLVEMENT: AVOIDING THE HIDDEN COSTS OF DEFENDING A COLLEGE'S VIOLENCE-PREVENTION POLICY

Because of the complexity of the law of bystanders in the campus-safety context, the final section of this Article will discuss in greater detail the importance of involving college legal counsel in the policy-development process. Legal counsel can help the college or university craft a constitutionally valid campus-safety plan that encourages bystander reporting of planned acts of violence. Having someone on the policy-planning committee who can draft the language concerning steps to be followed to protect the legal rights and safety of both the bystander and the suspected student will help ensure that the rights of both parties do not get trampled in the name of campus safety. Legal counsel also can help colleges avoid committing to do more about campus safety than they reasonably can do.

The shape and form of a college's violence-prevention plan should take into account both state and federal due-process concerns as well as college public relations and media concerns. Campus risk managers should be involved in any multi-

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> son furnishing the information has already been otherwise disclosed or (b) disclosure of his identity is essential to assure a fair determination of the issues.

N.J. Stat. Ann. § 2A:84A-28 (2002).

184. *The New Jersey School Search Policy Manual*, *supra* n. 163, at 162.

185. While the hotline may present the student–informant with a level of comfort, the information obtained from the hotline may be insufficient to allow the administrator to conduct a search. *Id.* at 159. "For this reason, as a general proposition, an anonymous tip, by itself, will *not* constitute reasonable grounds to justify an immediate search by school officials." *Id.* (emphasis in original).

disciplinary task forces formed to meet the challenge of creating a new policy on bystander reporting. The task force should take caution to draft policies that enumerate steps college administrators may take to protect bystander reporters from retaliation by suspected violent students.

In light of the variability from state to state and the growing legislative interest in campus-safety issues, college administrators should have their legal counsel undertake legal review of all elements of the campus-violence-prevention plan. Counsel also should be involved in formulating and revising any new plans or policies the college is moving to implement.[186] Bystander issues in particular require careful legal analysis to ensure that the campus policy is not exposing the institution to litigation by a bystander or accused student who feels aggrieved.

In creating a violence-prevention policy, colleges often do not consider the costs associated with defending the policy against lawsuits challenging their legality. In their article on legal aspects of school safety and violence, W. David Watkins and John S. Hooks offer some common-sense suggestions on steps administrators can take to avoid incurring unwanted legal challenges to their work:

> [I]n evaluating new safety measures, schools should consider both the actual costs of implementing plans and procedures, as well as the possibility of a costly legal battle that may conclude with the court finding unlawful the challenged policies.[187]

School districts, however, also need to address the potential costs of not acting. In evaluating the potential litigation expense of using, or failing to use, particular anti-violence tools, school districts often are placed in a difficult position. Parents and students, for example, have sued school districts that use metal detectors for infringing on the constitutional rights of the students.[188] School districts also have been sued for not using metal detectors on the theory that the school knew of the potential dan-

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186. This, of course, is easier said than done. For guidance in improving the collaboration between educators and lawyers, see Jay P. Heubert, *The More We Get Together: Improving Collaboration between Educators and Their Lawyers*, 67 Harv. Educ. Rev. 531 (1997).

187. Watkins & Hooks, *supra* n. 41, at 702–703.

188. *Id*. at 689–693.

ger of guns and knives on school property but failed to use metal detectors to provide a safe atmosphere.[189]

Situations involving student bystanders reporting threats or violence can be a source of litigation for colleges when the bystander perceives that he or she has been aggrieved. Scenarios in which litigation may follow a bystander report include incidents in which:

- a college acts on a bystander report but fails to adequately protect the bystander from retaliation; the bystander is later injured by the student alleged to have made a threat against the bystander or someone else; or
- a college takes action against a student on an unconfirmed bystander's report of a threat that turns out to be false; the falsely accused student is improperly expelled and stigmatized for an act he or she did not commit.

Both scenarios underscore the importance of colleges having legal counsel involved in the process of developing their violence-prevention plans. Counsel can help the institution avoid creating a policy that will subject the college to legal challenges from bystanders and accused students who feel they have been wronged.

Worth noting is the fact that the verbal threats and conduct that some students engage in and that is later reported by school bystanders *can* be controlled and limited. Despite the U.S. Supreme Court's admonition in *Tinker v. Des Moines Independent Community School District*[190] that students do not forfeit their constitutional liberties when they come to school,[191] the Supreme Court has been willing to allow administrators to regulate speech, provided the speech would disrupt school activities.[192] The *Tinker* decision and its progeny have been interpreted to establish that administrators have a right to limit speech that is "either disruptive to the educational environment" or that the school board determines is "offensively lewd and indecent speech."[193] These decisions lend support to college and university administrators faced

189. *E.g. Lawson v. City of Chicago*, 662 N.E.2d 1377, 1387 (Ill. App. 1st Dist. 1996).

190. 393 U.S. 503 (1969).

191. *Id*. at 506.

192. Watkins & Hooks, *supra* n. 41, at 666–670 (discussing *Tinker* and *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986)).

193. *Id*. at 669 (quoting *Bethel Sch. Dist. No. 403*, 478 U.S. at 685).

with a student making a hateful or threatening utterance or a bystander report that another student made such a threat.

A campus-safety policy can spell out the sorts of speech that it needs to prohibit as disruptive to the educational environment. For example, an honor code might explicitly state that students found to have made a threat — either verbal, in writing, or in an e-mail message — to or against a fellow student or staff person will be immediately suspended for a defined period of time. The honor-code policy might go on to explain to the reader the reasons for the new policy, and administrators should make efforts to widely publicize the new policy and regulations. Some colleges and universities may even wish to have students sign a pledge acknowledging that they have read and fully understand the new school policy.[194] State case law, like the Massachusetts Supreme Judicial Court's decision in *Milo M.*,[195] also contains helpful information about taking action on threats conveyed by bystanders.[196]

Weapons on campus also can be regulated. For example, colleges could implement campus bans on firearms.[197] Violence can

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194. The proposed honor-code amendment could be construed as unduly burdening students who, in a moment of excitement on the playground, should out, "I am going to kill you." Such outbursts underscore the way in which zero-tolerance policies on threats to do bodily harm are difficult to implement.

195. 740 N.E.2d 967; *see supra* nn. 150–161 and accompanying text.

196. *See Milo M.*, 740 N.E.2d at 974–975.

197. For example, the policy at Northwestern University states, "The possession or use of firearms, ammunition, BB guns, air rifles, firecrackers, explosives, slingshots, or other weapons of any description, for any purpose, is prohibited." Nw. U., *The Graduate Student Policy Handbook 1997/1998* <http://www.northwestern.edu/graduate/gspn/regulations.html> (accessed Aug. 23, 2002).

The Board of Trustees Rules of Public Order for The City University of New York states,

> No individual shall have in his possession a rifle, shotgun, or firearm or knowingly have in his possession any other dangerous instruments or material that can be used to inflict bodily harm on an individual or damage upon a building or the grounds of the University/college without the written authorization of such educational institution.

CUNY, *Rules and Regulations for the Maintenance of Public Order* <http://www.lagcc.cuny.edu/STUINFO/info7f.asp> (accessed Aug. 23, 2002).

Washington Administrative Code's firearms and dangerous weapons section states:

> (1) Only such persons who are authorized to carry firearms or other weapons as duly appointed and commissioned law enforcement officers in the state of Washington, commissioned by agencies of the United States government, or authorized by contract with the university, shall possess firearms or other weapons issued for their possession by their respective law enforcement agencies or employers while on the campus or other university-controlled property, including, but not limited to, resi-

also be prevented by supporting expanded campus- and community-mental-health services.[198] Perhaps most importantly, a successful prevention policy demands that college administrators accept that sometimes all the concern in the world is not enough to bring a mentally ill individual back to good health. All of these components of a successful prevention policy cannot, however, be successful in practice without bystanders who report verbal and written threats, weapons on campus, and behavior causing concern.

Involving bystanders in college-violence-prevention efforts is, therefore, not a matter of whether but of how. In light of September 11th, administrators will need to overcome their squeamishness at "compromising" the civil liberties of deeply troubled students in their midst. Student bystanders also will need to do their part for the campus community by helping administrators identify students who are suffering from mental illness. Post-September 11th, in a world where so many things seem beyond our understanding and control, my hope is that this Article has answered the question of how to involve bystanders in a college's violence-prevention effort.

> dence halls. No one may possess explosives unless licensed to do so for purposes of conducting university-authorized activities relating to building construction or demolition.
>
> (2) Other than the law enforcement officers or other individuals referenced in subsection (1) of this section, members of the campus community and visitors who bring firearms or other weapons to campus must immediately place the firearms or weapons in the university-provided storage facility. The storage facility is located at the university public safety department and is accessible twenty-four hours per day.
>
> (3) If any member of the campus community or visitor wishes to bring a weapon to the campus for display or demonstration purposes directly related to a class, seminar, or other educational activity, permission for such possession may be applied for at the university public safety department, which shall review any such proposal and may establish the conditions of the possession on campus.

Wash. Admin. Code 516-020 (2002). Also, the *University of Scranton Student Handbook* states, "Possession of firearms, explosive devices, martial arts paraphernalia, knives . . . or any weapon of any kind is forbidden anywhere on campus due to the inherent danger connected with the same." U. of Scranton, *Scranton Student Handbook* 49 (2002/2003) (available at <http://matrix.scranton.edu/student_handbook>).

198. Muckenhoupt, *supra* n. 18, at 4–10.