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## Constructing a Legal and Managerial Paradigm Applicable to the Modern-Day Safety and Security Challenge at Colleges and Universities

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**CONSTRUCTING A LEGAL AND MANAGERIAL PARADIGM  
APPLICABLE TO THE MODERN-DAY SAFETY AND SECURITY  
CHALLENGE AT COLLEGES AND UNIVERSITIES**

OREN R. GRIFFIN\*

ABSTRACT

This Article focuses on campus safety and security in higher education. In light of the numerous stakeholders in higher education that include faculty, law enforcement professionals, higher education lawyers, state and federal officials, and institutional administrators, this Article examines legal and policy considerations that should influence how colleges and universities respond to protect the campus community and safeguard the educational environment. In particular, the Article discusses the Incident Command System and the impact this management approach has had on the development of an organizational framework to manage emergency incidents. The Article also reviews selected case law regarding campus safety and state and federal statutory responses designed to minimize threats to campus safety. Finally, the Article acknowledges the role that members of the university community play in advancing campus security as well as the application of risk management concepts and strategies in the campus safety and security arena. Recognizing that colleges and universities are vital national institutions, the article encourages the development of a legal and managerial paradigm to deal with the modern-day perplexities of campus safety and security.

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## I. INTRODUCTION

As criminal behavior and unprovoked acts of violence have become an ever-growing presence in American life, higher education institutions have not been spared the experience of being the scene of such acts. In recent years, various active shooter incidents have occurred on college campuses across the country and abroad with horrific results.<sup>1</sup> Numerous stakeholders, including higher education administrators, faculty, law enforcement professionals, higher education lawyers, and state and federal officials, among others, have begun to examine how colleges and universities should respond to protect the campus community and safeguard the educational environment. As these recent campus shootings raise the specter of public concern, educational institutions must examine their ability and capacity to respond to emergency incidents on campus.<sup>2</sup>

This Article explores the complex array of concerns that influence campus safety and security. Addressed first is a discussion of the Incident Command System, also referred to as the incident management system, which has been recognized by state and federal agencies, public safety and law enforcement organizations, and professional groups as providing the necessary framework to manage emergency incidents. Second, the Article examines selected case law implicating campus safety, identifying the view courts have taken to the liability exposure colleges and universities have experienced and may continue to experience. Third, the Article reviews selected statutory responses designed to minimize threats to campus security and safety. Fourth, the Article considers the role that faculty may play in advancing campus security as well as the application of risk management concepts and strategies to the campus safety and security arena. The conclusion offers a series of recommendations that higher education administrators and their legal counsel may consider as their institutions negotiate the modern-day perplexities of campus safety and security.

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1. See *Timeline: Shootings at U.S. College Campuses*, NPR, Apr. 16, 2007, <http://www.npr.org/templates/story/story.php?storyId=9603275> (listing shootings from recent decades); Anthony DePalma, *Questions Outweigh Answers in Shooting Spree at College*, N.Y. TIMES, Dec. 28, 1992, at A1; *Timeline of School Shootings*, BBC NEWS, Sept. 23, 2008, <http://news.bbc.co.uk/2/hi/7631162.stm>.

2. It is troubling that, to the extent administrators, lawyers, and other professionals working with educational institutions do not respond promptly and effectively to the emergency preparedness concern, the void may be filled with less favorable approaches. See, e.g., James C. McKinley, Jr., *In Texas School, Some Teachers Carry Books, Chalk and Pistol*, N.Y. TIMES, Aug. 29, 2008, at A1 (discussing a proposal to provide guns to teachers and administrators at public schools in Texas as a response to safety concerns).

## II. INCIDENT COMMAND SYSTEM PRINCIPLES AND CONCEPTS

The Incident Command System (“ICS”) encompasses management concepts and principles intended to apply in crisis and emergency situations to minimize chaos and maximize the potential for an effective response to a crisis.<sup>3</sup> The ICS management approach originated in the late 1960s in response to the devastating wildfires that ravaged southern California.<sup>4</sup> Given the challenge faced by firefighters and other public safety professionals, ICS provided a framework for organizing the critical resources needed to save lives and property.<sup>5</sup> The ICS was developed through cooperative efforts among federal, state, and local governmental agencies in reaction to the harmful disorder that existed among agencies that respond to life-threatening events.<sup>6</sup> It represented a significant shift in the approach used to manage large-scale emergency incidents.<sup>7</sup>

In February 2003, triggered by an imperative need for intergovernmental cooperation regarding emergency preparedness, President George W. Bush issued Homeland Security Presidential Directive 5 (HSPD-5), which legally required intergovernmental cooperation for major incident response efforts.<sup>8</sup> HSPD-5 requires all federal agencies to collaborate with the Department of Homeland Security to adopt a National Response Plan (“NRP”) and a National Incident Management System (“NIMS”).<sup>9</sup> The NRP focuses on developing a national approach to domestic incident management to incorporate the resources of federal, state, local, tribal, private-sector, and nongovernmental organizations.<sup>10</sup> Acknowledging ICS as the cornerstone of any disaster response effort, NIMS provides a structural framework for incident management at all jurisdictional levels, regardless of the cause, size, or

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3. ICS is also referred to as the Incident Management System in the relevant literature. See LOUIS N. MOLINO, SR., *EMERGENCY INCIDENT MANAGEMENT SYSTEMS: FUNDAMENTALS AND APPLICATIONS I* (2006).

4. *Id.* at 5; see also James Parker, “*Be Prepared*”: *Safety Professionals Must Learn the Incident Command System*, SAFETY & HEALTH, Apr. 2005, at 26, 26.

5. MOLINO, *supra* note 3, at 7.

6. Gregory A. Bigley & Karlene H. Roberts, *The Incident Command System: High-Reliability Organizing for Complex and Volatile Task Environments*, 44 ACAD. MGMT. J. 1281, 1282 (2001).

7. *Id.*

8. Homeland Security Presidential Directive/HSPD-5-Management of Domestic Incidents, I PUB. PAPERS 229 (Feb. 28, 2003).

9. William C. Nicholson, *Seeking Consensus on Homeland Security Standards: Adopting the National Response Plan and the National Incident Management System*, 12 WIDENER L. REV. 491, 495 (2006) (citing Press Release, White House, Homeland Security Directive/HSPD 5, 16 (Feb. 28, 2003), available at <http://www.whitehouse.gov/news/releases.2003/02/200302289.html>).

10. *Id.* at 511.

complexity of the emergency incident.<sup>11</sup> NIMS's basic components include preparedness, communications and information management, resource management, and command and management.<sup>12</sup> In support of these components, ICS serves as the backbone for NIMS, and provides emergency responders an organizational structure free from cumbersome jurisdictional impediments.<sup>13</sup> Since its inception, ICS has evolved into an "all-risk" system capable of responding to any emergency, irrespective of type or scope.<sup>14</sup> Also, ICS has begun to have a presence in federal and state statutory law.<sup>15</sup>

ICS represents a comprehensive on-site incident management approach that provides a flexible organizational framework to respond to small and large-scale emergency situations. The organizational structure implemented through ICS seeks to efficiently and effectively coordinate the efforts of public safety personnel and first-responders to rapidly and effectively take action in emergency situations.<sup>16</sup> The command system seeks to prevent the dissemination of unreliable information, inadequate communications and poor coordination among relevant emergency responders, and reduce jurisdictional conflicts among government officials.<sup>17</sup> In addition, a salient objective of ICS is to advance the capabilities of decision makers to grasp an awareness of dynamic, and often rapidly changing, crisis situations and the public safety implications.<sup>18</sup>

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11. Aileen M. Marty, *Hurricane Katrina: A Deadly Warning Mandating Improvement to the National Response to Disasters*, 31 NOVA L. REV. 423, 433 (2007).

12. *Id.*

13. *Id.* at 426.

14. See Bigley & Roberts, *supra* note 6, at 1282.

15. Federal and state agencies that have adopted ICS management concepts include the U.S. Occupational Safety and Health Administration, which requires the use of an incident command system for emergency response to hazardous materials incidents. See 29 C.F.R. § 1910.120 (2002) (this same section in Appendix C, subsection (6), contains an extensive discussion of the Incident Command System). See also 29 C.F.R. § 1910.120(q) (applying the federal government's emergency response to hazardous substance releases); 6 U.S.C. § 317 (2006) (regarding the operation of regional offices within the Department of Homeland Security). State statutes that have mandated the use of an incident command system, include: ALASKA STAT. §§ 26.23.075(c), 26.23.077(b), (c) (2002); IND. CODE § 10-14-3-10.6(d) (2003); KAN. STAT. ANN. § 48-928(o) (2004); 110 ILL. COMP. STAT. ANN. 12/20 (West 2006).

16. See, e.g., 29 C.F.R. § 1910.120(q)(3)(ii) (2002).

17. See, e.g., U.S. Dept. of Labor, Occupational Safety & Health Admin, What Is an Incident Command Center, [http://www.osha.gov/SLTC/etools/ics/what\\_is\\_ics.html](http://www.osha.gov/SLTC/etools/ics/what_is_ics.html) (last visited January 6, 2010) ("ICS is a standardized on-scene incident management concept designed specifically to allow respondents to adopt an integrated organizational structure equal to the complexity and demands of any single incident or multiple incidents without being hindered by jurisdictional boundaries.").

18. See, e.g., *id.* ("An ICS enables integrated communication and planning by establishing a manageable span of control.").

As a functioning management system, ICS includes units that focus on command, planning, operations, logistics, and finance/administration.<sup>19</sup> These units work in concert to enhance control and remove chaos from the emergency response effort.<sup>20</sup> Understanding that any emergency response situation, regardless of scope, will likely occur with no warning, ICS seeks to eliminate common problems that emergency responders may face.<sup>21</sup> Problems such as the flow of reliable incident information, defining jurisdictional lines of authority, and development of coordinated incident objectives may severely hamper emergency response efforts.<sup>22</sup>

For college and university administrators, the challenge of responding to an on-campus emergency may be even more daunting given the diversified and decentralized structure of the campus environment. Therefore, the higher education community should give careful consideration to the methods and management approaches, such as ICS, that attempt to improve coordination and effectiveness.

### III. A VIEW OF THE JUDICIAL LANDSCAPE REGARDING CAMPUS SAFETY CASE LAW

Common law decisions addressing disputes regarding safety and security concerns at colleges and universities can be traced to the early twentieth century. In the 1913 *Gott v. Berea College*<sup>23</sup> case, the court found that the doctrine of *in loco parentis* granted institutional administrators the power to unilaterally bar certain activities by students in the interest of protecting the college and student community.<sup>24</sup> The case involved the enforcement of the college's rule which barred students from "forbidden places"—specifically, a local eating place.<sup>25</sup> Students who refused to abide by the college's rule were subject to expulsion.<sup>26</sup> The plaintiff, an owner of a local restaurant, sought an injunction to prevent enforcement of the college's rule because it would injure his business.<sup>27</sup> Finding that the college had the authority to adopt rules to protect the students, the court stated:

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

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19. MOLINO, *supra* note 3, at 7; *see also* Parker, *supra* note 4, at 26.

20. Parker, *supra* note 4, at 28.

21. *Id.*

22. *Id.*

23. 161 S.W. 204 (Ky. 1913).

24. *Id.* at 205.

25. *Id.*

26. *Id.*

27. *Id.*

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.<sup>28</sup>

Thus, by acknowledging that the relationship between the college and the student was characterized by the *in loco parentis* doctrine, colleges and universities were granted authority to impose reasonable restrictions for the best interest of the students.<sup>29</sup>

As student activism during the 1960s and 1970s unfolded at college campuses across the United States, courts abandoned the *in loco parentis* doctrine, and the link between colleges and students came to be viewed as a contractual relationship.<sup>30</sup> The consequential questions became whether colleges and universities have a duty to provide campus safety and security, and to what extent an institution may be legally liable when a breach of security occurs.<sup>31</sup>

In *Mullins v. Pine Manor College*,<sup>32</sup> a student was abducted from her dormitory room and raped.<sup>33</sup> The plaintiff sued the college for negligence, and the state court held that the college had a duty to exercise reasonable care in providing campus security.<sup>34</sup> Although recognizing the decline of the *in loco parentis* doctrine, the court reasoned that the college maintained a duty to protect the well-being of its resident students.<sup>35</sup> The court found that the college could not abandon any effort to protect students, and parents and students had a reasonable expectation that the college would provide adequate security.<sup>36</sup> In ruling that the college was negligent, the court pointed to evidence indicating that the college had a deficient security system, improperly supervised security guards, faulty locks, and other findings that demonstrated the college's failures were the substantial cause of the harm.<sup>37</sup> For these

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28. *Gott*, 161 S.W. at 206.

29. *Id.* at 207.

30. *See* *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150, 151 (5th Cir. 1961) (finding that a tax-supported college was required to grant students due process before expulsion from the institution for misconduct). *See also* Kristen Peters, *Protecting the Millennial College Student*, 16 S. CAL. REV. L. & SOC. JUST., 431, 437 (2007).

31. Oren R. Griffin, *Confronting the Evolving Safety and Security Challenge at Colleges and Universities*, 5 PIERCE L. REV. 413, 418 (2007).

32. 449 N.E.2d 331, 334 (Mass. 1983).

33. *Id.* at 334.

34. *Id.* at 340.

35. *Id.* at 335–36.

36. *Id.* at 336.

37. *Mullins*, 449 N.E.2d at 338.

reasons, the court found that the college's failures proximately caused the student's injuries.<sup>38</sup>

In *Eiseman v. State*,<sup>39</sup> however, the State University College at Buffalo avoided liability regarding the rape and murder of a student that occurred on its campus.<sup>40</sup> Larry Campbell, an ex-felon with a history of drug abuse, criminal conduct, and diagnoses with several mental health disorders that included schizophrenia, was conditionally released from prison in December 1975 after pleading guilty to criminal possession of dangerous drugs and receiving a six-year sentence.<sup>41</sup> In the spring semester of 1976, Campbell began taking classes at the college and lived on campus after being admitted to a state-wide program designed to offer higher education opportunities to disadvantaged high school graduates.<sup>42</sup> Within a few months after living on campus, Campbell murdered two students, one of whom was Rhomna Eiseman, and inflicted serious injuries upon another nonstudent.<sup>43</sup> Subsequently, Eiseman's representatives filed suit alleging that the college breached its duty to protect students from the unreasonable risk and foreseeable danger posed by Campbell.<sup>44</sup>

The court held that there was no justification for imposing such a duty, and acknowledged that the plaintiffs' claims centered on whether a college has a legal duty to shield its students from harm when the college admits an ex-felon as part of an approved special program.<sup>45</sup> The court found that the college had no heightened duty of inquiry relative to Campbell's prior imprisonment, nor did it have an obligation to restrict Campbell's contact with other students.<sup>46</sup> Absolving the college of any liability for acts or omission regarding Eiseman's death, the court stated, "while hindsight has a peculiar clarity and wisdom, the fact remains that the contemporaneous, non-reviewable judgments by which the college's actions must be evaluated were that Campbell, upon his release, needed no psychiatric care or other treatment, and further that he had a potential for success in college."<sup>47</sup>

In *Peschke v. Carroll College*,<sup>48</sup> John Aills shot a food service employee on May 18, 1990, at Carroll College in Helena, Montana.<sup>49</sup> Shortly before the

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38. *Id.* at 339.

39. 511 N.E.2d 1128 (N.Y. 1987).

40. *Id.* at 1130.

41. *Id.*

42. *Id.* at 1131-32.

43. *Id.* at 1132.

44. *Eiseman*, 511 N.E.2d at 1136.

45. *Id.*

46. *Id.*

47. *Id.*

48. 929 P.2d 874 (Mont. 1997).

49. *Id.* at 876.

shooting, Aills and a companion entered the chapel located on the Carroll College campus where Father Courtney was conducting mass.<sup>50</sup> During mass, the campus priest observed that Aills had a handgun in his possession.<sup>51</sup> Aills and his companion were also sources of disruption during mass, hollering and banging on pews.<sup>52</sup> Father Courtney confronted Aills about his behavior and detected the smell of alcohol on Aills' breath and subsequently escorted Aills from the chapel.<sup>53</sup> Aills left the chapel and entered the college cafeteria where he shot the plaintiff, Emma Peschke, in the chest.<sup>54</sup>

The plaintiff filed a negligence claim against the college alleging that Father Courtney failed to provide a proper warning or notify the security personnel prior to the shooting.<sup>55</sup> According to the plaintiff, either Father Courtney or the college had a duty to arrest, disarm, or remove Aills from the campus prior to the shooting.<sup>56</sup> The jury returned a verdict finding that the college was not negligent, and the plaintiff sought a new trial—which the court denied.<sup>57</sup> The court found there was sufficient evidence to support the jury's verdict that the college did not breach its duty.<sup>58</sup> There was no history of serious security problems at Carroll College or criminal activities with persons visiting the campus.<sup>59</sup> The plaintiff did call a security expert to testify, who criticized the fact that the college failed to post the 911 emergency phone number signs and that the campus lacked radio communications.<sup>60</sup> On cross-examination, however, plaintiff's expert witness admitted that he had not reviewed crime statistics for the college or the surrounding city, nor had the security expert ever been to the Carroll campus.<sup>61</sup> In short, the court found that there was substantial evidence to support the jury's verdict and insufficient evidence that the trial court abused its discretionary power.<sup>62</sup> Thus, the jury's verdict in favor of the college was affirmed.<sup>63</sup>

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50. *Id.*

51. *Id.* at 878.

52. *Id.* at 876.

53. *Peschke*, 929 P.2d at 876.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Peschke*, 929 P.2d at 878.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Peschke*, 929 P.2d at 881. In *Kane v. Board of Governors*, an associate professor was shot and killed on campus by a student who issued threats before the shooting. 356 N.E.2d 1340, 1341 (Ill. App. Ct. 1976). The professor's surviving wife brought a damages claim for wrongful death and sought declaratory relief. *Id.* The Illinois Court of Appeals affirmed a circuit court

A wrongful death action in *Gragg v. Wichita State University*,<sup>64</sup> was brought against Wichita State University (WSU) by the heirs of Barbara Gragg after she and a companion were shot and killed while leaving the Celebrate '93 fireworks display, an Independence Day event held on the WSU campus July 4, 1993.<sup>65</sup> Specifically, the lawsuit alleged that WSU failed to provide adequate security, install sufficient lighting, or issue warnings about potential criminal activity near the campus.<sup>66</sup>

Since 1976, WSU had held a Fourth of July event every year at WSU's Cessna Stadium.<sup>67</sup> A coordinating committee met several times prior to the event and included members from the university administration, such as the WSU Director of Community Relations and Special Events.<sup>68</sup> The WSU police department was directly involved in preparing the security plan before the event and had been for ten years prior to the 1993 Celebrate event.<sup>69</sup> Moreover, WSU's President granted authority for the use of Cessna Stadium for the fireworks portion of the event, which was open to the public.<sup>70</sup> Although the university was significantly involved in the event, a cooperative effort between the Wichita Police Department and the WSU police department provided security.<sup>71</sup>

Anthony Scott, a member of a street gang known as the "Insane Crips," shot Gragg.<sup>72</sup> Scott had been involved in previous gang-related shootings and attended the Celebrate '93 event looking for members of a rival gang known as the "Junior Boys."<sup>73</sup> After the fireworks display, Gragg and her companion left the WSU stadium by taking a short walk across a grassy field on the WSU south campus when Scott shot and killed them.<sup>74</sup> Following the shooting, police in the area responded and quickly apprehended Scott.<sup>75</sup> He was subsequently charged with murder and later convicted.<sup>76</sup>

In the civil action brought by Gragg's surviving family members, the court found that WSU owed no duty to protect Gragg from the criminal acts of an

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decision dismissing the plaintiff's complaint and finding, *inter alia*, that the plaintiff's sole remedy was provided by the Illinois Workmen's Compensation Act. *Id.* at 1345.

64. 934 P.2d 121 (Kan. 1997).

65. *Id.* at 125.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Gragg*, 934 P.2d at 126.

70. *Id.*

71. *Id.*

72. *Id.* at 127.

73. *Id.*

74. *Gragg*, 934 P.2d at 126.

75. *Id.*

76. *Id.*

unknown third party.<sup>77</sup> The plaintiff relied on § 318 of the Restatement of Torts, which refers to the duty a possessor of land has to control the conduct of third parties.<sup>78</sup> The court, however, noted that this provision did not apply because WSU lacked sufficient knowledge to control Scott's actions.<sup>79</sup>

Furthermore, the plaintiffs contended that liability should also be extended to the Celebrate '93 corporate sponsors, which included several radio stations and corporations.<sup>80</sup> The plaintiffs argued that these sponsors were possessors of the WSU campus, were engaged in a joint venture with WSU, and exercised the requisite control of Celebrate '93 through a coordinating committee.<sup>81</sup> Relying on the Restatement of Torts § 328E, a possessor of land requires occupation of the land with the intent to control it.<sup>82</sup> In order to determine liability, the court recognized the critical factors on causation of the harm included either occupation with the intent to control the conditions or proof that the alleged wrongdoer had the right to control the conditions.<sup>83</sup> The court concluded that assessing liability against the sponsors as possessors of land would be consistent with finding that the sponsors had a duty to provide reasonably safe conditions on the premises.<sup>84</sup> The Restatement definition of duty, however, confirms that no duty exists if the actor has no right of control over the conditions causing the harm.<sup>85</sup> Relying on a Kansas appellate decision, the court noted the following:

In a premises liability case, in order to be liable, the party charged must have had control over the premises in question. It is obvious that, without control, the responsibility for the dangerous or hazardous condition cannot exist. To put it another way, a party may not be held responsible for a condition which he or she did not cause and which he or she has no ability to remedy.<sup>86</sup>

The sponsors involved in Celebrate '93 at the WSU campus had a limited role, and did not have the authority to manage the WSU campus facilities or security measures implemented for the event.<sup>87</sup> The court recognized that WSU had direct control for security, and sponsorship did not establish a right

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77. *Id.* at 135.

78. *Id.* at 128.

79. *See* RESTATEMENT (SECOND) OF TORTS §§ 314A, 344 (1965). These sections deal with the duty to protect that may be owed by a possessor of land, and as the Kansas Supreme Court held, neither was applicable in the instant case. *Gragg*, 934 P.2d at 129.

80. *Gragg*, 934 P.2d at 127.

81. *Id.* at 130.

82. *Id.* (discussing RESTATEMENT (SECOND) OF TORTS § 328E (1965)).

83. *Id.*

84. *Id.* at 131.

85. RESTATEMENT (SECOND) OF TORTS § 4 cmt. a (1965).

86. *Gragg*, 934 P.2d at 130–131 (quoting *Rogers v. Omega Concrete Sys. Inc.*, 883 P.2d 1204, 1207 (Kan. Ct. App. 1994)).

87. *Id.* at 131.

of control.<sup>88</sup> Moreover, the court made a distinction between sponsoring an event and being responsible for the actions that take place at an event, and held that the sponsors lacked the control to establish that they were possessors of the WSU premises or owed some duty to Gragg that was violated.<sup>89</sup>

As for whether a sufficient special relationship existed that created a duty which WSU owed to Gragg, the court indicated that WSU had control and possession of the premises for the Celebrate '93 event.<sup>90</sup> WSU's ownership and control of the property, however, did not automatically establish that WSU had a duty to Gragg to prevent the shooting.<sup>91</sup> The court acknowledged the Supreme Court of Kansas' well-recognized decision in *Nero v. Kansas State University*,<sup>92</sup> which involved a sexual assault in a co-ed housing unit.<sup>93</sup> The university in *Nero* knew the attacker's history of sexual assault, but proceeded to place him in a dormitory with the victim without warning the occupants.<sup>94</sup> Denying the university's motion for summary judgment, the Court held that "a state university owes student tenants the same duty to exercise due care for their protection as a private landowner owes to its tenants."<sup>95</sup> The facts in *Nero*, however, differ significantly from the facts raised against WSU. Based on the totality of the circumstances, the attack that led to Gragg's death was unanticipated and unexpected.<sup>96</sup> Put another way, the court dismissed the action against WSU because the shooting on the WSU campus following the Celebrate '93 event was unforeseeable to the reasonably prudent person.<sup>97</sup>

The case of *McEnaney v. State*<sup>98</sup> involved a December 1994 incident where a student entered a lecture hall at the State University of New York at Albany ("SUNYA") and proceeded to hold a professor and several students at gunpoint, including Jason McEnaney.<sup>99</sup> The student gunman, Ralph Tortorici, allowed the professor to call certain public officials.<sup>100</sup> While police were called to the scene, Tortorici threatened the students who remained hostages.<sup>101</sup>

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88. *Id.*

89. *Id.* at 132.

90. *Id.* at 132-33.

91. *Gragg*, 934 P.2d at 133.

92. 861 P.2d 768 (Kan. 1993).

93. *Id.* at 772.

94. *Id.*

95. *Id.* at 780 (citations omitted).

96. *Id.*

97. *Gragg*, 934 P.2d at 135 (citing *Cupples v. State*, 861 P.2d 1360 (Kan. Ct. App. 1993) (defining 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")).

98. 700 N.Y.S.2d 258 (N.Y. App. Div. 1999).

99. *Id.* at 259.

100. *Id.*

101. *Id.*

Recognizing that the gunman was distracted, McEnaney took action to disarm Tortorici and was shot in the struggle.<sup>102</sup> Tortorici was taken into custody and subsequently charged and convicted of first-degree assault, kidnapping, and other crimes.<sup>103</sup>

The plaintiff subsequently filed a suit against the State of New York and SUNYA alleging that the university was negligent in providing proper security for its students, which proximately caused McEnaney's injuries.<sup>104</sup> McEnaney further claimed that SUNYA breached the duty of care that it owed to students in its capacity as a landowner.<sup>105</sup> The Court of Claims granted the defendant's motion for summary judgment, and the New York Supreme Court, Appellate Division, affirmed the complaint's dismissal.<sup>106</sup> The court's finding rested upon a close review of the plaintiff's allegation, challenging the adequacy of SUNYA's overall security system and its particular security provisions and practices.<sup>107</sup> These activities, providing police protection through campus security, involved the state university's fulfillment of its governmental function, not its propriety capacity as a landowner.<sup>108</sup> The court found this inquiry determinative based on well-settled law that a state university is immune from negligence claims arising out of the performance of their governmental function unless the injured party can establish a special relationship.<sup>109</sup> SUNYA's failure to adopt certain security measures, implement an overall security plan, or warn of potential criminal activity were governmental functions because they grew directly out of the failure to allocate police resources.<sup>110</sup> Hence, the specific acts and omissions alleged in the plaintiff's lawsuit flowed from the performance of governmental functions, not propriety functions.<sup>111</sup> Nor did the plaintiff allege that a special relationship existed between himself and the state university, or that the university assumed a legal duty, via promise, action, or otherwise, to protect him from criminal

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102. *Id.* at 260; *see also Man Sentenced in Albany Hostage Drama* N.Y. TIMES, Feb. 17, 1996, at A29.

103. *McEnaney*, 700 N.Y.S.2d at 259.

104. *Id.* at 259–60.

105. *Id.* at 260.

106. *Id.*

107. *Id.* at 261.

108. *McEnaney*, 700 N.Y.S.2d at 260.

109. *Id.* The Court recognized that the special duty rule is a limited exception to the general rule: “The general rule reflects the judicial recognition that a governmental entity’s allocation of limited public resources to provide security to the public remains a matter of legislative and executive decision making, as it requires the exercise of discretion in making the necessary policy tradeoffs between various security measures.” *Id.*

110. *Id.* at 262.

111. *Id.*

acts of third parties.<sup>112</sup> Given this reality, the court found the state university immune from liability.<sup>113</sup>

At issue in *Letsinger v. Drury College*<sup>114</sup> was whether a student occupant who shot at a fraternity house on the Drury College campus in Springfield, Missouri could sustain a negligence claim against the college and fraternity.<sup>115</sup> In May 1997, the plaintiff, John Letsinger, was shot at a house occupied by the Beta Iota chapter of Kappa Alpha fraternity on the Drury College campus.<sup>116</sup> Before the shooting, a hostile telephone exchange took place between Letsinger and an unidentified caller, where Letsinger eventually told the caller to shut up or come over and fight.<sup>117</sup> Joe Lee Daniel soon arrived at the fraternity house, pulled out a gun, and shot Letsinger.<sup>118</sup> Letsinger alleged that the college was negligent in that it failed to provide basic security, and that this breach proximately caused his injuries.<sup>119</sup>

The Supreme Court of Missouri acknowledged that, as a general rule, the college had no duty to protect a person from deliberate criminal attacks by a third person.<sup>120</sup> The court, however, noted that an exception to this rule exists when: (1) a landlord-tenant relationship exists between two parties, and (2) other “special circumstances” exist, warranting a shift of responsibility for the tenant’s security from the tenant to the landlord.<sup>121</sup> Although the lower court granted the college’s motion for summary judgment, the record in the case indicated that there was no express contract or agreement defining the existence of a landlord-tenant relationship between the plaintiff and the college, or the plaintiff and Kappa Alpha fraternity.<sup>122</sup> The court found that the record included conflicting and contradictory evidence regarding the existence of a landlord-tenant relationship.<sup>123</sup> While the circuit court granted the college and fraternity summary judgment, the Missouri Supreme Court reversed and remanded the decision because material issues of fact existed about whether a landlord-tenant relationship existed and the character of plaintiff’s occupancy as a tenant or licensee.<sup>124</sup>

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112. *Id.*

113. *McEnaney*, 700 N.Y.S.2d at 263.

114. 68 S.W.3d 408, 409 (Mo. 2002) (en banc).

115. *Id.* at 409.

116. *Id.* at 410.

117. *Id.*

118. *Id.*

119. *Letsinger*, 68 S.W.3d at 410.

120. *Id.* at 411.

121. *Id.* at 410.

122. *Id.* at 410–11.

123. *Id.* at 411.

124. *Letsinger*, 68 S.W.3d at 412.

*RLI Insurance Co. v. Simon's Rock Early College*<sup>125</sup> centered on a dispute between a college's primary insurance carrier and its excess liability insurer regarding whether actions by the college and its employees that arguably led to a on-campus shooting spree constituted a single occurrence under the college's primary insurance policy.<sup>126</sup> The court found that all claims resulting from the eighteen-minute shooting spree on December 14, 1992 at Bard College at Simon's Rock in Great Barrington, Massachusetts, constituted a single occurrence that would obligate the primary insurer to its one million dollar per occurrence limit, and obligate the excess liability insurer to begin payment upon exhaustion of the primary insurance policy limit.<sup>127</sup>

The facts set forth in this case, however, illustrate more than whether multiple events involved in an active shooting incident on a college campus can constitute a single occurrence for insurance purposes. The pertinent facts identified by the Massachusetts appellate court pointed out the opportunity college officials had, but apparently missed, that could have averted the shooting.<sup>128</sup> For instance, the college knew that a package was sent to the student shooter, Wayne Lo, with a suspicious return address containing the notation "Classic Arms."<sup>129</sup> While the package raised concerns among residence hall directors and a college dean, the school eventually delivered the package to Lo.<sup>130</sup> After receiving the package, the student refused to permit college officials to view its contents, but did explain that he had some weapons-related items as a gift for his father.<sup>131</sup> More importantly, the facts presented in the case indicate that later that same day, college officials received information that Lo did indeed have a gun and that he intended to kill.<sup>132</sup> Shortly thereafter, those on campus heard gunfire, signaling the start of Lo's shooting spree.<sup>133</sup> The facts arguably suggest that college officials might have missed an opportunity to avert this tragic shooting, which resulted in death. But what may be more striking from the facts of this case is the absence of a coherent, systematic response to a safety threat.

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125. 765 N.E.2d 247 (Mass. App. Ct. 2002).

126. *Id.*; see also Anthony DePalma, *Questions Outweigh Answers In Shooting Spree at College*, N.Y. TIMES, Dec. 28, 1992, at A1.

127. *Simon's Rock Early Coll.*, 765 N.E.2d at 254.

128. *Id.* at 251.

129. *Id.* at 249.

130. *Id.*

131. *Id.* at 249–50. Upon entering Lo's room, the residence hall director observed empty black plastic magazines, a black plastic rifle stock, and an empty metallic army surplus cartridge box. *Id.*

132. *Simon's Rock Early Coll.*, 765 N.E.2d at 250.

133. *Id.*

In *Rogers v. Delaware State University*,<sup>134</sup> the court reversed and remanded, in part, a summary judgment decision granted for Delaware State University (DSU) in a lawsuit brought by a student to recover damages for injuries sustained as a result of a targeted attack.<sup>135</sup> The situation began when a female student, fleeing her ex-boyfriend, asked the plaintiff-student to drive her to the police station.<sup>136</sup> Later that same evening, the ex-boyfriend, who suspected that the plaintiff-student and the female student had an intimate relationship, shot the plaintiff in the face.<sup>137</sup> All events relevant to the shooting happened at a motel that the university used as a supplemental student housing facility.<sup>138</sup> The plaintiff applied for on-campus student housing, but due to excessive demand, numerous students, including the plaintiff, were placed in supplemental housing at an off-campus location.<sup>139</sup> The court found that the university maintained no obligation to provide reasonable safety measures at the motel location, even though it housed students.<sup>140</sup>

A lower court granted DSU's motion for summary judgment, finding the attack was neither foreseeable nor preventable, and that deficient security measures did not cause the plaintiff's injuries.<sup>141</sup> The Delaware Superior Court specifically found that the plaintiff's injuries were caused by an unforeseeable targeted attack, and that the university owed the plaintiff no duty to protect him.<sup>142</sup> On appeal, however, the Delaware Supreme Court found material issues of fact existed regarding whether the attack was foreseeable, and the proximate cause of the student shooting.<sup>143</sup> As to what obligation the university had to protect the student from harm, the court stated, "Although DSU has a duty to exercise reasonable care when it undertakes to provide housing off campus for its students, this was not a contractual duty."<sup>144</sup>

*DeSanto v. Youngstown State University*<sup>145</sup> involved a student shooting that occurred off-campus, but that was triggered by a verbal altercation following a dance held at an on-campus pub.<sup>146</sup> Jermaine Hopkins, a student enrolled at Youngstown State University, attended a dance at the pub on

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134. No. 542,2005, 2006 WL 2085460, at \*1 (Del. July 25, 2006).

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Rogers*, 2006 WL 2085460, at \*2.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Rogers*, 2006 WL 2085460, at \*2.

145. No. 99-08777, 2002 WL 31966960, at \*1 (Ohio Ct. Cl. July 31, 2002).

146. *Id.*

January 27, 1996.<sup>147</sup> Sometime after midnight, a fight ensued and campus police officers arrived on the scene, ended the dance, and began to disperse the crowd of over 150 people.<sup>148</sup> As people were leaving the pub, in the presence of campus police officers, a verbal altercation between Hopkins and Timothy Slocum took place in the lobby during which Slocum threatened to kill Hopkins.<sup>149</sup> Although Hopkins had to be physically restrained by a campus police officer, the dispute with Slocum did not escalate, and the campus police officers ended the party.<sup>150</sup> Later that same evening, Eric Moore, a nonstudent, shot Hopkins in relation to the earlier altercation.<sup>151</sup> After being transported to the hospital, Hopkins died.<sup>152</sup>

Hopkins' parents filed a lawsuit, alleging that the state university was negligent because the campus police officers failed to arrest or detain Slocum after he threatened to kill their son.<sup>153</sup> The court, however, found that campus police officers' primary objective at the dance was to disperse the unruly crowd and that the officers' decision to arrest Slocum was discretionary.<sup>154</sup> Also, expert testimony provided at trial indicated that an arrest during the confrontation might have heightened tension and made the situation more dangerous.<sup>155</sup> Thus, the court found the decision not to arrest Slocum for threatening to kill Hopkins reasonable.<sup>156</sup>

Furthermore, the university did not owe Hopkins a duty beyond that owed to the general public.<sup>157</sup> The plaintiffs could not demonstrate that Hopkins had a special relationship with the university or that the university owed Hopkins a special duty distinct and separate from the duty owed to the general public.<sup>158</sup> The plaintiffs' negligence claim also failed because they could not show proximate cause.<sup>159</sup> Eric Moore, a nonstudent, shot and killed Hopkins.<sup>160</sup>

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147. *Id.*

148. *Id.*

149. *Id.*

150. *DeSanto*, 2002 WL 31966960, at \*1.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* at \*2.

155. *DeSanto*, 2002 WL 31966960, at \*2.

156. *Id.*

157. *Id.*

158. *Id.* 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." *Id.* (citing *Sawicki v. Ottawa Hills*, 525 N.E.2d 468, 470 (Ohio 1998)).

159. *Id.* at \*3.

160. *DeSanto*, 2002 WL 31966960, at \*3.

Plaintiffs failed to show how arresting or detaining Slocum would have prevented Moore from shooting Hopkins.<sup>161</sup>

Despite Youngstown State University's successful defense of the plaintiff's negligence and wrongful death claims, the troubling legacy of this case is that within a few hours after a student's life was threatened on-campus, the student was actually shot and killed. While the court's reasoning found the university not liable on the merits, the circumstances presented suggest that the campus police officers may have missed an opportunity to do more—perhaps even something that could have saved Hopkins's life. Could the campus police officers on the scene have spoken to Hopkins about the threat? Should local police have been contacted? Should there have been an assessment of the threat and its likely probability? On the other hand, would any of these actions have been construed as an assumption of an affirmative duty by the state university to act, thereby opening the door to the creation of a special relationship and potentially exposing the university to tort liability? These questions remain unanswered but may provide important insights into the advancement of campus safety at American colleges and universities.

While judicial reasoning applied by courts to threats regarding campus safety no longer embrace the tenets of the *in loco parentis* doctrine, as demonstrated in the 1913 *Gott* decision, it is difficult to find complete sanctuary in the campus safety and security approaches that may escape scrutiny because an institution's actions are protected by the sovereign immunity or particularized tort law arguments absolving a college or university of a legal duty to act. The tragic circumstances examined in cases like *Gragg*, *McEnaney*, and *DeSanto* are likely to be repeated in similar fashion at other campuses across the nation, and university counsel and administrations are likely to use similar arguments to defend their institutions. The campus safety and security dilemma that confronts higher education demands innovative legal and statutory efforts to protect and preserve the college and university community.

#### IV. FEDERAL AND STATE STATUTORY EFFORTS INTENDED TO ADVANCE CAMPUS SAFETY INITIATIVES AT COLLEGES AND UNIVERSITIES

The concern of lawmakers and governmental officials to violence and security problems at colleges and universities has led to legislative action. As will be discussed in this section, many states have considered and passed laws requiring disclosure of crime statistics and data relevant to security threats. Some statutes have even mandated enhanced coordination among first-responders and emergency personnel, including implementation of ICS concepts. Such enactments represent an important component in the campus safety effort that demands careful consideration.

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161. *Id.*

The New Jersey Campus Sexual Assault Victim's Bill of Rights Act<sup>162</sup> was signed into law in December 1994 to provide certain rights for victims of campus-related sexual assaults.<sup>163</sup> The statute accords a series of rights to "victims of sexual assaults that occur on the campus of any public or independent institution of higher education in the State . . ."<sup>164</sup> Among the rights provided by the statute are the right to have allegations of sexual assault treated seriously, the right to be treated with dignity, and the right to be free from pressure from campus personnel to report or refrain from reporting crimes.<sup>165</sup> While these rights as set out by the statute may demonstrate the intent to be sensitive to the concerns of sexual assault victims, they may raise expectations that are difficult to satisfy. For example, while it is admirable to avoid placing pressure on an assault victim, law enforcement officials may need detailed reports and information of the crime to pursue and arrest the perpetrator.

Furthermore, section 2 of the statute indicates that victims have the right "to be free from any suggestion that victims should refrain from reporting crimes in order to avoid unwanted personal publicity."<sup>166</sup> While this provision may accommodate a victim's interest in avoiding public attention, it may interfere with an institution's campus safety objectives.<sup>167</sup> Colleges and universities, acting in conjunction with law enforcement, may need wide discretion when responding to threats to the campus community. Victims or persons with knowledge regarding crimes or offenses may be the only source of information about criminal incidents. Thus, college and university administrators should be given some reasonable level of discretion to investigate and pursue perpetrators of crimes committed against students and others on campus.<sup>168</sup> While the language cited in the New Jersey Campus Sexual Assault Victim's Bill of Rights may be seen as burdensome to campus administrators, it triggers an important discussion regarding the importance of remaining sensitive to the privacy of crime victims on college and university campuses.

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162. The New Jersey Sexual Assault Victim's Bill of Rights Act, N.J. STAT. ANN. §§ 18A:61E-1-6 (West 1999).

163. *Id.*

164. *Id.* § 18A:61E-2.

165. *Id.*

166. *Id.* § 18A:61E-2(d).

167. The New Jersey Sexual Assault Victim's Bill of Rights Act, N.J. STAT. ANN. § 18A:61E-5. Section 5 of the statute states that nothing in the statute should be construed to preclude the reporting of crimes or offenses to law enforcement officers. The language used to articulate victim rights in section 2, however, appears to contradict section 5.

168. *See id.* § 18A:61E-6 (insulating colleges and universities from liability unless there is evidence of reckless, willful, wanton, or grossly negligent conduct).

The Kristin Smart Campus Security Act<sup>169</sup> requires California post-secondary institutions receiving public funding to enter into written agreements with local law enforcement agencies regarding coordination and responsibility for investigating criminal activity on or near campuses.<sup>170</sup> The California statute was passed, at least in part, to clarify the operational responsibilities for investigations of crimes that occur on college and university campuses among campus law enforcement agencies and local law enforcement agencies.<sup>171</sup> The statute was passed after the California Senate held hearings regarding the May 1996 disappearance of Kristin Smart, a student at California Polytechnic State University at San Luis Obispo.<sup>172</sup> Following reports of her disappearance, multiple law enforcement agencies were involved in the investigation.<sup>173</sup> The statute is intended to improve coordination among agencies participating in criminal investigations at higher education institutions.<sup>174</sup> Section 67381 provides that the written agreement entered into by colleges, universities, and law enforcement agencies shall delineate geographical boundaries for each agency's operational responsibility.<sup>175</sup> This approach is similar to the ICS-NIMS rationale, and suggests that California lawmakers recognize the importance of highly coordinated campus security efforts.<sup>176</sup>

The Oklahoma Campus Safety Act<sup>177</sup> addresses concerns relative to the establishment and jurisdictional authority of campus police departments.<sup>178</sup> The Act extends to public and private institutions of higher education, as well as public school districts within Oklahoma and grants the these institutions' governing boards the power to commission campus police officers and revoke such commission for any reason.<sup>179</sup> Furthermore, the Act provides that municipalities and county sheriffs' departments may enter into agreements with campus police departments to recognize and clarify jurisdictional boundaries.<sup>180</sup> While coordination is encouraged in the form of "mutual

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169. CAL. EDUC. CODE § 67381 (West 2003).

170. *Id.*

171. *See* S.B. 1729, 1998 Leg., Reg. Sess. (Cal. 1998).

172. *Id.*; *see also* *Decade Passes; Pain Lingers*, RECORDNET, May 25, 2006, <http://www.recordnet.com/apps/pbcs.dll/article?AID=/20060525/NEWS01/605250335/1001>.

173. *Id.*

174. Cal. S.B. 1729.

175. *Id.* It is important to point out that staff comments regarding the state senate bill that eventually passed as the Kristin Smart Campus Safety Act of 1998 indicated that it was unclear what problem the bill was trying to correct and whether the bill would have the intended effect. *Id.* The staff comments also stated that some campuses shared boundaries with more than one local law enforcement agency and might have to establish several written agreements. *Id.*

176. *See supra* Part II.

177. OKLA. STAT. ANN. tit. 74, § 360.15 (West 2003).

178. *Id.*

179. *Id.* § 360.18(A)–(B).

180. *Id.* § 360.20.

assistance agreements,” the Act does not seek to create an agent-principal relationship between the campus police officer and any municipality or county.<sup>181</sup> Thus, while the Act’s provisions may be viewed as narrow or limited in scope, overall, the Act acknowledges the need for coordinated law enforcement efforts to effectively respond to campus security threats.

Although originally passed into law in 1994, the State of Illinois Campus Security Act<sup>182</sup> has undergone important modifications resulting in new requirements for state colleges and universities.<sup>183</sup> While section 10 of the Act provides for the establishment of a community task force to coordinate crime prevention activities with community leaders and service providers, the provision does not address concerns that might be raised among colleges and universities with particularity.<sup>184</sup> In 2008, the legislature amended the Campus Security Act and effectively re-named it the Campus Security Enhancement Act of 2008, adding section 20 to the Act.<sup>185</sup> Section 20, subtitled “campus security enhancement,” directly responds to concerns regarding higher education institutions.<sup>186</sup> Accordingly, section 20 requires each institution of higher education in the state to develop a NIMS, “a multi-jurisdictional campus violence prevention plan.”<sup>187</sup> Implementation of the plan will include training and exercises, the formation of a campus violence prevention committee, and a campus threat assessment team.<sup>188</sup> In addition, county and regional officials with the appropriate emergency management agencies will also be required to provide assistance throughout the planning and training process.<sup>189</sup> Thus, section 20 of the Illinois Campus Security Act, which

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181. *Id.*

182. 110 ILL. COMP. STAT. ANN. 12/1 (West 2006).

183. *Id.*

184. *Id.* 12/10.

185. *Id.* 12/20.

186. *Id.* 12/20.

187. 110 ILL. COMP. STAT. ANN. 12/20 (West 2006).

188. *Id.*

189. *Id.* Specifically, county and regional officials, along with the appropriate emergency management agencies, shall assist in the planning and training involved with developing:

A National Incident Management System-compliant, all-hazards, emergency response plan in partnership with the institution’s county or major municipal emergency management official, report the plan to this official, and have training and exercises for the plan annually at a minimum; and (2) develop an inter-disciplinary and multi-jurisdictional campus violence prevention plan, including coordination of and communication between all available campus and local mental health and first response resources, in partnership with the institution’s county or major municipal emergency management official, report the plan to this official, and have training and exercises for the plan annually at a minimum. The campus violence prevention plan shall include the development and implementation of a campus violence prevention committee and campus threat assistance team.

*Id.*

became effective January 1, 2009, seeks to develop a fully integrated campus security approach.<sup>190</sup>

Passage of the Act came in the aftermath of the tragic shooting that occurred in February 2008 at the Northern Illinois University campus.<sup>191</sup> Following passage of the Campus Security Enhancement Act, the University's President John Peters said:

[W]e learned all too well on February 14th, it is necessary for our colleges and universities to have emergency operations plans in place . . . . I commend the Illinois General Assembly and the Governor for recognizing, through the passage of this Act, the importance of adequate campus security procedures and responses to protect our students, faculty and staff.<sup>192</sup>

The Illinois law represents a step forward for campus safety at colleges and universities, but will require continual political and community support to ensure effective implementation of the law's ambitious provisions.

In Kentucky, colleges and universities must adhere to the Campus Safety and Security Act,<sup>193</sup> also known as the Michael Minger Act, after Michael Minger, a student killed in a residence hall fire on the Murray State University campus.<sup>194</sup> The governor signed the Act into law in March 2000.<sup>195</sup> It grants the fire marshal substantial jurisdictional authority over property at public and private institutions of higher education for the administration and enforcement of laws designed to protect the public from fire loss.<sup>196</sup> The Minger Act incorporates concepts consistent with the Incident Command System by consolidating decision-making authority with the fire marshal regarding threats of fire or arson that may occur on college and university campuses.<sup>197</sup> It is important to note that the Kentucky statute applies to the entire campus, including residential facilities operated by any recognized student organization.<sup>198</sup> This would include facilities operated by student

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190. *Id.* 12/99.

191. Press Release, Office of Gov. Rod R. Blagojevich, Governor Blagojevich Signs Campus Security Enhancement Act (Aug. 22, 2008), available at [http://www.ibhe.org/FridayMemo/misc/080822\\_SB2691.pdf](http://www.ibhe.org/FridayMemo/misc/080822_SB2691.pdf).

192. *Id.* (quoting Northern Illinois University President John Peters).

193. KY. REV. STAT. ANN. § 164.948 (LexisNexis 2006).

194. *Disclosure Law Working, UK Official Says*, THE CINCINNATI-KENTUCKY POST, Sept. 10, 2002, at 3K.

195. *Id.*

196. KY. REV. STAT. ANN. § 164.948.

197. See *Disclosure Law Working, supra* note 194 (noting that the goal of the Minger Act requires decision-making to occur with the fire marshal, which is consistent with ICS goals of coordination between strategic and tactical operations).

198. KY. REV. STAT. ANN. § 164.948.

organizations such as fraternities and sororities that have occasionally been involved with disruptive campus activity.<sup>199</sup>

In addition, the Act established a crime reporting standard that requires Kentucky colleges and universities to maintain a crime log, and report crimes and security threats to the campus community.<sup>200</sup> The statute also requires prompt reporting of criminal incidents, such that disclosure to the public would be available within twenty-four hours of the first report.<sup>201</sup> The release of information, however, may be withheld where there is clear and convincing evidence that releasing it may cause a suspect to flee or evade detection, or result in the destruction of evidence.<sup>202</sup> Thus, the crime reporting provisions of the statute are designed to avoid interference with the pursuit and capture of criminal suspects, while urging college and university administrators to disseminate information about criminal activity as soon as practicable.<sup>203</sup>

The statute's proactive emphasis is further embraced by the requirement that postsecondary education institutions design programs to inform students and employees about campus safety and security procedures.<sup>204</sup> Beyond the Act's crime report provisions, it also directs colleges and universities to prepare and equip their students and employees on how to prevent campus security breaches.<sup>205</sup> The statute demands that administrators at postsecondary education institutions develop an informed and knowledgeable campus community. Through information sharing and training, perhaps fewer persons will be subject to harm or criminal wrongdoing.

In 1999, New York Governor George E. Pataki signed into law the state's Campus Safety Act,<sup>206</sup> which was dedicated to the memory of Suzanne Lyall, a student at State University at New York–Albany, who mysteriously disappeared from campus and was never seen again.<sup>207</sup> The Act requires colleges and universities to promptly investigate violent felonies on college campuses and file reports of missing students.<sup>208</sup> An additional provision requires colleges and universities to disclose crime statistics in campus

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199. See generally Byron L. Leflore, Jr., *Alcohol and Hazing Risks in College Fraternities: Re-evaluating Vicarious Liability and Custodial Liability of National Fraternities*, 7 REV. LITIG. 191, 192 (1988) (discussing examples of campus interaction with incidents involving fraternities and sororities).

200. KY. REV. STAT. ANN. § 164.9481(1) (LexisNexis 2006).

201. *Id.* § 164.9481(1)(b).

202. *Id.* § 164.9481(1)(b)(1).

203. *Id.* § 164.9481(2)(c) (providing that institutions should use computer networks and post crime reports in residential facilities and use other campus publications and media outlets to share information regarding threats to campus safety).

204. *Id.* § 164.9485(2).

205. KY. REV. STAT. ANN. § 164.9485(2).

206. N.Y. EDUC. LAW §§ 6430–6435 (McKinney 2009).

207. Elsa Brenner, *Campus Safety*, N.Y. TIMES, Apr. 18, 1999, at WE5.

208. N.Y. EDUC. LAW § 6434.

catalogs and make clear the scope of authority extended to private college security officers appointed to prevent criminal activity on campus.<sup>209</sup> More importantly, § 6434 requires colleges and universities to “adopt and implement” plans for the investigation of violent felony offenses on college campuses.<sup>210</sup> While the Act does not specify what is required for each institution’s plan, it does state that the plan should coordinate investigation and reporting efforts among law enforcement agencies.<sup>211</sup> The Act’s emphasis on coordination is essential to maintaining campus safety and security and, like the other statutes, consistent with ICS concepts.

Finally, it is important to note that Congress recently enacted new regulatory changes to federal law pursuant to the reauthorization of the Higher Education Act of 1965.<sup>212</sup> On August 14, 2008, President Bush signed the Higher Education Opportunity Act (“HEOA” or the “Act”) into law, imposing new reporting and disclosure obligations on institutions that participate in Title IV federal student financial aid programs.<sup>213</sup> More specifically, the Act places new requirements on colleges and universities, many in response to tragic campus shooting incidents that have resulted in the deaths of students, faculty, and staff.<sup>214</sup> Among other provisions, the HEOA amends the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (“Clery Act”)<sup>215</sup> by requiring that an institution annually issue a statement of current policies regarding immediate emergency response and evacuation procedures.<sup>216</sup> The policy statement must articulate procedures that will be used to notify the campus community upon confirmation of a significant emergency or dangerous situation involving an immediate threat to the health or safety of students or staff occurring on the campus.<sup>217</sup>

The HEOA may prompt college and university administrators to review or even reconsider whether campus emergency response efforts are sufficiently coordinated for maximum effect. Where shortcomings are found, strategic modifications consistent with ICS concepts should be considered for implementation.

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209. *Id.* § 6433.

210. *Id.* § 6434.

211. *Id.*

212. Pub. L. No. 110-315, 122 Stat. 3078 (2008).

213. *Id.* § 152.

214. *Id.* § 153(a)(2).

215. 20 U.S.C. § 1092(f) (2006).

216. Pub. L. No. 110-135, § 488(e), 122 Stat. 3297.

217. *Id.*

## V. THE ROLE OF FACULTY AND OTHERS IN CAMPUS SAFETY

In 1966, the American Association of University Professors, the American Council on Education (“ACE”), and the Association of Governing Boards of Universities and Colleges jointly formulated and issued a “Statement on Government of Colleges and Universities,” which stated, in part, the following:

The faculty has primary responsibility for such . . . subject 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 element, and the policies of other groups, bodies, and agencies having jurisdiction over the institution may set limits to realization of faculty advice.<sup>218</sup>

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.<sup>219</sup> 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.<sup>220</sup> Governance, or shared governance, is among the institutional-based service activities in which both faculty and administrators participate.<sup>221</sup>

In addition to contributing to the institution’s governance, faculty can and should contribute to the institution’s policy-making process because the faculty play a central role at a college or university: “In a very real sense, the faculty 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.”<sup>222</sup> 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. Colleges and universities should prepare faculty, as well as students and staff, 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

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218. AMERICAN ASS’N OF UNIVERSITY PROFESSORS, STATEMENT ON GOVERNMENT OF COLLEGES AND UNIVERSITIES 135 (10th ed. 2006).

219. Adrianna Kezar et al., *Challenging Stereotypes that Interfere with Effective Governance*, THOUGHT & ACTION: NEA HIGHER EDUC. J., at 121, 121 (2006).

220. *Id.*

221. *Id.*

222. CLARK KERR, THE USES OF THE UNIVERSITY 75 (5th ed. 2001).

presentations (i.e., residential life programming; orientation sessions for students and employees); Internet-based delivery; and documents.<sup>223</sup>

The challenge for legislators, legal counsel, and higher education administrators lies not only with campus safety concerns related to law and policy, but also implementation of a campus safety and security paradigm among the diverse members of the higher education community.

## VI. RISK MANAGEMENT CONSIDERATIONS

The importance of risk management should not be ignored or underestimated as colleges and universities work to maintain a safe and secure campus environment with the capability to effectively respond to emergency situations. A basic responsibility for any public or private sector entity involves assessing the nature and types of risks that confront an organization and threaten to interfere with an organization's mission and objectives.<sup>224</sup> The assessment of probable risk and corresponding exposure to catastrophic loss requires that prudent decision-makers consider action to shift risk, spread risk, or reduce risk.<sup>225</sup> While these risk management methods can result in certain efficiencies, higher education institutions often cannot avoid certain risks via a negotiated agreement or by purchasing insurance.<sup>226</sup> The wide array of activities and programs that are commonplace at most postsecondary educational institutions are vast and diverse.<sup>227</sup> Higher education institutions manage instructional facilities, laboratories, student residential housing, apartment complexes, and recreational facilities, provide food services, and a host of other operations.<sup>228</sup> Students, faculty, and support personnel rely on the stability and safety of the higher education environment to pursue their academic endeavors and extra-curricular activities.<sup>229</sup> Consequently, higher education administrators are compelled to utilize various management strategies, such as risk management, to mitigate sources of risk exposure.<sup>230</sup>

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223. RAYMOND H. THROWER ET AL., INT'L ASS'N OF CAMPUS LAW ENFORCEMENT ADMINISTRATORS, OVERVIEW OF THE VIRGINIA TECH TRAGEDY AND IMPLICATIONS FOR CAMPUS SAFETY: THE IACLEA BLUEPRINT FOR SAFER CAMPUSES 7 (2008).

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

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

226. *Id.*

227. See Peter H. Ruger, *The Practice and Profession of Higher Education Law*, 27 STETSON L. REV. 175, 179–80 (1997).

228. Robert C. Cloud, *Legal Issues in the Community College*, 125 NEW DIRECTIONS FOR COMMUNITY COLLEGES, Spring 2004, at 1, 1.

229. *Id.*

230. PETER L. BERNSTEIN, AGAINST THE GODS: THE REMARKABLE STORY OF RISK 197 (1996).

Conceptually, risk management does not disdain error, loss, or the potential for catastrophic events, but rather seeks to understand the probability of error, loss, or unintended consequences and transform and minimize the likelihood of such events.<sup>231</sup> Risk encompasses the concepts of uncertainty, probability, and consequences or potential impact.<sup>232</sup> The risk management process is dedicated to a prospective effort intended to minimize or prevent future events that may lead to harmful occurrences.<sup>233</sup> Further, risk management is an ongoing practice integrated into the structure of an organization for the purpose of anticipating preventable adverse events. More importantly, risk management elements complement many facets found in the Incident Command System.<sup>234</sup>

With respect to campus safety and security, risk management provides higher education administrators with a viable construct to evaluate, coordinate, and assess the various efforts that are advanced to reduce the consequences of poor decision-making and manage risk within a zone of tolerance.<sup>235</sup> The analysis by higher education administrators, therefore, must consider the probability of undesirable events occurring among students and faculty, and the severity of such events.

The initial risk management phase focuses on development of anticipatory mechanisms that will allow organizational resources to be used to minimize or confine undesirable occurrences. This phase should result in the production of plans that outline procedures to assure the continuous implementation of risk management initiatives. The plans also describe goals, operational and technical statements, and organizational structure that would assume responsibility for operational integration of risk management concepts. For higher education institutions, integrating risk management concepts into an institution's management processes remains critical because, like ICS principles, it provides a viable avenue for colleges and universities to assess and review potential threats and develop responses that improve campus safety and emergency preparedness.

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231. Oren R. Griffin et al., *Systematizing Information for Public Sector Risk Management: A Perspective from Higher Education*, EDUC. RES. Q., Dec. 2000, at 21, 22.

232. *Id.* at 24.

233. *Id.* at 22.

234. See FEDERAL EMERGENCY MANAGEMENT AGENCY, NIMS BASIC: THE INCIDENT COMMAND SYSTEM. No. 501-8 (2006) (discussing the Incident Command System's focus on coordination of strategic and tactical operations, planning, logistics and human resources, and how these objectives are consistent with the aims of risk management); see also Moss, *supra* note 225, at 555-57.

235. See E. FRANK HARRISON, *THE MANAGERIAL DECISION-MAKING PROCESS* 199 (1981); see also W.H. Snider, *Risk Management: A Retrospective View*, RISK MGMT., Apr. 1991, at 47, 48-49.

Next, the risk management process should focus on risk assessment and identification. This may include the creation of a risk assessment team comprised of personnel with the necessary expertise to discover, analyze, and communicate threats to organizational stability.<sup>236</sup> Risk identification depends on the systematic collection of salient information.<sup>237</sup> For higher education, emphasis should be placed on the discovery of information regarding risks associated with particular academic programs, administrative initiatives, and relevant off-campus enterprises. Once risks are identified through the assessment phase, strategies and methods should be selected to achieve the goals of risk reduction and increased stability.

Risk assessment as a risk management tool seeks to critically examine programmatic and organizational threats. Two methods may be applied to determine the nature and extent of risk exposure and threats.<sup>238</sup> First, remedial investigations can be used to collect information about risk exposure, such as its origin, configuration, and likely severity.<sup>239</sup> A second method used to assess risk exposure is prospective: feasibility studies that evaluate possible sources of risk and cost-effective ways to minimize risk exposure.<sup>240</sup> The importance of understanding the nature and extent of a particular exposure and developing cost-effective solutions should be a concern for those aspiring to manage risk effectively and efficiently.<sup>241</sup> Furthermore, risk assessment should not be viewed as a static exercise, but rather an on-going process done on a regular basis, involving the accumulation of information critically related to many organizational activities.<sup>242</sup>

While the risk analysis phase may not be wholly independent from the risk assessment phase, risk analysis focuses on two tasks.<sup>243</sup> First, like risk assessment, risk analysis should include a probative review of those variables that may expose the organization to liability or harm.<sup>244</sup> Next, the analysis phase of risk management evaluates and determines the feasibility of proposed

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236. See Kathleen C. Bailey, *Profiling an Effective Political Risk Assessment Team*, RISK MGMT., Feb. 1983, at 34, 37 (describing the importance of an experienced, expert risk management team in the managing political risk).

237. *Id.*

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

239. *Id.*

240. See Susan L. Santos, *Risk Assessment: A Tool for Risk Management*, ENVTL. SCI. TECH., Mar. 1987, at 239, 240 (discussing the importance of discovering the source and extent of environmental hazards in assessing environmental risks).

241. *Id.* While some risk assessment concepts originate from the scientific and industrial technology industries, the logic and rationale considered are applicable in diverse settings. *Id.*

242. John F. Adams & John W. Hall, *Legal Liabilities in Higher Education: Their Scope and Management*, 3 J.C. & U.L. 215, 217 (1976).

243. Bendyna, *supra* note 238, at 66 (describing a two-step risk assessment process).

244. *Id.*

remedies that may be utilized to reduce risk exposure.<sup>245</sup> The purpose of this analytical phase is to generate information on a range of contingencies available to avoid or to mitigate those adverse consequences identified as threats to the organization or institution.<sup>246</sup> Risk analysis should yield risk control strategies or risk treatment strategies that decision-makers may implement to manage risk. These strategies may include passive avoidance: a conscious decision not to engage in certain risky activities. Other risk treatment strategies include the assumption of certain risks while increasing the organization's capacity to respond to negative outcomes, and transferring or shifting risk to other entities through subcontracting efforts or insurance acquisition from third parties. While strategies that may be used to deal with risk are unlimited, any approach chosen represents an affirmative effort to prevent liability and/or harm to the organization rather than allowing an organization to drift haphazardly.

The stakes are high for college and university administrators as well as state and federal lawmakers. 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 systems and risk management concepts that can be combined to advance security efforts at educational institutions? Arguably, yes. While the mission of colleges and universities remains teaching, research, and public service, the reality is that campus safety and security must become an integrated responsibility of the institution.

## VII. CONCLUSION: MANAGING THE ACADEMIC ENTERPRISE GOING FORWARD

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 distracted or compromised by campus security threats is unacceptable. 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, if any, and conform to incident command system concepts that allow for early detection and response to emergency situations; (2) development of comprehensive recurring campus outreach efforts that teach faculty, staff, and students about potential threats, crime statistics, and emergency response protocol; and (3) passage of state and federal legislation that clarifies jurisdictional authority and grants law

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245. *Id.* at 66–67.

246. *Id.* at 67.

enforcement personnel the discretionary power to act promptly in emergency situations, but that also allows penalties and corrective action to be taken where discretionary power is abused by law enforcement personnel. The objective should be to develop a legal and managerial paradigm that permits colleges and universities to protect its campuses against the modern threats without sacrificing the character of these treasured institutions of higher education.