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SUICIDE ON CAMPUS: THE APPROPRIATE LEGAL RESPONSIBILITY OF COLLEGE PERSONNEL

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Author's note: The recent tragic events at Virginia Tech and Northern Illinois University[1] have triggered a new round of discussion about students with mental health problems on campus and how colleges and universities either may or should respond to the recurring issues raised by the presence of such students.[2] While the violence wreaked by Seung-Hui Cho on April 16, 2007, and Stephen P. Kazmierczak on February 14, 2008, could doubtlessly not have been predicted, there are vocal forces declaring that institutions of higher learning should have the power to notify parents when a student appears to campus personnel to pose a real danger to self or others. The question typically arises when a student presents an imminent danger of self-harm.[3] This Article deals with that

1. *See, e.g.*, John M. Broder, *32 Shot Dead in Virginia; Worst U.S. Gun Rampage*, N.Y. TIMES, Apr. 17, 2007, at A1; Jeff Coen & Monique Garcia, *Police Piecing Together Gunman's Activities, Still Lack Motive*, CHI. TRIB., Feb. 16, 2008, at C19.

2. *See, e.g.*, Eleanor Chute, *Colleges to Discuss How to Help Mentally Ill Students*, PITT. POST-GAZETTE, Apr. 23, 2007, at A1; Tamar Lewin, *Laws Limit Colleges' Options When a Student Is Mentally Ill*, N.Y. TIMES, Apr. 19, 2007, at A1; Editorial, *Parents' Right to Know*, STAR-LEDGER (Newark, N.J.), Apr. 19, 2007, at 18; Chuck Plunkett, *Colleges' Policies Matter of Life, Death: The Legal and Moral Paths Are Anything but Clear When Balancing Concerns of Safety, Privacy and Mental Health*, DENV. POST, Apr. 22, 2007, at A-1; Michael P. Riccards, *Colleges Confront Privacy Laws in Handling Troubled Students*, ASBURY PARK PRESS (Neptune, N.J.), May 15, 2007, at Opinion; Editorial, *A Shooter's Signals: When Is a Warning Sign a Threat?*, WASH. POST, Apr. 19, 2007, at A26; Stephen Joel Trachtenberg, Op-Ed., *Our Worst Nightmare*, WASH. POST, Apr. 19, 2007, at A27; Alisa Ulferts, *What More Can Be Done?*, ST. PETERSBURG TIMES (St. Petersburg, Fla.), Apr. 22, 2007, at 1A.

3. *See, e.g.*, Andrea Jones, *Counseling a Fine Line for Colleges: Schools Such as Emory Face Red Tape, Legal Landmines When Trying to Help Students Suffering from Mental Illness*, ATLANTA J.-CONST., Apr. 22, 2007, at 1A; Susan Kinzie, *Colleges Feel Caught in Shifting*

topic and proposes a rule of law that would impose a duty on college and university administrators (including faculty) to take reasonable steps to protect a student from self-harm when the administrator has actual knowledge that the student is seriously suicidal. Such steps would include, but not be limited to, notifying the student's parent/s or guardian of the danger. Such a rule might not have prevented the Virginia Tech or Northern Illinois killings; on the other hand, it might save the lives of many deeply troubled young people, and it could even stop a suicidal student who was determined to "take others with him"[4] as he played out his grim purpose.[5]

I. INTRODUCTION

In 2002, the academic world,[6] as well as much of the nation, was shocked[7] by the cover story of the *New York Times Magazine* of April

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Landscape: Privacy, Disability Laws Restrict Actions, WASH. POST, Apr. 19, 2007, at A11; Donald Rosen, Letter to the Editor, *Screening Students for Mental Health*, CHRON. HIGHER EDUC. (Wash., D.C.), May 25, 2007, at B13; Robert B. Smith & Dana L. Fleming, *Student Suicide and Colleges' Liability*, CHRON. HIGHER EDUC. (Wash., D.C.), Apr. 20, 2007, at B24; Paula Wasley, *Group Sets Guidelines on Troubled Students*, CHRON. HIGHER EDUC. (Wash., D.C.), May 25, 2007, at A47 (noting "a list of best practices . . . for colleges and universities in dealing with students with mental-health problems," released the week before by the Bazelon Center for Mental Health Law); Amanda Schaffer, *Stopping Suicide 101: The Dilemma of College Students Who Threaten to Kill Themselves*, SLATE, May 26, 2006, http://www.slate.com/id/2142373. These articles do not reference the events at Virginia Tech, but they did follow very shortly after that incident took place.

4. Julie Jennings, Ph.D., Public Speech on "Suicide" at the Rockbridge County Regional Library (May 8, 2007) (highly regarded local therapist posited that the behavior of both Seung-Hui Cho and the Columbine killers manifested a deeply suicidal nature in which the death wish included a desire to "take others with them"). For support for this thesis, see, e.g., GARY PAVELA, QUESTIONS AND ANSWERS ON COLLEGE STUDENT SUICIDE: A LAW AND POLICY PERSPECTIVE 139 (2006) (quoting the "suicidal rage" Columbine killer Eric Harris expressed on his AOL website: "I don't care if I live or die in the shoot-out. All I want to do is to kill and injure as many of you . . . as I can . . . ."); Rex Bowman & Bill McKelway, *Panel Gets Tech Killer's Records*, RICHMOND TIMES DISPATCH (Richmond, Va.), June 15, 2007, at A-1 (referring to Cho's initial contact with Virginia mental-health system on December 13, 2006, after a roommate reported that Cho had become suicidal).

5. *See* Bowman & McKelway, *supra* note 4; *see also A Shooter's Signals*, *supra* note 2 (noting that university police at Virginia Tech obtained a detention order from a local magistrate in December 2005 against Seung-Hui Cho on the grounds that he might have been suicidal, after which "he was briefly admitted to a mental health center").

6. *E.g.*, Joel Epstein, *Breaking the Code of Silence: Bystanders to Campus Violence and the Law of College and University Safety*, 32 STETSON L. REV. 91, 107 (2002); Peter Lake & Nancy Tribbensee, *The Emerging Crisis of College Student Suicide: Law and Policy Responses to Serious Forms of Self-Inflicted Injury*, 32 STETSON L. REV. 125, 125 n.3 (2002); Peter F. Lake, *Private Law Continues to Come to Campus: Rights and Responsibilities Revisited*, 31 J.C. & U.L. 621, 634 n.135 (2005).

7. Elizabeth Shin's suicide drew a great deal of attention in the popular press. *See, e.g.*,

28, which asked, "Who Was Responsible for Elizabeth Shin?" and went on to detail the Massachusetts Institute of Technology ("MIT") sophomore's suicide in April 2000 by self-immolation in her dormitory room, just one day after her family had dropped in to celebrate her nineteenth birthday.[8] The night before that visit, Elizabeth had attempted to stick a knife in her chest, but lost her nerve at the last minute. Her friends, the mental health center, and several MIT administrators[9] all knew of this incident. Other college officials were aware of prior suicidal threats and attempts.[10] Later the same night as the impromptu birthday party, Elizabeth told a friend she was going to commit suicide and asked him to erase her computer files; a campus mental health professional and the dorm master decided to let her sleep off the non-lethal mixture of alcohol and Tylenol. The next night, she succeeded in her aim, by a means more gruesome than anyone had imagined.[11]

David Abel & John Ellement, *Student Burned in Reported Suicide Attempt at MIT*, BOSTON GLOBE, Apr. 12, 2000, at B4; Eric Convey & Doug Hanchett, *MIT Student, 19, Dies from Burns Suffered in Dormitory Fire*, BOSTON HERALD, Apr. 15, 2000, at 6; Kevin Coughlin, *Probe Finds MIT Student Killed Herself*, STAR-LEDGER (Newark, N.J.), May 31, 2000, at 23; Julie Flaherty, *Suit on M.I.T. Suicide*, N.Y. TIMES, Jan. 29, 2002, at A18; Patrick Healy, *$27M Suit over Suicide at MIT Hits Privacy Rules*, BOSTON GLOBE, Jan. 29, 2002, at A1; Rochelle Sharpe, *Parents' Fury at MIT: A Study of Mental Illness on Campus*, USA TODAY, Jan. 25, 2002, at 1A; *Good Morning America: Interview with Kisuk Shin and Cho Hyun Shin, Elizabeth Shin's Parents, and David DeLuca, Attorney* (ABC television broadcast Jan. 28, 2002) (discussing Elizabeth's suicide and MIT's responsibility in it). Additionally, whenever I have mentioned Elizabeth Shin in class, invariably, some of my students are aware of the incident.

8. Deborah Sontag, *Who Was Responsible for Elizabeth Shin?* N.Y. TIMES, Apr. 28, 2002 (Magazine), at 56.

9. These included Associate Dean Arnold Henderson and Nina Davis-Millis, the housemaster at Random Hall, where Elizabeth lived. Shin v. MIT, No. 02-0403, 2005 WL 1869101, at *4–5 (Mass. Super. June 27, 2005) (order granting partial summary judgment); *see* Complaint ¶ 33, Shin v. MIT, 2002 WL 34214754 (Mass. Super. Jan. 28, 2002) (No. 02-0403).

10. During the second semester of her freshman year, she overdosed on fifteen Tylenol with codeine tablets and was rushed to the hospital by the campus police. During the first semester of her sophomore year, she met with a dean and showed him a half dozen self-inflicted cut marks on her arm. She later sent an email message to a professor, saying that she bought some sleeping pills, which were discovered by a friend before Elizabeth could take any. During the next semester her dorm master rushed her to the health center after she was reportedly upset and in possession of a knife. On another occasion she confessed to a school doctor that she had thoughts about hanging herself or bleeding to death. Later she told a dean that "she thinks she may not live long enough [to worry about long-term plans], that she might just end it one day." In April, the campus police took her to the health center after her friends reported that she wanted to stick a knife in her chest. The night before Elizabeth died, a friend reported to the dorm master that Elizabeth said she was preparing to kill herself with alcohol and Tylenol. Sontag, *supra* note 8, at 94, 139.

11. *Id.* at 139.

In the wake of Elizabeth's death, her parents—seemingly, her only acquaintances who were not aware of her fragile state—sued the school for its failure to notify them of their daughter's precarious mental condition and its failure to take effective steps to prevent her tragic death.[12] Named defendants included not only the counselors involved in Elizabeth's treatment (basically, medical malpractice claims) but also MIT itself, as well as two of its non-clinician administrators who had dealt directly with Elizabeth. To the surprise and great consternation of much of academia,[13] on June 27, 2005, Christine M. McEvoy, Justice of the Superior Court for Middlesex County, Massachusetts, while granting MIT's motion for summary judgment, denied similar motions filed on behalf of Dean Arnold Henderson, an associate dean in the office of the Dean for Student Life, and Nina Davis-Millis, a librarian at MIT and housemaster of Elizabeth's dormitory.[14] Trial was set for May 1, 2006.[15]

Given the Shins' unusual victory to that point, it was particularly surprising that on April 3, 2006, MIT and the Shin family jointly announced a resolution of the lawsuit, involving a settlement of an undisclosed sum. In addition to withdrawing their claims against the MIT administrators, the Shins agreed to drop their action against four MIT psychiatrists. Most surprising, however, was Mr. Shin's statement that "[w]e . . . have come to understand that our daughter's death was likely a tragic accident."[16] Gary Pavela, a University of Maryland

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12. *See* Complaint, *Shin v. MIT*, *supra* note 9.

13. Interested parties have variously described the ruling's "*in terrorem* effect on colleges across the nation" as having "turn[ed] settled tort law on its head," Brief of Amici Curiae Brown University et al. in Support of Petition for Relief Under G.L. ch. 231, § 118 (First Paragraph) by MIT Administrators Arnold Henderson and Nina Davis-Millis at 4, Shin v. MIT, No. 2006-J-0099 (Mass. Super. Feb. 24, 2006) [hereinafter Nat'l Colleges Brief]; that the effect is "already being felt" and "adversely affecting" administrator performance, Memorandum of Amici Curiae Amherst College et al. in Support of the Petition for Relief Under G.L. ch. 231, § 118 (First Paragraph) by MIT Administrators Arnold Henderson and Nina Davis-Millis at 3, Shin v. MIT, No. 2006-J-0099 (Mass. Super. Feb. 24, 2006) [hereinafter Mass. Colleges Brief]; and as engendering "massive and unpredictable liability," Motion of American Council on Education et al. for Leave to File Brief Amici Curiae in Support of MIT Administrators Arnold Henderson and Nina Davis-Millis' Petition for Relief Under G.L ch. 231, § 118 (First Paragraph) at 4, Shin v. MIT, No. 2006-J-0099 (Mass. Super. Feb. 24, 2006) [hereinafter Ass'n Motion].

14. *Shin*, 2005 WL 1869101, at *1 (order granting partial summary judgment in favor of MIT itself).

15. Opposition to the Motions of Nominal Amici Curiae for Leave to File Briefs and/or Motion to Strike Briefs of Non-Parties at 2, Shin v. MIT, No. 2006-J-0099 (Mass. App. Ct. Mar. 1, 2006) [hereinafter Shin Brief].

16. Press Release, Massachusetts Institute of Technology, Agreement Reached by MIT and the Shin Family (Apr. 3, 2006) (on file with MIT News Office), *available at*

professor and noted authority on higher education law, particularly as it pertains to student suicides,[17] spoke for many of us interested bystanders: "'I am surprised to see a suggestion that the Elizabeth Shin "suicide" was an accident. That muddies the waters . . . . It also means the lower court ruling on summary judgment will be cited rarely, if at all.'"[18]

With respect to Professor Pavela's last prediction, I beg to disagree. We may never know for sure whether the death of Elizabeth Shin was a result of her intentional action or "a tragic accident," but writers referring to the Shin case since the April 2006 press release continue to assume it was the former.[19] Moreover, the legal issues raised in the case, predicated on the presumption of suicide, appear likely to recur, and Judge McEvoy's opinion could hardly be ignored.[20] A similar case involving a student at Ferrum College in Franklin County, Virginia,[21] was settled after a federal judge found a basis for permitting the action to go forward. In a statement, the school "acknowledged that 'errors in judgment and communication by school personnel' were partly responsible for the suicide."[22] Said Federal District Judge Jackson Kiser, "it is true that colleges are not insurers of the safety of their students. . . . Nonetheless, '[p]arents, students, and the general community still have a reasonable expectation, fostered in part by colleges themselves, that reasonable care will be exercised to protect resident students from

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http://web.mit.edu/newsoffice/2006/lawsuit-statement.html; Marcella Bombardieri, *Parents Strike Settlement with MIT in Death of Daughter*, BOSTON GLOBE, Apr. 4, 2006, at B1; *see also* Jonathan D. Glater, *Settlement Reached in Student's Death*, N.Y. TIMES, Apr. 4, 2006, at A20.

17. *See infra* notes 175–78 and accompanying text (discussing Professor Pavela's ideas in greater detail).

18. Caryn Meyers Fliegler, *A Disquieting Accident at MIT*, U. BUS., May 2006, at 13 (quoting Gary Pavela).

19. *See, e.g.*, Elizabeth Bernstein, *After a Suicide, Privacy on Trial*, WALL ST. J., Mar. 24, 2007, at A1; Chute, *supra* note 2; Kinzie, *supra* note 3; *Parents' Right to Know*, *supra* note 2; Plunkett, *supra* note 2; Schaffer, *supra* note 3; Smith & Fleming, *supra* note 3; Ulferts, *supra* note 2; Sarah Elizabeth Richards, *The Suicide Test*, SALON, Mar. 9, 2007, http://salon.com/mwt/feature/2007/03/09/suicide/index.html.

20. For this reason, and because the relevant documents in *Shin v. MIT* presume suicide, the remainder of this paper will, for purposes of the argument, assume likewise.

21. Schieszler v. Ferrum Coll., 236 F. Supp. 2d 602, 609 (W.D. Va. 2002) (holding that a special relationship existed between the student and the college because alleged facts showed that there was "'an imminent probability' that [the student] would try to hurt himself, and that the defendants had notice of this specific harm").

22. Jen McCaffery, *Ferrum College Admits Fault in Student Suicide*, ROANOKE TIMES (Roanoke, Va.), July 25, 2003, at A1.

foreseeable harm.'"[23] Judge Kiser based his ruling on his finding of a "special relationship" between the suicidal student and the school, established in Restatement (Second) of Torts section 314A;[24] Judge McEvoy based her summary judgment denial on the grounds that such a "special relationship" *could* exist between Elizabeth and the non-clinician administrators who, knowing of Elizabeth's imminent suicidal threats, failed to take steps to protect her from self-harm.[25]

The situation of the young people in these cases was not unique. Suicide among college students, the second leading cause of death in this group, has risen dramatically in recent decades.[26] This Article sides with the judges cited above, and takes the position that, where college or university personnel are aware that a student has made serious suicidal threats or attempts, they have a duty to take reasonable steps to protect the student's safety. Where emergent circumstances appear to exist—i.e., where the threat would appear to the reasonable non-clinician to be serious or even imminent—that duty extends at least to the notification of parents or other responsible family members concerning the student's mental welfare and may also include more positive actions, depending upon what is reasonable under the circumstances. As the judges in both *Schieszler v. Ferrum College* and *Shin v. MIT* held, this duty arises under current tort law doctrine, Restatement (Second) of Torts section 314A, which recognizes a duty to give aid when a "special relation" exists between the defendant and the person injured. Notably, the Restatement (Third) of Torts section 40, adopted by the American Law Institute in May 2005,[27] specifically lists "a school with its students" as one of the "special relations" giving rise to "a duty of reasonable care with regard to risks that arise within the scope of the relationship."[28] Against the protest that such a "special relation" does not exist, at least

23. *Schieszler*, 236 F. Supp. 2d at 610 (quoting Mullins v. Pine Manor College, 449 N.E.2d 331, 336 (Mass. 1983)).

24. *Id.* at 606–10; RESTATEMENT (SECOND) OF TORTS § 314A (1965).

25. Shin v. MIT, No. 02-0403, 2005 WL 1869101, at *12–13 (Mass. Super. June 27, 2005); RESTATEMENT (SECOND) OF TORTS § 314A (1965). Significantly, Judge McEvoy also denied summary judgment to plaintiffs, which would have required a finding that a "special relationship" *did* exist.

26. *See infra* notes 34–40 and accompanying text.

27. AM. L. INST., ACTIONS TAKEN WITH RESPECT TO DRAFTS SUBMITTED AT 2005 ANNUAL MEETING 34, https://www.ali.org/ali/AM05ActionsTaken.pdf.

28. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 40 (Proposed Final Draft No. 1, 2005) (Section 40 replaces section 314A of Restatement (Second) of Torts). Comment *l* to section 40 confirms that "students" includes college-age students. For further discussion, see *infra* notes 61–71 and accompanying text.

not with respect to adult-age college students, and that furthermore, an adult student's privacy rights preclude notification of family without the student's consent, this Article argues that theories of corrective justice, reflecting general notions of morality, support legal recognition of such a duty; moreover, the "emergency" exception to federal privacy laws easily applies when a student is seriously suicidal. In fact, Congress has before it a highly desirable bill that would amend the law to clarify that point.[29] Finally, burgeoning knowledge about psychological and emotional development during the late teens and early twenties tells us that this period of life is a time when mental instability—and indeed, serious mental illness—often first emerge. Together with the fact that persons of this age have not yet developed higher judgmental faculties, this vulnerability buttresses arguments that institutions of higher learning should be held accountable for their actual awareness of seriously suicidal students and should be deemed to have a legal duty of care to take reasonable steps to prevent those tragedies.

II. SCOPE AND NATURE OF THE PROBLEM

Suicides on college campuses make news. Perhaps because we deplore the waste of such talented and promising young lives,[30] perhaps because we think this group of people is among our more fortunate—and therefore, we are all the more mystified[31]—or sometimes perhaps because they seem to come in clusters on certain campuses,[32] the suicides of college and university students receive intense publicity and have been the subject of widespread study in recent years.[33]

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29. Mental Health Security for America's Families in Education Act of 2007, H.R. 2220, 110th Cong. (as referred to House Committee on Education and Labor, May 8, 2007); *see also* Jerome L. Sherman, *Bill Would Share Student Mental Data with Parents*, PITT. POST-GAZETTE, Apr. 30, 2007, at A-4.

30. *See, e.g.*, RALPH L.V. RICKGARN, PERSPECTIVES ON COLLEGE STUDENT SUICIDE 39 (1994) ("[Suicide's] especial importance as affecting a group so highly selected as the college population, potentially so significant to society relative to later role and function, certainly is not to be gainsaid." (quoting T. Raphael et al., *The Question of Suicide as a Problem in College Mental Hygiene*, 7 AM. J. ORTHOPSYCHIATRY 1, 1 (1937))).

31. Ann Pollinger Haas et al., *Suicide in College Students*, 46 AM. BEHAV. SCIENTIST 1224, 1224 (2003) (remarking upon the perplexing suicidality of college students, an otherwise seemingly privileged segment of society).

32. Kate Kelly, *Lost on the Campus*, TIME, Jan. 15, 2001, at 51, 51 (noting that four MIT students had committed suicide in the previous three years); Daniel McGinn & Ron Depasquale, *Taking Depression on*, NEWSWEEK, Aug. 23, 2004, at 59, 59 (reporting that four N.Y.U. students had leapt to their deaths the previous year).

33. One study observes that the "intense media scrutiny" of college suicides is due in part to the few well known lawsuits brought by parents of students who committed suicide.

Suicide is now the second leading cause of death among college students in the United States, after accidents.[34] It is the third leading cause of death among young people ages fifteen to twenty-four.[35] Since the 1950s, the suicide rate among males in that age category has tripled, while for females, it has doubled.[36] Among undergraduate students, specifically, the suicide rate, which peaks at ages twenty to twenty-four,[37] is generally 7.5 per 100,000 students[38]—meaning that we can anticipate

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Haas et al., *supra* note 31, at 1230 (Haas and her two co-authors, Herbert Hendin and J. John Mann, are associated with the American Foundation for Suicide Prevention); *see also* Lisa C. Barrios et al., *Suicide Ideation Among US College Students*, 48 J. AM. C. HEALTH 229 (2000); Susan R. Furr et al., *Suicide and Depression Among College Students: A Decade Later*, 32 PROF. PSYCHOL.: RES. & PRAC. 97 (2001); Peter M. Gutierrez et al., *Suicide Risk Assessment in a College Student Population*, 47 J. COUNSELING PSYCHOL. 403 (2000); Lisa C. Konick & Peter M. Gutierrez, *Testing a Model of Suicide Ideation in College Students*, 35 SUICIDE & LIFE-THREATENING BEHAV. 181 (2005); Karen Arenson, *Suicide of N.Y.U. Student, 19, Brings Sadness and Questions*, N.Y. TIMES, Mar. 10, 2004, at B2; Kelly, *supra* note 32; McGinn & Depasquale, *supra* note 32; *Today: Profile: Suicide Incidence on College Campuses* (NBC television broadcast Oct. 19, 2004).

34. NAT'L MENTAL HEALTH ASS'N & JED FOUND., SAFEGUARDING YOUR STUDENTS AGAINST SUICIDE 2 (2002) [hereinafter NMHA & JED FOUND.], *available at* http://www.mentalhealthamerica.net/go/suicide (follow "Young People and Suicide: Safeguarding Your Students Against Suicide" hyperlink; then follow "Download Report" hyperlink). The Jed Foundation is a nonprofit charity aimed at preventing suicide among young people. It was created by Phil and Donna Satow after their son Jed committed suicide as a University of Arizona sophomore in 1998. The Jed Foundation, History, http://www.jedfoundation.org/foundation_history.php (last visited Apr. 12, 2008).

35. Centers for Disease Control and Prevention, Suicide Facts at a Glance (2007), http://www.cdc.gov/ncipc/dvp/suicide/suicidedatasheet.pdf; Nat'l Inst. of Mental Health, Suicide in the U.S.: Statistics and Prevention, http://www.nimh.nih.gov/publicat/harmsway.cfm (last visited Apr. 12, 2008). The second leading cause of death is homicide. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2004–2005, at 82 tbl.105, *available at* http://www.census.gov/prod/2004pubs/04statab/vitstat.pdf.

36. Haas et al., *supra* note 31, at 1224–25; *see also* NMHA & JED FOUND., *supra* note 34, at 2 (noting that in the past sixty years the overall rate has tripled).

37. Elizabeth Fried Ellen, *Suicide Prevention on Campus*, 19 PSYCHIATRIC TIMES, Oct. 2002, at 1; NMHA & JED FOUND., *supra* note 34, at 3 tbl.1; SUICIDE PREVENTION RES. CTR., PROMOTING MENTAL HEALTH AND PREVENTING SUICIDE IN COLLEGE AND UNIVERSITY SETTINGS 5 (2004), *available at* http://www.sprc.org/library/college_sp_whitepaper.pdf.

38. *See, e.g.*, Karen W. Arenson, *Worried Colleges Step up Efforts over Suicide*, N.Y. TIMES, Dec. 3, 2004, at A1; Elizabeth Fried Ellen, *Identifying and Treating Suicidal College Students*, 19 PSYCHIATRIC TIMES, Aug. 2002, at 1; SUICIDE PREVENTION RES. CTR., *supra* note 37, at 5; NMHA & JED FOUND., *supra* note 34, at 3 tbl.2. These figures come from Morton M. Silverman et al., *The Big Ten Suicide Study: A 10-Year Study of Suicides on Midwestern University Campuses*, 27 SUICIDE & LIFE-THREATENING BEHAV. 285 (1997). Although Silverman acknowledges the study's limitations, noting that the Big Ten schools are located in the Midwest—a region that has a lower suicide rate than the national average—and that a large number of former students who committed suicide were not included in the sample, his numbers are generally accepted. *Id.* at 296–99. Other possible limitations of the study are discussed in Haas et al., *supra* note 31, at 1226–28 ("The failure to include as

between 1,000 and 1,100 such deaths per year.[39]

The dramatic increase in these numbers over the past half-century,[40] plus the attendant negative publicity,[41] has motivated a number of colleges and universities to increase their psychological counseling services and to initiate programs to target students at serious risk.[42] Probably the most systematic effort has been the collaboration of Emory University with the American Foundation for Suicide Prevention, which has resulted in an online screening device, the "College Screening Project: A Program to Identify and Help Students With Significant Psychological Problems."[43] The College Screening Project invites students to log on anonymously and complete a survey measuring markers for psychological disturbance, especially depression (the most common diagnosis among young people who commit or contemplate suicide).[44] When a student responds to the site, the student's answers are reviewed by a clinically trained counselor or therapist, who sends a personalized evaluation to the student's log-in ID.[45] Where a student appears to be at risk, he or she is strongly encouraged to arrange a personal consultation with a mental healthcare

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'college suicides' the undetermined [but unusually high rate] of young people who kill themselves after dropping out of school artificially lowers the 'college' rate. . . .").

39. *See, e.g.*, NMHA & JED FOUND., *supra* note 34, at 2 (pinpointing the anticipated number at 1,088).

40. Haas et al., *supra* note 31, at 1224–25.

41. *See, e.g.*, Patrick Healy, *11 Years, 11 Suicides: Critics Say Spate of MIT Jumping Deaths Shows a "Contagion,"* BOSTON GLOBE, Feb. 5, 2001, at A1 (reporting that several MIT students say a "culture of suicide" has developed on campus). For a shocking example, see Jeane MacIntosh & Andy Geller, *Death Plunge No. 4: NYU's Grief*, N.Y. POST, Mar. 10, 2004, at 1 (displaying a front-cover photograph of the student falling from the building). Unfortunately many college administrators are too focused on university reputation and view student suicides as a public relations problem rather than a student health concern. Haas et al., *supra* note 31, at 1236.

42. Arenson, *supra* note 33; Kim Painter, *Colleges Throw Lifeline to Students*, USA TODAY, Mar. 3, 2004, at 1D; Ernest Sander, *Some Colleges Try Zero-Tolerance Toward Suicide Attempts*, WALL ST. J., Oct. 15, 2004, at B1.

43. Haas et al., *supra* note 31, at 1231; Ellen, *supra* note 38, at 1.

44. Haas et al., *supra* note 31, at 1232; *see also* Konick & Gutierrez, *supra* note 33, at 189 (finding depression a better predictor of suicidal thoughts than either hopelessness or negative life events); Allan J. Schwartz, *The Epidemiology of Suicide Among Students at Colleges and Universities in the United States*, *in* COLLEGE STUDENT SUICIDE 25, 39–40 (Leighton C. Whitaker & Richard E. Slimak eds., 1990) (stating that eighty-five percent of college suicides result from depression). *Contra* Furr et al., *supra* note 33, at 98 (hopelessness); John S. Westefeld et al., *College and University Student Suicide: Trends and Implications*, 18 COUNSELING PSYCHOLOGIST 464, 468 (1990) (hopelessness and pressure to succeed).

45. Haas et al., *supra* note 31, at 1232.

professional. If the student prefers not to do this, he or she may continue to pose questions online and receive help and encouragement.[46] Initial results from the College Screening Project appear promising: Not only have significant numbers of the targeted population responded positively to the program, but the increased awareness of the problem on the part of students and college personnel is thought to help bring into the open and thereby de-stigmatize major mental health issues.[47] After its initial tryout at Emory, the program was subsequently pilot-tested at the University of North Carolina at Chapel Hill.[48] Both institutions continue to use the test, which has been expanded to MIT, Morehouse College, the University of Pittsburgh, and Vanderbilt; several schools have invited talks with the American Foundation for Suicide Prevention to focus on graduate or medical students.[49]

A similar device, already accessible to all, has been established by The Jed Foundation, a nonprofit charity aimed at preventing suicide among young people.[50] The Foundation's website contains a link to Ulifeline.org, where students can log on to connect to a number of mental health sites. One of these is the Duke Diagnostic Psychiatry Screening Program, which screens students for various psychiatric disorders. As with the College Screening Project, students can remain anonymous; further links tell them about the counseling services available at their particular schools.[51]

Highlighting the need for such programs (and perhaps testifying to their effectiveness) is the fact that campus counseling centers have seen dramatic increases in their caseloads over just the past few years;

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46. *Id.*

47. *Id.* at 1233; *see* Ellen, *supra* note 38, at 4 (reporting that many Emory students have been surprised that seeing a psychiatrist was not "as big a deal" as they expected). The myth that talking about suicide will give the person the idea is, one author states, "the greatest deterrent of proactive suicide prevention and intervention." RICKGARN, *supra* note 30, at 89.

48. Ellen Freedman, *The American Foundation for Suicide Prevention: Initiatives in College Suicide Prevention*, SPARK, Oct. 22, 2004, http://www.sprc.org/thespark/spotlight.asp.

49. Rob Capriccioso, *Using the Web to Prevent Suicide*, INSIDE HIGHER ED, Sept. 20, 2006, http://www.insidehighered.com/news/2006/09/20/counseling (describing program and reporting expansion); Lynne Lamberg, *Experts Work to Prevent College Suicides*, 296 JAMA 502, 503 (2006) (reporting discussion of program at the annual meeting of the American Psychiatric Association in May 2006, which included a symposium on campus suicide).

50. Ellen, *supra* note 38, at 7.

51. *Id.* The Jed Foundation is also collaborating with the University of Rochester's Center for the Study and Prevention of Suicide on a college suicide prevention program for use on college campuses to "strengthen social networks and support systems" for students. The Jed Foundation, Pilot Program to Promote Mental Health and Prevent Suicide, http://www.jedfoundation.org/programs_colleges_prevention.php (last visited Apr. 15, 2008).

moreover, the students they are seeing are reportedly sicker and more often in need of hospitalization than used to be the case.[52] This phenomenon is in part attributable to the fact that more adolescents with mental health problems receive diagnosis and treatment in their high school years.[53] Many of these young people would not have been viable college candidates in the past; now, they are arriving on campuses in need of continuing care or, at the very least, watchfulness.[54] For some, departure from home plus the stressors of a new social environment and academic pressures may prove to be more than they can handle, at least not without substantial help.[55]

Another important factor in the campus suicide picture is that a number of serious psychiatric disorders typically emerge in the late teens or early twenties.[56] Institutions of higher learning are well situated

52. In 2004, eighty-five percent of student counseling center directors reported an increase in recent years in students with "severe psychological problems." ROBERT P. GALLAGHER, NATIONAL SURVEY OF COUNSELING CENTER DIRECTORS 2 (2004), *available at* http://iacsinc.org/2004%20Survey%20final-1.pdf. In 1990, only fifty percent of student counseling center directors reported an increase. Haas et al., *supra* note 31, at 1228–29. Richard Kadison, M.D., psychiatrist and head of Harvard University Health Services, observed, "Every director of every college counseling center is reporting more hospitalizations, more serious problems, and taking sicker students." Hara Estroff Marano, *Crisis on the Campus*, PSYCHOL. TODAY, May 2, 2002, http://psychologytoday.com/articles/pto-20030501-000005.html.

53. NMHA & JED FOUND., *supra* note 34, at 5 (dividing at-risk students into two major groups: those with previous psychological problems and those without such histories); *see also* Ellen, *supra* note 37, at 5 ("Today's colleges and universities also are drawing many more students who arrive on campus with diagnosed mental illnesses."); Mary Duenwald, *The Dorms May Be Great, but How's the Counseling?*, N.Y. TIMES, Oct. 26, 2004, at F1 ("Sometimes, students who suffered an episode of mental illness in high school or earlier will experience a recurrence in college."); Kelly, *supra* note 32, at 52 (noting widespread use of antidepressants such as Prozac and Zoloft); Marano, *supra* note 52 ("A decade of improved drugs has encouraged earlier diagnosis [of mental illnesses].").

54. Kelly, *supra* note 32, at 52. One observer calls this trend the "Prozac payoff." Marano, *supra* note 52; *cf.* Haas et al., *supra* note 31, at 1229 (increase on campus of students with mental disabilities in part due to accessibility requirements of the 1990 Americans with Disabilities Act); *see also infra* notes 158–59 and accompanying text.

55. Ellen, *supra* note 37, at 5 ("[W]hile many [students who arrive at college with diagnosed mental illness] can and do thrive, there is still a segment of this population that may be particularly vulnerable to the stressors inherent in college."); NMHA & JED FOUND., *supra* note 34, at 5 ("[T]he nature of the campus environment itself may serve to exacerbate any existing symptoms or engender the expression of emotional or behavioral disorders in those students who may be predisposed to mental illness.").

56. Ellen, *supra* note 37, at 4 ("Severe psychiatric disorders such as bipolar disorder and schizophrenia typically first manifest themselves between the ages of 18 and 24 years and can easily derail the lives of students. Major depression, posttraumatic stress disorder and personality disorders also can be extremely disruptive."). For a fuller discussion, see *infra* note 165 and accompanying text.

to spot such developing problems and provide the necessary support, a fact to which one expert attributes the lower rate of suicide in this group than in the general population.[57] No one could reasonably expect colleges to be guarantors of their students' safety—even for those in their active counseling care—so it is discouraging to read that one problem encountered by the College Screening Project has been "the unanticipated reluctance on the part of many university officials to know the actual identity of suicidal students, believing that not knowing will protect the institution from liability in the event of a student's suicide."[58]

III. THE CASE FOR LIABILITY: TORT LAW

A. Restatement (Second) of Torts Section 314A and Restatement (Third) of Torts Section 40: "Special Relationships"

As every law student learns in the first year, there is no general "duty to rescue" a person in even the gravest danger if the actor has no control over that person and did not create the danger, regardless of how easy and risk-free it would be for the actor to do so.[59] An exception to this general principle lies in the concept of Restatement (Second) of Torts section 314A, which provides that certain "special relations" between the actor and the person in danger of harm give rise to a duty in the former to "take reasonable action" to protect the latter "against unreasonable risk of physical harm."[60] Further, the actor must provide "first aid" once "it knows or has reason to know that [the person in

57. Silverman et al., *supra* note 38, at 299. Other factors include easier access to low-cost mental health services, existence of greater peer support, campus-wide bans of firearms and illicit drugs, regulation of alcohol use, freedom from cares of workaday world, and purpose-driven education. *Id.* at 299, 300; *see also* Schwartz, *supra* note 44, at 39–40 (reviewing previous studies and suggesting that the rate of college student suicide is likely lower than the national average). Schwartz attributes the lower rate to the absence of firearms on campus. *Id.* at 41.

58. Haas et al., *supra* note 31, at 1234.

59. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 37 (Proposed Final Draft No. 1, 2005) ("An actor whose conduct has not created a risk of physical harm to another has no duty of care to the other unless a court determines that one of the affirmative duties . . . is applicable."); RESTATEMENT (SECOND) OF TORTS § 314 (1965). ("The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action."). *See also* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 56, at 373 (5th ed. 1984) ("[T]he law has persistently refused to impose on a stranger the moral obligation of common humanity to go to the aid of another human being who is in danger, even if the other is in danger of losing his life.").

60. RESTATEMENT (SECOND) OF TORTS § 314A(1)(a).

'special relation' is] ill or injured, and to care for [the person] until [the person] can be cared for by others."[61] Actors to whom section 314A is specifically applicable are common carriers, innkeepers, landowners with respect to their business invitees, and custodians of others.[62] A caveat to the section states, however, that "[t]he [American Law] Institute expresses no opinion as to whether there may not be other relations which impose a similar duty."[63] Comment *b* notes, "The relations listed are not intended to be exclusive, and are not necessarily the only ones in which a duty of affirmative action for the aid or protection of another may be found."[64] Comment *c* provides the limiting principle that "[t]he rules stated in this Section apply only where the relation exists between the parties, and the risk of harm, or of further harm, arises in the course of that relation."[65] Importantly, the source of the harm is irrelevant: "The duty to give aid to one who is ill or injured extends to cases where the illness or injury is due to natural causes, to pure accident, to the acts of third persons, or to the negligence of the plaintiff himself . . . ."[66]

Restatement (Third) of Torts, in its Chapter 7 on "Affirmative Duties," expands upon the prior Restatement's language. Section 40 of Restatement (Third) provides:

> (a) An actor in a special relationship with another owes the other a duty of reasonable care with regard to risks that arise within the scope of the relationship.
>
> (b) Special relationships giving rise to the duty provided in Subsection (a) include:
>
> . . . .
>
> (5) a school with its students . . . .[67]

Comments to this revision of the "special relationship" provision make clear that the duty of care imposed goes beyond the "first aid" or "temporary care" contemplated by Restatement (Second): "A duty of

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61. *Id.* § 314A(1)(b).

62. *Id.* § 314A(1)–(4). Examples of custodial relationships include jailer-prisoner and school-schoolchildren. *Id.* § 314A illus. 6–7.

63. *Id.* § 314A Caveat.

64. *Id.* § 314A cmt. *b*.

65. *Id.* § 314A cmt. *c*.

66. *Id.* § 314A cmt. *d*.

67. RESTATEMENT (THIRD) OF TORTS § 40(a), (b)(5) (Proposed Final Draft No. 1, 2005).

reasonable care is flexible enough to account for a wide variety of situations. Nevertheless, the duty imposed requires only *reasonable* care under the circumstances."[68] The source of the risk triggering the duty is irrelevant and may even include the intentional act of the plaintiff, thereby eliminating the potential defense in a suicide situation of supervening independent cause: "The duty described in this Section applies regardless of the source of the risk. Thus, it applies to risks created by the individual at risk as well as those created by a third party's conduct, whether innocent, negligent, or intentional."[69]

With respect to the special relationship "between a school and its students," Comment *l* notes that "what constitutes reasonable care is contextual—the extent and type of supervision required of young elementary school pupils is substantially different from reasonable care for college students."[70] Significantly, the American Law Institute here makes clear its intent to include college students in its newly specified list of "special relationships," even though most people in that category have reached the age of legal adulthood.

Under the cases decided to date, whether a special relationship exists between a college or university and a student in any given situation depends upon a number of factors. Most commonly, courts and commentators cite some combination of the following: foreseeability of harm to the plaintiff (generally conceded to be the most important consideration); degree of certainty of harm to the plaintiff; burden upon the defendant to take reasonable steps to prevent the injury; some kind of mutual dependence of plaintiff and defendant upon each other, frequently (as in these cases) involving financial benefit to the defendant arising from the relationship; moral blameworthiness of defendant's conduct in failing to act; and social policy considerations involved in placing the economic burden of the loss on the defendant.[71]

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68. Id. § 40 cmt. *d*. The same comment declares that the change "recognizes both the variety of situations in which the duty may arise and advancements in medical technology that may enable an actor to provide more than mere first aid." *Id.*

69. *Id.* § 40 cmt. *g*.

70. *Id.* § 40 cmt. *l*.

71. *See generally* Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334, 342 (Cal. 1976) (holding that university had duty to warn victim of student psychiatric patient's intention to kill her). The opinion contains a "laundry list" of considerations in determining affirmative duty—highlighting foreseeability as most important—frequently cited by other courts. *Id.*; *see, e.g.*, Eisel v. Bd. of Ed. of Montgomery County, 597 A.2d 447, 448, 452–56 (Md. 1991) (using *Tarasoff* list to find school counselors had duty to use reasonable means to prevent suicide of thirteen-year-old girl); Mullins v. Pine Manor College, 449 N.E.2d 331, 336 (Mass.

Applying such criteria, courts have varied in their willingness to find a special relationship between a college or university and any given student. There is universal recognition that the age of *in loco parentis* has passed[72] and that the duty, if any, is not one of a general duty of care to all students in all aspects of their collegiate life.[73] Rather, courts have most often tended to find a legal duty of care in situations that overlap or most closely parallel other recognized examples of special relationship, such as landlord and tenant. For example, in *Mullins v. Pine Manor College*, the Massachusetts Supreme Court found that a residential college for women had a duty to provide for the security of its students, including the protection of plaintiff from abduction and rape on the campus.[74] Said the court:

> Of course, changes in college life, reflected in the general decline of the theory that a college stands in loco parentis to its students, arguably cut against this view. The fact that a college need not police the morals of its resident students, however, does not entitle it to abandon any effort to ensure their physical safety. Parents, students, and the general community still have a reasonable expectation, fostered in part by colleges themselves, that reasonable care will be exercised to protect resident students from foreseeable harm.[75]

Mullins was quoted with approval by the Delaware Supreme Court in *Furek v. University of Delaware*,[76] holding the school liable for an on-campus fraternity hazing incident:

1983) (finding that colleges voluntarily assume a duty of care to protect students from third party attacks by charging them for tuition and residence fees).

72. *See, e.g.*, Schieszler v. Ferrum Coll., 236 F. Supp. 2d 602, 608 (W.D. Va. 2002) ("[N]o duty arises from an *in loco parentis* relationship between [the college] and [the student]."); Furek v. Univ. of Del., 594 A.2d 506, 516 (Del. 1991) ("The concept of university control based on the doctrine of *in loco parentis* has all but disappeared in the face of the realities of modern college life . . . .").

73. *Furek*, 594 A.2d at 519–20 ("[T]here is no duty on the part of a college or university to control its students based *merely* on the university-student relationship."); Jain v. State, 617 N.W.2d 293, 297 (Iowa 2000) (commenting that a "university's relationship with its students is not custodial in nature").

74. *Mullins*, 449 N.E.2d at 335–36. The court based its holding on Restatement (Second) of Torts section 314A and an independent duty arising from voluntary assumption, under Restatement (Second) of Torts section 323 (1965).

75. *Id.*

76. *Furek*, 594 A.2d at 520 (Del. 1991). Like *Mullins*, this case also relied in part on other sections of the Restatement. *See id.*

> In sum, although the University no longer stands *in loco parentis* to its students, the relationship is sufficiently close and direct to impose a duty under Restatement § 314A. The university is not an insurer of the safety of its students nor a policeman of student morality, nonetheless, it has a duty to regulate and supervise foreseeable dangerous activities occurring on its property.[77]

Other courts have not gone so far[78] and have been especially reluctant to hold schools responsible where underage drinking was involved in the incident.[79] On the other hand, courts have often found a special relationship, triggering a legal duty of care, between an institution of higher learning and its athletes engaged in college-sponsored activities.[80]

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77. *Id.* at 522 (citing *Mullins*, 449 N.E.2d at 336); *accord* Knoll v. Bd. of Regents of Univ. of Neb., 601 N.W.2d 757, 765 (Neb. 1999) (finding that university as landowner owed duty of care to victim of fraternity hazing); *see also* Nero v. Kan. State Univ., 861 P.2d 768, 777–79 (Kan. 1993) (finding that university as landlord had duty to protect female student who was assaulted in residence hall; the court cited *Mullins* and *Furek*, but alleged negligence here was based more on a special relationship to the male who committed the assault, on grounds that the university knew of his dangerous propensities from a prior rape charge against him).

78. *See* Univ. of Denver v. Whitlock, 744 P.2d 54, 62 (Colo. 1987) (finding that university owed no duty of care to student who injured himself on a trampoline on lawn of fraternity house leased from university); *see also* Talbot v. N.Y. Inst. of Tech., 639 N.Y.S.2d 135, 136–37 (N.Y. App. Div. 1996) (finding that college owed no duty of care to residential student who was burned when rubber cement was accidentally ignited by nearby cigarettes, in part because college students are "'not young children in need of constant and close supervision'" (quoting Mintz v. State, 362 N.Y.S.2d 619, 620 (N.Y. App. Div. 1975)).

79. *See, e.g.*, Beach v. Univ. of Utah, 726 P.2d 413, 414 (Utah 1986) (concluding that university owed no duty of care to student on professor-accompanied field trip where underage plaintiff drank, became disoriented, and wandered off, falling from a cliff and injuring herself); Bradshaw v. Rawlings, 612 F.2d 135, 137, 142 (3d Cir. 1979) (holding that the college owed no duty of care to plaintiff injured in traffic accident caused by drunk classmate after off-campus sophomore class picnic, even though faculty member co-signed the check for funds later used to buy the alcohol).

80. *See, e.g.*, Davidson v. Univ. of N.C., 543 S.E.2d 920, 927 (N.C. App. 2001) (university owed duty of care to cheerleader injured performing dangerous stunt at school-sponsored team practice with no supervision (citing RESTATEMENT (SECOND) OF TORTS § 314A cmt. *b*)); Kleinknecht v. Gettysburg Coll., 989 F.2d 1360, 1370 (3d Cir. 1993) (recognizing that college owed duty of care based on special relationship to lacrosse player who suffered fatal heart attack during practice); *see also* Wallace v. Broyles, 961 S.W.2d 712 (Ark. 1998) (permitting suit against individual university employees to go forward on grounds of both negligence and wanton and willful conduct, where evidence tended to show illegal administration by them to plaintiff of controlled substances which may have contributed to his suicide). *But see* Klein v. Solomon, 713 A.2d 764 (R.I. 1998) (refusing to hold university vicariously liable for alleged negligent referral of student by one of its counselors, where

Obviously, the situation of a seriously suicidal student presents a different kind of safety issue from those of residential security and appropriate supervision of intercollegiate athletics. The landlord/tenant relationship, which forms the basis for the residential security cases, may often obtain (as was true in both *Schieszler v. Ferrum College* and *Shin v. MIT*), for college administrators are most likely to be aware of the suicidal threat when the student is physically on the premises where a responsible college employee lives. It is not the landlord/tenant relationship per se, however, that gives rise to the special relationship that creates the duty for school personnel to take reasonable steps to prevent the student from self-inflicted harm. The most important factor that triggers the duty here is foreseeability, arising from *actual knowledge* of the student's *serious*—even *imminent*—suicidal threat.

In *Schieszler*, Judge Kiser emphasized the factual circumstances underlying the special relationship envisioned by section 314A: the school had been warned of several ongoing serious suicide threats by the decedent,[81] and the dean of students had even asked him to sign a statement that he would not hurt himself.[82] In other words, the specific harm was highly foreseeable. Additionally, the student resided on campus, where intervention was easy. The judge cited several actions the school might have taken, including affirmative steps to supervise him, to obtain counseling for him, or to contact his guardian.[83]

Actual knowledge of a specific threat to a student's safety—whether that threat emanates from a fellow student, a campus intruder, or the student's own behavior—certainly passes the most rigorous foreseeability test. The situation of threatened suicide may well give rise to a factual issue over the imminence or veracity of the threat at the time.[84] Relevant psychological literature does suggest, however, that such threats should generally be taken seriously,[85] and in both *Schieszler*

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student committed suicide shortly thereafter).

81. Schieszler v. Ferrum Coll., 236 F. Supp. 2d 602, 609 (W.D. Va. 2002).

82. *Id.*

83. *Id.* at 610.

84. This factual issue remained for the jury, after the legal establishment of a duty of care. *Id.* at 609 (finding that based on the alleged facts, "a trier of fact could conclude that there was 'an imminent probability' that [the student] would try to hurt himself, and that the defendants had notice of this specific harm").

85. *See* American Academy of Child & Adolescent Psychiatry, Childrens Threats: When Are They Serious?, http://www.aacap.org/cs/root/facts_for_families/childrens_threats_when_are_they_serious (last visited Apr. 15, 2008); American Foundation for Suicide Prevention, When You Fear Someone May Take Their Own Life, http://www.afsp.org/index.cfm?fuseaction=home.viewPage&page_id=1 (follow "About Suicide" hyperlink, then follow

and *Shin*, they appeared to be highly credible at the time they were made.[86]

The Supreme Court of Iowa has nonetheless taken a different view in a similar situation. The court ruled that the University of Iowa had no special relationship with eighteen-year-old freshman Sanjay Jain that would trigger a legal duty to take steps to prevent him from harming himself.[87] Sanjay lived in an off-campus university dormitory.[88] The hall coordinator, a university administrator, was familiar with his moodiness and with at least some of his experimentation with alcohol and drugs: by early November, she had penalized him for an egg-throwing incident and placed him on one-year disciplinary probation for smoking marijuana in his room.[89] Shortly before Thanksgiving, on-duty resident assistants in the dorm were called to intervene when Sanjay and his girlfriend were arguing loudly in the hall over the keys to his moped, which he had brought up to his room for purposes of asphyxiating himself with the exhaust fumes.[90] The next day, the hall coordinator insisted that he move the moped, encouraged him to seek out university counseling services, and gave him her home telephone number to call if he intended to hurt himself.[91] He assured her that he would do so and also said he would talk to his family over Thanksgiving.[92] That conversation never took place; instead, Sanjay's contacts with his family during the holiday were reportedly positive and upbeat.[93] Shortly after his return to school, Sanjay carried out his erstwhile foiled intentions.[94]

The facts in *Jain* are somewhat more ambiguous than those alleged in *Schieszler* and *Shin*. The Iowa Supreme Court's legal analysis, however, presents the most striking difference. The court recited the general "no duty to rescue" rule of Restatement (Second) of Torts

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"What to Do" hyperlink) (last visited Apr. 15, 2008); National Alliance on Mental Illness, Teenage Suicide, http://www.nami.org/Content/ContentGroups/Helpline1/Teenage_Suicide.htm (last visited Apr. 15, 2008).

86. Ferrum College knew that Michael Frentzel had self-inflicted bruises on his head days before his suicide and was also aware of several communications of his intentions to his girlfriend and another friend. *Schieszler*, 236 F. Supp. 2d at 609. For the factual circumstances in *Shin*, see *supra* notes 6–11 and accompanying text.

87. Jain v. State, 617 N.W.2d 293, 295 (Iowa 2000).

88. *Id.* at 295.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 296.

94. *Id.*

section 314 but utterly failed to mention section 314A, other than an indirect reference to exceptions, "usually custodial in nature."[95] The plaintiff, Sanjay's father, acting in his capacity as administrator of his son's estate, conceded the lack of any custodial nature to the relationship. He argued that the university's knowledge of Sanjay's mental condition created a special relationship giving rise to a duty under Restatement (Second) of Torts section 323, concerning an actor's voluntary assumption of services to another, which must then be performed with due care.[96] Plaintiff's specific contention was that once the hall coordinator learned of Sanjay's first suicide threat, she had a duty to notify the dean of students, who then, according to university policy, would have contacted Sanjay's parents.[97] The court was unpersuaded, reasoning that section 323 applies only if "the defendant's actions increased the risk of harm to plaintiff relative to the risk that would have existed had the defendant never provided the services initially."[98] This condition was not met in Sanjay's case; neither was there any reliance upon the university's behavior by plaintiff's decedent that would satisfy the requirements of section 323.[99]

Surely the Iowa Supreme Court was correct that section 323 was inapplicable to the facts of the case, and that appears to have been the only argument that plaintiff made. While other courts have discussed section 323, in addition to section 314A, in finding a special relationship between an institution of higher learning and a student, those cases have dealt with either residential security[100] or campus activities sponsored or

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95. *Id.* at 297.

96. Section 323 provides:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
>
> (a) his failure to exercise such care increases the risk of such harm, or
>
> (b) the harm is suffered because of the other's reliance upon the undertaking.

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

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

98. *Id.* at 299.

99. *Id.* at 299–300.

100. *See, e.g.*, Mullins v. Pine Manor Coll., 449 N.E.2d 331, 334, 336 (Mass. 1983) (determining liability for the college was based partly on Restatement (Second) section 323 where breach of residential security led to abduction and rape of a resident student).

regulated by the university.[101] For policy reasons alone, no court would want to hold, nor should any plaintiff wish to make an argument suggesting, that a college or university acts at its peril whenever it institutes counseling and other services for students with mental health problems. This kind of analysis would confirm the fears observed by the surprised psychological counselors who noted the earlier-cited "reluctance on the part of many university officials to know the actual identity of suicidal students, believing that not knowing will protect the institution from liability in the event of a student's suicide."[102] Sound social policy should encourage institutions of higher learning to make such services available and to use devices such as the College Screening Project to sensitize students not only to mental health issues in general, but to dangers of suicidal ideation (in themselves or others) and suicide threats in particular.

Neither *Schieszler* nor *Shin* relies upon section 323 for its rationale. Indeed, Judge Kiser noted that the plaintiff in *Schieszler* abandoned a section 323 theory at oral argument.[103] The implicit suggestion here is that during the argument, the judge made clear to the plaintiff's lawyer that section 323 was not applicable to the case. Rather, both *Schieszler* and *Shin* are grounded in the notion that, under section 314A, a special relationship arises between a college or university and one of its students when a college official has *actual* knowledge that the student is *seriously* suicidal, thus rendering the infliction of self-harm a highly foreseeable event. Under those circumstances, the institution has a duty to take reasonable steps to prevent the foreseeable harm. The *Schieszler* opinion specifically suggested that one way this duty could have been discharged under the circumstances would have been to notify the family of the student's dire situation;[104] the Shins have wondered aloud why no one took this simple step.[105]

One other recent case deserves brief mention. In the unreported case of *Mahoney v. Allegheny College*, the parents of junior Chuck Mahoney sued the school, psychological counselors, and the dean of students and associate dean of students after their son hanged himself at

101. *See, e.g.*, Furek v. Univ. of Del., 594 A.2d 506, 520 (Del. 1991) (determining that Restatement (Second) section 323 addressed the duty of a college having assumed responsibility to protect fraternity pledges from ritual hazing).

102. Haas et al., *supra* note 31, at 1234; *supra* note 58 and accompanying text.

103. Schieszler v. Ferrum Coll., 236 F. Supp. 2d 602, 608 (W.D. Va. 2002).

104. *Id.* at 610.

105. *See* Sontag, *supra* note 8, at 58.

his off-campus fraternity house.[106] In granting summary judgment dismissing the two deans from the action, Judge Barry F. Feudale concluded that the facts at hand were more similar to those in *Jain* than to either *Shin* or *Schieszler*.[107] Specifically, the deans at Allegheny College lacked the detailed knowledge possessed by defendant administrators in *Shin* and *Schieszler* and had been made aware of any problem at all only three or four days prior to the student's death.[108] The opinion, a case of first impression in Pennsylvania, manifests the judge's dubiety with respect to the "special relationship" reasoning of the Massachusetts and Virginia courts,[109] but it is obviously non-precedential.[110]

B. FERPA: Not a Valid Defense Now . . .

Time after time, when students take their own lives, the parents' agonizing cry is, "Why were we not told that our child was so desperate?" That omission underlay the case against the MIT administrators in the Shins' lawsuit;[111] it was one of the steps cited by the judge that Ferrum College might have taken to help protect Michael Frentzel;[112] and it was the chief bone of contention asserted by Uttam Jain, Sanjay's father and administrator of his estate.[113] Chuck

106. Mahoney v. Allegheny Coll., No. AD 892-2003, slip. op. at 1–2 (C.P. Crawford County, Pa. Dec. 22, 2005).

107. *Id.* at 23 (stating, after examination of all three cases, "The *MIT* and *Ferrum* cases are factually distinctive . . . .").

108. *Id.* at 22.

109. *Id.* at 23 ("The appellation/determination of 'special relationship' outside the context of custody and/or control is subjective in nature and could be construed as an elevation of form over substance that could lend itself to reactive rather than reflective results steeped in 'hindsight' as compared to a careful and precise legal analysis required in a duty of due care.").

110. The case subsequently went to trial against the campus counselor who had worked with Chuck Mahoney, Allegheny College as her employer, and a psychiatrist who prescribed the student's medications. The jury returned a verdict eleven to one in favor of defendants; the jurors based their vote on Mr. Mahoney's status as an adult and on skepticism as to the parents' ignorance of the seriousness of his mental state. The lone dissenter, a retired high school teacher, stated her belief that "'safety must trump privacy.'" *See* Bernstein, *supra* note 19.

111. *See* Complaint ¶ 72, Shin v. MIT, No. 02-0403 (Mass. Super. Jan. 28, 2002) ("Defendants . . . acted in a wilful, wanton, reckless, or grossly negligent manner, by failing to design and implement an adequate mental health protocol, including . . . parental involvement, in the treatment of Elizabeth Shin."); *see also* Sontag, *supra* note 8, at 140 (quoting Cho Hyun Shin: "If they just let us know, just the one phone call, [Elizabeth] would be alive right now.").

112. Schieszler v. Ferrum Coll., 236 F. Supp. 2d 602, 610 (W.D. Va. 2002).

113. Jain v. State, 617 N.W.2d 293, 296–99 (Iowa 2000).

Mahoney's parents also maintained that Allegheny College should have broken confidentiality and involved them.[114] Behind the plaintiffs' query is the thinking that if only they had known, they could and would have done something to defuse the precipitate situation—withdraw the son or daughter from school, perhaps, or at least take steps to assure themselves that the crisis was past and the underlying problems were being dealt with effectively. Whether or not they are right is unknowable, but that question will haunt them for the rest of their lives. They should not have to live with it.

The universal response on the part of the schools, of course, is that *in loco parentis* is a thing of the past: Schools have no responsibility to supervise their students and no right to intervene in their lives.[115] College students are almost universally above the age of eighteen and therefore legal adults. Furthermore, the best way to assist their maturation is to treat them as independent, autonomous individuals, responsible for their own welfare.[116]

In addition to these general contentions, all of which—at least in the abstract—are true, educational institutions point to the Family Educational Rights and Privacy Act ("FERPA"), also known as the Buckley Amendment.[117] These 1974 amendments to the Elementary and Secondary Education Act of 1965[118] condition federal funding "to educational agencies or institutions"[119] upon compliance with provisions regulating first, the availability of school records to parents and students,[120] and second, the privacy of those records vis-à-vis the rest of the world. With respect to college students, the provisions relevant to

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114. *See* Mahoney v. Allegheny Coll., No. AD 892-2003, slip op. at 18–19 (C.P. Crawford County, Pa. Dec. 22, 2005).

115. *See, e.g.*, *Schieszler*, 236 F. Supp. 2d at 611 (noting defendant's argument that school had no duty because "they had insufficient custody or control of [suicidal student]"); *Mahoney*, slip op. at 18–19, 23; *see also* Bernstein, *supra* note 19 (discussing privacy laws vis-à-vis whether an educational institution should involve parents).

116. Baldwin v. Zoradi, 176 Cal. Rptr. 809, 818 (Cal. Ct. App. 1981) ("The transfer of prerogatives and rights from college administrators to the students is salubrious when seen in the context of a proper goal of postsecondary education—the maturation of the students. Only by giving them responsibilities can students grow into responsible adulthood. . . . [T]he overall policy of stimulating student growth is in the public interest."); *see also* Bernstein, *supra* note 19 (noting that jury ruled for defendants because it considered Chuck Mahoney an adult, "responsible for his own actions.").

117. 20 U.S.C. § 1232g (2000 & Supp. V 2005). The bill was sponsored by Sen. James L. Buckley of New York.

118. Pub. L. No. 93-380 (1974).

119. 20 U.S.C. § 1232g(a).

120. *See* 20 U.S.C. § 1232g(a)(1)–(6).

the issue at hand protect the privacy of the records of any student over the age of eighteen years from anyone else, including the student's parents, absent the student's consent.[121] Some of the bizarre results, in the eyes of most parents who have put a child through college,[122] are that all tuition and other financial statements are sent to the student, not to the parents who are actually paying, and grades are also addressed to the student only—parents have no right to find out what they are unless the student chooses to divulge the information. Similarly, parents may be blissfully unaware that a child is on academic or disciplinary probation, or is otherwise encountering any kind of problem in his or her collegiate life.[123]

FERPA has some exceptions, however. The important one for present purposes provides that an educational institution may disclose personal information to "appropriate persons" "in connection with an emergency . . . if the knowledge of such information is necessary to protect the health or safety of the student or other persons."[124] Information that a student is seriously suicidal or has attempted suicide easily fits the definition of an "emergency"; the student's parents or guardian would in almost any conceivable case be "appropriate persons" to notify; and conveyance of the information is logically "necessary to protect the health or safety of the student."[125]

This argument was raised by the plaintiff in *Jain v. State*.[126] Indeed,

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121. *See* 20 U.S.C. § 1232g(d).

122. These comments are anecdotal in nature. They reflect the experiences and attitudes of my husband and myself, as well as a number of our contemporaries with whom we have discussed the situation. In our experience, it is not uncommon to hear a parent say something like, "You mean I am paying for this and have no right to find out anything about what is going on?" At the same time, we who work for educational institutions are aware that their administrations can be almost paranoid about the necessity of compliance with the "Buckley Amendment."

123. For example, Sanjay Jain (who had turned eighteen just prior to his freshman year) had been skipping numerous classes and was doing poorly academically. He had also been placed on disciplinary probation, one condition of which was an order to attend alcohol and drug education classes, after he was found smoking marijuana in his room. Jain v. State, 617 N.W.2d 293, 295 (Iowa 2000). This observation is not intended as an argument for a return to *in loco parentis*; it is offered simply as an example of parental ignorance of what goes on with their students on campuses today.

124. 20 U.S.C. § 1232g(b)(1)(I) (2000 & Supp. V 2005). The accompanying regulation provides: "An educational agency or institution may disclose personally identifiable information from an education record to appropriate parties in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals." 34 C.F.R. § 99.36(a) (2006).

125. *Id.*

126. Jain v. State, 617 N.W.2d 293, 298 (Iowa 2000).

the University of Iowa had an unwritten policy of notifying parents of any student suicide attempt, although that decision lay solely in the hands of the dean of students. The dean, however, had never received the information.[127] The problem with the plaintiff's argument here, as the Iowa Supreme Court pointed out, was that FERPA's exception is discretionary in nature. While it permits a school to contact the student's family in the circumstances of attempted suicide, it does not create any duty on the school's part to do so.[128] In fact, the relevant regulations stipulate that FERPA's exception for disclosure of health and safety information shall be "strictly construed."[129]

Once again, the *Jain* court was correct. The federal statute does not impose any duty of notification of family on a collegiate institution that has actual knowledge of a suicidal student. It merely permits such notification. The argument of this Article is simply that institutions of higher learning should not be permitted to "hide behind" FERPA as a defense for their failure to contact families in such circumstances. Frequently, that simple act might be sufficient to discharge the institution's duty of care, which, this Article argues, arises from the institution's actual knowledge, which in turn creates the foreseeability of the student's self-infliction of harm.

The missed opportunity in *Jain* is especially poignant, given that the suicide attempt took place on November 20, very shortly before the Thanksgiving break, and the actual suicide occurred on December 4, very shortly afterwards.[130] Although Sanjay refused the hall coordinator's request for permission to call his parents, he told her that he would discuss his situation with them over the break;[131] his assurance turned out to be untrustworthy. Similarly, Chuck Mahoney had spoken to his parents the Saturday before his suicide. In response to a specific question posed by his counselor on the very day he hanged himself, he assured her that he "had told them all that was going on," although he also asked her not to contact them.[132] He had written the counselor a

127. *Id.* at 296.

128. *Id.* at 298; *see also* Mahoney v. Allegheny Coll., No. AD 892-2003, slip op. at 18 (C.P. Crawford County, Pa. Dec. 22, 2005).

129. *Jain*, 617 N.W.2d at 298 (quoting 34 C.F.R. § 99.36(c) (1994), the administrative regulations for implementing the Buckley Amendment).

130. *Id.* at 295–96.

131. As university protocol required, the hall coordinator relayed the information to her supervisor, the associate dean of students. He agreed with her recommendation to Sanjay to seek counseling; however, he took no further steps and did not notify the dean of students, who might have contacted Sanjay's parents. *Id.*

132. *Mahoney*, No. AD 892-2003, slip op. at 10.

desperate-sounding email at 3:18 that morning, but she felt it necessary to abide by his wishes.[133] She and the associate dean of students, in a conversation later that same day, discussed the fact that, while she felt bound by the therapist-patient relationship not to make parental contact,[134] the associate dean need not have such concerns. The counselor and Chuck had another meeting scheduled for the next day, so the associate dean decided to do nothing.[135] In *Schieszler*, the dean of students at Ferrum College had obtained a written statement from Michael Frentzel that he would not harm himself. Yet Michael's frantic communications to friends within the next few days belied that statement,[136] and, though warned, the college failed to follow up before Michael hanged himself.[137] Elizabeth Shin, it will be remembered, celebrated her nineteenth birthday with her family only a day before what certainly appears to have been the taking of her own life.[138] On that occasion, she talked about obtaining passport photos for a planned summer trip to Korea and invited her younger sister to visit her for a weekend.[139] She had held a knife to her chest only the night before, as her housemaster knew.[140] Yet Elizabeth's parents had no clue, and her behavior at the dinner gave nothing away about the sense of desperation she must have been feeling. All four schools involved in these tragic situations have defended their failure to notify students' families of their children's problems on the grounds of respect for student privacy.[141]

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133. *Id.* at 8–10.

134. *Id.* at 13. The therapist would have had in mind the Health Insurance Portability and Accountability Act of 1996 and the privacy regulations thereunder, which heavily restrict a healthcare provider's sharing of information without the patient's permission. Pub. L. No. 104-191, 110 Stat. 1936 (codified as amended in scattered sections of 18, 26, and 42 of U.S.C.). *See generally* 45 C.F.R. §§ 164.500–.534 (2007). This paper takes no position with respect to the potential liability of healthcare providers in the situations under discussion, which would be governed by principles of medical malpractice law.

135. *Mahoney*, No. AD 892-2003, slip op. at 13.

136. Schieszler v. Ferrum Coll., 236 F. Supp. 2d 602, 605 (W.D. Va. 2002) (Within a few days of signing the statement for the dean, Michael wrote to a friend, "'tell Crystal I will always love her.' The friend told Crystal who told the defendants. . . . Soon thereafter, Frentzel wrote yet another note stating 'only God can help me now,' which Crystal pressed upon the defendants.").

137. *Id.*

138. *See supra* notes 8–11 and accompanying text.

139. Sontag, *supra* note 8, at 58.

140. Complaint, *supra* note 9, ¶¶ 33–35.

141. *See, e.g.*, Jain v. State, 617 N.W.2d 293, 295 (Iowa 2000) ("Sanjay's parents and family were unaware of [his academic and personal] difficulties [at the University of Iowa]. University policy calls for privacy with respect to the university's relationships with its adult students."); Sontag, *supra* note 8, at 94 ("M.I.T., like many schools, operates from the premise

That general attitude is perfectly appropriate and, indeed, is required for compliance with federal funding statutes. Yet taken to its logical conclusion, it sends a message of callous indifference—an inappropriate "hands off" mentality—to grieving families who have learned that the expensive and prestigious educational institutions to which they were sending their children knew those children were in dire straits but failed to notify the families, who were clearly deeply involved in the welfare of their young members. Respect for student privacy as a defense, even buttressed by a federal law, fails to honor that law's exception and is no excuse for the schools' failure to take every reasonable step, including, but not limited to, family notification, to avert these young deaths.

C. . . . But the Proposed Amendment Would Offer Valuable Clarification

In the wake of the events at Virginia Tech, and in the face of obvious institutional confusion with respect to the reach of FERPA's emergency exception, U.S. Representative Tim Murphy of Upper St. Clair, Pennsylvania, introduced into Congress a bill to amend FERPA to make it clear that colleges and universities indeed have the right to notify a dependent student's parents (even when the student is beyond eighteen years of age) when the student appears to pose a danger of violence to self or others.[142] Representative Murphy, an experienced child psychologist, was motivated in part by Chuck Mahoney's suicide. He characterized the current exception as "too vague" and noted that educational institutions today are "'concerned that they'll end up with legal problems. We want them to first be thinking of student safety.'"[143] Shortly after its introduction, the bill was soundly endorsed by a number of major universities. Said Robert Berdahl, president of the Association of American Universities, representing sixty-two universities in the United States and Canada, "'We're pleased that he's seen the need for change . . . . This will give greater latitude to presidents and chancellors to contact parents.'"[144]

The proposed "Mental Health Security for America's Families in Education Act of 2007"[145] begins with a series of findings concerning the prevalence of mental illness among young adults, focusing especially on

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not that parents have a right to know but that students are adults with a right to privacy and a responsibility for self-care.").

142. *See* Sherman, *supra* note 29.

143. *Id.* (quoting Rep. Tim Murphy).

144. *Id.* (quoting Robert Berdahl).

145. H.R. 2220, 110th Cong. (as referred to House Committee on Education and Labor, May 8, 2007).

college students.[146] While noting the importance of confidentiality,[147] the proposed amendment also finds that "[p]arents and legal guardians of a student may be in the best position to supply essential help to a student suffering from significant mental illness," and "the value of parental involvement should not end when a student has attained 18 years of age."[148] Most specifically, the findings quote the FERPA exception in its entirety and make the following point:

> The unintended consequence of FERPA . . . is that school personnel, administrators, and teachers who have little or no training in mental health and mental illness are burdened with defining and determining if a student is at risk. These educational personnel are reluctant to release information to parents for fear of legal action. These issues create barriers and delays for informing families even when schools are concerned that students may be a risk to themselves or others.[149]

Section 3 of the bill, entitled "Mental Health Disclosures for Student Safety," provides that

> an educational agency or institution of higher education may disclose, to a parent or legal guardian of a student who is a dependent (as defined in section 152 of the Internal Revenue Code of 1986), information related to any conduct of, or expression by, such student that demonstrates that the student poses a significant risk of harm to himself or herself, or to others, including a significant risk of suicide, homicide, or assault.[150]

The disclosure permission is limited to situations in which college personnel obtain written certification from a licensed mental health professional, approved by the state where the institution is located, certifying (1) that the professional has reason to believe that the student's conduct or expression in fact demonstrates a significant risk of harm to self or others and (2) that the possession of such information by

146. *Id.* § 2(1)-(5).
147. *Id.* § 2(7).
148. *Id.* § 2(9), (10).
149. *Id.* § 2(11).
150. *Id.* § 3(k)(1).

the student's parent or legal guardian might protect the health or safety of the student or others.[151] Importantly, the bill does not require that the mental health professional has actually seen the student; consultation between the college administration and the professional, as a safeguard to validate the administrator's own evaluation, is presumably all that is necessary.

Representative Murphy's proposed amendment is a laudable and needed correction to the overreaction to FERPA on the part of many educational institutions and their concomitant hesitation to notify the families of troubled students under the current exception.[152] Like that exception, however, the bill only permits, but does not require, that such notification take place. One would like to think that Elizabeth Shin, Michael Frentzel, Sanjay Jain, and Chuck Mahoney, along with others, would still be alive today if that amendment had been in place. At least, the families might have been brought into the respective situations to try to see that the best possible care was undertaken. But even if Congress does its part by passing this amendment, tort law should recognize an actual duty on the part of educational institutions to notify parents or guardians of students who exhibit credible suicidal threats.

IV. THE ARGUMENT FROM PSYCHOLOGY

Although we have fixed the age of legal adulthood at eighteen and institutions of higher learning frequently cite that, along with FERPA, as key to their non-interventionist stance towards their students,[153] a burgeoning body of psychological literature tells us that a substantial number of young people in the age bracket of undergraduate students are highly susceptible to the kinds of mental health issues that can lead to suicidal ideation and actual attempts. Moreover, ongoing research

151. *Id.* § 3(k)(2).

152. Dr. Robert Berdahl, president of the Association of American Universities and former chancellor at the University of California, Berkeley, has stated that "he has known of cases in which college officials were reluctant to act because of legal issues." Sherman, *supra* note 29.

153. *See, e.g.*, Bradshaw v. Rawlings, 612 F.2d 135, 139 (3d Cir. 1979) (noting, in agreement with defendant's argument, that "[c]ollege students today are no longer minors; they are now regarded as adults in almost every phase of community life"); *accord* Beach v. Univ. of Utah, 726 P.2d 413, 418–19 (Utah 1986) (quoting *Bradshaw*); Furek v. Univ. of Del., 594 A.2d 506, 516–17 (Del. 1991) (quoting *Bradshaw*); *see also* Jain v. State, 617 N.W.2d 293, 295 (Iowa 2000) (noting that "University [of Iowa] policy calls for privacy with respect to the university's relationships with its adult students"); Bernstein, *supra* note 19 (noting Allegheny College's argument that Chuck Mahoney was an adult and it would have violated his privacy for the school to contact his parents against his request).

into brain development, revealing later development in the cerebral cortex than scientists had once thought to be the case, might correlate with lower faculties of judgment and impulse control than can be expected in more mature adults.

A. Mental Health Issues on Campus

Nationally, college student suicide is such a sufficiently pressing problem that in 2002, the National Mental Health Association and The Jed Foundation co-sponsored a panel of thirty leading experts from various disciplines[154] to convene for a conference entitled, "Expanding the Safety Net: A Roundtable on Vulnerability, Depressive Symptoms, and Suicidal Behavior on College Campuses" ("College Suicide Conference"). The panel focused on full-time students, aged eighteen to twenty-four, living in or near the campuses where they attended school. The panel found that "two distinct groups of students" are at higher risk for suicide: those with "pre-existing mental health conditions" at the time they enter college and those who "develop mental health problems during the college years."[155] With respect to the first group, the panel emphasized that college counseling services could not provide the total support that these students need. Rather, "college administrators and counselors must work more closely with the students, their families, their previous school systems, and other healthcare providers in order to ensure a more successful transfer of care."[156] This suggestion of a network of communication is a far cry from the "hands off" attitude that appears to prevail on so many campuses. Further, warned the panel, the "nature of the campus environment itself may serve to exacerbate any existing [conditions]," and "schools should try to avoid a cold, impersonal atmosphere where students feel they are treated as 'just a number.' This type of environment may only serve to unwittingly aggravate any feelings of inadequacy and lack of self worth."[157]

Other studies reveal that the number of students arriving on campuses in this first group—students with pre-existing mental health problems—has grown tremendously in recent years. The development

154. These included "clinical psychology, developmental psychology, and psychiatry, as well as epidemiology, suicidology, sociology, and public health." NMHA & JED FOUND., *supra* note 34, at 2.

155. *Id.* at 5.

156. *Id.*

157. *Id.*

of new drugs, notably anti-depressants such as Prozac and Zoloft, along with Ritalin, has enabled numbers of students to go to college who in times past would have been too sick to handle collegiate life.[158] *Time* magazine, in its January 2001 article on the subject, quoted well-known Johns Hopkins psychologist Kay Redfield Jamison: "The very effectiveness of modern treatment means that a lot of people who never would have made it into college are stable enough to go to universities .... [Colleges] are dealing with a lot of kids who are very sick."[159]

Besides the students who arrive at college with existing mental health problems, large numbers of students develop emotional difficulties or even full-blown psychological disorders while they are there. One report states that "[i]n 2001, 85% of North America's student counseling centers reported an increase in 'students with severe psychological problems' over the past five years. Thirty percent of them had a student suicide . . . ."[160] Hospitalizations are also up: eighty-nine percent of campus counseling centers sent at least one student to the hospital in 2001.[161] According to psychiatrist Morton Silverman, head of counseling services at the University of Chicago, counselors are diagnosing many more cases of depression than they once did.[162] The American Foundation for Suicide Prevention has found that "depression is the most prevalent diagnosis among young people who commit or attempt suicide."[163] This group also reported on studies attributing "more than 90% of all suicides [among youth and adults, generally] at least partly to a psychiatric disorder, most commonly a mood disorder."[164]

Strikingly, a number of such disorders characteristically emerge for the first time during the late teens or early twenties. One report states:

> There is the indisputable fact that age 18 to 25 is prime

158. Haas et al., *supra* note 31, at 1229 (also noting that the Americans with Disabilities Act has contributed to this effect); Kelly, *supra* note 32, at 52; *accord*, Ellen, *supra* note 37, at 5; Marano, *supra* note 52.

159. *Kelly, supra* note 32, at 52 (alteration in original). Kay Redfield Jamison, herself afflicted with bipolar disorder, is the author of such highly respected books as *An Unquiet Mind: A Memoir of Moods and Madness* (autobiographical) and *Night Falls Fast: Understanding Suicide*. She was also a member of the 2002 expert panel assembled to discuss the crisis of suicide on campus. *See supra* notes 34 and 154 and accompanying text.

160. Marano, *supra* note 52.

161. *Id.*

162. *Id.*

163. Haas et al., *supra* note 31, at 1232.

164. *Id.* at 1228.

> time for eruption of mental illness, making college, with its concentration of 18- to 25-year-olds, the prime place. Increasingly, mental health professionals recognize that depression, anxiety disorders, bipolar illness, personality disorders and schizophrenia are conditions that first arise in young adulthood. Catching them quickly is critical, as early management strongly influences how they play out over adulthood.[165]

These data suggest that, although it is tempting to think that parents who fail to detect their children's symptoms must be turning a blind eye to the obvious, such may not be the case at all.[166] A number of factors can exacerbate mental health problems once students reach the campus.[167] Many students coming to college are away from home for the first time, "entering into a new, unknown environment that may be extremely different from that with which they are familiar, and these are significant developmental issues."[168] Students who were successful in high school may encounter academic difficulties for the first time.[169]

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165. Marano, *supra* note 52; *accord* Ellen, *supra* note 37, at 4 ("Severe psychiatric disorders such as bipolar disorder and schizophrenia typically first manifest themselves between the ages of 18 and 24 years and can easily derail the lives of students."); Kelly, *supra* note 32, at 52 ("[M]any of the major psychiatric illnesses, including depression, bipolar disorder and schizophrenia, often do not manifest themselves until the late teens or early 20s.").

166. *See, e.g.*, Sontag, *supra* note 8, at 57, 58 (noting that the last time the Shins saw Elizabeth, she "seemed like herself"; now "[t]hey suspect that people wonder about them. . . . 'Some people might ask, "How could you not see?"' Cho Hyun Shin, [Elizabeth's] father, says"). Sanjay Jain's telephone calls home were described as "upbeat," and he appeared perfectly normal to his family over the Thanksgiving break immediately after his suicide attempt. Jain v. State, 617 N.W.2d 293, 295, 296 (Iowa 2000). In a similar vein, a stepfather interviewed on CBS's *Early Show* spoke of his stepson who committed suicide after losing his place on the Western Kentucky basketball team on account of a foot injury: "We're not realizing that because he couldn't play, because he wasn't achieving, in his mind that he wasn't measuring up. So all of a sudden, he's sinking. Right before everybody's eyes, he's sinking, and we don't even see him sinking." *The Early Show: Suicide on Campus* (CBS television broadcast Nov. 8, 2004), *transcript available at* http://www.cbsnews.com/stories/2004/11/07/earlyshow/contributors/tracysmith/main654130.shtml.

167. Marano, *supra* note 52.

168. NMHA & THE JED FOUND., *supra* note 34, at 5.

169. Both Elizabeth Shin and Sanjay Jain fell into this category. Elizabeth, who was salutatorian of her high school class, began to "panic about academic success" her freshman year at MIT and "saw it as a failure [that] she did not pass physics in her first term." Sontag, *supra* note 8, at 60, 61. Likewise, Sanjay was academically successful in high school, but in college quickly found that his chosen field of biomedical engineering seemed too difficult. *Jain*, 617 N.W.2d at 295. One expert points to "academic failure" as "frequently linked to suicidal behavior and completed attempts." Ellen, *supra* note 38, at 7.

Added to the academic stressors are the typical patterns of college life. Said *Time* magazine in 2001, "College can be a breeding ground for psychiatric problems. Poor eating habits, irregular sleeping patterns and experimentation with drugs and alcohol" can all contribute to mental health problems.[170] The panel of thirty experts at the 2002 College Suicide Conference agreed and pointed additionally to social and financial stress.[171] These observations have been borne out in student surveys. According to one survey of college freshmen conducted by UCLA in 1999, "a record 30.2% (39% of women and 20% of men) frequently felt overwhelmed by what they had to do."[172] This survey, conducted annually since 1966, has found "rising stress levels since 1985, when 16% said they were overwhelmed."[173] Another survey found that "76% of students felt 'overwhelmed' [in 2001] and 22% were sometimes so depressed they could not function."[174]

The picture that emerges is one of young people in transition, no longer children but nonetheless sometimes confused and even overwhelmed by the experiences they face in college. Gary Pavela, a noted authority on academic ethics and student rights and responsibilities, has commented on this phenomenon. Writing for *The Chronicle of Higher Education* in 1992, he had this to say:

> I think that it is time to give a new name to college students who are between the ages of 18 and 21. The term "adolescents" does not do them justice, yet calling them "young adults" suggests a level of maturity that many do not possess. Instead, I suggest calling them "post-adolescent pre-adults," or PAPAS, for short.[175]

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170. Kelly, *supra* note 32, at 52; *see also* Marano, *supra* note 52 ("Many students fall apart given the looser environment, erratic sleeping patterns and added stresses of college.").

171. NMHA & JED FOUND., *supra* note 34, at 10.

172. Haas et al., *supra* note 31, at 1228. The survey, conducted in September 1999 and reported by the UCLA Higher Education Research Institute in 2002, covered more than 350,000 freshmen at 683 colleges and was "statistically adjusted to reflect 1.5 million first-time, full-time students nationwide." *Id.*

173. *Id.*

174. *Id.* This report came from the American College Health Association's National College Assessment. *Id.*

175. Gary Pavela, *Today's College Students Need Both Freedom and Structure*, CHRON. HIGHER EDUC. (Wash. D.C.), July 29, 1992, at B1. Professor Pavela is the Director of Judicial Programs at the University of Maryland-College Park and editor of the national quarterly, *Synthesis: Law and Policy in Higher Education*, as well as the related *Synfax Weekly Report*.

Professor Pavela's article urges institutions of higher learning to re-think their obligations to provide for their students the appropriate environment to meet their needs as they mature into adulthood. He cites with approval the Delaware Supreme Court's ruling in *Furek v. University of Delaware*,[176] finding that the university had a duty of care "to regulate and supervise foreseeable dangerous activities occurring on its property"—specifically, in the context of a fraternity hazing incident on university-owned land.[177] Like that court, Professor Pavela thinks that a "special relationship" exists between a university and its resident students, at least paralleling the situation of landowner/business invitee.[178]

While psychology experts do not use Pavela's terminology, their findings and recommendations reflect the same line of thinking. The panel of experts at the College Suicide Conference recommends a "multifaceted collaborative approach" to the situation that goes beyond counseling centers to include administrators and the rest of the university community, including faculty, coaches, clergy, and student or resident advisors, as well as the general student body.[179] All of these people should be educated about the problem, and university personnel should be trained to spot risky behaviors (such as alcohol and drug abuse) that might mark a potentially suicidal student. Students should be informed as well, as "[t]hey are often more adept at noticing changes and detecting trouble in their peers than are many professionals who may merely be casual observers."[180] Student support groups can often provide a non-threatening outlet for conversation, and stress-reduction programs can be quite helpful.[181]

The panel also advises colleges and universities to make parents and families aware of their services, and especially recommends coordination where students already have a history of mental health problems.[182] The College Screening Project, discussed above,[183] was developed by the American Foundation for Suicide Prevention as a

176. 594 A.2d 506 (Del. 1991); *see supra* notes 72–73 and 76–77 and accompanying text.

177. Pavela, *supra* note 175.

178. *See id.*

179. NMHA & JED FOUND., *supra* note 34, at 8–9.

180. *Id.* at 9.

181. *Id.* at 10.

182. *Id.* at 9. *See also id.* at 12 (Table 6, "A Checklist for Your Institution," asks, *inter alia*, "Do we have a transitional support program in place for parents and families of incoming students who have already been diagnosed with mental health disorders?").

183. *See supra* notes 43–49 and accompanying text.

result of the same kind of response to the problem.[184] These suggestions for open institutional approaches recognize both the transitional nature of this highly vulnerable time of life and the need for programs on campuses that can nurture their students and provide the emotional support that all of them—not just those with specific mental health problems—need in order to thrive.[185]

B. Brain Development Studies: A New Avenue to Behavioral Research

Recent studies in brain development may contain clues to psychological maturation and age-related behaviors that have yet to be explored. Only in the past few years, with the advent of magnetic resonance imaging devices ("MRIs"), have neuroscientists been able safely to conduct longitudinal studies on the brains of healthy children as they progress through normal developmental stages.[186] The leading team of experts in these efforts has been headed by Dr. Jay Giedd, chief of brain imaging in the child psychiatry branch at the National Institute of Mental Health ("NIMH"). He and colleagues at NIMH, along with a group from UCLA, have painstakingly analyzed MRIs taken every two years of children from ages four to twenty-one.[187] These researchers and others conducting similar or parallel work[188] have learned, to their

184. *See generally* Ellen, *supra* note 38; Ellen, *supra* note 37; Haas et al., *supra* note 31; *see also supra* notes 43–49 and accompanying text (discussing the College Screening Project).

185. The pressures of college life, including leaving home, being on one's own, academic stress, etc., affect all students, as experts in psychology recognize. *See supra* notes 167–75 and accompanying text (discussing stresses encountered in college).

186. *See, e.g.*, Claudia Wallis, *What Makes Teens Tick*, TIME, May 10, 2004, at 56, 59 (quoting Dr. Jay Giedd, that MRI technology "'made studying healthy kids possible' because there's no radiation involved," and also noting that "[b]efore MRI, brain development was studied mostly by using cadavers").

187. *See generally* Jay N. Giedd, et al., *Brain Development During Childhood and Adolescence: A Longitudinal MRI Study*, 2 NATURE NEUROSCIENCE 861 (1999); Nitin Gogtay et al., *Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood*, 101 PROCEEDINGS OF THE NAT'L ACAD. OF SCI. OF THE U.S.A. 8174 (2004); Nat'l Inst. of Mental Health, *Teenage Brain: A Work in Progress* (2004) [hereinafter NIMH, *Teenage Brain*], *available at* http://www.nimh.nih.gov/publicat/teenbrain.cfm; Wallis, *supra* note 186; *Frontline*, *Inside the Teenage Brain* (PBS television broadcast Jan. 31, 2002), *transcript available at* http://www.pbs.org/wgbh/pages/frontline/shows/teenbrain/etc/synopsis.html; Press Release, Nat'l Inst. of Mental Health, Imaging Study Shows Brain Maturing (May 17, 2004) [hereinafter NIMH, Imaging Study], *available at* http://www.nimh.nih.gov/press/prbrainmaturing.cfm.

188. For example, using functional MRI, ("fMRI"), Dr. Deborah Yurgelun-Todd, of Harvard's McLean Hospital, has studied brain activity of teens and adults as they identified emotions on pictures of faces. There was a striking difference in the abilities of the two groups to identify fear: 100% of adults identified it correctly, while only about half of the teenagers did so. *Frontline*, *supra* note 187 (follow "Work in Progress" hyperlink, then follow

surprise, that a number of structural changes occur in the brain much later in adolescence than anyone had supposed.

Until these studies, most scientists believed that the brain had completed its development by around the age of twelve.[189] They know now that at about age eleven in girls and age twelve in boys, there is a second wave of synapse formation and a spurt of growth in the cerebral cortex, followed by a "pruning back" throughout adolescence.[190] (The first such outburst of activity takes place in early childhood.[191]) While the pruning process means a loss of gray matter (the "thinking" part of the brain),[192] it also consolidates learning, by discarding weaker branches and connections. At the same time, the brain wraps myelin, the white matter of the brain, around other connections to strengthen and stabilize them.[193] Myelinization actually goes on until a person's fourth decade.[194]

While the exact ages at which this brain activity occurs may differ from one person to another, there is a consistent developmental pattern.[195] Many parts of the brain undergo developmental change during the teen years,[196] although most striking is the growth of the

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"Interview: Deborah Yurgelun-Todd" hyperlink) (interview with Deborah Yurgelun-Todd, in which she reports that teens tended to interpret the fearful facial expressions as "sadness" or "confusion").

189. Wallis, *supra* note 186, at 56.

190. *Frontline*, *supra* note 187 (follow "Work in Progress" hyperlink, then follow "Adolescent Brains are Works in Progress" hyperlink) (producer Sarah Spinks describing why "Adolescent Brains are Works in Progress").

191. NIMH, *Teenage Brain*, *supra* note 187 ("Prior to this study, research had shown that the brain overproduced gray matter for a brief period in early development—in the womb and for about the first 18 months of life—and then underwent just one bout of pruning."); NIMH, Imaging Study, *supra* note 187 ("It was long believed that a spurt of overproduction of gray matter during the first 18 months of life was followed by a steady decline as unused circuitry is discarded."); *Frontline*, *supra* note 187 (follow "Work in Progress" hyperlink, then follow "Adolescent Brains are Works in Progress" hyperlink) (Sarah Spinks, reporting that "[i]t was thought at one time that the foundation of the brain's architecture was laid down by the time a child is five or six"); *see supra* note 187 (follow "Work in Progress" hyperlink, then follow "Interview: Jay Giedd" hyperlink) (Dr. Jay Giedd, in an interview, stating that "[b]y age six, the brain is already 95 percent of its adult size").

192. *See, e.g.*, *Frontline*, *supra* note 187 (follow "Work in Progress" hyperlink, then follow "Interview: Jay Giedd" hyperlink).

193. *Frontline*, *supra* note 187 (follow "Work in Progress" hyperlink, then follow "Adolescent Brains are Works in Progress" hyperlink).

194. Gogtay et al., *supra* note 187, at 8178.

195. NIMH, *Teenage Brain*, *supra* note 187.

196. Gogtay et al., *supra* note 187, at 8175–78; *Frontline*, *supra* note 187 (follow "part of the brain" hyperlink). Both of these sources show diagrams of the teenage brain; Gogtay et al. have used time-lapse sequences to make a "movie" of pediatric brain development.

prefrontal cortex, which is the latest part of the brain to mature.[197] The timing is important because that is the area responsible for the brain's highest judgmental faculties. Scientists call it the site of the "'executive functions'—planning, impulse control and reasoning."[198] In an interview, Dr. Giedd stated:

> The frontal lobe is often called the CEO, or the executive of the brain. It's involved in things like planning and strategizing and organizing, initiating attention and stopping and starting and shifting attention. It's a part of the brain that most separates man from beast, if you will. That is the part of the brain that has changed most in our human evolution, and a part of the brain that allows us to conduct philosophy and to think about thinking and to think about our place in the universe.[199]

Researchers are uncertain as to how long the brain's maturation process goes on, but they believe that it continues into young adulthood, at least through the early twenties. Says Dr. Giedd, "When we started, . . . we thought we'd follow kids until about 18 or 20. If we had to pick a number now, we'd probably go to age 25."[200]

The question, of course, is what this newfound knowledge tells us about behavior, generally, and mental health issues, in particular, in the teens and early twenties. Scientists so far are cautious in stating the

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Gogtay et. al., *supra* note 187, at 8174.

197. Gogtay et al., *supra* note 187, at 8176–77. Researchers may also refer to the last-developing area as the "temporal cortex," the "temporal lobe," or the "frontal lobe." *See, e.g., id.* (using various terms); *Frontline*, *supra* note 187 (follow "Work in Progress" hyperlink, then follow "Adolescent Brains are Works in Progress" hyperlink) ("prefrontal cortex" or "frontal lobe"); Wallis, *supra* note 186, at 61 ("prefrontal cortex").

198. NIMH, *Teenage Brain*, *supra* note 187; Wallis, *supra* note 186, at 61 ("planning, setting priorities, organizing thoughts, suppressing impulses, weighing the consequences of one's actions"); NIMH, Imaging Study, *supra* note 187 (naming as examples of "executive functions" "integrating information from the senses, reasoning, and other[s]").

199. *Frontline*, *supra* note 187 (follow "Work in Progress" hyperlink, then follow "Interview: Jay Giedd" hyperlink).

200. Wallis, *supra* note 186, at 58. Neuropsychologist Ruben Gur, of the University of Pennsylvania in Philadelphia, puts the age of biological maturity at around twenty-one or twenty-two; Abigail A. Baird, of Dartmouth College, estimates it to be closer to twenty-five or twenty-six. Bruce Bower, *Teen Brains on Trial: The Science of Neural Development Tangles with the Juvenile Death Penalty*, 165 SCI. NEWS 299, 299–300 (2004) (describing use of brain immaturity as evidence to argue against juvenile death penalty and quoting Baird as saying, "There's no reason to say adulthood happens at age 18.").

implications of what they have learned. Some have suggested a link between the brain's pruning process and the onset of adult schizophrenia and other disorders at this time of life.[201] More generally, the late development of the frontal lobe, responsible for the "executive functions," may help to account for teenagers' willingness to indulge in risky behaviors, including experimentation with alcohol and drugs.[202] Research also indicates that young people are more willing to take risks in the presence of friends than when they are alone.[203] Colleges and universities, where young people in their late teens and early twenties live close together in a "pressure cooker" environment, arguably might exacerbate a tendency towards impulsive behavior that a "sober second thought" would perhaps quell.[204] Commenting on the possible link between behavior and brain development, a 1999 article in *Nature Neuroscience* stated:

> The frontal cortex . . . controls higher cognitive functions, including emotions, organization of complex tasks and inhibition of inappropriate behaviors. These abilities develop relatively late and are generally considered as signs of maturity. It is perhaps no surprise to find that the brain regions that underlie these functions are among the last to mature.[205]

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201. Gogtay et al., *supra* note 187, at 8178 (noting that "adult-onset schizophrenia . . . is more strongly associated with deficits in later-maturing temporal and frontal regions," and that "alterations either in degree or timing of basic maturational pattern may at least partially be underlying these neurodevelopmental disorders"); NIMH, *Teenage Brain*, *supra* note 187 ("The observed late maturation of the frontal lobe conspicuously coincides with the typical age-of-onset of schizophrenia . . . which . . . is characterized by impaired 'executive' functioning."); Wallis, *supra* note 186, at 65 (Some experts believe the structural changes seen at adolescence may explain the timing of such major mental illnesses as schizophrenia and bipolar disorder. These diseases typically begin in adolescence and contribute to the high rate of teen suicide.).

202. Wallis, *supra* note 186, at 61 (citing several psychological experts' comments to the effect that not only hormones but also brain development could help to account for the "risky, impulsive behavior" so often seen in adolescents); *Frontline*, *supra* note 187 (follow "Work in Progress" hyperlink, then follow "Interview: Jay Giedd" hyperlink) (interview with Dr. Jay Giedd, noting that teens' organizational skills and decision making should not be held to adult standards because their frontal lobe has yet to fully develop).

203. Wallis, *supra* note 186, at 62.

204. According to *Frontline*, the late-developing prefrontal cortex has been called "the area of sober second thought." *Frontline*, *supra* note 187 (follow "Work in Progress" hyperlink, then follow "Adolescent Brains are Works in Progress" hyperlink).

205. Press Release, Nature Neuroscience, Watching the Brain Grow up (Oct. 1999), *available at* http://www.nature.com/neuro/press_release/nn1099.html.

Indeed, the legal profession itself has taken note of brain development research: in January 2004, the American Bar Association's Juvenile Justice Center issued a position paper, *Adolescence, Brain Development and Legal Culpability*, opposing the death penalty for juveniles on the grounds that adolescents are "less morally culpable" than adults by virtue of their "stark limitations of judgment."[206] The statement echoes arguments put forth in an amicus brief filed on behalf of the American Medical Association, the American Psychiatric Association, the National Mental Health Association (home of researchers Dr. Giedd and others heavily involved in brain development studies), and other similar organizations[207] on behalf of the sixteen- and seventeen-year-old juveniles in *Roper v. Simmons*, where the Supreme Court invalidated the death penalty for young people of those ages in 2005.[208] Speaking of adolescents as a whole (and, specifically, of those aged sixteen and seventeen) the medical groups' brief noted that they "are more impulsive than adults" and "more susceptible to stress, more emotionally volatile, and less capable of controlling their emotions than adults."[209] Therefore, "the average adolescent cannot be expected to act with the same control or foresight as a mature adult."[210] The brief goes on to link adolescent behavior to brain development, specifically observing that the maturation process continues beyond the age of eighteen:

> Behavioral scientists have observed these differences for some time. Only recently, however, have studies yielded evidence of concrete differences that are anatomically based. Cutting-edge brain imaging technology reveals that regions of the adolescent brain do not reach a fully mature state until after the age of 18. These regions are precisely those associated with impulse control,

206. ADAM ORTIZ, A.B.A. JUV. JUSTICE CTR., ADOLESCENCE, BRAIN DEVELOPMENT AND LEGAL CULPABILITY 3 (2004), *available at* http://www.abanet.org/crimjust/juvjus/Adolescence.pdf.

207. Brief of the Am. Med. Ass'n et al. as Amici Curiae in Support of Respondent, Roper v. Simmons, 543 U.S. 551 (2005) (No. 03-633). Also joined in the brief were the American Psychiatric Association, American Society for Adolescent Psychiatry, American Academy of Child & Adolescent Psychiatry, American Academy of Psychiatry and the Law, National Association of Social Workers, the Missouri Chapter of the National Association of Social Workers, and the National Mental Health Association.

208. Roper v. Simmons, 543 U.S. 551 (2005).

209. Brief as Amici Curiae in Support of the Respondent, *supra* note 207, at 2.

210. *Id.*

> regulation of emotions, risk assessment, and moral reasoning. Critical developmental changes in these regions occur only after late adolescence.[211]

While he did not rely specifically on data from brain development technology to decide that the Eighth Amendment prohibits the death penalty for persons below the age of eighteen, Justice Kennedy's majority opinion did cite "scientific and sociological studies" in amicus briefs confirming a "'lack of maturity and an underdeveloped sense of responsibility'" more prevalent in young people than adults that "'often result in impetuous and ill-considered actions and decisions.'"[212]

Despite the medical groups' partial reliance on brain studies in their *Roper v. Simmons* brief, the researchers conducting those studies are very cautious in their statements about the implications of their discoveries; it is simply too early, they say, to base social policy on what they have learned.[213] Put another way, the leap from *structure* to *function* is much more complicated than simple age-related correlations between the brain's development and the behavior of young people in their late teens and early twenties.[214] Yet no one doubts that there is a link, even though we are far from understanding just how that link works.[215] Certainly, while both cognitive behaviorists and brain development researchers can tell us about maturational changes extending at least into the early twenties, no one has proposed that we change the legal ages for behaviors such as driving (generally, sixteen), voting and contract-making (eighteen), or drinking (twenty-one).[216]

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211. *Id.* at 2–3.

212. *Roper*, 543 U.S. at 569 (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993)).

213. *See, e.g.*, Wallis, *supra* note 186, at 65 (noting that "[b]rain scientists tend to be reluctant to make the leap from laboratory to real-life, hard-core teenagers.").

214. *See, e.g.*, *Frontline*, *supra* note 187 (follow "Work in Progress" hyperlink, then follow "Adolescent Brains are Works in Progress" hyperlink) (report of Sarah Spinks).

215. *See, e.g.*, Wallis, *supra* note 186, at 65 (noting that despite the reluctance of scientists to leap from the laboratory to real life, "It is clear . . . that there are implications in the new research for parents, educators and lawmakers"); *Frontline*, *supra* note 187 (follow "Work in Progress" hyperlink, then follow "Interview: Jay Giedd" hyperlink) (similarly noting such reluctance but stating, "It is a good hypothesis that if a particular structure is still immature, the functions it governs will show immaturity").

216. Writing in *Roper v. Simmons*, Justice Kennedy observed, "Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. The qualities that distinguish juveniles from adults do not disappear when an individual turns 18[,] . . . [but] [t]he age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest." *Roper*, 543 U.S. at 574. Appendices to the Court's opinion list individual state

This Article offers a much more modest proposition: Given the current state of our knowledge about normal maturation, we can expect young people of the ages of most undergraduates, at least, to be more inclined than older adults toward reckless or impulsive behavior, and to act, at times, without full appreciation for the consequences of what they are doing. These tendencies are exacerbated by living situations where almost everyone is at the same age and stage of life. The result is an atmosphere where the stresses of academic life can readily be experienced as overwhelming. All of these factors add up to a recipe for a psychologically vulnerable student to fall prey to suicidal ideation and perhaps even to carry out the idea. While schools cannot possibly be "babysitters" (as one court put it)[217] for their students, we know there are situations in which college administrators or other university personnel are in fact aware that a particular individual student is seriously suicidal. In that situation, an appreciation for the general nature of student immaturity makes it appropriate to require, as a matter of law, that the university employee take reasonable steps to prevent the potential infliction of self-harm.

V. THE ARGUMENT FROM MORALITY

In his 1992 article in the *Chronicle of Higher Education*, *Today's College Students Need Both Freedom and Structure*,[218] Professor Gary Pavela maintains that, despite the demise of the rigid control that marked *in loco parentis*, "colleges still retain a 'special relationship' with

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statutes establishing, *inter alia*, the minimum age to vote (18 in all cases), *id.* at 581–83; to serve on a jury (generally 18, but 19 in Alabama and Nebraska, and 21 in Mississippi and Missouri), *id.* at 583–85; and to marry without parental or judicial consent (generally 18, but 16 in Georgia and Maryland, 19 in Nebraska, and in Mississippi, 15 for females and 17 for males), *id.* at 585–87; *see also* Wallis, *supra* note 186, at 65 ("In light of what has been learned, it seems almost arbitrary that our society has decided that a young American is ready to drive a car at 16, to vote and serve in the Army at 18 and to drink alcohol at 21. Giedd says the best estimate for when the brain is truly mature is 25, the age at which you can rent a car. 'Avis must have some pretty sophisticated neuroscientists,' he jokes.").

217. Beach v. Univ. of Utah, 726 P.2d 413, 419 (Utah 1986)

> Fulfilling [the role of custodian] would require the institution to babysit each student, a task beyond the resources of any school. But more importantly, such measures would be inconsistent with the nature of the relationship between the student and the institution, for it would produce a repressive and inhospitable environment, largely inconsistent with the objectives of a modern college education.

218. Pavela, *supra* note 175. *See generally supra* notes 175–78 and accompanying text (discussing Professor Pavela's ideas in this article).

students that requires them to exercise some responsibility for students' safety and behavior." In his view, this responsibility amounts to a "moral obligation[]," which he predicts "courts and legislatures will sooner or later transform into a legal duty."[219] Pavela is actually discussing disciplinary obligations on the part of institutions of higher learning that he thinks appropriately extend to situations of hazing, substance abuse, sexual assault, and the like.[220] As previously mentioned, some courts have already found a duty in instances involving residential security[221] and hazing in an on-campus fraternity.[222] The "moral obligation" to protect student safety must surely have been in the minds of the drafters of the American Law Institute's Restatement (Third) of Torts section 40, which added "a school with its students" to the "special relationships" previously identified as grounds for creating a duty of care.[223] This duty includes, according to the reporter's notes, at least some situations involving institutions of higher learning.[224]

Of course, the new draft does retain the general "no-duty-to-rescue" rule.[225] This rule itself is generally defended as consistent with the liberty properly pertaining to the individual in a free society.[226] It has, however, from time to time been vehemently attacked for the inherent immorality of its position.[227] Dean Prosser famously found decisions

219. Pavela, *supra* note 175. Pavela is in part expressing his agreement with remarks to a similar effect given by Robert Bickel, professor of law at Stetson University, at the 1992 National Conference on Law and Higher Education. *Id.*

220. *Id.* The "moral obligation" Pavela describes is more amorphous than that advocated here. He refers to "the moral obligations inherent in the student-teacher relationship, including the obligation to enforce a standard of civility on campus." *Id.*

221. Mullins v. Pine Manor Coll., 449 N.E.2d 331, 337 (Mass. 1983).

222. Furek v. Univ. of Del., 594 A.2d 506, 522–23 (Del. 1991).

223. RESTATEMENT (THIRD) OF TORTS § 40(a), (b)(5) (Proposed Final Draft No. 1, 2005); *see supra* notes 67–70 and accompanying text (discussing that section).

224. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 40 (Proposed Final Draft No. 1, 2005).

225. *Id.* § 37. Section 37 provides: "An actor whose conduct has not created a risk of physical harm to another has no duty of care to the other unless a court determines that one of the affirmative duties provided in §§ 38–44 is applicable." *Id.*

226. *See, e.g.*, Francis H. Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability*, 56 U. PA. L. REV. 217 (1908) (noting the distinction between misfeasance and non-feasance as "deeply rooted in the common law," *id.* at 219, and concluding that "duties to take positive action for the benefit and protection of others attach only to certain relations," and then extend only so far as "absolutely necessary" for their protection, *id.* at 243); Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 189–203 (1973) (arguing against Ames, *infra* note 229, on grounds of the importance of individual liberty and the problem of drawing lines). Epstein is particularly concerned with the necessity for a causal connection between defendant's act and plaintiff's injury.

227. *See, e.g.*, Ernest J. Weinrib, *The Case for a Duty to Rescue*, 90 YALE L.J. 247, 293

upholding the no-duty-to-rescue rule "revolting to any moral sense."[228] Although he failed to carry the day with this contention, other writers have from time to time espoused the notion that our common sense of the moral duty to help someone in peril, especially when that can be accomplished without danger or even great inconvenience to oneself, should, in fact, be a legal requirement. The famous essay by James Barr Ames, *Law and Morals*, which appeared in the *Harvard Law Review* of 1908,[229] began by tracing the historical evolution in the common law between liability in tort and a finding of blameworthiness, and concluded with the observation, "We should all be better satisfied if the man who refuses to throw a rope to a drowning man or to save a helpless child on the railroad track could be punished and be made to compensate the widow of the man drowned and the wounded child."[230]

Ames noted the practical line-drawing difficulties inherent in the imposition of a positive duty but observed, "that difficulty has continually to be faced in the law."[231] He therefore proposed a "possible working rule":

> One who fails to interfere to save another from impending death or great bodily harm, when he might do so with little or no inconvenience to himself, and the death or great bodily harm follows as a consequence of his inaction, shall be punished criminally and shall make compensation to the party injured or to his widow and children in case of death.[232]

Writing along similar lines almost seventy years later, Marshall Shapo singled out universities for special attention, along the lines of the Restatement's "special relation": "modern educational institutions represent great clusters of power, and, even given a laissez faire

(1980) (noting that "the common law is already instinct with the attitude of benevolence on which a duty to rescue is grounded" and that a duty of easy rescue of another in an emergency would satisfy "those who believe that law should attempt to render concrete the notion of ethical dealing between persons"). Weinrib argues that the duty he proposes satisfies the requirements not just of deontological concerns, but of utilitarianism as well. *Id.*; *see also* MARSHALL S. SHAPO, THE DUTY TO ACT: TORT LAW, POWER, & PUBLIC POLICY (1977).

228. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 54, at 336 (3d ed. 1964).

229. James Barr Ames, *Law and Morals*, 22 HARV. L. REV. 97 (1908).

230. *Id.* at 112–13.

231. *Id.* at 112.

232. *Id.* at 113.

approach to student life, perhaps the law should recognize a new relation of dependence fostered in students by that power, a relation quite akin to that of industrial workers with their employers."[233]

While the common law has not responded to suggestions of a positive duty to rescue, both judicial and legislative policies have developed that help to encourage the moral impetus to help one in imminent peril. Ernest Weinrib notes both courts' increasingly favorable treatment of rescuers and their expansion upon the "special relationship" doctrine.[234] "Good Samaritan" statutes, in force in forty-nine states and the District of Columbia, immunize physicians and other healthcare providers from negligence actions when they attempt to provide care in emergency situations.[235] And three states have, in fact, passed laws requiring a person at the scene of an emergency to provide reasonable assistance, potentially including a duty to contact appropriate authorities.[236]

This Article does not propose anything so grandiose as a general abolition of the "no-duty-to-rescue" rule. The point here rests upon the thought expressed by Ernest Weinrib that "the role of the common-law judge centrally involves making moral duties into legal ones,"[237] and the contention that in some situations, where college personnel are aware of the serious and imminent threat of suicide on the part of a student, it is incumbent upon them to take reasonable steps to prevent the death.

VI. OBJECTIONS TO A RULE OF POTENTIAL NON-CLINICIAN LIABILITY

There are important substantive objections and counter-arguments to any rule of law imposing a duty upon non-clinician college and university personnel to take reasonable steps to protect a seriously suicidal student against self-harm, notably indicated by the finding (so surprising to psychologists) of "reluctance on the part of many university officials to know the actual identity of suicidal students, believing that not knowing will protect the institution from liability in the event of a student's suicide."[238] These objections are well articulated

233. SHAPO, *supra* note 227, at 41.

234. Weinrib, *supra* note 227, at 248.

235. BARRY R. FURROW ET AL., HEALTH LAW § 6-5(c) (2d ed. 2000).

236. MINN. STAT. § 604A.01 (2000 & Supp. 2008); R.I. GEN. LAWS § 11-56-1 (2002); VT. STAT. ANN. tit. 12, § 519 (2002).

237. Weinrib, *supra* note 227, at 263.

238. Haas et al., *supra* note 31, at 1234; *see supra* text accompanying notes 58 and 102.

in *MIT v. Shin*, in briefs filed with the Massachusetts Appeals Court by MIT administrators Arnold Henderson and Nina Davis-Millis, appealing Judge McEvoy's denial of summary judgment as to them,[239] and by three amicus curiae briefs filed the same day by groups representing almost all institutions of higher education in the country.[240] They deserve serious examination prior to any specific proposal to address the salient legal issue.

A. Legal Arguments

1. "Special Relationship" Criteria Are Lacking

Restatement (Second) of Torts section 314 states the "no-duty-to-rescue" rule: "The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action."[241]

The Comments make clear that absent a special relationship, foreseeability alone does not trigger a duty to act on behalf of another; furthermore, any such duty is likely to arise only when the actor has created the situation that endangers the other or has actual control over a third person, or over land or chattels, that themselves create the dangerous conditions.[242] Section 314A, the "special relationship" section, includes custodial situations among those giving rise to its exception to the no-duty rule.[243] Colleges and universities clearly do not have either custody or control of their students, even those who live on campus. Furthermore, there is no known case where an institution of higher learning actually caused a student's suicidal impulse.

Under these circumstances, argued the MIT administrators, a "special relationship" is necessarily lacking, for the special relationship must be a pre-existing one; it cannot be triggered by foreseeability

239. *See* Memorandum in Support of Petition for Relief Under G.L. ch. 231, § 118 (First Paragraph) by MIT Administrators Arnold Henderson and Nina Davis-Millis, Shin v. MIT, No. 2006-J-0099 (Mass. Super. Feb. 24, 2006) [hereinafter MIT Brief].

240. *See* Ass'n Motion, *supra* note 13, at 1 (claiming to represent "most higher education institutions in the United States"); Brief of Amici Curiae American Council on Education et al. in Support of Petition for Relief under G.L. ch. 231, § 118 (First Paragraph) by MIT Administrators Arnold Henderson and Nina Davis-Millis, Shin v. MIT, No. 2006-J-0099 (Mass. Super. Feb. 24, 2006) [hereinafter Ass'n Brief]; Nat'l Colleges Brief, *supra* note 13; Mass. Colleges Brief, *supra* note 13.

241. RESTATEMENT (SECOND) OF TORTS § 314 (1965).

242. *Id.* cmts. *a–d* (especially cmt. *a*).

243. *Id.* § 314A(4).

alone.[244] Yet that is the only factor that could conceivably be deemed to create a legal duty here. Judge Kiser was wrong in his *Schieszler v. Ferrum*[245] decision, the argument goes, for he relied upon the sole factor of foreseeability in ruling that Ferrum College and its dean of student affairs, David Newcombe, had a duty to protect Michael Frentzel from his threatened suicide.

The contention of this Article is simply the point that, for all the reasons cited above, the law in this area is changing, and that change is one that reflects a better appreciation for the realities of the circumstances of a seriously suicidal student attending a college or university—particularly, a student who is in residence there. The American Law Institute, in its draft of the Restatement (Third) of Torts, has taken account of this fact and lent its considerable weight to the notion that there may be situations in which it is appropriate for courts to find a special relationship between an institution of higher learning and a given enrolled student.[246] This is not an argument that the "no-duty-to-rescue" rule should be overturned or that colleges and universities have a "special relationship" with all of their students, which would be a totally unworkable rule. It is both the *actual knowledge* on the part of the non-clinician college administrator, together with the *imminence* of the threat, that can create the duty to take reasonable steps to prevent the self-harm. Foreseeability is thus the most important factor in triggering the duty, but not the only one. Context is everything in this kind of question; it will necessarily require a case-by-case assessment to determine whether the facts can appropriately be characterized as creating the duty inherent in a special relationship. In this respect, protests in the briefs supporting MIT in *Shin* that Judge McEvoy's opinion was too open-ended and pointed the way to a standardless and indeterminate duty[247] are well taken; those objections should be taken into account in framing an operative rule.[248]

2. The Double-Bind: Liable Whatever the Institution Does?

Schools also feel caught in a bind with respect to countervailing

244. *See* MIT Brief, *supra* note 239, at 5–13.

245. Schieszler v. Ferrum Coll., 236 F. Supp. 2d 602 (W.D. Va. 2002); *see supra* notes 21–24 and accompanying text; *see also* MIT Brief, *supra* note 239, at 12–13.

246. RESTATEMENT (THIRD) OF TORTS § 40 (Proposed Final Draft No. 1, 2005).

247. *See* MIT Brief, *supra* note 239, at 13–14; Ass'n Brief, *supra* note 240, at 8–11; Nat'l Colleges Brief, *supra* note 13, at 6–7; Mass. Colleges Brief, *supra* note 13, at 25–30.

248. *See infra* notes 297–98 and accompanying text.

federal policy.[249] The privacy concerns of FERPA (with its emergency exception) have already been mentioned.[250] More problematic, possibly, is the difficulty some schools are encountering by demanding withdrawal when a student appears to be suicidal or to be suffering from severe mental problems. Most notorious in recent months is the case of Jordan Nott, who sued George Washington University for dismissing him from campus via letter for "endangering behavior," thereby violating the code of student conduct, two days after he had checked himself into the University Hospital on grounds of depression, sleeplessness, and suicidal ideation.[251] The suit eventually settled.[252] Other students have also complained of suspensions or forced withdrawals, and last year, the U.S. Department of Education's Office of Civil Rights warned several schools that students with mental health problems are protected by federal law.[253] Specifically, section 504 of the Federal Rehabilitation Act of 1973 prohibits recipients of federal funds from discriminating on the grounds of disability,[254] while the Americans with Disabilities Act prohibits such discrimination on the part of any entity that serves the public.[255] Between these statutes and the *Schieszler*

249. *See* Mass. Colleges Brief, *supra* note 13, at 24–25.

250. *See supra* notes 117–23 and accompanying text.

251. Susan Kinzie, *GWU Suit Prompts Questions of Liability*, WASH. POST, Mar. 10, 2006, at A1; *see also* Editorial, *Depressed? Get Out!*, WASH. POST., March 13, 2006, at A14 (describing GW's actions as "an excellent lesson in how not to respond to serious depression"); Rob Capriccioso, *Counseling Crisis*, INSIDE HIGHER ED, Mar. 13, 2006, http://www.insidehighered.com/news/2006/03/13/counseling (discussing the Nott case in some detail, with comments from a spokeswoman for GW).

252. Trachtenberg, *supra* note 2. Stephen Joel Trachtenberg is the president of George Washington University. *Id.* In his essay (commenting on the Virginia Tech killings) he notes the Nott situation and states that "we stand by the result that a life may have been saved." *Id.*

253. *See* Julie Rawe & Kathleen Kingsbury, *When Colleges Go on Suicide Watch*, TIME, May 22, 2006, at 62, 62–63 (reporting the experience of Anne Giedinghagen at Cornell, as well as the case of Jordan Nott, and noting that several students complained to the Department of Education's office about being "summarily booted"); *see also* Capriccioso, *supra* note 251, at 4 (reporting, in addition to the Nott case, the story of Sue Schaller, forced to take "mandated leave" from New York University, and also detailing actions of the U.S. Department of Education's Office of Civil Rights ("OCR"). The latter included a finding of violation on the part of Bluffton University in Ohio, which removed a student following a suicide attempt without any due process; said the OCR, the university "did not consult with medical personnel, examine objective evidence, ascertain the nature, duration and severity of the risk to the student or other students, or consider mitigating the risk of injury to the student or other students.").

254. 29 U.S.C. § 794 (2000 & Supp. V 2005).

255. 42 U.S.C. §§ 12101–12213 (2000 & Supp. V 2005). The specific provision is § 12182(a), providing for application to any party that "operates a place of public accommodation." *Id.*

and *Shin* opinions, notes *Time* magazine, "schools are left 'with the quandary of being sued no matter what they do.'"[256]

Finding the fine line between "damned if you do, damned if you don't" can concededly feel like a frustrating task. Jordan Nott has vented his own exasperation over George Washington's apparent greater concern with its own potential liability than with his mental health: "'When you are looking out for your own liability, you're not really looking out for the interests of the student, you're looking out for yourself. . . . I suppose every person has to look out for themselves, but this goes way beyond a certain line.'"[257] In the wake of several incidents similar to his, the Department of Education's Office of Civil Rights has notified schools that such extreme actions are justifiable "only when there is 'a high probability of substantial harm and not just a slightly increased, speculative or remote risk.'"[258]

Partly as a result of the Jordan Nott incident,[259] the Virginia legislature has unanimously taken the extreme step of passing a law banning public universities from expelling or punishing students simply because of their suicidal ideation or behavior.[260] Persons associated with institutions of higher learning in the state were generally dismayed by an action they deemed to undercut their flexibility in dealing with troubled students.[261] Interestingly, the legislation begins with a positive requirement that has been virtually overlooked in the news media and public pronouncements. The legislation reads as follows:

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256. Rawe & Kingsbury, *supra* note 253, at 62–63 (quoting United Educators, which insures more than 1,100 colleges and secondary schools nationwide).

257. Capriccioso, *supra* note 251. It is significant that in Nott's case, the healthcare provider shared patient information with the school administration—a context not contemplated here. However, his observation makes a relevant point, whatever the means of the administration's knowledge and involvement.

258. Rawe & Kingsbury, *supra* note 253, at 63.

259. Josh Keller, *Virginia Legislature Votes to Bar Colleges from Dismissing Suicidal Students*, CHRON. HIGHER EDUC. (Wash., D.C.), Mar. 9, 2007, at A41 (noting that the bill's sponsor cited the case of Jordan Nott, as well as a similar situation at Hunter College of the City University of New York that settled for $65,000).

260. VA. CODE ANN. § 23-9.2:8 (Supp. 2007).

261. *See, e.g.*, Keller, *supra* note 259 (quoting the dean of student affairs and the director of student health at Washington and Lee University (a private school) about their opposition to the bill and the need for any school to have all options open in such situations); *see also* Greg Esposito, *Kaine Likely to Sign Suicide Bill*, ROANOKE TIMES (Roanoke, Va.), Mar. 17, 2007, at B1 (noting letters to Governor Tim Kaine from the presidents of the Virginia Association of Student Personnel Administrators and the Virginia Association of College and University Housing Officers calling the bill "'a dramatic and intrusive effort' that 'will systematically impair our ability to assist potentially suicidal students.'").

> *The governing boards of each public institution of higher education shall develop and implement policies that advise students, faculty, and staff, including residence hall staff, of the proper procedures for identifying and addressing the needs of students exhibiting suicidal tendencies or behavior.* The policies shall ensure that no student is penalized or expelled solely for attempting to commit suicide, or seeking mental health treatment for suicidal thoughts or behaviors. Nothing in this section shall preclude any public institution of higher education from establishing policies and procedures for appropriately dealing with students who are a danger to themselves, or to others, and whose behavior is disruptive to the academic community.[262]

Though the circumstances surrounding the death of Michael Frentzel were not mentioned in connection with the passage of this law, the wording suggests that the legislature wished both to respect the "special relationship" cited by Judge Kiser in *Schieszler v. Ferrum College*[263] and to avoid the pitfalls posed by the Americans with Disabilities Act that formed the basis for Jordan Nott's lawsuit.

The proposal of this Article is neither that students should be forced to withdraw (except, perhaps, in the most extreme cases, where continuation in school appears not to be a practical possibility for the student), nor that schools should be precluded from requiring a student to take a leave of absence for a time. On the one hand, students may well not have access at home to the resources available at the college or university. On the other, they may be too troubled to deal well with the rigors of academic life, or their behavior may be disruptive to the academic environment. This Article does not seek to address those issues, which seem better left to psychological experts than to lawyers; rather, the proposal here is that school administrators who become aware that a student is seriously suicidal should take reasonable steps to protect the student's safety—a duty that ordinarily could be fulfilled simply by contacting the student's parents or other responsible party. Bringing them into the process of deciding what course of action is in the student's best interest should help to preclude—not to foster—

262. § 23-9.2:8 (emphasis added).

263. 236 F. Supp. 2d 602 (W.D. Va. 2002); *see supra* notes 21–24 and accompanying text. Note, however, that as a private institution, Ferrum College would not be bound by the legislation.

potential liability on the institution's part.

B. Policy Arguments

1. The Danger of "Perverse Incentives" on Both Sides

From a policy standpoint, opponents argue that the imposition of a duty of care on non-clinician administrators would create "perverse incentives"[264] for two groups. Administrators (teachers, coaches, residence personnel, and others) would disengage from their traditional nurturing and general counseling roles, in an effort to avoid becoming "aware" of students' severe mental health problems, and thereby avoid any potential for liability.[265] Students would become wary of approaching those same administrators in order to preserve their own privacy and avoid possible disclosure of confidential information (let alone the actions that might follow, such as suspension or forced withdrawal).[266]

Cases in the public eye provide fodder for this argument. Jordan Nott has stated that he "would never seek help at a campus counseling center again."[267] As reported by *Time* magazine, Anne Giedinghagen attempted (unsuccessfully) to "hide" her mental state from Cornell University personnel in order to stay on campus.[268] Sue Schaller was forced to take "mandated leave" by NYU administrators, even though a doctor who treated her in the university's hospital recommended that

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264. Ass'n Motion, *supra* note 13, at 3 (arguing that Judge McEvoy's holding "has engendered the opposite of its intended effect").

265. *See* MIT Brief, *supra* note 239, at 13 (noting that Judge McEvoy's ruling "already is causing severely harmful consequences for the large number of college students with significant mental health problems"); *see also* Ass'n Brief, *supra* note 240, at 6–7 (attributing the lower suicide rate among college students than among similar-aged peers to the "'more supportive peer and mentor environment' found on university campuses," and predicting a lessening of that support if the ruling is followed); Nat'l Colleges Brief, *supra* note 13, at 3 (positing "detrimental effects" that the ruling might have on "extensive student support systems" in place at most colleges and universities "which are important and beneficial both for those students who need mental healthcare and those who do not").

266. *See* MIT Brief, *supra* note 239, at 14 n.10 (predicting that students with suicidal ideation might "suffer alone and in silence," rather than seek help from school personnel who, they fear, might force them to leave the campus); *see also* Nat'l Colleges Brief, *supra* note 13, at 10–11 (predicting that if students anticipate parental notification or hospitalization, they might decide not to disclose information about their mental health history or their current problems).

267. Capriccioso, *supra* note 251.

268. Rawe & Kingsbury, *supra* note 253, at 62.

she be allowed to return to campus.[269] Complaints to the U.S. Department of Education's Office of Civil Rights are additional evidence of perceived discrimination against students with mental health problems, often allegedly engaged in for purposes of avoiding liability.[270]

Yet with each of the three above-named students, the university's action was taken after receiving reports from medical professionals involved in the respective student's case. Those actions may have been clumsy (as in the case of Jordan Nott, particularly) or ill-advised (as in NYU's apparent decision to act contrary to Sue Schaller's doctor's advice).[271] Yet an appropriate rule of liability for ignoring seriously suicidal behavior of which university administrators are aware need not result in such knee-jerk reactions grounded in fear of liability, rather than in considered judgments of what is best for the student. Furthermore, if the duty may be discharged in almost every instance by parental notification, the result is more likely to be the best possible care for the student, which might well be on campus, not at home.

2. Non-Clinician Administrators Lack the Expertise to Make These Judgment Calls

Opponents of placing any duty on administrators point out that, as non-clinicians, they are not equipped to make the sensitive medical judgments that necessarily go into any determination that a student presents a serious suicide risk. Where students are already in counseling, if non-clinician administrators act on their own hunches or fears, they may well do something—such as notifying parents or suspending students from school—that is quite contrary to the considered course of therapy specifically recommended by the student's counselors.[272] The implicit assumption is that administrators' roles

269. Capriccioso, *supra* note 251.

270. *See supra* notes 251–58 and accompanying text; *see also* Rawe and Kingsbury, *supra* note 253, at 62 (noting that many universities have adopted policies of mandatory leave in order to avoid student suicides). "But a tragic result, say psychiatrists and student advocates, is that emotionally distressed students may be less willing to come forward and get the professional help they need." *Id.*

271. After her condition worsened, and following talks with her therapists, Anne Giedinghagen went home for treatment in a psychiatric hospital. Rawe & Kingsbury, *supra* note 253, at 63.

272. *See* MIT Brief, *supra* note 239, at 13–14; *see also* Ass'n Brief, *supra* note 240, at 13–14 (pointing out that in addition to lacking diagnostic expertise, non-clinicians have no power to commit students to medical care involuntarily); Mass. Colleges Brief, *supra* note 13, at 31–33 (imposition of a duty may create conflicts between clinicians and administrators); Nat'l Colleges Brief, *supra* note 13, at 8–10 (non-clinicians may be more inclined either to contact parents or to seek separation from the university, contrary to therapists' recommendations).

should be limited to suggesting to students that they seek help from clinical counselors, perhaps following up to ask whether the students have done so.

No one doubts the inability of non-clinicians to make medical judgments or to recommend the best possible course of therapeutic action. No reasonable rule of law should require that they do so. Consider, however, the cases under consideration here.

Elizabeth Shin's housemaster, Nina Davis-Millis, knew that Elizabeth had held a knife to her chest the night before her parents' visit and had ingested a non-lethal mixture of alcohol and Tylenol later the same night of their surprise birthday party. The next day—the actual day of her death—two of Elizabeth's friends had told the administrator that she intended to commit suicide *that day*. In fact, Ms. Davis-Millis herself had an upsetting telephone call with Elizabeth that same morning.[273] According to her deposition, Ms. Davis-Millis reported this information to Dean Arnold Henderson *twice* on the morning of the day in question.[274] Dean Henderson later claimed that he did not recall the substance of the conversation, and it appears that at the meeting of the "deans and psychs" that morning, no such information was conveyed to the clinicians caring for Elizabeth.[275] The suggestion here is that the administrators had a duty *at least* to see that Elizabeth's counselors had this seemingly highly relevant information. In fact, their admitted lack of medical expertise would only enhance such an argument.

Again, in *Schieszler*,[276] campus personnel at Ferrum College were aware that Michael Frentzel, a freshman living in an on-campus dormitory, had a history of emotional difficulties.[277] They had required him to attend anger management sessions before returning for a second semester of school.[278] Even so, an argument between Michael and his girlfriend, Crystal, attracted intervention by the resident assistant and

273. *See* Shin Brief, *supra* note 15, at 5. The Brief states that according to Davis-Millis's testimony, the call occurred about 9:45 A.M. *Id.* Elizabeth had accused her of wanting to send her home and had said angrily, "you won't have me to worry about any more." *Id.* (citing Deposition of Nina Davis-Millis Oct. 16, 2003).

274. *Id.* at 5–7 (quoting Deposition of Nina Davis-Millis Oct. 16, 2003).

275. *Id.* at 6–7 (quoting Deposition of Arnold Henderson Nov. 18, 2003). The "deans and psychs" meeting is a weekly meeting of MIT administrators and clinical psychologists to discuss students whose mental health is deemed to be at risk. Shin v. MIT, No. 02-0403, 2005 WL 1869101, at *5, *13 (Mass. Dist. Ct. June 27, 2005).

276. *See* Schieszler v. Ferrum Coll., 236 F. Supp. 2d 602 (W.D. Va. 2002); *see supra* notes 21–24 and accompanying text (discussing the case generally).

277. *Schieszler*, 236 F. Supp. 2d at 605.

278. *Id.*

campus police.[279] Shortly after that incident, Crystal received a message from Michael of his suicidal intentions.[280] When she showed it to campus police, they found him locked in his room, with bruises on his head that he acknowledged to be self-inflicted.[281] David Newcombe, dean of student affairs, then required Michael to sign a statement that he would not hurt himself.[282] Further suicide threats within the next few days, which Crystal reported to campus authorities, resulted in no action other than a prohibition that she not visit his room.[283] When Crystal finally pressed a note upon campus police in which Michael had said, "only God can help me now," they went to his room and found that he had hanged himself with his belt.[284]

While the non-clinician administrators at Ferrum College (notably, the dean of student affairs) could not reasonably be held to a standard of medical expertise, these facts, if borne out by the evidence, surely paint a situation in which a reasonable person would consider Michael Frentzel to pose a serious threat of imminent suicide. Asking the student to sign an agreement not to harm himself obviously fails to address his emotional disturbance, and no reasonable person (especially one experienced at dealing with students) should think it trustworthy. As in the case of Elizabeth Shin, the dean's very lack of medical ability only enhances an argument that he had a duty to take steps to look out for Michael's safety—by calling in campus counselors, contacting his aunt and guardian, LaVerne Schieszler, or both. Given the very direct involvement of campus personnel in Michael's life and problems up to that point, it is neither unjust nor inaccurate to say that the course of events created a "special relationship" between them, as envisioned by both the Second and Third Restatements.[285]

Sanjay Jain's situation might present a less strong case; yet arguably, someone from the University of Iowa should have contacted the family about their eighteen-year-old freshman son. In his first semester, he became moody, skipped a number of classes, experimented with drugs and alcohol, and was involved in an egg-throwing incident.[286] Beth Merritt, the hall coordinator for Sanjay's dormitory, disciplined him for

279. *Id.*
280. *Id.*
281. *Id.*
282. *Id.*
283. *Id.*
284. *Id.*
285. *See supra* notes 60–70 and accompanying text.
286. Jain v. State, 617 N.W.2d 293, 295 (Iowa 2000).

these activities by imposing community service, requirements to attend alcohol and drug education classes, and one year of disciplinary probation for smoking marijuana in his room.[287] With this series of events as the operative context, Ms. Merritt was contacted after resident assistants found Sanjay arguing with his girlfriend over the fact that he was keeping his moped in his room with the intention of killing himself with the exhaust fumes.[288] When she met with him, he was evasive about the incident and his alleged suicidal intentions.[289] She told him to move the moped (which he failed to do), encouraged him to consult university counselors, gave him her home telephone number, asking that he call if he thought he was going to hurt himself, and received assurances from him that he would discuss his problems with his parents during the upcoming Thanksgiving holiday.[290] Ms. Merritt also consulted with the assistant director for residence life, David Coleman.[291] Her assessment at that point was that "Sanjay revealed more tiredness . . . than hopelessness or despair."[292] When Sanjay returned after the holiday (not having discussed any problems with his parents), Merritt, seeing him briefly, asked how things were going; his response was "good."[293] The moped was still in his room, however, and he told his roommate, Scott, that he planned to kill himself with its exhaust fumes one night when Scott was not there. Scott took this lightly, but a few days later, Sanjay followed through on his threat.[294]

In this case, Iowa had an unwritten policy of contacting a student's parents after a suicide attempt; the decision whether to do so lay with the dean of students. Neither Beth Merritt nor her supervisor, David Coleman, had contacted him with information, which might have prompted action on his part. Here again, two university administrators, lacking medical expertise themselves, were concerned about the student's situation but concluded they had done all that was necessary under the circumstances. This case was not argued on the grounds of "special relationship,"[295] and there is no way to tell how a jury might have reacted to the relevant facts. Ms. Merritt was not equipped to

287. *Id.*; *see supra* notes 87–94 and accompanying text (discussing the case generally).
288. *Jain*, 617 N.W.2d at 295.
289. *Id.*
290. *Id.*
291. *Id.*
292. *Id.* at 296.
293. *Id.*
294. *Id.*
295. *See supra* notes 60–70 and accompanying text.

diagnose the seriousness of Sanjay's condition, but their interactions did take place in the context of a pattern of problematic student behavior. The Jain family grounded their suit in the university's failure to notify them of his suicide attempt.[296] The validity of their claim may be questionable, even under the rule proposed here, but what does seem clear is that if the family had been notified, they would have had no basis for a suit at all.

VII. THE PROPOSED RULE OF LAW

In light of all the foregoing considerations, and for the protection of both campus administrators and students, I propose the following rule, applicable under Restatement of Torts (Second) section 314A, or Restatement of Torts (Third) section 40, concerning a "special relationship" between campus personnel and a given student:

> *When an administrator at an institution of higher education (including faculty) has actual knowledge of a suicide attempt on the part of an enrolled undergraduate*[297] *student, or of other circumstances indicating that the student is seriously suicidal, that administrator has a duty to take reasonable steps to protect the student from self-harm, including, but not limited to, notifying the student's parent/s or guardian or reporting the information to an administrator who has authority to make such notification. This duty may extend to other reasonable steps to protect the student's safety, such as contacting campus counselors or campus security officers, who might have the authority to take custody of a student presenting a danger to self or others. It may also include other actions, depending upon what is reasonable under the circumstances.*[298]

Under this rule, the duty would be triggered by actual knowledge either of a suicide attempt or of circumstances that a reasonable non-clinician

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

297. The scope of this Article is limited to consideration of undergraduate students for reasons of the age of most undergraduates and their peculiar vulnerabilities. It is not intended to express any opinion as to whether such a duty might obtain with respect to graduate or professional students.

298. An obvious example would be attempting to stop someone from jumping out of a window or off of a bridge. Circumstances might suggest other kinds of reasonable steps that could prevent disaster in a swiftly developing situation.

would perceive as a serious threat of suicide. Absent exigent circumstances, the duty normally could be satisfied by notifying the student's parent/s or guardian of the attempt or of the seriously suicidal situation. It might well be that the actual authority to contact a student's family would rest with a particular campus official, such as the dean of students—as, for example, at the University of Iowa in the policy cited in *Jain v. State*.[299] In that event, another campus administrator or faculty member could fulfill the duty by reporting the information to that official.

Many critics of this suggestion will undoubtedly question the wisdom of family notification as a virtually automatic response. Students suffering mental health problems often do not wish their families to be contacted, and, if asked, will request that they not be.[300] Therapists counseling those students might not think it to be a wise course of action, particularly where they perceive the family situation to be a major contributor to the student's problems.[301] Yet at least one group of mental health providers counsels that family members should always be contacted early in the process where serious mental disturbance is involved and hospitalization may be required.[302] Their experience shows that families are much more cooperative and helpful in agreeing to a recommended treatment plan when they are brought in early, rather than when they are consulted only after healthcare providers have taken perceived necessary drastic action. Psychiatrist Hannah J. Solky and three co-authors[303] say that a failure on the part of campus mental health professionals to include parents actually amounts to the assumption of

299. *Jain*, 617 N.W.2d at 296; *see supra* notes 87–94 and accompanying text (discussing *Jain* generally).

300. *See, e.g.*, *Jain*, 617 N.W.2d at 295 (describing Sanjay's attempts to hide his difficulties at school from his parents by talking about how much he enjoyed his classes and characterizing college life as "awesome"); Sontag, *supra* note 8, at 94 ("Elizabeth specifically asked that her parents not be contacted, M.I.T. officials have said.").

301. *See, e.g.*, Ann H. Franke, *When Students Kill Themselves, Colleges May Get the Blame*, CHRON. HIGHER EDUC. (Wash., D.C.), June 25, 2004, at B18 (recommending that students' parents be contacted "unless previously known indicators, like a history of child abuse, suggest that parental notification would be harmful"); Hara Estroff Marano, *The Pressure from Parents*, PSYCHOL. TODAY, Mar/Apr. 2004, http://www.psychologytoday.com/articles/pto-20040513-000005.html (noting that some counselors advocate a "parentectomy" when overprotective "helicopter parents" contribute to anxiety and other psychological problems in their children).

302. Hannah J. Solky et al., *Involving Parents in the Management of Psychiatric Emergencies in College Students Far from Home*, 36 J. AM. COLL. HEALTH 335 (1988).

303. These consist of a psychologist, James E. McKeever, and two psychiatrists, Richard A. Perlmutter and Thomas E. Gift.

an *in loco parentis* role, which is inappropriate and more likely to lead to litigious action than is early consultation.

These counselors were talking about healthcare providers, not college administrators. While not unsympathetic to a counselor's position, this Paper does not take a position on the question of when an actual counselor should consider a course of action that in some sense amounts to a breach of confidentiality. Rather, the context under discussion concerns a situation in which a college administrator has actual information that would lead a reasonable non-clinician to think that a student presents a severe suicidal threat. Although the administrator lacks the knowledge to determine whether hospitalization is necessary or appropriate, there are steps the administrator can and should take to prevent incipient self-harm. In emergent circumstances, that may involve contacting persons with authority to act immediately for the student's benefit, including the power to exert custodial control. In any event, the administrator should contact the student's family, or pass the relevant information along to a campus official who is authorized to do so. Surely, a student who is in need of intervention is highly likely to end up involving family members, anyway—if for no other reason than purposes related to insurance, or perhaps to co-pays. It stands to reason that, as Solky and her colleagues found, parents who are alerted early are in a much better position to cooperate with campus counselors and other personnel in any way possible. Even a determination that the student needs the kind of care that can be provided only off-campus—whether involving outside therapists or actual institutionalization—still does not necessarily mean that the student will have to leave the community, or even withdraw from school. Schools that are automatically suspending students, such as George Washington did in the case of Jordan Nott, risk not only violating federal laws, but also acting inimically to the student's best interests. It is far preferable to alert the family to the fact that their undergraduate student is suffering severe mental stress or disturbance than to call them in at the point of involuntary commitment, when the parents may be the only persons legally situated to make certain kinds of decisions.[304]

To those who say that such a policy might discourage campus

304. Every state has statutory mechanisms for healthcare decision making for patients who are unable to make responsible decisions for themselves. In the case of an unmarried adult son or daughter (of any age), the designated person would be the child's parent, unless the patient had executed a legal document specifying someone else. *See, e.g.*, Virginia's Health Care Decisions Act, VA. CODE ANN. § 54.1-2986 (2005).

administrators from counseling students in a nurturing and supportive way, there are several answers. First, with respect to at least some campus administrators, such as a dean of students or a housemaster, that is their job. Just as a healthcare professional can potentially be sued for medical malpractice for the allegedly negligent treatment of a suicidal patient,[305] so it is appropriate for non-clinicians to be subject to a negligence standard for failure to take reasonable steps to prevent a student's self-harm, when they are on actual notice of such a danger. Note, moreover, that in the reported cases, the campus personnel involved could not escape the knowledge they possessed. Nina Davis-Millis was approached by Elizabeth Shin's frightened friends when the student held a knife to her chest; the housemaster could neither avoid nor ignore that information. She was later presented with the warning from two students that Elizabeth intended to kill herself that day. She also spoke by telephone to Elizabeth, who delivered a troubling warning: "you won't have me to worry about any more."[306] The security police and others at Ferrum College were pressed by Crystal, Michael Frentzel's girlfriend, who told them of his suicidal messages to her and others.[307] Similarly, campus personnel found it necessary to intervene in an argument between Sanjay Jain and his girlfriend over the moped he had placed in his room for purposes of inhaling the exhaust fumes; earlier, the hall coordinator had found it necessary to discipline Sanjay on several grounds suggesting mental and emotional disturbance.[308] Conscientious campus personnel will, I predict, continue to nurture and support the students with whom they come in contact. The increasingly widespread adoption of campus-wide programs to make both students and administrators aware of mental health issues, particularly suicide, should also help to dispel a sense of avoidance in order to escape liability.[309]

The arguments of Solky et al. that a failure to notify family members of a suicide attempt or seriously suicidal behavior actually amounts to usurpation of an *in loco parentis* role will not be convincing to everyone,

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305. *See, e.g.*, Marshall v. Klebanov, 902 A.2d 873, 881–82 (N.J. 2006) (holding that statute shielding mental healthcare practitioners from civil liability for the violent acts of their patients did not bar suit for alleged negligence in treating patient who later committed suicide).

306. *See* Shin Brief, *supra* note 15, at 5. *See generally, supra* notes 8–11 and accompanying text.

307. *See supra* notes 276–84 and accompanying text.

308. *See supra* notes 288 and accompanying text.

309. *See supra* notes 251–58 and accompanying text.

but I think it provides much food for thought. Both psychologists and commentators from other fields have commented recently that our society has taken individualism to such an extreme as to be harmful; we are in danger of forgetting that we exist, after all, in subsystems, the most important of which is usually the family, and family members are likely to be involved to some degree whenever one of their group is seriously ill.[310] In the typical family situation (whatever strains might be at issue), parents are heavily invested in their college student's welfare. These students are still highly vulnerable and not yet fully mature.[311] It only makes sense to alert parents when an undergraduate son or daughter is seriously suicidal.

VIII. APPLICATION OF THE PRINCIPLE TO CASES

A major complaint about development of a doctrine that would pin a duty on college administrators in some situations involving seriously suicidal students is that such a duty is potentially indeterminate in scope. Critics ask: How would it be triggered? How would a college administrator know that he or she was in the kind of "special relationship" with a student that would meet the definition of such a duty? How can the non-clinician administrator with no medical expertise determine that a student is "seriously suicidal"? What would the duty consist of—i.e., what steps would the administrator have to take in order to be sure that his or her behavior was non-negligent? How would the actor know when the duty was fulfilled?[312]

In many respects, these questions represent objections to the shortcomings of Judge McEvoy's opinion[313] more than they do valid criticisms of the potential workability of a rule of law that would hold non-clinician administrators to a duty of reasonable care in some instances of interaction with seriously suicidal students. I have suggested that the college actor must have *actual* knowledge of the student's serious condition (though note that this may result from the

310. *See, e.g.*, KAY REDFIELD JAMISON, NIGHT FALLS FAST 259 (1999) ("Almost inevitably, family members and friends are drawn into the . . . world of possible suicide."); PAVELA, *supra* note 4, at 95 ("Experience has shown that families usually come together in a crisis. . . . [College employees' relationships with a student are] no substitute for the knowledge, insight, and devotion of the student's parents.").

311. *See supra* Part IV (discussing this age group's psychological development and brain maturation).

312. See Mass. Colleges Brief, *supra* note 13, at 20–30, for a particularly detailed exposition of these concerns.

313. *See* Shin v. MIT, No. 02-0403, 2005 WL 1869101 (Mass. Super. June 27, 2005)

reports of others, such as friends or girlfriends/boyfriends). The knowledge must be such as to alert a reasonable non-clinician to the possibility that the student is seriously suicidal. An attempted suicide would surely trigger such knowledge, but there could be other indications that the student appears likely to be harboring current suicidal intentions. The duty may most often be discharged by notification of parents or a guardian about the situation. If the circumstances would appear to the reasonable person to be emergent, the administrator should take further reasonable steps to prevent any self-harm.

It is important to keep in mind that the issue concerns what kinds of fact patterns would make out a prima facie case that a judge would send to a jury for a finding of negligence. The ultimate conclusion, of course, is always in the jury's hands. An examination of the primary cases discussed in this Article may make the relevant criteria more concrete. In *Schieszler v. Ferrum College*, Michael Frentzel's girlfriend was insistent in her dealings with college personnel that Michael was seriously contemplating suicide and intervention was required to save him.[314] Campus authorities responded to one call where Michael appeared to be trying to kill himself. The dean of student affairs asked him to sign a statement that he would not harm himself—an obvious sign that the dean thought such a danger existed.[315] After Michael hanged himself, his aunt and guardian was indignant that she had not been called in to help Michael before it was too late.[316] Judge Kiser found that this series of events made out a prima facie case of a violation of a duty of care on the part of Ferrum College personnel,[317] and I would agree. The situation—including the interactions between the dean of students and the student—was certainly sufficiently specific to put the dean on notice of a duty to take reasonable steps to prevent imminently threatened self-harm. At a minimum, contacting Michael's guardian would have been a simple step and might have prevented a tragedy.

Unlike Michael Frentzel, Elizabeth Shin had been in therapy with MIT counselors for quite some time when her suicidal threats seemingly became dire. Her past history, including at least one suicide attempt, was familiar to at least some MIT administrators. Under the

314. Schieszler v. Ferrum Coll., 236 F. Supp. 2d 602, 610 (W.D. Va. 2002).

315. *Id.* at 605.

316. Jen McCaffery, *Lawsuit Raises Issue of Colleges' Accountability*, ROANOKE TIMES, (Roanoke, Va.), Aug. 25, 2002, at B1 ("Hell, they airlifted him from Ferrum to Roanoke .... Somebody can't pick up the phone?").

317. *Schieszler*, 236 F. Supp. 2d at 610.

circumstances, when two of her friends anxiously reported to Nina Davis-Millis that Elizabeth had stated her intention to kill herself that day, Davis-Millis's alarmed telephone call to Arnold Henderson was appropriate. Assuming that the housemaster's testimony was accurate, Henderson's failure to mention the apparently developing situation at the "deans and psychs" meeting that morning surely would support a prima facie case of negligence, under the rule proposed here. One of those two administrators should have taken active steps to prevent the potential for self-harm on Elizabeth's part. I would argue, however, that the Shins should have been notified of Elizabeth's condition before that Monday—at least, after her friends found her with the knife, which they took away from her. Parental notification at that point, permitting the Shins to adopt an active role in their daughter's treatment, would have fulfilled the administrators' duty. As it is, both they and Elizabeth's parents are forced to live with a very sad question mark.

The circumstances of Sanjay Jain are less definitive, but might be sufficient to pose a jury question. Beth Merritt, Sanjay's hall coordinator, knew both that he was having adjustment problems in college and that he was actively contemplating suicide and had taken steps toward that end by placing the moped in his room. On the other hand, Sanjay assured Merritt that he would discuss matters with his parents over Thanksgiving break. She, for her part, discussed the situation with her supervisor, David Coleman, while at the same time telling him that she thought Sanjay was more tired than hopeless or despairing.[318] It appears from the reported case that it was his job to convey the information to the dean of students, who would then determine whether to notify Sanjay's parents.[319] The dean never received this report.[320] Though I would argue that an attempt or serious threat of self-harm should be reported to parents, I do find this case one of finer line-drawing. The law, however, draws these lines all the time; the difficulty of the enterprise does not negate the necessity of engaging in it.

Chuck Mahoney's parents should also have been brought into their son's treatment process, given that he had been considered "a high risk for suicide" for some time before his final act.[321] In that case, Judge

318. Jain v. State, 617 N.W.2d 293, 295–96 (Iowa 2000).

319. *Id.* at 296.

320. *Id.*

321. Mahoney v. Allegheny Coll., No. AD 892-2003, slip op. at 5 (C.P. Crawford County, Pa. Dec. 22, 2005) (statement of Jacquelyn S. Kondrot, Chuck's longtime counselor and head of the Allegheny College Counseling Center).

Barry F. Feudale found that the two defendant deans had been consulted only a few days before Chuck's suicide, making the case more similar to *Jain* than to *Schieszler* or *Shin*. That may be an accurate assessment, but if a "special relationship" rule were a generally operative tort principle, Chuck's situation might well have taken a different and happier course.

IX. CONCLUSION

Suicidal ideation and behavior among college students has been a matter of increasing concern over the past decade or more. Because of federal privacy laws, parents of these students are frequently kept in the dark about their student's troubled mental state, even though friends and college personnel may have been well aware of it for some time. In recent years, several lawsuits have garnered wide publicity that seem likely to lead to a long-overdue amendment to FERPA, specifically authorizing institutions of higher learning to contact the parents or legal guardian of a suicidal student. That change, however, is not sufficient. In addition, states should follow the lead of the judges in *Schieszler v. Ferrum College* and *Shin v. MIT* in carving out a principle of a "special relationship," pursuant to Restatement of Torts (Second) section 314A or Restatement of Torts (Third) section 40, triggering a duty, when a college administrator has actual knowledge of a suicide attempt on the part of an enrolled undergraduate, or of other circumstances that the student is seriously suicidal, to take reasonable steps to protect that student's health and safety. Such a duty should entail, perhaps among other things, a duty to contact the student's parent/s or legal guardian, or to notify the appropriate college official who would be authorized to do so. In some circumstances, a coordinated plan of care, worked out among college counselors, administrators, and the student's parents might even forestall harm, not only to the student himself or herself, but to others as well.