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The Gunslinger to the Ivory Tower Came: Should Universities Have a Duty to Prevent Rampage Killings?

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NOTES

THE GUNSLINGER TO THE IVORY TOWER CAME: SHOULD UNIVERSITIES HAVE A DUTY TO PREVENT RAMPAGE KILLINGS?

Ben "Ziggy" Williamson[*]

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I. INTRODUCTION

On April 16, 2007, Seung Hui Cho, a Virginia Tech student, went on a rampage[1] across the university's campus.[2] He murdered thirty-two

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1. *See* Ford Fessenden, *They Threaten, Seethe and Unhinge, Then Kill in Quantity*, N.Y. TIMES, Apr. 9, 2000, § 1, at 11 (defining a rampage killing as a multiple-victim killing that is not primarily domestic or connected to a robbery or a gang). *Id.* In academic scholarship, many terms are used to describe the same type of phenomenon. *See* James Alan Fox & Jack Levin, *Multiple*

people[3]—twenty-seven students and five professors—before killing himself.[4] Cho's rampage was not only the worst mass shooting on an American university campus,[5] it was the worst in American history.[6]

Homicide: Patterns of Serial and Mass Murder, 23 CRIME & JUST. 407, 408, 437 (1998) (mass murder, spree killing, going berserk, running amok); John R. Lott, Jr. & William M. Landes, *Multiple Victim Public Shootings, Bombings and Right-to-Carry Concealed Handgun Laws: Contrasting Private and Public Law Enforcement* 1 (Univ. of Chi. Law Sch., John M. Olin Law & Econs. Working Paper No. 73, 1999) (multiple victim public shooting). For the purposes of this Note, rampage killings exclude political violence, warfare, and killings committed by more than a few individuals.

2. VA. TECH REVIEW PANEL, MASS SHOOTINGS AT VIRGINIA TECH, at vii (2007), *available at* http://www.governor.virginia.gov/TempContent/techPanelReport-docs/FullReport.pdf [hereinafter VT REPORT]. Governor Tim Kaine of Virginia formed the Virginia Tech Review Panel, which included experts in criminology, education, law, law enforcement, and psychology, three days after the Virginia Tech tragedy. *Id.* at vii–viii.

3. VT REPORT, *supra* note 2, at vi. Some journalists speculated that Cho was motivated by romantic obsession. *See, e.g.*, David Williams & Stefanie Balogh, *Was Gunman Crazed over Emily?*, DAILY TELEGRAPH (Sydney, Austl.), Apr. 18, 2007, *available at* http://www.news.com.au/dailytelegraph/story/0,22049,21576271-5001021,00.html. However, there is no evidence that Cho knew any of his victims, including the first two students he shot in West Ambler Johnston dormitory before his second attack on Norris Hall. *See* VT REPORT, *supra* note 2, at 77–78, 86.

4. VT REPORT, *supra* note 2, at vii. Many rampage killers commit suicide, or are killed by others, during the rampage; this fact hampers attempts to understand what drives them to kill. *See* Fessenden, *supra* note 1.

5. *See* VT REPORT, *supra* note 2, at 5. Cho killed more than twice as many people as Charles Whitman, the University of Texas shooter. *See infra* Part II (discussing previous university shootings, of which the University of Texas shooting was the first and, prior to the Virginia Tech tragedy, the most deadly). Virginia Tech was the worst mass shooting to take place at any American educational institution—compare the Columbine High School massacre, in which thirteen died. *See* Castaldo v. Stone, 192 F. Supp. 2d 1124, 1133 (D. Colo. 2001). However, it was not the worst mass *murder*. In 1927, the Bath School bombing claimed forty-five lives. *See* M.J. ELLSWORTH, THE BATH SCHOOL DISASTER app. at 2 (1927), *available at* http://daggy.name/tbsd/tbsd-t.htm (listing the names of the deceased). The VT REPORT, *supra* note 2, does not provide a definition of mass shooting. However, one authority defines mass murder as the slaying of four or more victims by one or a few individuals attempting to satisfy personal desires. *See* Fox & Levin, *supra* note 1, at 407–08. Most mass murderers use firearms. *Id.* at 407.

6. *See Loner Filled with Anger and Spite*, BBC NEWS, Apr. 19, 2007, *available at* http://news.bbc.co.uk/1/hi/world/americas/6564653.stm (discussing "Cho Seung-hui, who staged America's worst shooting massacre"). Compare the San Ysidro McDonald's shooting, where a dismissed security guard killed twenty-one people. *See Mass Slayings and Toll: McDonald's Case Biggest*, N.Y. TIMES, Apr. 25, 1987, § 1, at 19. Compare also the Luby's cafeteria shooting, where the death toll was twenty-two. *See* Thomas C. Hayes, *Gunman Kills 22 and Himself in Texas Cafeteria*, N.Y. TIMES, Oct. 17, 1991, at A1.

Cho's horrific actions and his highly publicized video manifestos[7] revealed a deeply disturbed personality.[8] But to some students, teachers, and administrators, Cho's nature was not a revelation.[9] Cho's troubled history included suicidal and homicidal ideation since middle school,[10] violent and disturbing writings,[11] classroom behavior that frightened other students,[12] confrontations with professors,[13] allegations of stalking,[14] and involuntary outpatient commitment.[15] Various university administrators and officials knew about individual incidents or aspects of Cho's history,

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7. *See* Randall Mikkelsen, *NBC Criticized over Virginia Tech Gunman Video Airing*, REUTERS, Apr. 19, 2007, *available at* http://www.reuters.com/article/televisionNews/idUSN1820416720070419 (noting that the videos were shown repeatedly on news programs).

8. Roger Depue, a FBI behavioral scientist, analyzed Cho's personality and compared it to that of attention-seeking killers such as John Hinckley, Jr. *See* VT REPORT, *supra* note 2, app. N at 2.

9. *See, e.g.*, *id.* at 22–23, 44–46 (describing student complaints against Cho for stalking); *id.* at 22 (describing Professor Nikki Giovanni's removal of Cho from her writing class after she became concerned about the violent content of his writing); *id.* (noting that Professor Giovanni's superior, English Department Chair Lucinda Roy, notified student affairs, the counseling center, the health center, the campus police, and the university's "Care Team" about Professor Giovanni's concerns). Even Wayne Lo, perpetrator of the Simon's Rock College of Bard shooting, *see infra* Part II, thought that Virginia Tech should have anticipated Cho's actions. *See* Samantha Henig, *Eerie Similarities*, NEWSWEEK, May 2, 2007, *available at* http://web.archive.org/web/20070528065641/ and http://www.msnbc.msn.com/id/18442224/site/newsweek/. The interview was a *Newsweek* web exclusive and has since been taken off *Newsweek*'s website. However, it is still available on web archives such as archive.org. Of course, anyone who retroactively prophesized the Virginia Tech tragedy may have fallen prey to hindsight bias. *See generally* DAVID HACKETT FISCHER, HISTORIANS' FALLACIES: TOWARD A LOGIC OF HISTORICAL THOUGHT (1970) (describing a wide array of logical fallacies that plague historical thinkers).

10. VT REPORT, *supra* note 2, at 35. Cho first expressed thoughts of suicide and homicide shortly after the Columbine High School shooting in 1999. *Id.*

11. *Id.* at 42. Noted horror writer Stephen King notes that his own writing in college would have raised red flags. Stephen King, *On Predicting Violence*, ENT. WKLY., Apr. 20, 2007, *available at* http://www.ew.com/ew/article/0,,20036014,00.html. "For most creative people, the imagination serves as an excretory channel for violence: We visualize what we will never actually do . . . . On the whole, I don't think you can pick these guys out based on their work, unless you look for violence unenlivened by any real talent." *Id.*

12. VT REPORT, *supra* note 2, at 42–43. For example, Cho covered his face during class, and took pictures of his classmates without their permission. *Id.*

13. *Id.* at 42, 50.

14. *Id.* at 46. After one incident, the student Cho stalked complained. *Id.* The campus police told Cho that he was no longer to have contact with her. *Id.* Shortly thereafter, Cho sent an instant message to a suitemate saying, "I might as well kill myself." *Id.* at 47. This development led to Cho's involuntary outpatient treatment. *See infra* note 15 and accompanying text.

15. VT REPORT, *supra* note 2, at 47. Because Virginia law prohibits anyone who has been involuntarily committed from purchasing a firearm, there is some controversy over whether Cho's brief hospitalization and subsequent recommendation for outpatient treatment constituted an involuntary commitment. *See* Michael Luo, *U.S. Rules Made Killer Ineligible to Purchase Gun*, N.Y. TIMES, Apr. 21, 2007, at A1.

but "no one connected all the dots."[16]

Some of the victims' families felt that Virginia Tech had a duty to connect all the dots. They hired counsel and gave notice of a possible lawsuit to Virginia's attorney general's office.[17] Given the findings of the Virginia Tech Review Panel, attorneys for by the families could have claimed that the university negligently failed to identify Cho as a threat and prevent him from carrying out his murderous plan.[18] Ultimately, however, most of the families settled.[19]

Virginia Tech was not the first university rampage killing for which victims or their families sought compensation, nor is it likely to be the last.[20] Because the current state of the law is unclear, this Note explores whether universities should have a duty to identify and thwart students that pose a threat to the lives of other students. Part II traces the history of university rampage killings and the sparse legal history surrounding them. In light of that sparse legal history, Part III considers the *Tarasoff* case[21] and its progeny, which impose upon some professionals a duty to protect third parties from harm. Finally, Part IV considers and ultimately rejects the application of a *Tarasoff*-like duty to protect in the context of university rampage killings. Part V concludes that imposing upon universities a duty to prevent rampage killings would accomplish little, and cause great harm.

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16. VT REPORT, *supra* note 2, at 2.

17. *See* Sue Lindsey, *Lawsuits Possible from Va. Tech Shooting*, ASSOCIATED PRESS, Oct. 14, 2007, *available at* http://abcnews.go.com/TheLaw/wireStory?id=3725837. Peter Grenier, who represented the families of many of the victims, *id.*, also represented the daughter of Dave Sanders, a victim of the Columbine High School shooting. *See Judge Dismisses All but One Lawsuit From Columbine Attack*, N.Y. TIMES, Nov. 28, 2001, at A16.

18. *See, e.g.*, VT REPORT, *supra* note 2, at 2 ("During Cho's junior year at Virginia Tech, numerous incidents occurred that were clear warnings of mental instability. Although various individuals and departments within the university knew about each of these incidents, the university did not intervene effectively.").

19. *Virginia: Settlement in Virginia Tech Shootings*, N.Y. TIMES, June 18, 2008, at A15. Two of the families that filed notices of claims did not agree to the settlement. *Id.*

20. *See infra* Part II (discussing the 1992 Simon's Rock College of Bard shooting and subsequent lawsuit, which settled for an undisclosed sum). Rampage killings at American education institutions seem to be occurring much more frequently than in the past. *See* VT REPORT, *supra* note 2, app. L (listing fatal school shootings in the United States between 1966 and 2007). However, rampage killings of any kind, especially on a school or university campus, are so rare that they are difficult to study empirically. *See* John Lott, Jr., *Rampage Killing Facts and Fantasies*, WASH. TIMES, Apr. 26, 2000, at A15, *available at* 2000 WLNR 349723 (criticizing Fessenden's report, *supra* note 1, for researching only easily identifiable rampage killings, and arguing that there is no upward trend for multiple-victim shootings "at least since the mid-1970s").

21. Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334 (Cal. 1976).

II. UNIVERSITY RAMPAGE KILLINGS BEFORE VIRGINIA TECH

In March 1966, Charles Whitman, a student at the University of Texas at Austin (UTA) and former Marine sharpshooter,[22] told a university psychiatrist that he felt an urge to climb the university's clock tower and "start shooting people."[23] The psychiatrist noted that Whitman was "oozing with hostility."[24] Four months later, Whitman acted on his urge, killing thirteen people and wounding thirty-one before being gunned down.[25] There were signs beforehand that Whitman could pose a threat to the lives of UTA students;[26] even Whitman suspected that he might be mentally ill.[27] However, none of the victims or their families filed a lawsuit against the university.[28]

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22. Despite its connotation of mastery, the word "sharpshooter" is an intermediate rank of proficiency with a rifle, between "marksman" (the lowest) and "expert" (the highest). *See* U.S. MARINE CORPS JUNIOR ROTC, CADET HANDBOOK 18–19, *available at* http://www.mcjrotc.org/Documents/cadetbook.pdf (last visited July 12, 2008).

23. *See The Madman in the Tower*, TIME, Aug. 12, 1966, *available at* http://www.time.com/time/magazine/article/0,9171,842584,00.html. The psychiatrist urged Whitman, unsuccessfully, to return for another appointment. *Id.*

24. *Id.*

25. *Id.*

26. In addition to the comment to the psychiatrist, Whitman's record reflected problems with violent outbursts. He had been disciplined for threatening a fellow Marine and had beaten his wife on several occasions. *Id.*

27. Whitman's suicide note requested that an autopsy be performed to check for brain abnormalities. *Id.* The autopsy found a pecan-sized brain tumor in his hypothalamus region. *Id.* However, it was never determined that the tumor caused his actions, or even that he was mentally ill. *Id.* Psychiatrists have speculated that his traumatic childhood, experiences as a Marine, frustration with school, or use of stimulants could have caused the shooting. *Id.* Whatever the reason, his actions indicate a level of insight and planning that is not concordant with the stereotype of the "psycho killer" who suddenly snaps. *See id.* (describing Charles Whitman's meticulous planning, and his use of disguise and subterfuge to gain access to the Texas Tower). Similarly, Seung Hui Cho meticulously planned, and may have even rehearsed, the Virginia Tech shooting. *See* VT REPORT, *supra* note 2, at 24. Like Whitman, Wayne Lo, the Simon's Rock College of Bard shooter, was able to lie calmly about his intentions prior to the shooting. *See infra* note 39.

28. Arguably, the university psychiatrist had the best chance of preventing the shooting. However, the UTA shootings occurred ten years before *Tarasoff* imposed a duty on psychiatrists to take reasonable steps to prevent their patients from harming foreseeable victims. *See infra* Part III.A. Even if Texas had a *Tarasoff* statute in 1966, it is unclear whether Whitman's statements to the psychiatrist would meet *Tarasoff*'s requirement of a serious danger to an identifiable individual. *See infra* note 77. On the other hand, Whitman did mention the university tower specifically, and a particular school may be a small enough subset of the general population to be considered identifiable. *See* U.S. SECRET SERV. & U.S. DEP'T OF EDUC., THE FINAL REPORT AND FINDINGS OF THE SAFE SCHOOL INITIATIVE: IMPLICATIONS FOR THE PREVENTION OF SCHOOL ATTACKS IN THE UNITED STATES 4 (2002), *available at* http://www.secretservice.gov/ntac/ssi_final_report.pdf (describing "targeted" violence as targeting an individual, a particular group, or even an entire school).

After the UTA shooting, there were a number of high-profile school shootings,[29] but twenty-five more years elapsed before another university student committed a rampage killing on campus.[30] In 1991, after being passed over for an academic award, Gang Lu, a University of Iowa graduate student, killed four professors and one student, and left another student a quadriplegic.[31] Gang Lu had neither disciplinary problems nor any psychiatric history prior to the attack.[32] None of the victims or their families filed a wrongful death action against the university.[33]

In 1992, Wayne Lo, a student at Simon's Rock College of Bard[34] in Massachusetts, killed two and wounded four others on campus.[35] Like Gang Lu, Wayne Lo had no prior disciplinary problems[36] or psychiatric history.[37] Prior to the shooting, the dean of the College received a package, addressed to Lo, from a gun shop.[38] The dean gave the package to Lo,

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29. *See* VT REPORT, *supra* note 2, app. L at 3–5. One such shooting was perpetrated by Brenda Spencer, who famously remarked that she "didn't like Mondays" when asked why she fired on an elementary school, killing two employees. *Id.* at 4.

30. In 1976, a custodian killed seven coworkers at California State University, Fullerton, but neither the perpetrator nor the victims were students. *Id.* at 3.

31. *See* Michael Marriott, *Iowa Gunman Was Torn by Academic Challenge*, N.Y. TIMES, Nov. 4, 1991, at A12. Gang Lu, unlike many rampage killers, knew his victims personally. *Id.* Gang Lu's motives are not entirely clear, but seem to have involved personal grievances as well as academic and professional frustration. *Id.* Unlike Seung Cho's videos, *see supra* note 7, the missives Gang Lu left behind to explain his actions were not published. Marriott, *supra*.

32. However, Gang Lu's former roommate described Gang Lu as having a bad temper and a "psychological problem with being challenged." Marriott, *supra* note 31. Prior to the shooting, Gang Lu's former roommate warned Gang Lu's roommate and sole student victim, Linhua Shan, not to live with Gang Lu. *See id.*; Dennis Overbye, *A Tale of Power and Intrigue in the Lab, Based on Real Life*, N.Y. TIMES, Mar. 27, 2007, at F3. Like Seung Hui Cho, Gang Lu committed suicide during his rampage, complicating any attempts to diagnose him with a psychiatric disorder. *See id.*

33. The surviving student received worker's compensation. *See* Manpower Temp. Servs. v. Sioson, 529 N.W.2d 259, 260 (Iowa 1995). Sioson, who was left a quadriplegic by Gang Lu's attack, successfully sued to have her employer cover the cost of a special van that could transport her wheelchair. *Id.* at 260–62.

34. Lo was a gifted student, as was Gang Lu, the University of Iowa shooter. *See* Bard College at Simon's Rock, About Simon's Rock, http://simons-rock.edu/about (last visited May 13, 2008) (describing Simon's Rock as a college for students of high school age). Although conventional wisdom posits a connection between intelligence and insanity, it may be that intelligence and homicidality have a multiplicative effect. *Ceteris paribus*, a highly intelligent killer will likely kill more people.

35. *See* Commonwealth v. Lo, 696 N.E.2d 935, 937 (Mass. 1998). Unlike the university rampage killers before him, Wayne Lo was captured alive and criminally prosecuted. *Id.* at 936–37.

36. *See College Student Sprays Campus with an Assault Rifle, Killing 2*, N.Y. TIMES, Dec. 16, 1992, at A20. Like Gang Lu, however, he was described by a colleague as very angry. *Id.*

37. Lo apparently intended to fake insanity. *See Lo*, 696 N.E.2d at 937. Prior to the shooting, he told one friend that he was copying down passages from the Book of Revelations so that people would think he was crazy. *Id.*

38. *Id.*

unopened;[39] it contained ammunition and rifle parts later used in the shooting.[40] Three hours before the shooting, one of Lo's friends phoned in an anonymous tip about the impending attack to a resident advisor in Lo's dormitory.[41] Although the dean and the provost were notified almost an hour before the shooting,[42] they took no action.[43] The family of a student slain by Lo sued Simon's Rock.[44] Although the college never admitted negligence,[45] it settled the lawsuit for an undisclosed amount.[46]

Ten years later, Peter Odighizuwa, a forty-three-year-old student at the Appalachian School of Law in Virginia, killed three people and wounded three more.[47] Odighizuwa had been academically suspended one year before the shooting.[48] Although he returned to school, he was academically suspended again immediately prior to the shooting.[49] Odighizuwa had also been treated by a medical doctor for stress.[50] Afterwards, he was diagnosed with paranoid schizophrenia.[51] The family of the one student slain in the attack, along with the three wounded students, sued the school for $22.8 million.[52] Their complaint alleged that the school coddled Odighizuwa, despite his academic difficulties, because he was black.[53] The university settled for $1 million.[54]

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39. Wayne Lo told the dean that the package contained a gift for his father. *Id.* After the shooting, the Dean said that he didn't investigate further because of privacy concerns. *See* William Glaberson, *Man and His Son's Slayer Unite to Ask Why*, N.Y. TIMES, Apr. 12, 2000, at A1.

40. Glaberson, *supra* note 39.

41. *See* Charles Taylor, *Too Noble*, SALON.COM, Oct. 12, 1999, http://www.salon.com/books/feature/1999/10/12/dead_boys/.

42. *Id.*

43. *Id.*

44. *Id.*

45. *See* Glaberson, *supra* note 39. In 2000, the college issued a statement saying that, "[i]f mistakes were made prior to [the shooting] . . . such mistakes must be viewed in the context of the setting and of the times." *Id.*

46. *Id.*

47. *See* Scott Wallace, *Gunman Kills Three at Virgina* [sic] *School*, TIME, Jan. 16, 2002, *available at* http://www.time.com/time/nation/article/0,8599,194552,00.html.

48. *Id.*

49. Mary Shaffrey, *Shooting Suspect 'a Real Oddball'; Wife Had Protective Order; Doctor Recalls Erratic Behavior*, WASH. TIMES, Jan. 18, 2002, at B1. The first two victims—the dean who suspended him and a professor—were shot and then "executed" (presumably, shot again at close range). Wallace, *supra* note 47. The remaining victims were shot "at random" as Odighizuwa fled. *Id.*

50. *See* Wallace, *supra* note 47. The doctor who treated Odighizuwa for stress was also the county coroner. *Id.* It is unclear how much training in psychiatry he had.

51. Odighizuwa, like Wayne Lo, survived his rampage attack. *Id. See* Chris Kahn, *Ex-Law Student Admits to Slayings*, ASSOCIATED PRESS, Feb. 27, 2004, *available at* http://www.washingtonpost.com/wp-dyn/articles/A12363-2004Feb27.html (stating Odihizuwa's diagnosis).

52. *Id.*

53. *Id.* More specifically, Odighizuwa was a Nigerian immigrant. *Id.*

54. *See* John Gravois, *Law School to Pay $1-Million to Settle Lawsuits that Resulted from*

Recent incidents demonstrate that survivors of university rampage killings are willing to sue, and universities are willing to settle. Thus, a university's potential duty to protect student lives exists, at the very least, within the minds of university counsel.[55]

III. *TARASOFF*'S LONG SHADOW: THE DUTY TO PROTECT THIRD PARTIES FROM HARM

No court has ever stated that universities owe a duty to prevent a rampage killing. So why do universities think they may have a duty to prevent rampage killings? A person has no duty to prevent harm caused by another, unless the person has a special relationship with either the dangerous party or the potential victim.[56] For example, a parent has a duty to prevent harm caused by the parent's child,[57] and a sheriff has a duty to prevent harm caused to the sheriff's prisoner.[58] Similarly, *Tarasoff v. Regents of the University of California*[59] imposed a duty on mental health professionals to prevent harm caused by their patients.[60] In the wake of *Tarasoff*, courts have found special relationships in a wide variety of circumstances,[61] including between a university and a suicidal student.[62] To determine whether a university has a special relationship with a student rampage killer,[63] or with his potential victims, courts will likely consider *Tarasoff* and the myriad cases that extend its reasoning.[64]

Student's Shooting Spree, CHRON. HIGHER EDUC. (Wash., D.C.), Jan. 14, 2005, at A27.

55. At a minimum, universities seem aware that any student death may leave them open to liability. *See infra* note 155 (discussing cases in which universities expelled mentally ill students for fear of liability for suicide).

56. RESTATEMENT (SECOND) OF TORTS §§ 314, 315 (1965).

57. *Id.* § 316; *see also* Janelle A. Weber, Note, *Don't Drink, Don't Smoke, Don't Download: Parents' Liability For Their Children's File Sharing*, FLA. L. REV. 1163, 1191–92 (2005).

58. RESTATEMENT (SECOND) OF TORTS § 320 (1965). In either case, any duty owed is predicated on the actual ability of the parent or sheriff to control the actions of the dangerous party. *Id.* §§ 316(a), 320(a).

59. 551 P.2d 334 (Cal. 1976).

60. *See infra* Part III.A (discussing the facts of the *Tarasoff* case, and the court's reasoning).

61. *See infra* Part III.B (discussing the application of *Tarasoff*-like duties to other professionals).

62. *See infra* Part III.C (discussing university suicide cases).

63. A special relationship with the rampage killer could be relevant in two ways. The first is that the university might have a duty to protect third parties from the rampage killer. The second is that the university might have a duty to protect the rampage killer from himself. Like Seung Hui Cho, Charles Whitman, and Gang Lu, about half of rampage killers die during their rampages. *See* Fessenden, *supra* note 1. Thus, a discussion of university liability for student suicide may be relevant. *See infra* Part III.C. Of course, the idea of a rampage killer's next-of-kin suing a university for wrongful death seems preposterous.

64. For a fuller analysis of the history of university tort liability, see Valerie Kravets Cohen, Note, *Keeping Students Alive: Mandating On-Campus Counseling Saves Suicidal College Students'*

A. *The Duty of Mental Health Professionals to Protect Third Parties from Violent Patients*

Thirty-four years ago, *Tarasoff* established the duty of mental health professionals to protect third parties from violent patients.[65] The *Tarasoff* decision, controversial at the time,[66] remains the subject of much academic discourse.[67] However, the duty of mental health professionals to protect third parties from violent patients has withstood the test of time,[68] and has been extended in some jurisdictions.[69]

Tarasoff involved a therapist who believed that his patient, a graduate student named Prosenjit Poddar, would follow through on his threats to kill a fellow student, Tatiana Tarasoff, who had rejected Poddar's romantic overtures.[70] The therapist contacted campus police, but when the police interviewed Poddar they concluded that he was rational and could not be involuntarily committed.[71] Two months later, Poddar stabbed Tarasoff to death.[72] Tarasoff's parents sued the therapist.[73] The California Supreme Court found that the therapist had a special relationship with Poddar.[74] Because the therapist had determined that Poddar posed a serious danger of violence to Tarasoff, the Court found that the therapist had a duty to use reasonable care to protect her.[75] The Court held that calling the police was

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Lives and Limits Liability, 75 FORDHAM L. REV. 3081 (2007).

65. *See infra* note 75.

66. The *Tarasoff* case discussed here is a rehearing of the original, heard only two years earlier. *See* Tarasoff v. Regents of the Univ. of Cal., 529 P.2d 553 (Cal. 1974). The California Supreme Court might have granted the rehearing because of the controversy arising out of the first *Tarasoff* case. *See* Vanessa Merton, *Confidentiality and the "Dangerous" Patient: Implications of* Tarasoff *for Psychiatrists and Lawyers*, 31 EMORY L.J. 263, 294 (1982).

67. Douglas Mossman, *Critique of Pure Risk Assessment or, Kant Meets* Tarasoff, 75 U. CIN. L. REV. 523, 524 (2006) (describing *Tarasoff* as the "most influential ruling in mental disability law").

68. Christopher Slobogin, Tarasoff *as a Duty to Treat: Insights from Criminal Law*, 75 U. CIN. L. REV. 645, 645 (2006).

69. *See infra* Part III.B (discussing the application of the *Tarasoff* duty to other situations).

70. *See* Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334, 345 (Cal. 1976). *See generally* People v. Poddar, 518 P.2d 342, 344 (Cal. 1974) (describing Poddar and Tarasoff's relationship before the murder).

71. *Tarasoff*, 551 P.2d at 341.

72. *Id.*

73. *Id.*

74. *Id.* at 343.

75. *Id.* at 340 ("When a therapist determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger."); *see also id.* at 345 ("[O]nce a therapist does in fact determine, or under applicable professional standards reasonably should have determined, that a patient poses a serious danger of violence to others, he

not enough to satisfy the therapist's duty, and that the therapist's failure to warn Tarasoff could support a negligence claim.[76]

Although *Tarasoff* involved a therapist whose patient had made an express threat against a single, identifiable third party,[77] the California Supreme Court framed the duty to protect in broader terms.[78] Indeed, *Tarasoff* imposes a duty to protect third parties on:

> 1) a mental health professional
> 2) who knows or should know[79] that a patient poses a serious[80] danger of violence to a foreseeable victim, and
> 3) who is able to take reasonable steps to protect the third party.[81]

B. *The Growth of the* Tarasoff *Doctrine*

The courts and legislatures of many other states have adopted the *Tarasoff* rule.[82] Some courts extended the California Supreme Court's reasoning.[83] One court imposed a duty on mental health professionals to

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bears a duty to exercise reasonable care to protect the foreseeable victim of that danger.").

76. *Id.* at 340 ("[T]his duty may require the therapist to take one or more of various steps . . . . [I]t may call for him to warn the intended victim or others likely to apprise the victim of the danger, to notify the police, or to take whatever other steps are reasonably necessary under the circumstances.").

77. The Court in *Tarasoff* may have considered duty appropriate only where the therapist could know the identity of a potential victim (or, at most, a small number of potential victims). *See Tarasoff*, 551 P.2d at 345 n.11 ("We recognize that in some cases it would be unreasonable to require the therapist to interrogate his patient to discover the victim's identity, or to conduct an independent investigation. But there may also be cases in which a moment's reflection will reveal the victim's identity.").

78. *See supra* note 75 (stating the holding of *Tarasoff*).

79. Critically, the determination of whether a therapist should know that a patient is a threat is based on professional standards. *See supra* note 75; *see also infra* Part IV.A (arguing that the overwhelming majority of university employees have no professional standards for evaluating potentially violent students).

80. What constitutes a "serious" danger remains the elephant in the *Tarasoff* jurisprudential room. *See generally* Mossman, *supra* note 67, at 577 (discussing widespread differences in opinion about what constitutes "serious danger").

81. This requirement may seem obvious, but it is important enough to be included, for example, in the *Restatement (Second) of Torts*. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 316 (1965) (predicating a parent's duty to control the parent's child on the parent's ability to control the child); *cf. infra* Part IV.C (discussing the difficulty in determining what reasonable steps, if any, are available to university administrators faced with a potentially violent student).

82. *See* Ann Hubbard, *Symposium Introduction*, 75 U. CIN. L. REV. 429, 429 (2006) (opening a symposium discussing *Tarasoff*'s thirtieth anniversary). On the other hand, some states, including Florida, declined to follow *Tarasoff*. *See, e.g.*, Boynton v. Burglass, 590 So. 2d 446, 447 (Fla. 3d DCA 1991). For the purposes of this Note, "*Tarasoff* doctrine" means the *Tarasoff* case and those cases and statutes that rely upon and extend its reasoning.

83. *See* Hubbard, *supra* note 82, at 429. *See also* Eugene Volokh, *The Mechanisms of the*

protect unidentifiable but foreseeable victims of violent patients, even when the patient had made no threats.[84] Another court held that, in the absence of an actual threat, the therapist must interpret the patient's "psychological profile" to predict future violence.[85] A third court broadened the *Tarasoff* duty to encompass reckless, in addition to intentional, acts committed by patients.[86] Although these cases expanded the reach of *Tarasoff* considerably, they were limited to cases involving the liability of mental health professionals.

However, other post-*Tarasoff* cases have extended the duty to protect to pharmacists,[87] doctors treating AIDS patients,[88] and hospitals accepting

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Slippery Slope, 116 HARV. L. REV. 1026, 1098 (discussing the role of judicial attitude shifting in the extension of judicial precedent).

84. *See* Mossman, *supra* note 67, at 546 (discussing Lipari v. Sears, Roebuck & Co., 497 F. Supp. 185 (D. Neb. 1980)). The killer in *Lipari* slayed a stranger in a nightclub. *Id.* His therapists had never heard the killer threaten anyone, much less the victim. *Id.* Rather than rely on a patient's threatening expression or conduct, the court essentially required that the therapists forecast their patient's general future dangerousness. *Id.* It is unclear what the therapists could have done, had they decided that the killer was dangerous. Certainly, the idea of warning every possible victim of a violent patient seems to clash with footnote eleven in *Tarasoff*. *See supra* note 77 (discussing footnote eleven, in which the *Tarasoff* court evaluates the duty to protect in terms of a single victim).

85. *See* Mossman, *supra* note 67, at 547–48 (discussing Jablonski ex rel. Pahls v. United States, 712 F.2d 391 (9th Cir. 1983), *abandoned by In re* McLinn, 739 F.2d 1395 (9th Cir. 1984)). Jablonski, a mental patient, murdered his girlfriend. *Id.* at 547. Although Jablonski had never threatened his girlfriend, his psychiatric record reflected that he had had violent thoughts about his former wife. *Id.* at 547–48. The court found that the psychiatrist's failure to warn Jablonski's girlfriend had been a proximate cause of her death, because Jablonski's "psychological profile indicated that his violence was likely to be directed against women very close to him." *Id.* (quoting *Jablonski*, 712 F.2d at 398). Dr. Mossman notes that the court in *Jablonski* assumed that "there can be a crystal-clear distinction between those patients who do and do not have 'psychological profiles' portending particular types of violence." *Id.* at 548. Use of a psychological profile or psychological history raises the question of whether the harm is imminent: Jablonski's homicidal ideas about his wife occurred in 1968, ten years before he murdered his girlfriend. *See Jablonski*, 712 F.2d at 393. *See generally* Robert I. Simon, *The Myth of "Imminent" Violence in Psychiatry and the Law*, 75 U. CIN. L. REV. 631 (2006) (criticizing the application of the requirement in *Tarasoff* statutes and involuntary commitment proceedings that the potentially violent person pose an imminent threat). Requiring that a patient threaten imminent harm prevents unnecessary deprivation of liberty. *Id.* at 635. The alternative would be to allow the involuntary commitment of anyone who has ever demonstrated a potential for violence. On the other hand, Jablonski also threatened to rape the victim's mother a few days before he killed the victim; he may not be the best example of the mutability of human nature. *See Jablonski*, 712 F.2d at 393–94.

86. *See* Mossman, *supra* note 67, at 548–49 (discussing Petersen v. State, 671 P.2d 230 (Wash. 1983)).

87. *See* Sarah Buel & Margaret Drew, *Do Ask and Do Tell: Rethinking the Lawyer's Duty to Warn in Domestic Violence Cases*, 75 U. CIN. L. REV. 447, 488 (2006). Pharmacists have a duty to warn their customers of dangerous combinations of medicines. *Id.* However, this "duty to warn" is not analogous to the *Tarasoff* duty. The pharmacist's duty to protect her customer is not the same as the *Tarasoff* duty to protect a third party.

88. *Id.* at 490. A California appellate court ruled that doctors have a duty to warn the intimate

AIDS patients.[89]

Taken together, the post-*Tarasoff* cases suggest that a duty to protect may be imposed on:

> 1) any professional
> 2) who knows or should know that a client or customer poses a serious danger of harm[90] to any number[91] of foreseeable[92] victims, and
> 3) who is able to take reasonable steps to protect the third party or parties.[93]

C. *The Duty of Universities to Protect Suicidal Students from Themselves*

Wrongful death actions against universities for failing to prevent student suicide present a *Tarasoff*-like situation. If post-*Tarasoff* cases potentially impose upon professionals a duty to protect the intended victim of a dangerous person, then suicide cases are simply a special case in which the intended victim and the dangerous person are the same individual. Of course, warning someone that he might commit suicide seems rather less informative than the typical *Tarasoff* warning. However, *Tarasoff* states that the duty to protect might be satisfied by taking other reasonably necessary steps,[94] such as notifying a parent or intervening directly.

Schieszler v. Ferrum College[95] involved a wrongful death suit arising out of the suicide of Michael Frentzel.[96] Prior to his death, Frentzel sent a note to his girlfriend indicating an intention to commit suicide.[97] Upon learning of the note, the dean of student affairs required Frentzel to sign

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partners of AIDS patients. *Id.*

89. *Id.* at 490–91. As with the pharmacist's duty to warn her customers, *see supra* note 87, the hospital's duty to warn is based on a direct relationship with its employees, rather than a third-party relationship. Furthermore, the duty to warn is based on a known danger—the possibility of exposure to HIV—rather than a purely speculative one, such as future conduct. HIV can be diagnosed reliably, unlike a propensity for future violent conduct. *See infra* Part IV.B.

90. The duty is no longer restricted to violence, or even to intentional acts. *See supra* note 86 and accompanying text.

91. *See supra* note 84 (discussing *Lipari*).

92. In some jurisdictions, the victims need not be identifiable, only foreseeable. *See id.*

93. *See supra* note 81; *see also infra* Part IV.C (arguing that, because universities may be unable to take reasonably necessary steps to prevent rampage killings, they should not have a duty imposed upon them to do so).

94. *See supra* note 75.

95. 236 F. Supp. 2d 602 (W.D. Va. 2002).

96. *Id.* at 605. LaVerne Schieszler was Michael's aunt, guardian, and representative of his estate. *Id.*

97. *Id.*

a statement that he would not injure himself, but otherwise the dean took no action.[98] Days later, Frentzel sent another note, but the university took no action except to forbid Frentzel's girlfriend from checking his room.[99] After Frentzel sent a third note, university employees checked his room and found that he had hanged himself.[100]

After being sued by Frentzel's estate, the university moved for dismissal, arguing they had no duty to protect Frentzel.[101] The court held that, while it was unlikely that a special relationship existed as a matter of Virginia law between universities and their students, one might exist given the particular facts of the case.[102] In particular, the statement that the dean of student affairs required Frentzel to sign clearly indicated that the university knew of the danger to Frentzel's life.[103] After the court denied the motion to dismiss, the university settled, admitting "shared responsibility" for Frentzel's suicide.[104]

Shin v. Massachusetts Institute of Technology[105] dealt with another student suicide.[106] Like Michael Frentzel, Elizabeth Shin had repeatedly threatened suicide before her death.[107] MIT administrators had knowledge not only of her threats, but of her practice of cutting herself.[108] On the day she had planned to commit suicide, Shin phoned a MIT administrator and told her "[y]ou won't have to worry about me any more."[109] The administrators made a psychiatric appointment for her for the next day.[110] Shin killed herself that night.[111] Her parents sued, claiming that more timely intervention could have saved their daughter's life.[112] In a holding based in part upon *Schiezsler*,[113] the court found that the administrators

98. *Id.*
99. *Id.*
100. *Id.*
101. *Schieszler*. 236 F. Supp. 2d at 605–06.
102. *Id.* at 609.
103. *Id.* ("This last fact, more than any other, indicates that the defendants believed Frentzel was likely to harm himself."). This point makes *Schieszler* similar to *Tarasoff* in that the court found a duty based on the actual knowledge of the defendant, rather than what the defendant should have known.
104. *See* Eric Hoover, *Judge Rules Suicide Suit Against MIT Can Proceed*, CHRON. HIGHER EDUC. (Wash., D.C.), Aug. 12, 2005, at A1, *available at* http://chronicle.com/free/v51/i49/49a00101.htm.
105. No. 020403, 2005 WL 1869101 (Mass. Super. Ct. June 27, 2005).
106. *Id.* at *1.
107. *See id.* at *2,*4–5.
108. *Id.* at *2. The practice is colloquially referred to as "cutting." *See id.*
109. *Id.* at *5.
110. *Id.*
111. *Id*.
112. *See id.* at *14.
113. *Id.* at *13 (citing 236 F. Supp. 2d 602 (W.D. Va. 2002)).

with actual knowledge of the threat to Shin's life were in a special relationship with her.[114] Those administrators then settled.[115]

In both *Schieszler* and *Shin*, the students made express threats of suicide;[116] no university rampage killer has been as forthcoming.[117] A troubling story, a bad temper, or offensive conduct is a far cry from repeated suicide notes or even attempts. Although the holdings in the suicide cases were based on the actual knowledge of university officials, court findings that universities owe a duty to prevent student suicides may explain why universities fear that they owe a duty to prevent rampage killings as well. If nothing else, universities may owe a duty to prevent rampage killers from killing themselves.

IV. A SQUARE PEG FOR A BULLET HOLE: APPLYING THE *TARASOFF* DUTY TO UNIVERSITY RAMPAGE KILLINGS

The expansion of the *Tarasoff* doctrine raises the question: Why shouldn't courts apply the *Tarasoff* duty to university rampage killings? In fact, courts might do just that. However, the court's reasoning in *Tarasoff* was premised upon the facts of the case. Despite the superficial resemblance,[118] university rampage killings involve facts very different from those of Prosenjit Proddar's murder of Tatiana Tarasoff.[119]

A. *Most University Employees Cannot Rely on Professional Standards to Predict Violence*

In light of the expansion of the *Tarasoff* doctrine, there clearly is no requirement that the party charged with the duty be a mental health professional. However, an expectation exists that the party charged with the duty be professionally capable of forecasting harm.[120] A pharmacist or doctor, like a therapist, has extensive training in predicting specific types

114. *Id.* The cause of action against MIT itself was dismissed. *Id.* at *1.

115. Barbara Lauren, *MIT Student Suicide Case Settled Out of Court*, AACRAO TRANSCRIPT, Apr. 5, 2006, http://www.aacrao.org/transcript/index.cfm?fuseaction=show_view&doc_id=3116.

116. *See supra* notes 95–99, 105–10 and accompanying text.

117. The closest case was that of Wayne Lo. Arguably, the dean of Simon's Rock should have known that Lo was a threat based on the anonymous tip and the dean's personal knowledge that Lo had received a package from a gun store. However, none of the dean's actions indicated that he actually believed that Lo was a threat. *See supra* notes 34–46 and accompanying text.

118. In either case, survivors sue a university for failing to prevent one college student from murdering another.

119. *Cf. supra* notes 70–73 and accompanying text (describing the situation giving rise to Tarasoff's murder).

120. "[T]he judgment of the therapist . . . in predicting whether a patient presents a serious danger of violence is comparable to the judgment which doctors and professionals must regularly render . . . ." Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334, 345 (Cal. 1976).

of harm.[121] Although some employees of a university, such as mental health counselors, may be uniquely capable of forecasting student violence,[122] the vast majority are not. Most university employees, even those involved in student affairs, counseling, or discipline, are not doctors of psychology or psychiatry. Determining whether someone should have known something, for the purposes of *Tarasoff*, depends on the existence of professional standards.[123] For example, a professor of fluid mechanics surely is a professional, but her profession has no standards for predicting student violence. If we are willing to hold the fluid mechanics professor to the standard of the "reasonable fluid mechanics professor" faced with a potentially violent student, then the *Tarasoff* exception for "professionals" has entirely swallowed the common law rule.[124]

B. *Universities Cannot Reliably Predict Rampage Killings*

Moreover, there may be no one who is professionally capable of predicting future violent acts.[125] The problem, brushed off so readily by the majority in *Tarasoff*,[126] is that it is extremely difficult to reliably predict future violent conduct.[127] This isn't merely a Phildickian[128] epistemological

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121. Of course, a therapist's training is far less effective in this regard than that of a doctor. *See infra* Part IV.B (discussing the difficulty in reliably predicting future violent conduct).

122. For example, mental health professionals employed by the university may be uniquely capable of forecasting student violence or, as suggested by Stephen King, English professors could potentially identify threats based on their students' lack of literary talent. *See supra* note 11.

123. "[T]he therapist need only exercise 'that reasonable degree of skill, knowledge, and care ordinarily possessed and exercised by members of [that professional specialty] . . . .'" *Tarasoff*, 551 P.2d at 345 (second alteration in original) (quoting Bardessono v. Michels, 478 P.2d 480, 484 (Cal. 1970)).

124. *See supra* note 56 and accompanying text.

125. This observation leads to an interesting wrinkle. If everyone is equally (in)capable at predicting violence, then arguably it is non-professionals who should have a duty to warn about potentially violent people, as non-professionals do not have a duty of confidentiality. *See* Slobogin, *supra* note 68, at 655.

126. *See, e.g.*, *Tarasoff*, 551 P.2d at 345 (comparing the judgment of a therapist with that of a medical doctor); *id.* at 346 (concluding that "professional inaccuracy in predicting violence cannot negate the therapist's duty to protect"); *id.* (stating that inaccurate warnings were a reasonable price to pay to save lives).

127. "Reliably predicting any type of violence is extremely difficult. Predicting that an individual who has never acted out violently in the past will do so in the future is still more difficult. Seeking to predict acts that occur as rarely as school shootings is almost impossible." MARY ELLEN O'TOOLE, FBI, THE SCHOOL SHOOTER: A THREAT ASSESSMENT PERSPECTIVE 3 (2004), *available at* http://www.fbi.gov/publications/school/school2.pdf. Although addressed to secondary school shooters, the discussion of threat assessment is phrased in general terms. *Id.* at 1.

128. *See, e.g.*, PHILIP K. DICK, *The Minority Report*, *in* THE MINORITY REPORT AND OTHER CLASSIC STORIES BY PHILIP K. DICK (Citadel Press 2002) (1956) (describing a dystopian future in which the police detect crimes and punish criminals before the crimes have been committed).

concern; empirical data strongly suggest that the therapist's prediction of violence in *Tarasoff* was nothing more than an unhappy accident.[129] If a person says, prior to flipping a coin, "heads," neither possible outcome indicates that the person knew the result.[130] And because actual knowledge of future violence eludes even professionals, the idea of constructive knowledge—that someone ought to have known—holds little meaning.[131]

Furthermore, if the *Tarasoff* doctrine were applied to university rampage killings, mere knowledge of unspecified future violence could not suffice to create a duty.[132] Any duty to prevent harm from a university rampage killing would be predicated on knowledge that a university rampage killing would occur. While violent acts, generally, are extremely difficult to predict, reliable[133] prediction of a rampage killing is impossible.

"[W]hen the incidence of any form of violence is very low and a very large number of people have identifiable risk factors, there is no reliable way to pick out from that large group the very few who will actually commit the violent act."[134] The incidence of rampage killings is extremely low.[135] In the absence of specific evidence of a planned rampage threat assessments are instead based on the characteristics of a potentially dangerous student. However, university rampage killers share the characteristics of millions of other students who will never murder

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129. *See, e.g.*, *Tarasoff*, 551 P.2d at 360 n.5 (Clark, J., dissenting) (noting that among 989 patients assessed as too dangerous to be kept in civil mental hospitals, only seven committed, or even threatened, an act sufficiently dangerous to warrant a transfer to maximum security hospitals within the next year).

130. This analogy is imperfect in light of Stoppard's popular work on successive deterministic coin flips. *See* TOM STOPPARD, ROSENCRANTZ & GUILDENSTERN ARE DEAD (Grove Press, 2002) (1967). One could argue that a (fair) coin toss is random, while the propensity for violence of an individual is not. However, a success rate of seven in 989, *see supra* note 129, suggests that, even if we assume that future violent conduct is deterministic to some extent, psychiatric predictions of future violent conduct are less accurate than a random distribution. In other words, the psychiatrists would be better off flipping coins.

131. More troubling still is the possibility of imputing the aggregate knowledge of the population of a university to the university as legal entity. Thus, a university "should know" what its employees (or even its students) know. The consequences of imposing such a requirement on a university are beyond the scope of this Note. Rules of decision for even trivially simple cases are not readily apparent. Given person P, and integers M and N: If M people know that P is not going to go on a rampage, and N people know that P will, what does the university know?

132. *See Tarasoff*, 551 P.2d at 340 (stating that the therapist must protect the intended victim against the danger predicted).

133. The critical word here is "reliable." It is simple to predict rampage killings by stating: "Every person will go on a rampage killing." Such a statement will identify every rampage killer, but will generate so many false positives as to be useless. However, one could imagine a procedurally generated college brochure that warns every student that each other student could murder her. It is unclear whether such a brochure would satisfy any duty to warn.

134. O'TOOLE, *supra* note 127, at 3.

135. *See* VT REPORT, *supra* note 2, app. L (listing school and university rampage killings).

anyone.[136] For example, the Virginia Tech report identifies "strangeness," wearing black clothes, drinking alcohol, and breaking rules as risk factors for rampage killings.[137] These risk factors are hardly unusual. Thus, the overwhelming majority of people identified as a potential threat are no threat at all.[138]

The difficulty in predicting violence is compounded further by another significant difference between *Tarasoff* and university rampage killings. *Tarasoff* dealt with a specific, identified person in imminent danger.[139] The larger the pool of possible victims (for example, the entire populace of a university), the more difficult it is to rule out the possibility of a threat.[140] Similarly, projections into the distant future create even more uncertainty about whether someone will or will not cause harm. The duty to protect should be restricted to specific, imminent threats, not only out of fairness to the person charged with a duty, but to protect the rights of people labeled as threats.[141]

The sum of all these factors is that no one can reliably know who is a potential threat, but no one can prove that he won't, some day, harm someone else. The consequences of failing to predict that someone will be violent are potentially severe for the predictor or school administrator, but the consequences of inaccurately predicted violence fall upon the potential bad actor, or student. It's no surprise that psychiatric professionals tend to err dramatically on the side of false positives.[142] What, then, can be expected of laypeople? Better to admit that no one can reliably predict a rampage killing, and that the *Tarasoff* duty should not apply.

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136. *Cf.* O'TOOLE, *supra* note 127, at 2–3 (discussing the millions of secondary-school students who share characteristics of school shooters, but commit no crime).

137. *See* VT REPORT, *supra* note 2, app. M.

138. Nonetheless, some courts would impute knowledge of harm to a therapist with knowledge of the "psychological profile" of a dangerous person. *See supra* note 85.

139. *See* Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334, 339–42 (Cal. 1976) (Poddar stated that he would kill Tarasoff when she came back from Brazil). The Court was not insensitive to the difficulties attendant a *single* unidentifiable victim. *See id.* at 345 n.11 (stating that it would be unreasonable to require a therapist to interrogate a patient to determine the identity of the potential victim). Such difficulties are obviously compounded by having a large number of unidentifiable victims, and affect the balance of interests that applied in *Tarasoff*. *See infra* Part IV.C (discussing the difficulty of warning an amorphous population rather than an individual). *But see* Mossman, *supra* note 84 (discussing *Lipari*, a *Tarasoff*-like case in which the victims were strangers, and thus could not have been identified by the therapist).

140. The difference here is best demonstrated by comparing a threat to a particular student and a threat to an entire campus *including* that particular student. Of course, it may be easier to rule out a threat to an unavailable individual (e.g., Napoleon Bonaparte) than to a group of people.

141. *See* Simon, *supra* note 85, at 635 (discussing civil liberties implications of the "imminent threat" requirement in duty to warn and involuntary commitment statutes).

142. *See, e.g.*, *supra* note 129.

C. *Universities May Not be Able to Take Reasonable Steps to Prevent Rampage Killings*

Despite the lack of professional standards, a court might consider some university employees to have relevant professional expertise in predicting violence. Furthermore, a court might decide, contrary to all evidence, that those employees are capable of reliably predicting rampage killings. Alternatively, like the court in *Tarasoff*, a court might decide that all the false positives are a reasonable cost in order to save lives. However, university rampage killings implicate different concerns than do individual homicides, and a duty to take reasonably necessary steps to prevent a rampage killing is only meaningful or fair if that duty could possibly be discharged.[143]

Unfortunately, the court in *Tarasoff* provides little in the way of guidance. The court first states that the duty might require calling the police; however, the defendant in *Tarasoff* did not escape liability by doing so.[144] Second, the court states that the duty might require a direct or indirect warning to the potential victim.[145] Finally, the court states that the duty might require "whatever other steps are reasonably necessary under the circumstances."[146] It's no surprise, then, that *Tarasoff* is often read to create a duty to warn,[147] even though the court phrases it as a duty to use reasonable care to prevent danger.[148]

The problem is that the duty to warn in the context of a university rampage killing is completely different from the duty to warn applied in *Tarasoff*. The court in *Tarasoff* weighed the "uncertain and conjectural" damage done by an inaccurate warning against the possibility of saving someone's life.[149] In the context of university rampage killings, the probability of an inaccurate warning is astronomical.[150] Moreover, the damage done to a "dangerous" student by warning every person who might foreseeably be killed by that student cannot be overstated. It would be more merciful for the university, in the practice of the ancient Greeks, to write the accused's name down on a broken pottery shard and exile him

143. "Reasonably necessary steps" is a rephrase of a portion of the rule stated by the *Tarasoff* court. *See id.* at 340.

144. *Id.*

145. *Id.*

146. *Id.*

147. *See, e.g.*, Buel & Drew, *supra* note 87 (describing a *Tarasoff*-like duty as a duty to warn).

148. *Tarasoff*, 551 P.2d at 340.

149. *See id.* at 346 ("Weighing the uncertain and conjectural character of the alleged damage done the patient by such a warning against the peril to the victim's life, we conclude that professional inaccuracy in predicting violence cannot negate the therapist's duty to protect the threatened victim.").

150. *See supra* Part IV.B.

properly.[151] The *Tarasoff* court accepted the premise that the therapist must protect the patient's privacy.[152] It argued persuasively that issuing a warning to a single victim was a lesser violation of the dangerous person's privacy than involuntary commitment.[153] However, involuntary commitment would be far more discreet than warning every one of a student's peers, professors, and neighbors that the student might kill them. The damage to the falsely accused is neither uncertain nor conjectural; at minimum, the student would be constructively expelled. As such, the *Tarasoff* warning cannot be considered a "reasonable" step in the university setting.

Given that neither warning the police nor the potential victims could satisfy the duty to protect students from rampage killings, universities are left with few options indeed. Measures that may be "necessary" to protect students from a rampage killer may not be reasonable, or even available. As the *Tarasoff* court notes, the level of evidence of dangerousness required to support an involuntary commitment is higher than that required to invoke the *Tarasoff* duty.[154] Similarly, an attempt to expel a troubled student would be difficult to support based on the mere speculation that he might one day prove dangerous.[155] And it is far from clear that expelling a student would help matters.[156] The *Tarasoff* warning served as a stopgap. In its absence, the inconsistency between what measures are required, and what measures are actually available, looms much larger.

Thus, although the *Tarasoff* decision seems relevant at first glance, its reasoning cannot be extended to the context of university rampage killings. A therapist who knows that his patient will kill a particular individual is too far removed from a university administrator who feels that a particular student is acting strangely. Applying the *Tarasoff* duty to universities would require juries to determine, based on nonexistent professional standards, whether universities should have known something unknowable, and, if so, whether they then should have done the impossible.

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151. *See* Robert C.L. Moffat, *"Not the Law's Business:" The Politics of Tolerance and the Enforcement of Morality*, 57 FLA. L. REV. 1097, 1100 (2005) (discussing John Stuart Mill's criticism of ostracism in the absence of actually harmful behavior).

152. *Tarasoff*, 551 P.2d at 347.

153. *Id.* at 347 n.14.

154. *Tarasoff*, 551 P.2d at 346.

155. On several occasions, universities have settled lawsuits brought by mentally ill students who were expelled because the university feared liability if the student committed suicide. *See, e.g.*, Press Release, Bazelon Ctr. for Mental Health Law, Hunter College Settles Lawsuit by Student Barred from Dorm after Treatment for Depression (Aug. 23, 2006), *available at* http://bazelon.org/newsroom/2006/8-23-06-hunter-settlement.html (announcing settlement between the university and a student who was suspended after her suicide attempt).

156. The Appalachian School of Law shooter was academically suspended, and subsequently started his rampage by killing the people who suspended him. *See supra* Part II. It's easy to imagine a troubled student having a very similar reaction to being expelled.

V. CONCLUSION

During the month of October 2007, I watched a movie about vampires attacking Alaska,[157] made a rude gesture at someone in traffic,[158] made a "shoot myself in the head" gesture during a long lecture,[159] doodled a cartoon biplane in same,[160] pinned someone during wrestling practice,[161] skipped class to watch a Moot Court competition,[162] browsed Vauban's *Manual of Siegecraft and Fortification*[163] and worked extensively on this Note.[164] In just one month, I manifested eleven of the twenty-two warning signs that the Virginia Tech report associated with school shooters.[165] Although I read, spoke, and wrote endlessly about suicide and homicide, no one reported me to the authorities.[166]

The university is neither prison nor asylum. The function of the university is to educate its students, not to restrain, diagnose, or treat them. Because universities are incapable of preventing rampage killings, imposing a duty to do so would result in a paranoid farce. It would be unfair not only to the universities, but to the students, who would be forced into an adversarial relationship with their educators and with each other. This scenario would in turn result in increased stress and isolation not only for students at risk of becoming violent, but for any student who could be mistaken for one. Imposing a duty to prevent rampage killings upon universities would destroy more lives than the extraordinarily rare incidents that imposing the duty was intended to prevent.

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157. *See* VT REPORT, *supra* note 2, app. M at 2, 4 (describing an interest in "[v]iolent fantasy content" and "being able to view cruelty without being disturbed" as indicators of future violence).

158. *See id.* at 3 (describing "[a]nger problems" and "[h]omicidal ideation" as indicators of future violence). The report defines "[h]omicidal ideation" rather broadly as "[e]xpress[ing] contempt for other(s)." *Id.*

159. *See id.* (describing "[s]uicidal ideation" as an indicator of future violence).

160. *See id.* (describing "[f]ascination with weapons and accoutrements" as an indicator of future violence).

161. *See id.* (describing "[b]oasting and practicing of fighting and combat proficiency" as an indicator of future violence).

162. *See id.* (describing "[r]efusal to abide by written and/or verbal rules" as an indicator of future violence). The class had a compulsory attendance policy.

163. *See* VT REPORT, *supra* note 2, app. M at 4 (describing an "[u]nusual interest in . . . military . . . activities" as an indicator of future violence).

164. *See id.* at 3 (describing being "[i]solated and socially withdrawn" as an indicator of future violence).

165. *See id.* at 1–4. The author concedes that "[a] single warning sign by itself usually does not warrant overt action by a threat assessment specialist." *Id.* at 2. Presumably, eleven warning signs would warrant some sort of action. In contrast, nothing in the newspaper reports indicate that Gang Lu possessed more than three or four. *See supra* Part II (describing the University of Iowa shooter, Gang Lu, who had no prior psychiatric or disciplinary record).

166. To my knowledge.