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ABSTRACT

This comprehensive guide for protecting school crime victims provides a concise, central source for quickly accessing and utilizing new legal authorities pertinent to the inalienable right to safe schools and tort principles relating to the rights of campus crime victims. Intended for school officials and trial lawyers, the book can also be used as a supplemental text in courses such as education law, torts, family law, workers' compensation, juvenile justice and constitutional law, among others. Material is organized into nine chapters: (1) "School Crime and Violence Victims"; (2) "Victims Respond: The Right to Safe Schools"; (3) "The Victims' Rights Movement"; (4) Victims' Rights Litigation"; (5) "Classifications of Victims' Rights Litigation"; (6) "Schools as Victims' Rights Litigation Defendants"; (7) "Claims for Failure to Protect Against or Prevent Non-student Crime or Violence"; (8) "Claims for Failure to Protect Against or Prevent Student Crime or Violence"; and (9) "Schools Respond: Providing Safe Schools." An alphabetical list of primary citations and an index are appended. (MLF)

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SCHOOL CRIME & VIOLENCE

VICTIMS' RIGHTS

"There can be no justice until those of us who are unaffected by crime become as indignant as those who are."

Solomon Gross Burton

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SCHOOL CRIME & VIOLENCE VICTIMS' RIGHTS

Revised 1992

JAMES A. RAPP FRANK CARRINGTON GEORGE NICHOLSON

NATIONAL SCHOOL SAFETY CENTER

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By James A. Rapp, Frank Carrington and George Nicholson

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National School Safety Center
Pepperdine University's National School Safety Center is a partnership of the U.S. Department of Justice and U.S. Department of Education. NSSC's goal is to bring a national focus to school safety. This includes preventing campus crime and violence, improving discipline, increasing attendance and preventing drug traffic and abuse. NSSC communication and technical assistance activities help coalesce public, private and academic resources to ensure all our schools are safe, secure and peaceful places of learning.

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Foreword

When Massachusetts created America's first state board of education in 1837, that board selected a lawyer, Horace Mann, to serve as this nation's first state superintendent of schools, a post he held with distinction for 12 years. Many outstanding lawyers and judges, although usually in their lay capacities, have since been actively involved with public schools.

Formal legal intervention in school matters was a rarity until the 1950s and 1960s. Since then, lawyers and judges have become ever more actively involved with schools, frequently in a professional role, often adversarial in nature. This change is noted in many landmark United States Supreme Court decisions, among them *Brown v. Board of Education* and *Tinker v. Des Moines Independent Community School District.*

This trend is especially evident now that our country has entered an era of expanding liability and exploding litigation. The law has become the vehicle for attempting to settle countless conflicts which might formerly have been resolved by other means in the local community.

It is clear America's schools, and the people associated with them, are not immune from burgeoning liability and litigation. Cases involving virtually every aspect of education have been, or are currently, in court at some level.

Without debating the merits of injecting courtrooms into classrooms, it is safe to say many educators are not familiar with the magnitude, import or specifics of the amorphous, and often *ad hoc*, phenomenon. Parents and students are similarly handicapped. This lack of information and understanding can only breed more conflict and litigation.

It is futile to criticize the courts or lawyers for the tendencies of a litigious socity. It also serves no purpose to criticize educators, parents and students for their unfamiliarity with the legal process. Schools, and people within them, must deal with the legal here and now. The key questions here is: How can the legal community help

them to do that?

This volume, *School Crime and Violence: Victim's Rights*, will be of help to trial lawyers who represent victims of campus crimes. It will also be of help to school lawyers in their efforts to prevent such cases from arising in the first place; this book can serve as a useful tool for advice to educators and school administrators in risk and liability prevention and implementation of campus crime prevention programs.

In addition, *School Crime and Violence: Victim's Rights* will serve as an incentive for the implementation and expansion of multifaceted preventive law programs in all our nation's schools.

The necessity for such expansive anticipatory action can be taken from a popular television advertisement, "You can pay me now or you can pay me later." That is, we can pay to anticipate and prevent campus crime and violence, or in the absence of foresight and action, we can pay for the damage, destruction and, indeed, the human suffering which will inevitably follow. This book will demonstrate to any lay or professional reader that the fiscal and human costs of failure are too high.

Justice Stanley Mosk
Supreme Court
State of California

Justice Melvyn Tanenbaum
Supreme Court
State of New York

Introduction

Crime victims have long been forgotten parties in the administration of justice. In the mid-1970s that all began to change. It was then the "Victims' Movement" began in earnest.

Countless victim-oriented reforms have since swept through courthouses and statehouses until, in 1981, they reached all the way into the White House when President Ronald Reagan proclaimed America's first Victims' Rights Week. Ironically, he had become the nation's most visible crime victim, having just suffered a grievous gunshot wound at the hand of an attempted assassin.

While innocent citizens, even presidents, may be victimized by crime anywhere, there are some places where people do deserve special status. Schools are just such special places and their students and staff require special attention and special protection.

In 1982, California voters adopted Proposition 8, the Victims' Bill of Rights. It included an amendment to the California Constitution creating an inalienable right to safe public schools for all students and staff. While there is no similar constitutional mandate yet included in the law of any other state, this unique right holds the promise and potential of ushering in a new era of responsible school management —one which recognizes and responds to the needs and liberties of innocent students and staff. This reform is long overdue.

Although similar constitutional mandates are lacking in other states, virtually all states provide a potential remedy to innocent students and staff through civil tort suits against school officials who fail to warn of, or protect against, criminal dangers which are known or should have been known. Negligence suits for improper hiring or retention of dangerous school employees are yet another potential remedy for campus crime victims.

This exciting book, *School Crime and Violence: Victims' Rights*, is a comprehensive guide for protecting school crime victims. The book is authored by three prominent lawyers, James A. Rapp of the Illinois Bar, the late Frank Carrington of the Virginia Bar, and George Nicholson of the California Bar, all of whom possess established,

national credentials as crime victims' advocates.

The book provides the nation's first concise, central source for quickly accessing and utilizing new legal authorities pertinent to the inalienable right to safe schools and tort principles relating to the rights of campus crime victims. Thus, trial lawyers may use this book to enhance potential success in litigation.

The book also provides the means to implement an even more elemental right — that of being free from the risk of criminal victimization altogether. Thus, school officials may use the book to identify risks and responsibilities and respond in a variety of ways to minimize, if not totally eliminate, the potential for litigation.

Clearly, students and staff who suffer as a result of culpable misconduct of school officials should have a remedy. At the same time, everyone should work with school officials to help them anticipate, deter and prevent campus crime. This book serves both purposes well.

The book serves one additional purpose. It can be used as a supplemental text in courses such as education law, torts, family law, workers' compensation, juvenile justice and constitutional law, among others.

School Crime and Violence: Victims' Rights will thus help future professionals, as well as in-service professionals, to recognize and assimilate a change in the law which, heretofore, has largely gone unheralded. Former United States Chief Justice Warren Burger described that change: "The serious challenge of restoring a safe school environment has begun to reshape the law." This book is an excellent chronicle of the legal authorities that largely underpin the Chief Justice's cogent observation.

Ronald F. Phillips
School of Law
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Acknowledgments

The National School Safety Center and Pepperdine University gratefully acknowledge the significant contributions of authors James A. Rapp, Frank Carrington and George Nicholson. Their qualifications and experience are summarized below:

JAMES A. RAPP

James A. Rapp is a member of the Quincy, Illinois, law firm of Hutmacher, Rapp & Ortbal, P.C. He is admitted to practice law in the states of Illinois and Missouri, and before the United States Supreme Court and the Seventh, Eighth, and Federal U.S. Circuit Courts of Appeal, among other courts. He received his B.S. degree in Communications, with honors, from the University of Illinois, and his J.D. degree from Washington University, St. Louis.

Mr. Rapp is the editor-in-chief and principal author of *Education Law*, a comprehensive treatise on legal issues in education published by Matthew Bender & Company, Incorporated. Along with Frank Carrington, he also wrote *Victims' Rights: Law and Litigation*, published by Matthew Bender & Company, Incorporated. In addition, he co-authored *Illinois School Law*, *Illinois Public Community College Act: Tenure Policies and Procedures* and *Attorney's Guide to Illinois Real Estate Taxation*, all published by the Illinois Institute for Continuing Legal Education, and *Illinois Legal Systems: Domestic Relations*, published by Matthew Bender & Company, Incorporated. He also serves as editorial consultant for *Illinois Legal Systems: Corporations*, published by Matthew Bender & Company, Incorporated. He has written other articles and publications, and spoken at numerous conventions, seminars and workshops.

Among the organizations of which Mr. Rapp is a member are the National Organization on Legal Problems of Education, the National School Board Association Council of Attorneys, and the National Association of College and University Attorneys.

FRANK J. CARRINGTON

Frank J. Carrington, who died in January 1992, was a pioneer in victims' litigation and rights. He was admitted to practice law in the states of Colorado, Illinois, Ohio and Virginia, and before the United States Supreme Court, among other courts. He founded and was executive director of Victims Assistance Legal Organization, Inc. (VALOR), established as a national clearinghouse of legal information dealing exclusively with victims' rights. Mr. Carrington was a legal advisor to the National Victim Center and directed the Coalition of Victims' Attorneys & Consultants (COVAC). He received a B.A. degree from Hampden-Sydney College, an LL.B. degree from the University of Michigan, and an LL.M. degree in Criminal Law from Northwestern University.

Mr. Carrington had written extensively in the area of victims' rights, including the landmark publication *The Victims*, published by Arlington House, which focused concern toward the victims of crime. He had written *Evidence Law for the Police*, published by Chilton, and co-authored *The Defenseless Society*, published by Arlington House, and along with James A. Rapp, *Victims' Rights: Law and Litigation*, published by Matthew Bender & Company, Incorporated. He also wrote many law review and other articles.

Actively involved in victims' rights matters, Mr. Carrington was a member of President Reagan's Task Force on Victims of Crime, Attorney General Meese's Task Force on Violent Crime, and a chairman of the American Bar Association's Victims Committee. In 1991, Mr. Carrington was honored at the White House by President Bush regarding his efforts on behalf of victims of crime or violence.

GEORGE NICHOLSON

George Nicholson, an attorney in Sacramento, California, formerly was director and chief counsel of the National School Safety Center, Sacramento, California. He currently is an Associate Justice on the California Court of Appeal for the Third Appellate District. He is admitted to practice law in the state of California, the federal courts in the eastern district of California, the Ninth U.S. Circuit Court of Appeals, and the United States Supreme Court, among other courts. He received a B.A. degree from California State University at Hayward and a J.D.degree from Hastings College of Law.

Justice Nicholson has served as an adjunct professor of education at the Graduate School of Education and Psychology, Pepperdine University. He was senior assistant attorney general for California and in that capacity authored California's constitutional right to safe schools provision. Previously, he was executive director of the California District Attorneys Association, senior trial deputy district attorney with Alameda County and a legal and education advisor to Governor George Deukmejian. In addition, he has written numerous articles and publications on the right to safe schools and related topics, as well as spoken at various conventions, seminars and workshops.

Mr. Nicholson serves as a board member of the Victims Assistance Legal Organization, Inc. (VALOR); advisory committee member of the Victims of Crime Resource Center, McGeorge School of Law, University of the Pacific; member of the American Bar Association's Victims Committee; member of the President's Advisory Committee on the Victims of Crime; and member of the National Association of College and University Attorneys.

Contents

Chapter I

School Crime and Violence Victims

When Mark Twain's Tom Sawyer and his classmates believed themselves oppressed by the demands of their teacher, Tom sought retribution by lowering a cat from directly above the teacher during end-of-term festivities. The desperate animal clawed at the first thing she came into contact with which, as planned, was the teacher's wig. The cat, with her trophy still in her possession, was snatched up in an instant. "And how the light did blaze abroad from the vain teacher's bald pate"[1] — for one boy had secretly *gilded* it! That broke up the meeting. The boys were avenged.

Tom's prank was a risky sort of thing to do; the cat, thrashing about in the air, *could* have injured its target. For Mark Twain and readers of *The Adventures of Tom Sawyer*, it was a highly humorous episode of boyish devilment.

Students probably have been raising hell in schools[2] since the concept of structured classroom education first dawned. Maintaining order in the classroom has never been easy, but, as recognized by the United States Supreme Court, "in recent years, school disorder has often taken particularly ugly forms; drug use and violent crime in the schools have become major social problems."[3] In many localities, especially inner city urban campuses, we are not confronted simply by mischievously inclined students, but by hard core school-aged youth

1. M. Twain, *The Adventures of Tom Sawyer*, Chapter 21.
2. Throughout this book, the terms "school" and "schools" are frequently used. This book covers victims' rights at all educational levels — primary, secondary and postsecondary. Therefore, "school" and "schools" should be considered in their broadest sense.
3. New Jersey v. T.L.O., 469 U.S. 325, 105 S. Ct. 733, 742, 83 L. Ed. 2d 720, 21 Educ. L. R. 1122 (1985).

inclined to commit serious crimes against the persons and property of fellow students, teachers and others on or about the school campus.

The Scope of the Problem

Despite researchers' focus on academic standards and improvements, The Gallup Poll on the Public's Attitudes Toward the Public Schools identifies discipline as the number one public concern in all but one year since 1969.[4] The gravity of this concern was documented by the National Institute of Education (NIE), which completed and published *Violent Schools — Safe Schools: The Safe School Study Report to the Congress*.[5] Among the findings of the NIE Study were the following:

- Approximately 25 percent of the nation's schools are vandalized monthly, costing schools more than $200 million annually.
- Burglaries occur five times more often in schools than businesses, and average $150 for each theft of school equipment, supplies or other property.
- Break-ins, bomb threats or incidents, trespass cases, extortions and thefts of school property were the least likely offenses to be reported, although one of every 100 schools experienced a bomb-related offense in a typical month.
- Each month nearly 282,000 students are attacked in schools, with younger students being the most likely victims.
- Forty percent of the robberies and 36 percent of the assaults on teenagers occur in schools, with statistics even higher for youths 12 to 15 years of age.
- Each month, more than 2.4 million secondary school students are victims of theft, many involving the use of force, weapons or threats.
- Each month, approximately 130,000 of the 1.1 million secondary teachers have something of value stolen.
- Each month, approximately 5,200 teachers report being physically attacked, and they are five times more likely than students to be seriously injured in those attacks.[6]

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4. National School Boards Association, *Toward Better and Safer Schools: A School Leader's Guide to Delinquency Prevention* (1984).
5. NIE, U.S. Dept. of Health, Education and Welfare, *Violent Schools — Safe Schools: The Safe School Study Report to the Congress* (1978).

These national statistics have been reflected in local studies as well. A study of Boston's public schools showed that:

- Three out of 10 students admitted carrying weapons to school.
- Half of the teachers and almost 40 percent of the students were victims of school robbery, assault or larceny.
- Nearly four in 10 students often feared for their safety in school or reported avoiding corridors and rest rooms.[7]

Perpetrators' Rights

The problem of school crime and violence is acute and probably understated.[8] As the causes and solutions to the problem are debated,[9] the rights of students who engage in crime and violence are pitted against the rights of their victims.

In the broader area of criminals' rights versus victims' rights, spokespersons for the rights of accused and convicted criminals argue that: (1) victims do not have any constitutional rights;[10] (2) it is better to have a few people murdered than to tamper with the civil liberties of criminals;[11] and (3) victims of crime should not be allowed to describe the impact of the crime on their lives when the perpetrator is

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6. These statistics are also summarized in National School Boards Association, *Toward Better and Safer Schools: A School Leader's Guide to Delinquency Prevention* 11-12 (1984), and the Memorandum of the Cabinet Council on Human Resources Working Group on School Violence/Discipline entitled *Disorder in our Public Schools*.

7. Boston Safe Schools Commission, *Making Our Schools Safer for Learning* (1983).

   Other local studies have been conducted. *See, e.g.*, E. Tromanhauser, T. Corcoran and A. Lollino, *The Chicago Safe School Study* (Center for Urban Education, Chicago Board of Education, 1981); Hawaii Crime Commission, *Violence and Vandalism in the Public Schools of Hawaii* (1980); J. Parker, L. Winfree, W. Archambeault and S. Flemming, *The Nature and Extent of Delinquency Activity in Louisiana Public Schools* (Louisiana State University, 1982); J. Weis and J. Hawkins, *Prevention of Delinquency* (U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention, 1981).

   Attention to school and campus crime will increasingly be highlighted by federal and state reporting and disclosure requirements. The Crime Awareness and Campus Security Act (Pub. L. No. 101-542, 104 Stat. 2384 (1990), codified in part, at 20 U.S.C. §§ 1092, 1094(a)), for example, requires that institutions of higher education receiving federal financial assistance disclose campus security policies and campus crime statistics to the campus community. State laws have likewise been adopted mandating school crime reporting. *See, e.g.*, Cal. Penal Code § 628.

8. The NIE Study probably understated the actual incidence of school violence at the time the study was conducted because approximately two-thirds of personal thefts and robberies and almost three-fourths of property damages go unreported to the police. *See* J. Toby, *Violence in School*, in Crime and Justice: An Annual Review of Research (Institute for Criminological Research, Rutgers University, 1984).

9. A discussion of the causes and solutions to school crime and violence is beyond the scope of this book. Selected sources regarding these topics are noted in Chapter 9 *infra*.

sentenced, because the impact of crime is not relevant to the criminal justice system.[12] By analogy, the rationale that civil libertarians espouse on behalf of criminals in general is carried over into the area of school discipline in the form of "student rights."

In the landmark case of *Tinker v. Des Moines Independent Community School District*,[13] the United States Supreme Court recognized

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10. *See, e.g.*, B. Palmer, *The Rights of Victims: A Differing View*, Washington Star News, July 8, 1975, at 1, col. 1. In an interview with Alan Goldstein of the Maryland Civil Liberties Union, the following comments were made:

    B. Palmer: You have been outspoken in your opposition to the movement to strengthen the rights of victims. You have stated that "victims don't have rights." Could you explain this?

    A. Goldstein: Well, I don't mean that victims don't have rights in a general sense. But what they really are in the criminal justice process, are witnesses for the prosecution, and in that sense they do not have constitutional rights which are guaranteed to the defendant.

11. This was the position of Professor Vern Countryman of Harvard University Law School. In a conference sponsored by the Committee for Public Justice at Princeton University in 1971, Professor Countryman and Frank G. Carrington, one of of the authors of this book, engaged in the following colloquy regarding the right of the FBI to use infiltration techniques to prevent or solve bombings, specifically a bombing by the Ku Klux Klan of several school buses in Pontiac, Michigan:

    V. Countryman: Well, my judgment would be that if the only way to detect that bombing is to have the FBI infiltrate political organizations, I would rather the bombing go undetected.

    F. Carrington: No matter whether somebody was killed?

    V. Countryman: Yes. Yes, there are worse things than having people killed. When you have got the entire population intimidated, that may be worse. We put some limits on law enforcement in the interests of preserving a free and open society or at least we try to, and every time we do that — things like the privilege against self-incrimination, things like the Fourth Amendment — every time we do that, that involves a judgment that even though some crimes and some crimes involving the loss of life will go undetected, it is better in the long run to have a society where there is some protection from police surveillance.

    F. Carrington: I'm not really that sure that the family of Robert Fassnacht, who was blown up at Wisconsin, or the families of the kids that were killed in the Birmingham church bombing would agree with that.

    V. Countryman: I'm sure that the families of the victims would not agree in any of the instances that I've mentioned but I don't believe that most of us would say that for that reason we should repeal the Fourth and Fifth Amendments.

12. *See* D. Keisel, *Crime and Punishment, Victim Rights Movement Presses Courts, Legislatures*, 70 A.B.A. J. 25, 26 (January, 1984):

    Although the ACLU has taken no official position on victim impact statements, [Ira] Glasser [Executive Director of the ACLU] is concerned about their use. He fears they will generate inconsistent sentencing, and he is "... not sure the feelings of the victims are relevant" to the sentencing process.

    Although not necessarily reflecting the policy of the American Civil Liberties Union, the authors of its handbook regarding victims' rights recognize that crime victims deserve certain rights and that "these rights do not conflict with the concerns of the accused persons, prisoners, and free speech." J. Stark and H. Goldstein, *ACLU Handbook, The Rights of Crime Victims* 8 (1985). Victim impact statements are now commonly required in both federal and state courts. *Id.* at 79, 81-82.

that students do not shed their constitutional rights at the schoolhouse gate. Accordingly, students have been held to enjoy various substantive rights such as those afforded by the First Amendment to the United States Constitution, including the right to engage in symbolic speech and political expression by wearing armbands to protest the Vietnam War.[14]

In the area of student crime and violence, the most significant rights afforded perpetrators are the prohibition against unreasonable searches and seizures and the entitlement to procedural due process.

The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. By virtue of the Fourteenth Amendment, this restriction applies with equal force to the states.[15] In the case of *New Jersey v. T.L.O.*,[16] the United States Supreme Court held that students in public schools also are protected against unreasonable searches and seizures. Schools must thus conform to the restrictions of the Fourth Amendment in their efforts to preserve order. The Supreme Court nevertheless recognized a certain degree of flexibility is required in school disciplinary procedures.

Rejecting the more stringent criminal law test of probable cause as a prerequisite to school searches and the necessity of a warrant, the Supreme Court held that a search will be reasonable if: (1) there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school, that is, the search was justified in its inception; and (2) the search as actually conducted was reasonably related in scope to the circumstances which originally justified the search.[17]

In the case of *Dixon v. Alabama State Board of Education*,[18] the Fifth Circuit Court of Appeals held that students have a sufficient interest in remaining as students in good standing at a public institution of higher learning to require notice and the opportunity for a hearing before they could be expelled for misconduct. Similarly, in *Goss v.*

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13. 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969).
14. *See generally* J. Rapp, *Education Law* § 9.02 (Matthew Bender & Company, Incorporated).
15. *See* Elkins v. United States, 364 U.S. 206, 80 S. Ct. 1437, 4 L. Ed. 2d 1669 (1960).
16. 469 U.S. 325, 105 S. Ct. 733, 83 L. Ed. 2d 720, 21 Educ. L. R. 1122 (1985).
17. *Id.* 105 S. Ct. at 744-45. *See generally* J. Rapp, *Education Law* § 9.04 (Matthew Bender & Company, Incorporated).
18. 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930, 82 S. Ct. 368, 7 L. Ed. 2d 193 (1961).

Lopez,[19] the United States Supreme Court extended minimal due process protections to all students being suspended from a public elementary or secondary school even for as little as 10 days.[20]

Under due process requirements, a student facing a suspension of 10 days or less must be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the school authorities have and an opportunity to present his side of the story.[21] Rudimentary due process does not require that a student be afforded the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge or to call his own witnesses to verify his version of the incident. Instead, it requires only that the school authority do what a fair-minded person would impose upon himself in order to avoid unfair treatment.[22]

Where longer suspensions, expulsions or other substantial disciplinary actions are involved, more formal due process procedures are required. While the requirements of due process may vary under particular circumstances, they usually require the student be given: (1) written notice of the charges against him; (2) the names of the witnesses against him and an oral or written report of the facts to which each witness will testify and, perhaps, the opportunity to cross-examine them; (3) the opportunity to present evidence; (4) a reasonable opportunity to prepare for the hearing; and (5) the right to be represented by counsel.[23]

Although crime and violence in some schools have reached epidemic proportions and the public overwhelmingly wants a constructive solution, there is little question that students engaging in crime and violence should receive the rights constitutionally guaranteed to them. However, school officials have often yielded to nearly every legal hurdle which student advocates have placed before them. The threat of litigation has often stymied school officials' maintenance of a safe school environment.[24] School officials have assumed that by placing emphasis on student rights, desirable student behavior would necessarily follow. Many have learned the hard way that law and or-

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19. 419 U.S. 565, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975).
20. J. Rapp, *Education Law* § 9.05[1][a] (Matthew Bender & Company, Incorporated).
21. *Id.* at § 9.05[2][b].
22. *Id.*
23. *Id.* at § 9.05[3][b].

der are not necessarily partners.

The often-overlooked plight of the victims of school-related crime and violence has become the common and cooperative concern of many school boards, educators, judges, lawyers and law enforcers.[25] It is being recognized that students, school officials and third parties are no less victims because they happen to be victimized on a school campus. Our purpose is to further encourage this cooperation by discussing the developing right to safe schools and the consequences which result from the failure to assure a safe school environment.

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24. *See* National School Boards Association, *Toward Better and Safer Schools: A School Leader's Guide to Delinquency Prevention* 15-16 (1984).
25. Instrumental in this cooperation has been the National School Safety Center. The Center promotes a continued exchange of information related to school safety and delinquency prevention.

Chapter II

Victims Respond: The Right To Safe Schools

No matter how excellent the teachers or the material, learning is hampered when teachers are forced to teach, and students are forced to learn, in an atmosphere of fear of crime and violence. The effectiveness of the learning process varies in direct proportion to the quality of the learning environment.[1]

Many of the reports on educational reform — while agreeing about the need for curricula changes to develop "higher order thinking skills" and increased expectations and standards for graduation — insist that little reform can occur unless schools become safer.[2] Creating a safe and orderly environment is a prerequisite to any meaningful school improvement.[3]

Not only does a school's environment affect learning, but more than any other setting it influences how students — especially high school students — conform to society. Schools' internal life influences how all students behave, often more powerfully than the home or community. It is unlikely that a student immersed in a school environment of delinquency will form a more responsible view of soci-

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1. In National School Boards Association, *Toward Better and Safer Schools: A School Leader's Guide to Delinquency Prevention* at 3 (1984), the following concrete example is provided:
   > Four years ago, George Washington High School in the Watts neighborhood of Los Angeles was rife with gangs and drugs and had one of the lowest academic standings in the country. Then came a new principal who demanded discipline. The absentee rate dropped from 32 percent to six percent, and last year 80 percent of the graduating seniors went to college.
2. M. Rutter, B. Maughan, P. Mortimore, J. Ouston and A. Smith, *Fifteen Thousand Hours: Secondary Schools and Their Affects on Children* (Harvard University Press, 1979). *See also* National School Boards Association, *Toward Better and Safer Schools: A School Leader's Guide to Delinquency Prevention* (1984).
3. *Id.*

ety at large.[4]

Despite the acknowledged need for a safe and orderly school environment, public entities charged with providing for the safety of schoolchildren traditionally have failed to assign a sufficiently high priority to the problem.[5] Further, no one entity has been charged with coordinating the patchwork of responsibility for the problem.[6]

Reshaping the Law

In response to school crime and violence, victims have turned to the American legal system. Justice Lewis Powell best articulated the proper perspective with which the law should address cases involving school crime and violence:

> Without first establishing discipline and maintaining order, teachers cannot begin to educate their students. And apart from education, the school has an obligation to protect pupils from mistreatment by other children, and also to protect teachers themselves from violence by the few students whose conduct in recent years has prompted national concern.[7]

Our legal system is now turning its attention to the plight of school crime and violence victims. And, as recognized by Chief Justice Warren E. Burger:

> The true genius of the American legal system — indeed of our entire system of government — is its evolutionary capacity to meet new problems. Legal institutions change as they respond to new challenges. The serious challenge of restoring a safe school

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4. *Id.* The Supreme Court has acknowledged the legitimate interest schools have in maintaining an environment consistent with its basic educational mission. In Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 106 S. Ct. 3159, 92 L. Ed. 2d 949, 33 Educ. L.R. 1243 (1986), for example, the Supreme Court held that elementary and secondary school students may be disciplined for use of vulgar and offensive terms in public discourse notwithstanding the first amendment. According to the Supreme Court: "The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior." *Id.* 106 S.Ct. at 3164. *See also* Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 266, 108 S. Ct. 562, 98 L. Ed. 2d 592, 43 Educ L. R. 515 (1988).
5. G. Deukmejian, *A Lawsuit to Restore Safety in the Schools* 2 (Crime Prevention Center of the Office of the California Attorney General, 1980).
6. *Id.* at 3.
7. New Jersey v. T.L.O., 469 U.S. 325, 105 S. Ct. 733, 748, 83 L. Ed. 2d 720, 21 Educ. L. R. 1122 (1985) (Powell, J., concurring). This view was joined by Justice Sandra Day O'Connor.

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environment has begun to reshape the law.[8]
Education law is being reshaped to assure a right to safe schools.[9]

California Constitutional Right to Safe Schools

In a dramatic effort to focus attention on the problem of crime and violence in schools and to seek substantive safeguards for schoolchildren, George Deukmejian, then California Attorney General, filed in 1980 a lawsuit to restore safety[10] in the Los Angeles Unified School District.[11] The lawsuit was an attempt to establish a bedrock legal principle that public school students have special status and, because of that special status, are entitled to special protections and rights under the laws of California including, specifically, the right to attend safe schools.[12] According to the lawsuit, children were being compelled to attend schools under conditions that adults would never tolerate in the workplace.[13] The lawsuit was brought on behalf of the schoolchildren who could not speak for themselves, with the hope that schools could be made "islands of safety" in which students could pursue learning without fear.[14]

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8. W. Burger, *School Safety Goes to Court*, School Safety, National School Safety Center Newsjournal 4-5 (Winter, 1986).
9. A checklist is provided in Chapter 4, *infra*, to assist in evaluating the rights and remedies of victims.
10. For the six-year period from the 1973-1974 school year, the Los Angeles Unified School District had 51,785 *reported* crimes including 5,290 assaults; 859 arsons; 12,242 thefts; 6,245 vandalisms; and 27,149 burglaries. Not counting medical expenses to schools or to assault victims, the total fiscal losses to crime during the six-year period were more than $23.9 million. This figure does not include related costs of: (1) roughly $9 million in annual security force costs for the district; (2) fire and burglary alarm and response costs; (3) chain link fence costs; and (4) insurance costs. (Emphasis added.) G. Deukmejian, *A Lawsuit to Restore Safety in the Schools* 1-2 (Crime Prevention Center of the Office of the California Attorney General, 1980).

    Concern for school safety was also being expressed by others. In a letter dated December 23, 1981, John F. Brown, executive secretary of the California Commission for Teacher Preparation and Licensing stated that the attorney general's findings and recommendations were similar to those contained in the *Report on Handling Confrontation in the Schools* completed in September, 1980, by an ad hoc committee of the Commission. Mr. Brown further stated that there was "compelling rationale for timely, effective solutions to the problem of school confrontation and violence." Letter of John F. Brown to Glen C. Scrimger, California School Safety Center, dated December 23, 1981 (on file with the National School Safety Center).
11. People *ex rel.* George Deukmejian v. Los Angeles Unified School District, *et al.* No. C 323360 (Sup. Ct. County of L. A., filed May 21, 1980).
12. G. Deukmejian, California Attorney General, *A Lawsuit to Restore Safety in the Schools* 3 (Crime Prevention Center of the Office of the California Attorney General, 1980).
13. *Id.* at 4.
14. *Id.* at 3-4.

Five arguments were raised in the case against the Los Angeles Unified School District, all of which took the view that crime and violence at schools deny constitutional rights: (1) when students are required to attend school by compulsory education laws (much like prisoners are involuntarily confined), an excessive level of crime and violence violates students' rights against cruel or unusual punishment; (2) when crime and violence disrupt the learning environment, students are denied a constitutionally protected, state-afforded right to a free public education; (3) crime and violence at school deny students a fundamental right to personal security; (4) students are denied equal protection when substantial disparities exist in the level of violence between one district and other school districts; and (5) students are denied substantive due process rights when they do not receive proper educational opportunities at the school to which they are assigned because of crime and violence.[15] Notwithstanding these claims, the courts refused to hold that a school had an affirmative duty to make schools safe.[16]

In an effort to give constitutional parity between the rights of victims and perpetrators of crime and violence, the voters of California responded in 1982 by approving what is commonly known as "The Victims' Bill of Rights."[17] Designated on the ballot as Proposition 8, the amendment to the California Constitution was a comprehensive package of criminal justice reforms. These reforms were designed to

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15. *See* K. Sawyer, *The Right to Safe Schools: A Newly Recognized Inalienable Right*, 14 Pac. L. J. 1309, 1313 (1983). This article is reprinted in part in the *School Safety Legal Anthology* at 114 (National School Safety Center and Pepperdine University Press, 1985).

    A collateral issue which buttresses these arguments is that under some circumstances, threats to a student's health, safety or welfare owing to conditions at school may excuse attendance under compulsory education laws. Examples of cases excusing attendance on the basis of victimization or safety include: People v. M., 197 Colo. 403, 593 P.2d 1356 (1979); *In re* Foster, 69 Misc. 2d 400, 300 N.Y.F.2d 748, *sub. appeal* 15 Pa. Commw. 203, 325 A.2d 330 (1962); School Dist. v. Ross, 17 Pac. Commw. 105, 330 A.2d 290 (1975). *See generally* Annot., 9 A.L.R. 4th 122 (1981) (regarding conditions at school excusing or justifying non-attendance).

16. *Id.* at 1313-14. The Superior Court of Los Angeles County dismissed the case and this was upheld by the appellate court. The California Supreme Court refused to hear the case. By that time "The Victims' Bill of Rights" had been approved and the case was effectively rendered moot. The merits of the arguments have thus not been finally resolved.

17. *See* Proposition 8, June, 1982, Primary Ballot.
    Proposition 8 was largely the work of political activist Paul Gann, senior assistant attorney general George Nicholson, state senators John Doolittle and Jim Nielsen, and state assemblymen Alister McAlister and Pat Nolan. In addition, more than 300 police chiefs, sheriffs and district attorneys, joined by some 60 other legislators and countless victims' organizations, including Parents of

enforce and enhance the rights of law-abiding citizens and victims of crime and restore an appropriate balance between those rights and the rights of accused and convicted criminals.

In its preamble, the measure declares that safeguards for victims' rights are necessary "so that the public safety is protected and encouraged...."[18] In addition, the provision states that "[s]uch public safety extends to public....school campuses, where students and staff have the right to be safe and secure in their persons."[19]

Among the specific rights guaranteed by "The Victims' Bill of Rights" is the right to safe schools. The safe schools provision states that:

> All students and staff of public primary, elementary, junior high and senior high schools have the inalienable right to attend campuses which are safe, secure and peaceful.[20]

The Supreme Court of California has upheld the validity of the measure[21] and has succinctly stated that school premises must be "safe and welcoming."[22] The scope of the right to safe schools has been limited by the court to safety from criminal behavior,[23] although it had been suggested that the right may be more encompassing.[24]

California state officials[25] and state courts[26] now are going about translating the constitutional mandate into the reality of a secure school environment.[27] The full impact of the California right to safe

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Murdered Children, contributed significantly.

18. Cal. Const. art. I, sec. 28(a).
19. *Id.*
20. Cal. Const. art. I, sec. 28(c).
    Senior assistant attorney general George Nicholson authored the right to safe schools provision. Mr. Nicholson formerly served as director and chief counsel of the National School Safety Center and now serves on the California Court of Appeal for the Third Appellate District.
21. Brosnahan v. Brown, 32 Cal. 3d 236, 651 P.2d 274, 186 Cal. Rptr. 30 (1982) 22 People v. William G., 40 Cal. 3d 455 (1985).
22. People v. William G., 40 Cal. 3d, 550, 709 P.2d 1287, 221 Cal. Rptr. 118, 29 Educ. L. R. 394.
23. Brosnahan v. Brown, 32 Cal. 3d 236, 651 P.2d 274, 186 Cal. Rptr. 30 (1982).
24. Brosnahan v. Brown, 32 Cal. 3d 236, 651 P.2d 274, 186 Cal. Rptr. 30 (1982) (Bird, J., dissenting) (noting that the right could "encompass such diverse hazards as acts of nature, acts of war, environmental risks, building code violations, disruptive noises, disease and pestilence, and even psychological or emotional threats, as well as crime.").
25. California has adopted a series of bills designed to address many issues associated with school safety, discipline and campus environment. *See* G. Deukmejian, *School Safety: An Inalienable Right*, School Safety, National School Safety Center Newsjournal 4 (Fall, 1985).
    A dramatic example of legislative efforts are those of Stanford University law professor

schools remains to be developed by the courts, much like other constitutional guarantees.[28] Although the declared intention of those who drafted the provision was that the right is both mandatory and self-executing,[29] California courts generally have resisted this approach.[30] Implementation includes the possibility of increased expenditures for school security guards, safety devices, payments of tort damages and legal fees at the expense of books, equipment and more traditional operational and maintenance costs.[31] If not self-executing in the sense that the right to safe schools includes a constitutionally grounded

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Byron Sher, a prominent California legislator. Although Professor Sher did not author, support or endorse Proposition 8, he declared in a statement to the California Senate Judiciary Committee on May 22, 1984, that with its passage all students and staff in K-12 schools acquired a constitutional right to attend safe, secure and peaceful schools.

Professor Sher led successful efforts to enact legislation to assist its enforcement. A permanent statewide school crime statistical tracking system was adopted. Cal. Penal Code § 628 *et seq.* Further, the California attorney general is required to prepare and regularly update a complete summary of penal and civil law pertaining to crimes committed against persons or property on school grounds. The State Superintendent of Public Instruction must duplicate and distribute that publication to all schools. Parents are to be notified that it is available. Cal. Penal Code § 626.1.

26. Selected cases are cited in notes that follow. Because the constitutional right to safe schools is relatively new, the most current court decisions should be consulted. Information regarding decisions may be obtained from the National School Safety Center.

27. W. Burger, *School Safety Goes to Court*, School Safety, National School Safety Center Newsjournal 4 (Winter, 1986).

28. According to Justice Stanley Mosk of the Supreme Court of California:

> Obviously the foregoing provision is general in character, no specifics are indicated. However that is true of all our basic rights. Section 1 of Article I [of the California Constitution] is no more precise; it guarantees our right to be free and independent, to enjoy life and liberty, and to pursue and obtain safety, happiness and privacy. S. Mosk, *Education and the Law* at 7, presented October 23, 1985, at the National School Safety Leadership Symposium, Jacksonville, Florida.

29. K. Sawyer, *The Right To Safe Schools: A Newly Recognized Inalienable Right*, 14 Pac. L. J. 1309 (1983). *See also* F. Carrington and G. Nicholson, *The Victims' Movement: An Idea Whose Time Has Come*, 11 Pepperdine L. Rev. 1, 11-12 (Symposium Edition, 1984); G. Nicholson, *School Safety and the Legal Community*, School Safety Legal Anthology 142, 145 (National School Safety Center and Pepperdine University Press, 1985); G. Nicholson, F. Hanelt and K. Washburn, *Liability for Injuries to Staff on School Grounds: A Means of Avoiding the Exclusive Remedy Rule*, Forum, Vol. 16, No. 1, 22 (California Trial Lawyers Association, January/February 1986); G. Nicholson, F. Hanelt and K. Washburn, *Of Inalienable Rights and Exclusive Remedies*, 30 Educ. L.R. 11 (1986); *California Ballot Pamphlet*, Primary Election, June 1982, at 32, 55.

30. Among those cases considering the California right to safe schools are: Leger v. Stockton Unified School Dist., 202 Cal. App. 3d 1448, 249 Cal. Rptr. 688, 47 Educ. L.R. 1093 (1988) (provision not self-executing as "section 28(c) declares a general right without specifying any rules for its enforcement" and "imposes no express duty on anyone to make schools safe"); Clausing v. San Francisco Unified School Dist., 221 Cal. App. 3d 1224, 271 Cal. Rptr. 72, 61 Educ. L.R. 173 (1990) (the constitutional provision "imposes no express duty on anyone to make school safe" and "although inalienable and mandatory, simply establishes the parameters of the principle enunciated; the specific means by which it is to be achieved for the people of California are left to the

right to sue for damages or other relief, courts nevertheless are inclined to consider this right to safe schools in establishing a duty under general tort law.[32]

Federal Constitutional Considerations

Claims urging a federal constitutional right to safe schools have been limited significantly by decisions of the Supreme Court. The Supreme Court holds that the due process clause is not implicated by a single act of negligence[33] and does not require that the state undertake affirmative measures to protect the life, liberty and property of its citizens, absent special circumstances.[34] In essence, there is no general federal constitutional right to be protected against harm by criminals or madmen[35] or any "guarantee of certain minimum levels of safety and security."[36] This view has been applied to the educa-

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Legislature"): Rodriguez v. Inglewood Unified School Dist., 186 Cal. App. 3d 707, 230 Cal. Rptr. 823, 35 Educ. L.R. 240 (1986) (Rodriguez II) (although issue of whether provision is self-executing raised, issue not decided because incident occurred prior to its effective date); Hosemann v. Oakland Unified School Dist., No. A035856 (Cal. Ct. App., First Dist. 1989) (provision not self-executing)

31. Brosnahan v. Brown, 32 Cal. 3d 236, 651 P.2d 274, 288, 186 Cal. Rptr. 30 (1982) (refusing to invalidate right because of potential expenditures and noting that comparably broad constitutional rights have not produced financial ruin).
When Proposition 8 was presented to the voters of California, they were well aware that the measure could result in significant additional costs. The California attorney general, in the official title and summary of Proposition 8 contained in a pamphlet provided to all California voters prior to the vote, stated:
> Approval of the measure [Proposition 8] would result in *major state and local costs*. The measure could: ...; *increase claims* against the state and local governments relating to enforcement of the right to safe schools; *increase* school security *costs* to provide safe schools; .... (Emphasis added.) *California Ballot Pamphlet*, Primary Election, June 1982, at 32.

This was further reinforced by the legislative analyst in the pamphlet which stated:
> We conclude, however, that approval of the measure [Proposition 8] would result in *major state and local costs*. This is because the measure, taken as a whole, could: ... - *increase claims* against the state and local governments relating to enforcement of the right to safe schools; *increase* security *costs* to provide safe schools, ... (Emphasis added.) *California Ballot Pamphlet*, Primary Election, June 1982, at 55.

32. In Rodriguez v. Inglewood Unified School Dist., 186 Cal. App. 3d 707, 230 Cal. Rptr. 823, 35 Educ. L.R. 240 (1986) (Rodriguez II), the court cited the constitutional right to safe schools along with other authority as supporting a "conclusion that a special relationship is formed between a school district and its students so as to impose an affirmative duty on the district to take all reasonable steps to protect its students."

33. Daniels v. Williams, 474 U.S. 327, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986).

34. DeShaney v. Winnebago County Dept. of Soc. Servs., 489 U.S. 189, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989) (holding that the failure of a government agency to provide a child with adequate protection against his father's violence does not violate the child's civil rights because no "special re-

tional setting.[37]

A federal constitutional right to safe schools continues to develop and, under some limited circumstances, may meet with success. In order for a civil rights claim to be asserted against a public educational institution or official, it must be established that school crime or violence effectively resulted from governmental policy or custom. A victim must show: (1) the "existence of a continuing, widespread, persistent pattern of unconstitutional misconduct by the governmental entity's employees; (2) deliberate indifference to or tacit authorization of such conduct by governmental entity's policymaking officials after notice to the officials of that misconduct; and (3) that plaintiff was injured by acts pursuant to the governmental entity's custom, i.e., that the custom was a moving force behind the constitutional violation."[38] Stated otherwise, policymaking authorities must evince such deliberate indifference or callous disregard for known circumstances that a pattern of unconstitutional behavior is considered condoned.[39]

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lationships" giving rise to an affirmative duty arose merely because the state was aware of the child's need for protection).

35. *See* Bowers v. DeVito, 686 F.2d 616 (7th Cir. 1982).
36. DeShaney v. Winnebago County Dept. of Soc. Servs., 489 U.S. 189, 195, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989).
37. *Examples of cases rejecting civil rights claims*: Williams v. City of Boston, 784 F.2d 430, 30 Educ. L.R. 1053 (1st Cir. 1986) (student shot during high school football game); Spann *ex rel.* Spann v. Tyler Indep. School Dist., 876 F.2d 437, 54 Educ. L.R. 1212 (5th Cir. 1989) (principal allegedly failed to investigate reports of sexual abuse by bus driver of student; school did not officially sanction such conduct and may not be held liable under respondeat superior theory); J.O. v. Alton Community Unit School Dist. 11, 909 F.2d 267, 62 Educ. L.R. 65 (7th Cir. 1990) (school has no affirmative due process duty to prevent sexual abuse of student by teacher); Thelma D. v. Board of Educ., 934 F.2d 929, 67 Educ. L.R. 1101 (8th Cir. 1991) (although district court found in an earlier decision that a cause of action was stated by various sexually abused female public school students against a board of education where they alleged that the school district had knowledge of the employee's prior sexual misconduct and failed to properly receive, investigate, act upon and otherwise rectify complaints, court subsequently held that and it was affirmed plaintiffs failed to sufficiently establish deliberate indifference on part of board); D.T. v. Independent School Dist. No. 16, 894 F.2d 1176, 58 Educ. L.R. 483 (10th Cir. 1990) (school district's policy of investigating, hiring and supervising teachers was not so deficient that it constituted deliberate indifference or reckless disregard for the constitutional rights of plaintiffs who had been sexually abused by teacher). *See generally* J. Rapp, *Education Law* § 12.06[7] (Matthew Bender & Company, Incorporated).
38. Thelma D. v. Board of Educ., 934 F.2d 929, 932-33, 67 Educ. L.R. 1101 (8th Cir. 1991).
39. *Examples of cases at least finding civil rights claims stated*: Zemsky v. City of New York, 821 F.2d 148, 40 Educ. L.R. 106 (2d Cir. 1987), *cert. denied*, 484 U.S. 965, 108 S.Ct. 456, 98 L. Ed. 2d396 (1987) (high school teacher stated pro se claim where allegedly assaulted some six times); Stoneking v. Bradford Area School Dist., 882 F.2d 720, 55 Educ. L.R. 429 (3d Cir. 1989), *cert.*

A civil rights claim may also be stated where an individual is held in custody. This creates a special relationship between the state and the individual.[40] However, this normally is applied only where the individual is in police custody. Schoolchildren have not been considered in custody for this purpose although they are required to be in school under compulsory education laws.[41]

Tort Law Right to Safe Schools

The existence of a constitutional right to safe schools remains unclear or uncertain in most cases. There has developed, however, a trend in the law to hold third-party defendants, including schools, liable for injuries sustained by victims of crime and violence. Victims have thus responded to crime and violence in schools by demanding schools either assure a safe and orderly school environment or compensate them for their injuries.

In victims' rights litigation, courts have held that although a school may not be expected to be a guarantor or insurer of the safety of its students, it is expected to provide, in addition to an intellectual climate, a physical environment harmonious with the purposes of an educational institution.[42] This expectation is considered particularly appropriate in the closed environment of a school campus[43] or where,

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denied sub nom. Smith v. Stoneking, 493 U.S. 1044, 110 S. Ct. 840, 107 L. Ed. 2d 835 (1990) (female high school students who were sexually assaulted by school's band director stated a Section 1983 claim against school officials who took no action, despite complaints, to investigate and rectify the situation and administrative policies existed that allowed child abuse to flourish); Doe "A" v. Special School Dist. of St. Louis County, 682 F. Supp. 451, 46 Educ. L.R. 238 (E.D. Mo. 1988), *aff'd*, 901 F.2d 642, 60 Educ. L.R. 20 (8th Cir. 1990) (although cause of action stated, not proven); Pagano v. Massapequa Pub. Schools, 714 F. Supp. 641, 54 Educ. L.R. 830 (E.D.N.Y. 1989) (section 1983 claims alleged where student was beaten by other students 17 times despite promises of protection from school authorities); Doe v. Douglas County School Dist. RE-1, 770 F. Supp. 591, 69 Educ. L.R. 806 (D. Colo. 1991) (where school psychologist allegedly sexually molested student, cause of action stated based on policy of deliberate indifference).

40. *See* DeShaney v. Winnebago County Dept. of Soc. Servs., 489 U.S. 189, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989).

41. *See e.g.*, J.O. v. Alton Community Unit School Dist. 11, 909 F.2d 267, 62 Educ. L. R. 65 (7th Cir. 1990); Doe v. Douglas County School Dist. RE-1, 770 F. Supp. 591, 69 Educ. L.R. 806 (D. Colo. 1991); People *ex rel.* George Deukmejian v. Los Angeles Unified School Dist., No. C 323360 (Sup. Ct. County of L.A., filed May 21, 1980).

42. Eiseman v. State of New York, 109 A.D.2d 46, 489 N.Y.S.2d 967, 25 Educ. L. R. 876 (1985). *See generally* Chapter 8 *infra*.

43. Peterson v. San Francisco Community College Dist., 36 Cal. 3d 799, 685 P.2d 1193, 205 Cal. Rptr. 842, 19 Educ. L. R. 689 (1984).

as in school, there is custody of [44] and an absolute right to control students' behavior.[45]

Where not provided by express constitutional right, as in California, the developing right to safe schools includes the right of students and staff:

- To be protected against foreseeable criminal activity.[46]
- To be protected against student crime or violence which can be prevented by adequate supervision.[47]
- To be protected against identifiable dangerous students.[48]
- To be protected from dangerous individuals negligently admitted to school.[49]
- To be protected from dangerous individuals negligently placed in school.[50]
- To be protected from school administrators, teachers and staff negligently selected, retained or trained.[51]

The California constitutional right to safe schools provides an even more certain assurance of safety than is provided by tort law.[52]

Statutory Remedies

Victims' litigation is finding support in statutory remedies. The nature and extent of these remedies are developing.

Where female students are vicitimized, it has long been suggested that a charge could be made under Title IX of the Education Amendments of 1972.[53] The United States Supreme Court in *Franklin v. Gwinnett County Public Schools*[54] bolstered this theory by holding

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44. McLeod v. Grant County School Dist., 42 Wash. 2d 316, 255 P.2d 360 (Wash. 1953).
45. Collins v. School Bd. of Broward County, 471 So. 2d 560, 26 Educ. L. R. 533 (Fla. Dist. Ct. App. 1985), *mand. dismissed*, 491 So. 2d 280 (Fla. 1986).
46. *See* Chapter 7 *infra*.
47. *See* Chapter 8 *infra*.
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*
52. Not only does a constitutional right to safe schools clarify the existence of the right, but it will no doubt invalidate many of the defenses which could be raised in cases brought by victims: a lack of a duty under tort law, immunities or the availability of workers' compensation. Additionally, it can be the foundation of civil rights actions because the right is a constitutionally guaranteed inalienable right. *See* Chapters 4 and 6 *infra*.
53. 20 U.S.C. §§ 1681, 1682. *See* N. Hauserman and P. Lansing, *Rape on Campus: Postsecondary Institutions as Third Party Defendants*, 8J. Coll. & .U.L., 182, 201 (1981).
54. 80 U.S.L.W. 4167 (1992).

award of any appropriate relief, including monetary damages.

In the *Franklin* case, a student was allegedly subjected to continual sexual harassment for several years. A sports coach and teacher employed at the student's school engaged the student in sexually oriented conversations, in which he asked about her sexual experiences with her boyfriend and whether she would consider having sexual intercourse with an older man. It was alleged that he forcibly kissed her on the mouth in the school parking lot, telephoned her at home to ask if she would meet him socially, and that, on three occasions, he actually interrupted a class, requested that the teacher excuse the student and took her to a private office where he subjected her to coercive intercourse.

The student's complaint further alleged that. although they were aware of and investigated the teacher's sexual harassment of this student and other female students, teachers and administrators took no action to halt it and discouraged her from pressing charges against the teacher. The teacher ultimately resigned on the condition that all matters pending against him be dropped. The school then closed its investigation.

Title IX is most often enforced through administrative compliance procedures. In an appropriate case, Title IX now provides a monetary remedy to victims of sexual harassment and abuse. This is a significant advance in victims' litigation, particularly because of limited remedies available under Section 1983 to victims of school crime and violence.

The victims' rights movement has come to our nation's schools.

Chapter III

The Victims' Rights Movement

Less than a decade ago, an article inquired: "Victims' Rights — A New Tort?"[1] The article recognized that until very recently, victims' lawsuits were seldom filed, rarely collectible against the perpetrator himself and historically unsuccessful against third parties, who may have contributed to the perpetrator's crime through negligence. Victims were using the civil courts to vindicate their rights, and courts and juries were beginning to lend a sympathetic ear. The victims' rights movement had begun.

A significant element in the victims' rights movement is the trend toward third-party lawsuits. Victims of crime and violence, often dissatisfied and disillusioned with the results of the criminal justice system,[2] bypass their primary action against the perpetrators and assert their rights of action against third parties, whose negligence placed the perpetrator in a position to victimize or failed to prevent the victimization.

The Connie Francis Case

The idea of third-party defendants in victims' rights cases is not new. Third-party defendants in such cases date back to the early 1900s.[3] At that time, United States Supreme Court Justice Benjamin N. Cardozo noted that "justice, though due to the accused, is due the accuser also."[4] Treatment of victims of crime and violence was characterized as a national disgrace.[5] More recent impetus was given to the vic-

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1. F. Carrington, *Victims' Rights — A New Tort?*, 14 Trial 39 (June, 1978). *See also* F. Carrington, *Victims' Rights — A New Tort?: Five Years Later*, 19 Trial 50 (December, 1983).
2. *See generally*, F. Carrington, *The Victims* (1975).
3. *See* Neering v. Illinois Central R. R., 383 Ill. 366, 50 N.E.2d 497 (1943).
4. Snyder v. Massachusetts, 291 U.S. 97, 122, 78 L. Ed. 674 (1934).
5. 71 A.B.A. J. 25 (December, 1985).
6. Garzilli, *et al.* v. Howard Johnson's Motor Lodge, Inc., 1975 C 979 (E.D.N.Y. 1975). *See also*

tims' rights movement by a case involving singer Connie Francis.[6]

Connie Francis Garzilli was an internationally known recording artist, who in 1974 had sold about 80 million records. She commanded fees of $35,000 for an eight-performance engagement.

In 1973, Connie Francis married Joseph Garzilli, an international travel agent. Subsequent to this marriage and the loss of a child, she resumed her professional career. Her first engagement was to entertain at the Westbury Music Fair in Westbury, Long Island.

In connection with this engagement, Connie Francis took rooms at the Howard Johnson's Motor Lodge in Westbury. The rooms were on the second floor of the motel and had sliding glass doors leading to a balcony on the outside of her room. In the early morning hours, an unknown man entered her room through the sliding glass doors and criminally assaulted her.[7] The assailant was never caught.

Connie Francis sued Howard Johnson's Motor Lodges, Inc. for negligence in failing to provide security. Her husband joined the suit, alleging loss of her companionship, society and services in connection with his business. After a four-week jury trial, Connie Francis was awarded $2.5 million compensatory damages and her husband was awarded $150,000. She later settled for $1.5 million[8] and her husband's award was reduced to $25,000.[9]

The legal theory on which the suit was based was the special duty of security owed by innkeepers to guests. She claimed that this duty was breached through the negligence of Howard Johnson's and that this negligence was the proximate cause of her injury.

With regard to the issue of duty, Connie Francis alleged that: (1) Howard Johnson's was under a legal obligation to keep and maintain its premises in a reasonably safe condition so as not to expose its guests to an unreasonable risk of injury, including attacks by third parties; (2) while not an insurer of the safety of its guests, Howard

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Garzilli v. Howard Johnson's Motor Lodge, Inc., 419 F. Supp. 1210 (E.D.N.Y. 1976) (denying defendant's motions for a judgment notwithstanding verdict and for a new trial as to Francis, and granting defendant's motion for new trial as to her husband unless he accepted a reduction in hr award).

7. Her husband was away on a business trip.
8. 71 A.B.A. J. 25 (December, 1985).
9. Garzilli v. Howard Johnson's Motor Lodges, Inc., 419 F. Supp. 1210, 1214 (1976).
10. This information is taken principally from requests for jury instructions and related authority presented in the case.

Johnson's was under an obligation to take those measures of protection for its guests which were within its power and capacity to take and which could reasonably be expected to lessen the risk of injury to its guests, including providing safe and adequate locking devices for sliding glass doors; and (3) the duty of care varies with the grade and quality of the accommodations that the innkeeper offers; in the instant case, Howard Johnson's purported to offer first-class accommodations.[10]

Connie Francis alleged that Howard Johnson's was negligent in that it knew of a defective condition on the premises with respect to the sliding glass doors. The court noted that "the doors gave the appearance of being locked, but the testimony showed they were capable of being unsecured from the outside without much difficulty."[11] Expert testimony had established that the lock on the sliding glass door to the room was, in fact, defective. The manager had knowledge of the defects in the doors. He had ordered safety devices for sliding glass doors — so-called "Charley Bars" — several months before the assault, but they had not been installed. Evidence from the records of the county police department further indicated that in the year 1974 there had been several prior unauthorized entrances to guests' rooms through the sliding glass doors.

The notoriety of the Connie Francis case came not only from the prominence of the plaintiff and the size of her award, but also from the legal theory raised.[12] Just as others — racial minorities, women, homosexuals and prisoners, to name a few — had turned to the courts for protection and enforcement of their perceived rights, so victims of crime and violence were motivated in larger numbers to bring lawsuits similar to Connie Francis' to gain their rights as victims. Prior to the Connie Francis case, few recognized that victims of crime and violence constitute a class with enforceable rights.[13] Victims and their advocates have since coalesced efforts toward vindicating these rights.[14]

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11. Garzilli v. Howard Johnson's Motor Lodges, Inc., 419 F. Supp. 1210, 1212 (E.D.N.Y. 1976).
12. *See* 71 A.B.A. J. 25 (December, 1985).
13. F. Carrington, *The Victims* 236 (1975).
14. Even the authors of the American Civil Liberties Union handbook regarding victims' rights note:
    > As the disclaimer at the beginning of this book explains, the discussion of victims' rights contained here is not meant to reflect the policy of the American Civil Liberties Union. The goal of the authors has been to provide an overview of the emerging issues for crime vic-

Victims' Rights Movement Initiatives

Interest in the victims' rights movement has spawned various organizations devoted to the legal[15] and non-legal[16] aspects of victims' rights. These organizations have done a great deal to elevate the rights, and particularly the legal rights, of crime victims to a proper

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tims, accurately and comprehensively. While their descriptions and explanations do not represent an attempt to formulate an ACLU policy in this important new area, wherever possible the authors have tried to be mindful of the traditional ACLU concerns for protecting the rights of both the accused and prisoners, as well as protecting the right of freedom of speech. The authors feel strongly that crime victims deserve the rights described in this book and that in most instances these rights do not conflict with the concerns of accused persons, prisoners and free speech. J. Stark and H. Goldstein, *ACLU Handbook: The Rights of Crime Victims*. 7-8 (1985).

15. Organizations which emphasize the law as it pertains to victims' rights include:

Center for Criminal Justice Policy and Management (CCJPM), University of San Diego Law School, Alcala Park, San Diego, California. CCJPM was founded by Edwin L. Meese III, attorney general in the Reagan administration. Although its programs are wide-ranging, special interest is directed to the area of victims' rights.

National District Attorneys Association, Inc. (NDAA), Alexandria, Virginia. NDAA is an umbrella organization for the nation's district or state's attorneys. Its expertise covers almost every area in criminal justice. In 1972, NDAA established the victim/witness pilot programs, which have been emulated throughout the nation. In addition to coordinating the victim/witness programs, NDAA produces studies on victims' rights from the perspective of the prosecutor and participates in seminars and workshops on the subject.

National Judicial College (NJC), University of Nevada, Reno Campus, Reno, Nevada. NJC is a privately endowed school for advanced education for the judiciary. Its curriculum includes a wide range of academic courses to educate new judges and assist judges to remain current with developments in the law. In recent years, programs have been included on victims' rights.

National School Safety Center (NSSC), Westlake Village, California. NSSC is a partnership of the U.S. Department of Justice, U.S. Department of Education and Pepperdine University. NSSC's mission is to coalesce public, private and academic resources throughout the United States. NSSC provides a central headquarters to assist school boards, educators, law enforcers, lawyers and the public to ensure that schools are safe, secure and peaceful places of learning. Available through NSSC is information regarding the rights of school crime and violence victims and the related responsibilities of schools.

National Victim Center is organized to promote responsiveness of the judicial system to the rights of victims. Among its services is the Coalition of Victims' Attorneys & Consultants (COVAC), which provides a data base of litigation in the victims' area and other assistance to litigators. The National Victim Center was founded in honor of Martha "Sunny" von Bulow.

Victims Committee, Criminal Justice Section, American Bar Association (ABA Victims Committee), American Bar Association, Chicago, Illinois. The ABA Victims Committee was established in 1973 to represent the rights of crime victims before the legal profession. The Committee publishes papers and distributes information regarding victims' rights.

Victims' Rights Advocacy Project (VRAP), University of Virginia, Charlottesville, Virginia. VRAP is a victims' advocacy organization founded in 1982 and operated exclusively by law students. It engages in research for other victim assistance organizations and assists local victim programs in Charlottesville and the state of Virginia on legal matters.

Washington Legal Foundation (WLF), Washington, D.C. WLF is a conservatively-oriented public interest law firm. Although its range of activity is broad-gauged, it has a specific program

status in the criminal and civil justice system.[17]

The efforts of victims' rights organizations have been flanked by legislation at both the federal and state levels.[18] In 1982, for example, the Victim and Witness Protection Act[19] was enacted by Congress. The act recognized that: "Without the cooperation of victims and witnesses, the criminal justice system would cease to function; yet with few exceptions these individuals are either ignored by the criminal justice system or simply used to identify and punish offenders."[20] The substantive provisions of the act provide for: (1) victim impact statements at sentencing; (2) protection of victims and witnesses from intimidation; (3) restitution to victims of crime; (4) federal guidelines for fair treatment of crime victims and witnesses in the criminal justice system; and (5) a general tightening of bail laws. The act was intended to serve as a model for similar state legislation.[21]

Legislation has also afforded compensation for victims of crime and violence. In 1984, Congress enacted the Federal Victims of Crime Act.[22] Under the act, a fund was established from which a crime victim (or his survivors) could receive medical expenses, lost

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whereby it files suits without compensation on behalf of victims.

16. An organization which emphasizes non-legal matters involving victims is:
National Organization for Victim Assistance, Inc. (NOVA), Washington, D.C. NOVA is a paramount national organization in the victims field. It serves as a clearing house of information for victim advocates throughout the nation, maintaining comprehensive files on legislation, policy issues, current developments and almost anything germane to the victims' movement. It also keeps records of state and local victims' service organizations currently in existence. Additionally, NOVA publishes a newsletter and, on occasion, scholarly papers on victims' rights generally. It also holds an annual national conference, together with informative workshops across the nation, on all aspects of victims' rights. As a resource center it has no peer.
17. *See* R. Cronin and B. Borque, *Assessment of Victim/Witness Assistance Projects* (National Institute of Justice, U.S. Dept. of Justice, 1981); P. Woodard and C. Cooper, *Victim and Witness Assistance* (Bureau of Justice Statistics Bulletin, U.S. Dept. of Justice, 1981); S. Salasin, *Evaluating Victim Service* (Sage Publications, Inc., 1981).
18. Most legislation has followed various legislative and executive hearings or studies. For example, in 1982 the President's Task Force on Victims of Crime issued its Final Report, which contained 61 recommendations to enhance the rights of crime and violence victims. Not only have these hearings and studies been the basis for legislation, but they have also helped call attention to the plight of victims.
19. Pub. L. No. 97-291, 96 Stat. 1248 (1982). *See* 18 U.S.C. §§ 1501, 1512, 1513, 1514.
20. Pub. L. No. 97-291, sec. 2, 96 Stat. 1248 (1982).
21. Several states, such as California, Nebraska and Wisconsin, were ahead of the federal government. Nevertheless, the act did motivate most other states to adopt such measures. A comprehensive review of state laws pertaining to crime victims may be found in National Organization for Victim Assistance (NOVA), *Victims' Rights and Services, A Legislative Directory*.
22. Pub. L. 98-473, 98 Stat. 2170 (1984). *See* 42 U.S.C. § 10601.

wages and funeral expenses.[23] A vast majority of states have victim compensation programs.[24] Nevertheless, where compensation is available[25] it is limited and hardly compensates victims for their injuries.

Because of limitations in legislative efforts, victims, like Connie Francis, are turning to third parties to redress their injuries. Victims' rights litigation now represents a new and developing speciality in the personal injury field.[26]

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23. 40 U.S.C. § 10602.
24. *See generally* 20 A.L.R. 4th 63 (1983) (regarding statutes providing for governmental compensation for victims of crime); D. McGillis and P. Smith, *Compensating Victims of Crime. An Analysis of American Programs*, (National Institute of Justice, U.S. Dept. of Justice, 1983).
25. Each program has numerous requirements for eligibility and administrative hurdles. Those who have sought compensation under some programs have found the experience somewhat discouraging.
26. 71 A.B.A. J. 25 (December, 1985). *See also* J. Brown and D. Doyle, *Growing Liability for Premises Owners*, 72 A.B.A. J. 64 (March, 1986).

Chapter IV

Victims' Rights Litigation

Victims' rights litigation[1] is based on traditional tort law principles. Broadly speaking, a tort is a civil wrong, other than breach of contract, for which the court will provide a remedy in the form of an action for damages.[2] Unlike criminal law, which is concerned with the protection of interests common to the public at large and often exacts a penalty from the wrongdoer,[3] tort law is directed toward the compensation of individuals, rather than the public, for losses which they have suffered.[4]

Negligence Theory of Tort Liability

There are various theories of tort liability. In victims' rights litigation, negligence is generally the applicable tort theory. Unlike an intentional tort, such as assault or battery, negligence may be based on omissions to act.[5] Thus, for example, where a student is the victim of an assault, a school is not liable for that intentional tort, although the perpetrator would be. However, a school may be liable for failing to protect the student against the assault if the assault was foreseeable.[6]

Negligence involves four elements: (1) a duty, or obligation recognized by law, requiring the actor (e.g., the school) to conform to a certain standard of conduct for the protection of others against unreasonable risks; (2) failure to conform to the standard required; (3) a

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1. For purposes of this book, victims' rights litigation is limited to tort law remedies. Other remedies, such as those available under victims' compensation laws, workers' compensation laws and other laws are not generally considered.
2. W. Keeton, *Prosser and Keeton on The Law of Torts* 2 (5th Ed. 1984).
3. There has, of course, been some concern that in the effort to protect the interests of the public at large, the rights of the individual victims of crime have been disregarded and subordinated to the rights of those who perpetrate crime and violence. *See* F. Carrington, *The Victims* (Arlington House, 1975).
4. W. Keeton, *Prosser and Keeton on The Law of Torts* 5-6 (5th Ed. 1984).
5. W. Keeton, *Prosser and Keeton on The Law of Torts* 160 (5th Ed. 1984).
6. *See* Chapters 7 and 8 *infra*.

reasonably close causal connection between the conduct and the resulting injury, that is, proximate cause; and (4) actual loss or damage resulting to the interests of another.[7] In victims' rights litigation, there must be presented, or alleged, a case which establishes all of the required elements of negligence.[8]

Schools, like others, may be held liable if negligent.[9] A school, as an employer, will also be liable for the negligence of its administrators, teachers and other employees acting within the scope of their employment.[10] An administrator, teacher or other school employee is also generally liable for his own negligence.[11] If the facts and law warrant, victims' rights litigation accordingly may be brought against a school as well as its employees.

As in other negligence cases, a victim's claim is subject to negligence defenses. The two most common defenses in a negligence action are contributory negligence and assumption of risk.[12] Contributory negligence is conduct on the part of the plaintiff (i.e., the victim) that falls below the standard to which he should conform for his own protection and is a legally contributing cause, cooperating with the negligence of the defendant in bringing about the plaintiff's harm.[13] Students are, therefore, expected to protect their own self-interests to the extent possible.[14] Under the defense of assumption of risk, it is held that where a plaintiff voluntarily assumes a risk of harm arising from the negligent or reckless conduct of another, he cannot recover from such harm.[15]

The defenses of contributory negligence and assumption of risk have been criticized. The doctrine of contributory negligence, for ex-

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7. W. Keeton, *Prosser and Keeton on The Law of Torts* 164-65 (5th Ed. 1984).
8. Because victims' rights litigation is a rapidly developing area of the law, many reported cases involve pretrial hearings, such as motions to dismiss. A helpful example of a case which discusses each element of a negligence action is Mullins v. Pine Manor College, 389 Mass. 47, 449 N.E.2d 331, 11 Educ. L. R. 595 (1983), where a dormitory resident recovered from a college after being raped.
9. This assumes, however, that some special defense or immunity does not apply. *See* Chapter 6 *infra*.
10. Restatement (Second) of Agency § 219 (1958).
11. Restatement (Second) of Agency § 343 (1958). Again, this assumes that immunity, privilege or some other defense applies. *See* Chapter 6 *infra*.
12. W. Keeton, *Prosser and Keeton on The Law of Torts* 451 (5th Ed. 1984).
13. Restatement (Second) of Torts § 463 (1965).
14. Bradshaw v. Rawlings, 612 F.2d 135 (3rd Cir. 1979). *See generally* Chapter 9 *infra*.
15. Restatement (Second) of Torts § 496 A (1965).

ample, has been considered harsh because it effectively places upon the injured party the entire burden of a loss for which the two — both plaintiff and defendant — are, in theory, responsible.[16] This dissatisfaction had led a majority of states to adopt some form of comparative negligence.[17] Under comparative negligence, liability for damages is apportioned between parties on the basis of fault. If the injured party contributed to his injuries to the extent of, say, 20 percent, damages are reduced by that amount. Although the effects of comparative negligence on the traditional defenses of contributory negligence and assumption of risk vary from state to state, they are commonly abolished or at least modified.[18]

In addition to negligence defenses, the availability of workers' compensation may preclude a claim against an employing school. Under workers' compensation acts, an employee, such as a teacher, may recover certain benefits regardless of whether he could have recovered under some tort theory against the employer. Defenses such as contributory negligence and assumption of risk may not be raised by the employer. Workers' compensation acts make the employer strictly liable for an employee's injuries, regardless of the circumstances. In return, the employee may not bring any action against the school, workers' compensation being his exclusive remedy.[19] Most victims' rights litigation in the school setting, therefore, involves claims by students.

Although exclusivity of workers' compensation is the general rule, it is not at all uniform. Some statutes specifically preserve other rem-

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16. W. Keeton, *Prosser and Keeton on The Law of Torts* 468-69 (5th Ed. 1984).
17. *See, e.g.*, Li v. Yellow Cab. Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975); Alvis v. Ribar, 85 Ill. 2d 1, 421 N.E.2d 886, 52 Ill. Dec. 23 (1981) (citing jurisdictions adopting comparative negligence).
18. There are three primary comparative negligence systems, including pure, modified and slight-gross. Under pure comparative negligence, contributory negligence does not bar recovery (as it would at common law), but reduces an injured party's claim for damages. Under modified comparative negligence, contributory negligence does not bar recovery if it remains below a specified proportion of total fault (*e.g.*, 50 percent). Under the slight-gross system, contributory negligence is a bar to recovery unless it is "slight" and the defendant's negligence, by comparison, is "gross." If this threshold requirement is met, the injured party may recover his damages, but they are reduced by that portion of negligence attributable to him.

    The defense of assumption of risk is incorporated in the comparative negligence system in some states, but not others. *See generally* W. Keeton, *Prosser and Keeton on The Law of Torts* 471-75 (5th Ed. 1984).
19. *See* W. Keeton, *Prosser and Keeton on The Law of Torts* 574 (5th Ed. 1984).

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edies or allow them to be pursued if, for example, the employer has been grossly negligent or fraudulently failed to disclose serious risks.[20] Further, it has been urged that where a constitutional right is asserted,[21] the availability of workers' compensation should not preclude seeking damages for a deprivation of that guarantee.[22]

Special Considerations in Victims' Rights Litigation

Victims' rights litigation represents a new speciality in the personal injury field.[23] However, certain special considerations arise which differentiate victims' rights litigation from other aspects of personal injury practice.

Victims' cases are probably the most emotional kind of litigation. This is understandable; the plaintiffs in such cases will, by definition, have been injured because of some crime or violence, with all of the physical and mental trauma that they can cause.

Dealing with this emotional factor can create problems for attorneys and others, problems that rarely arise in other cases. For example, given a client with a facially sound case, perhaps a rape, the initial question may well be whether it is in the best interest of the victim to file at all. Perhaps the trauma of reliving the crime in the civil case, often after the victim has testified in a criminal case (and

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20. *Id.* at 576-77.
21. It must be recalled, however, that the circumstances where a constitutional right may be asserted are limited. *See generally* Chapter 2 *supra.*
22. *See* G. Nicholson, F. Hanelt and K. Washburn, *Liability for Injuries to Staff on School Grounds: A Means of Avoiding the Exclusive Remedy Rule*, Forum, Vol. 16, No. 1, 22 (California Trial Lawyers Association, January/February 1986); G. Nicholson, F. Hanelt and K. Washburn, *Of Inalienable Rights and Exclusive Remedies*, 30 Educ. L.R. 1 (1986).

    But see Halliman v. Los Angeles Unified School Dist., 163 Cal. App. 3d 46, 209 Cal. Rptr. 175, 21 Educ. L. R. 946 (1984). In Halliman a teacher had been injured by a student. Holding that workers' compensation was the teacher's exclusive remedy, the California Court of Appeal, Second District, stated:

    > Plaintiff's reliance on California Constitution article I, section 28, as a basis for recovery [under a theory other than workers' compensation] is misplaced. Article I, section 28, subdivision (c) provides: "All students and staff of public primary, elementary, junior high and senior high schools have the inalienable right to attend campuses which are safe, secure and peaceful." As part of the "Victim's Bill of Rights," that provision concerns the "broad reforms in the procedural treatment of accused persons and the disposition and sentencing of convicted persons" sought in the state criminal justice system. (Cal. Const., art. I, § 28, subd. (a).) It does not purport to create any exception to the exclusive remedy provisions of the workers' compensation laws. *Id.* 163 Cal. App. 3d at 52.

23. 71 A.B.A. J. 25 (December, 1985).

perhaps been subject to energetic cross-examination by defense counsel), will simply be too much of an ordeal for the victim to undergo. It is, of course, the province of a victim to decide whether to pursue a lawsuit, but it is incumbent upon those advising the victim to determine what sort of witness the client will make. The emotionalism inherent to victims' cases can have a distinct bearing upon this determination.

The very nature of the case can additionally affect the motivation of the victim. Emotions such as outrage over the crime, retribution, disgust with the criminal justice system or a desire to prevent such future crimes may be prime factors in the desire to sue, regardless of monetary compensation. When the victimization occurs at a school, emotions can be even greater because of the concern of other students and their parents.

Alternative Remedies

Because of the nature of victims' rights litigation, victims should consider other remedies that may be available.

A child, as a separate legal individual, has been held liable for his own torts,[24] and the parent has, at common law, no legal responsibility for them.[25] Since the child is usually not financially independent and the parent is not liable, juvenile torts are mostly uncompensated, unless the child is covered by some liability policy.[26] This has led to the enactment of statutes in most states that make parents liable for the acts of their children who are not yet adults, particularly if the damage results from some intentional conduct.[27] These statutes are adopted to serve two goals: (1) to compensate victims of crimes by

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24. Restatement (Second) of Torts § 8951 (1979).
25. A parent may, nevertheless, be subject to liability under some other theory. For example, a parent may be negligent by making loaded firearms available to a child. *See* Restatement (Second) of Torts § 308 (1965). It has been argued, but has not yet been resolved, the extent to which parents can be held responsible for their child denying another child a constitutional right to a safe school. *See* Chapter 2 *supra*.
26. W. Keeton, *Prosser and Keeton on The Law of Torts* 913 (5th Ed. 1984).
27. *See generally* Annot., 8 A.L.R.3d 612 (1966) (regarding the validity and construction of statutes making parents liable for torts committed by their minor children). *See also* J. Goldman, *Restitution for Damages to Public School Property*, 11 J. of L. & Educ. 147 (1984); D. Prescott and C. Kundin, *Toward a Model Parental Liability Act*, 20 Cal. W. L. Rev. 187 (1984); Shong, *The Legal Responsibility of Parents for their Children's Delinquency*, 6 Fam. L. Q. 145 (1972); Freer, *Parental Liability for Torts of Children*, 53 Ky. L. J. 254 (1965); Note, *The Iowa Parental Responsi-*

imposing liability, but vicariously, on parents of children who intentionally or maliciously harm the person or property of another, and (2) to deter crime by encouraging increased parental supervision.[28] Although these statutes have been repeatedly upheld against constitutional challenge,[29] the ability of these statutes to serve either of these purposes has been limited by the fact that recoverable damages are commonly limited to about $750.00.[30] Where not so limited, such statutes may provide a significant remedy to a victim.[31]

If schools or school administrators, teachers or staff are not fulfilling their obligations to provide safe schools, administrative remedies may be available to enforce these obligations. Many of these remedies will be within the structure of local, regional or state education agencies. Outside agencies may provide remedies as well. Where female students are being victimized, for example, it has been held that monetary remedies are available under Title IX of the Education Amendments of 1972.[32]

Victims of crime and violence may have claims against agencies other than schools. Circumstances may, for example, warrant a claim against law enforcement agencies for negligently releasing an individual from prison[33] or for failing to provide police protection.[34] If the perpetrator has revealed his intent to victimize to a third party, such as a psychotherapist, that third party may be liable for failing to warn the intended victim.[35] Other private parties may be liable as

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bility Act, 55 Iowa L. Rev. 1037 (1970) (citing various statutes); Comment, *Parental Responsibility Ordinances*, 19 Wayne L. Rev. 1551 (1973).

28. Note, *The Iowa Parental Liability Act*, 55 Iowa L. Rev. 1037 (1970).
29. W. Keeton, *Prosser and Keeton on The Law of Torts* 913 (5th Ed. 1984). *But see* Corley v. Lewless, 227 Ga. 745, 182 S.E.2d 766 (1971) (unlimited liability).
30. J. Goldman, *Restitution for Damages to Public School Property*, 11 J. of L. & Educ. 147, 152 (1984).
31. *See* Palmyra Bd. of Educ. v. Hansen, 56 N.J. Super. 567, 153 A.2d 393 (1959) (school awarded $344,000 in damages under parental responsibility statute where child started fire at school).
32. 503 U.S. ___, 112 S.Ct. ___, 117 L.Ed 2d 208.
33. *See generally* Annot., 6 A.L.R.4th 1155 (1981) (governmental tort liability for injuries caused by negligently released individual); Annot., 5 A.L.R.4th 773 (1981) (immunity of public officer from liability for injuries caused by negligently released individual); 19 Am. Jur. Proof of Facts 2d 583 (1979) (government entity's liability for injuries caused by negligently released individual).
34. *See generally* Annot., 46 A.L.R.3d 1084 (1972) (liability of municipality or other governmental unit for failure to provide police protection); 22 A.L.R. Fed. 903 (1975) (liability of United States under Federal Tort Claims Act for injuries resulting from failure to provide police protection).
35. Tarasoff v. Regents of the University of California, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (Cal. 1976).

well.[36]

Victims' rights initiatives may also be available. Federal or state victims' compensation laws provide some benefits to victims.[37]

Checklist for Victims' Rights Litigation

Whether pursuing or defending a victims' claim, various matters should be considered. A checklist[38] of these considerations follows.

[ ] Do the facts and the law warrant a lawsuit against the perpetrator?

[ ] Is there any basis or likelihood of a lawsuit by the perpetrator against the victim?

[ ] Do the facts and the law warrant a lawsuit against any third party, including a school or school employee?

[ ] What is the time period, or statute of limitations, for filing a lawsuit?

[ ] Does a special relationship exist between the victim or perpetrator and third-party defendant, including a school or school employee?

- Educational institution-student.
- Employer-employee.
- Landlord-tenant (e.g., dormitory resident).
- Landowner or operator-occupier (i.e., trespasser, licensee or invitee).
- Teacher-student.
- Other.

[ ] Did the third party assume a duty to prevent or protect against crime or violence by contract, relationship or otherwise?

[ ] What theory of third-party liability is available?

- Constitutional right to safe schools?

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36. Annot., 10 A.L.R.3d 619 (1966) (regarding private person's duty and liability for failure to protect another against criminal attack by third person).
37. *See* Chapter 3 *supra*.
38. This checklist is prepared in a format of questions that the victim must consider. The third-party defendant should necessarily consider whether these questions can be answered in the defendant's favor. The issues raised by the checklist are discussed throughout this book. Increasing resource materials are available to assist victims of crime and violence and their attorneys in pursuing claims. These should be consulted where available. *See, e.g.*, E. Villmoare & J. Benvenuti, *California Victims of Crime Handbook: A Guide to Legal Rights and Benefits for California Crime Victims* (Victims of Crime Resource Center, University of the Pacific McGeorge School of Law.)

- Failure to protect against criminal activity generally?
- Failure to protect against specific foreseeable criminal activity (e.g., assaults, drug trafficking, etc.)?
- Failure to supervise students?
- Failure to apprehend or restrain identifiable dangerous students?
- Negligent admission of dangerous students?
- Negligent placement of dangerous students?
- Negligent selection, retention or training of staff?
- Contract (e.g., dormitory)?
- Statutory (e.g., parental responsibility or dram-shop)?
- Failure to comply with established security or supervision manuals or policies?
- Failure to render aid or assistance after an incident?
- Misrepresentation of the existence of crime or the level of security provided?
- Other?

[ ] What remedy or remedies should be sought?

- Damages against the perpetrator or one or more third parties (e.g., school, school officials, perpetrator's parents, etc.)?
- Writs of *mandamus*?[39]
- Injunctions?[40]
- Declaratory judgments?[41]
- Other?

[ ] In what manner should any suit be brought?

- Individual action?

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39. Mandamus is Latin for "we command." A writ of mandamus is generally a remedy by which a court, or a superior authority, directs or commands an official to perform some public duty. Under some practice, a writ of prohibition may also be used much like a writ of mandamus. However, it is most often used to prevent a court (as opposed to some other official) from acting beyond its jurisdiction.

40. Injuctions are issued by a court directing that a party do or not do something. There are various types of injuctions. In general, some are issued prior to a case being concluded to preserve the status quo and others are issued upon the conclusion of the case. Unlike a writ of mandamus, which is usually issued to some public official directing the official to perform some ministerial act, injunctions are directed to public or private persons and may be issued to compel discretionary matters. Injunctive relief is commonly sought in desegregation cases by which a court may ultimately assume jurisdiction of the design and implementation of a school's desegregation plan. Similarly, such relief may be available to require the design and implementation of a safe school plan. *See* Chapter 2 *supra*.

41. Where declaratory relief is sought, the party bringing the suit is not seeking any specific remedy,

- Class action?[42]
- Private attorney general or public interest action?[43]
- Other?[44]

[ ] Will a remedy selected exclude other remedies selected?

[ ] Are there any organizations which can assist in bringing, researching or litigating the case?[45]

[ ] Must a tort liability claim or other notice be served upon the school?[46] If so, by when must it be served?

[ ] Is the school entitled to claim any common law or statutory immunities?[47]

- Sovereign or absolute immunity?
- Official or qualified immunity?
- *In loco parentis* immunity?
- Charitable immunity?
- Statutory immunity?

[ ] Has any available immunity been waived by insurance or otherwise?[48]

[ ] To what extent was the crime or violence foreseeable by the school?

- School crime statistics?
- Specific events?
- Community or gang crime, violence or drug activity?
- High crime area?
- Student, parent, staff or community complaints?
- News media accounts?
- Presence of non-students?
- Gathering place for likely perpetrators?

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such as damages. Rather, the party merely seeks a determination by a court of the respective rights and obligations of the parties. Significantly, the party need not have suffered actual wrong or sustained damages. Declaratory relief is often sought in conjunction with other remedies.

42. A class action is brought on behalf of or, in some limited circumstances, against other persons similarly situated.
43. Practice in many states allows private persons to bring actions in the public interest, particularly where public officials fail to act. Attorney's fees often may be recovered in these actions. *See* Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241 (1971) (Serrano I); *subsequent opinion*, 18 Cal. 3d 728, 557 P.2d 929 (1976) (Serrano II).
44. Local practice should be consulted to determine remedies available under state law.
45. *See* Chapter 2 *supra*.
46. *See* Chapter 6 *infra*.
47. *Id.*
48. *Id.*

- Other?

[ ] To what extent has the school attempted to prevent or protect against the crime or violence?
- Warnings to potential victims?
- Programs for students?
- Closed campus?
- Lighting?
- Increased staff presence?
- Security patrols, guards or parking lot attendants?
- Escort services?
- Policy to report crime or violence to police?
- Emergency telephone or other services?
- Other?

[ ] Is liability affected by any special contracts or student-school relationships?
- Dormitory contracts?
- Catalog representations regarding safety?
- Payment of tuition or fees?
- Other?

[ ] What likely defenses can be raised?
- Duty-at-large rule?
- Intervening cause doctrine?
- Contributory negligence?
- Assumption of risk?
- Comparative negligence?
- Other?

[ ] Are there any remedies which can or should be pursued other than a third-party suit?
- Claims under parental responsibility acts?
- Administrative remedies?
- Criminal prosecution and possible perpetrator restitution?
- Crime victims' compensation?
- Workers' compensation?
- Occupational health and safety acts?
- Violation of building or design codes or standards?
- Homeowner or other insurance?
- Other?

Chapter V

Classifications of Victims' Rights Litigation

Victims' rights litigation can be broadly classified into three main areas. These include lawsuits by victims against perpetrators; by perpetrators against victims; and by victims against third parties.

Victims Against Perpetrators

Crime or violence directed against another will usually give the victim (or the victim's survivors) a cause of action against the perpetrator. Lawsuits brought by victims against perpetrators are not, as a rule, difficult to win, particularly if there has been a guilty plea or conviction for the crime out of which the action arose.[1] Indeed, because criminal actions are typically tried before civil proceedings, the civil litigant will actually have a "preview" of what to expect when he begins to prepare his case.

Where a perpetrator is acquitted in criminal proceedings, a civil action is not necessarily barred because of the differences in the burdens of proof. The state must prove guilt beyond a reasonable doubt, while a civil plaintiff, in most instances, need only establish proof by a preponderance of the evidence.[2] Further, evidence which is inadmissible in the criminal case, such as evidence seized in violation of a suspect's Fourth Amendment rights,[3] may be,[4] but is not always,[5]

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1. Absent a statute to the contrary, pleas of guilty in criminal cases are usually admissible in subsequent civil actions as a declaration or admission against interest. 29 Am. Jur. 2d *Evidence* § 701 (1967). Pleas of nolo contendere (no contest) and convictions by a court or jury are usually inadmissible in civil actions. 29 Am. Jur. 2d *Evidence* §§ 334, 702 (1967).
2. 29 Am. Jur. 2nd *Evidence* § 335 (1967).
3. *See* Mapp v. Ohio, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961).
4. *See, e.g.*, Honeycutt v. Aetna Insurance Co., 510 F.2d 340 (7th Cir. 1975); Diener v. Mid American Coaches, Inc., 378 S.W.2d 509 (Mo. 1964).

   The trend clearly allows admission of such evidence in civil cases, although not admissible

admissible in a civil case.

The major problem in lawsuits by victims against perpetrators is that a monetary judgment is not always collectible, no matter how clear-cut the evidence of the civil defendant-perpetrator's guilt may be.

Realistically, *most* crime and violence are not committed by the wealthy. And, if the perpetrator is serving a prison sentence for the crime in question, he probably will be the epitome of the judgment-proof defendant. Nor, as a probationer or parolee, will he be an attractive candidate for any well-paying jobs. The dilemma thus arises: Is it worth the time of a busy attorney, or the time and trauma to the victim, to attempt to sue the perpetrator?

Some victims may wish to sue to experience a sense of catharsis. After receiving a probably uncollectible judgment of $365,000 against two men who had been convicted of raping her, one victim was candid in saying that the "purpose of this trial wasn't to collect. The purpose of this trial was that it's high time somebody got off their tail and did something about rape."[6]

Others may simply wish to establish the guilt of the perpetrator where the criminal justice system did not, or could not, do so. When the United States Supreme Court required that suspects be given Miranda warnings, for example, dissenting Justice Byron R. White predicted that "in some unknown number of cases the Court's rule will return a killer, a rapist or other criminal to the streets and to the environment which produced him, to repeat his crime whenever it pleases him."[7] Similarly, a criminal defendant may be innocent of a criminal charge by reason of insanity.[8] Under such circumstances,

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in criminal cases. *See* W. LaFave, *Search and Seizure* 106 (1978); H. Baade, *Illegally Obtained Evidence in Criminal and Civil Cases: A Comparative Study of Classic Mismatch* (pts. 1 & 2), 51 Tex. L. Rev. 1325 (1973), 52 Tex. L. Rev. 621 (1974); J. Sutherland, *Use of Illegally Seized Evidence in Non-Criminal Proceedings*, 4 Crim. L. Bull. 215 (1968); Note, *Constitutional Exclusion of Evidence in Civil Litigation*, 55 Va. L. Rev. 1484 (1969).

5. *See, e.g.*, Tannvasa v. City and County of Honolulu, 626 P.2d 1175 (Hawaii Ct. App. 1981); Lebel v. Swincicki, 354 Mich. 427, 93 N.W.2d 281 (1958); Kassner v. Fremont Mutual Insurance Co., 47 Mich. App. 264, 209 N.W.2d 490 (1973). *See also* Note, *Constitutional Law: Evidence Obtained Through a Private Unreasonable Search and Seizure Inadmissible in a Civil Action*, 46 Minn. L. Rev. 1119 (1962).
6. Washington Post, Feb. 1, 1976, at B, col. 1. The victim's name was Mary Knight.
7. Miranda v. Arizona, 384 U.S. 436, 542, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) (White, J., dissenting).

victims may wish to use civil proceedings to establish guilt.

As unlikely as collection against crime and violence perpetrators may be, there are exceptions. In a number of cases, criminals have become authors or received lucrative offers for interviews or story rights. Truman Capote probably started the trend with his classic "non-fiction novel" *In Cold Blood*,[9] which details the murder of the Clutter family in Kansas and the subsequent investigation, trial, conviction and hanging of Perry Smith and Richard Hitchcock for that crime. It is ironic, but understandable, that the more horrible the crime, the more curious the public.

Perpetrators of crime and violence may also experience a windfall. For example, a criminal might inherit from a relative, invent something that produces significant income or even win a lottery prize. Admittedly, such occurrences would be the exception rather than the rule; however, since civil judgments against perpetrators usually are not difficult to obtain or renew, the possibility of a windfall should not be overlooked.

For a more realistic example, prisoners tend to be very litigious people. Those who are incarcerated have little with which to occupy themselves. They have the time, the free law libraries, the paper and the typewriters that they need to file lawsuits against anyone. Additionally, such organizations as the American Civil Liberties Union (ACLU) have raised and expended hundreds of thousands of dollars in time or money for various "prisoners' rights projects." On occasion, a prisoner in confinement may receive a monetary award as a result of one of these cases. For example, one prisoner was awarded $518,000 in a lawsuit involving lack of medical treatment.[10] Two others were awarded $107,000 by a jury for two separate incidents of sexual assault.[11] If a prisoner receives a judgment for alleged mistreatment from the federal government, a state, a county or a city, the victim should attempt to satisfy his judgment from the proceeds of the prisoner's lawsuit.

Not all criminals are jobless. One study actually suggests that very

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8. Mentally disabled persons generally may be held liable in tort. *See* W. Keeton, *Prosser and Keeton on The Law of Torts* 1072-74 (5th Ed. 1984); Restatement (Second) of Torts § 895J (1979).
9. T. Capote, *In Cold Blood* (Random House, 1965).
10. Tucker v. Hutto, No. 78-161-R (E.D. Va. 1978).
11. Doe v. City of Albuquerque, Nos. CV-77-08127, CV-77-08130 (Bernalillo County Dist. Ct. 1979).

few individuals commit crime because of unemployment.[12] Some individuals work at legitimate jobs *and* criminal endeavors. Certain crimes, particularly sex crimes, very often involve individuals who are capable of, and often do, hold normal, well-paying jobs. An individual also may engage in very lucrative criminal activities. Local pimps, gamblers and drug dealers may often have enormous "stashes" of money. The sex offender with a well-paying job interested in maintaining his ties to a community or the criminal with vice activities concerned with Internal Revenue Service scrutiny may well wish to settle a victim's claim.

Although most liability and homeowner insurance policies contain specific exclusions for willful acts by an insured person intentionally causing injury to another, coverage may be provided for a victim's claim in some cases. In construing the exclusion, courts have generally, but not always, required that the insured have acted with the specific intent to cause harm to the victim. The insurer will not be relieved of providing coverage under such an exclusion unless the insured has acted with that specific intent.[13] Under this view, it is not sufficient that the insured's intentional, albeit wrongful, act has resulted in unintended harm to a third person; it is the harm itself that must be intended before the exclusion will apply.[14]

Courts have also held that legal insanity on the part of the perpetrator of a crime will negate an "intentional injury exclusion," using the theory that the insured lacked the mental capacity to form the requisite intent. Holdings such as these may be of considerable interest to victims' rights litigants because the "insanity defense" is most often raised in this type of case, one which involves death or serious bodily harm to the victim. Thus, if a well-insured but legally insane perpetrator is involved, collection may be materially facilitated.[15]

Many insurance carriers settle cases, regardless of ultimate liability,

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12. *See* W. Raspberry, *Jobless and Criminal?* Washington Post, March 28, 1980, at A, col. 1.
13. *See generally*, Annot., 2 A.L.R. 3d 1238, 1241 (1965) (regarding liability insurance exclusions for injuries intentionally caused by an insured).
14. *Id.*
15. *See, e.g.*, Rosa v. Liberty Mutual Ins. Co., 243 F. Supp. 407 (D. Conn. 1965); Arkwright-Boston Mfrs. Mut. Ins. Co. v. Durkel, 363 So. 2d 190 (Fla. Dist. Ct. App. 1978); Aetna Casualty and Surety Co. v. Dichti, 78 Ill. App. 3d 970, 398 N.E.2d 582 (1979); Von Damek v. St. Paul Fire and Marine Ins. Co., 361 So. 2d 283 (La. Ct. App. 1978), *cert. denied*, 362 So. 2d 794 (La. 1978). Ruvolo v. American Casulaty Co., 39 N.J. 490, 189 A.2d 204 (1963). *See generally* Annot., 2

based on the practical costs of defending a case[16] or the desire to avoid publicity.

Perpetrators Against Victims

As ironic as it might seem, victims of crime and violence are sometimes sued by the perpetrators.[17]

Perpetrators often sue victims for purposes of harassment. From the perpetrator's point of view, there is really no particular reason not to sue. In most instances, the perpetrators sue as paupers; they are immune from the imposition of costs if they are unsuccessful. Because of their poverty, they are practically immune from later tort actions for malicious prosecution or abuse of process.[18] As indigents, they approach the courts with nothing to lose and everything to gain.[19] The temptation to file unwarranted suits is obviously stronger in such a situation.

For convicted prisoners with idle time and free paper, ink, law books and mailing privileges, the temptation to sue a victim is especially strong.[20] And, as noted by United States Supreme Court Justice William H. Rehnquist, "though [an inmate] may be denied legal relief he will nonetheless have obtained a short sabbatical to the nearest ... court house."[21]

Most trial court judges are sufficiently sophisticated to know when the legal process is being utilized for spurious purposes. On motion, many such cases are dismissed[22] because a cause of action upon which relief can be granted is not alleged[23] or, in *pro se* actions, the

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A.L.R. 3d 1238 (1965) (regarding liability exclusion for injury intentionally caused by insured).

16. An insurer may be obligated to defend a claim whenever it ascertains facts which give rise to the potential of liability under the policy, although it may ultimately be determined that it has no liability. *See* Gray v. Zurich Insurance Co., 65 Cal. 2d 263, 419 P.2d 168 (1966).
17. For purposes of this discussion, it is assumed that the victim was, in fact, a victim of crime or violence and that the victim reasonably and in good faith believed the suspected perpetrator to be the guilty party. Where there is misuse of legal procedure by a victim, he may and probably should be subject to an action by the accused perpetrator (*e.g.*, malicious prosecution, malicious abuse of process, false arrest, false imprisonment, etc.).
18. Jones v. Bales, 58 F.R.D. 453 (N.D. Ga. 1972).
19. *Id.*
20. *Id.*
21. Cruz v. Beto, 405 U.S. 319, 327, 92 S. Ct. 1079, 31 L. Ed. 2d 263 (1972) (Rehnquist, J., dissenting).
22. *See, e.g.*, Jones v. Bales, 58 F.R.D. 453 (N.D. Ga. 1972); Daves v. Scranton, 66 F.R.D. 5 (E.D. Pa. 1975).

court is satisfied that the action is malicious or frivolous.[24] Unfortunately, a reasonably intelligent prisoner with a willingness to misrepresent the facts can often avoid dismissal, even though he actually has no chance of eventual success in his suit.[25]

A more troublesome case for the victim is one in which the victim mistakenly identified or charged a suspected perpetrator. An innocent party may have gone to jail or suffered the indignity of an arrest and the rigors of criminal prosecution.

Private citizens should be encouraged to bring perpetrators of crime to justice, not discouraged through fear of recrimination.[26] Therefore, where a good faith error of identity is made, courts are not inclined to award damages.[27] Of course, if the identification is made maliciously or in bad faith, the victim may be liable for malicious prosecution or other tort liability.[28]

Nothing can stop a perpetrator or suspected perpetrator from filing a lawsuit against a victim. However, the courts are, on public policy grounds, inclined to protect victims from lawsuits brought merely to harass, where victims have acted honestly and in good faith.

Victims Against Third Parties

Victims' rights litigation primarily involves lawsuits by victims against third parties, such as schools or school employees. The reasons for this are twofold. First, if liability can be established against a third party — public or private — the resulting judgment is usually collectible. Second, inherent in the great majority of such lawsuits is a very real *preventive* aspect insofar as future victimization is concerned.

Third-party victim lawsuits primarily involve allegations of negligence or gross negligence. They are based on the theory that the perpetrator was placed in a position to injure the victim through the neg-

23. *See* Fed. R. Civ. P. 12(b)(6).
24. *See* 28 U.S.C. § 1915(d).
25. Jones v. Bales, 58 F.R.D. 453, 464 (N.D. Ga. 1972).
26. Manis v. Miller, 327 So. 2d 117 (Fla. Dist. Ct. App. 1976).
27. *See, e.g.*, Turner v. Mellon, 41 Cal. 2d 45, 257 P.2d 15 (1953); Manis v. Miller, 327 So. 2d 117 (Fla. Dist. Ct. App. 1976); Shires v. Cobb, 271 Or. 769, 534 P.2d 183 (1975). *See generally* Annot., 66 A.L.R.3d 10 (1975) (regarding liability for instigation or prosecution of person mistakenly identified as person who committed an offense).
28. *Cf.* Armistead v. Escobedo, 488 F.2d 509 (5th Cir. 1974) (liability may arise if the victim does more than merely identify an individual, such as directing the suspect's arrest).

ligence of a third party; or, that by neglecting to act to prevent a foreseeable crime, the third party caused, or at least facilitated, victimization.

The preventive aspect of third-party litigation has become one of the more interesting and important features of this kind of case. The theory of tort law rests on the view that a defendant has a duty to refrain from certain actions or to take certain actions to prevent criminal injury to the plaintiff; and, if third-party lawsuits by crime victims are successful, then these cases will put other potential defendants, similarly situated, on notice that they too may be held liable. This, in turn, might stimulate potential defendants to conduct themselves in such a manner that future victimization in like cases will be prevented, or at least reduced.[29] The self-interest of potential defendants may dictate nothing less.

Perhaps this kind of thinking was best summarized in the case which involved the murder of Dr. Michael Halberstam by a master-burglar named Welch.[30] Dr. Halberstam's widow sued both Welch for the actual killing and his common-law wife for civil conspiracy leading to the wrongful death of her husband. The court ruled for the plaintiff, and ended its opinion as follows:

> Tort law is not at this juncture, sufficiently well-developed or refined to provide answers to all the serious questions of legal responsibility and corrective justice. It has to be worked over to provide answers to questions raised by cases such as this. Precedent, except in the securities area, is largely confined to isolated acts of adolescents in rural society. Yet the implications of tort law in this area as a supplement to the criminal justice process and possibly a deterrent to criminal activity cannot be casually dismissed. We have seen the evolution of tort theory to meet 20th century phenomena in areas such as product liability; there is no reason to believe that it cannot also be adapted to new uses in circumstances of the sort presented here. This case is obviously only

29. While the preventive aspects of victims' rights litigation are important, candor regarding this motivation may limit a damage claim. In one case a jury verdict against a school awarding damages to three students who were assaulted and cut by other students was reduced, in part, because the attorney for the three students had stated before the jury that the case had been brought to prevent future assaults. The award was considered somewhat punitive, not merely compensatory. School Bd. of Palm Beach County, Inc. v. Taylor, 365 So. 2d 1044 (Fla. Dist. Ct. App. 1978).
30. Halberstam v. Hamilton, 705 F.2d 472 (1983).

> a beginning probe into tort theories as they apply to newly emerging notions of economic justice for victims of crime.[31]

This preventive factor extends not only to the perpetrator, but also to third parties as well. A rather graphic illustration involves the murder of Natalia Semler.[32] Natalia, 14, was murdered at the Madeira School in northern Virginia by a man name John Gilreath. Gilreath had been convicted earlier of abducting and sexually molesting young girls from the same Madeira School. His 20-year sentence on this conviction was suspended by the judge, on the conditions that he be confined in a *secure* psychiatric facility and that he not be released to outpatient status without prior order of the court. The psychiatrist in charge of Gilreath and the assigned probation officer nevertheless, at a later date, placed him on outpatient status, in violation of the court's order. He then proceeded back to the Madeira School and murdered Natalia.

The Semlers were distraught because the crime was so very preventable; those responsible for Gilreath's release had only to obey the order of the sentencing court, and the killing probably would never have transpired.

In the words of Robert W. Lewis, the Semler's attorney, who successfully argued the case:

> The Semlers were obviously very distressed. They were interested in seeing that this kind of thing didn't happen again. When [the facts of the case] were revealed to them ... it seemed incredible that it should have ever happened in the first place. So a lawsuit was filed in the Federal District Court in Alexandria. It was without a jury. The Semlers interest was not to recover money.[33]

Because of the increase in the number of school crime and violence victims, schools have become common third-party defendants. This category of victims' rights litigation has become the most common.

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31. The development of tort law as it pertains to school crime and violence has been greatly enhanced in California by the adoption of a constitutional right to safe schools. *See* Chapter 2 *supra*.

32. Semler v. Psychiatric Institute, 538 F.2d 121 (4th Cir. 1976), *cert. denied sub. nom.*, 429 U.S. 827, 97 S. Ct. 83, 50 L. Ed. 2d 90 (1976).

33. Address of Robert W. Lewis before the annual meeting of the American Bar Association, August 10, 1977, Chicago, Illinois. The full text of his remarks can be found in *ABA: Victims of Crime or Victims of Justice*, available from the ABA Committee on Victims.

The fact that the Semlers were solely concerned with the preventive impact of the case is demonstrated by their donation of the entire amount of the judgment to a trust fund to provide scholarships for foreign affairs students because this had been Natalia's area of interest.

Chapter VI

Schools as Victims' Rights Litigation Defendants

Schools, whether public or private, are ordinarily "suable."[1] However, matters are not quite as simple as this statement might suggest. Third-party lawsuits against schools, particularly public schools, often encounter stringent, sometimes insurmountable obstacles.

Requirements Prior to Suit

A common requirement prior to bringing suit against a school, particularly a public school, is to serve notice. The notice explains that suit may be commenced and the basis for the suit. The notice, which usually must be given well before the statute of limitations expires, enables the school to investigate the claim at an early stage. While courts try to avoid the dismissal of a claim for failure to give notice, failure to substantially comply with the notice requirement typically results in the dismissal of a lawsuit.[2]

Sovereign or Absolute Immunity

At common law "the King could do no wrong." The same philosophy prevailed as monarchies developed into modern states. Exercising their sovereign powers, states as well as their subordinate bodies, such as schools, were traditionally held to be absolutely immune from suit.[3] An immunity is a freedom from suit or liability.[4]

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1. J. Rapp, *Education Law* § 12.01[2] (Matthew Bender & Company, Incorporated). State and local procedures should be consulted with regard to procedural aspects of litigation including such matters as pleadings, jurisdiction, venue and service of summons.
2. *See, e.g.*, Scarborough v. Granite School Dist., 531 P.2d 480 (Utah 1975). *See generally* J. Rapp, *Education Law* § 12.01[3] (Matthew Bender & Company, Incorporated).
3. *See generally* J. Rapp, *Education Law* § 12.02[2] (Matthew Bender & Company, Incorporated);

A number of policy reasons are advanced for the doctrine of absolute immunity for the sovereign state: (1) fear of lawsuits will "chill" aggressive action by government officials; (2) it is unfair to "second guess" the good faith decisions of a government employee; and (3) it is inappropriate to risk emptying government coffers in satisfying civil judgments. On the other hand, the thought of citizens injured through the negligence or willful acts of governmental officials and left without remedy has become unpalatable to courts and legislatures.

In 1946, Congress passed the Federal Tort Claims Act[5] which waived sovereign immunity, with certain exceptions, and allowed aggrieved parties to sue the federal government to the same extent that they would be able to sue another private citizen of the state in which the act took place. After the passage of the act, a citizen who had been injured through the negligent operation of, perhaps, a postal truck, could sue the United States government to recover his damages.

Among the significant exceptions to the Federal Tort Claims Act's waiver of immunity are discretionary functions.[6] The exception has resulted in a wide range of varying, often seemingly contradictory, interpretations by the courts. It appears that the more the courts attempt to explain the difference between "discretionary" (i.e., immune) acts[7] and "ministerial" acts,[8] for which there is no immunity,

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W. Keeton, *Prosser and Keeton on The Law of Torts* 1032 *et seq.* (5th Ed. 1984).

Because the individual sovereign has been replaced, the immunity of states, or their subdivisions, is commonly referred to as governmental immunity. Both terms are in common usage.

4. W. Keeton, *Prosser and Keeton on The Law of Torts* 1032 (5th Ed. 1984). For a comprehensive discussion of immunity, *see* 57 Am. Jur. 2d *Municipal, County, School, and State Tort Liability* (1988). For references to education law cases involving immunity, *see* J. Rapp. *Education Law* § 12.02[2] (Matthew Bender & Company, Incorporated).
5. 60 Stat. 843. As currently in force, *see* §§ 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671-2680.
6. 28 U.S.C. § 2680 provides that the act does not apply to:

   > Any claim based upon an act or omission of an employee of the government, exercising due care, in the execution of a statute or regulation, whether such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise a discretionary function or duty, on the part of a federal agency or employee of the government, whether or not the discretion involved is abused.

7. Examples of cases finding certain school-related activities to be discretionary include: Nunn v. State, 35 Cal. 3d 616, 677 P.2d 846, 200 Cal. Rptr. 440 (1984) (determination when firearms test would be given was a discretionary decision); Cady v. Plymouth-Carver Regional School Dist., 17 Mass. App. 211, 457 N.E.2d 294, 14 Educ. L. R. 1091, *review denied*, 391 Mass.1103, 461 N.E.2d

the more confusing the area becomes.

The United States Supreme Court grappled with the discretionary-ministerial dichotomy in *Dalehite v. United States*.[9] The court based its distinction upon whether the acts were taken at the planning stage (discretionary) or the operational stage (ministerial). The distinction between planning and operational decisions is, at best, difficult to apply.[10] What is important to recognize is that some courts have decided negligence or duty issues against the victim under the guise of "discretion."[11]

In some contexts, the determination of immunity may additionally or alternatively be based upon whether the function undertaken is governmental or proprietary. Immunity then applies to governmental functions, but not those that are proprietary. Unlike governmental functions, which can only be or are most appropriately performed by a governmental body, proprietary functions serve private functions. Activities associated with the operation of public schools have, with few exceptions, been held to be governmental functions.[12]

Another exception to government liability under the Federal Tort Claims Act is immunity for "any claim arising out of assault and battery," and various other intentional torts.[13] In *Sheridan v. United States*,[14] the Supreme Court explained that where a claim arises from an employment relationship between the government and the perpe-

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1219 (1983) (management of student imbroglios, student discipline and school decorum fall readily within the discretionary function exception to tort claims act).

8. *See, e.g.*, Baker v. State Bd. of Higher Educ., 531 P.2d 716 (Or. Ct. App. 1975) (maintenance of fairgrounds).
9. 346 U.S. 15, 73 S. Ct. 956, 97 L. Ed. 2d 1427 (1953).
10. W. Keeton, *Prosser and Keeton on The Law of Torts* 1041 (5th Ed. 1984).
11. *Id.* at 1042.
12. J. Rapp, *Education Law* § 12.02[2][c] (Matthew Bender & Company, Incorporated).

    Examples of cases finding certain school-related activites to be governmental include: Grames v. King, 332 N.W.2d 615, 10 Educ. L. R. 783 (Mich. 1983) (planning and carrying out of girls' basketball program was a governmental function to which immunity attached); Galli v. Kirkeby, 398 Mich. 527, 248 N.W.2d 149 (1976) (in action against board for negligent selection of principal who allegedly made repeated homosexual attacks determined that hiring of employees was a governmental function for which immunity existed); Belmont v. Swieter, 114 Mich. App. 692, 319 N.W.2d 386, 4 Educ. L. R. 629 (1982) (operation of a public school is a governmental function and, accordingly, school is immune from liability where student was injured when one of his schoolmates hit him in the eye with a chalkboard eraser while in a classroom that was left unsupervised).
13. 28 U.S.C. § 2680(b).
14. 487 U.S. 392, 108 S. Ct. 2449, 101 L. Ed. 2d 352 (1988).

trator (e.g., claims premised on the doctrine of *respondeat superior*, or on negligent hiring, retention or supervision), the intentional tort exception applies to bar any claim against the government. However, where the perpetrator's employment status and the characterization of the behavior as intentional are irrelevant to the claim, the exception is not applied to bar the claim. In *Sheridan*, a claim could be asserted against the government. An intoxicated off-duty serviceman fired several shots into an automobile on a public street near the naval hospital where he worked, causing physical injury to a passenger in the car. The theory of liability was independent of the serviceman's employment status. Liability was based on a government regulation that prohibited the possession of firearms on the naval base and required all personnel to report the presence of any firearms. The government had undertaken to provide care to a person who was visibly drunk and visibly armed, but failed to do so when naval corpsmen, attempting to take the serviceman to the emergency room, fled when they saw a rifle in his possession.

A vast majority of states, like the federal government, have abolished or modified sovereign immunity through judicial decision or legislation.[15] A case[16] in point involves a high school student in Pittsburgh, who had been accosted, assaulted and seriously beaten by a group of rowdy youths when he refused their demands for money. The Supreme Court of Pennsylvania found that the school was immune from liability, though it was alleged that the school knew similar criminal acts had occurred with great frequency in and about the same school. The school had done nothing about the situation. In a dissent, Justice Michael A. Musmanno stated:

> If the defendant school district had permitted a Bengal tiger to roam the school yard of the Schenley High School, and the minor plaintiff, Louis Husser, Jr., had been mangled by that savage beast, I cannot believe that the majority of this court would say that the defendant would not be guilty of neglect in allowing such a peril to life and limb to exist. The responsibility of holding in leash a raging mob of juvenile delinquents intent on ruinous mischief cannot be less.

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15. See W. Keeton, *Prosser and Keeton on The Law of Torts* 1044-45 (5th Ed. 1984).
16. Husser v. School Dist. of Pittsburgh, 425 Pa. 249, 228 A.2d 910 (1967).

> The school authorities knew of the criminal tidal wave which from time to time inundated the school property. The newspapers, as well as radio and television news programs, frequently referred to this disgraceful victimization of the small and the weak by the big and the brutal, but the authorities initiated no measures to offer protection to the schoolchildren. In consequence, Louis Husser suffered a broken jaw, facial paralysis, disfigurement and serious anatomical breakage.[17]

Justice Musmanno went on to argue that such "injustice cannot endure forever" and predicted "that the day will arrive, and it cannot be far off, when people will laugh at solemn decisions of the courts of law which declare that everybody is responsible for his civil wrongs at law, — everybody but the government."[18] Justice Musmanno's prediction did come true in 1973, after his death, when the Supreme court of Pennsylvania substantially abolished sovereign immunity.[19]

Where abolished by judicial decision, legislatures have typically responded by reinstating immunity to differing degrees.[20] In construing these statutes, it has been stated that "the rule is liability, immunity is the exception."[21] Accordingly: "Unless a legislature has clearly provided for immunity, the important societal goal of compensating injured parties for damages caused by willful or negligent acts must prevail."[22] Nevertheless, exceptions to immunity are often narrowly construed.[23]

While it is essential to review the status of sovereign immunity under state law, most states, similar to the federal government, have re-

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17. *Id.* 228 A.2d at 911 (Musmanno, J., dissenting).
18. *Id.*
19. Ayala v. Philadelphia Bd. of Educ., 453 Pa. 584, 305 A.2d 877 (1973) (school allegedly negligent in failing to supervise upholstery class resulting in student having arm caught in a shredding machine).
20. J. Rapp, *Education Law* § 12.02[2][e] (Matthew Bender & Company Incorporated). *See, e.g.*, Setrin v. Glassboro State College, 136 N.J. Super. 329, 346 A.2d 102 (1975) (statutory immunity applies to alleged failure to protect against the criminal propensity of a third person on school premises rather than a physical defect in the premises).
21. Lopez v. Southern California Rapid Transit Dist., 40 Cal. 3d 780, 710 P.2d 907, 221 Cal. Rptr. 840 (1985).
22. *Id.*
23. *See, e.g.*, Estate of Garza v. McAllen Indep. School Dist., 613 S.W.2d 526 (Tex. Civ. App. 1981) (school immune from liability where students were stabbed to death or injured by other students on school bus because, although immunity had been waived as to injuries arising from the use of motor vehicles, the incident did not arise from the use of a motor vehicle within the meaning of the waiver).

tained immunity for so-called discretionary acts and selected torts.[24] Thus, for example, a school may be immune from liability when it uses poor judgment in allowing two students to return to school after being involved in a fracas with another student, without taking special precautions to protect the other student. The management of student imbroglios, student discipline and school decorum is often considered a discretionary function.[25] At least one state, Illinois, has extended further statutory immunity to public schools for all but willful and wanton conduct in the discipline and supervision of students.[26] Accordingly, immunity remains a significant obstacle to victims of school crime or violence.[27] Immunity is most often avoided

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24. *See generally* Annot., 33 A.L.R.3d 703 (1970) (regarding the modern status of the doctrine of sovereign immunity as applied to public schools and institutions of higher learning).

25. Cady v. Plymouth-Carver Regional School Dist., 17 Mass. App. 211, 457 N.E.2d 294, 14 Educ. L. R. 1091, *review denied*, 391 Mass. 1103, 461 N.E.2d 1219 (1983).

26. Ill. Rev. Stat., ch. 122, §§ 24-24, 34-85a. *Immunity applied*: Mancha v. Field Museum of Natural History, 5 Ill. App. 3d 699, 283 N.E.2d 899 (1972) (allowing student who was assaulted during field trip to tour museum without supervision did not constitute willful or wanton negligence, if negligent at all, and therefore school was not liable); Booker v. Chicago Bd. of Educ., 75 Ill. App. 3d 381, 394 N.E.2d 452, 31 Ill. Dec. 250 (1979) (complaint failed to state claim based on willful and wanton conduct where student physically assaulted in restroom by a group of her classmates where their "leader" was appointed restroom monitor by teacher); Templar v. Decatur Pub. School Dist., 182 Ill. App. 3d 507, 538 N.E.2d 195, 131 Ill. Dec. 7, 53 Educ. L.R. 939 (1989) (no willful and wanton misconduct by school where child injured by another child; court rejected liability based on duty of parent to control child's conduct); Clay v. Chicago Bd. of Educ., 22 Ill. App. 3d 437, 318 N.E.2d 153 (1974) (where student was injured by being struck by another student while teacher was absent from classroom, willful and wanton negligence not alleged although other student allegedly had known propensities for violence). *Cf.* Cipolla v. Bloom Township High School Dist., 69 Ill. App. 3d 434, 388 N.E.2d 31, 26 Ill. Dec. 407 (1979) (where student was attacked and beaten as he stood outside the counselor's office on school premises, willful and wanton misconduct was sufficiently alleged); Gammon v. Edwardsville Community Unit School Dist., 82 Ill. App. 3d 586, 403 N.E.2d 43, 38 Ill. Dec. 28 (1980) (issue whether school was willfully and wantonly negligent when student injured from a battery inflicted upon a student was matter for jury). Other special educator immunities may be adopted. *See e.g.*, Crews v. McQueen, 385 S.E.2d 712, 57 Educ.L.R. 269 (Ga. Ct. App. 1989) (immunity for corporal punishment where imposition was authorized by law, within the scope of the imposer's authority, and was administered in the exercise of sound discretion); Atkinson v. DeBraber, 446 N.W.2d 637, 56 Educ. L.R. 597 (Mich. Ct. App. 1989) (by statute, gross abuse must be shown to recover for injuries sustained by students when force was used to maintain discipline).

27. *Selected other cases finding immunity:* Duyser v. School Bd. of Broward County, 573 So. 2d 130, 65 Educ. L.R. 655 (Fla. Dist. Ct. App. 1991) (school had immunity against liability where teacher performed satanic acts on his students including sexual abuse and battery); Wightman v. Town of Methuen, 26 Mass. App. Ct. 279, 526 N.E.2d 1079, 48 Educ. L.R. 640 (1988) (management of student imbroglios, student discipline and school decorum fall within discretionary function exception of tort claims act; older student injured another student by picking him up by his legs and spinning him around in the air); Willoughby v. Lehrbass, 150 Mich. App. 319, 388 N.W.2d 688, 33 Educ. L.R. 469 (1986) (where teacher allegedly imposed excessive corporal punishment, board

where non-discretionary or operational matters are involved.[28]

Official or Qualified Immunity

Another type of immunity, "official" immunity (as distinguished from "sovereign" immunity), arises when public officials are sued as individuals. Public officials are generally not personally liable for acts involving the negligent exercise of discretion. For acts that do not qualify as "discretionary" acts, that is, "ministerial" acts, there is no immunity.[29] Where there are no serious governmental concerns,[30] acts that create direct personal risks to others and acts involving ordinary considerations of physical safety are usually considered ministerial.

Official immunity applies only where discretion is exercised in good faith and without malice, improper purpose, or objectively unreasonable conduct.[31] Thus, the immunity is considered qualified.

In addition to whatever immunity is (or is not) available to an official, there is also a privilege to obey the command of judicial process fair on its face as well as the command of a valid statute.[32] Privilege may apply in other circumstances as well. For example, a school is not liable when an employee takes reasonable protective measures to prevent a mentally incompetent student from committing acts likely to cause serious bodily injury to himself or others.[33]

As in the case of governmental entities themselves, most states

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immune from negligent hiring or supervision claim as it was engaged in the exercise of a governmental function and superintendent and principal immune as engaged in discretionary acts in hiring and retaining teacher); Merritt v. Board of Educ., 513 A.2d 504, 34 Educ. L.R. 166 (Pa. Commw. Ct. 1986) (student raped in the school ladies' room by trespasser); Scott v. Willis, 543 A.2d 165, 47 Educ. L.R. 570 (Pa. Commw. Ct. 1988) (teacher sexually assaulted two students on school grounds; real property and willful misconduct exceptions to immunity inapplicable); Miller v. Gertz, 341 S.E.2d 620, 31 Educ. L.R. 611 (S.C. 1986) (student sexually assaulted in a school restroom by another student); Doe v. Board of Educ., 799 S.W.2d 246, 64 Educ. L.R. 602 (Tenn. Ct. App. 1990) (in case where teacher was assaulted by perpetrator who entered building through unlocked door, immunity applied because decision whether to leave a door unlocked and unattended for ingress and egress of school personnel was a performance of a discretionary function).

28. *See, e.g.*, Comuntzis v. Pinellas County School Bd., 508 So. 2d 750, 40 Educ. L.R. 1085 (Fla. Dist. Ct. App. 1987) (student beaten during lunch hour by fellow students stated claims; supervision of students is an operational and not discretionary function for purposes of immunity).
29. *See* Restatement (Second) of Torts § 895D (1979).
30. W. Keeton, *Prosser and Keeton on The Law of Torts* 1060 (5th Ed. 1984). *See, e.g.*, Baird v. Hosmer, 46 Ohio St. 2d 273, 347 N.E.2d 533 (1976) (gym teacher negligence).
31. *Id. See also* Restatement (Second) of Torts § 895D (1977).
32. *Id.* at 1066.
33. *See* Furrh v. Arizona Bd. of Regents, 139 Ariz. 83, 676 P.2d 1141, 16 Educ. L. R. 631 (1983)

have enacted statutes defining the nature and extent of tort immunity enjoyed by their employees.[34] A number of states have taken the approach of providing a defense to a suit against an employee or indemnifying or paying any judgment in the event of liability.[35]

Charitable Immunity

Another type of immunity, of importance to private schools, is charitable immunity. Numerous theories have been advanced to justify the application of charitable immunity to schools, including (1) that the donations to charitable organizations constitute a trust fund which may not be used for an unintended purpose; (2) that since no profits have been derived, the charity should not be liable for the acts of its employees; (3) that charities are engaged in the performance of governmental or public duties and therefore should be similarly immune; and (4) that it is in violation of public policy to hold charities liable since the overall good is protected by not diverting their money to pay damage claims.[36]

Only a handful of states retain charitable immunity.[37] In some states, efforts have been made to retain the immunity, at least in part, by statute. One state, for example, limits the liability of a charity where a tort is committed in the course of activities to accomplish its charitable purposes.[38] A partial immunity statute may, however, be subject to constitutional attack.[39] Also, even where charitable immunity applies, it may not extend to protect an agent or employee from liability.[40]

(claim for unlawful restraint rejected).

34. *See generally* Annot., 33 A.L.R.3d 703 (1970) (regarding the modern status of the doctrine of sovereign immunity as applied to public schools and institutions of higher learning).
35. W. Keeton, *Prosser and Keeton on The Law of Torts* 1068 (5th Ed. 1984). *See, e.g.*, Horace Mann Insurance Co. v. Independent School Dist., 355 N.W.2d 413, 20 Educ. L. R. 686 (Minn. 1984) (school obligated to defend, but not indemnify, teacher where malfeasance or willful or wanton neglect of duty involved).
36. J. Rapp, *Education Law* § 12.02[2][g] (Matthew Bender & Company Incorporated).
37. *See* Note, *The Doctrine of Charitable Immunity—the Persistant Vigil of Outdated Law*, 4 Baltimore L. Rev. 126, 128 n. 31 (1974); Annot., 38 A.L.R.3d 480 (1971) (regarding immunity of private schools and institutions of higher learning from liability in tort); Annot., 25 A.L.R.4th 513 (1983) (regarding the modern status of tort immunity of non-governmental charities).
38. *See, e.g.*, Mullins v. Pine Manor College, 389 Mass. 47, 449 N.E.2d 331, 11 Educ. L. R. 595 (1983) ($20,000 limit).
39. W. Keeton, *Prosser and Keeton on The Law of Torts* 1070-71 (5th Ed. 1984).
40. Restatement (Second) of Agency § 347(1). *See also* Mullins v. Pine Manor College, 389 Mass. 47,

Insurance Waiver of Immunity

Although the purchase of tort liability insurance traditionally does not constitute a waiver of immunity, many jurisdictions by judicial, legislative or even constitutional action have found that the purchase of liability insurance results in a waiver of immunity at least to the extent of insurance coverage.[41] Because few educational institutions rely solely on immunity to protect themselves against liability claims, insurance may assure a remedy to victims of crime or violence.[42] Insurance coverage, of course, must be applicable to the claim.[43] Coverage may not extend to claims involving intentional wrongdoing.[44]

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449 N.E.2d 331, 11 Educ. L. R. 595 (1983).

41. J. Rapp, *Education Law* § 12.02[2][c][E] (Matthew Bender & Company, Incorporated). *See also* Annot., 71 A.L.R.3d 6 (1976) (validity and construction of statute authorizing or requiring governmental unit to procure liabilty arising out of performance of public duties); Annot., 68 A.L.R.2d 1437 (1959) (liability or indemnity insurance carried by governmental unit as affecting immunity from tort liability).
42. *See, e.g.*, S.M. v. R.B., 811 P.2d 1295, 68 Educ. L.R. 160 (Mont. 1991) (purchase of insurance waived immunity to the extent of coverage where student was allegedly sexually abused by educational aide).
43. *See, e.g.*, Cotton States Mutual Insurance Co. v. Crosby, 244 Ga. 456, 260 S.E.2d 860 (1979) (no coverage under particular liability policy for alleged negligent breach of duty to safeguard school premises resulting in the attack and rape of student in the bathroom of a junior high school, but coverage for alleged unlawful detention of victim after rape.)
44. *See, e.g.*, Horace Mann Ins. Co. v. Independent School Dist. No. 656, 355 N.W.2d 413, 20 Educ. L.R. 686 (Minn. 1984).

Chapter VII

Claims for Failure to Protect Against or Prevent Non-Student Crime or Violence

One of the principal features of the "social contract" whereby men and women join together to form a society is the idea that government is in a better position to protect innocent, law-abiding citizens from criminal harm than are individuals who seek personal or familial retribution from wrongdoers. Thomas Jefferson summed up the matter quite succinctly in 1778 when he drafted the Preamble to the Bill for Proportioning Crimes and Punishments in Cases Heretofore Capital, for the Commonwealth of Virginia:

> Whereas it frequently happens that wicked and dissolute men, resigning themselves to the domination of inordinate passions commit violations on the lives, liberty and property of others, and the secure enjoyment of these have principally induced men to enter in to society, government would be defective in its purpose were it not to restrain such criminal acts...

Thus, government has assumed a duty to protect the members of society from criminal malefactors or, as Jefferson referred to them, the "wicked and dissolute." To what extent does this expectation of government extend to schools?[1]

Duty-at-Large Rule or Public Duty Doctrine

An element of all claims raised against schools involving a failure to protect against or prevent non-student crime or violence is a duty, or obligation, requiring schools to protect against or prevent that crime

1. *See generally* Annot., 1 A.L.R.4th 1100 (1980) (regarding liability of university, college or other school for failure to protect student from crime).

or violence.[2] The general rule in these cases excuses schools or their officials from liability on the theory that, while there may be a duty to protect the public *in general*, there is no duty to protect any *specific* individual, absent "special circumstances" or a "special relationship" that creates a duty to that particular individual. This rule is often referred to as the duty-at-large rule or public duty doctrine.

The duty-at-large rule is now firmly rooted in the law of torts. It seems to be grounded more on practical considerations than on principles of legal logic. If we consider the fact that the government, including agencies such as public schools, has taken upon itself the duty of protecting citizens from criminal depredations, and that, with the rare exception of people making citizens' arrests, the average person has no legal authority or duty to enforce the law, then it would seem logical that government should be held accountable when it fails in this responsibility. On the other hand, since most crime is foreseeable in the general sense, and, indeed, in some urban areas almost seems to be the rule rather than the exception, the call upon government to answer every time a crime is committed has been considered intolerable.[3]

The case that is most frequently cited for the duty-at-large rule is *Massengill v. Yuma County*,[4] decided by the Supreme Court of Arizona in 1969. In that case, the estate representatives of two persons who were killed by a drunken driver in an automobile accident alleged that the County of Yuma, its sheriff and deputy sheriff had been negligent when they failed to protect or prevent the deaths. According to the pleadings, Deputy Keenum was on duty during the late evening of August 8, 1964, in a marked car, equipped with a red dome light, outside two taverns. It was alleged that he knew or should have known that these establishments served alcoholic bever-

2. The elements of a tort are: (1) a duty, or obligation recognized by law, requiring the actor (*e.g.*, the school) to conform to a certain standard of conduct for the protection of others against unreasonable risks; (2) a failure to conform to the standard required; (3) a reasonably close causal connection between the conduct and the resulting injury, that is, proximate cause; and (4) actual loss or damage resulting to the interests of another. W. Keeton, *Prosser and Keeton on The Law of Torts* 164-65 (5th Ed. 1984). Of these elements, the issue of duty is the greatest obstacle and, conversely, the most common defense, to victims' claims.

3. *See* Chavez v. Tolleson Elementary School Dist., 12 Ariz. 472, 595 P.2d 1017 (1979). By its constitutional right to safe schools, California voters may well have determined that the financial burden is tolerable in that state's efforts to curb school crime and violence. *See* Chapter 2 *supra*.

4. 104 Ariz. 518, 456 P.2d 376 (1969).

ages to minors and were located "along a stretch of dangerous highway which was mountainous, winding and narrow, containing sharp curves and steep hills and was heavily traveled."[5]

Two men, Whaley and Wood, drove separately out of the parking lot in a reckless manner and continued along in a similarly reckless manner, side by side, one on the wrong side of the road, exceeding the speed limit and apparently intoxicated. They passed Deputy Keenum, who followed them but made no attempt to stop them until they caused an automobile accident which killed five persons, including those whose survivors brought the case. The estate representatives alleged that:

> All of the foregoing violations were committed in the presence of and were obvious and apparent to Keenum, who by virtue of his obligations as deputy sheriff thereupon had the duty to immediately arrest John Whaley and David Wood. Keenum knew or should have known that the driving of John Whaley and David Wood at that time created an extremely dangerous hazard to other motorists on River Road.[6]

The Supreme Court of Arizona ultimately upheld a dismissal of the lawsuit. Although the doctrine of sovereign immunity presented no defense because it had been abrogated in Arizona, the court recognized that the basic elements of a negligence action must nevertheless be shown. The general rule in cases involving governmental agencies and public officers is that: "If a duty which the official authority imposes upon an officer is a duty to the public, a failure to perform it, or an inadequate or erroneous performance, must be public, not an individual injury, and must be redressed, if at all, in some form of public prosecution."[7] Accordingly, the obligations of public officers are duties owed to the public at large, and not personally to each and every individual member of the public.[8]

The duty-at-large rule as recognized by the Supreme Court of Arizona became known and followed nationwide as the "*Massengill* rule."[9] Ironically, the Supreme Court of Arizona in 1982[10] reversed

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5. *Id.* at 520, 456 P.2d 378.
6. *Id.*
7. *Id.* at 521, 456 P.2d 379.
8. *Id.* at 523, 456 P.2d 381.
9. *See, e.g.*, Keane v. Chicago, 98 Ill. App. 2d 460, 240 N.E.2d 321 (1968) (no duty to protect

itself and expressly overruled its own *Massengill* rule. The fact that the rule is no longer the law in the state of its origin does not change in the slightest the wide recognition of the rule in states other than Arizona.[11]

Intervening Cause Doctrine

The duty-at-large rule generally applies when a victim sues a governmental entity or its officials, particularly in law enforcement. The duty-at-large rule has as its analogue in other third-party suits, including schools in some instances, the common law doctrine that, as a general rule, the criminal act of another is a superseding or intervening cause of injury which will shield the actor from liability to third-party victims.[12]

The *Restatement (Second) of Torts* has summarized the intervening cause doctrine as follows:

> There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless
>
> (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or
>
> (b) a special relation exists between the actor and the other which gives to the other a right to protection.[13]

There are two primary exceptions to this general rule which appear to permit liability to be found even in the absence of a special relationship between the actor and the third-party victim. The first exception is:

> The act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, *unless* the actor at the time of his negligent con-

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teacher murdered on public school grounds from criminal acts). *See generally* Annot., 46 A.L.R.3d 1084 (1972) (regarding the liability of a municiplality or other governmental unit for a failure to provide police protection).

10. Ryan v. State of Arizona, 134 Ariz. 308, 656 P.2d 597 (1982).
11. *See generally* Restatement (Second) of Torts § 314 (1965).
12. Independent School Dist. v. AMPRO Corporation, 361 N.W.2d 138, 22 Educ. L. R. 918 (Minn. Ct. App. 1985).
13. Restatement (Second) of Torts § 315 (1965).

> duct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime. (Emphasis added.)[14]

Very simply, if the likelihood of injury to an individual is such that the defendant knew or should have known that it might take place, that is, it was foreseeable, then he must act in a non-negligent manner.[15] Whether the likelihood of injury is foreseeable often determines liability.

A second exception established by the *Restatement* is:

> If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious, or criminal does not prevent the actor from being liable for harm caused thereby.[16]

This rationale appears somewhat circular on its face; however, it makes sense when it is interpreted to postulate the theory that some acts are taken for the precise purpose of preventing or attempting to prevent certain foreseeable criminal activity by third parties. If these acts are omitted or performed in a negligent manner then liability will attach. To illustrate, locks are provided for doors because of the likelihood that a criminally inclined person will be more deterred from attempting to force a locked door than he would be from simply stepping through an unlocked door or window. Hence, if there is no lock or the lock is defective, culpable negligence arises from the failure to perform adequately an act — furnishing of secure doors and windows — the purpose of which was to prevent foreseeable crime.[17]

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14. Restatement (Second) of Torts § 448 (1965).
15. *See also* Restatement (Second) of Torts S 302B which provides:

    > An act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, event though such conduct is criminal.

16. Restatement (Second) of Torts § 449 (1965).
17. In the final analysis, the positions taken by the Restatement, at least insofar as the exceptions to the intervening cause doctrine are concerned, are basically common sense rules. What third-party victims' rights litigation boils down to was summarized by a writer in the context of third-party practice involving contribution and indemnity (in Illinois):

    > Historically, third-party practice in Illinois can best be described as an effort by courts and attorneys to place ultimate liability in whole or in part for a loss where logic suggests such liability may really belong. Generally, this will be against the more negligent party or parties in appropriate proportions or against the party who by agreement undertook to assume the

The intervening cause doctrine, like the duty-at-large rule, typically is raised as a defense in victims' rights litigation. In general, it will serve as a defense unless: (1) the school is under a duty to the victim, because of some relation between them, to protect him against the crime;[18] (2) the school has undertaken the obligation of doing so; or (3) the school's conduct has created or increased the risk of harm through the crime.[19]

Failure to Protect or Prevent Cases in the School Setting

Almost every failure-to-protect case in the school setting involves a common legal scenario. The victim alleges that, in the circumstances of the case, the school had a duty to protect against or prevent crime and that this duty was breached, proximately causing injury or death to the victim. The defense counters with the duty-at-large rule or the intervening cause doctrine. The victim then asserts that an exception to the duty-at-large rule or intervening cause doctrine exists, such as a special relationship between the school and the victim. Where applicable, arguments are sculpted to either assert or avoid immunity doctrines.[20]

Victims' rights litigation in the school setting can be complicated by the fact that schools are often a microcosm of a community. The relationship between the school and a victim may not, for example, simply be equated to the relationship between a lessor and lessee or any other single legal relationship. Rather, schools at the primary, secondary or postsecondary level may have varying relationships with different victims, or even the same victim. In addition to whatever general student-school relationship may exist,[21] relationships

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risk of such loss. J. Kissel, *Development In Third Party Practice — Contribution and Indemnity* 71 Ill. B. J. 654 (1983).

Extrapolating these principles to third-party victims' rights cases, it is considered by many to be "logical" to transmit some or all of the loss to those third parties who were best in a position to protect against or prevent the injury. This is particularly true given the fact that the real cause of harm in victims' cases, the criminal himself, will usually be insolvent.

18. The duty may arise from a constitutional right to safe schools, as in California, common law, tort law, or otherwise. *See* Chapter 2 *supra*.
19. *See* Restatement (Second) of Torts § 449 comment a (1965).
20. The existence of a constitutional right to safe schools, as in California, will likely diminish the viability of the duty-at-large or intervening cause defenses, or constitute a specific exception to them. *See* Chapter 2 *supra*. This right should also avoid claims of immunity. *See* Chapter 6 *supra*.
21. *See generally* J. Rapp, *Education Law* § 8.01 (Matthew Bender & Company Incorporated) (regarding various theories of the student-school relationship).

may be legally analogous to those of parent-child (teacher-student or *in loco parentis*), master-servant (school-student employee or work study student), lessor-lessee (school-student dormitory resident), innkeeper-guest (school-temporary occupant of housing or student union hotel), landowner-occupier (school-trespasser, licensee or invitee), governmental body-citizen (public school-student or third party), security force-invitee, licensee or trespasser (school security force-student or third party),[22] and common carrier-passenger (school transportation service-student), among others. The nature of the relationship will often define the rights and obligations of the parties in victims' rights litigation. However, it can be said that a school's responsibility to protect students generally will be somewhat greater for younger, handicapped or immature students as compared with older, healthy students.

Against this general background, cases involving the liability of schools for non-student crime or violence fall into two categories[23] — failure to protect against criminal activity generally and failure to protect against specific foreseeable criminal activity.

Failure to Protect Against Criminal Activity Generally

Tolleson Elementary School had been in fall session for only one week. Shortly after school began one day, a puppy walked through the open door of the fifth grade classroom and down the aisle, causing the pupils to whisper and giggle. The teacher inquired if the dog belonged to anyone in the class. Several children raised their hands, including 10-year-old Regina Chavez, who told the teacher that the dog belonged to a neighbor. Regina asked if she could take the puppy home. Regina was sent with the dog to the principal's office to get permission. Permission was not given and Regina was told to return to her classroom. Regina did not argue, left with the dog and was subsequently observed leaving by a custodian, a student and a passerby. Regina disappeared. The only other evidence of disappearance

22. *See generally* D. Berman, *Law and Order on Campus: An Analysis of the Role and Problems of the Security Police*, 49 J. of Urban Law 513 (1971-72). *See also* Jones v. Wittenberg University, 534 F.2d 1203 (6th Cir. 1976) (security guard and university liable when fleeing student was negligently shot and killed).

23. There may also be some overlap with cases involving student crime and violence. *See* Chapter 8 *infra*.

was a tape-recorded statement of her abductor, John Cuffle, who was convicted and sentenced for murder. Cuffle abducted Regina outside the school grounds, took her to a field a few miles from the school and killed her. Her body was found three months later.[24]

The death of Regina Chavez was tragic. No doubt, some of those who saw her before her disappearance have wondered, "If only I had ...." But as tragic as her death was, can a school be held liable for her death?

Advocates for victims argue that we live in a ferociously crime-ridden society in which violence at the hands of individuals or mobs occurs almost on a random basis, with no prior warning. Because crime in general is so likely, it must be foreseen and either prevented or individuals, such as Regina Chavez, must be protected from it. This "crime-at-large" theory may be flanked, as it was in the *Chavez* case, by the claim that the school or other defendant had a general obligation to supervise the victim[25] or perpetrator.[26]

The Court in *Chavez*, as well as courts generally,[27] reject the crime-at-large theory, typically relying on the duty-at-large rule or the intervening cause doctrine. Where there are no facts indicating that school personnel should have been aware of the potential of criminal conduct in the area of the school, a school will not be liable for criminal conduct which may occur although it may, perhaps, be negligent by creating a situation which afforded an opportunity to a third

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24. *See* Chavez v. Tolleson Elementary School Dist., 122 Ariz. 472, 595 P.2d 1017 (1979) (affirming a decision of then Superior Court Judge Sandra Day O'Connor to grant defendants' motion for a judgment notwithstanding the verdict after a jury had awarded $400,000 to Regina's father).
25. Under Arizona law, as in most states, a school is required to provide for adequate supervision over its students. This duty is breached when conduct falls below the standard of ordinary care by creating an unreasonable risk of harm.
26. *See, e.g.*, Naishitt v. United States, 611 F.2d 1350 (10th Cir. 1980), *cert. denied*, 449 U.S. 885, 101 S. Ct. 239, 66 L. Ed. 2d 111 (1980) (the United States is not liable under the Federal Tort Claims Act for failing to supervise off-duty airmen who murdered an individual).
27. *Selected other cases rejecting liability*: Keane v. City of Chicago, 98 Ill. App. 2d 460, 240 N.E.2d 321 (1968) (no duty on the part of city or its police force to prevent the killing of a school teacher on school property); Hall v. Board of Supervisors Southern University, 405 So. 2d 1125, 1 Educ. L. R. 468 (La. Ct. App. 1981) (no liability when non-student shot student as she awaited an elevator); Setrin v. Glassboro State College, 136 N.J. Super. 329, 346 A.2d 102 (1975) (no liability for stab wounds incurred during a riot at a basketball game on a state college campus; third party action was an intervening cause); Salmond v. Board of Educ., 131 A.D.2d 829, 517 N.Y.S.2d 90, 40 Educ. L.R. 386 (1987) (no claim where student was assaulted by armed individuals on front step of his school).
28. Chavez v. Tolleson Elementary School Dist., 122 Ariz. 472, 595 P.2d 1017 (1979); Joner v.

person to commit a crime.[28] To make a school liable for unforeseeable criminal conduct is untenable. Indeed, "[i]f it were otherwise, prevision would become paranoia and the routines of daily life would be burdened by intolerable fear and inaction."[29] Similarly, it was held in a case involving the murder of a public school teacher on school grounds by one of her students, that the duty of law enforcement agencies to protect such a teacher from criminal acts is no more than the general duty owed to all citizens to protect the safety and well-being of the public at large.[30]

A minority of courts have rejected the duty-at-large rule. In *Ryan v. State of Arizona*,[31] the Supreme Court of Arizona expressly rejected the duty-at-large rule which it had originated in the *Massengill* case and held that victims could sue government officials for failure to protect.

The *Ryan* case involved the escape from custody of a 17-year-old inmate, John Myers, who had been held at the Arizona Youth Center. After his escape, Myers robbed a convenience store and shot the plaintiff, David Ryan, at point-blank range with a sawed-off shotgun, causing him serious and permanent injury. Ryan sued the state and individual correctional officials for gross negligence in the supervision of Myers, who had a long history of criminal behavior and three previous escapes from the Department of Corrections.

The Supreme Court of Arizona ultimately recognized that the "horribles" sought to be prevented by the duty-at-large rule were not warranted. Insurance coverage, which is readily available, could reduce the potential financial burden, as it does in almost every other situation in which state liability is possible (or even probable); and, government officials should have no fear to act because under state law they were already immune from personal liability. Therefore, the court concluded that governmental immunity should be available as a defense only when its application is necessary to avoid a severe hampering of a governmental function or thwarting of established public policy. Otherwise, the state and its agents should be subject to the

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Board of Educ., 496 A.2d 1288, 27 Educ. L. R. 203 (Pa. Commw. 1985). *See also* Restatement (Second) of Torts S 448 (1977); 62 Am. Jur. 2d, *Premises Liability*, § 200 (1972).

29. Chavez v. Tolleson Elementary School Dist., 122 Ariz. 472, 595 P.2d 1017 (1979).
30. Keane v. Chicago, 98 Ill. App. 2d 460, 240 N.E.2d 321 (1968).
31. 134 Ariz. 308, 656 P.2d 597 (1982).
32. *Id.* 656 P.2d at 600.

same tort laws as private parties.[32]

Failure to Protect Against or Prevent Specific Foreseeable Criminal Activity

Madelyn Miller, a 19-year-old junior at the State University of New York (SUNY) at Stony Brook, was confronted in her dormitory's laundry room at approximately 6:00 a.m. by a man wielding a large butcher knife. She was blindfolded and prodded out of the room through an unlocked outer door from the basement, back in another unlocked entrance to the dormitory, up some stairs to the third floor and into a dormitory room. She was raped twice at knife point and threatened with mutilation and death if she made any noise. Her assailant, who was never identified, finally led her out to the parking lot where he abandoned her.[33]

Strangers were not uncommon at the time in the dormitory hallways at SUNY, and there had been reports to campus security of men being present in the women's bathroom. Miller had herself twice complained to the dormitory manager about non-residents loitering in the dormitory lounges and hallways, unaccompanied by resident students. The school newspaper had published accounts of numerous crimes in the dormitories — armed robbery, burglaries, criminal trespass and a rape by a non-student. Notwithstanding these reports, the doors of the approximately ten entrances to the dormitory building were kept unlocked at all hours, although each contained a locking mechanism.[34]

To avoid the duty-at-large rule or the intervening cause doctrine, "special circumstances" or a "special relationship" creating a duty to the victim must be established.[35] The status of a student as a dormi-

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33. Miller v. State of New York, 62 N.Y.2d 506, 467 N.E.2d 493, 478 N.Y.S.2d 829, 19 Educ. L. R. 618 (1984). On remand, the award in this case was fixed at $400,000. See Miller v. State of New York, 487 N.Y.S.2d 115, 23 Educ. L. R. 1021 (N.Y. App. Div. 1985).

34. *Id.*

35. This principle and many others relevant to victims' litigation are crystalized in a few sections of the Restatement (Second) of Torts. The Restatement was prepared under the auspices of the American Law Institute. Many eminent legal scholars began an exhaustive analysis of the entire field of tort law and approved the Restatement that summarizes or recommends rules to be followed. Among the most helpful rules are stated at sections 314 A (special relations giving rise to duty to aid or protect), 315 (duty to control conduct of third persons), 344 (liability for acts of third persons with respect to premises open to the public), 448 (intentionally tortious or criminal acts done under opportunity afforded by actor's negligence), and 449 (tortious or criminal acts to prob-

tory resident is the most frequent instance where a duty arises with respect to third-party crime or violence because of special circumstances or a special relationship.

Although a school is usually not liable for some "generalized danger," it may be liable for injuries to its dormitory residents — the equivalent of a lessor-lessee or landlord-tenant relationship.[36] Thus, in the case of Madelyn Miller, SUNY was obligated to maintain its property "in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury and the burden of avoiding the risk."[37] Under this standard, a school as "a landlord has a duty to maintain minimal security measures related to a specific building itself in the face of foreseeable criminal intrusion upon tenants."[38] Specifically, SUNY "had a duty to take the rather minimal security measure of keeping the dormitory doors locked when it had notice of the likelihood of criminal intru-

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ability of which makes actor's conduct negligent).

36. The landlord-tenant relationship generally does not, in and of itself, impose a duty upon the landlord to protect his tenants against criminal conduct of third persons. A landlord must recognize and assume the duty to protect its tenants from foreseeable criminal conduct. *See, e.g.*, Cutler v. Board of Regents, 459 So. 2d 413, 21 Educ. L. R. 1071 (Fla. Dist. Ct. App. 1984). *See generally* 43 A.L.R.3d 331 (1972) (regarding landlord's obligation to protect tenant against criminal activites of third persons).

    In making housing or dormitory contracts with students, schools often utilize "license" agreements, rather than "lease" agreements. Designation of a student as a licensee rather than a lessee or tenant has been upheld for some purposes, such as tenant eviction, but generally has not be upheld for tort liability purposes. *See* Duarte v. State of California, 88 Cal. App. 3d 473, 151 Cal. Rptr. 727 (1979) (depublished by the Supreme Court of California).

    Probably the single most important case favorable to plaintiffs in victim versus landlord lawsuits is Kline v. 1500 Massachusetts Avenue, 141 App. D.C. 370, 439 F.2d 477 (D.C. Cir. 1970), in which liability was imposed where residents were assaulted in common hallways.

    Other relationships have not given rise to an obligation to protect. *See, e.g.*, Vitale v. City of New York, 60 N.Y.2d 861, 458 N.E.2d 817, 470 N.Y.S.2d 358, 15 Educ. L. R. 515 (1983) (special relationship not established where school adopted detailed security plan, which it failed to enforce, by fact that teacher had a role to play in the implementation of the plan); Corcoran v. Community School Dist., 494 N.Y.S.2d 747, 28 Educ. L. R. 554 (N.Y. App. Div. 1985) (where teacher was attacked as she reentered school premises after lunch, no special relationship created by employment of additional security guards absent evidence that they were employed specifically to protect the teacher or a limited class of teachers of which she was a member).

    Still other relationships have. *See, e.g.*, Lopez v. Southern California Rapid Transit Dist., 40 Cal. 3d 780, 710 P.2d 907, 221 Cal. Rptr. 840 (1985) (bus passenger).

37. Miller v. State of New York, 62 N.Y. 2d 506, 513, 467 N.E.2d 493, 478 N.Y.S.2d 829, 19 Educ.L.R. 618 (1984) (citing cases).

38. *Id.*

39. *Id.* 62 N.Y.2d at 514. The Court did not decide whether SUNY similarly would be liable for a fail

sion."[39] The landlord-tenant relationship has been a common argument raised when dormitory residents seek damages from a school after being victimized.[40]

The Supreme Court of Massachusetts in *Mullins v. Pine Manor College* [41] similarly found "that colleges of ordinary prudence customarily exercise care to protect the well-being of their resident students, including seeking to protect them against the criminal acts of third parties."[42] As in the Madelyn Miller case, *Mullins* involved the rape of dormitory resident.[43] In addition to relying on the general ex-

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ure to keep all dormitory doors locked at all times. *Id.* 62 N.Y.2d at 514-15 (Kaye, J., concurring). *See also* Schultz v. Gould Academy, 332 A.2d 368 (Me. 1975) (where 16-year-old student was criminally assaulted by an unidentified intruder, negligence issue presented where school watchman became aware of male intruder in girls' dormitory when he saw footprints leading up to, but not away from, building).

40. Other arguments may be raised to flank the landlord-tenant relationship including claims of breach of warranty of habitability, misrepresentation of a dormitory as safe and secure, and breach of an express contract to protect. *See* Cutler v. Board of Regents, 459 So. 2d 413, 21 Educ. L. R. 1071 (Fla. Dist. Ct. App. 1984).

41. 389 Mass. 47, 449 N.E.2d 331, 11 Educ. L. R. 595 (1983).

42. *Id.* 449 N.E.2d at 335.
The Court in Mullins continued:

> This consensus stems from the nature of the situation. The concentration of young people, especially young women, on a college campus, creates favorable opportunities for criminal behavior. The threat of criminal acts of third parties to resident students is self-evident, and the college is the party which is in the position to take those steps which are necessary to ensure the safety of its students. No student has the ability to design and implement a security system, hire and supervise security guards, provide security at the entrance of dormitories, install proper locks, and establish a system of announcement for authorized visiters. Resident students typically live in a particular room for a mere nine months and, as a consequence, lack the incentive and capacity to take corrective measures. College regulations may also bar the installation of additional locks or chains. Some students may not have been exposed previously to living in a residence hall or in a metropolitan area and may not be fully conscious of the dangers that are present. Thus, the college must take the responsibility on itself if anything is to be done at all.
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> 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. *Id.* 449 N.E.2d at 335-36.

43. Pine Manor College is a four year college for women. The college had taken various security measures, including surrounding much of the campus with a six foot high chain link fence, use of security guards to admit and register visiters during certain hours, use of visitor escorts and the stationing of a guard at an observation post. Another guard was assigned to patrol the campus. He was responsible for making rounds to the dormitory areas every 15 to 30 minutes to check the doors and gates to see that they were locked. Pine Manor College was located in an area with relatively few reports of violent crime, although a dormitory building had been burglarized a year be-

pectation of students that they will be protected from foreseeable harm, the court also recognized that the college had voluntarily assumed, in consideration of tuition or dormitory fees, a duty to provide their students with protection from the criminal acts of third parties.[44] Students, in turn, relied on this undertaking.[45] Having been negligent in protecting Lisa, the college was liable for damages.[46]

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fore the incident and the evening before a young man scaled the outer fence around the campus.

Lisa Mullins had returned to her dormitory at approximately 3:00 o'clock a.m. with two friends. They entered through an exterior gate that was unlocked. After visiting with friends, she returned to her room, locked her door and went to sleep. Between 4:00 and 4:30 o'clock a.m., she was awakened by an intruder. He ultimately led her out of the building and across an outside courtyard. They left the courtyard by proceeding under the chains of one of the exterior gates that was not secured tightly. They walked down a bicycle path toward the refectory, the college's dining hall. After marching about in front of the refectory, they entered the refectory through an unlocked door and spent several minutes inside. They proceeded out of the refectory and marched around in front. They then went back inside, and the assailant raped her. The entire incident lasted 60 to 90 minutes, and they were outside on the campus for at least 20 minutes.

44. According to the court: "Adequate security is an indispensable part of the bundle of services which colleges, and Pine Manor, afford their students." Mullins v. Pine Manor College, 389 Mass. 47, 449 N.E.2d 331, 336, 11 Educ. L. R. 595 (1983).

45. The court noted:

> ... [I]t is quite clear that students and their parents rely on colleges to exercise care to safeguard the well-being of students. When students are considering enrolling in a particular college, they are likely to weigh a number of factors. But a threshold matter is whether the college has undertaken to provide an adequate level of security. Thus, prospective students and their parents who visit a college are certain to note the presence of a fence around the campus, the existence of security guards and any other visible steps taken to ensure the safety of students. They may inquire as to what other measures the college has taken. If the college's response is unsatisfactory, students may choose to enroll elsewhere. Mullins v. Pine Manor College, 389 Mass. 47, 449 N.E.2d 331, 336, 11 Educ. L. R. 595 (1983).

46. The court pointed out that the following deficiencies in the college's security system could have warranted the verdict against the college:

> An observation post near the main entrance is situated at such a distance from the fence that an intruder could climb over the fence without being detected by the guard on duty. The exterior gates leading into the courtyards were not difficult to scale or to open. The walls surrounding the courtyards were too low to be adequately protective. The college used a single key system whereby the same key would open the door to the commons building, the door to the dormitory and the door to the individual room. Only two security guards were on duty at any time. No system was utilized to ensure that the guards were performing their patrols around the campus. The locks on the doors to the dormitory and the individual rooms were easy to pick, and neither deadbolts nor chains were used. The jury also could have credited the opinion of the plaintiff's expert that the security provided by Pine Manor was inadequate to protect a student in the position of the plaintiff. Additionally, there was evidence that after the evening of the attack, the college hired two additional guards to patrol the villages [dormitories] from 11:30 p.m. to 7:30 a.m. and installed chains on the interior side of the doors to individual rooms. There was also ample evidence that the guards failed to perform their duties both prior to the attack and on the evening of the attack. There was evidence that the locks to the individual rooms could be opened with a credit card. There was also evidence that the door to Mullins's dormitory lacked a knife guard which the defendants' expert wit-

As a possessor of land, a school may incur liability other than as a landlord. Traditionally, those occupying or using land other than as tenants have been categorized as trespassers, licensees and invitees.[47] The rights and obligations of the parties vary based on the characterization given the occupant, with the least care due a trespasser and the greatest care due an invitee.

A trespasser is a person who enters or remains upon land without consent.[48] With some exceptions,[49] a school is not liable for injury to trespassers caused by its failure to exercise reasonable care to put its land in a safe condition for them, or to carry on its activities in a manner which does not endanger them.[50]

A licensee is a person who is privileged to enter or remain on land by virtue of the possessor's consent.[51] In the school setting, licensees would include persons allowed to come upon land for their own purposes rather than the school's, such as those conducting[52] or attending[53] a meeting in facilities gratuitously provided. A school is generally not liable for harm caused to licensees by its failure to carry on its activities with reasonable care for their safety, unless it should expect that they would not discover or realize the danger or they do not know or have reason to know of the possessor's activities and the risk involved.[54]

Invitees are of two types, public invitee and business visitor. A public invitee is a person who is invited to enter or remain on land as

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ness indicated should have been present. Mullins v. Pine Manor College, 389 Mass. 47, 449 N.E.2d 331, 338, 11 Educ. L. R. 595 (1983).

47. A minority of states have abolished distinctions based upon the entrant's status as a trespasser, licensee or invitee, typically imposing ordinary negligence principles of foreseeable risk and reasonable care. Greater care is thus due trespassers and licensees than generally exists. *See, e.g.*, Rowland v. Christian, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968); Basso v. Miller, 40 N.Y.2d 233, 352 N.E.2d 868, 386 N.Y.S.2d 564 (1976). *See generally* W. Keeton, *Prosser and Keeton on The Law of Torts* 432-34 (5th Ed. 1984).
48. *See* Restatement (Second) of Torts § 329 (1965).
49. A primary exception pertains to trespassing children. For example, under the so-called "attractive nuisance" doctrine, the possessor of land may be subject to liability for physical harm to children trespassing thereon caused by certain artificial conditions. Restatement (Second) of Torts § 339 (1965).
50. W. Keeton, *Prosser and Keeton on The Law of Torts* 393-94 (5th Ed. 1984).
51. Restatement (Second) of Torts § 330 (1965).
52. Britt v. Allen County Community Junior College, 230 Kan. 502, 638 P.2d 914 (1982).
53. Smith v. Board of Educ., 204 Kan. 580, 464 P.2d 571 (1970).
54. *See* Restatement (Second) of Torts § 341 (1965).
55. Restatement (Second) of Torts § 332 (1965).

a member of the public for a purpose for which the land is held open to the public,[55] such as a person attending a class reunion.[56] A business visitor is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with the business dealings of the possessor of the land,[57] such as a patron of a college[58] or an employee of an independent school food service operator.[59] A school is subject to liability to its invitees for physical harm caused to them by its failure to carry on its activities with reasonable care for their safety, if it should expect that they will not discover or realize the danger or will fail to protect themselves against it.[60] Thus, a school is under an affirmative duty to protect invitees not only against dangers of which it is aware, but also against those which, with reasonable care, it might discover.[61] Students have often been characterized as invitees for purposes of victims' rights litigation.[62]

Where a victim can establish his status as an invitee, a school may be liable for injuries sustained from foreseeable crime. In *Peterson v. San Francisco Community College District*,[63] for example, the Supreme Court of California considered the liability of the City College of San Francisco for injuries sustained by Kathleen Peterson as a result of an attempted daylight rape while she was ascending a stairway in the school's parking lot. An unidentified male jumped from behind "unreasonably thick and untrimmed foliage and trees" which adjoined the stairway and attempted to rape her. The assailant used a *modus operandi* which was similar to that used in previous attacks on the same stairway. The college and other defendants were aware that other assaults of a similar nature had occurred in that area and had taken steps to protect students who used the parking lot and stairway. It had not, however, publicized the prior incidents or in any way is-

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56. Guilford v. Yale University, 128 Conn. 449, 23 A.2d 917 (1942).
57. Restatement (Second) of Torts § 332 (1965).
58. Jay v. Walla Walla College, 53 Wis. 2d 590, 335 P.2d 458 (1959).
59. Aarhus v. Wake Forest Univ., 291 S.E.2d 837, 4 Educ. L. R. 887 (N.C. Ct. App. 1982).
60. Restatement (Second) of Torts § 341 A (1965).
61. W. Keeton, *Prosser and Keeton on The Law of Torts* 419 (5th Ed. 1984).
62. *See, e.g.*, Jesik v. Maricopa County Community College Dist., 125 Ariz. 543, 611 P.2d 547 (1980); Peterson v. San Francisco Community College Dist., 36 Cal. 3d 799, 685 P.2d 1193, 205 Cal. Rptr. 842, 19 Educ. L. R. 689 (1984); Relyea v. State, 385 So. 2d 1378 (Fla. Dist. Ct. App. 1980); Schultz v. Gould Academy, 332 A.2d 368 (Me. 1975).
63. 36 Cal. 3d 799, 685 P.2d 1193, 205 Cal. Rptr. 842, 19 Educ. L. R. 689 (1984).
64. *Id.* The court cited Dailey v. Los Angeles Unified School Dist., 2Cal. 3d 741, 470 P.2d 360, 87

sued warning of the danger of attack in the area. Ms. Peterson had paid a fee for a parking permit to use the parking lot.

The court recognized that an enrolled student using a parking lot in exchange for a fee is an invitee to whom the possessor of premises would ordinarily owe a duty of due care. As the college was in a superior position to its students "to know about the incidences of crime and to protect against any recurrences," it was obligated "to exercise reasonable care to keep the campus free from conditions which increase the risk of crime" or warn students by "alerting them to unknown dangers and encouraging them to exercise more caution."[64]

Other cases have also considered the liability of schools for injuries

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Cal. Rptr. 376 (1970), and observed that "in some instances the relationship of a school district to its student gives rise to a duty of care." *Id.* 685 P.2d 1196 n. 3. This suggests an even greater duty of care would exist at a primary and secondary level of education.

The court distinguished the case of Hayes v. State of California, 11 Cal. 3d 469, 521 P.2d 855, 113 Cal. Rptr. 599 (1974), in which two considerations weighed against holding a university liable for attacks upon two young men who were using the university's beach at night. Those considerations were, first, that the public was well aware of the incidence of violent crime, particularly in unlit and little used places, and second, to the extent that warnings of criminal conduct might serve a beneficial purpose, it — unlike cautioning against a specific hazard in the use of property — admonishes against any use of the property whatever, thus effectively closing the area, a matter better left to legislative and administrative bodies, rather than the judiciary.

In Peterson the court noted that:

> While these factors may have been appropriate considerations in the context of Hayes they are inapplicable here. In the closed environment of a school campus where students pay tuition and other fees in exchange for using the facilities, where they spend a significant portion of their time and may in fact live, they can reasonably expect that the premises will be free from physical defects and that school authorities will also exercise reasonable care to keep the campus free from conditions which increase the risk of crime. Here the parking lot was not one of the "unlit and little used places" to which we referred in Hayes. Plaintiff was lawfully on the campus and was attacked in broad daylight in a place where school officials knew she and others as well as the assailant might be. Further, the warnings sought here would not result in preventing the students from using the campus or its facilities, only in alerting them to unknown dangers and encouraging them to exercise more caution.
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> An examination of the policies discussed in ...[previous] cases compels the conclusion that the defendants did in fact owe the plaintiff a duty of care. First, the allegations, if proved, suggest that harm to the plaintiff was clearly foreseeable. In light of the alleged prior similar incidents in the same area, the defendants were on notice that any woman who might use the stairs or the parking lot would be a potential target. Secondly, it is undisputed that plaintiff suffered injury. Third, given that the defendants were in control of the premises and that they were aware of the prior assaults, it is clear that failure to apprise students of those incidents, to trim the foliage or to take other protective measures closely connects the defendants' conduct with plaintiff's injury. These factors, if established [upon trial], also indicate that there is moral blame attached to the defendants' failure to take steps to avert the foreseeable harm. Imposing a duty under these circumstances also furthers the policy of preventing future harm. Finally, the duty here does not place an intolerable burden on the defendants.

sustained by trespassers, licensees and invitees as a result of crime.[65] Liability has been found, or at least alleged, in some cases,[66] but not others.[67] Foreseeability of crime and violence is typically essential to finding liability. Foreseeability is often based on prior incidents of crime and violence of a similar nature which are not too remote in time.[68]

If a party is unable to establish the status of invitee, licensee or

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As a community college district responsible for overseeing the campus, the defendant and its agents are in a superior position to know about the incidences of crime and to protect against any recurrences. *Id.* 685 P.2d 1201-02.

In Rowland v. Christian, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968), the court abolished the distinction among the respective duties owed to trespassers, licensees and invitees. Other courts would likely distinguish Hayes and Peterson by stating the the victims in Hayes were licensees, while the victim in Peterson was an invitee.

65. Cases often involve rape. More than any other area of victims' rights litigation in the school setting, the issue of rape on campus has created the most interest among legal commentators. *See* N. Hauserman and P. Lansing, *Rape on Campus: Postsecondary Institutions as Third Party Defendants*, 8 J. Coll. & U. L. 182 (1981); M. Nolte, *Rape on Campus: When is the Landlord Liable?*, 25 Educ. L. R. 997 (1985).

66. *See, e.g.*, Nieswand v. Cornell Univ., 692 F. Supp. 1464, 49 Educ. L. R. 216 (N.D.N.Y. 1988) (issues of fact precluding summary judgment presented as to whether adequate security measures were taken in dormitory and implied contract obligations of university where student shot by disappointed suitor); Stockwell v. Board of Trustees, 148 P.2d 405 (Cal.Ct. App. 1944) (student loss of eye after being struck by shot from BB gun discharged by an unknown boy; whether university negligently permitted use of grounds by boys using BB guns although campus was a game refuge was a matter for jury); District of Columbia v. Doe, 524 A.2d 30, 38 Educ. L. R. 1037 (D.C. Ct. App. 1987) (court upheld verdict awarding $250,976 in damages to fourth grade pupil lured away from her second floor classroom by an unknown intruder and raped); McGraw v. Orleans Parish School Bd., 519 So. 2d 847, 45 Educ. L.R. 437 (La. Ct. App. 1988) (award of damages upheld where student was abducted on school grounds during the school day, taken to a nearby abandoned house and sexually assaulted).

See also Duarte v. State of California, 88 Cal. App. 3d 473, 151 Cal. Rptr. 727 (1979) (school liable where student raped and murdered in dormitory; school had knowledge of chronic pattern of violent attacks, rapes and violence directed toward female students). The Supreme Court of California subsequently directed that the Duarte opinion not be published in the official California case reporter. Thus, the precedential value of Duarte nationwide is diminished and in California is essentially eliminated. *See* Baldwin v. Zoradi, 123 Cal. App. 3d 275, 294, 176 Cal. Rptr. 809 (1981). The opinion nevertheless provides an example of the approach which has been taken by a court in victims' rights cases.

67. *See, e.g.* Hayes v. State, 11 Cal. 3d 469, 521 P.2d 855, 113 Cal. Rptr. 599 (1974) (in action where one person was seriously injured and another died as a result of an attack by unknown persons while asleep in the night on a beach of the campus of the University of California, held no duty to warn against criminal conduct where public was aware of incidence of violent crime and no liability unless a dangerous condition on the property itself contributed to the assaults); Klobuchar v. Purdue Univ., 553 N.E.2d 169 (Ind. Ct. App. 1990) (no liability where student was shot on campus by her estranged husband).

68. *See* Gallagher v. City of New York, 30 A.D.2d 688, 292 N.Y.S.2d 139 (1968) (evidence of pushing incident which occurred 20 months previously and of another incident involving a student be-

even trespasser, no duty whatsoever will arise. Where a non-student walking on a sidewalk adjacent to a school was foreceably taken through an unsecured gate to the school grounds, beaten and sexually assaulted, the school will not be liable because the passerby was neither invited nor permitted on school property.[69]

Status as Student Sufficient to Establish Duty

Tammy Fazzolari, a 15-year-old student at Franklin High School, was routinely dropped off at 6:50 a.m. by her mother. Although classes did not begin until 8:15 a.m., she, like many other students, would arrive early at school to study, chat with friends or work on activities. The staff began opening the doors each day at 6:00 a.m., and all doors were opened by 6:45 or 7:00 a.m. As Tammy was about to enter the school building shortly before 7:00 a.m. one day, an unknown assailant grabbed her from behind and dragged her to some nearby bushes, where he beat and raped her.[70]

Only 15 days before the attack on Tammy, a woman delivering newspapers to the school was attacked and raped at the school around 4:30 a.m. Some school staff members became aware of the attack the day it occurred and promptly directed that the location and time of the paper drop be changed. No warning was given to students after the attack and no change was made in any existing security measures. No rules were adopted concerning students' time of arrival. Further, monitors still did not begin patrolling the halls or grounds until classes began.[71]

Where non-student crime or violence is involved, courts generally find a duty to protect only where "special circumstances" or a "special relationship" exists. This frequently involves reference by analogy to a relationship traditionally giving rise to a duty, such as the landlord-tenant (or educational institution-dormitory resident) relationship.[72] The trend is to recognize that a victim's status as a student

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ing slightly scratched on the cheek by a knife wielded by another student four months previously may not be considered in case involving rape of 13-year-old student as she proceeded on an errand at her teacher's request).

69. Joner v. Board of Educ., 496 A.2d 1288, 27 Educ. L. R. 203 (Pa. Commw. 1985) (isolated criminal act was not foreseeable use of school property or likely injury resulting from unsecured gate).

70. Fazzolari v. Portland School Dist. No. 1J, 303 Or. 1, 734 P.2d 1326, 38 Educ. L. R. 809 (1987), *aff'g*. 78 Or. App. 608, 717 P.2d 1210, 32 Educ. L. R. 281 (1986).

71. *Id.*

72. *See infra* (regarding failure to protect against or prevent specific foreseeable criminal activity).

will itself be sufficient to establish a duty of care even as to non-student crime or violence.[73]

A leading case adopting this view is the decision involving Tammy Fazzolari.[74] In that case, Justice Linde of the Oregon Supreme Court emphasized that traditional reliance on liability grounded on a school's liability as a possessor of land "has only marginal relevance."[75] Instead, a school's duty of care and supervision "is a special duty arising from the relationship between educators and children entrusted to their care apart from any general responsibility not unreasonably to expose people to a foreseeable risk of harm."[76] This duty applies not only to harm done to a student by other students, but also where third persons inflict the injury as in Tammy's case.[77] Under this standard, "negligence toward a student is tested by an obligation or reasonable precautions against foreseeable risks beyond those that might apply to other persons."[78]

Where the student-school relationship[79] is sufficient to support a duty to protect against non-student crime or violence, liability in an individual case still requires that the harm to the student be reasonably foreseeable. "Students are not at risk merely because they are at school" because schools are not inherently dangerous. Instead, "an unusual risk of harm at a specific location on school grounds" that "was reasonably foreseeable in the absence of supervision or a warning" must be shown.[80] Accordingly, "school authorities who know of

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73. *See* J. Rapp, *Education Law* § 12.06[5][c] (Matthew Bender & Company, Incorporated). *See, e.g.*, Leger v. Stockton Unified School Dist., 202 Cal. App. 3d 1448, 249 Cal. Rptr. 688, 47 Educ. L. R. 1093 (1988) (claim alleged where student battered by non-student in school bathroom where he was changing his clothes before wrestling practice; "we think it obvious that the individual school employees responsible for supervising plaintiff, such as the principal and the wrestling coach, also had a special relation with plaintiff upon which a duty of care may be founded"); Doe v. City of New Orleans, 577 So. 2d 1024, 67 Educ. L. R. 373 (La. Ct. App.), *cert. denied*, 580 So. 2d 924 (La. 12991) (school board could be held liable where teacher and principal were not in claim where child allowed to go to restroom alone and was there sexually molested by an unknown man wearing a ski mask, because board had duty to formulate and properly promulgate an official policy against allowing young children to leave the classroom alone).

74. Fazzolari v. Portland School Dist. No. 1J, 303 Or. 1, 734 P.2d 1326, 38 Educ. L. R. 809 (1987).

75. *Id.* 734 P.2d at 1336-37.

76. *Id.* 734 P.2d at 1337.

77. *Id.*

78. *Id.* Justice Linde explained this duty is based, in part, on the compulsory school attendance law because it "virtually mandates that children be so entrusted to a school and, for most families, leaves little choice as to which school."

79. This relationship is discussed in further detail in Chapter 7.

80. Leger v. Stockton Unified School Dist., 202 Cal. App. 3d 1448, 249 Cal. Rptr. 688, 694, 47 Educ. L.

threats of [or the likelihood] of violence that they believe are well-founded may not refrain from taking reasonable preventive measures simply because violence has yet to occur."[81] A school has a duty to guard its students against dangers of which it has actual knowledge and those which it should reasonably anticipate.[82] In the case of Tammy Fazzolari, a jury question of foreseeability existed based on the sexual assault of a woman on school grounds some 15 days earlier.

R. 1093 (1988).

81. *Id.*

82. *See* J. Rapp, *Education Law* § 12.06[5][c] (Matthew Bender & Company, Incorporated).

Chapter VIII

Claims for Failure to Protect Against or Prevent Student Crime or Violence

Just as the social contract establishing society presumes that government is in the best position to protect against or prevent crime or violence, so too do students and their parents look to schools to fulfill this obligation with regard to crime or violence caused by students in our nation's schools.[1] Although the applicable rules are substantially the same as for non-student crime or violence, the existence of the student-school relationship clearly enhances the possibility of a school being liable where immunity does not exist.[2]

Student-School Relationship

Numerous theories of the student-school relationship have been suggested.[3] The traditional theory advanced was that a school acted *in loco parentis* for the student, that is, in the place of a parent and with all a parent's rights, duties and responsibilities.[4] The doctrine holds that schools have a responsibility to protect students from harmful and dangerous influences[5] and to maintain order, so that teaching may be accomplished in an atmosphere conducive to education.[6]

For many years the *in loco parentis* theory has been eroding. It is now almost universally discounted as giving rise to a legal duty of

1. *See generally* Annot., 36 A.L.R.3d 330 (1971) (tort liability of public schools and institutions of higher learning for injuries caused by acts of fellow students).
2. *See* Chapter 6 *supra* (regarding immunities).
3. *See generally* J. Rapp, *Education Law* § 8.01 (Matthew Bender & Company, Incorporated).
4. *See* 1 W. Blackstone, Commentaries, Chapter 16.
5. *See* Bradshaw v. Rawlings, 612 F.2d 135 (3rd Cir. 1979); People v. Jackson, 65 Misc. 2d 909, 319 N.Y.S.2d 731 (App. Term 1971), *aff'd*, 30 N.Y.2d 734, 284 N.E.2d 153, 333 N.Y.S.2d 167 (1972).
6. *In re* Donaldson, 269 Cal. App. 2d 509, 75 Cal.Rptr. 220 (1969).

protection. In the widely reported case of *New Jersey v. T.L.O.*[7] involving the standard to be applied to student searches, the United States Supreme Court said that the *in loco parentis* theory of the student-school relationship is "in tension with contemporary reality." In an earlier case involving use of corporal punishment, the Supreme Court also recognized that "the concept of parental delegation" as a source of school authority is simply not "consonant with compulsory education laws."[8] According to the Supreme Court: "Today's public schools do not merely exercise authority voluntarily conferred on them by individual parents; rather, they act in furtherance of publicly mandated educational and disciplinary policies."[9] At the postsecondary education level as well, the *in loco parentis* theory has given way to the right of students to define and regulate their own lives.[10]

With the erosion of the *in loco parentis* theory of the student-school relationship, other theories have generally not been descriptive of a school's obligations to protect against or prevent student crime or violence.[11] Rather, courts have typically resorted to other legal relationships, such as landowner-invitee, to determine rights and obligations of the student and school.[12] Thus, the standard of care imposed upon a school in the performance of its mission is usually identical to that imposed on others; that is, the same degree of care which a person of ordinary prudence, charged with comparable duties, would exercise under the same circumstances.[13]

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7. 469 U.S. 325, 105 S. Ct. 733, 83 L. Ed. 2d 720, 21 Educ. L. R. 1122 (1985).
8. Ingraham v. Wright, 430 U.S. 651, 97 S. Ct. 1401, 51 L. Ed. 2d 711 (1977).
9. New Jersey v. T.L.O., 469 U.S. 325, 105 S. Ct. 733, 83 L. Ed. 2d 720, 21 Educ. L. R. 1122 (1985).
10. *See* Bradshaw v. Rawlings, 612 F.2d 135 (3rd Cir. 1979).
11. The most commonly raised theory of the student-school relationship, at least in postsecondary education, is the contract theory. Thus, courts enforce the reasonable expectations of the parties. *See generally* J. Rapp, *Education Law* § 8.01 [2] (Matthew Bender & Company, Incorporated). Implicit in some decisions is the view that the right to a safe school is one of those expectations. *See, e.g.*, Peterson v. San Francisco Community College Dist., 36 Cal. 3d 799, 205 Cal. Rptr. 842, 685 P.2d 1193, 19 Educ. L. R. 689 (1984); Mullins v. Pine Manor College, 389 Mass. 47, 449 N.E.2d 331, 11 Educ. L. R. 595 (1983).
12. As discussed in Chapter 7, the student-school relationship may, in various circumstances, be legally analogous to those of parent-child (teacher-student or in loco parentis), master-servant (school-student employee or work study student), lessor-lessee (school-student dormitory resident), innkeeper-guest (school-temporary occupant of housing or student union hotel), landowner-occupier (school-trespasser, licensee or invitee), governmental body-citizen (public school-student or third party), security force-invitee, licensee or trespasser (school security force-student or third party) and common carrier-passenger (school transportation service-student), among others.
13. *See* Dailey v. Los Angeles Unified School Dist., 2 Cal. 3d 741, 470 P.2d 360, 87 Cal. Rptr. 376

Although courts often rely on various legal relationships in defining the rights and obligations of students and schools when cases involve student crime or violence, there is a discernable trend to include the right to safe schools as an element of the student-school relationship.[14] When students attend school they expect that they not only will be afforded the means to derive an education in an atmosphere conducive to the stimulation of thought and learning, but also that they will be permitted to do so in environments reasonably free from risk of harm. This expectation is considered particularly appropriate in the closed environment of a school campus[15] or where, as in school, there is custody of[16] and an absolute right to control students' behavior.[17] Also significant is that minor students are deprived of the protection of their parents in school by enforcement of compulsory education laws.[18]

As with other failure-to-protect cases in the school setting, almost every case involves a common legal scenario: (1) the victim alleges that, in the circumstances of the case, the school had a duty to protect against or prevent crime and that this duty was breached, proximately causing injury or death to the victim; (2) the defense counters with the duty-at-large rule or the intervening cause doctrine; (3) the victim then asserts that an exception to the duty-at-large rule or superseding cause doctrine exists, such as a special relationship between the school and the victim. Where applicable, arguments are sculpted to either assert or avoid immunity doctrines.[19]

Against this general background, cases involving the liability of

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(1970). This rule does not, of course, apply where an immunity or the in loco parentis doctrine applies. *See* Chapter 6 *supra*.

14. *See generally* Chapter 2 *supra*.
15. Peterson v. San Francisco Community College Dist., 36 Cal. 3d 799, 205 Cal. Rptr. 842, 685 P.2d 1193, 19 Educ. L. R. 689 (1984).
16. Logan v. City of New York, 148 A.D.2d 167, 543 N.Y.S.2d 661, 54 Educ. L. R. 1305 (1989) (referencing Pratt v. Robinson, 39 N.Y.2d 554, 349 N.E.2d 849, 383 N.Y.S.2d 749 (1976) and Restatement (Second) of Torts § 320, comment (1965)); McLeod v. Grant County School Dist., 42 Wash. 2d 316, 255 P.2d 360 (1953).
17. Collins v. School Bd. of Broward County, 471 So. 2d 560, 26 Educ. L. R. 533 (Fla. Dist. Ct. App. 1985), *mand. dismissed*, 491 So. 2d 280 (Fla. 1986).
18. Fuzie v. South Haven School Dist., 146 Misc. 2d 1006, 553 N.Y.S.2d 961, 59 Educ. L. R. 1141 (Sup. Ct. 1990), *aff'd* 575 N.Y.S.2d 451 (Appl. Div. 1991).
19. The existence of a constitutional right to safe schools, as in California, will likely diminish the viability of the duty-at-large or intervening cause defenses, or constitute a specific exception to them. *See* Chapter 2 *supra*. This right should also avoid claims of immunity. *See* Chapter 6 *supra*.

schools for the failure to protect against or prevent student crime or violence fall into several categories, although there is naturally some overlap. The categories include: (1) failure to supervise, (2) failure to apprehend or restrain identifiable dangerous students, (3) negligent admission of dangerous students, (4) negligent placement of dangerous students, and (5) negligent selection, retention or training of staff.

Failure to Supervise

Robert Hammack was a student at Rogers Middle School. Part of his curriculum included a shop class.[20] The room where the shop class was held was approximately twice the size of a normal classroom. It contained numerous pieces of large machinery that the students normally used for various projects. Adjacent to the classroom were several smaller rooms, including a paint-finishing room in the rear of the classroom.[21]

On a particular day of class, the regular teacher was absent and a substitute teacher was employed. Because the substitute was not certified as a shop teacher, students were not allowed to use power machinery. They were instead directed to work on projects that could be completed with hand tools or to work on homework from other classes. As a result, the noise level only slightly exceeded that of a normal study period.[22]

Following the directions of the substitute, Robert began to work on a Christmas project. At some point, he went to the paint room to obtain paint for his project. While there, he was confronted by Robert Holloway and Tony Osborne. They shut the lights off in the small room and began harassing Robert. The substitute noticed this, went back, chased the students out and locked the paint room door.[23]

Not long afterwards, Holloway and Osborne again approached Robert. This time, according to Robert, Holloway began striking him

20. Robert was emotionally handicapped and was mixed in with regular students as part of a federally required "mainstreaming" effort which mandates such intermingling in certain vocationally oriented classes.
21. Collins v. School Bd. of Broward County, 471 So. 2d 560, 26 Educ. L. R. 533 (Fla. Dist. Ct. App. 1985), *mand. dismissed*, 491 So. 2d 280 (Fla. 1986).
22. *Id.*
23. *Id.*
24. *Id.*

and threatened to beat him up unless he performed oral sex on Holloway. With Osborne and other students acting as lookouts, Robert, at the rear of the class and at least partially hidden by a portable chalkboard, was forced to perform oral sex on Holloway. The entire incident may have lasted as long as ten minutes. In addition to those students directly involved, other students also witnessed the assault.[24]

There was some question concerning the location of the substitute during the episode. Most students said the substitute was in the front of the classroom, but Holloway said he was out of the classroom during the incident. The substitute said that he was generally by his desk or walking around by the tables. In any event, the substitute had no knowledge of the incident and, in fact, did not learn of the incident until a later date.[25]

Holloway's propensity to engage in sexually aggressive conduct had been the topic of some discussion among the school's administration and students alike. Holloway had apparently exposed himself to other students during class. He had been suspended at least twice for fondling and making sexually suggestive remarks to female students. Concerned for their daughter's safety, the parents of one student unsuccessfully sought to have her transferred from the shop class attended by Holloway.[26]

Although a school is not an insurer against a student being injured, it is entrusted with the care of its students and has a legal duty to properly supervise student activity.[27] In those instances where lack or insufficiency of supervision is charged, a school or teacher has an obligation to exercise reasonable, prudent and ordinary care,[28] or care akin to what a reasonable and prudent parent would exercise under the circumstances.[29]

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25. *Id.*
26. *Id.*
27. *Id. See also* Dailey v. Los Angeles Unified School Dist., 2 Cal. 3d 741, 470 P.2d 360, 87 Cal. Rptr. 376 (1970); Rupp v. Bryant, 417 So. 2d 658, 5 Educ. L. R. 658 (Fla. 1982); Eastman v. Williams, 124 Vt. 445, 207 A.2d 146 (1965).
28. *Id.* (citing Benton v. School Bd. of Broward County, 386 So. 2d 831 (Fla. Dist. Ct. App. 1980)). *See also* Miller v. Grissel, 261 Ind. 604, 308 N.E.2d 701 (1974); Swartley v. Seattle School Dist., 70 Wash. 2d 17, 421 P.2d 1009 (1966); Connett v. Fremont County School Dist., 581 P.2d 1097 (Wyo. 1978).
29. Swaitkowski v. Board of Educ., 36 A.D.2d 685, 319 N.Y.S.2d 783 (1971).

Cases involving supervision can sound very similar to so-called educational malpractice claims. Such claims are generally not cognizable under the law. *See generally* J. Rapp, *Education*

In determining the duty of a school under a particular set of circumstances, consideration of various factors may be helpful: (1) the activity in which the students are engaged; (2) the instrumentalities with which they are working (e.g. dangerous chemicals); (3) the age and composition of the class; (4) past experience with the class and its propensities; (5) the reason for and duration of any absence or lack of supervision;[30] and (6) the ability of the school to anticipate danger.[31] However, the determination generally must be made on a case by case basis.[32]

No doubt Rogers Middle School had a duty to supervise the shop class in which Robert Hammack was sexually assaulted.[33] That duty was breached when the substitute teacher was either absent (if that was the case) or failed to actively supervise the class while present.[34]

Although a school may be negligent in providing supervision, it is liable only if there is a reasonably close causal connection between the conduct or negligence and the resulting injury, that is, proximate

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Law § 12.03 (Matthew Bender & Company, Incorporated). *See also* P. Zirkel, *Educational Malpractice: Cracks in the Door?*, 23 Educ. L. R. 453 (1985). Unlike educational malpractice, claims for failure to supervise students who injure others is predicated on well-recognized principles. Cavello v. Sherburne-Earlville Central School Dist., 494 N.Y.S.2d 466, 28 Educ. L. R. 537 (1985), *appeal denied*, 67 N.Y.2d 601, 499 N.Y.S.2d 1027, 490 N.E.2d 555 (1986).

30. *See* Cirillo v. City of Milwaukee, 34 Wis. 2d 705, 150 N.W.2d 460 (1967).

31. Lauricella v. Board of Educ., 52 A.D.2d 710, 381 N.Y.S.2d 566 (1976).

32. A good example of this is the determination of when a teacher is considered negligent in playground supervision. *See, e.g.*, Green v. Bester, 568 So. 2d 792, 63 Educ. L. R. 684 (Ala. 1990) (teachers not liable where sixth-grader spontaneously threw rock at fourth-grader during physical education class); Charonnat v. San Francisco Unified School Dist., 56 Cal. App. 2d 840, 133 P.2d 643 (1943) (negligence found where only one teacher was assigned to supervise some 150 boys engaged in many games); Capers v. Orleans Parish School Bd., 365 So. 2d 23 (La. Ct. App. 1978) (no liability where there were six to eight adults supervising 250-300 students although injured student wandered from normal play area); Silverman v. City of New York, 28 Misc. 2d 20, 211 N.Y.S.2d 560, *aff'd*, 15 A.D.2d 810, 225 N.Y.S.2d 77 (1962) (jury verdict upheld finding school negligent by assigning one teacher for supervision of school yard when 200 to 250 students were present, including students known to be troublesome).

33. The court noted that the sexual assault occurred while class was in session. Since the school had an absolute right to control the students' behavior at that time, the school also had a corresponding duty to protect and supervise them. Moreover, the court noted that it is reasonable to conclude that the school's duty to actively supervise the students in this case was even greater than would otherwise be imposed due to the unique combination of factors in this case, including but not limited to: (1) the oversized classroom; (2) the presence of dangerous machinery; and (3) the intermingling of regular and emotionally and mentally handicapped students. Collins v. School Bd. of Broward County, 471 So. 2d 560, 564, 26 Educ. L. R. 533 (Fla. Dist. Ct. App. 1985), *mand. dismissed*, 491 So. 2d 280 (Fla. 1986).

34. Collins v. School Bd. of Broward County, 471 So. 2d 560, 564-65, 26 Educ. L. R. 533 (Fla. Dist. Ct. App. 1985), *mand. dismissed*, 491 So. 2d 280 (Fla. 1986).

cause.[35] Negligence is conduct which falls below the standard established by law for the protection of others against unreasonable risk.[36] An unreasonable risk necessarily involves a foreseeable risk. If one could not reasonably foresee any injury as the result of one's act, or if one's conduct was reasonable in light of what one could anticipate, there would be no negligence and no liability.[37]

In the school setting, there are two views regarding the foreseeability of injuries resulting from negligent supervision. According to one view, proximate causation between a student's injuries and a teacher's absence or negligent supervision exists only where the injury could have been prevented by the teacher's presence or adequate supervision[38] and there is knowledge that the injuries might occur.[39] Under this view an intervening cause,[40] such as student crime or violence, would often shield a school from liability. However, even under this view, dangerous conditions may require a higher standard of supervision.[41]

The alternative view assumes that certain student misbehavior is itself foreseeable and therefore is not an intervening cause that will relieve a school from liability.[42] Under this view, a school may be li-

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35. W. Keeton, *Prosser and Keeton on The Law of Torts* 165 (5th Ed. 1984).
36. W. Keeton, *Prosser and Keeton on The Law of Torts* 280 (5th Ed. 1984).
37. *Id.*
38. *See* Morris v. Ortiz, 103 Ariz. 119, 437 P.2d 652 (1968); District of Columbia v. Cassidy, 465 A.2d 395, 13 Educ. L. R. 755 (D.C. 1983); Segerman v. Jones, 256 Md. 109, 259 A.2d 794 (1969); Ohman v. Board of Educ., 300 N.Y. 306, 90 N.E.2d 474 (1949); Swaitkowski v. Board of Educ., 36 A.D.2d 685, 319 N.Y.S.2d 783 (1971); Rock v. Central Square School Dist., 494 N.Y.S.2d 579, 28 Educ. L. R. 548 (N.Y. App. Div. 1985); Guyten v. Rhodes, 65 Ohio App. 163, 29 N.E.2d 444 (1940); Fagan v. Summers, 498 P.2d 1227 (Wyo. 1972).
39. *See* Cooper v. Baldwin County School Dist., 386 S.E.2d 896, 57 Educ. L. R. 1377 (Ga. Ct. App. 1989); James v. Charlotte-Mecklenburg Bd. of Educ., 300 S.E.2d 21, 9 Educ. L. R. 401 (N.C. Ct. App. 1983); Silverman v. City of New York, 28 Misc. 2d 20, 211 N.Y.S.2d 560 (1961), *aff'd.* 15 A.D.2d 810, 225 N.Y.S.2d 77 (1962); Brown v. City of New York, 130 A.D.2d 701, 516 N.Y.S.2d 22, 39 Educ. L. R. 770 (1987); Simonetti v. School Dist. of Philadelphia, 454 A.2d 1038, 8 Educ. L. R. 1017 (Pa. Super. Ct. 1983).
40. The intervening cause doctrine is discussed in Chapter 7 *supra*.
41. Cioffi v. Board of Educ., 27 A.D.2d 826, 278 N.Y.S.2d 249 (1967) (hard frozen snow was a dangerous condition warranting supervision in view of the common knowledge of the propensity of children to engage in snowball throwing).
42. *See* Dailey v. Los Angeles Unified School Dist., 2 Cal. 3d 741, 470 P.2d 360, 87 Cal. Rptr. 376 (1970) (citing several related California cases); Charonnat v. San Francisco Unified School Dist., 56 Cal. App. 2d 840, 133 P.2d 643 (1943); Rupp v. Bryant, 417 So. 2d 658, 5 Educ. L. R. 1309 (Fla. 1982); Collins v.School Bd. of Broward County, 471 So. 2d 560, 26 Educ. L. R. 533 (Fla. Dist. Ct. App. 1985), *mand. dismissed*, 491 So. 2d 280 (Fla. 1986).

able for injuries sustained, as it was in the case involving Robert Hammack, although only the general type of harm could have been foreseen.[43] Thus, where a school should have realized that 15-year-old boys would likely perform acts of indecency if allowed unrestricted access to a darkened, out-of-the-way room, the school will be considered negligent, although the particular type of indecency — rape, molestation, indecent exposure, seduction, etc. — cannot be specifically anticipated.[44] Student supervision is necessary, precisely because of the tendency of some students to engage in aggressive and impulsive behavior that exposes them and their peers to the risk of serious physical harm.[45]

Although under the alternative view misbehavior is foreseeable, the fact that each student is not personally supervised every moment of each school day usually does not constitute fault on the part of a school.[46] Thus, spontaneous and/or planned acts of violence by students on school grounds generally do not create liability on behalf of the school if the school grounds are well-supervised.[47]

Supervision cases often arise in the classroom, playground and other areas in which students congregate. The duty of supervision clearly extends to a school's extracurricular activities,[48] even during

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43. Collins v. School Bd. of Broward County, 471 So. 2d 560, 566, 26 Educ. L. R. 53 (Fla. Dist. Ct. App. 1985), *mand dismissed*, 491 So. 2d 280 (Fla. 1986). *See also* Ziegler v. Santa Cruz City High School Dist., 168 Cal. App. 2d 277, 335 P.2d 709 (1959).

44. Campbell v. Montgomery County Bd. of Educ., 73 Md. App. 54, 533 A.2d 9, 42 Educ. L. R. 1239 (1987) (jury verdict for student upheld where 13-year-old female student was sexually molested by multiple students while voluntarily in boys' locker room); McLeod v. Grant County School Dist., 42 Wash. 2d 316, 255 P.2d 360 (1953) (12-year-old girl raped by fellow students).

45. Dailey v. Los Angeles Unified School Dist., 2 Cal. 3d 741, 470 P.2d 360, 87 Cal. Rptr. 376 (1970).

46. Narcisse v. Continental Insurance Co., 419 So. 2d 13 (La. Ct. App. 1982); Hampton v. Orleans Parish School Bd., 422 So. 2d 202 (La. Ct. App. 1982).

47. Nicolosi v. Livingston Parish School Bd., 441 So. 2d 1261, 15 Educ. L. R. 425 (La. Ct. App. 1983) (no liability where fight was planned in "off-limits" area if supervision adequate and teacher proceeded to the scene in an attempt to stop the fight as soon as she saw the students "squared off"); Clark v. Jesuit High School of New Orleans, 572 So. 2d 830, 65 Educ. L. R. 276 (La. Ct. App. 1990) (school not liable for shooting by student of fellow student where a spontaneous or planned act of violence involved). There is no doubt a point when "spontaneous and/or planned acts of violence" become such common occurences that they are no longer spontaneous and become foreseeable.

48. *See, e.g.*, Bryant v. School Bd. of Duval County, 399 So. 2d 417 (Fla. Dist. Ct. App. 1981) (cause of action stated against school, club advisor and others for failing to provide proper supervision of club during initiation; club had well-known reputation for conducting activities that violated school board regulations, such as consumption of alcoholic beverages; violations including hazing

summer vacation.[49] The scope of this responsibility is far broader, however. Schools, for example, also have such responsibilities as preventing students from engaging in campaigns of threats and harassment against fellow students,[50] controlling substance abuse[51] and preventing truancy.[52]

Failure to Apprehend or Restrain Identifiable Dangerous Students

Peter Jesik II was registering as a student for the fall semester at Phoenix College. Charles Doss, another student,[53] had "words" with Jesik. Doss then threatened that he was going home to get a gun and coming back to the campus to kill Jesik. Jesik reported this to Scott Hilton, a college security guard, and received assurances of help and protection. Jesik then continued with his registration. Hilton allegedly failed to arm himself or take any other precautionary measures.[54]

Approximately an hour later, Doss returned to campus carrying a

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lead to student being injured by severance of his spinal cord causing permanent paralysis from neck down).

49. *See, e.g.*, Verhel v. Independent School Dist. No. 709, 359 N.W.2d 579, 22 Educ. L. R. 2371 (Minn. 1984) (school liable when a cheerleader was hurt riding in a van driven by another cheerleader while they were bannering the homes of football players during summer vacation).

50. *See, e.g.*, Cavello v. Sherburne-Earlville Central School Dist., 494 N.Y.S.2d 466, 28 Educ. L. R. 537 (N.Y. App. Div. 1985), *appeal denied*, 67 N.Y.2d 601, 499 N.Y.S.2d 1027, 490 N.E.2d 555 (1986).

51. *See* J. Ullman, After T.L.O.: *Civil Liability for Failure to Control Substance Abuse?*, 24 Educ. L. R. 1099 (1985).

52. *See, e.g.*, Hoyem v. Manhattan Beach City School Dist., 22 Cal. 3d 508, 585 P.2d 851, 150 Cal. Rptr. 1 (1978).

In the Hoyem case, the Supreme Court of California held that a school may be liable for injuries to a student who had been struck by a motorcycle after leaving school grounds without permission. Liability is not based on any alleged failure to supervise the student when off school premises, but rather on a failure to exercise due care in supervision on school premises (*i.e.*, allowing him to become truant). Clearly, if a school may be liable for injuries sustained by the truant himself, it may be liable for injuries done by the truant to others.

Although the scope of the duty to supervise has broadened, it generally will be limited to school and school activities. *See, e.g.*, Morris v. Canipe, 528 So. 2d 659, 47 Educ. L. R. 1281 (La. Ct. App. 1988) (no duty arose to supervise or warn others regarding minor perpetrator's sexual misconduct to protect non-students from harm away from school grounds during summer recess). However, the duty to provide supervision does not end "when the bell rings" and instead continues a reasonable time before and after school, where and while students are known to congregate. *See, e.g.*, Broward County School Bd. v. Ruiz, 493 So. 2d 474, 34 Educ. L. R. 1263 (Fla. Dist. Ct. App. 1986) (liability found where student waiting in cafeteria for a ride home was beaten up by three fellow students because no supervision was provided).

53. State v. Doss, 116 Ariz. 156, 568 P.2d 1054, 1056 (1977) (relating to Doss' criminal conviction).

54. Jesik v. Maricopa County Community College Dist., 125 Ariz. 543, 611 P.2d 547 (1980).

briefcase. He proceeded to the gymnasium, where Jesik was continuing his registration. Jesik again contacted Hilton and pointed out Doss and the briefcase. Again, Jesik was assured of help and protection, and he remained in the gymnasium, relying on these assurances. Hilton approached Doss, questioned him and, apparently satisfied, turned his back on Doss and walked away. Doss immediately pulled a gun from his briefcase and shot and killed Jesik.[55]

In order to avoid the duty-at-large rule or intervening cause doctrine, individuals often attempt to pinpoint some specific individual from whom crime or violence might have been anticipated. Although a school is generally not liable for some "generalized danger" to an individual,[56] it is more likely to be liable where a specific dangerous person may be singled out. Arguably, such circumstances bring the individual much closer to the "special relationship" exception to the duty-at-large rule or intervening cause doctrine.

The death of Peter Jesik II presents a case where the school, or its employee, "had specific and repeated notice of both the actor and the exact type of harm that did in fact occur."[57] Under such circumstances, the school had a specific duty to exercise reasonable care to protect Jesik and could be held liable for his death.[58]

The obligation of a school to apprehend or restrain an identifiable dangerous individual is a corollary to its obligation to supervise students.[59] For example, it was held that the parents of Anthony Jr. and Tina Cavello could sue for damages where the school did not prevent their children from being harassed.[60] Soon after starting school, Tina was ceaselessly badgered by another student named Bobby Jo. Verbal abuse, foul language, death threats and the brandishing of a knife characterized the ongoing harassment that Tina apparently suffered for nearly a year. Tina's brother was subject to considerably less, but

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55. *Id.*
56. *See* Chapter 7 *supra*.
57. Jesik V. Maricopa County Community College Dist., 125 Ariz. 543, 611 P.2d 547, 551 (1980).
58. *Id. See also* Tarasoff v. Regents of the University of California, 551 P.2d 334, 131 Cal. Rptr. 14 (Cal. 1976) (where psychotherapist determines 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).
59. *Id* (supplemental opinion).
60. Cavello v. Sherburne-Earlville Central School Dist., 494 N.Y.S.2d 466, 28 Educ. L. R. 537 (N.Y. App. Div. 1985), *appeal denied*, 67 N.Y.2d 601, 499 N.Y.S.2d 1027, 490 N.E.2d 555 (1986).

similar, harassment. School officials were repeatedly advised of the intimidating conditions. Rather than deal with the student causing the problem, the school first segregated Tina from other students and later arranged for tutoring at home. At one point a school guidance counselor "placed Tina and Bobby Jo in a room, telling Bobby Jo to lock the door from the inside and 'settle your difference.'" The school finally informed the Cavello parents that "it was too dangerous for Tina and Anthony Jr. to come to school and stated that the district would provide the children a correspondence course."[61] The duty to supervise thus includes the obligation to protect students from being harassed by others.[62]

Despite the outcome in *Jesik*, courts are still reluctant to impose liability under to duty-at-large rule or intervening cause doctrine. In one often-cited case,[63] Linda Riss, an attractive young woman, was pursued by the attentions of an unwanted suitor, Pugach, whose attentions took the form of terrorizing and threatening to kill her if she did not yield to him. Riss repeatedly asked the police for protection and was repeatedly refused. She received a "last chance" telephone call from Pugach and again begged the police for help, but to no avail.

The "next day Pugach carried out his dire threats in the very manner he had foretold, by having a hired thug throw lye in Linda's face. Linda was blinded in one eye, lost a good portion of her vision in the other, and her face was permanently scarred."[64] Riss' claims for damages were rejected because special circumstances were not, according to the court, established. Moreover, it emphasized the basic policy consideration that a municipality should not be liable merely upon a showing of probable need for and request for protection in view of the staggering amount of crime that is undeniably prevalent. If scarce

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(claim for emotional distress).

61. *Id.* 494 N.Y.S.2d at 467.

    The school's reaction reminds one of the wisdom of former Israeli Prime Minister Golda Meir who related:

    > Once in a Cabinet meeting we had to deal with the fact that there had been an outbreak of assaults on women at night. One minister suggested a curfew: women should stay home after dark. I said, "But it's the men who are attacking the women. If there's to be a curfew, let the men stay home, not the women." Pogrebin. *Do Women Make Men Violent?*, MS. Magazine at 55 (Nov., 1974).

62. *See also supra* (discussion of failure to supervise).

63. Riss v. City of New York, 22 N.Y.2d 579, 240 N.E.2d 860, 293 N.Y.S.2d 897 (1963).

criminal justice resources were to be allocated to such requests, it should be based on a mandate from the legislature.[65]

Negligent Admission of Violent Students

Larry Campbell was conditionally released from prison and enrolled as a student at the State University College at Buffalo, in a program for the economically and educationally disadvantaged designated under the acronym SEEK (Search for Education, Elevation and Knowledge). Campbell's prison incarceration resulted from reduced pleas in satisfaction of three separate indictments, all involving violent conduct and including a charge of attempted murder.[66] Prior to those indictments, Campbell had been arrested approximately 25 times and charged with a variety of crimes including assault, robbery and a number of drug-related crimes. Each time he was released on parole he immediately reverted to heroin abuse,[67] which led to other crimes and violations of parole. During various psychiatric examinations, it was concluded that Campbell suffered from chronic schizophrenia, paranoid type, with an impulsive-explosive personality, a high criminal potential, including a potential for killing, a high mental pathology potential and a low rehabilitation potential.[68]

Participation in the SEEK program involved accepting incarcerated felons. When Campbell applied, he stated that his present and former

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64. *Id.* 22 N.Y.2d at 583.

65. The Riss case took an ironic twist after the civil case was disposed. Following Pugach's release from prison, Riss married "Poogie" on the advice of a fortune teller. *See* J. Oates, *A Very Different Love Story*, New York Times, Feb. 6, 1977, Section 7 (Book Reviews), p. 5, col. 1.

66. On the first indictment it was charged that Campbell robbed a motorist at gunpoint, ordered him out of his car and took the car. When the police apprehended him they found a loaded .32-caliber revolver and 77 decks of heroin. On the second indictment, he was charged with attempted murder, attempted assault in the first degree and robbery in the first degree, resulting from an incident in which he and other individuals robbed a woman of $26.00, threw her to the ground and fired a pistol, creasing her skull. The third indictment involved a charge that Campbell and another entered a drug "shooting gallery," robbed the occupants, stripped a woman of her clothes in view of the men present, struck her about the face and body, beat her with an electric wire and inserted his hand into her vagina. When one of the men began to lower his hands, Campbell stabbed him several times in the stomach with a knife. In satisfaction of those indictments, Campbell was allowed to plead to criminal possession of a dangerous drug and received a maximum sentence of six years. Eiseman v. State of New York, 109 A.D.2d 46, 489 N.Y.S.2d 957, 960-61, 25 Educ. L. R. 876 (1985), *rev'd.* 70 N.Y.2d 175, 511 N.E.2d 1128, 518 N.Y.S.2d 608, 41 Educ. L.R. 275 (1987).

67. Campbell was using up to 25 bags a day while not incarcerated. Eiseman v. State of New York, 109 A.D.2d 46, 489 N.Y.S.2d 957, 961, 25 Educ. L. R. 876 (1985), *rev'd.* 70 N.Y.2d 175, 511 N.E.2d 1128, 518 N.Y.S.2d 608, 41 Educ. L.R. 275 (1987).

addresses were correctional facilities. Although the application form requested an employer, pastor, teacher, principal, etc., as references, Campbell listed his fiancee and two others, residents of Buffalo, where Campbell had never lived. They had no opportunity to make observations and judgments concerning Campbell's character and fitness. A Health Report and Physicians' Certificate was prepared by an examining physician at the correctional facility at which Campbell resided, and it failed to indicate any emotional instability.[69]

When Campbell began[70] his studies, he lived in a dormitory on campus with the son of his sponsor for the program, a professor at the college. Through this connection he became friends of Rhona Eiseman, Thomas Tunney and Teresa Beynard, fellow students, and Michael Schostick, a non-student. About six months after he began the program, Campbell went to an apartment approximately one block from the college and murdered Tunney, raped and murdered Eiseman, and inflicted serious bodily injuries on Schostick by stabbing him six times. Beynard managed to escape.[71]

Schools have wide discretion to establish admission standards or requirements.[72] Where this discretion is limited by an individual's constitutional or statutory right to attend, as it often is at the public elementary and secondary levels, a school may nevertheless have wide discretion in placing the student in a particular educational setting.[73] In developing or implementing admission standards or re-

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68. *Id.*

69. In answer to the question on the Health Report, "Is there any evidence of anxiety or other tension states or emotional instability?" the physician answered, "No." Under the heading "Prior Conditions and Diseases," the physician failed to indicate Campbell's long history of abusing heroin and other drugs. No response was given to the question, "Have you ever been under the care of a psychiatrist?" *Id.*

70. Campbell anticipated beginning in the program in a fall semester. However, after being admitted into an temporary release program, he absconded from a work site, took a car and drove to Buffalo. As a result, he was removed from the temporary release program and, while awaiting transfer to a correctional facility, attempted suicide. He was then sent to a psychiatric diagnostic and evaluation unit. He wrote to his SEEK counselor, telling him of his suicide attempt and problems he was having in prison. He requested a leave of absence from the college so that he could enter the next semester. The SEEK counselor wrote to Campbell informing him that he was on official leave of absence and would be expected to "return" for the following semester. Despite receiving information regarding the suicide, no attempt was made to check into Campbell's background or emotional stability. Eiseman v. State, 109 A.D.2d 46, 489 N.Y.S.2d 957, 961-62, 25 Educ. L. R. 876 (1985), *rev'd*, 70 N.Y.2d 175, 511 N.E.2d 1128, 518 N.Y.S.2d 608, 41 Educ. L. R. 275 (1987).

71. Eiseman v. State, 109 A.D.2d 46, 489 N.Y.S.2d 957, 960, 25 Educ. L. R. 876 (1985), *rev'd*, 70 N.Y.2d 175, 511 N.E.2d 1128, 518 N.Y.S.2d 608, 41 Educ. L. R. 275 (1987).

72. *See generally* J. Rapp, *Education Law* § 8.02 (Matthew Bender & Company, Incorporated) (re-

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quirements, a school is generally not obligated to screen prospective students with an eye toward rejecting potentially dangerous individuals.[74] Does a different situation arise where a school embarks on an experimental program for the admission of convicted felons or dangerous individuals, such as the SEEK program?

According to the Court of Appeals of New York, the highest court of the state, participation in the SEEK program did not place a heightened duty of inquiry on the educational institution.[75] "Such a duty would run counter to the legislative policy embodied by the SEEK program as well as the laws and policies promoting the reintegration of former convicts into society."[76] The court found that "the underlying premise that, once released, Campbell, by reason of his past, presumptively posed a continuing, foreseeable risk of harm to the community is at odds with the laws and public policy regarding the release of prisoners."[77] In essence: "Publicly branding him on campus as a former convict and former drug addict would have run up against the same laws and policies that prevented discriminating against him."[78]

Whether the decision of the Court of Appeals of New York will be followed in other states remains to be seen. Because the concept of duty is largely based on policy, other courts may well take a different approach, as did the lower court in that case. Indeed, the same policy considerations that justify a duty to warn in cases involving released prisoners would suggest that some duty should be placed upon educational institutions when participating in programs involving dangerous individuals.[79]

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garding admission of students).

73. *See infra* (regarding negligent placement of students).
74. Eiseman v. State, 109 A.D.2d 46, 489 N.Y.S.2d 957, 963 and 965, 25 Educ. L. R. 876 (1985), *rev'd on other grounds*, 70 N.Y.2d 175, 511 N.E.2d 1128, 518 N.Y.S.2d 608, 41 Educ. L. R. 275 (1987).
75. Eiseman v. State of New York, 70 N.Y.2d 175, 511 N.E.2d 1128, 518 N.Y.S.2d 608, 41 Educ. L. R. 275 (1987).
76. *Id.* 518 N.Y.S.2d at 616.
77. *Id.*
78. *Id.*
79. The duty to warn has as its primary genesis the case of Tarasoff v. Regents of the University of California, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976), where the California Supreme Court imposed a duty on therapists to warn a patient's intended victim or take other reasonable steps to prevent harm where the patient presented a serious danger of violence to another. This duty has been extended to situations where prisoners have been released after serving a required

Negligent Placement of Violent Students

Josette Ferraro attended a New York junior high school. The students had lined up in preparation for a change of period when another student attacked her, apparently without cause. The substitute teacher attempted to intervene, but quickly became aware of her inability to stop the assault because the other student attempted then to strike the teacher. Another teacher was summoned. She entered the room and blew a whistle. The fracas stopped, but not before Josette had been injured.[80]

The student who attacked Josette had been transferred to Josette's junior high school only a few months before because of her record of misbehavior. According to the record, she had been a source of constant quarreling and had behaved aggressively toward other students as well as teachers. Indeed, since her enrollment, she had already assaulted other students on at least three occasions. On other occasions, she suddenly burst forth with forms of misbehavior for which there were no apparent reason.[81]

Although the principal and others were well aware of the misconduct of the student, the substitute teacher who was assigned to Josette's class on the day of the attack had never been told about the student's behavior. Nothing in her contact with the students alerted her to the problem either.[82]

As in the case of admissions, schools have wide discretion in the placement of students. Students do not have a right to be seated at a particular desk in a particular room at a particular school.[83] Students may be placed or grouped on the basis of various criteria.[84] Placement of students in an alternative educational program or facility is actually a well-recognized method of student control and discipline.[85] If there is a right to remain in a regular school setting, it should be a

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term of incarceration. *See* Division of Corrections v. Neakok, 721 P.2d 1121 (Alaska 1986); Anderson v. State, 147 Cal. Rptr. 729 (Cal. App. 1978).

80. Ferraro v. Board of Educ., 32 Misc. 2d 563, 212 N.Y.S.2d 615, 617, *aff'd*, 14 App. Div. 2d 815, 221 N.Y.S.2d 279 (1961).
81. *Id.* 212 N.Y.S.2d at 616. The junior high school principal had recommended medical attention for the child and requested on several occasions that the Bureau of Child Guidance examine the student's emotional stability. Despite his requests, no examinations were made.
82. *Id.* 212 N.Y.S.2d at 617.
83. J. Rapp *Education Law* § 4.01[3] (Matthew Bender & Company, Incorporated).
84. *Id.* at § 8.05.
85. *Id.* at § 9.06[3][g]. Procedural due process may be implicated prior to utilizing this, as well as

right of students who behave rather than students who engage in school crime and violence.[86]

In the case involving Josette Ferraro, the school was negligent in failing to alert the substitute teacher about the misconduct of the student who perpetrated the attack. Consequently, the substitute teacher was not in a position to determine whether any supervisory steps had to be taken in regard to the other students. If she had been informed, she *would* have been in a position to prevent the assault by compelling the unruly child to sit in a seat directly in front of the teacher, having the child stand immediately in front of the line to prevent a tendency towards mischief, or, possibly, having the child transferred for the day to the care of a more mature and experienced teacher.[87]

According to the *Restatement (Second) of Torts:*

> A parent is under a duty to exercise reasonable care so to control his minor child as to prevent it from intentionally harming others or from so conducting itself as to create an unreasonable risk of bodily harm to them, if the parent
>
> (a) knows or has reason to know that he has the ability to control his child, and
>
> (b) knows or should know of the necessity and opportunity for exercising such control.[88]

Similarly, where a school has notice of a student's propensities to harm others, it has an obligation to take reasonable steps to prevent the student from doing so.[89]

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other. discipline methods. *Id.* at § 9.05.

86. *Cf.* Cavello v. Sherburne-Earlville Central School Dist., 494 N.Y.S.2d 466, 28 Educ. L. R. 537 (N.Y. App. Div. 1985), *appeal denied*, 67 N.Y.2d 601, 499 N.Y.S.2d 1027, 490 N.E.2d 555 (1986). (school suggested that well-behaved students accept homebound instruction while disruptive student remained in regular classes because "it was too dangerous for ... [them] to come to school").

87. Ferraro v. Board of Educ., 32 Misc. 2d 563, 212 N.Y.S.2d 615, *aff'd*, 14 App. Div. 2d 815, 221 N.Y.S.2d 279 (1961).

88. Restatement (Second) of Torts § 315 (1965). An illustration provided by the Restatement is as follows:

> A is informed that his six-year-old child is shooting at a target in the street with a .22-rifle, in a manner which endangers the safety of those using the street. A fails to take the rifle away from the child, or to take any other action. The child unintentionally shoots B, a pedestrian, in the leg. A is subject to liability to B.

89. Ferraro v. Board of Educ., 32 Misc. 2d 563, 212 N.Y.S.2d 615, *aff'd*, 14 App. Div. 2d 815, 221 N.Y.S.2d 279 (1961). *See also* Cal. Welf. & Inst. Code § 827b (requiring reports).

90. Kelson v. City of Springfield, 767 F.2d 651, 652-53, 26 Educ. L. R. 182 (9th Cir. 1985).

Negligent Selection, Retention or Training of Staff

Brian Kelson confronted a teacher in his classroom, brandishing a .38-caliber revolver and demanding that the teacher place the coins in his desk drawer on the desk top. The teacher complied, and then persuaded Brian to accompany him to an empty room where the vice principal, Ronald Schiessel, was waiting. Brian showed Schiessel a suicide note. During this time, Brian kept the handgun in the waistband of his trousers. Although Brian asked to talk to his favorite teacher, he was not permitted to do so.[90]

School officials called the local police department. The police in turn called Brian's parents to notify them of the situation. As Brian and Schiessel left the empty room on their way to Schiessel's office, they were confronted by Officer Jerry Smith. Smith informed Brian that he was "in trouble with the law." Five minutes later Brian left Schiessel, entered the boys' rest room and shot himself. Brian died later that morning.[91]

Schools have a duty to use reasonable care in the selection, retention and training of its administrators, teachers and staff. This duty requires that a school hire and retain only safe and competent employees. A school breaches this duty when it hires or retains employees that it knows or should know are incompetent, or fails to adequately train them.[92]

A school or other employer is generally liable under the *respondeat superior*[93] doctrine for the wrongful acts of an employee that were committed while the employee was acting within the scope of his employment or in furtherance of his employer's interests.[94] Where an employee acts outside the scope of his employment, the doctrine does not apply. A school would not, for example, be liable for damages where an adult teacher-counselor engages in sexual contact with a 16-year-old student.[95]

If the *respondeat superior* doctrine does not apply, liability never-

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91. *Id.* 767 F.2d at 653.
92. *See generally* 29 Am. Jur. Trials 272 (1982) (regarding negligent hiring and retention of an employee).
93. This maxim literally means: "Let the master answer."
94. *Id.* 29 Am. Jur. Trials at 279. *See, e.g.*, Jesik v. Maricopa County Community College Dist., 125 Ariz. 543, 611 P.2d 547 (1980).
95. Horace Mann Insurance Co. v. Independent School Dist., 355 N.W.2d 413, 20 Educ. L. R. 686 (Minn. 1984). (school not liable where teacher had sexual contact with student, but by statute

theless may be imposed on an employer if it has selected, retained or inadequately trained its employee.[96] In such cases, the connection between the employment relationship in question and the plaintiff is critical in determining liability.[97] The relationship between a school administrator, teacher or staff member is clearly sufficient.

Courts have, in various cases, considered the liability of employers for the negligent selection[98] and retention[99] of employees. A developing area of the law involves negligent training.[100] Thus, in the Brian Kelson case, it was held that a claim may be based on a theory of

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school was obligated to defend the teacher). *Other examples involving intentional wrongdoing*: John R. v. Oakland Unified School Dist., 48 Cal. 2d 438 256 Cal. Rptr. 766, 52 Educ. L. R. 638 (1989) (a school district may not be vicariously liable for the sexual molestation of a student by a teacher while at teacher's home for officially sanctioned, extracurricular program); Giraldi *ex rel.* Giraldi v. Lamson, 205 Ill. App. 3d 1025, 563 N.E.2d 956, 150 Ill. Dec. 829, 64 Educ. L. R. 861 (1990) (neither school nor bus company were liable for series of sexual assaults on student by driver); Medlin v. Bass, 398 S.E.2d 460, 64 Educ. L. R. 590 (N.C. 1990) (board was not negligent in employment of principal who sexually assaulted student).

96. This liability is not vicarious liability for the employee's acts. Rather, the employer is liable for its own negligence.

97. It has been suggested that three requirements concerning the plaintiff and the employment relationship must be satisfied before the law will impose a duty upon the employer to use due care in the selection, retention or training of staff. These requirements are that: (1) the incompetent employee and plaintiff are in places where each have a right to be at the time that the plaintiff sustains injury; (2) the incompetent employee and the plaintiff came into contact as a direct result of the employment; and (3) the employer has received or would have received some benefit, either direct, indirect or potential, from the meeting of the employee and the plaintiff. 29 Am. Jur. Trials 272, 284 (1982). *See generally* Note, *The Responsibility of Employers for the Actions of Their Employees: The Negligent Hiring Theory of Liability*, 53 Chi.-Kent L. Rev. 717 (1977).

98. *See generally* 29 Am. Jur. Trials 267 (1982) (regarding negligent hiring and retention of an employee); Note, *The Responsibility of Employers for the Actions of Their Employees: The Negligent Hiring Theory of Liability*, 53 Chi.-Kent L. Rev. 717 (1977); S. Howard, *Negligent Hiring and Employer Liability in the Selection of Employees*, 49 Educ. L. R. 1 (1988); B. Beezer, *School District Liability for Negligent Hiring and Retention of Unfit Employees*, 56 Educ. L. R. 1117 (1990); Annot., 60 A.L.R. 4th 260 (1988) (liability of school authorities for hiring or retaining incompetent or otherwise unsuitable teacher); Annot., 73 A.L.R.4th 782 (1991) (validity, construction and application of state statute requiring doctor or other person to report child abuse, including private right of action for failure to report); Annot., 60 A.L.R.4th 260 (1988) (liability of school authorities for hiring or retaining incompetent or otherwise unsuitable teacher); Annot., 34 A.L.R.2d 372 (1954) (regarding liability of employer for a personal assault upon customer, patron, or other invitee); Annot., 48 A.L.R.3d 359 (1973) (regarding extent to which employer's knowledge of employee's past criminal record affects liability for employee's tortious conduct).

99. *Id. See, e.g.*, Kansas State Bank & Trust Co. v. Specialized Transportation Serv., Inc., 819 P.2d 587, 70 Educ. L. R. 1238 (Kan. 1991) (under circumstances of case, school liable for negligent supervision of bus driver who sexually molested student).

100. *See* Oklahoma City v. Tuttle, 471 U.S. 808, 105 S. Ct. 2427, 85 L. Ed. 2d 791 (1985) (where wife alleged city's failure to provide adequate training for its police officer resulted in the shooting of her husband, depriving him of life without due process of law, jury instruction deficient which did not require proof of a conscious adoption of an institutional policy of inadequate training, or of a

implementation of a policy of inadequate suicide prevention training.[101] School administrators, teachers and staff must be competent to prevent students from being a danger to themselves or others.[102] They also must be competent to deal with school crime and violence generally.[103]

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causal connection between the policy and the alleged constitutional deprivation); Sapp v. Effingham County Bd. of Educ., 409 S.E.2d 89, 70 Educ. L. R. 235 (Ga. Ct. App. 1991) (negligent training claim rejected where student was injured in parking lot altercation after being cut with a knife by student during school day; although contended that administrator should have been trained to contact police or parents after initial incident, court found that "it is impossible to provide a specific curriculum [of training] for all eventualities").

Cf. Nunn v. State, 35 Cal. 3d 616, 677 P.2d 846, 200 Cal. Rptr. 440 (1984) (community college immune from liabiltiy for alleged negligent failure to provide adequate instruction and timely test in firearms instruction course where enrollee was fatally shot while patrolling a manufacturing plant and had not, as a result of such alleged negligence, been licensed to carry a firearm)

101. Kelson v. City of Springfield, 767 F.2d 651, 26 Educ. L. R. 182 (9th Cir. 1985) (although Kelson's parents were being provided an opportunity to plead such a claim, the court did not express an opinion whether an actionable policy of inadequate training could be pleaded in the circumstances of the case).

102. *See* Furrh v. Arizona Bd. of Regents, 139 Ariz. 83, 676 P.2d 1141, 16 Educ. L. R. 631 (1983) (school and staff not liable where protective measures were taken to prevent student who was mentally incompetent from committing acts likely to cause serious bodily harm to himself or others).

103. The California constitutional right to safe schools clearly contemplates that schools must deal with school crime and violence regardless of increased costs. Tort law similarly requires that staff confront school crime and violence, refusing to allow schools to ignore foreseeable crime and violence with indifference.

Chapter IX

Schools Respond: Providing Safe Schools

The future of this nation lies in the quality of the education of our children. The fortunes of American schools and American society are thus inseparable. When schools succeed, society succeeds; when schools fail, society fails.[1] The success of many of our nation's schools and thereby our greatest resource — our children — has been jeopardized by crime and violence.

In some circumstances, society has come to tolerate human loss. For example, the theory underlying workers' compensation acts is that "the cost of the product should bear the blood of the workman."[2] Loss of flesh or life is treated as a cost of production, like the breakage of tools or machinery.[3] This nation should not consider the human loss, not to mention property damage, we annually suffer from crime and violence in our schools as an acceptable cost in educating our children. Schools must respond to school crime and violence by assuring students a safe, peaceful, secure and welcoming educational environment.

School Responsibility

To provide safe schools, school officials must first recognize that many are unsafe and that crime and violence are problems. The cases involving Tammy Fazzolari,[4] Madelyn Miller,[5] Kathleen Peterson,[6]

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1. National School Board Association, *Toward Better and Safer Schools: A School Leader's Guide to Delinquency Prevention* at iii (1984).
2. W. Keeton, *Prosser and Keeton on The Law of Torts* 573 (5th Ed. 1984)
3. *Id.* Prior to these acts industrial accidents generally were not compensated, primarily because of the rule that an employer was not liable for injuries caused solely by the negligence of a fellow servant. *Id.* at 571.
4. Fazzolari v. Portland School Dist. No. 1J, 303 Or. 1, 734 P.2d 1326, 38 Educ. L. R. 809 (1986).
5. Miller v. State of New York, 62 N.Y.2d 506, 467 N.E.2d 493, 478 N.Y.S.2d 829, 19 Educ. L. R.

Robert Hammack,[7] Peter Jesik II,[8] Josette Ferraro,[9] Brian Kelson,[10] the victims of Larry Campbell and others discussed highlight these problems. To a greater or lesser extent, far too many other schools throughout the nation witness crime and violence as well.

Schools often do not openly recognize the problems of crime and violence.[11] According to one report,[12] schools consciously and actively play down the incidents of crime and violence for many reasons. Schools and their administrators commonly are found to do so because they:

- Wish to avoid bad publicity;
- Sense they will be blamed as poor leaders;
- Wish to avoid litigation;
- Judge some offenses too minor to report;
- Prefer to rely on their own security and discipline;
- Suspect the police and courts will not cooperate; and
- Fear they will be regarded as ineffective.

Teachers commonly are found to refrain from reporting crime and violence because they:

- Sense they will be blamed;
- Wish to avoid litigation;
- Fear retaliation by the offender;
- Have trouble identifying the offender; and
- Do not wish to stigmatize young offenders.

Another task force found that while most school boards are genuinely outraged at student misconduct, crime and violence, they do not consider themselves responsible for eliminating the problem.[13]

The inaction of schools in dealing with student misconduct, crime

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618 (1984).

6. Peterson v. San Francisco Community College Dist., 36 Cal. 3d 799, 685 P.2d 1193, 205 Cal. Rptr. 842, 19 Educ. L. R. 689 (1984).
7. Collins v. School Bd. of Broward County, 471 So. 2d 560, 26 Educ. L. R. 533 (Fla. Dist. Ct. App. 1985), *mand. dismissed*, 491 So. 2d 280 (Fla. 1986).
8. Jesik v. Maricopa County Community College Dist., 125 Ariz. 543, 611 P.2d 547 (1980).
9. Ferraro v. Board of Educ., 32 Misc. 2d 563, 212 N.Y.S.2d 615, *aff'd*. 14 App. Div. 2d 815, 221 N.Y.S.2d 279 (1961).
10. Kelson v. City of Springfield, 767 F.2d 651, 26 Educ. L. R. 182 (9th Cir. 1985).
11. In some jurisdictions, it has been made a crime for school officials to defer or fail to report school crime. *See, e.g.*, Cal. Educ. Code §§ 12912(b), 12916; Cal. Penal Code, § 11161.5.
12. American Association of School Administrators, *Reporting: Violence, Vandalism and Other Incidents in Schools* (1981).
13. Reeves, *We Let It Happen — We Can Change It*, Thrust at 8, 9 (Oct., 1981) (regarding a task force

and violence in reality contributes to these problems.[14] The perpetrators believe that they "can get away with it." Others turn to crime and violence in self-defense because "that's the only way I can protect myself" or "get along with my peers." Crime and violence can quickly become an accepted part of a school's environment.

By recognizing an inalienable right to safe schools, the voters of California have specifically established the prevention of student crime and violence as a priority.[15] Victims' rights litigation throughout the nation has imposed a similar obligation as well.[16] As courts enhance the prerogatives of schools in dealing with school crime and violence, this duty becomes even more pronounced.[17]

The responsibility thus rests with the school community[18] to respond to school crime and violence by making schools safe, secure, peaceful and welcoming. To deal with school crime and violence,

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of the Association of California School Administrators).

14. *Id.* For this reason, some States now require that records of student crime and violence be maintained or that particular types of crime and violence be reported to law enforcement agencies. *See e.g.*, Conn. Gen. Stat. § 10-233g.

15. K. Sawyer, *The Right to Safe Schools: A Newly Recognized Inalienable Right*, 14 Pac. L. J. 1309, 1340 (1983). *See also* Chapter 2 *supra*.

16. *See* Chapters 7, 8 *supra*.

17. *See* J. Ullman, *After T.L.O.: Civil Liability for Failure to Control Substance Abuse?*, 24 Educ. L. R. 1099 (1985).

In People v. William G., Cal. 3d, 550, 709 P.2d 1287, 1295, 221 Cal. Rptr. 118, 29 Educ. L. R. 394 (1985), the Supreme Court of California noted that:

> When society requires large groups of students, too young to be considered capable of mature restraint in their use of illegal substances or dangerous instrumentalities, [to congregate in the public schools], it assumes a duty to protect them from dangers posed by anti-social activities — their own and those of other students — and to provide them with an environment in which education is possible. To fulfill that duty, teachers and school administrators must have broad supervisory and disciplinary powers.
>
> The public school setting is one in which governmental officials are directly in charge of children and their environments, including where they study, eat and play. Thus, [for purposes of searches] students' zones of privacy are considerably restricted as compared to the relation of a person to the police — whether on the street or at home. Further, the responsibility of school officials for each of their charges, the children, is heightened as compared to the responsibility of the police for the public in general. Thus, the approaches of the law, including constitutional law, must vary.

18. School safety must be a concern of both board and staff. Discussing initiatives by one group of teachers to restore campus peace, Edward Muir noted:

> The most important development for school employees is the feeling, for the most part, the board of education and the union are looking at the same school system and seeing the same set of problems. Usually they can work together to resolve these problems. E. Muir, *New York Teachers Unite for School Safety*, School Safety, National School Safety Center Newsjournal 21, 23 (Winter, 1986).
>
> *See also* A. Shanker, *AFT Commission Stresses School Safety, Discipline*, School Safety, Na-

schools must proactively recognize these problems and energetically assume the responsibility to do something about them.

Student Responsibility

Although it is incumbent upon schools to protect students and others against crime and violence, victims have a responsibility to exercise care on their part to prevent victimization to the extent they are able.[19]

Students are expected to help protect their own self-interests.[20] Thus, for example, one court rejected a claim against a university filed by the parents of a 17-year-old student alleging injuries when the student became associated with criminals, was seduced, became a drug user and was absent from her dormitory.[21] Students attending postsecondary schools and, certainly, older, healthy students in elementary and secondary schools, "must be presumed to have sufficient maturity to conduct their own personal affairs."[22] Although younger students or students with disabilities may not be able to protect their own self-interests as well as older, healthy students, they should be encouraged to develop responsibility commensurate with their health and maturity.[23]

Parent Responsibility

Parents are children's first teachers. As such, the foundation for good discipline begins at home.[24] Parental discipline guides children toward acceptable behavior and teaches them to make wise and respon-

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tional School Safety Center Newsjournal 8 (Fall, 1985).

19. Special care may be required where younger students or students with disabilities are involved. *See, e.g.*, Collins v. School Bd. of Broward County, 471 So. 2d 560, 26 Educ. L. R. 533 (Fla. Dist. Ct App. 1985), *mand. dismissed*, 491 So. 2d 280 (Fla. 1986).
20. Bradshaw v. Rawlings, 612 F.2d 135 (3rd Cir. 1979).
21. Hegel v. Langsam, 273 N.E.2d 351 (Ct. Com. Pleas 1971).
22. *Id. See also* Baldwin v. Zoradi, 123 Cal. App. 3d 275, 176 Cal. Rptr. 809 (1981) (no duty to prevent students from becoming intoxicated and engaging in a speed contest which resulted in one student being injured).
23. Many nationally acclaimed programs that develop student responsibility have been designed to reduce crime and violence on school campuses. Examples include: "Developing Student Responsibility for Violence on the High School Campus" at Alisal High School in Salinas, California; "Southern Oregon Drug Awareness Project" at Medford, Oregon; and "Triad Education" at Elk Grove High School in Elk Grove, California. K. Sawyer, *The Right to Safe Schools: A Newly Recognized Inalienable Right*, 14 Pac. L. J. 1309, 1341 n. 361 (1983).
24. A. Kahn, *Discipline at School Extends to the Home*, School Safety, National School Safety Center

sible decisions.[25] Further, proper discipline helps transmit parents' and society's values.[26] To extend discipline to school, it is important that parents support school rules and let their children know that they are expected to follow those rules.[27] Perhaps even more important is support of the school when those rules are enforced.

Community Responsibility

Immediate responsibility for making schools safe may well rest with schools and students, but the problems of school crime and violence are a community responsibility as well.[28] Conduct in school is reflected in students' actions when they become a part of the community at large. Thus, in addition to board members, educators and students, involvement is required by government officials, legislators, judges, attorneys, law enforcers, parents, guardians and other interested constituents. Professional and civic organizations can provide special expertise in dealing with the legal and non-legal aspects of school crime and violence as well. News organizations can be immensely helpful by investigating and reporting on school safety conditions and the importance assigned by school and community officials.

Checklist for Providing Safe Schools

What steps must be taken to provide safe, secure, peaceful and welcoming schools? The answers are complex and varied.[29] To help schools review their present efforts and plan future efforts, this checklist is offered.[30]

Newsjournal 7 (Fall, 1985).

25. *Id.*
26. *Id.*
27. *Id.*
28. According to California Governor George Deukmejian, in some communities: "Up to 65 percent of all daylight burglaries are committed by juveniles who are truant on the day the offense occurred." G. Deukmejian, *School Safety: An Inalienable Right*, School Safety, National School Safety Center Newjournal 4 (Fall, 1985). Thus, the community at large directly and immediately feels the sting of ineffectively managed schools with high truancy or dropout problems. Clearly, a community response is required.
29. No effort is being made to set forth the answers for every school. What is being provided are merely initial suggestions develop and implement a safe schools policy.
30. A discussion of the causes and solutions to school crime and violence is beyond the scope of this

[ ] Recognize the duty to provide safe schools, including:
- School responsibility;[31]
- Student responsibility;
- Parent responsibility; and
- Community responsibility.

[ ] Assign specific responsibility for developing, implementing and enforcing efforts to provide safe schools to an action team or other authority.[32]

[ ] Have an attorney knowledgable in education law participate in the school's efforts to eliminate crime and violence.

[ ] Determine the nature and scope of local school crime and violence.
- Establish an incident reporting and tracking system.[33]
- Identify categories of offenses and campus trouble spots war-

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book. Selected resources include:

J. Grant and F. Capell, *Reducing School Crime: A Report on the School Team Approach* (Social Action Research Center, 1983).

Los Angeles Unified School District, *Causes of and Possible Solutions to Campus Violence: A Report to the Los Angeles City Board of Education* (1979).

National Alliance for Safe Schools, *Manual on School Crime and Student Misbehavior: Analysis for Effective Action* (1984).

National School Boards Association, *Toward Better and Safer Schools: A School Leader's Guide to Delinquency Prevention* (1984) (including an extensive resource and reference guide).

National School Safety Center, *School Safety Legal Anthology* (Pepperdine University Press, 1985).

Resource Manual for Reducing Conflict and Violence in California Schools (California School Boards Association, 1974).

R. Rubel (ed.), *Crime and Disruption in Schools: A Selected Bibliography* (National Institute of Law Enforcement and Criminal Justice, 1979).

R. Rubel (ed.), *Juvenile Delinquency Prevention: Emerging Perspectives of the 1980's* (Institute of Criminal Justice Studies, Southwest Texas State University, 1980).

Vandalism and Violence: Innovative Strategies Reduce Costs to Schools (National School Public Relations Association, 1971).

S. Vestermark and P. Blauvelt, *Controlling Crime in the School* (Parker Publishing Co., Inc., 1978).

J. Weis and J. Hawkins, *The Social Development Model: An Integrated Approach to Delinquency Prevention* (Office of Juvenile Justice and Delinquency Prevention, 1980).

The National School Safety Center, Westlake Village, California, regularly publishes School Safety, a component of the NSSC School Safety New Service, which contains articles regarding many issues associated with school safety, discipline and campus environment. The Center also has or can direct interested persons to other resource information and materials.

31. By school, there is included the board, administrators, teachers, staff and related groups.
32. *See* J. Grant and F. Capell, *Reducing School Crime: A Report on the School Team Approach* (U.S. Government Printing Office, 1983).
33. Among the specific recommendations included in the *Final Report of the President's Task Force*

ranting special attention.

[ ] Identify and implement measures which can be taken to prevent crime and violence.
- Create a plan for conflict resolution.
- Limit access and opportunity for crime and violence.
- Close campuses.
- Improve surveillance.
- Have an effective, energetic staff that provides outstanding classroom instruction.[34]
- Develop alternative education programs.[35]
- Teach "character education" skills.
- Encourage better understanding of the law and legal system.[36]

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on Victims of Crime was that:

> School authorities should develop and require compliance with guidelines for prompt reporting of violent crimes committed in schools, crimes committed against school personnel, and the possession of weapons or narcotics.
>
> The Report went on to explain:
>
> School authorities must be able to respond flexibly to violations of school regulations. However, robbery, violent assaults, and the possession of dangerous drugs or weapons are more than mere transgressions of decorum.
>
> School boards should set forth guidelines that make clear to administrators, teachers, students, and parents exactly which kinds of misconduct will be handled within the school and which will be reported to the police.
>
> School boards should also require that each school keep records of the frequency of criminal offenses. Without such records, boards have fewer ways of evaluating their administrators and cannot effectively design and direct crime prevention policies. All too frequently, authorities become aware of danger in the schools only after an outburst of violence or after the problem has become so serious and pervasive that it simply cannot be hidden any longer. *Final Report of the President's Task Force on Victims of Crime* 101-02 (U.S. Government Printing Office, 1982); *See, e.g.*, Cal. Penal Code § 628 *et seq.*

34. *See* N. Quinones, *Creating the Climate for Safe, Effective Schools*, School Safety, National School Safety Center Newsjournal 4 (Winter, 1985).

35. According to testimony presented at a hearing before a United States Senate subcommittee:

> Whatever we now have as a problem of discipline can be expected to increase .... One single thing stands out as its existing cause, and this will only be exascerbated by heightened [educational] standards. In varying degrees and with varying consequences school problems of violence and discipline are primarily caused by students who do not want to participate in the educational process schools offer. This is not to say that intruders, the quality of school leadership, the mix of students in any given school, the inhibitions created by recent court rulings expanding student rights, the inadequacy of family support and a whole host of related factors are not important. They are. And each must be dealt with if comprehensive solutions are to be found. But addressing any one of these will amount to little more than a short term band-aid unless all are dealt with and unless all are approachable in terms of the fundamental issue of the turned-off kid. Testimony of Albert Shanker, President, American Federation of Teachers, AFL-CIO, before the United States Senate Subcommittee on Juvenile Justice, at hearings held January 25, 1984, at 1.

36. *See* C. Anderson, *Law-related Education Deters Delinquency*, School Safety, National School

- Utilize special education programs for students with behavioral disorders.
- Build or remodel schools that are security sensitive (e.g., improve lighting).
- Develop security systems, plans and procedures.[37]
- Require staff to challenge and assist outsiders.
- Make staff visible on campus.
- Check arrest records of employees and, if facts warrant, students.[38]
- Teach students how to avoid being victims.[39]
- Other.[40]

[ ] Establish procedures for school administrators, teachers and staff to recognize, anticipate, respond to and report incidents or potential incidents of crime and violence.[41]

[ ] Review or develop student discipline policies and procedures.[42]

Safety Center Newsjournal 17 (Winter, 1986); T. Evans, *Mentor Program Takes Lawyers Back to School*, School Safety, National School Safety Center Newsjournal 6 (Winter, 1986).

37. Designing and implementing security systems on school campuses is being recognized as a separate profession. See Mullins v. Pine Manor College, 389 Mass. 47, 449 N.E.2d 331, 335 n. 5, 11 Educ. L. R. 595 (1983).

School attorneys are often reluctant to encourage development of a security plan. Their concern is that the plan will somehow be used against the school if the plan is not implemented. *See, e.g.*, Mullins v. Pine Manor College, 389 Mass. 47, 449 N.E.2d 331, 11 Educ. L. R. 595 (1983) (duty of protection of dormitory student who was raped based, in part, on security measures adopted). *Cf.* Vitale v. City of New York, 60 N.Y.2d 861, 458 N.E.2d 817, 470 N.Y.S.2d 358, 15 Educ. L. R. 515 (1983) (court rejects argument that special duty was owed teacher by virtue of fact that teachers were to implement security plan which had not been enforced). In view of the trend in victims' rights litigation, it is more likely that liability will be imposed by failure to take preventive measures.

38. Among the specific recommendations included in the *Final Report of the President's Task Force on Victims of Crime* was that:

> School authorities should check the arrest and conviction records for sexual assault, child molestation, or pornography offenses of anyone applying for work in a school, including anyone doing contract work involving regular proximity to students, and make submission to such a check a precondition for employment. *Final Report of the President's Task Force on Victims of Crime* 102 (U.S. Government Printing Office, 1982).

39. Among the specific recommendations included in the *Final Report of the President's Task Force on Victims of Crime* was that:

> School authorities should be mindful of their responsibility to make students aware of how they can avoid being victimized by crime. *Final Report of the President's Task Force on Victims of Crime* 104 (U.S. Government Printing Office, 1982).

40. The above are merely a few examples. For a more detailed listing of suggestions, *see* National Institute of Justice, *Reducing School Crime and Student Misbehavior: A Problem-Solving Strategy* (1985).

41. *See, e.g.*, S. Vestermark and P. Blauvelt, *Controlling Crime in the School* 125-27 (Parker Publishing Co., Inc., 1978).

- Prescribe conduct standards.
- Prescribe general sanctions.
- Prescribe procedures for handling disciplinary matters.
- Give special attention to disciplinary procedures involving students with disabilities.
- Publicize policies and procedures extensively.

[ ] Establish regular in-service training programs for all staff regarding school crime and violence in cooperation with other appropriate agencies, including:

- Social and other problems contributing to school crime and violence;[43]
- Strategies for dealing with school crime and violence;
- Dynamics of behavior and personal interactions;[44]
- Implementation of disciplinary policies and procedures;
- Legal issues;
- Victims' rights;[45]
- Interagency cooperation; and
- Other.

[ ] Evaluate administrators, teachers and staff on their willingness and ability to anticipate and deal with school crime and violence and related student discipline policies and procedures.

[ ] Establish procedures whereby students, parents and the community may express comments, suggestions or concerns — specific or general — regarding school safety and respond adequately to them.

[ ] Develop effective, interactive relationships with local law enforcement and prosecution officials or agencies.

[ ] Develop effective relationships with the courts, probation and

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42. *See generally* J. Rapp. *Education Law* Chapter 9 (Matthew Bender & Company, Incorporated).
43. *See, e.g.*, A. Schauss. *Research Links Nutrition to Behavior Disorders*. School Safety, National School Safety Center Newsjournal 20 (Winter, 1985); J. Ryder. *Truancy and Drugs — Exploring Possible Links*. School Safety, National School Safety Center Newjournal 30 (Winter, 1985).
44. *See* P. Commanday. *"Peacemaking" Confrontation Management*. School Safety, National School Safety Center Newsjournal 7 (Winter, 1985).
45. Among the specific recommendations included in the *Final Report of the President's Task Force on Victims of Crime* was that:

    > Educators should develop and provide courses on the problems, needs and legal interests of victims of crime. *Final Report of the President's Task Force on Victims of Crime* 103 (U.S. Government Printing Office, 1982).

46. *See, e.g.*, B. Swans, Jr., *Gangbusters! Crisis Intervention Network*. School Safety, National School

social service agencies to better deal with problems, especially school crime and violence, drug traffic and use, or truancy and school dropout.[46]

[ ] Exchange and share information as appropriate to reduce school crime and violence.[47]

[ ] Work with legislators to improve laws relevant to school safety issues.[48]

[ ] Regularly evaluate programs established.

Prevention as Goal

Schools are increasingly vulnerable to suits brought by victims of student crime and violence. By becoming better aware of their liability, schools have the opportunity to take proper precautionary steps to avoid that liability. This will, in turn, prevent a certain amount of victimization. The ultimate goal should not be to compensate maimed victims or survivors of deceased victims, but to prevent students, teachers and others from becoming victims at all. What is required is that our schools be safe, secure, peaceful and welcoming.

Safety Center Newsjournal 12 (Winter, 1985); J. Yeaman, *Courtrooms — Classrooms*, School Safety, National School Safety Center Newsjournal 8 (Winter, 1986).

47. *See generally*, J. Rapp, R. Stephens & D. Clontz, *The Need to Know: Juvenile Record Sharing* (National School Safety Center).

48. *See, e.g.*, United States v. Nieves, 608 F. Supp. 1147 (S.D.N.Y. 1985) (upholding 21 U.S.C. § 845a creating irrebuttable presumption that the sale of narcotics within 1,000 feet of a school endangers students and thus allowing stiffer penalties upon conviction).

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