THE MENTAL HEALTH CRISIS ON CAMPUS: LIABILITY IMPLICATIONS OF USING EMERGING TECHNOLOGY

BETSY J. GREY*

Institutions of higher education are facing a "mental health crisis." Students are experiencing high rates of mental health issues, exacerbated by the pandemic. At the same time, the severity of psychological disorders is accelerating among students. These developments have put enormous pressure on traditional university support systems, and schools have turned to new technologies, like online mental health resources and monitoring systems using artificial intelligence, to expand their mental health services. This article explores the liability implications of using these emerging technologies to address these escalating needs. Universities offer mental health services in good faith to help their students succeed, and these emerging technologies potentially offer significant advantages toward meeting that goal. Tort law should not deter adoption of new technologies, but it is critical to recognize that their adoption may expand exposure to liability. Despite this paradox, use of these technologies is here, and universities need to consider their implementation.

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* Jack E. Brown Chair in Law, *Sandra Day O'Connor College of Law at Arizona State University*. I am grateful to Bob Dauber, Zak Kramer, Gary Marchant, and Joel Nomkin for helpful comments and discussions. Bego Contreras, Mason David, Ethan Randecker, and Aidan Wright provided excellent research assistance.

INTRODUCTION

Students of higher education institutions[1] are experiencing high rates of mental health issues.[2] The pandemic has exacerbated this problem.[3] At the same time, there is an escalation in the severity of

1. Although both universities and universities comprise higher education institutions, this Article uses the term universities to capture all institutions of higher education.

2. *See* NAT'L ACADEMIES SCI., ENG'G, MED., MENTAL HEALTH, SUBSTANCE USE, AND WELLBEING IN HIGHER EDUCATION: SUPPORTING THE WHOLE STUDENT 1–2 (Alan I. Leshner & Lanye A. Scherer eds., 2021) [hereinafter NAS REPORT] (explaining how almost eight million students, roughly forty percent of the total population, reported a significant mental health problem); Cara Murez, *Survey: 1 in 3 College Freshmen Deals with Depression, Anxiety*, UNITED PRESS INT'L (Dec. 7, 2021, 1:05 AM), https://www.upi.com/Health_News/2021/12/07/college-freshmen-one-third-depression-anxiety/8601638827178 [https://perma.cc/2PLA-5PFC] (confirming increased anxiety, depression, and other mental health problems in a 1,700 person survey of first-year Canadian undergraduates that researchers also found applicable to the United States). Mental health conditions include a broad range of issues, from depression, anxiety, and eating disorders, to obsessive-compulsive disorders and self-harm. *See generally Mental Health Conditions*, NAT'L ALL. ON MENTAL ILLNESS, https://www.nami.org/About-Mental-Illness/Mental-Health-Conditions [https://perma.cc/ZT45-42WJ].

3. *See* NAS REPORT, *supra* note 2, at 19–20; Changwon Son, Sudeep Hedge, Alec Smith, Xiaomei Wang, & Farzan Sasangohar, *Effects of COVID-19 on College Students' Mental Health in the United States: Interview Survey Study*, 22 J. MED. INTERNET RSCH. (2020), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7473764 [https://perma.cc/B2W5-

psychological disorders,[4] and suicide is a leading cause of death among university students in the United States.[5] These forces have created a crisis for universities. As a recent Report by the National Academy of Sciences found, "the increase in mental health and related problems has put tremendous pressure on the capacity of existing traditional university counseling and other support systems to handle the need for their services, leading to what some have called a 'mental health crisis' on university campuses."[6] To address the ever-increasing demand and the heightened severity of problems, and to promote generally the well-being and safety of their students, universities have looked to expand services for mental health.[7]

9N9R]; Andrea Peterson, *Universities Brace for Potential Increased Need for Mental Health Services; with Online and In-Person Teaching Planned, Counseling Teams Struggle with Uncertainty; a Sharper Focus on the Needs of Students of Color*, WALL ST. J. (June 29, 2020, 11:31 AM), https://www.wsj.com/articles/college-counseling-centers-brace-to-help-shaken-students-11593444702 [https://perma.cc/5BQW-RG9C].

4. *See* Karin McAnaney, Note, *Finding the Proper Balance: Protecting Suicidal Students Without Harming Universities*, 94 VA. L. REV. 197, 202 (2008) (describing potential factors to explain the increase in severity).

5. Hans Y. Oh, Caitlin Marinovich, Samantha Jay, Sasha Zhou, & Jacqueline H.J. Kim, *Abuse and Suicide Risk Among College Students in the United States: Findings from the 2019 Healthy Minds Study*, 282 J. AFFECTIVE DISORDERS 554, 554 (2021) (suicide is the second leading cause of death on college campuses).

6. *See* NAS REPORT, *supra* note 2, at ix.

7. *Id.* at 5 ("Nearly every institution of higher education provides some version of mental health and substance use counseling and treatment services, often through a counseling and psychological services center."); *id.* at 10 (reporting that a "great majority of university presidents surveyed indicated that they provide mental health services for their students"). Although limited data exist regarding the precise percentage of universities that offer mental health services, surveys that cover hundreds of university mental health centers indicate that many universities provide mental health services. *See* KIMBERLEY S. GORMAN, CINDY BRUNS, CALVIN CHIN, NIVLA Y. FITZPATRICK, LINDA KOENIG, & PETE LEVINESS ET AL., ASSOCIATION FOR UNIVERSITY AND COLLEGE COUNSELING: ANNUAL SURVEY: 2020 56–62 (2020) (covering 477 university counseling center directors); ROBERT P. GALLAGHER, NATIONAL SURVEY OF COLLEGE COUNSELING CENTERS 2014 36–54 (2014) (covering 275 counseling centers). A survey covering forty-two of the top universities and forty-one of the top liberal arts universities according to the U.S. News & World Report College Guide 2007 reported that 83/83 of the schools interviewed offered individual counseling and crisis intervention, and 74/83 offered group counseling. ANXIETY DISORDERS ASS'N OF AM., AN AUDIT OF MENTAL HEALTH CARE AT U.S. UNIVERSITIES AND UNIVERSITIES: FOCUS ON ANXIETY DISORDERS 8 (2007). Additionally, a 2007 study of college students at a large, public university noted that the university in its study and many others offer free campus mental health services. Daniel Eisenberg, Ezra Golberstein & Sarah E. Gollust, *Help-Seeking and Access to Mental Health Care in a University Student Population*, 45 MED.

Traditionally, schools mainly have relied on in-person counseling and referrals to address the mental health needs of their students.[8] With increasing barriers to these services, partly due to the pandemic,[9] some universities have turned to new technologies to help meet these needs.[10] These offerings, which are revolutionizing mental health services, include online mental health resources and monitoring systems using artificial intelligence.[11] The hope is that these services will lower barriers to treatment and identify patients who may pose a danger to themselves or others. At the same time, institutions of higher

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CARE 594, 594 (2007); *see also* Katherine Klebes, Note, *The Limited Provision of Mental Health Services at Community Universities: Obstacles, Initiatives, and Opportunities for Change*, 19 QUINNIPIAC HEALTH L. 315, 320, 324 (2017) ("The absence of mental health services is rare at traditional four-year institutions, which almost always provide some kind of free mental health counseling services . . . .") (first citing ANXIETY DISORDERS ASS'N OF AMERICA, *supra* note 7, at 8; and then citing Eisenberg, *supra* note 7, at 594).

8. *See* NAS REPORT, *supra* note 2, at 25; Mark Hay, *Colleges Say They Don't Have Money for Mental Health, Here's What They Should Do*, VICE (May 8, 2019, 9:40 AM), https://www.vice.com/en/article/a3xeqj/colleges-say-they-dont-have-money-for-mental-health-heres-what-they-should-do-triage [https://perma.cc/V8BE-DJG5]. Universities generally began addressing mental health needs of students in the 1950s, when counseling services became a more standard feature on campuses. *See* NAS REPORT, *supra* note 2, at 96.

9. Data suggest that other barriers, such as cultural stigma and availability, still exist among college students. *See* Emily G. Lattie, Sarah Ketchen Lipson & Daniel Eisenberg, *Technology and College Student Mental Health: Challenges and Opportunities*, FRONTIERS PSYCH. Apr. 2019, at 1–2, https://www.frontiersin.org/articles/10.3389/fpsyt.2019.00246/full [https://perma.cc/4QEW-YLHB] (explaining that barriers to mental health treatment for students include failure to recognize need, stigma, and access problems); Hay, *supra* note 8 (noting that in one survey, wait time reported at most universities to schedule counseling was two to three weeks, and up to two months).

10. Bethany Ao, *What Mental Health Services Will Look Like at Philly Colleges in the Fall: 'We Have a Plan A, a Plan B and a Plan C*,' PHILA. INQUIRER (July 25, 2020), https://www.inquirer.com/health/coronavirus-college-mental-health-teletherapy-services-swarthmore-dmax-20200724.html [https://perma.cc/QT4A-JU64]. These services include online mental health resources and tele-therapy sessions. *See* J. Christopher Fowler, Alok Madan, Courtenay R. Bruce, B. Christopher Frueh, Bita Kash, Stephen L. Jones et al., *Improving Psychiatric Care Through Integrated Digital Technologies*, 27 J. PSYCHIATRIC PRAC. 92, 96–97 (2021); NAS REPORT, *supra* note 2, at 5 (simply bolstering campus counseling centers may not be a sufficient solution to the mental health problems on campus today); Jennifer Melcher, Erica Camacho, Sarah Lagan, & John Torous, *College Student Engagement with Mental Health Apps: Analysis of Barriers to Sustained Use*, 70 J. AM. COLL. HEALTH 1819, 1819 (2022) (to help meet demand, college counseling centers have turned to use of mobile apps).

11. *See* Fowler et al., *supra* note 10, at 96.

education are under severe financial constraints.[12] These factors—the strain of the mental health crisis, increasing financial pressures, and the availability of emerging technologies—force consideration of two significant questions: whether universities owe a legal duty to provide any mental health services to their students; and if so, whether fulfillment of this duty is affected by the availability and adoption of new technologies.[13]

Tort law generally distinguishes between acts of commission and omission: a party does not owe a duty to aid another in danger if the party did not create the danger or have control over it.[14] Under this rule, universities would not owe a duty to address a risk they did not create, namely the mental health problems of their students.[15] But two important exceptions exist to the general "no-duty-to-rescue" rule. A party may owe an affirmative duty "to rescue" another from danger, regardless of their role in creating the danger, because of the nature of relationship (usually custodial or monetary) between the parties.[16] Under this exception, universities may owe certain affirmative duties to their students by virtue of the special relationship between the school and its students, which the school is obliged to carry out with reasonable care as circumstances warrant.[17]

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12. *See* NAS REPORT, *supra* note 2, at 2.

13. This Article focuses on the liability implications for institutions of higher education in providing mental health services for their students, but similar analysis potentially may apply generally to the business world and their employees. *See generally* Amanda Guarisco, *Not My Problem . . . Or Is It? An Examination of Changing Liability for Mental Health*, 6 EMORY CORP. GOVERNANCE & ACCOUNTABILITY REV. PERSPS. 1017, 1026 (2019).

14. DAN B. DOBBS, PAUL T. HAYDEN, & ELLEN M. BUBLICK, HORNBOOK ON TORTS § 26.1 (2d ed. 2016).

15. Studies attribute a variety of factors to the increase in mental illness experienced by students. The normal demands of pursuing a postsecondary education can be a challenging and overly stressful experience for some students. *See* NAS REPORT, *supra* note 2, at 22. "Many students arrive on campus with a mental health problem" while others experience it for the first time. *Id.* at 4. While upward trends of the incidence of mental health problems among students have been ongoing for decades, some of the recent increase may be attributed to the pandemic, economic downturns, and the systemic racism in the United States that is now being more widely acknowledged. *Id.* at 1. Some argue that cultural forces may also account for the rise in mental health issues among students. *See* Guarisco, *supra* note 13, at 1025 (outlining possible explanations for rise in demand for mental health services in universities, including emotional fragility from the "self-esteem movement," diminished stigma about mental health issues, and increased expectations of parents and students).

16. DOBBS ET AL., *supra* note 14, § 26.6.

17. *Id.*

A duty to rescue also may be created when a party undertakes to help the party in peril.[18] Under this exception, once a university undertakes to help its students with problems not of its own creation, it may owe the students a duty to carry out those efforts in a reasonable fashion.[19] Whether universities owe a duty to their students in the area of mental health services turns on the application of these two exceptions, and is the focus of this Article.

Universities have a strong interest in helping their students navigate their educational experience successfully.[20] They traditionally offer some form of mental health services to students in order to "assist students to define and accomplish personal, academic, and career goals by providing developmental, preventive, and remedial counseling."[21] To advance these goals, and to increase their support of students facing mental illnesses, universities have begun to turn to technology to expand their approach.

Technology now offers a variety of online therapy services and artificial intelligence systems to address students' mental health needs.[22] In particular, online technology allows schools to expand access to mental health services through a variety of formats,[23] which may help to meet the rising demand for services.[24] At the same time, universities may be in the best position to identify and manage risks associated with mental health issues as recent court decisions have broadened the affirmative duties of universities to include suicide and violence prevention.[25] Some schools may address these risks through monitoring systems to detect potential problems. This Article examines these social, legal, and technological developments to explore when universities owe an affirmative duty to provide mental

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18. *Id.* § 25.5.

19. *See id.*

20. *See* NAS REPORT, *supra* note 2, at 4–5 (finding that mental well-being affects academic achievement and graduation rates from several studies).

21. Martha Anne Kitzrow, *The Mental Health Needs of Today's College Students: Challenges and Recommendations*, 41 NASPA J. 165, 165 (2003) (citation omitted).

22. *See* Fowler et al., *supra* note 10, at 96–97.

23. *See* NAS REPORT, *supra* note 2, at 108.

24. *Id.* at 68 (asserting that universities are using online technology to support students needing mental health services); HEALTHY MINDS NETWORK & AM. COLL. HEALTH ASS'N, THE IMPACT OF COVID-19 ON COLLEGE STUDENT WELL-BEING 9 fig.11a, 10 fig.11b (2020), https://healthymindsnetwork.org/wp-content/uploads/2020/07/Healthy_Minds_NCHA_COVID_Survey_Report_FINAL.pdf [https://perma.cc/G893-QE39] [hereinafter HEALTHY MINDS].

25. *See infra* notes 211–232 and accompanying text.

health services and prevent self-harm and harm to others. It then probes how new technologies may affect how those duties are met.

Part I reviews the theoretical basis of affirmative duties that institutions of higher education generally owe to their students, tracing its evolution from the original custodial view of *in loco parentis* to the current one based on a special relationship or assumption of duty, a shift that affects the scope of the duties. It then examines those affirmative protective duties in the context of a duty to provide mental health services to students. Concluding that a duty exists in certain circumstances, Part II explores the nature and extent of that duty. Given the rise of mental health issues among university students,[26] emerging technologies offer many advantages. They enable universities to expand their services to students, including offering telehealth and testing chatbot services.[27] Other technological developments give universities increased ability to monitor students and detect potential mental health problems. Part III explores the liability implications of adopting these new technologies. The Article argues that universities need to consider the adoption of these technologies now, as traditional tests for the standard of care may soon impose a duty to adopt them. First, it may expand the standard of care as it becomes the custom for universities to adopt available technologies. Moreover, when these technological developments become sufficiently accurate, effective, and financially viable, they may affect the institutional duty of care through a cost/benefit analysis. Universities face a complex choice: they may act in good faith to address the campus mental health crisis through these technologies, but their adoption may give rise to new, increased, duties to act affirmatively to ensure student safety. Nonetheless, universities need to contemplate implementing these emerging technologies to assist and protect their students, notwithstanding the potential expansion of tort liability.

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26. HEALTHY MINDS, *supra* note 24, at 9 fig.10a, 10 fig.10b.
27. Fowler et al., *supra* note 10, at 96–97.

I. AFFIRMATIVE DUTIES OF HIGHER EDUCATIONAL INSTITUTIONS TOWARD THEIR STUDENTS

Institutional tort liability depends on whether a school owes a duty[28] to a student in a given situation. If the university is involved in an act of commission—creating a dangerous condition through negligence—then parties who are harmed can allege that the school breached its duty of due care toward them.[29] If a school is negligent in maintaining its premises, for example, resultant harm to students may be considered the responsibility of the school,[30] but harm to a student that occurs off campus may not be.[31]

As a general matter, however, tort law does not recognize a duty to a party if the actor did not create or have control over the risk of harm (i.e., an act of omission), regardless of how easy it would be to rescue the party from harm.[32] Thus, under the general common law rule, if a university did not create the condition causing the student's mental illness, it would have no legal duty to help the student address that illness.[33] But as discussed above, two exceptions may overcome this general rule and create affirmative duties: (1) "special relationships" may give rise to a duty "of reasonable care" to protect the endangered party "against unreasonable risk of physical harm";[34] or (2) once the actor voluntarily undertakes to assist a party in a given situation, the undertaking may create reliance on the part of the recipient, and thus engender a duty to carry out the undertaking in a reasonable fashion.[35] This Article examines these two exceptions in the context of

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28. A duty is an obligation "to conform to a particular standard of conduct in order to protect others against unreasonable risks of harm." Stearney v. United States, 392 F. Supp. 3d 1037, 1046 (D. Ariz. 2019).

29. DOBBS ET AL., *supra* note 14, § 26.6.

30. A. E. Korpela, Annotation, *Tort Liability of Public Schools and Institutions of Higher Learning for Accidents Due to Condition of Buildings or Equipment*, 34 A.L.R.3d 1166, § 3 (1970).

31. Kazanjian v. Sch. Bd. of Palm Beach Cnty., 967 So. 2d 259, 267–68 (Fla. Dist. Ct. App. 2007) (holding that a school was not liable for the death of a student that occurred off-campus during a car crash, even though the student was "habitually truant"; truancy did not engender any duty on the part of the school to protect the student from off-campus harm).

32. RESTATEMENT (THIRD) OF TORTS § 37 (AM. L. INST. 2012).

33. *Id.*

34. *Id.* § 40. In that case, a party may owe a duty of reasonable care with regard to risks that arise within the scope of the relationship, even if the defendant did not create the risks. *Id.*; *see* Dzung Duy Nguyen v. Mass. Inst. of Tech., 96 N.E.3d 128, 139 (Mass. 2018) (explaining affirmative duties to prevent suicide in special relationships).

35. RESTATEMENT (THIRD) OF TORTS, *supra* note 32, § 42.

affirmative duties universities owe to their students to provide mental health resources.

A. Special Relationships

The largest exception to the no duty to rescue doctrine stems from the nature of the relationship between the actor and the party. The Restatement (Third) of Torts recognizes certain characteristics of relationships that would support an affirmative duty of care in some circumstances.[36] These include some aspect of dependency, in which one party relies on the other for protection, or of control over a person's well-being, or on some monetary payment between the parties.[37] Classic examples of special relationships include jailer/prisoner, employer/employee, landlord/tenant, and common carrier/passenger.[38] The nature of the relationship also defines the boundaries of the duty owed.[39]

The affirmative duty of care arising from special relationships exists regardless of the source of the risk.[40] The special duties may apply to risks to parties that they themselves create, as well as those created by a third party's conduct—it does not matter whether the conduct is innocent, negligent, or intentional.[41]

Traditionally, the law has recognized a duty running between higher education institutions and their students in certain contexts. Courts historically have analyzed a university's protective duties to its students in various ways:

> [T]he university [has been] variously imagined as (a) standing *in loco parentis*, (b) a bystander/stranger (particularly when students are viewed as uncontrollable), (c) an insurer of student safety, (d) a landlord, (e) a custodian, (f) a babysitter, (g) an educator, (h) a supervisor, (i) sometimes, where appropriate, an employer, (j) a manager of student life or student activities, (k) a fiduciary, (l) a "producer" of educational product with respect to which a student

36. *Id.* § 40.
37. *See id.*
38. *Id.*
39. *Id.*
40. *Id.* § 40 cmt. f.
41. *Id.* § 40 cmt. g.

> is a "consumer," (m) a facilitator and/or (n) in a "delicate relationship" with students.[42]

The view has changed over time, reflecting prevailing social movements and cultural mores.[43] Much ink has been spilled over the basis for the university's duty to its students,[44] and it continues to evolve.

Originally, courts viewed universities as standing in for the parents—*in loco parentis*—toward students.[45] Under this view, parents delegated supervisory and disciplinary roles to the educational institution when it assumed physical custody of the student.[46] Universities had a duty to "exercise control over student conduct," which also "gave the students certain rights of protection . . . ."[47] At the same time, however, parents were generally immune from suit by their children, and universities drew on the same common law immunity to avoid liability.[48]

During the cultural revolutions of the 1960s and 1970s, social attitudes began to change, which affected the legal view of the university-student relationship and the potential liability of higher education institutions toward their students. While courts continued to see a school's relationship with minor students as custodial in nature, they redefined the relationship between universities and

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42. Robert D. Bickel & Peter F. Lake, *The Emergence of New Paradigms in Student-University Relations: From "In Loco Parentis" to Bystander to Facilitator*, 23 J. COLL. & UNIV. L. 755, 757–58 (1997) (citations omitted).

43. *See* Guarisco, *supra* note 13, at 1021. For more detailed reviews of this evolution, see Alberto Bernabe, *Do Colleges and Universities Have a Duty to Help? California and Massachusetts Lead the Way*, NE. U. L. REV. EXTRA LEGAL, Winter 2019, at 1, 2,, https://static1.squarespace.com/static/56a67d1e05caa777b1877b09/t/5c252cf30e2e72cac4827df5/1545940212017/EL_Bernabe_College+and+University+Duties+to+Students+12-27-2018.pdf [https://perma.cc/Y8XY-N3XM]; Guarisco, *supra* note 13, at 1027–28; Bickel & Lake, *supra* note 42, at 757–58.

44. *See generally* Bickel & Lake, *supra* note 42; Helen H. de Haven, *The Academy and the Public Peril: Mental Illness, Student Rampage, and Institutional Duty*, 37 J. COLL. & UNIV. L. 267 (2011); Helen H. de Haven, *The Elephant in the Ivory Tower: Rampages in Higher Education and the Case for Institutional Liability*, 35 J. COLL. & UNIV. L. 503 (2009); Peter F. Lake, *The Rise of Duty and the Fall of* In Loco Parentis *and Other Protective Tort Doctrines in Higher Education Law*, 64 MO. L. REV. 1 (1999); Christopher Ramos, *Adolescent Brain Development, Mental Illness, and the University-Student Relationship: Why Institutions of Higher Education Have a Special Duty-Creating Relationship with Their Students*, 24 REV. L & SOC. JUST. 343 (2015).

45. Bernabe, *supra* note 43, at 2; Lake, *supra* note 44, at 4.

46. Guarisco, *supra* note 13, at 1018.

47. Bradshaw v. Rawlings, 612 F.2d 135, 139 (3d Cir. 1979).

48. Lake, *supra* note 44, at 4; Guarisco, *supra* note 13, at 1018.

students over the age of majority.[49] Courts found that universities had less control over adult students and fewer opportunities to supervise their behavior than lower education institutions.[50] Instead, courts began to view higher education students as autonomous adults and deserving of less supervision, and declined to impose the same affirmative duties as those imposed on lower education institutions.[51] This "dramatic reapportionment of responsibilities and social interests" supported the idea that "the modern American college [was] not an insurer of the safety of its students."[52] During this "bystander era," courts recognized institutional duties to students with regard to premises liability, and safety in dormitories,[53] but as legal adults, university students could take responsibility for their own behavior, especially when it was potentially risky.[54]

Another view of university responsibility developed in the 1970s and 1980s. Some courts began to broaden university liability to include an affirmative duty on universities to protect students against the foreseeable misconduct of third parties.[55] Some courts even extended this duty to protect students during off-campus, school-related activities.[56] Other courts continued to resist imposing a duty to protect

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49. Guarisco, *supra* note 13, at 1018 (explaining that courts began to require that universities, in disciplining students, provide them with constitutional protections, including procedural due process, which spelled the end of the *in loco parentis* doctrine).

50. Bernabe, *supra* note 43, at 2.

51. *See, e.g.*, *Bradshaw*, 612 F.2d at 139–40.

52. *Id.* at 138–39.

53. Lake, *supra* note 44, at 12.

54. Bickel & Lake, *supra* note 44, at 787.

55. Guarisco, *supra* note 13, at 1019. *See* Mullins v. Pine Manor Coll., 449 N.E.2d 331, 335 (Mass. 1983) (university had a duty to protect its students from criminal acts of third parties based on "existing social values and customs") (citation omitted).

56. Guarisco, *supra* note 13, at 1019–20; *see, e.g.*, Regents of Univ. of Cal. v. Superior Ct., 240 Ca. Rptr. 3d 675, 679 (Cal. Ct. App. 2018) (extending the special relationship between universities and students to a "duty to use reasonable care to protect their students from foreseeable acts of violence in the classroom or during curricular activities") (quoting Regents of Univ. of Cal. v. Superior Ct., 4 Cal. App. 5th 607, 627 (2018)); Mintz v. State, 47 A.D.2d 570, 571 (N.Y. App. Div. 1975) (finding a duty to students during an extracurricular activity but declining to hold the university breached that duty).

the safety of their students from their own drug or alcohol related conduct.[57]

One of the most influential cases of this era was *Tarasoff v. Regents of the University of California*.[58] In *Tarasoff*, the California Supreme Court held that a university psychotherapist had a duty to protect a student from another student's violent intentions toward her.[59] The court based the affirmative duty to the third party on the special relationship between the psychotherapist and his patient, and the psychotherapist's belief that the patient/student posed a serious and imminent risk of harm to a reasonably identifiable victim.[60] The court listed an extensive number of factors to consider in deciding whether a special relationship exists between an actor and a patient that would engender a duty to protect a third party from harm.[61] Chief among these factors was the foreseeability of harm to the third party.[62] These factors became very influential in determining whether a special relationship exists generally, which could trigger affirmative duties even to outside parties.

In *Tarasoff*, the duty would require the psychotherapist to warn an identifiable victim.[63] This duty overrides the breach of confidentiality between the psychologist and their patient.[64] In a broader reading, *Tarasoff* establishes that when a special relationship exists, the institution has an affirmative duty to protect students from foreseeable harm.[65] Almost every state has adopted the *Tarasoff* rule as applied to

57. Guarisco, *supra* note 13, at 1020–21. *See* Alumni Ass'n v. Sullivan, 572 A.2d 1209, 1213 (Pa. 1990) (determining that a university did not have a duty to supervise fraternity party where alcohol was served; the court held that "the authoritarian role of [the university] has been notably diluted" and "is not an insurer of the safety to its students") (quoting Bradwhaw v. Rawlings, 612 F.2d 135, 138 (3d Cir 1979)); Beach v. Univ. of Utah, 726 P.2d 413, 419 (Utah 1986) (holding a university does not have a duty to prevent students from illegally consuming alcohol on a school trip).

58. 551 P.2d 334 (Cal. 1976).

59. *Id.* at 362.

60. *Id.* at 344–45.

61. *Id.* at 345–46.

62. *Id.* at 345.

63. *Id.* at 341.

64. *Id.* at 345.

65. *Id.*

psychotherapists in some form,[66] and courts have applied the *Tarasoff* rule directly to schools either explicitly[67] or implicitly.[68]

Notwithstanding these common law developments, states do not have a uniform view of the affirmative protective duties of higher education institutions.[69] The Restatement (Third) of Torts sought a middle ground in this area. While recognizing the affirmative protective duty universities may owe their students based on a special relationship, it noted that context drives the nature of the duty.[70] As the Reporters explained in their comments, "what constitutes reasonable care is contextual—the extent and type of supervision required of young elementary-school pupils is substantially different from reasonable care for university students."[71] The Restatement also recognized that the university–student relationship was not the exclusive consideration for determining whether a special relationship exists; it could also rely on other aspects of the relationship, such as their roles as landowners-invitees.[72]

In recent cases, many courts have continued to broaden the affirmative protective duties that universities owe to their students, especially with regard to protection from themselves or others.[73] Actual knowledge of or a highly foreseeable danger is a significant factor in both circumstances. Courts also consider the expectations of students and parents that the school will provide protection.[74]

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66. MARC A. FRANKLIN, ROBERT L. RABIN, MICHAEL D. GREEN, MARK A. GEISTFELD, & NORA FREEMAN ENGSTROM, TORT LAW AND ALTERNATIVES 162 (11th ed. 2021).

67. *See, e.g.*, Phyllis P. v. Superior Ct., 228 Cal. Rptr. 776, 777 (Ct. App. 1986) (holding that such a special relationship existed between a rape victim's school and her parents).

68. *See* Stoddart v. Pocatello Sch. Dist. No. 25, 239 P.3d 784, 789 (Idaho 2010) (noting "[a] duty may exist where foreseeable harm arises on school grounds during school hours, even where the actual injury occurs off school grounds and after school hours" without designating that this duty stemmed from a special relationship).

69. *Compare* Regents of Univ. of Cal. v. Superior Ct., 413 P.3d 656, 660 (Cal. 2018) (duty to protect students from foreseeable harm by other students), *with* Schieszler v. Ferrum Coll., 236 F. Supp. 2d 602, 609 (W.D. Va. 2002) (interpreting state law to find that, in general, "it is unlikely that Virginia would conclude that a special relationship exists as a matter of law between universities and universities and their students").

70. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 40 cmt. l (AM. L. INST. 2012).

71. *Id.*

72. *Id.*

73. Guarisco, *supra* note 13, at 1021.

74. Regents of Univ. of Cal. v. Super. Ct., 240 Cal. Rptr. 3d 675, 684 (Ct. App. 2018).

Common law tort doctrine traditionally finds that parties do not owe a duty to protect others from harm by independent third parties, except in limited circumstances.[75] The California Supreme Court examined this question in the university context in *Regents of the University of California v. Superior Court*.[76] In *Regents*, the court examined UCLA's duty to protect its students from actions of other students.[77] One student, who had a history of mental health issues, stabbed another student while in class.[78]The court declined to dismiss the case brought against the university, holding that a school could owe a duty to protect its students in that situation, based on the university-student special relationship.[79] It noted that the relationship between the university and its students has two important hallmarks of a special relationship: a substantial power inequity between the parties that leads the lesser party to depend on the greater party for safety, and the foreseeability of harm that the greater party has the power to prevent.[80]

Under *Regents*, a university has a duty to act reasonably to protect students when the university becomes aware of a threat to student safety.[81] Although it acknowledged that primary and secondary schools may owe a greater duty to their students than universities, given the more comprehensive control those schools can exert over their students, the *Regents* court found that university students remain vulnerable.[82] Young adults still depend on universities to provide "structure, guidance, and a safe learning environment."[83] The court limited the duty to enrolled students only, and only in the context of school-sponsored activities over which the school has some control.[84] Explaining these limitations, the court stated: "postsecondary schools *do* have a special relationship with students while they are engaged in

75. *See* Guarisco, *supra* note 13, at 1022–23 (contrasting the absence of a duty to protect others from harm caused by independent third parties in "traditional" tort law with the recent development of a duty to protect a victim from the criminal activity of an independent party in "certain 'special relationships'").

76. 413 P.3d 656 (Cal. 2018).

77. *Id.* at 659–60.

78. *Id.* at 659.

79. *Id.* at 674.

80. *Id.* at 668.

81. *Id.* at 673–74.

82. *Id.* at 664, 669.

83. *Id.* at 668.

84. Univ. of Cal. v. California, 413 P.3d 656, 673 (Cal. 2018).

activities that are part of the school's curriculum or closely related to its delivery of educational services."[85]

Some courts have extended the duty of protection from third party harm to protect students from self-harm or suicide. Traditionally, suicide is considered an intervening cause in negligence lawsuits, and thus not within the scope of risk of negligence.[86] Courts previously relied on this view to protect universities from liability for student suicide, finding that the schools did not cause the suicide or have a special duty to prevent it.[87] This view has begun to break down in the university context, especially when the harm is particularly foreseeable.[88]

The Massachusetts Supreme Court addressed this question in *Nguyen v. Massachusetts Institute of Technology*.[89] In *Nguyen*, the court found that a university has a duty to protect its students from committing suicide "[w]here a university has actual knowledge of a student's suicide attempt that occurred while enrolled at the university or recently before matriculation, or of a student's stated plans or intentions to commit suicide . . . ."[90] If the university has actual knowledge of "stated plans or intentions," or a recent suicide attempt, then the university "has a duty to take reasonable measures under the circumstances to protect the student from self-harm."[91]

The court described the "[r]easonable measures" that could satisfy the university's duty of protection, including initiating suicide prevention protocols, contacting appropriate university officials to help the student get clinical care, or if the student refuses assistance, notifying the student's emergency contact, and contacting emergency police or medical personnel.[92] The appropriate measures are context-driven: "By taking the reasonable measures under the circumstances presented, a university satisfies its duty."[93] The court noted that the duty is "time bound."[94] Thus, if medical professionals conclude that the

85. *Id.* at 667.

86. *See* Alex B. Long, *Abolishing the Suicide Rule*, 113 NW. U. L. REV. 767, 767 (2019); McAnaney, *supra* note 4, at 208.

87. *See* Brittney Kern, *Balancing Prevention and Liability: The Use of Waiver to Limit University Liability for Student Suicide*, 2015 BYU EDUC. & L.J. 227, 228 (2015).

88. *See* McAnaney, *supra* note 4, at 199.

89. 96 N.E.3d 128 (Mass. 2018).

90. *Id.* at 142.

91. *Id.* at 142–43.

92. *Id.* at 145.

93. *Id.*

94. *Id.*

student is no longer a suicide risk, that may end the university's duty to take further measures.[95]

In *Nguyen*, the court found that MIT did not breach its duty because it did not have actual knowledge of the student's plan to commit suicide, the previous attempts were too distant, and the student used his own therapists.[96] A later case made clear that to fulfill its duty in this context, a university's approach must meet a reasonableness test, and merely providing a suicide prevention protocol is not sufficient to meet the duty.[97]

Limitations to the affirmative duty of a university to prevent third party or self-harm may be based on geography or the nature of the activity. In *Regents*, for example, a concurring opinion would have constrained the boundaries of the decision "in the classroom."[98] Court decisions will continue to develop these limits, especially as universities increasingly change the nature of their teaching models. With the increase of remote learning offerings, for instance, geography may not be a limitation. A university conceivably could owe a duty to its students' wellbeing from the time they enroll at the university until the student actually graduates or otherwise effectively ends the relationship with the school, regardless of whether the student is physically present on campus.

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95. *Id.*

96. *Id.* at 146. A prior Massachusetts Superior Court decision, Shin v. Mass. Inst. of Tech., No. 020403, 2005 WL 1869101 (Mass. Super. Ct. June 27, 2005), refused to grant the university administrators' motion for summary judgment, rejecting the argument that the university administrators had no duty as a matter of law to prevent Shin's suicide. *Id.* at *11–13. It found that the university administrators were well aware of the student's mental health troubles and that the plaintiffs had provided sufficient evidence that defendants could have reasonably foreseen Shin's suicide. *Id.* at *13. The alleged facts included Shin's history of psychiatric trouble, reports to deans from students and professors about her self-destructive behavior, meetings with Shin to discuss her mental health, the university's referral of Shin to MIT's mental health center for an assessment, and notification of her suicidal intentions on the day of her suicide. *Id.* The court ruled, based on these allegations, that a jury question existed as to whether a special relationship existed to engender a duty to prevent the suicide. *Id.* The case settled before it went to the jury. Kern, *supra* note 87, at 236.

97. *See* Tang v. President & Fellows of Harv. Coll., No. MICV2018-2603, 2019 Mass. Super. LEXIS 486, at *10–12 (Super. Ct. Sept. 9, 2019).

98. Regents of Univ. of Cal. v. Superior Ct., 413 P.3d 656, 675 (Chin, J., concurring) (citation omitted). The majority opinion did not address limitations, however. *Id.*

Actual knowledge of danger or a heightened foreseeability standard is an important limitation. In *Schieszler v. Ferrum College*,[99] for example, the court rejected the assertion that a university always owes a special duty to their students based solely on the student-university relationship.[100] Instead, the relationship, plus the specific facts involved, triggered the duty. In *Schieszler*, Ferrum College had actual notice that a student had sent a message to his girlfriend expressing the intent to kill himself.[101] Shortly before committing suicide, campus police found the student with bruises on his head, which he claimed were self-inflicted.[102] These facts were sufficient to defeat the college's motion to dismiss, since a reasonable trier of fact could conclude that there was "an imminent probability" that the student would try to hurt himself and that the college "had notice" of this specific harm.[103] The court borrowed the imminent danger test from the special relationship between a business owner and invitee to support its finding.[104]

A related question is whether universities have a duty to notify a student's parents of potential self-harm prior to suicide. Several state courts have ruled that a university did not breach any legally cognizable duty by failing to notify parents of a prior suicide attempt.[105]

B. Voluntary Assumption of Duty

An alternative basis for affirmative protective duties may occur when a party voluntarily aids another or undertakes a duty to rescue. In some ways, this may be the stronger basis for imposing an affirmative duty in

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99. 236 F. Supp. 2d 602 (W.D. Va. 2002).
100. *Id.* at 609.
101. *Id.*
102. *Id.* at 605.
103. *Id.* at 609.
104. *Id.*; *see* Peterson v. S.F. Cmty. Coll. Dist., 685 P.2d 1193, 1194 (Cal. 1984) (en banc) (holding that students can be considered a business invitee to whom universities owe a duty to exercise reasonable care to protect them from foreseeable assaults on campus).
105. *See* Jain v. State, 617 N.W.2d 293, 294–95 (Iowa 2000); Shin v. Mass. Inst. of Tech., No. 020403, 2005 WL 1869101, at *8 (Mass. Super. Ct. June 27, 2005). Under the Family Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g, the federal laws that govern the privacy of health and education records, university staff are permitted but not required to inform "appropriate parties" of confidential mental health information where "knowledge of the information is necessary to protect the health or safety of the student or other individuals." 34 C.F.R. § 99.36(a) (2021). Neither the Department of Education nor the courts have clarified whether a suicide attempt should be construed as a health emergency under this provision. McAnaney, *supra* note 4, at 206–07.

the university context, since the majority of higher education institutions already have some form of mental health services in place, and students have come to rely on them.

The undertaking exception may engender a duty when the entity "render[s] services to another and . . . knows or should know that the services will reduce the risk of physical harm to the other has a duty of reasonable care to the other in conducting the undertaking if . . .the person to whom the services are rendered or another relies on the actor's exercising reasonable care in the undertaking."[106] In other words, the duty is triggered when a party offers assistance that creates expectations of protection by others.

Courts have applied the undertaking exception in the university context. The exception has been applied to impose an affirmative duty of protection on universities toward its students. In *Mullins v. Pine Manor College*,[107] the court imposed an affirmative duty on universities to prevent third-party harm.[108] In that case, a female student at Pine Manor College was abducted from her dormitory and sexually assaulted.[109] The court held that the school had a duty to protect its students against criminal acts of third parties, which was based on "existing social values and customs."[110] Furthermore, the court found that since the university had taken precautionary security measures, including hiring security guards, locking doors at night, and installing a security system, the university had voluntarily assumed a duty of protection from third-party crime.[111]

Some courts read the voluntary undertaking exception broadly. In *Furek v. University of Delaware*,[112] the court held that a university assumed a duty of protection from other students when it adopted an anti-hazing policy, even though it did not find that the plaintiff detrimentally relied upon it or was put at increased risk because of it.[113]

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106. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 42 (AM. L. INST. 2012); *see also* Furek v. Univ. of Del., 594 A.2d 506, 519–20 (Del. 1991) (holding that the university's policy against hazing constituted an assumed duty and the university had a duty to regulate and supervise foreseeable dangerous activities occurring on its property).

107. 449 N.E.2d 331 (Mass. 1983).

108. *Id.* at 337.

109. *Id.* at 334.

110. *Id.* at 335 (quoting Schofield v. Merill, 386 Mass. 244, 247 (1982)).

111. *Id.* at 336.

112. 594 A.2d 506 (Del. 1991).

113. *Id.* at 520, 523.

Other courts have read the exception more narrowly, requiring a showing of detrimental reliance to invoke it. In *Jain v. State*,[114] for example, the Iowa Supreme Court held that a university did not have a duty to notify the parents of a student's potential self-harm, even though the university had notice that the student had threatened to kill himself, and the university had adopted a parental notification policy.[115] After the student committed suicide, the parents sued the university for wrongful death, but the court rejected the claim.[116] It held that "[n]o affirmative action by the [university] . . . increased [the student's] risk of self-harm," the student had not relied on the parental notification policy, and the university had not voluntarily assumed a duty.[117]

Thus, under the court's interpretation, the university's undertaking (here, parental notification) must leave the victim in a worse position for a legal duty to arise. When universities voluntarily undertake to provide mental health services to their students, they may foster an expectation that they will act with reasonable care in providing these services.[118] Under *Jain*, however, simply undertaking a service may not be enough. As noted, the court found that that the plaintiffs had not provided sufficient evidence of detrimental reliance on a parental notification policy, or that the university's action increased the risk of harm to the student.[119]

Universities provide mental health services to their students for any number of reasons. Aside from an overall concern for their students' general welfare, universities have a strong incentive to help their

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114. 671 N.W.2d 293 (Iowa 2000).

115. *Id.* at 294–95.

116. *Id.*

117. *Id.* at 299–300.

118. *See* Mullins v. Pine Manor Coll., 449 N.E.2d 331, 336 (Mass. 1983); Anderson v. Bard Coll., No. CV19-236, 2020 Mass. Super. LEXIS 122, at *13–14 (Super. Ct. Aug. 18, 2020) (holding that providing services to attempt to satisfy the *Nguyen* test can affirm a duty even if the university had no original liability); Nguyen v. Mass. Inst. of Tech., 96 N.E.3d 128, 147 (Mass. 2018); Tang v. President & Fellows of Harv. Coll., No. MICV2018-2603, 2019 Mass. Super. LEXIS 486, at *10 (Super. Ct. Sept. 9, 2019). Plaintiffs have also raised claims of express or implied contracts based on representations made in the institution's marketing materials, but these claims are generally not successful. *See* Eric A. Hoffman, Note, *Taking a Bullet: Are Colleges Exposing themselves to Tort Liability by Attempting to Save Their Students?*, 29 GA. ST. U. L. REV. 539, 556–57 (2013); Shin v. Mass. Inst. of Tech., No. 020403, 2005 WL 1869101, at *6–8, 14–15 (Mass. Super. Ct. June 27, 2005) (rejecting contract and negligent misrepresentation claims).

119. *Jain*, 617, 617 N.W.2d at 299–300.

students succeed and graduate.[120] A related interest stems from safety interests: universities seek to manage the risk students pose to themselves and others to prevent foreseeable danger.[121]

But the undertaking exception presents an inherent paradox that society would want to avoid. By voluntarily taking steps to address student mental health issues, the university could theoretically expose itself to liability that it might not otherwise face.[122] This could create a perverse incentive for universities to avoid providing services for mental health, which could ultimately increase the danger to the student's safety and well-being, as well as to others.[123] Courts have taken note of this problem. For example, in *Mahoney v. Allegheny College*,[124] the court dismissed the parents' claim that the college had breached its duty to prevent their son's suicide and to notify them of their son's mental health problems.[125] The court found that no special relationship existed between the school and the student, noting that "Allegheny College did not have a custodial relationship with Mahoney who was an adult who lived in an off campus fraternity house."[126] In its analysis, the court expressed a concern that imposing a duty on colleges could encourage colleges to prioritize liability concerns over student health concerns:

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120. *See* NAS REPORT, *supra* note 2, at 4–5; McAnaney, *supra* note 4, at 201.

121. Universities also claim the power to expel or dismiss students, if necessary. *See* de Haven, *supra* note 44, at 352–53; McAnaney, *supra* note 4, at 226; Aaron Konopasky, Note, *Eliminating Harmful Suicide Policies in Higher Education*, 19 STAN. L. & POL'Y REV. 328, 328–29 (2008). This policy raises other liability concerns, including the potential to violate statutes that protect people with mental health problems from discrimination, such as the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213, and section 504 of the Rehabilitation Act, 29 U.S.C. § 794. McAnaney, *supra* note 4, at 199; Guarisco, *supra* note 13, at 1030–31.

122. The duty of care based on premises liability has followed a similar path. In *Mullins v. Pine Manor College*, an unidentified assailant raped a student on campus. 449 N.E.2d 331, 333 (Mass. 1983). The Supreme Court of Massachusetts concluded that a university has a duty to take reasonable measures to protect its students from foreseeable criminal acts of third parties, including on-campus sexual assaults. *Id.* at 337. Courts have extended this duty based on premises liability to include foreseeable harms to students when a special relationship between universities and their students exists. *See id.* at 335, 337 (explaining the imposition of a higher duty of care because of the special relationship between universities and resident students).

123. *See* Jane A. Dall, Note, *Determining Duty in Collegiate Tort Litigation: Shifting Paradigms of the College-Student Relationship*, 29 J.C. & U.L. 485, 505 (2003).

124. No. AD 892-2003 (Pa. Ct. Com. Pl. Dec. 22, 2005).

125. *Id.* at 22.

126. *Id.*

> [T]he "University" has a responsibility to adopt prevention programs and protocols regarding students [sic] self-inflicted injury and suicide that address risk management from a humanistic and therapeutic as compared to just a liability or risk avoiding perspective . . . . Rather than create an ill-defined duty of due care the University and mental health community have a more realistic duty to make strides towards prevention.[127]

Thus, the court recognized that if more involvement in the student's health and well-being could lead to liability, imposing a duty based on voluntary undertakings could unintentionally encourage universities to limit their involvement in the student's treatment.

Courts should be mindful of these perverse incentives that can be created by expanding the tort liability of universities. Tort liability rules should not deter universities from exploring new ways to handle the increased needs of students for mental health services. Fortunately, even in the face of potential liability exposure, many universities have responded to the campus mental health crisis by improving and increasing their mental health services.[128] Nearly every university provides some form of mental health services for their students.[129] In other words, it's fair to say that many universities put a higher premium on student health than on liability-risk avoidance. Consequently, "[p]arents, students, and the general community . . . have a reasonable expectation, fostered in part by colleges themselves, that reasonable care will be exercised to protect resident students from foreseeable harm."[130]

Nonetheless, the expectation of protection created by providing mental health services may create broader affirmative duties to address the risks associated with mental health issues, including monitoring students for potential problems. In the end, the undertaking to provide mental health services with a corresponding expectation of protection become critical factors in creating an institutional duty in the area of mental health. This duty can be viewed as related to the

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127. *Id.* at 25.

128. *See supra* note 7 and accompanying text.

129. *See* NAS REPORT, *supra* note 2, at 5.

130. Mullins v. Pine Manor Coll., 449 N.E.2d 331, 335–36 (Mass. 1983) (finding a college liable to student sexually assaulted on campus because of its duty grounded in "existing social values and customs" and voluntarily assumed); *see* NAS REPORT, *supra* note 2, at 120 ("[T]he U.S. postsecondary educational system is one of the few systems in the nation, other than the military, whose stakeholders expect to provide low-cost or free treatment for those within its community with mental health and substance use problems.").

provision of medical services generally, which can exist even if the school did not create the risk of harm.[131]

II. MEETING THE STANDARD OF CARE

When an affirmative obligation exists, created under either exception to the no-duty-to-rescue doctrine, the university owes a duty to act reasonably in fulfilling that obligation. Reasonableness primarily turns on two factors: the standard of care—informed by the custom of the industry—and the feasibility of providing the service from a cost-benefit point of view.[132]

Defining the custom among universities in providing mental health services is challenging because the types and extent of mental health services continue to develop, driven by increases in demand, the availability of resources, and changes in technology. Different types and sizes of schools may face different challenges and needs.

The vast majority of higher education institutions offer some form of mental health services to their students.[133] The form of these services generally includes individual and group counseling, crisis intervention, referrals to community resources, consultations, and

131. There is a long history of higher education institutions offering health services to students. Amherst College was the first postsecondary institution to offer student health care in 1861. *See* NAS REPORT, *supra* note 2, at 96. *But see* Shin v. Mass. Inst. of Tech., No. 020403, 2005 WL 1869101, at *15 (Mass. Super. Ct. June 27, 2005) (rejecting express and implied contract and negligent misrepresentation claims in wrongful death suit brought for a student's suicide).

132. DOBBS ET AL., *supra* note 14, § 12.1, at 263.

133. *See* GORMAN ET AL., *supra* note 7, at 61–67. A range exists in the investments in these offerings. In one survey of 270 higher education centers in 2020, the operating budget for university counseling centers ranged from $900 to over $3 million. *Id.* at 12.

outreach programming.[134] Many four-year universities also provide psychiatric services.[135]

At the same time, given the rise in mental health issues among higher education students, especially during the pandemic,[136] and faced with tight budgets, many universities have struggled to meet the increased demand for mental health services.[137] Many institutions have turned to technological advances to help meet that demand.[138] These advances take two major forms: teletherapy services and artificial intelligence systems to monitor students to detect potential health problems.[139] This section describes some of these technological

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134. ANXIETY DISORDERS ASS'N AM., *supra* note 7, at 8. Many schools also utilize threat assessment teams. As of January 2011, "more than half of the country's 4,500 colleges and universities 'acknowledge the need and have formed some capacity' to assess student threats." A.G. Sulzberger & Trip Gabriel, *Tucson Shooting Raises Questions on How to Handle Troubled Students*, N.Y. TIMES (Jan. 13, 2011), https://www.nytimes.com/2011/01/14/us/14college.html [https://perma.cc/NK5W-VSBH]. USA Today reported "80% of colleges nationwide have started [threat assessment teams] since the 2007 massacre at Virginia Tech." Hoffman, *supra* note 118, at 543 n.118328 (quoting Mary Beth Marklein, *Colleges' Watch for Killers Debated; Assessing Threats or Curbing Rights?*, USA TODAY, Jan. 14, 2011, at Al) (alteration in original). Threat assessment teams are composed of multidisciplinary groups such as administrators, mental health professionals, and law enforcement, whose goal is to detect, monitor, and intervene with students of concern to reduce and prevent violence on campus. John H. Dunkle, Zachary B. Silverstein, & Scott L. Warner, *Managing Violent and Other Troubling Students: The Role of Threat Assessment Teams on Campus*, 34 J. COLL. & U.L. 585, 588 (2008).

135. *See* GORMAN ET AL., *supra* note 7, at 15, 22 (reporting that in 2020, 68.4% of universities surveyed provided psychiatric services); GALLAGHER, *supra* note 7, at 5 (reporting that in 2014, fifty-eight percent of four-year universities surveyed provided on-campus psychiatric services; however, only seven percent of two-year universities provided access to on-campus psychiatric services).

136. *See supra* note 3 and accompanying text.

137. Lattie et al., *supra* note 9, at 2 (citing Henry Xiao, Dever M. Carney, Soo Jeong Youn, Rebecca A. Janis, Louis G. Castonguay, Jeffrey A. Hayes et al., *Are We in Crisis? National Mental Health and Treatment Trends in College Counseling Centers*, 14 PSYCH. SERVS. 407, 407–15 (2017)).

138. *See* Maria Carrasco, *Colleges Seek Virtual Mental Health Services*, INSIDE HIGHER ED. (Sept. 20, 2021), https://www.insidehighered.com/news/2021/09/20/colleges-expand-mental-health-services-students [https://perma.cc/4BDA-A9P7] (discussing institutions use of telehealth mental services even as students return to campus).

139. GORMAN, *supra* note 7, at 44–47; Drew Harwell, *Colleges Are Turning Students' Phones into Surveillance Machines, Tracking the Locations of Hundreds of Thousands*, WASH. POST (Dec. 24, 2019, 8:00 AM), https://www.washingtonpost.com/technology/2019/12/24/colleges-are-turning-students-phones-into-surveillance-machines-tracking-locations-hundreds-thousands [https://perma.cc/4BKL-VX7F] (discussing

advances, and the next section explores how the advances could potentially change the duty universities owe to students to protect their mental health and well-being.

A. Increased Services Through Teletherapy

The pandemic has generated a rise in the availability and use of online mental health services, known as teletherapy services.[140] Teletherapy services offer many advantages, such as expanding treatment and service options, enhancing the availability of mental health services, and supplementing understaffed university counseling centers.[141] While researchers urge further investigation of the effectiveness of these services,[142] studies suggest that they can be effective at treating anxiety, depression, and other, more common mental health issues.[143] Some therapists are concerned that virtual sessions will weaken the therapeutic bond and therapists will lose the ability to analyze body language.[144] But studies that compared patients undergoing virtual and in person therapy found equal improvement

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the use by over forty U.S. universities of novel performance and mental health monitoring systems, such as "SpotterEDU," which tracks student activity, location, and behavior to flag as indicia of potential problems, including mental health issues).

140. Tiffany C. Li, *Privacy in Pandemic: Law, Technology, and Public Health in the COVID-19 Crisis*, 52 LOY. UNIV. CHI. L.J. 767, 848 (2021); Alexa Wesley, *Strategies for Addressing Mental Health Support on Campus*, NASPA POL'Y & PRAC. SERIES, May 2019 at 1, 4, https://www.naspa.org/files/dmfile/NASPA_Policy_and_Practice_Issue_4_Mental_ Health_DOWNLOAD.pdf [https://perma.cc/ZG7D-NMTC].

141. Lattie et al., *supra* note 9, at 2–3. *See generally* NAS REPORT, *supra* note 2, at 107–10, 130–31.

142. E. Bethan Davies, Richard Morriss & Cris Glazebrook, *Computer-Delivered and Web-Based Interventions to Improve Depression, Anxiety, and Psychological Well-Being of University Students: A Systematic Review and Meta-Analysis*, NAT'L LIBR. MED. (May 16, 2014), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4051748 [https://perma.cc/ 59UQ-MSR2] (reviewing seventeen teletherapy trials); Louise Farrer, Amelia Gulliver, Jade K.Y. Chan, Phillip J. Batterham, Julia Reynolds, Alison Calear, Robert Tait et al., *Technology-Based Interventions for Mental Health in Tertiary Students: Systematic Review*, 15 J. MED. INTERNET RSCH. (2013), https://www.jmir.org/2013/5/e101 [https://perma.cc/Y62A-RTW4] (reviewing twenty-seven teletherapy studies).

143. Davies et al., *supra* note 142.

144. Benedict Carey, *The Psychiatrist Will See You Online Now*, N.Y. TIMES (Aug. 28, 2020), https://www.nytimes.com/2020/08/28/health/virtual-therapy-psychiatry-coronavirus.html [https://perma.cc/2XRK-YJ64].

in both services.[145] And teletherapy services can offer the enormous benefit of round-the-clock availability.[146]

Teletherapy services can be expensive, however. As noted by Inside Higher Ed, "teletherapy platforms can cost colleges anywhere from tens of thousands to hundreds of thousands of dollars."[147] The costs of providing teletherapy services have yet to standardize for services provided.[148] No doubt in part because of these costs, many universities have yet to adopt these services.[149]

Nonetheless, universities have increased the adoption of teletherapy services, as they have become more readily available, more cost effective, and more in demand.[150] Many forms of teletherapy services

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145. Paul E. Ruskin, Michele Silver-Aylaian, Mitchel A. Kling, Susan A. Reed, Douglas D. Bradham, J. Richard Hebel et al., *Treatment Outcomes in Depression: Comparison of Remote Treatment Through Telepsychiatry to In-Person Treatment*, 161 AM. J. PSYCHIATRY 1471, 1471–76 (2004) (finding that in a six-month study of 119 veterans with depression, those that received remote treatment equally improved and adhered to treatment); Leslie A. Morland, Margaret-Anne Mackintosh, Carolyn J. Greene, Craig S. Rosen, Kathleen M. Chard, Patricia Resick et al., *Cognitive Processing Therapy For Posttraumatic Stress Disorder Delivered to Rural Veterans via Telemental Health: A Randomized Noninferiority Clinical Trial*, 75 J. CLINICAL PSYCHIATRY 470, 470–76 (2014) (finding that "videoteleconferencing" was "as good as in-person treatment" in treating PTSD).

146. Greta Anderson, *Extending the Reach of Mental Health Therapy*, INSIDE HIGHER ED (Oct. 1, 2020), https://www.insidehighered.com/news/2020/10/01/teletherapy-platforms-extend-reach-college-counseling-centers [https://perma.cc/XV7U-YPNL] [hereinafter *Extending the Reach*] (describing TimelyMD third party service provider as offering 24/7 availability for teletherapy services). As of October 2020, TimelyMD was partnered with fifty universities. *Id.*

147. *Id.* (noting that TimelyMD can cost universities "five-or six-figure[s] . . . annually," and Uwill, a platform that allows students to text and virtually meet with therapists, costs about $25,000, or a range of $10 to $20 per student per year).

148. *Id.* ("There are also no standard costs or expectations on how much college administrators can or should spend on teletherapy providers.").

149. Lattie et al., *supra* note 9, at 3 (citing Tammy Toscos, Maria Carpenter, Michelle Drouin, Amelia Roebuck, Connie Kerrigan & Michael Mirro, *College Students' Experiences with, and Willingness to Use, Different Types of Telemental Health Resources: Do Gender, Depression/Anxiety, or Stress Levels Matter?*, 24 TELEMEDICINE & E-HEALTH 998, 1003 (2018), and Adam Kern, Victor Hong, Joyce Song, Sarah K. Lipson & Daniel Eisenberg, *Mental Health Apps in a College Setting: Openness, Usage, and Attitudes*, 4 MHEALTH, 2018, at 1, 1).

150. Deanna Paul, *Colleges Want Freshmen to Use Mental Health Apps. But Are They Risking Students' Privacy?*, WASH. POST (Jan. 2, 2020), https://www.washingtonpost.com/technology/2019/12/27/colleges-want-freshmen-use-mental-health-apps-are-they-risking-students-privacy [https://perma.cc/EWU5-8AUM]. The Higher Education Mental Health Alliance (HEMHA) produced a guide to telehealth for universities that outlines various benefits, limitations, and legal

are available.[151] One form it commonly refers to is video-based counseling and psychiatric sessions.[152] At the advent of the COVID-19 outbreak, some higher educational institutions did not have the technology or licensing to offer this virtual form of therapy.[153] As the pandemic continued, many institutions dramatically increased their reliance on video-based sessions.[154] Numerous states temporarily eased state licensure requirements during the pandemic, affording availability to out-of-state students, although some states have since lifted these exemptions.[155] Universities also collaborated with third parties to offer these services.[156]

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concerns regarding the services. *See generally* HIGHER EDUC. MENTAL HEALTH ALL., COLLEGE COUNSELING FROM A DISTANCE: DECIDING WHETHER AND WHEN TO ENGAGE IN TELEMENTAL HEALTH SERVICES (2018), http://hemha.org/wpcontent/uploads/2019/01/HEMHA-Distance-Counseling_FINAL2019.pdf [https://perma.cc/ACR9-PNVB].

151. THOMAS INSEL, HEALING: OUR PATH FROM MENTAL ILLNESS TO MENTAL HEALTH 214 (2022).

152. NAT'L INST. OF MENTAL HEALTH, WHAT IS TELEMENTAL HEALTH? 1 (2021).

153. Greta Anderson, *Mental Health Needs Rise with Pandemic*, INSIDE HIGHER ED (Sept. 11, 2020), https://www.insidehighered.com/news/2020/09/11/students-great-need-mental-health-support-during-pandemic [https://perma.cc/X9SA-WEXS] [hereinafter *Mental Health Needs*].

154. *Id.* "8 1/2 months prior to March 15, 2020, counseling centers averaged 17.1 video sessions," but from March 16 to June 30, 2020, counseling centers "averaged 1164.8 sessions." GORMAN ET AL., *supra* note 7, at 4; Peter Yellowlees, Keisuke Nakagawa, Murat Pakyurek, Angel Hanson, Jerry Elder, & Helen C. Kales, *Rapid Conversion of an Outpatient Psychiatric Clinic to a 100% Virtual Telepsychiatry Clinic in Response to COVID-19*, 71(7) PSYCHIATRIC SERVS. 749 (2020) (referring to the outpatient psychiatric clinic at UC Davis Health; NAS REPORT, *supra* note 2, at 109.

155. Anderson, *supra* note 146. Of 383 university centers surveyed in 2020, 52.6% provided services to students residing out of town. GORMAN ET AL., *supra* note 7, at 48.

156. Anderson, *supra* note 146.

Other forms of tele-mental therapy services include informational platforms,[157] "self-help" treatment apps,[158] and chatbots.[159] Research on the effectiveness of these tools is limited.[160] Chatbots, also known as conversational agents, have been a recent area of study.[161] They can be used to detect mental health problems, to direct users to resources, and to reach out to students during expected stressful times such as

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157. *See* Lindsay McKenzie, *Colleges Use Technology to Help Students Manage Mental Health*, INSIDE HIGHER ED. (Oct. 5, 2018), https://www.insidehighered.com/news/2018/10/05/colleges-turn-wellness-app-address-student-mental-health [https://perma.cc/JHS2-BLKW]. The platforms refer to programs such as YOU at College, "a platform that gives students information on how to recognize mental health issues and access resources on campus that might help them." *Id.* These programs are relatively inexpensive. For example, YOU at College costs institutions $0.75 to $3.00 per student per year. *Id.* As of January 2020, fifty-five universities utilized YOU at College. Paul, *supra* note 150.

158. As of January 2020, over 150 universities utilized TAO Connect, a customizable software that includes videos, exercises, courses, and other services "to help overcome anxiety, depression, and other concerns." *Therapy Assistance Online (TAO)*, UNIV. CENT. FLA.: COUNSELING & PSYCH. SERVS., https://caps.sdes.ucf.edu/therapy-assisted-online-tao-self-help [https://perma.cc/TM6X-Y6R5]; Paul, *supra* note 150. However, some warn that such apps pose data privacy concerns. *Id.*; *see* Melcher et al., *supra* note 10, at 1820 (identifying problems with student engagement with mental health apps included privacy concerns, reliability, and problems with user interface).

159. Izaak Dekker, Elisabeth M. De Jong, Michaéla C. Schippers, Monique De Bruijn-Smolders, Andreas Alexiou, & Bas Giesbers, Giesbers *Optimizing Students' Mental Health and Academic Performance: AI-Enhanced Life Crafting*, 11 FRONTIERS IN PSYCH. at 1, 2 (2020) https://www.frontiersin.org/articles/10.3389/fpsyg.2020.01063/full [https://perma.cc/NHK8-3TP6]; Michael Mattioli, *Second Thoughts on FDA's COVID-Era Mental Health App Policy*, 21 HOUS. J. HEALTH L. & POLICY 9, 17 (2021).

160. NAS REPORT, *supra* note 2, at 68, 108; *see* Jennifer Melcher & John Torous, *Smartphone Apps for College Mental Health: A Concern for Privacy and Quality of Current Offerings*, 71 PSYCHIATRIC SERVS. 1114, 1114 (2020) (calling for more study on nature or quality of mental health apps recommended to students); *see also* Dekker, *supra* note 159, at 2 (recognizing that campuses have yet to study the effects of chatbots on students' academics or well-being).

161. *See generally* Aditya Nrusimha Vaidyam, Hannah Wisniewski, John D. Halamka, Matcheri S. Kashavan & John B. Torous, *Chatbots and Conversational Agents in Mental Health: A Review of the Psychiatric Landscape*, 64 CANADIAN J. PSYCHIATRY 456, 456–64 (2019) (reviewing ten psychiatric chatbot studies); Alaa A. Abd-Alrazaq, Mohannad Alajlani, Ali Abdallah Alalwan, Bridgette M. Bewick, Peter Gardner, & Mowafa Househ, *An Overview of the Features of Chatbots in Mental Health: A Scoping Review*, INT'L J. MED. INFORMATICS, Sept. 2019, at 1, 3 [hereinafter *Chatbot Features in Mental Health*] (reviewing forty-one mental health chatbots from fifty-three studies); Prabod Rathnayaka, Nishan Mills, Donna Burnett, Daswin De Silva, Damminda Alahakoon, & Richard Gray, *A Mental Health Chatbot with Cognitive Skills for Personalizsed Behavioral Activation and Remote Health Monitoring*, SENSORS, May 11, 2022, at 1, 3 (pilot project on chatbot using behavioral activation; describing other chatbot studies).

exam periods.[162] Although use of chatbots for direct, therapeutic purposes is still in the testing stages for universities,[163] researchers report "high[er] retention rates and significant positive effects on anxiety and depression" in studies involving chatbot usage by students.[164] Some researchers suggest that chatbots lower the threshold for accessing mental health services.[165]

Two general types of chatbots exist: rule-based and those based on artificial intelligence.[166] Rule-based chatbots have predefined responses.[167] Unlike chatbots powered by artificial intelligence, they do not need to gather data and create new responses, but instead use a program to respond to potential scenarios.[168] Chatbots powered by artificial intelligence are more interactive and personalized. One study found that the AI chatbot, Woebot, could reduce depression in

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162. Dekker et al., *supra* note 159, at 8.

163. Universities already use chatbots for various purposes, including student academic guidance and general wellbeing inquiries. *See* Rachel Leingang, *Arizona State University Students Embrace and Profess Their Love to a Chatbot Named Sunny*, ARIZ. REPUBLIC (Jan. 29, 2020, 6:00 AM), https://www.azcentral.com/story/news/local/ arizona-education/2020/01/29/arizona-state-university-ai-chatbot-sunny-works-recruit-retain-students/4554789002 [https://perma.cc/JLH9-FWS5] (describing how "Sunny" is used to improve student "recruitment and retention" by helping students to better acclimate themselves to campus and assisting them with basic academic problems). Another example is "Spotter," which is described as an "automated attendance monitoring and early alerting platform." SPOTTER, https://spotteredu.com [https://perma.cc/429Z-PPE7]. Spotter uses a phone app, which connects to "iBeacons" placed in classrooms and other locations when students enter. *Id.* It reports use by over forty universities. *Id.*; Harwell, *supra* note 139.

164. Dekker et al., *supra* note 159, at 5 (citing Kathleen Kara Fitzpatrick, Alison Darcy, & Molly Vierhile, *Delivering Cognitive Behavior Therapy to Young Adults with Symptoms of Depression and Anxiety Using a Fully Automated Conversational Agent (Woebot): A Randomized Controlled Trial*, 4 JMIR MENTAL HEALTH (2017), https://mental.jmir.org/2017/2/e19 [https://perma.cc/WG9D-8DPM] and Russel Fulmer, Angela Joerin, Breanna Gentile, Lysanne Lakerink, & Michiel Rauws, *Using Psychological Artificial Intelligence (Tess) to Relieve Symptoms of Depression and Anxiety: Randomized Controlled Trial*, 5 JMIR MENTAL HEALTH (2017), https://mental.jmir.org/2018/4/e64 [https://perma.cc/T24L-XJZF]*)*.

165. Dekker et al., *supra* note 159, at 11; *see Chatbot Features in Mental Health*, *supra* note 161, at 1, 2 (highlighting the new technology's role in meeting demand for mental health services).

166. *Chatbot Features in Mental Health*, *supra* note 161, at 3–5.

167. Dekker et al., *supra* note 159, at 6; *Chatbot Features in Mental Health*, *supra* note 161, at 5.

168. *Chatbot Features in Mental Health*, *supra* note 161, at 5.

university students over a two-week period.[169] However, training the algorithm for such programs is time-consuming and requires significant processing power.[170]

Critics argue that chatbots should not replace human therapists but merely support them.[171] Other critics argue that chatbots may prevent people from seeking treatment when they need it.[172] Researchers have also warned about the limited research on the efficacy, effectiveness, and safety of chatbot therapy.[173] Nonetheless, "[m]ass availability of personalized and autonomous [therapy] chatbots" is expected in five to ten years.[174]

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169. *See* Fitzpatrick et al., *supra* note 164, at 6 (showing that PHQ-9 scores, a metric to measure depression, decreased over a two-week period). One of the authors of this study was founder of Woebot Labs, however. *Id.* at 9.

170. Dekker et al., *supra* note 159, at 6 (citing Martin Lambert, *Chatbot Decision Trees*, CHATBOTS LIFE (Apr. 21, 2018), https://chatbotslife.com/chatbot-decision-trees-a42ed8b8cf32 [https://perma.cc/878Z-GEH2]).

171. *See, e.g.*, Alaa Ali Abd-Alrazaq, Asma Rababeh, Asma Rababeh, Bridgette M. Bewick & Mowafa Househ, *Effectiveness and Safety of Using Chatbots to Improve Mental Health: Systematic Review and Meta-Analysis*, 22 J. MED. INTERNET RSCH. (2020), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7385637 [https://perma.cc/Q4VN-EH33] [hereinafter *Chatbot Effectiveness and Safety*] (discussing that professionals should use chatbots as an adjunct to existing interventions). One study indicated that "participants felt a greater rapport" with a human than with a rule-based chatbot. Alaa Ali Abd-Alrazaq, Mohannad Alajlani, Nashva Ali, Kerstin Denecke, Bridgette M. Bewick, & Mowafa Househ, *Perceptions and Opinions of Patients About Mental Health Chatbots: Scoping Review*, 23 J. MED. INTERNET RSCH. (2021), https://www.jmir.org/2021/1/e17828 [https://perma.cc/W43M-748S] [hereinafter *Chatbot Perceptions and Opinions*] (citing Kenji Yokotani, Gen Takagi, & Kobun Wakashima, *Advantages of Virtual Agents over Clinical Psychologists During Comprehensive Mental Health Interviews Using a Mixed Methods Design*, 85 COMPUTS. HUM. BEHAV. 135, 141 (2018)). However, another study reported that participants felt the same level of rapport with an AI chatbot as with a human. *Chatbot Perceptions and Opinions*, at 9 (citing David DeVault, Ron Artstein, Grace Benn, Teresa Dey, Ed Fast, Alesia Gainer et al., *SimSensei Kiosk: A Virtual Human Interviewer for Healthcare Decision Support*, 2014 INT'L CONF. ON AUTONOMOUS AGENTS & MULTI-AGENT SYS. 1061, 1067 (2014)).

172. *See, e.g.*, Karen Brown, *Something Bothering You? Tell It to Woebot.*, N.Y. TIMES (June 1, 2021), https://www.nytimes.com/2021/06/01/health/artificial-intelligence-therapy-woebot.html [https://perma.cc/NHB4-EY53].

173. *Chatbot Effectiveness and Safety*, *supra* note 171; *Researcher Warns About Dangers of AI Chatbots for Treating Mental Illness*, UTSA TODAY (July 8, 2020), https://www.utsa.edu/today/2020/07/story/chatbots-artificial-intelligence.html [https://perma.cc/4TGR-95TK].

174. Dekker et al., *supra* note 159, at 6 (citing Alex Weidauer, *Conversational AI: Your Guide to Five Levels of AI Assistants in Enterprise*, RASA: BLOG (Sept. 27, 2018),

Teletherapy services generally have faced several criticisms. Critics claim that there is low evidence of efficacy and effectiveness of these services.[175] Some express regulatory and security concerns.[176] Others point to equity concerns if an institution cannot ensure adequate access to reliable broadband for all students when they are not on campus.[177] Further, use of the technology raises privacy concerns.[178]

Both in person and virtual therapy services share a common problem: they rely on students to initiate the process and depend on self-reported symptoms for diagnosis, which may be subject to inaccuracies and bias.[179] Universities have turned to monitoring systems to collect objective, quantitative data that can better support evidence-based clinical assessment to identify students in need.

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https://blog.rasa.com/conversational-ai-your-guide-to-five-levels-of-ai-assistants-in-enterprise [https://perma.cc/6ZJQ-6L3S] (note, however, that RASA provides chatbot platform services).

175. WESLEY, *supra* note 140, at 4.

176. *See* Nicolas P. Terry & Tracy D. Gunter, *Regulating Mobile Mental Health Apps*, 36 BEHAV. SCI. L. 136, 139 (2018) (noting that consumer mental health apps are largely unregulated, and some have expressed concerns about app security for Android devices).

177. *See, e.g.*, WESLEY, *supra* note 140, at 4.

178. There is extensive literature on the privacy question. *See e.g.*, Li, *supra* note 140, at 848–58, 863 (discussing the emerging privacy concerns in the context of teletherapy, medical robots, and other new medical technology, as well as calling for more educational privacy protections); Scott Stiefel, *The Chatbot Will See You Now: Protecting Mental Health Confidentiality in Software Applications*, 20 COLUM. SCI. & TECH. L. REV. 333, 348 (2019) (raising questions about consumer protection and state privacy laws if chatbot apps are "unfair and deceptive" concerning their data usage); *see also* Jason Zenor, *If You See Something, Say Something: Can Artificial Intelligence Have a Duty to Report Dangerous Behavior in the Home?*, 98 DENV. L. REV. 839, 864–65 (2021) (positing if AI is "offered [for] suicide prevention counseling . . . it may constitute a medical device" and be subject to regulation by the U.S. Food and Drug Administration (FDA); INSEL, *supra* note 151, at 179 (describing privacy concerns from digital phenotyping); Suzanne Smalley, *A Data Collection Project at GW Leads to Privacy Questions*, INSIDE HIGHER ED. (Feb. 22, 2022), 22, 2022), https://www.insidehighered.com/news/2022/02/22/gw-data-collection-effort-sparks-campus-privacy-concerns [https://perma.cc/AU22-6F3] (reporting on the recent controversy at George Washington University, where the university used "invasive" monitoring systems to gather data on students' attendance and other behaviors).

179. *See* Alaa Althubaiti, *Information Bias in Health Research: Definition, Pitfalls, and Adjustment Methods*, 9 J. MULTIDISCIPLINARY HEALTHCARE 211, 212 (2016) (noting that self-reported data can be "unreliable and threatened by self-reporting bias").

B. Monitoring Students Through Artificial Intelligence

Innovative software programs may give universities the capacity to detect students at risk of severe mental illness problems that could lead to self-harm or suicide, or harm unto others.[180] These programs include online screening tools and early alert systems.[181] Researchers continue to develop software that relies on artificial intelligence to monitor students remotely and predict mental health concerns.[182]

Currently, no biomarkers—objective measures of disease—exist to detect mental health illnesses, and clinical diagnosis relies mainly on self-reported symptoms.[183] Scientists continue to search for biomarkers, and some are turning to technology using artificial intelligence to find objective measurements in behavior to aid in diagnosis and treatment of mental illness.[184] One avenue of research is using data collected from smartphones, using speech, voice, activity and location, to gather information on how an individual is

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180. *See* Lattie et al., *supra* note 9, at 3 (stating that mental health screening programs "have been implemented on campuses across the country").

181. Some examples of monitoring systems being developed for this purpose include one developed by Degree Analytics, which developed a monitoring system for universities that uses algorithms to detect patterns and irregularities in student "behavioral state[s]." Harwell, *supra* note 139. The system tracks student movement, location, and internet activity through campus Wi-Fi. *Id.* The program claims it can detect signs of "personal anguish," and other problems, for example by detecting a student who rarely leaves their room. *Id.* A program developed by Michigan State University, iSee, tracks student location, network activity, and biometric behaviors like running, eating, and sleeping, to detect depression and other illnesses. Jingbo Menge, Syed Ali Hussain, David C. Mohr, Mary Czerwinski & Mi Zhang, *Exploring User Needs for a Mobile Behavioral-Sensing Technology for Depression Management: Qualitative Study*, 20 J. MED. INTERNET RSCH. (2018), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6068382 [https://perma.cc/CQN2-ZNQG]. If a student is flagged by the algorithm, the app may send therapeutic solutions directly to the student without the intervention of a human counselor. *Id.*; NAT'L SCI. FOUND., Award Abstract, *iSee—Intelligent Mobile Behavior Monitoring and Depression Analytics Service for College Counseling Decision Support*, https://nsf.gov/awardsearch/showAward?AWD_ID=1632051 [https://perma.cc/CD5A-LTB8]. Another example is Ginger. GINGER, https://www.ginger.com [https://perma.cc/CWZ7-PVHP]. The app analyzes mobile data to detect whether a patient with a mental illness, such as depression, anxiety and bipolar disorders, is acting symptomatically. *Id.* It is already being used by health care institutions and academic centers in the United States. *Id.*

182. Terry & Gunter, *supra* note 176, at 138.

183. INSEL, *supra* note 151, at 174. Examples of biomarkers include blood tests to detect diabetes or measuring blood pressure to detect heart disease. *Id.*

184. *Id.*

functioning, to supplement self-reported symptoms.[185] This type of data analysis is known as digital phenotyping.[186]

Universities have begun to build on these efforts. Some universities have implemented voluntary online screening programs, in which students complete online mental health assessments and receive feedback, including links to services.[187] Such programs have shown "promising evidence of effectiveness" in connecting distressed students to services.[188] For example, UCLA has implemented a free campus-wide online mental health screening program and offers free treatment programs for students identified to be at risk.[189] Although

185. *Id.* at 178–80.

186. *Id.*

187. Lattie et al., *supra* note 9, at 3. Screening programs are subject to criticism. For example, in the context of youth screening programs, criticism includes claims that screening programs could lead to privacy violations, false positives, and self-fulfilling prophecies and stigmatization. UCLA CTR. FOR MENTAL HEALTH IN SCHS., SCREENING MENTAL HEALTH PROBLEMS IN SCHOOLS 1, 2, http://smhp.psych.ucla.edu/pdfdocs/policyissues/mhscreeningissues.pdf [https://perma.cc/7YRS-5HPW].

188. Lattie et al., *supra* note 9, at 3 (citing Steven J. Garlow, Jill Rosenberg, J. David Moore, Ann P. Haas, Bethany Koestner, Herbert Hendin & Charles B. Nemeroff, *Depression, Desperation, and Suicidal Ideation in College Students: Results from the American Foundation for Suicide Prevention College Screening Project at Emory University*, 25 DEPRESSION & ANXIETY 482, 483, 485-86(2008) and Cheryl A. King, Daniel Eisenberg, Kai Zheng, Ewa Czyz, Anne Kramer, Adam Horwitz, & Stephen Chermack, *Online Suicide Risk Screening and Intervention with College Students: A Pilot Randomized Controlled Trial*, 83 J. CONSULTING & CLINICAL PSYCH. 630, 631, 634-35 (2015)).

189. Brian Haas, *UCLA to Offer Free Mental Health Screening, Treatment to All Incoming Students*, UCLA: NEWSROOM (Sept. 14, 2017), https://newsroom.ucla.edu/Releases/ucla-to-offer-free-mental-health-screening-treatment-to-all-incoming-students [https://perma.cc/MV4A-D9YH]. The free treatment also includes remote monitoring. *Id.* Similarly, Drexel University offers screenings on a computer kiosk on campus. Emily Rolen, *Drexel University Implements New Mental Health Kiosk*, USA TODAY (June 25, 2015, 1:32 PM), https://www.usatoday.com/story/college/2015/06/25/drexel-university-implements-new-mental-health-kiosk/37403913 [https://perma.cc/TEP4-N7PW]. After the voluntary screening, the computer provides information about mental health resources. *Id.*

such screening programs are voluntary,[190] some have suggested that universities should make the screenings mandatory.[191]

Universities have also implemented "early-alert" monitoring systems, in which the faculty can identify at risk students based, say, on missed classes or assignments, and notify student support.[192] For example, Georgia State University uses predictive analytics to identify students who are at risk of failing courses and alert advisers.[193] Other schools have used third-party programs, which allow professors to record attendance and grades to flag students,[194] but a key to these systems is sufficient faculty engagement, which is not always present.[195] Universities use many early alert systems to identify students at risk of declining academic performance.[196] Because "mental health problems are associated with lower academic success,"[197] identifying students

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190. While student use of these systems is voluntary, they are almost universally automatic enrollment with an "opt-out" option. Mitch Daniels, *Someone Is Watching You*, WASH. POST (Mar. 27, 2018), https://www.washingtonpost.com/opinions/its-okay-to-be-paranoid-someone-is-watching-you/2018/03/27/1a161d4c-2327-11e8-86f6-54bfff693d2b_story.html [https://perma.cc/6YRG-XN9Y]. *See infra* note 198 (explaining the process of identifying at risk students).

191. *See, e.g.*, Marney A. White, *To Prevent Suicide in College, Make Mental Health Screening Mandatory*, WASH. POST: GRADE POINT (Dec. 21, 2015), https://www.washingtonpost.com/news/grade-point/wp/2015/12/21/to-prevent-suicide-in-college-make-mental-health-screening-mandatory [https://perma.cc/5JHG-BCC3].

192. Lindsay McKenzie, *Early-Alert Systems Seen as a Mixed Bag*, INSIDE HIGHER ED (Sept. 11, 2018), https://www.insidehighered.com/news/2018/09/11/academics-question-system-measuring-academic-performance-flagging-potential-problems [https://perma.cc/3N7W-NHST] [hereinafter *Early-Alert Systems*].

193. Jean Dimeo, *Data Dive* INSIDE HIGHER ED (July 19, 2017), https://www.insidehighered.com/digital-learning/article/2017/07/19/georgia-state-improves-student-outcomes-data [https://perma.cc/WU3S-SGKR]. From 2012–2017, Georgia State advisors held 200,000 meetings with students based on the alert system, and the school awarded thirty percent more degrees in the same period. *Id. See also* Dale R. Tampke, *Developing, Implementing, and Assessing an Early Alert System*, 14J.COLL. STUDENT RETENTION 523, 529–30 (2013) (discussing evidence that shows follow-up from the alert system correlates with higher levels of student success).

194. *Early-Alert Systems*, *supra* note 192.

195. *Id.*; *see also 3 Reasons Why Your Early-Alert Program Is Falling Short*, EAB (Feb. 19, 2019), https://eab.com/insights/blogs/student-success/3-reasons-why-your-early-alert-program-is-falling-short [https://perma.cc/56T8-TYPG] (explaining that early alert systems sometimes fail because they are not designed to maximize faculty input).

196. Dimeo, *supra* note 193.

197. Daniel Eisenberg & Justin Hunt, *Mental Health and Academic Success in College*, 9 B.E. J. ECON. ANALYSIS & POL'Y, 1, 27 (2009).

with declining academic performances could help connect them with campus resources when there are underlying issues.[198]

Researchers are developing even more sophisticated programs in mental health, utilizing algorithms, artificial intelligence and digital phenotyping. At Texas A&M, for example, researchers have developed a software that monitors patients for signs of mental distress using their smart devices.[199] Similarly, UCLA is studying objective measures of factors such as sleep, physical activity, heart rate and daily routines, to detect symptoms of depression and anxiety.[200]

One example of this type of sophisticated monitoring system is the Rose (Recognition of Speech & Emotion) app, which uses "deep technology for early detection of depression and mood disorders" and helps providers monitor their patients remotely.[201] Users supply journal entries and answer questionnaires in as little as thirty seconds. Drawing from that data, the program can identify mental health warning signs.[202] Likewise, the telephone application Mindstrong uses

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198. For example, at Texas Woman's University, one of the goals in their early alert system is to "[a]ssist students in becoming academically successful by referring them to appropriate campus resources critical to their success." *Early Alert Program*, TEX. WOMAN'S UNIV., https://twu.edu/curriculum-strategic-initiatives/faculty-staff-resources/early-alert-program [[[https://perma.cc/5MZK-4AHL].

199. Fowler et al., *supra* note 10, at 96–97; Alexandra H. Salazar, *Wearable Technology for Mental Health*, TEX. A&M TODAY (Feb. 17, 2020), https://today.tamu.edu/2020/02/17/wearable-technology-for-mental-health [https://perma.cc/MZ9S-58C8]. The platform reads facial cues, analyzes speech patterns and uses vital sign sensors from smartwatches. Fowler et al., *supra* note 10, at 96.

200. Bill Kisliuk, *UCLA Launches Major Mental Health Study to Discover Insights About Depression*, UCLA: NEWSROOM (Aug. 4, 2020), https://newsroom.ucla.edu/releases/ucla-launches-major-mental-health-study-to-discover-insights-about-depression [https://perma.cc/AN8W-Q5V2].

201. *Digital Health Startup Sees Growth in Remote Mental Health Monitoring*, JOHNS HOPKINS TECH. VENTURES: NEWS (Dec. 18, 2020), https://ventures.jhu.edu/news/rose-mental-health-monitoring-kavi-misri [https://perma.cc/3VHE-8WLW]. The program includes a patient focused app and a clinician web-based platform for providers to gain access to patient data. *Id.*

202. *Johns Hopkins Technology Startup, ROSE, Selected for Brigham and Women's Hospital Pilot COVID-19 Program*, GLOBENEWSWIRE (Aug. 17, 2020), https://www.globenewswire.com/news-release/2020/08/17/2079235/0/en/Johns-Hopkins-Technology-Startup-ROSE-Selected-for-Brigham-and-Women-s-Hospital-Pilot-COVID-19-Program.html [https://perma.cc/P9PT-GD2B]. In a four-week trial, participants who used the Rose app daily "showed statistically significant improvements in measurements of both depression and anxiety symptoms." Atif Adams, Ameena Jain, Alexandra Pletnikova, Rishi Bagga, Allison Vita, Lisa N. Richey et al., *Use of a Mobile App to Augment Psychotherapy in a Community Psychiatric Clinic: Feasibility and Fidelity Trial*,

phone activity such as scrolling and messaging, location, and voice to detect mental states.[203] Other signs of mental distress include "[c]hanges in typing speed, voice tone, word choice and how often kids stay home."[204] Researchers predict that there may be as many as one thousand such smartphone "biomarkers" for depression.[205]

JMIR FORMATIVE RSCH., 2020, at 1, 7, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7367543/pdf/formative_v4i7e17722.pdf [https://perma.cc/RJ6J-YEEK].

203. Kate Sheridan, *A Startup's Bold Plan for A Mood-Predicting Smartphone App Is Shadowed by Questions over Evidence*, STAT (Oct. 4, 2018), https://www.statnews.com/2018/10/04/mindstrong-questions-over-evidence [https://perma.cc/29P2-NBBW].

204. Lindsey Tanner, *Detecting Depression: Smartphone Apps Could Monitor Teen Angst*, DENV. POST (Jan. 14, 2019), https://www.denverpost.com/2019/01/14/apps-detect-teenage-depression-angst/?clearUserState=true [https://perma.cc/PR47-DGV5]. Studies have found a relationship between data received from 24/7 wearable sensors and stress and mental health states in college students. Akane Sano, Sara Taylor, Andrew W. McHill, Andrew J.K. Phillips, Laura K. Barger, Elizabeth Klerman et al., *Identifying Objective Physiological Markers and Modifiable Behaviors for Self-Reported Stress and Mental Health Status Using Wearable Sensors and Mobile Phones: Observational Study*, 20 J. MED. INTERNET RSCH. (2018), https://www.jmir.org/2018/6/e210 [https://perma.cc/2HZV-K7NH].

205. Researchers have explored other avenues of monitoring for and predicting mental distress. Facebook has implemented AI technology that can flag posts that indicate suicidal thoughts for employees to review. Tanner, *supra* note 204. Researchers have created machine learning algorithms based on electronic health records to the hospital for self-harm or suicide attempts. Colin G. Walsh, *Predicting Risk of Suicide Attempts Over Time Through Machine Learning*, 5 CLINICAL PSYCH. SCI. 457, 459–60 (2017). This algorithm was eighty-four percent accurate in predicting whether someone would attempt suicide the following week and eighty percent accurate in predicting whether patients would attempt suicide within two years. *Id.* at 463. The U.S. Department of Veteran's Affairs similarly uses predictive modeling and medical records to identify veterans at risk for suicide in its program, REACH VET. Mike Richman, *Crisis Prevention: Study Evaluates VA Program That Identifies Vets at Highest Risk for Suicide*, U.S. DEP'T OF VETERAN'S AFFS. (Sept. 20, 2018), https://www.research.va.gov/currents/0918-Study-evaluates-VA-program-that-identifies-Vets-at-highest-risk-for-suicide.cfm [https://perma.cc/6FR4-DLL3]. Researchers have also developed a data collection tool that uses passive phone data to "predict and prevent mental health crisis." Monika N. Lindl, Michelle L. Byrne, Geordie wicks, Alec M. Smidt & Nicholas B. Allen, *The Effortless Assessment of Risk States (EARS) Tool: An Interpersonal Approach to Mobile Sensing*, JMIR MENTAL HEALTH (2018), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6134227 [https://perma.cc/EMQ5-WE2R]. The Effortless Assessment of Risk States (EARS) captures signals such as "facial expressions, acoustic vocal quality, natural language use, physical activity, music choice, and geographical location." *Id.* These data are encrypted to the cloud and decrypted in a lab, but there is "no easy way" to link data with its user in the event of a breach. *Id.*

Increased adoption of these technologies may expand the standard of care to include their implementation, depending on how widely adopted these technologies are, their efficacy, and costs. But imposing monitoring as a standard has other implications, too. A significant question is whether their adoption would impose on the university a duty to investigate for potential problems after receiving an alert. Currently, caselaw about the affirmative duty of care in cases of student suicide requires actual notice or highly foreseeable harm.[206] Would changes in technology create a broader duty to investigate specifically for potential suicide risk or danger to others? And how does university staff determine when an alert from a system demands action? This Article now turns to examine these questions.

III. THE IMPACT OF MENTAL HEALTH TECHNOLOGY ON UNIVERSITY LIABILITY

The invention and growing adoption of new technologies in the area of mental health may affect the affirmative duties of universities to their students in several ways. First, an individual university's adoption of technology may provide some evidence that it has met the standard of care. Second, widespread adoption of technology among universities may demonstrate its feasibility and cost-effectiveness, and elevate generally the standard of care among institutions. Third, a university's implementation of technology may trigger the exception to the no-duty to rescue rule by inducing reliance.[207]

Any evaluation of liability implications must recognize that these technologies are not infallible nor are they meant to be. Nor are they comprehensive—they will not detect every sign of trouble or completely fulfill the demand for services. There is no one-size fits all solution to the problem of meeting mental health needs—a community university, small liberal arts university, or a large public land grant university may face different demands and needs.[208] Use of these technologies may not suffice to fulfill a standard of care, and other services will likely need to supplement the university's efforts to meet whatever duty it owes to its students. Online therapeutic services

206. Schieszler v. Ferrum Coll., 236 F. Supp. 2d 602, 608–09 (W.D. Va. 2002).

207. Public universities may also assert the defense of sovereign immunity under state law, which is beyond the scope of this essay. State sovereign immunity may offer a complete defense from liability assuming that the actor's decision involved a discretionary, rather than ministerial decision. *See generally* DOBBS ET AL., *supra* note 14, at 563–65.

208. NAS REPORT, *supra* note 2, at 6.

may not adequately address all student needs. And monitoring services raise special concerns. Models can be flawed, stemming from a number of factors that include problems with the data used to develop an algorithm and how the program is deployed.[209] Not every potential harm is detectable through monitoring, so universities cannot rely solely on its implementation to meet a duty to prevent violence or self-harm. Moreover, universities and monitoring companies recognize that the conclusions of the algorithms are not perfect, and that the data should be treated as mere alerts, with human decision-making necessary for intervention.[210] Whatever notifications the system generates would need to be interpreted to see whether and what response is warranted. Even when using technology to monitor, provide alerts, or suggest intervention, the university needs to determine an appropriate response, which may not be adequate or effective. In the end, these technologies remain just one tool for universities to use in their quest to provide adequate mental health services. In time, they may become an essential tool.

A. Meeting an Affirmative Duty of Protection through Adoption of Technology

Implementing new technology, like virtual teletherapy, chatbots, or monitoring services, may help provide a defense against a claim of breach of duty, or negligence. Universities could assert that they are following best practices of higher education institutions in adopting

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209. *See* Enrique Garcia-Ceja, Michael Riegler, Tine Nordgreen, Petter Jakobsen, Ketil J. Oedegaard & Jim Tørresen, *Mental Health Monitoring with Multimodal Sensing and Machine Learning: A Survey*, PERVASIVE & MOBILE COMPUTING, (Sept. 19, 2018) at 1, 15 (explaining that missing data and labels can lead to problems in the case data).

210. *See* Jin Hu, *The Construction of Psychological Early Warning Mechanism for College Students in the Big Data Environment*, 1 ASP TRANSACTIONS ON PSYCH. & EDUC. 999, 12 (2021) (listing need for professional psychological counselors to determine need for intervention). *See generally* John Zerilli, Alistair Knott, James Maclaurin, & Colin Gavaghan, *Algorithmic Decision-Making and the Control Problem*, 29 MINDS & MACHS. 555, 556 (2019). The consensus of big technology companies seems to be that big data should be accompanied by human judgment. *See generally* Paul Scherz, *The Displacement of Human Judgment in Science: The Problems of Biomedical Research in an Age of Big Data*, 86 SOC. RSCH. 957, 963–64 (2019). *Microsoft's Peggy Johnson: 'Have a Human Involved' to Combat Bias in Data Algorithms*, WASH. POST, at 0:32 (Mar. 20, 2018), https://www.washingtonpost.com/video/postlive/microsofts-peggy-johnson-have-a-human-involved-to-combat-bias-in-data-algorithims/2018/03/20/ec4dc770-2c45-11e8-8dc9-3b51e028b845_video.html [https://perma.cc/X3A8-TQQ3]. Some algorithms, such as iSee might send therapeutic solutions even without human interventions. *See* Harwell, *supra* note 139.

these technologies to help meet increased need. This defense would be comparable to that asserted in the medical malpractice area, in which health care professionals can argue they did not breach a duty of care if they followed the standards of their profession and used state of the art technology.[211]

The type of technology adopted is important. On one hand, if an institution offers teletherapy, a plaintiff would need to argue that this method of service delivery – as opposed to in person therapy – is inadequate to meet the mental health needs of students.[212] Data may suggest that virtual therapy is not as effective as in-person therapy. It is difficult to make this argument, however, especially in light of the pandemic, during which universities provided many of their classes and services remotely.[213] Similar arguments have been made during the pandemic about the shortcomings of remote versus in-person classroom teaching.[214] In the end, the fundamental question is whether offering virtual therapy is sufficient (reasonable) even if in person therapy is better or more effective. On the other hand, students may become used to receiving services on demand, say through a chatbot,

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211. *See* A. Michael Froomkin, Ian Kerr, & Joelle Pineau, *When AIs Outperform Doctors: Confronting the Challenges of a Tort-Induced Over-Reliance on Machine Learning*, 61 ARIZ. L. REV. 33, 51, 56–57 (2019) (explaining that "tort law recognizes that technology changes what is possible and reasonable, and thus the general standard of care for professions and trades may change too" while also citing the introduction of X-rays and defibrillators as changing the standard of care in healthcare).

212. *See* Zara Abrams, *How Well Is Telepsychology Working?*, AM. PSYCH. ASS'N (July 1, 2020), https://www.apa.org/monitor/2020/07/cover-telepsychology [https://perma.cc/53G4-ZG7G] (explaining that the COVID-19 pandemic has revealed areas where teletherapy can be strengthened).

213. *See, e.g.*, Mike Baker, *First U.S. Colleges Close Classrooms as Virus Spreads. More Could Follow.*, N.Y. TIMES (Mar. 11, 2020), https://www.nytimes.com/2020/03/06/us/coronavirus-college-campus-closings.html [https://perma.cc/6YCS-7WCJ] (reporting that the University of Washington was the first large college in the United States to "make the shift entirely to online classes amid virus concerns").

214. Student plaintiffs have sought refunds from tuition based on this theory but have met with mixed success. Doug Lederman, *Courts Skeptical on Covid-19 Tuition Lawsuits*, INSIDE HIGHER ED (May 6, 2021), https://www.insidehighered.com/news/2021/05/06/courts-view-covid-19-tuition-refund-lawsuits-skeptically [https://perma.cc/5E2T-CXYQ]. *Compare* Fedele v. Marist Coll., No. 20CV 3559 (VB), 2021 U.S. Dist. LEXIS 150094, at *1, *10 (D. N.Y. Aug. 10, 2021) *and* Mooers v. Middlebury Coll., No. 2:20-cv-00144, 2022 U.S. Dist. LEXIS 95129, at *1, *5 (D. Vt. May 27, 2022) (dismissing claims in relation to tuition fees for in person learning) *with* Barkhordar v. President & Fellows of Harv. Coll., Civ. Action No. 20-cv-10968-AK, 2022 U.S. Dist. LEXIS, at *1 (D. Mass. Mar. 1, 2022) (allowing motion to amend a complaint in relation to remote learning for Spring 2020 semester).

and may argue that services for which they need to wait for an appointment with an in-person provider are insufficient.

Monitoring services address different problems and raise different concerns. Monitoring services are not intended to provide individual therapy. Instead, they address the need to manage the risk of self-harm or violence.[215] The systems amass information to detect students who may be suffering from severe mental illness and pose risks to themselves or others.[216] Compiling this information may increase the affirmative protective duties of an institution, as the university gain actual or constructive knowledge of a highly foreseeable harm from the information gained through these services. Adopting a monitoring system could increase reliance by parents and students on the university's protection. The failure to act on an alert could heighten the risk of harm and convert a failure to act or warn from an act of omission to one of commission.

Whether to act on an alert could be a complex judgment, with inherent liability implications. Identifying the student issue could trigger an additional duty to investigate, intervene, or to warn parents of a potential issue. Moreover, the alerts generated by the AI system would not—and should not—be the only source of information. Even if the monitoring system did not notify the institution of a potential problem, it may not obviate a duty to intervene or warn, if notice has been provided directly to the university through another avenue, such as teacher or peer reports of abnormal student behavior.

A difficult question is whether an affirmative duty of protection would extend beyond the confines of the physical premises of the university. As previously discussed, the duty of protection that runs between higher education institutions and its students originally was based on notions of *in loco parentis* and custody.[217] Once the basis of the duty evolved to a special relationship, courts did not necessarily confine the duty to the university's physical premises.[218] Use of new technologies may further expand the physical boundaries of the duty. Since the AI algorithms rely on information gathered outside of the physical setting, universities may be required to act to intervene or at least warn, even if the risk occurs outside the school's premises.

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215. *See* INSEL, *supra* note 151, at 217 ("Technology will not and cannot replace boots on the ground.").

216. *Id.*

217. Bernabe, *supra* note 43.

218. DOBBS ET AL., *supra* note 14.

Expanding duty beyond the physical premises has important implications for the standard of care. It could potentially include any institution-related activity, even those occurring off-campus, as long as a monitored student is involved. At its broadest, it suggests that a university may have a duty to intervene regardless of where the harm may occur, as long as the university has specific information that constitutes actual or constructive knowledge of impending harm.[219]

Similarly, if systems continue to monitor even when the university is not in session, this could extend a duty to warn or even intervene, as long as the monitoring system is still receiving data and issuing an alert of potential danger.

An important consideration is whether and how to act on the information received from the algorithm. Once the AI algorithm issues an alert, the university must analyze whether to act on it. Universities will likely develop protocols on how to respond, but those protocols will probably allow for broad discretion. Several considerations will come into play, such as the accuracy of the algorithms at predicting potential problems, as well as how much weight to give the information from the monitoring services. The decision-making process and response will be significant in determining whether the university has sufficiently met its standard of care. Regardless, once the university has information from the algorithm, it likely will trigger at least a duty to investigate. The issue will be whether the extent of the investigation was sufficient.

Once the university has investigated a potential problem that triggered an alert, it will need to determine what actions to take. Context is very important in determining whether a university has met its duty of protection toward a student. A significant question is whether alerting parents to a potential problem will suffice. The parents may be out of state or not in a position to help the student. Other measures of intervention, including notifying campus police, may be more expedient. The university will need to weigh the options in determining how to aid a student potentially in danger. These tough calls may expose the university to liability.[220]

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219. Furek v. Univ. of Del., 594 A.2d 506, 519–20 (Del. 1991).

220. *See, e.g.*, Wheeler v. Am. Univ., No. 20-cv-02735, 2022 WL 160226, at *1, *2 (D.D.C. Jan. 5, 2022) (detailing a case in which a university ordered a student, who had a history of mental health issues, to be seized for a psychological evaluation based on complaints that the student was acting erratically and in a threatening manner). In *Wheeler*, the campus police forcibly removed her from her apartment when she resisted.

Adopting AI monitoring is a double-edged sword. As is true with any business that voluntarily expands its services to its customers and employees, enhancing student mental health services may also increase the responsibilities of the institution. A university may adopt monitoring technology to better identify students with potential problems. But once it does so, the institution can be charged with the knowledge of foreseeable dangers faced by its students, triggering an affirmative duty to act that it would otherwise want to avoid. On the other hand, as discussed further below, failure to adopt a monitoring technology that has been widely adopted by others may demonstrate a breach of the standard of care.

B. Inducing Reliance

Increasing mental health services through emerging technology may induce reliance by students and parents to the point that it creates an affirmative duty to act even if one did not exist before. The largest liability exposure may stem from the representations made by the university concerning the services they offer—whether in communications to students, parents, or even in marketing materials.

Universities using monitoring services will need to receive consent to gather data on the students.[221] In gathering consent, universities may represent to parents and students the need for the monitoring as well

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Id. The hospital found that she was a danger to herself or others, and successfully petitioned the court to continue hospitalization for seven days. *Id.* The student subsequently filed a lawsuit against the university, alleging that the defendants discriminated against her based on her mental health disability. *Id.*at *2. The court declined to grant the university summary judgment and held that the plaintiff was entitled to discovery. *Id.*

221. One study found that university students are favorably inclined toward use of mental health technology and digital phenotyping, or use of student smart phone technology, to monitor students. John Rooksby, Alistair Morrison & Dave Murray-Rust, *Student Perspectives on Digital Phenotyping: The Acceptability of Using Smartphone Data to Assess Mental Health*, (Proceedings of the 2019 CHI Conference on Human Factors in Computing Systems, Paper No. 425, 2019). Some universities enroll students in these systems automatically but provide them with an opt-out provision. Daniels, *supra* note 190. The opt out provision may not be clear to students, and in some cases, there may be other pressures brought to bear to enroll in the program. *See* Harwell, *supra* note 139 (reporting on an instance at Virginia Commonwealth University, where students were sent a short email containing an opt-out link which was to expire in two weeks; and reporting on an instance at Temple University, where students report being told by coaches and counselors that they will "get in trouble" if they opt-out).

as its efficacy.[222] This representation, in turn, could suggest to parents and students that the university will take affirmative actions to intervene if the algorithm suggests that a particular student is at risk.

The same effect may occur in providing chatbots to students. Students may assume that once they write a troublesome response to the bot, it will trigger a response by the university. This assumption may be affected by the notice and consent document, which could make explicit that the university is not assuming a duty of protection by providing the service.

C. Failure to Adopt Technology

Increased adoption of technologies to meet the demand for mental health services on campus may raise the standard of care generally among institutions of higher education. Moreover, the efficacy and benefits of the technology may prove to outweigh the expense of its adoption, so that the traditional cost-benefit analysis would argue in favor of adoption. Application of these factors could show that the failure to adopt certain technologies indicates a failure to meet a duty of care.

The two principal ways to determine the standard of care—custom and cost-benefit analysis—are a challenge in the area of emerging technologies.

When a sufficient portion of an industry adopt a certain technology, the technology can become the industry "custom."[223] That custom then becomes an important, but not dispositive, factor in determining the standard of care.[224] The medical field in particular contains numerous examples in which emerging technologies changed the standard of care, either because their adoption became a custom, or because their

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222. A different question raised is whether universities misrepresent the purpose for which they use these monitoring systems. *See* Smalley, *supra* note 178 (reviewing a monitoring system implemented by George Washington University represented as used for COVID-19 tracking purposes).

223. DOBBS ET AL., *supra* note 14, at 281.

224. *Id.* Custom is not dispositive. For example, in the famous case of *The T.J. Hopper*, the court held that a tugboat had been negligent for failing to use the newly developed radio technology, even though such use was not customary—because the technology was sufficiently advantageous and not unduly burdensome. 60 F.2d 737, 740 (2d Cir. 1932). Courts may be skeptical of using custom as a defense because it can create a disincentive to modernize and adopt new technology. Froomkin, *supra* note 211, at 51. *See generally* Michael D. Greenberg, *Medical Malpractice and New Devices: Defining an Elusive Standard of Care*, 19 HEALTH MATRIX 423, 430–34 (2009) (discussing how legal standards of medical care change in response to new technology).

benefits began to outweigh the costs of implementing the technology. For example, in 1910, a Washington court held that since prevailing practice was to use X-rays only as a "matter of extreme care," failure to use them could not justify a directed verdict.[225] Less than two decades later, however, a court held that failure to take an X-ray of an injured eye could constitute a prima facie case of negligence.[226] By 1961, X-rays formed an unquestionable part of the standard of care.[227] A similar story occurred with defibrillators.[228] In the early 1980s, defibrillators emerged in the medical literature as a promising new medical device for emergency personnel. By 1988, the Advanced Cardiac Life Support, part of the American Heart Association, endorsed defibrillators and they became the medical standard of care soon after.[229]

In these examples, data quickly and overwhelmingly supported the fact that, on balance, these breakthrough technologies provided safer and superior methods of achieving desired medical outcomes.[230] That information supported changing the standard of care. In other cases of emerging technology, the data may not make a compelling enough case. For example, new "machine-generated diagnosticians" that employ artificial intelligence to reach medical diagnoses present a promising future, but the scientific and medical communities have not yet reached a consensus that such technology offers methods superior to human diagnoses.[231]

The critical question, therefore, is at what point does a new technology cross the threshold and establish itself as superior, thereby affecting the existing standard of care? More to the point, on what side do medical monitoring systems for mental health, chatbots, and other teletherapies currently fall? Answering that question may depend on the level of scientific and medical consensus concerning their efficacy and benefits.

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225. Wells v. Ferry-Baker Lumber Co., 107 P. 869, 870 (Wash. 1910).

226. Lippold v. Kidd, 269 P. 210, 213, 215 (Or. 1928).

227. *See, e.g.*, Gonzales v. Peterson, 359 P.2d 307, 310 (Wash. 1961) (recognizing the prevailing standard of care by a physician in diagnosing a condition includes further examination and x-rays).

228. *See* R.O. Cummins, *From Concept to Standard-of-Care? Review of the Clinical Experience with Automated External Defibrillators*, 18 ANNALS EMERGENCY MED. 1269, 1270 (1989) (examining the introduction of automated external defibrillators and the impact effect the new technology had on the standard of care).

229. *See* Froomkin, *supra* note 211, at 57.

230. *Supra* notes 224–229 and accompanying text.

231. Froomkin, *supra* note 211, at 35–36.

1. Custom

While universities are beginning to introduce chatbot assistance generally, chatbot mental health assistance is not actively used by major universities in the United States. The custom is still to use traditional counseling services or to refer students to outside services.[232]

Similarly, while universities are beginning to implement some monitoring systems for health purposes, it has not yet risen to the status of "custom."[233] The custom is to use traditional university counseling services, while some universities use monitoring systems solely for attendance and general retention purposes. Since custom is not dispositive, however, current practices may not create the standard of care if new mental health treatment technologies prove sufficiently efficacious and beneficial, without unduly burdening universities.

2. Cost-benefit analysis

While a growing body of research supports the efficacy of these mental health technologies, the lack of scientific consensus concerning their superiority suggests that these technologies are still some way off from setting a new standard of care for universities. The predictive accuracy of the AI systems needs more study.[234] In addition, although some research supports the benefits of student-monitoring systems, concerns about costs and privacy pose significant barriers.[235] Mental health chatbots and other teletherapies undoubtedly offer several attractive benefits, including increased access for a larger portion of the population[236] and some research suggests that these

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232. CTR. FOR COLLEGIATE MENTAL HEALTH, 2021 ANNUAL REPORT 11 (2021), https://ccmh.psu.edu/annual-reports [https://perma.cc/GX5B-TF3Z] (detailing the rising mental health crisis and nation-wide university response practices).

233. DOBBS ET AL., *supra* note 14, at 281.

234. Tampke, *supra* note 193, at 231

235. *See* Katarzyna Stawarz, Chris Preist, Debbie Tallon, Nicola Wiles, & David Coyle, *User Experience of Cognitive Behavioral Therapy Apps for Depression: An Analysis of App Functionality and User Reviews*, 6 J. MED. INTERNET RSCH. (2018), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6010839 [https://perma.cc/A6LV-ZJJ2] (showing the importance of privacy to students subject to monitoring systems); *see also* Dekker et al., *supra* note 159, at 11 (elaborating on privacy concerns).

236. Ingrid K. Williams, *Can A.I.-Driven Voice Analysis Help Identify Mental Disorders?*, N.Y. TIMES (Apr. 5, 2022), https://www.nytimes.com/2022/04/05/technology/ai-voice-analysis-mental-health.html [https://perma.cc/TP34-A7QY]; Greg M. Kramer, Julie T. Kinn, & Matt C. Mishkind, *Legal, Regulatory, and Risk Management Issues in the Use of Technology to Deliver Mental Health Care*, 22 COGNITIVE BEHAV. PRAC. 258, 258 (2015).

services may even be superior to live therapy for some patients,[237] although this point is subject to considerable debate. [238] Most chatbot products specifically disclaim their ability to replace a human therapist and promote their services as supplemental. [239] Teletherapy appears to be widely supported as an effective medical practice,[240] but the field does not contend that it is superior or safer than an in-person therapy, and thus it is likely to persist as a viable option rather than the standard of care.[241]

Although adoption of these technologies has not yet risen to the level of the X-ray or defibrillator as mainstream use, they show great promise as mental health tools. As the evidence develops on the benefits of using new mental health technologies and the cost lowers to employ them, these technologies could increase the requirements to meet the standard of care in this area. However, because the landscape of emerging technologies is ever shifting, and institutions of higher education vary in their needs and scope of mental health services, it is unlikely that the technologies will become a negligence

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237. *See* D'Arcy J. Reynolds, William B. Stiles A. John Bailer & Michael R. Hughes, *Impact of Exchanges and Client–Therapist Alliance in Online-Text Psychotherapy*, 16 CYBERPSYCH., BEHAV. & SOC. NETWORKING 370, 370 (2013), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3677235 [https://perma.cc/4A7M-5GES] (finding that chatbot therapy was "in some respects more positive than, previous evaluations of face-to-face therapy"); *see also* Kathleen Kara Fitzpatrick, Alison Darcy & Molly Vierhile, *Delivering Cognitive Behavior Therapy to Young Adults with Symptoms of Depression and Anxiety Using a Fully Automated Conversational Agent (Woebot): A Randomized Controlled Trial*, 4 JMIR MENTAL HEALTH (2017), https://mental.jmir.org/2017/2/e19 [https://perma.cc/QT84-9P64] (finding that the chatbot "Woebot" reduced symptoms of depression and anxiety).

238. Mark Erik Larsen, Kit Huckvale, Jennifer Nicholas, John Torous, Louise Birrell, Emily Li et al., *Using Science to Sell Apps: Evaluation of Mental Health App Store Quality Claims*, NPJ DIGIT. MED., March 22, 2019, at 1, 2, https://www.nature.com/articles/s41746-019-0093-1#Tab3 [https://perma.cc/FX4R-F7KP] (showing that while many chatbots employ "scientific language," most provide very little clinical data that support efficacy); *see also* Stawarz, *supra* note 235 (studying thirty-one such apps and finding they do not yet offer a superior treatment method).

239. WYSA, https://www.wysa.io [https://perma.cc/5DUV-KGKQ] (providing a disclaimer that Wysa does not provide medical advice and encourages people with serious mental health conditions to seek a doctor).

240. *Telepsychiatry*, AM. PSYCHIATRY ASS'N, https://www.psychiatry.org/psychiatrists/practice/telepsychiatry [https://perma.cc/7BX8-JQDZ].

241. *See* Birgit Wagner, Andrea B. Horn, & Andreas Maercker, *Internet-Based Versus Face-to-Face Cognitive-Behavioral Intervention for Depression: A Randomized Controlled Non-Inferiority Trial*, 152 J. AFFECTIVE DISORDERS 113, 119 (2014) (finding that online therapy was on par with in-person therapy, and in some respects superior).

per se standard, in contrast to the X-ray example mentioned above.[242] Over time, professional organizations may develop guidelines, which may have a bearing on the question of the standard of care.[243] Regardless, it is more likely that the question of breach will be decided as a jury question on a case by case basis. Among other factors, juries will consider the type of school, and the effectiveness of the technology and its cost, as well as how widely adopted a technology is among higher education institutions, in determining whether a university has met the standard of care in this area.

D. Outsourcing Responsibility to Provide Mental Health Services

Although not the main focus of this article, it bears mention that many institutions rely upon third parties to provide mental health services. This can range from contracting therapy sessions to providing monitoring services. Universities may outsource their mental health services to limit their liability exposure.[244] If the contractor is negligent in providing those services, would the university be liable for the ensuing harm?

Briefly put, if the service provider is considered an independent contractor, then the university generally would not be held liable under a theory of vicarious liability, because the provider would not be an employee of the university. However, if the provider gives the appearance of being an employee to the recipient, it may be considered an "apparent" employee for purposes of the doctrine.[245]

Of course, the university would remain liable for its own negligence in responding to the notice of potential harm flagged by the

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242. *See generally* Wells v. Ferry-Baker Lumber Co., 107 P. 869, 870 (Wash. 1910) (holding that a surgeon's failure to treat a patient with an X-ray, which at the time was new technology in the field, was not a deviation from the standard of care).

243. DOBBS ET AL., *supra* note 14, at 282. Some organizations that may issue guidelines on the use of technology for student mental health services include Association of University and College Counseling Center Directors (AUCCCD), which represents nearly 1,000 college and university counseling centers, the American College Counseling Association (ACCA), American Psychological Association, and American College Health Association. *See* NAS REPORT, *supra* note 2, at 96–97.

244. Guarisco, *supra* note 13, at 1033.

245. RESTATEMENT (SECOND) OF AGENCY § 267 (AM. L INST. 1958); *see also* Federico v. Ord. of Saint Benedict in R.I., 64 F.3d 1, 4 (1st Cir. 1995) (suggesting that the doctrine of apparent authority could apply in the context of a school that uses third-party medical services while holding that the plaintiffs in the instant case did not do enough to establish the apparent authority of the doctor).

technology provided by the third-party contractor. And a university could be found negligent in its provision of materials to the contractor.

CONCLUSION

Even though universities generally do not create the mental health problems of students, they may have a duty to exercise reasonable care in providing mental health resources to help them. The duty does not extend to preventing the onset of mental health issues themselves. Instead, the special relationship between higher education institutions and their students, or the voluntary undertaking to provide services, may give rise to an affirmative duty to assist students in dealing with their mental health issues. In addition to providing therapeutic services, this duty could include a responsibility to identify, assess, and manage students who suffer from mental disorders, to prevent highly foreseeable harms. A known danger, or a highly foreseeable one, may trigger a duty to ensure student safety from self or third-party harm. The university may be in the best position to detect potential problems. The student's main—or only—source of mental health services may be from the university. Parents and students may come to rely on these services.

Technological advances in the area of mental health hold great promise and will assist universities in carrying out these duties. Delivering mental health services through virtual teletherapy or chatbots will give students greater access to mental health services, and monitoring technology may make it more likely that universities can save their students from harm to themselves or from others.

But implementing these technologies does not come without liability risks. Providing virtual therapy services may not be as effective as in-person therapy. Monitoring students through voluntarily-provided data, and then analyzing the data through an AI algorithm, can trigger a duty to investigate a student's well-being. However, assessing and responding to warning signs of mental illness is not an exact science. The algorithm provided by monitoring services is only as good as the data entered and algorithm designed, and the university will be held responsible for how it interprets the data and how it acts on it. Still, universities cannot ignore these emerging technologies. As these technologies improve and are increasingly adopted, university laggards will face increased liability exposure—and more importantly, may be less able to prevent student harm.