"HOPE AND DESPONDENCE": EMERGING ADULTHOOD AND HIGHER EDUCATION'S RELATIONSHIP WITH ITS NONVIOLENT MENTALLY ILL STUDENTS

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"Hope and Despondence" from William Knox, *Mortality*, THE LONELY HEARTH, THE SONGS OF ISRAEL, HARP OF SION, AND OTHER POEMS 95-97 (1847) *available at* http://rpo.library.utoronto.ca/poem/2846.html. Knox's *Mortality* was one of Abraham Lincoln's favorite poems, which he recited so often that he was thought to be its author. ABRAHAM LINCOLN RESEARCH SITE, *Abraham Lincoln's Favorite Poem*, http://rogerjnorton.com/Lincoln38.html (last visited Oct. 18, 2011). It is now believed that Lincoln suffered from chronic depression. Robert Siegel, *Exploring Abraham Lincoln's 'Melancholy,'* NPR.ORG (Oct. 26, 2005), http://www.npr.org/templates/story/story.php?storyId=4976127.

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INTRODUCTION

Seung-Hui Cho and Steven Kazmierczak: The rampage shooters at Virginia Tech (2007) and Northern Illinois University (2008) were both young men with histories of mental illness who took out their anger at a major university.[1] In the wake of the Virginia Tech massacre, colleges and universities across the country formed threat-assessment teams to deal with students who exhibit behavior that might lead to violent outcomes.[2] Just such a team at Pima Community College suspended Jared Loughner several months before he killed six people, including a federal judge, and wounded thirteen, most notably Rep. Gabrielle Gifford.[3] That team examined what would turn out to be Loughner's devolution from being a highly disruptive student to a violent shooter, starting with reports in September 2009, through that entire academic year until he was suspended in September 2010.[4] Loughner's on-campus behavior was characterized by observers as "creepy," "bizarre," and "strange" and included classroom outbursts, a bizarre YouTube video,[5] and overall hostile and strange behavior.[6] What all seem to agree on is that Loughner is mentally ill.[7]

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1. *See, e.g.*, Editorial*, Speak Up*, CHI. TRIB., Jan. 20, 2011, at 20, *available at* http://articles.chicagotribune.com/2011-01-20/news/ct-edit-tucson-20110120_1_ mental-illness-mental-health-shooting-rampage; Stephen A. Diamond, *Déjà Vu?: A Wicked Rage for Recognition*, PSYCHOL. TODAY (Jan. 11, 2011), http://www.psychologytoday.com/blog/evil-deeds/201101/deja-vu-wicked-rage-recognition. As this Article was going to press, another former student was arrested for murdering seven people at a small Christian college in northern Califormia. *See, e..g.,* Michael Martinez & Dan Simon, *California Man Ordered Held without Bail in Oakland College Mass Killings*, CNN.COM (April 4, 2012) http://articles.cnn.com/2012-04-04/us/us_california-shooting_1_goh-oakland-court?_s=PM:US.

2. Robert Anglen & Dennis Wagner, *College Unsure How to Handle Loughner's Behavior, E-mails Show*, AZCENTRAL.COM (May 10, 2011), http://www.azcentral.com/news/articles/2011/05/19/20110519loughner-emails-pima-community-college-brk19-ON.html.

3. *Id.*; *see also* Marc Lacey & Serge F. Kovaleski, *'Creepy,' 'Very Hostile': A College Recorded Its Fears*, N.Y. TIMES, Jan. 13, 2011, at A1, *available at* http://www.nytimes.com/2011/01/13/us/13college.html?pagewanted=all.

4. Lacey & Kovaleski, *supra* note 2.

5. Anglen & Wagner, *supra* note 2.

6. Lacey & Kovaleski, *supra* note 3. Although Pima Community College seemed to have done everything it could to prevent a tragedy similar to the ones at Virginia Tech and NIU, public sentiment suggests that the college was in some

The unfortunate consequence is that many colleges and universities paint all their mentally ill students with too broad a brush, especially those who are merely disruptive but do not devolve to violence.

Colleges and universities are caught in the cross-hairs when it comes to their mentally ill students. Colleges and universities cannot refuse to accept qualified applicants with mental illness, many of whom succeed in higher education and go on to lead productive lives. On the other hand, the public has become increasingly concerned about campus safety and rampage violence. As a consequence, campus authorities have been tasked with keeping their campuses safe from dangerous, mentally ill students who might kill.

Within that task, campus administrators must try to differentiate between those students who are mentally ill and a threat to others from those who are mentally ill but not a threat to others. Campus counseling centers see many mental disorders, and when there are concerns of violence, many campuses have adopted stringent but thoughtful processes for removing violent students from campus. But within the spectrum between violent and peaceable mentally ill students are those students whose behavior is "threatening" although not violent. They behave strangely and may be disruptive, but are not a threat to anyone, except perhaps to themselves. It is with these students that campuses have greater difficulty.

Out of an abundance of caution and fear of liability, some institutions have swept all mentally ill students into the same category, often mistaking disruption or the manifestation of mental disorder as the behavior of a violent student. As a consequence, some institutions have adopted blanket and involuntary withdrawal policies, especially for students who have manifested a suicidal ideation.[8] Other institutions are taking a hard-line

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way responsible for not doing more. Anglen & Wagner, *supra* note 2; *see also* Lucinda Roy, *After Tucson: A Personal Assessment of Higher Education's Response to Threats*, CHRON. OF HIGHER EDUC., Feb. 18, 2011, at B10–13, *available at* http://chronicle.com/article/After-Tucson-a-Personal/126274/. One obvious problem with the community college's taking "ownership" of Loughner would have been the liability issues for undertaking responsibility for a third party. *See*, *e.g*., Susan P. Stuart, *Participatory Lawyering and the Ivory Tower: Conducting a Forensic Law Audit in the Aftermath of Virginia Tech*, 35 J.C. & U.L. 323, 340 (2009).

7. Tim Steller & Kim Smith, *Loughner Found Incompetent to Stand Trial*, ARIZ. DAILY STAR, May 25, 2011, at A1, *available at* http://azstarnet.com/news/local/crime/article_1d5ce648-86f8-11e0-82ec-001cc4c03286.html.

8. *See, e.g*., Paul S. Appelbaum, *"Depressed? Get Out!": Dealing with Suicidal Students on College Campuses*, 57 LAW & PSYCHIATRY 914 (2006); Brian Whitley, *N.J. Report Finds Colleges Utilize "Blanket Removal" Policy When Handling Suicidal Students*, BLOG.NJ.COM (Dec. 3, 2009), http://www.nj.com/news/index.ssf/2009/12/nj_report_finds_colleges_utili.html.

disciplinary approach to dealing with disruptive students whose behavior is a manifestation of mental disorder.[9] These institutions reason that "'[i]t is not about suicide attempts or mental health issues[; i]t's about behavior."[10] And even in the absence of formal discipline proceedings, some mentally ill students are simply counseled out as part of a benign policy to help them recover but also just to get them off campus.

This Article is about those mentally ill students who do not pose threats of violence that might result in campus tragedy.[11] This category is necessarily imprecise because the indicators of violence are so imprecise. Profiling potential shooters and successfully removing them from campus are difficult propositions at best.[12] But what this Article challenges is the underlying presumption of lumping all mentally ill students—threatening, odd, disruptive, or the like—into the broad category of "dangerous" in order to winnow out and remove the "violent."

Colleges and universities cannot be blamed for catching small fish along with the big fish. Given the potential institutional liability for campus safety, it is better to be safe than sorry. Such an approach cuts down on mental health treatment costs for mentally ill students and avoids liability

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9. *See, e.g.*, Bonnie Miller Ruben & Megan Twohey, *Colleges Take Hard Line on Psychological Problems: Critics See Harm; Officials Cite Court Rulings, Virginia Tech*, CHI. TRIB., Dec. 27, 2007, at 1.1, *available at* http://articles.chicagotribune.com/2007-12-27/news/0712261226_1_mental-illness-mentalhealth-law-students. Cited instances include a student at Eastern Illinois University who suffers from post-traumatic stress disorder as a result of sexual abuse. During a French class, she felt a flashback was imminent and tried to leave the classroom. Unable to do so in time, she suffered an attack. Although she eventually signed a voluntary withdrawal form, she was threatened with removal for violating the university's disciplinary code. *See*, Stephen Di Benedetto, *Reliving the Past: Flashback Sends Student Home*, DAILY E. NEWS (Oct. 6, 2007), http://www.library.eiu.edu/denpdfs/2007/10/07oct05pg01.pdf; Elizabeth Redden, *Student, Interrupted*, INSIDE HIGHER ED. (Oct. 15, 2007), http://www.insidehighered.com/news/2007/10/15/ptsd. Another student, at Wisconsin's St. Norbert College, overdosed on prescription drugs after experiencing problems with the medication for her bipolar disorder. She eventually took a medical leave after being threatened with disciplinary action. Ruben & Twohey, *supra*.

10. Rubin & Twohey, *supra* note 9.

11. Since the events at Virginia Tech, institutions have been actively working on mechanisms for culling such violent students from campuses. They have increased campus information-sharing, created threat-assessment and emergency preparedness teams, and instituted training protocols. *See, e.g.*, Roy, *supra* note 6; Stuart, *supra* note 6, at 365–77.

12. *See, e.g.*, Stanton Peele, *Can We Profile Killers Like Jared Loughner, Nidal Malik Hasan, and the VA Tech Shooter?*, PSYCHOL. TODAY (Jan. 11, 2011), http://www.psychologytoday.com/blog/addiction-in-society/201101/can-we-profile-killers-jared-loughner-nidal-malik-hasan-and-the-va-.

costs for self-injury while on campus.[13] Furthermore, a behavioral threshold for removal from campus is more clear-cut and is easy to administer. However, this Article proposes a paradigm shift in an institution's default presumption of sweeping all the disruptive and mentally ill students into the same category in order to rid itself of dangerous students because the removal system then becomes over-inclusive.

As a general rule, mental illness is no more likely to be an indicator of violence in comparison to violence in the population at large. Rather, the literature suggests that a better and more accurate behavioral cut-off for campus threat assessment analysis should focus on students who are actually violent or have the potential for violence, i.e. those motivated by anger and rage.[14] Thus, the removal processes need not focus on all mentally ill students, especially those who are disruptive but not dangerous.

The institutional dilemma is that the mentally ill student often *is* different and behaves differently. Private and public fears of violence cause those differences to be viewed as threatening and *ipso facto* dangerous. When the community senses "danger," it wants it removed. The irony is that the campus community has more mentally ill students than ever before.[15] Indeed, the sheer number of mentally ill students on campus makes them an integral part of the community. Cutting indiscriminately among this growing mentally ill population—by using disruption as the measure of concern rather than violence—slices too deeply into the general campus community, a community that is supposed to embrace difference and individuality.

This Article advocates broader institutional acceptance of the behavior that accompanies a large swath of the mentally ill community and a shifting from the presumption of removal to inclusion. This can be achieved by the institution's engaging in a different legal relationship with its mentally ill students, thereby narrowing the focus of the presumption of removal onto the truly violent student. This paradigm shift requires an institutional approach that acknowledges that disruptive mentally ill students have more in common with the general student body than with violent students. That shift necessarily means that disruptive mentally ill students should be considered full-fledged members of the same "disciplinary" class as all other students.

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13. *See, e.g.*, Schiezler v. Ferrum Coll., 236 F. Supp. 2d 602 (W.D. Va. 2002) (holding college had a duty to protect a student who committed suicide); Shin v. Mass. Inst. of Tech., No. 020403, 2005 WL 1869101 (Mass. Super. Aug. 29, 2005) (finding university had a duty to protect a student who died in a dorm fire); *see generally* Stuart, *supra* note 6, at 343–44.

14. Diamond, *supra* note 1.

15. *See infra* Part I.

This shift in presumptions can be accomplished if the institution recognizes that the characteristics of the mentally ill student really have more in common with the general population than with the violent student. If the institution has a better understanding of the "emerging adulthood" maturational period[16] of current college and university students, then it will have a better understanding of the greater commonalities between the nonviolent mentally ill student and the general student population. Indeed, emerging adulthood brings with it a greater likelihood of mental illness as a function of the maturation between adolescence and adulthood.[17] In fact, many mental disorders actually manifest during this period, as a function of the disorder and even as a consequence of being a student.[18] Therefore, as goes the maturational period so go the mentally ill students.

This Article also broadly posits that, if colleges and universities better recognize the problems of emerging adulthood within their student bodies, they might be better able to align their legal responsibilities to them, especially in managing, accommodating, and educating those who are mentally ill. These generationally different scholars are unable to manage the transition from the adolescence of high school to the "adulthood" expected in college without significant assistance. As a result, institutions must change their traditional expectations of emerging adults as fully functioning participants in the academy. Likewise, parents can no longer adhere to those traditional expectations in order to avoid further responsibility for their children and then hold the contradictory expectation that the institution has a duty to protect them. Instead, these stakeholders need to understand that emerging adulthood requires a joint relationship that places students somewhere between adolescents needing protection and fully functioning adults. Such a view would place the institutional legal relationship between the duty to protect and the special relationship increasingly imposed by courts and the mere duty to supervise used in K-12 public education.[19] Making greater joint responsibility a priority for the

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16. *See infra* Part IV.

17. *See infra* text accompanying notes 65–71.

18. *See infra* text accompanying notes 56–71.

19. Other authorities have advocated changing certain formal legal relationships based on maturity levels. *See, e.g.*, Emily Buss, *What the Law Should (and Should Not) Learn from Child Development Research*, 38 HOFSTRA L. REV. 13 (2009); Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable than Adults*, 18 BEHAV. SCI. & L. 741 (2009); Vivian E. Hamilton, *Immature Citizens and the State*, 2010 BYU L. REV. 1055 (2010); Megan E. Hay, *Incremental Independence: Conforming the Law to the Process of Adolescence*, 15 WM. & MARY J. WOMEN & L. 663 (2009); Ann MacLean Massie, *Suicide on Campus: The Appropriate Legal Responsibility of College Personnel*, 91 MARQ. L. REV. 625 (2008); *see also* Rachael Andersen-Watts, Note, *Recognizing Our Dangerous Gifts: Applying the Social Model to Individuals with Mental Illness*, 12 MICH. ST. U. J. MED. & L. 141

student population at large will then make it easier for institutions to better manage their relationship to those students who are mentally ill.

Part I of this Article outlines the increasing mental health challenges that colleges and universities face as more students either come to college with mental disorders or manifest these disorders while there. Part II summarizes the current civil rights framework that protects and serves the mentally ill student under the Rehabilitation Act and the Americans with Disabilities Act (ADA), including its 2008 Amendments. Part III discusses the current model of legal relationship between the institution and its students and the problems inherent in continuing to rely on that model. Part IV introduces the emerging adulthood maturational period, its relationship to mentally ill students, and the rationale for treating mentally ill students as a subgroup of the larger population rather than as a subgroup of violent students. Finally, Part V proposes practical steps for adapting to the emerging adulthood model in its educational and legal relationship to all its students, especially those with mental disorders. The upshot is that if colleges and universities embrace an emerging adulthood model in dealing with all their students, they must necessarily embrace the differences that mentally ill students bring to the institution rather than relegating them to the same fate as the violent student.

I. MENTALLY ILL STUDENTS: "I WAS SUPPOSED TO BE HAVING THE TIME OF MY LIFE."[20]

There is little doubt that the number of college and university students with mental impairments—distinct from learning disorders—is on the rise.[21] Several explanations exist for this increase in student mental illness. Improvements in pharmaceuticals allow those with pre-existing conditions to attend college. But an equally compelling explanation for the increase, especially for first-time manifestations on campus, is that mental illness itself is rising in this contemporary student population, with a panoply of causes.

First, students with pre-existing disorders can now attend college because increasingly sophisticated medications are available for their treatment.[22] They are able to function better because they can rely on more

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(2008) (advocating a special legal analysis for the mentally ill and the right to make their own medical decisions); Josie Foehrenbach Brown, *Developmental Due Process: Waging a Constitutional Campaign to Align School Discipline with Developmental Knowledge*, 82 TEMP. L. REV. 929 (2009).

20. SYLVIA PLATH, THE BELL JAR 2 (Harper Collins Publishers 1996) (1963).

21. *See infra* Part I.

22. *See, e.g.*, Martha Anne Kitzrow, *The Mental Health Needs of Today's College Students: Challenges and Recommendations*, 41 NASPA J. 165, 169 (2003). "[I]mprovements in and increased use of psychotropic medications, particularly selective serotonin reuptake inhibitors (SSRIs), might bolster

effective medications to ameliorate their symptoms.[23] "[M]ore and more students are coming to college having already seen a mental health professional or having received psychiatric medications."[24] Indeed, "[s]ome students arrive at the University on five or six psychiatric medications considered crucial to their stability."[25] In a survey at a large Midwestern public university, researchers found 7% of respondents currently taking medication for psychiatric purposes.[26]

Second, although there is authority to suggest that college and university students may be more comfortable today in reporting mental health problems and seeking counseling,[27] conflicting evidence suggests that the college and university student population is no more likely to seek help than in the past, apparently hoping to solve their problems themselves.[28]

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otherwise disturbed students to the degree that they can attend college. . . . The sale rate of SSRIs in the United States has increased 800% since 1990." Ozgur Erdur-Baker et al., *Nature and Severity of College Students' Psychological Concerns: A Comparison of Clinical and Nonclinical National Samples*, 37 PROF'L PSYCHOL., RES. & PRAC. 317, 322 (2006); *see also* Jeffrey R. Young, *Prozac Campus*, CHRON. OF HIGHER EDUC., Feb. 10, 2003, at A37, *available at* http://www.utsystem.edu/news/clips/dailyclips/2003/0209-0215/Health-CHE-Prozac-021003.pdf.

23. Kitzrow, *supra* note 22, at 169; *College Students Exhibiting More Severe Mental Illness, Study Finds,* SCIENCE DAILY 2 (Aug. 13, 2010), www.sciencedaily.com/releases/2010/08/100812111053.htm.

24. Johanna Soet & Todd Sevig, *Mental Health Issues Facing a Diverse Sample of College Students: Results from the College Student Mental Health Survey*, 43 NASPA J. 410, 425 (2006).

25. Emily Gibson, *Mental Illness in the College Student*, MEDPAGE TODAY'S KEVINMD.COM 1 (Jan. 2011), www.kevinmd.com/blog/2011/01/mental-illness-college-student.html. A recent survey suggests that over 90% of student mental health clinics believe that the number of students arriving on campus with psychiatric medications has increased. ROBERT P. GALLAGHER, NATIONAL SURVEY OF COUNSELING CENTER DIRECTORS 2009 12 (2009), http://www.iacsinc.org/2009%20National%20Survey.pdf.

26. This finding is comparable to 7.7% of the general adult population. Soet & Sevig, *supra* note 24, at 425.

27. *See, e.g.*, Collegiate Health Risk Mgmt., *Old Stand-bys & Prescription Newcomers: College Drug Use in Brief*, OCT. COLLEGIATE HEALTH NEWS & VIEWS 4 (2005) [hereinafter *Old Stand-bys*]; Justin Hunt & Daniel Eisenberg, *Mental Health Problems and Help-Seeking Behavior Among College Students*, 46 J. ADOLESCENT HEALTH 3, 5 (2010).

28. Steven J. Garlow et al., *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, 487 (2008) ("[T]here is a disconcerting lack of utilization of treatment resources by those students with suicidal ideation and depression."); Kara Zivin et al., *Persistence of Mental Health Problems and Needs in a College Student Population*, 117 J. AFFECTIVE DISORDERS 180, 184 (2009) ("We also found a high

One study extrapolated a typical college or university applicant profile from a study of high school students and discovered that a student at risk for mental health problems was less likely to ask for help if she was Caucasian and had significantly higher grades with few if any behavioral problems.[29] That student was also more likely to report higher incidence of suicidal ideation and just as likely to report a prior suicide attempt.[30] Thus, the academic success that would impel a student to attend college may also prevent that student from seeking help for mental health issues. "Given that the maladaptive coping styles and attitudes of adolescents with suicidal ideation tend to revolve around the need for independence and autonomy, the same students may be more successful academically by appropriately applying similar attitudes and beliefs within an academic context."[31]

Third, the sheer number of students with mental health issues—many of whom first manifest symptoms while in college—is a factor in the rise of mental illness on campus. One study at a large public university explored student reports of depression, anxiety, eating disorder, self-injury, and suicidal ideation.[32] That study found that more than one-third of the students surveyed displayed at least one mental health problem at either the base-line year or at the two-year follow-up[33] with two-thirds of those at base-line having a *persistent* mental health problem, indicating that colleges and universities are not seeing just transient problems.[34] Even worse is a recent study finding that nearly half of college-age students had a psychiatric disorder the previous year.[35] In face-to-face interviews with over 2,000 college students, researchers discovered that 45.79% had a psychiatric disorder, with alcohol use disorders (20.3%) and personality disorders (17.68%) leading the pack.[36] Even the existence of mood disorders (10.62%) and anxiety disorders (11.94%) was significant.[37]

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degree of persistence in lack of perceived need for help and in lack of services use, even among those students who screened positive for disorders at both time points.").

29. Mathilde M. Husky et al., *Correlates of Help-Seeking Behavior Among At-Risk Adolescents*, 40 CHILD PSYCHIATRY & HUM. DEV. 15, 22 (2009).

30. *Id.* at 21–22.

31. *Id.* at 22.

32. Zivin et al., *supra* note 28, at 180.

33. *Id.* at 184.

34. *Id.*

35. Carlos Blanco et al., *Mental Health of College Students and Their Non-College-Attending Peers: Results from the National Epidemiologic Study on Alcohol and Related Conditions*, 65 ARCHIVES OF GEN. PSYCHIATRY 1429, 1429 (2008).

36. *Id.* at Table 2.

37. *Id.* Similar results were reached for this age cohort generally—eighteen- to twenty-nine-year-olds—in the National Comorbidity Survey Replication updated in 2007: Twelve-month prevalence of any anxiety disorder (22.3%), any

Another recent survey indicates that nearly half the clients seen by college and university mental health centers have severe psychological problems, of which "7.4% . . . have impairment[] so serious[] that they cannot remain in school or can only do so with extensive psychological/psychiatric help, while 40.9% experience severe problems but can be treated successfully with available treatment modalities."[38]

Depression alone affects 49% of college students so severely that they have difficulty functioning, with 14.9% meeting the criteria for clinical depression.[39] During any previous thirty-day period, as many as 4.8% of college and university students had symptoms of poor mental health or depression.[40] Unfortunately, student depression is inextricably linked with suicidal ideation. "Those students with the most severe symptoms of depression were more likely to experience current suicidal ideation[,] and conversely those students with suicidal ideation had worse symptoms of depression."[41]

However, depression is just one of the diagnoses in a much broader domain of internal distress. Other diagnoses include anxiety, rage, feeling out of control, and uncomfortable "emotional activation."[42] More students are being diagnosed with bipolar disorder and bipolar spectrum disorder.[43] Post traumatic stress disorder is more common than originally believed, with numbers exceeding social anxiety, substance abuse, psychosis, and obsessive-compulsive disorder.[44] As many as 30% of college and university students meet DSM-IV criteria for alcohol use, with 6% meeting the criteria for alcohol dependence.[45] While an estimated 1100 college and university students will commit suicide in a year, nearly 1400 will die of

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mood disorder (12.9%), and impulse-control disorders (11.9%), with an overall total of 43.8% having a DSM-IV disorder. NATIONAL COMORBIDITY SURVEY, NCS-R TWELVE-MONTH PREVALENCE ESTIMATES (Table 2) (2005), www.hcp.med.harvard.edu/ncs/index.php.

38. GALLAGHER, *supra* note 25, at 6.

39. Eric Swanholm et al., *Pessimism, Trauma, Risky Sex: Covariates of Depression in College Students*, 33 AM. J. OF HEALTH BEHAV. 309, 309 (2009). Depressed students tend to be pessimistic and report a higher rate of risky sexual behaviors. *Id.* at 312, 316; *Old Stand-bys*, *supra* note 27, at 3 (explaining 40% of students self-reported depression that inhibited functioning while 30% classified themselves as clinically depressed, but only 15% actually diagnosed).

40. Elissa R. Weitzman, *Poor Mental Health, Depression, and Associations with Alcohol Consumption, Harm, and Abuse in a National Sample of Young Adults in College*, 192 J. NERVOUS & MENTAL DISEASE 269, 275 (2004).

41. Garlow et al., *supra* note 28, at 486.

42. *Id.*

43. *Old Stand-bys*, *supra* note 27, at 3.

44. Soet & Sevig, *supra* note 24, at 425.

45. Weitzman, *supra* note 40, at 269.

alcohol-related causes.[46] Another study found increasing numbers of students presenting complex mental health problems, including anxiety, suicidal ideation (tripled), depression (doubled), personality disorders, and sexual assault (quadrupled).[47] The problem is particularly acute for students with co-occurring problems—substance abuse and mental health problems—because they "have more severe and chronic disorders . . . , greater functional impairment . . . , and higher risk of suicide[,]" but barely one-third seek mental health counseling.[48]

The mental health issues posed by today's college and university students are part of a much broader on-campus malaise. In a 2010 nationwide student health survey conducted by the American College Health Association, the following startling statistics stand out for previous twelve-month occurrences:

Felt overwhelmed	83.6%
Felt exhausted (but not from physical activity)	77.9%
Felt very sad	58.3%
Felt lonely	54.4%
Felt overwhelming anxiety	46.4%
Felt things were hopeless	43.9%
Felt overwhelming anger	36.7%
Felt so depressed it was difficult to function	28.4%
Seriously considered suicide	6.0%
Intentional injuries to self	5.1%
Attempted suicide	1.3% [49]

Understandably, administrators and mental health professionals are now spending more time with campus mental health issues, including marked

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46. *Old Stand-bys*, *supra* note 27, at 3. Annually, the average college student spends approximately the same amount on alcohol as on books, about $900. As a consequence, nearly one-fourth reports failing a test or project due to alcohol use; one-third reports missing class; more than 30,000 are treated for alcohol overdose; one in eight reports injuries from alcohol use while one in twenty requires medical treatment. *Id.* at 6. Interestingly, frequent binge drinking may more closely correlate with general anxiety disorder than with depression, especially among males. James A. Cranford et al., *Substance Use Behaviors, Mental Health Problems, and Use of Mental Health Services in a Probability Sample of College Students*, 34 ADDICTIVE BEHAV. 134, 142 (2009).

47. Sherry A. Benton et al., *Changes in Counseling Center Client Problems Across 13 Years*, 34 PROF'L PSYCHOL., RES. & PRAC. 66, 69–70 (2003).

48. Cranford et al., *supra* note 46, at 142 (internal citations omitted).

49. AM. COLL. HEALTH ASS'N, NATIONAL COLLEGE HEALTH ASSESSMENT II: REFERENCE GROUP EXECUTIVE SUMMARY, FALL 2010 13–14 (2011) [hereinafter *ACHA*].

increases in eating disorders, drug and alcohol abuse, classroom disruption, and suicide attempts.[50]

The specific indicia and risk factors for campus mental health issues are varied. Specific risks include being male, experiencing a higher number of stressful events within the previous year, being born in the United States, and living away from parents.[51] Male students are more likely to commit suicide while female and poorer students are more likely to have depression or anxiety disorder.[52] But the emotional profile of contemporary college students seems to play a major role. "The bottom line is that students are coming to college overwhelmed and more damaged than those of previous years."[53] Although students' self-rating on achievement and academic ability is trending upward,[54] the emotional health of college and university freshmen has now reached its lowest point since students were first asked in 1985 to self-rate their emotional health, with just barely half reporting that their emotional health is in the highest 10% or above average.[55] "Some university faculty describe the undergraduates entering prestigious institutions as falling into two types, neither of which is good: 'crispies' are burned out from too much work and too much perfectionism, and 'teacups' are perfect on the outside but easily broken if rattled."[56]

The underlying roots of this overall decline in student mental health are also various. They include "divorce, family dysfunction, instability, poor

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50. Kitzrow, *supra* note 22, at 167. *But see* Bettina B. Hoeppner et al., *Examining Trends in Intake Rates, Client Symptoms, Hopelessness, and Suicidality in a University Counseling Center Over 12 Years*, 50 J. COLL. STUDENT DEV. 539, 549 (2009) ("Our results do not support the notion of increasing levels of psychopathology and symptom severity among university counseling center client populations over the decade 1995–2005.").

51. Blanco et al., *supra* note 35, at 5.

52. Hunt & Eisenberg, *supra* note 27, at 4.

53. ARTHUR LEVINE & JEANETTE S. CURETON, WHEN HOPE AND FEAR COLLIDE: A PORTRAIT OF TODAY'S COLLEGE STUDENT 95 (1998); Kitzrow, *supra* note 22, at 167. As reported in 1998: "Eating disorders are up at 58 percent of the institutions surveyed. Classroom disruption increased at a startling 44 percent of colleges, drug abuse at 42 percent, alcohol abuse at 35 percent of campuses. Gambling has grown at 25 percent of the institutions, and suicide attempts have risen at 23 percent." LEVINE & CURETON, *supra*, at 95–96.

54. HIGHER EDUC. RES. INST. UCLA, HERI: RESEARCH BRIEF: THE AMERICAN FRESHMAN: NATIONAL NORMS FALL 2010 1 (Jan. 2011) [hereinafter *HERI*].

55. *Id. But see* Kali H. Trzesniewski & M. Brent Donnellan, *Rethinking "Generation Me": A Study of Cohort Effects from 1976-2006*, 5 PERSPECTIVES ON PSYCHOL. SCI. 58, 69 (2010) (finding that student profiles have changed little over the past thirty years).

56. Jean M. Twenge, *Generational Changes and Their Impact in the Classroom: Teaching Generation Me*, 43 MED. EDUC. 398, 403 (2008) [hereinafter Twenge, *Generational Changes*].

parenting skills, poor frustration tolerance, violence, early experimentation with drugs, alcohol and sex, and poor interpersonal attachments."[57] However, when succeeding generations of students are reporting more symptoms of psychopathology, something more deeply cultural is at work. "The pattern of change best fits a model of cultural change toward extrinsic rather than intrinsic goals that may have negatively impacted youth mental health."[58] In a seventy-year review of scores on the Minnesota Multiphasic Personality Inventory (MMPI), researchers found upward trends in measures of "moodiness, restlessness, dissatisfaction and instability"; "unrealistically positive self-appraisal, overactivity, and low self-control"; general symptoms of anxiety; and depression:[59]

> As American culture shifted toward emphasizing individual achievement, money, and status rather than social relationship and community, psychopathology increased among young people. . . . [S]ocieties emphasizing extrinsic goals may be promoting a cultural norm of personal autonomy and attainment that is unrealistic, unattainable or otherwise inappropriate, resulting in a gap between expectations and realities. Given that 50% of high school students in 2000 expected to obtain a graduate degree but only 10% will likely reach this goal, this seems to be a plausible explanation for at least some of the rise in psychopathologic symptoms.[60]

Similarly, this generation has a 50% greater confidence rate—compared to the mid-1970s—that they would hold a professional job by age thirty when the reality is that only 18% of high school graduates in either era did so.[61] However, today's *average* college student was more anxious than 85% of 1970s' students.[62]

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57. Kitzrow, *supra* note 22, at 169.

58. Jean M. Twenge et al., *Birth Cohort Increases in Psychopathology among Young Americans, 1938–2007: A Cross-Temporal Meta-Analysis of the MMPI*, 30 CLINICAL PSYCHOL. REV. 145, 152 (2010) [hereinafter Twenge, *Birth Cohort*].

59. *Id.* at 152. In this study, the authors collated the information of more than 63,000 college students on the MMPI and MMPI-2 from 1938 through 2007. *Id.* at 149.

60. *Id.* at 152 (citations omitted).

61. Jean M. Twenge & Stacy M. Campbell, *Generational Differences in Psychological Traits and Their Impact on the Workplace*, 23 J. MANAGERIAL PSYCHOL. 862, 866 (2008) [hereinafter Twenge & Campbell, *Generational Differences*]. Today's college students seem to be aiming higher than their actual abilities might warrant. Twenge, *Generational Changes*, *supra* note 56, at 400. Thus, they come to college with increasing narcissism and a sense of entitlement, "the sense that the world owes [them] something ('I deserve the best', 'I *need* an A'). . . . One recent study found that a third of undergraduates believed they deserved at least a B just for attending class; two-thirds believed they should get special consideration if they simply explained to their professor that they were

Somewhat surprising sources of student distress are the institution itself and possibly the students' unrealistic view of their ability to succeed. "[F]or many undergraduate students, the college experience may actually cause physical and psychological distress."[63] College and university freshmen become stressed simply from the transition to a new life and social environment, but especially the increased pressure on academic achievement.[64] In addition to students' inability to gauge their academic success, recent reports show fewer students are academically ready for college.[65]

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trying hard." *Id.* at 401–02. Similarly, a recent study reveals a past-decade decrease in college students' "empathic concern." Sara H. Konrath et al., *Changes in Dispositional Empathy in American College Students over Time: A Meta-Analysis*, 15 PERSONALITY & SOC. PSYCHOL. REV. 180, 187 (2011). "Young adults today compose one of the most self-concerned, competitive, confident, and individualistic cohorts in recent history." *Id. See also* Twenge & Campbell, *Generational Differences*, *supra*, at 864–65. For example, 81% of eighteen- to twenty-five-year-olds identified getting rich as among their generation's major goals while only 30% identified helping others as a major goal. Konrath et al., *supra*, at 187. This current generation is also more likely to agree with the following statements than did 1980s college students: "I think I am a special person" and "I can live my life any way I want to." Twenge & Campbell, *Generational Differences*, *supra*, at 865. Sadly, these characteristics manifest in increased crime rates against the marginalized and increased alcohol abuse. Konrath et al, *supra*, at 188.

62. Twenge & Campbell, *Generational Differences*, *supra* note 61, at 871; *see also* Trzesniewski & Donnellan, *supra* note 55, at 71.

63. Mary E. Pritchard et al., *What Predicts Adjustment among College Students? A Longitudinal Panel Study*, 56 J. AM. COLL. HEALTH 15, 18 (2007); *see also* Jennifer Jolly-Ryan, *The Last Taboo: Breaking Law Students with Mental Illnesses and Disabilities Out of the Stigma Straitjacket*, 79 UMKC L. REV. 123, 144 (2010) ("Many law students begin their legal education with little or no signs of mental impairment such as depression or anxiety. But due to the nature of a legal education, . . . depression and anxiety may develop.") With regard to mental illness problems in law school, "[a] student who coped well with the stress of undergraduate studies may find herself affected for the first time when faced with the chronic and generally greater stress of law school." Kevin H. Smith, *Disabilities, Law Schools, and Law Students: A Proactive and Holistic Approach*, 32 AKRON L. REV. 1, 28 (1999).

64. Shannon E. Ross et al., *Sources of Stress among College Students*, 33 COLL. STUDENT J. 312, 312 (1999).

65. *See, e.g.*, Sharon Otterman, *Data on New York's Graduates Show Most Aren't College Ready*, N.Y. TIMES, Feb. 7, 2011, at A1, *available at* http://www.nytimes.com/2011/02/08/nyregion/08regents.html; Holly K. Hacker, *Students Hit College, Then Play Catch-Up*, DALL. MORNING NEWS, March 21, 2010, at A1, *available at* http://www.dallasnews.com/news/education/headlines/20100320-Students-playing-catch-up-as-they-4288.ece.

The college environment itself is new, different, and unfamiliar, and it creates a range of issues alien to students' previous experiences, including changes in social activities and sleeping and eating habits, conflicts with roommates, financial difficulties, and even just waiting in long lines.[66] "College life itself can act as a trigger for mental health problems, with students facing an environment of less structure, more stress, irregular sleep patterns, poor eating habits, increased access to alcohol and drugs, new relationships, peer pressure and homesickness just to name a few."[67] College freshmen bring their stresses to orientation then compound their problems with increasing "[p]hysical ailments, quantity of alcohol consumed on weekends, frequency of drinking, frequency of intoxication, and negative affect."[68] These lifestyle changes and stressors manifest in lack of energy, sleeping and eating problems, depression, and inability to concentrate, with 10% reporting moderate to severe depression.[69] Some stressors are even considered traumatic, or at least difficult to handle, by significant numbers of college and university students: academics (42.1%); intimate relationships (30.7%); finances (33%); and sleep difficulties (22.9%).[70] As a consequence, "[y]oung adult students are living with more academic and social stress than they've ever known before at a vulnerable time in their development."[71]

A further source of the rise in student mental illness is the maturational period. Many mental disorders such as depression, schizophrenia, and

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66. Ross et al., *supra* note 64, at 316−17, Table 1.

67. Collegiate Health Risk Mgmt., *Mental Illness: The New Campus Epidemic?*, COLLEGIATE HEALTH NEWS & VIEWS, Oct. 2005, at 3–4 [hereinafter *Campus Epidemic*]. "Students report loneliness and other social difficulties. Many are unhappy without really understanding why." *Id.* at 3 (citation and internal quotation marks omitted). At a slightly different level, law students' sources of depression are a bit easier to pinpoint. *See* Todd David Peterson & Elizabeth Waters Peterson, *Stemming the Tide of Law Student Depression: What Law Schools Need to Learn from the Science of Positive Psychology*, 9 YALE J. HEALTH POL'Y L. & ETHICS 357, 375–85 (2009); Adam J. Shapiro, Comment, *Defining the Rights of Law Students with Mental Disabilities*, 58 U. MIAMI L. REV. 923, 929–933 (2004); Jolly-Ryan, *supra* note 63, at 125–127.

68. Pritchard, et al., *supra* note 63, at 18. This survey started during orientation week at one Midwestern university. *Id*. at 16.

69. *mtvU AP 2009 Economy, College Stress and Mental Health Poll*, HALFOFUS, http://www.halfofus.com/_media/_pr/may09_exec.pdf (last visited Feb. 29, 2012).

70. *ACHA*, *supra* note 49, at 15. The stress arising from going to school and working to pay for it is a primary reason why students drop out of college. JEAN JOHNSON ET AL., WITH THEIR WHOLE LIVES AHEAD OF THEM: MYTHS AND REALITIES ABOUT WHY SO MANY STUDENTS FAIL TO FINISH COLLEGE 5–8, *available at* http://www.publicagenda.org/TheirWholeLivesAheadofThem (A Public Agenda Report for the Bill & Melinda Gates Foundation).

71. Gibson, *supra* note 25.

bipolar disorder manifest themselves during this period of late adolescence and early adulthood.[72] "Young adulthood is . . . a high-risk period for the onset of psychiatric symptoms, with the typical ages of onset for serious mental illnesses being between the ages of 17 and 25."[73] This is not to suggest that serious mental illnesses only manifest in this period,[74] but it is during this crucial period when serious mental illnesses will have emerged.[75] An examination of the age-of-onset distribution of DSM-IV psychiatric disorders from the National Comorbidity Survey Replication reveals the following: 75% of the onset of any anxiety disorder manifests by age twenty-one; nearly 95% of the onset of impulse-control disorders manifests by age twenty-three; and 50% of major substance use disorders manifest by age twenty.[76] "Whatever else we can say about mental disorders, . . . they have their strongest foothold in youth, with substantially lower risk among people who have matured out of the high-risk age range."[77]

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72. Kitzrow, *supra* note 22, at 169; Kathy R. Hollingsworth et al., *The High-Risk (Disturbed and Disturbing) College Student*, 128 NEW DIRECTIONS FOR STUDENT SERV. 37, 41 (2009). S*ee also* Michael N. Sharpe et al., *The Emergence of Psychiatric Disabilities in Postsecondary Education*, 3 ISSUE BRIEF: EXAMINING CURRENT CHALLENGES IN SECONDARY EDUC. & TRANSITION (National Center on Secondary Education and Transition Institute on Community Integration, Minneapolis) Aug. 2004, at 1. "Depression, bipolar disorder, schizophrenia and many others often do not manifest themselves until a person's late teens and early twenties." *Campus Epidemic*, *supra* note 67, at 4.

73. Alexa Smith-Osborne, *Antecedents to Postsecondary Educational Attainment for Individuals with Psychiatric Disorders: A Meta-Analysis*, 1 BEST PRACTS. IN MENTAL HEALTH 15, 15 (2005).

74. One study revealed that many mentally ill adolescents between the ages of thirteen and eighteen had manifested early. Indeed, 50% of disorders may manifest at very early ages: anxiety disorders (six); behavior disorders (eleven); mood disorders (thirteen); and substance use disorders (fifteen). Kathleen Ries Merikangas, *Lifetime Prevalence of Mental Disorders in U.S. Adolescents: Results from the National Comorbidity Survey Replication—Adolescent Supplement (NCS-A)*, 49 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 980, 987 (2010). In addition, morbidity and mortality rates double during adolescence. *See* Ronald E. Dahl, *Adolescent Brain Development: A Period of Vulnerabilities and Opportunities*, 1021 ANN. N.Y. ACAD. SCI. 1, 3 (2004).

75. Smith-Osborne, *supra* note 73.

76. Ronald C. Kessler et al., *Lifetime Prevalence and Age-of-Onset Distributions of DSM-IV Disorders in the National Comorbidity Survey Replication*, 62 ARCHIVES OF GEN. PSYCHIATRY 593, 597 (2005). "The prevalence rates reported here closely approximate those of our nationally representative sample of adults using nearly identical methods, suggesting that the majority of mental disorders in adults emerge before adulthood." Merikangas, *supra* note 74, at 985 (exploring onset of DSM-IV disorders for adolescents between ages thirteen and eighteen years old).

77. Kessler et al., *supra* note 76, at 601.

Unfortunately, not all children who manifest mental disorders before attending college or university are identified in the public schools because the symptoms are intertwined with the typical problems exhibited during adolescence.[78] Thus, if "most" serious mental disorders are present during this maturational period and nearly 50% of this age group attends college or university,[79] then higher education is necessarily recruiting a significant number of students who have not yet been diagnosed or may develop mental disorders while on campus. Higher education needs to account for all the mental illness problems presented by its customer base whenever manifested.

II. THE RIGHTS OF MENTALLY ILL STUDENTS: "HELP, I NEED SOMEBODY"[80]

Whatever legal relationship higher education has with its mentally ill students, it must be informed by the civil rights statutes designed to protect the disabled, particularly the Rehabilitation Act and the Americans with Disabilities Act ("ADA"). Neither statute requires an affirmative out-reach program for dealing with those students: the students must self-identify

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78. Julia C. Dimoff, Note, *The Inadequacy of the IDEA in Assessing Mental Health for Adolescents: A Call for School-Based Mental Health*, 6 DEPAUL J. HEALTH CARE L. 319, 323 (2003). Part of the problem lies with the inability of public schools to identify many mental disorders under the IDEA referral model. *Id.* at 320. *See also* Wendy F. Hensel, *Sharing the Short Bus: Eligibility and Identity under the IDEA*, 58 HASTINGS L.J. 1147, 1164–65 (2007) (arguing "child with a disability" is under-identified and under-served in the "emotional disturbance" category under IDEA). Another problem lies in the wildly varying diagnostic choices. Dimoff, *supra*, at 323. A third problem is that adolescent conduct is so unpredictable that schools are not always the best judge of what is a mental disorder and what is just bad conduct. *Id.* at 321; *see also* Hensel, *supra*, at 1165. Last, the traditional methods of recognizing mental disorders in adolescents have been dismissed as insufficient. Dimoff, *supra*, at 325–329. One suggestion to help solve that problem is the introduction of mental health screenings in the public schools. *See e.g.*, Alixis L. Toma, Comment, *Identifying the Unidentifiable: How Washington's Public Education System Can Aid in the Prevention and Detection of Childhood Mental Illness*, 33 SEATTLE U. L. REV. 225, 261–62 (2009). If nothing else, mental health screenings may be more likely to identify students at risk for suicide. Michelle A. Scott et al., *School-Based Screening to Identify At-Risk Students Not Already Known to School Professionals: The Columbia Suicide Screen*, 99 AM. J. PUB. HEALTH 334, 337 (2009).

79. Zivin et al., *supra* note 28, at 180.

80. "When I was younger, so much younger than today/I never needed anybody's help in any way/But now these days are gone, I'm not so self assured/Now I find I've changed my mind and opened up the doors." JOHN LENNON & PAUL MCCARTNEY, *Help!*, *on* HELP! (Capitol Records 1965).

and request assistance.[81] However, the intent and content of both Acts is a necessary starting point for understanding the difficulties faced by mentally ill students on campus, although the ADA Amendments Act of 2008 may have some ameliorative effect.

The Rehabilitation Act is the older of the two civil rights laws governing higher education, and its 1973 amendment prohibits discrimination on the basis of disability by recipients of federal financial assistance.[82] Section 504 of the Act states that "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[83]

By reason of their receipt of federal funds, most colleges and universities were covered by § 504 from the outset but now their programs or activities are also covered.[84] Section 504 specifically requires that reasonable accommodations be provided to otherwise qualified individuals if they "would otherwise be denied meaningful access to a university."[85] Each institution must designate a compliance officer and adopt due process procedures for processing complaints under the Act.[86] Although the 1990 passage of the ADA overshadowed the Rehabilitation Act, § 504 remains a potent tool for redressing institutional discrimination against college students,[87] especially in its incorporation of some of the ADA's salient terms, such as the definition of "disability."[88]

The Americans with Disabilities Act expanded the rights set forth in the Rehabilitation Act by extending them to the private sector.[89] In keeping

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81. *See* 29 U.S.C. § 701(b)-(c) (2006); 42 U.S.C. § 12101(b) (2006).

82. 29 U.S.C. § 794 (2006); Laura Rothstein, *Higher Education and Disability Discrimination: A Fifty Year Retrospective*, 36 J.C. & U.L. 843, 846 (2010) [hereinafter Rothstein, *Fifty Year Retrospective*].

83. 29 U.S.C. § 794(a) (2006).

84. "For the purposes of this section, the term 'program or activity' means all of the operations of . . . a college, university, or other postsecondary institution, or public system of higher education." *Id.* at § 794(b)(2)(A) (2006). Indeed, private colleges and universities were nearly the only private-sector entities affected by the Act because of that funding. Rothstein, *Fifty Year Retrospective*, *supra* note 82, at 846.

85. 34 C.F.R. § 104.12 (2011); Karen Bower & Victor Schwartz, *Legal and Ethical Issues in College Mental Health*, *in* MENTAL HEALTH CARE IN THE COLLEGE COMMUNITY 113, 128 (Jerald Kay & Victor Schwartz ed., 2010).

86. 34 C.F.R. § 104.7 (2011); Bower & Schwartz, *supra* note 85, at 128.

87 *See, e.g.*, Brodsky v. New Eng. Sch. of Law, 617 F. Supp. 2d 1, 4–5 (D. Mass. 2009); Bowers v. Nat'l Collegiate Athletic Ass'n, 563 F. Supp. 2d 508, 516 (D.N.J. 2008).

88. 29 U.S.C. § 705(9)(B) (2006).

89. *See* Rothstein, *Fifty Year Retrospective*, *supra* note 82, at 854.

with congressional findings of discrimination against the disabled,[90] the ADA is divided into three operative subchapters to address access to employment opportunities (Title I),[91] public services (Title II),[92] and public accommodations and services operated by private entities (Title III).[93] For most intents and purposes (and what this Article will presume hereafter), both the Rehabilitation Act and the ADA generally have the same import for college and university students with mental disorders.[94] And, "unless one of the subtle distinctions [between the two Acts] is pertinent to a particular case, [courts] will treat claims under the two statutes identically."[95]

The ADA's Titles II and III affect higher education directly: Title II as to public institutions[96] and Title III as to private institutions.[97] The anti-discrimination provisions of both Titles are nearly identical in their import—and congruent with the Rehabilitation Act—by their prohibiting the exclusion of a qualified individual with a disability, by reason of that disability, from the benefits of either a public entity or a public accommodation provided by a private entity.[98] Both state and private

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90. 42 U.S.C. § 12101(a)(3) (2006)

91. *Id.* at § 12111 et seq. (2006 & Supp. | 2010).

92. *Id.* at § 12131 et seq. (2006).

93. *Id.* at § 12181 et seq. (2006).

94. Indeed, some students will file complaints that allege violations of both. *See, e.g.*, Mershon v. St. Louis Univ., 442 F.3d 1069, 1076 (8th Cir. 2006); Powell v. Nat'l Bd. of Med. Exam'rs, 364 F.3d. 79, 81 (2d Cir. 2004) *amended by* 511 F.3d 238 (2d Cir. 2004); Manickavasagar v. Va. Commonwealth U. Sch. of Med., 667 F. Supp. 2d 635, 637 (E.D. Va. 2009); *Brodsky*, 617 F. Supp. 2d at 4; Guckenberger v. Bos. Univ., 957 F. Supp. 306, 310–11 (D. Mass. 1997); Coleman v. Zatechka, 824 F. Supp. 1360, 1362 (D. Neb. 1993).

95. Henrietta D. v. Bloomberg, 331 F.3d 261, 272 (2d Cir. 2003).

96. "The term 'public entity' means . . . (A) any State or local government; (B) any department, agency, special purpose district, or other instrumentality of a State or States or local government . . . .". 42 U.S.C. § 12131(1) (2006) ("public entity" defined). *See, e.g.*, *Coleman*, 824 F. Supp. at 1367–68 (University of Nebraska is a public entity under the ADA); Bowers v. Nat'l Collegiate Athletic Ass'n, 563 F. Supp. 2d 508, 522 (D.N.J. 2008) (state universities are public entities under Title II of the ADA).

97. "The following private entities are considered public accommodations . . . (J) a[n] . . . undergraduate, or postgraduate private school . . . .". 42 U.S.C. § 12181(7)(J) (2006). *See, e.g.,* Rothman v. Emory Univ., 828 F. Supp. 537, 541 (N.D. Ill. 1993) (private law schools are governed by Title III of the ADA).

98. Title II states that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subject to discrimination by any such entity." 42 U.S.C. § 12132 (2006). Claims under Title II generally require a prima facie case showing the plaintiff is a qualified individual with a

institutions must provide reasonable accommodations (or modifications) to give "meaningful access" to their programs to "otherwise qualified individuals."[99]

These civil rights protections are not self-activating, however. In order to prove a discrimination case, a student must demonstrate that she informed the institution of her disability and requested a reasonable accommodation but that the institution refused.[100] The reasonableness of the request for accommodation is constrained by its financial burden on the

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disability and that the defendant denied the benefits of or participation in defendant's program because of the disability. *See, e.g.*, Kornblau v. Dade County, 86 F.3d 193, 194 (11th Cir. 1996) (Title II). Title III discrimination claims are somewhat similar although the statutory provision is a bit more specific: "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. § 12182(a) (2006). Consequently, a Title III discrimination claim requires proof of either a defendant's screening disabled people from its program or a defendant's failure to modify reasonably its program so disabled people may participate. *See, e.g.*, *Bowers*, 974 F. Supp. at 464–65; *Mershon*, 442 F.3d at 1076–77 (explaining prima facie case requires proof of 1) plaintiff's disability; 2) public accommodation; and 3) defendant's refusal to make reasonable modifications to its program).

99. *E.g.*, Martin v. PGA Tour, Inc., 532 U.S. 661, 682–83 (2001) (Title III); *Henrietta D.*, 331 F.3d at 282 (Title II). Title III's anti-discrimination provision is a bit more detailed than Title II's in specifying that public accommodations must afford "the most integrated setting appropriate to the needs of the individual" and the disabled "shall not be denied the opportunity to participate in such programs or activities that are not separate or different." 42 U.S.C. § 12182 (b)(1)(B)–(C) (2006). Public accommodations may also not impose a process to screen out the disabled and must afford reasonable modifications unless they would fundamentally change the program. *Id.* at § 12182 (b)(2) (2006).

100. *See, e.g.*, Bower & Schwartz, *supra* note 85, at 132; Lynn Daggett, *Doing the Right Thing: Disability Discrimination and Readmission of Academically Dismissed Law Students*, 32 J.C. & U.L. 505, 517 (2006); Felix Simieou et al., *Legal Issues and Responsible Practices Regarding Disability Accommodations in Postsecondary Education*, 262 WEST'S ED. L. REP. 9, 11 (2011); *see also* Tips v. Regents of Tex. Tech Univ., 921 F. Supp. 1515, 1518 (N.D. Tex. 1996) (holding postgraduate program did not intentionally discriminate against student when she failed to notify the university of her alleged learning disability). A student's reporting of her disability typically requires documentation: the diagnosis of disability, the credentials of the professional who made the diagnosis, the disability's effect on a major life activity, the disability's impact on educational performance, and recommendations for accommodation. Laura Rothstein, *Fifty Year Retrospective*, *supra* note 82, at 857; Simieou et al, *supra*, at 11; Laura Rothstein, *Disability Law and Higher Education*, 63 MD. L. REV. 122, 136–38 (2004).

institution[101] and by whether it would fundamentally alter the academic standards of the program.[102] The institution must make an informed and individualized inquiry into the student's disability and the student's requests in relation to the institution's program.[103] But the law "imposes no requirement upon an educational institution to lower or to effect substantial modifications of standards to accommodate a handicapped person."[104] Unfortunately, the clash between an educational program and accommodations for mental disorders creates a vague terrain upon which students with mental illness must struggle.

The first test is the nature of the disability itself. In order to be covered by the ADA, an individual must have a "mental impairment that substantially limits one or more major life activities of such individual"[105] or is "regarded as having such an impairment."[106] "Mental impairment" under the ADA means "[a]ny mental or psychological disorder, such as an intellectual disability (formerly termed 'mental retardation'), organic brain syndrome, emotional or mental illness, and specific learning disabilities."[107] These will generally include those that are specifically diagnosed under the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (DSM-IV-TR).[108] Setting aside

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101. Bower & Schwartz, *supra* note 85, at 132.

102. Rothstein, *Fifty Year Retrospective*, *supra* note 82, at 854–55.

103. *See, e.g.*, Wong v. Regents of Univ. of Cal., 410 F.3d 1042, 1070 (9th Cir. 2005) (Title II); Wynne v. Tufts Univ. Med. Sch., 932 F.2d 19, 26 (1st Cir. 1991) (Rehabilitation Act); Gluckenberger v. Bos. Univ., 974 F. Supp. 106, 148–49 (D. Mass. 1997) (Title III). Although it is beyond the scope of this Article to enumerate the accommodations requested and made in higher education, they typically include extra time to take exams; reduced course load; private rooms for test-taking; flexible class attendance; flexible assignment due dates; and online courses. *See, e.g.*, Bower & Schwartz, *supra* note 85, at 132. They may also include auxiliary aids; course substitutions; interpreters; note-takers; and recording devices. *See* Simieou et al., *supra* note 100, at 12.

104. Se. Cmty. Coll. v. Davis, 442 U.S. 397, 413 (1979) (Rehabilitation Act).

105. 42 U.S.C. § 12102(1)(A) (2006).

106. *Id.* at § 12102(1)(C) (2006 & Supp. | 2010).

107. 29 C.F.R. § 1630.2(h)(2) (2011).

108. *See* Peggy R. Mastroianni & Carol R. Miaskoff, *Coverage of Psychiatric Disorders under the Americans with Disabilities Act*, 42 VILL. L. REV. 723, 726–27 (1997) (citing DSM-IV as the widely used resource by courts for mental disorders under the ADA); Suzanne Wilhelm, *Accommodating Mental Disabilities in Higher Education: A Practical Guide to ADA Requirements*, 32 J.L. & EDUC. 217, 222–223 (2003). The chief distinction between the ADA's nomenclature and the DSM is that the former deals with legal protections whereas the latter deals with diagnosis and treatment. Ann Hubbard, *The ADA, the Workplace, and the Myth of the "Dangerously Mentally Ill,"* 34 U.C. DAVIS L. REV. 849, 857 (2001) [hereinafter Hubbard, *Myth*]. The *Diagnostic and Statistical Manual of Mental Disorders* is currently under revision by the American Psychiatric Association,

learning disabilities (such as learning and communication disorders) as a type of mental disorder, student mental or psychological disorders may include eating disorders, developmental disorders, mood disorders (bipolar, depression), substance-related disorders (associated with drug or alcohol use), psychotic disorders, anxiety (including stress disorders), and personality disorders.[109] These disorders qualify for coverage even if they are "episodic or in remission" so long as they would "substantially limit a major life activity when active."[110] The 2008 Amendments now require a broad construction of "disability."[111]

The next test is whether the disability substantially limits at least one major life activity. The 2008 Amendments also made significant changes to what constitutes a major life activity for purposes of proving a disability. "[M]ajor life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working."[112] A limitation is substantial if, given the totality of the circumstances, the purposes of the ADA would be broadly served by coverage.[113] Substantial limitation is determined without regard to whether mitigating measures might have an ameliorative affect, such as medications or "learned behavioral or adaptive

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with DSM-V anticipated for adoption in May 2013. *See, e.g.*, David L. Wodrish et al., *Contemplating the New DSM-V; Considerations from Psychologists Who Work with School Children,* 39 PROF'L PSYCHOL., RES. & PRAC. 626; *DSM-5 The Future of Psychiatric Diagnosis*, AM. PSYCHIATRIC ASS'N, http://www.dsm5.org/Pages/Default.aspx (last visited Mar. 1, 2012).

109. *APA Diagnostic Classification DSM-IV-TR*, BEHAVENET, http://www.behavenet.com/apa-diagnostic-classification-dsm-iv-tr (last visited Mar. 1, 2012). However, both Title II and Title III of the ADA deny disability coverage for either "sexual behavior disorders" or "[p]sychoactive substance use disorders resulting from current illegal use of drugs." 28 C.F.R. § 35.104 (2011) (Title II); *Id.* at § 36.104 (2011) (Title III).

110. 42 U.S.C. § 12102(4)(D) (2006 & Supp. | 2010). A minor and transitory impairment with an actual or anticipated six-month duration, however, is not a disability. *Id.* at § 12102(3)(B).

111. *Id.* at § 12102(4)(A); s*ee, e.g.*, Rothstein, *Fifty Year Retrospective*, *supra* note 82, at 869; *see generally* Paul R. Klein, Note, *The ADA Amendments Act of 2008: The Pendulum Swings Back*, 60 CASE W. RES. L. REV. 467, 488–90 (2010).

112. 42 U.S.C. § 12102(2)(A) (2006 & Supp. | 2010). The 2008 Amendments also added major bodily functions to the category of major life activities, including "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions." *Id.* at § 12102(2)(B).

113. A substantial limitation need not be one that prohibits or even severely restricts a life activity. "The term 'substantially limits' shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008." *Id.* at § 12102(4)(B). *See* Bower & Schwartz, *supra* note 85, at 128.

neurological modifications."[114] In the context of mental disorders, diagnosis will often describe severe and ongoing symptoms that neatly fit into a judicial notion of a substantial limitation,[115] and even episodic disorders may last several years.[116] To a certain extent, mental disorder is a disability unto itself in higher education.

Upon the 1990 enactment of the ADA, higher education had already adapted fairly well to making accommodations for students with disabilities because so many colleges and universities have been governed by the Rehabilitation Act's antidiscrimination provisions for decades.[117] Indeed, "[c]olleges and universities have been the leaders in finding ways to use technology to accommodate students with a wide range of disabilities."[118] But that ability to adapt has primarily been dedicated to those disabilities that impact learning and classroom performance and has proved more problematic for students with mental disorders.

To date, the majority of the few published cases brought by mentally impaired college and university students under the ADA before 2008 are those with learning disabilities. Only a tiny number address mental illness, and those with mixed results. Those results often turned on whether the student had a statutorily defined disability or on whether the student was an "otherwise qualified" individual.[119] The ADA's 2008 Amendments[120] may produce different results because of the broadened meanings of disability and major life activities. However, even if the judicial analysis is changed by the Amendments, proof of discrimination may still elude students with mental illness (as distinguished from a learning disorder).

Although a mental illness may be medically recognized, it might not be considered a substantial limitation on a major life activity[121] for a college or university student if academic success is the life activity in question. The 2008 Amendments will have some ameliorating impact by requiring an

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114. 42 U.S.C. § 12102(4)(E) (2010). *See* Rothstein, *Fifty Year Retrospective*, *supra* note 82, at 870.

115. Mastroianni & Miaskoff, *supra* note 108, at 725.

116. *Id.* at 725–26.

117. "Higher education had evolved practices, policies, and procedures before other sectors affected by the ADA (with the exception of K-12 education)." Rothstein, *Fifty Year Retrospective*, *supra* note 82, at 863.

118. *Id.* at 864.

119. *Id.* at 864 n.109.

120. Pub. L. No. 110-325, 122 Stat. 3553 (2008).

121. For example, a medical student's anxiety disorder did not qualify for accommodations because it only manifested on two particular types of tests—math and chemistry—for which he was able to mitigate by changing his study methods. He thereby failed to prove he was substantially limited in a major life activity. McGuinness v. Univ. of N.M. Sch. of Med., 170 F.3d 974, 978 (10th Cir. 1998). Even if mitigation were no longer considered under the 2008 Amendments, proof of a substantial limitation would still have been difficult to prove in that case.

individual assessment concerning whether a learning disability constitutes a substantial limitation.[122] But the tension will still remain if courts are persuaded to judge the student's academic abilities in comparison with the skills of the "average" person. Thus, if a college or university student has the same reading and writing skills as the average person, he may not qualify for accommodations for reading and writing impairments,[123] regardless of the individual assessment. Similarly, a disabled student's earlier educational success may prove to be a barrier to proving reasonable accommodations are even necessary.[124] Thus, unless the 2008 Amendments suggest that higher education must provide accommodations to provide optimal academic results—a standard that not even the Individuals with Disabilities Education Act requires[125]—only the institutional burden of proof has changed. In addition, some students may continue to fail in their suits when they cannot prove they are otherwise qualified because they cannot do the academic work,[126] instead being viewed as generally unsuited for that particular academic program,[127] especially an academically rigorous one.[128] Because of the deference

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122. Wendy F. Hensel, *Rights Resurgence: The Impact of the ADA Amendments Act on Schools and Universities*, 25 GA. ST. U. L. REV. 641, 681–82 (2009); *see also* Jenkins v. Nat'l Bd. of Med. Exam'rs, 08-5371 2009 WL 331638, at *3–4 (6th Cir. Feb. 11, 2009) (determining that the 2008 Amendments broadened the meaning of "substantial limitation").

123. Gonzales v. Nat'l Bd. of Med. Exam'rs, 225 F.3d 620, 626–27 (6th Cir. 2000); *see also* Rothberg v. Law Sch. Admission Council, Inc., 102 F. App'x 122 (10th Cir. 2004) (denying law school applicant with learning disability extra time on admissions exam).

124. Steere v. George Washington Univ. Sch. of Med. & Health Sci., 439 F. Supp. 2d 17, 25–26 (D.D.C. 2006) (holding medical student with ADHD not entitled to accommodations); Love v. Law Sch. Admission Council, 513 F. Supp. 2d 206, 228 (E.D. Pa. 2007) (finding prospective law student not entitled to accommodations for ADHD because he had never requested them before and could not prove that his ADHD otherwise substantially limited any major life activities).

125. Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 201 (1982).

126. Powell v. Nat'l Bd. of Med. Exam'rs, 364 F.3d. 79, 87 (2d Cir. 2004)

127. *E.g.*, el Kouni v. Trs. of Bos. Univ., 169 F. Supp. 2d 1, 4 (D. Mass. 2001) (holding medical student's inability to pass courses, to conduct himself appropriately, and to complete his thesis were cause of his dismissal, not his mental impairment); Manickavasagar v. Va. Commonwealth U. Sch. of Med., 667 F. Supp. 2d 635, 645–47 (E.D. Va. 2009) (finding medical school applicant's bipolar disorder did not form basis for school's rejection of his application when his undergraduate record and test scores were below the median admitted to that school).

128. *Steere*, 439 F. Supp. 2d at 25; *el Kouni*, 169 F. Supp. 2d at 4–5. This analysis is particularly applied if the student failed courses even with accommodations. Kaltenberger v. Ohio Coll. of Podiatric Med., 162 F.3d 432, 436

courts typically give to academic decisions,[129] this particular judicial analysis may be difficult to change, even under the broader sweep of the 2008 Amendments.

There are also behavioral issues caused by mental disorders. In the lone case dealing with a conduct problem, a medical school had technical standards with which its students were to conform. It dismissed a mentally impaired student, in part because he was "unfit to remain in the [program] because of his persistent offensive and disrupting behavior during course lectures."[130] This is the thrust of the problem with which higher education seems most concerned: the behavioral nonconformity of the mentally ill student, rather than the effect of the mental illness on academic performance.

The 2008 Amendments may prove somewhat helpful when using removal procedures for students who pose a "direct threat to the health or safety of others."[131] Under those circumstances, institutions must consider the mitigating circumstances of the impairment:

> In determining whether an individual poses a direct threat to the health or safety of others, a public entity [accommodation] must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of

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(6th Cir. 1998); Halasz v. Univ. of New England, 816 F. Supp. 37, 40–41 (D. Me. 1993).

129. *See generally* James Leonard, *Judicial Deference to Academic Standards under Section 504 of the Rehabilitation Act and Titles II and III of the Americans with Disabilities Act*, 75 NEB. L. REV. 27 (1996).

130. *el Kouni*, 169 F. Supp. 2d at 4.

131. Colleges and universities have an "outlet" for removing violent students: Both Title II and Title III of the ADA provide that an institution of higher education need not accommodate an individual who poses a direct threat to the health or safety of others. 42 U.S.C. § 12113(b) (2006). Title II: "This part does not require a public entity to permit an individual to participate in or benefit from the services, programs, or activities of that public entity when that individual poses a direct threat to the health or safety of others." 28 C.F.R. § 35.139(a) (2011). Title III: "Nothing in this subchapter shall require an entity to permit an individual to participate in or benefit from the goods, services, facilities, privileges, advantages and accommodations of such entity where such individual poses a direct threat to the health or safety of others." 42 U.S.C. § 12182(b)(3) (2006). "This part does not require a public accommodation to permit an individual to participate in or benefit from the goods, services, facilities, privileges, advantages and accommodations of that public accommodation when that individual poses a direct threat to the health or safety of others." 28 C.F.R. § 36.208(a) (2011).

> policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk.[132]

This regulation was only recently promulgated by the Department of Justice in the wake of the concerns about college rampage shooters.[133] However, this regulation is directed only at harm to others and does not embrace all the behavioral issues posed by the much larger student population that has mental disorders.

Insofar as the 2008 Amendments were intended to create broader coverage under the ADA and have expanded major life activities to embrace other components of a college or university student's life beyond academic performance,[134] institutions have a somewhat broader universe to govern vis à vis its mentally ill students. Indeed, the purpose for enlarging the disability analysis was to relieve the judicial constrictions on the protected class.[135] Thus, the breadth of purpose envisioned by the 2008 Amendments may force changes in the academic "environment" rather than just the classroom, thereby requiring a holistic approach to dealing with mentally ill students. If that indeed turns out to be the case, institutions may be better served by being hospitable to the mentally ill rather than requiring that they self-identify before they receive assistance.[136] After all, a significant portion of an institution's student population already has or will manifest a mental illness during their stay on campus. With that recognition, an institution's holistic approach to dealing with its mentally ill students necessarily will result in an adjustment in the relationship between the institution and all its students.

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132. 28 C.F.R. § 35.139(b) (2011); *id.* at § 36.208(b) (2011).

133. *Id.* at § 35.139((2011).

134. Those activities include eating, sleeping, speaking, learning, reading, concentrating, thinking, communicating, and working. 42 U.S.C. § 12102(2) (2006); Rothstein, *Fifty Year Retrospective*, *supra* note 82, at 869; *see also* Wendy F. Hensel, *Interacting with Others: A Major Life Activity under the Americans with Disabilities Act?*, 2002 WIS. L. REV. 1139 (2002) (positing that interacting with others is also a major life activity).

135. Jeannette Cox, *Crossroads and Signposts: The ADA Amendments Act of 2008*, 85 IND. L. J. 187, 199–204 (2010).

136. "These anti-discrimination laws broadly prohibit the denial of participation, the provision of unequal benefits, and the use of criteria or methods of administration that discriminate and actions that have the effect of excluding people with disabilities" from higher education programs. Bower & Schwartz, *supra* note 85, at 128. Discrimination claims may be brought if an individual is merely "regarded as having such an impairment." 42 U.S.C. § 12102(2)(C) (2006).

III. THE UNIVERSITY'S RELATIONSHIP TO ITS STUDENTS: "THE TIMES THEY ARE A-CHANGIN"[137]

Up until the middle of the twentieth century, colleges and universities were pretty sure of their legal relationship with their students:

> [T]he college/student relationship was considered to be as much, if not more of, a college/*parent* affair than a direct college/*student* relationship. In other words, a parent sent a "child" off to college—entering into an agreement with the institution—and delegated certain supervisory and disciplinary powers in the process. With regard to certain types of activities—those principally involving deliberate institutional acts of student regulation and discipline—the college stood "*in loco parentis*." The power of *in loco parentis* lay in the immunity that a college received from courts regarding lawsuits by students who were disgruntled over regulations and discipline.[138]

Then in the 1960s and 1970s, college and university campuses were assaulted by waves of students who rebelled against what they viewed as archaic disciplinary codes and protective features of campuses, those features loosely formulated by the institutions' "parental" role over their students.[139] These systematic attacks were fueled, in part, by the Twenty-Sixth Amendment and the draft. As a matter of law, the minimum draft age was eighteen, and the age of majority—the voting age—was lowered from twenty-one to eighteen and thereby transmuted, in students' minds, their status from child to adult.[140] If the law considered them to be adults, the students argued, so should campus authorities.[141]

The groundswell of student protests arising from the Vietnam War and the Civil Rights Movement was also fueled, in part, by student rebellion from parental control and authority figures. "College students demanded the individual freedoms that accompanied the responsibilities of being

137. BOB DYLAN, *The Times They Are a-Changin'*, on THE TIMES THEY ARE A-CHANGIN' (Columbia Records 1964).

138. 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, 4 (1999). *In loco parentis* had an aspect of protection for institutions—not just a tort defense—because "most American colleges and universities did exercise substantial dominion, control, and protection over students and student lives." *Id.* at 6. *See also* Gott v. Berea Coll., 161 S.W. 204, 206 (1913) ("College authorities stand *in loco parentis* concerning the physical and moral welfare, and mental training of the pupils . . . .").

139. Lake, *supra* note 138, at 3.

140. Spring J. Walton, In Loco Parentis *for the 1990s: New Liabilities*, 19 OHIO N. U. L. REV. 247, 252 (1992).

141. *Id.*

legally an 'adult' and openly rejected the role of the college and university as custodial parent."[142] In addition, the age of the average college or university student increased significantly as returning veterans took advantage of the G.I. Bill's educational benefits.[143] Thus was rung the death knell of *in loco parentis*.

Twin *in loco parentis* issues were at stake in the 1960s and 1970s, both of which created a legal relationship between the institution and its students. One aspect allowed colleges and universities to discipline without fear of question. The other allowed them to promulgate rules and regulations ostensibly to "protect" their students, such as single-sex living units, required chapel attendance, prohibition against on- and off-campus drinking, dress codes, and curfews. As to the first aspect, student civil rights cases forced colleges and universities to provide due process in matters of discipline.[144] As to the second, a systemic sea-change in the regulation of student life transformed the relationship of student and institution. Reluctantly acceding to that "deregulating" movement, colleges and universities drew back from *in loco parentis* and granted student demands to treat students as adults rather than children.[145] Institutions conceived a different model of student discipline,[146] but also a different model of governance that changed the dynamic of and liability for student safety.[147]

But that was then, and this is now. Nearly congruent with the 1990s development of the psychological and sociological models of emerging adulthood came a trend for greater institutional protection and responsibility for students.[148] Post-war students seemed to want it both ways; arguing, "I want all the liberty that an adult would exercise but you (the institution) must stop me before I hurt myself." The difficulty for institutions is trying to figure out where that line is. The judiciary can no more articulate that line than can the parties, and courts are struggling to create a model of shared responsibilities between students and the

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142. *Id.* (*citing* Szablewicz & Gibbs, *infra* note 145, at 456).

143. *Id.*

144. Theodore C. Stamatakos, *The Doctrine of* In Loco Parentis*, Tort Liability and the Student-College Relationship*, 65 IND. L.J. 471, 474–475 (1990); Walton, *supra* note 140, at 253–256.

145. James J. Szablewicz & Annette Gibbs, *Colleges' Increasing Exposure to Liability: The New* In Loco Parentis, 16 J.L. & EDUC. 453, 453 (1987). *See also* Perry A. Zirkel & Henry F. Reichner, *Is the* In Loco Parentis *Doctrine Dead?*, 15 J.L. & EDUC. 271, 281–82 (1986).

146. Corollary changes occurred in tort liability too. So long as *in loco parentis* no longer operated for discipline, it was also inoperable to act as a defense from tort liability. *See generally* Lake, *supra* note 138.

147. *See* Szablewicz & Gibbs, *supra* note 145, at 461–65.

148. *Id.* at 453–54; Walton, *supra* note 140, at 256–57.

institutions,[149] a modified *in loco parentis* legal relationship that attempts to balance the responsibilities of adulthood on students with rather amorphous custodial duties on the institution. Ironically, these struggles to articulate the institution-student relationship are driven by cases about students with mental disorders.

The first notable decision arose from a wrongful death case after the suicide of a University of Iowa student, Sanjay Jain, who ran his moped in his dormitory room and died from carbon-monoxide poisoning when he inhaled the exhaust fumes.[150] Experiencing both personal and academic problems, Sanjay exhibited emotional problems and had been disciplined for alcohol and drug use. After one suicide attempt, Sanjay refused to allow his hall coordinator to call his parents, and he apparently failed to seek recommended counseling.[151] The Iowa Supreme Court ultimately concluded that the parents' suit must fail because the university had created no special relationship with Sanjay that bound it to prevent his suicide.[152]

On the other hand, a federal district court in Virginia found that a sufficient, special relationship existed between Michael Frentzel and Ferrum College when he hanged himself in his room.[153] Michael's first semester in college was fraught with such significant disciplinary problems that he was required to seek counseling for anger management before he was allowed to return for his second semester. Shortly after returning to campus, he argued with his girlfriend and then attempted suicide. His next attempt was successful.[154] Before both the attempt and his suicide, Michael had sent notes to his girlfriend informing her of his intentions. In response to the university's motion to dismiss, the court determined that an institution-student relationship was created when Michael's girlfriend passed along both notes to campus officials.[155]

Finally, Elizabeth Shin came to college with a history of serious psychiatric problems, which emerged in high school and manifested in self-cutting.[156] The university became aware of these issues when she overdosed on Tylenol and codeine during spring semester of her freshman year. The university worked closely with Elizabeth and her parents to get her treatment for what was variously diagnosed as "adjustment disorder," borderline personality disorder, and severe depression.[157] Elizabeth's

149. Lake, *supra* note 138, at 17; Walton, *supra* note 140, at 256.

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

151. *Id.* at 295–96.

152. *Id.* at 300. The court particularly noted that the university had no obligation to call Sanjay's parents about the first attempt. *Id.* at 299–300.

153. Schieszler v. Ferrum Coll., 236 F. Supp. 2d 602, 605 (W.D. Va. 2002).

154. *Id.*

155. *Id.* at 609–10.

156. Shin v. Mass. Inst. of Tech., No. 020403, 2005 WL 1869101, *1 (Mass. Super. June 27, 2005).

157. *Id.* at *2–3.

mental health continued to deteriorate with repeated suicide threats until, in the spring of her sophomore year, she died of neurological damage after being pulled from her burning room.[158] Although the case against the university and its officials was eventually settled because the exact cause of the fire could not be directly attributed to a suicide attempt, it did proceed past the dismissal stage, in part because the court found a special relationship between Elizabeth and the university had been created, which obligated the university to protect Elizabeth from harming herself.[159]

Colleges and universities are particularly concerned about the risks of this type of relationship and duty because suicide is the second leading cause of death for students.[160] Nearly 1100 college and university students commit suicide every year,[161] 90% of whom suffered from a diagnosable psychiatric disorder.[162] The results of litigation and the dangers posed by the college or university student would easily cause whiplash in even the most sanguine of university counsel. It also suggests the difficulties campus officials face when dealing with the behavior of mentally ill students.

Colleges and universities are in a trick bag created by both court decisions and student demands. In the absence of *in loco parentis*, they must regulate students as adults because authoritarian control over student behavior is gone. However, many parents and students expect protection from harm, rather than liberty from constraint. Modern colleges and universities do the best they can by providing mental health professionals

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158. *Id.* at *5–6.

159. *Id.* at *13.

160. Valerie Kravets Cohen, Note, *Keeping Students Alive: Mandating On-Campus Counseling Saves Suicidal College Students' Lives and Limits Liability*, 75 FORDHAM L. REV. 3081, 3083 (2007). The suicide rate for college students is still lower than that of their non-student peers, primarily because college campuses usually prohibit firearms. *Id.*

161. *Id.*

162. AM. FOUND. FOR SUICIDE PREVENTION, RISK FACTORS FOR SUICIDE, http://www.afsp.org/index.cfm?fuseaction=home.viewPage&page_id=05147440-E24E-E376-BDF4BF8BA6444E76 (last visited Mar. 1, 2012). Depression is the predominant disorder. *Id.* In a recent survey of college and university counseling centers describing their collective 103 suicide deaths, the report noted:

> To the extent that it was known, 80% of the students were depressed, 44% had relationship problems, 15% had academic problems, 27% were on psychiatric medication, and 18% were known to have had previous psychiatric hospitalizations. Directors, however, did not know the previous psychiatric history of 59% of these students. In addition, 17% committed suicide by use of a firearm, 34% by hanging, 9% by ingesting toxic substances, 10% by jumping, and 30% by other methods.

GALLAGHER, *supra* note 25, at 7.

and training for campus officials, especially when it comes to suicide prevention. But some colleges and universities have responded by making the behavior of the mentally ill a discipline problem. This approach minimizes liability but is not without its legal hazards.

For example, in 2005, George Washington University began disciplinary proceedings against Jordan Nott after he sought on-campus treatment for depression and then voluntarily hospitalized himself for suicidal ideation.[163] He was suspended pending a hearing for violating the student code of conduct's prohibition against "endangering behavior" and barred from campus. Rather than face disciplinary charges, Jordan withdrew from school and then brought suit under the Rehabilitation Act and the ADA for the institution's disciplinary response to his mental health issues.[164]

In a similar case, Hunter College was challenged for evicting a female student with a history of depression from her dormitory room for a semester. According to the school, she had breached her housing contract even though she herself called 911 after ingesting handfuls of Tylenol.[165] The school not only evicted the student, it required her to enter counseling and be evaluated by a school psychologist before she could return. The district court determined that such a blanket zero-tolerance policy may have violated the student's disability rights, and the school settled.[166]

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163. First Amended Complaint at 4, Nott v. George Washington Univ., Civil Case No. 05-8503 (D.C. Super. Oct. 2005), *available at* http://bazelon.org.gravitatehosting.com/LinkClick.aspx?fileticket=nCXRbipk5Pc%3d&tabid=199; Bower & Schwartz, *supra* note 85, at 130. Jordan's depression stemmed from a fellow student's suicide the year before. Elizabeth Wolnick, *Depression Discrimination: Are Suicidal College Students Protected by the Americans with Disabilities Act?*, 49 ARIZ. L. REV. 989, 1001 (2007).

164. First Amended Complaint at 4, Nott v. George Washington Univ., Civil Case No. 05-8503 (D.C. Super. Oct. 2005); Bower & Schwartz, *supra* note 85, at 130. Although Jordan had never self-identified as having a mental impairment, the university's response treated him as such and triggered the protections under both Acts. Wolnick, *supra* note 163, at 1010–11.

165. Second Amended Complaint at 6–7, Doe v. Hunter Coll., No. 04-CV-6740 (SHS) (S.D.N.Y. Sept. 2005) ECF, *available at* http://bazelon.org.gravitatehosting.com/LinkClick.aspx?fileticket=LJYj0hJIXUw%3d&tabid=314; Bower & Schwartz, *supra* note 85, at 130.

166. Transcript at 22–23, Doe v. Hunter Coll., No. 04-CV-6740 (S.D.N.Y. Aug. 25, 2005), *available at* http://www.bazelon.org/LinkClick.aspx?fileticket=UaVNgmrehr4%3d&tabid=31; Bower & Schwartz, *supra* note 85, at 130. Similarly, the Department of Education's Office of Civil Rights letters of decision consistently require that students who qualify under the ADA and the Rehabilitation Act be given due process that accounts for the effects of their mental disorders. *See, e.g.*, Letter to Marietta Coll., OCR Docket 15-04-2060 (Mar. 18, 2005) (dismissal for history of suicide attempts), *available at* http://bazelon.org.gravitatehosting.com/LinkClick.aspx?fileticket=26yfG15xOM8%3d&tabid=313;

Disciplining students for the behaviors arising from mental health problems is a logical solution to the tensions that colleges and universities face between protecting students and protecting themselves. It also has the virtue of being easily administered. However, the consequences of doing so can also lead to legal problems. Therefore, colleges and universities should consider adjusting their policies regarding responsibility for the actions of mentally ill students. The best way to do so is for colleges and universities to reconsider their relationship with all students. This broad approach is not only convenient, but it also underscores why colleges and universities should not use mental illness, in and of itself, as a cause for discipline. Such a broad approach is appropriate because so many of the problems of mentally ill students are shared with the entirety of the student population.

IV. TODAY'S COLLEGE AND UNIVERSITY STUDENTS: "LET US DIE YOUNG OR LET US LIVE FOREVER"[167]

Given the increasing number of students with mental illness on campus, an institution's relationship with its students is best served by embracing the entire student population. As it stands, the population at large is increasingly diverse due to its generational and psychological differences. Consequently, any method by which colleges and universities change their legal relationship with their students based on the general characteristics of the entire student population inherently addresses many of the needs of the mentally ill since the maturational needs of contemporary college and university students are similar to the needs of the mentally ill.

Letter to DeSales Univ., OCR Docket 03-04-2041 (Feb. 17, 2005) (excluded from dormitory for clinical depression), *available at* http://bazelon.org.gravitatehosting.com/LinkClick.aspx?fileticket=LjQaJfgTgx4%3d&tabid=313; Letter to Bluffton Univ., OCR Docket 15-04-2042 (Dec. 22, 2004) (indefinite suspension after suicide attempt), *available at* http://bazelon.org.gravitatehosting.com/LinkClick.aspx?fileticket=LWFnT1VirFU%3d&tabid=313; Letter to Guilford Coll., OCR Docket 11-02-2003 (Mar. 6, 2003) (involuntary withdrawal for emotional disability), *available at* http://bazelon.org.gravitatehosting.com/LinkClick.aspx?fileticket=ckwX-y99cXk%3d&tabid=313; Letter to Woodbury Univ., OCR Docket 09-00-2079 (June 29, 2001) (excluded from dormitory for behavior related to psychological disability), *available at* http://bazelon.org.gravitatehosting.com/LinkClick.aspx?fileticket=tulMV2FrMvg%3d&tabid=313; Letter to San Diego Cmty. Coll. Dist., OCR Docket 09-98-2154 (Dec. 30, 1999) (suspension for psychiatric disability), *available at* http://bazelon.org.gravitatehosting.com/LinkClick.aspx?fileticket=ItMT2k2tT4c%3d&tabid=313. *See generally* Margaret M. McMenamin & Perry A. Zirkel, *OCR Rulings under Section 504 and the Americans with Disabilities Act: Higher Education Student Cases*, 16 J. POSTSECONDARY EDUC. & DISABILITY 55 (2003), *available at* www.ahead.org/uploads/docs/jped/journals/JPEDVol16No2.doc.

167. ALPHAVILLE, FOREVER YOUNG (Warner Records 1984).

In addition to the psychological vulnerability of college and university students, there is a distinct maturational stage,[168] a distinct phase of development between late adolescence and young adulthood that social scientists have classified as "emerging adulthood."[169] Emerging adulthood as a distinct developmental phase has fairly recent origins, apparently resulting from contemporary cultural conditions:

> [W]hat is mainly required for emerging adulthood to exist is a relatively high median age of entering marriage and parenthood, in the late twenties or beyond. Postponing marriage and parenthood until the late twenties allows the late teens and most of the twenties to be a time of exploration and instability, a self-focused age, and an age of possibilities.[170]

This age group is "exploring (if rather aimlessly); their lives are unstable; they have a sense of being in between adolescence and adulthood (and they are assiduously avoiding adult responsibilities); and they are self-focused (to an extreme)."[171] Concurrently, the brain's maturation process—particularly the development of the prefrontal cortex—is incomplete until at least the early twenties.[172] The prefrontal cortex is important in behavior because it "is the area responsible for the brain's highest judgmental faculties. Scientists call it the site of the '"executive functions"—planning, impulse control and reasoning.'"[173]

The increasing popularity of going to college has contributed to emerging adulthood's profile and problems.[174] One authority suggests that nearly two-thirds of emerging adults go to college or university after high school, although many of them fail to get their degrees within the traditional four-year trajectory.[175] Meanwhile, the institutional view of college and university education has not adapted to the maturational deficits in the target population. Many emerging adults flounder in college because they are simply too immature. They are not ready to attend college because they are not sure why they are there and are therefore not fully committed to it. Some fail in defiance of their parents' wishes, and many lack the self-discipline necessary to succeed. Others get caught up in the

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168. "The college years represent a developmentally challenging transition to adulthood, and untreated mental illness may have significant implications for academic success, productivity, substance use, and social relationships." Hunt & Eisenberg, *supra* note 27, at 3 (footnotes omitted).

169. *See generally* JEFFREY JENSEN ARNETT, EMERGING ADULTHOOD: THE WINDING ROAD FROM THE LATE TEENS THROUGH THE TWENTIES (Oxford University Press 2004).

170. *Id.* at 21.

171. *Id.* at 27–28.

172. Massie, *supra* note 19, at 660–61.

173. *Id.* (footnote omitted).

174. ARNETT, *supra* note 169, at 121.

175. *Id.* at 125.

excesses of college and university life because they have no sense of moderation, and many lack self-discipline because their parents have heretofore exercised significant control over them.[176] "[T]heir own resources of self-control and self-discipline prove to be inadequate for the challenges of college and university life. They blow off their classes, they fail to do their course work, they drink too much too often, and eventually they drop out or get kicked out."[177]

Although American culture views the college experience as the threshold from adolescence to adulthood, "[t]he university context can be both helpful and problematic in terms of preparing young people for adulthood. The constant flow of new ideas, social relationships, and potential career paths offered within the university context is likely to prompt identity exploration in some individuals . . . but to prompt confusion in others."[178] Certainly, there are many freshmen who are ready for and embrace this less structured environment. On the other hand, an increasing number of students are so immature that they are overwhelmed by their choices. Worse yet are those who have no interest in the choices at all.[179] The latter are "most likely to violate rules and to commit acts of physical aggression, and they reported the highest levels of many of the highest-risk behaviors, including dangerous drug use, anal and casual sex, and impaired driving."[180] Such students are still adolescents, and just like adolescents, they engage in risky behaviors that "include eating disorders, sexual behaviors, substance abuse . . . , and violence."[181] As a consequence, they are more likely to experience significant increases in sexually transmitted disease, unhealthy weight control issues, sleep deprivation, stress, and mental health problems.[182] Emerging adults also experience heavy episodic drinking and alcohol disorders,[183] while suicide

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176. *Id.* at 125–27.

177. *Id.* at 127.

178. Seth J. Schwartz et al., *Examining the Light and Dark Sides of Emerging Adults' Identity: A Study of Identity Status Differences in Positive and Negative Psychosocial Functioning*, 40 J. YOUTH & ADOLESCENCE 839, 854 (2010) (citation omitted).

179. *Id.* at 839–40.

180. *Id.* at 855; Jeffrey Jensen Arnett, *Emerging Adulthood: A Theory of Development from the Late Teens Through the Twenties*, 55 AM. PSYCHOLOGIST 469, 474–75 (2000).

181. Nancy R. Ahern, *Risky Behavior of Adolescent College Students*, 47 J. PSYCHOSOCIAL NURSING 21, 22 (2009). Violent college students are also more likely to have other mental health problems. *Id.* at 23.

182. Melissa Nelson Laska et al., *Latent Class Analysis of Lifestyle Characteristics and Health Risk Behaviors among College Youth,* 10 PREVENTION SCI. 376, 377 (2009).

183. *See generally* Deborah A. Dawson et al., *Another Look at Heavy Episodic Drinking and Alcohol Use Disorders among College and Noncollege*

is the third leading cause of death in this age bracket.[184] Studies have shown that suicide is far from a random phenomenon; there are at least one hundred attempts, and perhaps as many as two hundred, for each completed suicide.[185] "[T]he major sources of death and disability [in this age group] are related to *difficulties in the control of behavior and emotion*."[186] Emerging adulthood seems to be a primordial pool of mental illness.

Worse yet, this period of developmental immaturity is most pronounced in and most difficult for those students who enter it with pre-existing emotional disturbances.[187] But it is equally problematic and distressful for college and university students in general. It creates the perfect storm for developing mental disorders while on campus:

> Colleges and new high school graduates have what I think is a strange idea. They think every freshman is an adult who can make his or her own decisions. Students think going off to college is a declaration of independence. Colleges, by law and by inclination, don't involve parents in their children's academic progress and won't give out any information.
>
> Sometimes this is fine. . . . But then there are the other kids—probably most kids. College is being underwritten by parents'

Youth, 65 J. STUD. ON ALCOHOL 477 (2004). The highest rates of student alcohol dependence are among full-time residential students. *Id.* at 477.

184. SUBSTANCE ABUSE & MENTAL HEALTH SERV. ADMIN. (SAMHSA), OFFICE OF APPLIED STUDIES, THE DAWN REPORT: EMERGENCY DEPARTMENT VISITS FOR DRUG-RELATED SUICIDE ATTEMPTS BY YOUNG ADULTS AGED 18 TO 24: 2008, 1 (May 25, 2010), http://www.samhsa.gov/data/2k10/DAWN002/SuicideAttemptsYoungAdults.htm. Recent CDC data reveal over 4300 suicides between the ages of fifteen and twenty-four in a single year. Kenneth D. Kochanek et al., *Deaths: Preliminary Data for 2009*, 59 NAT'L VITAL STAT. REP. 1, 30 (Mar. 16, 2011), *available at* http://www.cdc.gov/nchs/data/nvsr/nvsr59/nvsr59_04.pdf.

185. SAMHSA, THE DAWN REPORT, *supra* note 184, at 1.

186. Dahl, *supra* note 74, at 3 (emphasis in original).

187. Maryann Davis & Ann Vander Stoep, *The Transition to Adulthood for Youth Who Have Serious Emotional Disturbance: Developmental Transition and Young Adult Outcomes*, 24 J. MENTAL HEALTH ADMIN. 400, 400 (1997).

> They enter the transition period developmentally behind their nondisabled peers. This immaturity can lead to difficulties in all domains of community adjustment. Their significant psychiatric impairment can also interfere with psychosocial functioning. One of the most common diagnoses among adolescents with [serious emotional disturbance] is conduct disorder, and a high proportion abuses or is dependent on substances. Youth with conduct disorders usually have poor peer relations and often come into contact with the law. Substance use interferes with impulse control and is associated with committing acts of violence in adults with mental illness.

Id. at 419.

> hard-earned cash, loans in both the parents' and the students' names, and student summer earnings. The student has uneven skills in managing time, money, and responsibilities. High school success was partly the result of parental monitoring and intervention. Students who are a little less mature than peers have needed some external structure like curfews and consequences for not getting things done; praise and reward for doing what they are supposed to do.
>
> For students like these, it's unlikely that the summer between high school graduation and the beginning of college has meant a magical transformation.[188]

Thus, higher education needs to rethink its relationship to all its students by rethinking its students' overall maturational and therefore psychological condition as emerging adults. The needs of the general student population are clearly congruent with those of the mentally ill population. What is good for the subset is necessarily good for the entire population.

V. PRACTICAL SUGGESTIONS FOR DEALING WITH MENTALLY ILL STUDENTS: "THE LONG AND WINDING ROAD"[189]

The ideal solution for realigning the institutional relationship with all students, and thus mentally ill students, will have a foundation of shared responsibility among the institution, the student, and the parent. Such a systemic solution is best accomplished if the realignment occurs with all college and university students, with periodic adjustments for increasing individual responsibility as the student matures. In other words, none of the stakeholders involved in college and university education for emerging adults can rely on an abrupt shift from high school dependence to college independence without acknowledging the need for transitional considerations. In addition, the institutional and parent stakeholders must understand how integral their continued cooperation is to this generation of college and university students. All the stakeholders must acknowledge the problems and share in the responsibilities. Such a system will not be a modified *in loco parentis* regime that gives students what they want—liberty without consequences—but a duty-relationship that resembles a comparative fault system. Colleges and universities can no longer afford the luxury of giving parents and students everything they want, while risking the backlash of liability.

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188. Marie Hartwell-Walker, *Ready or Not: Immature but Headed to College*, PSYCHCENTRAL.COM (2009), http://psychcentral.com/lib/2009/ready-or-not-immature-but-headed-to-college/.

189. THE BEATLES, LET IT BE (Apple Records 1969).

A. The Relationship between the “Workplace” and the Anti-Discrimination Laws

One of the first challenges for colleges and universities is better understanding their innate responsibility for both the institutional environment and its effect on students. In the past three decades, higher education has come to view itself as a commercial enterprise.[190] Congruent with the rise of the consumer-student in the 1980s has been the rise of colleges and universities as businesses.[191] Regardless of the motivation for these changes, the “business” of higher education necessarily has moved from a more student-centered model (which is expensive to maintain) to a more authoritarian model (which is less expensive). The demise of *in loco parentis* may not have facilitated that change, but the assumption that the consumer-student is sufficiently mature to understand the business model is a necessary consequence of this shift. On the other hand, perhaps the success of the business model itself requires that assumption. In any event, the student consumers—and their parents—still believe that the increasing tuition they are paying goes for the traditional model and its higher level of individualized attention. Parents and students want to get their money’s worth, and student safety and protection is part of that expectation.[192] This disjunction of the parties’ understanding of the “model” of the institution inexorably leads to a disjunction of expectations in the product of the institution and the customer to whom it is being delivered.

The shift to the business model has its most striking institutional consequence in dealing with the student, especially in not being able to decide whether they are customers or workers or even the product itself. The business model tends to view mentally ill students as flawed versions to whom it is less efficient to deliver services. Are they bad customers who should not use the service? Are they workers who can be dismissed because they disrupt the workplace? Or are they the problematic raw material waiting in the warehouse to be molded into an educated graduate? Their flaws make them less economically efficient to serve. The default model that many institutions use for litigation purposes is students as

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190. DEREK C. BOK, UNIVERSITIES IN THE MARKETPLACE: THE COMMERCIALIZATION OF HIGHER EDUCATION 1–17 (2003). “Universities share one characteristic with compulsive gamblers and exiled royalty: there is never enough money to satisfy their desires.” *Id.* at 9.

191. Within the past forty years, higher education has precipitously increased the number of management employees: 85% more administrators and 240% more administrative staff. Benjamin Ginsberg, *Administrators Ate My Tuition*, WASH. MONTHLY (Sept.–Oct. 2011), *available at* http://www.washingtonmonthly.com/magazine/septemberoctober_2011/features/administrators_ate_my_tuition031641.php?page=1.

192. *Id.* at 11.

employees. This model is a matter of convenience and familiarity because that is the model to which the current disability laws are most suited.

Unfortunately, that employer-employee paradigm is ill-fitting. The ADA and the Rehabilitation Act broadly cover institutions that receive federal funds, but higher education is not a traditional commercial or government enterprise. Unlike the Individuals with Disabilities Education Act (IDEA), which is all about education and the disabled, the civil rights statutes applicable to college students are less about learning and more about access to an educational environment. The ADA and the Rehabilitation Act are designed to insure that one can take part in the enterprise but is not about the enterprise itself. Higher education has done well in ensuring such access but not as well in actually integrating anti-discrimination practices into the educational service, especially for the mentally ill.

Access to campus for the mentally ill is significantly different from the integration of the mentally ill into the educational process because mental disorders inherently make campus life itself more difficult. "Mental health problems can have a profound impact on all aspects of campus life: at the individual level, the interpersonal level[,] and even the institutional level."[193] Worse yet, campus life can exacerbate and even cause student mental disorders. This latter problem—higher education's "causation" of mental disorders—resembles the toxic workplace.[194] But unlike an employee who fails to prove a discrimination claim against a toxic employer without evidence that she is disabled for a broad range of jobs,[195] a college or university student has only this one "job." If she is foreclosed from one "workplace" because of a mental disorder, then she is unlikely to find an equivalent "job" at all.[196]

Rather than using a reactive model to mental illness, higher education should consider a more proactive model that resembles the educational enterprise as it actually is rather than the business it pretends to be, by adhering to some principles basic to IDEA. Indeed, one of the transitional problems for students with pre-existing disorders arises because they may have operated under IDEA's principles through high school. IDEA creates

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193. Kitzrow, *supra* note 22, at 169. It is estimated that more than four million more people would have finished college but for mental disorders. *Id.* at 170. Similarly, an estimated seven million people have terminated either high school or college due to early-onset psychiatric disorders. Ronald C. Kessler et al., *Social Consequences of Psychiatric Disorders, I: Educational Attainment*, 152 AM. J. PSYCHIATRY 1026, 1031 (1995).

194. *See generally* John E. Rumel, *Federal Disability Discrimination Law and the Toxic Workplace: A Critique of ADA and Section 504 Case Law Addressing Impairments Caused or Exacerbated by the Work Environment*, 51 SANTA CLARA L. REV. 515, 515–518 (2011).

195. *Id.* at 519–523.

196. *See* Kessler et al., *supra* note 193, at 1026–27.

a haven for parents and disabled students from kindergarten through twelfth grade, a one-stop shop of identification, placement and accommodation for children with both learning disorders and other mental disorders.[197] Indeed, IDEA mandates that public schools actively find students who suffer from disabilities.[198] Children with qualifying mental disorders are afforded individual educational plans that will accommodate the disability and assist in their education.[199] Rather than having to self-identify, disabled elementary and secondary students have a team of teachers and other educational personnel to affirmatively help with their journey through the public schools to graduation.[200]

Insofar as colleges and universities invite students on campus—promising them that, in exchange for money, they will provide an

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197. 20 U.S.C. §§ 1411–1420 (2010).

198. *Id.* at § 1401(a)(3)(A) (2010). "The State must have in effect policies and procedures to ensure that . . . [a]ll children with disabilities residing in the State . . . and who are in need of special education and related services, are identified, located, and evaluated." 34 C.F.R. § 300.111(a)(1)(i) (2010) (child find). *See, e.g.*, El Paso Indep. Sch. Dist. v. Richard R., 567 F. Supp. 2d 918, 949–52 (W.D. Tex. 2008) (holding school district violated its duty under child find when it failed to refer child to evaluation despite suspecting he had a disability); N.G. v. Dist. of Columbia, 556 F. Supp. 2d 11, 25–30 (D.D.C. 2008) (holding child find obligations kick in for children suspected of disability, not just to those who are ultimately found to be disabled). *See generally* United States Office of Special Education Programs, *About Child Find*, CHILDFINDIDEA.ORG, www.childfindidea.org/overview.htm (last visited Mar. 2, 2012).

199. 20 U.S.C. § 1414 (2010). IDEA's category of student mental disorders is "emotional disturbance" and serves as a pretty broad umbrella for education professionals to "suspect" and "evaluate" for disability services. *Id.* at § 1401(3)(A)(i) (2010); 34 C.F.R. § 300.8(c)(4) (2010). *See also* Nat'l Dissemination Ctr. for Child. with Disabilities, *NICHCY Disability Fact Sheet #5: Emotional Disturbance* (June 2010), http://nichcy.org/disability/specific/emotionaldisturbance (last visited Mar. 2, 2012). On the other hand, the ADA's identification of disabilities generally is broader than IDEA's. *See, e.g.*, Perry A. Zirkel, *A Step-By-Step Process § 504/ADA Eligibility Determinations: An Update*, 239 WEST ED. L. REP. 333, 335 (2009).

200. A "child with a disability" under the IDEA must also "need[] special education and related services." 20 U.S.C. § 1401(3)(A)(ii) (2010). Even if a mental disorder does not qualify for IDEA accommodations, some public schools offer (and may require) counseling for students with mental disorders. Dimoff, *supra* note 78, at 321. It is believed that approximately half of public schools offer mental health services, with greatest availability in larger schools (both urban and suburban), schools in the Northeast, and schools with larger Medicaid populations. Eric P. Slade, *The Relationship Between School Characteristics and the Availability of Mental Health and Related Health Services in Middle and High Schools in the United States*, 30 J. BEHAV. HEALTH SERVICES & RESEARCH 382, 389 (2003). Rural schools are less likely to offer mental health services even though their mental health problems are as prevalent as in urban schools. *Id.*

education—the institutions should consider being pro-active rather than reactive in providing assurances to their mentally ill students that they too can and will be educated. Access is not enough. Nowhere is this more important than in better preparing all entering students for the college experience, thereby creating a smoother transition for those who already are mentally ill, treating them as one of the whole rather than a separate category.

B. Educational Transitions for Emerging Adults

If higher education recognizes that entering students are emerging adults, in which mental illness is a large subpopulation, then it also must do a better job of preparing them for what lies ahead.[201] This group does not see the college experience as the threshold for responsibility and adulthood. Rather, it assumes that college is a continuum of the adolescent experience. Higher education need not change its objectives. There is no reason to conclude that students no longer have the ability to engage in the academic life. But there is a greater need for higher education to adjust its assumptions of students' *immediate* capacities to engage in basic problem-solving crucial to higher academic achievement and to cope with an inherently less structured and less controlled environment. This problem is especially acute for the student who is mentally ill.[202]

In general, disabled entering students report that their contact with postsecondary assistance is either too little or too late.[203] They enter college trying to balance their need for accommodations with their new academic burdens, often fearful to disclose their needs and not knowing where to find the appropriate resources.[204] They often do not disclose because of institutional hostility or because they do not even realize they have a disability.[205]

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201. *See supra* Part I.

202. *See* Smith-Osborne, *supra* note 73, at 16 ("[T]he psychosocial rehabilitation literature has found that psychiatric disabilities are the least understood and least academically supported disability type on campus.").

203. Elizabeth Evans Getzel & Colleen A. Thoma, *Experiences of College Students with Disabilities and the Importance of Self-Determination in Higher Education Settings*, 31 CAREER DEV. FOR EXCEPTIONAL INDIVIDUALS 77, 82 (2008).

204. *Id.* at 77. *See also* Letter to Spring Arbor Univ. (Diana Y. Bower), OCR Docket 15-10-2098 (Dec. 16, 2010) (student advised university admissions representative of pre-existing disabilities, but was never referred to campus disabilities services office), *available at* http://www.nacua.org/documents/OCRLetter_SpringArborU.pdf.

205. Getzel & Thoma, *supra* note 203, at 77–78; Deborah Megivern et al., *Barriers to Higher Education for Individuals with Psychiatric Disabilities*, 26 PSYCHIATRIC REHABILITATION J. 217, 227 (2003). Another problem that students encounter is the disconnect between IDEA and ADA in the documentation

Those previously served by IDEA have some advantage insofar as the transition to post-secondary education must be addressed in the Individualized Education Program (IEP)[206] by the student's sixteenth birthday.[207] The IEP sets out post-secondary educational goals and transition services to reach those goals, including independent living skills.[208] A good transition program also advises the student that colleges and universities have different procedures and resources for students with disabilities.[209] But upon entering college, disabled students discover that the child-centered services of IDEA do not extend to colleges or universities. Instead, students have to self-identify, not an easy task for students coming onto campus with a competitive disadvantage. Furthermore, they are no longer provided services funded by the federal government. Funds come from the institution, and students are not assured that they will get the same accommodations—if any—that they received under IDEA. Indeed, students can find their relationship with the college or university to be adversarial rather than helpful.

Those disabled students who do succeed have made internal decisions about their disability vis à vis their academic experiences. These students have decided to succeed. They have a clear career goal and have reframed their disability experience to account for that disability, their strengths and

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required by postsecondary settings. NAT'L JOINT COMMITTEE ON LEARNING DISABILITIES, THE DOCUMENTATION DISCONNECT FOR STUDENTS WITH LEARNING DISABILITIES: IMPROVING ACCESS TO POSTSECONDARY DISABILITY SERVICES 1 (July 2007), *available at* http://www.ahead.org/uploads/docs/resources/njld_paper.pdf.

206. An Individualized Education Program is a self-encompassing plan for the use of multiple resources, teaching techniques, educational goals, and when necessary behavioral goals. It is more education-oriented than the 504 Plan used in higher education for listing a disabled student's accommodations. *See, e.g.*, Educ. Ctr, *504 Plan vs. IEP: What's the Difference?*, ED-CENTER.COM, http://www.ed-center.com/504 (last visited Mar. 2, 2012).

207. 20 U.S.C. 1414(d)(1)(A)(i)(VIII) (2010); 34 C.F.R. § 300.320(b) (2011).

208. 34 C.F.R. § 300.43 (2011). "*Transition services* means a coordinated set of activities for a child with a disability that . . .[i]s designed to be within a results-oriented process, that is focused on improving the academic and functional achievement of the child with a disability to facilitate the child's movement from school to post-school activities, including postsecondary education." *Id.* (emphasis added).

209. U.S. Dept of Educ. Office of Civil Rights, *Students with Disabilities Preparing for Postsecondary Education: Know Your Rights and Responsibilities*, (Sept. 2011), *available at* http://www2.ed.gov/print/about/offices/list/ocr/transition.html; Amy G. Dell, *Transition: There Are No IEP's in College*, TENJ.EDU (2004), http://www.tcnj.edu/~technj/2004/transition.htm; Stephanie Monroe, *Dear Parent Letter*, ED.GOV (Mar. 16, 2007), http://www2.ed.gov/about/offices/list/ocr/letters/parent-20070316.html.

weaknesses, and their goals.[210] Having assumed that orientation, these students are persistent, are focused on goals that tap into their strengths while minimizing their weaknesses, have learned creativity, and have developed a supportive social network.[211] These students are self-determined and actively engaged in the academic process.

This intentionality and self-determination are habits of the mind that should be instilled in all students upon entering college, either before they set foot on campus or through intensive orientation. Emerging adults are increasingly unprepared psychologically for the duties and responsibilities they are supposed to undertake and are often incompetent to engage in the academy.[212] Intentional self-determination rather than the self-absorption of emerging adulthood may not only increase academic success, it may be one way to prevent some of the mental health problems the environment itself causes. Entering students need to be taught how to deal with the separation from their known environments as well as with their individuation.[213] They need to be taught that they have to engage actively and intentionally in their education.[214] "[O]pen institutional approaches recognize both the transitional nature of this highly vulnerable time of life and the need for programs on campuses that can nurture their students and provide the emotional support that all of them—not just those with specific mental health problems need in order to survive."[215]

Today, the traditional notions of dropping a kid off at college or university and hoping she will cope hold true for a smaller proportion of freshman than in years past. Instead, those assumptions can do enormous harm to the unprepared freshman, who is vulnerable without the

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210. Tina M. Anctil et al., *Academic Identity Development Through Self-Determination: Successful College Students with Learning Disabilities*, 31 CAREER DEV. FOR EXCEPTIONAL INDIVIDUALS 164, 172 (2008).

211. *Id.* Students with disabilities must be self-advocates to get the support they need from their institutions. Therefore, they are engaged in problem-solving, they are self-aware, and they set goals. In particular, they recognize that their academic success requires developing support systems on campus and forming relationships with faculty. Getzel & Thoma, *supra* note 205, at 80–81.

212. *See generally* Vanessa Kahen Johnson et al., *Managing the Transition to College: Family Functioning, Emotion Coping, and Adjustment in Emerging Adulthood*, 51 J. COLL. STUDENT DEV. 607, 608 (2010).

213. *Id.* at 607.

214. Am. Psychol. Ass'n, *Increasing Student Success Through Instruction in Self-Determination*, APA.ORG (July 21, 2004), http://www.apa.org/research/action/success.aspx; Christine D. Bremer et al., *Self-Determination: Supporting Successful Transition*, 2 RES. TO PRACTICE BRIEF 1 (April 2003), *available at* http://www.ncset.org/publications/researchtopractice/NCSETResearchBrief_2.1.pdf; Wendy M. Wood et al., *Promoting Student Self-Determination Skills in IEP Planning*, 36-3 TEACHING EXCEPTIONAL CHILD. 8 (2004), *available at* http://www.transitiontocollege.net/percpubs/SelfDeterminationArticle.pdf.

215. Massie, *supra* note 19, at 659.

appropriate tools to cope, thus resulting in or exacerbating mental disorders. If institutions become more deliberate about such transitional and systemic instruction, they will benefit not just those with pre-existing mental disorders but all their students laboring under a maturational gap that makes them unprepared for campus life and its rigors.

C. Warnings to Parents: Responsibilities, Involvement, & Information Sharing

Families have a significant effect on student success.[216] The student who comes from a cohesive family unit is more likely to sail easily through emerging adulthood.[217] However, even a strong family environment may not be sufficient if the student's emotional coping skills are deficient.[218] Consequently, families should be informed of the psychological struggles their children might encounter in college, particularly if doing so will ameliorate student adjustment problems that might lead to mental illness on campus. Emerging adulthood is a maturational period that asks for a more continuing parental role than in previous generations, but higher education is neither a parent nor a surrogate parent.

Just as student transition is important, so too must parents' actions during this transition be more intentional and detailed about their children's emerging adulthood and about their own share of responsibility for their "not-yet-adult" children. That transitional information of course should include detailed materials on the educational service they are paying for. In fact, at least one organization recommends that, when Congress reauthorizes the Elementary and Secondary Education Act, the Act should require that public schools provide students and parents more and better information to inform their college or university choices.[219] Similarly, colleges and universities should better explain their function, their options, their resources, and all other aspects of the academic enterprise.

Colleges and universities need to better educate parents about emerging adulthood and what their children will experience in college. Parents are

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216. Johnson et al., *supra* note 212, at 618 ("[C]ollege students' perceptions of their family environment—namely family cohesion, family expressiveness, and family conflict—are linked to their academic, social, and emotional well-being when making the transition to college.").

217. *Id.* "Although a restructuring of the parent-child relationship occurs during the transition to young adulthood, parental acceptance, empathy, and support remain an essential foundation for healthy adjustment during this period." Charles J. Holahan, *Parental Support and Psychological Adjustment During the Transition to Young Adulthood in a College Sample*, 8 J. FAM. PSYCHOL. 215, 215 (1994).

218. Holahan, *supra* note 217, at 215.

219. Julie Maragetta Morgan, *Buying College: What Consumers Need to Know*, CTR. FOR AM. PROGRESS 6 (Mar. 14, 2011), *available at* http://www.americanprogress.org/issues/2011/03/pdf/buying_college.pdf.

no more aware of the ramifications of emerging adulthood and entry to college and university life than their children are, and their involvement is more integral to their children's success than ever before. As one educational tool, colleges and universities would do well to provide each freshman student's parents a copy of *College of the Overwhelmed*[220] before they move furniture into the dormitory. Parents need to be told that today's college and university students are capable of achieving success in both college and life.[221] However, parents also need to be told that such success will be achieved differently and that traditional expectations of a smooth, linear trajectory through college or university and then into the workplace may require adaptation of family expectations. Thus, the parents' transition package must prepare them for the realities of emerging adulthood and what parents should expect in terms of their child's ability (or inability) to adapt.

Such maturational and psychological transition is especially important for parents of mentally ill students. Parents of students who have received IDEA services are aware of resources that are available in K-12 education. However, colleges and universities need to reach out during transition to advise parents of available services, especially of any campus offices that afford disability services[222] and mental health counseling. Indeed, *all* parents should be given this detailed information for all eventualities. A family that understands the importance of such services is more likely to convey that sense of acceptability to their children and thereby make their use more acceptable and less stigmatizing. Parents that are informed of these services can then suggest them to their children when students refuse to otherwise seek out on-campus assistance.

Through this transition, parents and even institutions need to understand that a balance of involvement and disengagement is integral to emerging adulthood as a bridge to maturity, not to a continuing dependence. Because the law turns over educational and treatment records to children at eighteen,[223] parents must delicately balance their child's need for independence and need for support.[224] However, institutions can assist in the process by deliberately informing parents of the available services and enlisting them directly in the processes.

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220. RICHARD KADISON & THERESA FOY DEGERONIMO, COLLEGE OF THE OVERWHELMED: THE CAMPUS MENTAL HEALTH CRISIS AND WHAT TO DO ABOUT IT (Jossey-Bass 2004).

221. *See, e.g.*, Jeffrey Jensen Arnett, *Oh, Grow Up! Generational Grumbling and the New Life Stage of Emerging Adulthood—Commentary on Trzesniewski & Donnellan (2010)*, 5 PERSP. ON PSYCHOL. SCI. 89, 89 (2010).

222. Massie, *supra* note 19, at 658.

223. Pauline Jivanjee et al., *The Age of Uncertainty: Parent Perspectives on the Transitions of Young People with Mental Health Difficulties to Adulthood*, 18 J. CHILD. & FAM. STUD. 435, 443 (2009).

224. *Id.*

That also means involving parents when students are in psychological trouble. The institutional notion that the lives of their students are "private" and that parents and other outside authorities should not be notified under privacy laws[225] rests on the erroneous assumption that these students can independently order their lives. Many cannot. Whatever "culture of privacy" higher education has cultivated to encourage or respect student independence[226] is distinct from the prohibition against revealing student records under privacy laws. Regardless of that prohibition, the Family Educational Rights and Privacy Act (FERPA) has a health and safety emergency exception that allows an institution to reveal "personally identifiable information from an education record to . . . parents . . . to protect the health or safety of the student or other individuals."[227] Furthermore, that which happens in public—that which is observed in the classroom or dormitory—is a matter that is no longer confined to an "education record."[228] Dangerous acts can be revealed and often should be revealed to parents when their children are in trouble.[229]

Clearly, private or privileged mental illness and medical information should not be carelessly bandied about on campus. On the other hand, cooperation and collaboration among the institution, the student, and the parents require that all the interested parties be involved, and involvement requires notification. In these cases, determining whether a student's parents should be notified is not a privacy or confidentiality matter nor should it be an institutional "lesson" in independence. Emerging adults tend to have fewer higher-order problem-solving skills and less ability to make mature judgment calls, so leaving disclosure decisions to those

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225. *See, e.g.*, 20 U.S.C. § 1232g (2010).

226. Elizabeth Bernstein, *Delicate Balance: Colleges' Culture of Privacy Often Overshadows Safety: Laws Allow Disclosure of Troubling Behavior But Many Schools Resist*, WSJ.COM (Apr. 27, 2007), http://online.wsj.com/article/SB117763681568684306.html.

227. 34 C.F.R. § 99.36 (2011). *See generally* Allison B. Newhart & Barbara F. Lovelace, *FERPA Then and Now: Tipping the Balance in Favor of Disclosure of Mental Health Information under the Health and Safety Emergency Exception,* 2009 URMIA J. 19 (2009). FERPA's recently amended regulations make it easier for institutions to contact parents about health and safety emergencies by removing the strict construction requirement. *Id.* at 22. *See also* Lesley McBain, *Balancing Student Privacy, Campus Security, and Public Safety: Issues for Campus Leaders*, WINTER 2008 PERSP. (2008), *available at* http://www.aascu.org/uploadedFiles/AASCU/Content/Root/PolicyAndAdvocacy/PolicyPublications/08_perspectives%281%29.pdf.

228. *E.g.*, Stuart, *supra* note 8, at 365–68; Nancy Tribbensee, *Privacy and Confidentiality: Balancing Student Rights and Campus Safety*, 34 J.C. & U.L. 393, 396 (2008). *See also* Susan P. Stuart, *Lex-Praxis of Education Informational Privacy for Public School Childre*n, 84 NEB. L. REV. 1158, 1200 (2006).

229. Tribbensee, *supra* note 230, at 402–04.

students is a mistake.[230] Instead, colleges and universities should consider notification policies that allow students and their parents, cooperatively, to decide who should be contacted in an emergency. Parents need not be notified in all circumstances[231] because students need to be given increasing autonomy over their lives. However, parental notification should be required during freshman year,[232] with greater student autonomy upon evidence of greater student maturity.

The parental aspects of the transition to college and university life requires the institution to educate parents about their responsibility to the institution and their children's continuing presence on campus. Unfortunately, "[m]ost families of typically-developing adolescents in the U.S. follow cultural expectations for reducing their major responsibility for their children."[233] Today, parents can no longer assume that their children can make the clean and culturally expected step toward adulthood upon entering college without their assistance. Nor can they foist that responsibility entirely on the institution. So when a college or university does notify a parent of her child's risky behavior and suicidal tendencies, the parent cannot ignore the problem. In a recent and rather disturbing study, researchers discovered that most parents did not engage with the college or university after their child was involved in seriously self-destructive behavior.[234] Fewer than 25% of parents intervened following such episodes, even in the most serious cases requiring hospitalization.[235] Some parents even interfered in the delivery of mental health services to their children.[236] By leaving the responsibility for their obviously vulnerable children to colleges and universities, parents want to make the institutions legally responsible for a special relationship. In this litigious age, that is the last thing an institution should want to undertake, especially when such a relationship is created by default.

The parental role in this transition must therefore impress upon parents the educational necessity of their continued involvement in their children's lives, even after they have matriculated, but also the appropriate maturational evolution of letting go. Indeed, increasing evidence exists that students benefit when the institutions and their parents create a

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230. *See* Hartwell-Walker, *supra* note 190.

231. Thomas H. Baker, *Notifying Parents After a Suicide Attempt: Let's Talk About It*, 34 NAT'L ON-CAMPUS REP. 1 (Jan. 1, 2006).

232. Tribbensee, *supra* note 230, at 410–12.

233. Jivanjee et al., *supra* note 223, at 436.

234. Thomas R. Baker, *Parents of Suicidal College Students: What Deans, Judges, and Legislators Should Know About Campus Research Findings*, 43 NASPA J. 164, 172 (2006).

235. *Id.*

236. *Id.* at 173.

cooperative partnership.[237] Educating parents about the transitional process of emerging adulthood and the risks inherent in college life may be sufficient to persuade parents that their continued involvement is critical in protecting their children, or at the very least, protecting their investment. Such transitional education may also serve as notice to parents of the risks and dangers to their children, sufficient to ease some of the legal obligations from the institution, as do sufficient warnings on any product or service. And if the business model is the governing institutional paradigm, a parental behavior contract—with warnings and notices—could be drafted, spelling out the shared responsibilities and the conditions of waiver and estoppel. Regardless, colleges and universities should heed the conditions under which they are tasked with protecting students and try to shift at least some of that duty to co-equal partners because emerging adults are unable to do so, especially those with mental illness.[238]

Given the maturational risks inherent in this age group, parents in general must be encouraged to participate in their children's higher education experience, not to the point of smothering them but to the point that they acknowledge that institutions cannot be solely responsible for the continuing well-being of their children. By increasing the level of collaboration and engagement with parents, colleges and universities may be relieved of some of the enormous responsibility that derives from the special relationship. Such a comparative "fault" framework of shared responsibility might better balance the demands and needs of these emerging adults in the college and university setting.

D. The "Workplace" & Student Discipline

An additional challenge to mentally ill students is conforming their behavior to student disciplinary codes. Again, institutional adherence to the reactive regimes of the ADA and the Rehabilitation Act invites the compartmentalization of workplace rules violations with student discipline by making disorder-related behavior an incapacitating failure in the workplace. Because dismissal from one institution may have a more lasting impact than losing a particular job, a better approach blends the

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237. Rick Shoup, et al., *Helicopter Parents: Examining the Impact of Highly Involved Parents on Student Engagement and Educational Outcomes*, 10 (June 1, 2009), *available at* http://cpr.iub.edu/uploads/AIR%202009%20Impact%20of%20Helicopter%20Parents.pdf. The "helicopter" parent may not be the model an educational institution wants to encourage, but a recent study suggests the benefits to college students of high parental involvement, especially in students' self-reported gains and higher levels of engagement with the university. *Id.* at 20–21. Interestingly, the study also found that students whose parents are highly involved in their college experience have lower grades. *Id.* at 21.

238. "[M]any parents whose children have disabilities prepare to have continuing roles in their children's lives." Jivanjee et al., *supra* note 223, at 436.

more humane individual approach of IDEA as incorporated into the ADA's and Rehabilitation Act's accommodations requirements.

Under IDEA, children with disabilities "cannot be expelled for conduct that is related to their disabilities[,]"[239] and they are given an opportunity to establish that their behavioral problems may be associated with their disorder under a behavioral assessment and manifestation determination procedure to avoid serious sanctions that might otherwise be given to general education students.[240] If the behavior is related to the disabling condition, then the team that constructs the student's Individualized Educational Program (IEP) must try to adapt that program to deal with the behavior.[241] This is in contrast to the ADA, which only requires an individual assessment when a mentally ill student is identified as a potential threat to others and might be removed from campus.

This is in stark contrast to the Title I employment model that courts are generally inclined to follow for terminating employees for a violation of "workplace" rules, even if such violation is a manifestation of a mental illness.[242] Employers argue that such rules are job-related—consistent with business necessity—so they can terminate a mentally ill employee without violating discrimination statutes.[243] The employee who cannot comply with the rules is no longer otherwise qualified for the position and therefore no longer within the protected statutory class.[244] However, colleges and

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239. Randy Chapman, *The Discipline Process for Students with Disabilities Under the IDEA*, 36 COLO. LAW. 63, 63 (July 2007).

240. 20 U.S.C. § 1415(k)(1)(D)–(F) (2005); Chapman, *supra* note 239, at 65. The 2004 reauthorization of the IDEA sets out disciplinary measures of suspensions for up to ten days and of alternative placements for up to forty-five days for special circumstances, such as possession of weapons, possession or usage of illegal drugs, and serious bodily injury. 20 U.S.C. § 1415(k)(1)(G) (2005); Chapman, *supra* note 239, at 64-65; Anne Proffitt Dupre, *A Study in Double Standards, Discipline, and the Disabled Student*, 75 WASH. L. REV. 1, 43–45 (2000). IDEA also allows public schools to suspend disabled students for up to ten days without providing any additional educational services and allows a change in educational placement for up to forty-five days if the student, while in school, carries a weapon, is involved in illegal drugs, or has inflicted serious bodily injury on another. *E.g*., Chapman, *supra* note 239, at 64; Dupre, *supra,* at 37–40.

241. Chapman, *supra* note 239, at 65.

242. EEOC, *The Americans with Disabilities Act: Applying Performance and Conduct Standards to Employees with Disabilities*, http://www.eeoc.gov/facts/performance-conduct.html; Michael D. Meuti, *Disabling Legislation: The Judicial Erosion of the ADA's Protection for Employees with Psychiatric Disorders*, 14 STAN. L. & POL'Y REV. 445, 463 (2003).

243. Meuti, *supra* note 242, at 462.

244. "The courts emphasize that a plaintiff must prove discrimination because of disability and state that a plaintiff who was discharged for misconduct cannot prove that the employer discriminated because of the plaintiff's disability." Kelly Cahill Timmons, *Accommodating Misconduct under the Americans with*

universities do not run a traditional workplace by which they can justify the dismissal of students as a "business necessity."

Standing in as higher education's proxy for workplace rules are institutional codes of student conduct. Each college and university has academic standards by which it judges its students, which may include conduct standards.[245] In order to run an enterprise with so many individual customers/employees/products where individuality is encouraged, an institution necessarily demands a certain amount of homogeneity of behavior. Otherwise, students (especially emerging adults) would run amok. Furthermore, certain standards of conduct have traditionally proved successful in inculcating each institution's mission and values. But the notion that student conduct codes are anything but aspirational is foolhardy. "[T]he captains who navigate our ships of higher education know that the calm waters of consistently proper student behavior are unlikely ever to be reached."[246] If that is true, then what rules may a student with a mental disorder violate and yet remain an "otherwise qualified" student?

Unlike objective assessments to determine whether a student has lived up to academic standards,[247] disciplinary codes are elusive measures of determining whether a disruptive student with a mental disorder is "otherwise qualified." As a theoretical matter, articulating the measure is difficult, and institutions receive little guidance beyond citation to the ADA.[248] As a practical matter, colleges and universities have a tough time identifying a rule in a disciplinary code that has been violated by self-destructive behaviors, antisocial behaviors, classroom disruption, and other classic characteristics of mental illness.[249] In other words, institutions have difficulty extricating the behavior of the mental disorder from who that individual is. As a consequence, a disciplinary code as a measure of qualification can instead become a judgment about the student's essence.

Disabilities Act, 57 FLA. L. REV. 187, 213 (2005). If any distinction is drawn at all, it is between conduct that is compelled by the disability and that which can be controlled. *Id.* at 226.

245. Barbara A. Lee & Gail E. Abbey, *College and University Students with Mental Disabilities: Legal and Policy Issues*, 34 J.C. & U.L. 349, 375 (2008). *See generally* Bd. of Curators of Univ. of Mo. v. Horowitz, 435 U.S. 78 (1978).

246. Edward N. Stoner II & John Wesley Lowery, *Navigating Past the "Spirit of Insubordination": A Twenty-First Century Model Student Conduct Code with a Model Hearing Script*, 31 J.C. & U.L. 1, 17 (2004).

247. Such objective standards are used to determine whether a student with learning disabilities is otherwise qualified. Laura Rothstein, *Disability Law Issues for High Risk Students: Addressing Violence and Disruption*, 35 J.C. & U.L. 691, 700–01 (2009) [hereinafter Rothstein, *High Risk Students*].

248. *See, e.g.*, Jolly-Ryan, *supra* note 63, at 140; Lee & Abbey, *supra* note 245, at 360.

249. Rothstein, *High Risk Students*, *supra* note 247, at 701–02.

Colleges and universities need not fundamentally alter their academic programs, but they do need to make reasonable modifications even to academic requirements.[250] Thus, institutions must accommodate discipline procedures to students with mental illness. The Department of Education's Office of Civil Rights—which addresses complaints filed by college students under both the Rehabilitation Act and the ADA—requires institutions to establish a process for "an individualized consideration of the student's disability, particularly with regard to sanctions, penalties, and adverse restrictions."[251] Thus, institutions may have to make reasonable modifications in their disciplinary policies, practices, and procedures for students with mental illness.[252] Implicit in this accommodation for disciplinary due process is that the disruptive mentally ill may not be treated differently. The mentally ill student must be disciplined comparably to others for the same offense[253] and with the same procedures.[254] And, an institution may not establish different conditions for a mentally ill student.[255] For example, an institution can impose medical requirements for the readmission of all students[256] but may not

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250. 42 U.S.C. § 12201(f) (2008). The Rehabilitation Act similarly requires accommodations for disabilities in higher education. 34 C.F.R. § 104.44(a) (2000). An institution may not, however, be required to waive or lower requirements that are essential to its academic program. Guckenberger v. Boston U., 974 F. Supp. 106, 145–46 (D. Mass. 1997).

251. Letter to Woodbury Univ., OCR Docket 09-00-2079, 3 (June 29, 2001), *available at* http://bazelon.org.gravitatehosting.com/LinkClick.aspx?fileticket=tulMV2FrMvg%3d&tabid=313.

252. Letter to Marietta Coll., OCR Docket 15-04-2060, 5 (Mar. 18, 2005), *available at* http://bazelon.org.gravitatehosting.com/LinkClick.aspx?fileticket=26yfG15xOM8%3d&tabid=313.. *See* 34 C.F.R. § 104.37 (2011) (nonacademic services).

253. Meuti, *supra* note 242, at 63. Judicial deference in disciplinary procedures is lower than that for academic decisions under the ADA and the Rehabilitation Act. *See generally* Leonard, *supra* note 129.

254. Letter to St. Joseph's Coll., OCR Docket 02-10-2171 (Jan. 24, 2011) (College, instead of using its emergency suspension procedure for a mentally ill student, used a separate process.), *available at* http://www.galvin-group.com/media/96055/OCR%20Letter%20St%20Joseph's%20College.pdf..

255. Letter to Guilford Coll., OCR Docket 11-02-2003, 13-14 (Mar. 6, 2003), *available at* http://bazelon.org.gravitatehosting.com/LinkClick.aspx?fileticket=ckwX-y99cXk%3d&tabid=313..

256. Letter to Purchase Coll.(SUNY), OCR Docket 02-10-2181,. 2–3 (Jan. 14, 2011) (college had policy for returning to campus after emergency medical evaluation or treatment and required that all students had to follow certain procedures for returning to campus), *available at* http://ncherm.org/documents/OCRLetter_PurchaseCollege.pdf .

impose additional conditions upon a mentally ill student.[257] The most that any institution could do that would be different from the discipline of other students would be to add a due process protection. These additional protections would be analogous to the individual assessments now required before the removal of mentally ill students who are a threat to others.

An "educative" system of discipline as used in IDEA would create a more collaborative and cooperative system for embracing the differences that the mentally ill student presents. When the disorder manifests in behavior that is disruptive, challenging, or even self-destructive, the combined resources of the student, the institution, and the parents will not just create an objective assessment of the student's ability to remain on campus but—similar to IDEA—also formulate a behavioral contract with interventions, responsibilities, and treatments that are tailored to the mental illness.[258] Modeling institutional disciplinary procedures on the pro-active IDEA model is not only more likely to garner better outcomes with the disruptive and behaviorally non-conforming mentally ill students, it will also better comply with the procedures required under the more reactive ADA.[259] Interim remedies or other such summary procedures, although

257. Letter to Spring Arbor Univ. (Diana Y. Bower), OCR Docket 15-10-2098, 10-12 (Dec. 16, 2010) (mentally ill students required to submit medical documentation not otherwise required by the university's readmission procedures) *available at* http://www.nacua.org/documents/OCRLetter_SpringArborU.pdf. The OCR Letter was quite clear that such preconditions can be imposed for the readmission of a mentally ill student who has been removed because he posed a direct threat to the health and safety of others. *Id.* at 9. This particular student, however, had voluntarily withdrawn and was not under threat of academic or disciplinary dismissal, and the university had never deemed him a direct threat. *Id.* at 11.

258. In order to avoid questions of discrimination, behavior contracts would have to be part of the disciplinary process for all students. *Cf. id*. at 4, 12.

259. *See also* Hubbard, *Myth*, *supra* note 108, at 904–25 (discussing accommodations in the workplace for psychiatric disorders to reduce violence); John D. Thompson, *Psychiatric Disorders, Workplace Violence and the Americans with Disabilities Act*, 19 HAMLINE L. REV. 25, 49–57 (1995). It is beyond the scope of this Article to articulate all the resources and accommodations that higher education could consider. A follow-up Article is in process, joining the resources of IDEA training, disability services, and the law. In the meantime, numerous resources and articles provide some ideas. *See, e.g.*, The JED Foundation, *Student Mental Health and the Law: A Resource for Institutions of Higher Education* (2008), *available at* https://www.jedfoundation.org/assets/Programs/Program_downloads/StudentMentalHealth_Law_2008.pdf; Judge David L. Bazelon Center for Mental Health Law, *Supporting Students: A Model Policy for Colleges and Universities* (May 15, 2007), available at www.bazelon.org/pdf/SupportingStudents.pdf; Mark S. Salzer et al., *Familiarity with and Use of Accommodations and Supports Among Postsecondary Students with Mental Illnesses*, 59 PSYCHIATRIC SERV. 370 (2008); Michael N. Sharpe et al., *supra* note 72; Suzanne

proper in the abstract,[260] should not be combined with differing standards nor be the default method of removing the mentally ill student from campus.

Such an educative system of discipline is not unfamiliar to higher education. Colleges and universities already use similar systems for student alcohol abuse, which itself can be viewed as a type of mental disorder. According to the criteria of DSM-IV, "[t]he heavy drinking of some students reaches levels of clinical significance. . . . [N]early one in three college students (including three in five frequent binge drinkers) qualifies for a diagnosis of alcohol abuse, and one in seventeen (one in five frequent binge drinkers) qualifies for a diagnosis of alcohol dependence."[261] Furthermore, college students with alcohol-related issues experience problems in both their academic performance and their living environment.[262] However, under the Drug and Alcohol Abuse Prevention regulations applicable to higher education,[263] institutions exercise a great deal of discretion in disciplining students who violate conduct rules by drinking alcohol. A 1995 survey indicates the following discretionary choices made by administrators for underage, on-campus drinking:

Official Warning	72%
Fine	23%
Community Service	23%
Probation	32%
Suspension	5%
Expulsion	2%
Referral to alcohol education program	47%

Wilhelm, *Accommodating Mental Disabilities in Higher Education: A Practical Guide to ADA Requirements*, 32 J. L. & EDUC. 217 (2003). *See also* Leadership 21 Committee, *Campus Mental Health: Know Your Rights: A Guide for Students Who Want to Seek Help for Mental Illness or Emotional Distress*, JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW (2008), *available at* http://www.bazelon.org/Portals/0/pdf/YourMind-YourRights.pdf.

260. "Interim" suspensions may be imposed for health and safety reasons, pending a full due process hearing. Stoner & Lowery, *supra* note 246, at 59–60.

261. Henry Wechsler & Toben F. Nelson, *What We Have Learned from the Harvard School of Public Health College Alcohol Study: Focusing Attention on College Student Alcohol Consumption and the Environmental Conditions that Promote It*, 69 J. STUD. ALCOHOL & DRUGS 481, 483 (2008). *See also* John R. Knight et al., *Alcohol Abuse and Dependence among U.S. College Students*, 63 J. STUD. ALCOHOL 263, 263 (2002).

262. James G. Murphy et al., *Alcohol Consumption, Alcohol-Related Problems, and Quality of Life Among College Students*, 47 J. C. STUDENT DEV. 110, 116 (2006). Concurrent mental health issues likely have some impact on those effects. *See, e.g.*, Weitzman, *supra* note 40, at 275.

263. 34 C.F.R. § 86 (2011).

Referral to alcohol treatment program 8%[264]

Perhaps the social acceptance of alcohol abuse makes easier the graduated and discretionary discipline meted out to student alcohol abusers, while the disruptions caused by mentally ill students create more fear. However, the fact remains that alcohol abuse kills and injures more students than any student rampages attributable to mental illness.[265] Nonetheless, many campuses already have in place a system of discipline that accounts for immaturity and holds out the promise of redemption, at least for the disorder of alcohol abuse. The familiarity of such processes should equally enlighten graduated and informed discipline for the disruptive mentally ill students, rather than summary or involuntary removal processes and would avoid any discriminatory applications to similarly situated students.

E. Faculty & Staff: Collaboration & Cooperation

There are at least two implicit benefits of treating the nonviolent mentally ill students with the rest of the general population under an emerging adulthood model. The first is that the behavior of this generation of college and university students is not significantly different from that attributed to the mentally ill and that faculty training for dealing with the larger population's problems may necessarily carry over to dealing with the subpopulation of mentally ill students. The second is that faculty attention

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264. Henry Wechsler et al., *Current Research Summary: Enforcing the Minimum Drinking Age Law: A Survey of College Administrators and Security Chiefs*, HIGHER EDUC. CTR. FOR ALCOHOL & OTHER DRUG PREVENTION 6 (1995), *available at* http://www.higheredcenter.org/files/product/enforce.pdf. Drunken driving offenses elicited discipline from 42% of those surveyed with 17% taking no action at all. When a student overdoses on alcohol and is hospitalized, 80% of the administrators will refer the student to counseling or an educational program, with just over half taking steps to impose discipline. *Id.*

265. Recent data set out the following ugly snapshot of the consequences of annual student alcohol abuse:

1825 deaths
599,000 unintentional injuries
696,000 assault by another student
97,000 sexual abuse
400,000 unsafe sex
25% academic problems
1.2 to 1.5% commit suicide

COLLEGE DRINKING, A SNAPSHOT OF ANNUAL HIGH-RISK COLLEGE DRINKING CONSEQUENCES (July 1, 2011), www.collegedrinkingprevention.gov/StatsSummaries/snapshot.aspx (last visited Mar. 2, 2012). Also, students who drink heavily are more likely to have firearms. Matthew Miller et al., *Guns and Gun Threats at College*, 51 J. AM. C. HEALTH 57, 62–63 (2002).

can be directed to the discovery and reporting of violence specifically, rather than worrying about mental illness as an accurate indicator of violence.[266] Furthermore, the matter will become increasingly complicated with the matriculation of returning veterans, many of whom will also bring mental illness with them to campus.[267] As a consequence, "colleges should be committed to the success of all students, including those with . . . mental illnesses."[268] The adjustment of the institution to the mentally ill cannot help but benefit all students.

Accepting the proposition that the best method for integrating the mentally ill into campus life lies within the faculty, the institution's first step in the integration process is increasing faculty and staff understanding that campus disciplinary problems are as much a function of emerging adulthood as of mental illness. Integral to that understanding is increasing awareness that this generation really does have a higher rate of mental illness on campus, regardless of the sources, with a resulting rise in behavioral issues. Along with the increase in the number of college and university students seeking mental health counseling, "[b]ehavioral incidents in classrooms and residence halls, as well as student conduct cases, parallel these increases. Indeed, some campuses report increases that include high numbers of students who are hospitalized."[269]

For the pro-active—and too-often the smaller—campus,[270] intentional educational initiatives directed to faculty and staff on the needs, learning

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266. After Virginia Tech, how institutions should deal with violent students who might rampage on campus has been a hot topic in both legal and social science literature. *See, e.g.*, Christopher Flynn & Dennis Heitzmann, *Tragedy at Virginia Tech: Trauma and Its Aftermath,* 36 THE COUNSELING PSYCHOL. 479 (2008); Jun Sung Hong et al., *Revisiting the Virginia Tech Shootings: An Ecological Systems Analysis*, 15 J. LOSS & TRAUMA 561 (2010); Heather Littleton et al., *Longitudinal Evaluation of the Relationship Between Maladaptive Trauma Coping and Distress: Examination Following the Mass Shooting at Virginia Tech*, 24 ANXIETY, STRESS & COPING 273 (2011); Lucinda Roy, *Insights Gleaned from the Tragedy at Virginia Tech*, 17 WASH. & LEE. J. CIVIL RTS. & SOC. JUST. 93 (2010); Brett A. Sokolow et al., *College and University Liability for Violent Campus Attacks*, 34 J.C. & U.L. 319 (2008); Stuart, *supra* note 6; Ben Williamson, Note, *The Gunslinger to the Ivory Tower Came: Should Universities Have a Duty to Prevent Rampage Killings?,* 60 FLA. L. REV. 895 (2008).

267. Derek Neuts, *Veteran PTSD and Higher Education-Accommodations and Awareness*, SUITE101.COM (Jan. 12, 2011), http://derek-neuts.suite101.com/veteran-ptsd-and-higher-education--accommodations-and-awarenessn-a331957.

268. Karen Bower, *How Not to Respond to Virginia Tech-I*, INSIDEHIGHERED.COM (May 1, 2007), http://insidehighered.com/views/2007/05/01/bower.

269. Hollingsworth et al., *supra* note 72, at 41.

270. Emerging adults are often happier with and experience greater success at smaller campuses, especially when they have developed a personal relationship with their professors. ARNETT, *supra* note 169, at 137.

styles, and behavior of emerging adults will address the burgeoning mental illness problems they bring to campus. This is particularly important for the faculty. "Students benefit when faculty have an increased awareness and knowledge of the characteristics and needs of students with disabilities."[271] Concomitantly, faculty will have to wrestle with students' lack of preparedness, not just behaviorally but also academically,[272] as a characteristic of contemporary college students. Institutions also may have to make significant curricular decisions about whether this lack of preparedness is a matter for "remediation" or is instead so systemic that all entering students should receive significant training just to participate adequately in higher education. In addition, institutions may have to adapt to the emerging adult "model" of higher education. This model recognizes that "[f]or most emerging adults, entering college means embarking on a winding educational path that may or may not lead to a degree."[273] Unfortunately, personal experience in trying to locate resources for "positive" faculty training and programming reveals the paucity of such resources. Many are studying the phenomenon, but hardly anyone seems to be taking it on tour.[274] On the other hand, colleges and universities have built-in resources in their faculty who could be tapped to present the condition, summarize the literature, and describe the "macro" conditions under which faculty are operating.

The literature also suggests that at least one educational approach on the "micro" level improved success rates for disabled students and therefore could be systemically adopted to improve the success rates for the entire emerging-adult student population. "Universal design" is an educational approach for instructing all students through developing flexible classroom materials, using various technological tools, and varying the delivery of information or instruction."[275] Universal design does not mean lowering expectations or "dumbing down" the curriculum. Rather, it acknowledges that today's students have the capacity to learn the same problem-solving and professional skills as past students but also acknowledges that they will

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271. Elizabeth Evans Getzel, *Addressing the Persistence and Retention of Students with Disabilities in Higher Education: Incorporating Key Strategies and Supports on Campus*, 16 EXCEPTIONALITY 207, 207 (2008).

272. "Students are coming to college less well prepared than in the past. As a result, there is a growing need for remediation." LEVINE & CURETON, *supra* note 53, at 127–28.

273. ARNETT, *supra* note 169, at 125.

274. Locating individuals who have expertise or training in this area is difficult, even through extensive internet searches. Even more scarce are those individuals who act as public speakers or as consultants for higher education. In any event, the author believes it would be inappropriate to "advertise" such consultants in an academic journal.

275. Polly Welch, *What is Universal Design?* (2012), *available at* www.ud education.org/resources/62.html (excerpt from book).

not learn those same skills in the traditional format. This process does not trump the academic freedom to teach content but enhances the delivery of that content by giving faculty the tools to deal with students who learn and process in different ways than the teacher, which otherwise makes traditional delivery of content challenging.[276] Clearly, just adding technology, such as PowerPoint or Twitter, to one's teaching methods is insufficient without considering whether these features accomplish appropriate teaching goals, attain learning objectives, and meet student abilities and needs. Becoming more intentional about explicit strategies for teaching may make it easier to meet the implicit challenges emerging adults bring to campus.

The second aspect of faculty and staff training must address the distinction between the dangers of violence and the "dangers" of mental illness. This component of faculty and staff training is critical. Since the rampages at Virginia Tech and Northern Illinois, institutions have walked a very fine line between a violation of due process rights of their mentally impaired students and risk management.[277] Fear of liability has displaced the considered opinion of whether the mentally ill really are a threat to others.[278] As a consequence, institutions have been doing a thorough job of training faculty and staff on being alert to, reporting about, and dealing with violent students and following emergency procedures. However, thus far, training for identifying the violent student inexorably is intertwined with the indicia of mental illness, either by accident, by overbreadth, or by public fears.

Instead, institutions must also be proactive in distinguishing the violent mentally ill student from the nonviolent mentally ill. Although the public's perceived risks of violence by the mentally ill are not entirely groundless,[279] the actual risk of violence by the mentally ill is relatively low and usually derives from individuals who have dual diagnoses or severe disorders and who are not taking their medications. Making the risk even more serious, third-party strangers are significantly less likely to be

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276. Ironically, one of the toughest and most hostile educational programs—law schools—is acknowledging the realities of learning theory, teaching methods, and disabilities in teaching today's students. *See, e.g.*, WILLIAM M. SULLIVAN ET AL, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007); J. Patrick Shannon, *Who Is an "Otherwise Qualified" Law Student? A Need for Law Schools to Develop Technical Standards*, 10 U. FLA. J.L. & PUB. POL'Y 57 (1998); Scott Weiss, *Contemplating Greatness: Learning Disabilities and the Practice of Law*, 6 SCHOLAR 219 (2004); Peterson & Peterson, *supra* note 67; Shapiro, *supra* note 67.

277. Wolnick, *supra* note 164, at 1011.

278. *See, e.g.*, Thompson*, supra* note 259, at 25.

279. Hubbard, *Myth*, *supra* note 108, at 867.

victims of the mentally ill than are their family members.[280] "[E]xperts overwhelmingly agree that the mere diagnosis of an individual with a serious mental illness does not lead to the conclusion that she is likely to engage in violence."[281] However, news coverage and other mass media depict the mentally ill as being perhaps the most dangerous demographic.[282] As a consequence, public perceptions that the mentally ill are violent have increased, despite the exceptionally small risk to the public,[283] while high-profile college rampages have unnerved the public in general and campus stakeholders in particular.[284]

The faculty-staff training program must educate on the lack of reliable means for detecting whether another rampage will occur. Institutions do not have the professional expertise to identify students who will kill. No one does.[285] The rampage killer shares characteristics of millions of other

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280. MENTAL HEALTH: A REPORT OF THE SURGEON GENERAL (2001), *available at* http://surgeongeneral.gov/library/mentalhealth/chapter1/sec1.html#mental_disorders.

281. Hubbard, *Myth*, *supra* note 108, at 869; Hollingsworth et al., *supra* note 72, at 43. *But see* Kristy A. Mount, Note, *Children's Mental Health Disabilities and Discipline: Protecting Children's Rights While Maintaining Safe Schools*, 3 BARRY L. REV. 103, 107–08 (2002) (describing the relationship between young-adult violence and serious mental disorders when combined with substance abuse or lack of treatment).

282. SAMHSA Resource Ctr. to Promote Acceptance, Dignity and Social Inclusion, *Violence and Mental Illness: The Facts,* http://stopstigma.samhsa.gov/topic/facts.aspx (last visited Mar. 2, 2012).

283. MENTAL HEALTH, *supra* note 283. However, "members of the general public who have greater knowledge about or experience with mental illness are less likely to stigmatize, at least in terms of stereotypes of dangerousness." Patrick W. Corrigan et al., *Familiarity with and Social Distance from People Who Have Serious Mental Illness*, 52 PSYCHIATRIC SERV. 953, 956 (2001).

284. Violence against others [on college campuses] has even lower rates of prevalence on campuses. College students ages eighteen to twenty-four experience lower violent crime rates than nonstudents of the same age, and the majority (93 percent) of crimes occur off-campus. . . . However, campus disasters, combined with reports about student suicide, increases in serious mental health issues, and other troubled behaviors, create a heightened perception of risk for all campuses and their stakeholders. Anticipated risk, direct and vicarious violence, or serious mental health disturbances have the potential to disrupt and terrify any group of students and all who are concerned about them.

Hollingsworth et al., *supra* note 72, at 42–43. Indeed, "[t]oday's students are frightened. They are afraid of getting hurt. Nearly half of all undergraduates (46 percent) worry about becoming victims of violent crime." LEVINE & CURETON, *supra* note 53, at 93.

285. Williamson, *supra* note 266.

college students.[286] But what should not be a marker is the mere suspicion of mental illness. Faculty and staff need to be better informed of these distinctions, especially given the large number of mentally ill students on campus and the legal consequences of merely characterizing someone as mentally ill under the ADA.

Many institutions and mental health counseling centers are doing great work in embracing the mentally ill, and their educational resources are a great source of educational information. Faculty and staff training requires this type of sophistication, rather than instruction from law enforcement, to distinguish violent behavior from behavior that is merely a manifestation of mental illness. Although faculty and staff might prefer clear-cut standards to follow, such standards are simply not possible to generate. But "one of the most effective ways of identifying students in distress is to provide training to people of all levels and positions on campus."[287]

Intertwined with the identification of students with problems is college mental health education.[288] Faculty need to be educated on their leadership role in supporting those students who have been identified as having mental illness and fully integrate these students into the academy instead of treating them as outliers. Faculty can be at the forefront of acquainting themselves with their mentally ill students to reduce their stigma on campus and to assuage their own fears by understanding that mental illness does not necessarily presage violence. The mentally ill student benefits from academic integration, more than from removal from the academy.[289] "Most students experiencing psychiatric problems recover, and for many the recovery is facilitated by an environment which recognizes that healthy facets of a person's identity are not necessarily eliminated by a mental illness."[290]

If faculty are to serve their students effectively, they must also seek to serve those with mental illness. By being attentive to the needs of mentally ill students and to the successful self-determination of those students, faculty and staff can better serve all their students as these emerging adults make the educational adjustment to higher education.

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286. *Id.* at 910–11.

287. Newhart & Lovelace, *supra* note 227, at 25. *See also* CORNELL UNIV., RECOGNIZING AND RESPONDING TO STUDENTS IN DISTRESS: A FACULTY HANDBOOK (2011), *available at* http://dos.cornell.edu/dos/cms/upload/244734_StuHndBk_allPgs_LoRes.pdf.

288. *E.g.*, Gerald Stone, *Mental Health Policy in Higher Education*, 36 COUNSELING PSYCHOL. 490, 498 (2008).

289. Frances L. Hoffmann & Xavior Mastrianni, *Psychiatric Leave Policies: Myth and Reality*, 6 J. COLL. STUDENT PSYCHOTHERAPY 3, 14 (1992).

290. *Id.* at 18.

VI. EMERGING ADULTHOOD: "IT'S MY LIFE AND IT'S NOW OR NEVER"[291]

The ironic circumstance facing colleges and universities today is that addressing the challenges and behavior of mentally ill students is the same as addressing the challenges and behavior of all their students. Emerging adulthood has changed the demographics of the student population in ways that institutions are only just now beginning to realize. Traditionally, universities have made a distinction between the mentally ill and the general population when addressing student conduct. The mentally ill student is more likely to be lumped in with the violent student rather than the general population, even if the student is not a violent threat. A better recognition of the systemic mental health problems emerging adults bring to campus will more effectively serve those students who enter with mental illness, and will perhaps prevent the manifestation of mental illness on the campus.

Furthermore, a shift in attention to the overall student population may portend a shift in the legal relationship among institutions, students, and parents. Rather than a business relationship with three distinct litigation interests in both business and tort matters, the integration of all three stakeholders into a more meaningful relationship places a lower duty on the institution while increasing the responsibilities of parents and students. If "institutions of higher education have significant and unique power to make campuses more or less safe,"[292] then they likewise have the unique power to channel joint responsibilities for their emerging adults[293] with the ultimate goal of creating a better atmosphere for the continuing progress of the child-student, most particularly for those students who are mentally ill.

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291. JON BON JOVI, MAX MARTIN, & RICHARD S. SAMBORA, *It's My Life*, on CRUSH (Island Records 2000).

292. Helen H. de Haven, *The Academy and the Public Peril: Mental Illness, Student Rampage, and Institutional Duty*, 37 J.C. & U.L. 267, 348 (2011).

293. "All who work with emerging adults need to join together to understand the changing world in which students live and grow." Hollingsworth et al., *supra* note 72, at 51.