

# THE JOURNAL OF COLLEGE AND UNIVERSITY LAW

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Volume 37

2011

Number 2

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## ARTICLES

### ***Louisville v. Duke* and Its Implications for Breached College Football Scheduling Agreements**

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This article examines the increasingly frequent occurrence of NCAA Division I colleges and universities breaching college football scheduling agreements. Despite the havoc that these breaches inflict on colleges' and universities' football schedules, courts and commentators have yet to develop a suitable framework to apply in resulting litigation. This article addresses this deficiency in the current literature by identifying the competitive and financial concerns that future courts should consider when deciding cases involving breached scheduling agreements. The framework proposed in this article represents a significant advance over the approach recently utilized by the court in *University of Louisville v. Duke University*, a decision wholly inconsistent with the realities of modern college football scheduling. The proposed framework will allow future courts to more accurately assess the damages arising from a breached scheduling agreement, and in the process help ensure that the affected school is more fully and fairly compensated for its harm. Additionally, the article also discusses measures that colleges and universities can take when drafting future settlement agreements in order to protect themselves against the *Louisville v. Duke* precedent.

### **The Academy and the Public Peril: Mental Illness, Student Rampage, and Institutional Duty**

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developed for assessing, managing, and treating disturbed students, the law is changing with respect to institutional duty. This article explores the tensions and connections between providing effective treatment for mentally disturbed students who are allowed to remain enrolled and safeguarding campuses from anti-institutional violence. It concludes by proposing a model of institutional duty that supports the creation of safer academic spaces. It argues that the appropriate analytical framework emphasizes the prevention as well as the foreseeability of violent student behavior, acknowledges the administrative relationships of campus organization, and reinforces the institution's capacity to communicate relevant information about disturbed students and to coordinate appropriate responses. At the same time, the analysis respects the educational goals of individuality, inclusiveness, and diversity in the student body; supports better training of faculty and staff in identifying and managing disturbed students; and encourages college and university administrators to manage potentially dangerous students promptly and effectively to reduce the likelihood of violent outcomes.

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**NOTE**

**On Wisconsin: The Viability of Diploma Privilege Regulations  
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Wisconsin is the only state to allow certain applicants admission to the bar by means of a diploma privilege. Specifically, when the University of Wisconsin Law School or Marquette University Law School awards a first professional degree to its students, the student satisfies the state's legal competence requirement—if the student met

certain educational standards. In 2007, a graduate of the Oklahoma City University School of Law challenged Wisconsin's diploma privilege under the Dormant Commerce Clause. The parties settled the suit before a court could decide the case on its merits. This note seeks to answer the unanswered question: Do diploma privilege regulations violate the Dormant Commerce Clause? It will consider the evolution of the Dormant Commerce Clause, and previous challenges to diploma privileges or restrictions of legal practice based on residency or origin. It will then consider Wisconsin's diploma privilege in light of the applicable law. This analysis indicates that while diploma privilege regulations are conceptually permissible, Wisconsin's diploma privilege fails to provide a discernible educational benefit that would justify the burden it places on interstate commerce. Further, while Wisconsin could bring its privilege into constitutional conformity, political realities make such a modification unlikely.

# LOUISVILLE V. DUKE AND ITS IMPLICATIONS FOR BREACHED COLLEGE FOOTBALL SCHEDULING AGREEMENTS

NATHANIEL GROW\*

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## INTRODUCTION

In June 1999, the University of Louisville Cardinals (“Louisville” or “Cardinals”) and the Duke University Blue Devils (“Duke” or “Blue Devils”) entered into an athletic-competition agreement under which the schools’ football teams agreed to play each other four times over the next decade.<sup>1</sup> At the time the contract was signed, the two football squads were relatively evenly matched: Duke had finished sixth in the Atlantic Coast Conference (“ACC”) in 1998 with an overall record of four wins and seven losses, while Louisville had placed third in the less competitive Conference USA (“C-USA”) with a 7-5 overall record.<sup>2</sup> However, by the time the two schools were ready to play their first scheduled contest in 2002, Louisville’s program had improved significantly. The Cardinals were

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1. DUKE UNIV. & UNIV. OF LOUISVILLE, ATHLETIC COMPETITION AGREEMENT (1999) [hereinafter COMPETITION AGREEMENT]. See also *Univ. of Louisville v. Duke Univ.*, No. 07-CI-1765, at 1 (Franklin Cir. Ct. June 19, 2008) (discussing the agreement whereby Duke and Louisville agreed to play four times over the next decade), available at [http://www.ncbusinesslitigationreport.com/Duke Opinion.pdf](http://www.ncbusinesslitigationreport.com/Duke%20Opinion.pdf).

2. COLLEGE POLL ARCHIVE, 1998 *College Football Standings*, [http://www.collegefootballpoll.com/1998\\_archive\\_standings.html](http://www.collegefootballpoll.com/1998_archive_standings.html) (last visited Oct. 11, 2010) [hereinafter *1998 Standings*].

ranked seventeenth in that year's pre-season college football Top 25 poll<sup>3</sup> following a C-USA championship and 11-2 overall record in 2001.<sup>4</sup> Meanwhile, Duke's program had fallen to a projected last-place finish in the ACC,<sup>5</sup> on the heels of a 0-11 2001 campaign.<sup>6</sup> Not surprisingly, Louisville won the first game by a score of 40-3.<sup>7</sup>

Following that initial defeat, the Blue Devils developed second thoughts about playing three more games against the suddenly formidable Cardinals, and elected to cancel the remaining contests under the scheduling agreement (scheduled for 2007, 2008, and 2009) in March 2003.<sup>8</sup> Upset by Duke's breach of contract, Louisville ultimately sued Duke in a Kentucky state court, seeking enforcement of the scheduling agreement's liquidated damages provision. That clause specified that if the contract was broken, the breaching party would pay \$150,000 per cancelled contest to the other university should the non-breaching party be unable to schedule a replacement game against a "team of similar stature."<sup>9</sup>

The Kentucky state court dismissed Louisville's case, construing the "team of similar stature" language in the liquidated damages clause to mean simply any Division I football program, whether competing in the Football Bowl Subdivision or Football Championship Subdivision.<sup>10</sup> Because Louisville was able to replace Duke on its schedule with other Division I opponents, the court ruled that no damages were owed.<sup>11</sup>

Although *Louisville v. Duke* appears to have marked the first time that a court considered the sufficiency of a replacement opponent following the breach of a college football scheduling agreement, it is an issue that may arise again in the future. Indeed, the cancellation of uncompleted college football scheduling agreements has become commonplace.<sup>12</sup> As the

3. COLLEGE POLL ARCHIVE, 2002 *Preseason Football Polls*, <http://www.collegepollarchive.com/football/ap/seasons.cfm?appollid=874> (last visited Nov. 11, 2010).

4. COLLEGE POLL ARCHIVE, 2001 *College Football Standings*, [http://www.collegefootballpoll.com/2001\\_archive\\_standings.html](http://www.collegefootballpoll.com/2001_archive_standings.html) (last visited Oct. 11, 2010) [hereinafter *2001 Standings*].

5. 2002 ACC Football Preseason Poll, THEACC.COM, <http://www.theacc.com/sports/m-footbl/spec-rel/072302aao.html> (last visited Oct. 11, 2010).

6. *2001 Standings*, *supra* note 4.

7. Tommy Bowman, *Cardinals Cruise Past Blue Devils as Winning Streak Comes to Halt*, WINSTON-SALEM JOURNAL, Sept. 8, 2002, at C4.

8. *Univ. of Louisville v. Duke Univ.*, No. 07-CI-1765, at 1 (Franklin Cir. Ct. June 19, 2008), available at <http://www.ncbusinesslitigationreport.com/DukeOpinion.pdf>.

9. COMPETITION AGREEMENT, *supra* note 1, at 3.

10. *Louisville v. Duke*, No. 07-CI-1765, at 4. For more on the distinction between the Football Bowl Subdivision and the Football Championship Subdivision, see *infra* notes 17-18 and accompanying text.

11. *Louisville v. Duke*, No. 07-CI-1765, at 5-6.

12. See John Walters, *The Blackout Bowl: Scheduling is a Slippery Game in*

economics of college football continue to escalate rapidly upwards—in recent years, teams from major conferences have begun to pay schools from smaller conferences over one million dollars to play a single game<sup>13</sup>—universities are constantly reevaluating their scheduling commitments. Thus, the question of how to assess the sufficiency of a replacement opponent following the breach of a football scheduling agreement is likely to arise again in future litigation, either when determining the applicability of a liquidated damages clause (as in *Louisville v. Duke*), or as part of a determination of damages under contracts without liquidated damages provisions.

*Louisville v. Duke* provides a poor precedent for future courts to follow when grappling with this issue, as the court's overly simplistic analysis ignored many of the relevant factors that colleges and universities consider when drafting their football schedules. Football scheduling has become an increasingly complex process, with colleges and universities weighing a number of competitive and financial considerations beyond simply whether the prospective opponent competes at the Division I level.<sup>14</sup> Consequently, a better framework than that used by the *Louisville v. Duke* court is needed for future disputes arising from breached scheduling agreements.

This article considers the implications of *Louisville v. Duke*, both from the perspective of colleges and universities attempting to draft future scheduling agreements, as well as courts wrestling with similar issues in forthcoming cases. Specifically, Part I reviews modern college football scheduling strategies and trends, while Part II critically analyzes the court's opinion from *Louisville v. Duke*. Finally, Part III offers both suggestions for colleges and universities when drafting future scheduling agreements in the aftermath of the *Louisville v. Duke* precedent, as well as a proposed framework for future courts to use when deciding cases arising from breached scheduling agreements.

## I. COLLEGE FOOTBALL SCHEDULING STRATEGIES AND TRENDS

The National Collegiate Athletic Association (“NCAA”) regulates

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*College Football*, SI.COM, (Apr. 14, 2006), [http://sportsillustrated.cnn.com/2006/writers/the\\_bonus/04/12/cfb.scheduling/](http://sportsillustrated.cnn.com/2006/writers/the_bonus/04/12/cfb.scheduling/) (listing examples).

13. See Pat Forde, *Big Nonconference Games Vanishing*, ESPN.COM, (June 8, 2009), [http://sports.espn.go.com/espn/columns/story?columnist=forde\\_pat&id=4239858&sportCat=nf](http://sports.espn.go.com/espn/columns/story?columnist=forde_pat&id=4239858&sportCat=nf). See also Evan Woodbery, *ASU Says It Will Get a Million for Auburn Football Trip*, AL.COM, (Mar. 5, 2009), [http://blog.al.com/auburnbeat/2009/03/auburn\\_adds\\_arkansas\\_state\\_to.html](http://blog.al.com/auburnbeat/2009/03/auburn_adds_arkansas_state_to.html) (reporting that Auburn University agreed to pay Arkansas State University one million dollars for a single football game to be played in September 2010).

14. See Robert Zullo, *The Right Moves*, ATHLETIC MGMT., (Aug.–Sept. 2005), <http://www.momentummedia.com/articles/am/am1705/rightmoves.htm> (identifying factors).

intercollegiate football competition.<sup>15</sup> The NCAA has divided its football-sponsoring member institutions into several divisions, with those colleges and universities participating at the highest level of competition designated as Division I.<sup>16</sup> Division I football is itself subdivided into two separate classifications: Football Bowl Subdivision (“FBS,” formerly known as I-A) and Football Championship Subdivision (“FCS,” formerly known as I-AA).<sup>17</sup> FBS is regarded as the more competitive of the two subdivisions.<sup>18</sup>

In addition to belonging to the NCAA, most schools sponsoring Division I football also belong to a conference consisting of eight or more other colleges and universities.<sup>19</sup> These schools play eight or nine of the twelve permitted regular-season football games against their fellow conference

15. See Matthew J. Mitten, *Applying Antitrust Law to NCAA Regulation of “Big Time” College Athletics: The Need to Shift From Nostalgic 19th and 20th Century Ideals of Amateuism to the Economic Realities of the 21st Century*, 11 MARQ. SPORTS L. REV. 1, 2–3 (2000).

16. See Peter Kreher, *Antitrust Theory, College Sports, and Interleague Rulemaking: A New Critique of the NCAA’s Amateuism Rules*, 6 VA. SPORTS & ENT. L.J. 51, 70 (2006); see also Michael J. Nichols, *Time for a Hail Mary? With Bleak Prospects of Being Aided by a College Version of the NFL’s Rooney Rule, Should Minority College Football Coaches Turn Their Attention to Title VII Litigation?*, 8 VA. SPORTS & ENT. L.J. 147, 149–50 (2008) (discussing how the NCAA classifies a college or university football team as Division I).

17. 2009 NCAA Division I Manual, § 20.1.1.2, available at [http://www.ncaapublications.com/Uploads/PDF/D1\\_Manual9d74a0b2-d10d-4587-8902-b0c781e128ae.pdf](http://www.ncaapublications.com/Uploads/PDF/D1_Manual9d74a0b2-d10d-4587-8902-b0c781e128ae.pdf).

Prior to 2006, FBS teams were referred to as Division I-A, while FCS teams were labeled I-AA. C. Paul Rogers III, *The Quest for Number One in College Football: The Revised Bowl Championship Series, Antitrust, and the Winner Take All Syndrome*, 18 MARQ. SPORTS L. REV. 285, 286 n.5 (2008) (citing David Albright, *NCAA Misses the Mark in Division I-AA Name Change*, ESPN.COM (Dec. 15, 2006), <http://sports.espn.go.com/ncl/columns/story?id=2697774>).

This article primarily focuses on scheduling issues at the Division I FBS level, although many of the same factors discussed herein may also be relevant in the case of a terminated scheduling agreement at the Division I FCS, Division II, or Division III level.

18. Josh Martin, Comment, *The Fairness Doctrine: The BCS of American Politics*, 60 MERCER L. REV. 1393, 1393 n.4 (2009). See also Nathaniel Grow, *Antitrust & The Bowl Championship Series*, 2 HARV. J. SPORTS & ENT. L. 53, 60 (2010) (noting same).

19. See Gregg L. Katz, *Conflicting Fiduciary Duties Within Collegiate Athletic Conferences: A Prescription for Leniency*, 47 B.C. L. REV. 345, 348 (2006) (“Within the larger framework of the NCAA, entities known as conferences provide further structure to intercollegiate athletics. Conferences are associations of NCAA-member schools that conduct competitions among their members and determine a conference champion in one or more sports.”).

Presently, 117 of the 120 FBS schools belong to a conference. See 2009 NCAA College Football Standings, ESPN.COM, <http://espn.go.com/college-football/standings/> (last visited Jan. 12, 2010). Only the University of Notre Dame (“Notre Dame”), the United States Naval Academy (“Navy”), and the United States Military Academy (“Army”) remain independent of any conference affiliation. *Id.* See also Leslie Bauknight Nixon, *Playoff or Bust: The Bowl Championship Series Debate Hits Congress (Again)*, 21 ST. THOMAS L. REV. 365, 369–70 (2009) (noting same).



members, and these contests are generally scheduled by the conference office.<sup>20</sup> Therefore, most colleges and universities control the scheduling of only three to four regular-season, non-conference games per year.<sup>21</sup>

Even with so few games left to the discretion of the individual college or university, drafting an ideal college football schedule is a difficult, time-intensive process involving the input of several key decision makers, including members of both the football coaching and athletic-department staffs.<sup>22</sup> Indeed, the scheduling of each non-conference game has become incredibly important, affecting not only the college or university's chances for a successful football season, but also the profitability of its football program and athletic department as a whole. Colleges and universities thus must balance the competitive interests of the football program with the program's (and athletic department's) best financial interests when making scheduling decisions. While all institutions balance these two (sometimes conflicting) concerns, the precise weighing of these factors will vary not only from school to school,<sup>23</sup> but sometimes even from game to game on a single university's schedule.

The first factor that all colleges and universities must consider when drafting a college football schedule is the competitive strength of the potential opponent. This consideration not only requires schools to schedule opponents weak enough to maximize their chances of a winning season, but also to schedule opponents challenging enough to prepare their teams adequately for conference play and to garner respect from the media

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20. See Nathaniel Grow, *A Proper Analysis of the National Football League Under Section One of the Sherman Act*, 9 TEX. REV. ENT. & SPORTS L. 281, 298 n.150 (2008) (“[A] sizeable portion of most college football teams’ schedules are set by the team’s respective conference”). Since 2006, the NCAA has permitted FBS teams to play up to 12 regular-season contests. 2009 NCAA Division I Manual, *supra* note 17, § 17.9.5.1. FBS universities located in Alaska or Hawaii are authorized to play thirteen regular season games per year. *Id.* at § 17.28.2. See also Liz Clarke, *College Football Gets 12th Game: NCAA Approves Move for 2006*, WASH. POST, April 29, 2005, at D01 (reporting that the NCAA approved an expansion from an eleven game schedule to a twelve game schedule to begin with the 2006 season).

21. The three FBS independents, Notre Dame, Navy, and Army, control the scheduling of all twelve of their annual regular season football games.

22. See Max Olson, *Fans, Funds Factor into Scheduling Non-conference Games*, DAILY NEBRASKAN, (Oct. 1, 2009), <http://www.dailynebraskan.com/sports/fans-funds-factor-into-scheduling-non-conference-games-1.1933821> (noting that scheduling a single non-conference game can take months of negotiations with multiple schools).

23. See Danny Daly, *Gameday: Piecing Together the Scheduling Puzzle*, DAILY NORTHWESTERN (Oct. 16, 2009), <http://www.dailynorthwestern.com/outback-bowl/gameday-piecing-together-the-scheduling-puzzle-1.2001150> (noting that scheduling goals differ between the Big 10’s Northwestern University and the Mid-American Conference’s Northern Illinois); Olson, *supra* note 22 (“Each school takes a different approach to scheduling non-conference foes.”); Zullo, *supra* note 14 (“One question that needs to be at the heart of the scheduling game: What will give our team the greatest success? This will be very different for Florida than for Indiana, for example.”).

and fans for having played a sufficiently difficult schedule.

The primary competitive goal for most FBS colleges and universities is to have a winning season and qualify to play in a post-season bowl game.<sup>24</sup> Under present NCAA regulations, FBS teams must win at least six games in a season in order to qualify for a bowl game, and may not have an overall losing record.<sup>25</sup> Of the requisite six wins, only one may come against an FCS opponent, and only then if that FCS opponent has granted at least ninety percent of the permitted number of scholarships over the previous two years.<sup>26</sup> Therefore, the most basic competitive factor an FBS college or university considers when designing a schedule is how a prospective opponent will affect its chances of having a winning season and participating in a bowl game.<sup>27</sup>

However, most schools do not simply seek to schedule the easiest possible non-conference games for several competitive reasons. As an initial matter, playing extremely weak competition in the non-conference portion of the schedule can risk leaving a team unprepared for the level of competition it will face when playing two-thirds of its contests against its conference rivals.<sup>28</sup>

In addition to failing to adequately prepare a team for its conference schedule, playing only weak non-conference opponents can also backfire for FBS colleges and universities seeking to contend for the national title or a berth in one of the other most prestigious and lucrative bowl games. Presently, the participants in the national championship game, as well as four of the other most prestigious bowl games (the Rose, Sugar, Orange, and Fiesta Bowls), are selected through the Bowl Championship Series (“BCS”) selection process.<sup>29</sup> Under the BCS selection procedures, the teams that finish the regular season ranked first and second in the final BCS Standings are selected as the participants in the national championship game,<sup>30</sup> while the remaining champions of the so-called “BCS Conferences”—the ACC, Big East, Big Ten, Big 12, Pacific-10 (“Pac-10”),

24. Zullo, *supra* note 14 (“First of all, you want your necessary wins to get into a bowl game.”).

25. 2009 NCAA Division I Manual, *supra* note 17, § 30.9.2.1.

26. *Id.* § 30.9.2.2.

27. See Zullo, *supra* note 14.

28. See Stu Durando, *In Years Ahead, MU, Illini Face Schedule Issues*, ST. LOUIS POST-DISPATCH, Aug. 31, 2009, at B1 (finding that the University of Missouri attempts to draft a schedule that “prepares [its team] for the Big 12 [Conference season] and gives [it] the best shot to compete in the postseason.”); see also Chris Suellentrop, *A College Football Playoff That Works*, SLATE, (Oct. 24, 2000), <http://www.slate.com/id/91886/> (noting that playing the “toughest teams possible [helps] to prepare your team for the rigors of conference play.”).

29. See *BCS Explained*, COLLEGEFOOTBALLPOLL.COM, [http://www.collegefootballpoll.com/bcs\\_explained.html](http://www.collegefootballpoll.com/bcs_explained.html) (last visited Oct. 14, 2010) [hereinafter *BCS Explained*].

30. *Id.*

and Southeastern (“SEC”)—are each guaranteed an automatic berth in one of the other BCS bowl games.<sup>31</sup> Meanwhile, the champions of the other, so-called “non-BCS Conferences,” as well as the remaining teams from the BCS Conferences, are eligible—but not guaranteed—to be invited to participate in a BCS bowl game depending upon their rankings in the final BCS Standings.<sup>32</sup>

The BCS Standings are presently calculated by combining the results of two human rankings (the Harris Interactive College Football Poll and the USA Today Coaches Poll) with the average of six different computer-ranking systems.<sup>33</sup> The strength of a team’s competition factors into both the computer and human rankings. All six of the BCS’s component computer systems explicitly consider schedule strength in their ranking formulas,<sup>34</sup> a calculation which typically considers not only the win-loss record of a team’s opponents, but also the strength of those opponents’ own opponents.<sup>35</sup> Meanwhile, although schedule difficulty is not explicitly factored into the human polls, many voters will nevertheless consider the strength of a team’s schedule when ranking the team.<sup>36</sup> Thus, by playing only weak non-conference opponents, a college or university runs the risk of being judged to have not played a sufficiently challenging schedule to merit a berth in the national championship game or one of the other BCS bowls.

For this reason, many schools have settled on a scheduling strategy that balances winnable games against weaker competition with more

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31. *Id.*

32. *Id.* The non-BCS Conferences include C-USA, as well as the Mid-American (“MAC”), Mountain West, Sun Belt, and Western Athletic (“WAC”) Conferences. *See Is There a True No. 1?*, WASH. POST, Aug. 30, 2006, at H8. The BCS prefers to distinguish the BCS and non-BCS Conferences as Automatic Qualifying (“AQ”) or non-Automatic Qualifying (“non-AQ”), depending on whether the conference is guaranteed an annual BCS bowl bid. *See* BCS Conferences, BOWL CHAMPIONSHIP SERIES, <http://www.bcsfootball.org/news/story?id=4809755> (last visited Sept. 25, 2010). This article will nevertheless use the more widely adopted BCS and non-BCS Conference terminology.

33. *BCS Explained*, *supra* note 29. The six computer rankings are provided by Anderson & Hester, Richard Billingsley, Colley Matrix, Kenneth Massey, Jeff Sagarin, and Peter Wolfe. *Id.*

34. *Id.* (“Each computer ranking provider accounts for schedule strength within its formula.”).

35. *See* K. Todd Wallace, *Elite Domination of College Football: An Analysis of the Antitrust Implications of the Bowl Alliance*, 6 SPORTS LAW. J. 57, 63 n.36 (1999) (explaining that computer strength-of-schedule calculations are typically “calculated by determining the cumulative won/lost records of a team’s opponents and the cumulative won/lost records of a team’s opponent’s opponents. The formula is weighed two-thirds for the opponent’s record and one-third for the opponent’s opponents’ record.”).

36. *See* John Feinstein, *Vote for Utah, for College Football’s Sake*, WASHINGTONPOST.COM (Jan. 6, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/01/06/AR2009010600092.html> (noting that voters in college football’s human polls consider strength of schedule when ranking teams).

challenging games against tougher competition. While the exact breakdown will vary by school, one commonly employed strategy is to schedule one or two games against competition that presents a significant challenge (typically a school in a BCS Conference), and then to fill the other non-conference slots by playing easier competition, typically at home.<sup>37</sup> Under such a strategy, each non-conference game is scheduled to fill a specific purpose within the overall scheduling scheme.

For example, in 2009, national powers the University of Southern California (“USC”) and the Ohio State University (“Ohio State”) played each other in a challenging non-conference game.<sup>38</sup> USC filled its other two non-conference slots with a game against traditional rival Notre Dame and a home game against San Jose State University, a less competitive team from the non-BCS WAC.<sup>39</sup> Meanwhile, Ohio State played its remaining three non-conference games at home against lesser opponents Navy, the University of Toledo, and New Mexico State University.<sup>40</sup> Similarly, top-ten powers the University of Alabama and Virginia Tech University played a season-opening game in 2009,<sup>41</sup> with Alabama then rounding out the rest of its non-conference schedule with easier home games against Florida International University, the University of North Texas (“North Texas”), and the University of Tennessee-Chattanooga,<sup>42</sup> while Virginia Tech scheduled winnable games against Marshall University and East Carolina University, along with another challenging game versus the University of Nebraska.<sup>43</sup>

A similar competitive strategy is also utilized by schools in the lower ranked, non-BCS Conferences. For example, Ohio University from the

37. See Steve Yanda, *Scheduling Play Dates is Far From Kid's Stuff*, WASH. POST, Sept. 12, 2008, at E01 (noting that although “scheduling philosophies differ from program to program, athletic-department officials contacted for this story said they attempt to fill out their nonconference schedule in roughly the same manner” including “one legitimate challenge from another BCS school”). See also Daly, *supra* note 23 (describing Northwestern University’s ideal schedule as being one game against an FCS opponent, one game against an FBS opponent from a non-BCS Conference, and two games against programs from BCS Conferences); Olson, *supra* note 22 (noting that the University of Nebraska seeks to play “a competitive schedule” including at least one opponent from a BCS Conference every season).

38. Kelly Whiteside, *McKnight Carries USC in Clutch*, USA TODAY, Sept. 14, 2009, at 7C.

39. *USC 2009 Schedule/Results*, ESPN.COM, <http://sports.espn.go.com/ncf/teams/schedule?teamId=30> (last visited Oct. 14, 2010).

40. *Football–2009 Schedule & Results*, OHIO STATE BUCKEYES, [http://www.ohiostatebuckeyes.com/SportSelect.dbml?SPSID=87745&SPID=10408&D\\_B\\_OEM\\_ID=17300&Q\\_SEASON=2009](http://www.ohiostatebuckeyes.com/SportSelect.dbml?SPSID=87745&SPID=10408&D_B_OEM_ID=17300&Q_SEASON=2009) (last visited Jan. 14, 2010).

41. Mark Viera, *Hokies Come Up Short*, WASH. POST, Sept. 6, 2009, at D01.

42. *2009 Alabama Football Schedule*, CBSSPORTS.COM, <http://www.rolltide.com/sports/m-footbl/sched/alab-m-footbl-sched.html> (last visited Oct. 13, 2010).

43. *2009 Schedule & Results*, HOKIESPORTS.COM, <http://www.hokiesports.com/football/schedule/2009> (last visited Oct. 13, 2010).

MAC scheduled two games against challenging BCS Conference opponents in 2009 (the University of Tennessee and the University of Connecticut), as well as two non-conference games against lighter opposition (North Texas and FCS school California Polytechnic State University).<sup>44</sup> Meanwhile, Troy University of the Sun Belt Conference played two difficult opponents in the University of Florida and the University of Arkansas, both from the SEC, along with more winnable games against non-BCS programs Bowling Green State University and the University of Alabama-Birmingham.<sup>45</sup> Similarly, the University of Wyoming from the Mountain West Conference took on the University of Texas and the University of Colorado from the Big 12 Conference, in addition to easier games against Florida Atlantic University and FCS school Weber State University.<sup>46</sup>

While the strategy of blending a combination of both challenging and more winnable games has thus become common in college football, other colleges and universities have adopted different competitive strategies. For instance, some schools belonging to BCS Conferences have adopted the strategy of not playing any challenging non-conference games, in order to maximize their chances of being undefeated entering conference play.<sup>47</sup> Meanwhile, other schools—typically from non-BCS Conferences—take the opposite approach and schedule as many challenging opponents as possible.<sup>48</sup>

On top of deciding how many difficult teams to play, colleges and universities must also weigh the competitive implications of where the games will be held. Presently, the home team wins approximately sixty percent of the time in FBS Division I football,<sup>49</sup> meaning that schools seeking to give themselves the strongest competitive advantage will try to

44. *2009 Schedule*, CBSSPORTS.COM, <http://www.ohiobobcats.com/sports/m-footbl/archive/ohio-m-footbl-sched-2009.html> (last visited Oct. 13, 2010).

45. *2009 Football Schedule*, TROY UNIVERSITY, <http://www.troytrojans.com/schedule.aspx?path=football&schedule=12> (last visited Oct. 13, 2010).

46. *2009–2010 Schedule*, CBSSPORTS.COM, <http://www.wyomingathletics.com/sports/m-footbl/archive/wyo-m-footbl-sched-2009.html> (last visited Oct. 13, 2010).

47. See Olson, *supra* note 22 (“Several Big 12 schools tend to take on a light load of those so-called ‘creampuff’ teams from smaller conferences in the interest of playing four relatively easy games to prepare for the Big 12 season.”); Ryan Wood, *Mangino: What’s Good for ‘Cats Good for KU*, KUSPORTS.COM (Sept. 18, 2007), [http://www.kusports.com/news/2007/sep/18/mangino\\_what's\\_good\\_cats\\_good\\_ku/](http://www.kusports.com/news/2007/sep/18/mangino_what's_good_cats_good_ku/) (noting that the University of Kansas and Kansas State University have both been known to often schedule “games that weren’t expected to be tough”).

48. Walters, *supra* note 12 (noting that Fresno State University has adopted the strategy of playing the most challenging non-conference schedule possible and is willing to schedule games against “anyone, anytime, anywhere”).

49. Greg Dohmann, *Wins Aren’t Home Free: Visitors Prevailing More Frequently*, USA TODAY, Oct. 9, 2007, at 8C.

schedule most, if not all, of their non-conference games at home. However, whether for financial reasons (as will be discussed below)<sup>50</sup> or to present a challenge and prepare their teams for conference road games,<sup>51</sup> some colleges and universities may elect to play one or more non-conference games away from home. Thus, although the specific scheduling strategies used by colleges and universities may differ, most schools follow some discernable strategy when deciding what level of competition and where to play in a given football season.

In addition to considering the potential competitive implications of a non-conference game against a particular opponent, colleges and universities must also weigh the financial benefits of the potential game. Football and men's basketball are considered the two primary revenue-generating sports for most colleges and universities,<sup>52</sup> with football in particular accounting for significant profits in some programs.<sup>53</sup> Even at those colleges and universities where the football program does not generate a profit, schools must nevertheless consider the financial implications of scheduling decisions with an eye towards minimizing the losses incurred by their football teams.<sup>54</sup>

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50. See *infra* notes 59, 66 and accompanying text.

51. See Durando, *supra* note 28.

52. See, e.g., Timothy Davis, *African-American Student-Athletes: Marginalizing the NCAA Regulatory Structure?*, 6 MARQ. SPORTS L. REV. 199, 202 (1996) (noting that "Division I-A football and men's basketball [are] the most prominent revenue-producing sports."); Marc Edelman, *Reevaluating Amateurism Standards in Men's College Basketball*, 35 U. MICH. J.L. REFORM 861, 883 (2002) ("[M]ale student-athletes account for a significant percentage of revenue-generation, as men's basketball and football are the two NCAA sports with multi-million dollar television contracts."); Michael A. McCann & Joseph S. Rosen, *Sports and Eligibility—Who is Eligible to Play?: Legality of Age Restrictions in the NBA and the NFL*, 56 CASE W. RES. L. REV. 731, 749 (2006) ("The football teams and the basketball teams are generally the only way that any college can make money. The revenue they generate supports other teams at those universities."); Mitten, *supra* note 15, at 2 ("The tremendous public popularity of men's college football and basketball creates a substantial revenue-generating capacity and the prospect of increased visibility for universities."); John C. Weistart, *Setting a Course for College Athletics: Can Gender Equity Find a Place in Commercialized College Sports?*, 3 DUKE J. GENDER L. & POL'Y 191, 208 (1996) ("Primary responsibility for generating money . . . rests with the revenue-generating potential of a few sports, typically football and men's basketball.")

53. Richard T. Karcher, *The Coaching Carousel in Big-Time Intercollegiate Athletics: Economic Implications and Legal Considerations*, 20 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1, 8 (2009) ("[F]ootball by far generates the most revenue at the top revenue producing schools."). 68 of the 120 FBS football programs generated a profit from the 2004 through 2008 seasons. *2004–08 NCAA Revenues and Expenses of Division I Intercollegiate Athletics Programs Report*, THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION 1, 29, <http://www.ncaapublications.com/productdownloads/RED3ONLINE.pdf>.

54. See Jack Carey, *For Small Schools, There's a Big Payoff to Road Trips*, USATODAY.COM, (Sept. 3, 2009), [http://www.usatoday.com/sports/college/football/2009-09-02-small-school\\_payoffs\\_N.htm](http://www.usatoday.com/sports/college/football/2009-09-02-small-school_payoffs_N.htm) (noting that smaller schools not only use guaranteed

College football programs generate revenue from several sources. Some revenue comes to the college or university from its conference, which distributes profits generated from the conference's television contract(s), as well as payouts earned from conference members' participation in bowl games.<sup>55</sup> Most of the remaining revenue is generated individually by the college or university through the scheduling of home and road football games. Colleges and universities generate revenue from home games through ticket sales, sponsorship agreements, concession sales, and, in the case of some schools with particularly strong followings, by requiring fans to make significant donations to the college or university simply to obtain the right to buy tickets.<sup>56</sup> Meanwhile, non-conference road games can also generate revenue for colleges and universities, as schools negotiate so-called "guarantee" payments in exchange for agreeing to play games in the opponent's home stadium.<sup>57</sup>

The revenues produced from both home and road games can be significant. For schools with large stadiums and fervent fan bases, a single home game can generate more than five million dollars in revenue.<sup>58</sup> Meanwhile, because home games can be so lucrative, the demand for teams willing to travel to play on the road has risen dramatically in recent years, with visiting teams now able to negotiate guaranteed payments as high as \$1.2 million in exchange for playing a single road game.<sup>59</sup>

How an individual college or university best balances these competing potential revenue streams will vary from school to school. In the case of those colleges and universities with extremely strong fan support—where a sellout crowd is virtually guaranteed for every home game regardless of the quality of the opponent<sup>60</sup>—the most prudent financial strategy is relatively

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payments from road games to fund the football program, but also other non-revenue sports).

55. See Amy Christian McCormick & Robert A. McCormick, *The Emperor's New Clothes: Lifting the NCAA's Veil of Amateurism*, 45 SAN DIEGO L. REV. 495, 511–13 (2008) (discussing the role of the conferences in revenue generation and distribution).

56. *Id.* at 522 (stating that "at many schools, fans are required to make an additional 'donation' each year to the university to be eligible to purchase season tickets."); Jack Carey & Andy Gardiner, *Commercialized College: Corporate Sponsors in Spring*, USATODAY.COM, (Apr. 20, 2009), [http://www.usatoday.com/sports/college/football/2009-04-16-spring-game-sponsorship\\_N.htm](http://www.usatoday.com/sports/college/football/2009-04-16-spring-game-sponsorship_N.htm) (discussing revenues from football-related corporate sponsorships).

57. See, e.g., Carey, *supra* note 54 (discussing the frequency and use of guarantee payments).

58. Olson, *supra* note 22 (noting that the University of Nebraska generates over five million dollars for every home football game).

59. See Forde, *supra* note 13 (discussing examples).

60. *Id.* (noting that for many SEC schools, the demand for tickets is so high that they can attract "80,000 to 110,000 [fans] in the stands to see the home team play just about anyone"); Ralph D. Russo, *For Some College Teams, It Pays to Play Poorly*, ASSOCIATED PRESS, Sept. 15, 2006, available at <http://www.cstv.com/sports/m-footbl/stories/091506abb.html> ("At schools such as LSU, Michigan, Ohio State, Florida and Tennessee, fans fill 90,000-plus seats no matter who the home team plays.").

simple: maximize the number of home games while minimizing the guaranteed payments to your opposition.

However, for those schools that do not automatically sell out every home game they play, selecting the best financial strategy becomes more difficult. These schools must weigh the expected profitability of a home game against a particular opponent against the availability of a significant guarantee payment for playing on the road. For example, with respect to estimating the profitability of a home game, colleges and universities must compare the attractiveness of a game against the potential opponent for its fans (and thus how many tickets it is likely to sell) to the cost of the guaranteed payment necessary to entice the opponent to play on the road. Generally speaking, fans consider games against high-profile, competitive opponents—especially those from the BCS Conferences—to be more attractive than games against less competitive schools from the smaller, non-BCS FBS or FCS conferences.<sup>61</sup> However, because these high-profile colleges and universities generally reside near the top of the Division I food chain, they are often unwilling to travel on the road to play more than a single non-conference game per season, not only because doing so would force the high-profile school to forgo a large profit at home, but also because it risks placing the team at a competitive disadvantage by playing too many games on the road.<sup>62</sup>

In those cases where a high-profile college or university is willing to travel on the road to play, they will typically favor playing against a fellow BCS school and will generally require the host school to play at least one return game at the visiting team's stadium.<sup>63</sup> Meanwhile, when a lower-profile, non-BCS school finds a high-profile school willing to travel to play in its stadium, the larger school will often require two or three home games

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61. Zullo, *supra* note 14 (“[M]ost fans and alumni are not attracted to games with lower-caliber opponents, causing ticket sales, as well as related gameday revenue, to dip.”).

62. Jude D. Schmitt, *A Fresh Set of Downs? Why Recent Modifications to the Bowl Championship Series Still Draw a Flag Under the Sherman Act*, 14 *SPORTS LAW J.* 219, 246 (2007) (“[F]ew BCS schools are willing to play straightforward home-and-home series with non-BCS teams.”).

63. See Iliana Limon, *When It Comes to College Football, the Cash Flow Starts at the Top: The Big Schools Benefit from Scheduling Advantages*, *ORLANDO SENTINEL*, July 29, 2009, available at <http://www.allbusiness.com/sports-recreation/sports-games-outdoor-recreation/12594334-1.html> (stating that getting larger programs to agree to play on the road is difficult for the non-BCS leagues); Pete Thamel & Thayer Evans, *Playing Matchmaker for Reluctant Teams*, *N.Y. TIMES*, Sept. 6, 2008, at D1 (reporting that the BCS school the University of Cincinnati refuses to “play a major out-of-conference game without a return game”); Graham Watson, *The Key for the Non-BCS: Just Win*, *ESPN.COM*, (June 1, 2009), [http://espn.go.com/blog/ncfnation/post/\\_/id/4643/the-key-for-the-non-bcs-just-win](http://espn.go.com/blog/ncfnation/post/_/id/4643/the-key-for-the-non-bcs-just-win) (finding that teams from smaller conferences like “C-USA, the MAC and the Sun Belt [Conference] . . . rarely get home-and-home series” with opponents from larger schools).



in return.<sup>64</sup> Not only does such an agreement require the host school to give up multiple home games in future years, but these future road trips often do not come with significant guarantee payments,<sup>65</sup> meaning that the school must forgo up to several large paydays in order to secure a single home game with a high-profile opponent. This can make scheduling a marquee home non-conference game an expensive proposition for those schools that do not consistently draw at least 30,000 or 40,000 fans per game.

Accordingly, because it is difficult and expensive to schedule quality non-conference opponents at home, many schools—especially those in the lower-profile, non-BCS Conferences—find that scheduling non-conference road games, each coming with a potential guarantee of one million dollars or more, will generate significantly more revenue for the college or university than will home games. For colleges and universities that lose money on their football programs, the allure of playing at least one or two of these guarantee games is usually too strong to pass up, even if their teams are unlikely to win such games.<sup>66</sup> Therefore, while the most prudent financial scheduling strategy is relatively clear for schools with traditionally strong and supportive fan bases, those colleges and universities that do not consistently sell out all of their home games—and especially those schools which lose money on their football programs—have much more difficult financial decisions to make when drafting their football schedules.

Although competitive and financial concerns are the two primary factors for colleges and universities when deciding whether to schedule a football game against a particular opponent, a variety of other factors may also be considered in the case of a particular game. For example, one factor that has taken on increased importance in recent years is whether a potential game is likely to be selected for national television coverage.<sup>67</sup> The

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64. Zullo, *supra* note 14 (noting that agreements “in which a major conference school gets two home games and the mid-major school gets one home game over the course of three years” were popular in the mid-2000s).

65. See Tim Tucker, *Low-tier Programs Starting to Cash In*, ATL. JOURNAL-CONST., June 2, 2009, at 1C (stating that large guarantee payments are not required in home-and-home contracts). See also Russo, *supra* note 60 (reporting that some BCS Conference teams unable to afford the current going rate for guarantee games have had to agree to travel on the road to a non-BCS school’s stadium in exchange for two or more home games).

66. See Bruce Feldman, *Mailbag: Conference Rankings*, ESPN.COM, (Sept. 12, 2008),

[http://sports.espn.go.com/espn/blog/index?entryID=3583996&name=feldman\\_bruce](http://sports.espn.go.com/espn/blog/index?entryID=3583996&name=feldman_bruce) (finding that “[m]ost schools from non-BCS conferences will schedule major college powers now and then to . . . make a quick buck”); Watson, *supra* note 63 (reporting that teams from “C-USA, the MAC and the Sun Belt [Conference] . . . often play two or three major BCS opponents on the road in order to make sure they have enough money in their operating budgets for future seasons”).

67. Zullo, *supra* note 14 (stating that television exposure is an important

geographic location of a prospective opponent may also be considered, either in the case of schools avoiding the scheduling of road games requiring extensive travel,<sup>68</sup> or in cases where colleges and universities actively seek to schedule an opponent from a region of particular recruiting importance.<sup>69</sup> Other times, the continuation of a long-standing rivalry with another school may motivate colleges and universities to enter into a particular scheduling agreement.<sup>70</sup>

To make matters even more complicated, colleges and universities rarely weigh any of these motivations in isolation. For example, when scheduling a home game, a college or university may desire a particularly strong opponent for competitive reasons, but find that the cost of such an opponent is unreasonable from a financial perspective. Similarly, a school might decide that it is in its best financial interest to play all four non-conference games on the road in exchange for the largest guarantee payments possible, but hesitate when the competitive realities mean that its team will have little chance of winning a single such game.<sup>71</sup> In these cases, colleges and universities typically elect to balance the competing concerns, perhaps by scheduling less competitive but cheaper home opponents, or taking a smaller guarantee payment in order to play a more beatable team on the road.<sup>72</sup>

Because each non-conference game is designed to serve both a particular competitive and financial purpose, selecting and finalizing agreements with suitable opponents can be an extremely time-intensive endeavor.<sup>73</sup>

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consideration when making scheduling decisions, as playing on television gives universities greater national recognition, increases revenue, and helps recruit future athletes).

68. See Yanda, *supra* note 37 (reporting that few schools located on the East Coast are willing to travel to play games against universities from the Pacific-10 Conference).

69. See Daly, *supra* note 23 (quoting Northwestern head coach Pat Fitzgerald as stating that he likes to “play in geographic areas that [they]’re going to recruit in”); Limon, *supra* note 63 (finding that many larger programs are willing to play games at the University of Central Florida because the school is located in a prime recruiting area).

70. See Jack Bogaczyk, *This Lineup Should Please Fans*, CHARLESTON DAILY MAIL, Sept. 16, 2005, at 1B (noting that West Virginia University regularly plays non-conference games against regional rivals the University of Maryland and Marshall University); *Wolverines, Irish Add 20 More Years to Rivalry*, WASH. POST, July 31, 2007, at E02 (reporting that the University of Michigan and Notre Dame entered a 20-year scheduling agreement in order to ensure that their non-conference rivalry continues well into the future).

71. See Limon, *supra* note 63 (quoting Eastern Michigan University’s athletic director as stating, “You have to be careful because we absolutely rely on road games at some of these big schools to fund our entire athletics department, but we don’t want to put our team at risk of no longer being competitive . . . You have to really think about how much injuries and team morale can be hurt by playing too many of those games for money.”).

72. See *id.* (noting examples of same).

73. See Olson, *supra* note 22 (stating that scheduling “[n]egotiations can take several months” for just a single contract).

Accordingly, most schools attempt to stay well ahead of the process by scheduling their non-conference games years in advance.<sup>74</sup> This makes last-minute cancellations especially difficult to replace, as most suitable alternative candidates are no longer available to schedule a game on the particular date in question.<sup>75</sup>

Although cancellations inflict a significant burden on their peers, colleges and universities are nevertheless increasingly terminating unfinished scheduling agreements, often only months before a game is scheduled to be played.<sup>76</sup> In some cases, colleges and universities back out of these contracts after reevaluating the competitive benefits of an agreement that was entered into years in advance (as in *Louisville v. Duke*). In other cases, a college or university may back out of a previously scheduled road game in favor of a new agreement paying a significantly larger guarantee, especially when the former agreement calls for minimal liquidated damages.<sup>77</sup> Occasionally, colleges and universities will even break scheduling agreements at the behest of a television network, in order to schedule a game with guaranteed television coverage against another team.<sup>78</sup> Whatever the reason in a particular case, such breaches have become increasingly common in college football, wreaking havoc on the would-have-been opponent's well-planned schedule.

Despite this increase in the breach of football scheduling agreements, such disputes have historically been resolved outside of the litigation process, for several reasons. As an initial matter, many colleges and universities include liquidated-damage provisions in their scheduling agreements in order to minimize the harm inflicted by last-minute cancellations. These provisions typically take one of two forms, either requiring a specific payment in the event of a breach, without consideration of any mitigating factors, or alternatively requiring a financial payment only in the event that a comparable or suitable replacement opponent is not found.<sup>79</sup>

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74. Mark Hales, *The Antitrust Issues of NCAA College Football Within the Bowl Championship Series*, 10 SPORTS LAW. J. 97, 115 (2003); Zullo, *supra* note 14.

75. See Tony Barnhart, *Schools Race to Plug Holes in Schedules*, ATL. JOURNAL-CONST., Jan. 24, 2008, at 1D (quoting University of Kentucky Athletic Director Mitch Barnhart as stating that finding a last-minute replacement opponent "is very complicated—and expensive"); Walters, *supra* note 12 (noting that finding a last-minute replacement can be extremely difficult); Zullo, *supra* note 14 (explaining that last-second cancellations can quickly put "the host school's schedule . . . in disarray").

76. See Walters, *supra* note 12 (listing examples).

77. Barnhart, *supra* note 75 (reporting that Tulsa University decided to pay Texas Tech University \$150,000 in liquidated damages in order to enter a last-minute agreement with the University of Arkansas paying \$850,000); Forde, *supra* note 13 (noting general trend).

78. See Thamel & Evans, *supra* note 63 (discussing the role of ESPN in scheduling college football games); see also Walters, *supra* note 12.

79. Zullo, *supra* note 14.

In the case of the former category of agreements—automatically requiring a financial payment in the event of any breach—litigation is avoided when the breaching party simply pays the other party the agreed-upon damages. However, even in those cases where no liquidated damages provision was included in the agreement, or when the parties dispute whether the applicable mitigation provisions have been triggered, litigation has still been rare. In some cases, the affected college or university may simply decide that the cost of litigation outweighs the potential benefit. In other cases, the college or university may fear developing a reputation of being overly litigious, a stigma that may cause potential opponents to become leery of scheduling games with the school in the future.<sup>80</sup>

In any event, given the rapidly escalating value of these football scheduling agreements,<sup>81</sup> and the increasing frequency with which they are broken,<sup>82</sup> litigation is likely to become more common in the future, making *Louisville v. Duke*—the only existing precedent on the issue—all the more important.

## II. A CRITICAL ASSESSMENT OF *LOUISVILLE V. DUKE*

To date, only one court has confronted the issue of how to legally determine the sufficiency of a replacement opponent following the breach of a college football scheduling agreement. As discussed above, in *Louisville v. Duke*,<sup>83</sup> Duke cancelled the final three games of a four-game scheduling agreement with Louisville following an embarrassing 40-3 loss in the initial game under the contract.<sup>84</sup> Louisville sued, seeking payment under the agreement's liquidated damages clause, which provided that the breaching party must pay \$150,000 for each cancelled game if the non-breaching college or university was unable to schedule a replacement game against "a team of similar stature."<sup>85</sup>

The suit was ultimately dismissed by the Kentucky state court upon

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80. See *Antitrust Implications of the College Bowl Alliance: Hearing Before the Subcomm. on Antitrust, Business Rights and Competition, S. Comm. on the Judiciary, 105th Cong. 92 (1997)* (statement of Gary R. Roberts, then-Professor of Law and Sports Law Program Director, Tulane Law School) (noting that college athletics officials disfavor litigation against other universities not only due to the potential stigma affecting their ability to schedule future competitions, but also for fear of alienating potential future employers); see also K. Todd Wallace, *Elite Domination of College Football: An Analysis of the Antitrust Implications of the Bowl Alliance*, 6 *SPORTS LAW J.* 57, 84–85 (1999).

81. See *supra* notes 13, 59 and accompanying text.

82. See Walters, *supra* note 12.

83. *Univ. of Louisville v. Duke Univ.*, No. 07-CI-1765 (Franklin Cir. Ct. June 19, 2008), available at <http://www.ncbusinesslitigationreport.com/Duke%20Opinion.pdf>.

84. *Id.*

85. COMPETITION AGREEMENT, *supra* note 1; see also *Louisville v. Duke*, No. 07-CI-1765 at 2.

Duke's motion for judgment on the pleadings.<sup>86</sup> In its opinion, the court focused specifically on the "team of a similar stature" language from the agreement's liquidated damages provision, interpreting it to mean two teams "on the same level."<sup>87</sup> The court determined that this standard "could not be any lower" in the case before it since Duke had won only one of its twelve games during the 2007 season.<sup>88</sup> Therefore, the court believed that it was unnecessary "to conduct an in-depth analysis of the relative strengths and weaknesses of the breaching team and its potential replacements,"<sup>89</sup> and instead held that "any team designated by the NCAA as a Division I school, whether in the [FBS] or the [FCS]" competed at the same level as Duke, and thus was a team of similar stature as the Blue Devils.<sup>90</sup> Because Louisville could not establish that any of its opponents were not Division I colleges or universities, the court held that the action must be dismissed.<sup>91</sup>

The *Louisville v. Duke* court's analysis was flawed in several respects. As an initial matter, the court erred by misapplying basic black letter contract law. Specifically, it is well established that in breach of contract cases, courts attempt to place the injured party "in as good a position as he would have been in had the contract been performed,"<sup>92</sup> as judged by the parties' expectations at the time of contract formation, not at the time it was breached.<sup>93</sup> Despite this well-established principle, the court in *Louisville*

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86. *Louisville v. Duke*, No. 07-CI-1765 at 1.

87. *Id.* at 2.

88. *Id.* at 3.

89. *Id.* at 2.

90. *Id.* at 4.

91. Technically, the court dismissed the suit with respect to Louisville's claim for damages for the 2007 and 2008 seasons, while holding that the claim arising out of the 2009 season was not yet ripe for adjudication. *Id.* at 1.

92. RESTATEMENT (SECOND) OF CONTRACTS § 344(a) (1981). *See also* Karcher, *supra* note 53 at 54 ("A bedrock principle of contract law is that 'damages for breach of contract should be sufficient 'to place the plaintiff in the position he would be in if the contract had been fulfilled.'") (citing *Eckles v. Sharman*, 548 F.2d 905, 910 (10th Cir. 1977) (quoting C. MCCORMICK, HANDBOOK OF THE LAW ON DAMAGES § 137, at 560 (1935))).

93. *RealNetworks, Inc. v. DVD Copy Control Assoc., Inc.*, 641 F.Supp.2d 913, 948 (N.D. Cal. 2009) ("Under established principles of contract interpretation . . . the Agreement must be interpreted to reflect the mutual intent and reasonable expectations of the parties *at the time of contracting.*") (emphasis in original); *VTech Holdings Ltd. v. Lucent Techs. Inc.*, 172 F.Supp.2d 435, 441 (S.D.N.Y. 2001) ("[T]he essence of contract interpretation . . . is to enforce a contract in accordance with the true expectations of the parties in light of the circumstances existing at the time of the formation of the contract.") (citation omitted); *District of Columbia v. District of Columbia Pub. Serv. Comm'n*, 963 A.2d 1144, 1158 (D.C. 2006) (noting that the court's role is "to interpret the contract's terms as of the time of its formation in light of what the parties expected at the time"); RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 92 at § 344(a) cmt. a ("Ordinarily, when a court concludes that there has been a breach of contract, it enforces the broken promise by protecting the expectation that the injured party had when he made the contract.").

*v. Duke* focused its analysis on Duke's record during the 2007 season, the season in which the first cancelled game would have been played, rather than considering Duke's stature at the time the contract was formed in 1999. Thus, even if one accepts the court's argument that in 2007 any Division I opponent would have been a sufficient replacement for a one-win Duke squad (a contention rejected below), the court's analysis was nevertheless flawed because Duke was not coming off a 1-11 record when the contract was initially entered in 1999. Rather, Duke had just completed a 4-7 season in which it was a middle-of-the-pack ACC team.<sup>94</sup>

However, more significantly for future cases, the *Louisville v. Duke* court also erred by interpreting the breached agreement's "team of similar stature" language in a manner inconsistent with the realities of modern college football scheduling. Contrary to the court's suggestion, colleges and universities do not view all Division I schools as equally attractive opponents, from either a competitive or financial perspective. Competitively speaking, the *Louisville v. Duke* court erroneously concluded that just because Duke finished with a record of 1-11 in the 2007 season, it was necessarily one of the worst teams in Division I. In reality, Duke's win-loss record was not only a function of the quality of the Blue Devils' team, but also the quality of the opposition that it faced. As a member of the ACC, Duke played a series of conference games against extremely strong competition. For example, the Sagarin computer rankings (one of the computer rating systems factored into the BCS Standings), ranked Duke's 2007 schedule as the twenty-eighth most difficult in Division I.<sup>95</sup> Had Duke played in a weaker conference against easier competition, its record would likely have been significantly better. Indeed, despite its 1-11 record, the Sagarin system rated Duke the 109th best football team out of the 242 total Division I colleges and universities, and better than thirty-one other FBS teams, including a number of schools with significantly better win-loss records.<sup>96</sup>

Moreover, even if one were to accept that Duke really was among the worst teams in the nation, that fact alone does not mean that any other Division I team would have been a replacement of similar competitive stature. As noted above, colleges and universities do not always want to schedule the most competitive teams possible in non-conference games. Rather, most colleges and universities attempt to build a schedule with a blend of teams, some more competitive than others, in order to help ensure a winning season and bowl eligibility.<sup>97</sup> It is quite possible that Louisville entered its scheduling agreement with Duke specifically because it viewed

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94. 1998 *Standings*, *supra* note 2.

95. Jeff Sagarin *NCAA Football Ratings*, USATODAY.COM, <http://www.usatoday.com/sports/sagarin/fbt07.htm> (last visited Oct. 14, 2010).

96. *Id.*

97. See *supra* notes 37-46 and accompanying text.

the Blue Devils as a weak program, and thus a game that the Cardinals could expect to count as one of its requisite six wins to become bowl-eligible. In that case, Louisville would not view a stronger FBS opponent as being of a similar stature to Duke, nor necessarily for that matter any FCS team (as only one win versus an FCS team can count for purposes of bowl eligibility, and only then if it comes against a FCS team awarding a sufficient number of scholarships).<sup>98</sup> In fact, Duke's poor record and FBS status likely dramatically narrowed the pool of potential replacement opponents of a similar stature.<sup>99</sup>

It is also possible that despite the Blue Devils' lowly record, a game versus Duke would have actually improved the Cardinals' strength-of-schedule calculations, in view of the fact that the BCS' computer rankings consider not only a team's opponents' win-loss record, but also the strength of its opponents' opponents.<sup>100</sup> Because Duke is a member of the highly competitive ACC, a game versus the Blue Devils thus could have resulted in a significant boost to the Cardinals' strength of schedule—as evidenced by Duke's own schedule having been rated the twenty-eighth most difficult in the country—despite Duke itself not being a particularly competitive opponent. Therefore, by failing to consider any of Louisville's competitive motivations in entering its scheduling agreement with the Blue Devils, the *Louisville v. Duke* court erred in summarily concluding that all Division I teams were of a similar stature as Duke.

Furthermore, the *Louisville v. Duke* court also erred by not giving any consideration to Louisville's potential financial motivations when scheduling its games against the Blue Devils. Although Duke had a poor win-loss record in 2007, it is nevertheless a high-profile university in a major BCS Conference. Thus, home games against Duke may have had significant appeal to Louisville fans, even if the Blue Devils did not field the most competitive team. This heightened appeal would likely have enabled Louisville to sell more tickets for a game against Duke than a lower-profile FBS or FCS opponent, a factor which should be relevant in assessing whether two teams are truly of a "similar stature."

Despite these analytical failings, the *Louisville v. Duke* court nevertheless may have ultimately reached the correct outcome based upon the merits of the case. Specifically, Louisville apparently replaced Duke on its 2007 schedule with a game against the University of Utah ("Utah"),<sup>101</sup> a

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98. See *supra* note 26 and accompanying text.

99. See Gabe Feldman, *We're Number 119! More on Duke Football*, SPORTS LAW BLOG, (Sept. 18, 2008), <http://sports-law.blogspot.com/2008/09/were-number-119-more-on-duke-football.html> (noting that "[o]nly a few teams can claim to be the 'best' or the 'worst,' so it would seem to be more difficult to replace teams on either end of the spectrum.").

100. See *supra* notes 34–35 and accompanying text.

101. Univ. of Louisville v. Duke Univ., No. 07-CI-1765 at 5 (Franklin Cir. Ct. June 19, 2008), available at [http://www.ncbusinesslitigationreport.com/Duke Opinion.pdf](http://www.ncbusinesslitigationreport.com/Duke%20Opinion.pdf).

team that had developed a strong reputation despite not belonging to a BCS Conference. Utah's reputation thus likely helped mitigate the financial effect of Duke's cancellation on Louisville's expected ticket sales, although perhaps not offering the Cardinals an equally predictable chance of victory (for the reasons discussed below).<sup>102</sup> Indeed, Louisville drew nearly 41,000 fans for its game against Utah,<sup>103</sup> slightly more than its average home attendance for that season of just under 40,000 fans per game.<sup>104</sup>

Perhaps more significantly, though, the *Louisville v. Duke* court noted in its opinion that Louisville did not argue that any of the teams on its 2007 or 2008 schedules were inferior to Duke,<sup>105</sup> and failed to propose an alternative standard for the "team of similar stature" language, instead simply arguing that the term was inherently ambiguous.<sup>106</sup> Therefore, it appears that Louisville failed to make a sufficient case that the replacement opponents it scheduled were of a significantly different stature than Duke, either competitively or economically.

However, even if the *Louisville v. Duke* court ultimately reached the correct outcome given the posture of the case, the analytical errors discussed above render the decision an insufficient precedent for future courts wrestling with these issues. A better analytical framework is needed.

### III. THE IMPLICATIONS OF *LOUISVILLE V. DUKE* FOR FUTURE SCHEDULING AGREEMENTS AND RELATED LITIGATION

Given the questionable approach adopted by the court in *Louisville v. Duke*, the decision raises implications for both how colleges and universities draft future football scheduling agreements, as well as how future courts deal with assessing damages in forthcoming cases involving breached scheduling agreements.

#### A. Drafting Better Scheduling Agreements

As an initial matter, colleges and universities should take the *Louisville v. Duke* decision into account when drafting future scheduling agreements, not only for football games, but potentially for other revenue-generating

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Louisville contested this finding, but failed to offer any evidence to the contrary. *Id.*

102. See *infra* notes 127–129 and accompanying text.

103. *Utah vs. Louisville Cardinals*, Oct. 5, 2007, <http://www.uofl sports.com/sports/m-footbl/stats/2007-2008/game06.html> (last visited Oct. 14, 2010).

104. *Louisville Cardinals Cumulative Season Statistics*, <http://www.uofl sports.com/sports/m-footbl/stats/2007-2008/teamcume.html> (last visited Oct. 14, 2010).

105. *Louisville v. Duke*, No. 07-CI-1765 at 3.

106. *Id.*



sports as well. As noted above,<sup>107</sup> most football scheduling contracts presently contain some form of a liquidated damages provision, either requiring the breaching party to make a specific financial payment without consideration of any mitigating factors, or alternatively requiring a financial payment only in the event that a comparable or suitable replacement opponent is not found.<sup>108</sup>

Given the broad interpretation of the “team of similar stature” clause by the *Louisville v. Duke* court,<sup>109</sup> colleges and universities should reevaluate the use of similar mitigating language in their liquidated damages provisions. While this article has argued that the court’s interpretation of that clause was flawed,<sup>110</sup> it nevertheless remains the only decided case on point. Therefore, if a college or university contests the breach of an agreement containing an analogous liquidated damages provision in court, it risks a finding that any Division I college or university constitutes a comparable or suitable replacement opponent.

Colleges and universities that wish to protect themselves against such an outcome should use more precise terminology when drafting liquidated damages provisions in the future. The safest approach would be to simply dispense with any mitigating language at all, and instead require that liquidated damages be paid in the event of any breach irrespective of the comparability of the ultimate replacement opponent. Alternatively, rather than forgoing liquidated damages whenever a “similar” opponent is scheduled, schools should instead more specifically identify the type of replacement opponent that must be found to forgo the payment of liquidated damages. For instance, colleges and universities could specify that the replacement opponent must come from the ranks of FBS, or perhaps even a particular conference or group of conferences—such as the BCS Conferences—in order to avoid the payment of liquidated damages, as is appropriate for the particular agreement being negotiated.

Although not considered explicitly by the court in *Louisville v. Duke*, another factor that colleges and universities must consider when drafting a liquidated damages provision is its likely enforceability should it be challenged in court. Historically, the propriety of rejecting liquidated damages provisions as unenforceable has been the subject of significant debate amongst both courts and scholars.<sup>111</sup> Today, most courts refuse to enforce a liquidated damages clause that goes beyond simply compensating the other party for its actual injury, and instead serves to unfairly penalize

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107. See *supra* note 79 and accompanying text.

108. Zullo, *supra* note 14.

109. See *supra* notes 86–91 and accompanying text.

110. See *generally supra* Part II.

111. See *generally* Larry A. DiMatteo, *A Theory of Efficient Penalty: Eliminating the Law of Liquidated Damages*, 38 AM. BUS. L.J. 633 (2001) (discussing various perspectives).

the breaching party.<sup>112</sup> Liquidated damages provisions constitute unlawful penalties when they are unreasonable in light of either the anticipated injury at the time the contract is formed, or the actual injury caused by the breach viewed retrospectively.<sup>113</sup> Additionally, courts are more likely to enforce a liquidated damages provision when the actual amount of damage accruing as the result of the breach is difficult to assess.<sup>114</sup>

The United States Court of Appeals for the Sixth Circuit specifically considered the enforceability of a liquidated damages provision in the college football context in the 1999 case of *Vanderbilt University v. DiNardo*.<sup>115</sup> In *DiNardo*, Vanderbilt University (“Vanderbilt”) sued its former head football coach in order to enforce the liquidated damages provision in his employment contract after DiNardo left the school to become the head coach at Louisiana State University.<sup>116</sup> Among other things, DiNardo argued that the liquidated damages provision—which required him to pay Vanderbilt his net salary for each remaining year of service under the agreement in the event of a breach<sup>117</sup>—was an unlawful penalty and should not be enforced.<sup>118</sup> The court rejected this argument, concluding that the liquidated damages provision was reasonable in light of the likely damages resulting from a breach, damages that “would be difficult to measure.”<sup>119</sup> Specifically, the court quoted the district court opinion, which found that the loss of a head football coach would result in “damage beyond the cost of hiring a replacement coach,” including damage to “alumni relations, public support, football ticket sales, contributions, etc.,” all of which would be difficult, if not impossible, to precisely assess.<sup>120</sup>

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112. See, e.g., U.C.C. § 2-718; *Vanderbilt Univ. v. DiNardo*, 174 F.3d 751, 755 (6th Cir. 1999); *Carr-Gottstein Props. v. Benedict*, 72 P.3d 308, 310-11 (Ala. 2003); *Tal Fin. Corp. v. CSC Consulting, Inc.*, 844 N.E.2d 1085, 1093 (Mass. 2006); *Berens and Tate, P.C. v. Iron Mountain Info. Mgmt., Inc.*, 747 N.W.2d 383, 387 (Neb. 2008); *Boots, Inc. v. Prempal Singh*, 649 S.E.2d 695, 697 (Va. 2007). See also Daniel Browder, Comment, *Liquidated Damages in Montana*, 67 MONT. L. REV. 361, 377 (2006); Charles Calleros, *Punitive Damages, Liquidated Damages, and Clauses Pénales in Contract Actions: A Comparative Analysis of the American Common Law and the French Civil Code*, 32 BROOK. J. INT’L L. 67, 73 (2006); Robert A. Hillman, *The Limits of Behavioral Decision Theory in Legal Analysis: The Case of Liquidated Damages*, 85 CORNELL L. REV. 717, 726 (2000); Paul Bennett Marrow, *The Unconscionability of a Liquidated Damage Clause: A Practical Application of Behavioral Decision Theory*, 22 PACE L. REV. 27, 32-34 (2001).

113. Calleros, *supra* note 112, at 74.

114. Browder, *supra* note 112, at 377.

115. *DiNardo*, 174 F.3d at 751-56.

116. *Id.* at 753.

117. *Id.* at 753-54.

118. *Id.* at 753.

119. *Id.* at 756.

120. *Id.* (quoting *Vanderbilt Univ. v. DiNardo*, 974 F. Supp. 638, 642 (M.D. Tenn. 1997)).

Although *DiNardo* does not present a directly analogous case, it nevertheless provides a valuable precedent for purposes of determining the enforceability of liquidated damages provisions in college football scheduling agreements. Similar to the wide-ranging potential damage resulting from the loss of a head football coach noted by the court in *DiNardo*, the breach of a college football scheduling agreement can also affect a school in a variety of ways that are difficult to assess, including ticket sales, alumni donations, public support, and media coverage. For example, if a college or university loses a previously scheduled home game against a particularly compelling opponent, that breach might not affect just ticket sales on the day in question, but may also result in lost season-ticket sales and alumni donations, especially if the remaining schedule is not nearly as attractive. Similarly, if the ultimate replacement opponent is significantly stronger or weaker competitively than the breaching college or university, the breach may also dampen the affected school's chances of reaching a bowl game (in the case of a stronger replacement) or competing for a national championship (in the case of a weaker opponent), both of which could have a significant impact on alumni relations, public support, media coverage, and financial donations.

Therefore, damages accruing from college football scheduling agreements appear to possess the requisite difficulty of calculation some courts look for when approving a liquidated damages provision. Accordingly, the remaining factor for colleges and universities to consider when drafting a liquidated damages provision is whether the clause calls for unreasonably high damages compared to either the anticipated or actual harm, and thus runs the risk of being declared an unlawful penalty.<sup>121</sup> While the appropriateness of liquidated damages provisions will of course ultimately vary on a case-by-case basis, the recent escalation in the required guaranteed payments necessary to schedule even a single non-conference football game—currently over one million dollars per game in some cases<sup>122</sup>—provides colleges and universities with a strong reasonableness argument in support of significant liquidated damages provisions.

Thus, while colleges and universities can never guarantee that a court will uphold a particular liquidated damages provision, by drafting such clauses with an eye towards the ruling in *Louisville v. Duke*, schools can better protect themselves should a prospective opponent later decide to cancel a previously scheduled game.

#### B. A Recommended Framework for Future Courts Considering Breach of College Football Scheduling Agreement Cases

In addition to the best practices for drafting college football scheduling

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121. Calleros, *supra* note 112, at 74.

122. See *supra* note 13 and accompanying text.

agreements, the *Louisville v. Duke* opinion also raises implications for courts deciding similar cases in the future. The issue of the suitability of a replacement opponent may arise in either of two contexts. First, the issue could come up when determining the applicability of a liquidated damages provision where damages are due only if the aggrieved party cannot find a sufficient replacement opponent, as was the case in *Louisville v. Duke*. Given the common use of liquidated damages clauses in football scheduling contracts,<sup>123</sup> this is probably the most likely scenario. However, in the case of a breached scheduling agreement without a liquidated damages provision, the court may need to consider the suitability of the non-breaching college or university's replacement opponent as part of its damages analysis. In either scenario, future courts should reject the *Louisville v. Duke* precedent, and instead assess the suitability of the replacement opponent in light of the affected college or university's relevant motivations for entering the original contract.

The first factor that courts will generally need to consider is the affected college or university's competitive motivations for entering the original scheduling agreement. As discussed above, colleges and universities employ different competitive strategies when drafting their non-conference football schedules.<sup>124</sup> In many cases, schools will seek a mix of one or two competitive teams along with several home games against less competitive opponents, with each specific game intended to fill a particular role in the overall scheduling scheme.<sup>125</sup> In other cases, a college or university may have elected to schedule only highly competitive or non-competitive opponents.<sup>126</sup> Whatever the case, courts should attempt to understand the aggrieved college or university's competitive scheduling strategy, and then assess where the cancelled game or games fit into that overall scheme.

Once the court understands the college or university's scheduling strategy, it can then assess the sufficiency of the replacement opponent. In this regard, the court should compare the expected competitiveness of the breaching school at the time the original agreement was entered—considering not only the college's or university's win-loss record, but also its conference affiliation and computer rankings—with that of the ultimate replacement opponent. While it is unlikely that the original and replacement opponents will ever be exact competitive equals, this analysis will enable courts to better gauge the relative similarity of the replacement opposition to the breaching college or university.

For instance, if the court in *Louisville v. Duke* had employed this analysis with respect to the cancelled 2007 Cardinals-Blue Devils game, it

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123. See Zullo, *supra* note 14 (noting that scheduling agreements typically include a buyout provision).

124. See *supra* notes 23, 37–48 and accompanying text.

125. See *supra* notes 37–46 and accompanying text.

126. See *supra* notes 47–48 and accompanying text.

would have compared the competitive status of Duke in 1999 (a team that had just finished tied for sixth in the challenging ACC with a 4-7 overall record, and a computer ranking of eighty-fifth in the country),<sup>127</sup> with that of its apparent replacement Utah<sup>128</sup> (a team that went 8-5 in 2006, finishing third in the slightly less competitive Mountain West Conference, but with a computer ranking of forty-sixth in the country).<sup>129</sup> In that case, the question of whether Utah served as a sufficient competitive replacement for Duke would hinge on whether the Cardinals intended for the Blue Devils to serve as a challenging opponent (in which case Utah likely served as a reasonable replacement), or as an expected win (in which case Utah probably was not a team of reasonably similar stature). Similarly, had the record revealed that Louisville was forced to replace Duke on its schedule with a much less competitive team from the FCS, or with one of the most competitive FBS teams in the country, the analysis would again hinge on Louisville's competitive purpose in scheduling the Duke game.

In addition to assessing competitive motives, many cases will also require courts to consider the affected college or university's financial motivations for entering into the original scheduling agreement. For example, in a case where the sufficiency of a substitute home opponent is at issue, courts should consider whether a game against the originally scheduled opponent would have had similar appeal to the host school's fans as the game against the eventual replacement. In the case of *Louisville v. Duke*, the court thus should have considered whether Louisville would have reasonably expected to sell significantly more tickets to a home game versus Duke than a game against Utah. Additionally, in cases where no liquidated damages clause exists, the difference in guarantee payments for the cancelled and replacement games will also be highly relevant to the court's calculation of damages.

The specific applicability and weighting of these factors will vary by case. As noted above, college and universities will often balance competitive and financial motivations when entering a particular scheduling agreement,<sup>130</sup> a balancing that courts should consider when assessing the sufficiency of a replacement opponent. In other cases, however, the record will reflect that a college or university was primarily driven by only competitive or financial concerns when scheduling a game. Moreover, courts may also need to consider the relevancy of additional

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127. Jeff Sagarin *NCAA Football Ratings*, USATODAY.COM, <http://www.usatoday.com/sports/sagarin/fbt98.htm> (last visited Oct. 14, 2010); see also *1998 Standings*, *supra* note 2.

128. See *supra* note 101 and accompanying text.

129. *2006 College Football Standings*, COLLEGEFOOTBALLPOLL.COM [http://www.collegefootballpoll.com/2006\\_archive\\_standings.html](http://www.collegefootballpoll.com/2006_archive_standings.html) (last visited Oct. 14, 2010); Jeff Sagarin *NCAA Football Ratings*, USATODAY.COM, <http://www.usatoday.com/sports/sagarin/fbt06.htm> (last visited Oct. 14, 2010).

130. See *supra* notes 71–72 and accompanying text.

factors, such as whether the cancelled or replacement games were scheduled to be televised, or whether a historic rivalry was involved.<sup>131</sup> While these secondary factors are unlikely to drive the analysis in most cases—and often may not be implicated at all—they may nevertheless sometimes assist the court, particularly in difficult cases.

Whatever the case, by comparing the affected college or university's competitive and financial motivations when initially entering the breached agreement to those served by the eventual replacement opponent, future courts will be able to more accurately determine whether a sufficiently similar or suitable replacement was ultimately found, and what, if any, damages are owed.

#### IV. CONCLUSION

This article has considered the increasingly common occurrence of breached college football scheduling agreements by first exploring the modern trends in college football scheduling, and then critically evaluating the *Louisville v. Duke* decision, before finally offering suggestions to colleges, universities, and courts dealing with college football scheduling agreements. This article has argued that colleges and universities should take reasonable measures to protect themselves when drafting scheduling agreements, while courts need to develop a more sensible analytical framework in order to accurately assess the harm inflicted on a college or university by such a breach. In particular, future courts should primarily consider the sufficiency of a replacement opponent in view of both the non-breaching college's or university's competitive and financial motivations at the time the original scheduling agreement was executed. This framework will allow future courts to assess the sufficiency of a replacement opponent more accurately, and in the process help to ensure that colleges and universities affected by a breached scheduling agreement are more fully and fairly compensated for their harm.

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131. See *supra* notes 67–70 and accompanying text.



# THE ACADEMY AND THE PUBLIC PERIL: MENTAL ILLNESS, STUDENT RAMPAGE, AND INSTITUTIONAL DUTY

HELEN H. DE HAVEN\*

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## INTRODUCTION: THE ACADEMY AND THE PUBLIC PERIL

### A. Surveying the Work: A View from the Top

This is the author's second article on rampage shootings in higher education.<sup>1</sup> As promised in the first, it points the way toward a model of duty to which academic institutions may be held accountable if they fail to prevent acts of extreme violence by students. It is framed in terms of the mental health aspects of the rampage phenomenon. The structure was suggested by a question raised at a meeting of the Board of Directors of a law school where the author presented her research in 2008, less than a year after the shooting at Virginia Tech: "A certain number of people are crazy enough to commit mass murder, and some of them end up in universities and professional schools. How can we be expected to do anything about that?"

The same question is asked, one way or another, in the corporate boardrooms of the academy whenever campus violence by students becomes an issue.<sup>2</sup> This article is a considered response. It shows why institutions of higher education can indeed be expected to do something

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1. See Helen de Haven, *The Elephant in the Ivory Tower: Rampage Shootings in Higher Education and the Case for Institutional Liability*, 35 J.C. & U.L. 503, 607-12 (2009).

2. In 1905, the President of the Massachusetts Institute of Technology wrote: The American university, whether supported by private gift or by the state, is conducted under an administrative system which approximates closer and closer as time goes on that of a business corporation. The administrative power is lodged in a small body of trustees or regents, who are not members of the university community. Henry S. Pritchett, *Shall the University Become a Business Corporation?*, THE ATLANTIC MONTHLY, Vol. 96: 289, 293 (Sept. 1905). It is with that historic trend in mind and to address those particular holders of administrative power that the adjective "corporate" is used in this article.

about specific manifestations of mental illness in the student body and why, if we do not take reasonable preventive measures, we should be held responsible for the violence that may result.

This article tells a number of true stories. In each, the facts are either adjudicated or otherwise officially reported. The strong narrative component is deliberate. Facts, as the common law process understands very well, are the essential organic soil of the growing and changing law. Moreover, detailed case studies are the best way of examining and drawing conclusions about rare events such as campus killings, about which there is insufficient empirical data.<sup>3</sup> Examining actual cases allows us to understand the subtle and intricate dynamics of campus organization and academic relationships that should determine the boundaries and the content of an institutional duty of care. Not knowing the relevant stories keeps us from seeing where our duty lies, because it permits continuing denial of the way things really are.

Each of the next three sections of this article is organized around one primary story. The first is the famous *Tarasoff* case<sup>4</sup> arising from the 1969 murder of an undergraduate student at Berkeley by a graduate student; the student killer had threatened to “get even with her” during a session with his university-employed psychiatrist several weeks earlier. The second story is the 1995 shooting spree at Chapel Hill by a law student who, as a condition of remaining enrolled, was taken for treatment to the university psychiatric clinic by a law school dean; his condition was misdiagnosed at the clinic, and the progression of his illness was not adequately monitored. The third story is the 2007 rampage at Virginia Tech by an undergraduate student whose teachers repeatedly voiced concerns to university administrators and mental health professionals about his obsession with violence and his extraordinary social behavior; yet, he was sent away without treatment or follow-up each time he presented himself at the university clinic. Other cases are examined briefly—in particular, four recent cases of campus suicide discussed in Section IV.C.

The Berkeley, Chapel Hill, and Virginia Tech killings present useful commonalities of fact: student murderers, mental health professionals, campus police actors, university health care services, and civil court actions. Each story forms the basis for exploring an aspect of tort duty—foreseeability, preventability, special relationships, voluntary undertakings—and for illustrating the weaknesses of the traditional tort model when applied to academic settings. The three cases are also logically related stepping stones from the past into the present. Educational institutions are not static entities, and the path to the duty charted here moves from the 1960s to arrive on today’s campus. Section IV of the

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3. See de Haven, *supra* note 1, at 516 n.27.

4. *Tarasoff v. Regents of Univ. of Cal.*, 108 Cal. Rptr. 878 (Cal. Ct. App. 1973) [*hereinafter Tarasoff*].

article provides an overview of change, as student rampages are becoming an increasingly foreseeable peril of academic life and as new resources are being developed for assessing and treating disturbed and disturbing students. Section IV ends by pointing toward a model of legal responsibility that supports the creation of safer academic spaces. The model emphasizes the prevention as well as the foreseeability of violent student behavior. It acknowledges the administrative relationships of campus organization. It reinforces the institution's capacity to communicate relevant information about disturbed students and to coordinate delivery of mental health services. The model respects the educational goals of inclusiveness and diversity in the student body, supports better training of faculty and staff in identifying and managing troubled and troubling students, and encourages college and university administrators to heed the warning signs of mental disturbance and to manage the situation promptly and effectively in ways that reduce the potential for violent outcomes.

In examining these narratives of violence and the lawsuits that resulted, the author's hope is that all of us, including our corporate directors, may come to understand why the academy should accept its inextricably intertwined, collectively-held legal duties: to provide effective treatment for mentally-ill students and to safeguard educational spaces against public displays of anti-institutional violence.

#### B. Choosing the Period: College in the 1960s

Between 1965 and 1972, when many of the current elders of the academic and legal professions were in college or post-graduate school, the United States experienced the worst period of turmoil, confrontation, and violence between students and institutions of higher learning since before the Civil War.<sup>5</sup> Many events of the late 1960s still darken the collective memory and influence current views of campus violence, but two of these events serve as points of departure because they engage the triple themes of madness, murder, and institutional mental health services. They are useful referents for the question that has been posed: what is the academy's duty, these days, if any, when it comes to extreme violence by students who are mentally ill?

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5. See, e.g., *The Report of the President's Commission on Campus Unrest* (1970) [hereinafter *The Scranton Report*], available at <http://www.eric.ed.gov/PDFS/ED083899.pdf> (last visited May 3, 2010); Alan E. Bayer & Alexander W. Astin, *Violence and Disruption on the U.S. Campus, 1968-1969*, 4 EDUC. REC. 337 (1969) (American Council on Education); CHRISTOPHER J. LUCAS, *AMERICAN HIGHER EDUCATION: A HISTORY* 275-283 (2d ed. 2006); MARK EDELMAN BOREN, *STUDENT RESISTANCE: A HISTORY OF THE UNRULY SUBJECT* 138-146, 171-183, 186-192 (2001).

### 1. Austin, Texas: The Sniper in the University Tower

In the first event, on August 1, 1966, Charles Whitman, an undergraduate student at the University of Texas, shot forty-two people from the observation deck of the University Tower at Austin.<sup>6</sup> Four months before the shooting, Whitman, a twenty-five year old former Marine sharpshooter, made a single, voluntary appointment with University of Texas Health Center staff psychiatrist M. D. Heatly.<sup>7</sup> At the time, Dr. Heatly noted his patient “had fantasized about ‘going up on the Tower with a deer rifle and shooting people.’”<sup>8</sup> He also observed that Whitman “seemed to be oozing with hostility.”<sup>9</sup> The psychiatrist made no formal threat assessment, prescribed no medication, and alerted no authorities.<sup>10</sup> He simply advised Whitman to schedule another appointment in a week and to call him in the meantime if he needed to talk.<sup>11</sup> Whitman never called and did not return.<sup>12</sup> Neither Dr. Heatly nor the University clinic ever attempted to follow up with him; nor did anyone at the clinic think to warn city or University officials that Whitman might pose a threat to community safety.<sup>13</sup>

Whitman’s sniper attack was the first and, for many years, the worst school shooting in United States history. Not until the Virginia Tech rampage in 2007 would another such act of mass violence result in so many casualties. The Texas Tower shooting realized a previously unthinkable assault on the safety and integrity of academic space. It shook the entire

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6. Marlee Mcleod, *Charles Whitman: The Texas Tower Sniper, Back in Austin*, [http://www.trutv.com/library/crime/notorious\\_murders/mass/whitman/austin\\_3.html](http://www.trutv.com/library/crime/notorious_murders/mass/whitman/austin_3.html). (last visited Jul. 21, 2009).

7. *Id.*

8. *Id.*

9. *Id.*

10. Whitman was prescribed Valium by another doctor and self-medicated with the amphetamine Dexedrine. *Id.*

11. *Id.*

12. *Id.*

13. The morning of the shooting, having killed his wife and mother, Whitman wrote:

[L]ately . . . I have been a victim of many unusual and irrational thoughts. These thoughts constantly recur, and it requires a tremendous mental effort to concentrate on useful and productive tasks. In March . . . I noticed a great deal of stress. I consulted a Dr. Cochran at the University Health Center and asked him to recommend someone that I could consult with about some psychiatric disorders I felt I had. I talked to a Doctor [Heatly] once for about two hours and tried to convey to him my fears that I felt come [sic] overwhelming violent impulses. After one session I never saw the Doctor again, and since then I have been fighting my mental turmoil alone, and seemingly to no avail.

Whitman’s letter dated July 31, 1966, is in the collection of the Austin History Center and can be accessed through [http://www.popsubculture.com/pop/bio\\_project/sub/whitman\\_letter.pdf](http://www.popsubculture.com/pop/bio_project/sub/whitman_letter.pdf) (last visited Jul. 21, 2009).

country at the time. It prompted the University of Texas to transform its campus security guards into a professional campus police force.<sup>14</sup> For many years it remained a singular trail marker on the long path of student violence through the groves of the academy. But it did not have a direct impact on legal relationships between a college or university and its students, or therapists and their patients. Whitman was thought to have chosen the tower for its height, not for its academic associations, and there was not the slightest suggestion in the public commentary that the psychiatrist had been in any way negligent.<sup>15</sup>

## 2. Berkeley, California: The Murder of Tatiana Tarasoff

It was a different matter three years later when a graduate student at the University of California at Berkeley, Prosenjit Poddar, murdered Tatiana (Tanya) Tarasoff, an entering undergraduate who had rejected his offer of marriage.<sup>16</sup> Like Whitman, several months before the murder, Poddar voluntarily sought psychiatric help at Berkeley's university clinic.<sup>17</sup> Like Whitman, Poddar confided to a psychiatrist, Dr. Warren Moore, that he was thinking of committing a specific violent act—"getting even with" Tanya Tarasoff.<sup>18</sup> Like Dr. Heatly at Texas, Dr. Moore at Berkeley recommended that his patient continue therapy.<sup>19</sup> Like Dr. Heatly, Dr. Moore did not

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14. University of Texas Science Center San Antonio, *UT Police History*, [http://utpolice.uthscsa.edu/aboutus\\_2.asp](http://utpolice.uthscsa.edu/aboutus_2.asp) (last visited Jun. 19, 2010). Until the 1960s the campus police at most colleges and universities, even public ones, acted as unarmed security guards with no actual police authority conferred by the state. DIANE C. BORDNER & DAVID M. PEARSEN, *CAMPUS POLICING: THE NATURE OF UNIVERSITY POLICE WORK* ix–xi (1983).

With the advent of student dissent, campus protest demonstrations, disruptive student activities, violence and increases in reported crime and fear of crime, an increasing number of educational institutions began replacing their line security officers with more educated and better trained police officers with police powers of arrest and duties to enforce state statutes on campus. The decision to professionalize the campus police was, in part, a direct result of the negative experiences with intervention of local police and national guardsmen on campus. During the era of student dissent, Kent State offers a vivid example. It was also recognized that if the university did not govern itself it would be governed by others who might be less responsive to the campus community. Thus, professional police departments began to emerge on college campuses during the 1960s and early 1970s . . . .

*Id.* at xi. See also *infra* notes 109–10 and accompanying text; *infra* note 61.

15. Other than the inquest, no legal proceedings followed the shooting at the University Tower. The killer was dead, shot by the police, and no tort suits appear to have been filed against his estate, the University, or his psychiatrist.

16. *Tarasoff v. Regents of Univ. of Cal.*, 108 Cal. Rptr. 878, 880 (Cal. Ct. App. 1973).

17. Fillmore Buckner & Marvin Firestone, "Where the Public Peril Begins": 25 Years After Tarasoff, 21 J. LEGAL MED. 187, 193 (2000).

18. *Id.*

19. *Tarasoff*, 108 Cal. Rptr. at 880.

attempt to follow up when Poddar terminated the therapeutic relationship—indeed, he was prevented from doing so by his superior at the university clinic.<sup>20</sup> Nor did anyone associated with the clinic or the University warn Tanya Tarasoff that Poddar was talking about killing her—which he did, about two months after his last counseling session.<sup>21</sup>

The Berkeley murder on October 26, 1969, did not seize the public imagination to the same extent as the Texas University shooting, at least in part because it did not happen on campus. Nevertheless, when Tanya Tarasoff's parents successfully sued the therapists at Berkeley's hospital for neglecting to protect their daughter from harm, the killing resulted in a decision of major significance to institution-student relationships and the role of college and university mental health clinics in academic life.<sup>22</sup>

### C. Testing the Foundations: Violence, Madness, and the University

Two generations of students have occupied campuses since the Texas Tower shooting and the murder of Tatiana Tarasoff. Cultivating less in the way of collective protest or defiance, the groves of the academy now produce the strange fruit of the rampage shooting. Targeted school violence has been an alarming aspect of higher education since 1990, with the alarm sounding more and more often.<sup>23</sup> Even though the risk that a shooting will happen on any given campus at any particular time is remote, the academy is right to be alarmed. However infrequently it occurs, the rampager's assault is shocking and deeply destructive to the whole educational body. The merciless gunner, aiming to kill defenseless faculty and students, strikes terror both in the heart of the educational enterprise and at its higher centers. Though the horrific event typically produces an immediate surge of cohesive and restorative spirit, a campus shooting also leaves deep and lasting scars of dread, anxiety, and distrust among the members of the community.<sup>24</sup> Ensuring that campuses are safe from murderous insiders as best we can is appropriately the concern of the whole

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20. See *infra* text accompanying note 54.

21. *Tarasoff*, 108 Cal. Rprt. at 881.

22. *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334 (Cal. 1976) [*hereinafter Tarasoff II*]. The *Tarasoff* facts and decisions are discussed at greater length in Section I *infra*.

23. As used in this article, “targeted school violence” comprises “school shootings and other school-based attacks where the school was deliberately selected as the location for the attack and was not simply a random site of opportunity . . . . In the case of targeted school violence, the target may be a specific individual, such as a particular classmate or teacher, or a group or category of individuals, such as ‘jocks’ or ‘geeks.’ The target may even be the school itself.” Brian Vossekuil et. al., *The Final Report and Findings of the Safe School Initiative: Implications for the Prevention of School Attacks in the United States* (May 2002), available at [http://www.secretservice.gov/ntac/ssi\\_final\\_report.pdf](http://www.secretservice.gov/ntac/ssi_final_report.pdf). See *infra* notes 425–33 (definition of “school rampage”).

24. See de Haven, *supra* note 1, at 607–12.

academy.

Much work is already being done to shift tort law toward a model of shared responsibility that better serves the fundamental purposes of higher education than the present arm's length relationship between colleges or universities and their students.<sup>25</sup> Professors Bickel, Dickerson, Lake, and others have discussed an institutional duty to create and maintain reasonably safe learning and living conditions on the modern campus.<sup>26</sup> Addressing the overall physical and psychological safety and well-being of the student body is certainly integral to achieving safe conditions.

The duty this article considers is fully congruent with a general duty to provide reasonably safe learning conditions. This duty, however, is narrower and more specific: it focuses not on the educational environment as a whole, but on the singular student who may endanger it as a result of mental illness.<sup>27</sup> Like lights on an airstrip, the Texas Tower shooting and the Berkeley murder mark the ground from which this search for duty departs. We begin knowing that, first, in the new age of advanced and accessible weaponry, the ivory tower can be attacked from within, with devastating consequences, by a lone gunman who knows his way around. Second, if a mentally-ill student becomes violent following treatment at a college or university mental health facility, the common law may hold his treating therapist responsible, and possibly others as well. There is much more to be understood from the academy's legacy of violence than the easy lessons. We shall return to Texas at the end of this article. Next, we shall continue examining the *Tarasoff* case in greater detail.

#### I. BALANCING UNFORESEEABILITY: THE 1969 MURDER IN BERKELEY, CALIFORNIA

*"He is at this point a danger to the welfare of other people and himself."*<sup>28</sup>

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25. See generally de Haven, *supra* note 1.

26. See, e.g., ROBERT D. BICKEL & PETER F. LAKE, *THE RIGHTS AND RESPONSIBILITIES OF THE MODERN UNIVERSITY: WHO ASSUMES THE RISKS OF COLLEGE LIFE?* (1999); Darby Dickerson, *Background Checks in the University Admissions Process: An Overview of Legal and Policy Considerations*, 34 J.C. & U.L. 419 (2008).

27. As Professor Lake recently reminded us, "Courts frequently distinguish a duty to provide a generally safe learning environment from a duty to prevent a foreseeably dangerous individual's attacks." Peter F. Lake, *Still Waiting: The Slow Evolution of the Law in Light of the Ongoing Student Suicide Crisis*, 34 J.C. & U.L. 253, 268 (2008). See also Ann M. Massie, *Suicide on Campus: The Appropriate Legal Responsibility of College Personnel*, 91 MARQUETTE L. REV. 625 (2008). The duty discussed here is the second, though the author also foresees circumstances in which the two may converge. See *infra* note 542.

28. DEBORAH BLUM, *BAD KARMA: A TRUE STORY OF OBSESSION AND MURDER* 249 (1986) (treating psychiatrist Dr. Moore's letter to campus police concerning patient Prosenjit Poddar).

### A. The Facts

*Tarasoff v. Regents of the University of California* is among the most famous tort cases of the last century, but its facts were somewhat obscurely stated in the original California Supreme Court decision.<sup>29</sup> What follows are the basic facts of *Tarasoff* as they relate to the negligence issues decided by the Court.

Twenty-two year old Prosenjit Poddar arrived at Berkeley from Bengal in 1967 to take a graduate degree in shipbuilding.<sup>30</sup> About a year later, Poddar became romantically obsessed with nineteen-year old Tanya Tarasoff, whom he met at a campus dance.<sup>31</sup> Tarasoff did not reciprocate Poddar's affections, and he was disturbed and enraged by her rejection.<sup>32</sup> The intensity of his obsession alarmed his acquaintances.<sup>33</sup> In early June 1969, Poddar's best friend took him to the psychiatric clinic at Berkeley's Crowell Hospital.<sup>34</sup>

The Berkeley clinic was an internationally recognized treatment center, specializing in short-term but effective psychotherapy for young adults.<sup>35</sup> It had a staff of over forty psychiatrists, psychologists, and psychiatric social workers.<sup>36</sup> The clinic had experienced a 600% rise in student use between 1965 and 1968.<sup>37</sup> When Poddar first sought clinical services in June 1969, the Berkeley administration and a large group of students were embroiled in the People's Park controversy: the National Guard was on campus in force, a curfew was imposed, and students were flooding into the clinic for counseling.<sup>38</sup> Nevertheless, Poddar was immediately seen by psychiatrist Stuart Gold on an emergency basis, received medication, and within a few days began outpatient therapy with Dr. Warren Moore, a clinical psychologist.<sup>39</sup>

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29. The facts have been admirably clarified in several works. See Peter H. Shuck & Daniel J. Givelber, *Tarasoff v. Regents of the University of California: The Therapist's Dilemma*, in *TORTS STORIES* 100 (Robert Rabin & Stephen D. Sugarman, Eds.) (2003); Buckner & Firestone, *supra* note 17; CHARLES PATRICK EQING & JOSEPH T. MCCANN, *MINDS ON TRIAL: GREAT CASES IN LAW AND PSYCHOLOGY* 57–67 (2006); BLUM, *supra* note 28.

30. Buckner & Firestone, *supra* note 17, at 192.

31. Shuck & Givelber, *supra* note 29, at 102.

32. *Id.*

33. His studies and his work suffered. He stopped eating, bathing, and sleeping. He isolated himself and often wept uncontrollably. He taped conversations with her and replayed them over and over. He told a friend that he could not help himself. He said that he intended to kill Tarasoff by blowing up her room. His condition worsened over the spring semester. He lost his job and was in danger of losing his graduate career. Buckner & Firestone, *supra* note 17, at 4.

34. BLUM, *supra* note 28, at 198.

35. *Id.* at 198–99.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at 204–05. Gold diagnosed paranoid schizophrenia and prescribed



Moore had eight or nine sessions with Poddar over a period of two and a half months.<sup>40</sup> He became increasingly alarmed at the persistence of Poddar's obsession with Tarasoff, especially after he learned that his patient was trying to acquire a firearm.<sup>41</sup> On August 18, Moore challenged Poddar about his hostility towards Tarasoff, and Poddar angrily discontinued his therapy session.<sup>42</sup> On August 20, Dr. Moore called the campus police and reported that Poddar was dangerous to himself and others.<sup>43</sup> He proposed to sign a 72-hour emergency detention order if the police would pick Poddar up and take him to the hospital.<sup>44</sup> Dr. Moore provided the Campus Police Chief with a letter diagnosing Poddar, in which Dr. Gold concurred, as did the acting director of the psychiatry department.<sup>45</sup> Diagnosing Poddar as having "paranoid schizophrenic reaction, acute and severe," Dr. Moore wrote, "He is at this point a danger to the welfare of other people and himself."<sup>46</sup> He requested the assistance of the campus police in committing Poddar to a mental hospital for observation.<sup>47</sup> The letter warned, "At times [Poddar] appears to be quite rational."<sup>48</sup>

Acting on Dr. Moore's report, three campus police officers interviewed Poddar, who agreed that he would "try" to leave Tanya Tarasoff alone.<sup>49</sup> Based on that conversation, the officers decided that Poddar was not dangerous and therefore did not detain him or attempt to initiate committal proceedings.<sup>50</sup> Poddar never returned to therapy.<sup>51</sup> Neither Dr. Moore nor the clinic attempted to get in touch with him.<sup>52</sup>

Well before the murder occurred, Dr. Harvey Powelson, the Clinic's Director, condemned Dr. Moore's actions as a breach of patient

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Thorazine, Compazine, and Cogentin. *Id.* It is not clear that they were effective to treat his condition or that he kept taking them. The antipsychotic drugs Navane and Haldol prescribed for Wendell Williamson in the 1990s were not yet available in the 1960s, and such drugs play a larger part in that story. *See infra* Section II.A.

40. Buckner & Firestone, *supra* note 17, at 193.

41. BLUM, *supra* note 28, at 237.

42. *Id.* at 243–44; Shuck & Givelber, *supra* note 29, at 102; Buckner & Firestone, *supra* note 17, at 5.

43. BLUM, *supra* note 28, at 244.

44. Herrick Hospital, unlike Crowell, was a state-authorized evaluation and detention facility. *Tarasoff v. Regents of Univ. of Cal.*, 108 Cal. Rptr. 878, 882 (Cal. Ct. App. 1973).

45. BLUM, *supra* note 28, at 201, 245.

46. *Id.* at 249.

47. *Id.*

48. *Id.*

49. Buckner & Firestone, *supra* note 17, at 5.

50. The three officers and the Campus Police Chief were later named as individual defendants in the Tarasoffs' wrongful death lawsuit. *See infra* note 61.

51. Buckner & Firestone, *supra* note 17, at 194.

52. *Id.* at 193–94.

confidentiality.<sup>53</sup> He requested that Moore's letter to the campus police be returned, insisted that Moore destroy all copies, and directed that no further action be taken.<sup>54</sup> Thus, Dr. Moore, who believed Poddar might well try to kill Tarasoff, did not warn her of the danger.<sup>55</sup> Nor did the campus police let Tarasoff or her parents know that they had extracted a promise from Poddar to leave her alone.<sup>56</sup>

Tanya Tarasoff came back to Berkeley from a summer abroad in September 1969 and enrolled as an undergraduate student at the University.<sup>57</sup> Poddar stalked her for several weeks.<sup>58</sup> Finding her alone at her parents' house on October 27, he shot her with a pellet gun, chased her into the front yard, and stabbed her to death with a kitchen knife.<sup>59</sup> He then called the police and turned himself in.<sup>60</sup>

## B. The Civil Litigation

### 1. *Tarasoff I*

Tanya Tarasoff's parents brought a wrongful death claim against the University in September 1970, within a month of Poddar's criminal trial, at which Dr. Gold and Dr. Moore testified that their daughter's murderer was insane and not responsible for his actions.<sup>61</sup> The trial court dismissed the civil lawsuit, and the California Court of Appeals affirmed.<sup>62</sup> With respect

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53. *Id.* at 193.

54. *Tarasoff v. Regents of Univ. of Cal.*, 108 Cal. Rptr. 878, 880 (Cal. Ct. App. 1973); Buckner & Firestone, *supra* note 17, at 5.

55. *See Tarasoff*, 108 Cal. Rptr. at 881.

56. *Id.*

57. BLUM, *supra* note 28, at 261, 281.

58. Buckner & Firestone, *supra* note 17, at 194.

59. *Id.*

60. *Id.*

61. *Tarasoff v. Regents of Univ. of Cal.*, 108 Cal. Rptr. 878, 880 (Cal. Ct. App. 1973). In addition to the Regents of the University, plaintiffs Vitaly and Lydia Tarasoff named as defendants Dr. Moore, Dr. Gold, Dr. Yandell, and Dr. Powelson, Campus Police Chief Beall, and campus police officers Atkinson, Teel, Brownrigg, and Halleran.

The complaint alleged, *inter alia*, that defendants did not place Poddar in a 72-hour evaluation facility or otherwise detain him. It also alleged that, knowing he was mentally disturbed, they released him from the custody of the campus police and did not warn the Tarasoffs of the danger he posed. *Id.* at 881.

62. *Id.* at 879. The appellate court held that neither the individual psychiatrists nor the individual police officers had a duty to detain Poddar for evaluation even if they considered him dangerous to himself or others. The California Code sections governing involuntary commitment procedures did not empower either the campus police or the attending staff at Crowell to take custody of a dangerous person and place him in an evaluation facility. The campus police were not "peace officers" under the statute, and the therapists were not on the attending staff of a designated and approved evaluation facility. *Id.* at 882–83. Furthermore, the court held, even if defendants had a duty to detain and evaluate Poddar, their failure to do so was so clearly not the

to the defendants' failure to warn the Tarasoffs, the court held, neither the police nor the therapists had a special relationship with either Tanya Tarasoff or her parents that created a duty to keep Poddar from harming them.<sup>63</sup> Nor had any of them voluntarily undertaken such a duty.<sup>64</sup>

Dissenting, Judge Sims argued, more persuasively, that the facts compelled different reasoning.<sup>65</sup> Defendant University, through its staff at Crowell, accepted Poddar for treatment as a voluntary outpatient, and, as a result, he was "diagnosed as a danger."<sup>66</sup> The diagnosis included a recommendation for further treatment: that he "should be committed for observation in a mental hospital."<sup>67</sup> The diagnosis and recommendation created a duty to go forward with treatment.<sup>68</sup> Negligent failure to do so would be actionable.<sup>69</sup> Since Poddar was being uncooperative and since Dr. Moore and his colleagues did not work at a designated evaluation facility, their only alternatives under the state statute were to have Poddar taken into custody by a peace officer or to refer his case to the county social service agency empowered to secure a court order of committal.<sup>70</sup> Dr. Moore chose the first alternative and notified the campus police.<sup>71</sup> The dissent considered the police negligent in releasing Poddar, but argued that their intervening, untrained "diagnosis" did not relieve the therapists of their duty.<sup>72</sup> Once the therapists learned that their patient was still at large, they had a duty to warn his prospective victim.<sup>73</sup>

In the dissent's view, Dr. Moore exercised reasonable care, and the police, though negligent, were immunized from liability by statute.<sup>74</sup> Therefore, Dr. Powelson's decision to overrule Dr. Moore without reevaluating Poddar was the actionable event.<sup>75</sup> When Dr. Powelson

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proximate cause of Tanya Tarasoff's injury that the court could resolve the issue against the plaintiffs as a matter of law. *Id.* at 883–84.

63. *Id.* at 886.

64. *Id.*

65. *Id.* at 889 (Sims, A.J., dissenting).

66. *Id.*

67. *Id.* at 891.

68. *Id.*

69. *Id.*

70. *Id.*

71. The dissent pointed out that "[t]he law in effect prior to July 1, 1969 did not purport to define the type of "peace officer" who could effect an emergency apprehension." *Id.* at 892 n.4 (Sims, A.J., dissenting).

72. *Id.* at 893.

73. *Id.*

74. *Id.*

75. *Id.* at 893–94. Judge Sims elaborated:

Dr. Powelson did not undertake to furnish the diagnosis or treatment which the patient was entitled to expect from the clinic from which he had sought medical psychiatric assistance. . . . Dr. Powelson never examined the patient . . . Dr. Powelson requested the chief of the campus police to return Dr. Moore's letter; . . . he ordered that all copies of that letter, and all copies of

“arbitrarily terminated the relationship with the patient,” he failed in his statutory duty to provide treatment.<sup>76</sup>

Moreover, the dissent explicitly relieved the individual therapists of responsibility for discharging the duty and placed it instead directly on the institution, thus avoiding the aggravating question of conflicting duties, loyalties, interests, and relationships within the clinical hierarchy: “*The responsibility for carrying out the prescribed treatment was that of the clinic[,] not the individual doctors who were subject to Powelson’s directives.*”<sup>77</sup>

With respect to the duty to warn Tarasoff or her parents, the dissent wrote:

[B]alancing . . . the potentiality of the foreseeable risk and the fact that the injury, if resulting, would be fatal, with the preventative action involved in ‘the simple act of reaching for a telephone or of dispatching a messenger’. . . authorizes the imposition of a legal duty to one who would be directly endangered by the threatened action.<sup>78</sup>

Lastly, the dissent argued that the court could not reasonably conclude as a matter of law that defendants’ alleged negligence was not the proximate cause of Tanya Tarasoff’s wrongful death.<sup>79</sup> Her parents were entitled to prove that under reasonable psychiatric standards, but for the clinic’s negligence, Poddar would have been committed or successfully treated so that he was no longer a danger to their daughter.<sup>80</sup> In other words, the plaintiffs were entitled to prove that Poddar’s violence was preventable.

Judge Sims’ dissent in the court of appeals mapped a clearly confined theoretical terrain of institutional liability. First, it respected the immunity conferred on the campus police by the legislature, but it did not exonerate as a matter of the common law their inexpert and ill-considered decision not to hospitalize Poddar once they had undertaken to act as authorized

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Dr. Moore’s notes on the patient be destroyed; and . . . he ordered that no action be taken to place the patient in a 72-hour treatment and evaluation facility . . . . These allegations, strictly construed in favor of the pleader, do not permit the inference that Dr. Powelson’s actions were an exercise of discretion or part of a course of diagnosis or treatment . . . .

76. *Id.* at 894. The dissent characterized Powelson’s behavior as malfeasance, not nonfeasance, though it is arguably either. So viewed, Powelson’s action amounted to an “omission with respect to administering treatment prescribed for mental illness” for which the California Code specifically withheld immunity. *Id.* at 889.

77. *Tarasoff*, 108 Cal. Rptr. at 895 (emphasis added).

78. *Id.* at 897. With respect to the determinative element of foreseeability, the dissent concluded, “If the officers sought his promise to keep away from her, it cannot be considered remote or unexpected if she, unwarned, later was exposed to the fulfillment of [Poddar’s] demented purpose. *Id.* at 898.

79. *Id.* at 900.

80. *Id.* at 900–01.

peace officers under the committal statute.<sup>81</sup> Second, it respected all of the special relationships involved: not only the patient-therapist relationship between Poddar and the clinicians who diagnosed and treated him, but also the relationship between those clinicians and the university at which they worked, which imposed significant limitations upon their individual professional autonomy.<sup>82</sup> Third, it clearly located at the institutional level—not merely (and perhaps not at all) at the level of the individual therapist—the duty to treat the University clinic’s patients with a reasonable degree of care both for themselves and for their potential victims.<sup>83</sup> Last, in allocating liability for failure to act in circumstances of foreseeable danger, it articulated a balancing test that took into account both the nature of the risk and the relative ease of the protective measure called for.<sup>84</sup> Even if none of the defendants could reasonably have been expected to confine or treat Poddar after he evaded committal in August, and even if the risk that he would carry out his murderous fantasy became less foreseeable (and less preventable) by the defendants after their relationship with him ended, a telephone call to the Tarasoff home would have cost very little in time or energy, and, as it turned out, it might well have saved a life.<sup>85</sup>

The California Supreme Court issued its first opinion in the case (*Tarasoff I*) in 1974, sustaining a cause of action against all the therapists and the campus police for failing to warn Tarasoff’s parents.<sup>86</sup> Writing for the majority, Justice Tobriner affirmed the common law rule that there is no duty to control the conduct of another or to warn the potential victims of another’s conduct unless one of two circumstances is present: either the defendant has a special relationship to the actor or the victim that justifies imposition of a duty, or the defendant has voluntarily assumed an obligation to control the actor’s conduct or to protect the victim.<sup>87</sup> Under the first formulation, the therapist-patient relationship between Prosenjit

81. *Id.* at 894.

82. That Dr. Moore’s individual diagnosis and recommended treatment plan should bind the clinic until it was changed by another equally professional diagnosis made both medical and legal sense. To suggest, as the California Supreme Court did, that Dr. Moore was bound to a course of action that the clinic for which he worked was free to ignore, or contradict, was neither fair nor productive.

83. *Tarasoff*, 108 Cal. Rptr. at 895.

84. *Id.* at 897.

85. For example, Poddar moved in with Tanya’s brother in August, only a few blocks from Tarasoff’s house, which made his stalking of her much easier. Tanya had also enrolled at Berkeley and began attending classes in early October, which increased Poddar’s opportunities of stalking her on campus as well. See BLUM, *supra* note 28, at 262, 281.

86. *Tarasoff v. Regents of Univ. of Cal.*, 529 P.2d 553, 565 (Cal. 1974) [*hereinafter Tarasoff I*].

87. *Id.* at 557, 559 (“[A] duty . . . may also arise from a voluntary act or undertaking by a defendant. Once the defendant has commenced to render service, he must employ reasonable care . . .”).

Poddar and his treating therapists was sufficiently special to create a duty to warn Tanya Tarasoff, even though none of the therapists had any professional relationship with her.<sup>88</sup> “We conclude,” wrote the Court, “that a doctor or psychotherapist treating a mentally ill patient . . . bears a duty . . . to give threatened persons such warnings as are essential to avert foreseeable danger arising from his patient’s condition or treatment.”<sup>89</sup>

Imposing upon the defendants a duty to take Tarasoff’s safety into account was also justified, because the defendants had “voluntarily commenced to render services” and were therefore under an obligation not to “bungle” matters without warning those likely to be endangered as a result.<sup>90</sup> The facts alleged would sustain the inference that defendants’ actions caused Poddar to discontinue treatment that might otherwise have been effective to curb his violence.<sup>91</sup> In other words, plaintiffs were entitled to prove that defendants had made matters worse.

*Tarasoff* was the relatively rare case in which a psychiatrist and two clinical psychologists concurred in predicting that, unless confined, a patient was likely to harm a readily-identifiable victim.<sup>92</sup> The court remarked that discerning the difference between threats of violence that pose a serious danger and those that do not requires “a high order of expertise and judgment.”<sup>93</sup> The decision promised considerable deference to the therapist’s determination, but offered little else in the way of guidance. The lack of definition and guidance ignited fears that “playing it safe” would cause therapists to decline treatment of problematic individuals, would cause unnecessary hospital committals and breaches of confidentiality, and would result in loss of trust in the therapist-patient relationship.<sup>94</sup>

The decision was unsatisfactory in other respects as well. It raised and then ducked the question whether the duty to warn required Dr. Moore to disobey Dr. Powelson’s directives.<sup>95</sup> It also provided no limits on the duty of the police once they assumed responsibility for confining an

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88. *Id.* at 557.

89. *Id.* at 559. The second decision dropped this language. *See infra* text accompanying note 97.

90. *Tarasoff I*, 529 P.2d at 555.

91. *See id.* at 555, 559.

92. The defendant therapists argued that patients in psychotherapy often express violent thoughts—indeed, are encouraged to do so by their therapists—but act on them only rarely. Moreover, imposing a duty to warn others would disable the confidentiality essential to the therapeutic relationship, could interfere with therapy, and would be of little social benefit. *Id.* at 560.

93. *Id.* The assumption may not have been correct. *See Monahan, infra* note 458.

94. *See, e.g., Alan Stone, The Tarasoff Decisions: Suing Psychiatrists to Safeguard Society*, 90 HARV. L. REV. 358 (1976). *See also infra* text accompanying note 104.

95. “We lack sufficient factual background to adjudicate this conflict.” *Tarasoff I*, 529 P.2d. at 561 n.12.

individual.<sup>96</sup> Moreover, in contrast to the dissent, the decision did not impose a direct institutional obligation on the clinic (in the person of Dr. Powelson) to act with reasonable care.<sup>97</sup>

## 2. *Tarasoff II* and its Impact on the Academy

The outcry from the psychotherapeutic community persuaded the California Supreme Court to rehear the case in 1976.<sup>98</sup> The second decision did not, as a practical matter, improve matters much for the therapists. *Tarasoff II* no longer limited the duty to circumstances arising from the patient's treatment, nor limited the obligation to a warning.<sup>99</sup> "[O]nce a therapist does in fact determine, or under applicable professional standards reasonably should have determined, that a patient poses a serious danger of violence to others, he bears a duty to exercise reasonable care to protect the foreseeable victim of that danger."<sup>100</sup>

Though it did not greatly help the therapists, *Tarasoff II* improved matters considerably for the University defendants. The Court reversed its initial ruling that the University could be liable for acting in a way that increased the risk of violence.<sup>101</sup> *Tarasoff I* had been clear that a voluntary undertaking can create a duty not to make matters worse even when there is no prior special relationship between the parties.<sup>102</sup> *Tarasoff II* abandoned that position altogether, and without explanation.<sup>103</sup>

96. Dissenting, Justice Clark would have preserved confidentiality at the expense of warning the potential victim of patient violence unless it could be shown that the psychiatrist's termination of treatment increased the risk of violence. He would not have imposed a duty upon the police using essentially the same formula, however, because the majority had explained neither the circumstances that triggered the duty nor the policy upon which it was said to depend. *See id.* at 569 (Clark, J., dissenting).

97. It simply concluded that:

[P]laintiffs' complaints can be amended to state a cause of action against [the individual treating and supervising therapists] and against the Regents as their employer, for breach of a duty to warn Tatiana arising from the relationship of these defendants to Poddar. The complaints can also be amended to assert causes of action against the police defendants for failure to warn on the theory that the officers' conduct increased the risk of violence.

*Id.* at 561 (footnote omitted).

98. *Tarasoff II*, 551 P.2d at 334.

99. *See supra* text accompanying note 89.

100. *Tarasoff II*, 551 P.2d at 345.

101. *Id.* at 343.

102. *Tarasoff I*, 529 P.2d at 555.

103. The court wrote:

Turning now to the police defendants, we conclude that they do not have any . . . special relationship to either Tatiana or to Poddar sufficient to impose upon such defendants a duty to warn respecting Poddar's violent intentions. . . . Plaintiffs suggest no theory, and plead no facts that give rise to any duty to warn on the part of the police defendants absent such a special relationship.

*Tarasoff II*, 551 P.2d. at 349. Judge Sims's dissent had discussed such facts, and *Tarasoff I* had taken such facts as sufficiently alleged.

*Tarasoff* is best known for its impact on the mental health profession, where it is generally conceded to have done no significant harm and may have operated to the public benefit.<sup>104</sup> Some states have enacted “anti-*Tarasoff*” legislation, relieving individual therapists of liability for failing to warn except in very limited circumstances.<sup>105</sup> Few jurisdictions have specifically rejected the duty.<sup>106</sup> Some have expanded it either in scope or

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104. See, e.g., Christopher Slobogin, *Tarasoff as a Duty to Treat: Insights from Criminal Law*, 75 UNIV. CINN. L. REV. 645, 645–46 (2006). Professor Slobogin adds, however:

That conclusion does not mean that *Tarasoff* is without flaws, of course. At the margins, the *Tarasoff* rule undoubtedly leads to unnecessary breaches of confidentiality and hospital commitments, reticence about taking on problem patients, more tension between doctor and patient because of an increased focus on dangerousness, and more stress among therapists who know they are not particularly good at assessing risk.

*Id.* at 646.

105. In 1987, in response to expansive judicial decisions, the American Psychiatric Association proposed a model statute on the duty of physicians to take precautions against patient violence. The model statute imposes a duty to prevent harm by a patient only when the patient has communicated to the therapist an explicit threat to kill or seriously injure a known or reasonably identifiable victim and has the apparent intent and ability to carry out the threat. See AMERICAN PSYCHOLOGICAL ASSOCIATION, MODEL ACT FOR STATE LICENSURE (1987), available at <http://forms.apa.org/practice/modelactlicensure/mla-review-2009.pdf>. Virginia has adopted a version of this model. See *infra* note 313.

106. Since 2002, the following states have affirmed the imposition of an actual duty to warn: Arizona, see, e.g., *Graham v. Valueoptions, Inc.*, 2010 WL 5054442 (Ariz. Ct. App. 2010); California, see, e.g., *Ewing v. Northridge Hospital Medical Center*, 16 Cal. Rptr. 3d 591 (Cal. Ct. App. 2004); Colorado, see, e.g., 609 F.3d 1096 (10th Cir. 2010); Delaware, see, e.g., *Riedel v. ICI Americas, Inc.*, 968 A.2d 17, 24 (Del. 2009); Indiana, see, e.g., 910 N.E.2d 868 (Ind. Ct. App. 2009); Kentucky, see, e.g., *Devasier v. James*, 278 S.W.3d 625 (Ky. 2009); Louisiana, see, e.g., *United States v. Auster*, 517 F.3d 312, 316 (5th Cir. 2008); Maine, see, e.g., *Joy v. Eastern Med. Ctr.*, 529 A.2d 1364 (Me. 1987); Michigan; see, e.g., *Dawe v. Dr. Reuven Bar-Levav & Assoc., P.C.*, 780 N.W.2d 272 (Mich. 2010); Minnesota, see, e.g., *Molloy v. Meier*, 660 N.W.2d 444, 450 (Minn. Ct. App. 2003); Missouri, see, e.g., *American Home Assurance Co. v. Pope*, 487 F.3d 590 (8th Cir. 2007); Montana, see, e.g., *Gudmundsen v. State, ex. rel. Montana State Hosp. Warm Springs*, 203 P.3d 813 (Mont. 2009); Nebraska, see, e.g., *Munstermann v. Alegent Health-Immanuel Med. Ctr.*, 716 N.W.2d 73 (Neb. 2006); New Jersey, see, e.g., *Marshall v. Klevanov*, 902 A.2d 873 (N.J. 2006); New York, see, e.g., 864 N.Y.S.2d 264, 277 (N.Y. 2008); Ohio, see, e.g., *Douglass v. Salem Cmty. Hosp.*, 794 N.E.2d 107, 120 (Ohio Ct. App. 2003); Oklahoma, see, e.g., *J.S. v. Harris*, 227 P.3d 1089 (Okla. Civ. App. 2009); Pennsylvania, see, e.g., *DeJesus v. U.S. Dep’t. of Veterans Affairs*, 479 F.3d 271 (3d Cir. 2007); South Carolina, see, e.g., *Doe v. Marion*, 645 S.E.2d 245, 250 (S.C. 2007); Tennessee, see, e.g., *Stewart v. Fakhruddin*, 2010 WL 2134150 (Tenn. Ct. App. 2010); Vermont, see, e.g., *Barrett v. Prison Health Serv., Inc.*, 2010 WL 2837010 (D. Vt. 2010); Wisconsin, see, e.g., *Johnson v. Rogers Mem’l Hosp. Inc.*, 700 N.W.2d 27, 42 (Wis. 2005).

By statute, Alabama imposes a duty to warn in the context of marriage and family therapy. See Ala. Code § 34-17A-23 (2010).

The following jurisdictions allow but do not require warnings: District of Columbia; Alaska; Connecticut, see, e.g., *Weigold v. Patel*, 840 A.2d 19, 25 (Conn. App. Ct. 2004); Illinois, see, e.g., *Tedrick v. Cmty. Res. Ctr., Inc.*, 920 NE.2d 220, 229



applicability.<sup>107</sup> The few studies done since 1976 indicate that therapists

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(Ill. 2009); Iowa, *see, e.g.*, Long v. Broadlawns Med. Ctr., 656 N.W.2d 71, 79 (Iowa 2002), *but cf.* Iowa Code § 141A.5 (2010) (requiring warning to third party who is a sexual partner of HIV infected patient); Oregon, *see, e.g.*, U.S. v. Chase, 340 F.3d 978, 984 (Or. Ct. App. 2003); Rhode Island, *see, e.g.*, Santana v. Rainbow Cleaners, 969 A.2d 653; Texas; West Virginia.

The following states remain unclear as to whether warnings are allowed or required: Arkansas; Georgia, *see, e.g.*, Talton v. Arnall Golden Gregory, LLP, 622 S.E.2d 589 (Ga. Ct. App. 2005), *see also* Ga. Code Ann. § 19-7-5 (2009); Hawaii; Kansas, *see, e.g.*, Cunningham v. Braum's Ice Cream and Dairy Stores, 80 P.3d 35 (Kan. 2003); Maine; Nevada, *see, e.g.*, Sanchez v. Wal-Mart Stores, Inc., 221 P.3d 1276 (Nev. 2009); New Mexico; North Dakota; South Dakota; and Wyoming.

Virginia's Supreme Court has held that the relationship between a psychiatrist and a voluntarily committed mental patient is not sufficiently special to create a duty to protect or warn. Nasser v. Parker, 455 S.E.2d 502, 506 (Va. 1995). North Carolina has also expressly rejected *Tarasoff's* duty to warn. Gregory v. Kilbride, 565 S.E.2d 685, 692 (2002) *disc. rev. denied*, 580 S.E.2d 365 (2003). Texas, too, declined to impose a duty to warn. Thapar v. Zezulka, 994 S.W.2d 635, 638 (Tex. 1999). Florida has declined to impose a *Tarasoff* duty in case law, *see* Boynton v. Burglass, 590 So.2d 446, 447 (Fla. Dist. Ct. App. 1991), but allows warning by statute for communications between a patient and psychiatrist, *see* Fla. Stat. § 456.059 (2010). *See generally* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 41 cmt. g (Proposed Final Draft No. 1, 2005).

Although Washington imposed a duty to warn prior to 2002, *see* Paul B. Herbert, *The Duty to Warn: A Reconsideration and Critique*, 30 J. AM. ACAD. PSYCHIATRY & L. 417 (2002), the court in *Hahn* held that Washington's duty to warn statute, § 71.05.120, does not actually create a duty to warn under subsection (2), but simply provides that failure to warn will preclude immunity under subsection (1). *Hahn v. Chelan-Douglas Behavioral Health Clinic*, 2009 WL 3765993 (Wash. Ct. App. 2009).

For a list of whether each state imposes a duty to warn, whether it allows but does not require warnings, or whether it has no clear *Tarasoff* law as of 2002, *see* Paul B. Herbert, *The Duty to Warn: A Reconsideration and Critique*, 30 J. AM. ACAD. PSYCHIATRY & L. 417, 417 (2002), *available at* <http://www.jaapl.org/cgi/reprint/30/3/417.pdf>.

107. *Tarasoff's* progeny have extended the duty to warn beyond communications between therapist and patient. The scope and coverage of the post-*Tarasoff* duty extends to the physician-patient relationship, including the duty to warn of the danger of driving while medicated. *See, e.g.*, Myers v. Quesenberry, 192 Cal. Rptr. 583 (Cal. App. 1983), *republished*, 193 Cal. Rptr. 733 (Cal. App. 1983); Powell v. Catholic Med. Ctr., 749 A.2d 301 (N.H. 2000) (of the danger of stroke victim's behavior during treatment); Lipari v. Sears, Roebuck & Co., 497 F. Supp. 197 (D. Neb. 1980) (of pharmaceutical effects); DiMarco v. Lynch Homes-Chester County, 583 A.2d 422, 424 (Pa. 1990) (of infectious diseases), Hofmann v. Blackmon, 241 So.2d 752, 753 (Fla. Dist. Ct. App. 1970), C.W. v. Cooper Health Sys., 906 A.2d 440, 450 (N.J. Super. Ct. App. Div. 2006); Safer v. Estate of Pack, 677 A.2d 1188, 1192 (N.J. Super. Ct. App. Div. 1996) (of genetic conditions). For a comprehensive study of the physician-patient duty to warn, *see* W. Jonathan Cardi, *A Pluralistic Analysis of the Therapist/Physician Duty to Warn Third Parties*, 44 WAKE FOREST L. REV. 877 (2009).

States have also extended the duty to warn to cases of child abuse and neglect, some by statute. *See, e.g.*, Ga. Code Ann. § 19-7-5 (2009). *Tarasoff's* reasoning has additionally been extended to other types of special relationships including the owner of a movie theatre and its patrons, Mostert v. CBL & Assoc., 741 P.2d 1090 (Wyo. 1987), and the lawyer-client relationship, *see, e.g.*, Hawkins v. King Cnty. Dep't of Rehab. Servs., 602 P.2d 361 (Wash. Ct. App. 1979). For an examination of whether a

now routinely make a practice of warning the known potential targets of patients they consider dangerous.<sup>108</sup>

More to the point here is how *Tarasoff II* shaped the behavior of colleges and universities.<sup>109</sup> As a practical matter, the second decision handed the University a virtually clean win despite its reinstatement of the plaintiffs' negligence claims against the therapists. The result was timely and fortunate for University administrators. When the case began in 1969, the presence of police forces on campus was a national issue, and the *Tarasoffs* were by no means the only parents claiming that the police presence on campus provoked, exacerbated, and bungled confrontations with students in ways that increased the risk of violence.<sup>110</sup> Wrongful death actions in the Kent State killings were still active when the *Tarasoff* Court reversed itself and held that the Berkeley University police had no duty to take reasonable care in executing their commission.<sup>111</sup> *Tarasoff II* effectively privileged careless and indifferent police behavior towards students endangered by other students on college campuses, even when individual officers were aware of the danger. It declined to hold them (or their institution) accountable when they undertook to act, even if they made

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particular relationship could be deemed "special" for the purpose of determining whether a duty exists, see *Delgado v. Trax Bar & Grill*, 113 P.3d 1159 (Cal. 2005). See generally Bruckner & Firestone, *supra* note 17, at Section III; Shuck & Givelber, *supra* note 29, at 117–27.

108. See Bruckner & Firestone, *supra* note 17, at 21–23 (discussing studies). Law enforcement officers, on the other hand, who have no duty to warn, apparently do not warn the identifiable victims of specific threats even when it would cost them little to do so. See Michael Huber et al., *A Survey of Police Officers' Experience With Tarasoff Warnings in Two States*, 51 PSYCHIATRIC SERV. 807–09 (June 2000), available by subscription at <http://psychservices.psychiatryonline.org/cgi/reprint/51/6/807>.

109. *Tarasoff's* formulation of duty has been "frequently cited with little variation in most of the major university cases of the last twenty years. This may be the only undeniable point of consensus among all the disparate cases of the last few decades." BICKEL & LAKE, *supra* note 26, at 202. See also Peter F. Lake, *Revisiting Tarasoff*, 58 ALB. L. REV. 97 (1994).

110. For example, on May 15, 1969, allegedly the day Poddar first went to the Crowell Clinic for emergency treatment, the Berkeley campus police participated in the violent confrontation at People's Park that resulted in the shooting death of student James Rector by an officer of the Alameda County Sheriff's Department. See, e.g., BLUM, *supra* note 28, at 198–99; John Burks, John Grissim Jr., and Langdon Winner, *The Battle of People's Park*, ROLLING STONE MAG. (June 14, 1969), available at <http://www.beauty-reality.com/travel/sanFran/peoplespark3.html>. A year later, four unarmed student protesters were shot and killed on Kent State University's campus by National Guardsmen called in by the Ohio governor at the request of the University administration. See *The Scranton Report*, *supra* note 5, at 233–90.

111. In 1974, shortly before *Tarasoff I* upheld a cause of action against the campus police, the United States Supreme Court decided that state officials were not immune from wrongful death actions by the parents of the students killed by National Guardsmen at Kent State. See *Scheuer v. Rhodes*, 416 U.S. 232 (1974). On remand for trial on the merits, *Krause v. Rhodes* was still in active litigation and unsettled when *Tarasoff I* was issued. See Historical Note on *Krause v. Rhodes*, available at <http://speccoll.library.kent.edu/4may70/box113/113.html>.

matters worse.

Even more discouraging for long-term management of students suffering from mental illness, *Tarasoff*'s way of thinking does not promote effective communication between mental health providers and college and university administrators when the student-patient may pose a danger to others on campus. What if the identified target were everyone in sight of the University Tower, as in Whitman's case, or teachers in the College of Nursing, or fellow students in a creative writing class? To whom must the warning ultimately be delivered in such cases if not the college and university administration? But if that administration is free to ignore the warning, as appeared the case after *Tarasoff II*, what has been accomplished in the way of safety for the potential victims? On the other hand, what if the college or university administration has information about a disturbing student that the psychotherapist needs to know, and vice versa, in order for appropriate decisions to be made about the student's standing in the academic community? *Tarasoff*'s facts raised these issues only tangentially, but the decision did nothing to encourage such communication. The exception to the general rule of patient confidentiality was narrowly confined and generally applicable. It left for another day whether the special "public peril" posed by a disaffected student growing ever more violent on a college or university campus justifies a more situation-specific formulation of the duty to protect.

*Tarasoff II* also left for another day consideration of the intra-organizational realities of the college and university governance system, but it still revealed, and enabled, college and university dysfunction. It did not address the relationship between the clinical staff and the campus police with respect to diagnosis and detention. It deliberately avoided the issue raised by Dr. Powelson's administrative decision to overrule the treatment recommendations of his staff and forbid further contact with Poddar.<sup>112</sup> It ignored Judge Sims's opinion that the institution itself had a duty to prevent Poddar's reasonably foreseeable violence.<sup>113</sup> It confined the University's liability to *respondeat superior* and cloaked it with the statutory immunity provided to therapists and peace officers.<sup>114</sup> As nearly

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112. The opinion left for later decision whether duty required Dr. Moore to defy superior orders and risk termination by warning the Tarasoffs. See *Tarasoff II*, 551 P.2d. at 348 n.16. Since Powelson was not Poddar's treating therapist, the decision placed no duty on him. His "bungling," which he accomplished only by virtue of his position in the university hierarchy, was not actionable, and therefore not attributable to Berkeley under *respondeat superior*.

113. See *supra* text accompanying note 77.

114. *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334, 349 n.20 (Cal. 1976). In the end, the Tarasoffs negotiated a settlement with Dr. Moore's insurance company and the State of California. See Robert Reinhold, *Case of Two Brothers Accused of Killing Parents May Test Secrecy Limit in Patient-Therapist Tie*, N.Y. TIMES, Sept. 7, 1990, available at <http://www.nytimes.com/1990/09/07/us/law-case-two-brothers-accused-killing-parents-may-test-secrecy-limit-patient.html?pagewanted=all>.

as possible, it allowed college and university administration to disappear as a legal actor from the violent dramas of campus life, to cast itself as a bit player on its own stage. Even as it heralded a period of generally expanding tort liability, the case provided the basic script from which colleges and universities would successfully argue that their agents have no more duty than bystanders with respect to student violence on campus.<sup>115</sup> The position sanctioned by *Tarasoff* is that a college or university does not have a sufficiently special relationship with its students to create a legal duty to protect them.<sup>116</sup> This position has been considerably eroded by tort decisions in several states finding a duty by analogy to landlord-tenant and premises-liability law.<sup>117</sup> However, it is still the dominant view that institutions of higher education generally have no duty to protect the safety of their students, and, when on the defensive, institutions of higher education continue to maintain that position.<sup>118</sup> It is, in fact, the position taken by the Virginia Tech defendants in the wrongful death lawsuits that followed the 2007 rampage.<sup>119</sup>

### C. Reframing the Duty: On the Importance of Preventability

Violence is seldom predictable with any certainty; its precise timing and location are even less so.<sup>120</sup> Thus, when it comes to rare but catastrophic events such as campus rampages, preventing violence is more important than foreseeing it.<sup>121</sup> *Tarasoff's* focus on foreseeability as a virtually determinative factor doubtlessly operates to the benefit of the therapist most of the time. It is a way of confining individual professional liability to the most extreme cases. It is a much less satisfactory rubric, however, if it permits colleges and universities to wash their hands of a student solely because he has not made an overt threat of harm against a specific, identifiable victim.

Moreover, mental health professionals are not necessarily better equipped than others (such as teachers and student services administrators) to read the warning signs, particularly if they lack relevant information or if their judgment is clouded by other factors. And, to the extent that it is

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115. See BICKEL & LAKE, *supra* note 26, Chapter IV; de Haven, *supra* note 1, Section III.

116. *Tarasoff v. Regents of Univ. of Cal.*, 108 Cal. Rptr. 878, 886 (Cal. Ct. App. 1973).

117. See BICKEL & LAKE, *supra* note 26.

118. See de Haven, *supra* note 1, at 578–607.

119. See *infra* Section III.C.

120. Even the prescient Dr. Moore did not necessarily foresee that Poddar would wait another two months before acting on his violent fantasies.

121. “[T]he best practice of campus crisis management is evidenced by the violence that is averted or minimized.” Margaret Jablonski, George McClellan & Eugene Zdziarski, eds., *In Search of Safer Communities: Emerging Practices for Student Affairs in Addressing Campus Violence*, 9 (Nat’l Ass’n for Student Personnel Adm’rs 2008), available at <http://cra20.humansci.msstate.edu/fulltext.pdf>.

confined to therapists, the duty articulated by *Tarasoff II* may operate under-inclusively.

To illustrate this point, Professor Christopher Slobogin recently posed the question why mental health professionals have been “saddled with a duty to prevent violent harm while other groups—including medical doctors, lawyers, teachers and ordinary citizens—have not.”<sup>122</sup> He argued that only the capacity to treat threatening individuals with outpatient therapy or involuntary commitment usefully distinguishes therapists from others who may also recognize that the individual is dangerous.<sup>123</sup> We can recast Professor Slobogin’s argument without diminishing its logic. If it makes sense to impose a duty upon mental health professionals based on their capacity for therapeutic intervention, we should impose the same duty upon college and university officials who have the equivalent capacity to observe and monitor the behavior of disturbed students and exercise authoritative intervention, including the delivery of appropriate therapeutic measures. The operative factor then become less one of foreseeability and more one of the capacity to take reasonably effective preventive measures. When a law student in the criminal procedure class announces that he is telepathic and angrily demands that his classmates quit thinking about him, should the professor report it to the school administration? If he learns of the incident from the professor, should the dean of the law school insist that the student be given a clean bill of mental health before returning to class? What about the head of an English department, or a university-wide CARE team, who believe that a student, if untreated, may pose a threat to himself or the community?<sup>124</sup> What about a faculty member who is alarmed by the violence of a student’s written work or his threatening classroom behavior? Upon whose shoulders should the duty rest to rule out mental illness as a

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122. Slobogin, *supra* note 104, at 653. Professor Slobogin is not the only scholar to discern that the reasoning of *Tarasoff* is much less limited than its holding. See, e.g., Sara Buell & Martha Drew, *Do Ask and Do Tell: Rethinking the Lawyer’s Duty to Warn in Domestic Abuse Cases*, 75 U. CINN. L. REV. 447 (2006); Shuck & Givelber, *supra* note 29, at 118–20.

123. *Tarasoff’s* assumption, Professor Slobogin argued, is that because clinicians get to know their patients and are trained in prognostication and treatment, they can justly be required to prevent those patients from harming others. That assumption does usefully distinguish mental health professionals from others to the extent that the *Tarasoff* duty depends upon an ability to predict dangerousness and an ability to treat it. Although mental health professionals are not particularly good at foreseeing violence, those trained in modern risk assessment techniques are undoubtedly better than any other group at that task. And, compared to laypeople, psychiatrists and psychologists are clearly superior at treating aggressive individuals, and better equipped, both professionally and legally, to initiate civil commitment proceeding when appropriate.

Slobogin, *supra* note 104, at 654. See also Monahan, *infra* note 458.

124. “CARE team,” in this context, refers specifically to Virginia Tech’s case management team. See *infra* text accompanying note 314. Such student at-risk response teams are discussed further *infra* at text accompanying note 447.

safety concern? If we accept that *Tarasoff* is under-inclusive, all of these individuals might arguably have a legal duty to act with reasonable care for student safety, but at what point in the college or university hierarchy is it fair or useful or counterproductive to impose such a duty? Fully accepting Professor Slobogin's premise would mean imposing legal liability only upon those whose institutional authority extends to requiring outpatient therapy or inpatient treatment as a condition of continued enrollment.

The next section explores this issue further by examining the case of schizophrenic law student Wendell Williamson.

## II. UNDERTAKING THE SPECIAL RELATIONSHIP: THE 1995 SHOOTING AT CHAPEL HILL

*"Rule out schizophrenia."*<sup>125</sup>

### A. The Facts

It is seldom that a case like *Tarasoff* appears, with a comparable mix of student madness, student murder, therapeutic intervention, and administrative supervision. However, a shooting spree by a law student at Chapel Hill, North Carolina, in January 1995, raised many of the same factual issues, in a jurisdiction that, like California in 1969, did not impose upon mental health professionals a duty to protect or warn potential victims of violent patients.<sup>126</sup> Nor did North Carolina's courts impose upon colleges and universities a general duty to safeguard students.

The University of North Carolina (UNC) School of Law is among the oldest, most respected, and most selective in the country.<sup>127</sup> Located on the

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125. *Williamson v. Liptzin*, 539 S.E.2d 313, 315 (N.C. Ct. App. 2000); *see also infra* text accompanying note 148. Many of the facts reported here are from the depositions of Wendell Williamson, his mother Fonda Williamson, his father Dee Williamson, UNC Law Dean Judith Wegner, UNC Dean of Students Winston Crisp, and expert psychiatric witness John Warren, who testified on behalf of the defense at Williamson's trial for murder. The depositions of Dean Wegner (Oct. 7, 1996), Dean Crisp (Jul. 8, 1996), and Dr. Liptzin (Apr. 25, 1997), Dee Williamson (Jul. 16, 1996), and Fonda Freeman Williamson (Jul. 16, 1996) were all taken in connection with civil lawsuits filed after Williamson's rampage by the family of his victim Kevin Reichardt against Williamson's family, *Karl Reichardt v. Wendell Williamson*, 95-CVS-1707 (N.C. Superior Ct. 1996) and *State Farm & Casualty Co. v. Wendell J. Williamson et al.*, 96-CVS 132 (N.C. Super. Ct. 1996). The deposition of Dr. John Warren (May 20, 1998) was taken in connection with *Williamson v. Liptzin*. Copies of these documents, together with academic and medical records papers cited herein, were generously provided by the Reichardts' attorney Jona Poe, Durham, N.C., and are on file with the author.

126. *Gregory v. Kilbride*, 565 S.E.2d 685, 692 (N.C. 2002).

127. The Law School was established in 1845 and ranked 30th in the national rankings in 2010. It admits only 15.6% of applicants. The median LSAT score of admitted applicants is 162. Seventy-five percent of its applicants are from out-of-state. Seventy-five percent of its admitted applicants are from North Carolina. *University of North Carolina School of Law*, WIKIPEDIA, <http://en.wikipedia.org/wiki/>

main campus of UNC in Chapel Hill, the Law School has about 700 students, who have access to a full range of student services, including a mental health clinic.<sup>128</sup> In April 1992, Judith Wegner, the Dean of the Law School, hired its first Dean of Students, Winston Crisp.<sup>129</sup> Dean Crisp had primary responsibility for non-academic student issues, including tracking and “facilitating” students who needed counseling for various reasons.<sup>130</sup>

A 1991 graduate of UNC, Wendell Justin Williamson entered UNC Law School as a 1L in September 1992 after taking a year off to play bass and sing in a rock band.<sup>131</sup> A native of Western North Carolina, with a B.A. in English, and a score of 166 on the LSAT, Williamson was an attractive law school candidate, at least on paper.<sup>132</sup> He had no history of mental health issues or violence.<sup>133</sup> By the time he got to law school, however, he had been hearing voices for almost nine months without seriously pursuing treatment.<sup>134</sup> Williamson believed that people could read his thoughts.<sup>135</sup>

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University\_of\_North\_Carolina\_School\_of\_Law (last visited May 5, 2010).

The Law School’s administrators are bound by the policies and procedures of the larger UNC community relating to dangerous students and emergency situations. The Committee on Problem Admissions and Extraordinary Disciplinary Emergencies was established in part pursuant to NCGS §116-11(2) and “the university’s obligation to assure a safe campus.” Its membership consisted, *inter alia*, of the Vice Chancellor for Student Affairs, the Director of the Student Health Service, the Deans of the General College, the College of Arts and Sciences, the Graduate School, and the professional schools. Crisp Dep., *supra* note 125, at 17.

128. Liptzin Dep., *supra* note 125, at 24. Clinical services were paid for by \$150/year fee included in student tuition and fees. In 1995, the clinic had two psychiatrists on its payroll and 6–10 psychologists and social workers. It also provided clinical internships for medical students, though the clinic and the UNC Hospital were separate entities. The Student Services health clinics were under the direction of the Vice-Chancellor of Student Affairs; the UNC Hospital was under the direction of the Medical School. *Id.*

129. Wegner Dep., *supra* note 125, at 19; Crisp Dep., *supra* note 125, at 12. In 2006, Winston Crisp became Assistant Vice-Chancellor for Student Affairs at UNC, where he is now Vice-Chancellor for Student Affairs. He served as an on-campus consultant to Virginia Tech after the rampage there. *Crisp Supports and Learns from Virginia Tech Counterparts*, UNIV. GAZETTE ONLINE (Aug. 29, 2007), available at <http://gazette.unc.edu/archives/07aug29/file.4.html>.

130. Crisp Dep., *supra* note 125, at 13.

131. WENDELL JUSTIN WILLIAMSON, NIGHTMARE: A SCHIZOPHRENIA NARRATIVE 4 (2001).

132. In 1995, 166 represented the ninety-fifth percentile among LSAT takers. See <http://tars.rollins.edu/prelaw/percentiles.htm> (last visited Jan. 18, 2010).

133. As an undergraduate, Williamson sought and received counseling at Student Services once in May 1990 “for relationship issues and academic problems.” His problem was noted as “fairly normative” by the reviewing Student Services doctor. See *Williamson v. Liptzin*, 539 S.E.2d 313, 315 (N.C. Ct. App. 2000).

134. According to his personal account, published in 2001, Williamson first began hearing voices in January 1992, shortly before his twenty-fourth birthday, an event he associated with hitting too many high notes. WILLIAMSON, *supra* note 131, at 5. He tried to see a psychiatrist at the UNC Student Services facility in March 1992 but was turned away because he did not have an appointment. *Id.* at 19. He did not make an appointment and did not return to the clinic:

He had thought about killing himself and about harming others.<sup>136</sup> He was hearing voices telling him to get his gun and shoot people.<sup>137</sup> He had a loaded rifle in his apartment.<sup>138</sup>

Williamson had been in law school only a few weeks when he set off public alarm. It started at The Pit, an outdoor gathering place on campus near the Student Union building.<sup>139</sup> With no apparent provocation, Williamson began to scream and yell and slap himself in the face until someone called the campus police.<sup>140</sup> The police found him in the law school parking lot and took him to Student Services.<sup>141</sup> At Student Services, still under police escort, he was referred to UNC Hospital, where he was involuntarily committed for ten days.<sup>142</sup> At the hospital, he was argumentative and denied having any mental problem.<sup>143</sup> His treating

One day I went over to UNC Student Health to talk about what was happening to me. I wasn't really sure if it was a mental illness or not, but I believed someone in authority should be able to help me. When I got there, though, they told me I needed an appointment and that it would be at least a week before anyone could see me. While they were telling me this, I also heard them telepathically "telling" me that I was truly telepathic and not mentally ill, but that if I came back they were going to tell me I was going crazy and that they would lock me up. I didn't want that, so I didn't make the appointment. I decided I couldn't trust the professionals to tell me the truth any more than I could trust anyone else to do it.

*Id.* Cf. *supra* note 133, at 19 (Charles Whitman's last letter).

135. Williamson was tormented, among other hallucinations, by shame-inducing memories of having used a vibrating back massager to masturbate when he was a teenager. *Id.* at 12, 22–27. He was convinced that everyone around him could tell whenever he thought about the vibrator. *Id.* at 25–27. He therefore concentrated on imagining his M1 rifle instead, a practice he discontinued only when he began prescribed drug therapy in 1994. *Id.* at 25–27; *see also infra* note 192.

136. WILLIAMSON, *supra* note 131, at 19–23; Williamson Dep., *supra* note 125, at 29.

137. WILLIAMSON, *supra* note 131, at 37.

138. *Id.* *See also infra* note 142.

139. WILLIAMSON, *supra* note 131, at 41.

140. *Id.* at 41–42.

141. *Id.*

142. *Id.* at 43. According to some accounts, including his own, Williamson at this time kept an M1 rifle in his apartment. Shortly before the incident at The Pit in September 1992, he had loaded the weapon, put the barrel in his mouth, and thought about pulling the trigger, an event about which he told the intake interviewer at the hospital. The hospital staff arranged for his parents to confiscate it. Paul B. Herbert, *Williamson v. Liptzin Appeal: Issues of Liability for a Patient's Unexpected Act of Violence*, 26 AAPL NEWSLETTER 2 (Apr. 2001), available at [http://www.aapl.org/newsletter/N262\\_Williamson\\_v\\_Liptzin.htm](http://www.aapl.org/newsletter/N262_Williamson_v_Liptzin.htm); WILLIAMSON, *supra* note 131, at 41; Williamson v. Liptzin, 539 S.E.2d 313, 315 (N.C. Ct. App. 2000). The rifle in question, which was later used in the rampage, had belonged to Wendell's grandfather and was kept in the closet of Wendell's bedroom in the family home in western North Carolina. Fonda Williamson Dep., *supra* note 125, at 17, 49–51; Dee Williamson Dep., *supra* note 125, at 41–44.

143. Forensic Psychiatric History and Evaluation/Legal Assessment/Discharge Summary and Aftercare Plan at 8 (Apr. 21, 1995) (post-rampage assessment) (copy on



psychiatrist recommended that he remain at the hospital for another four weeks to determine whether the appropriate diagnosis was bi-polar or schizo-affective disorder and to establish an appropriate medication regimen.<sup>144</sup> She also recommended that he drop out of law school.<sup>145</sup>

Williamson refused to remain in the hospital voluntarily and refused all medication.<sup>146</sup> The hospital staff filed a committal petition.<sup>147</sup> Though agreeing that Williamson's thinking was "psychotic," the judge let him out of the hospital with the understanding that he would seek outpatient psychiatric care instead.<sup>148</sup> The diagnosis on his hospital discharge summary was "rule out schizophrenia."<sup>149</sup>

Williamson ignored the judge and pursued no further treatment. Instead, he resumed his studies at the Law School in mid-October, having missed 10 days of classes.<sup>150</sup> Dean Wegner and Dean Crisp knew only that Williamson had been taken to Student Services following an incident at The Pit.<sup>151</sup> They were not aware of the nature of his problem at the time and Williamson refused to discuss it with them.<sup>152</sup> Dean Crisp placed a call to Student Services to inquire whether there was any reason Williamson

file with author).

144. WILLIAMSON, *supra* note 131, at 43. Williamson's drug screen was negative at this point, and there was no evidence of marijuana use, though that later became an issue. *See infra* note 166.

145. WILLIAMSON, *supra* note 131, at 45.

146. *Id.* at 46.

147. As head of UNC's Student Services mental health clinic, Dr. Myron Liptzin was informed of the petition. Liptzin Dep., *supra* note 125, at 51. *See also infra* note 181. Williamson later reported "faking it" at the committal hearing. "I knew I had 'reconstituted' because I could act like there was nothing wrong any time I wanted to, which I believed I could do because I thought I wasn't really mentally ill. I was likewise faking it because I wanted out of that hospital . . ." WILLIAMSON, *supra* note 131, at 46.

148. The magistrate judge did not order outpatient treatment as a condition of his release. *Williamson v. Liptzin*, 539 S.E.2d 313, 315 (N.C. Ct. App. 2000).

149. *Id.* "[R]ule out/schizophrenia' means that either: (a) 'it's [schizophrenia] until proven otherwise, but we haven't had enough time to prove otherwise yet[.]" or (b) 'you should keep [schizophrenia] first and foremost in your mind until a less serious condition is shown to be causing the problem.'" *Id.*

150. Many would consider that a disabling number of absences for a first-semester 1L. UNC Law School did not have a practice of tracking student attendance, a matter that was left to the discretion of the individual professor. Crisp Dep., *supra* note 125, at 161. Students could also be dropped from the class if they did not show up for the first two or three class meetings so that other students could take their places. *Id.* at 194. When Williamson returned from his hospital confinement, Dean Crisp wrote to his professors that he should be readmitted and allowed to catch up on his work. Letter from Winston Crisp (Oct. 15, 1992) (on file with author).

151. Deans Crisp and Wegner both testified in depositions that they believed Williamson had some kind of seizure in the parking lot and might be suffering from epilepsy. Crisp testified that Williamson did not confide that he was hearing voices and suffering other forms of hallucination at that time. Crisp Dep., *supra* note 125, at 32-33; Wegner Dep., *supra* note 125, at 28.

152. Letter from Winston Crisp (Oct. 12, 1992) (on file with author).

should not be allowed to resume his studies and was told that there was not.<sup>153</sup> Crisp so notified Williamson's professors and Williamson resumed classes.<sup>154</sup> It was around this time, Williamson later said, that he first contemplated mass violence, but he was "still opposed to killing."<sup>155</sup> He was to have his mind changed on that score as his career in law school continued.

Here, then, is one of those junctures at which, in hindsight, subsequent events might have been prevented had there been better communication between the Law School and the student's mental health provider. Had Dean Crisp been forewarned that Williamson was resisting evaluation for possible schizophrenia and that he had been advised to discontinue his legal studies, he might have viewed the situation rather differently. As it was, the Dean had little to go on. Williamson was high-functioning and adept at disguising his symptoms.<sup>156</sup> Indeed, for over a year after his hospitalization, he was able to keep functioning in spite of his delusions of grandeur and persecution.<sup>157</sup>

That is not to say that there were no signs of trouble. In November 1992, soon after his release from the hospital, a woman student complained that Williamson was staring inappropriately at her in the library and had removed his shirt.<sup>158</sup> Associate Dean Powell cautioned him about his behavior.<sup>159</sup> That time, Williamson was able to persuade the Law School administration that he was suffering from "gross immaturity" rather than mental illness.<sup>160</sup> As time went on, however, it appears that one or more professors became fearful of him. At least one later reported being afraid to not give Williamson a passing grade.<sup>161</sup>

Williamson's fall semester grades—mostly D's—surely gave the Law School cause for concern, and might, at some schools, have been grounds for intervention on purely academic grounds.<sup>162</sup> His grades improved

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153. Crisp Dep., *supra* note 125, at 36.

154. *Id.* at 120.

155. WILLIAMSON, *supra* note 131, at 37; Forensic Psychiatric History, *supra* note 143, at 8.

156. Williamson's handwritten note dated October 15, 1992, to the Associate Dean read: "This is to confirm that today we discussed the causes of my disruptive behavior on Tuesday, September 29, 1992. Again I reiterate: I have no prior history of such outbursts. Nor is there any foreseeable risk of a repeat performance. I regret the incident, and apologize for any embarrassment it may have caused. Sincerely. . . ." Letter from Wendell Williamson (Oct. 15, 1992) (note on file with author).

157. It was at this time that he met and started dating Annette, who left him a year later when his symptoms worsened and he refused to get treatment. WILLIAMSON, *supra* note 131, at 55; *see infra* note 168.

158. Crisp Dep., *supra* note 125, at 38, 49.

159. *Id.* at 50.

160. WILLIAMSON, *supra* note 131, at 49.

161. Warren Dep., *supra* note 125, at 162.

162. WILLIAMSON, *supra* note 131, at 52–53. Williamson was a scholarship student. His fall grades were D- (civil procedure), D+ (property), D+ (torts), C-

dramatically in the spring, however, and he finished the year with a C average.<sup>163</sup> He improved his academic standing even further by attending summer school, where he made two B's.<sup>164</sup>

Williamson's delusions continued into his second year of law school. He kept hearing voices, smelling foul odors, and believing that he could hear what other people thought of him—most of it derogatory.<sup>165</sup> He dealt with his symptoms by drinking a six-pack of beer and smoking marijuana daily.<sup>166</sup> In January 1994, in order to prove that he was telepathic, he bought a camcorder and began to record the conversations of people around him at bars he frequented.<sup>167</sup> By then, his psychosis was becoming apparent.<sup>168</sup> The situation came to a head in March 1994 when Williamson's best friend, classmate Bill Brown, burst into Dean Crisp's office and said, "Come quick. Wendell's going crazy!"<sup>169</sup> In the criminal procedure classroom, where class was about to begin, Dean Crisp found that Williamson had angrily announced that he was telepathic, could tell what everyone thought of him, and was tired of being "jerked around" by his classmates.<sup>170</sup> Williamson insisted on remaining for class (to which the professor agreed), but he came to Crisp's office afterwards.<sup>171</sup> Several

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(contracts), and C+ (criminal law); and he passed legal writing. Williamson's UNC Law School Transcript (Mar. 27, 1995) (on file with author). Some law schools might, for example, have given him the option to withdraw, since his GPA was below 1.6 at the end of the first semester, and restart with a clean slate the next year, if circumstances had changed.

163. *Id.* at 56–57. In spring semester 1993, he made a B- in civil procedure, a B in contracts, a C+ in property, a C in torts, and a B in legal research and writing. Transcript, *supra* note 162.

164. *Id.* at 57.

165. *Id.* at 58.

166. *Williamson v. Liptzin*, 539 S.E.2d 313, 315 (N.C. Ct. App. 2000). The decision finds that Williamson engaged in "occasional" marijuana use, but his case records, including Dr. Liptzin's notes, indicate the use was daily. His post-shooting psychological evaluation states that "chronic marijuana use of one to two joints per day may have contributed to even more impaired judgment" on the day of the shooting. Forensic Psychiatric History, *supra* note 143, at 11.

167. He intended to submit the tape to a parapsychology laboratory as proof of his telepathic powers. The lab refused to accept the tapes. WILLIAMSON, *supra* note 131, at 69.

168. At that point, his girlfriend left him because he would not seek psychiatric help. *Id.* at 65. At the parapsychology lab where he tried (unsuccessfully) to have his videotapes analyzed, the operator told him that he was mentally ill. *Id.* at 69.

169. Crisp Dep., *supra* note 125, at 75.

170. WILLIAMSON, *supra* note 131, at 69; *Williamson*, 539 S.E.2d at 315.

171. WILLIAMSON, *supra* note 131, at 69–70; Crisp Dep., *supra* note 125, at 77, 83–84, 99–100. Dean Crisp also spoke more than once in early March 1994 with Williamson's mother, who was anxious about her son and wanted him to get treatment. "It's a little tricky," Crisp explained, "because he's an adult, I mean, and he's over twenty-one and so I sometimes feel constrained about how much of a student's personal information you can divulge to parents. But being concerned, we talked about a number of things." Crisp Dep., *supra* note 125, at 125. Mrs. Williamson and Dean Crisp even discussed involuntary committal proceedings. *Id.* at 126. She did not,

times during the next few days, the Dean urged Williamson to get psychiatric treatment.<sup>172</sup> Crisp also consulted the University's Dean of Students and the other Law School Deans about the situation, discussing the possibility of involuntary committal if Williamson would not agree to treatment.<sup>173</sup> He also discussed Williamson with Dr. Myron Liptzin, who directed the mental health clinic at UNC's Student Services.<sup>174</sup> Williamson continued to refuse treatment until, at Dr. Liptzin's suggestion, Dean Crisp warned him that he would not otherwise be recommended as a candidate for admission to the bar, whereupon he immediately agreed to comply.<sup>175</sup> The Dean escorted him to Student Services for an intake evaluation and told him that the Law School would check to make sure he was keeping his appointments.<sup>176</sup>

In fact, however, contact between the Law School and Student Services was virtually nonexistent.<sup>177</sup> Liptzin never initiated communication with any Law School official, and Crisp was able to get very little information from Student Services—after calling once to verify that Williamson was keeping his appointments, he did not try to communicate directly with the clinic.<sup>178</sup>

Williamson disliked the two women psychologists who evaluated him, so Liptzin took him on, even though he was planning to retire in May and

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however, confide in Crisp that Williamson had previously been hospitalized, nor did they at any time discuss firearms. *Id.* at 126–128.

172. *Id.* at 79–80. In an attempt to establish some rapport with Williamson, Crisp even watched the videotapes he had been taking at the local bar every night for months. *Id.* at 102.

173. *Id.* at 57–58, 79–80. “We felt that this was a student that we needed to have evaluated.” *Id.* at 58.

174. *Id.* at 95.

175. WILLIAMSON, *supra* note 131, at 70; *Williamson*, 539 S.E.2d at 315. The coercion (leverage) was Liptzin's suggestion. Crisp Dep., *supra* note 125, at 109; Liptzin Dep., *supra* note 125, at 64.

176. WILLIAMSON, *supra* note 131, at 70. The intake psychologist again diagnosed “rule/out schizophrenia” but did not recommend hospitalization because Williamson denied any suicidal thoughts or violent urges. *Williamson*, 539 S.E.2d at 315. Williamson made a further attempt to avoid follow-up treatment after the diagnostic session, but Dean Crisp “clarified behavioral expectations” and Williamson agreed to continue therapy. Forensic Psychiatric History, *supra* note 143, at 13.

177. Dean Crisp might have been well-advised to ask Williamson to sign a waiver permitting his therapist to share information with law school administrators. *See infra* note 456 and accompanying text.

178. Crisp Dep., *supra* note 125, at 141. Crisp recalled having a conversation with Liptzin at some point about the effects of the anti-psychotic medication Navane. *Id.* at 123–24. Liptzin did not recall having any conversation with Crisp after Williamson became his patient. Liptzin Dep., *supra* note 125, at 65. “Once a student goes off into Student Health Services there really isn't much information that comes back. . . . [T]he student is now in treatment and it's treated as a confidential situation and you don't get status reports. . . . When I first started, I would ask, [but] once I became aware that no, you don't get things, then I stopped.” Crisp Dep., *supra* note 125, at 139–41.

knew that his patient had another year and a half to go in law school.<sup>179</sup> His decision was more problematic because until then he had been communicating with the Law School administration about the best way to manage the troubled student, and the Law School abruptly lost the benefit of his counsel in that regard.<sup>180</sup> Liptzin counseled Williamson six times between March 8 and May 24, 1994, in sessions lasting between twenty minutes and one hour.<sup>181</sup> Liptzin certainly did not “rule out schizophrenia.” Instead, he recorded a “more generous” diagnosis—“delusional disorder grandiose”—so that his patient’s career in law would not be jeopardized.<sup>182</sup> He prescribed the anti-psychotic drug Navane.<sup>183</sup>

Williamson found the medication regimen frustrating and unpleasant.<sup>184</sup> His thinking remained incoherent for weeks, and he still claimed to be telepathic.<sup>185</sup> One of his professors reported to Dean Crisp that Williamson’s midterm paper was complete nonsense and that she was concerned about his mental state.<sup>186</sup> Crisp encouraged Williamson to persevere, and he kept an eye on the troubled student until the end of the semester.<sup>187</sup> In April, about six weeks after starting medication and therapy, Williamson told Crisp that the medication was working and that it felt “like waking up from a nightmare.”<sup>188</sup> He apologized, thanked the Dean, and said he was ashamed of his previous behavior.<sup>189</sup>

For the remaining few weeks of the semester, Williamson reduced his alcohol consumption somewhat.<sup>190</sup> He recognized that his delusions had “an organic cause” and that, at least for the time being, he needed the Navane in order to think normally.<sup>191</sup> He was able to concentrate on his studies.<sup>192</sup> He attended class, did well on his exams, entered a legal writing

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179. Forensic Psychiatric History, *supra* note 143, at 4.

180. See *supra* text accompanying notes 176–78.

181. *Williamson v. Liptzin*, 539 S.E.2d 313, 315 (N.C. Ct. App. 2000). It is reported that he reviewed Williamson’s chart from Student Services but only the discharge summary, not the full hospital records, from Williamson’s 1992 temporary committal. See *supra* note 143.

182. *Williamson*, 539 S.E.2d at 315.

183. *Id.* at 316; WILLIAMSON, *supra* note 131, at 71.

184. WILLIAMSON, *supra* note 131, at 70–71.

185. *Id.*

186. Crisp Dep., *supra* note 125, at 120–21.

187. Crisp met with Williamson several times at the Law School and went out with him once for a beer. Crisp Dep., *supra* note 125, at 113–14, 117.

188. *Id.* at 119.

189. *Id.* at 118, 172.

190. Forensic Psychiatric History, *supra* note 143, at Liptzin’s record sheet of 4/19/94 session.

191. WILLIAMSON, *supra* note 131, at 71.

192. *Id.* Williamson was able to stop concentrating on his M1 rifle. He does not appear to have confided in Dr. Liptzin that he visualized a rifle in order to keep his mind off other disturbing thoughts.

competition, and became “more like his old self.”<sup>193</sup> He had no urge to commit violence.<sup>194</sup>

Nevertheless, Liptzin detected “a good bit of hostility just below the surface” in his new patient.<sup>195</sup> He was not the first to observe that Williamson was easily angered, but he apparently did not read the records made by Williamson’s psychiatrist at the hospital in 1992, which included information about his possession of a weapon and about his earlier suicidally violent thoughts.<sup>196</sup> Instead, Liptzin decided to treat Williamson’s symptoms “pragmatically.”<sup>197</sup> He apparently did not try to convince Williamson that he had a permanent psychiatric condition. Instead, Liptzin allowed Williamson to believe that his illness might be temporary.<sup>198</sup> He even told Williamson that he might be able to discontinue the medication at some point, so long as he told a trusted adult that he had done so.<sup>199</sup>

In late April, Liptzin suggested that Williamson should start seeing another Student Services therapist in June.<sup>200</sup> Williamson declined, saying that he expected to be away from Chapel Hill over the summer, as he would probably be staying with his family.<sup>201</sup> Liptzin did not insist upon the introduction, a departure from best practices for which he was later criticized. Nor did he inform the Law School administration that continuation of therapy was recommended but not yet guaranteed, though he could easily have done so.<sup>202</sup> Instead, despite Williamson’s past

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193. *Williamson v. Liptzin*, 539 S.E.2d 313, 316 (N.C. Ct. App. 2000); WILLIAMSON, *supra* note 131, at 71.

194. *Williamson*, 539 S.E.2d at 316.

195. Forensic Psychiatric History, *supra* note 143, at Liptzin record sheet of 3/8/94 session.

196. The omission is particularly striking since he was aware of Williamson’s hospitalization at the time he was hospitalized. Liptzin Dep., *supra* note 125, at 51. He also had easy access to Williamson’s records, which is not always the case when students arrive at college with a history of hospitalizations they do not wish to reveal.

197. “I address his concerns strictly pragmatically. He insists that I review his evidence of the video tape and I tell him it’s immaterial, that whether or not he’s experiencing these things he needs to make a decision about priorities, and if it’s important to him to finish law school and to sit [for] the bar exam he must try to suppress these other experiences . . . .” Forensic Psychiatric History, *supra* note 143, at Liptzin’s record sheet of 3/8/94 session.

198. “He told me that he didn’t believe I was really psychotic or really schizophrenic but that possibly my past drug use had give me some ‘sensitive nerve endings’ in my brain . . . which might go away over time.” WILLIAMSON, *supra* note 131, at 73.

199. By Williamson’s account, that turned out to be “extremely bad advice.” *Id.*

200. Forensic Psychiatric History, *supra* note 143, at Liptzin’s record sheet of 4/5/94 session. Liptzin raised the matter of his successor again in late May: “He does know that I am leaving the service here and he will be seeing my replacement.” *Id.* at Liptzin’s record sheet of 5/25/94 session.

201. *Williamson v. Liptzin*, 539 S.E.2d 313, 316 (N.C. Ct. App. 2000).

202. Disclosing these facts would not have violated any confidences of the patient.

resistance to therapy and medication, Liptzin trusted that Williamson's career ambitions would keep him on Navane through the summer, even though that meant he would have to find another doctor to prescribe it, and that he would resume therapy of his own accord at UNC Student Services in the fall.<sup>203</sup>

Dr. Liptzin was wrong, and later experts testified that he should have known better.<sup>204</sup> Williamson discontinued the Navane in June because it made him sunburn more easily, and he never took it again.<sup>205</sup> Although his voices were attacking him again in August, he did not return to Student Services when he came back to Chapel Hill in the fall, and there was no follow-up by clinicians at Student Services.<sup>206</sup> Nor was there further follow-up by the Law School administration, although Williamson was enrolled as a 3L and attending classes.<sup>207</sup>

In his fifth of six semesters Williamson was not disruptive in class, but he stopped studying.<sup>208</sup> He barely passed his courses.<sup>209</sup> He again began to contemplate committing mass murder.<sup>210</sup> By October 1, he had "decided to go through with it for sure."<sup>211</sup> He attended a gun show, bought ammunition, and chose his weapons.<sup>212</sup>

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Such disclosure was also reasonably to be expected from the circumstances of Williamson's agreement with the law school and behavioral expectations of him. Dr. Liptzin could have secured Williamson's express permission had he been in any doubt about the propriety of such communication. See *infra* text accompanying note 445.

203. *Williamson*, 539 S.E.2d at 316.

204. See *infra* text accompanying note 248.

205. Williamson told his mother when he stopped taking the medication. "I thought if the symptoms came back I would know them to be an illness and start taking navane again. How naive I was." WILLIAMSON, *supra* note 131, at 74.

206. *Id.* at 74, 97.

207. Crisp stated in his deposition that Williamson stopped by to see him toward the end of the fall semester and said he was thinking about discontinuing his medication, which he had in fact done months before. See *infra* text accompanying notes 212 et seq.

208. *Id.* at 75; *Williamson v. Liptzin*, 539 S.E.2d 313, 316 (N.C. Ct. App. 2000).

209. *Williamson*, 539 S.E.2d at 316. Williamson's transcript shows that he took twelve hours of elective courses in which he made a 1.5, a 1.6, a 1.2, and a 1.3—all grades in the D range. Transcript, *supra* note 162. He later told psychiatric evaluator Dr. John Warren that he "gave up on law school" in September because "[p]eople were so jealous of me being a telepath. They would lay me as low as possible." Forensic Psychiatric Evaluation and Report on Wendell Justin Williamson at 15 (Oct. 3, 1995) (on file with author).

210. WILLIAMSON, *supra* note 131, at 76. "I decided that the risk-averse, and therefore safe, and therefore moral, thing to do would be to kill in order to prove others were afraid to kill me in return, and thus by implication force them to admit that this was because I was telepathic and very important to their scheme of things." *Id.* at 80.

211. "I would have to be brutal, remorseless, cold-blooded, calculating, from that day forward. There could be no more doubt." *Id.* at 83.

212. Williamson alarmed his friend Bill Brown by bringing a Nazi uniform to a Halloween party. Forensic Psychiatric Evaluation Report, *supra* note 212. He also told people that he knew how to get away with murder by establishing insanity

Shortly before Thanksgiving, Williamson initiated a conversation with Dean Crisp—the only one that semester that Crisp later remembered. He told the Dean that he was thinking about discontinuing his medication because the side effects were “tough.”<sup>213</sup> He did not think he had a mental problem any longer, or that he needed the drugs.<sup>214</sup> Crisp told Williamson that it was a “big mistake” to stop the medication and asked if Williamson had talked to his doctor about it.<sup>215</sup> Williamson said that he had.<sup>216</sup> Crisp was not satisfied. “I remember making a deal with him that he would think about it,” he later testified, “and if he decided that he was going to stop taking his medication, that before he did that he would come back and talk to me.”<sup>217</sup> Crisp did not see or hear from Williamson again.<sup>218</sup> Crisp did not try to get any information from Student Services, which would likely have told him nothing.<sup>219</sup> Instead, he discussed the conversation with the Law School’s Associate Dean Lisa Broome, who agreed that the Law School administration would “keep a watch” on Williamson.<sup>220</sup>

When Williamson returned to Chapel Hill after Christmas break, he began living out of his car.<sup>221</sup> He enrolled in school, but he paid no attention to his legal studies.<sup>222</sup> In mid-January, one of his professors

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beforehand, which greatly alarmed his lawyers later. WILLIAMSON, *supra* note 131, at 140.

213. Crisp Dep., *supra* note 125, at 132–33.

214. *Id.*

215. *Id.* Crisp knew by then that Dr. Liptzin had retired. *Id.* at 139.

216. *Id.* at 133–34.

217. *Id.*

218. *Id.*

219. Crisp Dep., *supra* note 125, at 132–33.

220. *Id.* at 136. Williamson found it even more difficult to convince his mother that he was no longer mentally ill. When he went home for Thanksgiving, she suggested that he go back to the psychiatrist and back on the medications, but he ignored her. *Id.* at 136. He did not come home for Christmas, and by the time he saw his parents again in early January, he had become so uncommunicative that his mother was even more alarmed. He refused to speak and spent his days sleeping or “flipping through the encyclopedia.” Fonda Williamson Dep., *supra* note 125, at 43. He later testified that he was silently warning everyone what he was about to do. Williamson Dep., *supra* note 125, at 41.

221. Williamson v. Liptzin, 539 S.E.2d 313, 316 (N.C. Ct. App. 2000). Williamson was afraid that he would be apprehended and prevented from carrying out his plan if he stayed in his apartment. Williamson Dep., *supra* note 125, at 44.

222. Instead, Williamson planned and prepared his assault. He was again self-medicating with marijuana and alcohol. See *supra* note 166. He made a trip home to get his M1 rifle and practiced target shooting at his family’s farm in Tennessee. WILLIAMSON, *supra* note 131, at 101; Williamson, 539 S.E.2d at 316. He picked his route. He decided that he would start shooting on Henderson Street at mid-day, then “cut a deadly swath” across the UNC campus to the Botanical Gardens. WILLIAMSON, *supra* note 131, at 105–06. He walked the projected route, *id.* at 105, stashed a cache of ammunition at the spot where he expected to make his final stand, *id.* at 104, loaded a backpack with over 600 rounds of ammunition, *id.*, and stopped calling his mother, Fonda Williamson Dep., *supra* note 125, at 51.



reported to Dean Crisp that he was not attending class.<sup>223</sup> The registrar also reported that Williamson appeared to be “missing in action.”<sup>224</sup> Crisp spoke with Williamson’s other professors and learned that he was not in their classes, either.<sup>225</sup> He left a couple of notes in Williamson’s mail file asking him to communicate about his absences.<sup>226</sup> He did not call Student Services to find out if Williamson was still in treatment.<sup>227</sup>

Early in the week of January 23, 1995, Williamson’s mother called the Law School and spoke with Dean Crisp.<sup>228</sup> She was worried about her son.<sup>229</sup> He had been very withdrawn over the Christmas break, she told Crisp.<sup>230</sup> She could not find him and had not heard from him since January 13.<sup>231</sup> On Thursday, January 26, Dean Crisp and Associate Dean Broome went to lunch to discuss what to do about the situation.<sup>232</sup> By the time they returned to campus, Wendell Williamson’s rampage was over: he had shot and killed two people and was in police custody.<sup>233</sup>

Williamson carried out his plan eight months and two days after his last session with Dr. Liptzin. He walked along Henderson Street with his M1 rifle and a loaded backpack.<sup>234</sup> He shot at random, whomever he saw, and he was a good shot. He killed UNC undergraduate student Kevin Reichardt, who was bicycling toward campus.<sup>235</sup> He killed Chapel Hill resident Ralph W. Walker, who was sitting on his front porch.<sup>236</sup> Williamson also injured police officer Dimitra Stevenson before police subdued him by shooting him in the legs.<sup>237</sup> He was stopped before he reached the campus; otherwise he might have killed or injured many others.

Williamson was arrested on two charges of first degree murder and was immediately suspended from the University.<sup>238</sup> At his trial in October 1995,

223. Crisp Dep., *supra* note 125, at 137.

224. *Id.*

225. *Id.*

226. *Id.* at 138.

227. *Id.* He would not likely have been answered. *See supra* note 178.

228. Fonda Williamson Dep., *supra* note 125, at 51–52; Crisp Dep., *supra* note 125, at 142.

229. Fonda Williamson Dep., *supra* note 125, at 51–52. She also called her son’s apartment manager and Student Services. *Id.* at 52.

230. *Id.*; Crisp Dep., *supra* note 125, at 142.

231. Fonda Williamson Dep., *supra* note 125, at 51–52; Crisp Dep., *supra* note 125, at 142.

232. Crisp Dep., *supra* note 125, at 30.

233. *Id.*; Gloria Lopez, *Wendell Williamson Back at Dorothea Dix Hospital Following Disappearance* (June 11, 2004), <http://www.wral.com/news/local/story/111584>.

234. WILLIAMSON, *supra* note 131, at 107–09; Lopez, *supra* note 233.

235. *Id.*

236. *Id.*

237. *Id.*

238. Letter Frederic W. Schroeder, Jr., UNC Dean of Students, to Wendell Justin Williamson (Jan. 26, 1995) (on file with author). Citing university procedures on

by which time he was again taking anti-psychotic medication and capable of non-delusional thinking, Williamson was found not guilty by reason of insanity.<sup>239</sup>

Williamson was committed to a state mental institution.<sup>240</sup> He applied for readmission to the University and permission to complete his law degree from the hospital.<sup>241</sup> Both applications were denied.<sup>242</sup>

### B. Williamson's Civil Litigation

A welter of lawsuits followed Williamson's acquittal. Suits were filed on behalf of all three victims against Williamson, his parents, and their homeowners' insurance carrier.<sup>243</sup> The parents of Kevin Reichardt also filed a tort claim against the University for wrongful death.<sup>244</sup> Williamson filed a negligence action against Dr. Liptzin and a tort claim of *respondet superior* against UNC.<sup>245</sup>

The only case that went to trial was Williamson's negligence action against Dr. Liptzin for failing to warn him of the serious nature of his mental illness and the almost certain return of his delusions if he

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admissions problems and extraordinary disciplinary emergencies, the University's Dean of Students suspended him "because of the seriousness of these [murder] charges and in consideration for the safety of the University community." *Id.*

239. *Williamson v. Liptzin*, 539 S.E.2d 313, 316 (N.C. Ct. App. 2000); WILLIAMSON, NIGHTMARE, *supra* note 131, at 156. Dr. Liptzin did not testify at the murder trial. Liptzin Dep., *supra* note 125, at 58.

240. *Williamson*, 539 S.E.2d at 316. Williamson has not yet been released and is unlikely to be. In that regard, he wrote, "As if it weren't bad enough that I had killed completely innocent people, it looked like my life was forever going to be ruined because of it." WILLIAMSON, *supra* note 131, at 132-33. In 2000, Williamson's forensic treatment team at Dorothea Dix Hospital recommended that he be allowed short periods of unsupervised time to engage in "off-ward" activities. *In re Williamson*, 151 N.C. App. 260 (N.C. Ct. App. 2002). The hospital grounds at Dorothea Dix Hospital are not fenced, and there have been escapes. *Id.* The Orange County Superior Court found that the public risk of allowing Williamson to be unsupervised outweighed the benefits and denied the recommendation. Williamson appealed on jurisdictional, equal protection, and due process grounds. Finding his arguments "unpersuasive," the Court of Appeals upheld the lower court. Two years later the trial judge did allow Williamson up to an hour of unsupervised time every day and in June, 2004 he created a local news sensation by disappearing for twelve hours. Lopez, *supra* note 233. He was found six miles away at a lakeside. *Id.*

241. WILLIAMSON, *supra* note 131, at 168.

242. *Id.*

243. All three suits settled after the Reichardts defeated a summary judgment motion by State Farm arguing that Wendell Williamson, as an adult child not living at home, was not covered by the policy. The court held that the circumstances created a genuine issue of material fact with respect to Wendell's capacity. Thereafter, State Farm settled with all three victims. Conversation with Jona Poe, Esq., attorney for the Reichardts (Jan. 4, 2010); WILLIAMSON, *supra* note 131, at 171.

244. *See Reichardt*, *infra* note 272.

245. *Williamson*, 539 S.E.2d at 313; Conversation with Nick Gordon, Esq., civil lawyer for Williamson (Oct. 15, 2009).

discontinued the anti-psychotic medication.<sup>246</sup> Experts who appeared on Williamson's behalf testified that Liptzin had violated the community standard of professional care by deciding not to diagnose Williamson's condition as schizophrenia (chronic, paranoid), by failing to perform a formal risk assessment, by failing to educate Williamson about his mental illness, and by failing to develop a plan for Williamson's continued treatment after Liptzin retired from Student Services.<sup>247</sup> Williamson had a history of recalcitrance and noncompliance with treatment and was an untreated substance abuser.<sup>248</sup> He had "no insight into his illness" when he began therapy and, it would appear, gained little from his sessions with Liptzin.<sup>249</sup> Under the circumstances, Liptzin's careless diagnosis and treatment, however generously intended, made it foreseeable that his patient's condition would worsen over time: that he would not comply with instructions; that his psychotic symptoms would increase; that his insight and judgment would remain poor or get worse; that he would continue to abuse substances; that he would again believe himself to be telepathic; that he would deteriorate and decompensate; that he would fall apart mentally; that he would become sicker.<sup>250</sup> About this much his experts could testify with confidence, and without significant contradiction.<sup>251</sup> Nor was there any significant dispute that paranoid schizophrenia is the mental illness most closely associated with violence. The probability of violence goes up when the schizophrenic is young and male and has easy access to firearms. Williamson fit all three categories.<sup>252</sup>

What was less clear, however, even to Williamson's own experts, was that his inevitable psychological disintegration would lead to violence of the sort he engaged in and result in the injuries of which he complained.<sup>253</sup> They were prepared to state that as his illness progressed it was foreseeable that he *might* retrieve his rifle from home and that he *might* become dangerous, but further than that none would hazard a prediction.<sup>254</sup>

Apparently, the jury was not troubled by such subtleties. Williamson's preventability argument was too strong: had Dr. Liptzin been reasonably thorough and discerning, had he taken his diagnostic obligations more seriously, had he not been lax in his therapeutic approach and soft on his

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246. *Williamson*, 539 S.E.2d at 315.

247. *Id.* at 317; Warren Dep., *supra* note 125, at 44 (stating that Liptzin should have done a formal risk assessment).

248. The experts criticized Liptzin for failing to treat Williamson's substance abuse seriously, though Liptzin did encourage his patient to reduce his drinking and consider a 12-step program.

249. *Williamson*, 539 S.E.2d at 317.

250. *Id.*

251. *Id.*

252. *Id.*

253. Injuries included getting shot, being incarcerated indefinitely, and losing his legal career.

254. *Williamson*, 539 S.E.2d at 317.

manipulative patient, Williamson would not have discontinued treatment, his psychotic thought processes would not have returned or worsened, and his rampage never would have happened.<sup>255</sup> He would not have murdered two people, he would not have been shot in the legs, he would not have been dismissed from law school, and he would not be indefinitely incarcerated in a mental hospital.<sup>256</sup> On that reasoning, the jury awarded Williamson \$500,000.<sup>257</sup>

Like *Tarasoff*, the jury award made national headlines and created a furor in the psychiatric community, to say nothing of the moral outrage expressed by the victims' families and by members of the public.<sup>258</sup> On the sole ground that Dr. Liptzin could not reasonably have foreseen Williamson's rampage, the North Carolina Court of Appeals reversed.<sup>259</sup> It left intact, and did not address, the jury's findings that Liptzin's care of Williamson was negligent and harmful to his patient, and that Williamson's own negligence did not contribute to the violent outcome.<sup>260</sup> Instead, it denied him a remedy out of "convenience, . . . public policy, . . . [and] a sense of rough justice."<sup>261</sup>

The court of appeals candidly acknowledged that its reversal of the jury's verdict was an extraordinary, even arbitrary move.<sup>262</sup> The extent to which a plaintiff's injury was a foreseeable result of the defendant's

255. Herbert, *supra* note 142, at 8.

256. *Id.* The jury found no contributory negligence. *Id.* See also *Williamson*, 539 S.E.2d at 318.

257. *Williamson*, 539 S.E.2d at 318.

258. William Glaberson, *Killer Blames His Therapist, and Jury Agrees*, N.Y. TIMES, Oct. 10, 1998, at A1.

259. *Williamson*, 539 S.E.2d at 320.

260. Yale clinical psychologist (and law clerk to Justice Tobriner on the *Tarasoff* case) Paul Herbert wrote:

As legal precedent, there is considerably less to Williamson than meets the eye. . . . As clinical precedent, however, [it] is signal. Stripped bare, the facts are that defendant (apparently purposely) misdiagnosed schizophrenia as "delusional disorder," neglected to diagnose or target for specific treatment (such as AA meetings or partial hospital therapy) substance abuse in a six-pack-a-day (plus "occasional" marijuana) gun-owning schizophrenic, and made no specific follow-up arrangements at termination (occasioned by defendant's retirement).

Herbert, *supra* note 142, at 8.

261. *Williamson*, 539 S.E.2d at 324 (*quoting* *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 103 (N.Y. 1928) (Andrews, J., dissenting)).

262. The court wrote:

We recognize that our jurisprudence in the area of proximate cause is quite varied. . . . We further recognize that it is only in the rarest of cases that our appellate courts find proximate cause is lacking as a matter of law. . . . However, the law of proximate cause "cannot be reduced to absolute rules." . . . This is one of those rare cases where "because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point."

*Id.* at 324 (citations omitted).

negligence is an element of proximate cause in North Carolina, and causation is a question of fact for the jury.<sup>263</sup> A court of appeals is seldom justified in reversing the jury's finding.<sup>264</sup> The court's reliance on foreseeability was not particularly persuasive.<sup>265</sup>

Even less persuasive was the court's suggestion that university mental health care is inherently more short-term and stop-gap than other clinical care arrangements. To the contrary:

University students are a fairly stable catchment, often followed for several years. ([Williamson's] contacts with his campus mental health service spanned four years, from May 1990 to May 1994); it is not clear that community mental health center clientele or private outpatients, given the limitations of health insurance coverage, have characteristically lengthier or deeper courses of treatment nowadays.<sup>266</sup>

Moreover, a well-functioning university clinic should be able to enhance

263. Moreover, North Carolina's definition of proximate cause is loose enough to support the jury's award in *Williamson*:

The element of foreseeability is a requisite of proximate cause. To prove that an action is foreseeable, a plaintiff is required to prove that "in the exercise of reasonable care, the defendant might have foreseen that *some* injury would result from his act or omission, or that *consequences of a generally injurious nature* might have been expected."

*Id.* at 319 (quoting *Hart v. Curry*, 78 S.E.2d 170, 171 (N.C. 1953)) (emphasis added).

264. *Id.*

265. Shortly after the decision issued, Paul Herbert commented:

But for a quite striking confluence of serendipitous facts, the appellate court could not have saved the defendant (and surely would not have been inclined to do so): the plaintiff harmed others rather than himself (the court view[ed] self-harm in this case as significantly more foreseeable); the plaintiff was extraordinarily high-functioning (attenuating the nexus between defendant's actions and the plaintiff's decompensation); a full eight months went by; the plaintiff made no attempt to pursue follow-up (as distinct from a mentally disturbed patient who might try on his own to make an appointment not arranged for him but fail[]); there were no documented threats or past acts whatsoever of violence (quite peculiar in a case that eventuates in a shooting spree); and the clinical setting was a university health service (which the court implie[d] unconvincingly carries a lesser standard of care with respect to diagnosis and follow-up).

Herbert, *supra* note 142, at 8.

266. *Id.* at 4. Nor did the court have any factual basis for implying, if it meant to, that university psychiatrists are or should be exempted from professional standards of care when diagnosing student-patients or arranging for their follow-up treatment. *Id.* at 5. Benign motives do not excuse false diagnosis in any setting. Herbert observed, "A cardiologist would not deliberately overlook a basketball prospect's serious valve pathology and then expect to be exonerated in a wrongful death suit by asserting that he had not wanted to stand in the way of the player's athletic career." *Id.* at 9. He continued, "[W]here follow-up is clearly indicated (as with a young and noncompliant substance-abusing schizophrenic), more must be done (and documented) than urging the patient himself to make appropriate arrangements." *Id.*

effective follow-up arrangements for patient care after a therapist retires, since it is capable of providing administrative continuity, intra-organizational communication, and professional replacement therapists.<sup>267</sup>

The professional therapists who treat students at such clinics are university employees. Dr. Liptzin was on both the staff of the clinic and the faculty of the University's medical school. The court of appeals was surely aware that if it did not rescue him from the jury award, UNC would absorb at least a portion of the cost.<sup>268</sup> Once again, as in the original case, application of the *Tarasoff* formula diminished the institutional context in which the professional negligence arose and relieved the institution of liability it might otherwise have incurred. Indeed, it is one of the ironies of the case that the North Carolina court cited *Tarasoff* in support of finding that Liptzin had no duty to warn his patient of the nature of his illness, because Williamson's violence was unforeseeable.<sup>269</sup>

It is difficult not to concur with the result of the *Williamson* appeal, since the jury award appeared to compensate the plaintiff for premeditated murder.<sup>270</sup> Given the self-confessed weakness of the appellate decision, however, the outcome left troubling questions concerning the extent of the University's potential liability to a more deserving claimant. It is perhaps not surprising that UNC decided to settle rather than defend the wrongful death claim of student victim Kevin Reichardt.<sup>271</sup>

### C. The Reichardts' Wrongful Death Action

#### 1. The Lawsuit

Filed in January 1997, the Reichardts' suit specifically identified Dean

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267. Compare, for example, the court's account of the course of treatment of a suicidal student in *Shin v. Mass. Inst. of Tech. (MIT)*, No. 020403, 2005 WL 1869101 (Mass. Super. Jun. 27, 2005). See *infra* note 478 and accompanying text.

268. The North Carolina Tort Claims Act (N.C.T.C.A.) covers public universities and in 1997 capped damages at \$150,000. N.C. GEN. STAT. §143-299.2 (1995) (amended 2007, increasing damage limit to \$1,000,000). Cases under the N.C.T.C.A. are adjudicated by the North Carolina Industrial Commission and reviewed by the North Carolina Court of Appeals. *Id.* § 143-291. At the same time that he sued Liptzin, Williamson filed a claim against the University on a theory of *respondeat superior*. The claim was dismissed when he lost his appeal in the separate suit against Liptzin. Conversation with Nick Gordon, Esq., Williamson's civil lawyer (October 15, 2009).

269. *Williamson v. Liptzin*, 539 S.E.2d 313, 322 (N.C. Ct. App. 2000) ("We recognize the difficulty that a therapist encounters in attempting to forecast whether a patient presents a serious danger of violence." (quoting *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334, 345 (Cal. 1976)).

270. The court also recognized a public policy in favor of less restrictive treatment modalities. *Id.* at 323. It did not, however, disturb the jury's determination that, even so, Liptzin's diagnosis and treatment of Williamson was so lax as to amount to negligence. *Id.* at 324.

271. See *supra* note 243 and accompanying text.

Crisp, Dr. Liptzin, and UNC Dean of Students Frederic Schroeder as negligent actors.<sup>272</sup> First, the plaintiffs complained that Williamson was allowed to resume law school in 1992, after his involuntary ten-day committal, and that defendants did not make sure he received continuing psychiatric care—the condition upon which he was discharged from the hospital.<sup>273</sup> Second, after Liptzin retired in May 1994, defendants made no effort to monitor Williamson's psychiatric condition or require continuation of his treatment.<sup>274</sup> Third, defendants knew days before the shooting that Williamson was mentally ill, should be on medication, was missing classes, and was out of communication with his parents, but they did not call the UNC or Chapel Hill police or otherwise try to locate him.<sup>275</sup>

UNC's answer denied any liability, but a later case, decided by the court of appeals in early 2001, suggests that discreet resolution may have been the better part of valor.<sup>276</sup>

## 2. The Sources of Law

### a. Davidson v. University of North Carolina

In *Davidson v. University of North Carolina*, the plaintiff was an undergraduate at UNC who suffered permanent brain injury in 1985 when

272. Karl Reichardt et al. v. Univ. of N. Carolina at Chapel Hill, I.C. File No A-14669 (Jan. 24, 1997) (on file with author); conversation with Jona Poe, *supra* note 243.

273. *Reichardt*, *supra* note 272.

274. The complaint also alleged that Crisp knew that Williamson was off his medications. See *supra* text accompanying notes 212–16.

275. *Reichardt*, *supra* note 272. The complaint concluded:

UNC through its employees owed to Mr. Reichardt the duty to protect him from and warn him about students that it knew or should have know presented a danger to inflict harm to other students and to otherwise assure a safe campus for the University community. UNC breached this duty in that it failed to secure adequate psychiatric care for Mr. Williamson despite the fact that it had determined that he posed a danger to himself and the University community and that he was suffering extreme psychotic delusions as a result of his paranoid schizophrenia. In addition, UNC failed to protect the University community, including Mr. Reichardt, from a student (Wendell Williamson) that it knew or should have known posed a continuing threat to himself and to other members of the University community despite the fact that it had the ability and duty to remedy the situation through the express powers of its Committee on Problem Admissions and Extraordinary Disciplinary Emergencies. As a direct and proximate result of UNC's breach of duty, Kevin Reichardt was murdered by Wendell Williamson. Accordingly, claimants Karl and Carol Reichardt, as co-administrators of the estate of Kevin Reichardt [,] have brought the present wrongful death claim against UNC for all damages recoverable pursuant to N.C.G.S. § 28-A-18-2.

*Id.*

276. See *Davidson v. Univ. of N. Car.*, 543 S.E.2d 920 (N.C. Ct. App. 2001), *cert. denied*, 353 N.C. 724, 550 S.E.2d 771 (2001).

she fell from a human pyramid during cheerleading practice.<sup>277</sup> The North Carolina Industrial Commission denied the claim, but the North Carolina Court of Appeals reversed.<sup>278</sup> The court confirmed that the school-pupil relationship is not special by definition in North Carolina.<sup>279</sup> However, a student's dependence upon the university, the benefit the university derives from the situation, and the university's control over student conduct and activities may in some circumstances create a special relationship that in turn gives rise to an affirmative duty to protect. Moreover, the court held that a duty to exercise reasonable care may also arise from a voluntary undertaking by the university.<sup>280</sup>

*Davidson's* reasoning provides a theoretical basis for liability in the Reichardt's wrongful death claim, even if Williamson's rampage was not precisely predictable. The University's Student Services was a benefit to both UNC and its students, and it was not gratuitous. Requiring students to pay \$150 per year in fees to support the clinic, which then provided services at no additional cost, benefitted students as it encouraged them to depend upon the clinic for mental health services.<sup>281</sup> Student Services had its own paid staff and also offered clinical practice opportunities for medical students at UNC, which benefitted the University.<sup>282</sup> Another benefit was that Dr. Liptzin not only directed the mental health clinic and taught in the medical school, but also served as a consultant to university administrators on psychological issues and "extraordinary disciplinary emergencies" (such as that which Williamson created by his outburst at The Pit, of which Liptzin was aware).<sup>283</sup> This arrangement enhanced UNC's capacity to maintain coordination and consistency in its approach to mental health issues on its campus.

The *Davidson* court also considered the degree of control that UNC exercised over student life as it related to the negligence claimed.<sup>284</sup> In

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277. *Id.*

278. *Id.* at 921.

279. *Id.* at 929.

280. *Id.*

281. The benefit of such a clinic is statistically greatest for full-time graduate and professional students, like Williamson, who are likely excluded by age 23–25 from parental insurance and unlikely to have health insurance available through an employer. See, e.g., MD. HEALTH CARE COMM'N, *Health Insurance Coverage Among College Students*, at 2 (2009), available at [http://mhcc.maryland.gov/legislative/hlthins\\_college.pdf](http://mhcc.maryland.gov/legislative/hlthins_college.pdf) (nationally, thirty percent of 19–29 year olds were uninsured in 2006–2007). They are therefore least likely to get medical care unless they have access through their educational institution.

Post-graduate students as a group are also the most likely to commit murder on campus. de Haven, *supra* note 1, at 508 n.10. Seen as a protective and preventive measure, affordable mental health care is of mutual benefit to them and to the institution at which they are enrolled for this reason as well.

282. Liptzin Dep., *supra* note 125, at 14, 21, 24, 36, 40.

283. *Id.* at 32, 33.

284. *Davidson*, 543 S.E.2d at 927.



Williamson's case, UNC exercised considerable control over students with psychological problems that manifested in disorderly public conduct. First, it could immediately control disturbances on its campus. Campus police employed by UNC had authority to detain and arrest students on campus, and UNC's Hospital, unlike Berkeley's, could accept short-term involuntary committals.<sup>285</sup> In September 1992, when Williamson was hurting himself at the Pit and in need of restraint, the University took immediate control of the situation.<sup>286</sup> The campus police were summoned and took Williamson to the UNC hospital, where he was treated and diagnosed by UNC staff who then notified the UNC psychiatric consultant with their recommendation that his commitment be extended.<sup>287</sup>

The University had control over the situation, too, by virtue of its power to dismiss students who posed a danger to people or property, created a serious threat of disruption of the academic process, or were charged with a serious crime.<sup>288</sup> The Law Deans had the additional clout of being able to make it difficult, if not impossible, for Williamson to take the bar examination if he did not seek psychiatric help.<sup>289</sup> The threat of disqualification, suggested by Dr. Liptzin, prevented further disturbance of the learning environment and protected the academic community without dismissing a promising law student. Moreover, it was effective. Only fear of exclusion from the legal profession persuaded Williamson into treatment.<sup>290</sup> The pleas of his mother, the concern of his friends, and the loss of the woman he intended to marry had had no such effect, and actual dismissal from school would have removed the incentive.<sup>291</sup> Considering the difficulty of coercing a disturbed adult into seeking outpatient

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285. Williamson, 539 S.E.2d at 315; University of North Carolina Public Safety, available at <http://www.dps.unc.edu/Police/policenav.cfm>; see *infra* note 288.

286. WILLIAMSON, *supra* note 131, at 41–43.

287. See *supra* text accompanying notes 142–48 (Williamson's first hospitalization). Taking Williamson to UNC's hospital for treatment further reinforced his dependence upon UNC's medical services and probably "caused him to forego other alternatives for protecting himself." See *infra* text accompanying note 466.

288. See UNC COMMITTEE ON PROBLEM ADMISSIONS AND EXTRAORDINARY DISCIPLINARY EMERGENCIES in effect in 1995 (on file with author).

289. Candidates for admission to the bar must undergo investigation to ensure they are of good character and otherwise fit to practice law. Law Deans or their designates have an opportunity to notify the candidate's state board of bar examiners if there is a question about a graduate's character or fitness based on law school performance, including mental or emotional instability. See, e.g., Nat'l Conference of Bar Examiners & ABA Section of Legal Educ. and Admissions to the Bar, Comprehensive Guide to Bar Admissions iii (2010), available at [http://www.ncbex.org/fileadmin/mediafiles/downloads/Comp\\_Guide/CompGuide\\_2010.pdf](http://www.ncbex.org/fileadmin/mediafiles/downloads/Comp_Guide/CompGuide_2010.pdf).

290. WILLIAMSON, *supra* note 131, at 70.

291. Had the more gentle coercive tactic not succeeded, the deans were considering having Williamson picked up and taken to the hospital again involuntarily. Dean Wegner testified in deposition that she generally preferred involuntary committal as the appropriate course of action. Wegner dep., *supra* note 125, at 43.

treatment, the school's capacity to insist that Williamson get help supports finding a special relationship.<sup>292</sup>

Moreover, UNC officials were clearly concerned about the danger Williamson might pose to the law school community and acted on that basis. In October 1992, Dean Crisp insisted on receiving official medical and psychological clearance before allowing Williamson's return to class.<sup>293</sup> When UNC dismissed Williamson summarily on the day of the rampage, it did so partly "in consideration for the safety of the University community."<sup>294</sup> These actions surely reflect the assumption of an ethical, if not a legal, duty on the part of college and university officials.

*b. Furek v. University of Delaware*

Even if dependence on UNC's clinical mental health services and UNC's control over dangerous and disturbing student behavior were not enough to establish a special relationship with Williamson, UNC might still have assumed a duty to keep him from injuring himself or others. To be sure, in terms of moral culpability, if not legal liability, there is a big difference between neglecting to prevent an accident during cheerleading practice and neglecting to prevent a suicide, an assault, or a rampage killing. Nevertheless, the *Davidson* court cited with approval *Furek v. University of Delaware*, a case holding a university liable to a student

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292. In 2004, in a report on incarceration of the mentally ill, the American Psychiatric Association cited scarce community resources and resistance to treatment as primary reasons why mentally-ill adult offenders do not receive appropriate outpatient mental health care:

In many jurisdictions in the United States, mental health treatment . . . resources are insufficient to serve the numbers of community members with mental illness. People with mental illness may be expected to get themselves to outpatient clinics, when the real need for a large proportion of them is for outreach services like assertive community treatment programs. Some service providers may lack the ability to provide the degree of structure often required by offenders who have mental illness. Since many of them have illnesses that are highly resistant to treatment, they may refuse to visit treatment providers, refuse or be unable to tolerate their medications, or may be unable to refrain from substance abuse.

THE AMERICAN PSYCHIATRIC ASS'N, *Mental Illness and the Criminal Justice System: Redirecting Resources Toward Treatment, Not Containment* 3 (2004), available at [http://archive.psych.org/edu/other\\_res/lib\\_archives/archives/200401.pdf](http://archive.psych.org/edu/other_res/lib_archives/archives/200401.pdf). Williamson appears clearly to have been in the category of individuals who are resistant to treatment, intolerant of medication, and engaged in substance abuse and therefore unlikely to receive mental health treatment unless coerced in some fashion.

293. Dean Crisp wrote to Williamson, "[A]s long as your situation is not one that can endanger either you or members of the law school community, we do not need to know any specifics." Letter from Crisp to Williamson (Oct. 12, 1992) (on file with author).

294. Letter from Schroeder to Williamson (Jan. 26, 1995) (on file with author). The sense of duty is surely strengthened by the independent obligation of law school administrators to certify the character and fitness of law graduates to their state boards of professional responsibility.

injured during a fraternity hazing.<sup>295</sup> The reference suggests that North Carolina, like several other jurisdictions, may be prepared to hold a college or university liable for deliberate student violence that it has undertaken to prevent.<sup>296</sup> Indeed, besides *Davidson*, the few cases that adopt an affirmative undertakings theory in the university context involve deliberate violence, not athletic injuries.<sup>297</sup>

In *Furek*, the University of Delaware had voluntarily undertaken to adopt, publish, and remind students of policies forbidding fraternity hazing.<sup>298</sup> However, it had neglected to communicate its policy to the campus police, and the policy had not been actively enforced.<sup>299</sup> On that basis the Delaware Supreme Court held that the school had breached its affirmative duty to protect an undergraduate fraternity pledge who was burned with oven cleaner during Sigma Chi's "Hell Night" hazing ritual.<sup>300</sup>

### c. Mullins v. Pine Manor College

*Furek*, in turn, cited with approval a 1983 decision by the Massachusetts Supreme Judicial Court, *Mullins v. Pine Manor College*, in which a woman student was kidnapped from her dorm room and raped by an off-campus intruder.<sup>301</sup> The Massachusetts court observed that, in general, colleges of "ordinary prudence" have imposed upon themselves, by consensus, a duty to protect the well-being of their resident students.<sup>302</sup> It also held, in particular, that Pine Manor College had voluntarily undertaken to protect the plaintiff, who had paid dormitory fees and had relied upon it for security.<sup>303</sup>

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295. *Davidson v. Univ. of N. Car.*, 543 S.E.2d 920, 929 (N.C. Ct. App. 2001) (citing *Furek v. Univ. of Del.*, 594 A.2d 506 (Del. 1991)).

296. *Furek* was not cited in the appellate brief of either party. It was the only out-of-state authority cited by the court, and the only case involving a university defendant. *Id.*

297. In addition to *Furek*, see *Nero v. Kan. St. Univ.*, 861 P.2d 768 (Kan.1993); *Mullins v. Pine Manor Coll.*, 449 N.E.2d 331 (Mass. 1983); *Jesik v. Maricopa Co. Comm. Coll. Dist.*, 611 P. 2d 547 (Ariz. 1980); *Schieszler v. Ferrum Coll.*, 236 F. Supp.2d 602 (W.D. Va. 2002).

298. *Furek*, 594 A.2d at 511.

299. *Id.*

300. The *Furek* court based its analysis directly on RESTATEMENT (SECOND) OF TORTS § 323 (1965):

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

301. 449 N.E.2d 331 (Mass. 1983).

302. *Id.* at 335.

303. *Id.* at 336-37. In an earlier case, *Jesik v. Maricopa Co. Comm. Col. Dist.*, 611

#### D. Reframing the Duty: On Situations that Require Special Attention

*Davidson's* reasoning, as illuminated by *Furek* and *Mullins*, might have been even more persuasive in a case involving extreme violence and death than in a case involving a cheerleading accident. The Reichardtts could have argued that UNC became a legal actor when its Law School Dean of Students "committed" a student to outpatient treatment as a condition of continuing in law school, thereby necessarily undertaking to monitor his compliance.<sup>304</sup> In Williamson's case, UNC was providing non-gratuitous psychological services to its students upon which many relied, and that might itself be viewed as an affirmative undertaking by the same reasoning as *Pine Manor*. Moreover, Dean Crisp undertook to escort Williamson to Student Psychiatric Services and explicitly made his continuing therapy a condition of staying in school—the kind of particular control over a certain student's behavior that can support finding a duty based on special circumstances. That Dean Crisp also directly monitored and encouraged Williamson's compliance for the next eight months, whenever Williamson was enrolled in school, strengthens the argument that, knowing his mental condition was problematic, the Law School undertook to look out for his welfare and the welfare of the students among whom he was still being allowed to study.

Arguably, too, Dean Crisp and, through him, Dean Schroeder were in a better position than almost anyone else to know whether Williamson posed a danger to himself or the community in January 1995. Weeks before the rampage, Dean Crisp knew that Williamson might have stopped taking his medication, which Crisp considered a "big mistake" and a "bad idea."<sup>305</sup> He knew that Williamson was missing his classes.<sup>306</sup> He had Williamson on the "watch list."<sup>307</sup> He knew that Williamson's mother was very worried and that Williamson was not communicating with her or with the school.<sup>308</sup> He and Dean Schroeder might not have been trained to administer a formal risk assessment themselves, but they were empowered

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P.2d 547 (Ariz. 1980), one student shot another during class registration after the victim had sought assistance from a campus security guard. The Arizona Supreme Court held that defendant university had a statutory duty to protect students even from a third party's intentional crime based on premises liability theory if the school "realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a . . . crime." *Id.* at 550 (citation omitted). The Court found it unnecessary to consider plaintiff's alternative argument based on affirmative undertaking. *Id.* at 551.

304. He also expressly undertook to keep tabs on the student, and conscientiously did so for the remainder of the semester. "*Furek* [is] about starting something and finishing it properly when people (mainly students) have come to rely on what you have started." BICKEL & LAKE, *supra* note 26, at 129.

305. Crisp Dep., *supra* note 125, at 132–34

306. *Id.* at 137.

307. *Id.* at 138.

308. *Id.* at 142.

to initiate a search for the missing student and to arrange immediate psychiatric evaluation, including a risk assessment, and longer-term treatment if necessary. As with the telephone call that was not made in *Tarasoff*, intervention of this kind would have been relatively easy to accomplish and might have averted much grief.

Based on *Davidson's* voluntary undertaking analysis, the North Carolina court might well have found that the University administrators had a duty, independent of Dr. Liptzin's, to pay closer attention to Williamson's mental state. If so, they also had a duty to take reasonable action when they learned within days of the rampage that Williamson was off his medications, missing, and incommunicado—that is, while the harm they had anticipated was still preventable and growing ever more imminently foreseeable. The primary question would have been whether they could reasonably have done more, under the circumstances, to prevent the tragedy that occurred. As in *Tarasoff*, where responsibility for the failure to prevent murder came to rest on Dr. Moore alone, it is difficult to justify imposing liability based on the alleged inaction of the conscientious Dean Crisp while exonerating Dr. Liptzin's adjudicated negligence. Whatever the outcome, however, resolution of the causation issues would almost certainly have required an evidentiary hearing before the Industrial Commission, painful for all concerned. Not long after the *Davidson* opinion issued, UNC settled quietly with the Reichardts for an undisclosed amount.<sup>309</sup>

### III. MAKING MATTERS WORSE: THE 2007 RAMPAGE AT VIRGINIA TECH

*"It could be hell trying to get help for a troubled student at Virginia Tech."*<sup>310</sup>

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309. The settlement was negotiated in late 2001 and executed in early 2002. The amount did not exceed the damage cap. See *supra* note 243; see also e-mail from Jona Poe (March 1, 2010) (on file with the author).

310. LUCINDA ROY, *NO RIGHT TO REMAIN SILENT: THE TRAGEDY AT VIRGINIA TECH* 30 (2009). Lucinda Roy was the Chair of the English Department at Virginia Tech during much of the relevant time frame, and she had numerous encounters with Seung Hui Cho before his rampage. Her personal account of the events, *No Right to Remain Silent*, is used here to supplement the primary source of information, the Virginia Governor's Report. See VIRGINIA TECH REVIEW PANEL, *MASS SHOOTINGS AT VIRGINIA TECH* (April 16, 2007) [*hereinafter* VT PANEL REPORT], available at [http://www.governor.virginia.gov/TempContent/techPanelReport-docs/Full\\_Report.pdf](http://www.governor.virginia.gov/TempContent/techPanelReport-docs/Full_Report.pdf). Other sources of information, including medical records of the shooter obtained during civil discovery, are noted *passim*.

The VT Panel Report is the most frequently cited resource for information about the events surrounding the rampage, but its findings are not undisputed. The families of some of the victims objected to certain aspects of the original report. The report was revised in 2010. Documents related to the controversy surrounding the report are accessible at David Cariens, *A Sense of Security: Our Children and Our Schools* (Jun. 6, 2010), [http://aquestionofaccountability.blogspot.com/2010\\_07\\_01\\_archive.html](http://aquestionofaccountability.blogspot.com/2010_07_01_archive.html).

Two other reports provide useful perspectives and information. Virginia's

Wendell Williamson is not the only student to have committed mass murder since the Texas Tower shooting—he is not even the only law student.<sup>311</sup> Attack by a solitary rampager, virtually unthinkable until the 1960's, has become an increasing risk of academic life.<sup>312</sup> The “Virginia Tech Massacre” committed by Seung Hui Cho is, so far, the worst of the university rampages, resulting in 50 casualties—even more than the Texas Tower shooting.

Like the murder in *Tarasoff* and the rampage at UNC, the shooting at Virginia Tech illuminates the dynamics of the university's administration, its mental health clinic, and a student exhibiting signs of mental illness—both in the classroom and in the university residence halls. The rampage at Virginia Tech also occurred in a jurisdiction that strictly limits a therapist's duty to protect third parties from violent behavior by a client.<sup>313</sup>

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Inspector General for Mental Health, Mental Retardation & Substance Abuse Services issued a report. OFFICE OF THE INSPECTOR GENERAL, INVESTIGATION OF APRIL 16, 2007 CRITICAL INCIDENT AT VIRGINIA TECH (2007) [*hereinafter* INSPECTOR GENERAL'S REPORT], available at <http://www.oig.virginia.gov/documents/VATechRpt-140.pdf>. The United States Department of Justice also authored a report to the President. U.S. DEPARTMENT OF JUSTICE, REPORT TO THE PRESIDENT ON ISSUES RAISED BY THE VIRGINIA TECH TRAGEDY (June 13, 2007), available at <http://www.hhs.gov/vtreport.pdf>.

311. See *infra* note 431 (Peter Odighizuwa, Appalachian School of Law, January 2002).

312. See de Haven, *supra* note 1; see also *infra* Section IV.A.

313. Virginia has limited the duty both by common law and by statute. See *supra* note 106. The Virginia Code Annotated provides in relevant part:

B. A mental health service provider has a duty to take precautions to protect third parties from violent behavior or other serious harm only when the client has . . . communicated to the provider a specific and immediate threat to cause serious bodily injury or death to an identified or readily identifiable person or persons, if the provider reasonably believes, or should believe according to the standards of his profession, that the client has the intent and ability to carry out that threat immediately or imminently. . . . The duty to protect does not attach unless the threat has been communicated to the provider by the threatening client while the provider is engaged in his professional duties.

C. The duty set forth in subsection B is discharged by a mental health service provider who takes one or more of the following actions:

1. Seeks involuntary admission of the client . . . .
2. Makes reasonable attempts to warn the potential victims . . . .
3. Makes reasonable efforts to notify a law-enforcement official having jurisdiction in the client's or potential victim's place of residence or place of work . . . .
4. Takes steps reasonably available to the provider to prevent the client from using physical violence or other means of harm to others until the appropriate law-enforcement agency can be summoned and takes custody of the client.
5. Provides therapy or counseling to the client or patient in the session in which the threat has been communicated until the mental health service provider reasonably believes that the client no longer has the intent or the

## A. The Facts

Like UNC and Berkeley, Virginia Tech is a large, public research university.<sup>314</sup> It has a fully-accredited police force with its own SWAT team.<sup>315</sup> In April 2007, it had an emergency response plan, including an emergency warning process that had been in place for two years.<sup>316</sup> It also had an interdisciplinary “Care Team” comprised of the Director of the Office for Student Life and Advocacy, the Director of Resident Life, the head of Judicial Affairs, representatives from Student Health, and legal counsel.<sup>317</sup> The Care Team met regularly to identify and discuss problem students and to make appropriate referrals and recommendations in specific cases of concern.<sup>318</sup>

Like UNC and Berkeley, Virginia Tech operated a mental health clinic, the Cook Counseling Center (CCC), supported by student fees. CCC provided therapeutic outpatient services to students free of charge.<sup>319</sup> Like Berkeley, however, CCC did not have the capacity to evaluate disturbed students for purposes of involuntary committal, even in an emergency.<sup>320</sup> Students whose need for professional intervention appeared acute were transported, often by way of the campus police, to the Carilion New River Valley Medical Center for evaluation; from there they could by magistrate’s order be admitted for overnight observation at St. Alban’s

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ability to carry out the threat.

D. A mental health service provider shall not be held civilly liable to any person for:

1. Breaching confidentiality with the limited purpose of protecting third parties by communicating the threats described in subsection B made by his clients to potential third party victims or law-enforcement agencies or by taking any of the actions specified in subsection C.
2. Failing to predict, in the absence of a threat described in subsection B, that the client would cause the third party serious physical harm.
3. Failing to take precautions other than those enumerated in subsection C to protect a potential third party victim from the client's violent behavior.

VA. CODE ANN. § 54.1-2400.1B-D (Sup. 2010). *See also infra* note 410.

314. WIKIPEDIA, *Virginia Polytechnic Institute and State University*, [http://en.wikipedia.org/wiki/Virginia\\_Tech](http://en.wikipedia.org/wiki/Virginia_Tech) (last visited May 24, 2010). It has, however, no medical school and no hospital.

315. JEANNE CLERY, *DISCLOSURE OF CAMPUS SECURITY POLICY AND CAMPUS CRIME ACT ANNUAL REPORT OF 2007* 4 (2007).

316. ROY, *supra* note 310, at 101.

317. The VT Panel Report criticized the composition of the Care Team as insufficiently inclusive. VT PANEL REPORT, *supra* note 310, at 52. In 2003, Virginia Tech abolished the Office of the Dean of Students (ODS) and decentralized its functions. The ODS was reinstated and a new dean appointed only after the shootings. ROY, *supra* note 310, at 130.

318. VT PANEL REPORT, *supra* note 310, at 52.

319. ROY, *supra* note 310, at 65.

320. *Id.*

Hospital.<sup>321</sup>

Seung Hui Cho enrolled as a freshman at Virginia Tech in August 2003 intending to major in Business Information Systems.<sup>322</sup> He completed his first year with a 3.0 average and without apparent difficulty, and his second year was equally uneventful.<sup>323</sup> In his junior year, however, hoping to become a creative writer, he switched his major to English, and his so-far unremarkable academic performance became both singular and disturbing.<sup>324</sup>

At the time, Virginia Tech's English Department employed about fifty professors and an equal number of instructors.<sup>325</sup> Cho was a junior in fall 2005, twenty months before his rampage, when he enrolled in Professor Nikki Giovanni's poetry writing class. In class he was silent and withdrawn, his face hidden behind mirrored sunglasses.<sup>326</sup> When required to speak, he was inaudible, until one day in mid-October when he unexpectedly found his voice and read aloud an angry piece directed at Giovanni and his classmates.<sup>327</sup> The performance alarmed Giovanni very much.<sup>328</sup> She also learned that Cho was photographing his classmates with his cell phone, which frightened several of them enough to stay away from class.<sup>329</sup> Giovanni reported her concerns to Professor Lucinda Roy, Ph.D., Chair of the English Department.<sup>330</sup> After Cho refused to switch

321. See VT PANEL REPORT, *supra* note 310, at 46–49. St. Alban's was not affiliated with the University.

322. ROY, *supra* note 310, at 33.

323. He was shy, silent, and isolated, as he had been in high school, but he was excited about college and appeared to be adjusting well. *Id.* at 37.

324. *Id.* at 40–41. At the same time, he also moved to a residential suite on campus with several suitemates. *Id.* at 41. His behavior in university housing would also prove a source both of concern and of information to the administration. See *infra* text accompanying note 363.

325. ROY, *supra* note 310, at 15.

326. VT PANEL REPORT, *supra* note 310, at 42. He came to Giovanni's class wearing dark glasses and a hat that obscured his face. Each time the class met, she had to insist that he take them off. Giovanni considered him disruptive and uncooperative. Later, he took to wearing a bedouin-style turban to class. She thought he was trying to bully her. He also refused to make changes in his writing. *Id.*

327. ROY, *supra* note 310, at 40.

328. The composition that alarmed Giovanni was delivered in a loud voice. ROY, *supra* note 310, at 40. It was entitled "So-Called Advanced Creative Writing-Poetry" and apparently took its subject from an earlier class discussion about eating animals. Addressing his classmates, Cho wrote:

You low-life barbarians make me sick to the stomach that I wanna barf over my new shoes. If you despicable human beings who are all disgraces to [the] human race keep this up, before you know it you will turn into cannibals—eating little babies, your friends. I hope y'all burn in hell for mass murdering and eating all those little animals.

VT PANEL REPORT, *supra* note 310, at 42. In a later e-mail to Roy, Cho compared his work to Jonathan Swift's "A Modest Proposal." ROY, *supra* note 310, at 42.

329. VT PANEL REPORT, *supra* note 310, at 42–43.

330. With respect to Giovanni's reaction to the student, Professor Roy later wrote:



voluntarily to another course, Giovanni insisted that he be removed from her class.<sup>331</sup>

Professor Roy appealed for advice and assistance to the division of Student Affairs, the Cook Counseling Center (CCC), the Dean of the College, and the Virginia Tech Police Department (VTPD).<sup>332</sup> She asked for both psychological and disciplinary review of Cho's behavior.<sup>333</sup> She was advised that University policies prohibited intervention unless a student had made an overt threat or seemed to be an "imminent danger" to him/herself or others.<sup>334</sup> When the University administration declined to intervene, Professor Roy tried to figure out for herself how troubled Cho was by conducting what she called "an initial interview."<sup>335</sup> The results

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Creative writing and artistic license go hand in hand. What might seem provocative could simply be a testament to a student's vivid imagination. But experienced teachers tend to know when something just doesn't feel right. If there was also something troubling about a student's behavior, I felt that we needed to respond. And as soon as I read the poem that Seung-Hui Cho had written earlier for Nikki Giovanni's class, I realized why she had asked me to look at it. The tone was angry and accusatory, and it appeared to be directed at Nikki and her students.

ROY, *supra* note 310, at 30.

331. *Id.* at 43.

332. Roy wrote:

It is not uncommon at any large institution for there to be a lack of communication between one unit and another, so I had learned to send out material to several places at once, in hopes that we would then all be on the same page. It wasn't a strategy that was always well received at Virginia Tech where reporting lines can be as rigidly adhered to as papal edicts.

ROY, *supra* note 310, at 32. *Cf. infra* text accompanying note 441 (Delworth).

333. *Id.* at 30–31. Before informing University officials of the problem, Professor Roy "followed a series of protocols" she had devised as department chair:

I consulted with trusted colleagues in the department . . . [W]e agreed that Nikki had been absolutely right to be concerned. Seung . . . had read the poem aloud in class, and although his piece could perhaps be read as immature student venting, it could also be interpreted in a more threatening way. I wasn't at all surprised that Nikki's students had been alarmed by it.

*Id.* at 31.

334. *Id.* at 32. The VTPD and the OSLA advised her that there was no specific university policy about cell phones but that a general prohibition on disruptive behavior that interfered with orderly University processes would apply and be grounds for discipline if Cho did not stop taking photographs of his classmates during class. The Dean also reported that he had showed Cho's writing to a counselor and that she "did not pick up on a specific threat." VT PANEL REPORT, *supra* note 310, at 43. He advised Roy to refer Cho to the counseling center and warn him that further disruption would be referred to the office of Judicial Affairs. *Id.*

By Roy's account, she was initially concerned that Cho might become violent—that is, might pose an imminent danger to himself or others—and that was one of the reasons she initially contacted the VTPD. ROY, *supra* note 310, at 32. She was somewhat relieved of that concern when Cho agreed to leave Giovanni's class and finish the course as a tutorial. *Id.* However, for some time she remained afraid of what he might do and was reluctant to teach him one-on-one. *Id.* at 43.

335. ROY, *supra* note 310, at 35.

did not reassure her.<sup>336</sup> She was even more troubled when she received a two-page, single-spaced e-mail from him defending his writing and criticizing Professor Giovanni's teaching.<sup>337</sup>

The University administration had made it clear to Professor Roy that Cho could not be compelled to seek outpatient counseling as a condition of continued enrollment.<sup>338</sup> Feeling out of her depth after the initial interview

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[A]n initial interview [was] a procedure I had instituted in English soon after I became chair so I could find out more about students who appeared to be disruptive, at risk, troubled, or even deeply disturbed. I use the term *deeply disturbed* to characterize writing and behavior that seemed to me to merit immediate intervention. The term *troubled* refers to students who seem to be in distress for one reason or another. Many "troubled" students are depressed, anxious about something, or overwhelmed by the pressures of academe. They are not potentially violent students, though, in my experiences, a small minority could wish to harm themselves. *At risk* is a broad term that is applied at some institutions to struggling minority students and those with low grade-point averages. It was not unusual to have a faculty member report that a student was in distress or at risk, but often these alerts were about students who seemed despondent, overwhelmed, or depressed. Angry and disruptive students were less common, though I had been asked by other faculty members to deal with them in the past, so it was not an unprecedented request by any means.

*Id.* See also *Documents Concerning Seung-Hui Cho*, COLLEGIATE TIMES, Dec. 18, 2008, available at <http://www.collegiatetimes.com/stories/12708/documents-concerning-seung-hui-cho> (last visited Mar. 16, 2011) [*hereinafter Cho Documents*] (notes taken by Roy's assistant during the initial interview).

336. "He was," Roy wrote, "strangely detached from his surroundings." ROY, *supra* note 310, at 40. He spoke very slowly and softly and with obvious difficulty. He was unenthusiastic at her suggestion that he see a counselor. *Id.* at 38–40. Roy and her assistant, who sat in on the interview, agreed "that we had never experienced anything quite like the interview we had just had with . . . Cho. There was no doubt in our minds that he was in trouble." *Id.* at 40.

337. "It contrasted sharply with the silent person who had shown up for the initial interview. Again, the tone of the note worried me. I therefore forwarded it to the units I had first contacted." *Id.* at 42.

338. *Id.* at 43–44. This prohibition was apparently a matter of policy, not authority. In other cases, Virginia Tech has required psychiatric examination as a condition of continued enrollment. See *Cheng-chien Chang v. Virginia Polytechnic Inst.*, No. 85-2134, 1986 WL 16227 (4th Cir. Oct. 1, 1986).

The Inspector General's report found that the Cook Counseling Center (CCC) observed the following practices, which precluded involuntary referrals:

[T]he center does not accept involuntary or ordered referrals for treatment from any source including other departments of the university, outside agencies and the courts. CCC will not report to outside agencies (including the courts) because it disrupts the voluntary nature of the service and it takes too much time away from direct services to other students. . . . A student who is dangerous to self or others would only be treated at CCC willingly or voluntarily. . . . The CCC will not accept referrals as a part of disciplinary action by the university. Students who are disruptive to the university community are only treated if willing to be served. . . . The director of Judicial Affairs reported to the [Inspector General] that they do not use mandated counseling with students because CCC will not accept these referrals. They do not make mandated referrals to outside agencies or

with Cho but convinced that he needed immediate psychological help, Professor Roy made a personal appeal to Dr. Cathye Betzel, a CCC counselor, to come and meet Cho with her.<sup>339</sup> Dr. Betzel refused to see Cho unless he came voluntarily to the clinic.<sup>340</sup> Disappointed, Professor Roy consoled herself:

If [Cho] did show up at the CCC, they would certainly take him seriously because he had been flagged. Several people over there, including Bob Miller [EdD, Director of CCC]—someone who had been helpful in the past—were aware of his writing and his behavior. There had only been one other occasion when I had been as insistent as this about needing help with a particular student, so counseling services would know that this was important. If Seung-Hui Cho called over to the CCC or stopped by for an appointment, I assumed he would be seen at once. All I had to do was persuade him that he needed help.<sup>341</sup>

From October through the end of the semester, Professor Roy communicated with a wide network of University officials about Cho.<sup>342</sup> The Care Team considered Cho's case that fall, but decided that the situation was taken care of when Professor Roy removed him from Giovanni's class and taught him herself, one-on-one, for the rest of the semester.<sup>343</sup> Nevertheless, Professor Roy continued to broadcast her reports: all of Cho's writing was now "about shooting and harming people because he's angered by their authority or by their behavior."<sup>344</sup>

Professor Roy's attempts to persuade Cho to seek counseling eventually proved successful.<sup>345</sup> She was wrong, however, to have assumed that he

professionals because the cost is too high.

INSPECTOR GENERAL'S REPORT, *supra* note 310, at 12.

339. ROY, *supra* note 310, at 43.

I explained why the current policy placed students, faculty, and staff in jeopardy. I said it was ridiculous that Virginia Tech expected me and others to meet with students who had indicated through their work or their behavior that they had the potential to be violent. I wanted to require Seung to see a counselor. Weren't there times when students were unable to ask for help even though they might need it? I asked.

*Id.*

340. *Id.* at 43–44. Professor Roy protested that she lacked the training to work with Cho, but "[t]he argument did not sway [Dr. Betzel]." *Id.* at 44.

341. *Id.* at 44. Dr. Robert Miller, EdD, head of the CCC, had spoken at the English Department's annual staff retreat the previous year at Professor Roy's invitation about handling angry students. *Id.* at 41. He also served on the CARE team. INSPECTOR GENERAL'S REPORT, *supra* note 310, at 12.

342. VT PANEL REPORT, *supra* note 310, at 43.

343. *Id.*

344. *Id.* at 45. From that point on, violent and angry content was a consistently disturbing aspect of Cho's writing for professors in the English Department.

345. See VT PANEL REPORT, *supra* note 310, at 44. Cho's decision to seek counseling may also have been influenced by the events of November 27, when a

would be counseled immediately because of her discussions with clinic personnel. On November 30, 2005, Cho called CCC and asked for an appointment with Dr. Betzel.<sup>346</sup> He was given an appointment for an initial intake on December 12, almost two weeks later.<sup>347</sup> By then, Cho was having second thoughts. Instead of showing up in person for the appointment, he called at the scheduled time to speak with Dr. Betzel.<sup>348</sup> He told her that his difficulties were the same but that he did not want “to come in at this time.”<sup>349</sup> When she offered to reschedule the appointment, he declined.<sup>350</sup>

This is one of the junctures at which plaintiffs are likely to ask, “What if?” and defendants are likely to ask, “So what?” What if, like Dean Crisp at UNC, Professor Roy had been allowed to escort Cho to the mental health clinic and insist that he agree to treatment as a condition of continuing his studies? What if Dr. Betzel had agreed to interview him and assess the risk he posed to himself or others when Professor Roy requested it? What if Professor Roy’s informal assessment had been taken seriously? Do Professor Giovanni’s warnings and Professor Roy’s observations and concerns not establish that Cho’s violent tendencies were not only foreseeable but foreseen? Once safety concerns were raised, should the University not have had an obligation to assess Cho’s capacity to participate safely in the educational program? On the other hand, did the situation call for more special attention than it received? Was not the accommodation of the specific conduct-based classroom issue sufficient to satisfy any duty the University may have had? So what if Dr. Betzel did not see Cho the day he called for an appointment? What difference should it make, at this point in the story, that the therapist had been forewarned by his teachers, or that she knew others found him alarming? Did any action taken or not taken by the University’s administrators, or therapists make matters worse for Cho or push him towards violence? If we did not know the end of the story, would we conclude at this point that the University

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woman student complained to the campus police that Cho was annoying her. *Id.* A campus policeman came to Cho’s suite to warn him to leave her alone and to advise him that the complaint would be referred to Judicial Affairs. *Id.* After the officer left, in a rare burst of audible extemporaneous speech, Cho volunteered to his suitemates that he had been playing a game: he sent the girl several text messages signed “?” and then showed up in her dorm room in his habitual dark, mirrored glasses and face-obscuring hat. *Id.* “I’m question mark,” he told her. *Id.* She “freaked out” so that the resident advisor called the campus police. *Id.*

346. Cook Counseling Center (CCC) Triage report dated November 30 states: “Ref. to CCC by prof. He has been depressed & has difficulty in social situations. Would like to see Cathye since one prof. has talked to her about the student.” COOK COUNSELING CENTER TRIAGE, REPORT (November 30, 2005) [hereinafter TRIAGE REPORT], available at <http://static.mgnetwork.com/rtd/pdfs/2009-08-rmrecords.pdf>.

347. *Id.*

348. *Id.*

349. *Id.*

350. *Id.*

was failing in a duty of care to Cho or the rest of the educational community?<sup>351</sup>

More such junctures and more such questions were to come. Cho did not come to the particular attention of University authorities and CCC, only through Professor Roy's attempts to get him into counseling. His behavior towards women in the dorms got him into trouble with the campus police as well.<sup>352</sup> On December 12, only a day after he declined to continue at CCC, a student complained that his attentions were making her uncomfortable.<sup>353</sup> It was the second such complaint within a month, and the second visit from the campus police warning him that his behavior was unacceptable and would be referred to the Office of Judicial Affairs.<sup>354</sup> Cho sent an instant message to a suitemate that he might as well kill himself "because everybody just hates me."<sup>355</sup> The student called the campus police, which prompted a third visit.<sup>356</sup> This time the police took Cho for a psychological pre-committal screening by Kathy Godby, a licensed clinical social worker at Carilion.<sup>357</sup>

Cho claimed it was all a joke, just as he had claimed that his composition about his classmates was a satire.<sup>358</sup> He denied any suicidal intent and insisted that he was not upset at being confronted by the police.<sup>359</sup> Godby spoke with his roommate, however, who told her that Cho's behavior had been "bizarre" lately: he had posted a "?" instead of a picture in an online profile; he claimed to be named "Question Mark" and that Seung-Hui Cho was his twin brother; he had had another run-in with the police about his behavior towards women residents.<sup>360</sup> Godby found Cho mentally ill, imminently dangerous, and resistant to voluntary treatment.<sup>361</sup> She secured a temporary detention order from a county magistrate, and Cho spent the night at St. Alban's, the local mental hospital.<sup>362</sup> Dr. Miller, at the CCC, received a report of the detention

351. See *infra* Section IV.C.

352. VT PANEL REPORT, *supra* note 310, at 23.

353. *Id.*

354. *Id.*

355. *Id.* at 47; CARILION HEALTH SYSTEM DISCHARGE SUMMARY (Dec. 14, 2005) [*hereinafter* DISCHARGE SUMMARY], available at <http://static.mgnetwork.com/rtd/pdfs/2009-08-rmrecords.pdf>.

356. VT PANEL REPORT, *supra* note 310, at 47; DISCHARGE SUMMARY, *supra* note 355.

357. VT PANEL REPORT, *supra* note 310, at 47; DISCHARGE SUMMARY, *supra* note 355.

358. DISCHARGE SUMMARY, *supra* note 355.

359. *Id.*

360. *Id.*

361. VT PANEL REPORT, *supra* note 310, at 47–48; DISCHARGE SUMMARY, *supra* note 355.

362. VT PANEL REPORT, *supra* note 310, at 47–49. He was given a single dose of anti-depressant medication. DISCHARGE SUMMARY, *supra* note 355.

before noon the following day.<sup>363</sup>

The psychiatrist who interviewed Cho at St. Alban's after his overnight stay recommended that he be discharged with "some outpatient counseling to [ac]culturate to proper norms."<sup>364</sup> At the commitment hearing, the judge ruled that Cho presented an imminent danger to himself as a result of mental illness and ordered that he follow all recommended outpatient treatments.<sup>365</sup> Before Cho was released, he made an appointment at CCC for 3:00 that afternoon.<sup>366</sup> Carilion faxed his psychiatric discharge summary to CCC at 2:30.<sup>367</sup>

Cho showed up for his appointment at CCC. He met for thirty minutes with therapist Sherry Lynch Conrad.<sup>368</sup> Conrad did not know that he had been adjudged mentally ill and a danger to himself or that he was there to commence court-directed counseling.<sup>369</sup> She did not attempt an evaluation since he had talked to Cathye Betzel only two days earlier.<sup>370</sup> She knew nothing about Professor Roy's e-mails to Dr. Miller, her clinical director.<sup>371</sup> She allowed Cho to leave without scheduling another appointment.<sup>372</sup> There was no follow up by the CCC.<sup>373</sup> His detention and overnight committal were not reported to the Care Team.<sup>374</sup> His parents were not told; nor was Professor Roy.<sup>375</sup> He never again attempted to get mental health support from the University. He made no more overtures to women, and he sent no more messages to his roommates. For the next two semesters, the content of his writing was the primary indicator of his state of mind. He raised his voice again in public only once more that has been reported, when Professor Carl Bean dismissed him from the Technical

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363. An e-mail report of the detention was forwarded to Dr. Miller at CCC at 10:46 a.m. on December 14 from Virginia Tech's Resident Life group. Dr. Miller in turn forwarded the report ("in the event this student is seen here") to Dr. Betzel and Sherry Lynch Conrad at 4:26 p.m. that afternoon, about an hour after Cho had come and gone. Karin Kapsidelis, *Va. Tech Releases Seung-Hui Cho's Medical Records*, RICHMOND TIMES DISPATCH, Aug. 19, 2009, available at <http://www2.timesdispatch.com/news/2009/aug/19/techgat19120090819-135002-ar-33614/>.

364. VT PANEL REPORT, *supra* note 310, at 49; DISCHARGE SUMMARY, *supra* note 355.

365. VT PANEL REPORT, *supra* note 310, at 48.

366. *Id.* at 49.

367. CCC later claimed not to have received it. *Id.* at 49; DISCHARGE SUMMARY, *supra* note 355.

368. VT PANEL REPORT, *supra* note 310, at 49; TRIAGE REPORT, *supra* note 346.

369. VT PANEL REPORT, *supra* note 310, at 49; TRIAGE REPORT, *supra* note 346.

370. TRIAGE REPORT, *supra* note 346.

371. *Id.*

372. *Id.*

373. VT PANEL REPORT, *supra* note 310, at 49.

374. *Id.* at 52.

375. *Id.* at 49.

Writing Class.<sup>376</sup>

The incident occurred in spring semester 2006.<sup>377</sup> Professor Bean, who taught Cho Technical Writing in the spring semester, refused to allow him to write his term paper as “an objective real-time experience” of Macbeth as a serial killer.<sup>378</sup> In mid-April, he suggested that Cho withdraw from the course.<sup>379</sup> In one of his rare audible speeches, Cho argued angrily and loudly that he would not withdraw.<sup>380</sup> Professor Bean refused to talk further until Cho could control himself.<sup>381</sup> Cho left Bean’s office and withdrew from the course.<sup>382</sup> Professor Bean apparently never discussed Cho with anyone in the administration.<sup>383</sup> He was unaware that Cho had been removed from Professor Giovanni’s class.<sup>384</sup>

That same semester, Professor Robert Hicock taught Cho in a fiction workshop.<sup>385</sup> He was concerned enough about Cho’s lack of participation in class and the violent content of his writing to discuss him with Professor Roy but decided he would “just deal with him.”<sup>386</sup> Cho wrote a story for Hicock’s class in which the narrator was a student shooter struggling to overcome his reluctance to kill.<sup>387</sup> Hicock gave him a D+ and never saw him again.<sup>388</sup>

Lucinda Roy vacated the Chair of the English Department in spring semester 2006, and she was in Sierra Leone when Cho returned to Virginia Tech in the fall.<sup>389</sup> There was no repetition of the behavior that caused him trouble the previous year.<sup>390</sup> He did not speak to his roommates.<sup>391</sup> He

376. *Id.* at 50.

377. The VT Panel Report notes that the incident occurred exactly a year before the rampage. *Id.* at 50. Lucinda Roy speculates that the altercation may have a direct bearing on the rampage for this reason, especially since Cho wrote an angry letter about Bean that he included in the packet of materials he mailed on the day of the rampage. ROY, *supra* note 310, at 79–82.

378. VT PANEL REPORT, *supra* note 310, at 50.

379. *Id.*

380. *Id.*

381. *Id.* Cho later told Professor Bean by e-mail that he had dropped the course. A year later, on the day of his rampage, Cho mailed a letter to the English Department about his encounter with Professor Bean. The letter was delivered by the then-English department chair, Carolyn Rude, to University counsel. ROY, *supra* note 310, at 79–82. No one in the English department saw it until after it was released to the VT Review Panel. *Id.* at 85.

382. VT PANEL REPORT, *supra* note 310, at 50.

383. *Id.* at 51.

384. *Id.* at 50–51.

385. *Id.* at 50; ROY, *supra* note 310, at 66–67.

386. VT PANEL REPORT, *supra* note 310, at 49.

387. *Id.* at 49–50. He did not inform anyone that Cho had written a school-shooting story until after the rampage. *Id.*

388. *Id.* at 49.

389. ROY, *supra* note 310, at 15.

390. VT PANEL REPORT, *supra* note 310, at 51.

391. *Id.*

went to bed early, got up early, and kept entirely to himself.<sup>392</sup> His room was extremely neat; the only book in it was a Bible.<sup>393</sup> His resident dorm advisor, who was expecting trouble, did not have a single problem with him.<sup>394</sup> His teachers and classmates, however, continued to regard him with alarm. The two plays he wrote fall semester 2006 for Professor Falco's drama class were graphic, angry, and violent.<sup>395</sup> One involved killing a teacher.<sup>396</sup> His fiction-writing teacher, Lisa Norris, repeatedly suggested that he go to counseling and requested the assistance of her colleagues.<sup>397</sup> She also asked for help from Mary Ann Lewis, Associate Dean of Liberal Arts and Human Sciences.<sup>398</sup> Though Dean Lewis had been copied on Professor Roy's e-mails the previous year, her staff found "no mention of mental health issues or police reports" in Cho's file.<sup>399</sup> Moreover, even had Cho agreed to seek counseling again, even if he had gone to CCC, the clinicians would have had no record of his previous visits or his overnight commitment at St. Alban's: his CCC records went missing sometime in the spring of 2006, when, for reasons yet to be explained, CCC's outgoing Director, Dr. Robert Miller, took Cho's file home and never returned it to the clinic.<sup>400</sup>

At this point, six months before the rampage, Cho was about to slip completely under the University radar. The only place he was still causing alarm was the place where his teachers and classmates first learned to fear him: in the small creative writing workshops in which a student could not easily disappear.<sup>401</sup> In spring semester, he took no such courses, and his

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392. *Id.*

393. *Id.*

394. *Id.*

395. Student reaction to the plays was cautious. *See id.*

396. Scripts and video enactments of the two plays, "Richard McBeef" and "Mr. Brownstone" can be found on the internet. *See, e.g., Virginia Tech Gunman Cho Seung-Hui's Plays—Mr. Brownstone*, MAVERICK (Tuesday, April 17, 2007, 5:52 PM), [http://nightskymines.blogspot.com/2007/04/virginia-tech-gunman-cho-seung-huis\\_17.html](http://nightskymines.blogspot.com/2007/04/virginia-tech-gunman-cho-seung-huis_17.html). Professor Falco described them as "juvenile, with some pieces venting anger." He did not let his colleagues or the administration know about their content. VT PANEL REPORT, *supra* note 310, at 51. After the shooting, however, he was instrumental in creating guidelines for assessing violent student writing. *See* Elizabeth Redden, *When Student Writing Could Be a Red Flag*, INSIDE HIGHER ED. (Sept. 5, 2007), <http://www.insidehighered.com/news/2007/09/05/writing>.

397. Cho declined Norris' suggestion that she accompany him to counseling. VT PANEL REPORT, *supra* note 310, at 24.

398. *Id.*

399. *Id.*

400. *See, e.g.,* Brigid Schulte & Rosalind S. Helderman, *Va. Tech Shooter's Mental Files Turn Up*, WASH. POST, July 23, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/22>; Michael Sluss & Tonia Moxley, *Missing Va. Tech Shooter records found in former counseling center director's home*, THE ROANOKE TIMES (July 22, 2009, 4:57 PM), <http://www.roanoke.com/news/breaking/wb/212699>.

401. Norris wrote to her colleagues:



class attendance dropped off.<sup>402</sup> Professor Roy, just back from Africa, thought that he must have graduated.<sup>403</sup>

Now that he had written the script of rampage and murder, Cho began acquiring the props and rehearsing the action: he bought guns and ammunition, made videotapes of himself pointing pistols and shouting at his victims, and checked the stage at Norris Hall, an older building with doors that could be chained shut from the inside.<sup>404</sup> On April 16, a year to the day after his shouting match with Professor Bean, he killed thirty-two students and teachers and then himself during a twenty-minute rampage that left the academy reeling with horror.<sup>405</sup>

### B. The Civil Litigation

Intense public scrutiny followed the rampage, including the first government investigation of a school rampage in higher education.<sup>406</sup> Most of the victims at Virginia Tech and their families eventually settled with the University, but on April 15, 2009, the parents of two students killed during Cho's rampage filed wrongful death suits, still pending at the time of this writing.<sup>407</sup> According to the plaintiffs, by the time Cho was taken to St. Alban's, University officials and therapists at the CCC should have known that he was psychologically disturbed and posed a threat to himself and others, yet they did not make an individual threat assessment or otherwise diagnose or treat his condition.<sup>408</sup>

On January 17, 2010, the trial court denied the defendant university therapists' motion to dismiss. Specifically, the trial court held that CCC employees Robert Miller, Cathye Betzel, and Sherry Lynch Conrad were not entitled to absolute or sovereign immunity.<sup>409</sup> It reserved for later

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He was in my Contemporary Fiction class last semester, and didn't say a word, but it was a large class . . . and he was effectively invisible . . . . This semester, however, he is in a class of 14 students, and the majority are quiet, shy people, and it is a workshop. He is extremely visible, and if you . . . have dealt with him, you know that he is not simply shy and quiet—there is something else going on.

See *Cho Documents*, *supra* note 335.

402. VT PANEL REPORT, *supra* note 310, at 51.

403. ROY, *supra* note 310, at 24–25.

404. VT PANEL REPORT, *supra* note 310, at 24, 52.

405. *Id.* at 77, 98.

406. See *supra* note 310.

407. Peterson & Pryde v. Thyden, Case No. CL09005525-00 (Montgomery Cir. Ct. VA Oct. 2009) [*hereinafter* *Thyden*] (ruling demurrer), available at [http://www.collegiatetimes.com/cms/resource/pdf/ruling\\_demurrers.pdf](http://www.collegiatetimes.com/cms/resource/pdf/ruling_demurrers.pdf).

408. *Id.* The suits also allege that on the day of the rampage, University officials, knowing that two students had been shot dead in a dormitory by an unknown assailant, negligently failed to lock down the campus or otherwise issue a timely warning to students and faculty that an active shooter might be loose on campus. These allegations are outside the scope of the present inquiry.

409. *Thyden*, *supra* note 407, at 7–8. The court also held that Dr. Miller was not

determination the therapists', perhaps somewhat disingenuous, claim that they should be cloaked with statutory immunity because they "provided medical services to Cho."<sup>410</sup>

More important to the present inquiry, the trial court held that the defendant therapists owed Cho and his student victims a legal duty to protect their safety through delivery of mental health services.<sup>411</sup> The court grounded the duty in the business invitee relationship between the university and its students and in a Virginia statute that charges the Virginia Tech Board of Visitors with "the protection and the safety of students . . . residing on the property. . . ."<sup>412</sup> Echoing Judge Sims's dissent in *Tarasoff*, the court also found that imposing a duty of care was justified under the circumstances, not because the harm to the rampage victims was foreseeable, but because the burden of preventing harm was "slight."<sup>413</sup>

### C. Reframing the Duty: On the Ease of Prevention

The Virginia Tech Massacre is widely and rightly viewed as a tipping

entitled to absolute immunity because he was not a high-ranking government official administering "any policy or regulation that affects the state as a whole." *Id.* at 7. Nor were the other university officials named as defendants, including the university president, entitled to such immunity. *Id.*

410. *Id.* at 10. Virginia Code Annotated § 54.1-2400.1A (West) defines "client" or "patient" as "any person who is voluntarily or involuntarily receiving mental health services or substance abuse services from any mental health service provider." The trial court wrote, "Defendants argue that Cho was a client and [the] triage assessments were 'counseling interventions designed to remediate Mr. Cho's mental, emotional and behavioral disorders.' It may be that triage does put Cho within the statutory definition of 'client' . . . . Since this is a factual determination, it may be a jury question." *Id.*

411. *Thyden, supra* note 407, at 11.

412. *Id.* at 11. Virginia Code Annotated § 23-122 applies by its terms only to the Board of Visitors of Virginia Tech. It provides as follows:

The board shall be charged with the care and preservation and improvement of the property belonging to the University, and with the protection and safety of students and other persons residing on the property, and in pursuance thereof shall be empowered to change roads or driveways on the property or entrances thereto, or to close temporarily or permanently the roads, driveways and entrances; to prohibit entrance to the property of undesirable and disorderly persons, or to eject such persons from the property, and to prosecute under the laws of the state trespassers and persons committing offenses on the property.

The board shall regulate the government and discipline of the students; and, generally, in respect to the government of the University, may make such regulations as they deem expedient, not contrary to law. Such reasonable expenses as the visitors may incur in the discharge of their duties shall be paid out of the funds of the University.

The trial court acknowledged that "[d]efendants contend this is not a safety statute and . . . call[] plaintiffs' position "absurd." *Thyden, supra* note 407, at 11.

413. *Thyden, supra* note 407, at 12. "These defendants simply needed to provide Cho the services [] he needed. The consequences of placing that burden on these defendants are simply that they would be required to perform the functions for which the office was created and the duties for which they were employed." *Id.*

point in the academy's attention to mental health issues as they relate to campus safety.<sup>414</sup> The Virginia Tech Review Panel commissioned by the Virginia Governor was critical of University administrators who missed the "red flags."<sup>415</sup> The Panel wrote:

The academic component of the university spoke up loudly about a sullen, foreboding male student who refused to talk, frightened classmate[s] and faculty with macabre writings, and refused faculty exhortations to get counseling. However, after Judicial Affairs and the Cook Counseling Center opined that Cho's writings were not actionable threats, the Care Team's one review of Cho resulted in their being satisfied that private tutoring would resolve the problem. No one sought to revisit Cho's progress the following semester or inquire into whether he had come to the attention of other stakeholders on campus.<sup>416</sup>

Elsewhere, the Report pointed out that not only the English department professors, but the Virginia Tech Police and the Resident Life staff received multiple reports and concerns about Cho's behavior in the dorms.<sup>417</sup> The Panel reported that "[t]he lack of information sharing among academic, administrative, and public safety entities at Virginia Tech and the students who had raised concerns about Cho contributed to the failure to see the big picture."<sup>418</sup>

What the Panel failed to identify as an impediment to effective intervention was the University's policy of refusing to engage in a psychological threat assessment unless a student made an overt threat of specific harm. This policy, which was invoked when Professor Roy first sought assistance from CCC, was central to the University's concept of its duty to act, and that concept reflected *Tarasoff's* rubric that foreseeability of harm is the primary element giving rise to a duty to protect either a potentially violent student or his potential victims.

Evaluating Cho at CCC when Professor Roy and her colleagues first identified him as a disturbed and disturbing student might have made a material difference in preventing his rampage for several reasons. First, if the University had insisted that Cho be evaluated by a trained therapist, much about his psychological history that was hidden until after the rampage might perhaps have been revealed: that his classmates in middle school mocked and teased him when he spoke in class because he was still not fully conversant in English; that he was diagnosed with "selective mutism" and provided with tutorial classes in high school (much the same

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414. Jablonski et al., *supra* note 121, at 6.

415. VT PANEL REPORT, *supra* note 310, at 52. "The Care Team at Virginia Tech was established as a means of identifying and working with students who have problems. That resource, however, was ineffective in connecting the dots or heeding the red flags that were so apparent with Cho." *Id.*

416. *Id.*

417. *Id.*

418. *Id.*

accommodation that Professor Roy devised); that he had an episode of depression in 1998 in which he said that he wanted to “repeat Columbine” and was placed on anti-depressant drugs for a year; that he had seen a therapist for several years; that his high school guidance counselor had recommended against his enrollment at Virginia Tech, advising instead that he attend a smaller school where he could get more individual attention.<sup>419</sup> Second, ongoing psychotherapy might well have helped him resolve his anger in more constructive ways than mass murder. Third, as in *Tarasoff*, his desire to “repeat Columbine” might have been expressed to his therapist in such a way that his capacity and intent to commit a rampage might have been clear enough to justify more extreme measures.

Moreover, and even more alarming, the University’s policy of limiting psychological threat assessment and therapeutic intervention to cases in which the threat of violence was overt may well have made matters worse—may, that is, have made Cho’s rampage more rather than less likely—for reasons having to do with the situational nature of rampages.<sup>420</sup> The disassociated rage that makes a rampage possible does not in most cases spring entirely from an individual’s innate pathology; it develops over time and as a result of environmental circumstances that shame and humiliate the perpetrator.<sup>421</sup> It is apparent that Cho reacted with anger and resentment to being “kicked out” of Giovanni’s and Bean’s classes.<sup>422</sup> His attempts to comply with his teachers’ recommendation that he seek counseling were failures. His encounters with the Virginia Tech Police and the mental health system in place at Virginia Tech frightened him and apparently left him even more deeply isolated and disaffected from University life. That none of these events resulted in appropriate long-term psychological treatment is extremely unfortunate: he was deprived of any benefit from the system, and his hatred of the institution in which he was enrolled may have grown increasingly murderous as a result.

#### IV. CORNERING OUR PRESENT DUTY

##### A. Describing the Campus Rampage

Since 1991, the academy has experienced mass shootings by current and former students in law, nursing, and business colleges, in graduate departments and undergraduate schools—accompanied by an equally disturbing rise in the number of mass shootings by high school students.<sup>423</sup>

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419. VT PANEL REPORT, *supra* note 310, at 35–37.

420. See *infra* text accompanying notes 426–32.

421. See Thomas J. Scheff, *Rampage Shooting: Emotions and Relationships as Causes* (Sept. 2, 2007), <http://www.soc.ucsb.edu/faculty/scheff/main.php?id=61.html>.

422. VT REVIEW PANEL, *supra* note 310, at 44; see *supra* text accompanying note 336 and text accompanying notes 376–78.

423. See de Haven, *supra* note 1, at 527 n.107.

An entire generation of students has now entered college with a cultural memory of Columbine.

In general, the crimes committed by students on campus are much the same as those committed off campus by the same-age population, except that campuses are, on the whole, less violent than the streets.<sup>424</sup> The facts upon which *Tarasoff* is based are, to that extent, typical of much campus crime: stalking and murder can happen anywhere.

However, school rampages are in a different category.<sup>425</sup> First, they involve extreme violence—that is, actual or attempted mass murder.<sup>426</sup> Second, unlike most other campus crimes, rampages do not happen “just anywhere.”<sup>427</sup> Anti-institutional motivation is characteristic of the school

424. *Id.* at 505 n.6.

425. “School rampage” (SR) is a term of art applied to secondary-school shooting sprees. *See, e.g.*, JONATHAN FAST, CEREMONIAL VIOLENCE: A PSYCHOLOGICAL EXPLANATION OF SCHOOL SHOOTINGS 9–14 (2008); *see also* KATHERINE S. NEWMAN, RAMPAGE: THE SOCIAL ROOTS OF SCHOOL SHOOTINGS (2004). Though there have as yet been no fully developed sociological or psychological case studies of rampages in institutions of higher education, the same term and definitions are used here. That definition excludes mass shootings on campus if the perpetrator is not a current or former student. For example, the shooting at Dawson College in Montreal, Canada on September 13, 2006 is excluded because the shooter, Kimveer Gill, was a stranger to the campus. *See infra* note 426.

426. “Extreme violence” is defined as “an act of retaliation completely disproportionate to its provocation.” FAST, *supra* note 425, at 12. Discussing mass murders, Professor Fast continues:

Most murders are unplanned, spontaneous, and occur when anger and fear produce violent behavior in response to an imminent threat. Such murders are often called “affective,” the human equivalent of the fight or flight response seen in animals. Mass murders, “the intentional killing of multiple victims by a single offender within a 24 hour period of time,” are rare events, accounting for less than one percent of all violent crimes. This latter style of aggression tends to be “predatory”: planned, purposeful, and without emotion. In the 1980s, Park Eliot Dietz, an eminent criminologist, proposed a typology of mass murderers with three categories: “family annihilators,” depressed men, highly invested in their families, who kill their wives and children along with themselves because they fear, or wish to believe, that no one else can care for them; “set and run” killers, those who set bombs and disappear, such as Ted Kaczynski, the Unabomber; and “pseudo-commandos,” those who are preoccupied with fire-arms and military garb, and plan and deliberate extensively before they act. School rampage shooters, obsessed with weapons and planning, often donning militaristic or terrorist costumes for their shootings and even playing theme music to “pump themselves up,” fall into the final category.

*Id.* at 12–13.

427. The prevailing definition makes this clear. “An institutional attack takes place on a public stage before an audience, is committed by a member or former member of the institution, and involves multiple victims, some chosen for their symbolic significance or at random. This final condition signifies that it is the organization, not the individuals, who are important.” NEWMAN, *supra* note 425, at 231. *See also* Glenn W. Muschert, *Research in School Shootings*, SOCIOLOGY COMPASS (July 2007) at 63–64.

rampage: the target is the school itself and what it has come to represent to the killer.<sup>428</sup> Thus, there is almost always a strong situational component to the event. Even Williamson, whose conscious motives were not vengeful, but messianic, intended to take his last stand on the campus where, he believed, his cohorts “would lay [him] as low as possible” to keep him from getting a law degree.<sup>429</sup> Almost always, rampage school shooters are acutely sensitive to the insults, indignities, and powerlessness of student life. They have unresolved grievances arising out of their academic experience, and some of their complaints may be justified, at least in part.<sup>430</sup> They often nurse grudges and pursue complaints against teachers,

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428. See de Haven, *supra* note 1, at 512–15. Professor Fast describes secondary school shootings as “acts of terrorism without an ideological core.” FAST, *supra* note 425, at 9. In their anti-institutional aspect, school rampages are akin to acts of domestic terrorism, such as the Oklahoma City bombing: the target is chosen for its symbolic significance; the violence is public; and the victims are harmed because of their relationship to the target, not because of their relationship to the killer. See generally, DOUGLAS KELLNER, *GUYS AND GUNS AMOK: DOMESTIC TERRORISM AND SCHOOL SHOOTINGS FROM THE OKLAHOMA CITY BOMBING TO THE VIRGINIA TECH MASSACRE* (2008).

Rampages in higher education also have many characteristics in common with workplace rampages. See NEWMAN, *supra* note 425, at 58. Like colleges and universities, workplaces are selective and intentional communities with a set of distinguishing relationships and distinctive behavioral norms. Like workplace rampages, rampages in institutions of higher education tend to be situational, in the sense that “a tendency toward violence is often bred by the workplace itself.” RICHARD V. DENNENBERG & MARK BRAVERMAN, *THE VIOLENCE-PRONE WORKPLACE: A NEW APPROACH TO DEALING WITH HOSTILE, THREATENING, AND UNCIVIL BEHAVIOR* ix (1999). Workplace rampages are also anti-institutional: “Violent incidents often appear to be random acts of slaughter but upon close examination reveal a calculated attempt to decapitate the command structure of the workplace. Such assaults might be labeled ‘organicides. . . .’” *Id.* at 5. See also NEWMAN, *supra* note 425, at 58.

429. See *supra* note 209 and accompanying text. Steven Kazmierczak, who rampaged at Northern Illinois University on Valentine’s Day 2008, also was not known to have expressed a grievance against NIU, where he had a successful career as an undergraduate, but he had recently left the graduate program at NIU under circumstances that are not entirely clear, and his studies and career hopes apparently began to derail at that point. See de Haven, *supra* note 1, at 574–76. Kazmierczak was also the only rampager besides Williamson known to have been “off his meds” when he rampaged. *Id.* at 576.

In other respects, however, especially in terms of the institutional duty under discussion here, the NIU rampage is unlike other campus rampages. See *infra* notes 430–33 and accompanying text. The perpetrator did not single himself out as having either conduct or mental health problems while he was an undergraduate or during the brief period he spent at NIU as a graduate student. Moreover, he moved to another city more than six months before his rampage, had very little contact with his former associates at NIU, made no threats, and apparently confided his intentions to no one. An attack like his would appear virtually impossible to prevent or to foresee at the institutional level.

430. See de Haven, *supra* note 1, at 512–15. The male pronoun is used advisedly throughout to refer to rampagers. Women only rarely engage in spree shootings or rampages. See Sam Tanenhaus, *The Amy Bishop Case—Violence that Art Didn’t See Coming*, N.Y. TIMES, Feb. 28, 2010, at AR1, available at

classmates, or members of the school administration.<sup>431</sup> Their hostility worsens over time: the author has discovered no college or university rampage whose perpetrator has been at the school for fewer than three semesters.<sup>432</sup> Almost always, the killer has experienced, or is about to

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[http://www.nytimes.com/2010/02/28/arts/28bishop.html?\\_r=2&pagewanted=1&hp](http://www.nytimes.com/2010/02/28/arts/28bishop.html?_r=2&pagewanted=1&hp). One exception is Brenda Ann Spencer, who, in 1979, at the age of sixteen, shooting from the door of her house, killed two adults and wounded a police officer and eight children on the playground of the elementary school across the street. See FAST, *supra* note 425, at 65–82. Another exception is forty-four-year-old Jennifer San Marco, who, in January 2006, shot and killed five employees at the postal service's processing and distribution center in Santa Barbara, California, from which she had been dismissed for mental health reasons two years previously; she also killed herself. See Dan Frosch, *Woman in California Postal Shootings Had History of Bizarre Behavior*, N.Y. TIMES, Feb. 3, 2006, at A19, available at <http://www.nytimes.com/2006/02/03/national/03postal.html>. The most recent case is Dr. Amy Bishop, who, on February 12, 2010, shot and killed three colleagues on the biology faculty at the University of Alabama at Huntsville and wounded three others. See Tanenhaus, *supra* note 430.

431. Gang Lu, a student at the University of Iowa, resented the fact that his professors had awarded a prestigious dissertation prize to another student, a decision that Lu appealed through University channels, and had not offered him a position at the University after he received his Ph.D. See de Haven, *supra* note 1, at 517. Among his victims were the academic rival who won the prize, his major professors, the head of the department, and the Associate Vice President for Academic Affairs who denied his appeal. *Id.* at 518–19. In the weeks before his December 1992 rampage at Simon's Rock, Wayne Lo was increasingly hostile toward college authorities, especially after one of his few friends was dismissed for stalking. FAST, *supra* note 425, at 90. He became confrontational with his adult dormitory advisors, claiming that he had “the power to bring the whole school down to its knees.” *Id.* at 92. He told a student acquaintance that he intended to kill the dorm advisor and her family. See *id.* at 95; see also de Haven, *supra* note 1, at 522. Peter Odighizuwa, the shooter at the Appalachian School of Law in 2002, filed complaints against employees in the student services department and against a professor whom he accused of treating him unfairly. *Id.* at 532. He was confrontational and abusive with other school personnel. *Id.* On the day before the shooting, he had a shouting match with an employee in Student Services. *Id.* at 533. On the day of the shooting, he had an acrimonious meeting with a professor. See *id.* at 527–34. Robert Flores, the shooter at the University of Arizona College of Nursing, left a lengthy suicide letter detailing numerous grievances against the nursing school and the faculty members who had given him failing grades in two of his clinical courses. *Id.* at 541–42. He wrote that he wanted his rampage to provoke lawsuits that would “change ‘the face of education.’” *Id.* at 545. Biswanath Halder, the rampler at Case Western Reserve University, sued an employee of the Weatherhead School's computer lab for allegedly hacking his website and destroying his computer files. *Id.* at 550. His rampage occurred a few days after his appeal had been dismissed. See *id.* at 552. Virginia Tech shooter Seung Hui Cho's student writing expressed alarming hostility towards classmates and teachers; he complained in writing to the head of the English Department about his professors; the videotapes he posted on the day of his rampage castigated his fellow students for their hedonistic lifestyles and their treatment of him. See *id.* at 556–66.

432. See generally de Haven, *supra* note 1. Gang Lu completed his entire Ph.D. program at the University of Iowa before he rampaged. *Id.* at 519. Wayne Lo rampaged during exam week of his third semester at Simon's Rock. *Id.* at 522. Peter Odighizuwa was enrolled at the Appalachian School of Law in fall semester 2000, then withdrew for a semester during which he was frequently on campus; he then returned for fall semester 2001. *Id.* at 530–31. He rampaged shortly after classes resumed for

experience, a severance of his relationship with the school.<sup>433</sup> For all these reasons, the rampage is best described not as a drive-by shooting, but as a parting shot at a hated place and a hated community.

Rampages also differ from other campus crimes because they invariably raise mental health issues. It almost defies belief that an act of such extreme and disproportionate violence could be conceived, planned, and carried out by someone of right mind.<sup>434</sup> Rampagers are “madmen,” whose rage against the institution has made them capable of shocking injustice and inhumanity. However, they also usually function within normal limits in most respects. They almost never make overt threats, and adult rampagers seldom feel the need to confide their intentions to others.<sup>435</sup> They are often not clearly insane in the legal sense, and they seldom meet the criteria for long-term psychiatric committal before they rampage.<sup>436</sup> Though insanity and diminished capacity have typically been raised in mitigation by the lawyers of rampagers, Wendell Williamson is the only student shooter to have been acquitted by reason of insanity.<sup>437</sup>

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spring semester 2002. *Id.* 533–34. Robert Flores, who rampaged in October 2002, had been at the University of Arizona College of Nursing as a transfer student since fall semester 2000. Biswanath Halder attended Case Western Reserve University for two years and received a master’s degree in 1999; at the time of his rampage in 2002, he had not been enrolled in courses at the University since August 2000. Seung Hui Cho had completed almost four years at Virginia Tech and was close to graduation when he rampaged. Steve Kazmierczak completed his undergraduate education and attended graduate school for a year at Northern Illinois University; he transferred to another graduate school a few months before he returned to his alma mater and opened fire on an undergraduate class. *Id.* at 574–75.

433. See de Haven, *supra* note 1. Gang Lu had recently completed his Ph.D. and was still working as a research assistant but had not been offered a position at the University of Iowa. *Id.* at 517. Wayne Lo told the Dean at Simon’s Rock on the day of his rampage that he intended to transfer. *Id.* at 523 n.80. Peter Odighizuwa was not in academic good standing at the Appalachian School of Law and had withdrawn the day before the shooting. *Id.* at 533. Robert Flores had been told that he was failing a course and was not allowed to take the exam; he believed that he would not be able to complete his degree at the University of Arizona College of Nursing. *Id.* at 544. Biswanath Halder had just lost his appeal in a lawsuit against Case Western Reserve University. *Id.* at 552. Seung Hui Cho was about to graduate from Virginia Tech. *Id.* at 556. Steve Kazmierczak had recently transferred from Northern Illinois University to the University of Illinois. *Id.* at 574–75.

434. Researchers believe that a rampage is always premeditated. Katherine S. Newman, *Opinion: Finding Causes of Rampage Shootings Is One Thing; Preventing Them Is Another*, CHRON. HIGHER EDUC., Apr. 19, 2007, available at <http://chronicle.com/article/Opinion-Finding-Causes-of/122449/>; FAST, *supra* note 425, at 12. Though the time between decision and action may be short, rampagers almost never “just snap.” Robert Fein et al., *Threat Assessment in Schools*, U.S. SECRET SERV. & U.S. DEP’T OF EDUC., at 18 (2002), available at [http://www.secretservice.gov/ntac/ssi\\_guide.pdf](http://www.secretservice.gov/ntac/ssi_guide.pdf).

435. FAST, *supra* note 425, at 13; see also Fein et al., *supra* note 434, at 20.

436. See de Haven, *supra* note 1.

437. Against their client’s wishes, Wayne Lo’s lawyers claimed he was insane, but the jury disagreed, and he was convicted. FAST, *supra* note 425, at 104–07.



Though most rampagers (again, Williamson is an exception) are not obviously insane, they are almost always obviously disturbed or disturbing in their campus conduct and interactions.<sup>438</sup> They are angry, depressed, and increasingly extreme in their reactions to their environment. More often than not—in the days, weeks, months, or even years before the shooting—the student killer alarmed faculty, staff, and other students by public displays of rage or other disruptive and extreme behaviors.<sup>439</sup> In

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Odighizuwa's trial was delayed for almost three years because he was considered psychologically incapable of assisting in his own defense; when he recovered enough to stand trial, he was offered a plea bargain. de Haven, *supra* note 1, at 539. The Commonwealth Attorney claimed to have developed doubts about his sanity at the time of the shooting. *Id.* at 539 n.163. He accepted life imprisonment without possibility of parole. *Id.* Biswanath Halder was convicted but apparently saved from the death penalty by his attorneys' arguments that he was mentally unbalanced. *Id.* at 553 n.272.

438. See de Haven, *supra* note 1.

Disturbing students are those whose conduct violates an institution's code of conduct but who do not have any evident mental health concerns . . . .

Disturbed students are those who may be experiencing mental health problems but whose conduct does not violate the college or university's code of conduct . . . . The disturbing/disturbed student is both disruptive and suffering from mental health problems.

John H. Dunkle, Zachary B. Silverstein, & Scott L. Warner, *Managing Violent and Other Troubling Students: The Role of Threat Assessment Teams on Campus*, 34 J.C. & U.L. 585, 596 (2008) (citations omitted).

439. See de Haven, *supra* note 1. During his final year as a graduate student, Gang Lu, the University of Iowa shooter, developed a grudge against his dissertation advisor, plasma physics theoretician Stan Goertz, whom he killed during his rampage. See EDWIN CHEN, *DEADLY SCHOLARSHIP: THE TRUE STORY OF LU GANG AND MASS MURDER IN AMERICA'S HEARTLAND* 95–96 (1995). At least twice in the weeks before the shooting, Lu, who was normally quiet and withdrawn, shouted and ranted at his advisor, accusing him of delaying a letter of recommendation, unfairly passing him over for an academic award, and discrediting his work. See *id.* at 117–18. He also had a loud and stormy confrontation with Dwight Nicholson, the head of the department, whom he also killed. See *id.* at 138–39. After an uneventful first year as an undergraduate freshman at Simon's Rock, Wayne Lo joined a trio of "perennially angry" and disaffected students, one of whom was dismissed for stalking. Openly racist and anti-Semitic, he became increasingly confrontational with his adult resident advisors, a bi-racial couple. Several hours before his rampage he told friends and acquaintances that he had a firearm and intended to use it, alarming them to such an extent that one of them called the college and reported the threat. See FAST, *supra* note 425, at 95; see also de Haven, *supra* note 1, at 521–24. Peter Odighizuwa, at the Appalachian School of Law, was openly threatening and hostile to fellow students in the classroom. de Haven, *supra* note 1, at 530–31. The victims claimed that he verbally assaulted and threatened women students and staff. Students nicknamed him "Shooter." *Id.* at 531. Several students and employees complained to the law school administration that he was abusive and that they were afraid of him. *Id.* In the twenty-four hour period before his rampage, he had a loud and angry confrontation with student services personnel about his student loan status and another loud and acrimonious meeting with a professor about his grades. *Id.* at 532–34. Robert Flores, at the University of Arizona College of Nursing, was frequently hostile to his teachers, all of whom were women. *Id.* at 542–43. He called them names in class and was so disruptive that the Associate Dean warned him that he could be expelled for inappropriate behavior. *Id.* at 542 n.186. He made it clear that he was capable of

several cases (including Williamson's), faculty, students, or staff reported such behavior to the campus police, the student mental health service, or other appropriate institutional authorities, specifically raising conduct-based concerns about the student's mental state.<sup>440</sup> After the rampage, questions are almost always raised about the adequacy of the institutional response.<sup>441</sup>

### B. Managing Troubled Students

Managing disruptive students is obviously not a new problem for college and university administrators. In 1989, proposing a threat assessment model for colleges and universities, Ursula Delworth wrote: "All campuses have or should have some system in place for handling the discipline or judicial problems and the psychological problems of students. *The issue often becomes one of insufficient coordination, inadequate information flow, and lack of a shared process . . .*"<sup>442</sup>

Delworth's last observation certainly applies in Williamson's case, when it comes to coordination and information flow between the University clinic and the Law School administration.<sup>443</sup> Its applicability is even more

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"bash[ing] someone's head against a curb"; threatened one teacher that if she gave him a low grade she should "watch [her] back"; and once threatened to plant a bomb under the school. *Id.* at 542–44. Biswanath Halder, who filed a lawsuit against a computer lab employee at Case Western Reserve University for hacking and destroying his website, threatened to "fuck those fuckers up" if he lost his appeal. *Id.* at 551. See also *supra* Section III.A. (discussing Seung Hui Cho's rampage at Virginia Tech).

440. See *supra* note 439; see also *supra* Section III.A.

441. See de Haven, *supra* note 1.

442. URSULA DELWORTH, DEALING WITH THE BEHAVIORAL AND PSYCHOLOGICAL PROBLEMS OF STUDENTS, NEW DIRECTIONS FOR STUDENT SERVICES 9 (1989), quoted in Dunkle, Silverstein & Warner, *supra* note 438, at 590. Delworth was a professor of counseling psychology at the University of Iowa. Dunkle, Silverstein & Warner, *supra* note 438, at 589. According to Dunkle, Silverstein, & Warner, "the framework she articulated, the Assessment-Intervention of Student Problems (AISP) Model, remains as relevant and useful as it did when it first appeared almost twenty years ago." *Id.* at 590.

The standard components of Delworth's threat assessment model are the formation of a campus assessment team; a general assessment process for channeling students into the most appropriate on-campus and off-campus resources; and intervention with the student of concern. *Id.* The AISP is currently the model recommended by the National Association of Student Personnel Administrators (NASPA). See Jablonski et al., *supra* note 121, at 2, 6, 13. More sophisticated and comprehensive refinements to the basic model are being developed by experts in the field of education, law, and mental health, and these efforts have gained momentum since the Virginia Tech rampage. See The Jed Foundation, *Student Mental Health and the Law: A Resource for Institutions of Higher Education*, THE JED FOUNDATION (2008), available at [http://www.jedfoundation.org/assets/Programs/Programs\\_downloads/StudentMentalHealth\\_Law\\_2008.pdf](http://www.jedfoundation.org/assets/Programs/Programs_downloads/StudentMentalHealth_Law_2008.pdf).

443. Otherwise, however, the informal process in place for handling students such as Williamson appears to have worked reasonably well and to have complied with Delworth's model, which does not require formality so much as accountability. In the

obvious in the case of Virginia Tech.<sup>444</sup> Collective experience with school rampages between the UNC and Virginia Tech shootings has not only reinforced Delworth's critique, but also focused attention on the best ways of creating safer educational environments and managing troubled and troubling students.<sup>445</sup> Because rampagers plan their attacks and give other warning signs of their intentions, often long before they attack, the appropriate use of threat assessments may prevent many incidents of targeted school violence.<sup>446</sup> A number of threat assessment models have emerged—indeed, it is recommended that each school adopt a model best suited to its circumstances.<sup>447</sup> There appears to be an emerging consensus, however, that an institution of ordinary prudence should create and empower a collaborative, interdisciplinary group, supported at the highest institutional levels, through which information about students of concern can reach appropriate ears and result in appropriate intervention.<sup>448</sup> Such groups should include “mental health professional[s].”<sup>449</sup>

Along with the development of case management protocols, statutory protections not available to students in *Tarasoff's* day now inform and contain institutional treatment of disturbed and disturbing students.<sup>450</sup>

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wake of the Virginia Tech rampage, NASPA is now calling for a formalized approach to threat assessment and intervention. See Jablonski et al., *supra* note 121, at 14.

444. See *supra* text accompanying note 415.

445. In 2002, in response to the alarming rise of high school rampage shootings, the United States Department of Education, in collaboration with the United States Department of Homeland Security (formerly the Secret Service), published a guide to threat assessment in schools directed specifically at preventing incidents of targeted school violence. Fein et al., *supra* note 434.

446. *Id.* A cautionary note: there are apparently differences between adolescent rampagers, who are likely to have confided their plans and intentions to friends, and adult rampagers, who are not likely to have done so. FAST, *supra* note 425, at 13.

447. See Dunkle, Silverstein & Warner, *supra* note 438, at 589; see also Jablonski et al., *supra* note 121, at 6.

448. Jablonski et al., *supra* note 121, at 6. Such groups are variously known as “campus response and evaluation” (CARE) teams, “behavioral intervention teams” (BIT), or, currently preferred, “student at-risk response teams” (SARRT).

The goal in developing a threat assessment [team] is early intervention to help assure the health, safety, and success of the individual and other members of the campus community. As such, the development of a team is an act of caring, as are the activities of that team, including the team's decision to share information with appropriate members of the campus community on a need-to-know basis or with a student's family.

*Id.* at 15. See Vossekuil et al., *supra* note 23, at 37; see also Dunkle, Silverstein & Warner, *supra* note 438, at 587; The Jed Foundation, *supra* note 442, at 11.

449. Dunkle, Silverstein & Warner, *supra* note 438, at 594; see also Jablonski et al., *supra* note 121, at 14. The team should also include Student Affairs professionals, law enforcement representatives, and legal counsel, and it may include others, such as health services representatives, clergy, and teachers in particular cases. Jablonski et al., *supra* note 121, at 17; see also The Jed Foundation, *supra* note 442.

450. Title II of the Americans with Disabilities Act, 42 U.S.C. §§ 12131–12134 (2006), prohibits discrimination against otherwise qualified individuals suffering from mental or psychological disability who are receiving educational services. Section 504

Colleges and universities are now well-advised to develop “individualized and objective” threat assessment capacities for determining whether students with mental disabilities pose a threat of harm to themselves or others.<sup>451</sup> At the same time, once appropriate guidelines are in place, an institution of higher education is not prevented from imposing conditions upon the continued enrollment of a disturbed or disturbing student to protect the safety of the student and the academic community.<sup>452</sup> Reasonable interventions may even include mandatory withdrawal or leave of absence.<sup>453</sup> There appears to be no question that requiring anger management classes, suicide counseling, or other therapeutic interventions as a condition of residence or enrollment is a legitimate exercise of institutional authority in appropriate cases.<sup>454</sup> Students’ statutory rights to privacy also ensure that care and discretion will be used in sharing information about students. At least since the Virginia Tech Massacre, it is clear that the Family Educational Rights and Privacy Act (FERPA) permits “well-informed professionals engaged in legitimate university business” to share “information related to protecting the health and safety of a student or member of the campus community.”<sup>455</sup>

Moreover, though institutions should always proceed with due respect for student rights and due care for confidential relationships, as a practical matter, the cases that justify threat assessment or other involuntary mental

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of the Rehabilitation Act applies to the same effect at educational institutions that receive federal funding. 29 U.S.C. § 794(b)(2)(A) (2006). The Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 12329 (2006), protects student educational records from disclosure, and the Health Insurance Portability and Accountability Act (HIPAA), 42 U.S.C. §§ 1320d to d-8b (2006), protects student medical records from disclosure. Fuller discussions of the interface between these laws and the operation of effective student at-risk response teams can be found in Dunkle, Silverstein & Warner, *supra* note 438, and Massie, *supra* note 27.

451. Dunkle, Silverstein & Warner, *supra* note 438, at 612. According to the Office of Civil Rights (OCR) of the United States Department of Education, to which college and university administrators now look for guidance, students with mental disabilities lose the protection of federal law and may be removed or dismissed from the academy when there is a “high probability of substantial harm” to themselves or others, not merely “a slightly increased, speculative, or remote risk.” *Id.* The school should make removal decisions based on sound evidence and not on “unfounded fear, prejudice, or stereotypes.” *Id.* at 613. The touchstone is whether the student can safely participate in the institutions’ academic programs. The OCR advises institutions of higher education to consult with medically-trained professionals when making removal decisions. *See id.* at 612.

452. *See* Darby Dickerson, *Mandatory Withdrawal and Leave of Absence Revisited*, 28 NASPA LEADERSHIP EXCHANGE (2007).

453. *Id.*; *see* Dunkle, Silverstein & Warner, *supra* note 438, at 614–16.

454. *See supra* Section III.C.

455. Jablonski et al., *supra* note 121, at 15–16. So, too, does HIPAA. *Id.* FERPA also contains an exception for emergency situations that permits disclosure of educational records covered by the Act “if . . . such information is necessary to protect the health or safety of the student or other persons.” 20 U.S.C. § 1232g(b)(1)(I) (2006). *See* Dunkle, Silverstein & Warner, *supra* note 438, at 626–27.

health intervention seldom raise such issues.<sup>456</sup> There were no overriding confidentiality or privacy issues in the case of Wendell Williamson that justified the virtually impenetrable wall of silence around him and Dr. Liptzin once his treatment began. Nor should privacy concerns have hindered the Care Team from considering Seung Hui Cho's repeated alarming behaviors and encounters with University and mental health professionals.<sup>457</sup>

The mental health landscape has also been altered since *Tarasoff* in several ways that tend to enhance a college or university's capacity to prevent campus violence by students who are mentally disturbed. For one thing, the profession has developed better risk assessment practices for professionally-trained therapists than were available in 1969.<sup>458</sup> Risk assessment instruments and guidelines have also been developed that can be used as screening devices by non-clinicians such as Professor Roy, who may need to make an individualized and objective initial assessment of an alarming student.<sup>459</sup> Further, there is growing acceptance in the therapeutic community that outpatient commitment may be an effective means of

456. It is the experience of the authors that, when approached with thoughtful concern, most students who are at risk of self-harm will: agree to sign waivers that permit information sharing between caregivers and college or university administrators; voluntarily move to more appropriate housing; and even voluntarily withdraw from school on a temporary basis until they are able to obtain the treatment and care they need in order to diminish any risk of harm. Where the student has agreed to permit threat assessment teams to share information that would otherwise be confidential, or where a student agrees to withdraw voluntarily from a program in order to seek treatment, the risk of a legal claim against the institution is greatly reduced. Thus, it is important for threat assessment teams to engage students of concern consensually throughout the threat assessment process to the extent possible.

Dunkle, Silverstein & Warner, *supra* note 438, at 610–11.

457. “The Cook Counseling Center and the University’s Care Team failed to provide needed support and services to Cho during a period in late 2005 and early 2006. The system failed for lack of resources, incorrect interpretation of privacy laws, and passivity.” VT PANEL REPORT, *supra* note 310, at 2.

458. Since *Tarasoff*, “the field of violence risk assessment has burgeoned and is now a vast and vibrant area of interdisciplinary scholarship.” John Monahan, *Tarasoff at Thirty: How Developments in Science and Policy Shape the Common Law*, 75 U. CINN. L. REV. 497, 497 (2006). Professor Monahan observes that “no instruments for structuring violence risk assessments were available in 1976. Rather, Poddar’s clinicians assessed whatever risk factors they believed to be most relevant to his particular case, and combined those risk factors in a subjective manner to generate their clinical opinion about his violence risk.” *Id.* at 499–500. Professor Monahan cites four studies conducted since *Tarasoff* supporting the conclusion that using traditional, unstructured, subjective assessment methods, “clinicians are able to distinguish violent from nonviolent patients with a modest, better-than-chance level of accuracy.” *Id.* at 501 (citation omitted).

459. See, e.g., Carl J. Patrasso, *Questions in the Evaluation for Threat Assessment in Schools*, THE FORENSIC EXAMINER (Winter 2005), available at [http://findarticles.com/p/articles/mi\\_go1613/is\\_4\\_14/ai\\_n29221396](http://findarticles.com/p/articles/mi_go1613/is_4_14/ai_n29221396); Fein et al., *supra* note 434, at 43–59. See also Dunkle, Silverstein & Warner, *supra* note 438, at 598 n.68; *supra* note 336 and accompanying text.

reducing violence by mentally ill patients, which reinforces the value of requiring students to use mental health services as a condition of continued enrollment in appropriate cases.<sup>460</sup>

### C. Litigating Student Suicides

Student suicides and campus rampages are not unrelated phenomena. Both are acts of violence occurring at an educational institution.<sup>461</sup> Though some campus rampagers are simply murderous and far from suicidal, about half have killed themselves before they could be arrested.<sup>462</sup> Even when suicidal students do not pose a risk of direct harm to others, suicide on campus demoralizes the academic community. Student self-injury is a major and growing concern of colleges and universities in what is being described as a “suicide crisis” in higher education.<sup>463</sup>

Since 2000, courts have taken differing theoretical paths and have come out in different places regarding a college or university’s duty to prevent student suicide. Along the way, they have encountered complaints not only against college and university therapists but also against Deans of Students and other university administrators who were not directly involved in mental health treatment of the suicidal student. Indeed, the complaint may be that college and university administrators knew the student was psychologically disturbed, even suicidal, but did not arrange appropriate professional treatment or warn the student’s family of the situation. Thus, the student suicide cases raise many of the same issues as the student rampage cases. A brief review of the few suicide cases decided since 2000

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460. Monahan, *supra* note 458, at 515. In a study conducted using patients who had previously been committed as in-patients and then released, results indicated that, provided the patient actually used the out-patient services, extended outpatient commitment of more than six months reduced the probability of violence by fifty percent. While another study reached the conclusion that court-ordered outpatient commitment does not reach better outcomes than enhanced follow-up services, Professor Monahan suggests that in *Tarasoff*-type cases raising particular concerns about violence, therapists should consider “intensified voluntary treatment, *outpatient commitment*, inpatient commitment, or warning the potential victim.” *Id.* at 519 n.81 (emphasis in original).

461. *See* Lake, *supra* note 27.

462. The following rampages ended in suicide by the killer: Gang Lu at the University of Iowa; Robert Flores at the University of Arizona; Seung Hui Cho at Virginia Tech; Steven Kazmierczak at Northern Illinois University.

On the other hand, campus rampagers have not for the most part been substance abusers (Williamson, again, is exceptional). Cases involving university liability for student self-injury relating to recreational drug use are not considered here. *See, e.g.*, *Bash v. Clark Univ.*, 22 Mass. L. Rptr. 84 (Super. Ct. Mass. 2006) (finding no university liability for student’s accidental death by heroin overdose).

463. *See* Lake, *supra* note 27, at 254. Student suicides affect graduate and professional schools as well as undergraduate institutions, and they appear to be increasing among older members of the student population. *Id.* at 254–55. Like rampagers, most successful student suicides (about eighty percent) are men, and among men, firearms are the most commonly used means of death. *Id.*

is therefore instructive if only to underline the need for a formulation of duty better adapted to the realities of academic experience with mentally disturbed students.<sup>464</sup>

### 1. *Jain v. State of Iowa*

Decided in 2000, *Jain v. State of Iowa* was typical of the *Tarasoff*-era analysis in rejecting the plaintiff's argument that the University of Iowa was responsible for the suicide of his son, Sanjay Jain, a young undergraduate in his first semester at the University of Iowa in 1994.<sup>465</sup> Upholding the trial court's dismissal of the action, the Iowa Supreme Court held that the University had not affirmatively undertaken to warn Jain's family that their son had threatened suicide.<sup>466</sup> The University's knowledge of the student's mental condition was not enough to create a special relationship giving rise to an affirmative duty of care, because the University's performance did not make matters any worse for Sanjay Jain or "cause [him] to forego other alternatives [for] protecting [himself]."<sup>467</sup>

### 2. *Schieszler v. Ferrum College*

Decided only a few months before *Davidson v. UNC*, *Jain* supported an institutional hands-off approach to self-inflicted student injuries, even when the college or university offered mental health services to students and could insist that they use them.<sup>468</sup> A year later, in *Schieszler v. Ferrum*

464. "Everywhere in America, in every type of institution of higher education, administrators make life and death decisions with imprecise and incomplete guidance from the law . . . . At this time, the law is failing colleges and universities with respect to the mental health crisis." *Id.* at 254.

465. *See Jain v. State*, 617 N.W.2d 293 (Iowa 2000). The hall coordinator at Sanjay's dorm learned a couple of days before Thanksgiving break in 1994 that he was threatening to gas himself and had a Moped in his room. *Id.* at 295. Jain later denied any suicidal intent, claimed that he was merely suffering from homesickness, and refused to let his parents be contacted. *Id.* The hall coordinator, whose qualifications and training are not reported, advised Sanjay to seek help at the University counseling center and gave him her home number. *Id.* at 295. Sanjay went home for Thanksgiving and did not mention his suicidal thoughts to his family. *Id.* He returned to school, where the hall coordinator checked on him. *Id.* He told her "things were going good." *Id.* His friends knew but did not share with the residence staff that Jain was still contemplating suicide and was still keeping the Moped in his room. *Id.* On December 4, when his roommate was out of town, Jain died in his room from inhaling exhaust fumes. *Id.*

466. *Id.* at 300. The University had an unwritten policy that the Dean of Students would notify the parents of any student who attempted suicide based upon "information gathered from a variety of sources." *Id.* at 296. The dormitory hall coordinator reported Jain's suicidal comments to the Resident Advisor, but the Dean of Students was not told about the situation. *Id.* at 295-96.

467. *Id.* at 299, citing RESTATEMENT (SECOND) OF TORTS § 323 (1977). Indeed, the Court noted, Jain failed to take advantage of the counseling services offered him. *Id.*

468. Early in his short undergraduate life, Jain was required to take substance abuse classes as a condition of remaining in the dormitory. *Id.* at 295.

*College*, a trial court in Virginia took a less tolerant view of the college or university's role when freshman Michael Frentzel hanged himself in his dorm room.<sup>469</sup> A federal court, sitting in diversity, found that a special relationship existed between Frentzel and the College under Virginia law because the facts alleged, if proved, constituted special circumstances that made the suicide foreseeable.<sup>470</sup> "[A] trier of fact could conclude that there was 'an imminent probability' that Frentzel would try to hurt himself and that the defendants had notice of this specific harm."<sup>471</sup> The college might therefore have had a duty to prevent the suicide. The court also appeared to find persuasive the reasoning of *Furek* and *Mullins*, both of which rested in part on the recognition that the defendants had voluntarily undertaken a duty to act. During oral argument on defendants' motion to dismiss, however, the plaintiff abandoned the claim of affirmative undertaking, and the court therefore did not address the obstacles raised by *Jain* to finding an affirmative undertaking in the context of student suicide.<sup>472</sup>

The two cases were not necessarily irreconcilable in theory or in outcome. In *Jain*, the student's first suicide threat (the only one about which the University learned) was investigated by his dormitory advisor, who determined that he did not intend to kill himself. She reported it and discussed it with her supervisor, and they decided not to report it to the Dean of Students for further action.<sup>473</sup> Moreover, Jain made a trip home after his alleged threat, and he reported to his dorm advisor that he was doing fine when he returned.<sup>474</sup> Under the circumstances it is hard to make a case that Jain's suicide, though perhaps preventable, was foreseeable. In contrast, the plaintiff in *Ferrum College* could state a case that Frentzel's

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469. 236 F. Supp. 2d 602, 605 (W.D. Va., 2002). In 2000, six years after Sanjay Jain's death, Michael Frentzel killed himself in his college dorm room. *Id.* The two cases had much in common. Like Jain, Frentzel was a young freshman living in student housing. *Id.* Like Jain, he had difficulty adjusting to college life and was required to enroll in "anger management counseling" as a condition of continuing his enrollment. *Id.* at 609. As in *Jain*, Ferrum College authorities knew that Frentzel had threatened suicide and that he had the means to carry out his threat. *Id.* Frentzel sent a note to his girlfriend threatening to hang himself with his belt. *Id.* She showed the note to the resident assistant at the dorm and the campus police, who intervened and found Frentzel in his dorm room with bruises on his head that he admitted were self-inflicted. *Id.* This information was communicated to the Dean of Student Affairs, and the Dean required Frentzel to sign a statement that he would not harm himself. *Id.* The Dean did not, however, place Frentzel on a suicide-watch or take any other action. *Id.* A day or so later (the facts are unclear), when Frentzel sent his girlfriend another alarming note, the Dean prevented her from seeing him. *Id.* Left all alone, Frentzel sent his girlfriend a third note. *Id.* This time she persuaded the administration to intervene, but the campus police arrived too late. Frentzel was dead by the time they opened the door. *Id.*

470. *Id.* at 609.

471. *Id.*

472. *Id.* at 608.

473. See *Jain*, 617 N.W.2d at 295–96.

474. *Id.* at 295.



suicide was both preventable and foreseeable even by a college or university administrator who was not trained in psychology. Indeed, because the matter was brought to the Dean, who then extracted a written promise from Frentzel not to injure himself, the jury might have inferred that the College actually did foresee the suicide.<sup>475</sup> Moreover, in contrast to *Jain*, the College's self-protective intervention probably made matters worse. The Dean not only left Frentzel alone and unattended; he affirmatively forbade Frentzel's friends to visit him in his dorm room, thereby depriving him of attention, companionship, and emotional resources and increasing his isolation at a critical juncture.<sup>476</sup> Under the circumstances it is perhaps not surprising that in settling the case, the College took the unusual step of publicly acknowledging "errors in judgment and communication" and "shared responsibility" for Frentzel's death.<sup>477</sup>

### 3. *Shin v. MIT*

In 2005, three years after the decision in *Ferrum College*, a trial court in Massachusetts upheld a wrongful death action against the Massachusetts Institute of Technology (MIT), where Elizabeth Shin apparently set herself on fire in her dormitory room in April 2000.<sup>478</sup> Shin was a sophomore who experienced recurrent states of suicidal depression related to the stress of academic life.<sup>479</sup> University mental health professionals and academic and residential administrators had been continuously involved in her care since she attempted suicide by drug overdose during the second semester of her freshman year.<sup>480</sup> After her death, her parents brought a wrongful death

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475. In *Tarasoff*, Judge Simms made much the same argument with respect to the campus police, who let Poddar go when he promised to stay away from the woman he later killed. *Tarasoff v. Regents of Univ. of Cal.*, 108 Cal. Rptr. 878, 898 (Cal. Ct. App. 1973)

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

477. Eric Hoover, *Ferrum College Concedes 'Shared Responsibility' in a Student's Suicide*, CHRON. HIGHER EDUC., Aug. 8, 2003, at A31.

478. *Shin v. Mass. Inst. of Tech.*, 2005 WL 1869101 1, 5 (Mass. Super. Jun. 27, 2005).

479. *Id.* at 9.

480. *Id.* at 1–5. Elizabeth Shin had a history of depressive behavior and "cutting" in high school. *Id.* at 1. Her father took her to MIT's Mental Health Center after she attempted suicide during her second semester, and she remained in treatment by an MIT psychiatrist for the rest of her freshman year. *Id.* at 1–2. When Shin returned to MIT for her second year, she told the Dean of Counseling and Support Services (CSS) that she was again thinking of killing herself. *Id.* at 2. The Dean sent her to the Mental Health department for immediate assessment, and she again began treatment by MIT psychiatrists. *Id.* In the spring of her sophomore year, Shin's mental health continued to deteriorate. *Id.* at 3. Her teachers, tutors, classmates, and housemasters reported to CSS and the Mental Health department that Shin was continuing openly to contemplate suicide. *Id.* In mid-March 2000, she was hospitalized in the MIT infirmary because she was considered unsafe to leave alone. *Id.* Her father took her home from the infirmary, but she returned to school after spring break. *Id.* She began seeing another

and negligence action against the MIT psychiatrists who had treated her, the Dean of MIT's Counseling and Support Services (CSS), and the housemaster at her dormitory.<sup>481</sup>

Only one of the defendant MIT psychiatrists denied having a special doctor-patient relationship with Elizabeth Shin that gave rise to a duty of care.<sup>482</sup> Defendant Dr. Girard moved for dismissal because she had ceased treating Shin six months before her death.<sup>483</sup> However, the court found that the psychiatrist was a member of the "deans and psyches" group that considered Shin's case on the day of her death and therefore might be considered still part of Shin's "treatment team."<sup>484</sup>

That a duty once owed a patient might continue, or be revived, if the therapist later participates in decisions affecting the patient's treatment is not much of a stretch, though the ruling has been taken as a sign that any mental health professional's membership on a threat assessment team may be sufficient to impose a duty of reasonable care.<sup>485</sup> Even more expansive was the court's extension of the duty to both MIT's Dean of CSS and Shin's dormitory housemaster, neither of whom was a mental health professional.<sup>486</sup> The court relied in part upon *Mullins v. Pine Manor*, locating the administrators' duty of care in the consensus of "existing social values and customs" that inform the academic community as a whole.<sup>487</sup> It also discussed with approval the ruling in *Ferrum College*, that the Dean of

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MIT psychiatrist, who prescribed medications, but her condition did not improve, and her teachers continued to sound the alarm to CSS and the Mental Health Center clinicians. *Id.* at 3-4. On April 8, following another suicide threat, one of Shin's suite mates called the MIT Campus Police, who took her to the Mental Health Center, where she spoke by telephone to an on-call psychiatrist, Dr. Van Niel. *Id.* at 4. Van Niel determined within five minutes that she was not "acutely" suicidal and sent her back to the dorm with no restrictions or follow-up plan. *Id.* Less than 48 hours later, shortly after midnight on April 10, Shin announced that she planned to kill herself that day and asked another student to erase her computer files. *Id.* at 5. The housemaster called the Mental Health Center and spoke to Dr. Van Niel, who declined to see Shin at that time because he believed that she was fine and that her friends were overreacting. *Id.* Shin's mental state still alarmed the housemaster at 9:45 that morning. *Id.* The housemaster contacted the Dean of CSS, who discussed Shin at a meeting of "deans and psychs" that met later that day. *Id.* At 9:00 that night, the campus police responded to a smoke alarm in Shin's locked dorm room and found her engulfed in flames. *Id.* She died a few days later of injuries suffered in the fire. *Id.*

481. *Id.* at 11.

482. *Id.*

483. *See generally id.* The other defendant psychiatrists moved for summary judgment on the grounds that although they owed a duty of care to Elizabeth Shin, they had not committed gross negligence as alleged. The trial court found a genuine issue of fact in that regard based on plaintiff's allegations that the defendant psychiatrists had failed to formulate and enact an "immediate" treatment plan in response to Shin's escalating suicide threats. *Id.* at 9.

484. *Id.* at 11-14.

485. *See Lake, supra* note 27, at 272.

486. *Shin*, 2005 WL 1869101 at 12.

487. *Id.* at 33.

Students had a duty because he knew or should have known that the suicide was imminently foreseeable.<sup>488</sup> It noted that both administrators had participated in important ways in caring for Shin's mental health and concluded that they, too, could both be sued as members of Shin's "treatment team."<sup>489</sup>

The ruling appeared to rest the administrators' duty entirely upon the fact that the Dean and the housemaster knew Shin's situation and should have foreseen that her death by suicide was imminent.<sup>490</sup> As Professor Lake has pointed out, ruling that foreseeability of harm alone creates a duty to prevent that harm "would be a novel and very broad departure from existing law."<sup>491</sup> The facts suggest, however, that distinctions might usefully have been drawn between the two administrative defendants to arrive at a somewhat more precise formulation that relies not only upon foreseeability, but also upon the capacity to take effective preventive action. The record on summary judgment, incomplete though it doubtless was, reflected that the Dean of CSS and the housemaster each had ongoing and significant involvement in Shin's care, but that they operated at different levels of institutional authority. The housemaster, for example, obviously played a vital front-line role in MIT's collaborative and interdisciplinary model of student mental health management. She received communications about Shin's mental state from other students, from Shin's teachers, and from Shin herself.<sup>492</sup> She communicated all such information either to the Dean of CSS or, in an emergency, directly to MIT's mental health services.<sup>493</sup> At one point, Shin's psychiatrist requested, through the Dean of CSS, that the housemaster discourage Shin from moving out of the dorm, and the housemaster was able to do so.<sup>494</sup> However, though the housemaster's personal and institutional influence was important, she does not appear to have occupied a position of institutional authority. The Dean of CSS, on the other hand, wielded considerable institutional power to intervene in Shin's situational distress. For example, two successive Deans arranged for Shin to receive immediate assessment for suicide risk at the MIT Mental Health Clinic based on alarming personal conversations with her.<sup>495</sup> The Dean of CSS was on the "deans and psychs" assessment team, in which the housemaster did not participate.<sup>496</sup>

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488. *See id.* 35–37.

489. *Id.* at 14.

490. *Id.*

491. Lake, *supra* note 27, at 274.

492. *Shin*, 2005 WL 1869101 at 1, 3, 5.

493. *Id.*

494. *Id.* at 3.

495. *Id.* at 2.

496. *See generally id.* at 5. The opinion does not reflect whether the Dean of CSS could arrange academic leaves of absence but does indicate that the Dean arranged to

Recognizing that only those with institutional authority to intervene should have a duty to prevent student injury would have provided an important limiting principle to the *Shin* court's expansive foreseeability formula. As it turned out, the parents and MIT finally agreed that Elizabeth Shin's "imminently foreseeable" suicide was in fact an accident, which had been MIT's position all along.<sup>497</sup> The settlement cast further doubt on the value of foreseeability as a determinative element in imposing a duty of care in cases of student self-injury.

#### 4. *Mahoney v. Allegheny College*

Shortly after *Shin* was decided in Massachusetts, a trial court in Pennsylvania dismissed negligence claims against two college administrators who were not treating therapists of the student who had committed suicide.<sup>498</sup> Charles Mahoney went to Allegheny College as a freshman in 1999 expecting to play football.<sup>499</sup> Like Elizabeth Shin, he quickly experienced psychological difficulties at college, and his mother referred him to the College Counseling Center (CCC), where he continued to receive drug therapy and counseling for major depression until his suicide by hanging in February of his junior year.<sup>500</sup> After his death, his

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postpone at least one of Shin's exams shortly before her death. *Id.* at 3.

497. Marissa Vogt, *MIT Settles Case, Parents Agree Death Likely an Accident*, THE TECH (Apr. 4, 2006), <http://tech.mit.edu/V126/N15/15shin.html>.

498. *Mahoney v. Allegheny College*, No. AD892-2003 (Pa. Ct. Com. Pl. 2005).

499. *Id.*

500. *See generally id.* Mahoney had panic and anxiety attacks when he started football camp as a freshman in August 1999. *Id.* at 3. He was evaluated and diagnosed with major depression, single episode. *Id.* He participated in regular counseling with Jacquelyn Kondrot at CCC throughout his freshman year. *Id.* In fall 2000, he began to feel suicidal and was again assessed by a CCC psychiatrist. *Id.* This time hospitalization was recommended, and Mahoney's parents were notified. *Id.* at 4. Mahoney was hospitalized briefly and anti-depressant medication was prescribed. *Id.* He continued counseling with Kondrot for the rest of the school year and continued taking anti-depressants when he left college for the summer. *Id.* When he returned as a junior in fall semester 2001, his condition began to deteriorate. *Id.* He quit the football team and broke up with his girlfriend because he thought he was ruining her life. *Id.* He confessed to Kondrot that he had lied to her about his high levels of alcohol consumption. *Id.* He began to say that he wished he were dead. *Id.* at 5. In late January 2002, his fraternity friends and former girlfriend visited Kondrot and voiced concerns that Mahoney was isolating himself and drinking heavily. *Id.* He arranged for one of his friends to adopt his beloved dog "if anything happens to me." *Id.* On January 28, Kondrot discussed his case with the Dean of Students. On February 1 Kondrot again referred him to the CCC psychiatrist for evaluation and diagnosis, review of his medication therapy, and assessment for suicide risk. *Id.* at 6. On February 11, Kondrot received an alarming e-mail from Mahoney. She met with him that day and tried to persuade him to take a leave of absence. *Id.* at 9-10. He refused. *Id.* at 10. She told him that normally she would call his parents and the Dean of Students to discuss options for his continuing care. *Id.* Again, Mahoney refused to permit his parents to be called. *Id.* He also firmly refused to consider hospitalization. *Id.* He left for class after a counseling session of over an hour, promising to check in with the counselor the

parents brought claims of medical malpractice and negligence against the CCC counselor who treated him, the College as her employer, and the College's consulting psychiatrist who prescribed his anti-depressant medication.<sup>501</sup> These claims proceeded to trial based upon expert affidavits proffered by the plaintiff creating factual issues with respect to malpractice.<sup>502</sup> The plaintiffs, the College's Dean of Students and Associate Dean of Students, were also named as negligent actors.<sup>503</sup> They claimed that the deans had a duty to prevent their son's suicide by having him hospitalized, by placing him on involuntary leave of absence for health reasons, or by notifying them of his deteriorating mental condition.<sup>504</sup>

The evidence before the court on summary judgment was that the Deans of Students learned about two weeks before Mahoney's suicide that he was having conflicts with fraternity brothers and seeing a counselor for depression.<sup>505</sup> They determined that his misconduct at the fraternity did not warrant disciplinary action.<sup>506</sup> On February 11, the day of his suicide, Mahoney's worried counselor discussed with them whether to advise Mahoney's parents of his condition and/or to place him on an involuntary leave of absence for mental health reasons.<sup>507</sup> The counselor advised the deans that taking either action was likely to make matters worse for Mahoney.<sup>508</sup> The deans testified in depositions that they deferred to the counselor's judgment with respect to the best course of action (or inaction) in Mahoney's case.<sup>509</sup>

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next morning. *Id.* at 11. Later that afternoon he hanged himself with the dog's leash at his off-campus fraternity house. *Id.* at 2; Elizabeth Bernstein, *After a Suicide, Privacy on Trial*, WALL STREET JOURNAL, Mar. 24, 2007, at A1, available at <http://online.wsj.com/article/SB117470447130847751.html>.

501. Mahoney v. Allegheny College, No. AD892-2003 (Pa. Ct. Com. Pl. 2005).

502. The jury found that the mental health professionals were not negligent in treating Mahoney, nor was Allegheny College liable in *respondeat superior*. See Bernstein, *supra* note 500.

503. See *Mahoney*, No. AD892-2003, slip op. at 2. The depositions and affidavits showed that the Office of the Dean of Students had first become aware of Mahoney's situation (though not his name) by way of a discussion on January 28, 2002, with his counselor, Kondrot, who was concerned about his depressed state. *Id.* at 11. On February 8, the Dean heard that Mahoney had disturbed the SAE fraternity house where he lived, apparently because his former girlfriend was dating one of his fraternity brothers. *Id.* at 11-12. He also learned that Mahoney was the student about whom Kondrot had reported. *Id.* at 12. The Dean investigated the fraternity incident, received assurances from the students that there would be no fighting, and decided that no formal disciplinary action was warranted. *Id.* at 12. Three days later, on February 11, the Dean received an e-mail from a student at the fraternity house again expressing concerns about Mahoney's emotional health and potential for violence. *Id.*

504. *Id.* at 12.

505. *Id.*

506. *Id.*

507. *Id.*

508. *Id.* at 13.

509. *Id.*

Viewing the lawsuit as essentially a claim of malpractice against the therapist, the psychiatrist, and, by extension, the deans, the trial judge declined to extend the mental health professional's duty of care to lay administrators.<sup>510</sup> The decision acknowledged that "courts are increasingly looking at duty within the ambit of the existence of a 'special relationship' and whether an event is 'reasonably foreseeable' or 'imminently probable,'" but it determined that the circumstances did not warrant finding a special non-therapeutic relationship between Mahoney and the deans.<sup>511</sup> Unlike Michael Frentzel and Elizabeth Shin, Mahoney had not previously attempted to kill himself or revealed suicidal intentions to the College deans.<sup>512</sup> Their only personal contact with him was in the context of a minor disciplinary matter. While Mahoney's therapist advised them of his mental health issues, she specifically requested that they not intervene on that basis.<sup>513</sup> They had no independent basis for placing him on leave of absence or calling his parents, although it is worth noting that they apparently had the institutional authority to take such actions in appropriate cases.<sup>514</sup> In addition, as the court noted, neither of the deans made matters worse.<sup>515</sup> They took no action that would have kept Mahoney from getting the professional help or parental support he needed.<sup>516</sup>

Moreover, the court was reluctant to extend the therapist's duty to college and university administrators because of the disruptive impact such an extension might have on other rights and relationships. "Concomitant to the evolving legal standards for a 'duty of care' to prevent suicide are the legal issues and risks associated with violations of the therapist-patient privilege, student right of privacy and the impact of 'mandatory medical withdrawal policies' regarding civil rights of students with mental disability."<sup>517</sup> Nevertheless, the court ended its decision with a note of caution to college and university administrations:

"[F]ailure to create a duty is not an invitation to avoid action. . . . Rather than . . . an ill-defined duty of due care[,] the University and mental health community have a more realistic duty to make strides towards prevention. In that regard, the University must not do less than it ought, unless it does all that it can."<sup>518</sup>

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510. *Id.* at 20.

511. *Id.*

512. *Id.*

513. *Id.* at 13.

514. *Id.* at 12.

515. *Id.* at 25.

516. *Id.* at 25. *See also supra* Section III.B.

517. *Id.* at 20.

518. *Id.* at 25.

## D. Framing a Newer Model of Institutional Accountability

Writing in 1983 in *Pine Manor College*, the Supreme Judicial Court of Massachusetts observed “with confidence” that colleges and universities “of ordinary prudence” exercise care for the protection and well-being of their resident students and that recognition of their duty to do so is therefore “firmly embedded in a community consensus.”<sup>519</sup> In 2010, the same can be said with equal confidence when it comes to protecting and safeguarding the well-being of faculty, students, and staff in classrooms, libraries, laboratories, offices, and other academic spaces.<sup>520</sup> Safe space is integral to the educational enterprise, and there is surely no dispute that a responsible institution of higher education must value the physical and psychological safety of the learning community.<sup>521</sup> That so much time and energy are now being devoted to campus safety practices in the wake of Virginia Tech is hopeful evidence that the consensus continues.

In her first article, the author argued that a duty of reasonable care for student safety should rest with institutions of higher education as such—that is, not as a result of their landlord-tenant or business-invitee relationship with students, but because of the unique characteristics, circumstances, and relationships of academic life.<sup>522</sup> To go further, at least with respect to students identified as disturbed or disturbing, recognizing that colleges and universities have a responsibility to protect students from reasonably preventable peer violence or deliberate self-injury, including rampage violence, makes sense for the reasons that support imposing tort duty upon the more powerful and capable party in other special relationships, such as employer-employee or manufacturer-consumer.<sup>523</sup>

First, as the *Furek* court pointed out, institutions of higher education

519. *Mullins v. Pine Manor Coll.*, 449 N.E.2d 331, 335; *see also Schieszler v. Ferrum Coll.*, 236 F. Supp. 2d 602, 610 (W.D. Va. 2002).

520. In 1997, Professors Robert Bickel and Peter Lake wrote, “There is a growing sentiment that universities have done things, can do things, and should do things to prevent unreasonable student injury. Ostrichism is bad policy and increasingly legally suspect.” BICKEL & LAKE, *supra* note 26, at 135.

521. *See* Peter F. Lake, *Private Law Continues to Come to Campus: Rights and Responsibilities Revisited*, 31 J. C. & U.L. 621, 622–32 (2005).

522. de Haven, *supra* note 1.

523. Section 314A of the Restatement (Second) of Torts states, “The law appears . . . to be working slowly toward a recognition of the duty to aid or protect in any relation of dependence.” RESTATEMENT (SECOND) OF TORTS § 314A (1977). Commenting on the *Shin* decision, Professor Lake reminds us that “special relationship analysis under Section 314 was intended to have an open-ended and evolving quality.” Lake, *supra* note 27, at 273.

To confirm Professor Lake’s observation, Section 40 of the new Restatement (Third) of Torts specifically recognizes that there is a special relationship between a school and its students that imposes a duty of reasonable care under the circumstances. RESTATEMENT (THIRD) OF TORTS §§ 40(a), (b)(5), cmt. d. (1998). *See also* Massie, *supra* note 27, at 637–39.

have significant and unique power to make campuses more or less safe.<sup>524</sup> Professors Peter Lake and Robert Bickel wrote in 1997, “[A] college is not merely a passive educational repository for students, like parentheses in an equation, but is one of the most important variables and part of the functions.”<sup>525</sup> When exercised with care and competence, institutional control and coordination operate to the benefit of the institution in general and are the best way to make campuses safe enough for learning to flourish. As at workplaces, where the employer’s responsibility for worker safety is well-established, educational institutions establish rules and guidelines for the conduct of the community, engage in strategic planning, hire and empower trained personnel, communicate expectations, monitor performance, and impose sanctions and restrictions, including dismissal, for aberrant behavior. Colleges and universities are capable of authoritative intervention that balances individual against community interests in the educational setting. Their administrations are in the best position to establish appropriate assessment and intervention capacities, to adopt and coordinate policies and procedures, to determine and enforce sanctions and interventions, and to allocate resources and raise funds. Specifically, as the cases considered here demonstrate, colleges and universities can coordinate the delivery of mental health services. They can also require in appropriate circumstances that students accept such services as a condition of remaining enrolled.

Next, many institutions of higher education have undertaken to care for disturbed and/or disturbing students by enlisting the services of mental health professionals on their campuses. It makes a significant difference in results when they manage such care responsibly.<sup>526</sup> Indeed, colleges and universities are largely successful in protecting students from extremes of rage and self-destruction as they live through the challenges of academic life.<sup>527</sup> At the same time, as the rampage and suicide scenarios show, the

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524. *Furek v. Univ. of Delaware*, 594 A.2d 506, 519 (Del. 1991).

525. BICKEL & LAKE, *supra* note 27, at 129.

526. See Lake, *supra* note 27, at 276. “It is an odd situation indeed when an actor or institution takes many steps to protect or assist an individual and later asserts those efforts did not, as a matter of law, require reasonable care. This is especially true in situations where highly foreseeable dangers arise.” *Id.* at 276.

527. The university’s capacity to affect outcomes is perhaps greatest when it owns the mental health services provider, as in the cases examined here. Then it can make sure, for example, that the director of the mental health clinic sits on the university threat assessment team and has a finger on the pulse of campus life. It can encourage its clinicians to use the assessment tools best suited to the academic environment and therapeutic methods best suited to the psychological problems of students. It can develop protocols and practices for communication between the mental health professionals at the clinic and other sectors of the university. The dean of the law school can then make sure that the student he sent to the clinic is keeping his appointments. The therapist or intake psychologist can learn more about the student’s alarming behaviors than the student himself may have revealed.

Colleges and universities that do not have the advantage of campus mental health



institution can make matters significantly worse by tolerating barriers to effective communication and intervention, by ignoring credible concerns, and by failing to act in situations of potential or actual violence. It can also make matters worse by adopting unreasonable protective measures that are not in the best interest of either the student or the community as a whole.<sup>528</sup> From a safety perspective, the complex dynamics of campus life are also worsened by hierarchical layers and disconnections among college and university constituencies—a problem that can be addressed only by recognizing the institution’s contribution to it and holding it accountable for its own disorder.

Another reason for making colleges and universities take some legal responsibility for student mental health is that students are a vulnerable population.<sup>529</sup> They depend on the college or university for their safety in two respects. First, as the cases discussed show, many students are psychologically vulnerable to the particular stresses of academic life, which

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services can accomplish effective assessment and treatment capacities for mentally disturbed students by developing relationships with independent service providers. *See* Dunkle, Silverstein & Warner et al., *supra* note 438, at 591 n.24.

Standard 209 of the American Bar Association Standards for Approval of Law Schools provides that “if a law school is not part of a university . . . [it] should seek to provide its students and faculty with the benefits that usually result from a university connection . . . .” AMERICAN BAR ASSOCIATION, 2010–2011 STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS (2010), *available at* [http://www.americanbar.org/content/dam/aba/migrated/legaled/standards/2010-2011\\_standards/2010-2011abastandards\\_pdf\\_files/chapter2.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/legaled/standards/2010-2011_standards/2010-2011abastandards_pdf_files/chapter2.authcheckdam.pdf). Presumably the benefits of a university connection include mental health services as well as library and other educational resources.

528. George Washington University, for example, was sued under the Americans with Disabilities Act when it suspended a student for “endangering behavior” in violation of the code of student conduct after he checked himself into GWU hospital in 2004 with depression and suicidal thoughts. Daniel de Vise, *GWU Settles Lawsuit Brought by Student Barred for Depression*, WASH. POST (Nov. 1, 2006), *available at* <http://www.washingtonpost.com/wp-dyn/content/article/2006/10/31/AR2006103101193.html>. *See also* Rob Capriccioso, *Counseling Crisis*, INSIDE HIGHER ED. (Mar. 13, 2006), <http://www.insidehighered.com/news/2006/03/13/counseling>. In contrast, the University of Illinois has an effective student prevention program that requires any student who has expressed suicidal intent to undergo four assessment sessions with a mental health professional. The program has resulted in a 40% relative reduction in suicide at the university between 1984 and 2002. *But see* Marlene Busko, *College Mental Health Issues and Suicide-Prevention Program Discussed*, MEDSCAPE MEDICAL NEWS (Oct. 3, 2007), <http://www.medscape.com/viewarticle/565545>. MIT, the University of Rochester, Harvard, Cornell, and Princeton are participating in a pilot project to adapt the United States Air Force’s suicide prevention program to college campuses. *Id.* The Jed Foundation also provides helpful guidance in establishing institutional suicide prevention programs. *See* THE JED FOUNDATION, *supra* note 442.

529. The *Furek* court determined that the university’s relationship with students is unique because of “situation[s] created by the concentration of young people on a college campus and the ability of the university to protect its students.” *Furek*, 594 A.2d at 519.

may precipitate or exacerbate mental health problems.<sup>530</sup> Students who suffer from psychological disturbance frequently must depend upon the services of the college or university mental health clinic, which may be the only care to which they have effective and affordable access, and responsible institutions encourage them to use such services. Second, students are vulnerable to attacks by other students. They are congregated in open spaces, such as classrooms and libraries. They are overwhelmingly unarmed.<sup>531</sup> They are encouraged to depend upon institutional safety measures—to rely, for example, on the campus police, or judicial affairs—when they feel endangered by other students. There is little support among college and university administrators for permitting students to carry firearms or engage in other self-help measures instead of using college and university processes in dangerous situations.<sup>532</sup>

Moreover, threat assessment methodologies and intervention practices specific to college and university campuses are sufficiently developed for a standard of reasonable care to be defined. An adaptable model of coordinated care makes it more likely that relevant information will be available to those who can best assume responsibility for managing disturbed and disturbing students so that they do not become dangerous to themselves or others.<sup>533</sup> Individual assessment methods for determining the risk of violence by a particular student are also improving.<sup>534</sup> Though not all mentally ill students are violent, and not all violent students are mentally ill, one effective way to reduce campus violence is to make sure

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530. See, e.g., Lawrence S. Krieger, *Institutional Denial About the Dark Side of Law School, and Fresh Empirical Guidance for Constructively Breaking the Silence*, 52 J. LEG. ED. 112 (Mar/June 2004); Helena Oliviero, *Anxiety, Stress plague college students*, ATLANTA JOURNAL-CONSTITUTION (Feb. 5, 2010), available at <http://www.ajc.com/health/anxiety-stress-plague-college-292174.html>; Ema Garcia, *A New Hope: Addressing the mental health problems of law students*, STUDENT LAWYER 33 (Mar. 2008).

531. It is estimated that nine percent of postsecondary students (eight percent of men, one percent of women) have working firearms on campus. Joetta L. Carr, AM. COLL. HEALTH ASS'N, *Campus Violence White Paper 2* (2005), available at [http://www.acha.org/info\\_resources/06\\_Campus\\_Violence.pdf](http://www.acha.org/info_resources/06_Campus_Violence.pdf). See de Haven, *supra* note 1, at 506 n.6.

532. In August 2008, the International Association of Campus Law Enforcement Administrators (IACLEA) issued a position statement opposing legislative initiatives that would allow students to carry concealed weapons on campuses. Lisa A. Sprague, INT'L ASS'N OF CAMPUS LAW ENFORCEMENT, *IACLEA Position Statement: Concealed Carrying of Firearms Proposals on College Campuses* (2008), available at [http://www.iaclea.org/Visitors/PDFs/ConcealedWeaponsStatement\\_Aug2008.pdf](http://www.iaclea.org/Visitors/PDFs/ConcealedWeaponsStatement_Aug2008.pdf).

The National Association of Student Personnel Administrators takes the position that there is no “legitimate educational purpose for the presence of firearms on campus with the exception of those being carried by law enforcement officers. If a college or university has a safety or sworn police force, the decision as to whether or not those officers are armed ought to include the opportunity across campus to comment on the question.” Jablonski et al, *supra* note 121, at 6.

533. See Jablonski et al., *supra* note 121, at 29–31.

534. *Id.*

that disturbed and disturbing students are receiving appropriate mental health services while enrolled in school.<sup>535</sup>

So how can the law of civil duty best be adapted to support safer campuses and more careful administration of essential student mental health services? As we remove the distorting lenses of *Tarasoff*, what lessons can we still learn from it? The law can recognize that an institution of higher education can and should take reasonable measures to prevent the violent disruption of academic spaces by students who are or ought to be treated as mentally ill. In applying this duty in any particular case, the following seven points, derived from the particular nature of the academic setting, should inform the analysis.

Point 1: When it comes to identifying where the public peril begins in the context of higher education, the existence of an overt or direct threat to an identifiable victim should not be required to trigger the institution's duty to engage in threat assessment as a means of preventing violence. Threat assessment involves the use of judgment, discretion, and expertise to which courts may properly defer, but an institutional policy that declines to engage in such assessment in the absence of an overt threat is unjustifiably simplistic given the sociology of targeted school violence. It also leaves it largely up to our killers whether or not we act to prevent the harm they intend to cause. When other warning signs are present and credibly reported, the school should at least be obligated to rule out intervention for reasons other than lack of overt and specific threat.<sup>536</sup>

Point 2: Even though not all college- and university-student relationships are special, special circumstances can make them so.<sup>537</sup> That the institution has undertaken to act in a situation of potential violence is material to determining whether such circumstances exist. Moreover, the situational nature of targeted school violence strongly suggests that when a student is psychologically disturbed and potentially violent, institutional carelessness, indifference, or overreaction is likely to make matters worse. Thus, where the administration knows or should know that a student has become singularly disturbed or disturbing, a special relationship is created that imposes a duty to act with reasonable care both for the student's psychological health and for the safety of the campus community.<sup>538</sup> The

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535. See *supra* note 527 (on successful suicide prevention programs).

536. See *supra* note 450 (briefly discussing threat assessment parameters under federal disability statutes).

537. Lake, *supra* note 27, at 276. The vast majority of students glide through college with few problems, if any. But a small percentage of students occupy a great deal of administrative time and cause administrators and others a great deal of concern. These individuals are often involved in repeated interventions (or should be) and, essentially, elect themselves a class of individuals for whom administrators may be required to take extra care. *Id.*

538. Again, students get up to all kinds of activity, so precise formulation is not possible or desirable. However, as this inquiry shows, law students who slap themselves in the face and scream until the police are called are singular and

duty should continue at least as long as the student is permitted to remain enrolled or on campus.

Of particular concern here, too, are students whose leave-taking is angry and unresolved in some important way; those who feel that they have been unfairly treated by professors, classmates, or the administration; those who, like Cho at Virginia Tech, feel “kicked out.” Like domestic murders, rampages seem most likely to occur when the individual’s relationship with the institution is severing. Therefore, the duty of care should extend to the manner in which dismissals or separations are accomplished. The point is, first, that the special relationship, once created, is not necessarily extinguished when the student is no longer enrolled. The student may continue to interact with the institution in some fashion that keeps the relationship alive, for example, as did Biswaneth Halder at Case Western Reserve University, who sued the school after he graduated.<sup>539</sup> Or he may distinguish himself from other graduates in some disturbing manner, as did Gang Lu at the University of Iowa, who became increasingly angry and desperate when he was not offered employment in the physics department after completing his Ph.D.<sup>540</sup> Second, the special relationship may be created or strengthened at the point that the severance from the institution occurs. The student intending to withdraw from the program may become (even more) threatening when he discovers that he must immediately begin to pay back his student loans, as did Peter Odighizuwa at the Appalachian School of Law.<sup>541</sup> Under the circumstances, reasonably prudent institutions should proceed in a manner that does not make matters worse between the student and the institution but, rather, ensures objective and individualized treatment, respects the privacy of the affected student, and provides as much justice as the institution can reasonably afford under the circumstances.<sup>542</sup>

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disturbing. So are students who announce before Crim. Pro. that they are telepathic and know what their classmates are thinking. So are students the content of whose writing is unusually and consistently violent and whose interpersonal behavior is unusually and consistently inappropriate. *See supra* note 439.

539. *See* de Haven, *supra* note 1, at 546–54. *See also* Lake, *supra* note 27, at 281. (“[M]ost homicidal, suicidal, or otherwise dangerous students are train wrecks, demonstrating numerous problems evidenced in a variety of situations, such as in the classroom or with roommates. In other words, there is ample over-determining information of a problem available through multiple sources.”).

540. de Haven, *supra* note 1, at 517–20.

541. *Id.* at 527–39.

542. Particular challenges are faced by administrators at colleges and universities that must depend upon local law enforcement instead of campus police in the (rare, one hopes) event that a dangerous student needs to be removed from campus. Often that support may not be forthcoming, particularly when it comes to having a student involuntarily committed. In terms of the practicalities, not all institutions are as well-equipped with either security forces or mental health services as Berkeley, UNC, and Virginia Tech, and institutional authority and control is accordingly diminished in reality. The author is indebted to Dean Darby Dickerson for this observation.

Point 3: The duty of care rests primarily with those who have the institutional power to protect both the community and the individual students by implementing protective or therapeutic measures, such as immediate risk assessment, mandatory outpatient treatment, or temporary removal from campus. Administrators who manage student mental health clinics, heads of colleges, chiefs of campus police forces, deans of students, deans of law schools, and administrators of student evaluation and referral processes are among those likely to possess such institutional authority as individuals, members of student at-risk response teams, or both. They bear a correlative responsibility, on behalf of the institution, for careful identification, assessment, and management of disturbed and disturbing students. It does not advance the goal of campus safety to shield institutions from liability for the negligence of those in positions such as Dr. Powelson's at Berkeley, or Dr. Liptzin's at UNC, or Dr. Miller's at Virginia Tech. It does not support more careful campuses to privilege, as did *Tarasoff*, administrative disconnection between the college or university apparatus and the actual delivery of student services.

Point 4: Liability should be limited to those who have the authority to act. In the context of an academic community, treating therapists are not the only ones who can identify and protect the potential victims of mentally-ill students who become violent. As Professor Slobogin pointed out, experienced faculty and staff are often as good as mental health professionals at identifying disturbed and/or disturbing students who act out in various ways in college and university classrooms, labs, libraries, and offices. Their warnings should be given serious attention and respect, which does not always happen. The examples of Professor Giovanni, Professor Roy, and Dean Crisp show that they may feel an ethical obligation to act and that they may be faced with a practical need to do so. The institution should support them in the exercise of such judgments.<sup>543</sup>

An institutional culture that supports or even requires that professors identify and share concerns they have about potentially dangerous students, with due respect for student confidentiality and privacy, should make for a safer educational environment. Thus, the institution can and should set policies and guidelines with respect to encounters with disturbed and disturbing students, and it can and should expect its authorities to be informed about a student who creates a disturbance in Criminal Procedure,

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This may be one of those junctures foreseen at the beginning, where the duty to prevent violence by a particular student meets the more general institutional duty to provide a safe educational environment. See *supra* note 27. In the end, the range of effective intervention available to institutional agents may fairly reflect how much, or how little, the institution values the safety of its campus in general.

543. See Jablonski et al., *supra* note 121, at 24 (“[F]aculty members are often the first to identify students who are troubled or in distress.”). Specific information and resources should be provided to faculty concerning the identification of such students, who to contact, and how to make referrals.

as Williamson did, or frightens his classmates with menacing performances like Cho's. However, faculty and staff should not be legally responsible if they are without the institutional power to trigger effective intervention. One of the most troubling aspects of *Tarasoff* remains the inherent unfairness of saddling Dr. Moore with liability for not warning Tanya Tarasoff after Dr. Powelson ordered him to stop all activity. Another is the decision's immunization of Powelson's carelessness in giving that order. The unfairness should not be perpetuated by obliging the Professor Roys and Dean Crisps of the academic world (or the housemasters and dormitory advisors) to proceed without adequate institutional backing while at the same time they risk incurring liability on behalf of the institution for inattention to student disturbances.<sup>544</sup>

Point 5: The duty must be shared by those whose action is necessary for an effective response. When credible concerns are raised about a potentially dangerous student, as at Virginia Tech and UNC, whether by students or faculty, the institution should have an affirmative obligation to assess both the student and the situation. Poor responsiveness to such reports at the institutional level is a recurrent theme in rampage cases. The unnecessary roadblocks encountered when Lucinda Roy tried to get help for Cho are a good example of poor practice in action, almost guaranteed to make matters worse both for Cho and for his teachers in the English Department, who were left on their own to deal with him and did so with varying levels of success. Dean Crisp had better access to effective intervention advice and support from other "deans and psychs," but he, too, was hampered by lack of expert advice and by lack of communication with the clinic.

Point 6: An important factor to consider is whether the institutional action or inaction made matters worse for the student, for other members of the academic community, or for the educational enterprise itself. "First do no harm" is an important cautionary principal for therapists and anyone else associated with the management of disturbed or disturbing students. In *Mahoney*, for example, the counselor's conscientious judgment, communicated to the deans, that calling the student's parents would do more harm than good legitimates what might otherwise be seen as culpable nonfeasance. Thus, applying the principle, even if turns out to be a mistake, is in and of itself evidence of due care. Moreover, as institutions of higher education learn to play it safer, being careful not to make matters

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544. What makes sense is to impose the duty at the highest corporate level and permit the institution wide discretionary authority to delegate and manage the responsibilities that attend it. In the dynamic of relationships in the modern university, faculty play complex and sometimes ambiguous roles, and faculty governance structures within the university system may complicate matters further. The author's next article focuses on the faculty's role(s) in campus violence. Suffice it to say here that absent provocation or incitement to violence, faculty and staff should not be individually liable if students in their care become violent.

worse is a principle of general as well as situational applicability. It includes, for example, recognizing that if a faculty member reports being alarmed or threatened by a student, it may increase the potential for harm to the faculty member if the institution fails to respond appropriately. As we create more effective safety nets, we must develop guidelines and protections for students who may get caught in them unfairly or by mistake, and we must also carefully avoid placing faculty and staff at greater risk.<sup>545</sup>

Point 7: The duty to protect includes the obligation to communicate vital information among those with an educational or administrative need to know.<sup>546</sup> If Liptzin and the mental health clinic at UNC had told Dean Crisp only that Liptzin was retiring, that Williamson had not transferred to another therapist, and that Williamson should continue therapy in the fall—none of which raised privacy or confidentiality concerns—his attack might have been prevented.<sup>547</sup> The Virginia Tech Massacre might not have happened if Miller had reported to the Care Team what he knew, or should have known: that continuing concerns were being raised about Cho's mental health, that he had been taken to St. Alban's, that there had been a committal proceeding resulting in recommendations for further treatment, and that the student had been repeatedly triaged at CCC but never thoroughly assessed or formally treated. None of this information was

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545. See *supra* note 338. Embedded in these narratives of campus violence are many and varied faculty and staff responses to singular student disturbance, some less effective than others. Not reflected in these stories are the faculty who are intimidated, harassed, or seriously inconvenienced by ongoing students or former students with whom they have had academic or disciplinary confrontations. An illustrative account was recently published in *Huggins v. Boyd*, 697 S.E.2d 253, 256 (Ga. App. 2010). Respondent was associate dean at a university in South Carolina who decided a disciplinary action against the Petitioner when he was a student at the university in the mid-1990s. *Id.* at 256 (Barnes, J., concurring). When Respondent left the university, Petitioner sent her e-mail for 18 months. *Id.* When she complained to authorities at Petitioner's school, the e-mail "became adversarial." *Id.* In 2003 Respondent received a warning from police that Petitioner was threatening her and e-mail from Petitioner claiming to be watching her. *Id.* Since then, according to her complaint, she has been subjected to continuing harassment and threats, many in the form of lengthy (65-page) e-mail messages to her colleagues. *Id.* These and other occupational hazards of teaching should be recognized and taken into account when decisions are made with respect to specific students. Moreover, the institution should benefit from allowing the faculty a strong voice in formulating and adopting best practices, guidelines, standards, and training programs designed to encourage safe relations between faculty and their disturbed or disturbing students and in identifying the kinds of institutional support reasonably necessary to protect faculty and staff from harm.

546. Campuses should make it a matter of policy that staff and faculty members acting in good faith, and in an effort to comply with applicable law and policy, should err on the side of caution by sharing more information rather than less when it relates to a matter of campus safety. Further, it should be a matter of policy that staff and faculty members doing so will be supported by the institution in the event of legal action. Jablonski et al., *supra* note 121, at 6.

547. Students whose continued enrollment is conditioned upon mental health monitoring may be required to agree to such disclosures. See *supra* note 456.

confidential, and the Care Team could have acted upon it to ensure that Cho was assessed and managed more carefully.

Point 8: The relative ease of protective or preventive measures should be a factor in determining the care to be exercised in a particular case. Most of the time the discharge of the duty means no more than “compliance with self-imposed standards” already in place.<sup>548</sup> Proposing to balance the risk of harm against the ease of prevention in *Tarasoff*, Judge Sims asked how hard it would have been for Dr. Moore to pick up the telephone and call Tanya Tarasoff’s mother. So, too, may we ask how hard it would have been for Liptzin to let Dean Crisp know about his retirement and the situation in which he was leaving Williamson? Or for Dr. Betzel to meet Cho in the English Department as Professor Roy requested, instead of insisting that the morbidly shy student present himself at the clinic? Or to make sure that if Cho did turn up at the clinic, he would immediately get in to see her, or someone else, who could begin his treatment immediately? Or to keep his clinical records complete and accessible?

These points do not obviate the need for more precise guidance expressed by *Mahoney* in the context of student suicide. But at both UNC and Virginia Tech, the killer came to the attention of the institution in some particularly aberrant way—he singled himself out, that is, for special attention and treatment that was not confined to the mental health services voluntarily available. Therefore, the duty being described, though more broadly applicable than the *Tarasoff* duty, is still quite narrow. The university-student relationship must have become special in fact at some authoritative level to trigger liability for negligent inaction. Nor does greater attention to prevention mean that foreseeability is not still a critical factor. The special relationship is between colleges and universities and a category of students whose disturbing behavior places them at higher risk of violence to themselves, others, or both. Applying the principles and distinctions proposed here would probably not change the outcome in *Jain*, *Ferrum College*, or *Mahoney*, for example, and it would almost certainly reduce potential liability in *Shin* by dismissing the housemaster. But reframing the way duty is allocated in the ivory tower will help keep us safe. Students whose psychological disturbance is disrupting the academic program will be less likely to slip through the cracks of institutional dysfunction and spiral into madness for lack of easily available treatment.

#### V. CONCLUSION: LIVING WITH OPEN ENDS

This inquiry has centered upon violence at colleges and universities with mental health clinics, and it has moved through years of college and university history as well. We are a long way now from the ‘60’s — the days of the Texas Tower sniper, the Berkeley Clinic, and the power

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548. *Furek v. Univ. of Delaware*, 594 A.2d 506, 519 (Del. 1991).



struggle between students and college and university administrations over control of campuses. In many respects, the academic landscape has not greatly changed, but we now find the peace and safety of our campuses threatened less from organized groups of protesters or police than from singular students whose response to their academic experience becomes extremely violent. From this peril we can best protect ourselves by creating wider networks of communication and shared responsibility among the centers of institutional authority, even if the institution does not directly employ mental health professionals.

In recognizing that a therapist may have a legal duty to protect the victim of a dangerous patient, *Tarasoff* laid a common law duty upon an already existing structure of statutory obligations and immunities, ethical and confidentiality requirements, and community standards of practice. Recognizing that an institution of higher education should exercise reasonable care to prevent extreme violence by obviously deranged students does essentially the same thing. Like *Tarasoff's* formulation, what is suggested here are a few restructuring principles, a scaffolding for situations of unusual stress in the educational relationship.<sup>549</sup>

College and university administrators and faculty alike are now living with many unanswered questions about where our ethical and statutory duties may lie and by what standards we may be judged in any situation involving threatening or alarming students. We should not be trying to live at the same time with corporate assumptions that there is no institutional duty to protect common educational spaces from extreme violence by students who have exhibited clear signs of mental illness.<sup>550</sup> Acknowledging an institutional duty of reasonable care with respect to disturbing behavior by students, on the other hand, encourages the academy to develop its own best practices and governance principles, to which courts are likely to give substantial deference, just as they gave the decisions of therapists to warn (or not) after *Tarasoff*.<sup>551</sup>

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549. It does not and should not be taken to provide an argument for disregarding the civil rights or invading the privacy of students or denying them due process in the event of involuntary dismissal. At the same time, it certainly does not hinder and may even facilitate individualized and objective assessment of students whose capacity to participate in the academic program is questioned on psychological grounds. *See supra* note 449 and accompanying text.

550. Such assumptions, if nothing else, may impact the institutional resources devoted to student services, mental health services, the establishment of CARE teams, and other institutional best practices discussed herein. The author is indebted to Vice-Chancellor Crisp for pointing out that disturbed and disturbing students are more likely to fall through the cracks when such services are underfunded and understaffed.

551. Dean Darby Dickerson has written:

[I]t is important to remember that trained administrators must use their best judgment in issues of campus health and safety, and that courts are hesitant to second-guess decisions that are made in reasonable manner . . . . Accordingly, when balancing interests and options, student health and safety must remain paramount.

Publicly or privately, for profit or not, the academy owns the ivory tower. It is up to the academy to keep the Charles Whitmans, Wendell Williamsons, and Seung Hui Chos among us from climbing the tower with a rifle and a backpack full of ammunition. To that end, as the *Mahoney* court put it, we must not do less than we ought, unless we are doing all that we can.<sup>552</sup>

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Dickerson, *supra* note 452, at 29.

552. *Mahoney v. Allegheny College*, No. AD892-2003, slip op. at 25 (Pa. Ct. Com. Pl. 2005).

# DEALING WITH TROUBLESOME COLLEGE FACULTY AND STAFF: LEGAL AND POLICY ISSUES

BARBARA A. LEE AND KATHLEEN A. RINEHART\*

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## INTRODUCTION

Due to their efforts to foster academic freedom and the free exchange of ideas, colleges and universities tolerate a wider spectrum of behavior, particularly with respect to faculty, than many nonacademic organizations would permit.<sup>1</sup> Additionally, because administrators, especially those

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trained as faculty, typically have had little or no preparation to supervise employees, they may be hesitant to respond to performance or behavior problems until those problems have become dysfunctional for the unit.<sup>2</sup> Thus, the culture of colleges and universities may complicate efforts to ensure that faculty and staff perform their jobs appropriately and conduct themselves professionally.

Employees with behavior or performance problems may make one or more legal claims if discipline or dismissal is imposed. Examples include claims of discrimination on the basis of race, gender, age, or other characteristics,<sup>3</sup> academic freedom claims,<sup>4</sup> First Amendment claims<sup>5</sup> brought by faculty who allege that their behavior is protected by contract or the Constitution, whistleblower claims,<sup>6</sup> claims of retaliation for asserting

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including governance; hiring/firing; evaluations; policy development and interpretation; and labor negotiations, contract implementation and interpretation. Kathleen serves as general counsel to several colleges and universities, and has been a featured speaker at local, regional and national education and employment conferences. She recently completed service on the Board for NACUA. Kathleen currently is completing post-graduate work in dispute resolution at Marquette University with a focus on dispute resolution systems design for use in the workplace and higher education, and serves as adjunct professor for the graduate course, Dispute Resolution in Education. She also serves as Chair of the Dispute Resolution Section of the State Bar of Wisconsin. Kathleen's B.A. and J.D. degrees are from Marquette University, with a Masters of Arts in Teaching (History) from the University of Chicago.

1. Jennifer Ruark, *In Academic Culture, Mental-Health Problems Are Hard to Recognize and Hard to Treat*, CHRON HIGHER EDUC. (Feb. 16, 2010), available at <http://chronicle.com/article/In-Academe-Mental-Health-1/64246/> (quoting David R. Evans who stated that among faculty, "there's a pretty high tolerance for eccentricity . . . . Where's the bright line between nonconformism and madness?"). Difficult employees are not limited to academic organizations; according to one writer, "disruptive physicians" are an increasing problem as well. John-Henry Pfifferling, *The Disruptive Physician: A Quality of Professional Life Factor*, PHYSICIAN EXEC. (Mar. 1, 1999), available at <http://www.thefreelibrary.com/The+disruptive+physician:+a+quality+of+professional+life+factor....-a0102274361>.

2. Ruark, *supra* note 1; see also John Scott Cowan, *Lessons Learned from the Fabrikant File: A Report to the Board of Governors of Concordia University 1* (May 1994), [http://archives3.concordia.ca/timeline/histories/Cowan\\_report.pdf](http://archives3.concordia.ca/timeline/histories/Cowan_report.pdf) (reviewing issues related to the murder of two faculty members by a third at Concordia University; identifying lack of administrative training as one problem contributing to poor quality of supervision of difficult faculty members.); *id.* at 5 ("When faced with the challenge of a 'bad' colleague, whose behavior is disruptive, threatening or merely unethical, [academic administrators] do not in general know what their powers are, and are massively risk-averse when it comes to exercising those powers, even when they are aware of them.").

3. See, e.g., *Boise v. Boufford*, 42 F. App'x 496, 497 (2d Cir. 2002) (concerning age discrimination).

4. See, e.g., *Piggee v. Carl Sandburg Coll.*, 464 F.3d 667, 671 (7th Cir. 2006).

5. See, e.g., *Renken v. Gregory*, 541 F.3d 769, 770 (7th Cir. 2008).

6. See, e.g., *Runyon v. Bd. of Trs. of the Cal. State Univ.*, 229 P.3d 985, 988 (Cal. 2010).

one's rights under the Family and Medical Leave Act,<sup>7</sup> or disability discrimination claims.<sup>8</sup> Although each of these claims may be difficult and complicated to defend, even if they lack merit, claims brought by employees who allege that their behavior or performance problems were a result of a mental impairment and that the ensuing discipline or dismissal constituted disability discrimination, are particularly difficult to address both from a legal and an administrative perspective. Thus, although the suggestions for practice offered in later sections of this article should be useful for administrators and counsel dealing with any of the possible claims listed earlier in this paragraph, our legal analysis will focus primarily on dealing with claims of disability discrimination by faculty or staff who claim to have a mental illness.

Although not all employee behavior or performance problems are related to the presence of a mental disorder,<sup>9</sup> it is very likely that some are. Data show that approximately twenty-six percent of all individuals in the United States age eighteen and over suffer from a diagnosable mental illness in any given year.<sup>10</sup> Although employees with mental disorders are protected by federal and state nondiscrimination laws, courts have been, for the most part, unsympathetic to claims brought by employees whose behavior or

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7. *See, e.g.,* Kobus v. Coll. of St. Scholastica, 608 F.3d 1034, 1035 (8th Cir. 2010).

8. *See, e.g.,* Lindsay v. Pa. State Univ., 367 F. App'x 364, 366 (3d Cir. 2010).

9. This article will use the term "mental disorder" to refer to any psychiatric disorder that is recognized by the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR). AM. PSYCHIATRIC ASS'N, DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. text rev. 2000). The DSM-IV-TR defines a "mental disorder" as [A] clinically significant behavioral or psychological syndrome or pattern that occurs in an individual and that is associated with present distress (e.g., a painful symptom) or disability (i.e., impairment in one or more important areas of functioning) or with a significantly increased risk of suffering death, pain, disability, or an important loss of freedom. In addition, this syndrome or pattern must not be merely an expectable and culturally sanctioned response to a particular event, for example, the death of a loved one. Whatever its original cause, it must currently be considered a manifestation of a behavioral, psychological or biological dysfunction in the individual. Neither deviant behavior (e.g., political, religious, or sexual) nor conflicts that are primarily between the individual and society are mental disorders unless the deviance or conflict is a symptom of a dysfunction in the individual, as described above. *Id.* at xxi-xxii. *See also* Ruark, *supra* note 1 (stating data collected by the Standard Insurance Company, which provides health insurance for employees at colleges and universities, indicates that employees of higher education institutions are nearly twice as likely to go on disability for psychiatric reasons than employees who work in other professions).

10. *The Numbers Count: Mental Disorders in America*, NAT'L INST. OF MENTAL HEALTH (2010), <http://www.nimh.nih.gov/health/publications/the-numbers-count-mental-disorders-in-america/index.shtml> (indicating approximately six percent of the U.S. adult population suffers from "serious" mental illness; mental illness is the leading cause of disability in the United States. The NIMH includes the following categories of mental disorders in its data: mood disorders, schizophrenia, anxiety disorders, eating disorders, attention deficit hyperactivity disorder, autism, and personality disorders).

performance problems resulted in discipline or dismissal.<sup>11</sup> Despite this lack of success, employees continue to bring claims. For example, in fiscal year (FY) 2009, the most recent year for which Equal Employment Opportunity Commission (EEOC) data are available, eighteen percent of all disability discrimination claims filed with the EEOC included an allegation of discrimination on the basis of a mental disorder.<sup>12</sup> This is an increase from thirteen percent in FY 2006.<sup>13</sup> Furthermore, the uninformed reaction of a supervisor or manager to an employee's misconduct could lead to a claim that the employer wrongly "regards" the employee as disabled.<sup>14</sup> This latter type of claim is more likely to be brought and potentially more likely to be successful, since Congress amended the Americans with Disabilities Act (ADA) in 2008 to broaden the definition of disability and to clarify the protections of the "regarded as" type of discrimination claim.<sup>15</sup>

Dealing with employees with performance or behavior problems can be challenging, particularly if the behavior is a manifestation of a mental disorder. According to one commentator, "[o]ne of the ways to distinguish between mental and physical illness is the notion that physical illness is characterized by organic causes and symptoms while mental illness is manifested by behavior."<sup>16</sup> This article suggests that administrators should deal with the employee's behavior or performance problems as they would in any situation in which an employee does not follow policies or rules, is disruptive, or does not turn in acceptable work performance, without

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11. See generally Dierdre M. Smith, *The Paradox of Personality: Mental Illness, Employment Discrimination, and the Americans with Disabilities Act*, 17 GEO. MASON U. C.R. L.J. 79 (2006); see also Susan Stefan, *Delusions of Rights: Americans with Psychiatric Disabilities, Employment Discrimination, and the Americans with Disabilities Act*, 52 ALA. L. REV. 271, 273 (2000); Laura F. Rothstein, *The Employer's Duty to Accommodate Performance and Conduct Deficiencies of Individuals with Mental Impairments Under Disability Discrimination Laws*, 47 SYRACUSE L. REV. 931 (1997).

12. Eeoc.gov, Charge Statistics FY 1997 Through FY 2010, <http://eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (last visited Mar. 2, 2011); Eeoc.gov, ADA Charge Data by Impairments/Bases – Receipts: FY 1997–FY 2010, <http://www.eeoc.gov/eeoc/statistics/enforcement/ada-receipts.cfm> (last visited Mar. 2, 2011) (categorizing mental disorder claims as the following: anxiety disorder, depression, manic depressive disorder, other psychiatric disorders, and schizophrenia).

13. Eeoc.gov, ADA Charge Data by Impairments/Bases – Receipts: FY 1997–FY 2010, <http://www.eeoc.gov/eeoc/statistics/enforcement/ada-receipts.cfm> (last visited Mar. 2, 2011).

14. See, e.g., *Mastrolillo v. Conn.*, 352 F. App'x 472 (2d Cir. 2009) (rejecting plaintiff faculty member's claim that college regarded her as disabled and failed to renew her contract for that reason).

15. Americans with Disabilities Act Amendments Act (ADAAA), Pub. L. No. 110-325 (2008) (became effective on January 1, 2009).

16. Stephanie Proctor Miller, Comment, *Keeping the Promise: The ADA and Employment Discrimination on the Basis of Psychiatric Disability*, 85 CALIF. L. REV. 701, 705 (1997).

attempting to “diagnose” the reason for the behavior or performance problem. In support of this thesis, the article first reviews the statutory protections for individuals with mental disorders. It then reviews court rulings in cases brought by employees who assert that they were discriminated against on the basis of their actual or perceived mental disorders. The article then discusses suggestions for dealing with troublesome employees in a manner that should minimize discrimination (and other) claims, and finally, concludes with a series of recommendations for policy and practice.

### I. DISABILITY DISCRIMINATION LEGISLATION

Two federal laws<sup>17</sup> and the laws of every state<sup>18</sup> prohibit employers from discriminating against applicants or current employees on the basis of a physical or mental disability. Although the two federal laws are very similar in language, their coverage is not in every case coterminous. Title I of the Americans with Disabilities Act of 1990 protects applicants and employees of private sector employers with fifteen or more employees,<sup>19</sup> and Title II protects employees of public entities, such as public colleges and universities.<sup>20</sup> The Rehabilitation Act protects individuals applying to or employed by organizations that receive federal funds, but there is no threshold number of employees that must be met.<sup>21</sup> It is not unusual for plaintiffs to state claims against colleges and universities under both laws<sup>22</sup> and under state law as well.

Unlike other laws prohibiting employment discrimination, both the ADA and the Rehabilitation Act require applicants or employees to prove that they are protected by the law in that the alleged impairment meets the statutory definition of a “disability.”<sup>23</sup> Thus, employees seeking legal

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17. Both the Rehabilitation Act of 1973, 29 U.S.C. § 794 (2000 & Supp. 2004), Pub. L. No. 93-112, and the Americans with Disabilities Act, 42 U.S.C. § 12101-12213 (2009), forbid employers from discriminating against individuals with physical or mental impairments in hiring, promotion, or other terms and conditions of employment.

18. See *State Disability Discrimination Laws*, CANCER LEGAL LINE (June 2008), [http://www.marlow.org/PATIENT/Support\\_Resources/Patient\\_Teleconferen/PDFs/Aug.6.08.Handout-State\\_Disability\\_Laws.pdf](http://www.marlow.org/PATIENT/Support_Resources/Patient_Teleconferen/PDFs/Aug.6.08.Handout-State_Disability_Laws.pdf) (last visited Mar. 2, 2011) (listing state laws prohibiting disability discrimination).

19. 42 U.S.C. § 12111(5) (2009).

20. 42 U.S.C. § 12132 (1990).

21. 29 U.S.C. § 794 (2000 & Supp. 2004).

22. Remedies available under the ADA include punitive damages, which are not available under Section 504. Only intentional violations of Section 504 may result in compensatory damages. Because Section 504 applies only to entities that receive federal funds, it is a “Spending Clause statute.” In *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 31 (1981), the Court ruled that plaintiffs must demonstrate intentional discrimination in order to obtain compensatory damages for violations of Spending Clause laws. For the application of *Pennhurst* to Section 504, see *Tanberg v. Weld County Sheriff*, 787 F. Supp. 970 (D. Colo. 1992).

23. See generally 42 U.S.C. § 12111(5) (2009); 29 U.S.C. § 794 (2000 & Supp.

redress for disability discrimination face a threshold issue that plaintiffs suing under other federal (or state) nondiscrimination laws do not.<sup>24</sup>

#### A. The Americans with Disabilities Act

This law, enacted in 1990,<sup>25</sup> defines “disability” as “(a) a physical or mental impairment that substantially limits one or more major life activities of such individual; (b) a record of such an impairment; or (c) being regarded as having such an impairment.”<sup>26</sup> “Major life activities” include “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working,” as well as a variety of “major bodily functions.”<sup>27</sup> In response to earlier decisions by the United States Supreme Court requiring the determination of whether a disability “substantially limited” a major life activity to be made after taking into consideration the effect of any “mitigating measures,”<sup>28</sup> the 2008 Amendments specifically reject that requirement and state that the impairment is to be evaluated without regard to any mitigating measures that the employee may have taken or developed.<sup>29</sup>

The amended law also includes disorders that are episodic within the definition of disability if the disorder would substantially limit a major life activity “when active.”<sup>30</sup> This provision is particularly important to individuals with mental disorders that may wax and wane, and may require periodic adjustments to medication.<sup>31</sup>

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2004).

24. *Id.*

25. Pub. L. No. 101-336, 104 Stat. 327 (1990). The ADA was amended in 2008, in large part to respond to very narrow interpretations by the U.S. Supreme Court of the definition of “disability” and the scope of the term “major life activities.” Americans with Disabilities Act Amendments Act of 2008, Pub. L. No. 110-325 (2008). References in this article are to the amended version of the ADA.

26. 42 U.S.C. § 12102 (2009).

27. 42 U.S.C. § 12102(2)(A)–(B) (2009).

28. *Williams v. Toyota Motor Mfg., Ky., Inc.*, 534 U.S. 184 (2002) (finding mitigating measures could include medication that controls the effects of the disorder, prosthetic or other devices, or the employee’s own ability to compensate for the effects of an impairment, such as one’s brain compensating for the effects of monocular vision).

29. Americans with Disabilities Act Amendments Act (ADAAA), Pub. L. No. 110-325, § 4(a) (2008). *Id.* at §4(a)(4)(E)(ii) (excluding corrective eyeglasses and lenses from this requirement).

30. *Id.* at § 4(a) (amending 42 U.S.C. § 12102(4)(D)).

31. See Wittchen, Hans-Ulrich, Roselind Lieb, Hildegard Pfister & Peter Schuster, *The Waxing and Waning of Mental Disorders: Evaluating the Stability of Syndromes of Mental Disorders in the Population*, 41 *COMPREHENSIVE PSYCHIATRY* 122, 122–32 (2000). According to one scholar, the inclusion of episodic disorders within the definition of disability suggests that employers may be required to accommodate disorders whose effects have not yet materialized. “If an expert hypothesizes that what is now a mild impairment will ‘substantially limit a major life activity when active,’ the



The law then defines a “qualified individual with a disability” as “an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.”<sup>32</sup> This definition was not changed by the ADA Amendments. If the applicant or employee meets the definition of “qualified individual with a disability,” then the employer must provide a “reasonable accommodation”<sup>33</sup> that enables the employee to perform the job’s essential functions, unless the employer can demonstrate that such an accommodation would be an “undue hardship” (which is defined as “significant difficulty or expense”).<sup>34</sup> The definition of “reasonable accommodation” was not altered by the ADA Amendments.

The ADA is enforced by the Equal Employment Opportunity Commission,<sup>35</sup> which has issued regulations interpreting the law.<sup>36</sup> Individuals must first file a charge with the EEOC and must either wait for its ruling or request a right-to-sue letter before they may file a lawsuit in federal court.<sup>37</sup> Compensatory and punitive damages are capped at a maximum of \$300,000, depending upon the number of employees working for the defendant employer.<sup>38</sup> With respect to the EEOC’s interpretations of the law’s protections for individuals with psychiatric disorders, the agency has issued “Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities”<sup>39</sup> in a question-and-answer

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statutory language, on its face, appears to be satisfied. If this reading is correct, it has the potential to require employers to accommodate individuals who have only hypothetically demonstrated the possibility of meaningful limitation at some point in the future. Take, for example, an employee who has experienced minor depressive episodes in the past, common to many people. If the employee secures a psychiatrist’s note indicating that that he or she will experience an active episode of debilitating depression if certain accommodations are not granted, the literal language of the statute would seem to cover the employee’s hypothetical condition.” Wendy F. Hensel, *Rights Resurgence: The Impact of the ADA Amendments Act on Schools and Universities*, 25 GA. ST. U. L. REV. 641, 664 (2009).

32. 42 U.S.C. § 12111(8) (2009).

33. The statute defines a reasonable accommodation as “(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.” 42 U.S.C. § 12111(9) (2009).

34. 42 U.S.C. § 12111(10)(A) (2009).

35. 42 U.S.C. § 12111(1) (2009).

36. 29 C.F.R. § 1630 (2011).

37. 42 U.S.C. § 12117(a) (1990). The law specifies that the enforcement provisions of Title VII of the Civil Rights Act of 1964 also apply to claims brought under the ADA. *Id.*

38. *Id.* Note the ADA’s caps on combined compensatory and punitive damages are identical to those of Title VII.

39. *EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities*, EQUAL EMP’T OPPORTUNITY COMM’N (Mar. 25, 1997),

format.

As noted above, the ADA provides that an individual may challenge an employment decision on the grounds that the employer “regards” him or her “as disabled.”<sup>40</sup> The statute provides:

An individual meets the requirement of “being regarded as having such an impairment” if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.<sup>41</sup>

Prior to the enactment of the ADA Amendments, few plaintiffs were successful in stating “regarded as” claims because courts required them to prove that the employer actually believed that the employee suffered from a specific impairment, rather than simply proving that the employer treated the employee as though he or she were disabled.<sup>42</sup>

#### B. The Rehabilitation Act (Section 504)

Section 504 of the Rehabilitation Act of 1973<sup>43</sup> states that “no otherwise qualified individual with a disability in the United States . . . shall, solely by reason of 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.”<sup>44</sup> This law applies not only to applicants and employees of federal fund recipients, but to students and other individuals who participate in programs at federally funded organizations such as colleges and universities.<sup>45</sup> Although the statute does not define disability, who is qualified under the statute, or reasonable accommodation, its regulations do, and those definitions are virtually identical to the terms’ definitions in the ADA.<sup>46</sup> The definition of “major

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<http://www.eeoc.gov/policy/docs/psych.html> (may be revised in light of the amendments to the ADA and concomitant changes in its regulations).

40. 42 U.S.C. § 12102(1)(C) (2009).

41. 42 U.S.C. § 12102(3) (2009).

42. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999). For a discussion of the difficulties plaintiffs faced in convincing courts that they met the statutory definition of “disabled,” see Chai R. Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?*, 21 *BERKELEY J. EMP. & LAB. L.* 91, 141 (2000).

43. Rehabilitation Act of 1973, 29 U.S.C. § 794 (2000 & Supp. 2004), Pub. L. No. 93-112.

44. *Id.*

45. 34 C.F.R. § 104.3(k)(2)(i) (2011) (providing that the regulations apply to “all of the operations of . . . a college, university, or other postsecondary institution, or a public system of higher education.”).

46. 34 C.F.R. § 104.3(j) (2011) (defining handicapped person); 34 C.F.R. § 104.3(l)(1) (2011) (defining qualified handicapped person); 34 C.F.R. § 104.12(b) (2011) (defining reasonable accommodation). The Rehabilitation Act uses the term

life activities” includes those activities from the pre-amendment version of the EEOC’s ADA Regulations; it is likely that the Rehabilitation Act regulations will be amended to conform to the final ADA regulations.<sup>47</sup> The Office for Civil Rights of the U.S. Department of Education (OCR) enforces Section 504, including its employment provisions. There is no exhaustion requirement, however; individuals may file a lawsuit in federal court without first filing a complaint with OCR.<sup>48</sup> Compensatory damages are available to plaintiffs who bring private lawsuits under Section 504, but punitive damages are not.<sup>49</sup> State laws prohibiting employment discrimination on the basis of disability tend to follow jurisprudence developed under the Rehabilitation Act and the ADA.<sup>50</sup>

The ADA Amendments were enacted, in large part, to extend the law’s coverage to more individuals than the small number whose claims had survived the narrow United States Supreme Court rulings prior to the law’s amendment.<sup>51</sup> Because the law continues to require an employee with a covered disability to be “qualified” and because any accommodation requested by the employee or provided by the employer must still be “reasonable,” it is unlikely that, once the plaintiff has established that his or her disorder meets the statutory definition of a disability, reviewing courts will markedly change their approach to analyzing ADA and Section 504 cases. For this reason, although it appears virtually certain that more ADA and Section 504 claims will be tried than in the past, it is not necessarily true that plaintiffs will prevail at a higher rate when their case is tried on the merits.

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“handicap” rather than the preferred term “disability.” 29 U.S.C. § 794 (2000 & Supp. 2004).

47. See 34 C.F.R. § 104.3(2)(ii) (2011) (listing the following major life activities: caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working); 74 Fed. Reg. 48431 (Sept. 23, 2009) (concerning proposed regulations that incorporate the changes occasioned by the ADA Amendments); see also Response to Question 3, *Questions and Answers on the Notice of Proposed Rulemaking for the ADA Amendments Act of 2008*, EQUAL EMP’T OPPORTUNITY COMM’N (Sept. 23, 2009), [http://www.eeoc.gov/policy/docs/qanda\\_adaaa\\_nprm.html](http://www.eeoc.gov/policy/docs/qanda_adaaa_nprm.html) (stating that all changes made by the ADA Amendments Act also apply to sections 501, 503, and 504 of the Rehabilitation Act).

48. *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624 (1984). See also *Barnes v. Gorman*, 536 U.S. 181, 185–89 (2002).

49. *Barnes*, 536 U.S. at 185–89.

50. See, e.g., *Bennett v. Nissan N. Am., Inc.*, 315 S.W.3d 832 (Tenn. Ct. App. 2009).

51. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b)(1), 122 Stat. 3553, 3554. “The purposes of this Act are—(1) to carry out the ADA’s objectives of providing ‘a clear and comprehensive national mandate for the elimination of discrimination’ and ‘clear, strong, consistent, enforceable standards addressing discrimination’ by reinstating a broad scope of protection to be available under the ADA.” *Id.*

## II. JUDICIAL REVIEW OF DISABILITY DISCRIMINATION CLAIMS<sup>52</sup>

In lawsuits filed under the ADA or Section 504, employees tend to allege either that they were excluded or removed from a job because of disability discrimination, or that the employer refused to accommodate their disability. In either type of claim, the employee must establish that 1) the employer is subject to the ADA, 2) the employee is disabled within the meaning of the ADA, 3) he or she is otherwise qualified to perform the essential functions of the job, and 4) he or she suffered an adverse employment action because of the disability or did not receive a reasonable accommodation.<sup>53</sup> If the plaintiff-employee cannot meet all of these requirements, the court typically will award summary judgment to the employer.<sup>54</sup> Prior to the enactment of the ADA Amendments Act in 2008

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52. Published court opinions involving college or university faculty or staff with mental disorders who claimed that negative employment decisions or alleged failures to accommodate their disability were discriminatory are scarce, and most were decided prior to 2000. This discussion focuses primarily on cases involving colleges and universities, and discusses a few more recent cases involving nonacademic organizations for illustrative purposes. Lawsuits involving post-2008 Amendment discrimination claims have yet to be tried at the time this article was prepared; faculty and staff employees may be more frequent, and more successful, plaintiffs when the broader definitions in the amended ADA are applied by the courts.

53. See, e.g., *Alexander v. DiDomenico*, 324 F. App'x 93 (2d Cir. 2009).

54. In cases litigated under the ADA prior to the amendments of 2008, courts awarded summary judgment to the employer or ruled against the employee on the merits virtually all of the time. See, e.g., ABA Commission on Mental and Physical Disability Law, *Study Finds Employers Win Most ADA Title I Judicial and Administrative Complaints*, 22 MENTAL & PHYSICAL DISABILITY L. REP. 403 (1998) (noting a survey found that employers prevailed in 90 percent of the cases litigated since 1992); see also John W. Parry, *1999 Employment Decisions Under the ADA Title I - Survey Update*, 24 MENTAL & PHYSICAL DISABILITY L. REP. 348 (2000) (finding that employers prevailed in 96 percent of the cases); Barbara A. Lee, *A Decade of the Americans With Disabilities Act: Judicial Outcomes and Unresolved Problems*, 42 INDUSTRIAL RELATIONS 11 (2003) (reviewing decisions of federal appellate courts in ADA cases over ten years, concluding that employees prevailed four percent of the time). Prior to the amendment of the ADA in 2008, plaintiffs with mental disorders faced particular difficulties in convincing courts that their claims were meritorious, or even that their claims should be tried. Commentators have been very critical of the judicial approaches to these cases. See, e.g., Jane Byeff Korn, *Crazy (Mental Illness Under the ADA)*, 36 U. MICH. J.L. REFORM 585 (2003); Susan Stefan, *Delusions of Rights: Americans with Psychiatric Disabilities, Employment Discrimination and the Americans with Disabilities Act*, 52 ALA. L. REV. 271 (2000); Randel I. Goldstein, Note, *Mental Illness in the Workplace After Sutton v. United Air Lines*, 86 CORNELL L. REV. 927 (2001); Stephanie Proctor Miller, Comment, *Keeping The Promise: The ADA and Employment Discrimination on the Basis of Psychiatric Disability*, 85 CAL. L. REV. 701 (1997); Michelle Parikh, Note, *Burning the Candle at Both Ends, and There is Nothing Left for Proof: The Americans with Disabilities Act's Disservice to Persons with Mental Illness*, 89 CORNELL L. REV. 721, 725 (2004); Jeffrey Swanson et al., *Justice Disparities: Does the ADA Enforcement System Treat People with Psychiatric Disabilities Fairly?*, 66 MD. L. REV. 94 (2006); Wendy F. Hensel & Gregory Todd Jones, *Bridging the Physical-Mental Gap: An Empirical Look at the Mental Illness Stigma on ADA Outcomes*, 73 TENN. L. REV. 47 (2006).

(ADAAA),<sup>55</sup> plaintiffs had great difficulty convincing federal trial courts that they met the Act's definition of disability.<sup>56</sup> Because the ADAAA has expanded and clarified the definition of disability, it is more likely that courts will find that plaintiffs meet the statutory definition of disability, but the hurdles of establishing that the employee can perform the essential functions of the position and that a "reasonable" accommodation exists to enable the employee to do so remain.<sup>57</sup> With respect to "regarded as" disabled claims, it is more likely now than prior to the Amendments that plaintiff employees may survive summary judgment. Therefore, employees are more likely to find an attorney willing to represent them,<sup>58</sup> and employers are now more likely to either face jury trials in these cases or to offer larger settlements than prior to the enactment of the amendments.

#### A. The Definition of "Disability"

As noted above, the ADAAA invalidated the narrow definition of disability crafted by the United States Supreme Court in *Toyota Motor Manufacturing v. Williams*,<sup>59</sup> and said that the law was to be interpreted expansively to include as many individuals as possible within its purview.<sup>60</sup> The employee's disability must "substantially limit[ ] one or more major life activities."<sup>61</sup> The list of "major life activities" in the ADAAA is "non-exhaustive," but includes activities, such as concentrating, that some courts had ruled were not "major life activities" under the original version of the ADA.<sup>62</sup> The specific inclusion of communication, concentration, and thinking in the amended statute as major life activities is relevant to individuals with certain mental disorders; in addition, the proposed regulations add "interacting with others" to the list of "major life activities" protected by the ADA.<sup>63</sup> This addition is a very important source of

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55. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

56. Amy L. Allbright, *Employment Decisions Under the ADA Title I—Survey Update*, 32 MENTAL & PHYSICAL DISABILITY L. REP. 335, 336 (2008). For example, in 2007, employers prevailed in 95.5 percent of all cases in federal courts brought under the ADA; in most of these cases, the plaintiff could not persuade the court that he or she met the statutory definition of "disabled." *Id.*

57. Hensel, *supra* note 31, at 661.

58. Smith, *supra* note 11, at 111 (stating that the low success rate of plaintiffs claiming disability discrimination made it difficult for potential plaintiffs to find an attorney to represent them).

59. *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002).

60. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(a)(4)–(5), 122 Stat. 3553, 3553.

61. *Id.* § 4(a), 3(1)(A), 122 Stat. at 3555.

62. *See, e.g., Humbles v. Principi*, 141 F. App'x 709, 712 (10th Cir. 2005) (stating that "interactions with others and concentration have not been deemed major life activities by this circuit").

63. 74 Fed. Reg. 48439, 43440 (Sept 23, 2009). The EEOC has explained the parameters of "interacting with others": "An impairment substantially limits an

protection for individuals with mental disorders, since prior to the enactment of the amendments, many courts rejected the EEOC's inclusion of this activity in its regulations<sup>64</sup> and ruled that getting along with fellow employees, supervisors, and customers was an essential function of every job.<sup>65</sup> It remains to be seen whether courts will be more accepting of this "major life activity" in reviewing claims that arose after the effective date of the Amendments.<sup>66</sup>

The Amendments did not change the definition of "substantially limited," which has been interpreted by the United States Supreme Court to require the plaintiff to demonstrate that the disability limits his or her ability to perform a wide range of jobs rather than just one.<sup>67</sup> Thus, the claim that an employee is limited in only one specific job is typically rejected by the courts.<sup>68</sup> If the employee can engage in the daily activities enjoyed by most people, a court will find no substantial limitation.<sup>69</sup>

For example, in *Lloyd v. Washington & Jefferson College*,<sup>70</sup> Karl Brett Lloyd, a professor with agoraphobia and panic attacks, sued when the college refused to provide him the accommodations he sought and, when he did not report for work as required, considered him as having resigned.<sup>71</sup>

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individual's ability to interact with others if, due to the impairment, s/he is significantly restricted as compared to the average person in the general population. Some unfriendliness with coworkers or a supervisor would not, standing alone, be sufficient to establish a substantial limitation in interacting with others. An individual would be substantially limited, however, if his/her relations with others were characterized on a regular basis by severe problems, for example, consistently high levels of hostility, social withdrawal, or failure to communicate when necessary." Enforcement Guidance on the Americans With Disabilities Act and Psychiatric Disabilities, Question 9, <http://www.eeoc.gov/policy/docs/psych.html>.

64. See *Humbles*, 141 F. App'x at 709.

65. See, e.g., *Mazzarella v. U.S. Postal Serv.*, 849 F. Supp. 89 (D. Mass. 1994) (stating that getting along with peers and supervisors is an essential function of every job). It is likely that courts will continue to rule this way, since the definition of "essential functions" was not changed by the ADA Amendments. *Id.*

66. The amendments became effective on January 1, 2009. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 7(2), 122 Stat. 3553, 3558.

67. *Sutton v. United Air Lines*, 527 U.S. 471, 472 (1999). Although the ADA Amendments express disapproval of the Court's interpretation of the definition of disability under the original version of the ADA, the language of "substantially limits" has not been modified. ADA Amendments Act of 2008, Pub. L. No. 110-325 § 2(a)(4), 122 Stat. 3553, 3553.

68. See, e.g., *D'Angelo v. Conagra Foods*, 422 F.3d 1220, 12 (11th Cir. 2005) (concluding that the plaintiff was not "substantially limited" in the major life activity of working because her vertigo only interfered with her own job, not an entire class of jobs).

69. See, e.g., *Weigert v. Georgetown Univ.*, 120 F. Supp. 2d 1, 3 (D.D.C. 2000) (finding that where employee could care for her four children, commute to work, take graduate courses, take a vacation at the beach, and engage in ordinary daily tasks, she was not "substantially limited").

70. 288 F. App'x 786 (3d Cir. 2008).

71. *Id.* at 788.

The college required all faculty to spend four hours per day, four days per week, on campus.<sup>72</sup> Professor Lloyd said that his disability did not permit this, yet, the court noted, he was able to teach courses three days per week, serve as a local government council member, work on job-related projects on the weekend, and engage in activities with his family.<sup>73</sup> The court rejected the plaintiff's claim that he was substantially limited in the major life activities of thinking and interacting with others.<sup>74</sup>

Since the Amendments have expanded the list of "major life activities" to include several that directly relate to the effects of a mental illness, plaintiffs will very likely have an easier time meeting the ADA's definition of disability than they did prior to their enactment.<sup>75</sup> Furthermore, if an employer challenges the existence of a qualifying disability, the resolution may depend on expert medical testimony on the condition and how it "substantially limits" the employee.<sup>76</sup> The need for such testimony would make it less likely that a court would look favorably on an employer's summary judgment motion, at least on that particular issue.

Despite the inclusion of additional categories of "major life activities" in the Amendments, the plaintiff-employee must still demonstrate that the impairment "substantially limits" one or more of these activities.<sup>77</sup> Courts have been skeptical of plaintiff claims that certain mental disorders *substantially* limit their lives.<sup>78</sup> For example, in *Treaster v. Conestoga Wood Specialties Corp.*,<sup>79</sup> a plaintiff who alleged that she was dismissed because she suffered several panic attacks while at work could not convince the court that these attacks met the "substantially limited" test. The court commented that:

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72. *Id.* Courts have little sympathy for faculty who claim that being required to teach on certain days, or to be present on campus for a particular number of days per week, is either discriminatory or retaliatory. *See, e.g.,* *Recio v. Creighton Univ.*, 521 F.3d 934 (8th Cir. 2008) (ruling that requiring a faculty member to teach on Mondays, Wednesdays, and Fridays when she preferred a different schedule was not an adverse employment action under Title VII).

73. *Lloyd*, 288 F. App'x. at 789.

74. *Id.*

75. ADA Amendments Act of 2008, Pub. L. No. 110-325, §§ 4(a), 3(2), 122 Stat. 3553, 3555.

76. *See* 42 U.S.C. § 12102 (2009).

77. ADA Amendments Act of 2008, Pub. L. No. 110-325 §§ 4(a), 3(2), 122 Stat. 3553, 3555.

78. *See, e.g.,* *Lee v. Ariz. Bd. of Regents*, 25 F. App'x 530, 534 (9th Cir. 2001) (finding that a faculty member who alleged that university failed to accommodate her depression could not establish that she was "substantially limited" any in major life activity).

79. No. 4:09-CV-00632, 2010 U.S. Dist. LEXIS 63257 (M.D. Pa. Apr. 29, 2010) *No. 4:09-CV-00632, 2010 U.S. Dist. LEXIS 63257 (M.D. Pa. Apr. 29, 2010)*.; *see also* *Cody v. County of Nassau*, 577 F. Supp. 2d 623 (E.D.N.Y. 2008) (computer department staff member at Nassau Community College did not establish that her anxiety and depression substantially limited a major life function; court ruled that she was not disabled).

[T]he testimony does not support a reasonable inference that the plaintiff's impairment significantly limited a major life activity of the plaintiff. The plaintiff has pointed to no evidence regarding how often she suffers panic attacks and her testimony was that the panic attacks last only a couple of minutes at a time. The plaintiff has failed to come forward with evidence creating a genuine issue of fact as to whether her ability to perform any major life activity is substantially limited. Therefore, the plaintiff has failed to present evidence from which a reasonable trier of fact could conclude that she was actually disabled.<sup>80</sup>

Since the Amendments did not change the law's requirement that the impairment *substantially* limit a major life activity, plaintiffs will still have to provide considerable evidence of limitation in order to meet the statutory definition of "disability."

Unless the employee notifies the employer that he or she has an impairment, there is no requirement that the employer provide an accommodation.<sup>81</sup> Since individuals with mental disorders may fear that they will be stigmatized or shunned when others learn of their diagnosis, employees may not disclose their conditions until they are close to dismissal or have been dismissed.<sup>82</sup> But if a supervisor or co-workers believe that the employee's behavior or performance problems are caused by a psychiatric disorder, they may consider the employee to be disabled even if the employee is not and may even treat the individual as impaired, which could lead to "regarded as disabled" claims by the employee.<sup>83</sup> Due to employees' hesitancy to disclose a mental disorder and the potential for "regarded as disabled" claims, dealing with the behavior and/or performance problems, rather than the underlying cause of these problems—either actual or assumed—is the safer strategy to avoid or defend lawsuits.

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80. *Treaster*, 2010 U.S. Dist. LEXIS 63257 at \*94; *see also* *Weigert v. Georgetown Univ.*, 120 F. Supp. 2d 1, 3 (D.D.C. 2000) (plaintiff's alleged disabilities did not prevent her from commuting to and from work, caring for her children, or going on vacation).

81. *Kobus v. Coll. of St. Scholastica, Inc.*, 608 F.3d 1034 (8th Cir. 2010) (painter with depression did not notify employer of diagnosis nor need for accommodation; dismissal for excessive absences upheld).

82. Ramona L. Paetzold, *How Courts, Employers, and the ADA Disable Persons with Bipolar Disorder*, 9 EMP. RTS. & EMP. POL'Y J. 293 (2005); *see also* Laura F. Rothstein, *The Employer's Duty to Accommodate Performance and Conduct Deficiencies of Individuals with Mental Impairments Under Disability Discrimination Laws*, 47 SYRACUSE L. REV. 931, 948–49 (1997).

83. 42 U.S.C. § 12102(3) (2009).



### B. Who is a “Qualified Employee?”<sup>84</sup>

The statute requires the employee to demonstrate that he or she can perform the “essential functions” of the position held or desired, with or without reasonable accommodation.<sup>85</sup> Employees who cannot perform the essential functions are not “qualified” and are not protected by the ADA or the Rehabilitation Act.<sup>86</sup> While listing essential functions may be relatively straightforward for many staff positions, it is less likely that a college or university has done so for faculty positions. Neglecting to make such a list can be problematic if a faculty member requests to be relieved of a particular job duty, such as teaching, and there is no documentation of the essential functions of the faculty member’s position.<sup>87</sup>

The ADA does not require the college or university to reduce, eliminate, or modify “essential functions” of a job in order to accommodate a faculty member with a disability.<sup>88</sup> The college or university must, however, be able to explain what the essential functions of a faculty member are in order for a court to ascertain whether a faculty member with a disability is “qualified” and thus protected by the ADA.<sup>89</sup> For that reason, it is important for a college or university to specify the essential functions of a faculty member, preferably in some official policy document, such as a faculty handbook, an individual employment contract, or a collective bargaining agreement. Determining the essential functions of the faculty member’s position prior to a request for accommodation is helpful to the faculty member, the college or university, and, if necessary, to the court; if

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84. This section has been adapted from Barbara A. Lee and Judith A. Malone, “Accommodating Faculty with Disabilities: Legal and Policy Issues,” Presented at Stetson University College of Law’s 28th Annual National Conference on Law and Higher Education (February 19, 2007), <http://justice.law.stetson.edu/excellence/HigherEd/archives/2007/AccommodatingFaculty.pdf>.

85. Americans with Disabilities Act of 1990, 42 U.S.C. § 12111(8) (2000). According to the regulations promulgated by the EEOC, “A job function may be considered essential for any of several reasons, including but not limited to the following: (i) The function may be essential because the reason the position exists is to perform that function; (ii) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or (iii) The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.” Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act 29 C.F.R. § 1630.2 (n)(2)(i)–(iii) (2011). “Evidence of whether a particular function is essential includes, but is not limited to: (i) The employer’s judgment as to which functions are essential . . . .” 29 C.F.R. § 1630.2 (n)(3)(i) (2011).

86. Schall v. Wichita State Univ., 7 P.3d 1144, 1157 (Kan. 2000).

87. See, e.g., Kingsbury v. Brown Univ., CA 02-068L, 2003 U.S. Dist. LEXIS 25792 (D.R.I. Sept. 30, 2003), discussed *infra* in note 91 and accompanying text.

88. Cleveland v. Prairie State Coll., 208 F. Supp. 2d 967, 977 (N.D. Ill. 2002).

89. See Americans with Disabilities Act of 1990, 42 U.S.C. § 12111(8) (2000); 29 C.F.R. § 1630.2 (n)(3)(i).

a faculty member states that he or she cannot perform a part of his or her job (such as teaching or attending committee meetings) that has been determined to be an essential function, a court could reasonably conclude that the individual was not “qualified” and thus not entitled to an accommodation that would exempt the individual from performing that part of the job.<sup>90</sup>

An example of the importance of developing a list of essential functions is found in *Kingsbury v. Brown University*.<sup>91</sup> In *Kingsbury*, the trial court was very critical of the university for the manner in which it developed a list of essential functions when a professor asked to return from medical leave after brain surgery.<sup>92</sup> The faculty member’s colleagues apparently did not wish him to return, and they collaborated in developing a list of “essential functions” that the court believed were not applied uniformly to other faculty.<sup>93</sup> When the university then refused to renew the faculty member’s contract, he claimed that the list of essential functions had been manipulated to allow departmental colleagues to create a set of functions that applied only to him. The court rejected the university’s motion for summary judgment, in part due to the lack of clarity as to the actual essential functions of his position.<sup>94</sup>

Cataloging the essential functions of a faculty member’s job is not an easy task, particularly at institutions where faculty members not only teach but serve on committees, advise students, conduct research, write grant proposals, mentor graduate students, consult, and perform service to their institution, community, state, nation, and discipline. Academic administrators must determine what is expected of faculty (particularly full-time tenure-track faculty). Must all faculty teach, and is there a standard teaching load? This is an important question, because if there is no standard teaching load, would a request for a lighter teaching load be a “reasonable accommodation?” Must all faculty conduct research, and if they do not, are there consequences? Are all faculty expected to advise students, mentor graduate students, or engage in committee work? Would a faculty member’s inability to perform service mean that he or she is not “qualified” under the ADA’s definition? Must all faculty be able to interact in a professional manner with peers, students, administrators, and the general public? This latter job requirement may be particularly important if a faculty member discloses a stress-related disorder and claims to be unable to work with particular individuals or to interact with a

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90. See, e.g., *Piziali v. Grand View Coll.*, No. 99-2287, 2000 U.S. App. LEXIS 1823 (8th Cir. Feb. 11, 2000); see also *Wynne v. Loyola Univ. of Chicago*, No. 97 C 06417 (N.D. Ill., October 10, 2000) (unpublished and unavailable in LEXIS) (on file with authors).

91. *Kingsbury*, 2003 U.S. Dist. LEXIS at \*1.

92. *Id.* at \*52–\*53.

93. *Id.* at \*60–\*65.

94. *Id.* at \*77–\*81.

particular supervisor.<sup>95</sup>

In nonacademic settings, getting along with one's supervisor or one's peers has been ruled an essential function of virtually every job, and the EEOC has rejected the idea that an employer is required to reassign the disabled employee to a different supervisor as a reasonable accommodation.<sup>96</sup>

The employer has the right to determine what functions are essential for a particular job or position, and need not remove essential functions from the position in order to accommodate the disabled employee.<sup>97</sup> In determining the list of essential functions, academic administrators should consider what impact a faculty member's inability to teach, conduct research, or perform service would have on the department or program. Would additional part-time faculty have to be hired, or would the institution "close ranks" and ask other faculty to cover that individual's teaching responsibilities? Would a faculty member's long-term absence from teaching make it difficult for advanced undergraduates or graduate students to complete their degrees or significant projects? Would important administrative responsibilities be neglected, or would faculty colleagues need to pick up those responsibilities as well? How do the institution's short- and long-term disability policies operate in a situation where a faculty member can do some, but not all, of his or her job?

In developing a list of essential functions, it is useful to include behavioral requirements. One source of standards for faculty behavior is the American Association of University Professors (AAUP) *Statement on Professional Ethics*.<sup>98</sup> The *Statement* notes that faculty "devote their energies to developing and improving their scholarly competence. They

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95. See, e.g., *Wynne v. Loyola Univ. of Chicago*, No. 97 C 06417 (N.D. Ill., October 10, 2000) (unpublished and unavailable in LEXIS) (on file with authors).

96. EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, Question 33, <https://www.eeoc.gov/policy/docs/accommodation.html#other>; see *Gaul v. Lucent Techs.*, 134 F.3d 576 (3d Cir. 1998) (employer not required to reassign employee to different supervisor as a reasonable accommodation); see also *Gilday v. Mecosta Cnty.*, 124 F.3d 760, 765 (6th Cir. 1997) ("The ability to get along with co-workers and customers is necessary for all but the most solitary of occupations . . ."); *Grenier v. Cyanamid Plastics, Inc.* 70 F.3d 667 (1st Cir. 1995) (reviewing cases that decide that essential functions include both technical and behavioral skills, such as emotional stability and the ability to get along with others); *Misek-Falkoff v. IBM Corp.*, 854 F. Supp. 215, 227 (S.D.N.Y. 1994) ("It is certainly a 'job-related requirement' that an employee, handicapped or not, be able to get along with co-workers and supervisors"). In *Cody v. Cnty. of Nassau*, 577 F. Supp. 2d 623 (E.D.N.Y. 2008), the court ruled that the employee could not be given her preferred accommodation because she would have been required to be supervised by an individual with whom she had refused to work.

97. *Fiumara v. President and Fellows of Harvard Coll.*, 327 F. App'x 212, 213 (1st Cir. 2009).

98. *Statement on Professional Ethics*, <https://www.aaup.org/AAUP/pubsres/policydocs/contents/statementonprofessionalethics.htm> (last visited Feb. 12, 2011).

accept the obligation to exercise critical self-discipline and judgment in using, extending, and transmitting knowledge. They practice intellectual honesty.”<sup>99</sup> Furthermore, with respect to faculty treatment of students, the *Statement* says, “Professors demonstrate respect for students as individuals and adhere to their proper roles as intellectual guides and counselors. . . . They respect the confidential nature of the relationship between professor and student.”<sup>100</sup> With respect to interactions with their colleagues, the *Statement* says, “Professors do not discriminate against or harass colleagues. . . . Professors accept their share of faculty responsibilities for the governance of their institution.”<sup>101</sup> The *Statement* has been found to be an appropriate standard of professional conduct by federal courts when faculty challenge discipline or dismissal for actions that colleges or universities have argued violated the *Statement*.<sup>102</sup>

Administrators may resist preparing a list of “essential functions” out of a concern that the college or university may want to accommodate a particularly valuable faculty member under one set of circumstances, but not accommodate a less-valued faculty member if a similar situation arises. Courts have been sympathetic to employers on this issue, and have allowed them to provide accommodations for some employees beyond those legally required without then subjecting the employer to the requirement that it provide similar accommodations to others, particularly if they do not meet the “qualified” requirement.<sup>103</sup> Establishing a clear set of “essential functions” for the institution’s faculty members should 1) notify the faculty what they are expected to do; 2) provide a guideline for academic administrators who are asked to provide “reasonable accommodation[s]” for faculty members who cannot perform certain parts of their jobs; and 3) justify an institution’s refusal to accommodate a faculty member who cannot perform one or more of the “essential functions” of his or her position if the institution determines that it is in the institution’s interest to do so. Of course, it is equally important to develop a clear set of essential functions for staff positions as well.

Courts have ruled, in both academic and nonacademic settings, that an employee who engages in misconduct is not “qualified” and thus is not

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99. *Id.* at Statement 1.

100. *Id.* at Statement 2.

101. *Id.* at Statement 3.

102. *See, e.g.,* Korf v. Ball State Univ., 726 F.2d 1222 (7th Cir. 1984); *see also* Hadlock v. Texas Christian Univ., No. 2-07-290-CV 2009, Tex. App. LEXIS 1330 (Tex. Ct. App. Feb. 26, 2009) (affirming dismissal of defamation claims based upon faculty committee’s determination that he had violated university’s code of ethics, which had incorporated AAUP Statement on Professional Ethics).

103. *See, e.g.,* Vande Zande v. Wis. Dep’t of Admin., 44 F.3d 538, 545 (7th Cir. 1995) (if an employer “bends over backwards to accommodate a disabled worker—goes further than the law requires— . . . it must not be punished for its generosity by being deemed to have conceded the reasonableness of so far-reaching an accommodation”).

protected by the ADA. An example of the application of implied (rather than express) behavioral standards to a faculty member is *Newberry v. East Texas State University*.<sup>104</sup> James Newberry, a tenured professor of photography, came to campus two days per week, worked afternoons only, refused to hold office hours, and engaged in numerous disputes with the department chair and other colleagues.<sup>105</sup> After fifteen years of disruptive behavior and several warnings to improve his relationships with his faculty colleagues, the administration decided to dismiss him.<sup>106</sup> Newberry then disclosed that he had obsessive-compulsive disorder, a recognized mental illness, and sued the university under the ADA.<sup>107</sup> A jury concluded that he was not qualified, and found for the university.<sup>108</sup> Newberry appealed.<sup>109</sup> Although several administrators had urged Newberry to seek professional help and believed that he might have a mental disorder, the appellate court ruled that the university had established that Newberry's dismissal was based upon his "work performance and lack of collegiality"<sup>110</sup> and was not motivated by a belief that he had a mental disorder.<sup>111</sup> The court also ruled

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104. *Newberry v. East Texas State Univ.*, 161 F.3d 276 (5th Cir. 1998).

105. *Id.* at 277.

106. *Id.* at 278.

107. *Id.*

108. *Id.* at 279.

109. *Id.*

110. *Id.*

111. *Id.* One commentator has criticized the *Newberry* decision, arguing that the faculty member's behavior was linked to the mental illness and that punishing him for the behavior was punishing him for the mental illness. Jane Byeff Korn, *Crazy (Mental Illness Under the ADA)*, 36 U. MICH. J. L. REFORM 585, 643-44 (2003). The author continues: "The concept that people with a mental illness can be held to the same standard of behavior as people without such an illness has no support in the ADA. The ADA only mentions this idea with reference to people who are abusing drugs or alcohol. Moreover, to hold people with a mental illness to the same standard of behavior as non-mentally ill people eliminates much of the protection Congress thought it was affording to the mentally disabled. While employers should not have to endure totally unacceptable behavior, this is not the same as holding someone with a mental illness to the same standard of behavior as others without a mental illness. We do not hold a hearing-impaired person to the same standard of hearing as people who are not deaf. We should not hold people with a mental illness to the same standard of behavior as the non-mentally ill." *Id.* at 646 (footnote omitted). This approach to analyzing ADA claims related to misconduct linked to mental illness does not appear to have found favor in the federal courts. Courts have ruled that bad behavior can be punished even if related to a mental disorder. *See, e.g., Kiel v. Select Artificials, Inc.*, 169 F.3d 1131, 1136 (8th Cir. 1999) ("[T]he anti-discrimination statutes do not insulate an employee from discipline for violating the employer's rules or disrupting the workplace."); *Palmer v. Cook Cnty.*, 117 F.3d 351 (7th Cir. 1997) (employee with major depression and delusional disorder dismissed for threatening to kill a co-worker, not because of her disability; these threats rendered her unqualified for her position); *Harris v. Polk Cnty.*, 103 F.3d 696 (8th Cir. 1996) (holding even if plaintiff's mental illness "caused" her to shoplift, employer could deny re-employment on basis of prior criminal activity); *Boldini v. Postmaster Gen. U.S. Postal Serv.*, 928 F. Supp. 125 (D.N.H. 1995) (finding plaintiff with major depression with psychotic features and

that the trial judge's refusal to include a jury instruction on Newberry's "regarded as [disabled]" claim made no difference to the outcome of the case because there was sufficient evidence to demonstrate that Newberry's behavior, not his mental illness, was the justification for the university's decision to dismiss him.<sup>112</sup>

Another case involving a faculty member, *Motzkin v. Trustees of Boston University*, turned on the question of whether the plaintiff could perform the essential functions of his job.<sup>113</sup> Motzkin, an untenured professor of philosophy, was dismissed after being found guilty by a faculty committee of sexually harassing several students and harassing and sexually assaulting a faculty colleague.<sup>114</sup> Until the university began termination proceedings against him, administrators were unaware that Motzkin apparently suffered from a psychiatric condition that caused "disinhibition," making it difficult for him to control his behavior.<sup>115</sup> Motzkin challenged the termination, stating that his disability had caused the misconduct, and suggested that a "reasonable accommodation" would be an assignment in which he had no contact with students.<sup>116</sup> The court reviewed Motzkin's contract with the university, which required him to teach three courses per semester.<sup>117</sup> The court ruled that, because teaching and interactions with students and faculty colleagues were essential functions of Motzkin's job as a professor, he was not qualified, and thus was not protected by the ADA.<sup>118</sup> The court also noted that the university was not aware of Motzkin's disorder when it terminated him, and granted the university's motion for summary judgment.<sup>119</sup>

Yet another case involving the analysis of whether a faculty member could perform the essential functions of his teaching position is *Horton v. Board of Trustees of Community College District No. 508*.<sup>120</sup> In this case, a

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personality disorder was not qualified for her position because of her hostile behavior toward her supervisor and co-workers); *Canales-Jacobs v. N.Y. State Office of Court Admin.*, 640 F. Supp. 2d 482, 500 (S.D.N.Y. 2009) (holding that a request that an employer excuse misconduct "is unreasonable as a matter of law, because on-the-job misconduct . . . always constitute[s] a legitimate and nondiscriminatory reason[] for terminating employment, even where the misconduct is caused by an undivulged psychiatric condition"); *Johnson v. Maynard*, 01 Civ. 7393 (AKH), 2003 U.S. Dist. LEXIS 2676, at \*12-13 (S.D.N.Y. Feb. 20, 2003) ("A disabled plaintiff ceases to be otherwise qualified for a position when she engages in misconduct in violation of workplace policy or poses a direct threat to the health or safety of others that cannot be eliminated by a reasonable accommodation.").

112. *Newberry*, 161 F.3d at 280–81.

113. 938 F. Supp. 983 (D. Mass. 1996).

114. *Id.* at 986–90.

115. *Id.* at 991.

116. *Id.* at 993.

117. *Id.* at 994.

118. *Motzkin*, 938 F. Supp. at 994.

119. *Id.* at 1000.

120. No. 95 C 23461996, U.S. Dist. LEXIS 6879 (N.D. Ill. May 15, 1996).

faculty member had been granted a leave of absence because of a “nervous disorder” that his doctor said was caused by “stress from teaching.”<sup>121</sup> Horton’s leave was extended twice when his physician said that he was unable to return to work because his condition had not improved.<sup>122</sup> Horton was on leave for five years, and requested a fourth leave, saying that he was unable to return to work.<sup>123</sup> The college asked Horton to formally apply for another leave, and to provide updated documentation from his physician.<sup>124</sup> Horton did not provide the requested documentation.<sup>125</sup> When the college dismissed him for failure to return to work and refusal to provide the requested documentation, Horton sued for disability discrimination under the ADA.<sup>126</sup>

The court ruled that Horton was not a qualified individual with a disability because he could not teach, an essential function of his position.<sup>127</sup> Although Horton argued that he could perform non-classroom-related functions, the court rejected that argument, noting that, as a full-time assistant professor, Horton was required to teach twelve to thirteen contact hours per semester (as provided for in the collective bargaining agreement between the faculty union and the college).<sup>128</sup> With respect to Horton’s request for an additional leave, the court found that the college made “a more than reasonable accommodation” for Horton’s disability.<sup>129</sup> The court granted the college’s motion for summary judgment.<sup>130</sup>

In both *Motzkin* and *Horton*, the court reviewed contracts that specified teaching loads, and relied, at least in part, upon these contracts to determine that the faculty members were not “qualified” and thus were not protected by the ADA. The definition of “qualified” was not changed by the ADA Amendments; clearly establishing a position’s essential functions, for both staff and faculty, should help colleges and universities defend claims that discipline or dismissal was inappropriate and an example of disability discrimination.

If an employee’s misconduct poses a “direct threat” to supervisors, co-workers, or the employee himself or herself, the court may determine that the employee is not qualified and thus is unprotected by the ADA. For example, in *Borgialli v. Thunder Basin Coal Co.*,<sup>131</sup> Dennis Borgialli, a “blaster” who worked for a mining company who had a history of good

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121. *Id.* at \*1.

122. *Id.* at \*2.

123. *Id.* at \*3.

124. *Id.* at \*4–\*6.

125. *Id.* at \*4–\*6.

126. *Id.*

127. *Id.* at \*9.

128. *Id.* at \*12 n.2.

129. *Id.* at \*14.

130. *Id.* at \*21.

131. 235 F.3d 1284 (10th Cir. 2000).

performance, threatened suicide and suggested that he might harm his supervisor or others.<sup>132</sup> He was diagnosed with major depression, anxiety, and personality disorders.<sup>133</sup> His employer attempted to transfer him to vacant positions, but he was not qualified to perform them, so he was terminated.<sup>134</sup> The court affirmed the jury's determination that he could no longer perform his previous job as a blaster because he was no longer qualified to perform those responsibilities safely.<sup>135</sup>

### C. What Accommodation is Reasonable?

If the employee can demonstrate that he or she is a qualified individual with a disability, the ADA and Section 504 require the employer to consider whether a reasonable accommodation will enable the employee or applicant to perform the essential functions of the position.<sup>136</sup> Neither law requires the employer to remove or modify essential functions, but EEOC guidelines require an "interactive process" between the employer and the disabled employee to determine the nature of the employee's limitations and the type of accommodation(s) that might be appropriate.<sup>137</sup> Numerous courts have ruled that the employer has the right to select the accommodation that it believes to be appropriate and that will enable the employee to perform the essential functions of the position.<sup>138</sup>

The most frequent type of accommodation requested by employees with mental disabilities is time off from work, either for periods of in-patient

132. *Id.* at 1284–85; *see also* *McKenzie v. Benton*, 388 F.3d 1342 (10th Cir. 2004) (affirming jury's determination that employer was justified in viewing former deputy sheriff with post traumatic stress disorder who shot a gun at her father's grave as a "direct threat" and thus employer's refusal to rehire her did not violate the ADA).

133. *Id.* at 1287.

134. *Id.* at 1289.

135. *Id.* at 1295.

136. Americans with Disabilities Act of 1990, 42 U.S.C. § 12112 (b)(5)(A) (2000). The law defines "discrimination," in part, as "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity." *Id.*

137. EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans With Disabilities Act, Question 5, <https://www.eeoc.gov/policy/docs/accommodation.html#general>.

138. *Id.* at Question 9 ("The employer may choose among reasonable accommodations as long as the chosen accommodation is effective."); *see* 29 C.F.R. § 1630.9 (1997); *Rehling v. City of Chi.*, 207 F.3d 1009, 1014 (7th Cir. 2000) (finding an employer is not obligated to provide a qualified individual with the accommodation of their choice upon demand); *Hollestelle v. Metro. Wash. Airports Auth.*, 145 F.3d 1324, at \*4 n.5 (4th Cir. 1998) (finding an employee does not have the right to select the accommodation of his choice); *Stewart v. Happy Herman's Cheshire Bridge, Inc.*, 117 F.3d 1278, 1285–86 (11th Cir. 1997); *Hankins v. The Gap, Inc.*, 84 F.3d 797, 800 (6th Cir. 1996); *Gile v. United Airlines, Inc.*, 95 F.3d 492, 499 (7th Cir. 1996).



care, or for psychotherapy.<sup>139</sup> The dual protections of the ADA and the Family and Medical Leave Act<sup>140</sup> require employers to provide these leaves to qualified workers, although courts will not require employers to provide open-ended, indefinite leaves, or protracted periods of leave on a sporadic basis.<sup>141</sup> But courts are less likely to require other accommodations frequently requested by employees with mental disorders, such as the transfer to a different supervisor (or in a higher-education context, the transfer of a faculty member to a different department),<sup>142</sup> a “stress-free” work environment,<sup>143</sup> or working at home<sup>144</sup> (unless, of course, faculty members routinely are permitted to work at home in lieu of being in their offices). Depending on the individual’s job responsibilities, it may not be

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139. Barbara A. Lee & Karen Newman, *Employer Responses to Disability: Preliminary Evidence and a Research Agenda*, 8 EMPLOYEES RESPS. & RIGHTS. J. (3) 209 (1995).

140. Family and Medical Leave Act, Pub. L. 103-3, 107 Stat. 6; *see also* 29 U.S.C. § 2601 (1991).

141. *See, e.g.*, *Fiumara v. President & Fellows of Harvard Coll.*, 327 F. App’x 212 (1st Cir. 2009); *see also* *Tyndall v. Nat’l Educ. Ctrs., Inc. of Cal.*, 31 F.3d 209 (4th Cir. 1994). *But see* *Gladden v. Winston Salem State Univ.*, 495 F. Supp. 2d 517 (M.D.N.C. 2007) (refusing to dismiss claims of director of student activities with depression and anxiety that university terminated him on the basis of his mental disorder when he did not return “promptly” from disability leave and retaliated against him for filing a discrimination charge).

142. *See* *Pritchard v. Dominguez*, No. 3:05cv40, 2006 U.S. Dist. LEXIS 46607, at \*44 (N.D. Fla. June 29, 2006) (“Employees may not use the Act—as Plaintiff is attempting here—as the means to obtain a transfer from an undesirable boss.”); *Gaul v. Lucent Techs. Inc.*, 134 F.3d 576 (3d Cir. 1998) (rejecting plaintiff’s claim that employer’s refusal to transfer him to a different supervisor was denial of a reasonable accommodation); *Warnock v. Fed. Reserve Bank of N.Y.*, 91 F.3d 379 (2d Cir. 1996) (rejecting plaintiff’s claim that employer’s refusal to transfer him to a different supervisor was denial of a reasonable accommodation). The involuntary transfer of a faculty member to a different department or a different building has been viewed by the courts as appropriate, and faculty challenging such transfers have been unsuccessful in claiming that they are discriminatory or violate the faculty member’s rights in some other way. *See* *Wynne v. Loyola Univ. of Chi.*, No. 97 c 6417, 1999 WL 759401 (N.D. Ill. October 10, 2000) (holding dean’s refusal to transfer faculty member to another department was not denial of a reasonable accommodation). But if the administration decides to transfer the faculty member involuntarily as a way of responding to behavior issues, courts typically permit it. *See, e.g.*, *Huang v. The Bd. of Governors of the Univ. of N.C.*, 902 F.2d 1134 (4th Cir. 1990) (holding transfer that does not result in reduction in compensation or job title is not an adverse employment action); *see also* *Maples v. Martin*, 858 F.2d 1546 (11th Cir. 1988) (same).

143. *See, e.g.*, *Fontan v. Potter*, 2006 U.S. Dist. LEXIS 39493 (D.P.R. June 12, 2006).

144. *See, e.g.*, *Rauen v. U.S. Tobacco Mfg.*, 319 F.3d 891 (7th Cir. 2003). *But see* *Humphrey v. Mem’l Hosps. Ass’n.*, 239 F.3d 1128 (9th Cir. 2001) (ruling that plaintiff, a medical transcriptionist with obsessive-compulsive disorder, might be able to establish at trial that working from home was a reasonable accommodation, and thus summary judgment was not appropriate; the fact that other employees with similar positions worked from home suggested that presence at work was not an essential function of the position).

possible to provide a “reasonable accommodation” that enables the individual to perform all of the essential functions of his or her job, but the employer must go through the interactive process of attempting to identify an accommodation that is appropriate.

The significance of the interactive process in determining which accommodations, if any, should be provided is illustrated in *Cleveland v. Prairie State College*.<sup>145</sup> Iris Cleveland, an adjunct instructor, had several physical disorders and requested a variety of accommodations, many of which were provided.<sup>146</sup> She had suffered a stroke and had difficulty writing, so she requested a student aide to record grades and perform other clerical work.<sup>147</sup> The academic vice president refused to consider such an accommodation, stating that all faculty had to record their grades personally to prevent unauthorized changing of grades or tampering with records.<sup>148</sup> Because the vice president had made this determination without engaging in the interactive process and considering ways that the instructor could have ensured that the student aide had recorded the grades correctly, and also did not follow up on another accommodation request, the court rejected the college’s motion for summary judgment, saying that the case had to be tried.<sup>149</sup>

*Meling v. St. Francis College*<sup>150</sup> demonstrates that failing to engage the disabled employee in an interactive process to identify accommodations can result in a punitive damage award as well as reinstatement and compensatory damages. Barbara Meling was an instructor of physical education who was involved in an automobile accident and was on medical leave for a year.<sup>151</sup> When she attempted to return to her teaching position, the college informed her that she could not perform the essential functions of her position—teaching physical education—and she was deemed to have resigned from the college.<sup>152</sup> Meling provided several examples of work she could do on the college’s behalf and stated that she could use a student assistant to demonstrate the physical activities required for the courses she taught.<sup>153</sup> In fact, according to the court, Meling could have taught all of the courses assigned to her during the term she was to have returned, with the exception of one course in which she would need a student demonstrator.<sup>154</sup> The college, however, refused to re-employ her.<sup>155</sup> A jury

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145. 208 F. Supp. 2d 967 (N.D. Ill. 2002).

146. *Id.* at 973.

147. *Id.* at 974.

148. *Id.* at 977.

149. *Id.* at 979.

150. 3 F. Supp. 2d 267 (E.D.N.Y. 1998).

151. *Id.* at 270–71.

152. *Id.* at 272.

153. *Id.* at 271.

154. *Id.* at 274.

155. *Id.* at 275.

awarded Meling \$225,000 in compensatory damages and \$150,000 in punitive damages.<sup>156</sup> The trial judge ordered back pay and reinstatement.<sup>157</sup>

In fashioning the accommodation, clear communication between the institution and the employee is critical. For example, faculty or staff with disabilities may take medical or disability leave and seek to return on a part-time basis, gradually increasing their work hours until they can tolerate a full-time schedule. In *Kacher v. Houston Community College System*,<sup>158</sup> Detna Kacher, an instructor in the Radiography Department of Houston Community College, requested a lengthy leave of absence because she needed a liver transplant.<sup>159</sup> When she returned to teaching, she was given a part-time schedule.<sup>160</sup> She was later denied a full-time appointment and was told that she had been terminated from her full-time position while she was on leave.<sup>161</sup> The court rejected the college's motion for summary judgment because the plaintiff and the college disputed whether, in fact, she had known about the dismissal and whether her failure to apply for vacant full-time positions was an appropriate defense to her discrimination claim.<sup>162</sup>

One method of accommodating an employee with a disability is restructuring of the position, as long as essential functions are not removed.<sup>163</sup> This issue was tested in *Hong v. Temple University*,<sup>164</sup> in which an assistant professor of anesthesiology who could not perform many of the essential functions of his position because of chronic pain asked to be excused from most patient care responsibilities, including administering anesthesia and covering on-call responsibilities.<sup>165</sup> The university denied his request and did not renew his faculty appointment. The court ruled that Professor Hong's request for a restructured position was really a request that many of the essential functions of his position be removed—something that the ADA does not require. Although the university had allowed Hong to work in such a “restructured” position for some time, the court said that it was not required to do so indefinitely.<sup>166</sup>

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156. *Id.* at 270.

157. *Id.* at 278.

158. 974 F. Supp. 615 (S.D. Tex. 1997).

159. *Id.* at 617.

160. *Id.*

161. *Id.*

162. *Id.* at 623.

163. *See, e.g., Jones v. Saint Joseph's Coll.*, 847 N.Y.S.2d 584 (N.Y. App. Div. 2007) (ruling that plaintiff, the sole corporate recruiter for the college, who could not drive as a result of injuries sustained in an auto accident, had not requested an accommodation that was reasonable when she asked the college to assign employees with other jobs to perform some of the essential functions of her position).

164. No. 98-4899, 2000 U.S. Dist. LEXIS 7301 (E.D. Pa. May 30, 2000).

165. *Id.* at \*2.

166. *Id.* at \*23.

The court commented:

Temple exceeded the ADA's requirements during the period from November 1995 to June 1997 when Dr. Hong was retained despite the fact that he was unable to perform the essential functions of his position with or without reasonable accommodations. It is unclear from the present record whether Temple did so out of benevolence, because of a pre-existing contractual duty, for a combination of both reasons, or for some other reason. In any event, the mere fact that an employer has exceeded its statutory obligations for a limited period of time does not create an obligation for it to continue to exceed those obligations indefinitely. To hold otherwise would undermine the goals of the ADA; employers would be reluctant to attempt extraordinary accommodations of disabled individuals, even for a limited period of time, for fear of being locked in to those extraordinary measures indefinitely.<sup>167</sup>

Reassignment of an individual with a disability may be viewed as a form of retaliation if the reassignment is involuntary. In *Lee v. Arizona Board of Regents*,<sup>168</sup> Chynhye Lee, a faculty member who alleged that she suffered from depression, was transferred to a less desirable teaching schedule after she filed a claim of disability discrimination with the EEOC.<sup>169</sup> Although the court found that the plaintiff had not demonstrated that her depression “substantially limited” a “major life activity,” it ruled that her claim of retaliation must be tried.<sup>170</sup>

#### D. “Regarded as” Disabled Claims

The ADA explicitly includes protection for individuals who can demonstrate that the employer regards them as disabled, even though they are not.<sup>171</sup> The 2008 Amendments to the ADA expanded the definition of the “regarded as” prong, which now reads:

An individual meets the requirement of “being regarded as

167. *Id.*

168. 25 Fed. App'x 530 (9th Cir. 2001).

169. *Id.* at 533.

170. *Id.* at 534–35.

171. 42 U.S.C. § 12102 (2009). The regulations define an individual with a perceived disability as one who “1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation; 2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or 3) Has none of the impairments defined in paragraph (h)(1) or (2) of this section but is treated by a covered entity as having a substantially limiting impairment.” 29 C.F.R. § 1630.2(l)(1) (2011). These regulations may change as a result of the expanded definition of “regarded as” disabled in the ADA Amendments. *See* Americans with Disabilities Act Amendments Act (ADAAA), Pub. L. No. 110-325 (2008) (became effective on January 1, 2009).

having such an impairment” if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.<sup>172</sup>

This language was added because, in some cases, courts required the employee to demonstrate that he or she had an actual impairment; the amended language makes it clear that the employee need only show that the employer perceived the employee to be substantially limited as a result of either a real or perceived impairment.<sup>173</sup> The Amendments also clarify the employer’s accommodation responsibility for perceived impairments, stating that no accommodation need be made for an individual who is regarded as disabled but who is not substantially limited under the Act’s definition.<sup>174</sup>

Employees who have challenged an employer’s requirement that they undergo a “fitness for duty” medical or psychiatric examination have claimed that such a requirement proves that an employer regarded the employee as disabled. The courts have disagreed.<sup>175</sup> For example, in *Vosatka v. Columbia University*,<sup>176</sup> Robert Vosatka, an assistant professor of medicine, sued the medical school when his contract was not renewed.<sup>177</sup> After a number of female colleagues complained about his allegedly sexist

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172. 42 U.S.C. § 12102(1)(C)(A) (2011). The law also states that “(B) Paragraph (1)(C) shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less.” 42 U.S.C. § 12102(1)(C)(B) (2011).

173. 42 U.S.C. § 12102(1)(C)(A).

174. The law now states: “(h) REASONABLE ACCOMMODATIONS AND MODIFICATIONS—A covered entity under title I, a public entity under title II, and any person who owns, leases (or leases to), or operates a place of public accommodation under title III, need not provide a reasonable accommodation or a reasonable modification to policies, practices, or procedures to an individual who meets the definition of disability in section 3(1) solely under subparagraph (C) of such section.” 42 U.S.C. § 12201(h) (2011).

175. See, e.g., *Doe v. Bd. of Educ. of Fallsburgh Cent. Sch. Dist.*, 63 Fed. App’x 46, 49 (2d Cir. 2003) (“[T]his fact alone is insufficient.”); *Colwell v. Suffolk Co. Police Dep’t*, 158 F.3d 635, 647 (2d Cir. 1998) (stating that the fact that the exams were required “suggests no more than that their physical condition was an open question”); *Sullivan v. River Valley Sch. Dist.*, 197 F.3d 804, 811 (6th Cir. 1999) (“[R]equesting a mental evaluation does not indicate that an employer regards an employee as disabled.”); *Cody v. CIGNA Healthcare of St. Louis, Inc.* 139 F.3d 595, 599 (8th Cir. 1998) (“[A] request for an evaluation is not equivalent to treatment of the employee as though she were substantially impaired.”). Some employees of public schools and colleges and universities have asserted that ordering an employee to undergo a mandatory psychiatric examination is a violation of due process. See *O’Connor v. Pierson*, 482 F. Supp. 2d 228 (D. Conn. 2007), *aff’d*, 538 F.3d 64 (2d Cir. 2009). Others have asserted that this is a violation of equal protection. See *Appel v. Spiridon*, 531 F.3d 138 (2d Cir. 2008). Courts have rejected these claims as well.

176. 2005 U.S. Dist. LEXIS 18139 (S.D.N.Y. August 25, 2005).

177. *Id.* at \*13.

behavior toward them, his supervisor placed him on medical leave and required him to undergo a psychiatric evaluation.<sup>178</sup> The evaluation determined that he was not mentally ill, but had several personality characteristics that made him unaware of the impact of his actions on others.<sup>179</sup> His supervisor offered him a transfer to a different lab so that the colleagues whom he had offended would not have to work with him, but the professor did not follow up on these opportunities.<sup>180</sup> Because the professor was viewed as relatively unproductive and had “low visibility” in the research community, the university decided not to renew his contract.<sup>181</sup>

The court rejected Vosatka’s claim that requiring the psychiatric evaluation demonstrated that the medical school leadership regarded him as disabled.<sup>182</sup> Finding that his inappropriate behavior provided a legitimate reason for the decision to request the examination, the court awarded summary judgment to the medical school.<sup>183</sup>

In other “regarded as” disabled cases, defendant employers have successfully defended against these claims by demonstrating that they did not believe that the employee was disabled, even if the employee insisted that he or she had a disability.<sup>184</sup> For example, in *Weigert v. Georgetown University*,<sup>185</sup> Susan Weigert, a research assistant, was rude and uncooperative to both supervisors and peers.<sup>186</sup> When she was dismissed for engaging in these behaviors, she claimed both disability discrimination and that her supervisors regarded her as disabled.<sup>187</sup> The court rejected her claim of disability because there was no medical evidence that she suffered an impairment. With respect to her “regarded as” disabled claim, the court cited testimony from supervisors and peers that they disbelieved her claims of disability, and that the reason for her dismissal was her unprofessional behavior.<sup>188</sup> The court awarded summary judgment to the university on all

178. *Id.* at \*11–\*13.

179. *Id.*

180. *Id.* at \*13–\*14.

181. *Id.* at \*4–\*5, \*13–\*14.

182. *Id.* at \*24.

183. *Id.* at \*40. *See also* *Mammone v. President and Fellows of Harvard Coll.*, 847 N.E.2d 276 (Mass. 2006) (ruling that it was the employee’s misconduct, rather than a perception that he had a mental disorder, caused his dismissal).

184. *See, e.g., Lee v. Ariz. Bd. of Regents*, 25 Fed. App’x 530 (9th Cir. 2001) (employer’s disbelief that plaintiff had mental disability provided legitimate, job-related justification for ordering plaintiff to undergo psychiatric evaluation and was not probative of disability discrimination); *see also Cody v. Cnty. of Nassau*, 577 F. Supp. 2d 623 (E.D.N.Y. 2008) (finding community college staff member with anxiety and depression was not regarded as disabled because supervisors ignored her claims of disability).

185. 120 F. Supp. 2d 1 (D.D.C. 2000).

186. *Id.* at 4.

187. *Id.* at 6–12.

188. *Id.* at 13.

of Weigert's claims.<sup>189</sup>

As noted above, the amended definition of "regarded as" is likely to result in fewer awards of summary judgment to employers on these claims. Furthermore, employees who either have documentation of a disorder or who can present some evidence that they were treated as though they were disabled may have more success in getting their claims to a jury.<sup>190</sup>

#### E. Retaliation claims

The ADA prohibits retaliation against an individual "because such individual has opposed any act or practice made unlawful by [the ADA] or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [the ADA]."<sup>191</sup> In 2006, the United States Supreme Court expanded the ability of employees to state claims of retaliation for a wide variety of "adverse employment actions,"<sup>192</sup> and the number of retaliation claims has skyrocketed as a result.<sup>193</sup> For example, in 1997, retaliation claims constituted twenty-three percent of all claims filed with the EEOC.<sup>194</sup> By 2009, the latest year for which data are available, thirty-six percent of all claims included a claim of retaliation,<sup>195</sup> which is an increase of fifty-six percent over the twelve year period. In some cases, plaintiffs cannot survive dismissal of their disability discrimination claims, but are permitted to go forward with retaliation claims because of the alleged reaction of their employer when they either request an accommodation or complain of

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189. *Id.* Similarly the court in *Newberry v. East Texas State University* ruled that it was the plaintiff's uncollegial behavior, not any perception that he was disabled, that was grounds for his termination; *see supra* text accompanying notes 104–12.

190. *See, e.g., Lynch v. Lee*, 2004 U.S. Dist. LEXIS 16906 (E.D. La. Aug. 18, 2004) (rejecting employer's motion for summary judgment because plaintiff presented evidence that employer knew of diagnosis of mental illness and ordered her to receive treatment, fabricated complaints against her, and then dismissed her); *see also Stroud v. Connor Concepts, Inc.*, 2009 U.S. Dist. LEXIS 112072 (M.D. Tenn. December 2, 2009) (employee dismissed after in-patient treatment for serious mental illness; court rejected defense motion for summary judgment).

191. 42 U.S.C. § 12203(a) (2011).

192. *Burlington N. v. White*, 548 U.S. 53 (2006). A second ruling by the U.S. Supreme Court in *Crawford v. Metro. Gov't of Nashville & Davidson Cnty.*, 129 S. Ct. 846 (2009), clarified that employees may state retaliation claims under Title VII (and presumably under the ADA, since the nonretaliation language is very similar), if they believe they have suffered an adverse employment action not only for complaining of discrimination themselves, but also for participating in the investigation of another employee's discrimination complaint.

193. Eeoc.gov, *supra* note 12.

194. *Id.*

195. Eeoc.gov, *supra* note 12. Employment attorneys have reported sharp increases in retaliation claims against employers, and one has cited retaliation as the "No. 1 risk for employers today." Cari Tuna, *Employer Retaliation Claims Rise*, WALL ST. J., October 5, 2009, available at <http://online.wsj.com/article/SB125470380636663209.html>.

discrimination.<sup>196</sup>

The order of proof in an ADA retaliation case follows the order of proof in Title VII cases, established by *McDonnell Douglas Corp. v. Green*.<sup>197</sup> In order to establish a claim of retaliation, the plaintiff must make out a prima facie case. The plaintiff must show that 1) the employee was engaged in an activity protected by the ADA; 2) the employer was aware of that activity; 3) an employment action adverse to the plaintiff occurred; and 4) there existed a causal connection between the protected activity and the adverse employment action.<sup>198</sup> If the plaintiff successfully makes out the prima facie case, the employer then must articulate a reason for the negative employment action that is unrelated to the employee's alleged protected activity. Should the employer do so, the employee must then establish that this nondiscriminatory reason is a pretext for retaliation.

In order for an employee to prevail on a retaliation claim, the alleged retaliation must have occurred either because an employee sought a reasonable accommodation or as a result of a complaint of discrimination, and the employee must show that the employer took some adverse employment action against the employee after the employee engaged in that protected activity.<sup>199</sup> For example, in *Lee*,<sup>200</sup> Prof. Lee was transferred to a less desirable teaching schedule after she filed a claim of disability discrimination with the university's affirmative action office. Although the court found that she had not established that she met the law's definition of disability, it allowed her retaliation claim to be tried because of the timing of the transfer and because an administrator had told her that the transfer

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196. See, e.g., *Emmons v. City Univ. of N.Y.*, 2010 U.S. Dist. LEXIS 54140 (E.D.N.Y. June 2, 2010) (holding an instructor could not establish that she was disabled because she did not provide evidence that she was "substantially limited," but she stated retaliation claim based upon negative treatment of her by her superiors after she took disability leave).

197. 411 U.S. 792 (1973); see *Rakity v. Dillon Cos.*, 302 F.3d 1152 (10th Cir. 2002); see also *Greenway v. Buffalo Hilton Hotel*, 143 F.3d 47, 52 (2d Cir. 1998); *Standard v. A.B.E.L. Services, Inc.*, 161 F.3d 1318, 1328 (11th Cir. 1998); *Barnett v. U.S. Air, Inc.*, 157 F.3d 744, 753 (9th Cir. 1998); *Steffes v. Stepan Co.*, 144 F.3d 1070, 1074 (7th Cir. 1998); *Sherrod v. American Airlines, Inc.*, 132 F.3d 1112, 1122 (5th Cir. 1998). But see *Metoyer v. Chassman*, 504 F.3d 919, 931 (9th Cir. 2007) (stating that when the plaintiff offers direct evidence of discrimination, the *McDonnell-Douglas* framework need not be used).

198. *Sarno v. Douglas Elliman-Gibbons & Ives, Inc.*, 183 F.3d 155, 159 (2d Cir. 1999).

199. See, e.g., *Fiumara v. President & Fellows of Harvard Coll.*, 526 F. Supp. 2d 150 (D. Mass. 2007), *aff'd*, 2009 U.S. App. LEXIS 9558 (1st Cir. May 1, 2009) (holding employee's dismissal not a result of request for reasonable accommodation; complaint about alleged discrimination occurred after dismissal). But see *Clinkscales v. Children's Hosp. of Pa.*, 2009 U.S. Dist. LEXIS 38939 (E.D. Pa. May 7, 2009) (noting termination for requesting leave of absence to deal with mental health disorder could be evidence of retaliation; defendant's motion for summary judgment denied).

200. 25 Fed. App'x 530 (9th Cir. 2001).



was a result of her discrimination claim.<sup>201</sup> Similarly, in *Geoghan v. Long Island Rail Road*,<sup>202</sup> the court was skeptical as to whether the plaintiff would be able to demonstrate that his impairment, attention deficit hyperactivity disorder, was sufficiently limiting to qualify as ADA-protected, but noted that his retaliation claim did not depend upon the success of his discrimination claim.<sup>203</sup> The court explained, “A claim of retaliation under the ADA is thus treated separately from a claim of discrimination, and a plaintiff need not show that he or she has a disability to make out a retaliation claim;”<sup>204</sup> the court ruled that the retaliation claim must be tried.<sup>205</sup>

In order to state a claim of retaliation under the ADA, an employee does not need to have first complained about discrimination.<sup>206</sup> Seeking a reasonable accommodation, which is a protected activity under the ADA, would be a sufficient precursor to a retaliation claim if the employee is subsequently disciplined, dismissed, or suffers some other negative employment action.<sup>207</sup> For these reasons, it is critical for the employer to support any negative employment action with documentation of reasons unrelated to the employee’s attempt to exercise rights under the ADA.

This review of litigation suggests that administrators need to focus more clearly on articulating the expectations for staff and faculty and to hone their supervisory skills and actions. The next section addresses how that might be accomplished.

### III. “TOTO, I HAVE A FEELING WE’RE NOT IN KANSAS ANYMORE”: THE CHANGING LANDSCAPE OF CAMPUS SUPERVISION

At the outset of this article, we suggested that the culture of colleges and universities might complicate efforts to ensure that faculty and staff perform their jobs appropriately and conduct themselves professionally. Too often this culture has embraced a “non-supervision supervision” approach, which reflects a reticence by professionals to believe that colleagues can or should be “managed” by each other. The current structure of academic administration (e.g., department chairs, deans), further complicates this reality by coupling a lack of formal supervisory skill development with a natural tendency toward conflict avoidance to produce an environment in which troublesome employees are able (or enabled) to behave inappropriately for extended periods of time.

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201. *Id.* at 533–34.

202. 2009 U.S. Dist. LEXIS 30491 (E.D.N.Y. April 9, 2009).

203. *Id.* at \*80.

204. *Id.*; *see also Sarno*, 183 F.3d at 159; *Emmons v. City Univ. of N.Y.*, 2010 U.S. Dist. LEXIS 54140, \*1 (E.D.N.Y. June 2, 2010)

205. *Geoghan*, 2009 U.S. LEXIS 30491 at \*80.

206. *Id.*

207. *Id.*

Additionally, the traditional “silo” model of campus organization actually discourages academic supervisors from consulting or interacting regularly with Human Resources and legal counsel to address the increasingly complex array of personnel issues arising on campuses today. As an added factor, supervisory positions on many campuses, such as deans and chairs, are not those for which one formally prepares or trains. Instead, individuals (especially at smaller, independent schools) must assume these roles simply because it is their turn to do so. The result?

1. Performance or inappropriate conduct issues may languish, unaddressed for years, or be ignored in the hope that they will drift away. In contrast, too many issues that do receive formal attention are more likely to be addressed in an *ad hoc* manner, and actions taken in response to inappropriate conduct will be driven more by an individual supervisor’s personality (good or bad) or innate leadership skill, rather than by objective best practices that are consistent with established policies and procedures.
2. Performance or conduct issues may be erroneously evaluated through the lens of academic freedom, as opposed to applicable institutional policies and expected standards for professional conduct.
3. Policies, procedures and associated sanctions for violations are more likely to be applied in an inconsistent manner, encouraging too many employees to forum shop for the policy interpretation or application they prefer.
4. Contradictory or competing responses regarding expected standards of workplace conduct produce unnecessary ambiguity and confusion within and across departments on campus.
5. The inconsistent application of policies and resultant confusion actually empower troublesome employees to continue their inappropriate conduct for an extended period of time, and contribute to increased legal exposure for the institution.

Effective compliance with federal law, such as the ADA and other campus risk management concerns, means that campuses no longer can afford—either legally or strategically—to continue this culture of “non-supervision supervision.” Instead, a new approach is required: the development of a culture of engaged supervision, supported by a campus-wide system that promotes the infusion of supervisory best practices all across an institution’s managerial spectrum. A culture of engaged supervision requires the development of effective, ongoing programs for *all* campus supervisors, programs that stress the critical role and impact supervisors can have on the implementation of institutional objectives. Consistent use of best practices all across the managerial spectrum will empower administrators to better manage inappropriate conduct and

troublesome behavior, as well as to lessen institutional legal risk that might otherwise result from actions taken by well-meaning but ill-prepared supervisors. This system will succeed only if we ensure that an administrative “toolbox” is placed in the hands of every administrator with supervisory responsibility, a toolbox that enables them to: 1) understand that effective supervision is not an inherent talent, but is skill-based and requires continuous refinement; 2) approach supervisory responsibilities in a preventive manner by identifying troublesome employees at a much earlier stage and working with Human Resources and legal counsel to develop practical options to manage or correct the difficult behavior; 3) think about decision-making in a more holistic way and recognize that patterns of inappropriate conduct which are not satisfactorily addressed in one department likely will have institution-wide strategic and legal consequences<sup>208</sup>; and 4) be cognizant of the personal characteristics one brings to the supervisory role and the impact of those characteristics on decision-making, including the ability to address and manage conflict.<sup>209</sup>

Let’s consider how a new culture of engaged supervision can influence the management of troublesome conduct in the following situation. Professor A has been a tenured member of the faculty for five years. The prior president actively recruited Professor A, believing that her national

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208. This holistic approach is in concert with an increased emphasis on the concept of enterprise risk management, which requires institutions to focus on the broader nature of institutional risk involving the strategic, financial, operational, compliance and reputational aspects of the institution. *See* Ass’n of Governing Bds. of Univs. & Colls. & United Educators, *The State of Enter. Risk Mgmt. at Colls. & Univs. Today*, available at [http://www.agb.org/sites/agb.org/files/u3/AGBUE\\_FINAL.pdf](http://www.agb.org/sites/agb.org/files/u3/AGBUE_FINAL.pdf); *see also* E. Gordon Gee, *A Call to (Link) Arms*, *PRESIDENCY MAG.* Spring 2009. In remarks delivered at the American Council on Education 2009 Robert H. Atwell Lecture, President Gee stated that “[w]e must move from thinking vertically to thinking horizontally,” and help campus constituencies initiate new types of collaborations, and “establish much richer partnerships” that enable them to work as allies, not adversaries. Though President Gee’s remarks were focused on the role that faculty could and should play, such horizontal thinking also creates a more effective platform for legal counsel, Human Resources and supervisors to address troublesome employees’ behavior. *Id.*

209. Engaged, reflective supervisors take the time to consider the personal characteristics, interests and goals they bring to the process of supervision. For example, is the position of dean or chair the best use of one’s skills and strengths? Will one who assumes a supervisory role have both the physical *and* emotional stamina to confront the personnel challenges that arise on a daily basis? Are supervisors prepared to carefully distinguish between being a friend and being a professional colleague? The personal characteristics one brings to a supervisory role also include one’s “emotional intelligence”—the varying levels of self-control, persistence, or the ability to motivate oneself, which inform the emotional habits we develop—and use—during decision-making. Research regarding intelligence places emotion “at the center of aptitudes for living,” helping us know whether we are able to “rein in emotional impulse; to read another’s innermost feelings; [or] to handle relationships smoothly . . . .” DANIEL GOLEMAN, *EMOTIONAL INTELLIGENCE: WHY IT CAN MATTER MORE THAN IQ* (Bantam Books 2006). Cognizance of one’s emotional intelligence is essential to reflective supervision and can be a potent predictor of potential success or failure in the management of daily challenges.

reputation as a researcher would enhance the University's Biology Department and its programs. Though Professor A's work and interaction with others during her first two years on campus were promising, her conduct toward colleagues and students on campus has become increasingly rude, contentious, and unpredictable. Students regularly began to complain that they did not feel free to ask questions in class or to meet with her during posted office hours for fear of being verbally attacked and told that their questions were either stupid or a waste of her time. A number of students also alleged that when they tried to discuss their concerns, Professor A retaliated by lowering their grades.

Colleagues complained that Professor A used department or faculty senate meetings to denigrate their work publicly. More often than not, Professor A refused to attend department meetings, claiming that this type of service was trivial and significantly detracted from the time that should be devoted to her research. Over the last two years, Professor A also started to dress in a more eccentric manner, left inappropriate notes or photos in faculty offices, engaged in public confrontations at campus faculty events, and regularly dismissed her classes or labs thirty to forty minutes early.

It is important to note that during the past six years, Professor A's department has had four department chairs—none of whom ever before served in a supervisory or managerial capacity. Each of the prior chairs found Professor A extremely difficult to work with; she ignored e-mails, voicemails, and other requests to communicate about department and student issues. In a conversation with one prior chair two years ago, Professor A unexpectedly disclosed that she had been on medication for depression most of her life, but stopped filling the prescription four years ago because she felt the medication impaired her ability to concentrate while at work. She then suggested a release from her teaching responsibilities in order to produce a more stress-free environment in which to conduct research. Other than telling Professor A that her request "was not in keeping with the nature of her appointment," the chair never followed up on this conversation with Professor A, nor did he share this information with Human Resources or the Provost.

Over the course of the past year, the Provost worked with the current chair<sup>210</sup> in an attempt to "rehabilitate" Professor A's relationship with her colleagues and students. Nevertheless, no formal or systematic process to accomplish this ever was implemented because the Provost's attention was continuously diverted to institutional financial concerns and student retention.

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210. In this scenario, the Provost happens to be working closely with the department chair. However, in large public or private institutions, it is understood that the department chair would be working on this matter with a dean for the division, school or college in which Professor A received her faculty appointment.

The current chair has the least seniority in the department. She has been easily intimidated by Professor A's conduct and does not know how to address Professor A's angry outbursts, her condescending manner when conversation does occur, or her refusal to complete departmental responsibilities expected of full-time faculty. During a recent meeting with the Provost, the current chair said:

You know, she's nuts! Everyone on campus believes this. Just look at her conduct over the years; no normal person behaves this way. Other members of the department are increasingly alarmed and fearful. So, I decided to ask a couple of colleagues in the Psychology Department to give me a sense of what they think is wrong with her. Their response: Professor A is a "classic" example of someone with a bipolar illness and associated personality disorder. Finally, we now know what is wrong with her! But, nobody seems to want to do anything about Professor A's conduct because her research and scholarship are viewed as being so valuable to this institution.

The Provost had to admit the institutional dilemma posed by Professor A. On the one hand, the caliber of Professor A's research has, until more recently, brought national recognition and distinction to the University and its Biology programs. On the other hand, Professor A's daily conduct and interactions with those on campus are intolerable. Further, according to the Provost, "What if her conduct worsens, or what if Professor A really is ill; how long can she reasonably sustain her current level of scholarship? I suppose I can no longer hope that she will resign and move on to another university."

What do we know at this point?

1. Professor A's perceived national reputation placed her on a faster track to the attainment of tenure at the university. In many ways, the Promotion and Tenure Committee believed its collective hands were tied. The Committee did not have enough specific evidence to make a negative recommendation five years ago, and the "glimmers" of concern that may have existed for several on the Committee were not enough to sustain a negative recommendation at the Provost, President, or Board levels. Further, the number of turnovers of department chair in the Biology Department during the past several years has made any sustained post-tenure review virtually impossible.
2. Professor A's inappropriate conduct has continued unchecked for well over two years. In fact, we have reason to believe that, absent Professor A's own understanding of what constitutes civil or professional behavior, she never received notice from any campus supervisor that her conduct was unacceptable or in violation of university policy.

3. Both the Provost and the current chair appear to be at a loss regarding how to proceed, whether by personal intervention or through some other formal University procedure, including administrative leave or even termination of tenure.
4. There is no indication that any department chair or the Provost has consulted with Human Resources or legal counsel during the past five to six years to discuss options to manage Professor A's troublesome behavior or identify any potential legal risks for the University.
5. Despite Professor A's disclosure two years ago of her lifelong treatment for depression, no documentary evidence of the diagnosis from her physician has been provided to the University. And, the only mention of anything resembling a request for accommodation also occurred two years ago when Professor A suggested she be relieved of her teaching duties.
6. Solicited and unsolicited opinions on campus regularly characterize Professor A as "nuts," a classic case of bipolar disorder, and one with whom "you don't want to tangle." This view, in combination with the Psychology Department's recent "diagnosis" of Professor A, has meant that she, as a result, has been permitted to chart her own course of conduct.

The Provost, concerned and alarmed by Professor A's conduct, the lack of department chair supervisory effectiveness over the last several years, and the legal implications of the Psychology Department's involvement in the matter, reached out to Human Resources and legal counsel, asking them to help her identify next steps. Their recommendations:

1. Develop a clear, accurate and thorough chronology that candidly answers the question, "How did we get here?" This chronology must identify all the facts—good, bad and ugly—as well as any information gaps. The Provost must speak with the current and former department chairs, each of whom must be completely forthcoming, and provide the Provost with any notes, formal and informal memos, recollections of conversations with Professor A about the performance of her duties, inappropriate conduct, or mental health issues. Legal counsel should review all of this information with the Provost to assess actual or potential legal implications. The Provost also should count on legal counsel to provide assistance in moving this process along, educate reluctant supervisors about short and long-term legal concerns, and address supervisor anxieties about any perceived impact of Professor A's conduct on them.
2. The Provost should consult with Human Resources and legal counsel to assess whether Professor A's conduct poses a threat to

her own health and safety or that of others on campus. If there is a reasonable basis to believe that such is the case, immediate medical and/or psychiatric assistance should be sought regarding how to talk with Professor A about her continued presence on campus and/or ongoing medical concerns and treatment. Too often there is a tendency to think that because someone “always acts that way,” the need to address the conduct may not be urgent. Recent tragedies at Virginia Tech,<sup>211</sup> Northern Illinois University,<sup>212</sup> and the University of Alabama at Huntsville<sup>213</sup> provide hard lessons to the contrary.

3. The Provost must review the job description for full-time faculty at the University, especially for members of Professor A’s department. If no formal job description exists—and this often is the case—the Provost must work with the department chair and/or the division dean to identify the essential functions full-time faculty are expected to perform (e.g., teaching, scholarship, service on/off campus, student advising). The essential functions must be viewed in relation to the actual activities in which Professor A has engaged—or been permitted to engage—over the last several years. For example, if the primary emphasis at the University is on teaching, but Professor A was hired to focus on research, will it be necessary or productive for the Provost to redirect Professor A’s attention to her teaching? As an additional issue, the Provost must consider the long-term consequences of any exceptions made for Professor A on the integrity of a faculty job description (e.g., the cohesion of those essential functions), as well as exceptions that may be requested by other faculty.
4. If Professor A has not been able to perform the established essential functions of a full-time faculty member, the Provost must be prepared to: 1) ensure that Professor A has a clear understanding of what those essential functions are; 2) work with Professor A to identify the reasons why the essential functions are not being met; 3) review any current or prior requests by Professor A to modify those essential functions for medical reasons—thereby implicating the interactive process under the ADA. All of these issues must be fully addressed *before* any discussion of options that include some

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211. Virginia Tech Review Panel, *Mass Shootings at Virginia Tech: Report of the Review Panel* (2010), available at <https://www.governor.virginia.gov/TempContent/techpanelreport.cfm>.

212. U.S. Fire Admin., *Technical Report Series No. 167: Northern Illinois Univ. Shooting* (2008), available at [https://www.usfa.dhs.gov/downloads/pdf/publications/tr\\_167.pdf](https://www.usfa.dhs.gov/downloads/pdf/publications/tr_167.pdf).

213. *Biology Professor Charged with Murder in Alabama Shooting*, CHRON. OF HIGHER EDUC. (2010), available at <https://chronicle.com/article/Biology-Professor-Charged-W/64194/>.

form of discipline or termination of tenure.<sup>214</sup>

It also will be necessary for the Provost to assess whether an emphasis on teaching by the current or former department chairs actually contributed in any way to Professor A's troublesome behavior. That is, were all department chairs who supervised Professor A during the past several years aware of the conditions of employment established at the time Professor A was hired (e.g., the focus on research/scholarship as opposed to the typical tenure track appointment)? Even if it is determined that ambiguity or confusion regarding the nature of her appointment existed and resulted in unmanaged conflict with Professor A, the Provost must now, on a go-forward basis, keep Professor A focused on compliance with the university's established standards of conduct that apply to all faculty on campus in relation to that appointment.

Bottom line: The Provost must be absolutely clear and candid with Professor A regarding 1) ongoing duties and responsibilities as a tenured member of the faculty; 2) expected compliance with university standards of conduct; and 3) the time frame within which compliance will be expected to occur.<sup>215</sup> The meeting with Professor A should include the Director of Human Resources (or another confidential employee) who will be present as an objective observer and to take notes.<sup>216</sup>

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214. The actions of the Provost, in consultation with Human Resources and legal counsel, constitutes an advanced, and thorough, application of what we call the "Can't vs. Won't" analysis: Is an employee not performing because he or she can't or because he or she won't? If the answer is the former, carefully consider what training, resources, etc., should have been, or can be, provided to enable the employee to comply with established policies/procedures or to perform one's duties and responsibilities. Once these administrative obligations have been met, the burden shifts to the employee to perform his or her work in accordance with clearly articulated standards.

Effective application ensures: (a) the maintenance of the integrity of applicable policies and procedures; (b) identification of any/all critical information gaps; and (c) the prevention of conduct/action by the institution that may serve as a distraction to the underlying inappropriate conduct—and ultimately, as a death-blow to the implementation of an effective resolution. As we know, absent issues that pose an immediate health and safety issue, toxic or inappropriate conduct on campus typically is provided an exceptionally inordinate amount of time to "ferment"—becoming more toxic and more complicated with each passing day. Effective application of the Due Diligence Checklist (discussed further below) and the "Can't vs. Won't" analysis have the effect of supplanting rash or *ad hoc* responses with a more thorough approach to promote and sustain positive, productive outcomes—over the short *and* long-term.

215. The time frame for improvement must be fair and realistic. On the one hand, Professor A is a professional and the University should be able to expect her compliance with clearly articulated and fair conduct standards. But, even if we assume that Professor A did not understand these standards or believed they did not apply to her, once the University provides Professor A with notice of non-compliance, adequate time (e.g., within the first two weeks following notice) must be given to Professor A to ask any follow-up questions, or to permit supervisors to eliminate any ambiguity regarding the application or interpretation of the policy.

216. In order for the Provost to stay focused on the information that must be conveyed to Professor A, The Human Resources Director should be present as an



The Provost is faced with a number of bad facts. First, prior chairs either ignored Professor A's request for accommodation or did not recognize the need to initiate the interactive process when Professor A suggested she be relieved from her teaching duties. Even if it ultimately were shown that such an accommodation was neither warranted nor reasonable, the discussion would have begun the process of "calling the question" regarding Professor A's behavior and established a more productive framework for the review of what is expected of a tenured member of the faculty. Second, the current chair's request for a "diagnosis" by the Psychology Department and the ongoing characterization of Professor A as "nuts" by colleagues created harmful distractions for the University.<sup>217</sup> Instead of keeping focused on Professor A's inappropriate conduct and non-compliance with established standards of conduct, the conduct by the department chair and others permitted the focus to shift to the University's potential non-compliance with requirements under the ADA. Third, the continuous turnover of department chairs in the Biology Department signaled a concern that was broader and deeper than the conduct of Professor A. Many, if not all, of those who held the position of department chair very likely did not receive the type of formal preparation or training considered essential to address the personnel issues, and the associated conflict, they were expected to manage on a daily basis. The result: increased conflict and lack of workable, sustainable resolutions.

Using the always popular "Shoulda, Woulda, Coulda" analysis, let's consider not only what the Provost might have done to prevent (or better manage) the cascade of troublesome conduct involving Professor A, as well as what can be done to prevent similar issues from arising in the future. The first and most fundamentally important step is to make a commitment to a broad-based culture of engaged supervision on campus. As noted earlier, this culture promotes the infusion of supervisory best practices all across an institution's managerial spectrum and the development of an administrative toolbox that serves as a practical daily guide for effective

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objective observer and to take notes—notes which can be provided to Professor A, if requested, and to serve as effective documentation of the type and level of notice provided. Should the Provost happen to veer off track or off message, a well-prepared Human Resources Director can ask to see the Provost outside the room for a couple of minutes—time to provide additional support and permit the Provost to refocus on the information that must be unambiguously conveyed to Professor A.

217. One of the most important arguments for the promotion of an engaged, holistic approach to supervision, as suggested in this article, is the prevention of *ad hoc* responses or poor preparation that create unnecessary distraction—distractions that shift the focus from the inappropriate or troublesome conduct of an employee to the ill-advised or inappropriate conduct of the institution and its representatives. Here, the department chair's engagement of Psychology Department colleagues to diagnose Professor A clearly was ill-advised and reflected inadequate supervisory preparation—an error that serves as distraction from her inappropriate conduct and likely could result in a potential claim by Professor A that the University regarded her as disabled.

management and decision-making. The administrative toolbox we propose includes the following:

1. Creation of a Due Diligence Checklist. The regular, ongoing use of this Checklist at *all* levels of supervisory responsibility creates a common language and greater clarity in the identification of issues; improves communication within and between departments; eliminates confusion and ambiguity—both of which can create or exacerbate conflict; serves as a valuable signal that concerns will be addressed early, with clarity and consistency; lessens the inclination toward *ad hoc*, ineffectual responses that may be contrary to policy and procedure, and/or increases the likelihood of legal risk. The essential components of the Checklist are the following:
  - a. How did we get here? We must be able to answer this question *before* we can identify where we can/need to go. The answer to this question also helps us identify an essential chronology, fundamental issues, and any “gaps” that may create distractions from the underlying conduct at issue.
  - b. What do I know? We must gather all necessary, relevant information and documentation *before* issuing a response. We also must be attentive to all relevant “back-stories” that actually may drive the troublesome behavior at issue.
  - c. What documents do I have? What emails, notes, memos, contracts, etc., exist? Is anything “hidden?”
  - d. What policy has been implicated? Our examination at this point requires us also to determine whether such policies have been consistently applied; whether the relevant policies are up to date and legally compliant; and whether any past practices have “trumped” current policy.
  - e. With whom should I speak—immediately? For example, does the conduct at issue pose a threat to health and safety? Does the conduct involve potential discrimination, such that legal counsel, Human Resources, and/or other administrative leaders should be consulted before further action is taken?
  - f. What options/effective next steps exist? At this point, we must be able to identify options to ensure the short and long-term management of the matter at hand, the prevention of legal exposure, and the targeted support required by affected departments. Preparation and effective collaboration are key.
2. Creation of a Culture of Supervisory Effectiveness. This should be done at all levels of supervisory responsibility and requires a

commitment to the ongoing preparation and development of supervisory best practices to ensure a reflective, holistic and engaged approach to supervision. For example, supervisory best practices programs must focus on hiring, evaluation and discipline (including termination)—three areas that cause special problems, both personally and professionally, for supervisors. Absent sufficient preparation, the *ad hoc* or inconsistent actions taken by supervisors in these areas actually may serve to increase the likelihood of institutional legal exposure, rather than to lessen the conduct of troublesome employees.<sup>218</sup> Consider the following:

- a. Hiring. Too many hiring decisions are made without taking sufficient time to ensure that: 1) clear and consistently applied hiring policies are in place; 2) job postings and position descriptions accurately reflect institutional needs *and* the essential functions of the position; 3) training is provided to all involved in the search process regarding appropriate interview questions, as well as verbal and electronic communications with candidates; and 4) search committees understand the risk management reasons underlying criminal background and reference checks (especially for adjunct faculty who may be conducting online courses or who are not regularly on campus).
- b. Evaluations. Too many supervisors are uncomfortable with the evaluation process and what actually is required to effectively manage the personnel problems that arise. Supervisors who are conflict avoidant or simply unwilling to “call the question” regarding troublesome behavior produce evaluations that are inaccurate or incomplete, delaying the management of that conduct. Therefore, effective evaluations must: 1) be based on a supervisor’s first-hand knowledge and provide a realistic assessment of an employee’s work for a specified period of time; 2) never come as a surprise or be used as a threat or punishment; and 3) be continuous in order to reflect successes, failures or other performance issues. Human Resources and legal counsel can provide supervisors with valuable support and insight in the preparation of effective evaluations.
- c. Discipline. It is critical for all supervisors to conduct a “Can’t vs. Won’t Analysis”: Is an employee not performing because he or she can’t or because he or she won’t? If the

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218. Links to valuable resources that discuss additional best practices and in-service programs are available in the NACUA database of conference outlines and resources. See NACUA, <http://www.nacua.org> (last visited Feb. 13, 2011).

answer is the former, carefully consider what training, resources, etc., should have been, or can be, provided to enable the employee to adequately perform one's duties and responsibilities. Once these obligations have been met, the burden shifts to the employee to perform his/her work in accordance with clearly articulated standards. If some form of progressive discipline is required, supervisors must: 1) not procrastinate; 2) be clear regarding what is expected and specific regarding which standards have not been met; 3) be consistent in the application of policies and procedures; 4) ensure that adequate documentation is prepared; and 5) provide for timely and meaningful follow-up.

Supervisors also must be aware of the ongoing tension between the legal ability to impose some form of discipline and the political will to do so. That is, supervisors must be prepared to understand how their actions and recommendations will be received and supported (or not) all the way up the decision making chain.

3. "Smarter" Use of Resources, such as Human Resources and Legal Counsel. Ensure that productive relationships are developed with legal counsel and Human Resources to provide supervisors with the necessary support: 1) to assess the major issues and patterns of conduct that contribute to troublesome behavior and potential legal risk for the institution; 2) the development of policy, its review and implementation; and 3) through the conduct of regular in-services.
4. Incorporate Dispute Resolution Techniques into One's Daily Work. Understand the nature and scope of available dispute resolution tools to manage and resolve conflicts *before* they develop into formal disputes. For example, conflict coaching can be used as a daily part of one's supervisory work to assist supervisors to better understand the nature of conflict, the means to manage it, and the communications behaviors that either exacerbate or resolve workplace disputes.<sup>219</sup>

The availability of the administrative toolbox to the Provost does not mean that Professor A's behavior never would have materialized. However, the broad-based, consistent use of these tools by the Provost and Professor A's department chairs over the past several years certainly would have permitted the University the opportunity to identify issues of concern much earlier, intervene where necessary, and craft sustainable options for

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219. See TRICIA S. JONES & ROSS BRINKERT, *CONFLICT COACHING: CONFLICT MANAGEMENT STRATEGIES AND SKILLS FOR THE INDIVIDUAL* (Sage Publications 2008).

resolution.

#### IV. CONCLUSION

The increasingly complex array of personnel issues on campuses too often has bewildered or stymied supervisors who have been ill-equipped to address them. A widespread culture of “non-supervision supervision” leaves academic administrators at all levels of the managerial spectrum without the necessary tools to effectively address these matters. We know that personnel issues and associated conflict are not likely to lessen in complexity anytime soon. Instead, troublesome employees will populate campuses for years to come. These facts make it imperative for campuses to adopt a new culture of holistic engagement that provides supervisors with the skills necessary to prevent, or at least better manage, the immediate impact of an individual’s troublesome behavior while also tending to the broader, long-term legal and strategic implications of that conduct across departments and constituencies. In addition, supervisory best practices programs adopted by campuses must include ongoing attention to the: 1) selection, promotion and/or support of individuals who are committed to the new culture of holistic engagement; 2) utilization of a due diligence approach as a daily part of one’s supervision; 3) refinement of skills and best practices in hiring, evaluation and, where necessary, discipline; 4) promotion of additional support through the development of productive, ongoing relationships with legal counsel and Human Resources; and 5) tangible and harmful consequences of conflict avoidance. Supervisors who receive a substantive grounding and a better understanding of the wide range of practical options available to them, via models for improved communications and the incorporation of dispute resolution skills into their daily work, will be empowered to address troublesome conduct and manage campus conflicts more productively, and at a much earlier stage.<sup>220</sup> In sum, an engaged, holistic approach to supervision means that the conduct of troublesome employees will not result in supervisory paralysis, or be viewed simply as a part of the fabric of departmental life until the employee chooses to leave or retires. Instead, a culture of holistic engagement encourages prevention, effective management, and the active, coordinated development of options to resolve

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220. We recommend that supervisors add the following to their resource libraries: Douglas Stone, Bruce Patton & Sheila Heen, *DIFFICULT CONVERSATIONS: HOW TO DISCUSS WHAT MATTERS MOST* (Penguin Group USA 1999); Kerry Patterson, Joseph Grenny, Ron McMillan, & Al Switzer, *CRUCIAL CONVERSATIONS: TOOLS FOR TALKING WHEN STAKES ARE HIGH* (McGraw-Hill Professional 2002); Kerry Patterson, Joseph Grenny, Ron McMillan, & Al Switzer, *CRUCIAL CONFRONTATIONS: TOOLS FOR RESOLVING BROKEN PROMISES, VIOLATED EXPECTATIONS AND BAD BEHAVIOR* (McGraw-Hill Professional 2004). These readings serve as a valuable introduction to the nature of the dispute resolution tools that can be incorporated into one’s daily work.

troublesome conduct—no matter what the nature of that troublesome conduct may be. The outcome: confident supervisors, containment of legal exposure, and greater time to focus on the implementation of institutional strategic goals.

# AFTER HITECH: HIPAA REVISIONS MANDATE STRONGER PRIVACY AND SECURITY SAFEGUARDS

VADIM SCHICK\*

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## INTRODUCTION

Protection of personal information is emerging among the top priorities for college and university administrators. Congress and federal agencies are consistently strengthening requirements for safeguarding privacy and security of personal information.<sup>1</sup> Academic medical centers and all other

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institutions of higher education who are “covered entities” under the Health Insurance Portability and Accessibility Act of 1996 (HIPAA)<sup>2</sup> are particularly affected by this trend.<sup>3</sup>

The last two years saw the most dramatic increase in federal regulation of patient privacy since HIPAA was enacted in 1996. The Health Information Technology for Economic and Clinical Health (HITECH) Act, part of the American Recovery and Reinvestment Act of 2009 (ARRA), was primarily intended to incentivize the healthcare industry to switch from paper to Electronic Health Records (EHRs). It is a monumental effort, one which would not succeed without ensuring the privacy and security of Protected Health Information (PHI), as such protected data is defined under HIPAA, contained on the newly created digital records. Therefore, the HITECH Act also introduced substantial changes to HIPAA and the related regulations (including the HIPAA Privacy and Security Rules)<sup>4</sup> limiting covered entities’ disclosure rights and mandating stronger safeguards for the safety and privacy of electronic PHI (e-PHI).

Colleges and universities are among the institutions most vulnerable to a data privacy breach.<sup>5</sup> According to the Department of Education, “[c]omputer systems at colleges and universities have become favored targets because they hold many of the same records as banks but are much

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1. See, e.g., Health Information Technology for Economic and Clinical Health (“HITECH”) Act Pub. L. No. 111-5, §§ 13001–424, 123 Stat. 226 (2009). In fact, on December 1, 2010, the Federal Trade Commission released its findings on Internet privacy, along with a “privacy framework” which will include FTC’s guidance regarding best practices in data protection; this privacy framework is expected to be the basis of a broader legislative action, championed by both Democratic and Republican members of Congress. See, e.g., Edward Wyatt, *Agency Proposes Privacy as Default for Online Data*, N.Y. TIMES, (Dec. 1, 2010), available at <http://www.nytimes.com/2010/12/02/business/media/02privacy.html?hp>; Wendy Davis, *Stearns' Privacy Bill Calls For Self-Regulation, FTC Oversight*, Online Media Daily (Mar. 7, 2011), available at [http://www.mediapost.com/publications/?fa=Articles.showArticle&art\\_aid=146280](http://www.mediapost.com/publications/?fa=Articles.showArticle&art_aid=146280).

2. Health Insurance Portability and Accessibility Act of 1996 (“HIPAA”), Pub. L. No. 104-191, 110 Stat. 1936.

3. See Joseph Goedert, *OCR Boosting Security Enforcement*, HEALTH DATA MANAGEMENT (May 12, 2010), [http://www.healthdatamanagement.com/news/privacy\\_security-40268-1.html](http://www.healthdatamanagement.com/news/privacy_security-40268-1.html).

4. 45 C.F.R. 160, 164 (2010).

5. Mark Hrywna, *Nonprofits and Data Breaches*, NONPROFIT TIMES (July 1, 2007), available at <http://www.nptimes.com/07Jul/npt-070701-2.html>; Dan Toughey, *Consolidating Campus Commerce is All in the Cards*, [http://www.touchnet.com/web/download/attachments/15433814/TouchNet\\_eBook .pdf](http://www.touchnet.com/web/download/attachments/15433814/TouchNet_eBook.pdf) (last visited Mar. 6, 2011).



easier to access.”<sup>6</sup> In 2010, a significant portion of the major data breaches in the healthcare sector was reported by university hospitals and medical centers.<sup>7</sup> Georgetown University Hospital, NYU Hospital Center, University of San Francisco, and University of Florida are among many medical and research institutions which reported a data breach this year.<sup>8</sup> These breaches were reported to HHS because of the new breach notification mandates under the HITECH Act, which went into effect on September 23, 2009.<sup>9</sup>

While understanding and complying with the breach notification requirements should be a top priority for the institutions of higher learning subject to the rule, this article will focus on a different set of HITECH Act-related regulations. Pursuant to the HITECH Act, on July 14, 2010, the Secretary of Health and Human Services (HHS) issued the notice of proposed rulemaking mandating significant new safeguards for collection, storage, disclosures and disposal of PHI. This notice of proposed rule making will affect every institution of higher education which is also a HIPAA-covered entity or business associate. This paper cannot present a complete and exhaustive study of all the implications of the new HIPAA Privacy and Security rules for colleges and universities. However, it should provide a useful overview and summary of such updates, and alert the readers to the importance of ever-evolving and expanding regulatory protection for healthcare information privacy, as well as the heightened penalties for violation of such regulatory protections.

More specifically, Section I of this paper addresses applicability of HIPAA and the HIPAA Privacy and Security Rules (“HIPAA Rules”) to post-secondary institutions. Section II examines the recent statutory and regulatory restrictions on collection, use and disclosure of PHI. Section III explores NPRM’s updated enforcement provisions. Finally, Section IV focuses on the effects of the new regulatory environment on colleges and universities and suggests a few crucial practices and procedures that the affected organizations need to implement in order to comply with the new regulations.

## I. APPLICABILITY TO COLLEGES AND UNIVERSITIES

### A. HIPAA

HIPAA regulates “covered entities,” which include health care providers

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6. Family Educational Rights and Privacy; Final Rule, 73 Fed. Reg. 74,806, 74,843 (Dec. 9, 2008).

7. *Breaches Affecting 500 or More individuals*, Office of Civil Rights, Department of Health and Human Services, available at <http://www.hhs.gov/ocr/privacy/hipaa/administrative/breachnotificationrule/breachtool.html>.

8. *Id.*

9. See 45 C.F.R. 160, 164 (2010).

who transmit any health information in electronic form, health plans, and health care clearinghouses.<sup>10</sup> The HIPAA Privacy and Security Rules oblige covered entities to safeguard the privacy of PHI and to honor security standards regarding patient information maintained in electronic form.<sup>11</sup> The HITECH Act extended many of the requirements of HIPAA and HIPAA Rules to business associates, which include persons and organizations performing functions or activities on behalf of, or certain services for, a covered entity that involve the use or disclosure of PHI.<sup>12</sup>

Colleges and universities mostly fall under the category of “covered entities” under HIPAA, either as health care providers or as health plans. However, colleges or universities and medical centers can also act as business associates in instances where such entities provide services to health care providers, including health information exchange (HIE) or similar data sharing or storage services. In turn, college and university medical centers and hospitals who are HIPAA covered entities engage many business associates including outsourced IT services providers, vendors of EHR and other healthcare IT technology, data processors and many other related organizations.

#### B. FERPA vs. HIPAA

Any university with a medical school, medical center, hospital, or a university health insurance plan most likely qualifies as a covered entity. Perhaps less obviously, some schools with on-campus clinics may be subject to the HIPAA rules also. Student clinics at colleges and universities are not necessarily subject to HIPAA and the related HIPAA Rules. The Family Educational Rights and Privacy Act<sup>13</sup> (“FERPA”) applies to most public and private postsecondary institutions and to the education records of the students of such institutions. Student treatment records fall under “education records” and are governed by FERPA, rather than HIPAA.<sup>14</sup> For example, notes from a college or university psychologist’s treatment of a student are not subject to HIPAA Rules, but to the relevant privacy rule under FERPA.<sup>15</sup> However, most institutions of higher education operate on-campus clinics not only for their students but

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10. 45 C.F.R. § 164.501 (2010).

11. 45 C.F.R. §§ 160, 164 (2010).

12. 45 C.F.R. § 160.103 (2006); HITECH Act, Pub. L. No. 111-5, § 13401(a), 123 Stat. 241, 260 (2009).

13. 20 U.S.C. § 1232g; 34 C.F.R. pt. 99 (2010).

14. *See* 45 C.F.R. §§ 160.103(2)(i), (2)(ii) (2010) (exceptions to the definition of “protected health information”).

15. *See* U.S. DEP’T OF HEALTH AND HUMAN SERVS., FREQUENTLY ASKED QUESTIONS: DOES FERPA OR HIPAA APPLY TO RECORDS ON STUDENTS AT HEALTH CLINICS RUN BY POSTSECONDARY INSTITUTIONS? [http://www.hhs.gov/ocr/privacy/hipaa/faq/ferpa\\_and\\_hipaa/518.html](http://www.hhs.gov/ocr/privacy/hipaa/faq/ferpa_and_hipaa/518.html) (last visited Feb. 24, 2011).

also for employees, staff, faculty, members of the local community, or the public in general. HIPAA Rules will apply to the protected health information of all nonstudents and such institutions will be “subject to both *HIPAA* and *FERPA* and . . . are required to comply with *FERPA* with respect to the health records of their student patients, and with the *HIPAA* Privacy Rule with respect to the health records of their *nonstudent* patients.”<sup>16</sup>

HHS further clarified that FERPA will apply to students treated at university hospitals only if the university hospital operates the clinic or treats the student *on behalf* of the university.<sup>17</sup> More commonly, if the university hospital is treating the student as any patient, regardless of their status as a student at the university, their records will be subject to the HIPAA Privacy Rule.<sup>18</sup> While a detailed discussion of FERPA is outside of the scope of this paper, it is worth pointing out that the major difference between application of FERPA and HIPAA is that HIPAA, including the HIPAA Rules, requires a much higher level of data protection safeguards than FERPA’s non-binding recommendations;<sup>19</sup> and, unlike FERPA, the HIPAA Rules now include far-reaching breach notification mandates.<sup>20</sup>

### C. Hybrid Entities

Finally, some colleges and universities will qualify as “hybrid entities” under the HIPAA Rules.<sup>21</sup> A hybrid entity is a single legal entity which is a covered entity, whose business activities include both covered and non-covered functions; and that designates the health care component in accordance with 45 C.F.R. §160.504(c)(3)(iii).<sup>22</sup> A hybrid entity must designate any component that would meet the definition of a covered entity as if it were a separate legal entity, but such designation is purely internal (although it must be in writing and accessible if audited by HHS).<sup>23</sup> A hybrid entity must ensure that its health care component complies with the applicable provisions of the HIPAA Rules, including, *inter alia*, not disclosing PHI to another component of the covered entity if the Rule

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16. *Id.*

17. U.S. DEP’T OF HEALTH AND HUMAN SERVS., FREQUENTLY ASKED QUESTIONS: DOES FERPA OR HIPAA APPLY TO RECORDS ON STUDENTS WHO ARE PATIENTS AT A UNIVERSITY HOSPITAL?, *available at* [http://www.hhs.gov/ocr/privacy/hipaa/faq/ferpa\\_and\\_hipaa/519.html](http://www.hhs.gov/ocr/privacy/hipaa/faq/ferpa_and_hipaa/519.html) (last visited Feb. 24, 2011).

18. *Id.*

19. Family Educational Rights and Privacy, 73 Fed. Reg. 74,806, 74,843–44 (Dec. 9, 2008) (describing the non-binding nature of the Department of Education’s recommendations on breach notification and implementing privacy and security safeguards to protect educational records).

20. 45 C.F.R. § 164.404 (2011).

21. 45 C.F.R. § 164.103 (2010) (definition of “hybrid entity”).

22. 45 C.F.R. §§ 164.103, 164.504 (2010).

23. 45 C.F.R. §§ 164.105(a)(iii)(C), 164.105(c)(i) (2010).

would prohibit such disclosure if the two components were separate and distinct legal entities and protecting e-PHI as if the two components were separate and distinct legal entities.<sup>24</sup>

## II. HITECH ACT AND HHS REGULATIONS

The HITECH Act includes numerous measures aimed to strengthen patient privacy safeguards and protections, including new breach notification requirements, limitations on disclosures of PHI, significant increases in penalties, and greater enforcement efforts by HHS. In this paper, however, we will focus on only a few key changes included in the HITECH Act and expanded upon in the regulations issued by the Office of Civil Rights (OCR) of the Department of Health and Human Services on July 14, 2010 (2010NPRM).<sup>25</sup> OCR has jurisdiction over both HIPAA Privacy and HIPAA Security Rules, after the responsibility for enforcement of the Security Rule was transferred to OCR from the Centers for Medicare and Medicaid Services on August 3, 2010.<sup>26</sup>

### A. New Requirements and Restrictions Regarding Disclosures of PHI

#### 1. Disclosures to a Health Plan

While individuals could request certain restrictions on the use or disclosure of their PHI, covered entities were not obligated to accept such requests under the original HIPAA Privacy Rule.<sup>27</sup> However, § 13405 of the HITECH Act restricts a covered entity's right to refuse an individual's request not to use or disclose such individual's PHI in instances where "the disclosure is to a health plan for purposes of carrying out payment or health care operations (and is not for purposes of carrying out treatment);" and the PHI "pertains solely to a health care item or service for which the health care provider involved has been paid out of pocket in full."<sup>28</sup>

OCR's comments in the 2010 NPRM expose some of the practical difficulties that providers will encounter in complying with this rule. OCR solicited comments on whether and how health care providers must notify pharmacies (especially as e-prescribing becomes more and more prevalent) and subsequent treating providers of such restriction by the patient.<sup>29</sup> The 2010 NPRM also references situations where a patient may not be able to

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24. 45 C.F.R. §§ 105(a)(ii)–(iii) (2010).

25. Modifications to the HIPAA Privacy, Security, and Enforcement Rules Under the HITECH Act, 75 Fed. Reg. 40,868 (July 14, 2010) [Hereinafter 2010 NPRM].

26. Press Release, U.S. Dep't of Health and Human Servs., *HHS Delegates Authority for the HIPAA Security Rule to Office for Civil Rights*, available at <http://www.hhs.gov/news/press/2009pres/08/20090803a.html>.

27. 45 C.F.R. §§ 164.522(a)(1)(i)–(ii).

28. HITECH Act, Pub. L. No. 111-5, , §§ 13401(a), 13405(a), 123 Stat. 241, 260, 264 (2009).

29. 2010 NPRM, 75 Fed. Reg. at 40,899.

pay for a procedure or service out-of-pocket (e.g., instances where providers are paid by an HMO).<sup>30</sup>

The HITECH Act requires covered entities to account for disclosures of PHI even to carry out treatment, payment and health care operations. All such disclosures must be accounted for if the disclosure was made “through an electronic health record.”<sup>31</sup> However, HHS has delayed issuing regulations on this major new mandate, thereby leaving it out of the scope of this paper.<sup>32</sup>

## 2. “Minimum Necessary” Disclosure Standard

Section 13405 of the HITECH Act also requires covered entities, when using or disclosing PHI, or requesting PHI from another covered entity, to limit “to the extent practicable” disclosure of PHI to the “limited data set” as defined under HIPAA,<sup>33</sup> or, if more information is “needed,” to the minimum necessary “to accomplish the intended purpose of such use, disclosure, or request, respectively[.]”<sup>34</sup> The Act retains all the current exceptions to the existing minimum necessary disclosure standard (including disclosures made for treatment purposes and disclosure required by law)<sup>35</sup> and does not apply to use, disclosure or request of de-identified PHI.<sup>36</sup> The Act calls on HHS to issue guidance defining the “minimum necessary” standard, but the 2010 NPRM merely requests comments on such standard.<sup>37</sup>

## 3. No Sale of PHI Without Authorization

Both the HITECH Act and the 2010 NPRM mandate that covered entities obtain an individual’s authorization prior to selling (or receiving remuneration for) his or her PHI.<sup>38</sup> Importantly, OCR decided not to require covered entities to state in the authorization whether PHI will be sold in the future because the recipient of such PHI would have to obtain an authorization prior to selling this PHI again.<sup>39</sup> The Act and OCR carve out eight exceptions with respect to disclosures of PHI for:

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30. 2010 NPRM, 75 Fed. Reg. 40,868, 40,900 (July 14, 2010).

31. HITECH Act, § 13405(c)(1), 123 Stat. at 266; 45 C.F.R. § 164.528(a)(1)(i) (2010).

32. *See, e.g.*, HIPAA Privacy Rule Accounting of Disclosures Under the Health Information Technology for Economic and Clinical Health Act; Request for Information, 75 Fed. Reg. 23,214 (May 3, 2010).

33. 45 C.F.R. § 164.514(e)(2) (2006).

34. HITECH Act, Pub. L. No. 111-5 § 13405(b)(1)(A), 123 Stat. 241, 264–65 (2009).

35. *Id.* at § 13405(b)(3), 123 Stat. at 265.

36. *Id.* at § 13405(b)(4), 123 Stat. at 265.

37. 2010 NPRM, 75 Fed. Reg. 40,868, 40,896 (July 14, 2010).

38. HITECH Act, § 13405(d), 123 Stat. at 267.

39. 2010 NPRM, 75 Fed. Reg. at 40,890–91.

1. Public Health activities (as defined under HIPAA), including a covered entity's or business associate's disclosure PHI in a "limited data set" for public health purposes;<sup>40</sup>
2. Research, if the price paid for PHI reflects the costs of preparation and transmission of PHI;<sup>41</sup>
3. Treatment and payment purposes;<sup>42</sup>
4. Sale, transfer, merger or consolidation of all or part of the covered entity and due diligence related to such activity,<sup>43</sup> as well as health care operations;<sup>44</sup>
5. Activities that the covered entity's business associate undertakes covered by an applicable business associate agreement;
6. Providing an individual with a copy of the individual's PHI pursuant to HIPAA regulation 164.524;<sup>45</sup>
7. To comply with applicable laws;<sup>46</sup> and
8. Instances where remuneration to the covered entity or business associate does not exceed the cost of preparing and transmitting such PHI.<sup>47</sup>

The HITECH Act also limits a covered entities' ability to use PHI for marketing purposes, with certain exceptions including for treatment of the individual and case management and care coordination, and allows patients to opt-out of receiving certain marketing communications.<sup>48</sup> Furthermore, the HITECH Act and the 2010 NPRM require covered entities sending fundraising communications to provide recipients with a "clear and conspicuous" opportunity and a "simple, quick, and inexpensive way" to opt-out of receiving future communications, explaining that such opting-out will not affect future treatment of the individual.<sup>49</sup> While such additional restrictions are outside the scope of this paper, they serve as a worthy reminder about the strengthening regulatory grip over healthcare

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40. *Id.* at 40,891.

41. OCR requested comments to determine such "costs." *Id.*

42. OCR added "for payment purposes" to make sure that paying for treatment does not qualify as a "sale" of PHI. 2010 NPRM, 75 Fed. Reg. 40,868, 40,891 (July 14, 2010).

43. 45 C.F.R. § 164.501 (2010) (found under definition of "health care operations" (6)(iv)).

44. 2010 NPRM, 75 Fed. Reg. at 40,891.

45. 45 C.F.R. 164.524 (2010) ("Access of Individuals to Protected Health Information").

46. 2010 NPRM, 75 Fed. Reg. at 40,892.

47. *Id.*

48. HITECH Act, Pub. L. No. 111-5, § 13406, 123 Stat. 241, 268 (2009).

49. 2010 NPRM, 75 Fed. Reg. 40,868, 40,896 (July 14, 2010), *citing in part*, HITECH Act, § 13406(b).

providers' handling of protected patient data.

#### B. Access to PHI Contained in an EHR

Upon a patient's request, the HITECH Act requires covered entities to produce a copy of such patient's PHI in electronic format, and if the individual so chooses, to transmit the copy directly to an entity or person designated by the individual, provided the request is "in writing, signed by the individual, and clearly identif[ies] the designated person and where to send the copy of protected health information."<sup>50</sup> The Act limits the fee a covered entity may charge the patient for such an electronic record to the labor costs in responding to the request for the copy (or summary or explanation).<sup>51</sup> The 2010 NPRM broadens the applicability of this rule to all e-PHI, regardless of whether it is stored in an EHR.

OCR's comments make it clear that OCR expects a covered entity or business associate to provide the patient with a copy of his or her e-PHI if it is readily producible, or, if not, in a readable electronic format as agreed to by both parties (e.g., e-mail, secure web-based portal, USB drives or other portable electronic media). Interestingly, OCR requires covered entities to safeguard the shared e-PHI, meaning providing copies only via secure portals or on encrypted disks or other storage media. OCR also allows a covered entity to charge the requesting patient for the cost of an encrypted USB drive containing his or her PHI.<sup>52</sup> However, "if an individual requests that an electronic copy be sent via unencrypted e-mail, the covered entity should advise the individual of the risks associated with unencrypted e-mail, but the covered entity would not be allowed to require the individual to instead purchase a USB flash drive."<sup>53</sup>

It is also worth noting that providing patients with copies of their PHI is not only a requirement under HIPAA, it is also an important objective for those college and university medical centers or hospitals seeking to achieve "meaningful use" in order to capitalize on the HITECH Act's significant incentives for "meaningful" EMR users, as defined in the HITECH Act and the related HHS regulations.<sup>54</sup> The relevant metric requires that eligible hospitals and professionals provide at least "50 percent of all patients who request an electronic copy of their health information . . . within 3 business

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50. *Id.* at 40,902.

51. HITECH Act, § 13405(e), 123 Stat. at 268 (2009).

52. 2010 NPRM, 75 Fed. Reg. at 40,902.

53. *Id.* The access requirement drew much attention in February 2011 when OCR issued its first fine for willful neglect of this requirement. This case is addressed in greater detail in Section III.

54. *See, e.g.,* Medicare and Medicaid Programs; Electronic Health Record Incentive Program, 75 Fed. Reg. 44,314. (July 28, 2010). While this is an additional point regarding the importance of providing access to patients' PHI, a detailed discussion of meaningful use and the HITECH incentives is outside the scope of this note.

days.”<sup>55</sup>

### C. Business Associate Provisions

As mentioned above, the HITECH Act extends many of the requirements under HIPAA and HIPAA Rules to business associates of covered entities.<sup>56</sup> The 2010 NPRM expands the definition of “business associate” even further to include health information organizations, patient safety organizations, personal health record vendors acting on behalf of a covered entity, e-prescribing gateways, and subcontractors of business associates.<sup>57</sup> Under the 2010 NPRM, “subcontractors” means persons who act “on behalf of a business associate, other than in the capacity of a member of the workforce of such business associate.”<sup>58</sup> More specifically, subcontractors who create, receive, maintain, or transmit PHI fall under the expanded definition of business associate.<sup>59</sup>

Importantly, OCR also weighed in regarding those entities which are *not* business associates. OCR clarified that the following common transactions, among others, do not give rise to a business associate relationship: conduits for transport of PHI (with only random or infrequent access to PHI);<sup>60</sup> PHI disclosures from one covered entity to another provider about treatment;<sup>61</sup> PHR vendors offering PHRs not on behalf of a covered entity (which, though not under HHS’s regulation, are still subject to the FTC’s jurisdiction pursuant to the HITECH Act); and health plan disclosures to plan sponsors.<sup>62</sup>

OCR requires subcontractors of business associates to enter into business associate agreements (BAAs) with business associates (similar to the ones between covered entities and business associates), but clarifies that the HIPAA Rules apply to such subcontractors regardless of the existence of such a business associate agreement.<sup>63</sup> Thus, covered entities do not have to enter into separate agreements with subcontractors.<sup>64</sup>

The new regulations also require a number of changes in the BAAs themselves. Some of the required provisions include:

#### 1. Requiring the business associate to comply with the HIPAA

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55. *Id.* at 44,567.

56. HITECH Act, Pub. L. No. 111-5, § 13401(a), 123 Stat. 241, 260 (2009).

57. 2010 NPRM, 75 Fed. Reg. 40,868, 40,912 (July 14, 2010) (definition of “business associate”) (to be codified at 45 C.F.R. § 160.103).

58. *Id.* at 40,913 (definition of “subcontractor”) (to be codified at 45 C.F.R. § 160.103).

59. *Id.* at 40, 912.

60. *Id.* at 40,873.

61. *Id.* at 40,912.

62. 2010 NPRM, 75 Fed. Reg. 40,868, 40,912 (July 14, 2010).

63. *Id.* at 40,887–88.

64. *Id.* at 40,888.



Security Rule;<sup>65</sup>

2. Requiring business associates to report security incidents and breaches of PHI to the covered entity (which also applies downstream, to the business associate-subcontractor agreements);
3. Ensuring that the business associate obtains a BAA with its relevant subcontractors and that such BAA will have the same terms as the BAA between the covered entity and such business associate; and
4. A termination right for the covered entity in the event the business associate breaches the BAA or violates HIPAA; the same termination requirement should apply downstream, to the business associate's agreements with its subcontractors.<sup>66</sup> (It is worth noting here that each BAA should contain a provision requiring the business associate to return all PHI to the covered entity, in the format requested by such covered entity, upon termination of the agreement, regardless of the reason for such termination).

OCR allows covered entities, business associates and their subcontractors a one-year reprieve from the compliance date of the revised rules to continue operating under existing contracts.<sup>67</sup> Section IV will provide a brief discussion regarding the importance of updating existing BAAs or negotiating new ones, including certain terms with regard to liability, cost allocation and indemnification.

#### D. Compound Authorizations for Research

Perhaps of particular note for research universities and medical centers is OCR's proposed modification regarding conditioned and unconditioned authorizations for clinical research. The HIPAA Privacy Rule bans "compound authorizations" (i.e., where PHI-related authorization is combined with any other legal permission).<sup>68</sup> This presents a problem for clinical researchers trying to obtain a single authorization that covers use or disclosure of PHI for a research study which includes both a clinical trial and bio-specimens banking (or "tissue-banking") for future research. The current rule requires covered entities to either restrict the stored PHI to a "limited data set" or obtain multiple authorization forms from the patient-subject. The first option is troublesome because it may negatively affect the very purpose of the study by removing important, relevant information about an individual. The second option is also flawed because, as OCR pointed out, clinical trials may involve thousands of participants, and storing two sets of authorizations is a major concern, and could potentially

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65. *Id.* at 40,919–21.

66. *Id.*

67. *Id.* at 40,889–90.

68. 2010 NPRM, 75 Fed. Reg. 40,868, 40,892 (July 14, 2010) *citing* 45 C.F.R. § 164.508(b)(3)(i) (2009).

confuse the subject.<sup>69</sup>

Responding to such concerns, OCR proposed to allow covered entities to combine a conditioned authorization for use of PHI in a clinical trial with an unconditioned authorization permitting inclusion of the individual's PHI in a central repository, providing covered entities some flexibility with respect to how they meet this authorization requirement.<sup>70</sup> OCR offered several examples of how a covered entity could design an effective authorization and solicited comments on any additional ways to achieve the same result. OCR's examples included:

1. "describing the unconditioned research activity on a separate page of a compound authorization[;]"
2. "[cross-referencing] relevant sections of a compound authorization to minimize the potential for redundant language[;]"
3. "us[ing] a separate check-box for the unconditioned research activity to signify whether an individual has opted-in to the unconditioned research activity, while maintaining one signature line for the authorization[;]" and
4. "[providing] a distinct signature line for the unconditioned authorization to signal that the individual is authorizing optional research that will not affect research-related treatment."<sup>71</sup>

However, if a provider has conditioned the provision of research-related treatment on the provision of one of the authorizations, any compound authorization "must clearly differentiate between the conditioned and unconditioned components and provide the individual with an opportunity to opt in to the research activities described in the unconditioned authorization."<sup>72</sup>

Furthermore, OCR is soliciting comments regarding authorizations for future research use or disclosure of PHI, including with respect to the HIPAA Privacy Rule's requirement to use or disclose PHI only for a specific purpose (which is sometimes referred to as the "specificity requirement").<sup>73</sup> OCR agreed to reconsider the specificity requirement in light of the comments and recommendations of an HHS advisory committee.<sup>74</sup>

Even if OCR loosens the requirement for obtaining authorization for each subsequent research use of PHI, an individual will always have the right to revoke such authorization at any time, and the applicable

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69. *Id.* at 40,893.

70. *Id.* at 40,892–93.

71. *Id.* at 40,893.

72. *Id.* at 40,921.

73. 2010 NPRM, 75 Fed. Reg. 40,868, 40,894 (July 14, 2010).

74. *Id.*

authorization will have to tell the individual how to do so.<sup>75</sup>

#### E. Student Immunization Records

The 2010 NPRM allowed covered entities to send a student's or prospective student's immunization records to schools upon request (which does not have to be in writing) of such student's parent or guardian, but only if the school requires proof of immunization in accordance with applicable state or other laws.<sup>76</sup> OCR is soliciting comments regarding a wide range of issues: defining the meaning of "school," including whether post-secondary institutions should fall under this definition; applicability of FERPA to the immunization records once in possession of the school; and whether oral request (rather than written authorization) is sufficient for the covered entity to provide immunization records.<sup>77</sup>

### III. ENFORCEMENT

The HITECH Act introduced a number of very significant changes to HIPAA's Enforcement Rule.<sup>78</sup> These HITECH-mandated changes, including the increased and tiered civil money penalties, were the subject of an interim final rule released in the Federal Register on October 30, 2009.<sup>79</sup> While a detailed discussion of the enforcement interim final rule is beyond the scope of this article, it is worthwhile to review a few key changes to the Enforcement Rule mandated by the HITECH Act:

1. HHS is required to formally investigate any complaint where a preliminary investigation of the facts indicates a possible violation of the HIPAA Rules due to willful neglect, and to impose a penalty in those cases where a violation is found;<sup>80</sup>
2. Any civil money penalty or monetary settlement collected under the HIPAA Rules must be transferred to OCR, and a percentage of such civil money penalties and monetary settlements must be distributed to harmed individuals;<sup>81</sup>
3. The Act dramatically increased the civil money penalty structure

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75. *Id.*

76. *Id.* at 40,922 (to be codified at 45 C.F.R. pt. 164).

77. *Id.* at 40,895–96.

78. The "Enforcement Rule" outlines the covered entities' responsibilities with respect to cooperation in the enforcement process, provides rules governing the investigation by HHS of such compliance, establishes rules governing the process and grounds for establishing the amount of a civil money penalty, and provides procedures for hearings and appeals where the covered entity challenges HHS's finding of a violation. *See* 2010 NPRM, 75 Fed. Reg. 40,868, 40,869 (July 14, 2010).

79. HIPAA Administrative Simplification: Enforcement, 74 Fed. Reg. 56,123 (Oct. 30, 2009).

80. 2010 NPRM, 75 Fed. Reg. at 40,870.

81. *Id.*

for violations of the HIPAA Rules occurring after February 18, 2009. Such civil money penalties are tiered based on culpability. This provision is already in effect, and has been since February 18, 2009. The new civil money penalties range from a minimum of \$100 for each violation the covered entity or business associate did not know about, to a minimum of \$50,000 for each violation which such covered entity or business associate willfully neglected and failed to correct, all with an annual (January 1st through December 31st) cap of \$1,500,000.<sup>82</sup> Table 1 of the interim final rule summarizes the penalties;<sup>83</sup>

Violation Category—Section 1176(a)(1)	Each violation	All such violations of an identical provision in a calendar year
(A) Did Not Know	\$100–\$50,000	\$1,500,000
(B) Reasonable Cause	1,000–50,000	1,500,000
(C)(i) Willful Neglect—Corrected	10,000–50,000	1,500,000
(C)(ii) Willful Neglect—Not Corrected	50,000	1,500,000

Table 1—Categories of Violations and Respective Penalty Amounts Available

- Also in effect as of February 18, 2009, state attorneys general now have the authority to enforce the HIPAA Rules on behalf of their states' residents.<sup>84</sup>

The 2010 NPRM discussed herein does not modify the interim final rule, which is now in effect, but clarifies the interpretation of a few important provisions, including:

- As of February 18, 2010, business associates are subject to the Enforcement Rule “in the same manner” as the covered entities, including for actions of such business associates' agents or subcontractors;<sup>85</sup>
- In cases involving willful neglect, HHS *must*, as opposed to may, impose a civil money penalty (as opposed to mandating a corrective action plan);<sup>86</sup>
- The definitions of “reasonable cause” and “willful neglect” applicable to covered entities' or business associates' actions are

82. HIPAA Administrative Simplification: Enforcement, 74 Fed. Reg. 56,123, 56,127–28. (Oct. 30, 2009).

83. *Id.* at 56,127.

84. *Id.*

85. 2010 NPRM, 75 Fed. Reg. 40,868, 40,875 (July 14, 2010).

86. *Id.* at 40,876.

clarified.<sup>87</sup> “Reasonable cause” is modified to mean “an act or omission in which a covered entity or business associate knew, or by exercising reasonable diligence would have known, that the act or omission violated an administrative simplification provision, but in which the covered entity or business associate did not act with willful neglect.”<sup>88</sup> The new definition makes it possible for a covered entity or business associate to know that it is violating the rule, but not be subject to willful neglect penalties. Noncompliance does not rise to the level of willful neglect when, for example, such organization exercises ordinary care and prudence in trying to comply, or when the organization lacks the *means rea* or reckless indifference to complying with the applicable regulations;<sup>89</sup>

4. An exception to a covered entity’s liability for violations of the HIPAA Rules caused by its business associates in cases where a compliant BAA was in place between the two organizations is stricken, thereby imposing an additional burden on the covered entity to make sure its business associates, agents and subcontractors are performing their duties;<sup>90</sup> and
5. The nature of the violation and the nature of the harm caused by such violation are added to the list of factors determining the scope of a covered entity’s or business associate’s culpability with respect to a violation of the HIPAA Rules.<sup>91</sup>

These high numbers described above are no longer empty threats. On February 22, 2011, HHS imposed the first civil money penalty on a covered entity pursuant to the HIPAA Privacy Rule.<sup>92</sup> HHS fined Cignet Health, a Maryland health plan and healthcare provider, \$1.3 million for violating the rights of 41 patients by denying them access to their medical records after repeated requests in 2008 and 2009. HHS imposed an additional \$3 million dollar civil money penalty on Cignet for failing to cooperate in the agency’s investigation of such claims.<sup>93</sup>

Even more surprising and ominous, however, was the settlement HHS

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87. 2010 NPRM at 40,877–78.

88. *Id.*

89. *Id.* at 40,878–79. OCR provides a number of very helpful examples for what constitutes “reasonable cause” or “reasonable diligence” or “willful neglect.” *Id.* However, a more detailed discussion of this subject is beyond the scope of this article.

90. 2010 NPRM, 75 Fed. Reg. 40,868, 40,879 (July 14, 2010).

91. *Id.* at 40,880–81.

92. HHS Press Release, *HHS Imposes a \$4.3 million civil penalty for violation of the HIPAA Privacy Rule* (Feb. 22, 2011), available at <http://www.hhs.gov/news/press/2011pres/02/20110222a.html>.

93. *Id.* See also Notice of Final Determination (Feb. 4, 2011), available at <http://www.hhs.gov/ocr/privacy/hipaa/enforcement/examples/cignetpenaltyletter.pdf>.

reached that same week with Massachusetts General Hospital (“MGH”). MGH agreed to pay HHS \$1 million for 192 lost patient records from its infectious diseases clinic.<sup>94</sup> Such records contained sensitive personally identifiable data, including HIV/AIDS status and patients’ insurance information, and were lost when an MGH employee left them on a subway train.<sup>95</sup> In its investigation, HHS found that MGH did not adopt adequate privacy and security safeguards for protected information when such data have been removed from the hospital’s premises.<sup>96</sup> Unlike Cignet, the MGH example presents a much more realistic and foreseeable situation for many university hospital centers, and should serve as a reminder to all covered entities to safeguard PHI at and outside the healthcare provider’s premises and the significance of training of each member of such provider’s staff in the patient privacy protection. This should also serve as a wake-up call for even the most sophisticated institutions that civil money penalties under HIPAA are not just hypothetical.

It is also vital to keep in mind that even the harshest civil money penalties do not represent the total cost of a data breach or HIPAA violation to colleges and universities subject to such regulations. The costs of investigations and audits, calculated both in terms of dollars spent and hours dedicated, can easily exceed the amount of fines imposed by HHS. As discussed in Section IV, below, taking affirmative steps to ensure compliance and protecting the school contractually will go a long way in easing this regulatory burden and reducing (though not necessarily eliminating) the likelihood of a HIPAA violation or breach at your school.

#### IV. IMPLICATIONS FOR COLLEGES AND UNIVERSITIES

If made final, the amendments discussed in Section II will have significant practical implications for those institutions of higher education that qualify as “covered entities” or “business associates” under HIPAA. While by no means exhaustive, the list below should highlight some of the obligations and next steps for such colleges and universities to prepare for HIPAA compliance in advance of the effective date of the new rules. Eligible schools should keep in mind that many of the changes discussed in Section II are mandated by the HITECH Act. Therefore, even though HHS has not produced the final regulations regarding privacy and security of patient information, compliance with the *statutory* portions of updates to HIPAA is unavoidable.

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94. HHS Press release, *Massachusetts General Hospital Settles Potential HIPAA violations* (Feb. 24, 2011), available at <http://www.hhs.gov/news/press/2011pres/02/20110224b.html>.

95. *Id.*

96. *Id.*

### A. Determine Eligibility

As discussed in Section I, some post-secondary institutions are not “covered entities” or “business associates” under HIPAA. Yet even if some colleges and universities are not subject to HIPAA, a plethora of other data privacy laws may apply to such institutions. For example, FERPA applies to students’ educational records; GLBA<sup>97</sup> and the Payment Card Industry Data Security Standards<sup>98</sup> apply to financial and credit card information that the college or university collects, uses or stores; and state data privacy laws (most notably in such states as California, which enacted strict data protection and breach notification laws<sup>99</sup>) apply to the personal information of the organization’s employees, applicants, and board members.

### B. Assess Current Privacy Policies and Procedures

Covered entities and business associates (especially those organizations which fall under the newly expanded definition of the latter) must review their HIPAA policies and procedures to ensure they comply with the HIPAA Rules as recently amended by the HITECH Act and the resulting regulations.

Such assessments should include, but should not be limited to:

1. The administrative, physical, and technical safeguards protecting PHI resident on the school’s servers or in another form of electronic media, especially if such media (e.g., laptops, USB drives, CDs) can be taken out of the covered entity’s premises;
2. Practices with regard to collection of data from students, applicants, patients, and employees;
3. Practices with regard to disclosure of PHI to a health plan in the event a patient requests restricting such disclosure and pays for the relevant service out-of-pocket;
4. Whether any sale of PHI is restricted to only the eight exceptions proposed in the 2010 NPRM (keeping in mind that at least six of such exceptions are statutory);
5. Any affect of the new rules easing bans on compound authorizations for research use, including exemptions affecting tissue-banking and possible elimination of the specificity requirement;
6. Marketing and fundraising practices, especially if the college and university is using patient data to solicit donations;

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97. *Grahm, Leach, Bliley Act*, Pub. L. No. 106-102, 113 Stat. 1338 (1999.)

98. *See* Payment Card Industry Security Standards Council, <https://www.pcisecuritystandards.org/>.

99. *See, e.g.*, CAL. CIV. CODE §§ 1798.80–84 (West 2010); CAL. HEALTH & SAFETY CODE, § 1280.15 (West 2010).

7. Policies and practices around requesting or providing student immunization records;
8. Staff's (especially staff with access to protected health information) familiarity with applicable laws and required procedures;
9. School's preparedness for a breach, including existence of an incident response plan; and
10. Risk analysis mandated by the HIPAA Security Rule and the analysis of all gaps identified in such assessment.<sup>100</sup>

After performing the assessment, the school should implement the required changes in a timely manner, and, if necessary, provide additional data protection safeguards, including encrypting the protected data (which removes it from the coverage of most breach notification laws), and limiting initial collection of personal information (on the principle that one cannot lose what one does not have). Colleges and universities should follow the HIPAA Security Rule's requirements of limiting access by staff to data systems based on their role in the organization, thereby preventing unauthorized or unnecessary downloading, printing, or e-mailing of protected data.

Training employees in data protection is absolutely critical to safeguarding PHI and other protected personal information. Intentional data breaches at university hospitals or the affiliated hospital systems are often inside jobs. For example, Huping Zhou, a former employee at the UCLA Healthcare System, plead guilty to federal charges of breaches of patient privacy.<sup>101</sup> Zhou accessed the UCLA patient records system 323 times during a three-week period, mostly looking for the files of celebrities, after being let go by the hospital.<sup>102</sup> On April 27, 2010, Zhou was sentenced to four months in prison after pleading guilty to four misdemeanor counts of HIPAA violations, thereby becoming the first person ever sentenced to prison for violating HIPAA.<sup>103</sup> In a similar incident at UCLA Medical Center, in 2008, nurse Lawanda Jackson "pleaded guilty to selling medical-records information to a tabloid. Her targets reportedly included Britney Spears and Farrah Fawcett."<sup>104</sup>

Finally, each school should have a data breach response plan and team in place to ensure a coordinated, quick and comprehensive response to a data

100. 45 C.F.R. § 160.308(a)(1)(ii)(A).

101. Bill French, *Former UCLA Healthcare Worker Sentenced to Prison for Snooping*, NBC LOS ANGELES, April 28, 2010, <http://www.nbclosangeles.com/news/local-beat/Former-UCLA-Healthcare-Worker-Sentenced-Prison-Snooping-92265634.html>.

102. Dennis Romero, *Former UCLA Health Worker Pleads Guilty To Accessing Celebrities' Medical Records*, L.A. WEEKLY, January 8, 2010, available at <http://blogs.laweekly.com/informer/city-news/ucla-health-worker-pleads-guil>.

103. French, *supra* note 101.

104. Romero, *supra* note 102.



breach. The response team should be tasked with, *inter alia*, discovering what information the school possesses and its location; content of the lost data, and determining all applicable laws.

#### C. Review Business Associate Agreements

Both covered entities and business associates should systematically review all business associate agreements for compliance with the HITECH Act's changes to HIPAA and the HIPAA Rules. Prior to the effective date of the updated HIPAA Rules (and, indeed, prior to OCR issuing the final regulations), each new BAA should include a provision where the parties acknowledge that the terms and conditions of such BAA remain subject to any changes mandated by the upcoming final rules issued by HHS pursuant to the HITECH Act. After review, covered entities should include the newly required provisions discussed in Section II.C above, including compliance with the Security Rule and clauses regarding termination rights and return of PHI upon such termination.

Colleges and universities should pay particular attention to the provisions governing liability for violations or breaches of HIPAA or the HIPAA Rules. Costs associated with breaches of PHI, and HIPAA violations more broadly, may be very substantial because such costs include expenses associated with forensic investigations, notification of affected individuals, and attorney and consultant fees. Business associates should indemnify covered entities for all such costs resulting from a breach caused by the business associate or its subcontractors. If business associates absolutely refuse to accept this indemnification obligation, then at minimum, the BAA should provide for the party responsible for the breach or HIPAA violation to compensate or indemnify the non-breaching party, and any damages resulting from such obligation should not be subject to a general limitation of liability clause in the master or license agreement between the two entities. For example, if a business associate health IT vendor causes a major breach (e.g., loses tapes containing PHI), and the covered entity must conduct investigations, hire attorneys, and then notify its patients, the health IT vendor should indemnify the covered entity and bear the costs associated with such a breach and such costs should be specifically carved out from any applicable cap on damages. Under no circumstances should a college or university agree to indemnify their vendors or business associates, especially in cases where such indemnification provisions may affect the school's insurance coverage.<sup>105</sup>

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105. While discussion of insurance is outside the scope of this article, it is important to note that many insurance contracts will not cover any costs or damages associated with an indemnification obligation assumed by the insured. In instances where healthcare providers obtained privacy and security insurance coverage, insurance professionals within or outside your organization should review the legal provisions regarding liability and indemnification in the BAA and the underlying agreement.

#### D. Confidentiality Clauses in Vendor Agreements

BAAs are often a part of a broader, “master” agreement between a medical center and its vendor-business associate. It is important to keep in mind that each school should know its vendors and their practices, and attempt to ensure through contractual obligations that such vendors use secure technology when handling sensitive data. Most standard vendor contracts contain terms protecting the vendor’s trade secrets and restricting access to the software. However, it is rare to find similar protections for the healthcare provider. Providers should insist on mutual confidentiality obligations with strict limitations on the vendor’s use of the organization’s patient information. Some vendors insist on obtaining the right to use patient data for their internal data analytics purposes. Even if vendors promise to collect or use only limited data sets of such PHI, healthcare providers should make sure that vendors indemnify them for any breaches or losses occurring as a result of such use. However, any such data use should be carefully examined, and the agreement should clearly delineate each party’s rights and responsibilities with respect to collection, maintenance, use, destruction and return of PHI upon termination of such agreement.

This is especially important in light of changes to the existing HIPAA regime, as mandated by the HITECH Act and the accompanying regulations. Privacy and security issues are directly related to a provider’s ability to amend and/or terminate the contract for a vendor’s failure to comply with applicable laws, fair allocation of compliance costs, and requirements for vendors to enter into business associate agreements, where applicable. Healthcare providers changing their existing BAAs with vendors should also review and assess the relevant provisions in the underlying “master” or license agreements with such vendors.

#### E. Providing Copies of e-PHI

Schools should have the ability to provide a patient with a secure electronic copy of his or her e-PHI upon written request by the patient and in a format requested by the patient. This will likely require some consideration and preparation, including assessing current practices, reviewing the institution’s EMR, PHR, or other technological capabilities, creating a set of procedures and assigning staff to procure such e-copies, and training such staff in these procedures. As mentioned previously, providing patients with access to their e-PHI is also one of the core objectives for achieving “meaningful use” under the HITECH Act’s incentive payment program for adoption of electronic health records.<sup>106</sup>

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106. Medicare and Medicaid Program; Electronic Health Record Incentive Program, 75 Fed. Reg. 44,314, 44,370–722 (July 28, 2010) (to be codified at 42 C.F.R. 412, 413, 422, 495).

This will be especially crucial for those university hospitals seeking to achieve meaningful use and capitalize on the HITECH Act incentives.

#### V. CONCLUSION

Post-secondary education institutions should pay close attention to the evolving regulatory landscape in data privacy protection. The federal government considers protection of patient information a high priority, and continues to mandate additional safeguards. This is particularly true of information stored in electronic format or on electronic health records because the government looks to health IT to improve patient care and achieve major cost savings. A hospital, medical center or any other covered entity or business associate within or affiliated with a college or a university, should review and revise their existing data privacy and security policies and procedures to both comply with the new regulations as they become effective, and to achieve a broader policy goal of keeping the personal information in their possession private and secure.





# *NO LONGER SEPARATE, NOT YET EQUAL: A STUDY OF THE IMPACT OF ELITE COLLEGE ADMISSIONS WITH REGARD TO RACE, CLASS, AND SOCIAL MOBILITY*

JONATHAN ALGER\*

In an era of economic uncertainty and increasing global competition, American colleges and universities face heavy scrutiny regarding the extent to which these institutions truly serve as engines of opportunity and social mobility. These questions are especially acute for selective institutions, which serve as influential gatekeepers for future opportunities and leadership positions in a society often enamored with rankings and prestige. At a time when politicians and pundits of all persuasions freely express strong opinions and emotions on these issues with no particular evidentiary basis, it is refreshing to come across a resource from serious scholars who are attempting to shed light on the subject with real empirical data and thoughtful analysis. Thomas J. Espenshade and Alexandria Walton Radford's recently published study, *No Longer Separate, Not Yet Equal: Race and Class in Elite College Admission and Campus Life*,<sup>1</sup> is just such a resource, and is therefore a much-needed and welcome addition to the literature on this contentious and important topic. Perhaps not surprisingly in light of the topic, the authors' research methods and conclusions have themselves been the subject of considerable debate.<sup>2</sup>

As the title suggests, the study intentionally focuses on race and social class because of the particular salience of these characteristics in the ongoing national dialogue on equality of opportunity. The authors acknowledge, as the Supreme Court reiterated in *Grutter v. Bollinger*,<sup>3</sup> that

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1. THOMAS J. ESPENSHADE & ALEXANDRIA WALTON RADFORD, *NO LONGER SEPARATE, NOT YET EQUAL: RACE AND CLASS IN ELITE COLLEGE ADMISSION AND CAMPUS LIFE* (2009). Espenshade is a professor of sociology at Princeton University and Radford is a research associate in postsecondary education at MPR Associates, Inc.

2. See, e.g., Scott Jaschik, *The Power of Race*, *INSIDE HIGHER ED* (Nov. 3, 2009), <http://www.insidehighered.com/layout/set/print/news/2009/11/03/elite>.

3. See *Grutter v. Bollinger*, 539 U.S. 306 (2003).

diversity in higher education includes many factors that contribute to the whole person.<sup>4</sup> Indeed, the book includes many interesting findings related to other attributes that students bring to the admissions process (such as leadership, involvement in extracurricular activities, work experience, etc.).

The authors choose to focus on selective institutions not because they reflect the totality of American higher education (which they most certainly do not), but rather because of the particularly influential role played by these institutions with regard to opening doors to opportunity and advancement in society. The questions the authors explore include the extent to which American elite higher education promotes social mobility, the nature and extent of so-called “affirmative action” used by these institutions, and what actually happens to students while they are at these institutions. These questions go to the heart of these institutions’ educational missions and the study sheds at least some light on the key issue as to whether these institutions are in fact promoting mobility and equality of opportunity—as contrasted with reinforcing existing privileges and exacerbating inequalities.

The study is based on data provided by the National Survey of College Experience (“NSCE”) collected from eight selective academic institutions that are part of the College and Beyond database assembled by the Mellon Foundation.<sup>5</sup> The database originally included ten institutions (including public and private, and research and liberal arts institutions), but the authors decided to exclude two historically black institutions from most of this study because of the nature of the questions being raised about race and class, and because of limitations in the data from those institutions.<sup>6</sup> The individual student data involved reflects many thousands of applicants for admission in the fall of 1983, 1993, and 1997. It takes a significant amount of time to collect, organize, and analyze such data, so it should not be surprising that there is a considerable time lag in the collection of the data and publication of the study results. Nevertheless, critics are already arguing that the age of the data is itself a problem because a lot may have changed in the past thirteen years with regard to admissions practices and student attitudes and experiences.<sup>7</sup> In spite of these limitations, the database nevertheless represents a large, rich, and detailed set of records on which a variety of regression analyses were performed.

Many of the results discussed in the book will surprise few readers. Espenshade and Radford conclude, for example, that academic merit (as indicated by high school grade-point averages, class rank, and standardized

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4. *Id.* at 337.

5. ESPENSHADE & RADFORD, *supra* note 1, at 10.

6. *Id.* at 413–14.

7. See, e.g., Martin Morse Wooster, *A Weak Defense of an Obsolete Idea*, CLARION CALL (Apr. 6, 2010), [http://www.popecenter.org/clarion\\_call/article.html?id=2331](http://www.popecenter.org/clarion_call/article.html?id=2331).

test scores) is the single most important criterion used by elite institutions,<sup>8</sup> although it is by no means the only factor. The definition of merit in its totality in the admissions context is one of the key educational judgments facing selective institutions as they assemble entering classes to create overall learning environments, and it is clear from this study that factors other than numerical academic criteria play an important role in admissions decisions. For example, the research results here also suggest that student-athletes enjoy a significant and growing advantage in admissions.<sup>9</sup> These findings reflect and reinforce commonly held perceptions of the admissions process.

But to what extent are elite institutions genuinely open and accessible to individuals of varying socioeconomic backgrounds? This question has been the subject of considerable recent debate and many commentators have called on colleges and universities to do much more to ensure equal access regardless of social class and wealth.<sup>10</sup> As expected, the study shows that high family socioeconomic status (“SES”) is correlated significantly with applying to elite institutions. The reasons for this correlation are numerous and built into the fabric of our democratic, capitalist society. Students and families from such backgrounds have a variety of financial, educational, and cultural advantages at their disposal. Students born into such environments may be raised with very different expectations and role models than students from more modest financial backgrounds.

Differences in socioeconomic backgrounds are in turn also related to other characteristics that admissions offices value and that contribute to broad definitions of “merit” or “potential.” For example, students from lower socioeconomic backgrounds are less likely to engage in extracurricular activities and leadership experiences that provide a boost in admissions.<sup>11</sup> The study shows that involvement in extracurricular activities, leadership, and community service makes a significant difference in admissions, especially at private institutions.

The study also reveals that not all activities are treated equally, however. Career-oriented programs such as ROTC or co-op work programs were found to have a negative association with admissions outcomes at highly selective institutions.<sup>12</sup> This finding raises questions about the values and priorities reflected in the admissions process and will undoubtedly add fuel to the fire for critics who charge that elite institutions of higher education are politically liberal and out of touch with much of mainstream America.

In fact, the authors’ overall assessment of the role of socioeconomic

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8. ESPENSHADE & RADFORD, *supra* note 1, at 110–11.

9. *Id.* at 114.

10. See, e.g., Richard D. Kahlenberg, *Toward a New Affirmative Action*, CHRON. HIGHER EDUC. (May 30, 2010), available at <http://chronicle.com/article/Toward-a-New-Affirmative-Ac/65675>.

11. ESPENSHADE & RADFORD, *supra* note 1, at 31–36.

12. *Id.* at 129.



status in elite higher education casts considerable doubt on the extent to which selective colleges and universities are actually contributing to the American dream of economic opportunity and social mobility. The study shows that “students who attend the most selective of these institutions are an increasingly privileged subgroup of all college students.”<sup>13</sup> A rising percentage of students at these schools are coming from upper-class and upper-middle-class backgrounds. Espenshade and Radford deduce that “[i]t would not be an exaggeration to conclude that elite higher education plays an important role in the intergenerational production and maintenance of social inequality in the United States.”<sup>14</sup> Accordingly, the authors call upon selective institutions to aspire to “socioeconomic neutrality”—i.e., “they should aim to preserve the socioeconomic composition of students in their applicant pools in the social class profiles of students whom they admit, enroll, and graduate.”<sup>15</sup>

These sobering findings should prompt selective colleges and universities to reexamine their efforts and strategies with regard to providing access for students from less privileged economic backgrounds and to ensure that their own policies and practices are not magnifying and reinforcing existing inequality. As the authors point out, high tuition costs and debt burdens may discourage many students from more modest socioeconomic backgrounds from applying to, or enrolling in, selective institutions. The challenge is not limited to private institutions, as cutbacks in state aid to public colleges and universities are putting a financial squeeze on students at those institutions as well. As our society looks increasingly upon higher education as a private good rather than a public benefit, the pressures on students and families from financially disadvantaged backgrounds will only increase.

In an era of severe financial constraints in higher education, these findings have important policy and resource implications for many facets of institutional decision-making and priorities—including admissions policies and the criteria used, the availability of need-based financial aid, strategies for debt management and financial counseling, and the nature and extent of other forms of support provided to students from underprivileged backgrounds. Institutions that are serious about providing access to students from socioeconomically disadvantaged backgrounds need to do more than pay lip service to this concern. Indeed, the types of findings evident in this study will need to be carefully and honestly understood, considered and addressed, or selective institutions will run the risk of multiplying inequities that already exist. And as is true generally with regard to access and opportunity, it is not enough to pay attention to these issues only when students are coming in the door—what happens

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13. *Id.* at 338.

14. *Id.*

15. *Id.* at 383.

after they arrive on campus (and how well they are supported while in the higher education environment) is equally crucial to their success.

With regard to race, the data reveal significant differences in the academic profiles of successful applicants at selective institutions. Asian students had the highest high school grades, class rank, and standardized test scores of all admitted students, whereas black students had the weakest numeric academic credentials. According to Espenshade and Radford, the data from the institutions studied show that:

Black applicants receive a boost equivalent to 3.8 ACT points at public NCSE institutions and to 310 SAT points (out of 1600) at private institutions, on an all-other-things-equal basis. The Hispanic advantage is less than one ACT point at public schools and equal to 130 SAT points at private institutions.<sup>16</sup>

The data also show, however, that broad racial and ethnic labels can hide a great deal of heterogeneity that must be unpacked to be properly understood.<sup>17</sup> For example, many black students admitted to these selective institutions were first or second-generation students in the United States (particularly at private institutions). In other words, they were not direct descendants of slaves in the United States.<sup>18</sup> Similarly, labels such as “Hispanic” or “Asian” ignore significant differences among sub-groups and individuals within those very broad categories. With its focus on holistic, individualized review—rather than bluntly stated, broad categories that mask all kinds of distinctions within them and that fail to account for the growing number of students who identify themselves as being multiracial—Justice O’Connor’s decision in *Grutter v. Bollinger* provides a useful guidepost for institutions seeking to take a more nuanced approach to complex issues of race.<sup>19</sup>

Nevertheless, critics of race-conscious affirmative action policies will point to the data here to bolster their argument that race is being used in a way that leads to the admission of academically less qualified students at these selective institutions.<sup>20</sup> Espenshade and Radford’s own assessment, however, is that race-conscious measures at selective institutions give students from historically underrepresented groups “a greater likelihood of graduating than if they attended a less selective college or university.”<sup>21</sup> They claim that their data fails to support the so-called “mismatch

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16. *Id.* at 127.

17. *Id.* at 128.

18. *Id.* at 150.

19. See *Grutter v. Bollinger*, 539 U.S. 306, 337 (2003).

20. See, e.g., Russell K. Nieli, *How Diversity Punishes Asians, Poor Whites and Lots of Others*, MINDING THE CAMPUS (July 12, 2010) [http://www.mindingthecampus.com/originals/2010/07/how\\_diversity\\_punishes\\_asians.html](http://www.mindingthecampus.com/originals/2010/07/how_diversity_punishes_asians.html); Patrick J. Buchanan, *Bias and Bigotry in Academia*, WorldNetDaily (July 19, 2010), <http://www.wnd.com/index.php?fa=PAGE.view&pageId=181357>.

21. ESPENSHADE & RADFORD, *supra* note 1, at 258.

hypothesis” (i.e., the theory that minority students are done a disservice by race-conscious measures because they are placed into settings where they are not adequately prepared for the level of academic competition they will face) and that greater institutional selectivity is associated with greater retention and graduation rates for all students.<sup>22</sup> While students from underrepresented groups may sometimes have lower grade-point averages than other students at these selective institutions, Espenshade and Radford argue that the long-term benefits of educational attainment, occupational status, and earnings outweigh this risk. In short, they conclude that “affirmative action, which enables more underrepresented minority students to gain access to selective colleges than would a race-blind admission policy, appears to help more than harm minority students’ futures.”<sup>23</sup>

The study also provides useful insights into the interrelationships of class and race. For example, among the students at these selective institutions, “[w]hites and Asians are consistently the most socioeconomically advantaged, while Hispanic and black students are by comparison more disadvantaged.”<sup>24</sup> Moreover, “[p]arents of white and Asian students consistently have more education than black and Hispanic students’ parents.”<sup>25</sup> These types of results have led some commentators to argue that increased attention to class-based affirmative action will help to lessen (or perhaps even eliminate) the need for race-conscious measures in admissions.<sup>26</sup> Most institutions of higher education purport to care about both of these facets of diversity and the data do not seem to suggest that class is a perfect substitute or proxy for race. Indeed, the authors conclude here that race-conscious measures are still necessary, at least in the short term, to ensure racial diversity at selective institutions. They argue that their own statistical simulations underscore the findings of previous researchers who have determined that “income-based policies are not an effective substitute” for race-conscious measures.<sup>27</sup> Given the legal necessity to analyze race-conscious measures and race-neutral alternatives on an ongoing basis, however, the kinds of questions asked by Espenshade and Radford may be useful to institutions seeking to study the impact and effectiveness of their own admissions criteria.

Espenshade and Radford’s work is noteworthy in that it goes beyond admissions data to look critically at how undergraduates engage with race

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22. *Id.* In this respect, the findings in this study are similar to the conclusions set forth in an earlier landmark study by the former presidents of Princeton and Harvard on the consequences of considering race in admissions at selective colleges and universities. See WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER* (1998).

23. ESPENSHADE & RADFORD, *supra* note 1, at 262.

24. *Id.* at 152.

25. *Id.* at 153.

26. See, e.g., Kahlenberg, *supra* note 10.

27. ESPENSHADE & RADFORD, *supra* note 1, at 358.

and ethnicity once they are on campus. Critics of affirmative action policies in higher education have long discounted the educational benefits of diversity by arguing that students from various groups self-segregate once on campus and have very little meaningful cross-racial interaction in or outside the classroom.<sup>28</sup> The results from this study provide a decidedly mixed picture on this subject, although there are certainly some encouraging signs that cross-racial interactions are occurring and gradually increasing over time. For example, “[n]early one-third of white students report having taken at least one course in African American, Latino, or Asian American studies.”<sup>29</sup> Nearly one-third of white students reported participating in ethnic extracurricular events or celebrations and more than ten percent belonged to a student organization oriented toward issues related to a particular race or ethnicity other than their own.<sup>30</sup> More than sixty percent of students indicated that they socialized “often or very often” with classmates from other races.<sup>31</sup> Roughly half had a roommate from a different race or ethnic background (an experience that correlates with a much greater likelihood of future additional cross-racial interactions for students) and a similar proportion had a close friendship with other-race classmates.<sup>32</sup> On the other hand, the data also show that “the amount of social contact within racial and ethnic groups is far greater than that between groups.”<sup>33</sup>

Once again, Espenshade and Radford do not simply report the data. They discuss the policy implications for institutions that are striving to obtain educational benefits from student body diversity both in and outside the classroom. They argue that the research suggests that fostering intergroup relations through general socializing and residential rooming arrangements can lead to meaningful cross-racial experiences. The data suggest that informal opportunities to interact may have a powerful impact, as “[s]tudents who report that they socialized often or very often with other-race classmates are more than three times as likely to report a substantial amount of learning from other-race peers.”<sup>34</sup> Similarly, curricular and extracurricular offerings focused on issues related to race and ethnicity can provide opportunities for students to learn across racial lines in a safe learning environment. The authors suggest that mandatory community service activities can also play a constructive role in encouraging people to interact across racial and ethnic lines, as well as in providing incentives that encourage diverse student organizations to co-

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28. *Id.* at 176–225.

29. *Id.* at 222.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 222–23.

34. *Id.* at 314.

sponsor events.<sup>35</sup>

Finally, the data reinforce the premise that population availability matters in fostering cross-racial experiences.<sup>36</sup> This finding underscores the importance of efforts to achieve a “critical mass” of students from historically underrepresented groups on campus in order to foster the educational benefits of diversity, as discussed by the Supreme Court in the *Grutter* decision.<sup>37</sup>

If institutional leaders believe that diversity has educational benefits for all students and that this aspect of the educational experience is a crucial part of the mission of their institutions, then they need to be intentional about fostering cross-racial engagement through a variety of means. These educational benefits are not automatic. Paying attention to diversity at the admissions stage alone is not enough to create a rich cross-racial learning environment. While many students may already be having such experiences and recognizing them as being a valuable part of their education, the data also demonstrate that not all students readily grasp such opportunities or believe them to be important. Students can be encouraged to think about the ways in which they each contribute to a robust learning environment, and faculty members can be provided with resources and information about how to engage more diverse classes of students in meaningful ways. In an era in which assessment and accountability are being incorporated into all aspects of higher education, colleges and universities should be analyzing the effectiveness of their diversity-related initiatives on an ongoing basis.<sup>38</sup>

So where do we go from here? To their credit, Espenshade and Radford do not simply provide a long list of statistics and regression analyses. Instead, they go beyond the data to propose specific steps to address nagging issues of inequality of opportunity. Based on their conclusion that “[t]he racial gap in grades, test scores, and other measures of the skills, abilities, and knowledge that children acquire is arguably the most pressing domestic issue facing the United States at the beginning of the twenty-first century,”<sup>39</sup> they conclude their book with a stirring call to action. They point out that the racial gap in academic performance is linked to most adult forms of social and economic inequality, as well as to the competitiveness of the United States workforce in a global economy. Therefore, Espenshade and Radford call for nothing short of a “declaration of war on the root causes,” rather than public policies focused merely on

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35. *Id.* at 392–94.

36. *Id.* at 224.

37. *Grutter v. Bollinger*, 539 U.S. 306, 329–30 (2003).

38. See, e.g., Peter Schmidt, *New Research Complicates Discussions of Campus Diversity—in a Good Way*, CHRON. HIGHER EDUC. (Feb. 5, 2010) (discussing additional research on whether and how racial and ethnic diversity produces educational benefits).

39. ESPENSHADE & RADFORD, *supra* note 1, at 398.

the symptoms of the underlying problem.<sup>40</sup> They propose a “Manhattan Project” for the behavioral and social sciences, which they label “the American Competitiveness and Leadership Project” (“ACLP”), to accomplish two aims:

- (1) to identify the causes and cumulative consequences of racial gaps in academic achievement and (2) to develop concrete measures that can be taken by parents, schools, neighborhoods, and the public sector all working together to close the gaps on a nationwide scale.<sup>41</sup>

Emphasizing the urgency of a strategic national approach to these issues, they assert that “[w]e should not be satisfied with demonstrated success in small-scale, localized projects.”<sup>42</sup>

The scope of the project recommended by Espenshade and Radford is dramatic and daunting, especially at a time when ambitious national goals and projects seem to create inherent suspicions of big government run amok and when constrained financial resources seem to inhibit major infrastructure projects of any sort. Their comparison to a national Manhattan Project for peaceful purposes is bold and visionary:

Like the Manhattan Project, the ACLP will of necessity involve interdisciplinary teams of researchers at multiple sites of universities and research institutes around the country. And like the Manhattan Project, the ACLP will be an important element of our national self-defense viewed broadly.<sup>43</sup>

Espenshade and Radford call for the monitoring of a large birth cohort, perhaps as many as 50,000 children, and point out that useful findings could emerge quickly “because racial gaps develop in the first few years of life.”<sup>44</sup> They argue that the benefits of such a project could be enormous for our society, since so many other major social challenges (crime, welfare, health care, etc.) have significant roots in the racial achievement gap.

The authors’ conclusions should help serve as a wake-up call to policy makers and educators throughout the country with regard to the urgency to understand and address persisting, fundamental inequities in our society. While progress has been made in many respects with regard to expanding opportunity in American higher education, this research makes clear that much work remains to be done. Espenshade and Radford declare that local, piecemeal approaches alone will not be sufficient to tackle these large societal issues and that “[t]ime alone is an unreliable ally” in light of rapidly increasing global competition and the relatively slow pace of

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40. *Id.* at 403.

41. *Id.* at 403.

42. *Id.*

43. *Id.* at 404.

44. *Id.*

change to date in overcoming racial achievement gaps.<sup>45</sup>

Espenshade and Radford are not exaggerating when they assert that the nation's economic future and national security are dependent upon addressing these major issues. Our diverse human capital may be our most important and valuable strategic asset, but it can only be fully utilized if individuals from all backgrounds have the opportunity to develop their skills and intellects to their full potential. As Justice O'Connor stated eloquently in *Grutter*, "the diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity."<sup>46</sup> This language could apply with equal force to social class as well as race, as well as to other barriers that stand in the way of true equality of opportunity.

The thoughtful work of Espenshade and Radford represented in this significant volume should be just the beginning of the next phase of the ongoing national conversation about the role of higher education in providing equality of opportunity and social mobility. This book provides a useful framework for additional research and policy development. Additional research is needed on the impact of the full array of institutions in American higher education, not just on the most selective institutions. Most of all, this study should serve as a reminder to all of us in higher education to focus our energies on the missions of our institutions as they relate to the democratic society of which we are a part, and on the ways in which we can and should contribute to the study and analysis of the biggest and most complex issues of our time.

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45. Thomas J. Espenshade & Alexandria Walton Radford, *A New Manhattan Project*, INSIDE HIGHER ED (Nov. 12, 2009), <http://www.insidehighered.com/views/2009/11/12/radford>.

46. *Grutter v. Bollinger*, 539 U.S. 306, 331 (2003).

# BUILD IT AND THEY WILL PUBLISH FINDING AIDS: THE MATURING OF HIGHER EDUCATION LAW

MICHAEL A. OLIVAS\*

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## INTRODUCTION

How does one measure the arrival of an academic field of study? Who can certify a developed area of law practice? How do we recognize that a specialization is fully formed? In the area of academic law, it is surely the appearance of instructional materials, ripened into casebooks. There is an astonishing rise of casebooks and other instructional materials in developing fields, some of which did not even exist as fields of study when I was in law school in the late 1970's, or in my early teaching years (at least as measured by the manifest evidence that they were fields, or the appearance of casebooks). Some examples are: terrorism and national security law,<sup>1</sup> animal rights law,<sup>2</sup> alternative dispute resolution and negotiation/mediation law,<sup>3</sup> food and drug law,<sup>4</sup> the many subjects of health law,<sup>5</sup> and intellectual property law.<sup>6</sup> Each of these fields, as well as

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1. See, e.g., VICTORIA SUTTON, *LAW AND BIOTERRORISM* (2003).  
2. See, e.g., DALE D. GOBLE & ERIC T. FREYFOGLE, *WILDLIFE LAW: CASES AND MATERIALS* (2002).  
3. See, e.g., R. HANSON LAWTON & RUSSELL L. WEAVER, *CONTEXTUAL NEGOTIATION: FACILITATED PROCEDURES AS ADVANCED NEGOTIATION* (2006).  
4. See, e.g., PETER J. COHEN, *DRUGS, ADDICTION, AND THE LAW: POLICY, POLITICS, AND PUBLIC HEALTH* (2004).  
5. See, e.g., WILLIAM E. ADAMS, JR., MARY ANNE BOBINSKI, MICHAEL L. CLOSEN, ROBERT M. JARVIS & ARTHUR S. LEONARD, *AIDS: CASES AND MATERIALS* (3d ed. 2002).



many others I could single out, have casebooks (and the respective law school courses),<sup>7</sup> organized sections of the American Bar Association or other professional organizations, including NACUA,<sup>8</sup> specialized journals such as the one you are reading,<sup>9</sup> and other formal evidence of being developing, legitimate fields of inquiry. Scholars of knowledge dissemination and organizational networks—themselves the avatars of developing fields of study—note that all new fields go through these same stages of infancy and maturity,<sup>10</sup> and I have considered them healthy signs that the legal academy is evolving and maturing.

Not all of these are salutary developments. Observers may believe them to be a sign of the excesses of the liberal state or, alternatively, evidence of a vast right-wing conspiracy, but the academic marketplace will only allow such developments if there is a place for them. In sum, people write casebooks (or instructional books, across disciplines) to establish a field, to subdivide a field, to put their own personal and pedagogical stamp upon a field, or for a variegated mixture of these motivations. Note that I do not include economic gain among the motivations, although that can result once in a while; indeed, truth be told, most casebook efforts violate minimum wage laws in the end. Carving out a specialized field of legal study can lead to lucrative consulting, litigation, or pro bono opportunities, but I believe that a profit motive is the least likely reason for undertaking such initiatives and the least likely result.

By this logic, finding tools, treatises, concordances, encyclopedias, and manuals are indisputably markers of a fully ripe and developed field of practice. By any of these markers, higher education law is, like many of its practitioners, in its middle age, meaning wiser and more nuanced than it was in its early years. As a result of my long labors in these fields, I am on virtually every listserv or mailing list there is, and I get many unsolicited

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6. See, e.g., KEITH AOKI, *SEED WARS: CONTROVERSIES AND CASES ON PLANT GENETIC RESOURCES AND INTELLECTUAL PROPERTY* (2008).

7. See MICHAEL A. OLIVAS, *THE LAW AND HIGHER EDUCATION: CASES AND MATERIALS ON COLLEGES IN COURT* (3D ED. 2006); JUDITH AREEN, *HIGHER EDUCATION AND THE LAW: CASES AND MATERIALS* (2009).

8. In my field of higher education law, for example, the D.C.-based National Association of College and University Attorneys (NACUA) provides many organizational tools and resources. For more information see their official website at <http://www.nacua.org> (last visited February 7, 2011). Happy 50th birthday, NACUA.

9. The *Journal of College and University Law*, for example, is jointly published by the University of Notre Dame Law School and NACUA. It is a hybrid, refereed and student-edited law review, on whose editorial board I serve. For more information see their official website at <http://www.nd.edu/~jcul> (last visited February 7, 2011).

10. See generally JOHN C. SMART, KENNETH A. FELDMAN & CORINNA A. ETHINGTON, *ACADEMIC DISCIPLINES: HOLLAND'S THEORY AND THE STUDY OF COLLEGE STUDENTS AND FACULTY* (2000) (study of academic disciplines and knowledge production theory). For a discussion of faculty research and discovery particularly see *id.* at ch. 1 ("Academic Disciplines and Academic Lives").

notices about published materials, although there is no one centralized, integrated repository or purveyor of these materials. As a service to the field, I have gathered several of the most promising in this review essay, and will endeavor to explain their place in the firmament of higher education finding tools and reference materials. Remarkably, each has something to recommend, and several are likely to be of great use to practitioners—a group in which I include faculty in all fields who write or teach in the area of higher education law writ large, campus administrators with these functions under their purview, policymakers at the state and federal level who influence postsecondary education policy or law, organizational actors in non-governmental organizations and associations that serve the field in some fashion, and the extended constellation of professionals with this polity in their sights.

I. *ENCYCLOPEDIA OF LAW AND HIGHER EDUCATION*,  
EDITED BY CHARLES J. RUSSO (SAGE, 2010)<sup>11</sup>

Charles Russo, who holds both a doctorate and a law degree, is one of the more prolific law and education scholars. And with his many years of editorial service and leadership in educational organizations, he has the reach to assemble the first Encyclopedia of Law and Higher Education, which struck me at first glance as an unnecessary tool, an opinion I reversed when I read it more carefully. While it will likely not appear on many personal desks, it should be found in many libraries as a useful and well-conceived reference guide. It covers the waterfront of important topics, and provides short summaries of each topic, with a bibliography of important cases, statutes, and reference materials. Most of the entries are by academics and most of them in Educational Administration departments. Topics include: **Cases:** Affirmative Action and Race-Based Admissions, Disability, Faculty Issues, Finance and Governance, Gender Equity, Religion and Freedom of Speech; **Concepts, Theories, and Legal Principles:** Academic Freedom, Copyright, and Tenure; **Constitutional Rights and Issues:** Affirmative Action, Due Process, and Equal Protection Analysis, among others; **Faculty Rights:** Academic Freedom, Collective Bargaining, and Tenure, among others; **Organizations and Institutions:** American Association of University Professors, Boards of Trustees, and Unions on Campus, among others; and **Primary Sources:** excerpts from “Landmark U.S. Supreme Court Cases,” Religion and Freedom of Speech, Statutes, Students Rights and Welfare, and Technology.

Simply listing these here shows the difficulty in any such taxonomy, which in this instance is both over-inclusive (religion lurks almost everywhere) and under-inclusive (virtually no immigration or international issues, and no USA-PATRIOT Act, despite the rising significance of each). Almost all of the entries are crisply written and annotated, and some are

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11. *ENCYCLOPEDIA OF LAW AND HIGHER EDUCATION* (Charles J. Russo, ed., 2010).

quite good given the space limitations inherent in the genre. The treatment of the various statutes is particularly efficacious, although I believe these thumbnails would have been better to have been sprinkled throughout the subject matter areas, rather than being cordoned off. Given the overlap of the subject matter, some topics appear almost too much, but my review of almost two dozen of the entries showed them to be authoritative and useful—surely the most important criteria in writing such a finding tool. For any revision, sure to be in the planning stages, I would urge that the large categories be better conceptualized and tightened. As two of many examples, it would never occur to me to look up “grading practices” in the area of Governance and Finance, or “tenure” as a Concept, Theory, and Legal Principle. In fact, I would tighten the category of Concept, Theory, and Legal Principle and scatter its pieces to their proper sections, since they confuse in their current standalone status.

Notwithstanding these quibbles, the Russo Encyclopedia is a useful reference document, especially if one does not wish to plow through the encyclopedic William Kaplin and Barbara Lee treatise, *The Law of Higher Education*, in which many if not most of these topics appear at more length and in more integrated fashion.<sup>12</sup> But that text is two volumes, with a likely supplement, and it has its own internal issues, as I noted in a laudatory review of the volume.<sup>13</sup> With over 550 pages, the Russo volume is hardly a *Nutshell*, but it will be an efficacious finding tool for many who just want a reference or note for the complex practice of college law.

II. *THE COLLEGE ADMISSIONS OFFICER'S GUIDE*, EDITED BY BARBARA LAUREN (AMERICAN ASSOCIATION OF COLLEGIATE REGISTRARS AND ADMISSIONS OFFICERS, 2008)<sup>14</sup>

While we are on the topic of encyclopedias, I note that there is no single style in the genre, and the definition would extend to this handy and specialized version, which is encyclopedic in its coverage of various admissions and registrar functions—as befits a volume published by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). Here, the editor Barbara Lauren, like Charles Russo, holds both a doctorate and a law degree.<sup>15</sup> Her approach, more focused upon the

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12. WILLIAM A. KAPLIN & BARBARA A. LEE, *THE LAW OF HIGHER EDUCATION* (4th ed. 2006).

13. Michael A. Olivas, *Higher Education Law Scholarship and the Key to All Mythologies*, 33 J.C. & U.L. 591 (2007) (book review).

14. *THE COLLEGE ADMISSIONS OFFICER'S GUIDE* (Barbara Lauren, ed., 2008) [hereinafter *GUIDE*].

15. Disclaimer: Lauren and I were Georgetown Law classmates and reconnected a dozen years after graduation when she moved to AACRAO. Also, I authored the chapters on prepaid tuition plans, Michael A. Olivas, *State Savings Plans and Prepaid Tuition Plans: A Reappraisal and Review*, in *GUIDE* *supra* note 14 at 41, and on undocumented students, Michael A. Olivas, *The DREAM Act and In-State Tuition for Undocumented Students*, in *GUIDE* *supra* note 14 at 337.

front-end issues of admissions, was to solicit forty-four longer essays, ten to twelve pages in length, in the following areas: Foundational Issues in Admissions, Recruiting in Different Settings, Marketing Tools, Outreach to Various Populations, International Students, Admissions Processing, Measurements and Placements, Graduate and Professional Level Admissions, Data and Institutional Research, and Professional Development. In contrast to the Russo approach, she largely invited practitioners to write the chapters, and it shows. These are very detailed, sometimes too much so, but with real bite and sage advice. My favorites (above the authoritative ones on prepaid tuition plans and undocumented students)<sup>16</sup> are the entries in Section I: Data and Institutional Research, where one learns about “rolling the data” which, it turns out, is not something that you would do at a Dylan or Stones concert, but a not-intuitively-obvious method of queuing applications.<sup>17</sup>

But a review of all the entries excites and delights. As just two examples, I had never given much thought to how home-schooled applicants are shoehorned into all the square holes of admission; this is an embarrassing admission (no pun intended), inasmuch as I work with many registrars and admissions officials to accommodate the round pegs of undocumented students, and so should be aware of how other, more mainstream admits do not come in one size.<sup>18</sup> In addition, Chapter 34, on law school admissions, was also excellent. Even though I have spent much of my professional life studying legal education and admitting law students, as well as conducting pre-law programs and encouraging undergraduates to apply to law school, I learned several new tricks by reading the Anne M. Richard entry.<sup>19</sup>

Because admissions and registrar officials can become isolated and overwhelmed with the sheer amount of work, a resource such as this is a useful tool, if supplemented with updated materials and additional detail. Sometimes, the devil (and God) are in the details, as where Chapter 34 counsels taking the LSAT once,<sup>20</sup> when an increasing number of students take it multiple times. In truth, applicants are widely disregarding this advice. In 2009, the most recent year for which such data are available, only fifty-three percent of all test-takers took the LSAT once; almost ten percent have taken it more than twice, and over 300 (about .2%) have taken it five or more times. As recently as 2006, two-thirds of all the test-takers took the LSAT only once.<sup>21</sup>

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16. See *supra* note 15.

17. Reta Pikowsky, *Student Data: The Relationship Between the Admissions and Registrar's Offices*, in GUIDE, *supra* note 14, at 523.

18. Angela J. Evans & David Wallace, *Homeschooled Students: Background and Challenges*, in GUIDE, *supra* note 14, at 277.

19. Anne M. Richards, *Law Schools*, in GUIDE, *supra* note 14, at 453.

20. *Id.* at 464.

21. E-mail communication among Kent Lollis, Philip Handwerk, LSAC, and the

To persons of my generation (born in 1951), the scariest chapter is the one concerning the voodoo admissions practice of online applications—entitled *Interactive Services: Staying in Tune with a Web-Savvy Generation*.<sup>22</sup> The chapter is quite detailed and makes a virtue of the institutional necessity of posting all materials online in order to reach applicants these days, who have come to expect such technological niceties and capabilities.

This specialized volume is widely-used by AACRAO members and college counselors, with its only drawback being the continuity and update plans. The Association advertises it as the first update in over a decade, and these types of publications do not age well. AACRAO has a comprehensive publications program, and offers not only *College & University*, a respectable academic journal that publishes scholarship on enrollment management, student characteristics, and the like, but also dozens of other specialized handbooks, studies, and administrative guides to very specialized markets, such as works on the Federal Right to Privacy Act (FERPA), international students, and document security. It is not clear when the Lauren Guide will be revised and updated, and there is no mechanism for supplements or updates. Even as it ages, however, it is a thorough and detailed guide to the many moving parts of admissions and academic records.

III. DEANNE LOONIN, *STUDENT LOAN LAW* (NATIONAL CONSUMER LAW CENTER, 3RD ED. 2006) WITH 2009 SUPPLEMENT AND COMPANION WEBSITE<sup>23</sup>

One volume under review that does get the updating requirements right is the exquisite *Student Loan Law* by Deanne Loonin in the National Consumer Law Center (NCLC) publications series. The NCLC is among the premier United States legal organizations devoted to the comprehensive field of consumer law, which is at the zenith of its influence after the enactment of major comprehensive student loan legislation and consumer protection/banking reform. Stumbling into the NCLC publications web must cause heart attacks to would-be predators and banking interests, or would if it turned out consumers could read these complex volumes. Regular bi-monthly publications include ones that pay detailed attention to Bankruptcy and Foreclosures, Debt Collection and Repossessions, Consumer Credit and Usury, and Deceptive Practices and Warranties.

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author (November 15–23, 2010) (on file with author).

22. Joe F. Head & Thomas M. Hughes, *Interactive Services: Staying in Tune with a Web-Savvy Generation*, in GUIDE, *supra* note 14, at 165.

23. DEANNE LOONIN, *STUDENT LOAN LAW* (3d ed. 2006) [hereinafter LOONIN]; DEANNE LOONIN, *STUDENT LOAN LAW* (3d ed., Supp. 2009) [hereinafter *Supplement*]; NCLC Companion Website, <http://www.consumerlaw.org/webaccess> (allowing access to site materials after subscribing and following the registration process) (last visited February 7, 2011).

Student Loan Law is part of the Debtor Rights Library, which includes similar volumes (all with websites) in Consumer Bankruptcy Law and Practice, Fair Debt Collection, Foreclosures, Repossessions and Access to Utility Service. While these are not my area of expertise, I would certainly want them on my desk if they were. There are also similar treasure troves in the Credit and Banking Library, Consumer Litigation Library, and the Deceptions and Warranties Library, each with extraordinary finding tools, supplemented every few years with compact discs and companion websites. These are serious players in the industry, and even the subtitle of Loonin's volume shows its seriousness: Collections, Intercepts, Deferrals, Discharges, Repayment Plans, and Trade School Abuses.

Because in 2010, the U.S. Supreme Court decided a student loan/bankruptcy case,<sup>24</sup> I dug deeply into the twenty-five-page, heavily footnoted and small-typed Chapter 7 entitled "Discharging Student Loans in Bankruptcy," which is subdivided into: The Bankruptcy Option, When Can a Student Loan Be Discharged, The Dischargeability Determination, Advantages of Chapter 13 Bankruptcy When a Student Loan Cannot Be Discharged, and Student's Rights After Discharge.<sup>25</sup> The 2009 Supplement helpfully marks changes from the original 2006 edition by bolding the new subsections in the Table of Contents (itself a marvel of categorization) and drawing attention to them, as well as adding an entirely new section entitled, "Refinanced Student Loans in Bankruptcy."<sup>26</sup>

While the 2010 Supreme Court case *United Student Aid Funds v. Espinosa* was not decided when the 2009 Supplement was issued, the text includes details about the case and the 9th Circuit decision.<sup>27</sup> The website includes it, as well as a useful summary, with preliminary advice about its implementation. It is difficult, although not impossible, to follow the thread from the 2006 volume to the 2009 Supplement to the current website, but it is surely preferable to the alternative: stale materials that do not ripen or age well, given the fast-paced world of student loans. One last remarkable feature: this is not only the best index I have ever used in almost any legal field, but there is a separate Index (dubbed "Quick Reference") that cross-references to the several other volumes in NCLC series, so that one can check the applicability of federal statutes or consumer law references across the series. I picked a half dozen concepts

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24. *United Student Aid Funds, Inc. v. Espinosa*, 130 S.Ct. 1367 (2010).

25. LOONIN, *supra* note 23, at 111–36.

26. *Supplement*, *supra* note 23, at xiv–xv.

27. *Id.* at 106–07. In March 2011, as this review was going to press, I received in the mail a revised 2010 version of the student loan text, DEANNE LOONIN, *STUDENT LOAN LAW* (4th ed. 2010), 694 pp., with Companion Website, \$100.00. Because of the *Journal* deadlines, I chose not to revise my reading of the overall project, but a very quick and cursory reading revealed it to be another superb reference text, one even more detailed than its 2006 predecessor volume under review. Also note how quickly the NCLC issued the revisions to the 2006 volume, after the 2009 update. This volume contained no CD.

to try the thoroughness of the Index and Quick Reference, and found them all until I could not find the provisions of the Uniform Gift To Minors Act, which I expected to find. I also could not find any useful references to undocumented students, in all likelihood because they are ineligible for Title IV financial aid, but Texas and New Mexico allow these students resident tuition status and some financial assistance, so I would have plausibly found some mention. In addition, some other students with legal status (say, refugees or asylees) have some eligibility as Permanently Residing Under Color of Law (PRUCOL), but either they were absent, or I could not find their mention anywhere.

That said, these are truly remarkable resources in a complex and fluid field, and the lag is minimized by the commercial availability of the comprehensive Supplement and website. Others in this large finding aid business could take a lesson from this volume, which is amazingly comprehensive, authoritative, and well-written. If I were in any position even peripheral to the student loan or financial aid business, I would sleep with these volumes under my pillow.

IV. MICHAEL PRAIRIE AND TIMOTHY GARFIELD, *COLLEGE AND SCHOOL LAW: ANALYSIS, PREVENTION, AND FORMS*  
(AMERICAN BAR ASSOCIATION, 2010)<sup>28</sup>

Three of the four finding aids under review originated from private organizations and membership associations, including this American Bar Association volume by Michael Prairie and Timothy Garfield, two experienced school lawyers in San Diego, California. Its nineteen chapters, totaling 632 pages, come with a compact disc containing hundreds of forms, from forms for the hiring of school janitors to varying vendor boilerplate for goods and services purchase agreements. Because the volume itself is a “lite” version of Kaplin and Lee,<sup>29</sup> with a conclusion in each chapter labeled “Preventing the Problems,” it is the preparation forms that may be the most useful part of this project. Not a day goes by on NACUANet where someone does not need a form for this or that problem, and remarkably, it is almost always to God’s ears, as someone else will post exactly the document requested, usually within hours. The book does have a list of “Forms For Colleges and Schools” that runs almost a dozen pages, but it does not indicate that the forms are in the compact disc, and the list does not conform to the order of the various contracts, policies, and forms on the compact disc. The volume would certainly be improved by making the index or finding tool more congruent with the compact disc, and generally more user-friendly. Here, as in almost any example I could pick, I would look at the NCLC Loonin project for guidance.

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28. MICHAEL PRAIRIE & TIMOTHY GARFIELD, *COLLEGE AND SCHOOL LAW, ANALYSIS, PREVENTION, AND FORMS* (2010).

29. See *supra* note 12 and accompanying text.

While the compact discs are useful (although they tend to skew more to primary and secondary schools than to colleges and universities), the chapters are not uniquely helpful, not only because they summarize major points covered in more detail in Kaplin and Lee (whose superior treatise is referenced in many chapters) but because they are too short to be authoritative. For some reason, the page format uses only two-thirds of each page, which makes it easier to read, but leaves some of the treatments of complex issues disconcertingly thin. As an example, I draw attention to the section on International Students,<sup>30</sup> which covers approximately twenty pages (perhaps less in real-time print). While it is adequate as far as it goes, it adds nothing fresh to various NACUA or NAFSA<sup>31</sup> materials, and omits things that readers, especially administrator and attorney readers need to know. In the list of statutes, for example, nowhere mentioned is important legislation, passed immediately after the 2001 terrorist attacks, dealing with colleges and universities, which partially include: USA-PATRIOT Act; Aviation and Transportation Security Act (affecting flight-training schools); Enhanced Border Security and Visa Entry Reform Act of 2002 (data collection on international students and scholars); the Border Commuter Student Act of 2002 (affecting part time, international commuter students); and the Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (controlling use and distribution of toxins and other biological agents used in scientific research and instruction). While they mention the Student and Exchange Visitor Information System (SEVIS), the comprehensive computerized system designed to track international students and exchange scholars, they omit mention of the Department of State's Technology Alert List (TAL), an enhanced consular official review process for detecting terrorists who seek to study sensitive technologies; Visas Mantis, a program intended to increase security clearances for foreign students and scholars in science and engineering fields; and many other salient and complex regimes that college and university officials really need to know. It is also not clear from the discussion that non-immigrants in other classifications can and often do attend college, even if they do not fit into the traditional SEVIS categories. Finally, the Chapter does not address the special issues of international children in primary and secondary schools and the attendant F-1 transactions.

I think that some of the problem is that Kaplin and Lee exist, and only if these entries are crisper, more synthetic, and more "preventive" would there be enough oxygen in the room to justify such an ABA volume. Further, lumping together primary and secondary with higher education contributes to the problem, as both are specialized fields, with overlap to be

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30. PRAIRIE & GARFIELD, *supra* note 26, at 329–50.

31. Information about NAFSA: Association of International Educators can be found at its official website, <http://www.nafsa.org>.



sure, but still with separate identities, requiring separate finding tools, regulatory regimes, and legal theories. If they asked me, and believe me, the ABA does not consult with me, I would urge attention be paid to one or the other, and then I would fill in the other half of the volume with more annotated and helpful “preventive law” cites. At present, this volume represents the worst of both worlds—not enough authoritative college and university law and too much primary and secondary school law, not all of it authoritative or fulsome. Some, but not all of the compact-disc-provided forms are likely to be useful. Because this is a new enterprise for the book, it is not clear what the plans are to update, revise, and supplement. However, because there is no Kaplin and Lee for primary and secondary school law, I would urge the authors and their publisher to pitch the tent there, and then perhaps branch out to college and university law, but in a different book project.

#### V. CONCLUSION: BUILD IT AND THEY WILL COME

It is significant that these texts have appeared, and the odd marketplace that combines specialized, professional, and association-based books will always have a ready audience. As another example, the National Association of Financial Aid Administrators publishes the authoritative quarterly *Journal of Student Financial Aid*,<sup>32</sup> and produces a series of detailed niche manuals for their membership; a 2010 example is *Professional Judgment in Eligibility Determination and Resource Analysis*,<sup>33</sup> a useful and fundamental higher education text. NAFSA: Association of International Educators is a group whose members navigate the complex statutory and regulatory shoals of recruiting and enrolling international students.<sup>34</sup> A very useful online text is NAFSA Adviser's Manual Online; while it is more administrative and manual-like than it is scholarly, it is regularly-updated and widely employed by campus users.<sup>35</sup>

Many of these publications cross my desk, in part because I am on their radar, and in part because I read widely in the higher education trade press. Years ago, I would attend professional meetings with topics like, “Is Higher Education a Field of Study?” Higher education is most assuredly a field of study with robust evidence to prove it: associations, scholarly

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32. JOURNAL OF STUDENT FINANCIAL AID, *available at* [http://www.nasfaa.org/research/Journal/Journal\\_of\\_Student\\_Financial\\_Aid\\_-\\_Current\\_Issue.aspx](http://www.nasfaa.org/research/Journal/Journal_of_Student_Financial_Aid_-_Current_Issue.aspx) (last visited March 17, 2011).

33. PROFESSIONAL JUDGMENT IN ELIGIBILITY DETERMINATION AND RESOURCE ANALYSIS, *available at* <http://www.eric.ed.gov/ERICWebPortal/detail?accno=ED364171> (last visited February 7, 2011).

34. *See supra* note 31.

35. NAFSA ADVISER'S MANUAL ONLINE, *available at* [http://www.nafsa.org/publication.sec/working\\_with\\_international/nafsa\\_adviser\\_s\\_manual](http://www.nafsa.org/publication.sec/working_with_international/nafsa_adviser_s_manual) (last visited February 7, 2011).

vehicles, literature being added to daily, a robust trade press, a robust scholarly press, and a regular place in the polity. Perhaps more to the point, its subfields (law, finance, history, student psychology, etc.) all have the same emerging phylogenetic and evolutionary evidence. My review of one part of this evidence—the existence of finding tools and manuals—suggests strongly that the field is continuing to evolve and spread. The use of technology applied to these aids has made several of them quite current and powerful. This marketplace will continue to ripen for both producers and users of higher education law scholarship.

Should one of them break through and provide timely and useful publications that are regularly refreshed and updated, I predict that this particular marketplace will respond powerfully and profitably, perhaps with a generous site license.<sup>36</sup> People of my generation, which I will situate as those who do not expect to download digital music for free, often prefer to hold their reference materials in hand and thumb through them, even if they are printed out offline. I clearly do, and yet even I also routinely go online for my research tools and ride the slipstream back and forth across the digital divide. All the authors of these works under review, Kaplin and Lee, and others who play in these fields should take heed about the need for updates and supplementing for putting their excellent work into play.

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36. *Id.* There is a site-license arrangement that is funded by differential membership/non-membership fees.





# ON WISCONSIN: THE VIABILITY OF DIPLOMA PRIVILEGE REGULATIONS UNDER DORMANT COMMERCE CLAUSE REVIEW

DANIEL B. NORA\*

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## INTRODUCTION

Lobbying for the abolition of the diploma privilege in Wisconsin is “slightly less popular than the 21-year drinking age is to teenagers.”<sup>1</sup>

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Diploma privilege is a device that confers bar admission to graduates of American Bar Association (ABA)-accredited Wisconsin law schools in lieu of a bar examination.<sup>2</sup> Although a once popular means of bar regulation, with as many as thirty-three jurisdictions having some form of diploma privilege,<sup>3</sup> the movement away from diploma privilege is well documented. At the turn of the twentieth century, the privilege's earliest critics called for its abolition, citing a lack of uniformity in law schools' curricula, discrimination against private law schools, discrimination against state residents who studied at out-of-state institutions, detrimental effects on standards of practice, and circumvention of the states' control of the bar.<sup>4</sup> By 1921, the ABA declared that "graduation from a law school should not confer the right of admission to the bar, and . . . every candidate should be subjected to an examination by a public authority to determine his fitness."<sup>5</sup> Gradually, these concerns—coupled with a belief that the bar was overcrowded and a perceived decrease in attorney income—led to states' abolition of diploma privilege and heightened bar-admission standards.<sup>6</sup> West Virginia was the most recent state to abolish its version of the privilege (doing so in 1988), leaving Wisconsin as the only state to offer diploma privilege for admission to its state bar.<sup>7</sup> Despite this seemingly national disapproval, support for the diploma privilege remains strong in Wisconsin, and there is no indication that any state body will seek its termination.

Wisconsin's diploma privilege provides in part:

An applicant who has been awarded a first professional degree in law from a law school in this state that is fully, not provisionally,

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Tidmarsh for his guidance throughout this project, and I thank Laura Crylen for sharing her thoughts at this project's inception.

1. Steven Levine, *End Separate-But-Equal-Bar Admission*, WIS. LAW., Vol. 75, No. 12 (Dec. 2002), available at [http://www.wisbar.org/AM/Template.cfm?Section=Wisconsin\\_Lawyer&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=22118](http://www.wisbar.org/AM/Template.cfm?Section=Wisconsin_Lawyer&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=22118).

2. WISCR 40.03 (2009).

3. Mark Hansen, *Wisconsin Bar Weighs a Degree of Change*, A.B.A.J., Apr. 2007, available at [http://www.abajournal.com/magazine/article/wisconsin\\_bar\\_weighs\\_a\\_degree\\_of\\_change/](http://www.abajournal.com/magazine/article/wisconsin_bar_weighs_a_degree_of_change/).

4. Beverly Moran, *The Wisconsin Diploma Privilege: Try It, You'll Like It*, 2000 WIS. L. REV. 645, 647 (2000).

5 *Id.* (quoting Elihu Root et. al., *Report to the Special Committee to the Section of Legal Education and Admissions to the Bar of the American Bar Association*, 46 Rep. Annual Meeting A.B.A. 679, 688 (1921)).

6. See Michael S. Ariens, *American Legal Ethics in an Age of Anxiety*, 40 ST. MARY'S L.J. 343, 415 (2008).

7. Deborah Ziff, *State's Longtime Diploma Privilege Challenged*, WIS. ST. J., Sept. 13, 2009, available at [http://host.madison.com/wsj/news/local/education/university/article\\_e45f22e3-7cb0-5c2e-8b92-8b81bbdd8061.html](http://host.madison.com/wsj/news/local/education/university/article_e45f22e3-7cb0-5c2e-8b92-8b81bbdd8061.html).

approved by the American bar association [sic] shall satisfy the legal competence requirement by presenting to the clerk certification of the board showing:

(1) Satisfactory completion of legal studies leading to the first professional degree in law. The law school shall certify to the board satisfactory completion of not less than 84 semester credits earned by the applicant for purposes of the degree awarded.

(2) Satisfactory completion of study in mandatory and elective subject matter areas. The law school shall certify to the board satisfactory completion of not less than 60 semester credits in the mandatory and elective subject matter areas as provided in (a) and (b). All semester credits so certified shall have been earned in regular law school courses having as their primary and direct purpose the study of rules and principles of substantive and procedural law as they may arise in the courts and administrative agencies of the United States and this state.

(a) Elective subject matter areas; 60-credit rule. Not less than 60 semester credit shall have been earned in regular law school courses in the subject matter areas generally known as: Administrative law, appellate practice and procedure, commercial transactions, conflict of laws, constitutional law, contracts, corporations, creditors' rights, criminal law and procedure, damages, domestic relations, equity, evidence, future interests, insurance, jurisdiction of courts, legislation, labor law, ethics and legal responsibilities of the profession, partnership, personal property, pleading and practice, public utilities, quasi-contracts, real property, taxation, torts, trade regulation, trusts, and wills and estates. The 60-credit subject matter requirement may be satisfied by combinations of the curricular offerings of each approved law school in this state.

(b) Mandatory subject matter areas; 30-credit rule. Not less than 30 of the 60 semester credits shall have been earned in regular law school courses in each of the following subject matter areas: constitutional law, contracts, criminal law and procedure, evidence, jurisdiction of courts, ethics and legal responsibility to the legal profession, pleading and practice, real property, torts, and wills and estates.<sup>8</sup>

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8. WISCR 40.03 (2009).

Accordingly, one who graduates from one of Wisconsin's two ABA-accredited law schools, the University of Wisconsin Law School and Marquette University Law School, will be granted bar admission without sitting for the bar exam, provided that he or she satisfies subdivisions (1) and (2).<sup>9</sup> However, one who graduates from an out-of-state institution will be required to pass the Wisconsin bar examination.<sup>10</sup>

In 2007, Christopher L. Wiesmueller, a student at Oklahoma City University School of Law, brought a § 1983 claim against the members of Wisconsin's Board of Bar Examiners and the Supreme Court of Wisconsin. Wiesmueller asserted that Wisconsin's diploma privilege discriminated against interstate commerce because it afforded a diploma privilege in lieu of a bar examination only to individuals graduating from Wisconsin's law schools.<sup>11</sup> Although Wiesmueller's case went before the Seventh Circuit twice, he ultimately settled the suit with the state in March of 2010.<sup>12</sup>

This note offers a review of the diploma privilege, both conceptually and as practiced in Wisconsin, and of the constitutional arguments for and against it that may be made under the Dormant Commerce Clause. It will provide a survey of Dormant Commerce Clause jurisprudence, previous challenges to diploma privilege statutes, and challenges to statutes regulating the availability of legal services based upon origin. It will also consider Wisconsin's diploma privilege and its surrounding litigation, both in this context as well as the privilege's legislative evolution. Such consideration suggests that the law, as currently written, violates the Dormant Commerce Clause. While there does not appear to be any constitutional prohibition on the diploma privilege as a concept, Wisconsin's version is ineffective at promoting its objective and would greatly benefit from textual reform.

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9. *Id.*

10. WI SCR 40.03-04 (2009).

11. *Wiesmueller v. Kosobucki*, 492 F. Supp. 2d 1036 (7th Cir. 2007).

12. Bruce Vielmetti, *Marquette, UW Law Grads Retain Diploma Privilege in Wisconsin*, MILWAUKEE J. SENTINEL, Mar. 24, 2010, available at <http://www.jsonline.com/news/wisconsin/89040482.html>. Mr. Wiesmueller elected to settle the suit for \$7,500 after U.S. District Judge Barbara Crabb stripped the class of certification due to concerns over his ability to adequately represent the interests of a federal class. *Wiesmueller v. Kosobucki*, 2009 WL 4722197 (2009).



## I. THE DORMANT COMMERCE CLAUSE: DEVELOPMENT, REVIEW, AND JURISPRUDENCE

The Dormant Commerce Clause (or Negative Commerce Clause) is a legal concept derived from the Commerce Clause in Article I of the United States Constitution.<sup>13</sup> While the states' police powers enable them to regulate a substantial part of everyday life, among Congress's enumerated powers is the regulation of interstate commerce among the several states.<sup>14</sup> Certainly, congressional regulation of commercial activity may displace state regulation. However, does such a grant of authority inhibit states' actions to regulate commerce where Congress has taken no action? The text of the Constitution is silent in this regard, and the Constitution "does not say what the states may or may not do in the absence of congressional action."<sup>15</sup> Accordingly, some have argued that "the mere grant of power to the general government cannot, upon any just principles of construction, be construed to be an absolute prohibition to the exercise of any power over the same subject by the States . . . . [S]uch regulations are valid unless they come in conflict with a law of Congress."<sup>16</sup> However, this argument has not prevailed, and the Commerce Clause "has been deemed to include both an affirmative grant of power to Congress to regulate commerce and a negative aspect limiting States' intrusion into that sphere."<sup>17</sup> This note will examine the development of the Dormant Commerce Clause and consider the present tests employed by courts.

### A. Development of the Dormant Commerce Clause

The Framers of the Constitution recognized the potential conflict between state and federal commercial regulation. Hypothetically, each state could ban or inhibit the products of other states and undertake other action that could otherwise frustrate congressional regulatory schemes.<sup>18</sup> In the Federalist No. 42, James Madison acknowledged that such practices would "nourish unceasing animosities, and not improbably terminate in serious interruptions of the public tranquility."<sup>19</sup> Moreover, in debating whether to permit states to lay duties of tonnage without congressional

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13. U.S. CONST. art. I, §8, cl. 3. ("[The Congress shall have the power to] regulate commerce with foreign nations, and among the several states, and with Indian tribes."). It should be noted that there is no explicit textual basis for the Dormant Commerce Clause apart from the Interstate Commerce Clause. This notation is shorthand for how courts deal with a subject of state laws that has an effect upon interstate commerce. The development of this legal concept is discussed *infra*.

14. *Id.*

15. *H.P. Hood & Sons v. Dumond*, 336 U.S. 525, 535 (1949).

16. *Thurlow v. Massachusetts*, 46 U.S. 504, 579 (1847).

17. NORMAN REDLICH, JOHN ATTANASIO & JOEL K. GOLDSTEIN, *UNDERSTANDING CONSTITUTIONAL LAW* § 6.01, at 193 (3d ed. 2005).

18. *Id.*

19. *THE FEDERALIST* NO. 42, at 268 (James Madison) (Clinton Rossiter ed., 1961).

interference, delegates to the Constitutional Convention acknowledged this concern.<sup>20</sup> Madison was “convinced that the regulation of Commerce was in its nature indivisible and ought to be wholly under one authority.”<sup>21</sup> Conversely, Roger Sherman argued that such concerns were unfounded, as “[t]he power of the United States to regulate trade being supreme can control interferences of the State regulations when such interferences happen; so that there is no danger to be apprehended from a concurrent jurisdiction.”<sup>22</sup> While the delegates ultimately resolved this issue through the inclusion of the language “[n]o state shall, without the consent of Congress, lay any duty of tonnage,”<sup>23</sup> the Constitutional Convention failed to definitively address the issue of state regulation in the absence of congressional regulation.

Chief Justice John Marshall, although refraining from using the phrase “Dormant Commerce Clause,” was the first to discuss the possible negative implications of the Commerce Clause in *Gibbons v. Ogden*.<sup>24</sup> In *Gibbons*, the petitioner, who operated a steamboat service under a congressional license, challenged the constitutionality of a New York monopoly, arguing that Congress had exclusive national power over interstate commerce under Art. 1, §8, and that a contrary conclusion could potentially frustrate congressional regulation.<sup>25</sup> While the case was ultimately decided on Supremacy Clause grounds,<sup>26</sup> Chief Justice Marshall noted that “[t]here is great force in this argument, and the Court is not satisfied that it has been refuted.”<sup>27</sup> Moreover, Chief Justice Marshall opined in dicta that the power to regulate interstate commerce “can never be exercised by the people themselves, but must be placed in the hands of agents, or lie dormant.”<sup>28</sup> Thus, it appeared for a time as though the power to regulate interstate commerce lay exclusively within congressional prerogatives.

However, post-Marshall-era opinions were conflicted as to whether the Commerce Clause possessed a dormant aspect. In *Thurlow v. Massachusetts*,<sup>29</sup> Chief Justice Roger B. Taney advanced the opposite view. He argued that “the State may nevertheless, for the safety or

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20. MAX FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787 625 (1937), available at [http://press-pubs.uchicago.edu/founders/documents/a1\\_10\\_3s2.html](http://press-pubs.uchicago.edu/founders/documents/a1_10_3s2.html).

21. *Id.*

22. *Id.*

23. U.S. CONST. art. I, §10.

24. *Gibbons v. Ogden*, 22 U.S. 1 (1824).

25. *Id.* at 209.

26. *Id.* at 210.

27. *Id.* at 209.

28. *Id.* at 189; see also *Wilson v. Black-Bird Creek Marsh Co.*, 27 U.S. 245, 252 (1829) (“We do not think that the act empowering the Black Bird Creek Marsh Company to place a dam across the creek, can, under all the circumstances of the case, be considered as repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed on the subject.”).

29. 46 U.S. 504 (1847).

convenience of trade, or for the protection of the health of its citizens, make regulations of commerce for its own ports and harbours, and for its own territories; and such regulations are valid unless they come in conflict with a law of Congress.”<sup>30</sup> Yet a mere two years later, Justice McLean, speaking for the majority of the Court, asserted that Congress had the exclusive power to regulate commerce, couched within states’ rights to protect the health or safety of their citizens.<sup>31</sup>

Finally, *Cooley v. Board of Wardens* presented the Court with the question of the extent of state power over commerce in the face of congressional silence.<sup>32</sup> In *Cooley*, the Court chose not to treat the challenged pilotage law as an exercise of police power, but instead recognized that its coverage of navigation regulated commerce within the scope of congressional power.<sup>33</sup> However, rather than creating a definitive rule as to whether the regulation of commerce lay exclusively within congressional prerogatives, the *Cooley* Court “adopted an intermediate approach, concluding that whether congressional power was exclusive varied with the circumstances of particular cases.”<sup>34</sup> Would the need for national uniformity or the need for local accommodation prevail? Ultimately, the matter rested on the nature of the subjects being regulated.<sup>35</sup> “Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress.”<sup>36</sup> Accordingly, *Cooley* rejected a bright line or uniform rule, and provided an intermediate approach in which the nature of the matter to be regulated would be considered in light of a national/local dichotomy.<sup>37</sup>

In practice, however, the *Cooley* approach proved unwieldy. The test failed to suggest criteria for distinguishing between the national and local spheres—thus producing vague opinions whose precedential value was dubious<sup>38</sup>—and did not implement legislative motive as a factor to guide a court’s assessment.<sup>39</sup> Accordingly, the implementation of *Cooley’s*

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30. *Id.* at 579.

31. REDLICH ET AL., *supra* note 17, § 6.02(1), at 195 (construing *Smith v. Turner*, 48 U.S. 283, 400 (1849)).

32. *Cooley v. Bd. of Wardens*, 53 U.S. 299 (1851).

33. *See id.* at 315–17.

34. REDLICH ET AL., *supra* note 17, § 6.02(2), at 196.

35. *Id.*

36. *Cooley*, 53 U.S. at 319.

37. REDLICH ET AL., *supra* note 17, § 6.02(2), at 196; *see also* Doug Linder, *Exploring Constitutional Conflicts: Commerce Clause Limitations on State Regulation*, University of Missouri-Kansas City Law School, <http://www.law.umkc.edu/faculty/projects/ftrials/conlaw/statecommerce.htm> (last visited Mar. 7, 2011) (asserting that *Cooley* represents the first case in which the Court engaged in a balancing act of local and national interests).

38. REDLICH ET AL., *supra* note 17, § 6.02(2), at 196.

39. *Id.*

national/local dichotomy created myriad seemingly conflicting opinions well into the twentieth century.<sup>40</sup> Eventually, the Court would abandon *Cooley* and articulate a test based on whether a state statute regulated interstate commerce directly or indirectly.<sup>41</sup> However, like *Cooley*, this dichotomy proved unworkable, as “it was uncertain in application and ignored matters of degree that are often critical.”<sup>42</sup>

Next, the Court began to implement a balancing test when considering claims brought under the Dormant Commerce Clause. *Southern Pacific Co. v. Arizona* presented a case in which the state of Arizona, in an effort to reduce railroad accidents, regulated the number of passenger rail cars a person or corporation could operate.<sup>43</sup> Finding that the statute placed too heavy a burden on interstate commerce by way of interstate rail service, the Court said that it must consider “the nature and extent of the burden which the state regulation of interstate trains, adopted as a safety measure, imposes on interstate commerce, and whether the relative weights of the state and national interests involved” justified the state law.<sup>44</sup> Accordingly, *Southern Pacific* marks a jurisprudential shift from dichotomous classification to a balancing of the regulation’s effects.

#### B. Modern Dormant Commerce Clause Analysis

Although the Court has adopted a variation of the *Southern Pacific* balancing test, the Court’s recent jurisprudence centers on two considerations that effectively create three categories of review. The first consideration is whether a state regulation discriminates on its face or in its

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40. Compare, e.g., *Munn v. Illinois*, 94 U.S. 113, 135 (1877) (upholding state authority to set the rates of warehouses used in interstate commerce, as the location of the warehouses in Illinois “is a thing of domestic concern”), *Chicago, Quincy & Burlington R.R. Co. v. Iowa*, 94 U.S. 155, 163 (1877) (regulation of railroad situated within a single state is a matter of domestic concern), and *Erie R.R. Co. v. Bd. of Pub. Util. Cmm’rs*, 254 U.S. 394 (1921) (upholding a state law ordering the elimination of dangerous grade crossings) with *St. Louis & Pacific Ry. v. Illinois*, 118 U.S. 577 (1886) (statute regulating rate for interstate rail transportation as rate regulation was a subject requiring national uniformity) and *Seaboard Air Line Ry. Co. v. Blackwell*, 244 U.S. 310 (1917) (striking down a Kentucky law that caused excessive rail stoppings).

41. See, e.g., *Disanto v. Pennsylvania*, 273 U.S. 34 (1927); see generally James W. Ely Jr., “*The Railroad System Has Burst Through State Limits*”: *Railroads and Interstate Commerce, 1830–1920*, 55 ARK. L. REV. 933 (2003).

42. REDLICH ET AL., *supra* note 17, § 6.02(3), at 198; see also *Disanto*, 273 U.S. at 44 (Stone, J., dissenting).

43. *S. Pac. Co. v. Arizona*, 325 U.S. 761 (1945). But see *Linder*, *supra* note 37 (asserting that *Cooley* represents the first case in which the court engaged in a balancing act of local and national interests).

44. *S. Pac. Co.*, 325 U.S. at 770; see also *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959) (Illinois mud flap regulation held unconstitutional as it unreasonably burdened commerce while providing little safety benefit); *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662 (1981) (striking down an Iowa prohibition on truck length).

effect against interstate commerce (out-of-state entities). This creates two categories, in which 1) a law is facially discriminatory, or 2) it is discriminatory in its purpose or effect. While these two categories differ, since the discrimination is transparent in “facial” cases but not in “purpose” or “effect” cases, placement in either of these categories nevertheless subjects a regulation to strict scrutiny, under which the law is likely to be found unconstitutional.<sup>45</sup> Second, if the law does not discriminate but pursues legitimate objectives with only an incidental impact on commerce, a court will weigh the state’s interest against the burden the law imposes on interstate commerce.<sup>46</sup> “Whereas a discriminatory statute is presumptively invalid, a non-discriminatory law is likely to be upheld unless the burden on commerce greatly outweighs some legitimate state benefit.”<sup>47</sup>

### 1. Facially Discriminatory Laws

The Dormant Commerce Clause prohibits states from regulating commerce in a way that facially discriminates against out-of-state competition. Where the regulation’s language manifests such discrimination, the Dormant Commerce Clause is easily applied. In such cases, a state is required to demonstrate that it seeks to further a legitimate state purpose, and that it has employed the least restrictive alternative in regulating the commercial activity—a test that resembles strict scrutiny.<sup>48</sup> These facially discriminatory statutes almost invariably fail to pass muster.

In cases where facially discriminatory language exists, a state must provide an adequate reason for its discriminatory law. In *Philadelphia v. New Jersey*, the Court considered a New Jersey statute that forbade the importation of out-of-state waste into its landfills.<sup>49</sup> New Jersey claimed that the statute was necessary to preserve its landfill space for its own citizens.<sup>50</sup> However, Justice Stewart, writing for the majority, noted that “[o]n its face, [the statute] imposes on out-of-state commercial interests the full burden of conserving the State’s remaining landfill space,”<sup>51</sup> and “discriminating against articles of commerce coming from outside the State [is prohibited] unless there is some reason, apart from their origin, to treat them differently.”<sup>52</sup> As the Court could find no such reason, it struck the statute down.<sup>53</sup>

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45. See, e.g., *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978) (distinguishing between patent and non-patent discrimination).

46. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

47. REDLICH ET AL., *supra* note 17, § 6.03, at 200.

48. REDLICH ET AL., *supra* note 17, § 6.04, at 200.

49. *Philadelphia*, 437 U.S. at 617.

50. See *id.* at 628.

51. *Id.*

52. *Id.* at 627.

53. *Id.*

A state will, however, often obscure its true motive behind some pretext, and the “Supreme Court must then detect and expose the subterfuge.”<sup>54</sup> Consider *Minnesota v. Barber*, where the Court analyzed a Minnesota statute prohibiting the sale of meat unless the state of Minnesota inspected the animal within twenty-four hours of its slaughter.<sup>55</sup> Even though Minnesota claimed that it sought to protect its citizens’ health, the Court concluded that the statute’s true purpose was to advantage local slaughterers.<sup>56</sup> Accordingly, the Court considered Minnesota’s stated purpose illusory and did not allow the statute to pass constitutional review.<sup>57</sup>

Moreover, a state must demonstrate that the regulation employs the least restrictive alternative in regulating the economic activity.<sup>58</sup> For example, in *Dean Milk Co. v. Madison*, the Court considered a Madison, Wisconsin ordinance making it unlawful to sell milk unless it had been pasteurized and bottled within five miles of the city.<sup>59</sup> Thus, Dean Milk—a company located in Winnebago County, Illinois, less than 100 miles away from the city—was prohibited from selling milk in that market. The mere fact that Madison claimed that the ordinance was a “health measure” did not insulate it from scrutiny; “[l]ess burdensome alternatives, such as inspection of plaintiff’s plants by city officials . . . could have served local health interests.”<sup>60</sup>

Accordingly, state statutes that facially discriminate against out-of-state actors, or prevent access to local markets,<sup>61</sup> almost invariably fail to pass a legitimate state purpose/least restrictive means (strict scrutiny) line of analysis. The sole exception to this general rule presented itself in *Maine v. Taylor*, a case in which Maine prohibited the importation of out-of-state bait fish in order to prevent the spread of parasites.<sup>62</sup> In that case, the Court found that Maine had a legitimate interest in protecting its marine ecology<sup>63</sup> and that no alternative remedy existed.<sup>64</sup> Yet it is questionable

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54. REDLICH ET AL., *supra* note 17, § 6.04, at 200. See generally *Philadelphia*, 437 U.S. at 625–27.

55. *Minnesota v. Barber*, 136 U.S. 313 (1890).

56. See *id.* at 329.

57. *Id.* at 329–30.

58. See *Hunt v. Wash. Apple Adver. Comm’n.*, 432 U.S. 333, 353 (1977).

59. *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951).

60. REDLICH ET AL., *supra* note 17, § 6.04, at 201; see also *Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep’t of Natural Res.*, 504 U.S. 353, 361 (1992) (asserting that a State cannot justify discrimination against out-of-staters by disadvantaging other communities within a state).

61. See generally *Hughes v. Oklahoma*, 441 U.S. 322 (1978) (striking down a state statute regulating transportation of minnows due to a lack of impartiality in distributing the burden among citizens of the United States).

62. 477 U.S. 131 (1986).

63. *Id.* at 148.

64. *Id.* at 151.

whether any facially discriminatory statute not related to health will pass muster.

## 2. Effectively Discriminatory Laws

More frequently, challenges under the Dormant Commerce Clause come from facially neutral statutes. The Dormant Commerce Clause test for effectively discriminatory regulations is fundamentally identical to the review of facially discriminatory statutes.<sup>65</sup> *Hunt v. Washington State Apple Advertising Commission* presents a prototypical example of such a statutory challenge.<sup>66</sup> In *Hunt*, a North Carolina statute mandated that apples sold within North Carolina could display only United States grades.<sup>67</sup> Thus, Washington-grown apples were prohibited from displaying state inspection certificates, whose inspection requirements could be considered more rigorous than the national inspection standards.<sup>68</sup> While the North Carolina statute did not facially discriminate against out-of-state interests—North Carolina producers were also prohibited from displaying alternative stickers—the statute was found to deny Washington apple growers the competitive advantage that the Washington inspection system would otherwise confer upon them.<sup>69</sup> Although the Court found that the North Carolina legislature harbored a discriminatory motive, the Court found it unnecessary to rely solely on that finding.<sup>70</sup> Rather, the Court noted, “the burden falls on the State to justify [the discrimination] both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake.”<sup>71</sup> Accordingly, where a state is unable to demonstrate that there is a legitimate interest and that the regulation employs the least restrictive means, facially neutral but discriminatory laws will be struck down.

Despite this rigorous standard, challenges to statutes that are purportedly “facially neutral, yet discriminatory” provide a minimal record of success. This may be attributable to an increased level of difficulty in demonstrating a discriminatory intent by the legislature or the existence of in-state losers, which provides a potential defense to a Dormant Commerce Clause claim. First, in *Exxon Corp. v. Governor of Maryland*,<sup>72</sup> the Court upheld a statute that, among other things, prohibited petroleum producers or refiners from operating retail gas stations within Maryland. When out-of-state producers

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65. *Or. Waste Sys., Inc. v. Dept. of Env'tl. Quality of Or.*, 511 U.S. 93, 99 (1994) (finding a cost-based surcharge on out-of-state waste to be unconstitutional).

66. 432 U.S. 333 (1977).

67. *Id.*

68. *Id.* at 352.

69. *Id.*

70. *Id.*

71. *Id.* at 353.

72. 437 U.S. 117 (1978).

challenged the statute as an unfair burden on interstate commerce,<sup>73</sup> the Court found that the regulation 1) did not offer a blanket exclusion against interstate marketers, 2) did not specifically burden interstate dealers' conduct of business, and 3) did not treat in-state retailers and out-of-state retailers differently.<sup>74</sup> The mere fact that out-of-state losers existed did not automatically invoke the protections of the Dormant Commerce Clause; rather, the clause is intended to "[protect] the interstate market, not particular interstate firms, from prohibitive or burdensome regulations."<sup>75</sup> Moreover, in-state losers may also share the burdens suffered by out-of-state interests and serve as political surrogates for the out-of-state interests harmed by state regulations.<sup>76</sup> For example, in *Minnesota v. Clover Leaf Creamery Co.*, the Court examined a case in which a Minnesota dairy regulation generally burdened the plastics industry to the benefit of the paper and plywood industry.<sup>77</sup> However, any adversely affected out-of-state interests could seek to advance their interests through in-state surrogates who were similarly disadvantaged by the regulation.<sup>78</sup> Thus, it is more difficult to invoke the protections of the Dormant Commerce Clause in the absence of language that overtly discriminates against out-of-state interests or the national market. Not only is it more difficult to prove a discriminatory motive, but the existence of in-state losers may dissuade a court from finding for a party challenging a potentially discriminatory regulation.

### 3. Non-Discriminatory Laws with an Incidental Effect on Commerce

States may pass regulations that have the unintended consequence of burdening interstate commerce. If a challenged law does not discriminate, but pursues legitimate objectives with only an incidental impact on commerce, a court will weigh the State's interest against the burden the law

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73. *Id.* at 118.

74. *See id.* at 125–36.

75. *Id.* at 127–28; *see also* REDLICH ET AL., *supra* note 17, § 6.04, at 203 (suggesting that the discrepancy between the *Hunt* and *Exxon* decisions may be attributed to a public policy favoring the promotion of national uniformity. Whereas the Court was sensitive to a statute that specifically targeted Washington-produced apples, no such "threat" existed in the Maryland statute). *But see Exxon Corp.*, 437 U.S. at 135 (Blackmun, J., dissenting) ("The effect is to protect in-state retail service station dealers from the competition of the out-of-state businesses. This protectionist discrimination is not justified by any legitimate state interest that cannot be vindicated by more evenhanded regulation.").

76. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981). *But see Philadelphia v. New Jersey*, 437 U.S. 617 (1978) (holding a law invalid despite the existence of in-state losers within New Jersey).

77. *Clover Leaf*, 449 U.S. at 456.

78. *Id.* at 472.



imposes on interstate commerce.<sup>79</sup> Accordingly, a court employs a balancing test that “compares benefits to legitimate state purpose against burdens on commerce.”<sup>80</sup> This balancing test was articulated in *Pike v. Bruce Church*, and asserts that “[w]here the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.”<sup>81</sup> Where the *Pike* balancing test is employed, the balancing act generally favors upholding the state statute.<sup>82</sup> While *Pike* balancing jurisprudence suggests that there is some sort of scale or metric by which a court may weigh safety benefits against commerce costs, *Pike* balancing, like its predecessors, is an imprecise test that offers no definitive answer as to what level of “incidental effect on commerce” is constitutionally permissible.

Despite this seemingly lax standard, the Court has struck down non-discriminatory laws with incidental effects on commerce. Indeed, the *Pike* Court struck down an Arizona statute regulating the manufacture and sale of fruits and vegetables.<sup>83</sup> While the Court noted the general tendency to uphold laws unless their burden on interstate commerce was clearly excessive in relation to the putative local benefits, it stated:

While the order issued under the Arizona statute does not impose such rigidity on an entire industry, it does impose just such a straitjacket on the appellee company with respect to the allocation of its interstate resources. Such an incidental consequence of a regulatory scheme could perhaps be tolerated if a more compelling state interest were involved. But here the State's interest is minimal at best—certainly less substantial than a State's interest in securing employment for its people. If the Commerce Clause forbids a State to require work to be done within its jurisdiction to promote local employment, then surely it cannot permit a State to require a person to go into a local packing business solely for the sake of enhancing the reputation of other producers within its borders.<sup>84</sup>

Thus, the Court determined that the regulation's impact on commerce outweighed the state's stated interest: “to protect and enhance the reputation of growers within the State.”<sup>85</sup>

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79. *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970).

80. REDLICH ET AL., *supra* note 17, § 6.05, at 204.

81. *Pike*, 397 U.S. at 142.

82. *See id.* at 142.

83. *Id.* at 138, 146 (discussing a statute that prohibited the packaging of Arizona-grown produce outside the state).

84. *Id.*

85. *Id.* at 143.

*Pike* also signals the Court's willingness to examine ulterior motives behind "non-discriminatory" laws.<sup>86</sup> The opinion's use of the words "interest is minimal at best—certainly less substantial than a State's interest in securing employment for its people"<sup>87</sup> is not only significant for noting the minimal benefit conferred by the statute. It also represents a judicial admonishment based on the Court's long-standing "suspicion [of] state statutes requiring business operations to be performed in the home State that could be more efficiently be performed elsewhere."<sup>88</sup> Moreover, subsequent Supreme Court decisions cast doubt on the validity of regulations that, despite being subjected to *Pike* balancing, appear to possess suspect ulterior or "illusory motives."<sup>89</sup> In *Kassel v. Consolidated Freightways Corp.*, the Court examined an Iowa statute prohibiting the use of 65-foot double-trailer trucks within its borders.<sup>90</sup> *Kassel* restated the principle that a State must demonstrate a legitimate interest in order for a law to come into harmony with the Commerce Clause.<sup>91</sup> Despite Iowa's efforts to justify its statute, observation of the available facts suggested that lawmakers possessed an ulterior motive.<sup>92</sup> The Court determined that this ulterior motive (limiting traffic on Iowa's highways), "being protectionist in nature, is impermissible under the Commerce Clause."<sup>93</sup> Accordingly, even where regulations are subject to *Pike* balancing, a court may seek out impermissible ulterior motives behind the "non-discriminatory laws."

While such an endeavor may further blur the lines between the competing standards of review, Justice Brennan's concurrence in *Kassel* provides an alternative, and perhaps simplified, framework under which Dormant Commerce Clause challenges to state regulations may be taken into account.<sup>94</sup> Justice Brennan said that a court must take into account three principles:

- (1) The courts are not empowered to second-guess the empirical judgments of lawmakers concerning the utility of legislation.
- (2) The burdens imposed on commerce must be balanced against the local benefits actually sought to be achieved by the State's lawmakers, and not against those suggested after the fact by

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86. This may further blur the line between the later two categories of Dormant Commerce Clause review. Indeed, at least one court has acknowledged that there is no clear line separating effects that constitute a case of nearly per se invalidity and those requiring a balancing approach. *See* *Wiesmueller v. Kosobucki*, 571 F.3d 699, 703 (7th Cir. 2009).

87. *Pike*, 397 U.S. at 146.

88. *Id.* at 145.

89. *Kassel v. Consol. Freightways Corp. of Del.*, 450 U.S. 662, 671 (1981); *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 449 (1978).

90. *Kassel*, 450 U.S. at 662.

91. *Id.* at 662–63.

92. *See id.* at 663.

93. *Id.* at 664.

94. *Id.* at 679 (Brennan, J., concurring).

counsel. (3) Protectionist legislation is unconstitutional under the Commerce Clause, even if the burdens and benefits are related to safety rather than economics.<sup>95</sup>

This framework pays deference to the respective roles of the legislature and the judiciary, while honoring the benefits or objectives sought by a state's lawmakers.<sup>96</sup> Further, Justice Brennan's analysis ensures that the constitutionality of a state regulation will be determined by the "judgments made by the State's lawmakers,"<sup>97</sup> rather than "the vagaries of litigation" created by a state's lawyers' in court.<sup>98</sup> To consider anything else, Brennan said, would answer the wrong question,<sup>99</sup> and where a regulatory purpose is protectionist in nature, such a regulation is impermissible.<sup>100</sup> As such, the alternative approach offered by Justice Brennan may be a more efficient means of analysis.

## II. PREVIOUS CHALLENGES TO DIPLOMA PRIVILEGE STATUTES AND RESTRICTIONS OF LEGAL PRACTICE BASED ON RESIDENCY OR ORIGIN

Diminished use of the diploma privilege has resulted in limited opportunities for courts to review challenges to diploma privilege statutes. Indeed, Montana appears to be the only other state to have its previous statute challenged, albeit on equal-protection grounds.<sup>101</sup> However, case law is rife with individuals challenging statutes that limit the availability of legal practice based on residence or origin. Most frequently, disadvantaged attorneys bring their claims under the potentially less stringent Privileges and Immunities standard,<sup>102</sup> but there are also Dormant Commerce Clause cases. Admittedly, analysis of these cases provides a limited amount of guidance. However, the Montana case is helpful, as its differing opinions parallel the constitutional arguments that can be made under the Dormant Commerce Clause. Further, the general survey of cases discussing

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95. *Id.* at 679–80 (Brennan, J., concurring) (emphasis added).

96. *See id.* at 680–81 (Brennan, J., concurring); *see also* Pike v. Bruce Church, 397 U.S. 137, 142 (1970); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464, 473 (1981).

97. *Kassel*, 450 U.S. at 680 (Brennan, J., concurring).

98. *Id.*

99. *See id.* at 681.

100. *Id.* at 686; *see also id.* at 675–77.

101. *Huffman v. Montana State Supreme Court*, 372 F. Supp 1175 (D. Mont. 1974) *aff'd*, 419 U.S. 955 (1974).

102. The Privileges and Immunities Clause provides a singularly different test than the Dormant Commerce Clause. It requires that "(i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State's objective." Supreme Court of New Hampshire v. Piper, 470 U.S. 274, 284 (1985) (discussed *infra*); *see also* Andrew M. Perlman, *A Bar Against Competition: The Unconstitutionality of Admissions Rules for Out of State Lawyers*, 18 GEO. J. LEGAL ETHICS, 135, 159–63 (2004) (arguing that the regulation of out-of-state bar admissions violates the Privileges and Immunities Clause).

restrictions on legal practice under both clauses is not farfetched, as courts may cite decisions under either of the closely related provisions where the discrimination may potentially fall within the scope of both clauses.<sup>103</sup>

A. Montana's Diploma Privilege: *Huffman v. Montana Supreme Court*

In *Huffman v. Montana Supreme Court*,<sup>104</sup> James L. Huffman, a graduate of the University of Chicago Law School and a Montana resident, contended that Montana's statutorily enacted diploma privilege violated the Equal Protection Clause of the Fourteenth Amendment.<sup>105</sup> Acknowledging that Equal Protection jurisprudence indicated that two potential standards of reviews could be employed, the court addressed whether the diploma privilege's statutory classification was predicated upon certain "suspect" criteria or affected "fundamental rights."<sup>106</sup>

Concluding that the classification was neither predicated upon suspect criteria nor burdensome to fundamental rights, a majority of the three-judge federal district court concluded that the less stringent standard, rational basis review, was applicable.<sup>107</sup> While the *Huffman* court acknowledged that the practice of law is a right, it refrained from classifying law practice as a fundamental right.<sup>108</sup> It stated: "Certainly a real and substantial distinction exists between one's wealth, race, nationality, or alienage . . . and one's choice of institutions at which to study law"; nor did the diploma privilege implicate any fundamental right.<sup>109</sup> The court believed that Huffman's case was not one "where one who has established his learning qualifications and moral character has been deprived of any right. . . . The object of the classification under scrutiny . . . is to ensure that the courts and people of Montana are represented by attorneys who are of sound

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103. See *Sestric v. Clark*, 765 F.2d 655, 664 (7th Cir. 1985) (noting the relationship between the two clauses).

104. 372 F. Supp. at 1175.

105. *Id.* at 1176.

106. *Id.* at 1177; see also *McGowan v. Maryland*, 366 U.S. 420, 425 (1960) ("The constitutional safeguard [of the Equal Protection Clause] is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective.").

107. *Huffman*, 372 F. Supp. at 1177.

108. *Id.* at 1178.

109. *Id.*; see also *Baird v. State Bar of Ariz.*, 401 U.S. 1, 8 (1970) ("The practice of law is not a matter of grace, but of right for one who is qualified by his learning and his moral character."). But see *Shapiro v. Thompson*, 394 U.S. 618 (1969) (declaring unconstitutional certain Connecticut and District of Columbia statutes which denied welfare assistance to persons who had not resided within the respective jurisdictions for at least one year preceding the application for assistance); *Corfield v. Coryell*, 6 Fed. Cas. 546, 552 (C.C.E.D. Pa. 1823) (enumerating the right to acquire and possess property of every kind, and the "right of a citizen of one state to pass through, or reside in any other state, for purposes of *trade*, agriculture, *professional pursuits*, or otherwise" as fundamental rights) (emphasis added).

ethical character and of competent legal skills.”<sup>110</sup> Citing a general trend for rational basis review for bar regulation statutes,<sup>111</sup> the court noted that graduates of the University of Montana Law School “must complete the required course of instruction with its emphasis on Montana law.”<sup>112</sup>

Moreover, the court addressed the dissent’s call for strict scrutiny. Despite the dissent’s assertion that the diploma privilege violated an individual’s fundamental right to travel,<sup>113</sup> the majority relied on a strict interpretation of a Supreme Court decision holding unconstitutional residence requirements that directly impinge on the fundamental right to travel.<sup>114</sup> Because the Huffman court believed the diploma privilege did not directly impinge upon the plaintiff’s fundamental right of interstate travel, the state needed satisfy only rational basis review.<sup>115</sup>

Finally, the *Huffman* court argued (in dicta and somewhat unsatisfactorily) that Montana’s diploma privilege satisfied strict scrutiny.<sup>116</sup> It asserted that the state “met the showing of a compelling governmental interest in the quality and integrity of the persons whom it licenses to practice law and [that it] may impose regulations which promote that interest.”<sup>117</sup> Conspicuously absent, however, is any discussion of strict scrutiny’s second prong. Did Montana’s diploma privilege employ the least restrictive means?

Judge East’s *Huffman* dissent argued that Montana’s diploma privilege failed to satisfy either strict scrutiny or rational basis review.<sup>118</sup> Judge East said that the diploma privilege should be subjected to strict scrutiny, as it infringed upon the fundamental right to travel, and the privilege failed this standard of review.<sup>119</sup> While the state has a legitimate objective in regulating the bar, Judge East said, its policy choices are permissible only “so long as an individual’s federal constitutional guarantees are not thereby infringed.”<sup>120</sup> Judge East discussed the courts’ long-standing tradition of honoring the fundamental right to travel among the states for purposes of

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110. *Huffman*, 372 F. Supp. at 1178. See *Dunn v. Blumstein*, 405 U.S. 330, 338 (1972) (asserting that durational residence laws penalize persons who have traveled from one place to another to establish new residence during qualifying period).

111. See *Smith v. Davis*, 350 F. Supp. 1225, 1229 (S.D.W. Va. 1972); *Hackin v. Lockwood*, 361 F.2d 499, 502 (9th Cir. 1966); *Schwartz v. Bd. of Bar Exam’rs of N.M.*, 353 U.S. 232, 239 (1957).

112. *Huffman*, 372 F. Supp. at 1179 (noting that Montana statutes and cases were actively examined in the supplementary materials for most courses).

113. *Id.* at 1185 (East, J., dissenting); see also *Shapiro*, 394 U.S. at 629–30 (discussing the fundamental right to travel).

114. *Huffman*, 372 F. Supp. at 1185.

115. *Id.* at 1182–83.

116. *Id.* at 1183.

117. *Id.*

118. *Id.* at 1184–85.

119. *Id.* at 1185.

120. *Id.* at 1184.

trade,<sup>121</sup> and asserted that the State of Montana's justification, based on the bar applicant's knowledge of the diploma privilege's favored treatment, emphasized "the unhappy fact of provincialism—come to us or else."<sup>122</sup> Effectively, the Montana statute required an individual like the plaintiff to choose between the exercise of his right to travel under the constitution and his right to equal treatment under the law.<sup>123</sup> Although Montana had an interest in the regulation of the bar, the state failed to show a compelling state interest in placing the burden on the plaintiff.<sup>124</sup>

Further, Justice East contended that the majority misinterpreted the Supreme Court's expansive opinions in *Shapiro v. Thompson* and *Dunn v. Blumstein*.<sup>125</sup> He wrote:

*Shapiro* and *Dunn* protect the fundamental right to travel from sustaining burdens not imposed on other residents in like standing, rather than some right to the necessities of life or to vote. The aggrieved parties were, as is the plaintiff here, actual residents of the given state who had exercised their right to travel and were penalized in sharing legal entitlements offered by the state with other residents in like standing equally under the law. The same rationale applies whether it be in the state's exercise of police powers, taxation, provisions for state grants of welfare, school benefits or licenses to engage in lawful pursuits. So here the requirement of the Bar examination is a state imposed burden upon the plaintiff's exercise of his right to freely travel to Montana and receive equal treatment with other residents in like standing under the laws of that state.<sup>126</sup>

As *Shapiro* and *Dunn* concerned the right to travel, not the voting rights and necessities of life emphasized by the majority, the majority opinion, Judge East said, misconstrued the Supreme Court's rulings.<sup>127</sup> Accordingly, the fact that the plaintiff possessed the same academic qualifications as Montana law school graduates did invoke the right to travel and rendered the majority opinion untenable.

The *Huffman* dissent also maintained that Montana's diploma privilege statute failed to satisfy even rational basis review.<sup>128</sup> It acknowledged that Montana possessed a legitimate, although not compelling, interest in bar regulation, thus satisfying the first prong of rational basis review.<sup>129</sup>

121. *Id.* at 1185–86.

122. *Huffman*, 372 F. Supp. at 1186 (East, J., dissenting).

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* (emphasis added).

127. *Id.*

128. *Id.* at 1186.

129. *Id.*

However, the only true academic qualification discussed in the rule was that the bar applicants be “graduate[s] of a law school approved by the [ABA].”<sup>130</sup> Arguing that the statutorily created classification did not confer a tangible benefit to the state that could justify the legislation, Judge East said:

It is indeed a delicate and ticklish posture for one to compare the relative merits and qualities of academic accomplishments held by the graduate of one ABA approved law school over those of another. . . . I cannot agree that the comparison of the curriculum of one ABA approved law school’s catalogue with another’s is a reasonable rationality upon which to waive the requirement of taking a bar examination in favor of the graduates of one such approved law school and in turn demand and require such an examination by graduates of all other such approved law schools.<sup>131</sup>

Moreover, while the Supreme Court of Montana played an advisory role over the state bar, “the Supreme Court holds no lawful authority or direction over the faculty, course of study or the end product of the Montana Law School whatsoever,” Judge East maintained.<sup>132</sup> Thus, as the state’s claimed benefit was dubious at best, the classification failed to satisfy the second prong of the reasonable rationality test.

#### B. Challenges to Restrictions of Legal Practice based on Residency or Origin

Ample case law exists concerning regulations of bar admission, or legal practice, based on residency or origin.<sup>133</sup> While this subject matter’s Privileges and Immunities Clause jurisprudence is well developed, its commercial cousin’s case law is comparatively scarce. Comparison of these closely related provisions is warranted, however, as courts may cite decisions under either provision if the discrimination may potentially be within the scope of both clauses.<sup>134</sup> These cases show a general judicial trend of disfavor towards such residency based regulations.

*Supreme Court of New Hampshire v. Piper* provided the first challenge to residency based bar regulation.<sup>135</sup> In *Piper*, the New Hampshire bar denied admission to Kathryn Piper, a Vermont resident who had already passed the New Hampshire bar exam, because of a requirement that all bar

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130. *Id.* at 1184.

131. *Id.* at 1185.

132. *Id.*

133. *See, e.g.,* Supreme Court of New Hampshire v. Piper, 470 U.S. 274, 284 (1985); Barnard v. Thornstenn, 489 U.S. 546 (1989).

134. *See* Sestric v. Clark, 765 F.2d 655, 664 (7th Cir. 1985).

135. *Piper*, 470 U.S. at 274.

examinees be in-state citizens.<sup>136</sup> Drawing from bountiful case law prohibiting occupational regulations based on residency,<sup>137</sup> the Court held the statute to be unconstitutionally discriminatory under the Privileges and Immunities Clause.<sup>138</sup> The Court applied the logic of *Piper* in *Barnard v. Thorstenn*,<sup>139</sup> holding unconstitutional a regulation requiring that a lawyer reside within the Virgin Islands for a year before becoming eligible for bar admission.<sup>140</sup>

Further, in *Supreme Court of Virginia v. Friedman*, the Court examined a Virginia rule that permitted Virginia residents to obtain admission to the Virginia Bar by motion while requiring non-resident out-of-state lawyers to pass the Virginia bar exam.<sup>141</sup> “Under this rule, an attorney who was admitted in Maryland but who lived in Virginia was allowed to gain admission on motion in Virginia, but an attorney licensed in Maryland who also lived in Maryland had to take the bar examination.”<sup>142</sup> As in *Piper* and *Thorstenn*, the Virginia rule unconstitutionally discriminated against out-of-state citizens and was therefore unconstitutional.<sup>143</sup>

While the Supreme Court has yet to examine a bar admissions claim under the Dormant Commerce Clause, two circuits have had the opportunity to discuss the Dormant Commerce Clause’s implications on statutes restricting the availability of legal services.<sup>144</sup> First, the Seventh Circuit considered a complaint citing the Dormant Commerce Clause in *Sestric v. Clark*.<sup>145</sup> In *Sestric*, Anthony Sestric, an attorney from Missouri, challenged an Illinois statute that waived the bar exam requirement for certain new residents of Illinois but required non-residents to pass the state bar examination before being allowed to practice law in Illinois.<sup>146</sup> Analyzing the potential economic impact of this law, Judge Posner wrote that “far from having placed an unreasonable burden on the interstate mobility of lawyers, Illinois may well have increased that mobility. . . . [T]he waiving of a condition for a class of new residents merely makes it easier for lawyers to change states.”<sup>147</sup> As there was no indication that the statute discriminated against interstate commerce, the subject of the

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136. *Id.* at 276.

137. *Id.* at 279–81.

138. *Id.* at 287–88.

139. 489 U.S. 546 (1989).

140. *Id.* at 558–59.

141. 487 U.S. 59 (1988).

142. Perlman, *supra* note 102, at 152–53.

143. 487 U.S. at 66–67.

144. Legal services constitute interstate commerce where they have a modest connection to another state. *Goldfarb v. Va. State Bar*, 421 U.S. 773, 787–88 (1975).

145. *Sestric v. Clark*, 765 F.2d 655 (7th Cir. 1985).

146. *Id.*

147. *Id.* at 661 (emphasis added).



Dormant Commerce Clause, the Seventh Circuit upheld the statute.<sup>148</sup> However, in *National Revenue Corp. v. Violet*, the First Circuit found that a Rhode Island statute, which defined debt collection as law practice and limited such collecting to licensed Rhode Island lawyers, discriminated against interstate commerce.<sup>149</sup> The *Violet* Court stated:

By defining all debt collection as the practice of law, and limiting this practice to members of the Rhode Island bar, Rhode Island effectively [barred] out-of-staters from offering a commercial service within its borders and confer[red] the right to provide that service—and to reap the associated economic benefit—upon a class largely composed of Rhode Island citizens.<sup>150</sup>

Thus, *Violet* acknowledges that rules affecting out-of-state lawyers' ability to practice within a jurisdiction impacts interstate commerce and implicates the Dormant Commerce Clause. Yet *Violet* is particularly noteworthy, as the First Circuit determined that a regulation is capable of being subjected to, and subsequently failing, either of the Dormant Commerce Clause tests.<sup>151</sup>

Accordingly, "*Violet* suggests that such rules give rise to strict [D]ormant Commerce Clause scrutiny even when they do not explicitly discriminate against out-of-state citizens."<sup>152</sup> This means that a statute may manifest effective discrimination merely where it "grants privileged status to a group composed 'largely' of in-state citizens."<sup>153</sup> Thus, while the Supreme Court has yet to pass judgment on a bar admissions claim under the Dormant Commerce Clause, two circuit courts have recognized similar regulations' potential impact on interstate commerce, and such regulations may fail one of the Dormant Commerce Clause tests.<sup>154</sup>

Although none of these cases may be considered dispositive, the judicial disfavor over restricting bar admission based on residency or origin is well documented. The Supreme Court has already invalidated using state citizenship as a requirement for bar admission,<sup>155</sup> and two circuits have had the opportunity to examine the Dormant Commerce Clause implications of restrictions predicated on the origin of legal services.<sup>156</sup>

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148. *Id.* at 664–65.

149. 807 F.2d 285 (1st Cir. 1986) (emphasis added).

150. *Id.* at 290.

151. *Id.* at 289 n.5, 290 (citations omitted).

152. Perlman, *supra* note 102, at 167.

153. *Id.*

154. To the extent that *Sestric* upheld the Illinois regulation, it is essential to note that the 7th Circuit said that the regulation could have increased the interstate mobility of lawyers. *Sestric v. Clark*, 765 F.2d 655 (7th Cir. 1985).

155. *See* Supreme Court of New Hampshire v. Piper, 470 U.S. 274 (1985).

156. *Sestric*, 765 F.2d at 655; *Violet*, 807 F.2d at 285.

III. *WIESMUELLER V. KOSOBUCKI*

## A. Background

In 2007, Christopher L. Wiesmueller, a student at Oklahoma City University School of Law, brought a §1983 claim against the members of Wisconsin's Board of Bar Examiners, as well as the members of the Supreme Court of Wisconsin.<sup>157</sup> Wiesmueller alleged that Wisconsin's diploma privilege discriminated against interstate commerce because it afforded bar admission in lieu of a bar examination only to lawyers graduating from one of Wisconsin's two ABA accredited law schools.<sup>158</sup> Additionally, Wiesmueller sought class certification for all out-of-state law school graduates who sought to practice within Wisconsin.<sup>159</sup> The United States District Court for the Western District of Wisconsin denied Wiesmueller's motion for summary judgment, denied Wiesmueller's motion for class certification, and granted defendants' motion to dismiss.<sup>160</sup>

Wiesmueller appealed both the dismissal of his claim and the denial of class certification.<sup>161</sup> The Seventh Circuit agreed with Wiesmueller and remanded the case.<sup>162</sup> After passing the Wisconsin bar examination, thereby mooting his claim, Wiesmueller moved, on remand, to vacate the earlier decision dismissing his claims on their merits and moved for class substitution of plaintiffs as well as class certification.<sup>163</sup> Included within this proposed class were:

[A]ll persons who (1) graduated or will graduate with a professional degree in law from any law school outside Wisconsin accredited by the American Bar Association; (2) apply to the Wisconsin Board of Bar examiners for a character and fitness evaluation to practice law in Wisconsin before their law school graduation or within thirty days of their graduation; and (3) have not yet been admitted to the Wisconsin bar.<sup>164</sup>

Although the District Court granted both the motions for plaintiff substitution and class certification, the court dismissed the action for failure to state a claim.<sup>165</sup> Bar applicants subsequently appealed this dismissal, whereupon the Seventh Circuit reversed and remanded the matter to the

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157. *Wiesmueller v. Kosobucki*, 492 F. Supp. 2d 1036 (W.D. Wis. 2007).

158. *Id.* at 1036.

159. *Id.* at 1037.

160. *Id.* at 1039–40.

161. *Wiesmueller v. Kosobucki*, 513 F.3d 784 (7th Cir. 2008).

162. *Id.* at 787.

163. *Wiesmueller v. Kosobucki*, 251 F.R.D. 365, 366 (W.D. Wis. 2008), *rev'd and remanded* 571 F.3d 699 (7th Cir. 2009).

164. *Id.* at 367.

165. *Id.* at 368.

district court once again.<sup>166</sup>

### B. The Seventh Circuit's Latest Opinion

Following dismissal for failure to state a claim,<sup>167</sup> the substitute plaintiffs and the class they represented appealed to the Seventh Circuit.<sup>168</sup> Appellants argued that the “‘diploma privilege’ discriminates against graduates of out-of-state law schools who would like to practice law in Wisconsin.”<sup>169</sup> Specifically, plaintiffs contended that they were set at a disadvantage vis-à-vis graduates of Wisconsin law schools, who comprise two-thirds of the admitted bar, by virtue of the requirement that out-of-state law school graduates take the bar examination before they be admitted to the state bar.<sup>170</sup> The defendants acknowledged that the bar examination imposed certain burdens on out-of-state law graduates, but responded that “as a qualification for practice in the state[,] the study of law in a Wisconsin law school [was] a reasonable substitute for passing the bar exam . . . .”<sup>171</sup> Additionally, the defendant responded that the plaintiffs lacked standing due to the nature of the relief sought: injunction against the words “in this state” from Wis. Sup. Ct. R. 40.03.<sup>172</sup>

The Seventh Circuit first sought to address the desired form of relief. The court quickly noted that Wis. Sup. Ct. R. 40.03 made “no reference to Wisconsin law, and none of the listed course names [had] ‘Wisconsin’ or any cognate in it.”<sup>173</sup> While the defendants maintained that the certified class could not achieve relief through the expungement of the words “in this state,” as plaintiffs failed to satisfy the educational requirements imposed by subsection (2) of the privilege, the court said that the defendants erred in assuming the educational requirements implicated the study of Wisconsin law.<sup>174</sup> Indeed, the required curriculum included:

(a) Elective subject matter areas; 60-credit rule. Not less than 60 semester credits shall have been earned in regular law school courses in the subject matter areas generally known as: Administrative law, appellate practice and procedure, commercial transactions, conflict of laws, constitutional law, contracts, corporations, creditors’ rights, criminal law and procedure, damages, domestic relations, equity, evidence, future interests, insurance, jurisdiction of courts, legislation, labor law,

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166. *Wiesmueller v. Kosobucki*, 547 F.3d 740 (7th Cir. 2008).

167. *Wiesmueller v. Kosobucki*, 667 F. Supp. 2d 1001 (W.D. Wis. 2009).

168. *Wiesmueller v. Kosobucki*, 571 F.3d 699 (7th Cir. 2009).

169. *Id.* at 701.

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.* at 702.

174. *Id.*

ethics and legal responsibilities of the profession, partnership, personal property, pleading and practice, public utilities, quasi-contracts, real property, taxation, torts, trade regulation, trusts, and wills and estates. The 60-credit subject matter requirement may be satisfied by combinations of the curricular offerings of each approved law school in this state.

(b) Mandatory subject matter areas; 30-credit rule. Not less than 30 of the 60 semester credits shall have been earned in regular law school courses in each of the following subject matter areas: constitutional law, contracts, criminal law and procedure, evidence, jurisdiction of courts, ethics and legal responsibility to the legal profession, pleading and practice, real property, torts, and wills and estates.<sup>175</sup>

Judge Posner wrote that “so far as appears, every class member could establish that his or her law school studies conformed to the requirements set forth in the rule except that the law school was in another state.”<sup>176</sup> Despite this distinction, the court asserted that the Constitution does not require Wisconsin to extend diploma privilege to all graduates of accredited law schools, for “[l]eveling down is a permissible form of compliance with a command to end unequal treatment.”<sup>177</sup> The court refrained from commenting on what form of relief would be required, but noted that “the loss of an opportunity to compete for a position . . . is injury enough to support standing . . . .”<sup>178</sup>

Progressing to the merits of the case, the court engaged in Dormant Commerce Clause review. While acknowledging that a statute’s facial discrimination against interstate commerce was nearly a case of *per se* invalidity, the court suggested the statute was not facially discriminatory.<sup>179</sup> Indeed, Wisconsin’s version of diploma privilege does not explicitly reference interstate commerce or any other interaction among the several states.<sup>180</sup> Accordingly, the court moved to a discussion of the effects diploma privilege has on interstate commerce.<sup>181</sup>

The court acknowledged that a regulation’s constitutionality largely depends on the magnitude of its effect on interstate commerce.<sup>182</sup> The

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175. WI SCR 40.03(2)(a)–(b) (2009). For a complete listing of Wisconsin’s diploma privilege, see *supra* text accompanying note 8.

176. *Wiesmueller*, 571 F.3d at 702.

177. *Id.*

178. *Id.* at 703.

179. *Id.* at 704.

180. See WI SCR 40.03 (2009).

181. *Wiesmueller*, 571 F.3d at 703.

182. See *id.*

commercial implications of diploma privilege were obvious to the court,<sup>183</sup> and the Seventh Circuit noted that where a regulation's effect is to favor in-state economic interest over out-of-state interests, courts have generally struck down the statute without further inquiry.<sup>184</sup> But where a statute regulates even-handedly and only has incidental effects on interstate commerce, the court should examine "whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits"; that is, a balancing test is required.<sup>185</sup> However, the Seventh Circuit noted that there is no clear line separating effects that constitute a case of nearly per se invalidity and those requiring a balancing approach.<sup>186</sup> While the diploma privilege favored the economic interest of Wisconsin law schools, it appeared to have only incidental effects on interstate commerce and regulated evenhandedly.<sup>187</sup> Moreover, Wis. Sup. Ct. R. 40.03 was not limited to Wisconsin residents, and Wisconsin law schools admitted students from other states.<sup>188</sup>

Despite a minimal record, the Seventh Circuit strongly suggested that Wisconsin's diploma privilege should be subjected to the *Pike* balancing approach.<sup>189</sup> While this challenge appeared to be a case of first instance, the Seventh Circuit had previously applied this principle to regulations of bar admission.<sup>190</sup> Indeed, the court said, "A state's right to regulate admission to the practice of law in the state is unquestioned, even though the result is to impede the interstate mobility of lawyers. But since that is a consequence, the regulation must be at least minimally reasonable."<sup>191</sup> Judge Posner went on to emphasize the word "minimally," noting that "[t]he judiciary lacks the time and the knowledge to be able to strike a fine balance between the burden that a particular state regulation lays on interstate commerce and the benefit of that regulation to the state's legitimate interests."<sup>192</sup> Further, "The effect on commerce of the discriminatory diploma privilege may be small and, if so, not much would be required to justify it."<sup>193</sup>

The opinion went on to chastise the district court for its premature dismissal of Wiesmueller's claim. This dismissal led the court to an

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183. See *id.* at 705; see also *Sestic v. Clark*, 765 F.2d 655, 661 (7th Cir. 1985).

184. *Wiesmuller*, 571 F.3d at 703.

185. *Id.*

186. *Id.* This would necessarily constitute the difference between the "Effectively Discriminatory Laws" and "Laws with an Incidental Effect on Commerce." See *supra* Part I.B.2–3.

187. *Wiesmueller*, 571 F.3d at 703.

188. *Id.* at 703–04.

189. *Id.* at 704.

190. *Id.*; see also *Sestic v. Clark*, 765 F.2d 655, 661–64 (7th Cir. 1985).

191. *Wiesmueller*, 571 F.3d at 704.

192. *Id.*

193. *Id.* at 705.

“evidentiary vacuum” in which:

[T]he scanty record that the plaintiffs were not allowed to amplify [suggests] that Wisconsin law is no greater part of the curriculum of the Marquette and Madison law schools than it is of the law schools of Harvard, Yale, Columbia, Virginia, the University of Texas, Notre Dame, the University of Chicago, the University of Oklahoma, and the University of Northern Illinois (which happens to be within a stone’s throw of Wisconsin, as are the four law schools in Minneapolis-St. Paul).<sup>194</sup>

While the court noted that the two Wisconsin schools were “doubtless among the nation’s best,”<sup>195</sup> the scarce record suggested that diploma privilege created an arbitrary distinction between graduates of Wisconsin law schools and those from other accredited schools.<sup>196</sup> Moreover, the opinion drew possible comparisons to the plaintiff in *Hunt* and took note of one out-of-state graduate’s difficulty in passing the Wisconsin bar.<sup>197</sup> All the while, a distinction existed in which Wisconsin law schools received various benefits while burdening interstate commerce.<sup>198</sup> Yet the premature dismissal denied the plaintiffs the opportunity to try their case and raised concerns that there may be nothing to justify this distinction at all.<sup>199</sup>

The defendants raised several arguments in support of diploma privilege. First, the defendants contended that Wis. Sup. Ct. R. 40.03 required Wisconsin law schools to include Wisconsin law.<sup>200</sup> However, the Seventh Circuit noted that absent from the provision was any reference to Wisconsin law and that the statutory language “rules and principles of substantive and procedural law as they may arise in the courts and administrative agencies of the United States and this state” suggested a national rather than local orientation.<sup>201</sup> The defendants also asserted that in promulgating the rule, the Supreme Court of Wisconsin reserved for itself a supervisory role in the curriculum of Wisconsin law schools, thus ensuring curricula rich in Wisconsin law.<sup>202</sup> Judge Posner noted, however, that there was no hint in the record that the Supreme Court of Wisconsin played any such role.<sup>203</sup> Indeed, equally plausible was the possibility that the Supreme Court of Wisconsin delegated such authority to the two law

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194. *Id.* at 704.

195. *Id.* at 706.

196. *Id.* at 704.

197. *See id.* at 704–05; *see also* *Hunt v. Wash. State Apple Adver. Com’n*, 432 U.S. 333 (1977); Hansen, *supra* note 3.

198. *See Wiesmueller*, 571 F.3d at 704–06.

199. *Id.* at 705, 707.

200. *Id.* at 705.

201. *Id.* at 705–06.

202. *Id.* at 706.

203. *Id.*

schools themselves.<sup>204</sup> Finally, the defendants argued that diploma privilege should be upheld on the basis of the “market participant” exception.<sup>205</sup> However, the court once again asserted that the claim’s premature dismissal left an insufficient record for the court to issue a ruling and noted that Marquette’s status as a private institution would further complicate this question.<sup>206</sup>

For the aforementioned reasons, the Seventh Circuit reversed and remanded the case to the Western District of Wisconsin. The parties settled in March 2010.<sup>207</sup>

#### IV. THE EVOLUTION OF THE WISCONSIN DIPLOMA PRIVILEGE

Wisconsin’s diploma privilege possesses a history dating back to later half of the nineteenth century. Its history suggests that Wisconsin initially enacted the diploma privilege as a means of promoting formal legal education.<sup>208</sup> While the diploma privilege’s statutory language has undergone two significant modifications, there is no indication that these modifications enhanced or altered the privilege’s purpose. Nor do these modifications appear to make Wisconsin-trained lawyers any more capable of practicing Wisconsin law within the state.

Initially, law practice was open to all citizens, and Wisconsin’s bar regulation, like other states’, consisted merely of an oral examination conducted by a judge.<sup>209</sup> These examinations were largely informal, and an infamous story about Abraham Lincoln conducting one such examination while bathing persists in the legal community to this day.<sup>210</sup> In an effort to improve the quality of the bar, numerous states sought to incentivize formal legal education and conferred automatic bar admission to graduates of the states’ law schools.<sup>211</sup> When the University of Wisconsin Law Department opened in 1868, offering a one year course of study,<sup>212</sup> the Wisconsin

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204. *Id.*

205. *Id.*

206. *Id.* at 706. While addressing the intricacies of the market participant exception is worthwhile, specifically addressing its applicability to Marquette University Law School in this context is beyond the scope of this note. Moreover, this consideration also raises the question of the viability of a separate institution’s potential claim that Wisconsin’s diploma privilege is a protectionist measure aimed at benefitting the state’s two law schools.

207. Vielmetti, *supra* note 12.

208. Levine, *supra* note 1.

209. Moran, *supra* note 4, at 645–46.

210. *Id.* at 646.

211. *Id.* But see George Neff Stevens, *Diploma Privilege, Bar Examination or Open Admission: Memorandum Number 13*, 46 B. EXAMINER 15, 18–19 (1977) (asserting that raising standards was not the true objective of the early law school drive for the diploma privilege).

212. Univ. Wis.-Madison, *Events in the History of UW Law School*, <http://www.law.wisc.edu/about/lore/events.html> (last updated July 4, 2007).

legislature moved quickly to establish diploma privilege in order to “encourage lawyers-to-be to receive a formal legal education instead of just ‘reading law.’”<sup>213</sup> By 1870, the state of Wisconsin offered diploma privilege to graduates of the University of Wisconsin Law School.<sup>214</sup>

Wisconsin’s diploma privilege has undertaken two significant statutory changes before achieving its current form.<sup>215</sup> The first pertains to the expansion of the diploma privilege. Marquette acceded to the privilege in 1935.<sup>216</sup> Prior to this ascension, Marquette was among diploma privilege’s most ardent critics,<sup>217</sup> and its faculty actively lobbied for the abolition of the privilege for University of Wisconsin graduates.<sup>218</sup> Indeed, in 1926 one Marquette law professor “wrote that his faculty and students recognized ‘the consequences on the morale . . . of the extension of this privilege . . . and far from desiring it will oppose by all legitimate means within [our] power the receipt of such a gift of the Greeks.’”<sup>219</sup> However, in 1931, Wisconsin opened the privilege to graduates of any law school within the State.<sup>220</sup> Yet Marquette’s opposition continued after the 1931 amendment, whereupon Dean Clifton Williams wrote the Committee on the Admission to the bar, saying, “You are authorized to state anywhere at any time that Marquette University Law School is opposed to the diploma privilege.”<sup>221</sup> Despite this continued opposition, 1933’s “Fons Bill” explicitly revised the diploma privilege statute as to explicitly extend the privilege to Marquette students.<sup>222</sup> Two years later, Marquette’s position changed.<sup>223</sup> The extent to which this change in behavior was coerced, through an acknowledgment of the competitive disadvantage faced by Marquette graduates, or welcomed as validation of Marquette’s equal status with the University of Wisconsin Law School is subject to debate.<sup>224</sup> However, the amendments of the 1930s represent a significant expansion of the privilege while maintaining its central tenets.

Second, in 1971 the state, motivated by the University of Wisconsin’s decision to change the upper-level curriculum to a strictly elective

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213. Levine, *supra* note 1.

214. WIS. STAT. § 79 (1870).

215. WIS. STAT. § 757.282 (1977).

216. *A History of the Organized Bar in Wisconsin*, Wisconsin State Bar Ass’n, ch. 13 available at <http://www.wisbar.org/AM/Template.cfm?Section=BarHistory&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=48667> (last visited Mar. 7, 2011) (hereinafter *A History*).

217. See Levine, *supra* note 1; Moran, *supra* note 4, at 648.

218. Levine, *supra* note 1.

219. Moran, *supra* note 4, at 648.

220. WIS. STAT. § 256.28(1) (1931).

221. *A History*, *supra* note 216, at ch. 13.

222. *Id.*

223. *Id.*

224. See generally Levine, *supra* note 1.



nature,<sup>225</sup> amended the diploma privilege to include the thirty-credit rule.<sup>226</sup> This rule may be considered “the central requirement for admission to the Wisconsin bar on diploma privilege,”<sup>227</sup> and requires students seeking bar admission through the diploma privilege to take the ten specific courses listed in Wis. Stat. 40.03(2)(b).<sup>228</sup> Prior to the enactment of these reforms, Wisconsin’s lawmakers entrusted the law schools’ faculties to determine how best to prepare students, and the diploma privilege was not subject to any educational requirement other than graduation from a Wisconsin law school.<sup>229</sup> This effectively represented an attempt, contrary to the wishes of the University of Wisconsin Law School administration,<sup>230</sup> to identify and codify a “canon of substantive law to which all entry-level American lawyers must be exposed in order to be competent lawyers.”<sup>231</sup> However, rather than reflecting concerns for Wisconsin practice, the thirty-credit rule considered basic national competence.<sup>232</sup>

While Wisconsin’s diploma privilege has a rich history, it lacks a Wisconsin-centric objective. The drafters of the original diploma privilege had a legitimate and admirable objective of promoting formal legal education.<sup>233</sup> The privilege’s history demonstrates both concern for law school curricula, and a willingness on the part of Wisconsin’s legislature, supreme court, board of bar examiners, and faculties to debate and reform the privilege.<sup>234</sup> However, this history lacks any indication of reform intended to make Wisconsin trained attorneys more attuned to Wisconsin law and procedure. To the contrary, the principal educational requirement imposed on those seeking to enjoy the privilege suggests a national orientation.<sup>235</sup>

#### V. PASSING JUDGMENT “ON WISCONSIN”

Because contemporary Dormant Commerce Clause jurisprudence has endeavored to transition from dichotomous classifications to balancing

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225. See generally Peter K. Rofes, *Mandatory Obsolescence: The Thirty Credit Rule and the Wisconsin Supreme Court*, 82 MARQ. L. REV. 787, 790–96 (1999).

226. WIS. STAT. § 256.28(1)(b) (1971). It should be noted that this statute is identical to the current statutory expression of Wisconsin’s diploma privilege. WIS. STAT. § 757.282 (1977).

227. Rofes, *supra* note 225, at 806.

228. These courses are constitutional law, contracts, criminal law and procedure, evidence, jurisdiction of courts, ethics and legal responsibilities of the legal profession, pleading and practice, real property, torts, and wills and estates. *Id.* at 797.

229. Rofes, *supra* note 225, at 791.

230. See *id.* at 798.

231. *Id.* at 794 (emphasis added).

232. See *id.*

233. Levine, *supra* note 1.

234. See generally, Rofes *supra* note 225, at 790–96.

235. See *id.* at 794.

acts,<sup>236</sup> Dormant Commerce Clause analysis is difficult and imprecise.<sup>237</sup> A regulation's constitutionality largely depends on the magnitude of its effect on interstate commerce, insomuch as that unknown metric determines what standard of review to be employed.<sup>238</sup> Where a statute effectively discriminates against interstate commerce, strict scrutiny almost certainly sounds its death knell.<sup>239</sup> However, *Pike* balancing generally favors upholding a regulation.<sup>240</sup> The premature dismissal of Wiesmueller's claim limited the Seventh Circuit's ability to determine which standard need be employed. While one may argue that review of Wis. Sup. Ct. R. 40.03 warrants strict scrutiny, based primarily on a liberal interpretation of the Dormant Commerce Clause that actively seeks out illusory motives,<sup>241</sup> case law, and the Wisconsin Supreme Court's demonstrated interest in legal education appears to support review under the *Pike* test.<sup>242</sup> However, it is uncertain whether the privilege satisfies even that comparatively lax standard of review.

The remainder of this section will analyze and dismiss the arguments in favor of strict scrutiny review. It will then advance the position that while the privilege warrants *Pike* balancing, the purported benefits conferred to the state by the statute do not outweigh the burden placed on interstate commerce.

#### A. Strict Scrutiny is Inappropriate

The implementation of strict scrutiny review is inappropriate in the present case. While an aggrieved party would understandably claim that Wis. Sup. Ct. R. 40.03 is effectively discriminatory, thus invoking strict scrutiny, the *Pike* balancing is the appropriate standard. The historical context surrounding the diploma privilege, the Supreme Court of Wisconsin's intent, and magnitude of the privilege's effect on interstate commerce each support using the lesser of the two Dormant Commerce Clause standards. Consideration of the arguments in support of strict scrutiny is warranted, but they are all easily refuted.

Arguments in favor of invoking strict scrutiny under the Dormant Commerce Clause center on notions of protectionism. The Supreme Court has a long-standing "suspicion [of] state statutes requiring business operations to be performed in the home State that could more efficiently be

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236. See generally *S. Pac. Co. v. Arizona*, 325 U.S. 761 (1945).

237. *Wiesmueller v. Kosobucki*, 571 F.3d 699, 703 (7th Cir. 2009).

238. *Id.*

239. *Hunt v. Wash. State Apple Adver. Com'n*, 432 U.S. 333, 353 (1977).

240. *Pike v. Bruce Church*, 397 U.S. 137, 146 (1970).

241. See, e.g., *id.* at 145; *Kassel v. Consol. Freightways Corp. of Del.*, 450 U.S. 662, 679–80 (1981) (Brennan, J., concurring).

242. See *A History*, *supra* note 216; *Rofes*, *supra* note 225, at 790–96.

performed elsewhere.”<sup>243</sup> Such statutes frequently “point[] to the unhappy fact of provincialism—come to us or else.”<sup>244</sup> Invokers of strict scrutiny will invariably draw comparisons to the plaintiff in *Hunt*.<sup>245</sup> However, instead of bemoaning the inability to display state inspection certificates,<sup>246</sup> diploma privilege’s critics will demand that their law degrees be recognized as entitling them to the diploma privilege. Instead of claiming that the statute is ostensibly a consumer protection measure designed to exclude apple growers,<sup>247</sup> aggrieved parties will label the privilege a protectionist measure cloaked in education’s clothing. They will petition courts to resume their continuing mission to detect and expose protectionist subterfuge.<sup>248</sup> Despite courts’ willingness to seek out “illusory motives,”<sup>249</sup> these protectionism arguments in favor of strict scrutiny are likely to fail.

Perhaps the most obvious of the protectionism argument’s shortcomings is the difficulty associated with demonstrating that the statute is effectively discriminatory. It is true that statutes that facially or effectively discriminate against interstate commerce are nearly a case of *per se* invalidity.<sup>250</sup> However, the Seventh Circuit’s latest opinion effectively dismissed the contention that Wisconsin’s diploma privilege was facially discriminatory,<sup>251</sup> and the invocation of strict scrutiny is far more difficult where facial discrimination is not present.<sup>252</sup> Accordingly, diploma privilege’s challengers face a practical hurdle to invoking strict scrutiny.

The statutory evolution of the diploma privilege continually echoes the importance of legal education, not protectionism. This presence of pedagogical concern further detracts from the calls for strict scrutiny. Wisconsin enacted the first diploma privilege statute in 1870, shortly after the institutionalization of the University of Wisconsin’s law department, as a means of promoting formal legal education.<sup>253</sup> The promotion of formal

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243. *Pike*, 397 U.S. at 145.

244. *Huffman v. Montana State Supreme Court*, 372 F. Supp 1175, 1186 (D. Mont. 1974) (East, J., dissenting), *aff’d*, 419 U.S. 955 (1974).

245. *Hunt v. Wash. State Apple Adver. Com’n*, 432 U.S. 333 (1977) (considering a North Carolina apple grading regulation).

246. *Id.*

247. *Id.* at 353–54 (“[A]lthough the statute is ostensibly a consumer protection measure, it directs its primary efforts, not at the consuming public at large, but at apple wholesalers and brokers who are the principal purchasers of closed containers of apples. And those individuals are presumably the most knowledgeable individuals in this area. Since the statute does nothing at all to purify the flow of information at the retail level, it does little to protect the problems it was designed to eliminate.”).

248. *See REDLICH ET AL.*, *supra* note 17, § 6.04, at 200. *See generally Philadelphia v. New Jersey*, 437 U.S. 617, 625–27 (1978).

249. *See Pike v. Bruce Church*, 397 U.S. 137, 146 (1970).

250. *Wiesmueller v. Kosobucki*, 571 F.3d 699, 704 (7th Cir. 2009).

251. *Id.*

252. *See Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981). *See also, e.g., Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 126 (1978).

253. *Levine*, *supra* note 1.

legal education does not suggest intent to protect Wisconsin lawyers or law schools. Similarly, Marquette's ascension to the privilege through the reforms of the 1930s<sup>254</sup> may be seen through an educational lens as the state recognized the value of a Marquette legal education.<sup>255</sup> Further, when the state added the thirty-credit rule in 1971, these efforts constituted an effort to codify a "canon of substantive law to which all entry-level American lawyers must be exposed in order to be competent lawyers."<sup>256</sup> Accordingly, there is a recurring emphasis on education from the privilege's original version through its current form.<sup>257</sup> Fostering education is not indicative of discriminatory protectionism.

There is no indication that the Supreme Court of Wisconsin, in its capacity as the monitor of fitness and qualifications, has ever acted with an invidious protectionist agenda. Rather, the Supreme Court of Wisconsin has acted in a proper manner in order to ensure a qualified bar. The court has actively monitored the Wisconsin bar for generations.<sup>258</sup> It is the stated belief of the court that the diploma privilege is a rigorously monitored device that succeeds in its goal of maintaining a qualified bar,<sup>259</sup> and "courts are not empowered to second-guess the empirical judgments of lawmakers concerning the utility of legislation."<sup>260</sup> Thus, the pristine record established by the Supreme Court of Wisconsin further weakens the call for strict scrutiny and lends further support to *Pike* balancing.

While a regulation's constitutionality may depend on its impact on commerce,<sup>261</sup> the Wisconsin diploma privilege's impact on interstate commerce may be insufficient to constitute effective discrimination. The majority of cases under the Dormant Commerce Clause involve the tangible articles or avenues of commerce.<sup>262</sup> While it is established law that legal services constitute interstate commerce where they have a modest connection to another state,<sup>263</sup> measuring the diploma privilege's impact on interstate commerce is more difficult than monitoring apple sales or rail traffic—although, unlike *Sestric*, one cannot say that the privilege fosters

254. *A History*, *supra* note 216.

255. Levine, *supra* note 1.

256. Rofes, *supra* note 225, at 794 (emphasis added).

257. WIS. STAT. § 757.282 (1977).

258. *See generally A History*, *supra* note 216 (providing a history of Wisconsin bar regulations).

259. Shirley S. Abrahamson, Letter to the ABA Center for Professional Responsibility (2002) available at [http://www.abanet.org/cpr/mjp/comm2\\_wsc.html](http://www.abanet.org/cpr/mjp/comm2_wsc.html).

260. *Kassel v. Consol. Freightways Corp. of Del.*, 450 U.S. 662, 679–80 (1981) (Brennan, J., concurring).

261. *Wiesmueller v. Kosobucki*, 571 F.3d 699, 704 (7th Cir. 2009).

262. *See, e.g., Hunt v. Wash. State Apple Adver. Com'n*, 432 U.S. 333, 333 (1977) (apples); *St. Louis & Pacific Ry. v. Illinois*, 118 U.S. 577, 577 (1886) (involving rail transportation).

263. *Goldfarb v. Va. State Bar*, 421 U.S. 773, 787–88 (1975).

the interstate mobility of attorneys.<sup>264</sup> One conceivable metric would be the means through which bar admission was achieved; at least one third of Wisconsin's bar did not enjoy the privilege.<sup>265</sup> However, the absence of a definitive metric through which the diploma privilege's economic impact may be measured lends further support to the less rigorous *Pike* test.

#### B. Unconstitutionality Under *Pike*

Wisconsin's diploma privilege, as presently written, fails to demonstrate a discernible benefit and should subsequently fail the balancing test required under *Pike*. *Pike* says that where a legitimate local purpose exists, the question becomes one of degree, and such a regulation should be upheld unless the burden imposed on commerce is clearly excessive to its local benefits.<sup>266</sup> Yet some sort of benefit must justify the burden imposed on interstate commerce,<sup>267</sup> and the state must make more than a speculative showing that the regulation contributes to an otherwise legitimate purpose.<sup>268</sup> The diploma privilege sought to encourage formal legal education and ensure that Wisconsin-trained lawyers were competent to practice law in the state.<sup>269</sup> Moreover, advocates of the privilege believe that "as a qualification for practice in the state the study of law in a Wisconsin law school is a reasonable substitute for passing the bar exam."<sup>270</sup> Those advocates believe that such study within Wisconsin promotes familiarity with Wisconsin law more than legal study outside of Wisconsin. However, Wis. Sup. Ct. R. 40.03 fails to provide any evidence for this last belief. To the contrary, its language and history support the proposition of a nationalist, rather than Wisconsin-centric, orientation. This nationalist orientation does not support a finding of any benefit, independent of the fact that the schools are located within the state of Wisconsin, which would justify the burden placed on interstate commerce (the interstate mobility of new attorneys).

Textual analysis of Wisconsin's diploma privilege fails to provide any indication of a Wisconsin-centered orientation. Wis. Sup. Ct. R. 40.03's entirety provides:

**SCR 40.03. Legal competence requirement: Diploma privilege.** An applicant who has been awarded a first professional degree in law from a law school in this state that is

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264. *Sestric v. Clark*, 765 F.2d 655, 655 (7th Cir. 1985).

265. *Wiesmueller*, 571 F.3d at 701; *See also* *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 456 (1981)(discussing the implications of in-state losers on Dormant Commerce Clause review).

266. *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970).

267. *Wiesmueller*, 571 F.3d at 705.

268. *Raymond Motor Transp., Inc., v. Rice*, 434 U.S. 429, 447 (1978).

269. Levine, *supra* note 1; *A History*, *supra* note 216.

270. *Wiesmueller*, 571 F.3d at 701.

fully, not provisionally, approved by the American bar association shall satisfy the legal competence requirement by presenting to the clerk certification of the board showing:

(1) Satisfactory completion of legal studies leading to the first professional degree in law. The law school shall certify to the board satisfactory completion of not less than 84 semester credits earned by the applicant for purposes of the degree awarded.

(2) Satisfactory completion of study in mandatory and elective subject matter areas. The law school shall certify to the board satisfactory completion of not less than 60 semester credits in the mandatory and elective subject matter areas as provided in (a) and (b). All semester credits so certified shall have been earned in regular law school courses having as their primary and direct purpose the study of rules and principles of substantive and procedural law as they may arise in the courts and administrative agencies of the United States and this state.

(a) Elective subject matter areas; 60-credit rule.

Not less than 60 semester credits shall have been earned in regular law school courses in the subject matter areas generally known as: Administrative law, appellate practice and procedure, commercial transactions, conflict of laws, constitutional law, contracts, corporations, creditors' rights, criminal law and procedure, damages, domestic relations, equity, evidence, future interests, insurance, jurisdiction of courts, legislation, labor law, ethics and legal responsibilities of the profession, partnership, personal property, pleading and practice, public utilities, quasi-contracts, real property, taxation, torts, trade regulation, trusts, and wills and estates. The 60-credit subject matter requirement may be satisfied by combinations of the curricular offerings in each approved law school in this state.

(b) Mandatory subject matter areas; 30-credit rule.

Not less than 30 of the 60 semester credits shall have been earned in regular law school courses in each of the following subject matter areas: constitutional law, contracts, criminal law and procedure, evidence, jurisdiction of courts, ethics and legal responsibilities of the legal profession, pleading and practice, real property, torts, and wills and estates.

(c) Law school certification of subject matter content of

curricular offerings.

Upon the request of the supreme court, the dean of each such law school shall file with the clerk a certified statement setting forth the courses taught in the law school which satisfy the requirements for a first professional degree in law, together with a statement of the percentage of time devoted in each course to the subject matter of the areas of law specified in this rule.<sup>271</sup>

Indeed, the diploma privilege's text contains "no reference to Wisconsin law, and none of the listed course names has "Wisconsin" or any cognate in it."<sup>272</sup> While it is true that the word "state" appears twice in the statute, its presence is easily dismissed. "State," or more precisely, "in this state,"<sup>273</sup> first appears as a qualifier for the words "law school"; this qualification was the very subject of the *Wiesmueller* litigation. Second, the word "state," or more precisely, "United States and this state,"<sup>274</sup> appears alongside the United States as a recognition of general legal practice. Thus, there is no explicit reference to Wisconsin law or practice within the regulation.

To the contrary, the privilege's text, coupled with consideration of the privilege's history, suggests a national orientation to the legal education that the privilege's drafters desired. First, the only "academic qualifications" required under Wis. Sup. Ct. R. 40.03 are the thirty-credit rule and its companion sixty-credit rule.<sup>275</sup> Noticeably absent from these lists of courses is any reference to Wisconsin law, practice, or procedure. In fact, these lists resemble a course offering that could be found at any other law school, and "so far as appears, [any graduate of an ABA accredited law school] could establish that his other law school studies conformed to the requirements set forth in this rule except that the law school was in another state."<sup>276</sup> Moreover, the 1971 amendment's imposition of the thirty-credit rule identified and codified a "canon of substantive law to which all entry-level American lawyers must be exposed in order to be competent lawyers."<sup>277</sup> Accordingly, subsections (2)(a) and (2)(b) fail to provide any basis from which a discernible contribution to education in Wisconsin law may be drawn.

Second, the inclusion of the phrase "approved by the American bar

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271. Wis. S.Ct. R. 40.03 (2009) (emphasis added).

272. *Wiesmueller*, 571 F.3d at 702.

273. Wis. S.Ct. R. 40.03 (2009).

274. Wis. S.Ct. R. 40.03(2) (2009).

275. Wis. S.Ct. R. 40.03(2)(a)–(b) (2009).

276. Rofes, *supra* note 225, at 794.

277. *Id.* (emphasis added); *See also Wiesmueller*, 571 F.3d at 706 ("The fact that the Wisconsin bar exam includes both the Multistate Professional Responsibility Examination and the Multistate Essay examination is a further indication that the state supreme court does not believe that saturation in Wisconsin law is a prerequisite for members of its bar . . .").

association”<sup>278</sup> reflects a national orientation to legal education. Wisconsin’s first diploma privilege statute went on the books in 1870,<sup>279</sup> eight years before the founding of the ABA. Subsequent versions of the privilege impose the requirement that bar applicants graduate from an ABA-approved law school.<sup>280</sup> The ABA enjoys something of a despotic role in determining law-school accreditation and educational requirements,<sup>281</sup> and the inclusion of the ABA accreditation requirement suggests that the state sought to adopt the ABA’s nationally de facto required standards.<sup>282</sup> While the inclusion of the ABA requirement indicates a need for national conformity, it provides no basis through which a Wisconsin-centric requirement may be drawn.

The ABA’s accreditation process is listed in its “Standards and Rules of Procedure for Approval of Law Schools.”<sup>283</sup> Its fundamental statement regarding ABA approval states, “A law school approved by the Association or seeking approval by the association shall demonstrate that its program is consistent with sound legal education principles. It does so by establishing that it is being operated in compliance with the Standards.”<sup>284</sup> It follows that an ABA-accredited law school’s education program is, in the judgment of the ABA, legally sound. Regarding education, the Standards’ provisions elaborate on: objectives, curriculum, academic standards and achievements, course of study and academic calendar, study outside the classroom, distance education, participation in studies or activities in a foreign country, and degree programs in addition to J.D.<sup>285</sup> Yet nowhere in this laundry list of educational concerns is any reference to conformity with a particular state’s practice, let alone Wisconsin.

Wisconsin’s inclusion of the ABA-approval provision suggests concern that Wisconsin’s law schools conform to national educational standards. Moreover, the state’s proffered interpretation of Wis. Sup. Ct. R. 40.03 seeks to secure ABA accreditations, and accreditation’s benefits, for its law schools while excluding others who have conformed with educational standards prescribed by ABA’s standards and explicit Wisconsin law. As

278. WISCR 40.03 (2009).

279. WIS. STAT. § 70 (1870).

280. *See, e.g.*, WIS. STAT. § 757.282 (1977).

281. *See generally*, *Mass. Sch. of Law v. United States*, 118 F.3d 776, 783–84 (1st Cir. 1995) (discussing a law school’s failed attempt to bring an antitrust claim against the ABA and noting the ABA’s response to a governmental investigation).

282. The motive behind this adoption is not entirely clear. It is plausible that the language’s inclusion is merely recognition of an additional standard, but it is equally plausible that the adoption also served to protect Wisconsin attorneys’ practice in light of the ABA’s de facto regulation of legal practice.

283. American Bar Association, *2010–11 Standards and Rules of Procedure for Approval of Law Schools*, Standard 101, available at <http://www.abanet.org/legaled/standards/standards.html>.

284. *Id.*

285. *Id.* at Standard 301–08.



Judge East noted:

It is indeed a delicate and ticklish posture for one to compare the relative merits and qualities of academic accomplishments held by the graduate of one ABA approved law school over those of another. . . . I cannot agree that the comparison of the curriculum of one ABA approved law school's catalogue with another's is a reasonable rationality upon which to waive the requirement of taking a bar examination in favor of the graduates of one such approved law school and in turn demand and require such an examination by graduates of all of all other such approved law schools.<sup>286</sup>

Moreover, Judge Posner's opinion acknowledged that the privilege could create an "arbitrary distinction between graduates of other accredited law schools."<sup>287</sup> Although the statute's language strives for conformity in national legal education standards, the proffered interpretation places extra-jurisdictionally trained attorneys at a disadvantage.

As to the privilege's purported benefits, advocates of the present privilege are mistaken if they believe that the rule of the Wisconsin Supreme Court requires that the curriculum include Wisconsin law.<sup>288</sup> The most obvious of this argument's shortcomings is that it "cannot be inferred from the language of the rule or from the list of mandatory and elective courses"<sup>289</sup> that the rule requires any Wisconsin law. However, the dissent among legal educators within the state also suggests that the present privilege does not require the inclusion of Wisconsin law. For example, one former law professor at Marquette, analyzing the latest *Wiesmueller* opinion, wrote:

[Judge] Posner seems to want more facts on exactly how Wisconsin-y the curricula at Wisconsin and Marquette are. Gordon [Smith, a former University of Wisconsin Law Professor,] has argued that his curriculum was Wisconsin-y, but I didn't see a lot of this at Marquette. No one ever gave me any parameters as to what to teach in my courses beyond a slim course description, which I don't remember mentioning Wisconsin. Of course, I may be jaded because . . . I am no fan of the privilege. I think it skews the incentives of graduates to stay in the Milwaukee area, limiting their own opportunities and saturating the market. It may also incentivize applicants with low

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286. *Huffman v. Montana State Supreme Court*, 372 F. Supp 1175, 1185 (D. Mont. 1974) (East, J., dissenting) *aff'd*, 419 U.S. 955 (1974).

287. *Wiesmueller v. Kosobucki*, 571 F.3d 699, 704 (7th Cir. 2009).

288. Even if this is the case, this raises the interesting question as to what would happen if the law schools in Minnesota, a state that already enjoys tuition reciprocity with Wisconsin, were to modify their curricula as to offer the "Wisconsin law" required by WISCR 40.03.

289. *Wiesmueller*, 571 F.3d at 705.

success indicators to borrow large amounts of money to go to law school because, if accepted, they are almost guaranteed a law license at the end of three years.<sup>290</sup>

Conversely, one of the directors of the Wisconsin Board of Bar Examiners defended the privilege, arguing that “not every state has adopted the most recent accretions to the [Uniform Commercial Code], nor have they accepted the wisdom that informs Wisconsin’s criminal law, marital property law, tort law, or real estate law.”<sup>291</sup> While the veracity and conviction of each of these individuals cannot be questioned, their discord highlights the lack of educational guidance provided by current Wisconsin law. Moreover, this disagreement reinforces the *Huffman* dissent’s concerns that a judiciary and a statute cannot control “the faculty, course of study or the end product” of law schools.<sup>292</sup> When facing *Pike* balancing, the state is required to show more than speculative benefits.<sup>293</sup> The present statute does not provide any assurance that Wisconsin students are better versed in Wisconsin law than their out-of-state colleagues.

Further, while the present diploma privilege’s supporters attempt to justify the regulation by virtue of the Wisconsin Supreme Court’s supervisory role, this justification is flawed. A state supreme court’s ability to regulate a bar is not at issue here,<sup>294</sup> but this argument misses the point. An ascertainable benefit must still be shown.<sup>295</sup> There is evidence that the Supreme Court of Wisconsin plays a supervisory role over academics and bar regulations,<sup>296</sup> but there is no evidence that they played a role in ensuring that Wisconsin law is a central component of the law schools’ curricula. In fact, during the Supreme Court of Wisconsin’s most notable intervention into the law schools’ educational requirements (the thirty-credit rule), the court acted to ensure that the curricula conformed to national educational standards.<sup>297</sup> However, even if the court plays such a role, the lack of language within the privilege indicating an orientation towards Wisconsin law is still problematic.

Admittedly, the “market participant” exemption may prove to be a

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290. Christine Hurt, *The Diploma Privilege Suffers Seventh Circuit Setback*, THE CONGLOMERATE: BUS., L., ECON., SOC’Y (July 9, 2009), <http://www.theconglomerate.org/2009/07/the-wisconsin-diploma-privilege-suffers-seventh-circuit-setback.html>.

291. Gene R. Rankin, *Other States Should Catch Up to Wisconsin*, WIS. LAW., Vol. 75, No. 12 (Dec. 2002), [http://www.wisbar.org/AM/Template.cfm?Section=Wisconsin\\_Lawyer&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=22118](http://www.wisbar.org/AM/Template.cfm?Section=Wisconsin_Lawyer&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=22118).

292. *Huffman v. Montana State Supreme Court*, 372 F. Supp 1175, 1185 (D. Mont. 1974) (East, J., dissenting) *aff’d*, 419 U.S. 955 (1974).

293. *Raymond Motor Transp., Inc., v. Rice*, 434 U.S. 429, 447 (1978).

294. *Sestric v. Clark*, 765 F.2d 655, 655 (7th Cir. 1985).

295. *Raymond*, 434 U.S. at 447.

296. *See generally* Rofes, *supra* note 225.

297. *Id.* at 794.

viable defense.<sup>298</sup> However, should this be the case, it is probable that Marquette's status as a private school will preclude its use of the privilege. While the amendments of the 1930s may be seen as honoring Marquette academics,<sup>299</sup> the continued use of the privilege, after implementing the market participant defense, would likely dishonor Marquette by creating a seemingly arbitrary distinction between graduates of the two law schools.<sup>300</sup>

There is a need to address a specific phrase that is circulating among the circles examining this case—the Wisconsin legal community, Wisconsin law schools, the ABA, and various colleges and universities. The phrase “Why diploma privilege works in Wisconsin,” or a phrase substantially similar, appears repeatedly among pieces dealing with this topic.<sup>301</sup> Some of the stated reasons for why the privilege “works” include: 1) Wisconsin is a small state with a relatively small bar, 2) a close relationship between the judiciary, bar, legislature, and law schools, 3) the public's esteem for the state's law schools, 4) the Supreme Court of Wisconsin's geographic proximity to the University of Wisconsin Law School, and 5) the supervisory role the Board of Examiners play.<sup>302</sup> While the first three of these points may be considered criteria for a model jurisdiction in which a diploma privilege regulation with a textually discernible benefit would thrive, they do not in and of themselves confer any form of educational benefit to the state or its bar that could satisfy *Pike*. If the fourth proposition, geographic proximity, were to be taken seriously, anyone who studied law at a hypothetical Northern Illinois University satellite campus in South Beloit, Illinois would be more qualified to practice in Wisconsin than an individual from Milwaukee by virtue of the town's proximity (South Beloit is twenty-three miles closer to Madison than is Milwaukee).<sup>303</sup> Finally, this note has gone at great length to demonstrate that there is no evidence that the Wisconsin law confers a discernible benefit on the state, let alone one that would outweigh the burden placed on interstate commerce. Where there is no established metric by which the Board of Examiners can determine that a Wisconsin-provided legal education makes a Wisconsin-trained attorney more versed in Wisconsin law than an extra-jurisdictionally trained attorney, no benefit

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298. *Wiesmueller v. Kosobucki*, 571 F.3d 699, 706 (7th Cir. 2009). While it is well beyond the scope of this note to discuss the nuances of the market participant exemption, the market participant exemption describes a situation in which a state is acting as a producer or supplier of a marketable good or service in which otherwise constitutionally offensive behavior by the state is allowed. *See generally* *Reeves, Inc. v. Stakke*, 447 U.S. 429, 438–39 (1980).

299. *See generally* *Levine*, *supra* note 1.

300. *See* *Wiesmueller*, 571 F.3d at 707.

301. *See, e.g.*, *Moran*, *supra* note 4, at 654–55; *Rankin*, *supra* note 291.

302. *Id.*

303. Coincidentally, Milwaukee is a mere twenty-four miles closer to Madison than Northern Illinois University.

is discernible.

The present regulation provides insufficient guidance to demonstrate any discernible educational benefit. Both the text and history of Wisconsin's diploma privilege suggest reforms aimed toward conformity with national educational standards. Even though Wiesmueller has elected not to continue to pursue this claim, the issue is still very much alive.<sup>304</sup> However, Justice Brennan issued a warning on this very topic.<sup>305</sup> He warned that determining the constitutionality of a state regulation by the factual record created by a state's lawyers in trial would be in error, "for it would make the constitutionality of state laws and regulations depend on the vagaries of litigation rather than the judgments made by the State's lawmakers."<sup>306</sup> While the state may list various ancillary and post-hoc "perks" resulting from the statute, the fact remains that the present statute fails to provide a discernible educational benefit. Such incidental consequences of a regulatory scheme could perhaps be tolerated if they were on par with a compelling state interest such as health or safety, but here the incidental rewards do not further the state's interest and are certainly less than a state's interest in securing employment for its people.<sup>307</sup> Although the diploma privilege is intended to ensure a qualified bar through education, no discernible educational benefit exists in Wis. Sup. Ct. R. 40.03's present form.

### C. Potential Reforms

A reformed diploma privilege statute could conceivably pass review under the Dormant Commerce Clause. In fact, it may even be desirable in a state such as Wisconsin where 1) the state has a relatively small bar, 2) a close relationship exists between the judiciary, bar, legislature, and law schools, and 3) the public has high regard for the state's law schools.<sup>308</sup> Potential reforms are discussed below.

A court might uphold an extension of the diploma privilege that covered graduates of all ABA accredited law schools, the remedy initially sought by Mr. Wiesmueller. As in *Sestric*, this would actually encourage the interstate mobility of lawyers.<sup>309</sup>

However, Wisconsin would likely refrain from implementing this reform. This course of action might flood the Wisconsin legal market with

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304. It is likely that Judge Crabb's concerns over adequate representation would be alleviated if an experienced class action litigator, perhaps a university attorney or a law professor, were to represent the same individuals in this case.

305. *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 680 (1981).

306. *Id.*

307. *Pike v. Bruce Church*, 397 U.S. 137, 146 (1970).

308. Moran, *supra* note 4, at 654–55 (conversely, the diploma privilege would not be ideal in a state such as California where there is a large population and several law schools).

309. *Sestric v. Clark*, 765 F.2d 655, 655 (7th Cir. 1985).

graduates from all accredited schools. Further, it is unlikely that this solution would be politically tenable as Wisconsin, and its bar, would find a horde of Illinoisans, Iowans, Minnesotans, and “UPers” crossing the state’s borders to practice law.

Alternatively, the state could amend the language by setting a “bar” at which the diploma privilege would be cut off. This could be achieved through some sort of ranking metric (such as the U.S. News and World Report). For example, Wis. Sup. Ct. R. 40.03 could be modified to read, “An applicant who has been awarded a first professional degree in law from a school that is fully, not provisionally, approved by the American Bar Association and ranked above number ‘x’ by survey ‘y.’”

However, this reform is equally unlikely. Law school rankings are somewhat fluid, arbitrary, and subject to manipulation by educational institutions.<sup>310</sup> Not only would this “solution” allow recent graduates and schools with no connection to Wisconsin to enjoy the privilege’s benefits, but it has the potential to offer a remedy that would escape Marquette and University of Wisconsin law graduates.

Alternatively, and most likely, Wisconsin could amend the statute to include the words “in Wisconsin law,” or some cognate of it to the courses listed in the thirty-credit rule. This could be achieved by Wisconsin requiring an explicitly “Wisconsin-oriented class” in the privilege’s list of mandatory courses. For example, Wis. Sup. Ct. R. 40.03(b) could become the “thirty-three-credit rule” and require an applicant to earn three credits in “Wisconsin Law 101.”

However, while providing a discernible Wisconsin-oriented education would provide a benefit that might pass *Pike* balancing, the addition of this curricular requirement may pose unforeseen problems. Should a college or university such as the University of Minnesota, a school that already engages in a tuition reciprocity program, elect to offer the same mandated education in Wisconsin law, it too would have a claim that Wisconsin imposed a seemingly arbitrary burden on interstate commerce. Another law school could conceivably conduct a cost-benefit analysis and determine that offering such Wisconsin-oriented classes required by a reformed version of the Wisconsin diploma privilege is in the school’s best interest. Admittedly, this is far more likely in “border schools” such as those in the Chicago area, or in the Minneapolis-St. Paul metropolitan area where it is more likely that the institutions’ students intend to practice in the state of Wisconsin. Indeed, such institutions may prove to be better, or more sympathetic, Dormant Commerce Clause challengers than Wiesmueller, a novice Oklahoma-trained attorney.

Despite the Wisconsin diploma privilege’s faults, it is far from doomed. If Wisconsin adopted either of the later two reforms, the regulation would

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310. See David Segal, *Is Law School a Losing Game?*, N.Y. TIMES, Jan. 8, 2011, at BU1, available at <http://www.nytimes.com/2011/01/09/business/09law.html>.

demonstrate a discernible benefit that would justify the otherwise arbitrary consideration.<sup>311</sup> These reforms would not be without their own issues, but Wisconsin could amend the law to save the privilege its law school graduates enjoy.

## VI. CONCLUSION

In an era of renewed debate over the utility of bar examinations,<sup>312</sup> the diploma privilege may serve as an innovative means of bar regulation. However, Wisconsin's present privilege is unconstitutional because the regulation provides no basis through which a discernible benefit may contribute to its intended purpose—ensuring a qualified bar through legal education. Undoubtedly, studying in Madison or Milwaukee provides one with unique experiences. A student at a Wisconsin school may get to “Jump Around” during a football game at Camp Randall, or they may even end up marrying the person who dresses up as the Golden Eagle at Marquette basketball games. However, these unique experiences, taken at face value, do not make an individual more qualified to be an attorney. In fact, they have nothing to do with legal education. Rather, the language of a viable diploma privilege statute must provide a discernible educational benefit that differentiates a Wisconsin law school provided education from other schools.

While lobbying for the privilege's abolition may be unpopular, Wisconsin should seriously consider abolishing the diploma privilege rather than reforming it. Consider all of the potential reforms discussed in the previous section. Do any of them provide a constitutional means through which a more qualified Wisconsin bar may be achieved without jeopardizing the Wisconsin law schools, Marquette and University of Wisconsin law students, or attorneys already admitted to the Wisconsin bar? There does not appear to be a reform that would not harm one of these constituencies.

Thus, while Wisconsin's diploma privilege may be trapped with the best of intentions—promoting a more qualified bar through legal education<sup>313</sup>—one simply cannot ignore an inherent political reality. Various constituencies benefit greatly from the present diploma privilege. Wisconsin's diploma privilege confers benefits to in-state constituencies, while making it effectively impossible for non-Wisconsin law schools and law students, who chose not to study in America's Dairyland, to comply with the regulation and enjoy its benefits. Admittedly, there is nothing conceptually unconstitutional with a diploma privilege *per se*. However,

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311. *Raymond Motor Transp., Inc., v. Rice*, 434 U.S. 429, 447 (1978).

312. See, e.g., Linda Jellum & Emmeline Paulette Reeves, *Cool Data on a Hot Issue: Empirical Evidence That A Law School Bar Support Program Enhances Bar Performance*, 5 NEV. L.J. 646, 647 (Spring 2005) (acknowledging the debate over bar examinations' merit).

313. Levine, *supra* note 1.

some form of change is required. Does the State of Wisconsin really want to open its doors to the detriment of its law schools, law students, and attorneys?



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The Journal of College and University Law  
(ISSN 0093-8688)

The *Journal of College and University Law* is the official publication of the National Association of College and University Attorneys (NACUA). It is published three times per year by the National Association of College and University Attorneys, Suite 620, One Dupont Circle, N.W., Washington, DC 20036 and indexed to *Callaghan's Law Review Digest*, *Contents of Current Legal Periodicals*, *Contents Pages in Education*, *Current Index to Journals in Education*, *Current Index to Legal Periodicals*, *Current Law Index*, *Index to Current Periodicals Related to Law*, *Index to Legal Periodicals*, *LegalTrac*, *National Law Review Reporters*, *Shepard's Citators*, and *Legal Resource Index* on Westlaw.

POSTMASTER: Send changes of address requests to the *Journal of College and University Law*, P.O. Box 780, Law School, Notre Dame, IN 46556.

Postage paid at Washington, D.C., and at additional mailing offices.

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Cite as — J.C. & U.L. —

Library of Congress Catalog No. 74-642623

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Correspondence regarding publication should be sent to the *Journal of College and University Law*, Notre Dame Law School, P.O. Box 780, Notre Dame, IN 46556, or by email to JCUL@nd.edu. The *Journal* is a refereed publication.

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