



Fall 9-1-2010

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Recommended Citation

Gary Pavela, *College Suicide: A Law and Policy Perspective*, 17 Wash. & Lee J. Civ. Rts. & Soc. Just. 13 (2010).

Available at: <https://scholarlycommons.law.wlu.edu/crsj/vol17/iss1/3>

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College Suicide: A Law and Policy Perspective[†]

Gary Pavela, J.D.*

One thing that will play out as the televised coverage and punditry about the Fort Hood shooting¹ unravels is that our country is particularly good at predicting events after they occur. However, we are still not good at predicting events *before* they occur. You will watch this skillful post-event prediction ability play out over the next few days.

Years ago, in the aftermath of a suicide at the University of Illinois, I had occasion to put together a compilation of the factors that led a nineteen-year old student to jump out of his tenth floor window. That task was easier than the most recent shooting before us, because the student from the University of Illinois had a lot of marginalia in his notebooks.² The marginalia described his thinking and his moods at the time, and you could literally date it and relate it to a particular class he was in at any given moment.³ It was immensely valuable and useful.

In a chemistry notebook early second semester the University of Illinois student wrote: "Can I ever teach, will I ever cure stuttering? Job interviews, phone calls, people notice. Or am I blowing this out of

[†] Transcript of presentation given on Friday, November 6, 2009, at the Violence on Campus Symposium, held by the Washington and Lee Journal of Civil Rights and Social Justice.

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1. See Robert McFadden, *Army Doctor Held in Fort Hood Rampage*, N.Y. TIMES, Nov. 5, 2009, at A1 (reporting the mass shooting that took place at Fort Hood in Texas on November 5, 2009). The alleged shooter killed thirteen people and wounded thirty others. *Id.*

2. See GARY PAVELA, QUESTIONS AND ANSWERS ON COLLEGE STUDENT SUICIDE: A LAW AND POLICY PERSPECTIVE 49–51 (Donald D. Gehring & D. Parker Young eds., 2006) (explaining the circumstances of the student's suicide and the comments written on his notes and papers in the months preceding his death).

3. See *id.* at 50–54 (detailing the comments written in the margins of the student's notebooks, including dates, times, and classes during which the comments were inscribed).

proportion?" Note the comment: "Do people notice my stuttering or am I blowing it out of proportion?"⁴ That might seem like a commonplace observation because we have that kind of internal discussion all of the time, for example: "Why am I in this room right now listening to this guy when I could be doing something else?" We are so used to this type of dialogue that we may not be aware of how important it is; how profound it is; what its implications are. We are creatures that seem to have multiple competing minds within us, and when we ask ourselves questions, it seems as though there are competing selves involved.

The current term for the "self" that stands back and says, "Am I blowing this out of proportion?" is the ego executive function.⁵ A lot of thinking and writing has developed around this term, although, of course, people such as Plato, Freud, and others discussed it long ago. With regards to the executive function, I want to add a word of caution about some of the observations regarding whether people of a certain age have the full capacity for an executive function. When I think of the difficulties we face in our society perpetrated by people who are well over the age of twenty-five, it makes me wonder at what age the executive function really does kick in. Maybe we would be better off with a younger leadership group.

The problem with the broad reference that certain age groups lack the full capacity for the executive function is that the research is somewhat contested.⁶ The disagreement in that research is partially reflected by what we know from common sense—you will meet someone who is eighteen or nineteen and is immensely mature, and you will be struck by their maturity, and then you will find another person who is eighteen or nineteen and does not have that maturity. I think everyone in this room has had that exact experience. Therefore, be wary of one-size-fits-all determinations, because the development of this capacity that we call the executive function is

4. *Id.* at 52.

5. See, e.g., Roy F. Baumeister, *Ego Depletion and Self-Control Failure: An Energy Model of the Self's Executive Function*, 1 SELF & IDENTITY 129, 129–30 (2002) (explaining the importance and purpose of the mind's "self-regulation" and "self-control" functions); see also Roy F. Baumeister & Kathleen D. Vohs, *Self-Regulation, Ego Depletion, and Motivation*, 1 SOC. & PERSONALITY PSYCHOL. COMPASS 115, 116–18 (defining self-regulation and its role in motivation).

6. See, e.g., Sarah-Jayne Blakemore and Suparna Choudhury, *Development of the Adolescent Brain: Implications for Executive Function and Social Cognition*, 47 J. CHILD PSYCHOL. & PSYCHIATRY 296, 301–02 (explaining the development of the executive function); see also Philip David Zelazo & Douglas Frye, *The Development of Executive Function*, 68 MONOGRAPHS SOC'Y RES. CHILD DEV. 1, 2 (finding the early stages of executive function to begin between ages two and five).

variable. Our military knows that. We have twenty-one-, twenty-two-, and twenty-three-year olds flying sophisticated aircrafts, a task which demands high-order thinking. The military finds the right people to do that. We must be wary of one-size-fits-all categorization, which complicates this whole issue of prediction and how we handle young adults. Young adults differ in their development.

The aim of the educator in this realm seems to be very compatible with the aim of the therapist, as well as the mental health professional, which is to enhance the executive function. The student note that I read—"Am I blowing this out of proportion?"—came from the ego, or higher self, asking a very important question. Part of what educators do, and similarly mental health professionals do in the realm of therapy, is to enhance precisely that skill.⁷ It does not matter whether you are age seventeen, eighteen, nineteen, or sixty-four; you want to develop that skill. It is a never-ending process and it is a theme that I have been thinking about a lot.

Let me stress the difficulty in predicting future behavior in the realm of suicide and rampage violence. The difficulty with prediction is variability—different people at different ages have heightened capacities for self-examination and for the use of the executive function.⁸ The real example that I read to you about a very troubled young man being treated for depression, leads us to question whether the executive function was trying to kick in or trying to ignite. There exists a dramatic drop-off from the number of individuals that have suicidal ideations, to those that actually attempt suicide, to those that actually complete suicide.⁹ And it is difficult to target the variables that show which individuals will go beyond suicidal ideation. A simple assertion that someone has attempted suicide, while heightening the prediction of a later attempt and completion, does not correlate well as an overall predictor of suicide.¹⁰ There are no good overall predictors.

7. See PAVELA, *supra* note 2, at 57–58 (explaining that educators and counselors should use "Cognitive-Behavior Therapy" to encourage deep, careful self-insight by students).

8. See GEORGE MCCLOSKEY ET AL., ASSESSMENT AND INTERVENTION FOR EXECUTIVE FUNCTION DIFFICULTIES 69 (explaining the variation in executive function development both between individuals and within a single individual).

9. See PAVELA, *supra* note 2, at 2 ("Suicidal ideation occurs in about 5.6% of the U.S. population, with about 0.7% of the population attempting suicide. The incidence of completed suicide is far lower, at 0.01%." (citing William Kanapaux, *Guideline to Aid Treatment of Suicidal Behavior*, 21 PSYCHIATRIC TIMES 1, 3 (2004))).

10. *Id.* at 2–3.

Why is prediction so complicated? Why does any mental health professional in this area tell you prediction is so complicated? One, suicide and violence are psychological—there are competing selves within each of us. Which one comes out on top? That is something we will be thinking about in light of the Fort Hood shooting.¹¹ How can we predict which competing self will win the debate at any moment? Who can predict this for us when we do not know it ourselves? The difficulty of prediction is compounded by our biological nature and changes in body chemistry. The difficulty of predicting suicide or rampage violence—and they are often the same thing, the rampage violence phenomenon is almost always suicidal in its aim—is its social element.¹² How does the person perceive his status? How do they perceive their relation with others? This social element is constantly variable.

I think as we find out more about the Fort Hood shooting, we will learn that we need to include religious orientation as a variable that affects behavior in this context. How can we be oblivious to the prevalence of religion in the midst of the suicide-bombing phenomenon? We need to include religious fundamentalism or religious commitment as a variable affecting violent behavior. But, no matter what factors are on the list, variability remains within each item on the list, as well as among all of the factors when they come together in a particular matrix that leads to suicide or rampage shooting.¹³ The American Psychiatric Association's (APA) Statement on Predictions of Dangerousness¹⁴ states that mental health professionals "have no special knowledge or ability with which to predict dangerousness or dangerous behavior. Studies have shown that even with patients in which there is a history of violent acts, including violence to self, predictions of future violence will be wrong for two out of three patients."¹⁵ After this disclaimer, the APA goes on to try to explain to lay people why prediction is so difficult.¹⁶

11. See McFadden, *supra* note 1 (referring to the Fort Hood mass shooting).

12. See, e.g., Stephanie Verlinden et al., *Risk Factors in School Shootings*, 20 CLINICAL PSYCHOL. REV. 3, 45–47 (2000) (explaining that suicide is often a motive for violent school shootings).

13. See JOHN MONAHAN ET AL., RETHINKING RISK ASSESSMENT: THE MACARTHUR STUDY OF MENTAL DISORDER AND VIOLENCE 143 (2001) (explaining that "the propensity for violence is the result of the accumulation of risk factors, no one of which is either necessary or sufficient" to produce violent behavior).

14. See PAVELA, *supra* note 2, at 32–33 (referring to information that was available on the APA website in December of 2004).

15. *Id.*

16. *Id.*

Prediction is important to the topic of suicide if we are going to fashion legal rules in this area. The rules must be informed by the best research and scientific evidence available. It would not be good law or good practice to do otherwise. The MacArthur Foundation has made a tremendous effort in the past few years to develop models or protocols for predicting violent behavior.¹⁷ After millions of dollars and some of the best scientific work available, funded by the MacArthur Foundation, the results provide: "Our data are most consistent with the view that the propensity for violence is the result of the accumulation of risk factors."¹⁸ It is similar to my earlier discussion, about all of these variable events occurring in a multifaceted way, "no one of which is either necessary or sufficient for a person to behave aggressively toward others. . . . At best, predictions will involve approximations of the degree of risk represented by a person, presented as a range rather than a single number, with the recognition that not every person thus classified, even one accurately determined to be in a high-risk group will commit a violent act."¹⁹ That information is from the very latest and probably the most extensive research in the United States in the area of violence prediction, and it does not take us any further beyond the statement of the APA.²⁰

As a result, we may be able to talk about some heightened ability to predict suicide if we talk about someone within a twenty, to thirty, to forty-percent range, particularly if there is substance abuse involved, an immediate prior history of violence, or other such factors.²¹ Experts who write in this area compare it to weather prediction: there can be a thirty-percent chance that it will rain tomorrow.²² But, when we are talking about regulating and legislating the lives of human beings, we should be wary of acting upon predictions that are like the weather reports.

17. See MONAHAN ET AL., *supra* note 13, at 143 (explaining that "no single model is sufficient, but the concurrent use of multiple models holds great promise").

18. *Id.*

19. *Id.* at 142–43.

20. See PAVELA, *supra* note 2, at 32–33 (referring to information that was available on the APA website in December of 2004).

21. See PAVELA, *supra* note 2, at 3 (providing a summarized list of frequently cited suicide risk factors).

22. See, e.g., LAWRENCE E. LIFSON, *THE MENTAL HEALTH PRACTITIONER AND THE LAW: A COMPREHENSIVE HANDBOOK* 171 (1998) (explaining the Weather Forecast Model of suicide prevention); see also RONALD W. MARIS, *ASSESSMENT AND THE PREDICTION OF SUICIDE* 267 (1992) ("Like weather forecasts, short-term suicide-risk assessments are much more accurate than long-term assessments because, in the short term, the parameters (suicide-risk factors) that influence future occurrences can be specified with greater precision.").

In my opinion, it is extremely important to look back at instances of violence and try to figure out what went wrong. Certainly there are things we can learn, especially after events like the Virginia Tech mass shooting.²³ The reflective process can give us immensely valuable insight, but it will not give us a predictive model for where we go after that point. Perhaps, when devising a policy for students, we would better foresee the actual impact of its implementation if we said: "Whatever it is that we develop, let us apply it to faculty as well." If our concern was to take some form of significant administrative action against someone at risk of violence to self or others, and we have a twenty-percent probability in the best-we-can-do range, why not apply that same policy created to respond to students, to everyone else on campus? Why not apply that to administrators? Why not apply it to faculty? Now, if you take the approach I recommend, you will find that the decision to adopt these types of policies becomes much more deliberate, particularly on the part of the faculty. No faculty member wants predictions of that nature to be applied to himself or herself, even when tempted to implement similar policies against students.

Let me move from this broader topic of prediction and provide a little information about data, and the number of suicides there are on college campuses. How dangerous are college campuses? Take the rampage shooting phenomenon, for example: the magnitude of the shootings at Virginia Tech is highlighted by the fact that the total number of murders on American college campuses, which involve about 4,200 institutions enrolling about sixteen million students, fluctuated between nine and twenty-four murders per year between 1997 and 2003.²⁴ According to data from the U.S. Department of Education, the Census Bureau, and the FBI, "the murder rate on college campuses was .28 per 100,000 people, compared with 5.5 per 100,000 nationally."²⁵ A 2005 U.S. Department of

23. See Christine Hauser & Anahad O'Connor, *Virginia Tech Shooting Leaves Thirty-Three Dead*, N.Y. TIMES, Apr. 16, 2007, available at <http://www.nytimes.com/2007/04/16/us/16cnd-shooting.html> (last visited Oct. 19, 2010) (reporting the school shooting that occurred at Virginia Polytechnic Institute and State University on April 16, 2007) (on file with the Washington and Lee Journal of Civil Rights and Social Justice). The alleged shooter killed thirty-three people before taking his own life. *Id.*

24. See *College Violence*, YOUTH VIOLENCE PROJECT, SCHOOL OF EDUCATION, UNIV. OF VIRGINIA, <http://youthviolence.edschool.virginia.edu/violence-in-schools/college-campus.html> (last visited Nov. 16, 2010) (citing U.S. DEP'T OF EDUC., SUMMARY OF CAMPUS CRIME AND SECURITY STATISTICS (2001–2004) which compiles data on murders that occur on college campuses) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

25. Alex Kingsbury, *Toward a Safer Campus*, U.S NEWS AND WORLD REPORT, available at <http://www.usnews.com/usnews/news/articles/070422/30security.htm> (last

Justice study revealed that from 1995 to 2002, college students aged eighteen to twenty-four experienced violence at annual rates significantly lower than for non-students in the same age group.²⁶ And the suicide rate itself is particularly revealing. I have done a little experiment in talking to faculty and students on this issue, and they are genuinely stunned to hear that the suicide rate for young adults attending college is about half the rate for comparably aged peers who are not attending college.²⁷ Let me repeat that: the suicide rate for college students is about half the rate for traditionally-aged college students than for the same age group that is not attending college.²⁸

Those figures may indicate that we are doing something right. If the suicide rate is dramatically lower, then we should learn from things we do well, in addition to things we do poorly. And there are implications that stem from using this data. For example, think of the policy and ethical implications when formulating policies that might lead to the prompt removal of someone who has engaged in suicidal ideations or who has made a suicidal gesture. We are taking someone out of an environment that might be protective and putting them in an environment that probably will not provide protection. There may be much quicker and more ready access to weapons in the new environment than on a college campus. And then beyond that, as word spreads about our reaction and prediction, what impact does that have on other students who are watching how we handle these matters? How willing will students be to tell the faculty what they know about a roommate who is depressed or about someone else that they know who is imposing a risk of violence to himself or others?

Extremely important implications flow out of this data that require us to think twice about formulating policy. Do we want an environment that is somewhat protective against suicide when there are so many implications for individual students? Do we want to keep someone enrolled if we can, or do we want to adopt policy that removes them quickly? I do think that

visited Oct. 19, 2010) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); *see also* FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES 2004: UNIFORM CRIME REPORT 11 (2004), *available at* http://www2.fbi.gov/filelink.html?file=/ucr/cius_04/documents/CIUS2004.pdf (providing statistics on murder rates).

26. DEP'T OF JUSTICE, NATIONAL CRIME VICTIMS' RIGHTS WEEK RESOURCE GUIDE (2007).

27. *See* PAVELA, *supra* note 2, at 1 (referring to research findings that the suicide rates of college students is half that of young people that do not go to college).

28. *See id.* and accompanying text.

the duty-driven or the legal-liability approach will drive us a bit too quickly to the quick removal model, which is bad policy.

On a positive note, given the data that we know about rates of violence and suicide on college campuses, there have been important developments post-Virginia Tech that ought to be highlighted. First, colleges and universities are finally paying attention to the Safe School Initiative.²⁹ The Safe School Initiative came together as a result of considerable research done by the Federal Bureau of Investigation, Secret Service, and the U.S. Department of Education.³⁰ What was fascinating and thought-provoking right after the Virginia Tech shootings was that it took the media three or four days to discover the Safe School Initiative: an initiative that arose after the Columbine shootings.³¹ It incorporates a tremendous amount of work and a lot of good research about how we address the school-shooting phenomenon.³² Unfortunately, many college administrators were largely oblivious to the Safe School Initiative and its wisdom. Today, however, we know about the Initiative and are beginning to be informed by it. Prior to the Virginia Tech shooting, a student could go to any large high school in the country and find a threat assessment team, but at an equally large university, no one would have known what a threat assessment team was. Now, there would be one. For example, these teams now exist at the University of Virginia³³ and Virginia Tech, which is a major advancement that has occurred at colleges all across the country.³⁴

29. See BRYAN VOSSEKUIL ET AL., THE FINAL REPORT AND FINDINGS OF THE SAFE SCHOOL INITIATIVE: IMPLICATIONS FOR THE PREVENTION OF SCHOOL ATTACKS IN THE UNITED STATES 3 (2002), http://www.secretservice.gov/ntac/ssi_find_report.pdf (explaining the history and findings of the Safe School Initiative).

30. See *id.* at ii–iii (explaining the efforts that went into providing the Safe School Initiative).

31. See James Brooke, *Terror in Littleton: The Overview; 2 Students in Colorado School Said to Gun Down as Many as 23 and Kill Themselves in a Siege*, N.Y. Times, Apr. 21, 1999, available at http://www.nytimes.com/1999/04/21/us/terror-littleton-overview-2-students-colorado-school-said-gun-down-many-23-kill.html?ref=columbine_high_school (last visited Oct. 19, 2010) (describing the events of the Columbine shooting) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

32. See VOSSEKUIL ET AL., *supra* note 29, at 3 (explaining the impetus behind the Safe School Initiative).

33. See *Training in Student Threat Assessment*, UNIV. OF VA., <http://youthviolence.edschool.virginia.edu/threat-assessment/pdf/yvp-flyer3-1-04.pdf> (outlining Virginia Guidelines that implement the Safe School Initiative recommendations).

34. See, e.g., *Threat Assessment Team*, VA. TECH, <http://www.threatassessment.vt.edu/> (last visited Oct. 19, 2010) (displaying the official website of the Virginia Tech Threat Assessment Team) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

Second, partly as a result of the work of Virginia, as well as a number of other national reports done after Virginia Tech, there exists a much greater inclination to involve parents in responding to college students who are at risk of violence to self or to others.³⁵ For example, in April of 2008, the Daily Progress wrote: "Under a policy approved Saturday the University of Virginia may notify a student's parents if their child has a mental illness and is deemed a danger to self or others."³⁶ The article goes on to explain that such changes to state legislation makes it easier for the University to mandate some kind of policy allowing the University to notify parents without prescribing every detail of how it has to be done.³⁷ The Federal Educational Rights and Privacy Act³⁸ (FERPA) permitted this kind of notification long ago.³⁹ But that is how progress works. The idea behind encouraging communication between the University and parents, is that parents can be helpful. And in Seung-Hui Cho's case, the parents had been helpful in the high school environment and probably could have made a tremendous difference if they had known about his deterioration in college.⁴⁰

Third, another positive development since Virginia Tech is the development of, and greater attention to, the role and influence of peers in responding to student mental health crises of one type or another.⁴¹ Consider the relative success of the national drunk driving reduction effort. That effort has been the success of the "friends-don't-let-friends-drive-

35. See PAVELA, *supra* note 2, at 14 (discussing shifting attitudes related to parental notification).

36. Brian McNeill, *UVA to Warn of Mental Illness Signs*, THE DAILY PROGRESS, Apr. 13, 2008, available at http://www2.dailyprogress.com/news/cdp-news-local/2008/apr/13/uva_to_warn_of_mental_illness_signs-ar-83939/ (last visited Oct. 19, 2010) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

37. See *id.* (describing legislation passed by the Virginia General Assembly).

38. Family Educational Rights and Privacy Act, 20 U.S.C. § 1232(g) (1974).

39. See PAVELA, *supra* note 2, at 13–14 (explaining the situations for which notification is permitted under FERPA).

40. See VIRGINIA TECH REVIEW PANEL, *Mental Health History of Seung Hui Cho*, in REPORT OF THE VIRGINIA TECH REVIEW PANEL, 31, 36 (2007), available at <http://www.governor.virginia.gov/TempContent/techPanelReport-docs/8%20CHAPTER%201V%20LIFE%20AND%20MENTAL%20HEALTH%20HISTORY%20OF%20CHO.pdf> (explaining Cho's high school counseling and the support and involvement of his parents).

41. See John H. Dunkle et al., *Managing Violent and Other Troubled Students: The Role of Threat Assessment Teams on Campus*, 34 J.C. & U.L. 585, 588–89 (explaining the important role of students in Threat Assessment Teams).

drunk advertising."⁴² The goal being to reach peers and to make peers recognize a responsibility to help each other. The same message should be part of our approach. Now, similarly, we have organizations on college campuses that are comprised of peers that try to reach out to other peers under the guidance of mental health professionals. Let me give you an example of how that can play out. Some campuses, very early on, understood the importance of depression screening, resulting in an effort to implement screening. Students would go to the union and there would be a table that would be set up by the health center and it would have a big sign up that read: "Depression Screening." However, no one lined up. The students advised, "Well, you know our friends really are not going to line up there at the depression screening table, but they may if you would use the term 'stress reduction strategy.'" The schools did as the students suggested, and the line of students went out of the door. The lesson being that it is extremely important to involve peers in the process of identifying and dealing with depression.

Fourth, the adoption of key components of the Air Force suicide prevention model at college campuses has accelerated since the Virginia Tech shooting. Cornell is a particularly good example of a school that reduced the number of suicides on its campus, as a result of adopting the Air Force suicide prevention model.⁴³ The Air Force suicide prevention model is based on reducing the stigma associated with seeking help.⁴⁴ The Air Force Chief of Staff wrote to all personnel about this objective:

Communicate in your words and actions that it is not only acceptable but a sign of strength to recognize life problems and to get professional help and to deal with them constructively. This may come from chaplains, mental health providers, family support centers, and other providers on-base or off-base. We must support and protect to the full extent possible those courageous people who seek help early.⁴⁵

This approach extends a large net, asking people to look out for each other, and it begins at the very top of the chain of command. It starts with the Air Force Chief of Staff and it emphasizes the importance of the

42. See *Drunk Driving Prevention (1983–Present)*, AD COUNCIL, <http://www.adcouncil.org/default.aspx?id=137> (last visited Oct. 19, 2010) (highlighting successes of the "Friends Don't Let Friends Drive Drunk" campaign) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

43. See PAVELA, *supra* note 2, at 24–27 (explaining the Air Force prevention model and its influence at Cornell).

44. *Id.*

45. *Id.*

courage involved in seeking help, explaining that it is not a sign of weakness but rather a sign of strength. Those core components of the model have been picked up by colleges around the country, specifically Cornell, the most notable example.⁴⁶

A fifth development since Virginia Tech has been the increased recognition that people with mood disorders, such as depression, who may have even engaged in suicidal ideation or attempted suicide, have civil liberties protected by the ADA⁴⁷ and Section 504 of the Rehabilitation Act.⁴⁸ There is a growing recognition of the legal protection on college campuses given to individuals who have a mental disability that might be manifested by suicidal ideation or a suicide attempt. The legal protection requires that the school administration go through what is called a direct threat analysis before the student may be removed.⁴⁹ The U.S. Department of Education outlined the requirements of a direct threat analysis in a letter to a college that failed to do so:

Although Section 504 does not prohibit a postsecondary education institution from taking action to address an imminent risk of danger posed by an individual with a disability who represents a direct threat to the health and safety of himself or others, such action must be grounded in sound evidence and cannot be based on unfounded fears, prejudice, or stereotypes In a direct threat situation, a postsecondary education institution needs to make an individualized and objective assessment of the student's ability to safely participate in the institution's program [based] on a reasonable medical judgment [basis], relying on the most current medical knowledge [T]he assessment must determine the nature, duration, and severity of the risk; the probability that the potentially threatening injury will actually occur; and whether reasonable modification[s] of policies, practices, or procedures will significantly mitigate the risk.⁵⁰

As the letter explains, the school must provide reasonable accommodation, not prompt removal from campus. Before the Virginia

46. *See id.* (commenting on Cornell's adoption of the Air Force program components).

47. Americans with Disabilities Act, 42 U.S.C. §§ 12101–12213 (1990).

48. Rehabilitation Act Pub. L. No. 93-112, § 504, 87 Stat. 355, 394 (1973) (codified as amended in scattered sections of 29 U.S.C.).

49. *See* 29 CFR § 1630.15(b)(2) (2001) (listing direct threat as a defense to an allegation of discrimination). Direct threat is defined as a "significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation." 29 C.F.R. § 1630.2(r) (2001).

50. Letter from U.S. Dep't of Educ., Office of Civil Rights, to Dr. Jean Scott, President of Marietta Coll. (Mar. 18, 2005), *available at* <http://www.nacua.org/meetings/virtalseminars/october2005/Documents/MariettaCollegeOCRCComplaint.pdf>.

Tech tragedy, we were oblivious in large measure to ADA requirements and the direct threat requirement, in the same way we were largely oblivious to the Safe School Initiative.

Finally, since the Virginia Tech shooting we have learned that profiling does not work. As part of the Safe School Initiative, the Secret Service observed that "[t]here is no accurate or useful profile of the school shooter."⁵¹ Instead, we engage in threat assessment. Threat assessment is not profiling. Threat assessment is fact-driven: who said what, when did they say it, what means have they gathered to implement harm to self or to others.⁵² If we can reach that person earlier as part of the threat assessment team, our goal is to keep them on campus and to help them. Our goal should not be finding a way to remove them. The Secret Service made a very obvious and relevant observation: you can expel someone today without addressing any of his underlying problems, and he will be back with a gun tomorrow.⁵³ Generally, campuses are not surrounded by moats. Consequently, the idea that we can address this problem by making a prediction, getting rid of someone, and avoiding the unlikely risk of liability for suicide is unwise. The ultimate problem is not resolved. The whole direct threat approach is to get to the heart of the troubled individual's problem as soon as possible. In order to do so, the school must be able to retrieve information about the individual that each department maintains separately but has not been shared. It is amazing what people will tell you if you ask them, such as: "Have you contemplated suicide?" or "Have you obtained the means to commit suicide?" Ask those questions. And while asking those questions, gather the information that can allow you to help that person remain in school.

All of these various things that I have listed, ending with the threat assessment policy, are very positive developments, most of them coming to fruition after Virginia Tech and not one of them driven by a legal duty. We have made very significant progress after Virginia Tech and it was not because of the wonders of tort law. It was because we have worked

51. See VOSSEKUIL ET AL., *supra* note 29, at 31 (listing the ten key findings of the Safe School Initiative).

52. See *Threat Assessment Team: Frequently Asked Questions*, VA. TECH, <http://www.threatassessment.vt.edu/FAQ/index.html> (last visited Oct. 19, 2010) (explaining the difference between threat assessment and profiling) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

53. See VOSSEKUIL ET AL., *supra* note 29, at 23 (recognizing that attacks are rarely impulsive and that they often occur as retaliation for causing the attacker feelings of loss or personal failure).

together professionally to begin to address this problem with the best research base that we have.

Now thinking about that very briefly, why not advocate a duty? Why not just add a legal duty as an additional component to the progress that has occurred? The answer is that if we made that argument, we would be adding marginal additional value given the progress that we have been making, while adding a significant risk. For example, imagine for a moment that coming through the door was a large saber tooth tiger. In all likelihood, everyone would be running for another exit. No one would be cognating about it. We would not be thinking: "That looks like a big tiger over there. Now, maybe I could go out that door. What should I do?" No one is going to be doing that. We are going to be running for the other door. Why am I using this example? We are wired in an evolutionary sense to respond in the most powerful way to fear.⁵⁴ And the fear quotient, the component of our minds and brains that work through fear, work very fast. The fear quotient bypasses all cognition and there are times when that is very good.

What do the words "lawsuit," "subpoena," and "summons" invoke in you? These are mechanisms to inspire fear. And they have their uses; but they also have their risks. Some of my colleagues on the college law circuit are good at inspiring fear. They will take one case that arose far away somewhere in one lower court and because they like that decision it becomes the trend of all law from here on out, no matter what other courts have done in other parts of the country. What is happening in those situations is the invocation of fear. And that is a powerful emotion. When fear sweeps away our capacity to think it produces very bad results.

A good example of the negative extents of fear surfaced in the Jordan Nott case at George Washington University, which involved a very prompt, automatic removal of someone who had gone to a university-affiliated hospital to seek help for suicidal ideation. The case prompted a wonderful Washington Post editorial entitled, "Depressed? Get out."⁵⁵ My hypothesis is that the school's response was motivated by fear. And that is part of the

54. See Sharon Begley, *The Roots of Fear*, NEWSWEEK, Dec. 15, 2007, available at <http://www.newsweek.com/2007/12/15/the-roots-of-fear.html> (last visited Oct. 19, 2010) (stating that the fear response is more powerful than rational reasoning) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

55. Editorial, *Depressed? Get Out!*, WASH. POST, Mar. 13, 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/03/12/AR2006031200804.html> (last visited Oct. 19, 2010) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

risk factor that I see in focusing on legal liability—the more we make the school liable for not predicting what an individual will do, even if the individual made a gesture recently—the more likely it will be that school administrations will decide not to dither around with the individual on campus. School administrators will try to get the individual off campus so that when he kills himself somewhere else, the school will no longer be liable. Obviously, no one is so crass as to put it that way, but they think that, in my view.

This is not simply a civil liberties issue,⁵⁶ and it is not only a violation of the ADA.⁵⁷ It is a safety issue. Why is it a safety issue? According to the Safe School Initiative, the Secret Service suggests we ask: what type of climate do schools need to create in order to establish a safer campus?⁵⁸ The climate needed is described as one with "respectful listening."⁵⁹ As I was reading some of the Secret Service literature on this topic,⁶⁰ I could not

56. See PAVELA, *supra* note 2, at 16 ("A distinction needs to be made between policies designed to facilitate parental notification by administrators and the confidentiality requirements campus mental health professionals have with students in therapeutic relationships.").

57. See Transcript of Civil Cause for Decision Before the Honorable Sydney H. Stein at 23, *Doe v. Hunter Coll.*, No. 04-CV 6740 (D.C.N.Y. Aug. 25, 2005) (upholding a motion to dismiss on a Section 504 claim from a student who was forced to vacate her dorm after an attempted suicide). Jane Doe, towards the end of her first year in college, swallowed twenty Tylenol PM pills and called 911, which led her to treatment at a hospital for four days. *Id.* at 5. Doe returned to her dorm to discover her lock had been changed and was told the following day that she was required to vacate her room immediately because she had violated her housing contract. *Id.* Doe pursued a claim under the ADA and Section 504, and the judge refused to grant the defendants' motion to dismiss. *Id.* at 23. See also Complaint at 22–24, *Nott v. George Washington Univ.*, No. 05-8503 (D.C. Super. Ct. Oct. 2005) (alleging a violation of Section 504 and the ADA). Jordan Nott suffered from depression and he was taking strong medication to sleep. *Id.* at 4. His depression took him to the GWU hospital for psychiatric help where the medical staff notified university officials of his problems. *Id.* GWU barred Nott from his dorm and mandated disciplinary charges against him to withdraw from the University. *Id.* Part of Nott's complaint included an alleged violation of Section 504 and the ADA. *Id.* at 5. This high profile case ended with a settlement agreement of which the parties declined to disclose the terms. *Nott v. George Washington University*, JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW, available at <http://www.bazelon.org/In-Court/Closed-Cases/Nott-v.-George-Washington-University.aspx> (last visited Nov. 15, 2010) (summarizing the facts and procedural history of the case) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

58. See VOSSEKUIL ET AL., *supra* note 29, at 42 ("Finally, educators can play a part in prevention by creating an environment where students feel comfortable telling an adult whenever they hear about someone who is considering doing harm to another person, or even whether the person is considering harming themselves.").

59. See PAVELA, *supra* note 2, at 24–25 (describing the Air Force suicide prevention program which emphasizes regular communication and support for those who seek help).

60. See *National Threat Assessment Center: Secret Service Safe School Initiative*,

help thinking that someone from the college counseling center was writing this stuff. But the reference on the part of the Secret Service to the respectful listening was based on a fundamental point.⁶¹ Their research after Columbine, combined with that of the FBI and the U.S. Department of Education, indicated that in the rampage shooting phenomenon and in many cases of suicide, people around the violent student often knew something about it, knew something was planned, or knew something had been contemplated.⁶² If an institution develops a response to these events that is motivated by fear, which is "Uh-oh, I have heard about so-and-so making this gesture, we better get rid of that person," it will be destructive to the climate of respectful listening. Other students, knowing about the school's hair-trigger approach, will not come forward to school administrators and will not tell them about the next person at risk of suicide or the next rampage shooter.⁶³ The Secret Service agrees that schools need the cooperation of people in the community to be eyes and ears for the administrators. However, schools will lose this cooperation if people feel that the school does not exercise discretion on a case-by-case basis or that the school does not work with a troubled student to allow him to remain in school, as opposed to quickly getting rid of him.⁶⁴

Let me conclude with an observation that comes from Paul Appelbaum, who is a professor, director of the Division of Psychiatry, Law, and Ethics at Columbia University, and past president of the American Psychiatric Association.⁶⁵ He narrowed right in on this topic:

U.S. SECRET SERVICE, available at http://www.secretservice.gov/ntac_ssi.shtml (last visited Oct. 19, 2010) (making available their final report, guide to threat assessment, press releases based on the Safe School Initiative and their publication, *Evaluating Risk for Targeted Violence in Schools*) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

61. See *supra* note 58 and accompanying text.

62. See VOSSEKUIL ET AL., *supra* note 29, at 34 ("In most cases, other people knew about the attack before it took place. In over three-quarters of the incidents, at least one person had information that the attacker was thinking about or planning the school attack.").

63. See Elizabeth Gray Carrie, Student Article, *The University-Student Relationship Amidst Increasing Rates of Student Suicide*, 31 L. & PSYCHOL. REV. 137, 145 (2007) (noting that "[e]ven when disclosure is permitted, professionals may choose not to disclose confidential information because they do not want to violate a student's privacy or damage his or her trust, upon which a counseling or relationship or friendship is built").

64. See VOSSEKUIL ET AL., *supra* note 29, at 33 ("Schools also may benefit from ensuring that they have a fair, thoughtful and effective system to respond to whatever information students do bring forward. If students have concerns about how adults will react to information that they bring forward, they may be even less inclined to volunteer such information.").

65. See Paul Appelbaum, MD, COLUM. U. MED. SCH., <http://asp.cumc.columbia.edu/>

Combining data from the available studies suggests that the odds that a student with suicidal ideation will actually commit suicide are 1,000 to one. Thus, policies that impose restrictions on students who manifest suicidal ideation will sweep in 999 students who would not commit suicide for every student who will end his or her life And even if such restrictions were limited to students who actually attempt suicide the odds are around 200 to one against the schools actually having acted to prevent a suicidal outcome.⁶⁶

The reason for that is that there is a dramatic drop-off from suicidal ideation to suicide attempt to completed suicide.⁶⁷ It is part of the immense difficulty in managing and predicting this kind of behavior.⁶⁸

That kind of evidence is the kind of evidence we have to keep focusing on. We must focus on the importance of developing the executive function, as was alluded to at the beginning of this Article: "People notice, or am I blowing this out of proportion?"⁶⁹ We are educators; we are the right environment to develop that trait, that skill.⁷⁰ The reason that we do that may be based on the fact that our suicide rate is comparatively low.⁷¹ But it is again the convergence of the aims of the educator and the therapist; the development of the capacity to stand back and to say, "I have emotions but I am not my emotions." That is probably the best suicide prevention policy that we can devise—the development of the executive function, and the development of ways to think that way, which is incompatible with developing policies based on fear.

facdb/profile_list.asp?uni=psa21&DepAffil=Psychiatry (last visited Nov. 14, 2010) (listing Paul Appelbaum's background and qualifications) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

66. *Id.*

67. See P.J. Meehan et al., *Attempted Suicide Among Young Adults: Progress Toward a Meaningful Estimate of Prevalence*, 149 AM. J. PSYCHIATRY 41, 42 (1992) (noting that in their study, of the 694 respondents, 374 (54%) reported having ever considered suicide and 72 (10%) reported ever having attempted suicide).

68. See PAVELA, *supra* note 2, at 2 (concluding that suicide cannot be predicted).

69. *Id.* at 52.

70. See *id.* at 21 (describing a successful program at the University of Illinois which reduced student suicide).

71. See Steven Stack, *Occupation and Suicide*, 82 SOC. SCI. Q. 384, 384 (June 2001) ("Bivariate logistic regression models find a total of 15 occupations with either significantly higher (e.g., dentists, artists, machinists, auto mechanics, and carpenters) or lower (e.g., clerks, elementary school teachers, cooks) risk than the rest of the working-age population.").