

**ORGANIZATIONAL REACTIONS TO THE THREAT OF STUDENT SUICIDE LITIGATION:  
SYMBOLIC COMPLIANCE PRECLUDES LIABILITY**

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## INTRODUCTION

On April 10<sup>th</sup>, 2000, a talented MIT sophomore named Elizabeth Shin set herself on fire in her dormitory room. She suffered “third-degree burns over 65% of her body” and was transported immediately to the hospital. She died 4 days later (*Shin v. Massachusetts Institute of Technology*, 19 Mass. L. Rep. 570 [2005]).

Elizabeth had been a known suicide risk for nearly her entire tenure on the Massachusetts Institute of Technology campus – while she was involved in extracurriculars and taking a full course load, she had struggled with mental health issues and self destructive thoughts since high school. MIT provided a host of resources for students in Elizabeth’s situation, she engaged therapists, administrators, and other university staff, usually following one of her 5 other suicide attempts or threats (*Shin v. MIT 1-15*).

The extent of administrators’ involvement in her life is striking, MIT staff made efforts to coordinate her care between her therapists, residential life staff and academic administrators. In fact, there was a “deans and psychs” meeting the morning of Elizabeth’s suicide – a regular gathering to discuss cases like Elizabeth’s. Her case was discussed at this meeting, due to the fact that she had threatened suicide only 11 hours before. However, the group did not stage any serious intervention, and they did not contact her parents (*Shin v. MIT 12*).

This incident would turn into a 7,659 word article featured in the New York Times Magazine and a 27 million dollar lawsuit, with Elizabeth’s parents claiming that the university and certain employees were responsible for her death. (Sontag

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2002; *Shin v. MIT*) This lawsuit came to MIT immediately after two similar cases, and created a wave of concern among higher education professionals that lawsuits against universities for failing to prevent suicide would become widespread (Lake and Tribbensee 2002; Tribbensee 2004). Universities were compelled to act to reduce this liability. In Elizabeth's case, the liability came in large part from the fact that they had done "too much" to help her and still failed to prevent her death (Sokolow 2005). Doing less to protect her would have reduced the university's liability.

However, because student mental health services are so widespread, it is unusual for colleges to not provide such services to their students. To retract existing services because a fear of liability would cause the university to appear excessively callous. The appearance of not caring about their students would cause the organization to lose legitimacy among several constituencies whose support is necessary for survival.

This situation presented a dilemma to colleges and universities: how to balance their desire to limit this source of liability with maintaining legitimacy derived from the perception that they care for their students. While Elizabeth's case did set an anti-university precedent for future similar cases, there have not been similar cases against colleges and universities, and universities haven't suffered a loss of legitimacy related to their suicide prevention policies.

I will argue that universities have resolved this dilemma by implementing symbolic measures to prevent student suicide while limiting liability in nonpublic

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ways. There is also the possibility that they have influenced the legal definition of acceptable anti-suicide measures by implementing programs that courts have approved and legitimated, therefore limiting liability for any other organizations that emulate these programs.

To build to this argument, I will explain Lauren Edelman's theories of symbolic compliance and the endogenous construction of law. Symbolic compliance is a branch of the new institutional theory, predicting that colleges and universities will elaborate organizational structures to prevent student suicide without regard to their efficacy in actually preventing suicides (Edelman, Abraham, and Erlanger 1992; Edelman 2005; Meyer and Rowan 1977). Edelman's theory regarding the endogenous construction of law helps to explain the lack of sweeping change in suicide prevention policies in the time following Elizabeth's case, despite universities' success in avoiding further liability (Edelman 2005).

There were a number of issues in the higher education environment that made the threat of student suicide litigation especially severe, such as long term trends in the litigation environment and shifts in university governance. Initially, universities reacted to the threat of this litigation with an "extreme hands off approach" to students in the late 2000s (Gray 2007). This approach included removing students from campus when they threatened or attempted suicide, either by persuading them to leave or identifying student conduct code violations inherent in their suicide attempt. These sorts of policies provoked a significant backlash from student, parents, and advocates for the mentally ill. This expanded to a threat to the

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universities' reputation when news outlets picked up on especially egregious cases of this policy at work. Shortly thereafter, it fell out of favor.

During the time that Elizabeth's case was being litigated and after, there were suicide prevention approaches available that would have addressed both the university's reputation concerns and actually reduced the risk of student suicide, such as the Illinois Plan. Despite the established efficacy of this plan and generous endorsement among legal scholars studying student suicide liability, it did not gain popularity in the late 2000s after Elizabeth's death.

This conundrum can be explained by the theory of endogenous construction of law. While not making radical overhauls to their approaches to dealing with suicidal students, colleges and universities reacted to the threat of liability by making small changes to how they interact with students and looking to cases that have been decided in the university's favor to understand what processes the courts consider to be adequate attempts to protect a student. These processes that have been legitimated by courts are then considered to be appropriate by compliance professionals and become the new normal organizational response.

### THREAT TO UNIVERSITIES

The Superior Court of Massachusetts' 2005 order to allow Elizabeth Shin's litigation against MIT to continue (a decision against the university) marks the culmination of a number of factors conspiring to increase universities' liability in the event of student suicide. These factors include professionalization among university administrators, a general increase in litigation against higher education

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organizations, and increases in mentally ill students on campus (Eiser 2011; Lake 1999; Moore 2007). Shin's suicide and subsequent litigation also came at a critical time in a long term trend away from legal doctrines that protected the university and toward those that viewed the university-student relationship as one that contains a "duty" from one party to another, opening the door for many kinds traditional tort litigation action against the university that had not existed before (Lake 1999).

Many news articles in the area of higher education also identified the risk in not protecting suicidal students on campus, though they are mixed on recommending increased monitoring of suicidal students with the intention of helping them, or removing them from campus entirely and placing them in residential treatment facilities or with their parents (Arenson 2004; Michael Doyle 2005). The threat in the legal arena is a "severe" financial one, as a Vice President of a school insurance company described it in a 2004 article (Arenson 2004).

Increasing pressure from external constituencies for universities to be more cost effective has lead to a shift toward managerial values in university governance. Professionals without academic qualifications have played a bigger role in university decision-making (Waugh Jr. 2003). These decision makers' input could have contributed to a more swift reaction to limit liability.

These factors together create a precarious environment for higher education organizations where they do not have the option of inaction, but all available actions present significant risks.

### THEORETICAL EXPECTATIONS

#### *New Institutional Theory & Symbolic Compliance*

New Institutional Theory views organizations as entities whose primary goal is “survival” (Meyer and Rowan 1977:349). Their pathway to continued existence is through seeking legitimacy from those around them. Meyer and Rowan argue that normative ideas of what organizations should do and look like are not widespread because of their efficacy, but instead because they are believed to be effective, and therefore any organization must adopt these ideas to be taken seriously and retain the support of constituencies that they need (Meyer and Rowan 1977:344).

This existence is separate from any actual goal attainment, as the formal organizational structure is at most “loosely coupled” with the “actual work activities” of the organization (Meyer and Rowan:341). This decoupling “enables organizations to maintain standardized, legitimating, formal structures while their activities vary in response to practical considerations” (Meyer and Rowan:357).

Once a set of behaviors has emerged in an organizational field, all actors begin to adopt behaviors and look increasingly similar. This similarity is known as isomorphism, DiMaggio and Powell describe three ways in which it comes about: mimetic, when organizations copy one another to gain legitimacy; coercive, when organizations succumb to an authority who wants them to be isomorphic; and normative, when organizations are influenced by the educational backgrounds of their decision makers.



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Lauren Edelman extends this theory to the realm of the law by observing the case of workplace antidiscrimination and labor organization laws. She finds that when the legal environment shifted to threaten the legitimacy of organizations that were not in compliance, they were compelled to act (Edelman 1990). These organizations elaborated organizational structures to demonstrate compliance, while displaying the loose coupling described by Meyer and Rowan to minimize the effect of the law on the organization (Edelman 1992). As attorneys and compliance professionals create organizational structures, they are defining what compliance will look like when other organizations in their field look to them for guidance. In this way, professionals are actually defining the laws, rather than a judge or legislature (Edelman 1992).

These structures may even be organizationally isolated from the functions that they are intended to influence (for example, an EEO office with no influence over Human Resources), and serve more of a public relations purpose than a substantive one to reduce underrepresentation in the workplace, an example of the loose coupling that we would expect.

In the case of student suicide litigation, a symbolic response would be one where universities continue to broadcast their high quality counseling and mental health services, while internally focusing on mitigating liability and reducing the possibility of a future suit against them.

### *The Endogeneity of Law*

Lauren Edelman's theory of "law as endogenous" builds on the symbolic compliance theory of organizations' interaction with law (Edelman 2005:337). As organizations elaborate structures in response to changes in the legal environment, they embed managerial values within the programs they create while still generating the appearance of compliance. These structures then spread throughout the field due to organizational isomorphism. Once they have spread, they inevitably face legal challenges and are brought into court where it becomes clear if they meet standards of compliance in practice. However, Edelman argues that this decision does not lie solely with the judge but instead with the organizational actors. As certain processes become widespread, for example the existence of a workplace grievance procedure for civil rights violations, courts will begin to view them as adequate efforts at compliance even without any evidence that such a structure is in accordance with the spirit or letter of the law (Edelman 2005). When the courts adopt this belief (and implement it in future cases), the organization's embedded managerial values are then incorporated into the law and will continue to benefit the field in perpetuity (Edelman, Uggen, and Erlanger 1999).

### **METHODS**

Initially, I sought to understand how colleges and universities would understand and react to the threat of liability for student suicide. I was interested in how attorneys, compliance professionals and administrators perceived this threat, their opinions about what should be done to mitigate it and the actual

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organizational changes that came out of the threat. When I was unable to obtain this information from interview data, I turned to an analysis of the case law and professional literature related to college student suicide for information on the suicides and the organizations. In the process of gathering information about the suicides themselves, I identified trends in these cases, which serve as the basis for my analysis.

### *Recruitment & Interview Efforts*

At the beginning of this project, I pursued open-ended interviews with key employees at colleges and universities that had experience with litigation in the past 20 years. I also wished to interview counterparts to these employees at similar universities without litigation to provide a comparative element to the study, but my recruitment did not proceed that far. I completed a protocol document and interview guide for this portion of the project, and the Health Sciences and Behavioral Sciences Institutional Review Board approved it as a fully regulated study.

The interview questions were designed to open by understanding the interviewee's position within the organization and job responsibilities, both now and at the time of the litigation. I then would have asked the interviewee to describe the litigation, and continued with questions about how others in the organization reacted to and thought about the litigation, to get the best possible picture of the general attitude toward the case. I also planned to ask about the presence and

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involvement of attorneys in meetings and decision-making. Finally, I included questions about changes that may have resulted from the litigation, if those changes were durable, and would have concluded the interview by asking about current policies, to determine if the organization had incorporated any of the following recommendations policies:

- Threat Assessment Teams (special purpose teams including administrators and professionals) to respond to student suicides or threats
- Mandatory assessment following a student suicide or attempt, in the style of the University of Illinois.
- Mandatory withdrawals or housing contract termination following a suicide attempt

The first two of these policies are recommended by suicide (and suicide liability) prevention literature (Cohen 2007; Kaveeshvar 2008; Penven and Janosik 2012). The third is a practice that was briefly prevalent in the late 2000s but is inadvisable from a legal, moral and student services points of view (Appelbaum 2006; Pavela 2005).

I identified target interviewees by reviewing university websites and gathering contact information for the leaders of counseling centers, mental health services, deans for student life, staff psychologists, general counsels and anyone else that I could find mentioned by name in the court documents or who seemed relevant based on the facts of the case. For example, in one case where named police officers were involved, I identified and contacted the police officers if they were still employed by the university as well as their superiors and the director of public safety.

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Following my IRB-approved protocol, I sent hand addressed, personalized letters to each potential interviewee's work address, and followed up with an email several days later. I received responses referring me to the organization's general counsel for further assistance (who was not responsive), and one informing me that the settlement terms of the case prohibited them from discussing it. I also received a response declining to participate due to limited time, though most of my emails went without reply. For those who had not explicitly declined to participate, I contacted them via their work phone numbers to request their participation a final time. After this process, I was left with one person who had replied positively to my email, though they stopped replying during the consenting and scheduling process.

This complete lack of willingness to participate is evidence of the relevance and sensitivity of this issue, and that university employees whose jobs are entirely non-legal are aware of the sensitivity of the issue.

### *Court Documents & Opinions*

At this point, I realized that interview data was prohibitively difficult to obtain on the timeline necessary for this project, and I began searching for alternative sources of reliable information on this topic. I reviewed court opinions that I had access to via LexisNexis Academic, and pursued additional trial court documents using the federal docket tracking system, "Public Access to Court Electronic Records" (PACER) and the state counterparts to this system. I was able to

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gather trial briefs, motions, and documents submitted as evidence in several of the cases as well as court opinions for all relevant cases.

I reviewed briefs and other submitted documents for background information and context on the cases, but I did not use this information in my final analysis of the cases because the information in these documents is not substantiated – they are simply the arguments that each party would like to advance. Instead, I treated information that the court found compelling to be true, and considered this in my analysis of the cases. This information is exclusively in the court opinions, and therefore those were the documents that comprise the core of my analysis. The court opinions include information about the suicide events and timelines that have been established in court, often in narrative format. They also include summaries of the arguments that both parties have made, and the courts' opinion on these points, and ultimately a judgment in favor or against the university, though the judgment is often partially in favor of each party rather than a conclusive victory for either side.

### *Case selection*

I gathered court opinions from a variety of legal databases, primarily LexisNexis Academic and Google Scholar's Case Law function. I ran a multitude of searches with variations on the words "university", "suicide", "student", "duty to protect" and "college". These searches repeatedly yielded the same set of cases, which I identified as cases of interest and have included here. I also included cases

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that were mentioned in law review articles on the subject of liability for student suicide, though these commonly came up in the searches as well.

### *Inclusion criteria*

The 7 cases included in this analysis were selected because they are similar in that the plaintiffs are family members (or other next of kin) of those who committed suicide, and defendants are four-year colleges and universities in the United States. All took place between 1990 and 2015. While the specific facts and legal arguments vary, the cases follow the same general form. In every case, next of kin of a victim of suicide were seeking to hold the university responsible for the event. However, this initial criterion also included several cases that I later removed because they were primarily about other factors such as professional misconduct on the part of a therapist or the claim that the university committed other significant wrongs than just failing to prevent the suicide. <sup>1</sup>

### *Code selection and analysis*

I coded all available court opinions and briefs for all of the included cases in NVivo. Coding allowed me to draw conclusions across time about the cases and make links between certain elements that were commonly present in the events and in the subsequent litigation. My objective was to observe trends in the litigation and how they are related to trends (or lack thereof) in the actual suicide events or the

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<sup>1</sup> These cases include, *Carpenter v. MIT* (21 Mass. L. Rep. 49 [2006]; 2006 Mass. Super. LEXIS 28), *Wallace v. Broyles* (331 Ark. 58; 961 S.W.2d 712 [1998]), *Mahoney v. Allegheny College* (2005), and *White v. University of Wyoming* (1998).

higher education environment. This called for a more structured approach of analysis than I initially intended to use when I thought I would be working with interview data – I anticipated being able to ask the interviewees what issues they believed to be especially relevant and pursue information related to those.

Code selection was based on legal concepts that scholars had identified as relevant when analyzing and predicting litigation trends on this topic, as identified in my literature review, as well as those that were related to elements of the law used in all the cases. Another group of codes identified different claims that the courts considered from plaintiffs and defendants, and a final set of codes catalogued other information about the events and cases that may be relevant to the legal concepts or tracking trends in the events over time.

Many of the included cases and the scholarship discussing them revolve around the concept of a duty that the University owes its students to protect them from harm (Bickel and Lake 1994; Lake and Tribbensee 2002). Joy Blanchard describes this legal concept as follows:

“Though the application of tort theory is amorphous (as tort law varies from state to state), certain tests, or prongs, must be met to bring forth a tort claim. For a tort claim to be successful, a plaintiff must prove four elements: (1) that the defendant had a duty, (2) that the defendant breached that duty, (3) that the plaintiff was injured, and (4) that the defendant's negligence and breach of duty was the proximate cause of the plaintiff's injury.” (Blanchard 2007)

Throughout the opinions, the courts consider this concept of duty in several forms, though is it often generalized as a “duty to protect” the student from harm in different situations. This was a major coding node, and several other codes were



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related to this one because scholars or judges had identified them as contributing to a duty to protect, or as serving as evidence that there was no duty to protect.

Related codes identifying things that could contribute to a duty are: an earlier suicide attempt or other significant incident, university awareness of suicide risk or attempt, university employee (faculty or staff) contact with the student. Coded factors that mitigate the university's duty to protect include university contact with parents, noted lack of university awareness of suicide risk, student insisting that they are doing well, and mental health or safety services available to the student.

I also identified codes for common claims that the court considered. These are primarily claims that the plaintiff makes against the university, but a few are arguments advanced by the defendants such as suicide as “superseding” factor in essence the argument that because the student consciously decided to commit suicide the university's actions are disconnected from the consequences by the student's intentional action of suicide (Blanchard 2007:466; Sparks Bradley 2012:701). The claims coded were: breach of contract, emotional distress (or similar) for surviving family, breach of fiduciary duty, negligence, special relationship was established, wrongful death and foreseeability. Foreseeability was a major theme appearing in a majority of cases. The concept of foreseeability is linked to many other important elements of the cases such as faculty interaction with the student and the University's duty to protect and it is a major concept in tort law generally. Finally, I coded the appearances of the Restatement (Second) of Torts, the legal treatise that courts refer to when working to understand liability. Not all of

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these concepts were persuasive to the court, but they appeared in briefs or in final opinions. Method of suicide, roommates involvement, significant others' involvement and students agreeing to mental health treatment plans were also identified as codes because changes in these factors across cases can help to explain other differences that appear in legal reasoning or outcomes.

I initially coded for about 30 different concepts or facts and then examined which NVivo nodes encompassed relevant information across cases and selected those for further examination. Nodes selected for further study fall into the two categories of Nodes related to fact patterns of the suicides and court reasoning.

Table 1: Coding Nodes Selected for Further Study

Codes related to fact patterns:	Nodes related to court reasoning:
<ul style="list-style-type: none"><li>• Staff contact with student,</li><li>• Staff awareness of suicide risk,</li><li>• Lack of staff awareness of suicide risk,</li><li>• Duty to assist or protect/special relationship,</li><li>• University contacting parents before suicide or policy to do so,</li><li>• Earlier suicide attempt or incident leading to mental health treatment,</li><li>• Services available to the student.</li></ul>	<ul style="list-style-type: none"><li>• Court considering foreseeability</li><li>• Court discussing in loco parentis explicitly (not in the context of a general duty to care for student)</li><li>• Outcome of the case (entirely in favor of the university or not).</li></ul>

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I examined each element of each category in the relevant cases and summarized the information into a spreadsheet, where I could visualize the change over time and the number of each element. Ultimately, selecting codes and discovering which ones were relevant across cases was a significant undertaking due to my limited knowledge of legal concepts and the wide array of factors identified as significant by scholars and the law.

### *Other Sources*

I gathered information from a number of documents produced in the mid-late 2000s that explain topics related to student suicide from a legal perspective. Largely published in law reviews, these articles provide advice and recommendations for how to effectively prevent suicide without creating liability. I also reviewed academic articles advising higher education professionals on how to deal with this issue from a non legal perspective. These documents were found via LexisNexis, ProQuest, Google Scholar and other search engines, using a wide variety of keywords related to universities and suicide.

Additionally, I reviewed websites of firms and professional associations that were created to deal with the issue of liability following student suicide, or more generally liability in higher education. These include the National Center for Higher Education Risk Management, which publishes guidance documents on a variety of timely topics in addition to providing risk management consulting services.

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I also consulted the websites of several plaintiffs' attorneys who specialize in this topic of litigation, in addition to contacting one attorney in an attempt to obtain some deposition documents related to the *Shin* case. While this attorney was willing to help, the depositions had not taken place before the case settled and he was unable to do much other than inform me that the *Ginsburg* case had settled recently.

News articles from newspapers about the cases and about the issues of student suicide or litigation were included as well. These provided information about how organizations were presenting themselves to constituents and the general public. Articles from *The Chronicle of Higher Education* gave similar insight, but also provided a perspective on the issue from within the industry.

### THE CASES

There are several trends within the 2000s student suicide cases that are notable. They show that universities were following an institutional model, maintaining student services to appease constituencies while also meeting internal goals by successfully reducing liability risk. The 6 major cases demonstrating this took place between 2000 and 2013.

In 2000, *Jain v. State* was decided in favor of the university even though the fact pattern is quite similar to *Schieszler* in which the university was not viewed favorably (617 N.W.2d 293 [2000]). A Resident Assistant intervened after Sanjay Jain had a fight with his girlfriend after expressing intent to commit suicide. The RA had a conversation with an administrator about it, who urged him to seek counseling but did not take further action. According to an informal policy, the

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university would have contacted his parents had the information reached the correct Dean, but this did not happen in time. The court found that there was no special relationship between Jain and the University, and granted summary judgment in favor of the University.

*Schieszler v. Ferrum College* (236 F. Supp. 2d 602 [2002]) was the first case to be decided against the university, with the judge denying their motion to dismiss and forcing the university to reach a settlement agreement with *Schieszler* or go to trial. In this case, the student Michael Frentzel (*Schieszler*, the plaintiff, was his legal guardian) got into a fight with his girlfriend about his intentions to commit suicide, and a Resident Assistant and police responded. An administrator compelled Frentzel to sign a no-suicide pledge and was aware of suicide notes that he had written to other friends. Frentzel was then left unattended and committed suicide by hanging himself in his dorm room. The judge found that Ferrum College had enough information about his situation to create a special relationship with Michael, and to make his suicide foreseeable to college administrators. After the case settled in 2002, Ferrum College released a statement acknowledging that they should have performed better to prevent the suicide (Associated Press 2003).

*Schieszler* served as precedent for *Shin v. MIT*. Elizabeth Shin's suicide was preceded by involvement with several different MIT counselors, extensive engagement with residential life staff related to her suicidal thoughts and the involvement of MIT administrators in making decisions about her care. The court found that all of the support that MIT provided had created a special relationship

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between her and the organization, and her suicide was foreseeable, leading them to rule against MIT. The case did not make it to court but Elizabeth's family and MIT settled the case without admitting fault, though MIT pledged to do a better job with suicide prevention in the future in subsequent public statements (Healy 2002).

In both *Shin* and *Schieszler*, residential life staff contact with the student prior to the suicide and administrators' awareness of the suicide risk were central facts that worked in favor of the plaintiffs. The existence of medical/counseling services was central to the *Shin* case, and was relevant in *Jain* though only tangential in *Schieszler* – likely because Ferrum College is quite small compared to the University of Iowa and MIT, and offered substantially smaller counseling resources to its students. In all three cases, the presence and involvement of non-therapist college administrators was considered extensively

The subsequent cases are similar to these three in that they all were brought by surviving family members against the university for failing to prevent a suicide, but they do not target college administrators or residence hall staff for failing to effectively intervene. In fact, those personnel are not even relevant to these cases. The next case, *Leary v. Wesleyan*, was decided in 2009 and was about a student who was taken into custody by Wesleyan police for having a panic attack, transported to the hospital, and dropped off with the expectation that he would seek treatment (Conn. Super. LEXIS 621 [2009]). Instead, he left the hospital and then committed suicide shortly after. The court found that the University had taken on a duty to

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protect the student by taking him into custody and they should have known that he was a suicide risk, and therefore they were liable for his subsequent death.

The next case, *Ginsberg v. Ithaca and Cornell University* is also not related to residential life staff or administrators' interaction with the student – in fact, the court acknowledges that Ginsberg's specific suicide could not have been foreseen (U.S. Dist. LEXIS 46940 [2012]; U.S. Dist. LEXIS 35192 [2012]). However, the court found that Cornell and Ithaca could be responsible for his suicide because they inadequately secured the bridge that he jumped off of and they should have known that a suicide at this spot was inevitable. This case was based on premise liability theory, which is a separate legal concept from the one used in all other student suicide cases discussed. The final case is *Conner v. Wright State University*, which was decided in 2013 in favor of the University (2013-Ohio-1511 [2013]; 2013-Ohio-5701 [2013]). Two months prior to his suicide, two university police officers responded to a call that Nathan had taken unprescribed pain medication, they transported him to the hospital and he then spent a week at home with his parents to recuperate. The same two officers responded on the night of his suicide when his roommate called emergency services because Nathan intended to commit suicide with a helium tank. The officers spoke with Nathan and determined that he was not a threat to himself. Later that night, Nathan committed suicide. This case was decided in favor of the university because the officers had not formed a special relationship with Nathan, though this question was considered in light of their

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status as public servants rather than the university-student relationship – markedly different from *Shin* and *Schieszler*.

It is unlikely that there were no incidents similar to Elizabeth Shin or Michael Frentzel’s in colleges or universities after 2005, even though universities throughout the country made public efforts to prevent student suicide. The fact that all cases after 2005 were about police actions or premise liability suggests that *Shin* and *Schieszler* induced some sort of change in the higher education environment to prevent further liability. Before the Ginsberg and Conner cases were filed, legal scholars published articles observing the complete lack of litigation in the vein of *Shin* and *Schieszler*, though this study presents a more complete view because several cases have been filed and resolved since these late 2000s articles were published (Fossey and Moore 2010).

### Timeline

Table 2: Timeline

1994	<b>Sanjay Jain’s Death</b>
2000	<b>Jain’s appealed Decision, <i>Frentzel’s Death</i>, <u>Shin’s Death</u></b>
2002	<u>2002 Shin complaint filed, Shin article in New York Times, Schieszler complaint and Decision (in favor of plaintiff)</u>
2003	<u>2003 Leary Death</u>
2005	<u>Shin Decision, Leary complaint filed</u>
2008	<u>Conner death</u>



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2009	<u>Leary decision (partially in favor of plaintiff)</u>
2010	<u>Ginsberg death</u>
2011	<u>Ginsberg complaint filed</u>
2012	<u>Conner complaint filed</u>
2013	<u>Conner decisions (court of claims and appeal - against plaintiff)</u>
2014	<u>Ginsberg decision (in favor of plaintiff)</u>

## DISCUSSION

### *Institutionalism and Symbolic Compliance in Higher Education*

Universities could not take the most economically rational path to reduce liability even more so than other large organizations with liability concerns like corporations, because of their claims to be moral leaders in society as well as their unusual diversity of constituencies. Universities are reliant on a large number of constituencies for support and survival, including the federal government, students, parents, donors, faculty, their geographic communities, the general public and other organizations that may provide funding. Further, a university must demonstrate to its stakeholders' satisfaction that it is meeting its goals, though the goals in this setting are contradictory and unclear (Harris 2015; Meyer and Rowan 1977). These factors combined will lead the organization to look to others in a similar situation and create structures that mimic common ones in hopes of gaining credibility with

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their constituencies by fitting the model of what they are expected to be (DiMaggio and Powell 1983).

Conformity to this expectation of caring for students is evident in a variety of services that universities generally provide, from counseling centers to health clinics to residence life staff. It has become an institutionalized practice for universities to have a counseling center available at low or no cost students, as evidenced by the numerous conferences for professionals who work in these offices, the existence of a survey of them, and parents' use of counseling service availability in college selection (Duenwald 2004; Gallagher 2012). Other services like residential life staff and administrators focused on undergraduate life are equally expected. To not have these services would be an aberration, and would cause the university to lose constituent support.

To maintain the support of many important constituencies, universities must continue to display the general philosophy of caring for students' physical and mental health that they have implemented in the past. However, this is directly in opposition to efforts to eliminate liability-causing programs like those that served Elizabeth Shin before her death. This dilemma puts the organization in the difficult position of maintaining legitimacy with its stakeholders at risk of large financial and public relations costs, or severing ties necessary for organizational survival in the interest of limiting litigation.

The institutional theoretical framework acknowledges that efforts to maintain constituent support are not necessarily in line with the organizations'

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internal goals and realities. In this case, the institution would have the option to maintain the internal goal of reducing liability in the expected fashion while creating “myth and ceremony” for constituents of the organization to persuade them that student service provision is a top priority (Meyer and Rowan 1977). This myth and ceremony takes the form of the brochures and promises discussed above, news articles about increasing services, as well as other communications to parents about the mental health and safety of students. These facts lead to the prediction that after the major litigation events in the early mid 2000s, universities will find a way to appear to maintain student services while effectively reducing liability in ways other than actually improving the mental health of the students on campus.

There is further evidence that colleges and universities are operating in the way of institutions. Lauren Edelman identifies the qualities of organizations that were early to institutionalize internal grievance procedures in response to civil rights laws. Universities have several of these qualities, including their size and public exposure. Large organizations create formalized compliant systems more quickly than small organizations, for the reason that they need to have externally visible official documents to continue operation on their scale. Universities are large and require formalized procedures to operate, factors which will cause them to come into compliance, even if only symbolically (Edelman 2005). A similar effect of increased and rapid symbolic compliance was observed in organizations that are “closer to the public sphere” than others. Universities fit this criterion, playing large roles in their immediate communities and often having a public service component

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to their educational mission (Edelman 1990:1414, 1417–1422). Based on these organizational characteristics, we would expect to see a large amount of (at least) symbolic compliance from these colleges and universities.

The nature of the laws affecting suicide liability also increases the likelihood of a symbolic response. In her discussion of symbolic compliance with employment discrimination laws Lauren Edelman argues, “laws that are ambiguous, ... and difficult to enforce invite symbolic responses – responses designed to create a visible commitment to law, which may, but do not necessarily, reduce employment discrimination” (Edelman 1992:1542). Unlike in discrimination cases, the relevant laws are general tort laws that apply to all kinds of injuries and do not include any specific provisions for dealing with suicide, making them quite ambiguous from the perspective of defendant organizations. Ordinarily, this sort of ambiguity is resolved by the existence of similar prior cases, and organizations can expect that their cases will follow a similar model. Due to the emerging nature of this issue, and universities’ tendency to settle these cases, such a body of case law does not exist, only further increasing the ambiguity of the law and decreasing the certainty of enforcement. Finally, these laws are enforced only when someone who has experienced harm has the resources to and effectively does use the legal system to respond to that harm, which is relatively rare. These factors combined invite an even more symbolic response in the case of suicide litigation than Edelman discovered in the case of employment discrimination law.

### *Removing Suicidal Students from Campus*

E. Allan Lind of the Duke University Fuqua School of Business argues that “litigation, and to an even greater extent the fear of litigation, is arguably a driving force in many organizational decisions” (Lind n.d.). The threat of liability presented by the early 2000s precedents was reflected in the mindsets of college administrators as well as in their actions.

In the course of an early 2000s research project that sought to screen college students for depression, researchers from the American Foundation for Suicide Prevention found that university administrators were unwilling to identify suicidal students individually (with the intention to treat them) from the survey for fear that doing so would create liability, even if the student refused treatment by the university after it was offered (Haas, Hendin, and Mann 2003). This tendency was striking to the researchers, but was present at multiple universities and their published work identifies it as one of their main findings from the project, despite it being only tangential to what they set out to study.

This fear of engaging with suicidal students did not end in the minds of administrators, and policies of removing students, against their wishes, from campus for attempting suicide or seeking treatment for suicidal thoughts became relevant. Gary Pavela, a professor of law and frequent writer on issues of the law and higher education notes that a “common reaction” on professional listservs and at conferences was “that students at risk of suicide should promptly be dismissed, preferably on medical grounds” (Pavela 2005:367). Brett Skolow, the president of

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the National Center for Higher Education Risk Management, refers to the practice of using a code of conduct to separate a suicidal student as a policy that has “long been considered a best practice” though he then outlines his concerns that the Office for Civil Rights will object to this in the future (Sokolow 2005).

Jordan Nott, a student at George Washington University, was evicted from his dormitory and forced to withdraw (under threat of expulsion) after he checked himself into the hospital for suicidal thoughts (Konopasky 2008). The justification for this action was that he had violated the student code of conduct, which bans behavior that puts any person at risk (Wei 2008). Other universities, such as Hunter College of the City University of New York simply had a policy written into their housing contract that a student would be required to leave after a suicide attempt (Wei 2008). These policies have resulted in students hesitating to use university resources once they are able to return to campus, and speaking to national news sources about their attempts to hide their mental state from university officials (Massie 2008:674).

While these practices are neither new nor rare, “there is some reason to believe that the incidence of such policies may be increasing and that the increase may be linked to administrators’ fears of adverse publicity and legal liability if students commit suicide on campus” observes Paul Appelbaum director of the Division of Psychiatry, Law, and Ethics of the Department of Psychiatry at the Columbia University College of Physicians and Surgeons (Appelbaum 2006:1).

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This tactic for limiting liability backfired in several cases, including Jordan Nott's. He sued George Washington University for violating the Americans with Disabilities Act, section 504 of the Rehabilitation Act, the Fair Housing Act and for intentional infliction of emotional distress. This created a rash of bad publicity for the school (Schaffer 2010).

Arguing that students are in violation of policy creates a bad situation for the student, often putting them in the position of defending themselves in university proceedings while in a sensitive state, but allows the university to remove them from campus in a way that limits their liability (Lapp 2010). While Jordan Nott's dismissal was based on a student conduct violation, other organizations use medical withdrawals (involuntary or voluntary) or housing contract provisions to remove suicidal students from campus (Wei 2008).

After several egregious incidents like Nott's, The Department of Education's Office for Civil Rights became involved in these cases and, through letters to universities and other regulatory tools, created strict guidelines for how and when a student can be removed from campus for suicidal thoughts (Wei 2008). They did not eliminate the practice, but it was clear from their response that universities were not free to treat their students however they pleased and that the OCR considers universities to be responsible for prioritizing student well being.

Such regulation adds to the pressure for universities to maintain an image (that can hold up under close regulatory scrutiny) of caring for students on a personal level, or at least taking students' well being into account. In addition to the

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federal reaction to involuntary withdrawal policies, at least one state (Virginia) passed a law “prohibiting state universities from penalizing or expelling students who have attempted or threatened suicide,” providing another example of the public’s expectation that universities will support students rather than remove them from campus (McAnaney 2008).

Despite the practice of involuntary medical or nonmedical withdrawal having been in existence for some time, there was a significant negative reaction to this practice from several important university constituencies, including other institutions of higher education (Pavela 2005). Ultimately, the existence of and increase in these policies’ use in the 2000s show that colleges and universities were attempting to limit their liability by refusing to provide student services – just not in a way that would harm the external image that they must maintain to retain support from governments, parents, faculty and others.

These strong and organized negative responses to the policy, despite its previous best practice nature, show the level of pressure on universities to provide the image that they are caring for their students and that attempts to reduce liability without consideration for these expectations will not be tolerated – in other words, this is a very important myth for universities to maintain.

### *The Illinois Plan – An Appealing Option*

Universities were still left in a difficult situation, with their options to limit liability constrained by constituent concerns but the risk of liability looming large. A



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policy known as the “Illinois Plan” or the “Joffe Model” came into prominence, though it too had been in existence for some time. This program mandates a series of four one-hour assessments for any student who expresses suicidal intent (Joffe 2008; Kaveeshvar 2008). Threats for disciplinary action or removal from campus are a part of the plan, but not as punishment for the suicidal intent or act but instead for failing to complete the four mandated sessions. This helps the university to avoid a claim that they have violated the students’ due process rights by removing them from campus without a hearing (Kaveeshvar 2008). To make this policy enforceable, all University of Illinois student Affairs personnel are required to submit an incident report form when they have reason to believe that a student is at serious risk for suicide. These forms are not an evaluation of the student’s state, but simply a declaration that they have crossed the “threshold” from passing thoughts to observable action (Joffe 2008; McAnaney 2008).

This program has been touted as highly successful, reporting a 45.3% decline in overall suicides, despite stable suicide rates elsewhere. However, the suicide rate for graduate students was 94.6% higher during the program (Joffe 2008:99). Pavela, a prominent champion of the program reports that the program “has led to the withdrawal of only a single student (who subsequently returned and graduated) in over 20 years” (Pavela 2005). However, he may be referring to only one *mandated* withdrawal, because other advocates report that “Students who are in serious trouble even after the four sessions will usually verbally consent to either leaving the University or getting more intense professional help” (Cohen

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2007:3121). This raises the question of if students are voluntarily leaving campus environments where they can receive a community of support because of the counseling sessions, or if the program is effectively connecting students with their best possible scenario.

The program is a middle ground between removing students for suicide and effectively limiting liability, and engaging with mentally ill students without regard for legal consequences. Nearly all university constituencies are satisfied by the solution – faculty have the option of submitting a suicide incident report and becoming involved in the student’s mental health, though they are not required to do so (Pavela 2005). Students see a support system that does not threaten to remove them from campus for expressing certain thoughts, and parents see a safety net for their students if the parents are unaware of an issue. Other constituencies such as state legislatures and donors also see a softened approach as compared to mandatory withdrawal, one that satisfies the expectation that the organization will reach out to and care for students in distress.

Despite these highly desirable characteristics and the empirically supported effectiveness of the Illinois Plan, it has not been widely adopted across college campuses. None of the schools included in my analysis indicated that they had adopted the program on their counseling center websites. There is little information available about actual adoption rates, but a 2008 article from Paul Joffe, the leader of the original program, chooses to discuss difficulties that universities have faced in adopting the program rather than announcing its success and wide adoption (Joffe

2008). The main obstacle to adoption that Joffe identifies is that existing counseling center directors and staffs are not willing to cede control of such a sensitive issue to a new approach or organization (Joffe 2008).

While there are numerous other suicide prevention plans that circulate among those discussing student suicide prevention, the Illinois model was the only one to gain attention for its effectiveness in mitigating liability and was the only one to make its way into the legal literature that discusses the issue of university liability. Because of this prominence of the model, its track record of efficacy and low cost of implementation it is surprising that it has not been more widely adopted (Joffe 2008).

### *The Endogenous Influence Explanation*

One possible explanation for the lack of adoption is that universities have dealt with the liability in ways other than substantively changing their suicide prevention programs. These other ways include hiring additional risk management consultants and increasing the role and influence of in house attorneys to manage situations that may generate lawsuits (McArdle 2012).

By understanding the law as endogenous, “that is, as generated within the social realm that it seeks to regulate,” it is easier to understand why the Illinois Model did not spread across the country (Edelman 2005:337).

Lauren Edelman argues that organizations affect the law as well as being affected by the law. As ambiguous laws come into existence, and the tort law

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surrounding student suicide is unquestionably ambiguous, organizations make sense of the law as it filters through compliance professionals, such as external legal consultants, compliance officers and in house attorneys (Edelman 2005). These actors present their own interpretation of what compliance would look like within an organization, and the organization generally takes this vision and implements it. In this case, the Illinois plan could have been one of these interpretations, but it is also possible that actors within organizations were endorsing existing policies or making minor tweaks to policies then endorsing them as compliant.

According to Edelman, “Lawyers often stand at the apex of this hierarchy by providing initial admonitions about changes in law or new threats posed by patterns of litigation” (Edelman 2005:342). The increase in the influence of in house counsel in organizations, especially colleges and universities, over the last half century created an organizational environment in higher education that was ripe for this sort of internal interpretation of the ambiguous tort law to take hold within organizations, pre-empting any efforts to seek outside solutions like the Illinois Plan (Liggio 1997; Ruger 2004).

With this endorsement process taking place in the mid 2000s, universities who grew concerned about the issue of liability for student suicide would look to “trend-setting” organizations whose attorneys claimed that they were in compliance as models for their own systems – even if the trendsetters did not make major changes (Edelman 2005:344). One example of this sort of change is the policy of having a care manager as part of the standard mental health care that universities

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offer to their students. After the *Shin* case, MIT announced that they would make this change to their organization in an effort to prevent future suicides (Waugh 2011). The existence of care managers can now be seen in other organizations with concerns about student suicide liability, such as Cornell University, notorious for student suicide even before the *Ginsburg* case (Gannett Health Services n.d.). These structures are considered evidence of compliance, “even though nothing in the statutory languages mandated that organizations create them” (Edelman 2005:344).

When this symbolic compliance becomes widespread, courts become willing to accept it as evidence of actual compliance. A possible explanation for the absence of recent litigation focusing on administrators' actions could be that tweaks similar to (or including) care manager policies were accepted by trial courts and cases similar to *Shin* and *Schieszler* were dismissed without proceeding to a level where they would have appeared in my searches or in any major news source.

The proliferation of in-house counsel can also make universities “more skillfully evasive” (Edelman 2005:347). These attorneys are more skillful at identifying loopholes and weaknesses in the law that fit with the existing organizational form, and can act as “strategic advisers” in the process of avoiding litigation. Considering the changing and increased role of general counsels within universities, the trend in litigation could simply be attributable to in-house attorneys doing their jobs effectively to steer their organizations away from legal threats (Edelman 2005:348; Liggio 1997).

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Further, colleges and universities' are "repeat players" in the legal system, meaning that they are accustomed to engaging with the law and may even have infrastructure in place to facilitate this engagement and ensure that it goes in their favor, such as taking the advice of counsel into account proactively rather than reactively (Edelman and Suchman 1999:969; Galanter 1974). Because of their repeat player status, they are especially well resourced and positioned to get certain policies and procedures legitimated by the courts.

### *Conclusion*

*Shin* and *Schieszler* changed the landscape of college and university law, creating the possibility that higher education organizations would face liability for doing too much or too little to help their mentally ill students. The dangers of doing too much for their students were clearly displayed in the *Shin* litigation – universities themselves argued that the decision the court handed down would create "perverse incentives" for administrators to avoid becoming aware of troubled students, and universities did in fact react harshly to the decision initially by removing students from campus (Massie 2008:674–675).

However, such an economically motivated decision is not appropriate in the higher education context, and universities faced significant backlash for behaving without considering the importance of their image. In an organizational field such as higher education, actors are reliant on a number of constituencies for legitimacy and resources that allow them to continue to operate. To retain this legitimacy,

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organizations must maintain certain “myths and ceremonies,” even if they are unrelated to the actual intentions of the organization. In this case, the appearance of caring for students’ well being is a myth that must be maintained, without disturbing the organization’s existing processes or creating liability by engaging too deeply with students.

This brought universities to a choice between reducing liability by eliminating student support programs, or maintaining an important component of the university’s image. Universities have resolved this issue by acting symbolically to maintain the myth of student service provision while working privately to limit liability while disturbing organizational functioning as little as possible.

Once organizations have acted to display compliance with legal requirements and constituent demands (in this case, by displaying an effort to support suicidal students), they will benefit from further reduced liability when their existing procedures become legitimated by the courts, providing protection against further suits for all in the organization’s field. This process was happening privately in the years following the *Shin* and *Scheizler* litigation.

While there were suits related to student suicide after *Shin*, they were qualitatively different from the earlier cases in that they were not related to the same organizational units – suggesting that these units in colleges and universities across the country had acted to prevent liability and come into compliance with legal expectations, but that they had done so in a subtle way that did not compromise their legitimacy.

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The existence of this phenomenon in an area with a distinctly different legal context than employment law is significant. Edelman's research surveys legal environments in which regulation is formal and explicit, with agencies and statutes specifically devoted to promoting compliance. The law in this case is markedly different: the relevant rules exist almost entirely in the common law, referring to treatises for clarity rather than legislation. Even though compliance is much more loosely defined in such a context, higher education organizations still display symbolic compliance. This finding demonstrates the strength of Edelman's theory to explain the interaction between organizations and the law.

### *Limitations of the Study*

The first limitation of this study is my limited understanding of tort law and other legal concepts. This is demonstrated by the fact that I repeatedly felt as though I had found a trend in the cases or in the courts' interpretation that was related to an organizational factor, only to realize that a fundamental legal principle was the cause for similarity rather than any sociological finding.

Another major limitation was my ability to search thoroughly for all available cases and access procedural history for each case. My search capabilities were limited to those provided by *LexisNexis Academic*, which is not specialized for searching for case law in the way that other legal research tools are. It is possible that recent and lower court cases that would have been relevant escaped my searches. Future research with more emphasis on the context for this litigation



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would provide insight into the limitations of applying Edelman's compliance theory in an environment where compliance is completely different.

Finally, the ultimate limitation is the lack of access to information from within the organizations about how they changed their policies and how administrators thought of this issue. Future research that is able to conduct interviews, access deposition documents and review internal records will provide insight into how the *Shin* and *Schieszler* litigation affected organizations, and how higher education organizations react to litigation threats that are counterweighted by moral and reputational obligations.

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