Robert Weinstock,[1] *M.D. and Harold Pruett,*[1] *Ph.D.*

Abuse of Psychiatric Legal Defenses Revisited: Mandatory Psychiatric Student Withdrawal

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ABSTRACT: Insanity defenses and competency to stand trial have had a history of abuse in forensic psychiatry. Currently Pavela has proposed a procedure for mandatory withdrawal from universities of students with psychiatric problems. Students can be removed who either meet criteria for being incompetent to stand "trial" or meet criteria for the McNaghten insanity "defense" after breaking even a minor university rule. By being forced to withdraw, they can receive worse than the maximum penalty for the offense.

An alternative procedure is proposed which makes the disciplinary process primary for withdrawal of all students and does not abuse psychiatric "defenses." Withdrawal of students who violate rules should occur only because the behavior itself warrants it. Psychiatric explanations should be reserved for possible mitigation in a role analogous to that in a criminal trial. Consultation between mental health professionals and university administrators also is recommended to help in understanding problem situations and behavior.

KEYWORDS: psychiatry, psychiatric defenses, psychiatric defense abuse, insanity defense, incompetency to stand trial, students, college withdrawal

Abuse of so-called psychiatric defenses has a long history in the criminal-justice system. In the recent past, defendants who were adjudicated as incompetent to stand trial or not guilty by reason of insanity could be incarcerated indefinitely. These psychiatric "defenses" were beneficial to a defendant in capital cases. However, in less serious cases it was possible to be incarcerated for much longer periods of time than if a defendant had been found guilty of the crime for which he had been charged. Moreover, if found to be incompetent to stand trial, he was deprived of his right to a trial and thereby could be incarcerated indefinitely even if he were innocent of the crime for which he was charged.

In 1972, in *Jackson v. Indiana* [*1*] the U.S. Supreme Court considered the case of a mentally retarded person who had stolen nine dollars worth of property and had been confined indefinitely as incompetent to stand trial. The Court interfered with the practice of finding a defendant indefinitely incompetent to stand trial and the use of such findings for indefinite confinement [*2*]. They required that there be some basis to suspect that a defendant could be restored to competency in a reasonable period of time—thereby interfering with this abusive practice.

However, more recently, in 1983 the U.S. Supreme Court in *Jones vs. United States* [*3*] did permit those found not guilty by reason of insanity to be institutionalized beyond

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[1]Coordinator of psychiatric training and director, respectively, Student Psychological Services, University of California at Los Angeles, Los Angeles, CA.

their maximum term if found still to represent a statutory level of danger to others, until such time as they were no longer dangerous. For minor crimes, being found not guilty by reason of insanity is again a "defense" which could lead to longer incarceration than if merely found guilty. At present it appears that other mentally ill prisoners cannot have their sentences so extended.

Discussion

Mandatory psychiatric withdrawal of students from universities has been proposed as a means of expelling students with emotional problems who may present problems for administrators. Because Section 504 of the Federal Rehabilitation Act of 1973 prohibits discrimination against the mentally ill, new procedures have been proposed to circumvent this act. These procedures have been adopted by as many as 40% of universities around the country [*4*]. They use language taken directly from psychiatric legal defenses and recreate serious abuses reminiscent of the earlier abuses. They also represent possible new applications of abuses of these defenses from the criminal justice system.

During the early years of this century, students in the United States could be expelled for violating extremely vague standards of student conduct. In 1928, a student at Syracuse University was expelled merely for not being "a typical Syracuse girl" [*5*] and, in 1924, another for not being in "sympathy with the management of the institution" [*6*]. Even in 1961, an Alabama student was expelled for "conduct prejudicial to the school" [*7*]. The court required only proper procedure, that is, the fundamental principle of fairness by giving the accused student notice of the charges and an opportunity to be heard in his own defense.

In the 1960s, more specific standards began to be required. In *Connelly v. University of Vermont* [*8*], the court held that "a student dismissal motivated by bad faith or capriciousness, may be actionable." It was necessary for regulations to state with sufficient precision what was and what was not acceptable behavior. Arbitrary dismissals no longer would be permitted. In *Lowry v. Adams* [*9*], the following standard was allowed: "any disruptive or disorderly conduct which interferes with the rights and opportunities of those who attend the university . . . to utilize and enjoy facilities provided to obtain an education." The court, however, in this case did criticize this standard as not being as precise as it could be. In 1980, a regulation which permitted only "activities of a wholesome nature" was insufficiently specific and found unconstitutional [*10*].

Many of the medical standards which replaced the old disciplinary ones unfortunately were equally vague. In 1981, in Illinois for example, students were dismissed whose mental health made them undesirable [*11*].

Universities receiving federal funds must be certain that they are not in violation of Section 504 of the Rehabilitation Act of 1973, which states, "No otherwise qualified handicapped individual . . . shall solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance" [*12*]. Handicapped individuals are defined as "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such impairment, or (iii) is regarded as having such impairment" [*13*]. "Physical or mental impairment" in the regulations was defined to encompass "any mental or psychological disorder" such as "emotional or mental illness" [*14*].

However, such prohibitions against discrimination had their limitations. A formal opinion by the United States Attorney General stated that Section 504 did not require unrealistic accommodation if a person's disability resulted in "behavioral manifestations" so that his "participation would be unduly disruptive to others" [*15*]. The Department of Health, Education and Welfare (HEW) similarly stated that the statute and regulations

were intended to prohibit excluding students from recipient institutions of higher education only "if the person can successfully participate in the education program and complies with the rules of the college and if his or her behavior does not impede the performance of other students" [*16*].

Students also could be excluded whose mental problems interfered with their ability to do the work in question. Jane Doe (a pseudonym) was admitted in 1975 to New York University School of Medicine after falsely indicating on her medical school application that she had no chronic emotional problems. In reality, she had been committed to a mental hospital after self-destructive behavior. In 1976, to cope with stress she bled herself with a catheter, withdrew from school, was hospitalized, and received treatment for her emotional problems. In 1977, she reapplied, but her application for readmission was denied. In 1981, she obtained a preliminary injunction to readmit because her handicap had been the reason for rejection. The decision was reversed on appeal [*17*]. The court held that even though she should be classified as handicapped under Section 504, she did not show that she qualified for admission despite the handicap. There are exceptional stresses in medical training and a significant risk of recurrence which could be taken into account and weighed against other factors. The court stated that considerable judicial deference should be given to the institution's evaluation. The tenth circuit, however, in another case, *Pushkin v. Regents of the University of Colorado* [*18*], affirmed that there was discrimination solely on the basis of a handicap when an applicant with multiple sclerosis was rejected from a psychiatric residency program because he was assumed to have emotional instability resulting from his handicap.

Considering the fact that Section 504 does not prohibit dismissal from school based on behavioral manifestations which are unduly disruptive to others and that the school is able to hold students with mental disorders "to the same standard of performance and behavior to which it hold others, even if any unsatisfactory performance or behavior" [*19*] is related to the mental disorder, it is of interest that many universities attempt to avoid use of the disciplinary process in such cases. They attempt to set up special procedures for psychiatric withdrawal, with mental health professionals as the ones who are most instrumental in excluding the students, as opposed to school administrators and disciplinarians. In fact, in a survey in 1985 in which 367 four-year colleges and universities responded, 40% of the responding institutions had policies for involuntary psychiatric withdrawal, and several more were considering such policies [*4*].

Circumstances in which psychiatric withdrawal procedures were utilized were actual harm to self, potential harm to self, actual harm to others, and potential harm to others. In all instances, a crisis in the institution prompted development of a policy in which there were no clearly defined institutional guidelines. It is not clear why psychiatric reasons alone should ever be reason for withdrawal, or even relevant, except perhaps occasionally as an exculpatory factor.

Recent policies were patterned after a very influential proposal by Pavela [*20,21*]. His standards for withdrawal are that a student would be "subject to involuntary administrative withdrawal from the university or from university housing if it is determined, by clear and convincing evidence, that the student is suffering from a mental disorder and as a result of the mental disorder (*a*) engages, or threatens to engage, in behavior which poses a danger of causing physical harm to self or others, or (*b*) engages or threatens to engage in behavior which would cause significant property damage or directly and substantially impede the lawful activities of others" [*20*].

A student accused of violating university disciplinary regulations according to Pavela's proposal may be "diverted from the disciplinary process and withdrawn in accordance with these standards, if the student, as a result of a mental disorder: (*a*) lacks the capacity to respond to pending disciplinary charges, or (*b*) did not know the nature or wrongfulness of the conduct at the time of the offense" [*20*].

An informal hearing before the dean of students or a designee is held according to

Pavela's proposed procedure. The student may "choose to be assisted by a faculty member or a licensed psychologist or psychiatrist or by a member of the faculty or staff of the institution." A "tenured faculty member" is appointed to "review and challenge any evaluation for involuntary withdrawal. . . . The mental health professional who prepared the evaluation . . . may be expected to appear at the informal hearing and to respond to relevant questions upon the request of any party, if the dean or designee determines that such participation is essential to the resolution of a dispositive issue in the case." Pavela also proposes that "The dean or designee may permit a university official and the mental health professional who prepared the evaluation to appear at the informal hearing and to present evidence in support of any withdrawal recommendation" [*20*].

Problems with Mandatory Psychiatric Withdrawal

As can be seen from the above procedure, the evaluating mental health professional becomes the student's adversary. An informal hearing process is employed in order to protect the student from the mental health professional. The appointed faculty member becomes the "defense attorney." The dean of students becomes the "judge." The mental health professional becomes the "prosecutor"—an unnecessary, counterproductive role for professionals who are supposed to be available to help students. Mental health professionals ideally should be so perceived in order to encourage students to obtain help without fearing its having any negative academic consequences. University administrators, under Pavela's proposal, appear to avoid becoming the punitive agent by passing that role to the psychiatrist or psychologist.

Mental health professionals should play disciplinary roles only as a last resort so that the primary function of providing treatment and support to university students is not undermined. Becoming a "prosecutor" unnecessarily could only undermine trust. It places the mental health professional in a "double-agent" role which necessitates clarification about whether the professional is acting to benefit the student or the university. In many cases, it would be clearly inappropriate for the same person to play both roles. Moreover, there is no reason why the usual disciplinary process should not be the more appropriate procedure.

Pavela's standards for withdrawal are behavioral, but there is a striking absence of any statement that the behavior is sufficient to warrant withdrawal in its own right. There is no statement that "engaging or threatening to engage in behavior which would cause significant property damage" would be of a nature sufficient to warrant dismissal under the disciplinary code. In regard to "directly and substantially impeding the lawful activities of others," there is also no statement that such behavior be sufficiently problematic so as to warrant dismissal under disciplinary procedures.

The standard of "engaging in behavior which would pose a danger of causing physical harm to self" might appropriately be grounds for involuntary hospitalization or treatment or even excuse from punishment—but why mandatory withdrawal? Such withdrawal in effect removes students from treatment opportunities at the university and forces students without independent financial means into inadequate, overburdened community facilities. Withdrawal does not guarantee treatment.

The standard of "threatening or causing physical harm to others" makes some sense for mandatory withdrawal. Frequently, the legal system has "abused" psychiatric defenses when defendants were believed to be dangerous but could not be found guilty of any crime. However, Pavela's proposal contains no requirement that the behavior itself be serious enough that it would be sufficient for withdrawal. Also, there is no reason why the disciplinary process could not be utilized. If desired, threats could be made a basis for disciplinary procedures. There is no reason to use the "back door" to exclude students with mental disorders for behavior insufficient to exclude other students.

In the absence of any requirement that the behavior itself be grounds for withdrawal,

the psychiatric "defenses" rationalized on humanitarian grounds in reality present a method to exclude students who cannot be excluded on disciplinary grounds and do not meet exclusion criteria. Rather than being humanitarian, mandatory psychiatric withdrawal can have even more stigma than disciplinary sanctions. The psychiatric "defenses" allow students to be excluded for behavior not otherwise warranting withdrawal. They receive the ultimate punishment at a university—dismissal.

The bases on which students are excluded under Pavela's proposals are strikingly similar to psychiatric defenses in the criminal justice system. The language should be familiar to any forensic psychiatrist or psychologist.

The first standard, that the student "lack the capacity to respond to pending disciplinary charges," is strikingly similar to competency to stand trail. The second standard that the student as a result of a mental disorder "did not know the nature of wrongfulness of the conduct at the time of the offense" is essentially the McNaghten insanity defense criterion [*22,23*]. Both "defenses" lead to the maximum punishment, that is, withdrawal.

Pavela does not differentiate between major and minor infractions. He does not say that dismissal otherwise must be a possible punishment for the offense if found guilty. In one case example, the only "offense" was an eating disorder. Yet this "offense" was a reason for mandatory psychiatric withdrawal. Therefore, rather than being a humanitarian diversion, the procedure can be a way to exclude students for minor offenses or without the behavioral manifestations necessary for civil commitment. It excludes students only if they are mentally ill and have a disturbance which can upset some other students and faculty. They therefore can receive worse than what otherwise would be the maximum sentence. The procedure involves clear discrimination against the mentally ill under the misleading cloak of humaneness by unnecessarily avoiding disciplinary proceedings. It probably is or at least should be in violation of Section 504 of the Rehabilitation Act of 1973. The psychiatric legal "defenses" inappropriately provide legitimacy for punishment which can be more severe than the worst disciplinary punishment—similar to abuses of such "defenses" by the legal system.

One of the best arguments for use of the disciplinary process ironically was made by Pavela himself [*24*]. He said a disciplinary code "should not use vague and ambiguous language or standards that prohibit such behavior as 'disturbed,' 'of concern to others' or 'abnormal.' The code should rely instead on judgment based on the observable facts of prohibited behavior." If the disciplinary process is inadequate, it should be strengthened. Administrators should mete out discipline and not look to abrogate their responsibilities by shifting the responsibility to mental health professionals. If certain behaviors are unacceptable in a school setting, most students, even if mentally ill, can benefit from being confronted by the unacceptability of certain behaviors.

Mental health professionals can play a consultative role to administrators, which should be separated from treatment roles to avoid the "double agent" problem. Psychiatric consultation and treatment can be a diversion from the disciplinary process when appropriate. The disciplinary process can be suspended pending the outcome of treatment or evaluation. Sometimes, retention in school could be contingent on treatment, especially when treatment appears likely to control the behavior, for example, lithium in a bipolar patient.

If the student is a danger to himself or others, civil commitment is available. It assures treatment unlike mandatory withdrawal. Even eating disorders, noted by Pavela as sometimes requiring mandatory psychiatric withdrawal, can be grounds for civil commitment if life-threatening. It, moreover, is unclear how eating disorders meet the McNaghten criteria, and he implies that such disorders do meet the McNaghten criteria by utilizing them as an example of where his scheme can be helpful. In our experience, many students with severe emotional problems can nevertheless do quite well in their academic studies. Only if their behavior becomes sufficiently disturbing to violate disciplinary codes or if academic performance is inadequate does threat of dismissal seem warranted. Sometimes

a student can be excluded selectively from the activity in question. If the behavior is merely upsetting to some at the university, perhaps those students or faculty need help with their reactions.

Other procedural problems with Pavela's proposal are that a finding of guilt is not even required. In some states, such as California, there even is as separate insanity defense trial in the criminal justice system after a defendant has been found guilty. In Pavela's scheme, the entire disciplinary procedure is avoided if the student is found to meet the McNaghten insanity criteria.

Pavela's proposals are reminiscent of the prior abuses in the criminal justice system before the days of *Jackson v. Indiana*, in which incompetency to stand trial for a minor offense could lead to indefinite incarceration. Excessive predictions of a dangerousness utilizing the Jones procedure have a similar potential, as existed in New York State prior to the Baxstrom decision [*25*]. Follow-up of people released by the Baxstrom decision who had been previously found dangerous by psychiatrists over a five-year period found only 2.7% requiring prison confinement or transfer to a hospital for the criminally insane [*26*]. Only 20% were assaultive to persons in the civil hospital or the community at any time during the four years after their transfer [*27*]. Only 8% of those released into the community were convicted of a crime [*28*]. Efforts should be made to avoid analogous abuses of mental illness "defenses" in the college setting and to make existing procedures work in these circumstances in which mentally ill students are disciplinary problems. The disciplinary code should be strengthened if necessary to permit suspension or dismissal for problem behaviors.

Case Examples

A 30-year-old male graduate student in the anthropology department at the University of California at Los Angeles (UCLA) had threatened to kill a secretary in his department because she had been, in his opinion, insufficiently responsive to several of his requests. He agreed to a psychiatric evaluation at the request of the dean's office and gave permission for us to give the dean's office the results of the evaluation. He had a history of a bipolar disorder for about eight years. On several occasions when he stopped his lithium he required involuntary hospitalization. He did not present a behavioral problem when on lithium. He was stabilized on lithium and agreed to continue psychiatric treatment, take lithium, and submit to periodic lithium blood levels as a condition for suspending disciplinary action. He did well, graduated, and moved to another state to do work in his field. He agreed to continue lithium and remain in treatment.

Another anthropology graduate student had upset her roommate and other students in the residence halls by making suicide attempts. She was getting A grades in all her courses. The university was concerned about how to deal with her. They asked her to leave the residence halls because her behavior was disruptive even though they had no rule which she had violated. There was no reason for her to leave school because she was getting As and was receiving psychiatric treatment. She would have lost eligibility for psychiatric treatment had she been asked to leave the school. Although she was removed from the residence halls for disruptive behavior, she was not asked to leave school. She made one other suicide attempt, but then did well with therapy and antidepressant medication. She finished most of her graduate work at UCLA and then transferred to another university in her home state to complete her Ph.D.

Conclusion

Much like abuses of psychiatric legal "defenses" in the criminal justice system, mandatory psychiatric withdrawal is a procedure fraught with abuse potential. Pavela's proposal, adopted by many universities across the country, uses the language of competency

to stand trial, insanity defenses, and civil commitment to legitimize procedures which in reality appear to sanction discrimination against the mentally ill, forbidden under Section 504 of the Rehabilitation Act of 1973. Mentally ill students, if they violate school rules, should be punished by the school's disciplinary process. Mental illness can be used occasionally to suspend the process or to mitigate the sentence. Perhaps in some instances, incompetency to stand trial or being not guilty by reason of insanity would be appropriate findings as a true defense for mitigation of punishment. However, these actions should be a part of the disciplinary process similar to the trial process in the criminal justice system—not a forced diversion by which students can be given a punishment even more severe than the maximum punishment for the offense or violation for which he is charged.

Such abuses have occurred in the legal system, but there is no reason for psychiatrists and psychologists to encourage such abuses in other systems whereby psychiatric "defenses" can be utilized to increase the punishment. People who are mentally ill and "bad" generally have been feared more strongly than those who are merely "bad." It is not unusual for many people to want to exclude the former or punish them even more severely. Abuse has often occurred in the criminal justice system when evidence has been insufficient to justify incarceration by alternative procedures or when there has been a reluctance to utilize openly a scheme for the preventive detention for those who represent a high-risk population for dangerous actions.

Generally, mandatory withdrawal procedures have been suggested by administrators, deans, or attorneys at universities, usually in response to mentally ill students who frighten them and whom they would like to exclude, even if no major school conduct regulations have been broken. Most psychiatrists and psychologists at these institutions have no forensic science experience or training and can be intimidated by legal terminology and procedure.

The fears and concerns of administrators are best dealt with by availability for consultation and evaluation by psychiatrists and psychologists working at these universities [*29*]. If the student is mentally ill and dangerous, civil commitment can be employed. If the student violates school rules, the disciplinary process should be used. If the process is ineffective, attempts should be made to strengthen the disciplinary process and not to use a so-called humanitarian diversion procedure, which can result in even more severe sanctions than the disciplinary process itself.

Forensic psychiatrists and psychologists should be aware of the attempt to misuse psychiatric legal defenses in this area in an effort to appear to legitimize what otherwise would be a clearly discriminatory action. The authors hope that a new trend will not develop to abuse psychiatric legal defenses in other areas in a way similar to that used at times by the criminal justice system. Forensic psychiatrists and psychologists should keep alert to the misuse of psychiatric legal defenses in unexpected settings. They should take advantage of their ability to clarify legal issues as well as call attention to potential abuses of forensic-psychiatric concepts in clinical or other settings in which misuse of these concepts may be proposed.

References

[*1*] *Jackson v. Indiana*, 406 U.S. 713 (1972).
[*2*] Slovenko, R., *Psychiatry and Law*, Little, Brown and Co., Boston, 1973.
[*3*] *Jones v. United States*, 103 S.C.T. 3043 (1983).
[*4*] Lampkin, P. "Dismissal of Students for Psychological Reasons." *NASPA Forum* (National Association of School Personnel Administrators), Vol. 7, 1987, pp. 1–2.
[*5*] *Anthony v. Syracuse University*, 231 N.Y.S. 435 (App. Div., 1928).
[*6*] *Woods v. Simpson*, 126A 882 Md. (1924).
[*7*] *Dixon v. Alabama State Board of Education*, 294 F 2d 150 (5th Cir. 1961) cert. denied, 368 U.S. 930 (1961).
[*8*] *Connelly v. University of Vermont*, 244 F Supp. 156 (D.V.T. 1965).

[9] *Lowry v. Adams*, F. Supp. 446 (W. D. Kentucky 1972).
[10] *Shamloo v. Mississippi Board of Trustees*, etc., 620 2d 516 (5th Cir. 1980).
[11] *Aronson v. North Park College*, 418 N.E. 2d 776 (Ill. App. 1981).
[12] 29 U.S.C. 794, 1982.
[13] 29 U.S.C. 706 (7) (B), 1982.
[14] 45 C.F.F. 84, 3 (j) (2) (i) (B), 1983.
[15] 430p Atty. Gen. No. 12, 1977 p. 2.
[16] 45 C.F.R. 84, 1983, App. A at 299.
[17] *Doe v. New York University*, 666 F 2d 76 (2nd Cir. 1981).
[18] *Pushkin v. Regents of the University of Colorado*, 658 F 2d 1372 (10th Circ. 1981).
[19] 45 C.F.R. 84, 1983, App. A at 298.
[20] Pavela, G., *The Dismissal of Students with Mental Disorders*, College Administration Publications, Asheville, NC, 1985.
[21] Pavela, G., "Limiting the Pursuit of Perfect Justice on Campus," *Journal of College and University Law*, Vol. 6, 1980, pp. 137–160.
[22] Daniel McNaghten's case, 10 Clark & Fin 200.
[23] 8 Eng. Rep. 718 (1843).
[24] Pavela, G., "Therapeutic Paternalism and the Misuse of Mandatory Psychiatric Withdrawals on Campus," *Journal of College and University Law*, Vol. 9, 1982–83, pp. 101–141.
[25] *Baxstrom v. Herold*, 383 U.S. 107 86 S.Ct. 760 (1966).
[26] Steadman, H., "Follow-up of Baxstrom Patients Returned to Hospitals for the Criminally Insane," *American Journal of Psychiatry*, Vol. 130, 1973, p. 317.
[27] Steadman, H. and Halton, A., "The Baxstrom Patients: Backgrounds and Outcome," *Seminars in Psychiatry*, Vol. 3, 1971, pp. 376–386.
[28] Steadman, H. and Keveles, C., "The Community Adjustment and Criminal Activity of the Baxstrom Patients: 1966–1970," *American Journal of Psychiatry*, Vol. 129, 1972, pp. 304–310.
[29] Dodson, W. W. and Vaccaro, B., "Mental Health Consultation in Campus Discipline: A Program in Primary Prevention," *Journal of American College Health*, Vol. 37, 1988, pp. 83–88.

Address requests for reprints or additional information to
Dr. Robert Weinstock
UCLA Student Psychological Services
4223 Math Sciences Bldg.
University of California
Los Angeles, CA 90024-1556