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Rethinking the Intent Exception in the Case of Teacher Violence in our Public Schools: Modifying to Include Willful and Wanton Misconduct.

I. Introduction

Public schools nationwide face increasing violence, with more than 600 school shootings occurring within the last decade.¹ In 2024 alone, 56 K-12 shootings have resulted in 38 deaths and 115 injuries. However, school violence extends beyond shootings, with teachers often overlooked as victims. Teachers encounter growing threats, including verbal harassment, physical assaults, and severe injuries.² A Pennsylvania high school teacher suffered a broken jaw from a student attack, a Las Vegas teacher was strangled and assaulted by a student, and most recently, a first-grade teacher in Virginia was shot in the chest by her six-year-old student.³

Teachers increasingly fear for their safety, with many contemplating leaving the profession.⁴ Causes of violence vary, but administrative failures—such as inadequate discipline, weak enforcement of zero-tolerance policies, and failure to adopt preventive measures and emergency systems—play a critical role.⁵ Many student attacks are not random but involve students with histories of threats or violence against teachers.

¹ Alex Leeds Matthews, et al., *School shootings in the US: Fast Facts*, CNN, <https://www.cnn.com/us/school-shootings-fast-facts-dg/index.html> (Jan. 22, 2025, 6:20PM).

² Jodie Fleischer, *Survey: 60% of Teachers are Afraid to go to School*, 11 NEWS (May 13, 2024, 10:25 AM), <https://www.wpxi.com/news/trending/im-scared-every-day-teacher-violence-survey-reveals-most-have-considered-leaving-teaching/NIG5GLUGSVEXRBNCNSBMQWKAJE/>.

³ *11 Investigates Surveyed Pennsylvania Teachers: 77% Say They Have Faced Violence From Students*, 11 NEWS (May 11, 2024, 8:58 AM), <https://www.wpxi.com/news/local/verbal-abuse-physical-assaults-channel-11-digs-into-concern-violence-against-teachers/P64EVFD3QRDPVK72HT6T6VGRTE/>; Katelyn Newberg, *Teen Sentenced to Prison for Attacking Eldorado High Teacher*, LAS VEGAS REV J. (June 28, 2023, 3:13 PM), <https://www.reviewjournal.com/crime/sex-crimes/teen-sentenced-to-prison-for-attacking-eldorado-high-teacher-2801012/>; Susan Dvorak McMahon, *New Study: Violence, Aggression Against Educators Reaching Concerning Levels*, NEWSROOM: DEPAUL UNIV. (May 30, 2024), <https://resources.depaul.edu/newsroom/news/press-releases/Pages/violence-against-educators.aspx>.

⁴ See Fleischer, *supra* note 2.

⁵ Deedee Sun, *Parents, Teachers Worry About Lack of Discipline for Misbehaving Students*, KIRO7 (Sept. 9, 2024, 12:20 PM), <https://www.kiro7.com/news/local/parents-teachers-worry-about-lack-discipline-misbehaving-students/3Q7CMLC7M5BHBBJYQYYPAGCUA/>; Rikki Schlott, *Teachers are Quitting in Drove Because They're Scared of Student Violence — and a Lack of Punishment*, N.Y. POST, <https://nypost.com/2023/12/06/news/teachers-are-quitting-over-fear-of-student-violence/> (Dec. 6, 2023, 2:49 PM).

Injured teachers must seek compensation through the workers' compensation system, which bars tort claims against employers under the exclusivity principle. While exceptions exist, notably the intent exception, courts interpret it so narrowly that meeting its standard is nearly impossible. As a result, teachers affected by preventable violence often lack adequate legal recourse and full compensation for their injuries.

This paper examines the application of workers' compensation to public school teachers. This paper argues that the exclusivity principle and intent exception must be reconsidered when student-inflicted injuries result from administrative failures to protect teachers. Specifically, the intent exception should be expanded to include willful and wanton misconduct, holding school administrators accountable for failing to protect educators from known threats.

II. Current Legal Landscape: Workers' Compensation

A. Overview

Workers' compensation laws in the United States emerged during the early twentieth century in response to rising workplace injuries due to industrialization. Before workers' compensation, compensation for workplace injuries was voluntary, leaving employees without wages for medical bills and basic needs. Employees had to seek relief through civil courts, which was often futile because employers could rely on the "unholy trinity" of defenses: contributory negligence, assumption of risk, and the fellow servant rule.

The workers' compensation scheme embodies the "grand bargain" between employees and employers. Employees received guaranteed benefits without proving fault on the employer in exchange for forfeiting their right to sue their employer in civil court. Employers gained predictability, fully insurable risk, and tort immunity in exchange for assuming strict liability to provide benefits to workers for workplace injuries. The workers' compensation system can be summarized as: "(1) replacing uncertain remedies with certain ones; (2) avoiding the expenses and risks of tort litigation; and (3) channeling workers' compensation disputes through the presumably cheaper administrative system."⁶

⁶ Richard A. Epstein, *The Historical Origins and Economic Structure of Workers' Compensation Law*, 16 GA. L. REV. 775, 805 (1982).

While workers' compensation systems run independently at the state level, each scheme follows a general framework: workers' compensation disregards employer and employee fault, bars civil lawsuits, caps medical expenses, and operates under administrative oversight with limited judicial review.⁷ Statutes define compensable injuries and available remedies and mandate employers to obtain workers' compensation insurance.⁸ A worker is entitled to benefits under workers' compensation if the worker "suffers a 'personal injury by *accident* arising out of and in the course of employment.'"⁹

B. Exclusivity Principle and the Intent Exception

By barring civil suits, workers' compensation has become the sole remedy for injured workers.¹⁰ Courts have justified this exclusivity as necessary to maintain the grand bargain. Specifically, tort claims against employers would undermine the no-fault strict liability balance. However, the scope of exclusivity mirrors the scope of compensability and, thus, is not absolute.¹¹

Employees may evade the exclusivity principle and sue their employer in tort where statutory or judicial exceptions exist. The most common exception is the intent exception. Workers' compensation is intended to cover accidental injuries, such as pure accidents and employer negligence.¹² Courts and legislatures recognize that employers who intentionally harm their employees should not receive protection due to the heightened moral blameworthiness.¹³

⁷ Mary Kati Haupt, *Workers' Compensation Law & the Remedial Waiver*, 4 BARRY L. REV. 217, 219-220 (2016) (quoting *Harper v. AutoAlliance Intern., Inc.*, 392 F.3d 195, 207 (6th Cir. 2004)).

⁸ *Workers' Compensation Program Description and Legislative History*, SOC. SEC. ADMIN., <https://www.ssa.gov/policy/docs/statcomps/supplement/2017/workerscomp.html> (last visited Jan. 10, 2025) (explaining that employers may be self-insured, purchase insurance privately, or buy into a state fund).

⁹ 1 LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW § 1.01 (2024).

¹⁰ STEPHEN P. PEPE & SCOTT H. DUNHAM, AVOIDING AND DEFENDING WRONGFUL DISCHARGE CLAIMS § 21:5 (2016) ("[R]eceipt of certain and expeditious payments becomes the sole and exclusive remedy for the injury.").

¹¹ David L. Lambert, *From Andrews to Woodson and Beyond: The Development of the Intentional Tort Exception to the Exclusive Remedy Provision – Rescuing North Carolina Workers from Treacherous Waters*, 20 N.C. CENT. L.J. 164, 173 (1992) ([T]he exclusivity principle "must be construed within the framework of the Act and as qualified by its subject and purposes.").

¹² *Mandolidis v. Elkins Indus.*, 246 S.E.2d 907, 911 (W. Va. 1978); *Sydenstricker v. Unipunch Prods., Inc.*, 288 S.E.2d 511, 517 (W. Va. 1982).

¹³ *Mandolidis*, 246 S.E.2d at 911.

Jurisdictions recognize two standards to the intent exception: actual intent and substantial certainty.¹⁴ Both standards focus on the act's intentionality, not "the degree of gravity or depravity of the employer's conduct."¹⁵

Under the actual intent standard, the employer must intentionally act to harm the employee.¹⁶ The employer must intend the action and the resulting injury. This exacting standard is not met if any intent behind the act other than to injure exists.¹⁷ For example, Kentucky and Maryland courts require that the employer act with a conscious objective to harm, rejecting claims based on reckless conduct, even if the employer appreciated the risk of harm.¹⁸ As a result, tort recovery is denied unless the act involves assault or battery.¹⁹

A minority of jurisdictions have adopted the substantial certainty standard, which requires that the employer knowingly engage in conduct substantially certain to cause harm.²⁰ Unlike actual intent, this standard focuses on the employer's knowledge rather than purpose. The employer must intend the injury-causing conduct but need not explicitly intend to injure.²¹ The standard focuses on the employer's subjective awareness of risk, not what a reasonable person would foresee.²² Courts adopted the substantial certainty

¹⁴ *Binkowski v. New Haven Bd. of Ed*, No. NNHCV1460500006S, 2015 Conn. Super. LEXIS 2489 at 7, 8 (Super. Ct. Sep. 30, 2015).

¹⁵ 9 LEX K. LARSON, *LARSON'S WORKERS' COMPENSATION LAW* § 103.03 (2024).

¹⁶ Matthew K. Brown, *How Exclusive is the Workers' Compensation Exclusive Remedy? 2010 Amendments to Oklahoma Workers' Compensation Statute Shoot Down Parret*, 65 OKLA. L. REV. 75, 102 (2012) ("An employer acts with 'purpose' to cause injury if, and only if, it is his conscious object to cause such injury.").

¹⁷ *Id.*

¹⁸ *See Meade v. Arnold*, 643 F. Supp.2d 913, 917 (E.D. Ky. 2009) (holding an employer's knowledge of risk of harm is irrelevant; only specific intent will meet the bar); *Gantt v. Security, USA*, 356 F.3d 547, 555 (4th Cir. 2004) ("Proof of an employer's 'willful, wanton, or reckless conduct' even when that conduct is 'undertaken with a knowledge and appreciation of a high risk to another'" does not amount to actual, deliberate intent).

¹⁹ *Urdiales v. Concord Technologies Delaware, Inc.* 120 S.W.3d 400, 406-07 (Tex. App. 2003) ("Falling within the intentional injury exception are direct assaults by the employer on an employee.").

²⁰ *See Binkowski v. New Haven Bd. of Ed*, No. NNHCV1460500006S, 2015 Conn. Super. LEXIS 2489 at 7, 8 (Super. Ct. Sep. 30, 2015); Shaun McParland Baldwin & Dennis N. Ventura, *Workers' Compensation Acts and Exceptions to the Exclusivity Bar*, TRESSLER LLP (June 2016), https://www.tresslerllp.com/docs/default-source/Publication-Documents/chicago1--665982-v1-workers_compensation_exclusions.pdf.

²¹ RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 1 cmt. a (AM. L. INST. 2010).

²² *Id.* at cmt. c.

standard to strengthen employee protections, curb employer immunity, and deter reckless practices under economic motivations.²³

C. Judicial Interpretation & State Variability

The substantial certainty standard, however, has been increasingly narrowed, effectively eliminating its benefits to employees. For example, Louisiana courts defined substantially certain as "nearly inevitable," "virtually sure," and "incapable of failing."²⁴ Even when an employer knowingly allows dangerous work conditions to exist or violates safety statutes, courts classify resulting injuries under workers' compensation, barring tort claims.²⁵ Teachers cannot escape workers' compensation exclusivity for school-related injuries due to the strict standard and courts' inconsistent application of law to facts.²⁶

In *Vallandigham v. Clover Park Sch. Dist. No. 400*, special education teachers Jeanette Vallandigham and Melinda Clarkes were attacked by their student, R.M.²⁷ Despite R.M.'s extensive history of violent behavior, Clover Park School District ("Clover Park") failed to take protective action. Vallandigham and Clarke sued Clover Park under Washington's workers' compensation intent exception, arguing that Clover Park deliberately intended their injuries.²⁸

Washington's intent exception allows an employee to sue if their injury results from an employer's deliberate intention to cause the injury.²⁹ The exception functions akin to the substantial certainty standard, requiring proof that the employer "had actual knowledge that an injury was certain to occur" and "willfully disregarded that knowledge."³⁰

The plaintiffs presented substantial evidence that Clover Park knew of R.M.'s aggression, citing R.M.'s 50 documented and 300 estimated undocumented attacks over two years and Vallandigham's

²³ Delgado v. Phelps Dodge Chino, Inc., 34 P.3d 1148, 1152, 1154 (N.M. 2001).

²⁴ Broussard v. Smith, 999 So. 2d 1171, 1174 (La. Ct. App. 2008).

²⁵ 9 ARTHUR LARSON, *supra* note 15.

²⁶ See Vallandigham v. Clover Park Sch. Dist. No. 400, 109 P.3d 805 (Wash. 2005).

²⁷ *Id.* at 807 (explaining R.M. shoved Vallandigham, causing her to fall, hit her head, and lose consciousness and bit Clarke's breast, breaking skin).

²⁸ See Vallandigham v. Clover Park Sch. Dist. No. 400, 79 P.3d 18, 19 (Wash. App. Div. 2 2003), *aff'd*, 109 P.3d 805 (Wash. 2005).

²⁹ Wash. Rev. Code Ann. § 51.04.010 (West 2024).

³⁰ Vallandigham, 109 P.3d at 806.

repeated intervention requests the week before the assault.³¹ However, the Washington Supreme Court held that the knowledge prong required certainty of continued injury—not mere probability or substantial certainty.³² Unlike *Birkliid v. Boeing Co.*, where the employer knew sickness was certain due to the predictability of toxic fumes exposure,³³ R.M.'s behavior was too unpredictable for administrators to know when or if he would engage violently.³⁴ Citing Clover Park's efforts to contact R.M.'s doctor and schedule a behavioral assessment, the court held that plaintiffs failed to meet the knowledge prong.³⁵ The court declined to rule on the second prong—willful disregard—since the first prong was unmet.³⁶ However, the court explained that remedial efficacy was irrelevant to willful disregard because it involved negligence principles inapplicable to workers' compensation cases.³⁷

Dissenting, Justice Sanders argued the majority's analysis was an unsupported "effort to sugarcoat a bad result for the employer."³⁸ Criticizing the certainty requirement as "push[ing] the level of predictability required into the stratosphere," Sanders proposed a more reasonable standard: whether an employer knowingly placed an employee in a situation where injury was highly probable.³⁹

While administrators could not have predicted the precise moment of violence, R.M.'s extensive history of aggression made future attacks inevitable. By requiring actual knowledge of harm at the precise moment of occurrence, the court seemingly made an arbitrary distinction favoring the school district. Additionally, the court's approach to the willful disregard prong effectively immunizes institutions from liability. All employer actions are treated as equally sufficient, even though willful disregard requires evaluating remedial efficacy.⁴⁰

³¹ See *Vallandigham*, 79 P.3d 18 at 19, 21; Brief for Appellant at 7-11, 15, *Vallandigham v. Clover Park School Dist.* No. 400, 119 Wash.App. 95, 98 (Wash.App. Div. 2, 2003) (No. 30301-9-II).

³² *Vallandigham*, 109 P.3d at 813.

³³ *Id.* at 814 (citing *Birkliid v. Boeing Co.*, 904 P.2d 278 (Wash. 1995)).

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* (stating that Clover Park "could not have willfully disregarded such knowledge").

³⁷ *Id.* at 814-15; but see *Vallandigham*, 79 P.3d 18 at 23-24 (declining to define willful disregard but holding that Clover Park's actions negated liability).

³⁸ *Vallandigham*, 109 P.3d at 816.

³⁹ *Id.* at 815.

⁴⁰ See Appellants' Reply Brief at 4-10, *Vallandigham v. Clover Park Sch. Dist.* No. 400, 109 P.3d 805 (Wash. 2005) (No. 74857-8).

Zwerner v. Newport News School Board, though not argued under the intent exception, exemplifies the violence teachers face and the limitations of workers' compensation exclusivity.⁴¹ The case highlights systemic failures and security lapses that go beyond mere negligence.

Abigail Zwerner, a first-grade teacher at Newport News School District's Richneck Elementary School ("Newport"), was shot in the hand and chest by her six-year-old student.⁴² The student's violent history was extensive and well-documented. Between 2021-2023, the student kicked and spat on a teacher assistant, choked his kindergarten teacher and a fellow student, and, just two days before the shooting, smashed Zwerner's phone and swore at her.⁴³ Despite these repeated incidents, Newport failed to implement meaningful behavioral interventions such as an individualized education program ("IEP") or alternative placement.⁴⁴

The events on January 6—the day of the shooting—exposed a shocking chain of administrative failures. Assistant Principal Dr. Ebony Parker ignored four reports about a firearm in the student's possession: students reported a firearm in the backpack, teachers witnessed the student place something in his pocket, and the student had shown a peer a firearm during recess.⁴⁵ Despite escalating concerns, Dr. Parker refused to authorize a search of the student or to notify law enforcement, claiming the student's mother would pick him up soon.⁴⁶ Zwerner was shot by the student in her classroom less than twenty minutes after Dr. Parker's statement.⁴⁷

A grand jury investigation revealed systematic issues plaguing Newport, warning:

⁴¹ *Zwerner v. Newport News Sch. Bd.*, 112 Va. Cir. 306 (Cir. Ct. 2023) (plaintiff is currently arguing on the grounds that the shooting did not occur within the scope of her employment to avoid the exclusivity principle).

⁴² *Id.* at 307.

⁴³ *Id.*

⁴⁴ The school originally had reduced the student's time in school until 11:00 a.m. and required that one of his parents attend the school day with him. At the time of the shooting, this was lifted and the student could attend the entire school day and a parent was no longer required to be in school with him. While this is another controversy and cause for concern because the school did not undergo background checks or notify the other students' parents about this, this is not relevant to the paper's scope. *See* SPECIAL GRAND JURY REPORT ON THE INVESTIGATION OF THE JANUARY 6, 2023 RICHNECK ELEMENTARY SCHOOL SHOOTING 5,6 (2024).

⁴⁵ *Id.* at 6-9.

⁴⁶ *Id.* The school's written policy required authorization by school administrators, such as Dr. Parker, to search students when there was "reasonable suspicion to do so

⁴⁷ *Id.* at 9.

Had this been an active shooter situation the unaddressed security issues at Richneck for the 2022-2023 school year would not have only guaranteed possible success, it would have guaranteed a probable massacre as many more children and faculty would have been seriously injured or fatally wounded.⁴⁸

Dr. Parker, aware of the student's behavioral issues, dismissed teacher concerns and ignored intervention opportunities.⁴⁹ The student's disciplinary records were "missing," and key administrators falsely denied knowledge of the student's violent history.⁵⁰ More broadly, Newport lacked emergency protocols, such as lockdown drills, a full-time school resource officer, and functioning classroom emergency buttons.⁵¹

Zwerner attempts to evade the workers' compensation exclusivity principle by pursuing legal arguments alternative to the intent exception.⁵² Virginia law classifies injuries caused by an employer's intentional conduct as "accidents," making the intent exception defunct.⁵³ Even if Virginia recognized the intent exception, its stringent standards established in cases like *Vallandigham* likely preclude civil recourse.⁵⁴ While it was likely the student would harm *Zwerner*, it was not certain when or how, particularly by firearm. Additionally, since faculty searched the student's backpack, the test's second prong—willful disregard—would likely fail.

III. Tort Law as a Basis for Reform

Workers' compensation laws have expanded beyond their original legislative intent, leaving teachers under-compensated while insulating employers from civil liability. This section examines the differing objectives of workers' compensation and tort law, as well as how tort law principles can address administrative and remedial failures related to student-on-teacher violence.⁵⁵

⁴⁸ *Id.* at 16.

⁴⁹ *Id.* at 20.

⁵⁰ *Id.* at 13, 17-19.

⁵¹ *Id.* at 16.

⁵² See *Zwerner v. Newport News Sch. Bd.*, 112 Va. Cir. 306, 311-13 (Cir. Ct. 2023).

⁵³ Va. Code Ann. §§ 65.2- 307 (2015) (exclusive remedy), 65.2-309 (2004) (exception).

⁵⁴ *Vallandigham v. Clover Park Sch. Dist. No. 400*, 109 P.3d 805 (Wash. 2005).

⁵⁵ *Brown*, *supra* note 16, at 108.

A. Deterrence.

Workers' compensation does not assign fault, shielding employers from liability as long as the injury is work-related.⁵⁶ Theoretically, financial burdens from compensating injuries should incentivize employers to improve workplace safety.⁵⁷ However, employers often pass the financial burdens—insurance premiums—to consumers under the support that "the cost of an industrial accident could be treated as a cost of production."⁵⁸ Coupled with the notion that injuries caused by willful, wanton, and reckless negligence are work-related accidents, employers are often left consequence-free.⁵⁹

In contrast, tort law aims to deter harm by holding individuals accountable for harm caused by their actions or inaction. Tort law operates as a form of corrective justice, requiring those responsible for harm to compensate victims.⁶⁰ Accountability is grounded in one's duty of care toward another, necessitating actions that reasonably protect others from harm.

Cleveland v. Taft Union High School is a case of student-on-student violence but recognizes administrative accountability.⁶¹ The student was shot by a student-peer who—for nearly a year—threatened to commit a school shooting, created hit lists, and explicitly stated his intention to kill the student.⁶² Despite warning signs, the district's threat assessment did not find a risk of harm, and the student-peer stayed in school without observational or safety measures.⁶³

⁵⁶ 99 C.J.S. *Workers' Compensation* § 36 (2024); Thomas D. Schroeder, *Workers' Compensation: Expanding the Intentional Tort Exception to Include Willful, Wanton, and Reckless Employer Misconduct*, 58 NOTRE DAME L. REV. 890, 892 (1983) (work-related means "arising out of" and "in the course" of employment).

⁵⁷ Joseph H. King, Jr., *The Exclusiveness of an Employee's Workers' Compensation Remedy Against His Employer*, TENN. L. REV. 405, 420 (1988).

⁵⁸ King, Jr., *supra* note 57, at 414 (explaining that "with liability insurance, it is debatable how much either tort or workers' compensation liability really deters employer misconduct"); PENNSYLVANIA INSURANCE DEP'T, YOUR GUIDE TO WORKERS' COMPENSATION INSURANCE 4 (2008); 82 AM. JUR. 2D *Workers' Compensation* § 447 (2024).

⁵⁹ *Bilsky v. Sanford*, 2004 WL 425239 at *2 (Conn. Super., 2004) (quoting *Sorban v. Sterling Eng. Corp.*, 79 Conn. App. 444, 449-50 (2003)).

⁶⁰ Steven Walt, *Eliminating Corrective Justice*, 92 VA. L. REV. 1311, 1311 (2006).

⁶¹ *Cleveland v. Taft Union High Sch. Dist.*, 291 Cal. Rptr. 3d 759 (Cal. App. 5th Dist. 2022).

⁶² *Id.* at 783-89; see also Bernise Carolino, *Court Finds School District and its Employees Liable for Shooting Incident*, HRD MAG. (Apr. 14, 2022), <https://www.hcamag.com/us/specialization/employment-law/court-finds-school-district-and-its-employees-liable-for-shooting-incident/402672>.

⁶³ The student was originally suspended during the school district's threat assessment. The student was able to return after being determined as a level four non-threat. A level one threat is "[h]igh violence potential; qualifies for immediate arrest or hospitalization." A level four threat is "[i]nsufficient evidence of violence potential, sufficient evidence for the unintentional infliction of emotional distress upon others." See *Cleveland*, 291 Cal. Rptr. 3d at 786.

The court in *Cleveland* recognized the school district's duty to protect students from foreseeable injuries by third parties and to take threats of violence seriously, as supported by school safety legislation.⁶⁴ Rejecting to extend immunity to the district's inadequate threat assessment and failure to implement safety plans, the court explained that liability is necessary to deter school official actions to minimize publicity of threats and encourage prompt student protection.⁶⁵

Tort law's deterrent value is vital in preventing student-on-teacher violence. Before the shooting in *Zwerner*, Newport experienced a shooting two years prior at its high school.⁶⁶ A prior lawsuit exposed the same failures as *Zwerner*: Newport lacked a full-time school resource officer, crisis plans, and critical incident training.⁶⁷ Newport also failed to put the student-perpetrator—a convicted felon for malicious wounding of a firearm—under a safety plan.⁶⁸ By insulating schools from liability, workers' compensation immunity enables administrative recklessness, endangering teachers.⁶⁹

B. Compensation

Workers' compensation provides injured employees with swift but limited benefits.⁷⁰ The system covers medical expenses but caps compensation at two-thirds of net wages and excludes noneconomic damages, such as pain and suffering.⁷¹ By contrast, tort law fully compensates victims.⁷² Tort law offers

⁶⁴ *Id.* at 797, 799 (“In nearly all of these cases the perpetrator has either made statements threatening future violence or engaged in overt behavior commonly associated with criminal violence prior to the shooting.”).

⁶⁵ *Id.* at 809-810.

⁶⁶ Adrienne Mayfield, 2 *Educators Sue Newport News After Heritage High School Shooting*, WAVY, <https://www.wavy.com/news/local-news/newport-news/2-educators-sue-newport-news-after-heritage-high-school-shooting/> (Jul. 21, 2023, 5:58 PM).

⁶⁷ *Webb v. Newport News Sch. Bd.*, No. CL 2302960T-00 at *4 (Va. Cir. 2023).

⁶⁸ *Webb v. Newport News Sch. Bd.*, No. CL 2302960T-00 at *8-11, *14 (Va. Cir. 2023).

⁶⁹ Kelsey Jones, *What Does Newport News School Safety Look Like a Year After Richneck Elem. Shooting?*, 3 WKTR, <https://www.wtkr.com/news/in-the-community/newport-news/what-does-newport-news-school-safety-look-like-a-year-after-richneck-elem-shooting> (Apr. 12, 2024, 9:25 AM); Zak Dahlheimer, *2 Years After Heritage High School Shooting, Actions Broken Down by NNPS Leaders About Security*, 3 WKTR, <https://www.wtkr.com/investigations/2-years-after-heritage-high-school-shooting-actions-broken-down-by-nnps-leaders-about-security> (Sept. 20, 2023, 2:16 PM).

⁷⁰ Schroeder, *supra* note 56, at 982 (explaining benefits are limited to an amount “sufficient to avoid economic and social degradation”); *Wright v. Ace American Ins. Co.*, 249 P.3d 485 (Mont. 2011) (explaining compensation is limited to incentivize employees to return to work).

⁷¹ *Exceptions To The Exclusive Remedy Requirements Of Workers' Compensation Statutes*, 96 HARV. L. REV. 1641, 1642 (1983).

⁷² 1 LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW § 1.03 (2024).

full damages for lost earnings, pain and suffering, and punitive damages for egregious misconduct.⁷³ Justifications for workers' compensation's limited benefits—system efficiency and tort immunity—are unconvincing when apparent misconduct occurs.

The efficiency justification suggests that quick, guaranteed benefits warrant reduced compensation.⁷⁴ This makes sense in early industrial workplaces; given the ultrahazardous environments characterized by frequent, often severe injuries, employees would otherwise go without wages.⁷⁵ This justification still holds merit today—employees go without wages entirely or while awaiting litigation to resolve.⁷⁶

The tort immunity justification, centered on the original grand bargain, overemphasizes no-fault, making under-compensation and employer misconduct irrelevant.⁷⁷ This justification is valid for pure accident or weak negligence cases but breaks down in scenarios of apparent institutional misconduct. For example, workers' compensation covers Zwerner's medical expenses, but the system provides no remedy for the profound psychological and emotional trauma.⁷⁸ The fundamental question emerges: does the discounted compensation benefit the injured employee, or does it protect employers from more significant financial consequences?

The workers' compensation system needs reform to address cases of willful misconduct and systemic failures. Supplementing workers' compensation with tort principles offers a comprehensive system that genuinely compensates victims and encourages proactive prevention of workplace harm through accountability mechanisms.⁷⁹

⁷³ Michael C. Duff, *Fifty More Years of Ineffable Quo? Workers' Compensation and the Right to Personal Security*, 1 KY. L.J., 111, 126 (2022).

⁷⁴ Theodore F. Haas, *On Reintegrating Workers' Compensation and Employers' Liability*, 21 GA. L. REV. 843, 870 (1987).

⁷⁵ E.H. DOWNEY, WORKMEN'S COMPENSATION 38 (1924); Duff, *supra* note 73, at 136.

⁷⁶ See Heather Eckstine, *Newport News School Board Files Workers' Comp On Zwerner's Behalf 1 Year After Richneck Shooting*, 3 WTKR, <https://www.wtkr.com/news/newport-news-school-board-files-workers-comp-on-zwerner-behalf-1-year-after-richneck-shooting> (Apr. 12, 2024) (explaining Abigail Zwerner's unpaid medical costs as a result of waiving workers' compensation and waiting to resolution of litigation).

⁷⁷ Emily A. Spieler, *(Re)Assessing the Grand Bargain: Compensation for Work Injuries in the United States, 1900-2017*, 69 RUTGERS U. L. REV. 891, 999 (2017).

⁷⁸ Duff, *supra* note 73, at 136.

⁷⁹ See Schroeder, *supra* note 56, at 905.

IV. Proposed Expansion of the Intent Exception

The intent exception must be redefined to account for employer conduct that, while not rising to deliberate intent, involves willful misconduct or reckless disregard for employee safety.⁸⁰ The narrow interpretation forces injuries caused by conscious disregard for imminent danger into the workers' compensation framework, eroding tort law's role in addressing egregious misconduct and denying employees adequate recourse.⁸¹

A. Willful Misconduct as Defined and Implemented

Tort law recognizes a hierarchy of misconduct: ordinary negligence, gross negligence, willful, wanton, or reckless negligence, and intentional misconduct.⁸² The gross, willful, wanton, and reckless negligence "twilight zone" varies by jurisdiction: some treat gross negligence as synonymous with willful, wanton, and reckless conduct,⁸³ while others view them on a continuum of culpability.⁸⁴

The Restatement (Third) of Torts' provides a helpful framework under a degree-kind distinction.⁸⁵ Ordinary and gross negligence differ in degree, whereas willful and wanton conduct, recklessness, or intentional misconduct differ in kind and are fundamentally distinct from negligence.⁸⁶ Likewise, intent includes willful conduct and recklessness includes wanton conduct.⁸⁷

A willful and wanton misconduct standard for a workers' compensation intent exception could be defined as: when an individual demonstrates a reckless disregard for the rights and safety of others or intentionally fails to perform a legally required duty necessary to prevent harm. Constructive intent may be

⁸⁰ *Id.* at 989.

⁸¹ *Id.* at 910.

⁸² 57A AM. JUR. 2D *Negligence* § 236 (2024).

⁸³ *Missouri Pac. Ry. Co. v. Shuford*, 10 S.W. 408, 411 (Tex. 1888) (exemplifying Texas defines gross negligence conduct as exhibiting "that entire want of care which would raise the belief that the act or omission complained of was the result of a conscious indifference to the right or welfare of the person or persons to be affected by it.").

⁸⁴ Edwin H. Byrd III, *Reflections on Willful, Wanton, Reckless, and Gross Negligence*, 48 LA. L. REV. 1384, 1394, fn. 63 (1988) (explaining willful conduct is more culpable than wanton or reckless conduct).

⁸⁵ RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM §§ 1-3 (AM. L. INST. 2010).

⁸⁶ *Green v. Ingram*, 608 S.E.2d 917, 924 (Va. 2005).

⁸⁷ Edwin H. Byrd, III, *Reflections on Willful, Wanton, Reckless, and Gross Negligence*, 48 LA. L. REV. 1383, 1400-1401 (1988).

imputed when conduct threatens safety and is so reckless or manifestly indifferent to its consequences that it is functionally equivalent to deliberate intent.⁸⁸

Defining *willful* as direct or constructive intent adheres to the original intent element.⁸⁹ Similar to substantial certainty, willfulness can connect to the act (purpose) or to the state of mind (knowledge).⁹⁰ Wantonness refers to conduct performed with reckless indifference to potential injury.⁹¹ As explained below, intent may be imputed when conduct so recklessly disregards the danger or potential for injury.⁹²

Two cases illustrate the distinction between ordinary negligence and willful and wanton misconduct. In *Patrick v. Palm Beach County School Board*, a teacher was injured breaking up a fight between two students with known violent tendencies.⁹³ Though the school had crisis response codes, the teacher never called a code and administrators were unaware of the incident.⁹⁴ Similarly, in *Kibler v. Roxbury Board of Education*,⁹⁵ a teacher was inadvertently injured when a fight broke out between two students during an assembly.⁹⁶ One student had a history of aggression, but administrators implemented progressive discipline and alternative education placement. While the school may have negligently supervised the assembly, the injuries resulted from inherent risks of the supervisory role, not ignored threats or reports of highly probable harm.⁹⁷

Liability for willful and wanton misconduct should target truly egregious behavior beyond ordinary negligence or minor judgment errors. Thus, disregarding escalating threats, failing to implement safety

⁸⁸ See *infra* notes 110-117 and accompanying text.

⁸⁹ *Holscher v. Valley Queen Cheese Factory*, 713 N.W.2d 555, 567-68 (S.D. 2006) (stating willfulness “contemplates conduct that constitutes serious, deliberate, and intentional misconduct”).

⁹⁰ 4 STRONG'S N.C. INDEX, WORKERS' COMPENSATION § 68 (2024).

⁹¹ *Wells v. Pollard*, 708 A.2d 34, 44 (Md. 1998).

⁹² See *infra* notes 110-117 and accompanying text.

⁹³ *Patrick v. Palm Beach Cnty. School Bd.*, 50 So.3d 1161 (Fla.App. 4 Dist., 2010).

⁹⁴ *Id.* at 1163.

⁹⁵ *Kibler v. Roxbury Bd. of Educ.*, 919 A.2d 878 (N.J. Super. App. Div. 2007).

⁹⁶ *Id.* at 879.

⁹⁷ *Kibler*, 919 A.2d at 884-85 (explaining the teacher “could just as easily been knocked down by a normally well-behaved student who was running in the hallway, turned the corner without looking where he or she was going, and collided with the teacher”).

measures, or neglecting disciplinary actions despite clear risks should constitute willful and wanton misconduct subject to tort claims.⁹⁸

B. Tort Law Justification

1. Tort Law Workers' Compensation Intersection

Narrowing of the intent exception has been supported by excluding tort law from workers' compensation. However, tort law maintains a necessary role within the system's framework. Courts rely on tort definitions of intent to determine when employer conduct falls outside of workers' compensation.⁹⁹ Likewise, courts imposed the substantial certainty standard because it furthered tort principles "that injuries are to be compensated and anti-social behavior is to be discouraged."¹⁰⁰ Workers' compensation was meant to coexist with tort law, allowing both schemes to achieve their objectives: workers' compensation provides efficient recovery while tort law ensures accountability and deterrence.¹⁰¹

2. Tort Principles in Workers' Compensation

Most jurisdictions agree that workers' compensation covers accidental injuries and negligence, while intentional torts remain outside its scope.¹⁰² The key distinction is an actor's state of mind.¹⁰³ Intentional torts require subjective realization of risk and knowledge that injury is substantially certain.¹⁰⁴ While distinct from intent, willful, wanton, and reckless misconduct align more closely with intentional conduct than ordinary negligence.

⁹⁸ See *Meyer v. Graphic Arts Intl. Union*, 151 Cal. Rptr. 597 (Cal. App. 2d Dist. 1979) (finding employer liability where there had been reported prior acts of aggression by that person against the complaining employee followed by the employer's ratification or acquiescence in failing to discipline, censure, criticize, suspend or discharge the offending co-employee).

⁹⁹ See, e.g., *Woodson v. Rowland*, 407 S.E.2d 222, 229 (N.C. 1991).

¹⁰⁰ *Parret v. UNICCO Serv. Co.*, 127 P.3d 572, 579 (Okla. 2005).

¹⁰¹ *Mandolidis v. Elkins Industries, Inc.*, 246 S.E.2d 907, 913 (W. Va. 1978); *Jones v. Chi. HMO Ltd.*, 730 N.E.2d 1119, 1130 (Ill. 2000).

¹⁰² See, e.g., *Jones*, N.E.2d at 1130.

¹⁰³ *Harding v. Thomas & Howard Co.*, S.E.2d 109, 110–11 (N.C. 1962) (stating accidental injuries are caused by "an unlooked for and untoward event" and "a result produced by a fortuitous cause"); 57A AM. JUR. 2D *Negligence* § 221 (2024) (defining ordinary negligence as "a failure to use the care which an ordinarily prudent man would use under the circumstances").

¹⁰⁴ *Oelze v. Score Sports Venture, LLC*, 927 N.E.2d 137, 149 (Ill. 1st Dist. 2010) (explaining that ordinary negligence involves mere inadvertence).

Recklessness, though applied to negligent conduct, differs qualitatively and is treated similarly to intentional conduct."¹⁰⁵ "Willfulness or wantonness imports premeditation ... and, strictly speaking, is not within the meaning of the term "negligence," which conveys the idea of inadvertence, as distinguished from premeditation or formed intention."¹⁰⁶ Like intentional torts, willful and wanton misconduct considers the tortfeasor's state of mind. Both require deliberate action or inaction.¹⁰⁷ Judicial reliance on intentional torts' requirement that the resultant harm be intended no longer stands to exclude willful and wanton misconduct because the Restatement (Third) of Torts recognizes purpose *and* knowledge as intent.¹⁰⁸ The primary distinction now lies in the probability of injury: as likelihood decreases below substantial certainty, conduct shifts from intentional to reckless.¹⁰⁹

Courts recognize that willful and wanton co-employee misconduct can meet the intent exception. In North Carolina, for example, constructive intent may be imputed on willful and wanton misconduct "where conduct threatens the safety of others and is so reckless or manifestly indifferent to the consequences" that it is effectively equivalent to actual intent."¹¹⁰ In *Pinckney v. Van Damme*,¹¹¹ a co-employee acted with constructive intent when he ignored safety warnings and procedures, injuring other actors and extras.¹¹² The impetus of imputing intent was to promote workplace safety by deterring reckless conduct by co-employees in the future.¹¹³

Historically, an employer's willful and wanton misconduct could satisfy the intent exception. West Virginia's Supreme Court acknowledged the injustice of employers escaping liability for conduct "so likely

¹⁰⁵ *Dilley v. Valentine*, 401 S.W.3d 544 (Mo. Ct. App. W.D. 2013); *Hatch v. V.P. Fair Foundation, Inc.*, 990 S.W.2d 126 (Mo. Ct. App. E.D. 1999).

¹⁰⁶ *Beneficial Fin. I, Inc. v. Windham*, 847 S.E.2d 793 (S.C. App. 2020).

¹⁰⁷ 34A MO. PRAC., PERSONAL INJURY AND TORTS HANDBOOK § 4:9 (2024).

¹⁰⁸ RESTATEMENT (SECOND) OF TORTS § 500 cmt. g (AM. L. INST. 1965); RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 1 cmt. a (AM. L. INST. 2010).

¹⁰⁹ RESTATEMENT (SECOND) OF TORTS § 8A (AM. L. INST. 1965).

¹¹⁰ *Pleasant v. Johnson*, 325 S.E.2d 244, 248 (N.C. 1985) (defining "wanton conduct" as "an act manifesting a reckless disregard for the rights and safety of others" and "willful negligence" as "intentional failure to carry out some duty imposed by law or contract which is necessary to the safety of the person or property to which it is owed").

¹¹¹ *Pinckney v. Van Damme*, 447 S.E.2d 825 (N.C. App. 1994).

¹¹² *Id.* at 146.

¹¹³ *Pleasant*, 325 S.E.2d at 248.

to produce injury or death" that it could warrant criminal liability.¹¹⁴ The court held that willful, wanton or reckless misconduct ceases being accidental and must be treated as deliberate intent under workers' compensation law.¹¹⁵

Unfortunately, statutory modification abolished the application of the willful and wanton standard for employer liability.¹¹⁶ Courts' willingness to evade the intent exception for co-employees on policy grounds of deterrence and workplace safety begs the question: why not extend this to employers whose misconduct has far broader and more significant consequences?¹¹⁷

V. Policy Considerations

The implication of redefining the intent exception must be considered. Though governmental immunity and duty-to-protect issues affect public school officials' liability, these concerns are outside the scope of this paper. It is worth noting that state tort claims acts often contain exceptions broadly construed to allow claims in cases of preventable school violence.¹¹⁸ This section discusses policy considerations of implementing a willful and wanton standard to the workers' compensation intent exception.

A. Judicial Implementation.

Ideally, state legislatures would amend workers' compensation statutes to recognize a willful and wanton standard applicable to educational settings.¹¹⁹ However, legislative reluctance to reform workers' compensation statutes makes this unlikely. Courts must therefore lead in recognizing and redefining the intent exception.¹²⁰ This judicial approach is feasible given dissatisfaction with strict statutory interpretation precluding tort remedies in workplace violence—an issue not contemplated when workers' compensation systems were established. As articulated by one judge in response to a workplace shooting, "what was 'so

¹¹⁴ *Mandolidis v. Elkins Industries, Inc.*, 246 S.E.2d 907, 911-14 (W. Va. 1978).

¹¹⁵ *Id.* at 914

¹¹⁶ *See Woodson v. Rowland*, 407 S.E.2d 222, 230 (N.C. 1991) (exemplifying statutory amendments in response to lower standards applied to employers for the intent exception).

¹¹⁷ *Lambert*, *supra* note 11, at 198.

¹¹⁸ *See e.g.*, *Cleveland v. Taft Union High Sch. Dist.*, 291 Cal. Rptr. 3d 759, 776 (Cal. App. 5th Dist. 2022); *Garufi v. Sch. Bd. of Hillsborough Cnty.*, 613 So. 2d 1341, 1342 (Fla. 2d Dist. App. 1993).

¹¹⁹ *See, e.g.*, 77 P.S. § 461 (2024) (clarifying "contractor" as "work performed consisting of (i) the removal, excavation or drilling of soil, rock or minerals, or (ii) the cutting or removal of timber from lands").

¹²⁰ *See Exceptions to the Exclusive Remedy Requirement of Workers' Compensation Statutes*, *supra* note 71, at 1657 (stating courts can shape workers' compensation by "not merely assuming tort remedies are precluded").

unlikely to occur within the setting of modern life' as to be unforeseeable in 1984 was not necessarily so unlikely by 2012."¹²¹

Courts can refine the standard's scope by allowing tort claims where a localized hazard threatens harm to identifiable employees within a limited time period.¹²² Since the exception must remain narrow to exclude injuries from ordinary negligence, schools should not face tort liability for supervisory lapses like in *Kibler*, nor for truly spontaneous, unpreventable school shootings, even though the effects are harrowing.¹²³ Conversely, schools that disregard escalating threats, fail to implement safety measures, or neglect disciplinary actions despite clear risks should fall outside workers' compensation exclusivity and be subject to tort claims.

Teachers who meet the willful and wanton standard should be entitled to both workers' compensation and tort remedies. To prevent double recovery, any damages awarded in tort should be offset by amounts already received from workers' compensation, including reimbursement for medical expenses and benefits paid before the civil action is finalized.¹²⁴

B. The Grand Bargain Did Not Consider Public Schools.

Workers' compensation originated from hazardous injuries in profit-focused industries, where workplace injuries were treated as business costs passed to consumers through product pricing.¹²⁵ Proponents of broad employer immunity focus on threats to economic vitality: tort liability encourages company relocation to avoid costly litigation and monetary penalties.¹²⁶

Public schools, however, do not operate within a consumer market. Schools' "consumers" are families whose children attend based on geographic districts, not market choice. Whether through tort litigation or workers' compensation, taxpayers bear the financial burden. From an economic standpoint, the

¹²¹ *Mitchell v. Rite Aid of Maryland, Inc.*, 290 A.3d 1125, 1154 (Md. Spec. App. 2023).

¹²² RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 1 cmt. c (AM. L. INST. 2010).

¹²³ See David K. Li et al., *Police Chief Tells NBC News a Sense of 'Resentment' May Have Fueled Nashville Shooter's Attack at Former School*, NBC NEWS, <https://www.nbcnews.com/news/us-news/nashville-christian-school-shooter-appears-former-student-police-chief-rcna76876> (Mar. 28, 2023, 5:16 AM) (describing a 2023 mass shooting at a K-6 private school by a 28 year old former student).

¹²⁴ *Mitchell*, 290 A.3d at 1144 n. 12.

¹²⁵ *Mandolidis v. Elkins Industries, Inc.*, 246 S.E.2d 907, 911 (W. Va. 1978).

¹²⁶ *Brown*, *supra* note 16, at 102.

potential for significant tort damages would incentivize schools to adopt stronger safety measures, enforce disciplinary policies, and respond proactively to threats of violence.¹²⁷ While litigation costs divert funds allocated to education, these expenses may be the necessary wake-up call for schools to prioritize teacher safety.

Unlike private enterprises, public schools cannot relocate to states with more employer-friendly laws. However, teachers can leave unsafe schools and exit the profession entirely. The nationwide teacher shortage, exacerbated by the Covid-19 pandemic, continues to grow.¹²⁸ Concerns over school violence and personal safety are significant contributors to teacher attrition.¹²⁹ Given the essential role of educators in society, schools must foster environments where teachers can work without fear for their safety.

VI. Conclusion

Teachers serve a vital function in educating future generations, yet the rise in student-on-teacher violence has left them fearing for their safety and inadequately compensated for injuries. While the workers' compensation system provides essential post-injury benefits, it fails to address administrative failures that allow foreseeable violence to persist. Within public schools, workers' compensation must be re-evaluated to ensure that injuries resulting from willful and wanton misconduct by administrators fall outside the intent exception. Expanding the intent exception to include willful misconduct ensures accountability, incentivizes preventative action, and aligns legal protections with the realities of modern educational settings.

¹²⁷ See SPECIAL GRAND JURY REPORT ON THE INVESTIGATION OF THE JANUARY 6, 2023 RICHNECK ELEMENTARY SCHOOL SHOOTING (2024).

¹²⁸ Annette Choi, *Teachers are Calling it Quits Amid Rising School Violence, Burnout and Stagnating Salaries*, CNN (MAY 31, 2023), <https://www.citeprograms.com/teachers-are-calling-it-quits-amid-rising-school-violence-burnout-and-stagnating-salaries/>; Amy Rock, *Teacher Shortages by State and How Schools are Trying to Fix the Problem*, CAMPUS SAFETY (Dec. 9, 2024), <https://www.campussafetymagazine.com/news/teacher-shortages-by-state-fix-the-problem/122542/> (explaining there are 567,000 fewer public-school educators compared to pre-pandemic statistics).

¹²⁹ McMahon, *supra* note 3.