PROTECTING THE MILLENNIAL COLLEGE STUDENT

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Over the last few decades, the dramatic changes that have occurred in American society have similarly altered the landscapes of college campuses across the country.[1] Furthermore, because today's college applicants are increasingly consumeristic, with access to a wealth of information about what each college has to offer, the current pool of applicants looks beyond classroom learning when choosing which college to attend. Consequently, colleges have expanded the learning environment beyond the classroom. In fact, "many of the 3,600 or so institutions of higher education are promoting, as never before, the campus as intellectual resort—Club Med with books."[2] Indeed, modern college campuses have been called "Athenian city-states," and as Harvard's president once said, "Where else in America can you get hotel, health club, career advice and 1,800 courses for $90 a day?"[3]

Inherent in the "bundle of services" today's students expect from colleges is a safe educational and social environment.[4] However, as educational offerings expand to meet the expectations of today's consumeristic applicant pool, the threat to campus safety has also expanded.[5] Once "the reality that modern college students experience a staggering amount of

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[1] For purposes of this note, "college" includes higher education, community colleges, universities, and undergraduate and graduate programs. I use "college," "university" and "higher education" interchangeably.

[2] Anne Matthews, *The Campus Crime Wave*, N.Y. TIMES, Mar. 7, 1993, §6, at 38.

[3] *Id.*

[4] Mullins v. Pine Manor Coll., 449 N.E.2d 331, 336 (Mass. 1983) ("Adequate security is an indispensable part of the bundle of services which colleges . . . afford their students.").

[5] Robert C. Cloud, *Safety on Campus*, 162 EDUC. L. REP. 1, 1-2 (2002) (arguing that the expansion of university services and facilities, accessible in "multiple sites at virtually all hours," also expands the potential for criminal activity on campus).

crime every year" surfaced in the media, college campuses quickly lost their "insulated, pristine" images.[6]

Furthermore, because many students are living "on their own" for the first time, this newfound freedom combined with a high concentration of similarly situated peers creates an illusion of safety, further increasing the potential for criminal activity and negligent injury on campus.[7] Additionally, "[a]lthough the amount of litigation [against colleges] has increased, courts have inconsistently imposed liability" and have failed to articulate a coherent legal definition of the college-student relationship that accurately reflects the unique coexistence of college and student.[8] This legal insecurity, along with student injuries and high-risk student behavior, attracts unfavorable media attention and invites further scrutiny into the college-student relationship. For these reasons and others, tort liability ranks high among the issues confronting college administrators today.[9]

This Note surveys the status of college liability for campus-related injury and proposes a new paradigm based on new policy considerations. Part I discusses the evolution of college liability. Part II examines current trends in college liability and the related policy reasons for these trends. Part III examines the current generation of college students and the modern societal trends that may impact college safety law. Part IV discusses prior doctrinal approaches, as well as other proposed models, and suggests a new

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[6] Douglas E. Fierberg, *The Greek Industry: Strategies for Litigating Claims Involving Serious Injury, Death, Hazing, and Alcohol Misuse*, 2 AM. TRIAL LAW. ASS'N CONVENTION REFERENCE MATERIAL 2617 (2005), *available at* 2 Ann.2005 ATLA-CLE 2617 (Westlaw 2005). According to a 2003 National Crime Victimization Survey, "[b]etween 1995 and 2000, college students were victims of more than *half a million* crimes of violence *annually*, including rape/sexual assault, robbery, aggravated assault, and simple assault." *Id.* at 1.

[7] ROBERT D. BICKEL & PETER F. LAKE, THE RIGHTS AND RESPONSIBILITIES OF THE MODERN UNIVERSITY: WHO ASSUMES THE RISKS OF COLLEGE LIFE? 5 (1999). The authors define the basic dangers of college life as follows: large concentrations of young men and women living on their own for the first time; residence halls designed at a time when campus crime was not a major concern, which makes them vulnerable to criminal intrusion; the unique and free nature of college life; an intense social environment with increased peer pressures; the illusion of safety (students often assume most other students are harmless, like themselves); and the recent surge in alcohol use. *Id*.

[8] Jane A. Dall, Note, *Determining Duty in Collegiate Tort Litigation: Shifting Paradigms of the College-Student Relationship*, 29 J.C. & U.L. 485, 485 (2003).

[9] Peter F. Lake, *Private Law Continues to Come to Campus: Rights and Responsibilities Revisited*, 31 J.C. & U.L. 621, 635 (2005). A recent $6 million settlement with the surviving family of Scott Krueger, a Massachusetts Institute of Technology ("MIT") student who died from alcohol poisoning, is especially notable. The size of the settlement, combined with the high-risk alcohol behavior, signals "a new climate of concern for potential success in courts of law on the issue of the legal duty of colleges to protect students from foreseeable danger in high-risk alcohol situations." *Id*. at 634; *see also* Press Release, Higher Educ. Ctr., MIT Settlement Makes Other Colleges and Universities Take Notice (Sept. 15, 2000), *available at* http://www.edc.org/hec/press-releases/000915.html.

model based on the college's educational mission in an attempt to modernize and streamline college safety law.

I. THE EVOLUTION OF HIGHER EDUCATION LAW

Historically, colleges maintained a position of institutional autonomy. Thus, college administrators had despotic power over their students and did not have to worry about potential litigation.[10] Although colleges resisted judicial interference with college-student affairs, abuse of their expansive power over students eventually led to the demise of college insularity from legal scrutiny.[11]

To appreciate the relevant case law, it is useful to understand both traditional negligence concepts as well as how courts' application of those concepts to the college-student relationship has evolved.[12] To that end, this section gives a general overview of three evolutionary phases of college law.

A. *IN LOCO PARENTIS*: COLLEGE STUDENTS AS CHILDREN

The first phase of college law, prior to the 1960s, was an era of legal insularity.[13] In this era, the doctrine of *in loco parentis* and various tort immunities largely protected colleges from legal interference.[14]

In 1913, the Kentucky Supreme Court's decision in *Gott v. Berea College*[15] reinforced the principle that colleges "stand in loco parentis concern-

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[10] *See* Douglas J. Goodman & Susan S. Silbey, *Defending Liberal Education from the Law*, *in* LAW IN THE LIBERAL ARTS 17, 22 (Austin Sarat ed., 2004).

[11] *See* BICKEL & LAKE, *supra* note 7, at 17.

[12] Peter F. Lake, *The Rise of Duty and the Fall of* In Loco Parentis *and Other Protective Tort Doctrines in Higher Education Law*, 64 MO. L. REV. 1, 2 (1999) (noting that understanding college safety law requires an examination of its evolutionary phases).

[13] *Id.*

[14] *Black's Law Dictionary* defines "in loco parentis" as "[o]f, relating to, or acting as a temporary guardian or caretaker of a child, taking on all or some of the responsibilities of a parent. The Supreme Court has recognized that during the school day, a teacher or administrator may act *in loco parentis*"; also, "[s]upervision of a young adult by an administrative body such as a university." BLACK'S LAW DICTIONARY 803 (8th ed. 2004); *see also* Dall, *supra* note 8, at 488.

[15] Gott v. Berea Coll.,161 S.W. 204 (Ky. 1913).

ing the physical and moral welfare and mental training" of their students.[16] Under the doctrine of *in loco parentis*, the college stood in place of the parent and thus had the same authority over its students that a parent had over a child.[17] Moreover, courts in this era were reluctant to interfere with family relations because of the father's broad disciplinary powers, making parents virtually immune from lawsuit by their children.[18] Accordingly, judges afforded great deference to college authorities' decisions and avoided making any inquiries into the college's reasonableness in promulgating regulations or instituting disciplinary actions.[19] The college, acting in place of the father,[20] therefore had de facto immunity from judicial interference throughout the early twentieth century.[21]

The modest amount of case law addressing *in loco parentis* made little, if any, mention of student safety.[22] While the doctrine gave colleges extensive rights and powers over students, as well as sovereignty over campus affairs,[23] the case law did not create a legal duty to regulate or su-

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[16] The Kentucky Supreme Court stated:

> College authorities stand in loco parentis concerning the physical and moral welfare, and mental training of the pupils, and we are unable to see why, to that end they may not make any rule or regulation for the government or betterment of their pupils that a parent could for the same purpose. Whether the rules or regulations are wise, or their aims worthy, is a matter left solely to the discretion of the authorities or parents, as the case may be, and in the exercise of that discretion, the courts are not disposed to interfere, unless the rules and aims are unlawful or against public policy.

Id. at 206.

[17] Dall, *supra* note 8, at 488.

[18] *See* Lake, *supra* note 12, at 5.

[19] Dall, *supra* note 8, at 489; *see also, e.g.*, Anthony v. Syracuse Univ., 231 N.Y.S. 435, 437 (App. Div. 1928) (upholding a college's decision to expel a student for not being a "typical Syracuse girl").

[20] BICKEL & LAKE, *supra* note 7, at 19. The first legal image of *in loco parentis* was "the *delegation* of a *father's* right to *discipline*." *Id*. Thus, *in loco parentis* transferred the father's sovereign rule—such as the power to restrain or correct—to the college, allowing colleges to handle their own disputes with students under this paternal shield of immunity. *See id*. at 19-20.

[21] *See* Lake, *supra* note 12, at 4 n.9 ("The use of *in loco parentis* amounted to blanket judicial approval for all *disciplinary* actions against students."); *see also, e.g.*, Tanton v. McKenney, 197 N.W. 510 (Mich. 1924). The Michigan Supreme Court upheld a refusal to compel the readmission of a female college student, reasoning that the college had acted within its power, based on evidence that the student

> smoked cigarettes on the public streets . . . rode around . . . in an automobile seated on the lap of a young man, and was guilty of other acts of indiscretion; and that she aired her grievances and her defiance of disciplinary measures in the public press, which tended to prevent her return to the institution and the maintenance of discipline there.

Id. at 511.

[22] BICKEL & LAKE, *supra* note 7, at 17.

[23] *See id*. Colleges have long preferred to manage campus affairs independent of any legal or judicial interference. *Id*. at 17 n.1. In the 1970s, despite having lost immunity from such interference, colleges successfully carved out special "no duty" rules in certain contexts. *Id*. at 18 n.2. Although colleges continue to resist judicial interference, courts today are much less likely to use "no duty" rules to immunize colleges from liability for student injuries. *Id*.

pervise students.[24] Thus, instead of protecting college students, "[i]n loco parentis protected the relation between the college and the student from legal intrusion."[25]

In recent years, some legal commentators have misconstrued attempts to hold colleges liable for negligence as a return to the doctrine of *in loco parentis*.[26] Similarly, some courts support their "no duty" rules by relying on the doctrine's demise: because colleges no longer stand *in loco parentis* to their students, they no longer have to shoulder responsibility for student injury.[27] However, this rationale overlooks the fact that the dominant legal rules governing college-student relations during the *in loco parentis* era stressed institutional insularity.[28] Therefore, both courts and legal commentators have reached their viewpoints by misconstruing *in loco parentis* as a doctrine of duty. Rather, the doctrine did not impose any duty requiring colleges to protect students, but instead shielded colleges' deliberate or intentional acts of discipline from legal scrutiny.[29] *In loco parentis* granted colleges implicit autonomy over campus affairs and, just as a father had no duty to explain his son's punishment, colleges had no obligation to provide their students due process.[30]

In fact, courts in the early 1900s did not even rely on the *in loco parentis* doctrine to dismiss student negligence claims. Instead, courts invoked charitable or governmental immunities to foreclose college tort liability.[31]

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[24] *See id*. at 20. During this era, courts did not mention college responsibility for student safety—*in loco parentis* did not burden colleges with duties to students, but granted colleges rights and powers over students. *Id*. However, a college did have a contractual duty to the father to educate the child. *Id.*

[25] Goodman & Silbey, *supra* note 10, at 23.

> The effect of the new liability regime on the institution goes beyond the actual rulings, that is, the legal changes over the last few decades have done more than simply increase the college's formal liability. Importantly, it has meant an increase in judicial scrutiny of college affairs and parallel loss of its cherished autonomy.

Id. at 24.

[26] *See* Peter F. Lake, *The Special Relationship(s) Between a College and a Student: Law and Policy Ramifications for the Post* In Loco Parentis *College*, 37 IDAHO L. REV. 531, 533 (2001).

[27] *See, e.g.*, Bradshaw v. Rawlings, 612 F.2d 135, 139-40 (3d Cir. 1979) (reasoning that *in loco parentis* imposed a duty on colleges to control behavior and gave students an expectation of protection; thus, the loss of the college's right to impose strict regulations on students stripped "adult" students of their right to protection).

[28] Bickel and Lake argue that if a court applied *in loco parentis* to a negligence lawsuit today, it would result in a "no duty" ruling because the doctrine effectively created college sovereignty. BICKEL & LAKE, *supra* note 7, at 7. "It was a time of *insularity* from legal scrutiny, and like governments, charities and families of that era, the college was considered to be another institution outside the safety rules of the legal system, and in a sense above the law." *Id*.

[29] *Id*. at 29.

[30] *Id*. at 31-32.

[31] *See id*. at 7 (noting that if a private college was involved, courts followed the law governing interpersonal relations or charitable organizations, which greatly limited liability; if the college was public, courts invoked governmental immunities to insulate the college from private civil lawsuits).

Thus, under the doctrine of *in loco parentis*, colleges had expansive rights over their students but virtually no responsibilities to them. However, the civil rights era brought momentous societal shifts, forcing many traditionally protected American institutions, including government, families and universities, to surrender their legal immunities for the greater good.

B. THE CIVIL RIGHTS MOVEMENT: COLLEGE STUDENTS GROWING UP

During the 1960s and early 1970s, the revolutionary climate of the American Civil Rights movement infused college campuses, inspiring students to help dismantle institutional immunities based on *in loco parentis* and ultimately win their civil rights on campus.[32]

After World War II, the G.I. Bill facilitated veterans' college matriculation at record rates,[33] changing the characteristics of the college student and further eroding the doctrine of *in loco parentis*.[34] The Baby Boom generation followed, further increasing college enrollment and the size of college campuses.[35] In addition, the Baby Boom students passionately embraced the culture of reform that defined the 1960s and 1970s.[36] Unwilling to accept a system of paternalistic control and a lack of civil rights, these students successfully challenged the insularity of the *in loco parentis* college, winning their own fundamental civil rights and subjecting college decisions to judicial review and basic legal standards.[37]

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[32] *Id*. at 35-36.

[33] *See* Cloud, *supra* note 5, at 2. The G.I. Bill allowed 2.2 million veterans returning from World War II to enroll in college. *Id*. The college enrollment of war veterans eroded the accepted notions about typical college students—"they had earned the right to be treated as adults at Omaha Beach in Normandy . . . and they expected to be treated as adults." *Id.*

[34] Philip M. Hirshberg, *The College's Emerging Duty to Supervise Students:* In Loco Parentis *in the 1990s*, 46 WASH. U. J. URB. & CONTEMP. L. 189, 196-97 (1994).

[35] *Id*. at 196 (arguing that the German model of higher education, characterized by "large and diversified institutions" with "little concern for the private life of the student," gained acceptance due to higher enrollment rates resulting from the G.I. Bill and the Baby Boom, contributing to the demise of *in loco parentis*). "In 1940, there were approximately 1.5 million [college] students . . . in the United States. This number increased to 2.5 million in 1955 . . . [and] [b]y 1965, more than 5.5 million students were enrolled." *Id*. at 196 n.36 (citing WILLIAM A. KAPLIN, THE LAW OF HIGHER EDUCATION: A COMPREHENSIVE GUIDE TO LEGAL IMPLICATIONS OF ADMINISTRATIVE DECISION MAKING 5-7 (2d ed. 1985)).

[36] BICKEL & LAKE, *supra* note 7, at 35-36. "The targets of reformers in college were the improper (and sometimes racially motivated) denial of civil rights, denial of procedural due process, unequal treatment of women, and abuses of authoritarian governmental power, etc. Students picketed, rioted, sat in, organized, marched, and *litigated.*" *Id.*

[37] "The fall of *in loco parentis* in the 1960s correlated exactly with the rise of student economic power and the rise of student civil rights." *Id*. at 36.

The landmark case of *Dixon v. Alabama State Board of Education*[38] set the stage for a dramatic reapportionment of rights between colleges and students by overturning deep-rooted legal immunities that had shielded college decisions from judicial review.[39] In *Dixon*, Alabama State College expelled six black students after their participation in a civil rights demonstration.[40] These students sued the college, arguing that the college denied them their constitutional rights to notice and hearing before expulsion.[41] The Fifth Circuit agreed, holding that college students were entitled to due process and, at a minimum, the right to "notice and some opportunity for hearing" before expulsion.[42] The *Dixon* decision prohibited colleges from abrogating their students' constitutional rights and, in doing so, substantially weakened the doctrine of *in loco parentis*—"rights [to notice and hearing] were not ever granted in the family."[43]

In rejecting the college's argument that the students contractually waived their rights by agreeing to the Board of Education Regulations,[44] the court recognized the students' right to fundamental fairness.[45] Additionally, *Dixon* shifted the contractual focus from the relationship between the parent and college to that of the student and college.[46] Thus, the college's contractual role shifted from an institution to which the father delegated authority, to one with which the student contracted to receive an education.[47]

By the early 1970s, college students had successfully vindicated their contractual and civil rights, redefining the college-student relationship to emphasize student freedom and abrogate college authority.[48] Although the

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[38] Dixon v. Ala. State Bd. of Educ., 294 F.2d 150 (5th Cir. 1961). The court decided in favor of the students, asserting that a college does not have the power to deny its students their basic constitutional rights, including due process; thus, contrary to the doctrine of *in loco parentis*, students had fundamental rights over which the college had no power to control or restrict. *Id.* at 158.

[39] *See* BICKEL & LAKE, *supra* note 7, at 38.

[40] *Dixon*, 294 F.2d at 152.

[41] *Id.*

[42] *Id.* at 158-59 (reasoning that because an education is increasingly basic and important in modern society, a college cannot arbitrarily expel a student).

[43] BICKEL & LAKE, *supra* note 7, at 39.

[44] *Dixon*, 294 F.2d at 156. The regulations used the core of the *in loco parentis* doctrine—the delegation of parental control to the college—to argue that when the students' parents signed the contract, they delegated to the college the power to discipline. *See id.*

[45] *Id.* at 157-59. Although *Dixon* only applied to public colleges, due process was eventually extended to private colleges through special rules of contract interpretation. *See* Corso v. Creighton Univ., 731 F.2d 529, 533 (8th Cir. 1984); *see also* BICKEL & LAKE, *supra* note 7, at 46.

[46] Dall, *supra* note 8, at 491.

[47] *Id.* at 491; *Dixon*, 294 F.2d at 157 ("[T]he relations between a student and a private university are a matter of contract.").

[48] BICKEL & LAKE, *supra* note 7, at 48.

demise of *in loco parentis* subjected colleges' regulatory and disciplinary actions to judicial review, various immunities continued to insulate colleges from tort liability.[49] Moreover, the fall of *in loco parentis* left a doctrinal vacuum regarding the rights and responsibilities of colleges and students and resulted in an era characterized by inconsistencies, confusion and varied judicial reactions to the newly empowered college student.[50]

C. THE BYSTANDER ERA: "DUTY" V. "NO DUTY"

During the third phase of college safety law, spanning from the mid-1970s to mid-1980s, courts attempted to fill the doctrinal void left by the demise of *in loco parentis*, but failed to define a consistent judicial approach to student lawsuits. Most courts refused to burden colleges with a legal duty to protect their students, often casting colleges in the role of bystander, which allowed them to avoid liability for student injuries.[51] At the same time, courts subjected colleges to ordinary business and tenancy laws, resulting in an incoherent body of college safety law that failed to define the modern college's legal duty to protect its students.[52]

On July 4, 1971, President Nixon signed the 26th Amendment into law, lowering the voting age to eighteen and signaling a significant policy shift toward treating college students as responsible adults.[53] Throughout the 1970s and 1980s, various legal developments further eroded colleges' legal insularity, such as the adoption of comparative fault,[54] the relaxation of proximate causation rules,[55] and the collapse of traditional charitable and governmental immunities.[56] Consequently, courts applied a duty-based doctrinal approach to students' negligence claims against colleges.[57] However, despite judicial recognition of students' rights and the erosion of traditional immunities, courts remained reluctant to impose tort liability on

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[49] *See* Lake, *supra* note 12, at 11.

[50] BICKEL & LAKE, *supra* note 7, at 48 (arguing that the "civil rights cases (broadly speaking) seemed to throw a system of law, once in balance, into a substantial imbalance").

[51] Lake, *supra* note 12, at 3.

[52] *Id.*

[53] Nick White, *Taking One for the Team: Should Colleges Be Liable for Injuries Occurring During Student Participation in Club Sports?*, 7 VAND. J. ENT. L. & PRAC. 193, 194 (2005).

[54] Lake, *supra* note 12, at 11 (noting that, during the 1970s and early 1980s "in most states, comparative fault had replaced the all-or-nothing defenses of contributory fault and, to some extent, assumed risk").

[55] *Id.* (noting that relaxed proximate cause standards led some courts to hold colleges responsible for foreseeable third party misconduct).

[56] *Id.* ("[C]harities were now rarely immune from tort lawsuits and governments, while still protected, were scrutinized particularly when they engaged in proprietary and/or ministerial . . . actions or assumed duties to particular members or segments of the public." (footnote omitted)).

[57] BICKEL & LAKE, *supra* note 7, at 49.

colleges. Courts often based their "no duty" holdings on the demise of *in loco parentis*,[58] allowing the doctrine to continue immunizing colleges from liability, even after its collapse.[59]

1. Duty and Negligence Law

Generally, negligence is a tort resulting from a plaintiff's failure to exercise ordinary care.[60] However, negligence is not actionable unless a court determines, as a matter of law, that the defendant owed the plaintiff a duty.[61] The court's duty inquiry essentially determines "whether the plain-

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[58] *See, e.g.*, Bradshaw v. Rawlings, 612 F.2d 135, 138-40 (3d Cir. 1979).

> Our beginning point of recognition is that the modern American college is not an insurer of the safety of its students. . . . There was a time when college administrators . . . assumed a role *in loco parentis*. . . . A special relationship was created between college and student that imposed a duty on the college to exercise control over student conduct and, reciprocally, gave the students certain rights of protection by the college. The campus revolutions of the late sixties and early seventies were a direct attack by the students on rigid controls by the colleges and were an all-pervasive affirmative demand for more student rights. In general, the students succeeded, peaceably and otherwise, in acquiring a new status at colleges throughout the country. . . . Regulation by the college of student life on and off campus has become limited.

Id.; *see also* Univ. of Denver v. Whitlock, 744 P.2d 54 (Colo. 1987) (reasoning that the demise of *in loco parentis* removed institutional responsibility for the private affairs of its students); Rabel v. Ill. Wesleyan Univ., 514 N.E.2d 552, 560-61 (Ill. App. Ct. 1987) (reasoning that because no custodial relationship exists between a college and its students, the only duty a college has to its students is to properly educate them); Brian A. Snow & William E. Thro, *Redefining the Contours of University Liability: The Potential Implications of* Nero v. Kansas State University, 90 EDUC.. L. REP. 989, 990-91 (1994) (noting that the demise of *in loco parentis* led courts to reason that colleges were no longer in a position of control over students and were therefore relieved of potential liability for student injuries).

[59] *See* Kathleen Connolly Butler, *Shared Responsibility: The Duty to Legal Externs*, 106 W. VA. L. REV. 51, 63 (2003); *see also* Lake, *supra* note 12, at 16 (arguing that where alcohol or other student misbehavior magnified the risk of the injury, "the typical college was a mere bystander").

[60] According to *Black's Law Dictionary*, "negligence" is "[t]he failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation; any conduct that falls below the legal standard established to protect others against unreasonable risk of harm, except for conduct that is intentionally, wantonly, or willfully disregardful of others' rights." BLACK'S LAW DICTIONARY 1061 (8th ed. 2004); *see also* Robert C. Cloud, *Extracurricular Activities and Liability in Higher Education*, 198 EDUC. L. REP. 1, 7-8 (2005). To prevail in a college-safety negligence claim, a plaintiff must prove:

> (1) the injury was foreseeable,
> (2) the institution had a duty to protect,
> (3) the duty was breached,
> (4) the failure to protect was the proximate cause of the injury, and
> (5) the alleged injury actually occurred.

Cloud, *supra*, at 7-8.

[61] *See* Knoll v. Bd. of Regents of the Univ. of Neb., 601 N.W.2d 757, 761 (Neb. 1999); Sharkey v. Bd. of Regents of the Univ. of Neb., 615 N.W.2d 889, 899 (Neb. 2000) ("The threshold inquiry in any negligence action is whether the defendant owed the plaintiff a duty.").

A college's ultimate goal is to convince the court that it did not owe the plaintiff a duty, ending the lawsuit before the reasonableness of the college's conduct is even submitted to a jury. Butler, *supra* note 59, at 61. Moreover, because jury verdicts are often unpredictable (and college student injuries are

tiff's interest that has been infringed by the conduct of the defendant is entitled to legal protection."[62] In other words, if the court determines that the defendant owed the plaintiff no duty in the first place, the court will grant the defendant summary judgment and the lawsuit will be dismissed.[63] Only after establishing a duty must the court consider the nature of the duty and whether sufficient evidence exists to prove that the defendant, by action or inaction, breached that duty.[64]

Negligence law is derived primarily from common law, rather than from statutory law, and it thus requires courts to review and reconsider accepted doctrinal analyses as societal conditions evolve.[65] Because of the significant changes that have occurred on college campuses, balancing competing policies and factors is an especially important element of a court's determination of duty in college injury cases.[66] Accordingly, the question of "whether a duty should be imposed in a particular case is essentially one of fairness under contemporary standards."[67] Although "[n]o single policy or factor . . . is dispositive of duty," courts generally give the most weight to foreseeability.[68] Foreseeability is a question of law for courts to decide.[69] The imposition of a duty may also depend on the legal relationship between the parties[70] and whether that relationship gives rise to a legal obligation to act for the benefit of the injured party.[71] Generally, an

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tragic events eliciting sympathy that could influence a jury verdict), if a duty is established, it is common for colleges to settle thereafter, even those that believe they have a good case. *Id*.

[62] *See Whitlock*, 744 P.2d at 57.

[63] *See Sharkey*, 615 N.W.2d at 903.

[64] The existence of a duty does not translate into automatic legal liability. If a duty is established, the question of whether the defendant breached that duty is a question of fact. Thus, a jury will decide if the defendant used the amount of care appropriate to meet the applicable legal standard. *See* Rhaney v. Univ. of Md. E. Shore, 880 A.2d 357, 364 (Md. 2005).

[65] BICKEL & LAKE, *supra* note 7, at 70.

[66] Generally, courts have settled on some consistent factors and policies to balance when determining duty. *Id*. For example, many courts employ a "risk-utility test," in which the court balances:

(1) the magnitude of the risk;
(2) the relationship of the parties;
(3) the nature of the attendant risk;
(4) the opportunity and ability to exercise care;
(5) the foreseeability of the harm; and
(6) the policy interest in the proposed solution.

See, e.g., *Knoll*, 601 N.W.2d at 761.

[67] *Whitlock*, 744 P.2d at 57.

[68] BICKEL & LAKE, *supra* note 7, at 71. Foreseeability limits the scope of duty to "embrace only those persons . . . to whom harm of some type might reasonably have been foreseen as a result of the particular tortious conduct." *Rhaney*, 880 A.2d at 364 (embracing J. Cardozo's iteration of the social policy to narrow the concept of duty).

[69] *Knoll*, 601 N.W.2d at 762.

[70] Furek v. Univ. of Del., 594 A.2d 506, 516 (Del. 1991).

[71] *See* Webb v. Univ. of Utah, 125 P.3d 906, 909 (Utah 2005). Negligence law distinguishes between active negligence, or misfeasance, and passive negligence, or nonfeasance. *See* Hirshberg, *supra*

actor only owes others a duty of ordinary care with respect to his or her own conduct[72] and has no duty to control the conduct of others.[73] Thus, a college is not obligated to act to protect others unless a "special relationship" exists.[74] Moreover, a failure to act is only actionable if, in addition to the existence of a special relationship, the college's inaction creates a foreseeable and unreasonable risk of injury.[75]

2. No-Duty/Bystander Era Rules

Beginning in the late 1970s, American college campuses transformed from "tranquil enclaves in both image and fact" to habitually unsafe and crime-ridden institutions.[76] This transformation, combined with the colleges' vulnerability to judicial intrusion, paved the way for a new wave of student lawsuits.[77] However, courts promulgated a powerful new immunity to help fend off students' lawsuits—a "no duty" rule that cast colleges in the "legal and cultural role of helpless 'bystander' to student life and danger."[78] Courts generally used the "no duty" rule to insulate colleges from liability for student injuries related to the student's disorderly behavior, including but not limited to alcohol consumption and fraternity activi-

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note 34, at 192-93. A college's failure to take affirmative action to protect or supervise its students is nonfeasance. *Id*. at 193.

[72] Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334, 342 (Cal. 1976).

[73] *Rhaney*, 880 A.2d at 364.

[74] Peterson v. S.F. Cmty. Coll. Dist., 685 P.2d 1193, 1196 (Cal. 1984). An affirmative duty to protect may arise where "(a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation exists between the actor and the other which gives the other a right to protection." *Id*. Typically, a relationship is "special" when it is a relationship of dependence or of mutual dependence. *See* Freeman v. Busch, 349 F.3d 582, 587 (8th Cir. 2003). Examples of "special relationships" include innkeeper-guest, business-invitee and parent-child. Univ. of Denver v. Whitlock, 744 P.2d 54, 58 (Colo. 1987). Although *Restatement (Second) of Torts* section 314A does not specifically exclude the college-student relationship, courts have consistently held that no special relationship exists between a college and its students. *Freeman*, 349 F.3d at 587-88.

[75] *See* Hirshberg, *supra* note 34, at 193.

[76] *See* Matthews, *supra* note 2, at 38 (noting that while most campuses still felt like "privileged and peaceful islands," it was clear that "image has less and less to do with reality"); BICKEL & LAKE, *supra* note 7, at 49 (arguing that as more "baby boom 'tweenagers,' people no longer under parental control but in between that control and mature adulthood," came to college, "campuses became more potentially dangerous and divisive places").

[77] BICKEL & LAKE, *supra* note 7, at 49.

[78] *Id*. "In the role of bystanders, colleges had no legal duties to students and hence were not legally responsible for harm." *Id*. Thus, the "bystander era" refers to the courts' application of the traditional tort rule that "a person has no general duty under tort law to come to the aid of a *stranger*." *See* Robert D. Bickel & Peter F. Lake, *The Emergence of New Paradigms in Student-University Relations: From "*In Loco Parentis*" to Bystander to Facilitator*, 23 J.C. & U.L. 755, 780 n.152 (1997) [hereinafter *New Paradigms*].

ties.[79] Professors Bickel and Lake, who have written extensively on college safety law, analogize the courts' "no duty" opinions to sociological commentaries that oppose state action aimed at decreasing urban crime rates; such commentaries claim that state action is useless because it is unlikely to have any significant effect on urban crime.[80] Similarly, say Bickel and Lake, courts often supported "no duty" rulings by arguing that imposing a duty would be futile because colleges could not protect their students even if they so desired: "The image these decisions conveyed was that of a newly disabled university (no longer able to exercise parental discipline and control), helplessly watching hordes of 'free' students (often) suffused with alcohol (or drugs), hormones, and poor judgment."[81]

The doctrinal shift in college safety law, from *in loco parentis* to a vague concept of duty, "ushered in . . . a new era of *uncertainty* in university law."[82] The "dramatic reapportionment of responsibilities" stripped colleges of their expansive disciplinary powers, which (arguably) left them unable to control rowdy student behavior; at the same time, colleges became bystanders and were (legally) unaccountable for the consequences of such behavior.[83] Further, stressing the notion that the primary objective of the students' on-campus civil rights protests was to abolish *in loco parentis*,[84] many courts decided that because the students emancipated themselves from the doctrine, they should be treated as "fully functioning adults."[85] In effect, the "no duty" standard became the new de facto college immunity.[86]

In the landmark case of *Bradshaw v. Rawlings*, the court supported the "no duty" standard with an extensive policy-based rationale that persists today.[87] *Bradshaw* and its progeny used college students' newfound free-

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[79] *See New Paradigms*, *supra* note 78, at 780.

[80] BICKEL & LAKE, *supra* note 7, at 50.

[81] *Id*.

[82] *Id*. at 11.

[83] Bradshaw v. Rawlings, 612 F.2d 135, 139 (3d Cir. 1979); BICKEL & LAKE, *supra* note 7, at 50.

[84] *See, e.g.*, *Bradshaw*, 612 F.2d at 138-40; Beach v. Univ. of Utah, 726 P.2d 413 (Utah 1986); Rabel v. Ill. Wesleyan Univ., 514 N.E.2d 552, 552 (Ill. App. Ct. 1987).

[85] BICKEL & LAKE, *supra* note 7, at 59; *Bradshaw*, 612 F.2d at 138-41 (reasoning that students' newfound freedoms made them "adults," resulting in a reapportionment of rights between colleges and students).

[86] BICKEL & LAKE, *supra* note 7, at 65.

[87] 612 F.2d 135. Bickel and Lake further note:

> *Bradshaw* became the judicially self-serving declaration of student independence and the announcement of the birth of the new "adult" student body. *Bradshaw* birthed the bystander (helpless) university. . . . [O]ther . . . decisions amplified *Bradshaw* and added their own touches to the new post *in loco parentis* legal archetype.

BICKEL & LAKE, *supra* note 7, at 59; *see also* Furek v. Univ. of Del., 594 A.2d 506, 518 (Del. 1991) ("Cases subsequent to *Bradshaw* which rejected a duty to supervise seem to rely on the policy analysis

doms against them, emphasizing that without the authority of *in loco parentis*, colleges had neither the ability nor the duty to control or protect these "newly empowered students."[88] Moreover, the *Bradshaw* court noted that the "modern American college is not an insurer of the safety of its students."[89] Thus, even though the college sponsored illegal drinking at an unsupervised off-campus site without providing transportation back to campus,[90] the Third Circuit summarily dismissed the claim, holding that the college had no duty to the underage student who attended the party and subsequently sustained serious injuries on the way back to campus.[91]

The *Bradshaw* line of cases links the fall of *in loco parentis* to the "no duty" rule, reasoning that when college students won their freedom, they alone had to bear the "costs" of their hard-earned independence.[92] The cases that follow the *Bradshaw* rationale reflect a policy determination that, after the fall of *in loco parentis*, college campuses became increasingly chaotic and unmanageable, effectively paralyzing colleges.[93] Thus, similar to those who declared futile any effort to stop the graffiti and crime that plagued Manhattan in the 1980s, many courts determined that imposing any duties on colleges to monitor or control alcohol abuse and other campus ills would be useless because the students were beyond reform.[94]

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set out in *Bradshaw* without considering the factual validity of its premises or the accuracy and consistency of its logic.").

[88] BICKEL & LAKE, *supra* note 7, at 56-57.

[89] 612 F.2d at 138.

[90] *Id*. at 137. Plaintiff student was a passenger in a car driven by another student who was intoxicated with alcohol provided by the college and consumed at a college-sponsored picnic. *Id.* Many of the sophomores for whom the event was thrown were under the legal drinking age. *Id.* A jury found the college negligent in its planning and supervision of the event and awarded damages of $1,108,067. *Id.* The college appealed, asserting it had no duty to supervise the driver or the activities at the picnic. *Id.*; *see also* BICKEL & LAKE, *supra* note 7, at 51.

[91] *Bradshaw*, 612 F.2d at 141; *see also* Beach v. Univ. of Utah, 726 P.2d 413, 418 (Utah 1986) ("The students whose relationship we are asked to characterize as 'custodial' are not juveniles. . . . We do not believe that Beach should be viewed as fragile and in need of protection simply because she had the luxury of attending an institution of higher education.").

[92] 612 F.2d at 139-40 (arguing that because the campus revolutions "were an all-pervasive affirmative demand for more student rights[,] . . . [r]egulation by the college of student life on and off campus has become limited").

[93] *See* Robert D. Bickel & Peter F. Lake, *Reconceptualizing the University's Duty to Provide a Safe Learning Environment: A Criticism of the Doctrine of* In Loco Parentis *and the Restatement (Second) of Torts*, 20 J.C. & U.L. 261, 272 (1994).

[94] BICKEL & LAKE, *supra* note 7, at 63 (analogizing *Rabel*'s reasoning to that of a 1980s New Yorker's "testament to how it is impossible to stop graffiti, clean up 42nd street, and reduce crime in Manhattan").

While the cases following *Bradshaw* admitted that colleges had some accountability to their students,[95] it was generally limited to the duty to properly educate them.[96] Because the civil rights movement established student independence, these courts reasoned that imposing any further duties on colleges would "produce a repressive and inhospitable environment, largely inconsistent with the objectives of a modern college education."[97] Despite these "retaliatory rulings,"[98] bystander era courts refused to allow colleges to abdicate *all* safety responsibilities to students,[99] often rooting the college's duty in its ordinary duty as a landowner.[100]

3. The Extension of Duty in the Bystander Era

This era marked the beginning of the college-as-business model, in which courts began treating colleges like ordinary businesses. Accordingly, colleges have a duty of due care in premises maintenance,[101] campus housing,[102] and activities in which colleges exercise supervision and control.[103] Because colleges are "landowners," courts established a duty of due care obligating them to keep their campuses reasonably safe for persons

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[95] *Beach*, 726 P.2d at 419.

> [C]olleges . . . are educational institutions, not custodial. . . . It would be unrealistic to impose upon an institution of higher education the additional role of custodian over its adult students. . . . Fulfilling this charge would require the institution to babysit each student, a task beyond the resources of any school.

Id.

[96] Rabel v. Ill. Wesleyan Univ., 514 N.E.2d 552, 560 ("[T]he university's responsibility to its students, as an institution of higher education, is to properly educate them.").

[97] *Beach*, 726 P.2d at 419.

[98] *See, e.g.*, Bradshaw v. Rawlings, 612 F.2d 135 (3d Dir. 1979); *Beach*, 726 P.2d 413; *Rabel*, 514 N.E.2d 552.

[99] *See, e.g.*, Mullins v. Pine Manor Coll., 449 N.E.2d 331, 336 (Mass. 1983); Peterson v. S.F. Cmty. Coll. Dist., 685 P.2d 1193 (Cal. 1984); Miller v. State, 467 N.E.2d 493 (N.Y. 1984); Duarte v. State, 148 Cal. Rptr. 804 (Ct. App. 1978).

[100] *See, e.g.*, Nieswand v. Cornell Univ., 692 F. Supp. 1464 (N.D.N.Y. 1988); *Duarte*, 148 Cal. Rptr. 804; Cutler v. Bd. of Regents of Fla., 459 So. 2d 413 (Fla. Dist. Ct. App. 1984); *Miller*, 467 N.E.2d 493.

[101] Lake, *supra* note 12, at 12 ("Colleges were often analogized to businesses and many entrants on premises were treated like business customers. Colleges thus became responsible for providing reasonably safe walkways, proper lighting, and other aspects of reasonably safe premises." (footnote omitted)).

[102] *See Duarte*, 148 Cal. Rptr. at 812; *Mullins*, 449 N.E.2d at 335-36.

[103] Mintz v. State, 362 N.Y.S.2d 619, 620-21 (App. Div. 1975). In *Mintz*, several students drowned on an overnight canoe trip. *See id.* The court granted the college summary judgment, determining that the college was not the legal cause of the students' deaths. *Id.* The court reasoned that the college activity club was adequately supervised and prepared for foreseeable dangers. *Id*. Thus, because the college could not have protected against the sudden and unforeseeable wind that tipped the canoes, the court implicitly established the college's duty to provide reasonable care for its students on a college-supervised trip. *Id*.; *see also* Lake, *supra* note 12, at 13.

deemed "invitees."[104] *Isaacson v. Husson College* and its progeny illustrate this duty, allowing students, employees and guests to recover from colleges if their injuries resulted from negligent maintenance.[105] Even if a defect that leads to injury is obvious, the injured party is entitled to recover in tort "when the college should have foreseen that a reasonable person would have proceeded despite such knowledge."[106] Thus, modern colleges owe persons on their campuses "the positive duty of exercising reasonable care in providing reasonably safe premises for their use."[107]

In addition to duties originating from premises liability, colleges' duties are often rooted in traditional landlord-tenant law.[108] During this era, courts greatly expanded the scope of landlord-tenant tort duties,[109] resulting

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[104] Isaacson v. Husson Coll., 332 A.2d 757, 761-62 (Me. 1975). The *Isaacson* court recounted section 343 of the Restatement (Second) of Torts (1965) in affirming a jury verdict for the injured student:

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land, if but only if, he
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> (i) knows or by the exercise of reasonable care would discover the condition and should realize that it involves an unreasonable risk of harm to such invitees and
>
> (ii) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
>
> (iii) fails to exercise reasonable care to protect them against the danger.
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> Section 343A(1) of the Restatement (Second) of Torts (1965):
>
> (1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

Id.; *see also* Lake, *supra* note 12, at 12 (noting that invitees usually include students and their guests, as well as college employees and their guests).

[105] *Isaacson*, 332 A.2d at 760; Poulin v. Colby Coll., 402 A.2d 846, 848 (Me. 1979); Jesik v. Maricopa County Cmty. Coll. Dist., 611 P.2d 547 (Ariz. 1980).

[106] *Poulin*, 402 A.2d at 851; *Isaacson*, 332 A.2d at 760.

[107] *Poulin*, 402 A.2d at 848 (extending the college's duty to all persons on campus through express or implied invitation, either as a student, employee, or for a social visit).

[108] *See* Snow & Thro, *supra* note 58, at 994-95.

[109] *Id.* at 996 n.36.

> Prior to 1970, there was no general tort duty on landlords to protect their tenants against criminal theft or attack. . . . *Kline v. 1500 Massachusetts Avenue Apartment Corp* . . . imposed a duty of reasonable care upon the owner of an urban multiple unit apartment dwelling to protect its tenants from foreseeable criminal assaults.

Id. Kline v. 1500 Massachusetts Avenue Apartment Corp., 439 F.2d 477 (D.C. Cir. 1970), is the leading case in landlord-tenant law, which was later extended to colleges; it establishes that while a landlord is not an insurer of a tenants' safety, a landlord has a duty to provide reasonable security where the location of the premises or prior criminal events make future criminal intrusion foreseeable. *See id.* at 481. The *Kline* court further noted:

> [S]ince the ability of one of the parties to provide for his own protection has been limited in some way by his submission to the control of the other, a duty should be imposed upon the one possessing control (and thus the power to act) to take reasonable precautions to protect the other one from assaults by third parties which, at least, could reasonably have been anticipated.

Id. at 483.

in a similar expansion in college safety law.[110] Under the landlord-tenant line of cases, colleges have a duty to provide adequate security to protect students from foreseeable danger,[111] including intrusions by dangerous persons.[112]

In *Duarte v. State*, the court held that the college had a duty to protect its students from foreseeable third party attacks, reasoning that, in contracting for the college experience, students living on campus surrender aspects of their self-protection to the college.[113] The court further explained that the college's superior control over residential facilities and certain aspects of students' personal lives[114] made the college responsible for warning students of known dangers[115] and providing adequate security against foreseeable criminal acts.[116]

Similarly, in *Mullins v. Pine Manor College*, the Massachusetts Supreme Court cemented the importance of effective campus security and offered an alternative approach to *Bradshaw*'s "students as adults" charac-

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[110] *See, e.g.*, Duarte v. State, 148 Cal. Rptr. 804, 809 (Ct. App. 1978). Tanya Duarte was raped and murdered in the student residence hall owned and operated by California State University in San Diego. *Id.* at 806. Her parents sued the college, alleging that the college breached its duty of care by failing to provide reasonable housing protections. *Id.* The court found that the college, as landlord, owed tenants a duty "to take appropriate measures to restrain conduct by third persons of which he should be aware and which he should realize is dangerous." *Id.*

[111] *See, e.g.*, *id.*

[112] In effect, Duarte and its progeny held that resident students were "not only entitled to a safe roof and adequate walls, but to an essentially safe place of residence." *Id.* at 812.

[113] *See id*. (noting that the college knew of past assaults and of conditions inviting further assaults).

[114] *Id.* In an analogous case, a court held a college liable for the sexual assault of a student by a non-student in a college-owned parking lot, noting:

> In the closed environment of a school campus where students pay tuition and other fees in exchange for using the facilities, where they spend a significant portion of their time and may in fact live, they can reasonably expect that the premises will be free from physical defects and that school authorities will also exercise reasonable care to keep the campus free from conditions which increase the risk of crime.

Peterson v. S.F. Cmty. Coll. Dist., 685 P.2d 1193, 1201 (Cal. 1984).

[115] *See, e.g.*, Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334, 350 (Cal. 1976) (holding that the university had a duty to warn its student of danger—the student's life was threatened and ultimately taken by the patient of a university-employed psychotherapist).

[116] *See, e.g.*, Miller v. State, 467 N.E.2d 493 (N.Y. 1984) (stating that college-operated housing imposes duties on a college identical to those of a landlord, such as requiring the college to perform maintenance of security devices, and therefore holding a college liable for injuries to a student who was raped in a dorm room by an intruder due to a history of complaints and prior criminal acts in the same dorm); *Peterson*, 685 P.2d 1193 (holding that a college has a duty to protect students from foreseeable harm and a duty to warn students of potential harms); Cutler v. Bd. of Regents of Fla., 459 So. 2d 413 (Fla. Dist. Ct. App. 1984) (holding that a college has a duty to provide reasonable security to protect against the risk of student rape by a criminal intruder); Nieswand v. Cornell Univ., 692 F. Supp. 1464 (N.D.N.Y. 1988) (holding that a university has duty to provide security for campus residence halls). *But see* Relyea v. State, 385 So. 2d 1378 (Fla. Dist. Ct. App. 1980) (holding that a university had no duty to protect students from on-campus sexual assault).

terization.[117] The court stated that even though colleges no longer stood *in loco parentis* to their students, they could not thereby "abandon any effort to ensure their physical safety."[118] The court also offered a policy-based rationale for imposing a duty to protect on the college, emphasizing the unique nature of the environment and the college-student relationship.[119] The *Mullins* court further grounded the college's duty to its students in two separate and established principles of negligence law: (1) the duty to act with ordinary prudence and (2) the duty to act with due care in carrying out a voluntarily assumed duty.[120] The court explained that the high concentration of young people and the college's superior ability to monitor and protect its students gave rise to its duty of due care, obligating the college to protect its students from foreseeable crime, regardless of "whether [the third party's] acts were accidental, negligent, or intentional."[121] Furthermore, the *Mullins* court defined the scope of foreseeable crime broadly; stating that "[t]he threat of criminal acts of third parties to resident students is 'self-evident'" on a college campus.[122]

Despite the sporadic bystander era rulings that expanded the college's duty to its students beyond that of an ordinary business or landlord, most courts in this era applied the minimum duty of care and portrayed colleges as mere bystanders to student injuries. In addition, a successful showing of

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[117] 449 N.E.2d at 335-36.

> [C]hanges in college life, reflected in the general decline of the theory that a college stands in loco parentis to its students, arguably cut against this view. The fact that a college need not police the morals of its resident students . . . does not entitle it to abandon any effort to ensure their physical safety. Parents, students, and the general community still have a reasonable expectation, fostered in part by colleges themselves, that reasonable care will be exercised to protect resident students from foreseeable harm.

Id.

[118] *Id*.

[119] The *Mullins* court identified inherent dangers on the college campuses and described the nature of the college-student relationship:

> The concentration of young people, especially young women, on a college campus, creates favorable opportunities for criminal behavior. . . . Some students may not have been exposed previously to living in a residence hall or in a metropolitan area and may not be fully conscious of the dangers that are present. Thus, the college must take the responsibility on itself if anything is to be done at all.. . . Parents, students, and the general community . . . have a reasonable expectation, fostered in part by colleges themselves, that reasonable care will be exercised to protect resident students from foreseeable harm.

Id. (citation and footnotes omitted). Although *Mullins* flatly rejects any application of *in loco parentis* to whether or not the college has a duty to provide security for resident students, some commentators have suggested that because "*Mullins* is, at times, perceived to state a *higher* standard of care than that imposed on other landowners . . . it . . . connote[s] a reliance upon notions of *in loco parentis*." Bickel & Lake, *supra* note 93, at 283.

[120] *Id.*

[121] *Mullins*, 449 N.E.2d at 337 (quoting Carey v. New Yorker of Worcester, Inc., 245 N.E.2d 420, 422 (Mass. 1969)).

[122] *Id*. at 335.

college liability remained an almost insurmountable task, especially if a student's irresponsible or unlawful conduct contributed to his or her injury.[123] Today, courts and college administrators continue to struggle to define the contours of college safety law.

II. COLLEGE SAFETY LAW IN THE NEW MILLENNIUM

"There is no reason why a university may act without regard to the consequences of its actions while every other legal entity is charged with acting as a reasonably prudent person would in like or similar circumstances."[124]

While courts do not regard colleges as insurers of students' well being,[125] they have increasingly recognized a college's duty to provide a safe learning environment both on and off campus.[126] Additionally, "no duty" rules have gradually fallen out of judicial favor in college safety law.[127] Courts continue to hold that the college-student relationship is not per se special,[128] but they often rely on other facets of the relationship, such as an assumed duty[129] or the landlord-tenant relationship,[130] to justify imposing a heightened duty. Nevertheless, modern college safety law has retained various bystander era principles that work to foreclose college liability, notably with regard to alcohol. Further, some current legal trends may obstruct college liability by providing new defenses for colleges to assert against student tort claims, such as increasing limits on tort liability[131] and

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[123] Dall, *supra* note 8, at 500.

[124] Nova Se. Univ., Inc. v. Gross, 758 So. 2d 86, 90 (Fla. 2000).

[125] *See, e.g.*, Tanja H. v. Regents of the Univ. of Cal., 278 Cal. Rptr. 918, 919 (Ct. App. 1991).

[126] *See, e.g.*, Nero v. Kan. State Univ., 861 P.2d 768 (Kan. 1993); *Gross*, 758 So. 2d at 86-90; Sharkey v. Bd. of Regents of the Univ. of Neb., 615 N.W.2d 889 (Neb. 2000).

[127] Lake, *supra* note 9, at 625.

[128] *See, e.g.*, Furek v. Univ. of Del., 594 A.2d 506, 519 (Del. 1991) ("Other courts have recognized, although denied liability under, the duty to supervise arising from the special relationship between university and student.").

[129] *Id*. at 520 (noting that *Restatement (Second) of Torts* section 323 states that affirmative duties are owed by one who assumes direct responsibility for the safety of another by the rendering of protection services).

[130] Generally, courts find that a college owes a duty to protect against risks stemming from conditions on the college's property or risks created by the acts of others while on college property. *See, e.g.*, Knoll v. Bd. of Regents of the Univ. of Neb., 601 N.W.2d 757 (Neb. 1999) (holding that college owed a duty to the victim of fraternity hazing in its capacity as landowner, with student as invitee); Stanton v. Univ. of Me. Sys., 773 A.2d 1045 (Me. 2001) (holding that college owed duty to provide appropriate safety precautions to student-athlete as invitee who was residing in dormitory).

[131] *See generally* Julie Davies, *Undercutting Premises Liability: Reflections on the Use and Abuse of Causation Doctrine*, 40 SAN DIEGO L. REV. 971 (2003).

a recent holding that allows the issue of causation to be decided as a matter of law.[132]

A. LANDLORD-TENANT AND THIRD-PARTY ASSAULTS

Courts continue to apply landlord-tenant and business-invitee standards to the college-student relationship, imposing the duty to protect students from known foreseeable risks of harm.[133] However, even though courts continue to acknowledge a college's duty to take reasonable precautions against foreseeable criminal intrusions by non-students,[134] many courts refuse to impose such a duty if a fellow student perpetrates the crime.[135] In such situations, courts often argue that occurrences like acquaintance rape are too difficult to police and that increased control "would directly contravene the competing social policy of fostering an educational environment of student autonomy and independence."[136] Moreover, if a student who assaulted another student has a history of misconduct that the school adjudicated internally,[137] courts may be reluctant to get involved with the victim's claim against the college because the student-student violence claim may implicate the college's internal disciplinary procedures.[138]

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[132] *See* Saelzler v. Advanced Group 400, 23 P.3d 1143 (Cal. 2001).

[133] *See, e.g.*, Sharkey v. Bd. of Regents of the Univ. of Neb., 615 N.W.2d 889 (Neb. 2000).

[134] For a list of college safety cases, see Bickel & Lake, *supra* note 93, at 281 n.82. Bickel and Lake argue that third-party assault cases decided under landlord-tenant law are not easy to reconcile with cases of student-student injury, which often follow a "no duty" rationale: "In principle, it is hard to know why a victim raped by a non-student fares better than the student who is assaulted (raped) by another student." *Id.*

[135] *See, e.g.*, Tanja H. v. Regents of the Univ. of Cal., 278 Cal. Rptr. 918, 919-20 (Ct. App. 1991) (noting that colleges are generally "not liable as an insurer for the crimes of its students" or "for the sometimes disastrous consequences which result from combining young students, alcohol, and dangerous or violent impulses").

[136] Univ. of Denver v. Whitlock, 744 P.2d 54, 62 (Colo. 1987). Various courts have quoted the Colorado Supreme Court when granting colleges summary judgment in cases where third parties attack students. *See, e.g.*, Freeman v. Busch, 150 F. Supp. 2d 995, 1002 (S.D. Iowa 2001); Benefield *ex rel.* Benefield v. Bd. of Trs. of the Univ. of Ala. at Birmingham, 214 F. Supp. 2d 1212, 1225 (N.D. Ala. 2002).

[137] *See* Rhaney v. Univ. of Md. E. Shore, 880 A.2d 357, 365-66 (Md. 2005). Plaintiff student was assaulted by his roommate, who was previously involved in two fights at the college. Both fights occurred before the college chose plaintiff and assailant as roommates. The court held that the college did not owe plaintiff a duty to protect him from his own roommate because the roommate did not present an unreasonable risk of harm to plaintiff and the college could not insure against all criminal acts. *See id.*

[138] *See* Eiseman v. State, 511 N.E.2d 1128, 1136 (N.Y. 1987) ("[C]olleges today in general have no legal duty to shield their students from the dangerous activity of other students . . . ."). *But see* Nero v. Kan. State Univ., 861 P.2d 768, 779 (Kan. 1993) (holding that a college had a duty to protect its students from foreseeable sexual assaults by other students in the same dorm; the crime was foreseeable based on the student-attacker's previous sexual assault charge, making the college negligent for housing student-attacker in co-ed dorm).

1. Policy: From Duty to Causation

Since the fall of *in loco parentis*, colleges have limited their exposure to tort liability for student injuries by arguing for a narrow construction of the element of duty. Furthermore, although foreseeability has been the most important factor in determining whether a college owes a duty,[139] the determination also involves a policy analysis of all relevant facts and circumstances.[140] Thus, even if a particular incident is foreseeable, a court may nevertheless hold that the college had no duty under the circumstances if the court determines that imposing such a duty will unduly burden the college.[141]

However, because courts increasingly find that colleges owe their students, at minimum, a duty of reasonable care, the factor of causation will move to the forefront of college safety law.[142] In addition, a recent California Supreme Court case[143] allows courts to dismiss negligent security cases at the summary judgment stage if a judge finds insufficient proof of causation.[144] In fact, in a 1993 third party assault case, the California Court of Appeal held that even assuming the college owed and breached its duty of care to a student, the student's claim would still fail without a showing that the college's breach bore a causal connection to the student's injury.[145] Al-

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[139] However, courts use different standards to determine foreseeability in the context of ascertaining duty. *See, e.g.*, Agnes Scott Coll., Inc. v. Clark, 616 S.E.2d 468, 470 (Ga. Ct. App. 2005) (stating that, for a crime to be foreseeable, "it must be substantially similar to previous criminal activities occurring on or near the premises such that a reasonable person would take ordinary precautions to protect invitees from the risk posed"); Stanton v. Univ. of Me. Sys., 773 A.2d 1045, 1050 (Me. 2001) (concluding that foreseeability is not dependant on prior similar acts and noting that "the concentration of young people, . . . on a college campus, creates a favorable opportunity for criminal behavior . . . [and] the threat of criminal behavior is self-evident" (citing Mullins v. Pine Manor Coll., 449 N.E.2d. 331, 335 (Mass. 1983))).

[140] Lake, *supra* note 9, at 655.

[141] *See, e.g.*, Gragg v. Wichita State Univ., 934 P.2d 121 (Kan. 1997) (finding no liability where college had taken adequate security measures and had no knowledge of assailant).

[142] Lake, *supra* note 9, at 654 (noting that if no duty exists in the first place, there is no reason to reach the issue of causation).

[143] Saelzler v. Advanced Group 400, 23 P.3d 1143 (Cal. 2001). Although this case involved a delivery to an apartment complex and did not involve colleges, California colleges filed amicus briefs in favor of the defendant. *See id.* at 1145.

[144] *See id.* at 1149. Although this case was decided by a small majority, the issues of duty and breach were not contested. *See id.*

[145] *See* Nola M. v. Univ. of S. Cal., 20 Cal. Rptr. 2d 97 (Ct. App. 1993). The court explained the necessity of establishing that a college's negligence was a substantial factor in bringing about the injury:

> We think it comes down to this: When an injury can be prevented by a lock or a fence or a chain across a driveway or some other physical device, a landowner's failure to erect an appropriate barrier can be the legal cause of an injury inflicted by the negligent or criminal act of a third person. But where, as here, we are presented with an open area which could [only]

though this case was decided before *Saelzler v. Advanced Group 400*,[146] it is likely that legal causation will determine more college safety cases in the future.

While the *Saelzler* case did not deal with college safety law directly, the decision will likely significantly affect such law in the future. The plaintiff in *Saelzler*, a Federal Express employee, made a delivery at an apartment complex and was attacked while attempting to leave the premises.[147] Although the apartment complex experienced rampant crime, there was no daytime security in place other than a gate, which had been propped open before the attack.[148] The majority's decision to dismiss the case turned on the fact that the plaintiff could not identify her attackers, and thus could not confirm whether they came through the propped-open gate or lived in the complex.[149] Consequently, the plaintiff could not prove that the complex's negligent security caused the assault.[150] Despite the court's causation rationale, the majority based much of its analysis on policy factors, such as weighing the cost the defendant would incur if the court required increased security against the utility of providing a safer environment.[151] The *Saelzler* decision may therefore offer college defendants another tool for avoiding liability.[152] Although the identity of an attacker is usually

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> be fully protected. . . by a Berlin Wall, we do not believe a landowner is the cause of a physical assault it could not reasonably have prevented.
>
> Otherwise, where do we draw the line? How many guards are enough? Ten? Twenty? Two hundred? . . . Are plants of any kind permissible or is USC to chop down every tree and pull out each bush? Does it matter if the campus looks like a prison? Should everyone entering the campus be searched for weapons? . . . Does a landowner have to effectively close his property and prevent its use altogether? To characterize a landowner's failure to deter the wanton, mindless acts of violence of a third person as the "cause" of the victim's injuries is (on these facts) to make the landowner the insurer of the absolute safety of everyone who enters the premises.

Id. at 107-08 (citations and footnote omitted).

[146] 23 P.3d 1143, 1154 (Cal. 2001) (citing *Nola M.* with approval).

[147] *Saelzler*, 23 P.3d at 1147.

[148] *Id.*

[149] *Id.*

[150] *Id.* at 1155 (reasoning that it was equally likely that the attack came from residents inside the complex, and thus the open gate was not the cause-in-fact of the assault).

[151] *Id.* at 1152 (emphasizing, however, that even with increased security measures, the attack was likely not preventable).

[152] Davies, *supra* note 131, at 973-74. Davies argues that *Saelzler* erodes traditional tort protections based in premises liability:

> Personal injury attorneys rightly perceive *Saelzler* as having erected a substantial, almost insurmountable barrier to premises liability. Under cover of the summary judgment statute, the California Supreme Court has undercut substantive tort law by shifting the meaning of duty and cause in fact and eroding the balance between judge and jury that has been developed through years of tort law. . . . [D]efendants who owe legal duties and have breached them have no incentive to provide greater protection from crime to those entering their land, and in fact, may have a significant disincentive.

Id.

clear in college safety cases,[153] removing the jury from a causation determination may be particularly damaging for injured students.[154] Further, the *Saelzler* holding suggests that even if a court establishes both a duty to provide for students' protection and a subsequent breach of that duty, courts can nevertheless grant defendants summary judgment if they perceive that the student lacks sufficient evidence to prove that the college's negligence caused the harm.[155]

In a recent Delaware college safety case, the court granted the college summary judgment, holding that there was no duty to prevent unforeseeable attacks.[156] The court determined that the college, by placing the student in overflow housing, had assumed a duty to provide him with reasonably safe accommodations; however, this duty did not extend to unforeseeable crimes, such as here, where the attack was preplanned and based on a personal vendetta.[157] Even though the college failed to provide security patrols at the overflow housing, the court stated that the failure was not a breach of duty because the security patrols could not have prevented this attack.[158] Notwithstanding the "no duty" holding, the court also noted that even if the college had a duty to prevent "this particular attack," it would have still granted summary judgment for the college "because no reasonable jury could find that [the college's] failure to provide for patrols . . . was the proximate cause of [the student's] injuries."[159]

The courts' continued use of "no duty" rules to dismiss student injury claims,[160] combined with the implications of the *Saelzler* ruling, may make defeating a summary judgment motion in a negligent security case almost

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[153] *See* Lake, *supra* note 9, at 655 (asserting that *Saelzler* will be relevant in cases where the attacker is unknown).

[154] Injured students may have a better chance of "winning" in trials decided by jury (although many student-favorable outcomes have been reversed on appeal due to a "no duty" ruling). *E.g.*, Bradshaw v. Rawlings, 612 F.2d 135 (3d Cir. 1979) (reversing jury verdict holding the college jointly liable along with several other defendants for an award of $1,108,067).

[155] *See* Saelzler v. Advanced Group 400, 23 P.3d 1143 (Cal. 2001). Davies argues that it is unclear what standard of evidence will be sufficient to raise a triable issue of fact and get the case to a jury, but asserts that if courts follow *Saelzler*, most plaintiffs will not succeed in proving causation to the requisite level of certainty. Davies, *supra* note 131, at 985.

[156] *See* Rogers v. Del. State Univ., No. Civ.A.03C-03-218, 2005 WL 2462271, at *7 (Del. Super. Ct. Oct. 5, 2005).

[157] *Id.* at *6.

[158] *Id.* at *7.

[159] *Id.*

[160] *See, e.g.*, Agnes Scott Coll. v. Clark, 616 S.E.2d 468, 471 (Ga. Ct. App. 2005) (holding that attack on student was "unforeseeable as a matter of law"); Kleisch v. Cleveland State Univ., No. 2003-08452, 2005 WL 663214, at *3 (Ohio Ct. Cl. Feb. 22, 2005) (holding that college did not breach duty of care owed to student in failing to prevent unforeseeable attack).

impossible.[161] If an injured student fails to adequately prove that the college's negligence caused an attack, even if the college owed that student a duty and completely failed to provide any security in an area highly susceptible to criminal attack, a college may escape liability without ever seeing a jury.[162]

B. HIGH-RISK STUDENT ACTIVITIES

High-risk alcohol consumption may be the most significant problem facing college communities today.[163] Nationally, college drinking contributes to 1700 student deaths, 600,000 injuries and 97,000 cases of sexual assault or date rape each year.[164] Despite the prevalence of binge drinking in college communities,[165] many courts refuse to hold colleges accountable for alcohol-related incidents, maintaining that it would be unrealistic and impossible to prevent college students from abusing alcohol.[166] Courts that continue to assume nothing can be done often rely on a revised version of the *Bradshaw* reasoning, asserting that a college's duty does not extend to a student's high-risk behavior.[167] Moreover, many courts reason that impos-

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[161] *See* Davies, *supra* note 131, at 986. Davies cites legal commentator Leon Green:

> [T]he causal relation issues in cases involving failure to provide safeguards for the victim's protection [are] among the "most difficult" . . . . "To ask whether he would have escaped unscathed had the facilities been provided may present a false issue heavily weighted against the victim and one that can seldom, if ever, be answered." . . . [M]uch of the confusion about causation stems from the courts' tendency to overburden the element with policy concerns that relate to other elements of negligence.

Id. (quoting Leon Green, *The Causal Relation Issue in Negligence Law*, 60 MICH. L. REV. 543, 548-62 (1962)).

[162] Like *Nola M.* and *Saelzler*, the Delaware court ruling indicates that even when a college assumes an affirmative duty to protect its students, the college may still escape liability if the plaintiff fails to show, by a preponderance of the evidence, that the college's negligence caused the assault.

[163] Lake, *supra* note 9, at 626.

[164] Shelby Oppel Wood, *OSU Fed Up with Bingers: Campus Leaders Work to End Traditions Built Around Drinking and Try to Show That Students Don't Need Alcohol to Have Fun*, OREGONIAN (Portland, Or.), Oct. 9, 2005, at D1 (citing a 2002 study of college drinking by the National Institute on Alcohol Abuse and Alcoholism).

[165] Jim Hughes, *Students' Binges Growing Heavier*, DENVER POST, Sept. 12, 2004, at C6 (according to a study by the Pacific Institute for Research and Evaluation, although binge drinking is defined as five or more drinks for a male, the latest figures show college males drinking more than twenty-four drinks in one sitting).

[166] This idea has persisted since the *Bradshaw* line of cases. In *Beach v. Univ. of Utah*, 726 P.2d 413 (Utah 1986), the court argued that regulating alcohol would be impossible and undesirable in light of students' emphasis on freedom. Similarly, the court in *Univ. of Denver v. Whitlock*, 744 P.2d 54, 60 (Colo. 1987), stated that taking the responsibility away from the students and putting it with the college would "produce a repressive and inhospitable environment, largely inconsistent with the objectives of modern education."

[167] In *Robertson v. State*, the court ruled in favor of the college on summary judgment after an intoxicated student fell from a college-owned rooftop. 747 So. 2d 1276, 1285 (La. Ct. App. 1999). Despite the fact that the roof at issue had been a clear risk to students for years—many students had

ing a duty to control student alcohol use on college campuses would unduly restrict student rights.[168]

Traditionally, courts have been reluctant to recognize a college's duty of care to an injured student whose high-risk behavior contributed to his or her own harm.[169] However, the media attention surrounding the hazing deaths in the late 1980s and 1990s raised the public awareness,[170] Because policy considerations often influence judicial interpretations, some courts responded to the public outcry by recognizing a duty to protect students from injuries arising out of hazing.[171] Because judges must conduct a policy analysis to determine whether to impose a duty, courts deciding hazing cases likely weighed the gravity and likelihood of hazing injury against the burden of such a duty on colleges. Courts came out on both sides after balancing the harms, and many courts decided that imposing an affirmative duty on colleges to prevent hazing would do more harm than good.

Some courts also recognize a duty of care in cases where students suffering an alcohol-related injury have a chronicled history of abusing alcohol.[172] Alcohol abuse, like fraternity hazing, is common on most college

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climbed the roof, resulting in injury or prompting college police to force them off—the court maintained that the college did not owe the student a duty to warn because the roof was not "inherently dangerous." *Id.* at 1281. In addition, the court relied on the *Bradshaw* line of cases: "Other courts have reviewed the modern university/student relationship, and like *Fox* and *Pitre*, have not imposed upon universities custodial duties for the protection against injury from youthful misjudgments, pranks or alcohol-related accidents." *Id.* at 1282. Thus, "[t]he duty of [Louisiana] Tech to provide a safe campus and not to act unreasonably with regard to its students did not extend to protect [the student] from his deliberate act of recklessness." *Id.* at 1284.

[168] *See* Tanja H. v. Regents of the Univ. of Cal., 278 Cal. Rptr. 918, 920 (Ct. App. 1991). In *Tanja H.*, the court declined to impose a duty on the college:

> College students are generally young adults who do not always have a mature understanding of their own limitations or the dangers posed by alcohol and violence. However, the courts have not been willing to require college administrators to reinstitute curfews, bed checks, dormitory searches . . . and the other concomitant measures which would be necessary in order to suppress the use of intoxicants and protect students . . . . "[I]mposition of such a duty would be unwarranted and impracticable."

Id. (quoting Crow v. State, 271 Cal. Rptr. 349, 359-60 (Ct. App. 1990)).

[169] *See* BICKEL & LAKE, *supra* note 7, at 153 ("College life has assumed over the years, *de facto*, the character of a no-liability social drinking community.").

[170] *See, e.g.*, Carol Jouzaitis, *College Still Stunned by Hazing Death*, CHI. TRIB., Nov. 14, 1990, § Chicagoland, at 1 (discussing student death and hazing concerns generally); Tom Krattenmaker, *Drinking Death Stirs Many Frats to Close Bars and Bring Back Advisers*, L.A. TIMES, Mar. 5, 1989, at A28 (discussing binge-drinking death of eighteen year-old Rutgers University freshman James Callahan at a Lambda Chi Alpha pledging ceremony and responses from the Greek community).

[171] *See* Furek v. Univ. of Del., 594 A.2d 506 (Del. 1991); Knoll v. Bd. of Regents of the Univ. of Neb., 601 N.W.2d 757 (Neb. 1999) (holding that a college has an affirmative duty to protect its students from hazing injuries if the college has a degree of control over it and it was foreseeable).

[172] *See* Coghlan v. Beta Theta Pi Fraternity, 987 P.2d 300 (Idaho 1999) (holding that a college exercised a sufficient degree of control and level of supervision to support an inference that the college

campuses and often results in injury. Further, because alcohol-related injuries are so widespread on college campuses,[173] continuing social and governmental pressures will eventually influence more courts to acknowledge the college's role in facilitating students' high-risk alcohol use.[174]

C. SPECIAL RELATIONSHIPS

Today, although fewer courts rely on the *Bradshaw* rationale that adult students are on their own and have to fend for themselves,[175] "courts have been reluctant to characterize the basic college-student relationship as 'special' so as to invoke a duty on behalf of the college."[176] A few courts, however, have established affirmative duties from the uniqueness of the college-student relationship.[177]

A similar and much more common occurrence is courts determining that student-athletes have special relationships with their colleges. The cases cite various factors that may make the relationship special, including the college's voluntary control and supervision over its athletes, active recruitment of the students' participation, and the benefits derived from the role athletes play at the institution.[178] Notably, an unreported Connecticut decision held that the relationship between a college and a student who sustained injuries participating in a voluntary, but college-recognized cheer-

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voluntarily assumed a duty of care for an underage student who was injured when she fell from a sorority house fire escape after she became intoxicated at fraternity parties).

[173] Congress recognized the problem of binge drinking in enacting the Collegiate Initiative to Reduce Binge Drinking and Illegal Alcohol Consumption, which urges colleges to actively engage "in an effort to change the culture of alcohol consumption on college campuses." *See* Collegiate Initiative to Reduce Binge Drinking and Illegal Alcohol Consumption, 20 U.S.C. § 1011h(b) (2000).

[174] Lake, *supra* note 9, at 625 (arguing that although some courts will continue to apply a "no duty" rule when alcohol is involved, social pressures will make courts more receptive to finding that a college owes an intoxicated student a duty of due care).

[175] *Id*.

[176] Geiersbach v. Frieje, 807 N.E.2d 114, 117 (Ind. Ct. App. 2004).

[177] *See, e.g.*, Furek v. Univ. of Del., 594 A.2d 506,518-19, 522 (accepting the *Mullins* court's "'consensus' duty" theory, which arises out of the uniqueness of the college-student relationship, as well as "the concentration of young people on a college campus and the ability of the university to protect its students"); Mullins v. Pine Manor Coll., 449 N.E.2d. 331, 335 (Mass. 1983) (imposing a duty based on "existing social values and customs" (quoting Schofield v. Merrill, 435 N.E.2d 339, 341 (Mass. 1982))).

[178] *See* Davidson v. Univ. of N.C. at Chapel Hill, 543 S.E.2d 920, 927 (N.C. Ct. App. 2001) (emphasizing that even though the college-student relationship was not itself special, the college established a special relationship with students in the cheerleading program by exerting a degree of control over, and benefiting from, the program, thus giving rise to an affirmative duty of care to plaintiff cheerleader).

leading club, likely presented enough evidence of dependency to give rise to a special relationship between the college and plaintiff cheerleader.[179]

III. "GENERATION Y"

Since the 1980s, courts have continued to widen the scope of colleges' duty of care over their students, substantially altering the landscape of college safety law and the contours of the college-student relationship.[180] The threat of legal liability for student injuries has led many colleges to increase control over student affairs,[181] causing some scholars to fear a return to *in loco parentis*.[182] Even though colleges may be increasing control over their students, there is no genuine threat of the doctrine returning.[183] The change in control and supervision of college students reflects the colleges' reaction to the media-fueled emphases on hazing and substance abuse, judicial demands for colleges to take more responsibility for their students' actions, and the changing student (and parent) expectations of the modern American college.[184]

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[179] Gonzalez v. Univ. Sys. of N.H., 38 Conn. L. Rptr. 673 (Conn. Super. Ct. 2005). In holding that sufficient evidence of the cheerleading club's dependency on the college existed to give rise to a special relationship, the court reasoned that voluntary participation does not necessarily negate the existence of a special relationship. *Id.* Because the club used college space and was entitled to receive monies from the Student Activity Fund, and because the college could maintain a degree of control over club activities through an advisor and required the club members to maintain a minimum GPA, the college's control and supervision over the club was likely sufficient to infer a special relationship. *Id.*

[180] Increasing levels of violent crime on campuses, as well as increased public awareness of the potential dangers of college binge drinking, has led students, parents and lawmakers to take an active position aimed at expanding institutional liability for harms to persons in the campus community. Snow & Thro, *supra* note 58, at 991.

[181] Susan Gurevitz, *From Booze to Breakthroughs: Higher-Education Risks Still Include Drinking Problems and Mental-Health Issues While Universities Also Grapple with Emerging Risks from Research and Technology*, RISK & INS., Sept. 1, 2005, at 32; Edward B. Fiske, *Role of Colleges Widen in Guiding Students' Lives*, N.Y. TIMES, Feb. 22, 1987, at A1.

[182] *See, e.g.*, Hirshberg, *supra* note 34; Snow & Thro, *supra* note 58.

[183] In *The Special Relationship(s) Between a College and a Student: Law and Policy Ramifications for the Post* In Loco Parentis *College*, Peter F. Lake makes three "critical" observations about the current state of safety law in institutions of higher education, or IHE–safety law:

> First, courts continue to insist that *in loco parentis* is dead in higher education law. Second, courts imposing legal responsibility—duty—on IHE's do not do so explicitly on *in loco parentis* doctrine. In fact, the decisions are bereft of any such reference to *in loco parentis*. And, third, it would make no doctrinal sense at all to speak of a return to *in loco parentis* because the doctrine originally existed as a protective insulating doctrine in higher education law with regards to IHE's and it was *not* used to *create* legal responsibilities of IHE's.

Lake, *supra* note 26, at 533 (footnotes omitted).

[184] Fiske, *supra* note 181 (for example, college women's groups have campaigned for more administrative involvement to combat campus sexual assault, including a more visible security force on campus).

Over the past few decades, significant societal changes have transformed the American college scene, including technological advancements changing the form and speed of communication,[185] the Baby Boomers' transition from rebellious students to overprotective parents,[186] increased litigiousness and consumerism,[187] and extensive media coverage of the thousands of student deaths and injuries at colleges each year.[188] Psychological distress, which may take the form of anxiety, depression, binge drinking, substance abuse, self-mutilation or even suicide, is rapidly becoming the most pressing issue facing college students today.[189] In response to these pressures, as well as a "more active interest in the welfare of their students,"[190] colleges have gradually reasserted some authority over student affairs.[191]

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[185] Technology, such as cell phones, wireless computers, Blackberry devices, Instant Messenger and email, have changed the face of modern communication, allowing instant and constant communication. This allows students to continue to rely on their parents for constant support and advice, something past generations of college students were not able to do. Consequently, some social commentators refer to cell phones as eternal umbilical chords, reasoning that college students with constant access to parental support will not have to figure out their own problems, which will delay their emotional maturation. Hara Estroff Marano, *A Nation of Wimps*, PSYCHOL. TODAY, Nov.–Dec. 2004, at 58, 58-70.

[186] *See* Mary Dejevsky, *Old Hippies Turn into Uptight Parents*, INDEPENDENT (London), Mar. 28, 1999, at 21; Jonathan Yardley, *The Old Alma Mommy*, WASH. POST, Mar. 8, 1999, at C2 ("[T]he student rebels of the '60s and '70s, who wanted nothing for themselves except utter license to do anything they jolly well pleased, want nothing so much for their own children as cocoons into which the realities and dangers of the world cannot penetrate."). Hara Estroff Marano notes that "Harvard psychologist Jerome Kagan has shown unequivocally that what creates anxious children is parents hovering and protecting them from stressful experiences." Marano, *supra* note 185, at 58-70. Marano further argues that this generation's hyper-concerned, over-protective parents have created a "fragile" generation of students who are more susceptible to lifelong anxiety and depression. *Id.*

[187] *See* Kara Swisher, *Lawsuits Increase as Campus Attacks Do: Colleges Scramble to Improve Security, Assistance to Victims*, WASH. POST, Feb. 24, 1990, at A1 ("Suing universities is a growing trend as violent attacks on campuses increase . . . .").

[188] BICKEL & LAKE, *supra* note 7, at 3 n.1 (noting the media's extensive coverage of college safety issues and listing numerous articles published in major newspapers since the 1980s about "the growing risk of criminal intrusion and student assault on college campuses, fraternity . . . hazing, alcohol related student injury and death, and the potential liability of the college").

[189] Marano, *supra* note 185 (studies show that relationship issues were the most common problems raised by students for decades, but in 1996, anxiety overtook relationship concerns and has remained the major problem).

[190] Fiske, *supra* note 181, at 28.

[191] Azell Murphy Cavaan, *Strict Rules Make Comeback on Campuses*, BOSTON HERALD, May 23, 1999, at 16 ("In the wake of extreme levels of campus drinking and against the backdrop of an increasingly litigious society, colleges and universities are imposing new restrictions on their students and taking a more supervisory role in students' lives outside of the classroom."); Fiske, *supra* note 181.

Colleges have tried various approaches to reduce binge drinking among students, but the efforts have been met with mixed results.[192] Recently, Congress amended the Family Educational Rights and Privacy Act to allow colleges to inform parents if their child violates campus policies. The amendments are a great departure from longstanding attempts to treat college students like adults and have made many colleges realize that today's college students are "very connected to their parents."[193] For instance, at the University of Wisconsin, the chancellor refused to notify students' parents of violations for years because he wanted to "treat students as adults."[194] However, after evidence indicated that parental notification was effective, Wisconsin adopted a mild disclosure policy that only discloses violations to parents if the student is both "under the legal drinking age of 21 and involved in a serious incident."[195] Similarly, under the University of Georgia's disclosure policy, administrators contact parents of underage students who violate a campus drug or alcohol policy for a second time.[196] The new generation of college students' consumer expectations and willingness to cooperate with authority figures will likely lead to significant changes in college safety law. Moreover, these changes may persuade the courts to revise the current legal definition of the college-student relationship to better reflect today's college experience.

> In short, administrators have a difficult task when sorting out the complex and not always consistent obligations imposed on them by laws and court decisions defining the relationship between them and their students. The legal issues are further complicated by the increasingly active participation of more and more parents in the everyday lives of their college-age children. . . .
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> While the law treats students for some purposes as children and for other purposes as adults, parents view their children as children, for whom they are paying significant tuition bills. They want to be their children's advocates to ensure that the college meets what they believe to be its obligations . . . [and] more often than in the past they want to hold

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[192] Wood, *supra* note 164, at D1 ("Though the proportion of nondrinkers increased in the 1990s, so did the proportion of students who binge-drink frequently, according to a 2001 study by the Harvard School of Public Health.").

[193] Mary Beth Marklein, *Parents Tune In to Realities*, USA TODAY, Nov. 17, 2005, at D1; *see also* 20 U.S.C. § 1232g(b) (2000 & Supp. 2004).

[194] Marklein, *supra* note 193, at D1.

[195] *Id.*

[196] Kelly Simmons & Andrea Jones, *Drinking on Campus: That Old Team Spirit*, ATLANTA J.-CONST., Nov. 19, 2005, at A1.

> the colleges accountable if their children are harmed or do not succeed.[197]

A. GEN Y: "THE CODDLED GENERATION"

The generation of college students born (roughly) between 1978 and 1994 are bringing unique challenges to college campuses.[198] In contrast to the revolutionary climate many of their Baby Boom parents embraced during their college years, Generation Y keeps close ties to mom and dad who, having abandoned the revolution, are now labeled "helicopter parents" for their tendency to hover or be hyper-involved in the lives of their college-aged children.[199] Moreover, growing up in the age of instant communication, this generation of students is accustomed to constant familial guidance and protection.[200] In fact, the unprecedented parental influence on Generation Y college students has already led some colleges to create separate online communities aimed at facilitating college-parent relations.[201]

Modern courts have consistently held that colleges, as facilitators of an expansive learning experience, have a duty to provide a safe learning environment for their students.[202] Accordingly, when college students and

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[197] Wendy S. White, *Students, Parents, Colleges: Drawing the Lines*, CHRON. OF HIGHER EDUC., Dec. 16, 2005, at B16.

[198] Meg Kissinger, *The Millennials: Focused on Achievement and Family and Raised on Technology, Babies of Boomers Are Ready to Make Their Own Impact*, MILWAUKEE J. SENTINEL, June 5, 2005, at A1. This is the first generation to reach 100 million and, in 1996, 65% of high school graduates went to college, up from 46.6% in 1973. *Id.*

[199] Dave Newbart, *The Coddled Generation: Generation Y Keeping Close Ties to Mom and Dad*, CHI. SUN-TIMES, Dec. 27, 2005, at A8. As Wendy White notes:

> [O]ne of the most significant changes today is the larger role that parents play in the lives of their college-age children and the greater expectations that they have of administrators. The "helicopter parent," or hovering parent who repeatedly tries to intervene and manage his or her child's life, seems to be a growing phenomenon on many campuses.

White, *supra* note 197, at B16.

[200] *See, e.g.*, Marano, *supra* note 185, at 58-70 (arguing that today's parents are "taking all the discomfort, disappointment and even the play out of development . . . while increasing pressure for success"); Don O'Briant, *Millennials: The Next Generation*, ATLANTA J.-CONST., Aug. 11, 2003, at D1 (calling this generation "the most protected generation in history").

[201] Alana Klein, *The Payoffs of Parent Outreach*, UNIV. BUS., Dec. 2004, at 57 (noting "a growing recognition by colleges . . . of the changing roles and expectations of incoming college parents . . . [who] are beginning to feel more like invited guests to a command performance").

[202] *See e.g.*, Mullins v. Pine Manor, 449 N.E.2d 331 (Mass. 1983); Miller v. State, 467 N.E.2d 493 (N.Y. 1984); Furek v. Univ. of Del., 594 A.2d 506 (Del. 1991); Nero v. Kan. State Univ., 861 P.2d 768 (Kan. 1993); Coghlan v. Beta Theta Pi Fraternity, 987 P.2d 300 (Idaho 1999); Knoll v. Bd. Of Regents of the Univ. of Neb., 601 N.W.2d 757 (Neb. Ct. App. 1999); Nova Se. Univ., Inc. v. Gross, 758 So. 2d 86 (Fla. 2000); Stanton v. Univ. of Me., 773 A.2d 1045 (Me. 2001). However, courts have generally "held that college is an educational, not a custodial, institution, and that it is both unrealistic and inconsistent with the objectives of higher education to hold institutions liable for injuries resulting from irresponsible student conduct." White, *supra* note 197, at B16.

their parents arrive on campus, they reasonably expect colleges to provide sufficiently safe housing and supervision over extracurricular activities. However, "the coddled generation," named for their overprotective parents and (often literally) cushioned upbringings,[203] will likely expect more from colleges than an ordinary duty of care and may challenge colleges to offer safer, more protective environments.

Many argue that this overconfidence and sense of entitlement stems from consumerism and a generation of parents, emerging in the early 1980s, who emphasized self-esteem and largely sheltered Generation Y from disappointment and risks.[204] These emotional child safety measures were coupled with physical safety measures, including "Baby on Board" car stickers, child-safety seats and bicycle helmets, ultimately leading to increased litigiousness in America as the law and various institutions were forced to accommodate the new protectionism of Baby Boomer parents.[205] The reliance that today's students have on their parents,[206] and their parents' corresponding willingness to intervene in college-student affairs, will help persuade colleges and judges to redefine the college-student relationship in terms more appropriate to modern American culture.[207]

IV. A NEW DEFINITION FOR A NEW GENERATION

Ever since the demise of *in loco parentis*, courts have relied on traditional negligence law to shore up college safety law, largely resulting in inconsistent rulings.[208] In light of the importance and prevalence of a college education in modern society, colleges and students need and deserve a legal

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[203] *See* Newbart, *supra* note 199.

[204] *See, e.g.*, Marano, *supra* note 185.

[205] *See, e.g.*, N.J. Div. of Highway Traffic Safety, N.J. Dep't of Law & Pub. Safety, New Law Requires More Protection for Child Passengers, http://www.nj.gov/lps/hts/childseats/childseats_newlaw.html (last visited Apr. 9, 2007). Moreover, many elementary schools fearing liability for children injured on playgrounds have responded by eliminating recess from the school day. *See* Lane DeGregory, *Out of Play*, ST. PETERSBURG TIMES (Fla.), Mar. 29, 2005, at E1. Also contributing to the demise of recess are lawsuits alleging playground bullying, as well as the federal equal access requirements, which requires playground equipment to be ADA-approved. *Id*.

[206] With cell phones and email, today's students are able to stay in touch with their parents to a degree not seen among previous generations. *See* Newbart, *supra* note 199.

[207] High tuition costs, coupled with high expectations have led many parents to blame the school whenever their kids get in trouble—"for $50 grand a year, they expect their kids back in perfect shape." Gurevitz, *supra* note 181. Many laws have come about due to the influence of parents whose children have been injured or killed, such as the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act. *See generally* Crystal L. Keels, *The Best-Kept Secret: Crime on Campus*, BLACK ISSUES HIGHER EDUC., May 6, 2004, at 20.

[208] Lake, *supra* note 12, at 23-28.

definition of the college-student relationship that accurately reflects its uniqueness, as well as the distinctness of modern campus culture.[209] The difficulty lies, in part, in the confusion created by the post-immunity era, both in the courts and on college campuses.

The failure to put forth a model that appropriately balances the rights and responsibilities of the modern college-student dynamic has led colleges to respond "with a mix of attempts to reassert paternalistic control where duty is clear and to avoid all signs that they might be assuming a duty where it is not clear."[210] In addition, colleges have so significantly withdrawn from the realm of character formation and moral guidance that the idea colleges bear any responsibility for the "character of their graduates has today a ring of anachronism and nostalgia."[211]

A. DEFICIENT MODELS POST–*IN LOCO PARENTIS*

The bystander model is inappropriate because it requires students to be completely responsible for their own safety, while allowing colleges to create and maintain obvious risks to student safety without consequence.[212] Bystander era cases, which were based on a misguided understanding of *in loco parentis*, discouraged imposing any college responsibility and reasoned that students, as adults, should be solely accountable for their behavior.[213] Courts promulgated the "no duty" rule to avoid requiring student supervision for fear that it "would produce a repressive and inhospitable environment, largely inconsistent with the objectives of a modern college education."[214] However, as *Furek v. University of Delaware* revealed, "no legal or other authority is cited for [that] assertion."[215] Additionally, unlike the rebellious Baby Boomers of the 1960s and 1970s, today's college students and parents are demanding that colleges play a wider role in promoting a safe learning environment.

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[209] Wendy White argues that the shift toward imposing a stricter duty on colleges to supervise student activities "may reflect the normal swing of the pendulum, general litigation trends, or maybe even pressure from helicopter parents." White, *supra* note 197, at B16.

[210] Goodman & Silbey, *supra* note 10, at 25.

[211] *Id.* (quoting DAVID A. HOEKEMA, CAMPUS RULES AND MORAL COMMUNITY: IN PLACE OF IN LOCO PARENTIS 19 (1994)).

[212] *See* Butler, *supra* note 59, at 108.

[213] *See, e.g.*, Univ. of Denver v. Whitlock, 744 P.2d 54, 59-60 (Colo. 1987) ("[T]he college student is considered an adult capable of protecting his or her own interests; students today demand and receive increased autonomy and decreased regulation on and off of campus.").

[214] Beach v. Univ. of Utah, 726 P.2d 413, 419 (Utah 1986).

[215] Furek v. Univ. of Del., 594 A.2d 506, 518 (Del. 1991).

The bystander era courts also promulgated the business model, but this too devalues the college-student relationship by analogizing the relationship to that of a common business and consumer. The model fails to recognize that colleges are not just providing goods and services to paying customers and that students are more than just "ordinary customers buying a sandwich or shirt."[216] It is true that today's college students are increasingly consumeristic, but promoting the idea that students should simply "get what they want and pay for" is inconsistent with the college experience because it fails to reflect the important aspect of shared community on campus.[217] Moreover, strict application of the business model may foster a sense of entitlement that some fear is already characteristic of Generation Y students.[218]

Because this generation of students grew up with an unprecedented amount of supervision and guidance,[219] it is essential to define a model that recognizes their continued need for guidance and structure, but also emphasizes personal responsibility.[220] While Generation Y college students need to mature and learn to be more responsible, many are not prepared for an abrupt transition into a hands-off environment, which may increase the already dangerous level of risk these students face.[221]

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[216] BICKEL & LAKE, *supra* note 7, at 182.

[217] *See id*. at 184-85. The authors note that one commentator, Arthur Levine, has pointed to grade inflation to illustrate how strict business model application results in the emergence of the radical and libertarian aspects of freedom and tends to polarize student conduct. *See id.*

[218] *See, e.g.*, Newbart, *supra* note 199.

[219] David Brooks, *The Organization Kid*, ATLANTIC MONTHLY, Apr. 2001, at 40. Brooks argues that kids today "lead lives that are structured, supervised, and stuffed with enrichment." *Id.* at 42. A University of Michigan time-analysis study done at the Institute for Social Research reveals "the best picture of the trend":

> From 1981 to 1997 the amount of time that children aged three to twelve spent playing indoors declined by 16 percent. The amount of time spent watching TV declined by 23 percent. Meanwhile, the amount of time spent studying increased by 20 percent and the amount of time spent doing organized sports increased by 27 percent. . . . In 1981 the association U.S. Youth Soccer had 811,000 registered players. By 1998 it had nearly three million.

Id.

[220] *See id.* at 52-54. Brooks further notes the tendency for micromanaged and sheltered kids to go crazy when given unrestricted, immediate freedom:

> By the time they reach college, they take this sort of pace for granted, sometimes at a cost. In 1985 only 18 percent of college freshmen told the annual University of California at Los Angeles freshman norms survey that they felt "overwhelmed." Now 28 percent of college freshmen say they feel that way.

Id. at 42.

[221] *See, e.g.*, Robert Davis & Anthony DeBarros, *First Year in College Is the Riskiest*, USA TODAY, Jan. 25, 2006, at A1 (noting that freshmen die at higher rates than other college students, representing half of all undergraduate deaths from falling and forty-seven percent of all deaths occurring on campus; they are also more likely to commit suicide, accounting for forty percent of all undergraduate suicides).

B. A NEW FORMULATION OF THE COLLEGE-STUDENT RELATIONSHIP

A college campus should be a community with regulations and values that are sensitive to the transitional stage of today's college students, but also facilitate maturation and promote personal responsibility. In light of the fact that many "coddled" college students will be shouldering exponentially more responsibility and experiencing more freedom than they ever have, it is important that a college provide its students with a degree of structure.

Professors Bickel and Lake propose a doctrinal model for college safety law that situates the college as a "facilitator of student education and development."[222] The "Facilitator Model" envisions a college-student relationship characterized by empowerment and shared responsibility.[223] According to Bickel and Lake,

> [f]or university life to be reasonably safe, there must be mutual, shared responsibility. The university is an environment, like others, which must collectively take charge of its own. . . . In teaching our students to balance freedom and responsibility, we do best by seeking legal standards for university/student relations that are set by balance, not extremes.[224]

The facilitator college accounts for the realities of modern campus culture by providing a reasonably safe environment that allows students to make choices on their own in furtherance of "overall educational goals."[225] Further, the facilitator college recognizes the consumeristic nature of modern culture while emphasizing the uniqueness of the college experience and the college student.[226]

The Facilitator Model provides a reasonable approach to many issues of college life while recognizing that skyrocketing college tuition costs have led parents and students to expect more from a college education. Often Generation Y college students face transitional issues,[227] and the facili-

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[222] BICKEL & LAKE, *supra* note 7, at 16. The authors emphasize that the educational mission of a college refers to "[e]ducation (in the broader sense, not just classroom instruction)." *Id.* at 194-95.

[223] *Id*. at 16.

[224] *Id.*

[225] *Id.* at 194. The authors advocate teaching students to "consume" college life without diverging from the educational mission: "[n]oise and alcohol restrictions facilitate studying. Co-ed dorms, properly managed, can facilitate safer living for female residents and greater socialization for young men and women." *Id.*

[226] *See id*. "College is not an arms-length bargaining process. Most students are in-between pure consumers and those under fiduciary care." *Id*.

[227] Although college administrators assert that Generation Y students are more focused than those just a decade earlier, their parents' heavy investment in them (both financially and emotionally)

tator college has a duty to be aware of potential risks and to protect students in light of the existing circumstances.[228] Moreover, a facilitator college assumes responsibility, just as a student does, for unreasonable risks arising from "lack of proper university planning, guidance, instruction, etc."[229] Thus, comparative fault is a benchmark of the Facilitator Model, focusing on the actor's reasonableness in discharging his or her responsibility to determine liability.[230] A facilitator college does not abdicate its duty to use reasonable care to prevent foreseeable harm by virtue of a student's negligence, but instead balances fault to arrive at shared liability.[231]

The Facilitator Model is too consumer-oriented. Although a student pays for a bundle of services, receiving a college education is not merely a business transaction and colleges are not strangers to their students. While this model focuses on college flexibility, a new doctrinal model must stabilize college safety law. Courts applying the Facilitator Model will have difficulty deriving consistency in the law because the model's duty analysis requires courts to balance the rights and responsibilities inherent in each specific college-student relationship.[232] To determine whether a college owes a student an affirmative duty, courts using the Facilitator Model must apply a policy-factor analysis that requires balancing the following:

> (1) foreseeability of harm;
>
> (2) nature of the risk;
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> (3) closeness of the connection between the college's act or omission, and student injury;
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> (4) moral blame and responsibility
>
> (5) the social policy of preventing future harm (whether finding duty will tend to prevent future harm);
>
> (6) the burden on the university and the larger community if duty is recognized;
>
> (7) the availability of insurance.[233]

Professors Bickel and Lake contend that if the courts universally apply the policy-factor analysis, it will result in a predictable doctrinal model

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takes its toll: "Coping with reality—plus constant pressure to succeed—can lead to increased anxiety . . . ." Newbart, *supra* note 199, at 8.

[228] *See* BICKEL & LAKE, *supra* note 7, at 193 (noting that a facilitator adapts to provide limited or more expansive roles to students, depending on their needs).

[229] *Id*. at 195.

[230] *See id.* at 195-96.

[231] *See* Butler, *supra* note 59, at 113.

[232] *See id.* at 114.

[233] BICKEL & LAKE, *supra* note 7, at 202.

from which to determine duty;[234] but this is an unlikely outcome because few of these factors have static definitions. The Facilitator Model is therefore an ideal that, while potentially helpful for college administrators in structuring student relations, would likely exacerbate the already present inconsistencies in judicial application. Because consistency is so important in college safety law, there is a great need for a legal definition of the college-student relationship that will allow courts to begin a more coherent legal era in college safety law.

I propose the Millennial Model, a college safety law paradigm based on mutual reliance, which gives rise to a special relationship between the college and student.[235] Although courts have resisted finding the college-student relationship per se special,[236] modern societal trends indicate that students and parents increasingly rely on colleges for protection. Further, in today's competitive market of college admissions, a college relies on its student body to both pay tuition and beneficially contribute to its image. The Utah Supreme Court recently indicated a willingness to establish a special relationship between a college instructor and a student in *Webb v. University of Utah*.[237] The court acknowledged that while college instructors do not generally have a special relationship with their students, "altering the academic environment" might create a special relationship.[238] The court logically reasoned:

> The hypothetical possibility that a special relationship can be created between an instructor and a student in a higher education setting flows from the fundamental reality that despite the relative developmental maturity of a college student compared to, say, a pre-schooler, a college student will inevitably relinquish a measure of behavioral autonomy to

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[234] *See id*. at 202-205.

[235] *Black's Law Dictionary* defines the "special-relationship doctrine" thus:

> The theory that if a state has assumed control over an individual sufficient to trigger an affirmative duty to protect that individual (as in an involuntary hospitalization or custody), then the state may be liable for the harm inflicted on the individual by a third party. This is an exception to the general principle prohibiting members of the public from suing state employees for failing to protect them from third parties.

BLACK'S LAW DICTIONARY 1433 (8th ed. 2004). "The general question of whether university school officials and students have a 'special relationship' such that there is an affirmative duty to protect and keep free from foreseeable harm . . . has not been addressed by the United States Supreme Court." Webb v. Univ. of Utah, 125 P.3d 906, 911 (Utah 2005) (quoting Apffel v. Huddleston, 50 F. Supp. 2d 1129, 1132 (D. Utah 1999)).

[236] *Webb*, 125 P.3d at 911 ("[S]ince the late 1970s, the general rule is that no special relationship exists between a college and its own students because a college is not an insurer of the safety of its students." (quoting Freeman v. Busch, 349 F.3d 582, 587 (8th Cir. 2003))).

[237] *See id*. at 911-12 (holding that a college instructor's level of control outside of the classroom was insufficient to give rise to a special relationship).

[238] *Id*. (suggesting that taking college students on a field trip to an area an instructor thought was safe, but turned out not to be, could give rise to a duty to protect).

> an instructor out of deference to her superior knowledge, skill, and experience.[239]

Although the *Webb* court ultimately held that the student's level of detrimental reliance was insufficient to establish a special relationship,[240] the court left open the "possibility that a special relationship may emerge from the university-student relationship."[241]

Importantly, the Supreme Court of Utah identifies "detrimental reliance" as the primary factor in determining whether a college-student relationship may be deemed a special relationship.[242] The court effectively states that a special relationship would have been found if the instructor's directive had a "tangential relationship to the field trip's academic mission" and a student reasonably relied on that directive to his or her own detriment.[243] Under this paradigm, therefore, a college is liable if it makes representations, directives, or acts to *reasonably* induce detrimental reliance by a student.[244] The *Webb* court reasoned that "[a] directive received in connection with a college course assignment is an act that would engage the attention of the prudent student."[245] The court set forth practical reasons for which this would be true, such as a student's desire to please a teacher and the student's belief that a teacher has a greater understanding of the subject and environment in which it is taught.[246] The *Webb* court refused to extend an affirmative duty to the college because "the directive given [to the student] . . . did not relate directly to the academic enterprise of the class."[247]

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[239] *Id*. at 911.

[240] *Id.* at 912 ("It is certainly possible that a directive inducing detrimental reliance may be one that creates an unreasonable risk of harm to the people expected to follow it. . . . [W]e conclude that [this] directive . . . does not meet this standard.").

[241] *Id*. ("We are not prepared to endorse the State's position that every college student is responsible for his [or her] own protection in any school-related activity, regardless of the risk.").

[242] *See id*. (noting that "actions that reasonably induce detrimental reliance" may create an "unreasonable risk of harm to the people expected to follow it").

[243] *Id*. at 912-13.

[244] *Id.* at 912 (citing the special relationship factors set out in *Day v. State*, 980 P.2d 1171 (Utah 1999), and using the third factor as the basis for its analysis: "(3) by governmental actions that reasonably induce detrimental reliance by a member of the public").

[245] *Id.*

[246] *See id.*

[247] *Id*. In referring to the "academic enterprise of the class," the court explained that

> it is not reasonable to believe that any student would understand that his [or her] academic success, measured either by the degree of knowledge acquired or by the positive impression made on the instructor, turned on whether they abandoned all internal signals of peril to take a particular potentially hazardous route to view fault lines.

Id. at 912-13.

Under the Millennial Model, the college-student relationship gives rise to an affirmative duty to act based on a student's detrimental, *reasonable* reliance on a college's act that is tangentially related to the college's *overall* mission. This paradigm does not make the college "an insurer of the safety of its students,"[248] but instead gives rise to an affirmative duty when a student reasonably relies on some act by the college that has a tangential relationship to the college's overall mission. The college-student dynamic creates a relationship of reliance and trust between the college and its student body based on a student's desire to succeed academically and to contribute to the broad educational mission of the college community.[249] As the *Webb* court noted, in the modern academic environment there exists a "fundamental reality that . . . college student[s] will inevitably relinquish a measure of behavioral autonomy . . . out of . . . deference to . . . superior knowledge, skill, and experience."[250] And, although the *Webb* court limited its analysis to the relationship between a college student and his instructor, today's college students relinquish the same control to the college itself.

The Millennial Model acknowledges that Generation Y college students are accustomed to relying on authority figures, and even expect their support. Thus, under this college safety paradigm, colleges have a duty to accommodate this "coddled generation"—to an extent—and both the college and its students must exercise a reasonable degree of care within the expansive scope of the educational mission.[251] Although millennial colleges have an affirmative duty to protect their students from foreseeable harm within the scope of this relationship, students have the corresponding duty to act reasonably under the circumstances. Consequently, millennial students should not expect their colleges to protect them from danger or injuries resulting solely from acts that a college had no reason to know about, acts the college had no power to protect against, or from the student's own patently irresponsible behavior. Therefore, under the Millennial Model, the

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[248] Bradshaw v. Rawlings, 612 F.2d.135, 138 (3d Cir. 1979).

[249] The formulation I propose, the Millennial Model, is also similar to Jane Dall's "educational mission" approach to adjudicating legal claims arising out of the college-student relationship. Under the "educational mission" approach, "a college owes a duty when it has clear responsibilities stemming from its educational mission." Dall, *supra* note 8, at 519. Dall defines the scope of the "educational mission" to include "many aspects of student life and community involvement such as residential life, multicultural programs, student organizations, student government, student media, community service, internships and externships, technology, health and fitness, and spirituality." *Id.*

[250] *Webb*, 125 P.3d at 911.

[251] I agree with Dall and believe that colleges have greatly expanded their educational missions in response to consumer demands and advanced technology. Thus, the Millennial Model bases the scope of the college-student relationship on the expansive aspects of Dall's "educational mission" listed in note 249.

college-student relationship is deemed per se special, while simultaneously emphasizing reasonableness under the circumstances and the reality that, every fall, a new freshman class of Generation Y students reasonably "relinquish[es] a measure of behavioral autonomy" to their respective colleges.[252]

V. CONCLUSION

Over the last century, the drastic social, political and legal changes that have occurred in America have transformed the nature and administration of higher education. The resulting expansion of the modern American college's educational mission, including diversified course offerings, increased student enrollment rates and larger campuses, has simultaneously increased the likelihood of student injury and, eventually, heightened the potential for college tort liability.[253] Up until the 1960s, the doctrine of *in loco parentis* and other legal protections shielded colleges from tort liability. Nevertheless, even after colleges lost these legal immunities, the lack of a viable, consistent doctrinal model for college safety law left students with few opportunities to seek tort damages from negligent colleges. In the new millennium, college safety law will likely continue to shift toward college accountability as parents exert more pressure on colleges to protect their college-aged children, and as colleges and courts realize that Generation Y college students are more receptive to administrative control and guidance than past generations.

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[252] *Webb*, 125 P.3d at 911.

[253] *See* Alex Kingsbury, *Say It Ain't So: Frats Gone Mild*, U.S. NEWS & WORLD REP., Nov. 28, 2005, at 40.