Missouri Law Review

Volume 64
Issue 1 *Winter 1999*

Article 6

Winter 1999

Rise of Duty and the Fall of In Loco Parentis and Other Protective Tort Doctrines in Higher Education Law, The

Peter F. Lake

MISSOURI
LAW REVIEW

VOLUME 64 WINTER 1999 NUMBER 1

The Rise of Duty and the Fall of *In Loco Parentis* and Other Protective Tort Doctrines in Higher Education Law

*Peter F. Lake**

I. INTRODUCTION

The story of twentieth century higher education student safety law[1] is the gradual application of typical rules of civil liability to institutions of higher education and the decline of insulating doctrines, such as *in loco parentis,*[2] which traditionally protected institutions of higher learning from scrutiny in the legal system. A series of recent events have brought public (and legal) attention to questions about the legal rules governing university responsibility for student injuries.[3] In recent times, courts have reversed a long-standing tradition of protecting universities from civil liability for physical injury to students arising

* ©Peter F. Lake (1999), A.B., J.D., Harvard University; Professor, Stetson University College of Law. The Author expresses gratitude to Professor Robert D. Bickel, who offered valuable insights on this Article. Professor Bickel and the Author are co-authors of THE RIGHTS AND RESPONSIBILITIES OF THE MODERN UNIVERSITY: WHO ASSUMES THE RISKS OF COLLEGE LIFE? (forthcoming Spring 1999, Carolina Academic Press).

1. Higher education includes colleges, community colleges and universities, undergraduate and graduate programs. Except where particularly relevant, I use "college, university" and "higher education" more or less interchangeably.

2. "[I]nstead of a parent; charged factitiously with a parent's rights, duties and responsibilities." BLACK'S LAW DICTIONARY 787 (6th ed. 1990).

3. *See* Leo Reisberg, *Some Experts Say Colleges Share the Responsibility for the Recent Riots*, THE CHRONICLE OF HIGHER EDUCATION, May 15, 1998, at A48. Recent campus riots over beer privileges, a string of alcohol related deaths at prestigious colleges including MIT and LSU and student injuries in study abroad programs and externships have been discussed in the media.

in the course of education. It is a time of transformation and transition in higher education and higher education student safety law.

In the last few decades, courts have applied (and focused upon) the tort/negligence law of "duty" to university affairs affecting student safety. The ascension of duty (and the fall of insulating doctrines) is an unmistakable transformation in higher education law. The rise in application of duty rules has brought an increase in legal liability and also an increase in judicial scrutiny of college affairs. Still, in many cases, courts use duty analysis to determine that there is no university liability. The messages of the new era of university law—the duty era—are cautious and mixed; with duty has come responsibility and legal accountability, but not always legal liability.[4]

Understandably, the shift to duty analysis has caused substantial confusion and concern in the higher education community. The most common concern (facilitated by several court decisions of the 1970s and 1980s) is that the law of higher education is "returning" to some bygone era in some way or other and/or that institutions of higher education are shouldering extreme or unusual burdens.[5] In actuality, what is and has been occurring is both entirely new and familiar. The widespread application of duty rules and principles to colleges is new: yet, those rules and principles are similar to ones which courts typically use with regard to other similar operations, especially businesses. The rise of duty is the special application of business law and other standard duty rules to university operations. It has been a time of mainstreaming for higher education law. The duty era is a period that features paradigms of shared responsibility for risk and injury to students.

II. THE FOUR PHASES OF MODERN UNIVERSITY LAW AND THE TREND TOWARDS MAINSTREAMING

To appreciate how higher education safety law arrived at its current state, it is useful to recognize four evolutionary/historical phases in the growth of university law. The first phase—roughly from the beginning of the Republic to the early 1960s was the epoch of *legal insularity.* In that period, universities were protected from legal actions of almost all varieties involving student safety and discipline. Courts protected university affairs by way of a trinity of tort immunities and related tort doctrines. There was little case law until the 1960s: so little in fact that there are more reported higher education safety law cases in

4. Courts today assiduously avoid imposing strict liability on colleges and instead favor approaches which apportion responsibility among students and institutions. *See infra* Section VI.A.

5. *See, e.g.*, Brian Jackson, *The Lingering Legacy of In Loco Parentis: An Historical Survey and Proposal for Reform,* 44 VAND. L. REV. 1135 (1991); James J. Szablewicz & Annette Gibbs, *Colleges' Increasing Exposure to Liability: The New In Loco Parentis*, 16 J.L. & EDUC. 453 (1987).

the last five or so years than there were in the nearly two centuries preceding. In the next phase—the *civil rights* phase—higher education lost immunities regarding certain rights over student discipline and regulation. In this phase (roughly the 1960s and early 1970s) university insularity was breached by a series of cases holding that public universities must provide basic constitutional rights to students. The fall of some legal insularity harbinged even more dramatic legal inroads into university affairs. The third phase (roughly the mid-1970s to mid-1980s) saw an almost complete redefinition of legal regulation of college safety rules. This phase was defined by certain signature cases that put the modern college in the role of a *bystander* or a *business*. This phase saw the *rise of duty* law and saw universities shoulder new responsibilities in certain *business* categories, but also saw them deflect responsibility ("no-duty") as *bystanders* to some student misconduct, particularly dangers associated with alcohol use and abuse. This phase has been particularly troublesome for courts and commentators to sort out, partly because courts in that period did little to attempt to reconcile apparently disparate (some duty, some no-duty) opinions. The current and fourth phase—the *duty* phase—is truly an extension of the previous phase. Courts today continue to consolidate university law around *duty* paradigms and have begun to challenge some no-duty rules of the previous *bystander/business* period.

Under current prevailing doctrines, the closest analogy to university legal responsibility for student safety remains business responsibility for customer/consumer/tenant safety. Increasingly, courts treat universities—public and private—like other businesses. Yet, throughout the history of the law of higher education, universities have received unique and special treatment. In the current duty era, this special treatment now reflects in the special application of general rules of tort duty to institutions of higher learning. In essence, universities are business-like, but are not businesses like shopping malls or restaurants. To courts, universities collectively are *sui generis*: and each college or university environment must be evaluated individually for its own special circumstances as well. Thus, the current duty era is both a time of mainstreaming and of tailoring.

III. ERA OF INSULARITY: UNIVERSITY PROTECTION BY IMMUNITIES AND OTHER COMMON LAW DOCTRINES PRE-1960

With few exceptions, the typical college or university was *insularized* from legal scrutiny regarding student safety and student rights until the early to mid 1960s (more or less). First, the typical university was considered to be similar to institutions like the family, charities, and the government, which had all been afforded substantial protective tort immunities.[6] In addition, colleges enjoyed

6. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, 901-07, 1032-71 (5th ed. 1984).

the protection of defensive tort doctrines that were shared by society at large. For example, to the extent that the use of alcohol by students created risks of physical danger, a college typically enjoyed—like many other defendants of that era—broad protection from tort liability for alcohol related injuries. Another example: by common rules of proximate causation of that era a deliberate attacker would have been the *sole* proximate cause of a student victim's injuries, even where a college had been negligent in maintaining security on campus. And, prior to the advent of comparative fault, all-or-nothing affirmative defenses of contributory negligence and assumption of risk would have barred many student injury claims, just as they would have barred the claims of many other plaintiffs in other settings.[7]

There was never a "university" tort immunity as such: courts wove analogous immunities given to other institutions and other doctrines together to make a *de facto* university immunity that was similar to, but not the same as, protections given to other major societal institutions. Where appropriate, the university was immunized as a parent (*in loco parentis*), a charity, or a government; or protected like a "social host" would be regarding alcohol use, or shielded by rules of proximate causation or by all-or-nothing affirmative defenses. The net result was minimal legal/judicial intrusion in college affairs regarding student rights and safety.

A. Family Immunity—In Loco Parentis

Until relatively recently, the college/student relationship was considered to be as much, if not more of, a college/*parent* affair than a direct college/*student* relationship. In other words, a parent sent a "child" off to college—entering into an agreement with the institution—and delegated certain supervisory and disciplinary powers in the process. With regard to certain types of activities—those principally involving deliberate institutional acts of student regulation and discipline—the college stood "*in loco parentis*."[8] The power of *in loco parentis* lay in the immunity that a college received from courts regarding lawsuits by students who were disgruntled over regulation and discipline.[9]

---

7. *Id.* at 461, 480-81.

8. *See* Stetson Univ. v. Hunt, 102 So. 637 (Fla. 1924); Illinois *ex rel.* Pratt v. Wheaton College, 40 Ill. 186, 187 (1866); Gott v. Berea College, 161 S.W. 204 (Ky. Ct. App. 1913).

9. Brian Jackson put it this way:

> The use of *in loco parentis* amounted to blanket judicial approval for all *disciplinary* actions against students. Some opinions invoking *in loco parentis* referred to contract law and contained premonitions of more balanced alternatives. Most courts, however, remained hostile to the student litigant. Any rule or regulation, however broad, was enforced. More important, the courts were unwilling to question a university's determination that the student was guilty of violating the rule at issue. Students enjoyed virtually no

Very few students, parents, or others tested the college regulatory disciplinary power during the pre-1960s heyday of *in loco parentis*. While courts hinted at possible judicial intervention in some disciplinary matters,[10] colleges typically won cases even when rules were vague, imprecise, and salutary, and when enforcement of rules was so procedurally casual that it bordered upon arbitrariness and capriciousness. Expelling a student summarily for "offensive habits," for example, was permissible.[11] Not surprisingly, given that sort of latitude, a college could prevent students from associating in certain ways or frequenting certain establishments,[12] or regulate virtually any form of expression or conduct on or off campus,[13] and of course, grade, evaluate, expel, etc. almost at will.[14]

The root of the power to be *in loco parentis* lay in contract and/or in delegation of sovereign power from the state via charter.[15] Whether by explicit agreement, tacit agreement, and/or by delegated sovereign authority, the university—public or private—acquired parental *rights* and *powers*.[16] In this era, a parent was virtually immune from lawsuit by a child: the parent had broad rights to discipline, etc., and a child had little or no right to protection from a parent's intentional or negligent torts, particularly those involving intangible interests like speech, association, and economic opportunity.[17] The college stepped—at least in part—into this parental immunity. When a college deliberately regulated or disciplined a student—allegedly denying that student intangible, civil, or economic rights—the courts used *in loco parentis* to immunize the college.

Today, there is quite a bit of discussion in the literature of a perceived return to or "lingering" of *in loco parentis*.[18] The concerns relate to certain

---

protection from either vague or intrusive rules or inadequate procedural safeguards.

Jackson, *supra* note 5, at 1147-48 (emphasis added) (footnote omitted).

10. *See, e.g.*, *Gott*, 161 S.W. at 206 (stating that a court will only interfere with college regulations that are "unlawful or against public policy"); *see also* Anthony v. Syracuse Univ., 231 N.Y.S. 435 (App. Div. 1928) (using rules of contract interpretation favorable to a university in upholding regulatory/dismissal power).

11. *Hunt*, 102 So. at 640-41.

12. *Gott*, 161 S.W. at 205-07 (upholding rule forbidding students from entering "eating houses or places of amusement" not controlled by the college).

13. Stetson Univ. v. Hunt, 102 So. 637, 640-41 (Fla. 1924).

14. In one case, a student at Syracuse University was successfully expelled for not being "a typical Syracuse girl." *Anthony*, 231 N.Y.S. at 437.

15. *See* Gott v. Berea College, 161 S.W. 204 (Ky. Ct. App. 1913); Anthony v. Syracuse Univ., 231 N.Y.S. 435 (App. Div. 1928).

16. *See Gott*, 161 S.W. at 206; *Anthony*, 224 N.Y.S. at 435.

17. *See* Hewellette v. George, 9 So. 885 (Miss. 1891).

18. *See* Jackson, *supra* note 5, at 1151-60; Brian Snow & William Thro, *Redefining the Contours of University Liability: The Potential Implications of* Nero v. Kansas State University, 90 ED. LAW. REP. 989, 991-93 (1994); Szablewicz & Gibbs, *supra* note 5, at

modern cases[19] that impose responsibilities on colleges to "protect" students from danger and appear to be a manifestation of a protective parental role for colleges toward students. These concerns, however, are historically misguided and doctrinally incoherent. As Theodore Stamatakos has pointed out, no historical case ever openly used *in loco parentis* to protect student safety by determining that colleges had legal responsibilities (or duties) to students to protect them.[20] The *in loco parentis* doctrine was used entirely as a way to defend a college's exercise of authority, not to require a college to exercise disciplinary or regulatory power. *In loco parentis* was a shield for colleges, not a sword for students. It was a power, not a duty. At common law, parents were not legally required to care for their children's safety interests.[21] The notion that placing someone *in loco parentis* would create a duty to care for a child (student) is a latter day development in K-12 education law. During the heyday of *in loco parentis*, a parent had no *legal responsibility* to discipline or "regulate" a child; the parent had a *right* to do so. It is tempting to think in terms of correlative rights and duties, particularly because most American colleges and universities did exercise substantial dominion, control, and protection over students and student lives. However, *in loco parentis* was an *immunity*, woven with others, that a college could assert against certain kinds of student claims. To return to or to reconfigure *in loco parentis* would be to recreate an era of legal immunity, not legal duty.

B. University as Immune Charity or Governmental Entity

In the period before the 1960s, the case law sometimes confronted a different type of problem than that presented by the typical *in loco parentis* case. In those other cases, courts were asked by students to impose duties of care upon colleges to protect students' *physical safety* in dormitories, classrooms, and walkways, with regard to other students or persons, and on field trips, etc. The issues in these cases were about physical safety of students—not discipline or expulsion—and typically raised questions of university *negligence* (acts or omissions or both), not deliberate or intentional acts of disciplinary or regulatory power.

With little exception, universities were also once broadly immunized from liability in these lawsuits. A tort parental immunity would have functioned very well to protect colleges from negligence based tort lawsuits based upon alleged

---

457-64.

19. *See, e.g.*, Nero v. Kansas State Univ., 861 P.2d 768, 779 (Kan. 1993) (holding that college, as landlord, has duty to protect female student tenants from known dangerous assailant).

20. Theodore Stamatakos, Note, *The Doctrine of In Loco Parentis, Tort Liability and the Student–College Relationship*, 65 IND. L.J. 471, 482-83 (1990).

21. *Hewellette*, 9 So. at 887.

failures to protect students, maintain premises, etc. Again, at common law parents were virtually entirely immune from such lawsuits. Courts, however, chose another path to insularize university activities from lawsuits. If a college were a *private* institution, courts often invoked charitable immunities as a way to block tort lawsuits.[22] If a college were a *public* institution, courts would invoke governmental immunities (and sometimes also charitable immunities, if appropriate) to protect that college from tort lawsuits.[23] Students sought to impose ordinary tort duties upon higher educational institutions,[24] but courts analogized universities to charities and governments for these purposes. Where there were traditional exceptions to either immunity,[25] and to the extent these immunities began to erode before 1960, students might have found a crack in the armor of university insularity,[26] but the cracks were not wide.

C. Protections Afforded by Rules of Proximate Causation, Liquor Liability Rules, and Affirmative Defenses

Well into the twentieth century, American courts would often hold that a deliberate, willful, and/or criminal act was so "unforeseeable" and "unexpected and extraordinary" as to be a superceding, intervening, or supervening cause of a harm: the negligence of another actor was thus not the legal or proximate cause of injury.[27] While the rule was not without exception and began to erode

---

22. For example, in *Hamburger v. Cornell*, 148 N.E. 539, 546 (N.Y. 1925), a student was injured in a laboratory incident and despite a jury award for the plaintiff/student, the court determined that the university was an immune charitable entity. *Id.* at 335. *See also* Parks v. Northwestern Univ., 75 N.E. 991 (Ill. 1905) (barring suit alleging negligence of university professor under charitable immunity); Alstonz v. Walden Academy, 102 S.W. 351 (Tenn. 1907) (barring liability for neglect to provide fire escapes under charitable immunity).

23. *See* Davie v. Board of Regents, 227 P. 243 (Cal. Ct. App. 1924) (holding student injured by university infirmary physician cannot sue the university because of governmental immunity); Robinson v. Washtenaw Circuit Judge, 199 N.W. 618 (Mich. 1924) (applying both charitable and governmental immunities).

24. Neither the immunity, nor the source of any duty alleged was rooted in *in loco parentis*. Students did not assert any sort of "parental responsibility" duties. To do so would have been incoherent under prevailing doctrines.

25. *See* Barr v. Brooklyn Children's Aid Soc'y, 190 N.Y.S. 296, 297 (Sup. Ct. 1921) (suggesting in dicta that a college could be liable under some circumstances because New York traditionally provided less charitable immunity).

26. For a rare case in which a student injured in a laboratory explosion successfully sued the university for negligence, see Brigham Young Univ. v. Lilly White, 118 F.2d 836 (10th Cir. 1941).

27. *See, e.g.*, Watson v. Kentucky & Indiana Bridge & R.R., 126 S.W. 146 (Ky. Ct. App. 1910) (holding man who deliberately threw a match into a negligently caused gasoline spill was the proximate cause of harm); *see also* DAN B. DOBBS, TORTS & COMPENSATION 237 n.1 (2d ed. 1993) (citing H.L.A. HART & A.M. HONOSE, CAUSATION

in the middle part of the twentieth century,[28] it was nonetheless a powerful deterrent to certain potential claims of university responsibility. For example, a college student attacked and robbed would have had little recourse even if the college negligently facilitated the crime by, say, failing to keep a parking area well lit. The attacker would have been the sole proximate cause of injury claims against a college arising from sexual assaults, and what we know today as date-rape would have been likewise barred from legal redress.

This rule also had a special analog in liquor-related injury cases. As the Supreme Court of Oklahoma pointed out:

> At common law a tavern owner . . . is not civilly liable for a third person's injuries that are caused by the acts of an intoxicated patron. Such rule is principally based upon concepts of causation that, as a matter of law, it is not the sale of liquor by the tavern owner, but the voluntary consumption by the intoxicated person, which is the proximate cause of resulting injuries, so that the tavern owner is therefore not liable for negligence in selling the liquor.[29]

Typically, the person furnishing alcohol was *not* considered to be a proximate cause of injury; the drinker was the proximate cause. Such a rule made it impossible to sue a university for failure to prevent alcohol use and/or for failing to enforce alcohol codes, etc., for example. It is not surprising then that there were no liquor liability cases by students against institutions of higher education until later in the twentieth century.

The no liability for liquor proximate cause rule gave way mid-century to new rights of action based upon Dram Shops Acts and/or similar rules announced in case law.[30] Either by Dram Shop Act, rule of court, or both, the traditional rule of proximate causation was abolished.[31] However, legislatures and courts recognized the potential for almost unlimited liquor liability and severely limited liability for serving or furnishing alcohol. For the most part, states placed duties of care upon commercial vendors of liquor regarding on premises consumption of alcohol, and then only if that vendor sold liquor to a visibly and noticeably intoxicated patron or to a minor.[32] These rules were supplemented by statutes prohibiting the furnishing of liquor to minors and by rules of negligent entrustment that made it unreasonable to provide certain

---

IN THE LAW (1962)).

28. *See* Concord Florida, Inc. v. Lewin, 341 So. 2d 242 (Fla. Dist. Ct. App. 1976) (holding arsonist is not sole proximate cause of fire); Hines v. Garrett, 108 S.E. 690 (Va. 1921) (holding negligence of railroad not barred by criminal attacks on plaintiff).

29. Brigance v. Velvet Dove Restaurant, Inc., 725 P.2d 300, 302 (Okla. 1986).

30. *Id. See* Rappaport v. Nichols, 156 A.2d 1 (N.J. 1959).

31. *Brigance*, 725 P.2d at 302-03.

32. *Id.* at 303.

chattels to intoxicated persons.[33] For the most part, all other parties connected to alcohol use and injury (other than the drinker) were not liable.

The new rules were highly protective of colleges. Colleges were seen to be, at most, social hosts or entities that merely engendered, tolerated, or facilitated alcohol use. As such, colleges did not face significant risk of liability for alcohol related injury to students. In the 1970s, some questions arose in the courts regarding 'social host' liability—potentially impacting the typical college—but as discussed *infra*, colleges were largely able to avoid liability for liquor related injuries in this period as well.

Finally, as if the powerful combination of immunities and rules of proximate causation/liquor liability were not enough, most states under most circumstances before 1960 would bar a plaintiff's action entirely if that plaintiff were either contributorily negligent or had assumed the risk of injury.[34] Thus, only blameless or ignorant-of-risk students had any chance to overcome these affirmative defense based bars to recovery. It was thus unlikely that a plaintiff/student could have any chance of recovery: immunities would have to fail in a case with no student misconduct (or assumed risk) and with no deliberate action (or drinking) of another.

IV. THE CIVIL RIGHTS MOVEMENT AND THE DECLINE OF INSULARITY

The 1961 decision of the Fifth Circuit in *Dixon v. Alabama*[35] marked the beginning of the end for *in loco parentis* as an immunity insularizing the public (and later, indirectly, the private) college. *Dixon* involved questions regarding a university's *power* to expel, discipline, and regulate students. In that case, several black students in Alabama were perfunctorily expelled from a public college in vague terms, but most certainly for their participation in civil rights demonstrations. The Fifth Circuit determined that a college's power (including *in loco parentis*) did not extend to the denial of basic constitutional rights of fair play and process, including procedural due process.[36] Students at public universities became constitutional adults with basic constitutional rights.

After *Dixon,* courts determined that students at public colleges enjoyed a range of constitutional freedoms including freedom of speech and association and rights against unreasonable searches and seizures.[37] As later courts and

33. *Id.* at 304.

34. As Dan Dobbs has pointed out: "Before 1960, only a handful of states had adopted comparative negligence for tort cases generally. From the late 1960s through the 1980s a wave of change washed through the states. In some states legislatures adopted comparative fault; in others, the courts did so." DOBBS, *supra* note 27, at 258.

35. 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961).

36. *Id.* at 158-59.

37. *See* Widmar v. Vincent, 454 U.S. 263 (1981); Healy v. James, 408 U.S. 169

commentators would come to recognize, *in loco parentis*, as an immunity in lawsuits challenging rights to discipline and regulate, was dead.[38]

Technically, *Dixon et al.* related only to *public* colleges. As Brian Jackson has pointed out:

> Dixon v. Alabama often is hailed as a pivotal rejection of the in loco parentis doctrine. But despite the Dixon decision, thousands of students at private universities remain outside the scope of constitutional protection. Since the Dartmouth College case recognized the independent nature of private education in the United States, the courts have been nearly unanimous in holding that private colleges and universities are not instruments of the state. As a result, actions by these schools cannot be attributed to the state for constitutional purposes. The Dixon decision thus left untouched thousands of students attending private colleges and universities. These students have no substantive or procedural constitutional safeguards. [39]

By virtue of state action doctrines, *Dixon's* rejection of *in loco parentis* would have to come to campuses in other ways.

Following the spirit of the decisions regarding public universities, courts began to decide that private colleges also owed their students fundamental fairness.[40] The courts achieved this through rules of *contract* interpretation and read "the contract" liberally in favor of student rights and narrowly in terms of purported "waivers" of contract rights.[41] The result was that in the wake of *Dixon, in loco parentis* ultimately fell as an immunity for private colleges as well.

(1972); Fox v. Board of Trustees, 841 F.2d 1207 (2d Cir. 1988); Gay Student Servs. v. Texas A&M Univ., 737 F.2d 1317 (5th Cir. 1984); Gay Liberation v. University of Mo., 558 F.2d 848 (8th Cir. 1977), *cert. denied*, 434 U.S. 1080 (1978); Greenhill v. Bailey, 519 F.2d 5 (8th Cir. 1975); Gay Students Org. v. Bonner, 509 F.2d 652 (1st Cir. 1974); University of S. Miss. Chapter of the Miss. Civil Liberties Union v. University of S. Miss., 452 F.2d 564 (5th Cir. 1971); Plazzalo v. Watkins, 442 F.2d 284 (5th Cir. 1971) (private university); Jones v. Board of Regents, 436 F.2d 618 (9th Cir. 1970); Bishop v. Aronov, 732 F. Supp. 1562 (N.D. Ala. 1990); Nash v. Auburn Univ., 621 F. Supp. 948 (M.D. Ala. 1985); Hall v. University of Minn., 530 F. Supp. 104 (D. Minn. 1982); Morale v. Grigel, 422 F. Supp. 988 (D.N.H. 1976); Soglin v. Kauffman, 295 F. Supp. 978 (W.D. Wis. 1968); Woody v. Burns, 188 So. 2d 56 (Fla. Dist. Ct. App. 1966).

38. *See, e.g.*, Beach v. University of Utah, 726 P.2d 413, 418-19 (Utah 1986); Stamatakos, *supra* note 20, at 474-75.

39. Jackson, *supra* note 5, at 1153-54 (citations omitted).

40. *See* Dixon v. Alabama, 294 F.2d 150, 157 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961); *see also* Corso v. Creighton Univ., 731 F.2d 529, 533 (8th Cir. 1984).

41. *Dixon*, 294 F.2d at 157.

It is important, however, not to read too much into the fall of *in loco parentis* as a result of the civil rights cases. As Theodore Stamatakos has correctly observed, "[These] decisions concerned college disciplinary actions—including rules of conduct and student searches—not institutional tort liability."[42] Only one type of insulation against certain types of claims had eroded. Erosion of the remaining aspects of insularity was to occur in other ways.

V. THE BYSTANDER/BUSINESS ERA: THE RISE OF DUTY AND THE ALMOST COMPLETE COLLAPSE OF TRADITIONAL INSULATING TORT DOCTRINES

In the 1970s and early 1980s, several trends emerged in higher education law. First, in most states, comparative fault had replaced the all-or-nothing defenses of contributory fault and, to some extent, assumed risk;[43] faulty plaintiffs now found greater access to tort remedies. Second, rules of proximate causation began to relax and some defendants were now required to guard against the foreseeable misconduct of third parties (including plaintiffs) and in some instances, criminal misconduct.[44] Third, trends toward the erosion of traditional charitable and governmental immunities which began somewhat earlier were now in full swing: charities were now rarely immune from tort lawsuits[45] and governments, while still protected, were scrutinized particularly when they engaged in proprietary and/or ministerial (non-discretionary) actions or assumed duties to particular members or segments of the public.[46] All of these changes were not indigenous to university law *per se*, but were part of larger global changes in American tort law that also came to roost locally in the law of higher education. These changes were not, however, complemented with significant changes in attitudes towards "social host" drinking—although the issue was tested. Thus, this period saw the rise in duty case law *and* also of some no-liability/no-duty rules in cases involving student alcohol related injuries.

With the fall of traditional immunities and the demise of strict affirmative defenses and rules of proximate causation, the law of duty was given the opportunity to rise to the forefront of university law. In a series of key university

---

42. Stamatakos, *supra* note 20, at 474.

43. *See* DIAMOND ET AL., UNDERSTANDING TORTS 251-54, 257 (1996).

44. *See, e.g.*, Kline v. 1500 Massachusetts Ave. Apartment Corp., 439 F.2d 477, 481 (D.C. Cir. 1970) (establishing that landlord only has to protect tenants from criminal attacks and that the criminal attacker is not the superseding cause of injury).

45. *See, e.g.*, Abernathy v. Sisters of St. Mary's Hosp., 446 S.W.2d 599, 606 (Mo. 1969); Albritton v. Neighborhood Ctrs. Ass'n for Child Dev., 466 N.E.2d 867, 869 (Ohio 1984); RESTATEMENT (SECOND) OF TORTS § 895E (1965).

46. *See* DIAMOND ET AL., *supra* note 43, at 261-66.

law cases, the courts established that universities had actionable duties to students in certain important overlapping areas—premises maintenance, curricular and co-curricular safety, dormitory/residential life safety, and dangerous persons. Courts began to treat colleges more and more like businesses. However, when alcohol found a way into the mix, courts of this period frequently stated no-duty rules. The new no-duty rules stated that colleges had become legal bystanders to "uncontrollable" student alcohol use. These cases went so far as to hold that there was nothing "special" in the college/student relationships. On their face, the duty and no-duty cases seemed irreconcilable; however, these cases reflected a common theme in that they represented further evolution toward the duty paradigm. Even in exonerating colleges in cases involving student alcohol (mis)use, courts focused upon lack of duty, not the traditional insulating doctrines.

A. Duty—Premises Maintenance

In this period, courts did not hesitate to say that a university was legally responsible to perform routine maintenance on premises or face tort litigation. Colleges were "landowners" and owed appropriate duties to certain "entrants" (usually students, their guests, and university personnel and their guests) who were considered "invitees" to whom reasonable care was owed.[47] Colleges were often analogized to businesses and many entrants on premises were treated like business customers.[48] Colleges thus became responsible for providing reasonably safe walkways, proper lighting, and other aspects of reasonably safe premises.

B. Curricular/Co-Curricular Student Safety

The fall of traditional immunities and other tort doctrines opened the way for students to sue colleges regarding injuries sustained in curricular and co-curricular activities. The first notable case regarding curricular activities occurred during the insularity era when a few courts were rethinking traditional immunities. In 1941, the Tenth Circuit ruled that a university could be sued when a student was injured in a laboratory class by an explosion caused by university negligence.[49] That case established that a university owed a duty of reasonable care regarding physical safety in the conduct of classes, laboratories, etc.[50]

---

47. *See* Poulin v. Colby College, 402 A.2d 846, 849 (Me. 1979); Isaacson v. Husson College, 332 A.2d 757, 760 (Me. 1975); Shannon v. Washington Univ., 575 S.W.2d 235, 237 (Mo. Ct. App. 1978).

48. *See* DIAMOND ET AL., *supra* note 43, at 261-66.

49. Brigham Young Univ. v. Lillywhite, 118 F.2d 836, 843 (10th Cir. 1941).

50. The courts do not accept educational malpractice arguments, but that is another

In the bystander era, universities became potentially responsible for injuries incurred in off-campus, co-curricular or extracurricular activities. The leading case is *Mintz v. New York*.[51] The case involved the outer limits of university responsibility for off-campus, extracurricular student activities. In that case, students were drowned in an icy lake during an overnight canoe trip.[52] The intercollegiate outing club had a university chapter, although beyond that, the university itself did little with regard to the activities of the particular trip in question.[53] Nonetheless, the university became a defendant in the litigation.

Much to the surprise of the university legal community at the time, *Mintz* determined that the university had a duty of reasonable care to the students.[54] The far reaching implications of *Mintz's* duty rule were buffered by the fact that the court determined that, in that case, the university did not *breach* the duty and was not a legal cause of the students' drowning.[55] The canoes were tipped by a sudden and unforeseeable wind on the lake: the activity club was well supervised and adequately guided and prepared for foreseeable dangers.[56]

The university escaped liability in *Mintz*, but a duty rule was born. The case had tremendous implications. Given that the role of the university in the particular incident was minimal—just one step from a student organized canoe run down a rough and cold Class III river during spring break—*Mintz's* duty rule clearly encompassed the full range of extracurricular activities in which universities exercised more supervision, direction, structure, and control. *Mintz* signaled a radical shift from the era of the insularized university. Loss of insularity did not necessarily mean liability, but courts would now be willing to scrutinize university affairs.

C. Residential/Dormitory Safety

In the bystander period, the courts began to recognize that students living on campus in dormitories or other university operated residential housing were similar to the tenants of landlords who owned apartments or similar housing. Courts rapidly determined that students were entitled to reasonably safe campus housing.[57] The university thus became like other landlords and was responsible for reasonable maintenance and security on premises and for using reasonable care to protect students from foreseeable dangers, including intrusion by

---

matter. *See* DOBBS, *supra* note 27, at 345-46.

51. 362 N.Y.S. 2d 619 (App. Div. 1975).

52. *Id.* at 620.

53. *Id.*

54. *Id.*

55. *Id.* at 621.

56. *Id.* at 620-21

57. *See* Duarte v. California, 148 Cal. Rptr. 804, 812 (Ct. App. 1978); Mullins v. Pine Manor College, 449 N.E. 2d 331, 335-36 (Mass. 1983).

dangerous persons. These responsibilities significantly overlapped with the college's duty to provide safe premises generally.

D. Dangerous Persons

At one time, a rapist or murderer, etc. was considered the sole proximate cause of injury, but judicial attitudes about such dangerous persons shifted in the 1970s and mid-1980s. Two seminal university law cases of this period stand out—*Mullins v. Pine Manor College*[58] and *Tarasoff v. Board of Regents*.[59]

The *Mullins* case involved a horrible sexual assault and abduction of a college dormitory resident. The court determined that colleges have duties to use reasonable care to protect against foreseeable criminal intrusion and attacks.[60] Colleges would now have to use care to guard against dangerous persons in the greater community who might come to prey upon students on campus. The *Mullins* rule would later be extended to include protection against dangerous students on campus.[61]

The university also now had duties regarding persons on campus endangering off-campus non-students in similar circumstances as well. In an unprecedented extension of duty-based responsibility, the California Supreme Court in *Tarasoff* determined that university psychotherapists had a duty to use reasonable care to warn/protect a foreseeably endangered non-student off-campus victim from a patient who had expressed credible violent and dangerous intentions towards that person.[62] In one form or another, *Tarasoff's* duty to warn/protect rule has become the majority rule in America.[63] As a result of *Tarasoff,* a college must protect students from dangerous persons under a number of circumstances.

E. The No-Duty Student Alcohol Cases—Bystander Rules

Against the backstage of the application of business-like duty rules to college campuses, some courts of this period also stated rules forming a new type of legal protection for colleges. These cases all involved students who were injured in incidents involving alcohol use. The cases turned to tort rescue doctrines—hence the bystander moniker—and became highly celebrated case law in the university community.

---

58. 449 N.E.2d 331 (Mass. 1983).

59. 551 P.2d 334 (Cal. 1976).

60. *Id.* at 335-36.

61. *See, e.g.*, Nero v. Kansas State Univ., 861 P.2d 768, 780 (Kan. 1983).

62. *Tarasoff*, 551 P.2d at 345.

63. *See* Peter F. Lake, *Revisiting* Tarasoff, 58 ALB. L. REV. 97, 98 (1994); *see also* Bradley v. Ray, 904 S.W.2d 302, 307 (Mo. Ct. App. 1995).

The cases arose at a time in American law when courts were being asked to reject social host immunities and to broaden the categories of tort responsibility for injury arising from alcohol use and abuse:[64] the courts generally rejected the expansion of responsibility (although there were notable exceptions).[65] Typically, American courts have protected employers when employees drink on the job or at office parties,[66] and they have also protected those employers who have facilitated drunken persons to return to their own cars and drive away.[67] The position of the courts of this era was so strong that it was clear that there was no duty (other than for bars and bartenders) to prevent a drunk person from creating danger to herself and others even if there was a "special" relationship between the person and the drinker.[68] The margin of responsibility was determined by the extent, if any, that a defendant *facilitated* a drunk person's own danger and endangering of others, but courts of this period usually took a pro-defendant view and required either negligent entrustment of a dangerous item (like giving a drunk a car) or "control" over the drunk (as in a bar, or in an involuntary detoxification center or jail).[69] In short, American law of this period was generally unprepared to impose civil liquor liability on social or other (non-bar/bartender) hosts for furnishing alcohol to adults, nor was it willing to require people, even in legally special relationships with drunks, to exercise reasonable care for the safety of drinkers and others except under unusual circumstances or in the exceptional case.

Thus, when students (or others) were injured in alcohol related incidents, the courts of this era instinctively followed the pattern of other non-college drinking cases. The college alcohol cases *seemed* out of line with other cases of the period imposing business duties, but they were not. The non-alcohol cases raised issues of residential life and premises safety, safety in student activities,

---

64. As Diamond et al. relate:

> Starting in the late 1970's, courts began to reconsider this common law view [that the drinker was the sole proximate cause of harm]. Several [jurisdictions] imposed liability on commercial suppliers of liquor. A few went further and determined that a social host could be liable to a third party injured by a drunken guest . . . . Most courts [and jurisdictions,] however, have refused to impose liability on social hosts. . . . These cases are viewed as duty to control cases because the plaintiff is asserting that the defendant should have stepped in to prevent the drunken third party from driving.

DIAMOND ET AL., *supra* note 47, at 124-25 (footnotes omitted).

65. *See, e.g.*, Leppke v. Segura, 632 P.2d 1057, 1059 (Colo. Ct. App. 1981) (imposing duty on person who jump started drunk's car); Kelly v. Gwinell, 476 A.2d 1219, 1224 (N.J. 1984) (imposing limited social host liability).

66. *See* Otis Eng'g Corp. v. Clark, 668 S.W.2d 307, 311 (Tex. 1983).

67. *See* DeBolt v. Dragen Auto Supply, Inc., 227 Cal. Rptr. 258 (Ct. App. 1986); *cf.* Congini v. Portersville Valve Co., 470 A.2d 515 (Pa. 1983) (imposing liability if employee is served liquor and is a minor).

68. DIAMOND ET AL., *supra* note 43, at 125.

69. DIAMOND ET AL., *supra* note 43, at 125.

and problems with dangerous persons. The alcohol cases talked of rescue law and no-duty to bystander rules, and spoke in terms of duty and, in some instances, special relationships. Neither line of authority was especially conscious of the other, but that was not too surprising given that courts were treating colleges much like businesses across the board. Importantly, a powerful *de facto* alcohol injury immunity (stated in the form of "no-duty") had come into existence, and it was powerful enough to trump background business-like duties *if alcohol or student drinkers were prominent in causing or contributing to the injury.*

In a series of famous bystander era cases, courts held that there was no duty to protect a student-drinker from injury related to inebriation while on a required curricular trip in a remote location,[70] that there was no duty to protect a female student in her dormitory from an individual drinking and performing a dangerous fraternity-encouraged "ritual,"[71] that there was no duty to protect students who drank in a dormitory and then went off campus to engage in drag racing,[72] and that there was no duty to protect even underage students from injury incurred after leaving a school sponsored off-campus drinking party.[73]

These cases have become known as the "bystander" cases because in each of them the university was cast in the role of a legal bystander to "uncontrollable" student actions and drinking.[74] These courts saw the problems presented in terms of nonfeasance/no-duty to rescue law and refused to view the student/university relationship as sufficiently "special" to impose any duty of care upon the college.[75] As such, the typical college was a mere bystander.

The cases seemed anomalous and inconsistent in that other courts had established that students were in a special relationship regarding on-premises safety as either "business invitees" or "tenants,"[76] that colleges were responsible for safety in on and off-campus co-curricular and extracurricular events, and that students (and others) were entitled to protection from foreseeably dangerous individuals. For example, the university had more involvement in facilitating an off-campus party in a case where there was no duty (*Bradshaw*) than the university had with respect to the canoe trip in *Mintz* where there was a duty.[77]

---

70. Beach v. University of Utah, 726 P.2d 413 (Utah 1986).

71. Rabel v. Illinois Wesleyen Univ., 514 N.E.2d 552 (Ill. App. Ct. 1987).

72. Baldwin v. Zoradi, 123 Cal. Rptr. 809 (1981).

73. Bradshaw v. Rawlings, 612 F.2d 135 (3d Cir. 1979).

74. *See Bradshaw*, 612 F.2d at 138, 139-40; *Baldwin*, 123 Cal. Rptr. at 818-23; *Rabel*, 514 N.E.2d at 560-61; *Beach*, 726 P.2d at 419.

75. *See Bradshaw*, 612 F.2d at 140-42; *Baldwin*, 123 Cal. Rptr. at 818-23; *Rabel*, 514 N.E.2d at 560-61; *Beach*, 726 P.2d at 419.

76. *See supra* Sections V.A, V.C.

77. In *Mintz v. New York*, 362 N.Y.S.2d 619, 620 (App. Div. 1975), the college sponsored the outing club. In *Bradshaw*, a sophomore class picnic was facilitated by, inter alia, funds made available to students with faculty advisor assistance, and by use of campus duplicating faculties and campus locations to advertise for the party.

These college alcohol cases, however, were simply following liquor no-duty/injury rules of that era and applying them to campus liability issues. These cases provided a limited and new form of insularity from legal liability for colleges. While doctrinally narrow, the alcohol cases were far reaching in impact. Liquor related injuries and problems were on the rise on college campuses. Because many injuries involved alcohol use, colleges could look to the courts for protection in a large number of situations. Whereas a typical business only occasionally would deal with alcohol issues, major safety problems on campus were consistently alcohol related.

The new limited insularity of the alcohol cases was very different from the traditional forms of insularity once given to colleges. In the bystander period, the legal protection of colleges would be in the form of *no-duty* rules, and not in the form of charitable, governmental, or parental immunities, nor in the form of rules of proximate causation or all-or-nothing affirmative defenses. University liability or non-liability was now firmly entrenched in dimensions of duty/no-duty. This was an almost entirely new phase for university law; university student safety law was being mainstreamed.

VI. THE CURRENT CONSOLIDATION OF THE DUTY ERA: POTENTIAL SHIFTS IN COLLEGE ALCOHOL RESPONSIBILITY

In the period from the mid-1980s to the present, courts have consolidated and reinforced the duty era in higher education law. In all of the areas that courts employed duty analysis in the previous era, recent court decisions have followed and refined duty analysis. An important development has been that courts have emphasized that duty does not always mean *liability* for a college: students share responsibility for many of the risks that result in harm and they also have a responsibility to use care for their own safety. The duty era is forming into an era of balanced and shared rights and responsibilities of students and colleges. In striking that balance, courts have clearly been influenced by business-tort law, although they continue to try to strike a unique balance for modern colleges. Significantly, the attitudes of courts toward college alcohol related injury responsibility may be shifting: courts taken as a whole no longer uniformly endorse no-duty rules in cases involving alcohol related injuries.

A. Premises Maintenance and Safety/Residence-Dormitory Maintenance and Safety

Since the seminal cases of the 1970s and early 1980s, courts have repeatedly acknowledged that universities have typical premises and landlord/tenant maintenance and safety responsibilities.

Bradshaw, 612 F.2d at 135, 137.

For example, a college must use the same care as a private landowner with respect to accumulation of snow and ice;[78] students are invitees and are entitled to reasonable care on premises;[79] a university must warn students of excavation dangers;[80] athletic facilities must be maintained in reasonable condition;[81] a college must install or keep dormitory/student residence doors and locks in reasonable condition;[82] and a university must repair and maintain sidewalks and parking garages including fixing defects and filling in holes.[83]

Notably, when a university attempted to argue that routine premises maintenance was protected as a discretionary function under modern rules of governmental immunity, a court seriously rebuked that argument and refused to reintroduce broad based governmental immunity into the law of higher education.[84]

Students, like other plaintiffs, however, must attend to open and obvious dangers.[85] Simple failure to advert to obvious dangers or deliberately encountering such dangers when other options are available can diminish and/or defeat student recovery.[86]

B. Dangerous Persons

Courts have reacted very strongly to problems involving dangerous persons, including other students, on campus and off. When injury occurs on campus, there is a significant overlap with the premises/landlord cases in that unreasonable premises/dormitory maintenance can facilitate criminal intrusions

---

78. Goldman v. State, 551 N.Y.S.2d 641, 642 (App. Div. 1990); Mead v. Nassau Community College, 483 N.Y.S.2d 953, 956 (App. Div. 1985).

79. *See* Furek v. University of Del. 594 A.2d 506, 520 (Del. 1991); Williams v. Junior College Dist., 906 S.W.2d 400, 401 (Mo. Ct. App. 1995); Baldauf v. Kent State Univ., 550 N.E.2d 517, 519 (Ohio Ct. App. 1988).

80. Prairie View A&M Univ. v. Thomas, 684 S.W.2d 169, 171 (Tex. App. 1984).

81. Henig v. Hofstra Univ., 553 N.Y.S. 479, 480 (App. Div. 1990).

82. Bolkhir v. North Carolina State Univ., 365 S.E.2d 898, 902 (N.C. 1988); Delaney v. University of Houston, 835 S.W.2d 56, 60 (Tex. 1992).

83. Boyle v. Board of Supervisors, 672 So. 2d 254, 259 (La. Ct. App. 1996); Malley v. Youngstown Univ., 658 N.E.2d 333, 335 (Ohio Ct. App. 1995).

84. *Delaney*, 835 S.W.2d at 60. In *Delaney*, the university essentially argued it did not have a legal responsibility to fix broken locks on doorway even when those doors became the point of entry for criminal intrusion. *Id.* at 57. The Texas Supreme Court disagreed. *Id.* at 60.

85. *See, e.g.*, Ward v. K Mart Corp., 554 N.E.2d 223, 231 (Ill. 1990).

86. *See* Pitre v. Louisiana Tech Univ., 673 So. 2d 585, 596 (La. 1996) (barring recovery to student who sledded down hill into light pole); Weller v. College of the SeNecas, 635 N.Y.S. 990, 993-94 (App. Div. 1995) (reducing recovery to student for failure to use care); Banks v. Trustees of the Univ. of Pa., 666 A.2d 329, 331 (Pa. Super. Ct. 1995) (barring recovery to student who climbed wall to bypass student gathering).

and attacks.[87] There is also a significant connection with alcohol, as many dangerous persons are student drinkers (these issues are treated *infra* Section *VI.D*).

With respect to dangerous persons on and off campus, three recent cases stand out—*Johnson v. Washington,*[88] *Nero v. Kansas State University,*[89] and *Gross v. Family Services Agency, Inc.*[90]

In *Johnson*, a first year student was abducted and sexually assaulted on the campus of Washington State University.[91] The court determined that the student was owed a duty of reasonable care as an invitee and tenant (the attack occurred near her dormitory).[92] The university was required to exercise reasonable—not all possible—care once criminal danger in the area became foreseeable.[93] *Johnson* also (re)affirmed two points: first, the attacker was not the sole proximate cause as a matter of law,[94] and second, the duty to protect against foreseeable criminal attack was not subject to discretionary governmental immunity.[95] The rule applied in *Johnson* is identical to that applied in commercial settings.[96]

In *Nero,* a student was sexually attacked by another student in the basement television room of her dormitory.[97] The attacker had been placed in the dormitory despite having been accused and charged with rape and sexual assault[98] and despite the fact that he had previously been removed from a male/female residence and placed in an all male dormitory.[99] There were no warnings given and no special safety precautions taken.[100] The *Nero* court determined that a college must use reasonable care once a dangerous student is placed in residential housing.[101]

Cases like *Johnson* and *Nero* are indications of strong judicial sentiments that students are entitled to reasonable precautions regarding dangerous persons *on* campus. Other cases have also sent this message since the 1980s.[102] Colleges

87. Delaney v. University of Houston, 835 S.W.2d 56, 56 (Tex. 1992).
88. 894 P.2d 1366 (Wash. Ct. App. 1995).
89. 861 P.2d 768 (Kan. 1993).
90. 716 So. 2d 337 (Fla. Dist. Ct. App. 1998).
91. *Johnson*, 894 P.2d at 1368.
92. *Id.*
93. *Id.* at 1371.
94. *Id.*
95. *Id.* at 1368-70.
96. DIAMOND ET AL., *supra* note 43, at 125.
97. Nero v. Kansas State Univ., 861 P.2d 768, 771-72 (Kan. 1993).
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.* at 780.
102. *See* Nieswand v. Cornell Univ., 692 F. Supp. 1464 (N.D.N.Y 1988); Jesik v. Maricopa County Community College Dist., 611 P.2d 547 (Ariz. 1980); Peterson v. San

face increasing responsibility regarding dangerous individuals off campus as well. First, in the recent and notable *Gross* case, a Florida intermediate appellate court ruled that a student participating in an off-campus internship is entitled to reasonable care from the sponsoring university with regard to foreseeable danger.[103] Second, *Tarasoff* in one form or another has developed into a majority rule regarding potential off (and on) campus dangerous individuals.[104] And third, following on the heels of *Tarasoff,* colleges must now be careful in how they package and ship students with known dangerous propensities to other programs and to employers:[105] it is no longer safe to facilitate the transfer of a dangerous student to another college (or to a job) as a way to avoid the problems with that student.

With respect to dangerous persons, colleges are not strictly liable and other parties can share responsibility for injuries that occur. First, in order to be liable, danger must be both foreseeable *and* there must be a failure to use reasonable care. Where danger is not reasonably foreseeable—including from the lack of prior incidents of similar nature—colleges are not liable.[106] Where reasonable care is used, a university is not liable as well.[107] Second and obviously, an attacker is legally responsible for damages caused. Third, in cases involving alcohol (discussed *infra* Section *VI.D*), some courts suggest that students who become victims of dangerous persons in alcohol related incidents may be subject to liability-limiting victim fault defenses.

Francisco Community College, 685 P.2d 1193 (Cal. 1984); Cutler v. Board of Regents, 459 So. 2d 413 (Fla. Dist. Ct. App. 1984); Miller v. New York, 467 N.E.2d 493 (N.Y. 1984).

103. Gross v. Family Servs. Agency, Inc., 716 So. 2d 337 (Fla. Dist. Ct. App. 1998). In *Gross*, a twenty-three year old graduate student was attacked in the parking lot of an off campus "praticum" location. *Id.* at 337. The student was required to do a practicum and had selected this location from a list provided by her university. *Id.* The court determined that she was entitled to proceed with her claim that she was assigned to an unreasonably dangerous "practicum" location without adequate warning. *Id.* at 340.

104. Tarasoff v. Board of Regents, 551 P.2d 334, 345 (Cal. 1976).

105. *See* Randi v. Muroc Joint Unified School Dist., 929 P.2d 582 (Cal. 1997) (holding actionable the failure to identify background history or dangerous behavior in reference letter).

106. *See* L.W. v. Western Golf Ass'n, 675 N.E.2d 760 (Ind. Ct. App. 1997) (dismissing action for lack of foreseeability where student attacker had never been a previous threat—no complaints, and no one felt threatened); Hall v. Board of Supervisors, 405 So. 2d 1125 (La. Ct. App. 1981) (finding no liability for unforeseeable shooting).

107. *See, e.g.*, Gragg v. Wichita State Univ., 934 P.2d 121 (Kan. 1997) (finding no liability where woman was shot and killed while attending 4th of July fireworks display on campus, where the university had deployed over 80 police officers for a 20,000 person event and had no knowledge of the assailant and had not had a shooting or other violent death on campus for over 25 years).

C. Student Activities—Duty and Student Responsibility

Colleges continue to owe duties to students in curricular and extracurricular activities; however, students are required to take responsibility for their own choices and the inherent risks of the activities they choose. Thus, recent court decisions confirm that students accept the obvious, ordinary, and inherent risks of a college sport or activity.[108] Students do not, however, accept the risk of non-ordinary, non-obvious, or non-inherent risks, of deliberate or reckless violations of safety rules or protocols, or that they will be taken to a level of activity and risk that requires guidance, assistance, or information the students do not have.[109] Thus, while universities continue to owe duties to students, students also shoulder significant responsibility. Typically, in the face of ordinary, obvious, and inherent risks, a student must take care to avoid injury.

D. The (Potentially) Changing Rules of Alcohol Liability

No-duty alcohol rules remained powerfully entrenched in higher education law well in to the early 1990s. Recently, however, there are signs that courts will no longer categorically insulate universities from liability when alcohol use contributes to an injury. There is now very clear precedent contradicting the "bystander" cases and there are potential trends afoot which could further undercut university alcohol injury legal insularity.

Consider first that in very recent times, some courts in non-college cases have begun to pick away at the no-duty rules that have protected "social hosts" and other non-bar/bartenders. Two types of authority are worth watching. In one line of cases, some courts have imposed liability on businesses that furnish alcohol to employees at work, at office parties, etc.[110] These cases raise questions of "furnishing" alcohol and facilitating driving after a person is intoxicated.[111] In another related development, some courts have taken an expanded view of the notion of what it means to "furnish" alcohol, particularly to minors.[112]

---

108. *See* Regents of the Univ. of Cal. v. Roettgen, 48 Cal. Rptr. 2d 922 (Ct. App. 1996); Sicard v. University of Dayton, 660 N.E.2d 1241 (Ohio Ct. App. 1995).

109. *See Roettgen*, 48 Cal. Rptr. at 925; *Sicard*, 660 N.E.2d at 1241.

110. *See* Jon R. Erickson & Donna H. Hamilton, *Liability of Commercial Vendors, Employers and Social Hosts for Torts of the Intoxicated*, 19 WAKE FOREST L. REV. 1013 (1983); David M. Holliday, Annotation, *Intoxicating Liquors: Employer's Liability for Furnishing or Permitting Liquor on Social Occasion*, 51 A.L.R. 4th 1048 (1998).

111. *See supra* note 105.

112. *See* Rust v. Reyer, 670 N.Y.S.2d 822 (1998). In *Rust*, a person who did not purchase or sell liquor facilitated a party where minors were furnished liquor. *Id.* at 823. The court determined that one can furnish liquor to minors without selling liquor to them or placing liquor in their hands directly. *Id.* at 824. The court made oblique reference to colleges' alcohol use and the case will no doubt influence campus liquor policies in

Second, social attitudes towards college-aged drinking (particularly abusive, under-aged drinking) have shifted, particularly in the last two or three years. As a result of the alcohol related death of a freshmen at the Massachusetts Institute of Technology (MIT), MIT has undergone *criminal* investigation for its role in the incident.[113] Similar alcohol related deaths have made headlines around the country,[114] and in the Spring of 1998, students at several colleges—including Michigan State University—reacted violently over the denial of beer privileges.[115] There is a sentiment that a dangerous college-aged drinking culture has gotten out of hand and needs to be dealt with. In particular, there is concern that some college freshman—first timers away from home especially—are particularly vulnerable to such college liquor cultures. Such strong social sentiment, coupled with trends in liquor liability law, suggest that more courts will craft rules for colleges that establish legal duties in alcohol related injury cases.

There is recent evidence that this shift is already occurring with some courts. In *Booker v. Lehigh University,*[116] a student who fell on a rocky trail after consuming a large amount of alcohol sued Lehigh University and lost. For the college, the case was a mixed victory; the court noted that had the university purchased and supplied liquor, served liquor, or otherwise planned a liquor event, the result would have been different.[117] The most notable case, however, is clearly *Furek v. University of Delaware.*[118] In that case, a student was badly burned when he had oven cleaner poured over his head in a pointless—and prohibited—fraternity hazing incident.[119] As is usual in hazing incidents, alcohol use facilitated the dangerous behavior. Unlike courts in the bystander era, the Delaware Supreme Court did not view the University as a helpless bystander to uncontrollable student drinking and hazing activities.[120] In particular, *Furek* faulted the University for not adopting particular rules and protocols that would have reasonably diminished the risks of alcohol and hazing injuries.[121]

New York State.

113. *See* John Ellement, *MIT Frat Accused of Manslaughter*, BOSTON GLOBE, Sept. 18, 1998, at B1.

114. *See* Richard Chacon, *Individual Issues Spark Campus Unrest*, BOSTON GLOBE, May 20, 1998, at B1.

115. *See* Christian Davenport & Rebeca Rodriguez, *Southwestern, SWT Clamping Down on Student Drinking*, AUSTIN-AMERICAN STATESMAN, Sept. 24, 1998, at A1; Scripps Howard News Serv., *Surveys and Headlines Agree: Results of Campus Drinking Can Be Deadly*, ST. LOUIS POST-DISPATCH, Dec. 12, 1997, at C11.

116. 800 F. Supp. 234 (E.D. Pa. 1992).

117. *Id.* at 240.

118. 594 A.2d 506 (Del. 1991).

119. *Id.* at 509-10.

120. *Id.*

121. *Id.* at 522-23.

Despite *Furek*, a number of courts in the late 1980s and early to mid 1990s have followed the more traditional path of no-liability for alcohol injuries to students. The cases have, *inter alia*, held that a minor was not entitled to sue regarding injuries sustained as a result of off-campus drinking;[122] a university was not liable for injuries sustained when an intoxicated student used a trampoline at a fraternity party;[123] and a university was not liable when a student who had been drinking at a fraternity party was killed in a motorcycle accident on a public street.[124] Several cases have held that where students are drinking and a student is suddenly and unforeseeably attacked (including sexual attacks) by other students, the university is not liable.[125] In perhaps the most unusual case displaying antipathy to a student-drinker, a college freshman became intoxicated off campus, was badly beaten in some unknown way, and made his way to a commuter rail way platform where he collapsed and needed assistance. The Illinois Supreme Court determined that the railroad personnel were under no duty to provide immediate assistance to this drunken trespasser.[126]

The future of liability and duty regarding college-aged drinking remains to be seen. It seems most likely that in the immediate future some courts will disassociate from the trend of the "bystander" courts and will be influenced by cases like *Furek*. It also seems likely that other courts will continue to follow the more traditional no-duty approach. In short, universities may face a genuine split of authority on alcohol liability in the near future. One thing is certain however: the crux of the issues presented will be oriented to duty/no-duty questions.

VII. DUTY—APPLICATIONS OF GENERAL RULES, PRINCIPLES, AND POLICIES TO THE UNIVERSITY CONTEXT

The history of university safety/liability law has consistently been dominated by special adaptations of general background rules and principles to the unique university environment(s). In the period of insularity, courts tailored a number of general tort doctrines—especially immunities—to create a unique form of legal protection for colleges. The great challenge in university law came when virtually all of the underlying doctrines made quantum shifts. Courts were forced to redefine the legal parameters of university culture vis-a-vis student safety. Courts went about this interstitially—not programmatically or systematically—although in retrospect some rather clear patterns have emerged.

---

122. Hartman v. Bethany College, 778 F. Supp. 286 (N.D.W. Va. 1991).

123. University of Denver v. Whitlock, 744 P.2d 54 (Colo. 1987).

124. Millard v. Thiel College, 611 A.2d 715 (Pa. Super. Ct. 1992).

125. Tanja H. v. Regents of the Univ. of Cal., 278 Cal. Rptr. 918 (Ct. App. 1991); L.W. v. Western Golf Ass'n, 675 N.E.2d 760 (Ind. Ct. App. 1997); Motz v. Johnson, 651 N.E.2d 1163 (Ind. Ct. App. 1995).

126. Rhodes v. Illinois Cent. Gulf R.R., 665 N.E.2d 1260 (Ill. 1996).

University law today has been substantially mainstreamed, particularly in line with business law paradigms. As a result, duty/no-duty rules have become prominent and are now the compass point from which college liability is judged.

The mainstreaming of college law has created a major issue. There is a legitimate concern that judges applying mainstream tort law—particularly business law—may miss the unique qualities of university life. Mainstreaming requires some attention to the special role of higher education in America, and to the diverse environments in which such education is delivered.

Modern American courts considering general duty issues have come to agree upon a basic premise:

> Duty is not sacrosanct in itself, but is only an expression of the sum of those considerations of policy which lead the law to say that the plaintiff is entitled to protection .... Accordingly, there is no more magic inherent in the conclusory term "duty" [than there is in the phrase "special relationship"]. Both are part and parcel of the same inquiry into whether and how the law should regulate the activities and dealings that people have with each other. As society changes, as our sciences develop and our activities become more interdependent, so our relations to one another change, and the law must adjust accordingly .... [R]elations perhaps regarded as tenuous in a bygone era may now be of such importance in our modern complicated society as to require assurances that risks associated therewith be contained.[127]

As a result of pioneering works by Prosser, Green, and others, American courts—including ones deciding university tort law issues—agree that analysis of duty and special relationships turns on considerations of policy.[128] Many university cases have formed a powerful agreement on the relevant policies that should be considered in the analyses of duty/no-duty questions.[129] The list of

---

127. Estates of Morgan v. Fairfield Family Counseling Ctr., 673 N.E.2d 1311, 1322 (Ohio 1997). University law cases follow this relatively basic idea as well. *See, e.g.*, Bradshaw v. Rawlings, 612 F.2d 135, 138 (3d Cir. 1979); Furek v. University of Del., 594 A.2d 506, 520 (Del. 1991); Beach v. University of Utah, 726 P.2d 413, 419 (Utah 1986).

128. *See* Peter F. Lake, *Common Law Duty In Negligence Law: The Recent Consolidation of A Consensus On the Expansion of the Analyses of Duty and The New Conservative Liability Limiting Use of Policy Considerations*, 34 SAN DIEGO L. REV. 1503 (1997).

129. The policies courts consider generally draw their roots one way or another to the seminal *Tarasoff* case. *See* Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334, 343 (Cal. 1976); *see also Bradshaw*, 612 F.2d at 138-142; University of Denver v. Whitlock, 744 P.2d 54, 59 (Colo. 1987); *Furek*, 594 A.2d at 506; *Beach*, 726 P.2d at 419.

factors courts consider are very similar:[130] essentially,[131] courts balance, weigh, and evaluate:

(1) foreseeability;
(2) nature/type of risk/harm;
(3) closeness;
(4) moral blame and responsibility;
(5) preventing future harm;
(6) burden on university and the larger community; and
(7) insurance.

These factors are similar to factors many courts use in other non-university contexts.[132] These factors can be used to adapt duty rules to the particular contexts of higher education. These factors work well in business contexts and can also work well for universities.

Courts will consider foreseeability to be the prominent, but not the only, factor. Forseeability works both ways. Colleges should prevent foreseeable risks, *ceteris paribus*; however, colleges cannot reasonably prevent unforeseeable risks and students are sometimes in the best position to foresee and avoid risks. For example, in instances where alcohol triggers a violent attack, a university cannot foresee every spontaneous outburst of anger and violence; but a student may be in the best position to foresee and avoid the risk.[133] Where students and colleges have equal knowledge of foreseeable danger—*e.g.*, the ordinary risks of intramural athletics—it will be fair and appropriate to weigh other factors to determine responsibility (such as the fact that imposing liability would burden the university with lawsuits over known and assumed risks and could curtail opportunities for intramural athletics).

Courts will be particularly sensitive to the nature of the risks and the type of harms presented. For example, courts have shown great concern over predatory sexual attacks on young college women and have crafted rules accordingly.[134] On the other hand, alcohol risks have troubled courts and have often received different, less liability generating treatment.

The third factor, closeness, can be particularly useful. Courts can analogize students to workers in the following way: Did the injury to the student occur within the scope of the student/university relationship? Did the injury occur in a manner, a time, and a place where reasonable persons would believe that the student/university relationship was sufficiently close to warrant imposing

130. *See supra* notes 128-29.

131. *See supra* note 129. I have slightly adapted the factors various courts use.

132. *See* Lake, *supra* note 128, at 1517-19.

133. *See, e.g.*, Motz v. Johnson, 651 N.E.2d 1163, 1167 (Ind. Ct. App. 1995).

134. *See, e.g.*, Gross v. Nova Family Serv. Agency, 716 So. 2d 337, 338 (Fla. Dist. Ct. App. 1998).

liability? Thus, when a student is attacked in a dormitory, there is such a close relationship, yet when students are off-campus drinking, driving, and on spring break, for example, the connection wanes.[135] Modern university cases are highly motivated by issues raised by this factor. Much of the discussion in the case law of whether a student/college relationship is "special" can be resolved under this factor.

The fourth factor—moral blame and responsibility—is a particularly important and dispositive factor for colleges. Students must be given the opportunity to take responsibility for themselves, their activities, and even each other. College life can facilitate moral development, but not if it assumes all (or none of) the responsibility for safety on campus. In this way, a college campus is very different from a shopping mall or supermarket. We usually do not ask consumers to construct a "shopping community"; we ask them to take only some responsibility for their collective safety on business premises. College does not and cannot function like a typical consumer premises. To be safe from attackers, students cannot view on-campus security passively or atomistically: students must not allow unknown visitors past checkpoints in violation of dormitory safety rules and must not pry open locked security doors in similar violation of rules. Students are active co-creators of the conditions under which collective safety occurs on campus. Moreover, it is important that colleges facilitate the learning of responsibility for self and others. While the college will take a lead role in campus security and safety issues, "babysitting" would defeat the proper role of most colleges in most instances. Most often the proper student/college relationship is one of *shared* responsibility.

Rules of liability for campus safety should be particularly sensitive to setting up proper incentives to prevent future harm. Some universities misread the bystander era cases as suggesting that the best liability limiting approach would be to distance college administration from student life, particularly regarding alcohol danger. That type of incentive backfired, and has facilitated greater risks, not more responsibility, in some instances. For example, first time away from home college freshpersons are often ill-equipped to encounter abusive alcohol cultures on campus. Rescue doctrine/bystander case law counseled against "assuming duties" for such students. A laissez-faire strategy towards such drinking—reinforced by the legal rules of bystander cases—has contributed to particularly risky behavior patterns on some college campuses. The students themselves, because of their levels of maturity, experience, and judgment, are not always in the best position to correct an alcohol culture without university guidance. On the other hand, some student injuries are either unpreventable or students themselves (or others) are in the best position to prevent them. Falling is an inherent risk of rock climbing; spontaneous acts of unforeseeable violence will occur no matter what level of security is present.

---

135. *See, e.g.*, Rhodes v. Illinois Cent. Gulf R.R., 665 N.E.2d 1260, 1269-70 (Ill. 1996).

The sixth factor, burden, has most likely always motivated courts. Out of concern for interfering with sovereign prerogatives of colleges, courts once gave broad insularity to higher education. Today, most universities are not economic colossi and safety costs can impact the quality of education and whether certain students will be able to afford college education at all. There is a balance to be struck. Too little safety and education suffers, but too many unnecessary expenditures can drive the quality of education down. Some of the financial burden can be distributed through insurance (see below), but not all can. Compliance costs associated with prevention programs can be expensive and uninsurable. Courts should be sensitive to sending messages that lead to unreasonable increases in unnecessary expenditures. Courts also need to be increasingly sensitive to the fact that some college environments create burdens on off-campus interests and the greater community. No-duty alcohol rules must be examined in light of the impact on the greater community. Do such rules tend to foster unregulated, abusive, off-campus drinking with higher risks that citizens will be injured or killed in automobile accidents? To what extent do students with known problems put the community at risk? Lightening the responsibilities of colleges can conceivably worsen the burden on the police, the community, business, etc.

Finally, courts should be aware of the availability—or lack thereof—of collateral sources. These factors relate heavily to the burden factor. Students in college are often engaging in activities that prepare them for life in the workforce, but they rarely have any system of loss compensation in place, such as a workers compensation system. Devastating injuries in college may find some compensation through health insurance, disability insurance, and other limited collateral sources: students and families are unlikely to have sufficient loss compensation insurance to cover certain injuries, with potentially catastrophic family consequences. Insurance markets have not evolved to provide the kind of safety net that workers compensation schemes provide. In and of itself, this should not necessarily counsel for or against liability, but should be a factor of consideration in some cases.[136]

Although the factors are basically similar to those that many courts use in other contexts (particularly business law), the factors are adaptable to unique higher education environments. It is likely that the factors will weight differently for colleges than for similar commercial settings. An attack on campus raises similar—but not identical—issues to an attack in a shopping mall, for example. Courts have had two major points of agreement since the fall of insularity: higher education law should be both mainstreamed and uniquely tailored. The duty path courts are following allows for both, and this accounts

136. For example, a student badly injured on a work internship program may not be able to recover for injuries when a full time work force employee could. Conversely, since most family caused injuries are not compensated, student activities that are not as clearly work-like perhaps should be treated similarly to family injuries, ceteris paribus.

for much of its appeal as the new model in higher education safety law. The duty era has brought mainstreamed uniqueness to college safety law.