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The College's Emerging Duty to Supervise Students: In Loco Parentis in the 1990s

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THE COLLEGE'S EMERGING DUTY TO SUPERVISE STUDENTS: IN LOCO PARENTIS IN THE 1990s

INTRODUCTION

The modern college campus is a dangerous place.[1] Students frequently fall victim to criminal attacks such as rape and sexual assault.[2] Alcohol consumption[3] often leads to serious injury.[4]

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1. According to a recent *New York Times* article:

> An American college or university (enrollment ranges from under 100 students to 45,000 and more) averages three reported violent assaults a year, eight incidents of hate crime or hazing violence, 430 property crimes and countless alcohol violations. Like much off-campus crime, many more incidents go unreported. One in three students will be the victim of some kind of campus crime. Estimates on the number of women raped or sexually assaulted during their college years range from 1 in 7 to 1 in 25.

Anne Matthews, *The Campus Crime Wave*, N.Y TIMES, Mar. 7, 1993, § 6 (Magazine), at 38. Some commentators have even pointed to studies indicating that the number of college women forced to engage in sexual acts against their will is 1 in 4. *Larry King Live* (CNN television broadcast, Sept. 10, 1993) (statement of Andrea Parrot, professor at Cornell University and authority on on-campus violence against women).

2. *See, e.g.*, Hartman v. Bethany College, 778 F. Supp. 286, 289 (N.D. W. Va. 1991) (student assaulted by two men after leaving bar close to campus); Tanja H. v. Regents of the Univ. of Cal., 278 Cal. Rptr. 918, 919 (1991) (student gang raped by football players living on her dormitory floor); Duarte v. State, 148 Cal. Rptr. 804, 806 (Cal. Ct. App. 1978) (student raped and murdered in residence hall), *vacated*, 151 Cal. Rptr. 727 (Cal. Ct. App. 1979); Relyea v. State, 385 So. 2d 1378, 1380 (Fla. Dist. Ct. App. 1980) (students abducted from campus, then assaulted and murdered); Klobuchar v. Purdue Univ., 553 N.E.2d 169, 170 (Ind. Ct. App. 1990) (student held at gunpoint by deranged ex-husband); Nero v. Kansas St. Univ., 861 P.2d 768, 771-72 (Kan. 1993) (student raped by fellow dormitory resident); Mullins v. Pine Manor College, 449 N.E.2d 331, 334 (Mass. 1983) (student raped by unknown intruder on campus); Brown v. North Carolina Wesleyan College, 309 S.E.2d 701, 701 (N.C. Ct. App. 1983) (student abducted, raped, and murdered following on-campus basketball game).

3. According to one commentator:

> Even before they begin their first day of college, say many experts

Under negligence law, the extent of the college's duty to protect students from such misfortunes remains unclear.[5]

American colleges historically provided for the physical well-being of their students.[6] This was derived from the traditional *in loco parentis*[7] student-college relationship.[8] During the 1900s,

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> on student life, a large number of undergraduates are messed-up, increasingly adept (often since high school) at reckless drinking and reckless sex, increasingly burdened by messy family histories, increasingly unprepared for college course work.

Matthews, *supra* note 1, at 38, 47. The author noted that "intoxicated students routinely smash toilets, yank out sinks, punch through ceilings, head-butt street lamps, uproot ornamental trees and body-slam vending machines . . ." *Id.* at 42.

4. For cases involving injuries suffered by students, see Kleinknecht v. Gettysburg College, 989 F.2d 1360, 1363-64 (3d Cir. 1993) (student suffered fatal heart attack during lacrosse practice); Bradshaw v. Rawlings, 612 F.2d 135, 137 (3d Cir. 1979) (student rendered paraplegic after car accident occurring while passenger in car of classmate who had become intoxicated at class picnic), *cert. denied*, 446 U.S. 909 (1980); Booker v. Lehigh Univ., 800 F. Supp. 234, 235-36 (E.D. Pa. 1992) (intoxicated student injured after falling and hitting her head on a rock while taking wooded shortcut), *aff'd mem.*, 995 F.2d 315 (3d Cir. 1993); Rehberg v. Glassboro St. College, 745 F. Supp. 1113, 1114 (E.D. Pa. 1990) (student injured in car accident after drinking at fraternity party); Baldwin v. Zoradi, 176 Cal. Rptr. 809, 811 (1981) (student engaging in "speed contest" injured in car accident after on-campus drinking); University of Denver v. Whitlock, 744 P.2d 54, 56 (Colo. 1987) (en banc) (intoxicated student injured while attempting a back flip on a trampoline); Furek v. University of Del., 594 A.2d 506, 510 (Del. 1991) (fraternity pledge injured during initiation event when student poured oven cleaner over pledge's body); Walker v. Daniels, 407 S.E.2d 70, 72-73 (Ga. Ct. App. 1991) (student drowned in campus pool); Rabel v. Illinois Wesleyan Univ., 514 N.E.2d 552, 554 (Ill. App. Ct. 1987) (female student injured when an intoxicated individual dropped her while running with her on his shoulder), *cert. denied,* 520 N.E.2d 392 (1988); Swanson v. Wabash College, 504 N.E.2d 327, 329 (Ind. Ct. App. 1987) (student injured by thrown baseball); Campbell v. Board of Trustees, 495 N.E.2d 227, 229 (Ind. Ct. App. 1986) (passenger in automobile driven by intoxicated student injured when automobile crashed into ditch); Pitre v. Louisiana Tech Univ., 596 So. 2d 1324, 1332 (La. Ct. App. 1992) (student crashed into light pole while sledding on university hill); Millard v. Osborne, 611 A.2d 715 (Pa. Super. Ct.) (intoxicated student killed in automobile accident following fraternity party), *cert. denied,* 615 A.2d 1312 (Pa. 1992); Beach v. University of Utah, 726 P.2d 413, 415 (Utah 1986) (student injured after falling off of a cliff while intoxicated).

5. *See* Amy Stevens, *Personal-Injury Lawsuits by Students are Endangering University Budgets*, WALL ST. J., Nov. 18, 1992, at B1. Stevens noted that recent court cases have left university administrators unsure of their legal responsibilities regarding student safety. *Id.*

6. *See* Brian Jackson, Note, *The Lingering Legacy of* In Loco Parentis: *An Historical Survey and Proposal for Reform*, 44 VAND. L. REV. 1135, 1138-40 (1992) (describing the traditional custodial relationship between the student and college). *See also infra* part I.B.

7. *Black's Law Dictionary* defines *in loco parentis* as: "[I]n the place of a parent; instead of a parent; charged, factitiously, with a parent's rights, duties, and responsibilities." BLACK'S LAW DICTIONARY 787 (6th ed. 1990).

8. For a discussion of the *in loco parentis* relationship, see *infra* part I.B.

colleges began to abandon this role and by 1970, *in loco parentis* seemed defunct.[9] Since then, courts have widely held that the demise of *in loco parentis* justifies the refusal to hold colleges responsible for protecting and supervising students.[10]

This trend began to reverse in the 1980s, when some courts recognized a duty to protect students from on-campus criminal attacks.[11] In the 1990s, however, some courts have recognized a broader duty, essentially a responsibility to protect students from their own reckless behavior, and from the reckless and often criminal acts of their classmates.[12] A duty to supervise students, not just to protect students, is emerging in the 1990s.

This has left college administrators uncertain regarding what responsive measures to institute.[13] Most, however, have responded by increasing student supervision and restricting dangerous activities.[14] Students, meanwhile, continue to file personal injury lawsuits against colleges in growing numbers.[15]

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9. *See, e.g.*, Buttny v. Smiley, 281 F. Supp. 280, 286 (D. Colo. 1968) (noting that "the doctrine of 'In Loco Parentis' is no longer tenable in a university community"); *see generally* WILLIAM A. KAPLIN, THE LAW OF HIGHER EDUCATION 5-7 (2d ed. 1985) (outlining factors leading to the demise of the *in loco parentis* doctrine); Jackson, *supra* note 6, at 1142-44 (same); Theodore C. Stamatakos, Note, *The Doctrine of In Loco Parentis, Tort Liability and the Student-College Relationship*, 65 IND. L.J. 471, 474-76 (1991) (same). See generally *infra* notes 33-43 and accompanying text for a discussion of the demise of *in loco parentis*.

10. *See* James J. Szablewicz & Annette Gibbs, *Colleges' Increasing Exposure to Liability: The New In Loco Parentis*, 16 J.L. & EDUC. 453, 456-57 (1987) (noting that "courts rejected negligence claims against colleges" after the demise of the *in loco parentis* doctrine); Timothy M. McClean, Note, *Tort Liability of Colleges and Universities for Injuries Resulting From Student Alcohol Consumption*, 14 J.C. & U.L. 399, 402 (1987) (noting that the establishment of a duty poses the most significant obstacle towards establishing a prima facie case of negligence for the failure to control student alcohol consumption). *See infra* part II.

11. *See infra* part III.

12. According to the *Wall Street Journal*, these new decisions deviating from the accepted view stem "from renewed judicial ambivalence over whether college students are fully accountable adults or kids who need protection form themselves." Stevens, *supra* note 5, at B1. *See generally infra* part IV.

13. The *Wall Street Journal* noted that institutions are without "clear legal guidelines" and "uncertain" as to when they might be accountable for injuries to students. Stevens, *supra* note 5, at B1. *See also* McClean, *supra* note 10, at 413 (noting that recent decisions create a dilemma because they hold colleges to a duty to enforce their protective policies, making it prudent not to institute such policies).

14. *See Clampdowns Cause Different Problems*, U.S.A. TODAY, Apr. 8, 1991, at 50 [hereinafter *Clampdowns*] ("While colleges investigate new ways to curb drinking through education, the threat of lawsuits has them redoubling old-fashioned efforts to monitor underage drinkers or ban alcohol from campuses."); Kathryn Kranhold & Katherine Farrish, *Anxiety About Sex, Dating,*

This Note discusses the emerging duty of colleges to supervise students under the *in loco parentis* theory.[16] Part I discusses the student-college relationship, focusing on the traditional *in loco parentis* relationship, and briefly examining contractual methods of determining the relationship. Part II examines cases that limit the duty of colleges. Part III addresses cases that have imposed on colleges a duty to provide adequate security on campus. Part IV examines recent cases in the 1990s that have imposed on colleges a broader duty to monitor students in an effort to protect them. Finally, Part V analyzes the emerging duty to supervise in terms of traditional tort duty analysis, and discusses policy factors that may be guiding these courts. This section concludes that recent attempts to impose supervisory responsibilities on the college should be embraced with caution.

I. THE STUDENT-COLLEGE RELATIONSHIP

A. *Duty and Negligence Law*

"Duty" is an element of the prima facie negligence case.[17] Whether a duty is owed is a question of law.[18] Common-law

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Rape Transforms College Life, HARTFORD COURANT, Oct. 10, 1993, at A1 ("[I]n response to . . . fear of lawsuits . . . [colleges] are adopting increasingly intrusive policies."); *Matthews*, *supra* note 1, at 38, 47 (noting "newfound paternalism" as a result of increased liability); *CNN & Company* (CNN television broadcast, Apr. 5, 1993) (noting "new paternalism" in american colleges and universities) [hereinafter *CNN & Company*].

15. The *Wall Street Journal* described a "new wave of personal-injury suits by students, many of whom claim the schools should have protected them from their own youthful mistakes." *See* Stevens, *supra* note 5, at B1. Personal injury suits against universities have "risen significantly" in the last five years. As a result, most schools now employ full time legal staffs. *Id.* at B6. William Kaufman, Vice President and General Counsel of the University of Alaska, Fairbanks, noted that, "There appears to be a greater tendency for people to look to the university for compensation for any injury, regardless if the matter was wholly in the control of the individual." *Id.*

The increase in lawsuits against colleges can also be seen as a by-product of the general litigation explosion. *See* Stamatakos, *supra* note 6, at 488 (noting that colleges have not been immune "from the general expansion of tort liability that has occurred over the last twenty-five years"). The litigation explosion began in the 1960s partially as a result of the increased willingness of courts to recognize new bases of liability. *See* Peter H. Schuck, *Introduction* to THE AMERICAN ASSEMBLY, TORT LAW AND THE PUBLIC INTEREST 19 (Peter H. Schuck ed., 1991).

16. This Note does not discuss numerous other theories on which a student can posit liability against a college, such as the affirmative negligence of the college, agency principles, or intentional torts. Additionally, this Note does not address the college's possible liability under dram shop statutes or under social host liability.

17. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS

negligence differentiates between active negligence, or misfeasance, and passive negligence, or nonfeasance.[19] The failure of the university to protect or supervise its students is nonfeasance, or the failure to take affirmative action.[20] There can be no duty to take affirmative action without the existence of a "special relationship" between the parties, a relationship that the law recognizes as warranting an exception from the general rule.[21]

In addition to the existence of a special relationship, a duty to take affirmative action requires a finding that non-action creates a foreseeable and unreasonable risk.[22] To determine whether a

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§ 30, at 164 (5th ed. 1984). Under the traditional approach to negligence, four elements compose a negligence cause of action: (1) a duty, or obligation, recognized by the law, requiring the actor to conform to a certain standard of conduct, for the protection of others against unreasonable risks; (2) a failure on the actor's part to conform to that standard, or a breach of the duty; (3) an injury resulting from that breach; and (4) a reasonably close causal connection between the injuries and the breach. KEETON, *supra*, § 30, at 164-65. The negligence framework can also be discussed in terms of duty-risk analysis. *See* E. Wayne Thode, *Tort Analysis: Duty-Risk v. Proximate Cause and the Rational Allocation of Functions Between Judge and Jury*, 1977 UTAH L. REV. 1, 22-32.

18. KEETON, *supra* note 17, § 45, at 320.

19. *Id.* § 56, at 373. The common law distinguishes between active negligence, misfeasance (*e.g.*, driving carelessly) and non-active negligence, nonfeasance (*e.g.*, failing to come to the aid of an injured party whose injuries the actor did not cause). *Id.* § 56, at 363-75.

20. *See, e.g.*, University of Denver v. Whitlock, 744 P.2d 54, 57 (Colo. 1987) (en banc) ("University is charged with negligent failure to act rather than negligent affirmative action.").

21. *See* KEETON, *supra* note 17, § 56, at 363-75. The misfeasance/nonfeasance distinction is rooted in the refusal of early courts to hold persons liable for non-action. *Id.* § 56, at 373. English judges "shrank from converting the courts into an agency for forcing men to help one another." *Id.* According to Prosser and Keeton, "[D]uring the last century, liability for 'nonfeasance' has been extended still further to a limited group of relations, in which custom, public sentiment and views of social policy have led the courts to find a duty of affirmative action." *Id.* § 56, at 373-74.

Section 314A of the *Restatement (Second) of Torts* lists special relationships that courts have commonly accepted as allowing a duty to protect another. The list, which the *Restatement* states does not preclude the finding of other special relationships, includes: the common carrier and passenger; the innkeeper and guest; the possessor of land and invitee; and the custodian and ward. RESTATEMENT (SECOND) OF TORTS § 314(a) (1965).

The *Restatement* lists additional relationships that allow a duty to supervise third parties. They include: the duty of parents to control their children; the duty of masters to control their servants; the duty of possessors of land or chattels to control the conduct of licensees; the duty of those in charge of persons having dangerous propensities; and the duty of persons having custody of another to control the conduct of third persons. *Id.* §§ 316-320.

22. *See* Palsgraf v. Long Island R.R., 162 N.E. 99, 100 (N.Y. 1928) ("The risk reasonably to be perceived defines the duty to be obeyed."); KEETON, *supra* note 17, § 31, at 170.

risk is unreasonable, courts weigh the gravity and probability of the harm associated with such non-action against the societal burdens that correspond with imposing such responsibilities.[23] Accordingly, duty is essentially a policy question.[24] Because duty has its foundation in policy concerns, the analysis changes with social norms.[25]

B. *In Loco Parentis*

Early American educational institutions[26] emphasized discipline and structure.[27] Courts granted to colleges great deference in

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23. According to section 291 of the *Restatement (Second) of Torts:*

> Where an act is one which a reasonable man would recognize as involving a risk of harm to another, the risk is unreasonable and the act is negligent if the risk is of such magnitude as to outweigh what the law regards as the utility of the act or of the particular manner in which it is done.

RESTATEMENT (SECOND) OF TORTS § 291 (1965). Comment f. to section 291 specifically applied this test to finding a duty to take affirmative action:

> Even where the relationship or precedent act is one which usually creates a duty of protective action, no such duty exists if the benefit to the other is less than, or merely equal to, the utility of action or inaction to the actor.

Id. § 291, cmt. f. The *Restatement* further set out factors to be considered in determining the utility of the affirmative action and risk of non-action. *See id.* §§ 292-293; *infra* notes 214 & 224. *See also* Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334, 342 (Cal. 1976). In *Tarasoff*, the court explained that judges should only depart from the traditional rule of non-liability for nonfeasance:

> [U]pon the balancing of a number of considerations; major ones are the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost and prevalence of insurance for the risk involved.

Id. (citations omitted).

24. "Duty is not sacrosanct in itself, but is only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection." KEETON, *supra* note 17, § 53, at 358.

25. *Id.* § 43, at 359.

26. The founders of the first American colleges emulated English institutions. Jackson, *supra* note 6, at 1139. Graduates of and teachers from the Cambridge and Emmanuel Colleges in England founded early American institutions. *Id.* at n.22.

27. Gerard A. Fowler, *The Legal Relationship Between the American College Student and the College: An Historical Perspective and the Renewal of a Proposal*, 13 J.L. & EDUC. 401, 408-09 (1984). Other authors describe a particularly harsh system of punishment in the early years of Harvard College: "Mistress Eaton and her servants made domestic life unbearable for the freshmen

formulating these restrictive policies, reasoning that colleges functioned *in loco parentis*, or in the place of the students' parents.[28] Accordingly, courts blocked attempts to question the college's power, much as they would restrict a minor's attempt to sue his parents.[29]

In loco parentis was also characterized by a custodial relationship between the college and the student.[30] College administrators exercised a parental role in securing the "physical and moral welfare" of their students.[31] It is unclear, however, whether *in loco parentis* provided a basis for a tort duty during its heyday.[32]

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who boarded in with her, and Master Eaton ruined the 'scholastic' side of freshman living by flogging the young men for disciplinary lapses." M. LEE UPCRAFT & JOHN N. GARDNER, THE FRESHMAN YEAR EXPERIENCE 29 (1989) (citation omitted).

28. *See, e.g.*, John B. Stetson Univ. v. Hunt, 102 So. 637, 640 (Fla. 1924) (deferring to university judgment when confronted by student allegation that university expelled him without cause and in bad faith); Gott v. Berea College, 161 S.W. 204, 206 (Ky. 1913) (noting that courts should grant great deference to university authorities unless the university policies are unlawful or against public policy); Woods v. Simpson, 126 A. 882, 883 (Md. 1924) (stating that the college administration must "be left untrammeled in handling the problems which arise, as their judgment and discretion may dictate. . . ."); *see also* Paul D. Carrington, *On Civilizing University Discipline*, *in* LAW AND DISCIPLINE ON CAMPUS 71 (Grace W. Holmes ed., 1971) ("Academic discipline used to be a cozy, family affair. The benign dean played the firm, fair father; his students, like good children everywhere, never questioned his integrity or his wisdom."). For a definition of *in loco parentis*, see *supra* note 7. Blackstone applied *in loco parentis* to the educational context in 1770 as follows:

> [The father] may also delegate part of his parental authority . . . to the tutor or schoolmaster of his child; who is then *in loco parentis*, and has such portion of the power of the parent committed to his change, *viz.* that of restraint and correction, as may be necessary to answer the purposes for which he is employed.

1 WILLIAM BLACKSTONE, COMMENTARIES *441.

29. *See, e.g.*, Illinois *ex rel.* Pratt v. Wheaton College, 40 Ill. 186, 187 (1866) ("A discretionary power had been given [college authorities] to regulate the discipline of their college in such manner as they deem proper. . . . [w]e have no more authority to interfere than we have to control the domestic discipline *of a father in his family.*") (emphasis added).

30. Stamatakos, *supra* note 9, at 474; Szablewicz & Gibbs, *supra* note 10, at 454 (noting that during the *in loco parentis* period, when parents placed "their children in the college's hands, parents transferred their parental authority and obligations to the schools").

31. *See, e.g.*, Gott v. Berea College, 161 S.W. 204, 206 (Ky. 1913) ("College authorities stand *in loco parentis* concerning the physical and moral welfare . . . of the pupils. . . ."). In *Gott*, the plaintiff, who owned a saloon near the college, sought to enjoin enforcement of a rule that made patronage of his establishment an expellable offense for students. The court deferred to the college's parental decision making responsibilities. *Id.* at 207.

32. Few opinions written during the time of *in loco parentis* discussed college tort liability, and none of these cases mentioned *in loco parentis*. One commen-

In loco parentis began to decline in popularity in the late nineteenth century when the German model of higher education emerged.[33] German higher education envisioned large and diversified institutions, and exhibited little concern for the private life of the student.[34] In the early twentieth century, state institutions embraced this idea because it allowed them to educate a larger student body.[35] German education increased in popularity after World War II because it allowed institutions to accommodate the soldiers sent to college on the G.I. Bill.[36] Enrollment increases

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tator suggested that the doctrine of *in loco parentis* never provided the "special relationship necessary for liability to obtain." Stamatakos, *supra* note 9, at 483. This author executed a series of LEXIS searches, "using various combinations of 'colleges,' 'universities,' '*in loco parentis*,' and 'injury,'" all of which failed to find any cases discussing *in loco parentis* in conjunction with college tort liability. *Id.* at 483 n.62.

Nevertheless, other commentators have asserted that the lack of appellate cases does not prove that the doctrine was inapplicable in tort. Szablewicz & Gibbs, *supra* note 10, at 455-56. According to these authors:

> The *Gott* definition of *in loco parentis* was qualified with an "unless against public policy" stipulation. Until recently courts felt that damage awards against colleges and universities drained the financial resources of such institutions and that such a drain was against public policy. Thus, the shortage of old cases discussing *in loco parentis* as a basis of liability comes as no surprise. This issue was never reached by most appellate courts because of the preemptory immunity issue.

Id. (footnotes and citations omitted).

The immunity doctrines mentioned by Szablewicz and Gibbs limit judgments against certain institutions. Such doctrines vary between states. Sovereign immunity doctrines often protect state institutions, while charitable immunity doctrines often protect private institutions. Most jurisdictions, however, now limit such immunities. *See generally* Janet Fairchild, Annotation, *Tort Immunity of NonGovernmental Charities — Modern Status*, 25 A.L.R.4th 517 (1983); Allen E. Korpela, Annotation, *Modern Status of Doctrine of Sovereign Immunity as Applied to Public Schools and Institutions of Higher Learning*, 33 A.L.R.3d 703 (1970) (citing sovereign immunity doctrines).

33. Jackson, *supra* note 6, at 1141-42.

34. *Id.* German higher education had its debut in the United States in 1876 when Johns Hopkins University was founded. According to Jackson, the students at Johns Hopkins "were remarkably free of paternalistic control, the curriculum was mostly elective, and students generally were unsupervised." *Id.* at 1142. The University of Chicago, founded in 1889, was another major institution to follow the German model. *Id.* at 1142 n.46. German education envisioned the large "university," whereas the English model embraced the smaller "college" setting. *Id.* at 1140-42.

35. *Id.* at 1142.

36. KAPLIN, *supra* note 9, at 6. In 1940, there were approximately 1.5 million degree students in institutions of higher education in the United States. This number increased to 2.5 million in 1955, a 66% increase. By 1965, more than 5.5 million students were enrolled. *Id.*

resulting from the baby boom further contributed to the popularity of the German model.[37]

Student protest during the 1960s ended traditional *in loco parentis*.[38] Students demanded additional freedoms and rights.[39] The courts responded by refusing to grant deference to unconstitutional university rules.[40] Courts and commentators soon concluded that *in loco parentis* no longer characterized the student-college relationship.[41] In 1971, Congress enacted the Twenty-sixth

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37. *See id.* (noting the increase in college students in the 1960s as a result of the baby boom).

38. *See generally* Jackson, *supra* note 6, at 1143; Stamatakos, *supra* note 9, at 474-76.

39. Jackson, *supra* note 6, at 1143.

40. Students' disobedience led to confrontations with university officials. *See* Szablewicz & Gibbs, *supra* note 10, at 456. One clash occurred at the University of California when the administration tried to stop students from political protest on campus. Jackson, *supra* note 6, at 1143. As a result, students who had worked during previous summers for the civil rights cause organized the "Free Speech Movement." *Id.* at 1143 & n.55. According to Jackson, the civil rights activists had "returned to campus unwilling to accept restrictions on their own political rights." *Id.* at 1143 n.55. *See generally* Donald A. Reidhaar, *The Assault on the Citadel: Reflections on a Quarter Century of Change In the Relationships Between the Student and the University*, 12 J.C. & U.L. 343, 347 (1985) (discussing origins of student protests during the 1960s); MICHAEL CLAY SMITH, CODING WITH CRIME ON CAMPUS 8-9 (1988) ("By the late 1960s, thousands of criminal cases were in the courts growing out of 'sit-ins' and other sorts of student demonstrations in support of political ideology.") (footnote omitted).

The Fifth Circuit, in Dixon v. Alabama State Bd. of Ed., 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961), provided a turning point in the rejection of *in loco parentis*. The *Dixon* court explicitly rejected traditional deference to the university and held that state-run institutions could not expel students without a hearing. *Id.* at 158. In *Dixon*, a state university had expelled two students because they had participated in civil rights demonstrations. *Id.* at 151, 152 n.3. The court rejected the contention that a public school could rely on traditional deference to the college, and found that the school's policies violated the students' due process rights. *Id.* at 157-58. *See generally* William W. Van Alstyne, *The Tentative Emergence of Student Power in the United States*, 17 AM. J. COMP. L. 403, 412 (1969) (referring to *Dixon* as "[t]he watershed decision" in the demise of *in loco parentis*).

Other courts have solved student-college disputes by analyzing the constitutional rights of the student. This method of analysis is limited, however, because it only applies to public colleges, and is generally not relevant to determining a duty relationship. *See* H.L. Silets, *Of Students' Rights and Honor: The Application of the Fourteenth Amendment's Due Process Strictures to Honor Code Proceedings at Private Colleges and Universities*, 64 DENV. U. L. REV. 46 (1987); Stamatakos, *supra* note 9, at 476 n.23.

41. *See, e.g.*, Buttny v. Smiley, 281 F. Supp. 280, 286 (D. Colo. 1968) (stating that *in loco parentis* is "no longer tenable"); Hegel v. Langsam, 273 N.E.2d 351, 352 (Ohio Ct. App. 1971) (holding that the university is "neither a nursery school, a boarding school nor a prison. . . . [Students] must be presumed to have sufficient maturity to conduct their own personal affairs."). Commentators have also almost uniformly proclaimed the *in loco parentis*

Amendment, which lowered the voting age to eighteen.[42] This appeared to reflect a societal view that college-aged students should be treated as adults.[43]

C. *The Student-College Contractual Relationship*

Courts also use contract principles to examine the student-college relationship.[44] Courts have found representations made by colleges concerning conduct, academics, and discipline enforceable because of implicit contractual agreements.[45] Implied contracts can arise from representations in catalogues, bulletins, housing contracts, registration materials, and admission applications.[46] Courts reason that these representations are part of the bargain between the parties.[47]

The application of contract principles in this context, however, suffers from analytical flaws.[48] Professor Virginia Dodd suggested that such contracts do not result from a true bargain.[49] Dodd argued that materials such as catalogues and bulletins are not drafted to be contracts.[50] Such representations are vague and easily changed.[51]

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relationship defunct. *See, e.g.*, Perry A. Zirkel & Henry F. Reichner, *Is the In Loco Parentis Doctrine Dead?*, 15 J.L. & EDUC. 271, 281-82 (1986) (noting that *in loco parentis*, in the college context, "has undergone a clear rise and a complete demise" in American courts).

42. U.S. CONST. amend. XXVI.

43. *See, e.g.*, Bradshaw v. Rawlings, 612 F.2d 135, 140 (3d Cir. 1979) (citing the 26th Amendment as evidence that society considers college-aged students to be adults), *cert. denied*, 446 U.S. 909 (1980). The enactment of the Twenty-sixth Amendment prompted Justice Douglas to proclaim that, "Students—who, by reason of the Twenty-sixth Amendment, become eligible to vote when 18 years of age—are adults who are members of the college or university community." Healy v. James, 408 U.S. 169, 197 (1972) (Douglas, J., concurring).

44. For a discussion of the application of contract law to the university-student relationship, see Jonathan F. Buchter, Note, *Contract Law and the Student-University Relationship*, 48 IND. L.J. 253 (1973).

45. *See id.* at 256-57 nn. 17-21 (citing cases employing contractual principles to settle disputes).

46. For cases in which various documents and communications have given rise to an implied contract, see *id.* at 256-57 nn. 17-21.

47. *See, e.g.*, Mullins v. Pine Manor College, 449 N.E.2d 331, 336 (Mass. 1983) ("students are charged, either through their tuition or a dormitory fee, for [protection from criminal acts]. Adequate security is as an indispensable part of the bundle of services which colleges . . . afford their students.").

48. *See* Virginia J. Dodd, *The Non-Contractual Nature of the Student-University Contractual Relationship*, 33 KAN. L. REV. 701 (1985).

49. *Id.* at 704.

50. *Id.* at 714.

51. *Id.* at 715, 728-29.

II. THE GENERAL RULE: THE LIMITED DUTY OF THE COLLEGE

Since the demise of *in loco parentis,* most courts have refused to hold the college responsible for protecting students,[52] generally on the grounds that no *in loco parentis* relationship exists.[53] In

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52. *See generally infra* notes 54-100. No court, however, has held that colleges cannot owe any duty towards their students. Because students are typically business invitees, universities have a duty to protect students against certain physical hazards on campus. For example, in Shannon v. Washington Univ., 575 S.W.2d 235 (Mo. Ct. App. 1978), the plaintiff sued the university after slipping on an icy walkway on campus. *Id.* at 236-37. The court, accepting the student as an invitee, acknowledged that a private university had a duty to exercise ordinary care to keep those areas intended for the use of the invitee in a reasonably safe condition. *Id.* at 237. *See* KEETON, *supra* note 17, §§ 60-64, at 412-50.

While some states have eliminated such distinctions, most jurisdictions classify those who enter upon land into three categories: trespassers, licensees, and invitees. *Id.* § 58, at 393. Further, the law has subdivided these categories. *Id.* A trespasser enters the land without privilege of consent. *Id.* A licensee can be described as someone who has entered the land with consent, but for his own purpose, and not for the purpose or interest of the landholder. *Id.* § 60, at 412. Traveling salesmen who come unsolicited to the door of the landholder and social guests are licensees. *Id.* § 60, at 413. Invitees generally include those consensually allowed on the premises for business that concerns the occupier, and upon the express or implied invitation of the occupier. *Id.* § 61, at 419.

The *Restatement (Second) of Torts* lists the generic landowner/invitee relationship as a special relationship. RESTATEMENT (SECOND) OF TORTS § 314A(3) (1965). Specifically, in § 344, the *Restatement* says:

> Business Premises Open to Public: Acts of Third Persons or Animals: A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land from such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to (a) discover that such acts are being done or are likely to be done, or (b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.

Id. § 344.

53. Plaintiffs who allege that the college has a duty to exercise reasonable care to protect students from various safety risks often allege an *in loco parentis* relationship as a basis for such a duty. Such a relationship has been analogized to § 314A(4) of the *Restatement (Second) of Torts,* which states:

> Special Relations Giving Rise to Duty to Aid or Protect:
>
> . . . .
>
> (4) One . . . who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection is under a . . . duty to the other.

Id. § 314A(4).

Similarly, *in loco parentis* has been analogized to § 320 of the *Restatement,* which states:

> Duty of Person Having Custody of Another to Control Conduct

Hegel v. Langsam,[54] a case decided soon after the demise of *in loco parentis*, an Ohio court refused to hold the college to a duty to monitor the non-academic activities of its students.[55] In *Hegel*, the plaintiffs, the parents of a delinquent female student, claimed that the university administration negligently allowed their daughter to become involved in an unacceptable lifestyle.[56] In dismissing the case, the court held that society presumed university students mature and capable of supervising their own affairs.[57]

In 1979, in *Bradshaw v. Rawlings*,[58] the Third Circuit Court of Appeals held that the demise of *in loco parentis* drastically limited the colleges duty to protect its students.[59] Bradshaw, a

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of Third Persons

One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal power of self-protection or to subject him to association with persons likely to harm him, is under a duty to exercise reasonable care so to control the conduct of third persons as to prevent them from intentionally harming the other or so conducting themselves as to create an unreasonable risk of harm to him, if the actor

(a) knows or has reason to know that he has the ability to control the conduct of the third persons, and

(b) knows or should know of the necessity and opportunity for exercising such control.

Id. § 320. Thus, the college would have a duty to supervise the entire student body to protect its students. Similarly, an *in loco parentis* relationship could be analogized to § 316 of the *Restatement*. Section 316 states:

Duty of Parent to Control Conduct of Child: A parent is under a duty to exercise reasonable care so to control his minor child as to prevent it from intentionally harming others or from so conducting itself as to create an unreasonable risk of bodily harm to them, if the parent

(a) knows or has reason to know that he has the ability to control his child, and

(b) knows or should know of the necessity and opportunity for exercising such control.

Id. § 316.

54. 273 N.E.2d 351 (Ohio Ct. App. 1971).

55. *Id.* at 352.

56. *Id.* According to the plaintiffs, the college allowed the student to "become associated with criminals, to be seduced, to become a drug user and further allowed her to be absent from her dormitory and failed to return her to her parents' custody on demand." *Id.*

57. *Id.* The court stated that "[w]e know of no requirement of the law . . . placing on a university or its employees any duty to regulate he private lives of their students, to control their comings and goings and to supervise their associations." *Id.*

58. 612 F.2d 135 (3d Cir. 1979), *cert. denied*, 446 U.S. 909 (1980).

59. *Id.* at 139-40. For student commentary on *Bradshaw*, compare Rita Mankovich Irani, Recent Decisions, *Torts—Negligent Supervision—College Liability—Student Intoxication Injury*, 19 DUQ. L. REV. 381 (1981) (approving of

student, sued his college after receiving injuries in an automobile accident.[60] The plaintiff was a passenger in an automobile being driven back to campus by a fellow student.[61] The driver had become intoxicated at an off-campus school picnic.[62] A jury found the university negligent in its planning and supervision of the event.[63] The college appealed, alleging that it had no duty to supervise the driver or the activities at the picnic.[64]

The Third Circuit reversed.[65] The court reasoned that "the modern American college is not an insurer of the safety of its students."[66] The court noted that college students demanded freedom from oppressive rules in the 1960s.[67] As a result, society now accorded broad responsibilities to college students.[68]

The court also refused to find that university regulations banning alcohol use created an ensuing obligation of enforcement.[69]

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the decision), with Note, *The Student-College Relationship and the Duty of Care: Bradshaw v. Rawlings*, 14 GA. L. REV. 843 (1980) (criticizing the opinion as allowing too broad of a liability shield for universities).

60. Bradshaw was paralyzed after an automobile in which he was a passenger struck a parked car. The driver of the automobile was speeding. The driver attempted to negotiate a road filled with drainage dips used to carry surface runoff. *Bradshaw*, 612 F.2d at 137. The accident rendered Bradshaw a quadriplegic. *Id.*

61. *Id.*

62. *Id.* A faculty member had participated in the planning of the event and had co-signed a check used to purchase alcohol. The planners of the event publicized the event throughout campus. Flyers "were mimeographed by the college duplicating facility and featured drawings of beer mugs." No faculty members, however, attended the picnic. *Id.*

63. *Id.* The jury ordered the university to pay the plaintiffs $1,108,067. *Id.*

64. *Id.*

65. *Bradshaw*, 612 F.2d at 142-43.

66. *Id.* at 138.

67. *Id.* at 139. The court noted that, "A dramatic reapportionment of responsibilities and social interests of general security took place [with the demise of *in loco parentis*]. Regulation by the college of student life on and off campus has become limited. . . . [T]oday students vigorously claim the right to define and regulate their own lives." *Id.* at 139-40.

68. *Id.* at 138-39. The court, exercising diversity jurisdiction and applying Pennsylvania law, examined the rights that Pennsylvania afforded to college age students:

> College students today are no longer minors; they are now regarded as adults in almost every phase of community life . . . [t]hey may vote, marry, make a will, qualify as a personal representative, serve as a guardian of the estate of a minor, wager at racetracks, register as a public accountant, practice veterinary medicine, qualify as a practical nurse, drive trucks, ambulances and other official fire vehicles, perform general fire fighting duties, and qualify as a private detective.

Id. at 139 (footnotes omitted).

69. *Id.* at 141. The regulation stated: "Possession or consumption of alcohol or malt beverages on the property of the College or at any College sponsored or related affair off campus will result in disciplinary action." *Id.*

The court reasoned that this regulation mirrored the state drinking age law, and was not an enforceable agreement.[70] The college could not reasonably have expected the plaintiff to rely on the alcohol ban for his protection.[71]

Moreover, the court found that the college, through failing to monitor the drinking, did not create a known probability of harm giving rise to a duty.[72] The court reasoned that student alcohol consumption was relatively harmless.[73] The court pointed to the lack of any ban on printed and broadcasted beer advertisements, and even seemed to invoke personal experience.[74] Moreover, the court held that supervisory obligations would create impossible burdens.[75]

Most courts after *Bradshaw* refused to hold colleges to a duty to protect students.[76] In *Baldwin v. Zoradi*,[77] a California appellate

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70. *Bradshaw*, 612 F.2d at 141.

71. *Id.* The court applied § 320 of the *Restatement*. *Id.* at 141. See *supra* note 53 for the text of § 320.

72. *Bradshaw*, 612 F.2d at 141. The court reasoned in part that because Pennsylvania law did not recognize social host liability, it could not hold the college to such a duty. *Id.*

73. *Id.* at 142. According to the court, "it cannot be seriously controverted that a goodly number of citizens indulge in this activity." *Id.*

74. *Id.* The court stated that "this panel of judges is able to bear witness to the fact that beer drinking by college students is a common experience." *Id.*

75. *Id.* at 142. The court referred to such an obligation as an "impossible burden." *Id.* In discussing the difficulty with enforcing such regulations, the court noted that New Jersey, a bordering state, had a lower drinking age, thus making alcohol an easy commodity for the underage drinkers at the college to obtain. *Id.*

76. *See* Albano v. Colby College, 822 F. Supp. 840, 841 (D. Maine 1993) (finding no duty to prevent adult college student from becoming intoxicated on school-sponsored field trip); Booker v. Lehigh Univ., 800 F. Supp. 234, 241 (E.D. Pa. 1992) (finding no duty to monitor student drinking at fraternity house), *aff'd mem.*, 995 F.2d 215 (3d Cir. 1993); Hartman v. Bethany College, 778 F. Supp. 286, 291-95 (N.D. W. Va. 1991) (holding that school had no duty to supervise and take action to prevent underage plaintiff from attempting to patronize off-campus bars); Tanja H. v. Regents of the Univ. of Cal., 278 Cal. Rptr. 918, 920-21 (Ct. App. 1991) (noting several policy reasons not to find that university had a duty to safeguard its students); Baldwin v. Zoradi, 176 Cal. Rptr. 809, 813-21 (Ct. App. 1981) (finding no duty to take action to control dormitory drinking); University of Denver v. Whitlock, 744 P.2d 54, 56-62 (Colo. 1987) (en banc) (finding no duty on part of college as either arising from custodial position towards students, or as landlord to fraternity house, to supervise potentially dangerous activity on trampoline located at fraternity house); Savannah College of Art & Design v. Roe, 409 S.E.2d 848, 849-50 (holding that dormitory lease agreement did not give rise to a special protective relationship); Walker v. Daniels, 407 S.E.2d 70, 75 (Ga. 1991) (finding no duty to have provided lifeguard where students were engaging in unauthorized use of campus pool); Leonardi v. Bradley Univ., 625 N.E.2d 431, 435-36 (Ill. App. Ct. 1993) (finding no duty to protect student against rape by fellow student

court refused to regard alcohol use by college students as so morally wrong that it justified extra efforts for prevention.[78] The court stated that decreased supervision allowed students to "grow into responsible adulthood."[79] Similarly, in *Beach v. University of Utah*,[80] the Utah Supreme Court refused to find a duty to supervise and protect the student, reasoning that the university's purpose was to educate, not to "baby sit," and that such obligations would divert resources from education and create a repressive environment.[81] In *Rabel v. Illinois Wesleyan University*,[82] the court rejected plaintiff's claim that the college, in representing itself as a "strong disciplined" and "religious" institution, assumed a duty to supervise or prevent student activities

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occurring in on-campus fraternity house), *appeal denied*, 155 Ill. 2d 565 (1994); Rabel v. Illinois Wesleyan Univ., 514 N.E.2d 552, 560-61 (Ill. App. Ct. 1987) (finding no protective relationship to control intoxication of fraternity members despite assertions in school bulletins concerning religious tenants and alcohol policies of the school), *cert. denied*, 520 N.E.2d 392 (1988); Klobuchar v. Purdue Univ., 553 N.E.2d 169, 172 (Ind. Ct. App. 1990) (finding no duty to protect student from the criminal acts of her husband); Swanson v. Wabash College, 504 N.E.2d 327, 329-31 (Ind. Ct. App. 1987); (finding no duty to supervise off-campus recreational baseball games); Campbell v. Board of Trustees, 495 N.E.2d 227, 232-33 (Ind. Ct. App. 1986) (finding no duty to take measures to prevent student drinking and driving); Fox v. Louisiana St. Univ., 576 So. 2d 978, 983 (La. 1991) (finding no duty to supervise rugby game and preceding alcohol consumption); Eiseman v. New York, 511 N.E.2d 1128, 1136 (N.Y. 1987) (holding that college had no duty to monitor ex-convict student enrolled under state program to educate the disadvantaged); Alumni Association v. Sullivan, 572 A.2d 1209, 1213 (Pa. 1990) (finding no duty to take measures to prevent intoxication of youth who committed arson while under the influence); Millard v. Osborne, 611 A.2d 715, 720-21 (Pa. Super. Ct.) (finding no duty to monitor drinking and driving), *cert. denied*, 615 A.2d 1312 (1992); Beach v. University of Utah, 726 P.2d 413 (Utah 1986) (holding that college had no duty to monitor student's drinking on school sponsored biology field trip); Smith v. Day, 538 A.2d 157, 159-60 (Vt. 1987) (finding no duty to take measures to prevent accidental shooting death). *See also* Michael R. Flaherty, Annotation, *Tort Liability of College or University for Injury Suffered by Student as a Result of Own or Fellow Student's Intoxication*, 62 A.L.R. 4th 81, 83 (1988) (noting that "courts often reason that college administrators and faculties do not assume a role *in loco parentis*, because college students are adults and not children of tender years").

77. 176 Cal. Rptr. 809 (1981).

78. *Id.* at 817. In *Baldwin*, the plaintiff received serious injuries after the car in which she was a passenger crashed. The car had been involved in a drag race. The drivers of the vehicles involved in the accident had previously been drinking in the school dormitories. *Id.* at 811-12.

79. *Id.* at 818.

80. 726 P.2d 413 (Utah 1986).

81. *Id.* at 418-19. In *Beach*, the plaintiff student had become intoxicated during a biology field trip. While she was intoxicated, the plaintiff fell off of a cliff and received serious injuries. *Id.* at 415.

82. 514 N.E.2d 552 (Ill. App. Ct. 1987), *cert. denied*, 520 N.E.2d 392 (1988).

inconsistent with such precepts.[83] The court then held that such obligations would cause administrative problems and divert resources away from education.[84] In *University of Denver v. Whitlock,*[85] the Colorado Supreme Court recognized the serious risks accompanying student alcohol use, but refused to find a special relationship that could warrant a duty.[86] The court reasoned that the school's efforts to ensure student safety were too minimal to create a dependent relationship, and that custodial obligations would directly conflict with student autonomy and independence.[87] In *Alumni Association v. Sullivan,*[88] the Supreme Court of Pennsylvania refused to hold a college to a duty to control the conduct and alcohol consumption of a student who had set a fraternity house ablaze.[89] The court reasoned that this would force upon a university an *in loco parentis* relationship that would be "inappropriate" in modern times.[90]

Courts have relied on *Bradshaw* when addressing the duty of a college to protect students against crime.[91] For example, in *Tanja H. v. Regents of the University of California,*[92] a California court held that the university had no duty to protect a student against being gang raped by fellow students in an on-campus dormitory.[93] The court conceded that the incident may have been foreseeable.[94] It recognized that students, due to their youth, were often unaware of the dangers that alcohol posed and the risk of violence.[95] Moreover, the court recognized that gang rape and

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83. *Id.* at 558. Moreover, the court refused to find a special relationship based upon the parties' landlord-tenant relationship. *Id.* at 562. The court reasoned that Illinois law did not recognize the landlord-tenant relationship as giving rise to a duty to control the intentional criminal acts of third parties. *Id.*

In *Rabel,* the plaintiff received injuries after she had been dropped by an intoxicated student engaging in a fraternity prank. *Id.* at 554.

84. *Id.* at 558-61.

85. 744 P.2d 54 (Colo. 1987) (en banc).

86. *Id.* at 61. Whitlock received injuries while attempting to complete a flip on a trampoline in front of his fraternity house. He landed on the back of his head, breaking his neck. *Id.* at 56.

87. *Id.* at 62. The court also rejected the plaintiff's argument that provisions in the lease executed between the student and university gave rise to an obligation to monitor the fraternity house. *Id.* at 61-62.

88. 572 A.2d 1209 (Pa. 1990).

89. *Id.* at 1209-10.

90. *Id.* at 1213.

91. *See* Hartman v. Bethany College, 778 F. Supp. 286, 291-95 (N.D. W. Va. 1991); Tanja H. v. Regents of the Univ. of Cal., 278 Cal. Rptr. 918, 920-21 (Cal. Ct. App. 1991).

92. 278 Cal. Rptr. 918 (Cal. Ct. App. 1991).

93. *Id.* at 919.

94. *Id.* at 921.

95. *Id.* at 920.

acquaintance rape on campus were widespread and "heinous."[96] Nevertheless, the court refused to find such risks unreasonable because custodial responsibilities would place extensive burdens on both students and colleges, burdens that would outweigh the utility of preventing future attacks.[97] In *Hartman v. Bethany College*,[98] a federal district court refused to find a duty to protect the student from a sexual assault that had occurred off-campus.[99] The court found that it would be too burdensome to hold a college responsible for monitoring the off-campus activities of their students.[100]

III. Reversal of the Trend: The 1980s and the Duty to Protect Against On-Campus Attacks

A. *Duty based on the College's Position as Landholder or Landlord*

Faced with the problem of rape and sexual assault on campus, some courts in the 1980s ignored the *Bradshaw* reasoning and found a duty to protect based on premises liability principles.[101] In *Relyea v. State*,[102] the plaintiffs sued the university after two female students were abducted from an unguarded parking lot and murdered, and claimed that the institution had breached a

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96. *Id.* at 921. In his concurrence, Justice Kline took issue with the majority's suggestion that the concentration of young women on campus somehow contributed to the problem of sexual assault. Justice Kline blamed the large number of campus rapes to the victimization rate for women throughout society that is highest at the age during which most women go to college. Thus, the college could not be considered as having placed the student in any additional danger and a duty to protect was not warranted. *Id.* at 923-26 (Kline, J., concurring).

97. *Tanja H.*, 278 Cal. Rptr. at 921-22.

98. 778 F. Supp. 286 (N.D. W. Va. 1991).

99. The plaintiff was assaulted by two non-students whom she met while socializing at an *off-campus* establishment named "Bubba's Bison Inn." *Id.* at 289.

100. *Id.* at 292-93.

101. *See* Peterson v. San Francisco Community College Dist., 685 P.2d 1193, 1201-02 (Cal. 1984) (finding duty to exercise care to ensure a campus safe from criminal attack); Relyea v. State, 385 So. 2d 1378, 1383-84 (Fla. Dist. Ct. App. 1980) (stating in dictum that college could have an obligation to take security measures if criminal acts had been foreseeable); Miller v. State, 467 N.E.2d 493, 497 (N.Y. 1984) (finding duty to provide adequate security in dormitories); Brown v. North Carolina Wesleyan College, 309 S.E.2d 701, 703 (N.C. Ct. App. 1983) (recognizing in dictum possible existence of a duty). *See generally* Sharlene A. McEvoy, *Campus Insecurity: Duty, Foreseeability, and Third Party Liability*, 21 J.L. & Educ. 137 (1993) (discussing extent of university liability for campus crime).

102. 385 So. 2d 1378 (Fla. Dist. Ct. App. 1980).

duty to provide adequate security.[103] The court reasoned that a duty to protect could arise from the parties' relationship as landowner and invitee.[104] However, for a duty to attach, the criminal acts had to have been reasonably foreseeable. According to the court, this finding hinged on actual or constructive knowledge of prior, similar crimes.[105]

In *Miller v. State,*[106] the New York Court of Appeals recognized that the university's position as landlord to dormitory residents could support a duty to protect students against foreseeable criminal attacks.[107] However, as many states have not recognized the landlord's general duty to protect against foreseeable crime, this argument has met limited acceptance.[108]

When courts base liability on the landholder/invitee or landlord/tenant relationships the main issue is the foreseeability of the crime.[109] As in *Relyea,* courts often hinge foreseeability on the finding of prior, similar crimes.[110] Congress aided plaintiffs

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103. *Id.* at 1380. The building in which the university held the class was located "in a remote, outlying area on the northeast corner of the campus, approximately three quarters of a mile from the main complex of buildings." *Id.*

104. *Id.* at 1383.

105. *Id.* The court found that the college had no such knowledge, and found no duty. The only crimes the university had previously encountered were minor transgressions. *Id.*

106. 467 N.E.2d 493, 497 (N.Y. 1984).

107. *Id.* at 497. *See also* Nero v. Kansas State Univ., 861 P.2d 768 (Kan. 1993) (recognizing that landlord/tenant relationship arising from dormitory housing could constitute special relationship).

108. *See* McEvoy, *supra* note 101, at 145-46 (noting that "state courts are split on the extent to which the university as a landlord has a duty to protect students who live in its residence halls").

The duty of a landlord to protect tenants against criminal attack or theft is a recent judicial invention. *See* KEETON, *supra* note 17, at 442. In Kline v. Massachusetts Ave. Apartment Corp., 439 F.2d 477 (D.C. Cir. 1970), a court first imposed a duty on the landlord of an urban apartment building to protect the tenants of the building from foreseeable criminal assaults. *Id.* at 485. Not all states accept this duty, but it is gaining increased recognition. KEETON, *supra* note 17, at 442; see *also* Irma W. Merrill, Note, *Landlord Liability for Crimes Committed by Third Parties Against Tenants on the Premises*, 38 VAND. L. REV. 431, 432 (1985).

109. *See* McEvoy, *supra* note 101, at 139-43.

110. *See, e.g.*, Peterson v. San Francisco Community College Dist., 685 P.2d 1193, 1201-02 (Cal. 1984) (finding duty to exercise care to ensure a safe campus based on knowledge of prior criminal attacks); Savannah College of Art & Design v. Roe, 409 S.E.2d 848, 850 (Ga. 1991) (recognizing possible existence of duty but finding no evidence of prior similar attacks). *See generally* Michael C. Griffaton, Note, *Forewarned is Forearmed: The Crime Awareness and Campus Security Act of 1990 and the Future of Institutional Liability for Student Victimization*, 43 CASE W. RES. L. REV. 525, 581 (1993) (noting that foreseeability typically hinges on finding of prior similar acts).

by passing the Student Right-to-Know and Campus Security Act in 1990.[111] The Act requires the college, as a condition to receiving federal funds, to release extensive information about the amounts and types of crimes that have occurred on its campus.[112] Commentators have suggested that this Act will help plaintiffs show the foreseeability of the particular crimes of which they were victims.[113]

B. *Duty to Protect Based on Policy Factors*

In *Mullins v. Pine Manor College*,[114] the Massachusetts Supreme Judicial Court justified finding a duty to protect largely on policy factors that conflicted with the *Bradshaw* reasoning.[115] The plaintiff, a resident student at an all women's college near Boston,

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111. Pub. L. No. 101-542, 104 Stat. 2381 (1990) (codified as amended at 20 U.S.C. § 1092(f) (Supp. IV 1992)).

112. 20 U.S.C. § 1092(f) (Supp. IV 1992). The Act requires colleges to certify that they have established a security policy on campus. Specifically, the Act requires the college to disclose:

> (A) A statement of current campus policies regarding procedures and facilities for students and others to report criminal actions or other emergencies occurring on campus and policies concerning the institution's response to such reports.
> (B) A statement of current policies concerning security and access to campus facilities, including campus residences, and security considerations used in the maintenance of campus facilities.
> . . . .
> (F) Statistics concerning the occurrence on campus, during the most recent calendar year, and during the 2 preceding calendar years for which data are available, of the following criminal offenses reported to campus security authorities or local police agencies —
> (i) murder;
> (ii) sex offenses, forcible or non-forcible;
> (iii) robbery;
> (iv) aggravated assault;
> (v) burglary; and
> (vi) motor vehicle theft.
> . . . .
> (H) Statistics concerning the number of arrests for the following crimes occurring on campus:
> (i) liquor law violations;
> (ii) drug abuse violations; and
> (iii) weapons possessions.

Id.

113. *See* McEvoy, *supra* note 101, at 151. *But see* Griffaton, *supra* note 110, at 579 (noting that the Campus Crime Act will create questions regarding the value of statistics in determining foreseeability).

114. 449 N.E.2d 331 (Mass. 1983).

115. See *supra* notes 58-75 and accompanying text for a discussion of the *Bradshaw* policy reasoning.

was raped by an intruder who broke into her dormitory.[116] The court first determined that a duty to protect the student arose from the expectations of society, parents, and students.[117] According to the court, the community still expected universities to take security measures for their students, despite the demise of *in loco parentis*.[118] The court pointed to factors that made it difficult for students to protect themselves.[119] The court emphasized that students need protection because of their inexperience.[120] Moreover, only the school could provide this safety.[121]

The court also found that the college voluntarily assumed a duty to protect its students.[122] The court found that physical manifestations of security, such as the fence that ran around the campus, implied that the college promised a secure campus.[123]

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116. *Mullins*, 449 N.E.2d at 334. Mullins locked her door to her dormitory room when she went to sleep. The intruder entered her room, awakened her, and took her out of the building into a courtyard outside the dormitory. The intruder brought Mullins out of the courtyard through a gate, which was chained, but not tightly secured. The intruder then led Mullins into a campus building which remained unlocked, whereupon he raped her. The entire incident lasted 60 to 90 minutes, and the plaintiff and intruder were outside campus buildings for at least 20 minutes. At no time did security intervene to assist the plaintiff. *Id.*

117. *Id.* at 335 (citing Schofield v. Merril, 435 N.E.2d 339 (Mass. 1982) (noting that duty finds its "source in existing social values and customs")).

118. *Id.* at 335-36. The court determined that the demise of *in loco parentis* did not mean it had no responsibility to provide a safe campus, noting "[t]he fact that a college need not police the morals of its resident students, however, does not entitle it to abandon any effort to ensure their physical safety." *Id.*

119. *Id.* at 335. The court noted that students could not establish a system for the announcement of authorized visitors in the dormitories, and pointed to university regulations that actually made it a violation to take individual security measures such as installing a second lock on a dormitory room door. The court also noted that the concentration of young women made this particular campus a target. *Id.*

120. *Id.* The court cited the testimony of one expert witness who referred to students as "young people who are legally adults and have not understood really what adulthood perhaps means." *Id.* at 335 n.7.

121. *Mullins,* 449 N.E.2d at 335. The court stated "[t]hus, the college must take the responsibility on itself if anything is to be done at all." *Id.*

122. *Id.* at 336. The court relied on § 323 of the *Restatement (Second) of Torts,* which states:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking.

RESTATEMENT (SECOND) OF TORTS § 323 (1965).

123. *Mullins*, 449 N.E.2d at 336. ("[P]rospective students . . . are certain to note the presence of a fence around the campus, the existence of security guards, and any other visible steps taken to ensure the safety of students.").

Parents and potential students relied upon these representations in choosing to go to the college, and later relied upon them for their security.[124] The court found that adequate security constituted an "indispensable" service that colleges provided to their students.[125] Finally, the court held that the crimes that had occurred were foreseeable to the college.[126] The court did not require findings of prior similar criminal acts.[127]

IV. The Nineties: Protection Through Supervision of Students

The decisions during the 1980s holding colleges responsible for providing security prompted commentators to debate whether *in loco parentis* was making a return in the area of tort liability.[128]

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124. *Id.* at 336-37.

125. *Id.* at 336. The court stated, "[W]hen students are considering enrolling in a particular college, they are likely to weigh a number of factors. But a threshold matter is whether the college has undertaken to provide an adequate level of security." *Id.*

126. *Id.* at 337. The court noted testimony of school officials who had warned students about the dangers of living in close proximity of an urban area. *Id.*

127. *Mullins,* 449 N.E.2d at 337 & n.12.

128. In their 1987 article, James Szablewicz and Annette Gibbs noted that "a new *in loco parentis* relationship is developing. Students are demanding it." Szablewicz & Gibbs, *supra* note 10, at 454. The authors reasoned that new attitudes in the 1980s created this trend. "Students began to expect their colleges to get them jobs, provide them with tuition assistance and establish their careers." *Id.* at 453. The authors suggested that the increase in lawsuits against universities is a manifestation of students' desires to receive university protection. *Id.* at 457. The authors pointed to four cases as evidence of their thesis: Peterson v. San Francisco College, 685 P.2d 1193, 1198 (Cal. 1984) (finding duty based on college's obligation to provide safe premises); Whitlock v. University of Denver, 712 P.2d 1072, 1075-76 (Colo. Ct. App. 1985) (finding duty to provide safe premises where student received injuries while jumping on trampoline), *rev'd*, 744 P.2d 54 (Colo. 1987) (en banc); Relyea v. State, 385 So. 2d 1378, 1382 (Fla. Dist. Ct. App. 1980) (noting possibility that college could have a duty to provide security, but declining to impose such duty absent a history of violent attacks in area); Mullins v. Pine Manor College, 449 N.E.2d 331, 336 (Mass. 1983) (holding college to a duty to provide security against foreseeable criminal actions). Szablewicz & Gibbs, *supra* note 10, at 458-61. Szablewicz and Gibbs, after discussing the intermediate court's decision in *Whitlock*, acknowledged that the Supreme Court of Colorado had recently reversed the decision. *Id.* at 460. Nevertheless, they asserted that the case evidences a return to the *in loco parentis* doctrine because a jury and appellate court imposed liability upon a university. *Id.* at 460-61.

The Szablewicz and Gibbs theory drew harsh criticism from Theodore Stamatakos. Stamatakos, in his 1991 article, vigorously rejected Szablewicz and Gibbs' argument that the *in loco parentis* doctrine is making a comeback. Stamatakos first rejected the contention that *in loco parentis* once provided a basis for tort liability. Stamatakos, *supra* note 9, at 482-84. Stamatakos asserted that recent cases to which Szablewicz and Gibbs cite represent ordinary appli-

Decisions during the 1990s have expanded the colleges' duties beyond merely providing adequate security. In many cases, these decisions have held the college to a duty to protect that requires the college to exercise a uniquely parental role. Courts are holding colleges responsible for monitoring the activities of students, and to educate and warn students about dangers on campus. Basically, courts are holding colleges responsible for keeping their students out of trouble. A general duty to supervise is emerging. This section highlights different types of injuries and risks in which the duty to supervise is emerging.

A. *Supervision of Dangerous Hazing Activities*

In *Furek v. University of Delaware*,[129] the Delaware Supreme Court found that the university owed a duty to control the hazing activities of an on-campus fraternity.[130] Hazing was against university rules, and the university had on several occasions expressed its concern that students abide by this rule.[131] The plaintiff, Jeffrey Furek, suffered second-degree burns after a fellow student poured a lye-based oven cleaner over Furek's body during a hazing event that occurred in an on-campus fraternity house.[132] Furek sued, claiming that the university had a responsibility to control the hazing.[133]

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cations of tort principles, and do not evince a repudiation of the *Bradshaw* policy rationale. *Id.* at 484-87. Stamatakos blamed the rise in tort claims against the university as a general manifestation of the litigation explosion of the 1980s, or as "a recognition by attorneys that college coffers are among the deepest of the much sought-after 'deep pockets.'" *Id.*

129. 594 A.2d 506 (Del. 1991).

130. *Id.* at 522-23.

131. *Id.* at 510-11. The court noted a university-published guide to student life. *Id.* at 510 n.2. It contained the following statement: "Respect for Dignity and Rights of Other Students is a basic tenet of the academic community. Hazing, the subjection of an individual to any form of humiliating treatment and the violation of the rights of other students, have no place in the University community." *Id.* The guide also advised students that "[t]he University reserves the right to deny registration to student . . . activities which expose their members to high bodily risk for which the University might be considered liable." *Id.* The court also pointed to statements that the Dean of Students had published that both recited concern about fraternity hazing and offered help to the fraternity in formulating non-hazing activities. *Id.* at 510. The court noted continued contact between the Dean of Students and the fraternities regarding alleged hazing incidents. *Id.* Also, the school sent fraternities a copy of a speech given on campus by the mother of a hazing victim from another institution. *Id.*

132. *Id.* at 510. Furek had been a pledge for Sigma Phi Epsilon Fraternity. *Id.* at 509. During the event, Joseph Donchez poured the oven cleaner over the neck, back, and shoulders of Furek, causing second-degree burns and permanent scarring. *Id.* at 510. Furek was blindfolded when this occurred. *Id.*

133. *Id.* at 511.

The Delaware Supreme Court confronted the *Bradshaw* line of cases and questioned why the student-college relationship should not be a special relationship.[134] The court described several factors showing that the university controlled and guided student life.[135] The university provided security, food, housing, and extracurricular activities.[136] The court questioned the premises underlying the *Bradshaw* line of cases.[137] First, the court questioned whether the lack of supervision furthered the maturation process, noting that *Bradshaw* provided no empirical support for that proposition.[138] The court also questioned whether supervising dangerous activities conflicted with the demise of *in loco parentis*, noting that students who revolted in the 1960s protested political and intellectual coercion rather than basic protective measures.[139] Further, the court noted that the law did not recognize most students as adults for the purpose of alcohol consumption because most students are not legally old enough to consume alcohol.[140] Nevertheless, the court bowed to the "apparent weight" of precedent[141] and refused to hold that the student-college relationship was a special relationship.[142]

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134. *Furek*, 594 A.2d at 517-19.

135. *Id.* at 516.

136. *Id.*

137. *Id.* at 516-18.

138. *Id.* at 518 (criticizing Beach v. University of Utah, 726 P.2d 413, 419 (Utah 1986)).

139. *Furek*, 594 A.2d at 518 n.11. In criticizing cases that have relied on the *Bradshaw* reasoning, the court noted that students during the 1960s did not protest against supervision and protection from dangerous activities like excessive drinking and the misuse of a trampoline. *Id.* at 518 n.11 (citing University of Denver v. Whitlock, 744 P.2d 55, 56 (Colo. 1987) (en banc)).

140. *Id.* at 518. The court found significant the fact that since the *Bradshaw* decision in 1979, there had been a national trend in raising the legal drinking age from 18 to 21. *Id.* at 518 n.12.

141. *Id.* at 519-20. The court also discussed *Mullins* and other decisions suggesting that the generic college-student relationship could give rise to a duty to supervise. *See id.* at 518-19 (citing Mullins v. Pine Manor College, 449 N.E.2d 331 (Mass. 1983); Rubtchinsky v. State Univ., 260 N.Y.S.2d 256 (Ct. Cl. 1965); Zavala v. Regents of the Univ. of Cal., 178 Cal. Rptr. 185 (Cal. Ct. App. 1981)).

142. *Id.* at 519-20. The court also rejected the argument accepted by the trial court that the university had a duty to supervise students because they were persons having dangerous propensities. *Id.* at 519. The plaintiff based this argument on § 319 of the *Restatement (Second) of Torts*, which states:

> Duty of Those in Charge of Person Having Dangerous Propensities.
> One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.

RESTATEMENT (SECOND) OF TORTS § 319 (1965).

The court suggested that this relationship contemplates relationships of much

Although the court did not find a special relationship, the court did find that the university had voluntarily assumed a duty to monitor the fraternity for hazing violations.[143] This duty arose implicitly through the school's repeated written and verbal communications concerning its efforts to eradicate hazing.[144] The court concluded that students could have relied on the university to enforce its own articulated ideals.[145]

The court also found that the student's position as a business invitee[146] gave rise to a special relationship that could support a duty.[147] Although the court acknowledged that the university did not own the fraternity house, a special relationship existed because the university owned the land on which the house stood.[148] The

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closer control than the university-student relationship. *Furek*, 594 A.2d at 519. The court cited the relationship between a physician at a mental hospital and a patient as an example. The court reasoned that the actions and qualities of fraternity brothers do not conform to this custodial standard. *Id.*

143. *Id.* at 520.

144. *Id.* See *supra* note 123 for a discussion of the university's anti-hazing communications.

145. *Id.* at 520 (citing Mullins v. Pine Manor College, 449 N.E.2d 331, 336 (Mass. 1983)).

146. The court cited §§ 343 and 344 of the *Restatement (Second) of Torts.* Section 343, *Dangerous Conditions known to or Discoverable by Possessor,* states:

> 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 (a) 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 (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and (c) fails to exercise reasonable care to protect them against the danger.

RESTATEMENT (SECOND) OF TORTS § 343 (1965). For the text of § 344, see *supra* note 52.

147. *Furek,* 594 A.2d at 520-22. *But see* University of Denver v. Whitlock, 744 P.2d 54, 61-62 (Colo. 1987) (en banc) (rejecting contention that lease provision allowing university to evict upon the discovery of "immoral or unlawful conduct" imposed a duty to direct and control activities within the property); Rabel v. Illinois Wesleyan Univ., 514 N.E.2d 552, 561-62 (Ill. App. Ct. 1987) (rejecting duty based on landlord-tenant relationship), *cert. denied,* 520 N.E.2d 392 (1988).

148. *Furek*, 594 A.2d at 522. *But see* Leonardi v. Bradley Univ., 625 N.E.2d 431, 435-36 (Ill. App. Ct. 1993), *appeal denied,* 155 Ill. 2d 565 (1994). In *Leonardi,* an Illinois appellate court refused to find that a landholder-invitee relationship existed between the university and a student who had been raped in a fraternity house located on-campus. *Id.* The court reasoned that there were "no facts alleged . . . which show that plaintiff's location at the time of the assault was connected with any activity conducted or sponsored by Bradley or that Bradley received any benefit from her presence at the fraternity house." *Id.* at 435. Additionally, the court relied on the fact that the fraternity house itself was not owned by the university. *Id.* at 436. The court did not address

court found that the university had a duty arising from this relationship because it could have foreseen the hazing dangers posed by the students, and because the students initiating the hazing were within the university's control.[149] In finding foreseeability, the court noted past hazing incidents at the fraternity house where the incident took place, and the university's general commitment to combat hazing.[150] In finding that the university had control, the court noted, among other factors, that the university police had authority to police the fraternity house because members of the fraternity were still subject to university rules.[151]

B. *Protecting Students from Physical Hazards on Campus*

In *Pitre v. Louisiana Tech University*,[152] a Louisiana Appellate Court held the university to a duty to protect the student from his own reckless behavior.[153] The plaintiff, Earl Pitre, suffered injuries while sledding down a hill on campus grounds.[154] Pitre hit a concrete encased light pole in the parking lot located at the bottom of the hill, rendering him a paraplegic.[155] The appellate court found that the university owed the plaintiff a duty to correct or warn of unreasonably dangerous conditions on the campus.[156] The court found that a special relationship arose from the plaintiff's status as a resident student.[157] The court reasoned that the university operated as a custodian of resident students because of its regulation of their lives.[158] This regulation created an ensuing obligation to take steps to protect students from foreseeable harm.[159] The court also held that a special relationship

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the *Furek* decision.

One Justice dissented. *Id.* at 436-39 (Breslin, J., dissenting). For a discussion of this dissent, see *infra* notes 195-203 and accompanying text.

149. *Furek*, 594 A.2d at 521-22.

150. *Id.*

151. *Id.* at 522.

152. 596 So. 2d 1324, 1332 (La. Ct. App. 1991), *cert. denied*, 604 So. 2d 998 (1992).

153. *Id.* at 1334.

154. *Id.* at 1332. Plaintiff had been using a trash container lid as a "sled." *Id.*

155. *Id.*

156. *Id.* at 1332-33.

157. *Pitre*, 596 So. 2d at 1332-33.

158. *Id.* at 1332. The court stated that "[u]niversities guide many aspects of student life by undertaking to provide food, housing, security and a wide range of extracurricular activities." *Id.*

159. *Id.* Judge Brown wrote the majority opinion. This opinion was written on rehearing, and reversed a prior decision the court made. In the original opinion, reprinted before the final opinion, Judge Brown dissented. *See id.* at

arose from the plaintiff's invitee status.[160] After establishing the existence of a special relationship, the court found that the university had created an unreasonable and foreseeable risk of injury by failing to take steps to prevent sledding at the spot where the injury occurred.[161] The court reasoned that the university had been aware of the dangers at the injury site, but had created an illusion of safety by allowing the sledding to occur.[162]

The dissent in *Pitre* argued that the majority's opinion would make the college responsible for ensuring the safety of their students.[163] This standard would contradict the generally accepted rule that colleges no longer stand in an *in loco parentis* relationship to their students.[164]

C. *Providing Safety Measures for Student Athletes*

In *Kleinknecht v. Gettysburg College*,[165] the Third Circuit Court of Appeals, the same court that decided *Bradshaw* almost fifteen years earlier, held the college to a duty to protect a student from harm while engaging in a school-sponsored athletic activity for which the student had been recruited.[166] Richard Kleinknecht, a

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1330-31 (original opinion) (Brown, J., dissenting). In his dissent, Judge Brown more emphatically asserted that the student-college relationship created a duty to supervise and protect the student:

> The concentration of young people on a college campus creates conditions that can cause injuries. Therefore, colleges have enacted many rules and regulations to protect its [sic] students. A college has a special relationship with its resident students which obligates it to take reasonable and necessary steps to protect their safety from foreseeable harm. . . . College administrators know that a 20 year old may be an adult legally, but normally lacks the experience to understand adulthood.

Id. at 1330-31 (Brown, J., dissenting).

160. *Id.* at 1332.

161. *Id.* at 1333.

162. The court reasoned that the school, through statements in its housing manual, had implied that sledding was safe at the area where the accident occurred. *Pitre,* 596 So. 2d at 1333. The court noted that the university had listed several spots in its housing manual where sledding was prohibited. *Id.* The spot where the accident had occurred was not listed. The manual otherwise encouraged sledding. *Id.* at 1332. However, the court noted that the campus police considered the area dangerous, and had made routine efforts to stop sledding at that spot. *Id.* at 1333-34.

163. *Id.* at 1333-34 (Lindsay, J., dissenting).

164. *Id.* The dissent also argued that the danger posed by the light posts was minimal, thus posing no unreasonable risk of harm. *Id.* at 1334. The Louisiana Supreme Court refused to review the decision. Pitre v. Louisiana Tech Univ., 604 So. 2d 998 (La. 1992) (three of seven justices wishing to grant certiorari).

165. 989 F.2d 1360 (3d Cir. 1993).

166. *Id.* at 1369.

seemingly healthy athlete, died of cardiac arrest on campus during a practice session for the school's lacrosse team.[167]

Kleinknecht's parents sued the university, claiming that it failed to implement reasonable preventative measures to ensure prompt medical attention if one of its athletes suffered cardiac arrest.[168] The trial court granted the university's motion for summary judgment on the grounds that the university had no duty to anticipate and guard against the chance that a young, healthy athlete would suffer cardiac arrest.[169] The Third Circuit reversed the summary judgment.[170] In finding a special relationship, the court reasoned that the school assumed such a responsibility because the student participated in a school sponsored and supervised activity.[171] The court differentiated the case from *Alumni Association v. Sullivan*,[172] decided by the Pennsylvania Supreme Court,[173] and *Bradshaw*, which had been decided under Pennsyl-

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167. *Id.* at 1365. According to the court, the plaintiff's brief described Kleinknecht as "a healthy, physically active and vigorous young man" with no unusual medical history until his death." *Id.* While the college employed two full-time trainers who were skilled in C.P.R., neither was present during the practice at which Kleinknecht died and the lacrosse coaches had no such training. *Id.* at 1363.

168. *Id.* at 1365.

169. *Id.* at 1332 (citing Kleinknecht v. Gettysburg College, 786 F. Supp. 449, 454 (M.D. Pa. 1992)).

170. *Kleinknecht*, 989 F.2d at 1372.

171. *Id.* at 1367. The court cited as supporting authority cases involving high school athletic programs. *Id.* The court cited to one case involving athletics at the college level. Fox v. Board of Supervisors, 576 So. 2d 978 (La. 1991). In *Fox*, however, the court held that the university had been under no duty to protect the student athlete in that case. *Id.* at 983. In *Fox*, Louisiana State University (L.S.U.) hosted a visiting rugby team. Before the scheduled game, the L.S.U. team hosted a cocktail party to which the visiting team was invited. *Id.* at 980. Tim Fox, a player on the visiting team, became intoxicated at the event. During the subsequent game, Fox missed a tackle and fell on his head, rendering him a quadriplegic. Fox sued the university on the theory that it had a responsibility to supervise the game and monitor the drinking before the competition. *Id.* The trial court granted summary judgment in favor of L.S.U. *Id.* The appellate court affirmed. Fox v. Board of Supervisors, 559 So. 2d 850 (La. Ct. App. 1990).

The Supreme Court of Louisiana affirmed. *Fox*, 576 So. 2d at 983. The court acknowledged that L.S.U. had a duty to ensure that its premises were free from defects. However, the court held that no special relationship existed between the injured student and L.S.U. The court reasoned that the injured party, a student at another school, had no connection with L.S.U. *Id.* at 982. Next, citing the demise of *in loco parentis* and the burden of supervisory responsibilities, the court refused to hold L.S.U. to a duty to monitor the actions of its rugby players. *Id.* at 982-83.

172. 572 A.2d 1209 (Pa. 1990). See *supra* notes 88-90 and accompanying text for a discussion of *Sullivan*.

173. The court, exercising diversity jurisdiction, applied Pennsylvania law. *Kleinknecht*, 989 F.2d at 1365.

vania law.[174] The court reasoned that there was no special relationship in *Sullivan* or *Bradshaw* because the students had acted in their private capacities.[175] Kleinknecht, however, had been injured while acting in the school's interest.[176] The school's recruitment of Kleinknecht indicated that the school intended to benefit from his participation in the program.[177] The court stated in dictum that the result probably would have been different if the student had been participating in intramural sports.[178]

The court went on to find that the college, in failing to provide the safety equipment, had created a foreseeable and unreasonable risk of injury.[179] The court found that it was foreseeable that student athletes could encounter life-threatening health problems during athletic activity.[180] The court noted the testimony of the athletic trainers at the school who were aware of other instances in which athletes died during competition.[181] Examining whether the foreseeable risk was unreasonable, the court determined that the utility of taking potentially life-saving protective action outweighed the burden of imposing such responsibilities on the college.[182]

D. *Supervision of Students to Prevent Rape*

In *Nero v. Kansas State University*,[183] the Kansas Supreme Court, facing a motion for summary judgment from the defendant university, refused to find as a matter of law that the university did not owe a duty to supervise the conduct of a potentially dangerous resident student.[184] In *Nero*, the plaintiff sued the university after she was sexually assaulted in her residence hall by a fellow student, Davenport.[185] Thirty-five days earlier, a

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174. *Id.* at 1367-68. For a discussion of *Bradshaw*, see *supra* notes 58-75.

175. *Kleinknecht*, 989 F.2d at 1367-68.

176. *Id.* at 1368.

177. *Id.* The court suggested that the school recruited Kleinknecht "thinking that his skill at lacrosse would bring favorable attention and so aid the College in attracting other students." *Id.*

178. *Id.* at 1368.

179. *Id.* at 1371.

180. *Kleinknecht*, 989 F.2d at 1370.

181. *Id.*

182. *Id.* One judge dissented, asserting the same reasons as the district court had expressed. *Id.* at 1375 (Alito, J., dissenting) (citing Kleinknecht v. Gettysburg College, 786 F. Supp. 449 (M.D. Pa. 1992)).

183. 861 P.2d 768 (Kan. 1993).

184. *Id.* at 779-80.

185. *Id.* at 771-72. Davenport joined Nero while she had been watching television and doing laundry in the basement recreation room of her dormitory. According to the court, Davenport sexually assaulted Nero while the two watched television. *Id.* at 772.

different student had accused Davenport of raping her.[186] Davenport had been indicted for the first incident one month before the second.[187] The university administration moved Davenport to the plaintiff's dormitory in an effort to separate him from the first victim.[188]

The defendant's motion for summary judgment claimed that the university owed no duty to monitor Davenport.[189] In rejecting this argument, the Kansas Supreme Court agreed that *in loco parentis* was inappropriate for the modern campus.[190] Nevertheless, the court found that the university could have a duty to exercise care to protect the plaintiff from Davenport via the parties' landlord/tenant[191] and landholder/invitee relationships.[192] Pointing to the university's knowledge of the alleged rape and its response in moving Davenport, the court held that the foreseeability of the attack could not be decided as a matter of law on summary judgment.[193] Thus, the judge's ultimate finding as to whether the university's non-action constituted an unreasonable and foreseeable risk to the plaintiff depended on subsequent findings of fact.[194]

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186. *Id.* at 771.

187. *Id.*

188. *Nero*, 861 P.2d at 771.

189. *Id.* at 768.

190. *Id.* The court also refused to posit a duty based on the plaintiff's argument that the university was in charge of a person with "dangerous propensities," as recognized in § 319 of the *Restatement (Second) of Torts*. The court reasoned that the university had not taken charge of Davenport when it changed his dormitory assignments. *Nero*, 861 P.2d at 778-79.

191. *Id.* at 779. The court found that the university, in providing campus housing, existed as a landlord in competition with other private landlords. *Id.* See generally supra note 108 for a discussion of the common-law duty of the landlord to protect tenants against foreseeable crime.

192. *Nero*, 861 P.2d at 780. The court cited to § 344 of the *Restatement (Second) of Torts*. See *supra* note 52 for the text of § 344.

193. *Nero*, 861 P.2d at 780.

194. *Id.* Two justices concurred in some parts of the opinion, but dissented regarding the finding of foreseeability. Justice Six concurred in the court's holding that the college did not act *in loco parentis*. *Id.* at 783 (Six, J., concurring and dissenting). However, Justice Six dissented from the court's holding that the attack was foreseeable. The Justice reasoned that the student had been charged with rape but had not been convicted. According to Justice Six, because the criminal justice system regards those charged with a crime as being innocent until proven guilty, it would be improper to require the university to single out such an individual for special supervision. *Id.*

Justice McFarland joined the concurring and dissenting opinion of Justice Six. *Id.* at 788 (McFarland, J., concurring and dissenting). In a separate opinion, Justice McFarland argued that the majority sought to place an unreasonable burden on the university. The university would be faced with a student presumed innocent by the law, who in most cases would be under instructions from his

Similarly, in *Leonardi v. Bradley University*,[195] the dissent vigorously argued that the university should have been held to a duty to protect a student from a rape by a fellow student that occurred in an on-campus fraternity house.[196] The majority refused to find a special relationship, claiming that no landholder/invitee relationship existed.[197]

The dissent concluded, however, that the student was a business invitee, reasoning that (1) the student had been expressly invited onto the university premises; (2) that the university had permitted the actions of the fraternity to take place; and (3) that the university had benefited from the fraternity's presence.[198] Next, the dissent emphasized the foreseeability of campus rape, pointing to statistical studies both at colleges in general and at Bradley University in particular.[199] The dissent next reasoned that the likelihood of injury in rape cases is extremely high,[200] and pointed to medical studies indicating the physical and psychological effects of rape.[201] The dissent reasoned that the burden of placing protective responsibilities on the university was low.[202] The dissent reasoned that colleges already disseminate large quantities of information to students, and that instituting programs to warn students of such potential dangers is an extremely low burden.[203]

V. The Emerging Duty to Supervise

A. *Analysis*

During the 1990s, courts have held colleges to greater responsibilities to oversee the lives and activities of their students. This threat of tort liability is moving the student-college relationship back towards *in loco parentis*.[204]

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lawyer to keep silent. Thus, while the university cannot discuss the events with the alleged perpetrator, it would be required to treat him like a pariah, and alienate him from female students. *Id.* at 789.

195. 625 N.E.2d 431 (Ill. App. Ct. 1993).

196. *Id.* at 436-39 (Breslin, J., dissenting).

197. *Id.* at 435-36. For a discussion of the majority's reasoning, see *supra* note 148.

198. *Id.* at 437 (Breslin, J., dissenting).

199. *Id.* at 438 (Breslin, J., dissenting).

200. *Leonardi,* 625 N.E.2d at 438 (Breslin, J., dissenting).

201. *Id.*

202. *Id.*

203. *Id.*

204. *See* Matthews, *supra* note 1, at 38, 42, 47 (remarking in the context of crime prevention that "[a]ll this resembles a revival of the *in loco parentis* doctrine," and a "newfound paternalism").

Because the duty question revolves around policy, it appears that courts are reexamining the policy foundations upon which *Bradshaw* was based.[205] First, courts seem to be recognizing an *in loco parentis* role for colleges, if not an *in loco parentis* special relationship in tort theory.[206] While no cases, except perhaps for *Pitre*,[207] assert a protective relationship based solely on the generic student-college relationship, decisions expanding the college's duty have relied on elements unique to the college context to find a duty. *Mullins*, *Pitre*, and *Furek* expressly point to aspects of the college setting that cause students to depend on the university for protection.[208] Dependence characterizes the historic *in loco parentis* relationship.[209] It is questionable whether courts would find a similar duty if the parties were not a student and a college. For example, in *Nero*, the court probably would not have held a non-university landlord or landholder to a duty to supervise the behavior of a tenant in its building solely because the tenant had been indicted for a crime.[210] Similarly, in *Furek*, it seems unlikely that the court could find any fact situation under which it would hold a non-university landlord or landholder to a duty to monitor fraternity hazing on its property.[211] Moreover, the court's reliance on contract principles in *Furek* is analytically weak, and provides a typical example of the flaws of contract analysis.[212] The court in *Furek* provided no evidence that students actually relied on and expected the college to enforce its homilies against hazing by patrolling fraternity houses.[213] Rather, it appears that the court's assumptions were based on its perception that the college fulfills a custodial role.

It appears that modern courts may be re-examining the benefit of prohibiting universities from intruding on students' lives.[214]

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205. *See supra* notes 23-25.

206. For a discussion of the *in loco parentis* relationship, see *supra* part II.B.

207. *See Pitre*, 596 So. 2d at 1332-33. See generally *supra* notes 152-64 for a discussion of *Pitre*.

208. *See, e.g., Leonardi*, 625 N.E.2d at 438 (noting high probability that women will be victimized by rape or sexual assault while in college).

209. See *supra* part II.B. for a discussion of *in loco parentis*.

210. *See* Nero v. Kansas State Univ., 861 P.2d 768, 780 (Kan. 1993).

211. *See* Furek v. University of Del., 594 A.2d 506, 520-21 (Del. 1991).

212. *See id.* at 520. *See generally* Dodd, *supra* note 48 (discussing analytical problems of contractual analysis as a tool for examining the student-college relationship).

213. *See Furek*, 594 A.2d at 520.

214. According to § 293 of the *Restatement (Second) of Torts*, the factors considered for determining the magnitude of the risk when finding whether the actor was negligent include: the social value of the interest in danger; the extent of the possibility that the actor's non-action will harm another; the extent of the harm likely to occur; and the number of persons likely to be harmed. RESTATEMENT (SECOND) OF TORTS § 293 (1965).

Society has become more concerned with hazing and alcohol use in recent years. Legislatures have imposed anti-hazing laws and courts have imposed greater liability on fraternal organizations and their individual members for hazing injuries.[215] Moreover, society has taken a stricter view of alcohol use in recent decades, as evidenced by increased drinking ages and stricter punishments for drinking and driving. Moreover, courts and legislatures have been more willing to impose dram shop and social host liability.[216] Thus, society has taken a different view of alcohol consumption than did the *Bradshaw* court, which dismissed beer drinking as a harmless rite of passage for students and an accepted practice for adults.[217]

Society has also become much more concerned with campus crime.[218] Perhaps the most telling manifestation of this is the Student Right-to-Know and Campus Security Act.[219] In passing the Act, Congress found that crime on campus was a serious and increasing problem.[220] Additionally, Congress found that "there is a clear need . . . to encourage the development on all campuses

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215. *See generally* Susan J. Curry, Note, *Hazing and the "Rush" Toward Reform: Responses from Universities, Fraternities, State Legislatures, and the Courts*, 16 J.C. & U.L. 93 (1989) (documenting cases that have increased fraternity liability and legislative attempts to reduce hazing); Byron L. LeFlore, Jr., Note, *Alcohol and Hazing Risks in College Fraternities: Re-evaluating Vicarious and Custodial Liability of National Fraternities*, 7 REV. LITIG. 191 (1988) (documenting the expanding theories that plaintiffs use to hold national fraternities liable for hazing).

216. Dram shop statutes, which are relatively common, impose civil and criminal liability for the harm caused by the actor's negligent conduct on businesses that served alcohol to the intoxicated actor. Social host liability, to which the courts have reacted lukewarmly, imposes liability for negligence on social hosts who serve alcohol to intoxicated guests. *See, e.g.*, McGuiggan v. New England Tel. and Tel. Co., 496 N.E.2d 141, 145-46 (Mass. 1986) (favoring social host liability in certain fact situations). For general discussions of such concepts, see Angelina Marie Massari, *Am I my Brother's Keeper? Social Host Liability Under Dramshop Acts and Common Law Negligence*, 32 WASH. U. J. URB. & CONTEMP. L. 149 (1987); Kevin N. Koloff, Note, *The Torts of the Intoxicated: Who Should be Liable?* 15 COLUM. J.L. & SOC. PROBS. 33 (1979).

217. *See supra* notes 73-75 and accompanying text.

218. *See, e.g.*, Matthews, *supra* note 1, at 38 ("Campus murders or threat of murder invariably make it to page 1 of local and national newspapers. . . ."). Matthews quoted one university administrator: "Our only campus crime used to be plagiarism, but so much odd stuff appeared in the 80's — rapes, robberies, even the kid who used his prosthetic arm to beat up a dormmate — that I decided we needed to know: Is it us or is it society?" *Id.* at 38-39.

219. Pub. L. No. 101-542, 104 Stat. 2381 (1990) (codified as amended at 20 U.S.C. § 1092(f) (Supp. IV 1992)). For the text of the reporting requirements, see *supra* note 112.

220. Student Right-To-Know and Campus Security Act, Pub. L. No. 101-542, § 202, *reprinted in* 1990 U.S.C.C.A.N. 2381, 2384-85.

of security policies and procedures. . . ."[221] Prior to the Act, several states had enacted similar statutes.[222]

Additionally, the problem of sexual assault on campus has increased, and has accordingly experienced enormous coverage in the media.[223] There has also been a recent backlash against student-faculty romantic encounters. Several colleges have banned such conduct, indicating the view that the college must protect its students, a hallmark of *in loco parentis.*

Moreover, it appears that society may no longer view intrusion into the student life as a serious harm.[224] *Bradshaw* relied on findings that custodial policies were inconsistent with the student-college relationship. In recent years, commentators have suggested that students, essentially acting as consumers, expect colleges to provide such functions.[225] Moreover, courts seem to look to the expectations of parents as opposed to those of students. Courts perhaps are viewing parents, who often foot the expensive tuition bill, as the true consumers of college education.[226]

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221. *Id.* § 207(7)(A).

222. *See* McEvoy, *supra* note 101, at 148-51.

223. *See, e.g., CNN & Company, supra* note 14 (discussing proposed rule to ban student-faculty sexual relationships at University of Virginia).

224. According to § 292 of the *Restatement (Second) of Torts,* the factors courts should consider the determining the utility of an actor's non-action when determining negligence include: the social value of the interest protected by the non-action; the possibility that this interest will be protected by the non-action; and the likelihood that this interest can be protected by a less dangerous course of conduct. RESTATEMENT (SECOND) OF TORTS § 292 (1965).

225. Anne Matthews suggested that students are demanding increased protection:

> Today's students, trained as consumers from the cradle, frequently prefer service to empowerment. In spirit if not in statute, *in loco parentis* is back. The widespread attitude "I get to do whatever I want but you have to protect me" is forcing overwhelmed, underfinanced student-life staffs and campus security forces to improvise a new care-giving role: part concierge, part social worker, part bodyguard.

Matthews, *supra* note 1, at 38, 42, 47. *See also* Szablewicz & Gibbs, *supra* note 10, at 453 ("During the 1980s, however, the college-student relationship began to show signs of change yet again. Students began to expect their colleges to get them jobs, provide them with tuition assistance and establish their careers. Further, the students demanded protections [against injuries]."); Kranhold & Farrish, *supra* note 14, at A1 ("Students and parents . . . are demanding that colleges resume responsibility for students' drinking and sexual behavior"); *see generally* DAVID RIESMAN, ON HIGHER EDUCATION: THE ACADEMIC ENTERPRISE IN AN ERA OF RISING STUDENT CONSUMERISM (1981).

226. *See, e.g.*, Katherine Farrish, *Trinity's President has seen Student Protests from Both Sides; Trinity President has Experienced Student Protests from Both Sides,* HARTFORD COURANT, May 3, 1993, at A1. According to the Farrish article:

> Parents and students are once again demanding that colleges take

B. *Recommendation*

Courts should cautiously embrace the emerging duty to supervise. Because duty is a fact-specific question, it is difficult to formulate per se rules. Nevertheless, it is clear that students deserve protection against criminal attacks, even if this demands increased supervision. *Mullins* is correct in holding that such protection is expected by parents, students, and the community in general. *In loco parentis* was not abandoned so colleges could stop taking basic measures to protect their students from violent crime. Because the rate of student against student crime is so high, such limited supervision is a necessary part of basic protective measures.

But cases such as *Furek* and *Pitre* envision a much greater intrusion into the private lives of students. These cases envision a duty to supervise students to protect them from accidents occurring during non-school-sponsored events. Such accidents typically result from "traditional" campus activities such as drinking and fraternity and sorority hazing. It is foreseeable that many, if not most, college students will participate in some "dangerous," non-school-sponsored activities. Monitoring of such activities necessarily requires great levels of supervision, perhaps requiring even monitoring of the entire student body. Thus, imposing responsibilities to guard against accidental injuries sustained during non-school-sponsored events should be imposed with restraint.

Imposition of broad supervisory responsibility over non-student events certainly conflicts with the demise of *in loco parentis*. A broad parental role is inconsistent with the societal factors that gave rise to the demise of the doctrine in the first place. Universities continue to embrace the German model of education,[227] and continue to educate massive amounts of students. A parental role is especially not feasible in this context. Moreover, society continues to recognize college-aged persons as adults. There is no reason why those members of society who choose to go to college

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> action in response to date rapes, crime and racial and sexual harassment . . . [The president of a college,] [w]hile open to listening to students as much as possible . . . ultimately answers to trustees, faculty and parents.

Id. See also Student Right-To-Know and Campus Security Act of 1990, Pub. L. No. 101-542, § 202(6), *reprinted in* 1990 U.S.C.C.A.N. 2385 (discussing rights of parents to know information about campus crime); Mullins v. Pine Manor, 449 N.E.2d 331, 336 (Mass. 1983) (noting expectations of parents); *CNN & Company, supra* note 14 ("I'm just curious as to parents paying $8,000 to $10,000 to send their kids off to school — thinking the faculty is in loco parentis — how they would feel if they had a vote on whether the college faculty to get to bang the kids if the kids'll go along with it.").

227. *See supra* notes 33-37 and accompanying text.

should be held less accountable for their own behavior. Thus, outside of the context of crime prevention, there is no compelling reason to justify a broad duty to supervise.

CONCLUSION

American colleges have new parental obligations. A duty to supervise the student is emerging in the 1990s. Implicit in the reasoning of the decisions expanding this duty is the notion that the college acts as a custodian of its students, a throw-back to the *in loco parentis* relationship.

This recent judicial expansion may reflect the societal view that college is becoming an increasingly dangerous place for students. This judicial trend may reflect changes in the student-college relationship itself. Courts, however, should be hesitant to hold colleges responsible for monitoring non-school-sanctioned activities to prevent accidents. Enforcing such a responsibility would directly intrude on student freedom, and will unnecessarily burden colleges. Courts should impose liability with restraint, and be conscious of the effects that their holdings can have on the American student-college relationship.

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