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Cocktails on Campus: Are Libations a Liability?

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"It would be unrealistic to impose upon an institution of higher education the additional role of custodian over its adult students and to charge it with responsibility for preventing students from illegally consuming alcohol and, should they do so, with responsibility for assuring their safety and the safety of others."[1]

I. INTRODUCTION

An estimated 1,825 college students die each year from alcohol-related, unintentional injuries.[2] Roughly 599,000 students between the ages of eighteen and twenty-four are injured every year while under the influence of alcohol.[3] More than 100,000 students have reported that they were too intoxicated to know whether they had consented to having sex, and an estimated 97,000 students annually are victims of alcohol-related sexual assault or date rape.[4]

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

2. *College Drinking*, NAT'L INST. ON ALCOHOL ABUSE AND ALCOHOLISM 1 (July 2013), http://pubs.niaaa.nih.gov/publications/CollegeFactSheet/CollegeFactSheet.pdf, *archived at* http://perma.cc/Z3Y9-RBJH [hereinafter NIAAA Report] (citing Ralph Hingson, et al., *Magnitude of and Trends in Alcohol-Related Mortality and Morbidity Among U.S. College Students Ages 18-24, 1998-2005*, J. STUD. ON ALCOHOL AND DRUGS SUPP., 2009, at 16).

3. *Id.* at 1.

4. *Id.* at 1-2; *see also* WHITE HOUSE COUNCIL ON WOMEN AND GIRLS, RAPE AND SEXUAL ASSAULT: A RENEWED CALL TO ACTION, at 10 (Jan. 2014), http://www.whitehouse.gov/sites/default/files/docs/sexual_assault_report_1-21-14.pdf, *archived at* http://perma.cc/F3ZH-TMQH (identifying one in five college women as sexual assault victims). A report prepared by the White House Council on Women and Girls found that "[t]he dynamics of college life appear to fuel the problem" and that many sexual assaults occur when the victim is "drunk, under the influence of drugs, passed out, or otherwise incapacitated." WHITE HOUSE COUNCIL ON WOMEN AND GIRLS, *supra*, at 14. While fifty-eight percent of these incapacitated assaults take place at college parties, the White House Task Force to Protect Students from Sexual Assault released a report in April 2014 that did not dwell on college parties or alcohol abuse as the catalyst of these assaults, but focused instead on the larger problem of victims of sexual assault being viewed negatively by the community. *See id.* (noting fifty-eight percent of incapacitated rapes occurred at college parties); NOT ALONE: THE FIRST REPORT OF THE WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT (Apr. 2014), https://www.notalone.gov/

College students report a higher binge-drinking rate and are involved in more drunk driving incidents than eighteen to twenty-four year olds who are not in college.[5]

Tales of intoxicated college students' wild and often violent behavior have made the national news. For example, at a fraternity party at the University of Central Florida in July of 2013, police arrived to find one student lying in a puddle of his own vomit and several other students passed out in the yard.[6] Another situation involved freshmen cheerleaders at Towson University who were told last year to "funnel a beer or take a shot of alcohol" before donning adult diapers over their shorts and performing a dance for other cheerleaders.[7] At Occidental College, a freshman was raped twice by her friend after both had been drinking.[8] A group of students at the University of Virginia gathered to take shots of alcohol at 7:00 a.m. before their graduation ceremony.[9] These and similar scenarios are not surprising to college administrators, who report that alcohol consumption is a factor in many student problems,[10] including mental health issues, poor academic performance, fights, rape, alcohol poisoning, traffic accidents, and other serious injuries.[11]

Alcohol abuse on college campuses is not a recent development unique to

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assets/report.pdf, *archived at* http://perma.cc/8JL2-SK5M [hereinafter NOT ALONE REPORT].

5. *See* NIAAA Report, *supra* note 2, at 1-2 (defining binge drinking as five drinks for men or four drinks for women in two-hour period).

6. *See* Leslie Postal, *Wild, Boozy Party Brings Suspension of UCF's ATO Frat*, ORLANDO SENTINEL, Sept. 5, 2013, at A1 (indicating ATO suspended for hosting unauthorized house party and serving alcohol to underage students).

7. *See* Carrie Wells, *Towson Hazing Report: Cheerleaders Drank Alcohol, Wore Adult Diapers*, BALT. SUN (June 4, 2014), http://articles.baltimoresun.com/2014-06-04/news/bs-md-towson-university-cheerleaders-20140603_1_cheerleading-team-edy-pratt-diapers, *archived at* http://perma.cc/VX2R-VJY4 (describing hazing incident involving Towson cheerleaders).

8. *See* Michelle Goldberg, *Why the Campus Rape Crisis Confounds Colleges*, THE NATION (June 5, 2014), http://www.thenation.com/article/180114/why-campus-rape-crisis-confounds-colleges, *archived at* http://perma.cc/NZ8C-4SPC.

9. *See* Jenna Johnson, *Schools Try New Strategies to Battle College Drinking*, WASH. POST MAGAZINE (Aug. 30, 2013), http://www.washingtonpost.com/lifestyle/magazine/schools-try-new-strategies-to-battle-college-drinking/2013/08/29/44919708-e011-11e2-b2d4-ea6d8f477a01_story.html, *archived at* http://perma.cc/NP9Z-BAHM.

10. *See* Ellen J. Bass et al., *Are Students Drinking Hand Over Fifth? Understanding Participant Demographics in Order to Curb a Dangerous Practice*, J. ALCOHOL & DRUG EDUC. (Dec. 1, 2011), http://www.thefreelibrary.com/_/print/PrintArticle.aspx?id=280092618, *archived at* http://perma.cc/G2F4-9AYZ (discussing "celebratory drinking" on college campuses).

11. *See About Us*, GORDIE CENTER FOR SUBSTANCE ABUSE PREVENTION, http://gordiecenter.studentheal th.virginia.edu/ (last visited Oct. 26, 2014), *archived at* http://perma.cc/BJ3W-T2QE. The non-profit Gordie Foundation was named for Lynn Gordon "Gordie" Bailey Jr., who died of an alcohol overdose at the University of Colorado after a fraternity initiation ceremony on September 17, 2004. *Id.* In the summer of 2010, the Gordie Foundation merged with the Center for Alcohol and Substance Education at the University of Virginia. *Id.* The Center honors Gordie's memory by "creating and distributing programs to reduce hazardous drinking and promote peer intervention among young adults." *Id.*

the current generation of college students. College freshmen have been surveyed annually since 1966, and the data shows that the number of students who report drinking "frequently" or "occasionally" has in fact slightly declined in recent years.[12] In 1966, 53.5% of all freshmen reported drinking beer frequently or occasionally, and 44.4% reported drinking wine.[13] Beer drinking[14] increased during the late 1970s and early 1980s; specifically, in 1978, 73.2% of all freshmen said they drank beer, and in 1982, 75.1% reported having drunk beer.[15] That figure dropped to 48.3% in 2000 and to 35.0% with the entering class of 2013 (the most recent data).[16] The students who drink to excess attract attention and cause other students to perceive that heavy drinking is fairly common on campus, but statistics show that a relatively small percentage of students are binge drinkers.[17] Nonetheless, excessive drinking by

12. *See generally The American Freshman Survey Publications*, HIGHER EDUCATION RESEARCH INSTITUTE, http://www.heri.ucla.edu/tfsPublications.php, *archived at* http://perma.cc/7MFG-UJUA [hereinafter *Freshman Surveys*]. Researchers at the University of California-Los Angeles have conducted a comprehensive survey of college freshman every year since 1966. *See id.* In most years, freshmen were asked whether they "frequently," "occasionally," or "never" drink beer. *See id.* In many years, the students were also asked how often they consumed liquor or wine. *See id.*

13. *See* Alexander W. Astin et al., *National Norms for Entering College Freshmen—Fall 1966*, 2 AM. COUNCIL ON EDUC. 1, 25 (1967), *available at* http://www.heri.ucla.edu/PDFs/pubs/TFS/Norms/Monographs/NationalNormsForEnteringCollegeFreshmen1966.pdf, *archived at* http://perma.cc/A9GM-WUNH (providing 1966 statistics).

14. Freshmen were asked if they drank beer, but were not polled about liquor or wine in the 1970s and 1980s. *See Freshman Surveys*, *supra* note 12. In 1990, when surveyed about alcohol consumption, students reported that 58.2% drank beer and 57.5% drank liquor or wine. *See* Alexander W. Astin et al., *American Freshman: National Norms for Fall 1990*, COOP. INST. RESEARCH PROGRAM, UCLA, at 45 (Dec. 1990), *available at* http://www.heri.ucla.edu/PDFs/pubs/TFS/Norms/Monographs/TheAmericanFreshman1990.pdf, *archived at* http://perma.cc/F6LE-2Y7T (providing 1990 freshman statistics).

15. *See* Alexander W. Astin et al., *The American Freshman: National Norms for Fall 1978*, COOP. INST. RESEARCH PROGRAM, UCLA, at 57 (1978), *available at* http://www.heri.ucla.edu/PDFs/pubs/TFS/Norms/Monographs/TheAmericanFreshman1978.pdf, *archived at* http://perma.cc/HY9Z-GWN2 (providing 1978 freshman statistics); Alexander W. Astin et al., *The American Freshman: National Norms for Fall 1982*, AM. COUNCIL ON EDUC., UCLA, at 56 (Dec. 1982), *available at* http://www.heri.ucla.edu/PDFs/pubs/TFS/Norms/Monographs/TheAmericanFreshman1982.pdf, *archived at* http://perma.cc/94EK-EPFS (providing 1982 freshman statistics).

16. *See* Alexander W. Astin et al., *The American Freshman: National Norms for Fall 2000*, COOP. INST. RESEARCH PROGRAM, UCLA, at 16 (Jan. 2001), *available at* http://www.heri.ucla.edu/PDFs/pubs/TFS/Norms/Monographs/TheAmericanFreshman2000.pdf, *archived at* http://perma.cc/57HX-7JEP (providing freshman statistics for 2000); Kevin Eagan et al., *The American Freshman: National Norms Fall 2013*, COOP. INST. RESEARCH PROGRAM, UCLA, at 28 (2013), *available at* http://www.heri.ucla.edu/monographs/TheAmericanFreshman2013.pdf, *archived at* http://perma.cc/F5ET-Q3YT (providing freshman statistics for 2013).

17. Telephone Interview with Susan Bruce, Director of the Gordie Center for Substance Abuse Prevention, University of Virginia (July 2, 2014); *see also* Susie Bruce, *Is Everybody Drinking??*, GORDIE CTR. FOR SUBSTANCE ABUSE PREVENTION, http://gordiecenter.studenthealth.virginia.edu/sites/gordiecenter.studenthealth.virginia.edu/files/Gordie%20Center%20summer%20orientation%20program%202014%20-%20web.pdf (last visited Oct. 26, 2014), *archived at* http://perma.cc/VG29-4KU5. In a scientific study, researchers concluded that "[s]tudents consistently overestimated the general student population's amount and frequency of alcohol consumption . . . ." James Turner et al., *Declining Negative Consequences Related to Alcohol Misuse Among Students Exposed to a Social Norms Marketing Intervention on a College Campus*, 57 J. AM. COLLEGE HEALTH 85, 85 (2008), *available at* http://alcohol.hws.edu/education/DecliningNegativeConsequences.pdf,

those students does lead to significant problems, as demonstrated by the 67% increase in hospitalizations for eighteen to twenty-four-year-olds due to alcohol overdoses from 1999 to 2008.[18]

Some of the "heaviest drinking was back in the 1970s and '80s, when parents of today's students would have been enrolled" in college.[19] The legal drinking age in most states during that time was eighteen, such that many college students could legally buy and consume alcohol. Eighteen became the age of majority in 1971 when the twenty-sixth amendment to the United States Constitution was adopted, granting eighteen-year-olds the right to vote.[20] One court commented that with the change in the age of majority to eighteen, "[c]ollege students today are no longer minors" and they have "discrete rights not held by college students from decades past."[21] Students asserted their independence in the late 1960s and early 1970s in campus demonstrations described as "a direct attack by the students on rigid controls by the colleges" as well as "an all-pervasive affirmative demand for more student rights."[22] Through these demonstrations, students succeeded in attaining expanded rights to privacy in college life.

Following this change in the age of majority, courts pointed out that college students are independent adults, and therefore, universities are not custodians of their students and do not owe them a duty of supervision.[23] For instance, in holding that a university had no duty to protect its students, the Third Circuit noted that adult students "are capable of protecting their own self interests."[24] Furthermore, "[c]ollege administrators no longer control the broad arena of general morals . . . . [as] students vigorously claim the right to define and regulate their own lives."[25] Another court held a university not liable for an alcohol-related accident and stated that a student should not be "viewed as fragile and in need of protection."[26] Ultimately, "society considers the modern college student an adult, not a child of tender years."[27]

A decade after eighteen-year-olds were guaranteed the right to vote, another significant (and seemingly incongruous) age-related legal change occurred: the drinking age was raised to twenty-one.[28] On July 17, 1984, President Ronald

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archived at http://perma.cc/JC9M-NREX.

18. *See* Bruce, *supra* note 17.

19. Johnson, *supra* note 9.

20. *See* U.S. CONST. amend. XXVI.

21. Bradshaw v. Rawlings, 612 F.2d 135, 139 (3d Cir. 1979).

22. *See id.*

23. *See* Beach v. Univ. of Utah, 726 P.2d 413, 418-19 (Utah 1986) (describing court's position and reasoning universities not custodians of adult students).

24. *Bradshaw*, 612 F.2d at 140.

25. *Id.*

26. *Beach*, 726 P.2d at 418.

27. Bradshaw v. Rawlings, 612 F.2d 135, 140 (3d Cir. 1979).

28. *See* 23 U.S.C. § 158 (2012) (establishing twenty-one as minimum drinking age).

Reagan signed the National Minimum Drinking Age Act, which provides that a percentage of federal highway funds will be withheld from any state that allows persons younger than twenty-one to purchase alcohol lawfully.[29] The United States Supreme Court upheld the constitutionality of the Act in 1987.[30] Within a year, all fifty states had adopted legislation setting the legal drinking age at twenty-one.[31]

Universities have repeatedly had to change the ways in which they regulate alcohol consumption at campus parties in response to new laws.[32] For example, the federal Drug Free Schools and Communities Act Amendments of 1989 requires an institution of higher education to report biennially on the effectiveness of its alcohol and drug programs, as well as the consistency of its enforcement of the policy.[33] Likewise, the Clery Act requires that universities develop policies to prevent crimes and report crime statistics to any employee, student, or applicant on an annual basis.[34] In addition to reporting crime statistics, a university must also provide:

> [a] statement of policy regarding the possession, use, and sale of alcoholic beverages and enforcement of State underage drinking laws and a statement of policy regarding the possession, use, and sale of illegal drugs and enforcement of Federal and State drug laws and a description of any drug or alcohol abuse education programs . . . .[35]

To comply with these new regulations, universities have implemented comprehensive programs to address alcohol abuse on campus.[36] Efforts include education on the effects of alcohol, sponsorship of alcohol-free events, notification to parents when their students are cited for alcohol-related infractions, and adjustment of the academic schedule to avoid long weekends by requiring more Friday classes.[37]

Litigation over alcohol-related incidents on college campuses arises from

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29. *See id.*

30. *See* South Dakota v. Dole, 483 U.S. 203, 211-12 (1987) (holding Act valid exercise of federal spending power). The Supreme Court rejected the argument that the Act violated the twenty-first amendment, which gives states power to impose restrictions on the sale of alcoholic beverages. *Id.* at 209.

31. J.H. Hedlund et al, *Determine* Why There Are *Fewer Young Alcohol-Impaired Drivers*, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN. (2001), *available at* http://www.nhtsa.dot.gov/people/injury/research/FewerYoungDrivers/index.htm#toc, *archived at* http://perma.cc/78X8-CGKB.

32. *See* Johnson, *supra* note 9 (describing tactics adopted by universities to control college drinking).

33. *See* 20 U.S.C. § 1011i (2012) (codifying act for preventative regulations); *see also* 34 C.F.R. § 86.1 (2012) (explaining purpose behind preventative regulations); Drug-Free Schools and Campuses, 55 Fed. Reg. 33580-01 (Aug. 16, 1990) (providing final regulations for 1989 Amendments).

34. *See* Clery Act, 20 U.S.C. § 1092(f) (2014) (requiring disclosure of campus security policy and crime statistics).

35. 20 U.S.C. § 1092(f)(1)(H).

36. *See* NIAAA Report, *supra* note 2, at 3-4 (detailing strategies taken to address college drinking).

37. *See id.*

various situations, including injuries that result from intoxicated students falling,[38] injuries suffered during parties and hazing rituals involving alcohol,[39] and injuries from other assaults that occur after alcohol has been consumed on campus.[40] One expert in the field of education law summarizes the situation in this way: "[T]he battleground over competing visions of the modern university is the high-risk alcohol culture and its epidemic primary and secondary effects."[41]

The victim of an alcohol-related assault or accident may attempt to establish the liability of a college or university by asserting a negligence claim. In order to prove the college or university was negligent, the plaintiff must show that the university owed a duty of care to the victim, the university breached its duty, the victim suffered injury or damages, and the university's breach caused the victim's injuries or damages.[42]

At the outset, this Article introduces the elements of a negligence claim that could be brought against a university when an alcohol-related incident has resulted in a student's injuries. Part II addresses the elements of a negligence claim and breaks the various arguments into subparts.[43] Much of this part of the Article is focused on the element of duty, as courts have generally concluded that there is no duty in these cases. Thus, analysis of the other elements is often unnecessary and negligence claims often fail. The analysis in Part III provides a discussion of the tension between the expectations of "helicopter parents" with regard to the caretaker role of the university versus the well-established rule that universities have no custodial relationship with their adult students and have no legal duty to supervise or protect them from harm.[44] This Article argues that it would be detrimental to return "full circle" to the notion that a university should act in loco parentis. A vital part of the higher education process involves the maturation of students into full, productive adulthood. As part of this process, students must learn to take responsibility for themselves.

Part IV of this Article concludes that universities are not and should not be liable for the tragic injuries that result from rampant alcohol abuse in most

38. *See* Beach v. Univ. of Utah, 726 P.2d 413, 414 (Utah 1986) (describing student's fall after drinking).

39. *See* Morrison v. Kappa Alpha Psi Fraternity, 738 So. 2d 1105, 1110 (La. Ct. App. 1999) (describing injuries sustained by student during fraternity hazing ritual).

40. *See* Crow v. State, 271 Cal. Rptr. 349, 351 (Cal. Ct. App. 1990) (describing assault on student at California State University).

41. Peter F. Lake, *Private Law Continues to Come to Campus: Rights and Responsibilities Revisited*, 31 J.C. & U.L. 621, 623 (2005) ("Litigation over injuries fueled by alcohol drive college and university safety law today.").

42. *See* Nero v. Kan. State Univ., 861 P.2d 768, 772 (Kan. 1993) (describing requirements for prima facie case under negligence).

43. *See infra* Part II.

44. *See infra* Part III.

instances.[45] Moreover, the obligation to ensure that students do not abuse alcohol cannot be assigned solely to university administrators who have no legal duty to monitor the students' private lives. Rather, shaping students' values and influencing the choices that adult students make must also come from the students themselves—as well as parents and community leaders—through preventive programs, leadership, and peer-to-peer guidance.

II. ELEMENTS OF A NEGLIGENCE CLAIM AGAINST A UNIVERSITY FOR ALCOHOL-RELATED INJURIES

A. Does a University Have a Legal Duty to Protect its Students from Alcohol-Related Harm?

One of the most difficult tasks for plaintiffs in a negligence action against a university is establishing that the school owed the plaintiff a duty of care.[46] Plaintiffs may argue that a university should owe a duty to its students based on several theories: A special relationship exists between the college and its students, so the school has a duty to supervise them; it is foreseeable that harm may befall a student when alcohol is abused, and the college has a duty to prevent foreseeable injuries; the university has the ability to control students' behavior and has knowledge that harm may come from alcohol abuse, thus giving rise to a duty to prevent injuries; and the university voluntarily assumes a duty when it enacts rules and regulations forbidding alcohol consumption on campus. Courts have addressed these arguments and have rejected them in the majority of cases.[47]

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45. *See infra* Part IV.

46. *See* Bradshaw v. Rawlings, 612 F.2d 135, 138 (3d Cir. 1979).

> "'[D]uty' is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that a particular plaintiff is entitled to protection." Thus, we may perceive duty simply as an obligation to which the law will give recognition in order to require one person to conform to a particular standard of conduct with respect to another person.

Id. (quoting WILLIAM L. PROSSER, LAW OF TORTS 333 (3d ed. 1964)).

47. Out of twenty-eight cases involving alcohol-related harm, in only six instances did the court conclude that the university likely owed a duty to the student. *Compare* Zavala v. Regents of Univ. of Cal., 178 Cal. Rptr. 185 (Cal. Ct. App. 1981), Flynn v. Fairfield Univ., No. CV040410558S, 2006 WL 2193246 (Conn. Super. Ct. July 18, 2006), McClure v. Fairfield Univ., No. CV000159028, 2003 WL 21524786 (Conn. Super. Ct. June 19, 2003), Coghlan v. Beta Theta Pi Fraternity, 987 P.2d 300 (Idaho 1999), Orzech v. Fairleigh Dickinson Univ., 985 A.2d 189 (N.J. Super. Ct. App. Div. 2009), *and* Wiener v. Gamma Phi Chapter of Alpha Tau Omega Fraternity, 485 P.2d 18 (Or. 1971), *with* Guest v. Hansen, 603 F.3d 15 (2d Cir. 2010), Bradshaw v. Rawlings, 612 F.2d 135 (3d. Cir. 1979), Miller v. Concordia Teachers Coll., 296 F.2d 100 (8th Cir. 1961), Anderson v. Principia Corp., 202 F. Supp. 2d 950 (E.D. Mo. 2001), Albano v. Colby Coll., 822 F. Supp. 840 (D. Me. 1993), Booker v. Lehigh Univ., 800 F. Supp. 234 (E.D. Pa. 1992), Tanja H. v. Regents of Univ. of Cal., 278 Cal. Rptr. 918 (Cal. Ct. App. 1991), Crow v. State, 271 Cal. Rptr. 349 (Cal. Ct. App. 1990), Baldwin v. Zoradi, 176 Cal. Rptr. 809 (Cal. Ct. App. 1981), Univ. of Denver v. Whitlock, 744 P.2d 54 (Colo. 1987), Pawlowski v. Delta Sigma Phi, No. CV-03-0484661S, 2009 WL 415667 (Conn. Super. Ct. Jan. 23, 2009),

For a third of a century, most courts have held that there is no duty on the part of a university to supervise or protect students: "[A]s a general rule, colleges and universities do not have a legal duty to supervise their students or to protect individuals from unforeseeable harm caused by their students."[48] As one court explained, to impose a "duty of care [on a university] to safeguard its student[s] from the risks of harm flowing from the use of alcoholic beverages. . . . would be unwarranted and impracticable."[49] Furthermore, "[t]he incursion upon a student's privacy and freedom that would be necessary to enable a university to monitor students during virtually every moment of their day and night to guard against the risks of harm from the voluntary ingestion of drugs [or alcohol] is unacceptable and would not be tolerated."[50]

1. Does the Connection Between a University and its Students Constitute a "Special Relationship" that Triggers a Duty in Tort Law?

The mere fact that a student is enrolled at a university does not create a special relationship that imposes a duty of care on the institution.[51] A special relationship only exists "when one assumes responsibility for another's safety or deprives another of his or her normal opportunities for self-protection."[52] "The essence of a special relationship is dependence by one party upon the other or mutual dependence between the parties."[53] College students are not

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Rigdon v. Kappa Alpha Fraternity, 568 S.E.2d 790 (Ga. Ct. App. 2002), Rabel v. Ill. Wesleyan Univ., 514 N.E.2d 552 (Ill. App. Ct. 1987), Campbell v. Bd. of Trustees of Wabash Coll., 495 N.E.2d 227 (Ind. Ct. App. 1986), Bearman v. Univ. of Notre Dame, 453 N.E.2d 1196 (Ind. Ct. App. 1983), Allen v. Rutgers, 523 A.2d 262 (N.J. Super. Ct. App. Div. 1987), Peterson v. Fordham Univ., 761 N.Y.S.2d 33 (N.Y. App. Div. 2003), Rothbard v. Colgate Univ., 652 N.Y.S.2d 146 (N.Y. App. Div. 1997), Mynhardt v. Elon Univ., 725 S.E.2d 632 (N.C. Ct. App. 2012), Van Mastrigt v. Delta Tau Delta, 573 A.2d 1128 (Pa. Super. Ct. 1990), Beach v. Univ. of Utah, 726 P.2d 413 (Utah 1986), *and* Houck v. Univ. of Wash., 803 P.2d 47 (Wash. Ct. App. 1991). In two of those cases, the courts stated that the university might be found to owe a duty because the university had undertaken or assumed the duty. *See Coghlan*, 987 P.2d at 312; *McClure*, 2003 WL 21524786, at *8. Of the six cases where the court concluded that the school likely owed a duty, only one ultimately resulted in the university being held potentially liable for ordinary negligence. *See Flynn*, 2006 WL 2193246, at *4 (denying defendant's motion for summary judgment, finding university's conduct possibly substantial factor in accident). In another case the university was found partially at fault. *See Zavala*, 178 Cal. Rptr. at 187 (finding university 20% liable for plaintiff's injuries). Finally, in *McClure*, the court found the University breached its assumed duty. *See McClure*, 2003 WL 21524786, at *8 (establishing university owed duty to plaintiff).

48. William P. Hoye, *What a Difference a Millennium Makes: Tort Litigation in Higher Education, Circa Y2K*, 147 ED. L. REP. 767, 769 (2000).

49. *Crow*, 271 Cal. Rptr. at 359–60.

50. Bash v. Clark Univ., No. 06745A, 2006 WL 4114297, at *5 (Mass. Super. Ct. Nov. 20, 2006).

51. *See* Freeman v. Busch, 349 F.3d 582, 587 (8th Cir. 2003). "[T]he general rule is that no special relationship exists between a college and its *own* students because a college is not an insurer of the safety of its students." *Id.*

52. *Beach*, 726 P.2d at 415 (citing RESTATEMENT (SECOND) OF TORTS § 314 (A)(1964)).

53. Beach v. Univ. of Utah, 726 P.2d 413, 415-16 (Utah 1986) (citing RESTATEMENT (SECOND) OF TORTS § 314(A) cmt. b (1964)); *see also* Univ. of Denver v. Whitlock, 744 P.2d 54, 58 (Colo. 1987) ("Special relationships . . . include common carrier/passenger, innkeeper/guest, possessor of land/invited entrant, employer/employee, parent/child, and hospital/patient.").

dependent children who need babysitters, but are independent adults and able to care for themselves.

In *Bradshaw v. Rawlings*, a well-known case from 1979, the Third Circuit held that the university does not have a duty to supervise or protect its adult students.[54] The plaintiff in this case suffered injuries in a car accident that occurred after the plaintiff had participated in underage drinking at a school-sponsored picnic.[55] However, because the plaintiff failed to establish that the college owed him a duty of custodial care, the school was not liable.[56] The court stated that their "beginning point is a recognition that the modern American college is not an insurer of the safety of its students."[57] "Whatever may have been [a college's] responsibility in an earlier era, the authoritarian role of today's college administrations has been notably diluted in recent decades."[58] In discussing an earlier period of history when there may in fact have been a duty, the court explained

> There was a time when college administrators and faculties assumed a role In loco parentis. Students were committed to their charge because the students were considered minors. A special relationship was created between college and student that imposed a duty on the college to exercise control over student conduct and, reciprocally, gave the students certain rights of protection by the college. . . . But today students vigorously claim the right to define and regulate their own lives.[59]

The court's holding in *Bradshaw* has remained the predominant position of courts today with regard to the absence of a custodial duty owed by a college to protect students.

In the three decades since that decision, courts have consistently echoed the same view. In the 1986 case *Beach v. University of Utah*, a Utah court addressed a plaintiff's argument "that a large, modern university has a custodial relationship with its adult students and that this relationship imposes upon it the duty to prevent students from violating liquor control laws whenever those students are involved directly or indirectly in a University activity."[60] The court said it did not.[61] This case involved a student who was injured on a

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54. *See* 612 F.2d 135, 143 (3d Cir. 1979) (finding plaintiff failed to establish university owed him duty of custodial care).

55. *See id.* at 137 (describing facts of case).

56. *See id.* at 143.

57. *Id.* at 138.

58. *Bradshaw*, 612 F.2d at 138.

59. *Id.* at 139-40.

60. 726 P.2d 413, 417-18 (Utah 1986).

61. *See id.* at 417-18. The court further explained:

> Determining whether one party has an affirmative duty to protect another from the other's own acts

school-sponsored field trip lead by a tenured professor. The student had attended a lamb roast where she consumed several home-brewed beers, a mixed drink, and whiskey.[62] The professor testified that he had several beers and assumed most people were drinking at the roast.[63] On her way back to the campsite the student got lost and was rendered quadriplegic after falling into a crevice.[64] Although a professor was with the group, the court did not impose any custodial or supervisory duty on him or the university.[65]

A year later, the Supreme Court of Colorado similarly concluded that a university had no special duty to protect a fraternity member from "the well-known dangers of using a trampoline"[66] during a party on campus:

> The demise of the doctrine of *in loco parentis* . . . has been a direct result of changes that have occurred in society's perception of the most beneficial allocation of rights and responsibilities in the university-student relationship. By imposing a duty on the University in this case, the University would be encouraged to exercise more control over private student recreational choices, thereby effectively taking away much of the responsibility recently recognized in students for making their own decisions with respect to private entertainment and personal safety.[67]

Declining to find a special relationship between the student (who became paralyzed after falling on the trampoline) and the University of Denver, the court said that to impose liability on the college "would directly contravene the

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> or those of a third party requires a careful consideration of the consequences for the parties and society at large. If the duty is realistically incapable of performance, or if it is fundamentally at odds with the nature of the parties' relationship, we should be loath to term that relationship "special" and to impose a resulting "duty[.]"

Id. at 418.

62. *See id.* at 415.

63. *See id.*

64. *Beach*, 726 P.2d at 415.

65. *See id.* at 417-18. One court criticized the logic in both *Beach* and *Bradshaw*, saying that although those courts declined to impose a duty on the university to supervise students who were "responsible adults," the offenses involved drinking alcoholic beverages, which is an area where "the students were unquestionably not deemed adults under the law since most, if not all, participants were below the drinking age." Furek v. Univ. of Del., 594 A.2d 506, 518 (Del. 1991). Since the students are not old enough to drink legally, it is illogical to say that they are "mature" with regard to making the choice and handling the effects of consuming alcohol, the court opined. *See id.* A California court made a similar observation: "College students are generally young adults who do not always have a mature understanding of their own limitations or the dangers posed by alcohol and violence." Tanja H. v. Regents of Univ. of Cal., 278 Cal. Rptr. 918, 920 (Cal. Ct. App. 1991). That point is well taken, but the fact remains that adult students need to learn to make their own decisions and to handle their own problems.

66. Univ. of Denver v. Whitlock, 744 P.2d 54, 62 (Colo. 1987).

67. *Id.* at 60 (citations omitted). Furthermore, "[s]uch an allocation of responsibility would 'produce a repressive and inhospitable environment, largely inconsistent with the objectives of a modern college education.'" *Id.* (quoting Beach v. Univ. of Utah, 726 P.2d 413, 419 (Utah 1986)).

competing social policy of fostering an educational environment of student autonomy and independence."[68]

Illustrating the consistency of the "no duty" rule over the decades, another court embraced the same logic in 1993, opining that "the university-student relationship does not in and of itself impose a duty upon universities to protect students from the actions of fellow students or third parties."[69] In that case, a female student was sexually assaulted in a coed resident hall by a sexual predator who had a violent history at the university.[70] The university had previously banned the student/perpetrator from coed resident halls, but had subsequently allowed him to live in a coed hall during summer school, where he attacked a female dormitory resident.[71] The court rejected the victim's claim that the university had a custodial duty to protect students in the residence hall. The court emphasized that "[t]he in loco parentis doctrine is outmoded and inconsistent with the reality of contemporary collegiate life."[72]

In yet another case, a female student sustained permanent injuries when she fell thirty feet from a third-floor fire escape after becoming intoxicated.[73] The student had been celebrating the end of "Rush Week" and had attended fraternity parties with names such as "Jack Daniels' Birthday" or "Fifty Ways to Lose Your Liver."[74] Even though school employees were present at the Greek houses, the plaintiff was never asked for identification.[75] The court held that the university had no legal duty to supervise its students even though college employees were actually on hand at the events.[76] "[S]ociety no longer expects universities to monitor the drinking activities of eighteen-year-old college students," stated the court.[77] There was no duty, and thus, no liability for negligence.

Seven years later, another court went beyond merely indicating that there is no duty to monitor students. Rather, the court stated quite strongly that it would be unacceptable and intolerable for college administrators to intrude into students' private lives in an effort to prevent them from using drugs or alcohol.[78] That case involved a freshman student who overdosed on heroin.[79] The student's estate sued the university for negligence, alleging that the university failed to take adequate precautions to protect the student; but the

68. *Whitlock*, 744 P.2d at 62.
69. Nero v. Kan. State Univ., 861 P.2d 768, 778 (Kan. 1993).
70. *See id.* at 771.
71. *See id.* at 773.
72. *Id.*
73. Coghlan v. Beta Theta Pi Fraternity, 987 P.2d 300, 304-305 (Idaho 1999).
74. *Id.* at 393.
75. *See id.*
76. *See id.* at 312 (declining to hold university has duty to aid or protect adult students).
77. *Coghlan*, 987 P.2d at 313.
78. Bash v. Clark Univ., No. 200600745, 2007 WL 1418528, at *2 (Mass. Super. Ct. Apr. 5, 2007).
79. *See id.* at *1.

court ruled against the plaintiffs because it was not the college's duty to supervise the student's private activities.[80]

Even in recent years, the rule has remained the same. In 2012, when a student was injured at a party and sued the university, the court stated that there was "no special relationship resulting in the imposition of a duty," particularly since the injured student "voluntarily, and uninvited, attended an off-campus party of which [the university] had no knowledge."[81] The court held the defendants "assumed no duty to protect Plaintiff from drinking-related injuries at an off-campus party."[82]

In sum, an argument that a duty exists based on a custodial relationship between a college and its students is highly likely to fail, as the courts have consistently rejected this viewpoint for more than thirty years.

2. If Harm from Alcohol Abuse is Foreseeable, Does the College Have a Duty to Protect Students from it in the Absence of a Special Relationship?

In the absence of a special relationship, a college does not have a duty to protect students from a foreseeable risk of harm from alcohol use.[83] Foreseeability alone is not sufficient to trigger a legal duty to protect and supervise a student. Because the "foreseeability of [an] injury does not determine the existence of [a] duty," a special relationship must exist before a university has any duty to protect a student from foreseeable harm.[84] In discussing this issue, courts consider whether there is a duty to supervise adult students, that is, a duty to protect students from foreseeable harm that results from their own choices.[85]

Because courts have consistently held that there is no special relationship between the college and the student, no duty to protect students exists and thus, courts do not dwell much on whether the harm from drinking was foreseeable.[86] This point was recently reinforced by the Second Circuit: "Under New York law, colleges have no legal duty to shield students or their guests . . . . They do not act *in loco parentis*. . . . This analysis *does not change*

80. *See id.* at *2 (finding Clark University did not owe duty to adult student).

81. Mynhardt v. Elon Univ., 725 S.E.2d 632, 637 (N.C. Ct. App. 2012) (finding university owed no duty to paralyzed student who had been pushed over at party).

82. *Id.*

83. *See* Baldwin v. Zoradi, 176 Cal. Rptr. 809, 813-14 (Cal. Ct. App. 1981).

84. Eiseman v. State, 511 N.E.2d 1128, 1134 (N.Y. 1987); *see also* Guest v. Hansen, 603 F.3d 15, 22 (2d Cir. 2010) (quoting language from *Eiseman* case). While it is well established that there is no duty to protect against unforeseeable harm, some may argue that injuries from alcohol consumption are foreseeable.

85. *See* Beach v. Univ. of Utah, 726 P.2d 413, 419 (Utah 1986) (asserting placing role of custodian over adult students on universities unrealistic).

86. *See supra* Part II.A.1. For example, in *Baldwin*, the court had stated, "[s]tudents have demanded rights which have given them a new status and abrogated the role of in loco parentis of college administrators." Baldwin v. Zoradi, 176 Cal. Rptr. 809, 816 (Cal. Ct. App. 1981).

merely because a danger is foreseeable."[87]

In *Bradshaw*, for example, the injured student argued that because the college knew that students would drink beer illegally at the class picnic and that harm could result, the knowledge of possible harm triggered a duty either to protect the students or to control their conduct.[88] The court rejected this argument, indicating that since there was no special relationship between the school and the students, there was no duty to protect them.[89] Additionally, the court clarified confusion in the law by noting that the victim's argument had blurred the distinction between duty and breach.[90] The opinion implied that the school's failure to exercise control might have been a breach if there had been a duty, but the failure to control or protect students from foreseeable harm did not, in and of itself, create any legal duty to do so.[91]

Some scholars, however, point to the landmark case *Tarasoff v. Regents of University of California*[92] as an example of a situation where the court held that the university's therapist had a duty to warn a student of threats against her life.[93] The harm in that case was foreseeable; the counselor learned during treatment that a patient intended to kill Tarasoff. However, in this case the court additionally found that there was a special relationship between the therapist and the patient.[94] That special relationship triggered a duty to warn where harm was foreseeable. This is different than the relationship between a university and its students.

In *Baldwin v. Zoradi*, a case involving an alcohol-related incident, the California Court of Appeals clarified the applicability of *Tarasoff*. In *Baldwin*, the plaintiff-student was injured as a result of a "speed contest" after the passengers and drivers had been drinking in the university dormitories.[95] The *Baldwin* court distinguished *Tarasoff*, indicating that whereas in the *Tarasoff* case the "defendant stood in a special relationship to both the victim [Tarasoff] and the person whose conduct created the danger," in *Baldwin*, by contrast, there was no special relationship, so the question of foreseeability of the injury was not determinative.[96] Even if it were foreseeable that the intoxicated students might be injured, the university had no duty to monitor students' alcohol consumption to protect them from injuries.[97]

The general rule remains the same: "When the avoidance of foreseeable

87. Guest, 603 F.3d at 21-22 (emphasis added).
88. *See* Bradshaw v. Rawlings, 612 F.2d 135, 141 (3d Cir. 1979) (describing plaintiff's argument).
89. *See id.* at 142-43 (stating court's reasoning).
90. *See id.* at 142.
91. *See id.*
92. 551 P.2d 334 (Cal. 1976).
93. *See id.* at 353.
94. *See id.* at 344 (describing special relationship and duty arising from it).
95. 176 Cal. Rptr. 809, 811 (Cal. Ct. App. 1981).
96. *See id.* at 814.
97. *See id.* at 816.

harm requires a defendant to control the conduct of another person, or to warn of such conduct, the common law as a general rule imposes liability *only if the defendant bears some special relationship* to the dangerous person or potential victim."[98] In the absence of a special relationship, the university has no duty to supervise or protect students even when harm is foreseeable.

3. Does a Duty Arise if the University has Both Control Over the Students' Social Activities and Knowledge of Potential Harm from Alcohol Use?

Courts have generally held that a university has no duty to control students' behavior—even if it can—because the students are independent adults.[99] The analysis still begins with a discussion of whether there is a special relationship between parties that would trigger the duty.[100] Even in instances where university officials knew about illicit alcohol use at parties, and even when school officials supervised the students' social activities, courts have held that there was no tort duty to protect the adult students from their own risky choices.[101]

a. Knowledge and Control in the Context of a Party Where University Officials Are Aware of Drinking

In *Guest v. Hansen*, decided by the Second Circuit in 2010, the court held that even if a university had the ability to control students' social behavior, it was under no obligation to do so.[102] In this case, a college administrator observed students as they congregated to drink and socialize at the lake near school grounds.[103] One student was killed in a snowmobile accident while returning to the campus early the next morning.[104] Even though the administrator knew the students had been drinking, the college was under no duty to take any action to protect them. The court stated, "[a]ssuming *arguendo* that the College had the ability to control off-campus social activities,

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98. *Id.* at 282 (emphasis added) (citing Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334, 342-43 (Cal. 1976)).

99. *See Baldwin*, 176 Cal. Rptr. at 819; Beach v. Univ. of Utah, 726 P.2d 413, 419 (Utah 1986).

100. In the *Beach* case, the court held that there was no special relationship between the university and the plaintiff Beach or other adult students. *See Beach*, 726 P.2d at 419. "Our conclusion is not affected by the presence of any university rules that might have existed regarding the consumption of alcohol, over and above the state ban on underage drinking." *Id.* The court further held that neither the student's attendance nor agreement to behavioral policies made "the student less an autonomous adult or the [university] more a caretaker." *Id.* at 419 n.5.

101. *See* Coghlan v. Beta Theta Pi Fraternity, 987 P.2d 300, 312 (Idaho 1999) (rejecting argument university owed students duty because officials knew or should have known about party); *see also Beach*, 726 P.2d at 415, 419 (asserting university did not owe duty of care to students despite supervision by university officials on trip).

102. 603 F.3d 15, 22 (2d Cir. 2010).

103. *See id.* at 17-19 (describing factual background leading to case).

104. *See id.* at 19.

it was under no obligation to do so."[105] Knowledge of the activity and the ability to control it did not give rise to a duty on the university's part. The court noted that the accident occurred off-campus, but expressly indicated that the conclusion would have been the same even if the drinking had begun on the college's premises.[106]

Similarly, the Idaho Supreme Court held that there was no duty in *Coghlan v. Beta Theta Pi Fraternity*, when an intoxicated freshman fell thirty feet from a fire escape after consuming alcoholic beverages at two parties that were supervised by university personnel.[107] The officials were aware of the alcohol consumption and could have controlled the students' drinking, but did not do so.[108] The young student was never asked for identification even though the event was sponsored and sanctioned by the university.[109] Although a university official knew that underage students were drinking, the court held that the college had no duty to control the students' social choices.[110]

On the other hand, the contrary view is illustrated in a case involving cheerleading, where the court stated that because a university exerted significant control over students' participation in the school-sponsored cheerleading program, there was a special relationship between the school and the cheerleaders.[111] That special relationship created an expectation that the college would protect its cheerleaders from unsafe activities.[112] Although no alcohol consumption was involved when the cheerleader was injured, the case represents narrow circumstances in which a court found a special relationship that gave rise to a duty on the part of the university to "exercise that degree of care which a reasonable and prudent person would exercise under the same or similar circumstances."[113]

Cases involving sports injuries (such as the cheerleading case) or hazing have in some instances led the court to make a narrow exception to the "no duty" rule. In a hazing case, *Furek v. University of Delaware*, freshman Jeffrey Furek went through a fraternity's pledge period and was permanently scarred

105. *Id.* at 22.

106. *See Guest*, 603 F.3d at 22 ("The same conclusion obtains even if the drinking at issue began on the College's premises . . . .").

107. *See* 987 P.2d 300, 305, 312 (Idaho 1999).

108. *See id.* at 312 (explaining court's response to plaintiff's arguments regarding university's duties).

109. *See id.* at 305.

110. *See id.* at 312. The court "decline[d] to hold that Idaho universities have the kind of special relationship creating a duty to aid or protect adult students from the risks associated with the students' own voluntary intoxication." *Id.* at 312. The court also noted what other courts have stated, that a university is not an insurer of its students. *Id.* Therefore, there was no duty imposed on the school because no special relationship existed between the plaintiff and the university. *Id.*

111. *See* Davidson v. Univ. of N.C., 543 S.E.2d 920 (N.C. Ct. App. 2001).

112. *See id.* at 927 (describing duty of university towards students).

113. *Id.* at 928. Sports injuries and hazing cases are occasionally the exceptions to the general rule that a university has no duty to supervise or protect its students. *See* Hoye, *supra* note 48, at 775 (describing sports and hazing issues as exceptions).

after liquid oven cleaner was poured on his head while he was blindfolded.[114] The University of Delaware argued that it assumed no responsibility to protect Furek, an adult student, from hazing. The Delaware Supreme Court found a duty based on Restatement § 323 because the university had assumed control over security on campus and had an obligation to protect students from the known dangers of hazing.[115] That court discussed—but did not follow—the prevailing rule announced by "a number of courts" that "have rejected both a duty under the *in loco parentis* doctrine and a duty of supervision under Restatement § 314A when one assumes responsibility for another's safety or deprives another of a normal opportunity for self-protection."[116] The court then departed from the weight of authority by holding that "where there is direct university involvement in, and knowledge of, certain dangerous practices of its students, the university cannot abandon its residual duty of control."[117] The duty to protect Furek arose from the university's knowledge that hazing was occurring, as well as the university's repeated communications regarding its policy against hazing and its commitment to provide security.[118]

b. Knowledge and Control by the University Under a Landowner or Landlord Theory.

Under the theory of a landowner liability, universities may owe a duty to their students. A landowner who has knowledge of a danger and fails to control or correct an unsafe condition can be held liable for resulting injuries.[119] Therefore, treating the university as a landowner instead of a custodial caretaker of its students may yield a different conclusion as to duty. The landowner liability theory, however, is a "narrow" approach and "does not appear to apply to activities that are dangerous independent of the landowner's actions."[120]

For example, the Maryland Court of Appeals held that a physically aggressive roommate was not "a dangerous or defective condition" which triggers the landlord's duty to rectify the situation.[121] Indicating that the

114. *See* 594 A.2d 506, 510 (Del. 1991) (describing injury leading to case).

115. *See id.* at 520 (explaining reasoning behind following specific Restatement section).

116. *Id.* at 517.

117. *Id.* at 520.

118. *Furek*, 594 A.2d at 520. The court in *Furek* stated a university's responsibility is based on Restatement § 323's provision regarding a "duty owed by one who assumes direct responsibility for the safety of another." *Id.*

119. *See* Guest v. Hansen, 603 F.3d 15, 22 (2d Cir. 2010); *cf.* Lloyd v. Alpha Phi Alpha Fraternity, No. 96-CV-348, 1999 WL 47153, at *4 (N.D.N.Y. Jan. 26, 1999) (alteration in original) (quoting Oja v. Grand Chapter of Theta Chi Fraternity, 255 680 N.Y.S.2d 277, 278 (N.Y. App. Div. 1998)) ("[A] landowner cannot be held liable for injuries sustained by a party engaged in a voluntary activity unless the landowner had knowledge of the activities and exercised a degree of supervision or control.").

120. *Guest*, 603 F.3d at 22.

121. Rhaney v. Univ. of Md. E. Shore, 880 A.2d 357, 365 (Md. 2005). The *Rhaney* case apparently did

landlord is not an insurer against criminal acts, that court clarified that "dangerous condition[s]" are physical defects such as poor lighting or defective security bars on doors in the building; the students who occupy the dormitory rooms are not such "conditions."[122] Thus, the university as a landlord has no duty to control the actions of a third party.[123]

Similarly, a California court opined that if students were drinking to excess in the dormitory, their conduct did not constitute a "dangerous condition" for which the university/landlord was responsible.[124] A dangerous condition on the land typically refers to "some physical feature of the property" or some "physical defect."[125] Although the court acknowledged prior cases where a vicious dog and the firing of guns on rental property had resulted in the landowner liability for invitees' injuries, a dormitory party filled with intoxicated students simply was not legally analogous to other dangerous conditions.[126] Thus, there was no basis for holding the Trustees of the California Polytechnic State University liable as a landlord despite the occurrence of a subsequent tragic accident.[127]

In *Crow v. State*, the court reached the same result, indicating that a dangerous person in a dormitory was not the same as a "dangerous condition" because there was no physical defect that the university should have repaired.[128] In *Crow*, a student attended a keg party in a dormitory and was assaulted by another student.[129] The injured student was unsuccessful in arguing that the university was liable under a California statute prohibiting the maintenance of property in a dangerous condition.[130]

Analogizing a university to an innkeeper who controls guests' lodging, another California court held that a university had no duty to protect its students from the actions of intoxicated third parties.[131] In that case, a student named Tanja H. drank alcohol at a party and was subsequently raped in the dormitory by some of her fellow students.[132] The harm resulted from the students' actions—both those of Tanja and of her male companions—and not from any dormitory conditions that the school could have controlled.[133] The

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not involve alcohol-related injuries; rather, a student was assaulted in the dormitory by a roommate with a history of violent tendencies. *See id.* at 359.

122. *Id.* at 365 (discussing defective and dangerous conditions).

123. *See id.* at 365–66.

124. Baldwin v. Zoradi, 176 Cal. Rptr. 809, 820 (Cal. Ct. App. 1981).

125. *Id.* at 292-93.

126. *See id.* at 293-94 (identifying prior cases, distinguishing present facts from those).

127. *See id.* at 294 (asserting no cause of action for negligent creation of dangerous condition stated).

128. *See* 271 Cal. Rptr. 349, 355-56 (Cal. Ct. App. 1990).

129. *See id.* at 351 (describing background facts of case).

130. *See id.* at 357-58 (explaining reasoning behind rejection of plaintiff's argument).

131. Tanja H. v. Regents of Univ. of Cal., 278 Cal. Rptr. 918, 920-21 (Cal. Ct. App. 1991) (utilizing innkeeper approach to analyze existence of duty on part of university).

132. *See id.* at 919 (describing facts of case).

133. *See id.* at 921 (stating shattered light bulb in stairwell did not trigger liability for sexual assault in

court compared the university to an innkeeper "who does not have a duty to search guests for contraband, separate them from each other, or monitor their private social activities."[134] "[T]he university does not undertake a duty of care to safeguard its students from the risks of harm flowing from the use of alcoholic beverages."[135] Emphasizing that the university had no special relationship with its students, the court held that "[a]bsent a special relationship, a person who has not created a peril may not be held liable for failure to protect against it."[136] The court nonetheless reflected some sensitivity toward the rape victim, but stopped short of holding the university responsible: "[c]ollege administrators have a moral duty to help educate students [about sexually degrading conduct or violence], but they do not have a legal duty to respond in damages for student crimes."[137]

Finally, in deciding whether there was a landlord-tenant relationship between the University of Denver and a fraternity, a Colorado court noted that the fraternity paid an annual rent of one dollar, and the university as landlord had the right to inspect the building.[138] The fraternity agreed that occupants would abide by the university's rules and regulations. However, since the university had not regulated trampoline use, the court found that there was no violation when a fraternity member fell while jumping on a trampoline during a party.[139] In addition, the university/landowner's "reservation of rights to inspect the premises and make repairs is generally not sufficient control to give rise to liability."[140] Therefore, the college owed no duty in its role as landlord to the injured fraternity member.

The *Furek* case, which was brought by the plaintiff on the landowner-invitee theory, represents an exception to the predominant rule that universities do not owe their students a duty of supervision or protection.[141] In that case, the university had leased land to a fraternity, and the fraternity subsequently constructed its house and permitted its members to live there.[142] The court deviated from the majority rule by applying the landowner analysis to the situation and thereby holding that the University of Delaware had knowledge of and control over the situation, and it owed a duty as a landowner when a

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dark stairwell). The court found the attack was not causally connected to darkness, and that the assault "began in one dormitory room, continued on the landing, and continued in two other rooms." *Id.*

134. *Id.* at 921.

135. *Tanja H.*, 278 Cal. Rptr. at 920 (quoting Crow v. State, 271 Cal. Rptr. 349, 359 (Cal. Ct. App. 1990)).

136. *Id.* at 925.

137. Tanja H. v. Regents of Univ. of Cal., 278 Cal. Rptr. 918, 921 (Cal. Ct. App. 1991).

138. *See* Univ. of Denver v. Whitlock, 744 P.2d 54, 61–62 (Colo. 1987) (explaining relationship between parties).

139. *See id.* at 61-62.

140. *Id.* at 62.

141. *See* Furek v. Univ. of Del., 594 A.2d 506 (Del. 1991); Lake, *supra* note 41, at 626.

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

student was injured by fraternity brothers in a hazing incident.[143] Despite the freedom enjoyed by university students, the university's status as a landowner created some duty "to regulate and supervise foreseeable dangerous activities occurring on its property."[144]

These cases show that courts do not always impose a duty on the university even when university officials were present or when the injury implicates the school's role as landlord or landowner. In summary, a university owes no duty of protection or supervision to its students even if the university has knowledge of and control over circumstances that can lead to alcohol-related injuries.

4. Does a College Voluntarily Assume the Duty to Supervise Students' Social Activities When the School Regulates Alcohol Use on Campus?

Colleges have rules and procedures for addressing alcohol consumption mandated by federal law.[145] Courts have held, however, that such rules and handbook provisions do not create a legal duty for purposes of tort liability.[146] Injured victims have argued that the enactment of campus conduct and safety regulations amounts to the voluntary undertaking of the duty by a university to supervise or protect its students.[147] Under that reasoning, even if there is generally no duty in tort law to safeguard adult students, once the college undertakes the task of regulating students' conduct, then the university is voluntarily assuming a duty. That argument has failed in almost every case.[148]

For example, in *Bradshaw*, the court held that even though the university had a policy banning underage students from consuming alcohol, that policy did not impose a special relationship that would lead to a duty on the part of the university.[149] Since the policy merely reflected state law, it did not indicate that the university had voluntarily assumed a custodial relationship with its students.[150]

This view was echoed in *Booker v. Lehigh University*, where the plaintiff argued that the university's publication, "A Guide to the Social Policy,"

143. *See id.* at 522.

144. *Id.*

145. *See* 20 U.S.C. § 1011i (2012) (codifying act for preventative regulations); *see also* 34 C.F.R. § 86.1 (explaining purpose behind preventative regulations); 55 Fed. Reg. 33580-01 (Aug. 16, 1980) (providing final regulations for 1989 Amendments).

146. *See* Booker v. Lehigh Univ., 800 F. Supp. 234, 238-40 (E.D. Pa. 1992) (holding university's "Social Policy" did not give rise to duty to students).

147. *See* Rabel v. Ill. Wesleyan Univ., 514 N.E.2d 552, 558 (Ill. App. Ct. 1987) (describing plaintiff's position that university's policies constituted duty to students); Rothbard v. Colgate Univ., 652 N.Y.S.2d 146, 148 (N.Y. App. Div. 1997) (explaining plaintiff's claim university handbook created duty to control or supervise student conduct).

148. *See* Beach v. Univ. of Utah, 726 P.2d 413, 420 (Utah 1986) (stating university's code of conduct permits disciplining students, but does not change student/university relationship).

149. *See* Bradshaw v. Rawlings, 612 F.2d 135, 141 (3d Cir. 1979) (describing court's belief policy does not lead to duty).

150. *See id.*

established a duty to enforce its provisions.[151] Through "A Guide to the Social Policy," the plaintiff argued that Lehigh controlled and policed parties and, therefore, the university had a duty to ensure compliance by students and guests.[152] The court rejected that claim, characterizing it as an effort to cast the university in a parental role by arguing that "Lehigh is responsible for the actions of its (underage) students *in loco parentis*."[153] Holding that Lehigh had no such custodial duty, the court stated that "[t]o require Lehigh to supervise its thousands of students would render null and void the freedoms won by adult students."[154] Moreover, "A Guide to the Social Policy" itself did not create a duty to prevent underage students from drinking alcohol; it was merely "a policy by which Lehigh hoped *all* members of its community would abide," and the university properly assumed "that the adult students were responsible enough to make their own decisions."[155] Declining to hold the university liable, the court described the plaintiff as one who "as a result of her own self-indulgent behavior . . . [became] inebriated at on-campus fraternity parties and thereafter injure[d] herself in a fall."[156]

Similarly, in a case where a freshman became intoxicated at a fraternity party and was subsequently killed in a head-on motorcycle accident, the court held that even though the college had an alcohol policy, there was no "special duty" to "control the actions of those students who are determined to acquire intoxicating beverages, even though they are underage."[157] The existence of a policy does not give rise to any legal duty to ensure that students comply with it; students themselves are responsible for acting responsibly.[158]

Likewise, in holding that Colgate University was not liable for student Jason Rothbard's injuries in an alcohol-related incident, the New York Appellate Court concluded that the publication of rules in a handbook did not give rise to any duty to police the students' compliance with the rules.[159]

> We reject plaintiffs' contention that in [publishing a handbook] the university voluntarily assumed the duty to take affirmative steps to supervise plaintiff and prevent him from engaging in the prohibited activity. At the time of his injury, plaintiff was not a young child in need of constant and close supervision; he

151. 800 F. Supp. 234, 236-37 (E.D. Pa. 1992).

152. *Id.*

153. *Id.* at 237.

154. *Id.* at 241.

155. *Booker*, 800 F. Supp. at 241.

156. *Id.* at 235.

157. Millard v. Osborne, 611 A.2d 715, 721 (Pa. Super. Ct. 1992).

158. *See id.* at 717; *accord* Univ. of Denver v. Whitlock, 744 P.2d 54, 60 (Colo. 1987) ("Nothing in the University's student handbook, which contains certain regulations concerning student conduct, reflects an effort by the University to control the risk-taking decisions of its students in their private recreation.").

159. Rothbard v. Colgate Univ., 652 N.Y.S.2d 146, 148 (N.Y. App. Div. 1997).

was an adult, responsible for his own conduct.[160]

In fact, the court indicated that the handbook's provisions showed that the university was making some positive effort to control drinking on campus.[161]

Even though underage drinking violates state law as well as violating a university's handbook provisions, most courts still find that the university has no tort duty to monitor compliance. For example, the court in *Baldwin* stated, "[a]lthough the consumption of alcoholic beverages by persons under 21 years of age is proscribed by law, the use of alcohol by college students is not so unusual or heinous by contemporary standards as to require special efforts by college administrators to stamp it out."[162] The court continued, "[a]lthough the university reserved to itself the right to take disciplinary action for drinking on campus, this merely follows state law. . . . We do not believe they created a mandatory duty."[163] Similarly, in a hazing case, the court explained: "[a]lthough the University published materials about the dangers of hazing and its prohibition on campus, and at times offered a seminar to help fraternities improve their pledge education programs, this involvement does not rise to the level of encouraging and monitoring pledge participation."[164]

Similarly, in a non-hazing case where a nineteen-year-old fraternity member voluntarily consumed significant quantities of liquor and beer, neither the fraternity itself nor the individual members were held liable for his death.[165] It was undisputed that the fraternity neglected to enforce its alcohol policies, nor did it abide by "university regulations or state law."[166] After a "Big

160. *Id.*

161. *See id.*

162. 176 Cal. Rptr. 809, 817 (Cal. Ct. App. 1981).

163. *Id.* The court squarely rejected the plaintiff's attempt to compare the role of the university to that of a bartender who is liable under the dram shop statute. *See id.* at 289-90 ("There is an obvious distinction between 'giving' or 'furnishing' alcoholic beverages and the failure to stop a drinking party or parties."); *accord* Allen v. Rutgers, 523 A.2d 262, 266 (N.J. Super. Ct. App. Div. 1987) ("Rutgers neither sells nor serves any alcoholic beverages consumed by violators, nor is it under any common law or statutory duty to protect patrons against the results of their voluntary intoxication.").

164. Lloyd v. Alpha Phi Alpha Fraternity, No. 96-CV-348, 1999 WL 47153, at *3 (N.D.N.Y. Jan. 26, 1999) "[T]he university expressly provided in its student handbook that certain conduct by its students was prohibited. We reject plaintiff's contention that in so doing the university voluntarily assumed the duty to take affirmative steps to supervise plaintiff and prevent him from engaging in the prohibited activity." *Id.* (quoting Rothbard v. Colgate Univ., 652 N.Y.S.2d 146, 148 (N.Y. App. Div. 1997)). *Contra* Furek v. Univ. of Del., 594 A.2d 506, 520 (Del. 1991) (stating university policy led to assumed duty). In *Furek*, the court indicated that the university's policy against hazing "constituted an assumed duty which became 'an indispensable part of the bundle of services which colleges . . . afford their students.'" *Furek*, 594 A.2d at 526 (alternation in original) (quoting Mullins v. Pine Manor Coll., 449 N.E. 2d 331, 336 (Mass. 1983)). The court modulated its pronouncement by adding, "[b]ecause of the extensive freedom enjoyed by the modern university student, the duty of the university to regulate and supervise should be limited to those instances where it exercises control." *Furek*, 594 A.2d at 522.

165. *See* Garofalo v. Lambda Chi Alpha Fraternity, 616 N.W.2d 647, 650-51, 654-56 (Iowa 2000) (describing facts of case, holding, analysis of court as to liability of fraternity and individuals).

166. *Id.* at 654.

Brother/Little Brother" ceremony, Matt Garofalo became intoxicated at the fraternity house.[167] Sometime during the night, he choked on his own vomit and was found dead by fraternity brothers the next morning.[168] The drinking was not part of a ritual, nor was participation forced or compelled, and therefore the court distinguished this situation from hazing cases where pledges were obligated to drink.[169] Citing other alcohol-related cases brought against universities, the court aligned itself with the majority rule: "[T]he adoption of institutional policies prohibiting underage drinking do[es] not establish custodial relationships between the institution and its students so as to impose a duty of protection on the part of the institution."[170] Further, the court emphasized that it was "unaware of any legal authority which would elevate the fraternity's failure to enforce its 'Policy on Alcoholic Beverages' to an actionable civil tort."[171]

Universities impose rules of conduct and aspire to maintain safe campuses.[172] A school may discipline a student for infractions if rules are not properly followed. However, tort liability will not attach because the school has not actually assumed a custodial role over an adult student.[173] As the court in *Beach* stated, "[n]either attendance at college nor agreement to submit to certain behavior standards makes the student less an autonomous adult or the institution more a caretaker."[174] In sum, a university is not deemed to have voluntarily assumed a duty to supervise its students by virtue of its enactment of policies that regulate students' alcohol use.

5. Conclusion as to the Element of Duty

For decades and with great consistency, courts have held that universities do not have a duty to protect their students except in very limited circumstances. Those circumstances are indeed so limited that they almost never exist. In case after case, as discussed above, courts have reiterated that college students are independent adults and colleges are not their caretakers, so unless there is some other special relationship (which is almost never found in cases involving alcohol-related injuries), the college simply has no duty to supervise the private

167. *Id.* at 150.

168. *See id.* at 651 (explaining events leading to student's death).

169. *See Garofalo*, 616 N.W.2d at 653-54.

170. *Id.* at 654. Although the University of Iowa was not a defendant in this case, the court's analysis of duty and special relationship was analogous to other negligence cases where universities were sued.

171. Garofalo v. Lambda Chi Alpha Fraternity, 616 N.W.2d 647, 654 (Iowa 2000).

172. The enactment of rules might set a higher standard than that which is required by the reasonableness standard. Thus, a university must act reasonably under the circumstances. However, enforcement of the rules could involve a higher degree of care, that is, one that is much loftier than the minimum standard required under the law. One has no duty to attain the most elevated level of care.

173. Bradshaw v. Rawlings, 612 F.2d 135, 141 (3d Cir. 1979) (stating college regulation not sufficient to establish custodial relationship between university and its students).

174. Beach v. Univ. of Utah, 726 P.2d 413, 419 n.5 (Utah 1986).

lives of its students.[175] As one court stated, requiring the school "to babysit each student . . . would be inconsistent with the nature of the relationship between the student and the institution, for it would produce a repressive and inhospitable environment, largely inconsistent with the objectives of a modern college education."[176]

B. Proving the Element of Breach of Duty

If a court finds that a university does owe a duty to its students, it must then decide whether the defendant has breached that duty. Generally, a breach is a failure by the party who owes a duty "to exercise reasonable care in protecting those at risk."[177] In a hazing case, the court held that Louisiana Tech University owed a duty to its students to protect them from "a hazing tradition that has too often led to tragedy," and also concluded that the university breached that duty.[178] Examining whether the university had exercised reasonable care, the court placed weight on Louisiana Tech's failure to investigate prior reports of hazing adequately, failure to follow its own procedures, and failure to report complaints to the national fraternity.[179] Although there are similar cases where courts have declined to find a duty at all, this one represents an exception and illustrates circumstances where a court found that the school breached its duty of care.[180]

In another example, the court found the University of North Carolina (UNC) had a duty to protect the cheer team from unsafe activities.[181] The court sent the case back to the North Carolina Industrial Commission to make a finding on the element of breach.[182] The circumstances that were to be considered when determining whether the university breached its duty included the injured cheerleader's age and skill level as compared to the other cheerleaders, and also whether the supervision by the university was "reasonable and commensurate with plaintiff's age, plaintiff's skill level, and the attendant circumstances."[183]

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175. That duty is normally only found in cases involving criminal acts by third parties such as rapes, shootings, and violent hazing. *See* Furek v. Univ. of Del., 594 A.2d 506, 520 (Del. 1991) (holding university owed duty to hazing victim); *see also supra* notes 111-18 and accompanying text (discussing exceptions to general rule). The societal interest in curbing such heinous acts may be shaping the courts' view of duty in those instances.

176. *Beach*, 726 P.2d at 419.

177. Morrison v. Kappa Alpha Psi Fraternity, 738 So. 2d 1105, 1116 (La. Ct. App. 1999).

178. *Id.* at 1115.

179. *See id.* at 1116-17 ("[B]reach of duty is a question of fact, or a mixed question of law and fact, and the reviewing court must accord great deference to the facts found and the inferences drawn by the jury.").

180. *See* Univ. of Denver v. Whitlock, 744 P.2d 54, 62 (Colo. 1987) (finding no special relationship between plaintiff and university, thus no duty); Garofalo v. Lambda Chi Alpha Fraternity, 616 N.W.2d 647, 653 (Iowa 2000) (finding no duty on part of fraternity towards member).

181. *See* Davidson v. Univ. of N.C., 543 S.E.2d 920, 930 (N.C. Ct. App. 2001).

182. *Id.*

183. *Id.* at 928. As noted, however, this case is not persuasive authority in alcohol-related suits because no alcohol use was involved.

In most reported cases involving alcohol-related injuries to college students, the element of breach is not discussed in detail because the analysis ceases with a determination that there was no duty.

C. What Must Students Show to Prove Causation in an Alcohol-Related Injury Suit Against a University?

If a court finds that a university had a duty to protect its students from alcohol-related injuries and the university breached that duty, the court must next determine whether the university's acts or omissions caused the plaintiff's injury.[184] There are two types of causation, cause-in-fact and proximate (or legal) cause.[185]

1. Cause-in-Fact

The test for determining whether the university's actions were the cause-in-fact of the student's injuries is a factual inquiry described as a "but for" analysis. The court asks whether the harm would have occurred "but for" the school's acts or omissions.[186] "[I]f the plaintiff would not have sustained the injuries but for the defendant's substandard conduct, then such conduct is a cause in fact of the plaintiff's harm."[187]

When multiple factors have contributed to the injury, the court examines whether the university's conduct was "a substantial factor" in leading to the harm.[188] For example, in *Morrison v. Kappa Alpha Psi Fraternity*, Louisiana Tech officials knew that a fraternity was hazing pledges (in violation of state law) but failed to "follow its own procedures for investigating or remedying" the situation.[189] The court implied that "but for" the college's failure to act, hazing would have been prevented and the injured student would not have been harmed.[190] Since other parties were more directly involved, such as the fraternity president who physically beat Morrison, the court looked at whether Louisiana Tech's actions were a substantial factor in the injury.[191] The court concluded that the jury did not err in finding that "the university's failure was a precipitating or contributing factor which made it possible for [Morrison] to be

184. Timothy M. McLean, Note, *Tort Liability of Colleges and Universities for Injuries Resulting from Student Alcohol Consumption*, 14 J.C. & U.L. 399, 405 (1987).

185. *See* Morrison v. Kappa Alpha Psi Fraternity, 738 So. 2d 1105, 1113 (La. Ct. App. 1999).

186. *See* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2525 (2013) ("[T]his standard requires the plaintiff to show 'that the harm would not have occurred' in the absence of—that is, but for—the defendant's conduct.").

187. *Morrison*, 738 So. 2d at 1117.

188. *Id.*

189. *Id.*

190. *See id.*

191. Morrison v. Kappa Alpha Psi Fraternity, 738 So. 2d 1105, 1117 (La. Ct. App. 1999).

physically hazed by the president."[192] Therefore, the element of cause-in-fact was met.

2. Proximate Cause

Proximate cause exists where plaintiff's injuries are a foreseeable consequence of the defendant's negligent actions.[193] However, foreseeability in the context of proximate cause is conceptually different than foreseeability in relation to whether the defendant owed a duty. When analyzing foreseeability as it relates to duty, the court's inquiry is limited to "whether the defendant's conduct foreseeably created a broader 'zone of risk' that poses a general threat of harm to others."[194] Yet, foreseeability in a proximate cause analysis questions whether "the defendant's conduct foreseeably and substantially caused the specific injury that actually occurred" within the "specific, narrow factual details of the case."[195]

In a case involving a UNC law student who went on a shooting rampage (and who subsequently sued the university's psychologist), the court defined proximate cause as "a cause which in natural and continuous sequence, unbroken by any new and independent cause, produced the plaintiff's injuries, and without which the injuries would not have occurred."[196] To prove foreseeability, which is an aspect of proximate cause, "a plaintiff is required to prove that in the exercise of reasonable care, the defendant might have foreseen that some injury would result from his act or omission."[197] The court found that the mental health therapist's actions were not the proximate cause of either the law student's shooting spree or his resulting bullet wounds, stating that "[i]n addition to being unforeseeable, plaintiff's injuries were too remote in time, and the chain of events which [led] to plaintiff's injuries was too attenuated."[198] Emphasizing that a person should not be "held liable to infinity for all the consequences which flow from his act,"[199] the court stated that if the connection between the act and the injury appears "unnatural, unreasonable and improbable in the light of common experience," there is no proximate cause.[200] Liability does not flow indefinitely; liability only follows where the injuries

192. *Id.*

193. *See* Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 100 (N.Y. 1928) (providing traditional explanation of proximate cause).

194. McCain v. Fla. Power Corp., 593 So. 2d 500, 502 (Fla. 1992).

195. *Id.* at 502-503.

196. Williamson v. Liptzin, 539 S.E.2d 313, 319 (N.C. Ct. App. 2000) (quoting Hairston v. Alexander Tank & Equip. Co., 311 S.E.2d 559, 565 (N.C. 1984)). In this case, the student-shooter sued the school's therapist for not preventing him from engaging in violent acts and for negligently causing the shooter himself to be shot in the legs by police. *See id.* at 315-16.

197. *Id.* at 319 (footnote omitted) (citations omitted).

198. *Id.* at 320.

199. *Id.* at 319 (quoting William L. Prosser, LAW OF TORTS § 50, at 303 (3d ed. 1964)).

200. *Williamson*, 539 S.E.2d at 319 (quoting Phelps v. Winston-Salem, 157 S.E.2d 719, 723 (N.C. 1967)).

suffered are the natural result of the negligent act.[201] Although that case did not involve intoxication, the opinion is useful for its description of proximate cause in a recent suit against a university.

In *Allen v. Rutgers*, a jury found that proximate cause did not exist when an inebriated college student vaulted a stadium wall and was seriously injured during a football game.[202] Rutgers University had rules in place that prohibited the consumption of alcohol during football games.[203] At trial, the jury found that the plaintiff's voluntary act of consuming a mixture of fruit punch and one-hundred-and-eighty proof grain alcohol severed the causal chain and relieved the university from liability.[204] On appeal, the court affirmed the jury's reasoning, stating that while Rutgers's enactment of a rule prohibiting alcohol may protect "patrons against their own folly," Rutgers is not necessarily liable for injuries that resulted from a student's violation of the rule.[205]

Further, *Allen* demonstrates that the existence of a rule or regulation does not necessarily lead to proximate cause in alcohol related negligence cases because the plaintiff's own actions may sever liability. In *Allen*, the plaintiff's own negligence in his decision to drink in violation of the rule was used to sever Rutgers's liability. The plaintiff contended that the jury was "so offended by [his] intoxication that they adopted whatever means necessary to insure he would not recover."[206] The court found, however, that the jury had been properly instructed, and that it was within the jury's province to find that "the negligence attributable to Rutgers was not so closely and significantly connected with Allen's improvident leap over the wall as to render it the proximate cause of his consequent injuries."[207] Moreover, it was apparent that the jury was not persuaded that Rutgers's lack of security at the football game caused Allen to behave recklessly while inebriated. The court stated that "fairness and common sense precluded a causal relationship."[208] Therefore, plaintiff's negligent actions severed the causal chain that would have rendered Rutgers liable.

Further, proximate cause may be extinguished when there is a superseding, intervening cause by a third party that was not foreseeable to the defendant.[209] The independent actions of third parties can break the chain of causation, as illustrated in *Freeman v. Busch*, where a guest of a Simpson College student was injured and raped after she consumed a large amount of vodka and rum at

201. Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 104-105 (N.Y. 1928).
202. 523 A.2d 262, 263-64 (N.J. Super. App. Div. 1987).
203. *See id.* at 264.
204. *See id.* at 264-65.
205. *Id.* at 266.
206. *Allen*, 523 A.2d at 266–67.
207. *Id.* at 266.
208. Allen v. Rutgers, 523 A.2d 262, 266 (N.J. Super. App. Div. 1987).
209. *See* Freeman v. Busch, 150 F. Supp. 2d 995, 1003 (S.D. Iowa 2001) (finding actions by defendants superseding causes relieving college of liability).

an unauthorized party in a dormitory.[210] The male student who had invited her to the party reported to the Resident Assistant that the young woman was intoxicated and unconscious on his bed.[211] Neither called for medical help and neither provided any other assistance to her. Instead, her host returned to his room, raped her, and invited his two of his other friends to fondle her breasts.[212] The young woman sued the male students (including the Resident Assistant who declined to call for assistance) and Simpson College. The court held that there was no special relationship between the young female guest and the college, so the college did not owe her a duty of care.[213] Looking beyond duty, however, the court also discussed whether the actions of the college's Resident Assistant would have been the proximate cause of the inebriated guest's injuries.[214] The issue was whether the sexual assault by the other students was the foreseeable result of the Resident Assistant's failure to act; if so, then the element of proximate cause could be met.[215] The court ruled against the victim, stating that "[i]njury due to alcohol poisoning may have been reasonably foreseeable, but shoulder damage, rape, and sexual assault [were] not."[216] Additionally, the "independent actions" of the other male students were "superseding causes" that broke the chain of causation and relieved Simpson College of liability.[217]

The existence of programs designed to curb the use of alcohol is not proof of foreseeability for purposes of showing proximate cause. A plaintiff may try to argue that universities foresee alcohol-related injuries, as evidenced by their anti-alcohol rules and handbook provisions. However, just as the adoption of alcohol policies does not mean that the university has assumed a legal duty to supervise students, neither does the implementation of rules mean that the injuries were "foreseeable" for purposes of proving proximate cause. In *Baldwin*, for example, a student brought a cause of action against California Polytechnic State University after a car accident that resulted from a combination of heavy drinking and drag racing rendered her a quadriplegic.[218] While the court in *Baldwin* primarily limited its discussion to the existence of a duty, the court briefly discussed whether the existence of a rule prohibiting alcohol consumption necessarily rendered all alcohol-related injuries foreseeable.[219] California Polytechnic State University had enacted rules

210. *See id.* at 998-99 (describing factual background of case).

211. *See id.* at 998.

212. *See id.* at 999.

213. *See Freeman*, 150 F. Supp. 2d at 1002.

214. *See id.* at 1003 (discussing Resident Assistant's liability).

215. *See* Freeman v. Busch, 150 F. Supp. 2d 995, 1003 (S.D. Iowa 2001) ("Foreseeable intervening forces are within the scope of the original risk, and therefore do not relieve the defendant from liability.").

216. *Id.*

217. *Id.*

218. *See* Baldwin v. Zoradi, 176 Cal. Rptr. 809, 811 (Cal. Ct. App. 1981).

219. *See id.* at 813 (discussing rule and duties arising from it).

limiting the consumption of alcohol in the dormitories via a license agreement.[220] The plaintiff argued that the university's failure to enforce its regulations against on-campus drinking made it foreseeable that the plaintiff would be injured.[221] Rejecting that claim, the court reasoned that foreseeability does not require that the defendant anticipate the resulting injury, and that "[e]ven though a harm may be foreseeable . . . a concomitant duty to prevent the harm does not always follow."[222]

It is foreseeable that a student could get hurt in an alcohol related incident, and such foreseeability is reflected in formulation of protective rules and regulations prohibiting the consumption of alcohol. Nonetheless, it does not follow that there is a causal connection—for tort purposes—between the university's awareness of drinking on campus and the student's injury. In sum, the fact that a university has published rules and regulations or educational materials is not enough to satisfy the foreseeability requirement of proximate cause. Alcohol-related incidents are too attenuated to establish the university's negligence, and in most cases, the inebriated actor serves as a sufficient supervening, intervening cause.

III. SPECIAL CONSIDERATIONS THAT LIMIT DAMAGES

A. Apportionment of Fault and Damages: Contributory or Comparative Negligence

Like supervening, intervening causes by third parties, comparative fault or contributory negligence affects the determination of whether a university will be liable for damages for a plaintiff's injury. This analysis is often included in a discussion of causation: whose negligence caused the injury and to what extent? At common law, the conduct of the alcohol consumer was the sole proximate cause of his own injuries, and suing a university for related injuries was barred by the doctrine of contributory negligence.[223] In many states today, courts apply the doctrine of comparative negligence and apportion the fault among the parties.[224]

Zavala v. Regents of University of California provides an example of such an application of comparative negligence.[225] The appellate court reinstated a jury verdict that apportioned the liability between the plaintiff and university—

220. *See id.* at 815 (explaining university's rules).

221. *See id.*

222. *Baldwin*, 176 Cal. Rptr. at 816.

223. Peter F. Lake & Joel C. Epstein, *Modern Liability Rules and Policies Regarding College Student Alcohol Injuries: Reducing High-Risk Alcohol Use Through Norms of Shared Responsibility and Environmental Management*, 53 OKLA. L. REV. 611, 614 (2000).

224. *See* Zavala v. Regents of Univ. of Cal., 178 Cal. Rptr. 185 (Cal. Ct. App. 1981).

225. *See id.* at 187-88 (explaining court's application of comparative negligence doctrine).

the plaintiff eighty percent at fault and the university twenty percent at fault.[226] In that case, the plaintiff, a non-student, was injured when he fell from a fourth floor balcony after drinking heavily at a Resident Assistant sponsored party at a university dormitory.[227] The court held that although the plaintiff's excess consumption of alcohol and use of marijuana amounted to willful misconduct, the university was partially liable for over-serving the plaintiff.[228]

However, in *Allen*, a student drank large quantities of grain alcohol at a university stadium, then vaulted a stadium wall and fell thirty feet to the concrete steps below.[229] Earlier, the student had stumbled drunkenly into security officers and was observed to be extremely intoxicated.[230] The student sued Rutgers and argued at trial that his own negligence was not at issue because "he was a member of the class protected by the policies and practices of the university against the use of alcoholic beverages at the stadium."[231] However, the jury found that any negligence on the part of Rutgers was not the proximate cause of the student's injuries: "[t]he circumstances of this case did not require a deviation from the general rule that voluntary drunkenness ordinarily constitutes contributory negligence."[232] Therefore, the student's own actions were the cause of his injuries and the university was not liable.

1. Amount of Damages

The amount of general damages apportioned to plaintiffs varies significantly from case to case.[233] In *University of Denver v. Whitlock*, involving a student who was rendered a quadriplegic after a trampoline accident during a fraternity party, the jury awarded plaintiff over $7 million.[234] After the jury attributed twenty-eight percent fault to the plaintiff, the award was limited to $5 million.[235] However, the defendant-university filed a motion for judgment notwithstanding the verdict, stating that "no reasonable jury could have found that the University was more negligent than [the plaintiff], and that the jury's monetary award was the result of sympathy, passion or prejudice."[236] The

226. *See id.*

227. *See id.* at 186 (describing factual history of case).

228. *Zavala*, 178 Cal. Rptr. at 187.

229. Allen v. Rutgers, 523 A.2d 262, 264 (N.J. Super. Ct. App. Div. 1987).

230. *See id.*

231. *Id.* at 265.

232. *Id.*

233. *See* Torres v. Sarasota Cnty. Pub. Hosp. Bd., 961 So. 2d 340, 345 (Fla. Dist. Ct. App. 2007). The *Torres* court explained: "Damages are measured by comparing the condition plaintiff would have been in, had the defendants not been negligent, with plaintiff's impaired condition as a result of the negligence." *Id.* (internal citation omitted).

234. Univ. of Denver v. Whitlock, 744 P.2d 54, 56 (Colo. 1987) (stating total damages awarded).

235. *See id.*

236. *Id.*

court subsequently reduced the award to $4 million.[237] On appeal, the Colorado Supreme Court reversed, concluding that there was no evidence of liability on the part of the university; thus, the injured student was not entitled to recover damages from the University of Denver.[238]

In *Morrison*, by contrast, the amount of damages at issue was far less than $4 million, and the Louisiana Appellate Court held that an award of $300,000 to a hazing victim was grossly excessive.[239] Noting that the plaintiff's own attorney had only asked the jury to award $100,000, the court stated that awarding $300,000 was "tantamount to an imposition of punitive damages."[240] After reviewing the medical evidence and observing that the victim's injuries were primarily psychological (and that he had mental issues even before the hazing occurred), the court reduced the amount of damages from $300,000 to $40,000.[241] In the concurring opinion in this case, one judge indicated that he would have further reduced the damages to "no more than $25,000" and that he would have apportioned only twenty percent of the liability to the university, assigning eighty percent of the fault to the individual fraternity member who inflicted the beating.[242]

These cases illustrate that damage determinations vary tremendously depending on the specific facts of a case, the rules in the particular jurisdiction, and the apportionment of fault decided upon by the court.

Moreover, many states have statutory caps on the amount of damages, thus making a tort claim less attractive to plaintiffs.[243] While these statutory caps do not affect the recovery of damages from private universities, the laws do affect relief from state colleges. For example, the Florida legislature has limited the amount of damages state agencies can pay to $200,000 for a single claim.[244] The rationale is that states get their funds from taxes, and if the state has to pay high sums in civil cases, the burden will fall unfairly on taxpayers.[245] At least thirty-three states have statutory limits on the amount of compensatory

237. *See id.*

238. *Whitlock*, 744 P.2d at 62.

239. *See* Morrison v. Kappa Alpha Psi Fraternity, 738 So. 2d 1105, 1121 (La. Ct. App. 1999) (describing plaintiff's damages).

240. *Id.*

241. *See id.* (explaining reasoning behind lowering damages).

242. *Id.* at 1125 (Stewart, J., concurring in part and dissenting in part). *Brueckner v. Norwich Uniersity* is another case involving hazing where the court held that the college was liable to the student for injuries. 730 A.2d 1086 (Vt. 1999). In that case, the court upheld an award of compensatory damages, but set aside an award of punitive damages, as the court did not find malice. *See id.*

243. *See, e.g.*, COLO. REV. STAT. ANN. § 24-10-114(1) (West 2014); FLA. STAT. ANN. § 768.28(5) (West 2014); VA. CODE ANN. § 8.01-195.3 (West 2014).

244. *See* § 768.28(5).

245. *See* Michelle Findley, Note, *Statutory Tort Caps: What States Should Do When Available Funds Seem Inadequate*, 46 IND. L. REV. 849, 854 (2013) ("The fact that recoveries in tort against the government are funded by taxpayers' dollars makes tort claim caps a necessity.").

damages that the state can pay.[246]

2. *Immunity from Suit and Avoidance of Liability*

Many states have statutorily barred some types of tort actions against state entities.[247] In addition, various immunity doctrines shield universities and their administrators from suit.[248] An early source of immunity for universities was the applicability of the doctrine of in loco parentis.[249] In the days when universities fulfilled the parental role as custodians of their students, the immunity of parents from suit by their children also shielded the institutions from negligence suits.[250]

Administrators who are employed at public institutions are usually entitled to raise qualified immunity defenses.[251] An early example of a public institution successfully invoking governmental immunity was the 1924 case of *Davie v. Board of Regents, University of California*.[252] Those who work for

246. *See* COLO. REV. STAT. ANN. § 24-10-114(1) (West 2014); FLA. STAT. ANN. § 768.28(5) (West 2014); GA. CODE ANN. § 50-21-29(b) (West 2014); IDAHO CODE ANN. § 6-926(1) (West 2014); 705 ILL. COMP. STAT. ANN. 505/8(d) (West 2014); IND. CODE ANN. § 34-13-3-4(a) (West 2014); KAN. STAT. ANN. § 75-6105(a) (West 2014); KY. REV. STAT. ANN. § 44.070(5) (West 2014); LA. REV. STAT. ANN. § 13:5106(B)(1)–(2) (2014); ME. REV. STAT. ANN. tit. 14, § 8105(1) (2014); MD. CODE ANN., STATE GOV'T § 12-104(a)(2) (West 2014); MASS. GEN. LAWS ANN. ch. 258, § 2 (West 2014); MINN. STAT. ANN. § 3.736(4) (West 2014); MISS. CODE ANN. § 11-46-15(1) (West 2014); MO. ANN. STAT. § 537.610(2) (West 2014); MONT. CODE ANN. § 2-9-108(1) (West 2013); NEB. REV. STAT. ANN. § 81-8,224(1) (West 2014) (providing legislature must review all claims above certain amount before can be paid); NEV. REV. STAT. ANN. § 41.035(1) (West 2014); N.H. REV. STAT. ANN. § 541-B:14(I) (2014); N.M. STAT. ANN. § 41-4-19(A)–(B) (West 2014); N.C. GEN. STAT. ANN. § 143-299.2(a) (West 2014); N.D. CENT. CODE ANN. § 32-12.2-02(2) (West 2013); OKLA. STAT. ANN. tit. 51, § 154(A) (West 2014); OR. REV. STAT. ANN. § 30.271(2)–(3) (West 2014); 42 PA. CONS. STAT. ANN. § 8528(b) (West 2014); R.I. GEN. LAWS ANN. § 9-31-2 (West 2014); S.C. CODE ANN. § 15-78-120(a)(1)–(3) (2013); TENN. CODE ANN. § 9-8-307(e) (West 2014); TEX. CODE ANN. § 101.023(a) (West 2013); UTAH CODE ANN. § 63G-7-604(1) (West 2014); VT. STAT. ANN. tit. 12, § 5601(b) (West 2014); VA. CODE ANN. § 8.01-195.3 (West 2014); WYO. STAT. ANN. § 1-39-118(a) (West 2014). Additionally, Delaware limits damages against municipalities and counties without limiting damages against the state. *See* DEL. CODE ANN. tit. 10, § 4013(a) (West 2014).

247. *See* ALASKA STAT. ANN. § 09.50.250(1) (West 2014); CAL. GOV'T CODE § 815(a) (West 2014); CAL. GOV'T CODE 815.3(a) (West 2014); COLO. REV. STAT. ANN. § 24-10-106(1) (West 2014); DEL. CODE ANN. tit. 10, § 4001 (West 2014); GA. CODE ANN. § 50-21-24 (West 2014); IDAHO CODE ANN. § 6-904(1) (West 2014); 745 ILL. COMP. STAT. ANN. 5/1 (West 2014); IOWA CODE ANN. § 669.14(1) (West 2014); KAN. STAT. ANN. § 75-6104(e) (West 2014); ME. REV. STAT. ANN. tit. 14, § 8104-B(3) (2014); MICH. COMP. LAWS ANN. § 691.1407(1)–(2) (West 2014); MISS. CODE ANN. § 11-46-9(1)(d) (West 2014); N.J. STAT. ANN. § 59:2-1(a) (West 2014); N.M. STAT. ANN. § 41-4-4(A) (West 2014); S.C. CODE ANN. § 15-78-60(5) (West 2013); WYO. STAT. ANN. § 1-39-104(a) (West 2014).

248. *See* Robert C. Cloud, *Qualified Immunity for University Administrators and Regents*, 131 ED. LAW REP. 561, 568 (1999) (discussing public universities and governmental immunity).

249. Peter F. Lake, *The Rise of Duty and the Fall of In Loco Parentis and Other Protective Tort Doctrines in Higher Education Law*, 64 MO. L. REV. 1, 6-7 (1999) (providing historical context).

250. *See id.*

251. *See generally* Hoye, *supra* note 48 (discussing qualified immunity as raised as defense in numerous cases).

252. 227 P. 243 (Cal. Dist. Ct. App. 1924) (holding university immune from liability for negligent acts of physician they employed).

private institutions, on the other hand, may be able to claim charitable immunity.[253] As early as 1925, the New York Court of Appeals found Cornell University immune from suit because, as a private school, it was characterized as a charitable entity.[254] More recently, a plaintiff brought suit when she was injured in a slip-and-fall incident on Princeton University's campus, but her claim was barred due to charitable immunity.[255]

Both public and private colleges can also shield themselves from liability—but not from suit—by asserting the "no duty" defense.[256] According to one commentator, "the 'no duty' defense is alive and well in higher education tort cases . . . . [and] [u]ntil such a defense is completely abrogated, college and university attorneys will and should continue to defend allegations of negligent supervision . . . [by] using the absence of a cognizable legal duty [to supervise] as a prime defense."[257] In that way, although some universities will not be immune from suit, courts will not ultimately hold them liable.

IV. PARENTAL EXPECTATIONS, STUDENTS' ROLE, AND THE UNIVERSITIES' RESPONSIBILITIES

A. Will Modern Expectations and Resulting Pressure from Parents Lead to a Return to the Concept of a Duty Based on In Loco Parentis?

In the thirty-five years since *Bradshaw*, courts have echoed the firm position that the doctrine of in loco parentis no longer applies to the role that universities fulfill vis-à-vis their adult students. This Article argues that the predominant view of the past thirty-five years should remain the same with regard to universities' liability for alcohol-related incidents: The college owes no legal duty to supervise or protect adult students from voluntary intoxication. A return to the in loco parentis rationale—even if parents may wish it—is inconsistent with the true purpose and goals of higher education.[258] Parents today expect more from college administrators and staff in terms of supervision and protection than in recent decades.

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253. *See* McLean, *supra* note 184, at 400 (explaining charity exemption for private universities); *see also* John T. Montford & Will G. Barber, *1987 Texas Tort Reform: The Quest for a Fairer and More Predictable Texas Civil Justice System*, 25 HOUS. L. REV. 1005, 1039-44 (1988) (describing charitable immunity "broadly applied to a variety of charities including . . . educational institutions").

254. *See* Hamburger v. Cornell Univ., 148 N.E. 539, 541 (N.Y. 1925).

255. Lax v. Princeton Univ., 779 A.2d 449, 452 (N.J. Super. Ct. App. Div. 2001) (finding university qualified under state's Charitable Immunity Act).

256. *See* Hoye, *supra* note 48, at 769-75 (giving examples of cases where universities asserted defense).

257. *Id.* at 775 (acknowledging some erosion of "no duty" rule in hazing cases and college sports injury suits).

258. As the parent of a college student, I wish fervently that if a harmful situation were to arise, the university would protect my daughter from injury and folly. On the other hand, I know from being a university administrator for more than twenty years that such a wish is unreasonable and impracticable. Moreover, it is not legally required.

The current generation of parents has been described as "helicopter parents" because they hover over their children and are loath to leave them unattended. Even after the child reaches the age of majority, many parents still exhibit an unwillingness to relinquish control. Undergraduate deans at prestigious schools such as the University of Michigan, the University of Chicago, New York University, and the University of Washington reported that as of the past few years, parents have been contacting the schools to find out about their adult children's grades, finances, and housing arrangements.[259] It is not uncommon for parents to investigate the assigned roommates before delivering their children to the freshmen dormitories, and parents who find Facebook postings that leave a bad impression have been known to request that the college reassign the roommates.[260] Parents even get involved in disputes over grades, arguing with a professor that a B+ should have been an A-, for example.[261]

These parents are the same individuals who grew up during the Vietnam War, earned the right to vote at eighteen, and attended college during the 1970s and 1980s. Most came of age during the peak period when university students asserted their rights as adults and rejected the idea that they needed supervision by college officials or any authority figures. It was not until the late 1960s that some colleges experimented with coeducational, open (uncontrolled access to rooms) dormitories.[262] The freedom to come and go from the dormitory rooms of the opposite gender accompanied many other freedoms and privileges of adulthood that students demanded and succeeded in obtaining. Demonstrations against the Vietnam War sparked violence on campuses such as the University of California-Berkeley, Kent State, Cornell University, and Jackson State.[263] The National Guard's shooting of four student protesters at Kent State in 1970

259. *See* Tamar Lewin, *Roommates, The Online Version*, N.Y. TIMES (Sept. 13, 2006), http://www.nytimes.com/2006/09/13/education/13college.html?_r=2&module=Search&mabReward=relbias%3As%2C%5B%22RI%3A6%22%2C%22RI%3A18%22%5D (describing parental involvement in their children's roommate placements at various universities); *see also* Bonnie Rochman, *Hover No More: Helicopter Parents May Breed Depression and Incompetence in Their Children*, TIME (Feb. 22, 2013), http://healthland.time.com/2013/02/22/hover-no-more-helicopter-parents-may-breed-depression-and-incompetence-in-their-children/, *archived at* http://perma.cc/NDX3-2A59 (providing examples of parental over-involvement).

260. *See* Lewin, *supra* note 259. "Given the proliferation of 'helicopter parents,' hovering and ready to swoop down and rescue their children, it was perhaps inevitable that this year's assignments of roommates prompted a stream of complaints to university housing offices, asking for a change of roommate because of something posted on Facebook." *Id.* "Sexual orientation, drinking, drugs and tattoos seem to prompt the most parental complaints to colleges." *Id.*

261. *See* Rochman, *supra* note 259.

262. *See* Rebecca James, *Coed Dorms, Coed Floors—Now, Coed Rooms*, FREE REPUBLIC (Dec. 3, 2007), http://www.Freerepublic.com/focus/new/1933975/posts, *archived at* http://perma.cc/8XWT-HZP2 (providing history of coed dormitories at universities)

263. *See* Linda Churney, *Student Protest in the 1960s*, YALE-NEW HAVEN TEACHERS INST. (Feb. 03, 1979), http://www.yale.edu/ynhti/curriculum/units/1979/2/79.02.03.x.html, *archived at* http://perma.cc/2Q7E-DH54 (providing history of student unrest).

became a tragic, galvanizing moment in the student movement.[264]

Now, a few decades later, these individuals are unwilling to allow their adult children to enjoy the same independence that they insisted upon as college students. Not only is this situation ironic, but it may have a legal impact on the role that college administrators play. Indeed, it may have some effect on whether courts in the future find that universities have a legal duty to protect and supervise adult students.

It is conceivable, but not ideal, that the law may shift to represent the contemporary standards based on what current "helicopter parents" want the role of the colleges to be. Helicopter parents prefer to be directly involved in their children's lives, but if their involvement is curtailed, they expect the university to assume the role of caretaker. As parents exert pressure on college administrators to increase their supervision over the lives of students, an echo of the old refrain of "in loco parentis" undergirds some of the parental requests. Perhaps there is a cry for a return to the more protective era of the 1950s. Many families expect the university to safeguard their children, and many, if not most, regard their eighteen-year-olds as children, not adults. Nonetheless, one important mission of higher education is that students develop into responsible adults. The court's reasoning in *Baldwin* is sound:

> The transfer of prerogatives and rights from college administrators to the students is salubrious when seen in the context of a proper goal of postsecondary education the maturation of the students. Only by giving them responsibilities can students grow into responsible adulthood. . . . [and] the overall policy of stimulating student growth is in the public interest.[265]

The law evolves and responds to changing social and political views. The *Bradshaw* case provides an example of this reflection on contemporary values when the court stated, "[t]here was a time when college administrators and faculties assumed a role in loco parentis . . . But today students vigorously claim the right to define and regulate their own lives."[266]

B. Is a University Negligent When It Fails To Enforce Its Rules?

Parents might think that if a university has rules against serving alcohol at student events, but fails to enforce those rules, courts would find the university negligent. Precedent does not support this view.[267] The legal analysis begins

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264. Jerry M. Lewis & Thomas R. Hensley, *The May 4 Shootings at Kent State University: The Search for Historical Accuracy* (Summer 1998), http://dept.kent.edu/sociology/lewis/lewihen.htm, *archived at* http://perma.cc/7NBC-YKFA (discussing Kent State shootings, responses, and implications).

265. 176 Cal. Rptr. 809, 818 (Cal. Ct. App. 1981).

266. 612 F.2d 135, 139-40 (3d Cir. 1979).

267. *See supra* note 47 and accompanying text (pointing out court's reluctance to find universities

with the threshold question of whether a university owes its adult students a duty to protect and supervise them at all. The answer is almost always no. A handbook provision does not create a duty on the part of the university to supervise students in circumstances involving alcohol, as noted above.[268]

It is a bit jarring to think that a failure to enforce regulations is not negligence. One wonders why a university publishes rules if it has no legal duty to enforce them. One court spoke in terms of the university reserving the right to take action under its rules, but emphasized that the university was not obligated to take affirmative steps to enforce its handbook provisions.[269] This reasoning reflects the pragmatic position that it is simply unrealistic and overly burdensome to require colleges to monitor their students' social lives.[270] Additionally, there is a legally significant difference between nonfeasance and misfeasance. Nonfeasance, or the failure to act, has not typically resulted in liability for negligence in college alcohol cases.[271] Where nonfeasance is alleged, liability will attach only where a special relationship exists between the plaintiff and the defendant.[272]

In addition to violating university policies, underage drinking violates state law. However, courts have stated that the fact that a student violates the law does not mean that the university has a duty to prevent that student's actions. As the *Beach* court explained, a student's violation of a law does not mean that a college has assumed a custodial relationship for tort purposes.[273] Perhaps a simple analogy to the criminal justice system is apt: A sheriff has the authority to arrest criminal offenders, but the sheriff is not negligent for failing to track

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negligent in circumstances involving underage drinking).

268. *See* Rothbard v. Colgate Univ., 652 N.Y.S.2d 146, 148 (N.Y. App. Div. 1997) (rejecting contention university's handbook constituted assumption of duty to supervise students).

269. *See* Baldwin v. Zoradi, 176 Cal. Rptr. 809, 817 (Cal. Ct. App. 1981) ("Although the university reserved to itself the right to take disciplinary action for drinking on campus, this merely follows state law."); *see also* Allen v. Rutgers, 523 A.2d 262, 266 (N.J. Super. Ct. App. Div. 1987).

> While the implementation of this rule may have the effect of protecting patrons against their own folly, such consequence does not require that the university be solely responsible for injuries resulting from violations of the regulation and the failure or inability of the university personnel to effectively enforce the prohibition.

Allen, 523 A.2d at 266.

270. *See* Booker v. Lehigh Univ., 800 F. Supp. 234, 241 (E.D. Pa. 1992) (explaining imposing duty to monitor thousands of students would place university in loco parentis); *see also* Bash v. Clark Univ., No. 06745A, 2006 WL 4114297, at *5 (Mass. Super. Ct. Nov. 20, 2006) (stating burden of protecting students from voluntary drug use similar to protecting student's moral wellbeing).

271. *See Baldwin*, 176 Cal. Rptr. at 813 (finding lack of liability for university's nonfeasance with regards to student's injuries sustained in crash after drinking); *see also* McLean, *supra* note 184, at 403 (describing distinction between nonfeasance, misfeasance in context of university's liability for students' accidents).

272. *See Baldwin*, 176 Cal. Rptr. at 812 (stating liability attaches for nonfeasance only in event special relationship exists between university and student).

273. Beach v. Univ. of Utah, 726 P.2d 413, 417-18 (Utah 1986) (disagreeing with plaintiff's claim about university's duty to prevent students from violating state liquor laws).

down and detain each and every law breaker. Similarly, a university has the authority to punish students who break the rules, but is not obligated to identify and penalize every offender. A student's violation of the law may give rise to punishment, but it does not change the college-student relationship itself.[274] Absent a special relationship, nonfeasance does not lead to liability under a negligence theory.[275]

C. How to Create a Cultural Change on Campus by Educating Students and Reducing Alcohol-Related Harm

Students need to receive more guidance on how to drink responsibly, which is admittedly challenging because their consumption of alcohol is illegal. There is a logical leap that one must make if arguing that engaging in illegal activity can be done in a responsible manner. That said, there are educational programs that have met with success on some college campuses.

A notable example is the social norming marketing campaign launched in 1999 at the University of Virginia. The university's campaign involved dormitory posters, educational programs, email messages, and special interventions aimed at high risk groups such as athletic teams and Greek organizations.[276] Some of the educational programs were presented by professionals, but others were presented by students.[277] The goal of the campaign was to correct misperceptions about alcohol consumption on campus and to reduce the harm related to alcohol abuse.[278] "Social norms theory" refers to the practice of introducing the subjects (students) to a large amount of accurate information about typical, normal behavior.[279] In other words, the marketing campaign was intended to educate students about alcohol use on campus in order to correct the misperception that other students drank more frequently and more excessively than they actually did.[280] The ultimate goal of the project as a whole was to teach students how to handle situations involving alcohol abuse so as to reduce the negative consequences of excessive drinking at the University of Virginia.[281] The campaign coached students on protective behaviors such as not leaving inebriated friends alone, intervening to prevent drinking and driving, asking friends not to drink so fast, having a designated driver, and eating a meal before drinking.[282]

The effort has been fairly successful. Researchers found that the negative

274. *See* Bradshaw v. Rawlings, 612 F.2d 135, 141 (3d Cir. 1979).
275. *See* Baldwin v. Zoradi, 176 Cal. Rptr. 809, 812 (Cal. Ct. App. 1981).
276. *See* Turner et al., *supra* note 17, at 86-87 (describing program).
277. *See id.* at 86 (describing second phase of program including educational presentations).
278. *See id.* (defining goals of program).
279. *Id.* at 87.
280. *See* Turner et al., *supra* note 17, at 86 (explaining method and goals of program).
281. *See id.* (discussing ultimate goal of whole program over six-year assessment period).
282. *See id.* (describing information provided to students).

consequences of drinking alcohol declined markedly after students were exposed to educational messages about drinking.[283] The researchers compared the negative consequences of drinking as experienced by students during the years of the study; for example, whether a student "performed poorly on test or project."[284] As a result, the odds ratio, calculated with 95% confidence intervals, declined from .97 in 2002 to only .45 in 2006 after the marketing campaign.[285] The data for those who "had been injured or hurt" showed a significant decrease from .95 in 2002 to .34 in 2006.[286] Additionally, students reported fewer incidents of driving under the influence with the numbers decreasing by .39 by 2006.[287]

This study of the social norming message campaign provides an answer as to how to begin solving the problems of alcohol abuse on college campuses. Although some researchers have claimed that excessive drinking has continued unabated despite educational programs at various universities, the University of Virginia's campaign provides a well-documented glimmer of hope that behaviors can be modified and that the culture surrounding drinking can become healthier. Other universities have applied a similar model. For example, the University of Arizona implemented the Student Health Alcohol Drug Education (SHADE) program.[288] Students who violate the school's alcohol and marijuana policies are referred to a class where they are taught how to calculate their own blood alcohol concentration, how to pace their intake so as to avoid intoxication, and how to recognize when it is time to stop drinking.[289]

Such educational programs provide an excellent way for students to take responsibility for themselves and their peers. Students' willingness to be proactive shows the type of maturation that courts describe when speaking about the importance of allowing students to develop into responsible adults.[290]

V. CONCLUSION

Courts face the challenge of how to reconcile competing views of what the university's role in society is and what it should be in light of tragic alcohol-

283. *See id.* at 90 ("[T]he chance of avoiding all consequences of drinking steadily improved over time, and the chance of students drinking in the most problematic ways . . . steadily declined.").

284. Turner et al., *supra* note 17, at 90.

285. *Id.*

286. *Id.*

287. *Id.* The researchers used regression analysis to isolate factors and to determine the statistical significance of exposure to social norming messages and the resulting decrease in negative consequences related to alcohol use. *See id.*

288. *SHADE Program*, UNIV. OF ARIZ., http://www.health.arizona.edu/hpps_aod_shade.htm (last visited Nov. 2, 2014), *archived at* http://perma.cc/X93P-D6NN (describing program and student reactions).

289. *See id.* (explaining program's purpose).

290. *See* Freeman v. Busch, 150 F. Supp. 2d 995, 1002 (S.D. Iowa 2001) (addressing importance of student independence in university setting).

related injuries that befall young adult students. In two particularly difficult areas, hazing and sexual assault, there is understandable pressure to hold university officials accountable for the devastating physical injuries and psychological harm that college-aged victims are suffering. The White House has turned its attention to sexual assault on college campuses, and is calling for universities to increase their preventive measures.[291]

To the extent that the law is shaped by contemporary societal values, the significant pressure from the new generation of parents may reform the notion of duty in the university setting. [292] It may be possible that the law will evolve "full circle," having begun in the 1940s and 1950s era of in loco parentis, then progressing through a half century of students treated as independent adults, and then swinging back to the university's protective role. This change could be triggered by the helicopter parents' desire to have university administrators hover over their offspring and shield them from harm. Courts do not currently hold this social view, and the weight of precedent does not support it, but it could come to be. This would be a negative development for students, as maturing individuals, and for society as a whole. To revert to the position that universities are the custodians of their students would, as one court put it, "directly contravene the competing social policy of fostering an educational environment of student autonomy and independence."[293] A return to the doctrine of in loco parentis is ill-advised, no matter how much the current generation of helicopter parents may wish for colleges to take care of their children in their absence. One of the fundamental purposes of higher education is to shape young adults and to allow for the maturation process.[294]

Moreover, a scientific study shows that well-intentioned helicopter parents may be harming their adult children.[295] Specifically, the study shows that parental interference undermines their offspring's ability to solve problems and

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291. *See* NOT ALONE REPORT, *supra* note 4, at 7-10. In addition, colleges will be held accountable for violations of Title IX if incidents of rape and other sexual assaults are not properly investigated and addressed. *See id.* at 16-17 (describing law and potential violations).

292. *See* Nicholas W. Woodfield, *The Policy/Operational Dichotomy in Intra-State Tort Liability: An Example of the Ever-Continuing Transformation of the Common Law*, 29 DENV. J. INT'L L. & POL'Y 27, 29–30 (2000). Woodfield explained:

> Because the laws of each respective State are continually developing and evolving in an attempt to reflect and define the contemporary values and morals of their society in order to achieve a more perfect sense of justice as viewed from within each State . . . .
>
> . . . .
>
> . . . as a society continues to evolve and develop, its common law will also continue to evolve and develop to reflect this dynamism.

Id.

293. Univ. of Denver v. Whitlock, 744 P.2d 54, 62 (Colo. 1987).

294. *See* Baldwin v. Zoradi, 176 Cal. Rptr. 809, 818 (Cal. Ct. App. 1981).

295. *See* Rochman, *supra* note 259 (stating high levels of parental involvement harmful to children and can lead to depression).

sends the "message to their children that they are not competent."[296] Helicopter parenting "decreased adult children's feelings of autonomy, competence and connection," concluded the report.[297]

It is important for students to develop their own sense of responsibility, decision-making ability, and awareness of risks and consequences. Not only do students deserve the chance to develop into mature decision-makers for their own sakes, they also need to become productive for the sake of the greater community so they can hold jobs, pay bills, take care of themselves, and participate effectively in civic and social activities. Even if universities were to assume custodial roles by attempting to regulate students' private lives (which would likely be almost impossible), the university would then be undermining its own goal of fostering the students' development and maturation. Universities do not, and should not, have a duty to protect young adults from their own choices, however risky those choices may be.

Some argue that the "scourge of crude binge drinking" coincided with the change of the drinking age to twenty-one, for instead of being permitted to socialize, drink, and flirt in a "controlled public environment," students drink privately in "boorish free-for-all" social settings.[298] Although some statistics refute the assertion that the amount of drinking by students has increased,[299] many university presidents support an initiative to lower the drinking age so that eighteen-year-olds can legally consume alcohol.[300] Requiring students to abstain from drinking leads to clandestine alcohol abuse (and other bad practices such as obtaining fake identification cards) and fosters disrespect for the law.[301] Advocates argue that the drinking age should be changed back to eighteen, claiming that it is "absurd and unjust that young Americans can vote, marry, enter contracts and serve in the military at 18 but cannot buy an

296. *Id.* (quoting Holly Schiffrin, lead author of study).

297. *Id.*

298. Camille Paglia, *It's Time to Let Teenagers Drink Again*, TIME MAGAZINE, May 19, 2014, at 22.

299. *See supra* note 12 and accompanying text (referring to studies taken over decades finding decline in underage drinking).

300. *See* AMETHYST INITIATIVE, http://www.theamethystinitiative.org/statement/ (last visited Nov. 2, 2014), *archived at* http://perma.cc/S2FH-5QNG (including list of 136 college presidents and chancellors who support drinking age change). Their statement is that "[a] culture of dangerous, clandestine 'binge-drinking'—often conducted off-campus" exists, and that trying to enforce abstinence from alcohol "as the only legal option has not resulted in significant constructive behavioral change among our students." *Id.* The statement continues:

> Adults under 21 are deemed capable of voting, signing contracts, serving on juries and enlisting in the military, but are told they are not mature enough to have a beer.
> By choosing to use fake IDs, students make ethical compromises that erode respect for the law.
> How many times must we relearn the lessons of prohibition?

Id.

301. *Id.*

alcoholic drink in a bar or restaurant."[302] This Article does not focus on the drinking age itself, but rather supports changing the culture surrounding social drinking. The social norming study conducted by the University of Virginia researchers gives hope that the culture can gradually be changed.[303]

Parents can encourage students to act responsibly, but must resist the urge to hover over them. "College is a time when parents can grant their children the precious opportunity to take responsibility as they develop into independent young men and women, fully prepared to be productive and engaged citizens," two senior university administrators wrote recently.[304] "To the parents of children who don't like their roommates, teachers, academic advisers or grades, we urge empathy and calm. The social and survival skills young people develop in these situations will serve them well later in life."[305]

Parents are encouraged to discuss health risks, including alcohol use, sexually transmitted diseases, and sleep deprivation, with their college-bound children.[306] To broach subjects such as how to handle social settings where excessive drinking occurs, parents can talk about how their student can protect his or her friends if he or she sees them taking risks.[307] Using this approach is an easier way to discuss a difficult topic than preaching to the student about her own behavior.[308] Parents can get involved in a positive way: "[W]e implore our parents, remind your children that, in an environment of almost total freedom, it will now be up to them to make responsible decisions about alcohol and sex."[309] There is a fine line between hovering, which is over-parenting, and fulfilling a strong parental role. The challenge is for parents to provide appropriate guidance, with help from the greater community and some assistance from universities.

College administrators alone cannot successfully shoulder the responsibility

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302. Paglia, *supra* note 298, at 22.

303. *See supra* note 276-87 and accompanying text (discussing study and its successes). The cultural change may come as a result of cases that involve the actions of intoxicated third parties. In a single year, more than 690,000 students between the ages of eighteen and twenty-four reported that they had been assaulted by another student who had been drinking. *See* NIAAA Report, *supra* note 2, at 1 (providing statistics). Societal interest in preventing tragic, violent attacks by drunken students is significant. In the few cases where courts have found that universities owed a duty to protect their students from alcohol-related injuries, the facts have involved attacks by third parties. Although the predominant rule is that universities have no special relationship with their students, and thus, no duty toward them, that rule may be eroded in particularly heinous cases.

304. Barry Glassner & Morton Schapiro, *Grounding the Helicopter Parent*, WASH. POST (Aug. 24, 2012), http://www.washingtonpost.com/opinions/grounding-the-helicopter-parent/2012/08/24/bc164088-ebcc-11e1-a80b-9f898562d010_story.html, *archived at* http://perma.cc/S5N2-KSHZ.

305. *Id.*

306. Perri Klass, *College Prep, This Time for Health*, N.Y. TIMES (Aug. 19, 2013), http://well.blogs.nytimes.com/2013/08/19/college-prep-this-time-for-health/?_php=true&_type=blogs&_r=0, *archived at* http://perma.cc/VA3Q-YC5W.

307. *See id.*

308. *See id.*

309. Glassner & Schapiro, *supra* note 304.

for curbing alcohol consumption. Partnerships with local law enforcement, merchants, and community leaders—as well as with student organizations on campus—can reduce alcohol violations.[310] The positive and appropriate influence of parents and family members is also of particular importance. The National Institute on Alcohol Abuse and Alcoholism reports that students whose parents have talked with them about alcohol use are more likely than other students to abstain or to avoid binge drinking.[311]

Imposing the tort liability upon college administrators for harm that results from students' drinking is not the answer to the problem. As one court indicated,

> [t]he imposition of a duty to exercise care . . . would hold the University liable for a risk it neither created nor exacerbated nor can readily abate. . . . [S]uch a duty cannot be imposed without resurrecting the university's role of *in loco parentis*, which is no longer feasible, even accepting the doubtful assumption it would be wise.[312]

In the context of tort law, this assertion is accurate, and courts should not impose a legal duty. However, in the broader social context, encouraging universities to engage in social norming message campaigns is a laudable idea and may help reduce alcohol-related injuries. Finding a solution that is based on preventive measures rather than litigation after injuries occur is ideal. Allowing parents to offer guidance is appropriate, but permitting parents to become overly involved in the choices their adult children make is counterproductive.

In general, the university has no heightened, specialized duty to care for adult students, and this "no duty" approach is appropriate. A return to in loco parentis is not a feasible option. One California court described the old days of in loco parentis and noted that the doctrine no longer applies: "courts have not been willing to require college administrators to reinstitute curfews, bed checks, dormitory searches, hall monitors, chaperons [sic], and the other concomitant measures which would be necessary in order to suppress the use of intoxicants and protect students from each other."[313] Another court stated summarily,

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310. There are various ways to crack down on alcohol abuse on campus in addition to university procedures and policies. Bringing a negligence suit against the university is unlikely to lead to relief for injured students or their families. However, criminal charges can be filed against the offending students in unlawful situations such as those involving horrific hazing. *See* Lloyd v. Alpha Phi Alpha, No. 96-CV-348, 1999 WL 47153, at *11 (N.D.N.Y. Jan. 26, 1999) (referencing possibility of criminal punishment for hazing).

311. *See* NIAAA Report, *supra* note 3, at 3 (providing statistics).

312. Tanja H. v. Regents of the Univ. of Cal., 278 Cal. Rptr. 918, 926 (Cal. Ct. App. 1991).

313. *Id.* at 920.

> We find unpersuasive the argument that college students—the great majority of whom are over eighteen years old—are so immature that they should be considered wards of their particular institution of higher education while the people of this country have found those same students as a whole to be mature enough to exercise the most sacred right a democracy can bestow.[314]

In summary, the no duty rule is the right approach, as universities should not be held responsible for monitoring the private lives of their students. Growing into mature adulthood involves taking risks and learning that accidents have consequences, even though the results can be tragically harsh for students and their loved ones.

314. Beach v. Univ. of Utah, 726 P.2d 413, 418 n.4 (Utah 1986).