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Is There a Duty?: Limiting College and University Liability for Student Suicide

Susanna G. Dyer
University of Michigan Law School

NOTE

IS THERE A DUTY?: LIMITING COLLEGE AND UNIVERSITY LIABILITY FOR STUDENT SUICIDE

*Susanna G. Dyer**

This Note argues that nonclinician administrators employed by institutions of higher education do not have a special relationship with their students such that they have a duty to act with reasonable care to prevent a foreseeable student suicide. Courts that have in recent years ruled to the contrary have done so by incorrectly basing their duty-of-care analysis on foreseeability of harm alone. With an eye toward a proper duty-of-care analysis, this Note analyzes multiple factors to reach its conclusion, including the ideal relationship between colleges and their students and the burden on and capability of colleges to protect their students from a particular harm. Moreover, public policy concerns weigh heavily against imposing a duty on nonclinician university administrators. This Note further argues that the tort doctrine of negligent performance of affirmative duties undertaken provides a better framework within which to assess the liability of institutions of higher education for student suicides by holding those institutions responsible for egregious missteps regarding student mental health problems. Liability pursuant to negligent performance of affirmitive duties undertaken requires that colleges and universities implement and operate their programs with due care, but leaves sufficient latitude for individual colleges and universities to explore suicide prevention techniques that are effective and feasible in light of their student body, resources, and overall educational philosophy.

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INTRODUCTION

In February of 1999, Nina Davis-Millis, a librarian at the Massachusetts Institute of Technology ("MIT"), served as a housemaster at the Random Hall dormitory on MIT's campus.[1] In her role as housemaster, Davis-Millis learned that Elizabeth Shin, a first-year student who lived in Random Hall, had been admitted to McLean Hospital for a one-week psychiatric hospitalization after overdosing on Tylenol with codeine.[2] With Elizabeth's permission, Davis-Millis informed Elizabeth's parents that she was in the hospital.[3] Although Elizabeth, in consultation with her father, declined a doctor's recommendation to seek treatment outside of the university, she did agree to meet with an MIT psychiatrist periodically for the remainder of the academic year.[4]

Elizabeth's psychological problems continued when she returned to MIT and Random Hall for her sophomore year. In March of 2000, a student noti-

1. Shin v. Mass. Inst. of Tech., 19 Mass. L. Rptr. 570, 570 (Mass. Super. Ct. 2005).
2. *Id.*
3. *Id.*
4. *Id.* at 571.

fied Davis-Millis that Elizabeth was cutting herself.[5] Davis-Millis persuaded Elizabeth to seek treatment at MIT's mental health facilities, and, with Elizabeth's consent, contacted her parents to inform them of their daughter's continuing problems.[6] Elizabeth's parents took Elizabeth home for spring break, but after she returned to campus her mental condition continued to deteriorate despite an antidepressant regimen and counseling sessions with various MIT psychiatrists.[7] From late March through early April, Davis-Millis kept in contact with an MIT dean about Elizabeth's condition and, presumably in order to be able to continue monitoring Elizabeth, discouraged her from moving out of Random Hall.[8]

On April 8, 2000 MIT campus police brought Elizabeth to MIT's medical health center after she threatened to kill herself with a knife.[9] The on-call psychiatrist determined that Elizabeth was not acutely suicidal and released her.[10] When late the following night two Random Hall students informed Davis-Millis that Elizabeth had again threatened suicide, the housemaster sought the advice of the psychiatrist who had treated Elizabeth the previous day.[11] Per the doctor's instruction, Davis-Millis checked on Elizabeth that night.[12] On the morning of April 10, Davis-Millis conferred with the dean about Elizabeth.[13] At an 11:00 a.m. meeting, MIT deans and psychiatrists discussed Elizabeth's situation and decided that Elizabeth would attend an appointment the next day to begin off-campus behavioral therapy treatment.[14] Later that night, Random Hall students discovered a fire in Elizabeth's room.[15] Elizabeth died of "self-inflicted thermal burns" some days later.[16]

Elizabeth's parents sued MIT, its medical professionals, and its nonclinician administrators—including Davis-Millis—for failing to prevent Elizabeth's suicide.[17] On Davis-Millis's motion for summary judgment, the Massachusetts Superior Court ruled that because Davis-Millis could have foreseen Elizabeth's suicide, the housemaster had a special relationship with Elizabeth and therefore owed her a duty to exercise reasonable care to

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5. *Id.*
6. *Id.*
7. *Id.* at 571–72.
8. *See id.* at 572.
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.* at 572–73.
13. *Id.* at 573.
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.* at 578 n.1.

prevent her suicide.[18] MIT settled the lawsuit with the Shins before the question of whether Davis-Millis had breached that duty reached a jury.[19]

As in *Shin*, a federal district court in Virginia held in *Schieszler v. Ferrum College* that a dean and resident advisor had a duty to exercise reasonable care to prevent a student's suicide.[20] In *Schieszler*, a Ferrum College student named Frentzel committed suicide in his dorm room.[21] Frentzel's personal representative sued the college, a dean, and a dormitory resident assistant for wrongful death.[22] The plaintiff claimed that the defendants were " 'negligent by failing to take adequate precautions to insure that Frentzel did not hurt himself.' "[23] Prior to Frentzel's suicide, the dean and resident assistant had noticed Frentzel had self-inflicted bruises and made Frentzel sign a statement that he would not hurt himself.[24] After signing the statement, Frentzel wrote two notes to his girlfriend implying he planned to commit suicide.[25] By the time the dean and resident assistant responded to the second note, however, Frentzel had hanged himself in his dorm room.[26]

The *Shin* and *Schieszler* courts' holdings deviated from previous cases holding that nonclinicians do not have a duty to exercise reasonable care to prevent suicide.[27] With some exceptions, plaintiffs claiming liability for a loved one's suicide generally fail to establish that defendants owed the deceased a duty to prevent his or her suicide.[28] Tort law does not assign defendants an affirmative duty to prevent foreseeable harm absent a special relationship.[29] The *Shin* and *Schieszler* courts seemingly brushed aside this rule of no affirmative duty by holding that the nonclinician defendants had a special relationship with Elizabeth—and thus owed her a duty of care—solely because her suicide was foreseeable.

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18. *Id.* at 577.

19. Marcella Bombardieri, *MIT, Relatives Settle Suit over Student Suicide in '01*, BOSTON GLOBE, Sept. 2, 2006, at B3.

20. 236 F. Supp. 2d 602, 609 (W.D. Va. 2002).

21. *Id.* at 605.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *E.g.*, Nally v. Grace Cmty. Church of the Valley, 763 P.2d 948, 964 (Cal. 1988) (holding that a church's nontherapist counselors had no duty to prevent suicide); Bogust v. Iverson, 102 N.W.2d 228, 230 (Wis. 1960) (holding that a college director of student personnel did not owe the same duty of care to prevent student suicide as did a trained medical professional).

28. *E.g.*, McLaughlin v. Sullivan, 461 A.2d 123, 127 (N.H. 1983) (discussing the exceptions that apply in the contexts of jails and hospitals and between patients and psychiatrists).

29. RESTATEMENT (SECOND) OF TORTS §§ 314, 314A (1965). Additionally, lawsuits alleging liability for suicides historically failed to establish causation because the suicidal person was deemed to be the sole proximate cause of his or her own death. *E.g.*, *McLaughlin*, 461 A.2d at 124 ("As a general rule, negligence actions seeking damages for the suicide of another will not lie because the act of suicide is considered a deliberate, intentional and intervening act which precludes a finding that a given defendant, in fact, is responsible for the harm.").

While college students are actually less likely to commit suicide than noncollege students in the same age range, student suicide is the second-most common cause of college student death; approximately 1100 college students commit suicide each year.[30] Further, college counselors have in recent years reported an increase in the number of students diagnosed with severe psychological problems.[31] In 2005, for example, ninety-five percent of college counseling directors nationwide reported an increase in the number of college students who were already on psychiatric medication when they came to the counseling center for assistance.[32]

Because the number of pending lawsuits against institutions of higher education is significant,[33] colleges and universities have struggled to balance their students' best interests against their own interest in avoiding liability for student suicide, and higher education attorneys and administrators worry about the potential implications of the *Shin* court's legal analysis.[34] Should a foreseeability analysis alone impose upon nonclinician administrators a duty to prevent student suicide, institutions of higher education may strategically alter their approach to student mental health issues in a way that negatively affects their students' mental health.[35] After *Shin*, colleges fear that "any program to increase student safety may also increase the institution's liability."[36] Because most programs aimed at reaching out to students with severe mental health problems will involve college administrators learning specific details about students' problems, any subsequent student suicide is more likely to be viewed by a court as having been foreseeable to that administrator. Institutions, then, may judge that the safer course from a risk-management perspective is to avoid foreseeability-generated liability by not offering such programs at all.

The Restatement (Second) of Torts includes several sections that are helpful in understanding the legal doctrines discussed in this Note. First, as the *Shin* and *Schieszler* decisions demonstrate, whether institutions of higher education ("IHEs") have an affirmative duty to protect students from harm is a key question in determining IHE liability for student suicide.

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30. Karen W. Arenson, *Worried Colleges Step Up Efforts Over Suicide*, N.Y. TIMES, Dec. 3, 2004, at A1; *see also* Peter F. Lake, *Private Law Continues to Come to Campus: Rights and Responsibilities Revisited*, 31 J.C. & U.L. 621, 656 (2005) ("The most significant and salient phenomenon of the current wellness crisis on campus is suicide.").

31. Elizabeth Fried Ellen, *Suicide Prevention on Campus*, PSYCHIATRIC TIMES, Oct. 2002, at 1, http://www.psychiatrictimes.com/p021001a.html (last visited Feb. 9, 2008).

32. Lynette Clemetson, *Off to College on Their Own, Shadowed by Mental Illness*, N.Y. TIMES, Dec. 8, 2006, at A1.

33. Ann H. Franke, *When Students Kill Themselves, Colleges May Get the Blame*, CHRON. OF HIGHER EDUC., June 25, 2004, at B18 (reporting that as of June 2004, ten suicide cases were pending against institutions of higher education).

34. *See* Brief of Amici Curiae Brown University et al. in Support of Petition for Relief under G.L. c. 231, § 118 (First Paragraph) by MIT Administrators Arnold Henderson and Nina Davis-Millis at 7, Shin v. Mass. Inst. of Tech., No. 2006-J-0099 (Mass. App. Ct. Feb. 24, 2006).

35. *See, e.g.*, Franke, *supra* note 33.

36. *Id.*

Restatement section 314, Duty to Act for Protection of Others, provides the baseline rule that a person does not have an affirmative duty to protect another person from harm or aid another person in danger.[37] Restatement section 314A, Special Relations Giving Rise to Duty to Aid or Protect, offers some special relationships that will give rise to an affirmative duty to aid or protect.[38] Importantly, the Restatement neither provides an exhaustive list of which relationships are "special" nor details how courts determine whether a special relationship exists. Second, IHEs may incur liability in certain cases of student suicide even if no such affirmative duty exists. According to Restatement section 323, Negligent Performance of Undertaking to Render Services, a person can be liable to another person if he or she, having voluntarily undertaken to help that person, fails to exercise reasonable care in providing the assistance undertaken.[39]

This Note argues that nonclinician administrators employed by IHEs do not have a special relationship with their students such that they have a duty to act with reasonable care to prevent a foreseeable student suicide. Instead, IHEs should be liable for increased risk to students if they fail to use due care to administer suicide-prevention programs that they do provide. Part I provides background on liability for suicide at common law and discusses the duties that courts have imposed and continue to impose upon IHEs to prevent various foreseeable harms, including suicide. Part II argues that courts holding that IHEs' nonclinician administrators have a special relationship with their students, solely because a suicide was foreseeable, incorrectly applied the tort principles of duty of care. It also argues that pub-

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37. The section states: "The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action." RESTATEMENT (SECOND) OF TORTS § 314 (1965).

38. The section states:

> (1) A common carrier is under a duty to its passengers to take reasonable action
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> (a) to protect them against unreasonable risk of physical harm, and
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> (b) to give them first aid after it knows or has reason to know that they are ill or injured, and to care for them until they can be cared for by others.
>
> (2) An innkeeper is under a similar duty to his guests.
>
> (3) A possessor of land who holds it open to the public is under a similar duty to members of the public who enter in response to his invitation.
>
> (4) One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection is under a similar duty to the other.

Id. § 314A.

39. The section states:

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

Id. § 323.

lic policy concerns weigh heavily against imposing such a duty on IHE administrators. Part III contends that the tort doctrine of negligent performance of affirmative duties undertaken provides a better framework within which to assess the liability of IHEs for student suicides. Finally, it proposes illustrations to be added to Restatement sections 314A and 323 that would clarify how courts should evaluate IHE and administrator liability for student suicide.

I. HISTORICAL LIABILITY FOR SUICIDE AND INSTITUTIONAL LIABILITY IN GENERAL

This Part provides the legal backdrop against which the issue of whether foreseeability generates a duty to prevent student suicide emerged. Section I.A discusses the common law's general reluctance to impose liability for suicide, but it also notes exceptions to that rule when a special relationship exists between the defendant and the victim. Section I.B sketches the historical development of the legal duties IHEs owe to their students. It discusses two distinct ways in which courts analyze IHEs' liability for student suicide, including the approach that has resulted in two holdings that IHEs' nonclinician administrators have a duty to exercise reasonable care to prevent foreseeable student suicide.

A. *Liability for Suicide at Common Law*

While the common law did not impose civil liability for a failure to prevent suicide, the law has evolved to make room for such liability in limited circumstances.[40] Under a traditional tort analysis, courts deemed the suicidal person to be the sole proximate cause of his or her own death, and the law did not impose affirmative duties on others to prevent foreseeable harm.[41] An exception to this no-duty rule emerged under the tort doctrine of special relationships.[42] Restatement section 314A states that common carriers, innkeepers, landowners, and those who have custody of another person have a duty to take reasonable action to aid or protect that person.[43] A comment accompanying section 314A clarifies that "[t]he relations listed are not intended to be exclusive," and, in fact, "[t]he law appears . . . to be working slowly toward a recognition of the duty to aid or protect in any relation of

40. *See* McLaughlin v. Sullivan, 461 A.2d 123, 124 (N.H. 1983).

41. *See id.*; *see also* RESTATEMENT (SECOND) OF TORTS § 314 ("The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action.").

42. In addition to the special relationship exception, courts have recognized an exception when the defendant actually caused the suicide. *McLaughlin*, 461 A.2d at 124. Although this exception is beyond the scope of this Note, see, for example, *Wallace v. Broyles*, 961 S.W.2d 712 (Ark. 1998), for a denial of a university's motion for summary judgment where there was a genuine issue of material fact as to whether the university dispensed controlled drugs to decedent, thereby contributing to or causing his suicide.

43. RESTATEMENT (SECOND) OF TORTS § 314A.

dependence or of mutual dependence."[44] As previously noted, the Restatement does not further clarify how courts determine whether a special relationship exists.

Courts have most commonly recognized a special relationship—which creates a duty to exercise reasonable care to prevent the suicide—in the contexts of jails and hospitals and between patients and psychiatrists.[45] In jails and hospitals, the defendant has "actual physical custody of and control over persons."[46] In relationships between patients and trained mental health professionals, the professionals are "deemed to have a special training and expertise enabling them to detect mental illness and/or the potential for suicide, and . . . the power or control necessary to prevent that suicide."[47] Courts have generally been reluctant to extend the special relationships duty to prevent suicide to noncustodial, nonprofessional counselor relationships.[48]

B. *Duties Institutions of Higher Education Owe to Their Students*

This Section describes how the approach courts have taken regarding the relationship between IHEs and their students has changed over the last century. Section I.B.1 examines the mid-twentieth-century shift away from an in loco parentis relationship to a "bystander" relationship, but notes that neither analysis imposed liability on IHEs. Section I.B.2 discusses how, more recently, some courts have demonstrated a new willingness to assign more protective duties to IHEs and examines a divide in the case law with respect to whether IHEs have a duty to prevent student suicide.

1. *Historical Paradigms of Institutional Relationships with and Duties to Students*

Until the last half-century, the doctrine of in loco parentis dictated courts' vision of the proper relationship between IHEs and their students. Literally translated, in loco parentis means "in place of a parent."[49] Under this paradigm, the college or university took the place of the father in the

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44. *Id.*, cmt. b.

45. *See, e.g.*, *McLaughlin*, 461 A.2d at 125.

46. *Id.*

47. *Id.*

48. *See, e.g.*, Nally v. Grace Cmty. Church of the Valley, 763 P.2d 948, 956–60 (Cal. 1988) (holding that a church's nontherapist counselors had no duty to prevent suicide and that mere foreseeability is not enough to create a special relationship). Some have argued, without success, that the law should impose a duty to prevent suicide broadly across society, even in the absence of a special relationship. *See* Charles J. Williams, *Fault and the Suicide Victim: When Third Parties Assume a Suicide Victim's Duty of Self-Care*, 76 NEB. L. REV. 301 (1997) (arguing that liability for a person's suicide should be analyzed with a comparative fault analysis); Kate E. Bloch, Note, *The Role of Law in Suicide Prevention: Beyond Civil Commitment—A Bystander Duty to Report Suicide Threats*, 39 STAN. L. REV. 929 (1987) (arguing that law should impose a general duty to report serious suicidal threats).

49. *See* BLACK'S LAW DICTIONARY 803 (8th ed. 2004) ("Of, relating to, or acting as a temporary guardian or caretaker of a child, taking on all or some of the responsibilities of a parent.").

lives of its students. As a result, courts in most circumstances gave great deference to the decisions of IHEs regarding their students, as they would defer to a parent's decision regarding his or her child.[50] The effect of the in loco parentis doctrine was to shield IHEs from liability by allowing courts to "avoid[] judging the reasonableness of decisions by college authorities."[51] While the cases discussing in loco parentis "protected a college's exercise of authority over the students," they did not "specifically address college tort liability." Prior to the 1960s, there were very few cases dealing with tort liability on college campuses at all.[52]

In the 1960s, the courts began viewing the relationship among IHEs, their students, and their students' parents as contractual rather than parental.[53] The shift was grounded at least in part on a growing recognition of college students as bona fide adults. Courts now generally accept that the law does "not expect colleges to play a role as surrogate parents."[54] Thus, between the 1960s and 1980s, in what has been labeled the "era of the 'bystander' university," IHEs owed no duty to students unless they "voluntarily assumed it."[55]

2. *Recent Developments: Courts Divided on Institutional Liability for Student Safety*

Although courts rarely imposed tort liability on IHEs during the in loco parentis and bystander eras, courts met increasing media and legislative attention to college-student deaths in the 1980s and 1990s with an increased predisposition to find that colleges and universities owed their students a duty of protection from certain specific harms.[56] Particularly in two contexts—violent crime and hazing activities—courts have found that IHEs have a special relationship with, and a duty to protect, their students.[57] On

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50. Jane A. Dall, Note, *Determining Duty in Collegiate Tort Litigation: Shifting Paradigms of the College-Student Relationship*, 29 J.C. & U.L. 485, 487–88 (2003).

51. *Id.* at 489.

52. *Id.* at 489. The court further asserted that "[i]f the doctrine of *in loco parentis* had any effect on college tort liability in the pre-modern era, it would appear to be that of limitation." *Id.* at 489–90.

53. *Id.* at 493.

54. Benefield v. Bd. of Trs. of the Univ. of Ala. at Birmingham, 214 F. Supp. 2d 1212, 1220 (N.D. Ala. 2002). The court stated:

> Clearly, college students are uniquely different from high school, junior high school and elementary school students. This court can find no notice to the defendant from which it should have been aware it stood *in loco parentis*, nor does the court believe the creation of such a duty is in the public interest.

Id.

55. Dall, *supra* note 50, at 491.

56. *Id.* at 501.

57. In *Mullins v. Pine Manor College*, 449 N.E.2d 331 (Mass. 1983), for example, the Massachusetts Supreme Judicial Court held that that the College had a special relationship with students and thus had a duty to provide security for its students in a lawsuit for injuries resulting when a

the other hand, courts have remained reluctant to assign IHEs a duty to prevent harm resulting from drug or alcohol use.[58]

Student suicide is another area in which courts have imposed increased institutional liability. Both the Massachusetts Superior Court and the United States District Court for the Western District of Virginia recently held that nonclinician college administrators and residence-life staff could have a special relationship with their students and a corresponding duty to exercise reasonable care to prevent suicide, at least in particular factual circumstances.[59] In *Schieszler v. Ferrum College*, a student committed suicide after a college dean and a resident advisor made him sign a statement that he would not hurt himself.[60] The district court concluded that a special relationship existed consistent with Restatement section 314A between the deceased, his resident advisor, and his dean because a jury could find that there was "an imminent probability" that the deceased might undertake self-injurious behavior.[61] In *Shin v. Massachusetts Institute of Technology*, the Massachusetts Superior Court found sufficient evidence that the deceased's dean and housemaster "could reasonably foresee" that Shin would hurt herself, and therefore it found a special relationship between these MIT administrators and the deceased under Restatement section 314A.[62]

Despite the *Shin* and *Schieszler* holdings, IHE nonclinician duty to prevent student suicide is far from a well-established rule. Recently, courts have relied on Restatement section 323 to deny recovery to the families of students who committed suicide.[63] Under Restatement section 323, the defendant is only responsible for the *increased* risk created by his or her failure to use due care.[64] Relying on this section, these courts found that the university nonclinician-defendants were not liable because they had not increased the risk of suicide or withdrawn services on which the suicidal

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student was raped on campus. In *Knoll v. Board of Regents of the University of Nebraska*, 601 N.W.2d 757 (Neb. 1999), the Nebraska Supreme Court held that the university owed a duty to its students to prevent harm resulting from fraternity hazing activities that included abducting and handcuffing a student.

58. *E.g.*, Bradshaw v. Rawlings, 612 F.2d 135, 138 (3d Cir. 1979) (finding a university had no duty to control the conduct of a student who drank alcohol at a university event); Baldwin v. Zoradi, 176 Cal. Rptr. 809 (Cal. Ct. App. 1981) (finding a university had no duty to control the alcoholic intake of their students in a lawsuit for injures arising out of a car-racing contest following a drinking party).

59. Schieszler v. Ferrum Coll., 236 F. Supp. 2d 602 (W.D. Va. 2002); Shin v. Mass. Inst. of Tech., 19 Mass. L. Rptr. 570, 577 (Mass. Super. Ct. 2005).

60. 236 F. Supp. 2d at 609. For a discussion of the facts of the case, see this Note's Introduction.

61. *Id.* at 606–07, 609.

62. 19 Mass. L. Rptr. at 577. For a discussion of the facts of the case, see this Note's Introduction.

63. *See* Jain v. State, 617 N.W.2d 293, 299–300 (Iowa 2000) (granting summary judgment for the college and its nonclinician administrators where parents sued for negligence, alleging defendants' failure to exercise reasonable care to prevent their adult-child's suicide); Mahoney v. Allegheny Coll., No. AD 892–2003, slip op. at 22 (Pa. Ct. Com. Pl. Dec. 22, 2005).

64. DAN B. DOBBS, THE LAW OF TORTS 861–62 (2001).

student had relied.[65] Particularly because the Restatement section 314A and section 323 approaches have yielded such different results, it may be difficult for IHEs to predict how courts will view nonclinician liability for student suicide and, therefore, how they can simultaneously attend to their students' health and protect the institution from liability.

II. INSTITUTIONS OF HIGHER EDUCATION DO NOT HAVE A DUTY OF CARE TO PREVENT STUDENT SUICIDE

This Part argues that, having applied a proper duty-of-care analysis, courts should not find that a special relationship exists between IHE administrators and their students. Section II.A asserts that a multifactor duty-of-care analysis, based on the various policy concerns raised by the particular facts of a case, is the proper method for determining whether a special relationship exists between an IHE and a student. Section II.B argues that the *Shin* and *Schieszler* courts wrongly based their finding of a special relationship on a single factor: foreseeability. Section II.C contends that the proper multifactor duty-of-care analysis and policy considerations weigh against imposing a special relationship on IHE nonclinicians to prevent foreseeable student suicides.

A. *Determining Whether a Special Relationship Exists Requires a Multifactor Duty-of-Care Analysis*

This Section outlines the multifactor analysis that courts employ to determine whether a duty of care exists outside the context of special relationships, and argues that courts should extend the multifactor analysis to determinations of whether or not to impose a duty based on a special relationship. This Section demonstrates that courts generally apply a duty-of-care analysis to IHEs that extends beyond foreseeability of harm to also examine the appropriate relationship between IHEs and their adult students and the burden on and capability of IHEs to effectively perform the responsibilities courts may impose upon them.

In tort cases generally, whether a defendant owed a plaintiff a duty of care is essentially a policy decision for the court. As one court stated, "legal duties are not discoverable facts of nature, but merely conclusory expressions that, in cases of a particular type, liability should be imposed for damage done."[66] Professor Prosser explained, " 'duty is not sacrosanct in itself,' " but is rather " 'only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection.' "[67] Finally, in his treatise on torts, Professor Dobbs reasons that

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65. *Jain*, 617 N.W.2d at 299–300; *Mahoney*, No. AD 892-2003, slip op. at 22.

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

67. DOBBS, *supra* note 64, at 582 (quoting WILLIAM LLOYD PROSSER & PAGE KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 54 (5th ed. 1984)).

"duty should be constructed by courts from building blocks of policy and justice."[68]

Courts weigh a number of factors to determine whether a defendant owed a plaintiff a duty of care in any particular case. In *Rowland v. Christian*, the court cited the following "major" factors:

> [F]oreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.[69]

Similarly, Professor Dobbs listed numerous factors to be considered:

> (1) the extent to which the transaction was intended to affect the plaintiff, (2) the foreseeability of harm to him, (3) the degree of certainty that the plaintiff suffered injury, (4) the closeness of the connection between the defendant's conduct and the injury suffered, (5) the moral blame attached to the defendant's conduct, (6) the policy of preventing future harm by deterrence, and (7) administrative factors, including the feasibility of administering a rule that imposed a duty. To this list can be added (8) the relationship of the parties and the customs to which they jointly subscribe.[70]

Thus, while the application of some or all of the aforementioned factors may differ from case to case, courts and commentators generally agree that foreseeability of harm is but one factor to be evaluated in determining whether a duty of care exists.

The term "special relationship" has been a source of confusion; courts sometimes conflate duty of care and special relationship, but at other times treat them as separate doctrines. Certain relationships—such as that between an innkeeper and a guest, or between hospital administrators and their patients—have clearly been established as "special relationships" as a matter of law.[71] In general, however, courts have not established a coherent method for determining when a relationship is "special" such that a defendant owes an affirmative duty to aid or protect another person where no such duty would otherwise exist.[72] A "special relationship" should not be thought of as a reference to some identifiable list of relationships in which an affirmative duty automatically exists. Rather, "special relationship" is a category that courts can assign when they specifically determine that a duty of care

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68. *Id.*

69. 443 P.2d 561, 564 (Cal. 1968).

70. DOBBS, *supra* note 64, at 582 (citations omitted).

71. RESTATEMENT (SECOND) OF TORTS § 314A (1965); *see supra* notes 45–48 and accompanying text.

72. *See, e.g.*, Schieszler v. Ferrum Coll., 236 F. Supp. 2d 602, 609 (W.D. Va. 2002); Shin v. Mass. Inst. of Tech., 19 Mass. L. Rptr. 570, 576–77 (Mass. Super. Ct. 2005).

should exist in a particular set of circumstances. Restatement section 314A states that, in certain relationships—for example, the relationship between an innkeeper and a guest—courts have performed a duty-of-care analysis by weighing factors such as those listed above, and this analysis has resulted in favor of imposing a duty.[73] Courts should then apply a multifactor duty-of-care analysis to determine whether there is a special relationship, as many already have.

One court has applied a multifactor duty-of-care analysis to determine whether a duty-of-care or special relationship existed in the student suicide context. In *Nally v. Grace Community Church of the Valley*, the plaintiffs sued nonmedical church counselors for failing to prevent their son's suicide.[74] To determine whether the nonclinician counselor defendants owed the plaintiffs' son a duty-of-care, the Supreme Court of California analyzed a set of factors similar to those listed by Professor Dobbs[75] and found that the counselors did not owe a duty.[76] The court stated that "[m]ere foreseeability of the harm or knowledge of the danger[] is insufficient to create a legally cognizable special relationship giving rise to a legal duty to prevent harm."[77]

Courts analyzing whether IHEs owe their students a duty of care in non-suicide cases have identified factors to be evaluated in the IHE context specifically. For example, in *Baldwin v. Zoradi*, a California court applied several of Professor Dobbs's factors.[78] In considering the foreseeability of the harm, the moral blameworthiness of the defendants, the policy of preventing future harm, the burden on the defendant, the consequences to the community of imposing a duty, and whether or not imposition of the duty is in the best interests of society,[79] the court articulated the ultimate question regarding duty: " '[W]hether the risk of harm is sufficiently high and the amount of activity needed to protect against harm sufficiently low to bring the duty into existence . . . .' "[80] Thus, an IHE's interest in avoiding duties that it could not realistically sustain weighed heavily in the court's analysis of whether the IHE had a duty in the first place.[81] Applying this test to the facts of the case, the court held that the university did not owe a duty to its students to protect them from injuries resulting from alcohol ingestion.[82]

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73. RESTATEMENT (SECOND) OF TORTS § 314A.

74. 763 P.2d 948 (Cal. 1988).

75. *See supra* note 70 and accompanying text.

76. *Nally*, 763 P.2d at 956–61.

77. *Id.* at 959.

78. 176 Cal. Rptr. 809, 812–19 (Cal. Ct. App. 1981).

79. *Id.* at 815–19. Although the court found that foreseeability was "central" to the duty determination, it found that "a concomitant duty to prevent the [foreseeable] harm does not always follow." *Id.* at 816.

80. *Id.* at 816 (quoting Bartell v. Palos Verdes Peninsula Sch. Dist., 147 Cal. Rptr. 898, 902 (Cal. Ct. App. 1978)).

81. *Id.*

82. *Id.* at 815–16.

A recent Massachusetts case highlights another factor courts evaluate to determine whether an IHE has a duty to protect its students. The court in *Bash v. Clark University* unequivocally stated that "foreseeability of physical harm is not the linchpin for determining the existence of a common-law duty under Massachusetts tort law."[83] Instead, the court should "'look to existing social values and customs, and to appropriate social policy.'"[84] The plaintiff in *Bash* brought a wrongful death action against Clark University and various university officials and deans after his daughter died of a heroin overdose while a freshman at the university.[85] The court balanced "the foreseeability of harm with what steps would be necessary to protect students."[86] Ultimately, the court found that the university had no duty because given "the challenges faced by university officials and staff in attempting to eradicate drug use on college campuses, recognizing a special relationship in this instance would impose on university officials and staff an unreasonable burden that would be at odds with contemporary social values and customs."[87]

Courts determining whether a duty exists in the IHE context also consider contemporary social values and customs regarding the ideal relationship between IHEs and students. The Third Circuit examined the contemporary social values and customs factor in *Bradshaw v. Rawlings*.[88] In that case, a student sued his university for injuries he suffered in a car accident with a fellow student driver who had become intoxicated at a university event.[89] The court evaluated the parties' interests to determine whether the university owed the plaintiff a duty of care: the plaintiff's interest was freedom from bodily injury, while the university's interest was "in the nature of its relationship with its adult students, as well as an interest in avoiding responsibilities that it is incapable of performing."[90] Starting from the premise that "the modern American college is not an insurer of the safety of its students,"[91] the court considered the ways in which the policy considerations surrounding the duty determination had changed in recent decades.[92] Higher education jurisprudence, the court emphasized, had moved away from in loco parentis as society had increasingly recognized

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83. 22 Mass. L. Rptr. 84, 86 (Mass. Super. Ct. 2006).

84. *Bash*, 22 Mass. L. Rptr. at 86 (quoting Yakubowicz v. Paramount Pictures Corp., 536 N.E.2d 1067, 1070 (Mass. 1989)).

85. *Id.* at 84.

86. *Id.* at 86.

87. *Id.* The *Bash* court cited the *Schieszler* and *Shin* opinions with approval because it regarded suicide as entailing a different set of considerations than drug abuse. This Note argues that this different set of considerations in fact weighs against imposing a duty on IHEs to prevent student suicide. *See infra* Section II.C.

88. 612 F.2d 135 (3d Cir. 1979).

89. *Bradshaw*, 612 F.2d at 137.

90. *Id.* at 138.

91. *Id.*

92. *Id.* at 138–39.

that college students were adults with their own rights and privileges.[93] In assessing whether it shculd find a duty of care, then, the court was persuaded that students remain free to "define and regulate their own lives."[94] The court held that the university did not have a special relationship with its students, and therefore did not owe them a duty of care under the circumstances.[95]

B. *The* Shin *and* Schieszler *Courts Incorrectly Concluded that a Special Relationship Existed Solely Because the Students' Suicides Were Foreseeable*

Despite the strong support for courts' use of a multifactor analysis to determine whether a duty of care exists—thus affirming the presence of a special relationship—the two recent cases that have imposed a duty on IHE nonclinicians to prevent student suicide relied exclusively on the foreseeability factor. The court in *Shin* determined that Elizabeth Shin's dean and housemaster had a special relationship with her because her suicide was foreseeable to them.[96] As a result, they had a duty to protect her from self-inflicted harm.[97] Similarly, the *Schieszler* court concluded that a special relationship existed between a student and the nonclinician defendants because there was an "imminent probability" that the student would commit suicide.[98]

The *Shin* and *Schieszler* opinions exemplify the confusion surrounding the doctrine of special relationships. The *Shin* court's analysis of whether a duty of care existed between the MIT administrators and Elizabeth began by citing Restatement section 314A's rule that where there is a "special relationship," a defendant might owe an affirmative duty to the plaintiff where none would otherwise exist under Restatement section 314.[99] The court, however, did not provide a coherent framework for or explanation of how courts should determine whether a special relationship exists.[100] The court cited a case for the proposition that special relationships "'are based to a large extent on a uniform set of considerations,'" of which foreseeability is foremost.[101] At another point, the court cited a case that determined whether a duty of care existed by reference to "'existing social values and customs'"

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93. *Id.* at 138–40.

94. *Id.* at 140.

95. *Id.* at 141–43.

96. Shin v. Mass. Inst. of Tech., 19 Mass. L. Rptr 570, 577 (Mass. Super. Ct. 2005). For the facts of the *Shin* case, see this Note's Introduction, *supra*.

97. *Id.*

98. Schieszler v. Ferrum Coll., 236 F. Supp. 2d 602, 609 (W.D. Va. 2002). For the facts of the *Schieszler* case, see this Note's Introduction, *supra*.

99. *Shin*, 19 Mass. L. Rptr. at 576.

100. *Id.* at 577.

101. *Id.* (quoting Irwin v. Town of Ware, 467 N.E.2d 1292, 1300 (Mass. 1984)).

and without reference to the doctrine of special relationships.[102] In citing to both precedents, the court seemed to acknowledge that in determining if there was a duty of care—whether the court named that duty a special relationship or not—it was advisable to consider more than mere foreseeability. But the *Shin* court then concluded something entirely different—that the foreseeability of harm established the special relationship. The court stated:

> The Plaintiffs have provided sufficient evidence that [the Administrators] could reasonably foresee that Elizabeth would hurt herself without proper supervision. Accordingly, there was a 'special relationship' between the MIT Administrators . . . and Elizabeth imposing a duty on [the Administrators] to exercise reasonable care to protect Elizabeth from harm.[103]

Similarly, the *Schieszler* court cited precedent that indicated it should apply a multifactor test to determine duty, but then failed to analyze any factors other than foreseeability. More specifically, the court explained that, "'[i]n determining whether a duty exists' . . . 'the likelihood of injury, the magnitude of the burden of guarding against it, and the consequences of placing that burden on the defendant must be taken into account.'"[104] The court's holding, however, was in stark contrast to the test it set out:

> Based on these alleged facts, a trier of fact could conclude that there was "an imminent probability" that Frentzel would try to hurt himself, and that the defendants had notice of this specific harm. Thus, I find that the plaintiff has alleged sufficient facts to support her claim that a special relationship existed between Frentzel and defendants giving rise to a duty to protect Frentzel from the foreseeable danger that he would hurt himself.[105]

Thus, the *Schieszler* court merely made a post hoc evaluation of the foreseeability of Frentzel's suicide, on which it based the finding of a special relationship.[106]

By concluding that foreseeability created a special relationship,[107] the *Shin* and *Schieszler* courts essentially rendered the basic tort doctrine of no affirmative duties null and void. Restatement section 314 specifically states that "[t]he fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action."[108] Thus, to say a special relationship, and

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102. *Id.* (quoting Mullins v. Pine Manor Coll., 449 N.E.2d 331, 335 (Mass. 1983)).

103. *Id.*

104. Schieszler v. Ferrum Coll., 236 F. Supp. 2d 602, 609 (W.D. Va. 2002) (quoting Wright v. Webb, 362 S.E.2d 919, 921 (Va. 1987)).

105. *Id.*

106. *Id.*

107. *Shin*, 19 Mass. L. Rptr. at 577; *Schieszler*, 236 F. Supp. 2d at 609.

108. RESTATEMENT (SECOND) OF TORTS § 314 (1965).

therefore duty of care, exists whenever a harm is foreseeable would render Restatement section 314 meaningless.

C. *A Proper Multifactor Analysis and Public Policy Support the Conclusion that Institutional Nonclinicians Should Not Have a Legal Duty to Prevent Student Suicide*

This Section applies a multifactor duty-of-care analysis to IHE liability for student suicide. It examines not only the foreseeability factor, but also the nature of the appropriate relationship between IHEs and their adult students, the burden on IHEs ordered to carry out court-imposed duties, and the abilities of IHEs and their administrators to take prospective steps to protect students from harm. It concludes that institutional nonclinicians should not have a duty to prevent student suicide.

The *Shin* and *Schieszler* courts engaged in an incorrect analysis of the foreseeability factor because suicide is difficult to predict. The American Psychiatric Association's guidelines for assessing patients with suicidal behavior reports that while only 0.7% of the United States population attempts suicide and 0.01% of the U.S. population actually completes suicide, 5.6% of the population engages in suicidal ideation.[109] According to the report, "[t]his rarity of suicide, even in groups known to be at higher risk than the general population, contributes to the impossibility of predicting suicide."[110] Experts explain that "suicidal acts are often impulsive," with "[m]ore than half of suicide attempts occur[ing] within the context of a premeditation period of less than five minutes."[111] The facts of *Shin* itself sadly illustrate the reality that even trained mental health professionals will not always accurately judge an individual's mental state. Two days before her suicide, MIT's on-call psychiatrist sent Elizabeth home from the hospital because he determined she was not "acutely suicidal."[112]

Beyond foreseeability, the *Shin* and *Schieszler* courts should have evaluated the appropriate relationship between IHEs and their students in the context of the law's abandonment of the in loco parentis doctrine.[113] As the *Bradshaw* court clearly outlined, IHE jurisprudence has long since moved away from the idea that college administrators should play a parental role in the lives of their students and has moved toward a respect for students as adults with their own rights, privileges, and responsibilities.[114] Imposing a duty of care on nonclinicians could force resident advisors, deans, and other

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109. AM. PSYCHIATRIC ASS'N, PRACTICE GUIDELINE FOR THE ASSESSMENT AND TREATMENT OF PATIENTS WITH SUICIDAL BEHAVIORS 12 (2003).

110. *Id.*

111. KAY REDFIELD JAMISON, NIGHT FALLS FAST: UNDERSTANDING SUICIDE 189 (1999).

112. *Shin*, 19 Mass. L. Rptr. at 570.

113. *See* Bash v. Clark Univ., 22 Mass. L. Rptr. 84, 87 (Mass. Super. Ct. 2006) ("The doctrine of *in loco parentis* has no application to the relationship between a modern university and its students.").

114. *See* Bradshaw v. Rawlings, 612 F.2d 135, 139–40 (3d Cir. 1979).

administrators to monitor students' behavior in a manner inconsistent with the current trend of recognizing and expanding students' privacy rights.[115]

Moreover, imposing a duty of care on IHEs and their nonclinician administrators would be extremely burdensome, as they are not well-positioned to prevent student suicide. As discussed above, suicide is extremely difficult to predict,[116] and nonclinicians do not have extensive training or experience dealing with the issue. A White Paper on college student suicide prevention published by the Suicide Prevention Resource Center described the challenge that colleges and universities face in the following way: "[T]here is no uniform definition for most suicidal behaviors, including suicide attempts," and "[t]hus, whether a student's actions are to be considered 'suicidal behavior' is often a judgment call—one that is often not made by a mental health professional, but by an administrator."[117] The report explained that nonclinicians do not handle such assessments effectively because their lack of training in mental health can result in a blurring of "[t]he concepts of intent, lethality, and temporality."[118] The University of Illinois, which has been uniquely successful in cutting its student suicide rate in half since 1984, requires that any student who threatens or attempts suicide attend "four sessions of professional assessment," presumably reflecting the university's judgment that professional treatment is necessary.[119] Thus, because training in mental health is important to being able to predict suicide, imposing a duty to prevent suicide on nonclinicians could burden IHEs with the responsibility and cost of training all of their employees in suicide prediction and prevention.

The various challenges IHEs face in their efforts to protect students from crime and substance abuse further illustrate the poor positioning of college administrators to prevent student suicide. The *Mullins* court explained that colleges are fairly well-positioned to exercise reasonable care to keep students safe from violent crime on campus because they have "the ability to design and implement a security system, hire and supervise security guards, provide security at the entrance of dormitories, install proper locks, and establish a system of announcement for authorized visitors."[120] In contrast, courts have generally not imposed a duty on colleges to protect students from the harmful effects of drug and alcohol use.[121] This is in large part because "it would be difficult to so police a modern university campus as to

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115. Baldwin v. Zoradi, 176 Cal. Rptr. 809, 816 (Cal. Ct. App. 1981) ("Students have insisted upon expanded rights of privacy . . . .").

116. *See supra* note 109 and accompanying text.

117. SUICIDE PREVENTION RES. CTR., PROMOTING MENTAL HEALTH AND PREVENTING SUICIDE IN COLLEGE AND UNIVERSITY SETTINGS 21 (2004).

118. *Id.*

119. *Id.* at 22.

120. Mullins v. Pine Manor Coll., 449 N.E.2d 331, 335 (Mass. 1983).

121. *E.g.*, Baldwin v. Zoradi, 176 Cal. Rptr. 809, 818 (Cal. Ct. App. 1981); Bash v. Clark Univ., 22 Mass. L. Rptr. 84, 86–88 (Mass. Super. Ct. 2006).

eradicate alcoholic ingestion."[122] While colleges can do much to improve campus safety without intruding on students' privacy, such is not the case with drug and alcohol use or self-injurious behavior.[123] Moreover, the relationship between IHEs and their students in the context of the duty to provide security on campus closely parallels the landlord-tenant relationship outside the IHE context. Imposing a duty on colleges to protect students against crime on campus is logical for the same reason that it is logical to impose a duty on lessors to protect their lessees against crime in their homes: IHEs and lessors alike are best positioned to provide such security. While the IHE-student relationship in the security context parallels the landlord-tenant relationship, the nonclinician-student relationship in the context of student suicide has no legal parallel from which to extend a special relationship and duty.

In addition to the multifactor analysis, broader public policy considerations weigh heavily against imposing a duty of care on nonclinician administrators to prevent student suicide. Should courts impose such a duty, administrators may overreact to student mental health problems or paradoxically discontinue efforts to reach out to troubled students. Presumably, IHEs' first priority is the safety of their students; yet IHEs must also be cognizant of the need to avoid liability for student suicide. To avoid severe liability, administrators may forcibly hospitalize students, mandate that students take a leave of absence, or discontinue outreach services altogether so that suicides would no longer be foreseeable. MIT, for example, faced a steep $27 million lawsuit for Elizabeth Shin's suicide.[124] As the amici curiae brief of numerous colleges in the appeal of the *Shin* decision argued, a duty to prevent suicide "creates incentives for non-clinicians to act in ways that may be inconsistent with the judgment of treating clinicians."[125] The *Shin* decision might make administrators or resident advisors "more likely to press for the student's involuntary hospitalization" despite a mental health clinician's determination that "hospitalization is not needed, and, indeed, may even be detrimental."[126] For specific students, mandatory leave could "make it . . . impossible for the student to continue receiving treatment from the mental-health clinicians who are familiar with his condition and who can best evaluate, assess, and respond to his risk of suicide."[127] Further, mandating that students with mental health problems enter treatment or take medical leave "can dissuade other[] [students] from asking for help and

122. *Baldwin*, 176 Cal. Rptr. at 818.

123. *See Bash*, 22 Mass. L. Rptr. at 87 ("The burden of protecting against the risks associated with the illegal use of drugs is far more like the burden associated with maintaining the moral well-being of students than it is like the burden of protecting the physical integrity of dormitories.").

124. Ann H. Franke, while an insurer for IHEs, explained that suicide litigation has the potential to be extremely costly for colleges, "not to mention the emotional and reputational impact they can have on a school." Arenson, *supra* note 30.

125. Brief of Amici Curiae Brown University et al., *supra* note 34, at 8.

126. *Id.*

127. *Id.* at 9–10.

discourage their friends from sounding the alarm."[128] Alternatively, colleges have expressed fear that the *Shin* decision could cause nonclinicians to believe that "the better course . . . would be to *not* become involved with a student's mental problems" so as to avoid being subjected to a hindsight-laden foreseeability analysis.[129]

Finally, if the *Shin* and *Schieszler* foreseeability analysis is enough to impose a duty, it would be just as logical for a court to impose duties to prevent suicide on anyone to whom self-injurious behavior is more clearly foreseeable.[130] Courts could logically extend the foreseeability analysis to impose duties on people who are more knowledgeable of a student's psychological state, such as a roommate, friend, professor, coach, or parent. Yet imposing a duty on college and university employees, as well as friends and family, to protect against such harms would likely signal a retreat from modern IHE jurisprudence with respect to the abandonment of in loco parentis status and the recognition of students as responsible adults. And allowing such parties to be sued for a failure to prevent a student's suicide would fly in the face of tort law's ban on affirmative duties of protection in general.

Ultimately, using a single-factor foreseeability analysis to impose a duty on nonclinicians to prevent suicide results in one of two negative consequences: either it produces the anomaly that IHEs are singled out as protectors against foreseeable harm, while those to whom the harm is more clearly foreseeable are deemed not to owe a duty; or it produces a generally-applicable foreseeability rule that runs counter to tort law's entire treatment of affirmative duties and the modern conception of the role of an IHE.

III. Restatement Section 323 as a Safety Net and Proposed Illustrations to Restatement Sections 314A and 323

This Part argues that Restatement section 323 provides an alternative framework under which to evaluate IHE liability for student suicide and proposes several illustrations concerning IHE liability for student suicide for inclusion in the Restatement. Section III.A explains that IHEs' suicide prevention programs will be most effective and practical when taking into consideration the particular resources of the institution and characteristics of the student body. The Section argues that courts can both allow IHEs the freedom to implement population-specific programs and hold IHEs responsible for egregious missteps in administering those programs by employing the rubric of negligent performance of undertaking to render services under

128. Arenson, *supra* note 30.

129. Brief of Amici Curiae Brown University et al., *supra* note 34, at 13.

130. One could also argue that courts could just as logically impose duties on administrators and resident advisors to protect students from arguably more common types of danger, such as binge drinking or the use of illicit or unprescribed prescription drugs to stay alert while studying. Such behavior is no doubt foreseeable to nonclinician administrators, and in most instances it is taking place just steps away from resident advisors.

Restatement section 323. Section III.B proposes several illustrations for addition to Restatement sections 314A and 323. These illustrations seek to guide courts in their decisions regarding the doctrines of special relationships and negligent performance of undertaking to render services, and how to best apply them to actions for student suicide.

A. *Holding Institutions of Higher Education Liable for Increased Risk of Student Suicide Under Restatement Section 323*

The tort doctrine of negligent performance of affirmative duties undertaken provides a framework within which courts can hold IHEs liable for any increase in risk of student suicide that an IHE program or administrator causes. This Note does not argue that nonclinicians should not play an important role in preventing college student suicide. In fact, the "complex problem of suicide and suicidal behaviors on campuses demands a multifaceted, collaborative, coordinated response, and cannot be left solely to counselors and mental health centers."[131] Instead, "[c]ollege administrators need to ensure that all elements of the campus and community work together."[132] A recently released publication entitled *Questions and Answers on College Student Suicide* noted that "[t]he key [to suicide reduction] is to create a climate where talking about personal problems with a mental health professional isn't stigmatized as some sort of failure. Outreach is essential, especially where students live."[133]

IHEs have chosen different methods for preventing suicide on their campuses. While the positive results at the University of Illinois are likely related to mandatory therapy,[134] some experts "fear that forcing students to enter treatment or to take a medical leave can dissuade others from asking for help and discourage their friends from sounding the alarm."[135] Further, some colleges express concern that some of their students do not welcome intervention.[136] Yet another contrast in IHEs' approaches to suicide reduction is evident among strategies for identifying and reaching out to troubled students. At Duke University the Vice President for Student Affairs admits that "he and members of the residence hall staff check up on the students, sometimes surreptitiously," by asking the residence hall staff to " 'dispatch a paraprofessional to inadvertently drop by a student's room as if it were a casual encounter.' "[137] Other colleges prefer to implement anonymous

131. SUICIDE PREVENTION RES. CTR., *supra* note 117, at 25.

132. *Id.*

133. GARY PAVELA, QUESTIONS AND ANSWERS ON COLLEGE STUDENT SUICIDE: A LAW AND POLICY PERSPECTIVE 56 (2006).

134. *See supra* note 119 and accompanying text.

135. Arenson, *supra* note 30. For example, after Columbia University required that a bipolar student take a leave of absence from college during her freshman year, the student stated that she is " 'so scared about screwing up' . . . 'and of being sent home again.' " *Id.*

136. *Id.*

137. *Id.*

internet mental health questionnaires to identify students that might need but do not seek help.[138] Still other colleges, such as Columbia University, New York University, and Cornell University, have placed counselors directly in residence halls.[139]

An IHE attentive to the issue of student suicide will realize that different populations of students may require different types of intervention and assistance, and that a close study of its population will inform its policies and protocols.[140] Any college's suicide reduction strategy will represent that institution's consideration of many variables, including its available resources and the specific characteristics of its student body. Moreover, a university's mental health services program is likely to be among those factors that some prospective students evaluate in choosing a college.

Restatement section 323 provides a framework to hold IHEs responsible for the competent management of their suicide prevention protocols while encouraging IHE attentiveness and the adoption of varied approaches. Given the importance of IHE attentiveness to issues surrounding student suicide, as well as the varied approaches IHEs have taken to confront the problem, courts must allow for population- and college-specific approaches. However, courts must also hold IHEs responsible for the competent management of protocols they do choose to adopt. Restatement section 323, Negligent Performance of Undertaking to Render Services, provides such a framework. The section states:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
>
> (a) his failure to exercise such care increases the risk of such harm, or
>
> (b) the harm is suffered because of the other's reliance upon the undertaking.[141]

This "increased risk rule" limits liability to the scope of the risk created by failure to use due care. If negligent nonperformance causes harm, but the harm caused is not the result of any increased risk, then liability is inappropriate.[142]

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138. *See id.* ("To address the problem, Emory University and the University of North Carolina are inviting students to fill out anonymous mental health questionnaires.").

139. *Id.*

140. SUICIDE PREVENTION RES. CTR., *supra* note 117, at 9–13 (outlining the differing concerns and needs of various populations, including commuter students, older students, gay and lesbian students, and international students); Arenson, *supra* note 30 ("Cornell is making a special effort to reach out to Asian and Asian-American students. Of 16 students there who have committed suicide since 1996, 9 were of Asian descent.").

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

142. *See* Turbe v. Gov't of Virgin Is., 938 F.2d 427, 432 (3d Cir. 1991) ("Put another way, the defendant's negligent performance must somehow put the plaintiff in a worse situation than if the defendant had never begun the performance.").

Under Restatement section 323, courts should stop short of imposing a broader duty on IHEs to prevent foreseeable suicide. Instead, courts should analyze the concept of duty from the narrow perspective of reasonable care once services are voluntarily undertaken. When a student's health worsens because the IHE negligently designed its suicide prevention program or an administrator negligently performed his role in the program, courts could apply such a theory of liability. This theory of liability may also be appropriate when an IHE fails to continue to provide services upon which the student had come to reasonably rely.[143] Courts could also hold IHEs liable for discontinuing services after inducing a student to "forego other opportunities of obtaining assistance."[144]

Two courts have already analyzed nonclinician liability for student suicide under Restatement section 323.[145] The year prior to *Schieszler*, in *Jain v. Iowa*, a court granted summary judgment to a college and its nonclinician administrators where parents sued for negligence by claiming failure to exercise reasonable care to prevent their adult child's suicide.[146] The court to most recently rule on the issue of an IHE's liability for student suicide, in *Mahoney v. Allegheny College*, similarly granted summary judgment for the college.[147] In *Jain* and *Mahoney*, the courts declined to hold the college and its administrators liable under the reasoning of section 323 where no affirmative acts by university employees increased the suicidal student's risk of harming himself and the suicidal student did not rely to his detriment on the services gratuitously offered by university personnel.[148]

Importantly, addressing the issue of IHE liability for student suicide under Restatement section 323 solves the problems of imposing a duty, as the *Shin* and *Schieszler* courts did, based on foreseeability alone.[149] There would be no incentive for administrators to withhold intervention from students in need because liability under section 323 would not hinge on how much an administrator knew about a particular student's situation, but rather on whether the IHE designed and the administrator implemented the protocol for addressing student mental health problems with reasonable care.[150] Furthermore, analysis under section 323 would not create an incentive for nonclinicians to take actions that could be detrimental to a student's overall

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143. *See* RESTATEMENT (SECOND) OF TORTS § 323 cmt. a.

144. *Id.* § 323 cmt. c; *see also* Jain v. State, 617 N.W.2d 293, 299–300 (Iowa 2000).

145. *Jain*, 617 N.W.2d at 298–300; *see also* Mahoney v. Allegheny College, No. AD 892-2003, slip op. at 22–23 (Pa. Ct. Com. Pl. Dec. 22, 2005).

146. 617 N.W.2d at 298–300.

147. No. AD 892–2003, slip op. at 22–23.

148. *Jain*, 617 N.W.2d at 298–300; *Mahoney*, No. AD 892–2003, slip op. at 22–23.

149. For a discussion of these negative effects, see *supra* Section II.C.

150. *See* Brief of Amici Curiae Brown University et al., *supra* note 34, at 13 (reasoning that guided by the *Shin* court's foreseeability-laden approach, the approach least likely to impose liability on college administrators would be to avoid learning about student mental health problems altogether).

treatment plan, as formulated by clinicians.[151] Instead, it would be in the best interests of nonclinicians to follow the advice of trained mental health professionals. Evaluating IHE liability for student suicide under Restatement section 323 would also allow courts to affirm the movement away from the in loco parentis view of the relationship between IHEs and their students. Finally, the section 323 approach would provide colleges and universities the freedom and discretion to implement a suicide prevention program that is effective for its particular student population. As such, IHEs could maintain respect for college students as adults, rather than being compelled to jeopardize student privacy and assume a parental role.

B. *Proposed Illustrations to Restatement Sections 314A and 323*

To provide guidance to courts and enhance predictability for IHEs dealing with potential liability for student suicide, this Note suggests several illustrations for addition to Restatement sections 314A and 323. First, the following illustration to Restatement section 314A will clarify that courts should not pervert the doctrine of special relationships to impose liability on nonclinician administrators for student suicide:

> A is an enrolled student at B University. C is a dean and D is a resident advisor at B University. C and D become aware of A's suicidal ideations and/or suicidal threats and foresee that A is a suicide risk. A commits suicide. Assuming no additional facts, C and D are not subject to liability for A's suicide because C and D were not in a special relationship with A and did not owe a duty of reasonable care to prevent A's suicide.

Next, the following illustration should be added to Restatement section 323 to address the issue of nonclinicians' liability for student suicide[152]:

> A is an enrolled student at B University. C is a dean and D is a resident advisor at B University. C and D are made aware of A's suicidal ideations and/or suicidal threats, and take it upon themselves to help A find a psychologist with whom to meet and seek advice. C and D ensure that an appointment for A is made with a psychologist several weeks into the future. In the interim, A commits suicide. C and D are subject to liability for the deterioration of A's mental health status caused by the delay in care if A decided to forego other opportunities of obtaining assistance in reliance on C's and D's promised assistance.

Finally, the following illustration should be added to Restatement section 323 regarding the liability of an IHE generally for student suicide:

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151. *See id.* ("[I]t would be far preferable for college's student-life staff to learn of a student's mental problems, including suicidal thoughts, and encourage him to see an expert mental-health clinician to address those problems.").

152. This Note and these proposed illustrations do not purport to eliminate the difficulties courts will continue to face in determining when an IHE has been negligent and when an IHE's negligence caused a student's suicide. Courts, however, are not unfamiliar with the task of making judgments on imprecise issues of negligence and causation.

> A is an enrolled student at B University. Administrators at B University are made aware of A's suicidal ideations and/or suicidal threats, and convince A to seek assistance at B's mental health center. B's program is designed and/or operated in a negligent manner. A commits suicide while receiving services from and participating in B's program. B University is subject to liability for the deterioration of A's mental health status that resulted from B's negligently designed and/or operated mental health program.

In adding these or similar illustrations, the Restatement could guard against the negative effects of foreseeability-generated duty of care of the *Shin* and *Schieszler* courts, while providing courts with guidance for imposing liability on IHEs and their nonclinician administrators in appropriate circumstances.

CONCLUSION

Courts should not find that IHE nonclinicians have a duty of care to prevent a foreseeable student suicide. The public policy concerns underlying an imposition of tort liability weigh against the assignment of such a duty. Instead, courts can utilize the tort doctrine of negligent performance of undertaking to render services to hold IHEs liable for substandard design and/or administration of their suicide reduction protocol that directly and negatively affect a student's risk of suicide. This latter theory of liability can ensure that IHEs take seriously the issue of student suicide, without creating perverse consequences or upending the law's abandonment of the in loco parentis relationship between IHEs and their students. IHEs are in the early stages of developing effective suicide prevention programs, and the law should not dictate or distort colleges' assessments of how they may best address the mental health issues of their students. Liability pursuant to negligent performance of undertaking to render services requires that IHEs implement and operate any service programs they choose to adopt with due care, but it leaves sufficient latitude for individual colleges and universities to explore, develop, and implement effective and feasible suicide reduction techniques in light of their student body, resources, and overall educational philosophy.