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Shared Responsibility: The Duty to Legal Externs

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SHARED RESPONSIBILITY: THE DUTY TO LEGAL EXTERNS

*Kathleen Connolly Butler**

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I. INTRODUCTION

As a torts professor, I supervise students in legal externships only occasionally, yet of the fewer than a dozen students I have overseen, two have reported potentially dangerous situations. One worked for a verbally abusive solo practitioner whose medication caused violent mood swings and whose urban office was burglarized during working hours.¹ Another student extern was working alone at night in the office, when an angry client, a criminal defendant, began pounding on the office door, demanding to be let in. Field placements provide law students with valuable real-world experiences, but the real world can be a dangerous place. When law schools send students off-campus for practical training, the students are vulnerable to dangers from the neighborhoods they work in, their field supervisors, their clients, opposing parties, and people with grudges against the legal system.²

Are law schools, then, responsible for the safety of these tuition-paying students whom they have placed in externships? The fact that legal externs are adult graduate students in workplaces and neighborhoods beyond the physical control of their law schools would seem to weigh against such an obligation. The field supervisors are more aware than the law schools of the potential dangers to externs and are better situated than the schools to guard against them. The externs themselves are, in terms of their ability to care for themselves, not

¹ She was removed from her placement.

² See *infra* Part II.B.

much different from the working attorneys they will soon be and thus have such significant personal responsibility for their own safety that it could argue against imposing a duty on the law schools. Yet a recent Florida case suggests that, despite issues of control, the role of supervising attorney, and the maturity of law students, courts may rule that law schools owe their externs a duty of care. In an analogous situation, the Florida Supreme Court held that Nova Southeastern University owed a duty of care to a Ph.D. candidate in psychology who was fulfilling a required clinical practicum off-campus when she was abducted from the parking lot at her assigned agency and then raped.³

For factual and legal background, Part II of this article examines the benefits and risks of legal externships, and then Part III explains the duty concept and its centrality to student negligence suits against colleges and universities and traces courts' evolving views of the duty question in these cases. Part IV examines recent decisions most analogous to the externship relationship, and Part V predicts how, in a transitional era of college duty law, courts are likely to rule on the duty of law schools to externs. Finally, Part VI proposes and illustrates the application of a facilitator model of shared responsibility to guide law schools and courts regarding duties to legal externs.

II. THE FIELD PLACEMENT: BENEFITS AND RISKS

A. *The Growing Role of Field Placements in Legal Education*

Most law schools now offer some kind of field placement program that allows students to earn academic credit by working in law firms, government agencies, courts, legal aid offices, and other real-world settings.⁴ Student externs work for free and pay their law schools for the experience,⁵ which is supervised by both an on-site attorney who focuses on the work product and job performance and a faculty member who addresses broader concerns involved in learning to be a reflective and effective attorney.⁶

The increased popularity of externships stems in part from external pressures. Law students have demanded practical legal experience,⁷ making externship programs a good marketing tool,⁸ and since a 1992 American Bar

³ Nova Southeastern Univ., Inc. v. Gross, 758 So. 2d 86 (Fla. 2000).

⁴ Robert F. Seibel & Linda H. Morton, *Field Placement Programs: Practices, Problems and Possibilities*, 2 CLINICAL L. REV. 413, 423-24 (1996).

⁵ David F. Chavkin, *Training the Ed Sparers of Tomorrow: Integrating Health Law Theory and Practice*, 60 BROOK. L. REV. 303, 318 n.53 (1994).

⁶ Seibel & Morton, *supra* note 4, at 417-18.

⁷ *Id.* at 413.

⁸ See, for example, the following law-school web pages, touting their externship programs: Boston College Law School, <http://www.bc.edu/schools/law/services/academic/programs/clinical/externship>; Pace Law School, <http://www.law.pace.edu/jjls/externsh.html>; Quinnipiac University

Association (ABA) Task Force Report on legal education, state bar associations have increasingly charged law schools with the responsibility of teaching lawyering skills as part of the J.D. curriculum.⁹ In addition, the ABA now requires law schools to “offer to all students: . . . adequate opportunities for instruction in professional skills”¹⁰ and to “offer live-client or other real-life practice experiences.”¹¹

The ABA Task Force Report, known as the MacCrate Report, found that law schools did well at teaching legal analysis, research, and writing, but that graduates began their first jobs otherwise unprepared to work as lawyers because they lacked critical lawyering skills and professional values.¹² The MacCrate Report urged law schools to train students in ten lawyering skills: problem solving, legal analysis and reasoning, legal research, factual investigation, communication, counseling, negotiation, litigation and alternative dispute resolution, organizing and management of legal work, and recognizing and resolving ethical dilemmas.¹³ The Report also called on law schools to instill professional values beyond those embodied in the Rules of Professional Conduct, in particular, provision of competent representation; striving to promote justice, fairness, and morality; striving to improve the profession; and professional self-development.¹⁴ In response to the Report, many schools performed self studies to examine whether and how they were teaching the Report’s critical lawyering skills and values, and some made curricular changes including greater emphasis on in-house clinical and field placement experiences.¹⁵

School of Law, <http://www.quinnipac.edu/x1600.xml>; University of Michigan Law School, <http://www.law.umich.edu/curriculum/externshipsandindependantstudy> [misspelling of “independent” is in URL]; University of Missouri-Columbia School of Law, <http://www.law.missouri.edu/career/externshipprograms.htm>; University of Nebraska College of Law, <http://www.unl.edu/lawcoll/externship.html>; and Whittier Law School, <http://www.law.whittier.edu/career/career.htm>.

⁹ See Robert MacCrate, *Educating a Profession: From Clinics to Continuum*, 64 TENN. L. REV. 1099, 1128-29 (1997); Seibel & Morton, *supra* note 4, at 413. State bar associations were responding to The Task Force on Law Schools and the Profession: Narrowing the Gap, *Legal Education and Professional Development – An Educational Continuum*, 1992 A.B.A. SEC. ON LEGAL EDUC. & ADMISSIONS TO THE BAR. Because this report is commonly referred to as the “MacCrate Report,” after the task force chairperson Robert MacCrate, it will be referred to hereinafter in this article as the “MacCrate Report.”

¹⁰ ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS § 302(c)(1) (2002).

¹¹ *Id.* § 302(c)(2).

¹² MacCrate, *supra* note 9, at 1131.

¹³ Jay M. Feinman, *The Future History of Legal Education*, 29 RUTGERS L.J. 475, 480 (1998); MacCrate, *supra* note 9, at 1131; MacCrate Report, *supra* note 9, at 235, 330.

¹⁴ MacCrate Report, *supra* note 9, at 235-36, 330-34.

¹⁵ See MacCrate, *supra* note 9, at 1131. The MacCrate Report is regarded by some as a “landmark,” C. Michael Bryce & Robert F. Seibel, *Trends in Clinical Legal Education*, N.Y. ST. B.J., June 1998, at 26, 27, and a “defining moment.” Feinman, *supra* note 13, at 480. For a more re-

The shift away from paid summer clerkships or part-time jobs as the only practical legal experience students gain during law school has also occurred because law schools recognize that practical, legal experience, overseen by a faculty mentor, helps law school graduates to be better lawyers from the outset of their careers and beyond because hands-on training can meet many student needs more ably than classroom instruction.¹⁶ Certainly, the key lawyering skills identified in the MacCrate Report are best served in a real-life context that lets externs both observe the skills in action and practice those skills themselves.¹⁷ For example, externships can provide intensive research, writing, and analytic problem-solving in a whole-case context.¹⁸ The field placement also helps students to develop personal standards of professional conduct as they observe and reflect upon the professional conduct of the attorneys at the externship site and confront ethical and professional-values questions of their own.¹⁹ Properly guided, the externship teaches students to reflect upon their skills, choices, and values and helps them to become reflective lawyers responsible for their professional growth.²⁰

The externship further enhances professional development by allowing students to experience career possibilities and develop professional contacts while still in law school.²¹ Indeed, the career-shopping aspect of the externship may benefit the community as a whole, as students who might not otherwise have chosen a public-service or government career follow those paths as a result of their externship experiences.²² Even if students do not choose public-service or government careers, these agencies benefit from free student labor during the externship because ABA regulations do not permit students to be paid for work they perform for academic credit.²³

served analysis of the initial impact and continuing significance of the report, see generally Russell Engler, *The MacCrate Report Turns 10: Its Impact and Identifying Gaps We Should Seek to Narrow*, 8 CLINICAL L. REV. 109 (2001).

¹⁶ See Seibel & Morton, *supra* note 4, at 413-14; see also William Wesley Patton, *Creating an Externship Consortium: The GLACE Experience*, 4 T.M. COOLEY J. PRAC. & CLINICAL L. 233, 242-49 (2001).

¹⁷ See Liz Ryan Cole, *Lessons from a Semester in Practice*, 1 CLINICAL L. REV. 173, 175 (1994).

¹⁸ See *id.*

¹⁹ See generally Marty Geer, *Law School Externships: Building Another Bridge over Troubled Waters*, NEV. LAW., May 2002, at 15; Lisa G. Lerman, *Professional and Ethical Issues in Legal Externships: Fostering Commitment to Public Service*, 67 FORDHAM L. REV. 2295 (1999).

²⁰ See J.P. OGILVY, ET AL., *LEARNING FROM PRACTICE: A PROFESSIONAL DEVELOPMENT TEXT FOR LEGAL EXTERNS* 1-2 (1998); Lerman, *supra* note 19, at 2296-97; Seibel & Morton, *supra* note 4, at 419-20.

²¹ See OGILVY, ET AL., *supra* note 20, at 1-2; Lerman, *supra* note 19, at 2295, 2297.

²² Lerman, *supra* note 19, at 2297.

²³ *Id.* at 2295 (citing ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS § 306(a) interpreta-

Another educational advantage is that the externship can supplement the law school curriculum, not only by exposing students to legal subjects not found in the course catalogue, but also by improving their understanding and retention of subjects they have studied in law school and deepening students' expertise in these areas through a more nuanced, detailed look in a whole-case context.²⁴ Allowing students to gain substantive knowledge through externships is an advantage to the law schools as well because providing enough faculty to address the wide range of subjects that interest students entering an ever more specialized legal profession may not be economically possible, nor would staffing clinics in every area of student interest.²⁵

In some instances, externships can be more valuable than course work because, as adult learners, law students benefit from the hands-on, experiential learning provided in the externship setting.²⁶ Adults learn better by using knowledge and practicing skills in the settings in which the knowledge and skills are meant to be used.²⁷ Adults prefer to learn and will learn more successfully when they are active participants involved in planning their learning, rather than passive participants following the educational goals set by someone else.²⁸

The externship helps to prepare the whole lawyer who works and lives in the real world outside the classroom — a lawyer who must be attentive to and serve client needs, wrestle with ethical issues, manage her time, reconcile the practice of law with her personal values, wangle input from a distant boss or appease an overbearing one, keep the secretaries in her camp, serve the community, and build professional relationships. With the aid of a faculty mentor and a field supervisor, the extern can make her first mistakes in a more supportive environment, begin taking intelligent steps in the career-long process of handling these challenges, and walk into that first job as a more competent and confident lawyer.

B. *Potential Dangers in Legal Externships*

Working for lawyers and judges to earn course credit exposes law students to the dangers that lawyers and judges face, and the profession daily places lawyers in emotionally charged conflict situations that can fuel vio-

tion 1 (1979)); *see also* ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS interpretation 305-2 (2002); OGILVY, ET AL., *supra* note 20, at 2.

²⁴ Cole, *supra* note 17, at 175.

²⁵ Seibel & Morton, *supra* note 4, at 420-21.

²⁶ *See* OGILVY, ET AL., *supra* note 20, at 3; Kimberlee K. Kovach, *The Lawyer as Teacher: The Role of Education in Lawyering*, 4 CLINICAL L. REV. 359, 373-75 (1998); *see also* Cole, *supra* note 17, at 177-78; Seibel & Morton, *supra* note 4, at 418-19.

²⁷ *See* OGILVY, ET AL., *supra* note 20, at 8; Kovach, *supra* note 26, at 374.

²⁸ *See* OGILVY, ET AL., *supra* note 20, at 7-9; Kovach, *supra* note 26, at 374.

lence.²⁹ Violence against attorneys has been on the rise since the 1980s,³⁰ and in the current climate of hostility towards the law and legal authority, angry litigants may attack opposing counsel, representing counsel, or the presiding judge.³¹ Most attacks against attorneys occur in the courtroom during trials and in legal offices, but violence against lawyers also occurs outside the workplace, in parking lots, and at home.³² After all, an attorney's work place is not just the office. Lawyers travel to investigate facts, meet with clients, and take depositions. They can be victims of violence at any place and any time.³³ Externs could become targets of violent anger because of their own involvement in cases or be harmed because they are with attorneys or judges who are attacked.

Some practice areas are more dangerous for lawyers than others. Family law, because of the intense, hostile emotions involved in custody and support issues,³⁴ is one of the most dangerous fields,³⁵ as evidenced by a 1997 survey of members of the ABA Section of Family Law. Twelve percent of the respondents had at least once been victims of violence by an opposing party or a client, and sixty percent had been threatened by an opposing party and seventeen percent by their own clients.³⁶ News accounts bring these statistics to life: a lawyer stabbed in the arm by his client's former husband after a custody case;³⁷ another divorce attorney shot and killed by his client's former husband, a graduate student,³⁸ a judge shot to death after an alimony hearing.³⁹ Another high risk

²⁹ See Stephen Kelson, *An Increasingly Violent Profession*, UTAH ST. B.J., March 2001, at 8, 8-9.

³⁰ *Id.* at 8.

³¹ See Harold J. Bursztajn & James T. Hilliard, *Ask the Expert—Violence Against Attorneys and Judges: Protecting Yourself Before and After a Threat*, at <http://www.forensicpsych.com/articles/artAskexp06.html> (last visited Aug. 20, 2003).

³² See Stephen Kelson, *Violence Against Lawyers*, 23 LEGAL PROF. 197, 200 (1999) [hereinafter *Violence Against Lawyers*]; Kelson, *supra* note 29, at 6.

³³ See *Violence Against Lawyers*, *supra* note 29, at 4.

³⁴ See Bursztajn & Hilliard, *supra* note 31, at 2.

³⁵ See *id.*; Kelson, *supra* note 32, at 197. When I practiced law in central Illinois, my local courthouse searched entrants only on the days of major murder trials, and the attorneys could frequently be heard joking about this because everyone knew that the courthouse was a much more dangerous place on the day of a divorce or custody hearing.

³⁶ Kelson, *supra* note 29, at 2.

³⁷ See *id.* (citing *Husband Charged in Court Stabbing*, VANCOUVER SUN, Nov. 30, 1990, at B4).

³⁸ See *Violence Against Lawyers*, *supra* note 32, at 200 (citing *Man Kills Former Wife's Lawyer, then Himself*, MILWAUKEE J. SENTINEL, Dec. 2, 1995, at 6).

³⁹ See Kelson, *supra* note 29, at 4 (citing *Panhandle Mourns 3 Slain in Courthouse*, MIAMI HERALD, Jul. 30, 1987).

practice area, for lawyers and judges, is criminal law.⁴⁰ For example, the defendant in a sexual assault case tried to hire someone to kill the victim and his attorney.⁴¹ A man awaiting charges of stock fraud conspired to murder the judge who had refused his bail.⁴² An attorney who handled child murder and civil rights cases was murdered as he walked to court.⁴³

In addition to high-risk cases, there are high risk clients, who can be triggered into violence by certain volatile situations, such as losing cases they expected to win or by falling behind in legal fees but feeling entitled to continued legal services.⁴⁴ The workers' compensation claimant who killed his lawyer and held fourteen people hostage before killing himself,⁴⁵ the man frustrated by a bank account and property dispute who began shooting in a law office,⁴⁶ and the client who shot and killed a lawyer over a billing dispute⁴⁷ may have been such high-risk clients.

The dangerous client could be more dangerous to a law student not experienced in client management than to an experienced lawyer. The younger, traditional law student, who enters the J.D. program fresh from undergraduate school, may be a chronological adult but lack the experience to recognize and read risky situations. Yale Law School students representing a client who had

⁴⁰ *Id.* at 4; see also Bursztajn & Hilliard, *supra* note 31, at 2.

⁴¹ *Violence Against Lawyers*, *supra* note 32, at 200 (citing *Man Accused of Plot to Kill Victim, Lawyer*, MILWAUKEE J. SENTINEL, Mar. 20, 1992, at A8).

⁴² Kelson, *supra* note 29, at 9 (citing *Man in Stock Fraud Case is Charged with Plotting to Kill Judge Who Raised His Bail*, N.Y. TIMES, Aug. 10, 2000).

⁴³ *Id.* at 4 (citing *Arrest Made in Lawyer Shooting*, ALBUQUERQUE TRIB., Mar. 6, 2000, available at www.abqtrib.com/archives/news00/030700_vigil.shtml).

⁴⁴ Bursztajn & Hilliard, *supra* note 31, at 3. According to a clinical psychiatrist who consults to attorneys nationally:

Certain explosive situations can compound the risk associated with a high-risk case and/or client. Some examples are: (1) A client feels victimized by society. (2) A client sees any authority (including government and the law) as the enemy. (3) A client falls behind in paying legal fees, but still feels entitled to an attorney's services. (4) A client has been inadequately prepared for the traumatic aspects of litigation. (5) A client loses a case he or she expected to win. (6) A client wins the case, but legal vindication does not bring the psychological resolution the client desired. (7) When a legal impasse is reached, the attorney offers to withdraw. The client, feeling abandoned and helpless, becomes enraged.

Id.

⁴⁵ See *Violence Against Lawyers*, *supra* note 32, at 200 (citing *Claimant Kills Lawyer, Self After Standoff*, CHI. TRIB., Sept. 20, 1996, at 14).

⁴⁶ See *id.* (citing Neil Steinber, *Man Charged in 2 Slayings at Loop Office*, CHI. SUN-TIMES, Feb. 28, 1994, at 11).

⁴⁷ See *id.* (citing William Recktenwald, *Lawyer is Slain in Loop Office: Shooting Follows Dispute over Bill*, CHI. TRIB., April 30, 1996, at 1).

stolen to support her cocaine habit befriended her by “driving her to court appearances, arranging for her to enter an inpatient drug treatment program and driving her there, and listening to and counseling her at all hours of the day and night, and on weekends.”⁴⁸ The clinical instructors encouraged the students to believe that representing the client “meant offering personal and logistical support that might help her stay out of prison and regain custody of her children.”⁴⁹ Yale students, representing homeless people threatened with expulsion from the New Haven train station, helped their clients confront the police by spending the night in the station with them.⁵⁰ Undoubtedly, the students learned important lessons about compassion and their clients’ real needs, yet either of the situations, with students’ very personal involvement in potentially volatile events, could have ended with physical injury to the students.

Sadly, the field supervisors themselves could pose the threat. Sexual harassment has been called the “dirty little secret” of the legal profession.⁵¹ A 1989 survey found that more than sixty percent of women lawyers had experienced unwelcome sexual conduct, ranging from teasing to attempted or actual rape on the job.⁵² The student extern is likely to be more vulnerable to sexual harassment than a female attorney. Studies show that from thirty percent to seventy percent of women in higher education are victims of sexual harassment,⁵³ and the particularly vulnerable groups include graduate students and female students in male-dominated fields.⁵⁴ Field supervisors can prey on externs who do not want to jeopardize the career benefits or academic credit that the externship provides.⁵⁵

⁴⁸ Stephen Wizner, *Beyond Skills Training*, 7 CLINICAL L. REV. 327, 335 (2001).

⁴⁹ *Id.* This example is from an in-house clinic and not an off-site externship, but it illustrates the kinds of situations that students may find themselves in as they leave the classroom and begin acting like lawyers.

⁵⁰ *Id.*

⁵¹ Stephanie Benson Goldberg, *Law’s ‘Dirty Little Secret’*, A.B.A. J., Oct. 1990, at 34.

⁵² Deborah K. Holmes, *Structural Causes of Dissatisfaction Among Large-Firm Attorneys: A Feminist Perspective*, 12 WOMEN’S RTS. L. REP. 22 (1990). The survey was conducted by West Publishing and the *National Law Journal*. *Id.*

⁵³ Cynthia Grant Bowman & Mary Beth Lipp, *Legal Limbo of the Student Intern: The Responsibility of Colleges and Universities to Protect Student Interns Against Sexual Harassment*, 23 HARV. WOMEN’S L.J. 95 (2000).

⁵⁴ *Id.* at 104, & n.26. The other highly vulnerable women are women of color, students in small departments or colleges, and economically disadvantaged students. *Id.*

⁵⁵ *Id.* at 37-38. *Harrington v. Louisiana State Board of Elementary and Secondary Education*, 714 So. 2d 845 (La. App. Ct. 1998), illustrates the most severe potential danger in placing students under the supervision of instructors in the field. In that case, the director of a community college culinary program, who performed half his work in the field, raped his twenty-year-old teaching assistant at the end of a working evening in which she had assisted him with a wine tasting and joined him in meeting restaurant owners and chefs. *Id.* at 847-48.

Finally, it is possible that the student, like the plaintiff in *Nova Southeastern v. Gross*,⁵⁶ could serve the externship in a dangerous neighborhood. The law student could work, for example, at a legal aid office located in an area convenient for low-income clients but more dangerous than the law firm in a neighborhood full of law firms. The extern could also be sent to a dangerous neighborhood to interview clients or witnesses or to view an accident scene.

Unlike the summer clerkship, the externship is overseen by a faculty member,⁵⁷ and the student pays tuition and receives academic credit.⁵⁸ The potential dangers to externs are, therefore, dangers in a curricular activity, and that distinguishing fact raises the question of the law school's responsibility for the safety of externs.

III. THE DUTY ANALYSIS IN NEGLIGENCE ACTIONS BY STUDENTS AGAINST COLLEGES AND UNIVERSITIES

The question of what duties law schools owe externs is a subset of the broader, unsettled question of what duties colleges and universities owe their students. Understanding the current, relevant case law requires a grasp not only of general duty concepts but also of how judicial application of those concepts to university law has evolved over the past few decades. To that end, Section A explains why duty is the central issue in college students' negligence suits against their schools but has only relatively recently become the gate-keeping issue. Section B then reviews key duty concepts necessary to understanding the history and present state of students' injury cases. In Section C, early, influential no-duty cases are placed in their proper context as judicial attempts to perpetuate fallen immunities and protective tort doctrines. Finally, the trend away from these cases towards greater judicial willingness to impose duties of care upon colleges and universities is considered in Section D.

A. *The Centrality of Duty*

If a law student injured in the course of an externship sues her law school for negligence, she will have to prove that the law school owed her a duty of care and breached that duty, thereby actually and proximately causing her harm.⁵⁹ In addition, she will face defenses based on her own assumption of the risk or contributory fault.⁶⁰ The past few decades of university law have demonstrated that among all these issues, the central battle of the litigation will

⁵⁶ 758 So. 2d 86 (Fla. 2000).

⁵⁷ See *supra* note 6 and accompanying text.

⁵⁸ See *supra* notes 5-6 and accompanying text.

⁵⁹ See 1 DAN B. DOBBS, *THE LAW OF TORTS* 269 (2000).

⁶⁰ See *id.*

be the question of whether the law school owed the student extern a duty of care.⁶¹

Colleges and universities fight hard on the duty issue because it is the most useful tool for defeating liability.⁶² Duty is an issue of law for the court,⁶³ therefore, a conclusion that the school owed the student no duty ends the lawsuit before a jury can evaluate the reasonableness of the school's conduct.⁶⁴ No duty means no more negotiations, no more discovery and investigation, no settlement, and no financial liability.⁶⁵ When a court determines that the school owed the student a duty of care, the case continues with further negotiations, further investigation and preparation, and further hearings.⁶⁶ Even if the school believes that it has a good argument that it acted reasonably, that the causal link is too tenuous, that the student failed to exercise reasonable care for her own safety or assumed the risk that befell her, these issues will be determined by a jury, which is a more costly, more time-consuming, and more uncertain process. Once a duty is found, the school that believes it has a good case may settle anyway.⁶⁷

Therefore, duty is the key question, but the law is not fully settled on what duties colleges and universities owe their students because duty did not become the focus of litigation between students and their college and universities until the 1970s. From the beginning of American history until the early 1960s, colleges and universities had almost no liability for student claims based on safety or discipline because institutions of higher learning were shielded by immunities and other protective tort doctrines, such as *in loco parentis*, proximate cause, contributory negligence, and assumption of the risk.⁶⁸ Student dis-

⁶¹ See ROBERT D. BICKEL & PETER F. LAKE, *THE RIGHTS AND RESPONSIBILITIES OF THE MODERN UNIVERSITY: WHO ASSUMES THE RISKS OF COLLEGE LIFE?* 10-11, 67 (1999). This book is a must-read for anyone interested in how courts have approached the duty question when students sue their colleges and universities.

⁶² See *id.* at 67, 76.

⁶³ *Id.*; 1 DOBBS, *supra* note 59, at 270.

⁶⁴ BICKEL & LAKE, *supra* note 61, at 96.

⁶⁵ *Id.* at 67, 96.

⁶⁶ *Id.*

⁶⁷ *Id.* at 67, 90.

⁶⁸ Peter F. Lake, *The Rise of Duty and the Fall of In Loco Parentis and Other Protective Tort Doctrines in Higher Education*, 64 MO. L. REV. 1, 1-9 (1999). Although there never was a university immunity, a de facto immunity arose by courts' analogizing universities to other groups such as parents, charities, government, and social hosts, which did enjoy substantial immunities. *Id.* at 4. A particularly strong shield for institutions of higher education was *in loco parentis*. Parents sent their "children" off to college, and the colleges and universities stepped into the parents' almost complete tort immunity. Their *in loco parentis* role shielded colleges and universities from student claims based on regulations or discipline. *Id.* at 4-6; see also BICKEL & LAKE, *supra* note 61, at 23-25, 29.

putes were usually handled quietly between the student and the school. The legal system was not involved.⁶⁹

Universities began to lose their legal insularity in the 1960s. First, a series of cases recognized students as constitutional adults entitled to minimum constitutional rights in their interactions with their schools.⁷⁰ These rulings ultimately toppled the doctrine of *in loco parentis*, which had placed colleges in an authoritarian, controlling position over students and had shielded them from law suits regarding student discipline and regulation.⁷¹ During the mid-70s to mid-80s, several significant trends even further diminished the protection from liability that colleges and universities had enjoyed: the adoption of comparative fault, the relaxation of proximate causation rules to require guarding against foreseeable third party misconduct — even criminal misconduct, and the collapse of traditional charitable and governmental immunities.⁷² When the traditional shields had fallen, duty became the gate-keeping issue that controlled whether colleges and universities were liable for injuries to students.⁷³

B. *The Duty Concept*

The careless defendant who injured the plaintiff will not be liable for the injury if the court determines that the defendant had no legal obligation to the plaintiff to act carefully. That legal obligation to exercise care is termed a “duty,” and duty is the first element of a negligence cause of action.⁷⁴ The question for the court is whether the plaintiff was entitled to protection,⁷⁵ and in most cases the answer is simple, so simple that it is not even contested. As a general rule, whenever it is foreseeable that a failure to use reasonable care would unreasonably risk harm to others or their property, the defendant is legally obligated to use reasonable care — he has a duty.⁷⁶ Drivers must drive carefully because, if they do not, their passengers, other drivers and their passengers, or pedestrians could be hurt. The driver who is sued for mowing down a jogger

⁶⁹ See BICKEL & LAKE, *supra* note 61, at 17-18.

⁷⁰ Lake, *supra* note 68, at 3. The first such decision was *Dixon v. Alabama*, 294 F.2d 150 (5th Cir. 1961), in which black students were perfunctorily dismissed from a public university on vague terms but presumably because they participated in civil rights demonstrations. The Fifth Circuit found that the students were constitutional adults with basic constitutional rights of fair play and process, which the college could not deny. *Id.* at 158-159; see also BICKEL & LAKE, *supra* note 61, at 39-43.

⁷¹ BICKEL & LAKE, *supra* note 61, at 29-30, 42.

⁷² Lake, *supra* note 68, at 11.

⁷³ *Id.*

⁷⁴ 1 DOBBS, *supra* note 59, at 269-70.

⁷⁵ See *id.* at 582.

⁷⁶ BICKEL & LAKE, *supra* note 61, at 71; 1 DOBBS, *supra* note 59, at 578.

will not bother to contend that he had no duty of care because the existence of his duty is clear.

Not all cases are so simple. The general principle requiring us all to act carefully to avoid foreseeable injury to others is riddled with exceptions,⁷⁷ and when sued by their students, colleges and universities almost always invoke the exceptions related to affirmative duties.⁷⁸ The school will characterize the plaintiff's theory of negligence as nonfeasance, a claim based on the defendant's pure failure to act for the plaintiff's benefit when the defendant was not the source of the danger.⁷⁹ The fact that care may have been easily provided and that harm was foreseeable if care was not provided is not a sufficient basis for imposing a duty in a nonfeasance case.⁸⁰ A court will not impose an affirmative duty to act unless the plaintiff proves that the defendant stood in a special relationship with her or voluntarily assumed a duty to act with care.⁸¹ Therefore, the injured student will likely face a motion for dismissal or summary judgment based on rules of "no duty to protect," "no duty to rescue," or "no duty to control the conduct of third parties," all subsets of the affirmative duty rule.⁸²

According to the Restatement (Second) of Torts, special relationships that impose an affirmative duty of protection, rescue, or control include the relationships between a common carrier and its passengers, an innkeeper and its guests, a possessor of land held open to the public and the entering public, and a custodian and ward.⁸³ A Caveat in the Restatement leaves open the possibility

⁷⁷ 1 DOBBS, *supra* note 59, at 578-79; CLARENCE MORRIS & C. ROBERT MORRIS, JR., MORRIS ON TORTS 126-142 (2d ed. 1980).

⁷⁸ BICKEL & LAKE, *supra* note 61, at 76-78.

⁷⁹ 2 DOBBS, *supra* note 59, at 853, 855-56. When a driver fails to stop at a stop sign and hits a jogger, failing to brake is not a pure failure to act. The driver acts by driving—the act of driving is the potential source of danger—and the driver must engage in that act with care. But if the driver had been sitting at a stop sign and had seen another car backing out of a driveway into the path of an oncoming jogger, he would have had no obligation to try to prevent the other car from hitting the jogger. His own driving did not present a danger to the jogger. Someone else's driving did. This driver is guilty only of nonfeasance, a failure to take affirmative action that might have helped the plaintiff, and the law does not impose affirmative duties to act, absent a special relationship or an assumption of the duty. A suit against this driver would fail for a lack of duty.

⁸⁰ According to RESTATEMENT (SECOND) OF TORTS § 314 (1965), "[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." The origin of this rule lies in the early common law distinction between "misfeasance" and "nonfeasance." *Id.* § 314 cmt. c.

⁸¹ 2 DOBBS, *supra* note 59, at 853; See RESTATEMENT (SECOND) OF TORTS §§ 314, 314A, 315, 323. There are other exceptions to the no affirmative duty rules, see generally RESTATEMENT (SECOND) OF TORTS §§ 314-328 (setting forth the duties of affirmative action), but these are the most relevant to the question at hand.

⁸² See DOBBS, *supra* note 59, at 853-54, 874-75; RESTATEMENT (SECOND) OF TORTS §§ 314, 315; RICHARD A. EPSTEIN, TORTS §§ 11.2, 11.5 (1999).

⁸³ RESTATEMENT (SECOND) OF TORTS § 314(A).

of other relationships that might impose a similar duty,⁸⁴ and case law in some states has expanded the list to include the relationship between primary and secondary schools and their students,⁸⁵ but courts have declined to find the relationship between college and student to be per se special.⁸⁶ Courts will expand the list of accepted special relationships to

a limited group of relations, in which custom, public sentiment and views of social policy have led the courts to find a duty of affirmative action. In such relationships the plaintiff is typically in some respect particularly vulnerable and dependent upon the defendant who, correspondingly, holds considerable power over the plaintiff's welfare. In addition, such relations have often involved some existing or potential economic advantage to the defendant. Fairness in such cases thus may require the defendant to use his power to help the plaintiff based upon the plaintiff's expectation of protection, which itself may be based upon the defendant's expectation of financial gain.⁸⁷

A plaintiff may also seek to overcome the "no duty to act" argument by proving that the defendant voluntarily assumed a duty to her, either by beginning performance of an act or by making a promise to act that demonstrated assumption of the duty.⁸⁸ The Restatement (Second) of Torts recognizes an affirmative duty when the defendant "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 . . . if . . . his failure to exercise such care increases the risk of such harm, or . . . the harm is suffered because of

⁸⁴ *Id.* § 314(A) caveat.

⁸⁵ See *infra* notes 127 and 147 and accompanying text. For example, if the jogger in note 79 *supra* had been a high school student on a cross-country team, and the defendant driver was his coach observing a practice run, then, where it is recognized, the special relationship between high school student and teacher would impose a duty. See 2 DOBBS, *supra* note 59, at 858; see also *Dailey v. L.A. Unified Sch. Dist.*, 470 P.2d 360, 363-64 (Cal. 1970). For a case declining to hold even the junior high or high school relationship special, see *Brum v. Town of Dartmouth*, 704 N.E. 2d 1147 (Mass. 1998). Case law has also expanded the list to include spouses, parents and children, and employers and employees. See 2 DOBBS, *supra* note 59, at 876.

⁸⁶ See *infra* notes 127-130, 148, and 172-73 and accompanying text.

⁸⁷ W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS 374 (1984).

⁸⁸ 2 DOBBS, *supra* note 59, at 854-55. This can also be thought of as a way of making the relationship special. *Id.* at 860; see also MORRIS & MORRIS, *supra* note 77, at 128, 131. If the driver in note 79 *supra* had told the jogger that he would follow along in his car to alert him to hazards by honking but then became absorbed in a cell phone conversation and did not watch out for hazards, a court might find that by making the promise, getting in his car, and following along, the driver had assumed a duty of care to the jogger.

the other's reliance upon the undertaking."⁸⁹ So, in addition to proving that the defendant began performance or promised to act, the plaintiff must show either that the defendant's negligence increased the risk of the personal injury or property damage suffered or that such harm was suffered in reliance upon defendant's performance.⁹⁰ The Restatement leaves open whether a defendant's mere promise, without starting any performance, is a sufficient undertaking to impose an affirmative duty,⁹¹ but the comments note that in cases where the plaintiff has been injured by relying upon the promise, courts tend to seek ways to characterize the defendant's conduct as having entered into performance.⁹² Professor Dobbs observes that courts "are entirely willing to impose liability for negligent nonperformance of a safety promise."⁹³

The defendant who has voluntarily assumed a duty may be held liable for negligent performance of the undertaking, failure to exercise reasonable care to complete the undertaking, or failure to exercise reasonable care to protect the other after discontinuing the undertaking.⁹⁴ The defendant's liability will be limited to the scope of the risk that the defendant's negligence created and to the harms that the undertaking was meant or reasonably expected to prevent.⁹⁵

It seems, then, that whether the injured student can establish that the college owed her a duty will turn on whether the court characterizes the case as one of misfeasance or nonfeasance, and if it finds nonfeasance, on whether it characterizes the relationship as special or the school's conduct or promises as assuming a duty that it did not otherwise have. These inquiries, however, may not always resolve the question. In negligence law, the court considers public policy under the duty issue, and in a particular case a court may find that social policy, the interests of justice, or the parties' own competing interests support or preclude a duty.⁹⁶ Many courts, deciding the duty issue, will apply a policy factor analysis that considers some or all of the following:

⁸⁹ RESTATEMENT (SECOND) OF TORTS § 323 (1965).

⁹⁰ DOBBS, *supra* note 59, at 861.

⁹¹ RESTATEMENT (SECOND) OF TORTS § 323 caveat & cmt. d. In the early development of tort law, mere failure to perform a promise, contrasted with actually entering into performance and performing carelessly, was regarded as nonfeasance, and action lay upon the contract and not tort principles. *Id* § 323 cmt. d.

⁹² *Id.* cmt. d.

⁹³ 2 DOBBS, *supra* note 59, at 872.

⁹⁴ *Id.*

⁹⁵ *Id.* at 861-62. Suppose the driver in note 79 *supra* told the jogger that he would drive ahead of him to shield him from oncoming traffic and did so, but the jogger was injured by a branch that fell from a tree. If the jogger sued the driver, contending that he had assumed a duty to protect him, the driver could successfully argue that falling tree limbs were outside the scope of the duty that he had assumed.

⁹⁶ 1 *id.* at 582.

- 1) foreseeability of harm to the plaintiff;
- 2) nature of the risk;
- 3) extent to which the transaction was intended to affect the plaintiff;
- 4) degree of certainty that the plaintiff suffered injury;
- 5) closeness of the connection between the defendant's conduct and the plaintiff's injury;
- 6) moral blameworthiness and responsibility of the defendant;
- 7) burden on the defendant and larger community if a duty is imposed;
- 8) social policy of preventing future harm (whether imposing a duty will tend to deter harm);
- 9) availability, prevalence, and cost of insurance for the risk involved; and/or
- 10) administrative factors, such as ease of administering a duty rule.⁹⁷

C. *Shielding Colleges and Universities with No-Duty Rules*

The loss of legal insularity that instated duty as the key issue in college students' negligence suits against their schools⁹⁸ did not create a new age of liability. Courts still thought of colleges and universities as special places that should be shielded from liability, and they used no-duty rules to accomplish a de facto immunity.⁹⁹ Beginning in the mid-'70s and continuing into the 1980s, courts generally characterized colleges and universities as bystanders to student activity, helpless to control the drunken, stoned, sex-crazed, hippie, but constitutionally adult, hordes who lived a spoiled, luxurious lifestyle on America's campuses.¹⁰⁰ As bystanders, the schools had not acted; they had created no risk.

⁹⁷ BICKEL & LAKE, *supra* note 61, at 202; 1 DOBBS, *supra* note 59, at 582; *see also* Doe v. Johnson, 817 F. Supp. 1382 (W.D. Mich. 1993); Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334 (Cal. 1976); Rowland v. Christian, 443 P.2d 561 (Cal. 1968).

⁹⁸ *See supra* notes 68-73 and accompanying text.

⁹⁹ BICKEL & LAKE, *supra* note 61, at 49.

¹⁰⁰ *Id.* at 50; *see infra* notes 157-60, 173 and accompanying text.

Therefore, courts treated injured students' theories of university negligence as premised on nonfeasance and requiring a special relationship before a duty could be imposed.¹⁰¹ In looking for this special relationship, the courts considered only the traditional categories, despite the Restatement's openness to expanding these categories. Of the traditional categories, the only one possibly applicable was a custodial relationship.¹⁰²

On the custodial relationship issue, students' newly won constitutional rights were used against them.¹⁰³ Courts ruled that, as constitutional adults, students could hardly be deemed in the custodial care of their schools. As adults, students were responsible for their own safety, and colleges and universities could not be expected to help them stay safe.¹⁰⁴ Courts characterized even university-sponsored activities as nonfeasance situations where no duty was owed absent a special relationship involving custodial control, and, of course, now that *in loco parentis* had fallen, the schools had no custodial control, no special relationship, no duty, no liability.¹⁰⁵ Even when students contended that a duty had been assumed, the courts rejected the argument on the ground that no *custodial* obligation had been assumed and did not consider that lesser obligations may have been undertaken and breached.¹⁰⁶ With a lack of judicial imagination, nostalgic courts saw the lost right to exercise rigid, authoritarian control as the only way to keep campuses safe.¹⁰⁷

1. *Bradshaw v. Rawlings*

*Bradshaw v. Rawlings*¹⁰⁸ is a highly influential 1979 opinion by the Third Circuit. Many cases have seized its argument that the inability of the modern American college to exercise custodial control over its students precludes finding a special relationship between student and university. The case is also frequently relied upon to reject an argument that university rules devised to

¹⁰¹ BICKEL & LAKE, *supra* note 61, at 49. Special relationships overcome this general rule rejecting affirmative duties. RESTATEMENT (SECOND) OF TORTS §§ 314A, 315 (1965); *see infra* notes 121, 127-35, 146, 169-70 and accompanying text.

¹⁰² *See* RESTATEMENT (SECOND) OF TORTS § 314A caveat; BICKEL & LAKE, *supra* note 61, at 78; *infra* text accompanying notes 127-35, 150-52, 169-73.

¹⁰³ BICKEL & LAKE, *supra* note 61, at 78; *see infra* notes 122-26, 157-58, 172 and accompanying text.

¹⁰⁴ BICKEL & LAKE, *supra* note 61, at 78; *see infra* text accompanying notes 122-24, 129, 172-76, 189.

¹⁰⁵ BICKEL & LAKE, *supra* note 61, at 78; *see infra* text accompanying notes 121-35, 169-76.

¹⁰⁶ *See infra* notes 127-30 and accompanying text.

¹⁰⁷ *See infra* notes 122-24, 157-58, 169-76 and accompanying text.

¹⁰⁸ 612 F.2d 135 (3rd Cir. 1979).

promote student safety created an assumed duty to enforce those rules.¹⁰⁹ A student at Delaware Valley College, Bradshaw had attended an annual sophomore class picnic, planned with the aid of a faculty supervisor, who co-signed the check used to purchase approximately seven half-kegs of beer by the underage class president.¹¹⁰ Most of the sophomore class was under the state drinking age, and university rules prohibited underage drinking, but the college duplicating center reproduced the beer-mug decorated flyers that the party organizers posted throughout campus to advertise the picnic.¹¹¹ The college provided no transportation, leaving the underage drinkers to find their own ways to and from the off-campus grove where the party was held.¹¹² The faculty sponsor did not attend the picnic or send anyone in his place who might have noticed that Rawlings, the student who was Bradshaw's ride back to campus, had become intoxicated.¹¹³ On the drive home, Rawlings lost control of his car, and the resulting accident rendered Bradshaw quadriplegic.¹¹⁴

The district court, which found that the college owed Bradshaw a duty of care and submitted the case to the jury, saw the college as an actor with knowledge of the dangers it had created by helping to plan and promote a party at which underage students would drink and then have to rely on private transportation to return to campus.¹¹⁵ To the district court, the case involved misfeasance, so that the duty question turned on whether an unreasonable risk of harm was foreseeable if care was not exercised.¹¹⁶ Under a duty, the college was required only to act reasonably, not to insure student safety.¹¹⁷ After the jury found the college liable to Bradshaw, and the district court denied a motion for judgment notwithstanding the verdict, the college appealed, contending that Bradshaw had failed to establish a duty of care.¹¹⁸

Writing for the Third Circuit, Judge Aldisert saw the case quite differently from the district court and overturned its opinion based on three intertwined themes: (1) that the relationship of the modern university with its students had changed radically, leaving the schools unable to exercise custodial control

¹⁰⁹ BICKEL & LAKE, *supra* note 61, at 57.

¹¹⁰ *Bradshaw*, 612 F.2d at 137.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Bradshaw v. Rawlings*, 464 F. Supp. 175, 180-81 (E.D. Pa. 1979), *aff'd in part and rev'd in part* by 612 F.2d 135.

¹¹⁶ *Id.* at 181.

¹¹⁷ *Id.*

¹¹⁸ *Bradshaw*, 612 F.2d at 137-38.

over students and keep them safe;¹¹⁹ (2) that imposing a duty would strap colleges with an impossible burden to fulfill, making them insurers of student safety;¹²⁰ and (3) that the college had not created a risk, the students had, so that the case was premised on nonfeasance and required a special custodial relationship between student and university if a duty was to be imposed.¹²¹

Regarding the first theme, Judge Aldisert explained that the relationship between college and student had changed dramatically in recent years. When institutions of higher learning were regarded as standing *in loco parentis* to their students, who were considered minors entrusted to their care, the schools could keep students safe by imposing and enforcing strict regulations on student conduct.¹²² Through the “campus revolutions of the late sixties and early seventies,” college students had “peaceably and otherwise” obtained greater rights, privileges, and freedoms and ended the *in loco parentis* doctrine.¹²³ As constitutional adults, freed from authoritarian university control, students had won the right to regulate their own lives: they had greater privacy rights; more liberal, even unlimited, visiting hours; and control over “the broad arena of general morals.”¹²⁴ Strict regulation of student conduct was now constitutionally forbidden, and the students had wanted it that way. Unable to regulate student conduct, the college was unable to control that conduct and therefore unable to keep students safe.

This vision leads to the second theme — the equation of duty with liability. To the Third Circuit, a university duty to the students meant liability. The court declared that its “beginning point” in analyzing the case was “a recognition that the modern American college is not an insurer of the safety of its students.”¹²⁵ As the modern American college was now unable to sanction students for misbehavior in their private lives, the court believed that the colleges were now helpless to keep students safe. A duty requiring them to do so would make them guarantors of student safety, liable whenever drunken students injured themselves or others.¹²⁶

¹¹⁹ *Id.* at 138-40.

¹²⁰ *Id.* at 138, 142.

¹²¹ *Id.* at 141.

¹²² *Id.* at 139.

¹²³ *Id.*

¹²⁴ *Id.* at 139-40.

¹²⁵ *Id.* at 138. Indeed, although this may be reading too much into imprecise writing, the Third Circuit also broadly stated that the “major question” presented was “whether a college *may be subject to tort liability* for injuries sustained by one of its students involved in an automobile accident when the driver of the car was a fellow student who had become intoxicated at a class picnic,” not narrowly as whether the college owed that student a duty. *Id.* at 136-37 (emphasis added).

¹²⁶ *Id.* at 138, 142.

The third theme, that this was a case of nonfeasance, was never explicitly stated, but the court's search for duty in the law of special relationships and the rhetoric employed throughout the opinion make clear that the court did not see the university as the risk creator. As students, not the school, were the source of danger, the school had to be in a special relationship with the student to owe him a duty. That duty could be found if the court expanded the traditional categories of special relationships to include that of college and student, just as the categories had been expanded to include the relationships between educational institutions and primary and secondary students.¹²⁷ The court found, however, that the momentous change in student rights and privileges precluded such an expansion. Although broadening the categories to include relationships between schools and elementary or secondary students was logical because these relationships involved minor children and traditional, custodial responsibilities,¹²⁸ the same logic did not apply to the relationship between college and student. Judge Aldisert equated constitutional adult status with actual maturity and the ability to make wise choices and so wrote that college students stood in a different relationship with their schools because they had "reached the age of majority and [were] capable of protecting their own self-interests."¹²⁹ The relationship had once been special, before college students gained minimal constitutional rights, but the source of the special relationship had been the fallen doctrine of *in loco parentis*.¹³⁰ By seeking greater freedoms, students had lost the custodial relationship that had been the source of a duty of care.

Although the Third Circuit declined to find the college and student relationship *per se* special, it considered whether the relationship between Bradshaw and Delaware Valley College had become custodial and therefore special.¹³¹ (The decision to analyze the problem in this manner seems to blur the concepts of special relationship and voluntary assumption of a duty.) Bradshaw had argued that a duty arose from college rules prohibiting alcohol consumption by any students, regardless of age.¹³² Because most students at the college would be under the state drinking age, the Third Circuit saw the prohibition as merely

¹²⁷ *Id.* at 140.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* at 138-39. *In loco parentis*, however, was never the source of a duty of care owed to students. It was a doctrine that allowed colleges and universities to step into the almost complete tort immunity enjoyed by parents and shielded them from suits based on regulation and discipline. Theodore Stamatakos, Note, *The Doctrine of In Loco Parentis, Tort Liability and the Student-College Relationship*, 65 IND. L.J. 471, 482-83 (1990) cited with approval in Lake, *supra* note 68, at 5.

¹³¹ *Bradshaw*, 612 F.2d at 140-41. The court found the record "not overly generous in identifying the interests possessed by the student." *Id.* Apparently, the student's interest in remaining free from serious personal injury was not a significant interest.

¹³² *Id.* at 141.

requiring students to obey state law, and such a requirement could hardly be seen as a voluntary assumption of custodial responsibility.¹³³ Therefore, the Third Circuit predicted “that the Pennsylvania courts would not hold that by promulgating this regulation the college had voluntarily taken custody of Bradshaw so as to deprive him of his normal power of self-protection or to subject him to association with persons likely to cause him harm.”¹³⁴ Without a custodial relationship, the case was not submittable to the jury.¹³⁵ The court did not consider the possibility that a lesser responsibility than custodial care, the responsibility to exercise reasonable care to enforce the college safety rules, had been assumed and breached. It was custodial care or nothing.

Bradshaw had also argued that the college owed him a duty to control the conduct of his drunken friend or to protect him in transportation to and from school activities since the college knew that students would drink beer at the party in violation of its regulations and state law, thereby creating a foreseeable risk to third parties.¹³⁶ Ridiculing Bradshaw’s argument as centered on the idea “that beer-drinking by underage college students, in itself, creates the special relationship,”¹³⁷ Judge Aldisert refused to recognize the college as an actor that had created any risks in this scenario. The court elaborated on “the fact that beer drinking by college students is a common experience”¹³⁸ to two ends: (1) that it is so common that it cannot really be regarded as the kind of harm-producing event that triggers a duty and (2) that it is so common that to find a duty would place “an impossible burden on the college.”¹³⁹ Bradshaw’s arguments that a duty here would not impose an impossible burden were dismissed, however, as blurring the duty and breach questions.¹⁴⁰

The three themes of *Bradshaw* rest on shaky foundations. First, granting students constitutional adult status is hardly the same as bestowing on them the maturity and judgment to exercise reasonable care for themselves, especially as many of them have just graduated from high school and are on their own for the first time in their lives. Second, the case easily could have been viewed as misfeasance, so that the plaintiff would not have had to play with the stacked deck of a special relationship inquiry. As the district court saw it, this case involved the college’s active sponsorship of a party by providing funds for alcohol

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* at 141.

¹³⁷ *Id.* at 142.

¹³⁸ *Id.*

¹³⁹ *Id.* The court also explained that the Pennsylvania Supreme Court had rejected social host liability for serving alcohol to visibly intoxicated guests and predicted that it would be even less likely to find a special relationship between the college and its students in this case. *Id.* at 141.

¹⁴⁰ *Id.*

and advertising that beer would be available.¹⁴¹ The school was not a mere bystander; it actively made the drinking possible and then did nothing to prevent the inevitable risk. This did not have to be a special relationship case at all.

Finally, imposition of a duty is not the same as imposition of liability, which the district court also recognized. A duty of reasonable care is not a duty of insurance, a duty to pay for any student injury, but a duty to act towards students with reasonable care and to compensate only those students injured because the college acted unreasonably. The “duty to protect” and “duty to control” are not duties to achieve protection and control but duties to act reasonably towards those goals.¹⁴²

Reasonable care, by its nature, is never impossible because it calls only for reasonable measures. Although stopping certain, individual students who want to drink and drive from doing so may indeed be impossible, taking reasonable steps to reduce the chances that other students will engage in this dangerous behavior is rather easy. The faculty sponsor could have inquired how the check was being spent and refused funds for alcohol. The faculty sponsor could have reminded the underage class president that alcohol rules applied off-campus and that student violators would be suspended. The faculty sponsor could have attended the picnic or sent another responsible adult employee in his place. The college could have refused to help advertise the picnic as a beer party. The college could have sent a van to shuttle students who drank too much. What the court really seems to find impossible is not living up to a reasonable care standard but changing the behavior of immature, constitutionally adult students who want to drink and behave recklessly, but whether one or all of these simple precautions would have prevented Bradshaw’s friend from driving drunk or Bradshaw from riding along with him is a causation question, not a question of the propriety of imposing a duty.

¹⁴¹ Bradshaw v. Rawlings, 464 F.Supp. 175, 180-81 (E.D. Pa. 1979), *aff’d in part and rev’d in part* by 612 F.2d 135.

¹⁴² The duties to take positive action imposed by common law are generally duties to act with reasonable care in order to give to others the aid or protection which the performance of the duty would afford them. The words “reasonable care” are here used to denote that the actor is required to do that which a reasonable man would believe to be necessary to afford the aid or protection to which the other is entitled, but no more.

RESTATEMENT (SECOND) OF TORTS, Topic 7, Scope Note (1965).

“Where the duty to rescue is required, it is agreed that it calls for nothing more than reasonable care under the circumstances.” KEETON ET AL., *supra* note 87, at 377. “In all such cases where the duty [to control third persons] does exist, the obligation is not an absolute one to insure the plaintiff’s safety, but requires only that the defendant exercise reasonable care.” *Id.* at 385. “The defendant’s relationship to the plaintiff has been recognized as a ground for requiring the defendant to take affirmative acts of reasonable care in a substantial body of cases.” 2 DOBBS, *supra* note 59, at 875.

2. The *Bradshaw* Line of Cases

From *Bradshaw v. Rawlings* came a line of cases characterizing the conduct of colleges and universities as nonfeasance and holding that colleges no longer *in loco parentis* to students were not in special relationships with them and did not assume duties to enforce their own safety provisions. The student plaintiff in *Baldwin v. Zoradi*¹⁴³ was also a passenger in a car driven by an intoxicated student. In this case, the student driver had become drunk in the college dormitory and then raced other drunk students.¹⁴⁴ The plaintiff contended that her university was negligent in its knowing failure to enforce its own alcohol prohibitions and in particular in the blind eye that dorm assistants turned to underage student drunkenness.¹⁴⁵ Explicitly finding this to be a case of nonfeasance, a California appellate court considered whether the relationship between a college student and her university was a special relationship.¹⁴⁶ The court acknowledged that elementary and high schools owed their students a duty of rule enforcement and supervision because school children have not attained full maturity and could not exercise the “discretion, judgment, and concern for the safety of themselves and others” that fully mature people can¹⁴⁷ but declined, because college students are adults, to find a similar obligation to college students based solely on the educational relationship.¹⁴⁸ Yet later in the opinion, considering the public policy implications of imposing a duty, the court declined to find a duty in part because students had *not* fully matured and needed freedom to make mistakes and learn from them: “Only by giving them responsibilities can students grow into responsible adulthood.”¹⁴⁹

The court also considered whether the student’s relationship to the university was one of such dependence that a special custodial duty was owed.¹⁵⁰ The plaintiff had argued that the dormitory contract, which gave the university the power to inspect the dorm and terminate the room license for reasons of health, safety, or general welfare and prohibited alcohol use, created a special relationship.¹⁵¹ The court rejected this argument because it was not apparent

¹⁴³ 176 Cal. Rptr. 809 (Cal. Ct. App. 1981).

¹⁴⁴ *Id.* at 811.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 812.

¹⁴⁷ *Id.* at 813 (quoting *Dailey v. L.A. Unified Sch. Dist.*, 470 P.2d 360, 364 (Cal. 1970)).

¹⁴⁸ *Id.* at 815.

¹⁴⁹ *Id.* at 818.

¹⁵⁰ *Id.* at 814.

¹⁵¹ *Id.*

that failure to enforce alcohol provisions would create an imminent danger to students.¹⁵²

The California appellate court was willing to look beyond the special relationship question and engage in a policy factor analysis.¹⁵³ This still did not produce, however, a finding of duty.¹⁵⁴ The court side-stepped the foreseeability question as easily outweighed by other factors¹⁵⁵ and found that the facts did not present a sufficiently close connection between the school's alleged negligence and the speed contest. More importantly, the court found that the university was not morally blameworthy in its nonfeasance.¹⁵⁶ Guided by *Bradshaw*, the court explained that the university had lost its authoritarian control over students and could not control student morals.¹⁵⁷ Feeling the sting of California student activism, the court wrote, "Since the turbulent '60's, California colleges and universities have been in the forefront of extension of student rights with a concomitant withering of faculty and administrative omnipotence. Drug use has proliferated."¹⁵⁸ To the court, the substance-abusing students were the parties with low morals, and "college administrators no longer control the general area of general morals."¹⁵⁹ In addition, and somewhat contradictorily, the failure to enforce prohibitions against alcohol use was not morally blameworthy because "the use of alcohol . . . is not so unusual or heinous by contemporary standards as to require special efforts . . . to stamp it out."¹⁶⁰ Concurring with *Bradshaw*, the court found that the decision to reserve the right to enforce state drinking laws did not impose a mandatory duty to do so.¹⁶¹

Although the legislature had repeatedly demonstrated a policy against drinking by minors, the policy factor of preventing future harm nonetheless weighed against the student because legislative prohibitions focused on active "giving" or "furnishing" of alcohol to minors and did not prohibit standing by as minors drank.¹⁶² Although the university did not stop student drinking, it also did not induce or encourage it. Therefore, policy concerns about underage drinking were not implicated. In addition, the court found that public policy

¹⁵² *Id.* at 815.

¹⁵³ *Id.* at 816; *see supra* notes 96-97 and accompanying text.

¹⁵⁴ *Baldwin*, 176 Cal. Rptr. at 816.

¹⁵⁵ *Id.* at 815-16.

¹⁵⁶ *Id.* at 816.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 817.

¹⁵⁹ *Id.* at 816.

¹⁶⁰ *Id.* at 817.

¹⁶¹ *Id.*

¹⁶² *Id.* at 817-18.

avored leaving underage students to their own devices when it came to drinking alcohol because “[o]nly by giving them responsibilities can students grow into responsible adulthood.”¹⁶³

Overstating the demands of a duty of reasonable care, the court found that the burden factor further weighed against finding a duty because “it would be difficult so to police a modern university campus as to eradicate alcoholic ingestion.”¹⁶⁴ Although considerations of the certainty of plaintiff’s injury and the availability of insurance weighed in the student’s favor, on balance, policy considerations supported a no-duty finding.¹⁶⁵

Building on *Bradshaw* and *Baldwin*, the Utah Supreme Court found in *Beach v. University of Utah*,¹⁶⁶ that the university owed no duty of care to an underage student injured on a required biology field trip.¹⁶⁷ After the curricular part of the day had ended, the plaintiff, along with her professor and other students, attended a lamb roast. There she drank four or five glasses of alcohol, and she continued to drink in the van driven back to the campsite by her professor. Her professor dropped her off, and on her way to her tent in the dark, the student became disoriented and fell off a cliff.¹⁶⁸ Although the case could easily have been characterized as the misfeasance of a college professor enabling his underage students to drink alcohol in violation of school rules and state law, the Utah Supreme Court saw it as an affirmative duty case, in which Beach, the injured student, was asking the university to “protect [her] from her own intoxication and disorientation on the night in question.”¹⁶⁹ This required a special relationship, the essence of which was dependence.¹⁷⁰ Among other unsuccessful arguments, Beach contended that university regulations prohibiting alcohol consumption by underage students created a special relationship,¹⁷¹ but the court, focused on whether the regulations made the relationship custodial, refused to find a duty because college students, who could vote and be tried as adults, were not juveniles.¹⁷² “We do not believe that Beach should be viewed

¹⁶³ *Id.* at 818.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 819.

¹⁶⁶ 726 P.2d 413 (Utah 1986).

¹⁶⁷ *Id.* at 414.

¹⁶⁸ *Id.* at 415.

¹⁶⁹ *Id.* at 415-16.

¹⁷⁰ *Id.* Beach’s counsel had conceded at oral argument that the student-teacher relationship was not enough to create a duty, and the court was unconvinced that a prior incident on a field trip made Beach sufficiently different from other students to impose a duty of care for her based on especial vulnerability. *Id.* at 416.

¹⁷¹ *Id.* at 417.

¹⁷² *Id.* at 418.

as fragile and in need of protection simply because she had the luxury of attending an institution of higher education.”¹⁷³

Quoting *Bradshaw*, the court explained that it was particularly important — even constitutionally required — to treat college students as adults, responsible for their own safety. Adding to the *Bradshaw* and *Baldwin* rhetoric, the court explained that

colleges and universities are educational institutions, not custodial. Their purpose is to educate in a manner which will assist the graduate to perform well in the civic, community, family, and professional positions he or she may undertake in the future. 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 assuring their safety and the safety of others. Fulfilling this charge would require the institution to babysit each student, a task beyond the resources of any school. But more importantly, such measures 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.¹⁷⁴

A “realistic assessment” of the relationship between parties precluded the court from finding a special relationship.¹⁷⁵ The duty was incapable of performance and at odds with the parties’ relationship.¹⁷⁶

Cherie Rabel, the plaintiff in *Rabel v. Illinois Wesleyan University*,¹⁷⁷ was an Illinois Wesleyan University (IWU) student living on campus in a dormitory.¹⁷⁸ Jack Wilk, also an IWU student, was a member of the Fiji fraternity, which was holding a lengthy, boisterous, drunken, day-time party, when Wilk summoned Rabel to the lobby of her dorm, grabbed her forcibly, threw her over his shoulder, and ran outside to run a gauntlet of fraternity members who were to hit him with bones as he passed.¹⁷⁹ Instead, Wilk fell, dropping Rabel and causing her serious, permanent head injuries.¹⁸⁰ The trial court dismissed

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 419 (internal citations omitted).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 418.

¹⁷⁷ 514 N.E.2d 552 (Ill. App. Ct. 1987).

¹⁷⁸ *Id.* at 554.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

Rabel's law suit against IWU on the pleadings on the ground that IWU did not owe Rabel a duty of care.¹⁸¹

On appeal, Rabel pointed out that IWU had marketed itself as a religious school with a tradition of supervising and controlling student activities and enforcing its rules prohibiting alcohol on campus.¹⁸² In reliance on the promise of a safe learning environment, students enrolled and paid the expensive IWU tuition.¹⁸³ Rabel contended that the representations that IWU would provide safety, the university rules that attempted to provide safety, and the premium tuition charged for providing safety, imposed a duty on the university to do what it said it would do.¹⁸⁴ That duty would be premised either on creating a special relationship or voluntarily assuming a duty.¹⁸⁵

The appellate court found that Illinois Wesleyan had not assumed a duty because Rabel had not identified any other court that had found a college or university had assumed a duty to provide a safe environment by promulgating rules or handbooks suggesting that it would.¹⁸⁶ Illinois Wesleyan, on the other hand, could point to *Bradshaw* and *Baldwin* for the principle that university prohibitions of student drinking did not impose a duty on the school to put any teeth into those prohibitions.¹⁸⁷ The appellate court, therefore, was unimpressed by Rabel's argument, despite the fact that it could be distinguished from the arguments rejected in *Bradshaw* and *Baldwin*. Rabel did not merely argue that because Illinois Wesleyan had the rules it must enforce them. She argued that she had been enticed to the university by those regulations and the promise of safety embodied in them and that Illinois Wesleyan took money that she paid based on the regulations, and that was why Illinois Wesleyan was obligated to enforce its own rules.

In addition, the appellate court found that the IWU handbook, rules, and policies did not create a custodial relationship between the university and its students.¹⁸⁸ In reaching this conclusion, the court was impressed by the rhetoric from *Bradshaw* and *Beach* that suggested the impossibility of fulfilling a duty if imposed:

The university's responsibility to its students, as an institution of higher education, is to properly educate them. It would be

¹⁸¹ *Id.*

¹⁸² *Id.* at 556-57.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 560-61.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

unrealistic to impose upon a university the additional role of custodian over its adult students and to charge it with the responsibility of assuring their safety and the safety of others. Imposing such a duty of protection would place the university in the position of an insurer of the safety of its students.¹⁸⁹

3. Finding No Duty Without Relying on the *Bradshaw* Line

Other courts of this era rejected injured students' duty arguments without relying on the *Bradshaw* line, as is seen, for example, in *Eiseman v. State*.¹⁹⁰ SUNY Buffalo admitted a conditionally released prisoner known to have a history of violence, drug abuse, and mental illness.¹⁹¹ He murdered a male student and raped and murdered a female student, whose estate sued the State, alleging that the university was negligent in admitting the ex-felon and/or failing to restrict his activities in light of the risk that he posed.¹⁹² The New York Court of Appeals considered whether the admission of an ex-felon through a special program imposed a duty despite the fact "that colleges today in general have no duty to shield their students from the dangerous activity of other students."¹⁹³ The court found "no justification" for imposing such a duty.¹⁹⁴ The court found no compelling public policy reasons to support a duty and instead found compelling reasons not to. Any duty of care for other SUNY Buffalo students would affect the privacy rights of potentially dangerous students and impede the rehabilitation and education of a former convict who had served his time and been legally released into the community.¹⁹⁵

4. Continuing Impact of Post-Immunity Era

Cases of this era continue to be cited uncritically and with approval today by some courts.¹⁹⁶ The attitude of this "bystander era"¹⁹⁷ made colleges and

¹⁸⁹ *Id.*

¹⁹⁰ 511 N.E.2d 1128 (N.Y. 1987). This is just one example of cases that did not impose a duty of care in the post-immunity era without turning to the Third Circuit's opinion in *Bradshaw* for guidance. See, e.g., *Donnell v. Cal. W. Sch. of Law*, 246 Cal. Rptr. 199 (Cal. Ct. App. 1988); *Univ. of Denver v. Whitlock*, 744 P.2d 54 (Colo. 1987).

¹⁹¹ *Eiseman*, 511 N.E.2d at 1130-32.

¹⁹² *Id.* at 1132.

¹⁹³ *Id.* at 1136.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ See, e.g., *Ochoa v. Cal. State Univ.*, 85 Cal. Rptr. 2d 768, 773 (Cal. Ct. App. 1999); *Niles v. Bd. of Regents*, 473 S.E.2d 173, 175 (Ga. Ct. App. 1996); *Robertson v. State ex rel Dep't of Planning & Control*, 747 So. 2d. 1276, 1280, 1282 (La. Ct. App. 2000).

universities more dangerous because administrations believed that if they did act to protect students, they would be found to have assumed duties that they did not otherwise have.¹⁹⁸ Yet some courts in this era recognized that student rights were not won at the price of student safety and did find a special relationship between the university and the injured student.¹⁹⁹ These cases opened the way to a more thoughtful duty analysis.

D. Courts Become More Open to Finding a Duty

1. Bucking the *Bradshaw* Trend: *Mullins v. Pine Manor College*

Not all courts ruling on the duties that colleges owed students in the post-immunity days saw colleges as mere bystanders to student injury, obligated to act only if the student could demonstrate a special, custodial relationship. The counter-point to *Bradshaw* is *Mullins v. Pine Manor College*.²⁰⁰ In that case, the Massachusetts Supreme Court stated that the general rule that there is no duty to protect others from the criminal or wrongful acts of third parties had “little application” to the case of Lisa Mullins, a freshman abducted from her dormitory at Pine Manor College and raped.²⁰¹ The court explained that the duty of Pine Manor College in that case had two possible sources in well-established legal principles. First, duty can derive from “existing social values and customs.”²⁰² Colleges of ordinary prudence do take steps to protect resident students from criminal acts.²⁰³ In fact, plaintiff’s expert visited eighteen area colleges, all of which took steps to provide adequate campus security.²⁰⁴ Therefore, the college community recognized an obligation to protect students from criminal acts, and that recognition indicated “that the imposition of a duty of care is firmly embedded in a community consensus.”²⁰⁵ The court pointed out that the concentration of young people, especially young women, made campuses ripe for criminal predators, and the college is better situated than students to provide the necessary security against criminal harm.²⁰⁶

¹⁹⁷ This descriptive label was coined by Professors Bickel and Lake. See BICKEL & LAKE, *supra* note 61, at 49.

¹⁹⁸ *Id.* at 133-35.

¹⁹⁹ *Id.* at 92-98; see *infra* notes 200-16 and accompanying text.

²⁰⁰ 449 N.E.2d 331 (Mass. 1983).

²⁰¹ *Id.* at 333-35.

²⁰² *Id.* at 335.

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

The *Mullins* analysis recognized the difference between being a constitutional adult, entitled to vote and have privacy rights, and being a true adult, able to act and choose with maturity, as well as the difference between a lack of authority to police student morals and a lack of responsibility for student safety.

Some students may not have been exposed previously to living in a residence hall or in a metropolitan area and may not be fully conscious of the dangers that are present. Thus, the college must take the responsibility on itself if anything is to be done at all.

Of course, changes in college life, reflected in the general decline of the theory that a college stands in loco parentis to its students, arguably cut against this view. The fact that a college need not police the morals of its resident students, however, does not entitle it to abandon any effort to ensure their physical safety. Parents, students, and the general community still have a reasonable expectation, fostered in part by colleges themselves, that reasonable care will be exercised to protect resident students from foreseeable harm.²⁰⁷

The court also found that the duty of care could be established by showing that the college had voluntarily assumed it.²⁰⁸ Pine Manor College had undertaken a duty to protect students from the criminal acts of third parties and it had done so not gratuitously but had charged students tuition and a dormitory fee.²⁰⁹ “Adequate security is an indispensable part of the bundle of services which colleges . . . afford their students.”²¹⁰ For the voluntary undertaking approach to succeed, the plaintiff must show either that the undertaking increased the risk to her or that she relied on the undertaking.²¹¹ The court found it “quite clear that students and their parents rely on colleges to exercise care to safeguard the well-being of students.”²¹² Prospective students care about campus security, and those visiting Pine Manor would have noticed the fence, the guards, and other visible security steps.²¹³ Indeed, the requirement that freshmen live in the dorm was a representation that the college could provide ade-

²⁰⁷ *Id.* at 335-36 (internal citations omitted).

²⁰⁸ *Id.* at 336.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.* at 336; *see supra* notes 88-95 and accompanying text.

²¹² *Mullins*, 449 N.E.2d at 336.

²¹³ *Id.*

quately for their safety.²¹⁴ Mullins had visited a number of colleges, and the court determined that students and parents rely on colleges to protect students from foreseeable harm.²¹⁵ These two bases were sufficient to establish a duty of colleges to use reasonable care to prevent students from being injured by accidental, negligent, and intentional acts of third parties.²¹⁶

2. Viewing the Relationship as More than Educational

By the mid-'80s a shift had begun; courts more and more frequently found that the university did owe the student a duty of care.²¹⁷ Although courts still required the student to prove a special relationship and still continued to reject the relationship between a university and a student as special per se, courts began to recognize that the school often stood in relationships to its students other than the educational one and that these relationships were special.²¹⁸ When the university ran a dormitory, it was a landlord, and the students were its tenants, who were owed a duty of care in the area of residential/dormitory safety.²¹⁹ When the university took fees from students, it was a business, and the students were its customers, who were owed reasonable care in those services.²²⁰ Duties were found for premises maintenance. The colleges and universities as businesses had to provide their customers, the students, "safe walkways, proper lighting, and other aspects of reasonably safe premises."²²¹ When

²¹⁴ *Id.* at 337 n.11.

²¹⁵ *Id.* at 336-37.

²¹⁶ *Id.* at 337.

²¹⁷ BICKEL & LAKE, *supra* note 61, at 12-13.

²¹⁸ Peter F. Lake, *The Special Relationship(s) Between a College and a Student: Law and Policy Ramifications for the Post In Loco Parentis College*, 37 IDAHO L. REV. 531, 535 (2001).

²¹⁹ See BICKEL & LAKE, *supra* note 61, at 109-24. A good example of this line of cases is *Nero v. Kansas State University*, 861 P.2d 768 (Kan. 1993). Shana Nero was raped in the lounge of her co-ed dormitory by another student resident; the university had assigned him to live there although it knew he had been accused of raping another student. *Id.* at 771-72. Although the court held that the university-student relationship was not special in itself and did not create a duty to protect students from other students or third parties, the court found that a special university-student relationship was not the only possible source of a university duty. *Id.* at 778. In this case, the university acted as Nero's landlord and owed her the same duty of care for her protection that a private landowner owed its tenants. *Id.* at 780. According to the court, if criminal conduct is reasonably foreseeable and within the university's control, the university has a duty of reasonable care to protect students against it. *Id.* Here, the university knew of the alleged prior rape, and when the accused rapist enrolled in summer school, the university had the option to refuse to rent dorm space to him. *Id.* By allowing him to live in the dorm, the university gave the plaintiff a false sense of security. *Id.* She saw him as a fellow student and stayed alone with him, rather than leaving as she likely would have had he been a stranger. *Id.*

²²⁰ See BICKEL & LAKE, *supra* note 61, at 179-81.

²²¹ Lake, *supra* note 68, at 12.

students worked on campus, the school was an employer.²²² A duty of care was even found off-campus, when a student was injured on a school-related canoe trip.²²³ Moreover, when schools acted to protect students and created reliance, they had a duty to exercise reasonable care in the endeavor that they started.²²⁴ Within the educational relationship, duties were found with regard to curricular and co-curricular safety, in the conduct of classes and labs.²²⁵ The obligation to provide curricular safety is not tied to exceptions to no affirmative duty rules and does not require a special relationship because it is based on the duty to use reasonable care in actions and activities.²²⁶

In a “radical shift” from the insular university, courts found duties in the full range of extra-curricular activities in which universities exercised more supervision, direction, structure, and control.²²⁷ This did not mean that schools would be liable, but it did mean that courts would at least consider that they were subject to liability where previously they would not have been.²²⁸ The willingness of courts to use a business analogy to find that the post-secondary institution owed a duty and to find that a duty was voluntarily assumed is the attitude change most important to the question of whether law schools owe externs a duty of care.

3. The *Furek* Turning Point — The University as a Business

The decision in *Furek v. University of Delaware*²²⁹ has been dubbed the end of the bystander era²³⁰ because it repudiates the logic of the line of cases that “seem to rely on the policy analysis set out in *Bradshaw* without considering the factual validity of its premises or the accuracy and consistency of its logic.”²³¹ *Furek* was a fraternity pledge who was permanently scarred when lye-based oven cleaner was poured on him as part of hazing. For years, the univer-

²²² *Id.*

²²³ *Mintz v. State*, 362 N.Y.S.2d 619 (N.Y. App. Div. 1975); *see Lake, supra* note 68, at 13.

²²⁴ *BICKEL & LAKE, supra* note 61, at 129.

²²⁵ *Id.* at 150-52; *see Delbridge v. Maricopa County Cmty. Coll. Dist.*, 893 P.2d 55 (Ariz. Ct. App. 1995); *Regents of the Univ. of Cal. v. Superior Court*, 48 Cal. Rptr. 2d 922 (Cal. Ct. App. 1996); *Fu v. State*, 643 N.W.2d 659 (Neb. 2002). Duties in curricular activities are not new, although older lawsuits regarding curricular duties are rare. *BICKEL & LAKE, supra* note 61, at 151; *see, e.g., Brigham Young Univ. v. Lillywhite*, 118 F.2d 836 (10th Cir. 1941); *Grover v. San Mateo Junior Coll. Dist.*, 303 P.2d 602 (Cal. Ct. App. 1956).

²²⁶ *BICKEL & LAKE, supra* note 61, at 151.

²²⁷ *Lake, supra* note 68, at 13.

²²⁸ *Id.*

²²⁹ 594 A.2d 506 (Del. 1991).

²³⁰ *BICKEL & LAKE, supra* note 61, at 128-30.

²³¹ *Furek*, 594 A.2d at 518.

sity was aware that students were being injured in fraternity hazing, and for years the university issued statements prohibiting hazing.²³² These pronouncements were ineffectual, and hazing continued openly on campus, as the university took no direct action to deal with the known hazing danger.²³³ No evidence was presented that campus security had been instructed to investigate or take action regarding hazing. In fact, the evidence showed that when officers witnessed hazing they permitted it to continue.²³⁴

Furek won his negligence case with the jury, but the trial court granted the university a judgment notwithstanding the verdict because Furek had presented insufficient evidence to establish a special relationship supporting a duty or the voluntary assumption of a duty to enforce the anti-hazing rules.²³⁵ Upon Furek's appeal, the university asked the court to accept the *Bradshaw* logic that the end of *in loco parentis* meant the end of any special relationship between university and student that would require the university to protect the student.²³⁶

Recognizing that the scope of a duty of care often turns on the relationship between the parties, the court chose to examine the relationship between student and university for itself, rather than relying on the Third Circuit's description. In its more accurate assessment, the court wrote:

The university-student relationship is certainly unique. While its primary function is to foster intellectual development through an academic curriculum, the institution is involved in all aspects of student life. Through its providing of food, housing, security, and a range of extracurricular activities, the modern university provides a setting in which every aspect of student life is, to some degree, university guided. This attempt at control, however, is directed toward a group whose members are adults in the contemplation of law and thus free agents in many aspects of their lives and life styles. Despite the recognition of adulthood, universities continue to make an effort to regulate student life and the courts have utilized diverse theories in attempting to fix the extent of the university's residual duty.²³⁷

The *Furek* court accepted the constitutional adulthood of college students as relevant to the legal obligations arising from the relationship but did not

²³² *Id.* at 510-11.

²³³ *Id.* at 511.

²³⁴ *Id.*

²³⁵ *Id.* at 516.

²³⁶ *Id.* at 517.

²³⁷ *Id.* at 516.

consider that adult status dispositive of the duty issue. The court rejected the idea that “student and the university operate at arms-length, with the student responsible for exercising judgment for his or her own protection when dealing with other students or student groups.”²³⁸ Given the nature of the relationship, the duty owed was limited, but a duty was owed.²³⁹ A key point here is that the Delaware Supreme Court did not see duty in all or nothing terms as many previous courts had. The duty did not have to be custodial care or no care — it could be limited as was appropriate in the particular case.

The court rejected the *Bradshaw* line of cases as utterly unsupported. Those cases offered no empirical evidence that reduced supervision fostered increased student maturity, and other than the assertions of the *Bradshaw* opinion itself, the line relied upon no legal or other authority for the contention that supervising potentially dangerous student activities would harm the college environment or be inconsistent with the goals of a college education. The court found it equally likely that supervision, particularly where it promoted student health and safety, was consistent with the parties’ relationship.²⁴⁰

Student activists in the 1960s had not protested and litigated for greater rights to end university supervision of dangerous activities — to ensure the right to have trampolines or haze fraternity pledges — but to end political and intellectual coercion.²⁴¹ The court could not accept that this successful activism meant students were no longer owed safety. In addition, the court pointed out a logical flaw in the *Beach* and *Bradshaw* opinions. Both rejected a duty because the students were adults, yet these were alcohol-related cases, and neither plaintiff was legally adult with regard to alcohol.²⁴²

The court observed that despite the fall of *in loco parentis*, some courts had found colleges and universities to owe a duty to their students²⁴³ as the Massachusetts Supreme Court did in *Mullins*.²⁴⁴ Even though the relationship could not be characterized as custodial and was not special per se, “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.”²⁴⁵

The source of the duty to Furek could be found in two places. First, the university could be found to have voluntarily assumed a duty of protection as set

²³⁸ *Id.* at 517.

²³⁹ *Id.*

²⁴⁰ *Id.* at 518.

²⁴¹ *Id.* at 158 n.11.

²⁴² *Id.* at 518.

²⁴³ *Id.* at 518-19.

²⁴⁴ 449 N.E.2d 331 (Mass. 1983); see *supra* Part III.D.1.

²⁴⁵ *Furek*, 594 A.2d at 519-20.

forth in Restatement (Second) of Torts § 323.²⁴⁶ The university had an anti-hazing policy and made repeated communications to students and fraternities regarding the policy. “The University’s policy against hazing, like its overall commitment to provide security on campus, thus constituted an assumed duty which became ‘an indispensable part of the bundle of services which colleges . . . afford their students.’”²⁴⁷

In addition, a duty could be premised on Furek’s business invitee status on university property.²⁴⁸ As a landowner with knowledge of an unreasonably dangerous use of its property, the university had a duty to safeguard Furek against the hazard, even though the hazard was the conduct of the third parties who hazed him.²⁴⁹ The duty was not absolute but extended to foreseeable acts of third parties subject to university control.²⁵⁰ Evidence of foreseeability could be found in the defendant’s past experience or the place or character of the business.²⁵¹ Also the property owner’s attempts to provide security or regulate a hazardous activity can demonstrate the foreseeability of the risk.²⁵² That was the case here. The university’s own weak attempts to curb the hazards plus known student injuries from hazing proved that such injuries were foreseeable.²⁵³

As to the issue of control, the fraternity was on campus and subject to the university security department.²⁵⁴ The university ban and its attempts to bring disciplinary action against the fraternity after Furek’s injury showed the university’s own belief that it had the authority to enforce its anti-hazing policy.²⁵⁵ The court stated that the necessary control to impose a duty did not have to be absolute. “If control includes authority to direct, restrict and regulate, the University with its significant involvement in the regulation of fraternity life, particularly in the area of hazing, may be deemed to have exercised supervision over the use of its property to permit ‘at least the inference of control.’”²⁵⁶

In summary, the court found that even without the *in loco parentis* relationship, “the relationship is sufficiently close and direct to impose a duty under

²⁴⁶ *Id.* at 520; *see supra* notes 88-95 and accompanying text.

²⁴⁷ *Furek*, 594 A.2d at 519-20 (quoting *Mullins*, 449 N.E.2d at 336); *see supra* notes 200-16 and accompanying text.

²⁴⁸ *Furek*, 594 A.2d at 519-20.

²⁴⁹ *Id.*

²⁵⁰ *Id.* at 521.

²⁵¹ *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 344 cmt. f. (1965)).

²⁵² *Id.* at 521-22.

²⁵³ *Id.* at 522.

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.*

Restatement § 314A.”²⁵⁷ Although the university was “not an insurer of the safety of its students nor a policeman of student morality, nonetheless it [had] a duty to regulate and supervise foreseeable dangerous activities occurring on its property.”²⁵⁸ The duty was not broad but limited to situations where the university exercised control and was owed to students on the property for permitted purposes.²⁵⁹

4. The University Assumes a Duty

Rejena Coghlan, the plaintiff in *Coghlan v. Beta Theta Pi Fraternity*,²⁶⁰ was an eighteen-year-old freshman at the University of Idaho. As a sorority pledge at Alpha Phi Sorority, she was invited during Rush Week to two fraternity drinking parties, where she was served beer, whiskey, and mixed hard alcohol.²⁶¹ Coghlan did not have identification, nor was she asked for it at either party.²⁶² One party was attended by two Greek advisors employed by the university, and one spoke to Coghlan.²⁶³ As a result of drinking at the fraternity parties, Coghlan became intoxicated and distraught. A sorority sister escorted her home and put her in bed. Later that night Coghlan fell from a fire escape platform to the ground thirty feet below.²⁶⁴

The trial court dismissed Coghlan’s negligence claim against the University, holding that it owed her no duty of care.²⁶⁵ On appeal, the Idaho Supreme Court concurred that no special relationship existed between Coghlan and the university that would overcome the general rule that imposes “no affirmative duty to act or assist or protect another.”²⁶⁶ 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.”²⁶⁷ The court cited with approval cases that have declined to find a special relationship between students and colleges because college students today are regarded as adults, and college and universities no longer assume the

²⁵⁷ *Id.*; see *supra* notes 83-87 and accompanying text.

²⁵⁸ *Furek*, 594 A.2d at 522.

²⁵⁹ *Id.*

²⁶⁰ 987 P.2d 300 (Idaho 1999).

²⁶¹ *Id.* at 304-05.

²⁶² *Id.* at 305.

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.* at 311.

²⁶⁷ *Id.* at 312.

authoritarian, custodial role they played under the *in loco parentis* doctrine.²⁶⁸ The court agreed with the Third Circuit opinion in *Bradshaw* that “the modern American college is not an insurer of the safety of its students.”²⁶⁹

Nonetheless, the court overruled the trial court’s dismissal of the case.²⁷⁰ Instead of finding a special relationship, the court determined that the pleadings sufficiently stated a claim for relief because the facts provided an inference that the university had assumed a duty.²⁷¹ The court explained that a duty can be created where one previously did not exist. “If one voluntarily undertakes to perform an act, having no prior duty to do so, the duty arises to perform the act in a non-negligent manner.”²⁷² In this case, two university employees attended the BTP party to supervise it. They knew or should have known that the fraternity was serving alcohol to underage students, and they knew or should have known that Coghlan was drunk.²⁷³ Without concluding at this stage that a duty had been assumed as a matter of law, the court held that it was error to dismiss the case at that point in the proceedings because the allegations supported an inference that the university had “assumed a duty to exercise reasonable care to safeguard the underage plaintiff from the criminal acts of third persons, *i.e.*, furnishing alcohol to underage students, of which the university employees had knowledge.”²⁷⁴

IV. DUTY ANALYSIS IN CASES MOST ANALOGOUS TO EXTERNSHIPS

A. *Finding No Duty*

The Supreme Judicial Court of Massachusetts rejected a duty in an externship context in *Judson v. Essex Agricultural & Technical Institute*.²⁷⁵ As part of her curriculum at Essex Agricultural and Technical Institute, Carol Ann Judson was required to participate in employment related to her course work.²⁷⁶

²⁶⁸ *Id.* at 311-12.

²⁶⁹ *Id.* at 312 (quoting *Bradshaw v. Rawlings*, 612 F.2d 135, 138 (3rd Cir. 1979)).

²⁷⁰ *Id.* at 310.

²⁷¹ *Id.* at 312.

²⁷² *Id.* (quoting *Featherstone v. Allstate Ins. Co.*, 875 P.2d 937, 940 (Idaho 1994)).

²⁷³ *Id.*

²⁷⁴ *Id.* Similarly, the court did not find a special relationship between Coghlan and her sorority but did find a material issue of fact as to whether the sorority “voluntarily assumed a duty of reasonable care to supervise and protect Coghlan until she was out of danger of harm due to her intoxication.” *Id.* at 314. The sorority invited her to attend the fraternity parties, knew or should have known that underage pledges would be served alcohol, and appointed a “guardian angel” sorority member to accompany Coghlan. *Id.* at 305. In addition, the sorority returned the intoxicated Coghlan to the sorority house and left her unattended. *Id.* at 314.

²⁷⁵ 635 N.E.2d 1172 (Mass. 1994).

²⁷⁶ *Id.* at 1173.

While fulfilling the requirement by working at Bradvue Farm, Judson fell from a barn loft and was injured.²⁷⁷ She sued her vocational school for negligence in failing to provide a reasonably safe workplace and failing to ensure that the farm had workers' compensation insurance as it had represented to the school.²⁷⁸ The trial court granted summary judgment to the vocational school.²⁷⁹ The state supreme court concurred and held that the school owed no duty to the student.²⁸⁰

The court declined to consider whether the vocational school owed Judson a duty based on a special relationship, leaving Judson to rely on her alternative theory that the placement agreement imposed a duty of care.²⁸¹ That agreement provided in part:

It is understood by the employer that the student's project instructor will visit or call the student on the job for the purpose of consultation, to insure that both the employer and the student get the most out of this situation. The instructor will show discretion in the time and the circumstances of these visits.

The employer is aware of, and agrees to abide by, labor and wage laws as they may apply to this employment. This agreement may be terminated by mutual agreement at any time by either the cooperating employer or the school.²⁸²

The court rejected Judson's analogy to *Mullins*²⁸³ because no social values or customs demonstrated that vocational schools have recognized an obligation to protect students in their school-related employment with third parties that would make students or their parents expect the school would exercise reasonable care to inspect the workplace or ensure that the employer had workers' compensation coverage for the student.²⁸⁴ Nor could the agreement be read to create such a duty. It did not assure the student or represent to her that the school would inspect the workplace to see that it was safe.²⁸⁵ Indeed, the agreement placed the duty to provide a safe work environment "squarely on the

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ *Id.* at 1174-75.

²⁸¹ *Id.*

²⁸² *Id.* at 1173 (internal quotations omitted). The agreement also stated that the student must be covered by workers' compensation insurance and that the employer had to indicate that the student would be covered. *Id.*

²⁸³ 449 N.E.2d 331 (Mass. 1983); *see supra* notes 200-16 and accompanying text.

²⁸⁴ *Judson*, 635 N.E.2d at 1174.

²⁸⁵ *Id.* at 1175.

plaintiff's employer" by requiring the firm "to abide by [] labor and wage laws as they may apply to this employment."²⁸⁶ The court observed that it was the student's responsibility to find a job placement and that the agreement merely indicated that calls or site visits would occur to ensure that both employer and student would "get the most out of this situation."²⁸⁷ The school was not obligated to ensure that the employer actually was insured. The statement in the agreement mandating insurance served only as notice to the student and employer of the employer's responsibility to obtain insurance.²⁸⁸

B. Finding a Duty

Some cases have found a duty in situations analogous to the legal extern. In *Silvers v. Associated Technical Institute*,²⁸⁹ a Massachusetts Superior Court found that a post-secondary vocational school owed a duty of care to a student who was referred by the school placement office to an employer who hired her and then sexually harassed and assaulted her. The school touted its placement services in promotional literature and mentioned them in its course catalogue and enrollment agreement. The school also verbally notified the student that it would attempt to put her in a job in her field.²⁹⁰ When the placement office received a telephoned job order for a "Female tech for Communications switching complex — a lot of travel — part-time," it sent the prospective employer the student's resume without first consulting her or making any investigation of the employer.²⁹¹ Minimal investigation would have revealed that the employer, Winchester International Group, consisted of a husband and wife and operated out of their home. In addition, just eight years before, the husband was convicted of indecent assault and battery.²⁹² The student accepted an offer for employment from Winchester International Group because she assumed that the placement office "would only refer [her] name to legitimate employers which it had screened."²⁹³ She worked for Winchester for a month and a half, and in that time her employer "sexually assaulted and harassed her, insisting that she share a room with him on business trips, walking naked in her presence, touching her

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ *Id.* at 1174-75.

²⁸⁹ No. 934253, 1994 WL 879600 (Mass. Super. Ct. Oct. 12, 1994). This is only a trial court opinion, but it was cited by the Florida Supreme Court in *Nova Southeastern University, Inc. v. Gross*, 758 So. 2d 86, 90 (Fla. 2000), and demonstrates how the duty issue may play out in the front lines.

²⁹⁰ *Silvers*, 1994 WL 87600, at *1.

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ *Id.* at *2.

against her will, and forcing her to have sexual intercourse,” before firing her for refusing to submit to his sexual demands.²⁹⁴

The student filed a negligence action against the vocational school, which contended that it did not owe her a duty “to investigate the background of every employee of every employer using its placement listings or to scrutinize job orders for potential violations of employment law and . . . that it could not foresee criminal assaults by the employees of prospective employers.”²⁹⁵ Such a duty, the school argued, would expose the school to suits for invasion of privacy, deter employers from using their services, and violate Commonwealth policy of encouraging gender-neutral hiring.²⁹⁶

The court analyzed this as a case of contractual undertaking. By receiving the student’s tuition payments, the school agreed to provide her a training program and job placement assistance. The school thus committed itself to exercising due care in delivering those services.²⁹⁷ Recognizing that generally, without a special relationship, there is no duty to protect people from the wrongdoing of others, the court explained that, nonetheless, the primary test for the existence of duty is whether the defendant should have “foreseen a reasonable need for proactive intervention and — most important — a substantial risk of harm to plaintiff from failure to act.”²⁹⁸ The court also stated that as the harms a defendant may foresee change with “the evolving expectations of a maturing society,” the special relationships that trigger a duty to take affirmative action with reasonable care also change.²⁹⁹ The court concluded that students at the vocational school would reasonably expect the placement office to take some effort to avoid placing them with employers likely to harm them.³⁰⁰ In this case, the court believed that the female-only job order should have prompted an inquiry, particularly in light of statutes prohibiting sexual harassment in employment.³⁰¹ Imposing a duty on the placement service to exercise reasonable care not to place students with employers who discriminate would foster state policies against such discrimination.³⁰² The court described the duty as an “[i]nquiry into the reasons that an employer has specifically requested a female candidate,” that did not need to be “intrusive” or “Orwellian” or cover every

²⁹⁴ *Id.* When the student, after her dismissal, reported the situation to the placement office, the placement director took no action but said, “Too bad he wasn’t younger and better looking.” *Id.*

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ *Id.* at *3.

²⁹⁸ *Id.*

²⁹⁹ *Id.*

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² *Id.* at *4.

employee of each prospective employer.³⁰³ The court did not describe what conduct would satisfy the duty but stated that it “requires more than what defendant did here.”³⁰⁴

In *Harrington v. Louisiana State Board of Elementary and Secondary Education*,³⁰⁵ a Louisiana appellate court ruled that a community college owed its students a duty of care in hiring an instructor for its culinary apprenticeship program.³⁰⁶ A twenty-year-old student at Delgado Community College, Kimberly Harrington volunteered to be a teaching assistant to John Veller, director of the culinary program.³⁰⁷ In this position, Veller “screened and interviewed applicants, placed students in hotels and restaurants as apprentices, and met with chefs and owners, often during nighttime hours.”³⁰⁸ Half his work was in the field.³⁰⁹ When Veller was hired, no one inquired about his past, verbally or on his application form.³¹⁰ Typically, the school checked teaching credentials and nothing more.³¹¹ Veller had a criminal record, with convictions for possession of marijuana with intent to distribute, theft, and interstate transportation of forged securities.³¹² In addition, he had used two aliases and had an outstanding warrant for his arrest in Illinois.³¹³ One night, after assisting Veller with a wine tasting, Harrington went with him to meet chefs and restaurant owners. One stop was at the home of a restaurant owner. When Veller and Harrington returned to Veller’s car in the restaurant owner’s driveway, Veller raped Harrington.³¹⁴ He was subsequently convicted of the crime.³¹⁵

Harrington sued the Board of Education for Delgado’s negligence in hiring an instructor with prior felony convictions.³¹⁶ Under a Louisiana statute, employers could be held primarily liable for negligent hiring, but a court still had to determine whether a duty existed in the particular case.³¹⁷ The court

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ 714 So. 2d 845 (La. Ct. App. 1998).

³⁰⁶ *Id.* at 851.

³⁰⁷ *Id.* at 848.

³⁰⁸ *Id.*

³⁰⁹ *Id.*

³¹⁰ *Id.* at 848, 850.

³¹¹ *Id.* at 850.

³¹² *Id.* at 848, 850.

³¹³ *Id.* at 848.

³¹⁴ *Id.* at 849.

³¹⁵ *Id.*

³¹⁶ *Id.* at 850.

³¹⁷ *Id.*

found that a duty of reasonable care in hiring exists when performing the duties of the job will give the employee a unique opportunity to commit a crime against a third party.³¹⁸ The court limited this duty to situations “where the plaintiff met the employee as a result of the employment and the employer would receive some benefit from the meeting had the wrongful act not occurred.”³¹⁹

Under this rule, the court determined that the community college had a duty to use reasonable care when it hired a professor who would be placed in a position of authority that enabled him to harm a student.³²⁰ “A professor is in a position where character, moral turpitude, and a clean record should be essential. The risk of being raped or harmed by a professor in a position of authority can be associated with the duty to use reasonable care when hiring.”³²¹

The case most analogous to legal externships is *Nova Southeastern University, Inc. v. Gross*.³²² As a Ph.D. candidate in the Nova Southeastern University psychology program, twenty-three-year old Bethany Gross was required to complete an internship and assigned by the school to work at Family Services Agency.³²³ After work one evening, she was abducted at gunpoint from the agency parking lot and robbed and raped.³²⁴ Gross filed a negligence action against the university and in response to the defendant’s summary judgment motion presented evidence that before her attack Nova was aware of a number of criminal incidents in or near the parking lot.³²⁵ The trial court granted summary judgment, but Florida’s Fourth Circuit reversed that ruling, and the Florida Supreme Court upheld the appellate court ruling.³²⁶

Nova argued that it “did not owe Gross a duty because she was an adult student, and therefore not within the ambit of a special relationship between a school and a minor student,”³²⁷ which exists because mandatory schooling forces parents to rely on schools to protect their children during school activities.³²⁸ University attendance, on the other hand, is not mandatory, and universi-

³¹⁸ *Id.* (citing *Smith v. Orkin Exterminating Co.*, 540 So. 2d 363 (La. Ct. App. 1989)).

³¹⁹ *Id.* (quoting *Roberts v. Benoit*, 605 So. 2d 1032, 1046 (La. 1991)).

³²⁰ *Id.* at 851.

³²¹ *Id.* Actually, freedom from moral turpitude should be essential.

³²² 758 So. 2d 86 (Fla. 2000).

³²³ *Id.* at 87-88. Students chose six internships from a list of sites approved by the university, and the university made the final assignments from the students’ choices. *Id.*

³²⁴ *Id.* at 88.

³²⁵ *Id.*

³²⁶ *Id.* at 87-88.

³²⁷ *Id.* at 88.

³²⁸ *Id.* at 89 (quoting *Rupp v. Bryant*, 417 So. 2d 658, 666 (Fla. 1982)).

ties do not stand *in loco parentis* to adult students. Therefore, according to Nova, this case did not present a special relationship giving rise to a duty.³²⁹

The Florida Supreme Court responded that the appellate court had not found a duty to Gross in the relationship between a minor child and public school officials.³³⁰ The district court had characterized the relationship as “essentially the relationship between an adult who pays a fee for services, the student, and the provider of those services, the private university.”³³¹ Within that relationship, the control that Nova exerted over students by mandating internships and assigning sites imposed a duty to act reasonably in making the assignments.³³² Given Nova’s knowledge of unreasonable dangers at the site, the question of whether Nova breached that duty should not have been taken from the jury.³³³ The court declined to think of the university as different from any other legal entity that must act reasonably in its activities: “There is no reason why a university may act without regard to the consequences of its actions while every other legal entity is charged with acting as a reasonably prudent person would in like or similar circumstances.”³³⁴ Liability was premised upon negligent conduct and not upon a failure to act.³³⁵ Nova’s duty was not one of general supervision but of ordinary care in assigning students to internship sites. That could include, but was not necessarily limited to, a duty to warn of the known dangers of sites. The court did not state what acts would fulfill the duty but compared the obligation to that found in *Silvers*: “‘students . . . could reasonably expect that the school’s placement office would make some effort to avoid placing [students] with an employer likely to harm them.’”³³⁶

A final critical feature of the case is that the court recognized that weaknesses in the plaintiff’s *prima facie* case and strong defenses should not remove the case from the jury on no-duty grounds. In other words, the Florida

³²⁹ *Id.*

³³⁰ *Id.*

³³¹ *Id.* at 88.

³³² *Id.* at 89.

³³³ *Id.*

³³⁴ *Id.*

³³⁵ The court was not explicit that it found this to be a case of misfeasance rather than nonfeasance overcome by a special relationship or voluntary assumption, and it blurred the line between voluntary assumption of duty and misfeasance by quoting at length the voluntary assumption of a duty case, *Union Park Memorial Chapel v. Hutt*, 670 So. 2d. 64, 66-67 (Fla. 1966), while also relying upon a misfeasance case, *Pate v. Threlkel*, 661 So. 2d 278, 280 (Fla. 1995). Nonetheless, this does seem to be a decision based on misfeasance, as the court did not consider whether the elements of voluntary assumption were met beyond that of an undertaking. See *supra* notes 88-95 and accompanying text.

³³⁶ *Nova Southeastern*, 758 So. 2d at 89. (quoting *Silvers v. Associated Tech’l Inst.*, No. 934235, 1994 WL 879600, at *3 (Mass. Super. Ct. Oct. 12, 1994)); see *supra* notes 289-304 and accompanying text.

Supreme Court did not equate duty with liability. Although Nova argued that it owed Gross no duty because she was aware that Family Services Agency was in a dangerous area, her awareness of danger was relevant to breach, causation, and comparative fault and did not eliminate a duty of care in making practicum assignments.³³⁷

V. PREDICTING HOW COURTS WILL RULE

Nova Southeastern cannot signal on its own that duties will now be found to student interns and externs. The law remains unsettled, and although courts more frequently impose duties upon colleges and universities, no consistent model for doing so has emerged. Part V ponders how courts are likely to rule on the duties that law schools owe to student externs by considering first, in Section A, the possibility that courts will improperly rely on the outdated *Bradshaw* line of cases, which could sound particularly convincing with regard to adult, graduate students working away from their campuses. Even courts that reject the no-duty bias of the *Bradshaw* line may still be influenced by their characterization of students' suits as nonfeasance cases requiring special relationship exceptions or a voluntary assumption of duty. Section B, therefore, considers how courts are likely to apply the special relationship and voluntary assumption principles to the legal externship.

A. *The Lingering Influence of the Post-Immunity Bradshaw Line of Cases*

In a case decided as recently as 2000, lawyers for Nova Southeastern University relied on the reasoning of post-immunity cases that colleges do not owe adult students a duty of reasonable care to protect them from third parties because college students are adults who are not in a custodial relationship with their schools.³³⁸ Although their argument failed, it demonstrates the continuing force that this view has for university counsel and suggests that the law student who sues her school for injuries in an externship can still expect an argument based on these cases. Despite decisions critical of the *Bradshaw* line and a judicial trend more receptive to students' duty arguments, some courts may still choose — incorrectly — to apply *Bradshaw* and its offspring to reject a duty to the legal extern. These cases do continue to be cited,³³⁹ and courts could find the false logic of this line to ring more true when applied to the legal extern wounded by an angry client or molested by her field supervisor than to the undergraduate injured by her own intoxication or a fraternity prank.

Although the post-immunity cases too readily view the university as a bystander to student injuries and therefore the student's claim as requiring an

³³⁷ *Nova Southeastern*, 758 So. 2d at 89.

³³⁸ *Id.* at 88.

³³⁹ See *supra* note 196.

affirmative duty, courts may more convincingly characterize the law school's role in externship injuries as nonfeasance and a third party as the sole risk creator: while away from the law school, working under someone else's direct supervision, the law student was injured by a third party. Indeed, the *Bradshaw* line of cases is so dismissive of the idea that the foreseeability of injuries triggers responsibility for student safety that courts disinclined to impose a duty might apply these cases to characterize the law school as a bystander even when it has sent the student to a site known to be unreasonably dangerous. When the court characterizes the law school's conduct as inaction that did not create the risk to the student, the student will have to demonstrate either that she stood in a special relationship with the law school or that the law school voluntarily assumed a duty of care to her, and she should find this even more difficult under a *Bradshaw*-type analysis than the unsuccessful undergraduate plaintiffs before her.

A court following the post-immunity cases will require a *custodial* special relationship to impose a duty³⁴⁰ — unlike more recent courts that have been willing to see the relationship as special in other ways. Within that narrow view of the possibilities, the law student is even more likely to lose the duty argument because the relationship between extern and law school is more clearly not custodial and, therefore, not special. The extern is not merely constitutionally adult; she is really adult, with four years of college and at least two years of law school behind her. Some externs may be in their thirties, forties, or older. The truly adult law student, who can reasonably be expected to exercise greater care for her own safety, certainly is not going to be considered in a relationship of dependence upon the school for safety, especially when the point of the externship is to take the student off-campus into a workplace setting beyond the physical control and hands-on supervision of the school. A court guided by the post-immunity decisions could voice astonishment that an adult graduate student participating in an off-campus activity would expect more care than courts have granted undergraduate minors on campus. Such astonishment would, of course, ignore the fact that students' adult status was significant to the post-immunity courts because they confused a limited ability to police student morals with the ability to look out for student safety.³⁴¹ Still, when the injury stems from the law student's own dangerous choices — like opening the office door to an angry client after hours — the argument against a duty to an adult student whose behavior is beyond the law school's control can be persuasive.

Law school counsel in externship cases are also likely to emphasize the idea from the *Bradshaw* line that a duty is inappropriate because the relationship is educational and not protective.³⁴² Although subsequent cases have made clear that the university relationship with students is more multi-faceted than a merely

³⁴⁰ See *supra* notes 127-35, 150 and accompanying text.

³⁴¹ See *supra* notes 207, 240-41 and accompanying text.

³⁴² See *supra* notes 174, 189 and accompanying text.

educational one, the case rhetoric about the public policy value in giving students leeway to make their own mistakes and learn from them has some force in the externship context. The point of the externship relationship is to place students in the real situations that they will confront as lawyers so that they can reflect, learn, and grow — in part from their own mistakes.³⁴³ The instructive mistakes that the externship provides are not limited to errors in research, writing, or legal analysis but are expected in the wide range of difficulties that lawyers face, and these could be argued to include potentially dangerous interactions. The courts in *Baldwin* and *Beach* reasoned, after all, that underage students needed to learn from injuries caused by their own and their fellow students' illegal intoxication rather than be protected from such mistakes and that enforcing prohibitions against underage drinking on campus would interfere with students' learning for themselves the dangers of drinking.³⁴⁴ Dangers to externs can be said to have curricular value — teaching the lawyer apprentice to handle an abusive boss, a volatile client, a necessary trip to a dangerous neighborhood. On the other hand, as the Delaware Supreme Court reasoned in *Furek*,³⁴⁵ exercising some limited, reasonable care for externs, such as advance instruction on common, dangerous situations for lawyers, should not really harm the educational process. Students do not have to be injured to learn.

The injured extern should also expect the *Bradshaw* rhetoric that “the modern American college is not an insurer of the safety of its students” to be used against her.³⁴⁶ A court not inclined to recognize the difference between an absolute duty to protect and a limited duty to exercise reasonable care towards protection can easily say that the impossibility of fulfilling a duty to a student is even greater when the issue is keeping off-campus (possibly thousands of miles off-campus) students safe from arguably unforeseeable harms (like criminal attacks in a courthouse parking lot). Given the difficulty of providing safety for a legal extern located off-site, particularly for a law school that approves a wide variety of sites over a wide geographic range, a court could declare that fulfilling the burden would be impossible so that any duty would contravene public policy by automatically imposing liability to injured students, making the law school their insurer.

A court that follows the *Bradshaw* line of cases is likely to resist finding assumed duties, particularly if the court believes, like the Third Circuit, that the duty assumed must be a custodial duty of care for there to be any obligation at all to the law student and declines to consider the possibility that more limited obligations were undertaken and possibly breached.³⁴⁷ A *Bradshaw*-influenced

³⁴³ See *supra* notes 17-20 and accompanying text.

³⁴⁴ See *supra* notes 163, 174 and accompanying text.

³⁴⁵ 594 A.2d 506 (Del. 1991); see *supra* note 240 and accompanying text.

³⁴⁶ See *supra* note 125 and accompanying text.

³⁴⁷ See *supra* notes 131-35 and accompanying text.

court will not rule that creating the externship program is itself the assumption of a duty of care in administering the externship. By sponsoring a sophomore picnic, hiring resident assistants to supervise a dormitory, and sending students on mandatory field trips, the defendants did not assume duties of care in *Bradshaw*, *Baldwin*, and *Beach*.³⁴⁸ Just as university rules regarding student conduct in dormitories did not impose duties of enforcement in *Baldwin* and *Rabel*,³⁴⁹ any language in the externship agreement regarding the extern or field supervisor's behavior will not be found to impose duties of enforcement upon the law school. Although the ABA mandates site visits,³⁵⁰ their point is to ensure the educational value of the externship site, and so the site visit will not be interpreted as an assumption of a duty to protect. Even the Supreme Judicial Court of Massachusetts, one of the first courts to question the *Bradshaw* logic and find that a student was owed a duty of care, declined to find that a post-secondary vocational school had assumed a duty of care to a student intern by contracting to make site visits to her internship.³⁵¹

Applying *Bradshaw* and its progeny to cases involving legal externs would be a step backwards in the law governing the relationships between students and universities. This line of cases has its roots in the judiciary's nostalgia for a time when schools could exercise authoritarian control over students, resentment over students' successful bids to obtain constitutional rights on campus, and desire to treat colleges and universities as unique places deserving immunity, despite the demise of the various doctrines that had long kept institutions of higher education safe from liability. More thoughtful jurisdictions have moved beyond the knee-jerk response that treats a college as free from responsibility based on the idea that it is not the custodian of its students and have recognized fundamental flaws in the *Bradshaw* logic, flaws not overcome when the injured student is a legal extern. The post-immunity cases often portray misfeasance as nonfeasance, equate duty with liability, assume that the special relationship must be custodial, take an all or nothing view of assumed duties, and refuse to ask schools to live up to non-gratuitous promises to students.

Institutions of higher learning have often been actors creating risks in situations in which they have been described as mere bystanders, and schools often take on and then neglect safety responsibilities more limited than custodial care. A duty of reasonable care does not mean absolute liability whenever an injury occurs but liability when a failure to act reasonably causes injury, and acting reasonably to reduce risks to students is not impossible, even when stu-

³⁴⁸ See *supra* notes 108-76 and accompanying text.

³⁴⁹ See *supra* notes 143-48, 182-89 and accompanying text.

³⁵⁰ See ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS § 305(f)(3) (2002).

³⁵¹ *Judson v. Essex Agric. & Tech'l Inst.*, 635 N.E.2d 1172 (Mass. 1994); see *supra* notes 275-288 and accompanying text. The case in which the Massachusetts Supreme Court questioned the *Bradshaw* logic was *Mullins v. Pine Manor College*, 449 N.E.2d 331 (Mass. 1983), which is discussed *supra* at notes 200-216 and accompanying text.

dents are adults with minds of their own. Courts have been too quick to raise the duty shield, when the true question has been whether or not a duty was breached, whether the lack of care was the cause of the student's injury, whether the student's own fault has played such a significant role that it reduces or bars the student's recovery. Fortunately, the approach taken immediately after colleges and universities lost their immunity is no longer the trend.³⁵²

B. *Beyond Bradshaw: Seeking a Duty Model in Current Law*

1. An Analysis Still Centered on Exceptions to No-Affirmative-Duty Rules

A court that rejects the post-immunity assumption that colleges and universities do not owe a duty of care to their students will not automatically conclude that law schools do, therefore, owe their externs a duty of care. Law schools will argue "no affirmative duty" when the legal extern has not been injured by the law school itself but by a third party, and the duty dialogue may yet center on whether the student was in some sort of special relationship with the law school or whether the law school assumed a duty of care that it did not otherwise owe the extern.

In the special relationship inquiry, no court is likely to decide that the relationship between law school and law student is per se special, as court after court has refused to find the relationship between college and undergraduate student to be special in itself.³⁵³ In the case of a California Western law student attacked on property adjacent to the law school library, a California appellate court explicitly ruled that the relationship between a law student and a law school is not special.³⁵⁴ Although the extern might argue that the relationship at issue is not the broad relationship between law student and law school but a narrower relationship between extern and law school, the externship generally does not place the student in a position of dependence upon the school for safety by taking away her own ability to watch out for herself,³⁵⁵ and so courts would

³⁵² BICKEL & LAKE, *supra* note 61, at 105.

³⁵³ See *supra* notes 127-30, 148, 172-73 and accompanying text; see also Davidson v. Univ. of N.C., 543 S.E.2d 920, 928 (N.C. Ct. App. 2001), *cert. denied*, 550 S.E.2d 771 (N.C. 2001).

³⁵⁴ Donnell v. Cal. W. Sch. of Law, 246 Cal. Rptr. 199, 200-01 (Cal. Ct. App. 1988).

³⁵⁵ See *supra* notes 83-87 and accompanying text. If the case involved a law school that made the field placement a graduation requirement and tightly controlled what sites were available to the student, in part by limiting them to a very short list of sites that the school maintained relationships with, the student might argue that she was dependent upon the school for safety in, at least, site selection. The externship relationship might be found special and to impose care limited to the issue of choosing sites and assigning students to them. The strongly held belief that the college student-to-college relationship is not special would probably keep a court from making such an analysis, however. But see, however, Susan Brown Foster & Anita M. Moorman, Gross v. Family Services Agency, Inc.: *The Internship as a Special Relationship in Creating Negligence Liability*, 11 J. LEGAL ASPECTS SPORT 245, 251 (2001), suggesting that internships may be special

not be persuaded to expand the traditional categories of special relationships to include law schools and externs.

Courts have, however, been willing to regard the aspect of the relationship that led to the injury as falling within recognized special relationships — landlord and tenant, employer and employee, business and invitee.³⁵⁶ Duty to the legal extern under a special relationship analysis may turn, then, on whether the externship relationship is sufficiently similar to a relationship already recognized as special — but not the relationships of custodian to ward or school to student.

Courts should not necessarily have to focus on exceptions to no-affirmative-duty rules in these cases. The affirmative duty analysis is triggered when the defendant is accused of nonfeasance — failing to take action to protect the plaintiff from risks that the defendant has not created.³⁵⁷ In some cases, the law school's role in an externship injury might well be viewed as misfeasance — active conduct that caused a foreseeable and unreasonable risk of harm to the student.³⁵⁸ Law schools do act in externship situations. How they act may vary from program to program, but they do not stand idly by. Law schools approve, assign students to, and visit externship sites. A faculty member communicates with the student throughout the externship and may provide an orientation at its outset. Some externships have a concurrent classroom component. When any of these actions created a foreseeable and unreasonable risk of the harm that befell the student, the court could choose not to describe the school's role as nonfeasance but as misfeasance, relieving the student of the difficulties of proving a special relationship or a voluntary assumption of a duty. If, for example, the law school had been aware of unreasonable dangers in the externship neighborhood or abusive behavior of the field supervisor but continued to send students to the site, the act of placing the student would be misfeasance, and affirmative duty issues should not arise.³⁵⁹

Even if the field supervisor was not known to be a threat, the law school should have a duty of care in a lawsuit based on harm caused by the supervising attorney because the case would be premised on misfeasance. Choosing the field supervisor is analogous to a negligent hiring case, such as *Harrington*.³⁶⁰ As college education continues to expand beyond campus boundaries, non-

relationships.

³⁵⁶ See *supra* note 83 and accompanying text.

³⁵⁷ See *supra* notes 77-79 and accompanying text.

³⁵⁸ KEETON, ET AL., *supra* note 87, at 373.

³⁵⁹ It is important to note, however, that foreseeability of injury plus misfeasance will not always add up to duty. The court may find, even where misfeasance is convincingly argued, that public policy does not favor a duty in the particular case.

³⁶⁰ *Harrington v. La. State Bd. of Elementary and Secondary Educ.*, 714 So. 2d 845 (La. Ct. App. 1998); see *supra* notes 305-21 and accompanying text.

traditional instructors will be more common, and courts are likely to find that their selection imposes a duty. It is important to point out here the difference between duty and liability. Although law schools may have a duty to exercise care in field supervisor selection, courts might require little more than ascertaining that the attorney is a member of the bar in good standing because lawyers are subject to character and fitness scrutiny to be admitted to and remain members of the bar. The dangerous supervisor case might not be winnable on duty but quite winnable on breach.

2. *Nova Southeastern* and the Business Model

The relationship between law school and extern is most likely to be compared to the relationship between a business and a customer, the comparison made in *Nova Southeastern* by the Florida Supreme Court.³⁶¹ Analogizing the legal extern to the clinical intern in *Nova Southeastern*, a court may determine that in the context of the externship relationship, the law school is a business providing an educational service and that the student-customer is owed care in that service. The court may either use this analogy to characterize the relationship as a special, business relationship overcoming no duty rules, or as a case of misfeasance by a business in its services.

Like the student in *Nova Southeastern*, the extern is an adult graduate student gaining real world experience for academic credit. The Florida Supreme Court believed that she was owed reasonable care in those services as much as any adult paying for services is owed care in their rendering. "There is no reason why a university may act without regard to the consequences of its actions while every other legal entity is charged with acting as a reasonably prudent person would in like or similar circumstances."³⁶² The court cited the opinion of a Massachusetts trial court, which found that a post-secondary vocational school owed students care in its job placement services.³⁶³ The placement office rendered services for a fee, promoted its school with those services, and owed care in their rendering as any business would.³⁶⁴ The externship program similarly places students with employers and collects tuition from the student extern for the field placement.³⁶⁵ Some schools tout their externship programs as part of their marketing programs.³⁶⁶ By comparison, the law school may be found to be a business charging students to place them in externship sites and to owe them a

³⁶¹ *Nova Southeastern Univ., Inc. v. Gross*, 758 So. 2d. 86, 89-90 (Fla. 2000).

³⁶² *Id.* at 90.

³⁶³ *Id.* (citing *Silvers v. Associated Tech'l Inst.*, No. 934253, 1994 WL 879600 (Mass. Super Ct. Oct. 12, 1994)).

³⁶⁴ See *supra* note 297 and accompanying text.

³⁶⁵ See *supra* note 5 and accompanying text.

³⁶⁶ See *supra* note 8.

duty of care within, at least, site selection.³⁶⁷ Possibly courts will accept *Nova Southeastern* for the broad principle that when colleges and universities place students in internships and externships for supervised, academic credit and receive tuition from the students, that as a business rendering services, they owe students some duty of care in those services.

On the other hand, a court might distinguish the program under consideration from the clinical psychology practicum at Nova and decline to apply the decision. The Nova practicum was mandatory. Nova developed a list of pre-approved practicum sites, and the student chose six sites from the list. Nova made the final site assignment from the student's choices.³⁶⁸ The Florida Supreme Court found that by requiring the internship and assigning students to a limited list of pre-selected locations, Nova had control over student conduct that gave it a corresponding duty to exercise care in making the assignments.³⁶⁹ A court that approves of the *Nova Southeastern* decision on its facts may reject an analogy to a legal externship case if the law school had less control than Nova exerted over the clinical psychology practicum. Because Bethany Gross had to complete a practicum and was limited to one of Nova's pre-selected practicum sites, Nova took away some of Gross's ability to care for herself, by denying her the ability to reject field work and limiting her ability to reject particular sites as too dangerous. Although some law schools may require clinical experience for graduation, as Nova did, most do not. The law school's control over site assignments might also be distinguishable. While some may limit externships to a specific prosecutor's office or legal aid clinic or to a list of specific pre-approved sites, others have much less control over the sites and allow students to locate their own externships and base approval of the site on how meaningful the work will be and on no other considerations.³⁷⁰ When a legal externship is an elective course and the student has freedom to select her own site, a court might reject an analogy to *Nova Southeastern* because the law school has not taken away the student's ability to care for herself by rejecting a placement as too dangerous. Either variable — whether the externship was required and how much control the law school had over site selection — could support a law school's argument that it simply did not have the kind of control shown in the *Nova Southeastern* case and so did not have a similar duty.

In addition, where the student is primarily responsible for selecting the externship site and the school's approval process is limited, the court may not view the law school as in the business of providing field placement services, but rather as providing a purely educational service, and therefore not find a duty regarding site selection. Also, when the school is more detached from site se-

³⁶⁷ Part of the duty to select the site with care may well be a duty to select the field supervisor with care. See *supra* text accompanying note 360.

³⁶⁸ *Nova Southeastern*, 758 So. 2d at 87-88.

³⁶⁹ *Id.* at 88.

³⁷⁰ See Seibel & Morton, *supra* note 4, at 423-26.

lection, there is less likely to be an obligation to warn of dangers particular to a given site because these dangers will not be known to the law school.

A legal extern who convinces a court to adopt the Florida Supreme Court's view of the duties owed to student interns will not succeed in holding the law school to a sweeping duty of care in all aspects of the externship. In clarifying that the duty to Gross could include, but was not limited to, warning of known dangers at the particular site, the Florida Supreme Court quoted the appellate court's statement that "We need not go so far as to impose a general duty of supervision . . . to find that Nova had a duty, in this limited context, to use ordinary care in providing educational services and programs to one of its adult students."³⁷¹ While declining to say what conduct would fulfill the duty, the court wrote that it would involve "some effort to avoid placing [students] with an employer likely to harm them."³⁷²

Courts that have broken away from a broad rejection of duties to students recognize that duty is not an all-or-nothing proposition and that duties can be limited as is appropriate. When the Delaware Supreme Court used a business invitee analogy to impose a duty on the University of Delaware to regulate and supervise hazing, it concurred with the post-immunity cases that the "university is not an insurer of the safety of its students" and stressed repeatedly that the duty was limited, extending only to the acts of third persons that were foreseeable and subject to university control.³⁷³ Control could be found in the "authority to direct, restrict and regulate."³⁷⁴

By analogy to *Nova Southeastern*, a court may find that the law school had a duty to exercise care in the placement decision and a duty to warn students of known dangers in the placement, but not a duty to provide on-going supervision and investigation of the student's safety at the externship site. The duty to protect student externs will be limited to facets of the externship experience that the law school can control. A law school's argument, though, that control is not possible because the externship is off-campus is not likely to carry much weight as practical, off-campus experiences become more and more important in the modern university and expand our concept of "campus." Also, control may be found in the "authority to direct, restrict and regulate."³⁷⁵ Therefore, a student could convincingly argue that control was possible by forbidding certain activities from the outset of the externship. The law school executes an agreement signed by the school, the student, and the field supervisor, and this agreement could direct, restrict, and regulate what occurs in the externship. The court

³⁷¹ *Nova Southeastern*, 758 So. 2d at 90. This may be because Gross herself premised the case on negligence in making the practicum assignment and not on inadequate supervision.

³⁷² *Id.* (citing *Silvers v. Associated Tech'l Inst.*, No. 934253, 1994 WL 879600, at *3 (Mass. Super. Ct. Oct. 12, 1994)).

³⁷³ *Furek v. Univ. of Del.*, 594 A.2d 506, 517, 520-22 (Del. 1991).

³⁷⁴ *Id.* at 522.

³⁷⁵ *Id.*

could, however, correctly consider certain restrictions at odds with the nature of the externship relationship, which is to provide a real-world lawyering experience, and reject a duty to impose those restrictions. Finally, control is not the only issue in limiting the duty. The unreasonable dangers of the activity must have been foreseeable, and some student injury claims will stem from risks that the law school could not have anticipated.

If a court adopts *Nova Southeastern* in an externship case where site selection is primarily the student's responsibility, dangers will often be less foreseeable to the school, which may not be acquainted with the site beyond its verification that work will be sufficiently valuable to earn academic credit. Given the burden of investigating the safety of all potential sites and field supervisors, weighed against the educational and social value of legal externships,³⁷⁶ a court is much less likely to impose upon the law school that does not restrict externships to a limited, pre-approved list a duty to exercise care in the placement decision or to warn of dangers particular to the site.

Sometimes, though, unreasonable dangers in the externship may become apparent to the faculty advisor, and a court should impose a duty of care consistent with the apparent dangers and the school's ability to exercise control over them. When a student reported to me escalating verbal abuse from her field supervisor, who had confessed both his attraction to her and that his medication made him so angry that he had thrown chairs, I told her not to return to work and found alternate assignments for her to complete the remaining two weeks of the externship. Had I done nothing, and had the student been attacked by the field supervisor, my knowledge of the danger and my ability to do something about it would have supported a duty to exercise care to protect her from this situation.

3. Voluntary Assumption of a Duty

In the post-immunity cases, courts analyzed whether colleges and universities had voluntarily assumed custodial duties of care and did not consider whether more limited obligations had been assumed.³⁷⁷ This all-or-nothing view of what duties could be assumed made voluntary undertaking an ineffective argument for students because courts ruled that no custodial care was assumed when schools promulgated rules against dangerous student behavior, hired dormitory advisors, or sponsored student activities.³⁷⁸ Today, courts do not assume that colleges and universities must undertake custodial duties to have safety obligations to their students; they are more willing to look at what acts and promises the school has undertaken and to determine whether care was owed in

³⁷⁶ See *supra* notes 12-28 and accompanying text.

³⁷⁷ See *supra* notes 128-35, 150 and accompanying text.

³⁷⁸ See *supra* Part III.C.

carrying out those acts and promises.³⁷⁹ For example, a court will not refuse to find an assumed duty in prohibitions against underage drinking on campus on the grounds that imposing such rules is not a voluntary assumption of custodial care over students but will instead consider whether the school had, by promulgating the rules, voluntarily assumed a duty to enforce the rules.³⁸⁰ A court will consider whether by hiring Greek advisors to attend fraternity and sorority parties the college had assumed a duty to exercise care in supervising those parties.³⁸¹ The rules have not changed — the courts' willingness to apply them accurately has changed, and this makes the injured extern's chances of demonstrating a voluntary assumption of a duty greater than they once would have been. The rules require the legal extern to prove three things: that a safety obligation was undertaken, that she was injured either because the undertaking increased the risk that befell her or because she relied on the undertaking, and that the responsibility she seeks to impose on the law school falls within the scope of the undertaking.³⁸²

The first important point is that to have assumed a duty, the defendant must have undertaken a safety obligation — “rendering services to another which he should recognize as necessary for the protection of the other's person or things.”³⁸³ In *Mullins*, the college had provided campus security.³⁸⁴ In *Furek*, the university established rules against hazing and attempted to enforce them.³⁸⁵ In *Coghlan*, the school had staff supervisors attend Greek parties.³⁸⁶ Having undertaken specific acts for the safety of their students, the schools had a duty to exercise care in those acts — providing security, enforcing prohibitions against hazing, supervising fraternity parties.

A student could not argue successfully that simply by establishing an externship program, the law school had assumed a duty to exercise care to protect her from third-party dangers within the program. (After all, it's quite clear that establishing a university does not create a duty to protect students from third-party dangers at the university.) The student must show that the law school undertook to render services that it recognized as necessary for her pro-

³⁷⁹ See, for example, the discussion of *Coghlan v. Beta Theta Pi Fraternity*, 987 P.2d 300 (Idaho 1999), beginning *supra* at text accompanying note 260. For a discussion of the current state of the law regarding the assumption of duties by colleges and universities, see BICKEL & LAKE, *supra* note 61, at 133-50.

³⁸⁰ BICKEL & LAKE, *supra* note 61, at 156-57.

³⁸¹ See *Coghlan*, 987 P.2d 300. This case is discussed *supra* in the text accompanying notes 260-74.

³⁸² See *supra* notes 88-95 and accompanying text.

³⁸³ RESTATEMENT (SECOND) OF TORTS § 323 (1965).

³⁸⁴ See *supra* notes 209-15 and accompanying text.

³⁸⁵ See *supra* notes 246-47 and accompanying text.

³⁸⁶ See *supra* notes 272-73 and accompanying text.

tection.³⁸⁷ Whether the law school assumed a duty of care in assigning students to externship sites would depend upon the nature of the externship program. When the program is linked to one or a very few sites, the choice to join forces in a long-term relationship with those sites could be considered rendering a service necessary for the safety of externs because the approval process for an ongoing partnership with a site might well involve considerations of site safety, and students might expect safety to have been considered in long-term site selection. When the law school leaves the site choice primarily to the student, an undertaking is not likely to be found because then the approval process will be more about ensuring that the student will be given meaningful work and experiences and not used as a free, glorified go-fer.

Another place that the student might seek to demonstrate an assumption of duty is in the externship agreement. If the agreement does not specifically make promises related to the student's safety, it should not be enough to show an assumed duty.³⁸⁸ In *Judson*, the externship agreement required the school to visit the internship site, and so the student argued that by agreeing to visit the site, the school had agreed to investigate the safety of the site and had breached that obligation. The court interpreted the point of the visits to be educational, to ensure that the student would learn as much as possible from the experience, and therefore did not interpret the visits as a voluntary assumption of a duty of care in making the visits.³⁸⁹ Similarly, the ABA requires site visits to ensure the educational value of the externship assignment,³⁹⁰ and faculty visits to the field placement should not be interpreted as voluntary assumptions of a duty of care in those visits.

Externs might also point to orientation meetings as assumptions of duty, but when an orientation addresses only requirements for reporting hours, turning in journals, completing work assignments, and the like, the law school has not undertaken services that it "should recognize as necessary for the protection of the other's person or things."³⁹¹ On the other hand, when the orientation warns students of dangers in the externship or counsels them how to handle dangerous situations, this is an undertaking related to student safety, and if the other re-

³⁸⁷ RESTATEMENT (SECOND) OF TORTS § 323. See, for example, *Tollenaar v. Chino Valley School District*, 945 P.2d 1310, 1311-12 (Ariz. App. 1997), in which the court found that, by imposing a closed-campus policy, the school district had not voluntarily undertaken to protect students from injuring themselves by leaving campus during school hours. The parents of high school students who violated the policy and were killed in an automobile accident presented no evidence that by undertaking the closed-campus policy the school recognized, or should have recognized, that it was necessary for the students' protection.

³⁸⁸ Even if a safety promise is made, there is some question as to whether a mere promise without starting performance can be an undertaking. Courts, however, tend to try to find ways to enforce safety promises. See *supra* notes 91-93 and accompanying text.

³⁸⁹ See *supra* notes 285-88 and accompanying text.

³⁹⁰ ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS § 305(f)(3) (2002).

³⁹¹ RESTATEMENT (SECOND) OF TORTS § 323.

quirements for voluntary assumption are met, a duty of reasonable care in providing those warnings would be imposed.

Undertaking to provide safety is not, by itself, enough to establish a voluntary assumption of a duty. As the court explained in *Mullins*, the plaintiff must have been injured either because she relied on the undertaking to be effective in protecting her or because the undertaking increased the risk of the harm that befell her.³⁹² The court found that Mullins, who had visited a number of colleges, had seen security measures on campus and relied on them to protect her.³⁹³ In *Furek*, the university's complete incompetence in enforcing its hazing prohibitions increased the danger to Furek of being injured by fraternity hazing.³⁹⁴

So, for example, if a law school has undertaken a safety service by its site approval process, a student attacked in the parking lot of one of the sites will still have to demonstrate that she was injured because the site assignment increased the risk of that injury to her or because she relied on the law school's care in making assignment.³⁹⁵ If the site is not unreasonably dangerous, site selection cannot be shown to have increased the risk to the student. If the student's testimony indicates that she did not drop her guard or choose to walk alone to the lot because she expected the school to have chosen the site with care, then injurious reliance will be difficult to show. Also, reliance will be difficult to prove if the student fully realized the dangers of the site before registering for the externship.

Similarly, reasonable orientation advice that does not encourage students to engage in risky behaviors or create a false sense of security that students rely on to their detriment should not be the basis for an assumed duty. Unreasonable orientation advice, however, could increase the risk of harm to students ("Never pass up an opportunity to work alone with your boss after hours") or induce reliance ("Although you should be alert, we wouldn't send you to a site we hadn't checked out thoroughly") and support an assumed duty theory.

Finally, the assumed duty will be limited to the scope of the undertaking.³⁹⁶ For example, by providing an externship orientation that gives general safety advice, the law school does not assume a duty regarding site inspection or supervision but assumes only a duty to exercise care in giving the warnings.³⁹⁷

³⁹² See RESTATEMENT (SECOND) OF TORTS § 323; *supra* note 211 and accompanying text.

³⁹³ See *supra* note 211 and accompanying text.

³⁹⁴ See *supra* notes 232-34 and accompanying text.

³⁹⁵ See *supra* notes 88-89 and accompanying text.

³⁹⁶ See *supra* note 95 and accompanying text.

³⁹⁷ See *supra* note 95 and accompanying text. When warnings are voluntarily provided, the only duty assumed is to warn with care. This is because, when a defendant has undertaken a specific task, the defendant is required to perform only that specific task with care. See, e.g., *Davis v. Westwood Group*, 652 N.E.2d 567, 571 (Mass. 1995) (finding that, by hiring an officer to direct

Even where a court believes that the site assumes a duty of care in site selection, it will not expand that duty to encompass safety supervision at the site.

As I have mentioned, one of my former externs worked for an abusive supervising attorney. As she began her externship, I did not have a duty to protect her from him, but she sought my counsel on how to handle him, and I advised her. We talked regularly about strategies for keeping matters professional, and I sent her articles on corporate psychology and how to manage a difficult boss. By that counsel, did I assume a duty to her?

First, did I undertake services that I perceived as important to her safety? Based on our interaction as I have just described it, the lawyer for the law school would likely argue that I advised the student regarding “keeping matters professional” and did not begin rendering services for the extern’s safety. And that is an accurate description of our initial consultations. At first, I just thought that the supervising attorney was overly critical and insensitive, and when I first talked about his harsh criticisms and sent the articles, I was not motivated by concern for the student’s safety but wanted to help her manage the field supervisor so that he would provide clearer and more appropriate expectations, priorities, and feedback. At that point, no safety duty was assumed. After time, though, the supervisor began to appear potentially dangerous to the extern because of his mercurial temperament, which he admitted was affected by medications, and our conversations turned to her safety working in his office. I began to question her about her perception of the degree of threat that he presented. It may be that a court would find that once I began any conversation focused on safety, I had begun rendering services related to her safety. Certainly, when my advice became safety advice, the first step towards establishing a voluntary assumption would be met.

My former extern was not physically harmed by her hot-tempered supervisor, and so the question of whether I assumed a duty by rendering safety advice now becomes hypothetical.³⁹⁸ If one evening, working late on a project, the student went into the attorney’s office where he berated her and then threw his chair at her, striking and injuring her, the next question would be whether my advice in any way increased the risk of that danger. If, for example, I gave

pedestrians across a state highway from the parking lot to the defendant’s greyhound track, the defendant did not undertake the broader duty of providing safe passage across the highway by means of a pedestrian bridge or traffic light); *see also* *Hinson v. Black*, 572 S.E.2d 653, 655 (Ga. Ct. App. 2002) (finding that defendant did not assume a duty to prevent injury to the decedent when he warned her not to go onto the balcony while intoxicated), *cert. denied*, No. 503C0196, 2003 Ga. LEXIS 61 (Ga. Jan. 13, 2003). The duty to warn with care is not assumed unless the warning increased the risk to the plaintiff or her harm was suffered in reliance on the warning. *Valance v. VI-Doug, Inc.*, 50 P.3d 697, 703 (Wyo. 2002).

³⁹⁸ That, in itself, merits comment. Duty rules tell parties how to behave, but a voluntary assumption of duty cannot be fully assessed until after an injury has occurred and the opportunity for exercising care has passed. How then do the voluntary assumption rules help guide behavior? They tell what kind of conduct assumes a duty and how broad the scope of the assumed duty will be.

her suggestions about how her work product and behavior might avoid conflict but did not tell her that she should not remain alone in his solo office with him after hours, she might claim that by omitting that warning, my advice increased the risk to her. I might also be argued to have increased the risk if I had advised her to be more assertive and her assertiveness then triggered the attack, or if I telephoned the field supervisor to discuss his behavior and my comments set him off. The extern could also contend that she relied on the undertaking if, for example, she had been thinking about asking to be removed from the externship but believed that because I had asked her questions about the office atmosphere and had not suggested her removal, she remained on the site in reliance on my assessment that it was safe. If I spoke with her field supervisor regarding my concerns about his temperament and then reported back to the student that I thought the conversation had gone well, she could contend that she worked late with him because she assumed I had reduced the danger.

Whatever duty I assumed, though, would be limited to the scope of my undertaking. If all I undertook to do was advise the student about how she herself could best handle her temperamental employer, she may not be able to premise her claim on my failure to consult with the field supervisor or to remove her from the site. She might be able to argue, though, that I had voluntarily assumed a duty to assess the risks of her placement, and that I breached that duty by underestimating the threat the field supervisor posed to her. If I spoke with her supervisor, she might contend that I had undertaken to reduce the dangers.

VI. CONSIDERING DUTY BASED ON A FACILITATOR MODEL OF SHARED RESPONSIBILITY

A. *The Inadequacies of the Business Model*

Duty rules for colleges and universities should promote a safe learning environment, which the post-immunity cases, by placing all responsibility for student safety upon the students themselves, failed to do. This imbalanced legal model encouraged colleges and universities to stand idly by in the face of risks to students because they feared that any protective action would assume duties not otherwise owed.³⁹⁹ Judicial use of business models to impose duties attempts to provide a more appropriate balance of responsibility, and courts can be expected to continue to analogize colleges and universities to landlords, employers, and other businesses because this is familiar territory and does not require the courts to develop a model specifically for the relationship between college students and their schools.⁴⁰⁰ Still, while the business model does seek to balance safety obligations on American campuses, the model is imposed by way of analogy and is not tailored to the unique features of colleges and univer-

³⁹⁹ BICKEL & LAKE, *supra* note 61, at 133-35.

⁴⁰⁰ *Id.* at 181.

sities. Duty, though, is dependent upon the nature of the relationship between the parties, and college students deserve a model that reflects their unique situation, not one cobbled together by a series of analogies to other relationships. The business model ignores that the university is not an ordinary business and that “[s]tudents are not ordinary consumers buying a sandwich or shirt.”⁴⁰¹ Critics have contended that a business model tends to divide responsibility rather than establish the shared safety responsibility appropriate to life in the college community,⁴⁰² does not address the unique aspects of the business of running a college or university, and cannot strike the right balance between university authority and student freedoms, so that it is too protective of students in some situations and not protective enough in others.⁴⁰³

Another flaw in decisions that apply various business models of special relationships to universities and students is that these cases consider special relationships at all. The post-immunity era so entangled the duties of colleges and universities with the law of special relationships that courts generally assume that the law of affirmative duties and special relationships must be evoked whenever students sue their colleges for negligence.⁴⁰⁴ Yet very often, the college or university has acted in a way that created a risk, and the analysis should not turn to whether the school was acting in a landlord special relationship or business special relationship or assumed a duty of care to the student.⁴⁰⁵ The

⁴⁰¹ *Id.* at 182.

First, if students are consumers, then they should be entitled to get what they want and pay for [W]e have given them this, for example with grade inflation. When universities have canceled beer privileges, students have rioted violently: as consumers paying more money than ever, they feel entitled to get what they pay for and be left alone. Students who view themselves as consumers often assert the very radical and libertarian aspects of freedom which the bystander cases described. In short, when applied to colleges, strict business paradigms tend to polarize student conduct.

Id. at 184.

⁴⁰² *Id.* at 184. Professors Bickel and Lake have stated,

Restoring community values — shared responsibilities — on campus can make campuses safer and less violent places. Business rules work well to promote safety at K-Mart, but young people on campus do not *live* at K-Mart or even spend significant amounts of their lives there. . . . A consumer has little investment in making a store safer for others; every student depends on other students for safety on campus.

Id. at 185.

⁴⁰³ *Id.* at 184.

⁴⁰⁴ *Id.* at 179-80.

⁴⁰⁵ Let us make this perfectly clear: Universities can owe duties to their students on and off campus irrespective of whether there is a special relationship of any kind. Legal special relationships only potentially enhance responsibility to include affirmative duties to proactively prevent harm even when caused by

business model cases perpetuate the incorrect assumption that all these cases must be analyzed as affirmative duty scenarios that require injured students to demonstrate special relationships or fit university actions into the elements of a voluntarily assumed duty where the university simply may have acted in a dangerous way appropriate for imposing a duty without such an analysis.⁴⁰⁶

The law school is so closely involved in the student's use of its externship "product" that it is more than a business selling an externship. The law school guides the student through a practice run for life as a lawyer, with site approval, an externship agreement, orientation, faculty supervision, and site visits. In this practice run, the adult law student is given real work by a real employer away from the campus, and so the relationship must, for practical purposes, place significant safety responsibility with the extern. A straight business analogy is a clumsy fit for this delicate balance of control and freedom.

A reality of this practice run is that legal externs will be exposed to the dangers that lawyers face daily, and a model that places all responsibility on the extern on the grounds that this is a working adult may discourage law schools from taking simple steps that will make the externship safer, while a model that imposes broad safety responsibilities on the law school as a business pocketing the extern's tuition payment could fail to recognize the adult law student's own significant responsibility for keeping safe in an exercise in making the transition to being responsible for one's professional life. Finally, the duty model applied to externships should consider that there is a third party with significant responsibility for the student's safety — the firm, agency, or other office where the student works.

When a court turns to a business model, it has assumed that the case is based on nonfeasance when such an assumption may simply be incorrect. The business law approach looks at all university conduct not as misfeasance but as possible voluntary assumptions of duty, when the key question may really be whether the law school has acted in a way that has unreasonably exposed the student to foreseeable dangers. The *Nova Southeastern* case, for example, seems to blur the question of the care owed by businesses in all services that they render with the issue of voluntarily assuming a duty and thereby being obligated to carry it out non-negligently.⁴⁰⁷ This creates a knotty problem of trying to sort out what externship behaviors are business behaviors in which care is

third parties, non-negligent forces, and/or students themselves. Special relations are not prerequisites to duty, per se, but only prerequisites to certain kinds of duty to take affirmative action. Custodial relations are only a subset of special relationships. This is basic tort law.

Id. at 180.

⁴⁰⁶ For example, to use the example from Part III.C.3, *supra*, if an externship advisor gave the student bad advice, why shouldn't that be analyzed as misfeasance rather than as an affirmative duty problem that requires a voluntary assumption of the risk analysis?

⁴⁰⁷ See *supra* note 334.

generally owed and which are voluntarily assumed duties in which care is owed limited to the scope of the voluntary assumption.

As the next section discusses, a fitting duty model for externship programs seems to be the facilitator model proposed by Professors Bickel and Lake. Describing appropriate university conduct, their model accurately mirrors the externship relationship as one in which the college or university provides “[i]nformation, training, instruction and supervision, discussion, options, and, in some cases, withdrawal of options” to create an atmosphere in which students make choices for themselves and bear significant responsibility for the consequences of their choices.⁴⁰⁸ In this model, unreasonable risks that arise from the university’s improper planning, guidance, and instruction are borne by the university, and comparative fault plays a significant role.⁴⁰⁹ The model works well, too, by detaching the law of duties owed to colleges and universities from the law of affirmative duties and special relationships and using a duty balancing test to decide the issue.⁴¹⁰

B. *The Facilitator University — An Appropriate Model for Externships*

1. The Facilitator Model

In reality, the responsibility for the legal extern’s safety will be shared, and so the proper legal model for the relationship should reflect that reality. During the externship, the law student will, for practical reasons, shoulder significant responsibility for her own safety because she is away from campus in a real-world experience, where what the school can do to protect her is limited. Yet the law school does establish the rules for and often the setting of the externship, provide guidance to the student, and act in other ways that influence student safety. The facilitator university model developed by Robert D. Bickel and Peter F. Lake is particularly suited to reflecting the reality of the relationship and guiding law school behavior and judicial analysis of the duty question regarding externships.⁴¹¹ “A facilitator college,” according to Bickel and Lake, “balances rights and responsibilities — it is neither extremely authoritarian nor overly solicitous of student *freedom*. Importantly, a facilitator college seeks *shared* responsibility rather than allocating it unilaterally or not at all.”⁴¹² A

⁴⁰⁸ BICKEL & LAKE, *supra* note 61, at 193.

⁴⁰⁹ *Id.* at 195.

⁴¹⁰ *Id.* at 202.

⁴¹¹ It must be noted at the outset, however, that no court has yet explicitly adopted this model, as of a March 2003 Westlaw search. Bickel and Lake do contend that many courts have implicitly applied this approach. *Id.* at 193. In addition, one of their articles about the facilitator university is noted with approval in a footnote to *Nova Southeastern Univ., Inc. v. Gross*, 758 So. 2d 86, 89 n.2 (Fla. 2000).

⁴¹² BICKEL & LAKE, *supra* note 61, at 192.

facilitator university places a significant amount of responsibility for student safety on the students themselves, but — like the well-run externship program — it also “provides as much support, information, interaction, and control as is reasonably necessary and appropriate in the situation” for students to exercise that responsibility intelligently and adapts to the needs of the particular student body.⁴¹³

Unlike parents, facilitators do not *choose* for students. Students must choose *for themselves* and shoulder significant responsibility for outcomes of their choice. The key is that the facilitator manages the parameters under which choices are made. Information, training, instruction and supervision, discussion, options, and, in some cases, withdrawal of options are all appropriate for facilitators. A facilitator (instructor or student affairs professional) is keenly aware of aberrant risks and risks known only to the more experienced. A facilitator is very aware of the types of students and the particular university community. Limited roles are fine for adult students who ‘just want classroom education.’ Greater roles are usually appropriate for less mature tweenagers, particularly those in full time on-campus living arrangements. In other words, a facilitator *adapts* and varies the level and nature of involvement.⁴¹⁴

The facilitator university does not abdicate its authority or proper duties and accepts responsibility for “those unreasonable risks that would arise from lack of proper university planning, guidance, instruction, etc.”⁴¹⁵ Furthermore, “[t]he facilitator is responsible to provide reasonable conditions of background safety in the interest of the student’s educational pursuits.”⁴¹⁶ As an example, Bickel and Lake suggest, clearly thinking of *Nova Southeastern*,⁴¹⁷ “A facilitator university would allow a student to visit a family services center on her own, but it would not assign her there as an intern without making some determination that it was a reasonably safe place for her to be and that she would receive proper orientation at the facility.”⁴¹⁸ The modern facilitator university should be alert for potential dangers to students and facilitate positive behavior by students to avoid those dangers.⁴¹⁹ Within this model, comparative fault is important,

⁴¹³ *Id.* at 193.

⁴¹⁴ *Id.*

⁴¹⁵ *Id.* at 195.

⁴¹⁶ *Id.* at 203.

⁴¹⁷ *Nova Southeastern Univ., Inc. v. Gross*, 758 So. 2d 86 (Fla. 2000).

⁴¹⁸ BICKEL & LAKE, *supra* note 61, at 195-96.

⁴¹⁹ *Id.* at 196.

and the student who fails to exercise carefully her responsibility for her own safety should find her recovery reduced or barred.⁴²⁰ But unlike the bystander model, the facilitator model does not find that student responsibility means no university responsibility, that student negligence means no university duty.

This model distinguishes duty from liability and encourages reasonable facilitation of student activities. When the university has acted as a reasonable facilitator, the student will survive a summary judgment on duty grounds, but the jury will rule in the university's favor because it did not breach its duty. When the university did not act reasonably, but unforeseen events or significant carelessness by the student plaintiff led to the injury, duty will not keep the case from the jury, but the university should win on causation or bar or significantly reduce student recovery on comparative fault grounds. If the question is reasonable facilitation, the duty issue is separated from the murky area of the law of affirmative duties, special relationships, and voluntary assumption of duty because it is no longer necessary to distinguish nonfeasance from misfeasance, misfeasance from assumed duties.⁴²¹

Bickel and Lake hope that universities will use the facilitator model to guide their practices regarding student safety and that courts will use the model to understand the nature of the relationship between college and student and to guide their duty analysis and impose those duties appropriate to assign a facilitator.⁴²² The question remains whether this model can create some predictability in this area of the law. The facilitator model, after all, involves much flexibility. The university adapts to the student body and to different situations; the balance of rights and responsibilities depends upon the types of students and the type of situation at hand. How, then, can the facilitator model create predictability? The best test for this, Bickel and Lake believe, is a policy-driven factor analysis that "may be the only undeniable point of consensus among all the disparate cases of the last few decades."⁴²³ In determining whether the college owed the student a duty, the court should weigh:

- (1) foreseeability of harm;
- (2) nature of the risk;
- (3) closeness of the connection between the college's act or omission[] and student injury;
- (4) moral blame and responsibility;

⁴²⁰ *Id.* at 195-96.

⁴²¹ *Id.*

⁴²² *Id.*

⁴²³ *Id.* at 202.

- (5) the social policy of preventing future harm (whether finding duty will tend to prevent future harm);
- (6) the burden on the university and the larger community if duty is recognized;
- (7) the availability of insurance.⁴²⁴

Existing case law, they say, has shown how these principles should be applied in certain recurring scenarios, and it will fall upon courts in future decisions to be clear about what will and will not be required under a factor analysis of facilitator responsibility.⁴²⁵ The advantage is that in the future, the discussion will be more straightforwardly and accurately about the kind of relationship truly shared between college and student, no hiding behind de facto immunities, no shoe-horning the relationship into familiar categories.

How, then, would the facilitator model apply to the externship situation? There are two concerns: how does the law school behave as a reasonable facilitator of the externship, and when should courts impose duties upon the law school under this model? The next two sections address these questions.

2. Using the Facilitator Model to Guide Externships

In the externship program, the facilitator law school, the extern, and the supervising attorney in the field will share responsibility for the student's safety. A significant amount of that shared responsibility will fall upon the law student, who, for most safety issues, will be in a far better position than the law school to keep herself safe. Nonetheless, shared responsibility does place some safety obligations on the law school and upon the externship site.

In planning and structuring the externship, the law school can address the issue of reasonable background safety.⁴²⁶ A significant part of background safety is site selection. Sometimes the law school is solely responsible for choosing the site, as when it creates an externship program that is connected to a limited list of sites. In that situation, it has a responsibility to determine that the site has no unreasonable dangers, particularly the kinds of dangers that good orientation advice cannot significantly reduce. This responsibility must fall upon the law school because it is not a responsibility that can be shared with the student; the law school is making the choice, not the student. On the other hand, when the student chooses the site, and the law school's approval is limited to the educational value of the placement, the far greater share of the responsibility for a safe choice should lie with the student who is making the choice. The law

⁴²⁴ *Id.* at 202.

⁴²⁵ *Id.* at 202, 204.

⁴²⁶ *Id.* at 203.

school should advise students to consider safety in making the choice and make clear that the school has no opinion regarding the safety of the site. The externship agreement should state that the student has chosen the site, that she understands that the law school has not evaluated its safety, and that she assumes the risk of dangers in the site.⁴²⁷

Sometimes, though, when students choose their own sites, other students will have worked at the sites before them. Law schools should keep track of safety concerns raised by students and faculty mentors regarding individual sites. If concerns are raised about a site's safety, some responsibility should lie with the law school before sending another student there because the school now has reason to be concerned about safety and does have the ability to do something about it. It can withdraw the option of this particular site, if the prior student's accounts suggest it is unreasonably dangerous. When externs go to sites where previous externs have worked, they may be less vigilant for their own safety, assuming that the site has not presented problems, or they would not have been sent there. If the school does not regard the dangers as so high as to be outweighed by the value of the experience the site affords, the school must at least give students the information necessary for them to decide whether they want to accept the site and to keep the appropriate vigilance if they do go there.

The law school cannot provide physical protection to students at their externship sites, but as a facilitator, it can provide at an externship orientation the information that will help students make good choices about their own safety. Although law students are adults and some have come to law school from other careers, a sector of the externship population will have gone from their high schools to a college campus to a law school campus and may yet be unsophisticated with regard to the wider world. Law schools should not hesitate to provide general safety information for fear that by doing so they will have assumed broad duties with regard to safety. The only duty assumed by providing safety information is to give that information with reasonable care.⁴²⁸ Students might be cynical, as they are law students, that safety talk is just an attempt to place legal liability on the student. This advice might be more convincing if it comes from someone outside the school. Also, should concerns have arisen about any particular sites, but not to the level that withdrawal of the site would be appropriate, students should be alerted to known dangers at particular locations. This provides them the information they will need to keep themselves safe.

Student safety can also be addressed in the externship agreement. As an agreement among three parties, the law school, the law student, and the field supervisor, the agreement can place certain obligations with the supervising attorney to ensure that the student receives proper information about any safety

⁴²⁷ Foster & Moorman, *supra* note 355, at 260-61.

⁴²⁸ See *supra* note 397.

issues particular to the site or work assignments that she will receive.⁴²⁹ It can require the field supervisor to agree to abide by law school regulations regarding sexual harassment and other forms of discrimination.⁴³⁰ The agreement can also prohibit activities that the school finds too risky, such as, perhaps, over-night travel with field supervisors of the opposite sex.

Throughout the externship, the student communicates with a faculty advisor. If anything in the conversation raises alarm bells, the faculty advisor should discuss it with the student to ensure that the student knows how to handle such situations and to discern whether the student is exposed to an unreasonable danger. A student told me in her e-mailed journal that she had been working alone at night in the office when an angry client began pounding on the door demanding to be let in. At the time, I did not realize I was following a facilitator model, but I questioned her about what she had done. As it turns out, she did not open the door and called one of the attorneys to determine just how scared she should be of this particular client before she attempted to walk to her car. We discussed her parking arrangements and how safe they were and how often she worked alone at night and whether that was a good idea or not. If our conversation had not assured me that she faced no unreasonable dangers, I could have, as a facilitator, withdrawn certain options from her.⁴³¹ I could have told her that she was not to work alone after hours and could have explained the reasons to her field supervisor. Fortunately, this step was not necessary because through supervision and consultation, I felt comfortable that the student was safe. If a student in an externship raises particularly high safety concerns — such as a sexually harassing supervising attorney — the student may need to be removed from the placement.

The point of site visits is educational, but should any concerns arise during the visit, the faculty supervisor should address them with the field supervisor and the student. The site visit should not turn into a safety inspection, in part because the kinds of dangers most likely to affect students would not be observable in the site visit. The site visitor would not notice the irate client who may show up the next day in a rage, and the sexually harassing field attorney is likely to be on his best behavior during the site visit. If the professor who supervises the student's journals is not the same professor who makes the site visit, the two should communicate before and after the site visit regarding any safety concerns. When safety concerns arise, a conversation should be held with the student and with the field supervisor. The point of talking to the supervisor is to find out what degree of danger is involved, and the point of talking to the student is to assess whether the student is aware of the danger and knows how best to conduct herself to avoid that danger.

⁴²⁹ It would also be possible to ask the field supervisors to enter indemnity agreements, but they might decline to accept externs on those terms.

⁴³⁰ Foster & Moorman, *supra* note 355, at 261.

⁴³¹ BICKEL & LAKE, *supra* note 61, at 193.

Law schools have limited control over the safety of students in externships. Their greatest point of control is in site selection, in making sure that students are not sent to unreasonably dangerous sites. Beyond that, all that they really can do is guide and advise the student about how best to keep safe in general and with regard to any known dangers at the site. They can, through the journals, keep an eye out for safety concerns, and when those arise assess the student's ability to deal with those dangers and speak to the field supervisor if necessary. The only other control that the school has is to remove the student from the site if dangers seem unreasonable. Students, though, may be resistant to this if it means losing the credit for that particular term. At such a point a waiver may be appropriate. Courts are more likely to impose duties upon colleges and universities with regard to student safety, and therefore schools must avoid liability by not breaching obligations rather than by doing as little as possible out of fear of assuming duties they would not otherwise have. To avoid liability for student injuries, schools should act as reasonable facilitators to prevent such injuries.

3. Judicial Application of the Facilitator Model to Externships

I supervised a student extern who worked for a solo practitioner specializing in international law. One day the student called me because her field supervisor had asked her to go on a business trip with him to Italy and she wanted permission to accompany him. This was the same field supervisor who, she had disclosed to me earlier, told her that she had been hired because she was pretty. "Look around you," he said. "Do you see anyone unattractive in this office?" She had also reported to me more than once his moodiness, quick temper, and harsh manner of criticism. He also often dangled the carrot of whether he would hire her at the end of the externship. Together with the head of the externship program I made clear to her that she was forbidden to take the European trip.⁴³²

But what if we had allowed the student to travel outside the country and the supervising attorney had harmed her in some way on the trip? If the extern sued the law school, could the school argue that it had no duty to protect her from her field supervisor and thereby escape liability?

Under the facilitator factor analysis, a court would first consider the *foreseeability of harm*, which is the key element in determining duty. Here, a sexist male attorney, who has not been particularly happy with a female student's work product, wants nonetheless to take her with him out of the country on business. The sexist male attorney has admitted that he finds the student attractive, and he is known to have a hot temper. The chances that alone in a foreign country this student will be vulnerable to some kind of sexual assault, a severe *nature of risk*, by the attorney seem to be unreasonably high. Also, with

⁴³² In other words, instead of consulting with her and helping her make her own choice, we withdrew the option, another avenue for the facilitator to make when that is the appropriate balance of responsibilities.

his temper, he could be foreseen to present some danger of other physical attack. While defense counsel might argue that the *closeness of connection between the law school's act or omission and the student's injury* is attenuated, because it was the supervising attorney and not the law school who inflicted the harm, this is a simple case where the student asked permission, and the school, aware that granting permission would expose the student to an unreasonable danger from the field supervisor, gave permission anyway. Had permission been withheld, the student would not have been injured, and the connection seems close.

Moral blame and responsibility would seem to lie with a law school willing to permit a young woman to travel outside the country with a sexist male in a position of power over her academic credit and career development.

The next issue is the *social policy of preventing future harm*. Future externs will be safer if law schools recognize that they must exercise care in granting permission to travel with a field supervisor who has presented some questions about the danger he presents to the student. Schools will be less likely to grant such permission, and so fewer students will be exposed to such dangers. Indeed, schools may simply decide that traveling with field supervisors should not be allowed.

Next we consider *the burden on the university and the larger community if a duty is recognized*. Law school counsel might contend there would be a chilling effect on useful externship experiences if schools become afraid to allow students to travel with supervising attorneys, but this seems to be a weak argument. Although one, small opportunity would be lost without travel, the externship will still provide significant opportunities for the students to grow in their legal analysis and writing, factual investigation, communications skills, counseling skills, organization skills, and so forth. Law school counsel might also contend that determining whether the travel opportunity presents a danger would be burdensome, but a duty would only be imposed where dangers of the particular travel opportunity are foreseeable. Here, they were. Courts should not find that, broadly, travel with a supervisor presents a foreseeable, unreasonable danger to an extern.

Finally, the court will consider *who usually insures for such risks*, and it is likely that the law schools do not insure against student injuries in field placements and more likely that they use the externship agreement to place that responsibility on the law firm, agency, or other office where the student will be working. Of course, where the student is a victim of an intentional tort by the supervising attorney, it is unlikely that the site will have coverage for the incident either.

On balance, it would seem that a duty was owed to this student to exercise care in the decision whether to permit her to go on the trip. A serious, unreasonable risk was foreseeable, and the student's injury was directly linked to the decision to permit her to travel with the attorney. By exposing her to possible sexual harassment or assault, the school seems to be morally blameworthy and the burden was minimal: simply deny permission to travel outside the country with the attorney. Future applications of such a duty would not be burden-

some in the sense that they deny significant opportunities to externs or subject the public to less highly trained attorneys.

Outside this hypothetical, what predictions could be made as to how a facilitator model, analyzed through the factors, would affect the issue of a law school's duty to injured student externs? Again, the key issue is *foreseeability*, and most often the kinds of dangers that will harm externs will be the random, unanticipated sort. A client, unknown and unknowable to the law school, bears a grudge against an attorney where the student is an extern, and the student is injured in an attack on the attorney. An opposing party in a divorce case, angry with the results of a hearing, attacks the extern. As these are dangers that the law school could not anticipate, their lack of foreseeability will weigh so heavily in the analysis that a duty should not be found. In addition, with these possible but not probable events, the *burdens* involved, if a duty is imposed, would be extreme, rendering the law school an insurer of student safety.

The law school can control the factor of *moral blameworthiness* by acting responsibly towards students, by not establishing sites known to be unreasonably dangerous or returning students to sites where unreasonable dangers are known.

Another factor that should be considered is the *social value* of externships themselves, which are training grounds for future lawyers, provide support to public service and government agencies, and encourage some students to pursue public service careers.⁴³³ Courts, therefore, should be hesitant to impose any responsibilities that would chill the externship experience.

VII. CONCLUSION

The law regarding the duties that colleges and universities owe their students continues to evolve and still is influenced by the post-immunity era in which courts used the constitutional adult status of students against them to create a *de facto* immunity through duty law. That influence is ever-decreasing as courts become more and more open to imposing obligations of care upon institutions of higher learning. What this means for law schools is that courts may compare the externship program to a business relationship that imposes a duty of care upon the law school, as it would upon any business rendering services, to exercise care in that relationship. Under this business model, courts may be inclined to limit the duty to care in site selection and warning of known dangers at the externship site and certainly would not impose it for unforeseeable dangers or those outside the law school's control. The fact that the externship is not served on the law school campus will not, however, place the student's safety outside the law school's control. Also, courts may be more willing to find that by certain acts within the externship the law school has assumed a duty of care in those acts. Finally, courts may move towards a facilitator model that regards the nature of the relationship as one in which the school's primary role in stu-

⁴³³ See *supra* notes 21-23 and accompanying text.

dent safety is to plan, guide, instruct, train, and consult, and where significant responsibility is placed upon the student herself for her own safety. The critical point is that courts are likely to impose some legal responsibility upon law schools for extern safety, and therefore, law schools seeking to avoid liability should not depend upon no-duty arguments to shield them but should instead conduct themselves so that no-breach arguments will.