George Jay Joseph Education Law Writing Award Winner

The Restatement (Third) of Torts: Combating Sexual Assaults on College Campuses by Recognizing the College-Student Relationship

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Imagine receiving the unsettling news of a loved one being sexually assaulted on a college campus by a third-party assailant. Then, imagine learning that the assault was due to the college having inadequate security. Moreover, the student cannot recover damages against the college[1] because the courts in that particular jurisdiction are reluctant to find that a college owes a duty to safeguard its students against third-party criminal attacks, or even slippery sidewalks for that matter. Unfortunately, this is a scenario that students can still face under the current legal framework. Essentially, for some students, the likelihood to recover any damages hinges more on logistics rather than the merits of the case.

The pervasiveness of sexual assaults on college campuses garnered the attention of President Obama, and now, the nation. In 2010,

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1. "College," as it is used in this Article, is synonymous with "university," "institution of higher education," and all other similar entities.

President Obama directed all federal agencies to prioritize the domestic and sexual violence epidemic, especially across our nation's college campuses.[2] Yet, the propensity of sexual assaults on college campuses forced a renewed call to action from President Obama when he created the White House Task Force on Protecting Students from Sexual Assaults earlier this year.[3] The Task Force's overall objective is to ensure colleges are held accountable for their legal obligations to combat campus sexual assault.[4] One area among many that the Task Force needs to address is the failure by the courts to uniformly recognize that an affirmative duty is owed in the student-college relationship. Accordingly, this Article submits various arguments that promote a student's ability to seek damages against her college after being victim to a preventable sexual assault committed by a third-party assailant.

Specifically, this Article presents three arguments. First, the current foreseeability standards are erroneously being incorporated into a legal duty analysis. Second, at least for matters that involve university law, the appropriate negligence standard comes from section 3 of the Restatement (Third) of Torts. And third, the college-student relationship should impose an affirmative duty upon a college to its students.

Part I provides a brief explanation of the current state of tort law in the collegiate setting. Part II attempts to rewrite the applicable foreseeability standard, along with discussing how critical it is for determinations on foreseeability to be decided by a jury. Part III demonstrates why foreseeability is best suited for a negligence standard

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2. The White House Council on Women and Girls, *Rape and Sexual Assault: A Renewed Call to Action*, WHITEHOUSE.GOV (January 2014) (footnote omitted), http://www.whitehouse.gov/sites/default/files/docs/sexual_assault_report_1-21-14.pdf [hereinafter *Renewed Call to Action*].

3. Office of the Press Secretary, *Weekly Address: Taking Action to End Sexual Assault*, WhiteHouse.gov (Jan 25, 2014), https://www.whitehouse.gov/the-press-office/2014/01/24/weekly-address-taking-action-end-sexual-assault.

4. *Renewed Call to Action, supra* note 2, at 24-26. Five objectives are explicitly stated to this end: (1) Provide educational institutions with guidance toward preventing and responding to rape and sexual assault; (2) increase federal enforcement efforts; (3) enhance transparency of the federal enforcement efforts; (4) increase public awareness of college's compliance with these federal laws; and (5) improve coordination among federal agencies in the enforcement efforts. *Id.* at 26.

that utilizes a balancing approach, such as the standard in the Restatement (Third) of Torts. Finally, Part IV examines the evolution of the college-student relationship, its treatment by the courts, and the more persuasive proposals addressing the issue.

I. NEGLIGENCE CLAIM FUNDAMENTALS

The increased number of civil actions alleging a college's failure to prevent sexual assaults has generated constant discussion within the legal community since it was recognized over thirty years ago.[5] These lawsuits are predominately pleaded as negligence claims under a premises liability theory stemming from the college's failure to reasonably protect students from sexual assaults on campus.[6] To succeed under a negligence theory, the student has the burden of proving four required elements:[7]

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5. *Compare* Nancy Hauserman & Paul Lansing, *Rape on Campus: Postsecondary Institutions as Third Party Defendants*, 8 J.C. & U.L. 182, 192 (1981) [hereinafter *Rape on Campus*] ("Civil actions based on sexual assaults in which the third party defendant is a postsecondary institution (university or college) appear to be recent innovations."), *with, e.g.*, Robert D. Bickel & Peter F. Lake, THE RIGHTS AND RESPONSIBILITIES OF THE MODERN UNIVERSITY: WHO ASSUMES THE RISKS OF COLLEGE LIFE? 105 (1999) ("The period since the early to mid 1980s has seen the . . . rise of successful student litigation regarding physical safety on campus."), *and* Martha Chamallas, *Gaining Some Perspective in Tort Law: A New Take on Third-Party Criminal Attack Cases*, 14 LEWIS & CLARK L. REV. 1351, 1373 (2010) (discussing developments in civil actions where colleges are third-party defendants based on sexual assaults), *and* Peter F. Lake, *Private Law Continues to Come to Campus: Rights and Responsibilities Revisited*, 31 J.C. & U.L. 621, 647 (2005) ("The problems of sexual assault at colleges and universities . . . have continued to vex courts . . . ."), *and* Sharlene A. McEvoy, *Campus Insecurity: Duty, Foreseeability, and Third Party Liability*, 21 J.L. & EDUC. 137 (1992) (analyzing the recent civil actions filed by victimized students, including sexual assaults).

6. *See, e.g.*, Stanton v. Univ. of Me. Sys., 773 A.2d 1045, 1049 (Me. 2001) (holding a college's duty to exercise reasonable care in preventing sexual assaults on campus is based on a premise liability theory); *But Cf.* Nova Se. Univ. v. Gross, 758 So.2d 86, 90 (Fla. 2000) (indicating the college erroneously argued premise liability defenses because the student was sexually assaulted at a location off campus and not under the college's control) ("[T]his is not a premises liability case. [Student] is suing [College] under a common law negligence theory based upon [College] assigner [Student] to do her mandatory practicum at an unreasonably dangerous location.").

7. *E.g.*, RESTATEMENT (SECOND) OF TORTS § 328A (1965); Scott F. Johnson & Sarah E. Redfield, EDUCATION LAW: A PROBLEM-BASED APPROACH § 6.02, at 334 (2d ed. 2012).

duty,[8] breach,[9] causation,[10] and damages.[11] Notwithstanding trivial deviations in articulation among the states, the requisite elements for the student's negligence claim against the college are essentially the same in every jurisdiction.[12] Moreover, state courts have traditionally approved section 328A of the Restatement (Second) of Torts insofar as the existence of a duty being a question of law and whether a duty was breached as a question of fact.[13]

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8. "[T]here must be a legal duty on the part of the defendant to conform to the standard of conduct established by law for the protection of the plaintiff." 1 MODERN TORT LAW: LIABILITY AND LITIGATION § 3:2 (2d ed. 2013) (footnote omitted).

9. "[T]he failure of the defendant to conform to the standard of conduct." *Id.* (footnote omitted).

10. "The breach of duty by the defendant must be a cause of harm to the defendant." *Id.* (footnote omitted).

11. "There must be harm suffered by the plaintiff of a kind legally compensable." *Id.* (footnote omitted).

12. *Compare* Stanton v. Univ. of Me. Sys., 773 A.2d 1045, 1049 ("A prima facie case of negligence requires a plaintiff to establish the following elements: a duty owed, a breach of that duty, and an injury to the plaintiff that is proximately cased by a breach of that duty.") (citation omitted), *with, e.g.*, Williams v. Utica Coll. Of Syracuse Univ., 453 F.3d 112, 116 (2nd Cir. 2006) ("In order to establish a prima facie case of negligence . . . a claimant must demonstrate that: (1) the defendant owed the plaintiff a cognizable duty of care; (2) the defendant breached that duty; and (3) the plaintiff suffered damage as a proximate result of that breach.") (internal quotation marks and citation omitted), *and* A.W. v. Lancaster Cnty. Sch. Dist., 784 N.W.2d 907, 913 (Neb. 2010) ("In order to recover in a negligence action, a plaintiff must show a legal duty owed by the defendant to the plaintiff, a breach of such duty, causation, and damages.") (citation omitted), *and* Thompson v. Kaczinski, 774 N.W.2d 829, 834 (Iowa 2009) ("An actionable claim of negligence requires the existence of a duty to conform to a standard of conduct to protect others, a failure to conform to that standard, proximate cause, and damages.") (internal quotation marks omitted) (citation omitted). *But cf.* Glover v. Jackson State Univ., 968 So.2d 1267, 1277 (Miss. 2007) ("Negligence is doing what a reasonable, prudent person would not do, or failing to do what a reasonable, prudent person would do, under substantially similar circumstances. . . . [To recover,] the plaintiff must show that the damage was proximately caused by the negligence.").

13. *Compare* RESTATEMENT (SECOND) OF TORTS § 328A cmt. c (1965) (explaining whether a duty exists is a legal question to be determined by the court), *and* RESTATEMENT (SECOND) OF TORTS § 328A cmt. d (1965) (indicating the determination of whether the defendant breached a duty is "entirely a question of fact" for the jury), *with, e.g.*, Nero v. Kan. State Univ., 861 P.2d 768, 772 (Kan. 1993) ("Whether a duty exists is a question of law. Whether the duty has been breached is a question of fact.") (internal quotation marks omitted) (citation omitted), *and Stanton*, 773 A.2d at 1049-50, *and* Kleisch v. Cleveland State Univ. No. 05AP-289, 2006 WL 701047, at *3-*4 (Ohio Ct. App. Mar. 21, 2006), *and Lancaster Cnty.*, 784 N.W.2d at 913. *Accord* RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 7 cmt.

Still, despite these instances of unity, "[t]he concept of duty in tort law remains in turmoil,"[14] and "the legal doctrine with respect to third-party criminal attack cases is currently in a state of confusion."[15] Additionally, in the context of higher education, the courts' sensitivity to the uniqueness of the "American college experience,"[16] compounded with the current conception of a legal "duty," or lack thereof,[17] has left "American courts . . . [without a] well defined and appropriate overall legal vision" [18] for the modern-day university. To better illustrate this dilemma, it is best to first examine how the courts have incorporated foreseeability inquiries into negligence claims.

II. WHAT IS THE STANDARD FOR FORESEEABILITY?

To start, this Article's purpose is to discern whether any obligation of protection exists in the college-student relationship (duty); and, if so, what is the standard in determining whether the requisite duty was exercised with reasonable care (breach). The difficulty in analyzing these two questions separately is the profound tendency for courts to mistakenly give "foreseeability" a substantial, if not dispositive, role in legal duty inquiries.[19] As a result, Part IV signifies that a conscious effort to demonstrate a duty can exist regardless of foreseeable risk. However, in adopting the Restatement (Third) approach, many

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a (2010) (reaching same conclusion while reframing the duty and breach inquiries as questions concerning no-duty rules and scope-of-liability, respectively).

14. W. Jonathon Cardi & Michael D. Green, *Duty Wars*, 81 S. CAL. L. REV. 671 (2008).

15. Chamallas, *supra* note 5, at 1374.

16. Bickel & Lake, *supra* note 5, at 105.

17. *Id.* at 11 ("Not only is the legal concept of "duty" complex, but its meaning has been rapidly changing in recent times."); *see also* Oren R. Griffin, *Confronting the Evolving Safety and Security Challenge at Colleges and Universities*, 5 PIERCE L. REV. 413, 416 (2007) ("[There is no] brightline rule that a university has a duty to protect its students, [and] many jurisdictions continue to wrestle with the question of whether a special relationship exists between the university and its students that establishes that the university has a legal duty to protect students.").

18. Bickel & Lake, *supra* note 5, at 11.

19. Benjamin C. Zipursky, *Foreseeability in Breach, Duty, and Proximate Cause*, 44 WAKE FOREST L. REV. 1247, 1259 n.47 (2009) (indicating forty-seven states have relied heavily on foreseeability in analyzing the duty element).

jurisdictions will have little, if any, precedent on how to properly assess foreseeable risk exclusive of duty determinations.[20] Therefore, this Section illustrates how foreseeability has been misunderstood, identifies current standards for evaluating foreseeable risks, and proposes a standard targeting the college-student relationship.

A. Foreseeability Issues Have Disrupted the Function of Judge and Jury

In tort law, *Palsgraf v. Long Island Railroad Company*[21] is arguably best known for its discussion on foreseeable risk and its role in determining liability.[22] In his majority opinion, Judge Cardozo held that the crux of a legal duty determination lies in the foreseeable risk of harm in relation to the plaintiff.[23] Conversely, in his dissent, Judge Andrews argued that a duty is created from an act that creates risk, regardless of the foreseeable risk to a particular plaintiff; and thus, an actor owes a duty to everyone for the risks created by the actor's conduct.[24] Further, according to Judge Andrews, a defendant can be

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20. *See, e.g.*, Kleisch v. Cleveland State Univ. No., 05AP-289, 2006 WL 701047, at *4 (Ohio Ct. App. Mar. 21, 2006) (requiring the court to find a foreseeable risk before imposing a duty from third-party attacks in the "special relationship" context); Love v. Morehouse Coll. 652 S.E.2d 624, 626 (Ga. Ct. App. 2007) ("Duty cannot be divorced from foreseeability."); Schrieber v. Walker, 79 F. Supp. 2d. 965, 967 (N.D. Ind. 1999) (imposing a duty against third-party attacks only when a totality-of-the-circumstances test reveals a foreseeable risk).

21. 162 N.E. 99 (N.Y. 1928).

22. *See, e.g.*, W. Jonathon Cardi, *The Hidden Legacy of Palsgraf: Modern Duty in Microcosm*, 91 B.U. L. REV. 1873, 1874 (2011) (suggesting that *Palsgraf's* popularity lies in how foreseeability is viewed in relation to the duty and proximate cause elements).

23. *Palsgraf*, 162 N.E. at 100 ("The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension."); *see also* Cardi, *supra* note 22, at 1874 ("[P]laintiff-foreseeability lies at the heart of the duty determination . . . .").

24. *Palsgraf*, 162 N.E. at 102 (Andrews, J., dissenting) ("Due care is a duty imposed on each one of us to protect society from unnecessary danger, not to protect A, B, or C alone."); *see also* Cardi, *supra* note 22, at 1876 ("Either interpretation of Cardozo's majority opinion stands in contrast to Judge Andrews's view, in dissent, that a duty arises from an act that creates risk, regardless of whom the risk might be expected to harm.").

liable for the unforeseeable risks created by his actions.[25] This Article argues that neither the majority nor dissenting opinion found from *Palsgraf* correctly articulates the legal duty determination in so far as the determination is in the college-student context. Specifically, the "Cardozo" duty erroneously incorporates foreseeability into the duty determination, and the "Andrews" duty can be breached without any foreseeable risk of harm.

In the past, courts routinely held that defendants had no duty to foresee a particular harm based on the particular circumstances of the case.[26] These "no-duty" rules are instead meant to be matters of law decided by the courts; barring liability based on "factors applicable to categories of actors or patterns of conduct."[27] Conversely, when liability hinges on "factors specific to an individual case," foreseeability should *then* influence the determination.[28] As the Restatement (Third) summarizes: crux

> [W]hen courts attempt to determine foreseeability as an aspect of the duty determination, they either are led to decide it based on the specific facts of the case before them—a matter ordinarily for the jury—or to estimate some average foreseeability of risk across the entire duty category with which the court is concerned. Yet that average does not reveal the range of foreseeability that may exist across the category based on specific facts of the cases within that category.[29]

Therefore, a duty is better established by examining whether the parties' interaction with one another suggests that one party owes a

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25. *Palsgraf*, 162 N.E. at 103 (Andrews, J. dissenting) ("But, when injuries do result from out [sic] unlawful act, we are liable for the consequences. It does not matter that they are unusual, unexpected, unforeseen, and unforeseeable.").

26. *See, e.g., Kleisch*, 2006 WL 701047, at *4 (reversing trial court judgment based on the evidence of requisite foreseeability needed to impose a duty as insufficient as a matter of law); Agnes Scott Coll. Inc. v. Clark, 616 S.E.2d 468, 471 (Ga. Ct. App. 2005) (holding defendant is entitled to motion for summary judgment where plaintiff produces no evidence of past criminal acts to show foreseeable risk).

27. RESTATEMENT (THIRD) OF TORTS: PHYSI. & EMOT. HARM § 7 cmt. a. (2010).

28. *Id.* at cmt. a (emphasis added); *see also, Id.* at cmt. c, l.

29. *Id.* at Reporters' Note cmt. *j.*

responsibility to the other party as a matter of law. If a responsibility is owed, a duty exists. It is then the jury's obligation to determine whether that duty was breached, and that is when the foreseeable risk of harm should be considered.

Any consideration of foreseeable risk in determining whether there is a duty should only be permitted in accordance with prior precedent or legislation that comports with the Restatement (Third). Further, foreseeability, or lack thereof, should not be used to bar the existence of a duty unless there is evidence that clearly justifies the court to categorically immunize a class of individuals from liability. Such determinations are not matters of fact, but instead, matters of law determined by principle and policy.[30] Considering foreseeability in any other manner prior to determining the existence of a duty is impermissible. The relationship between the parties is the dispositive issue.

Far too often, however, courts include "foreseeability determinations into the analysis of duty, . . . [which] expands the authority of judges at the expense of juries."[31] This has led to countless opinions improperly using a foreseeable risk analysis to make "no-duty" determinations,[32] when the analysis should, in fact, result in "no-breach" determinations.[33] In other words, "[n]o-duty rules are appropriate *only when* a court can promulgate relatively clear, categorical, bright-line rules of law applicable to a general class of people."[34]

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30. *See* discussion *infra* Parts III.C, IV.C.

31. A.W. v. Lancaster Cnty. Sch. Dist., 784 N.W.2d 907, 914 (Neb. 2010) (citation omitted).

32. *See, e.g.*, Kleisch v. Cleveland State Univ. No. 05AP –289, 2006 WL 701047, at *1 (Ohio Ct. App. Mar. 21, 2006). (reversing trial court judgment based on the evidence of requisite foreseeability needed to impose a duty as insufficient as a matter of law); *See* Agnes Scott Coll. Inc. v. Clark, 616 S.E.2d 468, 471 (Ga. Ct. App. 2005) (holding defendant is entitled to motion for summary judgment where plaintiff produces no evidence of past criminal acts to show foreseeable risk).

33. RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 7 cmt. j (2010) ("A lack of foreseeable risk in a specific case may be a basis for a no-breach determination, but such a ruling is not a no-duty determination. Rather, it is a determination that no reasonable person could find that the defendant has breached the duty of reasonable care.").

34. *Id.* at cmt. a. (emphasis added). *See Id.* at Reporter's Note cmt. j ("Avoiding reliance on unforeseeability as a ground for a no-duty determination and instead articulating the policy or principle at stake will contribute to transparency, clarity, and better understanding of tort

Arguably, prior to the civil rights movement, courts could have justified invoking a no-duty rule to the college-student relationship under the Restatement (Third) because the courts would rely on their adherence to the principles and policies under the *in loco parentis* and the bystander doctrines.[35] Today, however, courts face an extremely difficult task in justifying a no-duty rule. As Part IV.B will discuss, since the 1980s, courts have been unsuccessful in reestablishing a categorical prohibition from liability for colleges evidencing the inability to justify using a bright-line rule. Moreover, for years, the U.S. government has allocated considerable resources to combat the extraordinarily high number of sexual assaults occurring across college campuses.[36] This fact alone will most likely eviscerate any attempt to invoke a no-duty rule to the college-student relationship.

Despite the intricacy in recognizing and applying the no-duty, no-breach distinctions, the Restatement (Third) resolves the issue by simply restructuring the order and recipient of the basic questions posed by a negligence claim.[37] Accordingly, the defendant's conduct should be examined, "not in terms of whether it had a 'duty' to take particular actions, but instead in terms of whether its conduct breached its duty to exercise the care that would be exercised by a reasonable person under the circumstances."[38] By reallocating the element of foreseeability from the duty context to breach, the Restatement (Third) ensures that juries determine liability based on the particularized facts.[39] Also, it is

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law."). Further, see the Restatement (Third) for various examples of these categorical classes (*e.g.*, landowners toward particular trespassers and dram shop scenarios).

35. *See* discussion *infra* Part IV.B.1-2.

36. *See supra* text accompany notes 2-**Error! Bookmark not defined.**.

37. *See* A.W. v. Lancaster Cnty. Sch. Dist., 784 N.W.2d 907, 918 (Neb. 2010) (explaining that the Restatement (Third) "is better understood as rearranging the basic questions that are posed by any negligence case and making sure that each question has been put in its proper place.").

38. *Id.* (emphasis added). "To say, as we have in the past, that a defendant had no duty, under particular circumstances, to foresee a particular harm is really no different from saying that the defendant's duty to take reasonable care was not breached, under those circumstances, by its failure to foresee the unforeseeable."

39. *Id.* ("[P]lacing foreseeability in the context of breach, rather than duty, properly charges the trier of fact with determining whether a particular harm was, on the facts of the case, reasonably foreseeable."). *See also* Furek v. Univ. of Del., 594 A.2d 506, 522 (Del. 1991) (Because of the extensive freedom enjoyed by the modern university student, the duty of the

important to remember that in the college-student relationship, the college's duty to protect its students applies to all risks—even those posed by trespassers—arising out of the relationship.[40]

Nevertheless, an important power reserved to the courts cannot be ignored: "the power to determine that the defendant did not breach its duty of reasonable care, as a matter of law, where reasonable people could not disagree about the unforeseeability of the injury."[41] This has commonly been interpreted to "treat foreseeability as a significant factor (and frequently the most significant factor) in analyzing whether the duty element is met in a negligence claim."[42] Surprisingly, forty-seven states have followed this approach in the past.[43]

Still, courts more aligned with the Restatement (Third) argue that "foreseeability helps define what conduct the standard of care requires under the circumstances and whether the conduct of the alleged tort-feasor conforms to that standard . . . [D]eterminations reserved for the finder of fact."[44] Simply put, foreseeability helps define the parameters of the breach element. At a fundamental level, in support of the Restatement (Third), these arguments are premised on providing clearer

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university to regulate and supervise should be limited to those instances where it exercises control); Leonardi v. Bradley Univ., 625 N.E.2d 431, 436 (Ill. App. Ct. 1993) (placing an emphasis on ownership without acknowledging location or instances of quasi-shared ownership).

40. RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 40 (2010); *see also* discussion *infra* Part IV.A.3.i.

41. *Lancaster Cnty.*, 784 N.W.2d at 918; *see also* RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 7 cmt. j (2010) ("[C]ourts should leave [foreseeable risk] determinations to juries unless no reasonable person could differ on the matter.").

42. Zipursky, *supra* note 19, at 1259 (also noting foreseeability is not uniformly applied in the duty analysis, but is nonetheless firmly rooted in the determination). *See also, e.g.*, Thompson v. Kaczinski, 774 N.W.2d 829, 834 (Iowa 2009) ("Our previous decisions have characterized the proposition that the relationship giving rise to a duty of care must be premised on the foreseeability of harm to the injured person as 'a fundamental rule of negligence law.'" (quoting Sankey v. Richenberger, 456 N.W.2d 206, 209-10 (Iowa 1990))).

43. *See* Zipursky, *supra* note 19, at 1260 (listing the forty-seven state jurisdictions that consider foreseeable risk in satisfying the duty element).

44. *Lancaster Cnty.*, 784 N.W.2d at 918 (citation omitted); *see also Kaczinski*, 774 N.W.2d at 834 (adopting the duty analysis of the Restatement (Third)); Shelton v. Ky. Easter Seals Soc'y, 413 S.W.3d 901, 912-14 (Ky. 2013) (citing *Lancaster Cnty.*, 784 N.W.2d at 918 (adopting RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 7 (2010))).

guidance to future courts,[45] safeguarding the jury's function as factfinder,[46] and most importantly, ensuring that plaintiffs receive a determination by the jury.[47] These rationales, in addition to those discussed in Part IV.C, further justify the notion that constructing doctrinal stability in college affairs begins with eradicating the outmoded Restatement (Second). Accordingly, the next Section explores the most common foreseeability standards that have been applied in negligence actions, including actions involving college sexual assaults.

B. Currently Used Foreseeability Standards

As previously mentioned, foreseeability is best viewed as a sub-element to the element of breach, not duty.[48] Therefore, in order to determine whether the defendant exercised reasonable care in relation to the duty owed, "the fact finder must assess the foreseeable risk at the time of the defendant's alleged negligence."[49] This determination is a fact-intensive inquiry into the circumstances surrounding each individual case that could have placed the defendant on notice that the injury at issue was possible.[50] More often than not, this requires assessing "the likelihood of various events that [could have occurred] between the time of the [defendant's] alleged negligence and the time of the harm itself."[51] Basically, the jury must ask what (and when) the

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45. *See, e.g.*, *Lancaster Cnty.*, 784 N.W.2d at 918-19.

46. *See, e.g.*, *Kaczinski*, 774 N.W.2d at 835.

47. *See, e.g.*, *Ky. Easter Seals Soc'y*, 413 S.W.3d at 917 ("[P]laintiffs should not be barred from bringing legitimate claims. The approach we adopt today, adopted in a number of other states, continues this policy").

48. *See Lancaster Cnty.*, 784 N.W.2d at 917 ("Under the Restatement (Third), foreseeable risk is an element in the determination of negligence, not legal duty").

49. *Id. See also* RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 29 cmt. j (2010) ("[W]hen scope of liability arises in a negligence case, the risks that make an actor negligent are limited to foreseeable ones, and the factfinder must determine whether the type of harm that occurred is among those reasonably foreseeable potential harms that made the actor's conduct negligent.").

50. *See Lancaster Cnty.*, 784 N.W.2d at 917.

51. RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 3 cmt. g (2010).

defendant knew, and "whether a reasonable person would infer from those facts that there was a danger."[52]

Unfortunately, most courts addressing the foreseeable risk of harm have done so under the purview of a legal duty, not breach. This has resulted in courts applying a wide range of "foreseeability tests" that assumed the scope of liability and were actually used to evaluate the sufficiency of the evidence in sustaining that assumption. Essentially, the courts were determining breach before duty.[53] Additionally, these tests risk "being misunderstood because of uncertainty about what must be foreseen, by whom, and at what time."[54] This Section examines the flaws in the more common foreseeability tests—past similar occurrences and totality of the circumstances—used in college assault cases, in addition to expounding on why these tests are inferior to balancing approaches.

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52. *Lancaster Cnty.*, 784 N.W.2d at 917. Further, these inquiries are the function of the jury because they "are *factual* inquiries that should not be reframed as questions of law."

53. *See Lancaster Cnty.*, 784 N.W.2d at 916. Explains this phenomenon best in its rationale for its prior reasoning in *Sharkey v. Regents of Univ. of Neb.*, 615 N.W.2d 889 (Neb. 2000):

> [B]ecause the evidence showed that violent altercations were non unknown at the location on campus where the plaintiff was attacked, the attack was foreseeable; thus, we held that the university owed a duty to its students to take reasonable steps to protect against foreseeable acts of violence on its campus and the harm that naturally flows therefrom.
>
> In other words, we reasoned that because the attack at issue in that case was foreseeable, the defendant had a duty to protect against foreseeable acts of violence. Our reasoning was tautological. It is evident that the university had a landowner-invitee duty to protect against *foreseeable* acts even had the attack in the case *not* been foreseeable. While we purported to be discussing duty, we were in fact assuming the conclusion we claimed to be proving, and were actually evaluating the sufficiency of the evidence to sustain a conclusion that the university had breached its duty to take reasonable care.

Lancaster Cnty., N.W.2d at 916 (quoting *Sharkey*, 615 N.W.2d at 902 (internal quotation marks omitted) (footnotes omitted) (alteration in original)).

54. RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 29 cmt. j (2010), *cited with approval in* Thompson v. Kaczinski, 774 N.W.2d 829, 839 (Iowa 2009).

1. Past Similar Incidents

Jurisdictions using the past similar incidents (PSI) test as its yardstick for foreseeability require that the crime at issue "be substantially similar to previous criminal activities occurring on or near the premises such that a reasonable person would take ordinary precautions to protect invitees from the risk posed by the criminal activity."[55] Courts have varied in what factors are necessary for this determination, but all universally consider the proximity, nature, likeness, and extent of prior criminal activities to the crime in question.[56] Note, however, the PSI test does not require that the prior criminal acts be identical to the crime in question; it only requires that the past incident(s) be sufficient enough to put the landowner on notice of the harm which caused the litigated incident.[57] Unsurprisingly, this vague standard has left courts disagreeing "in terms of how proximate and similar the prior crimes are required to be as compared to the current crime."[58]

Putting the PSI test in perspective, the Georgia Court of Appeals in *Agnes Scott College v. Clark*,[59] used the PSI test to determine the foreseeability of a student's daytime abduction from the college's parking lot and subsequent rape at an off-campus location.[60] In attempting to establish foreseeable risk, the plaintiff presented evidence of property crimes (*e.g.*, vehicle break-ins) at the location, reports of

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55. Agnes Scott Coll. Inc. v. Clark, 616 S.E.2d 468, 470 (Ga. Ct. App. 2005).

56. *See e.g., Id.* at 470-71; Delta Tau Delta v. Johnson, 712 N.E.2d 968, 972 (Ind. 1999) (citations omitted) ("Although courts differ in the application of [prior similar occurrences], all agree that the important factors to consider are the number of prior incidents, their proximity in time and location to the present crime, and the similarity of the crimes.").

57. *See Agnes Scott Coll.*, 616 S.E.2d at 471 ("While the prior criminal activity must be substantially similar to the particular crime in question, that does not mean identical. What is required is that the prior incident be sufficient to attract the [landowner's] attention to the dangerous condition which resulted in the litigated incident." (alteration in original) (internal quotation marks omitted) (citations omitted)).

58. *Delta Tau Delta*, 712 N.E.2d at 972; *Compare* Baptist Mem'l Hosp. v. Gosa, 686 So.2d 1147 (Ala. 1996) (holding fifty-seven crimes reported over a five year period, with only six involving physical touching, did not make the assault of someone with a gun foreseeable), *with* Sturbridge Partners, Ltd. v. Walker, 482 S.E.2d 339 (Ga. 1997) (holding two prior apartment burglaries was sufficient to foresee a rape in an apartment).

59. 616 S.E.2d 468 (Ga. Ct. App. 2005).

60. *See Id.* at 470-71.

suspicious persons frequenting the parking lot at night, and general crime statistics for the area.[61] However, the court held that the evidence did not make the daytime abduction and subsequent rape foreseeable.[62] In reaching this conclusion, the court focused on the lack of evidence showing "person-to-person violence or contact" that would make the daytime abduction and subsequent rape a reasonable likelihood.[63] In other words, the evidence presented was not sufficiently comparable to suggest that the plaintiff's "injury would occur in the manner that did in this case."[64]

Agnes Scott College[65] and other opinions using PSI tests represent the public policy concerns that have forced many courts to reject a strict PSI application. Specifically, the PSI test bars recovery for the first victim, disincentives landowners to be proactive in safeguarding risks, and unjustly places an emphasis on specific crimes/events.[66]

2. Totality of the Circumstances

Courts have also given differing instructions for applying a totality-of-the-circumstances approach to sexual assault cases in the college context. The particular disagreement among the courts is on the evidentiary weight that certain factors receive and/or require. Nonetheless, all interpretations are meant to expand "the determination of foreseeability beyond the prior similar incidents to a consideration of all circumstances surrounding the event."[67] Still, the end result is usually the same: the courts' analyses routinely revert back to prior similar incidents.

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61. *See Id.* at 470.

62. *See Id.* at 471.

63. *See Id.* ("As a matter of law, break-ins to unoccupied cars and other incidents that did not involve person-to-person violence or contact would not make the daytime abduction of [plaintiff] foreseeable.") (citation omitted).

64. *Id.* at 471.

65. 616 S.E.2d 468 (Ga. Ct. App. 2005).

66. *See* Delta Tau Delta v. Johnson, 712 N.E.2d 968, 972 (Ind. 1999) ("[T]he first victim in all instances is not entitled to recover, landowners have no incentive to implement even nominal security measures, [and] the [PSI] test incorrectly focuses on the specific crime and not the general risk of foreseeable harm." (citation omitted)).

67. 4 MODERN TORT LAW: LIAB. & LITIG. § 39:13 (2d ed. 2013).

Some courts ostensibly apply the PSI test under a so-called totality approach by giving evidence of prior similar evidence, or lack thereof, significant influence in determining foreseeable risk.[68] In addition to looking for prior similar incidents, courts following this approach will generally consider the "nature, condition, and location of the land."[69] Further, "lack of prior similar incidents will not preclude a claim where the landowner knew or should have known that the criminal act was foreseeable."[70] Nevertheless, even though these courts allege to use a totality approach, a majority of the decisions hinge on the proximity and extent of prior similar incidents.[71]

Other courts apply a totality approach that requires a heightened evidentiary standard.[72] By requiring that the evidence used to show foreseeable risk be "somewhat overwhelming,"[73] this approach effectively reverts the analysis back to prior similar incidents. This is due to the evidence being evaluated in relation to prior similar incidents, which is illustrated in *Shivers*.[74]

Shivers involved a female student who was raped in her dormitory bathroom by an unknown assailant.[75] At trial, the plaintiff presented a considerable amount of evidence to demonstrate the foreseeability of her rape, including evidence of a prior rape and that the college knew

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68. *See, e.g.*, Severson v. Bd. Of Tr. of Purdue Univ., 777 N.E.2d 1181, 1200 (Ind. Ct. App. 2002) (suggesting foreseeability determinations under a totality-of-the-circumstances approach still hinge on prior similar incidents).

69. *Id.* (internal quotation marks omitted) (citation omitted).

70. *Id.* (internal quotation marks omitted) (citation omitted).

71. *See, e.g.*, *Id.*; Ellis v. Luxbury Hotels, 716 N.E.2d 359 (Ind. 1999); L.W. v. W. Golf Ass'n, 712 N.E.2d 983 (Ind. 1999).

72. *See, e.g.*, Tr. of Univ. of D.C. v. DiSalvo, 974 A.2d 868, 870 (D.C. Ct. App. 2009) ("[T]his court has repeatedly held that liability depends upon a more heightened showing of foreseeability than would be required if the act were merely negligent." (internal quotation marks omitted) (quoting Potts v. D.C. 424 A.2d 317, 323 (D.C. 1997))); Shivers v. Univ. of Cincinnati, No. 06AP-209, 2006 WL 3008478, at *2 (Ohio Ct. App. Oct. 24, 2006) ("Because criminal acts are largely unpredictable, the totality of the circumstances must be 'somewhat overwhelming' in order to create a duty." (quoting Reitz v. May Co. Dept. Stores, 583 N.E.2d 1071, 1075 (Oh. Ct. App. 1990))).

73. *Shivers*, 2006 WL 3008478, at *2.

74. *Id.*

75. *Id.* at *1.

unauthorized persons could gain access to the co-ed dormitories.[76] In holding that the plaintiff's rape unforeseeable, the court indicated that the incident of a prior rape was not sufficiently similar even though it occurred in a nearby building less than two years before the plaintiff's rape.[77] Moreover, the twenty-three non-violent crimes and six violent crimes reported at the dorm in the ten months prior to the plaintiff's rape was also insufficient under Ohio's "somewhat overwhelming" evidentiary standard.[78] What is most unusual, however, is the *Shivers* court's rationale in discrediting evidence that the college knew unauthorized persons could gain access to co-ed dormitories. The court conceded that this evidence "may raise the possibility that rape will occur."[79] But, in the same breath, the court found it to be insufficient because prior rapes and other violent crimes had not yet been committed in the dorm by unauthorized persons who had gained access to the co-ed dorm.[80] Thus, the *Shivers* decision rooted its decision in a PSI analysis, barred relief for the first victim, and highlights the public policy concerns associated with PSI inquiries.

Contrary to the aforementioned cases, *Mullins* is the most definitive holding involving a campus assault to use a totality approach that did not place an unjust focus on prior similar incidents. In fact, the court provided a strong indication that prior similar incidents would not receive substantial influence over other factors in its determination.[81] Still, *Mullins* and the other aforementioned cases appear to incorporate

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76. *Id.* at *2. Specifically, the plaintiff presented evidence of:

> (1) defendant's efforts to warn students of the risks associated with living in an open, urban campus; (2) defendant's knowledge that numerous criminal activities occurred on campus, in classrooms, and in dormitories; (3) the risk of harm to female students in the setting of a co-ed dormitory, as it allowed male visitors access to all floors and common areas; (4) prior assaults and criminal activity; and (5) unauthorized persons' ability to gain access to [the dormitory]. *Id.*

77. *Id.* at *3.

78. *Id.*

79. *Id.* at *4

80. *Id.*

81. Mullins v. Pine Manor Coll., 449 N.E.2d 331, 337 (Mass. 1983) ("'Prior criminal acts are simply one factor among others that establish the foreseeability of the act of the third party.'" (quoting Samson v. Saginaw Professional Bldg., Inc., 224 N.W.2d 843, 849 (Mich. 1975))).

the foreseeability inquiry into the legal duty context, even when alluding to a determination of breach.

3. The Proper Foreseeability Test Contemplates All Relevant Facts

Past foreseeability tests almost universally fail to acknowledge that foreseeability can stem from past crimes of a lesser degree than the one at issue and from past crimes in close proximity to campus.[82] Instead of narrowly limiting foreseeable risk determinations to tests that rely heavily on past similar incidents, all relevant facts should be considered. Since every determination is a fact-intensive inquiry, the relevant circumstances will be case specific. However, courts should suggest the more significant factors that ought to be considered in determining the foreseeability of third-party attacks:

- The prior crimes on campus (both similar and non-similar);
- The prior crimes that occurred in close proximity to campus (both similar and non-similar);
- The size and location of the college;
- The presence of any security, or lack thereof;
- The architectural design of the building/structure where the crime occurred in relation to surrounding buildings/structures;
- The nature and circumstances of nearby businesses;
- The crime level in the general neighborhood; and
- The customs or norms within the college community, both nationally and locally.[83]

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82. 4 MODERN TORT LAW: LIABILITY AND LITIGATION § 39:13 (2d ed. 2013) ("[F]oreseeability can stem from prior criminal acts that are lesser in degree [sic] than the one committed against the plaintiff and can also arise from prior criminal acts that did not occur on the defendant's property, but instead occurred in close proximity to the defendant's premises.").

83. 4 MODERN TORT LAW: LIABILITY AND LITIGATION § 39:13 (2d ed. 2013) (footnote omitted); Mullins, 449 N.E.2d at 335 (indicating the concentration of young people on college campuses is an existing norm that "creates favorable opportunities for criminal behavior") (considering all relevant circumstances, not just prior similar incidents, in determining foreseeability).

Furthermore, past crimes that are in close proximity and nature to the harm being litigated should serve as a "plus factor" instead of a prerequisite for foreseeable harm. In other words, evidence of past similar incidents should only increase, not determine, the likelihood of foreseeable harm. Above all else, the jury should be instructed to assess all "practical considerations concerning the college's ability to anticipate future events or to understand dangerous conditions that already exist."[84]

Yet, even if a foreseeability test could be clearly articulated, it would only define the scope of liability and not the existence of a breach. Incorporating the foreseeability determination in a balancing approach, on the other hand, can be used to properly analyze the breach element by evaluating whether the college exercised care that was reasonably proportional to the degree of duty owed (*i.e*, the foreseeable risk). In this context, foreseeability is not used to determine if a duty was owed (duty analysis). Instead, it aids in determining whether the defendant provided the degree of duty that was owed to the plaintiff (breach analysis).

III. USING FORESEEABILITY IN A BALANCING APPROACH

A number of balancing approaches have either directly or indirectly balanced foreseeability determinations with other policy considerations to determine whether the college deviated from the requisite standard of care. In doing so, these balancing approaches contemporaneously determine the degree of protection owed (scope of liability) and whether the college provided those protections. The more equitable approaches balance a list of factors that, more or less, fall within the broad language of section 3 of the Restatement (Third).[85] Accordingly, this Section examines a select number of balancing approaches in relation to the

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84. RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 3 cmt. g (2010) ("Foreseeability often relates to practical considerations concerning the actor's ability to anticipate future events or to understand dangerous conditions that already exist.").

85. *See infra* Part III.B-C.

Restatement (Third) in order to construct a framework that juries can reasonably rely on to reach fair, just decisions.

A. The Restatement (Third) Approach

Under the Restatement (Third) of Torts, negligence is the failure to "exercise reasonable care under all the circumstances."[86] This approach is rooted in Judge Learned Hand's negligence formula that was articulated in the landmark case, *U.S. v. Carroll Towing*.[87] Under the Hand Formula, a defendant is liable when the burden of taking precautions is outweighed by the gravity and probability of harm.[88]

Similarly, under the Restatement (Third) approach, the three primary considerations a jury must balance in this determination are:

> (1) [T]he foreseeable likelihood that the person's conduct will result in harm;
> (2) [T]he foreseeable severity of any harm that may ensue; and
> (3) [T]he burden of precautions to eliminate or reduce the risk of harm.[89]

The drafters of the Restatement (Third) explain that juries ascertaining negligence must engage in a "risk-benefit test."[90] This test balances the foreseeable risk created by the college's conduct against the advantages, if any, which are gained by not taking precautionary measures.[91] In

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86. RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 3 (2010) ("A person acts negligently if the person does not exercise reasonable care under all the circumstances.").

87. 159 F.2d 169 (2nd Cir. 1947).

88. *Id.* ("[I]f the probability be called *P*; the injury, *L*; and the burden, *B*; liability depends upon whether *B* is less than *L* multiplied by *P*: i.e., whether *B* less than *PL*." (emphasis added)). Most simply written: Liability = B < PL.

89. *Id* at cmt. e. "Overall, this Section can be referred to as supporting a 'balancing approach' to negligence."

90. *Id.* This is also referred to as a "'cost benefit test,' where 'cost' signifies the cost of precautions and the 'benefit' is the reduction in risk those precautions would achieve."

91. *Id.* ("[T]he 'risk' is the overall level of the foreseeable risk created by the actor's conduct and the 'benefit' is the advantages that the actor or others gain if the actor refrains from taking precautions." (quotation marks in original)); The "risk" can also be thought of being "evaluated by reference to the foreseeable (if indefinite) probability of harm of a foreseeable severity." RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 29 cmt. d (2010).

simpler terms, negligence exists when the "risk" of foreseeable harm is greater than the "benefits" of not taking certain precautions.[92]

1. The Likelihood of Harm

Implementing the foreseeability test articulated in Part II.B.3 permits a jury to reach a conclusion regarding the first primary factor from section 3 of the Restatement (Third)—the likelihood of harm. This is because this Article's proposed foreseeability standard enables a jury to determine the likelihood of harm created by the college's conduct through a multi-factor approach that does not possess the inherent biases of previous methods (*e.g.*, PSI and totality approach).[93]

2. The Severity of Harm

Notably, the second primary factor—the foreseeable severity of harm—imposes a ceiling on the foreseeable "risk" that must be balanced against the "benefits." Additionally, section 29 of the Restatement (Third) limits liability to only those harms resulting from the risks created by the tortious conduct.[94] Hence, the magnitude of the risk—including the foreseeable likelihood and severity of harm[95]—is limited to the types of harm the college should have known its conduct would facilitate, discounted by the severity of the harm.[96] In effect, the

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92. Comment e to section 3 of the RESTATEMENT (Third) best explains the approach:

> The balancing approach rests on and expresses a simple idea. Conduct is negligent if its disadvantages outweigh its advantages, while conduct is not negligent if its advantages outweigh its disadvantages. The disadvantage in question is the magnitude of risk that the conduct occasions; as noted, the phrase 'magnitude of the risk' includes both the foreseeable likelihood of harm and the foreseeable severity of harm that might ensue. The 'advantages' of the conduct relate to the burden of risk prevention that is avoided when the actor declines to incorporate some precaution. The actor's conduct is hence negligent if the magnitude of the risk outweighs the burden of risk prevention.

RESTATEMENT (Third) of Torts: Phys. & Emot. Harm § 29 cmt. e (2010).

93. *See supra* Part II.B.3.

94. *Supra 13 n.90.* ("An actor's liability is limited to those harms that result from the risks that made the actor's conduct tortious.").

95. RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 3 cmt. e (2010).; *see also supra* note 92.

96. *See* RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 29 cmt. d (2010).

second primary factor, read in conjunction with section 29, incorporates proximate cause into the determination.[97]

3. The Burden of Precautions

After calculating the magnitude of the risk, the jury then determines whether that "risk" is outweighed by the "benefit" of not taking precautionary measures[98] However, the comments to section 3 are relatively vague in regards to the third primary factor, especially on which, if any, policy considerations are relevant in the determination.

Lastly, it should be noted that this approach is not perfect. At times, it may be difficult to quantify the magnitude of risk, or even the burdens of precautions for that matter.[99] Still, Judge Hand's opinion in *Moisan v. Loftus*,[100] provides simple, yet valuable, guidance. Specifically, Judge Hand emphasized that the balancing approach allows you to focus *only* on the *determinative* factors given the case-specific facts.[101]

B. Other Approaches

Professors Bickel & Lake, in their Facilitator Model, implicitly endorse the Restatement (Third) approach;[102] and, in doing so, suggest a

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97. *Id.* at cmt. b.

98. *Supra 14 n.94.*

99. *Id.* at Reporter's Notes cmts. h-i.

100. Moisan v. Loftus, 178 F.2d 148, 149 (2nd Cir. 1949), *cited with approval in* RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 3 cmt. h (2010).

101. *Id.* ("[P]robability varies with the severity of the injuries. It follows that all such attempts [for statistics] are illusory; and, if serviceable at all, are so only to center attention upon which one of the factors may be determinative in any given situation.").

102. Bickel & Lake, *supra* note 5, at 202. Indicating the relevant factors the Facilitator Model considers for both duty and liability are:

(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;

(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.

few notable policy considerations worth highlighting. First, they assert that moral blame and responsibility should be factored into the determination. Specifically, this factor considers whether a student would be the cheapest cost avoider if that student were provided the proper education.[103] If so, it follows that to properly educate students on foreseeable risks would increase the college's burden to safeguard its students from harm (*e.g.*, a burden of precaution). Second, the Facilitator Model contemplates social policy considerations in relation to the burden placed on the university and community at large when a college's duty extends to preventing a specific risk.[104] Basically, will extending the college's duty to prevent this particular harm tend to prevent future incidents; and if so, is it reasonable to impose this burden upon the college?

Additionally, several state courts have suggested a variety of ways on how to evaluate whether a college's preexisting safeguards were sufficient in light of the foreseeable risk. A California court balanced the foreseeable risk "against the burdensomeness, vagueness, and efficacy of the proposed security measures" alleging to have made the harm avoidable.[105] The Nebraska Supreme Court, in adopting the Restatement (Third), considered "the opportunity and ability to exercise care" and "the policy interest in the proposed solution."[106]

Id.

103. *Id.* at 204 "[C]ourts have often suggested that after proper education, a student may be in the best position to avoid and foresee otherwise random violence.").

104. *Id.* at 202.

105. Yu Fang Tan v. Arnel Mgmt. Co., 88 Cal.Rptr.3d 754 (Cal. Dist. Ct. App. 2009), *as cited in* 1 JOHN ELLIOTT LEIGHTON, LITIGATING PREMISES SECURITY CASES § 2:6 (2013).

106. A.W. v. Lancaster Cnty. Sch. Dist., 784 N.W.2d 907, 913-14 (Neb. 2010). Ironically, the court used the risk-utility test previously used to determine legal duty in its negligence determination. *Id.* Specifically, the court considered:

(1) the magnitude of the risk;
(2) the relationship of the parties;
(3) the nature of the attendant risk;
(4) the opportunity and ability to exercise care;
(5) the foreseeability of the harm; and
(6) the policy interest in the proposed solution.

Id. at 913-14, 918.

However, the negligence standard in relation to proposed security measures primarily hinges on the financial cost of risk elimination.[107] Likewise, liability exists even when the risk is remote, so long as the burden of precautionary measures is relatively trivial.[108]

C. Proposed Approach

This Article proposes to adopt the balancing approach under section 3 of the Restatement (Third) of Torts. First, the foreseeability standard that this Article proposed in Part II.B.3 can seamlessly determine the first primary factor—the likelihood of harm. Applying this foreseeability standard within the Restatement (Third) balancing approach alleviates the concerns related to prior similar incidents and totality approaches. Further, the second primary factor—the severity of harm—in conjunction with section 29, serves as a method to reasonably limit the risk when balanced against the college's precautionary burdens.[109]

Lastly, this Article proposes that the following factors should be considered when analyzing the third primary factor—the burden of precautions:

- Whether the college warned/educated students on the foreseeable risks;
- Whether the burden is too costly on the college and community

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107. RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 3 cmt. i (2010) ("[T]he negligence standard adopts a marginal approach, recognizing that the relevant issue may be reasonable risk reduction, rather than complete risk elimination. In another sense, however, the negligence standard does not require marginalism.").

108. *See* Levi v. Sw. La. Elec. Membership Coop., 542 So.2d 1081, 1087 (La. 1989) ("[T]he law imposes liability for failure to take precautions even against remote [recognizable] risks, if the costs of the precautions would be relatively low." (citation omitted)). *See also* RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 3 cmt. f (2010) ("[E]ven if the severity of expected harm is low, the person can be negligent if the likelihood of harm is high and the burden of risk prevention limited.").

109. *See* RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 29 cmt. e (2010) (appealing "to intuitive notions of fairness and proportionality by limiting liability to harms that result from risks created by the actor's wrongful conduct, but for no others."). *See also* Thompson v. Kaczinski, 774 N.W.2d 829, 838 (Iowa 2009) (quoting RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 29 cmt. e (2010)) ("It also is flexible enough to 'accommodate fairness concerns raised by the specific facts of a case.'").

as it relates to preventing future incidents of the harm at issue;
- Whether the plaintiff's proposed security measures would tend to prevent similar incidents in the future;
- Whether the plaintiff's proposed security measures are stated with such specificity to adequately describe how the proposed measures will prevent future harm; and
- Whether the plaintiff's proposed security measures bear a financial burden that should only require the college to achieve reasonable risk reduction, rather than risk elimination.

As a general matter, these facts best define the parameters of a college's responsibility to preemptively safeguard against the litigated harm. Still, these policy considerations do not stand as an exhaustive list; instead, they serve as the indispensable inquiries that juries should acknowledge in addition to any other policy that may be relevant.

It is important to remember, however, that this approach requires the existence of a duty before a foreseeability determination is needed. Therefore, further examination of the college-student relationship is needed in order to determine whether the relationship should impose an affirmative duty upon a college to protect its students. Part IV attempts to answer this question.

IV. DOES A COLLEGE HAVE A DUTY TO ITS STUDENTS?

A. Theories Used to Establish Duty

1. Special Relationships Under the Restatement (Second)

As previously stated, this Article addresses the various issues arising from lawsuits stemming from on-campus sexual assaults committed by third parties. What has yet to be stated is that there is an additional "no duty" doctrine deeply rooted in the common law pertaining to criminal acts committed by third parties in most, if not all, states. As a general matter, state common law does not impose a duty upon colleges to

safeguard students against criminal acts committed by third parties.[110] One exception to this rule is the existence of a "special" relationship between the defendant and the third-party actor, or between the defendant and plaintiff, that imposes some degree of duty upon the defendant.[111]

Generally, courts have thus approached the college/student relationship inquiry by first placing the particular claim in a (somewhat predictable) "special" relationship that has traditionally imposed a legal duty, and then viewing that claim based on the parameters of the applicable relationship.[112] The three relationship theories on which the courts have most commonly rely when holding that a duty exists are: business/invitee,[113] landlord/tenant,[114] and assumption of duty.[115] To better comprehend how this process works, this Section delves into how each "special" relationship has been applied to the unique college/student relationship.

a. Business/Invitee

A student's legal status as a college's business invitee is rooted in the principles set forth within section 344 of the Restatement (Second):[116]

> A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm

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110. *See* Nero v. Kan. State Univ., 861 P.2d 768, 778 (Kan. 1993) ("[T]he university-student relationship does not in and of itself impose a duty upon universities to protect students from the actions of . . . third parties."). *See, e.g.*, Leonardi v. Bradley Univ., 625 N.E.2d 431, 434 (Ill. App. Ct. 1993) ("Generally, there is no duty requiring a landowner to protect others form criminal activity by third persons on his property absent a 'special relationship' between the parties.") (citation omitted) (internal quotation marks omitted);. *Accord* RESTATEMENT (SECOND) OF TORTS § 315 (1965).

111. *See* RESTATEMENT (SECOND) OF TORTS § 315 (1965). *Accord, e.g.*, *Leonardi*, 625 N.E.2d 431 (Ill. App. Ct. 1993), *Nero*, 861 P.2d 768 (Kan. 1993).

112. RESTATEMENT (SECOND) OF TORTS § 315 (1965).

113. *See infra* Part IV.A.1.i.

114. *See infra* Part IV.A.1.ii.

115. *See infra* Part IV.A.1.iii.

116. *See, e.g.*, Furek v. Univ. of Del., 594 A.2d 506, 522 (Del. 1991); *Leonardi*, 625 N.E.2d at 434-35 (Ill. App. Ct. 1993); *Kleisich*, 2006 WL 701047, at *1.

> caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to (a) discover that such acts are being done or are likely to be done, or (b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.[117]

A college engages in the business of education by inviting students on its campus to both participate in and contribute to the educational experience.[118] This places the college in a "legally special relationship" with its students.[119] So, for this relationship to exist, the student (invitee) must be permitted on campus (business property) by either an expressed or implied invitation, and with a purpose that benefits the college (the business).[120] The justification behind this relationship is that colleges benefit from students' tuition and other fees for educational instruction.[121] Accordingly, as a business invitee, a student is generally owed a duty of protection from injuries that should have reasonably been foreseen, whether the injuring party be a fellow student, third party, or otherwise.[122]

Notwithstanding the role of foreseeability, the current case law is relatively consistent in this area, with only subtle distinctions among the courts.[123] Accordingly, courts have considered students business invitees

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117. RESTATEMENT (SECOND) OF TORTS § 344 (1965).

118. Bickel & Lake, *supra* note 5, at 83 ("Universities own property and buildings and invite students (and the public in many cases) to do educational business.").

119. *Id.*

120. *See Kleisch*, 2006 WL 701047, at *3 ("[Business] invitees are persons who rightfully come upon the premises of another by invitation, express or implied, for some purpose which is beneficial to the owner.") (citations omitted) (internal quotations omitted).

121. *Id.* at P13 (*construing* Richmond v. Ohio State Univ., 564 N.E.2d 1145 (Ohio Misc. 2d 1989)).

122. *See, e.g.*, Stanton v. Univ. of Me. Sys., 773 A.2d 1045, 1049 (Me. 2001) ("'[T]he owner of premises owes a legal duty to his business invitees to protect them from those dangers reasonably to be foreseen.'" (*quoting* Schultz v. Gould Acad., 332 A.2d 368, 371 (Me. 1975))); *Kleish*, 2006 WL 701047, at *1 (holding a college student, as an invitee on a college campus, imposes a duty upon the college to exercise ordinary care and protect the student by maintaining the campus in a safe condition) (citation omitted). *See also Clark*, 616 S.E.2d at 470 (Ga. Ct. App. 2005) ("An intervening criminal act by a third party generally insulates a landowner from liability unless such criminal act was reasonably foreseeable.").

123. *Infra* notes 128-139 and accompanying text.

as to assaults in college parking garages,[124] injuries from icy walking conditions,[125] hazing,[126] and even abductions from campus.[127] However, with section 344's broad language, courts limited its breadth by defining its parameters within higher education.

In *Leonardi v. Bradley University*, a female student sought to recover against the college for failing to take reasonable steps in preventing her alleged sexual assault at a fraternity house.[128] The court dismissed the suit, holding the student lacked a business invitee status during the alleged assault.[129] This decision is based on two distinct limitations to the business invitee relationship: purpose and ownership. In other words, a college has no liability "for non-curricular activities taking place on property not owned by the college."[130]

In regards to the student's purpose, the court discussed how her legal status hinged on whether she was "engaged in various activities conducted by the university, such as attending classes or participating in university-sponsored activities."[131] If not, she would not enjoy the status of, and protections afforded to, a business invitee.[132] Alternatively, the court reasoned that the college would have had no duty to protect if the fraternity owned its house.[133] Hence, *Leonardi* reaffirmed the traditional notion that a duty to protect exists only while the plaintiff is on the defendant's premises.[134]

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124. Peterson v. S.F. Comty. Coll. Dist., 685 P.2d 1193, 1198 (Cal. 1984).

125. Isaacson v. Husson Coll., 297 A.2d 98, 100 (Maine 1972) (indicating duty owed to student walking to dorm and subsequently slipped on icy walkway).

126. Knoll v. Bd. of Regents of Univ. Neb., 601 N.W.2d 757, 760 (Neb. 1999), *abrogated by* A.W. v. Lancaster Cnty. Sch. Dist. 0001, 784 N.W.2d 907 (Neb. 2010).

127. Brown v. N.C. Wesleyan Coll., Inc., 309 S.E.2d 701, 701 (N.C. Ct. App. 1983).

128. *Leonardi*, 625 N.E.2d at 432, 435 (Ill. App. Ct. 1993).

129. *Id.* at 435 ("[W]e cannot agree that a special relationship exists here based upon the facts alleged by plaintiff.").

130. *Id.* at 436 (citing Hartman v. Bethany Coll., 778 F. Supp. 286, 291 (N.D.W.Va. 1991).

131. *Id.* at 435.

132. *Id.*

133. *Id.* at 436.

134. *Leonardi*, 625 N.E.2d at 436 (Ill. App. Ct. 1993).("The law is clear that a business owner has no duty to protect a plaintiff when the plaintiff is no longer on the business owner's premises." (citations omitted)); *Accord* RESTATEMENT (SECOND) OF TORTS § 344 (1965).

Contrarily, under somewhat comparable facts, *Furek v. University of Delaware*[135] applied a different tort theory to find a duty. *Furek* addressed fraternity hazing at a fraternity house on campus that was owned by the fraternity, but built on university-owned land.[136] This quasi-shared "ownership" scenario not only transferred the court's inquiry from ownership to control, but also from a business-invitee to a custodial framework.[137] In justification for finding a duty, the court reasoned that the university's "significant involvement in the regulation of fraternity life, particularly in the area of hazing," could provide a sufficient inference of control in order to impose a duty under section 314(A).[138]

A comparison between *Leonardi* and *Furek* represents a prime example of how courts create and remove a college's legal duty based on relatively similar determinations. Although *Leonardi* did not contemplate the particular ownership distinction in *Furek*, the *Leonardi* opinion suggests it would have ruled opposite of *Furek*.[139] Nonetheless, these cases display the courts' limited application of section 344 in the student-college relationship context.

b. Landlord-Tenant

In addition to the business-invitee relationship, section 344 of the Restatement (Second) also applies to the landlord-tenant relationship, and is the applicable relationship to examine under section 344 when the student's injury occurred in campus housing.[140] In *Nero v. Kansas State*

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135. Furek, 594 A.2d 506 (Del. 1991).

136. *Id.* at 509, 522.

137. *Id.* at 522.

138. *Id.* ("Because of the extensive freedom enjoyed by the modern university student, the duty of the university to regulate and supervise should be limited to those instances where it exercises control.. Situations arising out of the ownership of land, and within the contemplation of [section 344], involving student invitees present on the property for the purposes permitted them are within such limitations.")

139. *Id.* at 436 (placing an emphasis on ownership without acknowledging location or instances of quasi-shared ownership).

140. *E.g.*, Nero v. Kan. State Univ., 861 P.2d at 779 (Kan. 1993) (designating the relationship between a college and student as landlord-tenant where the injury involved a rape in a dormitory). *But see* Shivers v. University of Cincinnati, No. 06AP-209, 2006 WL

University, the court explained the landlord-tenant distinction by emphasizing that the university had made the discretionary decision to compete with other student housing landlords, thus owing a duty of reasonable care to its student-tenants.[141] Still, state courts are not unified in the minimal protection a student-tenant is owed, or whether a duty exists at all.[142]

In *Miller v. New York*,[143] the court held that, as a landlord, the degree of duty owed by a university to its students will fluctuate based on the characteristics of each individual building or dormitory.[144] This is because the university, in light of all the circumstances, must maintain a reasonably safe campus, taking into account factors that "include[e] the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk."[145] Therefore, *Miller* stands for at least some degree of a heightened duty by effectively mandating that universities take affirmative steps toward ensuring campus safety. However, this opinion only addresses a specific campus population—students living in campus housing—and not the entire campus community. Thus, if the *Miller* standard is strictly applied, the minimal security measures are not guaranteed to a commuter or any other student that is not staying in campus housing.

Alternatively, *Duarte v. State*[146] explained that students living in campus housing have a college-student relationship, which enhances the

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3008478, at *3. (using precedent to designate the relationship as business-invitee, despite the injury occurring in a dormitory).

141. *Nero*, 861 P.2d at 779.

142. *Compare* Miller v. State, 467 N.E.2d 493, 497 (N.Y. 1984) ("[A] landlord has a duty to maintain minimal security measures, related to a specific building itself, in the face of foreseeable criminal intrusion upon tenants.") (citation omitted), *with* Cutler v. Bd. of Regents, 459 So.2d 413, 415 (Fla. Ct. App. 1984) ("Florida [is unsettled on] whether liability may be predicated on foreseeability alone, i.e., whether a landlord has a duty to provide reasonable security from foreseeable criminal acts against tenants by third party intruders, absent an allegation that the landlord expressly or impliedly assumed such a duty.") (citation omitted). *See also* McEvoy, *supra* note 5, at 145-46.

143. *Miller*, 467 N.E.2d 493 (N.Y. 1984).

144. *Id.* at 497 ("[A] landlord has a duty to maintain minimal security measures, related to a specific building itself, in the face of foreseeable criminal intrusion upon tenants." (citation omitted)).

145. *Id.* at 497.

146. Duarte v. State, 151 Cal. Rptr. 727 (Cal. Ct. App. 1979).

traditional landlord-tenant application; consequently, holding that a college has a heightened duty to its student residents.[147] In justifying the existence of a heightened duty, the *Duarte* court emphasized that a college controls certain aspects of students' lives involving personal security, placing their security in the college's hands.[148]

Nevertheless, a basic duty of protection under the landlord-tenant relationship is not guaranteed for all student-tenants. In Florida, for example, a college has no duty to protect against third-party criminal attacks merely because of a landlord-tenant relationship.[149] This was highlighted when the Florida District Court of Appeals indicated that a student was owed no duty against third-party attacks unless the college not only recognized a duty to protect its students from foreseeable attacks, but also assumed that duty.[150] Thus, not all students living in campus housing have a right to even *minimal* security from third-party attacks.

c. Assumption of Duty

In some instances, a college can be viewed as having voluntarily assumed to perform a duty with due care.[151] Section 323 of the Restatement (Second) of Torts provides the generally accepted circumstances that trigger this legally special relationship:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the

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147. *Id.* (holding the student had a "landlord-tenant relationship-plus with the university").

148. *Id.* ("The university not only had control over the campus areas and the residential facilities but also many aspects of [student's] personal activities. [Student] . . . could not purchase and install security devices or hire a private police force; she could not possess a dog or firearm. . . . The contract between the university and [student] was more than a leasing of space in a student dormitory. She submitted her security to control by the university.")

149. Cutler v. Bd. of Regents of State of Fla., 459 So. 2d 413, 414 (Fla. Dist. Ct. App. 1984).

150. *Id.* at 414-15 ("[A] landlord, who recognizes and assumes the duty to protect his tenants from foreseeable criminal conduct, may be liable if he fails to take reasonable precautions to prevent injury to his tenants from this conduct." (citations omitted)).

151. *See, e.g.*, Mullins v. Pine Manor College, 449 N.E.2d 331, 336-37 (Mass. 1983) (holding that the college voluntarily assumed to provide security, requiring the college to perform that duty with due care). *Id.* ("It is an established principle that a duty voluntarily assumed must be performed with due care." (citations omitted)).

> protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking.[152]

A college's assumed duty to its students is best articulated in *Mullins v. Pine Manor College*,[153] the landmark case rejecting the no-duty model of the bystander era. Specifically, *Mullins* viewed the college's tuition and/or housing fees to include the voluntary assumption to provide a service of adequate security.[154] In fact, the court went on to state that "[c]olleges generally undertake voluntarily to provide their students with protection from the criminal acts of third parties."[155] The court also suggested that imposing an assumed duty is justified further if a college requires its students to live in campus housing.[156]

As a threshold matter, *Mullins* signified that an assumption of duty framework first requires evidence of the college's "undertak[ing] to provide an adequate level of security."[157] The court emphasized this initial inquiry because prospective students and their parents touring the campus will certainly notice these security measures.[158] Thus, in determining where to attend college, it is reasonable to assume the student's reliance on the college's proactiveness toward student safety influenced the decision, which in turn, imposes a duty upon the

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

153. *Mullins*, 449 N.E.2d 331.

154. *Mullins*, 449 N.E.2d at 336 ("Students are charged, either through their tuition or a dormitory fee, for this service. Adequate security is an indispensable part of the bundle of services which colleges, and Pine Manor, afford their students.").

155. *Id. See also* Furek v. Univ. of Del., 594 A.2d 506, 520 (Del. 1991) ("[O]verall commitment to provide security on . . . campus . . . constituted an assumed duty." (citing *Mullins*, 449 N.E.2d at 336)).

156. *See Mullins*, 449 N.E.2d at 336-37 n.11 ("Implicit in Pine Manor's requirement that freshmen live in dormitories provided by the college is the representation that the college believed that it could provide adequately for the safety and well-being of tis students.").

157. *Id.* at 336.

158. *Id.* ("[P]rospective students and their parents who visit a college are certain to note the presence of a fence around the campus, the existence of security guards, and any other visible steps taken to ensure the safety of students.").

college.[159] After all, if the student was unsatisfied with the visible security measures, or the college's response to student safety, she may choose to attend a different college.[160]

However, regardless of which college a student *chooses* to attend, the assumed duty rationale from *Mullins* neglects to provide an analysis on the implications from the student's potential assumption of risk.[161] Identifying these implications is done by determining the foreseeable risk the student either expressly or impliedly assumed by attending, or remaining at, the college.[162] Most importantly, this determination opens the door for courts to foreclose prematurely on the jury's opportunity to hear the case. This is the primary reason for why the *Mullins* opinion is ill-suited as the proper framework to define the parameters of the college-student relationship.

2. *Existing Social Values and Customs*

In addition to an assumption of duty theory under section 323 of the Restatement (Second), *Mullins* also imposed a duty upon the college based on the "existing social values and customs" within the college

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159. *Id.* at 336-37 ("[T]he jury could have found that students and their parents rely on the willingness of colleges such as Pine Manor to exercise due care to protect them from foreseeable harm." (footnote omitted)). *See also* RESTATEMENT (SECOND) OF TORTS § 323(b) (1965).

160. *See Mullins*, 449 N.E.2d at 336 ("[Prospective students and their parents] may inquire as to what other [security] measures the college has taken. If the college's response is unsatisfactory, students may choose to enroll elsewhere.").

161. *Cf.* RESTATEMENT (SECOND) OF TORTS §496A (1965) (The general principle for the assumption of risk doctrine is that the "plaintiff who voluntarily assumes a risk of harm arising from the negligent or reckless conduct of the defendant cannot recover for such harm.").

162. *See* RESTATEMENT (SECOND) OF TORTS § 496B-C (1965). Issues will most likely arise through the student's implied assumption under section 496C, which states:

(1) Except as stated in Subsection (2), a plaintiff who fully understands a risk of harm to himself or his things caused by the defendant's conduct or by the condition of the defendant's land or chattels, and who nevertheless voluntarily chooses to enter or remain, or to permit his things to enter or remain within the area of that risk, under the circumstances that manifest his willingness to accept it, is not entitled to recover for harm within that risk.

(2) The rule stated in Subsection (1) does not apply in any situation in which an express agreement to accept the risk would be invalid as contrary to public policy.

Restatement (Second) of Torts § 496C (1965).

community.[163] This theory is founded on the consensus that "colleges of ordinary prudence *customarily* exercise care to protect the well-being of their resident students, including seeking to protect them against the criminal acts of third parties."[164] The court went on to note that this "custom" derives from the nature of the college community—"[t]he concentration of young people, especially young women, on a college campus, creates favorable opportunities for criminal behavior."[165] Fittingly, the court held that "[p]arents, students,, and the general community . . . have a reasonable expectation, fostered in part by colleges themselves, that reasonable care will be exercised to protect resident students from foreseeable harm."[166]

Designating a duty based solely on the existence of a college-student relationship can be found in *Furek* as well. *Furek* held "[t]he university is not an insurer of the safety of its students nor a policeman of student morality, nonetheless, it has a duty to regulate and supervise foreseeable dangerous activities occurring on its property."[167] Recognizing the current freedoms that modern students enjoy, *Furek* limits this duty "to those instances where [the college] exercises control."[168] Still, these cases, among others, signify the courts' increased willingness to impose a general duty upon a college to protect its students from foreseeable harm.[169]

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163. *Mullins*, 449 N.E.2d at 335 (internal quotation marks omitted) (citations omitted).

164. *Id.* (emphasis added). "[T]he college community itself has recognized its obligation to protect resident students from acts of third parties. This recognition indicates that the imposition of a duty of care is firmly embedded in a community consensus." *Id.*

165. *Id.*

166. *Id.* at 336.

167. Furek v. Univ. of Del., 594 A.2d 506, 522 (Del. 1991).

168. *Id.*

169. *See, e.g.*, Hartman v. Bethany Coll., 778 F. Supp. 286, 291 (N.D.W.Va. 1991) ("A college has a general obligation to its students to maintain a campus environment free of foreseeable harm." (citations omitted)).

3. Restatement (Third) of Torts: Liability for Physical and Emotional Harm

a. A College owes an Affirmative Duty to Protect its Students

Realizing the difficulty to categorize the college-student relationship within one of the special relationships recognized by the Restatement (Second),[170] the drafters of the Restatement (Third) specifically designated an affirmative duty of reasonable care in section 40 that extends from the college to its students.[171] This duty applies to risks created either by a student or third party.[172] Additionally, the drafters indicated that the definition of "reasonable care" is contextual.[173]

Section 40 of the Restatement (Third) also resolves the issue in Florida concerning a college's duty to safeguard its students from third-party attacks. This affirmative duty, however, is reasonably limited "to risks that occur while the student is at school or otherwise engaged in school activities."[174] Moreover, section 40 comment h states that an affirmative duty is needed because "some relationships necessarily compromise a person's ability to self-protect, while leaving the actor in a superior position to protect that person."[175] Notably, this rationale mirrors the rationale in the *Duarte* opinion delivered over thirty years ago.[176]

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170. *See supra* Part IV.A.1; RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 40 Reporter's Note cmt. 1 (2010) ("Courts are split on whether a college owes an affirmative duty to its students. Some of the cases recognizing such a duty are less than ringing endorsements, often relying on other aspects of the relationship between the college and its student to justify imposing a duty.").

171. RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 40 (2010).

172. *Id.* at cmt. g ("[This duty] applies regardless of the source of the risk. Thus, it applies to risks created by the individual at risk as well as those created by a third party's conduct, whether innocent, negligent, or intentional.").

173. *Id.* at cmt. l ("[T]he extent and type of supervision required of young elementary-school pupils is substantially different form reasonable care for college students.").

174. *Id.*

175. *Id.* at cmt. h.

176. Duarte v. State, 151 Cal.Rptr. 727 (Cal. Ct. App. 1979) (ordered not to be officially published) (holding the student had a "landlord-tenant relationship-plus with the university"). *See supra* text accompanying note 89.

b. No-duty Rules

More significantly, the comments to the Restatement (Third) explain that the affirmative duties are based on principles and policy, and courts are permitted to make exceptions by adopting a no-duty rule.[177] Normally based on social norms of responsibility (*e.g.*, dram shop statutes),[178] the Restatement (Third) states that "[a] no-duty ruling represents a determination . . . that no liability should be imposed on actors in a category of cases."[179] To make this determination, courts need to explain their reasoning by articulating the principles and policies that justify their decision.[180] The most important requirement, however, is that the justification *should not* be based on the foreseeable risk of harm presented in the case.[181] Thus, the general rule is that "[a] lack of foreseeable risk in a specific case may be a basis for a no-breach determination, but such a ruling *is not* a no-duty determination."[182]

By requiring a clear justification for categorizing a no-duty rule for certain actors, the Restatement (Third) allows for more transparent explanations that courts can seek for guidance; and also, it preserves the jury's function as factfinder.[183] Essentially, the Restatement (Third)

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177. RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 7 cmt. b-c, j. (2010).

178. Specifically, the comments to the Restatement (Third) state:

> In deciding whether to adopt a *no-duty rule*, courts often rely on general social norms of responsibility. For example, many courts have held that commercial establishments that serve alcoholic beverages have a duty to use reasonable care to avoid injury to others who might be injured by an intoxicated customer, but that social hosts *do not have a similar duty* to those who might be injured by their guests.

Id. at cmt. c (emphasis added). The example described in comment c describes how a no-duty rule applies to a dram shop statute (statute concerning an establishment that serves alcoholic beverages).

179. *Id.* at cmt. j.

180. *Id.* ("Such a ruling should be explained and justified based on articulated polices or principles that justify exempting these actors from liability.")

181. *See id.* ("These reasons of policy and principle *do not depend* on the foreseeability of harm based on the specific facts of a case. They *should be* articulated directly *without* obscuring references to foreseeability." (emphasis added))

182. RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 7 cmt. j (2010).. (emphasis added).

183. *Id.* ("Despite widespread use of foreseeability in no-duty determinations, this Restatement disapproves that practice and limits no-duty rulings to articulated policy or

addresses how foreseeability affects an actor's duty, which is the discussion in Part IV.C.[184]

4. Proposed Models

a. Facilitator Model

Since 1999, in recognizing "duty's" uncertainty in college affairs, professors Bickel and Lake have campaigned for a doctrinal model fixated on "mutual, shared responsibility."[185] Known as the "Facilitator Model," it defines the college-student relationship as a "*balancing* of rights and responsibilities."[186] Thus, for a college to be reasonably safe, there must be a collective effort by both parties toward that end.[187] The Facilitator Model balances certain factors in a policy-based determination in deciding whether a college owes an affirmative duty to its students: (1) location, (2) the nature of risks to be prevented; (3) foreseeability; and (4) what could reasonably and realistically be done to prevent harm.[188]

The Facilitator Model, stands to represent the theoretical model courts should universally use for guidance, and thus, is becoming a doctrine with predictable outcomes.[189] However, this model is inherently flawed because it considers "foreseeability" when determining the

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principle in order to facilitate more transparent explanations of the reasons for a no-duty ruling and to protect the traditional function of the jury as factfinder.")

184. *See* discussion *infra* Part IV.C.; to summarize in one sentence, Part IV.C. explains why a lack of foreseeable risk "is a determination that no reasonable person could find that the defendant has breached the duty of reasonable care." *Id.*

185. Bickel & Lake, *supra* note 5, at 16.

186. *Id.*

187. *Id.* ("For university life to be reasonably safe, there must be mutual, shared responsibility. The university is an environment, like others, which must collectively take charge of its own.").

188. *Id.* at 204-205. *See* Kristen Peters, Note, *Protecting the Millennial College Student*, 16 S. CAL. REV. L. & SOC. JUST. 431, 436 (2007), for a slightly different articulation of the applicable policy-based factors. However, these factors seem to be Bickel & Lake's summarization of the factors most relied on in modern courts.

189. *See* Peters, *supra* note 188, at 464-65 (criticizing the Facilitator Model's potential to create predictable outcomes); Bickel & Lake, *supra* note 5, at 16, 202-205.

existence of a duty.[190] Bickel & Lake even admit that, so long as foreseeability remains a factor in the determination, uncertainty in this area of the law will always exist.[191] To mitigate this issue, Bickel & Lake place considerable trust in something the courts have yet to do in this area—consistently state their holdings and rationale with particularity.[192] In doing so, however, Bickel & Lake create a new category of "special relationships" that does nothing to combat the problems surrounding foreseeability inquiries besides asking the courts to give better explanations.

b. Millennial Model

In response to the Facilitator Model, Kristen Peters advocates for a doctrinal model without as strong an emphasis on foreseeability.[193] Instead, the college-student relationship creates "an affirmative duty to act based on a student's detrimental, *reasonable* reliance on a college's act that is tangentially related to the college's overall mission."[194]

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190. *See, e.g.*, *supra* Zipursky, note 19 at 1259 n.47 (indicating forty-seven states have relied heavily on foreseeability in analyzing the duty element). Some courts have held that no duty existed based on the unforeseeability of risk. *See, e.g.*, Bailey v. Huggins Diagnostic & Rehab. Ctr., Inc., 952 P.2d 768 (Colo. Ct. App. 1997), *cited with approval* in RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 7 Reporters' Note cmt. j. (2010). Other courts have required a foreseeable risk before imposing a duty of reasonable care. *See, e.g.*, Brennen v. City of Eugene, 591 P.2d 719, 723 (Or. 1979) ("Whether a defendant's conduct creates a risk of harm to others sufficiently foreseeable to charge the defendant with a duty to avoid such conduct is a question of law." (citation omitted)), *quoted in* RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 7 Reporters' Note cmt. j. (2010). Moreover, courts have also been known to rely on a no-duty determination based on a lack of foreseeable risk to hold that, as a matter of law, there was no breach. *See, e.g.*, Williams v. Cingular Wireless, 809 N.E.2d 473 (Ind. Ct. App. 2004), *cited with approval in* RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 7 Reporters' Note cmt. j. (2010).

191. Bickel & Lake, *supra* note 5, at 204 ("The line of foreseeability will nearly always be drawn in fact specific, case sensitive ways. In *all* tort cases, it is an element with an air of unavoidable uncertainly [sic]." (emphasis added)).

192. *Id.* ("Courts can do their part by being particularly explicit in their decisions as to what is expected or permitted and what is not.").

193. Peters, *supra* note 188, at 465-66.

194. *Id.* at 467 (emphasis added). "Although millennial colleges have an affirmative duty to protect their students from foreseeable harm within the scope of this relationship, students have the corresponding duty to act reasonably under the circumstances." *Id.*

However, Peters asserts that the "Millennial Model" designates the college-student relationship as "*per se* special, while simultaneously emphasizing reasonableness under the circumstances."[195] This will only perpetuate the existing problem because it makes a question of fact—whether a duty was breached—a judicial determination. Essentially, instead of intertwining foreseeability with duty as in the Facilitator Model, the Millennial Model adds a reasonableness factor to the duty determination. Hence, while asserting to be analyzing duty, these models are evaluating the sufficiency of the evidence to an assumed conclusion they claim to be proving.[196] As a result, a court can erroneously use an otherwise proper jury question to prevent the jury from ever hearing the case.

While the model of a legal duty within college affairs is currently in a state of uncertainty,[197] its evolution is best traced through three distinct transitional eras in university law:[198] The *In Loco Parentis* era, the Bystander era, and the Millennial era.[199]

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195. *Id.*

196. *See* A.W. v. Lancaster Cnty. Sch. Dist., 784 N.W.2d 907, 916 (Neb. 2010), for a more in-depth discussion regarding this argument. In providing more insight, this court stated it had erroneously found a duty in a previous case by grounding its decision entirely in foreseeability. *Id.* (construing Sharkey v. Board of Regents of Univ. of Neb., 615 N.W.2d 889 (2000)). In doing so, the court relied on prior violent altercations to foresee another attack, and thus, imposed a duty owed to its students. *Id.* Here, the flaw is ignoring a landowner's duty to protect against foreseeable attacks regardless of whether an attack was foreseeable in the instant case. *Id.*

197. Bickel & Lake, *supra* note 5, at 11.

198. *Id.* at 18 ("[T]he study of university law is a study of the mostly gradual evolution of the application of legal norms (particularly "duty") to university affairs.").

199. *See generally*, Bickel & Lake, *supra* note 5, for an in-depth discussion on the social, political, and legal influences underpinning these eras. Note, however, that this Article believes the "duty" era from Bickel & Lake, *supra* note 5, is better described as the "millennial" era. This is due to the author's contention that the "duty" era designation unjustly characterizes the era. See Part IV.B.C for further discussion on this matter.

B. Eras in College Law

1. The In Loco Parentis Era

Prior to the 1960s, colleges enjoyed legal insularity from almost any student injury occurring on campus.[200] During this era, "the doctrine of *in loco parentis* and various tort immunities largely protected colleges from legal interference."[201] *In loco parentis* is a Latin phrase that literally means "in place of a parent."[202] The Supreme Court has held that teachers and school administrators "stand *in loco parentis* over the children entrusted to them."[203] As a result, courts have used the *in loco parentis* doctrine to grant schools the right "to discipline students, to enforce rules, and to maintain order."[204]

Under the doctrine of *in loco parentis* in the higher education context, the college stands in place of the parent,[205] exercising the paternal right to discipline, control, and regulate.[206] Yet during this era, "the law generally did not hold universities accountable for student safety."[207] Thus, it is better to view the *in loco parentis* era as an era providing immunity for when colleges discipline or regulate their students, rather than holding colleges responsible for student safety.[208]

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200. Bickel & Lake, *supra* note 5, at 23 ("[P]rior to 1960, universities themselves were rarely held liable to a student for injuries, no matter how the student was injured."). This is roughly consistent with legal insularity that employers enjoyed prior to workers' compensation laws. *See, e.g.*, Colo. Dep't of Labor and Emp't, *Workers' Compensation Guide for Employers* 1 (2005), *available at* http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheader=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1251724760333&ssbinary=true ("Before the workers' compensation law was established, there was little recourse for workers injured on the job.").

201. Peters, *supra* note 186, at 434.

202. BLACK'S LAW DICTIONARY (9th ed. 2009).

203. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 654 (1995).

204. Morse v. Frederick, 551 U.S. 393, 413 (2007) (Thomas, J., concurring) (footnote omitted).

205. Bickel & Lake, *supra* note 5, at 7. *Black's Law Dictionary* defines "*in loco parentis*" as the "[s]upervision of a young adult by an administrative body such as a university." BLACK'S LAW DICTIONARY (10th ed. 2014).

206. Bickel & Lake, *supra* note 5, at 23.

207. *Id.*

208. *Id.* at 29 ("As a technical legal doctrine, *in loco parentis* was not—ever—a liability/responsibility/duty creating norm in higher education law. *In loco parentis* was only a

During the civil rights movement, the *in loco parentis* doctrine in college affairs began to unravel after students began challenging college authority and control over student freedom.[209] *Dixon v. Alabama State Board of Education*[210] is the seminal case representing this era's demise.[211] In *Dixon*, six black students at Alabama State College were expelled after they participated in civil rights demonstrations.[212] Before being expelled, they were not provided any formal notice of why they were expelled nor the opportunity to have a hearing on the matter.[213] The college argued that the students had waived these rights pursuant to a contractual provision within the college's regulations.[214] The *Dixon*

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legal tool of immunity for universities when they deliberately chose to discipline students."); *see also* Theodore Stamatakos, *The Doctrine of In Loco Parentis, Tort Liability and the Student-College Relationship*, 65 IND. L.J. 471, 484 (1990) ("The conspicuous absence of appellate court discussion of the doctrine of in loco parentis fully supports the conclusion that the doctrine of in loco parentis was never operational in the context of personal injury suits in the first place."). The freedoms that universities enjoyed in relation to student discipline and regulation is similar to the freedoms that religious institutions are provided via the ecclesiastical abstention doctrine, "which prevents secular courts from reviewing many types of disputes that would require an analysis of . . . 'church discipline . . . or the conformity of the members of the church to the standard of morals required.'" Patton v. Jones, 212 S.W.3d 541, 547-548 (Tex. App. 2006) (citation omitted).

209. "This is because the 1960s civil rights movement raised questions of basic civil rights and the bargains struck between universities and students . . . [and] [t]he fall of *in loco parentis* . . . correlate[s] exactly with the rise of student economic power and the rise of student civil rights." Bickel & Lake, *supra* note 5, at 36.

210. 294 F.2d 150 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1961). *See also, e.g.*, Bickel & Lake, *supra* note 5, at 37 (noting most university law commentators view *Dixon* as the "watershed decision" in the *in loco parentis* era).

211. *See, e.g.*, Bickel & Lake, *supra* note 5, at 37 (noting most university law commentators view *Dixon* as the "watershed decision" in the *in loco parentis* era).

212. *Dixon*, 294 F.2d at 154.

213. *Id.*

214. *Id.* at 156. The particular provision reads as follows:

> Attendance at any college is on the basis of a mutual decision of the student's parents and of the college. Attendance at a particular college is voluntary and is different form attendance at a public school where the pupil may be required to attend a particular school which is located in the neighborhood or district in which the pupil's family may live. Just as a student may choose to withdraw from a particular college at any time for any personally-determined reason, the college may also at any time decline to continue to accept responsibility for the supervision and service to any student with whom the relationship becomes unpleasant and difficult.
>
> Id.

court rejected this argument, holding that a college's power to expel its students "is not unlimited and cannot be arbitrarily exercised."[215] As a result, *Dixon* effectively recognized a constitutional right for students in good standing to remain at public universities,[216] and paved the way for students to acquire further constitutional protections regarding their education.[217]

By the early 1970s, the legal insularity that colleges enjoyed during the *in loco parentis* era ended.[218] Consequently, colleges became increasingly "subject to judicial review and . . . legal, not simply institutional, norms."[219] More importantly, the fall of *in loco parentis* placed higher education in a state of uncertainty, as the courts attempted to define the parameters of students' rights.[220]

2. *The Bystander Era*

Once the *in loco parentis* doctrine was dismissed from university law, the courts shifted to "the legal analytical/doctrinal tools of *duty* and *no duty*."[221] Accordingly, the central focus in university law became the legal concepts of "duty" and "no duty."[222] Initially, a college's legal responsibility for a safe campus effectively remained the same – non–

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215. *Id.* at *157.*

216. Bickel & Lake, *supra* note 5, at 39 ("*Dixon* established—and other courts soon followed—that whatever *contractual* relations existed in a public university, they were subject to an irreducible minimum of *constitutional* rights inhering to he *student*. Such rights were not ever granted in the family." (emphasis in original)).

217. *Id.* at 41 & n.13. "These rights were not absolute but were subject to balancing against the university's responsibility to provide for the orderly conduct of classes and other programs and to protect the rights of other students, particularly to a safe learning environment." *Id.* at 42 (footnote omitted).

218. *Id.* at 48.

219. *Id.*

220. Peters, *supra* note 188, at 438 (asserting that the in locos parentis era was followed by "an era characterized by inconsistencies, confusion, and varied judicial reactions to the newly empowered college student."(footnote omitted)).

221. Bickel & Lake, *supra* note 5, at 49 (internal quotation marks omitted) (emphasis added).

222. *Id.* at 10, 49.

existent.[223] This was because courts began treating colleges as bystanders[224] rather than parents.[225]

Under the Restatement (Second) of Torts, a bystander has no duty to protect another person from harm, regardless of the burden, or lack thereof, in protecting that person from harm.[226] Basically, colleges avoided the same liability for student injuries under a bystander designation as they did under the *in locos parentis* doctrine.[227]

The pivotal case that transitioned higher education into the bystander era is most likely *Bradshaw v. Rawlings,*[228] which held that the emphasis on "duty," or lack thereof, resulted from the newly defined relationship that students had with their college:

> [F]or purposes of examining fundamental relationships that underlie tort liability, the competing interests of the student and of the institution of higher learning are much different today than they

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223. *Id.* at 11 ("For a brief time following the fall of in loco parentis, many 'bystander era' courts used critical, if nebulous, 'duty' concepts to reach fairly predictable results. These courts often held that no 'duty' was owed by a university to a student to protect that student form injury.").

224. Bickel & Lake define a "bystander university" as being "like a stranger who has no power or responsibility to step in to 'assist' the endangered students." *Id.* at 11 n.9.

225. *See supra* notes 200-208 and accompanying text.

226. *See* RESTATEMENT (SECOND) OF TORTS § 314 (1965) ("The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action"); *see also* John H. Marks, *The Limit to Premises Liability for Harms Caused by "Known or Obvious" Dangers: Will it Trip and Fall over the Duty-Breach Framework Emerging in the Restatement (Third) of Torts?*, 38 TEX. TECH L. REV. 1, 8-9 (2005) ("[A] classic no-duty rule form the Second Restatement states that a bystander has no duty to aid or protect another person in peril, no matter how simple it may be to save that person from severe harm or even death." (citation omitted)). Comment c to the RESTATEMENT (SECOND) OF TORTS provides an illustration on this no-duty rule:

> *A* sees *B*, a blind man, about to step into the street in front of an approaching automobile. *A* could prevent *B* from so doing by a word or touch without delaying his own progress. *A* does not do so, and *B* is run over and hurt. *A* is under no duty to prevent *B* from stepping into the street, and is not liable to *B*.

RESTATEMENT (SECOND) OF TORTS § 314 cmt. c (1965) (emphasis added).

227. *Compare* Bickel & Lake, *supra* note 5, at 49 ("In the role of bystanders, colleges had no legal duties to students and hence were not legally responsible for harm."), *with supra* notes 200-208 and accompanying text.

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

> were in the past. At risk of oversimplification, the change has occurred because society considers the modern college student an adult, not a child of tender years.[229]

In other words, in ostensibly recognizing the rise in student freedoms, the courts now held that "*no duty* was owed to students because, as free and uncontrollable beings, students owed *duties* to protect themselves."[230] As a result, the bystander-era cases[231] routinely adhered to a *no-duty rule* that not only limited a college's liability, but also kept juries out of college affairs.[232] In turn, these cases used the no-duty rule to create a "new *de facto* university *immunity*."[233] More significantly, in creating this no-duty rule, the bystander-era cases articulated the legal determination as whether the college–student relationship created a legal duty.[234] This legal question is the basis for the current uncertainty in campus safety law.

By the mid-1980s, the simplistic no-duty model had lost its legal validity.[235] Instead, courts began analyzing the law surrounding the college–student relationship on a case-by-case basis.[236] This has prevented the current law from developing a theoretical model that

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229. *Id.* at 140.

230. Bickel & Lake, *supra* note 5, at 10 (emphasis added) (internal quotation marks omitted).

231. *See generally, e.g.*, *Bradshaw*, 612 F.2d 135; Baldwin v. Zoradi, 176 Cal. Rptr. 809 (Cal. Ct. App. 1981); Rabel v. Ill. Wesleyan Univ., 514 N.E.2d 552 (Ill. App. Ct. 1987); Beach v. Univ. of Utah, 726 P.2d 413 (Utah 1986). Bickel & Lake view these four cases as the most famous for the "no duty" holdings. *See* Bickel & Lake, *supra* note 5, at 50.

232. *See* Bickel & Lake, *supra* note 5, at 57.

233. *See id.* at 65 (emphasis in original).

234. *See id.* ("The legal question in these [bystander era] cases became: 'does this type of university/student relationship create a legal duty?'").

235. *See id.* at 104 ("The no-liability case law [became] rife with hard rhetoric and strained rationales."); *id.* at 91 (listing the duties some courts had held to be owed by colleges during the bystander era); *see also, e.g.*, Mullins v. Pine Manor Coll., 449 N.E.2d 331, 335-36 (Mass. 1983); *cf.* Tarasoff v. Regents of the Univ. of Cali., 551 P.2d 334 (Cal. 1976) (stating a university, under certain circumstances, can owe a duty to an off-campus, non-student individual); Mintz v. New York, 362 N.Y.S. 2d 619 (N.Y. App. Div. 1975) (holding university was not liable because it exercised reasonable care).

236. *See* Bickel & Lake, *supra* note 5, at 106 ("Courts [now] confront the law of student/university relations on a situational basis—one case at a time . . . .").

courts can seek for guidance.[237] Therefore, the crux of the issue following the bystander era was in defining the circumstances within the college–student relationship that generates a responsibility owed to students.[238]

3. The Millennial Era[239]

While the current trend is to impose a duty upon the college–student relationship, we are still left with courts interpreting a very abstract doctrine—duty—to conceptualize the confines of the college–student relationship. This attempt at defining the current "trend" in the law, however, has ignored the complex nature a legal duty has in college affairs;[240] representing the transition from the overly simplistic, yet inconsistent, no-duty/duty model to an era characterized by "a sense of rapid acceleration toward an uncertain future."[241] Still, it is worth noting that a sense of uncertainty is reasonably expected when the law moves from prior eras of all-or-nothing models to an era that balances "university control/authority with student freedom/rights."[242] Nonetheless, it is becoming increasingly difficult, if not impossible, to justify a lack of overall vision after thirty years of attempting to define the duties associated with college–student relationship. Accordingly, this Article proposes that the Restatement (Third) approach should be the theoretical framework used to promote jury determinations instead of over-inclusive judicial gatekeeping.

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237. *See id.* (indicating that the current law in college/student affairs "is difficult to understand, and needs a theoretical model").

238. *See id.* at 67 ("Duty is about setting limits on responsibilities owed to others." (emphasis omitted)).

239. Bickel & Lake refer to this era as the "duty era," *id.* at 12, largely due to their recognition that this era witnessed an ever-increasing trend using the various special relationships under the Restatement (Second) as a vehicle to impose a duty upon colleges. *See id.* But, in an attempt to limit confusion regarding the contextual use of "duty" within their book, the author has chosen another word—millennial—to reference this time period.

240. "'Trends' in the law are hard enough to discern and work with . . . but this is especially so when there is a genuine lack of determinable overall vision." *Id.* at 107. Moreover, in this context, Bickel & Lake indicate that "duty is an organic concept and needs to be carefully fitted: it is ill suited to fast, off the rack, solutions." *Id.*

241. *See id.* at 11 (footnote omitted) (internal quotation marks omitted).

242. *See id.* at 109.

C. The Restatement (Third) Approach is Best

The Restatement (Third) of Torts acknowledges the need for an affirmative duty in the college–student relationship that prior cases routinely recognized for decades, "often relying [however] on other aspects of the relationship between the college and its student to justify imposing a duty."[243] By designating the college–student relationship as a per se special relationship with an affirmative duty owed to the students, the Restatement (Third) is the most efficient approach toward stability in higher education law. Courts have sufficiently demonstrated their systemic inability in using the Restatement (Second) to provide everyone involved with clear and consistent guidelines for the college–student relationship.[244] The Facilitator and Millennial models attempt to clarify the purpose for a duty in the college–student context, but still permit courts to unjustly take factual questions away from the jury through judicial gatekeeping that characterized by its over-inclusiveness.[245] And while imposing a duty based on existing social values and customs will routinely impose an affirmative duty, this

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243. *See* RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 40 Reporters' Note cmt. *l.* (2010). To clarify, the comment states:

> Some of the cases recognizing such a duty are less than ringing endorsements, often relying on other aspects of the relationship between the college and its student to justify imposing a duty. Conversely, a number of the cases declining to recognize a duty speak in narrow, fact-specific terms that do not rule out the possibility of recognizing a duty in other contexts.

Id.

244. *Compare, e.g., supra* Part IV(A)(1)(i) (discussing how courts applied different special relationships from the Restatement (Second) under similar facts regarding a sexual assault at a fraternity house), *with supra* Part IV(A)(1)(ii) (displaying how some courts require colleges to at least provide minimal security for their student-tenants, while other courts do not afford student-tenants any guaranteed security), *and supra* Part IV(A)(1)(iii) (suggesting that a special relationship under an assumed duty theory possesses too many unresolved issues regarding assumption of risk implications).

245. *Compare* Part IV(A)(4)(i) (Facilitator Model), *with* Part IV(A)(4)(ii) (Millennial Model).

approach permits unnecessary deviation toward defining the parameters of societal norms.[246]

Both the Restatement (Second) and the previously proposed models (Facilitator and Millennial) fail to address inherent procedural flaws; therefore, preventing any doctrinal solution. Moreover, the Restatement (Third) embraces the *Mullins* opinion through its expectation of a duty based on the inherent risks associated with attending college—including sexual attacks.[247] Similar to *Mullins*, but stated more definitively, the Restatement (Third) diminishes the unnecessary discussion on societal trends by limiting the court's authority to invoke categorical no-duty rules.[248] This is because the Restatement (Third) implicitly permits courts to invoke no-duty rules based on static issues—not the trending issues discussed in the media—because societal trends are less likely to have established principles and policies to justify implementing a categorical no-duty rule.[249] This enables the Restatement (Third) to properly submit legal determinations to the judge and factual inquiries to the jury, but more importantly, it reallocates the jury's attention to the

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246. *See generally* Mullins v. Pine Manor Coll., 449 N.E.2d 331, 336-37 (Mass. 1983) (considering the extent to which students and their parents expect "collages to exercise care to safeguard the well-being of students").

247. *Compare* RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 40 (2010) (explicitly designating the existence of a special relationship between a school and its students, mandating that the school owes its students "a duty of reasonable care with regard to risks that arise within the scope of the relationship"), *with Mullins*, 449 N.E.2d at 336 ("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." (emphasis added)). In recognizing the likelihood of sexual assaults on campus, the *Mullins* court stated:

> The concentration of young people, especially young women, on a college campus, creates favorable opportunities for criminal behavior. The threat of criminal acts of third parties to resident students is self-evident, and the college is the party which is in the position to take those steps which are necessary to ensure the safety of its students.

Mullins, 449 N.E.2d at 335.

248. *Compare Mullins*, 449 N.E.2d at 51 ("[A] duty finds its 'source in existing social values and customs.'" (quoting Schofield v. Merrill, 435 N.E.2d 339 (Mass. 1982))), *with* RESTATEMENT (THIRD) OF TORTS:.PHYS. & EMOT. HARM § 7 cmt. b-c, j. (2010), *and supra* text accompanying notes 177-184.

249. *Mullins* ignored the breadth and limitations associated with a determination based on existing social values and customs.

element of breach—whether the college acted in proportion to the *degree of duty* owed.

Selecting the doctrinal framework concerning a college's responsibility to protect its students from foreseeable harm does not resolve the issue. To breed stability and fairness into future cases, the standard for foreseeability must also be clearly outlined and uniformly applied. If not, it is reasonable to assume that juries will return inconsistent, and sometimes contradicting, verdicts through applying different standards to factually similar situations. Stated differently, the Restatement (Third) correctly positions the questions posed in negligence cases, but falls short in providing juries with the instructions needed to adequately answer those questions. However, the balancing approach proposed in Part III.C should be utilized to fill the void.

V. CONCLUSION

Current application of tort law in collegial matters has compromised the legal rights of both colleges and students. A theoretical framework must be adopted by the courts or mandated by the legislature before colleges can justify a shift from interpreting the law to compliance. If the law were to impose an affirmative duty on the college–student relationship, colleges would be able to focus on matters that actually contribute to limiting their liability—precautionary measures. Further, the foreseeability determination would no longer be ubiquitous with a legal duty analysis, but instead, it would be included in a jury's determination of breach. But without fundamental changes in the interplay between tort law and university law, victimized students will be at the mercy of logistics before ever considering if the damages they are entitled to can ever be recovered.