

ADOLESCENT BRAIN DEVELOPMENT,
MENTAL ILLNESS, AND THE
UNIVERSITY-STUDENT
RELATIONSHIP: WHY INSTITUTIONS
OF HIGHER EDUCATION HAVE A
SPECIAL DUTY-CREATING
RELATIONSHIP WITH THEIR
STUDENTS

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[D]uty is not an immutable concept, nor is it grounded in natural law [T]he statement that there is or is not a duty begs the essential question—whether the plaintiff’s interests are entitled to legal protection Accordingly, there is no more magic inherent in the conclusory term special relation than there is in the term “duty.” Both are part and parcel of the same inquiry into whether and how the law should regulate the . . . dealings that people have with each other.

Estates of Morgan v. Fairfield Fam. Counseling Ctr., 673 N.E.2d 1311, 1322 (Ohio 1997).

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ABSTRACT

Historically, courts have applied a variety of legal theories to assess college and university tort liability in legal disputes arising out of violent or self-injurious student behavior, resulting in wildly inconsistent outcomes. Somewhat consistently, however, courts have held that no *per se* duty-creating “special relationship” exists between colleges and universities and their students. But recognition of a duty-creating “special relationship” between colleges and universities and their students is warranted in light of recent scientific information about the brain development of traditional college-age students and its potentially adverse effects on their mental health. This information is critical to provide an adequate lens by which to assess institutional tort liability because students often depend on the mental health services provided by their schools—and colleges and universities are highly involved in student life. Because a high concentration of this psychiatrically vulnerable population is on college campuses, the law should recognize that the university-student relationship is indeed legally “special,” and thus gives rise to a duty for colleges and universities to exercise reasonable care in the identification, assessment, and management of students suffering from mental health problems to prevent potentially violent or self-injurious behavior.

TABLE OF CONTENTS

I. INTRODUCTION	345
II. THE EVOLUTION OF UNIVERSITY TORT LIABILITY	349
A. THE REIGN OF IN LOCO PARENTIS	350
B. CHANGING ATTITUDES OF THE CIVIL RIGHTS MOVEMENT	351
C. NEW WILLINGNESS TO APPLY TRADITIONAL TORT PRINCIPLES.....	352
1. Express and Implied Contract Theories.....	352
2. Premises-Based Liability	353
3. Voluntary Assumption of Duty	354
4. The “Special Relationship” Doctrine.....	355
III. UNDERSTANDING TODAY’S COLLEGE STUDENTS	359
IV. THE “SPECIAL,” DUTY-CREATING, UNIVERSITY- STUDENT RELATIONSHIP	363
V. CONCLUSION	366

I. INTRODUCTION

Elizabeth Shin began cutting herself when she was in high school.¹ After high school graduation, late in her freshman year at the Massachusetts Institute of Technology (“MIT”), Elizabeth intentionally overdosed on Tylenol with codeine and was admitted for a “one-week psychiatric hospitalization,” during which she was diagnosed with “adjustment disorder.”² Over the course of a few months, she performed poorly in her classes, expressed a desire to transfer schools, and was even reported making “suicidal comments.”³

On one occasion early in her sophomore year, Elizabeth again expressed a desire to commit suicide and was sent for an assessment.⁴ She reportedly told a teaching assistant that she had bought a bottle of sleeping pills with “the intention to take them” and cause herself harm.⁵ For the next six months, Elizabeth’s mental health was in flux.⁶ After spring break that year, she began treatment with a new psychiatrist who diagnosed her with “borderline personality disorder and depression.”⁷ She also began to explore treatment options outside of MIT.⁸

On another occasion, a student called the MIT campus police after Elizabeth said that she planned to commit suicide with a knife.⁹ Elizabeth was taken to the MIT Health Center, where she spoke on the telephone with an on-call psychiatrist who determined that she was “not acutely suicidal” after speaking “for less than five minutes.”¹⁰ Elizabeth was returned to her dorm “without any restrictions or planned follow-up.”¹¹

Two days later, two students reported that Elizabeth asked one of them to erase her computer files because she planned to kill herself that day.¹² In the morning, Elizabeth’s housemaster reported that Elizabeth said

¹ Shin v. Mass. Inst. of Tech., No. 020403, 2005 WL 1869101, at *1 (Mass. Super. June 27, 2005).

² *Id.* at *1–2.

³ *Id.*

⁴ *Id.* at *3.

⁵ *See id.* (implying that she intended to harm herself because she later decided not to take the pills).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at *5.

she would not “have to worry about [Elizabeth] anymore.”¹³ Later that night, campus police and firefighters responded to a call at Elizabeth’s dorm room.¹⁴ When they broke down her door, they “found her . . . engulfed in flames.”¹⁵ She died from the self-inflicted burns four days later.¹⁶

Seung-Hui Cho emigrated from Korea with his family when he was just eight years old.¹⁷ He was a “shy” child, “frail and leery of physical contact.”¹⁸ He was deeply troubled and, before beginning the seventh grade, was diagnosed with “social anxiety disorder.”¹⁹ By the eighth grade, he had already expressed suicidal and homicidal tendencies.²⁰ After the Columbine school shooting, for example, Seung wrote a paper describing his desire to duplicate the attacks.²¹

Seung was also diagnosed with “social anxiety disorder.”²² Social anxiety disorder is “characterized by consistent failure to speak when speech is expected,” and selective mutism.²³ Selective mutism is manifested by passive-aggressive, stubborn, and controlling behavior.²⁴ These symptoms were alleviated when Seung was prescribed antidepressants, although he was later taken off them when it was thought his condition had improved.²⁵

After his diagnosis, Seung was placed in a special education program.²⁶ He received treatment and support during his early high school years, but by his junior year he began feeling that “there [was] nothing

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at *5–6.

¹⁷ Vicki Smith, *Cho’s Problems Date to Early Childhood*, USA TODAY, Aug. 30, 2007, http://usatoday30.usatoday.com/news/nation/2007-08-30-3532663914_x.htm.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ VA. TECH REVIEW PANEL, MASS SHOOTINGS AT VIRGINIA TECH 35 (April 2007), available at <http://cdm16064.contentdm.oclc.org/cdm/ref/collection/p266901coll4/id/904>.

²⁶ Brigid Schulte & Tim Craig, *Unknown to Va. Tech, Cho Had a Disorder*, WASHINGTON POST, Aug. 27, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/08/26/AR2007082601410.html>.

wrong with [him]” and he refused treatment.²⁷ Nevertheless, with the accommodations he had received, Seung achieved enough academic success to be admitted to the Virginia Polytechnic Institute and State University (“Virginia Tech”).²⁸

Seung completed his first two years of college largely without incident.²⁹ During his junior year, however, his mental health began to deteriorate and he became increasingly isolated from his cohorts.³⁰ He exhibited strange and violent behavior with other students in the dorms, and in one incident, repeatedly stabbed the floor in a female student’s dorm room.³¹ On several occasions, Seung also called his suitemates from different dormitory lounges asking for “Seung” while identifying himself as “question mark,” the name for his imaginary twin brother.³²

Seung kept weapons, such as large knives in his room.³³ He also exhibited disruptive and hostile behavior while in the classroom and wrote violent papers expressing resentment and hostility toward his classmates.³⁴ Many of them stopped attending classes with Seung because they felt uncomfortable, and teachers requested that Seung be removed from their classes.³⁵ Some teachers even threatened to resign.³⁶

After his conduct was reported to school administration, Seung met with a dean who noted that “he seemed depressed, lonely, and very troubled.”³⁷ Initially, Seung refused to attend counseling sessions, but in late November 2005 he finally contacted the on-campus counseling center and scheduled an appointment that he later missed.³⁸ A second counseling appointment was never made, but Seung was subsequently triaged over the phone a second time.³⁹

Throughout late 2005, Seung left strange messages for a female

²⁷ Smith, *supra* note 17.

²⁸ Daniel Golden, *From Disturbed High Schooler to College Killer*, WALL ST. J., Aug. 20, 2007, <http://online.wsj.com/news/articles/SB118756463647202374>.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ VA. TECH REVIEW PANEL, *supra* note 25, at 41–45.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

student.⁴⁰ The student contacted the police, who warned Seung not to contact her again.⁴¹ The police also received a report that Seung had made suicidal comments to another suitemate.⁴² After these incidences, Seung was brought in for an evaluation by a licensed clinical social worker, who concluded that he was “mentally ill, . . . an imminent danger to [him]self or others, and was not willing to be treated voluntarily.”⁴³ Seung was hospitalized for the night, but the next morning an independent evaluation reached the opposite conclusion.⁴⁴ He was triaged for a third time at the Virginia Tech counseling center but did not make any follow-up appointments and never returned.⁴⁵

In the ensuing months, Seung continued writing violent stories and having trouble with his instructors.⁴⁶ One story in particular portrayed a scene with a chilling similarity to the massacre at Virginia Tech he would later commit.⁴⁷

Stories like those of Elizabeth and Seung illustrate the tragedies that can result when colleges and universities fail to adequately identify, assess, and manage mentally ill students on campus. Over the last decade, advancements in neuroscience have confirmed that the adolescent brain does not fully mature until people reach their mid-twenties.⁴⁸ While the brain develops, it suffers from increased vulnerability to mental disorders, such as depression and schizophrenia, which can lead to self-injurious or violent behavior.⁴⁹ It is no surprise that large numbers of the psychiatrically vulnerable population are concentrated at American colleges and universities—about two-thirds of students attending institutions of higher education (“IHEs”) are under twenty-five years of age.⁵⁰

⁴⁰ *Id.* at 46.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Mariam Arain et al., *Maturation of the Adolescent Brain*, 9 *NEUROPSYCHIATRIC DISEASE AND TREATMENT* 449, 451 (2013).

⁴⁹ *Clues to Role of Brain Development as Risk for Mental Disorders May Also Lead to Better Treatments*, NAT'L INST. OF MENTAL HEALTH, (May 6, 2008), <http://www.nimh.nih.gov/news/science-news/2008/clues-to-role-of-brain-development-as-risk-for-mental-disorders-may-also-lead-to-better-treatments.shtml>.

⁵⁰ See *National Center for Education Statistics, “Fast Facts,”* INST. OF EDUC. SCIENCE,

College and university liability rules have historically been inconsistent due, at least in part, to a difficulty in defining the role of college students in our society.⁵¹ While the nature of the university-student relationship favors special legal recognition, current liability rules largely reflect a bygone era in which courts espoused that colleges and universities had no duty to exercise reasonable care in ensuring student safety.⁵² Recently, however, a few courts have been increasingly willing to impose liability for student safety, albeit based on a variety of (at times inconsistent) legal theories.

This Article suggests that the university-student relationship is a “special relationship” that gives rise to a duty of care. IHEs owe a duty of care to their students because advances in neuroscience over the last decade have shed light on adolescent brain development and its resulting psychiatric conditions. Part II of this Article briefly discusses the history of college and university institutional tort liability, while Part III summarizes recent scientific information on adolescent brain development, and the current mental health condition of students at IHEs. Part IV argues that there is a “special relationship” between IHEs and their students, which gives rise to a duty to exercise reasonable care in the identification, assessment, and management of students suffering from mental disorders.

II. THE EVOLUTION OF UNIVERSITY TORT LIABILITY

[W]ith no hint of irony, courts continue to hold that adult college students are not in a special relationship with an IHE, except when they are.

Peter F. Lake

The Special Relationship(s) Between a College and a Student: Law and Policy Ramifications for the Post In Loco Parentis College.

Historically, the legal relationship between IHEs and their students has been difficult to define. Courts and commentators have both proposed and rejected a myriad of descriptions:

The university [has been] variously imagined as (a) standing in loco parentis, (b) a bystander/stranger (particularly when students are viewed as uncontrollable), (c) an insurer of student safety, (d) a landlord, (e) a

<http://nces.ed.gov/fastfacts/display.asp?id=98>.

⁵¹ See discussion *infra* Part II A, C.

⁵² *Id.*

custodian, (f) a babysitter, (g) an educator, (h) a supervisor, (i) sometimes, where appropriate, an employer, (j) a manager of student life or student activities, (k) a fiduciary, (l) a “producer” of educational product with respect to which a student is a “consumer,” (m) a facilitator and/or (n) in a “delicate relationship” with students.⁵³

This ever-changing understanding of the university-student relationship has made accurately defining the connection problematic. Nevertheless, an accurate understanding of the societal role college students occupy and their relationship to the IHEs they attend is critical to provide an adequate lens by which to assess institutional tort liability.⁵⁴

The evolution of the university-student relationship, and its impact on the development of the law governing institutional tort liability, has been widely discussed in legal scholarship.⁵⁵ While it is not recounted in detail here, what follows is a brief summary of the development of jurisprudence in this area.

A. THE REIGN OF IN LOCO PARENTIS

For nearly two centuries after America’s founding, colleges and universities stood in loco parentis, or in the place of the parent, with their students.⁵⁶ As Sir William Blackstone explained, the “tutor or schoolmaster” was delegated “parental authority” over the student,⁵⁷ and students were “committed to [the] charge” of colleges and universities

⁵³ Robert D. Bickel & Peter F. Lake, *The Emergence of New Paradigms in Student-University Relations: From “In Loco Parentis” to Bystander to Facilitator*, 23 J.C. & U.L. 755, 757–58 (1997).

⁵⁴ See Jane A. Dall, Note, *Determining Duty in Collegiate Tort Litigation: Shifting Paradigms of the College-Student Relationship*, 29 J.C. & U.L. 485, 487–507 (2003) (providing an overview of the relationship between IHEs and students).

⁵⁵ See generally, e.g., Bickel & Lake, *supra* note 53 (discussing the relationship between IHEs and students); Dall, *supra* note 54 (same); Helen H. de Haven, *The Academy and the Public Peril: Mental Illness, Student Rampage, and Institutional Duty*, 37 J.C. & U.L. 267 (2011) [hereinafter de Haven, *The Academy and the Public Peril*] (same); Helen H. de Haven, *The Elephant in the Ivory Tower: Rampages in Higher Education and the Case for Institutional Liability*, 35 J.C. & U.L. 503 (2009) [hereinafter de Haven, *The Elephant in the Ivory Tower*] (same); Eric A. Hoffman, Note and Comment, *Taking a Bullet: Are Colleges and Universities Exposing Themselves to Tort Liability by Attempting to Save Their Students?*, 29 GA. ST. U.L. REV. 539, 553–54 (2013) (same); Peter F. Lake, *The Rise of Duty and the Fall of In Loco Parentis and Other Protective Tort Doctrines in Higher Education Law*, 64 MO. L. REV. 1 (1999) (same).

⁵⁶ Dall, *supra* note 54, at 488.

⁵⁷ *Id.*

because they were considered minors.⁵⁸ Colleges were effectively immunized from legal liability in the exercise of these powers.⁵⁹ During this era, university legal liability of almost any kind, for both student safety and discipline, was virtually nonexistent.⁶⁰ It is clear that whatever relationship the in loco parentis doctrine had to university tort liability, it served not as a sword to students, but as a shield to universities.⁶¹

B. THE CHANGING ATTITUDES OF THE CIVIL RIGHTS MOVEMENT

In the 1960s and 1970s, the social and cultural shifts of the Civil Rights Movement contributed to the changing understanding of the university-student relationship.⁶² Student-activism helped erode the paternalistic role IHEs once played.⁶³ College students attained a new status and were no longer regarded as minors, but adults.⁶⁴ IHEs became limited in their ability to regulate student life, and students were “identified with an expansive bundle of individual and social interests and possess[ed] discrete rights not held by college students from decades past.”⁶⁵ This “dramatic reapportionment of responsibilities and social interests” was the foundation for the idea that “the modern American college [was] not an insurer of the safety of its students,” and IHEs were generally not liable for losses suffered by students.⁶⁶

⁵⁸ *Id.*; *Bradshaw v. Rawlings*, 612 F.2d 135, 139 (3rd Cir. 1979).

⁵⁹ Lake, *supra* note 55, at 4.

⁶⁰ *Id.* at 4.

⁶¹ *Id.* at 6.

⁶² Hoffman, *supra* note 55, at 553–54.

⁶³ *Bradshaw*, 612 F.2d at 139.

⁶⁴ *Id.* at 138–39.

⁶⁵ *Id.* at 138.

[E]xcept for purposes of purchasing alcoholic beverages, eighteen year old persons are considered adults by the Commonwealth of Pennsylvania. They may vote, marry, make a will, qualify as a personal representative, serve as a guardian of the estate of a minor, wager at racetracks, register as a public accountant, practice veterinary medicine, qualify as a practical nurse, drive trucks, ambulances and other official fire vehicles, perform general fire-fighting duties, and qualify as a private detective. Pennsylvania has set eighteen as the age at which criminal acts are no longer treated as those of a juvenile, and [eighteen-year-old] students may waive their testimonial privilege protecting confidential statements to school personnel. Moreover, a person may join the Pennsylvania militia at an even younger age than eighteen and may hunt without adult supervision at age sixteen.

Id. at 139.

⁶⁶ *Id.*

C. A NEW WILLINGNESS TO APPLY OLD PRINCIPLES

In the decades following the Civil Rights Movement, several new trends in tort law emerged.⁶⁷ Liability was imposed on colleges and universities, for example, in the areas of “premises maintenance, curricular and co-curricular safety, dormitory and residential life safety, and dangerous persons.”⁶⁸ This reflected the increased willingness of courts to impose a duty of reasonable care on IHEs in limited circumstances.⁶⁹ During this era, which Professor Peter Lake has named the “bystander era,” however, courts frequently refused to find a duty of care in areas of “uncontrollable” student behavior, like drug and alcohol use.⁷⁰ In some cases where no duty was found, courts went so far as to espouse that no special relationship existed between colleges and their students.⁷¹

Nevertheless today, “[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.”⁷² Plaintiffs suing IHEs for harm caused by violence or student suicides advance a variety of legal theories, including: express and implied contracts; premises-based liability; voluntary assumption of duty; and, most importantly here, the “special relationship” doctrine.⁷³

1. Express and Implied Contract Theories

A university can create a valid contract with students through “definite and certain” representations made in marketing, promotional, and informational materials, if those materials are reasonably foreseeable to

⁶⁷ Lake, *supra* note 55, at 11. For example, comparative fault doctrines emerged in most states; rules of proximate causation relaxed, requiring some defendants to guard against foreseeable misconduct of third parties; and, the erosion of many charitable and governmental immunities occurred.

⁶⁸ *Id.* at 11–12.

⁶⁹ Bickel & Lake, *supra* note 53, at 760–61.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Mullins v. Pine Manor Coll.*, 449 N.E.2d 331, 336 (Mass. 1983) (finding a college liable to student raped on-campus because it had duty grounded in “existing social values and customs” and voluntarily assumed duty); *but see Nola M. v. Univ. of S. Cal.*, 20 Cal. Rptr. 2d 97 (Cal. Ct. App. 1993) (discussing how university not liable for on-campus rape where duty to student was too remote from causation).

⁷³ Hoffman, *supra* note 55, at 554–71.

induce reliance.⁷⁴ Courts have historically been reluctant, however, to impose liability on this basis.⁷⁵

In the litigation that arose out of Elizabeth Shin's suicide, for example, a theory advanced against MIT was that the university violated an express or implied contract "to provide necessary and reasonable medical services," based on representations in MIT's advertising and marketing materials.⁷⁶ On that basis, the plaintiffs also sought to impose liability on MIT under theories of promissory estoppel and negligent misrepresentation.⁷⁷ But after examining the MIT Medical Department's brochure and by-laws, the court rejected the contract based claims because the materials merely contained "generalized representations" of the medical services provided by MIT and not a "specific promise."⁷⁸

2. Premises-Based Liability

Plaintiffs have had more success suing universities under theories of premises-based liability. Courts have held that students are business invitees while on university grounds, and that universities have a duty to provide students with a reasonably safe campus.⁷⁹ Premises-based liability has substantial limitations, however, because courts disagree as to the basis of the business-invitee relationship.⁸⁰ For example, if a housing contract was the only basis for a business-invitee relationship, the relationship might cease the moment the students left their residence hall.⁸¹ No matter what the basis for the business-invitee relationship is, under premises-based liability theories, colleges' duty of care is limited to

⁷⁴ *E.g.*, *Guckenberger v. Bos. Univ.*, 974 F. Supp. 106, 150 (D. Mass. 1997).

⁷⁵ *See, e.g.*, *Tanja H. v. Regents of the Univ. of Cal.*, 278 Cal. Rptr. 918, 921–22 (Cal. Ct. App. 1991) (finding a university not liable for rape of female student in dormitory after a party at which alcohol was served to minors despite theory of "express or implied promises concerning the safety and security . . . of dormitory premises").

⁷⁶ *Shin v. Mass. Inst. of Tech.*, No. 020403, 2005 WL 1869101, at *6 (Mass. Super. June 27, 2005).

⁷⁷ *Id.* at *6–8, *14–15.

⁷⁸ *Id.* at *7–8 (internal quotation marks omitted).

⁷⁹ *Nero v. Kan. State Univ.*, 861 P.2d 768, 780 (Kan. 1993) ("A university owes student tenants the same duty to exercise due care for their protection as a private landowner owes its tenants." (citing *Relyea v. State*, 385 So. 2d 1378, 1382–83 (Fla. Dist. Ct. App. 1980))).

⁸⁰ *See, e.g.*, *Peterson v. S.F. Cmty. Coll. Dist.*, 685 P.2d 1193, 1197–98 (Cal. 1984) (finding a business-invitee relationship existed based on purchase of a parking pass at community college); *Nero*, 861 P.2d at 780–81 (finding a business-invitee relationship existed based on university dormitory housing contract).

⁸¹ *Hoffman*, *supra* note 55, at 558.

maintaining a reasonably safe campus against foreseeable dangers within their control.⁸²

3. Voluntary Assumption of Duty

The voluntary assumption of duty framework provides another method of assessing institutional duty in cases of student suicide or criminal acts.⁸³ When institutions render services to their students, they may assume a duty to exercise reasonable care in the undertaking.⁸⁴ If a student is harmed as a result of the school's failure to exercise reasonable care in performing services and its failure increased the risk of the harm occurring, the university may be subject to liability.⁸⁵ A university may also be liable for failing to exercise reasonable care if a student reasonably relied upon the service and was harmed as a result.⁸⁶

Courts, however, have inconsistently applied this doctrine. In *Jain v. State*, for example, a court held that a university did not have a duty to notify a student's parents of his self-destructive behavior, even though the university had adopted a parental notification policy and the student had previously told his resident assistant that he intended to kill himself.⁸⁷ After the student committed suicide, the Iowa Supreme Court held in favor of the university, concluding that "no affirmative action by the [institution] . . . increased [the student's] risk of self-harm," the student did not rely on the parental notification policy, and the university had not voluntarily assumed a duty.⁸⁸

Generally, the simple enactment, publication, or enforcement of policies that regulate student conduct does not give rise to a "voluntary undertaking."⁸⁹ However, in *Furek v. University of Delaware*, a court held that a university had assumed a duty by enacting an anti-hazing policy, without finding that the plaintiff had detrimentally relied upon it or

⁸² *Nero*, 861 P.2d at 780; *Furek v. Univ. of Del.*, 594 A.2d 506, 522 (Del. 1991); Hoffman, *supra* note 55, at 558–59 ("Areas found to be within the institution's control include on-campus residence halls and their vicinities, parking garages, academic buildings, and fraternity houses." (footnotes omitted)).

⁸³ Hoffman, *supra* note 55, at 561.

⁸⁴ See RESTATEMENT (SECOND) OF TORTS § 323 (1965) (discussing when a party owes another a duty of protection).

⁸⁵ *Id.* § 323(a).

⁸⁶ *Id.* § 323(b).

⁸⁷ *Jain v. State*, 617 N.W.2d 293, 294–95 (Iowa 2000).

⁸⁸ *Id.* at 299–300.

⁸⁹ Hoffman, *supra* note 55, at 562.

been put at an increased risk of harm by the policy.⁹⁰ This is but one example of the varying outcomes that have resulted from the inconsistent application of the voluntary assumption of duty doctrine in the context of IHE liability.

4. The “Special Relationship” Doctrine

IHE liability for student suicide or harm caused by third parties may also be premised on the existence of a “special relationship” between the college and either the victim or an assailant. As a general rule, there is no duty to act for the “aid or protection” of another.⁹¹ Certain relations, however, are exempted from the general rule and give rise to a “special responsibility.”⁹² In recent decades, courts insisted that there was no *per se* “special relationship” between IHEs and their students.⁹³ Nevertheless, some courts have imposed liability on institutions based on “*specific duty-creating relationships . . .*, some of which are legally ‘special.’”⁹⁴

The Third Restatement of Torts, furthermore, evidences an increased willingness to recognize that the college-student relationship is indeed legally “special.”⁹⁵ According to the chapter on “Affirmative Duties,” the relationship between “a school [and] its students” gives rise to a “duty of reasonable care with regard to risks that arise within the scope of the relationship.”⁹⁶ Section 40 expressly adopts “a more general duty of reasonable care” compared to its predecessor, partly, in recognition “of the variety of situations in which the duty may arise.”⁹⁷ The duty imposed,

⁹⁰ *Furek v. Univ. of Del.*, 594 A.2d 506, 520–24 (Del. 1991).

⁹¹ RESTATEMENT (SECOND) OF TORTS § 314 (1965).

⁹² *Id.* § 314A. Section 314A lists relations that are considered special, for example: a common carrier and its passengers; an innkeeper and his guests; a possessor of land who holds it open to the public and those who enter in response to his invitation; and, one who is required by law or who voluntarily takes custody of another to his detriment. This list, however, was not intended to be exclusive. *Id.* § 314(a), cmt. b.

⁹³ Peter F. Lake, *The Special Relationship(s) Between a College and a Student: Law and Policy Ramifications for the Post In Loco Parentis College*, 37 IDAHO L. REV. 531, 535 (2001); Knoll v. Bd. of Regents of the Univ. of Neb., 601 N.W.2d 757, 761–64 (Neb. 1999).

⁹⁴ Lake, *supra* note 93, at 535 (emphasis added). Institutions become responsible to exercise reasonable care in the following situations: by assuming duties of care; by being a landlord or tenant in business-invitee relationship with a student; by having a relationship with foreseeably dangerous individuals and foreseeable patterns of danger; or by engaging in activities that create foreseeable risks.

⁹⁵ See RESTATEMENT (THIRD) OF TORTS § 40 (2012). The Restatement (Third) of Torts is still in the proposed drafting stage and thus has not yet been generally adopted by courts.

⁹⁶ *Id.* § 40(a), (b)(5).

⁹⁷ *Id.*, cmt. d.

however, “requires only reasonable care under the circumstances.”⁹⁸ Because the duty applies to a “wide range of students . . . what constitutes reasonable care is contextual—the extent and type of supervision required of young elementary-school pupils is substantially different from reasonable care for college students.”⁹⁹ Notably, this duty of care applies regardless of the source of the risk, and thus, “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.”¹⁰⁰ Accordingly, an argument for institutional liability, for student suicides or third-party acts for example, can be premised on § 40 of the Third Restatement of Torts.

As the Third Restatement of Torts notes, the university-student relationship and K-12 relationship must be distinguished. Equating the two only serves to complicate matters. The doctrine of *in loco parentis* holds K-12 schools in a duty-creating relationship with students because of the “special” custodial relationship between them.¹⁰¹ Importantly, the relationship is special *because it is custodial*; but “special relations” need not necessarily be custodial.¹⁰² A faulty line of reasoning has pervaded that “if duties of care exist in higher education they must be based upon custodial . . . duties. . . . The temptation to fall into this fallacious logic,” Professor Lake explains, “lies in the . . . simple reality that whether by way of custodial special relations or other non-custodial situations, the . . . result is . . . the same—a legal duty to use reasonable care.”¹⁰³

A duty for IHEs to exercise reasonable care to protect the well-being of resident students may “find[] its ‘source in existing social values and customs.’”¹⁰⁴ In *Mullins v. Pine Manor College*, the court imposed upon a college a duty to protect a female student who was raped on campus, because such a duty was “embedded in a community consensus.”¹⁰⁵ “This

⁹⁸ *Id.*

⁹⁹ *Id.*, illus. l.

¹⁰⁰ *Id.*, illus. g.

¹⁰¹ Lake, *supra* note 93, at 535–36.

¹⁰² *Id.*

¹⁰³ *Id.* at 536; *see also* *Jain v. State*, 617 N.W.2d 293, 298 (Iowa 2000) (declining to find that a university had a duty of reasonable care to prevent a student from committing suicide). In *Jain*, the court fell victim to this fallacious line of reasoning: “Plaintiff claims no reliance on the ‘custody or control’ exception here, conceding the university’s relationship with its students is not custodial in nature. What plaintiff does claim is that the university’s knowledge of [the student’s] ‘mental condition or emotional state requiring medical care’ created a special relationship giving rise to an affirmative duty of care toward him.” *Id.* at 297.

¹⁰⁴ *Mullins v. Pine Manor Coll.*, 449 N.E.2d 331, 335 (Mass. 1983).

¹⁰⁵ *Id.*

consensus stem[med] from the nature of the situation,” namely: “[t]he concentration of young people, especially young women, on a college campus”¹⁰⁶ It gave rise to a reasonable expectation that the college would exercise reasonable care “to protect resident students from foreseeable harm.”¹⁰⁷

Other courts have rejected this view, holding that the mere relationship between IHEs and their adult students does not give rise to a duty-creating “special relationship.”¹⁰⁸ In *Beach v. University of Utah*, the court rejected the argument that a university had a duty to supervise an intoxicated student who fell from a cliff while on a school field trip, even though the supervising faculty member on the trip was also intoxicated and knew the student had a similar alcohol-related incident on a prior field trip.¹⁰⁹ The *Beach* court, relying on the outdated social policy analysis set forth in *Bradshaw v. Rawlings*,¹¹⁰ concluded that a “realistic assessment of the nature of the relationship between the parties here preclude[d] [a] finding that a special relationship existed between the University and [the student] or other adult students.”¹¹¹

Still, other courts have declined to take positions at either extreme, and have held that a special duty-creating relationship exists between an institution and one of its students.¹¹² One such case, *Tarasoff v. Regents of the University of California*, establishes a special relationship between medical professionals and both patients and potential victims that gives rise to a duty of care.¹¹³ Tarasoff, a student at UC Berkeley, was killed by another student, Poddar, after Poddar had told a university psychologist of his intention to kill her a couple months earlier.¹¹⁴ Poddar had been briefly detained by campus police after the psychologist reported what Poddar told him, but was released because he appeared “rational.”¹¹⁵ The psychologist was directed to take no further action to detain Poddar, and Tarasoff was never warned of the danger she faced.¹¹⁶

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 336.

¹⁰⁸ See *Furek v. Univ. of Del.*, 594 A.2d 506, 517 (Del. 1991).

¹⁰⁹ *Beach v. Univ. of Utah*, 726 P.2d 413, 418–19 (Utah 1986); *Furek*, 594 A.2d at 517.

¹¹⁰ See *Bradshaw v. Rawlings*, 612 F.2d 135, 138–40 (3rd Cir. 1979); see Part III *infra*.

¹¹¹ *Beach*, 726 P.2d at 419.

¹¹² *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334 (Cal. 1976).

¹¹³ *Id.* at 343–44.

¹¹⁴ *Id.* at 339–40.

¹¹⁵ *Id.* at 340.

¹¹⁶ *Id.*

The court in *Tarasoff* considered numerous factors in determining whether the university had a duty to warn Tarasoff of her peril.¹¹⁷ They included: the “foreseeability of harm”; the degree of certainty of harm to the plaintiff; the closeness of the connection between the IHE’s conduct and the plaintiff’s injury; the moral blameworthiness of the IHE’s conduct; the “policy of preventing future harm”; “the extent of the burden to the IHE and consequences to the community of imposing a duty of care”; and “the availability, cost and prevalence of insurance for the risk involved.”¹¹⁸ The court noted that the most important of these considerations was foreseeability and that since the therapist-patient relationship was “special,” foreseeability of the harm gave rise to a duty to warn.¹¹⁹

In cases of student suicide, courts have been similarly inconsistent in finding the existence of duty-creating special relationships. In *Jain*, for example, the court held that the university did not have a “special relationship” with a student that gave rise to a duty to prevent him from harming himself.¹²⁰ There, the student, Jain, asphyxiated himself in his dormitory room located in an off-campus residence hall by using the exhaust fumes from his moped.¹²¹ A university administrator had previously intervened in an argument between Jain and his girlfriend over the keys to his moped, which he had brought to his room for purposes of committing suicide.¹²² The hall coordinator instructed Jain to remove the moped, seek out a university therapist, and call her if he intended to hurt himself.¹²³ No further steps were taken, however, and Jain killed himself with the moped shortly thereafter.¹²⁴ The court rejected the argument that the university’s knowledge of Jain’s mental condition created a “special relationship” that gave rise to a duty to notify the dean of students, who in turn would have notified Jain’s parents of his condition.¹²⁵

¹¹⁷ *Id.* at 342.

¹¹⁸ *Id.* at 344.

¹¹⁹ *Id.* at 342–43.

¹²⁰ *Jain v. State*, 617 N.W.2d 293, 294–95 (Iowa 2000).

¹²¹ *Id.* at 296.

¹²² *Id.* at 295–96.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* at 296–97. Other courts, conversely, have held that a “special relationship” exists when a college official has knowledge that a student is suicidal, because the infliction of self-harm is thereby a highly foreseeable event. *See Schieszler v. Ferrum Coll.*, 236 F. Supp. 2d 602, 609 (W.D. Va. 2002) (“[T]he plaintiff has alleged sufficient facts to support her claim that a special relationship existed between [the student] and [the university] giving rise to a duty to protect [him] from the foreseeable danger that he would hurt himself”); *Shin v. Mass. Inst. of Tech.*, No.

These inconsistencies demonstrate that courts continually reconceptualize liability rules for IHEs in light of new information and an evolving understanding of the university-student relationship. Meanwhile, colleges and universities continue to experience notable amounts of criminal and civil assaults and batteries,¹²⁶ student violence,¹²⁷ and student suicides.¹²⁸ It is possible that new insights into the brain development of traditional college-age students may help explain these phenomena, and might inform college and university liability rules for personal injury. To the extent IHEs can implement systems and policies to reduce the risk of these tragedies, consistent liability rules are necessary in circumstances where IHEs fail to do so.

III. UNDERSTANDING TODAY'S COLLEGE STUDENTS

Adolescent brain studies reveal valuable insights into our students' behavioral patterns, and provide scientific evidence to underpin policy-making.

Linda P. Rowe

Understanding the College Student Brain.

In *Bradshaw*, the court reasoned that the “modern American college [was] not an insurer” of student safety because “the competing interests of the student and of the institution of higher learning [were] much different . . . than they were in the past. At risk of oversimplification,” it cautioned, “the change [had] occurred because society considers the modern college student an adult, not a child of tender years.”¹²⁹ Recent advancements in neuroscience have revealed, however, that while modern college students may not legally be children, they may nevertheless be of tender years after all.¹³⁰

020403, 2005 WL 1869101, at *1 (Mass. Super. June 27, 2005) (“[MIT Administrators] could reasonably foresee that Elizabeth would hurt herself without proper supervision. Accordingly, there was a “special relationship” between the MIT Administrators . . . and Elizabeth, imposing a duty on [them] to exercise reasonable care to protect Elizabeth from harm.”); Ann M. Massie, *Suicide on Campus: The Appropriate Legal Responsibility of College Personnel*, 91 MARQ. L. REV. 625 (2008).

¹²⁶ Bickel & Lake, *supra* note 53, at 756–57.

¹²⁷ de Haven, *The Elephant and the Ivory Tower*, *supra* note 55, at 505–06.

¹²⁸ George Krucik, *Depression and College Students*, HEALTHLINE (2012), <http://www.healthline.com/health/depression/college-students> (noting that adolescents diagnosed with depression are five times more likely to attempt suicide than adults).

¹²⁹ *Bradshaw v. Rawlings*, 612 F.2d 135, 138–40 (3rd Cir. 1979).

¹³⁰ See Arain, *supra*, note 48.

As previously mentioned, the human brain does not reach full maturity until a person reaches about twenty-five years of age.¹³¹ According to the National Center for Education Statistics, in 2011, 67 percent of all students attending American colleges and universities were under age twenty-five.¹³² Additionally, in 2012, 41 percent of eighteen to twenty-four year-olds in the United States were enrolled at IHEs.¹³³

A number of complications can occur while the brain is in development; the onset of psychiatric disorders is one of them.¹³⁴ During adolescence, significant development in brain structure and functioning occurs that is influenced by hormonal changes.¹³⁵ Neurons and synapses, which proliferate during puberty, are gradually pruned back based on an individual's experience.¹³⁶ During this time, the adolescent brain "negotiates inner selfish needs and wants as it selects from necessary and unnecessary cells."¹³⁷ At maturation, the fully developed brain will have eliminated more than 40 percent of all synapses (mostly in the frontal lobe).¹³⁸ But while this process occurs, a "struggle in the brain" erupts when it cannot "negotiate between [what is] happening in its immediate environment and the process happening internally."¹³⁹ Gradually, the "precision and efficiency of neuronal communication" improves, as "the white insulating coat of myelin on the axons that carry signals between

¹³¹ Linda P. Rowe, *Understanding the College Student Brain*, 7 C.S. & S.D. 6 (2006). The period between the ages of eighteen and twenty-five will, on occasion, hereinafter, be referred to as "adolescence" or "late adolescence," and individuals of this age as "adolescents."

¹³² *Table 303.45*, U.S. DEP'T OF EDUC., NATIONAL CENTER FOR EDUCATION STATISTICS (2013), https://nces.ed.gov/programs/digest/d13/tables/dt13_303.45.asp. The most recent data on total fall enrollment in degree-granting postsecondary institutions, by level of enrollment, sex, attendance status, and age of student, is from the year 2011. *See id.* (providing data through 2011 only).

¹³³ *Table 302.60*, U.S. DEP'T OF EDUC., NATIONAL CENTER FOR EDUCATIONAL STATISTICS (2013), https://nces.ed.gov/programs/digest/d13/tables/dt13_302.60.asp. The most recent data on enrollment rates of eighteen- to twenty-four-year-olds in degree-granting institutions, by level of institution and sex and race/ethnicity of student, is from the year 2012. *See id.* (providing data through 2012 only).

¹³⁴ *The Adolescent Brain: Beyond Raging Hormones*, HARVARD HEALTH PUBL'NS (July 2005), <http://www.health.harvard.edu/blog-extra/the-adolescent-brain-beyond-raging-hormones>.

¹³⁵ *Id.*

¹³⁶ Amy Biolchini, *U-M Experts: Brain Development, Stress Put College Students at Higher Risk for Depression*, ANN ARBOR NEWS, (Feb. 27, 2013), <http://www.annarbor.com/news/u-m-experts-brain-development-stress-put-college-students-at-higher-risk-for-depression>; Rowe, *supra* note 131.

¹³⁷ *Id.*

¹³⁸ *The Adolescent Brain: Beyond Raging Hormones*, *supra* note 134.

¹³⁹ Biolchini, *supra* note 136.

nerve cells continues to accumulate.”¹⁴⁰ Until the brain fully matures, however, the frontal cortex cannot adequately oversee and regulate the origination of emotions.¹⁴¹ This inability can lead to the onset of depression.¹⁴²

The link between the prefrontal cortex and the “midbrain reward system” also does not fully develop until late adolescence.¹⁴³ This area of the brain is responsible for substance addiction.¹⁴⁴ Evidence suggests that the adolescent brain responds differently to drugs and alcohol than does the adult brain,¹⁴⁵ and studies have shown that adolescents become addicted to substances faster and at lower doses than do adults.¹⁴⁶ This problem is exacerbated if, as functional brain scans suggest, adolescents process “reward stimuli” differently than adults and are “hypersensitive to the value of novel experiences.”¹⁴⁷ In addition, adolescents often turn to drugs and alcohol in an effort to self-medicate because of their inability to deal with feelings of depression.¹⁴⁸ These concerns pervade until the brain fully develops at around age twenty-five.¹⁴⁹

Schizophrenia, a formal thought disorder, also occurs frequently in people between the ages of sixteen and twenty-five.¹⁵⁰ During adolescence, stress can hinder the growth of the hippocampus, the section of the brain that consolidates memories.¹⁵¹ Research suggests that the pruning of gray matter or the thickening of the myelin coat that occurs while the brain completes maturation during late adolescence can cause the early symptoms of schizophrenia.¹⁵² “[P]aranoia, impairment of mental functions, delusional thoughts, and a lack of enjoyment, are caused by a ‘split’ in the brain between emotion and thinking.”¹⁵³ Although people

¹⁴⁰ *The Adolescent Brain: Beyond Raging Hormones*, *supra* note 134.

¹⁴¹ Rowe, *supra* note 131.

¹⁴² Biolchini, *supra* note 136.

¹⁴³ *The Adolescent Brain: Beyond Raging Hormones*, *supra* note 134.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ Biolchini, *supra* note 136.

¹⁴⁹ Rowe, *supra* note 131.

¹⁵⁰ Lisa Hoffman, *Schizophrenia Common Among College Students*, THE MICH. DAILY, (Sept. 17, 2001), <http://www.michigandaily.com/content/schizophrenia-common-among-college-students>.

¹⁵¹ *The Adolescent Brain: Beyond Raging Hormones*, *supra* note 134.

¹⁵² *Id.*

¹⁵³ Hoffman, *supra* note 150.

with schizophrenia are generally not violent, they are significantly more likely to engage in violent behavior compared to the general population and that risk increases sharply with substance abuse.¹⁵⁴ Because stressful conditions can exacerbate the symptoms of schizophrenia, students usually manifest the “early stages of schizophrenia . . . during the college years.”¹⁵⁵

Moreover, “environmental influences, including social context . . . can have profound influences at the cellular level on the way the brain[]” develops.¹⁵⁶ Brain development can be significantly impacted by “nutrition, sleep schedules, peer influences, and the ingestion of substances.”¹⁵⁷

Colleges and universities, furthermore, are increasingly diverse and must be sensitive to the “momentous changes in the demographics of today’s college student population.”¹⁵⁸ For example, of undergraduate students: 15 percent are African American; 16 percent are Hispanic; 6 percent are Asian or Pacific Islander; 1 percent are American Indian; 3 percent are two or more races; 3 percent are non-resident aliens; and 59 percent are female.¹⁵⁹ This highlights the need for colleges and universities to consider environmental and social factors in providing adequate mental health services.

As a result of all these factors, today’s college students are generally more “overwhelmed and more damaged than those of previous years.”¹⁶⁰ During the past two decades, students seeking counseling services at universities and colleges have developed new needs.¹⁶¹ Traditionally, students sought help for more “benign developmental and informational needs,” such as “problems of adjustment and individuation.”¹⁶² More recently, however, an alarming number of college students sought

¹⁵⁴ T.M. Luhrmann, *The Violence in Our Heads*, N.Y. TIMES, (Sept. 19, 2013), http://www.nytimes.com/2013/09/20/opinion/luhrmann-the-violence-in-our-heads.html?_r=0.

¹⁵⁵ Hoffman, *supra* note 150.

¹⁵⁶ Rowe, *supra* note 131.

¹⁵⁷ *Id.*

¹⁵⁸ Martha A. Kitzrow, *The Mental Health Needs of Today’s College Students: Challenges and Recommendations*, 41 NASPA J. 165, 165–66 (2003), available at http://depts.washington.edu/apac/roundtable/1-23-07_mental_health_needs.pdf.

¹⁵⁹ *Table 306.10*, U.S. DEP’T OF EDUC., NATIONAL CENTER FOR EDUCATIONAL STATISTICS (2013), http://nces.ed.gov/programs/digest/d13/tables/dt13_306.10.asp.

¹⁶⁰ *Id.* at 167.

¹⁶¹ ROBERT P. GALLAGHE, NATIONAL SURVEY OF COLLEGE COUNSELING CENTERS 2014 3, available at http://0201.nccdnet.net/1_2/000/000/088/0b2/NCCCS2014_v2.pdf.

¹⁶² Kitzrow, *supra* note 158, at 166.

counseling services for “severe psychological problems.”¹⁶³

In 2013, the American College Health Association surveyed college students about whether they had felt certain feelings or if they had been diagnosed or treated for a mental condition within the last twelve months.¹⁶⁴ The results are noteworthy: 32 percent reported feeling “so depressed that it was difficult to function”; 51 percent reported feeling “overwhelming anxiety”; 8 percent reported “[s]eriously consider[ing] suicide”; 41 percent reported feeling “[m]ore than average stress”; 10 percent reported feeling “[t]remendous stress”; and, 21 percent reporting being diagnosed or treated by a professional for a mental health condition.¹⁶⁵

IV. THE “SPECIAL,” DUTY-CREATING, UNIVERSITY-STUDENT RELATIONSHIP

As society changes, as our sciences develop and our activities become more interdependent, so our relations to one another change, and the law must adjust accordingly.

Estates of Morgan v. Fairfield Fam. Counseling Ctr., 673 N.E.2d 1311, 1322 (Ohio 1997).

While modern IHEs may be limited in their ability to regulate student life, they are “not merely a passive educational reposit[or] for students, like parenthesis in an equation.”¹⁶⁶ IHEs should have a duty of reasonable care for the safety of their students simply by virtue of “the unique characteristics, circumstances, and relationships of academic life.”¹⁶⁷ The fragility of the adolescent brain, together with the stresses of adjustment

¹⁶³ BRIAN J. MISTLER ET AL., ASSOC. FOR UNIV. & COLL. COUNSELING CTR. DIRS. ANNUAL SURVEY 5 (2012), available at http://files.cmcglobal.com/Monograph_2012_AUCCCD_Public.pdf. “Anxiety continues to be the most predominant presenting concern among college students (41.6%), followed by depression (36.4%), and relationship problems (35.8%). Other common concerns are suicidal ideation (16.1%), alcohol abuse (9.9%), sexual assault (9.2%), ADHD (8.9%), and self-injury (8.7%). On average, 24.5% of clients were taking psychotropic medications.” *Id.*

¹⁶⁴ AMERICAN COLL. HEALTH ASSOC., NAT’L COLL. HEALTH ASSESSMENT: UNDERGRADUATE STUDENTS REFERENCE GRP. EXEC. SUMMARY, 14–16 (2013), available at http://www.acha-ncha.org/docs/ACHA-NCHA-II_UNDERGRAD_ReferenceGroup_ExecutiveSummary_Spring2013.pdf.

¹⁶⁵ *Id.*

¹⁶⁶ de Haven, *The Academy and the Public Peril*, *supra* note 55, at 348 (quoting Peter F. Lake, *Still Waiting: The Slow Evolution of the Law in Light of the Ongoing Student Suicide Crisis*, 34 J.C. & U.L. 253, 268 (2008)).

¹⁶⁷ *Id.*

and academic life that make students increasingly susceptible to mental disorders that can result in self-injurious or violent behavior, warrants the recognition of a special duty-creating relationship between IHEs and their students.¹⁶⁸ This special relationship should give rise to a duty on the part of IHEs to exercise reasonable care in identifying, assessing, and managing students suffering from mental disorders to prevent reasonably foreseeable harms.¹⁶⁹ In fact, many factors traditionally used to determine whether a duty of care exists, like those outlined in *Tarasoff*, support establishing a general duty of care arising from the “special relationship” between IHEs and their students.¹⁷⁰

IHEs should have a duty to exercise reasonable care in protecting students from harms while their brains are developing because foreseeability is the prominent factor in determining whether a duty of care exists.¹⁷¹ As explained earlier, today’s IHEs have a high concentration of young people on their campuses. Many of these young persons’ brains are not fully developed and are at an increased risk for mental illness, including depression and schizophrenia.¹⁷² As in the cases of Elizabeth Shin and Seung, significant harm can result from these illnesses if not properly treated.

IHEs are in the best position to take the steps necessary to ensure student safety¹⁷³ because, as the court in *Furek* recognized, IHEs have a significant and unique power to affect the safety of their campuses.¹⁷⁴ College campuses have a large concentration of psychiatrically vulnerable students who often depend on the mental health services provided by the institution, which may be their only access to affordable healthcare.¹⁷⁵ As cases like *Jain* and the Virginia Tech incident show, when IHEs ignore credible concerns or fail to act in situations of potential student violence or self-harm, the outcome can be worse for both the student and the campus community. Campus safety is not furthered by immunizing the “administrative disconnection between the college or university apparatus and the actual delivery of student services.”¹⁷⁶

¹⁶⁸ See *id.* (discussing reasons to impose a duty of care).

¹⁶⁹ See *id.* (discussing reasons to impose a duty of care).

¹⁷⁰ See *Tarasoff*, 551 P.2d at 342 (discussing the factors used to find a duty of care).

¹⁷¹ *Id.*

¹⁷² See *supra* Part III (describing college students).

¹⁷³ See *Mullins v. Pine Manor Coll.*, 449 N.E.2d 331, 335 (Mass. 1983).

¹⁷⁴ *Furek v. Univ. of Del.*, 594 A.2d 506, 519 (Del. 1991).

¹⁷⁵ See de Haven, *The Academy and the Public Peril*, *supra* note 55, at 350.

¹⁷⁶ *Id.* at 354.

Modern IHEs are undoubtedly “involved in all aspects of student life” and provide a “setting in which every aspect of student life, is to some degree, university guided.”¹⁷⁷ Seung Cho, for example, exhibited concerning behavior in the classroom, in his dormitory, and in his social life; he also received treatment from campus therapists.¹⁷⁸ Of course, the time, place, and manner in which student injuries occur should determine whether liability is imposed, so that for example, a university may not have a duty to prevent a student drinking and driving injury that occurs during spring break at an off-campus, unsanctioned event.¹⁷⁹ But an IHE should not be absolved when it deliberately over-serves students alcohol in a context where psychosocial pressures enhance the risk of high-risk alcohol use.¹⁸⁰

Additionally, moral blame and responsibility for harms that result from inadequately treated student mental illness should be shared by IHEs. “College life can facilitate moral development,”¹⁸¹ but students have only limited responsibility for their harmful acts that are manifestations of problems with a developing brain. IHEs therefore must share responsibility for losses that result from student suicide due to inadequately treated depression, as in *Shin*, or murder-suicide due to inadequately treated depression and thought disorders, as in the Virginia Tech incident.

Recognition of a duty of care for student safety may also create incentives to prevent future harm. The voluntary assumption of duty cases can be criticized for creating a “perverse incentive” for colleges and universities to *not* intervene in student life to prevent harm.¹⁸² Distancing college administration from student life contributes to risky behavior,¹⁸³ and allows symptoms of mental illness to become more dangerous as they go untreated.¹⁸⁴ Given what we know about adolescent brain development, schools should be obligated to assess and respond to credible warning signs of mental illness because they are in the best position to identify and treat its symptoms which can lead to violent or self-injurious behavior by

¹⁷⁷ *Furek*, 594 A.2d at 516.

¹⁷⁸ See generally VA. TECH REVIEW PANEL, *supra* note 25 (describing Cho’s history).

¹⁷⁹ Lake, *supra* note 55, at 25–26.

¹⁸⁰ Lake, *supra* note 93, at 544. *Contra* Beach v. Univ. of Utah, 726 P.2d 413, 420 (Utah 1986).

¹⁸¹ Lake, *supra* note 55, at 26.

¹⁸² Dall, *supra* note 54, at 505.

¹⁸³ See, e.g., Beach, 726 P.2d at 418 (noting that students are often considered adults).

¹⁸⁴ See, e.g., Commonwealth v. Peterson, 749 S.E.2d 307, 360 (finding that Virginia Tech had no duty to warn students of potential harm from a “third party criminal”).

their students.

IHEs should bear the burden of establishing appropriate assessment and management mechanisms because they have the power to “to adopt and coordinate policies and procedures, to determine and enforce sanctions and interventions, and to allocate resources and raise funds.”¹⁸⁵ Imposing liability on IHEs due to their special relationship with students makes sense for the same reasons it does in other areas of tort law.¹⁸⁶ IHEs are able to deliver mental health services and can require that afflicted students undergo treatment as condition of continued enrollment.

The duty of care IHEs owe to their students should extend to the manner in which dismissals and expulsions of mentally ill students are carried out, should those actions be deemed necessary.¹⁸⁷ Even after a student is dismissed, IHEs should exercise reasonable care in making sure to not make matters worse for the dismissed student because the “special relationship” should not expire upon dismissal.¹⁸⁸ This might mean continuing to provide mental health services for a limited period of time, even after the student is dismissed, if the student’s only access to affordable healthcare is through the IHE.¹⁸⁹

Institutional liability should be imposed only if an IHE failed to exercise *reasonable care under the circumstances*—a simple negligence standard that would not make IHEs insurers of student safety in all circumstances.¹⁹⁰ Despite having a duty of reasonable care, IHEs would not—and should not—be expected to insure students against any and all losses; IHEs should only be required to take reasonable steps to prevent harms that are reasonably foreseeable.¹⁹¹

V. CONCLUSION

“Duty” is not a rigid formalistic concept forever embedded in the standards of a simplistic yesteryear. Relations perhaps regarded as tenuous in a bygone era may now be of such importance in our modern

¹⁸⁵ de Haven, *The Academy and the Public Peril*, *supra* note 55, at 349.

¹⁸⁶ See RESTATEMENT (SECOND) OF TORTS § 314A (discussing when special duties of care arise); de Haven, *The Academy and the Public Peril*, *supra* note 55, at 348 (discussing the factors for finding a duty of care).

¹⁸⁷ de Haven, *The Academy and the Public Peril*, *supra* note 55, at 352–53.

¹⁸⁸ *Id.*

¹⁸⁹ *See id.*

¹⁹⁰ See RESTATEMENT (THIRD) OF TORTS § 40, illus. 1 (describing a hypothetical where restaurant employees choose not to help a patron in obvious need).

¹⁹¹ *See id.* (describing one situation in which liability should be imposed).

complicated society as to require certain assurances that risks associated therewith be contained.

Estates of Morgan v. Fairfield Fam. Counseling Ctr., 673 N.E.2d 1311, 1322 (Ohio 1997).

Inconsistencies in the law of college responsibility for student injury are largely attributable to a concept of duty “embedded in the standards of a simplistic yesteryear”¹⁹² and the antiquated social policy analysis expounded in *Bradshaw*. As the court in *Furek* pointed out, *Bradshaw* cited “no legal or other authority . . . for the assertion that supervision of potentially dangerous student activities would create an inhospitable environment or would be largely inconsistent with the objectives of college education. . . . [The] supervision of potentially dangerous student activities is not fundamentally at odds with the nature of the parties’ relationship, particularly if such supervision advances the health and safety of at least some students.”¹⁹³ While not all mentally ill students are violent or suicidal, and not all violent or suicidal students are mentally ill, on-campus violence and student suicide can be meaningfully reduced by ensuring that mentally ill students receive appropriate mental health care.¹⁹⁴

The university-student relationship is not as tenuous as it was once thought to have been. The involvement of modern IHEs goes well beyond the academic setting and reaches into almost all the aspects of their students’ lives. IHEs should have a duty to exercise reasonable care in the identification, assessment, and management of students suffering from mental disorders, in order to prevent violence, student suicide, and other self-injurious behavior. Because IHEs are highly involved in student life and a high concentration of this psychiatrically vulnerable population are on college campuses, the law should recognize that the university-student relationship is indeed legally “special.”

¹⁹² *Id.*

¹⁹³ *Furek v. Univ. of Del.*, 594 A.2d 506, 518 (Del. 1991).

¹⁹⁴ de Haven, *The Academy and the Public Peril*, *supra* note 55, at 351.