

## The Rights and Responsibilities of the Modern University:

### *Who Assumes the Risk of College Life?*

#### A Book Review

Chapter 1 – The shift in higher education from unquestioned institutional authority to the current combination of student freedom and institutional responsibility took multiple centuries, scores of torts, thousands of lawsuits, and constitutional reform. The expectations of today's college students and their parents, and the college students themselves, are vastly different from their colonial counterparts. Burgeoning population density, coupled with inadequate infrastructure and antiquated and ambiguous policy has led to potentially hazardous situations on college campuses. These dangers may, or may not, be predicted and avoided. The shift away from *in loco parentis* removed the insulation that colleges enjoyed from legal scrutiny and recognized students as constitutional adults. When stripped of institutional sovereignty, colleges and universities attempted to protect themselves from litigation by claiming 'no duty' to the newly free, and unruly, students. Case law born of this 'bystander' period led to institutions accepting some of the duty to provide for student safety. This new paradigm has evolved as the 'facilitator' model, seeking a balance between shared rights, risks and responsibilities between the students and the institutions. The colonial role of college was to prepare students to assume an active role in society, to be community leaders as statesmen, preachers, teachers, by providing a holistic education including instruction on morals and manners, as well as academics. The facilitator model expects students, faculty and administrators to work together to build community through communal values and common visions in this new era of shared responsibility.

Chapter 2 – The unquestioned authority over student behavior held by colleges until the 1960s was based on English family law, emphasizing the father’s power over his household. That paternal right which provided almost limitless license for a man to govern and censure his children was readily delegated to faculty and administrators prior to the beginning of the civil rights era. Additionally, the implied family law that constrained children from suing their fathers also limited students’ ability to secure governmental sanctions against institutions of higher education for ill treatment at the hands of the faculty, or because of institutional negligence. Courts did not want to challenge university policy unless it became blatantly unreasonable, so student litigation was infrequent and rarely successful during this period. Colleges had a contractual duty to educate, which included discipline and corporal punishment, and offered little consideration for protection of the individual student. Colleges assumed a sovereign-like rule that existed above the law, enjoying many of the characteristics of Charitable and Governmental immunity. The rulings from many of the early student lawsuits upheld this institutional immunity, generally finding in favor of the defendant rather than the wronged student. In short, *in loco parentis* was predominately about institutional power, not about students’ rights or individual wellbeing.

Chapter 3 – Various sub-groups of American people began to rally together during the 1960s and 1970s to challenge the government’s responsibility to uphold all citizens’ civil rights, ushering in an era of social unrest and vocal dissatisfaction with the status quo. Sovereignty in higher education ended as the courts repeatedly ruled against institutions, restoring constitutional rights to individual students. A ruling from *Dixon vs. Alabama State Board of Education* caused an important shift in the interpretation of *in loco parentis*, establishing that institutions of higher

education had a contractual relationship with the student, not with the students' parents. Thus began the journey toward seeking a balance between the responsibilities and rights delegated to, and shared by, the individual students and the institution. As the courts leaned toward upholding consumer rights in public institutions, private schools also began to lose contractual power over students due to rulings over ambiguous and unclear institutional expectations. Arguments ensued, debating the difference between the rights granted to students in private, versus public, institutions. In *Corso vs. Creighton University* the court found that their contract provided for more than minimal due process, indicating that private institutions also owe their students fundamentally fair treatment in campus hearings. These drastic changes created an era of uncertainty on campus, as centuries of legal insulation and authoritarian rule left institutions ill prepared for their upcoming role in respecting, and upholding, student rights and reasonably providing for their safety.

Chapter 4 – College enrollments soared as the baby boomer's babies matriculated into higher education, exacerbating institutions inability to deal with immature and unruly students without the authority of *in loco parentis*. Institutions claimed they had no control over these newly free students who were experimenting with alcohol, sex and drugs, and to some extent those claims were supported by the courts. Students were considered responsible for their own actions and institutions declared that they had 'no duty' to protect students from their own bad decisions. Institutions attempted to distance themselves from the students, adopting a bystander stance, claiming no liability in student safety issues. *Bradshaw verses Rawlings* set a standard for future cases by focusing on the independence of the adult student. This deflected blame from institutions despite that fact that had the institutions enforced alcohol laws, and censured

irresponsible faculty, dangers to students would have been reduced. This court-sanctioned lack of duty essentially renewed institution's legal insularity, by claiming to be an innocent bystander, and institutions ducked responsibility once again. This was a transitional period, however, and 'no duty' transitioned to 'some duty' as institutions of higher education were being viewed as businesses with responsibilities to both their client/students and to the communities they impacted. A new balancing act was called for, and colleges and universities began to share the responsibility for providing safe learning environments in partnership with their students.

Chapter 5 – Since the 1980s, a combination of business law, no duty/duty, personal rights and institutional responsibility has mingled with remnants of educational law precedents, creating a transitional state in the current legal realm in higher education. It is an era where both the student and the institution owe responsibility toward the overall safety of the greater campus community, but no clear distinctions of accountability exist. Although the courts still lean toward placing responsibility for alcohol misuse on the individual rather than the institution, the courts agree that other areas regarding student safety and institutional liability are less well defined. Division of, and shared, duty will pave the way for a new structure for responsibility and the protection of the rights of both individuals and institutions. Reasonable care, rather than a bystander attitude, has emerged in institutional responsibility; this coupled with student accountability would ideally create fairly safe collegiate environments. Alas, bad shit still happens (can I say that in a paper?). Although it seems that there are clear distinctions between gross institutional negligence, thoughtless or stupid student behavior, and unforeseen and tragic accidents, current events and historic cases prove otherwise. Deliberate indifference, or the ostrich stance, no longer protects institutions from litigation or unfavorable press, as both the

courts and the students expect more from the modern university. There is much to be done as we enter the ‘facilitator’ era.

Chapter 6 – Universities need to act as facilitators over a broad spectrum of functions that are governed by existing law, but the context of the educational relationship clouds the authority/liability boundaries. The ‘facilitator model’ provides an adaptable, comprehensive, and functional, legal framework regarding collegiate safety affairs. Ideally this model serves to balance students’ rights and freedoms with the institutions’ authority and responsibilities. Shared responsibility is at the core of the facilitator model. The success of this model relies in part on the courts adopting a moderate stance, which would also balance student accountability and institutional responsibility. Clear and unambiguous expectations, rules, policies, and sanctions need to be agreed upon and widely publicized. Campus officials and advisors need to equip students with the information and tools to make good decisions, and must validate positive choices and penalize inappropriate behavior. The institution as a facilitator needs to help students make their campus a community of their own design, and campuses and student bodies must have the flexibility to morph over time, as both are dynamic in nature. It is clear that institutions owe a duty to reasonably safeguard and develop their students; much in the way that a parent has a duty to nurture and protect their children. It is also clear that ‘adult’ students have personal and communal responsibilities as members of the campus, and greater community, family. Only sincere and thoughtful acceptance of responsibility on the part of both the institution and the individual will secure the future safety of our students. Honest communication, personal and institutional integrity, and heartfelt community respect, are critical to the success of this facilitator model.

Chapter 7 – The last millennium experienced four loosely distinct eras in student safety law, characterized by: legal insulation, reclaimed civil rights, a bystander stance and finally the acceptance of some duty. From the implied contract of paternal authority, to individual rights, to no duty, and yes duty, the notion that institutions had an obligation to protect students has taken centuries to evolve. In the fifty years since the demise of *in loco parentis*, institutions of higher education have grappled with student safety issues by adapting to, rather than proactively preparing for, change. The twenty-first century will bring yet new changes that place demands on the students and institutions alike. Shared responsibility includes personal accountability coupled with institutional guidance that educates students both inside and outside the classroom. The modern university needs to attend to educating the whole student, facilitating their ability to make informed and thoughtful decisions. Unfortunately, the transition from ultimate authority over students via the designated paternal right of *in loco parentis*, to the current ‘balance’ between student and institutional rights and responsibility, grossly reduced non-academic faculty and student interaction. In the continuing quest to balance rights and responsibilities on campus, institutions need to reconnect the faculty and administration with the students beyond the curriculum, expanding their personal, social, spiritual and global awareness. Students, faculty and the administration need to be encouraged and empowered to build, not divide communities. This is a golden opportunity to recreate the campus milieu, to build safe and vibrant collegiate communities based on trust, respect, faith, acceptance and the common goals of increased knowledge and interpersonal care.