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ABSTRACT

This paper focuses on four functions common to colleges and universities that can be a source of liability when plaintiffs seek to impose on the school duties of care relating to alcohol or drug abuse: the college's limited role (1) as supervisor of student conduct; (2) as property owner; (3) as seller of alcohol; and (4) as "social host." The requirements of the Drug Free Schools and Communities Act Amendments of 1989 and special considerations that apply in the case of student drug abuse are addressed. Recent cases are evaluated to highlight the standards that courts are applying to determine whether a "duty of care" exists and the facts that have supported determinations of liability. Finally the paper discusses points that colleges and universities may wish to consider in determining whether their existing policies warrant review and revision. Specific discussions include the considerations needing to be addressed when considering meeting the Act's minimum requirements; going beyond these minimums; and the problems associated with efforts at enforcing the policy such as student rights to privacy and due process. (GLR)

INSTITUTIONAL LIABILITY FOR ALCOHOL CONSUMPTION

A White Paper on
Institutional Liability for Consumption of Alcohol and Drugs on Campus
August 1992

The American Council on Education

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I.

Introduction

Courts, legislatures and the public have launched an increasingly vigorous attack on alcohol abuse in recent years. Police are enforcing stern new penalties against drunk drivers and those who give alcohol to underage drinkers. An unprecedented federal law has effectively established a nationwide 21-year-old drinking age by denying highway funds to states that allow young people to drink legally. Another federal mandate requires that colleges and universities adopt formal policies addressing the abuse of narcotics and alcohol or risk losing all federal funding, including financial aid for students. The abuse of alcohol and dangerous drugs on college campuses -- including cocaine and crack -- has become so widespread that one governor recently proposed sweeping programs to deal with the problem.[1]

Drawing on this heightened social concern, people seeking compensation for alcohol-related injuries have been casting their nets more widely. Many courts are responding by spreading legal responsibility to third parties for injuries caused by those who have been drinking. This trend toward broadening tort liability should concern any institution whose members consume or serve alcohol, including colleges and

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[1] See Donald P. Baker & John F. Harris, Wilder Eyes Drug Tests on Campus, Wash. Post, April 3, 1991, at A1, A4 (suggesting mandatory drug tests for incoming freshmen or random drug testing of students throughout college years).

universities.[2] While there have so far been no comparable judicial decisions establishing broad third-party liability associated with drug abuse, the precedents announced by alcohol-related cases stand as readily-applicable analogies. The "deep pocket" principle is an unpleasant reality: schools are targets of opportunity for plaintiffs whose only recourse might otherwise be against individuals with limited assets and income.

Neither this nor any other analysis can provide a fool-proof formula for avoiding tort liability in this troublesome area.[3] Tort liability is routinely imposed in hindsight on the basis of a jury's (or judge's) feeling that someone's breach of a "duty of care" has "proximately caused" the plaintiff's injury. Verdicts awarding damages are frequently the product more of sympathy for an injured person and comparison of the parties' resources than of conscientious weighing of the evidence and the legal rule of fault. For colleges and universities, the "duty of care" is a particularly troublesome issue because many judges and juries have unrealistic expectations about a school's ability to supervise and control the conduct of students who are regarded as adults for most legal purposes.

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[2] Many colleges and universities are becoming aware that these trends in social policy and tort law may have serious implications for them. See Gonzalez, Alcohol on Campus: You Must Ensure Its Responsible Use -- Here's How, AGB Reports, July/August 1985, at 24.

[3] Moreover, this memorandum seeks to provide an overview of trends in the law throughout the nation. We have not performed a complete analysis of the applicable law in any individual jurisdiction.

Nevertheless, colleges and universities can minimize their exposure to tort liability by understanding the principal risks and dealing with them responsibly. That does not simply mean promulgating strict rules; unrealistic rules that are incapable of practical enforcement can actually invite greater liability by defining a set of "duties" that schools do not and cannot satisfy. By acting knowledgeably and realistically, schools can provide strong evidence of their efforts to live up to the "duty of care" that may reasonably be demanded of them.

Accordingly, this paper focuses on four functions common to colleges and universities that can be a source of liability where plaintiffs seek to impose on the school duties of care relating to alcohol or drug abuse: the college's limited role as supervisor of student conduct; as property owner; as seller of alcohol; and as "social host." We also address the requirements of the Drug Free Schools and Communities Act Amendments of 1989 and special considerations that apply in the case of student drug abuse. We evaluate recent cases to highlight the standards that courts are applying to determine whether a "duty of care" exists and the facts that have supported determinations of liability. We also discuss points that colleges and universities may wish to consider in determining whether their existing policies warrant review and revision.

II.

The University's Limited Role as Supervisor of Student Conduct

The student-college relationship, without more, does not make a school liable for the conduct of its students. It is not a "special relationship" of the sort that obliges a person to prevent another from injuring himself or others. See Restatement of Torts 2d §§ 315, et seq. Nor does one's status as a student make a person the agent of a university.[4]

Nevertheless, the law is not entirely consistent in defining the scope of the legal duty of colleges and universities to supervise student conduct. Influential leading cases in recent years decisively reject the view that schools have some duty, arising from the doctrine of in loco parentis or otherwise, to police the private behavior of college students. But, as our discussion of alcohol-related cases will show, judges and juries still seem to be deciding occasional cases from the point of view that the "immaturity" of college-age students makes their risky conduct sufficiently "foreseeable" that schools have some "duty" to protect against it. This inconsistency in legal decisions reflects society's own ambivalent feelings about whether college

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[4] See, e.g., Annotation, Tort Liability of Public Schools and Institutions of Higher Education for Injuries Caused by Acts of Fellow Students, 36 A.L.R. 3d 330, 339 (1976).

students are fully-responsible adults or high-spirited adolescents.[5]

A. The Eclipse of In Loco Parentis

The leading cases hold that colleges and universities have no inherent duty -- nor any realistic ability -- to control students who are acting in their personal capacities. They sensibly recognize that a university has neither the authority nor the duty towards a college-age student that a parent has towards a child. While a primary or secondary school may stand in loco parentis with respect to elementary or high school students, that doctrine has been discredited with regard to universities and colleges.[6] See, e.g., Bradshaw v. Rawlings,

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[5] A good example of this ambivalence emerges from two New York Appellate Division cases decided 14 months apart. In Eddy v. Syracuse University, 433 N.Y.S.2d 923 (1980), the court held the university liable for a player's injury because it "should have foreseen" that students would use the gymnasium to engage in unauthorized games of "ultimate frisbee." The court stressed the "propensity of college students to engage in novel games."

But in Scaduto v. State of New York, 446 N.Y.S.2d 529 (1982), the university was not liable for injuries sustained by a player who fell into a drainage ditch adjoining a softball field because college students are deemed old enough to appreciate and assume risks of the "inherent dangers" of sports.

[6] See Crow v. State, 271 Cal. Rptr. 349, 359, 222 Cal. App. 3d 192, 208-09 (Cal. App. 3 Dist. 1990) (distinguishing for liability purposes "young, immature school children in grammar and high schools on the one hand and adult students in colleges and universities on the other"); Mintz v. State, 362 N.Y.S.2d 619, 620 (App. Div. 1975) (holding adult college students are "assumedly cognizant of perilous situation and able to care for themselves, and not young children in need of constant and close supervision"); see also Graham v. Montana State Univ., 767 P.2d 301, (Mont. 1988)

612 F.2d 135 (3d Cir. 1979) (university not liable for student's injuries caused by drinking during evening off-hours on geology field trip); Whitlock v. University of Denver, 744 P.2d 54 (Colo. 1987) (college has no duty to protect student from hazards of trampoline jumping during a private party at his on-campus fraternity house); Eiseman v. New York, 511 N.E.2d 1128 (N.Y. 1987) (school not liable for student's murder at the hand of ex-convict admitted to remedial program); Timothy M. McLean, Tort Liability of Colleges and Universities for Injuries Resulting From Student Alcohol Consumption, 14 J.C. & U.L. 399 (1987).[7]

Bradshaw v. Rawlings is a leading and influential decision refusing to impose unrealistic supervisory duties on colleges. While returning from the sophomore class picnic, the plaintiff suffered injuries as a passenger in a car which was

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(imposing greater responsibility for supervision upon a university attended by high school students during a summer program).

[7] See also Van Mastrigt v. Delta Tau Delta, 573 A.2d 1128, 1131 (Pa. Super. 1990) (neither fraternity nor university stands in loco parentis to students); Rabel v. Illinois Wesleyan University, 514 N.E.2d 552 (Ill. App. 1987), appeal denied, 520 N.E.2d 392 (1988) (no duty to protect student from criminal conduct of other students arising out of fraternity party); Nelson v. Ronquillo, 517 So. 2d 353 (La. App. 1987) (no duty to prevent students on athletic scholarships who take meals at off-campus restaurant during college break from injuring third parties); Campbell v. Trustees of Wabash College, 495 N.E.2d 227 (Ind. App. 1986) (no duty to supervise drinking at off-campus fraternity); Hegel v. Langsam, 29 Ohio Misc. 147, 273 N.E.2d 351 (C.D. Ohio 1979) (no duty to protect student from drug abuse and vice); Douglas R. Richmond, Institutional Liability For Student Activities and Organizations, 19 J.L. & Educ. 309, 311-18 (1990); Dennis E. Gregory, Alcohol Consumption by College Students and Related Liability Issues, 14 J.L. & Educ. 43 (1985); Annotation, Tort Liability of Public Schools and Institutions of Higher Education for Injuries Caused by Acts of Fellow Students, 36 A.L.R.3d 330, 339 (1976).

driven by an intoxicated student. The picnic was an annual event that a faculty advisor helped to plan; class funds had been used to buy beer for the picnic; flyers advertising the event on campus featured beer mugs; and many sophomore class members were underage drinkers. 612 F.2d at 137.

Despite these entanglements with student drinking, the court held that the college was obliged neither to control the conduct of the student driver nor to protect students traveling to and from the off-campus picnic. Whether or not a duty arose out of the university-student relationship, said the court, depended upon "the competing individual and societal interests associated with the parties." Id. at 138, 140. The court recognized that colleges lack the practical ability and the legal authority necessary to control students' private conduct. It also stressed that college students' opportunity to assume and exercise responsibility for their own behavior is an important aspect of college education. Id. at 138-140. It said that the college had no special duty to enforce laws against under-age drinking. Id. at 142-43. On balance, the court found no basis for making the school an insurer of its students' conduct in this case or for defining the university-student relationship as a "special" one that gives rise to a duty as a matter of law. Id. at 141-143.

The court in Baldwin v. Zoradi, 123 Cal. App. 3d 275, 176 Cal. Rptr. 809 (1981), which also involved a plaintiff injured while riding in a car driven by a drunk student, rejected

similar arguments that the university had a duty to control student conduct. After drinking in dormitories on campus, the plaintiff and other students were injured in an off-campus drag race. One of the plaintiff's chief contentions was that the university had shouldered a duty to supervise student alcohol abuse by reason of the terms of a dormitory license agreement prohibiting students from possessing or using alcohol on campus.[8] Plaintiff also named as defendants the dormitory resident advisors, alleging that they knew of student drinking in the dormitories.

Quoting extensively from Bradshaw v. Rawlings and extending its rationale, the court held that the university and its dormitory advisors had no duty to control its students' private drinking activities on campus. The court emphasized that there is no "faculty and administrative omnipotence," and that college students may reasonably be expected to assume personal responsibility for their own conduct. 123 Cal. App. 3d at 288, 291, 176 Cal. Rptr, at 817, 818. The court also found that the license agreement imposed no duty to supervise the students in these circumstances. 123 Cal. App. 3d at 286-87, 176 Cal. Rptr. at 816. Finally, the court observed that there was no "close

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[8] The license agreement prohibited the possession and consumption of alcoholic beverages on campus, and reserved to the University a "reasonable right of inspection by appropriate University personnel" insofar as "necessary to the University's performance of its duties with respect to management, health, safety (and), maintenance of applicable rules and regulations." 123 Cal. App. 3d at 285, 176 Cal. Rptr. at 815.

connection between the failure to control on-campus drinking and the speed contest." Id.

The Supreme Court of Utah expressly endorsed Bradshaw and Baldwin in its unanimous decision in Beach v. University of Utah, 726 P.2d 413 (Utah 1986). Beach, a 20-year old student, was severely injured during a geology field trip when she fell off a cliff at night while others slept. The faculty members in charge of the expedition knew she had been drinking before the accident and, in fact, had drunk alcohol themselves. The Utah Supreme Court held that neither the university nor the faculty members breached any tort duty by failing to supervise the student's conduct, to enforce laws and school rules against underage drinking, or to refrain from drinking themselves. The Court declared that colleges must not be saddled with unrealistic, unenforceable duties of supervision that undermine the educational goals of a college education:

> "It would be unrealistic to impose upon an institution of higher education the additional role of custodian over its adult students. . . . Fulfilling this charge would require the institution to babysit each student, a task beyond the resources of any school. But more importantly, such measures would be inconsistent with the nature of the relationship between the student and the institution, for it would produce a repressive and inhospitable environment, largely inconsistent with the objectives of a modern college education." Id. at 419.

These cases are forceful statements that colleges and universities have no general duty to supervise or control their student's private conduct. They are subject to qualifications:

the accidents occurred off-campus (raising no issue of the schools' obligations to provide a reasonably safe campus); they did not involve curricular activities or social activities sponsored by the school itself;[9] and each decision contains broad language that can be used to distinguish them in future cases.[10] But Bradshaw, Baldwin and Beach stand as important precedents protecting colleges and universities from imposition of unrealistic duties of supervision.

Making the legal landscape even more confusing, sometimes courts continue to apply a rule of in loco parentis while disclaiming the doctrine, as in the lower court decisions in Whitlock v. University of Denver, 712 P.2d 1072 (Colo. App. 1985). A majority of the intermediate appellate court (over a vigorous dissent) upheld a jury award of $7.3 million to a student who injured himself jumping on a trampoline located prominently in his fraternity's front yard, following a night of heavy drinking. In affirming the school's liability for failing to prohibit or to supervise such trampoline jumping, the court

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[9] See Yarborough v. City Univ. of N.Y., 520 N.Y.S.2d 518, 520-21 (N.Y.Ct.Cl. 1987) (imposing duty to use reasonable care to prevent injury to students in curricular setting). Generally speaking, colleges and universities are held to a high degree of care in supervising activities performed within the context of the curriculum. See, e.g., Morehouse College v. Russell, 136 S.E.2d 179 (Ga. 1964); Miller v. MacAlester College, 115 N.W.2d 666 (Minn. 1962); DeMauro v. Tusculum College, 603 S.W.2d 115 (Tenn. 1980).

[10] Bradshaw enforces a kind of "balancing" test that could lead other courts to hold a college liable if a few factors (such as location of the class picnic) were different. Baldwin cryptically notes that there was no "close connection" between the on-campus drinking and the off-campus drag race; future decisions could find the missing "close connection."

purported to "balance" the burden of preventing the injury, the consequences of imposing such a duty of the school, and the social utility of the plaintiff's conduct. It disclaimed any intention to apply notions of in loco parentis.

In fact, the Whitlock majority performed no "balancing" analysis nor took any account of the impracticability and dubious "social utility" of requiring the school to supervise fraternity members' private conduct. While the decision was reversed by the Colorado Supreme Court, Whitlock (like the lower court decisions in Eiseman) reminds us that tort law sometimes threatens to impose virtually absolute liability on bystanders whose only "fault" is their apparent ability to compensate for a grave injury. Other cases ultimately won by colleges and universities have come uncomfortably close to establishing sweeping tort liability for failing to control student conduct.[11]

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[11] In one recent case, an intermediate New Jersey appellate court upheld a jury's verdict for a university and against a student who fell from an upper tier at the school's stadium during a football game. Allen v. Rutgers Univ., 523 A.2d 262 (N.J. Super. App. 1987). The court reasoned that the jury was entitled to find that the student had himself been contributorily negligent by becoming severely intoxicated. The case qualifies as a "near-miss," however, because the trial court also submitted to the jury the question whether the university had been negligent for failing to enforce its rule against use of alcohol within the stadium.

In another close call, summary judgment in favor of a college was upheld on appeal in a lawsuit resulting from a car accident involving a student who had consumed alcohol in a university-owned, off-campus fraternity house. While joining Bradshaw in rejecting in loco parentis and its accompanying duty of supervision, the court also noted that "there may be situations where a college or university will be required to control a drunk driver in order to avert liability for injuries sustained by another." Campbell v. Board of Trustees, 495 N.E.2d at 232. The court suggested that the result might have been different if the

Recent decisions continue for the most part to reflect appreciation of the impracticability of reimposing a heightened standard of care on colleges and universities.[12] In Tanja H. v. Regents of the Univ. of Cal., 278 Cal. Rptr. 918, 228 Cal. App. 3d 434 (Cal. App. 1 Dist. 1991), a female student brought suit after she was raped in a university dormitory by four football players, all underage, who had been drinking at a dormitory party. In refusing to find that the university owed a duty to prevent the attack, the court stressed that the imposition of liability on the university for alcohol-induced student behavior would pose a serious threat to student freedoms:

> "College students are generally young adults who do not always have a mature

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college had provided the alcohol, had known that the student would be drinking on the night in question, or had known that the student would be driving an automobile while intoxicated. Id.

[12] See, e.g., Sterner v. Wesley College, Inc., 747 F. Supp. 263, 271 (D.Del. 1990) (no duty to protect student from death suffered from fire in dormitory started by intoxicated fellow student); Fox v. Board of Supervisors, 576 So. 2d 978, 983 (La. 1991) (no duty to protect visitor from injuries resulting from party hosted by students); Van Mastrigt, 573 A.2d at 1131 (no duty to protect student from his own violent conduct after becoming intoxicated) ("Neither the fraternities nor [the university] stands in loco parentis to the appellant"); Crow v. State, 271 Cal. Rptr. 349, 360 (Cal. App. 3 Dist. 1990) (no duty to protect student from attack by another student who became intoxicated at dormitory party); Smith v. Day, 538 A.2d 157 (Vt. 1987) (no duty to protect third party from violent actions of student) ("The students attending these institutions are usually of age and must be treated as adults with the full range of rights and responsibilities for their actions as any other adult"); Rabel, 514 N.E.2d at 560-61 (no duty to protect student from injury suffered as result of alcohol-related hazing prank) ("The university's responsibility to its students, as an institution of higher education, is to properly educate them. It would be unrealistic to impose upon a university the additional role of custodian over its adult students. . . .").

> understanding of their own limitations or the dangers posed by alcohol and violence. However, the courts have not been willing to require college administrators to reinstate curfews, bed checks, dormitory searches, hall monitors, chaperons, and the other concomitant measures which would be necessary in order to suppress the use of intoxicants and protect students from each other." 278 Cal.Rptr. at 920.

B. The Furek Decision: A Step Backwards?

In one recent case, decided since the last edition of the White Paper was written, the Delaware Supreme Court attacked the logic and result in Bradshaw and Beach and concluded that "even though the policy analysis of Bradshaw has been followed by numerous courts, the justification for following that decision has been seriously eroded by changing societal attitudes toward alcohol use and hazing." Furek v. University of Delaware, 594 A.2d 506, 522-23 (Del. 1991). In Furek, the Delaware Supreme Court ordered a new trial after a trial judge overturned a jury verdict against a university charged with injuries suffered by a student during a hazing prank in a fraternity house on university property. The Delaware Supreme Court questioned the view that colleges owe no duty of supervision because college students are "adults" when, "in the area of activity that was the subject matter of the dispute, alcohol consumption, the students were unquestionably not deemed adults under the law since most, if not all, participants were below the drinking age." Id. at 518.

The opinion in Furek also challenged the notion that "supervision is inversely related to the maturation of college students." Id. It stressed that "[a]side from the opinion in Bradshaw, no legal or other authority is cited 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." Id. Despite these criticisms of the foundation of Bradshaw and its progeny, however, the Furek court expressly held that colleges do not possess a "special relationship" arising from a "custodial" power and duty to control and supervise students' conduct. Id. at 519. Rather, the court found that, in its capacity as landowner and provider of security and other services to students -- including particularly its rules against hazing at fraternity houses located on university land -- a jury should be permitted to decide whether the school unreasonably failed to regulate dangerous conduct in "instances where it exercises control." Id. at 522.

It is of course impossible to predict whether Furek will stand as a minority view, or whether it is a harbinger of a new trend in which tort law will impose increased liability upon colleges and universities for the conduct of their students. We believe that Furek is not entirely out of line with the Bradshaw line of decisions, notwithstanding the Delaware Supreme Court's criticism of those opinions. The court emphasized that the university's regulation of hazing was "pervasive," and that the

jury should accordingly be permitted to decide whether the university failed to enforce its own regulations forbidding dangerous conduct occurring on its own property. While Furek unquestionably imposes greater duties on colleges than the Bradshaw line of cases, it ultimately holds that the jury should be allowed to decide whether the school failed to implement effectively the regulations it had promulgated.

C. The "Assumption of Risk" Defense

Colleges and universities have frequently raised as a defense in tort actions the proposition that college students are old enough to "assume the risk" of the consequences of their behavior. Especially in lawsuits involving extracurricular athletic events, schools have often asserted that the injured student voluntarily accepted the risk of injury inherent in the activity. While "assumption of risk" and its companion defense of contributory negligence may sometimes prove successful,[13] they are a decidedly less favorable approach to charting the

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[13] See, e.g., Gehling v. St George's Univ. School of Medicine, Ltd., 705 F. Supp. 761, 766 (E.D.N.Y. 1989) (medical school student assumed risks inherent in running road race in tropical weather conditions); Drew v. State, 536 N.Y.S.2d 252, 253-54 (N.Y.App. 1989) ("having voluntarily opted to participate [in the football game], claimant naturally assumed the risks inherent in the game"); see generally Case Comment, Gehling v. St. George's University School of Medicine, Ltd.: Continued Erosion of Colleges' and Universities' Duty to Students Injured in Collegiate Activities, 16 J.C.U.L. 677, 689 (1990) ("The sweeping effect of the court's conclusion suggests the potency of assumption of risk as a defense in actions by injured students against colleges and universities.").

duties of colleges and universities than the Bradshaw/Beach approach. The very assertion of an "assumption of risk" defense assumes the existence of some legal duty the university has failed to discharge, and casts the burden of proof upon the school to show the student's irresponsible behavior. This can be self-defeating enterprise, particularly when it calls upon the defendant to attack a severely injured youth who naturally appeals to the sympathy of the jury.[14]

There will surely continue to be tension as judges and juries grapple with the question whether college students are adults or something else.[15] Colleges and universities must walk

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[14] In Ballou v. Sigma Nu General Fraternity, 352 S.E.2d 488 (S.C. 1986), the South Carolina Supreme Court affirmed the jury's rejection of both contributory negligence and assumption of risk asserted by a fraternity being sued after a student died of acute alcohol intoxication resulting from the fraternity's "hell night." The court disposed of the contributory negligence defense simply by finding the fraternity guilty of willful or wanton conduct. Id. at 495. Similarly, the court rejected the assumption of risk defense by concluding that although the student "may have been aware that he was participating in an activity involving a great deal of drinking, the jury could find from the evidence that at some point [the student's] further drinking no longer constituted 'deliberate drinking with knowledge of what was being consumed, so that the result was deliberately risked.'" Id.

[15] Two decisions illustrate the point. In Eiseman v. State of New York, No. 60491 (N.Y. Ct. Cl. March 21, 1983), aff'd, No. 375/85 (N.Y. App. Div. June 4, 1985), a university was held negligent for admitting an ex-convict, who later murdered another student off-campus while under the influence of drugs. The court reasoned that the murdered student was an "inexperienced adult" to whom the University owed a duty of protection against meeting and consorting with dangerous companions. The New York Court of Appeals overruled the decision, holding that the University owed no such duty to the student. 511 N.E.2d 1128 (N.Y. Ct. App. 1987).

In Mullins v. Pine Manor College, 449 N.E.2d 331 (Mass. 1983), the court held that the school owed a duty to protect students on campus from crime because of the special invitation to

a fine line in developing effective drug and alcohol policies that do not impliedly assume a duty of supervision over independent-minded college students. Colleges and universities that are litigating these issues should deny that they are under legal duty to supervise and control the private conduct of their students and avoid the trap of defending ont the basis of "assumption of risk" or similar theories. These policy-development problems are discussed more fully below.

III.

The University as Proprietor

In their capacity as property owners, colleges and universities are also subject to the legal duty to maintain safe premises. See Restatement of Property 2d § 17.3 (1977); Restatement of Torts 2d §§ 341-341A, 343-343A. Generally speaking, a property owner owes a duty of reasonable care to "invitees" and "licensees" who come to the premises to live, transact business, work, see football games or engage in other legitimate activities. The recent Delaware Supreme Court opinion in Furek turns partially upon the principle that a school is obliged to "supervise dangerous activities arising on its property," 594 A.2d at 522.

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danger posed by the "concentration of young people, especially young women, on a college campus."

The university is not an insurer of the safety of those who come onto the campus; it cannot be held responsible simply because a student injures himself or another on school property. See, e.g., Baum v. Reed College, 401 P.2d 294 (Ore. 1965). But a university may be liable if it fails to remedy a foreseeably dangerous state of affairs of which it is, or should be, aware.[16] And when experience teaches that there could be potential behavior problems in particular circumstances -- such as recurring rowdiness at football games or parties -- a school may breach its duty of care if it fails to provide adequate security.[17]

From these principles emerge a few generalizations about how a college's duties as proprietor may embrace student drinking and drug abuse. Schools should be alert and respond quickly to any disorderly conduct on campus -- and to quell potential disturbances -- before irresponsible conduct results in injury or property damage. Similarly, if experience teaches that

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[16] See Brown v. Florida State Board of Regents, 513 So. 2d 184, 186 (Fla. App. 1 Dist. 1987) (swimming without lifeguard in university-owned lake recreational area); Stockwell v. Board of Trustees, 148 P.2d 405 (Cal. 1944) ("promiscuous" use of BB guns on campus). Similarly, a school may be negligent if it fails to protect others from a student known to be abusive. See Korenak v. Creative Workshop Center, 237 N.W.2d 43 (Wis. 1976).

[17] See Nieswand v. Cornell Univ., 692 F. Supp. 1464 (N.D.N.Y. 1988) (university liable as landowner for shootings in dormitory if there is "failure to exercise reasonable care to prevent or minimize reasonably foreseeable danger"); Furek, 594 A.2d at 520-21 (university owes student-invitee duty to safeguard against foreseeable injuries resulting from "unreasonably dangerous condition" of fraternity hazing); Bearman v. University of Notre Dame, 453 N.E.2d 1196 (Ind. 1983); Tanari v. School Directors, 373 N.E.2d 5 (Ill. 1977).

there is likelihood of disturbances or rowdiness -- such as after dances, at sporting events, during fraternity rush season, or during particular social weekends -- there should be reasonable efforts to prevent recurrence and to provide the additional security patrols or other monitoring appropriate to the situation. In addition, a university may risk liability by failing effectively to deal with repeat student offenders or groups of offenders whose conduct eventually results in personal injury or property damage.[18]

The university's responsibilities as proprietor implicate the same issue discussed earlier: is there some heightened duty of care by reason of the youth and possible immaturity of students? The answer should be the same -- in most cases schools will be unable as a practical matter to exercise effective supervision over the private conduct of students, as Bradshaw, Baldwin, Beach and the other cases rejecting in loco parentis sensibly recognize.

Indeed, the plaintiff in Baldwin argued that the lack of supervision of students in a dormitory should be regarded as a "dangerous condition" because it invited alcohol abuse. 123 Cal. App. 3d at 291-292, 176 Cal. Rptr. at 819. Rejecting this "safe premises" and "failure to supervise" claim, the court held that a

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[18] See Sterner, 747 F. Supp. at 271 (no premises liability where no evidence that college officials had "reason to believe that the college's regulations concerning the use of alcohol in the dormitories were deficient to the point of creating hazardous circumstances on the college campus or that a reinforcement of the provisions of state law was required in the form of a college regulation").

dangerous condition (other than a physical defect in the premises) must be remedied only if the property owner has notice of prior conduct which suggests that those who use the property with due care face a substantial risk of injury. 123 Cal. App. at 294, 176 Cal. Rptr. at 820. Although it was reasonably foreseeable that students might drink in the dormitories, that alone did not place the university on notice that the use of the dormitory rooms posed a substantial risk of injury to those exercising reasonable care.

Other cases confirm that ownership of premises does not ordinarily create a duty to police underage drinking occurring there. In Weiner v. Gamma Phi Chapter of Alpha Tau Omega Fraternity, 485 P.2d 18 (Or. 1971), an injured passenger sued a fraternity and owners of a ranch for injuries suffered in an accident involving an underage drunk driver returning from a party hosted by a fraternity at the ranch. The plaintiff claimed that the ranch owners were legally negligent because they knew when they rented the ranch that the fraternity would serve alcohol to guests, that some of the guests were minors, and that they would leave the premises by automobile. While holding that the fraternity could be liable for serving alcohol to minors, the court concluded that the ranch owners had no duty to prevent such activities or to supervise them. 485 P.2d at 22. Other recent cases likewise hold that parents cannot be held liable, simply on the basis of their ownership of the premises where drinking has occurred, for the tortious conduct of intoxicated children or

guests. See, Langemann v. Davis, 495 N.E.2d 847 (Mass. 1986); Reinert v. Dolezel, 383 N.W.2d 148 (Mich. App. 1985), appeal denied (1986).

Weiner, Langemann and Dolezel suggest important limitations on the role of a proprietor in holding that ownership, in and of itself, does not create a legal duty either to supervise or to prevent those on the premises from serving or consuming alcohol. (No questions were raised in any of those cases touching on the owners' responsibility to maintain the safety of the premises themselves.) Furek, on the other hand, blurs the distinction between safety of premises and control of student conduct by insisting that the school reasonably enforce its own regulations governing conduct on university premises. But with that qualification it can be said that the chief concern of the university as proprietor should be coping with hazardous situations on the campus rather than private student drinking or drug abuse on campus. A college or university should identify and respond quickly to disorderly situations. It should anticipate recurring patterns of rowdiness or dangerous conduct (such as hazing during rush season) with heightened security and take steps to prevent repeated misconduct by particular individuals or groups. If it does this much, and can point to a responsible alcohol and drug policy of the sort outlined earlier, the school will have good arguments that it has exercised all the due care that can reasonably be required of a property owner.

IV.

The University as Seller of Alcohol

Anyone who sells alcohol commercially bears special risks and responsibilities. Colleges or universities selling alcoholic beverages are not immune from such duties. All states have laws or regulations governing the sale of alcoholic beverages, and typically require that vendors be licensed. In most states there are also statutes, commonly known as "dramshop" acts, making it unlawful to sell alcohol either to a minor or to an already-intoxicated person. The scope of these laws and the civil or criminal liabilities they may impose vary considerably from state to state.[19] Each college or university should become familiar with the state and municipal laws in its jurisdiction in order to determine the extent to which its activities may be subject to any such laws.

Dramshop laws typically provide that it is unlawful to sell (and sometimes give) alcoholic beverages to a person who is intoxicated or who is not of legal age to drink. See, e.g., O.C.G.A. §§ 3-3-22, 3-3-23(a)(1); Iowa Code §§ 123.47, 123.49(1). In some states these laws impose sanctions without regard to the seller's actual knowledge of the purchaser's age or sobriety. See, e.g., Iowa Code § 123.49. This type of law imposes an

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[19] See Timothy M. McLean, Tort Liability of Colleges and Universities for Injuries Resulting from Student Alcohol Consumption, 14 J.C. & U.L. 399, 408-13 (1987); Special Project, Social Host Liability for the Negligent Acts of Intoxicated Guests, 70 Corn. L. Rev. 1058 (1985).

affirmative duty on the seller to ascertain whether a drinker is sober or underage before selling the beverage. Dramshop laws may apply to numerous situations in which colleges or universities sell alcohol, including university-sponsored dances, fund raisers, sports events or alumni gatherings.

Many states' laws impose on those who sell alcohol in violation of the dramshop provisions civil liability for any injuries to third parties that result from the prohibited purchaser's consumption of alcohol. See, e.g., Mich. Comp. Law § 436.22. Some of these statutes allow no defenses based on the reasonableness of the sellers' conduct or the foreseeability of the harm - the wrongful sale of alcohol and resulting injury conclusively establish the seller's liability. See, e.g., Haafke v. Mitchell, 347 N.W.2d 381, 384 (Iowa 1984).

In some states where there is no statute imposing civil liability, the courts have nevertheless inferred a cause of action for civil damages by third parties against the seller.[20]

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[20] See Largo Corp. v. Crespin, 727 P.2d 1098 (Colo. 1986) (en banc); Nehring v. La Counte, 712 P.2d 1329 (Mont. 1986); Annotation, Common Law Right of Action for Damage From Sale or Gift of Liquor or Drug, 97 A.L.R. 3d 528 (1986).

In some jurisdictions the courts and legislatures have strictly limited any cause of action against the vendor to those rights specifically created by the specific terms of the statute. See, e.g., Cornack v. Sweeney, 339 N.W.2d 26 (Mich. App. 1983) (holding that third persons may recover for injuries but the drinker himself may not); Holmquist v. Miller, 367 N.W.2d 468 (Minn. 1985) (holding Minn. Stat. § 340.95 preempts common law action against social hosts for damages).

In other states, the intoxicated person himself may also sue the provider for injuries he may suffer; Soronen v. Olde Milford Inn, Inc., 218 A.2d 630 (N.J. 1966).

Some courts have directly incorporated into the tort law the duty expressed by the criminal law, reasoning that violations of the dramshop act are negligence per se. Congini v. Portersville Valve Co., 470 A.2d 515, 518 (Pa. 1983). Others have refused to do so. See Bell v. Alpha Tau Omega Fraternity, 642 P.2d 161 (Nev. 1982). Some courts have concluded, in the exercise of their common law judicial power, that the standard set by the criminal statute should be incorporated into the tort law as a standard of reasonable care by the seller to prevent foreseeable risks. See Sutter v. Hutchings, 327 S.E.2d 716, 718-19 (Ga. 1985); Clark v. Mincks, 364 N.W.2d 226 (Iowa 1985).

The potential for sweeping, strict liability under dramshop laws makes it important for every school to be familiar with the state and local laws governing those who sell alcoholic beverages. In most states, a university would not be held responsible for sales of beverages by organizations such as fraternities, clubs and extracurricular associations. See, e.g., Campbell v. Trustees of Wabash College, 495 N.E.2d 227 (Ind. App. 1986) (college cannot be held liable for fraternity's serving alcohol). But applicable local law may be different. The college might in any case wish to consider advising campus organizations of the potential liabilities under dramshop statutes (as well as the licensing and other requirements governing sales of alcoholic beverages). Unless the university intends to take an active role in supervising such organizations,

or absolutely prohibits them from selling alcoholic beverages, it may wish to leave the task of complying with all applicable regulations and laws to the organizations themselves under a school policy requiring such compliance.

With the rise of the drinking age to 21, many schools have stopped serving alcoholic beverages in campus pubs or student unions.[21] Some have continued sales because of such factors as the large number of students over 21 among the university population or the belief that an on-campus tavern will reduce the risks of auto accidents involving students driving to more distant commercial bars. Any college or university that elects to sell alcoholic beverages should scrupulously follow local alcoholic beverage control laws; refrain from serving anyone who appears even slightly intoxicated; and require reliable proof that each customer is of legal age. The age-old problem with rules such as these is the difficulty of insuring their consistent enforcement; it is a virtual certainty that hurried bartenders on a busy Saturday night will miss the danger signals of some customers' intoxication and overlook the youthfulness of others.

Many schools will be unwilling to shoulder the risks in states that have adopted virtually a strict-liability rule for vendors of alcohol. But caution and adherence to guidelines is prudent even in states that have not modified the common law

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[21] See J. Gabriel Neville, College Nightclubs Now on a Dry Run, N.Y. Times, Nov. 5, 1989, at II-18.

rules. Given today's climate of public opinion it is certainly not far-fetched to fear that an accident occurring tomorrow may be governed by different and stricter -- judge-made tort rules by the time it comes to trial several years from now. See, e.g., Longstreth v. Gensel, 377 N.W.2d 804, 815 (Mich. 1985) (new rule of liability applicable to all pending cases and claims).

V.

The University as Social Host

One of the more controversial aspects of the recent trend toward discouraging alcohol abuse is some states' extension of dramshop liabilities to non-commercial or "social" hosts who serve alcoholic beverages to minors or intoxicated persons.[22]

This fast-developing area of the law calls for attention and concern on the part of colleges and universities. Both the existence and scope of social host liability and its limitations are determined by state law, which varies among jurisdictions. As in the case of sales of alcoholic beverages, each college and university should ascertain locally applicable law and monitor developments. In states that do impose "social

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[22] See, e.g., Recent Decisions, Tort Law -- Intoxicating Liquors -- Minors -- Social Hosts -- Universities -- National Fraternities, 29 Duq. L. Rev. 357 (1991); Comment, Social Host Liability on Campus: Taking the 'High' Out of Higher Education, 92 Dick. L. Rev. 665 (1988); McLean, supra note 19, at 407-13; Special Project, supra note 19; Comment, Social Host Liability for Furnishing Alcohol: A Legal Hangover?, 10 Pac. L. Rev. 95 (1986); Note, Common Law Negligence Theory of Social Host Liability, 26 Bost. Col. L. Rev. 1249 (1985).

host" liability, colleges and universities will need to consider whether existing policies are adequate.

The debate over the doctrine has been widespread and vigorous.[23] Courts that have imposed social host liability have stressed that it is anomalous to punish the negligence of commercial hosts but not the comparable acts of social hosts.[24] Courts refusing to charge social hosts with such duties have raised a number of features that distinguish the social from the commercial setting. Commercial vendors should be experienced in complying with local liquor license requirements and identifying purchasers who may be intoxicated or underage. Commercial settings are usually easy to control: the server has custody of

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[23] Some of the decisions imposing social host liability of some variety include: Michigan (Longstreth, 377 N.W.2d at 804); New Jersey (Kelly v. Gwinnell, 476 A.2d 1219 (N.J. 1984)); Indiana (Ashlock v. Norris, 475 N.E.2d 1167 (Ind. Dist. 1985)); Pennsylvania (Congini, 470 A.2d at 515 (imposing social host liability for minor guests)); and Georgia (Sutter, 327 S.E.2d at 716).

Some of the jurisdictions that have declined to impose such liability in some or all cases include California (recent amendments to Cal. Civ. Code § 1717, overruling Coulter v. Superior Court of San Mateo County, 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 543 (1978)); Missouri (Andres v. Alpha Kappa Lambda Fraternity, 730 S.W.2d 547 (Mo. 1987) (en banc)); Minnesota (Holmquist, 367 N.W.2d at 468); Ohio (Settlemeyer v. Wilmington, 464 N.E.2d 521 (Ohio 1984)); Pennsylvania (Klein v. Raysinger, 470 A.2d 515 (Pa. 1983) (no social host liability for actions of adult guests)); and Mississippi (Boutwell v. Sullivan, 469 So. 2d 526 (Miss. 1985)).

[24] "It makes little sense to say that (a) licensee . . . is under a duty to exercise care, but give immunity to a social host who may be guilty of the same wrongful conduct merely because he is unlicensed." Linn v. Rand, 356 A.2d 15, 18 (N.J. Super. 1976) (potential liability of social host for injuries to a third party where host served liquor to a visibly intoxicated minor, knowing that the minor would thereafter drive).

the alcohol and may simply refuse to fill an order. Social hosts, by contrast, are not trained; they do not provide alcohol for profit; and they often have little control over guests' access to beverages. To impose legal liability on social hosts unquestionably burdens private social occasions with unpleasant and often impractical obligations to monitor guests' behavior.

In addition to judicial activism on this front, at least several states have adopted dramshop statutes that utilize language so broad that it may encompass university social hosts. See, e.g., Ala. Code § 6-5-71(a) (authorizing private right of action against person "who shall by selling, giving or otherwise disposing of [sic] to another, contrary to the provisions of law, any liquors or beverages, cause the intoxication of such person") (emphasis added); Utah Code Ann. § 32A-14-1(1)(c) (imposing liability upon "any person who directly gives, sells, or otherwise provides liquor") (emphasis added); Vt. Stat. Ann. tit. 7, § 501 (imposing liability upon anyone "selling or furnishing intoxicating liquor unlawfully, have caused in whole or in part such intoxication").

The quick pace of developments in this area of the law makes it difficult to provide guidelines. A dramatic illustration of this is the fact that it is unclear whether Bradshaw would still be decided the same way. The Bradshaw court refused to hold the college liable because, inter alia, Pennsylvania did not at that time impose civil liability upon social hosts. 612 F.2d at 141. But since then, Pennsylvania has

held that social hosts are liable if they "knowingly furnish" alcohol to persons under the age of twenty-one. Congini v. Portersville Valve Co., 470 A.2d 515 (Pa. 1983). The Bradshaw court did not reach the question whether the college's involvement in the class picnic was sufficient to make it a social host; if it were, the college might have been liable.

A recent opinion by the Pennsylvania Supreme Court suggests that the result in Bradshaw would be different today. In Alumni Ass'n v. Sullivan, 572 A.2d 1209 (Pa. 1990), the Pennsylvania Supreme Court refused to impose social host liability on a university after an underage student became intoxicated at a fraternity house and then started a fire that damaged the plaintiff's property. The Pennsylvania court rejected the assertion that a social host should be liable if the host knew or should have known that alcohol would be furnished to minors. Id. at 1211. In doing so, however, the court reaffirmed that the university could be liable as a social host where it "was involved in the planning of these events or the serving, supplying, or purchasing of liquor." Id. at 1213. Moreover, the Pennsylvania legislature amended its dramshop statute in March 1988 to impose social host liability on hosts that knowingly "supply, give or provide to, or allow a minor to possess [alcohol] on the premises owned or controlled by the person charged." Pa. Cons. Stat. Ann. § 6310.1.[25]

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[25] This newly adopted provision did not apply to the incident at issue in Sullivan, which took place in December 1983.

What constitutes behavior as a "social host" will accordingly be a critical question for colleges and universities in those jurisdictions that have extended liability to such hosts. Obviously, a university is likely to be a social host where it or its agents actually serve alcoholic beverages, such as at an official reception or ceremony. Resident dormitory advisors will probably be regarded as agents of the college for the purpose of social host liability. See Zavala v. Regents of the University of California, 178 Cal. Rptr. 185 (Ct. App. 1981) (holding college 20 percent negligent where resident assistants and preceptors sponsored a party).[26] Similarly, the college may be regarded as social host where, for example, drinks are served during seminars at professors' homes; at departmental receptions or cocktail parties; or at athletic awards banquets.

Fortunately, courts seem to be requiring proof of actual control over premises before imposing social host liability upon colleges. In Houck v. University of Washington, 803 P.2d 47, 52-53 (Wash.App. 1991), the court refused to hold a university liable as social host where the university did not exert genuine "control" over the dormitory room where the underage drinking took place. In reaching this result, the court relied on decisions under the state constitution that dormitory rooms were "private residences" subject to warrantless intrusions

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[26] The result in Zavala would probably be different today. Since that decision was announced, California has statutorily absolved social hosts from civil liability. See Cal. Bus. & Prof. § 25602.

only upon a showing of compelling need. Colleges should take note that, under this analysis, drug and alcohol policies with invasive enforcement techniques might very well expose themselves to the argument that their own conduct establishes sufficient evidence of actual "control" to justify imposition of social host liability.

There are a number of situations in which the college's role as social host is likely to remain unclear or depend on analysis of all the surrounding facts and circumstances. Is the school to be regarded, for instance, as social host at class picnics (such as in Bradshaw); student dances; or parties sponsored by campus organizations? The better argument is that there should not be university social host liability in those circumstances. To impose liability would be simply a back-door means of imposing upon colleges and universities supervisor responsibility of the type rejected in Bradshaw, Baldwin, Beach and the other decisions refusing to apply in loco parentis. It would make a great deal of practical and policy sense to hold that a college acts as a social host only where one of its agents or employees (including faculty, dormitory advisors, administrators) dispenses alcohol to students while acting within the scope of his or her authority. A university should not be a social host simply because it may be aware of student functions at which alcohol might be served but elects not to intrude.[27]

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[27] Indiana has enacted a statute that apparently attempts to draw such a distinction between the university's providing the beverages and its awareness of student functions at which beverages

Particularly in the case of fraternities it would be a de facto imposition of in loco parentis duties to regard the school as social host, a principle with which the court agreed in Campbell v. Trustees of Wabash College, 495 N.E.2d at 232 ("fraternity members are not children . . .").

The decisions in Langemann v. Davis and Reinert v. Dolezel, discussed above, in which courts refused to hold parents liable simply on the basis of their owning the premises on which alcohol was served to minors, suggest a restriction in the scope of social host liability. But some legislatures -- such as Pennsylvania's -- impose liability on the host that "allows" minors to possess alcoholic beverages on premises controlled by the host.

It should be borne in mind that one's status as a social host may not be determinative of liability. In states that do not impose strict liability for serving minors or intoxicated persons, colleges and universities may still exercise reasonable care and avoid liability by requiring those who serve beverages to check identifications and refuse to serve those who appear intoxicated. And quite apart from "social host" liability, there can be negligence under traditional tort principles if anyone

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might be served. Indiana amended its statute imposing civil liability for serving alcohol to minors in order to exclude "any educational institution of higher learning" unless the institution or its agent actually sold or provided an alcoholic beverage to a minor. See Ind. Code § 7.1-5-7-8, discussed in Ashlock v. Norris, 475 N.E.2d at 1169, n.1.

provides alcoholic beverages to another under circumstances in which injury is reasonably foreseeable.[28]

VI.

Additional Issues Posed By Student Drug Abuse

The potential liability of colleges and universities arising from students' abuse of prescription or illegal drugs parallels, but is not identical to, risks associated with student use of alcohol. Here, too, plaintiffs can assert that colleges have a duty to supervise student conduct and/or to maintain safe premises by preventing foreseeable, dangerous student conduct. In addition, colleges may be charged with negligence for a student's use of drugs in connection with school-sponsored athletic programs or health care. Actions of university employees or agents may also expose the university to liability as a seller or provider of drugs.

As in the case of alcohol abuse, colleges and universities should review their regulations governing student conduct to ensure that they are realistic and enforceable, and

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[28] See Ashlock, 475 N.E.2d at 1169 (social host may be liable to injured third party for serving drinks to a visibly intoxicated friend, but is not independently liable to third party for helping a visibly intoxicated friend into car); Klotz v. Persenaire, 360 N.W.2d 255 (Mich. App. 1985) (civil damage statute precludes recovery from social hosts by underage person for injuries suffered; however social host may be liable for negligence in allowing 18-year old, whom they knew or should have known was intoxicated, to take boat onto lake).

that they are conscientiously followed. Focusing on drug abuse in particular, colleges should monitor their athletic and health care programs to identify whether agents of the school are irresponsibly encouraging or aiding student drug abuse. University counsellors, security forces and health care personnel should be trained to recognize signs of drug use and to respond appropriately to situations in which students appear to be under the influence of drugs.

Colleges and universities should have no duty in loco parentis to police their students' private, recreational use of drugs. While few courts have addressed the issue of a school's liability associated with student drug use, one court has specifically found that a college does not have a duty to prevent a student from becoming a drug user. Hegel v. Langsam, 273 N.E.2d 351 (Ohio 1971). Likewise, a college has no duty to prevent students from associating with drug users. See Eiseman v. State of New York, 511 N.E.2d 1128 (N.Y. 1987).

There are some college and university activities, however, that present special risks of liability arising from student drug use. Perhaps the foremost among these is university athletic programs. Some overzealous athletic department or medical personnel may condone or even promote athletes' use of performance-enhancing drugs having potentially adverse health consequences. Colleges should strictly forbid any use of performance-enhancing drugs or the misuse of any drugs (e.g., painkillers, steroids) for purposes other than providing the best

medical care to a student. This policy could be implemented through an educational program for student athletes and athletic department personnel, followed up by adequate supervision to ensure compliance. Many schools have implemented drug-testing programs for some or all student athletes.[29] But careless implementation of testing programs also presents risks: a student injured while under the influence of drugs or whose health suffers from drug use may seek to hold the university liable for negligent discharge of its assumed duty to identify and regulate drug use.

Drug testing programs raise other potential issues. Colleges and universities may have a duty under state law to report suspected violations of the drug laws, while they at the same time have a potentially conflicting duty to protect students' privacy.[30] A student incorrectly identified as a drug user may sue the university for damages that allegedly result from the incorrect test results (e.g., libel, false arrest, disqualification from athletic competition). A drug testing program itself, if not carefully developed and implemented, may expose state colleges to liability for violating

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[29] For ACE's recommendations on drug-testing programs, see American Council on Education Guidelines: Student Athlete Drug Testing Programs.

[30] The Family Educational and Privacy Right Act, 20 U.S.C. § 1232g, imposes restrictions on the maintenance and use of student records.

students' state-guaranteed "right to privacy" and protection against illegal searches and seizures.[31]

In addition to athletic programs, colleges and universities may face liability related to student drug use resulting from their role as providers of health care.[32] As in the case of doctor-patient relationships in general, schools may be liable for the malpractice or other negligence committed by their medical personnel. Liability could arise from such errors as the prescription of inappropriate drugs; failure to detect and treat side effects; or inducement of drug dependence or addiction to prescription drugs. In addition, colleges and universities could be liable in their capacities as health providers if their medical staffs fail to recognize and respond to visible signs that students may be under the influence of drugs or may be experiencing drug-induced reactions. Similarly, the failure of university security personnel, dormitory advisors or others to respond properly to drug-related emergencies, such as an

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[31] Compare Hill v. National Collegiate Athletic Ass'n, 273 Cal. Rptr. 402 (Cal. App. 6 Dist.), review granted, 801 P.2d 1070 (Cal. 1990) (NCAA drug testing of athletes at Stanford University held to violate students' right to privacy under the state constitution); with O'Halloran v. University of Washington, 679 F. Supp. 997 (D. Wash. 1988) (NCAA drug testing rules upheld); Bally v. Northeastern Univ., 532 N.E.2d 49, 53 (Mass. 1989) (upholding university's drug testing against civil rights statute, state constitutional challenge). For a discussion of these issues, see Todd A. Leeson, The Drug Testing of College Athletes, 16 J.C. & U.L. 325 (1989).

[32] Colleges and universities with medical research facilities may face additional liabilities arising out of individual research projects and the operation of the school's Institutional Research Board.

overdose, might give rise to litigation. Colleges and universities should consider providing training about the signs of drug abuse and appropriate responses to school personnel whose responsibilities foreseeably might involve the providing of emergency assistance to students.

VII.

Developing an Institutional Policy Under the Drug-Free Schools and Communities Act Amendments of 1989

Public concern over student alcohol and drug abuse has prompted federal legislation requiring colleges and universities to adopt and implement drug and alcohol policies. See Section 22 of the Drug-Free Schools and Communities Act Amendments of 1989, 20 U.S.C. § 1145g (the "Act"). The Act applies to each college and university that receives federal funds in any form, including all institutions attended by students receiving guaranteed student loans.[33] The college must certify to the Department of Education that it has implemented a program designed to prevent the illegal use of drugs and alcohol. At a minimum, the program must:

- prohibit the unlawful possession, use, or distribution of drugs or alcohol, on college property or as part of a college activity;

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[33] The U.S. Department of Education has issued final regulations implementing the Act. 34 C.F.R. § 86 (1991).

- distribute annually to all students[34] a document describing the health risks of use of illicit drugs and abuse of alcohol, available counseling programs, local, state and federal legal sanctions, and the college's sanctions; and

- establish sanctions up to and including expulsion and referral for prosecution.

In addition, the school must:

- ensure consistent enforcement of its sanctions;

- provide upon request a copy of the program to the Secretary of Education; and

- review the program at least every two years.[35]

It is important that colleges understand what the Act does not require, as well as what it demands. Colleges are not required to assume new obligations to protect students from their own use of illicit drugs or abuse of alcohol, or to protect students or third parties from the actions of students using drugs or alcohol. Schools must take care that their programs do not unintentionally assume unwanted additional duties or infringe their students' rights to privacy and due process.

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[34] The Act requires that the program apply to all employees as well as to students, but this White Paper focuses solely upon students.

[35] The Secretary of Education has established sanctions for colleges' inadequate implementation of the Act, 34 C.F.R. § 86.5, and will audit a sample of college programs each year.

A. Meeting the Act's Minimum Requirements

The Act requires schools to adopt rules prohibiting student conduct that violates the law; it does not mandate any additional standards of conduct for lawful drug and alcohol-related activity. See 55 Fed. Reg. 33,580, at 33,595 (1990) (Appendix C -- Analysis of Comments and Responses). Similarly, the Act requires only the promulgation and imposition of sanctions for the unlawful possession, use or distribution of drugs and alcohol.

Because the Act requires only that an institution's standards for student conduct mirror applicable state and federal law governing drug and alcohol use, a school clearly adopting these minimum standards is unlikely to assume unintentionally a duty to protect students and third parties from the actions of its students using alcohol or drugs. As we discuss below, a school that consciously chooses to adopt disciplinary rules that go beyond the prohibition of unlawful behavior should take care, however, not to assume unwillingly a broader duty of care.

More problematic in the adoption of minimum standards is the scope of school-related activities that must be covered by the policy. The Act requires at a minimum that the institution's policy prohibit the unlawful possession, use, or distribution of drugs or alcohol on college property or as part of a "college activity." Because the Act specifically addresses actions on college property, schools need to exercise particular care not to

assume inadvertently any duty as landlord to protect students from the consequences of their own conduct or the conduct of other students.

The regulations promulgated under the Act define a "college activity" to include all student activities, on or off campus, considered to be university-sponsored events. See 55 Fed. Reg. at 33,595-96. The Department of Education has suggested informally that such "college activities" include fraternity and sorority events held off-campus. See Letter from Leonard L. Haynes, Ass't Sec'y, U.S. Dep't of Education (Feb. 11, 1991) ("Dear Colleague" letter to college and university administrators). This interpretation of the statutory term "any of [the school's] activities" seems too sweeping. It literally embraces any event attended by employees of the university or sponsored by student organizations officially recognized by the university. Schools may wish to consider including language in their policy statements that would reach conduct occurring at such off-campus events, while being careful not to assume any enforcement obligations apart from taking action when and if such circumstances come to the attention of school officials. Because such off-campus activities present risks of drug and alcohol-related accidents that are so difficult to police, each institution should consider carefully how extensively it wishes to monitor or supervise such events.

B. Going Beyond the Act's Minimum Requirements

1. Adopting Drug/Alcohol Use Restrictions

In all cases, institutions should consider including in their written enforcement policies a disclaimer of any intention to assume duties to protect students from their own abuse of drugs or alcohol or to protect third persons from the conduct of students. If an institution chooses to implement rules for student conduct that go beyond the minimum required by the Act, the school should also be careful to draft a policy with realistic standards that can be effectively and consistently enforced.

It is a poor practice for a school to promulgate a set of regulations that it will not or cannot enforce, just to please parents, alumni or federal officials with a tough-sounding policy. Although having strict rules on the books may delude a school into thinking that it thereby has a responsible "policy" governing student alcohol or drug use, unenforced or unenforceable rules may come back to haunt the institution if a court or jury regards the rules as establishing a standard of student conduct that the school itself has failed to maintain. See Douglas R. Richmond, Institutional Liability for Student Activities and Organizations, 19 J.L. & Educ. 309, 319 (1990) ("When universities negligently attempt to control student activities, their conduct draws them across the line from nonfeasance (nonperformance of an act that ought to be performed)

into misfeasance (improper performance of an act), and makes liability easier to establish").[36]

The recent opinion in Furek illustrates the danger. The Delaware Supreme Court concluded that the university's adoption of strict anti-hazing regulations, and associated sanctions, could be a basis for finding the assumption of broadened duties:

> "While we acknowledge the apparent weight of decisional authority that there is no duty on the part of a college or university to control its students based merely on the university-student relationship, where there is direct university involvement in, and knowledge of, certain dangerous practices of its students, the university cannot abandon its residual duty of control. . . . The University's policy against hazing, like its overall commitment to provide security on its campus, thus constituted an assumed duty. . . ." 594 A.2d at 519-20 (emphasis in original).[37]

Stated differently, adoption of strict regulations may not only evidence the school's knowledge of dangerous conduct but also

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[36] See also Sterner v. Wesley College, Inc., 747 F. Supp. 263 (D.Del. 1990) (plaintiff argued that college's "failure to institute its own express prohibitions on the use of alcohol by minors in the dormitories" justified award of punitive damages); Rabel v. Illinois Wesleyan Univ., 514 N.E.2d 552, 558 (Ill. App. 4 Dist. 1987), appeal denied, 520 N.E.2d 392 (1988) (plaintiff argued that university's "strong disciplined" policies, regulations, and handbooks established "corresponding duty to protect its students against the alleged misconduct of a fellow student").

[37] See also 594 A.2d at 522 (university owned property but not actual fraternity house yet still owed duty as landlord because "in the area of general security and of hazing in particular the University's regulation was pervasive").

imply the university's assumption of a duty to protect students from harms arising from that conduct.[38]

2. Providing Services Relating to Drug/Alcohol Abuse

The Act requires colleges to inform students about available treatment options and to establish and enforce sanctions for illegal use of drugs and alcohol. The Act does not require colleges to provide treatment programs or to engage in activities, such as drug testing, designed specifically to identify students using illegal drugs.[39]

A school that decides to provide treatment or to adopt screening programs should be mindful of associated legal obligations. A college operating a treatment program would be held to the standard of care of any institution operating any health-care program. For example, a college exercising control

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[38] Some courts have also viewed the adoption of strongly-worded university policies as creating an "implied contract" between the university and its students. In Nieswand v. Cornell Univ., 692 F. Supp. 1464, 1469-71 (N.D.N.Y. 1988), the court held that an implied contract to provide a certain level of campus security arose from "a series of documents, brochures, leaflets, and pamphlets Cornell sent to prospective students and to students accepted for enrollment." Id. at 1469. Though implied contract cases are typically limited to claims seeking tuition refunds or enforcement of post-graduation employment guarantees, see id. at 1471 (citing cases), colleges and universities should be careful when adopting drug and alcohol abuse policies not to utilize language that suggests a "drug-free" or "alcohol-free" environment exists for students.

[39] See 55 Fed. Reg. 33,580, at 33,595 (1990) (Appendix C -- Analysis of Comments and Responses) (advising that colleges and universities need not "identify and provide an employee assistance program and student assistance program").

over a hospital or clinic might be liable for the consequences of negligent treatment. Gehling v. St. George University School of Medicine, Ltd., 698 F. Supp. 419 (E.D.N.Y. 1988).[40]

And schools using testing or similar measures to identify substance abusers should be aware of the risk that such activities could be held to violate students' privacy rights. As we have already noted, for example, courts have scrutinized college drug testing programs with an eye to protecting the privacy interests of student athletes.[41] One court found a high school drug testing program to be an improper attempt to control students' out-of-school behavior. Anable v. Ford, 653 F. Supp. 22, modified, 663 F. Supp. 149 (W.D. Ark.) (1985).

Many schools require professional counseling for students who have been found to be substance abusers. Those that recommend or mandate use of particular counsellors or programs should exercise care and diligence in determining that the selected counsellors are competent, adequately trained, and possessed of all professional credentials and qualifications.

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[40] The court later determined that the university did not control the hospital, although it trained its medical students there. Gehling v. St. George's University School for Medicine, Ltd., 705 F. Supp. 761 (E.D.N.Y.), aff'd without opinion, 891 F.2d 277 (2d Cir. 1989).

[41] See supra note 31.

C. Enforcing the Policy

The Act does not require that the institution's written policy specify what means an institution will employ to enforce its disciplinary sanctions,[42] so long as the actual enforcement is effective and consistent.[43] It is unclear whether the Act requires a school to adopt anything more than a "passive" enforcement policy -- that is, the consistent imposition of sanctions when the university becomes aware of policy violations.[44] But even if no active measures are taken to identify offenders, passive enforcement of the prohibition against unlawful drug and alcohol-related behavior should include

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[42] See 55 Fed. Reg. at 33,595 (advising that an institution need not "describe its drug prevention program design and plan for implementation, identify the individuals who will plan and implement the program").

[43] These requirements are embodied in the Act's mandate that each school conduct a biennial review of its policy "to determine its effectiveness" and "to ensure that the sanctions . . . are consistently enforced." 20 U.S.C. §1145g(a)(2).

By its terms, the requirement of consistent enforcement applies only to those sanctions employed for unlawful possession, use or distribution of drugs and alcohol. See 20 U.S.C. 1145g(a)(2)(B). The regulations promulgated by the Secretary of Education suggest, however, that additional sanctions adopted for lawful drug and alcohol-related behavior also must be uniformly enforced. See 55 Fed. Reg. at 33,597 (advising that the Act "require[s] a clear statement that the [institution] will impose disciplinary sanctions for violations of its standards of conduct, and consistent enforcement of those sanctions").

[44] The Secretary has provided no criteria for determining what level of enforcement satisfies the requirement that the policy be "effective." Instead, a series of self-imposed, objective measures for monitoring effectiveness are recommended. See 55 Fed. Reg. at 33,597.

acting upon reliable information obtained from such sources as the observations of residential advisers and employees of the institution.[45]

An institution deciding upon a more active enforcement role should display the same realism and consistency in selecting enforcement techniques as it does when setting the appropriate standard for students' use drugs and alcohol. More intrusive enforcement mechanisms may collide with students' rights to privacy and seem to assume a degree of control and supervision that exceeds what the school can actually achieve. Highly intrusive enforcement techniques may also run afoul of the Act itself. The Act requires that the institution's disciplinary sanctions be "consistent with local, State, and Federal law." 20 U.S.C. § 1145g(a)(1)(E). The Secretary has interpreted this to mean that "[t]o the extent that an [institution] is currently bound by antidiscrimination statutes, contract law, and constitutional protections, it will continue to be bound by those laws" when enforcing its drug and alcohol policy. 55 Fed. Reg. at 33,597. Accordingly, schools should be careful to conform their enforcement practices to all legal standards concerning

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[45] A court is more likely to hold a university responsible for the knowledge of a student employee when the school chooses to rely on residential advisers and similar student employees to aid enforcement of the rules as the "eyes and ears" of the administration. A court might conclude that because the student employee acted as the university's enforcement agent, the adviser's knowledge of drug and alcohol abuse can be imputed to the university itself. Cf. Sterner, 747 F. Supp. at 272 (university charged with residential advisers' knowledge or lack thereof about student use of smoke bombs in dormitories).

students' privacy rights and guarantees of procedural due process.[46]

1. Students' Right to Privacy

The Act does not limit or reduce students' right to privacy. Whether or not a school adopts standards or enforcement measures that go beyond the minimum required by the Act, it must respect students' privacy rights when developing procedures for compiling information about student use of drugs or alcohol, imposing sanctions, and providing information to law enforcement agencies.[47]

Enforcement of drug and alcohol policies implicates two distinct types of privacy concerns. First, techniques used by the school for the identification of potential violators may be

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[46] It is an open question whether a private college's enforcement of sanctions adopted to comply with the Act would be deemed "state action" triggering constitutional and other protections previously inapplicable to the school. See Albert v. Carovano, 851 F.2d 561 (2d Cir. 1988) (en banc), and dissenting opinion of Judge Oakes; see also Albert v. Carovano, 824 F.2d 1333 (2d Cir. 1987) (same question). Most private institutions have traditionally regarded themselves as subject to the same principles of due process and respect for students' privacy as public institutions because of their own traditions or the requirements of state policy or contract law.

[47] The Act does not require that schools refer all violations of state and federal law for prosecution. See 20 U.S.C. § 1145g(a)(1)(E); 55 Fed. Reg. at 33,597 (advising that "it is up to the discretion of the [institution] to decide which violations of its standards of conduct to refer for prosecution"). Some states do, however, require that persons with knowledge of use of illegal drugs report that information to law enforcement authorities. See, e.g., Colo. Rev. Stat. § 18-8-115 (1989).

unduly intrusive. See, e.g., Houck v. University of Washington, 803 P.2d 47, 52-53 (Wash.App. 1991) (under state constitutions, dormitory rooms are "private residences" subject to warrantless intrusions only upon a showing of compelling need); Hill v. National Collegiate Athletic Ass'n, 273 Cal. Rptr. 402 (Cal. App. 6 Dist.), review granted, 801 P.2d 1070 (Cal. 1990) (NCAA drug testing held to violate students' right to privacy under state constitution).

Second, concerns about confidentiality may arise when enforcement of drug and alcohol policies results in the compilation of records about student conduct. Information in such program records and individual students' files may be subject to constitutional privacy rights and the restrictions of the "Buckley Amendment." See Family Education Rights and Privacy Act of 1974, 20 U.S.C. § 1232g.

For example, the Buckley Amendment contains special rules concerning the confidentiality of campus security records. See 20 U.S.C. § 1232g(a)(4)(B)(ii). The Secretary of Education has acknowledged that the Buckley Amendment prevents schools from releasing to law enforcement officials records relating to reported violations of the school's drug and alcohol policy. On the other hand, the Secretary has stated that the Buckley Amendment does not apply to the personal observations of school officials and has accordingly advised that institutions may choose to adopt a policy "requiring staff, faculty and students to report violations to the police." See 55 Fed. Reg. at 33,597.

Unless program records are protected by a physician-patient or other privilege, schools may be required to release those records by subpoena or other mandatory process in either civil or criminal cases. In addition, the Department of Education has asserted authority to subpoena a student's educational records to facilitate its enforcement of the Drug Free Schools Act. See 55 Fed. Reg. at 33,598.

Colleges should review all enforcement procedures to ensure that they do not unnecessarily or unreasonably intrude into students' privacy and that the confidentiality of student records is maintained to the extent required by the Buckley Amendment and applicable state law. In addition, staff training should emphasize the need to protect students' privacy.

2. Students' Right to Due Process

Similarly, the Act does not (and could not) eliminate a student's right to procedural due process when a college decides whether a student is subject to sanctions for illegal use of drugs or alcohol. To the contrary, the Act requires the college to enforce its drug and alcohol abuse program consistently and in accordance with other applicable law.

Courts routinely require colleges to ensure fairness in the procedures themselves, including reasonable notice and an opportunity for a hearing before an impartial decision-maker before sanctions are imposed, although the formality required of

the hearing procedure depends on the seriousness of the threatened sanctions.[48]

Colleges should review each step in the drug and alcohol program to ensure that students receive notice, information, and hearing opportunities that are adequate in light of the severity of the potential sanctions that the college might impose for the alleged conduct.

3. Evenhanded Enforcement and Limited Discretion

Although the Act requires consistent enforcement of sanctions, it does not specify the degree of discretion afforded university personnel in imposing disciplinary punishment. The Secretary has stated only that institutions may consider "the circumstances surrounding each case" so long as the institution "treat[s] similarly situated offenders in a similar manner." 55 Fed. Reg. at 33,597.

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[48] See, e.g., Gorman v. University of R.I., 837 F.2d 7, 12-16 (1st Cir. 1988) (enforcing due process requirements in university disciplinary proceeding) ("Notice and an opportunity to be heard have traditionally and consistently been held to be the essential requisites of procedural due process."); Nash v. Auburn Univ., 812 F.2d 655, 660-67 (11th Cir. 1987) (due process requires notice, hearing, impartial decision-maker, and right to respond to charges); Shuman v. University of Mich. Law Sch., 451 N.W.2d 71, 74-75 (Minn. App. 1990) (due process requires notice and hearing before impartial decision-maker); Beaver v. Ortenzi, 524 A.2d 1022, 1024-26 (Pa. Commw. Ct. 1987) (student charged with drug use entitled to due process protections); see also Psi Upsilon v. University of Penn., 591 A.2d 755 (Pa. Super.), app'l denied, 598 A.2d 994 (Pa. 1991) (guaranteeing college fraternity facing hazing-related disciplinary sanctions the same level of procedural safeguards usually afforded to students).

The Act does not protect institutions from liability for imposing sanctions that may be improper on such grounds as negligence, breach of contract, denial of equal protection, malicious prosecution, bias, or other theories. See, e.g., Anderson v. University of Wis., 841 F.2d 737 (7th Cir. 1988) (university did not deny student equal protection or violate the Rehabilitation Act, 29 U.S.C. § 701 et seq., when it refused to readmit a student with an alcohol problem and poor grades).

In addition, courts have required that colleges satisfy the federal constitutional guarantee of "substantive due process" by imposing sanctions that are adequately supported by the factual record and that are not arbitrary or capricious.[49]

Courts have also held college employees liable for the employees' negligence when enforcing sanctions. For example, a security officer who failed to remove potentially harmful objects from a drunk student before locking him in a holding cell was found liable for negligence when the student hanged himself. Hickey v. Zezulka, 443 N.W.2d 180 (Mich. App. 1989), app'l granted in part, 457 N.W.2d 345 (Mich. 1990).

Because the process of compiling information and imposing sanctions for improper use of drugs and alcohol implicates important rights of affected students, colleges must establish procedures that protect both the institution and individuals from claims arising out of actions taken to implement

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[49] See, e.g., Nash, 812 F.2d at 667-68 (applying substantive due process analysis to determine whether sanction was "arbitrary").

the college's drug and alcohol program. At a minimum, colleges should develop procedures that provide (1) standards to guide the exercise of decision-making;[50] (2) training, adequate review and supervision, and retraining as necessary for employees implementing the program; and (3) periodic reassessment to identify any problems that might require changes in the program.

VIII.

Conclusions

Since the adoption of the Drug-Free Schools Act, nearly every college and university has adopted a written policy toward its students' use of alcohol and drugs. Each school should reappraise its policy in light of the changing temper of public policy toward alcohol and drug abuse. This does not mean that colleges should make fundamental changes in rules of student conduct for fear of severe but remote potential liabilities.[51]

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[50] In states that still recognize governmental immunity, there is an inherent conflict between, on the one hand, the college's interest in establishing detailed rules that allow no discretion so as to avoid both the chance for employee negligence and the charge of inconsistent application of the program and, on the other hand, an employee's interest in arguing that the employee was exercising discretion and is therefore entitled to governmental immunity. A Michigan court held that an employee sued for negligence was not entitled to governmental immunity because the employee was engaged in a ministerial act involving no exercise of discretion. Hickey v. Zezulka, 443 N.W.2d 180 (Mich. App. 1989), app'l granted in part, 457 N.W. 2d 345 (Mich. 1990) (including whether the employee was entitled to qualified immunity and whether her conduct was discretionary).

[51] See, e.g., Amherst: Prohibition Tried, But the Results Are Familiar, N.Y. Times, March 19, 1989, at I-44.

It does mean that schools ought to be aware of current developments in the law and try to minimize their risks in areas in which they face the greatest potential exposure.

The risks of institutional liability are most clear-cut in two areas: the obligation of colleges or universities to maintain safe premises and the growing exposure of those who serve alcoholic beverages to minors or intoxicated persons. Schools may wish to evaluate whether they are adequately policing and anticipating on-campus safety and security problems presented by student drinking and drug abuse. They may also want to examine whether agents of the university (including dormitory advisors, faculty members, coaches, etc.) are unwittingly exposing the school to liability for serving alcoholic beverages to underage or drunk students; planning or attending events featuring drinking or drug use; encouraging the use of performance enhancing or pain-killing drugs by athletes; or even simply being aware of, but not reporting, potentially hazardous incidents of student abuse of drugs and alcohol.

The more difficult question will continue to be how extensively the college should supervise private student conduct. Many schools may wish to consider an approach suggested by Bradshaw, Baldwin and the other cases rejecting in loco parentis: (1) to recognize explicitly (perhaps in a written Code of Student Rights and Responsibilities) that students are adults and are expected to obey the law and take personal responsibility for their conduct; (2) to acknowledge that the school will neither

police the personal lives of students on or off campus nor invade their privacy by spying or intrusive searches; (3) to caution that students will be disciplined if their use of alcohol or drugs threatens disorder, public disturbances, danger to themselves and others, or property damage; (4) to warn that the school will impose sanctions when illegal use of alcohol or drugs comes to its attention; and (5) to enforce the standards consistently.

Every school's policy should include standards of conduct that are easily understood by those expected to comply with them, that are realistic and enforceable, and that are in fact enforced in a fair and consistent manner. As required by the Drug-Free Schools Act, schools should at a minimum have a policy mandating that students comply with applicable laws governing alcoholic beverages and illicit drugs. Some schools -- perhaps because of tradition or religious orientation -- may have very strict rules against any alcohol or drug use and be better able to enforce them.

Schools should also consider offering educational and counselling programs addressing the responsible use of alcohol and the hazards of alcohol and drug abuse. Colleges and universities are society's experts in educating young adults, and it is through educational efforts that schools can most effectively discharge their legal and moral responsibilities. Such programs, perhaps offered in conjunction with orientation sessions or scheduled close to events such as fraternity/sorority

rush, are consistent with the fundamental truth that the college's mission and strength lie in educating students, not in policing their conduct. Schools that conscientiously teach students to assume personal responsibility for their own conduct, and that enforce realistic regulations consistent with their students' dignity as adults, can with justice argue that they have done all that may fairly be required in the exercise of due care.