EXAMINING EDUCATIONAL MALPRACTICE JURISPRUDENCE: SHOULD A CAUSE OF ACTION BE CREATED FOR STUDENT-ATHLETES?

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I. INTRODUCTION

The state of intercollegiate athletics continues to generate substantial study and intense debate. In 1990, the Knight Commission released a report which recommended major reforms and structural changes in intercollegiate athletics. The compromise of academic integrity was specifically identified as one of the critical issues confronting intercollegiate athletics. Public officials have also joined the chorus de-

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1. This Article is a sequel to Timothy Davis, An Absence of Good Faith: Defining a University’s Educational Obligation to Student-Athletes, 28 Hous. L. Rev. 743 (1991). The foregoing article focuses on the extent of the compromise of academic integrity in intercollegiate athletics. That article also explored the nature of the express contractual relationship between student-athletes and their institutions. Arguing that universities by virtue of this contractual relationship make some form of educational commitment to student-athletes, the article proposed that the good faith doctrine provides a mechanism by which meaning can be given to an institution’s otherwise vaguely expressed academic obligation to student-athletes.

The scope of this Article is summarized in the text accompanying notes 20-34, infra.


Professor Murray Sperber provides a comprehensive examination of the financial, ethical and academic issues confronting intercollegiate athletics in Murray Sperber, College Sports Inc.: The Athletic Department vs. The University (1990). The role that intercollegiate athletics plays in American society is examined in Donald Chu, The Character of American Higher Education and Intercollegiate Sport (1989). Additional studies and surveys are identified and discussed in Davis, supra note 1.

3. Report of the Knight Commission on Intercollegiate Athletics, Keeping Faith with the Student-Athlete: A New Model for Intercollegiate Athletics (1991) [hereinafter KNIGHT COMMISSION REPORT]. The Knight Commission’s proposed changes are discussed in detail in Davis, supra note 1, at 767-68.


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crying the condition of intercollegiate athletics. Federal legislation was enacted in 1990 requiring colleges to disclose graduation rates for student-athletes.\textsuperscript{5} Congressional hearings during the summer of 1991 focused on financial disclosure laws for college sports.\textsuperscript{6} Student-athletes\textsuperscript{7} have taken steps to protect and promote their interests in the form of private actions challenging the quality of the academic instruction they received during college.\textsuperscript{8} A recent lawsuit\textsuperscript{9} asserted by a former basketball scholarship student questioned Drake University's educational commitment to student-athletes.\textsuperscript{10} Shortly thereafter, a decision was rendered in Ross v. Creighton University,\textsuperscript{11} a much celebrated\textsuperscript{12} educational malpractice lawsuit asserted by a student-athlete.

Kevin Ross asserted claims against Creighton sounding in tort and contract\textsuperscript{13} for its alleged failure to provide him an opportunity to acquire basic academic skills during his tenure at the university.\textsuperscript{14} Ross's dissatisfaction with Creighton stemmed from Creighton's recruitment of


\textsuperscript{7} "Student-athlete" refers to college students who attend post-secondary institutions on athletic scholarships. Davis, supra note 1, at 745 n.18; Derek Quinn Johnson, Note, Educating Misguided Student Athletes: An Application of Contract Theory, 88 COLUM. L. REV. 96 n.1 (1985).


\textsuperscript{9} In Jackson v. Drake Univ., No. CC-84-49942, (Iowa Dist. Polk County, May 7, 1990), Terrell Jackson asserted breach of contract, negligent misrepresentation and civil rights claims against Drake University. The gravamen of Jackson's lawsuit was Drake's alleged failure to afford him an opportunity to acquire a meaningful education.

\textsuperscript{10} Id.

\textsuperscript{11} Ross, 740 F. Supp. at 1319.


\textsuperscript{14} Ross, 740 F. Supp. at 1322.
him to play basketball, notwithstanding the university's alleged knowledge of his lack of preparedness to take advantage of the school's educational opportunities. The essence of Ross's claims was that Creighton's conduct amounted to educational malpractice.

In dismissing Ross's complaint, the federal district court aligned itself with the majority of courts that refuse to recognize a cause of action for educational malpractice. Adopting the reasons enunciated by these courts, Judge Nordberg cast the dispositive issue as whether an institution of higher education owes a duty to provide student-athletes with a minimal level of academic competence. He concluded that an examination of relevant public policy considerations—"the likelihood of the injury, the magnitude of the burden of guarding against it and the consequences of placing that burden upon defendant"—dictated a negative response to the controlling question.

This Article examines whether a doctrinal basis exists for legally recognizing an educational malpractice claim in tort for student-athletes against colleges and universities. Part II begins this inquiry by summarizing the precedent for the result reached in Ross. In this regard, the Article reviews the history of educational malpractice actions in the United States. Cases which demonstrate the judiciary's reluctance to entertain suits for educational malpractice brought by students at all levels of the educational process—whether it be primary, secondary or post-secondary—are examined. As a part of this examination, the public policy considerations adopted by courts declining to legitimate educational malpractice claims are closely scrutinized. This assessment reveals that although policy considerations implicate valid social and legal concerns, they are often based on invalid assumptions and have not been subjected to in-depth judicial evaluation. The fragility of these policy considerations becomes even more apparent when analyzed in the context of educational malpractice actions brought by stu-

15. See id. at 1324; Davis, supra note 1, at 745; Sherman, supra note 12, at 661.
16. Ross, 740 F. Supp. at 1322. Ross also asserted claims for negligent infliction of emotional distress and breach of contract. Id. at 1329. The court acknowledged previous Illinois precedent, which created a cause of action under certain circumstances for negligent infliction of emotional distress on behalf of direct victims of malpractice. Id. The Ross court ruled, however, that inasmuch as plaintiff did not possess a cognizable educational malpractice claim, a negligent infliction of emotional distress claim would not lie. Id. at 1330. Likewise, the court rejected Ross's breach of contract claim which it viewed as merely an attempt to circumvent its refusal to recognize a tort-premised educational malpractice cause of action. Both the emotional distress and breach of contract claims are beyond the scope of this article. For a discussion of the breach of contract claim, see Davis, supra note 1.
17. Ross, 740 F. Supp. at 1327 (citing cases rejecting educational malpractice as a viable cause of action in the context of elementary and secondary education). See infra text accompanying notes 47-83, for an analysis of the leading cases.
19. Id.
20. See infra text accompanying notes 47-136.
21. Id.
22. Id.
23. See infra text accompanying notes 137-79.
24. See infra text accompanying notes 192-94.
dent-athletes against their schools.\textsuperscript{25} This section concludes by suggesting that the judiciary's unjustified reliance on dubious policies serves as a convenient means by which courts evade determination of the critical issue—whether the academic interests of particular plaintiffs warrant protection against the conduct of academic institutions.\textsuperscript{26}

Part III of this Article focuses on this critical issue within the context of the student-athlete/university relationship. It first notes that the weakness of the policies relied on by courts to reject educational malpractice claims may alone be sufficient to warrant imposing a duty on universities in favor of student-athletes. The Article next explores whether an independent basis exists for creating such a duty.\textsuperscript{27} In this regard, it examines whether traditional tort doctrine, either directly or by analogy, justifies protecting a student-athlete's academic interests from certain types of institutional conduct.\textsuperscript{28} The inquiry begins with an analysis of the circumstances in which the judiciary exhibits a willingness to subject colleges to tort liability for injuries to students.\textsuperscript{29} An examination of the \textit{in loco parentis} doctrine reveals that institutions' liability to students is not appropriately premised on that legal doctrine.\textsuperscript{30} This part concludes that liability has been imposed on universities in situations where a traditionally recognized special relationship is present between academic institutions and particular students.\textsuperscript{31} The case law unequivocally demonstrates that absent such a special relationship tort claims by students against colleges fail to present justiciable controversies.\textsuperscript{32}

The Article next discusses the policies on which these special relationships are founded.\textsuperscript{33} Notions of dependency and mutual dependency are understood as underlying recognition of special relationships. Similarly, the student-athlete/university relationship is viewed not only as one of mutual dependency, but also as a relationship in which the university is clearly the dominant party. The Article concludes by proposing that the dependency and vulnerability of student-athletes in their relationship with colleges create a special relationship. This relationship is sufficiently similar to those traditionally recognized in tort to justify imposing a duty on colleges and universities to provide an educational opportunity to student-athletes.\textsuperscript{34}

\textsuperscript{25} See infra text accompanying notes 180-91.
\textsuperscript{26} See infra text accompanying notes 192-94.
\textsuperscript{27} See infra text accompanying notes 195-252.
\textsuperscript{28} Id.
\textsuperscript{29} See infra text accompanying notes 197-236.
\textsuperscript{30} See infra text accompanying notes 197-208.
\textsuperscript{31} See infra text accompanying notes 209-36.
\textsuperscript{32} Id.
\textsuperscript{33} See infra text accompanying notes 237-48.
\textsuperscript{34} See infra text accompanying notes 253-76.
II. THE HISTORY OF EDUCATIONAL MALPRACTICE

A. Judicial Refusal to Recognize Educational Malpractice

A review of educational malpractice jurisprudence in the United States is the first step in understanding the competing legal and policy issues implicated in assessing whether to recognize a tort of educational malpractice in favor of student-athletes. This section summarizes the treatment the judiciary has afforded educational malpractice claims. What appears in the case law is a common theme of judicial reluctance and hesitancy to interject itself in disputes questioning the substantive quality of the education conferred by institutions on their students.

1. Educational Malpractice Defined

Suits against educators traditionally have centered on issues such as safety, supervision and student discipline. In contrast, educational malpractice refers to complaints against academics and academic institutions alleging professional misconduct analogous to medical and legal malpractice. Educational malpractice has been viewed as premised on the notion that academic institutions have a legal obligation to instruct students in such a manner as to impart a minimal level of competence in basic subjects. The theory behind educational malpractice has also been described as placing a duty on schools to provide that standard of education appropriate for the particular student.

In bringing to the forefront the alleged failure of colleges to provide educational opportunity to students, lawsuits by student-athletes are premised on a similar if not the same theory. Student-athletes desire an opportunity to derive substantive educational benefits during their college careers. They argue that institutional conduct, both passive and affirmative, interferes with their ability to make academic progress and acquire useful skills.

38. Collis, supra note 35, at 7-8. This definition emphasizes that the relevance of peculiar needs of individual students, or groups of students, may be particularly pertinent in the context of educational malpractice claims brought by student-athletes. Arguably, student-athletes’ needs are distinctly different from those of other students due to the circumstances that often accompany their attendance at college as well as the essence of their relationship with their schools. See infra text accompanying notes 253-76.
39. Student-athletes seek to impose a duty on colleges and universities to provide them with an educational opportunity in contrast to a duty to educate. Refer to Davis, supra note 1, at 788-89, and sources cited therein for a discussion of the ramifications of defining the duty as one to provide an educational opportunity rather than a duty to educate.
40. See id. at 789.
41. Id.; see infra text accompanying notes 249-51 (discussing the types of claims student-athletes assert against colleges).
2. Judicial Treatment of Educational Malpractice at the Primary and Secondary School Levels

Educational malpractice suits in the context of student or parental claims against elementary and secondary schools typically arise in two factual contexts. In one group of cases, secondary school students allege negligent acts or omissions by their schools resulting in the conveyance of inadequate basic academic skills or intellectual damage. These cases can be properly classified as pure educational malpractice actions because students challenge the quality of the academic instruction they receive. The second category of cases typically involves grade school students alleging improper placement in special education programs according to their academic and physical needs. For example, in *Hoffman v. Board of Education*, a child placed in classes for the mentally retarded after he was misdiagnosed sought damages for injury to his emotional well-being and his inability to obtain employment. Relying on a broadly

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42. *Collis, supra note 35, at 79, 88; Funston, supra note 37, at 750.*
43. *Collis, supra note 35, at 325, 335; Wilkins, supra note 36, at 442.*
44. Illustrative "pure" educational malpractice cases include: *Peter W. v. San Francisco Unified Sch. Dist.*, 131 Cal. Rptr. 854 (Cal. Ct. App. 1976); *Donohue v. Copiague Union Free Sch. Dist.*, 391 N.E.2d 1352 (N.Y. 1979) (refusing to recognize claim alleging plaintiff was permitted to obtain degree without having acquired basic academic skills); *Helm v. Professional Children's Sch.*, 431 N.Y.S.2d 246 (N.Y. App. Term. 1980) (extending policies of *Donohue* in refusing to recognize educational malpractice claim brought against a private school).
45. 400 N.E.2d 317 (N.Y. 1979); see Catherine D. McBride, Note, *Educational Malpractice: Judicial Recognition of a Limited Duty of Educators Toward Individual Students; A State Law Cause of Action for Educational Malpractice*, 1990 U. ILL. L. REV. 475, 479 (finding Hoffman paradigmatic of the second category of educational malpractice cases). In *Hoffman*, the court framed the controlling issue as whether public policy considerations precluded recovery for the allegedly negligent evaluation of a student's intellectual capacity. *Hoffman*, 400 N.E.2d at 318. Relying on a broadly stated policy of non-interference in academic matters, which it had articulated in *Donohue*, the Court of Appeals reversed the Appellate Division's affirmation of a jury award in favor of plaintiff. In dismissing plaintiff's educational malpractice claim, the court acknowledged a distinction between educational malpractice cases involving nonfeasance, such as in *Peter W.* and *Donohue*, and those involving the type of misfeasance raised by plaintiff. Yet the court rejected any notion that this distinction should alter its determination not to recognize a cause of action for educational malpractice. *Id.* at 319. The court held the policy concerns expressed in *Donohue* were equally applicable to an educational malpractice claim alleging misfeasance. *Id.*


Notwithstanding the preceding authority, in one particularly shocking case of alleged improper placement, the court held for plaintiff but sidestepped creating a new tort of educational malpractice by finding that school employees acted as medical personnel. *Snow v. State*, 469 N.Y.S.2d 959 (N.Y. App. Div. 1983), *aff'd*, 475 N.E.2d 454 (N.Y. 1984); *Collis, supra note 35, at 155; Wilkins, supra note 36, at 482.
stated policy of non-interference in academic matters, the New York Court of Appeals dismissed plaintiff’s educational malpractice claim.\textsuperscript{46} Central to these cases is the belief that schools possess a duty to properly evaluate and place each child in a learning environment appropriate to his or her needs.\textsuperscript{47}

\textit{Peter W. v. San Francisco Unified School District,}\textsuperscript{48} the seminal educational malpractice case,\textsuperscript{49} also represents the quintessential \textit{pure} educational malpractice case.\textsuperscript{50} The plaintiff was a functionally illiterate\textsuperscript{51} high school graduate\textsuperscript{52} who alleged that defendant’s acts and omissions deprived him of basic academic skills such as reading and writing. This, according to plaintiff, resulted from defendant’s negligent\textsuperscript{53} performance of its duty to provide him with adequate instruction and counseling in basic academic skills.\textsuperscript{54} Focusing on the duty\textsuperscript{55} element of a cognizable negligence cause of action,\textsuperscript{56} the court rejected plaintiff’s assertion that the school district owed such a duty.\textsuperscript{57}

In so ruling, the court linked its determination of whether the school district owed a duty to plaintiff to broader issues of public pol-

\textsuperscript{46} Hoffman, 400 N.E.2d at 319-21.
\textsuperscript{47} See cases cited supra note 45.
\textsuperscript{49} Cohen, supra note 35.
\textsuperscript{50} The two categories of educational malpractice claims have been differentiated as follows:

\textit{Hoffman} represents not only the extension of \textit{Donohue} to claims arising from special education, but also represents a second category of cases alleging educational malpractice. \textit{Peter W.} and \textit{Donohue} can be thought of as presenting claims for negligence in the process of educating, while \textit{Hoffman} is better viewed as an action for negligence in educational evaluation.

Eugene R. Butler, Comment, \textit{Educational Malpractice Update,} 14 \textit{Cal. U. L. Rev.} 609, 613 (1985); see McBride, supra note 45, at 479 n.41. One commentator describes claims involving the process of educating as cases in which the adequacy or competency of the instruction is attacked. Butler, supra at 613, 615. See also Funston, supra note 37, at 758 (suggesting that the general cases represented by \textit{Hoffman} should not be conceptualized as educational malpractice cases since they are more closely analogous to cases imposing liability on schools in the context of special education programs).

\textsuperscript{51} "Functional illiteracy" refers to inadequate application of basic academic skills such as reading, writing and arithmetic to practical problems encountered daily. Wilkins, supra note 36, at 429 n.11.

\textsuperscript{52} Despite having attended public schools for 12 years, plaintiff attained a fifth grade reading level. Peter W. v. San Francisco Unified Sch. Dist., 131 Cal. Rptr. 854, 856 (Cal. Ct. App. 1976).

\textsuperscript{53} Plaintiff sought recovery based upon theories sounding in misrepresentation, breach of statutory duty and breach of constitutional duty. \textit{Id.} at 856, 862; \textit{Collis, supra} note 35, at 83.

\textsuperscript{54} Specific, allegedly negligent acts included defendant’s: (1) failure to apprehend plaintiff’s learning disability; (2) assigning plaintiff to classes for which he was academically inadequately prepared; (3) promotion of plaintiff to higher grade levels despite knowledge of plaintiff’s unpreparedness to succeed academically at these levels; and (4) permitting plaintiff to graduate from high school even though he read at a fifth grade level. Peter W., 131 Cal. Rptr. at 856.

\textsuperscript{55} Plaintiff identified three possible sources for imposing such a duty on defendant: (1) defendant’s obligation to exercise with reasonable care its assumption of the educational function; (2) the special relationship between the student and teacher; and (3) common law duty requiring teachers to exercise reasonable care in instructing students. \textit{Id.} at 858.

\textsuperscript{56} \textit{Id.} at 857.
\textsuperscript{57} \textit{Id.} at 861.
Relying upon *Rowland v. Christian*, the court first discussed general policy considerations critical in evaluating whether to recognize a duty regardless of the factual context in which the issue arose. The court next delineated policy considerations specifically applicable to the factual scenario before it. The primary policy concerns were characterized as the nonexistence of a standard of care for educators and the improbability of a court arriving at such a standard. Another policy consideration was the difficulty of establishing the causal connection between defendant’s conduct and plaintiff’s injuries due to the multiplicity of factors affecting academic performance. Finally, the court was very concerned about the adverse financial impact countless numbers of claims might have on school systems.

Later courts have relied upon these and additional public policy considerations to reject educational malpractice claims. In *Donohue v. Copiague Union Free School District*, plaintiff’s school authorities promoted him from grade to grade despite knowledge of his learning disabilities and awarded him a diploma, notwithstanding his failure to acquire basic academic skills. The court concluded plaintiff had failed to state a cause of action, buttressing its decision with a policy of judicial non-interference in academic affairs. The court defined the policy of non-interference as founded on the judiciary’s perceived lack of acumen in matters involving education policy, as well as a lack of competence to oversee day-to-day administration of public schools.

*B.M. v. State* represents the single instance where a court recognized educational malpractice as a tort cause of action. The plaintiff al-

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58. Funston, *supra* note 37, at 751.
59. 443 P.2d 561 (Cal. 1968).
60. These policies included: (1) the foreseeability of harm resulting from defendant’s deviation from the standard of care; (2) establishing injury with sufficient certainty; (3) the closeness of the causal connection between defendant’s conduct and the injury suffered; (4) the moral culpability of defendant’s conduct; (5) the policy of deterring future harm; and (6) the consequences to the community of imposing a duty to exercise care with resulting liability for breach. *Peter W.*, 131 Cal. Rptr. at 859-60; see also *Rowland*, 443 P.2d at 564.
62. The court stated, "we find in this situation no conceivable 'workability of a rule of care' against which defendants' alleged conduct can be measured (citation omitted). . . ." *Peter W.*, 131 Cal. Rptr. at 861.
63. The court identified physical, neurological, emotional, cultural and environmental factors external to the formal teaching process that may affect academic performance. *Id.*
64. *Id.; McBride, supra* note 45, at 476.
65. McBride, *supra* note 45, at 476; *Collins, supra* note 35, at 102 (noting that courts deciding similar cases have cited *Peter W.* and *Donohue* as persuasive authority).
67. *Id.* at 1355. According to the court, recognition of an educational malpractice action would not only require the court to develop general education policies but would require it to “sit in review of the day-to-day implementation” of those policies. *Id.*
68. 649 P.2d 425 (Mont. 1982).
69. Wilkins, *supra* note 36, at 442 (noting that *B.M.* is the one instance in which a court has “refused to attach the fatal ‘educational malpractice’ label to this type of claim”); McBride, *supra* note 45, at 483 (concluding that Montana is the only jurisdiction to permit relief for educational malpractice).
leged that she was negligently placed in a special education program when she was six years old.\textsuperscript{70} The defendant urged the court to dismiss the action on grounds of governmental immunity and lack of legal duty to the improperly placed child.\textsuperscript{71} Although the court did not identify the case as an action for educational malpractice, the case still falls within the non-\textit{pure} category of educational malpractice claims.\textsuperscript{72} A sharply divided court held that a duty of care arose out of the regulations and statutes governing student placement in special education programs.\textsuperscript{73} The court also concluded, however, that absent a clear statutory declaration, public policy considerations relating to judicial reluctance to interfere in the administration of a special education program justify refusal to recognize the duty.\textsuperscript{74} No determination was made as to whether the duty had been breached or what damages would flow from such a breach.\textsuperscript{75}

Arguably, \textit{B.M.} is of little precedential value to plaintiffs asserting educational malpractice actions. The court’s reliance on the mandatory statute as the source of the school’s duty lends no indication that liability might lie absent the statute. In fact, the concurring chief justice attempted to limit the reach of the majority’s ruling by specifically pointing to the statute as the source of the school’s duty.\textsuperscript{76} Because negligent classification and placement were the essence of plaintiff’s claims,\textsuperscript{77} \textit{B.M.}’s precedential value is arguably reduced in the pure educational malpractice context, which implicates a different type of dissatisfaction with the process of educating. Cases such as \textit{B.M.} may fail to implicate the process of educating. The dissatisfaction present in \textit{B.M.} and similar cases can be characterized as the failure of an institution to advance a student to the educational level that he or she is actually capable of comprehending as a result of an improper evaluation of the student’s capacity to learn.\textsuperscript{78} Thus, \textit{B.M.} and similar cases become readily distinguishable from \textit{pure} educational malpractice claims, which implicate the substantive quality of the educational process.\textsuperscript{79}

If a recent case, \textit{Rich v. Kentucky Country Day, Inc.},\textsuperscript{80} reflects the cur-

\begin{footnotes}
\item \textsuperscript{70} \textit{B.M.}, 649 P.2d at 425.
\item \textsuperscript{71} \textit{Id.} at 426. Plaintiff also urged the court to dismiss the complaint due to its alleged immunity as a governmental entity for discretionary acts.
\item \textsuperscript{72} As noted by the concurring judge, the case \textit{sub judicia} differed from those such as \textit{Peter W.}, which involved “negligent failure to adequately educate a child in basic academic skills.” \textit{Id.} at 428. \textit{See McBride, supra note 45, at 483 (comparing the facts in \textit{B.M.} to those involved in \textit{Hoffman}); Butler, supra note 50, at 615 (asserting that plaintiffs’ claims in both \textit{B.M.} and \textit{Hoffman} were premised on negligent evaluation); Wilkins, supra note 36, at 442 (concluding the facts of \textit{B.M.} resemble those of \textit{Hoffman}).}
\item \textsuperscript{73} \textit{B.M.}, 649 P.2d at 427.
\item \textsuperscript{74} \textit{Id.}
\item \textsuperscript{75} \textit{Id.}
\item \textsuperscript{76} \textit{Id.} at 428 (Haswell, C.J., concurring) (distinguishing \textit{Peter W. and Donahue}).
\item \textsuperscript{77} \textit{See supra} text accompanying notes 45-46.
\item \textsuperscript{78} Funston, \textit{ supra note 37}, at 747 n.13.
\item \textsuperscript{79} \textit{See supra} note 49 (the gist of educational malpractice differs for the two categories of educational malpractice claims which have been asserted by plaintiffs at the primary and secondary school levels).
\item \textsuperscript{80} 793 S.W.2d 832 (Ky. Ct. App. 1990).
\end{footnotes}
rent judicial attitude towards educational malpractice claims at the primary and secondary school levels, courts will not soon depart from the stance taken in Peter W., Hoffman and their progeny. Rich involved alleged educational malpractice stemming from improper evaluation and placement.81 Addressing an issue of first impression in Kentucky,82 the Kentucky Court of Appeals relied on the policy justifications articulated in Peter W. and Donohue to conclude plaintiff's complaint failed to present a justiciable controversy.83

3. Judicial Reluctance at the Post-Secondary School Level
   a. Traditional Claims Against Colleges and Universities

   Historically, student claims against colleges and universities have fallen into a few broad categories. Students have most often turned to the judiciary for relief for injuries resulting from disciplinary or academic decisions made by post-secondary institutions.86 Typical examples include a student alleging denial of an academic right, such as dismissal for poor grades,87 or allegations that an institution engaged in improper disciplinary action, such as suspension for cheating.88

81. Id. at 834.
82. Id.
83. Id. at 836.
84. See, e.g., Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir.), cert. denied, 368 U.S. 930 (1961) (disciplinary decisions of a public college were subject to the Fourteenth Amendment Due Process Clause). The court held that students expelled for participating in off-campus demonstrations were denied due process when they were neither given notice of the charges against them nor afforded a hearing. Id. at 158-59; see also Goss v. Lopez, 419 U.S. 565 (1975). Dixon is widely recognized as the first case in American jurisprudence to constrain the previously unfettered discretion universities exercised over students. Gerard A. Fowler, The Legal Relationship Between the American College Student and the College: A Historical Perspective and the Renewal of a Proposal, 13 J.L. & Educ. 401, 408-09 (1984); Donald L. Reidhaar, The Assault on the Citadel: Reflections on A Quarter Century of Change in the Relationship Between the Student and the University, 12 J.C. & U.L. 343, 346 (1985); see Note, Judicial Review of the University-Student Relationship: Expulsion and Governance, 26 Stan. L. Rev. 95, 96, 98, 99 (1975) (noting that prior to 1961, courts almost unanimously upheld the expulsion of students from both private and public colleges).
86. See Fowler, supra note 84, at 401.
88. Id. The authors conclude that notwithstanding the "notion of judicial non-interference in college affairs," students enrolled in public colleges are afforded due process protection in regard to disciplinary and academic matters, albeit to a lesser extent with
b. Educational Malpractice Claims

College students pursuing pure educational malpractice claims, like their primary and secondary school counterparts, allege denial or deprivation of a certain quantum of substantive educational benefits. Unlike their counterparts, however, college students premise educational malpractice actions not only on tort but other substantive theories as well—principally breach of contract and misrepresentation. This has not, however, translated into more favorable treatment. The judiciary, relying on the policies established in cases involving claims against primary and secondary academic institutions, has refused to recognize educational malpractice however framed as a viable claim against colleges and universities.

i. Quasi-Educational Malpractice

Initially it should be noted that pure educational malpractice claims against institutions of higher education are notable for their paucity. Pure educational malpractice claims require a court to engage in an evaluation of the quality of the academic instruction provided by an institution. At the post-secondary level, these claims are distinguished from those which in form may appear to allege educational malpractice but in substance allege student dissatisfaction tangential to the substantive quality of the educational process. These other cases involve claims analogous to those asserted in the Hoffman and B.M. category of educational malpractice actions. Thus, they can properly be denominated as quasi-educational malpractice cases since the essence of plaintiffs’ actions are peripheral to the substantive quality of education provided by colleges and universities.\(^{89}\) Differentiation between pure and quasi-educational malpractice dispels any illusion that courts exhibit a greater willingness to recognize educational malpractice claims brought against colleges and universities. The differentiation illustrates that courts have had very few occasions to address the question of educational malpractice at the post-secondary level. In addition, the characterization of a claim often impacts the ultimate resolution of the suit.

Quasi-educational malpractice claims at the post-secondary level respect to the latter. Id. at 220, 227-29. Professors Latourette and King also conclude that relying upon contract principles, private college students achieve the same, if not greater, due process protections afforded public college students. Id. at 231.

Two other categories of claims beyond the scope of this paper are commonly asserted against post-secondary institutions: those by handicapped and those by minority students asserting discriminatory treatment. Fowler, supra note 84, at 401.

89. The "quasi" designation may be applied to cases that arise in both factual contexts—the primary/secondary and post-secondary school levels—because of the indirect nature of the challenges to substantive adequacy of the education. It should be noted, however, that these factual settings produce different forms of student dissatisfaction and accordingly different types of claims. The discussion below explains that quasi-educational malpractice claims against colleges typically involve allegations of breach of express contractual commitments and abuse of academic discretion. As discussed above, B.M. and Hoffman are the paradigmatic quasi-educational malpractice claims at the primary and secondary school levels.
typically include those in which students allege institutions breached an express contractual commitment or exercised academic discretion unfairly. For example, in *Dizick v. Umpqua Community College*, plaintiffs who enrolled in a welding technology program alleged that, contrary to representations contained in the college's course catalogue, certain courses were not offered and certain materials were not available for their use. As a result, plaintiffs asserted that they were inadequately prepared to enter the marketplace as welders upon completion of the one-year program. They further argued that this inadequate program was contrary to representations set forth in the school catalogue.

The Oregon Court of Appeals framed the dispositive issue as whether the promised level of proficiency could be achieved without the practical usage and training. Concluding that to make such a determination would intrude upon the state's discretionary functions, the court rejected plaintiffs' claim on grounds that such a decision should be made by the legislature and not the judiciary. At the same time, the court emphasized that a different result might be warranted if the institution had breached a specific promise to include practical training in its welding curriculum.

Even though the court made no reference to educational malpractice, such a characterization implicates the adequacy or quality of the academic offerings. The court's transformation of what in essence was a promissory fraud action into one for educational malpractice is underscored by the following statement: "The method of instruction and course content obviously involve complex judgmental decisions by college officials. A jury verdict here is tantamount to a direction to the college to provide practical use training as part of the curriculum for the courses offered in the catalog." Thus, the court of appeals characterized plaintiffs' educational malpractice claims as a challenge of the sufficiency of the courses offered to adequately educate the students. In actuality, however, plaintiffs' dissatisfaction arose not from the content of the course offering but the failure of the college to offer what it had previously represented.

The Oregon Supreme Court correctly adopted this characterization in reversing the lower court. Quoting from the dissent at the court of appeals, the supreme court stated:

While I agree that an action based on the failure of the college

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91. *Id*.
92. *Id*.
93. *Id* at 537.
94. The court also ruled that the college was immune from tort liability for the alleged misconduct. *Id* at 539. Disagreeing with this characterization, the dissenting judge viewed the cases as turning on what specific representations were made regarding the machines which would be available, not on the level of proficiency plaintiffs would attain from their participation in the program. *Id* (Schwab, C.J., dissenting).
95. *Id* at 538.
96. *Id* at 537.
to include certain courses in the curriculum or teach certain techniques in the courses would be barred by governmental immunity, I see no relevance to that position in this case. The plaintiff sued on account of statements made to him in order to induce his enrollment.

The Oregon Supreme Court concluded that sufficient evidence was introduced to substantiate a case of promissory fraud.

Woodruff v. Georgia provides another illustration of a quasi-educational malpractice case since it arose in an academic context but failed to require the court to evaluate the quality of the education in order to reach a decision. There, a student alleged inter alia that the university negligently supervised her graduate studies program. Couching a claim in this manner suggested a pure educational malpractice claim hinging on the failure of a student’s instructors to provide the guidance necessary for her to benefit academically. The gist of plaintiff’s lawsuit, however, was that certain of the university’s professors refused to submit recommendations required for her to proceed from a masters to a doctoral program of study. Thus, the central issue in Woodruff was whether the academic decision rendered by the university violated plaintiff’s due process rights or, as stated by the court, whether relief could be granted for alleged impropriety in teachers’ academic assessment of plaintiff’s work.

The same quasi-educational characterization can be given to Smith v. Ohio State University. There, a graduate student sued the university on theories of negligence and breach of contract alleging that defendant failed to provide timely advice with respect to the researching and drafting of his master’s thesis. Once again, despite the plaintiff’s couching of his claim, the heart of the action was unrelated to the nature, quality or adequacy of the education defendant conveyed to plaintiff.

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98. Id. at 447 (citation omitted).
99. Id. at 445.
100. 304 S.E.2d 697 (Ga. 1983).
101. Id. at 698.
102. Id.
103. Id. at 699.
105. Id. at 859.
106. See also Chevlin v. Los Angeles Community College Dist., 260 Cal. Rptr. 628 (Cal. Ct. App. 1989). In Chevlin, the plaintiff, who enrolled in a nuclear medicine technology program offered by the defendant community college, was dismissed allegedly due to her poor performance in the program. Plaintiff argued that her dismissal resulted in part from the college’s failure to perform its duties including supervising and training her. Id. at 631. The court characterized plaintiff’s claim as one for educational malpractice and declined to hold the district liable for the reasons set forth in . Despite the court’s characterization of the claim as one for educational malpractice, the gist of the action appears to have been wrongful dismissal and thus called into question whether the district had properly exercised its academic discretion. See also Abbaiia v. Hamline Univ. Sch. of Law, 258 N.W.2d 108 (Minn. 1977) (in addition to alleging wrongful dismissals, student alleged breach of contract).

In Iannelli v. University of Bridgeport, No. 2-748-100009, Second Circuit Court, County of Fairfield at Bridgeport (Aug. 22, 1974), plaintiff alleged the content of the course differed from the description set forth in the school bulletin which plaintiff had relied on in deciding to enroll in the course. Plaintiff’s allegations appeared to sound in
ii. Pure Educational Malpractice

A survey of the few pure educational malpractice cases at the post-secondary educational level reveals a strong judicial disinclination to sustain such claims in tort. In rejecting educational malpractice as a cause of action at this level, the judiciary has relied on the policy justifications developed by courts which refuse to embrace educational malpractice in the primary and secondary school context.

In Moore v. Vanderloo, an educational malpractice action arose out of unique circumstances. The action was asserted not by a student of the defendant but by a patient of a graduate of a chiropractic college. The plaintiff alleged that her injuries could have been avoided if the college had properly instructed its former student on the risks attendant to certain techniques. The court viewed plaintiff's claim as implicating the quality of the education provided, thereby creating an issue of educational malpractice. The court began its analysis of the educational malpractice issue by acknowledging the differences between the case sub judice and others in which educational malpractice was at issue. The court noted that most of the other cases involved claims by students against public school districts at the primary and secondary school level. Distinctions between various types of educational malpractice cases did not militate against adhering to the authority created by and policies articulated in those cases. In concluding that there was no justiciable controversy, the court adopted the rule of law established in cases such as Peter W. and Donohue and the policy justifications set forth therein.


In Ross v. Creighton Univ., 740 F. Supp. 1319, 1331 (N.D. Ill. 1990), the court noted that a different result would ensue if plaintiff could establish breach of a specific contract provision. In the court's view such a scenario does not implicate educational malpractice. 107. 386 N.W.2d 108 (Iowa 1986).

108. Id. at 115.

109. Id.

110. According to the court, educational malpractice claims arise out of a limited number of factual contexts and can be placed into three categories: (1) claims alleging a public school district breached a duty to teach a student basic skills; (2) cases involving negligent evaluation or placement of a public school student; and (3) a case involving a physician alleging he committed malpractice due to inadequate supervision. Id.

111. Id.

112. Id. at 114.

113. First, the court was persuaded that the absence of a standard of care by which to measure the defendant's conduct militated against imposing a duty. It deemed itself unprepared to determine what a reasonable chiropractic institution should have taught its students. Id. The court credited Peter W. as establishing a justification for not recognizing an educational malpractice cause of action. Id. Second, the court relied on the perceived inherent uncertainty in determining proximate causation in educational malpractice suits. Id. Quoting from Donohue, the court stated "[w]e agree with the New York Court of Appeals' observation that although it may assume too much to conclude that proximate cau-
The policies of Peter W. and Donohue were also adopted by the court in Swidryc v. Saint Michael's Medical Center, which involved an educational malpractice claim arising out of facts similar to those in Moore. Plaintiff, who had been sued for medical malpractice, alleged defendant failed to train him adequately during his medical school residency. The critical issue was whether a physician may assert a claim for educational malpractice against his residency program. Noting the factual differences between the matter before it and cases such as Peter W., the court concluded that the same policy concerns expressed in those cases applied to the educational malpractice claim asserted in this particular context. The court went on to identify additional public policy considerations specific to the facts before it. The court expressed concern that recognition of plaintiff's claim would result in: (1) unwarranted judicial intervention into the day-to-day academic decisions of a graduate medical school; and (2) an increased judicial administrative burden which would arise if physicians were permitted to sue their medical school every time they were sued for medical malpractice.

Wilson v. Continental Insurance Co. established the precedent, later relied upon by the Ross court, that educational malpractice claims at the post-secondary level fail to present justiciable controversies. In Wilson, a former law student initiated a negligence action against Marquette University. Wilson alleged he suffered serious mental problems resulting from his participation in a mind-control program aimed towards minority students entering the university's law school with lower admissions standards than white students. He further alleged that the law school coerced students into participating in the program (by giving special grading consideration to participants) despite the program's adverse recommendation from the university's counseling center. The court focused on the reasonable foreseeability of the risk of harm and
concluded defendant could not be held liable for offering a course and failing to discover the possible adverse psychiatric and psychological effects on particular students.\textsuperscript{125} The court further stated that it was not prepared to impose a duty on schools to conduct psychiatric or psychological evaluations of students in order to ascertain possible negative susceptibility to particular educational offerings. The court enunciated the following policy considerations as further support for its holding:

\textbf{[B]ecause of the demands society places upon schools this court will not promote a legal doctrine which would require educational systems to litigate every suit claiming negligence in the selection of curriculum, teaching methods, teachers or extra curricular activities. To rule otherwise would subject schools to constant harassment in the courts. We cannot foist such an unreasonable burden upon our schools without being fearful of the irreparable harm that might be done to public and private education.}\textsuperscript{126}

Even though the court made no reference to educational malpractice, the above quoted statement is a reiteration of the fear of litigation rationale relied upon by courts refusing to impose a duty on schools.\textsuperscript{127}

In \textit{Wickstrom v. North Idaho College},\textsuperscript{128} a group of students asserted a tort claim against the institution for alleged failure to educate them as promised in the school bulletin. The basis for the claim was that the quality of provided education varied from the quality of education the students believed to be promised in the school bulletin.\textsuperscript{129} Due to the students' non-compliance with the notice provision of the state tort claims act, their tort action was dismissed.

\textit{Wickstrom} is nevertheless notable for dicta stating that, notwithstanding dismissal of the tort action, plaintiffs could state a viable breach of contract action if evidence demonstrated that the defendant failed to comply with the terms of the implied contract between the college and the students.\textsuperscript{130} As an illustration of such a breach, the court stated that "if certain fundamentals of the course necessary to attaining qualification as an 'entry-level journeyman' were not even presented in the course, such could be a breach of the implied contract between the college and the students."\textsuperscript{131} The court noted that "fundamentals" might include the number of days or hours required to complete the subject course. The court provided this illustration, no doubt, to ameliorate concerns that a plaintiff might attempt to rely on this statement to pursue an educational malpractice claim under the guise of a breach of con-

\textsuperscript{125} \textit{Id.} at 684.
\textsuperscript{126} \textit{Id.} at 686.
\textsuperscript{127} Note also that plaintiff's claims are analogous to those in which students at the primary and secondary levels allege negligent evaluation and placement.
\textsuperscript{128} 725 P.2d 155 (1986).
\textsuperscript{129} Plaintiff's specific allegation was that, contrary to statements in the school bulletin, they were not qualified as entry level journeymen upon successful completion of the course of study. \textit{Id.} at 156.
\textsuperscript{130} \textit{Id.} at 157.
\textsuperscript{131} \textit{Id.}
tract action. In this regard, the court added that educational malpractice claims implicate subjective factors such as teaching methodology.\footnote{Id. at 157-58.} On the other hand, the objective nature of the fundamentals identified by the court did not implicate the policy considerations pertinent to educational malpractice suits.\footnote{Id.}

A strongly worded dissent disapproved of the majority's attempt to distinguish a breach of contract action from an educational malpractice claim. After summarizing cases rejecting educational malpractice claims, the dissent acknowledged that a breach of contract action might lie against an educational institution under limited circumstances which would not involve the quality or adequacy of the instruction provided by a school.\footnote{Id. at 160 (Donaldson, C.J., dissenting). The dissent gave two illustrations of when a breach of contract action would be distinct and clearly distinguishable from an educational malpractice action under the guise of a contract claim. One illustration occurs when a college accepts tuition from a student but provides no educational services. Peretti v. State of Mont., 464 F. Supp. 784 (D. Mont. 1979), is a case that appears to fall into this category. There the state terminated an aviation technology program after plaintiff had been enrolled in the program for three quarters. The program's elimination precluded plaintiffs from completing their training and rendered the three quarters of course work completed of dubious value. Id. at 786. Ruling in favor of plaintiffs, the court found the existence of an implied contract that plaintiffs would be given an opportunity to complete their training if they enrolled in the aviation technology program. Id. at 787.}

The other illustration provided by the dissent occurs when the contract obligates the educational institution to complete certain services and it fails to comply with this obligation such as in Zumbrun v. University of S. Cal., 101 Cal. Rptr. 499 (Cal. Ct. App. 1972). Zumbrun arose out of a professor's early termination of a course—as an anti-war protest, he refused to give all scheduled lectures and to give a final examination. Id. at 502. Plaintiff alleged deprivation of her education and injuries resulting therefrom. Id. After characterizing the student/university relationship as contractual in nature, the court held that the university had breached its contractual obligation to give a course that consisted of a certain number of lectures and a final examination. Id. at 504-05. Thus, the true essence of the complaint went not to the quality of the education provided but rather to defendant's failure to provide that which was promised.

Similarly in Stad v. Grace Downs Model and Air Career Sch., 319 N.Y.S.2d 918 (N.Y. Civ. Ct. 1971), the court held that a career training school breached a promise of a guarantee of job placement which was contained in its implied contract with plaintiff. \footnote{Id. at 922.} The quality of the education provided by a post-secondary institution was also attacked in Huckabay v. Netterville, 263 So.2d 113 (La. Ct. App. 1972). A law school
confronted with this issue at the primary and secondary school levels. In so doing, these courts have not made an independent assessment of whether the differences in the factual circumstances warrant reaching a different result. Moreover, they have not undertaken a critical analysis of the soundness of the policies on which educational malpractice claims have been denied.

B. **Examining Public Policy Considerations**

Peter W. Donohue and their progeny clearly illustrate that courts have uniformly rejected a cause of action for educational malpractice.\(^{138}\) Existing precedent also make apparent that the foremost obstacles to plaintiffs asserting educational malpractice claims are concerns such as establishing a duty of care, the courts' perceived inability to arrive at a standard for assessing breach of that duty and demonstrating causation.\(^{139}\) In other words, the question of whether academic institutions owe a duty to impart a minimum level of proficiency\(^{140}\) has been analyzed by the judiciary as a question of law dependent on public policy considerations.\(^{141}\) In refusing to impose a duty on educators, courts effectively conclude that policy considerations militate against imposing such a duty.\(^{142}\) The following examination reveals, however, that these and other policy concerns identified by courts cannot withstand critical evaluation.

1. **Inability to Create a Standard of Care**

A plaintiff asserting a negligence claim must show: (1) the existence of a legally recognized duty of care on the part of the defendant; (2) a

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\(^{138}\) Graduate, who had failed a state bar examination on three occasions, alleged that his failure resulted from the inferior education he received from Southern University School of Law. *Id.* at 114. The court was able to dispose of the case without making a determination of the ultimate issue. It upheld the lower court dismissal of the action on grounds that there had been no legislative waiver of immunity, which would permit the action to go forward against the named defendants. *Id.* at 116. The court in reaching this result characterized the action as one grounded in tort rather than contract.

In Beaman v. Des Moines Area Community College, No. 158332, Polk County, Iowa (Sept. 28, 1976), plaintiffs asserted a negligence action against the community college. Their action arose out of defendant's alleged negligent failure to comply with standards and guidelines regarding the qualifications of instructors and classroom equipment. Assessing the case as one presenting a novel legal issue, the court held in favor of defendant due to plaintiffs' inability to establish the duty element of a negligence claim. In this regard, it relied on the policy arguments stated by the court in Doe v. San Francisco Unified Sch. Dist., 131 Cal. Rptr. 854 (Cal. Ct. App. 1976), the intermediary opinion in *Peter W.*

\(^{139}\) Collis, *supra* note 35, at 8 (concluding no plaintiff has prevailed in a pure educational malpractice claim); Funston, *supra* note 37, at 750; Butler, *supra* note 50, at 609 (stating that only one court has recognized educational malpractice as a viable cause of action against public educators); Wilkins, *supra* note 36, at 431. The term "pure" denotes suits premised on academic negligence in contrast to suits premised on theories such as fraud, contract, or violation of statutory or constitutional provisions.

\(^{140}\) See Cohen, *supra* note 35.

\(^{141}\) W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 37, at 236 (5th ed. 1984); Blackburn, *supra* note 140, at 119-20; McBride, *supra* note 45, at 484.

\(^{142}\) McBride, *supra* note 45, at 484.
breach of that duty by the defendant; (3) that the breach was the proximate cause of plaintiff's injury; and (4) injury to plaintiff. Thus, assuming educators owe a duty of care to students, a standard of care must be developed in order to determine a breach of the duty. The perceived impossibility of establishing such a standard of care has been emphasized by courts refusing to recognize educational malpractice claims. The Peter W. court articulated this concern stating: "We find in this situation no conceivable 'workability of a rule of care' against which the defendants' alleged conduct may be measured . . . ."

Apprehension over the feasibility of establishing a workable standard of care is somewhat justified due, in large part, to the amorphous nature of the education process. Educators often disagree as to pedagogical techniques employed in the educating process as well as the content of instruction comprising the education process. Since a breach of the standard of care in cases involving professional malpractice is established by expert testimony, critics of educational malpractice claims assert that this lack of consensus results in the inability of experts to provide an applicable standard of care.

Notwithstanding the merit of judicial concern over the inevitable difficulties associated with developing and evaluating a standard of care, courts deciding educational malpractice claims have made no serious effort to create such a standard. Courts have not made an in-depth analysis of what they have come to consider the inherently impossible task of developing a standard of care to measure an educator's breach of duty. The resulting judicial approach automatically forecloses the possibility of assessing whether, in a given situation or context, a workable standard of care can, in fact, be devised. This policy concern,

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143. KEETON ET AL., supra note 141, at 164-65.
146. Id.
148. KEETON ET AL., supra note 141, at 188-89.
149. One commentator articulated this argument: "In medical malpractice cases, an expert witness can take the stand and provide evidence on the correct and accepted standard of performance to which the particular doctor should have adhered. No such expert can offer a single clear-cut educational standard for the teacher to follow." Blackburn, supra note 140, at 127.
150. Foster, supra note 144, at 190-91.
151. Id. at 191; Collingsworth, supra note 147, at 489 (arguing the Peter W. court should have attempted to define a standard of care).
152. Foster, supra note 144, at 191.
153. Id. One advocate of imposing a duty of care on educators suggests that courts' conclusions regarding the standard of care are based on dubious assumptions. First, it is assumed without any deliberation that the appropriate standard of care is that of the reasonable man on the street and not a standard drawn from the
therefore, becomes a convenient justification for a blanket rule of non-liability.

Moreover, the judiciary has exaggerated the ambiguous nature of the education process in buttressing its conclusion that a standard of care cannot be devised.\textsuperscript{154} Despite differences as to pedagogy, it is likely that experts could agree on the basic goals of education as well as the most effective methods of teaching.\textsuperscript{155} In addition, a well-developed body of law involving professional malpractice in other areas is available to assist the judiciary in devising a model standard of care for educational malpractice.\textsuperscript{156}

2. Difficulty of Establishing Causation

Intertwined with the concern of developing a standard of care is the judiciary's perceived difficulty of establishing causation. Although courts in educational malpractice cases rarely reach the question of causation, they nevertheless identify it as another consideration militating in favor of non-recognition of educational malpractice claims. The argument underlying this policy concern is that a school's negligence is but one possible cause of a student's academic failure.\textsuperscript{157} In \textit{Donohue}, the court identified such factors as the "student's attitude, motivation, temperament, past experience and home environment" as playing critical roles in the process of learning.\textsuperscript{158}

Indeed, the broad range of factors which potentially contribute to a student's educational failure present a serious obstacle for a plaintiff asserting an educational malpractice claim. Nevertheless, the law does

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professional or occupational group to which educators belong. Secondly, it is assumed that if there exists no consensus about how best to engage in or pursue a certain activity, about whether the activity should be undertaken at all or about the goals of the activity, then there can be no standard of care.

\textit{Id.}

\textsuperscript{154} Collingsworth, supra note 147, at 494.

\textsuperscript{155} Foster, supra note 142, at 221 (remarking most educators attest the sufficiency of their knowledge and experience to determine whether teaching methods, practices or policies are unacceptable). Also, if within a particular field there are various schools of thought, a professional's conduct is judged in accordance with the standard common to the field to which he or she subscribes. Sherman, supra note 12, at 680.

\textsuperscript{156} Collingsworth, supra note 147, at 496; see also Foster, supra note 144, at 224-26 (suggested ways to establish negligent conduct by an educator); Blackburn, supra note 140, at 126 (suggesting an analogy can be drawn to the standard of care in medical malpractice cases that requires physicians to "exercise the care and skill ordinarily exercised by other members of the profession"); Wilkins, supra note 36, at 457 (arguing the courts in these cases, as in other professional negligence cases, will avail themselves of highly qualified expert witnesses to both establish and assess the standard of care).

\textsuperscript{157} The \textit{Peter W.} court expressed its concern with the plaintiff's likelihood of establishing causation:

Substantial professional authority attests that the achievement of literacy in the schools, or its failure, are [sic] influenced by a host of factors which affect the pupil subjectively, from outside the formal teaching process, and beyond the control of its ministers. They may be physical, neurological, emotional, cultural, environmental; they may be present but not perceived, recognized but not identified.

\textit{Peter W.}, 131 Cal. Rptr. at 861.

\textsuperscript{158} Donohue v. Copiague Union Free Sch. Dist., 391 N.E.2d 1352, 1355 (N.Y. 1979) (Wachtler, J., concurring).
not require that a defendant's conduct be the sole cause of the plaintiff's injury in order to establish the causation element in a negligence cause of action. The plaintiff is only required to make a showing that the defendant's conduct was a substantial factor in causing the particular injury.\textsuperscript{159} "The test for causation is one of significance, rather than of quantity."\textsuperscript{160} In short, the issue of causation is one of proof\textsuperscript{161} and, as such, courts should not rely upon it as a rationale to automatically reject educational malpractice claims.

It is one thing to recognize that establishing cause in fact in many educational malpractice situations may be difficult and that, in a particular case, the difficulties may prove insurmountable. It is quite another thing to conclude that merely because difficulties may be encountered in showing causation no educational malpractice actions must be entertained and the defendant, as a consequence, should be relieved from liability.\textsuperscript{162}

In summary, the resolution of the standard of care and causation issues poses certain difficulties which, in a particular case, would bar recovery. Resorting to these difficulties as a rationale for adopting a broad rule of non-liability, however, is totally unsatisfactory inasmuch as courts conveniently dispose of educational malpractice actions without assessing the interests of the alleged victims. Finally, this approach precludes a case-by-case determination of educational malpractice claims and the possibility of recovery by a student who could otherwise establish a standard of care and causation.\textsuperscript{163}

3. Non-Interference Premised on Judicial Incompetence

The judiciary buttresses its refusal to recognize a tort action for educational malpractice by pointing to a policy of non-interference in matters of education. This policy is premised on the belief that courts lack the expertise to formulate workable standards for teaching and learning\textsuperscript{164} or to address the types of complex educational issues inevitably involved in educational malpractice suits.\textsuperscript{165} This argument serves as a
surrogate for the basic policy consideration: the legitimacy of the judiciary to participate in matters of educational policy.\textsuperscript{166}

As is true of policy concerns relating to causation and standard of care, the courts exaggerate the lack of judicial expertise rationale as a justification to reject educational malpractice claims.\textsuperscript{167} This argument loses its force in view of judicial involvement in the areas of medicine, law, accounting, psychiatry and other professional fields where courts are willing to review policy making-activities.\textsuperscript{168} Moreover, courts intercede in matters requiring the assessment of the quality of educational programs and substantive educational issues such as those in desegregation cases. For example, courts must evaluate the quality of education in racially segregated schools and, in financing cases, assess the impact financing has on the quality of the education meted out.\textsuperscript{169}

This rationale also rests on the unsound premise that those with special expertise should be afforded absolute deference to safeguard the various interests which the law protects.\textsuperscript{170} Although the "formulation and implementation" of educational practices and policies are best left to school teachers and administrators, courts should not afford total deference and abandon the problem of educational malpractice to educators.\textsuperscript{171}

4. Excessive Litigation

The final specific policy concern influencing courts is the fear of adverse consequences to the educational process if educational malpractice causes of action are legally recognized. This concern has typically been expressed in terms of the potential imposition of unlimited liability on school systems.\textsuperscript{172} Those who agree with this concern argue that recognizing an educational malpractice cause of action would burden schools with substantial damage awards and further divert resources available to provide education.\textsuperscript{173} In other words, courts fear a flood of claims, many of which would be either frivolous or feigned.\textsuperscript{174} The

\textsuperscript{166} Klein, supra note 147, at 37.

\textsuperscript{167} Id. at 38.

\textsuperscript{168} Id. at 40; John Elson, A Common Law Remedy for the Educational Harms Caused by Incompetent or Careless Teaching, 73 NW. U. L. Rev. 641, 670 (1978) (suggesting the difficulty in understanding issues related to educational malpractice is likely to be less than that encountered in determining issues involved in complex cases such as antitrust, patent infringement and products liability).

\textsuperscript{169} Robert H. Jerry II, Recovery in Tort for Educational Malpractice: Problems of Theory and Policy, 29 Kan. L. Rev. 195, 203 (1981); Collins, supra note 35, at 367 (the judiciary has decided matters in the education sphere ranging from school finance, expulsion and discrimination to teacher incompetency and dismissals); Klein, supra note 147, at 38; McBride, supra note 45, at 489; Wilkins, supra note 36, at 440.

\textsuperscript{170} Elson, supra note 168, at 669.

\textsuperscript{171} Id. at 677-78.

\textsuperscript{172} Funston, supra note 37, at 793; McBride, supra note 45, at 486 (stating the potential expense to public schools is another reason for denying educational malpractice claims).

\textsuperscript{173} Funston, supra note 37, at 801; Klein, supra note 147, at 36, 41; McBride, supra note 45, at 492.

\textsuperscript{174} Funston, supra note 37, at 793.
court in *Peter W.* summarized this objection as follows:

To hold them to an actionable “duty of care,” in the discharge of their academic functions, would expose them to the tort claims—real or imagined—of disaffected students and parents in countless numbers. They are already beset by social and financial problems which have gone to major litigation, but for which no permanent solution has yet appeared . . . . The ultimate consequences, in terms of public time and money, would burden them—and society—beyond calculation.175

Despite the legitimacy of this concern, justice should not be denied and wrongs should not go uncorrected simply because of an increase in litigation.176 It is inappropriate for a court to deny a meritorious claim due to uncertainties related to how such claims will be handled or because such claims will lead to the filing of other meritorious claims.177 In addition, the time and expense of such litigation—attorneys fees, expert witness fees and court costs—render it unlikely that a flood of litigation would ensue if this cause of action was given recognition.178 Moreover, imposing liability for educational malpractice might encourage institutions “to develop . . . effective internal procedures for the fair out-of-court resolution of conflicts over . . . educational injuries.”179

C. Policy Concerns in the Student-Athlete/University Context

The foregoing criticism of the policy reasons given to reject educational malpractice actions apply with equal, if not greater, force in the student-athlete/university context. First, the types of misconduct alleged by student-athletes do not in fact challenge educational methods.180 Rather, student-athletes complain of active and passive conduct

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176. Collingworth, *supra* note 147, at 504 (arguing a fear of increased litigation does not justify leaving a deserving plaintiff without a remedy); Wilkins, *supra* note 36, at 439; Woods, *supra* note 144, at 395.

One educational malpractice critic disagrees and argues that these generalized objections to the excessive litigation rationale lose their muster when particularized to the educational malpractice context. Funston, *supra* note 37, at 795-96. Professor Funston asserts that these critics overlook the sheer number of potential litigants if educational malpractice becomes a viable cause of action. *Id.* at 796. *But see* Foster, *supra* note 144, at 195 (arguing there is a lack of empirical evidence to support such a conclusion). This conclusion can only be supported if there is a substantial number of successful malpractice claims, which is an unlikely result given the reasons previously discussed. Professor Foster also attempts to discredit this concern by arguing that educational institutions are in a considerably better position than students to distribute the losses resulting from educational malpractice. Foster notes that institutions can shift the losses to the public through taxes or procure liability insurance. *Id.*

177. Collis, *supra* note 35, at 384; accord William L. Prosser, *Law of Torts* 51 (1983) (“It is the business of the law to remedy wrongs that deserve it, even at the expense of a ‘flood of litigation,’ and it is a pitiful confession of incompetence on the part of any court of justice to deny relief on such grounds.”).


by colleges and universities impeding their ability to acquire an educational opportunity. Improper conduct appears with failing to provide sufficient study time or independent and satisfactory counseling and tutoring, with disregarding student-athletes' progress towards education, with channeling student-athletes into classes which lack substantive education merit and with passing student-athletes to higher levels to maintain their academic eligibility. 181

The above-described conduct also assists in establishing the causation element of negligence that presents a significant evidentiary hurdle that the student-athlete must traverse. 182 The evidentiary burden arising from the necessity of establishing causation is justifiable inasmuch as the student-athlete shares the responsibility for his or her education. 183 Nevertheless, the joint nature of the responsibility does not lead to an inescapable conclusion that a causal connection cannot be established between the university's conduct and its failure to afford the student-athlete an educational opportunity.

The principle that causation can be established notwithstanding the existence of several contributing factors is equally applicable to this context. 184 Therefore, to establish causation, a court would be required at a minimum to focus on two categories of conduct—that of the student-athlete and that of the institution. With respect to the former, the student-athlete would be required to proffer evidence demonstrating an innate intellectual capacity to learn and the motivation, diligence and intention to pursue a course of study, which would result in the acquisition of basic educational skills. 185

Proving that the institution's conduct was a substantial factor in the resulting harm can be accomplished through evidence focusing on several factors including:

1. the breadth of the student athlete's curriculum;
2. the type of guidance offered;
3. the number of absences occasioned by athletic commitments;
4. compilation of exams, papers and assignments;
5. a record of complaints by the student and/or his guardian;
6. the school's standing and reputation in a given athletic sport;
7. evidence of passing grades in courses never attended; and
8. evidence tending to show that the student placed an inordinate degree of trust in the coach and his staff. 186

Evidence related to these and other forms of the institution's conduct

181. See Davis, supra note 1, at 789-90; Sherman, supra note 12, at 679-80 (identifying the types of negligence typically alleged by student-athletes).
182. See Johnson, supra note 7, at 121 (noting the onerous evidentiary burden confronting the student-athlete); Sherman, supra note 12, at 684 (difficulties inherent in establishing causation provide a defense institutions can assert against these claims).
183. Johnson, supra note 7, at 121.
184. See supra text accompanying notes 155-60.
185. See Foster, supra note 144, at 238-39; Johnson, supra note 7, at 121; Sherman, supra note 12, at 684; Michael N. Widener, Note, Suits by Student-Athletes Against Colleges for Obstructing Educational Opportunity, 24 Ariz. L. Rev. 467, 481 (1982).
186. Johnson, supra note 7, at 121; see supra text accompanying note 181 (describing the nature of potential improper conduct by colleges and universities).
will enable the trier of fact to determine the causal connection between the conduct and the student-athlete’s failure to obtain an educational opportunity. Moreover, due to the nature of the alleged harm, creating a standard of care will not constitute an insurmountable task. Whether a university breached its duty of care could be determined by focusing on the above-described conduct. All of these instances of improper conduct are capable of assessment under professional standards commonly used in education such as state accreditation standards and the educational standards the student-athlete’s university has adopted.  

In addition, colleges would not be subjected to the same potential exposure as public schools. First, the duty imposed on universities would be limited to student-athletes and thus would create a smaller pool of possible litigants. Second, the scope of the duty could be defined to balance and protect the interests of the student-athlete and his or her school. Defining the duty as providing an educational opportunity instead of a guarantee would limit the potential liability of the institution. Finally, student-athletes would have to overcome evidentiary obstacles in proving their claims. “In order to succeed in asserting educational malpractice, a student would have to withstand evidence that he or she did not attend class, missed tutoring sessions, failed to complete assignments, showed a non-cooperative attitude, and didn’t [sic] participate in class or tutoring sessions.”

D. Consequences of Focusing on Policy Concerns

The foregoing discussion illustrates the basic weaknesses in policy rationales traditionally employed by courts to justify denial of educational malpractice claims. By adhering to what has become a blanket rule of non-liability for educational malpractice, courts automatically preclude meritorious claims from consideration. This is particularly disturbing given that victims of educational malpractice incur real and measurable injuries. One writer observed:

[Refusal to recognize the cause of action is incompatible with accepted tort principles, and that a cogent theory supporting

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188. Id. at 682.
189. Davis, supra note 1, at 785-86 (discussing the justifications for limiting the university’s duty to student-athletes). The author of a recent student note argues that it is improper to compare public schools to universities. The latter are under no obligation to engage in intercollegiate competition but do so because of the benefits perceived as flowing from college athletics. Since colleges voluntarily create major sports programs to further these objectives, they should not be able to take advantage of the fear of litigation rationale as a shield to potential liability arising out of the manner in which they conduct their sports programs. Sherman, supra note 12, at 682-83.
190. Davis, supra note 1, at 785.
191. Sherman, supra note 12, at 683.
192. Woods, supra note 144, at 395. Commentators have been troubled by the courts’ failure to allow action on educational injuries given the plight of illiterate high school graduates who cannot read at a level sufficient to function in a modern, information-intensive work environment. Klein, supra note 147, at 39-40.
193. Wilkins, supra note 36, at 432.
nonrecognition cannot be articulated within the confines of the accepted principles and the general policies upon which those principles are based. If special policies justifying nonrecognition exist, then that result should be legislatively prescribed, rather than judicially pronounced in a manner that is antithetical to the recognized, traditional tort principles.194

Equally disturbing is that undue reliance on these dubious policy considerations channels the judiciary away from the ultimate issue—whether a particular plaintiff’s interests are entitled to protection against the defendant’s conduct. The remainder of this Article focuses on this critical issue in the context of the student-athlete/university relationship.

In attempting to respond to the ultimate question, the foregoing discussion arguably shows that courts should recognize an educational malpractice action in the student-athlete/university context merely due to the weaknesses of the policy justifications relied on to reject educational malpractice claims. While the weaknesses are clear, this Article goes beyond a criticism of the foregoing policy reasons. Rather, within the confines of traditional tort doctrine and thus independent of these criticisms, the academic interests of student-athletes are deserving of protection against the conduct of their institutions, which deny them an educational opportunity. In other words, traditional tort doctrine, directly or by analogy, provides precedent compelling courts to create a common law duty on the part of colleges and universities to confer an educational opportunity to student-athletes.

III. ESTABLISHING A SOURCE FOR THE DUTY

A duty recognized by law is the threshold element of a negligence cause of action.195 As a general proposition, no duty exists absent a special circumstance.196 This rule of law has been applied to absolve universities from liability to students, although not without exception. Courts demonstrate a willingness to impose a duty on colleges to protect students where a special relationship exists. These circumstances and the justifications for imposing a duty of care are discussed below.

A. Tort Liability of Post-Secondary Institutions to Students

1. Liability Premised on In Loco Parentis?

In the early part of this century, the doctrine of in loco parentis197—

194. Jerry, supra note 169, at 196.
195. KEETON ET AL., supra note 141, at 164-65.
197. The doctrine of in loco parentis originally appeared during the late 18th Century in England as a defense to civil and criminal actions brought by parents against private tutors responsible for administering corporal punishment to students. Id. at 473; see also William M. Beaney, Students, Higher Education, and the Law, 45 Denv. L.J. 511, 514 (1968); Perry A. Zirkel & Henry F. Reichner, Is the In Loco Parentis Doctrine Dead?, 15 J.L. & Educ. 271, 273 (1986) (employing doctrine as a defense to assault and battery actions against teachers).
"in the place of a parent"—defined the student/university relationship. In its fullest form, in loco parentis permitted colleges to not only devise, implement and administer student discipline, but to foster a student's physical and moral well-being. Focusing on this latter notion of the physical welfare of students, consideration was given to whether the authority that permitted colleges to govern student conduct carried with it a correlative legal duty owed by institutions to protect students. Thus, the question arises whether in loco parentis, the paradigmatic model for the student-college relationship, creates a special relationship between students and colleges such that a duty is imposed on the latter to not only exercise control over their students' conduct but, reciprocally, to protect their students' welfare.

Serious doubt has been cast over whether the in loco parentis doctrine ever provided the basis for imposing tort liability on colleges for injuries to students. This uncertainty arises in part from the dearth of reported cases identifying in loco parentis as the theoretical justification for im-

The judiciary developed the notion that surrogate parents such as tutors or schoolmasters possessed the same authority to punish children as the children's parents. Beaneey, supra, at 514. Thus, a school authority had the right to control and discipline the child since the school was viewed as standing in the place of the parent. Jonathan Flagg Buchter, Note, Contract Law and the Student-University Relationship, 48 Ind. L.J. 253, 253-54 (1973); David M. Rabban, Note, Judicial Review of the University-Student Relationship: Expulsion and Governance, 26 Stan. L. Rev. 95, 97 n.15 (1973) (stating in loco parentis transferred the parental discretionary authority to academic institutions).

The doctrine was first applied formally to higher education in Gott v. Berea College, 161 S.W. 204 (Ky. Ct. App. 1915). Victoria J. Dodd, The Non-Contractual Nature of the Student-University Contractual Relationship, 33 Kan. L. Rev. 701, 705 n.35 (1985); Buchter, supra, at 253 n.4; Stamatakos, supra note 196, at 473-74. In Gott the court stated:

College authorities stand in loco parentis concerning the physical and moral welfare and mental training of the pupils, and we are unable to see why, to that end, they may not make any rule or regulation for the government or betterment of their pupils that a parent could for the same purpose. Whether the rules or regulations are wise or their aims worthy is a matter left solely to the discretion of the authorities or parents, as the case may be, and, in the exercise of that discretion, the courts are not disposed to interfere, unless the rules and aims are unlawful or against public policy. Gott, 161 S.W. at 206.

Due to the increasing complexity of modern disputes between students and educational institutions, the judiciary abandoned its reliance on the in loco parentis doctrine. Beaneey, supra, at 518 (explaining that many courts found the doctrine inadequate to provide the foundation for determining the rights of participants in complex university affairs); Dodd, supra, at 705 n.35 (noting that in loco parentis was supplanted in later years by contractual theories since the doctrine was too narrow to resolve the myriad of educational disputes satisfactorily); Buchter, supra, at 254 (stating the limited applicability of the doctrine, as in disputes over academic performance, increased the need for alternative theories).

198. Zirkel & Reichner, supra note 197, at 271.
199. Stamatakos, supra note 196, at 474.
200. Id.
201. Id. at 476 n.21.
203. Brigham Young Univ. v. Lillywhite, 118 F.2d 836 (10th Cir. 1941), has been identified by some as an illustration of a court's reliance on the in loco parentis doctrine to impose liability on a college. In Lillywhite, a student sustained personal injuries resulting from an explosion in a chemical laboratory experiment. Id. at 838. The court relied in part on the plaintiff's student status to impose liability grounded on improper supervision by her instructor. Id. at 840-41. The court reasoned that the university stood in the place
posing liability on a college or university. Moreover, a reexamination of the few cases previously believed to illustrate instances premising a college's tort liability on in loco parentis further challenges the proposition that the doctrine once provided a doctrinal basis for liability for student injuries.

The 1960s saw the demise of the in loco parentis doctrine as students challenged the rigid controls that the doctrine authorized institutions to exert over students' affairs. A subsidiary effect of greater student control of their affairs is that students no longer expect or demand to be protected by universities. Thus, rejection of the doctrine as a basis of the student's parents and owed a duty to protect the student from physical harm. See also Barr v. Brooklyn Children's Aid Soc'y, 190 N.Y.S. 296 (N.Y. Sup. Ct. 1921), where the court acknowledged that a college or university could be held liable for a student's injuries caused by the institution's servant. Id. at 297.


205. A recent scholarly debate addresses the issue of whether the in loco parentis doctrine ever served as a viable theory for imposing tort liability on colleges and universities for negligence. Szablewicz and Gibbs examined three cases, which they contend support the notion that a new in loco parentis doctrine is developing as a basis for imposing tort liability on universities. The authors argue that the extraordinary circumstances under which negligence liability was imposed in these cases can only be explained by virtue of relying on elements of the doctrine of in loco parentis. Id. at 461. Szablewicz and Gibbs contend that:

[I]n each case, the court has struggled with traditional legal theories short of in loco parentis to define the relationship between the student and college. It is clear, however, that none of these theories supports the courts' ultimate decisions. Rather, only something akin to in loco parentis adequately serves to resolve these cases.

Id. Finally, the authors argue that the limited use of in loco parentis as the basis of a tort action against a college or university may have arisen not from the inapplicability of the doctrine but from sovereign immunity, which protected educational institutions from liability. Id. at 455.

A recent student note challenges these assertions. In Stamatakos, supra note 196, the author concludes that, although elements of the doctrine continue to exist (e.g. providing for the health and safety of students), the doctrine of in loco parentis is no longer legally tenable in the college context. Id. at 475. Indeed, the author argues that a close reading of cases such as Lillywhite reveals that the courts failed to specifically utilize the doctrine in reaching a determination of institutional liability. The author further argues that the alternative contract, fiduciary and unitary theories are also inappropriate for determining an institution's tort liability to students. Id. at 476-77.

In the wake of in loco parentis' demise, courts and theoreticians proposed four models of the student-college relationship: constitutional, contractual, fiduciary and 'unitary.' All four models suffer from a systemic deficiency that cripples their use when courts examine institutional tort liability: Not one of the models is designed to adequately define the student-college relationship when student sues college for personal injury. It is no surprise, then, that these models only have been used, if ever, in litigation concerning the college disciplinary rules and regulations, student fees, and facilities use. The models simply do not inform personal injury suits by students against colleges.

Id. at 481.

206. Brodshaw, 612 F.2d at 139-40 (colleges once used the doctrine to impose strict regulations on student conduct but students demanded the right to define and regulate their own affairs).

207. Dodd, supra note 197, at 705 n.35 (concluding that in loco parentis was supplanted by contractual theories); Szablewicz & Gibbs, supra note 204, at 456 (noting that the relationship premised on in loco parentis was replaced by an arms-length relationship between colleges and students); Zirkel & Reichner, supra note 197, at 282 (contractual and constitutional doctrines have replaced in loco parentis as a source of protection for students); Buchtch, supra note 197, at 254 (indicating that courts turned from in loco parentis to the
the exercise of authority carries a corresponding rejection of the doctrine as a basis to impose tort liability on institutions. Therefore, in loco parentis cannot be looked to as precedent or a doctrine to support imposition of a tort duty on universities in favor of student-athletes.

2. Liability Premised on Special Relationships

In the 1970s and 1980s, courts manifested greater willingness to impose tort liability on post-secondary institutions for physical injuries to students. The judiciary, however, has narrowly limited the situations in which a university will be held liable for such injuries. Institutional liability has been limited to those instances where a special relationship exists between a college and a student. It is important to note, however, that the arguably unique relationship between students and colleges is not the basis of the special relationships on which liability has been premised. In other words, courts have turned to special relationships which exist independent of any relationship arising merely from a plaintiff’s status as a student. This judicial attitude has been summarized as follows:

Courts have largely disregarded the fact that the college/university-student relationship is a unique one. The institution is often the center of the student’s life—in addition to classroom education, the institution may provide a place for the student to live and may be the site of many if not all of the student’s extracurricular activities.

Judicial reluctance to recognize a special relationship arising merely out of the student/university relationship is premised on the belief that institutions are not insurers of student safety since students are considered adults capable of caring for themselves.

written contract between students and universities to define the relationship; Stamatakos, supra note 196, at 477 (courts have turned to contract which predated the demise of in loco parentis doctrine as an alternative model).

208. Szablewicz & Gibbs, supra note 204, at 456 (courts reject claims against colleges for negligence which may have been successful under the in loco parentis doctrine).

209. Stamatakos, supra note 196, at 485.


211. Stamatakos, supra note 196, at 485.

212. Miyamoto, supra note 210, at 151-52, 175; Barbara J. Lorence, Note, The University’s Role Toward Student Athletes: A Moral or Legal Obligation?, 29 Duq. L. Rev. 343, 353 (1991) (claims premised on student status have been unsuccessful). One author notes: Thus far, courts have not held institutions liable for extracurricular injuries occurring off campus. Courts have been willing to hold institutions liable for injuries sustained by students in a limited number of cases. This disparity in treatment is largely due to the fact that in an on-campus injury case, the plaintiff can argue that the institution’s status as landowner imposes a duty of care. This duty has been more readily recognized in the higher education context than a duty arising from the in loco parentis doctrine, a duty to supervise, or a duty to control third persons . . .

Stamatakos, supra note 196, at 486-87.

213. Lorence, supra note 212, at 353.

214. Miyamoto, supra note 210, at 151-52.

215. Bradshaw v. Rawlings, 612 F.2d 135 (3d Cir. 1979); Miyamoto, supra note 210, at 162, 175.
Courts have turned to traditionally recognized tort “special relationships” as a basis for imposing a duty on universities to protect the interests of students.\(^{216}\) For example in Peterson v. San Francisco Community College District,\(^ {217}\) the California Supreme Court determined whether a college possessed a duty to protect a student from an on-campus physical assault.\(^ {218}\) The plaintiff alleged that the college's duty arose out of a special relationship between herself and the institution.\(^ {219}\) In holding for the plaintiff, the court first explained that as a general matter a duty might be found where: “(a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation exists between the actor and the other which gives the other a right to protection.”\(^ {220}\) It concluded that the student’s status as an invitee and the college’s status as a possessor of premises created a special relationship sufficient to impose a duty on the latter in favor of the former.\(^ {221}\) Thus, in finding a duty of care on the part of the college, the court turned to a long-recognized special relationship—that between a possessor of land and an invitee.\(^ {222}\)

A similar result was reached in Stockwell v. Board of Trustees of Leland Stanford Junior University.\(^ {223}\) A student sustained personal injuries after being struck in his eye by a bullet fired from a BB gun.\(^ {224}\) The student alleged that the University failed to use reasonable care in maintaining its premises in a safe condition.\(^ {225}\) Evidence presented by plaintiff demonstrated knowledge by the University that the small firearms (including BB guns) were being used in the area where the injury occurred.

\(^{216}\) Miyamoto, supra note 210, at 162. The special relationships sufficient to impose liability are those articulated in the RESTATEMENT (SECOND) OF TORTS § 315 (1965). For example, unlike the argument that a special relationship exists between a postsecondary institution and its students which warrants a duty to control another, the duty arising from an institution's landowner status has clearly been recognized by the courts, as exemplified by Stockwell and Mortiboys. However, the acceptance of the landowner duty in the college and university context has nothing to do with the unique relationship between postsecondary institutions and their students.

Miyamoto, supra note 210, at 173 (citing Stockwell v. Board of Trustees of Leland Stanford Junior Univ., 148 P.2d 405 (Cal. Ct. App. 1944); Mortiboys v. St. Michael's College, 478 F.2d 196 (2d Cir. 1973)).

\(^{217}\) 685 P.2d 1193 (Cal. 1984).

\(^{218}\) Id. at 1195.

\(^{219}\) Id.

\(^{220}\) Id. at 1196 (citations omitted).

\(^{221}\) Id. at 1198.

\(^{222}\) RESTATEMENT (SECOND) OF TORTS § 344 provides in part:

A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons . . . and by the failure of the possessor to exercise reasonable care to (a) discover that such acts are being done or are likely to be done, or (b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.

Id.; accord Richmond v. Ohio State Univ., 564 N.E.2d 1145, 1147 (Ohio Ct. Cl. 1989) (university could be liable to a student by virtue of its status as an occupant of premises and the student’s status as an invitee).


\(^{224}\) Id. at 406.

\(^{225}\) Id. at 405.
notwithstanding signs prohibiting the possession of guns therein.\textsuperscript{226} Relying on the duty of a landowner to protect invitees from dangerous conditions on the premises,\textsuperscript{227} the court reversed the lower court's grant of a nonsuit. As was true in \textit{Peterson}, the court relied on the well-recognized and accepted special relationship between landowner and invitee to impose liability on the University.\textsuperscript{228}  

In \textit{Bearman v. University of Notre Dame},\textsuperscript{229} plaintiff sued the University for injuries sustained after she was knocked down by a drunk after a football game.\textsuperscript{230} The issue on appeal was whether the University owed a duty of care to plaintiff for injuries resulting from the acts of a third party. The court answered affirmatively, holding that the University's duty to plaintiff arose out of the duty of a landowner to protect an invitee from the harmful acts of third persons.\textsuperscript{231}  

Notwithstanding the foregoing illustrations, in the majority of cases involving suits brought by students, courts have refused to impose negligence liability on colleges and universities for injuries students have sustained. Even in denying liability, however, the judiciary has recognized the notion that the existence of a special relationship is a sufficient basis on which to impose duty on colleges and universities. This is illustrated in the leading case of \textit{Bradshaw v. Rawlings},\textsuperscript{232} where the Third Circuit awarded recovery to a college student injured in an off-campus automobile accident, which occurred on his return from a class picnic.\textsuperscript{233}  

The college's liability hinged on whether it owed plaintiff a duty of care.\textsuperscript{234} After discussing the evolution of the student/university relationship and the demise of the doctrine of \textit{in loco parentis}, the court held that, absent a special relationship, plaintiff was incapable of establishing a duty owed by the university to him. The court went on to reject the notion that beer-drinking by under-age college students alone created a special relationship upon which to predicate liability.\textsuperscript{235} By so

\textsuperscript{226} \textit{Id.} at 406.  
\textsuperscript{227} The court characterized the principle that creates the special relationship between a landowner and invitee as follows: "[A] person invited upon the premises of another may recover damages from such owner for injuries received owing to the dangerous condition of the premises known to the owner and not known to the person so injured . . . ." \textit{Id.} at 408.  
\textsuperscript{228} \textit{See also} Mortiboys v. St. Michael's College, 478 F.2d 196 (2d Cir. 1973) (recognizing special relationship of college as landowner and student as invitee as providing foundation on which to establish duty owed by college to student).  
\textsuperscript{230} \textit{Id.} at 1197.  
\textsuperscript{231} \textit{Id.} at 1198. The special relationship relied on by the court to impose a duty on the college is defined in \textit{Restatement (Second) of Torts} § 344 cmt. f (1965). \textit{See also} Nieswand v. Cornell Univ., 692 F. Supp. 1464, 1469 (N.D.N.Y. 1988) (the court refused to recognize a special relationship between a student and a university but found that liability could be based on the university's status as a landowner in operating, maintaining and supervising its dormitories).  
\textsuperscript{232} 612 F.2d 135 (3d Cir. 1979).  
\textsuperscript{233} \textit{Id.} at 137.  
\textsuperscript{234} \textit{Id.} at 138.  
\textsuperscript{235} \textit{Id.} at 142. The court refused to impose such a duty based in part on the substantial burden that would be placed on colleges. Other courts followed the view that liability will not be imposed absent a special relationship. \textit{See} Fox v. Board of Supervisors of La.
concluding, the court denied the existence of a unique special relationship between student and university, which could provide the foundation of a duty of care owed by universities to their students. Nevertheless the court left the door open for liability to be premised on a traditionally recognized special relationship such as that found in section 320 of *The Restatement (Second) of Torts*, which creates a special relationship when a person takes custody of another under circumstances where the other is deprived of his normal power of self-protection.\(^{236}\)

### B. Justifications for Creating Special Relationships

In a notable recent case, *University of Denver v. Whitlock*,\(^{237}\) the Colorado Supreme Court refused to hold a university liable for personal injuries to a student, but recognized that liability could be premised on a special relationship. The court framed the dispositive issue as whether the University owed the student a duty of care to take measures to protect him from the injuries he sustained.\(^{238}\) Differentiating nonfeasance from misfeasance,\(^{239}\) the court held that with the former, liability can

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\(^{236}\) *Bradshaw*, 612 F.2d at 140. *Restatement (Second) of Torts* § 320 (1965) defines the duty of a person having custody of another to control the conduct of third persons: One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal power of self-protection or to subject him to association with persons likely to harm him, is under a duty to exercise reasonable care so to control the conduct of third persons as to prevent them from intentionally harming the other or so conducting themselves as to create an unreasonable risk of harm to him, if the actor (a) knows or has reason to know that he has the ability to control the conduct of the third persons, and (b) knows or should know of the necessity and opportunity for exercising such control.

\(^{237}\) *Bradshaw*, 612 F.2d at 140. *Restatement (Second) of Torts* § 320 (1965) defines the duty of a person having custody of another to control the conduct of third persons: One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal power of self-protection or to subject him to association with persons likely to harm him, is under a duty to exercise reasonable care so to control the conduct of third persons as to prevent them from intentionally harming the other or so conducting themselves as to create an unreasonable risk of harm to him, if the actor (a) knows or has reason to know that he has the ability to control the conduct of the third persons, and (b) knows or should know of the necessity and opportunity for exercising such control.

\(^{238}\) Id.

\(^{239}\) For criticisms of the *Bradshaw* court's holding that the evidence did not support the existence of a special relationship, see Rita Mankovich Irani, Recent Decision, 19 Duq. L. Rev. 381 (1981); Miyamoto, supra note 210, at 165-66; Comment, *The Student-College Relationship and the Duty of Care: Bradshaw v. Rawlings*, 14 Ga. L. Rev. 843, 854 (1980).
only attach if there is a special relationship between the parties, which imposes a duty to act on the defendant.240 Identifying certain recognized special relationships,241 the court noted that underlying the recognition of a duty of care in situations involving a special relationship are the notions of dependence and mutual dependence. The court concluded that student status does not create a special relationship and thus fails to provide the basis to impose a duty on the University.242

Similarly, the court in Beach v. University of Utah,243 in refusing to hold a university liable to a student absent the existence of a special relationship discussed the assumptions that underlie special relationships. According to the court, judicially recognized special relationships arise when one assumes responsibility for another’s safety or when one deprives another of normal opportunities to protect his or her interests.244 The Beach court further stated that at the heart of these special relationships is the idea of dependence by one party upon the other or mutual dependence between them.245 The court concluded that the student/college relationship alone does not constitute a special relationship.246 According to the court, a realistic assessment of the modern student/university relationship—the essence of which is education and not custody—justified the refusal to find a special relationship between colleges and adult students. It found that since the evidence failed to demonstrate a special relationship, the University possessed no obligation to protect or supervise the injured student.247

C. **Is the Relationship Between Student-Athletes and Colleges Special?**

The foregoing discussion leads to the critical inquiry: whether the student-athlete/university relationship has attributes that warrant its

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In determining whether a defendant owes a duty to a particular plaintiff, the law has long recognized a distinction between action and a failure to act—"that is to say, between active misconduct working positive injury to others [misfeasance] and passive inaction or a failure to take steps to protect them from harm [nonfeasance]. . . ." Liability for nonfeasance was slow to receive recognition in the law. "The reason for the distinction may be said to lie in the fact that by 'misfeasance' the defendant has created a new risk of harm to the plaintiff, while by 'nonfeasance' he has at least made his situation no worse, and has merely failed to benefit him by interfering in his affairs."

*Id.* (quoting Keeton *et al.*, supra note 141, § 56, at 373).

240. *Id.* at 58.

241. The court noted that judicially recognized special relationships include "carrier/passenger, innkeeper/guest, possessor of land/invited entrant, employer/employee, parent/child, and hospital/patient." *Id.*

242. In reaching the conclusion that the student/university relationship is not one based on dependence, the court relied on the analysis and policy rationale enunciated in Bradshaw and its progeny. *Id.* at 59-61.

243. 726 P.2d 413 (Utah 1986).

244. *Id.* at 415 (quoting RESTATEMENT (SECOND) OF TORTS § 314A (1964)).

245. *Id.* at 415-16 (quoting RESTATEMENT (SECOND) OF TORTS § 314A cmt. b (1964)).

The concept of dependence as the essence of special relationships was also noted by the court in Baldwin, 176 Cal. Rptr. at 814, where the court refused to impose liability on a college for personal injuries suffered by a student during an accident that occurred in the aftermath of drinking on college grounds.

246. Beach, 726 P.2d at 416, 419.

247. *Id.*
designation as a special relationship. If such a relationship exists, it
arguably provides the basis that the court in *Ross* deemed a prerequisite to
imposing tort liability on postsecondary institutions for failing to pro-
vide student-athletes with an educational opportunity. Judge Nordberg,
in refusing to create a negligence cause of action *sui generis* for student-
athletes, wrote that "a new rule declared through the evolutionary pro-
cess of the common law ought fairly be deduced from existing doc-
trine—something that cannot be said for Ross's claim."248

1. The Misfeasance/Nonfeasance Distinction

In determining whether the student-athlete/university relationship is special, this Article assumes that the institutional conduct of which stu-
dent-athletes complain would constitute nonfeasance. If student-ath-
letes incur emotional and intellectual harm due to failure of colleges and
universities to take affirmative action to provide them with an educa-
tional opportunity, the existence of a special relationship must be
demonstrated in order to impose a duty on these institutions to act.
This is in no way intended to suggest that the alleged improper conduct
cannot be characterized as misfeasance and that a strong case249 does
not exist for imposing tort liability based upon an institution's failure to
exercise reasonable care in carrying out an assumed duty.250 Indeed
the argument can be made that, in the context of educational malpractice
actions by student-athletes, the alleged improper conduct amounts to
both nonfeasance and misfeasance.251 Yet, this Article defines the pur-
ported negligent conduct as nonfeasance in order to focus more directly
on the question of whether a duty exists arising independently of any


249. Student-athletes may argue that the express contractual relationship with the uni-
versity contains an educational commitment on the part of the latter. See *Davis*, supra note
1, at 743. The contract would establish the parameters of the duty. Thus, the university's
failure to use reasonable care in fulfilling its duty would not only constitute a breach of
contract but would also provide grounds for a negligence action. *Keeton et al.*, supra note
141, at 660-61 (noting that American courts have extended tort liability for misfeasance in
contract actions where defective performance results in injury to the promisee and the
misperformance involves a foreseeable, unreasonable risk to the interest of the promisee).

250. Historically, liability is easier to find in cases of misfeasance than those involving

251. *Id.* at 374 (in practice, determining where to draw the line between conduct that is
active misfeasance, and passive nonfeasance, is not easy); *Fowler V. Harper et al.*, *The
Law of Torts*, § 18.6, at 729 (2d ed. 1986) (commenting on the tenuous nature of the
distinction between nonfeasance and misfeasance).

Student-athletes have alleged conduct by their schools that can be characterized both
as active misconduct (misfeasance), and passive inaction (nonfeasance). *Keeton et al.*,
supra note 141, at 373. For example, in his complaint Terrell Jackson alleged that Drake
University failed to provide sufficient study time or independent and satisfactory academic
counseling and tutoring, and disregarded his progress toward an undergraduate degree.
Compl. at 38, *Jackson v. Drake Univ.*, No. CC-84-49942 (Iowa Dist. Polk County, May 7,
1990). Such conduct might constitute nonfeasance. On the other hand, Jackson alleged
conduct that could be characterized as misfeasance such as Drake's requiring plaintiff to
take classes that lacked substantive education merit, and requiring plaintiff to submit
plagiarized papers. *Id.* Similar allegations are contained in the complaint filed by Kevin
duty that may be owed to students by virtue of the express contract. In other words, does traditional tort doctrine provide a basis for imposing liability on universities for failing to provide student-athletes with an educational opportunity independent of the "manifested intent,"\textsuperscript{252} which resides in their express contract?

2. The Nature of the Student-Athlete/University Relationship
   
   a. Express Contractual Relationship

   The student-athlete/university relationship is generally recognized as based upon an express contract.\textsuperscript{253} The Letter of Intent and the Statement of Financial Aid,\textsuperscript{254} which the parties execute, operate as the primary sources of this express contractual relationship.\textsuperscript{255} These documents define the formal relationship between student-athletes and universities and set the parameters of their respective rights and obligations.\textsuperscript{256} For example, by executing a Letter of Intent, a student-athlete commits to attend a particular school and restricts his ability to participate in intercollegiate athletics at other schools.\textsuperscript{257}

   While these documents evidencing the express contract provide some indicia of the essence of the student-athlete/university relationship, they fail to present a complete picture. A complete understanding of this relationship is achieved by examining the circumstances surrounding, and the conduct that manifests during, the performance stage of this relationship.\textsuperscript{258} An analysis of the parties' conduct reveals attrib-

\textsuperscript{252} Keeton et al., supra note 141, at 656.

\textsuperscript{253} Davis, supra note 1, at 769 (citing to cases recognizing, and commentators arguing, that a student-athlete's relationship with his school is contractual).

\textsuperscript{254} For a description of these documents as well as an analysis of their legal effect, see Davis, supra note 1, at 769-72; Michael J. Cozzillio, The Athletic Scholarship and the College National Letter of Intent: A Contract by Any Other Name, 35 Wayne L. Rev. 1275, 1290-92 (1989); Johnson, supra note 7, at 114-16; Widener, supra note 183, at 469-70.

\textsuperscript{255} See Cozzillio, supra note 254, at 1290.

\textsuperscript{256} See Davis, supra note 1, at 777 (arguing that due to the vague expression of institutions' educational commitment to student-athletes, it is appropriate to utilize the duty of good faith and fair dealing as an interpretative tool to define the substance and breadth of this commitment).

\textsuperscript{257} See Cozzillio, supra note 254, at 1290 (student-athlete waives right to participate in sports at another college by executing the Letter of Intent); Davis, supra note 1, at 771 (discussing implications of student-athlete's execution of Letter of Intent).

\textsuperscript{258} The strictly contractual relationship may also evidence a relationship marked by dominance and dependence. See supra text accompanying notes 246-50. The first indicator occurs during the bargaining stage where student-athletes are presented with standard form agreements; the parties do not engage in negotiations over the terms of the boilerplate agreement. In short, universities are in a superior bargaining position with student-athletes and their parents. James V. Koch, The Economic Realities of Amateur Sports Organization, 61 Ind. L.J. 9, 23-24 (1985) (arguing the ability of student-athletes to bargain with their schools is constrained by collusion between and among universities and noting the inability of student-athletes to negotiate the terms of these standard contracts); Alfred D. Mathewson, Intercollegiate Athletics and the Assignment of Legal Rights, 35 St. Louis U. L.J. 99, 74-75 (1990) (recognizing that student-athletes, and those acting on their behalf, are at a bargaining disadvantage with universities); Johnson, supra note 7, at 111 (discussing the inequities in the bargaining process and the superior bargaining position of universities).

It may also be argued that the restrictions placed on student-athletes by the express contract denote not only the inequality of the bargaining process, but are consistent with a relationship of dominance and dependence. Sperber, supra note 2, at 239-40 (identifying
utes—mutual dependence between student-athletes and their institutions with the latter as the dominant party in the relationship—that justify denominating the relationship as special. Therefore, while the contract creates the relationship between student-athletes and their colleges, the duty on the part of the latter can be viewed as arising independently of the implied or express terms of the contract by virtue of the special relationship between them.\footnote{259}

b. Mutual Dependency

A college’s dependency on its student-athletes arises out of the institution’s need for the athletic abilities and services that student-athletes bring to the relationship. In short, colleges depend on student-athletes to provide services that in turn generate substantial revenues from intercollegiate competition.\footnote{260} Student-athletes are dependent on their schools to provide them with an education.\footnote{261} Athletic scholarships enable student-athletes to gain access to the potential academic benefits, which are found at colleges and universities.\footnote{262} Yet the formal attributes of this relationship fail to reflect the pervasive nature of student-athletes’ dependency on their schools. It also creates the illusion of a reciprocal relationship where neither party is in a position of dominance\footnote{263} and obscures the magnitude of the subservience of the student-athlete in this relationship.

c. Institutional Dominance and Student-Athlete Subordination

The degree of student-athlete dependency arises out of the perverseness of the control and dominance that schools through their athletic departments exert over every aspect of a student-athlete’s college

\footnote{NCAA restrictions which tilt the relationship in favor of universities); \textit{id.} at 207-10 (discussing how one year renewable scholarships vest institutions with significant control over student-athletes); Johnson, supra note 7, at 114-16 (arguing the Letter of Intent protects and promotes the university’s interests by inflicting severe consequences on student-athletes who wish to play for another school, and noting that universities reserve the right to retract athletic scholarships).

\footnote{259. Note, however, that the contract itself may provide additional grounds for liability. \textit{See Davis}, supra note 1.}

\footnote{260. Lorence, supra note 212, at 355 (discussing the financial dependency of institutions on their athletes); \textit{see Davis}, supra note 1, at 748-51 (exploring the financial attributes and implications of the student-athlete/university relationship); Koch, supra note 258, at 11 (characterizing colleges as university-firms creating products such as athletic entertainment, which require the input of people, the most essential of whom is the student-athlete). \textit{See generally} PATRICIA A. ADLER & PETER ADLER, BACKBOARDS & BLACKBOARDS: COLLEGE ATHLETES AND ROLE ENGULFMENT 83 (1991) (observing that student-athletes perceive themselves as quasi-employees of colleges); Sperber, supra note 2, at 208 (providing a detailed account of the intricacies of intercollegiate finances, and arguing that since the services of student-athletes are essential to college athletic programs they are akin to employees of the institutions).

\footnote{261. Lorence, supra note 212, at 355.}

\footnote{262. Performing athletic services for institutions allows student-athletes access to education. Sperber, supra note 2, at 104-05, 209.}

\footnote{263. \textit{See supra} text accompanying note 252 (arguing that the formal contractual relationship is skewed in favor of the university).}
life. In the academic realm, this dominance manifests itself as control over academic decision-making.

Unlike other students, athletes did not look over course descriptions, schedules, or general education requirements. Rather, they were registered into specific colleges (business, engineering, arts and sciences, etc.), majors, and class by the assistant coach in charge of academics. They were usually (although not always) consulted in the selection of their college and major, but rarely asked about which courses they would like to take.264

The end result of athletic department control is limited autonomy of student-athletes over academic decisions265 and their inability to handle such matters independently.266 The intimate involvement of an athletic department in student-athletes’ affairs leads student-athletes to become dependent on agents of their schools to protect their academic interests.267

This relationship of dependence and trust which develops in the academic arena also appears in the social aspects of student-athletes’ lives. For example, student-athletes are required to participate in athletically related social activities such as booster functions that divert time away from studying and social activities of their choosing.268 More important is the role of coaches who exert control and influence over both

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265. Id. at 221. Athletic departments are guided by the goal of maintaining their athletes’ eligibility to compete. Thus, they often steer student-athletes into courses that will help them achieve this goal despite the lack of intellectual depth and challenge. Davis, supra note 1, at 786-87; Lee Goldman, Sports and Antitrust: Should College Students Be Paid to Play?, 65 Notre Dame L. Rev. 206, 256-57 (1990) (asserting academically unprepared student-athletes are channeled by schools into “gut” courses that devalue their education); Widener, supra note 185, at 472 (describing the effects of athletic department control over student-athletes).
266. Adler and Adler state as follows:

The players, uninvolved in academic decision-making, had little direct contact with professors (beyond simple class attendance), academic counselors, or academic administrators. As a result, the players did not learn how to handle these academic matters, nor—in many cases—were they interested in doing so. They did not worry that these academic decisions were being made for them, or that they did not have to process their own academic paperwork; they took it for granted that this was the way things were.

267. Id. at 221. The adverse consequences of this dependency may extend beyond academics. “I have seen so many football players struggle with the basics of day-to-day living once they were out from under their coaches’ wings—players who had trouble renting apartments, showing up for work on time, simply doing things on their own.” Rick Telander, The Hundred Yard Lie: The Corruption of College Football and What We Can Do to Stop It 103 (1989).

268. Id. The authors argue that this assumption of responsibility by athletic departments not only creates a relationship of trust, but reinforces the importance of student-athletes’ athletic identities to the detriment of their academic identities. Id. The overall consequence of this and other conduct on the part of institutions is to change the educational orientation of student-athletes from one that might have prepared them for careers after college to one that maintains their athletic eligibility. Id. at 221. The ultimate impact is that student-athletes are “partly socialized to failure.” Id. at 230.

269. Id. at 95.
the social and academic spheres of student-athletes’ college careers.\textsuperscript{269} Coaches often become surrogate parents for student-athletes who can significantly influence their social identities during their college tenure.\textsuperscript{270} Moreover, because of their role, coaches assume they can influence both academic and non-academic decisions made by student-athletes.\textsuperscript{271} As one author notes, because young people “tend to internalize personal-social characteristics of adults whom they admire and respect . . . coaches have the potential for powerfully influencing attitudes and values of their athletes.”\textsuperscript{272} Coaches can exert this influence in a number of ways, including discouraging particular majors because the resulting time demands might conflict with a student-athlete’s time commitment to his sport.\textsuperscript{273} In summary, a student-athlete’s position at a college or university can be characterized as “institutionalized powerlessness.”\textsuperscript{274}

D. \textit{The Special Nature of the Student-Athlete/University Relationship as a Basis for Tort Liability}

The foregoing demonstrates that, while the student-athlete/university relationship is one of mutual dependency, the institution is clearly the dominant party in the relationship. As a result, student-athletes are vulnerable and particularly dependent on their institutions.\textsuperscript{275} This dependence and reliance is particularly true with respect to student-athletes’ academic affairs. In short, colleges and universities exercise dominion and control over the affairs of student-athletes. As such, a quasi-fiduciary relationship is created, which mandates that these institutions give at least as much attention to protecting the interests of student-athletes as to protecting their own. In the academic realm, such attention in a particular case may require the institution to engage in affirmative conduct to assist student-athletes in taking advantage of the educational opportunities colleges offer. The requirement that institutions engage in affirmative conduct is particularly justifiable given the economic advantages that accrue to colleges and universities as a result of their relationships with student-athletes.\textsuperscript{276}

\textsuperscript{269} Coaches develop a relationship of trust and confidence with student-athletes that typically begins during recruitment. \textit{See Alexander Wolff & Armen Keteyian, Raw Recruits} 136 (1990); \textit{Davis, supra note 1}, at 786-87.

\textsuperscript{270} \textit{Adler & Adler, supra note 258}, at 85, 120-25. One author asserts that coaches are “experts at brainwashing, at keeping their players subservient.” Telander, \textit{supra note 266}, at 90.


\textsuperscript{272} \textit{Id. at 10} (quoting Sage, \textit{An Occupational Analysis of the College Coach, in Sport and Social Order: Contributions to the Sociology of Sport}, 418-19 (Donald W. Ball & John W. Loy eds., 1979)).

\textsuperscript{273} Alessandro, \textit{supra note 5}, at 293.

\textsuperscript{274} Adler & Adler, \textit{supra note 260}, at 224.

\textsuperscript{275} Attributes of the traditionally recognized special relationships are vulnerability and dependence by one party. \textit{Keeton et al., supra note 141}, at 374.

\textsuperscript{276} Special relationships typically involve some existing or potential economic benefits to the defendant. \textit{Id.}
Thus, the student-athlete/university relationship contains all of the elements to which courts look in determining whether to characterize a relationship as special for purposes of imposing a duty of care. Because of the trust and dependence that student-athletes place in their institutions, the latter possess both a moral and legal obligation to engage in affirmative conduct providing student-athletes with an educational opportunity. Failure to engage in such conduct should constitute actionable negligence.

IV. CONCLUSION

The Ross court's failure to inquire into the true essence of the student-athlete/university relationship eliminated from consideration the concept of special relationships as the precedent the court believed was required for it to recognize an educational malpractice action on behalf of student-athletes. Yet, as we have seen, residing within the student-athlete/university relationship are attributes justifying the expansion of the judicially recognized special relationships to include this relationship. Indeed, such an expansion is not unwarranted as exhibited by recent instances where courts have relied upon the concept of the special relationship to create a duty of care and thereby impose tort liability.277

In addition, the notion of the special relationship as the source for requiring a party to engage in affirmative conduct to protect the affairs of another is a well-recognized legal doctrine. Consequently, imposing a tort duty on colleges and universities in favor of student-athletes would not be as novel and unprecedented as it might first appear. To the contrary, creating such a duty is consistent with and falls within the contours and strictures of well-recognized tort doctrine. Thus, it renders ineffective and inapplicable to the student-athlete/university context the analysis and justifications that the judiciary has traditionally employed in rejecting educational malpractice claims.

[Author's Note: On March 2, 1992, the Seventh Circuit issued its decision in Ross v. Creighton, No. 90-2509 (7th Cir. Mar. 2, 1992), affirming in part and reversing in part the lower court's judgment. Relying on the policy justifications articulated by the district court, the

Seventh Circuit concluded the Illinois Supreme Court would not recognize the tort of educational malpractice. *Id.* at 8. For the same reasons, it held that Illinois would reject any claim for “negligent admission.” *Id.* at 9. With respect to Ross’s contract claim, the court first noted that a breach of contract claim challenging the sufficiency of the educational instruction would fail since it constitutes an “attempt to repackage an educational malpractice claim as a contract claim.” *Id.* at 12. The court reasoned, however, that a breach of contract action may be available where the essence of the complaint is the defendant’s failure to honor an “identifiable contractual promise.” *Id.* Reading Ross’s complaint as alleging that the University failed to honor a specific promise that he would be able meaningfully to participate in the school’s program of study, the court remanded the matter for consideration of whether Ross was barred from “any participation in and benefit from the University’s academic program. . . .” *Id.* at 14.]