

WHO IS THE UNIVERSITY? BIRNBAUM’S BLACK BOX AND TORT LIABILITY

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I. INTRODUCTION

From small, isolated campuses that made gentlemen out of society’s elite, higher education has grown to encompass a variety of institutions, students, and missions. During that time, higher education has developed into both a private and public good. From a private perspective, research shows that the collegiate experience has driven social mobility by increasing the lifetime earning capacity of individuals.¹ Furthermore, it has

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1. SANDY BAUM ET AL., COLLEGE BOARD, EDUCATION PAYS: THE BENEFITS OF

contributed to the moral, cognitive, and personal development of individuals.² In the public sphere, higher education has grown the wealth of our nation by providing an educated workforce to power a modern economy, increasing the wages of laborers across the board, and strengthening democracy through engaged citizenship.³ Higher education, to use an aphorism, truly has been the rising tide that lifted all boats.

Tides shift, however, and affordability concerns have created turbulent seas for higher education. With the onset of the American recession, the forecast looks dimmer still. Although American higher education has expanded since the seventeenth century, student growth has stagnated in recent years.⁴ The number of high school graduates who immediately enter college or university “has largely stalled at around 60 percent since the late 1990s.”⁵ This lack of growth erodes the United States’ international standing in degree attainment. President Obama cited the United States’ fall from first in the world in college and university graduation rates to twelfth during his speech at the University of Texas in August of 2010.⁶ Lagging degree attainment hinders the United States’ competitiveness in the global marketplace,⁷ and it stunts the beneficial development of its society.⁸ When looking at what factors stymie student access to higher education and the related statistic of degree attainment, researchers found decreased affordability played a central role.⁹ From 1982 to 2006, college and university tuition and fees mushroomed by 439% while the overall inflation rate increased by only 110%.¹⁰ In analyzing this growth, the Department of Education found legal regulation to be a “little-recognized

HIGHER EDUCATION FOR INDIVIDUALS AND SOCIETY 12 (2010).

2. See 2 ERNEST T. PASCARELLA & PATRICK T. TEREZINI, *HOW COLLEGE AFFECTS STUDENTS: A THIRD DECADE OF RESEARCH* (1st ed. 2005) (discussing psychosocial changes, moral development, and intellectual growth as a result of attending a college or university).

3. SANDY BAUM & JENNIFER MA, COLLEGE BOARD, *EDUCATION PAYS: THE BENEFITS OF HIGHER EDUCATION FOR INDIVIDUALS AND SOCIETY 2* (2007). See also BAUM ET AL., *supra* note 1 (discussing the correlation between higher levels of education and increased salaries and civic participation).

4. NAT’L CTR. FOR PUB. POLICY & HIGHER EDUC., *MEASURING UP 2008: THE NATIONAL REPORT CARD ON HIGHER EDUCATION 5* (2008).

5. U.S. DEP’T OF EDUC., *A TEST OF LEADERSHIP: CHARTING THE FUTURE OF U.S. HIGHER EDUCATION 8* (2006) (citation omitted).

6. President Barack Obama, Remarks by the President on Higher Education and the Economy at the University of Texas at Austin (Aug. 9, 2010).

7. U.S. DEP’T OF EDUC., *supra* note 5, at 7.

8. See BAUM ET AL., *supra* note 1.

9. *Id.* at 8. Accord NAT’L CTR. FOR PUB. POLICY & HIGHER EDUC., *supra* note 4, at 8.

10. NAT’L CTR. FOR PUB. POLICY & HIGHER EDUC., *supra* note 4, at 8. Cf. *Consumer Price Index: All Urban Consumers*, U.S. DEP’T OF LABOR, <ftp://ftp.bls.gov/pub/special.requests/cpi/cpi.ai.txt> (last visited Sept. 20, 2012) (reflecting 109% increase of average annual consumer price index from 1982 to 2006).

source of cost increases”¹¹; so too, it seems, is liability for student injuries. From 2003 to 2007, 50% of general liability insurance claims filed by colleges and universities related to student injuries.¹² While the law cannot solve all of the economic issues affecting college affordability, much can be done to resolve the uncertainty swirling around this particular issue.

Throwing open the gates to the ivory tower has changed the legal dynamic between colleges and universities and their students. Historically, courts had based the institution-student dynamic on the concept of *in loco parentis*; accordingly, courts compared an institution’s standard of care to what an actual parent owes a child and granted similar immunity to institutional decision-making.¹³ The student rights movement in the 1960s, however, ended the *in loco parentis* framework, and courts began treating the institution-student dynamic as a relationship between an institution and an adult.¹⁴ This resulted in courts finding that a college or university had no duty towards its students absent the finding of a special relationship.¹⁵ Courts were often reluctant to find such a relationship.¹⁶ By the 1980s, courts began shifting to a host of different theories on the university-student dynamic. Some found the college or university as a bystander unable to control the acts of students.¹⁷ Other courts based the duty requirement of colleges and universities in property law.¹⁸

11. U.S. DEP’T OF EDUC., *supra* note 5, at 11.

12. KAREN-ANN BROE, *THE BUCK STOPS WHERE? STUDENT ORGANIZATIONS—RISKS, LIABILITIES, AND FIRST AMENDMENT ISSUES I* (2009).

13. WILLIAM A. KAPLIN & BARBARA A. LEE, *THE LAW OF HIGHER EDUCATION: STUDENT VERSION 16–17* (4th ed. 2007). *See also* ROBERT D. BICKEL & PETER F. LAKE, *THE RIGHTS AND RESPONSIBILITIES OF THE MODERN UNIVERSITY: WHO ASSUMES THE RISKS OF COLLEGE LIFE?* 7 (1999) (“It was a time of *insularity* from legal scrutiny, and like governments, charities and families of that era, the college was considered to be another institution outside the safety rules of the legal system, and in a sense above the law.”) (emphasis in original); Kristen Peters, *Protecting the Millennial College Student*, 16 S. CAL. REV. L. & SOC. JUST. 431, 435 (2007) (“Therefore, both courts and legal commentators have reached their viewpoints by misconstruing *in loco parentis* as a doctrine of duty. Rather, the doctrine did not impose any duty requiring colleges to protect students, but instead shielded colleges’ deliberate or intentional acts of discipline from legal scrutiny.”) (citation omitted).

14. Robert D. Bickel & Peter F. Lake, *Reconceptualizing the University’s Duty to Provide a Safe Learning Environment: A Criticism of the Doctrine of In Loco Parentis and the Restatement (Second) of Torts*, 20 J.C. & U.L. 261, 270 (1994). *See also* KAPLIN & LEE, *supra* note 13, at 91.

15. Bickel & Lake, *supra* note 14, at 274.

16. *See, e.g.*, *Geiersbach v. Frieje*, 807 N.E.2d 114, 117 (Ind. Ct. App. 2004) (“[Geiersbach] admits that courts have been reluctant to characterize the basic student-college relationship as ‘special’ so as to invoke a duty on behalf of the college.”).

17. Robert D. Bickel & Peter F. Lake, *The Emergence of New Paradigms in Student-University Relations: From “In Loco Parentis” to Bystander to Facilitator*, 23 J.C. & U.L. 755, 779 (1997). *See also* KAPLIN & LEE, *supra* note 13, at 91 (discussing the college or university as a bystander).

18. Bickel & Lake, *supra* note 17, at 761.

Legal theorists, in response, have attempted to unify courts by developing broadly-applicable tort standards for determining college and university liability. In developing their standards, theorists appear to have envisioned the college and university portion of the institution-student dynamic as a single actor with rational goals.¹⁹ Many proposed standards do provide courts with the flexibility to examine the circumstances of each case in light of the institution involved.²⁰ Marrying this flexibility, however, to the vision of a university as a single actor results in creating a monolithic reasonable man in higher education tort law, which this article titles a “Reasonable Institution” standard.

This article begins by tracing the evolution of the institution-student legal dynamic through two cases, both decided by the Supreme Court of Utah. The earlier, *Beach v. University of Utah*,²¹ is one of the most cited cases on special relationships in a higher education context.²² *Beach* rejected the notion that a professor’s actions created a duty for colleges and universities to protect a student from injury. The latter, *Webb v. University of Utah*,²³ represents the court’s updated stance on the faculty-student relationship that acknowledges that a college or university may have a duty to students based upon a professor’s acts in some circumstances.

Next, this article summarizes several Reasonable Institution standards that reject the ‘no duty’ rule in *Beach*.²⁴ It then challenges the reasonable institutional assumption, relying on organizational theory and higher education research by Richard Birnbaum, which envisions a college or university as a collection of systems with varied and often divergent interests.²⁵ Accordingly, this article proposes the “Black Box Model” as a new tort standard in higher education law. In addition to providing a truer vision of an actual college or university, the Black Box Model champions a more conservative expansion of a university’s standard of care in order to avoid the policy consequences that would result if Reasonable Institution standards were broadly adopted. Specifically, the standard of care attempts to balance recovery for injured students with safeguarding college and university access for all students. To do so, this article provides background on the spectrum of student injuries, analyzes the ability of

19. See, e.g. Jane A. Dall, Note, *Determining Duty in Collegiate Tort Litigation: Shifting Paradigms of the College Student Relationship*, 29 J.C. & U.L. 485, 519 (2003) (imposing a duty upon a college or university “when it has clear responsibilities stemming from its educational mission.”).

20. See, e.g., Bickel & Lake, *supra* note 17, at 788 (requiring a university, “given its particular circumstances, to use reasonable care to facilitate student education and growth.”).

21. *Beach v. Univ. of Utah*, 726 P.2d 413 (Utah 1986).

22. KAPLIN & LEE, *supra* note 13, at 92.

23. *Webb v. Univ. of Utah*, 125 P.3d 906 (Utah 2005).

24. Peters, *supra* note 13, at 448.

25. ROBERT BIRNBAUM, *HOW COLLEGES WORK: THE CYBERNETICS OF ACADEMIC ORGANIZATION AND LEADERSHIP* 11 (1988).

colleges and universities to manage risks so as to avoid such situations, and considers the ramifications of loss spreading when risk management fails.

II. BACKGROUND ON THE LEGAL LANDSCAPE

In 1986, the Supreme Court of Utah dealt with the institution-student legal dynamic through a special relationship framework in *Beach v. University of Utah*. Although not the first case of its kind—in fact, it built upon the holdings in *Bradshaw v. Rawlings*²⁶ and *Baldwin v. Zoradi*²⁷—it ranks among the most cited cases on the standard of care that colleges and universities owe to students.²⁸ In *Beach*, the court rejected the notion that a professor’s actions created an affirmative duty on behalf of the college or university to protect a student from injury.²⁹

In 2005, the Supreme Court of Utah again took on the institution-student legal dynamic in *Webb v. University of Utah*. Though the court applied *Beach* in concluding that no special relationship existed, it stated that “[d]espite the result in *Beach*, we are persuaded that a college instructor who has no special relationship with her class members in a benign academic setting can create a special relationship by altering the academic environment.”³⁰ This dicta suggests a willingness to broaden the standard of care envisioned in *Beach*.

Based on the holdings in these and similar cases, a number of legal theorists championed rethinking the institution-student legal dynamic. Their works have attempted to move the legal analysis from the relationship that the injured party has with the college or university toward Reasonable Institution standards that would greatly expand a college or university’s standard of care. A brief summary of these articles is provided to support this assertion.

A. *Beach v. University of Utah*

In *Beach*, Danna Beach enrolled in a field biology class taught by tenured professor Orlando Cuellar.³¹ During a required class trip, Beach consumed wine and fell asleep in the bushes; she later told Cuellar that “the incident was unusual.”³² During the final required trip, Beach again consumed alcohol.³³ Beach fell down a cliff face, and her injuries left her disabled.³⁴ Subsequently, Beach sued the University of Utah.³⁵ On appeal

26. *Bradshaw v. Rawlings*, 612 F.2d 135 (3d Cir. 1979).

27. *Baldwin v. Zoradi*, 176 Cal. Rptr. 809 (Cal. Ct. App. 1981).

28. KAPLIN & LEE, *supra* note 13, at 92.

29. *Beach v. Univ. of Utah*, 726 P.2d 413, 418 (Utah 1986).

30. *Webb v. Univ. of Utah*, 125 P.3d 906, 911 (Utah 2005).

31. *Beach*, 726 P.2d at 414.

32. *Id.*

33. *Id.* at 415.

34. *Id.*

from summary judgment, Beach asserted “a special relationship existed between the parties which gave rise to an affirmative duty on Cuellar’s part to supervise and protect her.”³⁶ Basing her claim on the earlier incident, Beach argued that Cuellar “knew or should have known of her propensity to become disoriented after drinking.”³⁷

The court acknowledged that no duty normally exists toward a person who becomes voluntarily intoxicated; consequently, it stated that the law would impose an affirmative duty to act only if a special relationship existed.³⁸ The court cited section 314(A) of the *Restatement (Second) of Torts*, stating that “[t]hese relationships generally arise when one assumes responsibility for another’s safety or deprives another of his or her normal opportunities for self-protection.”³⁹ Accordingly, the court held “as a matter of law that Beach’s situation was not distinguishable from that of the other students on the trip; therefore, no special relationship arose between the University and Beach.”⁴⁰

After dismissing Beach’s other arguments, the court considered whether Cuellar’s failure to enforce institutional rules and state laws regarding underage drinking created a special relationship that required Cuellar and the University of Utah to protect a student from “voluntary . . . intoxication during a field trip sponsored by the University.”⁴¹ Persuaded by the reasoning in *Bradshaw v. Rawlings*⁴² and *Baldwin v. Zoradi*⁴³ and the demise of *in loco parentis*, the court held that it did not create such a relationship.⁴⁴ Specifically, the court reasoned that students were empowered adults and that colleges and universities treated them accordingly, unlike the treatment of high school and elementary school students.⁴⁵ The court found that recognizing a custodial relationship between colleges and universities and their students would require institutions to babysit students at an exorbitant expense and that it would harm the maturation process at the heart of the institution-student educational relationship.⁴⁶ Accordingly, it held that “[i]f the duty is realistically incapable of performance or if it is fundamentally at odds with the nature of the parties’ relationship, we should be loath to term that

35. *Id.*

36. *Id.*

37. *Id.* at 416.

38. *Id.* at 415.

39. *Id.* (citation omitted).

40. *Id.* at 416.

41. *Id.* at 417 (citation omitted).

42. *Bradshaw v. Rawlings*, 612 F.2d 135 (3d Cir. 1979).

43. *Baldwin v. Zoradi*, 176 Cal. Rptr. 809 (Cal. Ct. App. 1981).

44. *Beach*, 726 P.2d at 418-419.

45. *Id.*

46. *Id.* at 419.

relationship ‘special’ and to impose a resulting ‘duty’”⁴⁷

B. *Webb v. University of Utah*

In *Webb*, James Webb fell while on a field trip to examine fault lines in the Salt Lake area when the professor in charge of the field trip had directed students to walk on icy and snowy sidewalks.⁴⁸ Webb filed suit against the University of Utah alleging negligence.⁴⁹ On appeal from summary judgment, the court of appeals found that the facts established a special relationship between the University and Webb.⁵⁰

Citing its decision in *Day v. State*,⁵¹ the Supreme Court of Utah said that public policy concerns normally shield governmental actors from liability for acts and omissions.⁵² The court said, however, that liability potentially arises if a special relationship can be identified.⁵³ For governmental actor lawsuits, the court may find the governmental actor liable if his negligence leads to “injury to persons who stand so far apart from the general public that we can describe them as having a special relationship to the governmental actor.”⁵⁴ Further, the court determined that a governmental actor can “create a special relationship, where one did not previously exist, by her acts.”⁵⁵

In the context of a public college or university and its students, the court stated that a “college [or university] instructor who has no special relationship with her class members in a benign academic setting can create a special relationship by altering the academic environment.”⁵⁶ This conclusion flowed “from the fundamental reality that despite the relative developmental maturity of a college [or university] student compared to, say, a pre-schooler, a college student will inevitably relinquish a measure of behavioral autonomy to an instructor out of deference to her superior knowledge, skill, and experience.”⁵⁷ In such a situation, the question becomes “how much loss of autonomy a student must sustain and how much peril must be present to establish a special relationship.”⁵⁸ To help answer this question, the court turned to its decision in *Day*.

In *Day*, the court held that a special relationship can be established in

47. *Id.* at 418.

48. *Webb v. Univ. of Utah*, 88 P.3d 364, 365 (Utah Ct. App. 2004).

49. *Id.* at 364.

50. *Id.* at 367 n.6.

51. *Day v. State*, 980 P.2d 1171 (Utah 1999).

52. *Webb*, 125 P.3d at 909.

53. *Id.*

54. *Id.*

55. *Id.* at 910.

56. *Id.* at 911.

57. *Id.* at 911–12.

58. *Id.* at 912.

several ways, including “by governmental actions that reasonably induce detrimental reliance by a member of the public”⁵⁹ Applying the holding in *Day to Webb*, the court stated that actions of professors could reasonably induce reliance because “[a] directive received in connection with a college course assignment is an act that would engage the attention of the prudent student.”⁶⁰ Furthermore, the court reasoned that a student could detrimentally rely on a professor’s actions due to the student’s desire to please the instructor, desire to succeed in her coursework, and faith in the professor’s expertise.⁶¹ The *Webb* court, however, determined that it was

not reasonable to believe that any student would understand that his academic success, measured either by the degree of knowledge acquired or by the positive impression made on the instructor, turned on whether they abandoned all internal signals of peril to take a particular potentially hazardous route to view fault lines.⁶²

Therefore, the court upheld the lower court’s granting of the university’s motion for summary judgment.⁶³

C. Bickel and Lake’s *Furek* Model and Facilitator Model for University Liability

In 1994, Robert Bickel and Peter Lake, two of the most prolific writers on the subject of university liability, published *Reconceptualizing the University’s Duty to Provide a Safe Learning Environment: A Criticism of the Doctrine of In Loco Parentis and the Restatement (Second) of Torts*.⁶⁴ In it, the authors traced the development of tort liability from *in loco parentis*, through the student rights revolution of the 1960s and cases like *Beach* that resulted, and up to the Supreme Court of Delaware’s decision in *Furek v. University of Delaware*.⁶⁵

59. *Id.* (citing *Day v. State*, 980 P.2d 1171, 1175 (Utah 1999)).

60. *Id.*

61. *Id.*

62. *Id.* at 912–13.

63. *Id.* at 906.

64. Bickel and Lake, *supra* note 14.

65. *Id.*; *see also* *Furek v. Univ. of Del.*, 594 A.2d 506 (Del. 1991). In *Furek*, a student pledged a fraternity and was injured when a member poured cleaner containing lye on the student’s back and neck during a hazing incident. Though the university argued that it had no duty to the injured student, the Supreme Court of Delaware disagreed and found that the university had undertaken a limited duty based on the university’s pervasive efforts to regulate hazing through policies and student-warnings. The court held that “[c]ertain established principles of tort law provide a sufficient basis for the imposition of a duty on the University to use reasonable care to protect resident students against the dangerous acts of third parties. . . . [W]here there is direct university involvement in, and knowledge of, certain dangerous practices of its students, the university cannot abandon its residual duty of control.” *Id.* at 519–20.

The authors suggested that *Beach* and other courts had misinterpreted the changing role of *in loco parentis* and created

what amounts to an institutional immunity or set of immunities for the failure of an institution of higher learning to exercise reasonable care to secure the safety of its students. Courts commonly characterize these *de facto* immunities as ‘no duty’ rules—rules which ostensibly arise from the *lack* of a *custodial* and/or . . . a *special* relationship between an injured student and the institution.⁶⁶

The authors recognized that the reluctance of courts to adopt a duty rule often stemmed from public-policy concerns.⁶⁷ Accordingly, Bickel and Lake argued that courts should adopt the liability model found in *Furek*, which shifts a fact-finder’s inquiry from duty to foreseeability.⁶⁸ Under this model, a college or university would have a duty to “exercise reasonable care when it has actual or constructive knowledge of acts or behavior including the acts or behavior of students or student groups [such as fraternities], or of historical events or occurrences, which present a known or foreseeable, and unreasonable, risk to a foreseeable student or class of students.”⁶⁹ The imposition of liability would be based on the institution’s knowledge of the danger.⁷⁰

In 1997, Bickel and Lake again tackled the subject of college and university liability.⁷¹ Their analysis found that courts had demonstrated an increased willingness to hold colleges and universities responsible for torts arising from premises liability and college and university activities.⁷² However, the authors also found that courts continued to shield “universities from liability for student misconduct that injures other students by imagining the university as, in effect, a bystander in student life.”⁷³ In other words, the bystander model treated colleges and universities as unable to exert control over student behaviors.⁷⁴ Accordingly, Bickel and Lake expressly attacked *Beach*, stating, “[w]hat the *Beach* court overlooked is that the university’s legal responsibility arises in such a situation from *actual misconduct* (misfeasance, negative duty), not passive inaction (nonfeasance, affirmative duty).”⁷⁵

See also KAPLIN & LEE, *supra* note 13, at 100–01 (discussing the university’s duty in *Furek*).

66. Bickel and Lake, *supra* note 15, at 279.

67. *Id.* at 290.

68. *Id.* at 291.

69. *Id.* at 290.

70. *Id.* at 291.

71. Bickel and Lake, *supra* note 18.

72. *Id.* at 760–61.

73. *Id.* at 780.

74. *Id.*

75. *Id.* at 782.

Developing their *Furek* Model, the authors suggested courts adopt a college or university as facilitator standard of care. The Facilitator Model required a college or university, “given its particular circumstances, to use reasonable care to facilitate student education and growth.”⁷⁶ In analyzing an institution’s circumstances under this model, courts should consider: foreseeability of harm, the nature of the risk, relatedness between student misconduct and college or university activities, moral blameworthiness and responsibility, prevention of future harm, burden on college or university and the larger community, and insurance.⁷⁷ Although admitting that the Facilitator Model increased liability, the authors suggested that colleges or universities could mitigate costs by spreading the risk of loss.⁷⁸

D. Dall’s Educational Mission Paradigm for University Liability

In 2003, Jane Dall responded to Bickel and Lake’s work by proposing that college and university liability be tied to the educational mission of an institution.⁷⁹ Dall concurred with Bickel and Lake that policy considerations drove determinations of duty and lead to inconsistent outcomes.⁸⁰ In response, she championed the use of particular paradigms to “evaluate the policy considerations underlying the imposition of college tort liability.”⁸¹ Dall proposed courts use her Educational Mission Paradigm to weigh such policy issues as “plaintiff recovery, social responsibility, and the preservation of education resources.”⁸² The Educational Mission Paradigm is intended to “capture[] the college-student relationship *and* suggest[] criteria for the legal determination of duty.”⁸³ Courts would use that paradigm to compensate injured students, encourage safe practices by colleges and universities, capture the breadth of the institution-student relationship, provide flexibility for individual institutional analysis, and recognize the adult or semi-adult status of students.⁸⁴ Dall’s paradigm imposed a duty to protect students on college or university campuses “when it has clear responsibilities stemming from its educational mission.”⁸⁵ Dall acknowledged that her paradigm would potentially increase liability⁸⁶ and shift money from educational and co-curricular programs to litigation.⁸⁷ Dall suggested that colleges and

76. *Id.* at 788.

77. *Id.* at 789-92.

78. *Id.* at 792.

79. Dall, *supra* note 19, at 519.

80. *Id.* at 505.

81. *Id.* at 509.

82. *Id.* at 522.

83. *Id.* at 518 (emphasis in original).

84. *Id.* at 519-21.

85. *Id.* at 519.

86. *Id.* at 522-23.

87. *Id.* at 507-08.

universities could engage in risk management to offset the effects of increased liability if courts uniformly adopted a cognizable duty standard like the Educational Mission Paradigm.⁸⁸

E. Peters's Millennial Model for University Liability

In 2007, Kristen Peters focused on the student portion of the institution-student legal dynamic.⁸⁹ Peters found the current generation of students (commonly referred to as "Millennials") tended to be sheltered by parents in youth and through the college and university years.⁹⁰ Further, the expansion of college and university services⁹¹ and increased tuition prices⁹² led students and parents to expect colleges and universities to provide greater safety.⁹³ Consequently, Peters argued, the unique attributes of Millennials decreased their autonomy and thereby increased the need for institutional accountability.⁹⁴ Peters proposed classifying the institution-student dynamic as a per se special relationship using her Millennial Model.⁹⁵

Rejecting Bickel and Lake's Facilitator Model as too consumer-oriented and subjective,⁹⁶ Peters devised her Millennial Model on the court's reasoning in *Webb*. However, Peters expanded the court's focus on the professor's acts to encompass the entire institution-student dynamic.⁹⁷ Finding that the *Webb* court had identified "'detrimental reliance' as the primary factor in determining whether a college-student relationship may be deemed . . . special,"⁹⁸ the Millennial Model imposed "an affirmative duty to act based on a student's detrimental, *reasonable* reliance on a college's act that is tangentially related to the college's *overall* mission."⁹⁹ Consequently, colleges and universities would need to protect students from any foreseeable harm.¹⁰⁰ Offsetting this college and university duty is a student's duty to "act reasonably under the circumstances."¹⁰¹ Peters emphasized that the model's use of a reasonable student standard would

88. *Id.* at 522–23.

89. Peters, *supra* note 14.

90. *Id.* at 459.

91. *Id.* at 432.

92. *Id.* at 463.

93. *Id.*

94. *Id.* at 468.

95. *Id.* at 465.

96. *Id.* at 464–65.

97. *Id.* at 467 ("And, although the *Webb* court limited its analysis to the relationship between a college student and his instructor, today's college students relinquish the same control to the college itself.").

98. *Id.* at 466.

99. *Id.* at 467.

100. *Id.* at 467.

101. *Id.*

absolve colleges and universities from a duty to protect students "from danger or injuries resulting solely from acts that a college had no reason to know about, acts the college had no power to protect against, or from the student's own patently irresponsible behavior."¹⁰²

III. THE BLACK BOX MODEL

In *Beach*, the Supreme Court of Utah stated that the lack of a special relationship between a student and his or her college or university meant that the institution had no duty to take affirmative action to protect that student. In *Webb*, the court reaffirmed its holding in *Beach* but opened the door to recognizing a special relationship when a student detrimentally relies upon the actions of a professor. Lake and Bickel framed the academic arguments for expanding college and university liability by stating "the central theoretical problem in student/university case law is how to imagine the student-university relationship in legal terms."¹⁰³ Subsequently, academic theorists have envisioned the college or university as a cohesive actor with rational goals, which in essence created a reasonable college or university standard for analyzing the university-student legal dynamic.

Robert Birnbaum presented an entirely different picture of colleges and universities in his seminal work "How Colleges Work."¹⁰⁴ Using organizational theory, Birnbaum identified four major models of post-secondary institutions: collegial, political, bureaucratic, and anarchic.¹⁰⁵ He found several organizational dynamics helped understand these systems; notably, he discussed the issue of coupling.¹⁰⁶ Coupling describes how systems within a system are connected and interact. Birnbaum uses "black box" analogies to explain coupling concepts.¹⁰⁷ In the first analogy, a crank enters a black box and, through a series of gears that fit together tightly, connects to a rotor on the other side.¹⁰⁸ In this tightly coupled system, when a person turns the crank, the gears turn the rotor one revolution clockwise; every time the crank is turned, the rotor responds the

102. *Id.*

103. Bickel and Lake, *supra* note 17, at 784.

104. BIRNBAUM, *supra* note 25.

105. *Id.* at xvii. See also G. LESTER ANDERSON, *The Organizational Character of American Colleges and Universities*, in *THE STUDY OF ACADEMIC ADMINISTRATION I* (Terry F. Lunsford ed., 1963); MICHAEL D. COHEN & JAMES G. MARCH, *LEADERSHIP AND AMBIGUITY: THE AMERICAN COLLEGE PRESIDENT* (1974); HERBERT STROUP, *BUREAUCRACY IN HIGHER EDUCATION* (1966); and Gerald R. Salancik & Jeffrey Pfeffer, *The Bases and Use of Power in Organizational Decision Making: The Case of a University*, 19 *ADMIN. SCI. Q.*, 453 (1974).

106. BIRNBAUM, *supra* note 25, at 35.

107. *Id.* at 36-39.

108. *Id.* at 36.

same way.¹⁰⁹ In the second analogy, a crank enters a black box and is connected, through a series of gears that are not fit together tightly, to a rotor on the opposite side of the box.¹¹⁰ In this loosely coupled system, the first time the crank is turned once, the gears turn the rotor one revolution clockwise, but the second time the crank is turned the rotor turns counterclockwise, and the third time it is turned the rotor does not move at all.¹¹¹ Because the gears do not fit tightly, actions applied to the loosely coupled black box lead to unpredictable results.¹¹²

Birnbaum found that all four major models of post-secondary institutions operate like a loosely coupled black box.¹¹³ From the outside, a university looks like a single cohesive system. A peek inside, however, reveals a number of smaller systems, like gears. These systems—which include academic departments, faculty, administrators, college or university offices, government officials, and more—often have independent goals and visions for the institution that may or may not align with other systems.¹¹⁴ Faculty, for instance, are often divided into locals and cosmopolitans. The goals and commitments of locals often are aligned at the campus level, while the goals and commitments of cosmopolitans are often aligned at the research level.¹¹⁵ Cosmopolitan faculty members are divided into smaller, discipline-related systems that can have opposing goals.¹¹⁶ In addition to differing goals, college and university leaders exert varying amounts of

109. *Id.*

110. *Id.* at 37.

111. *Id.*

112. *Id.* at 38.

113. *Id.* at 98–99, 120–21, 144–45, 159–60.

114. *Id.* at 11 (“As colleges become more diverse, fragmented, specialized, and connected with other social systems, intuitional missions do not become clearer; rather they multiply and become sources of stress and conflict rather than integration. The problem is not that institutions cannot identify their goals but rather that they simultaneously embrace a large number of conflicting goals.”). *See also* COHEN & MARCH, *supra* note 104, at 33 (“Teachers decide if, when, and what to teach. Students decide if, when, and what to learn. Legislators and donors decide if, when, and what to support. Neither coordination (except the spontaneous mutual adaptation of decision) nor control are practiced. Resources are allocated by whatever process emerges but without explicit accommodation and without explicit reference to some superordinate goals. The ‘decisions’ of the system are a consequence produced by the system but intended by no one and decisively controlled by no one.”), *and* EDWARD GROSS & PAUL V. GRAMBSH, *CHANGES IN UNIVERSITY ORGANIZATION, 1964–1971*, 43–74 (1974) (discussing the many conflicting goals within colleges and universities, such as protecting academic freedom and cultivating students’ intellect).

115. BIRNBAUM, *supra* note 25, at 19. *See also* Alvin W. Gouldner, *Cosmopolitans and Locals: Toward an Analysis of Latent Social Roles*, 2 *ADMIN. SCI. Q.* 281 (1957).

116. BIRNBAUM, *supra* note 26, at 135 (“[F]aculty in different disciplines and departments are as much divided by their professionalism as united by it.”) (citation omitted). *See also* Burton R. Clark, *Faculty Organization and Authority*, in *THE STUDY OF ACADEMIC ADMINISTRATION* 37 (Terry F. Lunsford ed., 1963).

control over the institution's systems.¹¹⁷ For example, a college or university may have a low locus of control over a tenured faculty member but have a high locus of control over a residence hall director. In a college or university, legal pressure, presidential decisions, and similar forces operate like the turning of the black box's crank. Each applies a force to the institution's "gears," yet the reaction is unpredictable due to these differing goals and varying levels of control.¹¹⁸

Birnbaum's conception of a college or university as a loosely coupled system validates the notion that courts should analyze the institution-student dynamic through a relational lens. Doing so focuses the legal analysis within the black box at the gears level, while a court using a Reasonable Institution standard would concentrate its analysis on the outside of the black box, which assumes a false and predictable vision of a cohesive system.¹¹⁹

The *Webb* court provides a workable approach for focusing a court's analysis on the gears level of colleges and universities. *Webb* found that a special relationship, which would impose a duty on a college or university to protect a student, may arise when a student detrimentally relies on a directive from his professor that strongly relates to a class activity.¹²⁰ This holding focuses the analysis on a loosely coupled system, the faculty, when determining liability in the institution-student dynamic. Inspired by *Webb* and its relational analysis and Birnbaum's vision of colleges and universities, I developed my Black Box Model as a workable rule for courts to adopt in student-injury cases:

(1) Public and private universities are under no duty to protect students from injuries absent clear and convincing evidence showing an act, including a failure to act:

- a. was made by a member or division of the college or university occurring under the color of their authority;
- b. induced reasonable and detrimental reliance by the student;

117. BIRNBAUM, *supra* note 25, at 28. See also J. VICTOR BALDRIDGE ET AL., POLICY MAKING AND EFFECTIVE LEADERSHIP: A NATIONAL STUDY OF ACADEMIC MANAGEMENT 9 (1978):

[T]he organizational characteristics of academic institutions are so different from other institutions that traditional management theories do not apply to them. Their goals are more ambiguous and diverse. They serve clients instead of processing materials. Their key employees are highly professionalized. They have unclear technologies based more on professional skills than on standard operating procedures. They have 'fluid participation' with amateur decision makers who wander in and out of the decision process. As a result, traditional management theories cannot be applied to educational institutions without carefully considering whether they will work well in that unique academic setting.

118. BIRNBAUM, *supra* note 25, at 38.

119. *Id.* at 38-39.

120. *Webb v. Univ. of Utah*, 125 P.3d 906, 912 (Utah 2005).

- c. was foreseeable by the college or university;
- d. the college or university could have exerted control over the member or division to avoid such an act; and
- e. the college or university failed to undertake reasonable measures to exert such control.

The Black Box Model has four benefits. It provides courts with a truer vision of the university in the institution-student legal dynamic by incorporating Birnbaum's loosely coupled systems research into its elements along with the court's analysis in *Webb*. The model also expands the scope of *Webb* and incorporates elements from Reasonable Institution standards. Finally, the model limits the expansion of liability to balance competing policy concerns.

First, element (b) of the Black Box Model stems from *Webb* and requires a plaintiff to identify an act that so reduced her autonomy as to create the environment in which she relied on the member or division of the college or university to her detriment. As in *Webb*, the student's detrimental reliance must be reasonable. The final three elements of the Black Box Model specifically address loosely coupled systems. The model, therefore, goes beyond the analysis in *Webb*. It requires the plaintiff to show that the college or university could and should have stopped the act through its control of the actor before liability attaches to the college or university.¹²¹ To my knowledge, no other rule currently incorporates such an analysis.

Second, element (a) expands the dicta in *Webb* to encompass all systems within the institution-student dynamic by including acts by members or divisions of the institution. *Webb* only considered academic, faculty-led situations where special relationships might arise. However, injuries are just as likely to occur outside the classroom. Further, one may reasonably assume students would detrimentally rely—though, perhaps to a lesser degree—on acts by a residence hall director, coach, or orientation leader just as they would rely on a professor. All these groups are in positions of power, and a student could view them as experts, which was a central concern in *Webb*.

Next, acts must occur “under the color” of the member or division's authority. This requirement would include acts that either occur pursuant to an official capacity or could be perceived that way by students, which benefits plaintiffs. A student would not need to understand a university organizational chart. Rather, the student's perception would only need to be reasonable, which would satisfy element (b) of the rule. It also stops a university from making a “frolic and detour” style argument that might exist if the rule instead required acts to occur “within the scope” of

121. For a case where the Black Box Model could potentially be used in place of an employment law analysis, see *Whittington v. Sowela Technical Inst.*, 438 So. 2d 236, (La. Ct. App. 1983) (holding that a student driving a van on a field trip was a university agent).

authority.

Finally, *Webb* can be read to address only public institutions because its detrimental reliance analysis stemmed from special relationships created by governmental, not private, actors. The Black Box Model would apply to both private and public colleges and universities because Birnbaum does not differentiate between the two in his study of loosely coupled systems. Also supporting the expansion, the government immunity concept that undergirded the special relationship analysis in *Webb* has a charitable immunity counterpart for private institutions.¹²²

Third, the Black Box Model builds upon the work of legal theorists. It imposes a duty based upon foreseeable danger in element (c), similar to the *Furek* and Millennial models; however, it does not do so *carte blanche*. Elements (a) and (b) ensure that colleges and universities owe a duty to a student only when her injury stems from a specific act or failure to act that resulted in reasonable, detrimental reliance. Like the Facilitator Model, elements (d) and (e) of the Black Box Model allow courts to consider the particular circumstances of colleges and universities before assigning liability. Yet, it goes a step further and incorporates Birnbaum's research to focus the analysis on whether the institution could have exerted control over a system to protect against injury.¹²³

The Black Box Model also trims away nebulous analysis suggested by Reasonable Institution standards. Unlike the Facilitator Model, the Black Box Model does not require courts to delve into the educational benefits the institution conferred on students when determining the reasonableness of the standard of care.¹²⁴ The external management of educational efforts would consume a large amount of judicial resources and would require judges to familiarize themselves with theories on college and university student development and the best practices for teaching specific disciplines. Similarly, the Black Box Model differentiates itself from the Educational Mission Paradigm, which suggested a college's or university's duty should stem from its educational mission.¹²⁵ Within a loosely coupled system, the educational mission changes depending upon the person asked—be they professor, administrator, or state politician.¹²⁶ Finally, the Black Box Model avoids the need to develop a new rule for each generation of students while still addressing the Millennial Model's underlying concern about student autonomy. To do so, the Black Box Model ties autonomy concerns to causation in element (b).

122. KAPLIN & LEE, *supra* note 14, at 17.

123. See BIRNBAUM, *supra* note 25, at 28.

124. Bickel & Lake, *supra* note 17, at 788.

125. Dall, *supra* note 19, at 519.

126. See BIRNBAUM, *supra* note 25, at xiii, 11. See also COHEN AND MARCH, *supra* note 105, at 33–34, and GROSS & GRAMBSH, *supra* note 114, at 43–74 (discussing the many conflicting goals within colleges and universities, such as protecting academic freedom and cultivating students' intellect).

Fourth, the Black Box Model takes a conservative approach to the expansion of an institution's standard of care as compared to Reasonable Institution standards. When one takes into account Birnbaum's research, policy reasons—namely, student access to higher education—justify this approach. To accomplish it, the Black Box Model employs a high evidentiary standard, requires an overt act or omission before attaching duty, and asks courts to take into account loose coupling by analyzing the degree to which a college or university could have exerted control over the actor.

While the Black Box Model provides numerous advantages for addressing the institution-student legal dynamic, it does possess three potential drawbacks. First, critics may argue that loose coupling is an excuse to avoid institutional accountability. Birnbaum acknowledges that “[l]oose coupling has often been attacked as merely a slick way to describe waste, inefficiency, or indecisive leadership and as a convenient rationale for the crawling pace of organizational change.”¹²⁷ However, loose coupling can be essential to colleges and universities. It allows one subsystem to respond to the needs of students without marshaling all institutional resources.¹²⁸ Further, loose coupling contains failures within individual systems, thereby limiting negative consequences to the entire institution.¹²⁹ Finally, it allows college and university systems to accomplish incompatible but important goals. Colleges and universities have many demands placed upon them by students, governmental entities, research sponsors, citizens in the community, and more; “[l]oose coupling therefore can be considered not as evidence of organizational pathology or administrative failure to be identified and corrected but rather as an adaptive device essential to the survival of an open system.”¹³⁰

Second, insisting upon clear and convincing evidence could act as too high of a bar for injured students to overcome. Though student access to higher education is a policy consideration that justifies a conservative expansion of an institution's standard of care, courts must also consider the need to make injured parties whole. Consequently, the Black Box Model's evidentiary standard is not an absolute bar to recovery, unlike the 'no duty' rule of *Beach* and its progeny. By allowing recovery in cases where clear and convincing evidence exists, the model does attempt to balance competing policies.

Further, a Department of Education report on higher education stated that a “little-recognized source of cost increases is excessive state and federal regulation. . . . At their best, these regulations are a mechanism to

127. BIRNBAUM, *supra* note 25, at 39.

128. *Id.* at 40.

129. *Id.*

130. *Id.* at 41 (citation omitted). See also KARL E. WEICK, *THE SOCIAL PSYCHOLOGY OF ORGANIZING* 1979) (discussing loose coupling as an adaptive action).

support important human values on campuses. At worst, regulations can absorb huge amounts of time and waste scarce campus financial resources with little tangible benefit to anyone.”¹³¹ Similarly, a tort standard regulating an institution’s duty in the university-student legal dynamic should maximize human values and minimize resource costs. Many of the Reasonable Institution standards focus on the first half of the equation, maximizing human values, by protecting and compensating students. These proposals are an understandable reaction to a legal history of deferential college and university treatment at the expense of students. The Black Box Model’s evidentiary standard considers both human values and resource costs. It provides compensation for injured parties with strong claims while preserving institutional and judicial resources by eliminating weak claims.

Third, in his discussion of loss spreading, Guido Calabresi has argued that charities should not be immune from liability.¹³² If Calabresi is correct, then the governmental and charitable immunities that I mentioned earlier should not exist. In his argument against such immunity, Calabresi argues that charities could spread loss among people through insurance.¹³³ He also suggests that charities could spread loss over time by resource allocation.¹³⁴ A charity could accomplish this resource allocation, Calabresi argues, by charging those who can pay higher prices for services, demanding more of donors, and decreasing the amount of charity that people receive.¹³⁵ Finally, Calabresi argues that incorporating risk into the actual cost of the charitable services would allow economically rational donors and consumers to better evaluate charities.¹³⁶ Calabresi’s reasoning suggests that loss spreading justifies an expansion of institutional liability so long as colleges and universities can insure against loss, increase tuition, increase donations, and decrease the amount of educational benefits students receive. While colleges and universities can potentially do all of these things, some will harm students’ access to higher education. The conservative expansion of an institution’s standard of care, therefore, limits the need for loss spreading.

IV. TORT LIABILITY, LOOSELY COUPLED SYSTEMS, AND STUDENT ACCESS

As suggested above, student access to higher education is a policy consideration that courts should weigh when choosing the appropriate standard of care owed by colleges and universities to students. As an

131. U.S. DEP’T OF EDUC., *supra* note 5, at 11 (citation omitted).

132. Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 548 (1961).

133. *Id.*

134. *Id.* at 548–49.

135. *Id.* at 548.

136. *Id.* at 549.

institution's standard of care expands (and liability increases), loose coupling causes student access to decrease. To help understand why this is so, this section begins with describing the universe of student injury claims so that future conversations on the subject of college and university liability have context. This section then discusses why risk management will not ameliorate the financial impact that increased liability would have on colleges and universities, in contradiction to what many Reasonable Institution standards suggest. Finally, because risk management fails, this section analyzes the effect of loss spreading, another justification offered by many Reasonable Institution standards.

A. The Current Student Injury Universe Sheds Light on the Financial Impact of Expanded University Liability

In recent years, United Educators has seen student injuries become a "substantial and growing source of claims."¹³⁷ To give an idea of the size, from 2003 to 2007 the total costs of student claims filed with United Educators by member colleges and universities was approximately \$64 million, with average payouts of \$198,630, under United Educator's general and excess liability insurance policies.¹³⁸ As the largest insurer of college and universities, United Educators is a repository for data on the nature and cost of student injuries.¹³⁹ Of the 8,000 claims filed against colleges and universities insured by United Educators from 2004 to 2008, 38% came from students.¹⁴⁰ Of the general liability claims reported by colleges and universities, 29% related to slips and falls, 20% to assaults, 19% to vehicle and other accidents, 9% to athletics, 7% to property, 7% to mental or physical health, and 10% to a potpourri of "other claims" that included damaged reputations, invasions of privacy, civil rights deprivations, and pollution.¹⁴¹ The frequency of a particular injury did not forecast the most costly injury categories, however. Of the total, post-deductible dollars paid by United Educators and institutional members, 10% went to slip and falls, 14% to assaults, 18% to vehicular and other accidents, 11% to athletics, and 1% to property.¹⁴² On the other hand,

137. BROE, *supra* note 12, at 1.

138. *Id.* at 1–2.

139. See KEVIN MAY, UNITED EDUCATORS, AN INSIDE LOOK AT UE'S STUDENT LIABILITY CLAIMS IN HIGHER EDUCATION (2010). (United Educators was willing to share its data as part of the background research for this paper; the information is included to give readers context to the scope and costs of student injuries. In their evaluation, readers should consider that an enterprise operating on behalf of colleges and universities to manage risks and reduce loss provided the data; however, they should note that I have no direct connection to United Educators and that the company did not contribute to my analysis beyond providing data.)

140. *Id.* at 1.

141. *Id.* at 2.

142. *Id.* at 4.

mental or physical health and the “other claims” category, which accounted for just 17% of reported claims, represented 46% of the dollars paid to plaintiffs.¹⁴³

For mental or physical health, the costliest category of injury, 80% of claims arose from self-inflicted injuries or suicide; the remaining 20% resulted from alleged negligence from medical and counseling treatment.¹⁴⁴ Examples of these injuries include the alleged negligence of a student nurse depriving a patient of oxygen, an alleged failure of health services to properly diagnose a student’s meningitis, and the alleged improper application of hot packs by an athletic trainer that burned a student’s legs.¹⁴⁵ Five claims in this category “exceeded over \$1 million in defense costs and payments to claimants, one of which totaled nearly \$20 million.”¹⁴⁶

The “other claims” category was the second costliest category. Two reputational harm claims led to the high costs. One claim, a multimillion dollar injury claim, was not resolved at the time United Educators published its data. According to the company, such claims “typically occur when one or more students are involved in a high-profile situation in which their names are made public. The students’ claims allege reputational damage that makes it difficult for them to continue their education at the institution.”¹⁴⁷

Seven accidents in the vehicular and other accident category resulted in losses of \$1 million or more, which made this category of injury the third most expensive.¹⁴⁸ Of the total accidents, 22% were vehicular and the rest fell into the other category, which included: a student’s death while unloading stage equipment, a student injury resulting from operating a saw in class, an explosion in an institution’s chemical engineering building that injured a student, and student horseplay that caused the injured student to hit his head on concrete.¹⁴⁹

The remaining injury categories account for a smaller amount of loss to United Educators and member institutions. These injuries arose in a variety of situations. Reported slip and falls occurred primarily on campus grounds, but also in campus buildings, residence halls, and off campus.¹⁵⁰ Twenty slip and falls resulted in six-figure or higher losses; a few examples include two students’ falling through a window during a dance rehearsal, a hole in the sidewalk causing a student to break her arm, and a fall in an icy

143. *Id.*

144. *Id.* at 3.

145. *Id.* at 3–4.

146. *Id.* at 3–4.

147. *Id.* at 6.

148. *Id.* at 5.

149. *Id.* at 3–5.

150. *Id.* at 3.

parking lot.¹⁵¹ Assaults also occurred across campus, but the majority occurred in residential buildings.¹⁵² Of reported assaults, 66% were sexual assaults; it should be noted, however, that 75% of losses resulted from non-sexual assaults that included physical violence, verbal abuse, stalking, and the like.¹⁵³ Alcohol played a part in approximately 29% of all reported assaults.¹⁵⁴ Next, 53% of athletic accidents arose from intramural and club sports and recreational athletics; the rest resulted from varsity athletics participation.¹⁵⁵ Lastly, most property claims were settled for small amounts or covered by the homeowner insurance of parents.¹⁵⁶

Moving from general liability, educators' legal liability constitutes a final form of student injuries. Injuries falling within this umbrella included discrimination (52% of the claims in this area), breach of contract (33%), and other wrongful acts (15%).¹⁵⁷ Discrimination claims resulted in nine six-figure losses, breach of contract claims resulted in an additional sixteen six-figure losses, and other wrongful acts contributed three six-figure losses.¹⁵⁸ Alleged situations giving rise to these claims included: failure of a program to gain accreditation prior to a student's graduation, failure to provide enough core courses for a timely degree completion, failure to follow due process in a student conduct hearing, failure to notify a student of an outstanding account balance, a multicultural affairs office's mistaken release of private student data, a university employee's false and defamatory statements to a student's potential employer, a tenured professor making offensive comments and touching a student inappropriately, and a professor's sexual harassment of a student whose personal information then appeared in school and local newspapers.¹⁵⁹

Understanding the current universe of student injuries demonstrates the potential explosion of costs that would arise if courts expanded the college or university's standard of care in the institution-student dynamic. Insurers view the underwriting process as an analysis of the risk—or, exposure—that institutions will face.¹⁶⁰ An expanded standard of care results in more claims being filed. More claims mean more monetary awards resulting from either settlements or court decisions. The increased risk of monetary awards factors into a college or university's premium calculation; consequently, colleges and universities could expect insurance rates to rise

151. *Id.* at 4–5.

152. *Id.* at 3.

153. *Id.* at 3–5.

154. *Id.* at 3.

155. *Id.* at 5.

156. *Id.*

157. *Id.* at 7.

158. *Id.* at 9.

159. *Id.* at 8–10.

160. Johanna F. Chanin et al., *Dances with Wolves: A Primer on Working with Insurers*, NACUA Annual Conference Outline (2001).

if their standard of care expanded. Further, the actual losses noted in United Educators' data would blossom. Even if payouts remained static, some juries might find that colleges and universities owed a duty where none previously existed; therefore, student claims might succeed at a higher rate. The risk of this could lead to more settlements. Even unsuccessful claims would incur more litigation expenses for colleges and universities, as claims survive that would have ended at the summary judgment stage under current rules. In short, an institution's operating costs inevitably increase as its standard of care expands.

B. Loosely Coupled Systems Hinder Effective Risk Management

Proponents of Reasonable Institution standards cite risk management and loss spreading as vehicles for reducing the costs associated with an expanded college and university standard of care. The risk management justification suggests that a unified duty rule would provide a better basis for colleges and universities to evaluate and manage the wide range of risks described above.¹⁶¹ In other areas of tort law, legal theorists have argued that justifying the expansion of duty based on risk management requires "appraisal of the actor's ability to systematically evaluate the risks of his activities and make sound cost-benefit decisions about the manner of operations as well as the level and location of the activity, safeguards, and alternatives."¹⁶² As discussed, Birnbaum's research into the effects of loosely coupled systems on college and university decision-making creates doubt as to whether colleges and universities can systematically evaluate risk and impose sound cost-benefit decisions.¹⁶³ If Birnbaum is correct, then risk management fails as a justification for expanding the college and university standard of care.

To briefly recap, traditional management theories and accountability techniques applied in business do not translate to higher education due to the unique nature of colleges and universities.¹⁶⁴ Unlike a corporation producing widgets, colleges and universities often do not have decision

161. Dall, *supra* note 19, at 522–23.

162. Joseph H. King, Jr., *A Goals-Oriented Approach to Strict Tort Liability for Abnormally Dangerous Activities*, 48 BAYLOR L. REV. 341, 352–53 (1996).

163. See BIRNBAUM, *supra* note 25, at 53–54:

The relationships between the environment and organizational subsystems, and between the subsystems themselves, are exceptionally complex. We usually cannot specify with assurance precisely what the relevant elements are or how they interact. For that reason, administrative actions may sometimes have a very dramatic and expected effect, but at other times identical actions may appear to have little or no effect (and occasionally may have an effect directly opposite to the one expected). . . . We may fail to get what we want not because we have not planned well enough but because many aspects of the system do not operate in a manner that conforms to conventional administrative rationality.

164. *Id.* at 28–29.

makers who can directly influence systematic risk management. Power in colleges and universities is diffused, as evidenced by the roles that state and federal government, boards of trustees, administrators, faculty, alumni, and students all play in institutional decision-making.¹⁶⁵ Further, these decision makers have independent goals that may or may not align. Unlike businesses, there is not a singular concept like “profits” that unite an institution.¹⁶⁶

Independent goals brought about by the diffusion of power create “system parts [that] are themselves systems; they constantly change as they interact with themselves and with the environment”¹⁶⁷ This results in loosely coupled subsystems, or “connections between organizational subsystems that may be infrequent, circumscribed, weak in their mutual effects, unimportant, or slow to respond.”¹⁶⁸ Loosely coupled subsystems lead to probabilistic cause-and-effect management within the organization rather than to a deterministic system of choices-and-outcomes.¹⁶⁹ A decision maker can say what outcomes are possible by undertaking risk management efforts but cannot predict the consequences with certainty.¹⁷⁰

A hypothetical example of loosely coupled systems may be helpful. Ms. Esquire in the Office of the General Counsel for Blackacre University writes a memo asking faculty to refrain from course activities that create potentially liability-supporting scenarios similar to the scenario in *Webb*. Dr. Tweed, a professor of earth sciences, ignores the memo and takes his class on a trip to view fault lines, believing that field work is the best way to teach the students. Clearly the goals of Ms. Esquire and Dr. Tweed differ. Further, each may feel that she is the proper person to make the ultimate decision. Consider the decision-making from the standpoint of academic freedom.¹⁷¹ Ms. Esquire could rely on court cases that say that academic freedom provides her client institution the right to determine its curriculum.¹⁷² These cases, however, have assumed that the institution is

165. *See id.*

166. *Id.* at 11.

167. *Id.* at 35.

168. *Id.* at 38 (citation omitted).

169. *Id.* at 35.

170. *Id.*

171. KAPLIN & LEE, *supra* note 13, at 258 (asserting that “there are now three sets of beneficiaries of academic freedom protections: faculty members, students, and individual higher educational institutions. Obviously the interests of these three groups are not always compatible with one another, therefore assuring that conflicts will arise among the various claimants of academic freedom.”).

172. *Id.* at 258. *See also* Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 226 n.12 (1985) (distinguishing between an institution’s academic freedom and that of its professors and students), and *Sweezy v. New Hampshire*, 354 U.S. 235, 263 (1957) (outlining the four essential academic freedoms of a college or university to determine “who may teach, what may be taught, how it shall be taught, and who may be admitted to study”).

working in furtherance of the faculty.¹⁷³ Meanwhile, Dr. Tweed may rely on court cases that have held that “[i]t is ‘the traditional role of deans, provosts, department heads, and faculty [to make] academic decisions,’ and they make ‘discretionary choices . . . in the contexts of hiring, tenure, curriculum selection, grants, and salaries.’”¹⁷⁴ Further, Dr. Tweed could assert that custom has treated academic freedom as granting professors the ultimate decision making in teaching.¹⁷⁵

While Reasonable Institution standards wrestle with ways to envision the institution-student legal dynamic, the greater question is who constitutes the institution and, of those, who, if anyone, is in control? This example illustrates one potential way that loosely coupled systems can cause risk management efforts to fail as a method for controlling liability costs. The likelihood of loose coupling having such an effect contradicts the assumption offered by Reasonable Institution standards that financial gains from risk management justifies expanding an institution’s standard of care. Of course, the roles played in this example by Ms. Esquire and Dr. Tweed do not always have to be general counsel and professor. The statistics show that student injuries occur in a variety of campus settings, and Birnbaum’s loosely coupled systems approach applies to all areas of an institution. Consequently, the Black Box Model accounts for the breadth of student injuries in its expansion of *Webb* to all members and divisions of an institution.

C. If Risk Management Fails, how will Losses be Spread?

The failure of risk management means that the increased costs associated with increased liability must be paid, and this requires an examination of the second common justification found in reasonable college and university standards for expanding the institution’s standard of care: loss spreading. In discussing loss spreading, judge and professor Guido Calabresi states that “[t]he justification for allocation of losses on a nonfault basis which is found most often among legal writers is that if losses are broadly spread—among people and over time—they are least harmful.”¹⁷⁶ If Calabresi is correct, then loss spreading is a suitable justification for imposing greater standards of care on certain industries.¹⁷⁷ As noted earlier, Calabresi

173. KAPLIN AND LEE, *supra* note 13, at 258 (citation omitted).

174. *Id.* at 258 (quoting *Urofsky v. Gilmore*, 216 F.3d 401, 432–33 (4th Cir. 2000)).

175. *See* KAPLIN & LEE, *supra* note 13, at 260. *See also* AM. ASS’N OF UNIV. PROFESSORS, 1940 STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE (10th ed. 2006).

176. Calabresi, *supra* note 132, at 517 (citation omitted).

177. *Id.* at 517–19. Calabresi compares the justification of spreading losses broadly among people to the economic theory of diminishing marginal utility of money. *Id.* In so doing, he says that some economists do not agree that small losses absorbed by a large group of people is less harmful than a large loss absorbed by a single person because studies showed that small price increases harmed people similarly to large

believes that loss spreading could be properly applied to charities because charities could spread loss via insurance and reallocation of resources.¹⁷⁸

The formation of United Educators demonstrates that colleges and universities can insure against losses. In this and other ways, the insurance portion of the Calabresi framework is satisfied. Insurance premiums, however, will go up in conjunction with increases in college and university liability. The more a tort model expands an institution's standard of care, the more an institution must reallocate resources to cover insurance. Consequently, before loss spreading can justify expanding an institution's standard of care under the Reasonable Institution standards, the effect of resource reallocation must be considered.

An analysis of resource allocation requires an understanding of college and university revenue streams. In 1995-1996, public and private colleges and universities received 38% of their revenue from student tuition and fees, 35% from local and state governments, 16% from the federal government, and 11% from additional sources, such as endowments, gifts, and private grants.¹⁷⁹ These sources of funding are in flux, with the two largest—tuition and state appropriations—experiencing dramatic change. A 2006 report by the Department of Education found that “[f]rom 1995 to 2005, average tuition and fees at private four-year colleges and universities rose 36 percent after adjusting for inflation. . . . [and] rose 51 percent at public four-year institutions and 30 percent at community colleges.”¹⁸⁰ Tuition increases coincided with a fall in state funding of higher education to a two-decade low.¹⁸¹ This trend can be partly attributed to the recognition by state politicians that higher education “has a revenue source (tuition and fees) in contrast to most other governmental services”¹⁸²

This trend has continued into the end of the decade. From 1999–2000 to 2009–2010, the Department of Education found that “prices for undergraduate tuition, room, and board at public institutions rose 37 percent, and prices at private institutions rose 25 percent, after adjustment for inflation.”¹⁸³ During that decade, the growth in published price of

price increases when the small price increase resulted in a loss of social status. *Id.* Calabresi, however, is unswayed by these studies. *Id.* He finds it unlikely that a situation would arise “where the extra \$1 charged to one thousand people would be one thousand straws which would break one thousand backs and ruin one thousand homes or businesses” *Id.* at 518. Similarly, Calabresi believes that spreading loss broadly over time would result in little to no danger to social status. *Id.*

178. *Id.* at 548–49.

179. Aims C. McGuinness, Jr., *The States and Higher Education*, in *AMERICAN HIGHER EDUCATION IN THE TWENTY-FIRST CENTURY: SOCIAL, POLITICAL, AND ECONOMIC CHALLENGES* 198, 201 (Philip G. Altbach et al. eds., 2005).

180. U.S. DEP’T OF EDUC., *supra* note 5, at 9 (citation omitted).

181. *Id.* (citation omitted).

182. McGuinness, *supra* note 180, at 202.

183. NAT’L CTR. FOR EDUC. STATISTICS, U.S. DEP’T OF EDUC., *DIGEST OF EDUC. STATISTICS 2010* (NCES 2011–015) 4 (2011).

tuition and fees increased 5.6% per year above inflation at public four-year institutions and 3.0% per year above inflation at private four-year institutions.¹⁸⁴ One of the sharpest spikes during the decade was in 2009–2010 during the recession, when published tuition and fees at public four-year institutions rose 9.3% beyond inflation in that year and growth at private institutions also spiked sharply.¹⁸⁵

As a result of the decline in appropriations, a 2002–2006 study by Delta Project found “students’ share of educational costs at public four-year institutions has gone from one third to nearly one half.”¹⁸⁶ Recession data points to a different cause, yet the result in increased cost to students remains the same. In 2004–2005, tuition and fees represented 16.4% of total revenue at public institutions and 29.5% of total revenue at private institutions.¹⁸⁷ In 2008–2009, those numbers grew to 19.4% and 77.8%, respectively.¹⁸⁸ State appropriations remained nearly constant from 2004–2009 for public institutions, growing from 23.6% of revenue to 24.5%.¹⁸⁹ Meanwhile, investment return dropped to -3.5% of total revenue for public institutions and -93.0% of total revenue for private institutions.¹⁹⁰

Revenue sources beyond tuition and fees are poor methods for reallocating resources due to their scope, reliability, and limitations. As noted above, investment income is one such source; however, it is not a highly dependable source due to market fluctuations and a limited number of colleges and universities with sizeable investments.¹⁹¹ Furthermore, 80% or more of public and private college and university endowments are

184. SANDY BAUM & JENNIFER MA, COLLEGE BOARD, TRENDS IN COLLEGE PRICING 13 (2010).

185. *Id.*

186. Kurt Brobeck, *Higher Education Tough Times Raise Tough Questions*, IDEAS IN ACTION, Summer 2009, at 8–9.

187. SUSAN AUD ET AL., NAT’L CTR. FOR EDUC. STATISTICS, U.S. DEP’T OF EDUC., THE CONDITION OF EDUCATION 2011 (NCES 2011–033) 306 (2011).

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.* at 134 (explaining the decline in investment revenue for higher education institutions):

Historically, investment return has generally been among the largest revenue sources for private not-for-profit institutions. In contrast, private for-profit institutions typically receive little revenue from this source, while public institutions receive a moderate amount. Changes in the value of endowment funds from investments affect total revenue and can fluctuate from year to year. For example, in 2008–2009, private not-for-profit institutions saw a loss in investment return of \$64 billion, which decreased total revenue and caused other revenue sources to account for larger shares of the total. Investment income at public institutions was affected to a lesser degree (a loss of \$9 billion).

comprised of restricted gifts.¹⁹² Using those gifts for anything other than their intended purpose creates donor unrest and legal liability.¹⁹³ Similarly, research revenue is of limited use when reallocating resources. Normally, such revenue is restricted to the research purpose of the grant proposal that received the funds.¹⁹⁴ Moreover, research revenue is “highly concentrated on a relatively small number of institutions, most of them major research universities.”¹⁹⁵

By understanding colleges’ and universities’ revenue streams, one can analyze how resources will likely be reallocated. Calabresi’s framework justifies loss spreading in a non-profit college or university context when resource reallocation can be accomplished by increasing donations, decreasing educational quality, or increasing tuition to those who can pay.¹⁹⁶

For the first element, colleges and universities have undertaken efforts to develop charitable giving, research enterprise, and technology transfer revenue streams; so far, however, those efforts have proven insufficient to mitigate current costs.¹⁹⁷ Therefore, it is not clear whether increased donor support justifies the expansion of the college and university standard of care in the university-student dynamic.

For the second element, colleges and universities could decrease educational benefits to students. Those decreases could take the form of “cutting weaker programs or those with less societal impact, focusing on core areas of institutional distinction, conducting more rigorous assessments of student development and establishing output measures, and pursuing innovative degree and pricing strategies.”¹⁹⁸ Certainly, the feasibility of these suggestions should be explored. At first blush, however, it would seem that attempts to decrease educational quality would be as unpredictable as risk management due to loose coupling. Further, it would create more litigation concerns as both students, who feel they did not receive the education promised by the institution, and tenured faculty, who lose their jobs, file suit. Finally, graduating more poorly educated students has its own public policy concerns.

192. Karen W. Arenson, *When Strings Are Attached, Quirky Gifts Can Limit Universities*, N.Y. TIMES (Apr. 13, 2008), <http://www.nytimes.com/2008/04/13/education/13endow.html>.

193. See John Hechinger, *New Unrest on Campus as Donors Rebel*, WALL ST. J. (Apr. 23, 2009), <http://online.wsj.com/article/SB124043394794145007.html>.

194. See, e.g., Lawrence E. Gladieux et al., *The Federal Government and Higher Education*, in AMERICAN HIGHER EDUCATION IN THE TWENTY-FIRST CENTURY: SOCIAL, POLITICAL, AND ECONOMIC CHALLENGES 163, 170–71 (Philip G. Altbach et al. eds., 2005) (discussing the U.S. federal government’s focus for the last fifty years on defense-related science and technology versus other research endeavors).

195. *Id.* at 170.

196. Calabresi, *supra* note 132, at 548–49.

197. Brobeck, *supra* note 186, at 10.

198. *Id.* at 11.

Despite the uncertainty of the first two elements in Calabresi's framework, it is clear that colleges and universities can increase prices. Tuition and fees have grown by 439% from 1982 to 2007, whereas healthcare costs increased by only 251% over the same period.¹⁹⁹ It is not clear, however, that tuition increases are charged only to those who can pay.²⁰⁰ To answer that question would require an analysis of whether scholarships for low-income individuals can offset the across-the-board hikes in tuition due to loss spreading. When calculating the total price of attendance minus grants and scholarships, research shows that "the net price of sending a student to a postsecondary institution was higher in 2007–08 than in 1999–2000 for families at all income levels. For low-income, middle-income and high-income families, the net price increased, respectively by \$1,400, \$2,200, and \$3,600."²⁰¹ Post-recession, increases in the Federal Pell Grants and Veterans Benefits in 2009–2010 actually decreased net price as compared to five years prior.²⁰² Net price was estimated to once again increase in four-year private, four-year public, and two-year public institutions in 2010–2011 based on past years and changes in financial aid, but data is still pending to confirm the increase.²⁰³ Without a new influx of federal funding, it seems likely that the cost of colleges and universities will continue to increase for all students and not just those who can pay.

The ability of colleges and universities to increase tuition, coupled with the potential to increase donor support and decrease educational benefits, may make loss spreading an appropriate justification for expanding an institution's standard of care. At this point, it becomes a question of policy: how much loss spreading is acceptable? Answering this question directly affects how aggressively courts should expand an institution's standard of care in the university-student legal dynamic.

D. Loss Spreading Will do Harm to College Access, Which Benefits Individuals and Our Society

As is true of colleges and universities, the aims of tort law are multiple and can be contradictory.²⁰⁴ On one hand, tort law seeks to provide justice; therefore, it compensates the injured by holding those who caused the injury liable.²⁰⁵ On the other hand, tort law must consider social policy and

199. NAT'L CTR. FOR PUB. POLICY & HIGHER EDUC., *supra* note 4, at 7.

200. *Id.* at 8 (noting that the burden of college tuition has increased all income levels, from low- to high-income families).

201. AUD ET AL., *supra* note 187, at 128.

202. BAUM & MA, *supra* note 184, at 15.

203. *Id.*

204. See DAN B. DOBBS & PAUL T. HAYDEN, TORTS AND COMPENSATION: PERSONAL ACCOUNTABILITY AND SOCIAL RESPONSIBILITY FOR INJURY 4 (5th ed. 2005).

205. *Id.* at 3.

“provide a system of rules that, overall, works toward the good of society.”²⁰⁶ Requiring colleges and universities to compensate students for injury creates the opportunity for such a contradiction. Through loss spreading, particularly tuition increases, colleges and universities have the ability to compensate students for injuries. Alternatively, colleges and universities provide an educational experience that is vital to personal and national well-being, and tuition costs directly affect a person’s ability to attend college.²⁰⁷ Consequently, courts must balance access to higher education as a public policy alongside justice to injured students when selecting an appropriate model for expanding the college and university standard of care.

Fifty-five percent of Americans consider higher education necessary to succeed, yet 69% also see access to higher education as a problem for many qualified students.²⁰⁸ Research concurs that the burden of paying for college and university attendance has been felt by all families; however, it has become particularly acute for “low- and middle-income families, even when scholarships and grants are taken into account.”²⁰⁹ Low- and middle-income students who choose to pursue higher education must take on more debt than ever before; student borrowing more than doubled from 1997 to 2007.²¹⁰ Flat or declining growth in family income over the past three decades exacerbated the impact of tuition increases.²¹¹

Affordability greatly impacts access to higher education.²¹² Given these facts, it is unsurprising that over the past decade, access to higher education experienced relatively flat growth.²¹³ Lack of growth precipitated the United States’ fall to seventh in the world in college and university enrollment for students between eighteen and twenty-four years of age.²¹⁴ Furthermore, the United States now ranks tenth in the world for the percentage of adults between twenty-four and thirty-four years old who hold an associate’s degree or higher—a sharp contrast to the United States’ rank of second place on the same list in the thirty-five- to sixty-four-year-old bracket.²¹⁵ With the country’s changing demographics, degree declines

206. *Id.*

207. U.S. DEP’T OF EDUC., *supra* note 5, at 8. *Accord* NAT’L CTR. FOR PUB. POLICY & HIGHER EDUC., *supra* note 4, at 8.

208. JOHN IMMERWAHR ET AL., PUB. AGENDA & NAT’L CTR. FOR PUB. POLICY & HIGHER EDUC., SQUEEZE PLAY 2010: CONTINUED PUBLIC ANXIETY ON COST, HARSHER JUDGMENTS ON HOW COLLEGES ARE RUN 10–11 (2010) (analyzing a study comprised of a national random sample of 1,031 adults aged eighteen and over in 2009).

209. NAT’L CTR. FOR PUB. POLICY & HIGHER EDUC., *supra* note 4, at 8.

210. *Id.* at 9.

211. *Id.* at 8.

212. U.S. DEP’T OF EDUC., *supra* note 5, at 8. *Accord* NAT’L CTR. FOR PUB. POLICY & HIGHER EDUC., *supra* note 4, at 8.

213. NAT’L CTR. FOR PUB. POLICY & HIGHER EDUC., *supra* note 4, at 5.

214. *Id.* at 6.

215. *Id.*

will likely continue due to the disproportionate impact of tuition increases on minority students.²¹⁶

Access to higher education serves both a private and public function. Privately, a person with a college degree will enjoy approximately 66% more lifetime earnings than peers with only a high school diploma.²¹⁷ In 2008, individuals with a bachelor's degree averaged \$55,700 annually in earnings, whereas similar individuals with a high school diploma earned \$33,800.²¹⁸ Historically, this effect on private earning makes higher education the engine that powers social mobility; it is a "prerequisite for employment that supports a middle-class life."²¹⁹ Just as important, research shows a college education positively influences the cognitive, moral, and identity development of individuals.²²⁰ Some might argue that the salary commensurate with a college degree justifies burdening all students with tuition increases as opposed to burdening a single, injured student. As Calabresi acknowledges, however, when it comes to loss spreading a small burden to a large group of people is just as significant as a large burden to a single person if both affect social status.²²¹

From a public perspective, seventy-eight million Americans are about to retire; this constitutes the "best-educated generation in the United States—both currently and historically."²²² Meanwhile, the majority of our nation's fastest growing jobs require post-secondary education.²²³ To compete globally, the United States will need a college- and university-educated workforce capable of filling the gaps on the labor line.²²⁴ As Patrick M. Callan puts it in *Measuring Up*, "[t]he relative erosion of our national 'education capital' has occurred at a time when we need more people to be college educated and trained because of Baby Boomer retirements and rising skill requirements for new and existing jobs."²²⁵ Another societal benefit of college- and university-educated workers is their impact on coworkers. College and university degrees act as a rising tide that lifts the earnings of the entire workforce no matter the education level.²²⁶ Beyond labor benefits, a college or university education correlates to higher levels of civic engagement, which invigorates the democratic process.²²⁷ It

216. See, e.g., U.S. DEP'T OF EDUC., *supra* note 5, at 9.

217. BAUM ET AL., *supra* note 1, at 12.

218. *Id.* at 11.

219. NAT'L CTR. FOR PUB. POLICY & HIGHER EDUC., *supra* note 4, at 7.

220. See PASCARELLA & TEREZINI, *supra* note 2.

221. Calabresi, *supra* note 132, at 518.

222. NAT'L CTR. FOR PUB. POLICY & HIGHER EDUC., *supra* note 4, at 7.

223. U.S. DEP'T OF EDUC., *supra* note 5, at 7.

224. NAT'L CTR. FOR PUB. POLICY & HIGHER EDUC., *supra* note 4, at 9.

225. *Id.*

226. BAUM & MA, *supra* note 3, at 8 (discussing positive impacts of higher education on society, including widespread productivity of coworkers).

227. BAUM ET AL., *supra* note 1, at 33 (discussing the high correlation of college

provides society with volunteers.²²⁸ Finally, citizens with college or university educations rely less often on social welfare programs due to lower incidents of unemployment and poverty and better overall health.²²⁹

Loss spreading through tuition would detrimentally affect college and university affordability for a large number of students and, by extension, their access to higher education. Therefore, from a policy standpoint, loss spreading is justified only if it balances the right of an injured student to recover with the desirability of making a college or university education widely accessible. The Black Box Model provides proper balance: it places a high evidentiary burden on students, yet it allows injured students to recover in clear and convincing cases of college or university fault. The Black Box Model requires reasonable, detrimental reliance by a student based on the act of a college or university member or division. Finally, it accounts for the impact that loosely coupled systems have on the ability of the institution to exert control over those acts, providing a more accurate approach to assessing college and university fault. Models that treat institutions as reasonable actors instead of loosely coupled systems, models focusing primarily on the injured student's right to recovery, and models that aggressively expand the college or university standard of care without a thorough analysis of the feasibility or desirability of offsetting costs through risk management and loss spreading all fail to strike a proper balance.

V. CONCLUSION

As higher education has evolved in the United States, so too has the institution-student legal dynamic. While institutions began with a parental standard of care and enjoyed similar immunity, they now face a myriad of possible standards.²³⁰ *Beach* and *Webb*, two decisions by the Supreme Court of Utah regarding the University of Utah's duty to protect its students from injury, held that institutions did not owe a duty to adult students absent the existence of a special relationship.²³¹ *Webb*, however, allowed for the possibility of recovery when a student could show a reasonable, detrimental reliance on course-related instructions from a professor.²³² Legal theorists have pushed for a more aggressive expansion of the college and university standard of care in relation to students.²³³

education to voting participation).

228. *Id.* at 32.

229. *Id.* at 4–5.

230. KAPLIN & LEE, *supra* note 14, at 16–17.

231. *See* *Beach v. Univ. of Utah*, 726 P.2d 413 (Utah 1986); *Webb v. Univ. of Utah*, 125 P.3d 906, 912–13 (Utah 2005).

232. *Webb*, 125 P.3d at 912.

233. *See* Bickel & Lake, *supra* note 14; Dall, *supra* note 19; and Peters, *supra* note 13.

Two preeminent theorists, Bickel and Lake, identified the challenge of establishing a university standard of care as how to envision the institution-student relationship.²³⁴ In recent years, numerous articles have attempted to define the institution-student relationship and impose an applicable tort standard of care. An unaddressed assumption in many of these articles is that the institutional portion of the university-student dynamic behaves as a single actor with rational, unified goals.²³⁵ This school of thought leads to a monolithic reasonable man inhabiting the role of institutions in the institution-student legal dynamic. Organizational theory research into higher education by Robert Birnbaum challenges this vision.²³⁶

Birnbaum found that colleges and universities are composed of loosely coupled systems.²³⁷ Loosely coupled systems have weak, circumscribed connections to each other.²³⁸ In the case of colleges and universities, these systems include students, faculty, academic departments, administrators, administrative offices, donors, boards of trustees, politicians, and more. Loose coupling allows these systems to have different and contradictory goals.²³⁹ Further, loose coupling reduces the ability to predict the effects of actions applied to the systems.²⁴⁰ Decision making in colleges and universities is more probabilistic than deterministic, which Birnbaum contrasts using two black boxes as analogies.²⁴¹ In a tightly coupled, deterministic black box, when a crank on one side of the box is turned, the gears inside the box always turn the rotor on the other side one revolution clockwise.²⁴² In a loosely coupled, probabilistic black box, when a crank is turned the gears inside may turn the rotor one revolution clockwise, one revolution counter-clockwise, or not at all.²⁴³ Similarly, when college or university presidents enact new policies, the effects of the policies are often unknowable.

Envisioning colleges and universities as a composite of loosely coupled systems should influence how courts and theorists define the institution's standard of care in the institution-student legal dynamic. For example, theorists using Reasonable Institution standards often propose an aggressive expansion of institutions' standard of care in order to better

234. Bickel & Lake, *supra* note 14, at 784.

235. *See, e.g.*, Bickel and Lake, *supra* note 14, at 788 (requiring a university "given its particular circumstances, to use reasonable care to facilitate student education and growth").

236. *See* BIRNBAUM, *supra* note 25.

237. *Id.* at 37-38.

238. *Id.*

239. *Id.* at 11.

240. *Id.* at 38.

241. *Id.* at 37-38.

242. *Id.* at 36.

243. *Id.* at 37-38.

protect students from injury.²⁴⁴ They acknowledge that such an expansion would increase college and university costs, but they cite risk management and loss spreading as methods for ameliorating this consequence.²⁴⁵ If, however, colleges and universities are treated as made up of many loosely coupled systems, then the ability of risk management to offset costs becomes less clear. A college or university president, for example, may try to put in place policies to manage risk, but she cannot guarantee that the implementation of the policies will result in the desired outcomes.

The potential ineffectiveness of risk management will likely result in colleges and universities relying more on loss spreading to recoup costs associated with an expanded duty of care. Guido Calabresi argues that loss spreading is appropriate when a charity—such as a college or university—can insure against loss and reallocate resources by increasing prices to those who can pay, increasing donor support, and decreasing the amount of charity given to individuals.²⁴⁶ Colleges and universities can insure against loss; they already do so as demonstrated by the work of United Educators.²⁴⁷ It is less clear whether institutions can increase donor support and decrease educational benefits to absorb loss. What colleges and universities can do—and have been doing over the last three decades to make up for reduced state appropriations, higher operating costs, more students, and market fluctuations—is increase tuition prices.²⁴⁸

Whether loss spreading justifies an expansion of an institution's standard of care depends upon the policy choices supporting increased liability. As stated, theorists using Reasonable Institution standards support an expansion to better protect students from injury and provide recovery for those who are injured. This is an understandable reaction given the historical deference shown to colleges and universities in student injury lawsuits. College and university access, however, is another important policy, and it favors a conservative expansion of a university's standard of care. College and university access correlates to college and university affordability; as prices go up due to loss spreading, fewer students will be able to attend.²⁴⁹ The populations most sensitive to decreases in college and university affordability are historically underrepresented students and students from poor or middle-class backgrounds.²⁵⁰ From a policy perspective, access to higher education has both private and public benefits.

244. See, e.g., Peters, *supra* note 13, at 468 (arguing that decreased autonomy in the Millennial generation of college and university students required an increased university standard of care).

245. See, e.g., Dall, *supra* note 19, at 522–23.

246. Calabresi, *supra* note 132, at 548–49.

247. Broe, *supra* note 12, at 1.

248. See U.S. DEP'T OF EDUC., *supra* note 5, at 10.

249. *Id.* at 8; accord NAT'L CTR. FOR PUB. POLICY & HIGHER EDUC., *supra* note 4, at 8.

250. NAT'L CTR. FOR PUB. POLICY & HIGHER EDUC., *supra* note 4, at 8.

For the individual, college or university attendance has historically powered social mobility within the United States.²⁵¹ Consequently, loss spreading would significantly harm the social standing of numerous individuals and put the American promise of a better life further out of their reach. Further, college or university attendance contributes to an individual's moral, cognitive, and identity development.²⁵² Publicly, reduced college and university attendance due to loss spreading would detrimentally impact the United States' labor market, its ability to compete in the global marketplace, and the development of its society.²⁵³

To introduce the concept of colleges and universities as a grouping of loosely coupled systems into the discussion of an institution's standard of care, I developed the Black Box Model starting with the court's analysis in *Webb* and Birnbaum's organizational theory research. If courts choose to apply the Black Box Model, an injured student would need to demonstrate that an act by a member or division of the college or university caused the student's reasonable and detrimental reliance and a college or university foreseeing the act could and should have stopped the act by exerting control over the system in question. Consequently, the Black Box Model provides a truer understanding of institutions by accounting for loosely coupled systems. It has several other benefits as well. It applies to any type of institution, encompasses all systems within a college or university, creates the opportunity for injured students to recover, and synthesizes several legal theories to fully develop a new understanding of the institution-student legal dynamic. Furthermore, by understanding that loosely coupled systems affect risk management and loss spreading, the Black Box Model uses a clear and convincing evidentiary standard and a prerequisite act to conservatively expand an institution's standard of care. Doing so balances student recovery and protection with concerns about college and university access.

Potential drawbacks exist with any revision of the institution-student legal dynamic, and the Black Box Model is no exception. Critics may argue that loose coupling is an excuse to avoid accountability, that the clear and convincing evidentiary standard is too high a bar, and that loss spreading justifies a more aggressive expansion of the standard of care. First, loose coupling is a necessary evil in that it allows colleges and universities to respond to needs without mobilizing the entire institution, contains failures to one system, and allows colleges and universities to achieve important yet incompatible goals.²⁵⁴ Second, the evidentiary standard is not a complete bar to recovery, unlike other standards applied by courts, and it is used by the Black Box Model to balance recovery with

251. *Id.* at 7.

252. *See generally* PASCARELLA & TEREZINI, *supra* note 2.

253. *See generally* BAUM ET AL., *supra* note 1.

254. BIRNBAUM, *supra* note 25, at 39–41.

student access to colleges and universities. Third, the model will lead to loss spreading, but it understands that loss spreading will increase tuition and decrease college and university attendance. It limits liability to reduce costs and minimize loss spreading to avoid the policy consequences of decreased access to higher education.

