

The Rights and
Responsibilities of the
Modern University

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University

Who Assumes the Risks of College
Life?

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and
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To Marilyn and Lea

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Preface

Several years ago, Bob Bickel walked into my office for one of our frequent “two people who teach torts” chats. Bob had always supported my interests in tort duty and rescue doctrines, and cases like *Tarasoff v. Board of Regents* (the seminal duty to warn a victim of a foreseeable attacker case). I knew of his stature in the university law community, but I saw only the obvious connections between my work and his. Bob said that I should become more involved with university law issues and that I would enjoy the field and the people involved in it a great deal. I like Bob so much as a person and a friend that in an act of faith, I agreed to do a few things with him.

Bob was animated from the start by two points in particular. First, he kept pushing me on the idea that tort “duty” law was the key to the future of modern university law. Second, he insisted that a series of problematical decisions had been the result of a misreading of the cases involving the 1960’s civil rights movement on campus. We both share a deep affection for American universities, and I could detect that Bob was concerned that the law was somehow on the brink of facilitating the erosion of community and safety in institutions of higher learning.

In retrospect, Bob’s intuitions—formed by years and years of devoted (often selfless) service to the field—emerged to me as profound insights regarding the law of higher education and tort law generally. As we began to write law review articles and travel to more colleges and more professional meetings, the themes of this book became apparent to us.

Writing the book was greatly facilitated by the conjunction of our sabbaticals in 1998 which gave us the time and opportunity to complete this book. The book was made possible by the diligent work of our faculty support staff (led by Connie Evans), particularly Sharon Gisclair and Barbara Lernihan, and with the assistance of Louise Petren, Susan Stinson, Marge Masters, and Shannon Mullins. My handwriting is particularly atrocious (I am still not good with computers) and their work was often akin to that of dedicated Egyptologists. Many people have supported us in our endeavors. Bob has thanked many of them in his Preface, but I would like to express particular gratitude to Joel Epstein, Greg McCann, Ray Goldstone, Art Broadhurst, Jeff Chasen, David Aronofsky, Mike Shanahan, Adam Oler, and Keith Sipe. My research assistant Melissa Jagger deserves special recognition for her dedicated and invaluable

able help on the book; Labor Day 1998 was aptly named for her. I would like to remember my mentor when I was in practice in New York City at Cahill Gordon & Reindel, Michael J. Tiemey, who taught me most of my lawyering skills. I must express a very special gratitude to my parents Chester and Mary, who worked so hard to insure that I received the education I needed to make a project like this possible: there were many sleepless nights and early mornings, and many financial sacrifices along the way. Also, I will always remember that Coyote was my constant companion through the long spring days I spent writing and revising the manuscript. Most of all, I must thank Bob himself: he has been my greatest facilitator and one of those few great friends of a lifetime. It is my most earnest desire that this book become a lasting tribute to his lifelong efforts to improve the law and safety on American colleges and universities.

Peter F. Lake
January 1999

During my eight years as a university attorney, and more than twenty years of teaching education law, I have observed what I believe to be an unnecessary struggle to properly define the joint responsibility of the university, its students, and to some extent parents, regarding the safety and quality of college life. It is my fundamental belief that the law—both judicial decisions and legislative enactment—should recognize that an unreasonably unsafe learning environment is not an appropriate learning environment. The college or university, students, and parents must understand that all students, but especially those who come to college—at age 18 or so—directly from a family setting characterized by dependency and parenting, are not yet fully prepared for the freedoms of an adult life without the continued active intervention of family and the active guidance of the university. Our colleague, Gary Pavela, describes the challenge as “complementing freedom with structure for the student within the context of university life.”

Several years ago, I took this idea to my colleague Peter Lake. Together we examined the body of texts, caselaw, and commentary and, with support from Dr. Don Gehring of Bowling Green State University (providing for a summer teaching and writing opportunity for me), we developed the first of two articles on the subject. That work expanded, during a period of three years, to a series of lectures, seminars, and brief papers presented at various annual meetings of educational associations and special workshops at the University of Notre Dame, the University of Montana, the

National Conference on Law and Higher Education, the annual meetings of the National Association of College and University Attorneys and the International Association of Campus Law Enforcement Administrators, and elsewhere. The result has been this book, presenting our view that prior notions of university law have failed to accurately reflect the shared legal responsibility of colleges and universities, and their students for student safety.

Our views have been described as controversial by some university attorneys, and some in both higher education law and university administration see our observations as calling for a return to *in loco parentis*—an era of autocratic university control. We admit to generating a debate for the purpose of clarifying and redefining university/student relations in the legal sense. What we seek is not a return to the days of autocratic control of students by universities but the replacement of a failed approach to the management of risks that threaten student safety and the security of the learning environment.

Many people have inspired and contributed to the development of this book by way of countless formal and informal discussions, seminars, and debates. I am especially appreciative of the support of our colleagues Gary Pavela, Ed Stoner, Peter Ruger, George Shur, Joe Buchanan, Beverly Ledbetter, Art Broadhurst, and Jeff Chasen, Pamela Bernard, Sheila Bell, Joel Epstein, Paul Ward, Jim Beasley, Mike Shanahan, and Jan Majewski. I also wish to thank the faculty and editorial staff of the Journal of College and University Law, and especially Professors John Robinson and “Tex” Dutile, and Brien Crotty, for their active involvement in the publishing of our views and for inviting us to lecture on this subject at the Notre Dame Law School. I also genuinely appreciate the support of Stetson University and my colleagues at its College of Law who encouraged our research. Finally, we give special thanks to our research assistants, Melissa Jagger and Holly Burke, for their careful work in checking our sources, to Sharon Gisclair, who spent countless hours with this manuscript, to Pamela Burdett, our reference librarian, and to Barbara Lemihan, Connie Evans, Louise Petren, Susan Stinson, Marge Masters, and Shannon Mullins for their patience and superior secretarial skills that made the production of this manuscript possible.

Robert D. Bickel
January 1999

