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AUTHOR Conrath, Richard Cranmer
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ABSTRACT

Is the doctrine of "in loco parentis" a viable legal theory today for describing the relationship between the university and the student in the United States? The student dissent of the 1960's forced both the universities and the courts to reconsider the basic legal nature of the university-student relationship, but there is still considerable controversy about the exact nature of the relationship. Does the doctrine imply that a university has not only the duty to discipline but also the responsibility to serve as advocate and protector? If so, what precisely are those rights and responsibilities? This study analyzes and interprets court decisions concerning this legal relationship. (Author/MSE)

IN LOCO PARENTIS: RECENT DEVELOPMENTS IN THIS LEGAL DOCTRINE AS APPLIED TO THE UNIVERSITY-STUDENT RELATIONSHIP IN THE UNITED STATES OF AMERICA, 1965-75

A dissertation submitted to the
Kent State University Graduate School of Education
in partial fulfillment of the requirements
for the degree of Doctor of Philosophy

by

Richard Cranmer Conrath

June, 1976

Dissertation written by

Richard Cranmer Conrath

B.A. in Philosophy, St. John Vianney Seminary, 1959

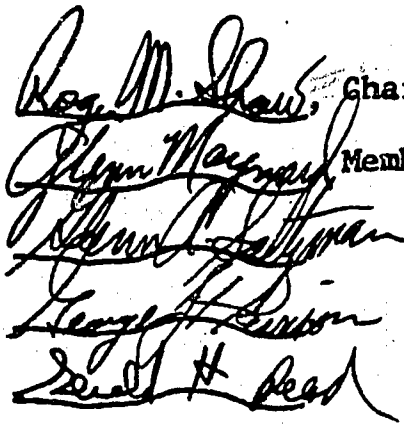
S.T.L., Catholic University of America, 1963

B.S. in Education, The College of Steubenville, 1966

M.Ed., Kent State University, 1972

Ph.D., Kent State University, 1976

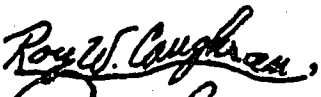
Approved by



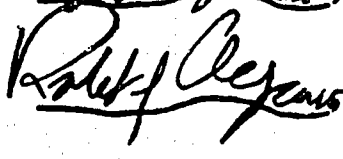
Chairman, Doctoral Dissertation Committee

Members, Doctoral Dissertation Committee

Accepted by



Chairman, Department of Educational Administration



Dean, Graduate School of Education

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CHAPTER I

INTRODUCTION

The Problem and Its Significance

> Colleges would do well, before the next cycle of violence, to enunciate through committees or task forces the principles that should govern student . . . activities and to hypothesize the conditions to which the principles might apply . . . .
>
> . . . If a university or college cannot act as a parent or constitute a political and social enclave, and if civil forces are to be denied authority on campus, the resultant confusion still must be treated--by someone.[1]

Thus did two professors of education at Western Washington State College sum up the state of things as they saw them in the fall of 1969 when disorder still plagued the campuses of the country. The situation is somewhat different in the fall of 1975. Things have quieted down on the campuses and everyone, teachers, students, and administrators, are back to education. The problem, however, remains the same, that is, how to define the relationship between student and university today. This dissertation will deal with a theory

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[1]R. Thompson and S. Kelly, "In Loco Parentis and the Academic Enclave," 50 Educational Review 450 (1969).

that has been the one most frequently employed historically in answering that question, and that is, the doctrine of in loco parentis.

The Problem

The question, therefore, that will serve as the guiding light through the dissertation and will untimately be answered is as follows: Is the doctrine of in loco parentis a viable legal theory today for describing the relationship between the university and the student in the United States of America?

The history of the problem

In loco parentis is a legal doctrine with a rich and varied history. It has been traced back by one author as far as Roman Law[2] and by another to the ancient law of Hammurabi.[3] Its application, however, to the university-

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[2]R. Shaw, "In Loco Parentis," 74 School Executive, 56 (1955).

[3]K. Moran, "An Historical Development of the Doctrine of in Loco Parentis with Court Interpretations in the United States" (unpublished doctoral dissertation at the University of Kansas at Lawrence, 1967) [hereinafter cited as Moran].

student relationship in the United States is much more recent. Henry Steele Commager in a letter to William Van Alstyne sets forth succinctly its application to institutions of higher learning in the United States when he states that in loco parentis

> . . . was transferred from Cambridge to America and caught on here even more strongly for very elemental reasons: College students were, for the most part, very young. A great many boys went to college in the colonial era at the ages of 13, 14, and 15. They were, for the most practical purposes, what our high school youngsters are now. They did need taking care of, and the tutors were in loco parentis.[4]

E. G. Williamson goes even further than the consideration of age and proposes three further reasons. First, the college, feeling an obligation to raise moral, well-mannered gentlemen, played the role of the parent in insulating their charges from the lawlessness of the new frontier. Secondly, because religion was so vital to education at that time, the colleges saw themselves as parental guides to spiritual growth also. Finally, and most importantly, the college assumed the role of disciplinarian which they saw invested

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[4]W. Van Alstyne, "Procedural Due Process and State University Students," 10 U.C.L.A. Law Review 368 (1963).

in them by the parents of their charges.[5] Moreover, the earliest court cases recognized the parental authority of the college.

The turmoil of the 1960s

We have come a long way from college life in colonial times to campus life in the sixties and seventies. The university which was once a place of quiet, scholarly activity became, with the declaration of rights by the students of Port Huron, Michigan, the center of a seething, swirling cycle of events which would soon erupt into violent demonstrations of all kinds on campuses everywhere. In the face of the turmoil which raged from San Francisco State College to Columbia University and eventually came to a climax at Kent State University, authorities struggled to maintain order through the enforcement of local academic regulations. In a few instances, unfortunately, because of the seriousness of the upheaval, civil authorities had to intervene to reestablish order on campus.

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[5]E. Williamson, "Do Students Have Academic Freedom?" in The American Student and His College 311-13 (ed. E. Lloyd-Jones and H. Estrin 1967).

The current debate

The dissent forced both the universities and the courts to reconsider the basic legal nature of the university-student relationship. This issue has been bitterly debated in both legal journals and popular educational magazines for the past ten years. Alexander and Solomon have summarized the basic theories that have served as the fuel for these debates regarding the definition of the university-student relationship. Those theories are in loco parentis, privilege, contract, trust, fiduciary, and constitutional.[6] The oldest and most widely known of these is the doctrine of in loco parentis; it has been the most widely contested of the six during the last decade.

Black's Law Dictionary defines in loco parentis as "in the place of a parent."[7] The doctrine of in loco parentis, therefore, rests upon the rights, duties, and responsibilities of parents. As mentioned earlier, during the Colonial Period when students were very young, colleges relied extensively upon in loco parentis and were granted

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[6]K. Alexander and E. Solomon, College and University Law 411-14 (1972).

[7]Black's Law Dictionary 896 (4th ed. 1968).

almost omnipotent authority by the courts. Recently, however, critics of the doctrine have argued that the student-university relationship has changed radically from that which existed during the Colonial Period, principally because of the more mature age of students today.

Other arguments advanced by legal authorities against further reliance on the doctrine are: (1) that all the recent court cases (though few in number) have ruled against the use of in loco parentis to determine the university-student relationship; (2) that some of the major universities (Cornell and Berkeley) have retreated from further use of surrogate parenthood; and (3) that many people in the field of law, practicing attorneys and legal writers (notably William Van Alstyne), have voiced their opposition to its continued use.[8]

Yet, there are many who ardently defend the present vitality of this age-old doctrine. The most vociferous, perhaps, is Clarence Bakken, Assistant to the Dean of Students, California State College at Long Beach and a member of the Minnesota Bar. He proposes three areas in which its

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[8]K. Brittain, "Colleges and Universities: The Demise of in Loco Parentis," 6 Land and Water L. Rev. 727-30 (1971) [hereinafter cited as Brittain].

application is most widely used: university housing, student activities, and discipline. Even the argument attesting the more mature age of students today does not seem to dissuade him. He writes that it is not possible to exclude children from the college's parental authority simply because they are over the majority age "because the rules under which the colleges regulate and control their students have developed over the years until they have been accepted by the courts as correct and proper."[9] Thompson and Kelly plead emotionally:

> If institutions are not to assume parental authority and monitor certain student behavior, and if civil authorities apparently are to be banned from the academic enclave in all but major upheavals, who is in charge?[10]

Significance of the Study

There is still, then, considerable controversy about the exact nature of the student-university relationship. Inherent to the problem are the questions about the precise nature of in loco parentis. Does in loco parentis mean that a university has not only the duty to discipline

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[9]C. Bakken, "Legal Aspects of in Loco Parentis," 8 Journal of College Student Personnel 234 (1967).

[10]R. Thompson and S. Kelly, supra note 1, at 449.

but also the responsibility to serve as advocate and protector? If so, what precisely are those rights and responsibilities? At any rate the increased debate and the possible threat of further controversy indicate a need for an analysis and a clarification of the current legal status of in loco parentis on the college campus. As Thompson and Kelly warn:

> Colleges would do well, before the next cycle of violence, to enunciate . . . the principles that should govern student . . . activities . . . .
> If a university or college cannot act as a parent or constitute a political and social enclave . . . the resultant confusion still must be treated--by someone.[11]

In order to analyze more carefully the present status of the doctrine, four questions are presented below which, when answered, should provide the college administrator with a picture of the current status of the developing law regarding in loco parentis and the college campus:

1. Has statutory law modified or abridged the doctrine of in loco parentis as applied to the university-student relationship?
2. Have court decisions, especially those in the last decade, either abrogated or modified the doctrine of

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[11] Id. at 450.

in loco parentis as applied to the university-student relationship?

3. Has the recent Twenty-sixth Amendment to the Constitution of the United States,[12] lowering the majority age for the right to vote, abrogated the doctrine of in loco parentis as applied to the university-student relationship?

4. Is the doctrine of in loco parentis a viable legal theory today for describing the relationship between the university and the student in the United States of America?

Scope and Limitations

Scope

The type of research anticipated in this study will involve analysis and interpretation of court decisions concerned with the legal relationship of the university as surrogate parent and the student as its charge. Cases dealing

[12] U.S. Const. amend. XXVI, sec. 1. That section reads as follows:

"The right of the citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age."

with the other theories to define this relationship will be included only if they might have some persuasive effect on later development of the law of in loco parentis. Discussion of legislative enactments will be limited to those that have direct relevance to the problem of in loco parentis in higher education. Administrative rules and regulations will not be treated exhaustively; selected university policy statements will be included in the discussion inasmuch as they are immediately relevant to specific court decisions. It is not anticipated that reporting of legislative or judicial action outside of the body of school law will be necessary.

Some conclusions and implications may be drawn from the results of this legal research that may help guide colleges and universities in the process of developing and implementing school policy regarding the rights and responsibilities of university professors and administrators toward students on their campuses.

Limitations

This investigation will be limited almost exclusively to the realm of legal research. Research techniques will be those customarily used by a lawyer in the development of

a case or by a court in deliberation prior to the pronouncement of a decision.

This study will treat the developing law on in loco parentis during the last decade since the completion of Donald Moran's dissertation in 1965.[13] There will be no effort to replicate work already done by him. Moreover, the primary focus of the study will be restricted to in loco parentis at the college or university level; statutes and cases dealing with secondary or elementary education will be considered only if they are immediately applicable to higher education. Nor will there be any attempt to explore the status of in loco parentis outside the United States.

The pros and cons of the propriety of using the doctrine of in loco parentis as a matter of opinion will not be considered in this research except as the courts have ruled or as the statutes have been construed.

Methodology

The modus operandi to be pursued in this investigation of the legal status of in loco parentis on the campuses of institutions of higher learning in the United

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[13]Moran, supra note 3.

States of America today will be to locate, scrutinize, analyze, report, and interpret the law, whether constitutional, statutory, or case, as it is related to the issue delimited above. Sources of both primary and secondary authority, therefore, will be utilized as well as those great books of index which, though not usually cited as persuasive authority, serve as valuable aids in helping to find the "all-fours" case.

Sources of the Law

Constitutional law

Although in loco parentis is derived primarily from common law and not constitutional law, it is nonetheless directly related to constitutional law. The search, therefore, will begin with the Constitution of the United States and with court decisions construing applicable provisions. The United States Code and the United States Code Service will be the major sources for the study of related federal statutory law.

Statutory law

Since the rules of law are not universally accepted and the laws applied in one jurisdiction are not necessarily

applicable in another, it will be necessary to search the individual state statutes and the court decisions, interpreting them in a systematic fashion to discover pertinent points of law.

Acts of Congress

Acts of Congress, along with rules and regulations adopted by agencies commissioned to implement those acts, will be analyzed also. The Federal Register, the Congressional Record, and The Code of Federal Regulations will serve as sources of information at the federal level. Rules and regulations on the local level of government will be investigated only as they may apply to a specific case of consequence.

Case law

Case law related to the application of in loco parentis at the college level will be a most significant factor in this study. Sources for pertinent cases will be the volumes of the National Reporter System and the latest advance sheets that yield the most recent court holdings. Relevant points of law will be investigated through the outstanding Key Number System developed by the West Publishing

Company. Finally, significant cases as well as statutes will be Shepardized through the proper volume of Shepard's Citations down to the latest supplement to find the most recent cases and developments.

Secondary authorities such as legal encyclopedias, legal dictionaries, textbooks, and legal periodicials will be consulted for commentaries and interpretations of the law. Books of index such as Words and Phrases and Key Number Digests will be used to find the appropriate primary authorities.

Search Method Utilized

The basic search methods used by a lawyer in preparing a case for court will be utilized here also. Those methods include: (1) the analytical or law chart approach; (2) the descriptive word index approach; (3) the table of cases approach; and (4) the words and phrases approach. Descriptions, illustrations, and explanations of all the legal methods of research and sources of law discussed in the preceding paragraphs can be found in most basic law textbooks.

Facilities Needed to Support the Work

Library facilities are the only requirement of the proposed research for this dissertation. The Kent State University Library, while providing some of the essential legal materials, is inadequate for the specialized nature of this extensive legal research. The great law libraries of Cleveland State University and Case Western Reserve University will doubtless be more than adequate for this research.

Definition of Terms

The terminology used throughout this research will conform generally to standard usage in educational and legal writings. The following term is listed for the purpose of clarification:

In Loco Parentis: "In the place of a parent; instead of a parent; charged factitiously, with a parent's rights, duties, and responsibilities."[14]

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[14]Black's Law Dictionary, supra note 7, at 896.

Related Dissertations

A careful search of related dissertations indicates that the question proposed is sufficiently original to serve as a fit topic for a dissertation. To date there have been only two dissertations which have touched on the topic of in loco parentis on the college level. Both treatments were historical in nature aimed primarily at the doctrine as it applied to secondary schools. Both were written before the change in the majority age, the recent controversies over student housing, and the major college disturbances of the early 1970s. One of the studies concluded that, because the courts have not taken a definite stand and because family authority itself (from whence the doctrine derives its chief strength) is waning, the doctrine of in loco parentis is dead on the university level.[15] More will be said about Moran's dissertation in Chapter III. Harms, in a later study, discussed, as did Moran, the historical development of the doctrine on both the secondary and university level, treating chiefly the former but including

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[15]Moran, supra note 3, at 97.

some of the more important cases on the college level.[16] It was of some use to this writer in treating of the historical development of in loco parentis in higher education in the United States. Two other dissertations treat the doctrine of in loco parentis as applied to secondary schools. Hirschberger's study is primarily historical in nature with an emphasis on an application of the doctrine to corporal punishment, teacher supervision, and locker searches.[17] Hamilton dealt strictly with the public school teacher and in loco parentis.[18]

Several dissertations were primarily surveys. A study by Johnson examined the relationship between the in loco parentis attitudes and political attitudes of eight

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[16]H. Harms, "A History of the Concept of in Loco Parentis in American Education" (unpublished doctoral dissertion at the University of Florida, 1970) [hereinafter cited as Harms].

[17]M. Hirschberger, "A Study of the Development of the in Loco Parentis Doctrine, Its Application and Emerging Trends" (unpublished doctoral dissertation at the University of Pittsburgh, 1971).

[18]M. Hamilton, "The Current Legal Status of the Teacher Standing in Loco Parentis" (unpublished doctoral dissertation at the University of Denver, 1973).

publics of the University of Oregon.[19] Serra surveyed the attitudes of the parents of undergraduates at Indiana University in relation to their concept of in loco parentis.[20] While not a legal study the research did point out, interestingly enough, an attitudinal trend on the part of most parents supportive of a parental role for educational institutions. In another survey Whitsett studied the attitudes of college deans to determine whether or not they operated under the principle of in loco parentis.[21] Finally, Wagoner examined the attitudes of four Nineteenth Century university presidents (Daniel Gilman of John Hopkins, Andrew D. White of Cornell, Charles W. Eliot of Harvard, and James B. Angell

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[19] D. Johnson, "In loco parentis and Political Attitudes: Their Relationship as Viewed by Eight University of Oregon Publics" (unpublished doctoral dissertation at the University of Oregon, 1971).

[20] J. Serra, "In Loco Parentis: a Survey of the Attitudes of Parents of Undergraduate Students" (unpublished doctoral dissertation at Indiana University, 1968).

[21] J. Whitsett, "The Concept of In Loco Parentis in Higher Education in America" (unpublished doctoral dissertation at East Texas State University, 1969).

of Michigan) as they related to the doctrine of in loco parentis.[22]

Of those dissertations done to date on the topic of in loco parentis, therefore, two have touched on the topic of higher education and those were primarily historical in nature. This research, on the other hand, is primarily legal in nature; though there will be some attempt, for purposes of clarifying the climate in which the cases dealing with in loco parentis were heard, to sketch the beginning, and eventual evolution of that ancient legal doctrine from the time of Hammurabi to the 1970s.

The following chapters, therefore, will present a legal picture of the present development of that age-old doctrine. Chapter II will outline the controversy surrounding the vitality of the doctrine of in loco parentis as reflected in recent legal literature, while in Chapter III the evolution of that doctrine will be traced.

The heart of the research will be reported in Chapters IV and V wherein the statutes of the several states will be

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[22]J. Wagoner, Jr., "From in Loco Parentis toward Lernfreiheit: an Examination of the Attitudes of Four Early University Presidents Regarding Student Freedom and Character Development" (unpublished doctoral dissertation at the Ohio State University, 1968).

reviewed and the cases dealing with in loco parentis in higher education will be reported. Finally the results of the research will be summarized and analyzed in Chapter VI in order to answer the four questions of law posed at the beginning of this research.

CHAPTER II

REVIEW OF LITERATURE

Foreword

The current controversy over whether or not the doctrine of in loco parentis is relevant on today's college campus is but another facet in the stormy and colorful history of that doctrine whose origins have been traced as far back as the Code of Hammurabi.[23] The purpose of this Chapter is to trace the debates through current legal literature and to present in some logical fashion the major arguments advanced by each side. To complete that task it seemed necessary to review some of the contemporary alternative solutions to the doctrine that have been suggested either in the law journals or by the courts themselves. Hence the first part of the Chapter deals with that discussion. In Chapter III I shall attempt to paint in broad strokes the colorful history of the doctrine as it relates to the American college campus. At the beginning of that

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[23]Moran, supra note 3, at 1.

Chapter there will be a brief summary of the work done by K. Donald Moran whose dissertation (though dealing only sketchily with higher education) traced the origins of the doctrine from the Code of Hammurabi to 1965--hence, the reason for the phrase, "1965 to the present," in the title of this dissertation, there being no reason to duplicate the work already done by him.

With that brief foreword we may begin with a look first at the alternatives to that doctrine and then at the debate which began in the early sixties and has continued through the present.

A Variety of Views

There have been, historically, a number of different attempts to define that ever-so-nebulous and elusive relationship that the university enjoys with its students. Those attempts can be classified roughly into three categories: constitutional, statutory, and non-constitutional.

Constitutional Approach

The constitutional approach, the latest to steal the scene in school law today, has as its chief advocate, William Van Alstyne. This approach emphasizes principally

the student's rights under the constitution as a citizen.[24] The courts seem to have made it clear, especially since Dixon v. Alabama State Board of Education, that students do not shed their constitutional rights simply because they enter an educational institution.[25]

Statutory Approach

The statutes of some of the states also define the rights and responsibilities of universities toward their students. Those statutes generally grant, expressly or by implication, rather broad discretionary powers to the university to keep order on campus. An Ohio statute, for example, provides that:

> The board of trustees of any college or university, which receives any state funds in support thereof,

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[24] K. Brittain, supra note 8, at 716.

[25] For the constitutional consideration of procedural due process see the landmark case of Dixon v. Alabama State Bd. of Educ., 294 F. 2d 150 (5th Cir. 1961), cert. denied, 368 U.S. 930 and Due v. Florida A. & M. Univ., 233 F. Supp. (N.D. Fla. 1963). For those who might have thought that this was always the case, consider the words of the Court in North v. Bd. of Trustees: "By voluntarily entering the university, or being placed there by those who have the right to control him, he necessarily surrenders many of his individual rights." 137 Ill. 296, 306, 27 N.E. 54, 56 (1891).

shall have full power and authority on all matters relative to the administration of such college or university.[26]

Non-Constitutional

The third method, non-constitutional and non-statutory in nature, is a kind of loose association of various and sundry legal stances, one a long standing legal doctrine and the others of rather recent origin. One of the approaches loosely grouped under this heading is the contractual theory, so named because it is based on the concept that the relationship between the college and student is contractual in nature:[27] "The courts have interpreted the approach to mean that the college student agrees contractually to obey the rules and regulations of his college."[28] The provisions of the contract are supposedly to be found in such documents as in the student's registration form, in

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[26]Ohio Rev. Code Ann. sec. 3345.021 (Page 1972).

[27]G. Michael, "Student-School Legal Relationship: toward a Unitary Theory," 5 Suffolk U.L. Rev. 468, 481 (1971). The classic case applying the notion of contract to the university-student relationship was Anthony v. Syracuse Univ., 224 App. Div. 487, 231 N.Y.S. 435 (App. Div. 1928).

[28]K. Brittain, supra note 8, at 718.

his application for admissions, the catalogue, and the student handbook.[29]

Another non-constitutional approach, the status theory, is based on the concept that the rights and duties of college students and university are derived from the status of the parties as it has evolved through custom over the years.[30]

Two other non-constitutional approaches are of rather recent origin and have been, therefore, largely untested in the courts. The trust theory contends that the relationship between students and university is one of trust rather than of contract or status. The school is considered as a kind of trustee, empowered to administer some educational trust for the student who is, in turn, the beneficiary.[31] Another very recent approach is based on the theory that there is a fiduciary relationship between the student and the college; it is really a variant of the status theory. This approach differs from the trust theory in

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[29]R. Ratliff, Consitutional Rights of College Students 38 (1972).

[30]Id. at 47-55.

[31]Alexander and Solomon, supra note 6, at 413.

that the fiduciary relationship rests upon the concept of a "confidence" existing between two parties rather than a "trust" granted the university to administer for the student. The concept suggests that the university acts as a fiduciary to the student; that is, it acts as one who, in carrying out a duty, attempts in all circumstances always and everywhere to act in behalf of the other in connection with the undertaking.[32] The fiduciary theory has this in common with the constitutional approach, that is, they both share the quest for greater procedural rights for students. It is, however, a relatively weak approach since neither it nor the trust theory have been given any more than passing attention by the courts.

The final non-constitutional approach, and the one which is the subject of this paper, is the ancient English doctrine of in loco parentis. Of all the approaches to explain the relationship between student and university, none is better known or more debated than this one.

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[32]K. Brittain, supra note 8, at 718. Only one case mentions the fudiciary approach and then only in passing: Soglin v. Kauffman, 295 F. Supp. 978, n. 6 at 986 (W.D. Wis. 1968).

The Early English Approach:

In Loco Parentis

A decision by an English court almost two centuries ago defined in loco parentis as one who assumes the character and duties of a parent.[33] Blackstone applied this doctrine to the schools when he wrote:

> The legal power of a father over a child ceases when the latter reaches twenty-one years of age, for the child has arrived at the age of discretion, and is then enfranchised. Up to that age, the father may appoint a testamentary guardian over him, or may delegate part of the parental authority to a tutor or schoolmaster, who is then in loco parentis.[34]

Sometimes the authority to act as surrogate parent is enacted formally into law. "However, where there is no statute, the common law will prevail."[35] This point will be developed in greater detail in Chapters IV and VI.

There are a variety of contexts, moreover, in which the school might assume quasi-parental powers. Early in American education schools assumed control of the totality

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[33]Weatherby v. Dixon, 34 Eng. Rep. 631 (Ch. 1815); Howard v. United States, 2 F. 2d 170, 174 (E.D. Ky. 1924); See Black's Law Dictionary, supra note 7.

[34]Blackstone's Commentaries on the Law 196 (1892).

[35]See K. Brittain, supra note 8, at 721. See also E. Reutter, Schools and the Law 64 (1970).

of student life, passing regulations governing everything from academics to moral conduct off campus. Generally, the schools felt empowered to pass rules regarding boarding, health care, religious activities, discipline, recreational activities, and moral behavior--all matters falling under the scope of parental duties and responsibilities.

The parental authority of the schools has been modified by the courts in recent years, however, delineating more clearly the areas of control to which the doctrine might be applied. In the public schools the most widely accepted application of the school authorities standing in loco parentis is in the area of corporal punishment.[36] On the college level the application has generally been restricted to the areas of student activities, housing, and discipline.[37] There has been considerable debate, however, in the last decade as to whether it belongs there at all. The remainder of this Chapter will attempt to summarize briefly that debate.

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[36]Restatement (Second) of Torts sec. 152 (1965).

[37]C. Bakken, The Legal Basis for College Student Personnel Work 56 (Student Personnel Service, No. 2, 2d ed. 1968).

A Storm of Controversy

The Student Insurrection

The controversy extending over the past dozen years has come largely in the wake of student rebellion in the sixties and seventies. Authority was being challenged in all corners and the parental authority of the school was as objectionable as that of the political establishment, parents, or traditional churches. In loco parentis, then, was as suspect as anyone over thirty. It was apparently galling for rebellious students, seeking new rights (and responsibilities?) to find themselves still under a kind of parental yoke. Such a condition did not sit well with the declaration of student rights made at Port Huron, Michigan. The peaceful academic setting, then, came alive with demonstrations of all kinds, and the leaders of student rebellion leaped to litigation.

Some faculty members and a few administrators, startled by the new unrest, rushed to the side of the students, anxious to settle the matter. A number of legal authorities also took their side calling for an end to paternalism on campus and for the beginning of responsible student self-government. And so the controversy grew

between those who agreed that in loco parentis was an outmoded vehicle of the Middle Ages, when students were young with morals to be cautiously minded, and those who felt that this doctrine was the only legitimate legal definition of the university-student relationship recognized by common law and the courts and, in the end, the one most beneficial to the students.

The Controversy

The attack on the doctrine

One of the most vigorous attacks on the doctrine is led by William Van Alstyne, a noted legal writer and an ardent defender of student rights.

Van Alstyne observes that universities have been treated by courts in decades past as surrogate parents endowed with general functions beyond that of providing educational opportunities, functions "which combined the responsibilities of the church, the civil and criminal law, and the home in the rearing of the young."[38]

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[38]W. Van Alstyne, "Student Academic Freedom and the Role-Making Powers of Public Universities: Some Constitutional Considerations," 2 Law in Transition Q. 3 (1965).

He outlines what are perhaps the major arguments that have been summoned over the past two decades to attest to the demise of the age-old doctrine! Firstly, he argues that the mean age of college students is now over the age of twenty-one. "Even in Blackstone's time, the doctrine did not apply to persons over twenty-one."[39] Secondly, he observes that it is "unrealistic to assume that relatively impersonal and large-scale institutions can act in each case with the same degree of solicitous concern as a parent reflects in the intimacy of his own home."[40] It is not possible, he feels, for the institution to achieve the same kind of emotional identification with those in attendance as a parent with his children. Thirdly, an institution necessarily has divided interests, having a need to be concerned with the administrative job of keeping the school afloat and yet maintaining a personal concern for her children. "It simply blinks at reality to treat the mother and the college as one and the same in drawing legal analogies, no matter how frequently one refers to his alma mater for other purposes."[41]

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[39]W. Van Alstyne, "The Student as University Resident," 45 Denv. L.J. 591 (1968).

[40]Ibid.

[41]Ibid.

Moreover, a college may not arrogate to herself the power to expel a child in the name of surrogate parenthood when even a parent may not do so in his own home.[42] Fifthly, he argues that in loco parentis grants the university plenary powers to dismiss a student summarily without the right of due process. This practice, he feels, is no longer tenable since the landmark decision in Dixon[43] wherein the court outlined the elements of due process which a university must extend to a student.[44] Finally, Van Alstyne contends that the historical basis for the doctrine no longer applies to the twentieth century university. In support of this contention he cites an excerpt from a letter that Henry Steele Commager wrote to him on May 5, 1962 on the subject of in loco parentis. Professor Commager observes:

> [In loco parentis] was transferred from Cambridge to America, and caught on here even more strongly for very elementary reasons: College students were, for the most part, very young. A great many boys went up to college in the colonial era at the age of 13, 14, 15. They were, for the most practical purposes, what our high school youngsters are now. They did need taking care of, and the tutors were in loco parentis. This habit

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[42] Ibid.

[43] Dixon v. Alabama St. Bd. of Educ., supra note 25.

[44] W. Van Alstyne, "Procedural Due Process and State University Student," 10 U.C.L.A.L. Rev. 378 (1962-1963).

> was re-enforced with the coming of education for girls and of co-education [sic]. Ours was not a class society. There was no common body of tradition and habit, connected with membership in an aristocracy or an upper class [sic], which would provide some assurance of conduct.
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> All of this now is changed. Students are 18 when they come up, and we have a long tradition with co-education from high school on. Students marry at 18 and 19 now and have families. Furthermore, we have adjusted to the classless society and know our way about. Therefore the old tradition of in loco parentis is largely irrelevant.[45]

Van Alstyne, however, does recognize a certain value, a kind of "benevolent edge," to in loco parentis and adduces what could be perhaps the most cogent argument in behalf of the doctrine when he indicates that the college may, in fact, act as a shield for the student where college rules and civil laws overlap. "[A] number of colleges have established working relations with the downtown police so that the alleged offender is released to the college and favored in this regard over nonstudents arrested under identical circumstances."[46] Van Alstyne feels, however, that the practice has only dubious merit either legally (since civil authorities are really favoring unequally those who happen to be students) or educationally (since the "favored"

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[45] Id. at 377-78.

[46] W. Van Alstyne, supra note 39, at 602.

student might get an "elitist" notion about his status as a university student).[47]

One of the most aggressive attacks on the doctrine recently was directed by Brittain who repeats many of the points made so masterfully by Van Alstyne while summoning up a few of his own. He observes that the earliest colleges were for the most part private institutions, whereas today most institutions of higher learning are public. This distinction, he feels, is important: "[A] state supported institution can use legislative enactments as justification for disciplinary action; but a private college must frequently employ common law principles, such as in loco parentis, for justifications of authority."[48] Since the earliest and most commonly cited cases dealing with in loco parentis concerned private colleges, Brittain surmises that perhaps the decisions of the court in these cases upholding the use of surrogate parenthood may merely indicate judicial reluctance to interfere with the governance of private colleges. If so, he concludes that those decisions hardly justify meaningful use of the doctrine by state universities.[49]

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[47] Ibid.

[48] Brittain, supra note 8, at 733-34.

[49] Id. at 734.

Brittain further points out that the limits of the in loco parentis doctrine are not clearly spelled out. At the secondary school level the one clear place where the doctrine can be utilized is in the administration of corporal punishment. Since this really has no place in college, "all that remains of quasi-parental limitations are vague requirements of reasonableness of the rules and that they be connected to the performance of some educational function."[50]

A final crucial point that he makes is that in loco parentis is a two-edged sword. The very same doctrine which permits the university to discipline a student requires that the university assume the responsibilities of protecting him as would a parent. Very few colleges, he feels, would be willing to expose themselves to the back edge of this blade.[51]

Schwartz observes that the college student in early America did not choose to go to college. He was sent. He goes on to say:

> The classical American college was a place of serene social relationships and scholarly detachment. The students of this classical college had their place in a well-ordered hierarchy. In the bucolic setting of their

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[50] Id. at 736.

[51] Id. at 737.

> splendid isolation, they indulged in the costly luxury and privilege of the liberal arts and the administrator taught what he believed the students needed to learn.[52]

In a study edited by Caffrey the protests against the further use of in loco parentis are seemingly endless. Almost to a man the authors cited reject the doctrine in favor of a new form of control and a more responsible kind of self-regulation.[53] In general they dismiss as outmoded the concept of in loco parentis, "that umbrella under which both parents and personnel deans 'sheltered' students for so many generations."[54] In two other articles the authors report that in loco parentis has been rejected both at Brown University[55] and at Cornell, as involving the "university in almost limitless obligations of dubious connection with its central purpose, and it demeans students as members of the educational community."[56]

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[52]H. Schwartz, "The Students, the University, and the First Amendment," 31 O.S.L.J. 638-39 (1970).

[53]J. Caffrey, "The Future Academic Community?" in The Future Academic Community: Continuity and Change 11 (ed. J. Caffrey 1969).

[54]L. Elliott, "Changing Internal Structure: the Relevance of Democracy," id. at 50.

[55]C. MaGrath, "Student Participation: What Happens When We Try It?" id. at 103.

[56]A. Sindler, "A Case Study in Student-University Relations," id. at 123.

Callis rejects the doctrine on the grounds that it is not necessary to the college to fulfill its mission. "The mission that the college is authorized to perform is education, and, therefore, the relationship between a college and its student is an educational one."[57] Dublikar takes the tack that students today are too old to be "parented" and that the "college had the authority of parents, but not the responsibility."[58] Clowes contends that in effect the courts have rejected the doctrine as applicable to the student-college relationships today.[59]

In a conference on student rights reported by the Denver Law Journal in 1968, several of the writers refer to the Sindler report and the rejection of in loco parentis. Both reject the use of surrogate parenthood as a justifiable basis for disciplining students.[60] Another comments about

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[57] R. Callis, "Educational Aspects of in Loco Parentis," 8 J. of College Student Personnel 232 (1967).

[58] R. Dublikar, "Recent Cases," 42 U. Cin. L. Rev. n. 33 at 381 (1973).

[59] D. Clowes, "The Student-Institution Relationship in Public Higher Education," 2 J. Law and Ed. 129-30 (1973).

[60] R. McKay, "The Student as Private Citizen," 45 Denver L.J. 560 (Special 1968); N. Stamp, "Comments," id. at 666.

the "unlamented passing" of that ancient doctrine.[61] Finally, one writer, while praising what he considers the passing of the doctrine from the educational scene, considers, somewhat fearfully, the alternative, a danger envisioned by the president of Cornell University, James A. Perkins, when he declared in a widely read speech:

> We do view with some alarm the spector that seems to be rising out of its [in loco parentis] ashes and taking the form of a rash of court cases challenging decisions in areas that were once considered the educational world's peculiar province. The filing of these cases seems to suggest that judicial processes can be substituted for academic processes.[62]

Building a case for the doctrine

A recent defender of the continued applicability of in loco parentis to the college campus in recent years has been Clarence J. Bakken,[63] a member of the Minnesota Bar, and author of a monograph used as a legal guide for

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[61] E. Clifford, "Comment," id. at 677.

[62] J. Perkins, "The University and Due Process," at 1, Dec. 8, 1967 (Report of address by American Council on Education, Washington, D.C.), cited by R. Powell, Jr., "Comment," id. at 671.

[63] C. Bakken, supra note 9. See also, C. Bakken, The Legal Basis for College Student Personnel Work (1968). (Clarence Bakken died in 1967 shortly before the editing of this monograph was completed. This was a revised edition of his original work published in 1961.)

personnel workers in higher education similar to that edited by Martha Ware for the public schools.[64]

He outlines three basic areas of college life where in loco parentis is most applicable: student activities, housing, and student discipline.

Bakken feels that the parietal rule used in housing is only one aspect of the more basic rule that governs the entirety of college life, that is, in loco parentis. He feels, however, that this rule, intended primarily to allow a university to require that unmarried minors live "in college-approved housing under rules and regulations established for their physical, moral, and mental protection,"[65] should be carefully reevaluated before being applied to adults.

He applies the doctrine to student activities as well. "Rules and regulations covering student activities are generally aimed at fulfilling a college responsibility to take reasonable steps to protect and assure the well-being, morals, health, safety, and convenience of its students, with unmar-

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[64] Law of Guidance and Counseling (M. Ware ed. 1964).

[65] C. Bakken, supra note 9, at 235.

ried minor students its principal concern."[66] Once again he urges caution in applying rules to everyone that were originally applicable to minors only.

It is in the area of student discipline that Bakken makes his major pitch:

> The college through its disciplinary machinery has used every method used by parents including deprivation of privileges, counseling and guidance, social and institutional pressure, and other devices available within the college to keep the student within the regulations and on the straight and narrow path.[67]

He goes on to contend that both the community and the courts have recognized and supported the parental role of the university. He observes that frequently law enforcement officials turn over students who violate community regulations to the custody of the college. Moreover, he quotes a paragraph from a statement by the American Association of University Professors (AAUP) on academic freedom (Committee S, 1965) which declares that colleges should protect their students from the community when they violate its laws.[68]

Regarding the question of age, and whether or not the legal doctrine of in loco parentis applies to other than

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[66] Ibid.

[67] Ibid.

[68] Id. at 236.

minor students, Bakken insists, despite cautions mentioned before, that it is not possible to exclude students over the age of eighteen or twenty-one from the discussion "because the rules under which the colleges regulate and control their students have developed over the years until they have been accepted by the courts as correct and proper."[69]

Moreover, Bakken rejects the notion that in loco parentis is outmoded on the premise that the college student today is different from the student of forty years ago. He contends that the paternalistic approach used by the college over the years is expected "and has become through usage the common law of college student personnel administration. The courts will not in the foreseeable future overrule this custom."[70]

Finally, Bakken takes issue with Van Alstyne and Callis who would reject the use of in loco parentis on the grounds that it is violative generally of due process. He observes that the doctrine of in loco parentis is an analogy among other competing analogies. School authority, he maintains, is derived from the following sources:

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[69] Id. at 234.

[70] Id. at 236.

> [E]xpress delegation of the authority of the parental status; delegation of the parental status implied from similar roles; functional needs of schools; customary process of schools, legislation or charter; implied contract between student and school.[71]

These analogies, he feels, can be reduced to the "In Loco Parentis Rule, the Contractual Rule, Educational Purpose Rule, and Custom or Legislation Rule."[72] At any rate "the needs and capacities of school, student, and court must play the primary role in deciding the legal relationships to exist among them."[73]

Though Callis argues that there is no need for the use of analogies at all, Bakken contends that one cannot deny that they have been used continually in the past by the courts to justify in holding for the college in its attempts to discipline students. He sees the analogy as an "instructive but incidental mode of weaving results into the fabric of law."[74]

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[71]C. Bakken, The Legal Basis for College Student Personnel Work, supra note 63 at 40.

[72]Ibid.

[73]Ibid.

[74]Ibid.

In conclusion and after a lengthy discussion of legal processes for protecting the Fourteenth Amendment rights of students, Bakken states:

> A college or university acts in loco parentis to its students. It can do anything that the parent can do as long as it is done without malice and for what is thought to be for the best interest of the student and the institution.[75]

Williamson[76] and Leonard[77] trace the development of the doctrine of in loco parentis in college personnel services in the United States. The legal nature of the relationship, Williamson contends, in no way interferes with nor weakens the parental nature of the relationship between personnel worker and student. He observes that "while experience over the centuries clearly indicates that this paternalism frequently has rigidified into Orwellian 'Big Brotherism,' the record is by no means a dismal chronicle of parental oppression."[78]

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[75] Id. at 56.

[76] E. Williamson, Student Personnel Services in Colleges and Universities 380 (1961).

[77] E. Leonard, Origins of Personnel Services in American Education (1956).

[78] E. Williamson, supra note 76, at 380.

The legal counsel to the National League of Cities and U.S. Conference of Mayors, in a 1974 article dealing with the vulnerability of students to double prosecution, that is, by the courts as well as by the schools, discusses two policy positions that underlie the university's claim to authority to discipline: 1.) the "service facility" position which states that a "university is properly concerned only with the academic training of its students, not with student conduct in non-academic matters" and 2.) the "in loco parentis" positions in which the university concerns itself with the total development and welfare of each student.[79] Although he indicates that universities have been inclined to move away from using "in loco parentis" and that they attempt generally to justify disciplinary action in terms of serving the needs of the academic community, he states that practically speaking

> [T]he distinction between "academic interest" and "in loco parentis" may be hard to discern. The Sindler Report, for example, (which rejected in loco parentis) decided that the university had an interest in "the generation and maintenance of an intellectual and education atmosphere throughout the university community," and that such an atmosphere could only be harmed by marijuana smoking.[80]

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[79] T. Kelly, "Double Prosecution of Students," 1 J. of College and U. Law 270 (1974).

[80] Ibid.

They premised their action on a primary concern for the total emotional and physical welfare of their students; hardly a "pure" "service facility" position.

Kelly notes further that the General Order and Memorandum on Judicial Standards of Procedure and Substance in Tax Supported Institutions of Higher Education[81] is forced into a kind of in loco parentis position when it attempts to distinguish the lesser disciplinary sanction that a university might have to invoke from those invoked against criminal acts. He feels that the General Order and Memorandum is forced to a rationale close to the "in loco parentis" one when, in characterizing those lesser disciplinary sanctions, it specifies that the lawful aim of those actions may indeed be simply to teach proper behavior.[82]

Three authors comment about the fact that though it is not clear just how significant the doctrine is today, it is clear that schools have power over their students. One of those writers, however, comments that "the view that the school has plenary power over pupils in school is an over-

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[81] 45 F.R.D. 133 (W.D. Mo. 1968).

[82] T. Kelly, supra note 79, at 271.

simplification and distortion of the in loco parentis doctrine."[83] Beaney questions the present potency of the doctrine even more than Goldstein. However, while he describes the doctrine as a "legal relic of an earlier and simpler era." he observes that the courts have generally played "hands off" in reference to institutions of higher learning, both public and private.[84] Monypenny makes the same observation about the "hands off" policy of the courts and adds that "except in a few deviant cases, the courts have chosen not to review in detail the university or college's use of discretionary authority in relation to students."[85] Both Beaney and Monypenny indicate that the college may in effect describe its relationship to a student in any way it wants (including in loco parentis) as long as there is no "departure from a reasonable use of discretion."[86]

Several other writers cast a kind of negative vote of confidence in the doctrine. One author, while observing

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[83]S. Goldstein, "The Scope and Sources of School Board Authority to Regulate Student Conduct and Status: a Non-Constitutional Analysis," Univ. of Pa. Law Rev. 117 (January 1969): 373-430.

[84]W. Beaney, "Students, Higher Education, and the Law," 45 Denver L.J. 515 (Special 1968).

[85]P. Monypenny, "The Student as a Student," id. at 653.

[86]Ibid.

that the doctrine condones excessive regulation when employed as a standard of review, feels that it may have some value in elucidating the role of the school in the education of the child.[87] Another writer, while recognizing the present vitality of the doctrine, makes the following prediction: "In loco parentis will be much less important than responsibility for self-regulation as a basis for codes of non-academic student affairs and conduct."[88]

Finally, two professors of education at Western Washington State College, at Bellingham, angry in the wake of the violence that shook the campuses in the late 1960s protest the attempts of faculty and students "to abolish some aspects of the institutional in loco parentis role" while attempting to retain those that would "safeguard students from civil authority through declaring the campus an enclave."[89]

A question they direct to the educational community and to civil authorities is, if schools are not permitted to

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[87]"Developments in the Law, Academic Freedom," 81 Harv. L. Rev. 1145 (1967-68).

[88]J. Caffrey, "Predictions for Higher Education in the 1970s," supra note 53, at 265.

[89]R. Thompson and S. Kelly, supra note 10, at 449.

assume parental control and regulate certain kinds of student behavior and if civil authorities are not permitted on campus in times of crisis, "Who is in charge?"[90] They sum up the whole situation as they see it regarding a college's authority with the following commentary:

> Colleges would do well, before the next cycle of violence, to enunciate through committees or task forces the principles that should govern student and faculty activities and to hypothesize the conditions to which the principles might apply.[91]

At any rate they have thrown the issue to the wind and it has been tossed about violently for the last decade.

Conclusion

And so the exchange continues. With the major arguments pro and con thus outlined and providing a backdrop for consideration of what *is* the status of the legal doctrine of *in loco parentis* in higher education, there remains yet another facet of the doctrine that needs to be studied before turning to the lawmakers and to the courts: namely, the evolution of that doctrine down through the ages--how it grew, how it developed, and how it came inevitably to be applied

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[90] Ibid.

[91] *Id.* at 450.

to the relationship between student and university on the college campuses in the United States of America. Allowing the dust of the present debate to settle a bit, therefore, we shall turn to the past and look at what was, to better see, perhaps, what might still be.

CHAPTER III

THE DEVELOPMENT OF THE DOCTRINE OF *IN LOCO PARENTIS* IN HIGHER EDUCATION IN THE UNITED STATES

The story of the evolution of the legal doctrine of *in loco parentis* is as rich and varied as the current debate about its continued relevance is heated. As it was the purpose of the previous chapter to round up the major figures and issues of the debate, so it will be the point of this chapter to trace briefly its evolution.

The first part will deal with the general notion of common law and then with a study by K. Donald Moran which outlined in proper detail the history of the common law doctrine of *in loco parentis* from the time of Hammurabi to the present. The remainder of the chapter will be devoted to the evolution of the doctrine as it relates to its application to higher education in the United States.

What is Common Law?

"The school systems at all levels are administered by both statutory and common law."[92] Statutory law and its impact on common law will be discussed in Chapter IV. We are concerned here with common law.

Common law, evolving gradually from centuries of tradition, from customs dating back as far as Babylon, impinged ultimately upon the shores of England whose people became heirs to that ancient legal code developed by the legendary Hammurabi and the lawmakers of Rome. In England it was applied by itinerant judges "who visited the various sections of the country and in their duties began to make a national, common law for the entire country which in effect was a living law, rooted in the customs and traditions of the land."[93]

Black defines common law as:

> [T]hat body of law and juristic theory which was originated, developed, and formulated and is administered in England, and has obtained among most of the states and peoples of Anglo-Saxon stock.
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> As distinguished from law created by the enactment of legislatures, the common law comprises the body of those principles and rules of action, relating to the government and security of persons and property, which derive their authority solely from usages and customs of im-

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[92] Harms, supra note 16, at 61.

[93] Ibid.

> memorial antiquity, or from the judgments and decrees of the courts recognizing, affirming, and enforcing such usages and customs; and, in this sense, particularly the ancient unwritten law of England.[94]

In reference to its force and authority in the United States of America, Black states that the phrase "designates that portion of the common law of England . . . which had been adopted and was in force here at the time of the Revolution."[95] He goes on to say: "This, so far as it has not since been expressly abrogated [by statute], is recognized as an organic part of the jurisprudence of most of the United States."[96]

With that definition in mind we can turn now to one of the more distinguished doctrines of that body of common law, the doctrine of in loco parentis.

From Hammurabi to English Common Law

Moran traces the doctrine of in loco parentis back to the Code of Hammurabi.[97] This ancient law, whose codifi-

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[94]Black's Law Dictionary 345-46 (4th Rev. Ed. 1968).

[95]Id. at 346.

[96]Ibid.

[97]Moran, supra note 3, at 79. See R. Harper, The Code of Hammurabi, King of Babylon, about 2250 B.C., at 2 (1904).

cation is ascribed to the King of Babylon himself, was one of the first attempts to legalize what had been previously part of the natural law of man; that is, the father had supreme control over his children; they were at his complete mercy.

Roman Law later modified the power granted the parent by the Lawmaker of Babylon. It too, however, granted absolute power at first: "In accordance with ancient Hebrew usages, the death penalty might be given by parents to a child who became incorrigible."[98] Emperor Hadrian, however, tempered the harsh character of parental authority when he declared that parental power (patria potestas) should be characterized by devotion not barbarism.[99] Moreover, this doctrine expressly stated that parental authority extended to legitimate offspring only.

From the doctrine of patria potestas grew the concept of tutor (tutela) from which evolved eventually the doctrine of in loco parentis. The notion of "tutor was an outgrowth of a father's authority to manage the lives of his children and tutela was a type of guardianship which the father could provide for his children in the event of his death."[100]

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[98]Moran, supra note 2 at 13-14.

[99]Id. at 14.

[100]Id. at 80.

The concept of tutor gave rise to the doctrine of patroni loco which established the legal right of the tutor to act in place of the parent in matters concerning the ward or the child. At first this notion did not include the right to discipline but later developments of the principle allowed chastisement of the ward.

There were, then, three principles that evolved from Roman Law which had direct bearing on the doctrine of in loco parentis:

> 1) parents have a duty to educate their children, 2) parents have the right to delegate their authority to another person as tutor or guardian and, 3) parents, when delegating their authority to a second person, delegated the right to chastise their children.[101]

Later, through the military campaigns of Caesar and the writings of Augustine, Roman Law was introduced to England. Though early English Law reflected Roman Law in many respects it wasn't until the Norman Conquest (1066) that the guardianship laws of Roman times were written down. The notion of guardianship grew and so did the salient part of in loco parentis: the right of the parent to delegate authority to the guardian. By the Sixteenth Century, though the phrase in loco parentis was not used as such, the master

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[101] Id. at 81.

clearly stood in the place of the parent. "The concept of loco parentis was firmly established in English life."[102]

The Development of the Doctrine in Colleges and Universities in the United States of America

The Medieval Model

Although the first settlers in America were busy with the struggle against nature and starvation and creating a new country with new rules, there remained embedded in their memories as they struggled in the fields the recollections of a life left behind--not the least of which were those of an educational system now far away. And so, because they were for the most part well-educated themselves, they dreamed of an educational system in their own land. Oxford and Cambridge would serve as the models for the first colonial colleges.[103] Those universities, in turn, were the product of the Middle Ages.

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[102] Id. at 82. Pufendorf (1673), Moran observes, was one of the first writers to use the expression in loco parentis.

[103] J. Brubacher and W. Rudy, Higher Education in Transition, an American History 1636-1956, at 3 (1958) [hereinafter cited as Brubacher].

The medieval universities were, as the very name university implies, "an association of masters and scholars leading the commonlife of learning."[104] They were places of residence for both students and faculty where strict emphasis was placed on training in morals, religious behavior, and learning. Rules of discipline, therefore, were plentiful. Some of the regulations common to all colleges dealt with such things as:

> Carrying arms, impunctuality, talking during the reading in Hall or disturbing the Chapel services, bringing strangers into College, sleeping out of College, absence without leave, negligence and idleness, scurrilous or offensive language, spilling water in upper rooms to the detriment of the inhabitants of the lower rooms and failure to attend the regular "scrutinies" or the stated general meetings for college business.[105]

Discipline was meted out for each offense not always in strict proportion to the seriousness of the act. The statutes at Christ College allowed for flogging for "unpunctuality, for negligence and idleness, for playing, laughing, talking,

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[104]C. Haskins, The Rise of Universities 24 (1929). A distinction must be made between the terms "college" and "university." While both terms mean literally a community or association, the distinction really occurs in respect to the subjects taught there. In the university not only the seven liberal arts were taught but also one or more of the higher studies of theology, law, or medicine (called the studium generale). The college was devoted to more particular studies (particularia studia).

[105]R. Rait, Life in the Medieval University 6 (1931).

making noise or speaking English in a lecture room, for insulting fellow students, or for disobedience to his pastors and masters."[106] "Making odious comparisons" was forbidden to the undergraduates of that College. By avoiding "comparisons" the statute meant not indulging in such things as "remarks about the country, the family, the manners, the studies, and the ability, or the person, of a fellow student . . . ."[107] Punishment for infractions was the birch.

The growing practice of discipline at the college level led gradually to the adoption of disciplinary traditions at the university level. At Fifteenth Century Oxford, students who were not members of a college lived in unendowed halls (such halls were becoming typical of the growing universities). Students who resided in those halls were governed by statutes as severe as those in any school anywhere in history. There were rules for table manners, moral behavior, conversation, church-attendance, singing in public, going to town, sleeping with another student and again the making of "odious comparisons." Most of these offenses were punishable with a monetary fine of one penny.[108] There were

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[106] Id. at 67.

[107] Ibid.

[108] Id. at 99.

even dress codes outlining in the most descriptive detail the outfits that were acceptable for wear on campus. Thus we see the first housing regulations and student discipline codes that would serve as a model for Harvard, William and Mary, and other American colleges centuries later.

Violence was not absent from the campus either. "Town-Gown" differences led to some of the most violent campus disruptions in history. One such incident was the battle of St. Scholastica's Day at Oxford (10 February 1354) in which both students and townsmen were slain over a period of several bloody days:

> One day eighty armed townsmen attacked certain scholars walking after dinner in Beaumont, killed one of them, and wounded others. A second battle followed in which the citizens, aided by some countrymen, defeated the scholars, and ravaged their halls, slaying and wounding. Night interrupted their operations, but on the following day, with hideous noises and clamours they came and invaded the scholars' houses . . . and those that resisted them and stood upon their defense (particularly some chaplains) they killed or else in a grievous sort wounded . . . . The crowns of some chaplains, that is, all the skin so far as the tonsure went, these diabolical imps flayed off in scorn of their clergy.[109]

As a result of the heinous crimes of the community, the King granted the University complete jurisdiction over the town and the market. The school apparently not only had

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[109] Id. at 125-26.

the power (in loco parentis) to control the behavior of their students but also the obligation to protect them.

The Colonial College in America

Thus we see the backdrop for that common law doctrine by which the colonial colleges supervised students.[110] It was a venerable old system of governance inherited from medieval Oxford and Cambridge that stressed the housing of students in closely supervised dormitories, compulsory attendance at religous exercises, and "the enforcement of discipline in loco parentis;"[111] this was the "collegiate way of living."[112]

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[110]The statement of that common law doctrine can be found in The Laws of England:

> "The authority of a schoolmaster is, while it exists, the same as that of a parent. A parent, when he leaves his child with a schoolmaster, delegates to him all his own authority, so far as is necessary for the welfare of the child, and so far as is necessary to maintain discipline with regard to the child committed to the teacher's care. The delegation is revocable, and in case of conflict the authority of the parent must prevail and he may have a habeas corpus if the master detains the child against his wish. The parent undertakes that the master shall be at liberty to enforce with regard to the child the rules of the school, or at all events such rules as are known to him and to which he has expressly or impliedly agreed. The master is bound to take such care of his pupils as a careful father would take of his children" (Position of Schoolmasters, Eliz. 2, c. 4, sec. 1242 [1955]).

[111]Brubacher, supra note 103, at 119.

[112]Ibid.

Housing

From the very beginning the English concept of how students should be suitably housed was sown across the new frontier along with the first fields of corn and wheat. This concept could be summed up most succinctly in the phrase: "the collegiate way of life." Oxford and Cambridge, unlike the European universities where there was little concern for the student outside the lecture hall, stressed the residential college. But these colleges were much more than dormitory houses; they were "homes" where faculty and student lived together in an atmosphere both intellectual and moral.[113]

The early colleges in America tried to copy their big brothers across the ocean; but they were forced to diverge from their pattern in time. The frontier did not lend itself to the building of large clusters of colleges around a university center. Furthermore:

> The poverty of American resources prevented the construction of elaborate quadrangular structures; the sparseness of the resultant barrackslike dormitories was not designed to foster the characteristic close and well-knit social life of the English college.[114]

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[113] Id. at 41.

[114] Ibid.

The English system, therefore, was not transferred in toto to America. By the Nineteenth Century, Oxford and Cambridge had become mainly educational institutions whereas the American colleges were places for students to "sleep, eat, and study."[115]

Moreover, approaches to discipline differed radically. At the English colleges discipline was handled by the deans, proctors, and beadles; in America it fell to the lot of the faculty which led later to problems of healthy student-faculty relationships.[116]

The remainder of this chapter will detail the evolution of discipline in American colleges, emphasizing the early history of Harvard, which served in effect as the prototype for educational institutions in the United States.

Discipline in the colonial college

We have had already a quick glimpse of the paternalistic regime under which the students of Oxford and Cambridge struggled. Students in the Colonies were expected in like manner to observe a long list of rules and regulations. The

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[115] Id. at 42.

[116] Ibid.

early American colleges, following the lead of Oxford and Cambridge, bore the burden of ensuring the development of the student's moral and intellectual life. Even religious routine was outlined for those early colonial students. Part of their daily routine was mandatory attendance at chapel, something not uncommon even today in some parts of the country.[117]

Even the government itself was empowered to act in loco parentis in that office enacted educational legislation stressing morality and good manners.[118] A law in the New Plymouth Colony provided that children who would play cards or throw dice might be corrected at the discretion of the natural parent or the masters. Upon the second offense they would be whipped in public.[119]

Jesuit schools established in the colonies passed strict rules governing every phase of student life. They were patterned after the fashion of a family with the students under the direct supervision of the faculty both during the academic year as well as on vacation. Since the faculty was empowered to control every aspect of a student's

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[117]Harms, supra note 16, at 63-64.

[118]Id. at 66.

[119]E. Leonard, Origins of Personnel Services in American Education 11-13 (1956).

life, they were considered to be acting in every sense in loco parentis.[120]

The presidents of the early colleges generally stood in loco parentis to their students not only in the exercise of discipline but also in the supervision of student housing, good manners, morals, religious training, and recreational activities.[121] Nathaneal Eaton, the first president of Harvard, exemplified the extremes to which such discipline and supervision were carried by some of the early presidents. Samuel Eliot Morison recounts an episode in which Eaton was brought into court on the charge of striking a man in anger "for taking the name of God in vain."[122] Another of the

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[120] Id. at 17.

[121] Harms, supra note 16, at 67-70. See also S. Morison, Three Centuries of Harvard 16, 25, 40, 44, passim (1936) wherein Morison reviews the terms in office of all the great presidents of that college and recounts in instance after instance their emphasis on religious development, morality and the general control of the students' entire life. He reviews the presidential terms of the tyrannical Nathaneal Eaton, the first President of Harvard, through James Bryant Conant under whose solid direction and scholarly hand Harvard progressed with remarkable swiftness and whose liberal policies stood in sharp contrast to the paternalism of the presidents who preceded him.

[122] S. Morison, id. at 372.

grievances brought against him was that he exercised "ill usage toward his scholars . . . ."[123]

The early colonial colleges, then, were simply reflective of the times in which they were born. Discipline was liberally administered in all walks of life; its purpose was to encourage the hard work that typified the Puritan way of life. It was a Puritan society much influenced by Satan and governed by Mr. Mather in which the rod was used by both parent and schoolmaster to "beat the devil" out of the child (for the more intractable student a stick made of walnut was usually used).[124] At any rate in loco parentis did not need a definition or a defense to be used in school, for if the schoolmaster administered a whipping, the child could be sure of another upon his arrival at home.[125]

The colleges also possessed a disciplinary authority delegated by the parents. Their power was almost without limitation, extending from the supervision of morals to the care of the student's health and safety.[126]

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[123]Ibid.

[124]J. Winthrop, The History of New England from 1630-1649 307, 314, passim (1853 ed.).

[125]Harms, supra note 16, at 70.

[126]Ibid.

Harvard College

If one were to know upon what model the Early American College was patterned he need look no farther than Harvard University. And the founders of Harvard, in turn, seeking to formulate the goals and purposes of their own college looked across the ocean to that great institution that most of them attended, the University of Cambridge.

The average age at Cambridge in 1576 was over seventeen. Twenty-four students were seventeen but twenty-five, including John Harvard himself, were over eighteen. Despite the relatively advanced age of some of the students at Cambridge, the tutor "had almost absolute control over his pupils with whom his relation was more than paternal."[127]

And so it was at Harvard in its early years under the despotic direction of Nathaneal Eaton, himself a graduate of Cambridge. Those years were extremely difficult ones, complete with riots, poor food, and severe discipline.[128] The students, according to the New England Fathers

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[127]S. Morison, The Founding of Harvard College 62 (1935).

[128]A. Bevis, Diets and Riots 87-88 (1936).

and Cotton Mather were to be brought up in "the collegiate way of living."[129]

The laws of the college just as the laws of Massachusetts Bay Colony were derived from the laws of England. Governor Winthrop, in his history of New England, recounts something of the way in which early law developed in Colonial America. The passage is included below, though it is somewhat lengthy, because it both indicates the spirit of the times in which Harvard grew and gives positive proof of the mind of the Colonists toward the common law of England.

> The people had long desired a body of laws, and thought their condition was unsafe, while so much power rested in the discretion of the magistrates. Divers attempts had been made at former courts, and the matter referred to some of the magistrates and some of the elders; but still it came to no effect; for being committed to the care of many whatsoever was done by some, was still disliked or neglected by others. At last it was referred to Mr. Cotton and Mr. Nathaniel Warde, etc. and each of them framed a model, which were presented to this general court, and by them committed to the governour and deputy and some others to consider of, and so prepare it for the court in the 3d month next. Two great reasons these were, which caused most of the magistrates and some of the elders not to be very foreward in this matter. One was, want of sufficient experience of the nature and disposition of the people, considered with the condition of the country and other circumstances, which made them conceive, that such laws would be fittest for use, which should arise pro re nata upon occasions, etc., and so the laws of England and other states grew, and therefore

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[129]S. Morison, supra note 127, at 252.

> the fundamental laws of England are call customs, consuetudines. 2. For that it would professedly transgress the limits of our charter, which provide, we shall made no laws repugnant to the laws of England, and that practice and custom had been no transgression; as in our church discipline and in matters of marriage, to make a law, that marriages should not be solemnized by ministers, is repugnant to the laws of England; but to bring it to a custom by practice for the magistrates to perform it, is no law made repugnant, etc.[130]

Thomas Hutchinson confirms the determination of the Colonists regarding their English legal heritage:

> Let us not [here in New England] despise the rules of the learned in the lawes of England, who have both great help and long experience.[131]

He observes for the edification of the Governors of the Colonies:

> By this it may appeare that our politie and fundamentals are framed according to the lawes of England, and according to the charter.[132]

In accord with the practice of the Massachusetts Bay Colony Government, then, Harvard drafted its first laws (in 1642) after the fashion of the statutes of Cambridge and Oxford. Those laws regulated every aspect of student life,

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[130] J. Winthrop, supra note 124, at 388-89.

[131] T. Hutchinson, Collection of Original Papers Relative to the History of the Colony of Massachusetts Bay 296 (1789).

[132] Id. at 208.

treating in detail such things as attendance at chapel, the reading of scriptures, swearing, respect for parents and elders, lying, obscene gestures, intrusion on the affairs of others and so on ad infinitum:

> 2. Let every Student be plainly instructed, and ear stly pressed to consider well, the maine end of his life and studies is, to know God and Jesus Christ which is eternall life, Joh. 17.3. and therefore to lay Christ in the bottome, as the only foundation of all found knowledge Learning.
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> And seeing the Lord only giveth wisedome, Let every one seriously set himselfe by prayer in secret to seeke it of him Prov 2,3.
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> 3. Every one shall to exercise himselfe in reading the Scriptures twice a day, that he shall be ready to give such an account of his proficiency therein, both in Theorettical1 observations of the Language, and Logick, and in Practicall and spirituall truths, as his Tutor shall require, according to his ability; seeing the entrance of the word giveth light, it giveth understanding to the simple, Psalm. 119. 130.
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> 4. That they eschewing all profanation of Gods Name, Attributes, Word, Ordinances, and times of Worship, doe studie with good conscience, carefully to retaine God, and the love of his truth in their mindes, else let them know, that (notwithstanding their Learning) God may give them up to strong delusions, and in the end to a reprobate minde, 2 Thes. 2. 11, 12. Rom. I. 28.
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> 5. That they studiously redeeme the time; observe the generall hours appointed for all the students, and the speciall houres for their owne Classes; and then diligently attend the Lectures, without any disturbance by word or gesture. And if in any thing they doubt, they shall enquire, as of their fellowes, so, (in case of Non satisfaction) modestly of their Tutors.
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> 6. None shall under any pretence whatsoever, frequent the company and society of such men as lead an unfit, and dissolute life.
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> Nor shall any without his Tutors leave, or (in his absence) the call of Parents of Guardians, goe abroad to other Townes.

> 7. Every Schollar shall be present in his Tutors chamber at the 7th. houre in the morning, immediately after the sound of the Bell at his opening the Scripture and prayer, so also at the 5th. houre at night, and then give account of his owne private reading, as aforesaid in Particular the third, and constantly attend Lectures in the Hall at the houres appointed? But if any (without necessary impediment) shall absent himself from prayer or Lectures, he shall bee lyable to Admonition, if he offend above once a weeke.
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> 8. If any Schollar shall be found to transgresse any of the Lawes of God, or the Schoole, after twice Admonition, he shall be lyable, if not adultus, to correction, if adultus, his name shall be given up to the Overseers of the Colledge, that he may bee admonished at the publick monethly Act.[133]

And so these laws formulated in 1642 for the governance of Harvard set the tenor for the control of American colleges. Subsequently

> every possible aspect of student behavior was regulated--promptness, attendance at classes and prayers, dressing, idling, fishing, gunning, dancing, drinking, gambling, fighting, gaming, swearing, and so on ad infinitum.[134]

The college, moreover, in all its pursuits enjoyed the full support of the Commissioners of the United States. In a letter replying to Governor Winslow in which they

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[133]New England's First Fruits 14-15 (1643), found in S. Morison, supra note 127, at 434-35 (Appendix D).

[134]Brubacher, supra note 103, at 50.

acknowledged the need for enlarging "the college at Cambridge,"[135] they expressed the hope that "the kingdom of our Lord Jesus, the generally professed end of all interested in the worke, may be advanced thereby."[136]

According to present day standards the breadth of the "parental concern" that the colonial colleges exhibited toward their students would seem harsh indeed. But this was a time considerably different than ours. The Puritans in their co[illegible] for passing on religious doctrine utilized the schools to bring their goals to fruition. They were zealous in their demands for strict attention to the teachings of the schoolmaster and required absolute obedience to religious doctrine. Both "the government as well as the school officials stood in loco parentis and in this position could pour into the children as much education as possible under whatever situation existed."[137]

From the Revolution to the Civil War

As the Revolution marks the close of one grand era in American history and signals the beginning of another, so it also marks an historic period in the history of the doctrine

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[135]T. Hutchinson, supra note 131, at 231.

[136]Ibid.

[137]Harms, supra note 16, at 71.

of in loco parentis. Black, in fact, defines common law in reference to its force and authority in the United States of America in terms of that great struggle between the Colonies and England. It is, he says, "[t]hat portion of the common law of England . . . which had been adopted and was in force at the time of the Revolution."[138] Hence, the doctrine of in loco parentis as we have seen it brought from the shores of England and employed in the colleges of Early Colonial America remains in force today unless expressly abrogated.

In the previous sections we have seen that law as it emerged from the shadows of ancient Babylon, was adopted and modified by the Roman lawmakers, came to flower in the Medieval Colleges, and was ultimately brought to the shores of America by the early settlers. There now remains but to watch how it developed from the time of the Revolution, was modified, and even ultimately challenged during the college crises in the 1960s and 1970s.

Housing

Though the doctrine of in loco parentis underwent some small changes in the wake of the Revolution, the major

[138]Black's Law Dictionary, supra note 7, at 346.

emphasis still was on student behavior and housing. During post-Revolutionary times in loco parentis became even more important than ever before,[139] for during this period colleges began to expand their facilities to accommodate the larger number of students anxious to engage in the pursuit of advanced learning. The control previously exercised by college overseers and governmental bodies gradually passed to the president and the faculty. They were charged generally with the responsibility of guarding the manners of the students and, by precept and example, "to recommend to them a virtuous and blameless life, and a diligent attention to the public and private duties of religion."[140]

With students arriving on campus in greater numbers, more emphasis was placed on student activities: recreation, student government, and school organizations of all kinds. Thus did student personnel services begin to take shape with a gradual change in emphasis from the enforcement of discipline to the job of aiding the smooth transition from the dependence of home life to the independence of college life.[141]

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[139] Harms, supra note 16, at 74.

[140] Leonard, supra note 119, at 47.

[141] Harms, supra note 16, at 75. For language strikingly reminiscent of this phraseology see Schick v. Kent State Univ., Civil Action File No. C 74-646 (N.D. Ohio, Jan. 19, 1975).

With greater numbers also came a greater heterogeneity in the makeup of the student body. Lessened somewhat in the wake of the changing face of the college in post-Revolutionary times, then, was the emphasis on the moral and religious training of the students.[142] With diversity arose disputes about the application of in loco parentis by school administrators. Those disputes were frequently settled in court and resulted in further modification and interpretation of in loco parentis in the American schools. While the earliest of these cases dealt with issues involving secondary schools, official judicial intervention occurred at the college level eventually. That, however, did not occur until after the Civil War.[143]

The reform in colleges

Following the War of Independence another reform movement was going on that challenged the paternalistic spirit of the early Colonial colleges. During this period the first state universities began to appear. It was at the most famous of those early state universities of higher learning, the Uni-

[142]Harms, supra note 16, at 75.

[143]See Chapter V.

versity of Virginia, that the reform movement began, and the reformer none other than Thomas Jefferson. It was his conviction that learning should be based on presuppositions of complete academic freedom for both student and teacher.[144]

Reforms were taking shape on other campuses at about the same time. At Harvard, a young upstart professor of French and Spanish by the name of George Ticknor was the instigator. Ticknor had gone to Europe to study at the University of Göttingen where he was overwhelmed by the "breadth of courses offered, the depth of scholarship of the professors and their devotion to teaching, the freedom of the students in the election of what lectures they wished to attend and the methods of teaching."[145]

When he received a professorship at Harvard, Ticknor attempted to introduce some of the new ideas he had learned overseas to the language department into which he was hired. In 1823, in the wake of a wild student riot, Ticknor formally made his proposition for reform to the faculty. In 1825 his reforms were finally adopted by the University. Among his

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[144]R. Potter, The Stream of American Education 178-79 (1967).

[145]Id. at 181.

recommendations were the elimination of winter vacation, an increase in the number of subjects offered, an opportunity for students to elect some subject, and changes in teaching methods to allow students to progress at their own rate.[146] The emphasis generally was on greater student freedom and less faculty supervision of student behavior. Ticknor's reforms were not popular with the faculty, though, and he resigned ten years later.

Reactions to the reforms of Jefferson and Ticknor were nationwide and generally negative. In 1828 the faculty at Yale University issued a statement demeaning the reforms and defending the status quo. The report asserted that "the role of the college was still, as it had always been, 'to lay the foundations of a superior education' at a period of the student's life when a substitute must be provided for parental superintendence."[147] (Italics mine.)

Contrary to the spirit of the reformers, the Yale faculty dismissed the notion that young men should direct themselves. In paternalistic tones, the report stated that in the students' daily activities, faculty members ought

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[146] Ibid.

[147] Id. at 182.

always to be "present with them, not only at their meals, and during the business of the day; but in the hours allotted to rest." Furthermore, the student rooms should be "near the chamber of one of the officers."[148] The popularity of this report was a clear reflection of the conservatism of the period.

From the 1860s to the 1970s

Rise of personnel services

While the nation was embroiled once again in war, higher education in this country was involved in yet another reform. Colonial American teachers were saddled with the burden of discipline and in that role acted in loco parentis.[149] This disciplinary responsibility made it nearly impossible for there to be a healthy relationship between teacher and student. Around the middle of the Nineteenth Century, that relationship began to change and college presidents began employing deans and personnel workers to

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[148] Id. at 182-83.

[149] E. Williamson, supra note 5, at 312.

handle discipline and leaving the teachers simply with academic functions.[150]

After the Civil War the changing relationship between student and teacher became more apparent:

> The benign relationship and model of the family became the prevailing mode as to relationships. And instead of the harsh regimentation, a benign relationship, the loving caring relationship of the family became dominant. This caring relationship modeled after the family today, is being extended to bring students into institutional decision-making.[151]

During this same time a contrary force was developing in the Midwest given impetus chiefly by Tappan of Michigan. Influenced by his personal experiences with the freedom of the German Universities, Tappan "turned the dormitory into classrooms and disclaimed institutional responsibility for all but instructional relationships with students."[152]

In many of the midwestern universities personnel work was deemphasized if not eliminated, the thinking being that students would mature faster through handling their own affairs, a kind of "sink or swim" philosophy. This relationship pervaded many institutions for decades until the over-

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[150] Ibid.

[151] Ibid.

[152] W. Williamson, Student Personnel Services in Colleges and Universities 7 (1961).

whelming influx of student problems forced them to consider "a host of new problems, especially those concerned with identifying and predicting scholastic aptitude in order to reduce the alarming rate of scholastic failures."[153]

Personnel work, however, was here to stay despite currents to the contrary. In 1870 Harvard employed a dean to serve both as teacher and personnel worker in charge of discipline and enrollment. In 1889 Johns Hopkins appointed a "chief of the faculty advisors" for students. Oberlin appointed special matrons to supervise its coeds when it first opened its doors in 1837. The position of Dean of Students was created at the University of Chicago in 1930.[154]

Harms editorializes about the development of personnel services in the United States:

> Often the student was living away from home and needed assistance to make the transition to school and provide a substitute for that parental direction which was formerly available in the family. The dean of students stood in loco parentis and made the transition more easily attainable. It was not their position to place the student in a dependent attitude so much as it was

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[153] Id. at 8.

[154] T. Blackwell, College and University Administration 56-57 (1966).

their duty [illegible] parental status to aid the students in moving into their rightful place in society as full participants.[155]

Personnel services were gradually expanded during the postwar period to include such things as health education, intercollegiate and intramural athletics, student loans, scholarships, and occupational counseling. Deans of students were here to stay and in them in loco parentis had found its strongest ally![156]

The courts intervene

While in loco parentis was being modified within the college walls, greater forces were confronting the doctrine from without. Students and members of the community, no longer content to allow the university to act unchallenged, took their disputes before the bench for adjudication. By so intervening the courts further established, defined, and modified the ancient doctrine of in loco parentis as it applies to the student-university relationship in American colleges. The first of those cases was heard in 1866 and the last in the late 1960s. But that is the story of another

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[155]Harms, supra note 16, at 83.

[156]See C. Bakken, supra note 37.

chapter. There remains now the task of tracing the legal history of that doctrine as it is reflected in the statutes and court cases in the United States to determine ultimately whether the doctrine as it existed at the time of the Revolution is still legally alive on the college campuses of America. We turn now to the enactments of the legislatures of the several states to see what modifications, if any, have been made in that common law by statute.

CHAPTER IV

STATUTORY LAW AND IN LOCO PARENTIS

Preliminary Discussion

Though this chapter may be the shortest one of the dissertation, it is be no means the least important, if for no other reason than that it represents 783 hours of research in the law library. Its purpose is to report the results of investigation into the statutes of the several states and into the opinions of the Attorneys General as they related to the issue of the college and in loco parentis. In searching the legislative enactments of fifty states, the Virgin Islands, and the District of Columbia, only those statutes were considered that used language expressly stating or analogously reflecting the doctrine of in loco parentis. One should not conclude, however, simply because the statutes of the majority of the fifty states did not employ language supportive of the doctrine of in loco parentis that they repudiated it by their silence. It

is interesting to note, as a matter of fact, that no statute clearly repudiated the doctrine.

Common Law

The real force of this Chapter lies not so much in what the statutes state but rather in what they do not state. For common law, as Black defines it, stands until expressly abrogated.[157] The following citation from Corpus Juris Secundum summarizes the law on the repeal and revival of common law:

> Ordinarily, a constitutional or statutory enactment is the only means by which the common law may be altered, repealed or abrogated. As a general proposition, and under some authorities, the courts may not change or repeal the common law by judicial decision, especially where the common law is clear and free from doubt. However, under other authorities the common law may be changed or repealed by the courts as well as by the legislature, and the courts may apply or effectuate common law principles in the light of altered or new conditions or make such modifications as the situation requires . . . .[158]

Common law, moreover, needs no other law to support it; it already has the full force of law per se. It is the living law, buttressed by centuries of tradition and custom. It his such authority that "[w]hen a statute abrogating a

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[157] Black, supra note 7.

[158] 15A C.J.S. Common Law: Repeal and Revival sec. 12.

rule or principle of the common law is repealed, the common law principle or rule is ipso facto revived . . . ."[159] The major point of this Chapter, therefore, is not to find statutes to support in loco parentis (for it really needs no support), but to search the enactments of the several states to see if that common law doctrine has been abrogated within their particular jurisdictions.

In Loco Parentis Language

One further point needs to be made before proceeding with the search of the statutes of the fifty states, and that is the matter of in loco parentis language. None of the statutes reported hereinafter use the expression in loco parentis as such. They do, however, use language commonly considered to be in loco parentis by extension.

The word "guardianship," used in several statutes, has a tradition as old as the guardianship laws of ancient Rome. That notion developed and ultimately became a principal part of in loco parentis in English law of the Sixteenth Century.[160] The supervision of religious and moral behavior

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[159] Ibid.

[160] See Chapter III at 5.

falls also within the concept of surrogate parenthood. Evidence for such an interpretation can be found throughout the early history of American Colleges.[161] There is also judicial support for such an interpretation. The Court in

v. Louisiana Polytechnic Institute acknowledged the

tion of moral behavior as parental with the following obiter dictum:

> We tend to agree with the line of thinking which states that the modern college or university, which has in attendance thousands of students, even if it should, is ill-equipped to regulate off-campus social and moral lives of its students, thus making futile, and perhaps improper, any attempt to act "in loco parentis."[162] (Italics mine.)

Moreover, the Court in Goldberg v. Regents of University of California cited four cases using the kind of language described above (rather than the express phrase in loco parentis) as "following the doctrine."[163]

Statutory Law

In tackling the legislative enactments of the several states, the published codes of each state were searched, in-

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[161] See Chapter III, passim.

[162] 316 F. Supp. 872, 877 n.2 (W.D. La. 1970).

[163] 248 Cal. App. 2d 867, 57 Cal. Rptr. 463, 470 n.11 (Ct. App. 1967).

cluding the supplements to those codes, as well as the most recent advance sheets, for the latest legislative action and opinions of Attorneys General regarding in loco parentis on the college campus. The following pages report the results of that research.

The seven states where pertinent statutes were found are reported alphabetically; there was, however, no attempt to comment (in this Chapter) on the legal implications of the doctrine of in loco parentis for college teachers and administrators; analysis and final summation will be done in Chapter VI.

Colorado

Only a half-dozen states were found with statutes that employed language smacking of surrogate parenthood. Colorado was one of them. Section 23-31-114 of the Colorado Revised Statutes Annotated, dealing with the rights of the faculty of Colorado State University to make rules for the governance of that University, reads:

> The faculty shall pass all needful rules and regulations necessary to the government and discipline of the university, regulate the routine of labor, study, meals, and the duties and exercises, and all such rules and

> regulations as are necessary to the preservation of all morals, decorum, and health.[164] (Italics mine.)

Though not using the actual words "parent" or "guardianship" the legislature employed language suspiciously supportive of the parental role of the schools with the phrase "preservation of all morals, decorum and health." One is reminded by such language of the charge given to the early colleges of frontier America wherein the president and faculty were entrusted with the physical, intellectual, moral, and spiritual care of their students.

Delaware

In Delaware the mind of the legislature regarding the parental nature of the school-pupil relationship in the elementary and secondary schools is clear:

> Every teacher and administrator in the public schools of this state shall have the right to exercise the same authority as to control, behavior and discipline over any pupil during any school activity, as the parents or guardians may exercise over such people.[165] (Italics mine.)

This particular statute, though applicable only to the public schools of the state of Delaware, was included here inasmuch as it might shed some light on the statute

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[164]Colo. Rev. Stat. Ann. sec. 23-31-114 (1974).

[165]Del. Code Ann. tit. 14, sec. 701 (1975).

relevant to higher education. There the intent of the lawmakers is not nearly so obvious:

> The faculty of the college, composed of the teachers whome the trustees shall employ, one of whom shall be President of the College and, ex officio, a member of the Board of Trustees, shall have the care, government and instruction of the students, subject, however, to the bylaws. They shall have authority, with the approbation of the Board, to confer degrees and grant diplomas.[166] (Italics mine.)

While the word "care" is far less explicit than the parental terminology of Section 701 relating to the public school, it still rings with the tone of guardianship or parental concern.

Georgia

A Georgia Statute, while not dealing with in loco parentis per se, does touch, perhaps, on a vital point that frequently arises during the discussion, that is, the impact that the new age of majority has had on the present legal status of that doctrine:

> Nothing in this law Acts 1972, p. 197 changing the age of majority shall be construed to limit the power of the Board of Regents of the University System of Georgia to adopt and enforce rules and regulations for the government, control and management of the University System; nor shall this law be construed so as to limit the authority of any institution in the University

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[166] Del. Code Ann. tit. 14, sec. 6506 (1975).

> System of Georgia to adopt and enforce rules or regulations governing housing, conduct, discipline and other related activities of the student body.[167]

This was the only statute found to touch on the legal implications of the new majority age law as it bears upon the student-university relationship. The implications of this statute for in loco parentis will be discussed in Chapter VI.

Idaho

The only legislative body to drop in loco parentis language from the wording of the law was that of the State of Idaho. Regarding the supervision of students at the Lewis-Clark Normal School, the old statute read:

> The Board of Trustees, in their regulations, and the president and assistants in their supervision and government of said school, shall exercise a watchful guardianship over the morals of the students at all times during their attendance upon the same, but no religious or sectarian tests shall be applied in the selection of teachers, and none shall be adopted in said school.[168] (Italics mine.)

The new statute reads simply:

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[167]Ga. Code Ann. sec. 32-170 (Supp. 1974).

[168]Idaho Code sec. 33-3113 (1963), as amended, Idaho Code sec. 33-3113 (Supp. 1974).

> No religious or sectarian test shall be applied in the admission of students, nor in the selection of instructors or other personnel of the college.[169]

Clearly the legislature had second thoughts about the parental tone of the old language. We might conjecture that the phrase "watchful guardianship over the morals of the students" was the portion of the statute most distasteful to the lawmakers and that its strikingly parental tone led them to delete the entire first portion of the law.

Michigan

A Michigan statute, regarding the formulation of rules and regulations at Michigan State University, is strikingly similar to the statute passed by the Colorado legislature.[170] It reads:

> The faculty shall pass all rules and regulations necessary to the government and discipline of the college and for the preservation of morals, decorum and health.[171] (Italics mine.)

Again the parental phraseology, "preservation of morals, decorum and health," is identical with that of the Colorado statute.

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[169]Idaho Code sec. 33-3113 (Supp. 1974), as amending Idaho Code sec. 33-3113 (1963).

[170]Colo. Rev. Stat. Ann. sec. 23-31-114 (1974).

[171]Mich. Comp. Laws Ann. sec. 390.114 (1967).

In 1963 the constitutionality of this statute was challenged. Interestingly enough, however, the issue was not the use of parental language but rather the "invasion by legislature of exclusive authority of the state board of agriculture over the agricultural college" by granting the rule-passing authority to the faculty of that college.[172]

Nebraska

The strongest language supportive of the ancient doctrine of in loco parentis and never stricken in later revisions of the code was found in the Nebraska statutes. The lawmakers, in addressing themselves to the rule-making powers of the board and faculty of the state colleges in Nebraska, determined that:

> The board in its regulations, and the president in his supervision and government of the state colleges, shall exercise a watchful guardianship over the morals of the pupils, but no religious or sectarian test shall be applied in the selection of teachers, and none shall be adopted in the state colleges.[173] (Italics mine.)

The phrase, "a watchful guardianship over the morals of the pupils," as strong as any language encountered in any of the

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[172] Id. at 578 n.1.

[173] Neb. Rev. Stat. sec. 85-317 (1971).

statutes, is reminiscent indeed of the language rescinded by the legislators in Idaho.[174]

North Dakota

The only other state that was found in the search through the laws of fifty states, the Virgin Islands, and the District of Columbia that used in its statutes language analogously supportive of surrogate parenthood was North Dakota. Employing phraseology strikingly similar to that used in other states, the lawmakers of North Dakota, in addressing themselves to the rule-making powers of the faculty at the State University of Agriculture and Applied Science, decreed that:

> The faculty shall consist of the president, teachers, and instructors. It shall adopt all necessary rules and regulations for the government and discipline of the college, for the regulation of the routine labor, study, meals, duties, and exercises, and for the preservation of morals, decorum, and health.[175] (Italics mine.)

Opinions of the Attorneys General

While a half-dozen statutes dealt in some sense with surrogate parenthood, no opinions of the states' Attorneys

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[174] 171 Idaho Code sec. 33-3113 (1963).

[175] N.D. Cent. Code sec. 15-12-04 (1971).

General could be found construing the statutes of the several states, replying to official government inquiries, interpreting case law, or giving legal counsel relevant to the issue of in loco parentis in higher education.

Brief Afterword

The review of statutory law has provided us with a partial picture of how legislative action has modified (or reinforced) the traditional doctrine of in loco parentis. An analysis of the impact of those statutes on that doctrine will be made in Chapter VI. But there remains to be studied another great area of the law in order to complete the picture of the legal status of in loco parentis today. That area is comprised of the vast body of case law handed down by the courts which, together with the legislation, constitutes the primary source of law and which, through the doctrine of stare decisis, becomes binding, just as legislation is binding, upon all in whose jurisdiction the case is decided. Thus, the remainder of the legal research done in this paper will be spent in isolating those significant court cases which have dealt with the issue of in loco parentis as it affects the university-student relationship in colleges and universities of the United States of America.

In Chapter VI, I intend to draw together, for purposes of final discussion and legal analysis, the legislation and case law which was reported and briefed earlier to determine the legal implications of the doctrine of surrogate parenthood for administrators in institutions of higher education in America today.

CHAPTER V

CASE LAW AND IN LOCO PARENTIS ON THE COLLEGE CAMPUS

Introductory Remarks

The heart of this research rests with the court cases decided within the eleven decades past that dealt with in loco parentis and the college student. Some of those cases were heard at a time in our nation's history that was as different from the present as the Oakies of Steinbeck's The Grapes of Wrath were from the cattle raising ranchers of Ferber's Giant. They are, however, classic cases that clearly delimit the mind of the courts in reference to that age-old doctrine and for that reason must be included here. The early cases, dating back as far as the Civil War, generally reinforced the doctrine; the more recent cases (those decided after 1965) are more divided on the issue.

Many courts have ruled on the rights of colleges and universities to make rules and regulations for the control of student activities, discipline and university housing, but

only seventeen significant cases have expressly or analogously based that right on the doctrine of in loco parentis. The point of this research is not to assume that certain cases (those that deal with student housing, for example) should be construed as in loco parentis cases, for that surely seems to be begging the question. There are other principles that have been used to govern student-university relationships already mentioned in Chapter 1. Therefore, only those cases that use language clearly supportive of the doctrine either expressly or analogously will be reported hereinafter.

The same rule applies, here, moreover, that applied in Chapter IV, that is, that common law stands unless expressly abrogated by law.[176] This chapter is important, therefore, not only for the expressed statements about the doctrine by the courts reported herein, but also for the silence of other courts. For in loco parentis as the living law of the land stands on its own merits, requiring no support from either

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[176]There is some discussion, however, as to whether the courts can override common law. There is considerable authority cited to indicate that they cannot. See 15A C.J.S. sec. 12, supra note 158.

statute or the courts, awaiting only to be interpreted, modified, or abrogated.[177]

Seventeen significant cases have been found that dealt with in loco parentis as applied to higher education. Those cases will be treated in chronological order, from the oldest decision to the most recent. Moreover, each case will be legally briefed in preparation for final summation and analysis in Chapter VI. With that we may begin the investigation of those seventeen cases of significance that have dealt with the doctrine of in loco parentis on the campuses of institutions of higher learning in the United States of America.

Cases of Significance

While the court had recognized the ability of the school to stand in loco parentis as early as 1833,[178] the first judicial recognition that it applied to higher education did not occur until 1866 in People ex rel. Pratt v. Wheaton College.[179] B. Harley Pratt, a student in Wheaton College, violated college rules by joining a secret society

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[177] Ibid.

[178] Commonwealth v. Townsend Fell, 11 Haz. Pa. Reg. 179 (1833).

[179] 40 Ill. 186 (1866).

known as the Good Templars; whereupon the faculty suspended him until he should reform his purpose and conform to the rules. His father, Leonard Pratt, having been refused mandamus compelling the college to reinstate his son as a student at the college, appealed to the State Supreme Court for judgment.

In the process of reaching his decision, Judge Wilson pointed out that Wheaton College was a private institution receiving no aid from the state or from taxation. He stated further that the trustees of the college had power from the charter of the college "to adopt and enforce such rules as may be deemed expedient for the government of the institution."[180] Moreover, the Court gave judicial sanction to what was common law doctrine when it said,

> A discretionary power has been given them to regulate the discipline of their college in such a manner as they deem proper, and so long as their rules violate neither divine nor human law, we have no more authority to interfere than we have to control the domestic discipline of a father in his family.[181]

Twenty-one years later a county court in Cumberland, Pennsylvania reexamined the doctrine without really affirming or rejecting it; the case in point was Commonwealth ex rel.

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[180] Id. at 187.

[181] Ibid.

Hill v. McCauley.[182] On September 26, 1885 John M. Hill, an adult citizen of the Commonwealth of Pennsylvania, was admitted as a student to Dickinson College. He made such excellent progress there that one year later on September 22, 1886 he made application for and was admitted to the last or senior year of the Latin course. Then, on November 16, 1886 the faculty gathered in a meeting to discuss a disturbance that had taken place on campus the week previous. The President of the College, Dr. McCauley, had learned from a janitor, Robert Young (who enjoyed no good reputation around the college), that "Mr. Hill was there at the disturbance in great excitement, brandishing his arms, making a noise, and running up into the college and out."[183] Dr. Rittenhouse, a faculty member, told his associates that he had been told by a student, whose name was never divulged and who was never summoned at any time, that "he had observed Hill at the disturbance, and that he, the student, was surprised and disgusted."[184]

Hill was then summoned before the faculty and questioned about his conduct. Hill, posing a question himself, inquired as to what was meant by riotous conduct and was told

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[182] Pa. County Ct. 77 (1887).

[183] Id. at 81.

[184] Ibid.

that "it was singing, rioting, and throwing stones."[185] He denied throwing stones and insisted that prior to the disturbance he was studying. The disturbance, as described by President McCauley, consisted of "hooting, singing, making noises, throwing small stones against the front window, and a large one thrown through the back window with great force which passed through both rooms, and in close proximity to some of the faculty, and out the front one."[186] After Hill's departure the faculty discussed the matter and determined that he should be dismissed within twenty-four hours.

The question before the Court was whether the relator, John Hill, was dismissed for justifiable cause and if his dismissal was in accord with lawful procedure. There never was any doubt in the Court's mind that the faculty had the power to enforce rules and regulations adopted by the trustees of the college by reprimanding, censuring, or dismissing students; the only issue was the procedure used to carry out the investigation of guilt. In reviewing the process of investigation used by the College the Court observed:

> The tribunals of educational institutions should not, in cases as the one before us, be less regardful of

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[185] Ibid.

[186] Ibid.

> these fundamental rules, which lie at the very foundation of the administration of justice, than the courts of common law. If it appears to a court of justice, upon the proper application of one aggrieved by the action of those who control a college, founded as Dickinson College is, that he has been seriously aggrieved and injured upon a trial by the faculty, not so conducted, it is obligatory upon it to interfere and compel a recognition of the rights of the complainant.[187]

The Court, noting a gross lack of legal evidence to support the charges (witnesses were not even questioned) and a presumption of guilt in the minds of the faculty even prior to the questioning of student Hill, held

> When guilt may not only be inferred but deemed established on such grounds by a member of a college faculty it can hardly be deemed of doubtful propriety for a court to hold that the form of procedure should at least be regular and the cause of dismissal reasonable. We are well satisfied that the relator had not such a trial as he was entitled to under the laws of this state, and that his dismissal from Dickinson College was therefore invalid, and you will render a verdict in his favor.[188]

In so holding, the Court made note of the plea by respondents that

> [t]he relation between student and professor is similar to that existing between parent and child, and that there would be as much justification for interference by the courts with the discipline of the one as of the other, and, further, that if they should assume to declare the action of a faculty invalid in a case like the present, that there would be an end of all discipline in educational institutions and their efficiency would be greatly

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[187] Id. at 84.

[188] Id. at 89.

> impaired; if not utterly destroyed, while the courts would be crowded with a new and innumerable class of suitors.[189]

In response to this argument the Judge reminded respondents that

> There need be no apprehension of such direful results from the declaration of the doctrine that the dismissal of students from colleges should be in accordance with those principles of justice which existed even in Pagan times, before the dawn of Christianity, and which are recognized as controlling in the determination of the rights of men in every civilized nation on the globe.[190]

The Judge went on to observe that there might be some discussion as to what is meant by parental discipline when applied to a man such as Hill who had already attained his majority.

> And, even in the case of a minor son, the circumstances would be rare, which could demand an expulsion from the parental roof and the hospitalities and associations of home. Not even if such circumstances existed, would any prudent parent impose so serious a penalty, without first consulting the primary sources of his information, and freely communicating them to his accused son, and according to him the amplest time and opportunity to exculpate himself.[191]

The Court, therefore, in holding for plaintiff, rejected the unlicensed use of in loco parentis to justify any action,

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[189] Id. at 87.

[190] Ibid.

[191] Id. at 87-88.

however arbitrary, by the college. While hardly rejecting the use of the doctrine per se, the Court insisted that even parents are obliged to follow those basic principles of justice which serve as the hallmark of civilization and that, therefore, those who attempt to act in the stead of a parent are at least as obliged.

North v. Board of Trustees of University of Illinois,[192] though not as explicit in its support of in loco parentis as Pratt v. Wheaton, is included here because it has been cited by a later court as supportive of that doctrine.[193] It is interesting also because it gives us some indication of the kind of language courts generally interpret as in loco parentis.

The instant case involved the expulsion of Foster North, a student at the University of Illinois, for refusing to attend chapel exercises mandated by the rules of that institution. Plaintiff North petitioned for a peremptory writ of mandamus against the University to compel the Board to reinstate him as a student.

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[192]137 Ill. 296, 27 N.E. 54 (1891) supra note 25.

[193]See Goldberg, supra note 161.

The Court held that the faculty of the University has the right to pass reasonable rules for the government of its students. The only question was whether the rules mandating chapel exercises were unreasonable. The Court held that they were not:

> There is certainly nothing in this section of our constitution of prohibiting this and like institutions of learning from adopting reasonable rules requiring their students to attend chapel exercises of a religious nature, and to use all at least moral suasion and all argumentative influences to induce obedience thereto.[194] (Italics mine.)

And in language that almost takes us back to the Medieval colleges, where religion and morals were part of the daily routine of students and faculty, the Court observed:

> It may be said with greater reason that there is nothing in that instrument so far discountenancing religious worship that colleges and other public institutions of learning may not lawfully adopt all reasonable regulations for the inculcation of moral and religious principles in those attending them.[195] (Italics mine.)

In those days the colleges often assumed the parental role of spiritual and moral indoctrination.[196] They had broad discretionary powers and generally took full advantage

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[194] Id. at 56.

[195] Ibid.

[196] E. Williamson, supra note 5, at 312.

of the almost omnipotent power vested in them by the doctrine and the Courts.[197] Besides, the Court continued in fatherly tones, "Many esteem it a privilege to be allowed to attend such exercises."[198]

One of the most frequently cited cases used to substantiate in loco parentis was one heard by the Kentucky Court of Appeals on December 11, 1913 in which J. S. Gott brought action against Berea College, a private institution in Berea, Kentucky.[199] In this case the Court stated unequivocally that the authority that the school has is directly derived from the doctrine of in loco parentis. Moreover, in the instant case the principle was dispositive, though the conflict was not between university and student.

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[197]Brittain, supra note 8, at 725. See also North v. Bd. of Trustees wherein the Court states:

> "By voluntarily entering the university, or being placed there by those who have the right to control him, he necessarily surrenders many of his individual rights. How his time shall be occupied; what his habits shall be; his general deportment; that he shall not visit certain places; his hours of study and recreation--in all these matters, and in many others, he must yield obedience to those who, for the time being, are his masters." (Supra note 25, at 56.)

[198]Ibid.

[199]Gott v. Berea College, 156 Ky. 376, 161 S.W. 204 (1913).

J. S. Gott conducted a restaurant in the small town of Berea, Kentucky that he had purchased on September 1, 1911. It was located directly across the street from the premises of Berea College and depended mainly on the profits that arose from its student patronage. For many years it had been the practice of the college to publish in its "Student's Manual" along with rules and regulations governing student conduct a section headed "Forbidden Places." During the 1911 summer recess the college faculty, revising the rules, added a clause modifying the section on forbidden places, and this was read to the students on September 11 at the first chapel exercise of the year. The rule read:

> Eating houses and places of amusement in Berea, not controlled by the college, must not be entered by students on pain of immediate dismission. The institution provides for the recreation of its students, and ample accommodation for meals and refreshmant, and cannot permit outside parties to solicit student patronage for gain.[200]

During the several days following the publication of the rules, two or three students were expelled from the college for its violation. The making of the rule seriously damaged the appellant's business, therefore, since students were afraid of patronizing it.

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[200] Id. at 205.

On September 20 Gott instituted action against the College seeking temporary injunction against the enforcement of the rule and praying for damage of $2000, charging that slanderous remarks were spoken at chapel against him to the effect that he was a bootlegger and sold liquor illegally.

The College argued that it was a private institution supported wholly by donations, that every student agreed upon admission to conform to the rules and regulations of the College, and that, since practically all students were mountain boys and girls and of very limited means and experience, the faculty had been compelled from time to time to pass rules to prevent them from wasting their time or money and to keep their attention on their studies.

The question, as the Court saw it, was whether or not the College authorities were guilty of a breach of some legal duty which they owed to Gott. In finding against appellant the Court held:

> College authorities stand in loco parentis concerning the physical and moral welfare and mental training of the pupils, and we are unable to see why, to that end, they may not make any rule or regulation for the government or betterment of their pupils that a parent could for the same purpose. Whether the rules or regulations are wise or their aims worthy is a matter left solely to the discretion of the authorities or parents, as the case may be, and, in the exercise of that discretion, the

> courts are not disposed to interfere, unless the rules and aims are unlawful or against public policy.[201]

The Court did not in fact find anything unlawful or unreasonable about the rule published by the College since the right to enact the regulation fell well within the provision of its charter. Nor was there any contract or other relation with appellant to indicate that the College had any special duty to him.

Finally, the Court observed that, even should the rule be judged unreasonable, Gott still had no reason to complain. He was not a student nor did he have children enrolled at the college:

> For the purposes of this case the school, in its officers and students, are a legal entity, as much as any family, and, like a father may direct his children, those in charge of boarding schools are well within their rights and powers when they direct their students what to eat and where they may get it, where they may go, and what forms of amusement are forbidden.[202]

The Court completed its analysis of the case with a lengthy quote from People v. Wheaton College which included the parental language used in that case. Thus we have here the first of the cases in which the language in loco parentis

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[201] Id. at 206.

[202] Id. at 207.

is used expressly and which serves as the point of law on which the case turned.

The next court case takes us further south yet to the state of Florida where the supreme court of that state in John B. Stetson University v. Hunt[203] ruled in much the same way as did the court in Gott. The two cases are similar in that they are both dismissal cases and both involve action against private institutions. They differ in that the doctrine, though recognized by the Court, was not dispositive in Stetson v. Hunt as it was in Gott.

On April 6, 1907 Helen Hunt, a student at John B. Stetson University was expelled from that institution by the President, Dr. Lincoln Hulley. The evidence adduced indicated that Miss Hunt was involved in disorders bordering on rebellion for some time before the expulsion. Much of the disruption, occurring in the girls' dormitory, consisted of "hazing the normals, ringing cow bells and parading in the halls of the dormitory at forbidden hours, and cutting the lights . . . ."[204]

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[203] 88 Fla. 510, 102 So. 637 (1924).

[204] Id. at 639.

The Trial Court found in favor of the plaintiff, Helen Hunt, and granted her a $25,000 settlement. The Appeals Court reversed the decision of the lower Court on the grounds that the college trustees did not exceed the bounds of their jurisdiction, the issue being that a private college or university has the power to "prescribe requirements for admission and rules for the conduct of its students, and all who enter such institutions as students impliedly agree to conform to the rules of government."[205]

Moreover, the Court reinforced the holding of Gott regarding the role of surrogate parenthood played by the University when it said:

> As to mental training, moral and physical discipline, and welfare of the pupils, college authorities stand in loco parentis and in their discretion may make any regulation for their government which a parent could make for the same purpose, and so long as such regulations do not violate divine or human law, courts have no more authority to interfere than they have to control the domestic discipline of a father in his family.[206] (Italics mine.)

Interestingly enough the Court used a case involving secondary schools, Vermillion v. State ex rel. Englehardt, to support the notion that the President, in acting in his

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[205] Id. at 640.

[206] Ibid.

capacity of disciplinarian, is really a substitute parent:

> He stands for the time being in loco parentis to his pupils, and because of that relation he must necessarily exercise authority over them in many things concerning which the board may have remained silent. In the schools, as in the family, there exists on the part of the pupils the obligations of obedience to lawful commands, subordination, civil deportment, respect for the rights of other pupils, and fidelity to duty.[207]

The Court then made reference to the common law origins of the doctrine when it stated "These obligations are inherent in any proper school system and constitute, so to speak, the common law of the school."[208]

Anthony v. Syracuse[209] was mentioned by one Court as "[t]he classic case applying the in loco parentis approach."[210] This case like the five preceding ones involves the dismissal of a student and is similar to Hill and North in that the action involved a state supported institution.

Beatrice Anthony brought action against Syracuse University on the grounds that she was dismissed from that institution in an arbitrary and unjust manner. She had

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[207] 78 Neb. 107, 110 N.W. 736, as quoted by Stetson v. Hunt, supra note 201, at 640.

[208] Ibid.

[209] 130 Misc. 249 (Sup. Ct. 1927), rev'd, 244 App. Div. 487, 231 N.Y.S. 435 (1928), supra note 27.

[210] Goldberg, supra note 163.

entered that university in September, 1923, at the age of seventeen. On or about the sixth of October, 1926, she was notified by the University that she was immediately dismissed from the institution. No statement of reasons was afforded at that time nor any opportunity to answer charges of misconduct or delinquency offered. The shock of the dismissal to plaintiff was so severe that it resulted in a week's confinement in the school's infirmary. Action was then brought against the University to have her reinstated as a student in such a way that would have the effect that she was never dismissed.

Judge Smith, in handing down the decision in the trial Court, ordered her immediate reinstatement on the grounds that the University exceeded its powers when it refused to give reason for its actions. He noted that the relationship between student and university is a contractual one and for that reasons is subject to the laws of justice which rule against arbitrary dismissal. In the process of reaching his dismissal he mentioned the doctrine of in loco parentis:

> So far as infants are concerned, university and college authorities "stand in loco parentis concerning the physical and moral welfare and mental training of the pupils, and to that end they may make any rule or regulation for the government or betterment of their pupils that a parent could for the same purpose. Whether the rules or regulations are wise or their aims worthy is a matter left

> solely to the discretion of the authorities, and in the exercise of that discretion the courts are not disposed to interfere unless the rules and aims are unlawful or against public policy."[210] (Citation omitted.)

The Appellate Court reversed the decision of the lower Court. In finding for the University, however, the Court held that the institution must indeed have reasons for dismissal stating two grounds upon which dismissal may be based. The second of those reasons reinforced the standing of the school in loco parentis:

> The University may dismiss a student for reasons falling within two classes, one in connection with safeguarding the University's ideals of scholarship, and the other in connection with safeguarding the University's moral atmosphere.[211] (Italics mine.)

Moreover, the Court stated that it would not disturb such actions without good reason since "the University authorities have wide discretion in determining what situation does and what does not fall within the classes mentioned, and the courts would be slow indeed in disturbing any decision of the University authorities in this respect."[211]

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[211] Anthony v. Syracuse, 130 Misc. 249, 256 (Sup. Ct. 1927).

[212] 231 N.Y.S. 435, 440 (App. Div. 1928), supra note 27.

[213] Ibid.

Another case cited in Goldberg as following the doctrine[214] was heard in Butler County by the Ohio Court of Appeals in 1931.[215] Plaintiff, Jean West, dismissed from Miami University's Normal School because of grades, sued for a permanent injunction against the dismissal. The Court of Common Pleas granted the injunction but the Appeals Court reversed that decision.

The Court, in finding for defendant, quoted from the statutes enacted for the creation of that University. The statute, among other things, stated that the University was instituted "for the promotion of good education, virtue, religion and morality . . . ."[216] The Court, not questioning the paternalistic role of the University, noted that as long as rules were not enforced unreasonably and arbitrarily it would not interfere. Even plaintiff recognized the rule-making power of the schools. She contended that:

> [T]he university and school . . . are open to all citizens, who have the rights to continue as students there in as long as their conduct shall not offend against

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[214] See Goldberg, supra note 163.

[215] West v. Bd. of Trustees of Miami Univ., 41 Ohio App. 367, 181 N.E. 144 (1931).

[216] Id. at 147.

reasonable rules, requiring order, decency and decorum.[217] (Italics mine.)

A Score of Years Later

It was not until twenty years after West that the next in loco parentis case appeared. The most significant thing about Pyeatte v. Board of Regents of Oklahoma[218] is that it has served as a landmark case for dormitory suits that have arisen in the late sixties and early seventies since it dealt with the right of the University to mandate dormitory living for certain students while exempting others and to pass regulations for their supervision. What is significant in the instant case is that some of the language the Court used was parental in tone, and while not dispositive, certainly indicated the mind of the Court regarding the nature of the university-student relationship.

Plaintiff, Mary Pyeatte, owned a private home near the University of Oklahoma which she used as a kind of boarding house for students attending the University. On September 10, 1947 the Board of Regents of the University of Oklahoma adopted a resolution requiring that undergraduate

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[217] Id. at 148.

[218] 102 F. Supp. 407 (W.D. Okla. 1951).

married and unmarried students be required to live in University approved dormitories or family dwellings, and specifying the housing units by name. There were certain exceptions listed. As a result plaintiff had great difficulty filling her rooms since university housing was generally adequate enough to accommodate most students.

The gravamen was not that the University of Oklahoma illicitly passed rules governing the admission of students but rather that "the effect of the rules is to prevent her from contracting with the students for room and board and that such prevention is a violation of her liberty to contract."[219] Plaintiff argued further that the university by such rules and regulations was discriminating against her in that it allowed students to reside in some homes while not in others. The Court rejected both arguments holding that plaintiff's right to contract was not unlimited and further that the University had good reason for its rules and had not capriciously and arbitrarily passed them to deny Pyeatte her equal protection rights. At this juncture the Court used language parental in tone:

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[219] Id. at 414.

> This court cannot, in light of the evidence and in contravention of the good judgment of the Board of Regents of the University of Oklahoma, say that the action taken was unreasonable or arbitrary. The state has a decided interest in the education, well being, morals, health, safety and convenience of its youth.[220] (Italics mine.)

The Court went on to state in terms more clearly parental:

> It cannot be questioned that proper housing for students is an integral part of the responsibility placed upon the authorities of the University of Oklahoma. The great majority of the students must have a home away from home while attending school at the University, and it is incumbent upon school authorities to see that all precautions are taken to insure that not only adequate but also suitable housing is available.[221] (Italics mine.)

A 1959 case cited by the Goldberg case as one of "recent cases" that have "followed the doctrine"[222] and which used such language to describe the university mandate as the "teaching of good manners and good morals" is Steier v. New York State Education Commission.[223] Plaintiff, Arthur Steier, arguing pro se, contended that he was dismissed from Brooklyn College, a public institution of higher education in the city of New York, without being afforded due process. He had assumed, allegedly, the role of a reformer of the College and

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[220] Id. at 415.

[221] Id. at 413.

[222] See Goldberg, supra note 163.

[223] 271 F.2d 13 (2d Cir. 1959).

sent several letters to the President containing bitter and intemperate language. In the wake of those letters plaintiff was suspended on two different occasions and ultimately dismissed.

The District Court dismissed plaintiff's complaint that the College's action deprived him of his constitutional rights, particularly those guaranteed by the Fourteenth Amendment. It held that the College had not acted arbitrarily and unreasonably but rather that plaintiff had violated the use of the bylaws of the College requiring that students "shall conform to the requirements of good manners and good morals."[224] Plaintiff Steier then took the case to the Federal Circuit Court. The Appellate Court, however, affirmed the ruling of the lower Court and once again dismissed the complaint. In reaching its decision the Appeals Court reinforced in a sense the parental role of the College by the following obiter dicta:

> One of the primary functions of a liberal education to prepare the student to enter a society based upon principles of law and order may well be the teaching of "good manners and good morals."[225]

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[224] 161 F. Supp. 549, 551 (E.D. N.Y. 1958).

[225] 271 F.2d 13, 20 (2d Cir. 1959).

Finally, plaintiff never questioned (nor did the Court) the right of the College to pass rules governing moral behavior. For plaintiff

> [A]rgues that he was unaware of the nature of his misconduct despite the fact that he was specifically told wherein his acts departed from good manners and good morals in the academic community.[226]

Carr v. St. John's University[227] is another case not using the express language of the doctrine yet listed as also "following the doctrine" by Goldberg.[228] Carr is similar to Gott in that they both involved private institutions and yet dissimilar in that this case involved the dismissal of students.

In the instant case Howard Glenn Carr, a student at St. John's University, a Catholic College in New York, was married in a civil ceremony to Greta Schmidt. Such a marriage is forbidden by the Canon Law of the Roman Catholic Church. For their action plaintiff Carr, his wife, and the two witnesses were dismissed from the University.

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[226] Ibid.

[227] 231 N.Y.S. 2d 403 (Sup. Ct. 1962), rev'd, 231 N.Y.S. 2d 410 (App. Div. 1962).

[228] Goldberg, supra note 163.

On July 2, 1962 the Supreme Court of Kings County overturned the action by the University on the grounds that the regulation pursuant to which the petitioners were dismissed was unreasonable in that it was overly broad and vague. The regulation in question read as follows:

> In conformity with the ideals of Christian education and conduct, the University reserves the right to dismiss a student at any time on whatever grounds the University judges advisable.[229]

The Appellate Court, however, in reversing the lower court decision, noted that petitioners understood that Christian conduct meant Catholic conduct and were therefore fully aware of the implications of their actions. In finding for the defendant University, however, the Court rejected the notion that dismissal could be arbitrary or unreasonable, thus calling into question the last part of the regulation, "on whatever grounds the University judges advisable."

Six Cases Against the Doctrine

All the cases reported heretofore have been supportive of the doctrine of in loco parentis. It was not until February 28, 1967 that the first case of record appeared

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[229] Carr, supra note 227, at 409-10.

rejecting the doctrine as applicable in higher education. Thereafter, five other courts in fairly rapid succession, four in 1968 and one in 1970, followed the lead of the 1967 case and indicated that they felt the doctrine no longer had any place in institutions of higher learning. It should be noted, however, that in none of those cases was the doctrine of in loco parentis the issue. Comments about the doctrine were made generally as obiter dicta.

The first of those cases rejecting the doctrine was heard in California by the Court of Appeals, First District in 1967.[230] It involved the dismissal of students from the University of California on the grounds that they participated in campus rallies. The trial Court held in favor of the University; later that ruling was upheld in the Court of Appeals.

Plaintiffs, among whom was Arthur Goldberg, a former student of the University of California, participated in rallies on the campus to protest the March 3, 1965 arrest of John Thomson, a new student who had carried a sign reading "Fuck: Verb." The Court described the incident in some detail, one portion of which is reported below:

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[230]Goldberg, supra note 163.

> Goldberg was charged with: having organized and participated in the March 4 rally held on the steps of Sproul Hall to protest the arrest of Thomson, acting as moderator for the rally and in the course thereof addressing the persons assembled by repeatedly using the word "fuck" in its various declensions; on Friday, March 5, with moderating and speaking at another rally conducted from the steps of the Student Union Building utilizing the terms "fuck, bastard, asshole, and pissed off."[231]

The other plaintiffs were charged with similar behavior: Klein with using the word "fuck" in the course of his statement and later on in Room 2 of Sproul Hall with quoting several passages from Lady Chatterly's Lover wherein the work "fuck" appeared several times; Bills with manning a table on March 4 to raise money for the defense of Thomson on which stood a container called "Fuck Fund;" Zvegintzov with leading a cheer in the March 4 rally that consisted of first spelling and then shouting the word "fuck."[232]

In the wake of their dismissal plaintiffs contended that their First Amendment rights of free speech were violated by the University action, that the regulations of the University enforced against them were so broad and so vague as to further abridge those rights, and that finally they were denied due process in the manner in which the dismissal

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[231] Id. at 466.

[232] Id. at 467.

was conducted, that is that the Committee did not follow the rules of evidence generally applicable in judicial proceedings.

The Court rejected all three complaints, holding that Constitutional rights are not absolute, that they indeed are subject to reasonable restriction, and that plaintiffs were not denied due process by the University (noting that criminal proceedings are different from those conducted on a university campus), and finally that "the University's disciplinary action was a proper exercise of its inherent general powers to maintain order on the campus and to exclude therefrom those who are detrimental to its well being."[233]

However, in a kind of trend-setting fashion, the Court, for the first time in the long history of the doctrine, cast a judicial glance of disfavor toward it when it noted as obiter dicta:

> For constitutional purposes, the better approach, as indicated in Dixon, recognizes that state universities should no longer stand in loco parentis in relation to their students.[234]

In 1968 four cases were heard dealing with in loco parentis each in turn, rejecting, as did Goldberg, its

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[233] Id. at 473.

[234] Id. at 470.

further use in controlling students on the college campus today.

The first of those cases was heard in February of that year involving David Buttny, a student of the University of California, along with other students of that University and Joseph Smiley, President of the University.[235] Plaintiffs, David Buttny et al., admitted to taking part in a protest in which they physically blocked the entranceways to the Placement Service offices of the University where an officer of the Central Intelligence Agency of the United States was waiting to interview students. For their action nine plaintiffs were suspended with the right to reapply for admission after the 1968 spring semester, nine were suspended and immediately readmitted, and four others were put under probation.

Plaintiffs argued that the rules on which defendants based jurisdiction did not exist, that they were at best vague and overbroad, and that their constitutional rights of equal protection under the law were violated.

The Court held against plaintiffs and summarily dismissed the action. As part of its argument the Court noted:

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[235]Buttny v. Smiley, 281 F. Supp. 280 (D.C. Colo. 1968).

> The right of the University administration to invoke its disciplinary powers in this instance need not be entirely bottomed on any published rule or regulation. As previously noted, it is an inherent power that the school administration authorities have to maintain order on its campus, and to afford students, school officials, employees and invited guests freedom of movement on the campus and the right of ingress and egress to the school's physical facilities.[236]

However, the Court stopped and observed in language clearly obiter dicta (taking for the time the side of the students):

> We agree with the students that the doctrine of In Loco Parentis is no longer tenable in a university community; and we believe that there is a trend to reject the authority of university officials to regulate "off-campus" activity of students. However, that is not to say that conduct disruptive of good order on the campus should not properly lead to disciplinary action.[237]

The second of that 1968 foursome involved action by expelled Louisiana college students against the College for injunctive relief to redress an alleged violation of constitutional rights involving both the First and Fourteenth Amendments.[238]

Plaintiffs, twenty-six students, were dismissed from Grambling College, a black college in Louisiana, for illegal

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[236] Id. at 286.

[237] Ibid.

[238] Zanders v. Louisiana State Bd. of Educ., 281 F. Supp. 747 (W.D. La. 1968).

activities that resulted in the complete paralysis of that institution. The demonstrations began on October 25, 1967 under the leadership of a student group known as the "informers." They took the form of marches punctuated with yelling and clapping, "sit-downs," and giant meetings in the auditorium. The student activity culminated on Thursday, October 26, in a demonstration which resulted in the physical seizure of the college administration building. Offices and classrooms in that building were made completely inoperative. On Saturday the National Guard was called in to restore order. On Monday, October 30, the Interdepartmental Council announced that twenty-nine students, among whom were the twenty-six plaintiffs named in the instant case, were expelled.

Since due process had not been observed in the original expulsion, the Council, on order from the Court, held another hearing in which the original expulsion was upheld. Counsel for the students then requested a hearing before the State Board of Education. This was granted and a hearing de novo was conducted. At the conclusion of that hearing the original action by the College was once again upheld, whereupon plaintiffs requested a Temporary Restraining Order and injunctive relief on the grounds that their constitutional

rights of free speech were violated, that due process was denied, and that the judges were discriminatory in their action.

The Court, while agreeing with plaintiffs that due process was denied in the original expulsion, refused to allow that it was not present in the lengthy hearing de novo by the State Board of Education. Furthermore, Judge Dawkins could see no legal cause of action justifying the physical seizure and retention of property. All causes of action by plaintiffs were dismissed.

In writing the case Judge Dawkins included the history of the relationship between the university and student. He discussed two theories that have been traditionally used to characterize this relationship; that is, contract and in loco parentis.[239] He had this to say about the common law doctrine of in loco parentis:

> . . . a parent could delegate a part of his parental authority during his life to the tutor or schoolmaster, who was then "in loco parentis," with such allocable portion of the parent's power as was necessary to answer the purpose for which he was employed. The doctrine primarily has been used as a defense in suits involving potential tort liability of school teachers when administering some type of corporal punishment to

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[239] Id. at 755.

students of tender years. Viewed in this light, the doctrine is of little use in dealing with our modern "student rights" problems.[240]

After discussing both theories the Court stated:

> Regardless of which theory may be applied, it now is generally conceded that colleges and universities have the inherent power to promulgate reasonable rules and regulations for government of the university community.[241] (Italics mine.)

It appears that the Court was hesitant to dismiss the legal use of the doctrine by a College and was more concerned with the fact that an institution of higher learning had rule-making powers within the limits of due process as specified by Dixon.[242]

Moore v. Student Affairs Committee of Troy State University, heard in May of that year, was, unlike the two preceding, a search and seizure case.[243]

On February 28, 1968 the dormitory room of Gregory Moore, a student at Troy State, was searched by the Dean of Men and two agents of the State of Alabama Health Department in the presence of plaintiff but without his permission.

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[240] Id. at 756.

[241] Id. at 757.

[242] Dixon v. Alabama State Bd. of Educ., supra note 25.

[243] 284 F. Supp. 725 (D.C. Ala. 1968).

They found in their search a matchbox containing a vegetable matter later identified as marijuana. Plaintiff charged violation of Fourth Amendment rights and due process. The Court found that due process had indeed been accorded plaintiff and that reasonable search was not forbidden by the Fourth Amendment.

Judge Johnson, however, made the following obiter dictum about in loco parentis:

> The college does not stand, strictly speaking, in loco parentis to its students, nor is their relationship purely contractual in the traditional sense. The relationship grows out of the peculiar and sometimes the seemingly competing interests of college and student . . . .[244]

It was the Court's view that the regulations and their enforcement should be judged in accordance with their necessity in maintaining discipline and the "educational atmosphere," rather than in terms of such "legal" entities as in loco parentis or contract.[245]

The last of the 1968 cases was heard in the United States District Court in Wisconsin by James Doyle with

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[244] Id. at 792.

[245] Ibid.

one of the attorneys for plaintff none other than William Kunstler.[246]

Paul Soglin and a few other students at the University of Wisconsin, alleged to be members of the Students for a Democratic Society (Madison Chapter), were charged with having taken part in a demonstration on October 18, 1967 that resulted in the disruption of activities on that campus. They were notified on October 19, 1967 by defendant Dean Kauffman that they were in violation of Chapter 11.02 of the Laws and Regulations of the University and that they were suspended from the University pending hearing before the Committee on Student Conduct and Appeal. The specifications of the charges were that the students, among other things, had:

> I. Intentionally, denied to others their right to interview for jobs with the Dow Chemical Corporation and to carry out that purpose did:
>
> a. Intentionally, physically obstruct and block the hall and doorways of the first floor of the Commerce Building:
>
> b. Intentionally deny to persons who desired to interview with Dow Chemical Corporation their right to do so; . . . .[247]

The foregoing charges along with others listed in the transcript of the trial were all alleged by plaintiffs

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[246] Soglin v. Kauffman, supra note 32.

[247] Id. at 961.

to constitute "1. Misconduct, as well as 2. A violation of Chapter 11.02 and 11.15 of the University Policies on Use of Facilities and Outside Speakers."[248]

Judge James Doyle held that the standard of "misconduct" alone "may not serve as the sole foundation for the imposition of the sanction of expulsion, or the sanction of suspension for any significant time, throughout the entire range of student life in the university."[249] He held further that Chapter 11.02 of the Laws and Regulations of the University of Wisconsin was "uncontitutionally vague."

> Assuming, again with difficulty as was true with "misconduct" as a standard, that the term "lawful means which do not disrupt the operations of the university" is sufficiently definite to avoid the vice of vagueness, I conclude that it is overly broad. As explained above (at page 985), when the end can be more narrowly achieved, it is not permissable to sweep within the scope of a prohibition activities that are constitutionally protected free speech and assembly.[250]

In the course of coming to his decision the Judge discussed briefly the various models used to describe the university-student relationship: "parent-child (in loco pa-

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[248] Id. at 982.

[249] Id. at 991.

[250] Id. at 993.

rentis); owner-tenant; parties to a contract."[251] He commented on the changing relationship between the courts and the schools, tracing it to the radical changes that have occurred in the nature of the educational institutions themselves and in the radically altered relationship between younger and older people in present day American Society. "These changes seldom have been articulated in judicial decisions," he observed, "but they are increasingly reflected there."[252]

The Court then made clear its position on the doctrine of surrogate parenthood with the following dicta:

> The facts of life have long since undermined the concepts, such as in loco parentis, which have been invoked historically for conferring upon university authorities virtually limitless disciplinary discretion.[253]

Judge Doyle further observed that "for some years the mean age of American college and university students has been more than 21 years, and that among them are more over 30 years than under 18."[254]

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[251] Id. at 986.

[252] Id. at 985-86.

[253] Id. at 986.

[254] Ibid.

Almost as if he were viewing the funeral rites of that ancient doctrine the Judge, sounding a bit like Wordsworth, added rhetorically:

> The world is much with the modern state university. Some find this regrettable, mourning the passing of what is said to have been the old order. I do not share this view. But whether the developments are pleasing is irrelevant to the present issue. What is relevant is that the University of Wisconsin at Madison may continue to encompass functions and situations such as those which characterized a small liberal arts college of the early 20th century . . . , but that it encompasses many more functions and situations which bear little or no resemblance to the "models" which appear to have underlain, and continue in some cases to underlie, judicial response to cases involving college or university discipline.[255]

And then, with a bit of sarcasm, perhaps, Judge Doyle, recalling earlier in loco parentis cases and the relatively minor issues involved there and all too aware of the violence that struck university campuses during the middle and late sixties, added:

> What is relevant is that in today's world university disciplinary proceedings are likely to involve many forms of misconduct other than fraternity hazing or plagiarism, and that the sanctions imposed may involve consequences for a particular student more grave than those involved in some criminal court proceedings.[256]

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[255] Ibid.

[256] Ibid.

On July 10, 1970 in the State of Louisiana, a three-judge court heard the case of Pratz v. Louisiana Polytechnic Institute.[257] It was a class action suit for declaratory judgment brought against a mandatory housing policy that required students to live and eat their meals in college facilities. The section of the housing policy under attack read in part as follows:

> It is the policy and philosophy of higher education in the State of Louisiana as interpreted by this Board . . . that all unmarried full-time undergraduate students, regardless of age or whether or not emancipated, are required to live in on-campus residence halls as long as space is available.

Defense based its argument principally on the grounds that the parental rules embodied in their policy manual are based on the soundest of educational principles. Defendant University argued that educators the country over espoused the value of the "living and learning concept" (a theory frequently utilized in dormitory suits) and that the regulations enforcing that concept had the "highest educational value and should be enforced as being in the best interest of all students, present and future."[259]

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[257] 316 F. Supp. 872 (W.D. La. 1970), supra note 162.

[258] Id. at 875.

[259] Id. at 877.

The Three-Judge Court, using Pyeatte as precedent, found nothing discriminatory in the parietal regulations of the college wherein certain students were exempted from living in university housing where others were not, nor anything unconstitutionally violative of a student's right to privacy or freedom of movement.

In a footnote, however, the Court paused to define the word parietal and to distinguish it from in loco parentis. In the same note the Court made clear its attitude toward that doctrine:

> In one of their main thrusts, plaintiffs assert the doctrine of "in loco parentis" is dead . . . . Defendants point out the Louisiana educational institutions have never attempted to operate under a theory of "in loco parentis" because of the tort liability which may have attached as a result of such assumption.
>
> We tend to agree with that line of thinking which states that the modern college or university, which has in attendance thousands of students, even if it should, is ill-equipped to regulate the off-campus social and moral lives of its students, thus making futile, and perhaps improper, any attempt to act "in loco parentis."[260]

Thus did Pratz bring to an end the string of cases beginning in 1967 that looked with disfavor at the utilization of the ancient doctrine of in loco parentis to modern campus problems.

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[260] Id. at 876-77 n.2.

One Case More

The last of the cases on in loco parentis is significant not only because it is last but because it challenges in its summation the statements of a previous case. That case is Evans v. State Board of Agriculture.[261] It was heard by the United States District Court in Colorado on May 4, 1971 and involved action by Students of Colorado State University against the President of the University. The gravamen of the complaint was that a policy statement adopted by the University and ordered by the State Board of Agriculture, the governing board, was violative of plaintiffs' First Amendment rights. The policy statement under attack forbade the use of the university facilities for any purpose other than that for which the facility was intended; demonstrations were the primary target of the policy and more specifically a demonstration such as the one that had occurred only hours before.

During the intermission of a basketball game between Brigham Young University and Colorado State, pom-pom girls from Brigham Young were performing on the floor when suddenly a group of people swarmed onto the gym floor carrying signs in protest of alleged discriminatory practices on the part of

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[261] 325 F. Supp. 1353 (D.C. Colo. 1971).

Brigham Young University. A fight erupted and campus police as well as those from the City of Fort Collins were called in. During the melee which ensued, a "flaming missile" was hurled onto the floor and a large angle iron was thrown striking a press photographer on the head, almost killing him. In general the rage of the crowd rose to such a dangerous pitch that only the most tactful and thoroughly professional behavior of the policemen kept the situation from developing into a full scale and bloody riot.

Judge Winner, obviously moved by the actions of the police and by the seriousness of the occasion and mindful of another tragedy which had occurred in the small town of Kent, Ohio, only the year before (on the anniversary of this very trial), commented:

> It would be unfair to fail to comment upon the remarkable tact, restraint and professional skill exhibited by the police in their handling of an explosive situation which was pregnant with possibility of development into a Kent State tragedy. The police handled a group of hooligans without injuring any of them and without serious injury to anyone else.[262]

The next day, in the tense atmosphere of all that had just occurred, the University authorities wrote the policy that was later to come under fire from plaintiff Evans and the

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[262] Id. at 1355.

others. The Court held that, although the policy was written hastily and without much specificity, it was nevertheless "drawn with adequate certainty" and was "reasonable."[263] The Court went on to state, almost passionately:

> The record shows the exercise of great patience on the part of the University officials, and it is only because of their tolerance and patience that there has been more or less "peace in our time" on the school's campus.[264]

Judge Winner, in reviewing the films of the events of February 5, 1970 in Moby Gymnasium, commented that they left little doubt "as to whether the students' conduct of that night . . . should be characterized as juvenile or infantile . . . . An infant would not have had the strength to throw the steel missile which could so easily have caused death."[265]

In reaching his conclusion, namely that plaintiffs had no grounds for action, Judge Winner cited Buttny wherein Judge Arraj stated that students, upon enrollment in a college, do not ipso facto have a right to absolute immunity or to any special considerations, and certainly not the right to

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[263] Id. at 1361.

[264] Ibid.

[265] Id. at 1360.

violate the constitutional rights of others.[266] Interestingly enough the Judge in Evans cited that very passage in Buttny which rejected the further use of in loco parentis. Judge Winner, however, took exception with Buttny on this point and argued that perhaps in loco parentis was still a viable legal doctrine:

> Students rightfully seeking enforcement of their constitutional rights must accept the duties of responsible citizens. They must not confuse their constitutionally protected right of free speech with an illusive and nonexistent right to violently disrupt. They cannot be adults when they choose to be and juveniles when that course of conduct appeals to them more. Buttny says, "We agree with the students that the doctrine of 'In Loco Parentis' is no longer tenable in a university community," but conduct such as that with which we are here faced gives cause for pause to wonder if the law may not be forced to retreat to the earlier In Loco Parentis doctrine.[267] (Italics mine.)

To reinforce its inclination the Court went on to say:

> The comments of Justice Blackman in Esteban bear repeating (415 F.2d 1078, 1089): "These plaintiffs are no longer children. While they may have been minors, they were beyond the age of 18. Their days of accomplishing ends and status by force are at an end. It was time they assumed at least the outward appearance of adulthood and of manhood. The mass denial of rights of others is irresponsible and childish. So is the defiance of proper college administrative authority."[268]

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[266] Id. at 1356.

[267] Id. at 1360.

[268] Ibid.

Thus, one year after the Kent State University tragedy, on the very anniversary of the shootings, Judge Winner handed down one of the strongest vindications in recent times of the right of the university to pass regulations and to enforce them against students openly rebellious. And in loco parentis, a doctrine eyed suspiciously through the riots of the late sixties, was once again summoned to the bar.

Some Recent Dormitory Cases

With the discussion of Evans ends the presentation of the seventeen significant cases dealing with the doctrine of in loco parentis as it applies to the student-university relationship in the United States of America. Some recent dormitory cases have, however, raised the issue about the vitality of the doctrine of in loco parentis as much as the campus disorders and for that reason will be included here. In the past three years complaints have been brought to the bench by students seeking relief from university mandatory housing rules. In each instance the courts ruled in favor of the university. Though none of them are what would be considered significant in loco parentis cases, since the courts never addressed themselves either in ratio decidendi or in dicta to the issue of in loco parentis, they are mentioned

here because in two cases the in loco parentis language was employed by the defendant universities and because as one author put it, they may perhaps represent "a quiet evolutionary suggestion from the Courts, that colleges and universities may, or should, return to the days of in loco parentis, or some reasonable modification thereof."[269]

In the first of those cases, Postrollo v. University of South Dakota,[270] two students argued that university regulations requiring all single freshmen and sophomores to live in residence halls were unconstitutional on the grounds that they constituted "an arbitrary and unreasonable classification which had no rational relationship to this purpose . . . ."[271] The Federal District Court Judge held in favor of the students on the grounds that the regulations constituted arbitrary classification and were therefore unconstitutional. Defendant appealed. Judge Loy, in reversing the decision of the lower Court, pointed out that the District Court Judge had "erred" in deciding "the reasonableness of the classification on the

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[269] J. Holloway and R. Tharp, "Recent Developments in Student Affairs," 2 J. of Col. U.L. 122) [hereinafter cited as Holloway].

[270] 369 F. Supp. 778 (S.D. S.D. 1974), rev'd, 507 F. 2d 775 (8th Cir. 1974), cert. denied, 95 S. Ct. 1687 (1975).

[271] Id. at 777.

basis of a single primary purpose in the face of evidence revealing multiple purpose."[272]

Of significance here is the list of "purposes" adduced by the school authorities which the Judge seemed to permit, one of which certainly rings of in loco parentis. Those reasons briefly were: (1) that the regulations would ensure repayment of the bonds for dormitory construction and (2) that the dormitory would provide the younger students "a home away from home" to help them adjust to self discipline and community living which is part of college life.[273]

In the second dormitory case, Schick v. Kent State University, Lawrence Schick and others brought action against the Kent State University housing policy seeking a declaratory judgment that that policy was unconstitutional and a permanent injunction against its enforcement. Though the issue was ultimately resolved on constitutional grounds, part of defendant's argument was that:

> Special attention must be afforded the vast number of students commuting from the residence of their family especially during their first two years of enrollment

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[272] Id. at 779.

[273] Id. at 777-78.

> in order to assist in the more complicated process of transition from dependence to independence.[274] (Italics mine.)

Both Courts in reaching their decisions cite Poynter v. Drevdahl as support for their holdings.[275] In that case a federal district judge held that a requirement that all single undergraduates under twenty-three must live in a dormitory was not arbitrary and did not constitute classification. The Judge further ruled that economic reasons per se formed a rational basis for the regulations.

The foregoing cases, all decided in favor of the University, have induced several recent authors, both Counsels to universities, to offer the following advice to university officials:

> In conclusion, we believe that the present state of the law raises an interesting question. Are we witnessing a quiet evolutionary suggestion from the courts, that college and university authorities may, or should, return to the days of in loco parentis, or some reasonable modification thereof? Speaking for myself, I don't think the courts ever intended Dixon v. Alabama to signal an end to institutional concern for the non-academic welfare and well-being of its students. What is needed now, in my opinion, are college and university administrators who

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[274] Schick, supra note 141 at 5.

[275] See Poynter v. Drevdahl, 359 F. Supp. 1137 (W.D. Mich. 1972).

are willing to accept and discharge these responsibilities within the parameters now established by the Courts.[276]

With Evans, then, and the recent dormitory cases, the discussion of the courts and in loco parentis comes to an end. There remains only the summary and analysis of those cases (as well as of the statutes reported earlier) and an application of that research for administrators who find themselves tested daily on campuses across the Nation. Before we turn to the final chapter, however, there remains one last point of discussion relating to the application of in loco parentis to today's college student that needs to be treated, that is, the possible impact that the new laws regarding the majority age might have on the doctrine.

Age and In Loco Parentis

Several cases have touched on the issue of age and in loco parentis. In one case the Court determined that, in the absence of any prohibition of law, in loco parentis should be applied without age considerations.[277] Plaintiff, Christine Meisner, contended that Robert Parks, a deceased soldier who had left her a $10,000 insurance policy, was

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[276]Holloway, supra note 260.

[277]Meisner v. United States, 295 F. 866 (D.C. Mo. 1924).

indeed her brother and that her parents stood in loco parentis to him. Parks, according to plaintiff, had no home and no relatives when he wandered onto the farm owned by her parents. She contended further that they had cared for him as a parent would from age twenty-four until he entered the armed services at age twenty-seven.

The Court observed that the word children

> . . . [W]hen used irrespective of parentage, may denote that class of persons under the age of 21 years of age as distinguished from adults; but its ordinary meaning, with respect to parentage, is sons and daughters of whatever age. It is frequently so used with reference to those who stand in the place of parents and have assumed the parental relation.[278]

The Court went on to say in reference to whether or not the sister (if she be sister) could recover the insurance money left by the deceased:

> Congress evidently had this relationship in mind when it provided that the provisions of subdivisions 4a and 5a of the [War Risk Insurance Act] should apply to persons "who have stood in loco parentis to a member of the military or naval forces at any time prior to his enlistment or induction for a period of not less than one year."[279]

The Court held that:

> The provision contains no limitation as to age. It was open to any member of the military or naval forces. If

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[278] Id. at 8.

[279] Ibid.

> an adult is a legal subject of adopting which formally established the relationship of parent and child, and if one, who assumes the obligation incident to the parental relation and takes the place of a parent without going through the formalities necessary to a legal adoption, stands in loco parentis to another, why should age condition the nature of the relationship? No sound reason appears why a person may not assume a parental relation toward an adult as well as toward a minor. The responsibilities and obligation may be fewer, but substantial ones remain.[280]

The Court ruled for plaintiff.

In Niewiadomski v. United States,[281] another case involving an insurance recovery suit, the insured was also an adult. The Court, however, refusing to make a ruling on the issue as to whether the relationship of in loco parentis can exist even when the insured is not a minor decided to concern itself only with the issue of whether or not appellant Rebecca Niewiadomski really stood in the relationship of in loco parentis "irrespective of the fact that he was an adult."[282] The Court held that she did not. Once again, however, we find a Court allowing an in loco parentis relationship in the case where the "child" is an adult.

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[280] Id. at 868-69.

[281] 159 F.2d 683 (6th Cir. 1947), cert. denied, 331 U.S. 850.

[282] Id. at 685.

Appellant in Niewiadomski relied chiefly in the development of their case on another insurance case Zazove v. United States.[283] In that case the Court held that the fact that the insured was an adult did not prevent him from being in an in loco parentis relationship to the beneficiary of the policy. In that case the Court largely concerned itself with ruling that an in loco parentis relationship was indeed possible even with an adult.

"The term, 'in loco parentis,' never had any generally accepted common-law meaning."[284] Generally, however, in loco parentis in common law refers to someone who has put himself in the place of a parent by taking on those obligations indigenous to the parental role without going through the legal formalities of adoption.[285] Moreover, "[t]here is no rule that in all events a person may not enter into a loco-parentis relationship with an adult and financial support is only one objective manifestation of the existence of the relation-

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[283] 156 F.2d 24 (7th Cir. 1946).

[284] 39 Modern Federal Practice Digest, Parent and Child, sec. 15 [hereinafter cited as M.F.P.D.] (citations omitted).

[285] Ibid. See Richards v. United States, 93 F. Supp. 208 (N.D. W.Va. 1950).

ship."[286] Another court, holding that financial responsibility was essential to demonstrate, stated further that continuance of support was not necessary to the continuance of the relationship after the child becomes an adult.[287] According to the common law doctrine "the lack of intentions by one who is allegedly in loco parentis to an adult, to be responsible for the support of the adult, does not necessarily negate the existence of the parental relationship."[288]

It is evident, therefore, that someone may stand in loco parentis even to an adult. Further conclusions about the implication of the new majority age law for the common law doctrine of in loco parentis will be drawn in the final chapter.

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[286] M.F.P.D., supra note 284; see Banks v. United States, 267 F.2d 535 (2d Cir. 1959).

[287] Strauss v. United States, 160 F.2d 1017 (2nd Cir. 1947), cert. denied, 331 U.S. 850 (1947).

[288] M.F.P.D., supra note 284; see Strauss v. United States, supra note 287.

CHAPTER VI

SUMMARY, LEGAL ANALYSIS, AND FINAL SUMMATION

Foreword

The unrest on the nation's campuses of the last decade or so has caused some concern about the role that the university should play in relationship to its students. One need hardly be reminded of the demonstrations that sprang up on the grounds of San Francisco State, Columbia, Wisconsin, Berkeley, Jackson State, and Kent State to be made aware of the complexity of running a college or university today. Administrators have frequently found themselves caught up in legal activity that followed action taken in the line of duty and under fire. There is probably no time better than the present, therefore, for clarifying the nature of the relationship between the university and student. This has never been done adequately by the courts, the statutes, or legal authorities. The purpose of this paper is to bring more clearly into focus the present status and vitality of

one of the most frequently used of the legal theories for describing that relationship, and so to put to rest finally at least one issue in the question of the university's relationship to its students, and that is, "Is in loco parentis dead on the college campus?"

In order to answer that question as clearly as possible, we will pose once again those four questions that were presented at the beginning of this research, consider them each individually, and, after analysis, answer each one carefully and succinctly. Those questions are:

1. Has statutory law modified or abridged the doctrine of in loco parentis?
2. Have court decisions, especially those in the last decade, either abrogated or modified the doctrine of in loco parentis as applied to the university-student relationship?
3. Has the recent Twenty-Sixth Amendment to the Constitution of the United States lowering the majority age for the right to vote abrogated the doctrine of in loco parentis as applied to the university-student relationship?
4. Is the doctrine of in loco parentis a viable legal theory today for describing the relationship between

the university and the student in the United States of America.

Statutory Law and In Loco Parentis

Black in defining common law states that it is that which "designates that portion of the common law of England . . . which had been adopted and was in force here at the time of the Revolution . . . . This so far as it has not since been expressly abrogated by statute, is recognized as an organic part of the jurisprudence of most of the United States."[289] (Italics mine.) It was the purpose of Chapter IV, therefore, to determine if recent statutory law has indeed abrogated that common law doctrine of in loco parentis.

289Black's Law Dictionary, supra note 7 at 345-46; 15A C.J.S. Common Law: Repeal and Revival sec. 12, supra note 158. For further discussion of this point see Brittain who makes specific application to the State of Wyoming:

> "Whether in loco parentis applies to the various levels of schools in Wyoming has never been determined by an appellate court. Furthermore, the state has never enacted a statute that specifically deals with student conduct and discipline as an extension of parental authority. However, it was pointed out earlier that assuming parental power is a common law concept, and absent statute, the common law will prevail. Should the need arise, therefore, Wyoming would probably accept the common law use of in loco parentis." (supra note 8, at 739.) (Italics mine.) See also E. Reutter who states that the common law prevails even when the statutes are vague (supra note 35, at 63).

In only one instance among the statutes of the several states was there a hint of repudiation of the doctrine. That occurred in the revision of a statute in the State of Idaho relative to the supervision of students at the Lewis-Clark Normal School. The phrase, "shall exercise a watchful guardianship over the morals of the students at all times," was dropped from the wording of the law.[290] Other than the Idaho statute there was no statute discovered by the writer that expressly or impliedly abrogated the doctrine of in loco parentis.

Six other statutes supported the doctrine more or less expressly, though none used the words "in loco parentis." They did, however, use words and expressions that have been construed as implying the in loco parentis doctrine: those words are "guardianship" and the "preservation of morals."[291]

The answer, therefore, to the question, "Has statutory law modified or abridged the doctrine of in loco parentis?" is "No." The only statute where there is some question is that of the State of Idaho where in loco parentis

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[290]Idaho Code sec. 33-3113 (Supp. 1974).

[291]Colo. Rev. Stat. Ann. sec. 23-31-114 (1974); Mich. Comp. Laws Ann. sec. 390.114 (1967); Neb. Rev. Stat. sec. 85-312 (1971); N.D. Cent. Code sec. 15-12-04 (1971).

terminology was dropped from the language of the law.[292] It should be noted, however, that "common law is not to be considered altered, changed, or repealed by statute unless the legislative intent to do so is plainly or clearly manifested, and any such alteration or repeal will not be considered effected to a greater extent than the unmistakable import of the language used."[293] (Citations omitted.)

The Courts and In Loco Parentis

Seventeen significant cases were uncovered that dealt either expressly or analogously with the doctrine of in loco parentis and the college student. Four cases involved action against private institutions, twelve against public institutions, and one against a "quasi-public" institution. The distinction between the two is significant since some authors have argued that the recent emphasis on constitutional rights has operated against the doctrine of in loco parentis. If it has, it has done so only in public institutions. Twelve cases involved the dismissal of students, one involved a suspension, two the mandatory housing regulations

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[292] Idaho Code sec. 33-3113 (Supp. 1974).

[293] 15A C.J.S. Common Law: Repeal and Revival sec. 12, supra note 158.

of a university, and one the search of a student dormitory and the seizure of illegal materials. The action against the private colleges all involved dismissals. All of the early cases tried between 1866 and 1950 were heard before county or state courts. The remainder of the cases were tried before the federal courts with the exception of Carr v. St. John's University which was heard before the New York State Appellate Court.[294] The earlier cases did not turn on constitutional issues but rather the principle of in loco parentis was frequently called upon to bolster the court's holding that the college has the inherent power to pass rules for its own governance. After 1950, and beginning with Pyeatte,[295] the cases turned on constitutional issues (with the exception of Carr which involved a private University) with in loco parentis language constituting merely part of the dicta of the court.

The Early Cases of In Loco Parentis

Perhaps the best way to look at the present status of the doctrine of surrogate parenthood is to review the cases.

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[294] 231 N.Y.S. 2d 410 (Sup. Ct., App. Div., 2d Dept. 1962), supra note 227.

[295] Pyeatte v. Bd. of Regents of Okla., 102 F. Supp. 407 (W.D. Okla. 1951), supra note 218.

There were seven cases in all that were heard between 1866 and 1931 that we describe herein as early in loco parentis cases. They all have several things in common: 1.) they all were suspension or dismissal cases; 2.) they all were heard before state courts rather than federal courts; and 3.) they all upheld the doctrine of in loco parentis (with the possible exception of Hill v. McCauley[296]).

In People ex rel. Pratt v. Wheaton College[297] Harley Pratt was suspended for violating college rules. In its holding the Court emphasized the fact that Wheaton College was a private institution and for that reason the Court would not interfere unless the rules violated divine or human law. Although the principle was not dispositive in this particular case and was referred to by way of analogy only, it, nevertheless, constituted part of the ratio decidendi of the Court:

> A discretionary power has been given them to regulate the discipline of their college in such a manner as they deem proper, and so long as their rules violate neither divine nor human law, we have no more authority to interfere than we have to control the domestic discipline of a father in his family.[298] (Italics mine.)

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[296]Pa. County Ct. 77 (1887), supra note 182.

[297]40 Ill. 186 (1866), supra note 179.

[298]Id. at 187.

The first due process case was heard in a county court in Pennsylvania in 1886, Commonwealth ex rel. Hill v. McCauley.[299] Plaintiff Hill was dismissed from Dickinson College, a public institution, for unseemly behavior. The Court in finding for Hill slapped the wrists of the College officials for relying on the principle of in loco parentis to the detriment of Hill and the abridgement of his right to due process. The Court, while not rejecting in loco parentis, clearly established for the first time in higher education the limits to the powers of the college that derive from its application:

> When guilt may not only be inferred but deemed established on such grounds by a member of a college faculty it can hardly be deemed of doubtful propriety for a court to hold that the form of procedure should at least be regular and the cause of dismissal reasonable.[300] (Italics mine.)

Five years after Hill another case was heard in Illinois in which plaintiff North sought reinstatement as a student at the University of Illinois after being dismissed for refusing to attend chapel exercises.[301] Though today such mandatory attendance at religious exercises would hardly be

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[299] 3 Pa. County Ct. 77 (1887), supra note 5.

[300] Id. at 89.

[301] North v. Bd. of Trustees of Univ. of Ill., 137 Ill. 296, 27 N.E. 54 (1891), supra note 15.

cipal concern of the Court was whether or not the rules of the University were reasonable. In those days the universities had broad discretionary powers over those in their charge and in that capacity often assumed the parental role of spiritual and moral indoctrination. Such a broad assumption of parental duties is limited today by recent court cases regarding the separation of Church and State.

In 1913 the case most frequently cited as supportive of in loco parentis was heard; it was Gott v. Berea College.[302] J. S. Gott brought action against Berea College for a temporary injunction against the enforcement of a rule which had resulted in the expulsion of several students and the loss of business to plaintiff. In finding for defendant University the Court held that the College stands "in loco parentis concerning the physical and moral welfare and mental training of the pupils."[303] (Italics mine.) The Court went on to say that the College was the sole judge of whether or not its regulations were reasonable and that, in fact, it

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[302] 156 Ky. 376, 161 S.W. 204 (1913), supra note 22.

[303] Id. at 206.

(the Court) did not find its regulations unreasonable! This was the first case in which the principle of in loco parentis was dispositive. One distinguishing feature about this case, however, is that the College in question was a private one whereas in most of the later cases the institutions involved, with the exception of two, were public. The Court, moreover, went on to hold that even should the regulations have been unreasonable, Gott had nothing to complain about since the College owed no legal duty to him whatsoever.

Stetson v. Hunt,[304] heard eleven years after Gott, was similar to that case in that it too involved a private institution. Helen Hunt brought action against Stetson University on the grounds that she was maliciously dismissed from that institution. The Court held that the relation between a student and a private college is purely contractual in nature and that the student in seeking admission to such a college impliedly agrees to adhere to the rules and regulations of that institution. It noted further that if the institution were publicly supported the regulation would have been viewed more critically and would have been subject to "legislative regulation."[305]

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[304] 98 Fla. 510, 102 So. 637 (1924), supra note 23.

[305] Id. at 640.

Although the principle of in loco parentis was not dispositive in the instant case, the Court, citing Gott, recognized it in its ratio decidendi as the basis upon which colleges and universities make rules and regulations for their students:

> As to mental training, moral and physical discipline, and welfare of the pupils, college authorities stand in loco parentis and in their discretion may make any regulation for their government which a parent could make for the same purpose, and so long as such regulations do not violate divine or human law, courts have no more authority to interfere than they have to control the domestic discipline of a father in his family.[306] (Italics mine.)

Once again, therefore, the Court indicated its hesitation to interfere in school matters unless the rules violated divine or human law.

The Court in Anthony v. Syracuse[309] held for the defendant University against Beatrice Anthony who claimed that she was unjustly dismissed from Syracuse University without just cause. The Court based its decision on the concept of contract as well as in loco parentis. Judge Smith in the trial Court held that the relationship between student and university is basically contractual. But he also mentioned the doctrine of in loco parentis, stating that "[S]o far as infants

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[306] Ibid.

[307] 130 Misc. 249 (Sup. Ct. 1927), supra note 33.

infants are concerned, university and college authorities stand in loco parentis concerning the physical and moral welfare and mental training of the pupils . . . ."[308] The Appellate Court, upholding the decision of the trial Court, listed two reasons for which a university might dismiss, the second of which reinforced the standing of the school in loco parentis. These reasons were: to safeguard 1.) the University's ideals of scholarship, 2.) and the University's moral atmosphere.[309]

In West v. Board of Trustees of Miami University[310] the Court once again indicated its unwillingness to interfere in disciplinary matters (in this case a dismissal) unless the institution enforced rules in an unreasonable and arbitrary manner. The Court held that the University has the power to make rules governing such matters as good education, virtue, religion, and morality.[311]

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[308] Id. at 256.

[309] 224 App. Div. 435, 440 (1928), supra note 27.

[310] 41 Ohio App. 367, 181 N.E. 144 (1931), supra note 215.

[311] Id. at 147-48.

The Later Cases--Constitutional Emphasis

Beginning with Pyeatte,[312] a case heard in 1951 dealing with mandatory housing regulations, there was a change in the standard of review employed by the courts being considered here in dealing with student discipline. While earlier cases, heard before state courts, were concerned mainly with the inherent power of the university to pass rules and with the reasonableness of such rules, later cases, beginning with Pyeatte and heard, with one exception, before the federal courts, emphasized the constitutional rights of students attempting to balance those rights with the university's power to pass and enforce regulations for its own governance.

Pyeatte is the first of those cases to be considered here. It involved action by Mary Pyeatte against the University of Oklahoma for an injunction against their mandatory housing regulations. While the Court considered the arguments of plaintiffs which rested mainly upon the complaint that Fourteenth Amendment Rights were violated, it held for the defendant University on the grounds that plaintiffs were not discriminated against by the housing policy, and that,

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[312] 102 F. Supp. 407 (W.D. Okla. 1951), supra note 218.

furthermore, constitutional rights are not unlimited; that the University has the power to "pass all rules and regulations which the Board of Regents considered to be for the benefit of the health, welfare, morals, and education of the students, so long as such rules are not expressly or impliedly prohibited."[313] Interestingly enough the Court also placed responsibilities upon the University; responsibilities which seem to derive from an in loco parentis role. One of those responsibilities is to provide the students "a home away from home while attending school at the University, and it is incumbent upon school authorities . . . to insure that not only adequate but suitable housing is available." 314 (Italics mine.)

Steier v. New York State Education Commision[315] was a civil rights case. Steier argued that he was dismissed from Brooklyn College without being afforded due process. The Courts, in finding for the College, held that due process was granted, reinforcing the parental duty of the College:

> One of the primary functions of a liberal education is to prepare the student to enter a society based upon

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[313] Id. at 413.

[314] Ibid.

[315] 271 F. 2d 13 (2d Cir. 1959), supra note 223.

principles of law and order may well be the teaching of good manners and good morals.[316] (Italics mine.)

Carr v. St. John's University[317] differs from the other cases under this section in that it involved a private institution and was heard before a state court. Carr brought action against St. John's after being dismissed from that University on the grounds that he did not adhere to the ideals of Christian conduct. The Appellate Court, refusing to consider constitutional issues regarding religion on the grounds that St. John's was a private institution, held for the University's right to pass regulations governing conduct. The Court further noted, however, that such regulations could not be unreasonably or arbitrarily enforced.[318]

Six cases against the doctrine

The cases that follow are significant here for two reasons: 1.) they all occurred after 1965 and 2.) they were all generally negative toward the application of the doctrine in higher education. In all instances, however, the rejections were made in dicta of the court and, interestingly

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[316] Id. at 20.

[317] 231 N.Y.S. 2d 410 (App. Div. 1962), supra note 227.

[318] Id. at 414.

enough, the court found in favor of the college in every instance but one. Another significant factor in each case is the emphasis on the constitutional rights of students and the attempt by the courts to balance them with the rights of the institution to pass rules and regulations for its governance.

The first of those cases, Goldberg v. Regents of University of California,[319] involved the dismissal of students for participating in demonstrations. Plaintiffs argued that their rights to free speech were abridged by the University action, that the University regulation enforced against them was so broad and vague as to further abridge those rights, and finally that they had been denied due process. Judge Taylor dismissed all three complaints, holding that the University's action did not infringe upon the constitutional rights of plaintiffs.

The following passage, however, is found in the dicta of the Court:

> For constitutional purposes, the better approach, as indicated in Dixon, recognizes that state universities should no longer stand in loco parentis in relation to their students.[320] (Italics mine.)

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[319] 57 Cal. Rptr. 463 (1st D. 1967), supra note 163.

[320] Id. at 470.

Then in a footnote, Judge Taylor, in language clearly obiter dicta, discussed the classic cases following the doctrine of in loco parentis and remarked that it seemed more applicable in earlier decades when students were generally und eighteen than today when they are often much older.[321]

In Buttny v. Smiley,[322] another case similar to Goldberg in that students were dismissed for creating disorder on campus, Judge Arraj held for the University, stating that college officials have the power to take action to maintain order on campus. The Judge held that the rules and regulations of the University were not unconstitutionally vague, that the equal protection clause of the Fourteenth Amendment was not violated, and that plaintiffs were afforded due process by University authorities.

Then, in language clearly obiter dicta, the Court noted:

> We agree with the students that the doctrine of 'In Loco Parentis' is no longer tenable in a university community; and we believe that there is a trend to reject the authority of university officials to regulate "off-campus" activity of students.[323] (Italics mine.)

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[321] Id. at 470 n.11.

[322] 281 F. Supp. 280 (D.C. Colo. 1968), supra note 235.

[323] Id. at 286.

The Judge went on to state, however, that he was not saying that students could not be disciplined for actions disruptive of good rules on campus.

In another 1968 case, Zanders v. Louisiana State Board of Education,[324] Judge Ben Dawkins refused to grant injunctive redress to students expelled from Grambling College. They had alleged violation of First and Fourteenth Amendment Rights.

In writing his twenty-six page decision Judge Dawkins paused to trace historically the relationship between university and student. He noted that there have been two theories traditionally used to characterize that relationship: "in loco parentis" and "contract." In language clearly obiter dicta he observed that

> This doctrine primarily has been used as a defense in suits involving potential tort liability of school teachers when administering some type of corporal punishment to students of tender years. Viewed in this light, the doctrine is of little use in dealing with our modern "student rights" problems.[325] (Italics mine.)

However, after discussing the contract theory in some detail, the Judge, almost disregarding his previous comments about the doctrine, stated:

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[324] 281 F. Supp. 747 (W.D. La. 1968), supra note 238.

[325] Id. at 756.

> Regardless of which theory may be applied, it now is generally conceded that colleges and universities have the inherent power to promulgate reasonable rules and regulations for government of the university community.[326] (Italics mine.)

The Court, obviously hesitant to dismiss the doctrine entirely, was apparently more concerned with the college's inherent power to pass rules and regulations than with in loco parentis.

Moore v. Student Affairs Committee of Troy State University[327] involved action by plaintiff Moore for reinstatement as a student in good standing at the University after school officials had searched his room and seized marijuana they found there. The Court found in favor of the University, holding that the student's constitutional rights were not violated by the actions of the University, that the search was not unreasonable, and that plaintiff had been afforded due process.

Of interest here is that the Court noted in language obiter dicta that "[t]he college does not stand, strictly speaking, in loco parentis to its students, nor is their relationship purely contractual in the traditional sense."[328] Rather, the Court stated that the relationship grows out of the "peculiar and sometimes the seemingly competing interests

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[326] Id. at 757.

[327] 284 F. Supp. 725 (D.C. Ala. 1968), supra note 243.

[328] Id. at 729.

of college and student,"[329] and with that went on to discuss the constitutional considerations of Fourth Amendment rights.

Soglin v. Kauffman[330] is the only case besides Hill[331] in which the Court found in favor of the students. It involved action by the students of the University of Wisconsin for injunctive relief against University regulations and disciplinary measures taken against them for alleged "misconduct." The Court held that the regulations of the University regarding student freedom were unconstitutional for vagueness and that the standard of "misconduct" was an unacceptable basis for suspension or expulsion.

In writing his decision Judge James Doyle discussed several models used historically to describe the relationship between student and university. One of those was the doctrine of in loco parentis. In describing the changing nature of American colleges and universities, he made clear his feeling about the present applicability of the doctrine with the following dictum:

> The facts of life have long since undermined the concepts, such as in loco parentis, which have been invoked histori-

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[329] Ibid.

[330] 295 F. Supp. 978 (W.D. Wis. 1968), supra note 32.

[331] Commonwealth ex rel. Hill v. McCauley, supra note 182.

cally for conferring upon university authorities virtually limitless disciplinary discretion.[332]

He did, however, recognize that there is considerable d[illegible]e as to what the precise relationship between student [illegible]nd university is. Furthermore, he stated that the precise issue with which he was concerned was not that relationship nor the power that the university has to discipline but rather "the manner in which this power to govern and to discipline is exercised."[333] (Italics mine.)

Pratz v. Louisiana Polytechnic Institute[334] was the last of the cases to reject the doctrine. It was a class action suit for declaratory judgment against the parietal regulations of Louisiana Polytechnic Institute. The Court held for Louisiana Tech on the grounds that the regulations were educationally sound and that they did not deprive students of their constitutional rights.

In a footnote, and in language clearly obiter dicta, the Court, pausing to clarif[illegible] the meaning of the phrase "parietal rules," made the following comment about the doctrine of in loco parentis:

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[332]Soglin v. Kauffman, supra note 32.

[333]Id. at 989.

[334]316 F. Supp. 872 (W.D. La. 1970), supra note 162.

> We tend to agree with that line of thinking which states that the modern college or university, which has in attendance thousands of students, even if it should, is ill-equipped to regulate the off-campus social and moral lives of its students, thus making futile, and perhaps improper, any attempt to act "in loco parentis."[335] (Italics mine.)

The Judge, as well as the defendants, therefore, limited the word "parietal" to those "regulations affecting the educational, particularly the living portion, sphere of a university's function."[336] There is hardly here a clear rejection of the doctrine of in loco parentis, but simply a cautiously worded opinion in language obiter dicta.

One final positive case

The final case of significance is interesting for two reasons: 1.) it goes against the trend of the six cases reported heretofore and 2.) it was heard, ironically, on the anniversary day of the Kent State tragedy. The case was Evans v. State Board of Agriculture.[337] It involved action by students at Colorado State University against the officials of the University. The gravamen was that a regulation, adopted

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[335] Id. at 876-77 n.2.

[336] Id. at 877 n.2.

[337] 325 F. Supp. 1353 (D.C. Colo. 1971), supra note 261.

by the University in the wake of a violent disturbance prohibiting demonstrations at certain times and places, constituted an abridgement of the First Amendment rights of the students. Judge Winner held that not only had the constitutional rights of the students not been abridged but also that the University had acted in the only way it possibly could.

In his concluding statements the Judge, concurring with Buttny that students seeking enforcement of constitutional rights must also accept responsibilities, took exception to that Court's rejection of the doctrine of in loco parentis and observed that "conduct such as that with which we are here faced gives cause for pause to wonder if the law may not be forced to retreat to the earlier In Loco Parentis Doctrine."[338] (Italics mine.)

Thus have the cases come full swing from the first application of the doctrine to higher education in 1866, through an era of general reliance on the doctrine, to a brief period of rejection from 1967-1970, a time of general campus disruption matched only by the violence overseas, to a final tentative approval by Judge Winner in Evans who observed in language, perhaps obiter dicta, that the rejection, obiter dicta, in Buttny was hasty.

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[338] Id. at 1360.

Recent dormitory cases

In recent dormitory cases the Courts have been favorable in their holdings to the universities' parietal rules. Interestingly enough mandatory housing is permitted even if the only purpose is the economics of retiring bonded indebtedness.[339] In two cases in loco parentis language was employed by the defendant institutions. In Postrollo v. University of South Dakota[340] the Federal Circuit Court Judge, while deciding the case on constitutional grounds, pointed out that a university might have multiple reasons for mandating housing. Interestingly enough one of the reasons adduced by the University authorities used language analogous to in loco parentis and that is that the dormitories provide "a home away from home" in aiding younger students to learn self-discipline and the habits of community living.[341] (Italics mine.)

In January, 1975, in a case involving Kent State University and some students there, Judge Thomas likewise held

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[339]Poynter v. Drevdahl, supra note 275.

[340]507 F. 2d 775 (8th Cir. 1974).

[341]Id. at 777-78.

in favor of defendant University and on constitutional grounds.[342] The University, in defense of its mandatory housing rules, used language similar to that used in Postrollo:

> Special attention must be afforded the vast number of students commuting from the residence of their family especially during their first two years of enrollment in order to assist in the more complicated process of transition from dependence to independence.[343]

What is noteworthy is that in both cases the Courts paid attention only to the constitutional issues involved and never questioned the in loco parentis stand of the universities. Such favorable decisions caused the legal counsels to the University of Colorado and to DePauw University to wonder if indeed what we are witnessing in the Courts is not a "return to the days of in loco parentis or some reasonable modification thereof?"[344] What is evident, at any rate, is that the recent courts have not disturbed university housing regulations nor interfered with the in loco parentis stance of the universities as long as constitutional rights are not abridged and "that the rule is reasonable and not arbitrary

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[342]Civil Action File No. C (N.D. Ohio, Jan. 8, 1975).

[343]Id. at 5.

[344]Holloway, supra note 269, at 122.

and that it bears a rational relationship to a permissible state objective."[345]

Conclusions Regarding the Courts and In Loco Parentis

Private v. public institutions

One distinction made by the courts that comes through most clearly is that private institutions require a different standard of review than public ones. Constitutional considerations do not have the force on the campuses of St. John's University or Berea College as they would at the University of Alabama or the University of Southern California. One of the Courts which rejected in loco parentis did so only for public institutions.[346] In all of the cases that rejected its use the issues were resolved by constitutional considerations. Such a standard of review would generally not be applied in a private college. The argument, therefore, that

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[345]Postrollo v. Univ. of South Dakota, supra note at 782.

[346]Goldberg, supra note 163, at 470. Dixon also distinguishes sharply between public and private institutions (supra note 25, at 158). See also Carr v. St. John's Univ., supra note 226, at 413; accord, Pratt v. Wheaton College, supra note 178, at 187.

the constitutional approach is the better one, would not work against the use of in loco parentis on the campuses of private institutions.

Constitutional considerations

The emphasis on the constitutional rights of students is especially evident in the last seven significant cases reported herein. That emphasis received its impetus chiefly from the landmark case of Dixon v. Alabama,[347] a case which marked the turning point toward closer attention to the constitutional rights of accused students to "procedural due process in college disciplinary cases."[348]

In that case students, summarily dismissed from Alabama State College at Montgomery for participating "in sit-ins," appealed to the Federal Circuit Court after the District Court had upheld the University action. The University felt that it could dismiss without any reason other than for the general benefit of the institution. The Court, distinguishing sharply between private and public institutions, held that public institutions are obliged to follow at least

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[347] 294 F. 2d 150 (5th. Cir. 1961), supra note 25.

[348] M. M. Chambers, The Colleges and the Courts: the Developing Law of the Student and the College 216 (1972).

the fundamental laws of fairness by giving students a notice of charges made and a chance to defend against them. Ever since that case, administrators have been constantly struggling to strike the delicate balance between the rights of students and the needs and welfare of the institution.

Dixon, however, was not the first case to grant due process to students under threat of dismissal. In Hill v. McCauley[349] the Court struck down action by the University to dismiss plaintiff Hill on the grounds that proper procedure was not followed by the dismissing faculty committees in granting Hill a hearing. Thus, though due process was already before the bench in 1886 it was not until Dixon in 1961 that the student's right to due process was once again affirmed. Since then, as never before, the Courts have been aware of the constitutional rights of students. They have generally recognized, however, that those rights are not unlimited. Freedom of speech does not give the right to interfere with the rights and safety of others.[350] In all cases there is the need for proper balancing of First Amendment

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[349]Hill v. McCauley, supra note 182.

[350]Evans, supra note 261.

Rights and the welfare of the school system.[351] Though the courts have been more aware of constitutional issues today, they still recognize the inherent power of the schools "to promulgate reasonable rules for the government of the university community."[352] It is in this grey area where the student's constitutional rights cease and the rights and obligations of the University begin that the doctrine of in loco parentis operates.

In contrast with the standard of review utilized by the courts a hundred years ago, today they look not only at the university's power to pass rules and regulations but also at the rights that every student enjoys under the constitution as a citizen of the United States. Mandel argues that it is this general change "in the judicial review in civil rights, rather than any change in the judicial attitude toward public schools in particular or toward the concept of 'in loco parentis,' which is the legal foundation for modern view of the limitations on the authority of school officials over student conduct."[353] (italics mine.)

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[351]Goldberg, supra note 163, at 471.

[352]Zanders, supra note 238, at 757.

[353]R. Mandel, "Student Rights, Legal Principles, and Educational Policy" 103 Intellect 238 (1975).

The force of the rejections

The six cases heard from 1967 to 1970 that were negative toward the doctrine would seem, at first glance, to pose the most formidable threat to the doctrine. In one of those cases,[354] however, the Court, while stating that the doctrine is of little use today, seemed ready in its later reasoning to allow that in loco parentis might indeed be used, holding that the principle point is that the universities have the inherent power to promulgate rules, "regardless of which theory may be applied."[355] Another rejection, occurring in a footnote, employed the weak language "we tend to agree that the doctrine is out of fashion."[356] Finally, the rejection in Buttny[357] by the District Court in Colorado was offset by the remarks of Judge Winners in Evans,[358] a case heard by the Federal District Court in Colorado.

[354] Zanders, supra note 238.

[355] Id. at 757.

[356] Pratz v. La. Polytech. Inst., supra note 162.

[357] Buttny v. Smiley, supra note 235.

[358] Evans v. State Bd. of Agric., supra note 261.

Dicta v. stare decisis

Beyond the relatively weak "rejections" of the six cases reported, the critical point is that they were all contained in language of the Court that is clearly dicta. Five or six cases (depending on how negative one would consider Zanders) wherein the issue of in loco parentis was not dispositive can hardly stand up against the weight of eleven cases in which the principle was upheld. Furthermore, the common law doctrine of in loco parentis, made applicable through the principle of stare decisis, can hardly be destroyed by dicta of the court which lacks the force of adjudication,[359] and to which stare decisis does not attach.[360] Dicta may be cited by counsel if nothing else in point can be found;[361] it is not, however, binding as precedent.[362] Four thousand years of developing doctrine, therefore, cannot be swept away by four thousand days of obiter dicta.

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[359]Black's Law Dictionary, supra note 7, at 541.

[360]Ballentine's Law Dictionary 346 (3rd ed. 1969).

[361]Ibid.

[362]J. Jacobstein and R. Mersky, Legal Research Illustrated: Abridgment of Pollack's Fundamentals of Legal Research xix (4th ed. 1973).

We can now restate the question posed at the onset of this research regarding the impact of case law on the doctrine: Have court decisions, especially those in the last decade, either abrogated or modified the doctrine of in loco parentis as applied to the university-student relationship?

The answer to the first part, "Have they abrogated . . . the doctrine?" is "NO." The answer to the second part, "Have they modified the doctrine?" is a qualified "YES."

Ever since the holding of Judge Rivers in Dixon in 1961, the courts have been conscious of the constitutional rights of students and of the protection of those rights through due process. The courts have, therefore, indicated that they will intervene where those constitutional rights are jeopardized. The standard of review which courts have employed has been modified since the earliest in loco parentis cases to the extent that not only will they scrutinize the reasonableness of rules and the inherent power of colleges to prescribe regulations for ther governance but also, in cases that involve public institutions, balance those powers against the constitutional rights which students enjoy as citizens of the United States.

In private colleges the courts are slow to disturb decisions of the university as long as the rules are reasonable and the actions of the university have not been arbitrary or malicious. In public institutions the courts have indicated that they will intervene only if rules and regulations are unreasonable and jeopardize the constitutional rights of the students; those rights most commonly brought before the courts in recent years are those guaranteed by the First, Fourth, and Fourteenth Amendments.

Age and In Loco Parentis

Several cases have touched on the issue of age and in loco parentis. Meisner v. United States[363] was an insurance recovery case involving Christine Meisner and Robert Parks, a deceased soldier who she contended was her brother on the grounds that her parents stood in loco parentis to him. The Court held that "no sound reason appears why a person may not assume a parental relation toward an adult as well as toward a minor. The responsibilities and obligations may be fewer, but substantial ones remain."[364] (Italics mine.)

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[363] 295 F. 866 (W.D. Mo. 1924).

[364] Id. at 868-69.

In Niewiadomski v. United States,[365] another insurance recovery case, the Court held that appellant, Rebecca Niewiadomski, stood in the relationship of in loco parentis despite the fact that the insured was an adult. In another case, Zazove v. United States,[366] the Court, in concerning itself largely with the issue of whether or not the in loco parentis relationship was possible with an adult, held that the fact that the insured was an adult did not prevent him from being in an in loco parentis relationship to the policy's beneficiary. There is no rule, generally then, that a person may not enter into an in loco parentis relationship with an adult.[367]

The answer to the question, then, "Has the recent Twenty-sixth Amendment to the Constitution of the United States lowering the majority age for the right to vote abrogated the doctrine in loco parentis as it applies to institutions of higher education in the United States?" is "NO."

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[365] 159 F. 2d 683 (6th Cir. 1947).

[366] 156 F. 2d 24 (7th Cir. 1946).

[367] Banks v. United States, supra note 286, at 535.

Final Summation

It is apparent, then, that the phrase in loco parentis, as a technical term in law, constitutes "words of art" and as such can be properly explained by an expert witness. In its long and tortuous history the meaning of that phrase has gradually developed, been modified, and shaped by customs, by traditions, and by the courts. Its biography is as colorful as the story of those itinerant judges who traveled the countryside in England and under whose gavels the common law of that nation was forged.

The principal concern of this dissertation is what is the present status of that legal doctrine, the history of which has been traced from Hammurabi through Roman Law and English Common Law, through the early days of frontier America and the development of Harvard College, through early court cases that applied and interpreted the doctrine, and finally to the American college campuses of the 1960s and 1970s where violent disturbances tried both the doctrine as well as the very structure of the higher educational system itself.

The ultimate question then to be answered in this research is as follows: Is the doctrine of in loco parentis

a viable legal definition of the nature of the relationship between the university and the student in the United States of America today?

The answer is "YES." In private colleges and universities the courts have generally not interfered in institutional matters unless the rules and regulations of the school are unreasonable and offend against divine or human law, or the actions of the college authorities are judged malicious or capricious.

In public colleges and universities the courts have shown an inclination not to intervene in university matters as long as the rules and regulations of the school are reasonable and understandable and do not abridge the constitutional freedoms of students, and as long as the elements of due process as outlined by the courts in Hill v. McCauley[368] and more recently in the dicta of Dixon[369] are extended.

In loco parentis, then, a legal theory which developed slowly through forty centuries of tradition, which became a part of the common law of England during the last thousand

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[368] Pa. County Ct. 77 (1887), supra note 182.

[369] 294 F. 2d 150 (5th Cir. 1961), supra note 25.

years of that development, which was brought to America in the last five hundred years, and which has been legally in force there for the two hundred years since the Revolution, is still part of the common law of the land today. It has been abrogated neither by statute nor by court. Common law is set aside by statute only when the wording of the law clearly and expressly rescinds it. That has never been the case with the doctrine of in loco parentis. As regards the courts and in loco parentis, one viewpoint holds that they may not abrogate common law; another, though perhaps a minority view, maintains that they may. At any rate those six cases that did treat it negatively did so in language clearly obiter dicta. Four thousand days of dicta, however, do not abrogate four thousand years of developing doctrine. It is there, then, waiting for university administrators to use as they find the need. Alive and well; ancient, honorable--on call in the wings.

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