THE EVOLUTION OF THE DOCTRINE OF IN LOCO PARENTIS
IN DEFINING THE STUDENT-INSTITUTION RELATIONSHIP
IN HIGHER EDUCATION IN THE 1980s AND EARLY 1990s

By
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To my husband, Christopher E. Hannum, and
my parents, Joseph and Berit Benacci
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Abstract of Dissertation Presented to the Graduate School of the University of Florida in Partial Fulfillment of the Requirements for the Degree of Doctor of Philosophy

THE EVOLUTION OF THE DOCTRINE OF IN LOCO PARENTIS IN DEFINING THE STUDENT-INSTITUTION RELATIONSHIP IN HIGHER EDUCATION IN THE 1980s AND EARLY 1990s

By
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Chair: James Wattenbarger
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Major Department: Educational Leadership

The purpose of this study was to examine the emergence, development, and contemporary status of the legal doctrine of in loco parentis as it has influenced the relationship between American colleges or universities and students. Traditional legal research methods identified relevant federal and state appellate cases. Legislative research procedures identified federal legislation, passed within the last decade, that addressed parental type institutional responsibilities. An analysis of the cases and legislation was completed as they related to the doctrine of in loco parentis.

The legal analysis of the case law revealed that the judiciary has not resurrected the doctrine of in loco parentis in deciding student-institution disputes. It is erroneous to apply the in loco parentis doctrine to cases centering on whether an institution had a duty to protect a student from a injury, when the doctrine traditionally was broadly applied to cases involving student conduct as well as the moral well being of the student. However, colleges are confronted with additional duties and liabilities due to expanded theories of negligence, contract, policy and social host laws.

The analysis of the federal legislation revealed that the government has imposed numerous obligations upon institutions to regulate student behavior. The Drug-Free Schools and Campuses Act, the Crime Awareness and Campus Security Act and the Sexual Assault Bill of Rights legislate that institutions provide an environment for students that
is safer than society at large. The various Acts dictate heightened institutional responsibilities and parental boundaries regarding the safety of students.

It was recommended that institutions be aware of current and evolving federal and state statutes and case law. In addition, institutions should have written policies pertaining to issues such as student and institutional responsibilities. These regulations should be enforced and reviewed periodically. Institutions should also implement effective security policies and crime prevention-education programs to satisfy federal and state regulations while limiting institutional liability. Future research was recommended concerning analyzing case law to determine if recent legislation has had any effect on the judiciary's decisions in resolving student-institution disputes.
CHAPTER ONE
INTRODUCTION

The legal relationship between the student and institution can be described as being complex and dynamic. Historically, educators and the courts have assigned a legal doctrine to describe the student-institution relationship in an attempt to comprehend better, for purposes of support and opposition, the trends of the legal status of students. The legal relationship between the student and the institution at different times since the 17th century has encompassed several legal theories including contract, fiduciary, constitutional and in loco parentis. The doctrine of in loco parentis--literally "in the place of the parent" was formally recognized as early as the late eighteenth-century in England as the central doctrine addressing the student-institution relationship. However, in loco parentis has been traced back as far as Roman Law by some and to the ancient law of Hammurabi by others. The doctrine of in loco parentis provided that the institution had the responsibility to regulate the physical and

1 Jon C. Rogers, "The Evolution of a Contractual Right for the American College Student," (Tallahassee, FL: Florida State University, 1986): 41.


4 Stamatakos, "The Doctrine," 473.


moral welfare of its students. Institutions traditionally had a right to enforce academic and nonacademic codes of conduct and a duty to protect the safety, morals, and welfare of its students.\(^7\)

In 1601, the English enacted "Poor Laws" that required all parents to educate their children or send them to learn a trade as an apprentice.\(^8\) In the 17th century at Oxford and Cambridge, it was widely accepted that students were to observe and adhere to an extensive list of rules and regulations established to guide their behavior. The doctrine of *in loco parentis* provided a common law basis for maintaining the authority of school administrators to control student conduct. Administrators were able to exercise essentially the same authority as would a parent in similar circumstances. In 1770, Sir William Blackstone in his *Commentaries on the Laws of England*, stated that:

> The father may delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child, who is then *in loco parentis*, and has such a portion of the power of the parent committed to his charge, viz. that of restraint and correction, as may be necessary to answer the purposes for which he is employed.\(^9\)

During the Colonial Period in America, colleges and universities relied extensively upon the *in loco parentis* doctrine that was borrowed from the English. College students were largely considered to be children, rather than adults.\(^10\) This paternalistic position reflected and reinforced the colonial Puritan legacy. In addition, institutions of higher education were granted a great deal of authority by the American courts. The

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courts were sensitive to the uniqueness of the educational mission and were thus
reluctant to interfere in controversies arising between students and institutions of
higher education. The early courts found refuge in in loco parentis and permitted
institutions to "exert almost untrammeled authority over students' lives."11

The doctrine of in loco parentis was accepted by society as the basis of a strict and
ordered legal existence on college campuses. For example, in the early case of Stevens v.
Fassett,12 the Court held that the right of a parent to control a child was secured by
common law, and therefore the parent could lawfully correct the child for the benefit of
the child's personal welfare. Accordingly, a parent could delegate this parental authority
to the schoolmaster or tutor, who was then in loco parentis through delegated parental
authority.13 This gave the teacher the right to act in place of the parent. Students at all
levels of education were subordinate to the teacher, as the child would be subordinate to
the parent in the home. Students were considered "wards of a paternalistic institution,
to be disciplined and molded into maturity."14 Thus, in its early stages in loco parentis
was a delegation of authority designed for the special circumstances of the tutor-pupil
relationship.15 Later, however, in loco parentis became the model for all student-
institution relationships.16 It was the classic Gott v. Berea College17 case of 1913 that

11 William A. Kaplin, The Law and Higher Education 2d ed. (San Francisco: Jossey-


13 Id.

14 Earl J. McGrath, Should Students Share the Power? (Philadelphia: Temple

15 Brian Jackson, "The Lingering Legacy of In Loco Parentis: An Historical Survey

16 Id.

17 156 Ky. 376, 161 S.W. 204 (1913).
stated that institutions had complete legal authority over and responsibility for their students. This responsibility, as stated by the \textit{Gott} court, concerned not only the protection of morals but the protection of student's physical safety as well.\textsuperscript{18} The \textit{Gott} precedent was largely upheld in the courts for approximately forty years, resulting in students having virtually no recognized rights.

During the late 1960s, however, the doctrine of \textit{in loco parentis} declined and was abandoned as the predominant legal doctrine addressing the student-institution relationship.\textsuperscript{19} After World War II, many political and social relationships were very different than they were before the war. For example, federal bureaucracy had grown and institutions of higher education felt increasing government influence over their daily affairs. The Warren Court, stressing the 1st and 14th Amendments, focused on the rights of individuals while racial minorities and women demanded improved status. In the wake of student protests, college students demanded to be treated as adults, free from college or university control. In addition, the twenty-sixth amendment to the Constitution lowered the voting age to eighteen and the courts struck down attempts by institutions to limit students' rights.\textsuperscript{20} Within this climate of change, the composition of colleges and universities were altered. An older, more mature, veteran student entered higher education as did many middle class students, prompted by federal financial assistance programs.

As institutions of higher education grew and changed, traditional relationships were altered and new relationships emerged. During the late 1960s \textit{in loco parentis} no longer

\textsuperscript{18} \textit{id.} at 379, 161 S.W. at 206.

\textsuperscript{19} See Chapter Two, "Review of the Related Literature"; and Chapter Five, "An Analysis of the Decline of the Doctrine of \textit{In Loco Parentis} in Higher Education Appellate Case Law; 1960-1980" of this study for a supporting analysis of this statement.

seemed appropriate in characterizing the relationship between students and their institutions.\textsuperscript{21} Institutions of higher education and the courts accepted the demise of the doctrine of \textit{in loco parentis} with little hesitation or question for almost twenty years. Universities dismissed their \textit{in loco parentis} status and no longer felt burdened to guard the moral and physical welfare of students under the \textit{in loco parentis} doctrine.\textsuperscript{22} Consequently, theories based on contract, fiduciary, and constitutional law gained prominence in describing the student-institution relationship in regard to higher education.

It wasn't until the 1980s, when the courts appeared to be imposing new duties on institutions to expand control over campus life and to protect students related to issues such as drug abuse and sexual assault, that many legal and academic scholars began suggesting a possible return to the doctrine of \textit{in loco parentis} as an important doctrine in addressing the student-institution relationship.\textsuperscript{23} Students began to demand protection against criminal attack, against harm inflicted by others and against injuries sustained often due to their own carelessness.\textsuperscript{24} Cases such as, \textit{University of Denver v.}

\begin{itemize}
\item \textsuperscript{23} Michael Clay Smith, "College Liability Resulting From Campus Crime: Resurrection of \textit{In Loco Parentis}?," \textit{West's Education Law Reporter} 59, no.1 (May 1990): 1. See also Szablewicz and Gibbs, "Colleges' Increasing Exposure," 454. For an in depth analysis see Chapter Six of this study, "An Analysis of Appellate Case Law That Addresses the Institutional Responsibility of the 1980s and Early 1990s."
\item \textsuperscript{24} Szablewicz and Gibbs, "Colleges' Increasing Exposure," 453.
\end{itemize}
Whitlock\textsuperscript{25} and Peterson v. San Francisco Community College\textsuperscript{26} were being viewed by some\textsuperscript{27} as being similar to those cases of an earlier time marked by in loco parentis.

The 1980s were marked by considerable controversy over the nature of the student-institution relationship. This controversy continued into the early 1990s. In regard to the student-institution relationship, "there is an unending progression of court decisions that continue to define the rights and responsibilities of both the student and the institution".\textsuperscript{28} Courts and commentators have struggled to define the student-institution relationship using theories of landlord liability, guest, host and contract, yet these legal theories have not seemed to define adequately the student-institution relationship.\textsuperscript{29}

A 1988 study of the student-university relationship by Rosa Hall recognized contract theory as being the predominant legal theory addressing student-university claims in the 1960s and 1970s.\textsuperscript{30} Hall cited a decline and predicted a continual demise of the contract theory in defining the legal relationship between students and their colleges and universities. She concluded that student contract litigation was "not the burning issue it was in the 1960s and 1970s."\textsuperscript{31} While Hall did not call for a return to


\textsuperscript{26} 36 Cal.3d 799, 685 P.2d 1198, 205 Cal. Rptr. 842 (1984).

\textsuperscript{27} Szablewicz and Gibbs, "Colleges' Increasing Exposure," 463.

\textsuperscript{28} Young, \textit{The Law}, 2.

\textsuperscript{29} Szablewicz and Gibbs, "Colleges' Increasing Exposure," 453.

\textsuperscript{30} Rosa Hall, "The Evolution of the Contractual Relationship Between American Students and Their Colleges or Universities," (Gainesville, FL: University of Florida, 1988).

\textsuperscript{31} Id. at 391.
the doctrine of *in loco parentis*, or any other specific legal theory, she recognized that the relationship between students and their institutions would continue to evolve as social and legal patterns continued to change and that the evolving student-institution relationship must be investigated often.\(^3\) It is the continuing controversy and the evolutionary nature of the student-institution relationship that warrant this study.

**Statement of the Problem**

Many legal scholars have suggested that the courts have looked at and will continue to look at the doctrine of *in loco parentis* in gaining understanding and direction of the student-institution relationship.\(^3\) Others disagree.\(^4\) The 1980s and early 1990s have witnessed much debate as to whether *in loco parentis* is a viable doctrine in influencing the decisions of the court and consequently, the policies of institutions of higher education.\(^5\) Policy makers in colleges and universities must understand the evolution of the student-institution relationship so that they might recognize past and current trends in order to make legally sound decisions. As stated by Hall,

\(^3\) Id. at 398.


With greater information to provide broader perspectives and keener insights into the past, those involved in future academic leadership are more likely to reconsider the past and direct more intelligently a course of change which will eliminate many of the adversarial aspects which currently exist . . . between students and their colleges . . . .

There has been a lack of definition and understanding of the basic legal relationship between the student and the institution. It has been noted that the courts' failure to embrace a legal doctrine or theory has resulted in confusion as to the responsibilities and potential liability involved in protecting students' welfare. For example, institutions have not had an identifiable set of expectations to meet and thus have walked a fine line between providing too much or too little regulation and protection. In either case, institutions risk exposure to liability. In addition, the direction that has been provided by the courts and legislation for institutions of higher education has been viewed by administrators and legal counsel as ambiguous, erratic and broad. Such a lack of understanding of the student-institution relationship has led to inaccurate decision making and an often unsubstantiated fear of legal issues involving the student and the institution. An analysis of the evolution of in loco parentis with an emphasis on several current student-institution issues of the 1980s and early 1990s, such as safety and substance abuse, will clarify the contemporary status of the doctrine and the impact of that status upon the potential liability of institutions of higher education.

If in loco parentis is emerging as a viable legal doctrine, then there is the threat that institutions will assume an increased risk of liability. Likewise, mistaken claims


37 Thomas, "The New In Loco Parentis," 34.

38 Id. at 39.


arising from a new in loco parentis doctrine may create greater "confusion in the courts and may induce colleges to draft and implement policies that spawn, rather than diminish, institutional liability."\(^{41}\) It is important that the current status of in loco parentis be analyzed in relation to its history, case precedent and current legislation. Such comprehensive legal research has often been referred to by judges in determining cases and must therefore be a part of the literature base. In addition, this study can serve to promote discussions between administrators and their legal counsel which may lead to policies that serve to diminish institutional liability. Institutions must understand the current status of in loco parentis if they are to make informed policy decisions that guide the day to day relationships between students and institutions.

**Purpose of the Study**

The purpose of this study was to examine the emergence, development, and contemporary status of the legal doctrine of in loco parentis as it has influenced the relationship between American colleges or universities and students. The analysis of the evolution of this doctrine was intended to provide an increased understanding of how the legal doctrine concerning the student, the institution, and in loco parentis has developed, the current status of the legal doctrine, and the impact of that status upon institutions of higher education.

To investigate this issue, research questions were developed as follows:

1. What documentation may be found within appellate case law to indicate an evolution of the legal doctrine of in loco parentis?

2. To what extent does federal legislation and/or appellate case law reflect an evolutionary pattern emphasizing a current return to the doctrine of in loco parentis in regard to issues such as regulating student conduct and providing a safe environment?

\(^{41}\) Stamatakos, "The Doctrine," 472.
3. To what extent does the legal doctrine of *in loco parentis* define the student-institution relationship in the 1980s and early 1990s?

**Justification of the Study**

Laudicina and Tramutola stated that college administrators must become knowledgeable of new laws and regulations in addition to the basic legal principles that have evolved from on-going case law in order to review and reassess policies and practices.\(^{42}\) Similarly, Gehring wrote that "Administrators who recognize the legal issues involved in various situations, are in a better position to use those situations as learning experiences to enhance the moral and ethical development of the student."\(^{43}\) Identified patterns of law enable college and university authorities to make logical decisions based on relevant evidence and reason which reduces error in judgement on the behalf of the administrator or representing attorney.\(^{44}\)

Information must be gathered and analyzed concerning the trends of litigation which illustrate patterns of law between the student and the institution. According to Stamatakos, a coherent model of the student-institution relationship is of critical importance.\(^{45}\) Lawyers, judges, administrators, parents, and students should be concerned that the courts have uniformly failed to elucidate and embrace a legal model of the student-institution relationship.\(^{46}\) Such a model or analysis can contribute to current thinking and influence important court, legislative and policy decisions. Not

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\(^{44}\) Rogers, *The Evolution*, 8.

\(^{45}\) Stamatakos, "The Doctrine of In Loco Parentis," 471.

\(^{46}\) Id.
recognizing a legal model or theory of the student-institution relationship can result in erratic decision making and confusion as to the role of the student and the institution.

Defining the student-institution relationship has been a difficult task and the debate over whether *in loco parentis* is reemerging as a viable legal doctrine of the student-institution relationship in higher education law must be investigated. The nature of the doctrine of *in loco parentis* in the 1980s and 1990s must be addressed to reduce the confusion in the courts and to reduce potential policy errors by institutions of higher education. There has been substantial concern that *in loco parentis* may have adverse effects on institutional policies and liability.\(^{47}\) This study is justified as an attempt to clarify, contribute new knowledge and anticipate further legal change concerning the evolution of the *in loco parentis* doctrine in American higher education.

**Theoretical Framework**

*In loco parentis* was defined in *Black's Law Dictionary* as "in the place of a parent; charged factitiously; with a parents rights, duties and responsibilities (discipline, care, supervision)."\(^{48}\) While this definition was sufficient for purposes of this study, further description of the doctrine adds insight into its complexity and subtleties.\(^{49}\)


\(^{49}\) Legal commentators have defined *in loco parentis* in numerous ways. As cited in a dissertation by Arland Rees, "In Loco Parentis and Student Discipline in Higher Education," (Buffalo, NY: SUNY/Buffalo, 1979): 1; "By *in loco parentis* we mean that the institution is responsible for the general welfare of the student, including moral welfare, much as the parent is responsible for the child." As cited in Harms, *A History of the Concept*, 10; "The concept of *in loco parentis* extends not only to the educational and disciplinary areas of education but also to the areas of moral, physical, and social life to the improvement of human development ... In its broad concept, *in loco parentis* embraces physical education and social supervision of residence halls and clubhouses, health services, student organizations and publications, guidance of many different types, financial aid and scholarships and fellowships." As cited in Rogers, *The Evolution of a Contractual Right*, 1; *in loco parentis* was defined as the student-college relationship "... in which the physical and moral and mental training of the student was the complete responsibility of the college." As cited in Stamatakos, *The Doctrine,* 471; "In its fullest form the doctrine of *in loco parentis* permits colleges to devise, implement
Because *in loco parentis* has been interpreted differently by so many courts, it has become characterized as a broad and imprecise legal doctrine.\(^5^0\) Not only have the interpretations differed, but the existence of *in loco parentis* language has further complicated the simplicity of the doctrine as the doctrine has been recognized by extension in numerous cases.\(^5^1\)

and administer student discipline and to foster the physical and moral welfare of students."

\(^5^0\) The following cases illustrated the evolution and differences in interpretations of the doctrine of *in loco parentis*. The Gott v. Berea College (156 Ky. 376, 161 S.W. 204) court in 1913 described *in loco parentis* in the following manner; "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 . . . the courts are not disposed to interfere, unless the rules and aims are unlawful or against public policy" 206. According to the John B. Stetson v. Hunt (88 Fla. 510, 102 So. 637) court in 1924, "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 regulation does 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" 516, 640. The Bradshaw v. Rawlings (612 F.2d 135 (3d Cir.), cert. denied, 446 U.S. 909) court in 1979 stated, "There was a time when college administrators and faculties assumed a role in loco parentis . . . A special relationship was created between college and student that imposed a duty on the college to exercise control and, reciprocally, gave the students certain rights of protection by the college . . . A dramatic reapportionment of responsibilities and social interests [has taken] place . . . College administrators no longer control the broad arena of morals. At one time exercising their rights and duties in loco parentis, colleges were able to impose strict regulations. But today students vigorously claim the right to define and regulate their own lives" 139.

\(^5^1\) *In loco parentis* language has been recognized by extension, meaning that the term "*in loco parentis*" may be substituted by certain terms or language in reference to the doctrine. As cited in Conrath, "In Loco Parentis," 83; the word "guardianship became a principle part of *in loco parentis* in the English law of the Sixteenth Century. The supervision of religious and moral behavior falls also within the concept of surrogate parenthood. The interpretation of the regulation of moral behavior as parental was acknowledged in the 1970 case of Pratz v. Louisiana Polytechnic Institute (316 F. Supp. 872):" We tend to agree with the line of thinking which states that the modern college or university, which has in attendance thousands of students, is ill-equipped to regulate off-campus social lives and moral lives of its students, thus making futile, and perhaps improper, any attempt to act "in loco parentis."
In loco parentis was based on the view that the college should act as the surrogate parent. It provided a common law basis for maintaining the authority of school personnel over student conduct. In loco parentis first developed as an English Tort principle used in tutor-pupil disputes, particularly issues of corporal punishment. So long as the tutor used no more force than a parent was privileged to use, and so long as its use was related to the maintenance of discipline within the scope of his tutorial authority, the teacher could maintain a defense against a suit for battery on the ground that he was acting in loco parentis.

Blackstone, one of the first to apply the doctrine of in loco parentis, stated that the power must be delegated by the father to the schoolmaster and it included only a 'portion of the power of the parent,' that of restraint and correction.

According to Hogan and Schwartz, in loco parentis had originally been a very narrowly defined doctrine which the American courts adopted and expanded. It was not

Similar in loco parentis language was used in Pyatte v. Board of Regents of University of Oklahoma (102 F.Supp. 407, 72 S.Ct. 567)

[The Board of Regents] has the power to pass all rules and regulations which the Board of Regents considers 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 . . . The great majority of students must have a home away from home while attending school at the University . . .

See also Goldberg v. Regents of the University of California in Chapter Five of this study.

52 Rogers, The Evolution of a Contractual Right, 50.

53 Van Alstyne, "The Tentative Emergence," 403.

54 Jackson, "The Lingering Legacy," 1145.


57 Id. at 260.
long before the school authorities' role, in place of the parent, defined a basis for imposing a duty on the teacher to supervise, subjecting the teacher to liability in tort for breach of that duty. The doctrine of *in loco parentis* then evolved from its limited context of pupil-tutor relations to become the model for all student-institution relationships.

According to Zirkel and Richner, the doctrine of *in loco parentis* represented the status of the school as an institution standing in place of the parent with accompanying responsibility and freedom to discipline. The doctrine imposed a duty on the college to exercise control over the behavior of students. There was also the responsibility or expectation that the college authorities would instill moral values in their students. Under the *in loco parentis* doctrine, students were considered children by the courts and the institutions, and the courts consequently allowed college administrators and faculty essentially the same authority over the student as the parent would have in similar circumstances.

The doctrine of *in loco parentis* had become accepted by society and the courts as the basis for an ordered legal existence on college campuses. Most American courts viewed *in loco parentis* as a justification for non-intervention. However, the doctrine of *in loco parentis* had been broadly interpreted and applied to student-institution disputes, causing it to be surrounded by controversy for decades.


59 Jackson, "The Lingering Legacy," 1145.

60 Zirkel and Richner, "Is the In Loco Parentis Doctrine Dead?," 271.


Overview of the Methodology

The traditional methodology of legal research was used to identify judicial reasoning concerning established legal principles as applied to the doctrine of *in loco parentis* in defining the student-institution relationship. As stated by Mouly:

> Legal research is subject to the same general requirements as other forms of research. The task is to summarize pertinent statistics, to trace further legal developments though related court decisions, and finally to analyze the decisions in light of the problem under investigation.63

In addition, legal research must reflect the dynamic and evolutionary nature of the law. According to Beckham and Leas, "a legal proposition which arises out of a case is made into a rule of law which is then applied to a new, similar case."64 Similarly, Cardozo recognized the evolutionary process of gradual court modifications when he stated:

> The rules and principals of case law have never been treated as final truths, but as working hypotheses, continually retested in those great laboratories of the law, the courts of justice. Every new case is an experiment; and if the accepted rule which seems applicable yields a result which is felt to be unjust, the rule is reconsidered.65

It was the evolutionary nature of *in loco parentis* that caused changes and a re-framing of the doctrine. For that reason, legal research methodology must allow the researcher to recognize changes as they occur from precedent to precedent. The methodology used allowed for a chronicled depiction of related case law.66

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66 A complete description of the legal research methodology used in this study can be found in Chapter Three.
A list of relevant federal and state appellate court cases were located through comprehensive legal research. Federal and state appellate court cases based on or concerned with the doctrine of *in loco parentis* were analyzed. Legal analysis of the legislation was then conducted. Relevant federal legislation was located through legislative research procedures and analyzed in regard to *in loco parentis* qualities as defined in *Black's Law Dictionary*. Federal legislation, passed in the last ten years, was analyzed only as it addressed parental type institutional responsibilities of the 1980s and early 1990s. These analyses identified the evolution of the legal doctrine of *in loco parentis* as it applied in the higher education setting.

**Limitations and Delimitations of the Study**

This study has the following limitations and delimitations:

1. The cases reported in this study relied on reported federal and state appellate court decisions only. Unreported cases, and cases that were settled out of court or within the institution, were not reviewed.

2. With the exception of the literature review, the status of *in loco parentis* was explored only in regard to higher education in the United States.

3. This study did not include an analyses of cases involving elementary and secondary institutions. Any such cases mentioned were considered only as they were immediately applicable to higher education.

4. Discussion of legislative enactments were limited to those which were directly related to the *in loco parentis* doctrine and higher education during the 1980s and early 1990s

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67 See footnote 51, Chapter One, of this study for a description of *in loco parentis* language.
Definition of Terms

The following terms are used throughout this study. Definitions were acquired from Black’s Law Dictionary unless otherwise cited.68

**Appellant.** The party who makes an appeal for a review of the case from an inferior (trial) court to a superior (appellate) court because the party lost the case at the inferior level. Used broadly as one who sues out of writ of error.

**Appellate court.** A court having jurisdiction of appeal and review. A reviewing court.

**Breach of duty.** Failure to fulfill the duty owed to another.

**Case law.** The aggregate of reported cases forming a body of jurisprudence, or the law of a particular subject as opposed to statutes and other sources of law.

**Charitable immunity.** A doctrine which relieves a charity of liability in tort; long recognized, but currently most states have abrogated or restricted such immunity.

**Common law.** Law which develops from court decisions as distinguished from legislative enactments.

**Contract.** A legally enforceable agreement which occurs between two or more parties that creates an obligation to do or not to do a particular thing.

**Defendant (appellee).** The party against whom relief is sought in an action or suit. The accused in a criminal case. In an appellate court, the person who won at the lower court and against whom an appeal is taken is the appellee.

**Injury.** Any wrong or damage done to another, either in his person, rights, reputation or property.

**In loco parentis.** In the place of a parent; charged, factitiously, with a parent’s rights, duties and responsibilities (discipline, care, supervision).

**Liability.** A legal responsibility; the state of one who is bound in law and justice to do something which may be enforced by action.

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Negligence. The omission to do something which a reasonable man would do. Failure to use such care.

Plaintiff. The person who initiates an action; the party who complains, sues, or seeks remedial relief for an injury to rights.

Precedent. An adjudged case or decision of a court, considered as furnishing an example of authority for an identical or similar case afterwards arising or a similar question of law. A rule of law established for the first time by a court for a particular type of case and thereafter referred to in deciding similar cases.

Reasonable. Fair, proper, just, moderate, suitable under the circumstances; fit and appropriate to the end in view; rational; governed by reason.

Sovereign immunity. A judicial doctrine which precludes bringing suit against the government without its consent. Most states have waived immunity in various degrees at both state and local government levels.

Third party. One not a party to an agreement, a transaction, or an action but who might have rights therein.

Tort. A legal wrong committed upon the person, reputation, or property of another, independent of contract.

Writ of Mandamus. A mandatory precept issued for the purpose of compelling a person to do something therein mentioned.

Organization of the Study

This study was organized into eight chapters. Chapter One contained the introduction, the statement of the problem, the purpose of the study, the theoretical framework, an overview of the methodology, limitations of the study and definition of terms. In Chapter Two a review of the doctrine of *in loco parentis* as it is developed in the literature was presented. This included a review of *in loco parentis* as it existed in English Common Law and as it shaped higher education in the United States. Chapter Three focused on the methodology of the study. Chapters Four, Five and Six included
analyses of relevant, historical appellate court cases. More specifically, Chapter Four focused on appellate cases from 1900-1960 that reflected the emergence of *in loco parentis*. Chapter Five focused on appellate cases from 1960-1980 that reflected the decline of *in loco parentis*. Chapter Six focused on appellate cases from 1980-1994 that addressed the responsibility of higher education institutions to determine if *in loco parentis* was a viable legal doctrine in the 1980s and early 1990s. This was followed by Chapter Seven in which an analysis of legislation that directly related to higher education liability in the 1980s and early 1990s was presented. Chapter Eight contained conclusions drawn from the appellate case law and federal legislation analysis, responses to legal questions, recommendations for institutions of higher education, and recommendations for future research.
CHAPTER TWO
REVIEW OF THE RELATED LITERATURE

English Law and the In Loco Parentis Doctrine

Many of the common laws of the United States had their origin in England. The concept that an instructor stood in loco parentis to his students was evident in early English common law. The *Laws of England, (1910), Vol. XII, Education Part X, Sec. 2, Common Law Rules, Para. 284* stated:

> The Master is in loco parentis: the parent delegates to him all his own authority over the child, so far as it is necessary for the child's welfare though this delegation is revocable. The parent further 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 which he has expressly or impliedly agreed. The Master is bound to take such care of his pupils as a careful father would take care of his children.¹

Under this paternalistic regime, students at Cambridge and Oxford were expected to adhere to numerous rules and restrictions. Before enrollment largely began to increase, it was not unusual for college students at Cambridge and Oxford to live with the president of the institution. The presidents of the institutions were largely responsible for emphasizing religion and upholding the rules of the institution. They were generally considered as acting in loco parentis in regard to housing, discipline, morality, academic and other aspects of student life.²


As attendance at Oxford and Cambridge increased, however, concern about the student outside the lecture hall prompted the establishment of residential colleges. They were designed to bring faculty and students together in a common life which was both intellectual and moral. Students who resided in the halls were governed by strict regulations. There were rules for table manners, moral behavior, conversation, church-attendance, singing in public and traveling into town.

Town-Gown violence also contributed to the institutions obligation to protect students. For example, the battle of St. Scholastica's Day at Oxford (February 10, 1354) was described as follows:

One day eighty armed townsmen attached 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.

As a result of this violence, the King granted the University complete jurisdiction over the town. The institution had the power, in loco parentis, to control the behavior of their students and the obligation to protect them.

American Law and the In Loco Parentis Doctrine

The colonial colleges were established by graduates of the English universities. The first American colleges were thus largely reproductions of English institutions. In a letter to William Van Alstyne, Henry Steele Commager stated 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


5 Id. at 125.
and 15. They were, for the most practical purposes, what our high school youngsters are now. They did need taking care of, and tutors were in loco parentis.6

E.G. Williamson agreed stating that colleges felt an obligation to play the role of the parent in hope of raising moral, well-mannered gentlemen. Williamson also noted that in loco parentis was transferred to American colleges because religion was so vital in education that colleges saw themselves as parental guides to spiritual growth.7

The orientation of the colonial college was religious but the relations between the church and the college were diverse.8 "Colonial colleges were poor and in close dependence on the community; the Church controlled them and the State supported them."9 The early colonial colleges reflected Puritan values and attempted to regulate nearly all aspects of student life. Most of the colleges required prayer and church attendance. Compulsory chapel attendance was used for moral supervision and religious indoctrination.10 Clergymen and faculty believed that students should be protected, and as a result, their behavior at college was strictly regimented.

According to one scholar, colleges "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."11

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10 Brubacher and Rudy, Higher Education, 44.

Another scholar similarly stated that the colonial college concerned itself with numerous parental functions such as "housing, boarding, recreation, general welfare, manners, morals, and religious observances, as well as intellectual development" of its students.\textsuperscript{12} For example, at Harvard students could be punished for being absent from quarters except during certain hours, tardiness, going outside the yard without coat or gown, absence from worship, possession of a gun, fighting, lying, gambling for money, swapping books or clothing, indecent noises, using or sending for distilled spirits, profane swearing, cursing, playing cards or dice, walking or other diversions on the Sabbath, picking locks or doors, blasphemy, forgery, or any other very atrocious crime.\textsuperscript{13}

Student housing, succinctly phrased as "the collegiate way of living," provided "homes" where faculty and students lived together in an atmosphere of intellectual and academic pursuit.\textsuperscript{14} The "collegiate way of living," emphasizing the enforcement of in loco parentis was criticized by many from the beginning. In 1800, Reverend Cutler stated that residence halls were the "secret nurseries of every vice and the cages of unclean birds."\textsuperscript{15} In addition, President Wayland of Brown argued that residence halls provided a menace to the maintenance of the system of paternalistic discipline and close supervision of student life which he felt to be essential.\textsuperscript{16}


\textsuperscript{14} Brubacher and Rudy, \textit{Higher Education}, 41.

\textsuperscript{15} Id.

\textsuperscript{16} Id.
Professors and tutors were responsible for maintaining student discipline which they enforced under the doctrine of *in loco parentis*. Germano wrote that "*in loco parentis* was a principle factor in the preservation of Puritan authoritarianism, for it effectively insulated faculty and administrators from the legal consequences of their actions."\(^{17}\)

Faculty became students' enemies as they struggled to enforce chapel attendance, disciplinary regulations and daily restrictions. As early as 1801, institutions began to be faced with an outburst of "orthodox religiosity." The college atmosphere was emotional, subjective, romanticist--a far cry from the rational temper of seventeenth-century Puritan Christianity.\(^{18}\)

Brubacher and Rudy stated that from the colonial period through the Civil War, colleges were battlegrounds between students and faculty: "it was pre-eminently, a period of rowdies, riots, and rebellions."\(^{19}\) In most colleges, the traditional authoritarian system, based on *in loco parentis*, remained the rule. Faculty were still responsible for discipline. Their role was to be "detectives, sheriffs, and prosecuting attorneys" in pursuit of controlling student conduct both in and out of the classroom.\(^{20}\)

According to Sheldon, "They were in duty bound to capture and punish all rebels against the severe college discipline of the time."\(^{21}\) This rigid, paternalistic regime was based on the "sternly pietist and religious matrix of the old-time college."\(^{22}\) The breaking of institutional rules would result in severe punishment. The most dramatic response of

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19 *Id.* at 50.

20 *Id*.

21 Sheldon, *Student Life*, 95.

the pre-Civil War college student to the strict disciplinary systems of institutions was violence and open rebellion.\textsuperscript{23} Student rebellions against the rigorous discipline strategies of the paternalistic colleges posed serious problems for many colleges. Because American colleges lacked the legal power of the European universities they were helpless in the face of these disturbances.\textsuperscript{24}

The 150 years of colonial tradition in American education established the tone and character of American educational institutions in the centuries to follow. Brubacher and Rudy noted that rebellions diminished as colleges made changes in the curriculum, lightened up on discipline, began treating students like young adults, accepted female students, and began emphasizing athletics and a fraternity system.\textsuperscript{25} Also, institutions ceased to require the faculty to act as police and instead hired a special force of campus police.

In addition, personnel services developed in the United States. As one scholar stated:

Often the student was living away from home and needed the 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 \textit{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 their duty in parental status to aid the students in moving into their rightful place in society as full participants.\textsuperscript{26}

According to C. Bakken, \textit{in loco parentis} found its strongest ally in personnel services.\textsuperscript{27}

\textsuperscript{23} \textit{Id.} at 53.

\textsuperscript{24} \textit{Id.} at 54-55.

\textsuperscript{25} \textit{Id.} at 55-56.

\textsuperscript{26} Harms, "A History of the Concept," 83.

Despite some minor gains on behalf of the student, and the development of personnel services, the imbalance between student and institution was still evident. According to Professor Beaney:

Whatever the traditions of Medieval European universities, or the traditions or practices in other parts of the world, American institutions assumed that their power - administered through governing boards and officials acting under their authority - to control the academic program was unlimited, and that there were few if any limits on their power to control the noncurricular activities of students.\(^{28}\)

Regardless of efforts to be less authoritarian, the student-institution relationship remained rather strict and the students and institutions found themselves increasingly in court to settle disputes.

The earliest case applying in loco parentis was State v. Pendergrass.\(^{29}\) In this case the Supreme Court of North Carolina held that teachers were delegated authority, similar to that of a parent. While no authority was cited by the Court, it was adopted by many courts as precedent supporting the use of corporal punishment by the teacher or administrator. Although the doctrine of in loco parentis was first applied to provide authority for school discipline, it was not long before the teacher's or administrator's legal role, in place of the parent, defined a basis for imposing the duty to supervise, so as to subject the teacher or administrator to liability in tort for breach of this duty.\(^{30}\)

Another case to challenge the provisions of the in loco parentis doctrine was decided in 1847 by a Maine court.\(^{31}\) The Court ruled that anyone over twenty-one years of age was


\(^{29}\) State v. Pendergrass, 19 N.C. 348 (1837).

\(^{30}\) Robert Bickel, "The History of the Application of the Doctrine of 'In Loco Parentis' to Characterize the Legal Relationship of the College to its Students and the Misperception of its Applicability in Defining the College's Duty to Provide a Safe Learning Environment" (Lecture, Stetson University College of Law, 1993): 2.

\(^{31}\) Stevens v. Fassett, 27 Me. 266 (1847).
considered to be in the same category as any student under twenty-one years of age. If the student voluntarily attended an institution, the rules of common law and the concept of in loco parentis were to be applied, regardless of age. In 1866 an Illinois court ruled in Pratt v. Wheaton College, that a college rule that forbade its students from joining secret societies was not unreasonable. The Court viewed the institution as being different from the larger society in that the institution could determine rules and penalties that were different from society's rules and penalties. In this case, the Court determined that joining a secret society would reduce faculty control and would impair the institution's ability to discipline its students. The Court saw nothing inconsistent in expulsion for violation of rules and thought it absurd to even think that a college could not take this action under such circumstances. The Court recognized that a discretionary authority had been given to the College "... to regulate the discipline of (the college) in such manner as (the college) deem[s] proper; and, so long as their rules violate neither divine nor human law, (the courts) have no more authority to interfere than (they) have to control the domestic discipline of a father in his family." Consequently, as long as a rule did not violate good morals or law of the land, student discipline was thought to be a matter of discretion of the college authorities.

In the years after 1865, two opposing concepts of college discipline increasingly came into conflict. The first of these dated back to the colonial colleges and was based

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32 Id.

33 People ex rel. Pratt v. Wheaton College, 40 Ill. 186 (1866).

34 Id.

35 Id.

36 Id. at 187.

37 Brubacher and Rudy, Higher Education, 123.
on the paternalistic system in which colleges looked after the moral as well as the intellectual development of its students. This concept, also referred to as the "collegiate way of living" stressed the importance of housing students, compulsory chapel attendance and the enforcement of in loco parentis. Under this system a faculty member's point of view was well stated by President Taylor of Vassar in 1893:

One is obliged to suspect, at times, that the student comes to be a mere disturber of ideas and schemes, and as a disquieting element in what, without him, might be a fairly pleasant life.

The second concept of college discipline came into prominence after the introduction of the elective system in the late 1800s. This concept was patterned after the German universities and regarded students as responsible adults, rather than as children. The emphasis on utilitarian considerations and democracy made the traditional paternalistic approach seem increasingly out of place. While Puritan ideals influencing the student-institution relationship may have started to relax, the courts continued to recognize in loco parentis as an important doctrine in determining cases between the student and the institution.

In an Indiana court in 1882, a plaintiff brought suit against a college when he was denied admission because he refused to sign a pledge to sever the relationship with his fraternity. In this case the Court stated that upon admission the institution, the student, by implication, promised to submit to and be governed by all the rules of the

38 Id.


40 Brubacher and Rudy, Higher Education, 123.


42 State ex rel. Stallard v. White, 82 Ind. 278, 42 Am. Rep. 496 (1882).
institution so long as the rules were not unlawful. The Court made it clear that admission could not be denied because of refusal to sign a pledge to sever his relations with the secret organization. However, the Court also stated that as long as the rules were not contrary to law or common usage, the institution's authorities had wide discretionary powers. Basically, the Court believed that the institution could act on behalf of what they believed to be in the best interest of the student as long as it was not unlawful.

In 1887 a Pennsylvania court heard the Hill v. McCauley case in which a student was dismissed for "hooning, jeering, singing of disrespectful songs, and throwing stones". There was never any doubt in the Court's mind that the faculty had the power to enforce rules and regulations; the only issue was the procedure used to investigate guilt or innocence. The Court stated that

> the 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 impaired; if not utterly destroyed . . .

The Court noted that dismissal must be a lawful dismissal and that the Court could not do so on a charge of disorderly conduct, except on a hearing or trial in accordance with lawful procedure. This case followed previous rulings that the courts would not interfere except when the institution's actions were considered unlawful.

In 1891, in the North v. Trustees of the University of Illinois case, the Court recognized that a student at a university is different than a citizen in society and must surrender some of the individual rights that are afforded to a typical citizen. In this

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44 Id. at 87.

45 North v. Trustees of University of Illinois, 137 Ill. 296, 27 N.E. 54 (1891).
expulsion case, the plaintiff went before the Court to request a writ of mandamus to be reinstated. The plaintiff had been expelled for failing to comply with the university rule to attend chapel. The Court stated that while a citizen has the right to use his time as he pleases so long as he does not interfere with the rights of others, a student, on the other hand, surrenders some of the individual rights afforded to citizens in society at large. The Court stated that when a citizen enters a university, he becomes subservient to the will of those who have authority over him. Emphasizing moral and religious principles, the Court stated, "It may be said with greater reason that there is nothing in that instrument so far discountencing religious worship that colleges and other public institutions of learning may not lawfully adopt all reasonable regulations for the inculation of moral and religious principles . . ." The institution could determine how student's time was occupied, their conduct, where they visited, and recreation they engaged in. The Court did not view this as an invasion of personal liberty for there was ample provision in the constitution to protect the student from the enforcement of any institutional rules that were unlawful or infringed upon the students personal liberty.

Elementary and Secondary Education and the In Loco Parentis Legal Doctrine

Although not the focus of this study, a discussion of the legal doctrine of in loco parentis in relation to elementary and secondary education has relevance. While a complete analyses of the literature, cases, and legislation has not been attempted, a brief overview of the doctrine as it influenced elementary and secondary education has been presented.

In loco parentis has traditionally been used as a defense for certain teacher conduct in the classroom and as a protection for teachers who administered corporal punishment.47

46 Id. at 56.

47 Zirkel and Richner, "Is In Loco Parentis Dead?," 466.
This protection took the form of "broad, but not unlimited, defense in criminal and civil suits for assault and battery." In loco parentis permitted punishment for misconduct and the enactment of rules designed to protect the morals, welfare, and safety of students. In loco parentis was used to defend the use of discipline (corporal punishment, suspension, or expulsion) for acts committed both on and off the school ground.

Elementary and secondary school teachers and administrators were given broad powers to maintain order. A teacher could be held liable only if it could be found that permanent injury resulted or "legal malice" was involved. In the late 1880s, a second line of reasoning regarding what constituted reasonable punishment emerged. Courts ruled that reasonableness was a question of fact, to be determined by a jury. In 1878, a Wisconsin court stated that the principal or teacher "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." There was a presumption that the exercise of discipline, based on the doctrine

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48 Id.


50 Id. See Boyd v. State, 113 Ind. 276, 15 N.E. 341 (1878); Mangrum v. Keith, 147 Ga. 603, 95 S.E. 1 (1917).

51 Id. See Commonwealth v. Seed, 5 Clark 78 (Pa.) (1851); Lander v. Seaver, 32 Vt. 114, 76 Am. Dec. 156 (1859).

52 Id.

53 Id. See Sheehan v. Sturges, 53 Conn. 481, 2 A. 841 (1885).

of in loco parentis allowed the teacher or principal to exercise "judgement of a reasonable man."  

Many of the cases decided during the 1900s strengthened the concept of in loco parentis in regard to corporal punishment at the elementary and secondary grade level. By the mid 1900s, however, most courts had changed their thinking in regard to unrestricted corporal punishment:

It might have been said, in days when schooling was a voluntary matter, that there was an implied delegation from the parents to the school...[but] parents no longer have the power to choose either the public school or the teacher in the public school. Without such power to choose, it can hardly be said that parents intend to delegate the authority to administer corporal punishment by mere act of sending their children to school.

In addition, the Warren Court, active in 1953, and the Burger Court, active in 1969, rendered many decisions that changed, or influenced courts to change the concept of in loco parentis. Prior to the Warren Court, the rights of teachers in loco parentis, took precedence over the rights of students. The definition of the teacher standing in loco parentis, after the Warren and Burger courts, took into account the teacher's right to


59 Id. at 108.
control and discipline students but also admonished the teacher to protect the constitutional rights of students.\textsuperscript{60}

During the past two decades, most courts have favored a narrower application of \textit{in loco parentis}. The courts have limited the power of \textit{in loco parentis} "by allowing reasonable punishment in light of the totality of circumstances, including such factors as the nature of the infraction, the method of discipline, and the age of the student."\textsuperscript{61}

Alluding to \textit{in loco parentis}, the United States Supreme Court stated:

\textit{Although the early cases viewed the authority of the teacher as deriving from the parents, the concept of parental delegation has been replaced by the view- more consonant with compulsory education laws- that the state itself may impose such corporal punishment as is reasonably necessary 'for the proper education of the child and for the maintenance of group discipline.'}\textsuperscript{62}

Consequently, parental delegation has evolved to state delegation to meet the special circumstances of public schools.\textsuperscript{63}

In addition to corporal punishment, \textit{in loco parentis} has been used in regard to developing and supporting school rules.\textsuperscript{64} Although \textit{in loco parentis} has been successful\textsuperscript{65} in justifying many school rules, it has been less successful in other cases.\textsuperscript{66} According to Zirkel and Richner, \textit{in loco parentis} is alive and thriving as a

\textsuperscript{60} \textit{Id.} at 105-106.

\textsuperscript{61} Zirkel and Richner, "Is In Loco Parentis Dead?", 467. See Garrett v. Olson, 691 P.2d 123 (Or.App. 1984).

\textsuperscript{62} Ingraham v. Wright, 430 U.S. 651 (1977).

\textsuperscript{63} Zirkel and Richner, "Is In Loco Parentis Dead?" 468.


justification for school rules that are reasonably related to the general purpose of education.67

In addition, in loco parentis has been formidable at the elementary and secondary level in regard to supervision issues. Students have claimed that the failure of the school to properly exercise supervision resulted in a breach of duty, resulting in liability.68 This doctrine has been met with a fair amount of success in grade schools, where the students are minors in need of supervision.69 In the 1980s and early 1990s it appeared that in loco parentis at the elementary and secondary school levels was a viable legal doctrine in addressing issues such as corporal punishment, rules and regulations and to some extent, supervision.

Critics of the In Loco Parentis Doctrine

In loco parentis has been met with sharp criticism from its inception.70 The 1960s, however, marked the height of the legal commentator's condemnation of in loco parentis as a viable doctrine addressing the student-institution relationship. William Van Alstyne, a noted legal writer and an ardent defender of student rights, was one of the most outspoken critics of in loco parentis. In regard to in loco parentis he stated: "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."71

67 Zirkel and Richner, "Is In Loco Parentis Dead?," 469.


69 Dumas, Defective Buildings," 3.

70 Curry v. Lasell Seminary Co., 168 Mass. 7, 46 N.E. 110 (1897) Student expelled for visiting parents on Sunday.

In 1965, Strickland argued that a college did not have an identical relationship with its students that parents have with their children because if it could, the college could impose the same corporal punishment as parents, minor students could not marry without the college's consent and the college would have a duty to support its students financially. Strickland supported Van Alstyne's argument by recognizing the following reasons why a college's authority is not like that of a parent:

(a) colleges provide services that parents can not or will not themselves provide; (b) parents do not necessarily approve of, or even know of, all the aims of the college (or, rather, all the aims of the disparate officers and teachers); (c) the college undertakes to put a final touch on a long process of training, not to wean, love, shield, and attend the child; and (d) the sending of a child to college, whether or not it works emancipation, is generally done with clear knowledge the child assumes new responsibilities for his own physical and moral welfare.

Similarly, legal commentator Sally Furray stressed that the in loco parentis analogy was weak in that real parents may not legally sever all ties with their offspring as educational institutions do. In addition, Alvin Goldman stated that in loco parentis "does not explain the school's power to regulate student conduct when the student acts with his parent's consent," nor does it explain the basis of authority over an emancipated pupil or one who has reached majority.

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73 Id. at 337.


At the center of most critics' arguments over *in loco parentis* has been the issue of the age of the college student. Historically, the early American colleges and universities were attended by very young students who it was believed needed discipline, spiritual, and moral guidance. However, many critics of *in loco parentis* contended that these needs no longer existed with older students being the majority of students on campus. As stated by Brittain, the parental role has been based on the theory that one stands in place of the parent.\(^77\) The college student who is past the age of the majority is no longer subject to parental control and thus would not be subject to a college's *in loco parentis* control.\(^78\) Van Alstyne, at the heart of his argument, contended that *in loco parentis* became irrelevant when the mean age of college students became twenty-one. As stated by Young and Gehring, "The doctrine of *in loco parentis* is not legally tenable today. With a lowered age of the majority in most states, almost all college students today are legally adults."\(^79\) Similarly, Dublikar contended that students are too old to be "parented" and that the "college had the authority of parents, but not the responsibility."\(^80\)

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78 Id. at 733.


Although there are some elements of *in loco parentis* on campus today (for example, providing for the health care, safety and general welfare of students), colleges are under no legal compulsion to provide for such, although some students do indeed seek such (for example, when they ask for the dean to bail them out of jail or seek help concerning abortions, etc.) Strictly speaking, *in loco parentis* as a legal doctrine has no legal validity in a public institution today, although it may depend upon how that term is defined. Certainly the institution can provide for the health, safety and welfare of its students.

In addition to the lowered age of the majority by the Twenty Sixth Amendment, Kaplin cited two additional factors that contributed to the demise of *in loco parentis*: 1) the emergence of the student-veteran, and 2) the loosening of the "lock-step" pattern of educational preparation that led students directly from high school to college to graduate work. Kaplin stated:

The notion that attendance was a privilege seemed an irrelevant nicety in an increasingly credentialized society. To many students higher education became an economic or professional necessity, and some, such as the G.I. Bill veterans, had cause to view it as an earned right. Student protests, the draft, the Vietnam War, and the Civil Rights Movement encouraged student independence. During this time, students demanded to be viewed and treated as adults rather than as children. Institutions, society and the courts obliged this student request. Consequently, changes in the student clientele largely influenced the evolving legal status of students away from the traditional *in loco parentis* doctrine.

Critics of *in loco parentis* also cited the growing size of institutions as limiting the viability of the *in loco parentis* doctrine. Brittain recognized that "colleges in the past were generally small, closely knit communities which, in some respects, duplicated family life." However, he stated "It is an obvious fallacy . . . to contend that a college with as many as eight thousand students duplicates in any manner the close supervision and personal relationship that the family maintains." Stamp stated that *in loco parentis* was an oversimplification for "no university with a student body numbering in

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81 Kaplin, The Law, 6.

82 Id.

83 Brittain, "Colleges and Universities," 734.

the thousands could possibly assume the role of a surrogate parent for each student."\textsuperscript{85} Van Alstyne stated 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."\textsuperscript{86}

Other critics have noted the public v. private distinction in justifying the demise of in loco parentis. D. Parker Young stated, "In contrast to the constitutional standards applied to the legal relationship between students and a public institution, a private college is free to promulgate and enforce reasonable rules and regulations with less fear of judicial restraints."\textsuperscript{87} According to Brittain, most college students attend state supported public institutions rather than private institutions. This was noteworthy because "a state supported institution can use legislative enactments as a justification for disciplinary action; but a private college must frequently employ common law principles, such as in loco parentis, for justification of authority."\textsuperscript{88} Since the earliest cases regarding in loco parentis concerned private institutions, Brittain concluded that the courts' decisions to uphold in loco parentis may have been merely an indication of judicial reluctance to interfere in the realm of the private college. For this reason, Brittain rejected any transfer of the in loco parentis doctrine to state institutions.\textsuperscript{89}

Brittain identified three additional reasons for the demise of in loco parentis: 1) the gradual rejection of the doctrine in case law, 2) the rejection of the surrogate parent


\textsuperscript{86} Van Alstyne, "The Student," 591.


\textsuperscript{88} Brittain, "Colleges and Universities," 733-734. See Gott v Berea College, 156 Ky. 376, 161 S.W. 204 (1913) and John B. Stetson v. Hunt, 88 Fla. 510, 102 So. 637 (1924).

\textsuperscript{89} Id. at 734.
role by increasing numbers of administrators, and 3) the declared opposition to its use by legal commentators, educators and students.\textsuperscript{90} Callis rejected \textit{in loco parentis} simply because he felt it was not necessary to the college to achieve its mission. He stated, "The mission that the college is authorized to perform is education and therefore, the relationship between a college and its students is an educational one."\textsuperscript{91}

Van Alstyne, however, recognized a value or "benevolent edge" to \textit{in loco parentis} when he indicated that it acted as a shield for the student where college rules and civil laws overlap. He stated "[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."\textsuperscript{92} A critical point that Brittain made was that \textit{in loco parentis} acted as a two edged sword. The doctrine that permitted the university to discipline a student also required that the university assume the responsibilities of protecting the student. Brittain stated that very few colleges were willing to expose themselves to the back edge of this blade.\textsuperscript{93}

According to critics of \textit{in loco parentis}, colleges lost their previous autonomy to discipline students without allowing them First Amendment and due process rights. It was realized that institutions could no longer discipline students without the fear of judicial intervention. In a 1969 study, edited by Caffrey, numerous commentators protested the further use of \textit{in loco parentis}.\textsuperscript{94} In general, they dismissed as outmoded

\textsuperscript{90} \textit{Id.} 715-741.
\textsuperscript{92} Van Alstyne, "Procedural Due Process," 377-378.
\textsuperscript{93} \textit{Id.} at 737.
the concept of in loco parentis, "that umbrella under which both parents and personnel deans 'sheltered' students for so many generations." According to Zirkel and Richner: "In sum, the college context is the only one in which the in loco parentis doctrine has undergone a clear rise and complete demise in our courts." In regard to the assertion that there has been a "new in loco parentis" arising in the 1980s, critics such as Stamatakos have disagreed by stating "courts assessing the 'special relationship' between student and college are merely recognizing a liability rooted in long-standing tort duties which arise when a party acts as supervisor, landlord or controller of third persons. Institutional liability is now manifested in traditional tort law principles, not the lifeless in loco parentis doctrine." Stamatakos also noted that the "new in loco parentis" that has been discussed referred to the physical welfare of students whereas the traditional in loco parentis extended to moral welfare and student discipline. Stamatakos warned about the dangers of announcing the coming of a "new in loco parentis . . . that carries none of its traditional baggage." Stamatakos concluded, "In loco parentis was rejected because it no longer adequately manifested the dynamic legal relationship between college and student; it would be regressive to restore the lifeless doctrine."


96 Zirkel and Richner, "Is the In Loco Parentis Doctrine Dead?," 283.


98 Stamatakos was referring to the article that was written by Szablewicz and Gibbs entitled "Colleges' Increasing Exposure to Liability: the New In Loco Parentis."


100 Id.

101 Id. at 490.
Supporters of the In Loco Parentis Doctrine

Perhaps the most ardent proponent of preserving in loco parentis in the 1960s and 1970s was Assistant to the Dean of Students at California State College at Long Beach, Clarence J. Bakken. Bakken believed that in loco parentis was a necessary doctrine which served to prevent punishment of college students from being solely punitive. He was concerned that without a continuance of in loco parentis, discipline would lose its educational aspect and any reasons for guidance and counseling would be lost.

Bakken outlined three basic areas of college life where in loco parentis was most applicable: student activities, housing, and student discipline. He stated, "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 unmarried minor students its principal concern." He cited institutional rules governing alcohol and visitation as being illustrative of in loco parentis.

Bakken believed that the "ultimate application of the legal formula of in loco parentis" was applied to issues of student discipline. Bakken stated that law enforcement officials have often turned over students who violated community regulations to the custody of the college. This has been said to be similar to when a minor has been turned over to the custody of a parent for discipline when the minor

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103 Id.
104 Id.
105 Id.
106 Id.
resided with the parent. Bakken quoted the American Association of University Professors (AAUP):

If students violate laws, institutional officials should apprise them of their legal rights and offer other assistance. The institution should assert its own authority only when its interests differ from those of the general community.

Bakken believed that this statement implied that the institution should act in place of the parent and protect students from the larger community.

Kelly further noted in the General Order and Memorandum on Judicial Standards of Procedure and Substance in Tax Supported Institutions of Higher Education that the institution was forced into an in loco parentis position when it distinguished a lesser disciplinary sanction from a greater sanction that would be imposed against a non-student who committed an identical criminal act. Kelly stated that when an institution issued a lesser disciplinary sanction, it specified that the lawful aim of those actions may be simply to teach proper behavior thus supporting the institutions role in loco parentis.

107 Id. at 235-236.

108 Id. at 236 citing "Statement on academic freedom of students," AAUP Bulletin 51 (1965): 447-449. In 1967 and 1990 a joint committee formulated a "Joint Statement on Rights and Freedoms of Students." The only statement in regard to civil arrests is noted the section entitled "Off-Campus Freedoms of Students". It reads, "Students who violate the law may incur penalties prescribed by civil authorities, but institutional authority should never be used merely to duplicate the function of general laws. Only where the institution's interests as an academic community are distinct and clearly involved should the special authority of the institution be asserted." cited in National Association of Student Personnel Administrators, Joint Statement on Rights and Freedoms of Students (Washington, DC: National Association of Student Personnel Administrators, Inc., 1992): 10.

109 Bakken, "Legal Aspects," 236.


111 Id.
Pursuing a separate issue, Bakken rejected the notion that in loco parentis was outmoded on the premise that students were "different" from students of an earlier time. He stated, "... after thousands of interviews with students as a counselor and disciplinarian ... the student of today is little different from the student ... some forty years ago ... the paternalistic approach to student conduct practiced over the years is an expected approach and has become through usage the common law of college student personnel administration." 112

Hobbs argued that in loco parentis had always been operative in regard to private or church-affiliated institutions. 113 Hobbs stated that the viability of the doctrine of in loco parentis has been evident in regard to the institution's responsibility to protect students and "free speech" issues. 114 Similarly, Jackson stated, "The continuing debate over hate speech rules on American campuses further illustrates an institutional reluctance to relinquish rigid parental control 115 ... the legal doctrine of in loco parentis continues to influence the legal status and internal policies of many American multiversities." 116

In his dissertation, Edward Harms, borrowing from E.G. Williamson, stated that in loco parentis had evolved from a "fatherly repression" to a "benevolent and humane

112 Bakken, "Legal Aspects," 236.


114 Id. at 8.

115 Jackson stated that the arguments used to justify hate speech rules are remarkably similar to those used by early courts to invoke the in loco parentis theory (ie. regulate student conduct) The Supreme Court has invoked in loco parentis to suppress offensive speech by high school students; see Bethel School District No. 403 v. Fraser, 478 U.S. 675, 684 (1986).

116 Jackson, "In Loco Parentis," 1137. Jackson used the term "multiversity" to describe those institutions that are "true universities in the European sense" (large institutions composed of numerous undergraduate and professional schools).
parenthood."\textsuperscript{117} John Brubacher stated that the college stands in loco parentis yet he recognized that this parental authority had become more relaxed just as parental authority in society has become less strict.\textsuperscript{118} Similarly, Williamson noted that "While experience over the centuries clearly indicates that paternalism frequently has rigidified into Orwellian 'Big Brotherism,' the record is by no means a dismal chronicle of parental oppression."\textsuperscript{119}

Harms further stated:

The deep commitment and environment of the educational institutions in areas of housing, food service, loans, scholarship, tuition, health, recreation, guidance, and placement services indicates not only a belief in the concept but also the continued participation with perhaps even more responsibility on the part of the institutions.\textsuperscript{120}

Harms noted that abandoning in loco parentis would be failing to meet the needs of the students.\textsuperscript{121} He argued: "To treat the student as any other citizen, as some legal advocates would contend is the proper procedure, would be to deny them the authority to accomplish their unique mission."\textsuperscript{122}

In 1963, Clark Kerr mentioned that "there is an incipient revolt of undergraduate students against the faculty; the revolt that used to be against the faculty in loco parentis

\textsuperscript{117} Harms, "A History of the Concept," 144.


\textsuperscript{120} Id. (Note: the word "responsibility," as used by the author, referred to non-completion, student drop-outs and re-training of students.

\textsuperscript{121} Harms, "A History of the Concept," 128.

\textsuperscript{122} Id.
is now against the faculty in absentia.\textsuperscript{123} Gregory and Ballou stated that since 1970 there has been a growing tendency on the part of legal scholars and student affairs professionals to advance a parenting function that they had gotten away from.\textsuperscript{124} The authors recognized that elements that aided the erosion of the applicability of \textit{in loco parentis} in the 1960s, such as an older student population and a more diverse student body, revealed that the role of the student affairs professional had changed from that of a strict disciplinarian and supervisor of morals to an individual concerned with the intellectual and psychosocial development of the student.\textsuperscript{125}

Gregory and Ballou also recognized that the validity of \textit{in loco parentis} depended largely on how broad a definition of the term an individual is willing to apply to \textit{in loco parentis}. For example, Parr and Buchanan contended that the \textit{in loco parentis} doctrine had evolved to an \textit{in loco uteri} (in place of the womb) theory in which the parenting function was brought to a broader, "higher level" by incorporating a developmental theory.\textsuperscript{126} Gregory and Ballou supported Parr and Buchanan's premise of a new \textit{in loco parentis} that includes both a broader legal responsibility and a new nurturing and developmental function only vaguely called for in the past. Institutions today can not only be held accountable for the actions of their students, but are

\textsuperscript{123} Clark Kerr, \textit{The Uses of the University} (Cambridge, MA: Harvard University Press, 1963): 103-104.

\textsuperscript{124} Dennis Gregory and Roger Ballou, "In Loco Parentis Reinventis: Is There Still a Parenting Function in Higher Education?," \textit{NASPA Journal} 24 (Fall 1986): 28.

\textsuperscript{125} \textit{id.} at 29.

\textsuperscript{126} Parr and Buchanan cited in Gregory and Ballou, "In Loco Parentis," 30.
also mandated to provide a full range of services deemed essential to students' intellectual and psychosocial maturation.\textsuperscript{127}

In 1987, Szablewicz and Gibbs became outspoken proponents of a "new in loco parentis". They recognized the demise of the traditional in loco parentis in the 1960s yet stated that events and trends of the 1980s demonstrated change in the student-institution relationship:

Students began to expect their colleges to get them jobs, provide them with tuition assistance . . . students demanded protections . . . against criminal attack . . . and injuries often due to their own carelessness. In short, students began to ask colleges to take care of them much like their parents did.\textsuperscript{128}

In addition, the authors stated that since students have increasingly brought more negligence suits, they have been asking the courts to make their institution of higher education act as a protector and guardian.\textsuperscript{129}

Szablewicz and Gibbs provided a discussion of several court cases\textsuperscript{130} and concluded:

In each case, the court has held that a special relationship between the plaintiff-student and the defendant-university must be demonstrated in order to create a duty, the breach of which causes liability to attach.\textsuperscript{131}

Szablewicz and Gibbs rejected traditional legal theories such as contract and landlord liability in describing the student-institution relationship and stated "only something

\begin{itemize}
    \item \textsuperscript{127} Gregory and Ballou, "In Loco Parentis," 30.
    \item \textsuperscript{128} Szablewicz and Gibbs, "Colleges' Increasing Exposure," 453.
    \item \textsuperscript{129} Id. at 457.
    \item \textsuperscript{131} Szablewicz and Gibbs, "Colleges' Increasing Exposure," 461.
\end{itemize}
akin to in loco parentis adequately serves to resolve these cases. Thus, in loco parentis was described by Szablewicz and Gibbs as a doctrine

... under which the college has no right to control students' morals and character but retains a duty to protect students' physical well-being. It is this duty which is the key element. And, ... this duty arises only when there is a true college-student relationship.

Szablewicz and Gibbs concluded that the courts unwillingness to completely define the student-institution relationship and fully articulate the "new in loco parentis" has been consistent with the emergence of a new common law doctrine.

Thomas argued that institutions have began to "pull back the reins" on students. She cited numerous trends and events such as litigious societal trends, student conservatism, alcohol related incidents, drug abuse, racial, gender and religious intolerance, and increased incidents of campus crime while heeding a warning that institutions have been codifying rules and enacting policies that are characteristic of a new in loco parentis. While not entirely supporting a new in loco parentis doctrine, Thomas stated:

In some respects, the days of in loco parentis were preferable. At least institutions and students had an identifiable set of expectations to meet. Now, however, colleges and universities must walk that fine line between providing too much and too little regulation and protection. In each case, the institutions risk exposure to liability.

132 Id.

133 Id. at 464.

134 Id. at 465.


136 Id. at 39.
Summary

The legal doctrine of in loco parentis was adopted through common law and the courts as evident in the early cases of Gott v. Berea College, State v. Pendergrass, Stevens v. Fassett, People v. Wheaton College, Hill v. McCauley and North v. Trustees of the University of Illinois. There has been a great deal of commentary in regard to criticism and support of the viability of the in loco parentis doctrine in relationship to how the judicial system defined the student-institution relationship. Despite the longevity of the in loco parentis debate, there has been little agreement on the nature of the student-institution relationship. The legal questions of this study were developed to investigate the evolution and relevance of the doctrine of in loco parentis in today's higher education setting.
CHAPTER THREE
METHODOLOGY

The object of the legal research method is to uncover the primary authority, case
law, statutory or otherwise, that governs the problem being searched. Precisely how
legal research is conducted can vary from researcher to researcher yet basic procedures
are followed.

Legal research is subject to the same general requirements as other forms of research. The task is to summarize pertinent
statistics, to trace further legal developments through related
court decisions, and to analyze the decisions in light of the
problem under investigation.

The legal research method always involves researching from the general to the
specific, starting with a broad search of the various sources of law. The researcher
then narrows the search and focuses on the specific legal issue.

The researcher's first step was to analyze relevant statutes where they were
pertinent. The second step of research involved compiling a list of court cases through
the use of legal finding tools. Each court decision was read and analyzed in a procedure
allowing for a systematic case-by-case analysis. The third step involved reviewing
related legal commentary such as law review articles, legal periodicals and treatises.

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For this particular study the methodology began with a search for legislation concerning institutional responsibility in the 1980s and early 1990s to determine if any federal legislation portrayed or dictated in loco parentis responsibilities by universities. The second step of this research began with a search for and analysis of legal reasoning used in appellate court decisions concerning in loco parentis, or cases that had been decided on similar grounds,4 from Colonial times through 1994. The third phase of this research focused on an extensive review of critical legal commentary concerning in loco parentis from Colonial times through 1994. Once this was accomplished, the cases were summarized and synthesized with the other sources to determine to what extent the legal doctrine of in loco parentis defined the student-institution relationship in the 1980s and early 1990s. As indicated by legal scholars:

After one has analyzed the relevant statutes and court decisions, the researcher examines secondary sources. After synthesizing both primary and secondary sources, the analyst should be able to state a definitive position on the given legal issue.5

Data Sources

Primary and secondary sources were used in this study. Primary sources were defined as "those recorded rules of human behavior which will be enforced by the state."6 The primary sources used in this study were appellate court decisions concerning the student-institution relationship, particularly those relating directly to the doctrine of in loco parentis. Appellate decisions were located through research procedures including the descriptive word method and the topic method.

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4 See Chapter One, footnote 51 of this study for a description of in loco parentis language.


The descriptive word method relied on the use of specific words derived from an analysis of the problem in question. The researcher, using the Descriptive Word Index of *West's Federal Practice Digest* 3d, looked up specific words and phrases to locate relevant Key Numbers and cases. The topic method required the researcher to select relevant legal topics and to locate Key Numbers. The Key Numbers allowed the researcher to locate other additional relevant cases and cases in point. After determining relevant Digest Topics and Key Numbers, federal cases were located in the various editions and Supplement(s) to *West's Federal Practice Digest*. The Decennial Digests, which include all jurisdictions were used to locate state cases. Regional Digests that corresponded to the seven regional units of the National Reporter System were also used to locate state cases.

Significant tools for locating primary sources included the following: American Digest System, American Jurisprudence, Corpus Juris and Corpus Juris Secundum. WESTLAW computer searches were particularly beneficial in locating relevant cases. Numerous databases within WESTLAW were used such as Allfeds, Allstates, FED-CS, and MED-CS.

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7 West digests are based on a classification system of topics. Each topic is divided into subheadings and each subheading is assigned a Key Number. *West's Federal Practice Digest* 3d provided summaries of all federal cases reported after November 1975. Prior to November 1975, *West's Federal Practice Digest* 2d which encompasses federal cases from 1961 to November 1975 was used. Prior to 1961, federal cases were located in *West's Federal Practice Digest*.

8 The process of finding relevant Digest Topics and Key Numbers was aided by looking at Headnotes which are an abstract of each point of law in a case.

9 These digests are designated by geographic areas: Atlantic, California, New York Supplement, Northeastern, Northwestern, Pacific, Southeastern, Southern and Southwestern. The Southwestern Digest was discontinued with Volume 209.

10 Defined by WESTLAW as combined federal cases.

11 Defined by WESTLAW as case law from all 50 states; 1949 to present.

12 Defined by WESTLAW as federal case law under education.
Court cases were found in a variety of reports. Federal cases were located in the Federal Supplement which contained the opinions of the federal district courts; the Federal Reporter which included all cases heard by the federal courts of appeals and the Supreme Court Reporter which contained decisions made by the U.S. Supreme Court.

State cases were found in the published state Reporter for each of the fifty states and the regional Reporter, which contained state appellate court decisions.

The cases were shepardized\(^{14}\) to trace the judicial history by providing parallel citations, to verify the current validity of each case and to locate later cases which were cited in the main case under investigation.\(^{15}\) Shepard's Citations explained the treatment of the case by citing whether a case had been explained, criticized or distinguished, reversed or modified by another court. The Federal Register, the Code of Federal Regulations, the Congressional Record, and the United States Code were used to locate additional information at the federal level regarding cases and legislation.

In addition to appellate cases, legislation comprised another primary source used by the researcher. Official and unofficial methods of compiling the legislative histories were used in this study.\(^{16}\) The official sources used included Congressional bills, hearings, committee reports, and debates. The unofficial sources used in this research

\(^{13}\) Defined by WESTLAW as cases from all 50 states under education.

\(^{14}\) Shepard's Citations is a research tool used to trace (shepardize) and evaluate the relevance of previously located sources. The resource books list cases and other sources that mention a given case citation. It is a common and essential approach in legal research to update case law.

\(^{15}\) To check the validity of each case, opinions were read after Sheparding to determine the exact treatment of the case by the citing court. Shepard's Citations also referred the researcher to American Law Report (A.L.R.) annotations and law review articles which are secondary sources.

\(^{16}\) Official sources are United States government publications. Unofficial sources are finding aids published by private companies. Both are valuable to the research process.
included Sources of Compiled Legislative Histories, U.S. Code Congressional and 
Administrative News, Congressional Information Services (C.I.S.), and the Commerce 
Clearing House Congressional Index.

Secondary sources, defined as descriptions and analyses of the law, explained, 
criticized, and analyzed existing law and on occasion proposed new law.17 Legal 
journals, law reviews and legal texts were used as secondary sources. Computerized data 
bases such as ERIC, WESTLAW and Dissertation Abstracts helped identify numerous 
secondary resources. Legal encyclopedias such as Corpus Juris Secundum and American 
Jurisprudence 2d revealed patterns in unsettled areas of law. American Law Reports 
(A.L.R.) were used to gain information on additional cases as well as to gain insight into 
discussions and analysis of legal principles. The Journal of College and University Law 
and the Journal of Law and Education were particularly helpful secondary sources. 
These and other journals and law reviews provided commentary, opinions and analysis 
which were relevant to this study.

Data Analysis

All data were presented chronologically to illustrate the evolution of legal reasoning, 
legal commentary and legislation concerning in loco parentis as applied in the higher 
education setting.

Critical legal commentary was reviewed for clarification of legal principles and 
reasoning. The appellate court decisions were analyzed to identify legal reasoning and 
established precedents concerning in loco parentis. Legislation was reviewed to 
determine if legal provisions since the 1980s have revealed documentation signifying a 
re-emergence of the doctrine of in loco parentis in defining the student-institution 
relationship in the higher education setting.

17 Klein, Legal Research, 8.
Standards of Adequacy for Legal Research

Legal research may be evaluated in numerous ways such as the phrasing of the problem, selection and criticism of sources, generalizations, and causal explanations. The following questions were of central importance in assessing the adequacy of the selection and criticism of sources: 1) Did the study use primary sources relevant to the topic?; 2) Was the criteria for selection of primary sources stated?; 3) Were authentic sources used for documentation?; 4) Did the researcher indicate criticism of sources?

Techniques of internal and external criticism were applied to all sources. External criticism determined the authenticity of the source. Since the legal database consists largely of primary materials, forged or unauthentic documents were unlikely. However, established legal citation standards were used to address the external criticism of authenticity of sources. The shepardizing procedure was essential in checking the validity of cases. After shepardizing, each opinion was read to determine the exact treatment of the case by the court instead of relying on a secondary source for vital information. Internal criticism determined the accuracy and trustworthiness of stated

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18 McMillan and Schumacher, Research in Education, 446-450.

19 Id.

20 Id.

21 Id.

facts.\textsuperscript{23} Accuracy of facts was addressed by considering common knowledge, motivation of parties in court cases, and agreement with other known facts and analysis.\textsuperscript{24}

Additional criteria for insuring the standards of adequacy included a clearly stated legal issue with a defined scope, logical organization of commentary, appropriate selection of sources for the legal topic under consideration, unbiased treatment of the topic, and logical relation of conclusions to analysis.\textsuperscript{25} These issues were addressed in Chapter One and in Chapter Three.

The final step in validating legal research was in presenting the research to a published authority for comment. Chapters One, Two, and Three were read by Donald D. Gehring, a leading authority on higher education legal issues and the Director of the Higher Education Doctoral Program at Bowling Green State University.

\footnotesize{\textsuperscript{23} McMillan and Schumacher, Research in Education, 448.}

\footnotesize{\textsuperscript{24} Id.}

\footnotesize{\textsuperscript{25} Id. at 465.}
CHAPTER FOUR

AN ANALYSIS OF THE DEVELOPMENT OF THE DOCTRINE OF IN LOCO PARENTIS IN HIGHER EDUCATION APPELLATE CASE LAW; 1900-1960

The 1913 landmark case of *Gott v. Berea College* has been largely recognized as the case that ushered the in loco parentis doctrine into case law. The case involved J.S. Gott, a restaurant owner in Berea, Kentucky, who was seeking a temporary injunction against a campus regulation that forbade students from patronizing off-campus "eating houses and places of amusement." The college argued that it was a private institution and that every student agreed, upon admission, to conform to the rules and regulations of the College. The faculty believed that the college rules were necessary to prevent students from wasting their time and money and to keep attention on their studies.

The question the Kentucky Supreme Court considered in this case was whether or not the College authorities were guilty of a breach of a legal duty which they owed to Gott. The Court dismissed Gott's claim, choosing to use the occasion to define the right of colleges to regulate student behavior. 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 rules and aims are unlawful or against public policy.2

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1 156 KY. 376, 161 S.W. 204 (1913).

2 Id. at 379, 161 S.W. at 206.
In addition, the Court stated:

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 . . .

In the decision, the Court clearly granted Berea College the authority to act in place of the parent, and in the process established in common law a legal doctrine that recognized the "rights and powers" of institutions to direct their students "what to eat and where they may get it, where they may go, and what forms of amusement are forbidden." By allowing the institution to make virtually any rule or regulation for the betterment of pupils, the Court gave the institution control over students' moral welfare and social life. The Court essentially allowed the institution complete control over students' lives. The Court did not, however, impose an obligation on the institution to act in that capacity. Instead, the Court placed the institution in the role of a parental figure, allowing the institution to use its own judgement in making rules and regulations for the betterment of student lives and to do so without interference regarding the wisdom or worth of their aims. This granting of unfettered discretion to the institution, subject to scrutiny only when such rules were unlawful or against public policy, unequivocally demonstrated a willingness by the Gott Court to embrace the doctrine of in loco parentis as it had been defined earlier by scholars.

It is important to note that this initial definition of in loco parentis espoused by the Kentucky Supreme Court focused more on the right of the institution to control students lives rather than on an obligation for it to do so. Over time the doctrine evolved from

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3 Id. at 207.

4 Id.

5 See Chapter One, footnote 49 of this study (as defined by legal commentators) and Chapter One, footnote 50 of this study (as defined in appellate court cases).
this authoritative nature to impose an obligation on the institution to control student lives and to protect the welfare of the student. Thus, with the Gott decision, the doctrine of in loco parentis became imbedded in judicial case law as a viable doctrine defining the student-institution relationship.

While the Gott decision supported the right of a private institution to act in loco parentis to its students, the Court recognized that rules would be "viewed somewhat more critically" if Berea College had been a public institution. It was still not known, therefore, whether in loco parentis would define the relationship between a public institution and its students. It was only two years after the Gott decision that this issue was brought before the Supreme Court of Mississippi. In 1915, in Waugh v. University of Mississippi, the Court concluded that attendance at a public university was a "gift of civilization" rather than a right.

J.P. Waugh had applied for admission into the law department of the University of Mississippi, but was denied admission when he declined to sign a required pledge stating that he had never been a member of any prohibited fraternity. The Court ruled that abolishing and prohibiting secret organizations in state supported educational institutions was not a decision controlled entirely by the college, but was legislated by the State for the welfare of students. The Court stated: "The legislature is in control of the colleges and universities of the state, and has a right to legislate for their welfare, and to enact measures for their discipline . . ."8

Similar to the Court of Appeals in Gott, the Supreme Court in Waugh concluded that students at an institution of higher education were subject to the discretion of the institution's in loco parentis authority. In regard to a state institution, however, this

6 Id. at 380, 161 at 206.
8 Id. at 723.
parental authority did not originate with the educational institution. Instead, public institutions were able to exercise this parental authority as an extension of the state's legislative powers. The Court stated that while the legislature had the right to legislate for the welfare of students, and enact measures for their discipline, the trustees had the duty "... to see that the requirements of the legislature are enforced; and when the legislature has done this, it is not subject to any control by the courts." While not directly citing the in loco parentis doctrine, the Waugh Court relied on the doctrine by demonstrating the parental status of an educational institution in governing student behavior.

In supporting its conclusion, the Court imposed a duty on institutions to enforce state legislation. For example, when the state imposed legislative requirements on the institution and the institution acted to enforce those requirements regarding its students, the Court believed that any recourse regarding the wisdom or necessity of those requirements through judicial means was futile. As the Court stated,

> It is not for us to entertain conjectures in opposition to the views of the state, and annul its regulations upon disputable considerations of their wisdom or necessity.\(^9\)

The Waugh decision has often been overlooked in regard to the in loco parentis doctrine due to its Constitutional emphasis. The fact that the Court's decision was in part based upon the analysis of such significant Constitutional protections as due process and privileges and immunities may have led some to believe that the decision was based solely on Constitutional grounds. By extending in loco parentis to student-institution relationships at public institutions and by discussing the futility of judicial recourse by students, however, the decision greatly influenced the development and evolution of the in loco parentis doctrine.

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\(^9\) Id.

\(^{10}\) Id.
The **Gott** decision and the **Waugh** decision together granted public and private institutions the authority to regulate the affairs of students based on the doctrine of **in loco parentis**. In defining the doctrine of **in loco parentis** the **Waugh** Court ruled that the doctrine originated from the state's legislative powers. The **Gott** decision, however, beyond the assertion that institutions stand in place of parents under schooling circumstances and therefore assume their rights and powers, did not provide a rationale on which to base the doctrine of **in loco parentis**. Thus, while these cases clarified that courts would support the decisions of institutions of higher education in controlling students by recognizing such parental authority, the foundation on which courts would base the doctrine in regard to private institutions was still unknown.

This foundation was explained in 1924 when the Supreme Court of Florida broadly reinforced the **Gott** decision in **Stetson University v. Hunt**. The **Stetson** case involved a female student who was expelled for ringing cow bells, parading in the halls of the dormitory at forbidden hours, turning off the lights, and for other events that were considered subversive to the discipline of the University.\(^{11}\) The Trial Court found in favor of the plaintiff, Helen Hunt. However, 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 Court reinforced **Gott** when it stated:

> 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.\(^{12}\)

In supporting the **in loco parentis** doctrine, the Court stated that the doctrine originated from an implied contractual relationship between the student and the private

\(^{11}\) 88 Fla. 510, 102 So. 637 (1924).

\(^{12}\) Id. at 640.
institution, rather than from the state's legislative powers. In describing this contractual relationship, the Court believed that there was an implied condition that the student conform to the regulations of the institution and that the institution had the discretion to discipline the student for any breach of that condition. The Court considered any failure of a student to conform to institutional regulations as a breach of contract. The institution's parental authority was therefore derived from the students' contractual obligation to be subservient to the wishes of the institution.

It was clear that the Court based its decision to recognize the institution's parental authority on contractual principles. The Court, however, failed to articulate the contractual duty of the institution in such a relationship. For example, the Court did not impose a duty on the institution to protect student welfare. Rather, the Court merely stated that the institution stands in loco parentis to students as long as the institution's regulations "do not violate divine or human law." Thus, although the Court based the in loco parentis doctrine on a contractual foundation, by imposing such a vague duty on the private institution in regulating student conduct, the relationship was a one-sided relationship to the significant detriment of the student. Based on the virtual lack of duty imposed on the institution, it was therefore questionable whether the Court truly supported an in loco parentis doctrine founded on contractual principles.

The impact of contract law on the in loco parentis doctrine was further discussed in a 1928 landmark decision, Anthony v. Syracuse University, where Bernice Anthony, a student at Syracuse University, was expelled by the institution for not being a "typical

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13 The Stetson Court cited Gott as stating that the in loco parentis theory was based on a contractual foundation. However, the reliance on Gott for this conclusion was questionable. There was no indication in the Gott decision that the court supported the theory of in loco parentis on this foundation.

14 Id. at 639.
Syracuse girl. The institution did not give the student a reason for the dismissal, nor was it required to give it as the student had signed a registration card allowing the institution the right to withdraw a student at any time, for any reason it deemed fit, with no reason being given for withdrawal. Despite having signed the card, Bernice Anthony brought action against Syracuse University on the grounds that she was dismissed from the institution in an arbitrary and unjust manner. The Trial Court judge ordered that Anthony be reinstated on the grounds that the University exceeded its powers when it refused to give reason for its actions. The Court recognized the in loco parentis doctrine, but ruled in favor of the student because no reason for the dismissal had been given to the student. The Court stated:

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.

The Appellate Court, basing its decision on contract law while commenting on in loco parentis, reversed the decision of the lower Court. The Court held that while the institution must have reasons for dismissal that state grounds upon which the dismissal may be based, the reasons need not be stated to the student. Appearing to support in loco parentis, the Court added:

The University may dismiss a student for reasons falling within two classes, one in connection with safeguarding the

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16 Id. at 805.
University’s ideals of scholarship, and the other in connection with safeguarding the University’s moral atmosphere.\textsuperscript{17}

The Appellate Court concluded:

When dismissing a student, no reason for dismissing need be given. The University must, however, have a reason...Of course, 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 in disturbing any decision of the University authorities in this respect.\textsuperscript{18}

The Court stated that in administering disciplinary action, the University had widespread discretion and was not bound by the general principles of justice found in the courts.\textsuperscript{19}

In \textit{Anthony}, the lower court expressly recognized the authoritative rights of the institution in regulating student conduct based on the doctrine of \textit{in loco parentis}.\textsuperscript{20}

Dicta from the Appellate Court also supported the parental role of the institution in regulating the affairs of its students. In general, the case has been cited by scholars as a decision that recognized the \textit{in loco parentis} doctrine. Interestingly, however, the reasoning of the Appellate Court appeared to be derived from contractual grounds. Rather than ruling in favor of the institution solely due to an implied authority to regulate the affairs of its students, the Court ruled in favor of the institution at least in part due to a written contract (the registration card) expressly entered into by the parties. Therefore, the degree to which the Court relied on the \textit{in loco parentis} doctrine in making its decision was questionable.

\textit{Anthony v. Syracuse} was a noteworthy case in that it recognized that the student-institution contractual relationship was basically a mutual relationship. The Court

\textsuperscript{17} \textit{id.} at 440.

\textsuperscript{18} \textit{id.}

\textsuperscript{19} \textit{id.}

\textsuperscript{20} \textit{id.} at 805.
determined that the school's regulations were analogous to a termination-at-will clause in an employment contract.\textsuperscript{21} This was the first indication of the application of mutual contract law to student-institution disputes, despite the fact that the Court allowed the institution authoritarian control in regulating student conduct and for the preservation of a moral atmosphere at the institution.

In the 1930s, courts continued to recognize sweeping authority for higher education institutions to regulate the affairs of students based on the \textit{in loco parentis} doctrine. In \textit{West v. Board of Trustees of Miami University}\textsuperscript{22} the plaintiff, Jean West, was dismissed because of poor grades and inadequate credit points. The Court of Common Pleas granted the injunction against the university. The Appeals Court, however, reversed the decision. In making its determination, the Court recognized a University regulation that stated that the institution was to promote "good education, virtue, religion and morality . . . ."\textsuperscript{23} The Court, not questioning the paternalistic role of the University, stated that the Court would not interfere unless rules were unreasonable or arbitrary.\textsuperscript{24}

In recognizing the parental role of the public institution, the Court stated that the legislature had the right to vest any power in the University that the legislature deemed necessary to promote the best interests of that institution. It is important to note, as illustrated by this case, that state legislatures during this period allowed institutions the freedom to enact regulations to promote the best interest of the institution. There appeared to be little concern for the best interest of students. This was in sharp contrast with legislative action pursued by state and federal legislatures during

\textsuperscript{21} \textit{id.} at 491.

\textsuperscript{22} 41 Ohio App. 367, 181 N.E. 144 (1931).

\textsuperscript{23} \textit{id.} at 147.

\textsuperscript{24} \textit{id.} at 381.
subsequent periods, which required institutions to enact regulations for and on behalf of the best interests of students.25

Throughout most of the 1940s and 1950s, the student-institution relationship remained essentially unchallenged. Cases discussing in loco parentis as a basis for institutional liability were scarce due to charitable and sovereign immunity. Under the doctrines of sovereign and charitable immunity, colleges and universities were immune from liability in most cases, and students had little recourse in pursuing their grievances. The lack of cases addressing the student-institution relationship in the 1940s and 1950s may also be attributed to the courts' efforts to preserve the independence of colleges and universities in regard to student-institution issues which had been established through earlier decisions. Cases such as Waugh, Anthony and West recognized the courts' unwillingness to interfere in student-institution disputes and their desire to discourage subsequent litigation involving institutions of higher education.

Pyeatte v. Board of Oklahoma was one of the few cases addressing in loco parentis during the 1950s26 It represented an early effort to balance students' constitutional rights with the University's power to pass and enforce regulations. The Pyeatte case concerned the right of the University of Oklahoma to mandate residence hall living for certain students and to uphold regulations for their supervision. The plaintiff, Mary Pyatte, owner of a boarding house, argued that requiring students to live in University housing prevented her "from contracting with the students for room and board and that such prevention is a violation of her liberty to contract."27 The Court held for the

25 See Chapter Six of this study for a discussion of subsequent legislative action.


27 Id. at 414.
defendant University on the grounds that the plaintiffs’ constitutional rights were not violated. The Court stated:

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.\textsuperscript{28}

The Pyeatt\textsuperscript{e} case was factually similar to the Gott case. The Court in Pyeatt\textsuperscript{e}, while recognizing the parental role of the institution, however, based its decision primarily on constitutional law, legal theory independent of the doctrine of \textit{in loco parentis}. In addition, the Pyeatt\textsuperscript{e} court's view of \textit{in loco parentis} differed from the view espoused by earlier courts. The earlier courts viewed the \textit{in loco parentis} doctrine as a grant to the institution of discretionary and authoritarian powers, while the Pyeatt\textsuperscript{e} court ruled that the institution's parental role required the institution to fulfill various obligations regarding its students. For example, the Pyeatt\textsuperscript{e} Court stated:

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.\textsuperscript{29}

The Pyeatt\textsuperscript{e} case was therefore a further step in the evolution of the \textit{in loco parentis} doctrine from a doctrine that granted powers to institutions to one that imposed duties upon institutions.

The \textit{in loco parentis} doctrine continued to be a viable judicial doctrine in student-institution case law during the late 1950s. The 1959 case of \textit{Steier v. New York State}

\textsuperscript{28} \textit{Id.} at 415.

\textsuperscript{29} \textit{Id.} at 413.
Education Commissioner\(^{30}\) was an indication of this trend. In *Steier*, the plaintiff, Arthur Steier, contended that he was dismissed from a public institution without being afforded due process. Steier had sent several letters to the president of the institution containing bitter language. This resulted in his suspension and then dismissal. The New York City Board of Higher Education had prescribed conditions "that each student obey all rules, regulations and orders of the duly established college authorities, and shall conform to the requirements of good manners and good morals." \(^{31}\)

A federal district court dismissed the plaintiff's complaint and held that the College had not acted arbitrarily, but rather that the plaintiff had violated the rule requiring students to "conform to the requirements of good manners and good morals." \(^{32}\) The United States Appellate Court affirmed the ruling of the lower court on the grounds that the court itself lacked jurisdiction to decide the case. In making its determination, the Court indicated that students should not have recourse to the courts to decide such disputes with educational institutions. This recognition of an institution's authority to enact regulations and sanctions to control students without the threat of court interference constituted an acknowledgment by the Court that an institution's relationship to its students was parental in nature.

Judge Moore, writing a concurring opinion, more specifically addressed the parental role of the institution. He stated that educational institutions were obligated to provide for the welfare of students in a variety of ways, saying:

One of the primary functions of a liberal education to prepare the student to enter society based upon principles of law and order may well be the teaching of 'good manners and good morals.' \(^{33}\)

\(^{30}\) 271 F.2d 13 (1959).

\(^{31}\) Steier, 271 F.2d at 14.


\(^{33}\) 271 F.2d 13, 20 (2d Cir. 1959).
While the majority opinion in Steier recognized an inherent parental power of the institution, Judge Moore's concurring opinion pointed the way toward an expansion of the doctrine to include the concept that the parental role of educational institutions imposed duties on higher education institutions, rather than merely granting discretionary or unbridled authority.

Summary

There were seven significant cases that were tried from 1900-1960 that supported the institutions' role to act in loco parentis. Three involved action against private institutions, and four against public institutions. Three cases involved student dismissals, three involved mandatory regulations, and one involved the regulation of student behavior in regard to admission to the institution. Table 1 contains a summary of the various categories of cases reviewed in this chapter that contributed to the development of the doctrine of in loco parentis.

Table 1
Summary of Cases Tried From 1900-1960 That Contributed to the Development of the Doctrine of In Loco Parentis

<table>
<thead>
<tr>
<th>Case</th>
<th>Institution</th>
<th>Category</th>
<th>Theoretical Basis</th>
</tr>
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<tbody>
<tr>
<td>Gott</td>
<td>Private</td>
<td>Mandatory Reg.</td>
<td>1</td>
</tr>
<tr>
<td>Waugh</td>
<td>Public</td>
<td>Mandatory Reg.</td>
<td>1, 3</td>
</tr>
<tr>
<td>Stetson</td>
<td>Private</td>
<td>Student Conduct</td>
<td>1, 2</td>
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<tr>
<td>Anthony</td>
<td>Private</td>
<td>Student Dismissal</td>
<td>1, 2</td>
</tr>
<tr>
<td>West</td>
<td>Public</td>
<td>Student Dismissal</td>
<td>1</td>
</tr>
<tr>
<td>Pyeatte</td>
<td>Public</td>
<td>Mandatory Reg.</td>
<td>1, 2, 3</td>
</tr>
<tr>
<td>Steier</td>
<td>Public</td>
<td>Student Dismissal</td>
<td>1, 3</td>
</tr>
</tbody>
</table>

1  In loco parentis
2  Contracts
3  Constitution
As these cases demonstrated, the doctrine of *in loco parentis* came to be a doctrine strongly relied on by the courts to define the student-institution relationship. The courts considered attendance at public institutions to be a privilege and not a right. Occasionally the courts held that students had some contractual and constitutional rights but overall *in loco parentis* was the prevailing theoretical basis for the courts' decisions in these cases. Case after case recognized that the college or university stood *in loco parentis* and unless the institution abused its authority, the court would rule in favor of the institution, supporting its decision. In addition, the courts strongly recommended that disputes be settled within the institution rather than by the judicial system.

The student-institution appellate case law of the 1900s-1960s demonstrated a strong support for higher education institutions concerning the regulation of students. During this period, the courts recognized an inherent authoritative power of institutions to act "in place of the parent." This amounted to the use of the doctrine of *in loco parentis* as a virtual blanket of judicial approval in favor of institutions, strengthening their authority and power.

Although the courts recognized such authoritarian parental power, there were indications that the *in loco parentis* doctrine would at some time evolve into a doctrine that granted student rights and imposed institutional restrictions as opposed to a doctrine that also granted institutional rights and imposed student restrictions. It appeared that contract law would be the impetus behind much of the change. Regardless of these indications, from 1900 to 1960 *in loco parentis* was the predominant doctrine allowing public or private institutions to impose almost any rule or regulation, despite its breadth or vagueness, for the betterment of the institution.
CHAPTER FIVE
AN ANALYSIS OF THE DECLINE OF THE DOCTRINE OF IN LOCO PARENTIS IN HIGHER EDUCATION APPELLATE CASE LAW; 1960-1980

In the 1960s, many college students gave strong indication that they believed they were too closely counseled and supervised and that "students were impatient of all official restraint on their lives and were suspicious of anything that smacked of the traditional in loco parentis regime."\(^1\) Student attitudes relating to in loco parentis issues were influenced by a number of factors. Questions in regard to civil rights fostered anti-establishment attitudes. In addition, a more permissive response from some parents and university officials contributed to the modification of parental rules and the trend toward "the permissive society." College deans were quoted as making statements such as "we are not interested in the private lives of students as long as they remain private" and "we don't ask what we don't want to know."\(^2\)

Student activism was met with conventional disciplinary measures such as probation, suspension and expulsion. Since the institutions stood in loco parentis in earlier decades, few questioned the authority of colleges and universities to regulate student lives. Yet as early as 1957, students began to suspect that they had been unjustly treated without regard of their civil liberties. It was at this time that the courts became increasingly involved in evaluating the appropriateness and legality of many institutional policies.

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\(^1\) Brubacher and Rudy, *Higher Education*, 348.

\(^2\) Id.
With the student outbursts of the 1960s, many students began to look to the law to protect their rights and to the legal system as a major force for change. In addition, it became clear that students were asking institutions for less disciplinary control and more personal treatment. Student services at institutions began to focus on assistance to students in regard to numerous personal issues. Institutional parental concern in the areas of housing, food service, financial aid, work-study, physical and mental health, guidance and placement certainly could not be denied. The institutions did not stop acting "in the place of the parent," yet institutions and the courts increasingly began to recognize the rights of students.

There were numerous cases decided in the 1960s that reflected a more liberal attitude of students and institutions involving an institution's parental role. For example, in Dixon v. Alabama State Board of Education, the United States Court of Appeals for the Fifth Circuit determined that college students at a public institution have a right to remain at the institution if the students were in good standing. In the Dixon case, several black students were refused service at a public lunchroom. The lunchroom was then closed but the students refused to leave until the police arrived. Following the student demonstrations, the President of the college told several of the students that such actions were disruptive to the orderly conduct of the college and asked them to return to their classes. The demonstrations continued. The Board of Education, after hearing reports, expelled nine students. Based on the grounds that their constitutional rights had been violated, six of the students sought an injunction against the action of the Board and the President so they could return to college.

\[3\] 294 F.2d. 150 (1961).

\[4\] Id.
In ruling for the students, the Court established the right of students at a tax-supported institution to a notice and a hearing prior to severe disciplinary action such as suspension or dismissal. The Court stated:

Whenever a governmental body acts as to injure an individual, the Constitution requires that the act be consonant with due process of law... The precise nature or the interest that has been adversely affected, the manner which this was done, the reason for doing it, the available alternatives to the procedure that was followed, the protection implicit in the office of the functionary whose conduct is challenged, the balance of hurt complained of and good accomplished—these are some of the considerations that must enter into the judicial judgment.5

While previously the courts had used the in loco parentis doctrine to recognize the power of colleges and universities to determine their own disciplinary processes, the doctrine was overlooked in Dixon by the Court's willingness to extend its jurisdiction to the public campus to protect students' constitutional rights of due process. The Court stated that "... due process requires notice and some opportunity for hearing before a student at a tax-supported college is expelled for misconduct."6

The Dixon case clearly indicated that the State, operating as an institution of higher education, may not infringe on the constitutional rights of students simply because of their status as students. This principle marked the beginning of a new era in student institution law and signified a weakening of the authoritarian control of institutions so long protected in the courts by the in loco parentis doctrine.

As the Dixon case illustrated, there was an increasing recognition of students' constitutional rights regarding their relationship with state institutions. Various courts, however, were confronted with the task of balancing these constitutional rights against the parental authority of institutions that had long been recognized. In 1967, the

5 Id. at 155.
6 Id. at 158.
Court of Appeal, First District, decided Goldberg v. Regents of the University of California. In Goldberg, the Court recognized the changing relationship between the student and the institution. This case involved the dismissal of students on the grounds that they participated in campus rallies, protesting the arrest of a non-student in a manner which interfered with the University's interest in preserving "proper decorum in campus assemblages." The plaintiffs contended that their First Amendment rights of free speech were violated, that the university's regulations were so broad as to abridge further those rights and that they were denied due process. The question before the Court was whether the University's regulation with respect to "loud, repeated public use of certain terms was reasonably necessary in furthering the University's educational goals," or whether those regulations violated the constitutional rights of the students. The Court rejected all three complaints, holding that the University's action did not infringe on the constitutional rights of the plaintiff.

While the Court ultimately ruled in favor of the institution in this particular case, the Court recognized an elevated status of students in discussing the student-institution relationship. Recognizing the student's constitutional rights, the Court stated that "The case is one of first impression in this state and requires the drawing of fine lines of demarcation between matters that involve the legitimate interests of the University and those that involve constitutionally protected rights [of students]." Similar to earlier cases that recognized parental authority in institutions, the Court, using in loco parentis language, stated that the University had "the power to formulate and enforce rules of

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7 248 C.A. 2d 867, 57 Cal. Rptr. 463 (1967).

8 Id. at 472, 880.

9 Id.

10 Id. at 467, 875.
student conduct that are appropriate and necessary to the maintenance of order and propriety."\textsuperscript{11} Interestingly though, the Court stated that order was to be maintained based on the norms of social behavior in the community, "where such rules are reasonably necessary to further the University's educational goals."\textsuperscript{12} In expanding the traditional definition of the \textit{in loco parentis} doctrine, the Court stated that societal norms, instead of parental norms, were the foundation for maintaining discipline and order in the campus community.

In balancing this inherent authority against the constitutional rights of students, however, the Court regarded attendance at a public institution as a benefit as opposed to a mere privilege. The Court stated

\begin{quote}
The test is whether conditions annexed to the benefit reasonably tend to further the purposes sought by conferment of that benefit and whether the utility of the conditions manifestly outweighs any resulting impairment of constitutional rights.\textsuperscript{13}
\end{quote}

Consistent with the \textit{in loco parentis} doctrine the Court stated that the institution could attach conditions to the conferment of this benefit in the form of institutional regulations on students. To be valid, however, the benefit of imposing those conditions had to "manifestly outweigh" the impact of those conditions on student constitutional rights.\textsuperscript{14}

By imposing such constitutional restrictions on the inherent parental powers of public institutions, the Court in \textit{Goldberg} significantly limited the \textit{in loco parentis} doctrine. Although the Court continued to recognize the viability of the \textit{in loco parentis}

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\textsuperscript{11} \textit{Id.} at 471, 879.
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\textsuperscript{12} \textit{Id.}
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\textsuperscript{13} \textit{Id.} at 877.
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\textsuperscript{14} \textit{Id.} While the Court recognized student's constitutional rights, the institution was granted the authority to continue to make rules and regulations that were in its best interest. Regardless of student gains in the judicial system during the 1960s, institutions were still granted the discretion to make decisions for the student that focused on the institution, not the student.
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doctrine, the case demonstrated that constitutional rights of students were an essential element of the student-institution relationship. Due to the recognition of these rights, public institutions could no longer enjoy the virtually unlimited discretionary authority that previous courts had granted.

After the Goldberg case, courts continued to recognize the inherent power of institutions to regulate the conduct of students, and continued to balance those powers against the constitutional rights of students. In addressing the powers of institutions, however, some courts were reluctant to label those powers as parental in nature. In 1968, a federal court in Colorado was petitioned to issue an injunction against the University of Colorado as a result of disciplinary action taken against student protest demonstrations. The case, Buttny v. Smiley,15 was heard under due process and civil rights provisions. The plaintiff, David Buttny, admitted to taking part in a protest in which he and other students blocked the entrance ways to the Placement Service offices where an officer of the Central Intelligence Agency was waiting to interview students. Buttny argued, among other points, that his constitutional rights of equal protection were violated. The Court ruled against the plaintiff, holding that the rules and regulations were not unconstitutionally vague, that the equal protection clause of the Fourteenth Amendment was not violated, and that due process had been provided.

While the Court ruled in favor of the institution primarily on constitutional grounds, it was evident that the Court supported its conclusion by recognizing inherent powers of institutions to maintain order on their campuses. The Court stated that institutional "Regulations and rules which are necessary in maintaining order and discipline are always considered reasonable."16 Interestingly, despite this clear recognition of inherent institutional powers the Court stated that the doctrine of in loco


16 Id. at 285.
parentis was "no longer tenable in a university community." This reasoning illustrated the acceptance by the Court of traditional in loco parentis principles but also noted the reluctance of the Court to label institutional powers as parental in nature. Thus, while the Court explicitly declared that the doctrine no longer existed, in actuality, the Court recognized the powers of the institution that had traditionally been associated with the in loco parentis doctrine. Accordingly, while the case could be interpreted to mark the decline of the in loco parentis doctrine, it appeared that the doctrine, in substance, continued to influence judicial decisions.

In the 1968 case of Zanders v. Louisiana State Board of Education, the United States District Court recognized that the doctrine of in loco parentis was of minimal value in dealing with modern "student-rights" problems. Similar to the Buttny case, however, the decision in Zanders appeared to be based on traditional in loco parentis principles. The case involved action by Louisiana college students who had been expelled for demonstrating and seizing a college administration building. The Court refused to grant injunctive relief to the students, who alleged violation of First and Fourteenth Amendment rights. The Court recognized and discussed the student-institution relationship as being characterized by either in loco parentis or contract law. The Court commented 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 parents' power as was necessary to answer the purpose for which he was employed. The doctrine primarily has been used as a

17 Id.

18 It is important to note that Buttny, as well as numerous preceding cases, focused on a narrow aspect of the often broadly interpreted in loco parentis theory by discussing the theory only in regard to an institution's right to regulate student conduct. This was in contrast with the interpretations of courts during the early stages of the theory, which focused on the institutions' role relating to the moral welfare and training of pupils.

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 right problems.\textsuperscript{20}

Despite denouncing the use of the \textit{in loco parentis} doctrine in addressing student right
problems, the Court appeared to disregard these comments in making its ultimate
decision. 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.\textsuperscript{21}

By recognizing this inherent power in universities, the Court appeared hesitant to
dismiss the doctrine of \textit{in loco parentis} entirely. The Court was more concerned with,
and the decision was based on, the university's power to promulgate rules and
regulations. Therefore the Court's decision was based at least in part on the \textit{in loco}
\textit{parentis} doctrine.

In denouncing the \textit{in loco parentis} doctrine while ultimately making its decision based
in part upon traditional \textit{in loco parentis} principles, the Court struggled with balancing
the traditional discretions of universities against notions of fair play concerning student
status. This was evidenced by the Court stating that colleges and universities had the
inherent power to promulgate regulations for the government of the university
community while at the same time recognizing the necessity of the courts to intervene in
student-institution disputes. Thus, while decisions such as \textit{Buttny} and \textit{Zanders}
appeared to mark the end of the \textit{in loco parentis} doctrine, in actuality, the courts
struggled to determine the exact status of the doctrine and to define the judiciary's role
in resolving student-institution disputes. This struggle further contributed to the

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{20} \textit{Id.} at 756.
\item \textsuperscript{21} \textit{Id.} at 757.
\end{itemize}
\end{footnotesize}
vagueness and confusion surrounding the applicability of the doctrine of *in loco parentis* in defining the student-institution relationship.

Despite the increased recognition of the constitutional rights of students, some courts were reluctant to discontinue judicial deference to institutions regarding institutional regulations. In *Moore v. Student Affairs Committee of Troy State University*,\(^{22}\) the plaintiff sought reinstatement as a student after being dismissed when officials searched his room and found marijuana. The Court ruled in favor of the institution by upholding the use of reasonable search and seizure as a part of a college's duty. The Court recognized students' constitutional rights when it stated that students have a natural right to be free from unreasonable searches and that institutions can not compel a waiver of such rights. The Court further stated, however, that the institution had an affirmative obligation to enforce "reasonable regulations designed to protect campus order and discipline . . . "\(^{23}\) The Court stated that any regulation pursuant to the basic responsibility of the institution regarding the maintenance of "educational atmosphere" would be presumed to be reasonable despite potential constitutional infringements.\(^{24}\) Thus, while the Court acted in conformity with post-*Dixon* cases which recognized the constitutional rights of students, the Court nonetheless acted in conformity with pre-*Dixon* cases which granted judicial deference to institutions in regulating student conduct.

It is important to note that the Court viewed the regulations of institutions as regulations imposed pursuant to a duty of the institution rather than pursuant to an institution's discretionary authority. Despite this view, and the Court's deference to the institution, the Court did not believe that the institution acted *in loco parentis* nor did it

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\(^{22}\) 284 F. Supp. 725 (1968).

\(^{23}\) Id. at 728.

\(^{24}\) Id.
believe that the student-institution relationship depended on contractual, privacy, or property concepts.\textsuperscript{25} The court stated that "college students who reside in dormitories have a special relationship with the college involved . . . The college does not stand, strictly speaking, in loco parentis to its students . . . The relationship grows out of the peculiar and sometimes the seemingly competing interests of college and student."\textsuperscript{26} While the Court did not believe that the institution acted in loco parentis, it nonetheless granted great deference to the institution. Therefore, it was unclear as to whether the Court was departing from the in loco parentis doctrine or whether it was redefining the doctrine as a doctrine that imposed duties rather than granted authority. Despite this confusion, it was clear that the Court disregarded traditional notions of the in loco parentis doctrine.

The appellate case law of the 1960s reflected a marked decline in the courts' willingness to grant institutions broad powers under the in loco parentis doctrine. While legal scholars unequivocally claimed that the doctrine of in loco parentis was no longer a viable doctrine in regard to the student-institution relationship during this period,\textsuperscript{27} the cases illustrated the confusion surrounding the doctrine and the inability of the courts to consistently and uniformly interpret the doctrine and its applicability to students and institutions of higher education. Such confusion indicated the demise of the doctrine in influencing judicial law.

\textsuperscript{25} Id.

\textsuperscript{26} Id. at 729.

Indications of the doctrine's demise continued in the 1970s. *Evans v. State Board of Agriculture* was yet another case that reflected the courts' confusion in regard to the demise of *in loco parentis* in student-institution case law. In *Evans*, the plaintiff brought suit claiming that his First Amendment rights had been violated. The institutional policy that was under question was one that forbade the use of university facilities for any purpose other than that for which the facility was intended. This policy was written in response to a violent demonstration that occurred during the intermission of a college basketball game. The Court, in concluding that the plaintiffs had no ground for action, determined that perhaps *in loco parentis* was 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 more. Butttny 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.

Judge Winner, in *Evans*, thus reported that the rejection of *in loco parentis* may have been too hasty. The judge stated that universities had a right to adopt restrictions and regulations that the university in its own best judgement deemed appropriate. Despite this apparent retreat to the traditional *in loco parentis* doctrine, the Court recognized the constitutional rights of students. The Court stated

> We do not subscribe to the notion that a citizen surrenders his civil rights upon enrollment as a student in a university. As a corollary to this, enrollment does not give him a right to immunity nor special consideration, and certainly it does

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29 Id. at 1360.
not given him the right to violate the constitutional rights of others.\textsuperscript{30}

In recognizing student rights, however, the Court stated that such rights did not give the students the unfettered right to disrupt the university community and to interfere with the safety of others. It was therefore unclear whether the Court was actually retreating to the traditional \textit{in loco parentis} doctrine or whether, due to the extreme conduct of students in this particular case, the Court was merely prohibiting students from abusing their constitutional rights as students.

Also, in 1971, the 26th Amendment was passed which provided citizens of the United States who were eighteen years of age or older the right to vote. This resulted in the change of the legal status of many students from that of "child" to "adult." This amendment altered the enforcement of regulations once justified by the legal doctrine of \textit{in loco parentis}. The 26th Amendment provided future courts with a foundation on which to further declare the demise of the doctrine of \textit{in loco parentis}.

\textit{Healy v. James}\textsuperscript{31} and \textit{Papish v. Board of Trustees of the University of Missouri}\textsuperscript{32} added to the trend of cases that signified the demise of the doctrine of \textit{in loco parentis}. These cases upheld the right of college students to engage in constitutionally protected speech, association, and publication. These decisions supported \textit{Dixon} by confirming that students did not relinquish their constitutional rights when they enrolled as students.

\textit{Healy v. James} illustrated the Supreme Court's adamant protection of First Amendment rights of students. In accordance with college requirements, the students in \textit{Healy} applied to have their organization, Students for a Democratic Society (SDS), recognized as an official campus organization at a state supported college. However, their application was rejected by the president because he was not satisfied that the

\textsuperscript{30}\textit{Id.} at 1356.

\textsuperscript{31} 408 U.S. 169 (1972).

\textsuperscript{32} 410 U.S. 667 (1973).
organization was independent of the National SDS, which he concluded had a philosophy of disruption and violence in conflict with the college's declaration of student rights.\textsuperscript{33} The plaintiffs sought equitable relief affording them the right to form a group with official campus recognition.

Similar to courts in earlier decisions, the Supreme Court struggled to balance the need of public educational institutions to have peaceful environments against the constitutional rights of students. The Court stated that issues concerning academic communities required special attention, as members and students of the institutions have an interest in having their environment be free of disruption. The Court recognized that such interests, however, may compete or be inconsistent with students' First Amendment rights.\textsuperscript{34}

Although the Court was confronted with these conflicting interests, unlike courts in previous cases, the Court expressly declared that the interest of maintaining order on campus must succumb to students' First Amendment rights. The Court stated that public colleges and universities were not "immune from the sweep of the First Amendment,"\textsuperscript{35} and that the College acting as the instrumentality of the State, "... may not restrict speech or association simply because it finds the views expressed by any group to be abhorrent."\textsuperscript{36} The Court further stated that First Amendment protections applied with equal if not greater force on college campuses than in the community. The Court nonetheless respected, however, that institutions had an interest in controlling student conduct. The Court stated

\textsuperscript{33} Healy, 408 U.S. 169 (1972).

\textsuperscript{34} \textit{Id.} at 170.

\textsuperscript{35} \textit{Id.} at 180.

\textsuperscript{36} \textit{Id.} at 188.
A college administration may impose a requirement . . . that a group seeking official recognition affirm in advance its willingness to adhere to reasonable campus law . . . it merely constitutes an agreement to confirm with reasonable standards respecting conduct. This is a minimal requirement, in the interest of the entire academic community . . .

The Court concluded that although students must abide by reasonable campus rules and regulations, a "heavy burden" rested on the college to demonstrate the appropriateness of any action aimed at preventing disruption on campus.

The Healy decision signaled a judicial departure from the stringent application of in loco parentis cases involving student rights. By placing such a heavy burden on the institutions to justify institutional regulations that were in conflict with First Amendment rights, and by stringently protecting such First Amendment rights, the Court gave little credence to traditional notions of in loco parentis.

The Supreme Court's broad protection of students' First Amendment rights was also illustrated in Papish v. Board of Curators. Papish involved action by a graduate student for injunctive relief under the Civil Rights Act. Barbara Papish was expelled from a state university for publishing a political cartoon in the school's newspaper which was said to have "disapproved content" because it depicted a policeman raping the Statue of Liberty and the Goddess of Justice. The Court held that the cartoon was not constitutionally obscene and could not be justified as a nondiscriminatory application of reasonable rules governing conduct.

In ruling for the student, the Court reiterated its position in Healy that stated that colleges and universities may not inhibit First Amendment freedoms despite an institution's interest in maintaining order on campus. The Court stated, "... the mere dissemination of ideas--no matter how offensive to good taste--on a state university campus may not be shut off in the name alone of 'conventions of decency'." While the

37 Id. at 193.

38 Papish, 410 U.S. 667 at 670.
Court recognized that an institution may exercise authority to enforce regulations that are reasonable as to "time, place, and manner," the Court concluded that the student was expelled due to the content of the publication, and that therefore the institution acted in violation of her Constitutional rights.\(^{39}\)

Despite the majority opinion of the Court, dissenting opinions such as that of Chief Justice Burger suggested that the First Amendment should not be so stringently protected when the forum for the speech or publication was a state university campus. Justice Burger stated that while a university is an arena for the discussion of ideas, it is also an environment where individuals should express themselves in a civil manner. Justice Burger stated, "[t]o preclude a state university or college from regulating the distribution of such obscene materials does not protect the values inherent in the First Amendment; rather it demeans these values."\(^{40}\) Justice Burger's conclusion that the institution's action did not violate the constitution was not specifically based upon notions of \textit{in loco parentis}. Rather, his dissenting opinion seemed to merely be based upon a constitutional disagreement with the majority opinion. It can therefore be concluded that \textit{Healy} and \textit{Papish} characterized a judicial abatement of \textit{in loco parentis} in that the cases supported judicial review of a public college's enforcement of student discipline.\(^{41}\)

Evidence of the demise of the \textit{in loco parentis} doctrine was also found in various tort related cases. One of the leading cases in this area was the 1979 case of \textit{Bradshaw v. Rawlings}\(^{42}\) which involved the injury of a student in a car accident following an off-
campus class picnic. The injured student brought action against the college, the beer
distributor, and the municipality, alleging that all owed him a duty of care to protect
him from harm. The Trial Court awarded Bradshaw damages in the amount of
$1,108,067 against all defendants. The United States Court of Appeals, Third Circuit,
determined that the plaintiff had failed to establish that the College owed him a legal duty
of care.

In discussing whether the College had a duty to protect the student, the Court noted the
evolution of the student-institution relationship:

... the modern American college is not an insurer of the
safety of its students. Whatever may have been its
responsibility in an earlier era, the authoritarian role of
today's college administrators, and faculties have been
required to yield to the expanding rights and privileges
of their students.43

Due to such occurrences as expanding rights of students, constitutional amendments and
the adult age of most students, the institution was found to no longer posses the
authoritarian role that it once had. As a result, the Court determined that such
institutions no longer stood in loco parentis. The Court stated:

There was a time when college administrators and faculties
assumed a role in loco parentis... A special relationship was
created between college and student that imposed a duty on
the college to exercise control over students' conduct and,
reciprocally, gave the students certain rights of protection
by the college... College administrators no longer control the
broad arena of general morals. At one time exercising their
rights and duties in loco parentis, colleges were able to impose
strict regulations, but today's students vigorously claim the
right to define and regulate their own lives.44

The Court therefore dismissed the doctrine of in loco parentis as a basis of determining
whether the institution owed a duty of care to the student under traditional tort

43 Id. at 138.
44 Id. at 139.
principles. Instead, the Court determined that such a determination should be made by first assessing the parties' competing individual and social interests.

A basic principle of law holds that one who voluntarily takes custody of another is under duty to protect that person. However, in Bradshaw, the Court dismissed the plaintiff's argument on the ground that the college regulation merely tracked state law which prohibited persons under the age of twenty-one from consuming alcohol. The Court stated

A college regulation that essentially tracks a state law and prohibits conduct that to students under twenty-one is already prohibited by state law does not, in our view, indicate that the college voluntarily assumed a custodial relationship with its students so as to make operative the provisions of § 320 of the Restatement (Second) of Torts.45

The Court recognized that colleges lacked the ability and legal authority necessary to control students' conduct and stressed the students' responsibility for their own behavior.46 The Bradshaw Court's refusal to entertain that the college may be liable for negligent failure to enforce its rules was based on the finding that the colleges' rules created no special relationship between the College and its students as to drinking, and represented no assumption of duty by the College.47

Despite the Court's disregard for the in loco parentis doctrine in ascertaining whether a specific duty of care existed, the Court did not state that the institution lacked any responsibility for students' protection. The Court merely examined whether a custodial relationship or educational relationship existed with the student to create a

45 Id. at 141. A custodial relationship required the one who voluntarily took custody of another to exercise reasonable care to control the conduct of third parties so as to prevent them from harming the other.

46 Id. at 138.

47 Colleges with drinking rules and regulations that do not merely track state law may be held liable if the regulations are interpreted as a voluntary assumption of a custodial relationship.
duty to protect the student. The Court, as indicated, abolished the idea that a custodial relationship existed between the College and its students.

The Court’s dismissal of the *in loco parentis* doctrine and its conclusion that a custodial relationship did not exist arguably suggested that there was no longer a special relationship between the institution and student granting the institution authority over students and imposing upon it responsibility to protect the students. It is important to remember, however, that such a judicial determination did not abolish traditional legal relationships based upon the institution’s role as a landlord or as a provider of instructional and other activities. Thus, the institution was still subject to liability under other theories.

**Summary**

Nine cases were discussed in the chapter that were tried from 1960-1980. With the exception of one case, the cases marked a slow yet progressive decline in the applicability of *in loco parentis* in higher education. One case involved action against a private institution, eight against public institutions. Five cases involved student dismissals, two involved mandatory regulations, one involved the disciplinary process and one involved student injury/accident. Table 2 contains a summary of the various categories of cases reviewed in this chapter that contributed to the decline of the doctrine of *in loco parentis*.

As these cases illustrated, by the late 1960s and early 1970s, *in loco parentis* was considered by many courts and commentators to be obsolete in defining the student-institution relationship.

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49 Cases involving private institutions were minimal during this period because most of the cases tried during the 1960s and 1970s involved student rights.

Table 2
Summary of Cases Tried From 1960-1980 That Contributed to the Decline of the Doctrine of In Loco Parentis

<table>
<thead>
<tr>
<th>Case</th>
<th>Institution</th>
<th>Category</th>
<th>Theoretical Basis</th>
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</thead>
<tbody>
<tr>
<td>Dixon</td>
<td>Public</td>
<td>Student Dismissal</td>
<td>3</td>
</tr>
<tr>
<td>Goldberg</td>
<td>Public</td>
<td>Student Dismissal</td>
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</tr>
<tr>
<td>Buttny</td>
<td>Public</td>
<td>Disciplinary Process</td>
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<tr>
<td>Zanders</td>
<td>Public</td>
<td>Student Dismissal</td>
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<tr>
<td>Moore</td>
<td>Public</td>
<td>Student Dismissal</td>
<td>1, 3</td>
</tr>
<tr>
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<td>Public</td>
<td>Mandatory Reg.</td>
<td>1, 3</td>
</tr>
<tr>
<td>Healy</td>
<td>Public</td>
<td>Mandatory Reg.</td>
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<tr>
<td>Papish</td>
<td>Public</td>
<td>Student Dismissal</td>
<td>3</td>
</tr>
<tr>
<td>Bradshaw</td>
<td>Private</td>
<td>Injury/Accident</td>
<td>4</td>
</tr>
</tbody>
</table>

1 In loco parentis. (Note: While the courts discussed notions of in loco parentis in these cases, it was not the primary doctrine used in deciding the cases during this time period; 1960-1980.)
2 Contracts
3 Constitution
4 Tort

The demise of the in loco parentis doctrine evolved over a substantial period of time beginning in the early 1960s. As student attitudes became more liberal, and as more attention was placed on constitutional protections and other rights of students, courts began to struggle with traditional notions of in loco parentis and the difficulty of balancing those notions against the mandate to respect and clarify the ever increasing rights and elevated status of students. This initial struggle by the courts was evident in a variety of contexts. Some courts recognized the elevated status of students but were still reluctant to totally dismiss the in loco parentis doctrine. Other courts quickly denounced the in loco parentis doctrine in express terms while simultaneously making determinations based on traditional in loco parentis notions. Such struggles and inconsistencies illustrated the courts' initial difficulties in shaping a consistent judicial

role regarding the *in loco parentis* doctrine. As evident in later cases, however, the courts more readily relied on traditional legal notions such as contact, tort and constitutional principles in deciding student-institution disputes, rather than relying on traditional notions of *in loco parentis*. It thus became clear that the *in loco parentis* doctrine declined during this period.

The cases, ushered in by *Dixon*, also clarified the effect of the student rights movement through judicial recognition that persons above the age of eighteen were legally adults, and must be afforded their rights while attending institutions of higher education. *In loco parentis* had been rejected as a viable legal doctrine in influencing the student-institution relationship at public institutions, as indicated by legal scholars and the courts of the 1960s and 1970s. The extension of constitutional rights to public university students appeared to signify the end of extreme judicial deference to institutional disciplinary control. Due to such factors as increased student activism and judicial intervention, higher education was forced to respond to many changes and challenges, presumably without the assistance of traditional notions of *in loco parentis*. 
CHAPTER SIX
AN ANALYSIS OF APPELLATE CASE LAW THAT ADDRESSES THE INSTITUTIONAL RESPONSIBILITY OF THE 1980S AND EARLY 1990S

In 1987, Szablewicz and Gibbs contended that a "new de facto in loco parentis" had developed as students and parents increased their expectations that institutions of higher education would provide protection for students. Szablewicz and Gibbs stated that the recent judicial approach to college liability for personal injuries to students indicated a limited return to in loco parentis. In addition, they cited the increasing number of negligence suits instituted by students against institutions as signaling that students have again turned to institutions of higher education as their guardians and protectors.

The lack of a predominant theory addressing the student-institution relationship, and several other factors to be discussed, prompted the resurrection of the debate over the viability of the in loco parentis doctrine in modern higher education case law. Reylea v. State was one of the first cases that contributed to the debate over the return to the in loco parentis doctrine in higher education in the 1980s. In this Florida District Court of Appeals case, the parents of two Florida Atlantic University students alleged that the university failed to provide adequate security after the students were abducted.

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1 Szablewicz and Gibbs, "College' Increasing Exposure," 457.
2 Id.
3 Id. at 453.
driven to a secluded area and murdered upon leaving an evening class. Allegations of negligence attributed to the defendants were in regard to the inadequate provisions to provide security guards, parking attendants, security gates, lighting, and the fact that the class was held in a remote part of campus during the evening hours. The Court held that the murder was not foreseeable because no serious crime had been committed at the university since the founding of the institution seven years earlier. Consequently, absent foreseeability, the university was not held liable.

The Court's conclusion in Reylea appeared to be based on nothing more than traditional notions of tort liability. Instead of treating the student-institution relationship as a unique relationship warranting special considerations, the Court stated that the institution had a duty to protect the student from foreseeable harm. Such notions applied by the Court reflected traditional tort principles that have been applied in typical landowner-invitee situations. The Court stated, "As a basic principle of law, a property owner has no duty to protect one on his premises from criminal attack by a third person." It was therefore difficult to conclude that this case, based on fundamental tort concepts, could be construed as establishing or defining a modified in loco parentis.

Nonetheless, Redford, citing Reylea, stated that foreseeability was the recurring theme in many recent decisions dealing with university liability and campus crime and concluded

Accordingly, it appears that the doctrine of in loco parentis has been partially revived. The modified in loco parentis doctrine is limited to the college's duty to protect students

6 Reylea, 385 So.2d at 1382.
physical safety but does not extend to control over students' morals.\textsuperscript{7}

Despite such claims by Szablewicz, Gibbs and Redford that \textit{Reylea} signaled a revival of the \textit{in loco parentis} doctrine, the Court's express statements regarding the liability of institutions as property owners, and the Court's ultimate conclusion based exclusively on the lack of foreseeability, caused such assertions to be questionable.

\textbf{Mullins v. Pine Manor}\textsuperscript{8} was another case that arguably suggested the return of a modified \textit{in loco parentis} doctrine. The plaintiff student, Lisa Mullins, was abducted from her residence hall room, blindfolded, taken across campus and raped. In this negligence claim, the Supreme Judicial Court of Massachusetts ruled that Pine Manor College was liable because it had a duty to protect students against the criminal acts of third party intruders and that the college's negligence was the proximate cause of the student's injuries.

The Court's decision was based on two theories, each of which supported the institution's duty of care. First, duty was established by "social values and customs."\textsuperscript{9} The Court held that "colleges of ordinary prudence customarily exercise care to protect the well-being of their resident students from the criminal acts of third parties."\textsuperscript{10} In addition, the Court agreed with expert testimony which stated that standards had been established for determining what precautions should have been taken to protect residents from attack of intruders. Thus, there was found to be a general community consensus imposing duty of care stemming from the nature of the environment.


\textsuperscript{8} 389 Mass. 47, 449 N.E.2d 331 (1983).

\textsuperscript{9} \textit{Id.} at 335.

\textsuperscript{10} \textit{Id.}
In *Mullins*, the Court defined "reasonable care" according to the Restatement of Torts 323:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking . . . 11

The Court determined that the attack was foreseeable because the students were warned during orientation of the dangers of living near a metropolitan area.12 In addition, the Court reasoned that the precautions taken by the college to protect the students from third party criminal attacks would make little sense unless criminal acts were foreseeable.13 One of the significant contributions of the *Mullins* case was the Court's recognition of a student's right to rely on the college's duty to provide protection from third parties.

In regard to colleges taking responsibility to warn students of dangers, Judge Liacos stated

Of course, changes in college life, reflected in the general decline of the theory that a college stands in *loco parentis* to its students, arguably cut against this view. The fact that a college need not police the morals of its resident students, however, does not entitle it to abandon any effort to ensure their physical safety. Parents, students, and the general community still have a reasonable expectation, fostered in part by colleges themselves, that reasonable care will be exercised to protect resident students from foreseeable harm.14

11 *Id.* at 336.

12 *Id.* at 337.

13 *Id.*

14 *Id.* at 335-336.
The Court's focus on such concepts as duty, foreseeability, and causation clearly indicated that its decision was based on traditional tort principles rather than on in loco parentis.

Because the Court considered the student-institution relationship as unique and different from a typical landlord-tenant relationship, and because the Court imposed a higher standard of care on the institution, scholars\(^\text{15}\) have suggested that such a conclusion marked a revival of a modified in loco parentis. However, simply because the Court suggested that a special relationship existed between the institution and the student did not mean that a modified in loco parentis doctrine necessarily existed. The Court recognized that elements of tort liability, such as the standard of foreseeability, depend on an examination of all the facts and circumstances of a particular case. The fact that there was a special student-institution relationship merely required that the Court consider the unique aspects of the institutional environment. The Mullins Court then applied those unique aspects to impose liability on the College under traditional landlord-tenant tort concepts for negligent failure to provide safe premises. Accordingly, it was clear that the Court did not consider the College to be an insurer of the student's safety, any more than the landlord is the insurer of a tenant's safety. The college apparently would not have been liable for the student's injury caused by the student's own voluntary acts or the unforeseeable acts of a third person. Traditional tort principles dictated the decision in the Mullins case, not a revitalization of the doctrine of in loco parentis.\(^\text{16}\)

\(^{15}\) See Szablewicz and Gibbs, "Colleges' Increasing Exposure;"; Redford, "Pennsylvania's College and University Security Information Act."

\(^{16}\) The Mullins Court differentiated between the in loco parentis doctrine, tort principles, and policy considerations that became a stumbling block for later courts such as Eisman and Tanja H.
The application of traditional landlord-tenant tort principles to the student-institution relationship continued in a 1984 case, when a negligence claim was filed by Madelyn Miller in *Miller v. State of New York*.\(^\text{17}\) In this case the plaintiff had been confronted in her residence hall laundry room at the State University of New York at Stoneybrook, and led to a room where she was raped at knife-point and threatened with mutilation. In addition to allegations of inadequate police protections, the plaintiff claimed that the institution was negligent in acting in its proprietary capacity as a landlord. The Court of Appeals acknowledged that when a state operated housing, it was acting in a proprietary capacity as a landlord rather than in a governmental capacity, and that it was therefore held to the same duty under tort principles as private landlords regarding the maintenance of security. The Court held that the State could be held liable in its landlord capacity when: 1) there has been a reasonably foreseeable likelihood of criminal intrusion into the building, 2) the university negligently failed to keep outer doors locked, and 3) when such failure was the proximate cause of the injury.\(^\text{18}\) The Court found that the State (university) had breached its duty to protect its tenants from reasonably foreseeable harm when it failed to lock the outer doors of the building after there had been published reports of crimes in campus dwellings. The Court stated:

> As a landlord, the state must act as a reasonable (person) in maintaining his property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding risk.\(^\text{19}\)

In holding the institution liable, the Court struggled with determining the role of governmental immunity in such situations. The Trial Court had concluded that since no


\(^{18}\) *Id.* at 830.

\(^{19}\) *Id.* at 833.
"special relationship" between the student and the institution was established, the State owed no duty to protect the student. It could therefore be asserted that when the Court of Appeals concluded that the State was acting in a proprietary capacity, the Court was treating the student-institution relationship as a unique relationship, signaling a return to some form of the in loco parentis doctrine. However, it appeared that the Court was simply analogizing the student-institution relationship to that of a landlord and tenant, and merely applied traditional tort principles to hold the institution liable.

The principle that a college has the duty to protect its students from reasonably foreseeable harm on campus was reinforced by the Supreme Court of California in *Peterson v. San Francisco Community College.*\(^{20}\) Kathleen Peterson, a student, was assaulted while ascending the stairway in the school's parking lot by a man who jumped out from behind "unreasonably thick and untrimmed foliage and trees" and attempted to rape her. The college administration had been aware of similar assaults occurring on the same stairway. Although the institution had taken some measure to improve security, they had not publicized the prior incidents or taken any measure to warn the student of potential danger. The Court stated that while warning the students of previous attacks would not necessarily prevent a student from using the campus or facilities, it would alert them to "unknown dangers" and encourage them to "exercise more caution."\(^{21}\)

In finding that the assault in question was reasonably foreseeable, the Court in *Peterson* held that the college had a duty to exercise reasonable care to protect students from such assaults. Even though no student had asked questions pertaining to security, the college was found to have an affirmative duty to be forthcoming and warn students of known danger. The Court recognized that several factors must be considered in determining whether one owes a duty of care to another, including the foreseeability of


21 Id. at 1201.
the harm and the relationship of the parties. As to foreseeability, the Court concluded that campus security reports indicating the occurrence of campus crimes deemed the harm foreseeable. Regarding the existence of a special relationship, the Court held the institution to principles of landlord-tenant liability, and held the College to a duty to provide safe premises.

The Court's statement that the student-institution relationship was a "special relationship" indicated that, in applying traditional tort principles, the Court considered the relationship of the parties as important in imposing a duty on the institution, just as a court would typically do when a landlord-tenant relationship existed. The Court was analyzing the nature of the parties' relationship in determining duty and foreseeability. Thus, rather than imposing a unique standard on the institution to determine the institution's liability, or applying a theory unique to the student-institution relationship such as in loco parentis, the Court was merely recognizing the fact that tort law requires the examination of all of the facts and circumstances of a particular case.

Courts have typically held that landlords have a duty to keep their premises free from foreseeably dangerous conditions. Logically, when an educational institution has been involved and the institution has been held to the standard of and treated as a landlord, it followed that the premises of the "landlord" institution encompassed the entire campus, as the institution controls that area. In light of this premise, when a court applied traditional tort principles to student-institution disputes, it was not surprising to see statements in the opinion such as "... responsible for overseeing its campus" or "... reasonable care to keep the campus free from dangerous conditions." These statements reflected an imposition of liability on the institution under ordinary tort principles involving a landlord.
Commentators have suggested that the Peterson decision supported the argument that a modified form of in loco parentis was emerging.\textsuperscript{22} Such commentators believed, for example, that the Court held the institution to an unusually high standard of care, and that the Court's decision was based on more than traditional tort principles. This commentary was flawed for a number of reasons. Most importantly, the commentary ignored the basic principles of the "duty" element of tort law, including the necessity of analyzing several factors in determining whether a duty exists. Second, such commentary ignored the basic principles of landlord-tenant liability as discussed by the courts and applied to student-institution disputes. Therefore, the case should not have been interpreted as suggesting a return to a modified in loco parentis.

The 1987 case of Smith v. Day\textsuperscript{23} demonstrated that courts would not rely on the in loco parentis doctrine to hold an institution liable in situations where a student caused harm to a third person. In this case, decided by the Supreme Court of Vermont, the plaintiff victim, Kenneth Day, brought a negligence action against Norwich University because he was shot by a student who attended classes at the university. Plaintiffs argued that a special relationship existed between the institution and the student that warranted imposing a duty on the institution due to the stringent regulations that the institution imposed on its students. The Court rejected the plaintiff's claim that a duty of care extended from Norwich University to a third person after being harmed by the criminal acts of another student. The Court also rejected that a special relationship existed between the student and the university because the degree of control exerted by the university over its students' activities did not in itself impose a legal duty upon the university.

\textsuperscript{22} Szablewicz and Gibbs, "Colleges' Increasing Exposure," 459.

\textsuperscript{23} 538 A.2d 157 (1987).
The Court explicitly recognized that *in loco parentis* did not apply to student-institution disputes. In support of this assertion, the Court believed that, due to the adult status and the liberal freedoms granted to students, it would be inappropriate to hold institutions liable to third parties for volitional acts committed by students. The Court stated:

The students attending these institutions are usually of age and must be treated as adults with the full range of rights and responsibilities for their actions as any other adult.\(^{24}\)

In addition, the Court stated that "it is unrealistic to expect the modern American college to control all of the actions of its students" and "making a university liable for this type of action would inevitably lead to repressive regulations . . . and a loss of student freedoms . . ."\(^{25}\) In so holding, the Court clearly rejected the notion that *in loco parentis*, or a modified version of the doctrine, should have influenced the Court in resolving a dispute involving an institution of higher education.

As the above cases demonstrated, *in loco parentis* was broadly rejected as a doctrine to support the liability of institutions in the late 1980s. Some courts, however, apparently still considered using the doctrine as a basis to hold an institution liable. For example, in *Eisman v. State of New York*,\(^ {26}\) the Court of Appeals analyzed the applicability of *in loco parentis* despite the disavowance of the doctrine as a basis to hold an institution liable by other courts, including the lower court in the *Eisman* case.

In *Eisman*, a student was raped and murdered by a non-student who was a conditionally released prisoner and a former student at the state college. Eisman's parents brought suit against the State, claiming among other assertions that the

\(^{24}\) Id. at 159.

\(^{25}\) Id.

\(^{26}\) 511 N.E.2d 1128, 70 N.Y.2d 175 (1987).
institution was liable for negligently admitting the perpetrator to the College without appropriate inquiry and for failing to supervise the former convict. The Court of Claims held the state liable for the student's death on two theories, one of which was that the College was negligent in admitting the perpetrator or in failing to restrict his activity, a theory the Court concluded to be a proximate cause of the injury. The Appellate division affirmed the Trial Court's decision, and the State appealed.\(^{27}\)

The Court of Appeals reversed the award and dismissed the claim. In assessing the liability of the State for the acts of the College, the Court initially recognized the lower Court's conclusion that the doctrine of in loco parentis no longer offered a basis to impose liability as colleges had no duty to shield students from the dangerous actions of other students. Despite such recognition, however, the Court stated that "... the question before us, in essence, is whether such a duty should nonetheless be recognized when a college admits an ex-felon."\(^{28}\) The Court then went on to conclude that the college was not liable because "such a duty would run counter to legislative policy ..." and liability would impose a higher duty than others in the case whom the Court had concluded were not negligent.\(^{29}\)

While the Court's ultimate holding may have been appropriate, its reasoning and analysis were questionable. Importantly, the Court failed to distinguish between imposing liability based on the in loco parentis doctrine and imposing liability under traditional tort principles. Rather, the Court seemed to conclude that imposing a duty on the institution would have necessarily caused a resurrection of the in loco parentis doctrine and on that basis deemed the institution liable. Imposing liability based on the doctrine of in loco parentis, however, was mutually exclusive from imposing liability

\(^{27}\) Id. at 1131.

\(^{28}\) Id. at 1135.

\(^{29}\) Id. at 1136.
under traditional tort principles. Various cases discussed in this chapter demonstrated that courts have often held institutions to be liable under tort principles while simultaneously dismissing the *in loco parentis* doctrine as a basis of liability. As discussed, a true tort analysis required a thorough examination of all the facts of the particular case, whereas *in loco parentis* has been a broad based doctrine in which to base liability.

One explanation for the Court's questionable reasoning was that the Court was not analyzing the case under traditional tort principles relating to negligence but rather was basing its determination on whether *in loco parentis* applied, and in doing so used the term "duty" as a synonym for imposing liability under the *in loco parentis* doctrine rather than in its traditional sense as an element of negligence liability. Since the lower courts appeared to analyze the case under traditional tort principles, as evidenced by references to such negligence elements as proximate cause, it became doubtful whether such an explanation was feasible.

*Whitlock v. University of Denver*,\(^\text{30}\) a comparative negligence case, was decided in 1987, the same year as the *Eisman* case. In *Whitlock*, the Colorado Court of Appeals held the defendant University liable for injuries sustained by an intoxicated student while jumping on a trampoline at a fraternity function. Oscar Whitlock was rendered a quadriplegic when he broke his neck while attempting to do a flip on the fraternity's trampoline. The Court of Appeals ruled that the University owed a legal duty to the student because the University exercised a degree of control over the fraternity, it leased the house and property to the fraternity, and it was aware of the presence and danger of the trampoline (indicating that the harm was foreseeable).\(^\text{31}\)


In 1987 the Supreme Court of Colorado reversed the judgement of the Court of Appeals, holding that the University did not owe a duty of care to the student to take reasonable measures to protect him from injuries resulting from his use of the trampoline. The Court emphasized that the present case involved the alleged negligent failure to act, rather than negligent action. The Court then discussed the nature of the student-institution relationship, and the decline of the in loco parentis doctrine. The Court stated:

At one time, college administrators and faculties stood in loco parentis to their students, which created a special relationship... However, in modern times there has evolved a gradual reapportionment of responsibilities from the universities to the students, and a corresponding departure from the in loco parentis relationship. Today, colleges and universities are regarded as educational institutions rather than custodial ones... the college student is considered an adult capable of protecting his or her own interests, students today demand and receive increased autonomy and decreased regulation on and off campus.\(^3^2\)

Based on such conclusions, the Supreme Court found that the student-university relationship was not sufficiently special to impose upon the institution a duty to protect fraternity members from extracurricular dangers.

Szablewicz and Gibbs suggested that the ruling of the Court of Appeals in Whitlock evidenced a return of the in loco parentis doctrine and that the ruling by the Supreme Court of Colorado prevented the return of the doctrine.\(^3^3\) On the contrary, the decisions by both courts were based on the application of traditional tort principles. The emphasis by the Court of Appeals on factors such as control and foreseeability indicated that the Court was applying traditional tort notions to determine if the duty element of negligence existed. The Court's holding that the institution owed a duty to the student indeed reflected a very high standard of institutional responsibility. The holding, however, merely reflected the Court of Appeals' belief that such injuries were foreseeable by and

\(^3^2\) 744 P.2d 559 (Colo. 1987).

\(^3^3\) Szablewicz and Gibbs, "Colleges' Increasing Exposure," 461.
were controlled by the institution. The fact that courts in subsequent decisions may rule similarly if the Court of Appeals decision had not been reversed, did not suggest the existence of a disguised *in loco parentis* doctrine. Rather, it merely suggested that institutions would be held to a higher standard in negligence cases.

The judiciary's reliance on tort law in adjudicating student-institution disputes continued in *Furek v. University of Delaware*, 34 decided by the Supreme Court of Delaware in 1991. In *Furek*, Jeffrey Furek brought suit against his fraternity arising out of a fraternity hazing incident in which he was burned when lye-based oven cleaner was poured over his body. The Supreme Court of Delaware reversed the lower court's determination that the institution was not liable. The Court initially concluded that there was no duty on the part of the institution to control students based solely on the student-institution relationship. The Court stated:

> Despite the recognition of adulthood, universities continue to make an effort to regulate student life and the courts have utilized diverse theories in attempting to fix the extent of university's residual duty. In earlier times of strict university control, the institution was viewed as acting *in loco parentis* . . . The concept of university control based on the doctrine of *in loco parentis* has all but disappeared in the face of the realities of modern college life where students are now regarded as adults in almost every phase of community life . . . the demise of *in loco parentis* has dispelled the notion that any special relationship exists . . . 35

Despite the University's contention that the demise of the *in loco parentis* doctrine dispelled the notion that the university automatically owed a duty to protect students, and the Court's recognition that the *in loco parentis* doctrine had vanished, " . . . in the face of

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35 *Id.* at 516-517. While the *Furek* case rejects the theory of *in loco parentis*, some courts continue to recognize the uniqueness of the student-institution relationship (see Mullins v. Pine Manor College, 389 Mass. 47, 449 N.E.2d 331) as cited in *Furek* 518.
the realities of modern college life," the Court proceeded to analyze the potential liability of the University. The Court correctly stated that, "certain established principles of tort law provide a sufficient basis for the imposition of a duty on the University to use reasonable care to protect resident students against the dangerous acts of third parties." The Court then proceeded to conclude that the assumption of control by the University and the foreseeability of the act of the third party created a duty on the institution to protect the student.

The Court ruled that the University was aware of the "dangerous propensities of the fraternities as they related to hazing," and that the university was "... not only knowledgeable of the dangers of hazing but, in repeated communications to students ... and fraternities ... emphasized the University policy of discipline for hazing infractions." The Court held that the University's policy against hazing, like its overall commitment to provide security on campus, constituted "an assumed duty which became an indispensable part of bundle of services which it provided ..." and was bound to carry out with reasonable care. The Furek Court then ruled that the University of Delaware breached this duty by not exercising due care to prevent the hazing injury.

The Court's conclusion was consistent with other tort related rulings. As evidenced by the repeated publications concerning the dangers of hazing and the frequent warnings by the University, the harm to Furek was clearly foreseeable to the University. Similarly, the University's ownership of the property and its initiative to control

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36 Id. at 516.
37 Id. at 519.
38 Id. at 515.
39 Id. at 507.
40 Id. at 516.
hazing may have been analogized to a landlord's responsibility and control of common areas, and its duty to exercise reasonable care over those areas. The Court's conclusion was therefore not surprising.

The Furek Court took extensive measure to specify that in loco parentis was not operative in dictating the Court's decision. In doing so, the Court stated:

In sum, although the University no longer stands in loco parentis to its students, the relationship is sufficiently close and direct to impose a duty under Restatement 314A. The university is not an insurer of the safety of its students nor a policeman of student morality, nonetheless, it has a duty to regulate and supervise foreseeable dangerous activities occurring on its property. That duty extends to the negligent or intentional activities of third persons. 41

In addition,

Because of the extensive freedom enjoyed by the modern university student, the duty of the university to regulate and supervise should be limited to those instances where it exercises control.42

By expressly stating that the Court's decision depended on the specific facts at issue, the Court did not support the notion that such a duty should automatically be imposed on all institutions as might have been the case under the in loco parentis doctrine. Rather, by stating that duty extended only to acts that were foreseeable and subject to university control, the Court recognized that such cases were based on tort principles and that therefore an analysis of the facts and circumstances was required to properly decide any particular case.

Recent cases that recognized a demise of the in loco parentis doctrine were based in part on the fact that the students were of adult age. The question remained, however, whether the courts would conclude that an institution had an in loco parentis

41 Id. at 522.
42 Id.
relationship with its minor students. This question was answered in Hartman v. Bethany College. In Hartman, a student was assaulted by two men whom she met while engaged in under-age drinking at a bar in the vicinity of Bethany College.

The student sued the institution alleging that the College was negligent and that it failed to exercise the duties and obligations of one standing in loco parentis to a minor. In holding that the institution did not stand in loco parentis to the student, the Court stated that the recent trend in case law was against finding an in loco parentis relationship between universities and their students. In recognizing the unique fact that a minor student was injured, the Court stated, "... however, all of these cases involved students eighteen years of age or older. This case then, represented an opportunity to consider . . . whether a college has an in loco parentis relationship with its minor students." The Court went on to discuss the in loco parentis doctrine and its relationship to minor students:

A crucial element behind imposition of in loco parentis status is the conclusion that certain individuals require parental protection and supervision even when a parent is not present. As this Court has already discussed, parents and students do not expect colleges to play a role as surrogate parents . . . It is not reasonable to conclude that seventeen year old college students necessarily require parental protection and supervision. If they did, society might place many more limitations upon the ability of a minor to attend college than currently exists.

The Court also deemed it important that, in its view, society and the courts were willing to grant seventeen year olds "... both the benefits and the burdens of adulthood." After determining that the demise of in loco parentis extended to minor students

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44 Id. at 293.
45 Id. at 294.
46 Id.
attending institutions of higher education, the Court concluded, consistent with previous injury cases involving majority age students, that the College did not owe the student a heightened duty beyond the institution's duty to protect against negligent conduct.

Even though most courts asserted the demise of the in loco parentis doctrine prior to 1991, it was obvious that judicial understanding of the theory was still unclear during the 1990s, as apparent in Tanja H. v. Regents of the University of California. In Tanja H., a resident student was raped by a non-student in various residence hall rooms, as well as a dark stairway landing in which a light had been broken. The student was then raped by fellow students in the co-educational residence hall. The student brought action against the University asserting in part that the University was liable under a typical landlord-tenant theory of liability. The Court rejected the student's landlord-tenant theory of liability, stating that the University's role was "more akin to an innkeeper, who does not have a duty to search guests . . . separate them from each other, or monitor their private social activities." The Court then addressed the current status of students of modern colleges and their relationship with universities. According to the Court, "... courts have not been willing to require college administrators to reinstate curfews, bed checks, dormitory searches . . ." and other measures necessary to protect students from one another. Given such realities of modern life, the Court stated that the University did not have a duty of care to safeguard its students from risks of harm associated with alcoholic beverages. Such conclusions by the Court indicated that the Court believed that imposing a duty on the institution would necessarily resurrect the in loco parentis doctrine. Rather than base its determination on a strict tort analysis, the Court cut short such an

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48 Id. at 921.

49 Id.
analysis by focusing on traditional *in loco parentis* notions and the policy reasons for not returning to such a status. Accordingly, as the Court in *Eisman* had done a decade earlier, the Court made the mistake of failing to distinguish liability under tort law from a return to *in loco parentis*.

Similar to the situation in *Eisman*, the Court's focus on *in loco parentis* concerns precluded a focused and appropriate substantive tort analysis. Instead of focusing on *in loco parentis*, which the Court admitted to be irrelevant, the Court should have focused on the actual facts and circumstances of the case to reach its decision, as appropriate in tort cases. For example, the Court should have focused on whether the rapists had committed prior acts and considered the University's knowledge of prior occurrences or such an individuals' threat to society.

By citing the *in loco parentis* doctrine to preclude imposing a duty on a university to protect a student, the Court erroneously applied the doctrine. The doctrine was traditionally applied to allow institutions to control the morals and behavior of students and was incorrectly extended to hold institutions responsible for student protection. The realization by the judiciary that student injury cases have been governed by tort law and the liberal rights of modern students, however, left little room for the *in loco parentis* doctrine in such cases. The use of the *in loco parentis* doctrine by the courts in *Eisman* and *Tanja H.* to relieve universities from liability not only were inappropriate diversions from true tort analysis, but it also allowed the universities to be protected by a doctrine that they have long claimed to be dead.

Despite such a conclusive denouncement of the doctrine of *in loco parentis* in *Tanja H.*, and other cases, some courts continued to analyze the viability of the doctrine of *in loco parentis*. In *Booker v. Lehigh University*, Lora Ann Booker brought suit against Lehigh University for injuries sustained in a fall after she became inebriated at on-

campus fraternity parties and attempted to walk down a rocky, unlighted trail. The United States District Court held that the University did not undertake a duty to protect the underage student from drinking alcohol by promulgating a social policy and that the University would not be liable to a student who became inebriated as a result of her own behavior.\textsuperscript{51}

The plaintiff argued that Lehigh undertook a duty to protect students when it promulgated its social policy\textsuperscript{52} concerning underage drinking, that Lehigh was negligent by failing to insure compliance with the social policy, and that Lehigh was negligent as a landlord of the fraternities. Despite such tort based allegations, the Court construed the allegations as an attempt to hold the institution liable under the \textit{in loco parentis} doctrine. The Court stated that the student was, "... in fact arguing for accountability in loco parentis ..."\textsuperscript{53} Having made such an initial determination the Court proceeded to analyze the \textit{in loco parentis} doctrine. The Court stated

\begin{quote}
There was a time then college administrators and faculties assumed a role in loco parentis ... A special relationship was created between college and student that imposed a duty on the college to exercise control over student conduct and, reciprocally, gave the student certain rights of protection from the college. The campus revolutions of the late sixties and early seventies were a direct attack by the students on rigid controls by the colleges ... Regulation by the college of student life on and off campus has become limited ... College administrators no longer control the broad arena of general morals.\textsuperscript{54}
\end{quote}

\textsuperscript{51} \textit{Id.} at 234.

\textsuperscript{52} The Social Policy stated that "Party hosts are responsible for ensuring that only persons 21 years of age or over are served alcoholic beverages ... Party hosts must hire a uniformed security guard to check identification at the entrance to the room where alcoholic beverages are served. Hosts must ensure that no one under the age of 21 possesses or consumes alcohol at the party ... Registration of the party does not constitute University approval of such events."

\textsuperscript{53} 800 F. Supp at 237.

\textsuperscript{54} \textit{Id.} at 238.
The Court then concluded that holding the institution liable in this particular case "... would be finding that Lehigh was potentially liable in loco parentis."\(^{55}\)

Similar to the *Tanja H.* case, the Court inappropriately discussed the *in loco parentis* doctrine in ruling for the University. The student's allegations were clearly based on notions of negligence and landlord liability rather than on *in loco parentis.* The Court therefore made the initial mistake of implying allegations based on *in loco parentis.* The question remained, however, whether the Court made such an incorrect implication as an excuse to base its decision on policy reasons related to the *in loco parentis* doctrine rather than on traditional tort notions. Such an initial implication allowed the Court to surmise that finding that the University owed the student a duty would necessarily resurrect the *in loco parentis* doctrine.

The Court's chain of analysis was flawed for several reasons. Most importantly, holding the institution liable under tort principles would not have caused a re-emergence of the *in loco parentis* doctrine. While it may have caused courts in subsequent cases to hold universities to a higher standard of care, such a consequence would not have been synonymous with recognizing the *in loco parentis* doctrine. Modern cases based on allegations of tort liability required a thorough and systematic analysis of facts and circumstances as well as a focus on notions of duty, breach and causation. The *in loco parentis* doctrine, on the other hand, has historically been generally used by courts to allow universities to control student's morals and behavior and to hold universities liable for student injuries without such a systematic analysis.

Students continued to allege institutional liability based on unfulfilled parental responsibilities in 1993. For example, in *Albano v. Colby College*,\(^{56}\) Eric Albano sustained severe head injuries while participating in a college sponsored tennis team

\(^{55}\) *Id.* at 239.

trip to Puerto Rico. Albano sued the college and tennis coach for negligence. Despite the negligence claim, the Court recognized that the alleged basis for liability was that the student's intoxication exposed him to the risk of injury. The Court stated

Although the plaintiff's legal memorandum also refers to the defendants' duty to protect the plaintiff from the harm of a third party assault, there is no suggestion that the defendants had any reason to believe that a third party assault was likely. Instead, the basis for liability seems to be the argument that the plaintiff's intoxication exposed him to this risk ... Albano apparently maintains that the coach should have stopped him from drinking.57

The Court went on to conclude that neither the college nor the coach owed a legal duty to Albano and that the doctrine of in loco parentis was inapplicable. Regarding legal duty, the Court stated

... neither Colby College nor the tennis coach had a legal duty under Maine law to prevent this tragic injury. First, Albano is an adult and voluntarily chose to drink. Second, Albano's activity took place not on Colby College's premises but at a public resort. Third, the drinking was not part of the tennis practice or instruction that the coach and Colby college provided.58

Citing Bradshaw v. Rawlings, the Court stated that the in loco parentis doctrine had significantly deteriorated. The Court then concluded that it did not believe that the in loco parentis doctrine would apply to find a duty on the part of the College or the coach in such circumstances.59

Summary

Twelve cases were discussed in the chapter that were tried from 1980 to 1994. Five cases involved action against private institutions, seven against public institutions. Eight cases involved injury/security issues, three involved injury/accident issues and

57 Id. at 841.
58 Id. at 842.
59 Id.
one involved an injury/hazing issue. Table 3 contains a summary of the various categories of cases reviewed in this chapter that continued to discuss the applicability of the in loco parentis doctrine after its decline had been proclaimed in previous decades.

Table 3
Summary of Cases Tried From 1981-1994 That Continued To Discuss The Applicability of the Doctrine of In Loco Parentis

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<td>Injury/accident</td>
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1 In loco parentis (Note: While the courts discussed notions of in loco parentis in these cases, it was not the primary theory used in deciding the cases during this time period; 1980-1994).
2 Contract
3 Constitution
4 Tort
5 Policy

As many of these cases decided between 1980 and 1994 illustrated, parents and students expected institutions to provide a safe environment for students. Institutions have been asked to be accountable for the conduct of students, to monitor fraternities, to provide safe premises, and to prevent third party crimes from occurring on campus. Szablewicz and Gibb's recognition that students have increasingly demanded protection from injuries caused by the actions of themselves, the university, and third parties was accurate. The courts have become more receptive to student claims as universities have been held to a higher standard of duty to protect students than in the decades before. The
imposed liability for breach of this duty has prompted some legal scholars to argue that
the courts have returned to a new in loco parentis that "looks suspiciously like the in
loco parentis of an earlier time, under which colleges take custody of their students and
in effect become the insurer of their safety . . . "60 While many of the cases in the
1980s and early 1990s were concluded in favor of the students, the decisions were not
based on in loco parentis but were based on issues of landlord and supervisor liability
and liability premised on the institution as a controller of third persons.

Many cases in the past two decades have involved student or third party injuries.
Despite allegations to the contrary, many of the courts deciding such cases relied solely
on traditional tort principles in making their rulings. It was clear that the judiciary
has attempted to recognize that the university community is simply a microcosm of
society as a whole. Accordingly, in loco parentis has been largely replaced by traditional
tort and other legal principles in deciding student-institution disputes. For example,
when students have been injured on campus, courts have treated institutions as
landlords, and have charged the institutions with duties and responsibilities as those of
an ordinary landlord when a tort has been committed on the premises.

As courts have held institutions to various standards under tort law, some courts61
and commentators62 have feared or stated that subsequent rulings in favor of the student
would necessarily trigger the return of a modified in loco parentis doctrine. This theory
allowed some courts to divert from a true tort analysis while simultaneously allowing
institutions to be protected from the doctrine that institutions have consistently claimed
to be dead. Such decisions contributed to the recent controversy surrounding in loco

60 Szablewicz and Gibbs, "Colleges' Increasing Exposure," 463.


62 Szablewicz and Gibbs, "Colleges' Increasing Exposure."

parentis and illustrated the confusion about the doctrine that continues to permeate the judiciary.

It was inconsistent with tort law to suggest that the relationship between students and institutions imposed a duty of care upon institutions for student safety based solely on a custodial or parental relationship. As the cases of the 1980s and early 1990s illustrated, institutions have had a relationship with students that has required institutions to take reasonable measures to provide for their safety. However, suggesting that the institution must act "in place of the parent" was contrary to negligence law that required that "reasonable care" be exercised in providing for the safety of the other legal party. As society becomes more violent and as institutions become less and less the protected ivory towers of yesteryear, institutions, under negligence law, may have to increase standards to meet the expectations of what constitutes "reasonable care." A higher standard of care under tort law, however, has not and does not equate to a return to in loco parentis.

The functions that determined tort liability may have many characteristics in common with parental roles. The traditional doctrine of in loco parentis as defined and discussed in earlier times,63 however, can not be used when an institution or a court mentions a function characteristic of a parental role. Just because an institution acted in a parental manner or was asked to perform a parental function, does not mean that the doctrine of in loco parentis has returned. It may signify that the institution was acting in loco parentis or was being asked to act in loco parentis, yet this can not be confused with the application of the legal doctrine of in loco parentis in a court of law. The doctrine of in loco parentis has always been a vague doctrine, yet it should not be confused with tort theory in defining the student-institution relationship.

63 See footnote 50 in Chapter One of this study, defining in loco parentis as dictated by the courts.
In addition to negligence theory, institutions may increasingly be held to a higher
duty under expanded contract and social host laws. The student handbook, as well as
other documents published by the institution may be considered binding, and must thus
be enforced by the institution, or the result may be a breach of contract claim. Social
host liability had broad implications for colleges and universities who sponsor groups
who serve alcohol to minors. Despite the particular theory that gains prominence in
higher education case law, it seems certain that institutions are at an increased risk of
liability and have increased responsibilities and duties in regulating student conduct and
providing a safe environment. Colleges and universities must be careful when
developing rules and policies governing student behavior so as not to further increase
their institutional responsibility and liability.
CHAPTER SEVEN

AN ANALYSIS OF THE LEGISLATION THAT ADDRESSES THE INSTITUTIONAL RESPONSIBILITY OF THE 1980s AND EARLY 1990s

There was a time when federal legislation and regulations affecting institutions of higher education were virtually nonexistent or unobtrusive. The Higher Education Act of 1965 stated

No provision of any applicable program shall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution, school, or school system . . . ¹

Times have changed, however, and institutions of higher education have increasingly been restricted and influenced by legislative decisions. In 1968, William Beaney insightfully stated,

Neither the legislatures nor courts are competent to run universities. Yet, if our educational institutions become distressed and pressures for solutions become severe, legislatures may intervene.²

Pressures for solutions have become severe as the federal legislature has passed the Drug-Free Schools and Campuses Act of 1989, the Crime Awareness and Campus Security Act of 1990, and the Campus Sexual Assault Bill of Rights of the Higher Education Amendments of 1992. These legislative acts were the federal government’s response to increased pressure from the courts, parents and students to address tragic social issues that have continued to threaten students and institutions of higher education.


Drug-Free Schools and Campuses Act of 1989

The Drug-Free Schools and Campuses Act\(^3\) imposes upon institutions of higher education an obligation to prohibit drug and alcohol use by students, to report to the local authorities certain student conduct related to drug and alcohol use, and to operate drug and alcohol awareness programs. The Act was passed in response to public concern over widespread alcohol and drug abuse by students and the unlawful possession and distribution of such substances by students. The Act applies to colleges and universities that receive federal funds, in any form, and requires such institutions to adopt and implement drug and alcohol policies.

Under the Act, a college or university subject to its provisions must distribute, in writing to each student, regardless of the length of the student's program of study,

"(A) standards of conduct that clearly prohibit, at a minimum, the unlawful possession, use, or distribution of illicit drugs and alcohol by students and employees on its property or as part of any of its activities;
"(B) a description of the applicable legal sanctions under local, State, or Federal law for the unlawful possession or distribution of illicit drugs and alcohol;
"(C) a description of the health risks associated with the use of illicit drugs and the abuse of alcohol;
"(D) a description of any drug or alcohol counseling, treatment, or rehabilitation or re-entry programs that are available to employees or students, and;
"(E) a clear statement that the institution will impose sanctions on students and employees (consistent with local, State, and Federal law), and a description of those sanctions, up to and including expulsion or termination of employment and referral for prosecution, for violations of the standards of conduct required by paragraph (1)(A); . . . \(^4\)

Such statements must be followed by consistent enforcement of sanctions, and the program must be periodically reviewed to determine its effectiveness so that necessary changes can be implemented.\(^5\) Colleges and universities subject to the Act must

\(^3\) Drug-Free Schools and Campuses Act of 1989, 20 USCS 1145g.

\(^4\) 20 USCS 1145g(a)(1).

\(^5\) 20 USCS 1145g(a)(2).
maintain thorough documents and records regarding institutional drug enforcement programs and must make such information and any other necessary information that is requested, accessible for review by the federal government.

Through the imposition of such stringent requirements, the Act forces higher education institutions to exercise more control over students' lives than the judiciary has warranted in recent cases and to assume responsibilities that extend beyond mere curricular and educational concerns, and that reflect a return to in loco parentis. A college or university must inform its students of "... health risks associated with the use of illicit drugs and the abuse of alcohol" and describe any "... drug or alcohol counseling, treatment, or rehabilitation or re-entry programs ..." provided by the institution. Such responsibilities are consistent with traditional in loco parentis notions of placing responsibility on institutions to provide for and maintain the health and safety of students. A college or university must inform students of expected "standards of conduct" imposed by the institution that "prohibit" certain activities on an institution's property and at an institution's activities. Traditional in loco parentis, as it was initially interpreted, was characterized by the understanding that students, while attending an institution, were subject to the institution's power to control and regulate student conduct. While the Act does not purport to force institutions to control all aspects of students' lives, references to such terms as "standards of conduct" and "prohibit" relating to campus property and activities reflect an intention by the federal legislature to once again expect institutions to control and regulate student conduct. Similar to traditional in loco parentis notions, the responsibilities imposed by the Act

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6 20 USCS 1145g(a)(1)(C).
7 20 USCS 1145g(a)(1)(D).
8 20 USCS 1145g(a)(1)(A).
suggest that higher education institutions are guardians of students and are therefore expected by students and society to provide for students' physical, emotional and moral welfare.

The Act requires that higher education institutions make students aware of the disciplinary sanctions that the institution may impose on students for the unlawful use and possession of drugs. Institutions must distribute "a clear statement that the institution will impose sanctions on students . . . a description of those sanctions . . ." and inform students of the applicable legal sanctions imposed for the unlawful possession or distribution of drugs. Under initial interpretations of the in loco parentis doctrine, institutions were granted the power to discipline students as the institution in its discretion deemed appropriate. Reminiscent of the in loco parentis doctrine, the requirements of the Act regarding "sanctions" and expulsion powers suggests a willingness by the legislature to allow institutions of higher education the ability and flexibility to discipline students as the institution deems appropriate and to encourage institutions to control student conduct through authoritarian and disciplinary means. For example, the Act requires institutions to describe possible sanctions, "up to and including expulsion or termination." By describing the most severe sanctions that an institution may impose (expulsion and termination), the Act by implication allows institutions the discretion to discipline students as the institution deems appropriate, as long as the discipline is consistent with the law. This discretion is consistent with powers granted under the in loco parentis doctrine. Such a requirement is also

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9 20 USCS 1145g(a)(1)(E).
10 20 USCS 1145g(a)(1)(B).
11 20 USCS 1145g(a)(1)(E).
12 Id.
indicative of the freedom to control student conduct that institutions enjoyed under original interpretations of the in loco parentis doctrine.

Even if one does not accept the premise that the Act mandates a return to the in loco parentis doctrine, the Act may subject higher education institutions to increased risks of liability by increasing the duty on institutions under traditional law doctrines, particularly as an owner of property. As a minimum standard, the Act requires that institutions implement a policy that prohibits the unlawful possession, use or distribution of drugs or alcohol on college property. Since the Act specifically addresses acts taking place on college property, there is a risk that courts will be more likely to hold institutions to higher duties as a landlord and require institutions to protect students from harm caused by a student's own conduct.

The Act requires that institutions enact drug and alcohol prevention programs "... to prevent the use of illicit drugs and the abuse of alcohol by students..." This provision may prompt institutions to pursue drastic measures to comply with this request, placing unwarranted and unexpected legal obligations on the institution. A broad or all-inclusive drug enforcement program may cause more courts to deem any particular student injury as foreseeable in analyzing the facts under tort law. The Act requires that institutions provide a "... description of the health risks associated with

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13 See Restatement of Torts s 344 which provides that A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons... and by the failure of the possessor to exercise reasonable care and to (a) discover that such acts are being done or are likely to be done, or (b) give a warning adequate to enable the visitors to avoid the harm, or otherwise protect them against it.

14 20 USCS 1145g(a)(1)(A).

15 Id.

16 20 USCS 1145g(a).
the use of illicit drugs and the abuse of alcohol." A "description of the health risks" is a broad requirement that seemingly requires institutions to conduct extensive research in this area and to provide students with a substantial amount of information regarding the dangers of drugs and alcohol. The more that institutions inform students of the various dangers associated with drugs and alcohol in complying with such a requirement, particularly in a written policy, the more likely that drug or alcohol related injuries may be deemed by a court of law to have been foreseeable.

The increased risk of institutional liability as a result of the Act is evident in recent decisions such as Furek v. University of Delaware. As stated, in Furek, the court deemed that anti-hazing policies and warnings constituted evidence that the institution had knowledge of the risk of harm, that the harm was foreseeable, and that the institution assumed an increased duty to protect the student. The Court held that the University's policy against hazing constituted "an assumed duty which became an indispensable part of the bundle of services which it provided . . . " Similarly, an institution's descriptions and information contained in a drug and alcohol policy in compliance with the Act may create an assumed duty on the institution to prevent injuries associated with the risks of alcohol and drugs. Higher education institutions face the risk of losing federal assistance by not meeting the minimum standards of the Act. In addition, as the Furek case suggested, such institutions run the risk of increased liability exposure by enacting policies that reflect the institution's knowledge of dangers to students.

17 20 USCS 1145g(a)(1)(C).
19 Id. at 516.
20 20 USCS 1145g(a)(1)(C).
Crime Awareness and Campus Security Act of 1990

In November 1990, the Crime Awareness and Campus Security Act of 1990 was signed into law. This Act is the second major section of the Student Right-to-Know and Campus Security Act (Public Law 101-542) which amends the Student Consumer Information requirements (Section 1092 of Title 20 of the United States Code). The legislation is designed to ensure "... that students and employees at institutions of higher education are aware of crimes committed on campus and are familiar with security policies and procedures." The Act requires that colleges and universities receiving federal money for student financial assistance, report and disseminate campus crime statistics. More specifically, under the Act, the institution must distribute, to all applicants for admittance to the institution, current students and employees, descriptions of policies concerning campus security and statistics concerning a variety of crimes including:

"(i) murder;
(ii) rape;
(iii) robbery;
(iv) aggravated assault;
(v) burglary; and
(vi) motor vehicle theft."

In addition, institutions are required to publish annual reports on security, including "A statement of current policies concerning security and access to facilities ..." and


23 ss 204 (a), 104 Stat. at 2386 ((f)(1)(F)).

24 ss 204 (a), 104 Stat. at 2386 ((f)(1)(B)).
"A statement of current policies concerning campus law enforcement . . . "

In addition, institutions are required to disclose statistics concerning:

"(i) liquor law violations
"(ii) drug abuse violations; and
"(iii) weapons possessions."

The purpose of the law is to increase the availability of information so that prospective students and their parents can make informed choices regarding which institution to attend, as well as to enable students to take precautions against becoming victims once enrolled at an institution of higher education.

The Act does not mandate particular institutional policies concerning security.

"Nothing in this subsection shall be construed to authorize the Secretary to require particular policies, procedures or practices . . . " By referring throughout the Act to campus policies and procedures, however, the Act impliedly imposes upon institutions the obligation to enact some policies to ensure the safety of students. If institutions fail to enact policies regarding the dissemination of such information as stated in the Act, the institution will be forced to compete with other institutions without the benefit of federal assistance. Such a condition to federal financial assistance, in effect, forces institutions to enact policies and regulations that, as will be discussed, may increase institutional responsibility and risk of liability.

Although the Act was heralded as "the most important piece of education accountability legislation ever approved by the Congress," it has its limitations. For example, the generality of the Act may be misleading. One provision of the Act merely requires that

25 ss 204 (a), 104 Stat. at 2386 ((f)(1)(C)).

26 ss 204 (a), 104 Stat. at 2386 ((f)(1)(H)).

27 ss 204 (a), 104 Stat. at 2386 ((f)(2)).

the institution provide statistics as to crimes on campus.29 Such generalizations ignore the fact that the public's perception and definitions of crimes may not coincide with legal definitions. This generality may cause one violent act to be statistically represented under two categories of crimes and may not constitute an adequate disclosure to the public of the nature and seriousness of the crimes committed.

Also, the Act, by solely addressing on-campus incidents, fails to remedy the problem of reporting off-campus student victimization. The term 'campus' includes

(i) any building or property owned or controlled by the institution of higher education within the same reasonably contiguous geographic area and used by the institution in direct support of, or related to its educational purposes; or
(ii) any building or property owned or controlled by student organizations recognized by the institution.30

Such a definition ignores the fact that a substantial number of students at many institutions of higher education live in facilities that are not affiliated with the institution such as residential housing owned by individuals or entities independent of the institution. The Act does not require the dissemination of crime statistics pertaining to crimes occurring in such dwellings, even though the crimes may involve students enrolled at the institution. Thus, crime statistics may provide students with a false impression or a false sense of security regarding the safety of a particular institution. Another concern or limitation of the Act is that a reported statistic may appear to have indicated an increase in the number of rapes, or assaults on a specific campus, when in fact, the number may have actually been a result of increased disclosure, or improved enforcement of crimes on that campus.31

29 ss 204 (a), 104 Stat. at 2386 ((f)(1)(F)).
30 ss 204 (a), 104 Stat. at 2387 ((f)(5)(A)).
31 An explanation of the statistic in the report may reduce misleading statistics.
Similar to the Drug-Free Campuses Act, the Crime Awareness and Campus Security Act indicates a legislative intent to return to the in loco parentis doctrine. To receive federal funding, the Act requires that institutions distribute to all current and prospective students an annual security report of the institution.\(^{32}\) The annual report must contain, among other information, procedures for reporting campus crime,\(^{33}\) campus security policies,\(^{34}\) campus law enforcement,\(^{35}\) and campus security programs.\(^{36}\) One of the most significant characteristics of the in loco parentis doctrine was the imposition of an obligation on the institution to provide for and maintain the protection and security of students.\(^{37}\) The Act, through references to such terms as "programs" and "policies" regarding campus crime, reflects the legislature's expectation that institutions pursue affirmative action to protect students. By consistently referring to activities of the institution regarding crime,\(^{38}\) the Act makes it incumbent upon institutions to enact measures aimed at securing the physical welfare of students.

The Act does force institutions to describe programs designed to "... encourage students ... to be responsible for their security ... "\(^{39}\) This suggests a disregard for the in loco parentis doctrine and reflects the shift of responsibility for health and safety

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\(^{32}\) ss 204 (a), 104 Stat. at 2385 (f)(1)).

\(^{33}\) ss 204 (a), 104 Stat. at 2385 ((f)(1)(A)).

\(^{34}\) ss 204 (a), 104 Stat. at 2386 ((f)(1)(B)).

\(^{35}\) ss 204 (a), 104 Stat. at 2386 ((f)(1)(C)).

\(^{36}\) ss 204 (a), 104 Stat. at 2386 ((f)(1)(D)).


\(^{38}\) ss 204 (a), 104 Stat. at 2385, 2386 ((f)(1)(A)-(l)).

\(^{39}\) ss 204 (a), 104 Stat. at 2386 ((f)(1)(D)).
matters to students that occurred with the civil rights movement. It appears clear, however, that the legislation did not intend such an interpretation of the Act. Rather, the Act assumes that the institution is responsible for student's safety and well-being. In doing so, the Act represents a return to the in loco parentis doctrine.

The Act also implies the existence of a discretionary power in institutions in regulating student conduct, another characteristic of the in loco parentis doctrine. The institution must inform students of its policy concerning the use of alcohol and drugs and its enforcement of state drinking laws\(^4^0\) and provide a statement regarding local police monitoring.\(^4^1\) Thus, institutions are free to, and impliedly required to, provide for disciplinary rules and sanctions regarding student misconduct. As with the Drug-Free Schools and Campuses Act, this provision is reminiscent of institutional obligations under the in loco parentis doctrine.

The Act may serve to heighten student and parental awareness of campus crime yet it may also increase an institution's liability. The Act requires that institutions disseminate statistics regarding a variety of crimes that have occurred on campus.\(^4^2\) Similar to the Drug-Free Schools and Campuses Act, the publishing of crime statistics and information regarding crime prevention may cause courts to deem a student injury as foreseeable to the institution. The institution's awareness that similar crimes had occurred on campus, or its awareness that such crimes were likely to occur, contribute to the determination of foreseeability particularly if the injury is the result of a frequently reported crime. Consequently, an institution which complies with the Act by publishing crime statistics may be more likely to be held liable for failure to take reasonable measures to protect its students from foreseeable criminal activity.

\(^4^0\) ss 204 (a), 104 Stat. at 2386 ((f)(1)(I)).

\(^4^1\) ss 204 (a), 104 Stat. at 2386 ((f)(1)(G)).

\(^4^2\) ss 204 (a), 104 Stat. at 2386 ((f)(1)(F)).
The risk of increased exposure to liability through compliance with the Act may be illustrated by examining various cases and the judiciary's historical treatment of foreseeability. In Miller v. State of New York, the plaintiff prevailed when the Court found that the institution's notice of similar attacks, including a complaint by the plaintiff, and its failure to institute security precautions after receiving such notice, deemed the plaintiff's injury as foreseeable to the institution. However, in Tanja H. v. Regents of the University of California, the plaintiff did not recover against the institution, despite the presentation of statistical evidence illustrating the frequency of date rape on college campuses. The Court found that the plaintiff's evidence did not establish a correlation between the assault and the University's alleged breach of duty. As previously stated, however, the Court in Tanja H., by failing to distinguish tort law from a return to in loco parentis, erroneously analyzed the issue of foreseeability. While foreseeability was approached differently by the two courts in Miller and Tanja H., it nonetheless appears that the disbursement of uniform crime statistics as mandated by the Act, particularly when compiled over a three year period, may serve to increase the likelihood of a court being able to ascertain the foreseeability of a particular crime, thereby increasing the probability of institutional liability. By informing prospective students, in compliance with the Act, that certain crimes have occurred on campus, or that certain crimes are likely to occur based on statistical evidence, it becomes more difficult for an institution to argue that a crime involving a

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45 ss 204 (a), 104 Stat. at 2386 ((f)(1)(F)).

46 Id.

47 Id.
student, that was a crime explicitly described in institutional material published under the Act, was unforeseeable to the institution. An institution that publishes materials in compliance with the crime reporting requirements of the Act, 48 such as reported statistics of specific crimes occurring on campus, is necessarily aware of criminal activity on campus and the likelihood that a particular crime would occur on campus. Such knowledge directly affects the issue of foreseeability under a tort analysis.

The accumulation and distribution of crime statistics over a three year period would most likely be cited by a court as an indicator of activity that was foreseeable to the institution if a similar crime had previously occurred. In addition, if the institution had not taken reasonable steps to reduce the threat of crime, the plaintiff could almost be assured recovery as foreseeability and breach of care could be easily established in a court of law.

On the other hand, students who receive and are aware of publications from institutions describing specific reported offenses under the Act, 49 may assume the risk of injury by choosing to attend the institution. As institutions comply with the Act and distribute statistics regarding the occurrence and frequency of crimes, 50 campus security procedures, 51 and other information pertaining to student safety and campus crime, students become aware of the dangers and risks involved in attending the institution. Accordingly, it could be argued that by choosing to attend the institution, in light of such disclosures by the institution in compliance with the Act, students realize the risk of harm and knowingly choose to assume the risks of attending the institution.

48 Id.

49 Id.

50 ss 204 (a), 104 Stat. at 2386 ((f)(1)(F)-(H)).

51 ss 204 (a), 104 Stat. at 2385, 2386 ((f)(1)(A)-(D)).
including risks implied in materials published by the institution under the Act. The fact that the student may have assumed the risk of campus crime by choosing to attend a particular institution, in light of having been presented with the campus crime statistics and other crime related information, may therefore serve to protect an institution in a court of law. For example, a student who acquired an institution's crime report under the Act,\textsuperscript{52} was aware of the institution’s security policies and the incidents of crime on campus, may be found to have voluntarily assumed a known risk by deciding to attend the institution. Thus, if the student was a victim of a crime that was reported by the institution as one that had frequently occurred on its campus, the university may be able to avoid liability by arguing that the student assumed the risk of becoming a victim to campus crime. This, of course, would defeat the purpose of the Act, which was intended to benefit and safeguard college students.

Another limitation or concern of the Act is that inaccurate crime statistics may form the basis for action against the institution for negligent misrepresentation.\textsuperscript{53} The Act merely requires the dissemination of “statistics concerning the occurrence on campus” of particular crimes during years “for which data are available.”\textsuperscript{54} Depending on the availability of information to any particular institution, the reporting of crimes may be inconsistent and misleading to a prospective student. The judiciary has already recognized that a university may be sued for misrepresentation. In \textit{Duarte v. State}, the plaintiff, the parents of a campus crime victim, sought damages alleging that the safety

\textsuperscript{52} ss 204 (a), 104 Stat. at 2386 ((f)(1)(F)).

\textsuperscript{53} See Restatement of Torts s 311 which provides that (1) One who negligently gives false information to another is subject to liability for physical harm caused by action taken by the other in reasonable reliance upon such information, where such harm results (a) to the other, or (b) to such third persons as the actor should expect to be put in peril by the action taken. (2) Such negligence may consist of failure to exercise reasonable care (a) in ascertaining the accuracy of the information, or (b) in the manner in which it is communicated.

\textsuperscript{54} ss 204 (a), 104 Stat. at 2386 ((f)(1)(F)).
of the university was negligently misrepresented and that the decision to place their daughter in the residence hall rather than private housing was based on the institution's representation of campus safety. Given the provisions of the Act concerning the particular crime statistics and monitoring of criminal activity, if an institution negligently compiled inaccurate statistics, the student plaintiff would need to prove that the institution misrepresented itself, that the student relied on that information when determining whether to attend that institution, and that the student was injured due to being a target of the crime.

In addition to concerns regarding misrepresentation, the Act may cause institutions to assume unwanted duties. In formulating rules and policies to assure compliance with the Act, institutions run the risk of enacting policies that the institution is incapable or performing or that are unrealistic to enforce. If not carefully stated, an institution could put itself in a position where a court could determine that the institution voluntarily assumed a duty, beyond what was imposed by law, to protect or ensure the safety of the student.

The Campus Sexual Assault Bill of Rights of the Higher Education Amendment of 1992

The Sexual Assault Victim's Bill of Rights amends the Student Right-to-Know and Campus Security Act. The legislation is, in part, a result of the criticism that colleges and universities "hide the truth" of sexual assaults in an attempt to avoid negative publicity. The provisions of the Bill promote the importance of encouraging sex crime victims to report offenses and mandate campus procedures to facilitate reporting. It requires the development and communication by institutions of higher education of

55 ss 204 (a), 104 Stat. at 2386 ((f)(1)(F)-(H)).

certain sexual assault policies on campuses, but states that it did not create duties enforceable by a private right of action. Among other characteristics, the Bill recommends that each institution should develop and distribute:

"(i) such institution's campus sexual assault programs, which shall be aimed at prevention of sex offenses; and
"(ii) the procedures followed once a sex offense has occurred.\(^{57}\)

The policy should address:

"(i) Education programs to promote the awareness of rape, acquaintance rape, and other sex offenses.
"(ii) Possible sanctions to be imposed following the final determination of an on-campus disciplinary procedure regarding rape, acquaintance rape, or other sex offenses, forcible or nonforcible.
"(iii) Procedures students should follow if a sex offense occurs, including who should be contacted, the importance of preserving evidence as may be necessary to the proof of criminal sexual assault, and whom the alleged offense should be reported.
"(iv) Procedures for on-campus disciplinary action in cases of alleged assault, which shall include a clear statement that-
  "(I) the accuser and the accused are entitled to the same opportunities to have others present during a campus disciplinary proceeding; and
  "(II) both the accuser and the accused shall be informed of the outcome of any disciplinary proceeding brought alleging a sexual assault.
"(v) Informing students of their options to notify proper law enforcement authorities, including on-campus and local police, and the option to be assisted by campus authorities in notifying
"(vi) Notification of students of existing counseling...
"(vii) Notification of students of options for, and available assistance in changing academic and living situations after an alleged sexual assault incident, if so requested by the victim and if such changes are reasonable available.\(^{58}\)

Another important influence of the Bill is that it changed the word "rape" in the Campus Security Act to read as "sex offenses, forcible or nonforcible."\(^{59}\) A forcible sex offense is defined as "any sexual act directed against another person's will, or not

\(^{57}\) s 1541 (c)(2), 106 Stat. at 448 ((7)(a)(i,ii)).

\(^{58}\) s 1541 (c)(2), 106 Stat. at 448 ((7)(B)).

\(^{59}\) s 1541 (c)(1), 106 Stat. at 448 ((F)(ii)).
forcibly or against the person's will where the victim is incapable of giving consent;" and includes forcible rape, forcible sodomy, sexual assault with an object, and forcible fondling. Nonforcible sex offenses are defined as "unlawful, nonforcible sexual intercourse," and includes incest and statutory rape.

The Bill requires institutions to disclose the outcome of the sexual assault hearing to both parties.\textsuperscript{60} In addition, the Bill requires institutions to notify the campus community of reported crimes that are considered to be a threat to other students and employees. However, the institution does not have to disclose the results of hearings involving other "crimes of violence." A crime of violence is defined as:

(a) an offense that has an element of use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against that person or property of another may be used in the course of committing the offense.\textsuperscript{61}

As did the Drug-Free Schools and Campuses Act and the Crime Awareness and Campus Security Act, the Sexual Assault Bill of Rights forces universities and colleges to address existing or potential campus crime problems. University and college administrators are forced by the Act to examine sexual assaults occurring on their respective campuses. Since the 1960s, issues in higher education focused on recognition and respect for constitutional and other rights and freedoms of students as evidenced by the predominance of student-institution disputes and cases involving such matters. Case law focused on the protection of student rights and freedoms and not on in loco parentis notions such as institutional control and the protection of students from third party

\textsuperscript{60} The Family Educational Rights and Privacy Act (FERPA) known as The Buckley Amendment stated that institutions were not prohibited from disclosing the results of a disciplinary hearing to the alleged victim of a "crime of violence" defined as an offense using, attempting to use, or threatening the use of physical force or a felony by which by its nature involves a substantial risk of physical force against another (18 U.S.C. 14).

\textsuperscript{61} 18 U.S.C. 14.
assaults. The Sexual Assault Bill of Rights prompts discussion about and helps, by essentially forcing institutions to take affirmative steps to develop and implement sexual assault policies, to bring campus sexual assault crimes to the forefront of issues concerning institutions.

The Sexual Assault Bill of Rights is yet another indication that the legislature had begun to mandate a return to the in loco parentis doctrine regarding students and institutions of higher education. The doctrine has been interpreted as a doctrine that imposed upon institutions an obligation to protect and provide for the welfare of students. Consistent with the interpretation, the Act mandates that institutions adopt programs aimed at the "prevention" of sex offenses. Such an express provision essentially places the responsibility on institutions to protect students from the harm of sex offenses. Conversely, the provision impliedly shifts the responsibility to institutions when such offenses occur. Such a provision that shifts responsibility away from the student to the institution, clearly reflects the in loco parentis doctrine.

Similarly, the Bill of Rights reflects an intent by the legislature to effectuate a return to in loco parentis by requiring institutions to take measures that essentially have the ultimate effect of protecting the moral and physical welfare of the students. Under the Bill of Rights, institutions are required to inform students as to available counseling services for victims, programs to develop rape awareness, and assistance available from the institution. These provisions not only require an institution to pursue affirmative steps to prevent harm to students, but also obligate institutions to act to rehabilitate the mental health of students once a sexual assault has occurred. Such

\[\begin{align*}
62 & \text{ s 1541 (c)(2), 106 Stat. at 448 ((7)(A)(i)).} \\
63 & \text{ s 1541 (c)(2), 106 Stat. at 448 ((7)(B)(vi)).} \\
64 & \text{ s 1541 (c)(2), 106 Stat. at 448 ((7)(B)(i)).} \\
65 & \text{ s 1541 (c)(2), 106 Stat. at 448 ((7)(B)(vii)).}
\end{align*}\]
provisions extend beyond mere welfare of individual students. Institutional provisions of extra-curricular education, increased counseling, and other assistance by institutions as required by the Bill of Rights\(^{66}\) starkly contrast with the student freedoms of the civil rights movement, when students fought for non-intervention by institutions and the courts respected such demands. Under the Bill of Rights, institutions are also required to inform students of possible sanctions following on-campus disciplinary procedures addressing sexual assault crimes\(^{67}\) and procedures for victims to follow to help assure the identity of the perpetrator.\(^{68}\) While such provisions seem aimed at protecting the health and welfare of students, reflective of the later interpretations of the in loco parentis doctrine, the provisions also reflect a recognition by the legislature of an institution's power and authority to control students. By possessing the freedom to discipline and sanction student perpetrators, as the institution deems appropriate, as the Bill of Rights impliedly allows, institutions are granted freedoms consistent with the doctrine of in loco parentis. Such provisions clearly reflect a legislative intent to have institutions focus on safety and welfare issues of students, indicative of institutional responsibilities under the in loco parentis doctrine. The Act also appears to be the result of student and parental desires for more protection from institutions, which necessarily entails more involvement by institutions in the lives of students. The provision of counseling,\(^{69}\) educational instruction,\(^{70}\) and protective information to students\(^{71}\) make institutions more accessible and approachable by students. Such

\(^{66}\) s 1541 (c)(2), 106 Stat. at 448 ((7)(B)(i)(vi)(vii)).

\(^{67}\) s 1541 (c)(2), 106 Stat. at 448 ((7)(B)(ii)).

\(^{68}\) s 1541 (c)(2), 106 Stat. at 448 ((7)(B)(iii)).

\(^{69}\) s 1541 (c)(2), 106 Stat. at 448 ((7)(B)(vi)).

\(^{70}\) s 1541 (c)(2), 106 Stat. at 448 ((7)(B)(i)).

\(^{71}\) s 1541 (c)(2), 106 Stat. at 448 ((7)(A)(v)).
accessibility reflects a legislative intent for institutions to once again be active in the lives of students and to once again place responsibilities on institutions reminiscent of those associated with in loco parentis. This contrasts with student claims for independence and individual responsibility that were inherent in the student rights movement, which ultimately contributed to the judicial demise of the in loco parentis doctrine.

Summary

As discussed in Chapter Six, the judiciary in recent decisions repeatedly denounced the in loco parentis doctrine as a vehicle for resolving student-institution disputes. Instead, courts in recent cases have primarily relied on traditional legal principles in deciding cases involving students' disputes with colleges or universities, disregarding notions that have long been associated with the in loco parentis doctrine. It may be argued, however, that the responsibilities of higher education institutions mandated by the federal legislation signifies a return to in loco parentis and that in loco parentis will again play a significant role in defining the student-institution relationship.

Public concern over drug and alcohol use by students, and the increase of crimes committed on campuses, prompted federal legislation that effectively mandated increased involvement of institutions in the lives and safety of students. The enactment of this legislation created new challenges for colleges and universities. Most importantly, the legislation indicated that colleges and universities would be forced to assume roles and responsibilities reminiscent of times when institutions were considered to act in loco parentis regarding student issues. Such roles and responsibilities contrast with the recent trend of case law, which has continually pronounced the in loco parentis doctrine as obsolete in regard to students and institutions of higher education. It therefore appears that the legislature, prompted by public demand, decided to act to increase institutional responsibility where it felt that the judiciary had failed to act.
It is impossible to determine the future status of *in loco parentis* as it relates to higher education institutions. There is a possibility, however, that this recent legislation could influence the judiciary to revitalize the doctrine of *in loco parentis* in regulating student behaviors and resolving student-institution disputes. To the extent that a court of law views such legislation as reflecting an expectation of society that institutions be insurers of students' safety and welfare, the courts are more likely to base their rulings on broad based notions of *in loco parentis* rather than on a thorough analysis of traditional law principles. While this may result in the conveyance of additional powers in an institution's role as controller of students, institutions would once again be expected to assume great responsibilities to assure the safety and welfare of students and would be held liable for not meeting those expectations. It is a role that many institutions are not willing to accept, and that students fought against in the 1960s. Regardless, parental roles such as mandating institutions to inform adult students to be responsible for their own safety, imposing sanctions if drugs are used, and warning students that they may be the victim of a sexual assault, have been mandated by the federal government during the 1980s and early 1990s.

To some extent, the federal legislation discussed in this chapter imposes obligations upon institutions of higher education to regulate student behavior, a role that the institutions might otherwise have declined and one that the federal government, through such legislation appears to be increasingly encouraging and supporting. Legislation such as the Drug-Free Schools and Campuses Act, the Crime Awareness and Campus Security Act and the Sexual Assault Bill of Rights, requested by public constituents concerned with increasing crime and substance abuse on America's campuses, in effect set expectations and guidelines requiring institutions of higher education to provide safer environments for students than for society at large. Such legislation also raises liability issues for institutions, particularly in regard to negligence issues. While well intentioned, the federal legislation discussed in this chapter could be interpreted as
erasing the freedoms gained by students in recent decades while simultaneously promoting a legislative return to in loco parentis.
CHAPTER EIGHT
CONCLUSIONS AND RECOMMENDATIONS

The purpose of this study was to examine the emergence, development, and contemporary status of the legal doctrine of in loco parentis as it has influenced the relationship between American colleges or universities and students. The analysis of the evolution of this doctrine was intended to provide an increased understanding of how the in loco parentis doctrine concerning the student and the institution has developed, the current status of the legal doctrine, and the impact of that status upon institutions of higher education.

To accomplish these objectives, relevant appellate case law was identified through legal research. These cases were then analyzed to identify the legal principles and reasoning used to arrive at decisions concerning in loco parentis and the student-institution relationship. Federal legislation concerning higher education institutions was also analyzed and applied to determine the current status of the in loco parentis doctrine and to determine its influence on the higher education case law. The research questions of this study concerned the history, evolution and modern status of the in loco parentis doctrine and its role in defining the student-institution relationship in the 1980s and early 1990s. The conclusions and recommendations presented in this chapter emerged from the analysis of relevant case law and federal legislation.

Until the 1960s the doctrine of in loco parentis was the predominant judicial doctrine that allowed institutions of higher education to act as benevolent guardians, free to govern and control the lives of students. Dramatic social and political
changes that occurred during the 1960s challenged the broad parental authority that had been granted to institutions of higher education under the doctrine of *in loco parentis*. During the 1980s, increasing concern over alcohol-related incidents, drug abuse incidents and crime on America's campuses resulted in expanded institutional duties and responsibilities that prompted an important discussion addressing the student-institution relationship and a possible revival of the doctrine of *in loco parentis*.

**Conclusion on the Basis of Case Law Analysis**

The Kentucky Supreme Court in *Gott v. Berea College*\(^1\) established *in loco parentis* as a viable legal doctrine in resolving disputes involving students and institutions of higher education. The Court held that institutions assumed a parental role over students, and pursuant to that role allowed institutions to enact and enforce rules and regulations at the institution's discretion. The original interpretation of the doctrine in *Gott* protected private higher education institutions and allowed the institution to exercise virtually unfettered control over the lives of students.

After the *Gott* decision, other courts embraced the *in loco parentis* doctrine in ruling in favor of institutions, but struggled to determine the legal theory, if any, upon which the doctrine was based. Regarding public colleges and universities, institutional powers were deemed to be derived from the state's legislative powers.\(^2\) By interpreting an institution's powers under the doctrine to be derived from a separate body of government, the powers of institutions to control student behavior was further immune from control and limitation by the judiciary. While courts deciding cases involving private institutions could not use the legislative powers rationale upon which to base the *in loco parentis* doctrine, courts in such cases struggled to determine other possible

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\(^1\) 156 Ky. 376, 161 S.W. 204 (1913).

foundations for the doctrine. For example, some courts stated that an institution's powers under *in loco parentis* was derived from an underlying contractual relationship between the institution and the student. In basing decisions on the *in loco parentis* doctrine, however, courts often failed to articulate a definite and justifiable basis for the doctrine using traditional legal principles.

Despite the courts' inability to articulate a legal foundation for *in loco parentis*, the courts continued to use and rely on the doctrine through the 1930s to enforce and support the broad authority of institutions to control student behavior as institutions deemed appropriate and in their own best interests. The interests of individual students were subordinate to those of institutions, and the courts preferred and chose not to intervene in student-institution disputes under the shield of the *in loco parentis* doctrine.

Throughout the 1940s and part of the 1950s, this broad interpretation and use of the *in loco parentis* doctrine coincided with the increased focus on the doctrine of sovereign and charitable immunity. The latter doctrine caused institutions to be immune from liability in most situations. It is probable that these doctrines, along with institutional authority and the judiciary's biased use of the *in loco parentis* doctrine in prior years, contributed to the limited existence of student-institution disputes before the courts during that period.

During the end of this initial period marking the evolution of the doctrine, student-institution cases increased and the *in loco parentis* doctrine assumed a new role in influencing judicial decisions. In the 1950s, courts began to rely on the *in loco parentis* doctrine in deciding cases that resulted in the increased imposition of duties and

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3 See Stetson University v. Hunt, 88 Fla, 510 (1924).

4 Id. Also see Anthony v. Syracuse University, 231 N.Y.S. 435 (1928).
responsibilities on higher education institutions. This treatment of the doctrine contrasted with the interpretation and use of the doctrine by courts in previous decades, when the doctrine served almost exclusively as a basis for granting institutions unbridled discretion and control over students, free from judicial interference. As the in loco parentis doctrine was interpreted to support and recognize the rights of students, as well as its traditional role of protecting the rights of institutions, the doctrine evolved into a valuable tool to resolve student-institution disputes.

The second period characterizing the evolution of the in loco parentis doctrine was greatly influenced by the civil rights movement in the 1960s. Students on American campuses began to demand respect for their civil liberties and actively fought for their personnel freedoms. Such activism was in direct confrontation with the ideals and notions characterizing the in loco parentis doctrine. As expected, institutions continued to assume an authoritarian and defiant role in facing this activism, relying on the well-established in loco parentis doctrine to justify their actions.

In response, many students turned to the judiciary to remove the authoritarian control of institutions that had been established to define the student-institution relationship and to replace it with the recognition of increased student freedoms. The judiciary responded to the pleas of students. In doing so, however, the courts began to rely less on the in loco parentis doctrine to resolve student-institution disputes. The courts were faced with the challenge of balancing the traditional authoritarian role and freedoms of institutions against the constitutional rights of students.

Some courts imposed significant constitutional restrictions on the parental role of institutions, which led to a decreased reliance on the in loco parentis doctrine in defining the student-institution relationship. Other courts, while at times expressly rejecting

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in loco parentis as a viable legal doctrine, continued to rule in favor of the institution on the basis of inherent parental powers of institutions that characterized the traditional notion of the in loco parentis doctrine. Such cases illustrated the courts’ struggle to recognize the increased civil demands of modern students while at the same time respecting notions of parental control and judicial non-interference that had become imbedded in judicial case law regarding institutions of higher education.

Despite continued confusion by the judiciary of the status and applicability of the doctrine of in loco parentis and the judiciary’s role in resolving student-institution disputes, with few exceptions, evidence of the demise of the doctrine continued in the 1970s. After the Twenty-sixth Amendment was passed in 1971, many students were legally classified as adults, which altered one of the original justifications for the in loco parentis doctrine. As the recognition of constitutional rights of students increased, the original notions of the in loco parentis doctrine and the authoritarian control of institutions naturally eroded. Marking a drastic departure from the judiciary’s posture in earlier cases, courts assumed an active role in resolving student-institution disputes, and began to force institutions to justify decisions and actions that had once been left unquestioned by the courts under the veil of the in loco parentis doctrine. It became evident that the constitutional freedoms of students were given priority over the authoritarian and parental powers that institutions had long enjoyed yet were generally willing to relinquish.

While the demise of the doctrine first became evident with the increased recognition of the constitutional rights of students, the demise of the doctrine was also evident in cases involving traditional legal principles, such as torts and contract law. For example, instead of relying on the in loco parentis doctrine to define the duties and

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responsibilities of institutions in tort related cases, or to grant automatically student rights of protection under the doctrine, courts relied on traditional notions of tort and landlord liability in resolving such cases.

From the 1960s to the end of the 1970s, the in loco parentis doctrine gradually became virtually obsolete in deciding student-institution disputes. With the rise of constitutional protections and the increased reliance on traditional tort principles, in loco parentis came to be viewed by the courts as an archaic doctrine that no longer had a place in judicial decision making.

The third period marking the evolution of the doctrine began in the 1980s when in loco parentis began to reappear in student-institution disputes. The frequency of in loco parentis discussions and cases involving student-institution disputes suggested that students were calling on the judiciary to force institutions to protect students based on the in loco parentis doctrine. Particularly in the area of student injuries, courts often discussed the doctrine and its role in resolving modern student-institution disputes.

Although courts often discussed the doctrine, it was clear that most cases were decided solely based on traditional legal notions such as tort and policy considerations. For example, in tort cases most courts focused on elements of tort law such as duty and foreseeability, rather than the broad based doctrine of in loco parentis. While such courts could have examined the facts of the particular cases with more scrutiny than in the past, increased intervention by the judiciary to rule in favor of students should not have been construed as a revival of the in loco parentis doctrine. Rather, it was merely an indication that the judiciary would treat injuries and crimes on campus similar to its treatment of such issues in society as a whole. This was evident by the frequent use of

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and reliance on landlord and landowner liability by the courts in deciding student injury cases.

The judiciary, however, at times appeared to be confused about the in loco parentis doctrine as recently as the late 1980s. Some courts failed to distinguish assessing liability based on the doctrine of in loco parentis from doing so based on traditional law notions. In addition, some courts refused to hold institutions liable out of fear that the in loco parentis doctrine would be resurrected as a result. It is not clear whether these courts were genuinely confused about the doctrine or whether the courts intentionally used the demise of the doctrine as an excuse not to hold institutions liable. Despite such confusion, many courts expressly refuted the doctrine as a basis for deciding cases, and relied increasingly more on traditional law notions. Rather than exercise non-intervention under the veil of the traditional or a modified in loco parentis doctrine, courts made a concerted effort to take an active role in deciding student-institution cases, and conducted a thorough and systematic analysis of the facts and circumstances of each case, disregarding any special relationship between institutions and students. This occurred even in cases involving students of minority age. Nonetheless, in the early 1990s, the judiciary still appears reluctant to disregard, wholeheartedly, the in loco parentis doctrine and the uniqueness of the parental role of institutions in resolving student-institution disputes.

Conclusions on the Basis of the Federal Legislation Analysis

In recent years, the federal legislature has enacted measures that significantly influence the student-institution relationship. In particular, legislation enacted in the

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late 1980s and early 1990s clearly reflects an intent by the legislature to force institutions of higher education to assume, once again, a role in loco parentis.

The Drug-Free Schools and Campuses Act requires institutions to assume parental responsibilities that are reminiscent of responsibilities associated with the in loco parentis doctrine. Consistent with the in loco parentis doctrine, institutional responsibilities mandated by the Act extend beyond mere educational and curricular concerns. Institutions must take measures under the Act that emphasize the health, protection, and overall welfare of students. In addition, the Act requires institutions to exercise more control over students and discipline related matters, further indicating a re-emergence of the in loco parentis doctrine and increased institutional authority.

In response to an argument that the legislature, through the Act, has forced a return to in loco parentis in regard to the higher education student-institution relationship, an argument can be made that the Act does not revive to doctrine. It can be argued that the Act, through such phrases as "consistent with . . . law"12 and "applicable legal sanctions,"13 merely requires that an institution enforce state and federal law governing drug use, and to enforce rules consistent with such purpose. Therefore, under such an argument, there is no increased duty or right of an institution to control and be responsible for the welfare of students which would suggest a return to the in loco parentis doctrine. Despite the possibility of such an argument, the rights and responsibilities of institutions under the Act regarding discretion, discipline, health and safety suggest a return to the doctrine and outweigh the credibility of such an argument. The Act signifies a willingness on the part of the legislature to provide for more control over, guidance for, and protection of students than is provided for in society as a whole.

12 20 USCS 1145g(a)(1)(E).

13 20 UCSC 1145g(a)(1)(B).
It therefore seems clear that by implementing the Act, the legislature has forced institutions to assume a role in loco parentis.

The Crime Awareness and Campus Security Act extends institutional responsibilities into the areas of campus crime and student protection. The requirement of the Act that institutions fully inform students of crimes committed on campus, and enact campus security policies, indicates an expectation by the legislature that institutions act as guardians of students rather than mere providers of educational services. The Act, consequently, requires institutions to provide a safer community than found in society at large. Similarly, the Sexual Assault Bill of Rights is further indication of a legislative support for the return to the in loco parentis doctrine. The Sexual Assault Bill of Rights forces institutions to examine and focus on crime on campus and to take action to address the security and safety needs of students. By placing campus crime at the forefront of higher education issues, the Sexual Assault Bill of rights mandates that institutions assume a more protective posture regarding students, a posture that had seemingly been nonexistent on campus since the 1960s.

Although this recent legislation may allow institutions to exercise more authority and control over students than existed since the 1960s, the legislation exposes institutions to liability under the in loco parentis doctrine as institutions are increasingly viewed by the legislature as guardians and protectors of students. In addition, the legislation may expose institutions to increased liability under other legal doctrines such as tort and contract law. A broad and stringent policy, exceeding the scope of the Act, may be interpreted by a court of law as requiring increased contractual obligations by the university, or as an establishment of an increased standard of care under tort law. Increased responsibilities of institutions may lead courts to rule that institutions are subject to an elevated standard of care under tort law regarding injuries to students. Also, the prevalence of warnings provided to students pursuant to the legislation may cause a court to view a particular student injury as more foreseeable to the institution,
and may increase the likelihood that an institution will be held liable for negligent misrepresentation. For example, the reporting of crime statistics may increase the likelihood that the subsequent occurrence of similar crimes was foreseeable to the institution. The legislation may provide the courts with the incentive to hold institutions' liable under the supposedly dead in loco parentis doctrine, and to therefore side step a thorough analysis based upon traditional legal principles. Also, providing more information than the legislature requires may constitute the assumption of increased responsibilities by the institution. On the other hand, increased warnings may cause courts to rule that a particular student injured on campus assumed the risk of injury by his or her mere decision to attend the institution despite the warnings. Unfortunately, the weight that a court would allocate to these competing interests is still unclear.

In light of the apparent legislative return to the in loco parentis doctrine, and the risks of liability of institutions arising from such legislation, institutions need to exercise care and pursue a course of action to minimize the risks of liability. Among the actions, institutions should emphasize to students that, although the institution is taking measures as warranted by the legislation, students are adults and must assume responsibility for their own actions.

It seems prudent for institutions to emphasize and focus on the rights and status of students as they have developed in recent decades. An institution must make it clear to students, in writing, that students are adults with constitutional rights and freedoms not subject to institutional interference, and that students will be expected to uphold and obey the law as the rest of society. The institution will then be less likely to be held liable under the in loco parentis doctrine. Institutions must also carefully consider the extent to which they should supervise student behavior and conduct. While it is important that institutions comply with the legislative requirements, and attempt to serve the best interests of students, institutions should not pursue any other actions that
might give the courts more reason to return to the in loco parentis doctrine in resolving student-institution disputes. Specifically, institutions should emphasize the issues that have led to increased student freedoms and the demise of the doctrine. For example, institutions may wish to emphasize, in written pamphlets or otherwise, that students are adults and are expected to act in a responsible manner and that the institution is not an insurer of their welfare. If institutions can emphasize such points, they will be better equipped to argue that they have fulfilled any legal expectations placed upon them, will have taken steps to avoid additional liability, and will have worked to prevent a return to in loco parentis. By focusing on and emphasizing ideals that led to the demise of the in loco parentis doctrine, institutions may strengthen the judiciary's reluctance to resurrect the doctrine.\textsuperscript{14}

Furthermore, institutions should exercise care in drafting programs and policies in compliance with the legislation. Institutions need to exercise case in drafting drug and alcohol programs so as not to increase the foreseeability by the institution of any particular harm to a student, and to not inadvertently assume unwanted or impossible duties and responsibilities. While institutions need to comply with the Act in order to survive in the short term through the use of federal funds, institutions should focus on the responsibility of students to act as adults and to control their own behavior for institutions to avoid unwanted responsibility under the in loco parentis doctrine and to otherwise survive in the long term. Also, to reduce the risk of liability for negligent misrepresentation, institutions should take measures and exercise caution to assure that the crime statistics and other information provided to students is a complete and accurate depiction of the facts that the information represents. Finally, institutions

\textsuperscript{14} See Chapter Three and Five of this study for information regarding the demise of in loco parentis. Several examples include, the majority age of students attending institutions of higher education, student activism focusing on less disciplinary control and more personal treatment, civil and constitutional rights of students v. the authoritarian power of institutions.
should constantly be aware that the recent legislation may cause the judiciary to return to or increasingly rely on the *in loco parentis* doctrine in holding institutions liable. Regardless, in addition to complying with federal legislation to receive federal funds, and to addressing concerns and risks regarding institutional liability, institutions have an ethical responsibility to educate students in regard to the prevention of drug and alcohol abuse on campus. Institutions should educate students of the dangers of abuse as part of the larger responsibility of educating students.

**Responses to the Legal Questions**

The following answers were provided to the research questions of this study:

1. There is documentation within appellate case law to reflect an evolution of the doctrine of *in loco parentis*. Beginning in the 1930s, the courts recognized that institutions stood *in loco parentis* to their students regarding moral and discipline related matters. The judiciary's traditional interpretation of the doctrine allowed institutions to control and regulate students as the institution deemed appropriate. As institutions were granted essentially unbridled discretion and authority under the *in loco parentis* doctrine, the justification for judicial interference in student-institution disputes was minimal. Accordingly, institutional actions of control were often supported by the courts under the *in loco parentis* doctrine.

Gradually, the doctrine evolved from a doctrine that supported institutional authority to one that also enforced institutional responsibility to protect students. While the judiciary continued to support the authoritarian role of institutions, institutions were expected to take actions and assume responsibilities pertaining to the safety and security of students. As the interpretation of the doctrine expanded, courts became more involved in student-institution disputes, often intervening to assure the protection of student rights.

The dramatic social and political changes that occurred in the 1960s challenged the broad parental authority granted to institutions under the *in loco parentis* doctrine. In
addition, students were more concerned with individual freedoms than the individual protections associated with the doctrine. The doctrine assumed a less significant role as courts looked to the constitution to recognize rights of students and to define the student-institution relationship. In addition, cases involving student security and safety were often resolved under traditional notions of tort and contract rather than the in loco parentis doctrine, as courts began to view American campuses similar to society as a whole.

During the 1980s, commentators\textsuperscript{15} argued that there was a resurrection of the in loco parentis doctrine. There was an increasing number of cases being brought before the courts to hold institutions of higher education responsible for student safety. In addition, the doctrine increasingly appeared in judicial opinions of cases involving student-institution disputes. It does not appear, however, that the recent stage of the evolution of the doctrine constitutes a resurrection of the doctrine. Courts have generally continued to resolve student-institution disputes under notions of tort, contract and other such legal principles, and have not relied on the broad notions of the in loco parentis doctrine.

2. Appellate case law does not reflect a return to in loco parentis in regard to issues such as regulating student conduct and providing a safe environment for students. In recent decades, the courts have increasingly discussed the doctrine of in loco parentis in crime and alcohol related cases. The courts have not resurrected the in loco parentis doctrine in determining recent student-institution disputes. The courts have discussed the in loco parentis doctrine, yet they have relied heavily on advanced theories of tort, contract and policy issues to determine the outcome of student-institution disputes. It appears that the judiciary has recognized a higher standard of care for institutions to

\textsuperscript{15} See Szablewicz and Gibbs, "Colleges' Increasing Exposure,"; Redford, "Pennsylvania's College and University Security Information Act."
follow under these theories; however, this does not equate to a return to the in loco parentis doctrine.

Recent federal legislation, however, such as the Drug-Free Schools and Campuses Act of 1989, the Crime Awareness and Campus Security Act of 1990 and the Campus Sexual Assault Bill of Rights of the Higher Education Amendments of 1992 have clearly introduced in loco parentis responsibilities on institutions of higher education in regard to regulating student conduct and providing a safe environment for students. According to the legislation, institutions of higher education are expected to be safer than society at large and institutions are required to closely monitor the behavior of their students. Although not yet evident, this recent federal legislation could influence the judiciary to return to in loco parentis in deciding student-institution disputes.

3. Prior to 1960, in loco parentis defined the student-institution relationship. Institutions had the right to assume the role of a student’s parents and a duty to protect the morals and safety of students. With the decline of the doctrine of in loco parentis in the 1960s and 1970s, no predominant theory has defined the student-institution relationship. Recently, however, in the 1980s and early 1990s, social forces and legislative action have begun to redefine the relationship between students and institutions of higher education. Institutions have been asked by the federal government to eliminate drug and alcohol abuse, to be accountable for the conduct of students and to provide a safe and secure premise for students. These increased responsibilities dictated by Federal legislation may have an impact on the judicial doctrine of in loco parentis and the student-institution relationship. It is still uncertain as to whether in loco parentis will define the student-institution relationship in future court cases. If it does, it would be influenced by the federal government’s parental legislation rather than by the judiciary’s desire to utilize the doctrine of in loco parentis in modern student-institution cases. As it stands, the student-institution relationship will evolve as social and legal patterns continue to change and the judiciary places increased demands on
institutions to assume in loco parentis responsibilities. While a return to the doctrine of in loco parentis may not be preferable due to the substantial risk of liability of institutions and the inhibited rights of students associated with the doctrine, its resurrection may nonetheless more clearly define the student-institution relationship. Currently, colleges and universities must regulate and protect students, struggling to provide a balance so as not to provide too much or too little regulation and protection, each increasing the risk of institutional liability.

Recommendations for Institutions of Higher Education

1. Institutions of higher education must be aware of current and evolving federal and state statutes, particularly those that force institutions to assume greater responsibilities related to the student-institution relationship. Constituents are pressing state and federal officials for additional legislation that will directly affect the responsibilities and policies of public and private institutions of higher education. In addition, colleges and universities must review legislative changes periodically to ensure compliance with these changes and to avoid unintended exposure to liability.

2. Institutions of higher education must keep abreast of judicial case law involving student-institution disputes. Case law is always evolving and any one decision may directly or indirectly affect the activities and liabilities of institutions. For example, in March of 1993, the Georgia Supreme Court held that the state Open Records and Meetings Act applied to disciplinary proceedings conducted by the University of Georgia Office of Judicial Programs and that the Buckley Amendment did not prohibit disclosure of records. Such a court decision can initiate major changes in the daily functioning of an institution. While other courts in other states may decide similar cases differently, college or university officials need to have knowledge of relevant, current case law so that they may keep abreast of legal issues affecting their institutions and students. The awareness of judicial decisions has become particularly important in light of recent
legislation imposing increased duties on institutions. The judicial reaction to this legislation may have great impact on the *in loco parentis* doctrine and the nature of the student-institution relationship.

3. Institutions of higher education should have written policies and regulations pertaining to such issues as student and institution rights and responsibilities, and enforce these policies and regulations while also conducting frequent reviews of them. Policies and regulations should be reviewed by board members, administrators, faculty, and students to assure consistent and thorough enforcement and awareness of such policies. In addition, the policies should be carefully reviewed by legal counsel to assure compliance with the legislation while reducing the risks of unnecessary exposure to liability.

4. Institutions of higher education should implement effective security policies and crime prevention-education programs. From an ethical standpoint, institutions must take active measures to decrease occurrences of crime on campus. Even if the facts of a particular case establish foreseeability due to prevention measures, an institution with sufficient security procedures may be able to satisfy its duty of reasonable care by implementing such policies and programs and exercising consistent enforcement of such policies and programs. In addition, institutions should encourage students and employees to be responsible for their own security and safety, and to not expect institutions to assume such responsibilities. Placing responsibility in the hands of students and employees may minimize institutional liability under the *in loco parentis* doctrine.

5. Institutions of higher education should be aware of what other higher education institutions are doing to satisfy federal and state regulations, to limit institutional liability and to provide for changing student needs. Helpful documents providing information to institutions about federal legislation include publications by the National Association of Student Personnel Administrators, Inc.
Recommendations for Future Research

Recommendations for future research include:

1. An analysis of appellate case law in 3-5 years to determine if the Drug-Free Schools and Campuses Act, the Crime Awareness and Campus Security Act and the Sexual Assault Bill of Rights have had any effect on the judiciary's decisions in resolving student-institution disputes at the higher education level.

2. An analysis of new and evolving Federal and state legislation in 3-5 years to determine if federal or state legislatures are continuing to impose obligations upon institutions of higher education to regulate student behavior and, in effect assume a role in loco parentis regarding the student-institution relationship.

3. A survey of administrators, faculty, parents and students of public and private institutions of higher education to obtain their perceptions of the student-institution relationship, and, thereby assess in loco parentis responsibilities and expectations.

4. A comprehensive investigation and analysis of institutional regulations and policies in regard to federal legislation such as the Drug-Free Schools and Campuses Act, the Crime Awareness and Campus Security Act and the Sexual Assault Bill of Rights.

5. Replicate this study focusing on public and private elementary and secondary school case law and relevant Federal legislation to determine the contemporary status of the in loco parentis doctrine at the public school level.
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BIOGRAPHICAL SKETCH

Kristina Ingrid Hannum was born in Erie, Pennsylvania, in 1967. She attended Fairview High School in Fairview, Pennsylvania, and graduated in 1985. She then attended Allegheny College in Meadville, Pennsylvania, and in 1989 received a Bachelor of Arts degree in psychology, graduating magna cum laude and Phi Beta Kappa. In 1990, she received a Master of Arts degree in education from Allegheny College.

From 1990 until 1993 she was employed by the University of Florida, first as a Hall Director and then as a Coordinator of Student Services. She also was an adjunct faculty member for Santa Fe Community College from 1990 until 1991, while also participating in the development and marketing of the College’s Downtown Center Weekend College program.

It was during the summer of 1990 that she entered the doctoral program of the educational leadership program at the University of Florida, Gainesville, Florida. She currently resides in Charlotte, North Carolina, and is employed by Queens College as the Adult Student Services Assistant.
I certify that I have read this study and that in my opinion it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a dissertation for the degree of Doctor of Philosophy.

James Wattenbarger, Chair
Distinguished Service Professor of Educational Leadership

I certify that I have read this study and that in my opinion it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a dissertation for the degree of Doctor of Philosophy.

David Honeyman, Cochair
Associate Professor of Educational Leadership

I certify that I have read this study and that in my opinion it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a dissertation for the degree of Doctor of Philosophy.

Phyllis Meek
Associate Professor of Counselor Education

I certify that I have read this study and that in my opinion it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a dissertation for the degree of Doctor of Philosophy.

Art Sandeen
Professor of Educational Leadership

This dissertation was submitted to the Graduate Faculty of the College of Education and to the Graduate School and was accepted as partial fulfillment of the requirements for the degree of Doctor of Philosophy.

December 1994

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