Land & Water Law Review

Volume 6 | Issue 2 Article 13

1971

Colleges and Universities: The Demise of in Loco Parentis

Kerry Robert Brittain

COLLEGES AND UNIVERSITIES: THE DEMISE OF IN LOCO PARENTIS

> Courts have a creative job to do when they find that a rule has lost touch with reality and should be abandoned or reformulated to meet new conditions and new moral values.
>
> Roger J. Traynor,
> Law and Social Change in a Democratic Society,
> Illinois Law Forum 232 (1956)

INTRODUCTION

The relationship between the college student and his college[1] is a topic of considerable contemporary discussion. This upsurge can be attributed to no single factor, but there is little room for doubt that the law has had much to do with it. In the past, the courts were reluctant to examine problems that arose between the student and his college, the theory being that it was not for the courts to interfere with a college's authority.[2] During this same period of time, legal scholars gave little recognition to the potential rights and responsibilities of the college student.[3] However, with the Supreme Court's predominant concern with civil rights,[4] the courts[5] and legal authorities[6] no longer feel so constrained.

---

1. The terms "college" and "university" will be used interchangeably in this comment to refer to any non-private institution awarding earned degrees of baccalaureate level or higher.
2. *E.g.*, the New York Supreme Court, in reviewing the authority of college officials, said 42 years ago, "the University officials have wide discretion . . ., and the courts would be slow indeed in disturbing any decision of the University." Anthony v. Syracuse Univ., 224 App. Div. 487, 231 N.Y.S. 435, 440 (1928). The case involved dismissal of a girl from Syracuse University because she was not "a typical Syracuse girl".
3. *E.g.*, 2 INDEX TO LEGAL PERIODICALS 240 (Oct. 1928 - Sept. 1931), under the heading of *Colleges and Universities* lists only six law review articles which deal with the legal relationships of a college and its students.
4. "[I]n the 1963-1964 Term of Court, forty of the fifty decisions accompanied by an opinion and concerned with constitutional questions, were roughly within the 'civil rights—civil liberties' field, as reported by the American Jewish Congress." Van Alstyne, *Student Academic Freedom and the Rule-Making Powers of Public Universities: Some Constitutional Considerations*, 2 LAW IN TRANSITION QUARTERLY 1, 13 n. 44 (1965).
5. *E.g.*, Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961); Knight v. State Bd. of Educ., 200 F.Supp. 174 (M.D. Tenn. 1961).
6. In 15 INDEX TO LEGAL PERIODICALS 50 (Sept. 1968 - Aug. 1969) under the heading of *Colleges and Universities*, there were twenty-nine articles dealing with the legal relationships of colleges and their students.

The intent of this comment is to examine the doctrine of *in loco parentis*[7] as a basis for the governing of students attending college. Consequently, there will be no in-depth analysis of student rights as a whole, nor of any specific rules and regulations, except when they are in point with the comment. Although the comment will deal with the significance of in loco parentis in all colleges, the University of Wyoming will be used as a primary reference. The actual case law pertaining to colleges standing in the place of the parent is relatively small and incomplete, hence there has been an incorporation of in loco parentis material from elementary schools and secondary schools, with recognition of the fact that such material may sometimes be inappropriate at the higher educational level. Also, there has been reliance on treatment of the subject in the non-legal fields such as education and sociology.

APPROACHES THAT DEFINE THE STUDENT-COLLEGE RELATIONSHIP

There are a variety of approaches a college may take in justifying the use of rules and disciplinary actions. The approaches can generally be divided into three categories: nonconstitutional; constitutional; and statutory.[8] The constitutional approach is the latest to gain recognition, but it probably occupies the dominant position in school law today. The constitutional approach to defining student rights and responsibilities concerns itself primarily with the college student's rights as a citizen.[9] It is established law today that the student does retain his constitutional rights while attending college.[10] The Supreme Court in *Tinker v. Des Moines Inde-*

7. Since the doctrine of *in loco parentis* achieves such a common meaning in this comment, it will no longer be italicized.
8. For a thorough analysis of these approaches *see*, Note, *Private Government on the Campus—Judicial Review of University Expulsions*, 72 YALE L. J. 1362 (1963); Goldstein, *The Scope and Sources of School Board Authority to Regulate Student Conduct and Status: A Non-Constitutional Analysis*, 117 U. PA. L. REV. 1045 (1968); *Academic Freedom*, 81 HARV. L. REV. 1045 (1968); Seavy, *Dismissal of Students: Due Process*, 70 HARV. L. REV. 1406 (1957); Goldman, *The University and the Liberty of its Students—A Fiduciary Theory*, 54 KY. L. J. 643 (1966).
9. For a detailed examination of the constitutional problems involved in college law, *see*, Van Alstyne, *Student Academic Freedom and the Rule-Making Powers of Public Universities: Some Constitutional Considerations*, 2 LAW IN TRANSITION QUARTERLY 1 (1965).
10. For the reader who assumed this was always the law, consider the court's statement in *North v. Board of Trustees:*

pendent School District stated the approach concisely when it said: "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the school house gate."[11]

The statutory method of defining student-college relationships is found in a state's enabling acts. The acts usually grant broad discretionary powers to those in charge of operating a college. The University of Wyoming's enabling act is not unique in this respect.[12] Wyoming Statutes provide that:

> The board of trustees and their successors in office shall constitute a body corporate by the name of "the trustees of the University of Wyoming." They shall possess all the powers necessary or convenient to accomplish the objects and perform the duties prescribed by law.[13]

The statutes further clarify this power by providing:

> The president and the professors of the university shall be styled "the faculty" and shall have power as such a body to enforce the rules and regulations adopted by the trustees for the government of the students, to reward and censure students as they may deserve, and generally to exercise such discipline, in harmony with the said regulations, as shall be necessary for the good order of the institution.[14]

Finally, there are approaches which might be loosely classified is non-constitutional and non-statutory in nature. Three primary approaches fall within this category. The first approach is that the college and the student are in a contrac-

---

> By voluntarily entering the university, or being placed there by those who have the right to control him, he [the college student] necessarily surrenders many of his individual rights. How his time shall be occupied; what his habits shall be; his general deportment; that he shall not visit certain places; his hours of study and recreation—in all these matters, and in many others, he must yield obedience to those who, for the time being, are his masters. 137 Ill. 296, 306, 27 N.E. 54, 56 (1891).

11. 393 U.S. 503, 506 (1969).
12. *Compare*, COLO. REV. STAT., § 124-5-1 (1963) § 1: "The Trustees and their successors . . . may make by-laws and regulations for the well ordering and government of the schools and its business not repugnant to the constitution and laws of the state."
13. WYO. STAT. § 21-352 (1957).
14. *Id.*, § 21-338. The University of Wyoming has not ignored this power vested in it. For example, REGULATIONS OF THE UNIVERSITY OF WYOMING BOARD OF TRUSTEES, Pt. IV, § 2 provides that the University faculty can "establish policies regarding student conduct and all phases of student life, activities and student organizations." *See also*, STUDENT CONDUCT, RIGHTS AND RESPONSIBILITIES, RESOLUTION OF THE TRUSTEES OF THE UNIVERSITY OF WYOMING (July 16, 1970).

tual relation to each other.[15] The courts have interpreted this approach to mean that the college student agrees contractually to obey the rules and regulations of his college.[16] Typically, the terms and conditions of such a contract are found in school bulletins, admissions applications, and registration forms.[17] Lacking such specific clauses and conditions, some courts have found an implied contract between the student and the college.[18]

A second approach is based on a fiduciary relationship between the college and the student. Essentially this approach treats the college as a fiduciary; that is, "a person having a duty, created by his undertaking, to act primarily for the benefit of another in matters connected with his undertaking."[19] This approach, however, would still seem to be on the drawing board,[20] for the courts have given it little recognition.[21]

The third approach within the non-constitutional category is the doctrine of in loco parentis which will be analyzed in detail in the next section of the comment.

Although these are the three main theories in the non-constitutional, non-statutory category, there are other possible rationales that a college might use in formulation of university standards.[22] The actual use of other approaches not previously mentioned has been small and whether any of them would constitute a single, distinct approach would be doubtful. Fur-

15. *See generally*, Note, *Private Government on the Campus—Judicial Review of University Expulsions*, *supra* note 8.
16. Anthony v. Syracuse Univ., *supra* note 2.
17. Goldman, *supra* note 8, at 651.
18. Booker v. Grand Rapids Medical College, 156 Mich. 95, 120 N.W. 589 (1909).
19. RESTATEMENT (SECOND) OF AGENCY § 13, comment *a* (1959).
20. The theory was first advanced by Seavey, *Dismissal of Students: Due Process*, 70 HARV. L. REV. 1406 (1957); and later discussed in more detail by Goldman, *The University and the Liberty of its Students—A Fiduciary Theory*, 54 KY. L. J. 643 (1966). *But see*, Note, *Legal Relationship Between the Student and the Private College or University*, 7 SAN DIEGO L. REV. 244, 261 (1970).
21. Only one case has been found to explicitly mention the fiduciary theory, and it did so only in passing. Soglin v. Kauffman, 295 F. Supp. 978, 986 n. 6 (W.D. Wis. 1968).
22. *E.g.*, Moore v. Student Affairs Comm. of Troy State Univ., 284 F. Supp. 725 (M.D. Ala. 1968) (formulating college regulations is an inherent power in the college); Gott v. Berea College, 156 Ky. 376, 161 S.W. 204 (1913) (making rules is a part of a college's basic purpose); John B. Stetson Univ. v. Hunt, 88 Fla. 510, 102 So. 637 (1924) (the ability to make rules is the result of long standing custom).

thermore, it should be noted that all of the approaches mentioned above have been rather arbitrarily separated for the sake of identification. A college or a court could resort to any or all of these approaches in determining the status of a student in college.[23]

THE DOCTRINE OF IN LOCO PARENTIS

An early English decision defined in loco parentis as an individual who assumes the parental character and discharges the parental duties.[24] Through the use of such a broad meaning, in loco parentis has been applied in a variety of situations. Guardians,[25] stepparents[26] and grandparents[27] have been determined to have the ability to stand in the place of the parent. Generally, the effect of one standing in loco parentis gives rise to the same rights and liabilities that the true parent possesses.[28] One who is in the position of being a quasi-parent can discipline and punish the child,[29] although the extent and nature of such punishment is not universally agreed upon.[30] One definite limitation, however, is that the punishment administered cannot go beyond reasonable limits.[31] The reasoning behind this is that the punishment allowed an individual is not a right of action as a surrogate parent, rather it is for the welfare of the child.[32]

The classic statement of a schools' ability to stand in loco parentis came from Blackstone:

> [A parent] may also 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

23. Because of the omnipotent abilities vested in the Constitution, the constitutional approach would merit consideration when discussing any of the other approaches.
24. Wetherby v. Dixon, 34 Eng. Rep. 631 (Ch. 1815). *See also,* Howard v. United States, 2 F.2d 170, 174 (E.D. Ky. 1924); BLACK'S LAW DICTIONARY 896 [4th ed. 1951].
25. Nelson v. Johansen, 18 Neb. 180, 24 N.W. 730 (1885).
26. Harris v. Lyon, 16 Ariz. 1, 140 P. 825 (1914).
27. Dodson v. McAdams, 96 N.C. 149, 2 S.E. 453 (1887).
28. Young v. Hipple, 273 Pa. 439, 117 A. 185 (1922).
29. "Child" in this context is used to denote anyone under twenty-one years old or one not considered to be legally adult.
30. *E.g.,* Steber v. Norris, 188 Wis. 366, 206 N.W. 173 (1925).
31. Holmes v. State, 39 So. 569 (Ala. 1905).
32. People v. Green, 155 Mich. 524, 119 N.W. 1087 (1909).

> charge, viz. that of restraint and corrections, as may be necessary to answer the purposes for which he is employed.[33]

Blackstone makes it clear that a school's ability to stand in the place of the parent is limited. By use of the word "may", Blackstone implies that a parent could elect whether or not the school should stand in loco parentis. Furthermore, the statement sets a limit on the extent to which the delegated parental authority may be exercised, *i.e.* "as may be necessary to answer the purposes for which he is employed." It will soon become evident, however, that American decisions have not always followed Blackstone's rule.

A convenient place to start a discussion of in loco parentis as a basis for setting the nature and bounds of educational authority is in the elementary schools.[34] It is in this area that the concept still retains a certain amount of validity and use. Furthermore, by examining the limits set upon the doctrine in lower educational levels, it might be possible to draw some conclusions as to its limits in colleges.

The school standing in loco parentis is one of the oldest and most widely employed justifications for the use of disciplinary power.[35] The right to use discipline in the school is looked upon as a common law privilege that allows it to escape any liability in tort. The Restatement has said that:

> One who is charged only with the education or some other part of the training of a child has the privilege of using force or confinement to discipline the child only in so far as the privilege is necessary for the education or other part of the training which is committed or delegated to the actor.[36]

---

33. BLACKSTONE, COMMENTARIES 453 (1870).

34. The word "schools" will be used here to mean only elementary and secondary schools.

35. *See generally*, 43 A.L.R.2d 469 (1955); PETERSON-ROSSMILLER-VOLZ, THE LAW AND PUBLIC SCHOOL OPERATION 401-27 (1968); RESTATEMENT (SECOND) TORTS §§ 147-155 (1965); Clausen v. Pruhs, 69 Neb. 278, 95 N.W. 640 (1903).

36. RESTATEMENT (SECOND) OF TORTS § 152 (1965).

Sometimes this authority to discipline is formally enacted into law.[37] However, where there is no statute, the common law will prevail.[38]

The ability of a school to assume a quasi-parental relationship can arise in a variety of contexts. Corporal punishment by a teacher is the most widely accepted instance of the school standing in loco parentis.[39] As long as the discipline does not exceed the bounds of reason and is not prompted by malice,[40] the courts will permit its use much as they permit a parent to punish his own child. A 1905 Alabama court recognized this rule in the case of *Holmes v. State:*

> One standing *in loco parentis,* exercising the parent's delegated authority, may administer reasonable chastisement to a child or pupil to the same extent as a parent himself; and to fasten upon him the guilt of criminality he must not only inflict on the child immoderate chastisement, but he must do so with legal malice or wicked motives, or else he must inflict on him some permanent injury.[41]

Besides requirements or reasonableness and lack of malice, other limitations on the use of corporal punishment require that the type and extent of the punishment administered have some relation to the sex, age, size and physical strength of the pupil.[42]

Problems that arise over the administering of corporal punishment usually center around the meaning of "reasonableness;" that is, was the type of punishment given commensurate with the offense. One suggested test of reasonableness has been to inquire: "Might a responsible parent under similar circumstances [have] inflicted such corporal punishment?"[43]

37. PURDON'S PA. STAT. ANN. § 24.13-1317 (1962):
> Every teacher in the public schools shall have the right to exercise the same authority as to conduct and behavior over the pupils attending his school, during the time they are in attendance, including the time required in going to and from their homes, as the parents, guardians or persons in parental relation to such pupils may exercise over them.

38. REUTTER, SCHOOLS AND THE LAW 64 (1964).

39. RESTATEMENT (SECOND) OF TORTS, *supra* note 36.

40. Dill v. State, 219 S.W. 481 (Tex. 1920); State v. Pendergrass, 19 N.C. 365 (1837).

41. *Supra* note 31 at 570.

42. Boyd v. State, 88 Ala. 169, 7 So. 268 (1890); Berry v. Arnold School Dist. 199 Ark. 1118 137 S.W.2d 256 (1940); RESTATEMENT (SECOND) OF TORTS § 150 (1965).

43. HAMILTON-REUTTER, LEGAL ASPECTS OF SCHOOL BOARD OPERATION 25 (1958).

Formerly, when a question of reasonableness arose, the court would create a presumption of reasonableness.[44] However, questions of reasonableness are now usually treated more as a problem of fact, not presumption.[45]

Except for the use of corporal punishment, there are differing views as to how far the school is able to replace the parent. To Blackstone, the power to stand in loco parentis had to be voluntarily delegated by the parent. The modern view, because of compulsory education, and the obvious need for a school to maintain order, is that a school will assume the parental duties regardless of the parent's consent.[46] The ability to stand in the place of the parent, however, must be directly linked to the promotion of some educational purpose.[47] "Private matters unrelated to education are not within the purview of the teacher under the concept of *in loco parentis.*"[48] The promotion of some educational purpose has been found to grant the schools a control over a student's "health, proper surrounding, necessary discipline, promotion of morality and other wholesome influences."[49] As broad as this might seem, however, it would be wrong to assume that a school possesses parental power in all aspects of school life.[50] For example, disciplinary power does not always belong to the school when the student is off the school grounds. The case of *Dritt v. Snodgrass*[51] clearly pointed this out in striking down a school regulation that prohibited pupils from attending social parties during the school year. The court held:

> When the schoolroom is entered by the pupil, the authority of the parent ceases, and that of the teacher begins; when sent to his home, the authority of the teacher ends, and that of the parent is resumed. For his conduct when at school, he may be punished or even expelled, under proper circumstances; for his conduct when at home, he is subject to domestic control.[52]

44. Drake v. Thomas, 310 Ill. App. 57, 33 N.E.2d 889 (1941).
45. Clausen v. Pruhs, *supra* note 35, Note, *Private Government on The Campus —Judicial Review of University Expulsions, supra* note 8, at 1375.
46. RESTATEMENT (SECOND) OF TORTS § 153(2) (1965).
47. Guerrieri v. Tyson, 47 Pa. Super. 239, 24 A2d 468 (1942); State v. Burton, 45 Wis. 150 (1878).
48. PETERSON-ROSSMILLER-VOLZ, *supra* note 35, at 404.
49. Richardson v. Braham, 125 Neb. 142, 249 N.W. 557, 559 (1933).
50. Lander v. Seaver, 32 Vt. 114 (1859).
51. 66 Mo. 286 (1877).
52. *Id.* at 298.

On the other hand, courts have upheld a teacher's disciplinary action against a student's misconduct outside of the school if such discipline can be directly related to the keeping of order within the school. The vague and general manner in which these rules are stated has created considerable confusion over the extent to which a school stands in the place of a parent. Hence, a precise statement of the law of in loco parentis and its use in elementary and secondary schools today would be a difficult, if not an impossible task to undertake. As a doctrine, in loco parentis is so vague and potentially nebulous that it could be used as a justification for also most any school regulation or disciplinary action.[53] The courts have traveled a considerable distance since Blackstone stated the limits of the law. In fact, the link between corporal punishment and in loco parentis would seem to be the only well-settled area of the law. Beyond that, there has been no definitive statement as to how far in loco parentis can be applied in school administration.[54] Stephen H. Goldstein, Assistant Professor of Law at the University of Pennsylvania, summed up the problem very well when he said: "Neither the school boards nor the courts have attempted to develop any consistent theory of school board rule-making power over the pupil conduct or status."[55] A few court cases have arisen along this line, yet they all fail to clarify the problem.[56] Furthermore, vague statements that define a school's assumed parental power in terms of controlling general welfare and student morality[57] contribute nothing toward an understanding of the law.

53. School expulsion or suspension provides a prime example. The deprivation of an education is far more important than corporal punishment. Consequently, to employ the in loco parentis scheme to anything beyond corporal punishment might not fit the intentions of the doctrine at all.

54. *E.g.*, Deskins v. Gose, 85 Mo. 985 (1885) (court upheld pupil's punishment for fighting on the way to school); Lander v. Seaver, *supra* note 50 (court upheld a pupil's punishment for deriding the teacher outside the school grounds); Douglas v. Campbell, 89 Ark. 254, 116 S.W. 211 (1909) (court upheld a student's suspension for being drunk and disorderly off the school grounds).

55. Goldstien, *supra* note 8 at 375.

56. People v. Mummert, 50 N.Y.S.2d 699 (1944) (court upheld the ability of a principal to administer punishment); Phillips v. Johns, 12 Tenn. App. 354 (1931) (court denied a teacher's right to search a student for stolen money). *But see*, Marlar v. Bill, 181 Tenn. 100, 178 S.W.2d 634 (1944); Pendergast v. Masterson, 196 S.W. 246 (Tex. Civ. App. 1917); Hailey v. Brooks, 191 S.W. 781 (Tex. Civ. App. 1916).

57. *E.g.*, Richardson v. Braham, *supra* note 49.

Two possibilities exist that might serve to clear up this problem of vagueness. First is for the school boards to formulate clear statements about their power to stand in loco parentis.[58] The second possibility rests with the courts. Already several constitutional issues concerning schools are being raised and the courts are indicating a willingness to examine such issues. Although no case has expressly defined the limits of the in loco parentis power in the schools, its application could be limited by requirements such as procedural due process and general recognition of student rights.[59]

The first judicial indication that in loco parentis might also apply on a college level was not until 1866.[60] However, there is authority to the effect that the concept of undertaking parental duties was employed by the colleges for some time before the courts took official notice of it.[61] The use of in loco parentis on the campus has its roots in a colonial era that would be foreign to the contemporary colleges:

> "[*In loco parentis*] was transferred from Cambridge to America, and caught on here even more strongly for very elemental reasons: College students were, for the most part, very young. A great many boys went to college in the colonial era at the ages of 13, 14, and 15. They were, for most practical purposes, what our high school youngsters are now. They did need taking care of, and the tutors were *in loco parentis*.[62]

58. In response to this suggestion, the court in *State v. Burton* said:
> [The 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. . . . [I]t would seem impossible to frame rules which would cover all cases of insubordination and all acts of vicious tendency which the teacher is liable to encounter daily and hourly. 45 Wis. 150, 155 (1878).

59. "The need for procedural fairness in the state's dealing with college student's rights to public education . . . should be no greater than the need for such fairness when one is dealing with the expulsion or suspension of juveniles from public schools."—Madera v. Bd. of Educ., 267 F. Supp. 356, 373 (S.D.N.Y. 1967). *Cf.* Woods v. Wright, 334 F.2d 369 (5th Cir. 1964); Tinker v. Des Moines Indep. School Sys., *supra* note 22; Smith, *School Expulsions and Due Process*, in CURRENT SCHOOL PROBLEMS 9 (Carroll ed. 1969).

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

61. Williamson, *Do Students Have Academic Freedom?* in THE AMERICAN STUDENT AND HIS COLLEGE 311 (Lloyd-Jones-Estrin ed. 1967).

62. Henry Steele Commanger made this comment in a letter to William Van Alstyne who then included it in Van Alstyne, *Procedural Due Process and State University Students*, 10 U.C.L.A. L. REV. 368, 377 & n. 33 (1963).

Going beyond considerations of age, E. G. Williamson sees three underlying reasons why early colleges so extensively relied upon in loco parentis.[63] First, the college felt obligated to raise moral, well-mannered students and to this end they played the role of the parent "to segregate, isolate and insulate the students from the lawlessness characteristic of the frontier."[64] Furthermore, education and religion were closely linked, and the college often assumed the parent's duty of spiritual indoctrination. Thirdly, the early application of in loco parentis "in determining the relationship between the individual and his institution [arose] in the charge to the faculty to become disciplinarians."[65] The early colleges took full advantage of this omnipotent power vested in them.[66]

The first case to allude to the ability of a college to stand in loco parentis was *People ex rel. Pratt v. Wheaton College,* which judicially sanctioned the doctrine's use when the court said:

> A discretionary power has been given [college officials] to regulate the discipline of their college in such a manner as they deem proper, and so long as their rules violate neither divine nor human law, we have no more authority to interfere than we have to control the domestic discipline of a father and his family.[67]

The *Pratt* case, however, is seldom used as authority for establishing the application of in loco parentis in the college. The reason for this is probably because the doctrine's application is only referred to by analogy.

For the university officials who may have awaited specific judicial sanction of in loco parentis, the Kentucky Court of Appeals in 1913 delivered a clear-cut application of the concept, and just nine years later this was improved upon by the Supreme Court of Florida. In the Kentucky case of *Gott*

63. Williamson, *supra* note 61, at 311-13.
64. *Id.* at 312.
65. *Id.* at 312.
66. North v. Bd. of Trustees, *supra* note 10.
67. People ex rel. Pratt v. Wheaton College, *supra* note 60, at 187-88. (The case involved the suspension of a student for joining a secret society in violation of the college's rules. Ironically, while the court was comparing college authority to that of parental authority, it was the student's father who was seeking a mandamus to compel reinstatement).

v. Berea College,[68] a restaurant owner in the town of Berea attempted to procure an injunction against a private college's regulation forbidding college students to eat at any place not owned by the college. Employing the *Pratt* case in the opinion,[69] the court said:

> 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 . . . 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.[70]

It is worth noting, however, that the *Gott* case was not the typical instance of a college taking disciplinary actions against a student. Furthermore, the case points out that the regulations had a special purpose in protecting students who were poor and "unused to the ways of even a village the size of Berea."[71]

The case of *John B. Stetson University v. Hunt* (1924)[72] did involve the relationships between a student and college. Like *Gott,* the college was private. The suit was by a student who claimed she had been maliciously expelled. In upholding the college's ability to expel the student, the court employed the exact language of the *Gott* decision.[73] The court also pointed out its reluctance to interfere with college authority, saying that "every presumption must be indulged in favor of the school authorities to the extent that they acted in good faith, for the best interests of the school and the pupil."[74]

---

68. 156 Ky. 376, 161 S.W. 204 (1913).
69. *Id.* at 207.
70. *Id.* at 206.
71. *Id.* at 206.
72. 88 Fla. 510, 102 So. 637 (1924).
73. *Id.* at 640.
74. *Id.* at 641.

After the *Hunt* decision, the application of in loco parentis to the college was not so extensively applied by a court again until 1967.[75] Because of this forty-three year lapse in judicial application of in loco parentis, several authorities have assumed that the doctrine was dead;[76] one noted author called it a "factual demise."[77] However, as the dissenting justices pointed out in *Poe v. Ullman,*[78] simply because a law has fallen into disuse does not mean it is a "dead letter". In addition, a great number of cases, while not specifically mentioning in loco parentis, use language somewhat similar to that of the *Gott* and *Hunt* decisions.[79] Whether the courts in such cases entertained any thoughts as to the use of in loco parentis in college relationships can never be determined, although the idea cannot be completely dismissed.

THE DEMISE OF IN LOCO PARENTIS ON THE CAMPUS

While it may be slightly premature to administer the final rites to in loco parentis as a basis for determining student-college relationships, death seems eminent. Specific case law, constitutional law, legal and non-legal authorities, logic and fact are all assaulting the validity of the concept as it applies to the modern college. The intent will now be to organize and analyze these various lethal instruments.

Specific case law rejecting the use of in loco parentis on the campus is not large. The first rejection of an attempt by a college to justify its action through the assumption of parental powers occurred over eighty years ago in the case of *Common wealth ex rel. Hill v. McCauly.*[80] The dispute arose

75. Goldberg v. Regents of Univ. of Cal., 248 Cal. App.2d 867, 57 Cal. Rptr. 463 (1967).

76. McIlhenny, *Due Process and the 'Private' Institution,* in THE COLLEGE AND THE STUDENT 326 (Dennis-Kauffman ed. 1966); Wilson, *Freedom and Responsibility in Higher Education, id.* at 337. *But see,* Frankel, *Rights and Responsibilities in the Student-College Relationship, id.* at 237; Mudinger, *Campus Life in a Litigous Age, id.* at 318.

77. Van Alstyne, *Student Academic Freedom and the Rule-Making Powers of Public Universities: Some Constitutional Considerations, supra* note 9, at 17.

78. 367 U.S. 497 (1961) (Although the *Poe* decision was discussiong statutory law, not common law, the reasoning still has validity).

79. *E.g.,* Pyeatte v. Bd. of Regents, 102 F. Supp. 407 (D.C. Okla. 1952); Connell v. Gray, 33 Okla. 591, 127 P. 417 (1912).

80. 3 Pa. C. C. Rep. 77 (C. P. Cumberland Cy. 1887).

over the dismissal of a student for allegedly participating in riotous conduct. The court found the dismissal to be invalid, largely because of the manner in which the college deprived the student of any voice in the affair. In apparent need of a doctrine to justify the employment of such an absolute power over a students' future, the college suggested that it possessed the power of dismissal because the relation between student and professor was similar to that existing between parent and child. The court conceded that the argument was advanced with "great earnestness and warmth," but rejected it, saying that the doctrine could not be used to bar the court from interfering with manifestly unjust actions by a college. While the case cannot be said to stand for the proposition that in loco parentis in the colloge is invalid, it would seem to clearly indicate that the concept cannot be employed as an absolute license to control the lives of students.

More recent judicial rejections of in loco parentis have all occurred within the last three years. Although few in number, the cases are evidence of the courts' increasing reluctance to base a college's power on a vague doctrine like in loco parentis. The first of these decisions was handed down in the case of *Goldberg v. Regents of the University of California.*[81] Once again this was a dispute over a college's authority to expel students. The expulsions were upheld by the court as a reasonable use of a college's inherent power to govern and discipline its students to the point of expulsion, providing proper procedural steps are taken. By way of dictum, however, the court rejected the use of labels or fictions as justifications for the control of student conduct. The court said that: "For constitutional purposes, the better approach . . . recognizes that state universities should no longer stand *in loco parentis* in relation to their students."[82] A short time later, a district court in *Buttny v. Smiley*[83] said: "We agree with the students that the doctrine of in loco parentis is no longer tenable in a university community."[84] Shortly thereafter, the case of *Moore v. Student Affairs Committee of*

81. Goldberg v. Regents of Univ. of Cal., *supra* note 75.
82. *Id.* at 470.
83. 281 F. Supp. 280 (D. Colo. 1968).
84. *Id.* at 286.

Troy State University[85] was decided. Although this was another expulsion case, the crucial issue centered around the college's right to search a dormitory room and then subsequently expel the room's occupant for possession of marijuana seized in the search. The court upheld the use of reasonable search and seizure as being an integral part of a college's performance of its duty to operate an educational institution. However, the court refused to permit the college to base its right to dormitory search and seizure on in loco parentis, when it said: "The college does not stand, strictly speaking, *in loco parentis* to its students."[86] This time only seven months elapsed before another district court found that: "The facts of life have long since undermined the concepts, such as *in loco parentis,* which have been invoked historically for conferring upon the university authorities limitless disciplinary discretion."[87]

While it must be conceded that statements condemning in loco parentis in five cases do not necessarily overturn the common law doctrine, it would be difficult to deny that any similar decisions in the future will give considerable weight to these opinions.

In contrast to the small number of cases which have specifically rejected the college's ability to undertake parental authority, a great many colleges and educational authorities have repudiated its contemporary vitality. There is no exact method of determining how many colleges have administratively rejected the use of in loco parentis. The University of California, at Berkeley, and perhaps all colleges in California,[88] have retreated from any further use of the doctrine.[89] After appointing a commission to study the whole area of campus rules and public law, Cornell University discarded any continued use of in loco parentis.[90] Cornell President James

85. 284 F. Supp. 725 (M.D. Ala. 1968).
86. *Id.* at 729.
87. Soglin v. Kauffman, 295 F. Supp. 978, 988 (W.D. Wis. 1968).
88. Goldberg v. Regents of Univ. of Cal., *supra* note 75 (In light of this decision, it is doubtful whether California colleges would employ in loco parentis any longer).
89. Van Alstyne, *Student Academic Freedom and the Rule-Making Powers of Public Universities: Some Constitutional Considerations, supra* note 9, at 17-18.
90. Sindler, *A Case Study in Student-University Relations* in THE FUTURE ACADEMIC COMMUNITY: CONTINUITY AND CHANGE 119 (Caffrey ed. 1969).

A. Perkins expressed the attitude of the college in disposing of quasi-parental power, when he said: "None of us, least of all the faculty and administration, much mourn the demise of the tradition of *in loco parentis*.[91] By implication, at least three other colleges have declined to make any more use of surrogate parenthood.[92] Finally, in a concerted effort to formulate a model code for student discipline, students and faculty at the New York University of Law found in loco parentis to be inadequate for defining the student-college relationship.[93] The widespread acceptance of such a model code could result in a great many more colleges eliminating any further use of acting the parent's role.

In addition to the judicial and institutional eliminations of in loco parentis, a great number of individuals, both in and out of the field of law, have declared their opposition to its continued use. The rejection by such individuals has covered the full spectrum of society, ranging from a current member of the cabinet[94] to a college student.[95]

By far the most vociferous condemnation of in loco parentis has come from those involved in studying the legal and non-legal aspects of the educational process.[96] While the non-legal

91. Perkins, *The University and Due Process*, at 1, Dec. 8, 1967 (Reprint of address by American Council on Education, Washington D.C.) *cited in* Powell, *Comment*, 45 DENVER L. J. 669, 671 & n. 4 (1968).

92. Urban, *In Loco Parentis*, in PROCEEDING OF THE SEVENTEENTH ANNUAL CONFERENCE OF THE ASSOCIATION OF COLLEGE AND UNIVERSITY HOUSING OFFICERS 168 (1966) (rejection by Pennsylvania State University); *The American College and Some Legal Aspects of In Loco Parentis*, 13 THE NAT'L ACAC J. 6-10 (1968) (indicates probable rejection by Johnson State College); Richardson, *Recommendations on Student Rights and Freedoms*, 39 JUNIOR COLLEGE J. 34 (1969) (probable rejection by Northhampton County Area Community College, Pa.).

93. NEW YORK UNIVERSITY SCHOOL OF LAW, STUDENT CONDUCT AND DISCIPLINE PROCEEDINGS IN A UNIVERSITY SETTING; PROPOSED CODES WITH COMMENTARY, 1-30 (August, 1968).

94. R. Finch, *Foreword* in *Symposium: The Campus Crises*, 11 WILLIAM & MARY L. REV. 575, 576 (1970).

95. One of the most interesting characterizations of in loco parentis this writer has encountered, came from a student at the University of Texas: "In loco parentis, that practice which encourages the will not to be curious, which feeds our youth intravenously with noncontroversial pabulum, and which engenders the wrong type of *alma mater*, should be abolished." Lipscomb, *A Student Looks at Academic Freedom* in Dennis-Kauffman *supra* note 76 at 291.

96. *E.g.*, in a recent law review, in loco parentis was mentioned by name no less than eight times by as many different writers, none of whom considered it to be a doctrine meriting continued enforcement. Beaney, *Students, Higher Education, and the Law*, 45 DENVER L. J. 511, 513 (Special 1968); McClellan, *Comment, id.* at 539, 542; McKay, *The Student as Private Citizen, id.* at 558, 560; Van Alstyne, *The Student as University Resident, id.*

authorities have not been recalcitrant in withholding their beliefs concerning in loco parentis on the campus,[97] the legal writers have had the most telling effect on its decline. Their criticisms have been able to factually and logically point out the inconsistency created in the colleges by their use of assumed parental authority.[98] Although no single authority could be said to speak for all the legal experts in college law, William Van Alstyne,[99] a long standing advocate of student rights, perhaps best summed up the general feeling of the authorities concerning in loco parentis when he said: "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."[100]

The ranks of authorities in education, however, are not completely devoid of individuals who still see in loco parentis as a valid concept.[101] Perhaps the strongest proponent of preserving quasi-parental powers on the campus is Clarence Bakken, Assistant to the Dean of Students, California State College at Long Beach. As recently as 1967, Mr. Bakken has expressed the belief that in loco parentis was a necessary doctrine which served to prevent punishment of college students from becoming solely punative. Mr. Bakken's thesis would seem to be that without a continuance of in loco parentis discipline will lose its educational aspect and any reasons for guidance and counseling will be lost.[102] Two other possible arguments

---

at 582, 590; Monypenny, *The Student as Student, id.* at 649; Stamp, *Comment, id.* at 663, 666; Powell, *Comment, id.* at 669, 671; Clifford, *Comment, id.* at 675, 677.

97. *E.g.*, Penny, *Variations on a Theme: In Loco Parentis*, 8 J. OF COLLEGE STUDENT PERSONNEL 22 (1967); *supra* notes 76 & 92.

98. The criticisms will be dealt with specifically later in this comment.

99. Mr. Van Alstyne is a Professor of Law at Duke University and the author of several law review articles concerning student rights, with special emphasis on constitutional issues. Some of the articles for which he is best known are: Van Alstyne, *Procedural Due Process and State University Students*, 10 U.C.L.A. L. REV. 368 (1963); Van Alstyne, *Political Speakers at State Universities: Some Constitutional Considerations*, 111 U. PA. L. REV. 328 (1963); Van Alstyne, *Student Academic Freedom and the Rule-Making Powers of Public Universities: Some Constitutional Considerations*, 2 L. IN TRANS. Q 1 (1965); Van Alstyne, *The Student as University Resident*, 45 DENVER L. J., 582 (Special 1968).

100. Van Alstyne, *The Student as University Resident, supra* note 99, at 591.

101. *E.g.*, Bakken, *The Legal Basis for College Student Personnel Work*, 34 (STUDENT PERSONNEL SERIES No. 2, 1961); Bakken, *Legal Aspects of In Loco Parentis*, 8 J. OF COLLEGE STUDENT PERSONNEL 234 (1967); Crookston, *Is In Loco Parentis Dead?*, 7 AFFAIRS OF COLORADO STATE UNIVERSITY 4 (1968).

102. Bakken, *Legal Aspects of In Loco Parentis, id.*

have been advanced for the retention of in loco parentis in the colloge. A recent survey of the parents of freshman attending the University of Michigan indicated that they wanted the University to exercise more control over their children than they often did themselves.[103] Secondly, in the opinion of one clinical psychologist, students attending college seek to put the college in the role of a parent, they "attribute the intention of parental behavior to university officials, whether or not it is in fact there."[104]

Although condemnation of in loco parentis by the courts and educational scholars is strong, it is submitted that in the light of contemporary conditions, the doctrine is self-discrediting. Any factual or logical application of in loco parentis clearly indicates that it is ready to be interred. The criticism will be divided into a historical analysis; a comparison of the family and the college; a discussion of in loco parentis limitations; and a brief examination of constitutional considerations. Although none of these categories is clearly divisible from the others, they are sufficiently distinct to aid in clarification of the fallacies that hide behind the college's undertaking of parental authority.

Historically, the colleges were geared to teaching younger students.[105] These students lived in an era when the college undertook the task of disciplinarian, as well as spiritual and moral guide.[106] However, the frontier has long since disappeared, the separation of church and state has been established,[107] and the teacher no longer supplements his educational duties with the monitoring of student morals and conduct outside the classroom.

Today's college student is much older than those who formerly attended college. Modern prerequisites for attending college are a high school diploma. Therefore, nearly all students are at least eighteen years old when they enter college and before they graduate they have achieved the magic age of twenty-one. According to the 1960 Census, there are more

103. *Universitas In Loco Parentis*, 97 SCHOOL & SOCIETY 146 (1969).
104. Urban, *In Loco Parentis*, *supra* note 92, at 169.
105. *Supra* note 62.
106. *Supra* note 61.
107. Zorach v. Clauson, 343 U.S. 306 (1952).

college students between the ages of thirty and thirty-five than there are those under eighteen, the latter group comprising only seven percent of total college enrollment.[108] The average age of all college students is twenty-two.[109] On the basis of this, it is questionable whether in loco parentis factually applies to very many college students at all. Since the quasi-parental role is based upon the theory that one stands in the place of the parent, the college student who is past the age of majority and no longer subject to parental control *a fortiori* would not be subject to a college's in loco parentis control.[110] Furthermore, there are a great many college students between the ages of eighteen and twenty who have been emancipated and would be considered legally adult.[111] For example, the college student (regardless of age) who is financially self-supporting or is married could not logically or legally be considered subject to parental discretion, either directly or indirectly through an agency such as the college. When the number of college students who would no longer be considered within the parent's realm of control is totaled, the greatest majority of college students would not be subject to a college's in loco parentis control. It seems highly inappropriate, therefore, that a college should be able to formulate regulations under the guise of standing in the stead of the parent while such regulations logically apply to only a minority of the students.[112]

Also in a historical vein, it is worth noting that a great many early colleges were private institutions. Most college students today attend state supported colleges and universities. The distinction can be important; 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 justi-

108. U.S. BUREAU OF THE CENSUS, DEP'T. OF COMMERCE, *Current Population Reports, Population Characteristics*, Series P-20 n. 110, at 12 (July 24, 1961).

109. *Id.*

110. Blackstone recognized this same limitation. BLACKSTONE'S COMMENTARIES 782-84 (8th ed., 1890, Bancroft-Whitney pub.).

111. Strickland, *In Loco Parentis—Legal Mots and Student Morals*, 6 J. OF COLLEGE STUDENT PERSONNEL 335, 337 (1965).

112. William Van Alstyne must be credited with exposing the writer to this concept.

fications of authority.[113] In both the *Gott*[114] and the *Hunt*[115] cases, the courts upheld the use of surrogate parent power in private colleges. Hence, the *Gott* and *Hunt* decisions could very well have come about because of judicial reluctance to under-cut any of the common law relied on by the private college for imposing authority. If this was the judicial rationale for the application of in loco parentis on the campus, then it falls short of any meaningful use by state supported colleges.

Finally, colleges in the past were generally small, closely knit communities which, in some respects, duplicated family life. A great number of colleges today, however, have many thousands of students in attendance. It is an obvious fallacy, therefore, to contend that a college with as many as eight thousand students[116] duplicates in any manner the close supervision and personal relationship that the family maintains.[117]

In fact, an attempt to draw any comparisons between the family and the college as a justification for in loco parentis fails. The definition of in loco parentis[118] implies that the one permitted to assume a quasi-parental role does so on the basis of some comparison between the true parent and the surrogate parent. For this reason, taking on parental authority in the lower level schools makes some sense. In elementary and secondary schools, the students are usually legal infants who live at home. The school becomes a home away from home, but it never completely replaces the home. While the pupil is in school, the teacher exercises the parental perogatives of discipline and control for a few hours each day. Since lower level schools do not have exceptionally large student bodies and the number of students in a single class is not excessively large, the schools are able to operate on a more personal basis with the student.

The same comparisons between the public school and the parent do not work on the college level. For one thing, the

113. *See generally*, McIlhenny, *supra* note 76.
114. Gott v. Berea College, *supra* note 68.
115. John B. Stetson Univ. v. Hunt, *supra* note 72.
116. Eight thousand students is approximately the number attending the University of Wyoming.
117. Van Altyne, *Procedural Due Process and State University Students*, *supra* note 99, at 376.
118. *See* cases and materials cited *supra* note 24.

age of the college student has already been shown to destroy much of this comparison. In addition, most students no longer live at home while attending college, thereby nullifying any delineations between the cessation of the school's quasi-parental power and the beginning of the parent's.

Finally, any basis for comparing the personal relationship between the parent and child with the college and the student lacks validity. Colleges are too large and the classes frequently too massive in size to duplicate the affinity created by the family. The intimacy within a family serves important purposes, for it creates in the parent a tolerance of a sibling's misconduct and serves as a restraining force against excessive punishment.[119] The student-college relationship is not created out of love, hence the tolerance and restraint loses its motivation.[120] Althought parental discretion might be transferrable by means of in loco parentis, the inherent limitations on it are not.[121]

The lack of comparison between the family and the college can also serve to point out an even deeper problem of in loco parentis. When the courts and colleges accepted the ability to assume parental authority, they failed to recognize any established limitations.[122] Limitations on the use of in loco parentis in the lower level schools have been established over a considerable period of time.[123] The colleges, however,

119. Van Alstyne, *Procedural Due Process and State University Students*, *supra* note 99, at 376.

120. *Cf.*, Lander v. Seaver, *supra* note 50.

121. Strictly speaking, the familial affection can never be transferred, in either the lower level schools or the colleges. However, there might be some reason to speculate that some type of personal affection can come about in the public schools that cannot be duplicated in the colleges. This is due mainly to the peculiar role of the public school teacher. The greatest majority of in loco parentis cases in grade and elementary schools concern punishment by the teacher. Blackstone referred to the teacher as did Henry Steele Commanger. On the basis of this, the courts may have been comparing a teacher's role to that of a parent's, due primarily to a similarity in personal contact. The modern college, however, does not achieve the same student-teacher relationship. The college teacher is not meant to fill a disciplinarian role with the students, such a function is usually left to other administrative personnel. Hence, there is no comparison between the public school teacher and the college instructor. If, in fact, the courts did follow in loco parentis reasoning because of a teacher's more personal role, it certainly would not apply on a college level.

122. "In college situations, courts have seemed to borrow *in loco parentis*' doctrines as sources of power without importing the limitations upon that power." Note, *Private Government on the Campus—Judicial Review of University Expulsions*, *supra* note 8, at 1379.

123. *See* notes 34-59 and accompanying text.

have been limited only to compliance with human and divine law.[124] The colleges, therefore, assumed a complete parental role, not being limited to sanctions either on the school grounds[125] or in the name of education.[126] In short, in loco parentis furnished the colleges with a vague, ill-defined power that could be used to justify almost any type of discipline or control over the student. Any doubts that such power can exist can be quickly dispelled by examining the facts in the *Hunt*[127] decision. There a student was summarily expelled on the basis of vague generalized rules which the student had allegedly violated.

Even if the college imported the public school limitations of in loco parentis,[128] it would do little to clarify the limits of the doctrine. The point has already been made that, except for the use of corporal punishment, the extent to which a pupil in public school might be subject to various in loco parentis sanctions is unclear. Since corporal punishment has no place in the college, all that remains of quasi-parental limitations are vague requirements of reasonableness of the rules and that they be connected to the performance of some educational function. Obviously these limitations do nothing to clarify the extent to which a college can use in loco parentis power.

The governing of college students through the use of an unlimited in loco parentis power can present many logical inconsistencies. For one thing, the doctrine distorts any delineations between the individual as a college student and the individual as a municipal, state and federal citizen. Since in loco parentis knows no limitations, then presumably a college can control its students on or off the campus. The result is an overlapping of college rules with local, state and federal laws. When a student violates an overlapping rule, he may be subject to a "multiplicity of trials and punishments, exactly to the extent that the laws of these several jurisdictions happen to overlap."[129] Although the law of double jeopardy merits

124. *Supra* notes 68 & 60.
125. Dritt v. Snodgrass, *supra* note 51.
126. *See* notes 47-49 and accompanying text.
127. John B. Stetson Univ. v. Hunt, *supra* note 72.
128. For a suggestion to this effect, *see* Note, *Private Government on the Campus —Judicial Review of University Expulsions*, *supra* note 8, at 1379-80.
129. Van Alstyne, *The Student as University Resident*, *supra* note 99, at 598.

consideration, a common sense feeling of unfairness created by overlapping rules should be enough to eliminate them.[130]

One of the greatest logical inconsistencies with college authority that acknowledges no limitations is that it can potentially exceed even parental limitations. It is extremely ironic when a college can expell a sudent under the guise of in loco parentis while a parent cannot expell a child from his home without violating some law.[131] This also serves as a prime example of how the intimacy between the parent and child has no counterpart in the college.

A final logical inconsistency of an unlimited in loco parentis power is that the doctrine can go both ways. Not only can in loco parentis permit a college to discipline a student, but it can also be used by the student to compel the college to act in his best interest, much the same as a parent would.[132] Hence, the college gains quasi-parental authority as well as the liability of parental responsibility.[133] It would seem that few colleges today would be as willing to accept in loco parentis responsibilities as they did its unlimited authority.

Not only is the unlimited nature of in loco parentis logically unsound, but it is probably unconstitutional in many respects. The emphasis today is upon clear statements of a student's rights and responsibilities. *Dixon v. Alabama Board of Education,* the landmark case in this area, foretold the demise of a college's use of vague discretionary powers when the court said:

> [O]ur sense of justice should be outraged by the denial to students of the normal safeguards . . . It is shocking to find that a court supports [the college] in denying to a student the protection given to a pickpocket.[134]

---

130. *Id.* at 598-603 (discusses specific suggestions on eliminating this problem).

131. Van Alstyne, *Procedural Due Process and State University Students, supra* note 99, at 376.

132. Frankel, *supra* note 76, at 237.

133. A frequent reason as to the use of in loco parentis by a college acting in a protective capacity is that the campus is an enclave that safeguards students from civil authorities. Thompson-Kelly, *In Loco Parentis and the Academic Enclave,* 50 EDUC. RECORD 449 (1969).

134. 294 F.2d 150, 158 (5th Cir. 1961).

Since *Dixon,* the courts have clearly indicated that a college student has rights that the Constitution will protect from arbitrary infringement by a college.[135] If the student in the *Hunt* case were to be expelled today in the same manner that he was in 1924, there is little doubt that the courts would require either reinstatement or at least a fair due process hearing. In the face of this, to propose that a college can possess unlimited in loco parentis power would seem absurd.

In order to drive the final nail into the coffin containing the corpse of in loco parentis, specific rebuttal should be made to those who would argue for retention of the doctrine. Clarence Bakken would seem to have largely defeated his own proposals when he said that careful consideration should be made when questioning the application of rules regarding housing and student activities to students over 21.[136] Since it has already been shown that most students are over twenty-one or the legal equivalent of it, Mr. Bakken's adament refusal to attend the funeral of in loco parentis seems to take on much less significance. Furthermore, what Clarence Bakken really seems to be advocating is the creation of a more personal relationship between the college and the student. With this argument there can be no disagreement, but the creation of a personal relationship with the student need not depend on the in loco parentis doctrine. A college does not have to play the role of the parent in order to communicate or discipline its students. The clinical psychologist who believed the students were attempting to place the college in a parental role sees little value in using in loco parentis as a means to fulfilling the student's needs:

> In loco parentis is a symphon [symptom] of a more primary problem deriving its motive force from the resentment students feel over the perceived neglect of them as people and a failure to collaborate in helping them achieve their life's ambitions and goals.[137]

---

135. *See* notes 4-6 and accompanying text; Van Alstyne, *The Student as University Resident, supra* note 99, at 592-94 (contains a very concise listing of what procedures a college must follow to insure that a student is not deprived of his rights).

136. Bakken, *Legal Aspects of In Loco Parentis, supra* note 101.

137. Urban, *supra* note 92, at 173.

The University of Michigan's survey,[138] which indicated a desire on the part of many parents to have the college discipline the students even more than the parent himself, has revealed many faults. To begin with, such things as smoking, drinking and sexual contacts ranked high on the list of those things parents most wanted the college to control. Yet, these are activities which a college cannot supervise unless they resort to complete dominance over the student's life, an unrealistic, if not illegal, proposal for most colleges today. On the other hand, matters such as vocational or educational control (which the college might be able to sanction), illicited a much weaker response. As a report on the survey concludes:

> Parents seem to need more information about how the University of Michigan operates and the degree to which students are allowed to exercise individual responsibility for their lives in both personal and academic areas.[139]

CONCLUSION

Whether in loco parentis applies to the various levels of schools in Wyoming has never been determined by an appellate court. Furthermore, the state has never enacted a statute that specifically deals with student conduct and discipline as an extension of parental authority.[140] However, it was pointed out earlier that assuming parental power is a common law concept, and absent a statute, the common law will prevail.[141] Should the need arise, therefore, Wyoming would probably accept the common law use of in loco parentis.

The right of a college to formulate reasonable rules and regulations for governing students is an undisputed neces-

---

138. *Universitas In Loco Parentis, supra* note 103.

139. *Id.* at 146.

140. WYO. STAT. § 21-194 (1957) provides:
> The principal of any such high school, with the approval of the board of trustees, shall make such rules and regulations as may be deemed proper in regard to study, conduct and government of the pupils under his charge; and if any such pupils shall not conform or obey the rules of the school, they may be suspended or expelled therefrom by the board of trustees.

See also, WYO. STAT. §§ 2-352 to -53 (1957) (University of Wyoming enabling acts); WYO. STAT. § 21-11 (1957) (this would appear to be the appropriate enabling act for the grade schools in Wyoming).

141. *Supra* note 38.

sity.[142] The intent of this comment has not been to question this right. However, while recognizing the need for rules and regulations, one should seriously question the means used to achieve this end. In loco parentis is a far too vague and unlimited a doctrine to govern a college. Its continued use flys in the face of logic and constitutional rights. In short, the time has come for all colleges and universities to recognize in loco parentis for what it is—an out-moded doctrine that deserves no berth in a contemporary college. The University of Wyoming should be no exception.[143]

If a college repudiates in loco parentis, it would not leave itself powerless. In the early part of this comment several approaches were mentioned as a basis for defining the student-college relationship. Although the constitutional and statutory approaches appear to be the best, any one of the approaches would provide a suitable alternative to in loco parentis. There is no reason why a college should have to rely on assumed parental powers and all their inconsistencies when established alternatives exist.

To bury the doctrine of in loco parentis could do much to help solve the frequent problems a college encounters when it asserts its authority. Colleges across the country have often been the site for student protests and disturbances. The subject of these protests has often centered around a college's methods of administration.[144] Although there is no guarantee that elimination of in loco parentis would solve the college-student problems, it certainly would contribute to an elimination of the uncertainty that now surrounds college administration. On one hand, college students should have a right to have it made clear what the college expects of them and what the results will be if they do not live up to those expectations. Conversely, clear and unambiguous rules and regulations

142. *E.g.*, Soglin v. Kauffman, *supra* note 87.

143. The possible use of in loco parentis at the University of Wyoming certainly cannot be ruled out. For example, the language employed by the University in its manual, STUDENT CONDUCT RIGHTS AND RESPONSIBILITIES, RESOLUTION OF THE TRUSTEES OF THE UNIVERSITY OF WYOMING (July 16, 1970), is much the same as the language used in the *Gott* and *Hunt* cases. Furthermore, Berea College, although a private college, had drawn up its own enabling act with language very similar to that of the University of Wyoming's.

144. Peterson, *Organized Student Protest in 1964-65*, 30 J. OF THE NAT'L ASS'N OF WOMEN'S DEANS AND COUNSELORS 50 (1967).

would no longer force the college into *ad hoc* policy formation that might be regretted later.

In addition, the courts have made it clear that the days of reviewing a college's use of authority only in extreme instances are now gone. Reasonable rules reasonably applied has increasingly become a judicial requirement for the colleges. For a college to void in loco parentis would go far in eliminating the possibility of a court overturning a college's future actions. Simply put, the best way to avoid losing the power a college has is for the college to avoid abusing it.

The only argument of merit that has been advanced for the retention of in loco parentis is that the student and the college need to communicate on a more personal level, one comparable to that of the family. While the basic idea is sound, its application through in loco parentis is not. Colleges in the past have been too fond of employing the magic words "in loco parentis", yet failing to use them as a means of relating to the student. If the ability of a college to call itself a parent is removed, it in no way affects the college's ability to communicate with the student body. It is not a problem of the words a college uses to describe its attempts at communication, but whether it is in fact communicating in meaningful ways.

In fine, it can be said that whatever validity, if any, in loco parentis might once have had at the college level, it no longer exists. If nothing else, the doctrine should die of extremely advanced age.

KERRY ROBERT BRITTAIN