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AUTHOR Edwards, Alan F., Jr.
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ABSTRACT

This paper reviews the conflicting literature on "in loco parentis" as applied to college settings. Specifically, attention is focused on three areas: (1) the roots, origins, and early history of the concept; (2) the concept's apparent demise in the 1960s; and (3) its recent comeback as a hot topic. The doctrine of "in loco parentis" is traced to 18th century English common law and beyond, with origins in ancient Roman law and even the Code of Hammurabi. Emerging American colleges adopted the concept. Many of the applications of "in loco parentis" centered on the maintenance of campus order and student discipline and the associated authority of institutions to make and enforce their rules. A movement away from "in loco parentis" occurred in the 1960s, perhaps due to rebellion against authority and difficulty in treating students as children, or perhaps due to American institutions adopting a research university model in which students were free of paternalistic control. Contemporary treatments of the doctrine are grouped into four thematic areas: dead and buried, alive and kicking, resurrecting, and reincarnating. The paper concludes that "in loco parentis" assumes a consensus of values that does not exist today and that the judiciary is attempting to formulate a useful student-institution legal relationship while this relationship itself is still changing. (Contains 31 references.) (JDD)

IN LOCO PARENTIS: ALIVE AND KICKING, DEAD AND BURIED, OR RISING PHOENIX?

Alan F. Edwards, Jr.

School of Education
College of William and Mary
Williamsburg, Virginia

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Texas A&M University
Department of Educational
Administration
College Station, TX 77843
(409) 845-0393

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IN LOCO PARENTIS: ALIVE AND KICKING, DEAD AND BURIED, OR RISING PHOENIX?

Alan F. Edwards, Jr.[1]

INTRODUCTION

Seldom has a presumably simple concept generated as much debate and controversy as has the legal doctrine of in loco parentis in American higher education. The debate and controversy did not arise with courts' initial applications, but rather, sprang up as law and education scholars attempted to document the concept's history--its 18th-century English origins, its 1960s fall from grace, and its possible contemporary resurrection. Little agreement is found in the literature as to the extent of the concept's presence and precedence in the history of student-institution relationships at American colleges and universities. Given this lack of consensus, it should not be surprising that researchers differ on questions of whether in loco parentis is truly dead, is still alive (in the same or some new form), or whether it is simply dormant and posed for a rebirth.

This analysis reviews the conflicting literature on in loco parentis. Specifically, attention is focused on three areas: (1) the roots, origins and early history of the concept; (2) the concept's apparent demise in the 1960s; and, (3) its recent comeback as a hot topic. Based on this review, generalized conclusions are offered concerning both the historical and contemporary usefulness of the doctrine for understanding student-institution relationships in American higher education.

THE LIFE OF IN LOCO PARENTIS

Conception

The doctrine of in loco parentis can be traced to 18th-century English common law and beyond, with origins in ancient Roman law and even the Code of Hammurabi (Moran, 1967). In his 1770 compilation, Blackstone offers one of the first applications to education:

> The father may also delegate part of his parental authority ... to the tutor or schoolmaster of his child; who is then in loco parentis, and has such 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 (p. 413).[2]

While in loco parentis was initially developed as an English tort principle (see Jackson, 1991; Ratliff, 1972; and, Brubacher, 1971)--a

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[1]Alan F. Edwards, Jr. is a doctoral student in higher education at The College of William and Mary in Williamsburg, VA.

[2]Blackstone gives no citation or precedent for his application of in loco parentis to education. Hogan and Schwartz (1987) have found no case law in Britain applying this term to educators prior to Blackstone's 1765 writing.

legal defense for educators accused of student battery based on parental (fathers') delegation of authority--it eventually received a much broader application in U.S. higher education.

Thus, in loco parentis may have been imported to the U.S. from England as both an allowance and protection for the public school teacher to use corporal punishment (Zirkel & Reichner, 1986). Writers often cite State v. Pendergrass,[3] an 1837 North Carolina Supreme Court case in which the justices ruled "[t]he teacher is the substitute of the parent," as one of the initial American applications of the doctrine. Emerging American colleges are assumed to have adopted the concept from the schools.

On the other hand, the groundwork for in loco parentis in higher education may have been laid in the English colleges concurrent with the public schools. This institutional model, with in loco parentis perhaps inherent within, was imported by the emerging American higher education system. The claim is made that:

> The [English] college was ... an almost organic entity, a large family in which the intimate nature of residential life demanded strict authority and control. The English model fostered absolute institutional control of students by faculty both inside and outside the classroom .... the emphasis on hierarchical authority stemmed from medieval Christian theology and the unique privileges afforded the university corporation (Jackson, 1991, pp. 1139-40).

The English college was a small, cohesive community populated by minors who not yet held any rights as adults. To the degree that the colonial colleges mirrored their English models, some authors conclude that in loco parentis was the natural form of institutional authority and student-institution relationship (see Jackson, 1991 and Thomas, 1991).[4]

But such control and authority may have been paternalistic habit more than legal rule. Although in loco parentis had not yet been articulated by name, courts considered themselves powerless to intervene in the authority of college administrators. In People v. Wheaton College,[5] an 1866 Illinois court ruled:

> [a] discretionary power has been given [college authorities] to regulate the discipline of their college ... and ... we have no more authority to interfere than we have to control the domestic discipline of a father in his family (supra at p. 187).

The court did not deem the issue to be a justiciable action, and this "judicial view of the college-student relationship eventually grew into the in loco parentis doctrine" (Szablewicz & Gibbs, 1987, p. 454).

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[3] 19 N.C. (2 Dev. & B.) 365, 366 (1837).

[4] Thomas quotes 17th-century Harvard president Henry Dunster in his charge to the faculty to "advance" and "take care" not only of the students' education, but also of their "conduct and manners" (1991, p. 34). She also cites Rudolph (1962) in expounding the depth and breadth of institutional control by noting that "[e]very possible aspect of student life was regulated" (Thomas, p. 34).

[5] 40 Ill. 186, 187 (1866).

Birth, Life, and Times

Generally the concept implied that institutions stood in place of their students' parents. Colleges assumed the ***rights*** inherent in the parental ***status*** as well as the associated ***duties*** of parental ***responsibility***. Administrators had a duty to protect the safety, morals, and welfare of their students because parents transferred their authority and obligations to the institution. But, since early-19th century higher education was viewed as a privilege and not a right, and since most colleges were private and not public, institutions were almost completely autonomous (Walton, 1992, p. 248). The courts allowed them broad powers in superseding individual student freedoms in the name of what amcunted to an institutional "father knows best."

For a relatively brief period in the late 1800s, students found some protection from summary discipline in the corporate status of universities (both public and private). An 1887 Pennsylvania court issued a writ of mandamus in granting a student relief from dismissal based on his membership in the university corporation (Commonwealth ex rel. Hill v. McCauley).[6] The writ "overrode the discretionary power of the college in favor of the student's due process rights" because of his status as a corporate member (Walton, 1992, p. 249). But:

> [t]he use of mandamus against educational institutions ... provoked such a hostile response from some legal authorities that the practice was abandoned. In 1911 Dean Oliver Harker argued that judicial intervention ... was an inappropriate interference with the discretionary powers of universities. Most American courts seemed to agree and viewed in loco parentis as a justification for nonintervention (Jackson, 1991, p. 1146).

Thus, in student-institution disputes from then on, in loco parentis was dominant.

The first judicial articulation of in loco parentis in American higher education came in 1913 from the Kentucky Supreme Court in Gott v. Berea College:[7]

> 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 betterment of their pupils that a parent could for the same purpose. Whether the rules or regulations are wise or their aims worthy is 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 (supra at p. 379).

The court further explained this familial relationship between the student and college as one of complete authority, acknowledging the Wheaton College case (supra) as the predecessor of this legal doctrine. In Gott, (supra), the court stated:

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[6] 3 Pa. C. 77, 84 (1887); see also its English antecedent The King v. Chancellor of the University of Cambridge 2 Ld. Raym. 1334, 92 Eng. Rep. 370 (K.B. 1723).

[7] 156 Ky. 376, 161 S.W. 204 (1913).

> For the purpose of this case the school, its officers and students are a legal entity, as much so as any family, and like a father may direct his children, those in charge ... are well within their rights and powers when they direct their students what to eat and where they may get it, where they may go and what forms of amusement are forbidden (at p. 381).

Even though the plaintiff was a local restaurateur (not a student), the institution was private (not limited by the 14th amendment), and the students were poor, inexperienced "mountain" children (not typical college students), the court's ruling in this case became the basis for a judicial hands-off policy toward administrators' decisions in American higher education (Ratliff, 1972, p. 46). As long as administrative decisions met a standard of reasonableness, which the courts chose to interpret very broadly, and were not "unlawful or against public policy," the courts generally let them stand. The courts were also reluctant to hold colleges liable for harm against students, viewing damage awards as undue financial strains on institutions, and therefore, as actions "against public policy" (Walton, 1992, p. 251).

The Kentucky court's articulation of in loco parentis in Gott (supra) was upheld two years later in Waugh v. University of Mississippi.[8] The concept's constitutionality was affirmed by the U.S. Supreme Court when the university's right to prohibit students from joining fraternities was upheld. Subsequent cases[9] also upheld the concept. Thus, in loco parentis thrived through the early 20th century.

Death

Many of the applications of in loco parentis centered on the maintenance of campus order and student discipline and the associated authority of institutions to make and enforce their rules, including the ability to dismiss. While contract law's movement toward formalizing a contractual relationship between students and their institutions (based on institutional publications) promoted "fairness and good faith performance" (Jackson, 1991, p. 1149), constitutional freedoms were often allowed by the courts to be abridged on the grounds that institutional decisions and policies were "reasonable." But not everyone agreed. Seavey (1957) complained:

> [o]ur sense of justice should be outraged by denial to students of the normal safeguards. It is shocking that the officials of a state educational institution, which can function properly only if our freedoms are preserved, should not understand the elementary principles of fair play. It is equally shocking to find that a court supports them in denying to a student the protection given to a pickpocket (p. 1406).

Beyond the application of contract law, a stirring of rebellion

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[8] 62 S. 827 (Miss. 1913), aff'd, 237 U.S. 589 (1915).

[9] See the student dismissal cases of Tanton v. McKenney 197 N.W. 510 (Mich. 1924) and Stetson University v. Hunt 102 So. 637 (Fla. 1924).

against in loco parentis was taking shape.[10]

Many scholars (Walton, 1992; Jackson, 1991; Szablewicz & Gibbs, 1987) find parallels between the changing societal attitudes and trends of the 1960s and changing attitudes toward the appropriateness of in loco parentis. Such facts as the increase in older students on campus, the lowering of the age of majority, the turn from conservatism to liberalism in student thinking, the protests over civil rights and Vietnam, and general student rebellion against authority and "the establishment" made it more difficult to treat students as children and to abridge their rights without their consent. Students asked for adult status and treatment, and assumed more responsibility for their own actions (Walton, 1992; Gibbs & Szablewicz, 1988; Szablewicz & Gibbs, 1987).

It is also argued that these changes, coupled with the economic conditions of the 1960s, transformed the public's view of higher education from a *privilege* to a *right* or "important benefit" (Walton, 1992 and Millington, 1972). The conclusion is reached that:

> These changes in the profile of the university student population and in campus atmospheres made it inevitable that judicial attitudes would be transformed. Courts began to weigh the rights of students against the once-sacred autonomy of universities to establish rules to manage the educational process. The student-institution relationship thereafter shifted toward an uneasy balance between students' and institutions' rights (Walton, p. 252-253).

Other writers place the blame of initiation of the movement away from in loco parentis on institutions rather than with students or the public (see Jackson, 1991; Hobbes, 1981; Conrath, 1976). Continuing the argument that the doctrine inevitably followed the English-based colonial college model, one line of reasoning argues that in loco parentis was incompatible with the German-based, research universities which arose at the end of the 19th century. Students in these large, usually state-supported (public) institutions were "remarkably free of paternalistic control, the curriculum was mostly elective, and students generally were unsupervised" (Jackson, p. 1142). As American higher education moved away from its English origins and adopted the research university model, it may have been moving away from in loco parentis as well.

But regardless of the antecedent punches against in loco parentis, the knock-out blow--at least in public-institution cases--came with the Fifth Circuit's 1961 ruling in Dixon v. Alabama State Board of Education.[11] In Dixon, the appellate court established that students have constitutional rights that entitle them to due process. While the court did not hold higher education to be a right, it also did not hold higher education's status to be such a privileged one as to permit administrators to violate the Constitution with impunity. It

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[10] Nonetheless, as late as 1959, a college's authority to suspend a student without a hearing was still being upheld on the grounds that higher education was a privilege and not a right; see Steir v. New York State Commissioner, 271 F.2d. 13 (2d. Cir. 1959).

[11] 294 F. 2d. 150 (5th Cir. 1961), cert. denied, 368 U.S. 930 (1961).

ruled that the governmental authority of the institution "is not unlimited and cannot be arbitrarily exercised" (supra at p. 157).

The traditional judicial deference to university discipline decisions thereby was rejected by the court in Dixon, (supra). The state, operating as a public institution of higher learning, was prohibited from violating students' rights simply because they were students. "The principle was clear: colleges and universities must preserve the [constitutional] rights of students in establishing regulations and student disciplinary policies" (Walton, 1992, p. 253). The U.S. Supreme Court let the ruling stand by denying certiori.[12] A new era in student-university law was begun.

But, why Dixon? Only two years prior in a similar case,[13] another Federal court had upheld the in loco parentis doctrine. Perhaps the issue was ripe and Dixon had all the right elements to be a "test case" of the realization that students were "more than second-class citizens" (Millington, 1979, p. 7):

> First, the case involved minority students; second, it involved the ultimate sanction power of higher education--expulsion; third, the expulsion was based upon a vague and non-specific rule; and, fourth, the procedure (or lack of procedure) upon which such severe punishment was meted out provided the students with neither notification nor hearing (Millington, p. 7).

Authors often state that, with Dixon, the courts stepped through the gates of higher education (see Hendrickson, 1991). Stated more appropriately and perhaps more eloquently is the claim that with this case "the Constitution ha[d] come to the campus" (Wright, 1969, p. 1033). And, in loco parentis was in the first stage of its death throes.

CURRENT THOUGHT ON IN LOCO PARENTIS

The above discussion reveals not only the importance of the doctrine of in loco parentis, but also the varied opinions about its origins and history in American higher education. But these different explanations can be seen as minor points when compared to the varied and often-conflicting theories offered to clarify the concept's current status. For purposes of simplification, this review groups the contemporary treatments into four thematic statuses: (1) dead and buried; (2) alive and kicking; (3) resurrecting and (4) reincarnating. With authors purporting all four views, one must wonder whether the reports of the death of in loco parentis were greatly exaggerated (with all due respect to Mark Twain).

Dead and Buried

Most authors writing from the late 1960s through the early 1980s were quick and succinct in their reiterations that in loco parentis

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[12] Due process requirements in public higher education were further clarified by such decisions as Esteban v. Central Missouri State College 277 F. Supp. 649 (W.D. Mo. 1967).

[13] Steir v. New York State Commissioner (supra at note 12).

had died with the Dixon ruling. Few committed much effort to proving the point; many simply assuming a new judicial view consistent with that stated in Hegel v. Langsam:[14]

> We know of no requirement of the law ... placing on a university ... any duty to regulate the private lives of their students to control their comings and goings and to supervise their associations (supra at p. 148).

In loco parentis appeared to be gone, and forgotten. But by the late 1980s, questions and concerns about the concept reappeared. Some who took a second (or new) look found the doctrine to be, in fact, dead.

A 1986 review of in loco parentis' history centers primarily on the secondary school aspects of the concept (Zirkel & Reichner, 1986). But, in their discussion of higher education, Zirkel and Reichner find "the college context is the only one in which the in loco parentis theory has undergone a clear rise and complete demise in our courts" (1986, p. 282). Several court rulings[15] are cited to illustrate that in loco parentis "[is] no longer tenable in either private or public institutions of higher education" (p. 281).[16]

Such assertions reject that the doctrine was the "paradigmatic legal model for the resolution of *all* student-university disputes" (Jackson, 1991, p. 1144, emphasis added), concluding instead that in loco parentis "operated only in the context of student discipline and moral welfare," and "*never* served as a basis for institutional duty to protect students' physical well-being" (Stamatakos, 1990, p. 490). The courts' rulings in liability cases--which some authors view as a judicial return to in loco parentis--may actually be traditional tort liability rulings arising "from the college's status as landlord, supervisor and controller of third persons" (p. 490). Beating the dead in loco parentis horse "may create confusion in the courts and may induce colleges to draft and implement policies that spawn, rather than diminish, institutional liability" (p. 472).

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[14] 29 Ohio Misc. 147, 148 (1971).

[15] In Soglin v. Kaufman (295 F. Supp. 978, 988 [W.D. Wis. 1968]) a 1968 Wisconsin court ruled that concepts such as in loco parentis, which in the past had been used to confer "virtually limitless disciplinary discretion" to administrators, had "long since" been "undermined" by the "facts of life." In 1979 a federal court of appeals reversed a negligence judgment against an institution, claiming that "the rights/duties derived from the in loco parentis doctrine" had been reversed by the "campus revolutions" of the 1960s (Bradshaw v. Rawlings 612 F. 2d. 135 [3d. Cir. 1979], cert. denied sub nom. Doylestown v. Bradshaw 446 U.S. 909 [1980]). And in 1985 a New York state court refused to award damages to the estate of a student raped and murdered in her dorm room by a schizophrenic felon attending the institution on a special program (Eiseman v. State 489 N.Y.S.2d. 957 [Sup. Ct. App. Div. 1985]; see also Tanja H. v. Regents of University of California 278 Cal. Rptr. 918 [1991]). Here too the court referred to the 1960s when students "demanded and received expanded rights and greater freedom in connection with their college life." Zirkel and Reichner conclude that the protections of in loco parentis are gone, and have given way to "contractual and constitutional doctrines" (1986, p. 282).

[16] Others agree that in loco parentis is dead. Citing Zirkel and Reichner, Stamatakos (1990) argues that the student-institution relationship has been "recast" into four forms: (1) constitutional; (2) contractual; (3) fiduciary; and, (4) unitary (p. 476). Those who foresee a return to in loco parentis are claimed to be unfounded in their assertions.

Clearly, some scholars believe that as the legal relationship between students and institutions became more dynamic, in loco parentis was rejected, and it died. They hold it to still be a lifeless doctrine with little need for reevaluation. To do so, some contend, may do unnecessary harm.

Alive and Kicking

But others are giving further consideration to the topic, and are arriving at different conclusions; in loco parentis may not be gone forever. Even some of those who conclude that "[t]he legal legitimacy of the doctrine ia dead, at least insofar as tax-supported colleges are concerned" (Ratliff, 1972, p. 201), point to the increase in student-rights cases as evidence that "[m]any college administrators still consider it the governing rule regarding student-college [relations]" (p. 201). Such informal manifestations of the concept lead some (Jackson, 1991 and Conrath, 1976) to question whether the heralded demise of in loco parentis was "more style than substance" (Jackson, 1991, p. 1137).

In fact, some strongly assert that "in loco parentis lives, both in the courts and within the educational establishment" (Jackson, 1991, p. 1160). Types of control have changed. But:

> Despite repeated judicial assurances that in loco parentis was doctrinally inadequate, student litigants still rarely prevail in suits against universities. The new contractual and constitutional analysis applied to student-university disputes is problematic. The state action doctrine, usually applied to public institutions, cannot be employed in a private context. The continuing debate over hate speech rules ... further illustrates an institutional reluctance to relinquish rigid parental control (Jackson, p. 1137).

Courts tend to apply "exceptionally harsh rules of construction" and "[u]nusual judicial deference" when students bring suit on contractual grounds (Jackson, p. 1151). Some writers also believe that the Dixon ruling did nothing to affect in loco parentis policies and practices in private higher education, leaving thousands of students with "no substantive or procedural constitutional safeguards" (Jackson, 1991, p. 1154); others disagree (Zirkel & Reichner, 1986). "Universities are reluctant to abandon their traditional control [as evidenced by recent attempts at campus speech codes]," and as a result, "in loco parentis survives" (Jackson, p. 1151).

But is this supposed presence of in loco parentis on American campuses a hidden continuance or a rebirth?

Resurrecting

> It is the responsibility of the administration to discourage disruptive behavior through the imposition of whatever penalties it sees fit, and we certainly support such sanctions (as quoted in Fass, 1986, p.39, emphasis added).

This statement could easily have come from a turn-of-the-century court decision, but it did not. It comes from a 1980s letter written by a fraternity accused of campus rules violations to its institution's president! Even though the campus had longstanding policies placing

such matters in the hands of a student council, this group of students assumes or believes that the ultimate authority and responsibility rests with the administration (Fass, 1986, p. 39). Some writers take such developments as evidence that the 1960s' student desire of freedom and self-responsibility has passed, and that in loco parentis is being resurrected in American higher education.

Such digressions were forewarned as early as 1974:

> students may at times selectively seek a return to the in loco parentis concept where it is of special advantage to them, i.e., students may ask that police not come to campus and arrest those persons using drugs, but that such use remain an intramural matter for campus administrative determination (Laudicina & Tramutola, 1974, p. 7).

To the degree that such student acquiescence is now the case, some scholars argue that an in loco parentis phoenix has arisen from its nest's ashes and is back on campus.

Others also note a possible resurgence of campus paternalism, but place the primary impetus of the change on non-education forces, such as "considerable intervention by the federal government, governors, legislators, boards of trustees, and other external constituencies into the lives of students" (Mullendore, 1992, p. 5). While many campus officials have no desire to return to in loco parentis, they are expanding their control of student behavior. Many "who thought the death knell had sounded for ... in loco parentis are now rethinking their positions" (Mullendore, p. 5).

A similar position is held by those who place the responsibility for a return to in loco parentis on the courts (see Smith, 1990). These arguments center on campus crime, security, and liability. As late as 1980, there had never been a case "in which a college or university was held liable in compensatory damages to any person who was victimized by crime on a campus" (Smith, p. 1). But this situation had changed greatly by the late 1980s and the courts were "imposing new duties upon the institutions to expand their control over campus life and to protect students, sometimes even from themselves" (Smith, p. 1; see also Gose, 1994). The judicial determinations of students' "special relationship" of dependence on institutions (very similar to the original in loco parentis concept) and of institutional duties regarding "foreseeable" risks and harms is cited as evidence of a return to in loco parentis (Smith, p. 2).[17]

The *responsibility* aspect of in loco parentis is returning (Smith, 1990). The parental *status* and concomitant discretionary powers are still being worked out (for modern situations). In loco parentis may be "inevitable" in higher education, emanating from some "natural law" of the student-institution relationship. Even if it was

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[17] Smith discusses what he considers to be the four most illustrative recent cases of the doctrine's "resurrection:" (1) Miller v. State of New York 62 N.Y.2d. 506, 467 N.Y.2d. 493 [19 Ed. Law Rep. 618] (1984); (2) Mullins v. Pine Manor College 389 Mass. 47, 449 N.E.2d. 331 [11 Ed. Law Rep.] (1983); (3) Jesik v. Maricopa Community College 125 Ariz. 543, 611 P.2d. 547 (1980); and, (4) Peterson v. San Francisco Community College District 36 Cal.3d. 799, 205 Cal. Rptr. 842, 685 P.2d. 1193 [Ed. Law Rep. 689] (1984).

once lifeless, in loco parentis may be breathing again. But is it in the same form, or some new one?

Reincarnating

Still others believe that current student-institution relations can best be described as some new form of in loco parentis. Often this debate focuses on different aspects of the relation; some scholars deal with narrow, legal interpretations, while others focus on more general conceptions of educational paternalism on campus. Regardless of the focus, the idea that a new in loco parentis exists or is emerging in American higher education is a popular theory drawing increasing attention and support.

Often this new concept is given a new name. In loco uteri (Parr and Buchanan, 1979) is one term coined to describe the new, more-encompassing relationship taking shape. Based on evidence of new and expanding responsibilities being placed on institutions, the concept is defined this way:

> under in loco uteri an institution has a minimal legal obligation in such areas as race, sex, or age discrimination; in minimal procedural due process; and in the host of other duties defined by the law, such as accurate and timely career counseling, and provision of job placement data and like information (Parr and Buchanan, p. 12).

Taking the parenting function to the extreme, institutions may now stand "in place of the womb."

From a broader but also parental developmental theory, the phrase in loco parentis indulgentis (Pitts, 1980) describes a perceived movement toward "fostering the growth of the whole student" (Pitts, p. 21). "Colleges are still in the nurturing business, operating in a quasi-parental (albeit permissive) role" (p. 22). While some student behaviors which were once regulated are no longer, new campus services for students are continuing the institutional activity of parenting, nurturing and developing.

In assimilating the two theories above, in loco parentis reinventis (Gregory & Ballou, 1986) is offered. This line of explanation concludes:

> While a strict 1950s-type interpretation of in loco parentis may be dead, what has arisen from its ashes, like a phoenix from ancient lore, is a new form and meaning of the term .... [It] 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 also mandated to provide a full range of services deemed essential to students' intellectual and psychosocial maturation (Gregory & Ballou, p. 30).

Regardless of the label placed upon it, this new parenting function must be realized and dealt with soon by administrators.[18]

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[18] Given these discussions of "nurturing," one is left to wonder whether this reincarnating in loco parentis is coming back more maternalistic than paternalistic.

In a different line of thought which fccuses on negligence and personal injury liability, the conclusion is reached that such cases "may be just the first step to a return to a full-fledged in loco parentis" (Szablewicz & Gibbs, 1987, p. 465).[19] Courts have struggled to define the current student-institution relation using traditional legal theories. When the courts' ultimate decisions are analyzed, "only something akin to in loco parentis adequately serves to resolve these cases" (p. 461). According to this interpretation, this new doctrine grants institutions *no rights* to "control students' morals and character," but does place a ***strong duty*** to "protect students' physical well-being" (p. 464). Since student protests and activism led the court to reject in loco parentis, such authors believe that student claims of negligence and institutional duties to protect them can bring it back.

Such ideas (see Fass, 1986 and Szablewicz & Gibbs, 1987) lead some to the following conclusion:

> A continuing increase in student demands for protection, coupled with a swell of public concern about alcohol consumption, campus violence, and social problems ... expands the vulnerability of colleges and universities .... [T]he relative immunity of institutions from liability for students' social conduct will undoubtedly diminish. The balance of opposing rights and liabilities will tip toward a new 1990's version of the in loco parentis doctrine that will encroach somewhat on students' autonomy and oblige colleges and universities to more rigorously protect students and monitor their conduct, particularly in social situations (Walton, 1992, p. 270).

As students and others call for more protections, student rights may be infringed and new forms (or spirits) of in loco parentis may be formulated. Many contend these new doctrines are already taking shape and being tested by institutions and the courts.[20]

CONCLUSION

> The law .... In order to know what it is, we must know what it has been, and what it tends to become (Oliver Wendell Holmes, Jr. as quoted in Millington, 1979, p. v).

Holmes's sentiments concerning the understanding of law may be applied to the understanding of legal concepts with equal verity. This analysis has attempted to delineate the past, present, and future of the in loco parentis doctrine in American higher education. What is revealed by this analysis is a divergence of opinions of the concept's history, relevance, applicability, and current standing. Few truths and little consensus have been found.

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[19] *Szablewicz and Gibbs (1987) also discuss the Mullins and Peterson cases (supra at note 17), as well as Relyea v. State 385 So. 2d. 1378 (Fla. Ct. App. 4th Dist. 1980) and Whitlock v. University of Denver 712 P.2d. 1072 (Colo. App. 1985). They note the later case as particularly significant because the student "asked the court to make the college his de jure guardian--a complete reversal of the 1960s and 1970s claims of student independence" (Szablewicz & Gibbs, 1987, p. 460).*

[20] *However, Bickel and Lake (1994) and Oshagan (1993) warn that the contemporary application of in loco parentis to questions of institutional duty is inappropriate.*

One truth may be that, historically, in loco parentis provided a much clearer and coherent structure and process for the creation, content, and enforcement of campus rules than is evident, possible, and perhaps desirable today. In loco parentis assumed a consensus of values (Morrill & Mount, 1986). Little consensus exists in contemporary society, and as campuses make strides in multiculturalism and diversity, even less consensus is found in higher education.

Whether or not the concept is dead, alive, or returning in some form, the environment to which it applied a century ago has changed a great deal. ***Students have changed.*** Their acquiescence to authority gave way to 1960s activism and revolt, which has given way, to some degree, to consumerism and conservatism (Thomas, 1991). ***Institutions have changed.*** They have moved from the enjoyment of considerable authority and power to a post-1960s laissez faire attitude to an increasingly government-mandated re-involvement in student life.

To a large degree, the judiciary is currently attempting to formulate a useful student-institution legal relationship while this relationship itself is still changing. In loco parentis was rejected rather suddenly and before any suitable replacement policy was evident. Before such a replacement could be found, the landscape of higher education changed again, and continues to do so. It should not be surprising, therefore, when scholars call for a return to in loco parentis (see Willimon, 1993) or find situations to which it may appear to currently apply.

The review of literature in this analysis lends itself to few specific conclusions. Nonetheless, some informed thoughts are worth mentioning. First, sometimes writers use different interpretations of the meaning of in loco parentis. Some focus on the parental ***status*** aspect, with its related broad, discretionary powers. Others focus on parental ***responsibility***, with its attendant duties, obligations, and liabilities. These represent quite different conceptions and make discussions of one aspect without the other very skewed and limited.

Second, it is difficult to understand the past based on multiple, conflicting accounts. Some researchers would have readers believe that administrators enjoyed the "powers" permitted them by the courts, while others report these "duties" to have been burdens. Somehow both views come together in reporting that current administrators have no desire to return to the days of in loco parentis. Also, some authors report that responsibilities were often dismissed by the courts, while others hold that tort liability has been constant. Therefore, it is rather confusing when writers, looking at the same court decisions, see either the same old in loco parentis, a different version, or no evidence of it at all.

It is the conclusion of this writer that few people--legal scholars, education scholars, administrators, lawyers, or students--truly understand the complete history and scope of the legal doctrine of in loco parentis as it applies to American higher education. Indeed, more-sophisticated analysis is definitely needed. A useful starting place may be the above two points.

Perhaps, in the past, administrators were granted and used considerable "parental" powers without much attention to the responsibilities implied in the doctrine. And perhaps today students (as well as government officials) who call for more protections and administrative responsibility do not realize the necessary and concomitant increase in campus rules and regulations that must accompany these protections. All parties must be better informed before far-reaching and hard-to-change legal and/or legislative precedents yield decisions with which all of higher education will have to live. Education must still be the first priority.

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