

# The Curious Life of *In Loco Parentis* at American Universities

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*In this article I trace the legal history, through court opinions, of in loco parentis (Latin for “in the place of the parent”) as applied to the relationship between American universities and their students. I demonstrate that until the 1960s, the in loco parentis doctrine allowed universities to exercise great discretion in developing the “character” of their students without respect to their students’ constitutional rights. The demise of this doctrine forced courts, and universities themselves, to redefine the relationship of universities with their students in important ways.*

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The Curious Life of *In Loco Parentis* in American Universities**Introduction**

*In loco parentis* (Latin for “in the place of a parent”) refers to a legal relationship in which a temporary guardian or caretaker of a child takes on all or some of the responsibilities of a parent (Garner, 2009, p. 858). The relationship applies to both government and non-government entities acting in the place of a parent, typically in relation to minors. Until the 1960s, American universities have been deemed by courts to be acting *in loco parentis* with respect to their students.<sup>1</sup> This meant that universities could regulate the students’ personal lives—including speech, association, and movement—and take disciplinary action against students without concern for the students’ right to due process. Starting in the 1960s, the university-student relationship changed. Courts started affording constitutional protections to university students. These new protections led to the demise of *in loco parentis*. The universities could no longer regulate all aspects of their students’ lives without considering their constitutional rights.

In this article, I rely primarily on court cases to analyze the changing relationship between universities and their students over time.<sup>2</sup> In Part I, I discuss *in loco parentis* before the 1960s. In Part II, I analyze the turning point of *in loco parentis* where a court, for the first time, recognized the due process rights of public university students. In Part III, I examine the connection between the demise of *in loco parentis* and the recognition of constitutional protections for students engaging in civil rights and other protests. In Part IV, I discuss the new models for the relationship between university and student that emerged in a post-*in loco parentis* world, where courts determined what duty under personal injury law, if any, universities owed to their students. In Part V, I analyze what has been described as the new “facilitator” relationship between universities and their students and I explore a number of examples that suggest that the facilitator model is the most relevant one today.

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<sup>1</sup> In this article, I do not differentiate between “colleges” and “universities.” I use both to mean postsecondary degree-granting four-year undergraduate institutions.

<sup>2</sup> In this article, I highlight some key cases that illustrate the points I make. These cases are not meant to be exhaustive.

## Part I. *In Loco Parentis* from the mid-1800s to the 1960s

Prior to the 1960s, American universities acted *in loco parentis* in relation to their students. This concept was rooted in British and American common law. Contemporary scholars have analyzed *in loco parentis* in different ways. However, from the mid-1800s through the late 1950s, courts have routinely enforced the universities' prerogative under this doctrine to assume control over their students' lives.

### IA. Origins of *In Loco Parentis*

*In loco parentis* is rooted in the British and American common law traditions. William Blackstone (1765), a British legal scholar who authored a number of legal commentaries in the late 1700s read by generations of both British and American lawyers, wrote that a parent “may delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then *in loco parentis*, and had such a portion of the power of the parent committed to his charge, viz. that of restraint and correction, as may be necessary to answer the purposes for which he is employed” (p. 441). From the mid-1800s to the 1960s, American colleges assumed this responsibility over their students' lives that went well beyond academics. During this time, constitutional rights stopped at the college gates—at both private and public institutions. In his inaugural address as the first President of Johns Hopkins University, Daniel Coit Gilman (1876) stated:

The College implies, as a general rule, restriction rather than freedom; tutorial rather than professional guidance; residence within appointed bounds; the chapel, the dining hall, and the daily inspection. The college theoretically stands *in loco parentis*; it does not afford a very wide scope; it gives a liberal and substantial foundation on which the university instruction may be wisely built. (para. 24)

In application, this typically meant a rigid set of “character-building” rules that were strictly enforced. At the Hampton Institute, a historically Black university located in Virginia, students were summarily expelled in the late 1800s for bad work habits and “weakness of character” (Anderson, 1988, p. 54). Since their inception in the mid- to late-nineteenth century, women's colleges also imposed restrictive social rules on their students, including curfews and other regulations restricting speech, socialization, and movement (Horowitz, 1984).

## **IB. Interpretations of *In Loco Parentis***

Contemporary scholars have focused on different aspects of *in loco parentis*. Some commentators have described the doctrine of *in loco parentis* in terms of a fiduciary relationship, “where there is a special confidence reposed in one who in equity and good conscience is bound to act in good faith with regard to the interests of the one reposing the confidence” (Hendrickson, 1999, p. 209). Other scholars have focused on the one-sided distribution of power inherent in the relationship by viewing it as an attempt at complete—sometimes arbitrary—control over students. Tieman (1996), contends, “The college’s interest [during the *in loco parentis* era] is not parental in the sense of a relationship in which the parent constantly encourages the child toward self-regulatory autonomy. The college is interested in hierarchical and unilateral control” (p.29). Still other commentators have focused on the legal insularity created by *in loco parentis*. Bickel and Lake (1999) state, “In its heyday, *in loco parentis* located power in the university—not in courts of law, or in the students. *In loco parentis* promoted the image of the parental university and insured that most problems were handled within the university, by the university, and often quietly” (p. 17).

Despite these different analyses of the doctrine, the common thread that runs through all of them is that *in loco parentis* placed the decision-making control over student life with the university. This is evident in early court cases.

## **IC. Court Challenges to University Actions Upholding *In Loco Parentis***

In legal challenges to university rules and subsequent discipline for violations thereof, courts routinely upheld the university’s authority to stand in place of parents. In one of the earliest judicial articulations of the relationship between universities and their students, Wheaton College suspended a student, E. Hartley Pratt, for joining a secret society (*People v. Wheaton College*, 1866). The Supreme Court of Illinois found in favor of the college, explaining:

A discretionary power has been given [to college authorities] to regulate the discipline of their college in such a manner as they deem proper, and so long as their rules violate neither divine nor human law, we have no more authority to interfere than we have to control the domestic discipline of a father in his family. (*People v. Wheaton*, 1999, p. 186)

In another early court case decided in 1891, the University of Illinois’

expulsion of a student who violated this public institution's rule of mandatory attendance to religious chapel service was upheld. Describing the relationship between the university and its students, the Supreme Court of Illinois observed:

By voluntarily entering the university, or being placed there by those having the right to control him, he necessarily surrenders very 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 many others, he must yield obedience to those who, for the time being, are his masters; and yet, were it not for the fact that he is under the government of the university, he could find ample provision in the constitution to protect him against the enforcement of all rules thus abridging his personal liberty. (*North v. Board of Trustees of the University of Illinois*, 1891, p. 306)

A clear early expression of the *in loco parentis* doctrine, calling it by name, was contained in the case of *Gott v. Berea College* (1913), in which the Kentucky Supreme Court upheld a rule forbidding students from entering “eating houses and places of amusement in Berea, not controlled by the College” (p. 377). Berea College, a private institution in Kentucky, expelled some students for violating this rule because they visited a restaurant prohibited by the rule that was located across the street from the college. The college argued that it has “been compelled from time to time to pass rules tending to prevent students from wasting their time and money, and to keep them wholly occupied in study” (*Gott v. Berea College*, 1913, p. 378). The restaurant owner, J.S. Gott, subsequently challenged the rule as unlawfully injuring his business. The Court upheld the rule, reasoning:

College authorities stand *in loco parentis* concerning the physical and moral welfare, and mental training of the pupils, and we are unable to see why to that end they may not make any rule or regulation for the government, or betterment of their pupils that a parent could for the same purpose. Whether the rules or regulations are wise, or their aims worthy, is a matter left solely to the discretion of the authorities, or parents as the case may be, and in the exercise of that discretion, the courts are not disposed to interfere, unless the rules and aims are unlawful, or against public policy. (*Gott v. Berea College*, 1913, p. 379)

In another case decided after *Gott* (1913), the Florida Supreme Court upheld Stetson University's summary suspension of a student for "offensive habits that interfere with the comforts of others" (*Stetson University v. Hunt*, 1924, p. 516). The student, Helen Hunt, was alleged to have rung cow bells, paraded the halls of the dormitory at forbidden hours, and turned off the lights. Hunt was not given a hearing. The Court, in upholding the suspension by this private institution, adopted the reasoning in *Gott*:

As to mental training, moral and physical discipline and welfare of the pupils, college authorities stand *in loco parentis* and in their discretion may make any regulation for their government which a parent could make for the same purpose, and so long as such regulations do not violate divine or human law, courts have no more authority to interfere than they have to control the domestic discipline of a father in his family. (*Stetson University v. Hunt*, 1924, p. 516)

In a similar case, a student at Syracuse University was expelled based on rumors that she caused trouble and that she was not "a typical Syracuse girl" (*Anthony v. Syracuse University*, 1928, p. 489). This student, Beatrice Anthony, was dismissed without any notification of the charges and evidence against her. The Court, relying on contract principles between the student and Syracuse, observed:

The university may only dismiss a student for reasons failing within two classes [set forth in the registration card that a student would have to sign before enrolling], one, in connection with safeguarding the university's ideals of scholarship, and the other in connection with safeguarding the university's moral atmosphere. When dismissing a student, no reason for dismissing need be given. (*Anthony v. Syracuse University*, 1928, p. 491)

During this era of *in loco parentis*, courts gave great deference to colleges and universities—both public and private—and afforded no constitutional protection when students were found to be guilty of "offensive habits" (*Stetson University v. Hunt*, 1924, p. 516) or being detrimental to the "moral atmosphere" (*Anthony v. Syracuse University*, 1928, p. 491). This would change in the 1960s.

## **Part II. *Dixon v. Alabama*: The Turning Point for Public Universities**

Starting in the 1960s, courts started to recognize the constitutional rights of university students – sounding the death knell for *in loco parentis*.

In the seminal case of *Dixon v. Alabama* (1961), Alabama State College summarily expelled a group of African American students for participating in a civil rights demonstration after they were refused service at a lunch grill located in the basement of the Montgomery County Courthouse. The college expelled the students without any notice, hearing, or opportunity for appeal – in other words, without respect for due process rights. The students challenged their expulsions as in violation of their constitutional rights to due process.

## **IIA. Due Process Clause**

According to the 14th Amendment of the U.S. Constitution, “No state shall . . . deprive any person of life, liberty, or property, without due process of law” (U.S. Const. amend. XIV). This provision, known as the Due Process Clause, ensures fairness in state action. Due process requires that “governmental action not be arbitrary, unreasonable, or discriminatory, and that fair procedures be followed by officials before they carry out any action depriving anyone of ‘life, liberty, or property’” (Schimmel, Stellman, & Fischer, 2011, p. 234).

Before a court can require a university to comply with the Due Process Clause, it must first determine that the disputed action constitutes “state action” (Kaplin & Lee, 2007, p. 33). Kaplin and Lee (2007) observe:

Due to varying patterns of government assistance and involvement, a continuum exists, ranging from the obvious public institution (such as a tax-supported state university) to the obvious private institution (such as a religious seminary). The gray area between these poles is a subject of continuing debate about how much the government must be involved in the affairs of a ‘private’ institution or one of its programs before it will be considered ‘public’ for the purposes of the ‘state action’ doctrine. (p.33)

Because of this state actor requirement, due process is not generally required at a private university unless a plaintiff can overcome the difficult burden of showing that a private university was acting as a state actor (Jackson, 1991). However, as discussed in Part IIIC below, courts may require due process protections for private university students based on contract principles.

## **IIB. Dixon Ruling**

The Fifth Circuit Court in *Dixon* held “that due process requires notice and some opportunity for hearing before a student at a tax-supported college is expelled for misconduct” (*Dixon v. Alabama*, 1961, p. 158). Specifically, the Court outlined some general due process protections that

students should be given when facing expulsion in similar misconduct cases:

- 1) The students should be given notice containing a statement of the specific charges and grounds which, if proven, would justify expulsion;
- 2) The students should be given the names of the witnesses against them and an oral or written report on the facts to which each witness testifies;
- 3) The students should be given the opportunity to present their own defense against the charges and to produce either oral testimony or written affidavits of witnesses on their behalf; and
- 4) If the hearing is not before the Board of Education directly, then the results and findings of the hearing should be presented in a report open to the students' inspection. (*Dixon v. Alabama*, 1961, p. 158-59)

This was a radical break from previous cases that held that no process was due because the students consented to an *in loco parentis* relationship with a college by their very enrollment therein. However, in recognizing the state actor requirement, the *Dixon* court limited its holding to public institutions by observing “that the relations between a student and a private university are a matter of contract” (*Dixon v. Alabama*, 1961, p. 157) whereby students at such institutions can waive their due process rights through agreements with the colleges. On the other hand, state colleges were treated as state actors for purposes of the Constitution, so students were presumptively protected by the Due Process Clause. This increasing level of constitutional protection for state college students was evident during the 1960s.

### **Part III. The Demise of *In Loco Parentis* and the Rise of the Civil Rights Protests**

The Civil Rights Movement of the 1960s ushered in a new era in which many Americans mobilized against racism and other forms of social and political restriction across the United States (Franklin & Moss, 1994; Williams, 1987). American college students took an active role during this time in protesting racism and other social injustices, and advocating greater rights for students in general (Rhoads, 1998). Some of the major court cases, including *Dixon* (1961), which defined the contours of due process for students at college, arose from challenges to student discipline



in the wake of student activism.

### IIIA. Student Activism Cases

In *Knight v. State Board of Education* (1961), Tennessee Agricultural and Industrial State University summarily suspended some students for participating in the Mississippi freedom rides. The Mississippi freedom riders were civil rights activists who sought to enforce the U.S. Supreme Court's ruling in *Boynton v. Virginia* (1960), in which the Court overturned a judgment convicting an African American law student for trespassing for being in a restaurant at a bus terminal that was designated for "whites only" (Williams, 1987, pp. 144-61). The Court held in *Boynton* (1960) that segregation in public transportation was illegal because such segregation violated the Interstate Commerce Act, which prohibited discrimination in interstate passenger transportation. In May and June of 1961, Pauline Knight and other students, after completion of their school work for the year, traveled by interstate bus to Jackson, Mississippi, where they entered the segregated waiting rooms of the Greyhound and Trailways Bus Terminals. When they refused to leave the bus terminals, they were arrested and charged with disorderly conduct. Each student spent approximately 30 days in jail pending efforts to post bond. While the students were in jail, Tennessee Agricultural and Industrial State University suspended the students after an *ex parte* hearing, without notice to the students. The students challenged the suspensions in court. Relying on the precedent set by *Dixon* (1961), the Tennessee federal trial court held that the suspensions were in violation of the students' due process rights.

In another case, the University of Wisconsin, Oshkosh, suspended seven African American students for participating in a demonstration at the university president's office (*Marzette v. McPhee*, 1968). As part of this confrontation, the students issued demands on behalf of the Black Student Union with respect to university personnel, curriculum, and programs. When the president refused to sign the list of demands, some of the students damaged school property in an act of defiance. The seven students identified by the university as leaders of the demonstration were given notice of their suspensions, but no other process was provided. The federal trial court, in invalidating the disciplinary action, held that "this suspension has been imposed, and has been continued to be present, without due process of law" (*Marzette v. McPhee*, 1968, p. 569).

### IIIB. Free Speech Cases

During this time, other cases were expanding free speech rights for college students as they related to vocal student opposition to the status quo. The First Amendment of the U.S. Constitution provides, in pertinent

part, “Congress shall make no law . . . abridging the freedom of speech . . .” (U.S. Const. amend. I). The First Amendment initially only applied when the federal government promulgated laws that abridged free speech; however, the U.S. Supreme Court in 1925 held that the Due Process Clause of the 14th Amendment made the First Amendment applicable to the states (*Gitlow v. New York*, 1925). Similar to the 14th Amendment, the First Amendment includes a state actor requirement for this constitutional right to be enforceable; private entities, in general, cannot violate the First Amendment.

In one case applying First Amendment protections to students on a public college campus, a South Carolina federal trial court invalidated a South Carolina State College rule forbidding campus demonstrations without prior approval of college authorities (*Hammond v. South Carolina State College*, 1967). The college suspended some students for violating this rule and these students challenged their suspensions. Relying on free speech principles, the Court held “that the rule under which these students were suspended was incompatible with constitutional guaranties and is invalid” (*Hammond v. South Carolina State College*, 1967, p. 950). Additionally, an Alabama federal trial court, also relying on freedom of speech principles, invalidated a University of Alabama rule that prohibited editorials in the school paper criticizing the governor or legislature (*Dickey v. Alabama State Board of Education*, 1967). A student, George Clinton Dickey, published an editorial that was found by university authorities to violate this rule and was suspended. The court held that the university rule was inconsistent with “the basic principles of academic and political expression as guaranteed by our Constitution” (*Dickey v. Alabama State Board of Education*, 1967, p. 619). For the first time in American history, courts required public universities to protect their students’ free speech rights.

### **IIIC. Private versus Public University Cases in the 1960s**

Students challenging disciplinary rules and actions taken at private institutions have generally had less success than those at their public counterparts. As mentioned in Part IIA and IIIB, courts recognize that public institutions must adhere to constitutional principles, while private institutions are usually exempt. For example, in a case involving St. John’s University, students were dismissed for violating university marriage policies (*Carr v. St. John’s University*, 1962). The New York Court of Appeals affirmed the lower court’s holding that the students entered into an implied agreement with the private institution to comply with its rules—constitutional rights did not apply. In a case involving Columbia University, students and others conducted sit-ins in four of Columbia’s

buildings for a week until they were forcibly removed (*Grossner v. Trustees of Columbia University*, 1968). The students were subject to disciplinary proceedings arising from the sit-ins. They subsequently sought to enjoin the proceedings in court as a violation of their freedom of speech and due process rights. The New York federal trial court, in denying the injunction, held, “Plaintiffs show nothing approximating the requisite degree of ‘state participation and involvement’ in any of the University’s activities, let alone the specific proceeding in question here” (*Grossner v. Trustees of Columbia University*, 1968, p. 549). The distinction between private and public institutions for purposes of affording students constitutional protection observed by *Dixon* (1961) remained relevant.

In deciding challenges to disciplinary action involving private institutions, the courts generally turned to contract principles because the lack of government action failed to implicate constitutional rights. However, some courts, in interpreting the contract between a university and its students, relied on due process standards articulated in state university cases to determine if the discipline was arbitrary or fair.

Although not typically applicable at private colleges, because of the state actor requirement for enforcement of both the First and 14th Amendments, the expansion of due process and free speech rights for students at their public counterparts was unprecedented in American history. By affording these protections, students could now advocate civil rights and other causes without fear of arbitrary and summary expulsion. Perhaps one of the clearest expressions of recognizing this expansion of rights was from a federal trial court in Wisconsin that struck down, on vagueness grounds, a university rule that allowed the school to suspend students for any “misconduct” (*Soglin v. Kauffman*, 1968). The Court observed:

Underlying these developments in the relationship of academic institutions to the courts has been a profound shift in the nature of American schools and colleges and universities, and in the relationships between younger and older people. These changes seldom have been articulated in judicial decisions but they are increasingly reflected there. The facts of life have long since undermined the concepts, such as *in loco parentis*, which have been

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<sup>3</sup> For example, see *Slaughter v. Brigham Young University* (1975), which held that due process is the standard for determining whether or not the private institution’s process for dismissal was fair; or see *Militana v. University of Miami* (1970), which held that notice and opportunity to be heard may be required in student discipline cases at this private institution.

invoked historically for conferring upon university authorities virtually limitless disciplinary discretion. (*Soglin v. Kauffman*, 1968, p. 987-88)

The relationships between colleges and their students would continue to evolve.

#### **Part IV. Two New Models Emerge Through Negligence-Based Duty Analysis: University-as-Bystander and Relationship-Based Duty**

By the early 1970s, *in loco parentis* at universities was a relic of the past (Kaplin & Lee, 2007, p. 91). In addition to court cases, the 26th Amendment to the U.S. Constitution accelerated the demise of *in loco parentis* at colleges (U.S. Const. amend. XXVI). The 26th Amendment, ratified in 1971, lowered the minimum voting age from 21 (in most states) to 18. Since most college students would reach this lower age of majority while still enrolled, colleges were hard pressed to justify its temporary parent status over these young adults. The constitutional rights of students at public universities, therefore, seemed well settled by this time. In the subsequent decades, courts struggled with the new relationship between university and students as it defined the contours of legal liability of universities when students were injured. These cases moved away from constitutional law; instead, they were based in tort law.

#### **IVA. Tort Law and the Concept of Duty**

Tort law deals with “a breach of a duty that the law imposes on persons who stand in particular relation to each other” (Garner, 2009, p. 1626). In the post-*in loco parentis* era, courts defined the new relationship between universities and their students in the context of students’ personal injury claims based on negligence.<sup>4</sup>

The elements of negligence include: 1) duty; 2) breach of duty; 3) causation (“in fact” and “proximate”); and 4) damage (Bickel & Lake, 1999, p. 66). The first essential element of negligence, and the most relevant for defining the university-student relationship, is determination whether a duty was owed by the university defendant to the student plaintiff in preventing the injury.<sup>5</sup> Since this negligence-based duty analysis was free of constitutional issues, it applied to both public and private institutions.

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<sup>4</sup> Negligence involves “[t]he failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation” (Garner, 2009, p. 1133).

<sup>5</sup> The imposition of duty on a university in student injury cases is generally based on the following factors: 1) the foreseeability of harm/danger;

## IVB. The Bystander Era

Some courts have held that, due to the demise of *in loco parentis*, universities are not liable for the activities of their students. Kaplin and Lee (2007) have characterized these cases as constituting the “bystander era” (p. 91) in which universities are viewed as mere bystanders in relation to the activities of their adult students. Some courts have expressed the bystander rationale for absolving universities of tort liability.

In *Bradshaw v. Rawlings* (1979), the U.S. Third Circuit Court refused to impose liability on Delaware Valley College for serious injuries suffered by a student, Donald Bradshaw. Bradshaw, a sophomore, was hurt in a car accident following a college sponsored off-campus picnic, where alcohol was served to underage students. The driver of the car was another student who became intoxicated at the picnic. The college argued that the student failed to establish that the college owed him a legal duty of care under the law of negligence. In ruling for the college and focusing on the demise of *in loco parentis*, the Court observed:

College administrators no longer control the broad arena of general morals. At one time, exercising their rights and duties [*i*]n *loco parentis*, colleges were able to impose strict regulations. But today, students vigorously claim the right to define and regulate their own lives. Especially they have demanded and received satisfaction of their interest in self-assertion in both physical and mental activities, and have vindicated what may be called the interest in freedom of the individual will. (*Bradshaw v. Rawlings*, 1979, p. 140)

Several courts followed *Bradshaw* (1979) by imposing no liability on the bystander colleges as their students were injured in various ways. In *Baldwin v. Zoradi* (1981), a student, Cynthia Baldwin, at California Polytechnic State University, San Luis Obispo (Cal Poly), was severely injured in a collision that was the result of a car race that was fueled by underage drinking. She became a quadriplegic as a result of the collision. Baldwin sued Cal Poly for negligence, arguing that the university had a duty to protect her from such an injury. The California Court of Appeals ruled in favor of the university:

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2) seriousness of the harm; 3) closeness between the defendant’s conduct and the injury produced; 4) moral blameworthiness of the defendant’s conduct; 5) policy of preventing future harms; 6) the burden on and consequences to the defendant and the community should a duty be imposed; and 7) the cost, availability, and prevalence of insurance (*Tarasoff v. Regents of the Univ. of Cal.*, 1976, p. 434).

The transfer of prerogatives and rights from college administrators to the students is salubrious...when seen in the context of a proper goal of postsecondary education—the maturation of students. Only by giving them responsibilities can students grow into adulthood. Although the alleged lack of supervision had a disastrous result to this plaintiff, the overall policy of stimulating student growth is in the public interest. (*Baldwin v Zoradi*, 1981, p. 291)

In *Beach v. University of Utah* (1986), a student, Danna Beach, was injured after falling off a cliff in a university-sponsored field trip. Beach, who was under the legal drinking age, had consumed alcohol in front of a faculty advisor before being injured. As a result of her fall, she became a quadriplegic with limited use of her arms. The Utah Supreme Court, finding no duty to on the part of the university to protect Beach, held:

[C]olleges and universities are educational institutions, not custodial. . . It would be unrealistic to impose on an institution of higher education the additional role of custodian over its adult students and to charge it with responsibility for preventing students from illegally consuming alcohol, and, should they do so, with responsibility for assuring their safety and the safety of others. Fulfilling this charge would require the institution to babysit each student, a task beyond the resources of any school. (*Beach v. University of Utah*, 1986, p. 419)

In *Rabel v. Illinois Wesleyan University* (1987), a female student, Cherie Rabel, suffered permanent head injuries after being carried off from her residence hall by a male student who was engaged in a fraternity initiation. The Illinois Court of Appeals found for the university. The Court noted:

The university's responsibility to its students, as an institution of higher education, is to properly educate them. It would be unrealistic to impose upon a university the additional role of custodian over its adult students and to charge it with the responsibility for assuring their safety and the safety of others. Imposing such a duty of protection would place the university in the position of an insurer of the safety of its students. (*Rabel v. Illinois Wesleyan University*, 1987, p. 361)

These cases illustrate a bystander model of university-student relations that suggests that universities should have little or no affirmative involvement or duty over their students' lives outside of academic pursuits. Indeed, Lake (2001) characterizes this model as one "in which institutions

of higher education...were encouraged to eschew over-involvement in student life for fear of assuming duties to students” (p. 532).

### IVC. The Duty Era

Starting in the 1980s, some courts found that colleges had a duty to take reasonable measures keep their students safe. Bickel and Lake (1999) have characterized this time as the “duty era” characterized by “an implicit search for a balance between university authority and student freedom and for shared responsibility for student safety/risk” (p. 157). Some court cases are illustrative.

In *Mullins v. Pine Manor College* (1983), after a female college student, Lisa Mullins, was raped on campus, she filed a personal injury action against the college for not taking reasonable steps to protect her from the attack. The Supreme Judicial Court of Massachusetts held for the student, reasoning, in part:

“Of course, changes in college life, reflected in the general decline of the theory that a college stands *in loco parentis* to its students, arguably cut against this view. The fact that a college need not police the morals of its resident students, however, does not entitle it to abandon any effort to ensure their physical safety. Parents, students, and the general community still have a reasonable expectation, fostered in part by colleges themselves, that reasonable care will be exercised to protect resident students from foreseeable harm. (*Mullins v. Pine Manor College*, 1983, p. 52)

In another case, *Furek v. University of Delaware* (1991), a student, Jeffrey Furek, sued the University of Delaware for negligence after receiving serious chemical burns as a result of a hazing incident at a fraternity. The Delaware Supreme Court, in following *Mullins* (1983), held:

In sum, although the University no longer stands *in loco parentis* to its students, the relationship is sufficiently close and direct to impose a duty [for tort analysis purposes]. The university is not an insurer of the safety of its students nor a policeman of student morality, nonetheless, it has a duty to regulate and supervise foreseeable dangerous activities occurring on its property (*Furek v. University of Delaware*, 1991, p. 522).

The Court further recognized:

The university-student relationship is certainly unique. While its primary function is to foster intellectual development through an academic curriculum, the institution is involved in all aspects of student life. Through its providing of food, housing, security, and a range of extracurricular activities the modern university provides a setting in which every aspect of student life is, to some degree, university guided. This attempt at control, however, is directed toward a group whose members are adults in the contemplation of law and thus free agents in many aspects of their lives and life styles. (*Furek v. University of Delaware*, 1991, p. 516)

In focusing on this close relationship between university and student—a relationship in which the university is viewed, not as a parent, but as a guide and students are seen, not as children, but as adults and “free agents in many aspects of their lives and life styles” (*Furek v. University of Delaware*, 1991, p. 516)—the *Furek* court’s observation suggested a new model with more relevance for modern time than either the *in loco parentis* or university-as-bystander doctrines. In the next section, I explore a model for a more reciprocal relationship between a university and its students that is the most relevant for today.

### **Part V. The Modern Relationship Between Universities and their Students: University as Facilitator and Students as Responsible Adults**

Bickel and Lake (1999) propose a new model to define the relationship between universities and their students that they call the “facilitator model” (p. 163). They posit that, “a wide grant of freedom or a heavy dose of authority will often disempower the college or the student” (Bickel & Lake, 1999, p. 163). Instead, the facilitator model focuses on “establishing balance in college and university law and responsibilities” (Bickel & Lake, 1999, p. 163). With this new model, the university facilitates student development by providing rules for decision-making and consequences for breaches of these rules by students. The university also allows students to make their own choices within individual and student organizational settings. Further, the university will respect the due process rights of their responsible adult students when disciplining them.

#### **VA. Facilitator Examples**

The facilitator model is consistent with many student life policies in place today. An online search of student affairs resources at both private and public four-year colleges and universities around the country demonstrates the point. At Harvard College, the Office of Student Life



states on its official webpage (2011):

We collaborate with students, faculty, administrators, and other partners both inside and outside of the Harvard community to create safe environments for students. In addition, we create opportunities for students to learn through active participation and reflection where they can:

1. Develop as responsible leaders and as active participants in non-leadership roles;
2. Apply knowledge in creative ways;
3. Experiment with new ideas, identities, and skills;
4. Develop resiliency and resourcefulness;
5. Assume responsibility for the consequences of personal actions and learn from successes and failures;
6. Engage with others and cultivate appreciation for diversity; and
7. Serve society to work for the betterment of our global community. (para. 2)

This language sets forth an affirmative commitment on behalf of the Harvard Office of Student Life to create opportunities for the students to develop into effective leaders and citizens – while students are expected to take responsibility for their learning.

At Delaware Valley College, the 2010-2011 Student Handbook (2010) provides:

Student Affairs professionals work within the College Mission to facilitate the development of the total person and affirm that campus life is an essential part of the educational process. By offering educationally purposeful activities, Student Affairs professionals foster citizenship, community and leadership development and the acceptance of differences in a climate of support and challenge. (para. 1)

As is apparent from this language, Delaware Valley College seeks to facilitate student growth and development by creating “educationally purposeful activities.” While the College provides the opportunities, the students are responsible for capitalizing on them.

Similarly, at University of California at Berkeley, the Division of Student Affairs states on its official webpage (2011) that the office has three main priorities:

- Access: Maintain access and affordability; provide opportunities for equity and excellence.
- Service: Improve and sustain cutting edge student services, making them more applicable to this generation of students.
- Engagement: Foster learning and leadership development, transforming students into engaged local, national, global citizens.

Together these create the student experience and foster student success. (para. 1) The Student Affairs professionals at this institution are also committed to fostering the learning and leadership development opportunities for their students, while students are expected to become engaged members of the community. As a final example, at Syracuse University, the Division of Student Affairs states on its official webpage (2011):

The Syracuse University Division of Student Affairs works with students, faculty, staff, and community partners to deliver programs and services to enhance the student experience at SU. It supports student leadership and works to create opportunities for them to engage meaningfully with the University and the world.

We in the Division of Student Affairs foster students' intellectual, personal and professional growth, and prepare them for success on campus and beyond graduation. Most importantly, we strive to create safe, diverse, and stimulating environments responsive to student needs. We encourage students and parents to take advantage of the variety of programs and services we offer, and invite your questions and value your feedback.<sup>6</sup> (para. 2)

Syracuse University sees its role as fostering growth in partnership with its students. Similar language can be found on many college student affairs websites around the country.

These modern student life policies are not at all consistent with the *in loco parentis* or university-as-bystander models. However, these policies'

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<sup>6</sup> Note that the language in Syracuse University's Division of Student Affairs' webpage explicitly includes parents in the partnership with the university. This may be a trend in which more institutions are participating (Henning, 2007).

common focus on the university as facilitator for leadership development and community engagement, while recognizing the agency of the students to make choices in what opportunities they will take, is wholly consistent with Bickel and Lake's (1999) facilitator model. Some recent court cases may provide insight into how the facilitator model, with its emphasis on reciprocal duties between universities and their students, is changing the way that universities are going forward even in the aftermath of judicial determinations of no liability in negligence actions brought by their students.

## **VB. Two Case Studies: Lehigh and Colgate**

In the last two decades, some courts faced with defining the university-student relationship in personal injury actions have rejected the existence of a duty of care by the university based on a notion that students should bear responsibility for their actions.<sup>7</sup> While the result is similar to the university-as-bystander cases, the subsequent steps taken by universities even though they were absolved of liability demonstrates that universities are defining their own roles as facilitators for student growth regardless of whether the courts are applying pressure on them to do so. Case studies of two universities dealing with alcohol-related injuries or deaths and their aftermath illustrate this point.

### *Lehigh University*

In *Booker v. Lehigh University* (1992), a 19-year old sophomore student, Lora Ann Booker, injured herself in a fall after becoming drunk at an on-campus fraternity party. She sued Lehigh University claiming that the university breached its duty to keep her safe from such injury. The U.S. District Court for the Eastern District of Pennsylvania held that the university had no duty to protect her. The Court noted that the fact that the university had rules prohibiting underage drinking did not create such a duty. Indeed, the responsibility for violations of these rules and consequences thereof fell squarely on the student. The Court observed:

There can be no question that [Booker] was competent, legally or

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<sup>7</sup> Not all courts are moving in this direction. For example, see *Morrison v. Kappa Alpha Psi Fraternity* (1999), which held that Louisiana Tech had a duty to protect its students from injuries caused by hazing about which it had prior knowledge; or see *McClure v. Fairfield University* (2003), which held that Fairfield University had a duty to protect its students in an area between the campus and the beach in which it was already providing shuttle service due to student safety concerns.

otherwise, to decide, *inter alia*, whether to break the law, e.g., she was competent to make the initial decision whether to drink alcohol. She thus makes such a decision as an adult who is merely under the legal age for consuming alcohol. (Booker v. Lehigh University, 1992, p. 238)

Although the court found that Lehigh did not have a duty to protect Lora Ann Booker in this alcohol-related injury case, Lehigh subsequently implemented new student alcohol policies that focused on a partnership with its students.

In 1996, Lehigh collaborated with the A Matter of Degree (AMOD) program, with a five-year grant and programmatic support from the American Medical Association (Weitzman, Nelson, Lee, & Wechsler, 2004 ; Cooke, 2005). AMOD is a “coalition-based approach that brings campuses and communities together to change environments that promote heavy alcohol consumption” (Weitzman et al., 2004, p. 188). Weitzman et al., found that Lehigh’s AMOD, along with four other AMOD schools, showed significant decreases in the harmful secondhand and other effects of high risk drinking, including reductions in assault and property vandalism (Weitzman et al., 2004). In September 2001, Lehigh received a four-year grant renewal to continue its AMOD program (Cooke, 2005). Furthermore, a policy task force composed of students, staff, and community members spent more than a year discussing possible changes to the alcohol policy (Lehigh University, Office of Special Projects, 2011a, para. 2). The task force’s recommendations formed the basis of new policies that went into effect in the fall of 1999. These policies “continue to work to reduce high risk drinking by setting expectations, promoting responsibility and accountability, and helping shape the overall environment” (Lehigh University Office of Special Projects, 2011a, para. 2).

Since the end of the AMOD grant in 2005, “Lehigh has grown into a year-round, comprehensive alcohol prevention program (CAP)” (Lehigh University Office of Special Projects, 2011b, para. 2). CAP efforts begin even before students arrive for their freshman year, including educational programs, orientation activities, peer activities, substance-free housing, and alcohol free social activities. Further, “[t]he Office of Special Projects is currently responsible for coordinating and overseeing Lehigh’s alcohol prevention efforts” (Lehigh University Office of Special Projects, 2011c, para. 1). In its online welcoming message, the office states:

Our prevention efforts are concentrated on helping you make smart choices, and creating an environment where your alcohol use does not impose risk on yourself or others. We focus on personal and second-hand effects – or what happens as a result of drinking. We

drinking. We provide a multitude of social activities and ways that you can get involved in our campus community... ways that lead to a fulfilling social life. We also have strong resources to help you or other students concerned about alcohol related issues. As a member of the Lehigh community we all share, it is our hope that when you do chose you will choose wisely. (Lehigh University Office of Special Projects, 2011d, para. 3)

Consistent with the facilitator model of university-student relations, Lehigh's alcohol policy takes proactive steps to curb alcohol abuse by emphasizing student education with individual responsibility and supporting non-alcohol-centered community building. Instead of focusing on punishment and discipline for students who break rules that was common in the *in loco parentis* era, Lehigh took affirmative steps to create a culture of informed decision making among its young adult student population. Further, instead of eschewing involvement in student life as a bystander university, Lehigh fully engaged with its students to address excessive student drinking.

### *Colgate University*

In *Rothbard v. Colgate University* (1997), a student, Jason Rothbard, who had been injured in a drunken fall from the second floor of a fraternity house, sued Colgate arguing that the university had breached its duty to control or supervise the conduct of students in fraternity houses. The New York Appellate Division rejected the imposition of a duty on the university, writing that the plaintiff, who was a sophomore at the time of the fall, "was not a young child in need of constant and close supervision; he was an adult, responsible for his own conduct" (*Rothbard v. Colgate University*, 1997, p. 148). The Court also observed that the fact that the university had rules prohibiting certain conduct did not create a duty of care. It was the responsibility of the students to follow the rules.

Even though the court found no liability in this case, Colgate subsequently took steps to create a safer campus environment in partnership with its students. A fatal drunk driving accident that occurred three years after the *Rothbard* decision served as a further catalyst for action. On November 11, 2000, an intoxicated student crashed his car on campus, killing four other students; the student was subsequently charged with driving while intoxicated and four counts of vehicular manslaughter (Ward, 2010, November 11). In 2001, in light of these tragic deaths and increasing alcohol abuse by its students, Colgate's Board of Trustees charged a task force with "recommending improvements that will better help achieve Colgate's mission, enhance academic excellence and

strengthen the college overall” (Colgate University, 2011, para. 1). The task force recommended, *inter alia*, the following action items:

- That alcohol education program employ the concept of ‘social norming.’
- That the residential life staff be augmented to provide support for the student Residential Advisors and to develop proactive alcohol education programming in all residences.
- That Colgate support students in their efforts to provide more non-alcoholic social options, especially late at night on weekends.
- That the administration work with student leaders to clarify the sanctions resulting from the most egregious behaviors. (Colgate University, 2011, para. 10).

The task force’s principles and recommendations were taken seriously, and Colgate’s current alcohol policy articulates the following philosophy:

Colgate condemns the abuse of alcohol and other drugs. Because abuse of alcohol and other drugs is detrimental to the physical and psychological well-being of students, the University seeks to educate students about the dangers of drug and alcohol abuse and the importance of healthy and responsible choices. Repeated involvement with, or excessive use of, alcohol and/or other drugs will be viewed as a health concern as well as a disciplinary matter. (Colgate University, 2010, p. 100)

Colgate’s new initiatives in furtherance of this philosophy have included late-night campus shuttles, on-campus emergency phones, stricter penalties for students caught drunk driving, and theme-based living arrangements (Fein, 2005, November 11). These university sponsored programs are consistent with the facilitator model for university-student relations.

Like Lehigh University, Colgate has chosen to embrace its role as a facilitator for student development and develop proactive approaches to combat alcohol abuse that focus on education and a partnership with students. Again, Colgate moved away from a punishment and discipline model of the old *in loco parentis* era and embraced a collaboration with its students that emphasized education, community building, and personal responsibility. Further, Colgate chose not to act as a bystander; instead, it worked together with its students to tackle the challenge of abusive student drinking.

In both case studies, we observe that courts have been willing to treat college students as young adults who have responsibility for the consequences of their behavior. These courts found no duty in tort law on the part of the universities based on this view. Although the legal outcome is the same as in the university-as-bystander cases, these universities' internal responses to alcohol-related injuries on their campuses illustrate the ways in which some schools are self-identifying as facilitators for student growth. Instead of taking a step back from student life, especially after some courts have partially shielded them from tort liability, these schools are choosing to take proactive measures to combat alcohol abuse and related injuries. These steps treat students as responsible young adults who have the freedom to make decisions—hopefully informed—over their own lives.

### Conclusion

In conclusion, until the 1960s, the *in loco parentis* doctrine allowed universities to exercise great discretion in developing the “character” of their students without having to consider their students' constitutional rights. The demise of this doctrine, particularly at public universities, forced courts to redefine the relationship of universities with their students. While the cases that announced the demise of *in loco parentis* arose from the recognition of constitutional rights of students engaged in civil rights and other protests, subsequent cases that articulated the new relationship between university and students arose from tort law – specifically, from personal injury lawsuits brought by students against their schools. At first, courts held that universities were mere bystanders to student activities and absolved them of liability in negligence actions brought by injured students. Later, courts recognized a duty of care based on the close relationship that universities have with their students. Consistent with these later cases, universities—both public and private—embraced this close relationship and became facilitators of student development through the work of their student affairs offices. Recent court cases and university policies suggest that universities, as facilitators of student development, will continue to remain involved in student life, but students will be deemed by some courts to have a higher level of responsibility over their actions than in the past.

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