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## INTRODUCTION

This nation supports 3,587 public and private colleges and universities.[1] These institutions of higher education attempt—among other aims—to educate almost 12.8 million students, at a cumulative annual expenditure in excess of 97.5 billion dollars.[2] Given the breadth of post-secondary educational institutions, lawyers, judges, scholars, administrators and students should be concerned that, with respect to tort liability, the courts have uniformly failed to elucidate and embrace a coherent legal model of the student-college relationship.

Several commentators have recently examined post-secondary institutional liability, albeit on limited grounds.[3] Liability as dicussed in this Note includes liability for institution-sponsored events, criminal acts, activities sponsored by social fraternities, and more generally, liability arising on campus property. These forms of institutional liability are united by a common thread: The plaintiffs assert that the defendant college owes its students a duty of care to take reasonable measures to protect students from potential harms caused by the college and/or others. Thus, the plaintiffs' claims go to the heart of the student-college relationship. Accordingly, a coherent model of this relationship is of critical importance for the adjudication of these claims.

Prior to its celebrated demise in the 1960s, courts employed the doctrine of *in loco parentis* to define the student-college relationship.[4] Suprisingly,

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1. Chron. Higher Educ. Almanac, Sept. 6, 1989, at 5. The term "college" is used throughout to denote both college and university. It will become evident that the distinction between public and private colleges is not important for the purposes of this Note.

2. *Id.*

3. *See generally* Gregory, *Alcohol Consumption by College Students and Related Liability Issues,* 14 J.L. & EDUC. 43 (1985); Hauserman & Lansing, *Rape On Campus: Post-secondary Institutions as Third Party Defendants,* 8 J.C. & U.L. 182 (1981-82); Roth, *The Impact of Liquor Liability On Colleges and Universities,* 13 J.C. & U.L. 45 (1986); Comment, Eiseman v. State of New York: *The Duty of a College to Protect its Students From Harm by Other Students Admitted Under Special Programs,* 14 J.C. & U.L. 591 (1988).

4. *See, e.g.,* Beaney, *Students, Higher Education and the Law,* 45 DEN. L.J. 511, 513-15 (1968); Comment, *Colleges and Universities: The Demise of* In Loco Parentis, 6 LAND & WATER L. REV. 715 (1971).

however, several commentators have recently asserted that the doctrine is rising from its ashes.[5] This Note demonstrates that warnings of a "new" *in loco parentis* are both wrong and problematic. Following the death of *in loco parentis,* courts and scholars have developed alternative models of the student-college relationship. Nevertheless, despite the various models, courts resolving personal injury claims by students against colleges have uniformly assessed the relationship under traditional tort theories. Furthermore, the doctrine of *in loco parentis,* properly understood, never did serve as a basis for tort liability. Thus, the mistaken claims of the coming of a "new" *in loco parentis* may create confusion in the courts and may induce colleges to draft and implement policies that spawn, rather than diminish, institutional liability.

This Note first examines the doctrine of *in loco parentis*—its creation, definition, importance in the tort arena and its demise. Next, the models of the student-college relationship which replaced *in loco parentis* are presented. Finally, this Note provides a critical examination of claims that *in loco parentis* is experiencing a "second coming."

## I. THE *IN LOCO PARENTIS* DOCTRINE

Duty of care, causation, proximate cause, injury and negligence are the five *prima facie* elements of any negligence suit. A basic principle is that, absent "special" circumstances, no duty obtains.[6] Hence, common law negligence principles impose no duty upon a college to aid and protect its students unless a "special relationship"[7] exists between the institution and

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.5. *See* Szablewicz & Gibbs, *Colleges' Increasing Exposure to Liability: The New* In Loco Parentis, 16 J.L. & EDUC. 453 (1987); Goodman, *Boston University Plays Parent with Curfew,* The Wash. Post, Sept. 20, 1988, at A21, col. 1; Fiske, *Role of Colleges Widen in Guiding Lives of Students,* N.Y. Times, Feb. 22, 1987, at 1, col. 2.

6. Section 314 of the *Restatement (Second) of Torts* states: "The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action." RESTATEMENT (SECOND) OF TORTS § 314 (1963-64).

7. *Restatement (Second) of Torts* § 314A states:

> (1) A common carrier is under a duty to its passengers to take reasonable action
> (a) to protect them against unreasonable risk of physical harm, and
> (b) to give them first aid after it knows or has reason to know that they are ill or injured, and to care for them until they can be cared for by others.
> (2) An innkeeper is under a similar duty to his guests.
> (3) A possessor of land who holds it open to the public is under a similar duty to members of the public who enter in response to his invitation.
> (4) One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection is under a similar duty to the other.

*Id.* § 314A (1963-64). The caveat to § 314A states: "[t]he Institute expresses no opinion as to whether there may not be other relations which impose a similar duty." *Id.* § 314A Caveat.

its students.[8] Commentators often have asserted that the *in loco parentis* doctrine once provided this "special relationship."[9] The focal point of this Note is the role of *in loco parentis* and the "special relationship" between college and student.

The development and subsequent demise of *in loco parentis* in the courts has been thoroughly presented elsewhere.[10] Nonetheless, a cursory review of the doctrine's guiding principles and functional areas of operation is essential in order to properly assess the current status of the student-college relationship and the claims of commentators who have attempted to establish a "second coming" of *in loco parentis.*

## *A. Development of the Theory*

The doctrine of *in loco parentis*—literally "in the place of a parent"[11]—was formally recognized in the educational context as early as the late eighteenth-century in England.[12] It provided educators with parental authority to protect students' welfare.[13] The doctrine's first formal judicial enunciation occurred in *Gott v. Berea College:*[14]

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

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8. "[A] negligence claim must fail if based on circumstances for which the law imposes no duty of care on the defendant." Bradshaw v. Rawlings, 612 F.2d 135, 138 (3d Cir. 1979), *cert. denied,* 446 U.S. 909 (1980).

9. Fowler, *The Legal Relationship Between the American College Student and the College: An Historical Perspective and the Renewal of a Proposal,* 13 J.L. & EDUC. 401, 408 (1984); Gregory, *supra* note 3, at 43; Miyamoto, *Liability of Colleges and Universities for Injuries During Extracurricular Activities,* 15 J.C. & U.L. 149, 152 (1988); Zirkel & Reichner, *Is the* In Loco Parentis *Doctrine Dead?,* 15 J.L. & EDUC. 271 (1986); Comment, *supra* note 4, at 727; Comment, *supra* note 3, at 592.

10. Zirkel & Reichner, *supra* note 9; *see also* Szablewicz & Gibbs, *supra* note 5.

11. BLACK'S LAW DICTIONARY 708 (5th ed. 1979).

12. Blackstone observed:

> [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.

1 W. BLACKSTONE, COMMENTARIES 441 (1765).

13. The extent and evolution of *in loco parentis* in the primary, secondary and post-secondary levels of education is particular to each category. *See* Zirkel & Reichner, *supra* note 9.

14. 156 Ky. 376, 161 S.W. 204 (1913). In *Gott* the court upheld the college's authority to promulgate a rule forbidding students to eat anyplace not owned by the college.

> disposed to interfere, unless the rules and aims are unlawful, or against public policy.[15]

In its fullest form the doctrine of *in loco parentis* permits colleges to devise, implement and administer student discipline[16] and to foster the physical and moral welfare of students. This latter notion of physical welfare is critical to institutional tort liability: The exercise of legal authority is inextricably bound with the obligations of legal duty, and *Gott* suggests that the *in loco parentis* doctrine imposes a duty to protect the physical welfare of students. Thus, as college administrators governed students with parental authority, courts began to recognize a correlative legal duty to protect the students over which such authority was exercised.[17]

### B. *The Demise of* In Loco Parentis

The doctrine of *in loco parentis* was rendered inoperative in a series of cases decided in the 1960s.[18] These early decisions concerned college disciplinary actions—including rules of conduct and student searches—not institutional tort liability. Nevertheless, the demise of *in loco parentis* altered all facets of the student-college relationship. As one court wrote: "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

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15. *Id.* at 379, 161 S.W. at 206 (emphasis added).

16. For example, corporal punishment and student searches. *See* Zirkel & Reichner, *supra* note 9, at 273 for the development of *in loco parentis* in the area of student discipline.

17. *See, e.g.*, Brigham Young Univ. v. Lillywhite, 118 F.2d 836 (10th Cir.) (university liable for injuries sustained by student in chemistry lab explosion that occurred while instructor not in classroom), *cert. denied,* 314 U.S. 638 (1941); Barr v. Brooklyn Children's Aid Soc'y, 190 N.Y.S. 296 (Sup. Ct. 1921) (A college or university is liable to an injured student for the negligence of its servants.).

18. *See* Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir.) (due process requires notice and some opportunity for hearing before a student at a tax-supported college can be expelled for misconduct), *cert. denied,* 368 U.S. 930 (1961); Soglin v. Kauffman, 295 F. Supp. 978, 989 (W.D. Wis. 1968) (constitutional doctrines of vagueness and overbreadth are applicable in some measure to standard or standards to be applied by state university in disciplining its students), *aff'd,* 418 F.2d 163 (7th Cir. 1969); Buttny v. Smiley, 281 F. Supp. 280, 286 (D. Colo. 1968) ("[D]octrine of 'In Loco Parentis' is no longer tenable in a university community . . . . We do not subscribe to the notion that a citizen surrenders his civil rights upon enrollment as a student in a university."); Goldberg v. Regents of Univ. of Cal., 248 Cal. App. 2d 867, 876-77, 57 Cal. Rptr. 463, 470 (1967) ("For constitutional purposes, the better approach . . . recognizes that state universities should no longer stand in loco parentis in relation to their students. Rather, attendance at publicly financed institutions of higher education should be regarded a benefit somewhat analogous to that of public employment.").

For commentary on the factors that contributed to the increasingly untenable status of *in loco parentis* see W. KAPLIN, THE LAW OF HIGHER EDUCATION 4-6 (2d ed. 1985); Likins, *Six Factors in the Changing Relationship Between Institutions of Higher Education and the Courts,* 42 J. NAT'L A. WOMEN DEANS ADMIN. & COUNS. 17 (Winter 1979).

goings and to supervise their associations."[19] Upon reviewing the evolution of the *in loco parentis* doctrine, Zirkel and Reichner concluded: "In sum, 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."[20]

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19. Hegel v. Langsam, 29 Ohio Misc. 147, 148 (1971) (plaintiff parents failed to state a claim in alleging that university "permitted" their seventeen year-old daughter, a student, "to become associated with criminals, to be seduced, to become a drug user and further allowed her to be absent from her dormitory and failed to return her to her parents' custody on demand"); *accord* Baldwin v. Zoradi, 123 Cal. App. 3d 275, 287, 176 Cal. Rptr. 809, 816 (1981) (demurrer in favor of defendant university affirmed where student plaintiff brought action for injuries sustained in automobile speed contest which occurred after drinking on university premises) ("[T]he authoritarian role of college administrators is gone. Students have demanded rights which have given them a new status and abrogated the role of *in loco parentis* of college administrators."); Swanson v. Wabash College, 504 N.E.2d 327 (Ind. Ct. App. 1987) (affirming summary judgment in favor of college where plaintiff student brought action against college for injuries sustained while participating in recreational baseball practice).

> [S]chools are not intended to be insurers of the safety of their pupils, neither are they strictly liable to them for any injuries they may incur. To support his argument that Wabash owed him a duty to supervise the baseball practices, Eric cites several cases, from Indiana and other states, imposing such a duty on schools. However, these cases generally involve a school's duty to supervise young school children in the classroom, at recess, or in some other school-organized activity. Eric, on the other hand, was a college freshman at Wabash participating in recreational baseball practices.

*Id.* at 330 (citation omitted); Campbell v. Board of Trustees of Wabash College, 495 N.E.2d 227, 232 (Ind. Ct. App. 1986) (affirming summary judgment in favor of college where plaintiff student sued to recover damages for injuries sustained while passenger in an accident involving automobile driven by fraternity member, following fraternity party at which both plaintiff and fraternity member consumed alcoholic beverages) ("College students and fraternity members are not children. Save for very few legal exceptions, they are adult citizens, ready, able, and willing to be responsible for their own actions. Colleges and fraternities are not expected to assume a role anything akin to *in loco parentis* or a general insurer.").

20. Zirkel & Reichner, *supra* note 9, at 282. Zirkel is University Professor of Education and Law, Lehigh University. Reichner is a recent graduate of the University of Pennsylvania School of Law. *Accord,* D. YOUNG & D. GEHRING, THE COLLEGE STUDENT AND THE COURTS (1977).

> The doctrine of *in loco parentis* is not legally tenable today. With a lowered age of majority in most states, almost all college students today are legal adults. Although there are some elements of *in loco parentis* on campus today (for example, providing for the health care, safety and general welfare of students), colleges are under no legal compulsion to provide for such, although some students do indeed seek such (for example, when they ask for the dean to bail them out of jail or seek help concerning abortions, etc.).
>
> Strictly speaking, *in loco parentis* as a legal doctrine has no legal validity in a public institution today, although it may well depend upon how that term is defined. Certainly the institution can provide for the health, safety and welfare of its students.

*Id.* at 1-13; *cf.* Graham v. Montana State Univ., 767 P.2d 301 (Mont. 1988). *Graham* shows the danger of discussing the status of the law in absolute statements. In *Graham,* plaintiff, a minor high school student who was participating in a summer program at the university, obtained her residence hall advisor's permission to visit an off-campus residence. There the plaintiff consumed alcohol, went for a ride on a motorcycle driven by an intoxicated inhabitant of the residence, and was seriously injured when the motorcycle left the highway. The Supreme Court of Montana affirmed summary judgment in favor of defendant on the ground that no

Thus, the doctrine of *in loco parentis* was invalidated. Courts, scholars and college administrators had to look elsewhere for an explanation of the legal relationship between college and student. Consequently, several alternative models of the student-college relationship have been developed.[21]

### C. *"Replacement" Models*

After the broad and unambiguous renunciation of *in loco parentis,* both courts and scholars have made several detailed attempts to recast the student-college relationship.[22] Constitutional, contract, fiduciary and "unitary" theories have all emerged as alternate models.[23] Each of these models, however, is inappropriate for determining institutional tort liability.

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proximate cause obtained. Nevertheless, the court also found that the university assumed a duty to protect the injured plaintiff because it effectively took custody of her during her participation in the summer program, thereby eliminating her normal opportunity for parental protection. Noting "the demise of the *in loco parentis* status once occupied by universities" and that "universities no longer have a special, custodial relationship to their adult students," *id.* at 303, the court distinguished the present case:

> The plaintiff in this case is a minor high school student. When MSU [Montana State University] undertook to have Kimberly live on its campus and supervise her during the MAP [Minority Apprenticeship Program] program, it assumed a custodial role similar to that imposed on a high school because Kimberly is a juvenile. Once MSU assumed that role, it was charged with exercising reasonable care in supervising the MAP participants.

*Id.* at 304. Thus, colleges have the capacity to act *in loco parentis,* however rare this capacity may actually be exercised. Accordingly, it is mistaken to say that *in loco parentis* has undergone a "complete demise" in the college context. It is more appropriate to say that *in loco parentis* has undergone a complete demise with respect to the doctrine's operation concerning adult college students.

21. This is not meant to imply that the alternative models materialized only subsequent to the demise of the *in loco parentis* doctrine. Indeed, it appears that several of the models developed co-extensively with the doctrine of *in loco parentis.* The point here is that prior to its demise, the doctrine of *in loco parentis* was the predominant model of the student-college relationship.

22. *See generally* R. HENDRICKSON & A. GIBBS, THE COLLEGE, THE CONSTITUTION, AND THE CONSUMER STUDENT: IMPLICATIONS FOR POLICY AND PRACTICE (ASHE-ERIC Higher Educ. Report No. 7, 1986); Fowler, *supra* note 9.

23. Constitutional analysis generally focuses on the fourteenth amendment's guarantees of due process, especially fair notice and the opportunity to be heard. For an examination of the student-college relationship that posited "college as government," see *Dixon,* 294 F.2d at 150. Constitutional analysis is restricted to public colleges and universities. It is also inappropriate in tort analysis: fair notice and the opportunity to be heard are irrelevant to the duty element necessary for a successful tort claim. Thus, while constitutional requirements may prove useful tools in determining roles and responsibilities in the disciplinary context, constitutional considerations do not facilitate tort analysis. Additionally, constitutional analysis is restricted to public colleges and universities, because private institutions of higher education are not governmental entitites nor agents of the government. For these reasons, the legal relationship between college and student grounded in constitutional doctrine is not addressed in this Note.

### 1. The Contract Model

The student-college relationship has been defined under contract principles.[24] Contractual analysis of the relationship, in fact, predates the demise of *in loco parentis*.[25] The Florida District Court of Appeal explained the dynamics of contractual analysis in *University of Miami v. Militana*:[26]

> The operation of a private college or university is touched with eleemosynary characteristics. Even though the public has a great interest in seeing these institutions encouraged and supported, they are operated as a private business. This being true, the college may set forth the terms under which it will admit and subsequently graduate students who subject themselves to the rules, regulations and regimen of the college. It is generally accepted that the terms and conditions for graduation are those offered by the publications of the college at the time of enrollment. As such, they have some of the characteristics of a contract between the parties, and are sometimes subject to civil remedies in courts of law.[27]

Contract law is equally applicable to public and private institutions.[28] Additionally, it is useful in the analysis of college disciplinary actions against students.[29] The contractual method, however, is also seriously flawed. Several critics of the contractual approach are quick to point out the failure of the analogy: Students and colleges do not engage in an "arm's length" agreement. Without such bargaining, quasi-contracts, unconscionable contracts, and contracts of adhesion all emerge as impairments to contractual analysis. Not all potential students are free to attend the college of their choice, nor are students able to negotiate the terms contained in a college bulletin.[30]

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24. *See, e.g.*, Note, *Contract Law and the Student-University Relationship*, 48 IND. L.J. 253 (1973).

25. Koblitz v. Western Reserve Univ., 21 Ohio C.C. 144 (1901). The court held that the expulsion of a tuition-paying law student from a proprietary school was valid because:

> the consideration that he has paid for the privileges that he is to obtain under that contract, is paid under certain restrictions and conditions to be complied with upon his part, and upon such conditions and restrictions as may be imposed upon that contract by the authorities of the university so long as they do not conflict with the laws of the state or the laws of the country.

*Id.* at 154.

26. 184 So. 2d 701 (Fla. Dist. Ct. App.) (denying plaintiff medical student's request for an order directing the university to promote his class standing one year), *cert. denied*, 192 So. 2d 488 (Fla. 1966).

27. *Id.* at 704.

28. *See supra* note 23 and accompanying text. This is an advantage over constitutional analysis. Contract law is, in fact, the primary model of the student-college relationship in the private college context.

29. For example, contract law is useful in determining the propriety of an expulsion.

30. *See* Note, *supra* note 24, at 262-65 (comparing student-university contract law and the general law of contract); *see also* Dodd, *The Non-Contractual Nature of the Student-University Contractual Relationship*, 33 U. KAN. L. REV. 701 (1985) (discussing the tenability of contract

Furthermore, defining the student-college relationship with contractual analysis will not work in the area of tort liability. Contract law has not been used in tort claims against colleges, with good reason. Contract law does not adequately capture the underlying dynamics of tort law. For example, contractual analysis does not permit the proper operation of the compensatory, deterrent and cost-spreading objectives so fundamental to tort law. Accordingly, the contract model is not appropriate for tort analysis because the goals and principles of contract law and tort law are too disparate.

### 2. The Fiduciary Model

The legal relationship between college and student has also been described as a fiduciary relationship.[31] A fiduciary relationship is based on trust principles and imposes upon the fiduciary the duty to act for the benefit of the principal in all matters relevant to their relationship. Professor Goldman, an advocate of this model, argues:

> All of the elements of a fiduciary relation are present in the student-university relationship. It is no small trust—no small display of confidence to place oneself under the educational mentorship of a particular university. The value of an educational experience is directly affected by the school's conscientious, faithful performance of its duties—duties which are directed toward the student's benefit. . . . In addition to often making confidential disclosures about his background, his health and his financial situation in applications for admission and [financial] assistance, the student is expected to confide in course and career counselors who are appointed by the university. . . . In making these disclosures, the student reposes confidence in the school's skill and objectivity . . . .[32]

The fiduciary model recognizes the trust a student places in the institution she attends. In response to this trust, a legally stringent standard of conduct is imposed upon the university.

However, the fiduciary model is not practical. Whenever the student-college relationship is implicated, an institution must justify all actions

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principles in the student-university setting). Dodd concludes:

> [L]aws of contract are not in fact being applied in student-university cases. Nor should they be. Instead, theories of tort law should be applied more frequently to issues concerning the student-university relationship, as the basic conceptual premises of contract law are not truly reflective of that relationship and thus are not appropriate analytical tools in the education law area.

*Id.* at 702.

31. For a proposal urging the judiciary to embrace the fiduciary theory of the student-college relationship, see Fowler, *supra* note 9.

32. Goldman, *The University and the Liberty of Its Students—A Fiduciary Theory*, 54 KY. L.J. 643, 671 (1966).

affecting the relationship with fully-defensible explanations.[33] Further, placing a fiduciary responsibility on institutions reduces students' responsibilities. This state of affairs compromises the institution's ability to foster responsible student decision-making and mature behavior.[34] More damaging to the fiduciary model, however, is judicial resistance towards its adoption. To date, no court has characterized an educational institution as owing a fiduciary duty to its students.[35] Thus, even if the fiduciary model were theoretically tailored to sound dimensions, the model has failed to be viable in practice.

### 3. The "Unitary Theory"

The "unitary theory," proposed by Michael,[36] describes the legal relationship between college and student as a relationship that is both dynamic and unique. Michael's theory is "an effort to maintain 'substantial justice' between the school and its students"[37] by focusing on the distinct characteristics of each given academic community. He argues that, because academic communities are "distinct from other societal groups" and "possess[] [their] own unique condition[s]" and characteristics, legal principles must develop that are applicable to the dynamics of particular institutions.[38]

According to Michael, a court reviewing institutional behavior implicating the legal relationship between college and student, should focus its inquiry on the "particular goals of the educational institution and its students."[39] Typically, the primary goal of an institution of higher education "is to provide the necessary facilities and atmosphere leading to a stable academic community for the effective transmittance of knowledge,"[40] while a typical student's primary goal is "to receive an adequate educational experience."[41] Michael acknowledges that secondary goals probably exist,[42] but he maintains

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33. Professor Munch criticizes the fiduciary concept: "It shifts to the university the burden of justifying in detail, in a legally oriented and artificially formal structure, the actions of the university in every case in which they might be challenged, no matter how informal or capricious the challenge might be." Munch, *Comment,* 45 DEN. L.J. 533, 535 (1968).

34. Professor Munch states: "To the extent that the fiduciary theory might be construed to diminish the accountability and responsibility of the student in the student-institutional context, the theory might be subject to legitimate criticism." *Id.*

35. *See* Fowler, *supra* note 9, at 415; *see also* Goldman, *supra* note 32, at 671 (Goldman suggests two reasons for judicial resistance: (1) lawyers have failed to pursue this approach, and (2) laissez faire jurisprudence.).

36. Michael, *The Unitary Theory: A Proposal for a Stable Student-School Legal Relationship,* 1 J.L. & EDUC. 411 (1972).

37. *Id.* at 425.

38. *Id.*

39. *Id.* at 426.

40. *Id.*

41. *Id.*

42. *Id.* ("athletics, social accord, and cultural advancement" among them).

that the educational goal is the paramount aim of any student-college relationship.

After identifying the parties' educational objectives, the court must next "relate the problem to the goals and apply a standard test: Whether or not the act or acts complained of injure, obstruct, or adversely affect the educational goals of the school or student."[43] The approach is "unitary" because it links the method by which courts assess student-college litigation with the reasons behind the parties' relationship.

The "unitary" theory suffers from at least three deficiencies. First, the "unitary" theory's goal-oriented analysis is not effective for resolving student personal injury suits against colleges and universities. A "test based on the goals of each party"[44] could never properly determine the point at which liability should obtain. The finder of fact would have to determine the point at which the goals of receiving "an adequate educational experience" and fostering the facilities and atmosphere necessary for "the effective transmittance of knowledge"[45] have been impaired. And this determination is nebulous. Without, at least, an extensive documentation of the dynamics of a particular student-college relationship, the "unitary" theory is impotent. In fact, Michael's examples of "unitary" theory application[46] fail to address a student-brought personal injury suit.

The "unitary" theory also fails to facilitate tort law's deterrent function. Deterrence cannot be accommodated by a theory that espouses judicial inquiry into the "particular goals of the educational institution and its students":[47] The essence of deterrence is predictability, and there is little predictability in ad hoc examinations of unique student-college relationships.

Finally, the "unitary" theory fails because it has not been viable. The literature of higher education tort law and court holdings have yet to address the "unitary" theory. Almost twenty years ago, Michael asked, "[c]an an adoption or testing of the unitary theory occur?"[48] So far, the answer is "no"—perhaps due to its nebulousness, perhaps due to its inability to deter.

The "unitary" model of the student-college relationship is not an adequate "replacement model" for the defunct doctrine of *in loco parentis*. While maintaining substantial justice between a school and its students,[49] the "unitary" model fails to provide sufficient guidance to either courts or colleges. It is not surprising, then, that scholars and courts have ignored Michael's theory.

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43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.* at 426-27.
47. *Id.* at 426.
48. *Id.* at 432.
49. *Id.* at 425.

### 4. Summary

In the wake of *in loco parentis*' demise, courts and theoreticians proposed four models of the student-college relationship: constitutional, contractual, fiduciary and "unitary." All four models suffer from a systemic deficiency that cripples their use when courts examine institutional tort liability: Not one of the models is designed to adequately define the student-college relationship when student sues college for personal injury. It is no surprise, then, that these models only have been used, if ever, in litigation concerning the college disciplinary rules and regulations, student fees, and facilities use. The models simply do not inform personal injury suits by students against colleges.

In review, a student suing a college in tort must establish that the college owed her the duty of reasonable care. This duty can only be grounded in a "special relationship." This "special relationship" allegedly once could be established by employing the doctrine of *in loco parentis*. The doctrine of *in loco parentis* was then swept away by the courts. Yet the models of the student-college relationship since employed by courts do not function properly in the tort context. Upon what "special relationship," then, is liability predicated when student sues college in tort? By way of criticizing the claim that *in loco parentis* is re-emerging in tort suits against colleges, the balance of this Note will answer this question.

## II. A "SECOND COMING" OF *IN LOCO PARENTIS*?

### *A. The Szablewicz-Gibbs Theory*

In a recent article on the expansion of college tort liability, Szablewicz and Gibbs[50] claim that the doctrine of *in loco parentis* may not be quite so dead:

> [A] trend is *clearly* emerging from the courts which suggests a rebirth (with revision) of the doctrine. An even stronger trend in plaintiff claims suggests that students are asking for this doctrine which they once rejected. Many courts have responded to the onslaught of students' personal injury lawsuits by imposing liability upon colleges and universities, often in extraordinary circumstances. *This new liability is recog-*

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50. Szablewicz is a practicing attorney in Richmond, Virginia. Gibbs is Professor of Higher Education Administration and Director of the Center for the Study of Higher Education, Curry School of Education, University of Virginia. Dr. Gibbs has published extensively in the area of post-secondary school law. *See, e.g.*, R. HENDRICKSON & A. GIBBS, *supra* note 22; Gibbs, *Colleges and Gay Student Organizations: An Update*, 22 NASPA J. 38 (1984); Gibbs, *Mandatory Student Activity Fees: Educational and Legal Considerations*, 21 J.C. STUDENT PERSONNEL 535 (1980); Gibbs, *Solicitation on Campus: Free Speech or Commercialization?*, 27 J.C. STUDENT PERSONNEL 49 (1986).

> *nizable as a return to the old* in loco parentis . . . . What distinguishes the *in loco parentis* of the 1980s is that it is limited to protection of student safety. Missing is the once complementary power of colleges to police and control students' morals—this having long been barred by constitutional civil rights protections.[51]

Szablewicz and Gibbs maintain that "[a] close look at some recent court decisions show[s the claim that *in loco parentis* is dead] to be wrong."[52] An even closer look at court decisions and the role of the *in loco parentis* doctrine shows Szablewicz and Gibbs' position to be untenable.

According to Szablewicz and Gibbs, "it seems that a new *in loco parentis* relationship is developing. Students are demanding it. College administrations are greatly concerned by it. And courts are enforcing it."[53] This "new" *in loco parentis* places on colleges and universities a parental authority and obligation to protect students from physical harm. However, parental control to shape morality and the authority to impose discipline remain dormant. This "new *de facto in loco parentis* . . . cannot be explained away by traditional notions of contract or constitutional law."[54]

Szablewicz and Gibbs' thesis rests on three premises: (1) *in loco parentis* at one time *did* serve as the "special relationship" necessary for liability to obtain; (2) recently courts have held colleges liable for injuries to students, often in extraordinary circumstances;[55] and (3) with increasing frequency, students have brought tort suits against colleges.[56] These premises, the authors argue, lead to the conclusion that the doctrine of *in loco parentis* is re-emerging in the courts.

### *B. Theoretical Weaknesses*

#### 1.

Szablewicz and Gibbs assume that *in loco parentis* previously provided a basis for institutional tort liability: A "second coming" analytically presupposes a prior existence. Certainly, *Gott v. Berea College*[57] states that "[c]ollege authorities stand in loco parentis concerning the physical and moral welfare, and mental training of the pupils . . . ."[58] And the court in

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51. Szablewicz & Gibbs, *supra* note 5, at 465 (emphasis added).
52. *Id.* at 457.
53. *Id.* at 454.
54. *Id.* at 457.
55. *Id.* ("[S]everal courts in several jurisdictions have held colleges responsible for injuries to students, often in extreme and extraordinary circumstances.").
56. *Id.* ("[S]tudents have increasingly brought such . . . suits.").
57. 156 Ky. 376, 161 S.W. 204 (1913).
58. *Id.* at 379, 161 S.W. at 206. This quote, which serves as the first judicial proclamation of *in loco parentis*' viability in the college context, occurs as dictum.

*John B. Stetson University v. Hunt*[59] includes in its description of *in loco parentis*' scope, "physical . . . welfare."[60] Yet, no *tort case* has used the doctrine of *in loco parentis* as the ground for establishing the institutional duty necessary for liability.[61]

Despite Szablewicz and Gibbs' contentions, there exists a more plausible explanation for the absence of tort analysis that employs *in loco parentis:* The *in loco parentis* doctrine has *never* provided the "special relationship" necessary for liability to obtain. This becomes clear on the examination of several cases ostensibly using the doctrine of *in loco parentis* in the student-college tort context.[62]

In *Barr v. Brooklyn Children's Aid Society,*[63] the court held that a charitable institution is liable for the negligence of its servants. The court, drawing from law concerning post-secondary institutional liability, indicated that a college or university is liable to an injured student for the negligence of its servants: "If it could be said under this complaint that the defendant is a college or university, the defendant would be liable."[64] More simply put, a college or university is liable to an injured student for the negligence of its servants. While this declaration is doubtless true, it does not support the claim that the doctrine of *in loco parentis* operated as a basis for institutional liability. Accordingly, *Barr* does not offer tangible evidence that *in loco parentis* was operating in this context of institutional liablity.

The doctrine of respondeat superior, not *in loco parentis,* was the basis for a student's personal injury action against a university in *Hamburger v. Cornell University.*[65] *Hamburger* involved a chemistry laboratory explosion.

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59. 88 Fla. 510, 102 So. 637 (1924). In dictum, the court stated:

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

*Id.* at 516, 102 So. at 640.

60. *Id.* at 516, 102 So. at 640.

61. Szablewicz and Gibbs offer an explanation for the absence of precedent. The *Gott* court included in its formulation of *in loco parentis* the caveat that imposing liability on colleges may be void as "against public policy." *Gott,* 156 Ky. at 379, 161 S.W. at 206. This warning, say Szablewicz and Gibbs, served as a springboard for institutional immunity. Szablewicz & Gibbs, *supra* note 5, at 456.

62. The three cases that follow are often cited as support for the proposition that the doctrine of *in loco parentis* at one time formed the basis for tort liability. *See* Szablewicz & Gibbs, *supra* note 5, at 455-56; Zirkel & Reichner, *supra* note 9, at 281; Comment, *supra* note 4, at 718. In addition, a Lexis search was employed using various combinations of "colleges," "universities," "*in loco parentis,*" and "injury." The searches failed to produce any cases in which *in loco parentis* was cited as a basis for tort liability.

63. 190 N.Y.S. 296 (Sup. Ct. 1921).

64. *Id.* at 297.

65. 184 A.D. 403, 172 N.Y.S. 5 (N.Y. App. Div. 1918), *aff'd,* 226 N.Y. 625, 123 N.E. 868 (1919).

The student plaintiff was injured when she mixed and heated chemical compounds that were improperly dispensed to her. The explosion occurred under the direct supervision of her instructor. The court found that the university was liable for the negligence of its servants. Like *Barr, Hamburger* does not mention *in loco parentis* as a basis for institutional duty.

Similarly, in *Brigham Young University v. Lillywhite,*[66] the Tenth Circuit affirmed the lower court's determination that a university should be liable for a student's injuries sustained in a chemistry laboratory explosion that occurred while the instructor was not in the classroom. Even though the court analyzed the duty that a university owes its students, the court never mentioned the doctrine of *in loco parentis.*

These three cases, decided while the doctrine of *in loco parentis* was allegedly thriving[67] in the context of college liability for student personal injuries, present no evidence that the doctrine was viable. The conspicuous absence of appellate court discussion of the doctrine of *in loco parentis* fully supports the conclusion that the doctrine of *in loco parentis* was never operational in the context of personal injury suits in the first place. The doctrine of *in loco parentis* did form the basis for a college's parental authority and obligation to shape morality and impose discipline. However, the duty to protect students' physical well-being always has been grounded in the realm of traditional tort categories. Thus, there can be no "new" *in loco parentis* characterized by the resurrection of colleges' duty to protect students from physical harm.

2.

Szablewicz and Gibbs' second premise, that courts recently have held colleges liable for injuries to students in extraordinary circumstances, is only partially true. Indeed, several courts in several jurisdictions have held colleges liable for injuries sustained by students, but a close examination of these cases yields the conclusion that the liability imposed has not been under "extreme and extraordinary circumstances."

The courts of the 1980s have invariably adhered to the Third Circuit's statement of the student-college relationship in *Bradshaw v. Rawlings:*[68]

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66. 118 F.2d 836 (10th Cir.), *cert. denied,* 314 U.S. 638 (1941).

67. *See* Fowler, *supra* note 9, at 408; Gregory, *supra* note 3, at 43; Miyamoto, *supra* note 9, at 152; Zirkel & Reichner, *supra* note 9, at 281-82; Comment, *supra* note 4, at 727; Comment, *supra* note 3, at 592.

68. 612 F.2d 135 (3d Cir. 1979), *cert. denied,* 446 U.S. 909 (1980) (refusing to impose liability when an intoxicated student harmed a classmate following a class picnic for which the college furnished alcoholic beverages). For a critical examination of the court's reasoning, see Note, *The Student-College Relationship and the Duty of Care:* Bradshaw v. Rawlings, 14 GA. L. REV. 843 (1980).

> There was a time when college administrators and faculties assumed a role *in loco parentis.* Students were committed to their charge because the students were considered minors. A special relationship was created between college and student that imposed a duty on the college to exercise control over student conduct and, reciprocally, gave the students certain rights of protection by the college . . . . [But with the campus revolutions, legislation, and case law, a] dramatic reapportionment of responsibilities and social interests of general security took place . . . . [T]oday students vigorously claim the right to define and regulate their own lives. Especially, have they 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.[69]

The court in *Bradshaw* articulated two fundamental policy considerations that underpin many student-college tort cases: (1) a recognition "that the modern American college is not an insurer of the safety of its students,"[70] and (2) "society considers the modern college student an adult, not a child of tender years."[71]

The courts of the 1980s have shaped institutional tort liability under the direction of *Bradshaw*'s policies and traditional tort principles, not a revived and reshaped *in loco parentis* doctrine. Miyamoto's recent article[72] surveys student-college tort cases decided in the 1970s and 1980s. Miyamoto dismisses the *in loco parentis* doctrine as "no longer an appropriate basis for imposing a duty on colleges and universities to protect students."[73] The author contends that plaintiffs have advocated, and courts have accepted, three theories of institutional duty arising out of the "special relationship" between colleges and students: (1) the duty to supervise students;[74] (2) the duty to control the acts of third persons;[75] and (3) the duty to protect

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69. *Bradshaw,* 612 F.2d at 139-40.

70. *Id.* at 138.

71. *Id.* at 140.

72. Miyamoto, *supra* note 9.

73. *Id.* at 152.

74. The author notes that courts have analyzed this duty in light of § 314A of the *Restatement (Second) of Torts. Id.* at 155. At least one court has analyzed this duty in light of § 319 of the *Restatement (Second) of Torts,* which states: "One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm." RESTATEMENT (SECOND) OF TORTS § 319 (1963-64); *see also* Furek v. University of Delaware, No. 82C-SE-30 (Del. Super. Ct. Sept. 25, 1987).

In addition to *Furek,* case law addressing colleges' duty to supervise students includes *Bradshaw,* 612 F.2d at 135, and Smith v. Day, 148 Vt. 595, 538 A.2d 157 (1987) (imposing no legal duty upon university to control volitional criminal acts of its students, where student shot at plaintiff train engineers, even though university exercised great control over activities of its students and imposed stringent rules governing student life at university).

75. *Restatement (Second) of Torts* § 315 states:

> There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless

students pursuant to their status as invitees.[76] The article concludes:

> Courts are reluctant to impose liability on colleges and universities for injuries sustained by students while participating in extracurricular activities. Thus far, courts have not held institutions liable for extracurricular injuries occurring off campus. Courts have been willing to hold institutions liable for injuries sustained by students in a limited number of cases. This disparity in treatment is largely due to the fact that in

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(a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or

(b) a special relation exists between the actor and the other which gives to the other a right to protection.

RESTATEMENT (SECOND) OF TORTS § 315 (1963-64).

The Restatement sections that specify "special relation[s]" that give rise to duty are: § 316 (Duty of Parent to Control Conduct of Child); § 317 (Duty of Master to Control Conduct of Servant); § 318 (Duty of Possessor of Land or Chattels to Control Conduct of Licensee); § 319 (Duty of Those in Charge of Person Having Dangerous Propensities); § 320 (Duty of Person Having Custody of Another to Control Conduct of Third Persons).

Case law addressing the issue of the duty to control the conduct of third persons includes Donnell v. California W. School of Law, 200 Cal. App. 3d 715, 246 Cal. Rptr. 199 (1988) (law school did not owe a duty to protect adult student from attack by third party on dark, adjoining city sidewalk, where student was attacked and stabbed by unknown assailant); Rabel v. Illinois Wesleyan Univ., 161 Ill. App. 3d 348, 514 N.E.2d 552 (1987) (university, by its handbook, regulations, or policies, did not voluntarily assume or place itself in a custodial relationship with its students, so as to impose upon it a duty to protect the plaintiff, where plaintiff student was seriously injured in prank during a fraternity party on university property); Eiseman v. State, 70 N.Y.2d 175, 511 N.E.2d 1128, 518 N.Y.S.2d 608 (1987) (college had no duty to restrict the on-campus activities of ex-felon enrolled in a special state college program for the disadvantaged, where ex-felon raped and murdered plaintiff student in her off-campus apartment).

76. *See* RESTATEMENT (SECOND) OF TORTS § 343, which states:

A possessor of land is subject to liability for physical harm caused by his invitees by a condition on the land if, but only if, he

(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and

(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and

(c) fails to exercise reasonable care to protect them against the danger.

*Id.*

Case law addressing the issue of the duty to protect invitees includes Nieswand v. Cornell Univ., 692 F. Supp. 1464 (N.D.N.Y. 1988) (summary judgment precluded by genuine issues of material fact over university's ability to foresee crime so as to give rise to duty to provide adequate security measures, and university's or residence hall advisor's failure to meet obligations under implied contract governing dormitory security, where student was fatally shot in her dormitory room by disappointed non-student suitor of victim's roommate); Cutler v. Board of Regents of Fla., 459 So. 2d 413 (Fla. Dist. Ct. App. 1984) (stating that university's failure to warn of known dangerous condition is actionable cause, where student was raped in her residence hall and filed suit alleging liability for (i) breach of warranty of habitability; (ii) failure to control conduct of third persons; (iii) breach of duty to anticipate; (iv) misrepresentation; and (v) failure to maintain common areas); Burch v. University of Kan., 243 Kan. 238, 756 P.2d 431 (1988) (university as landlord owed duty to residents and their invited guests to exercise reasonable care in keeping common areas of residence hall in reasonably safe condition, where resident student's grandmother was injured when she fell in unlighted stairwell in campus dormitory).

> an on-campus injury case, the plaintiff can argue that the institution's status as landowner imposes a duty of care. This duty has been more readily recognized in the higher education context than a duty arising from the *in loco parentis* doctrine, a duty to supervise, or a duty to control third persons . . . .[77]

Szablewicz and Gibbs' assertion that a "new liability" "recognizable as a return to the old *in loco parentis*" is "clearly emerging" is incorrect.[78] Instead, courts assessing the "special relationship" between student and college are merely recognizing a liability rooted in long-standing tort duties which arise when a party acts as supervisor, landlord or controller of third persons. Institutional liability is now manifested[79] in traditional tort law principles, not the lifeless *in loco parentis* doctrine.

3.

Szablewicz and Gibbs' third premise for their argument that a "new" *in loco parentis* doctrine is emerging is that "students have increasingly brought such suits."[80] However, an increase in tort filings against colleges and

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77. Miyamoto, *supra* note 9, at 174-75.

78. All four of the cases that Szablewicz and Gibbs present as evidence of the "new" *in loco parentis* contain explicit language acknowledging the complete demise of *in loco parentis,* and are resolved by landowner tort principles. *See* Peterson v. San Francisco Community College, 36 Cal. 3d 799, 808-09, 685 P.2d 1193, 1198, 205 Cal. Rptr. 842, 847 (1984) (judgment for plaintiff student who was victim of attempted rape on campus grounds affirmed, because plaintiff "was an invitee to whom the possessor of the premises would ordinarily owe a duty of due care"); University of Denver v. Whitlock, 744 P.2d 54 (Colo. 1987) (reversing judgment for student fraternity member injured while using a fraternity-owned trampoline in front lawn of university-leased fraternity house under unsafe conditions). The court in *Whitlock* held that:

> [T]he relationship between the University and Whitlock was not one of dependence with respect to the activities at issue here, and provides no basis for the recognition of a duty of the University to take measures for protection of Whitlock against the injury that he suffered . . . . [In addition,] the lease, and the University's actions pursuant to its rights under the lease, provide no basis of dependence by the fraternity members upon which a special relationship can be found to exist between the University and the fraternity members that would give rise to a duty upon the University to take affirmative action to assure that recreational equipment such as a trampoline is not used under unsafe conditions.

*Id.* at 61-62; Relyea v. State, 385 So. 2d 1378, 1382-83 (Fla. Dist. Ct. App. 1980) (denying tort claim of plaintiff student raped on campus grounds because "landowner is not an insurer of the safety of his invitees and is not required to take precautions against a sudden attack from a third person which he has no reason to anticipate"); Mullins v. Pine Manor College, 389 Mass. 47, 449 N.E.2d 331 (1983) (affirming judgment for plaintiff student who was victim of rape on campus grounds, as plaintiff "was an invitee to whom the possessor of the premises would ordinarily owe a duty of due care"). The *Whitlock* case is probably the most important recent holding concerning institutional tort liability due to its lengthy discussion of the *in loco parentis* doctrine.

79. Given the analysis presented *supra* at notes 57-67 and accompanying text, institutional liability was never manifested in the *in loco parentis* doctrine.

80. Szablewicz & Gibbs, *supra* note 5, at 457.

universities[81] does not mean that students are "demanding" that a new *in loco parentis* relationship be established. The increase may only indicate that colleges are not insulated from the general expansion of tort liability that has occurred over the last twenty-five years.[82] Alternately, an increase in personal injury suits brought by students against colleges may result from a recognition by attorneys that college coffers are among the deepest of the much sought-after "deep pockets."

Szablewicz and Gibbs attempt to distinguish the "new" *in loco parentis* from the old *in loco parentis* by calling the "new" version *"de facto" in loco parentis,* and by limiting the "new" *in loco parentis* to cases in which colleges are held liable for failing to protect the physical welfare of their students.[83] But this characterization does not adequately describe the manner in which courts are assessing institutional liability. More accurately, colleges are being held liable for failing reasonably to exercise the duty incumbent upon them, not in their role as parent, but in their multiple role as landlord, supervisor and controller of the acts of third parties.

### C. *Ill-Effects*

The implications inherent in Szablewicz and Gibbs' theory are as troubling as its analytic flaws. The Szablewicz and Gibbs analysis contains at least three undesirable effects. First, colleges fearing an "expansion of liability" may develop and implement policies the breach of which creates liability.[84]

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81. This assertion is not empirically supported by the authors.

82. *See generally* Galanter, *The Day After the Litigation Explosion,* 46 MD. L. REV. 3 (1986); Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society,* 31 UCLA L. REV. 4 (1983). Galanter's studies contain useful empirical data concerning civil suit filings, tort suits in federal courts, etc.

83. *See supra* note 77 for cases cited by Szablewicz and Gibbs which actually support this point.

84. An example illustrates the notion of a cycle of self-fulfilling liability. Facing the costs of alcohol-related tort liability, X College's administrators and counsel develop an alcohol-use policy that allows for, among other things, the use of undercover student "excise" police and administrator-led "raids" on college-owned fraternity houses that are suspected of unlawfully possessing and dispensing alcohol on the premises. The administrators regularly orchestrate such "raids" and impose the remedial actions permitted. On one occasion, the administrators negligently (*i.e.,* failing to exercise the requisite reasonable care) stage a "raid" on a particular fraternity, and a pledge of that fraternity later that night drinks himself to death from beer drawn from the keg overlooked by the raiding administrators. The parents of the decedent then sue the fraternity's local and national entities, and the college is joined as a third party defendant. The complaint alleges, *inter alia,* that the college owed the decedent a duty of reasonable care based on the "special relationship" of *in loco parentis.*

The notion of developing an alcohol policy in response to the rising cost of liability is hardly hypothetical. *See* Fuchsberg, *Colleges Forming Liability-Insurance Companies to Guarantee Coverage, Keep Premiums Down,* Chron. Higher Educ., Nov. 16, 1988, at A-29; Manger, *Alcohol-Related Problems Have Not Decreased on Most College Campuses,* Chron. Higher

Says Roth, in *The Impact of Liquor Liability On Colleges and Universities,* "[f]ailure of a university to enforce its own rules is an invitation for litigation in the future . . . . [S]ome courts may construe university alcohol regulations as the voluntary assumption of a custodial duty which must be performed with due care."[85]

Claiming the return of the doctrine of *in loco parentis* creates a second possible effect. Once college administrators believe that they will be held liable in tort for failing to act *in loco parentis,* they will indeed begin to act *in loco parentis.* Even if the duty to act as a parent is limited to physical safety, any exercise of authority may hearken back to the so-called "heavy-handed" and "oppressive" administrative policies that were critical factors in *in loco parentis*' initial downfall.[86]

Finally, a semantic problem arises from the claim that a "new *de facto in loco parentis*"[87] doctrine can be formulated from recent holdings in student-college personal injury cases. The use of a term to denote X when that term is traditionally used to denote YZ may result in the assimilation of XYZ: The *in loco parentis* doctrine traditionally extended to the areas of moral welfare and student discipline, and the pronouncement of a "new" *in loco parentis* doctrine, limited to the physical welfare of students, the incorporate and resurrect student discipline and moral welfare as well. Thus, it is unwise to announce the coming of a second *in loco parentis* that carries none of its traditional baggage. At worst, use of the term *in loco parentis* to announce a "new" institutional duty to protect students from physical harm may breathe life into the traditional doctrine of *in loco parentis* and

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Educ., Nov. 9, 1988, at A-35 ("A survey being released this week found that 35 per cent of student-affairs administrators thought campus problems involving alcohol had increased in the past several years, and 41 per cent saw no change."). For an example of one university's policy, see INDIANA UNIV., STATEMENT OF STUDENT RIGHTS AND RESPONSIBILITIES §§ 1.7, 1.13(9) (1988).

Further, alcohol abuse in fraternities is a substantial problem, given that "[a]s many as 400,000 men now belong to fraternity chapters on the nation's campuses . . . ." Collinson, *National Interfraternity Conference to Weigh Alternatives to Pledge System in an Effort to Halt Hazing Excesses,* Chron. Higher Educ., Dec. 14, 1988, at A-25; *see also* Collinson, *2 National Fraternities Plan to Eliminate Pledging in Campaign Against Alcohol Abuse and Hazing,* Chron. Higher Educ., Sept. 6, 1989, at A-1.

The scope of this "new" potential liability is not easy to define. The cloud of liability may be extensive, because every student has a legal relationship with the college she attends, and this relationship operates in a variety of contexts (*e.g.,* school-sponsored field trips, dormitories, school grounds). On the other hand, since the doctrine of *in loco parentis never* provided the element of duty in student-brought personal injury suits against colleges, the fear of expanded institutional liability may be unjustified. *See supra* notes 57-67 and accompanying text.

85. Roth, *supra* note 3, at 57.

86. *See* Goodman, *supra* note 5, for commentary on the new Boston University policy banning overnight and late night visitors to dormitories. "B.U. behaved like an authoritarian parent and the students rebelled against being treated like children. It was utterly predictable." *Id.* at col. 1.

87. Szablewicz & Gibbs, *supra* note 5, at 457.

thereby make it fully functional in the context of student moral welfare and discipline. *In loco parentis* was rejected because it no longer adequately manifested the dynamic legal relationship between college and student; it would be regressive to restore the lifeless doctrine.

## CONCLUSION

Recently, scholars have suggested that a "new" *in loco parentis* doctrine is emerging in tort suits by students against colleges. This "new" *in loco parentis* is said to represent a judicial resurrection of one area of the traditional doctrine: parental authority and obligation to protect students from physical harm. The claims of a "second coming," however, are unfounded. While courts are holding colleges liable for injuries sustained by students, the duty to protect students arises from the college's status as landlord, supervisor and controller of third persons. Courts, as ever, are assessing liability within the confines of traditional tort principles. Further, *in loco parentis* has *never* served as a basis for institutional duty to protect students' physical well-being; when viable, the doctrine operated only in the context of student discipline and moral welfare.

It is thus a mistake to signal the coming of a "new" *in loco parentis,* both as a matter of analysis, and because of the possible effects of such a warning. Although the cancer of institutional liability is not benign, college administrators need to know where to look in order to design and implement the appropriate treatment, and courts need to know where to look to resolve liability issues. Accordingly, the doctrine of *in loco parentis* does not provide relief.

# ARTICLES

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