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The Lingering Legacy of "In Loco Parentis": An Historical Survey and Proposal for Reform

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The Lingering Legacy of *In Loco Parentis*: An Historical Survey and Proposal for Reform

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I. INTRODUCTION

The changing legal relationship between students and their college or university reflects the evolution of higher education in this country. During the Colonial period and the early years of the Republic, higher education was conducted mainly through small, church-affiliated colleges.¹ In most cases, the founders and faculties of early American

1. See *infra* notes 20-22 and accompanying text.

schools imitated the collegiate systems of Oxford and Cambridge.² Students and their teachers aspired to withdraw from the world of everyday affairs to live and work in an environment that mirrored the families students left behind. Faculties were concerned not only with intellectual advancement but also with the development of sound moral character, classical virtue, and conventional religious sensibility. Institutions of higher learning were exclusive, intimate, and religious. Whatever the institutional rhetoric, the driving force behind American schools was collegiality.³

The dominant legal philosophy courts used to describe this familial relationship was the doctrine of *in loco parentis*.⁴ College authorities stood in the place of parents to the students entrusted to their care.⁵ Courts were loathe to interfere with college authorities in either academic or disciplinary matters.⁶ Students with nonacademic grievances had little chance of successfully petitioning the courts for redress.

In the late nineteenth and twentieth centuries, academia's understanding of itself underwent a dramatic transformation. Under the influence of Johns Hopkins, Chicago, and Harvard, many prominent colleges aspired toward university status. Germany replaced England as the principal model for American schools.⁷ Yet the traditional legal interpretation of the student-university relationship remained relatively constant as courts continued to defer to almost every expression of institutional authority.⁸

The widespread student protests of the 1960s forced courts to recognize the fundamental changes in educational philosophy and campus life that made *in loco parentis* an outdated concept.⁹ Many courts acknowledged the new nature of the student-university relationship and struggled for ways to characterize these changes. Contract and constitutional law became useful tools for the student litigant. By the 1990s

2. *Id.*

3. The collegiate way of life

is the notion that a curriculum, a library, a faculty, and students are not enough to make a college. It is an adherence to the residential scheme of things. It is respectful of quiet rural settings, dependant on dormitories, committed to dining halls, permeated by paternalism. It is what every American college has had or consciously rejected or lost or sought to recapture.

F. RUDOLPH, *THE AMERICAN COLLEGE AND UNIVERSITY: A HISTORY* 87 (1962).

4. *In loco parentis* means literally "in the place of a parent."

5. The very young age, by modern standards, of college students in the nineteenth century made this concept understandable. In 1826 two-thirds of Yale College's freshman class was 16 years of age and younger. J. McLACHLAN, *AMERICAN BOARDING SCHOOLS: A HISTORICAL STUDY* 181 (1970).

6. See *infra* notes 61-66, 84-102, and accompanying text.

7. See *infra* notes 43-46 and accompanying text.

8. See *infra* notes 61-66, 84-102, and accompanying text.

9. See *infra* notes 53-56 and accompanying text.

courts and legal authorities unequivocally proclaimed the death of *in loco parentis*.¹⁰

But to what extent was the death of *in loco parentis* more style than substance? Despite repeated judicial assurances that *in loco parentis* was doctrinally inadequate, student litigants still rarely prevail in suits against universities.¹¹ The new contractual and constitutional analysis applied to student-university disputes¹² is problematic. The state action doctrine, usually applied to public institutions, cannot be employed in a private context.¹³ The continuing debate over hate speech rules on American campuses further illustrates an institutional reluctance to relinquish rigid parental control.¹⁴ In sum, the legal doctrine of *in loco parentis* continues to influence the legal status and internal policies of many modern American multiversities.¹⁵

This Note surveys the history of the American ideal of higher education, its evolution in the courts, and recent indications that *in loco*

10. See, e.g., *Buttny v. Smiley*, 281 F. Supp. 280, 286 (D. Colo. 1968) (noting that *in loco parentis* is "no longer tenable in a university community"); Zirkel & Reichner, *Is the In Loco Parentis Doctrine Dead?*, 15 J.L. & Educ. 271, 281-82 (1986) (examining the "complete demise" of the doctrine in the college context); Van Alstyne, *The Student as University Resident*, 45 DEN. L.J. 582, 591 (1968) (asserting that "we need not be surprised nor alarmed that [*in loco parentis*] is now being discarded"); Note, *The Doctrine of In Loco Parentis, Tort Liability and the Student-College Relationship*, 65 IND. L.J. 471, 474 (1990) (arguing that the doctrine has been "rendered inoperative"); Note, *Toward Contractual Rights for College Students*, 10 J.L. & Educ. 163, 166 (1981) ("[i]n the fact [sic] of the changing character of higher education, the theory has lost its support") [hereinafter Note, *Toward Contractual Rights*]. But see Szablewicz & Gibbs, *Colleges' Increasing Exposure to Liability: The New In Loco Parentis*, 16 J.L. & Educ. 453 (1987) (claiming that *in loco parentis* is being revived in the area of tort liability).

11. See *infra* notes 133-56 and accompanying text.

12. For purposes of this Note, unless otherwise specified, student-university disputes refers to disputes involving disciplinary actions, financial arrangements, or other nonacademic matters. Whether courts should intervene in purely academic disputes is not addressed in this Note. Courts are even more reluctant to adjudicate what they perceive to be academic disputes. See, e.g., *Board of Curators, Univ. of Mo. v. Horowitz*, 435 U.S. 78, 90 (1978) (stating that academic dismissal "requires an expert evaluation . . . and is not readily adapted" to judicial review); *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985) (stating that courts "should show great respect for the faculty's professional judgment"); *Jansen v. Emory Univ.*, 440 F. Supp. 1060, 1063 (N.D. Ga. 1977) (noting the "traditional rule of nonintervention in academic matters"). But see Buss, *Easy Cases Make Bad Law: Academic Expulsion and the Uncertain Law of Procedural Due Process*, 65 IOWA L. REV. 1, 99 (1979) (arguing that *Horowitz* did in fact involve regulation of conduct as well as academic standards).

13. See *infra* notes 144-56 and accompanying text.

14. In many cases, the same people who once advocated expanding student rights now argue that the preservation of collegiality and campus harmony demands restrictions on student speech. See *infra* notes 157-86 and accompanying text.

15. This Note does not address the *in loco parentis* doctrine as applied to elementary and secondary school students. For a discussion of this area of the law, see Zirkel & Reichner, *supra* note 10, at 273-81.

The term "multiversity" is used in this Note to describe those institutions that are true universities in the European sense. While no rigid criteria exist, multiversities generally are large institutions composed of numerous undergraduate, graduate, and professional schools.

parentis is not dead. Part II surveys the development of higher education in America, focusing on the struggle between the English and German models. Part III examines the doctrine of *in loco parentis* and its development in the American courts. Part IV discusses twentieth century inroads on *in loco parentis*. Part V demonstrates that *in loco parentis* remains a significant force in shaping American law and educational philosophy. Finally, Part VI offers a proposal for redefining the student-university relationship to conform with the evolution of higher education in America.

II. HISTORICAL BACKGROUND¹⁶

Much of the legal confusion apparent in student-university disputes stems from the judiciary's failure to appreciate the history of American higher education. Following the Civil War, the stage was set for a confrontation between the two competing educational philosophies in this country. Early American colleges emulated English residential colleges.¹⁷ By the late nineteenth century, however, many institutions began to follow the example of the German universities.¹⁸ Any understanding of the student-university relationship must take into account these conflicting models that continue to divide American higher education.

A. *The English Collegiate Ideal*

1. The Colonial and Early American College

The founders of the earliest American colleges¹⁹ explicitly invoked the medieval English universities as their models and inspirations.²⁰ Harvard's earliest statutes derived directly from those at Cambridge. The first Harvard degrees, for example, were granted *pro modo*

16. Part II of this Note is merely a brief survey of certain trends in American educational history that are relevant to the legal issues at hand. An historical understanding is necessary in approaching this subject. Law is in part a reflection of social institutions, and the law in this area cannot be understood without reference to specific historical developments. The work of the historians cited should be consulted for a more comprehensive discussion.

17. See *infra* notes 20-22 and accompanying text.

18. See *infra* notes 43-46 and accompanying text.

19. Nine colleges founded before 1770 survive: Harvard, William and Mary, Yale, New Jersey (now Princeton University), King's (now Columbia University), Philadelphia (now the University of Pennsylvania), Rhode Island (now Brown University), Queen's (now Rutgers University), and Dartmouth. See F. RUDOLPH, *supra* note 3, at 3.

20. See J. BRUBACHER & W. RUDY, *HIGHER EDUCATION IN TRANSITION* 3 (3d ed. 1976). The influence of the English model on American schools, however, should not be exaggerated. The unique circumstances of the American context resulted in many differences, although the basic character and principles of residential life were the same. G. SCHMIDT, *THE LIBERAL ARTS COLLEGE* 21 (1957).

*Academiaram in Anglia.*²¹ The most influential Harvard founders were Cambridge graduates who brought to colonial Massachusetts a distinctly Puritan educational ideal fostered at Emmanuel College in England.²² These direct connections with English universities ensured that American education was modeled after the English system and its peculiar values.

The earliest American colleges explicitly promoted religious values and virtuous moral behavior among their students.²³ Although most American schools did not restrict admissions to members of a particular religious sect, few questioned the fundamentally religious goals of higher education. Harvard's founders sought to produce well-educated clergy and laymen with sufficient learning to practice their faith intelligently.²⁴ The College of William and Mary in Virginia also subscribed to religious values,²⁵ although the nature of Anglicanism in Virginia contributed to a somewhat more secular approach.²⁶ The earliest American colleges, whether located in Virginia or Massachusetts, sought to ensure that their communities maintained a common religious faith and system of moral values. The college was not only an institution where students learned Greek and Latin but also was a place where the faculty nurtured in them the local version of orthodox Christianity.

The English origins of American colleges exerted a practical as well as a philosophical influence. The curriculum of early colleges was traditional in that Greek and Latin exercises formed the core of study.²⁷ The English viewed a college as more than a collection of individuals engaged in separate intellectual pursuits.²⁸ The college was instead an al-

21. The literal translation of this phrase is "according to the manner of universities in England." J. BRUBACHER & W. RUDY, *supra* note 20, at 3.

22. F. RUDOLPH, *supra* note 3, at 24. "The founders of Harvard attempted to re-create at Cambridge the college they had known at the old Cambridge in England." *Id.* David Hackett Fischer conducted a fascinating examination of the English origins of American settlers that underscores Cambridge's position as the "Mother of Harvard." See D. FISCHER, *ALBION'S SEED* 39 (1989) (showing that half of a group of university-trained immigrants to Massachusetts attended three Cambridge colleges and 30% attended Emmanuel). Appropriately, John Harvard himself was a matriculant of Emmanuel College. *Id.* at 42.

23. Harvard's earliest statement of purpose expressed hope that "[e]very one shall consider the mayne End of his life and studyes, to know God and Jesus Christ, which is Eternall life." J. BRUBACHER & W. RUDY, *supra* note 20, at 8.

24. *Id.* at 6.

25. The founders of William and Mary attempted to operate the school in such a way that "the youth . . . [were] piously trained in good letters and manners." *Id.* at 7.

26. See F. RUDOLPH, *supra* note 3, at 7. When compared with their Puritan brethren, Virginians appeared substantially less concerned with religious piety. One visitor to Westmoreland County, Virginia, in 1715 observed that every man at a church service was smoking a pipe. O. HANDLIN & L. HANDLIN, *LIBERTY AND POWER* 117 (1986).

27. F. RUDOLPH, *supra* note 3, at 24-25.

28. The colonists also imported the English system of collegiate life, which was different from that of European institutions. Because the European universities included graduate and pro-

most organic entity, a large family in which the intimate nature of residential life demanded strict authority and control.²⁹ The English model fostered absolute institutional control of students by faculty both inside and outside the classroom. At all the early American schools, students lived and worked under a vast array of rules and restrictions.³⁰ This one-sided relationship between the student and the college mirrored the situation at English schools where the emphasis on hierarchical authority stemmed from medieval Christian theology and the unique legal privileges afforded the university corporation.³¹

2. The Antebellum College

Although the paternalistic view of colleges predominated in the early nineteenth century, some educators began to question the English approach.³² The University of Virginia was one of the earliest schools to

fessional schools, the faculty were not concerned with outside student activities. Students conducted their own affairs through formal student governments. See J. BRUBACHER & W. RUDY, *supra* note 20, at 5.

Traditionally, all students at German universities were mandatorily members of the student body, or *Studentenschaft*, of their university. Geck, *Student Power in West Germany*, 17 AM. J. COMP. L. 337, 345 (1969). In most cases, the *Studentenschaft* was a legal entity with an independent role in the university community. *Id.* See also Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 TEX. L. REV. 1265, 1270 (1988) (stating that "[t]he German university confronted its student body primarily as a purveyor of knowledge and as a credentializing agency, not as a parent surrogate").

29. See F. RUDOLPH, *supra* note 3, at 88. In upholding the English ideal, President Smith of Dartmouth asserted that "[e]arliest young men crave real guidance. . . . They welcome, too, a proper system of compulsion and restraint." Letter from President Smith of Dartmouth to President McCosh of Princeton (1873), *quoted in* F. RUDOLPH, *supra* note 3, at 88.

30. The paternalism was so pervasive that it occasionally bordered on the ludicrous. The president of the University of Georgia, for example, routinely would sweep Athens with binoculars searching for signs of disobedient students. Also, the faculties did not hesitate to use corporal punishment on students in their care. At Harvard flogging continued until 1718, while boxing was not eliminated until 1755. According to one critic, the colleges engaged in a "[m]inute regulation of conduct that was not peculiarly Puritan as much as it was peculiarly collegiate, breathing not the free spirit of adult scholarly inquiry but the atmosphere of a boarding school for small boys." *Id.* at 27. As this comment indicates, Professor Rudolph sharply criticizes the nineteenth century collegiate ideal. His history, while thorough and readable, is imbued with an intractably Whiggish understanding of American education. In Professor Rudolph's view, every schoolboy knows that the modern American system of education is the best system, and its history is mostly the chronicle of the near-mystical evolution of that ideal. This understanding colors Professor Rudolph's approach to his subject, and the critical reader would do well to question his appraisal of the collegiate ideal as an antediluvian absurdity.

31. In medieval times "[t]he university was largely an autonomous corporation whose members were free from most, if not all, of the usual civil regulations and laws. . . . By accepting the authority of the university. . . , the student accepted a position in which obedience to the university hierarchy was required." M. ROSS, *THE UNIVERSITY: THE ANATOMY OF ACADEME* 69 (1976). The medieval student's surrender of personal autonomy may be viewed as a quid pro quo exchange. In return for protection from civil authority, the student agreed to submit to university discipline. This idea continues to influence student-university legal theory.

32. See J. BRUBACHER & W. RUDY, *supra* note 20, at 100-04; F. RUDOLPH, *supra* note 3, at 90-91.

move away from the English model.³³ George Ticknor, one of the first Americans to study in Germany, returned to teach at Harvard in 1819 and unsuccessfully pressed for major reform.³⁴ Likewise, Phillip Lindsley, president of the University of Nashville, ambitiously attempted to reshape American education in the 1820s.³⁵

These early reform efforts met with little success. A series of riots at Virginia threatened to close the school soon after its founding.³⁶ The University of Nashville failed when President Lindsley was unable to muster sufficient financial support.³⁷ Moreover, traditionalist academics soon responded to the challenge of the reformers with a manifesto of their own. In 1828 Yale College answered the reform proposals with a report³⁸ advocating continued adherence to the collegiate ideal.³⁹ The Yale report firmly rejected the suggestion that American institutions model themselves after German schools.⁴⁰ Widely applauded by other schools, the Yale report became the rallying cry for educational traditionalists who were increasingly alarmed by the prospects for major reform.⁴¹

B. *The University Comes to America*

Widespread reform of American higher education did not take place until after the Civil War. An increasingly industrialized society forced colleges to respond to the demand for technically specialized workers.⁴² Once again, reformers looked to the German model when they founded Johns Hopkins in 1876.⁴³ Johns Hopkins's German-educated faculty emphasized research and specialized knowledge rather than leisurely academic pursuits and Christian moral values.⁴⁴ The

33. Virginia's charter stressed student autonomy and self-responsibility, a radical innovation for the time. See J. BRUBACHER & W. RUDY, *supra* note 20, at 101.

34. See F. RUDOLPH, *supra* note 3, at 118.

35. President Lindsley hoped to reform the fledgling school based on German principles, which emphasized scholastic endeavor over collegiate life. He also attempted to implement a practical curriculum designed to suit the needs of the growing nation. See *id.* at 116-17.

36. *Id.*

37. *Id.*

38. *Original Papers in Relation to a Course of Liberal Education*, 25 AM. J. SCI. & ARTS 297-351 (1829) [hereinafter *Original Papers*].

39. See F. RUDOLPH, *supra* note 3, at 130-31.

40. See *id.* at 133. "We hope at least, that this college may be spared the mortification of a ludicrous attempt to imitate . . . [the German universities], while it is unprovided with the resources necessary to execute the purpose." *Original Papers*, *supra* note 38, at 312, quoted in F. RUDOLPH, *supra* note 3, at 133.

41. See F. RUDOLPH, *supra* note 3, at 135.

42. J. BRUBACHER & W. RUDY, *supra* note 20, at 177.

43. *Id.* at 178-82.

44. See *id.* at 178.

school's students were remarkably free of paternalistic control, the curriculum was mostly elective, and students generally were unsupervised.⁴⁵ By the 1880s a number of eastern colleges began the transition from college to university.⁴⁶

In the early years of the twentieth century, most American colleges hastened to follow the lead of the university reformers.⁴⁷ Newly created state colleges in particular embraced the German model and strived for growth to support increasingly specialized research.⁴⁸ Only a few institutions avoided the rush to enlarge. This small but influential group of liberal arts colleges continued to stress undergraduate intimacy over the rewards of multiversity status.⁴⁹ The larger research universities usually attempted to maintain a core college operating under English precepts.⁵⁰ As the schools grew in size and the student bodies became increasingly heterogeneous, however, maintenance of such intimacy became difficult.⁵¹ The English ideal was based on the cohesiveness of a small community. Thus, the social unity of university communities tended to diminish as their size increased. The influx of older veterans after World War II highlighted the tension between an antiquated disciplinary system and the new developments in American education.⁵²

This tension between nineteenth century discipline and the composition of the modern multiversity culminated in the student protests of

45. *Id.* at 180.

46. Other new schools aspired to university status from their formation. The University of Chicago, founded in 1889, was the most prominent of these schools. Like Johns Hopkins, Chicago emphasized innovative academic research over intimate faculty-student interaction. *Id.* at 179-84. More than 8000 Americans pursued graduate studies in Germany between 1870 and 1900. Often they returned eager to enlighten American institutions with the superiority of German ways. See Metzger, *supra* note 28, at 1269.

47. F. RUDOLPH, *supra* note 3, at 329-34. A comment by Professor John W. Burgess of Columbia University aptly illustrates the zeal to expand: "I confess that I am unable to divine what is to be ultimately the position of Colleges which cannot become Universities and which will not be Gymnasias. I cannot see what reason they will have to exist. It will be largely a waste of capital to maintain them, and largely a waste of time to attend them." *Id.* at 330.

48. See *id.* at 332-33.

49. *Id.* at 448-49. These schools continued to espouse the Renaissance ideal of wholly educated men and a leisurely period of study. *Id.* at 448.

50. This fact leads commentators to declare that, in spite of the Germanic influence, the collegiate ideal remained the central philosophy of American education. See, e.g., Metzger, *supra* note 28, at 1272 (stating that residential colleges "survived the rise of the graduate school and reigned supreme"). While collegiate values enjoyed a renaissance during the early and middle years of the twentieth century, American institutions irrevocably committed themselves to the multiversity ideal. The "college life" movement was largely a student phenomenon, as the proliferation of fraternities, literary societies, and secret societies indicates. See H. HOROWITZ, *CAMPUS LIFE* 11-14 (1987). The promotion of the English ideal in these organizations is not a sign that Germanization failed. Rather, it indicates that it succeeded so well that students were forced to create their own intimate communities.

51. See H. HOROWITZ, *supra* note 50, at 71-73.

52. See J. RUDOLPH, *supra* note 3, at 486.

the 1960s. After World War II, increased enrollment and student diversity made it difficult to operate a collegiate system premised on homogeneity.⁵³ Confrontation between diverse student bodies and the disciplinary strictures of an earlier era perhaps was inevitable. A major clash occurred in 1964 when the University of California attempted to prevent students from using the campus for political or social protests.⁵⁴ Angry students responded with the Free Speech Movement, which culminated in mass demonstrations and hundreds of arrests.⁵⁵ The Free Speech Movement was only one in a series of campus protests that racked American campuses for several years.⁵⁶ The widespread discontent was a clear sign that the philosophy of *in loco parentis* was no longer tenable in the multiversities dominating American education.

The student protests of the 1960s sealed the fate of traditional collegiate values at most American institutions. By the late twentieth century, those schools that continued to espouse the educational philosophy of an earlier era were a distinct minority.⁵⁷ Although some universities attempted to maintain strict scrutiny of student behavior through the creation of vast student life bureaucracies,⁵⁸ the heyday of paternalism was over. In 1852 John Cardinal Newman wrote that "a university is, according to the usual design, properly an Alma Mater, knowing her children one by one, and not a foundry, or a mint, or a treadmill."⁵⁹ In 1971 the American Bar Association acknowledged the new reality: "Most of our institutions have become far too large and

53. See Reidhaar, *The Assault on the Citadel: Reflections on a Quarter Century of Change in the Relationships Between the Student and the University*, 12 J.C. & U.L. 343, 347 (1985).

54. *Id.* at 349.

55. *Id.* at 350. Many of the leaders of the revolt at Berkeley had spent their summer working as civil rights activists in the South. See H. HOROWITZ, *supra* note 50, at 231. They returned to campus unwilling to accept restrictions on their own political rights. See *id.*

56. As a result of these protests, a number of academic organizations strongly reaffirmed the principle of free speech on American campuses. See JOINT STATEMENT ON THE RIGHTS AND FREEDOMS OF STUDENTS, reprinted in STUDENT PROTEST AND THE LAW 213 (G. Holmes ed. 1969). The statement, which was drafted by the American Association of University Professors, the U.S. National Student Association, the Association of American Colleges, and others, asserted that "[s]tudents and student organizations should be free to examine and discuss all questions of interest to them, and to express opinions publicly and privately." *Id.* at 218. The statement was an attempt to quell the increasingly violent nature of the student protests. See H. HOROWITZ, *supra* note 50, at 221. The widespread arrests by noncampus authorities underscores the failure of *in loco parentis* on modern campuses. While in earlier times, colleges provided students protection from civil authorities, *supra* note 31, the multiversity in the 1960s often was forced to rely on the state to maintain any semblance of order on campus.

57. Approximately 800 liberal arts colleges continue to operate in the United States. G. SCHMIDT, *supra* note 20, at viii.

58. See F. RUDOLPH, *supra* note 3, at 460.

59. J. NEWMAN, *Knowledge Viewed in Relation to Learning*, in THE IDEA OF A UNIVERSITY: NINE LECTURES TO THE CATHOLICS OF DUBLIN § 8 (1852).

impersonal to resemble a family in any important respects."⁶⁰

III. *IN LOCO PARENTIS* AND AMERICAN HIGHER EDUCATION

Most courts readily accepted the early American view of colleges as intimate and familial institutions. When students sought legal remedies for school disputes, courts invoked the doctrine of *in loco parentis* to justify their nonintervention.⁶¹ Just as children usually cannot sue their parents, the courts ordinarily deprived students of redress in disputes with their colleges. This legal doctrine survived well into the twentieth century. By the time courts began to question the wisdom of *in loco parentis*, radical changes in American education had made the doctrine obsolete.

A. *English Origins*

In loco parentis first developed as an English tort principle used in the resolution of tutor-pupil disputes.⁶² A tutor could raise the doctrine as a defense to a charge of battery against a student.⁶³ The parent delegated part of his authority to the tutor or schoolmaster of his child. The schoolmaster was then *in loco parentis* and had a partial share of parental power. Any necessary discipline could be employed by the surrogate parent.⁶⁴ Thus, in its early stages the *in loco parentis* doctrine was a delegation of authority designed for the special circumstances of the tutor-pupil relationship. Later, however, *in loco parentis* became the model for all college-student relationships.⁶⁵ The American courts eventually expanded the doctrine into a paradigmatic legal model for the resolution of all student-university disputes.⁶⁶

Although *in loco parentis* was perhaps the dominant doctrine applied to student disputes, the corporate status of universities afforded

60. ABA Committee on Civil Rights and Responsibilities, *A Statement of the Rights and Responsibilities of College and University Students*, reprinted in Kessler, *The Students*, in *LAW AND DISCIPLINE ON CAMPUS* 209 (G. Holmes ed. 1971).

61. See *infra* notes 84-102 and accompanying text.

62. See Van Alstyne, *The Tentative Emergence of Student Power in the United States*, 17 *AM. J. COMP. L.* 403, 405-06 (1969).

63. *Id.* at 406.

64. 1 *W. BLACKSTONE, COMMENTARIES* *453 (1770).

65. *Id.*

66. See *infra* notes 84-102 and accompanying text. Seventeenth and eighteenth century writers often looked to the family as a model for the well-ordered community. In 1699 Cotton Mather wrote: "There are *Parents* in the *Common-Wealth*, as well as in the *Family*; there are *Parents* in the *Church*, and *Parents* in the *School*, as well as in the *Common-Wealth*." O. HANDLIN & L. HANDLIN, *supra* note 26, at 148 (emphasis in original). The courts of the period recognized broad rights of parents to enforce their will on their offspring, even at a relatively advanced age. See *id.* at 161-62.

students some protection from summary discipline.⁶⁷ Under this approach membership in the university corporation protected students from arbitrary dismissal.⁶⁸ *The King v. Chancellor of the University of Cambridge*⁶⁹ is the principal English case employing the corporate doctrine. In *Cambridge* a student sought a writ of mandamus⁷⁰ to compel the university to nullify the suspension of his degree.⁷¹ The school argued that the courts should not interfere with the internal affairs of a college created by an independent charter.⁷² Lord Pratt, however, held that while the court would not interfere with strictly academic matters,⁷³ the student must be given an opportunity to be heard before being removed as a member of the university corporation.⁷⁴ The fact that the corporation involved was a university was not dispositive. Since the case did not concern any specifically academic matters, ordinary corporation law provided the student some protection.⁷⁵

The approach of the *Cambridge* court offered students more protection than the *in loco parentis* doctrine.⁷⁶ By requiring that students be given an opportunity to be heard before dismissal, *Cambridge* anticipated the landmark case of *Dixon v. Alabama*,⁷⁷ which extended procedural due process protections to public university students.⁷⁸ Since mandamus could be used against private as well as public universities, the range of student protection was even greater. Unfortunately, only a handful of American courts adopted the mandamus approach to compel universities to grant degrees⁷⁹ or reinstate students.⁸⁰ At least one court

67. See, e.g., *The King v. Chancellor of the Univ. of Cambridge*, 2 Ld. Raym. 1334, 92 Eng. Rep. 370 (K.B. 1723).

68. See, e.g., *id.* at 1348, 92 Eng. Rep. at 378; *Commonwealth ex rel. Hill v. McCauley*, 3 Pa. C. 77, 84 (1877).

69. *Cambridge*, 2 Ld. Raym. 1334, 92 Eng. Rep. 370.

70. A writ of mandamus is an "extraordinary writ which lies to compel performance of a ministerial act or a mandatory duty where there is a clear legal right in the plaintiff, a corresponding duty in the defendant, and a want of any other appropriate and adequate remedy." BLACK'S LAW DICTIONARY (6th ed. 1990) (citing *Cohen v. Ford*, 19 Pa. Commw. 417, 422, 339 A.2d 175, 177 (1975)).

71. The school had suspended the student's degree for nonpayment of a debt. *Cambridge*, 2 Ld. Raym. at 1334, 1336, 92 Eng. Rep. at 370, 371.

72. The college argued that with "this privilege of suspending degrees . . . it was necessary, that universities should have a summary method of proceeding." *Id.* at 1347, 92 Eng. Rep. at 377.

73. *Id.* at 1348, 92 Eng. Rep. at 378.

74. *Id.* at 1347, 92 Eng. Rep. at 378.

75. See *id.* at 1347, 92 Eng. Rep. at 378.

76. See *supra* note 64 and accompanying text.

77. 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961).

78. See *infra* subpart IV(B)(1).

79. See, e.g., *Illinois State Bd. of Dental Examiners v. People ex rel. Cooper*, 123 Ill. 227, 13 N.E. 201 (1887).

80. See, e.g., *Baltimore Univ. v. Colton*, 98 Md. 623, 57 A. 14 (1904). A mandamus occasionally is issued to compel a university to comply with the requirements of due process. See, e.g.,

explicitly referred to *Cambridge* and used the same rationale to grant students relief.⁸¹ The use of mandamus against educational institutions, however, provoked such a hostile response from some legal authorities⁸² that the practice was abandoned. In 1911 Dean Oliver Harker argued that judicial intervention in such matters was an inappropriate interference with the discretionary powers of universities.⁸³ Most American courts seemed to agree and viewed *in loco parentis* as a justification for nonintervention.

B. In Loco Parentis and the American Courts

Although *Gott v. Berea College*⁸⁴ was not the first American case to articulate the basic principles of *in loco parentis*,⁸⁵ the opinion often is cited as the clearest expression of that doctrine in this country.⁸⁶ The case was procedurally unusual. The plaintiff was not a student seeking relief from a disciplinary action by the college. Rather, the owner of a restaurant near the campus sued the school for forbidding students to patronize his business.⁸⁷ The Kentucky Supreme Court dismissed the claim on several grounds, but much of the opinion examines the right of colleges to regulate the behavior of their students.⁸⁸ The court held that college authorities stand *in loco parentis* when the physical, moral, and mental welfare of the pupils is concerned.⁸⁹ Any rule or regulation for the betterment of their pupils in these areas was deemed permissible.⁹⁰ In an environment composed of a small number of extremely young stu-

Woody v. Burns, 188 So. 2d 56 (Fla. Dist. Ct. App. 1966).

81. Commonwealth *ex rel.* Hill v. McCauley, 3 Pa. C. 77, 84 (1887). For a discussion of the influence of *Cambridge* on the *Hill* case, see 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, 402-03 (1984).

82. See, e.g., Harker, *The Use of Mandamus to Compel Educational Institutions to Confer Degrees*, 20 YALE L.J. 341 (1911).

83. Dean Harker believed that universities had the power "to regulate the conduct of students as to study, recreation . . . social enjoyment . . . and general conduct." *Id.* at 351. In his opinion, "[universities] know more about such matters than the courts or anyone else. Their habits of thought, study, and life better fit them for the exercise of correct judgment than others, and, except in clear cases of abuse of discretion, courts should keep their hands off." *Id.* at 352.

84. 156 Ky. 376, 161 S.W. 204 (1913).

85. See, e.g., *People ex rel. Pratt v. Wheaton College*, 40 Ill. 186, 187 (1866) ("A discretionary power has been given . . . and . . . we have no more authority to interfere than we have to control the domestic discipline of a father in his family"). *But see* Commonwealth *ex rel.* Hill v. McCauley, 3 Pa. C. 77 (1887) (rejecting an *in loco parentis* argument).

86. See, e.g., Fowler, *supra* note 81, at 408.

87. 156 Ky. at 378-79, 161 S.W. at 205. The plaintiff sought \$2000 in damages for conspiracy to injure his business and slanderous remarks made by college officials. *Id.* The college pleaded its right to govern internal affairs as an affirmative defense. *Id.* at 378, 161 S.W. at 206.

88. *Id.* at 379-82, 161 S.W. at 206-09.

89. *Id.* at 379, 161 S.W. at 206.

90. *Id.*

dents, college authorities were permitted to deny students the autonomy and rights enjoyed by others in order to preserve institutional harmony.⁹¹ The breadth of the *Berea College* decision—"any rule or regulation"—exemplifies the extreme deference afforded colleges under the *in loco parentis* doctrine.

Although the *Berea College* decision offered little hope that courts would interfere with the exercise of institutional authority, the court did allude to some possibilities for the expansion of student rights. The court noted that the rules would be "viewed somewhat more critically" if Berea were a public, instead of a private, institution.⁹² The court also acknowledged the existence of a contract that defined the student-university relationship.⁹³ Finally, the court recognized that public policy might justify judicial intervention in certain situations.⁹⁴

Other courts were willing to uphold university authority in almost any disciplinary action.⁹⁵ In *Stetson University v. Hunt*⁹⁶ the Supreme Court of Florida ruled against a student who allegedly was expelled without cause and in bad faith.⁹⁷ The court quoted *Berea College* in upholding the expulsion, which was based on a college rule prohibiting offensive habits that intrude on others.⁹⁸ Even though the court acknowledged the student-university contractual relationship, this condition seemed to burden only the student's side of the bargain.⁹⁹ Despite the extreme breadth and vagueness of the rule, and the lack of any procedural protections, the court found that *in loco parentis* prohibited judicial second-guessing of the college authorities unless they had acted in a patently unreasonable manner.¹⁰⁰

The use of *in loco parentis* amounted to blanket judicial approval for all disciplinary actions against students. Some opinions invoking *in*

91. See *id.* at 381-82, 161 S.W. at 207-08 (quoting *Wheaton*, 40 Ill. at 187-88).

92. 156 Ky. at 380, 161 S.W. at 206.

93. The court stated: "A college or university may prescribe requirements for admission and rules for the conduct of its students, and one who enters as a student impliedly agrees to conform to such rules of government." *Id.*

94. Courts are not to interfere with college rulemaking "unless the rules and aims are unlawful or against public policy." *Id.* at 379, 161 S.W. at 206. This statement anticipated future constitutional rulings. See *infra* notes 115-29 and accompanying text.

95. See, e.g., *Woods v. Simpson*, 146 Md. 547, 551, 126 A. 882, 883 (1924) (stating that college officers "must, of necessity, be left untrammelled in handling the problems which arise, as their judgment and discretion may dictate"); *Booker v. Grand Rapids Medical College*, 156 Mich. 95, 120 N.W. 589 (1909); *Barker v. Bryn Mawr College*, 278 Pa. 121, 122 A. 220 (1923).

96. 88 Fla. 510, 102 So. 637 (1924).

97. *Id.* at 513, 102 So. at 639.

98. *Id.* at 516, 102 So. at 640. The rule prohibited "[o]ffensive habits that interfere with the comforts of others, or that retard the pupil's work, etc." This rule resembles modern hate speech rules discussed *infra* at notes 157-86 and accompanying text.

99. See *Hunt*, 88 Fla. at 517, 102 So. at 640.

100. *Id.*

loco parentis referred to contract law and contained premonitions of more balanced alternatives.¹⁰¹ Most courts, however, remained hostile to the student litigant. Any rule or regulation, however broad, was enforced.¹⁰² More important, the courts were unwilling to question a university's determination that the student was guilty of violating the rule at issue. Students enjoyed virtually no protection from either vague and intrusive rules or inadequate procedural safeguards. The parental relationship between schools and their students amounted to absolute authoritarian control.

IV. THE SUDDEN DEATH OF *IN LOCO PARENTIS*?

By the second half of the twentieth century, many courts acknowledged that the *in loco parentis* doctrine no longer provided a satisfactory solution to student-university disputes. The influx of older students, the lowering of the age of majority, and changing social conditions made the common-law approach untenable at most institutions. Courts experimented with a variety of approaches designed to recognize the fundamental changes in American education. In particular, courts increasingly used contract law to treat the student-university relationship as not entirely one-sided.¹⁰³ If disciplinary rules held a student to certain standards of conduct, then the educational institution reciprocally could be bound by its own representations. In addition, several crucial decisions recognized that students and teachers enjoy certain constitutional rights.¹⁰⁴

A. *Contract Comes to Campus*

Contract law has been applied to student-university disputes for many years,¹⁰⁵ and recent litigants have relied on contract doctrine with increasing frequency.¹⁰⁶ Although the first American courts to address the contract theory typically found for the university defendant, their

101. See, e.g., *Gott v. Berea College*, 156 Ky. 376, 161 S.W. 204 (1913).

102. See *supra* notes 89-100 and accompanying text.

103. See *infra* subpart IV(A).

104. In the words of the Supreme Court, "students or teachers [do not] shed their constitutional rights . . . at the schoolhouse gate." *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969) (ruling that a high school could not prohibit the wearing of arm bands protesting the Vietnam War). See also *infra* subpart IV(B).

105. See, e.g., *Koblitz v. Western Reserve Univ.*, 21 Ohio C.C. 144, 155 (1901) (holding that a student contracts to submit to reasonable discipline while university promises not to "impose on him penalties which he in no wise merits"). Cases invoking *in loco parentis* often referred to the contractual nature of the student-university relationship as well. See *supra* note 93 and accompanying text. In these cases, however, the courts treated the "contract" as one-sided.

106. See *Slaughter v. Brigham Young Univ.*, 514 F.2d 622 (10th Cir. 1975); *Carr v. St. John's Univ.*, 17 A.D.2d 632, 231 N.Y.S.2d 410, *aff'd mem.*, 12 N.Y.2d 802, 187 N.E.2d 18, 235 N.Y.S.2d 834 (1962).

recognition of mutual contractual obligations was promising. One of the earliest cases, *Anthony v. Syracuse University*,¹⁰⁷ involved a student who was dismissed for failing to be "a typical Syracuse girl." Although the court rejected her claim, the opinion acknowledged that the rules of contract largely define the student-university relationship.¹⁰⁸ The court determined that the school's good-conduct regulations were analogous to a termination-at-will clause in an employment contract.¹⁰⁹ The *Anthony* decision was broadened by subsequent rulings that found implied contractual duties in the student-university relationship¹¹⁰ and held that the contractual terms could be defined by the contents of the school's official publications.¹¹¹ A student's dismissal motivated by bad faith, capriciousness, or arbitrariness could be challenged as a violation of the school's contractual obligation to deal fairly with its students.¹¹²

The application of contract law to student-university disputes thus seemed promising for student litigants. As courts displayed a greater willingness to use contract law as a tool to promote fairness and good faith performance, many hoped that student rights would undergo a similar expansion.¹¹³ If the student-university relationship could be defined primarily in terms of written and implied agreements, the all-encompassing authority schools enjoyed under the *in loco parentis* doctrine would be limited severely.¹¹⁴

B. *The Constitution and the Colleges*

1. *Dixon v. Alabama*

The Fifth Circuit's landmark decision in *Dixon v. Alabama*¹¹⁵ seemed to sound the death knell for the *in loco parentis* doctrine at public universities.¹¹⁶ In *Dixon* six black students were expelled from an Alabama state college presumably because of their participation in civil rights demonstrations.¹¹⁷ The students claimed that the United States

107. 224 A.D. 487, 231 N.Y.S. 435 (1928).

108. *Id.* at 490-91, 231 N.Y.S. at 439.

109. *Id.* at 491, 231 N.Y.S. at 440.

110. *See Carr*, 17 A.D.2d at 633, 231 N.Y.S.2d at 413.

111. *See University of Miami v. Militana*, 184 So. 2d 701, 704 (Fla. Dist. Ct. App. 1966).

112. *Connelly v. University of Vt. & State Agric. College*, 244 F. Supp. 156, 159 (D. Vt. 1965).

See also Wong v. Regents of Univ. of Cal., 15 Cal. App. 3d 823, 93 Cal. Rptr. 502 (1971).

113. *See infra* note 140.

114. In response to claims that such enforcement would constitute undue interference, one commentator argued that "courts would no more than hold institutions of higher education to their voluntary promises, a practice as appropriate to the courts as it is fair to students and colleges alike." Note, *Toward Contractual Rights*, *supra* note 10, at 189.

115. 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961).

116. *See Van Alstyne*, *supra* note 62, at 412 (calling *Dixon* a "watershed" decision).

117. 294 F.2d at 151, 152 n.3.

Constitution¹¹⁸ required procedural due process in the form of notice and an opportunity to be heard before they were expelled from the state-supported institution.¹¹⁹ The Fifth Circuit agreed and explicitly rejected the district court's assertion¹²⁰ that because the Constitution does not guarantee a citizen the right to attend a state-supported educational institution, school administrators may violate the constitutional rights of students with impunity.¹²¹ The court noted that public universities are instruments of the state for purposes of due process and therefore they could not employ disciplinary regulations to curtail students' constitutional rights.¹²² The *Dixon* court rejected the notion that traditional judicial deference to university discipline decisions should control the outcome of the case.¹²³ The state, operating as an institution of higher learning, may not infringe on the constitutional rights of students simply because they are students.¹²⁴ This potentially revolutionary principle marked the beginning of a new era in student-university law.¹²⁵

2. Beyond *Dixon*

In addition to the procedural due process rights ensured by *Dixon* and its progeny,¹²⁶ public colleges and universities now are prohibited from infringing on students' First Amendment rights of free speech and association,¹²⁷ and their Fourth Amendment protections against unrea-

118. The student litigants based their arguments on the due process clause of the Fourteenth Amendment. *Id.* at 151 n.1.

119. *Id.*

120. See *Dixon v. Alabama*, 186 F. Supp. 945, 950 (M.D. Ala. 1960).

121. 294 F.2d at 156. The court quoted the well-known dictum of the Supreme Court that "[o]ne may not have a constitutional right to go to Bagdad, but the Government may not prohibit one from going there unless by means consonant with due process of law." *Id.* (quoting *Cafeteria Workers v. McElroy*, 367 U.S. 886, 894 (1961)). Previous case law supported the idea that a state-supported education was a privilege. See, e.g., *Hamilton v. Regents of Univ. of Cal.*, 293 U.S. 245, 261-62 (1934) (holding that conscientious objectors could be required to take a military training course).

122. *Dixon*, 294 F.2d at 156. See also *infra* notes 127-29 and accompanying text.

123. 294 F.2d at 157-58.

124. See *id.* at 158.

125. See Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027, 1030-32 (1969) (explaining the revolutionary nature of *Dixon*).

126. See *Greenhill v. Bailey*, 519 F.2d 5 (8th Cir. 1975); *Nash v. Auburn Univ.*, 621 F. Supp. 948 (M.D. Ala. 1985); *Stoller v. College of Medicine*, 562 F. Supp. 403 (M.D. Pa. 1983), *aff'd*, 727 F.2d 1101 (3d Cir. 1984); *Hall v. University of Minn.*, 530 F. Supp. 104 (D. Minn. 1982); *Soglin v. Kauffman*, 295 F. Supp. 978 (W.D. Wis. 1968); *Woody v. Burns*, 188 So. 2d 56 (Fla. Dist. Ct. App. 1966).

127. See *Widemar v. Vincent*, 454 U.S. 263 (1981); *Healy v. James*, 408 U.S. 169 (1972); *Fox v. Board of Trustees of State Univ. of N.Y.*, 841 F.2d 1207 (2d Cir. 1988); *Students Against Apartheid Coalition v. O'Neil*, 838 F.2d 735 (4th Cir. 1988); *Gay Student Services v. Texas A & M Univ.*, 737 F.2d 1317 (5th Cir. 1984); *University of Miss. Chapter of Miss. Civil Liberties Union v.*

sonable search and seizure.¹²⁸ Post-*Dixon* constitutional decisions dealt *in loco parentis* a nearly fatal blow at public institutions of higher learning. The courts no longer justified egregious constitutional violations by reference to the paternalistic authority of school officials to discipline students. Not surprisingly, many commentators heralded a new era in student-university law after the *Dixon* decision.¹²⁹ The extension of constitutional rights to public university students appeared to mark the end of extreme judicial deference to institutional disciplinary authority.

V. *IN LOCO PARENTIS*: GONE BUT NOT FORGOTTEN

Despite these developments in contract and constitutional law, significant barriers continue to impede student litigants in American courts. When a student sues on the basis of contractual theories, courts may apply exceptionally harsh rules of construction. Unusual judicial deference replaces widely accepted commercial contract doctrine.¹³⁰ Although the Constitution offers a promising legal opportunity for some students, the state action doctrine severely limits its applicability.¹³¹ What is more disturbing is that universities are reluctant to abandon their traditional control, as the hate speech controversy demonstrates.¹³² However disguised and reformed, *in loco parentis* survives.

A. *Judicial Hostility to Student Claims*

1. The Strange Rules of Contract

While courts have recognized that the laws of contract may define the student-university relationship, they have avoided applying ordinary commercial contract doctrine, especially in the private university context.¹³³ In many cases, the court acknowledges the contractual na-

University of Miss., 452 F.2d 564 (5th Cir. 1971); *Gay Liberation v. Univ. of Mo.*, 558 F.2d 848 (8th Cir. 1977), *cert. denied*, 474 U.S. 1080 (1978); *Gay Students Org. of Univ. of N.H. v. Bonner*, 509 F.2d 652 (1st Cir. 1974); *Jones v. Board of Regents of Univ. of Arizona*, 436 F.2d 618 (9th Cir. 1970); *Bishop v. Aronov*, 732 F. Supp. 1562 (N.D. Ala. 1990).

128. See *Piazzalo v. Watkins*, 442 F.2d 284 (5th Cir. 1971) (involving a private university); *Morale v. Grigel*, 442 F. Supp. 988 (D.N.H. 1976).

129. See, e.g., *Van Alstyne*, *supra* note 62; *Wright*, *supra* note 125. Not surprisingly, this new era coincided with the lowering of the age of majority from 21 to 18 in most jurisdictions. At least theoretically, the *in loco parentis* theory always had been based on the delegation of authority to the school by the natural parent.

130. See *infra* notes 133-37 and accompanying text.

131. See *infra* notes 144-47 and accompanying text.

132. See *infra* subpart V(B).

133. See, e.g., *Slaughter v. Brigham Young Univ.*, 514 F.2d 622 (10th Cir.), *cert. denied*, 423 U.S. 898 (1975); *Mahavongsanan v. Hall*, 529 F.2d 448 (5th Cir. 1976); *Giles v. Howard Univ.*, 428 F. Supp. 603 (D.D.C. 1977). Since private colleges and universities are not subject to constitutional claims because they are not state actors, a suit in contract often is the only possibility for an

ture of the student-university relationship, but proceeds to resurrect thoroughly discredited contract law to construe the agreement against the student.¹³⁴ Almost without exception, courts apply exceptionally harsh standards to student litigants.¹³⁵ The courts typically hold that contract law should not be rigidly applied, even though the student-university relationship is contractual in nature.¹³⁶ Courts also justify the stricter standard by declaring that the student-university relationship is unique.¹³⁷ Such statements are not particularly helpful, however, since any business is in some sense unique when compared with other businesses. Nevertheless, courts seem to imply that some particular, unidentifiable characteristic of higher education makes commercial contract doctrine inappropriate.

Not all courts employ this inarticulate rationale to deny student contract claims. A handful of judges have been less reluctant to apply ordinary commercial contract doctrine to student-university disputes. For example, in the unreported case of *Lowenthal v. Vanderbilt University*,¹³⁸ the court rejected assertions that the special nature of uni-

aggrieved student.

134. See *infra* note 136. See also Note, *Toward Contractual Rights*, *supra* note 10, at 170 (stating that "student and school were scarcely the conventional equal partners of commercial contract law"). One commentator has observed the inherent unfairness in many student-university contracts:

The rules which a student "contracts" to observe are altogether nonnegotiable The majority of "sellers" uniformly employ a self-serving clause reserving the right to terminate the relation at will according to standards they unilaterally determine pursuant to a vague "good conduct" rule. Thus, the nonnegotiability of terms is compounded by the real lack of shopping alternatives, the inequality of the parties in fixing terms, parallel practices among sellers, and the impotency of individual applicants to affect terms.

Van Alstyne, *supra* note 10, at 584 n.1. While not all student-university situations are so drastically one-sided, enough conform to *Van Alstyne's* model to raise questions about the courts' seriousness in implementing contract doctrine.

135. This harsh treatment of student claims is particularly surprising in light of the general trend of contract law in this area. Most modern courts interpret vague rules against the drafter and have not hesitated to void unconscionable provisions. See, e.g., *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965).

136. See, e.g., *Slaughter*, 514 F.2d at 626. One court, for example, found that a university could modify contractual provisions at will in order "to properly exercise its educational responsibility." *Mahavongsanan*, 529 F.2d at 450.

137. *Slaughter*, 514 F.2d at 626; *Jansen v. Emory Univ.*, 440 F. Supp. 1060, 1062 (N.D. Ga. 1977). Often judges also will mention a concern about the institutional competence of the judiciary to make "academic" decisions. This rationale seems somewhat disingenuous given the courts' usual willingness to make decisions regarding almost any other enterprise.

138. No. 8-8525, Chancery Court of Davidson County, Tennessee (Aug. 15, 1977), *reprinted in* J. EDWARDS & V. NORDIN, *HIGHER EDUCATION AND THE LAW* 430, 432 (1979). The case involved a graduate program that was inadequately funded and supported by the university. The *Lowenthal* court observed that "[w]hile the student-university relationship is indeed unique, it does not vest a university with unlimited power to do as it pleases without facing the consequences." The court also noted: "[S]hould this court ignore the obvious failure of Vanderbilt to live up to its contractual obligations to these students, it would be a signal to Vanderbilt and other institutions that

versities made them immune to ordinary contract principles. The court also dismissed Vanderbilt's argument that a ruling for the plaintiff would have "dire consequences" for higher education.¹³⁹

The use of contract law in student-university disputes was promising to the student litigant laboring under the *in loco parentis* doctrine. As commercial contract law became more concerned with actual bargains and more sensitive to signs of unfair advantage, many believed that the student plaintiff's position would be strengthened.¹⁴⁰ Courts, however, have been reluctant to apply accepted commercial contract doctrines to student-university disputes. By focusing on the unique characteristics of educational institutions, courts avoid confronting the evolution of most American schools from intimate colleges to massive multiversities.

Courts must take a long, hard look at modern education to decide if it remains entitled to this extraordinary deference. Undoubtedly, education serves an important role in American society. But the courts have yet to explain convincingly why this justifies a unique and peculiarly harsh application of contract law. When many modern universities rival large corporations in their numbers of customers, employees, and size, it is unfair for them to remain immune from basic commercial contract principles.¹⁴¹

2. Limitations on Constitutional Claims

*Dixon v. Alabama*¹⁴² often is hailed as a pivotal rejection of the *in loco parentis* doctrine.¹⁴³ But despite the *Dixon* decision, thousands of students at private universities remain outside the scope of constitutional protection.¹⁴⁴ Since the *Dartmouth College* case¹⁴⁵ recognized the independent nature of private education in the United States, the

they are immune from the same legal obligations which govern other relationships in our society." *Id.*

139. *See id.*

140. *See generally* Note, *Toward Contractual Rights*, *supra* note 10, at 167.

141. The schools themselves have contributed to the commercialization of education by an increasing involvement in nonacademic enterprises, such as retirement homes, vacation homes, and real estate development. *See Berg, Academic Capitalism Helps Make Ends Meet*, N.Y. Times, Jan. 5, 1986, at 39, col. 1.

142. 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961).

143. *See supra* subpart IV(B)(1).

144. *See generally* Silets, *Of Students' Rights and Honor: The Application of the Fourteenth Amendment's Due Process Strictures to Honor Code Proceedings at Private Colleges and Universities*, 64 DEN. U.L. REV. 47 (1987); Comment, *An Overview: The Private University and Due Process*, 1970 DUKE L.J. 795; Annotation, *Action of Private Institution of Higher Education as Constituting State Action, or Action Under Color of Law, for Purposes of Fourteenth Amendment and 42 USCS § 1983*, 37 A.L.R. FED. 601 (1978).

145. *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819).

courts have been nearly unanimous in holding that private colleges and universities are not instruments of the state.¹⁴⁶ As a result, actions by these schools cannot be attributed to the state for constitutional purposes.¹⁴⁷ The *Dixon* decision thus left untouched thousands of students attending private colleges and universities. These students have no substantive or procedural constitutional safeguards.

A number of writers have questioned this bright-line distinction between the public and private contexts.¹⁴⁸ They have advanced several justifications for recognizing certain universities as instruments of the state.¹⁴⁹ The courts, however, have been unwilling to extend constitutional protections to students attending these private universities. In *Blackburn v. Fisk University*,¹⁵⁰ for example, a student argued that the university should be treated as an arm of the state since it exhibited many of the characteristics of a municipality.¹⁵¹ The student noted that the university provided municipal services, including health and sanitation services, a police force, roads, and public housing.¹⁵² The Sixth Circuit, however, followed other courts¹⁵³ in finding these governmental functions to be insufficient to qualify as state action.¹⁵⁴ Likewise, courts have been unsympathetic to claims that the inherent importance of the educational enterprise constitutes a sufficient "public function"¹⁵⁵ to satisfy the state action doctrine.¹⁵⁶

The courts' reluctance to extend constitutional protections to uni-

146. See *Browns v. Mitchell*, 409 F.2d 593 (10th Cir. 1969); *People v. Boettner*, 80 Misc. 2d 3, 362 N.Y.S.2d 365 (N.Y. Sup. Ct. 1974).

147. When the government is significantly involved in the affairs of a private organization, the organization is subject to constitutional restrictions. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961). State action exists when there is a "sufficiently close nexus between the State and the challenged action." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974).

148. See, e.g., Silets, *supra* note 144, at 57; McKay, *The Student as Private Citizen*, 45 DEN. L.J. 558, 560 (1968); Goldman, *The University and the Liberty of its Students—A Fiduciary Theory*, 54 KY. L.J. 643, 650 (1966); Comment, *Common Law Rights for Private University Students: Beyond the State Action Principle*, 84 YALE L.J. 120, 122-23 (1974).

149. For example, one commentator argues that increasing federal financial involvement in private education rises to the level of state action. See Cohen, *The Private-Public Legal Aspects of Institutions of Higher Education*, 45 DEN. L.J. 643, 646-47 (1968).

150. 443 F.2d 121 (6th Cir. 1971).

151. *Id.* at 122-23.

152. *Id.* at 123.

153. See, e.g., *Browns v. Mitchell*, 409 F.2d 593 (10th Cir. 1969).

154. *Fisk*, 443 F.2d at 124.

155. Under this analysis, an enterprise may be considered state action when the function performed is one that is "traditionally the exclusive prerogative of the State." *Jackson*, 419 U.S. at 353.

156. See *Krolm v. Harvard Law School*, 552 F.2d 21, 24 (1st Cir. 1977); *Powe v. Miles*, 407 F.2d 73, 80 (2d Cir. 1968); *Counts v. Voorhees College*, 312 F. Supp. 598, 606 (D.S.C. 1970). See generally Annotation, *supra* note 144. But see *Belk v. Chancellor of Wash. Univ.*, 336 F. Supp. 45, 48 (E.D. Mo. 1970) (finding education to be a public function).

versity students is unfortunate. Contrary to the *Fisk* ruling, many multiversities are in fact small cities. The university police may be the only law enforcement officers students encounter. Courts should give serious consideration to the practical effects of the modern university's size and complexity. While it may not be possible to apply constitutional limitations to private universities without seriously undermining the state action doctrine, the idea should be considered carefully.

B. *Assault from Within: Hate Speech Rules*

The lingering attraction of *in loco parentis* has not been confined to the courts. Universities and colleges experienced the same inability to accept the changed nature of American education. This reluctance to abandon *in loco parentis* is seen in the recent debate over college hate speech rules.¹⁵⁷ These rules were designed as a response to the reports of increased hostility toward minorities on campuses during the 1980s.¹⁵⁸ To discourage such incidents of harassment, several colleges and universities adopted disciplinary provisions as a means of punishing offenders.¹⁵⁹

157. For a useful and thorough discussion of the various legal issues associated with the hate speech controversy, see Note, *Closing the Campus Gates to Free Expression: The Regulation of Offensive Speech at Colleges and Universities*, 39 EMORY L.J. 1351 (1990) [hereinafter Note, *Closing the Campus Gates*]. See generally Hechinger, *On Campus, and Elsewhere, Should Free Speech Include Harsh Words?*, N.Y. Times, June 6, 1990, at B7, col. 1; Taylor, *Fending Off "Fighting Words,"* Legal Times, Jan. 1, 1990, at 19, col. 2.

158. Incidents of minority harassment have been reported on at least 170 campuses. See Bayh, *Let's Tear Off Their Hoods*, NEWSWEEK, Apr. 17, 1989, at 8. These attacks have been directed at racial minorities, women, and homosexuals, and sometimes involved physical violence. See Note, *Student Discriminatory Harassment*, 16 J.C. & U.L. 311, 311-13 (1989). But see Leo, *Racism on American College Campuses*, U.S. NEWS & WORLD REP., Jan. 8, 1990, at 53 (arguing that isolated racist incidents are not truly representative of a widespread problem). Some commentators have argued that any increase in racism may be a result of minority favoritism. See D'Souza, *Sins of Admission*, NEW REPUBLIC, Feb. 18, 1991, at 30, 33 (arguing that "many white students who are generally sympathetic to the minority cause become . . . irritated by the extent of preferential treatment and double standards").

159. As many as 117 institutions have adopted some form of hate speech regulation. Post, *Free Speech and Religious, Racial and Sexual Harassment*, 32 WM. & MARY L. REV. 267 (1991). The institutions include: the University of California, Emory University, Smith College, Stanford University, the University of Vermont, the University of Massachusetts, the University of North Carolina at Chapel Hill, and the University of Wisconsin. Note, *supra* note 158, at 1375-76 n.137. Administrators at Notre Dame University hoped to complete the formulation of a policy by the end of the 1990-91 academic year. See *Minority Students Present Demands*, N.Y. Times, Feb. 4, 1991, at B4, col. 1. Vanderbilt University also was preparing a racial speech policy. See *Issue of Restricting Some Speech to be Debated at Vanderbilt Forum*, Nashville Banner, Dec. 1, 1990, at B-3, col. 3. The Board of Regents of the University of Tennessee adopted a minority harassment policy in March 1991. See *New College Rule on Slurs Incites Free Speech Debate*, The Tennessean, Mar. 17, 1991, at 3-B, col. 1.

The Carnegie Foundation for the Advancement of Teaching estimates that 70% of colleges and universities have adopted some form of a hate speech code. Innerst, *'Political Correctness'*

The University of Michigan adopted perhaps the broadest anti-harassment policy in 1988.¹⁶⁰ The policy established three levels of regulation based on the location of the speech¹⁶¹ or type of behavior.¹⁶² The regulations prohibited behavior that "stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam-era veteran status" when such behavior might interfere with educational pursuits.¹⁶³ Students who violated the policy could be punished by penalties ranging from formal reprimand to expulsion.¹⁶⁴ The

Bashed From Right, Left, Washington Times, Mar. 13, 1991, at A1. Harvard University, however, has explicitly refused to implement a hate speech policy after a controversy involving a student's display of the Confederate flag.

160. The policy is reprinted in *Doe v. University of Mich.*, 721 F. Supp. 852, 856 (E.D. Mich. 1989). The administration created the regulations after what appeared to be an increase in racist incidents on campus. The incidents included racially discriminatory remarks on the student radio station and the distribution by an anonymous person of a flier that called for "open season" on "saucer lips, porch monkeys, and jigaboos." *Id.* at 854. The acting university president declared that such incidents were seriously offensive to members of the community and detracted from the school's educational climate. *Id.* at 855. The acting president acknowledged the potential First Amendment problems with the regulations, but somewhat circuitously reasoned that

just as an individual cannot shout "Fire!" in a crowded theater and then claim immunity from prosecution . . . , so a great many American universities have taken the position that students at a university cannot by speaking or writing discriminatory remarks which seriously offend many individuals beyond the immediate victim, and which, therefore detract from the necessary educational climate of a campus, claim immunity from a campus disciplinary proceeding. I believe that position to be valid.

Id.

A civil libertarian might respond with the observation of Judge Learned Hand that the First Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many, this is, and always will be, folly; but we have staked upon it our all." *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943). Hate speech rules represent precisely the sort of authoritative determination of acceptable speech that Judge Hand warned against. Many university administrators have decided that what they personally consider to be racist speech should not be spoken. This understanding runs directly counter to the idea of free speech as a competitive marketplace of ideas. When community leaders begin distinguishing between right and wrong speech, the potential for abuse is evident. *But see Wiener, Words That Wound: Free Speech for Campus Bigots?*, THE NATION, Feb. 26, 1990, at 272.

161. Certain public areas and student publications were exempt from the regulations, which applied mainly to classrooms, libraries, and other academic areas. *Doe*, 721 F. Supp. at 856.

162. *Id.*

163. *Id.* For a representative sampling of other hate speech regulations, see REGULATING RACIAL HARASSMENT ON CAMPUS: A LEGAL COMPENDIUM (T. Hustoles & W. Connolly, Jr. eds. 1990).

164. *Doe*, 721 F. Supp. at 857. Expulsion was reserved for "violent or dangerous acts, repeated offenses, or a willful failure to comply with a lesser sanction." *Id.* At least one student at an American college has been expelled for violation of a hate speech policy. In 1991 Brown University expelled a student who was found guilty of violating a policy prohibiting students from subjecting "another person, group or class of persons to inappropriate, abusive, threatening or demeaning actions based on race, religion, gender, handicap, ethnicity, national origin or sexual orientation." *Student at Brown is Expelled Under a Rule Barring 'Hate Speech'*, N.Y. Times, Feb. 12, 1991, at A13, col. 1. The school determined that the student shouted the word "nigger" in the courtyard of

university's interpretive guide to the policy indicated that derogatory comments about a person's physical appearance or a statement asserting men's superiority to women in a particular field might violate the regulations.¹⁶⁵

The University of Michigan disciplined or threatened to discipline at least three students for classroom comments that allegedly violated the policy.¹⁶⁶ One student was formally charged for stating that he believed homosexuality to be a treatable disease.¹⁶⁷ Another student who felt threatened by the regulations filed suit challenging their constitutionality.¹⁶⁸ In *Doe v. University of Michigan*¹⁶⁹ the court found the policy to be an unconstitutional infringement on student rights.¹⁷⁰ The *Doe* court did not address specifically the special problems created by the student-university relationship in its examination of the policy. But the court forcefully reiterated the message of *Dixon v. Alabama*:¹⁷¹ A public university has no greater ability to infringe on citizens' rights than any other government agency.¹⁷² *Doe v. University of Michigan* is an important reaffirmation of the *Dixon* doctrine guaranteeing constitutional protections to university students.

Despite the *Doe* ruling, many universities continue to discourage racist speech through restrictive regulations.¹⁷³ Many public universities

a dormitory and called a particular student a "faggot" and a "Jew". *Id.* at col. 3. The President of Brown, Vartan Gregorian, stated that "[i]t is my intention to prosecute vigorously, and to expel immediately, such individual or individuals for any attempt to inject and promote racism and thus insult the dignity of our students as citizens of Brown." *Id.* at col. 4.

165. *Doe*, 721 F. Supp. at 857-58. According to the publication, hosting a party and inviting everyone except a suspected lesbian could be actionable. *Id.* at 858. A similarly broad policy was enacted by the University of California-Berkeley. Curtis, *Racial, Ethnic Slurs Banned on UC Campus*, San Francisco Chron., Sept. 27, 1989, at A1, col. 3. The rules prohibited abusive language demeaning a student's "race, ethnicity, religion, sex, sexual orientation, disability, and other personal characteristics." *Id.* (emphasis added).

166. *Doe*, 721 F. Supp. at 861.

167. *Id.* In another incident, authorities charged a student with a violation of the policy for allegedly reciting a "homophobic" limerick in a public speaking class. *Id.* at 865. The charges were dropped when the student was persuaded to attend a "gay rap" session and apologize. *Id.*

168. *Id.* at 858. The plaintiff, a psychology graduate student, asserted that the rules chilled his right to discuss controversial theories which might be deemed racist. *Id.*

169. 721 F. Supp. 852 (E.D. Mich. 1989).

170. The court found the policy to be overbroad, both facially and in application, and so vague as to violate due process. *Id.* at 866-67.

171. 294 F.2d 150 (5th Cir. 1961). See *supra* subpart IV(B)(1).

172. Judge Cohn noted that "[w]hile the Court is sympathetic to the University's obligation to ensure equal educational opportunities for all of its students, such efforts must not be at the expense of free speech." *Doe*, 721 F. Supp. at 868. After the rules were invalidated, the university extensively revised its policy. See DePalma, *Battling Bias, Campuses Face Free Speech Fight*, N.Y. Times, Feb. 20, 1991, at B10, cols. 1, 2. Under the new code, almost 20 complaints were filed during the period from September 1990 to February 1991. *Id.* at col. 2.

173. In fact, some commentators have argued that the disputed speech regulations do not go far enough and suggest that in an ideal world unfettered by constitutional restraints, it would be

responded to the decision by enacting less restrictive rules aimed at banning only "fighting words."¹⁷⁴ These rules are based on United States Supreme Court decisions holding that certain types of face-to-face speech designed to inflict injury or which tend to provoke an immediate hostile response are not protected by the First Amendment.¹⁷⁵ Some private universities have also opted for a fighting words approach and punish speech only when it is addressed to an individual or small group.¹⁷⁶ This narrower class of rules has not been challenged in the courts. As more colleges and universities implement racist speech policies, however, the debate over their wisdom promises to continue.

Commentators ranging from civil libertarians¹⁷⁷ to political con-

desirable to regulate, for example, the "common and potentially devastating" effect of a professor's inattentive posture when a female student speaks in class. Bartlett & O'Barr, *The Chilly Climate on College Campuses: An Expansion of the "Hate Speech" Debate*, 1990 DUKE L.J. 574, 575.

174. See, e.g., Note, *supra* note 157, at 1376 n.137 (observing that the University of Connecticut at Storrs adopted a fighting words approach). But see Hodulik, *Prohibiting Discriminatory Harassment by Regulating Student Speech: A Balance of First Amendment and University Interests*, 16 J.C. & U.L. 573, 576 (1990) (noting that the University of Wisconsin adopted a code similar to Michigan's). Although some private schools have opted for more restrictive regulations, they might do well to heed the warning of Professor Wright: "[I]t seems to me unthinkable that . . . any private institution would consider recognizing fewer rights in their students than the minimum the Constitution exacts of the state universities, or that their students would long remain quiescent if a private college were to embark on such a benighted course." Wright, *supra* note 125, at 1036.

175. See, e.g., *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). Subsequent Court decisions have so limited the *Chaplinsky* doctrine that it is questionable whether it supports most racist speech rules. See, e.g., *Hess v. Indiana*, 414 U.S. 105, 108-09 (1973) (requiring that punishable fighting words be directed at a particular person and that violence be imminent). See generally L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 12-18 (2d ed. 1988).

176. Stanford University has taken this approach. See, e.g., STANFORD UNIVERSITY, *FUNDAMENTAL STANDARD INTERPRETATION: FREE EXPRESSION AND DISCRIMINATORY HARASSMENT* (June 1990), reprinted in relevant part in Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484, 524. In March 1991 Republican Congressman Henry J. Hyde of Illinois introduced legislation to amend the Civil Rights Act of 1964. See *Bill Would Widen Assaults on Campus Speech Codes*, N.Y. Times, Mar. 13, 1991, at B7, col. 1. The amendment would allow students at nonreligious private schools receiving federal aid to challenge disciplinary actions related to speech. *Id.*

177. After much debate, the American Civil Liberties Union (ACLU) officially condemned hate speech rules in October 1990. See *Still Freer Speech*, *ECONOMIST*, Feb. 2, 1991, at 26, col. 1. The ACLU policy statement on the issue declares that "[a]ll members of the academic community have the right to hold and to express views that others may find repugnant, offensive, or emotionally distressing." *ACLU Policy Statement: Free Speech and Bias on College Campuses*, reprinted in Strossen, *supra* note 176, at 571. For a civil libertarian's extensive and persuasive critique of hate speech regulations, see Strossen, *supra* note 176, at 493-94 (arguing that "equality will be served most effectively by continuing to apply traditional, speech-protective precepts to racist speech"). But see Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 Nw. U.L. Rev. 343, 387 (1991) (arguing that racist speech "crushes the spirits of its victims while creating culture at odds with our national values"); Lawrence, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 437 (asserting that rules promote "important values expressed elsewhere in the Constitution"). The obvious problem with Professor Delgado's argument is that it presupposes a definitive and mandatory understanding of "our" values.

servatives¹⁷⁸ have criticized hate speech rules as an attempt to limit the free exchange of ideas in the name of "political correctness."¹⁷⁹ Clearly, hate speech rules represent a revival of the *in loco parentis* concept. The arguments used to justify the hate speech rules are remarkably similar to those used by early courts to invoke the *in loco parentis* doctrine.¹⁸⁰ Advocates of campus speech regulations promote an understanding of the university as an insular and ideal world interested primarily in promoting substantive moral values different from those of society as a whole.¹⁸¹ While perhaps accurate at the small liberal arts colleges, this view represents an understanding closer to eighteenth century educational philosophy than the twentieth century multiversity.¹⁸² These modern multiversities are far too large, impersonal, bureaucratic, and diverse to serve as laboratories for the creation of a utopian nondiscriminatory world.¹⁸³ Proponents of hate speech rules seem to advocate the replacement of the earlier Christian orthodoxy with a new orthodoxy based on the promotion of diversity.¹⁸⁴ This approach creates seri-

178. See, e.g., *Sensitivity Facism*, NAT'L REV., Nov. 10 1989, at 19; Washburn, *Liberalism Versus Free Speech*, NAT'L REV., Sept. 30, 1988, at 39.

179. This phenomenon has been described as "a large body of belief in academia and elsewhere that a cluster of opinions about race, ecology, feminism, culture and foreign policy defines a kind of 'correct' attitude toward the problems of the world, a sort of unofficial ideology of the university." Bernstein, *The Rising Hegemony of the Politically Correct*, N.Y. Times, Oct. 28, 1990, at X-1, col. 1. See also Cermele, *The Political Seduction of the University*, CAMPUS, Winter 1991, at 3, col. 1; Mooney, *Scholars Decry Campus Hostility to Western Culture at a Time When More Nations Embrace its Values*, Chron. Higher Educ., Jan. 30, 1991, at A15, col. 2 (noting concern that "U.S. academics increasingly face restraints . . . aimed at curbing language found offensive by some colleagues and students").

180. See, e.g., Hodulik, *supra* note 174, at 576 (arguing that "[l]egal and policy principles establish the University's duty to provide equal access to education, to prevent interference with educational opportunities, and to regulate student conduct"). The Supreme Court has invoked *in loco parentis* to suppress offensive speech by high school students. See *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 684 (1986).

181. This moral ideal is expressed in different terms at every school. At Marquette, for example, the defining term is "human dignity." At Mount Holyoke, the ideal is "diversity." Post, *supra* note 159, at 275-77.

182. "Drawing on the Carnegie Foundation's call for a more 'caring' campus, and led by college presidents with 'helping professionals' in tow, administrators are now redefining the purpose of higher education. Some colleges have in effect reverted to their earlier roles as religious/confessional institutions." Siegal, *The Cult of Multiculturalism*, NEW REPUBLIC, Feb. 18, 1991, at 34, 36. See also D'Souza, *Illiberal Education*, ATLANTIC MONTHLY, Mar. 1991, at 51, 54 (stating that "[t]he quest for 'diversity' . . . risks its own paradoxical forms of closure and parochialism").

183. See Massaro, *Equality and Freedom of Expression: The Hate Speech Dilemma*, 32 WM. & MARY L. REV. 211, 260 (1991) (noting that "any wide-ranging claim that public colleges and universities should be able to inculcate values through disciplinary measures misstates the[ir] proper role"). But see *Krasnow v. Virginia Polytech. Inst. & State Univ.*, 414 F. Supp. 55, 57 (W.D. Va. 1976) (asserting that public colleges may require "superior moral standards, which may be set by the institution") (citing *Papish v. Board of Curators of Univ. of Mo.*, 331 F. Supp. 1321, 1333 (W.D. Mo. 1971), *aff'd*, 464 F.2d 136 (8th Cir. 1972)).

184. According to Dinesh D'Souza, "[d]iversity' no longer refers to a range of views on a

ous tensions within the university community. Faculty and students are fearful of speaking freely lest they be branded racist, sexist, or "Vietnam-era-status-phobic."¹⁸⁵

Ironically, many of the faculty and administrators who support restrictions on free speech were students themselves during the Free Speech Movement of the 1960s.¹⁸⁶ Once protesters against conventional campus orthodoxy and outdated disciplinary rules, they now seek to reshape the university in the name of their own orthodoxy. Both the continuing judicial hostility to student claims and the hate speech controversy demonstrate that *in loco parentis* lives, both in the courts and within the educational establishment.

VI. MAKING SENSE OF THE STUDENT-UNIVERSITY RELATIONSHIP: A PROPOSED SOLUTION

Student-university legal doctrine remains confused and frustratingly myopic. Although most courts have recognized the inherent inadequacies of the *in loco parentis* doctrine, many are unwilling to abandon their traditional deference to the decisions of academic institutions. The consequence of these conflicting impulses is a hodgepodge of liberal theories and harsh results. Courts feel that the sanctity of academia and the uniqueness of the educational enterprise demand deference and nonintervention in some instances. At the same time, they are at least vaguely aware that the nature of American higher education has changed significantly.

The challenge for the judiciary is to develop a flexible, but doctrinally consistent approach to student-university disputes.¹⁸⁷ A solution

disputed question but rather entails enlisting in a whole set of ideological causes that are identified as being 'for diversity.' " D'Souza, *supra* note 182, at 55. Faculty members often are explicit about their ideological objectives. *See id.* at 57 (quoting a dean as saying "I see my scholarship as an extension of my political activism"). Student activists have made clear their opinion that diversity does not include the right of others to express inappropriate attitudes toward minorities. In the words of one student at the University of Massachusetts, "[w]e'll do anything we need to be able to live our lives free of harassment and with dignity." *Gay Groups Drown Out Rally by Conservatives*, N.Y. Times, Mar. 11, 1991, at B4, col 1. *See also* Blow, *Mea Culpa*, NEW REPUBLIC, Feb. 18, 1991, at 32 (asserting that "[t]heir idea of diversity is a chorus of voices all saying the same thing").

185. *See Universities: Take Care*, ECONOMIST, Feb. 10, 1990, at 20 (observing that "[t]eachers as well as students must weigh their words"). The racial hypersensitivity resulting from the quest for diversity occasionally borders on the absurd. At Harvard, for example, dining-hall workers were charged with racial insensitivity for planning a "Back to the Fifties" party. *Id.* Apparently, nostalgia for that period was unacceptable since it was a time of segregation. *Id.*

186. *See supra* notes 53-56 and accompanying text.

187. Several commentators have acknowledged the need for "a more flexible judicial approach to these conflicts, . . . one based on the nature of the relationship between the student and the school." Note, *Toward Contractual Rights*, *supra* note 10, at 164; *see also* Fowler, *supra* note 81, at 416 (arguing for a fiduciary theory since previous approaches "have not served to clearly

is possible only if courts are willing to acknowledge the differences between traditional colleges and the modern multiversity. The history of American higher education reflects the transformation of colleges into universities, a distinction crucial to any coherent adjudication of student-university disputes. Colleges and universities differ substantially in philosophy and structure and should not be evaluated by the same legal standard.¹⁸⁸ The most important issue is not whether a school is public or private, but whether it is a college or a university. Courts must recognize that every American school has chosen one of these two competing models. This choice should affect the standard applied to student-university disputes.

Much of the reluctance of courts to interfere in campus affairs stems from an unrealistic view of modern education. Perhaps judges, remembering fondly their own college days, resist intervening in the sacrosanct world of their youth. Most American schools, however, long ago abandoned the collegiate model that once justified the policy of nonintervention. The rhetoric of community has been overwhelmed by the mass of students, teachers, and employees. Many schools now resemble small cities instead of the intimate and insular collegiate structures that gave birth to the *in loco parentis* doctrine. Their legal status should reflect this expansion and change in philosophy. On the other hand, those schools that have chosen to remain colleges or which promote explicit religious values should be treated deferentially by the courts. The two different models of higher education should be considered first in the resolution of any student-university dispute.

A. *The Courts and the Multiversity*

The majority of American students attend large universities¹⁸⁹ modeled after the German ideal.¹⁹⁰ A large number of these students

define the relationship between the institution and the student"). One writer has proposed a "unitary theory" designed to promote substantial justice for both the student and the university. Michael, *The Unitary Theory: A Proposal for a Stable Student-School Legal Relationship*, 1 J.L. & EDUC. 411 (1972). This approach would emphasize the fundamental goals of the school and the student. Michael's proposal seems too vague, however, to be helpful to the courts.

188. See *Slaughter v. Brigham Young Univ.*, 514 F.2d 622, 626 (10th Cir. 1975) (stating that the student-university relationship may "be different at different schools"); Michael, *supra* note 187, at 427 (noting that courts must consider the type of institution involved); Note, *Toward Contractual Rights*, *supra* note 10, at 187 (arguing that "the model of higher education protected by the courts may bear little resemblance to the diversity of educational experiences").

189. In 1985, 38% of American institutions consisted of fewer than 1000 students. These institutions enrolled less than 5% of the total national student populations. In the same year, 50% of students attended institutions with more than 10,000 students. OFFICE OF EDUCATIONAL RESEARCH AND IMPROVEMENT, U.S. DEP'T OF EDUCATION, EDUCATION INDICATORS 116 (1988).

190. See *supra* notes 43-46 and accompanying text.

are past the age of majority¹⁹¹ and live in nonuniversity housing. For many students, education has become primarily an economic transaction and a means to professional success.¹⁹² At the same time, their schools consciously have rejected the English collegiate model of education in favor of the grander European university design. The intimacy and insularity that justified the *in loco parentis* doctrine has been lost in the rush to expand. Schools founded as intimate colleges have become, in effect, small cities. The modern multiversity bears little resemblance to the nineteenth century college.

For this reason, *in loco parentis* should not affect either the legal disputes or the internal philosophies of these multiversities. By purposefully pursuing university status, most American institutions have forfeited their right to the legal deference granted them by the English common law. Contract law should be used rigorously and consistently to ameliorate the effects of students' poor bargaining position. Courts should give serious consideration to enforcing constitutional rights at both public and private multiversities. Courts should not allow vestiges of *in loco parentis* to hinder the fair resolution of student-university disputes.

In addition, the schools should resist the efforts of those who seek to give ideological correctness the force of law. Hate speech rules stem from an understanding of the modern educational system that is simply contrary to fact. Multiversities long ago abandoned their responsibility to act as moral guardians of their students. Having made this decision, they should not attempt to enforce selective moral ideals that reflect a particular political agenda.¹⁹³

B. *The Collegiate Model*

Although multiversities play the leading role in modern American higher education, a conspicuous minority of schools have chosen a different path. These institutions avoided the rush to Germanize and in-

191. In fact, the number of students of the age of 25 or older has increased steadily in recent years. In 1972 only 28% of postsecondary students were 25 or older; by 1986 that figure rose to 39%. OFFICE OF EDUCATIONAL RESEARCH AND IMPROVEMENT, U.S. DEP'T OF EDUCATION, DIGEST OF EDUCATION STATISTICS 116 (1988).

192. See *Picozzi v. Sandalow*, 623 F. Supp. 1571, 1576 (E.D. Mich. 1986) (stating that "[e]ducation is the key—or at least the prerequisite—to many successful careers"); Sheler, *A New Era on Campus*, U.S. NEWS & WORLD REP., Oct. 16, 1989, at 54 (reporting a consumer fraud suit filed against a college for failure to provide useful job skills); Wright, *supra* note 125, at 1032 (stating that a "college education is no longer . . . a luxury . . . but . . . a necessity").

193. Proponents of hate speech rules usually couch their argument in terms of protecting minority students from pain or injury rather than tempering the moral failures of certain students. This sort of protection is a quintessentially parental and moralistic function.

stead focused on educating a small, select group of undergraduates.¹⁹⁴ In the age of the multiversity, these liberal arts colleges remain bastions of the collegiate method of education.

The doctrine of *in loco parentis* still may be applicable in these few schools.¹⁹⁵ Courts should not reject summarily the doctrine as an appropriate legal model for these institutions. In the context of student-university disputes, courts should not equate liberal arts colleges with their multiversity counterparts. Commercial contract doctrine, for example, is not particularly relevant to the truly collegiate schools. The mysterious quality of uniqueness referred to by many courts¹⁹⁶ has real meaning in the collegiate context. Even hate speech rules may enjoy greater justification in the collegiate context.¹⁹⁷ Many of the arguments used to justify these rules are absurd only when applied to the massive multiversities that dominate the educational landscape. Courts should hesitate before applying the standards of the commercial market to student-university relations at liberal arts colleges.

Courts should be able to determine whether an institution involved in litigation is a true college or a multiversity. Relevant factors include the history of the school and its statement of its purposes as defined in official documents. A court should determine if the primary focus is on undergraduate education or postgraduate and professional programs. The average age of the students, the percentage of students living on campus, and the nature of community life outside the classroom are also factors to be considered.¹⁹⁸ Moreover, a critical factor is whether the school asserts a parental role in guiding and shaping the moral and physical well-being of its students as a matter of regular policy.¹⁹⁹ An

194. Others expanded in size, but resisted secularization by retaining explicit religious ties. See generally G. SCHMIDT, *supra* note 20.

195. These schools offer students an alternative to the prevailing multiversity approach. Students value liberal arts colleges precisely because they are different. William Van Alstyne has noted the "problematical relevance" of *in loco parentis* to "the dwindling proportion of small, residential, private, denominational colleges." Van Alstyne, *supra* note 62, at 408.

196. See *supra* note 137 and accompanying text.

197. Even in the collegiate context, however, hate speech rules represent a troubling development. Civil libertarians such as Strossen, *supra* note 176, make a persuasive argument that the best way to discourage racism is through the free exchange of ideas. See also Note, *Closing the Campus Gates*, *supra* note 157, at 1388-89 (stating that a private school adopting hate speech codes "risks being seen as disingenuous at best, and perhaps even intellectually dishonest").

198. This community life should not be measured simply by counting the number of student life programs available to students. Rather, the court should consider whether the school's social insularity is suggestive of the intimacy of a family unit. In other words, do the students and their teachers work together, live together, and play together?

199. For example, a school that enforces opposite sex visitation rules is very different from one which pursues a laissez-faire attitude toward students' private lives. The court should be sensitive to inconsistency. Generally, a school should not be permitted to exercise paternal authority in a selective manner.

examination of such indicators²⁰⁰ should make clear whether the school involved is a college or a multiversity.

When a court determines that the institution involved in a dispute is in fact a true college, then *in loco parentis* counsels against undue interference. This does not mean that the courts must defer to the college's decision in every case. The courts, however, should respect the voluntary decision by both parties to enter into a familial community. By rejecting the Germanization of American education, the twentieth century college has secured the common-law right to supervise its students closely. Likewise, by consciously choosing to attend an intimate college instead of a multiversity, the student implicitly has agreed to more extensive control.

Courts should not hesitate to examine the actual nature of the institution and to use that determination in selecting the appropriate legal standard. Deference may be warranted if the defendant is a true college. Courts should not allow a desire to protect these institutions to justify the covert application of *in loco parentis* to multiversity disputes. The adoption of a two-tiered approach based on the type of school involved would clarify the situation.

VII. CONCLUSION

American education has changed radically since the founding of the earliest colleges. The great nineteenth century debate over the German and English academic ideals ended in the apparent triumph of the university model. The courts should recognize these developments and not allow the vestiges of *in loco parentis* to obscure the reality of modern education. Student rights at true universities should be vigorously enforced. At the same time, courts should respect the conscious choice of a minority of institutions to remain residential colleges. At these schools the traditional deference should be acknowledged and applied. Only by such an approach will courts do justice to the reality of American education and bring lasting order to this confused but important area of the law.

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200. These factors are only some of the most obvious examples. Perhaps the most important indicator of all, the size of the institution, would be the easiest to evaluate objectively. While it is possible for a large institution to operate a true college, in practice such attempts usually have failed, possibly because of the absence of a truly residential housing system.

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