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A (UN)PERFECT FIT: EVALUATING THE FITNESS OF THE MODEL RULES IN LAW SCHOOL CODES OF CONDUCT

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A (UN)PERFECT FIT: EVALUATING THE FITNESS OF THE MODEL RULES IN LAW SCHOOL CODES OF CONDUCT

Katie Kramer Tear*

INTRODUCTION

In 1999, 21-year-old David Powers sold LSD to an undercover police officer. Powers was subsequently arrested on charges of possession with intent to distribute LSD and MDMA, also known as Ecstasy.[1] Following his arrest, Powers completed an inpatient drug program and pleaded guilty to lesser charges of possession of LSD and Ecstasy.[2] Eventually, his record was expunged.[3]

After completing a rehab program, Powers was "hungry to swing his life in a significantly different direction."[4] He attended college, graduated with a 3.9 grade point average, worked at PricewaterhouseCoopers, and even served as the head of

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[1] Elizabeth A. Harris, *Past Drug Charges Derail a Law Student's Education*, N.Y. TIMES, Apr. 10, 2015, at A22, https://www.nytimes.com/2015/04/10/nyregion/past-drug-charges-derail-a-law-students-education.html [hereinafter Harris, *Past Drug Charges Derail a Law Student's Education*].

[2] *Id.*

[3] *Id.*

[4] *Id.*

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finance and as the director of global taxation at two different hedge funds.[5] As described by his lawyer, Powers was truly the "poster boy for rehabilitation."[6]

Powers did not stop there. In 2005, he applied to St. John's University School of Law.[7] As part of the application, St. John's asked Powers to disclose any prior criminal charges, as well as findings or pleas of guilt. After consulting with his lawyer, Powers disclosed his possession charges on his application.[8]

St. John's eventually admitted Powers as a part-time student.[9] From 2006 to 2008, he completed three semesters of law school before making inquiries with the school administration about admittance to the New York State bar.[10] In doing so, Powers "gave a more detailed" history to the school—explaining that he "used drugs habitually from [ages] sixteen to twenty-one and that he sometimes sold them" during that time.[11] Based on this new information, St. John's rescinded his acceptance.[12]

In justifying the institution's decision, counsel for St. John's explained that admissions standards for law schools are stricter than undergraduate institutions because of the responsibility to admit and educate students who are likely to be admitted to the bar.[13] According to St. John's, a history of selling drugs made bar entry unlikely—even though the New York State Bar Association notes that a felony conviction does not automatically disqualify an applicant from the bar.[14] The Supreme Court of New York upheld the school's decision, concluding that the recission of Powers's admission was not arbitrary or capricious and did not warrant

[5] *Id.*

[6] *Id.* Powers' lawyer, Roland Acevedo, is another example of an individual who turned his life in a "different direction." *Id.* Prior to graduating from Fordham Law School in 1996, Mr. Acevedo was twice convicted of robbery. *Id.*

[7] *Id.*

[8] *Id.*

[9] Andrew Denney, *Pace Law Admits Student Who Lost Place at St. John's*, LAW.COM: N.Y. L.J. (Sept. 1, 2015, 5:05 AM), https://www.law.com/newyorklawjournal/almID/1202736119424/.

[10] Harris, *Past Drug Charges Derail a Law Student's Education*, *supra* note 1.

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

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judicial intervention because Powers was not entitled to invoke the grievance procedures set forth in the law school's student handbook.[15]

In 2015, Pace Law School—having heard about Powers's case—accepted him as a transfer student.[16] Ultimately, Powers was admitted to the New York State bar following his graduation from Pace Law.[17]

Stories like Powers's have become more common at graduate and professional schools. These institutions increasingly view their purpose as producers of model students who have the highest probability of meeting professional code requirements.[18] Law schools—in an effort to parallel the legal field's disciplinary requirements and professional standards—have begun to include references to these standards within their respective codes of conduct.[19] For some law schools, specifically, this means that the law school student handbooks include language requiring students to act in accordance with the American Bar Association ("ABA") Model Rules of Professional Conduct ("Model Rules").[20] Further, because the legal basis of the student-university relationship is now understood as a "contract between the student and the institution,"[21] with student handbooks documenting the respective terms of the arrangement, students find themselves bound to professional rules and standards during their studies—even though these institutions lack the

[15] *See In re* Powers v. St. John's Univ. Sch. of L., 973 N.Y.S.2d 285, 287 (App. Div. 2013).

[16] Elizabeth A. Harris, *A 2nd Chance to Study Law After a 'Raw Deal'*, N.Y. TIMES, Aug. 31, 2015, at A13, https://www.nytimes.com/2015/08/31/nyregion/student-gets-second-chance-at-law-school.html [hereinafter Harris, *A 2nd Chance*].

[17] *David Powers Attorney Detail Report*, N.Y. STATE UNIFIED CT. SYS., https://iapps.courts.state.ny.us/attorneyservices/search?6 (search in attorney search bar for "David Powers"; select registration number "5528963") (last visited Apr. 20, 2023).

[18] *See infra* Part II.

[19] *E.g.*, CASE W. RSRV. UNIV. SCH. OF L., 2021–2022 STUDENT HANDBOOK 5 (2021), https://case.edu/law/sites/case.edu.law/files/2021-08/2021-2022%20Student%20Handbook.8.13.2021.pdf ("To the extent it is applicable, every law student must abide by the American Bar Association's Model Rules of Professional Conduct[.]").

[20] The ABA *Model Rules of Professional Conduct* "serve as models for the [legal] ethics rules of most jurisdictions" within the United States. *Model Rules of Professional Conduct*, AM. BAR ASS'N, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/ (last visited Oct. 22, 2023).

[21] Jonathan Flagg Buchter, *Contract Law and the Student-University Relationship*, 48 IND. L.J. 253, 253 (1973).

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authority to actually determine students' admission or rejection to the respective state bars.[22]

This Note considers the changes in the relationship between student and university—from the development of *in loco parentis*, the shift to the duty-focused connection, and finally, the development of the contract-based model seen today.[23] It will then evaluate the historical origins of Model Rules and their path to inclusion within law school student handbooks and codes of conduct.[24] Finally, this Note will evaluate the appropriateness of professional standards, like the Model Rules, given the espoused purpose of these programs, the current educational environment, and legal employment outcomes.[25] Ultimately, this Note is intended to encourage discussion about whether professional ethics requirements, such as the Model Rules, should be included within the law school-student contract, i.e., schools' codes of conduct.

I. HISTORY OF THE STUDENT-UNIVERSITY RELATIONSHIP

A. In Loco Parentis

To understand the current relationship between students and higher education institutions, it is important to recognize how the relationship originated and developed. The student-university relationship was first understood through the doctrine of *in loco parentis*.[26]

[22] *See* Lisa Tenerowicz, Note, *Student Misconduct at Private Colleges and Universities: A Roadmap for "Fundamental Fairness" in Disciplinary Proceedings*, 42 B.C. L. REV. 653, 657 (2001) ("Although several different theories have been suggested, including tort law, association law, and *in loco parentis*, courts most often have employed contract law principles when reviewing university disciplinary procedures." (footnote omitted)).

[23] *See infra* Part II.

[24] *See infra* Part IV.

[25] *See id.*

[26] In Loco Parentis, DICTIONARY.COM, https://www.dictionary.com/browse/in-loco-parentis (last visited Jan. 16, 2022) (defining *in loco parentis* as Latin for "in the place or role of a parent"); Edward N. Stoner II & John Wesley Lowery, *Navigating Past the "Spirit of Insubordination": A Twenty-First Century Model Student Conduct Code with a Model Hearing Script*, 31 J. COLL. & U.L. 1, 8 (2004) (citing Donald R. 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, 401 (1984)).

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Developed in English law in the early 1800s, *in loco parentis* initially arose as a tort principle used to resolve disputes between tutors and pupils.[27] More specifically, tutors used the theory as "a defense in battery cases brought by students"—particularly to argue that parents, by leaving their children in the care of a tutor at school, delegated decision-making and disciplinary authority to the tutor.[28] Accordingly, because children were unable to sue their parents for "disciplinary decisions" and because parents had the "duty to educate their children," tutors could not be held liable for disciplining students while in their custody.[29]

Like many other legal doctrines, *in loco parentis* made its way across the pond and eventually expanded to include a wide variety of protections for academic institutions in the United States.[30] For instance, the doctrine extended to "prevent courts or legislatures from intervening in the student-university relationship, thus insulating the institution from criminal or civil liability or regulation."[31] In other words, *in loco parentis* created "a general defense or form of immunity for the university in cases brought by students."[32] "[C]onstitutional rights stopped at the college gates" and institutions preserved control over students by implementing and strictly enforcing "character-building" rules.[33]

As exhibited in a multitude of cases from the 1800s to the 1960s, *in loco parentis* persisted through the first part of the twentieth century.[34] One such example of its influence comes from *People ex rel. Pratt v. Wheaton College*, a case that arose after a student, Pratt, violated college rules by joining a secret society.[35] Upon

[27] *See* Cheryl McDonald Jones, In Loco Parentis *and Higher Education: Together Again?*, 1 CHARLESTON L. REV. 185, 185–86 (2006).

[28] *Id.* at 187.

[29] *Id.* at 186 (quoting Robert D. Bickel & Peter F. Lake, *Reconceptualizing the University's Duty to Provide a Safe Learning Environment: A Criticism of the Doctrine of* In Loco Parentis *and the Restatement (Second) of Torts*, 20 J. COLL. & U.L. 261, 264 (1994)).

[30] *See* McDonald Jones, *supra* note 27, at 187.

[31] Jason A. Zwara, *Student Privacy, Campus Safety, and Reconsidering the Modern Student-University Relationship*, 38 J. COLL. & U.L. 419, 432 (2012).

[32] McDonald Jones, *supra* note 27, at 187.

[33] Philip Lee, *The Curious Life of* In Loco Parentis *at American Universities*, 8 HIGHER EDUC. REV. 65, 67 (2011).

[34] Stoner II & Lowery, *supra* note 26, at 8.

[35] People *ex rel.* Pratt v. Wheaton Coll., 40 Ill. 186, 186 (1866).

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learning of Pratt's actions, the college faculty suspended him from the institution.[36] Pratt's father then "applied for a mandamus to compel the college to re-instate him as a student."[37] In concluding that the college had the power to make and enforce the rule banning participation in secret societies, the court focused on the private, incorporated nature of the college, as well as the powers granted to the institution:

> A discretionary power ha[d] been given [to the college] to regulate the discipline of their college in such a manner as they deem proper, and so long as their rules violate neither divine nor human law, we have no more authority to interfere than we have to control the domestic discipline of a father in his family.[38]

Nearly fifty years later, the Court of Appeals of Kentucky reiterated the same position in *Gott v. Berea College*.[39] In *Gott*, the appellant operated a restaurant across the street from Berea College.[40] For years, the "governing authorities" of Berea distributed a "Student Manual" to the student population.[41] The Student Manual included a tenet that restricted students from entering "eating houses and places of amusement in Berea" that were not controlled by the College—i.e., Gott's restaurant.[42] After a few students were expelled for violating this rule, Gott brought suit against Berea.[43] In determining "whether the rule forbidding students entering eating houses was a reasonable one, and within the power of the college authorities to enact," the court noted that "college authorities stand *in loco parentis* concerning the physical and moral welfare, and mental training of the pupils."[44] Because the restaurant and entertainment restriction rule fell within the college's scope of authority, the court upheld it as valid.[45]

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[36] *Id.*

[37] *Id.*

[38] *Id.* at 187.

[39] *See* McDonald Jones, *supra* note 27, at 187 (citing Gott v. Berea Coll., 161 S.W. 204 (Ky. 1913)).

[40] *See* Gott v. Berea Coll., 161 S.W. 204, 205 (Ky. 1913).

[41] *Id.*

[42] *Id.*

[43] *See id.*

[44] *Id.* at 206.

[45] *Id.* at 207.

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As demonstrated by the aforementioned cases, as well as a multitude of others,[46] the doctrine of *in loco parentis* defined the student-university relationship for decades, providing higher education institutions with complete authority to discipline students.[47] Consequently, as courts "remained hostile to the student litigant," nearly all university rules challenged in court were upheld.[48]

B. Shifting Away from In Loco Parentis

The 1960s brought major changes to the American higher education system. These changes were driven by a multitude of factors that revolved around the growing access and national investment in the higher education system.[49] For one, mounting concerns over Cold War competition caused the government to increase its investment in sponsored research and development during the 1950s and 1960s.[50] Such investment by the U.S. government funded the study of foreign languages, anthropology, political sciences, physics, and chemistry.[51] American society watched as new campuses opened, existing campuses expanded, and college enrollment boomed.[52] The federal government's increased focus and support of student financial aid programs, as well as the addition of "readily accessible, low-priced continuing education" community college programs, vastly increased Americans' access to higher education.[53]

As the higher education system changed and more students matriculated to college campuses, the perception of college students also shifted.[54] Students were

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[46] *See, e.g.*, Barker v. Bryn Mawr Coll., 122 A. 220, 221 (Pa. 1923) (upholding a college code that granted its president the "power to impose the more serious penalties for all non-academic offenses" and further, granted the college the "right to exclude[,] at any time[,] students whose conduct or academic standing it regards as undesirable.").

[47] Brian Jackson, Note, *The Lingering Legacy of* "In Loco Parentis*": An Historical Survey and Proposal for Reform*, 44 VAND. L. REV. 1135, 1148 (1991).

[48] *Id.*

[49] John R. Thelin et al., *Higher Education in the United States: Historical Development, System*, STATE UNIV., https://education.stateuniversity.com/pages/2044/Higher-Education-in-United-States.html (last visited May 9, 2023).

[50] *See id.* (noting that, due to the impact of federal funding, between fifty to one hundred colleges and universities positioned themselves as "Federal Grant Universities" during the period).

[51] *See id.*

[52] *Id.*

[53] *Id.*

[54] *See* McDonald Jones, *supra* note 27, at 185.

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seen as more independent, more inquisitive and more recalcitrant—demanding that their opinions on American politics, war, and racial injustice be heard and respected.[55] The old perception of college students—juveniles in need of parental guidance—gave way to images of student radicalism and protests.[56] Professors began to "rankle[] at their duties as controllers of the gate and question[] the direction of change in American higher education."[57] Soon enough, the "hold [on] undergraduate rebellion quickly evaporated."[58]

Courts began to acknowledge these changes and their "dramatic impact on both the campus atmosphere and the relationship between students and the university."[59] This resulted in courts allowing a "significantly greater number of students' claims, beginning with those based in contract theories and constitutional rights."[60] By challenging the universities, students began to break down the precedential strength of *in loco parentis* and build on recognized constitutional rights of university students.[61]

C. Dixon v. Alabama

The landmark case, *Dixon v. Alabama State Board of Education*, marked a turning point in the student-university relationship and the role of *in loco parentis*.[62] In *Dixon*, six African American college students took part in a demonstration after being denied service at a lunch grill in the Montgomery County Courthouse.[63] The college expelled the students for their role in the demonstration but did not provide the students with notice or a hearing; the college also did not provide an opportunity to appeal the decision.[64] The students brought suit, arguing that the college deprived

[55] Helen Lefkowitz Horowitz, *The 1960s and the Transformation of Campus Cultures*, 26 HIST. EDUC. Q. 1, 11–13 (1986).

[56] *See id.* at 12 (discussing the exaggerated media coverage of student participation in radicalism during the 1960s).

[57] *Id.* at 14.

[58] McDonald Jones, *supra* note 27, at 188.

[59] *Id.*

[60] *Id.*

[61] *See* Lee, *supra* note 33, at 71.

[62] *Id.* at 72.

[63] Dixon v. Ala. State Bd. of Educ., 294 F.2d 150, 152 n.3 (5th Cir. 1961).

[64] *See id.* at 154–55.

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them of rights protected by the Due Process Clause of the Fourteenth Amendment.[65] While the lower court believed the dispute to be governed by *in loco parentis*,[66] the Fifth Circuit disagreed.[67] The Fifth Circuit held that a public institution could not deny students their constitutional rights.[68] In doing so, the court outlined a multitude of due process protections afforded to college students during the expulsion process—such as notice of the specific charges and grounds justifying expulsion, the right to hearings, and the right to inspection.[69]

Even though *Dixon* "limited its holding to public institutions by observing 'that the relations between a student and a private university are a matter of contract' whereby students . . . can waive their due process rights through agreements with the colleges,"[70] it still served as the first instance of students' constitutional rights being welcomed (and safe) on a college campus. In other words, it marked the demise of the *in loco parentis* doctrine as an all-encompassing protection to higher education institutions in reprimanding their students.

*D. Post-*Dixon*: Contractual Relationships & the Bystander Era*

As colleges and universities no longer received the sweeping immunity previously recognized by the *in loco parentis* doctrine, "several trends emerged in higher education law."[71] For instance, courts began to replace the doctrine with an implied contract theory where higher education "institutions entered into contracts with their students to provide . . . educational services in exchange for students

[65] *See id.* at 151 n.1.

[66] Dixon v. Ala. State Bd. of Educ., 186 F. Supp. 945, 951 (M.D. Ala. 1960) (stating that "the courts have consistently upheld the validity of regulations that have the effect of reserving to the college the right to dismiss students at any time for any reason without divulging its reason other than its being for the general benefit of the institution").

[67] *Dixon*, 294 F.2d. at 158–59.

[68] *See id.*

[69] *Id.* (providing that the student should be given notice on the "specific charges and grounds which, if proven, would justify expulsion," granted a hearing for the opportunity to testify, and provided with "a report open" for inspection).

[70] Lee, *supra* note 33, at 72.

[71] Peter F. Lake, *The Rise of Duty and the Fall of* In Loco Parentis *and Other Protective Tort Doctrines in Higher Education Law*, 64 MO. L. REV. 1, 9–11 (1999).

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paying certain fees and obeying certain rules."[72] This contractual relationship was understood to bind both parties. On one hand, the student was obligated to pay "necessary fees" and "compl[y] with other reasonable requirements" required by the university.[73] On the other hand, the university was obligated to "to permit a student in good standing to continue the particular course for which he . . . entered."[74]

The contractual nature of the relationship provided courts with the ability to review and hold each party accountable to the terms of the agreements, especially those processes prescribed by the institutions.[75] And because "no specific contract document [was] signed [by the students] at the time of application, admission, or registration[,]" acceptance of these contracts was inferred by the students' very entry onto college campuses.[76]

The burden of potential liability from these contracts motivated colleges and universities to respond by crafting "written student disciplinary codes."[77] Beyond "educating students on how to behave appropriately as members of an academic community," the codes provided students with notice of policies, procedures, and rules.[78] Most importantly, however, these codes defined the scope of responsibility and oversight held by the institutions. In other words, the codes of conduct detailed when and where universities were liable versus when and where universities were merely witnesses or bystanders to student conduct.

Throughout the 1970s and 1980s, courts across the country demonstrated a willingness to support the universities as bystanders.[79] For instance, in *Campbell v. Board of Trustees*, the court refused to impose liability on a college's board of trustees after a female student was injured by a male student driving who drunkenly

[72] Buchter, *supra* note 21, at 254; Stoner II & Lowery, *supra* note 26, at 8 (citing Elizabeth M. Baldizan, *Development, Due Process, and Reduction: Student Conduct in the 1990's*, 82 NEW DIRECTIONS FOR STUDENT SERVS. 29, 3–31 (1998)).

[73] Buchter, *supra* note 21, at 255 (quoting Samson v. Trs. of Columbia Univ., 167 N.Y.S. 202, 204 (Sup. Ct. 1917)).

[74] *Id.*

[75] Stoner II & Lowery, *supra* note 26, at 10.

[76] Buchter, *supra* note 21, at 256–57 (explaining the basic contract principle whereby acceptance of an offer can be inferred from the parties' actions).

[77] Stoner II & Lowery, *supra* note 26, at 11.

[78] *Id.* at 11 & n.35.

[79] *See id.* at 77–79.

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drove into a ditch.[80] As the male student consumed the alcoholic beverages on college premises, the female student argued that the college had the authority to control the male student and thus, carried a duty to control students' consumption and dangerous behavior.[81] Focusing on the "changed role of college administration vis-à-vis college students," the court reiterated that college students "are not children" but instead, "adult citizens, ready, able, and willing to be responsible for their own actions."[82] Seeing no "recognized duties or theories of third party liability" to support the claim, the court upheld the lower court's grant of summary judgment.[83]

*E. Post-*Dixon*: Duty-Focused Relationship*

In the 1980s and 1990s, courts began to shift from the "bystander era" to the "duty era." Colleges and universities found themselves with a "duty to take reasonable measures [to] keep their students safe."[84] Considering the courts' "implicit search for a balance between university authority[,] student freedom and shared responsibility for student safety/risk," the duty era worked to resolve the gap universities left during the bystander era.[85]

The duty-focused era is best illustrated by *Furek v. University of Delaware*.[86] In *Furek*, a university student brought suit after suffering chemical burns during a fraternity hazing incident.[87] In assessing the university's lack of supervision over the conduct of its students, the court recognized the demise of *in loco parentis*—noting that the doctrine had "all but disappeared from the face of the realities of modern college life where students are now regarded as adults in almost every phase of community life."[88] Even so, the court found a duty-focused relationship between the university and its students, holding that while the university is "not an insurer of the

[80] *See* Campbell v. Bd. of Trs. of Wabash Coll., 495 N.E.2d 227, 228–29 (Ind. Ct. App. 1986).

[81] *See id.* at 229.

[82] *Id.* at 232, 232 n.4.

[83] *Id.* at 232–33.

[84] Lee, *supra* note 33, at 79.

[85] *Id.* (quoting ROBERT D. BICKEL & PETER F. LAKE, THE RIGHTS AND RESPONSIBILITIES OF THE MODERN UNIVERSITY: WHO ASSUMES THE RISKS OF COLLEGE LIFE? (1999)).

[86] *Id.* at 79–80 (citing Furek v. Univ. of Del., 594 A.2d 506, 517 (Del. 1991)).

[87] *Id.* at 79 (citing *Furek*, 594 A.2d at 510).

[88] *Furek*, 594 A.2d at 516–17 (quoting Bradshaw v. Rawlings, 612 F.2d 135, 139 (3d Cir. 1979)).

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safety of its students nor a policeman of student morality," the school has a duty to supervise those foreseeable activities "where it exercises control."[89]

The scope of the duty-oriented relationship was further demonstrated in *Pitre v. Louisiana Tech University*.[90] In *Pitre*, a Louisiana Tech University ("Tech") student was severely injured while sledding on-campus.[91] Following the accident, the student and his parents sued Tech, arguing that the university had a duty to protect the student from reasonable and foreseeable harm.[92] At trial, Tech presented evidence of a bulletin issued by their Housing Office, which specifically discouraged sledding on some hills.[93] While the trial court "determined that Tech owned *no duty* to protect [the student] from his voluntary actions," the Second Circuit Court of Appeal of Louisiana concluded that a duty did exist between the university and its resident student:

> Tech had a duty arising out of its relationship with plaintiff as a resident student. Universities guide many aspects of student life by undertaking to provide food, housing, security and a wide range of extracurricular activities. In attempting to regulate the conduct of its students, Tech was obligated to take some reasonable and necessary steps to protect these students from foreseeable harm.[94]

*F. Post-*Dixon*: The Entitlement Relationship*

In time, a final shift in the doctrinal analysis of the student-university relationship occurred. Inspired in part by *Dixon*, "the idea of higher education as an *entitlement* . . . conditioned the subsequent conception of students as possessing contractual rights."[95] As explained by Melear, this "entitlement" resulted in a characterization of students as consumers with a property interest in their education

[89] *Id.* at 522.

[90] *See* Pitre v. La. Tech Univ., 596 So. 2d 1324, 1332 (La. Ct. App. 1992).

[91] *See id.*

[92] *See id.*

[93] *See id.*

[94] *Id.* (citing Fox v. Bd. of Supervisors of La. State Univ. & Agric. & Mech. Coll., 576 So. 2d 978 (La. 1991)).

[95] K.B. Melear, *The Contractual Relationship Between Student and Institution: Disciplinary, Academic, and Consumer Contexts*, 30 J. COLL. & U.L. 175, 178 (2003).

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and of universities as educational service providers.[96] Accordingly, this relationship provided students with greater privileges in both public and private institutions, specifically with regard to "a means to seek redress of their disagreements with colleges and universities."[97]

Courts embraced this relationship and "held that contracts between student and institution can be created expressly in written or oral form, or created impliedly from the conduct of the parties."[98] And while contracts related to housing, food service, and other auxiliary enterprises of a college or university were the most likely to involve classic contract principles, courts also consistently evaluated "lawsuits involving disputes over tuition, fees, scholarships, loans and related pecuniary matters" through the lens of contract law.[99]

What makes this era and line of thinking distinct from the contractual era is that students rely on this perspective to challenge institutional disciplinary policies and stated disciplinary procedures.[100] They use the contracts with their respective institutions to understand the nature of their respective roles—i.e., what they, as students, are and are not permitted to do. And courts, in their evaluation of institutional disciplinary policies, uphold this relationship by "apply[ing] strict standards of construction and substantial compliance to express statements made in university publications[,]" including the student handbook, the honor code, and the university catalog.[101]

II. MODEL RULES AND LAW SCHOOL HANDBOOKS

A. Introduction to the Law School-Law Student Contract

Having explained that the modern student-university relationship is understood as contractual—a contract specifically dictated via the student code of conduct—this Note now turns to discuss the "contract" between law students and law schools. Specifically, it examines the logic behind including the Model Rules in said contract. Given that the student codes of conduct guide, and define, the legal relationship—

[96] *Id.* at 178.

[97] *Id.*

[98] *Id.* at 179.

[99] *Id.*

[100] *See id.* at 182.

[101] *Id.* at 182, 187.

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and thus, a school's authority to discipline students—it is important and necessary to question what *exactly* should be (or not be) included in this contract.

Many contemporary law school student handbooks and codes of conduct incorporate language from the Model Rules. Specifically, out of the 199 American Bar Association ("ABA") accredited law schools in the United States,[102] at least five schools include language in their Code of Conduct that specifically cites to the Model Rules.[103] While some of the institutions clearly define just how the standards set by the ABA will be incorporated into the law schools' conduct standards, others remain vague.[104]

The question becomes whether including a reference, and thus, binding law students to the Model Rules, is necessary during law school.

There are several relevant factors to consider in questioning the appropriateness of the Model Rules in law school codes of conduct and thus, disciplinary structures. Specifically, it is important to evaluate the origins of the Model Rules, the ABA's law school requirements for admissions, the nature of post-law school employment,

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[102] *See List of ABA-Approved Law Schools in Alphabetical Order*, AM. BAR ASS'N, https://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools/in_alphabetical_order/ (last visited Feb. 2, 2023).

[103] *See ABA-Approved Law Schools*, AM. BAR ASS'N, https://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools/ (last visited Feb. 25, 2022); *see, e.g.*, CASE WESTERN RESERVE UNIVERSITY 2021–2022 STUDENT HANDBOOK 5 (2021), https://case.edu/law/sites/case.edu.law/files/2021-08/2021-2022%20Student%20Handbook.8.13.2021.pdf (requiring that "every law student must abide by the American Bar Association's Model Rules of Professional Conduct"); AM. UNIV., AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW HONOR CODE art. 2, § B (2022), https://www.wcl.american.edu/studentaffairs/honorcode/#:~:text=Washington%20College%20of%20Law%2C%20American,%2C%20clinical%2C%20and%20co%2Dcurricular (noting that the "standards set forth in the American Bar Association Model Rules of Professional Conduct shall be deemed incorporated" into their Honor Code); UNIVERSITY OF MONTANA ALEXANDER BLEWETT III SCHOOL OF LAW STUDENT HANDBOOK 3 (2022), https://www.umt.edu/law/files/school-of-law_student-handbook_2022-2023.pdf (explaining that the school "requires law students to conform to similar standards" as those standards of conduct prescribed by the "American Bar Association and the Montana Supreme Court").

[104] Of course, this disciplinary element within the Code of Conduct is in addition to the ABA's required Professional Responsibility course. *See* AM. BAR ASS'N, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2017–2018, at 16 (2017), https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2017-2018ABAStandardsforApprovalofLawSchools/2017_2018_standards_chapter3.authcheckdam.pdf ("Standard 303. Curriculum: a law school shall offer a curriculum that requires each student to satisfactorily complete at least the following: (1) one course of at least two credit hours in professional responsibility that includes substantial instruction in rules of professional conduct, and the values and responsibilities of the legal profession and its members.").

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the predictability of the Character and Fitness requirements, and finally, student body demographics.

1. Origins of the Model Rules

Evaluating the appropriateness of including the Model Rules in law school codes of conduct requires an understanding of the origin and subsequent development of the Model Rules and Canons.[105]

The Canons originated from the nineteenth century Alabama State Bar Association's Code of Ethics.[106] Adopted in 1887, the Alabama Code "grew out of a national trend . . . [of] increas[ing] professionalism [within] the legal community in the post-Civil War era."[107] Specifically, American attorneys, in attempting to rebuild the economy, society, and legal structure after the war, turned to "professionalism" to restore a sense of order, stability, and a higher moral standard into the practice of law."[108] Fittingly, support for professional ethics codes became common among attorneys across the United States and ultimately resulted in eleven states adopting a similar version of the Alabama Code by 1908.[109]

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[105] The current ABA Model Rules of Professional Conduct were adopted in 1983. *Model Rules of Professional Conduct*, AM. BAR ASS'N, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/ (last visited Oct. 22, 2023). However, before adoption in 1983, "the ABA model [of ethics rules] was the 1969 Model Code of Professional Responsibility." *Id.* "Preceding the [1969] Model [C]ode were the 1908 Canons of Professional Ethics[.]" *Id.* This Note uses "Model Rules and Canons" as reference to the all three ABA models.

[106] John M. Tyson, *A Short History of the American Bar Association's Canons of Professional Ethics, Code of Professional Responsibility, and Model Rules of Professional Responsibility: 1908–2008*, 1 CHARLOTTE L. REV. 9, 10 (2008).

[107] *Id.*; Allison Marston, *Guiding the Profession: The 1887 Code of Ethics of the Alabama State Bar Association*, 49 ALA. L. REV. 471, 472 (1997). Marston further notes that the original author of the Alabama Code was Thomas Goode Jones, a twice elected Governor of Alabama who fought for the Confederacy in the Civil War. *Id.* at 478. Outside of his legal and political career, Jones was an advocate for "racial hierarchy" and during his tenure as governor, the state passed "laws segregating blacks and whites on common carriers." *Id.* at 479. Jones also "helped draft the 1901 Alabama Constitution, which established racial segregation as a fundamental principle of social organization in the state." *Id.*

[108] *See* Marston, *supra* note 107, at 472.

[109] *See id.* at 472 n.3 (quoting Katherine A. Smith, *Truth or Dare: The Rules of Professional Conduct and Stretching the Discovery Boundaries*, 16 MISS. COLL. L. REV. 455, 460–61 (1996)) (noting that the Alabama State Bar was adopted or inspired by Professor George Sharswood's lectures at the University of Pennsylvania); Tyson, *supra* note 106, at 10.

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While encouraging that post-Civil War attorneys were somewhat unified by a desire to rid the profession of the "odor of corruption,"[110] it is also "puzzling," given the timing and individuals involved.[111] For one, the original Canons were created by the socioeconomic elite, as the drafting lawyers in each jurisdiction "came 'predominately from families of wealth, status, and importance.'"[112] And even while "a higher percentage of new lawyers [entering the profession came from] middle class" backgrounds, the more prestigious and legal elite were "solid Republic, conservative in outlook, standard Protestant in faith, [and] old English in heritage."[113] Accordingly, the Canons were drafted by those men and reflected their respective views of the world:

> The essential historical backdrop when the Canons were drafted and adopted one hundred years ago was concern by the leaders of the ABA—a de facto elite men's club—that those from other socioeconomic and ethnic strata, who were entering the profession in increasing numbers were not up to what they believe were their own high and lofty standards.[114]

This self-serving attitude reflects the mindset of those drafting the original code in Alabama, and thus, explains the loftiness of the first drafted Canons.[115] As such, elitism was woven into the very language of the first Canons, and served to disenfranchise aspiring lawyers from more modest and diverse backgrounds.

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[110] Carl Horn III, *The Evolution of Lawyer Self-Regulation: 1908 to 2008 in a Nutshell*, 1 CHARLOTTE L. REV. 3, 4 (2008) (quoting LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 648 (2d ed. 1985)).

[111] Marston, *supra* note 107, at 472.

[112] Horn III, *supra* note 110, at 4 (quoting LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 648 (2d ed. 1985)).

[113] *Id.* at 5 (quoting LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 638 (2d ed. 1985)).

[114] *Id.* This is further demonstrated by the "1906 'Report of the [ABA] Committee on [the] Code of Professional Ethics[,]'" which stated that the legal profession was "increasingly subject to the corroding and demoralizing influence of those who are controlled by graft, greed and gain or other unworthy motive," including the "shyster, the barratrously inclined, the ambulance chaser, [and] the member of the Bar with a system of runners." *Id.* (quoting Report of the Committee on Code of Professional Ethics, 30 A.B.A. REP. 600, 601 (1906)).

[115] *Id.*

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B. Educational Value & Employment

Another element in the assessing whether the Model Rules should be incorporated in law school codes of conduct and thus, disciplinary considerations, is the nature of legal education and employment outcomes. This is an important element because, while there is "no uniformity among law schools with regard to the purposes for which they educate students," one consistent goal of law schools is positive post-graduation employment outcomes.[116]

Driven in part by rising tuition rates—and the correlated increases in student debt[117]—prospective students increasingly question the value of law school in relation to other career options.[118] In order to ease students' fears regarding their ability to successfully pay back their student loans, law schools market their programs as successful producers of *employed post-graduates*.[119] However, as some scholars have pointed out, this might paint a "falsely rosy picture of employment outcomes" to prospective law students; while the majority of law students enter into Juris Doctor ("J.D.") programs with an expectation of joining either private law firms or government agencies/offices, the weak entry-level job market has left many students with more limited prospects.[120]

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[116] Chuma Himonga, *Goals and Objectives of Law Schools in Their Primary Role of Educating Students: South Africa—The University of Cape Town School of Law Experience*, 29 PENN ST. INT'L L. REV. 41, 42 (2010).

[117] The 2020 Law School Survey of Student Engagement ("LSSSE") Special Report found that in 2019, 39% of law student participants owed more than $100,000 in student loan debt, up from 18% in 2004. CTR. FOR POSTSECONDARY RSCH., IND. UNIV., 2020 LAW SCHOOL SURVEY OF STUDENT ENGAGEMENT SPECIAL REPORT 10 (2020), https://lssse.indiana.edu/wp-content/uploads/2015/12/LSSSE_Annual-Report_Winter2020_Final.pdf.

[118] Alfred L. Brophy, *Ranking Law Schools with LSATs, Employment Outcomes, and Law Review Citations*, 91 IND. L.J. SUPP. 55, 55 (2015).

[119] Ben Trachtenberg, *Law School Marketing and Legal Ethics*, 91 NEB. L. REV. 866 (2013).

[120] *Id.* at 877 (discussing the pervasiveness of dishonesty in marketing schemes among American law schools); CTR. FOR POSTSECONDARY RSCH., IND. UNIV., *supra* note 117 (explaining that as of 2019, 45% of surveyed law students expected to be employed in private firms, while 29% expected to join government agencies, judicial clerkships, prosecutor's office and public defender's offices); Stephanie Francis Ward, *2020 Law School Grads Having Harder Time Finding Jobs, Data Shows*, ABA J. (Apr. 20, 2021, 3:57 PM), https://www.abajournal.com/news/article/data-shows-decrease-in-long-term-full-time-jobs-for-2020-law-school-grads#:~:text=2020%20law%20school%20grads%20having%20harder%20time%20finding%20jobs%2C%20data%20shows,-By%20Stephanie%20Francis&text=Image%20from%20Shutterstock.com.,for%20the%20class%20of%202019 (demonstrating an increase in unemployment for the class of 2020 relative to previous classes of law school graduates).

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In response to the changing legal market, a growing new category of jobs has arisen: "J.D. Advantage."[121] First defined by the NALP in 2001,[122] J.D. Advantage positions are those job opportunities that do not require bar passage, but where a J.D. degree provides a demonstratable advantage in performing the job:

> A position . . . for which the employer sought an individual with a J.D., and perhaps even required a J.D., or for which the J.D. provided a demonstratable advantage in obtaining or performing the job, but which does not itself require bar passage or an active law license or involve practicing law. Examples of positions for which a J.D. is an advantage include corporate contracts administrator, alternative dispute resolution specialist, government regulatory analyst, FBI agent, and accountant. Also included might be jobs in personnel or human resources, jobs with investment banks, jobs with consulting firms, jobs doing compliance work in business and industry, jobs in law firm professional development, and jobs in law school career serves offices, admissions offices, or other law school administrative offices. Doctors or nurses who plan to work in a litigation, insurance, or risk management setting, or as expert witnesses, would fall into this category, as would journalists and teachers (in a higher education setting) of law and law related topics. It is an indicator that a position does not fall into this category if a J.D. is uncommon among persons holding such a position.[123]

C. Variability of Character & Fitness

The justification for the Model Rules' inclusion within student handbooks has been based, in part, on the fact that law school graduates applying for bar admission must meet—or "pass"—the jurisdiction's Character and Fitness investigation. Historically justified by a need to "protect the public from 'morally unfit' lawyers" and to deter "questionable characters from even seeking to practice law to begin with," Character and Fitness is used by every state bar:[124]

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[121] *Detailed Analysis of JD Advantage Jobs*, NALP (May 2013), https://www.nalp.org/jd_advantage_jobs_detail_may2013.

[122] *Id.*

[123] AM. BAR ASS'N, 2013 EMPLOYMENT QUESTIONNAIRE (FOR 2012 GRADUATES): INFORMATION & DEFINITIONS 4 (2013), https://law.scu.edu/wp-content/uploads/careers/2013EmploymentQuestionnaireDefinitionsandInstructions%20(1).pdf.

[124] Lindsey Ruta Lusk, Note, *The Poison of Propensity: How Character and Fitness Sacrifices the "Others" in the Name of "Protection,"* 2018 U. ILL. L. REV. 345, 364 (2018); *id.* at 356.

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> In preparation for Character and Fitness, the ABA advises students to answer two questions personally: "1. Is there anything in my past (or my present) that might bring my character and fitness into question?" And if the answer to the first question is yes, then: "2. If my character is in question, what can I do now to begin to rehabilitate my reputation?"[125]

And eventually, upon commencement of the formal bar application process, students are left to complete the Character and Fitness questionnaire, which subjects applicants to the Model Rules as part of the application review process.[126] The application is then reviewed by the investigation entity (either through the respective state bar itself or through the NCBE) to determine whether the application meets the requisite "good moral character" needed to obtain a license to practice law.[127]

In theory, Character and Fitness investigations play an important role in the assessment of future advocates. But in practice, Character and Fitness investigations are widely variable. This is because there is "no clear guidance on what constitutes (or is even enough) rehabilitation" and further, what warrants a complete ban on admission.[128] Further, even if a candidate fails the initial screening of their questionnaire answers (i.e., their behavior is deemed inappropriate on initial review), he is subject to a preliminary investigation; because the investigation "may include things such as contacting schools, employers, courts, . . . other parties . . . and any other relevant information[,]" the initial review and further investigation may return different results due to a different scope of review and subjective nature of the investigative role/body.[129] Accordingly, the results of these examinations can lead to a variety of outcomes, including: full admission; provisional licenses; conditional admission with mandatory supervision; or continued treatment for mental-health or substance-abuse issues.[130]

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[125] *See id.* at 356–57.

[126] *See id.* at 357 (explaining that questionnaires vary from state to state, but in most part, they follow ABA's Model Rules of Professional Conduct).

[127] *See id.* at 357–58. As part of the Character and Fitness decision-making process, applicants are asked to disclose certain types of action, such as unlawful conduct, academic misconduct, neglect of financial responsibilities, employment misconduct, violations of court orders, evidence of mental or emotional instability or substance abuse issues. *Id.* at 358 (citing Mary Dunnewold, *The Other Hurdle: The Character and Fitness Requirement*, 42 STUDENT LAW. (Dec. 1, 2013) (internal quotations omitted)).

[128] *Id.* at 357.

[129] *Id.* at 358.

[130] *Id.* at 359.

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1. Evaluating the Appropriateness

Taking the historical origins of the Model Rules alongside the changing employment prospects for J.D. graduates, one might question whether law school codes of conduct should include language subjecting law students to the Model Rules while in law school.

On one hand, law schools have justifiable reasons to include the Model Rules within their respective codes. The codes of conduct serve as the contract for the student university relationship; within the codes, references to the Model Rules ensure that law students understand their conduct requirements—i.e., what they, as students, are and are not permitted to do. As the law school's purpose is undeniably to educate and produce candidates for admission to state bars, it is the law schools' obligation to their students to ensure that they are aware of and carry the requisite characteristics to achieve that purpose.

On the other hand, there are a multitude of reasons why law schools might opt not to include such a reference to the Model Rules. First, by incorporating the Model Rules within the code, law schools appoint themselves as the guiding "authority" for disciplinary matters within the institution. But as demonstrated by Powers's case,[131] when law school administrators pass disciplinary judgment based on a predictive Character and Fitness assessment, they often make incorrect judgments.[132] That is, while law school administrations are often comprised of former or practicing lawyers, they are not infallible arbiters of who will, and will not, satisfy Character and Fitness requirements for state licensure. Thus, it is unreasonable to put this onus on administrators, as they should not be the gatekeepers or granted authority to pass judgment on a student's "character" or "fitness" outside the confines of the academic environment. To place such a burden on the law school is effectively equivalent to reinstating the doctrine of *in loco parentis*—administrators and conduct officers should not be placed in the position of parental guidance and moral authority.

Further, even if law schools could make predictable decisions as to whether students would *definitely* (or *definitely not*) be admitted to a particular state bar, law school discipline or expulsion based on an inability to be admitted into a state bar is unnecessary. Given the growing number of J.D. Advantage employment opportunities that do not require state bar licenses, students may pursue or continue their education merely for the sake of professional and personal development. To put

[131] *See supra* text accompanying notes 1–21.

[132] *See* Harris, *A 2nd Chance*, *supra* note 16.

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it more neatly, not everyone who goes to law school ends up becoming a lawyer, but the current system fails to account for that. By including the Model Rules within the student and university's contract, law schools limit the professional possibilities of students who the schools deem to be "unfit." In so doing, law schools perpetuate the same elitism that imbued the original Canons on which the Model Rules were based and reinforce a pattern of disenfranchisement of students from non-traditional backgrounds.

Ultimately, the addition of the Model Rules into the contract between students and law schools may be an infiltration of the *in loco parentis* doctrine into the contractual relationship. This provision of authority unto law school administrations—one that students are unable to negotiate out of or challenge—runs contrary to two centuries of developments in the student-university relationship.

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