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Gregory E. Michael

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GREGORY E. MICHAEL*

Education is of such a nature that, necessarily, those who have acquired it must assist and protect those who desire to secure it. It comes only after long study and practical experience. Unless it is upon a sound basis and in the hands of competent teachers it must result in frustration and disappointment, usually during a period of life that cannot be wasted.[1] (Emphasis supplied.)

Written over 35 years ago, these words may be even more relevant today, especially if a "sound basis" is taken to include the legal relationship between student and school.[2] The numerous changes in judicial interpretation of this relationship, make it questionable whether a "sound basis" now exists. Its absence is, in turn, a factor to be considered when investigating the volatile academic atmosphere on many college and university campuses.[3]

For years the courts have applied different theories to describe the legal relationship existing between a school and its students, which normally results in an unequal balance of rights, with the school dominating.[4] Consequently, student rights have not been adequately protected, causing the once passive student to question the system which controls and directs

* J.D., Suffolk University Law School, 1972; Lead Article Editor of their *Law Review*.

[1] Institute of the Metropolis, Inc. v. University of State of New York, 159 Misc. 529, 289 N.Y.S. 660, 666 (Sup. Ct. 1936).

[2] "School" as used herein will be primarily employed to describe public and private colleges and universities awarding associate, bachelor, or higher degrees. It is also meant to denote the administrative portion of the entire academic community composed also of students and teachers. Thus, "school" comprises the trustees, administrators, and officers of the academic community.

[3] A culmination of student unrest was probably the shooting incident at Kent State. Newspaper accounts of that period, Spring, 1970, reveal the extent of campus disorder leading to that event. It should be noted that student dissent cannot be solely attributed to the war in Southeast Asia. Disagreement over student rights and ability to share in the school administrative functions also play a large role in causing campus unrest. *See* American Association of University Professors—American Council on Education, *Statement on Government of Colleges and Universities*, 52 AAUP BULL. 375 (1966).

[4] *See* p. 418 *infra*.

his life for the period of his study. The reason why different theories have been accepted and used by the courts is difficult to ascertain and can be answered only through a general understanding of the theories, themselves.

The present statement examines past and present theories, pointing up their strengths and weaknesses and the many rules which have developed from their use. The relationship between a school and its teachers is also examined in order to provide a full and proper framework for understanding. The proposed unitary theory, which may help to resolve the dilemmas of the legal relationship within and without the system, centers on the primary responsibilities and goals of all associated members. Its result should be increased stability on the campus.

Varied Relationship Theories

Seven major theories are advanced to describe the legal relationship existing between a school and its students. Most familiar is *in loco parentis*, which places the school in the position of a student's parents, and which evolved to justify the ability of private tutors and teachers to inflict physical punishment upon students. The courts reasoned that because a parent could punish his child, so also could the substituted parent, *i.e.*, the tutor or the teacher.[5] In the past, and when currently used, the influence of *in loco parentis* is primarily felt in the case of private elementary and secondary schools.[6] It "has the virtue of emphasizing the need for the school to participate in the process of rearing a child." [7] However, it cannot be "purely" used, since a school also needs the right to dismiss or expel disruptive students.[8] Removing a child from the family structure is not a normal part of the true parent-child relationship.[9] Also, its advantages seem rather superficial when one considers who is to interpret correctly the role of a parent in a parent-child relationship. It is doubtful that any one standard would be effective, as all children and parents are different and respond to varying parental techniques and childhood patterns.

It is now rather difficult to conceive of a school acting as a parent, especially in a college or university community.[10] Consequently, this theory

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[5] Gott v. Berea College, 156 Ky. 376, 161 S.W. 204 (1913) is cited as a leading authority for this theory. *See also* Note, *Private Government on the Campus—Judicial Review of University Expulsions*, 72 YALE L.J. 1362, 1368 (1963).

[6] Starr v. Liftchild, 40 Barb. (N.Y.) 541 (Sup. Ct. 1863).

[7] *Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045, 1144 (1968).

[8] Note, *Private Government on the Campus—Judicial Review of University Expulsions*, 72 YALE L.J. 1362, 1380 (1963).

[9] *See, e.g.*, N.Y. DOM. REL. LAW §§ 32, 33 (McKinney 1964) (child support obligations of a parent).

[10] Related to *in loco parentis* is another relationship theory known as *in loco altricis*, which may be more applicable to a university environment than *in loco parentis*.

has fallen into disuse.[11] It still does retain an anomalous existence, however, when it can be safely used by courts to obtain a reasonable result in a pending controversy.[12] Its structural confines are also oftentimes breached, causing a limited or hybrid use when it is needed.[13]

A second theory is *privilege*. It is based on the premise that it is a privilege to attend a school and not a legal right.[14] As a consequence, students would seemingly have limited legal rights against the school. Inapplicable where schooling is compulsory,[15] it is also now of limited application when concerned with both public and private colleges and universities. Although a school may be autonomous to a substantial degree, courts have not allowed complete freedom when dealing with all aspects of student-school relationships, especially since education has come to be regarded as a matter of great importance. In *Dixon* v. *Alabama State Board of Education*,[16] the *privilege* theory was rejected when the court stated that "[t]he precise nature of the private interest involved in this case is the *right* to *remain* at

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In loco altricis is a Latin phrase which describes a relationship between the student and the university, whereby an important function of the university is to offer those services to the transient student which the student has lost due to the severance of his hometown community ties.

H. W. Pettigrew, *The University and the Bail System: In Loco Altricis,* 20 CLEVELAND STATE L. REV. 502 (1971).

This theory does not indicate any true legal basis but only appears to show one service the university performs for its students. Consequently it is dismissed as a legal relationship theory.

[11] This theory was abrogated in Goldberg v. Regents of the University of California, 248 Cal. App. 2d 867, 57 Cal. Rptr. 463, 470 (1967) where the court stated: "[T]he better approach . . . [is] that state universities should no longer stand in loco parentis in relation to their students." One writer has commented that:

> One might say that *in loco parentis* is dead as a pervasive legal doctrine in the educational setting, and properly so. The character of the educational institution has greatly changed in recent years. The nineteenth century model of the educational institution, if that is what is meant by normal, will never return to us.

R. B. Yegge, *If You Trust the Beneficiaries, You Don't Need Trustees,* 3 CONN. L. REV. 406, 409 (1970). *See also* Buttney v. Smiley, 281 F. Supp. 280 (D. Colo. 1968); J. G. Hill Jr., *The Fourteenth Amendment and the Student—Academic Due Process,* 3 CONN. L. REV. 417, 419 (1970).

In loco parentis is further abrogated by the elimination of corporal punishment. Recently this occurred in Maryland. *See* Boston Globe, Evening ed., Jan. 28, 1971, at 11, col. 1.

[12] Recently, in People v. Jackson, 319 N.Y.S.2d 731, 65 Misc. 2d 909 (1971) *in loco parentis was reaffirmed.* Even though the case involved a high school student, this theory's continued existence again indicates a time-honored judicial practice of finding the theory to justify a reasonable result.

[13] In Axtell v. LaPenna, 323 F. Supp. 1077 (W. D. Penn. 1971) the court felt that the school authorities do stand *in loco parentis* over children while attending school. The Pennsylvania statute investing this power, however, indicated that this authority should only be used "to prevent infractions of discipline and interference with educational process." 25 P.S.PA. §§ 5–510, 13–1317.

[14] Board of Trustees v. Waugh, 105 Miss. 623, 62 So. 827 (1913), *aff'd,* 237 U.S. 589 (1915).

[15] *See supra* note 2.

[16] 294 F.2d 150 (5th Cir.), *cert. denied,* 368 U.S. 930 (1961).

a public institution of higher learning in which the plaintiffs were students in good standing." [17] (Emphasis supplied.) The court felt that "education is vital, and indeed, basic to civilized society." [18]

The third legal relationship theory—*constitutional*—arises as a corollary to the *Dixon* case.[19] It holds that the student-school relationship is based on constitutional principles. For example, when a student pays tuition and begins attendance at a school, he acquires a property interest protected by the Fourteenth Amendment.[20] This theory has also been used as the basis for judicial review of a school's administrative actions when a student is summarily dismissed.[21] Such an action could deprive one of property "without due process of law." [22] Also, the constitutional theory has helped produce substantive protections for students in flag salute,[23] school segregation,[24] and prayer cases.[25]

The immediate problem with this theory is its application, which is presumably only to public institutions because of traditional constitutional limitations.[26] However, although a school may be private property, the fact that it is engaging in an activity which affects the public at large may impute to it a "public interest," [27] thus bringing it within the scope of the Fourteenth Amendment.[28] The fact that private colleges and universities receive beneficial tax treatment[29] and are chartered by the state[30] also

[17] 294 F.2d at 157. *But see* Esteban v. Central Missouri State College, 415 F.2d 1077 (8th Cir. 1969).

[18] 294 F.2d at 157.

[19] *See* Goldman, *The University and the Liberty of Its Students—A Fiduciary Theory*, 54 KY. L.J. 643, 648 (1965–66).

[20] *Cf.* State *ex rel.* Sherman v. Hyman, 180 Tenn. 99, 171 S.W.2d 822 (1942), *cert. denied*, 319 U.S. 748 (1943). *See also* Recent Decisions, 60 MICH. L. REV. 499, 501 (1962).

[21] *See* Hamilton v. Regents, 293 U.S. 245, 258 (1934); Webb v. State University, 120 F. Supp. 554 (N.D. N.Y.), *appeal dismissed*, 348 U.S. 867 (1954).

[22] *Contra*, Board of Trustees v. Waugh, 105 Miss. 623, 62 So. 827 (1913), *aff'd*, 237 U.S. 589 (1915).

[23] West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

[24] Cooper v. Aaron, 358 U.S. 1 (1958); Brown v. Board of Educ. of Topeka, 347 U.S. 483 (1954).

[25] Abington School Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).

[26] Normally, constitutional safeguards only extend to disputes between citizens and the state rather than between private individuals. Civil Rights Cases, 109 U.S. 3 (1883). This has produced the "state action" doctrine. *See* Coleman v. Wagner College, 429 F.2d 1120 (2d Cir. 1971).

[27] Institute of the Metropolis, Inc. v. University of State of New York, 159 Misc. 529, 289 N.Y.S. 660, 665 (Sup. Ct. 1936).

[28] Garner v. Louisiana, 368 U.S. 157, 181 (1961). *See also* Slochower v. Board of Educ., 350 U.S. 551 (1956); Marsh v. Alabama, 326 U.S. 501 (1946).

[29] Hammond v. University of Tampa, 344 F.2d 951 (5th Cir. 1965). *See also* INT. REV. CODE OF 1954, § 501.

[30] While a private school's charter is granted by the state, since Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819), it has been recognized that a state may not infringe upon the lawful powers possessed by a private school. The private school's charter is a contract which cannot be arbitrarily altered except by agreement.

tends to place these entities within the public domain. Nonetheless, constitutional principles must be stretched to encompass the private school sector.

An additional problem with the constitutional theory is that, while it is effective in defining the student-school relationship to a limited degree, it actually encompasses very little. It only applies constitutional principles and safeguards in some situations. It is doubtful, for example, that the Constitution would be an effective guide when a school is attempting to recover unpaid tuition from a student. Thus, while our whole body of law in some way relates to the Constitution, its use as the basis for a student-school relationship is not well-grounded.

The fourth relationship worthy of attention is that of a *trust.* Here the school is considered to be a trustee administering a charitable or educational trust, with the students considered beneficiaries.[31] This theory is deficient in several respects. A trust relationship by its nature is not a concept which can be adequately applied to many situations arising within a modern educational institution. As applied to a student-school relationship, it is quasi-medieval in nature[32] and is as outdated and inflexible as *in loco parentis.* For example, what if a student becomes involved in a campus disorder which has as its purpose the destruction of the present school structure and system? Normally a person who is the beneficiary of a trust does not attempt to destroy the relationship excluding himself from deriving any benefit. This immediately casts doubt upon the existence of a trust relationship on a campus. Also, a trustee does not normally have the ability to change the beneficiaries of the trust,[33] *i.e.,* they would then lack the power to expel a student. Yet, the power of expulsion is often necessary to maintain order and control.[34] Thus, while aspects of trust may exist, it cannot be the sole and independent basis for determining a correct student-school legal relationship.

Closely allied to the trust relationship is the *fiduciary* theory, which operates on the assumption that a fiduciary duty is owed by the school to

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[31] People *ex rel.* Tinkoff v. Northwestern University, 333 Ill. App. 224, 77 N.E.2d 345 (1947), *cert. denied,* 335 U.S. 829 (1948); Anthony v. Syracuse University, 130 Misc. 249, 223 N.Y.S. 796 (Sup. Ct. 1927), *rev'd,* 224 App. Div. 487, 231 N.Y.S. 435 (1928). *See also* Fisk, *A System of Law for the Campus: Some Reflections,* 38 GEO. WASH. L. REV. 1006, 1011 (1970).

[32] *See* CARDINAL NEWMAN, THE IDEA OF A UNIVERSITY (1871) for some nineteenth century English views of educational ideas and relationships. This book is enlightening and in many ways foreshadows the elements of today's educational structure.

[33] RESTATEMENT (SECOND) OF TRUSTS § 167 (1) (1959) provides that a change of circumstances allows "the trustee to deviate from a term of the trust if... compliance would defeat or substantially impair the accomplishment of the purposes of the trust...." This might give validity to an expulsion if it could be shown it was for the benefit of the trust generally, but it is doubtful the beneficiary-student who is expelled would regard it as a benefit.

[34] *See* Note, *Supra* note 8, 72 YALE L.J. at 1380.

its students.[35] This duty always exists in any trust relationship.[36] The fiduciary theory is, in one significant respect, a step forward: it is based on the law of status rather than the law of contract. As is well known, the law of status arises out of consensual legal relations, such as principal and agent, master and servant, vendor and purchaser, and husband and wife.[37] It is characterized by the fact that normally sufficient words *cannot* be found to describe all the incidents of the relationship. This results in the elimination of bargaining for and defining all its peculiar incidents.[38] The nature of the relationship with its fixed incidents of status assumes primary importance.[39] For example, an employer may not disaffirm his vicarious liability by contract. He must reconstruct the relationship into one of principal and contractor.[40]

The fiduciary relationship, although based on status and thus capable of reducing a school's arbitrary and monopolistic powers, such as are found in the contract theory,[41] is still incapable of encompassing the fullness of the student-school relationship. First, it suffers, like the constitutional theory, in that a fiduciary duty is borrowed in part from other theories.[42] Thus, it is really an element of the other theories rather than a separate one. Buttressing this is the fact that the courts, in interpreting it, would probably first find the existence of a fiduciary duty and then apply other theories in an attempt to remedy a breach. As an example, assume a fiduciary duty between a school and its students. Suppose, then that the school closes without reasonable basis, thus breaching its duty to educate the student. The student then sues to recover a portion of his tuition. The court, while recognizing the breach of a fiduciary duty, will probably allow recovery on a contract basis[43] and not on the basis of a breach of that duty. In this same situation the breach of a trust relationship may also

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[35] A fiduciary duty arises out of a fiduciary relation. This relation usually exists when one party depends on the trust and integrity of the other. *See, e.g., In re* Cover's Estate, 188 Cal. 133, 204 P. 583, 588 (1922); State v. King, 8 How. Pr. 298, 299 (N.Y. Sup. Ct. 1853). A fiduciary relationship can also exist where domination of one party by the other occurs. Cranwell v. Oglesby, 299 Mass. 148, 153, 12 N.E.2d 81, 83 (1937). *See generally* H. BALLANTINE, CORPORATIONS §§ 62, 66 (rev. ed. 1946). *See also* Goldman, *supra* note 19.

[36] RESTATEMENT (SECOND) OF TRUSTS, § 170 (1) (1959) states that "[t]he trustee is under a duty to the beneficiary to administer the trust solely in the interest of the beneficiary."

[37] Chaffee, *The Internal Affairs of Associations Not for Profit,* 43 HARV. L. REV. 993, 1007 (1930).

[38] *Id.* at 1007.

[39] Goldman, *supra* note 19, at 666.

[40] Goldman, *supra* note 19, at 666; *see* cases cited *id.* at 666 n.110.

[41] *See* pp. 417–18 *infra.*

[42] "Since schools exist primarily for the education of their students, it is obvious that professors and administrators act in a fiduciary capacity with reference to the students." Seavey, *Dismissal of Student: Due Process,* 70 HARV. L. REV. 1406, 1407 n.3 (1957).

[43] Paynter v. New York University, 314 N.Y.S.2d 676 (1970), *rev'd,* 319 N.Y.S.2d 893 (1971).

form the basis of recovery. Thus, this theory fails to describe fully the actual legal basis existing between the parties.

The sixth theory—the *associational*—fares better: "[t]he idea being simply that the academic community is an association of voluntary nature functioning under a fundamental set of principles to which all its members are bound by their continued membership." [44] It is grounded upon the idea of an academic community—a miniature society and political order—where members act in concert toward a common goal, presumably the teaching and learning experience. This theory also implies an equal balance of power between the students, school, and teachers, resulting in a rather communal approach to life *within* the academic community as a whole.

Although the associational theory is an ideal, which when pursued within the community could help stabilize student-school relations, how will it be interpreted by the courts *outside* the community? Will its existence change a court's approach to problems between members?

The theory's maintenance depends, by definition, on a fundamental set of principles. A guiding light within the community, they may not assist a court in resolving a dispute. Even when applied within the academic community, they may create more of a moral than a legal obligation[45] among its members and thus be unenforceable at law. If this is the case, the community may lack internal control over its members if and when control is needed.

In the event that an internal conflict did arise in the community, it is probable that more traditional relationship theories would be applied by the judiciary. Consequently, the value of its use as a new relationship theory is, from a legal standpoint, negligible.

The last of the traditional theories and probably the most legally inspired is the *contract* theory.[46] At present the most popular theory with the courts, it is oftentimes used in resolving questions concerning the rights and liabilities of parties in the educational sphere. This is especially true in regard to private schools,[47] where the amount of govern-

[44] Fisk, *supra* note 28, at 1012.

[45] "Membership in it [university] is an associational membership, a membership of adhesion rather than a relationship simply of contract or a membership in a purely self-constituted, self-created organization. Obligation flows from this." Fisk, *supra* note 31, at 1012. If obligation flows solely from membership it is possible that a moral rather than a legal obligation exists. It should be noted that Mr. Fisk's article only uses the associational theory as part of a vehicle for developing a system of constitutional law for the campus. He does not attempt to promote an associational theory. Consequently, the actual rule structure of this theory is not deeply investigated.

[46] *See, Developments in the Law—Academic Freedom, supra* note 7, at 1145.

[47] People *ex rel.* Tinkoff v. Northwestern University, 333 Ill. App. 224, 77 N.E.2d 345 (1947), *cert. denied*, 335 U.S. 829 (1948); Miami Military Institute v. Leff, 129 Misc. 481, 220 N.Y.S. 799 (1926).

mental rules and control is substantially less than in public schools.[48] Notwithstanding the compulsory public school issue,[49] which is contrary to basic contract principles,[50] the relation between public universities and students has also been implied to be based on contract.[51]

What are some of the advantages and disadvantages of the contract theory of the student-school legal relationship? A great deal depends on court interpretation and whether or not the aggrieved party is the school or the student. As applied in the past, the contract theory has been biased in favor of the school and has tended to limit student rights. For example, courts have held that the student has the burden of proof in establishing the breach of an agreement.[52] Also, ambiguous language in the contract has not been interpreted against the school, the formulator of the contract terms.[53] Finally, courts have permitted schools to remove any implied student rights by express statements to the effect that no irrevocable contract arises from enrollment in the school, and that the school is allowed to change rules and regulations at any time.[54] A similar effect may be had by the use of a "waiver" clause in which the school "reserves the right to sever the connection of any student with the university for appropriate reasons." [55] Both these clauses may appear in the school's catalog or yearly bulletin.[56] Thus, it is evident that a contract theory which is not enforced in a normal contract manner may be beneficial only from a school's viewpoint. If a more balanced approach were taken, this

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[48] While the state has the ability to intervene in private affairs via the use of the police power, Pyeatte v. Board of Regents, 102 F. Supp. 407 (W.D. Okla. 1951), *aff'd*, 342 U.S. 936 (1952), the legislature cannot normally make rules and regulations for private schools as it can for public institutions. Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819).

[49] *See supra* note 2.

[50] The right to choose a party to a contract is an essential contractual element. For example, a person's duties under a contract may not be assigned where the personal nature of the contract is important. Central Union Bank v. New York Underwriters' Ins. Co., 52 F.2d 823 (4th Cir. 1931).

[51] *See, e.g.*, State *ex rel.* Stallard v. White, 82 Ind. 278 (1882); Jackson v. State, 57 Neb. 183, 77 N.W. 662 (1898).

[52] *See, e.g.*, Anthony v. Syracuse University, 224 App. Div. 487, 231 N.Y.S. 435 (1928).

[53] *See, e.g.*, Carr v. St. John's University, 224 App. Div. 2d 632, 231 N.Y.S.2d 410, *rev'g*, 34 Misc.2d 319, 231 N.Y.S.2d 403 (Sup. Ct.), *aff'd mem.*, 12 N.Y.2d 802, 187 N.E.2d 18, 235 N.Y.S.2d 834 (1962).

[54] In Robinson v. University of Miami, 100 So.2d 442 (Fla. Dist. Ct. App. 1958) a statement in the school bulletin was held valid. The statement provided:

> The provisions of this Bulletin are not to be regarded as an irrevocable contract between the student and the University. The University reserves the right to change any provision or requirement at any time within the student's term of residence. The University further reserves the right to ask a student to withdraw at any time. *Id.* at 443.

[55] Dehaan v. Brandeis University, 150 F. Supp. 626, 627 (D. Mass. 1957) (statement in university's general catalog).

[56] For a more comprehensive analysis of a school's catalog or bulletin as a source of contract terms, see p. 420 *infra*.

theory would be less biased, thus giving students increased rights, and would more definitely establish the student-school relationship.

If a contract theory is regarded as effective in defining a student-school legal relationship, what is the basis of the contract and what are its express and implied terms? It can be said that by advertising, a school is constantly soliciting students to matriculate on its campus and that after preliminary negotiations are completed, the student by his act of registration is said to have accepted a position at the institution with all its rules and regulations.[57] The courts have consequently implied that a student has a right to remain in attendance as long as he remains in good standing.[58] It should be noted that this approach is more applicable to private than public schools.[59]

While a pure contract theory regarding offer and acceptance and choice of parties can possibly be found regarding private schools, the same is not wholly applicable to public institutions of higher learning. Attendance[60] at a state institution has been said to be "a right which the trustees are not authorized to abridge materially, and which they cannot, as an abstract proposition, rightfully deny." [61] This does not mean that anyone may attend a state-operated school. The school may still enforce its legitimate entrance requirements and may request "waivers" of the students.[62] It has been held that this right to attend is not a natural one, but a benefaction of the law. Thus, one seeking to exercise this right validly must also submit to such conditions precedent as the law requires.[63]

A state-operated school, then, cannot *arbitrarily* refuse a resident stu-

[57] McClintock v. Lake Forest University, 222 Ill. App. 468 (1921). *See, e.g.,* 62 GRINNELL COLLEGE BULLETIN: 1965–1966, at 55 (Aug. 1965); 67 DENISON UNIV. BULLETIN: Information 1968, at 25 (Aug. 1967).

[58] *See, e.g.,* Booker v. Grand Rapids Medical College, 156 Mich. 95, 120 N.W. 589 (1909). *See also* Freedman, *Roots of Student Discontent,* in BEYOND BERKELEY: A SOURCEBOOK IN STUDENT VALUES 236–49 (C. Katope & P. Zalbrod eds. 1966).

[59] While some distinctions between public and private are of academic value (*e.g.,* right to freedom of contract), the fact still remains that: "The public schools belong to the public. Private schools do not. Students stand in a different position to each class of schools." People *ex rel.* Tinkoff v. Northwestern University, 333 Ill. App. 224, 77 N.E.2d 345, 349 (1947), *cert. denied,* 335 U.S. 829 (1948).

[60] *See supra* p. 413–14 where attendance as a right was discussed as an abrogation of the privilege theory and it concerned the *right to remain* and study *after* admittance to a school rather than a *right to admittance* itself which is under scrutiny here.

[61] 15 AM. JUR. 2d *Colleges & Universities* § 16 (1964). *See* State *ex rel.* Stallard v. White, 82 Ind. 278 (1882).

[62] Anthony v. Syracuse University, 224 App. Div. 487, 231 N.Y.S. 435 (1928).

[63] Pyeatte v. Board of Regents, 102 F. Supp. 407 (W.D. Okla. 1951), *aff'd,* 342 U.S. 936 (1952), where the court upheld housing regulations stating:

> It is a prerequisite that all persons who seek enrollment in the University of Oklahoma comply with the Housing Regulations *before* they are permitted to attend the University. (Emphasis supplied.)

102 F. Supp. at 411.

dent admission as can a private institution.[64] It is doubtful that the "police power" of a state[65] could be validly used to force a private school to accept certain persons with whom it did not wish to contract.[66]

As a result of the preceding discussion, the legal relationship between a public school and its students cannot be termed "purely contractual," as at least one necessary contract element is seemingly abrogated: the right to freely choose a party to a contract.[67] This problem may be resolved in part by an implied acquiescence on the part of the school to contract with anyone who meets its entrance requirements. Also mitigating this problem is the fact that in other areas of the law there is a curb on complete freedom of choice in contract. These include agency (undisclosed principal), third party beneficiaries, and some assignments.[68] Thus, as with every general rule there are attendant exceptions.

To what are the parties expressly and impliedly agreeing? In the absence of any explicit written agreement, the courts, especially when dealing with private schools, have looked to a school's catalog or yearly bulletin in an effort to locate and interpret part of the express terms of any contract.[69] Doing this, courts have applied various contract principles to bind or not bind the parties. The first requires that a person's attention be brought to the catalog terms in order that he be bound by them.[70] Adjunct to this is the rule of imputed knowledge due to extensive circulation of a catalog.[71] Despite these probable principles, there is no general rule as to how a court will interpret the contents of a catalog even though they are fre-

[64] People *ex rel.* Tinkoff v. Northwestern University, 333 Ill. App. 224, 77 N.E.2d 345 (1947), *cert. denied*, 335 U.S. 829 (1948); Booker v. Grand Rapids Medical College, 156 Mich. 95, 120 N.W. 589 (1909).

[65] Schools, both public and private, may be affected under the "police powers" of a state "for the protection and welfare of the public at large." Pyeatte v. Board of Regents, 102 F. Supp. 407, 413 (W.D. Okla. 1951), *aff'd*, 342 U.S. 936 (1952).

[66] Rejection based on race or color is not discussed as its ramifications would broaden this article's purpose to an uncontrollable degree. It may be generally stated that it is unlawful for both public and private schools to arbitrarily refuse to admit a student on the grounds of race or color. Civil Rights Act of 1964, Act of July 2, 1964, Pub. L. No. 88–352, 78 Stat. 241.

[67] *See supra* note 50.

[68] Kaufman v. Sydeman, 251 Mass. 210, 146 N.E. 365 (1925).

[69] Miami Military Institute v. Leff, 129 Misc. 481, 220 N.Y.S. 799 (1926); Aynesworth v. Peacock Military College, 225 S.W. 866 (Tex. Civ. App. 1920).

[70] The court in Hartridge School v. Riordan, 112 N.Y.S. 1089 (App. Div. 1908) held that:

> [The student] does not appear to have expressly contracted, nor does he impliedly appear to have so agreed as it was not shown that his attention was directed or called to matter pertaining thereto on an application blank of remote date, or in a catalogue of the current year. *Id.* at 1090.

[71] The plaintiff's catalogue, published for so long a time, and so extensively circulated, would ordinarily be some evidence tending to show that a party who patronized the school had seen and known its terms . . . and if they [jury] should find that defendant had seen the catalogue, and then patronized the school, the terms would be binding on him, as an accepted offer and contract.

Horner School v. Westcott, 124 N.C. 518, 32 S.E. 885, 886 (1899).

quently used in ascertaining the parties' agreement. Since the catalog is formulated by the school, any contract terms resulting therefrom are, from the student's standpoint, difficult to change. This would liken these student-school contracts to other contracts of adhesion,[72] and of necessity would imply an element of monopoly power.

> Standard contracts are typically used by enterprises with strong bargaining power. The weaker party [student], in need of the goods or services, is frequently not in a position to shop around for better terms, either because the author of the standard contract [school] has a monopoly (natural or artificial) or because all competitors use the same clauses. His contractual intention is but a subjection more or less voluntary to terms dictated by the stronger party, terms whose consequences are often understood only in a vague way, if at all.[73]

In discussing the possible label of contract of adhesion to student-school agreements, it should be realized that in other areas where these contracts exist courts have tried to protect the weaker contracting party without distorting the elementary rules of contract law. As a result, the law surrounding standardized contracts is "highly contradictory and confusing." [74]

In conjunction with the possible express contract terms found in school catalogs or bulletins are many implied terms between a student and his school. These arise from the acts of the parties and from prior courses of dealing between a particular school and its students. As was stated earlier, two implied conditions normally arise when a student-school agreement is created, the first being that the student at the risk of expulsion will refrain from breaking reasonable rules and regulations, and the second being that the school shall not arbitrarily expel a student.[75] It should be noted that the rules a student impliedly is responsible for are those which would reasonably be found applicable at most schools and that any special rules would normally have to be brought to a student's attention.[76] The latter category might include a college's ban on any student's smoking or drinking, even for those who are able to do so under state law. The former category might encompass a rule prohibiting girls from being present in men's dormitories. Without express provisions, an implied provision also exists as to a yearly calendar of events, such as vacation periods, final examinations, and tuition payments. Students as well as the school will be

[72] Contracts of adhesion are basically standardized or form contracts, one example being those found in the insurance business. *See* Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract,* 43 COLUM. L. REV. 629 (1943). The term was originated by Patterson, *The Delivery of a Life-Insurance Policy,* 33 HARV. L. REV. 198, 202 (1919).

[73] Kessler, *supra* note 72, at 632.

[74] Kessler, *supra* note 72, at 633.

[75] John B. Stetson University v. Hunt, 88 Fla. 510, 102 So. 637 (1924). *See* material cited note 58 *supra.*

[76] *See supra* note 70.

bound by them. The extent of implied terms in a student-school relationship, if a contract is in fact deemed to exist, will of course, depend on the inclusiveness of the written catalog terms. In some instances, the catalog completely incorporates all school rules and regulations, a calendar of school events, the academic courses offered, plus entrance requirements with applicable waiver clauses and conditions precedent.[77]

Generally, a school has the power to require waivers[78] of certain rights by incoming students, such as the ability to live off campus[79] or to eat somewhere other than in a college dining hall.[80] While some are probably necessary and logically within the power of the boards of trustees, unreasonable waivers could possibly be construed as unconscionable and would thus be stricken by a court.[81] An unreasonable waiver should be construed as one which prevents the student from asserting his fundamental rights. Normally, a school has broad powers and can "adopt and enforce such reasonable rules and regulations as it may deem necessary and proper, regarding the management of school affairs. . . ." [82] Thus, judicial review of any school administrative decisions is limited and will result only from a school's blatant disregard of its powers.[83]

A contract theory, as describing a legal relationship, is well-suited to business and commercial transactions, but cannot exist in a pure sense in a student-school relationship. One reason for this is the presence of monopoly power in favor of the schools.[84] Presently students are unable to add or delete terms from any agreements made with the school. It has been "take it or leave it" for over 300 years. Consequently, the contract theory, while valid, is constantly being abrogated by various monopoly powers possessed by the schools. Also the fact that it is based on contract itself rather than the law of status[85] causes the relationship to be inflexible to a degree. This causes the courts to constantly search for the actual agreed upon terms, when in fact it would be impossible to list completely all the ramifications of a student-school relationship. Thus, the contract theory, while a business-like solution to the problem, is not an appropriate solution when applied to actual student-school relations.

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[77] *See, e.g.,* 12 UNITED STATES AIR FORCE ACADEMY: CATALOG, 1967–1968 (April 1967).

[78] *See supra* note 54.

[79] Pyeatte v. Board of Regents, 102 F. Supp. 407 (W.D. Okla. 1951), *aff'd* 342 U.S. 936 (1952).

[80] Gott v. Berea College, 156 Ky. 376, 161 S.W. 204 (1913).

[81] By analogy with unconscionable waivers of liability by a merchant of consumer goods *see, e.g.,* Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).

[82] PA. STAT. ANN. tit. 24, § 5–510 (1962).

[83] Woods v. Simpson, 146 Md. 547, 126 A. 882 (1924); University of Mississippi v. Waugh, 105 Miss. 623, 62 So. 827 (1913), *aff'd,* 237 U.S. 589 (1915); Foley v. Benedict, 122 Tex. 193, 55 S.W.2d 805 (1932). *See also* W. G. Buss, *Procedural Due Process for School Discipline: Probing the Constitutional Outline,* 119 U. PA. L. REV. 545, 554 (1971).

[84] *See supra,* at 418–21.

[85] *See supra,* at 416.

The School-Teacher Legal Relationship

It is helpful to examine the status of the teacher in the academic community to illustrate how problems involving teachers have been handled. These same solutions may sometimes be applicable to students, but they are more likely to be inappropriate as a foundation for a student-school legal relationship.

Essentially, in both public and private schools, the relationship of teacher and school is one of contract between the parties, with both being liable to one another for a breach.[86] Certainly there is no privilege or right to teach as may characterize student-school relationships.[87] More troublesome is a teacher's status at a particular public institution. At most public and private educational institutions the teachers are simply regarded as employees and the courts also see them in this light.[88] However, in some instances, teachers at public institutions have been regarded as public officers, and not as employees, principally to allow relief for a wrongful removal from a teaching position.[89]

From a standpoint of liability it can be argued that a teacher is the agent of a school when acting within the scope of his real or apparent authority.[90] The teacher then could be personally liable for his own *ultra vires* acts. However, statutory authority may be needed to sue a public official.[91] Thus, while an agency relationship may be present, lack of statutory authority to sue may bar any remedy.[92]

[86] State Bd. of Agriculture v. Meyers, 20 Colo. App. 139, 77 P. 372 (1904); Pardue v. Miller, 306 Ky. 110, 206 S.W.2d 75 (1947); Butler v. Regents of University of Wisconsin, 32 Wis. 124 (1873).

[87] *See supra,* at 413. It should be noted that there is some support for the idea that a teacher's rights are constitutional rather than contractual in nature. Pred v. Board of Public Instruction, 415 F.2d 851 (5th Cir. 1969). If this concept is adopted it can aid a non-tenured teacher in retaining his present employment, whereas, if only contract rights are involved, and the contract has expired, the teacher would have no further rights against the school. *See* Perry v. Sindeman, 430 F.2d 939 (5th Cir. 1970), *cert. granted,* 91 S.Ct. 2226 (1971); Drown v. Portsmouth School Dist., 435 F.2d 1182 (1st Cir. 1970).

[88] State Bd. of Agriculture v. Meyers, 20 Colo. App. 139, 77 P. 372 (1904).

[89] Eason v. Majors, 111 Neb. 288, 196 N.W. 133 (1923).

[90] Bank of United States v. Dandridge, 25 U.S. (12 Wheat.) 64 (1827).

[91] In the event that any relationship basis is deemed to exist enabling an effective recovery attempt by a student one other hurdle must be surmounted when dealing with a public institution: statutory authority is needed before a suit can be maintained against a state school. Garrity v. State Board of Administration of Educational Institutions, 99 Kan. 695, 162 P. 1167 (1917); Smith v. Doehler Metal Furniture Co., 195 Miss. 538, 15 So.2d 421 (1943); Oklahoma Agricultural & Mechanical College v. Willis, 6 Okl. 593, 52 P. 921 (1898). Possibly this same immunity may extend to a teacher who is regarded as a public official especially if acting within the scope of his real or apparent authority.

Normally those schools founded by private individuals are private in nature while those founded by the use of public funds are public. Annot., 65 A.L.R. 1394, 1395 (1930). A problem occurs when one asks how much state funding causes a private institution to become public in nature despite its private beginnings and current "private" status. Obviously this is a question of fact since state support of private schools is recognized as necessary to help in the education

Teachers, to be effective, should not only be secure *via* a binding contract of employment, but also should be allowed considerable freedom in their classroom activities. Consequently, the scope of a teacher's permissible action within the university or college community may, of necessity, be broad.[93] Also "[p]olitical power must abstain from intrusion into this activity of freedom, pursued in the interest of wise government and the people's well-being, except for reasons that are exigent and obviously compelling." [94] While there must be a strong relationship between a school and its teachers, the power directing them in their work and any outside influence should be kept at a minimum to allow a teacher to perform his function properly.

The Unitary Theory

None of the theories described deal adequately with the student-school legal relationship. Since the relationship basis between a school and its teachers is generally contractual, its usefulness in this context is as limited as the contract theory previously discussed. What is the underlying problem prevalent in all the traditional theories?

In the past, when a problem was encountered between a school and student, courts found the school to be "like" a parent, trustee, fiduciary, business enterprise, etc., and applied various legal and social principles applicable to these particular areas to the problem at hand. Consequently, as circumstances changed and different problems arose, different views of the legal relationship were introduced to cope with the new problems. The basic fault in this legal slight-of-hand is the fact that while a school may resemble these different legal entities and relationships, it is a unique

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of many of its own residents, as well as others, and does not result in its becoming a public institution. The Regents of the University of Maryland v. Williams, 9 Gill. & J. (Md.) 365 (1838); Trustees of Dartmouth College v. Woodward, 17 U.S. (19 Wall.) 526 (1873). As a result of extensive state funding of private schools, a "hybrid" institution may result with the state having a great degree of control over the college or university, but property and asset control remaining private. Trustees of Rutgers College v. Richman, 41 N.J. Super. 259, 125 A.2d 10 (1956).

[92] It should be noted that a problem arises when a student attempts to recover from a teacher because of an *ultra vires* act. Suppose the teacher without the school's knowledge or implied acquiescence cancelled classes for a period of extended duration. The school possibly would not be liable as this might be an *ultra vires* act. However, upon what basis does the student have a cause of action against the teacher? There is no express or implied in fact contract between them. Maybe an implied in law contract exists. Or the students might be considered third party beneficiaries under the school-teacher contract. *See* Lawrence v. Fox, 20 N.Y. 268 (1859). A better solution could be the application of the unitary theory to this relationship also. *See* p.p. 425–27 *infra.*

[93] *See* Board of Trustees of Compton Jr. College Dist., Los Angeles County v. Stubblefield, 94 Cal. Rptr. 318, 16 C.A. 3d 820 (1971) for a case in which a teacher exercised freedom outside of class which went beyond normal bounds.

[94] Sweezy v. New Hampshire, 354 U.S. 234, 262 (1957).

entity.[95] Hence, a special relationship must be defined to handle a school's special problems.

The traditional theories, or at least their structure,[96] should be dispensed with by the courts, and a new relationship theory looked to in an effort to maintain the rights of all parties in the educational community. At present, the schools, because of their superior bargaining position and past court interpretations, have limited the rights of students. Examples include expulsion because a coed failed to be a "typical Syracuse girl," [97] or where a student refused to pay purported debts which she claimed were her husband's.[98] At the same time, students have caused disruptions on many campuses resulting in injury and harm to themselves, property, and others, without the schools or institutions taking appropriate disciplinary measures. If the academic world is to prosper, a new approach must be taken in developing an adequate student-school legal relationship on which such matters can be fairly judged. Such an approach would serve to "equalize" the parties in the eyes of the law. The traditional theories, while attempting to enforce substantive "rights," have not aided in ascertaining how strongly or weakly these rights should be enforced.

The unitary theory is an effort to maintain "substantial justice" between the school and its students. It is an attempt to classify the student-school legal relationship independently, unrelated to traditions applicable in other areas. It looks upon the academic community as a unit, separate and distinct from other societal groups[99] and possessing its own unique condition. It completely dismisses the structure of all previous theories in order to develop a principle or set of principles applicable to this unique relationship.

It is easier to understand the elements of the unitary theory when a theoretical court application of it is viewed: If a student or a school be-

[95] College cannot be a replica of the larger community. This ignores the fact that it is a special community in itself. The community cannot be isolated from the world but to function properly it must be insulated. Wilson, *Campus Freedom and Order,* 45 DENVER L.J. 502, 503 (1968).

[96] Any legal theory usually has both substantive rules and a surrounding structure holding the rules together and enabling the creation of new rules within it. A problem arises when the structure causes an inability on the part of the courts to introduce changes in the present substantive rules. For example, if a court recognizes the existence of a contractual legal relationship with the catalog terms used as evidence of the contract, a court may be bound to enforce monopoly terms without really examining the imbalance of bargaining power because the student has "signed and accepted" the terms of the contract. Consequently the "structure" of the relationship rather than substantial justice has controlled.

[97] Anthony v. Syracuse University, 224 App. Div. 487, 231 N.Y.S. 435, 437 (1928).

[98] White v. Portia Law School, 274 Mass. 162, 174 N.E. 187 (1931), *cert. denied,* 288 U.S. 611 (1932).

[99] It is important to note that this theory is to be used by the courts when viewing the student-school legal relationship. It is not developed to describe any particular relationship which may exist *within* the academic community itself, although it might be used for such a purpose.

lieves that rights are being infringed upon by the other party, either can bring a civil action based upon the unitary theory. No traditional basis, such as contract or trust, need be proved. Only the tests relevant to the unitary theory should be applied.

Using the unitary theory, a reviewing court would ask one question: What are the particular goals of the educational institution and its students? Normally it can be said that the primary goal or function of a school is to provide the necessary facilities and atmosphere leading to a stable academic community for the effective transmittance of knowledge.[100] The students' primary goal is to receive an adequate educational experience. While other secondary goals exist—*e.g.*, athletics, social accord, and cultural advancement—the educational goal is, in fact, the primary reason for any type of student-school relationship. It should be viewed in discerning the rights and liabilities of these parties within the academic community.

After the goals are identified, a reviewing court should then relate the problem to the goals and apply a standard test: Whether or not the act or acts complained of injure, obstruct, or adversely affect the educational goals of the school or student.[101] In other words, a test based on the goals of each party, which is the reason for the relationship existing, should be applied, rather than groping among traditional theories.

For example, if a student refuses to pay a school's required tuition, this act will cause a reduction in money needed for furnishing the facilities necessary to accomplish the school's primary goal: to educate students. Consequently, under the unitary theory, the student will be liable, as this act thwarts the desired educational goal of the school. Similarly, if the school attempts to arbitrarily dismiss a student, this will hamper the student's primary goal of receiving an education. In this instance the school will be liable under the unitary theory.

Thus, despite restrictive waiver provisions creating monopoly power in the school,[102] a student's rights can be enforced to a substantial degree.

[100] Seavey, *supra* note 42, at 1407.

[101] In determining whether or not a breach or injury has occurred, a test can be applied to a particular act: whether or not the act was "substantially educational" in nature. Thus, if a court is weighing the evidence in an action by a student against a school which has closed, it must determine the underlying basis of the school's closing. If the closing resulted from a special vacation in order to let students attend a football bowl game, or because of a cultural activity, or to allow students to campaign for candidates during election time, the act may be termed substantially educational in nature. On the other hand, if closings result from *emotional* rather than *educational* motives a school may find itself liable as the act may not be substantially educational in nature. An inquiry as to whether or not an act is "substantially educational" should be reserved for the fact finding body—*i.e.*, the jury or the court sitting without a jury.

[102] *See supra* at 421–22.

This is because contract terms are not specifically looked to by the court in reaching a final result.

Another example of unitary theory application might be a school bringing an action to enforce rules requiring students to live in school dormitories or to eat in school operated dining halls. Here the goals of the student body collectively must be considered as well as that of the single student and the school.[103] Since maintenance of dormitories and eating facilities on a bulk basis can provide these services at a low cost, enabling many students to continue college attendance and reach their desired educational goals, enforcement of these rules could be considered desirable acts. While a small number of students may possibly be forced to comply, accomplishment of general student and school goals require this condition. If, however, other housing and eating facilities are available at a reasonable cost, enforcement of these rules could thwart a segment of a student's educational goals. These rules would then be invalid. The experience, both financial and sociological, of living and eating alone or in a group situation[104] can be an integral part of an educational experience. College should not be limited to classroom learning. The correct result under the unitary theory will then depend on an inquiry as to the type of college, its location, and nearby facilities before a determination relative to goal effect can be reached.[105]

[103] Herein lies another prospect for the unitary legal relationship theory. Possibly, as with teachers (*see supra* note 92), a student could bring an action against another student under the unitary theory for interfering with his educational goals. This would eliminate the need for legislative action allowing such a suit by another student.

In New Hampshire just such a bill (H.B. 76) has been filed before the legislature and it would allow students to bring "a civil cause of action" in court because "every student has the right to pursue his studies 'Without any hinderance or interference by any other person.'" Manchester Union Leader, Feb. 4, 1971, at 1, 14, col. 2. Note that superficially at least, the bill does not recognize the existence of any traditional relationship theory between students or between the student and other persons who hinder his educational goal. "Other persons" could conceivably include the administrators, trustees, and officers, *i.e.*, the school. *See supra* note 2. Consequently this bill could almost be considered a statutory form of the unitary legal relationship theory when viewed by a student—because anyone who hinders his educational goals can be subject to liability if the student brings "a civil cause of action" and is allowed to recover.

Also note that the bill abrogates the privilege theory, *see supra* at 413, as it recognizes the student's "right to pursue his studies."

[104] In many instances it may be cheaper for a student to live with a group of other students, thus, if he has limited finances, his educational goals may be better served without the dormitory and dining rules.

[105] Obviously a church-operated seminary college or military college, *i.e.*, Virginia Military Institute (VMI), would have a different goal structure than a "normal college." In the former, required dormitory and dining rules may be necessary to accomplish these schools' particular goals.

Another example of the importance of school type can be illustrated: suppose a male student is to be expelled for having sexual relations with a consenting female. Today at most colleges and universities this would probably amount to a rather arbitrary dismissal and would

One writer who has also recognized the usefulness of a goal-related educational structure is R. B. Yegge.[106] He feels, however, that " [f]rom a legal standpoint, the educational institution should freely borrow, by analogy, from all of the formal doctrines herefore discussed [some of the traditional legal theories]. The application of each legal analogy will vary with the institution; that is, with the honestly derived statement of institutional goals." [107] What Yegge proposes is to apply the best traditional legal theory or theories once the proper institutional goals are defined.[108] A step in the right direction, since at least institutional goals are recognized, it is doubtful that "order, among what might otherwise appear to be chaos, is possible." [109] A policy by the courts of choosing from a stockpile of traditional legal theories can only lead to a more chaotic academic environment as different results can occur by the application of different theories—a true dilemma of the first order especially for students.[110] Traditional

normally be prohibited by the unitary theory. However, if the same incident occurred at a Roman Catholic seminary college it would probably cause the opposite result as part of an educational goal of the school (*i.e.*, celibacy) has been breached by the student.

[106] R. B. Yegge, *If You Trust the Beneficiaries, You Don't Need Trustees*, 3 CONN. L. REV. 406, 413 (Spring 1971).

[107] *Id.* at 414.

[108] For example, an institution could decide to assume the parental role in certain (noteably in governance of dormitories), or all, campus activities. The institution could draw an explicit contract through its writings and conversations. It would then be understood by prior agreement that on the items specified, *in loco parentis* would be applicable to the extent necessary. ... In all other areas of university activity, the university might stand in a different relationship to the student. *Id.* at 414.

Disregarding the mixing of traditional legal theories for the moment, it is rather difficult to perceive a school drawing up an "explicit contract through its writing and conversations." This is the principle reason a status-type relationship is preferred in student-school dealings. *See supra* at 416.

[109] R. B. Yegge, *supra* note 106, at 414.

[110] Possibly, the traditional theories can be helpful in providing substantive evidence to assist or help sway a court's interpretation of an act's relation to the goals of the parties. As an example, if an action to recover unpaid tuition is instituted against a student using the unitary relationship as a basis, a catalog might be introduced as evidence relative to the amount of tuition due. Likewise, evidence of some form of trust relationship might be introduced by a student proceeding under the unitary theory to dispell the right of the school (trustees) to arbitrarily expel him. Also, evidence of constitutional principles and a possible fiduciary duty will help support a student's right to remain at a school without being dismissed unless for substantial reasons. Inapplicability of *in loco parentis* may be used as evidence by a student to prevent his being forced to eat in a college dining hall or to sleep in a college dormitory. Likewise, a school might use it for the opposite purposes. This same reasoning could also apply when using the substance of the privilege theory as evidentiary matter. Evidence of the associational theory could be used by the school in an attempt to show that the school's goals are the student's goals and vice-versa since the academic community is to be regarded as a single group working together in pursuing a common goal. This could aid the school in attempting to show that it has not infringed upon a student's goals in maintaining a certain course of conduct. The student could also use it for the same purpose. Consequently, while the structure of these traditional theories is cast aside, they may be used, not as a basis, but as evidentiary elements in helping to ascertain a correct result under the unitary theory.

legal theories must be discarded to provide a more flexible method by which courts can determine if institutional, or, just as important, student goals are being thwarted.

Adoption of the Unitary Theory

Many factors must be considered in analyzing the correct application of the unitary theory. The courts have been going beyond traditional legal theories in reaching final determinations between schools and students, which may reveal a reluctance to use traditional legal theories for fear of an unjust result[111] or merely confusion about what legal theory to use, when, and how. These cases are a strong signal that a new legal relationship between a student and his school should be considered and possibly adopted.

Paynter v. *New York University*[112] amply indicates the judicial uncertainty resulting from the use of traditional theories. Paynter, the father of a student at New York University, sued the school to recover a portion of tuition paid when the school closed as a result of the shootings at Kent State in the Spring of 1970. The lower court ostensibly allowed recovery based upon a breach of contract.[113] In the same breath, however, it completely disregarded the school's catalog provisions allowing for any changes in the school's programs and requirements.[114] Consequently, one wonders just what basis was used by the lower court. It seems that Judge Picariello merely recognized a "wrong" and provided a remedy. He saw an infringement of a student's goal of obtaining an education, and allowed recovery.

The appellate court while recognizing that "... in a strict sense, a student contracts with a college or university ...," [115] felt that deviations from the contract were allowed.[116] It reasoned that the University administration had a better ability to judge whether or not suspension of classes was needed, and the lower court's rulings were reversed.[117]

Thus, the appellate court allowed the "fox to redesign the chicken

[111] *See supra* note 96.

[112] 314 N.Y.S. 2d 676 (1970), *reversed,* 319 N.Y.S. 2d 893 (1971).

[113] "The Court finds neither form nor substance in defendant's denial of liability in this breach of contract suit." 314 N.Y.S. 2d at 680.

[114] "It [defendant] offers in evidence a bulletin which is delivered to all students at the time of their enrollment wherein it is stated 'That the programs and requirements are subject to change without notice at any time at the discretion of the administration.' " *Id.*

[115] 319 N.Y.S.2d at 894.

[116] *Id.* This reasoning certainly makes the student's contract with the school rather nebulous.

[117] The appellate court's reasoning which led to a reversal appears very sketchy and almost ironic. They felt that an "insubstantial change made in the schedule of classes does not permit a recovery of tuition." *Id.* However, they also felt that "... the services rendered by the university cannot be measured by the time spent in the classroom." *Id.*

The one conclusion which can be drawn from this judicious result is that the court wanted to close a gap which might have opened quite wide; a flurry of suits in New York and possibly in other jurisdictions by irate parents and students.

coop," since the school is again allowed to be the judge of what is best. Its decision also permits continued use of school monopoly power over students and promotes "[t]he assumption . . . that a university resembles a factory which takes in homogeneous raw material and produces homogeneous products, with the B. A. Seal of Good Housekeeping." [118]

Esteban v. *Central Missouri State College*[119] involves a student who was dismissed for participating in two disorderly college demonstrations. This student's arguments centered around constitutional rights, as well as a desired abrogation of the privilege theory—*i.e.*, he maintained he had a *right* to remain in school.

Esteban tried to show an infringement of his First Amendment right, but the court indicated that his conduct was not protected by the First and Fourteenth Amendments.[120] He then argued that he had a right to remain at the school, rather than just a privilege. This argument was short-lived as the court refused to uphold the right-privilege distinction.

> We are not certain that it is significant whether attendance at such a college, or staying there once one has matriculated, is a right rather than a privilege. . . . And one may act so as constitutionally to lose his right or privilege to attend a college.[121]

In upholding Esteban's dismissal, the court indicated that an educational institution may establish standards reasonably relevant to the lawful missions and functions of the institution.[122] Again the court declined to use or enforce catalog waiver provisions or get trapped in the right-privilege dilemma, but struck out on its own by recognizing goal-related conflicts of both the student and school to reach a conclusion. This is, by definition, the operation of the unitary theory.[123]

Another class of cases which have, in part, been decided by weighing educational goals are those concerning hair.[124] Since 1965, many cases have arisen as a result of boys wearing long hair to school contravening normal hair length codes. Some cases uphold the codes,[125] while others strike them

[118] G. R. Weaver, *All is Not Quiet on the Academic Front*, 3 CONN. L. REV. 466, 469 (Spring 1971) citing, R. THEOBALD, AN ALTERNATE FUTURE FOR AMERICA, 171 (1968).

[119] 415 F.2d 1077 (8th Cir. 1969).

[120] *Id.* at 1087. This again indicates that while constitutional rights may exist, their use as a legal relationship theory is unsound.

[121] *Id.* at 1089.

[122] *Id.* at 1088.

[123] *See supra* at 425–26. *See also* Katz v. McAulay, 438 F.2d 1058 (2d Cir. 1971).

[124] Note that these cases normally arise in the compulsory school areas, and are used solely to illustrate the courts' disposition of them.

[125] Stevenson v. Board of Education, 426 F.2d 1154 (5th Cir.), *cert. denied*, 400 U.S. 957 (1970); Whitsell v. Pampa Independent School Dist., 316 F. Supp. 852 (N.D. Tex. 1970); Gfell v. Rickelman, 441 F.2d 444 (6th Cir. 1971); Wood v. Alamo Heights Independent School Dist., 308 F. Supp. 551, 553 (W. D. Tex.), *aff'd per curiam*, 433 F.2d 355 (5th Cir. 1970). *See also* Howard, *Student Dress, School Policies and the Law*, 41 CLEARING HOUSE 357, 362 (1962); *Recent Cases, Constitutional Law*, 84 HARV. L. REV. 1702 (1971).

down.[126] The interesting element in many is the use of an educational goal concept to justify a given result.[127]

Courts always consider the student's constitutional rights when these cases arise, but whether or not they are upheld normally has depended on the educational disruption which has occurred. One court felt "... that such regulations concerning personal behavior and appearance are appropriate in the area of conduct only where necessary to prevent 'a deleterious effect on the student's ability to read and write and to communicate and interact with other human beings in a positive manner.' " [128]

Once again, these cases tend to show that the basis of many court decisions rest on something other than traditional legal concepts.

One other case is interesting at this point. In *Ordway* v. *Hargraves*,[129] a high school student was banned from attending classes because she was pregnant and unmarried. The court felt that the educational goals of the student were paramount and allowed her to remain.[130] The court went on to discuss her *right* to a public school education and felt that the school authorities had not overcome the burden of showing why this right should be limited. It thus justifies its result by inserting the right-privilege distinction, possibly because it felt it had to "hang its hat" on something.[131]

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[126] Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969), *cert. denied*, 398 U.S. 937 (1970); Watson v. Thompson, 321 F. Supp. 394 (D. C. Tex. 1971).

[127] "The predominant interest of a school is to educate its students. If a particular type of conduct has the effect of disrupting the learning atmosphere, it should be subject to regulation." Davis v. Firment, 269 F. Supp. 524, 528 (E.D. La. 1967), *aff'd per curiam*, 408 F.2d 1085 (5th Cir. 1969).

[128] Axtell v. LaPenna, 323 F. Supp. 1077, 1079–80 (W. D. Penn. 1971) (citing testimony of Superintendent LaPenna at p. 64 of Dec. 28, 1970 proceeding.) *See also* Parker v. Fry, 323 F. Supp. 728 (E. D. Ark, 1971); Riseman v. School Committee of City of Quincy, 439 F.2d 148 (1st Cir. 1971).

[129] 324 F. Supp. 1155 (D. C. Mass. 1971).

[130] The court said that there is:

> ...no likelihood that her presence will cause any disruption of or interference with school activities...and no valid educational or other reason to justify her segregation and to require her to receive a type of treatment which is not the equal to that given others in her class has been shown. *Id.* at 1158.

[131] Two pending cases will provide another testing ground for judicial ingenuity. In one, a teenage, married mother is not being allowed to play on her high school basketball team because any girl is ineligible "who has been associated with marriage or motherhood." Not only is a secondary educational goal, athletics, being infringed but her chance of getting an athletic scholarship, thus pursuing higher education is being thwarted. *See* Boston Globe, Nov. 4, 1971, at 33, col. 1. It appears that no valid school goals are being infringed by her presence on the team, consequently under the unitary theory she would be allowed to play as the infringement of her goals outweighs any harm to the school or other students.

In the other case a fifteen year old girl is being dropped from her school's chess team because of "a rule which makes women ineligible from interscholastic competition." *See* Nashua Telegraph, Oct. 30, 1971, at 11, Col. 2. Clearly under the unitary theory, absent any valid school arguments, this girl should be allowed to play chess competitively for the school.

It will be interesting to explore the findings and reasoning used by the courts in disposing of these two cases. A strong probability exists that educational goals will be weighed at some point.

This analysis shows one thing very clearly:

> The problems created by [these cases] defy geometric solutions. The best one can hope for is to discern lines of analysis and advance formulations sufficient to bridge past decisions with new facts. One must be satisfied with such present solutions and cannot expect a clear view of the terrain beyond the periphery of the immediate case. It is a frustrating process which does not admit of safe analytic harbors.[132]

The unitary theory, if correctly applied, can remove a portion of the pessimism exhibited by this court. It can become a calm "harbor" from a turbulent sea.

These cases also give an indication that courts have been prone to weigh the educational consequences of any particular remedy, causing an unwitting use of unitary theory principles. A recognition of the unitary theory must occur, however, before its total value can be examined. Hopefully, judges and lawyers alike will show vigor in testing its validity.

Conclusion

Can an adoption or testing of the unitary theory occur? Holmes once said, "certainty generally is illusion, and repose is not the destiny of man.... We do not realize how large a part of our law is open to reconsideration upon a slight change in the habit of the public mind." [133] Hopefully, past campus conflicts will ignite a reconsideration of the problems prevalent in the academic community with an eye toward change and betterment. The courts would probably welcome a reasonable change; that their minds are fixed on any single relationship is, however, doubtful.

One may wonder if adoption of the unitary theory would be an unprecedented step in law. On the contrary; many times in the past, when change for a valid reason has been sought, it has occurred. One example was the adoption of the Uniform Commercial Code, especially Article 9, which swept away years of "legal ingenuity." It is easy to compare the code comments describing the desired effect of Article 9 with part of the hoped for effect of the unitary theory:

> Under this Article the traditional distinctions among security devices, based largely on form, are not retained; the Article applies to all transactions intended to create security interests... and the single term 'security

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[132] Eisner v. Stanford Bd. of Education, 440 F.2d 803, n. 1, 804–5 (2nd Cir. 1971).

[133] Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 466 (1897). Note that a recent writer has indicated that "with the advent of student unrest—of 'student power'—there has been a great erosion of the image of higher education in the public mind." Hatfield, *Public Pressures on Higher Education*, in THE TROUBLED CAMPUS 75 (G. Smith ed. 1970). Possibly, then, Holmes' theory will cause the law surrounding student-school problems to be reconsidered.

> interest' substitutes for the variety of descriptive terms which has grown up at common law and under a hundred-year accretion of statutes.[134]

This is part of the idea behind the unitary theory—to eliminate old, traditional, legal theories built up over a long period of time, which now confuse rather than aid both bench and bar.

Another portion of this same comment again describes a desirable effect which would be made possible by the adoption of the unitary theory:

> The Article's flexibility and simplified formalities should make it possible for new forms of secured financing, as they develop, to fit comfortably under its provisions, thus avoiding the necessity, so apparent in recent years, of year by year passing new statutes and tinkering with the old ones to allow legitimate business transactions to go forward.[135]

Hopefully, we might profit by examining retrospectively the gains made by adopting the Uniform Commercial Code and apply some of this to the student-school area. If and when the unitary theory is adopted, distinctions will be made "... where distinctions are necessary, along functional rather than formal lines." [136] Old legal theories will be abandoned and the courts will not be attempting to make the student-school legal relationship something which it is not.

Given time, courts will continue to gravitate toward unitary principles. This process should and can be accelerated by support for the unitary theory among all those interested in a more stable academic environment.

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[134] Uniform Commercial Code Comments 9–101.

[135] *Id.*

[136] *Id.*