EMERGING STUDENT RIGHTS AND THE SCHOOL'S DISCIPLINARY AUTHORITY

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INTRODUCTION

During the last five years, there has been a marked assertion of student rights and as an off-shoot there developed the concept of "student power". This insidious tug-of-war between the students and the school administration becomes conspicuous in faculty-student boards and in negotiation tables.

It is surprising to note, however, that the basic conflicts in the area of school-student relationship have not yet been resolved by our courts. Nevertheless, the Executive Orders and the Rules and Regulations implemented by the executive branch of the government give indications that our courts will adopt the attitude prevalent in American courts. Moreover, the survey of rules from the various schools in the Greater Manila area reflect a liberal orientation of school administrators. It is because of this speculation that a large part of this paper has been an effort to harmonize American decisions with Philippine jurisprudence. Not much difficulty has been encountered, however, since our constitutional rights have been patterned after those of the United States.

The numerous student protests erupting in Philippine school campuses today are often directed against what students believe are "arbitrary" or "unreasonable" rules and regulations. They decry what they claim is a systematic suppression of their rights both as students and as citizens. As to be expected, schools retort that their acts are within their competence and authority. Cognizant of this struggle, this paper endeavors to delineate the proper sphere within which constitutional rights of students may be regulated.

Most possibly the recriminations between the school and the the students stem from the fact that school authorities cling tenaciously to the old saw that they are the sole masters while students, on the other hand, clamor if not for an effective administration — student partnership, then at least for a recognition of their basic rights.

Evolution of the Recognition of Student Rights

In order to have a proper perspective and appreciation of the current steaming conflict between the students and the school

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administration it is apt to expound on the different theories advanced to describe the nature of the relationship between these two contending sectors. The theories interposed are reflective of the stages of social demand for formal education.

The *in loco parentis* theory probably found its justification during the time when formal education was for the exclusive enjoyment of the privileged few. It was at this time that education was the hallmark of royalty and social prestige. Possibly, because of the system of education then prevailing in which the students were charges left to the complete care of their mentors and governesses for certain periods of the year, it is easy to discern why educators were conceived of as substitutes for parents. The parents were said to have temporarily forfeited their parental control in favor of the mentors whose task is to mold the child into a "gentleman" or an "educated man" befitting his social status.

With the advent of the middle class, the influence of education was able to pervade a large portion of society. This new orientation wrought concomitant changes in the system of education. Education was no longer conceived of as a medium for turning out "gentlemen" but as a means for learning a trade or profession. It was with this backdrop against which the contractual theory evolved.

The political upheavals of the twentieth century revealed the stark neglect of the masses and their eventual awakening from stupor. Progressive governments endeavored to promote the social welfare and one of the instruments employed was to make education available to every citizen or subject at the lowest cost possible. Some states have even implemented compulsory education programs in their campaign to combat ignorance. On account of this emphasis on education and its consequential role in social amelioration, students began to feel that education is a matter of right of which they should not be arbitrarily denied; hence, the theory of the right to education.

In Loco Parentis Theory

The more traditional view, described in a capsule by the words *in loco parentis,* stresses the quasi-familial nature of the relationship. According to this precept, "as to mental training, moral and physical discipline, and welfare of the public, college authorities stand *in loco parentis,* and in their discretion may make any regulation for their government which a parent could make for the same purpose, and so long as such regulations do not violate divine, or human law, courts have no authority to interfere than they have

control over the domestic discipline of a father in his family."[1] The majority of the courts, therefore, found judicial abstention warranted by noting that the regulation of a university is a job entrusted to the expertise of peculiarly qualified officials who should not be unduly hampered in the exercise of their discretion.[2]

The familial notion leads to non-specific rules and informal procedures. Strict legalities are eschewed because they create a wrong tone. Facts are to be determined by administrator's inquiries, not by courtroom combat.[3]

The doctrine of *in loco parentis* was originally used primarily as a defense in suits invoking potential tort liability of school teachers when administering some type of corporal punishment to young students.[4] Bemused by the hoary *in loco parentis* shibboleth, decision after decision has not only expressed a toleration for arbitrary action but has approved it. Fortunately, increasing awareness of the age of today's student population and the impact of even the mildest of academic disciplinary measures on the individuals directly affected appears to be leading the courts away from the idea that the university is a vicarious, all-wise parent and toward an appreciation of the realities of the university-student relationship.[5]

In American jurisprudence, the doctrine retains no vitality today as to university students, having been repudiated as inapplicable in several recent decisions.[6]

Adherents of the doctrine in the Philippines find their position shored up by the new Civil Code. Article 349 explicitly provides that teachers and professors shall exercise substitute parental authority. However article 350 indicates that these substitutes shall only exercise *reasonable* supervision over the conduct of the child. Moreover, article 352 states that "the relations between teacher and pupil, professor and student, are fixed by government regulations and those of each school or institution. In no case shall corpo-

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[1] Stetson University v. Hunt, 88 Fla. 510, 102 S. 637 (1925).

[2] Smart, *The Fourteenth Amendment and University Disciplinary Proce dures*, 34 MO. L. REV. 236 (1969).

[3] Heyman, *Some Thoughts on University Disciplinary Proceedings*, 54 CALIF. L. REV. 74 (1966).

[4] Zanders v. Louisiana State Ed. of Education, 281 F. Supp. 747, 755-756 (1968).

[5] Sherry, *Governance of the University: Rules, Rights and Reponsibilities* 54 CALIF. L. REV. 23 (1966).

[6] Goldberg v. Regents of the Univ. of California, 248 Cal. App. 2d 867, 57 Cal. Rptr. 463 (1967); Zanders v. Louisiana State Bd. of Education, 281 F. Supp. 747 (1968); Jones v. State Bd. of Education, 279 F. Supp. 190 (1968); Soglin v. Kauffman, 295 F. Supp. 978; 37 U.S.L.W. 2357 (1968):

ral punishment be countenanced. The teacher or professor shall cultivate the best potentialities of the heart and mind of the pupils or student." A reading of these pertinent provisions indubitably gives the impression that a wide latitude of discretion is surrendered to the school administration in order that it can "cultivate the best potentialities" of the student. The only limit to its discretion is that it be reasonable and as long as an act is not palpably arbitrary and oppressive, courts are prone to confirm the act as reasonable.

Understandably, the *in loco parentis* theory is a bugbear to the student sector. It runs counter to the claim of responsible and mature studentry. Fortunately, according to a survey of schools in the Greater Manila area, only ten percent of the school administrators now cling tenaciously to this outmoded view.

Contractual Theory

The prevailing view has always invoked the law on contract as operative once a student has been admitted by the school. As expounded in the case of *Anthony v. Syracuse University*:

> " . . . when a student becomes duly matriculated in a college or university a contractual relationship arises: On the one hand, the student having paid the tuition, agrees to abide by the rules and regulations of the college or university; he must accept the course of study prescribed; if he would remain, he must meet the tests required as to attendance, as to diligence in study, and as to personal conduct, failure on his part in any of these respects empowers the university or college to impose penalties or puni prescribed, and in some cases authorizes dismissal. On the other hand, the university or college agrees that, in the event the student successfully pursues the course of study prescribed and complies during his attendance at the institution with the disciplinary rules and regulations of it, he will receive evidence of certificate or diploma."[7]

The majority of American courts adhere to this view. The principles of contract law are used as standards for adjudicating conflicts arising out of the student-university relationship. The courts usually find that "there is *implied* in such contract a *term or condition* that the student will not be guilty of such misconduct as would be subversive of the discipline of the college or school, or as would show him to be morally unfit to be continued as a member thereof."[8] Expulsion or suspension for breach of such implied condition is judicially approved, and the regulations of conduct set out in the college catalogue are held by most courts to be part of the contract. The Supreme Court of Illinois stated:

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[7] 231 N.Y.S. 435 (1928).

[8] Goldstein v. New York University, 28 N.Y.S. 739 (1902).

> "By the acceptance of an application for admission of plaintiff's son to an academy, which stated that the applicant understood the rules and regulations for the government of the academy, as published in its catalogue, a contract was concluded between the plaintiff and such academy."[9]

The courts have granted the university great discretion as to the nature and scope of the provisions incorporated into the contract. Provisions allowing the university to terminate a student's registration at any time without advancing any reason,[10] and provisions negating any contractual obligation to continue the student's enrollment, have received judicial approval. Said the U.S. Federal Court:

> "Where a private university has, by regulation in its general catalogue, reserved the right to sever connection of any student with the university for appropriate reason, the university authorities may decide for themselves what constitutes appropriate reason and the court will not question it."[11]

The contract analysis, as it has generally been applied in adjusting student-private university relations, has operated to the disadvantage of the student. Utilizing the concept of "implied contract in fact", i.e. a contract derived from the presumed intent of the parties as inferred from their conduct, American courts have held students to be bound to conditions undoubtedly beyond their conscious undertaking. In addition, in most of the cases the burden has been placed on the student to prove freedom from breach of contract. a departure from the traditional rule requiring the party terminating a contract to defend his action . . . It seems equitable that where courts raise an implied promise on the part of students to be bound by all university regulations, a reciprocal promise should also be implied, whereby the institution agrees to utilize just and fair disciplinary procedures, identical to those applied by public universities.[12]

The judicial favoritism shown for the university's rights probably would shock the conscience of many collegians. A student enrolling in a private university, dedicated to an educational purpose, probably has certain minimal expectations as to his relationship with the school. He probably believes there is an implied understanding that he will not be arbitrarily dismissed and that the initial fees are paid and received wih the understanding that his work will not be made fruitless nor a degree impossible by an arbitrary re-

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9 McClintock v. Lake Forest University, 222 III. App. 468 (1921).

10 Anthony v. Syracuse University, *supra*, note 7.

11 Dehaan v. Brandeis University, 150 F. Supp. 626 (1957).

12 Horwitz & Miller, *Student Due Process in the Private University: The State Action Doctrine*, BJ SYRACUSE L. REV. 911 (1969).

fusal to permit further attendance.[13]

The principles of law espoused by U.S. courts in their application of the contractual theory are open to question in the light of modern contract law. Provisions which give the university the right to dismiss without reason, or for any reason, may be unconscionable or contrary to public policy by analogy to other areas of contract law. Article 1159 of the New Civil Code provides that "obligations arising from contracts have the force of law between the contracting parties and should be complied with in good faith." This article presupposes, that the contract is valid and enforceable on account of Article 1306 which states in clear terms that "The contracting parties may establish such stipulations, clauses, terms and conditions as they may deem convenient, provided they are not contrary to law, morals, good customs, public order or public policy."[14]

In order to declare a contract void as against public policy, a court must find that the contract as to the consideration or the thing to be done, contravenes some established interest of society, or is inconsistent with sound policy and good morals, or tends clearly to undermine the security of individual rights.[15] As will be discussed in latter part of this paper, the arbitrary infringement of a student's right to a diploma contravenes an established interest of society and undermines the security of individual rights. Surely a provision which gives an institution unfetterd unilateral power to dismiss a student, when considered in the light of the irreparable harm which such an expulsion can inflict, is not only contrary to the policy of encouraging advanced education but is also fundamentally unfair and unjust.

Repugnant rules of the sort mentioned before can also be attacked on the ground of unconscionability. Unconscionability generally has been recognized to include an absence of meaningful choice on the part of one of the parties and contractual terms which are unreasonably favorable to the other party. The possibility of a meaningful choice is often negated by a gross inequality of bargaining power.[16]

The application of the doctrine of unconscionability to the

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[13] Herman, *Judicial Intervention in Expulsions or Suspensions by Private Universities*, 5 WILLIAMETTE L. J. 277, 280-1 (1969)

[14] Magahiz v. Soliman, CA-G.R. No. 1632-R, March 17, 1948, 45 O.G. 3492 (Aug., 1949); Barranco v. Labordo, CA-G.R. No. 14465-R, December 29, 1958; Sy Suan v. Regala, 105 Phil. 1024 (1959).

[15] Gabriel v. Monte de Piedad, 71 Phil. 497 (1941). See also, 20 SCAEVOLA, CODIGO CIVIL 505 (1904).

[16] Herman, *supra*, note 13 at 281.

student-university contract clearly is justified. There are few if any instances when a student has a choice, meaningful or otherwise, as to the terms of the contract. The typical student is relatively obscure and often has limited financial resources. The university has large resources, is well-known and respected, and may have the powerful support of faculty, trustees and alumni. Obviously there is a gross inequality of bargaining power in favor of the institution, negating the possibility of meaningful choice of contract terms by the student. Provisions allowing the university to unilaterally terminate the student's enrollment for no reason or any reason which the university believes justifiable, could not be more unreasonably favorable to the university. Thus the two conditions warranting the application of the doctrine of unconscionability are present in the student-university contract.[17]

The doctrine of unconscionability is frequently invoked in cases involving contracts of adhesion which obtain in a university-student relationship. These are contracts where all the terms are fixed by one party and the other has merely "to take it or leave it." According to Mr. Justice J.B.L. Reyes,[18] the "situation demands greater corrective remedies than contracts produced by bargaining on equal terms, with power lodged in the Courts to deny enforcement of provisions that are exclusively for the benefit of the stronger party, and cannot be justified by reasons of public interest."

Another legal basis for inpugning arbitrary rules is Article 1377 of the New Civil Code which provides that "the interpretation of obscure words or stipulations in the contract shall not favor the party who caused the obscurity."

In the Philippines, there is good reason to believe that the courts would adhere to the contractual theory. Rule III, Section 2 of the Rules and Regulations for the Implementation of Executive Order 260, promulgated by the Secretary of Education, states:

> "When a student enrolls and is admitted in a college or university, he *agrees* to recognize accept and comply with all existing rules, regulations, policies and requirements, concerning his school duties, campus activities and discipline as set forth in duly approved and published school handbooks, catalogues, bulletins and prospectuses."

Privilege Theory

In large part, the confusion and misunderstanding between students and the school administration in the context of contemporary student activist movements may be attributed to a widely - held

[17] *Id.* at 282.

[18] Observations on the New Civil Code, 16 LAWYERS J. 49 (1951).

impression that the admission of a student is a matter of grace or of privilege that, once extended, can be recalled or revoked upon simple grounds of what appears to be "best' for the university, of failure to conform to matters of custom or of deportment, or for engaging in conduct "unbecoming a student."[19]

This view was adopted in the case of *Anthony v. Syracuse University* where the court categorically asserted:

> "Attendance at the University is a privilege and not a right. In order to safeguard those ideas of scholarship and that moral atmosphere which are in the very purpose of its foundation and maintenance, the university reserves the right, and the student concedes to the university the right, to require the withdrawal of any student at any time for any reason deemed sufficient to it, and no reason for requiring such withdrawal need be give."[20]

It should be noted that although the court averred that attendance was a mere privilege, the university could not revoke it arbitrarily. There is a right to withdraw the privilege only upon a showing that it is necessary to safeguard the ideals of scholarship and moral atmosphere. Notwithstanding this qualification, students still find the theory repugnant on account of the facility of relating a wide spectrum of acts to the concepts of "morality" and "scholarship." Indeed, the privilege theory is merely a euphemistic expression of the *in loco parentis* theory.

A dichotomy should be had between the privilege of being *admitted* in a school and the right to *continue* one's training at a university of his choice. There is a consensus that private institutions of learning, though incorporated, may select those whom they will receive and may discriminate by sex, age, proficiency in learning, or otherwise.[21] Even admission to a public school is not an absolute right. In the case of *Sherman v. Inhabitants of Charleston*,[22] the court said that "the right to attend a public school is not absolute and unqualified but one to be enjoyed only under reasonable conditions."

The right of a school to set up requirements for admission has been recognized by the courts. As was stated in *Lesser v. Board of Education of City of New York*:

> "Court should refrain from interjecting its views within delicate areas of school administration which relate to eligibility of applicants for admission to college and determination of marking standards, un-

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19 Smart, *supra*, not 2 at 236.

20 *Supra*, note 7.

21 Booker v. Grand Rapids Medical College, 156 Mich. 96 (1909).

22 62 Mass. (8 Cush). 160 (1851)

> less clear abuse of statutory authority or practice of discretion or gross error has been shown. The judicial task ends when it is found that application for admission has received from the college authorities uniform treatment under reasonable regulations fairly administered."[23]

Once a student has been admitted, it is contended that his continued stay in the university is no longer a matter of privilege. The acceptance of his application for admission creates a contractual right in favor of the student. The U.S. Federal Court states:

> "It is undeniable, in the first place, that the plaintiffs in being suspended, although they were given the conditional right to be reinstated if and when their Mississippi convictions should be reversed, were deprived of a valuable right or interest, i.e., the right or interest, to continue their training at a university of their choice."[24]

Right Theory

This theory stemmed from the social significance attributed to education. Accordingly, each child has a natural right to be educated for social and economic adequacy according to the exigencies of the time.[25]

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[26]

As expounded in *Dixon v. Alabama State Board of Education*:

> "It requires no argument to demonstrate that education is vital and, indeed, basic to civilized society. Without sufficient education the plaintiffs would not be able to earn an adequate livelihood, to enjoy life to the fullest, or to fulfill as completely as possible the duties and responsibilities of good citizens. Expulsions may well prejudice the student in completing his education at any other institution. Surely no one can question that the right to remain at the college in which

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[23] 239 N. Y. S. 2d 776 (1963).

[24] Knight v. State Board of Education, 200 F. Supp. 174 (1961).

[25] LOUGHERY, PARENTAL RIGHTS IN AMERICAN EDUCATIONAL LAW, 53 (2d. ed., (1957).

[26] Brown v. Board of Education, 347 U.S. 483, 98 L. Ed. 873, 74 S. Ct. 686, 38 A.L.R. 2d 1180 (1954).

plaintiffs were students in good standing is an interest of extremely great value."[27]

If the student has a right to continue his education or training in the school where he was previously admitted, then there is a corresponding obligation on the part of the school to respect such right which should not be deprived in an arbitrary or capricious manner.

Executive Order No. 170, otherwise known as the Manual of Students Rights and Responsibilities, adopted the right theory when it provided as one of the rights of the students, under Sec. 1 par. (a), "The right to admission of any such college or university upon meeting its specific academic requirements and reasonable regulations adopted by the institution concerned with the approval of the Department of Education authorities." Barely 10 months from its promulgation this Executive Order was, for one reason or another, repealed by Executive Order 200.

In the survey returns, it is surprising to note that 55% of metropolitan colleges and universities adhere to the right theory.

DEVELOPING THEORIES

Fiduciary Relationship —

It has been suggested that the relationship of the student to the university should be regarded as a fiduciary relationship, since the purpose of the school is to educate the students, and since the students place their trust in the institution to perform its obligations adequately and fairly.[28]

As a fiduciary, the university has an obligation to the students as a whole to dismiss or punish those students whose conduct interferes with the education of others, and the fiduciary model would also require the school to provide the accused student with the maximum possible procedural safeguards. It would place upon the university the burden of showing that appropriate safeguards were provided the student, and that the university performed its obligations as a fiduciary in dealing with the accused student.[29]

State Agency Theory —

If we accept the idea that the university must be prepared to deal at arm's length with college men and women, then the obvious

[27] 294 F. 2d 150 (1961), cert. den., 368 U.S. 930 (1961).

[28] Goldman, *The University and the Liberty of its Students — A Fiduciary Theory*, 54 KY. L. J. 643 (1965).

[29] Smart, *supra*, note 2 at 247.

legal model would seem to be that of the typical administrative agency of the government. The government body of the state educational system may be regarded as the delegate of the state's authority and responsibility for education; hence all disciplinary action must be designed to facilitate the educational process. Reasonable rules and regulations have their place, and the university is justified in removing a trouble-maker from the university community. However, as when any part of the government deals with citizens, the state cannot abridge or affect the substantial interest of an individual without due process of law. Thus, a student may not be expelled or suspended on the basis of failure to meet inexplicit standards of comportment or decency unless the conduct of the student is such as to be a disruptive influence on other students in the university as a whole.[30]

RIGHT OF A UNIVERSITY TO IMPOSE RULES AND REGULATIONS

Since the modern university began in the 11th century, it has received its legal powers from some government agency. All medieval universities operated on the basis of charters that had been granted by the Pope or some other temporal rulers.[31]

In the United States and the Philippines, colleges and universities operate on the basis of charters or articles of incorporation. These corporate documents are necessary to establish the school as a legal entity, to define its functions and to set up a government for the institution to be managed by a board of trustees or regents.[32]

Under the grant of power in the corporate charters of educational institutions, the governing boards have been given broad grants of authority to manage and govern colleges and universities, including the implicit grant of power to enforce compliance with regulations and policies pertaining to student conduct and discipline.[33]

The power of the school to administer discipline among its students has been justified, among others, by the following interests that the school seeks to promote:

1. A university has a primary concern with matters which impinge upon academic achievements and standards, and the personal integrity of its students.

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[30] *Id.* at 242.

[31] Dizon, *Educational Trends Abroad;* A Report of the Philippine Association of Colleges and University Executive Officer, p. 12.

[32] *Ibid.*

[33] *Ibid.*

2. A university has an obligation to protect its property and the property of members of its community.

3. A university has a special interest in the mental and physical health and safety of members of its community.

4. A university has a fundamental concern for preserving the peace, for insuring orderly procedures, and for maintaining student morals.

5. A university has some responsibility for character development, for maintaining standards of decency and good taste, and for providing a moral climate on the campus.

6. A university has a commitment to enforce its contractual obligations.

7. A university seeks to protect its public image as an educational institution responsible through its governing board to a nationwide community.[84]

Broadly stated, the mission of the university is to impart learning and to advance the boundaries of knowledge. This carries with it administrative responsibility to control and regulate whatever conduct and behavior of the members of the university family impedes, obstructs, or threatens the achievement of its educational goals. In turn, it is the responsibility of students and faculty to refrain from conduct that obstructs or interferes with the educational and research objectives of the university, which impairs the full development of the mutual process of teaching and learning, or which imposes restraints upon the advancement of knowledge.[85]

American courts recognize the power of a college governing board to adopt and enforce such rules as may be deemed expedient for the orderly management of the institution and the preservation of discipline therein,[86] an Illinois court adding that the board would have possessed that power even without any express grant "because it is incident to the very object to its incorporation and indispensable to the successful management of the college."[87] In one other case, the Michigan court accepted the position that the university could set the terms of the contract with regard to the regulation of student behavior. It said further:

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[84] *Ibid.*

[85] Sherry, *supra*, note 5 at 27.

[86] Waugh v. University of Mississippi, 237 U.S. 589, 35 S. Ct. 720, 59 L. Ed. 1131 (1915); State *ex rel.* Little v. Regents of University of Kansas, 55 Kan. 389, 40 P. 656 (1895); Woods v. Simpson, 146 Md. 547, 126 Atl. 882, 39 A.L.R. 1016 (1924)

[87] Pratt v. Wheaton College, 40 Ill. 186.

> "Inherently, the managing officers have the power to maintain such discipline as will effectuate the purposes of the institution x x x. That in the absence of an abuse of discretion, the school authorities and not the courts shall prescribe proper disciplinary measures."[38]

A review of American decisions would reveal that schools are given wide discretion in formulating their rules and regulations. As expressed in *Knight v. State Board of Education*:

> "It may be conceded that a state college or university must necessarily possess a very wide latitude in disciplining its students and that this power should not be encumbered with restrictions which would embarass the institution in maintaining good order and discipline among members of the student body and a power relationship between the students and th school itself. It may be further conceded that it is delicate matter for a court to interfere with the internal affairs and operations of a college or university, whether private or public, and that such interference should not occur in the absence of the most compelling reasons."[39]

In a very real sense, the university's rules of conduct constitute the criminal law of the campus. Beyond that, it is a law whose penalties may have an impact upon a student's career, livelihood, or reputation of far more disastrous proportions than conviction for crime. The stigma of expulsion or suspension and even the effect of so minimal a penalty as a recorded reprimand may become a lifelong handicap.[40]

Academic sanctions, however, when used as a means of controlling, discouraging, or suppressing the exercise of constitutionally protected rights, whether on or off campus, is beyond the university's rightful jurisdiction. Assuming that conduct of this nature does not impair or impede the university's primary function of imparting and expanding the boundaries of knowledge, attempts to control it because it arouses public condemnation is to treat the university community as a sub-class having no right to enjoy the equal protection of the law. It also degrades the university and perverts its purpose through its implicit denial of the right to dissent.[41]

This is obviously not the proper function of university rules and regulations. They serve the university and, in turn, the world beyond the university not as protectors of the university's image, not as guarantors of campus conformity, and not as restraints upon the expression of unpalatable ideas but only as shields to be lifted against

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[38] Tanton v. McKenney, 226 Mich. 245; 197 N.W. 510, 33 A.L.R. 1170 (1924)

[39] 200 F. Supp. 174 (1961)

[40] Sherry, *supra*, note 5 at 36-37.

[41] *Id.* at 38.

the acts of those who, unfaithful to the traditions of scholarship, are destructive of the ideals of learning and the means by which they may be attained.[42]

DIFFERENCE BETWEEN PUBLIC AND PRIVATE SCHOOLS

On account of the identification of public schools as instruments or agencies of the government, courts have not faltered to invoke constitutional safeguards, especially the due process clause, in protecting students from the vagaries of public school administrators. Private schools in the United States, on the other hand, enjoy a large degree of immunity from court interference. An example of this is the case of *Carr v. St. John's University*.[43] Two Catholic students were expelled from the university on the eve of their graduation because they had served as witnesses for friends at a civil marriage ceremony. Two judges in the Appellate Division, and two more in the Court of Appeals, insisted that since "the University is a public institution" it could not enforce against a student an ecclesiastical law, the breach of which is not immoral according to standards of society in general. But the majority in both courts declined to interfere, feeling the institution a completely private one and the substantive question particularly delicate for judicial scrutiny.

Obviously this distinction is unfair to the students in private colleges and universities. The student in all universities today demands and deserves the full panoply of constitutional safeguards. His decision to attend a private university should not require a waiver of these rights. A student often chooses a private school with the expectation of getting better teachers, more individual attention, and the prestige associated with a name. Whether he receives these benefits or not, he should not pay for them by forfeiting rights that would be his if he were at a state university.[44]

In the Philippines, private schools have acquired a major and significant role in the educational set-up. In the Greater Manila area, at least seventy-five per cent of the college students are enrolled in private institutions of learning. Several reasons have been advanced why private schools have assumed such importance.[45]

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[42] *Id.* at 38-39.

[43] 34 Misc. 2d 319, 231 N.Y.S. 2d 403 (1962), *rev'd;* 17 App. Div. 2d 632, 23k N.Y.S. 2d 410 (1962)

[44] Buess, *A Stop Toward Guaranteed Student Rights — The University as Agency* STUDENT LAWYER J. 7 (May 1967) as cited in Horwitz & Miller, *supra*, note 12 at 917.

[45] O'Neil, *Private Universities and Public Law,* 19 BUFFALO L. REV. 155 (1970).

1. Private institutions give Philippine education a diversity and scope not possible in tax-supported institutions alone, and they have an opportunity to emphasize, if they wish, individualistic patterns of thought, courses of social action, or political or religious activity.

2. It guarantees liberty of choice. As the U.S. Federal Court aptly said, "The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only."[46]

3. Social reasons.

4. Flexibiliy with resources comes about because private institutions do not have to submit line-item budgets to executive budget divisions and legislatures, but have much larger pools of unrestricted funds. This means there is likely to be much more innovation in the private sector, greater readiness to adopt or try out new methods and materials, and better ability to deal promptly with new demands and challenges.

In an effort to eliminate the harsh distinction between public and private schools in the scope of their rule-making authority and to place private school students under the panoply of constitutional safeguards, the state action doctrine has been evolved. This doctrine proffers the view that the due process clause of the constitution can be invoked to restrict the acts of private universities in their dealings with students.

According to Cooley, due process of law in each particular case means such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs.[47]

The purpose of the guaranty is to prevent governmental encroachment upon the life, liberty, and property of individuals, to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principle of private rights and distributive justice, and to protect property from confiscation by legislative enactment, from seizure, forfeiture, and destruction without a trial and conviction by the ordinary modern modes of judicial procedure.[48]

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[46] Pierce v. Society of Sisters, 268 U.S. 510, 45 S. St. 571, 39 A.L.R: 468, 69 L. Ed. 1070 (1925).

[47] 2 COOLEY, CONSTITUTIONAL LIMITATIONS, 738 (8th ed., 1927)

[48] 12 C.J. CONSTITUTIONAL LAW, sec. 961 (1917).

At first the protection of due process was limited to procedural rights. Courts did not use it then as a test for determining whether or not substantive rights were violated. Questions involving substantive rights were determined by other constitutional provisions. But the increasing number of laws considered arbitrary and unreasonable gradually compelled the courts to extend its application to questions affecting substantive rights.[49] It is in this respect that the due process clause could be employed as a defense against unreasonable and capricious school rules and regulations.

It can be observed from the exposition above that due process is a shield against arbitrary acts of the government but not against those of private individuals or entities. As stated in *Terry v. Adams*[50]: "Under the fourteenth amendment the jurisdiction of the court can only be established if the protested action is shown to be that of the state."

How then can it be used to circumscribe a private school's power to impose rules and regulations? It is precisely to resolve this quandary that the state action doctrine was evolved. This doctrine, in essence, treats nominally private conduct as state conduct for purposes of the due process clause through a finding of state control, the carrying out of a state function, or on the basis of several state contracts.[51]

If the state is the controlling force behind the activities of a private institution, the state action doctrine will be applied. A showing of more than mere presence of the state, however, is essential. Control that will warrant application of the doctrine can occur in the forms of financial control and legislative: The latter form of control exists when the abridgement of rights is made possible by virtue of legislative decree.

The state action requirement can also be possibly complied with by showing the public function of education. In *Guillory v. Administrators of Tulane University*,[52] Judge Wright stated:

> "No one any longer doubts that education is a matter affected with the greatest public interest. And this is true whether it is offered by a public or private institution x x x. Clearly, the administrators of a private college are performing a public function. They do the work of the state, often in the place of the state. Does it not follow that they stand in the state's shoes?"

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[49] SINCO, PHILIPPINE CONSTITUTIONAL LAW. 101 (2d ed., 1960)

[50] 345 U.S. 461, 73 S. Ct. 809, 97 L. Ed. 1152 (1953).

[51] Horwitz & Miller, *supra*, note 12 at 917.

[52] 203 F. Supp. 855 (1962).

Proof of the public purpose of education is the fact that the government now regulates and controls the private universities to a degree commensurate with their public character.

Another approach to satisfy the state action requirement is to show such quantum of contacts between the state and the private university as will indicate clearly the fact that the university is merely an agency of he state. The contacts theory involves a weighing and balancing process. It is perhaps the most promising approach for application of the state action doctrine. Under this theory the factors indicating state involvement are given a cumulative effect rather than an exclusively individual emphasis. It is not unlike the grouping of contacts employed in the choice of law area of conflict of laws.

It is undeniable that there is some state action present in virtually all instances when dealing with a college or university. The question which will confront the court, therefore, is whether the degree of state involvement and the interest of the public in applying constitutional limitations is sufficiently significant when balanced against the right of the private college to bring the university within the operation of the due process clause.[53]

RULE-MAKING BY SCHOOL AUTHORITIES

The rules should be written with reasonable precision and without ambiguity as to the kind of conduct to which they relate and they must receive sufficient publication to insure that their existence and content is brought to the attention of all who may be affected by them.[54]

Although it is rarely that an average student would read all the rules contained in the school catalogue or pamphlet, American courts, adhering to the contract theory, have resolutely declared that the students are bound by the school rules which are terms of the contract, notwithstanding ignorance of such rules.

Executive Order No. 170, promulgating the Manual of Student Rights and Responsibilities, vests on the student the "right to be informed, before admission, of all school policies, rules and regulations governing academic duties, co-curricular and extra-curricular activities, discipline and specific assessment for tuition and other fees. As adverted to before, the aforementioned Executive Order was revoked by Executive Order No. 200.

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[53] Johnson, *The Constitutional Rights of College Students*, 42 TEXAS L. REV. 344 (1964).

[54] Sherry, *supra*, note 5 at 37.

The exercise of the university's rule-making authority and the imposition of sanctions for breaches of its regulations are plainly within its jurisdiction when the rules relate to the performance of academic duties and compliance with its standards of scholarship. Disqualification because of deficiencies in these areas or because of dishonesty or fraud in meeting requirements present no jurisdictional problems but there may be problems of fact determination and the assessment of proper penalties filled with difficulty. Similarly, conduct disruptive of good order in the classroom, the library or n other campus facilities, which results in the damaging or defacing of property, or which endangers the health or safety of others on campus may properly lead to disciplinary action.[55]

The relationship of the particular student conduct to disciplinary power should be judged in terms of the whole spectrum of university regulatory interests. Thus the university's claim to penalize student conduct, whether on or off the campus, should vary in direct proportion to (1) the general strength or importance to the academic community of the special regulatory interests which that conduct offends; (2) the relevance of the particular conduct to these interests; and (3) the difficulty of vindicating these interests by resort to nonpunitive sanctions.[56]

The Rules and Regulations promulgated by the Secretary of Education for the implementation of Executive Order No. 200 defines school regulations as those "referring to the reasonable rules governing the duties, campus activities and discipline of the students within and without the school as defined in published school handbooks, catalogues, bulletins or prospectives."

"A school regulation is considered reasonable whenever it supplements and *conforms with the legitimate purposes and objectives of the college or university concerned,* and at the same time is supported by good, valid and justifiable reasons and does not contravene existing legislation."

Although courts will interfere when they determine that the rules are within the reasonable exercise of power and discretion of college authorities, they do not demand a clear and actual connection between the rule and the school interest but merely a reasonable one. Because of this wide scope conceded to school authorities, a rule is almost always sustained as connected with a school objective. Illustrative of this is the case of *Knight v. State Board of*

[55] *Id.* at 29.

[56] O'Neil, *Reflections on the Academic Senate Resolution,* 54 CALIF. L. REV. 88 (1966).

Education.[57] A regulation was into effect stating that "the misconduct of any student enrolled in an institution of higher learning reflects dishonor and discredit upon the institution in which he is enrolled and upon higher education in general." Hence, the school administrator was instructed "to dismiss promptly any student enrolled in the institution, who shall, in the future, be arrested and convicted on charges involving personal misconduct."

In this case, plaintiffs, after completion of their school work for the year, traveled by interstate bus to Jackson, Mississippi, where they entered the waiting rooms of the Greyhound and Trailways Bus Termiinals. When they refused to leave the bus terminals in response to an order from a local police officer, they were arrested, charged with disorderly conduct and convicted. Consequently, plaintiffs were dismissed from their school. The court held that the rule was valid.

It has been suggested by several writers on the subject that when on-campus behavior constitutes, likewise, a violation of the criminal law, the school should not make it doubly harsh on the student. As a matter of law; since the conduct is an offense against university regulations as well as an offense against the state, both have jurisdiction to impose appropriate penalties. As a matter of prudence and discretion, however, wisdom may well dictate that in some such cases, action by one jurisdiction is enough.[58]

In *Anthony v. Syracuse University*,[59] the school concerned had a regulation stating that "Attendance at the University is a privilege and not a right. In order to safeguard those ideals of scholarship and that moral atmosphere which are in the very purpose of its foundation and maintenance, the University reserves the right, and the student concedes the University the right, to require the withdrawal of any student *at any time for any reason* deemed sufficient to it, and no reason for requiring such withdrawal need be given."

Impugning this regulation, the court opined that "the obvious effect of this rule is to reserve to this institution the arbitrary power, not only to destroy the career of a student, but also to injure his reputation — not by reason of anything which he may have done, but by the very act of the University itself, because the purpose of a dismissal under the rule is "to safeguard those ideals of scholarship and that moral atmosphere" etc. No arbitrary act can be tak-

[57] 200 F. Supp. 174 (1961).
[58] Sherry, *supra*, note 5 at 29.
[59] 223 N.Y.S. 796 (1927).

en under this provision which by force of the declared purpose does not cause a blight upon the reputation as to ideals of scholarship or as to moral standing, or both, of that student against whom its provisions are invoked. The right to one's life, to develop one's character, to have one's reputation free from smirching by the acts of others, is inherent and of the most valuable of rights; no institution by its own act can endow itself with the power to impair, by indirection, by innuendo, or by implication, the reputation of any individual. The Legislature of the State of New York, when it granted to the defendant the power to make suitable regulations, was itself without power to grant to this University the right to exercise any such power as it here attempts to exercise in pursuance of the terms of this regulation. The regulation as operative in the instant case creates an intolerable and unconscionable situation, and the action of the university under it is void, because it is arbitrary, unreasonable, and in a high degree contravenes a true conception of sound public policy.

The court sought support from 11 *Corpus Juris*, p. 997 which asserted:

> "The proper authorities of a college or university may make reasonable rules and regulations for the government and discipline of the students, so long as they do not interfere with some positive right; x x x and unless such rules and regulations are found to be unauthorized, against common right, or palpably unreasonable, the courts will not annul or revise them."

The court cited also 27 R. C. L. 141 which expresses the view that "whether the rules or regulations are wise or their aims worthy is a matter left solely to the discretion of the authorities, and in the exercise of that discretion the courts are not disposed to interfere unless the rules and aims are unlawful or against public policy."

SCHOOL REGULATIONS AND THE CONSTITUTIONAL RIGHTS OF STUDENTS

Most often the conflict between the school and the students is in the definition of student rights. Students are quick to howl that their constitutional rights have been trampled upon every time they feel that their "freedom" of action has been hedged in. Nevertheless, it is gratifying that the present crop of students is jealous and vigilant over their constitutional rights.

Legally, students as such have no rights or freedoms apart from those granted by governing boards, administrators, or faculty. Any rights they have are rights granted to all citizens by the Consti-

tution. Their status bestow on them no additional constitutional rights.[60]

The parallels of constitutional liberties which should exist for students on campuses are not easy for all administrators to accept, since the view is still strong, even in public institutions, that educational institutions are essentially proprietary enterprises whose owners and managers have the rights to determine what to do with their property and whose good name is bound up with the use to which it may be put. The only rejoinder is that the legal rights of ownership are an insufficient basis for determining what policies should be put into effect in an educational institution. If it is to achieve it purpose as an educational enterprise, then it must observe the conditions which its education purpose requires. The basic assumption which we make is that in higher education the conditions are best summed up by regarding the educational enterprise as a community of scholars devoted to the discovery and propagation of knowledge. Those persons who have the legal responsibility for the creation of such a community best fulfill their responsibilities by giving its educational processes the largest measure of autonomy that they can.[61]

Such constitutional rights as freedom of speech, assembly, petition, publication, and possibly, religion are basic conditions of scholarship, therefore basic conditions of any educational enterprise. Since a university trains people for independent thought by giving them occasion for thought and opportunities for expression of thought the whole campus, and not just the classroom must provide appropriate conditions. Therefore, restrictions on speeches and speakers on campus, restrictions on meetings and topics of discussion, on the distribution of leaflets and pamphlets, on demonstrations of sentiment and conviction by picketing and parading, are unacceptable except as they are necessitated by the protection of instructional activities from disturbance, by the minimum requiremnts of safety, orderly traffic and the protection of property against misuse. It is true that the intellectual content of these activities is largely limited to the various issues of public which currently agitate students, but it is in the context of a self-governing society that all of our scholarly traditions have developed. None of us, whatever his scholarly field ca escape the responsibility for participating in the decisions of the great questions about the character of

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60 Bakken, *Students Rights as Seen by a Lawyer Educator*, COLLEGE PERSONNEL JOURNAL (March, 1965).

61 Monypenny, *Toward a Standard for Student Academic Freedom*, 28 Law AND CONTEMP. PROB. 625 (1963).

human life which lie behind the current topics of political discussion. It is just such topics that stretch the intellectual competence of individuals to the utmost, since they cannot be handled by any neat pattern of established scientific principle.[62]

The guarantee of constitutional rights to students does not mean, however, that they are without limitations. As a court declared in one case: "Basic rights of freedom of speech and freedom to peaceably assemble must on occassion be subordinated to other values and consideration."[63] Moreover, another court said:

> "Picketing cannot be dogmatically equated with constitutionally protected freedom of speech and aspects of picketing going beyond free speech may be subject of restrictive regulations."

An American writer formulated three principles with respect to school limitations on the freedom of speech and assembly.[64]

The first principle demands that the rights to freedom of assemblage and freedom of expression must not be exercised in such a way as to interfere with the operations of classrooms anad laboratories, with the availability and use of libraries and other facilities, with the conduct of the university's administrative responsibilities. Reasonable regulation to prevent such interference is clearly within the rule-making jurisdiction of the university.

A second principle requires that permissible regulation must not be applied in a discriminatory manner. Facilities for speech and assemblage may not be withheld or restricted in such a way as to confer monopolistic use or to impede equal access.

The third important principle requires that no restriction, or censorship of the content of speech or advocacy be imposed unless there are extraordinary impelling reasons; such controls must be limited to situations where clear and present dangers to vital interests of the university present themselves and where it is not possible to resort to the general law.

Apart from the obvious interests in quiet and orderly movement of traffic, shared with libraries and hospitals, the university has certain special interests which justify regulations of a different character. Such special interests are both academic and non-academic. The academic interest include, for example, the power to punish cheating or examinations, plagiarism, and unsatisfactory written work. The special non-academic interests derive largely from the

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[62] *Ibid.*

[63] Clemmons v. Congress of Racial Equality, 210 F. Supp. 737 (1962).

[64] Sherry, *supra*, note 5 at 31-32.

university's guardianship of minors and young adults, and traditionally warrant special protections against such dangers as financial fraud, exposure to gambling, liquor, drugs, and narcotics.[65]

Most rules based upon these special regulatory interests are of the "sex, beer, and cheating" variety. Such rules seldom inhibit freedom of expression to any significant degree. Yet occasional implementation of these special interests may raise difficult constitutional questions which are nevertheless resolved in favor of university regulations banning fraternities. These prohibitions have been held valid, though similar restraints on freedom of association would be invalid outside the campus. The difference must derive from the university's strong special interest in regulating the living accomodations and residential environment of its students. A university may also prohibit students to read English translations in a foreign language class. The university's special academic interests presumably justify such drastic curtailment of the student's freedom to read. Thus the special regulatory powers of a university may occasionally warrant more than incidental interference with freedom of expression and association, even though the (Bill of Rights) applies as much to the campus as to the outside community.[66]

The big problems occur when students or faculty, whether on or off campus, become involved as members of the university community in political advocacy, demonstrations of protest against social and economic conditions, and other group action designed to express criticism and disapproval by highly visible and provocative means.

The exercise of university authority to make rules and regulations in these areas requires the drawing of fine lines of demarcation between matters which involve legitimate university interests and matters which directly involve constitutionally protected rights. The existence of these rights in a public educational institution is not delimited by campus boundaries, they are not lost by affiliation with it, and they require very much the same kind of recognition on campus as elsewhere.[67]

It is contended that political activity on the campus could be validly regulated by the university with respect to time, place, and manner. Although "time" and "place" are easy enough to define, "manner" is a rather vague term. It could provide the handle for regulation of speech content under the guise ostensibly procedural

[65] O'Neil, *supra*, note 45 at 92-93.

[66] *Ibid.*

[67] Sherry, *supra*, note 5 at 30.

restrictions. To avoid this abuse, "manner" should be understood to denote only those physical and procedural incidents of public expression that are neither "time" nor "place" — for example, the size and number of posters that can be displayed in certain locations, the volume of sound amplification, chairmanship of public meetings, identification of persons soliciting funds, methods of distributing literature, and the myriad other matters that must be regulated in order effectively to regulate the speech situation. With this understanding, reference to "manner" should provide no invitation to veiled censorship.[68]

THE RIGHT TO HEAR POLITICAL SPEAKERS AND ITS LIMITATIONS

The general principle is that freedom of discussion on the campus should be uninhibited. This means that student organizations should be free to invite speakers without prior authorization as to speaker or topic. Clearance for the use of space and the avoidance of conflict with other events is reasonable if it is not used as a device to provide an indirect veto.[69]

The school should not bar a prospective guest speaker from the campus merely because of the affiliation of the speaker. The mere fact that the speaker spouses heterodox ideas is not a justifiable license for the school to prohibit the students to hear his views. For it has been aptly stated that "you really believe in freedom of speech if you are willing to allow it to men whose opinions seem to you wrong and even dangerous."[70] It is suggested that those who are alarmed by what they believe to be false and misleading opinions should exercise their own freedom of speech in rebuttal; they cannot so structure the market place of ideas that only sentiment agreeable to them can be heard.[71]

To many people educational institutions are primarily agencies for inculcating the habits and values that will continue the kind of society which they find comfortable. Any social scientist will recognize that this is in fact an important function of any educational institution. However, educational institutions have never been only this: They are also places at which innovative behavior may develop, in which the accomodations to changing conditions may be tested, in which the knowledge which creates new possibilities of action may

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[68] O'Neil, *supra*, note 45 at 104.

[69] Monypenny, *supra*, note 61 at 631.

[70] Van Alstyne, *Political Speakers at State Universities: Some Constitutional Considerations*, III U. PA. L. REV. 328, 330 (1963) citing Rex v. Secretary of State *ex-parte* O'Brien 2 K.B. 361, 382 (1923).

[71] *Id.* at 337.

be won if educational institutions are to serve these functions, then they must be a community in which ideas can develop, be exchanged, tested, and discarded, in which the unorthodox is given a hearing and in which the inhibitions against the new and strange are at a minimum.[72]

Granting, however, that freedom of speech must be given full protection within the campus, it does not follow that it may be exercised at any time, in any manner, on any school property without regard to the primary use to which the property has been dedicated. Regulations may be made to assure that facilities are not overtaxed by excessive use and that the fundamental curriculum is not upset by endless distractions.

State universities may deny guest speakers access to premises structurally suited for addresses in only two situations — when the proposed speech is likely to detract substantially from the rest of the educational program, or when it is not otherwise constitutionally protected because of the evil it will produce. Furthermore, the interference with the educational program must be direct, fully equivalent to the disruption of traffic caused by a parade. The disruption must physically interfere with the regular college program. Some examples are a speech so scheduled as to encourage students to be absent from class in substantial number; one which would compete with a regularly scheduled university function being held on another part of campus; or an assembly conducted in so raucous a manner as to disturb library, office, or classroom work.[73]

All that ought to be required of any student organization or faculty member wishing to invite a guest speaker should be adequate notice of the time and place of the proposed address, so as to make certain that speaking facilities will be physically available and that the event will not cause undue congestion.[74]

A rule limiting the use of college premises to speakers invited by recognized student organizations, faculty members, or administrative personnel many be valid as a reasonable precaution against frivolous outside use. This would only be true, however, if the university did not discriminate in recognizing student groups.[75]

Executive Order 170, promulgating the Manual of Student Rights and Responsibilities, recognizes the right of students "to hear lecturers or speakers chosen upon the recommendation of the

[72] Monypenny, *supra*, note 61 at 633.
[73] Van Alstyne, *supra*, note 70 at 339-340.
[74] *Ibid.*
[75] *Ibid.*

recognized student organizations", and the "right to avail and use of campus facilities as members of authorized student organizations, subject to uniform regulations as may be required for the coordinated use of school rooms and conference halls or field spaces: Provided, that the facilities shall be used for the purposes contracted and for no other purpose." Section 4 thereof, makes a qualification that "only student organizations recognized officially by the university or college administration shall be entitled to the grant of campus facilities." It is noteworthy that under Sec. 4, Rule IV of the Rule and Regulations of the Secretary of Education for the Implementation of Executive Order 200," the recognition of campus organizations shall be ministerial on the part of the administration of the college or university . . ."

RULES ON PERSONAL APPEARANCE [76]

Several writers are of the opinion that school regulations on student appearance have to pass a test of "reasonableness," that is, the regulations mus not be arbitrarily made and must be reasonably connected with educational goals. A typical statement of the test of reasonableness was made in *Pugsley v. Sellmeyer*:[77]

> "The courts are usually disinclined to interfere with regulations adopted by school boards, and they will not consider whether the regulations are wise or expedient, but merely whether they are a reasonable exercise of the power and discretion of the board."

American courts which have made an effort to apply the test of reasonableness generally have followed three approaches. One approach requires only that there be some *conceivable justification* for the regulation. The *Pugsley* and *Leonard* cases employed this method.

In the *Pugsley v. Sellmeyer* case, the Arkansas Supreme Court upheld the expulsion of a girl who used talcum powder on her face in violation of a rule forbidding "the wearing of transparent hosiery, low necked dresses or any style of clothing tending toward immodesty in dress, or the use of face paint or cosmetics."

Likewise, in *Leonard v. School Committee of Attleoro*[78] the Supreme Judicial Court of Massachusetts upheld a student's suspension for violating a rule forbidding "extreme haircuts or any other items which are felt to be detrimental to class decorums."

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[76] Discussion of this topic is taken largely from *Constitutional Law — A Student's Right to Govern His Personal Appearance*, 17 J. PUB. L. 151 (1968).

[77] 158 Ark. 247, 250 S. W. 538 (1923).

[78] 349 Mass. 704, 212, N.E. 2d 468 (1965).

The other approach followed deems the test of reasonableness fulfilled by evidence of *prior incidents* whose occurrence the rule allegedly attempts to prevent. Illustrative of this is the case of *Davis v. Firment*,[79] wherein the court upheld the expulsion of a student who violated the rule forbidding wearing of "exceptionally long, shaggy hair." The court emphasized the following testimony:

> "During my tenure as principal of other high schools, fights occurred because of derogatory remarks made to students with extreme hair styles. In addition to this, these extreme hair styles have created distraction and disturbances in classrooms, therefore I instituted a regulation that prohibited long and shaggy hair or exaggerated side burns."

The third approach is to find whether the grooming in question does not *materially and substantially* interfere with the requirements of appropriate discipline in the operation of the school. This was availed of in the case *Burnside v. Byars*.[80] Defining a reasonable regulation as one which is "essential in maintaining order and discipline" and which "measurably contributes to the maintenance of order and decorum, the court held the regulation unreasonable because the wearing of freedom buttons had not actually interfered with educational activities. Evidence was clear that there was only mild curiosity and no commotion among the studentry.

School rules regulating personal appearance could be impugned on the basis of two constitutional rights, the rights of free speech and the right of privacy.

In the case *Burnside v. Byars*, the court was explicit in stating that the freedom buttons were worn "as a means of silently communicating an idea and to encourage the members of the community to exercise their civil rights." This was reinforced in the case of *Tinker v. Des Moines Independent Community School District Education*,[81] where it was declared that the wearing of an arm band "for the purpose of expressing certain views is a symbolic act and falls within the protection of the free speech clause."

Traditionally, the protective scope of freedom of expression has been limited to activity which symbolizes or attempts to communicate an idea or point of view. The U.S. Supreme Court has placed the flag salute within this limitation because "there is no doubt that in connection with the pledges, the flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas

[79] 269 F. Supp. 524 (1967).
[80] 363 F. 2d 744, 749 (1966).
[81] 258 F. Supp. 971, 972 (1966).

. . . a short cut from mind to mind."[82]

Applying this established principle, a court rules that the wearing of long hair is not symbolic and therefore not within the scope of the right of expression. The court reasoned that a "symbol must symbolize a specific idea or viewpoint. A symbol is merely a vehicle by which a concept is transmitted from one person to another and unless it represents a particular idea — a symbol becomes meaningless. It is, in effect, not really a symbol at all."[83]

Another legal ground being explored as a possible basis for repudiating rules on personal appearance is the right of privacy. The main obstacle, however, is in locating the specific constitutional provisions which grant such right. In *York v. Story*,[84] the court creatively took the position that the concept of "liberty" in the due process clause embraces a fundamental right of privacy. Again, in *Griswold v. Connecticut*,[85] the Supreme Court held a Connecticut anti-contraception statute unconstitutional because it violated a right of marital privacy, a right "lying within the zone of privacy created by several fundamental constitutional guaranties," without being able to specify any.

CONCLUSION

This paper does not pretend, and it was never the intention of the author, to give an exhaustive discussion of all the areas of conflict between the student and the school administration. It was intended merely to give a sufficiently general view but not a microscopic examination of all the aspects of the school-student relationship.

From a reading of this paper one can glean that no absolutes could be arrived at. It is a matter of placing the values on the scale and striking a balance between them. Vis-a-vis the constitutional rights of student are the legitimate interests of the university. Of course, constitutional rights occupy a preferred position and are to be given much weight but as has been explicitly declared: "Basic rights must on occasion be subordinated to other values and consideration."[86] They are not a license to trample on the rights of others and must be exercised responsibly and without depriving others of their rights.[87]

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[82] West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 63 S. Ct. 1178, 147 A.L.R. 674, 87 L. Ed. 1628 (1934).

[83] Davis v. Firment, *supra*, note 79 at 527.

[84] 324 F. 2d 450 (1963).

[85] 381 U.S. 479, 14 L. Ed. 2d 510, 85 S. Ct. Ct. 1678 (1965).

[86] Clemmons v. Congress of Racial Equality, *supra*, note 63.

[87] Baines v. City of Damville, Va., 337 F. 2d. 579 (1964).