AN ANALYSIS OF HOW THE ROLE OF LAW HAS AFFECTED SPECIFIC RELATIONSHIPS BETWEEN PUBLIC UNIVERSITIES AND THEIR STUDENTS: LEGAL GUIDELINES FOR ADMINISTRATIVE DECISION-MAKING

Thesis for the Degree of Ph. D.
MICHIGAN STATE UNIVERSITY

Stephen D. McClellan

1967

This is to certify that the

thesis entitled

An Analysis of How the Role of Law Has Affected Specific Relationships Between Public Universities and Their Students: Legal Guidelines for Administrative Decision-Making

presented by

Stephen D. McClellan

has been accepted towards fulfillment of the requirements for

Ph. D. **degree in** Administration and Higher Education

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Date 7-17-67

ABSTRACT

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The bond which exists between the law and education has a long and honorable history. Individuals may be well aware of how litigation and/or statutory construction has vitally affected the development of American elementary and secondary schooling. Less is known, however, of how the law and higher education are inter-related. In an even more localized aspect, very little has been written concerning the impact law may have on those policies, regulations, and procedures instituted by administrators of institutions of higher education. Briefly, the present study is designed to meet this need. Specific relationships which currently exist between public universities and students were chosen for comprehensive legal review. The regulatory aspects of each relationship were examined as they have emerged from judicial interpretation, administrative agency ruling, and/or legislative enactment. Then, from the information gained from such review, the investigator has developed legal guidelines for decision-making by administrators of public colleges and universities. The implicit intent of providing such guidelines is to make administrators aware of what courts of law might expect

in particular areas, but simultaneously preserve the autonomy of educational authorities to make decisions on educational issues.

Method

Three student-university relationships were chosen for study: disciplinary proceedings; on-campus housing for students; and student records. Using numerous legal resources (e.g., federal and state statutory compilations, federal and state court decisions, administrative agency rulings, and legal encyclopedias) each relationship was traced to its origin in the legal literature, and then updated with respect to its current legal status.

Conclusions and Implications for Further Research

This study was devoted to the examination of one major hypothesis, stated as follows:

> Non-legal norms, which have long governed specific relationships between public universities and students, have been and are being replaced by legal norms.

On its face, the evidence documented in the study would seem to support this hypothesis. The two hundred cases cited in the text overwhelmingly point to the conclusion that courts and legislative assemblies have set forth behavioral standards for higher education. A more important finding, however, is the repeated judicial declaration that educational issues are more suitably

attended to by educational authorities. It may be concluded that courts of law would prefer not to be called upon as the arbiter of educational policies and procedures, provided that fundamental measures of reasonableness and fairness have been employed by administrators of public institutions of higher education.

Further research is needed in the area of student-university relationships. The aspects of tuition and scholarship, and admission and re-admission, particularly need attention. Living in such a litigious age promises to bring judicial review for administrative decisions affecting these areas. Following the guidelines presented in this study, and development of legal research in additional areas, will contribute to the needed preservation of administrative decision-making autonomy.

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A THESIS

Submitted to
Michigan State University
in partial fulfillment of the requirements
for the degree of

DOCTOR OF PHILOSOPHY

Department of Administration and Higher Education

1967

ACKNOWLEDGMENTS

To my regret, space will not permit the mention of all those who helped make this study possible. Several individuals, however, deserve special comment. First, I am indebted to Dr. George M. Johnson, the thesis director, for his wisdom, patience and inspiration. Beyond the advice given during the development of the study, Dr. Johnson has provided a model of exemplary professional achievement and personal sensitivity to the needs of others.

The chairman of my doctoral committee, Dr. Walter F. Johnson, deserves special mention for his continued assistance and constructive criticism. His insight and encouragement were crucial to the development and design of this work.

Words cannot express my feeling of gratitude for the helping hand extended to me by Miss Charlotte Dunnebacke, Librarian for the Michigan State Law Library. On countless occasions, she was most willing to offer use of the Law Library facility. Without access to the library, this study would not have been possible.

Other individuals gave willingly of important resource materials. William L. Lemmers, legal counsel for the University of Michigan, and Thomas E. Emmett, Assistant to the Vice-President of the University of Detroit, were of invaluable assistance. I am grateful for their cooperation and interest.

Finally, a special place among those who contributed so much is lovingly reserved for my wife, Jill. Her patience and understanding throughout the study provided constant inspiration and incentive. Truly, the thesis is as much her work as it is mine.

To all of these individuals, I say "Thank you," and apologize for the fact that this short acknowledgment is not at all commensurate with their contributions.

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CHAPTER I

INTRODUCTION AND STATEMENT OF THE PROBLEM

In recent years,the nature of higher education has undergone a gradual but distinct change. Evolving from a point in time wherein higher education was available to only a select few, and was in essence a private enterprise, modern colleges and universities have emerged as institutions which provide educational opportunities for a great number of students. Attendant to this change has been a proliferation of rules, regulations, policies and procedures which have been necessary for the general goverance of institutions of higher learning.

Consequent to the increased number of governing principles and sanctions has been the expanded reliance on administrative rule-making power. As public institutions of higher education are subject to state control, the ultimate disposition of all such administrative regulations must be housed within the formal framework of civil and criminal law. Thus, as administrators in higher education are confronted with problem situations, they must pay homage to two masters: (1) to their institution, which has delegated to them the power to promulgate regulations designed to promote and sustain the educational process; and (2) to the searching analysis of judicial review,

making certain that their decisions do not conflict with constitutional and statutory requirements.

In order to reconcile these principal concerns, administrators must develop an understanding of how law is inextricably bound to higher education. A knowledge of the legal implications inherent in his responsibilities will better prepare the administrator to make decisions which are educationally sound and legally valid. All too often, reacting in a crisis situation and without the careful weighing of complex considerations, administrators respond in a manner which is judicially arbitrary and unreasonable. Decisions are based upon erroneous and inadequate fact gathering means. Judgments of this nature may prove disastrous in a day and age in which American college students are more aware than ever before of their legal rights and responsibilities as citizens.

Purpose

It is the purpose of this study to investigate several specific relationships which exist between public universities and students; relationships which have been defined and set forth by law. The writer proposes to thoroughly examine the regulatory aspects of each relationship as they have emerged from judicial interpretation, administrative agency rulings, and/or legislative enactment, and as a result of this examination, offer legal guidelines for

decision-making to administrators who have responsibilities relating to these relationships. Using numerous legal materials for research purposes, each of the relationships chosen for study will be reviewed with regard to its origin in the literature, and up-dated in terms of its current legal status. The facts as revealed through research will be carefully documented and presented in an empirical manner, exclusive of critical interpretation.

Hypothesis to be Examined

This study is devoted to the examination of one major hypothesis, stated as follows:

Non-legal norms, which have long governed specific relationships between public universities and students, have been and are being replaced by legal norms.

This hypothesis is the core of the study, and has great relevance in light of the fact that little has been written with regard to the educational soundness of judicial, legislative, and administrative bodies acting as final arbiters of educational policy. If the hypothesis is upheld, it will mean that the position of the administrator on college campuses has changed, making him more vulnerable to legal redress. It is the intention of this study to underline the nature of this change, and to more clearly define the broadening parameters of the college administrator's legal relationship with university students.

Scope and Limitations

The relationships which exist between public colleges and universities and students, having resulted from the students' decision to enroll and the university's decision to admit, are many and varied. Nearly all aspects of student life, curricular and extracurricular, are linked to an ongoing relationship with the institution. That is to say, in each relationship there exists a reciprocal set of expectations on the part of both university personnel and students.

Certain relationships appear more frequently in the legal literature than others. Specifically, three relationships have received a greater quantity of judicial interpretation, administrative ruling, and/or legislative consideration. Assuming that an analysis of these relationships will have the greatest amount of practical value for college and university administrators, the following were selected for investigation:

1. Disciplinary proceedings;
2. On-campus housing for students;
3. Records and record-keeping

In addition, the study will deal only with relationships which have developed between students and representatives of the university administrative structure. Parties excluded from the study would include teaching faculty and university employees responsible for the care and maintenance of university facilities, equipment and property.

A final limitation of the study is found in the nature of the student-university relationship. Dean Mautz, speaking before the National Conference of University Attorneys, highlights this point:

> The nature of the relationship may not be love, but it is a many splendored thing. Any general statement may not be wholly applicable to any particular jurisdiction. Education is a state function and the law pertaining thereto is arrived at individually in each of fifty jurisdictions. The complexity produced by the operation of the state sovereignty principle in the sphere of education is then further compounded by the number of fields of law which are encompassed by the university-student relationship. If law could be reduced to mathematical precision, it is apparent that there would be an almost infinite number of possible combinations which could represent student-university law in any one state.[1]

The three specific areas which are researched, then, are descriptions of particular student-university relationships in particular jurisdictions. Their universal value lies in the revelation of trends which are emerging from the fluid state of education law. These trends may be expected to touch all jurisdictions in the near future, provided that education continues to hold the public interest.

Definition of Terms

In the process of legal research, several terms may be used which have specific legal connotation. So that the

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[1]Robert B. Mautz, "The Legal Relationship of the University and the Student," Proceedings of the 1st Annual Conference of University Attorneys, Ann Arbor, Michigan, (unpublished, 1961).

study may be presented in a clear and trenchant manner, the following terms will be defined in advance:

1. Administrator. Individuals who perform neither public judicial nor legislative acts, who belong to the executive department of university government, and who have responsibility for the supervision and administration of student activities.

2. Public university. A college or university is deemed to be public in character if its primary support is derived from state funds. The principal factor in the determination of status is origin: if founded by private individuals, privately endowed and supported, the courts will consider it to be a private corporation. If, on the other hand, the college or university was organized and established by the legislature and if it is primarily supported by public funds, it is treated as a public corporation or an agency of government.[2] However, the corporate status of an institution of higher education in this country can only be determined by an analysis of its charter and the method of its establishment, support and control, as interpreted by the courts.[3]

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[2] American Jurisprudence, Volume 55, Section 3, page 3.

[3] Thomas Edward Blackwell, College Law: A Guide for Administrators (Washington: American Council on Education, 1961), page 24.

3. Due process. Although a fundamental principle of justice, the term "due process of law" is often misunderstood and misused. A broad definition would define due process of law as meaning in due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights.

The United States Supreme Court has suggested that due process of law should reflect: "certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard,"[4] procedures which "have been found to be implicit in the concept of ordered liberty,"[5] and "fundamental principles of liberty and justice which lie at the base of all civil and political institutions."[6]

a. Substantive due process. The phrase "due process of law," when applied to substantive rights, means that a state is without right to deprive a person of life, liberty or property by an act having no reasonable relation to any governmental purpose, or which is so far beyond necessity of case as to be an arbitrary exercise of governmental power.[7]

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[4] Holden v. Hardy, 169 U.S. 366, 389 (1898).

[5] Palko v. Connecticut, 302 U.S. 319, 325 (1937).

[6] Herbert v. Louisiana, 272 U.S. 312, 316 (1926).

[7] Valley National Bank of Phoenix v. Glover, 159 Pac. 2d, 292, 298, (1945).

b. Procedural due process. Procedural due process of law contemplates a fair hearing before a legally constituted court or some other authority, with notice and opportunity to present evidence and argument, representation by counsel, if desired, and information as to the claims of the opposing party.[8]

4. Doctrine of reasonableness. In the determination of liability, courts of law frequently apply the criterion of reasonableness to the actor's behavior. In other words, given the circumstances involved, did the actor conform to a standard of conduct as would be expected of a "reasonable man" under like circumstances. The qualities which primarily characterize the reasonable man, to whose standard the actor is required to conform in order to be protected in his ignorance of the actual facts, are normal acuteness of perception and soundness of judgment.[9]

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[8]For further explanation of what constitutes a "fair hearing" and additional rudiments of an adversary proceeding, see: "Dismissal of Students; Due Process," Warren A. Seavey, 70 Harvard Law Review, 1406, 1407 (1957); "Procedural Due Process and State University Students," 10 UCLA Law Review, 368, 380, 381 (1963); 60 Michigan Law Review, 499 (1961); Dixon v. Alabama State Board of Education, 294 F 2d, 150, 158, 159 (1961); State ex rel. Ingersoll v. Clapp, 263 Pac. 433, 277 U.S. 591 (cert. denied, 1928); State ex rel. Sherman v. Hyman, 171 S.W. 2d, 822, 826 (1942), 319 U.S. 748 (cert. denied).

[9]Restatement of the Law, Torts 2d, Volume 1, American Law Institute, St. Paul, Minn.: American Law Institute Publishers, 1965, page 19.

5. Doctrine of unconstitutional conditions. The doctrine of unconstitutional conditions holds that enjoyment of governmental benefits may not be conditioned upon the waiver or relinquishment of significant consitutional rights, in the absence of some compelling social interest which justifies the subordination of those rights under the circumstances.[10] This concept has relevance to the scope of university rules and regulations, as it clearly indicates that students at public universities, as a condition for remaining in good standing, may not be forced to surrender preferred liberties which are secured in the federal constitution.

6. Law. It would appear obvious that a single definition of "law" cannot possibly encapsulate the total meaning of the term. As stated by Roscoe Pound, "law is a word of more than one meaning. As used by jurists it has at least three: The legal order, the regime of adjusting relations and ordering conduct by systematic application of the force of a politically organized society; the body of authoritative grounds of or guides to decision in accordance with which relations are adjusted and conduct is ordered in such a regime; and the judicial and administrative

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[10] Law in Transition Quarterly, "Student Academic Freedom and the Rule Making Powers of Public Universities: Some Constitutional Considerations," William W. VanAlstyne, Winter, 1965, p. 21.

processes in which those grounds of or guides to decision are applied."[11]

As the present study proposes to analyze various legal relationships, and in concert with guidelines developed by analytical jurists, the intended definition of "law" will be that of a body of authoritative grounds of or guides to decision, "a body of logically interdependent precepts made to a logical plan discoverable by analysis. . . ."[12]

Procedures Used in the Study

The importance of this study is dependent upon the degree to which each of the chosen relationships under investigation is effectively identified and researched. To ensure systematic gathering of data and analysis, the following procedure will be used:

1. Each relationship will be traced to the period wherein all institutions of higher education were private and the relationship between the university and the student was contractual by nature. To find such information,

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[11]Sidney J. Simpson and Julis Stone, Law and Society, Book One, (St. Paul: West Publishing Company, 1948), page XIV.

[12]Ibid.

the following legal materials will be used: federal and state statutory compilations; federal and state court decisions; administrative agency rulings and opinions; legal encyclopedias (Corpus Juris Secumdum and American Jurisprudence); legal periodicals; attorneys general opinions; and loose leaf service such as Prentice-Hall and Commerce Clearing House.

2. With the advent of public institutions of higher education, new variables began to affect the university-student relationship. Constitutional and statutory construction, as well as the development of administrative law and state action, emerged as factors for consideration as administrators of public universities became involved in decisions which necessitated awareness of these developments. The second step, then, will be an analysis of how each relationship chosen for study evolved through this transitional period.

3. Following the legal research of all information pertinent to each relationship chosen for investigation, a section on legal guidelines for administrative decision-making will be offered.

Summary

This study has been designed to investigate the role of law as it has affected three (3) specific relationships between public universities and students, and to offer

legal guidelines for administrative decision-making in each relationship chosen for study.

Each of the relationships chosen for study will be thoroughly researched in the legal literature, in order to determine where the relationship initially received legal consideration and what the current legal status of the relationship may be.

The purpose of offering legal guidelines for administrative decision-making is two-fold. First, such information will enable administrators to make decisions which are in concert with contemporary legal requirements. And second, the suggested guidelines will provide insight with regard to the impending direction of various university-student relationships. Such information may precipitate decisions which are interstitial, filling the gap between what is educationally sound and legally permissable.

Overview of the Study

The next chapter provides a review of those elements which combine to form the academic community: boards of trustees; administrators, faculty; and students. As these elements make contact with one another, relationships of various types are formed. Chapter III provides an historical description of the student-university relationship;

emphasizing the three important phases of this development. Chapters IV, V, and VI are comprehensive discussions of particular student-university relationships: disciplinary proceedings; on-campus housing; and student records. At the conclusion of each chapter, legal guidelines are offered for administrative decision-making. Conclusions and implications for future research are stated in the final chapter.

CHAPTER II

THE CONSTITUENT ELEMENTS OF THE ACADEMIC COMMUNITY

Like all complex human enterprises, the American college or university is composed of several elements. For a public institution of higher education, these elements may be identified as boards of trustees, administrators, faculty,and students. Identified as separate entities, with separate autonomous functions, these elements are tied together by a network of human relations. The results of the interaction which takes place between elements may be defined as a relationship. These interrelationships are ordered by a system of authority.

The student-university relationship has a long history. Traditionally, this relationship has been one wherein administrative authorities and faculty possessed an inordinate amount of power with regard to the control and supervision of students. Such power has been delegated to administrative and faculty personnel by the governing board, often called the board of trustees, board of regents, board of governors, or some similar name. The board, in turn, has received its authority from constitutional provision, enabling legislation or the language of the institution's charter.

Execution of said authority has sometimes been demonstrated in an arbitrary manner. In 1928, a young woman was dismissed from an eastern institution for failing to be a "typical Syracuse girl."[1] In another case, reported in a recent law journal[2] a student was expelled because she refused to pay purported debts which she asserted were properly her husband's obligations.[3]

To protect themselves against such arbitrary administrative action, students have sought relief from the courts. Although the results have not been favorable to them, litigation initiated by students has steadily increased to the point that legal writers and educators have begun to re-examine the legal principles applicable to the student-university relationship. Whether it emanates from the University of Maryland, where students protested to dramatize the absence of protest,[4] or from Berkeley where students protested for freedom of speech and political action, it has been made eminently clear that the student-

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

[2] Kentucky Law Journal, Volume 54 (1966).

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

[4] Campus Rebellions and Constructive Changes, Papers and Proceedings from the 52d Annual Convention of the National Lutheran Educational Converence, January 8-10, 1966, page 64.

university relationship should be re-cast in the light of contemporary campus and societal developments.

Those who would undertake this task, however, must first have a clear understanding of the constituent elements which combine to form the authority structure of the university. The following analysis will proceed along the conventional lines of regarding trustees, administration, faculty, and students as constituencies, disregarding other groups.

Boards of Trustees

Today, the majority of tax-supported colleges and universities are considered to be public corporations.[5] Defined as a public corporation by statutory or constitutional enactment, public institutions of higher education receive supervision and control from governing bodies called boards of trustees, boards of regents, or boards of governors. While functioning within the scope of their authority, the governing boards of public institutions are subject to legislative control or supervision. However, several public universities have received the benefit of legislative action which has given them constitutional autonomy. The

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[5]Thomas E. Blackwell, College Law: A Guide for Administrators (Washington; American Council on Education, 1961), page 241.

selection of members of governing bodies is established by the legislation which gave rise to the founding of the institution[6] and may be accomplished via appointment by the governor[7], election on a state-wide basis, or by permitting the governing body itself to fill vacancies.

The laws of the federal, state, and local governments provide the basic sanctioning of the college including all of its programs. These laws are of two general kinds: First, there are those laws which pertain to all individuals and organizations regardless of their status as educational institutions. Second, there are those laws which pertain directly to the organization and conduct of institutions of education.[8]

It is customary for a college to have its own written charter or bylaws by which it specificially declares its operational standards. Such a charter usually defines the auspices of the college, its chosen philosophy, and such matters as the way by which the students and staff are secured, advanced and dismissed.[9] Within the context of the federal, state, and local laws, the terms of the

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[6]Allen v. Morton, 127, S.W. 450, (1910).

[7]Driscoll v. Hershberger et al., 238 Pac. 2d 493, Kansas, (1951).

[8]Herbert H. Stroup, "Freedom and Responsibility in Higher Education," Christian Faith and Higher Education Institute, E. Lansing, Michigan, 1964, page 6.

[9]Ibid.

charter set the bounds for the public institution. However, the governing board has absolute power to make decisions in the discharge of its total responsibility for the institution provided these decisions remain within the parameters set forth in the founding legislation. Legally, then, whether the institution is public or private, the governing board is the university.[10]

While boards may execute a variety of functions, Rauh has pointed out that as a general rule they discharge a minimum of four basic responsibilities:

(1) To fill vacancies and make changes in the office of president. In this function the board oversees the basic purpose of the institution.

(2) To hold title and conserve property.[11] The board thus supervises the financial well-being of the institution.

(3) To act as a court of last resort.

(4) To hold the charter and such revision of it when it is deemed necessary.[12]

Also, the trustees or regents are usually given power by the incorporating act or charter of the university or

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[10] See M. M. Chambers, "Who is the University? A Legal Interpretation," Journal of Higher Education, June 1959. Also, M. M. Chambers, The Colleges and the Courts Since 1950 (Dansville, Ill.: The Interstate Printers and Publishers, Inc., 1964), page 146.

[11] Hempstead v. Meadville Theological School, 130 Atl. 421 (1925).

[12] M. A. Rauh, College and University Trusteeship (Yellow Springs, Ohio: The Antioch Press, 1959), page 19.

college to elect and employ all professors and teachers, and to remove them,to fix and regulate compensations, to do all acts necessary and expedient to put and keep the university in operation and manage it, to sue and be sued, to acquire and dispose property, to make contracts, to grant diplomas, and to perpetuate themselves.[13]

The governing body of a college or university has authority to contract within the limitations on its power imposed by law, although mere executive officers ordinarily lack power to make such contracts unless specially authorized. The authorities are in conflict respecting the validity of a contract between the college governing board and one of its members.[14]

Additional duties are expressly imposed on the regents or other officers by the statutes of some states.[15]

Ultimate authority and responsibility for the orderly operation and maintenance of the institution, then, is vested in the board of trustees. When certain matters have been placed in the exclusive control of the governing board, or

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[13] State ex rel. Stallard v. White, 82 Ind. 278 (1882); University of Maryland v. Williams, 9 Gill and Johnson (Md.) 365 (1838); Oklahoma A & M College v. Willis, 6 Okla. 593, 52 Pa. 921 (1898); Worzella v. Board of Regents of Education, 77 S.D. 447; 93 N.W. 2d, 411 (1958); Foley v. Benedict, 122 Texas 193, 55 S.W. 2d, 805, (1932).

[14] See Corpus Juris Secundum, William Mack (ed.) Volume XIV, (Brooklyn, New York: The American Law Book Co., 1939), page 1352; Bauer v. State Board of Agriculture, 129 N.W. 713 (1911).

[15] Young v. Regents of State University, 124 Pac 150, (1912).

where it has a sound discretion to exercise in the performance of a duty, the court will not interfere unless the delay in the performance of such duty is unnecessary or willful, or unless the acts of the board are subversive of the purposes for which the board was created.[16]

It is unrealistic, however, to expect a body which only convenes beteween four and eleven times a year to minister to the daily needs and concerns of the institution. For such a purpose, the board delegates the responsibility to agents of its own choosing, in the fashion designated in the charter which it holds.[17] Generally, a board will create as its sole agent the president, holding the incumbent of this solitary office wholly responsible for the conduct of the affairs of the institution. Thus, the legal authority of faculty and students is governed by delegation from the president. Such delegation tends to have the effect of "common law" in practice, even though it has no legal standing in the courts, and may be altered from time to time by the board and the president.[18] As the theory of delegable and non-delegable powers may be confusing,

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[16] Corpus Juris Secundum, William Mack (ed.) Volume XIV (Brooklyn, New York: The American Law Book Co., 1939), page 1352; Bauer v. State Board of Agriculture, 129 N.W. 713, (1911).

[17] Terry F. Lunsford (ed.), The Study of Academic Administration (Boulder, Colorado: Western Interstate Commission for Higher Education, October 1963), page 24.

[18] Ibid.

it would be appropriate at this point to define the essential elements of this important legal concept.

Theory of Delegable and Non-Delegable Powers

All too often the delegation of authority from the governing board of trustees to the president, and subdelegation from the president to appropriate administrative officers, is taken for granted and not submitted to legal analysis. Not all responsibilities are delegable, and the body of literature in Administrative Law makes it clear that administrators in the higher education enterprise must be aware of the legal parameters of delegable and non-delegable tasks.

Much of the subdelegation of administrative responsibility which takes place in public colleges and universities does so by means of tacit assumption. But such delegation is well grounded within the framework of administrative law, and courts may be disposed to determine whether it will infer the power of the administrator to subdelegate authority, despite the absence of a statutory provision expressly permitting the practice.[19] It has been suggested that administrative authorities have the power to

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[19]Nathan D. Grundstein, "Subdelegation of Administrative Authority," George Washington Law Review, Volume 13, 1945, page 146.

promulgate binding rules governing their organization and procedures even in the absence of specific statutory authorization.[20]

Administrative authorities at public universities do not possess legislative power per se. The principle of separation of the three branches of government and the vesting by the Constitution of all legislative power in the legislature provide the basis for the doctrine that the legislature cannot delegate its legislative power to an administrative authority.[21] Operating with broad discretionary power, administrative authorities at public colleges and universities are free to exercise rule-making power, or to fashion new regulations through a case-by-case interpretation of applicable statutory standards. Though critics may disclaim the case-by-case approach, the courts have indicated that restricting administrative authorities to only the rule-making approach would make the administrative process inflexible and incapable of dealing with many of the specialized problems which arise.[22]

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[20]Kenneth C. Davis, Administrative Law Treatise, Volume 1, Section 5.03, (1958).

[21]Norman Abrams, "Legislative Powers of Administrative Authorities: The Rule of Law," The Los Angeles Bar Bulletin, March 1961, Volume 36, page 161.

[22]Securities and Exchange Commission v. Chenery Corporation, 332 U.S. 194, (1947).

The rule-making power delegated to administrative authorities, however, may not be used in an arbitrary manner. The delegation of said authority is contingent upon the development of adequate standards to guide the administrative authority. These guidelines for behavior may be established by the legislature or by the custom and practice of the particular administrative authority. As a result of inappropriate guidelines for administrative decision-making, several state courts have invalidated subdelegations of administrative authority.[23]

Where subdelegation of administrative authority is made pursuant to express statutory provisions, no questions of difficulty are presented.[24] In the absence of a provision for delegation, however, questions of subdelegation frequently constitute the basis of attack upon an administrative order or regulation which is free from any doubt as to the validity of its substance--in short, the act of subdelegation may involve a deviation from statutory authority.[25]

Thus, the authorizing statutory language must be clear with regard to the scope of delegated powers for administrative bodies.

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[23]See Van Riper v. Traffic Telephone Workers' Federation of New Jersey, 66 Atlantic 2d 616 (1949); Bell Telephone Company of Pennsylvania v. Driscoll, 21 Atlantic 2d 912 (1941).

[24]Robertson v. United States ex rel. Baff, 285 Federal Reporter 911 (1922).

[25]Walter Gellhorn, Administrative Law; Cases and Comments (Chicago: The Foundation Press, Inc., 1940), page 315.

The non-delegation issue generally centers on the adequacy of the standards limiting the granted rule-making power. There are instances, however, in which the legislature has intended that the instructions given to a single named officer be carried out only by that officer. Sub-delegation of responsibility in this situation would be inappropriate.[26] It is inappropriate to conclude, however, that every official act calling for the exercise of discretion must be performed by the one named in the statute.[27]

In summarizing this issue of delegable and non-delegable powers assigned to administrative authorities in public colleges and universities, it must be re-emphasized that the governing board of an institution is ultimately responsible for all administrative decisions made by subordinate officials. The legal implications of this important consideration are made eminently clear by Gellhorn:

> . . . one suspects that the courts might be especially prone to reject regulations having the force and effect of law and bearing upon the rights or conduct of private citizens, when such regulations have been promulgated without the responsible head's active approval. Departmental chiefs may be shrewdly advised, therefore, to be themselves the source of subordinate legislation which emanates from their official establishments.
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> . . . even where the courts have sanctioned sub-delegation of many important elements of regulatory authority, they have still sometimes hesitated

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[26] Dunn v. United States, 238 Federal Reporter 508 (1917); In re Tod, 81 N.W. 637, (1900); Runkle v. United States, 122 U.S. 543, (1887).

[27] See French v. Weeks, 259 U.S. 326, (1922); Hannibal Bridge Co. v. United States, 221 U.S. 194 (1911).

> to overlook the delegation of the actual final execution of a power conferred upon the department head.[28]

It is incumbent upon governing boards, then, to carefully interpret the statutory language which grants authority to their policies and procedures. They may find that the responsibilities which may be subdelegated to administrative officials of the university are severely limited. On the other hand, they may find considerable latitude with respect to the subdelegation of authority. Finally, to be consistent with the tenets of administrative law, they should develop appropriate guidelines for administrative decision-making by individuals to whom they have subdelegated authority.

Administration

The second constituent element of the university community is the administration. Perhaps no part of the academic community is more often misunderstood or criticized, especially by faculty and students, than administration.[29] In the light of the legal authority structures, the administration is the group of persons to whom the president re-delegates authority which has been initially delegated to him by the board for the conduct of all the functions of the institution.[30]

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[28] Walter Gellhorn, op. cit., page 323.

[29] John D. Millett, The Academic Community: An Essay on Organization (New York: McGraw-Hill Co., 1962), page 179.

[30] James P. Dixon, "The Authority Structure: Legality and Reality," The Study of Academic Administration, Terry F. Lunsford (ed.) (Boulder, Colorado: Western Interstate Commission for Higher Education, October 1963), page 27.

Millett reports that administration in the academic community must perform three essential services. These are (1) to provide educational leadership and to cultivate an image of the college or university; (2) to augment and to allocate the scarce economic resources of the college or university; and (3) to maintain the college as a going, viable enterprise.[31]

Faculty

The third constituent element of the university community is the faculty. These individuals are the professional educators on the campus, and it is common practice for the lay governing board to delegate to faculty members primary responsibility in all matters of curriculum and teaching. In a larger context, it is the faculty's responsibility to structure and administer the entire learning experience of students.

In order to discharge this responsibility, university faculties must both make policy decisions and sub-delegate authority. Faculty members set policy with regard to standards of performance which will lead to the conferring of a bachelor's degree. It leaves to individual teachers the assessment in each course of study, and it leaves to administrative officials such as registrars the

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[31]John D. Millett, op. cit., page 180.

final decision as to whether a student is qualified to graduate. The faculty sets the policy, the registrar carries it out.[32]

With regard to internal organization, university faculties have emulated the larger university structure. From the American college of 1840 which contained six professors and fifty to one hundred students[33] the modern university has become multi-structured. The University of California at Berkeley in 1962-63, with over 23,000 students and 1,600 "officers of instruction," was divided into fifteen colleges or schools, over fifty institutes, centers, and laboratories, and seventy-five departments.[34] As faculty emphasis has currently centered around intense specialization, it has been natural for departmental proliferation to keep pace with the federalized nature of the university structure. In body and in spirit the day of Mr. Chips is gone. Specialized competence based on involvement in knowledge is the hallmark of the modern professor.[35] And as a specialist, the modern academic man demands a great

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[32]Buell G. Gallagher, "Who Runs the University? Order and Freedom on the Campus (Boulder, Colorado: Western Interstate Commission for Higher Education, October, 1965), page 92.

[33]Richard Hofstater and Walter P. Metzger, The Development of Academic Freedom in the United States (New York: Columbia University, 1955) pages 222-223.

[34]Burton R. Clark, "Faculty Organization and Authority," The Study of Academic Administration (Boulder, Colorado: Interstate Commission for Higher Education, October 1963), page 39.

[35]Ibid., page 42.

deal of autonomy. Combining these factors--proliferation of departmental organization and increased emphasis on specialization--precludes a modern-day definition of the faculty as being a collegiality or "community" of scholars.

Having defined the specific responsibility given to faculty members, and then having outlined the organizational schema by which this responsibility is discharged, it would be appropriate to conclude with a delineation of faculty expectations.

These are three in number. First, every faculty member expects that the system of organization and operation in a college or university will recognize the importance of the role of the faculty member and provide him with a status of dignity and consideration. Secondly, the faculty member expects to be provided appropriate facilities for the practice of his profession and proper remuneration for his services. And third, the faculty member expects freedom in which to pursue his profession of scholarship.[36]

Students

The fourth constituent element of the university community is the student. My purpose at this point is not to submit a detailed description of what we know

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[36]John D. Millett, The Academic Community: An Essay on Organization (New York: McGraw-Hill Book Company, 1962) pages 101-103.

about the new college generation. Indeed, with the attention students are now getting, such a description would be interminable. The literature on college students is overwhelming. They have been described as a "new breed,"[37] their role in the academic society has been defined and redefined,[38] and numerous causes have been attributed to their restive orientation.[39] "They sit in, march on, and go-go. They sit around, march away, and no-no. Are they alienated, disoriented, victims of anomie? Are they repelled by Poor Dad's American Dream? The answer, my friend, is blowing different ways!"[40] Within a relatively short period, in fact, the college student bids fair to become the most researched, analyzed, probed, charted, dissected

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[37]James L. Garrett, "College Students-The New Breed," Saturday Review, December 1965.

[38]Richard L. Cutler, "The New Role of the Student in the Academic Society," Address presented at the 3rd General Session of the 21st National Conference on Higher Education, sponsored by the Association of Higher Education, Chicago: March, 1966.

[39]Joseph Katz and Nevitt Sanford, "Causes of the Student Revolution," Saturday Review, December 18, 1965; Mervin B. Freedman, "Roots of Discontent," Beyond Berkeley, Christopher Kotope and Paul G. Zolbrok (ed.)(Cleveland: The World Publishing Company, 1966), pages 236-249.

[40]William Spencers "Students--A Survey," College and University Journal, Vol. 4, No. 3, Summer 1965, page 5.

scrutinized, and catalogued species of our time, not even excluding the astronauts.[41]

Rather, my purpose is to merely identify the student constituency as a vital force in the total university structure. Evidence may be found for the point of view that the student is an apprentice in the academic community and does not possess the credentials to justify his exercise of equal authority with the faculty or administration in the government of that community's affairs.[42] However, the student must be more than raw material to be fitted into the conveyor belt of the academic curriculum and, when satisfactorily educated, to be given a degree.[43] They have a capacity to express concern for the quality of their educational experience, for the competence of the faculty, and for the content of the curriculum. But more important than this, students have begun to realize that collectively they possess a latent power which is strong enough to bring university proceedings to a grinding halt. The well-documented incident at Berkeley is testimonial to this observation.

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[41]Lawrence E. Dennis, "On Discovering College Students," The College and the Student, Lawrence E. Dennis and Joseph F. Kauffman (eds.) (Washington, D.C.: American Council on Education, 1966), page 4.

[42]Charles Frankel, "Rights and Responsibilities in the Student-College Relationship," The College and the Student, op. cit., page 246.

[43]F. Cyril James, "The Place of the Student in University Life," Bulletin of the International Association of Universities, 1965, pages 9-10.

A final word concerning the legal definition of student status in the public college or university. As natural-born citizens of the United States,public university students are accorded certain constitutional liberties. Among these may be listed freedom of speech, freedom of assembly, freedom of petition, freedom of publication, and freedom of worship.[44] State-supported colleges and universities are instrumentalities of the government, acting as state agencies engaged in an endeavor designed to promote the public good; namely, public education. As governmental agencies, public institutions of higher education fall within the purview of the federal constitution, and enrollees of these institutions enjoy the guarantees afforded by said document. Specifically, all rights which the student has under the federal constitution are derived from particular clauses of the fourteenth amendment. From a legal point of view, then, this dimension of student status brings a significant variable of which administrators and university officials must be cognizant as they deal with students.

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[44]Phillip Monypenny, "Toward A Standard for Student Academic Freedom," Law and Contemporary Problems, Vol. 28, Summer 1963, page 628.

In summary, there are the four constituent elements in the academic community. Boards of trustees are the ultimate authority for sanctioning the operational policies and procedures of the university. Administrators, including the President, are subdelegated the responsibilities of implementing the administrative decisions of the governing board. The faculty is responsible for determining the curricular direction of the university, and providing professional instruction for students. The students have no place in the formal authority structure of the university, but are a potent force in the copesetic operation of the institution. As this discussion is oriented towards the public college or university, students enrolled at said institutions enjoy certain constitutional rights and liberties. Protection and recognition of these rights must be reflected in the student-university relationship.

CHAPTER III

A HISTORY OF THE STUDENT-UNIVERSITY RELATIONSHIP

The student-university relationship has developed along three lines. First, institutional authority exercised in order to control the behavior of students was justified on the basis of being an extension of the authority of the parents. The Latin phrase, in loco parentis, "in place of parents," was used to indicate that the institution would serve as surrogate parent, directing and controlling student conduct to the same extent that a parent might.

The second line of development has been that of the contract theory. Whether the in loco parentis concept implies a valid assertion of institutional authority, the fact remains that the student enters into a contractual relationship with the university, and, as party to a matriculation contract, is bound by the obligations of said agreement.

And third, the most recent conceptual explanation of the student-university relationship is that of fiduciary relationship. The university is said to be a trustee who will, in good faith, make decisions which affect student interests and behavior.

A more detailed analysis of each theory is in order at this point.

The In Loco Parentis Theory

The power which the officers of a college may lawfully exert to restrict and to control the actions of its students is based upon the fact that, in law, the college stands in the same position to its students as that of a parent--in loco parentis--and it can therefore direct and control their conduct to the same extent that a parent can.[1] The basic expression of this legal mandate was formulated in 1913, in a case involving Berea College. In this case the owners of a public restaurant, being chiefly dependent upon student patronage, sought an injunction to compel the college to rescind a regulation prohibiting its students from entering public eating houses in the community. The court refused the petition and supported the right of the college to control its students by stating:

> College authorities stand in loco parentis concerning the physical and moral welfare and mental training of pupils. For the purposes of this case, the school, its officers and students are a legal entity, as much so as any family, and, like a father may direct his children, those in charge

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[1]Thomas E. Blackwell, College Law: A Guide for Administrators (Washington, D.C.: American Council on Education, 1961) page 104.

> of boarding schools are well within their rights and powers when they direct their students what to eat and where they may get it; where they may go and what forms of amusement are forbidden.2

As originally conceived in the days of the American colonial college, the concept of the institution acting as foster parent was meant to prevail throughout all aspects of student behavior. The campus religious and psychological counseling services, its fraternity and sorority system, its provision for dances and other social affairs, and its regulation of dormitory and extra-curricular life were all in whole or in part, aspects of this function.[3] This concept was so firmly entrenched as justifiable rationale for disciplinary procedures that few would question college charter statements, such as that at the University of Pennsylvania, which directed the institution to teach manners, character, and dress of the individual student.[4] Student rights were subordinate to institutional authority, as indicated by the following statement from the Supreme Court of the State of Illinois:

> By voluntarily entering the university, or being placed there by those having the right to control him, he, the student, necessarily surrenders very

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

[3] Charles Frankel, "Rights and Responsibilities in the Student-College Relationship," The College and the Student, Lawrence E. Dennis and Joseph F. Kauffman (eds.) (Washington, D.C.: American Council on Education, 1966), page 237.

[4] E. G. Williamson, "Do Students Have Academic Freedom?" The American Student and His College, Ester M. Lloyd-Jones and Herman A. Estrin (eds.) (Boston: Houghton-Mifflin Company, 1967) page 311.

> many of his individual rights, how his time shall be occupied, what his habits shall be, his general deportment, that he shall not visit certain places, his hours of study and recreation--in all these matters, and others, he must yield obedience to those who, for the time being, are his masters.[5]

To fully understand the concept of in loco parentis, one must be aware of the societal context out of which this legal precept arose. Williamson intimates that three factors have been particular concerns to institutional authorities:

1) the desire to segregate students from the lawlessness characteristic of the frontier;

2) the assumed obligation to impart religious instruction to youth, whether the university be public or private;

3) the institutional charge for the faculty to discharge discipline.[6]

Also,it should be pointed out that the great majority of students matriculting to colleges and universities during the colonial college period, and well into the nineteenth century, were quite young. Most were legally defined as minors, that is, under twenty-one and under eighteen,

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[5] North v. Board of Trustees, 27 N.E. 54, 56 (1891).

[6] E. G. Williamson, op. cit., page 312.

and it was not uncommon for youths of fourteen and fifteen to enter the university.

But many of these conditions have changed, and with it, the role of in loco parentis has begun to erode. Students are older, with less than seven percent of all students currently attending American colleges being under the age of eighteen, and it is the age of eighteen which for most legal purposes establishes adulthood.[7]

Professor Henry Steele Commager updates the reasons for the current erosion of in loco parentis, when he states:

> The concept of in loco parentis was transferred from Cambridge to America, and caught on here more strongly for very elementary reasons. College students were, for the most part, very young. A great many boys went to college in the colonial era at the age of 13, 14, and 15. They were, for most purposes, what our young high school students are now. They did need taking care of, and the tutors were in loco parentis. This habit was reinforced with the coming of education for girls and of coeducation. Ours was not a class society. There was no common body of tradition and habit connected with membership in an aristocracy or in an upper class which would provide some assurance of conduct. All this has now changed. Students generally are at least eighteen when they come up, and we have a long tradition with coeducation from high school on. Many students marry at eighteen and nineteen and have families. Furthermore, we have adjusted to the classless society and we know our way about. Therefore, the old tradition of in loco parentis is largely irrelevant.[8]

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[7]William W. Van Alstyne, "Legal Due Process and Student Rights," Proceedings of the Forty-Seventh Anniversary Conference of the National Association of Student Personnel Administrators, Washington, D.C., April 4-7, 1965, page 154.

[8]Van Alstyne, op. cit., page 155.

The in loco parentis theory has also been questioned because it does not explain the institution's power to regulate student conduct when the student acts with parental consent;[9] now does it explain the basis of authority over a student who has reached majority.[10]

However, the concept of in loco parentis is still extant law, particularly at the state level. There are those who rigorously support its enforcement, especially in regard to disciplinary matters. Austin MacCormick, Professor of Criminology at the University of California at Berkeley, claims that the college properly is to be considered as being in loco parentis at least with respect to freshmen and sophomores who are chronologically and psychologically immature, who are often bewildered and befuddled by the complexities and wonders of the campus world, and who are seriously facing problems on which they seriously need guidance.[11]

Though cracks may be seen in its categoric application, it may be concluded the law exists and colleges can scarcely deny the obligation to abide by the ordered legal life of the college as prescribed by the laws and courts of the community.

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[9] United States ex rel. Gannon v. Georgetown College, 28 App. D.C. 87, (1906); Curry v. Lasell Seminary Company, 46 N.E. 110 (1897).

[10] William W. Van Alstyne, "Student Academic Freedom and the Rule-Making Powers of Public Universities," Law in Transition Quarterly, Vol. 2, pages 17-18, 1965.

[11] Austin MacCormick, "The Nonconformist in the Crew-Cut Crowd," Proceedings of the Thirty-Eighth Anniversary Conference of the National Association of Student Personnel Administrators, Berkeley, June 22, 1956.

The Contract Theory

As exclusive reliance on in loco parentis as a basis for authority and educational responsibility has become more indefensible, college and university administrators have developed as the basis for their authority the contract theory. Reduced to its simplest terms, contractual theory implies reciprocal responsibilities. The student, freely electing to affiliate himself with a particular institution, agrees to abide by the governing rules and regulations of the university. It is his obligation to become educated. The institution, on the other hand, assumes the obligation to provide instruction and award degrees. The specifics of the contract--the precise educational goal, means to be used, nature and extent of authority--are all determined by the matriculation contract.[12]

The concept of an educational contract appears to be more palatable to students. They appreciate and identify more readily with institutional goals, feeling that they were involved in a consideration of these goals prior to their decision of enrollment. The authority structure, and the ramifications of its operation, are made

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[12] Rev. Patrick H. Ratterman, S. J., "Campus Activity Problems," Journal of the National Association of Student Personnel Administrators, Vol. 1, Number 2, March 1964, page 22.

clear through contract. Transferred parental authority is not offered as rationale for various administrative decisions. Rather, it may be assumed that the institution, in offering admission to the student, made clear its academic and behavioral expectations. And in return, the student, in electing to enroll, gave explicit approval to these institutional expectations.

But contractual theory may not be the answer. The law states three requirements are necessary for the valid formation of a contract. First, there must be a promisor and promisee, each of whom has legal capacity to act as such in the proposed contract. Second, there must be a manifestation of mutual assent by the parties who form the contract to the terms thereof. And third, there must be sufficient consideration.[13]

Applied to the student-university relationship, the majority of these requirements are satisfied. The college or university is eminently qualified to offer admission. Also, the promise of an education is ample consideration. There is legal dispute, however, regarding the qualification of a minor to make a binding contract or be a promisee. In general, an infant may, at his pleasure, repudiate and disaffirm some of his contracts.[14]

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[13] Restatement in the Courts, American Law Institute, (St. Paul: American Law Institute Publishers, 1965 Supplement, 1967),Sections 19-84, pages 462-514.

[14] Thomas E. Blackwell, College Law: A Guide for Administrators (Washington, D.C.: American Council on Educaton, 1961), page 101.

The exception to this rule is the principle that a minor may make himself liable for goods and services that are "necessary" considering his position and station in life.[15]

There is evidence that courts have begun to view college training as a "necessary." In a Montana divorce case [16] the former wife was successful in obtaining alimony payments which would be used to defray her son's college expenses, even though the original disposition did not obligate the former husband to pay alimony. Chambers reports an additional case which indicates a judicial attitude towards the concept of higher education as being a "necessary." In this instance, the original decree of divorce was made in 1926, and the former husband was ordered to pay $125.00 per month for the maintenance of the two children of the marriage. Ten years later the mother came into court complaining that the payments were $752.50 in arrears and asked judgment for that amount. The trial court awarded the judgment, but on appeal it was reversed, on evidence that the father had actually paid out sums substantially in excess of that amount for the tuition and other expenses of the older child, who was enrolled at Florida State

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[15] Ibid.

[16] Refer v. Refer, 56 Pac. 2d, 750, (1936).

College for Women.[17] Pointing to this issue, the court held:

> The original decree did not provide for, nor did the parties contemplate at the time of the entry of the decree, the incidental expenses of a college education for either of the children named in the decree. The father, appreciating the advantages of a college training, made the necessary financial sacrifice and the daughter was kept in college. The record discloses a pride and interest in his daughter, and this interest has manifested itself beyond the requirement of the terms and provisions of the decree. . .[18]

Additional litigation indicate a judical predisposition towards recognition of a college education as a right for the children of divorced parents.[19]

However, there are cases which counter this contention.[20] Regardless of the prevailing judicial attitude, and this will vacillate because the cases occur at the state level, the implications must be made clear. If a college education may be judicially defined as a "necessary," a minor may make himself liable for fulfillment of contractual obligations. If the opposite is true, whereby a minor becomes party to a contract for goods or services which are not "necessary," it is eminently feasible that

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[17] M. M. Chambers, The Colleges and the Courts, 1936-40 (Boston: The Merrymount Press, 1941). pages 2-3.

[18] Monty v. Monty, 179 S. 155 (1938).

[19] Jackman v. Short, 109 Pac. 2d, 860, (1941); Titus v. Titus, 18 N.W. 2d, 883 (1945); Atchley v. Atchley, 194 S.W. 2d, 252 (1946); Esteb v. Esteb, 244, Pac. 264 (1926).

[20] See Middlebury College v. Chandler, 16 Vt. 683, (1844); Morris v. Morris, 171 N.E. 386 (1930); Moskow v. Marshall, 171, N.E. 477, (1930).

he may repudiate said contract and successfully request a reimbursement for tuition. Although state legislatures in Illinois and Oklahoma have adopted statutory laws which prevent such a situation, one might agree with Blackwell's statement that the common law in this area has not kept pace with modern educational concepts and procedures.[21]

In addition to the question of whether a minor may be defined as a qualified promisee for purposes of contract, the contractual theory has been attacked on other grounds. It is reported by Cohen and Kessler that contract rules were developed to deal with the hard bargains made by self-interested persons operating in a commercial situation.[22] To apply this standard to the university setting seems inadequate.

In registering or applying for admission, the student is concerned with the details of entrance and degree requirements, not with protections against the autocratic imposition of disciplinary measures. It is unreasonable to bind him to terms set forth in the middle of a lengthy catalogue or in the fine print of a registration card which was executed together with course cards, bursars receipts,

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[21] Blackwell, op. cit., page 103.

[22] Morris R. Cohen, "The Basis of Contract," Harvard Law Review, Volume 46, page 562 , 1933; Friedrich Kessler, "Contracts of Adhesion-Some Thoughts About Freedom of Contract," Columbia Law Review, Volume 43, page 640, 1943.

student directory forms and the like. The restrictions in choice of school imposed on most entering students by financial limitations, entrance requirements and geographic location plus the added barriers to transferring to a new school, place the student in a weak bargaining position. Moreover, the registration contract is not a result of bargaining. It is unlikely that a student wishing to re-negotiate its terms would be able to find someone during the registration period who had the authority to vary the provisions of the contract.[23] His contract with the university is purely a contract of adhesion, and hence should not be given literal effect in enforcing it against him.[24]

The Fiduciary Theory

An emerging concept is that the student-university relationship should be characterized by the law of status rather than the law of contracts. This has given rise to a recognition of fiduciary status. Specifically, a fiduciary is one whose function it is to act for the benefit of another as to matters relevant to the relation between them. In Civil Law, this denotes one in a position of trust. Since schools exist primarily for the education

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[23]Alvin L. Goldman, "The University and the Liberty of Students--A Fiduciary Theory," Kentucky Law Journal, Volume 54, Summer, 1966, page 653.

[24]Note, "Private Government on the Campus: Judicial Review of University Expulsions," Yale Law Journal, Volume 72, 1963, page 1377.

of their students, it is obvious that professors and administrators act in a fiduciary capacity with reference to students.[25]

Although the law permits a fiduciary relationship to exist where one party dominates the other,[26] special standards of conduct have been imposed on the fiduciary.[27] The tone of these standards implies that the highest sense of ethical behavior must characterize a fiduciary relationship. For example, the fiduciary must show that the confidence of the relationship was not betrayed, that he carried out his function conscientiously and in good faith and that he has not obtained any undue advantage as a result of the relationship.[28]

Clearly, the elements of a fiduciary relationship may be applied to the student-university model. The university sets forth academic tasks which the student is expected to undertake. As stated earlier, it is the institution's obligation to provide instruction and award degrees. Assuming that the university is discharging its obligations in good faith, the student may then feel free to repose complete confidence in the integrity of the institution.

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[25]Warren A. Seavey, "Dismissal of Students: Due Process," Harvard Law Review, Vol. 70, June, 1957, footnote # 3, page 1407.

[26]Cranwell v. Oglesby, 12 N.E. 2d 81,(1937); Roberts v. Parsons, 242 S.W. 594 (1922); Cowee v. Cornell, 75 New York Reports 91 (1878).

[27]Pepper v. Litton, 308 U.S. 295 (1939); State ex rel. Harris v. Gautier, 146 S. 562 (1933).

[28]Pepper v. Litton, 308, U.S. 295, (1939); In re Cover's Estate, 204 Pac. 583,(1922) Neagh v. McMullen, 165, N.E. 605 (1929).

The model of fiduciary places the student-university relationship on a higher level. It obligates the university to act in a just and reasonable manner toward its students. But more important than freedom from arbitrary and capricious administrative behavior, students who act as entrustees in the fiduciary relationship will be unrestrained in their quest of free inquiry and critical examination.

In summary, it has been the purpose of this chapter to historically trace the development of student-university relationships. This development has proceeded along three lines. First, it was characterized by the concept of in loco parentis. Second, the theory of contract became appropriate rationale for adjudicating conflicts arising out of the student-university relationship. And finally, the theory of fiduciary has been contemperaneously descriptive of the student-university relationship.

Having described the institutional constituencies of public universities and then having outlined how relationships have developed within this great matrix, it would now be appropriate to examine several specific student-university relationships. Such will be the intent of the following four chapters.

CHAPTER IV

DISCIPLINARY PROCEEDINGS

Perhaps the most dramatic aspect of the student-university relationship is that which involves disciplinary proceedings. In one setting, it places two concerns in contradistinction: the rights of students to freedom and justice, and the authority of university administrators to enforce rules and regulations. The courts have been called upon as the ultimate mediator of such a conflict, and their work has become significantly burdensome and complex during recent years.

In this chapter, I will attempt to define the important legal concepts which relate to disciplinary proceedings at public universities. Requisite to such an analysis is an historical description of judicial temperament and disposition in regard to such litigation. Having described how various courts have dealt with this problem, and illustrated the distinguishing characteristics thereof,I will conclude with a series of suggested guidelines for university administrators who must make decisions with respect to disciplinary proceedings.

Source of Authority for Public University Administrators

Disciplinary proceedings generally arise from alleged violations of regulations established by university administrative officials. Formulation of such regulations derives from the express power granted to university officials via the institutional charter or founding legislation. Several court decisions give support for this sub-delegation of rule-making power[1] and the rules enacted in exercise of a power so delegated are of the same force as would be a like enactment of the legislature, and their official interpretation by the university authorities is a part thereof.[2] Although acknowledging their jurisdiction,[3] courts of law have demonstrated a marked reluctance to intervene in university discipline, provided that the administrative authorities have not arbitrarily or

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[1] Pratt v. Wheaton College, 40 Ill. 186, 187, (1866); American Jurisprudence, Volume 55, Section 19, page 13, citing: Waugh v. Board of Trustees of the University of Mississippi, 237 U.S. 589 (1915); Tanton v. McKenney et al., 197, N.W. 510, (1924); Woods v. Simpson, 126 Atl. 882, (1924); Gott v. Berea College et al., 161 S.W. 204, (1913); and State ex rel. Little v. Regents of the University of Kansas, 40 Pac. 656 (1895).

[2] American Jurisprudence, op. cit., citing Foley v. Benedict et al., 55 S.W. 2d, 805 (1932).

[3] See People ex rel. Cecil v. Bellevue Hospital Medical College, 14 N.Y. Supp. 490 (1891); Barker v. Bryn Mawr College, 122 Atl. 220 (1923); Carr v. St. John's University, 231 N.Y. Supp. 2d, 403, rev'd. 231 N.Y. Supp. 2d, 410, (1962); Dixon v. Alabama State Board of Education, 294 F. 2d, 150, cert. denied, 368 U.S. 930 (1961).

capriciously abused the power vested in them. A typical position is that taken by the Supreme Court of Michigan in Tanton v. McKenney, et al., (197 N.W. 510, 511, 1924).

> Inherently the managing officers have the power to maintain such discipline as will effectuate the purposes of the institution. . . . That in the absence of an abuse of discretion, the school authorities and not the court shall prescribe proper disciplinary measures is, we think, settled by the text-writers and the adjudicated cases.

Not only have courts been reluctant to intervene, but it would appear that they have given public university officials considerable support in the enactment and implementation of regulations which are "reasonable" and serve a "valid interest" of the university. In Hamilton v. The Regents of the University of California (293 U.S. 245, 1934) the United States Supreme Court sustained a regulation of the University of California requiring ROTC instruction for all freshman and sophomore male students. The court rejected the students' contention that they were conscientious objectors and that such a regulation violated their constitutional right to freedom of religion.

Courts have consistently manifested the belief that educational matters should be handled by those best qualified for their disposition, namely, educators. Witness to this may be found in the following decision:

> The maintenance of discipline, the upkeep of the necessary tone and standards of behavior in a body of students in a college, is, of course, a task committed to its faculty and officers; not to the courts. It is a task which demands special experience, and is often one of much delicacy. . . and the officers must, of necessity, be left untrammeled in handling the problems which arise,as their judgment and discretion may dictate, looking to the ends to be accomplished. Only in extraordinary situations can a court of law ever be called upon to step in between students and the officers in charge of them. When it is made clear that an action with respect to a student has been, not an honest exercise of discretion, looking to the proper ends, but beyond the limits of that discretion, or arising from some motive extraneous to the purposes committed to that discretion the courts may be called upon for relief. In such case the officials have, as it is sometimes stated, acted arbitrarily, or abused their discretion; and the courts may be required to remedy that.[4]

Indeed, it is clear that university authorities may even dismiss students for a number of reasons, among them failure to maintain a prescribed scholastic rating,[5] eating in a forbidden place,[6] stealing,[7] and lying.[8]

Instances wherein the courts have determined improper exercise of discretion by administrative and faculty personnel have been characterized by such terms as "palpably unreasonable," "fraudulent,"[9] "against the common right,"

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[4]Woods v. Simpson, 126 Atl. 882, 883 (1924).

[5]Foley v. Benedict et al., 55 S.W. 2d, 805 (1932).

[6]Gott v. Berea College et al., 161 S.W. 204 (1913).

[7]Hutt v. Haileybury College, 4 Times L.R. (Eng.) 623 (1888).

[8]Goldstein v. New York University, 78 N.Y.S 739 (1902).

[9]Stetson v. Hunt, 102 So. 637, (1924).

"unauthorized;"[10] "unreasonably oppressive," "lack of impartiality," "without any cause whatever,"[11] "arbitrary,"[12] "lack of good faith,"[13] "with malice,"[14] "without sufficient reason,"[15] "capriciously,"[16] "not within the scope of their jurisdiction,"[17] and a "clear abuse of discretion,"[18]

To summarize this point, it may be seen that administrative officials of public universities have legitimate power to exercise certain rules and regulations and conduct disciplinary proceedings for students. Provided that this power is exercised in a reasonable manner, courts will not interfere.

However, new student forms of social expression on the campus, combined with a sophisticated political awareness, promise to further test administrative disposition of disciplinary proceedings. An additional complication of the issue resides within the mounting degree

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[10] State ex rel. Stallard v. White ex rel., 82 Ind. 278 (1882).

[11] Koblitz v. Western Reserve University et al., 21 Ohio Circuit Court Reports 144 (1901).

[12] Booker et al., v. Grand Rapids Medical Center, 120 N.W. 589 (1909).

[13] Robinson v. University of Miami, Florida, 100 So., 2d, 442 (1958).

[14] McCormick v. Burt, 95 Ill. 362 (1880).

[15] Anthony v. Syracuse University, 231 N.Y. Supp. 435, (1928).

[16] Frank v. Marquette University, 245, N.W. 125 (1932).

[17] Goldenkoff v. Albany Law School, 191 N.Y. Supp. 349 (1921).

[18] Ingersoll v. Clapp, 263 Pac. 433 (1928).

of literature which argues for constitutional protections being afforded students in a university disciplinary proceeding.[19]

The power to discipline, then, is obvious. The manner in which it is exercised now becomes the question.

It is very important that fair and reasonable procedures be followed in all student disciplinary cases at a public university. The majority of cases do not carry the possibility of suspension or expulsion from the university and courts have been quite content to leave these less serious matters to the proper educational authorities.

Disciplinary incidents which have potential for suspending or expelling a student, however, are matters of a different import. Generally, the more grave the consequences to a person who may be found guilty of some offense, the more circumspect must be the procedure to be followed before such a finding may be made.[20] As an academic experience at a college or university has gained increased importance, courts have expressed an interest in proceedings which may deprive a student of said experience. Lesemann indicates that cases such as these are most likely to result in a challenge by the student in the courts of the

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[19]See William W. Van Alstyne, "Student Academic Freedom and the Rule-Making Powers of Public Universities: Some Constitutional Considerations," Law in Transition Quarterly, Winter, 1965; Michael T. Johnson, "The Constitutional Rights of College Students," Texas Law Review, February, 1964.

[20]Garrett v. United States, 340 F. 2d, 615, 618 (1965).

adequacy of the procedures and the justification for the action taken.[21] When the challenge has been presented, the courts have been interested in whether the proceedings conformed to the "due process" standard of the federal constitution. It must be admitted, as will be later demonstrated, that definitive guidelines have not been proposed for what constitutes procedural and substantive due process. Important elements of fair play, however, may be gleaned from a historical analysis of cases involving student dismissal proceedings.

For a variety of reasons, students have not fared well in judicial decisions which have reviewed university disciplinary proceedings. One author, in reacting to People ex rel. Bluett v. Board of Trustees of the University of Illinois, was appalled at the lack of judicial protection.

> At this time, when many are worried about dismissal from public service, when only because of the overriding need to protect the public safety is the identity of informers kept secret, when we proudly contrast the full hearings before our courts with those in the benighted countries which have no due process protection, when many of our courts are so careful in the protection of those charged with crimes that they will not permit the use of evidence illegally obtained, our sense of justice should be

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[21] Ralph F. Lesemann, "Due Process in Student Disciplinary Proceedings," Proceedings of 1st Annual Conference of University Attorneys, Ann Arbor, Michigan, 1961.

> outraged by denial to students of the normal safeguards. It is shocking that officials of a state educational institution which can function properly only if our freedoms are preserved, should not understand the elements of fair play. It is equally shocking to find that a court supports them in denying to a student the protection given to a pickpocket.[22]

The weight of evidence shows that certain elements of due process, as that term is applied to judicial proceedings, has not been applied to requirements of due process in student disciplinary cases. In a survey conducted by Van Alstyne, which reported the disciplinary procedures of seventy-two state universities, the following was found:

1. Forty-three percent did not provide students with a reasonably clear and specific list which described misconduct subject to discipline;

2. Fifty-three percent did not provide students with a written statement specifying the nature of the parricular misconduct charged, and only seventeen percent provided such a statement at least ten days before the determination of guilt or imposition of punishment;

3. Sixteen percent did not provide for a hearing in cases where the student takes exception to the charge of misconduct or to the penalty proposed;

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[22] Warren A. Seavey, "Dismissal of Students: Due Process," Harvard Law Review, Volume 70, 1956-57, pages 1406-1407.

4. Forty-seven percent allowed students or administrators who appear as witnesses or who bring the charge, to sit on the hearing board if they are otherwise a member;

5. Thirty percent did not allow the student charged to be accompanied by an adviser of his choice during the hearing;

6. Twenty-six percent did not permit the student charged to question informants or witnesses whose statements may be considered by the hearing board in determining guilt; and even those colleges which normally allow some cross-examination, eighty-five percent permit the hearing board to consider statements by witnesses not available for cross-examination;

7. Forty-seven percent permitted the hearing board to consider evidence which was "improperly" acquired (e.g., removed by a university employee during a search of a student's room in the absence of some emergency justifying such a procedure.)[23]

Notwithstanding the observations made by Dr. Seavey and Professor Van Alstyne, state courts have substantially endorsed summary disciplinary proceedings of public universities. An analysis of early cases will demonstrate the rationale for such action.

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[23]William W. Van Alstyne, "Procedural Due Process and State University Students," UCLA Law Review, Volume 10, 1962-63, page 369.

Summary Disciplinary Proceedings

Disciplinary proceedings which have resulted in the summary dismissal of students have been justified by college officials on the following grounds: (1) attendance at a college or university is a privilege and not a right, and as such, may be revoked by the college at any time for any reason; (2) college officials stand *in loco parentis* to students, and may take appropriate action provided they feel that it is best for the student involved; and (3) the implied contract theory, whereby college officials claim that specific or implied terms of the matriculation contract grants them the power of summary dismissal. A case illustration of each theory will more clearly identify the prevailing rationale.

In *Anthony v. Syracuse University*[24] a female student was peremptorily dismissed from the university for no stated cause. No statement of the ground for dismissal was made, and no opportunity to answer any charge of misconduct warranting dismissal was given. Miss Anthony was arbitrarily dismissed under a claimed right of the univesity officials to do so without notice and without stating reasons. After recovering from the unexpected shock of her dismissal, which resulted in her confinement in the university infirmary for one week, plaintiff brought an

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[24] 223 N.Y. Supp. rev'd at 231 N.Y. Supp. 435 (1928).

action for reinstatement. The university built its case on the language of a university regulation set forth in its catalogue:

> 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 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 given.[25]

In holding for Miss Anthony, the trial court held that she, having demanded the reason for her dismissal, thereby challenging the existence of any grounds for the claim that she had failed to safeguard good ideals of "scholarship" and "moral atmosphere" of the institution, was entitled to the elementary right of notice and the opportunity to be heard. Failing to discuss the issue of plaintiff's right to a hearing, an appellate court reversed the trial court decision, stating:

> The University may only dismiss a student for reasons falling within two classes, one in connection with safeguarding the University's ideals of scholarship and the other in connection with safeguarding the University's moral atmosphere. When dismissing a student, no reason for dismissing need be given. The University must, however, have a reason and that reason must fall within one of the two classes mentioned above. Of course, the University authorities have wide discretion in determining what situation

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[25] Syracuse University Catalogue, 1925-26, at page 67.

> does and what does not fall within the classes mentioned, and the courts would be slow indeed in disturbing any decision of the University authorities in this respect.
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> When the plaintiff comes into court and alleges a breach of contract, the burden rests upon her to establish such breach. She must show that her dismissal was not for a reason within the terms of the regulation. The record here is meager on this subject. While no adequate reason was assigned by the University authorities for the dismissal, I find nothing in the record on which to base a finding that no such reason existed. She offered no testimony, either as to her character and relation with her college associates, or as to her scholarship and attention to her academic duties. The evidence discloses no reason for her dismissal not falling within the terms of the regulation. It follows therefore, that the action fails.[26]

Doctrine of Unconstitutional Conditions

With regard to public universities, the issue of whether college attendance is a "right" or a "privilege," and what regulations may issue from this distinction, has been attacked from a constitutional point of view. According to the traditional view, students do not have a "right" to attend a public university. The "privilege" of attendance is a government gratuity and, as such, may be conditioned without limit because it could be withdrawn without notice or formal proceedings.[27]

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[26] 231 N.Y. Supp. 435, at 440, (1928).

[27] Robert M.O'Neil, "Unconstitutional Conditions: Welfare Benefits with Strings Attached," California Law Review, Volume 54, May 1966, page 445.

Applied to disciplinary proceedings, university authorities have posited that one condition of enrollment may be the waiver of any right to due process. This is accomplished by the student conceding the right of the university to dismiss him summarily as a condition of admission. Van Alstyne has proposed that public universities may not condition enrollment on such grounds and that to do so would invoke the doctrine of unconstitutional conditions.

The doctrine of unconstitutional conditions holds that enjoyment of governmental benefits may not be conditioned upon the waiver or relinquishment of significant constitutional rights, in the absence of some compelling social interest which justifies the subordination of these rights under the circumstances.[28] Students are citizens and have the benefit of certain constitutionally guaranteed rights. For example, they enjoy freedom of speech, and within reasonable boundaries, may exercise that constitutional right to criticize governmental involvement in Viet Nam, support the legalization of marijuana, or denounce the administrative policies of the university. In addition, students at public universities enjoy the freedoms of assembly, association, and religious preference. For these liberties to be taken from them would require demonstration

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[28]William W. Van Alstyne, "Student Academic Freedom and the Rule-Making Powers of Public Universities: Some Constitutional Considerations," Law in Transition Quarterly, Winter, 1965, page 21.

that such action was initiated as a result of some "compelling societal interest."

Professor Van Alstyne states that the doctrine of unconstitutional conditions has direct application to public university officials in a two-fold manner:

1. A university rule which threatens a student with dismissal for any activity he is constitutionally entitled to pursue as a citizen carries the burden of establishing precisely how that activity would especially interfere with the legitimate business of the university.

2. The university must take care that the functions it assumes and seeks to protect by particular rules and regulations are themselves constitutionally legitimate. It cannot, for instance, promiscuously incorporate within a general function of "education" a number of objectives constitutionally withdrawn from the state itself. It may not defend a rule requiring chapel attendance, or payment of a fee to support a religious affairs center, by attempting to incorporate direct support of religion as an aspect of some presumed function of "educating students in good morals." It may not forbid students from listening to George Lincoln Rockwell, or from affiliating with the Communist Party by attempting to incorporate direct support of political orthodoxy as an aspect of some presumed function of "educating students in good citizenship." It may rule against such conduct only to the extent

that some particular manifestation disrupts or detracts from its legitimate business, as it would were students to demonstrate for Rockwell by parading through classrooms, or as it would were a student to disclaim noisily in favor of communism in the middle of the library.[29]

In a recent discussion, Van Alstyne suggests that the doctrine has particular effect in eroding the "right-privilege" argument, and that public university officials may want to consider the doctrine when they decide to discipline a student whose activities are directly protected by the Bill of Rights.[30]

Support for Van Alstyne's thesis may be found in Dixon v. Alabama State Board of Education (294 Fed. 2d, 150, 1961) when the court held:

> It nonetheless remains true that the State cannot condition the granting of even a privilege upon the renunciation of the constitutional right to procedural due process.[32]

It is to be re-emphasized, however, that the doctrine of unconstitutional conditions applies only to public colleges and universities.

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[29]Van Alstyne, Law in Transition Quarterly, op. cit., pages 21-24.

[30]William W. Van Alstyne, "Student Rights and University Authority," The College Counsel. Transcript of proceedings of the Sixth Annual Conference of University Attorneys, Princeton, New Jersey, June 1966, pages 45-50.

The second theorum offered by university officials as justification for summary disciplinary proceedings is that of in loco parentis. As a parent surrogate, university administrators may make decisions commensurate with the type of power wielded by natural parents. An example of this rationale is found in John B. Stetson University et al., v. Hunt (102 So. 637, 640, 1925) in which case plaintiff sued the university for "maliciously, wantonly, and without cause and in bad faith," expelling her from the university. Following a brief interrogation, Miss Hunt and several others were suspended for instigating numerous disorders in the girls' residence hall where Miss Hunt resided. Although the trial court held for the plaintiff, the Supreme Court of Florida reversed the judgment on appeal. Basing their finding on the implied nature of the matriculation contract and the theory of in loco parentis, the court held:

> 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 can make for the same purpose, and, so long as such regulations do not violate divine or human law, courts have no more authority to interfere than they have to control the domestic discipline of a father in his family.[31]

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[31]See also Gott v. Berea College, 161 S.W. 204 (1913).

The third theory which has been used for validation and judicial support of summary disciplinary proceedings is that of implied contract. Simply stated, this means that the authority to dismiss students for reasons of misconduct, without the benefit of due process, is incorporated in the contract of admission.An excellent example may be found in DeHaan v. Brandeis University (150 F. Supp. 626, 1957). In this case, a graduate student brought action against a private university to enjoin it from withholding a scholarship award and from refusing to permit him to renew his registration at the university. As a result of a letter which plaintiff addressed to the university, protesting the inadequacy of the scholarship award and accusing the defendant of bad faith with respect to promises allegedly made at the time of his admission to the school, the Graduate Committee voted unanimously to summarily dismiss Mr. DeHaan.

In finding for the defendent university, a United States District Court held that where a university, by regulations set forth in its general catalogue, reserved the right to sever connections with any student for appropriate reasons, the court would not substitute its judgment for that of the university authorities. Specific regulations of this nature are viewed as implied conditions of the

matriculation contract. Upon signing said contract, the student necessarily binds himself to these conditions.[32]

It may be seen, then, that institutions of higher education have the power to suspend and expel students for reasons of misconduct. Based on the theories of college attendance as a privilege, in loco parentis, and implied contract, university officials have sometimes exercised this power in summary fashion. Summary dismissal deprives the student of notice of charges and an opportunity for hearing, giving vent to the cry by critics that such procedure is unfair and lacks the characteristics of due process. Although this issue of hearing and notice has never been litigated before the United States Supreme Court, there are legal writers who maintain that deprivation of such procedures constitute a violation of the students' constitutional rights.[33]

"Due process of law," as secured in the fifth and fourteenth amendments to the federal constitution, is

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[32]See John B. Stetson University v. Hunt, 102 So. 637, (1925); Booker v. Grand Rapids Medical College, 120 N.W. 589 (1909); Barker v. Trustees of Bryn Mawr College, 122 Atl. 220 (1923).

[33]See Michael T. Johnson, "The Constitutional Rights of College Students," Texas Law Review, Volume 42, 1963-64, pages 344-63; William W. Van Alstyne, "Procedural Due Process and State University Students," UCLA Law Review, Volume 10, 1962-63, pages 368-89.

comprised of two elements: substance and procedure. Translated to the university setting, substantitve due process would relate to the establishment of rules and regulations designed to promote the orderly business and management of the university. Procedural due process, on the other hand, refers to the proceedings whereby rights are protected through the application of proper remedies. To the writer's knowledge, issues involving substantive due process in relation to university rules and regulations have not appeared in the legal literature. Procedural due process, however, which has been defined as requiring notice and an opportunity to be heard[34] has been the focal point of education law dealing with the suspension and expulsion of students for reasons of misconduct.

Public and Private Universities: The Concept of "State Action"

The protection afforded by due process clauses of the fourteenth amendment, however, applies only to governmental and states agencies,not to private action.

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[34] Almon v. Morgan County, et al., 16 So. 2d, 511 (1944); Vernon v. State, 18 So. 2d, 388 (1944); Eisler v. Clark, 77 F. Supp. 610 (1948); Bruhake v. Golden West Wineries, 132 B. 2d, 102 (1942); In re Ryan, 40 N.Y.S. 2d, 592 (1943); Dodds v. Ward, 418 Pac. 2d, 629 (1966); Lamb v. State, 406 Pac. 2d, 1010, (1965), Weiner v. State Dept. of Roads, 137 N.W. 2d, 852 (1965), Cooper v. Watts, 191 So. 2d, 519 (1966).

Privately supported colleges and universities are not defined as governmental instrumentalities and thereby lie beyond the scope of the federal constitution. Although critics of the existing legal relationships in the area of discipline deny any distinction between state and public institutions[35] the constitutional restrictions of the fourteenth amendment have traditionally been found only where "state action" is found to be present.[36] The trend, however, is towards private institutions moving closer to the full restraints imposed on state instrumentalities.

Inroads have been made into the state action requirement.[37] Three cases are of particular importance due to

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[35]Clark Byse, "Procedural Due Process and the College Student: Law and Policy," The College and the Student, Lawrence E. Dennis and Joseph F.Kauffman (eds.) (Washington, D.C.: American Council on Education, 1966); Warren A. Seavey, "Dismissal of Students: Due Process," Harvard Law Review, Volume 70, 1956-57, page 1406; Robert B. Mautz, "The Legal Relationship of the University and the Student," speech at the First National Conference of University Attorneys, Ann Arbor, Michigan, 1961.

[36]"State action" under the fourteenth amendment is action taken by the state or a political subdivision thereof, or by a person or persons acting for the state or political subdivision, or pursuant to their authority or direction, or in obedience to their requirement; "private action" is action taken voluntarily and not by state compulsion. Brown v. City of Richmond, 132 S.E. 2d, 495 (1963).

[37]Terry v. Adams, 345 U.S. 461, (1953); Smith v. Allwright, 321, U.S. 649 (1944); Smith v. Illinois Bell Telephone Company, 270, U.S.587 (1926).

their recency. In Burton v. Wilmington Parking Authority et al., (365 U.S. 715, 1961) the United States Supreme Court held that, owing to the very "largeness" of government, no readily applicable formula may be fashioned to indicate when a case falls within the purview of private versus state action.

Citing the Burton decision for support, Judge J. Skelly Wright, in Giullory v. Administrators of Tulane University of Louisiana (203 F. Supp. 855, 1962) held that Tulane University, a private institution, was subject to the restrictions of the fourteenth amendment:

> At the outset, one may question whether any school or college can ever be so "private" as to escape the reach of the Fourteenth Amendment. In a country dedicated to the creed that education is the only "sure" foundation of freedom; without which no republic can maintain itself in strength; institutions of learning are not things of purely private concern . . . No one 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. 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? And, if so, are they not then agents of the state, subject to constitutional restraints on governmental action, to the same extent as private persons who govern a company town, Marsh v. State of Alabama, 326 U.S. 501 , 1946; or control a political party, Terry v. Adams, 345 U.S. 461, 1953, or run a city street car and bus service, Public Utilities Commission of the District of Columbia v. Pollak, 343 U.S. 451, 1952, or operate a train terminal, Baldwin v. Morgan, 287 F. 2d, 750, 1961?

Although overturned on rehearing, the distinguishing characteristic was not the existence of state action; rather, the degree of same.

In Evans v. Newton (86 Sup. Ct. 486, 1966), the Supreme Court declared that the equal protection clause of the fourteenth amendment applied to the administration of a park, even though private trustees had been appointed by a state court. For the majority, Justice Douglas remarked:

> What is "private" action and what is "state" action is not always easy to determine. Conduct that is formally "private" may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action.
>
> When private groups or individuals are endowed by the state with powers and functions governmental in nature, they become agencies or instrumentalities of the state and subject to its constitutional limitations.[38]

In a recent law review article, the merger of state and private action is made clear:

> States participate in "private" schools, notably through financial subsidy for the schools. Such exemptions have been justified, in fact, by judicial holding that private college fulfill a public purpose. (Yale University v. Town of New Haven, 42 Atl. 156, 1890). Moreover, a significant part of the cash income of private colleges flows from governmental sources including direct grants. Besides giving financial aid, governments exercise a degree of direct supervision and control over the affairs of "private" colleges (e.g., New York Education Law, Section 601; THE BOOK OF THE STATES, 1960-61, p. 300). In some cases they are chartered by a special

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[38] Ibid., at page 488.

> act of legislation, which includes a specific delegation of legislative power (e.g. Duke University, Dartmouth University, Colby College, Princeton University, and Yale University), "Private" colleges may be subject to state supervision through authority reserved in their state charters. (See Bartlett, State Control of Private Higher Education, 1926) Several states have agencies to supervise the administration of "private" colleges (Ibid., pp. 51-59) Formal state supervision of some private colleges is at times so extensive that the state legislature has reserved the power to revise student regulations, and has established seats on the college governing board to be filled by state officials. (See Yale University charter). In addition to their identification with the state through financial aid and regulation, all colleges act under color of state authority. Colleges are among the few institutions in our society whose function is the award of new statuses-degrees. The authority to award such statuses is not that of the school itself, but that of the state, which has specially authorized certain schools to grant certain degrees. (Bartlett, op. cit., p. 49). . . As a result of all these forms of state participation and assistance, few if any "private" colleges are exempt under the "state action" test.[39]

Although other sources point to an expanded concept of "state action,"[40] it is to be acknowledged that a distinction still remains between public and private institutions of higher learning. The matter of degree of state involvement in the institutional management of private universities will be the determining factor in future litigation. Clearly,

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[39]Comment: "Private Government on the Campus--Judicial Review of University Expulsions," Yale Law Journal, Volume 72, 1962-63, pages 1383-84.

[40]John Silard, "A Constitutional Forecast: Demise of the 'State Action' Limitation on the Equal Protection Guarantee," Columbia Law Review, Volume 66, page 855,1966; Joseph B. Robison, "The Possibility of a Frontal Assault on the State Action Concept," Notre Dame Lawyer, Volume 41, page 455, 1966; Griffin v. Maryland, 378 U.S. 130, 1964; Bell v. Maryland, 378 U.S. 226, 1964; Peterson v. City of Louisville, 373 U.S. 244, 1963; Lombard v. Louisiana, 373 U.S. 267, 1963.

the trend seems to be toward an increased erosion of the polarized state v. private dichotomy. Authorities at private institutions may want to carefully consider this movement prior to taking disciplinary action against a student. It requires no great expansion of accepted concepts of constitutional law to find that the guarantee secured by the fourteenth amendment are applicable in measuring the legality of the conduct of a private university.[41]

The Right to Notice and an Opportunity to be Heard

With regard to public institutions, a student's right to a hearing, formal or informal, is derived from the due process clause of the federal constitution (". . . no state shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law;. . . ." Fourteenth Amendment to the United States Constitution, Section 1). Due process of law has been held to necessitate notice and opportunity to be heard.[42] Although it

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[41] Alvin L. Goldman, "The University and the Liberty of Its Students--A Fiduciary Theory," Kentucky Law Journal, Volume 54, Summer, 1966, page 650.

[42] Eisler v. Clark, 77 F. Supp. 610, at p. 611 (1948); Clemens v. District Court of City and County of Denver, Colorado, 390 Pac. 2d, 83, at p. 86 (1964); Lane v. Johnson, 28 N.E. 2d, 705, at p. 708 (1940); In re Stephens, 211 F. Supp. 201, at p. 202, (1961); Kwong Hai Chew v. Colding, 73 Supp. Ct. 472, at p. 302 (1930); Cooper v. Watts, 191 So. 2d, 519, at p. 522 (1966); Dohany v. Rogers, 50 Sup. Ct., 299, at p. 302 (1930).

has been demonstrated that university officials have summarily dismissed students[43] it can be generally stated that colleges and universities are required to give notice and grant a hearing prior to dismissing students for reasons of misconduct. This rule had its origin in The King v. Chancellor of the University of Cambridge (92 Eng. Reports 370, 1732) an eighteenth century English case in which the King's Bench condemned the deprivation, without notice and/or hearing, of a master's academic degree.

With one notable exception, public universities are unanimous in their adherence to the right of hearing rule. In People ex rel. Bluett v. Board of Trustees of the University of Illinois (134 N.E. 2d, 635, 1956) a student's suspension and subsequent expulsion from a public university without a formal charge and a formal hearing was held valid. The plaintiff, a student in the medical school, was suspended and prohibited from further continuing her course at the university, on the grounds that she had attempted to turn in an examination paper written for her by another individual. Further, it was alleged that she had submitted similarly forged papers in two other courses. One year following her suspension, plaintiff was granted a hearing, with counsel, before the Committee on Policy and

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[43] "Summary Disciplinary Proceedings," supra.

Discipline. At this meeting, no witnesses were produced to support the charges and no other evidence was heard. One month following the hearing, the Committee changed plaintiff's status from suspension to expulsion. Plaintiff brought an action for reinstatement, based on lack of a formal charge and formal hearing at which she could be confronted with the accusing witnesses and given an opportunity to cross-examine them. The petition filed in the suit was dismissed upon the university's motion, and the appeal was transferred to the first district appellate court.

In upholding the dismissal of her suit, the appellate court cited State ex rel. Ingersoll v. Clapp (263 Pac. 433, at p. 437, 1938):

> Upon a consideration of the foregoing authorities we are impelled to the conclusion that to hold to the rule laid down in Commonwealth ex rel. Hill v. McCauley (3 Pa. County Court Reports 77, requiring a quasi-judicial proceeding) and seemingly approved in Anthony v. Syracuse University, would lead to a wholly impractical and unworkable situation. As above pointed out, the president of the university has no authority to compel the attendance of witnesses at a hearing or to compel them to testify if they were present. To hold that the power of suspension could only be exercised after a hearing had been held, such as is indicated in the cases last referred to, would be to hold that the power was practically ineffective, except where witnesses voluntarily attended and testified.

For private institutions, the necessity of notice and hearing have been denied. Being outside of the provisions of the due process clause, authorities from private schools deny the right to notice and hearing on the grounds of the contractual language of the matriculation contract. Noting that the relationship between a student in a private institution and the appropriate authorities is solely contractual in character, and that there is an implied condition that the student knows and will conform to the rules and regulations of the institution, a court has held:

> Where the rules and regulations of a private institution of learning receiving no aid from the public treasury, in effect provide that a student may forfeit his connection with the institution without any overt act if he is not in accord with its standards, it is not incumbent on the institution to prefer charges and to prove them at trial before dismissing permanently or temporarily a student regarded by it as undesirable. The acceptance and enjoyment of the benefits afforded by such institution is necessarily conditioned upon that degree of good conduct on the part of each which is indispensable to the comfort and progress of others.[44]

In Barker v. Trustees of Bryn Mawr College et al., (122 Atl. 220, 1923) the Supreme Court of Pennsylvania supported the suspension of a student based on language in the college catalogue to the effect:

> . . . the college reserves the right to exclude at any time students whose conduct or academic standing it regards as undesirable.[45]

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[44] John B. Stetson University v. Hunt, 102 So. 2d, 637, at 641, (1925).

[45] Barker v. Trustees of Bryn Mawr College et al., 122 Atl. 220 (1923), at p. 221.

The court held that the college was not required to prefer charges and hold a trial before dismissing a student regarded by it as undesirable.

Summary dismissal proceedings by private institutions without notice and hearing and based on the contractual nature of their relationship with students may be found in the following: Miller v. Clement, 55 Atl. 32,(1903);Vermillion v. State ex rel. Englehardt, 110 N.W. 736 (1907); State ex rel. Burpee v. Burton, 45 Wisc. 150 (1878); Anthony v. Syracuse University, 231 N.Y. Supp. 435 (1928); Gott v. Berea College, 161 S.W. 204 (1913); DeHaan v. Brandeis University, 150 F. Supp. 626 (1957); and Robinson v. University of Miami, Fla., 100 So. 2d, 442 (1958).

Two cases involving private schools, however, failed to subscribe to the precedent set forth above. In Baltimore University v. Colton (57 Atl. 14, 1904) a law student was dismissed from the institution without benefit of notice or hearing, on the charge that he was not regarded as a student by the faculty, had attended few lectures, and generally "was not known to the faculty." On appeal, an appellate court affirmed the lower court decision that the student was wrongfully dismissed for lack of notice.

Being more elaborate with regard to the right to a hearing, a Pennsylvania court ruled that a private institution which receives pecuniary aid from the state cannot dismiss a student without a hearing or trail in accordance with the lawful form of procedure. In Commonwealth

ex rel.Hill v. McCauley (3 Pa. County Court Reports 77, 1887) plaintiff was expelled for his alleged participation in a campus disturbance which occurred adjacent to a faculty meeting. Making their judgment on the basis of evidence supplied by a janitor of "questionable credibility," a faculty committee asked plaintiff to appear before them and presented him with their findings. Mr. Hill denied the charges and was subsequently expelled. Supporting his action for reinstatement, the court held that his hearing before the faculty committee was improper. In part, they stated:

> In order to justify his dismissal it must appear that he was notified that a charge of misconduct was made against him, which was so fully, plainly, and substantially described, that he might clearly apprehend it, realize its gravity and the possible harm which might come to him, if it were sustained and thus be admonished of the necessity of preparing to meet it. He was entitled to know what testimony had been given against him, and by whom it had been delivered and that the proofs be made openly and in his presence, with a full opportunity to question the witnesses and to call others to explain or contradict their testimony.[46]

Adequacy of the Hearing

Few cases have followed the lead of Commonwealth ex rel. Hill v. McCauley, and held that a student is entitled to a formal, quasi-judicial hearing.[47] The weight of

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[46] Commonwealth ex rel. Hill v. McCauley, 3 Pa. County Court Reports 77, (1887).

[47] Geiger v. Milford Independent School District, 51 Pa. D and C, 647 (1944).

authority supports the view that a formal hearing is not required.[48] A formal hearing, as defined by the cases holding the majority point of view, would necessitate that written charges be preferred, that evidence in support of the charges be introduced at the hearing, that the witnesses be heard under oath, that the student be represented by counsel, that he be confronted with the witnesses against him, that he be permitted the privilege of cross-examination, as a matter of right, and that the hearing be governed by the strict rules of evidence. Each of these characteristics has been rejected as not necessary in disciplinary proceedings for college and university students.[49]

The Dixon Decision

A recent case has emerged as being the leading piece of litigation in the area of student disciplinary

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[48] Smith v. Board of Education, 182 Ill. App. 342 (1913); People ex rel. Bluett v. Board of Trustees of the University of Illinois, 134 N.E. 2d, 635, (1956); Tanton v. McKenney, 197 N.W. 510 (1924); State ex rel. Crain v. Hamilton, 42 Missouri App. 24, (1890); State ex rel. Ingersoll v. Clapp, 263 Pac. 433, cert. denied, 277 U.S. 591 (1928); Vermillion v. State, 110 N.W. 736 (1907); Goldstein v. New York University, 78 N.Y. Supp. 739 (1902); Koblitz v. Western Reserve University, 21 Ohio County Circuit Court 144 (1901); State ex rel. Sherman v. Hyman, 171 S.W. 2d, 822 (1942).

[49] See American Law Reports, Annotated, 2d series, Volume 58, pages 906-07.

proceedings. Indeed, it is the most recurrent in the legal literature.[50]

In Dixon et al., v. Alabama State Board of Education (294 F. 2d, 150, cert. denied, 368 U.S. 930, 1961) a federal court for the first time clearly enunciated guidelines which, if used, would guarantee due process in university disciplinary proceedings. Specifically, the court held that due process requires notice of charges and some opportunity for hearing before a student at a tax supported college can be expelled for misconduct.

Due to the importance attached to the case, the relevant facts should be noted. Although the actual misconduct for which the students were disciplined was never specified, it appears that nine students at the Alabama State College were expelled for alleged participation in a series of civil rights demonstrations. The Alabama State Board of Education, through the president of the institution at Montgomery, sent the students notices of expulsion, declining to grant notice of charges or an opportunity to be heard to any of the plaintiffs. As may be gleaned

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[50]See Vanderbilt Law Review, Volume 15, June 1962; University of Illinois Law Forum, Fall 1962; South Dakota Law Review, Volume 8, Spring 1963; Michigan Law Review, Volume 60, Fall 1962; Temple Law Quarterly, Volume 35, Summer, 1962; Notre Dame Lawyer, Volume 38, 1962; Harvard Law Review, Volume 75, May 1962; Alabama Law Review, Volume 14, Fall, 1961; and Georgetown Law Journal, Volume 50, Winter 1961.

from the court record, it appears that the Board of Education defined the action of these students in demonstrating on the college campus and in certain downtown areas as having a disruptive influence on the work of other students at the college and upon the orderly operation of the college in general.

Action was brought by six of the expelled students, specifically seeking preliminary and permanent injunction restraining the State Board of Education from obstructing their right to attend college. From an adverse decision by the federal district court, the case was taken on appeal to the United States Court of Appeals, Fifth Circuit.

With one judge dissenting, Judge Rives, for the majority, reversed the decision and held that "due process" requires that notice and an opportunity for a hearing be given to students before they are suspended or expelled from a public institution.

Going beyond what was necessary for settlement of the case, Judge Rives said in dicta:

> For the guidance of the parties in the event of further proceedings, we state our views on the nature of the notice and hearing required by due process prior to expulsion from a state college or university. They should, we think, comply with the following standards. The notice, should contain a statement of the specific charges and grounds which if proven, would justify expulsion under the regulations of the Board of Education. The nature of the hearing should vary depending upon the circumstances of the particular case. . . . By its nature, a charge of misconduct, as opposed to a failure to meet the scholastic standards of the college, depends upon a collection of the facts concerning

> the charged misconduct, easily colored by the point of view of the witnesses. In such circumstances, a hearing which gives the Board or the administrative authorities of the college an opportunity to hear both sides in considerable detail is best suited to protect the rights of all involved. This is not to imply that a full-dressed judicial hearing, with the right to cross-examine witnesses, is required. Such a hearing, with the attending publicity and disturbance of college activities, might be detrimental to the college's educational atmosphere and impractical to carry out. Nevertheless, the rudiments of an adversary proceeding may be preserved without encroaching upon the interests of the college. In the instant case, the student should be given the names of the witnesses against him and an oral or written report on the facts to which each witness testifies. He should also be given the opportunity to present to the Board, or at least to an administrative official of the college, his own defense against the charges and to produce either oral testimony or written affidavits of witnesses inhis behalf. If the hearing is not before the Board directly, the results and findings of the hearing should be presented in a report open to the student's inspection. If these rudimentary elements of fair play are followed in a case of misconduct of this particular type, we feel that the requirements of due process will have been fulfilled.[51]

Thus, for the first time, a federal judiciary set forth what are considered to be the adequate elements of notice and hearing.

Implications of the Dixon Decision

1. Dixon v. Alabama State Board of Education was the first case to recognize the need for notice and hearing and to base that need on the due process clause of the federal constitution;

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[51] Dixon et al., v. Alabama State Board of Education, 294 F. 2d, 150 cert. denied, 368 U.S. 930, (1961), at page 158-59.

2. The decision indicated that a public university must not declare that it is empowered to dismiss a student at any time for any reason, without informing the student prior to such an action;

3. Statements in the college bulletin cannot be used as waivers of the right to due process. To do so would be to deprive the student of his constitutional right to due process, and a state instrumentality may not condition the grant of a privilege upon the renunciation of a constitutional right;

4. Dixon v. Alabama State Board of Education, along with the school segregation cases[52] established the principle that the disciplinary authority of state colleges is not solely a matter of the discretion of officials but is limited by the constitutional rights of students.[53]

5. The Dixon decision is likely to be very persuasive. The Supreme Court of the United States declined to review the case by denying a writ of certiorari (368 U.S. 930). The Court has repeatedly warned, however, that such denial does not reflect upon the merits of the case.

More importantly, three cases have followed the Dixon rationale. Knight v. State Board of Education (200 F Supp. 174, 1961) a 1961 civil rights case, carefully

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[52] Brown v. Board of Education, 347 U.S. 483 (1954).

[53] See Comment, "Private Government on the Campus-Judicial Review of University Expulsions," Yale Law Journal, Volume 72, 1962-63, page 1373.

followed the Dixon guidelines that disciplinary rules must be applied in a fair and reasonable manner. In Due v. Florida A. and M. University (233 F. Supp. 396, 1963), a federal court upheld the disciplinary procedures of the university, citing the Dixon criteria for support. In Schiff v. Hannah (Civil No. 5147, W.D. Michigan, October 14, 1965) the court held that the disciplinary proceedings instituted by the defendant university were not in keeping with Dixon and Knight. This case made it clear that the courts will not hesitate to intervene in a university's disciplinary proceedings if the court finds they are weighted in favor of the administration.

In addition, a federal court decision is binding on the state courts of the particular jurisdiction to the extent that a constitutional question is involved. To render this decision ineffective would necessitate a decision by a higher level federal court.

Summary

One of the difficult areas in the administration of university affairs is that of discipline. Either by legislative grant or constitutional enactment, the university board of trustees is given the power to formulate rules and regulations necessary to the orderly management of the institution. In turn, the board of trustees has subdelegated

the power of implementing and enforcing such rules to various administrative officers (e.g., Vice-President for Student Affairs; Dean of Students, Dean of Men). It is this enforcement of regulations, balanced against the rights and interests of students, which has given rise to litigation testing the university's authority to suspend or expel, and appropriate procedures included therein.

In a substantial number of decisions, courts have expressed a reluctance to intervene in the administration of university discipline. Their one entre, however, is intervention into a situation where administrative authorities have acted arbitrarily or with malice. When such a circumstance appears, courts have appropriately responded to the plea for relief by the student plaintiff.

To our regret, university officials have received judicial support for summarily dismissing students. The tenor of the times have changed, however, and the contemporary philosophy is that a college education is so vital to success and well-being in our society that it may not be arbitrarily or capriciously stripped from a student. The student at a public university is constitutionally guaranteed due process of law, and procedural due process has been interpreted as requiring notice of charges and an opportunity to be heard.

The constitutional guarantee of due process, provided for in the fifth and fourteenth amendments, applies only to governmental and state agencies. The activities of private organizations lie beyond the scope of the federal constitution. An expanded concept of "state action," however, promises to bring private institutions under the tent of restraints imposed on state instrumentalities. As private schools continue to be involved with the state, through the media of tax exemptions and financial aid, it is not surprising to note three recent court decisions which have ruled that private actions are subject to constitutional limitations.

As a general rule, public universities are required to give notice and grant a hearing prior to suspending or expelling a student for reasons of misconduct. With one notable exception, this rule is unanimous. Private institutions, basing their action on the contractual language of the matriculation contract, have denied the student's right to notice and hearing. Only two cases are at variance with this point of view.

Regardless of whether the university was public or private, in all cases relating to the adequacy of the hearing the judicial answer was affirmative. The authorities are in conflict with the type of hearing required. Some have held for a formal hearing,inclusive of all the formalities of a trial in court. The weight of authority, however, supports the view that an informal hearing is sufficient.

Due to its recency and relevancy, a singular court decision was given special attention in the chapter. In Dixon v. Alabama State Board of Education, a federal court held that due process required notice of charges and an opportunity to be heard for students at a state-supported institution. Going beyond what was needed for disposition in the case, the court stated in dicta what would be the rudimentary elements of fair notice and hearing.

The Dixon case will have impact upon future disciplinary proceedings at tax-supported institutions of higher learning. In addition to the fact that the Supreme Court declined review of the case, three recent decisions involving student misconduct have followed the Dixon rationale.

Guidelines for Disciplinary Proceedings

Although the United States Supreme Court has declined to give a comprehensive definition of due process[54] certain principles of the concept may be adduced from a case by case analysis. These principles, as examined in an exhaustive study of how courts have dealt with university disciplinary proceedings, may be applied to all public institutions of higher education, regardless of jurisdiction.

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[54] Twining v. New Jersey, 211 U.S. 78, at page 100 (1908).

The correlation between university disciplinary proceedings and due process is mentioned because due process implies the standard which must guide all disciplinary action: reasonableness and fair play. It is not referred to because of the correlation between disciplinary proceedings and constitutional implications. If the following guidelines are adopted, the standard will be met and courts will not intervene.

1. A written notice should be forwarded to the student,containing the following:

   a) specification of the acts he allegedly committed;

   b) the specific nature of the alleged violation, and the possible penalties thereof;

   c) indication of the time and place at which a hearing will be held for the alleged violation. If he elects to do so, the student may waive the hearing;

   d) opportunity to be represented by a person of his choice. If the student desires legal counsel, but cannot secure one of his own means, the university should provide for such representation.

2. Receipt of the notice should be at least one week prior to the hearing, giving the student ample time to prepare his defense.

3. The hearing may be formal or informal, and it would be reasonable for the student to make the appropriate choice. If a formal hearing is preferred, the following should be in effect:

a) all evidence in support of the charges be introduced at the hearing;

b) all witnesses testify under oath;

c) the student should be confronted with the witnesses against him;

d) the student be permitted the privilege of cross-examination;

e) the student may be informed of his right to remain silent, and preclude self-incrimination;

f) rules of evidence should be employed (governing burden of proof, admissibility of evidence, authentication of documents, competency and credibility of witnesses, hearsay, circumstantial evidence,and evidence illegally obtained).

Regardless of the choice, ex parte consultations should not be allowed, wherein university administrators would be party to an activity or action unknown to the student. Statements against the student should not be considered unless he is advised of their content.

4. At an informal hearing, the student should be able to submit oral and/or written argument challenging the charges stated in the notice. He need not confront and cross-examine witnesses, although he should be given an adequate summary of the nature of their testimony. The names of these witnesses may be withheld.

On the other hand, the student should be given full opportunity to produce any competent witness in his own behalf, or other materials relevant to his defense.

5. The hearing may be public. However, courts have supported private hearings under certain circumstances.

6. A complete transcript of the hearing should be kept. This may be done via the services of a stenographer or through the use of a tape recorder. A copy of the proceedings should be made available to the student. For purposes of appeal, this guideline is very important.

7. At the conclusion of the hearing, the student should be given the opportunity to make a final statement or closing argument.

8. Opportunity for appeal must be provided and this fact should be announced to the student at the hearing. The appeal procedure should be clearly outlined.

9. If the student elects to appeal the decision, the subsequent hearing should be a de novo proceeding. Different individuals should hear the case, and the student should be given a fresh opportunity to present his defense.

10. All university rules and regulations should be codified and available to students. These regulations should set forth the procedure to be followed in disciplinary cases. This material should be given to the student at the time of his matriculation to the university.

CHAPTER V

ON-CAMPUS HOUSING FOR STUDENTS

The surge of new students clamoring for admission to institutions of higher learning across the face of the nation brings a myriad of complex problems for administrators of public colleges and universities. An area of particular concern is student on-campus housing. As colleges brace themselves for an influx of more than six million students by 1970, forty percent of whom will be housed on campus, consideration must be given to the development of residential policies and procedures which will promote the maximum amount of student freedom and maintain a necessary degree of order.

To provide students with a residential environment which will constructively supplement their in-class experiences, residence hall administrators have been subdelegated the authority to develop necessary rules and regulations. As these regulations deal primarily with the aspects of control and supervision, it is incumbent upon those who initiate such measures to consider the individual rights of student residents. Ignorance of these rights, or unreasonable application of particular rules and

regulations, may result in students seeking relief from the courts. It appears important, therefore, to clarify the relationship between the law and housing for on-campus students.

Governmental Immunity

Prior to a consideration of how the improper administration of a residence hall may result in litigation, one must understand the meaning and present status of governmental immunity for educational institutions. The state supported college or university, as an instrumentality of the sovereign power of government, exercising and conducting a necessary function of government, is usually immune from suit.[1] This shield of immunity is based upon the medieval philosophy of English common law that "The king can do no wrong." Translated by American courts, this is construed to mean that the state cannot be sued without consent of the legislature. Thus, the public institution of higher education--as a sovereign function of government--is immune from suit unless the state legislature has enacted a consent statute. Some states have established a court of claims. Moreover, the courts in some states have repudiated the doctrine of immunity in the absence of legislative action.

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[1]Thomas E. Blackwell, College Law: A Guide for Administrators (Washington, D.C.: American Council on Education, 1961) page 148.

Few states have altered the doctrine of governmental immunity. Some have exercised the prerogative, however of providing for recovery via legislative enactment. For example, New York and California have consented by statute to be sued. Although these are the only states to take such action, several cases have pointed out their inability to deal with the issue because it was a legislative problem.[2]

The future of governmental immunity rests with the discretion of state courts and legislatures. A minority of state courts have held that to the extent of the pecuniary value of the indemnity named in a liability insurance policy, the institutional purchaser must be regarded as protected, and hence as having waived its immunity to that extent only.[3] In Christie v. Board of Regents of the University of Michigan,[4] a trial court judgment was affirmed which ordered the Board of Regents of the University to produce in court its liability insurance policy as evidence as to whether any part of the university's immunity had been waived. However, purchase of such a policy, providing compensation for personal injuries

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[2]Scott v. State, 158 N.Y.S. 2d, 617 (1956); Brittan v. State, 200 Misc., 743; 103 N.Y.S. 2d, 485 (1951); Grover v. San Mateo Junior College District, 146 App. 2d, 86, 303, Pac. 2d, 602 (1956).

[3]M. M. Chambers The Colleges and the Courts Since 1950 (Danville: The Interstate Printers and Publishers, Inc., 1964), page 34.

[4]Christie v. Board of Regents of the University of Michigan, 111 N.W. 2d, 30 (1961).

caused by the negligent action of individuals employed by a governmental agency, does not amount to a waiver of immunity.

The doctrine of "the king can do no wrong," may be gradually declining in popularity. Although only New York and California have expressly repudicated the doctrine via legislative enactment, and Illinois via court decision, other states appear ready to follow suit. Governmental immunity, however, is a strong and resourceful bulwark. The change will not be easy nor will it be swift. Such is not the case of charitable immunity, the invisible shield which protects private institutions from tort responsibility.

Doctrine of Charitable Immunity

Although the doctrine of immunity of charitable organizations applies primarily to private institutions, the changing status of this important legal concept is a persuasive argument for discussion at this point. The doctrine of full charitable tort immunity was imported into this country in 1876 by a Massachusetts court.[5] Due to the fact that the doctrine never truly represented American opinion, it has been subjected to constant criticism. In addition, judicial uncertainty and hesitancy concerning

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[5] McDonald v. Massachusetts General Hospital, 120 Mass. 432 (1876).

the extent to which immunity should be retained or eliminated has added to the complexity of the issue. The result has been a patchwork definition of immunity in the courts of the various states, with the leading case being Muller v. Nebraska Methodist Hospital.[6] In this case, the court said that non-profit charitable organizations are immune from tort liability; non-liability, however, is restricted to inmates, participants, or recipients of a charity and not to strangers or business invitees.

Twelve states have accepted the "trust fund" theory and do not apply the doctrine of respondent superior, thereby prohibiting the dissipation of funds which are being held in trust by the institution (Arkansas Idaho, Kentucky, Maine, Massachusetts, Missouri, Oregon,Pennsylvania, South Carolina, West Virginia, Wisconsin and Wyoming). Recovery is allowed in three states where the assets of the charitable organization will not be depleted (Illinois, Tennessee,and Maryland). Eleven states deny liability to recipients of the charity, but recovery is allowed to employees, invitees, and strangers (Connecticut, Indiana, Louisiana, Michigan, Nebraska, Nevada, New Jersey, North Carolina, Ohio, Rhode Island, and Virginia). Recovery is

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[6]Muller v. Nebraska Methodist Hospital, 160 Nebraska 279, 70 N.W. 2d, 86 (1955).

permitted to paying patients or recipients in three states (Alabama, Georgia,and Texas). And finally, a number of states have expressly rejected the doctrine of immunity of charitable corporations (District of Columbia, Arizona, Alaska, California, Colorado, Deleware, Florida, Iowa, Kansas, Minnesota, New Hampshire, New York, North Dakota Oklahoma, Utah, Vermont,and Washington).[7]

The trend seems to be away from acceptance of complete charitable immunity. States have moved from total immunity to liability only for negligent selection of employees and servants; from there to permitting a paying beneficiary and a stranger to recover, and finally to unqualified repudiation of the doctrine. A growing practice is for charitable institutions to voluntarily obtain liability insurance for the benefit of persons injured or damaged by torts for which they are responsible.[8]

Four principal factors have contributed to the erosion of the charitable immunity doctrine. First, most individuals are covered by hospitalization today. Second, charitable organizations currently have extensive assets and endowments; they are not threatened by the fear that an individual suit for damanges or injury might deplete their trust fund.

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[7]Breakdown of charitable immunity doctrine taken from appellees' trial brief, in case of Miller v. Hahn et al., No. 16, 717, United States Court of Appeals, Eighth Circuit, (1958); also, see Prosser on Torts, Second edition 1955, page 784.

[8]State v. Arundel Park Corporation, 147 Atl. 2d, 427 (1959).

Third, most charitable organizations currently invest a good deal in liability insurance. And fourth, charity is no defense for tort.[9] The possible future of the immunity rule is summarized by a recent statement in the Villanova Law Review:

> Present social conditions, the interests of justice and the need for clarification of the law combines to require the judiciary and legislatures of those jurisdictions which still adhere to this incongruity to relinquish their waivering hold on this theory and to respond to the needs and economic realities of our twentieth century by discarding all remnants of this crumbling anachronism.[10]

This doctrine, then, along with that of governmental immunity, provides the legal base from which litigation relevant to housing for on-campus students might arise.

The Law as it Relates to Residence Halls

To understand how the law relates to residence halls, one must consider the authority structure of residence halls administration. Through residence hall directors or advisors, the policies and procedures which serve to control and supervise student residents are given effect. Legally, this individual maintains a contractual relationship with the university which makes him an employee and not a public officer. As an employee, he is personally liable for his own negligent acts, provided negligence is proven. The contractual arrangement of the chief administrative officer in the student housing unit does not accord him any degree of special immunity.

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[9] President and Directors of Georgetown College v. Hughes 130, Fed. 2d, 810 (1942).

[10] Edith L Fisch, "Charitable Liability for Tort," Villanova Law Review, Vol. 10, Number 1, Fall 1964, page 91

Responsibility for the development and implementation of policies and regulations which directly relate to the conduct of students carries certain legal overtones. Searching a student's room, counseling, and handling privileged communication are activities fraught with the possibility of suit. The lack of protection afforded by most states and disagreement over what constitutes "safe" or "reasonable" behavior in these areas makes it imperative that the chief administrative officer in the student housing unit understand his legal rights and responsibilities.

The Reasonable Man

To measure tort behavior, the courts have created a fictitious person, commonly referred to as "the reasonable man." Simply stated, the standard of conduct by which a man will be judged is what a reasonable and prudent man would have done in similar circumstances. As stated in the Restatement of the Law on Torts, "unless the actor is a child or an insane person, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like circumstances."[11]

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[11] Restatement of the Law on Torts, American Law Institute (St. Paul, Minnesota: American Law Institute Publishers, 1934) Volume II, page 742.

Although the characteristics or qualities of the "reasonable man" vary according to judicial interpretation, certain guidelines have been offered. As indicated by the American Law Institute, "the qualities which are of importance are those which are necessary for the perception of the circumstances existing at the time of his act or omission and such intelligence, knowledge, and experience as are necessary to enable him to recognize the chance of harm to others involved therein."[12] Prosser, in his Law on Torts, describes four qualities which accrue to the reasonable man of ordinary prudence:[13]

1. The physical attributes of the actor himself;
2. Normal intelligence and mental capacity;
3. Normal perception and memory, and a minimum of experience and information, common to all the community;
4. Such superior skill and knowledge as the actor has, or holds himself out as having, when he undertakes to act.

Becoming more specific, Prosser goes on to mention several identifiable characteristics of the reasonable and prudent man:

> There are certain things which every adult with a minimum of intelligence must necessarily have learned: the law of gravity, the fact that fire burns and water will drown, that inflammable objects will catch fire; that a loose board will tip when it is trod upon, the ordinary features of the weather to which he is accustomed, and similar phenomena of nature.

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[12] Restatement of the Law of Torts, op. cit., page 764.

[13] William L. Prosser, Law on Torts (St. Paul, Minnesota: West Publishing Company, 1955) page 124.

> He must know in addition a few elementary facts about himself; the amount of space he occupies, the principles of balance and leverage as applied to his own body, and the limits of hiw own strength. In addition, he is expected to have knowledge of the capacities and reactions of other human beings, the danger involved in explosives, inflammable liquids, electricity, moving machinery, slipping surfaces and firearms. . . . Above this minimum, the individual will not be held to knowledge of risks which are not apparent to him.[14]

Authors of the Restatement of the Law on Torts also have identified several characteristics of the reasonable and prudent man:

1. Physical capacity to obtain sense impressions;

2. Attention to one's surroundings in order that the capacity to obtain sense impressions may be effectively exercised;

3. Power of intelligent correlation of the sense impressions with previous knowledge, belief and experience by which the nature of the surroundings may be recognized.

4. Memory, not only insofar as it brings to mind previous knowledge, belief and experience but more importantly in that it recalls to the actor's mind the existence of a fact which he could not perceive by the present use of his senses.[15]

These characteristics of the reasonable and prudent man could well be called qualities of the ideal man. Idealistic though they may be, they are so with good reason. Such standards of excellence obligate the actor--in this

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[14] Prosser, op. cit., pages 129-131.

[15] American Law Institute, op. cit., pages 765-66.

case the chief administrative officer of the student housing unit--to exercise a good deal of foresight and discretion. It is his incumbent responsibility to predetermine the magnitude of the risk, the value which the law attaches to such conduct, and the interests and welfare of others. In the final analysis, he must make administrative decisions from the following frame of reference. Would a reasonable and prudent man, under similar circumstances, and being fully apprised of the situation, react in a like manner? The answer to this question must guide his behavior.

Search and Seizure

Entry and search of student's room in the residence hall may carry severe legal implications for residence hall administrative personnel. As the constitutional rights of university students becomes a more pervasive topic for discussion on the nation's campuses, this area promises to elicit great debate. On its face, the search of a student's room appears to be a logical and fairly simple procedure, devoid of any serious consequence. However, the unknowing advisor or administrator, ignorant of the proper protocol for such an action, makes himself vulnerable to serious judicial repercussion.

The courts are in conflict concerning the question of the search of a student's room in the residence hall. As a general proposition, apart from a search incident to an arrest, the only legal means which can be employed to search the premises of a private individual is a search warrant.[16] Further, a search without warrant is unreasonable in the eyes of the law.[17] The question is whether the guarantee of freedom from an unreasonable search and seizure applies fully, or with qualifications, to a search made in a dormitory room, or in a college rooming house, or in dormitory living and public premises.[18]

Evidence may be produced to show that for a university to conduct a search in a student's room without his permission and seize evidence to be used against him would be illegal.[19] In Jones v. United States[20] the Supreme Court held that anyone on the premises where a search occurs may challenge its legality by way of a motion to suppress, when its fruits are proposed to be used against him. Evidence which is the product of an illegal search has been excluded

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[16]Martha L. Ware (ed.), Law of Guidance and Counseling (Cincinnati, Ohio: The W. H. Anderson Company, 1964), page 149.

[17]Carroll v. United States, 267, U.S. 132 (1925).

[18]Martha Ware, op. cit., page 149.

[19]Michael T. Johnson, "The Constitutional Rights of College Students," Texas Law Review, Volume 42, February 1964, page 354.

[20]Jones v. United States, 362 U.S. 257 (1960).

from evidence in trials in the federal courts for almost eighty years, and has recently been held inadmissable in state proceedings.[21]

Evidence which may be excluded from judicial proceedings as a result of the manner in which it was procured, giving rise to the exclusionary rule,originated in the case Boyd v. United States.[22] In this instance, the court held that Boyd's private papers could not be introduced into evidence to incriminate him because they were illegally seized. It is conceivable that students might invoke the exclusionary rule, provided that they can convince the courts that entrance into their room was illegal by nature and articles seized were personal and could have the effect of compelling them to incriminate themselves.

It appears reasonable to assume that, in the normal course of his administrative responsibilities, the chief administrative officer of the student housing unit, will have occasion to search a student's room. In Burdeau v. McDowell[23] the court held that there will be no constitutional limitation of the counselor's rights of search if this is exercised within reason and without caprice or malice and

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[21] Mapp v. Ohio, 367 U.S. 643 (1961).

[22] Boyd v. United States, 116 U.S. 616 (1886).

[23] Burdeau v. McDowell, 256 U.S. 465 (1921).

done within the scope of the job. The purpose of a reasonable search would be that the counselor needed to obtain information or articles necessary to the well-being and welfare of the particular student involved. This could be a search for certain contraband materials and goods brought into a dormitory section, or information deemed necessary to solve some problem involving the student or students.[24]

Obviously, a search being conducted with the consent of the resident is comparatively free from legal repercussion, provided it is conducted in the normal discharge of a job responsibility. The question has been raised whether a minor may legally give consent, but this issue has been resolved in the affirmative.[25] There is support, however, for the right of officials to serach a room without prior consent by the resident of said room. In People of the State of California v. Kelly[26] the District Court of Appeals held that where police officers had reasonable cause to believe that the defendent, a student at California Institute of Technology, was involved in burglaries before entering his room in the residence hall, and whereby the officers believed in good faith that the situation confronting them

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[24] 11 American Jurisprudence, 1009, 1020.

[25] See Restatement of the Law on Torts, op. cit., Section 49.

[26] People of the State of California v. Kelly, 16 Cal. Reporter 177, (1961).

was an emergency,they were justified to enter and search the room without consent of the student. The court held that this was not a violation of the fourth amendment, which forbids unreasonable search and seizure, and articles seized in this action may be used as evidence. The court went on to say that whether or not the officers had reasonable cause to act as they did, and whether or not they acted in good faith, were questions for trier of fact (jury).

An interesting sidelight to the problem of search and seizure is that constitutional restraints upon a search without warrant are applicable to a transciently occupied room in a hotel,motel, or rooming house, but not to a student living in a residence hall. One court has ruled that a student rooming in a residence hall which is an auxiliary of a state college is not to be deemed a tenant or lodger in the technical sense of these terms. To justify the search of a student's room, the court stated that when he enters into a housing agreement with the college or university the student impliedly agrees to conform to all the reasonable rules which have been adopted for the government of the institution. Under the guise of this protective statement, search was viewed as an appropriate action.[27]

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[27] Englehart v. Serena, 300 S.W. 268 (1927).

However, a test of whether the nature of the student matriculation contract constitutes a valid assertion of implied consent has not been attempted in the courts. There would be no difficulty in regard to consent if the student, on his own initiative, would consent either in writing or verbally to such a procedure. On the other hand, to extrapolate that the mere signing of an admission contract would serve to validate the search of a student's room at any time is pure speculation at this point, and has no litigatory support.

Without the restraint of rights normally accured to a rentor, it appears that the college or university might exercise considerable latitude with regard to the development of reasonable rationale for search and seizure. At present, it is not possible to determine the parameters of this latitude as this presumption has not been tested in court.

Guidelines for the Conduct of Search and Seizure

1. A room should not be searched for arbitrary or capricious reasons. In determining liability, the court will apply the measure of reasonableness to the actions of the residence hall administrator. Reasonable behavior is directly linked to whether or not the search is related to the job responsibilities of the administrator.

2. A necessary first step when search of a room appears imminent is to obtain the permission of the resident. Every effort should be made to secure this approval, even though it may constitute a delay in the search procedure.

3. Assuming that permission for search is given, the resident of the room should remain during the investigation. A third party should accompany the administrator during the course of his search of the premises.

4. Removal of articles from the room should remain the exclusive province of law enforcement officials. If the occasion should present istself wherein the administrator would decide to confiscate certain personal effects, an inventory of these items should be prepared and signed by both the administrator and the owner of said articles.

5. If permission for search is not given, the residence hall administrator may enter the room provided that such action is necessary for the continued welfare and safety of those under his charge. It will be his responsibility, however, to justify such behavior based upon the emergent nature of the situation.

6. A wise procedure, to be used in situations wherein permission for search is not possible and a clear emergency does not exist, is to request the aid of campus security officials. These authorities may decide to search the room via the aid of a warrant.

7. The rights of the student resident must be protected. He should be informed of the reasons for the search, and be apprised of his right to deny admission to his room.

Privileged Communication and Counseling

The question of testimonial compulsion has been bandied about in courts of law for hundreds of years. In England, compelling witnesses to testify has been the rule for four centuries. This was based on the fundamental principle of government that the administration of justice is a mutual benefit to all members of a community, and every competent citizen is under an obligation to further it as a matter of public duty; that the personal sacrifice is a part of the necessary contribution to the welfare of the public.[28]

Shortly after the policy of testimonial compulsion became established in England, the courts occasionally were confronted by witnesses who refused to answer particular questions put to them on the ground that their testimony would necessarily result in the disclosure of confidential communications or information which, for reasons of public policy or personal honor, they ought not to be compelled to reveal. Usually it was claimed by such witnesses that matters of a genuinely confidential character were not the

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[28] Blair v. United States, 250 U.S. 272, 281 (1918).

proper subject of inquiry in courts of law; that, to improve the administration of justice, all persons should be encouraged to come forward with their evidence by shielding them as far as possible from compulsory disclosure of matters strictly confidential.[29] Weighed against this is the argument that complete justice can only be done when all facts relevant to a litigated issue are available to the court. As stated by Judge Learned Hand, ". . . the duty to disclose in a court all information within one's control, testimonially or by the production of documents, is usually paramount over any private interest that may be affected."[30]

The courts have been persuaded by the former argument, and have proceeded to grant privileges of non-disclosure to particular persons. The more widely known of these privileges are those which relate to state secrets, political votes, trade secrets, religious beliefs, anti-marital facts, and self-incriminating matters; those which have been extended to persons standing in a confidential relationship such as husband and wife, grand jurors, petit jurors, judges, arbitrators, public officers, and informers who furnish government officials evidence of a crime; and that which is granted to attorneys acting in a professional capacity.[31]

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[29]Clinton DeWitt, Privileged Communications Between Physician and Patient (Springfield, Ill.: Charles C. Thomas, 1958), page 4.

[30]McMann v. Securities and Exchange Commission, 87 Fed. 2d, 377, 378 (1937).

[31]Clinton DeWitt, op. cit., page 5.

Student who reside within housing units on public university campuses will frequently relate personal concerns to administrative officials of the housing unit. Due to the intimate nature of these concerns, they are often shared with the administrator under a tacit agreement of confidentiality. Whether the principle of privileged communication might legitimately apply in this instance, or whether the administrator might be compelled to disclose significant aspects of this relationship, is a matter of utmost concern to students and student personnel administrators.

Those who serve as administrative officials in student housing units occupy a peculiar position. They counsel with students, but are not professionally identified as guidance counselors. Thus, the guidelines proposed for activities of professional counselors, such as the Code of Ethics developed by the American Personnel and Guidance Association, do not directly apply. In addition, the courts have been silent with regard to legal or ethical obligations of people who serve in this capacity. Therefore, the discussion which follows is extrapolatory and theoretical by nature, intended to provide pertinent guidelines for those who by virtue of their administrative responsibilities develop confidential relationships with students.

Developed through common law, four fundamental conditions are recognized as necessary to the establishment of a privilege against the disclosure of communications:

1) The communications must originate in a confidence that they will not be disclosed.

2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.

3) The relation must be one which in the opinion of the community ought to be sedulously fostered.

4) The inquiry that would insure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.[32]

These conditions have been cited for approval in a number of cases,[33] and have been found to apply in the following relationships; attorney and client; husband and wife; between jurors; informer and government; physician and patient; and priest and penitent.

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[32]John H. Wigmore, Evidence in Trials at Common Law, Volume 8 (Boston, Massachusetts: Little, Brown and Company, 1961) page 527.

[33]See United States v. Funk, 84 F. Supp. 967 (1949); Falsome v. United States, 205 F. 2d, 734 (1953); Baskerville v. Baskerville, 75 N.W. 2d, 762 (1956).

These conditions must exist for communication to be deemed as privileged. The common law clearly indicates that the mere fact of a communication being made in express confidence, or in the implied confidence of a confidential relation, does not create a privilege.[34] According to common law, no pledge of privacy nor oath of secrecy can prevail against demand for the truth in a court of justice.[35]

Although the common law has been loath to create new privileges, various occupations have successfully proposed legislation to the same end. A recent compilation shows that journalists[36] and psychologists[37] are examples

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[34]Wigmore, op. cit., page 528.

[35]Cox v. Montague, 78 Fed, 845 (1897); Rogers v. State, 40 So. 744 (1906); Roof v. State, 245 Pac. 666 (1926).

[36]Alabama: Alabama Code Title 7, Section 370 (1955); Arizona: Arizona Revised Statutes Annotated, Section 12-2237 (1956); Arkansas: Arkansas Statute Annotated, Section 43-917 (1959); California: California Civil Procedure Code, Section 1881 (6) (1955); Indiana: Indiana Annotated Statutes Section 2-1733 (1960); Kentucky: Kentucky Revised Statutes, Section 421.100, (1959); Maryland: Maryland Annotated Code, Article 35, Section 2(1957); Michigan: Michigan Statutes Annotated, Section 28.945 (1) (1954); Montana: Montana Revised Codes Annotated, Section 93.601-2 (1959); New Jersey: New Jersey Statutes Annotated, Section 2A:84A-21, (1960); Ohio: Ohio Revised Code Annotated, Section 2739.12, (1953); and Pennsylvania: Pennsylvania Statutes Annotated, Title 28, Section 330 (1958).

[37]Arkansas: Arkansas Statutes Annotated, Section 72-1516 (1957); California: California Business and Professional Code, Section 2904 (1960); Georgia: Georgia Code Annotated, Section 38-418 (1960); Illinois: Binder v. Ruvell, No. 52-C-2535, Circuit Court of Cook County (1952); Kentucky: Kentucky Revised Statutes, Section 319.110 (1959);Montana: Montana Revised Code Annotated, Section 93-701-4 (6) (1947); New Hampshire: New Hampshire Revised Statutes Annotated, Section 330-A:19 (1959); New York: New York Education Law, Section 7611; Tennessee: Tennessee Code Annotated, Section 63-1117 (1955); Utah: Utah Code Annotated, Section 58-25-9 (1959); and Washington: Washington Revised Code, Section 18.83, 110 (1955).

of professions which now have statutory protection for confidential relations.[38] But with regard to the student-counselor relationship which may develop within a student housing unit, no such privilege of confidentiality exists at present. In effect, the residence hall administrator, regardless of his training or lack thereof, may be required to reveal aspects of confidential relationships he shares with students.

Michigan offers the singular exception to the principle that counselors may be devoid of protection for privileged communication. As found in Public and Local Acts:

> No teacher,guidance officer, school executive or other professional person engaged in character building in the public schools or in any other educational institution, including any clerical worker of such schools and institutions, who maintains records of students; behavior or who has such records in his custody, or who receives in confidence communications from students or other juveniles, shall be allowed in any proceedings, civil or criminal, in any court of this state, to disclose any information obtained by him from such records or such communications; nor to produce such records or transcript thereof; provided, that any such testimony may be given with the consent of the person so confiding or to whom such records relate, if such person be twenty-one years of age or over, or if such person be a minor, with the consent of his or her parent or legal guardian.[39]

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[38]John Henry Wigmore, Evidence in Trials at Common Law, Volume VIII (Boston: Little, Brown and Company, 1961), page 532-535.

[39]Public and Local Acts of the Legislature of the State of Michigan, Number 41, Approved May 6, 1935, effective September 21, 1935; also reported in Michigan Statutes Annotated, Volume 21, Section 27A.2165 (1961).

It is not unreasonable to infer that the chief administrative official of a student housing unit may be engaged in "character building," and thus be afforded the protection inherent in this statute.

In summary, the relationship created when a student contracts to live in university on-campus housing is fraught with potential for legal action. Generally, such actions would arise as a result of an administrative decision which affects students' rights. Typically, this decision would be made by the principal housing administrator, commonly referred to as a residence hall director.

Guidelines for Privileged Communication and Counseling

1. Confidential information shared by the housing administrator and a student is not afforded common law or statutory protection. Good faith, and acting in the best interests of the other, must characterize this relationship. Again, the concept of fiduciary is applicable. Acting as a trustee for the student imports to the housing administrator the highest sense of ethical behavior.

2. Information should not be communicated to a third party unless the student grants permission authorizing such release. The courts have stated that the right to privacy is a legal right of property and is entitled to protection by law.[40] Capricious release of information

[40] Munden v. Harris et al., 153 Missouri Appeal Reports 652 (1911).

about a student,defaming his character and person, could well constitute grounds for action based upon invasion of privacy.

3. It is incumbent upon the housing administrator to explain his legal position to the student with whom he counsels on issues of severe magnitude. It should be clearly explained, prior to the point at which a student might implicate himself in a disciplinary incident, that the administrator cannot hold in confidence those matters which he feels he must report to a superior. Also, the student should be made aware of the fact that aspects of his counseling relationship with the administrator may be subpoened and become a matter of public record.

4. Information may be released to internal administrators or teachers at the college or university. The housing administrator must determine, however, that these individuals have a legitimate and constructive interest in the student. Upon request, then, information may be forwarded to the Dean of Students' office, to campus security agencies, and the university health center.

5. The housing administrator should avoid subjective interpretation of the records or information which is released. Only that which may be defined as factual should be offered, thereby permitting the inquiring party to make their own subjective analysis concerning the significance of the facts.

6. To be completely fair with the student, and to maintain a good faith relationship with same, the housing administrator should clearly state his professional limitations. A recent case illustrates this important point. In Bogust v. Iverson[41] action was brought against the defendent who was employed as a full-time director of student personnel services and professor of education. It was alleged that plaintiff's daughter, as a student of the college, was under the direct guidance and supervision of the defendent, that he had administered to her aptitude and personality tests and was familiar with her personal, social and educational problems and her conflicting feelings, environment, and social ineffectiveness. It was further stated that he was negligent in failing to secure or attempt to secure psychiatric treatment for the girl or in failing to advise her parents of the difficulty or in failing to provide proper student guidance. As a result of such negligence, charged the plaintiff, the girl committed suicide.

In its response, the court held that not only did the plaintiff's petition fail to allege any negligence of the defendent upon which a judgment could be based but that the act of the plaintiff's daughter in committing suicide could not have been reasonably foreseen. Termination of the relationship by the defendent was not an intervening act which was the proximate cause of the girl's death.

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[41] Bogust v. Iverson, 102 N.W. 2d, 228 (1960).

The court had little trouble with this case on the grounds that the counselor was not a medical graduate and in the exercise of reasonable care was not obliged or expected to recognize medical symptoms of serious conditions. Nevertheless, clear warnings are presented by this judicial action.

It is not unrealistic to think that a housing administrator may know as much about a student as Dr. Iverson knew about Miss Bogust. Misrepresenting his professional qualifications, and attempting to treat a serious emotional disorder, could result in legal liability. Increased abandonment of the governmental immunity rule,[42] heightens the possibility of such litigation. To insure against such an occurrence, the following is suggested:

1. The housing administrator should contact an appropriate official when he encounters a case where the student is more than generally emotionally unsettled.

2. If a student is referred, his or her parents should be notified immediately of the student's condition.

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[42] Wisconsin: Holytz v. Milwaukee, 115 N.W. 2d, 618 (1962); Illinois: Molitor v. Kaneland Community Unit District, 163 N.E. 2d, 89 (1959).

Summary

Increasing student enrollments, expanded residence hall programs, and contemporary concern over the issue of student rights combine to bring the law into sharper focus in the area of student housing. The residence hall director, as the chief administrative officer, must be alert to possible legal implications which may result from decisions or policy made in his office. An ignorance of how the law affects residence halls could place the administrator and the college or university in a most embarassing situation.

Before specifics may be discussed, the doctrine of governmental immunity should be well understood. This doctrine determines whether or not the university will make itself vulnerable to redress filed by individual claimants. This doctrine, once a bulwark of university philosophy, is gradually declining. Most institutions presently permit recovery by various and assorted claimants. This has been accomplished by provision of liability insurance or legislative enactment.

In the field of tort law, courts have repeatedly referred to the "reasonable man." This fictious person possesses many idealistic qualities which serve to make all of his activities "reasonable and prudent." To avoid liability, the court demands that all individuals conform to this hypothetical standard of conduct. Those who are defined as administrative officers in on-campus student housing units, being responsible for the welfare of many students, should be cognizant of these idealistic characteristics and endeavor to conduct themselves accordingly.

The right of privacy,a constitutional right guaranteed to all persons, must be respected by the student personnel worker. In the area of search and seizure, the literature indicates that the courts are in conflict. A basic rule of thumb, then, is that the student housing administrator should secure consent of the resident before he searches a student's room. However, if he perceives the situation to be an emergency and conducts the search in a reasonable manner, he may do so without fear of liability.

As the student housing administrator receives confidential information concerning students, it is important for him to know which facts should be considered privileged communication. To be sure, information should not be released to anyone without the student's consent. Internal administrators at the university may be viewed as an exception; their concern for the welfare of the student involved is almost always legitimate. It is significant for housing administrators to note that they are liable for release of information which may provide injurious to a student. The Michigan statute which provides that no student personnel worker is compelled to divulge privileged communication in a court of law is an excellent model.

Counseling students in the residence hall setting is a common occurrence. Although this appears to be a relatively uncomplicated procedure, the recent court case of Bogust v. Iverson has lent additional meaning to this

practice. The student housing administrator has a legal and moral responsibility to work only in the areas for which he is professionally trained. He must realize his personal limitations and convey these to the counselee. Such precaution may serve to keep him out of court.

CHAPTER VI

STUDENT RECORDS

The History of College and University Student Records

Although colleges have used student records since the seventeenth century, no comprehensive history of student personnel records has been written. In general, this is due to the inefficient systems which characterized early record-keeping, and to the fires which destroyed the physical facilities of many colleges.[1] The student accounting register appears to be the first formalized record maintained in schools. Upon the recommendation of Horace Mann, the Massachusetts legislature in 1839 passed an act requiring the maintenance of a form for pupil accounting by all school districts.[2]

Maintenance of school registers, given a boost by the compulsory attendance laws, were quickly adopted by a majority of the states. In general, however, they were simple and "almost devoid of personal data."[3] Until the

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[1] H. G. Good, "Colleges and Universities - 1. Historical Development in the United States," in Monroe (ed.) Encyclopedia of Educational Research (New York: Macmillan Book Company), page 224.

[2] Arch O. Heck, Administration of Pupil Personnel, (Boston, Massachusetts: Ginn and Company, 1929), page 187.

[3] "Manual for the Cumulative Record Folders of Schools and Colleges," (Washington, D.C.: American Council on Education, May 1947), page 2.

American Council on Education Cumulative Record was published in 1928, the main consideration in student records below the college level were student accounting and academic marking.[4]

The earliest records used at the college level were related to admissions. It is believed that Harvard University used a written translation of Latin for purposes of admission as early as 1665.[5] The small numbers of students enrolled in colleges and universities during the seventeenth and eighteenth centuries did not require elaborate record systems. The rigidity of the university curricula also precluded the use of comprehensive records. Between 1800 and 1870, however, the liberalization of curricula and the advent of the elective system necessitated an expansion of record systems. College admission standards also became more flexible, and the academies or preparatory schools began to compete with the universities for students.[6] The change in admission standards was particularly relevant because it represented a change from pure academic achievement

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[4] Ibid., page 3.

[5] W. L. Sprouse and F. W. Bradshaw, "Admission and Registration," in Monroe (ed.) Encyclopedia of Educational Research (New York: Macmillan Book Company), pages 18-19.

[6] Benjamin Fine, Admission to American Colleges (New York: Harper and Brothers, 1946), pages 16-17.

at the high school level to an emphasis on evaluating personal characteristics and aptitudes of students. With such a change, a greater variety of data became a part of the student record.

Compared with the admission record of students, the academic record has received much less mention in the literature. Stibal reports that academic records, as we know them today, did not exist in the earliest colleges.[7] Other authors report great variability among the record systems which were maintained, to the degree that they were inadequate for giving an accurate and permanent account of student scholastic achievement.[8]

Although the national development of accrediting agencies brought added importance to the maintenance of student records at the secondary level, it is not likely that these bodies had a similar effect on colleges and universities.[9] The work of the American Council on

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[7]Willard O. Stibal, The Historical Development of Student Personnel Records in Colleges and Universities (Emporia, Kansas: Kansas State Teachers College, Volume 8, December 1959), page 12.

[8]Roy M. Carlson, "College Student Records in Relation to Transfer," American Association of Collegiate Registrars Journal, 1942, Volume 17, pages 526-31; G. L. Singewald, "Analysis of Permanent Records Forms Used by Eighty-Five Pacific Coast Colleges," American Association of Collegiate Registrars Journal, 1942, Volume 17, pages 355-58.

[9]Stibal, op. cit., page 17.

Education, however, appears to have provided significant impetus for the development of academic record-keeping systems for institutions of higher education. In 1928, the American Council on Education published four cumulative record forms: (1) a folder for college students; (2) a folder for secondary school students; (3) a card for elementary school students; and (4) a card that may be used in either elemenetary school or the secondary school.[10] These forms were revised in 1941 and 1943, allowing for greater flexibility in the recording of academic work and a greater emphasis upon the recording of observations about student behavior.[11]

In addition to the model for record-keeping presented by the American Council on Education, E. G. Williamson has pointed to another factor which gave rise to the need for records. This was the trend towards implementation of formalized student personnel services on various campuses.[12]

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[10] Committee on Revision of Cumulative Records, "Manual for Cumulative Records," (Washington, D.C.: American Council on Education, 1947), pages 3-4.

[11] Ibid., page 4.

[12] E, G. Williamson, "To Avoid Waste," Journal of Higher Education, February 1933, Volume 8, page 64.

By this, Dr. Williamson was referring to the increased use of personnel services such as counseling and guidance, placement, financial aid, and housing. Each of these operations would be ill-prepared to help students unless they were to employ a comprehensive and efficient record-keeping system.

Additional developments, peculiar to the growth of colleges and universities, have provided support for the burgeoning of student records. Increased college enrollment has given rise to numerous research studies of the college population. Changes in college admission standards call for greater record articulation between schools and universities. And, as mentioned with regard to Williamson's comment on increased need for student personnel services, it has become clear that effective use of record may facilitate student growth.

This brief analysis of the history of college and university student records has been intended to implicitly demonstrate the need for such records as they relate to the orderly management of the university. The fact that records will be maintained seems clear. As stated by Martha Ware: "We are a nation of record keepers and a nation of individuals about whom records are kept. From the birth certificate to the death certificate, someone, somewhere, is recording information about each one of us most of the time. Thus,

it is that teachers, guidance counselors, and administrators keep records about students from kindergarten through graduate school."[13]

In addition to the important role they plan in the on-going educational process of the institution, records and record-keeping carry legal implications for university administrative personnel. A definition of these implications, followed by a series of guidelines to be used by administrators who must deal with problems regarding student records, will constitute the remainder of this chapter.

Definition

The preceding historical sketch of the development of records in colleges and universities may provide the reader with some insight as to the scope and nature of this subject. As can be observed, records may be of varying shapes and sizes, may serve a multitude of purposes, and may be defined as public or private. Prior to an analysis of the legal implications of college and university records, however, it will be necessary to set forth a more definitive statement of records.

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[13]Martha L. Ware (ed.) Law of Guidance and Counseling Foreword, (Cincinnati: The W. H. Anderson Company, 1964),

At the outset, it should be recognized that a generic description of records will not be adequate. True definition lies with statutory draftsmanship or judicial application of common law principles. With this in mind, the following is offered for general understanding of the subject under consideration.

The term "record" is ordinarily applied to public records only.[14] A "public record" has been defined as one required by law to be kept, or necessary to be kept in the discharge of a duty imposed by law, or directed by law to serve as a memorial and evidence of something written, said, or done, or a written memorial made by a public officer authorized to perform that function, or a writing filed in a public office.[15] The elements essential to constitute a public record are, namely, that it be a written memorial, that it be made by a public officer, and that the officer be authorized by law to make it; but the authority of the officer need not be derived from express statutory enactment, and if authorized to make the record, it is not necessary that he should be required to do so.[16]

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[14] Corpus Juris Secundum, Volume 53, Section 1, William Mack and Donald J. Kisir (eds.) (New York: The American Law Book Company, 1931) page 604.

[15] Corpus Juris Secundum, Volume 76, Section 1, Francis J. Ludes (ed.) (Brooklyn, New York: The American Law Book Company, 1952), page 112.

[16] Ibid.

The authors of Corpus Juris Secundum further define public records:[17]

> Generally, there is no single test which can be applied to determine what are and what are not public records (Coldwell v. Board of Public Works, 202 Pac. 879, 1921) All records which the law requires public officers to keep, as such officers, are public records (State v. Henderson, 169 S.W. 2d, 389, 1943) and whenever a written record of the transactions of a public officer in his office is a convenient and appropriate mode of discharging the duties of the office, and is kept by him as such, it is a public record. (People v. Shaw, et al., 112 Pac. 2d, 241,1941) However, the mere fact that a document is deposited or filed in a public office, or with a public officer (Miller v. Murphy et al., 248 Pac. 934, 1926) even though necessarilyso deposited (Tobin v. Blythe Township School Directors, 11 Pa. District and County 696, 1928) or is in the custody of a public officer (Miller v. Murphy, et al., 248 Pac. 934, 1926) does not make it a public record. Likewise, every memorandum made by a public officer is not a public record (People ex rel. Stenstrom v. Harnett, 226 N.Y.S. 338, 1937, affirmed 230, N.Y.S. 28, 1927) papers or memoranda in the possession of public officers which are not required by law to be kept by them as official records, are not public records (Barrickwan v. Lyman, 160 S.W. 267, 1913); . . . Whether or not records are strictly public records is often declared by statute, but, in the absence of statute, the nature and purpose of the record, and possibly, custom and usage, must be guides in determining whether a record is a public record. (People v. Harnett, supra.)

In a legal report to the American Society of Newspaper Editors, intended as a study of legal access to public records and proceedings, Harold L. Cross suggests that statutory language is the primary source for a definition of records. Fifteen states have general statutes of

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[17] Ibid., pages 112-13.

definition, (California, Delaware, Idaho, Illinois, Kansas, Louisiana, Maryland, Massachusetts, Montana, New Jersey, North Carolina, Oregon, Tennessee, Texas, and Utah).[18] As stated by the author, none of these statutes is automatic in effect or of crystal clear import. All require on occasion, and most have received, judicial interpretation.[19] Of special note, owing to its great detail, is the Louisiana Public Records Act (Act No. 195, 1940). This legislative enactment specifies quite clearly the following:

(1) What records, documents, or other writings may be defined as public records:

(2) How examination and copying of such documents may be conducted;

(3) The specific parties who might examine and copy public records;

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[18]Harold L. Cross, The People's Right to Know (New York: Columbia University Press, 1953), page 39.

[19]Ibid. Cases cited for support are: Coldwell v. Board of Public Works, 202 Pac. 879 (1921); Harrison v. Powers, 127 Pac. 818 (1912); Runyon v. Board of Prison Terms and Paroles, 79 Pac. 2d 101 (1938); Evans v. District Court of Fifth Judicial Circuit, 293 Pac.323 (1930); State v. Matteo, 31 So. 2d, 801, cert. denied 68 Sup. Ct., 145 (1947); State v. Egan, 105 So. 288 (1925); State ex rel. Waqan v. Clements, 192 So. 126 (1940); Sanford v. Boston Herald-Traveler Corporation, 61 N.E. 2d, 5 (1945); Hurley v. Board of Public Welfare of Lynn, 37 N.E. 2d 993 (1941); Hobart et al., v. Commissioner of Corporations and Taxation, 41 N.E. 2d, 38 (1942); Hardman v. Collector of Taxes of North Adams, 58 NE. 2d, 845 (1945); State ex rel. Halloran v. McGraith, 67 Pac. 2d, 838 (1937); Stack v. Borelli, 66 66 Atl. 2d, 904 (1949); Bend Public Company v. Haner, 244 Pac. 868 (1926).

(4) A definition of the duty of all persons having custody of public records;

(5) Provisions for the preservation of all public records, and

(6) Provisions for enforcement of the Act.

Within the limits of the author's investigation, this legislative enactment is unique in the literature.

In addition to statutes, courts of law have endeavored to define records. In Amos v. Gunn[20] the Supreme Court of Florida held:

> A public record is a written memorial, made by a public officer authorized to make it. It is required by law to be kept, or necessary to be kept, in the discharge of a duty imposed by law, or directed by law to serve as a written memorial of something written, said or done.

The Supreme Court of Indiana was more fullsome in its treatment of the same issue:

> It is said that a public record is one required by law to be kept, or necessary to be kept in the discharge of a duty imposed by law, or directed by law to serve as a memorial and evidence of something written, said or done.
>
> Whenever a written record of the transaction of a public officer in his office is a convenient and an appropriate mode of discharging the duties of his office it is not only his right but his duty to keep them memorial, whether expressly required to do so or not; and when it becomes a public document- a public record belonging to the office and not to the officer.[21]

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[20] Amos v. Gunn, 94 So. 615 (1922).

[21] Robinson v. Fishback, 93 N.E. 666 (1911).

A New York court also offered a definition of records:

> A public record, strictly speaking, is one made by a public officer in pursuance of a duty, the immediate purpose of which is to disseminate information to the public, or to serve as a memorial of official action for public reference. . . .
>
> Whether or not records are strictly public records is often expressly declared by statute. In the absence of statute, the nature and purpose of the record, and, possibly, custom and usage, must be the guides in determining the class to which it belongs.[22]

Common law interpretation or statutory construction, then, constitute the primary sources whereby records may be defined. In the absence of either, authorities are remanded to consider the custom and usage of the record prior to making a decision as to whether or not the record involved is public. Insofar as student and other records of an institution of higher learning are concerned, there does not appear to be a clear-cut definition as to which are public records and which are private records of the institution. It is determined as a matter of law.[23]

From a legal point of view, the answer to the question of definition is critical because it leads to the question of inspection. In general, public records are of such a

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[22] People ex rel. Stenstrom v. Harnett, Commissioner of Bureau of Motor Vehicles, 226 N.Y.S. 338, affirmed 230 N.Y.S. 28 (1928).

[23] Burnell Waldrep, "The Public and Private Records of an Institution of Higher Learning," Fifth Annual Conference of National Association of College and University Attorneys, 1965, New Orleans, Louisiana, page 126.

public nature that members of the community might assert a legitimate interest in them. The aspects of inspection, however, as the following discussion will demonstrate, carry legal implications for the college and university administrator.

Inspection of Public Records

The student record at a public college or university may contain a great deal of information. It is not uncommon to find recorded information on the following:

1. Pre-college academic records;
2. College board scores, including misconduct in taking these college boards;
3. Materials submitted as a part of the applicant's application;
4. Pre-admission physical and psychological examinations required of all students;
5. Routine and special physical examinations;
6. Secondary information as to the student's health;
7. Knowledge of a student's special infirmities;
8. Information which has come to the college as a result of his participation in ROTC and other on-campus military training programs;
9. Information dealing with psychological studies done on the student individually or as a part of a group;
10. Psychiatric treatment reports;
11. Information concerning the student's extracurricular activities; and

12. Post-graduation records utilized by the alumni office and university development office in fund raising.[24]

To the above list may be added information pertinent to academic progress or lack thereof and notation of criminal activities. Obviously, the university has on deposit a great deal of significant information about students. Improper use of this information may lead to legal action instigated by a student who has been "damaged."

The Right of Inspection

A brief look at the development of law in regard to the question of inspection may aid in understanding the existing situation. There is authority to the effect that according to the English common law there is no right in all persons to inspect public documents or records.[25] It is, however, to be noted that the English courts have seldom been called upon to enforce a private individual's right to inspect public documents and records except where the inspection was desired to secure evidence in a pending or prospective suit. Accordingly, there was formulated the following common-law doctrine: Every person is entitled to the inspection, either personally or by his agent,

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[24]Justin C. Smith, "Legal Pitfalls Facing College Personnel Workers," Speech before the American Personnel and Guidance Convention, April 12, 1965, page 3.

[25]Shelby County v. Memphis Abstract Company, 203, S.W. 339 (1918).

of public records, including legislative, executive, and judicial records, provided he has an interest therein which is such as would enable him to maintain or defend an action for which the document or record sought can furnish evidence or necessary information.[26] This rule has been interpreted as not so much a denial of the right of every citizen to inspect the public records as a declaration of the interest which a private individual must have to avail himself of the extraordinary writ of mandamus to enforce his right.[27]

It has been said that the rule adopted by the English courts has no basis in reason or justice.[28]

As stated by a public university attorney:

> It is absurd to hold that a man could inspect the public records, providing his purpose was to use the information in some litigation and to deny him the right to inspect for some other purpose that might be equally beneficial to him. It does not protect all of his substantial rights and has not been received with general favor in this country. So, in this country mandamus will lie to enforce a citizen's right to inspect public records, irrespective

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[26] American Jurisprudence, Vol. 45, "Records and Recording Laws," 817, citing for support, Fayette County v. Martin, 130 S.W. 2d, 838 (1939); Nowack v. Auditor General, 219 N.W. 749, (1928); North v.Foley, 265 N.Y.S. 780 (1933); In re Caswell, 29 Atl. 259 (1893); Shelby County v. Memphis Abstract Company, 203 S.W., 339 (1918).

[27] Nowack v. Fuller, 219, N.W. 749 at 750 (1928), emphasis added.

[28] Burnell Waldrep, op. cit., page 124.

> of whether it is sought in aid of pending or contemplated litigation with respect to his personal rights.[29]

In this country, the right of citizens to inspect public records has found support in statutory construction, Cross reports that the overall statutory picture places states in three categories:

> 1. "general inspection" states, in which the legislative policy is to state a general right of inspection of such records as are determined to be public by statutory and judicial definition, and to delimit by statute the right to inspect particular records or classes of records that otherwise would be public. The general inspection states are: Alabama; Arizona; California; Florida; Georgia; Idaho; Iowa; Kentucky; Louisiana; Massachusetts; Michigan; Minnesota; Montana; Nebtaska; Nevada; New Mexico; New York; North Carolina; Oklahoma; Oregon; South Dakota; Utah; and Wisconsin.
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> 2. "specific statute" states, in which the legislative policy is to state rights of inspection of particular records or classes of records by a series of specific statutes, and to delimit by statute the right to inspect other particular records which may be public and subject to inspection. The specific statute states are: Colorado; Connecticut; Illinois; Indiana; Kansas; Mississippi; Missouri; North Dakota; Ohio; Pennsylvania; Tennessee; Texas; Virginia; Washington; and Wyoming.
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> 3. "common law" states, in which the legislative policy is to leave the determination of the right of inspection to the common law, and in some instances to deny rights of inspection to the common law, and in some instances to deny rights of inspection of particular records or classes of records that otherwise would or might be public and subject to inspection by a series of specific statutes. The common law states are: Arkansas; Delaware; Maryland; Maine; New Hampshire; New Jersey; Rhode Island; South Carolina; Vermont; and West Virginia.[30]

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[29]Burnell Waldrep, op. cit., page 124, see also 60 American Law Reports, 1351, and 169 American Law Reports 653.

[30]Harold L. Cross, op.cit., pages 51-54.

To round out Cross' national study, it may be added that the District of Colubmia has no general statute, but provides for inspection of certain records. The Alaska Statutes (1962) do not provide for general inspection of public records, with the exception of election records. The Revised Laws of Hawaii (1955) follow very closely the English common law tradition of permitting inspection of public records to only those individuals who will use such information for purposes of litigation. Chapter 225, Section 1, provides:

> Any party to any action or suit depending in any court of record, shall be at liberty to apply to the court or a judge of the court for a rule or order for the inspection by himself or by his witnesses of any real or personal property, the inspection of which may be material to the proper determination of the question in dispute; and it shall be lawful for the court or any such judge, if they or he think fit, to make such rule or order upon such terms as to costs and otherwise as such court or judge may direct.

Who May Inspect Public Records

The authorities are in conflict as to who might inspect public records, and for what purpose, if any. An appropriate answer for those interested in this question may only be found in jurisdictional statutes or common law decisions.

A state has the power to grant by statute the right of inspection of public records to all persons, regardless

of interest[31] and correspondingly to withhold by statute the right of inspection of such records or to surround the exercise of theright with such restrictions as it deems proper and necessary.[32] Interpreted through litigation, several state statutes provide that inspection of records is limited to "interested persons"[33] and prohibited to those who attempt to assert such a right for purely speculative reasons;[34] or merely to gratify idle curiosity.[35]

On the other hand, some statutes have been construed to make public records subject to inspection irrespective of the motive of the investigator.[36] Others have not forced the applicant to prove his reasons for inspection of the records are proper.[37] Indeed, it has even been held that citizens may inspect public records for the satisfaction

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[31] Silver v. People, 45 Illinois Reports, 224 (1867), Direct Mail Service v. Registrar of Motor Vehicles, 5 N.E. 2d, 545 (1937).

[32] Flint v. Stone Tracy Company, 220 U.S. 107 (1911); State v. McCubrey, 87 N.W. 1126 (1901).

[33] Payne v. Staunton, 46 S.E. 927 (1904); State ex rel. Clark v. Long, 16 S.E. 578 (1892).

[34] Randolph v. State, 2 So. 714 (1887).

[35] Ibid.

[36] Butcher v. Civil Service Commission, 61 Atl. 2d 367 (1948).

[37] State ex rel. Davidson v. Couch, 156, So. 297 (1934).

of curiosity.[38] However, it has also been determined that all citizens do not have the unrestricted right to inspect records which are not strictly public records.[39]

In the final analysis, whether an individual may successfully assert his right to inspection of public records rests with the discretion of the recording officer in charge of the records. Although this power of discretion is clear, it may not be exercised arbitrarily.[40] The recording officer may determine whether inspection is being sought for a proper purpose.[41] Further, it has been held that a statutory right of inspection is not unqualified or free from all restrictions, but must be accepted and exercised by the person making inspection in such a manner as not materially to interrupt or interfere with the recording officer in the administration or discharge of his duties.[42]

Records Subject to Inspection

The question of which records are subject to inspection, as is true of the question of who might inspect records, may only be answered by statutory language or common law

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[38] People ex rel. Stenstrom v. Harnett, Commissioner of Bureau of Motor Vehicles, 226 N.Y.S. 338 (1927), affirmed 230 N.Y.S. 28 (1928).

[39] People ex rel. Stenstrom v.Harnett, supra.

[40] State v. Keller, 21 Pac. 2d, 807 (1933).

[41] State ex rel. Clay County Abstract Company v. McCubrey, 87 N.W. 1126 (1901).

[42] State ex rel. Colescott v. King, 57 N.E. 535 (1900); State ex rel. Wagen v. Clements, 192 So. 126 (1939); affirmed 195 So. 1 (1940); State ex rel. Sullivan v. Wilson, 5 Ohio Supp. 399 (1937).

interpretation. In the absence of either, the answer must be found in the custom and usage of the records.

Particular types of records have been judicially defined as subject to inspection. Those states defined as "specific statute states" have expressed a permissive attitude towards the number of records open to inspection.[43]

Corpus Juris Secundum reports the following records as open to inspection:

1. town records[44]
2. books of a municipal corporation[45]
3. books of a public utility corporation[46]
4. marriage license records[47]
5. police records not required to be kept secret as a matter of public policy[48]
6. public records of a state[49]
7. records and papers relating to liquor licenses[50]
8. records of a county clerk[51]

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[43] Kansas Law Review, Comment: "Inspection of Public Records, Volume 11, 1962, page 161.

[44] State ex rel. Hansen v. Schall, 12 Atl. 2d, 767 (1940).

[45] Mushet v. Los Angeles Public Service Department, 170 Pac. 653 (1917).

[46] State ex rel. Cummer v. Pace, 159 So. 679 (1935).

[47] Kalamazoo Gazette County v. Vosburg, Kalamazoo County Clerk, 111 N.W. 1070 (1907).

[48] Lee v. Beach Publishing Company, 173 So. 440 (1937).

[49] Nowack v. Fuller, 219 N.W. 749 (1928).

[50] Commonwealth v. Blair, 5 Pa. District 488 (1896).

[51] Brown v. County Treasurer, 19 N.W. 778 (1884).

In addition, numerous states have statutes of specific character subjecting particular records to public inspection. Exhaustive citation of all such statutes is beyond the scope of this discussion. The general rule is that, in the absence of statutes or common law rule to the contrary, all public records of the state government (legislative, executive, and judicial) are open to inspection.[52] There are, however, exceptions to this rule.[53]

Certain records have been held not subject to inspection. In general, the records in public offices which are not subject to public inspection are (1) those which are not public in the legal sense, but are non-public, private, secret, privileged or confidential because of their nature or stated considerations of public policy, and (2) those which, though public in the legal sense, are withheld from such inspection by statute or by common law rules based on stated considerations of public policy.[54]

There is no general right of inspection of records: (reported in Kansas Law Review, op. cit., pages 162-163.)

(1) of executive departments which are not intended as notice, but are kept merely as evidence of transactions in the departments.[55]

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[52] American Jurisprudence, Vol. 45, "Records and Recording Laws," Section 14, page 426.

[53] Ibid.

[54] Harold L. Cross, op. cit., page 75.

[55] McGarrahan v. New Idria Mining Company, 96 U.S. 316 (1877); Lefebvre v. Somersworth Shoe Company, 41 Atl. 2d, 924 (1945).

(2) of communications in writing passing between officers of the government, in the course of their official duties and relating to the business of their offices;[56]

(3) which, although of a public nature, must be kept secret and free from common inspection, such as dispatches in the detective police service, or records otherwise relating to the apprehension and prosecution of criminals;[57]

(4) which fall within the rule that it is the duty of a citizen to communicate to the executive officers of government any information he has of the commission of any offense against the laws - such information by a private citizen being a privileged and confidential communication;[58]

(5) on file in public institutions such as hospitals, concerning the condition, care, and treatment of patients or inmates;[59]

(6) where such inspection or use of contents would be detrimental to the public interest.[60]

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[56] Gardner v. Anderson, Federal Case No. 5220, C.C. Md. (1876).

[57] American Jurisprudence, Vol. 45, Section 26 (1943).

[58] Vogel v. Gruaz, 110 U.S. 311 (1884); United States v. Keown 19 Fed. Supp. 639 (1937).

[59] Massachusetts Mutual Life Insurance Company v. Michigan Asylum, 144 N.W. 538 (1913); Smart v. Kansas City, 105 S.W. 709 (1907).

[60] State v. Miller, 85 So. 700 (1920); In re Caswell, 29 Atl. 259 (1893).

Public College and University Records

Whether public college and university student records are public or private, and whether they are open to inspection to the general citizenry has not been defined by statute or at common law. However, one recent case is of particular import. In Morris v. Smiley et al.,[61] a former student of the University of Texas brought a mandamus action to require university officials and the assistant attorney general to produce and permit inspection, copying and photographing of university health records relating to himself. The specific charge by the student was that he had been denied inspection of his complete medical record, that doctors testified falsely as to his mental condition, and that false information was given to prospective employees. In this case, the Court of Civil Appeals attempted to answer two questions: (1) are the records sought to be inspected and copied public records; and (2) who is the legal custodian of such records? In response to the former, court cited American Jurisprudence, Volume 45, page 420:

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[61] Morris v. Smiley et al., 378 S.W. 2d, 149 (1964).

> It is said that a public record is one required by law to be kept, or necessary to be kept, in the discharge of a duty imposed by law, or directed by law to serve as a memorial and evidence of something written, said, or done. In all instances where by law or regulation a document is filed in a public office and required to be kept there, it is of a public nature, but this is not quite inclusive of all that may properly be considered public records. For whenever a written record of the transactions of a public officer in his office is a convenient and appropriate mode of discharging the duties of his office, it is not only his right but his duty, to keep that memorial whether expressly required so to do or not; and when kept it becomes a public document which belongs to the office rather than to the officers. What is a public record is a question of law.
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> If the records which appellant desires to inspect and copy come within the definition of public records contained in this opinion, then appellant is entitled to inspect and copy them, and the lawful custodian of those records is under a legal duty to comply with all reasonable requests to this end. (emphasis added)

In response to the latter, the court directed attention to Article 259, Vernon's Annotated Civil Statutes, which provides in part, that "the librarian of the University of Texas and the archivist of the Department of History of said University are hereby authorized to make certified copies of all public records in the custody of the University."

The court held that Mr. Morris' motion for summary judgment was not conclusive in establishing that the records sought to be inspected and copied were public records and, if so, who was the legal custodian for them.

The court gave no further clue as to what types of university student records might be defined as "public." It is interesting to note that, in a previous action against the superintendent of a state hospital, ordering said individual to produce and permit inspection of records of Mr. Morris, plaintiff was successful.[62] In this instance, the court stated that the records Morris desired to inspect were public records, and while not available for inspection by the general public, they were, under law, accessible to inspection by him.

With the exception of the Morris case, the courts have not attempted to define the public or private nature of university student records. Even the Morris case does not provide a satisfactory response to this issue. With the nature of university records unclear, it follows that the aspect of inspection is equally ambiguous. If the college or university administrator is unsure as to which student records may be inspected, and what parties may be given access to said records, it may be assumed that he will have concern with regard to pieces of student information he may release or circulate. Unfortunately, an indiscriminate decision in this area carries the greatest potential for legal liability.

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[62] Morris v. Hoerster et al., 377, S.W. 2d, 841 (1964).

Release of Student Records

Frequently, college or university administrators are asked by various individuals or agencies for interpretation of information from the file of a student or alumnus. Unless the institution has received legal advice in regard to such an activity, it is probable that administrators faced with such a decision would benefit from guidelines which would enable them to cooperate with the request without fear of legal liability. As mentioned, irresponsible handling of student record information may bring irreparable harm to the student. A possible result would be disbarment from employment with a government agency or government associated industry.

Unfortunately, the extant law pertinent to the subject of college and university student records is virtually non-existent. There is no federal statute requiring that university administrators comply with requests for information from a student or alumni's record. Also, there is no statute which requires such records to be kept confidential.[63] As indicated by a recent article in the Journal of National Student Personnel Administrators, many administrators "play the situation by ear." When information is requested, some

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[63]Robert B. Meigs, "The Confidential Nature of Student Records," Second Annual Conference of College and University Attorneys, Evanston, Illinois, 1962, page 14.

individuals get out the record and discuss it, but do not specifically give, or show it, to the inquirer. Others are willing to reproduce the information and release it to a governmental agent without student approval. Still others are willing to divulge the complete student record to the agent and feel strongly that this is a matter of honesty and integrity. Finally, some administrators may require that the inquiring agency secure the release approval of the student or graduate.[64]

Without the benefit of statutes or case law in point, it appears that the subject of student records is devoid of legal definition. Indeed, there are no guidelines which would help form an opinion as to how inclusive university student records should be. Public institutions of higher education appear free to include as much or as little material as they feel is necessary to keep track of the individual student.[65] With regard to the dissemination of information from records, it is clear that few guidelines are available. However, there are well recognized general principles which apply to this problem, and may serve to fill this void.

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[64]George K. Brown, "Release of Student Records," Journal of National Association of Student Personnel Administrators, Volume 3, October, 1965, page 5.

[65]Justin C. Smith, "Legal Pitfalls Facing College Personnel Workers," a speech before the American Personnel and Guidance Convention, April 12, 1965, page 3.

The Legality of Record Dissemination

It has been established that administrators at public colleges and universities maintain a great deal of academic,non-academic, and personal information about individual students. Also, it may be demonstrated that administrative officials are frequently faced with requests for said information by private employers, governmental agencies, professional licensing bodies, and individuals of like nature. The law is not clear as to whether this information is confidential. If information is released which serves to discredit or defame the student, he may claim personal injury and sue for damanges. In the American system of jurisprudence, an injured party has a right to have his grievance heard by a court of law. This may not be interpreted to mean that his claim will necessarily be successful. Such disposition will remain with the trier of fact, or jury.

From a previous discussion, it may be recalled that, depending upon legislative enactment, certain public universities may be immune to suit under the doctrine of governmental immunity. This will not eliminate the fact, however, that someone is at fault for improper handling of student records. Under the recognized legal doctrine, of personal responsibility, an individual is accountable for his personal actions. Thus, a student may bring a suit for damages against an administrator. To be successful, the petitioner must establish that his reputation or good name has been unjustly defamed.

Libel and Slander

Defamatory action, manifested through a disclosure of student information, may result in a suit for damages grounded in the legal concepts of libel and slander. The two terms may be distinguished. Libel was originally construed to mean written or printed works. Since its inception in the seventeenth century, it has been extended to include pictures, motion pictures, and even conduct carrying a defamatory imputation, such as hanging the plaintiff in effigy, erecting a gallows before his door, dishonoring a valid check drawn upon the defendent's bank, or even, in one Wisconsin case, following the defendent over a considerable period in a conspicuous manner.[66]

There are four general situations which give rise to libel per se:

(1) Any statement which falsely accuses a person of suffering from some loathsome or contagious disease. Limited to cases of veneral disease, this situation gave rise to one of the few cases which deals with the release of student records. In Kenny v. Gurley (95 So. 34, 1923) a female student brought an action for libel against the authorities of Tuskegee Normal and Industrial Institute.

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[66] William L. Prosser, Law of Torts, Third edition (St. Paul, Minnesota: West Publishing Company, 1964), page 770.

The student claimed that libel had been uttered through letters. The girl had been sent back home and in answer to a letter from her asking to return, the college physician and the dean of women wrote the girl's parents that she could not be allowed to return. The doctor stated that the girl had been in the school hospital with a veneral disease, and that she should be placed in the care of a good physician. The dean of women's letter, enclosing the doctor's, stated that the letter "explains itself," and that it "seems to indicate that Velma had not been living right." In the action brought by Miss Gurley the university authorities pleaded that the communication was made in good faith, without malice, and upon a subject matter in which they had an interest and moral duty. In reversing the trial court judgment for Miss Gurley, the Supreme Court of Alabama held that the burden of proof was on Miss Gurley to show actual malice, and there was no evidence of such in this case. After noting the duties of the physician and dean toward the student body, the opinion declared that when the authorities dismissed a student that it was only an expected duty on their part to advise the parents of the cause, and that letters for that purpose were privileged communications.

(2) a statement which falsely accuses a person of lack of fitness in conducting his business;

(3) any statement which falsely accuses a person of a crime involving moral turpitude or makes such person liable to punishment infamous in character;

(4) any false statement which upon its face brings disgrace upon the party accused.

False statements not falling under one of the above headings may nevertheless be libeous per se if on their face and without reference to any specific facts they bring hatred, ridicule or contempt upon the accused in the eyes of the public.[67]

Slander has been interpreted to mean the spoken word. Generally, slander has not been considered criminal, as has been libel. However, some slanderous words, such as those imputing unchastity to a woman, are now made criminal by special statutes in various jurisdictions.[68]

Although subject to specific exceptions, libel and slander may be distinguished on a further ground. Slander, in general, is not actionable unless actual damage is proven. On the other hand, libel may be actionable without the necessity of proving that the plaintiff had suffered damages. On its face, then, the mere publication of a printed word may bring action for libel. This is an important distinction for those charged with the care and maintenance of student records.

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[67]Justin C. Smith, "Legal Vulnerables in the Handling of Student Records and Information," speech before the American Personnel and Guidance Association, April 4, 1966, page 3.

[68]Prosser, op. cit., see footnote 79, page 769.

Defenses Against Suits for Libel and Slander

When an action for defamation has been brought, the accused has several means of defense. The best selection of these means will be that which provides complete immunity. Two defenses fit this category: truth and privilege.

In order to constitute a complete defense, truth pleaded in justification of a defamatory charge must meet the precise charge and be as broad as the defamatory accusation.[69] Truth of only a part of the charge or accusation will not amount to a complete defense.[70] Also, there are some authorities which have held that, in order for truth to be a complete defense, the accusation must have been published with good motives.[71] Thus, it may be seen that, depending upon how completely the defendent justifies his defamatory allegation, truth may be a complete defense.

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[69] Corpus Juris Secundum, Volume 53, Section 137, (Brooklyn, New York: The American Law Book Company, 1948), page 224.

[70] Holden v. American News Company, 52 F. Supp. 24 (1943); Abell v. Cornwall Industrial Corporation, 150 N.E. 132 (1925); Diamond v. Krasnow, 7 Atl. 2d, 65 (1939); Luna v. Seattle Times Company, 59 Pac. 2d, 753 (1936).

[71] Hutchins v. Page, 72 Atl. 689 (1909); Corpus Juris, Volume 36 (New York: The American Law Book Company, 1924), page 1232.

Privilege is a recognized defense for civil action for libel and slander, but in order to be shielded from liability for thepublication of defamatory words on this ground, the communication must be a privileged one uttered on a privileged occasion by a privileged person to one within the privilege.[72] A privileged communication is one made bona fide by a person who has an interest in the subject matter to one who has an interest in it or stands in such a relation that it is a reasonable duty, or is proper for the writer to give the information. Such communications are often divided into two classes: absolute privilege, and conditional or qualified privilege.[73]

Absolute privilege has been limited to a very few situations, and has been interpreted to mean a communication which, by reason of the occasion on which it is made, no remedy is provided for the damages in a civil action for slander and libel.[74] Thus, individuals who receive privileged communication of this nature should not disclose said information without the consent of the maker.

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[72] Corpus Juris Secundum, op. cit., Section 87, page 139.

[73] Ibid., page 140.

[74] Reagan v. Guardian Life Insurance Company, 166 S.W. 2d, 909 (1943); George Knopp and Company v. Campbell, 36 S.W. 765 (1896).

Absolute privilege has been limited to judicial proceedings, legislative proceedings, executive communications, husband and wife communications, political broadcasts, and situations wherein the plaintiff has given his consent.[75]

Pending statutory or constitutional language to the contrary, the privilege of absolute immunity may extend to the relationship developed between university physicians and students. For example, the State of New York has adopted, by legislation, rules of evidence which put such a privilege into effect in judicial proceedings. The Consolidated Laws of New York, Annotated (1963) states as follows:

> Prohibition of Civil Practice Act, Section 352, prohibiting disclosure by doctor of information acquired in attending patient in a professional capacity is absolute and remains effective unless provisions of such section are expressly waived at trial by defendent.[76]

Clinton DeWitt also indicates that absolute immunity may extend to such a situation:

> Generally speaking, staff physicians and other physicians in the employ of a hospital, public or private enter into the relationship of physician and patient with every person who enters the hospital for the purpose of care and treatment.[77]

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[75]Prosser, op. cit., pages 796-804.

[76]Consolidated Laws of New York, Annotated, 1963, Section 4504, page 352.

[77]Clinton DeWitt, Privileged Communications Between Physician and Patient (Springfield, Illinois: Charles C. Smith, Publishers, 1958), page 121.

Within the limitations of his search of state statutes, the author of this work found no additional instance wherein the privilege of absolute immunity would apply to the relationship between public university administrators and students.

Qualified, or conditional, privilege is the immunity usually claimed by university administrators.[78] Briefly stated, a qualifiedly privileged communication is a defamatory communication made on what is called an occasion of privilege without actual malice. With such communication there is no civil liability, regardless of whether or not the communication is libelous.[79]

The rationale which supports this qualified grant of immunity is that, in certain situations, information communicated is of great importance to the public interest. This degree of importance is given priority over the private interests of the communicant. Thus, communication of this type may be disclosed to certain individuals for certain purposes, regardless of its defamatory result, without the consent of the maker of the statement.

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[78]Charles R. Gambs, Jr., "Sharing Data From Student Records," Journal of the National Association of Student Personnel Administrators, Volume 3, October 1965, page 6.

[79]Corpus Juris Secundum, op. cit., page 144.

It is pointed out by Meigs that there are certain circumstances under which a university may divulge information from its records under qualified privilege without subjecting itself to legal liability. They are:

1. The information must be requested and not voluntarily offered;

2. It must be given to a person having a real interest in the matter and a need to know;

3. The information given shall not exceed the scope of the request;

4. It must be given in good faith, and not with intent to damage the individual.[80]

Additional restrictions on the grant of qualified privilege has been noted. The condition attached to all such qualified privileges is that they must be exercised in a reasonable manner and for a proper purpose.[81] The right becomes forefeit if the administrator publishes defamatory information in order to be malicious,[82] or if the administrator were to deliberately lie.[83]

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[80]Robert B. Meigs, "The Confidential Nature of Student Records," speech at the Second Annual Conference of College and University Attorneys, Evanston, Illinois, 1962, page 16.

[81]Prosser, op. cit., page 819.

[82]Ibid., page 821.

[83]Caldwell v. Personal Finance Company of St. Petersburg, Florida, 46 So. 2d, 726 (1950).

The best advice for the university administrator, who wishes to stay within the bounds of qualified privilege, is to act as a reasonable man under the circumstances with due regard to the strength of his belief, the grounds that he has to support it, and the importance of conveying the information.[84]

Summary

An historical analysis of the use of student records shows that a proliferation of university functions and activities has led to a corresponding rise in the number and type of student records needed. The work of the American Council on Education, in addition to these internal demands provided a needed impetus in the development of important student records. An additional external force was the growth of the professional field of student personnel administration.

The care and maintenance of student records have potential for legal implication. At present, the available case law and statutory guidelines in this area are virtually non-existent. However, this should not diminish the fact that two aspects of record keeping have legal significance. These are the problems of inspection and disclosure of student record information.

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[84] John E. Hallen, "Character of Belief Necessary for the Conditional Privilege in Defamation," Illinois Law Review, Volume 25, 1931, page 876.

An important prefatory question, prior to the discussion of whether public university student records are open to inspection, is whether said records may be defined as "public." There is no evidence of a clear answer to this question. The best guideline is, in the absence of statute, that the public nature of a student record will be determined by its purpose and usage. According to the author's search of the statutes, this test would apply to student records in all public colleges and universities, as no statute was found to the contrary. An answer to this question of definition is important, because it leads to the question of inspection. If public university student records may be defined as "public," then they are open to inspection by certain parties.

For public records kept in areas other than the university setting, statutory language has clearly indicated which records may be inspected, and who may be inspectors. A national survey shows that the states may be divided into three classes: (1) "general inspection" states; (2) "specific statute" states; and (3) "common law" states.

In regard to what parties might inspect public records, it is clear that the state has discretionary power to grant this right to all persons, or to only certain individuals. The weight of authority points toward a disposition whereby those who inspect public records must demonstrate a tangible interest, and may not conduct such an inquiry merely to satisfy curiosity.

As was true of the question of who might inspect public records, the query of which public records might be inspected can only be answered by one of three methods: case law, statutory construction, or the custom and usage of said records. A corollary to this question is the fact that case law, statutory construction, and the principle of usage have also declared some records as not being subject to inspection.

The ambiguous condition of whether public university student records are "public," and whether they may be subject to inspection, serves to confound the issue of disclosure of student information. This is unfortunate, because those charged with the custody and maintenance of student record information may be held personally liable for irresponsible use of said information. Mounting requests by outside agencies and parties places an ever-present pressure on this ill-defined situation.

If information is released which serves to defame the character or reputation of a student, he may bring a legal action for recovery of damages. Generally, this action will take the form of a suit for libel and/or slander. Libel refers to the written word;slander refers to the spoken statement. Libel has traditionally been construed as the more serious offense, sometimes being interpreted as criminal.

Faced with a suit for libel and/or slander, the public university administrator may choose one of several defenses. The two which promise greatest success are truth and privilege. Although there is substantial evidence to the contrary, truth has not always been a complete defense against a defamatory action. The defense of privileged communication is divided into two classes; absolute and qualified or conditional. Absolute privilege means complete protection of communication, implying that such communication may be withheld from disclosure. In one instance, that being the relationship existing between the university physicians and a student patient, the absolute privilege may apply to the public university. This privilege has not been directly applied to any other university-student relationship.

The privilege of qualified or conditional immunity is applicable to university administrators. Simply stated, qualified privilege would enable an administrator to issue defamatory student information, provided that he do so in good faith and without malice. In addition, there are important conditions for disclosure which attach to the doctrine of qualified privilege. Disregard for these conditions will result in a loss of the privilege.

In final summary, this chapter has been intended to set forth well recognized legal principles which may be

applied to the university functions of records and record-keeping. These principles will now be applied through a suggested list of guidelines for administrators who must cope with problems inherent in the area of student records.

Guidelines for Student Records

In general, a university is neither required to disclose, nor prevented from disclosing, information contained in a student's record. The exception to this would be a court decision, requiring that the university produce certain student records. It may be assumed that discretion will lie with the appropriate administrator, and it is hoped that educational soundness will be reflected in the university policies which govern records and record-keeping. The following guidelines may be helpful in formulating such policies:

1. One reason for the ambiguity which surrounds the problem of record-keeping is the extreme diversification of types of records. Some records are academic in nature, and some are personal. For this reason, the first guideline is a careful codification of all university student records. A suggested categorization might be:

a. Academic information: The official educational record which is an all-inclusive abstract of academic achievement maintained in the office of the registrar or other comparable official. This information may safely be released to inquiring parties, provided they have a legitimate interest in the student.

b. Public information: "Address book" information which may include name, date of matriculation to the institution, classification, age, degree, major or minor fields of study. This information may also be released without the consent of the student.

c. Non-academic information: This file may include comments from the financial aids office, from the treasurer's office, from the placement office, and from the Dean of Student's office. The latter will normally be relevant to disciplinary proceedings. Information of this nature may be released to identified persons when it is germane to their inquiry.

d. Personal information: Statements on a student's race, color, or creed, organizations to which he belongs, his or her marital status, the student's general financial status or that of his parents, his religious affiliations, and results of personality and aptitude tests should be treated as confidential information and not released unless consent is given. Hospital or medical records would also qualify for such confidential treatment.

It is important, then, to classify records. It is one thing to release minimal personal identification, and quite another to release a comprehensive personnel file record.

2. Those seeking information should be asked to identify themselves. Also, it would be appropriate to ask the investigator if he seeks the information in his official capacity.

3. A minimal risk of liability will ensue if the university administrator follows carefully the conditions applicable to qualified privilege. To recapituate:

a. The information should be requested and not volunteered by the university administrator.

b. Information should only be given to individuals who evidence a tangible interest in the student, and need the information for purposes of their investigation.

c. Information given should not exceed the scope of the request; it should be directly to the point.

d. Information must be given in good faith, without malice or intent to damage the individual.

4. When consent is desirable, it is advised that the consent of <u>parents</u> be obtained, and not that of the minor student.

5. The university administrator must be <u>reasonable</u> in his decisions to release or withhold student information. His first consideration should be whether his decision is in keeping with the educational goals and objectives of the

institution. Reasonable behavior would dictate that indecision with regard to the confidential nature of a student record is enough reason to withhold such information. Protection of the student should be a paramount consideration.

CHAPTER VII

FINDINGS, CONCLUSIONS, AND IMPLICATIONS FOR FURTHER RESEARCH

The Problem

Law and education have much in common. Both are viable social institutions which set normative standards for behavior. Indeed, both are intent upon the educational process, intending by their actions to impart learning and knowledge. As both are intricately linked to the complex human enterprise, it is natural that the two should affect one another as they exist and thrive in our modern American society.

The ultimate goals of law and education, however, are at variance and may even be mutually exclusive. Generally, law seeks to guide the behavior of men, and to set definitive boundaries for particular activities. Education, on the other hand, seeks to educate man so that he may set his own course and define his own behavior. These orientations are not of equal weight, as the law must ultimately settle questions of dispute which arise from man's decision to assume a particular course of action which produces conflict with the interests or possessions of others. The law, then, may be called upon to settle educational questions or issues.

The problem taken under consideration in the present study has been to define particular areas wherein the

law has affected educational issues. Specifically, the areas of concentration were housed within the public university--student relationship, and are manifested through the provision for student on-campus housing, disciplinary proceedings, and the maintenance and release of student records. Having defined these areas through a search of various legal materials, the problem then became one of setting forth guidelines for decision-making to be used by administrators in public institutions of higher education. These suggested guidelines were included at the end of the appropriate chapters.

Findings and Conclusions

As numerous cases in this study demonstrate, the courts of this nation would prefer to allow educational experts and authorities to settle educational issues. They have said, in dicta, that judges are not necessarily well prepared to define and answer those questions which may result in educational policy. It is their position that such matters should not be decided in courts of law. Rather, issues of this nature should be decided by those best qualified to do so, namely, teachers and administrators at the elementary, secondary or higher educational level.

The present study set out to examine the hypothesis that legal norms for the conduct of educational matters have been replacing non-legal norms. It seems clear from

the evidence presented on preceding pages that courts of law have intervened in the adjudication of educational issues and problems. It is equally clear from the evidence presented that courts have seen fit to take such action only in instances which are characterized by unfair, arbitrary, or capricious behavior on the part of educational authorities. It may be concluded that legal norms have been implemented in order to insure that the basic ingredients of fair and reasonable behavior characterize the actions and decisions of those responsible for the education of our nation's youth. Courts are not concerned with forging educational policy, or substituting their judgment for that of educational experts. Simply, the concern of jurists is that the interests of individuals be duly protected. It is the hope of this study that the guidelines offered for consideration by administrators of public institutions of higher education might serve to preserve their autonomy in the articulation of educational issues, while simultaneously being informative with regard to expectations held by courts of law. It must be remembered, however, that the soundness of said guidelines will be determined by a court of law.

Implications for Further Research

This study has not been intended as an exhaustive treatise on the field of education law with regard to public institutions of higher education. In fact, it purports to offer research relative to only three specific relationships which have developed between public institutions of higher education and their students. Areas which still need study are numerous. The aspect of tuition and scholarship, for example, is looming on the horizon. Tuition rates at state universities are going up in the fall of 1967 in at least ten states (Hawaii, Colorado, South Dakota, Alaska, Arkansas, Maryland, New Hampshire, New Mexico, South Carolina, and Vermont) and fundamental legal questions are being raised relevant to such action. Specifically, the right of state universities to impose higher tuition rates on out-of-state students is being challenged as unconstitutional, with the premise being that such action deprives out-of-state students of equal protection of law. One case which raises this precise question is presently pending in a United States District Court (Iowa).

Also, the area of admission and re-admission promises to bring judicial interpretation, unless administrators of public universities initiate an examination of policies and procedures which deal with this issue. Specifically, the courts would take special note of those admission policies which employ criteria which are discriminatory or unreasonable.

This brings the author to a final point. In addition to the disclosure of specific litigatory or statutory information, I have attempted to insert the importance of theoretical doctrines which have played, or may play, key roles in the formulation of certain educational policies. The doctrine of unconstitutional conditions may have direct bearing in the future on decisions by administrators who are considering serious dispositions in the case of disciplinary incidents. Also, the concept of state action may sound a warning to the administrators of private institutions, indicating to them that institutional ties with state or federal activities may result in an obligation to afford constitutional rights to students on their respective campuses.

The most important doctrine, however, and the one which promises the greatest protection for educational decisions, is found in the concept of "the reasonable man." Time and again, the majority court opinion has held that educational decisions must be <u>reasonable</u>. The question has been asked: Would a <u>reasonable</u> man in similar circumstances, have elected a similar course of action? The court will not call to question the qualifications of those who are empowered to make such decisions. They will, however, willingly intervene if they feel that the administrative action taken was unreasonable or arbitrary. This is

the legal norm, then, that courts of law insist upon. If administrators of public colleges and universities will only apply this standard to all decisions they make with regard to the university-student relationship, they need not fear legal repercussion. In fact, courts will rally to their support, provided that the standard of reasonableness has been a part of the rationale for the administrative action.

GLOSSARY OF LEGAL TERMS AND ABBREVIATIONS

GLOSSARY OF LEGAL TERMS AND ABBREVIATIONS

cert. denied - certiorari denied; certiorari is a writ of review in an appellate proceeding, asking for re-examination of action taken by a lower court. When certiorari is denied, the superior appellate court has simply refused to review the case. Great care should be exercised in assigning reasons for such denial.

et al. - an abbreviation for et alii, meaning "and others."

ex rel. - an abbreviation for ex relations, meaning "on the relation." Legal proceedings which are instituted by the attorney general (or other proper person) in the name and behalf of the state but on the information and at the instigation of an individual who has a private interest in the matter, are said to be taken "on the relations" of such person.

In re - a method of entitling a judicial proceedings in which there are not adversary parties, but merely some matter concerning which judicial action is to be taken.

mandamus - a writ which issues from a court of superior jurisdiction, commanding the performance of a specific duty which the relator, or person asking for the writ, is entitled to have performed.

trier of fact - a jury

trier of law - a judge

West's Regional Reporter System - state court decisions are published in two forms: the official report which is published by the courts themselves as their authoritative text and the unofficial reports which include two separate systems--the West Publishing Company's comprehensive National Reporter System and Lawyers Cooperative Publishing Company's selected American Law Reports.

A. National Reporter System. West's National Reporter System consists of a series of regional reporters which collectively publish most of the approximately 25,000 decisions which are issued by the appellate courts of the fifty states every year. West has divided the country into seven

regions: Atlantic (Maine, New Hampshire, Vermont, Connecticut, Pennsylvania, Rhode Island, New Jersey, Deleware, and Maryland); Pacific (Arizona, California, Colorado, Idaho, Kansas, Montana, Nevada, New Mexico, and Oklahoma); Northeastern (Illinois, Indiana, Massachusetts, New York, and Ohio); Northwestern (North Dakota, South Dakota, Michigan, Minnesota, Nebraska, Wisconsin, and Iowa); Southeastern (Georgia, North Carolina, South Carolina, Virginia, and West Virginia); Southwestern (Arkansas, Kentucky, Tennessee, Missouri, Texas, Indiana, and Southwest Territories); and Southern (Alabama, Florida, Louisiana, and Mississippi).

The decisions of the appellate courts of the states in each region are published together in one series of volumes. These series have been supplemented by West with separate Reporters for the two most litigious states, New York Supplement and the California Reporter, which also include lower court decisions.

For purposes of interpretation, the following directory of Reporter abbreviations is included:

Atl.....Atlantic
F.....Federal
F. 2d.....Federal, Second Series
F.Supp.....Federal Supplement
N.Y.S.....New York Supplement
N.E.....Northeastern
N.E.2d.....Northeastern, Second Series
N.W.....Northwestern
Pac.....Pacific
Pac.2d.....Pacific, Second Series
S.E.....Southeastern
So.....Southern
S.W.....Southwestern
S.W.2d.....Southwestern, Second Series

Also, it may be helpful in reading legal citations to know that the first number preceding the name of the Reporter indicates volume number, and the number following the name of the Reporter indicates pagination. Thus, 332 S.W. 2d, 662 is interpreted as: Volume 332 of the Southwestern Reporter, Second Series, at page 662.

B. American Law Reports. The American Law Reports is based on the annotated reporting of a small selection of significant cases. American Law Reports includes only 500 carefully chosen state and lower federal court decisions, each of which is annotated with an editorial discussion of the law of that case, including past developments, the current law in all of the states on that problem, and future trends which seem likely to develop. The abbreviation for American Law Reports is A.L.R.

United States Supreme Court Decisions- the official reporting of Supreme Court decisions is found in U.S. Reports. In addition to the official U.S. Reports there are also two privately published editions of the Supreme Court's decisions which provide special research aids and supplementary material not found in the official edition. These unofficial editions are the Supreme Court Reporter and Lawyers Edition of the Supreme Court Reports.

BIBLIOGRAPHY

BIBLIOGRAPHY

Books

American Jurisprudence, Volume 11, 1937.

American Jurisprudence, Volume 45, 1943.

American Jurisprudence, Volume 55, 1946.

American Law Reports, Annotated, Second Series, Volume 58, Robert T. Kimbrough (ed.), San Francisco, California: Bancroft-Whitney Company,1958.

Blackwell, Thomas E. College Law: A Guide for Administrators. Washington, D.C.: American Council on Education, 1961.

Chambers, M. M. The Colleges and the Courts, 1936-1940. Boston, Massachusetts: The Merrymount Press, 1941.

Chambers, M. M. The Colleges and the Courts Since 1950. Dansville, Illinois: The Interstate Publishers and Printers, 1964.

Corpus Juris Secundum. William Mack and Donald J. Kisir (eds.) Volume 53, New York: The American Law Book Company, 1939.

Corpus Juris Secundum. Volume 53, Brooklyn, New York: The American Law Book Company, 1948.

Corpus Juris Secundum. Francis J. Ludes (ed.) Volume 76, Brooklyn, New York: The American Law Book Company, 1952.

Cross, Harold L. The People's Right to Know. New York: Columbia University Press, 1953.

Davis, Kenneth C. Administrative Law Treatise, Volume 1, St. Paul, Minnesota: West Publishing Company, 1958.

Dennis, Lawrence E. and Kauffman, Joseph F. (eds.) The College and the Student. Washington, D.C.: American Council on Education, 1966.

DeWitt, Clinton. Privileged Communications Between Physician and Patient. Springfield, Illinois: Charles C. Thomas, 1958.

Encyclopedia of Educational Research. Morris (ed.) New York: Macmillan Book Company, 1950.

Fine, Benjamin. Admission to American Colleges. New York: Harper and Brothers, 1946.

Gellhorn, Walter. Administrative Law: Cases and Comments. Chicago, Illinois: The Foundation Press, Inc., 1940.

Heck, Arch O. Administration of Pupil Personnel. Boston, Massachusetts: Ginn and Company, 1929.

Hofstater, Richard and Metzger, Walter P. The Development of Academic Freedom in the United States. New York: Columbia University Press, 1955.

Katope, Christopher and Zolbrok, Paul G.(eds.) Beyond Berkeley. Cleveland, Ohio: The World Publishing Company, 1966.

Lloyd-Jones, Ester M. and Estrin, Herman A. (eds.) The American Student and His College. Boston, Massachusetts: Houghton-Mifflin Company, 1967.

Millett, John D. The Academic Community: An Essay on Organization. New York: McGraw-Hill Company, 1962.

Prosser, William L. Handbook on Law of Torts, Second Edition, St. Paul, Minnesota: West Publishing Company, 1955.

Prosser, William L. Law on Torts, Third Edition. St. Paul, Minnesota: West Publishing Company, 1964.

Rauh, M. A. College and University Trusteeship. Yellow Springs, Ohio: The Antioch Press, 1959.

Restatement of the Law on Torts. American Law Institute, St. Paul, Minnesota: American Law Institute Publishers, 1934.

Restatement of the Law on Torts, Second Edition, Volume 1, American Law Institute, St. Paul, Minnesota: American Law Institute Publishers, 1965.

Restatement in the Courts. American Law Institute, St. Paul, Minnesota: American Law Institute Publishers, 1965 Supplement, 1967.

Simpson, Sidney J. and Stone, Julius. (eds.) Law and Society. Book One, St. Paul, Minnesota: West Publishing Company, 1948.

Stibal, Willard O. The Historical Development of Student Personnel Records in Colleges and Universities. Emporia, Kansas: Kansas State Teachers College, December, 1959.

Ware, Martha L. (ed.) Law of Guidance and Counseling. Cincinnati, Ohio: The W. H. Anderson Company, 1964.

Wigmore, John H. Evidence in Trials at Common Law. Volume 8, Boston, Massachusetts: Little, Brown and Company, 1961.

Cases Cited

Abell v. Cornwall Industrial Corporation, 150 N.E. 132, 1925.

Allen v. Morton, 127, S.W. 450, 1910.

Almon v. Morgan County et al., 16 So. 2d, 511, 1944.

Amos v. Gunn, 94 So. 615, 1922.

Anthony v. Syracuse University,231 N.Y.S. 435, 1928.

Atchley v. Atchley, 194 S.W. 2d, 252, 1946.

Baldwin v. Morgan, 287 F. 2d, 750, 1961.

Baltimore University v. Colton, 57 Atl. 14, 1904.

Barker v. Bryn Mawr College, 122 Atl. 220, 1923.

Barrickwan v. Lyman, 160 S.W. 267, 1913.

Baskerville v. Baskerville, 75 N.W. 2d, 762, 1956.

Bauer v. State Board of Agriculture, 129 N.W.713, 1911.

Bell v. Maryland, 378 U.S. 226, 1964.

Bell Telephone Company of Pennsylvania v. Driscoll, 21 Atl. 2d, 912, 1941.

Bend Public Company v. Haner, 244 Pac.868, 1926.

Blair v. United States, 250 U.S. 273, 1918.

Bogust v. Iverson, 102 N.W. 2d, 228, 1960.

Booker et al. v. Grand Rapids Medical Center, 120 N.W. 589,1909.

Boyd v. United States, 116 U.S. 616, 1886.

Brittan v. State, 103, N.Y.S. 2d, 617, 1956.

Brown v. Board of Education, 347 U.S. 483, 1954.

Brown v. County Treasurer, 19 N.W. 778, 1884.

Brown v. City of Richmond, 132 S.E. 2d, 495, 1963.

Bruhake v. Golden West Wineries, 132 Pac. 2d, 102, 1942.

Burdeau v. McDowell, 256 U.S. 465, 1921.

Burton v. Wilmington Parking Authority et al., 365 U.S. 715, 1961.

Butcher v. Civil Service Commission, 61 Atl. 2d, 367, 1948.

Caldwell v. Personal Finance Company of St. Petersburg, Fla., 46 So. 2d, 726, 1950.

Carr v. St. John's University, 231 N.Y.S. 2d, 403; rev'd 231 N.Y.S. 2d, 410, 1962.

Carroll v. United States, 267 U.S. 132, 1925.

Christie v. Board of Regents of University of Michigan, 111 N.W. 2d, 30, 1961.

Clemens v. District Court of City and County of Denver, Colorado, 390 Pac. 2d, 83, 1964.

Coldwell v. Board of Public Works, 202 Pac. 879, 1921.

Commonwealth v. Bair, 5 Pa. District 488, 1896.

Cooper v. Watts, 191 So. 2d, 519, 1966.

Cowee v. Cornell, 75 New York Reports, 91, 1878.

Cox v. Montague, 78 Fed. 845, 1897.

Cranwell v. Oglesby, 12 N.E. 2d, 81, 1937.

Curry v. Lasell Seminary Company, 46 N.E. 110, 1897.

DeHaan v. Brandeis University, 150 F. Supp. 626, 1957.

Diamond v. Krasnow, 7 Atl. 2d, 65, 1939.

Direct Mail Service v. Registrar of Motor Vehicles, 5 N.E. 2d, 545, 1937.

Dixon v. Alabama State Board of Education, 294 F. 2d, 150, 1961, cert. denied 368 U.S. 930, 1961.

Dodds v. Ward, 418 Pac. 2d, 629, 1966.

Dohany v. Rogers, 50 Sup. Ct. 299, 1930.

Driscoll v. Hershberger et al., 238 Pac. 2d, 493, 1951.

Due v. Florida A & M University, 233 F. Supp. 396, 1963.

Dunn v. United States, 238 Fed. Reporter 508, 1917.

Eisler v. Clark, 77 F. Supp. 610, 1948.

Englehart v. Serena, 300 S.W. 268, 1927,

Esteb v. Esteb, 244 Pac, 264, 1926.

Evans v. District Court of Fifth Judicial Circuit, 293 Pac, 323, 1930.

Evans v. Newton, 86 Sup. Ct. 486, 1966.

Falsome v. United States, 205 F. 2d, 734, 1953.

Fayette County v. Martin, 130 S.W. 2d, 838, 1939.

Flint v. Stone Tracy Company, 220 U.S. 107, 1911.

Foley v. Benedict, 55 S.W. 2d, 805, 1932.

Frank v. Marquette University, 245 N.W. 125, 1932.

French v. Weeks, 259 U.S. 326, 1922.

Gardner v. Anderson, Federal Case No. 5220, C.C. Md., 1876.

Garrett v. United States, 340 F. 2d, 615, 1965.

Goldenkoff v. Albany Law School, 191, N.Y.S. 349, 1921.

Goldstein v. New York University, 78 N.Y.S.739, 1902.

Gott v. Berea College, 161 S.W. 204, 1913.

Griffin v. Maryland, 378 U.S. 130, 1964.

Grover v. San Mataeo Junior College District, 303 Pac. 2d, 602, 1956.

Guillory v. Administrators of Tulane University of Louisiana, 203 F. Supp. 855, 1962.

Hamilton v. Regents of University of California, 293 U.S. 245, 1934.

Hannibal Bridge Company v. United States, 221 U.S. 194, 1911.

Hardman v. Collector of Taxes of North Adams, 58 N.E. 2d, 845, 1945.

Harrison v. Powers, 127 Pac.818, 1912.

Hempstead v. Meadville Theological School, 130 Atl. 421, 1925.

Herbert v.Louisiana, 272 U.S. 312, 1926.

Commonwealth ex rel. Hill v. McCauley, 3 Pa. County Court Reports 77, 1886.

Hobart et al. v. Commissioner of Corporations and Taxation, 41 N.E. 2d, 38, 1942.

Holden v. American News Company, 52 Fed. Supp. 24, 1943.

Holden v. Hardy, 169 U.S. 366, 1898.

Holytz v. Milwaukee, 115 N.W. 2d, 618, 1962.

Hutchins v. Page, 72 Atl. 689, 1909.

Hutt v. Haileyburg College, 4 Times L.R. (Eng.) 623, 1888.

In re Caswell, 29 Atl. 259, 1893.

In re Cover's Estates, 204 Pac. 583, 1922.

In re Ryan, 40 N.Y.S. 2d, 592, 1943.

In re Stephens, 211 F. Supp. 201, 1961.

In re Tod, 81 N.W. 637, 1900.

Jackman v. Short, 109 Pac. 2d, 860, 1941.

Jones v. United States, 362 U.S. 257, 1960.

Kalamazoo Gazette County v. Vosburg, 111 N.W. 1070, 1907.

Kenney v. Gurley, 95 So. 34, 1923.

The King v. Chancellor of the University of Cambridge, 92 Eng. Reports 370, 1732.

Knight v. State Board of Education, 200 F. Supp. 174, 1961.

George Knopp and Company v. Campbell, 36 S.W. 765, 1896.

Koblitz v. Western Reserve University et al., 21 Ohio Circuit Court Reports 144, 1901.

Kwong Hai Chew v. Colding, 73 Sup. Ct. 472, 1930.

Lamb v. State, 406 Pac. 2d, 1010, 1965.

Lane v. Johnson, 28 N.E. 2d, 705, 1940.

Lee v. Beach Publishing Company, 173 So. 440, 1937.

Lefebvre v. Somersworth Shoe Company, 41 Atl. 2d, 924, 1945.

Lombard v. Louisiana, 373 U.S. 267, 1963.

Luna v. Seattle Times Company, 59 Pac. 2d, 753, 1936.

Mapp v. Ohio, 367 U.S. 643, 1961.

Marsh v. State of Alabama, 326 U.S. 501, 1946.

Massachusetts Mutual Life Insurance Company v. Michigan Asylum, 144 N.W. 538, 1913.

McCormick v. Burt, 95 Ill. 362, 1880.

McDonald v. Massachusetts General Hospital, 120 Mass. 432, 1876.

McGarrahan v. New Indria Mining Company, 96 U.S. 316, 1877.

McMann v. Securities and Exchange Commission, 87 Fed. 2d. 377, 1937.

Middlebury College v. Chandler, 16 Vt. 683,1844.

Miller v. Clement, 55 Atl. 32, 1903.

Miller v. Murphy et al., 248 Pac. 934, 1926.

Molitor v. Kaneland Community Unit District, 163 N.E. 2d, 89, 1959.

Monty v. Monty, 179 So. 155, 1938.

Morris v. Hoerster et al., 377 S.W. 2d, 841, 1964.

Morris v. Morris, 171 N.E. 386, 1930.

Moskow v. Marshall, 171 N.E. 477, 1930.

Morris v. Smiley et al., 378 S.W. 2d, 149, 1964.

Muller v. Nebraska Methodist Hospital, 70 N.W. 2d, 86, 1955.

Munden v. Harris et al., 153 Miss. App. Reports 653, 1911.

Mushet v. Los Angeles Public Service Department, 170 Pac. 653, 1917.

Neagh v. McMullen, 165 N.E. 605, 1929.

New Haven v. Sheffield Scientific School,22 Atl. 156, 1890.

North v. Board of Trustees, 27 N.E. 54, 1891.

North v. Foley, 265 N.Y.S. 780, 1933.

Nowack v. Auditor General, 219 N.W. 749, 1928.

Oklahoma A & M College v. Willis, 52 Pac. 921, 1898.

Palko v. Connecticut, 302 U.S. 319, 1937.

Payne v. Staunton, 46 S.E. 927, 1904.

People of the State of California v. Kelly, 16 Cal. Reporter 177, 1961.

People v. Shaw et al., 112 Pac. 2d,241, 1941.

People ex rel. Bluett v. Board of Trustees of University of Illinois, 134 N.E. 2d, 635, 1956.

People ex rel. Cecil v. Bellevue Hospital Medical College, 14 N.Y.S. 490, 1891.

People ex rel. Stenstrom v. Harnett, 226 N.Y.S. 338, 1927.

Pepper v. Litton, 308 U.S. 295, 1939.

Peterson v. City of Louisville, 373 U.S. 244, 1963.

Pratt v. Wheaton College, 40 Ill. 186, 1866.

President and Directors of Georgetown College v. Hughes, 130 Fed. 2d, 810, 1942.

Public Utilities Commission of District of Columbia v. Pollack, 343 U.S. 451, 1952.

Randolph v. State, 2 So. 714, 1887.

Reagan v. Guardian Life Insurance Company, 166 S.W. 2d, 909, 1943.

Refer v. Refer, 56 Pac, 2d, 750, 1936.

Roberts v. Parsons, 242, S.W. 592, 1922.

Robertson v. United States ex rel. Baff, 285 Fed. Reporter 911, 1922.

Robinson v. University of Miami, Florida, 100 So. 2d,442, 1958.

Robison v. Fishback, 93 N.E. 666, 1911.

Rogers v. State, 40 So. 744, 1906.

Roof v. State, 245 Pac. 666, 1926.

Runkle v. United States, 122, U.S. 543, 1887.

Runyon v. Board of Prison Terms and Paroles, 79 Pac. 2d, 101, 1938.

Sanford v. Boston Herald-Traveler Corporation, 61 N.E. 2d, 5, 1945.

Scott v. State, 158 N.Y.S. 2d, 617, 1956.

Schiff v. Hannah, Civil No. 5147, W.D. Michigan, 1965.

Securities and Exchange Commission v. Chenery Corporation, 332 U.S. 194, 1947.

Shelby County v. Memphis Abstract Company, 203 S.W. 339, 1918.

Silver v. People, 45 Ill. Reports 224, 1867.

Smart v. Kansas City, 105, S.W. 709, 1907.

Smith v. Board of Education, 182 Ill. App. 342, 1913.

Smith v. Illinois Bell Telephone Company, 270 U.S. 587, 1926,

Stack v. Borelli, 66 Atl. 2d., 904 1949.

State v. Arundel Park Corporation, 147 Atl. 2d, 427, 1959.

State v. Egan, 105 So. 288, 1925.

State v. Henderson, 169 S.W. 2d, 389, 1943.

State v. Keller, 21 Pac. 2d. 807, 1933.

State v. Matteo, 31 So. 2d, 801, cert. denied 68 Sup. Ct. 145, 1947.

State v. Miller, 85, So. 700, 1920.

State ex rel. Burpee v. Burton, 45 Wisc. 150, 1878.

State ex rel. Clark v. Long, 16 S.E. 578, 1892.

State ex rel. Clay County Abstract Company v. McCubrey, 87 N.W. 1126, 1901.

State ex re. Colescott v. King, 57 N.E. 535, 1900.

State ex re. Crain v. Hamilton, 42 Missouri App. 24, 1890.

State ex rel. Cummer v. Pace, 195 So. 679, 1935.

State ex rel. Davidson v. Couch, 156 So. 297, 1934.

State ex rel. Halloran v. McGraith, 67 Pac, 2d, 838, 1937.

State ex rel. Hansen v. Schall, 12 Atl. 2d, 767, 1940.

State ex rel. Harris v. Gautier, 146 So. 562, 1933.

Stetson v. Hunt, 102 So. 637, 1924.

State ex rel. Ingersoll v. Clapp, 263 Pac, 433; cert. denied 277 U.S. 591, 1928.

State ex rel. Little v. Regents of University of Kansas, 40 Pac. 656, 1895.

State ex rel. Sherman v. Hyman, 171 S.W. 2d, 822, cert. denied 319 U.S.748, 1942.

State ex rel. Stallard v. White, 82 Ind. 278, 1882.

State ex rel. Sullivan v. Wilson, 5 Ohio Supp. 399, 1937.

State ex rel. Wagan v. Clements, 192 So. 126, 1940.

Tanton v. McKenney et al., 197 N.W. 510, 1924.

Terry v. Adams, 345 U.S. 461, 1953.

Titus v. Titus, 18 N.W. 2d, 883, 1945.

Tobin v. Blythe Township School Directors, 11 Pa. District and County 696, 1928.

Twining v. New Jersey, 211 U.S. 78, 1908.

United States v. Funk, 84 F. Supp. 967, 1949.

United States ex rel. Gannon v. Georgetown College, 28 App. D.C. 87, 1906.

United States v.Keown, 19 Fed. Supp. 639, 1937.

University of Maryland v. Williams, 9 Gill and Johnson (Md.) 365, 1938.

Valley National Bank of Phoenix v. Glover, 159 Pac. 2d, 292, 1945.

Van Riper v. Traffic Telephone Workers' Federation of New Jersey, 66 Atl. 2d, 616, 1949.

Vermillion v. State ex rel. Englehardt, 110 N.W. 736, 1907.

Vernon v. State, 18 So. 2d, 388, 1944.

Vogel v. Gruaz, 110 U.S. 311, 1884.

Waugh v. Board of Trustees of University of Mississippi, 237 U.S. 589, 1915.

Weiner v. State Department of Roads, 137 N.W. 2d, 852, 1965.

White v. Portia Law School, 174 N.E. 187, 1931.

Woods v. Simpson, 126 Atl. 882, 1924.

Worzella v. Board of Regents of Education, 93 N.W. 2d, 411, 1958.

Yale University v. Town of New Haven, 42 Atl. 87, 1899.

Young v. Regents of State University, 124 Pac. 150, 1912.

Periodicals

American Association of Collegeiate Registrars Journal. Roy M. Carlson, "College Student Records in Relation to Transfer," Volume 17, 1942.

American Association of Collegeiate Registrars Journal. G. L. Singewald, "Analysis of Permanent Record Forms Used by Eighty-Five Pacific Coast Colleges," Volume 17, 1942.

Alabama Law Review, Volume 14, Fall, 1961.

Bulletin of the International Association of Universities. F. Cyril James, "The Place of the Student in University Life," 1965.

California Law Review. Robert M. O'Neil, "Unconstitutional Conditions: Welfare Benefits With Strings Attached," Volume 54, May 1966.

College and University Journal. William Spencer, "Students-A Survey," Volume 4, Number 3, Summer, 1965.

Columbia Law Review, Friedrich Kessler, "Contracts of Adhesion-Some Thoughts About Freedom of Contract," Volume 43, 1943.

Columbia Law Review, John Silard, "A Constitutional Forecast: Demise of the 'State Action' Limitation on the Equal Protection Guarantee," Volume 66, 1966.

Georgetown Law Journal, Volume 50, Winter, 1961.

George Washington Law Review. Nathan D. Grundstein, "Subdelegation of Administrative Authority," Volume 13, 1945.

Harvard Law Review. Morris R. Cohen, "The Basis of Contract," Volume 46, 1933.

Harvard Law Review. Warren A. Seavey, "Dismissal of Students: Due Process," Volume 70, 1957.

Harvard Law Review, Volume 75, May, 1962.

Illinois Law Review. John E. Hallen, "Character of Belief Necessary for the Conditional Privilege in Defamation," Volume 25, 1931.

Journal of Higher Education, E. G. Williamson, "To Avoid Waste," Volume 8, February 1933.

Journal of Higher Education. M. M. Chambers, "Who Is the University? A Legal Interpretation," June 1959.

Journal of the National Association of Student Personnel Administrators. Rev. Patrick H. Ratterman, S. J., "Campus Activity Problems," Volume 1, March 1964.

Journal of the National Association of Student Personnel Administrators. George K. Brown, "Release of Student Records," Volume 3, October, 1965.

Journal of the National Association of Student Personnel Administrators. Charles R. Gambs, Jr., "Sharing Data From Student Records," Volume 3, October, 1965.

Kansas Law Review, Comment: "Inspection of Public Records," Volume 11, 1962.

Kentucky Law Journal, Alvin L. Goldman, "The University and the Liberty of Its Students - A Fiduciary Theory," Volume 54, 1966.

Law and Contemporary Problems. Phillip Moneypenny, "Toward A Standard for Student Academic Freedom," Volume 28, Summer, 1963.

Law in Transition Quarterly. William W. Van Alstyne, "Student Academic Freedom and the Rule-Making Powers of Public Universities: Some Constitutional Considerations," Winter, 1965.

The Los Angeles Bar Bulletin. Norman Abrams, "Legislative Powers of Administrative Authorities: The Rule of Thumb," Volume 36, March 1961.

Michigan Law Review. Recent Decisions: "Expulsion of Student From State-Operated College Without Notice or Hearing," Volume 60, Fall 1962.

Notre Dame Lawyer, Volume 38, 1962.

Notre Dame Lawyer. Joseph B. Robison, "The Possibility of a Frontal Assault on the State Action Concept," Volume 41, 1966.

Saturday Review. James L. Garrett, "College Students - The New Breed," December, 1965.

Saturday Review. Joseph Katz and Nevitt Sanford, "Causes of the Student Revolution," December, 1965.

South Dakota Law Review, Volume 8, Spring, 1963.

Temple Law Quarterly, Volume 35, Summer, 1962.

Texas Law Review, Michael T. Johnson, "The Constitutional Rights of College Students," Volume 42, February 1964.

U.S.L.A. Law Review. William W. Van Alstyne, "Procedural Due Process and State University Students," Volume 10, 1963.

University of Illinois Law Forum, Fall, 1962.

Vanderbilt Law Review, Volume 15, June, 1962.

Yale Law Journal. Note: "Private Government on the Campus: Judicial Review of University Expulsions," Volume 72, 1963.

Monographs, Proceedings, and Speeches

Campus Rebellions and Constructive Changes. Papers and proceedings from the Fifty-Second Annual Convention of the National Lutheran Educational Conference, 1966.

The College Counsel. Transcript of proceedings of the Sixth Annual Conference of University Attorneys, Princeton, New Jersey, June, 1966.

Cutler, Richard L. "The New Role of the Student in the Academic Society," Proceedings of the Third General Session of the Twenty-First National Conference on Higher Education, Chicago, Illinois, March, 1966.

Lesemann, Ralph F. "Due Process in Student Disciplinary Proceedings," Proceedings of the First Annual Conference of University Attorneys, Ann Arbor, Michigan, 1961.

Lunsford, Terry F. (ed.) The Study of Academic Administration. Boulder, Colorado: Western Interstate Commission for Higher Education, 1963.

MacCormick, Austin. "The Nonconformist in the Crew-Cut Crowd," Proceedings of the Thirty-Eighth Anniversary Conference of the National Association of Student Personnel Administrators, Berkeley, California, 1956.

Manual for the Cumulative Record Folders of Schools and Colleges. Washington, D.C. : American Council on Education, May 1947.

Mautz, Robert B. "The Legal Relationship of the University and the Student," Proceedings of the First Annual Conference of University Attorneys, Ann Arbor, Michigan, 1961.

Meigs, Robert B. "The Confidential Nature of Student Records," Proceedings of the Second Annual Conference of University Attorneys, Evanston, Illinois, 1962.

Order and Freedom on the Campus. Boulder, Colorado: Western Interstate Commission for Higher Education, 1965.

Public and Local Acts of the Legislature of the State of Michigan, Number 41, approved May 6, 1935, effective September 21, 1935.

Smith, Justin C. "Legal Pitfalls Facing College Personnel Workers," Speech before the American Personnel and Guidance Convention,April 12,1965.

Smith, Justin C. "Legal Vulnerables in the Handling of Student Record Information," Speech before the American Personnel and Guidance Convention, April 4, 1966.

Stroup, Herbert H. "Freedom and Responsibility in Higher Education," East Lansing, Michigan: Christian Faith and Higher Education Institute, 1964.

Van Alstyne, William W. "Legal Due Process and Student Rights," Proceedings of the Forty-Seventh Anniversary Conference of the National Association of Student Personnel Administrators, Washington, D.C. April, 1965.

Waldrep, Burnell. "The Public and Private Records of an Institution of Higher Learning," Proceedings of the Fifth Annual Conference of University Attorneys, New Orleans, Louisiana, 1965.