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SOME THOUGHTS ON THE ADMINISTRATIVE PROCESS AS A MEANS TOWARD REVOKING THE PUBLIC EDUCATION BENEFIT

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Higher education in the United States the past two decades has assumed proportions never before considered in the wildest imagination of the most optimistic prognosticator. Contemporaneous with that growth is the phenomenon of student activism—involvement, expression and dissent—a phenomenon which sharpens the scalpel of the libertarian, taxes the patience of the conservative and gives pause to the university administrator to ponder whether he would have been more successful in some other form of endeavor.

The societal and administrative impact of such student expression has received considerable comment in the popular[1] and academic press[2] and in the law reviews.[3] Yet an administrative impasse arises by attempting a definitional response between the function of the internal administration of the public university,[4] its

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1 *See, e.g.*, Molnar, *D-day at Brooklyn College*, National Review, Jan. 30, 1968, at 86-87; Crackdown on Protestors, Time, Nov. 10, 1967, at 54; Chaos on the Campus: San Francisco State College Suspensions, New Republic, Jan. 6, 1967, at 14-15.

2 *See, e.g.*, Brickman,*Student Power and Academic Anarchy*, School and Society, Jan. 6, 1968, at 6; Langer, *Students' Rights: They Should Have More; Establishment Agrees*, Science, Aug. 4, 1967.

3 "Public indignation, generated by expressions of protest and dissent by students and faculty members which run counter to popular public feeling, stimulates the urge to punish and suppress by any means readily at hand. And what means are more convenient, swift and effective than the simple expedient of throwing the ungrateful rascals out?" *Symposium: Student Rights and Campus Rules*, 54 CALIF. L. REV. 40 (1966); Seavey, *Dismissal of Students: "Due Process,"* 70 HARV. L. REV. 1406 (1957); Van Alstyne, *Procedural Due Process and State University Students*, 10 U.C.L.A., L. REV. 368 (1963); *Note*, 1962 U. Ill. L. F. 438 (1962); *Note*, 18 VAND. L. REV. 819 (1964).

4 There seems to be little reason to attempt a distinction between public education at the elementary, high school or college-university level except to recall the compulsory nature of elementary education and to suggest that the time consumed by the administrative process at the elementary level may have some bearing upon the courts' attitudes toward granting summary relief. *See* Madera v. Board of Educ. of City of N.Y., 267 F. Supp. 356 (S.D.N.Y. 1967).

taxpaying constituents, and the rights of the student.[5] While transgressions upon academic administrative authority have ranged from such inoffensive conduct as petty insubordination to social protest by means of four-letter expression,[6] the result may be the same to the expressive but recalcitrant student—a denial of the public education benefit.[7]

At the risk of oversimplification, it may suffice to say that some of the conflicts which arise from student activist involvement are occasioned by the fact that the modern college student feels somehow locked into a society which refuses to heed his drive toward self-determination and which leaves him with no alternative but to seek his own means of expression which sometimes transgresses authority of the central administration. Administratively relevant to this assumption is the question of whether or not he is also locked into an administrative process which promises only pro-

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[5] "In large part, the confusion and misunderstanding between town and gown in the context of contemporary student activist movements may be attributed to a widely-held impression that the admission of a student is a matter of grace or of privilege that, once extended, can be recalled or revoked upon simple grounds of what appears to be 'best' for the university, of failure to conform to matters of custom or of deportment, or for engaging in conduct 'unbecoming a student'. It cannot be gainsaid that there is a fair amount of legal authority that may be cited in support of the proposition that the discretion of the school authorities to invoke even the most extreme academic sanctions is limited only by such undefinable standards. For the most part, however, these decisions have failed to make any distinction between private and public institutions, they have been based upon theories of express or implied contract, and that have either antedated or ignored the flowering of the concept of due process. There is good reason now to expect that the trend of judicial decision will reject the notion that a citizen surrenders his civil rights upon enrollment as a student in the university." Sherry, *Governance of the University Rules: Rights and Responsibilities*, 54 CALIF. L. REV. 23, 25-26 (1966).

[6] *Compare* Gleason v. University of Minn., 104 Minn. 359, 116 N. W. 650 (1908), *with* Goldberg v. Regents of Univ. of Cal., 57 Cal. Rptr. 463 (1967).

[7] The choice of the word "benefit" is occasioned by the conclusion that it seems more appropriate here than other terms such as "largess," "conditioned benefit," "privilege," "right," etc. *See* Goldberg v. Regents of Univ. of Cal., 57 Cal. Rptr. 463 (1967). For the purpose of establishing the federal court jurisdictional amount, it has been held that a third-year medical student's interest is to be determined by the value of the right to be protected. In this case, the value for the purpose of jurisdiction was held to be in excess of $10,000.00 Connelly v. University of Vt. & State Agr. College, 244 F. Supp. 156 (D. Vt. 1965). *Compare* O'Neil, *Unconstitutional Conditions: Welfare Benefits with Strings Attached*, 54 CALIF. L. REV. 443 at 446 (1966), *with* Reich, *The New Property*, 73 YALE L. REV. 733 (1964).

cedural safeguards in student discipline matters, without promise of fulfillment of the education benefit.[8]

As in other areas in which public sanctions are imposed upon human conduct and where basic human values are relevant, semantic attitudes have at times prevailed which have added little to the definition of student rights.[9] Notwithstanding this, no longer is the public education institution justified in exerting autocratic disciplinary sanctions without reference to the procedural rights of the student.[10] Of doubtful authority are the cases which have held that public education is a privilege, the conditions of which the student might accept or reject.[11] Yet the duty of the public institution has been defined:

> Officials of the defendant school district have the responsibility for maintaining a scholarly, disciplined atmosphere within the classroom. These officials not only have a right, they have an obligation to prevent anything which might be disruptive of such an atmosphere. Unless the actions of the school officials in this connection are unreasonable, the courts should not interfere.[12]

The concomitant duties of student and faculty have also been analyzed in relation to the pressures of activism:

> [I]t is the responsibility of students and faculty to refrain from conduct that obstructs or interferes with the educational and research objectives of the university, which impairs the full development of the mutual process of teaching and learning or which imposes restraints upon the advancement of knowledge. In part, these mutual responsibilties are reflected in rules and regulations ordinarily

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8 *Compare* Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1961), representing a major breakthrough in defining the rights of a student to a hearing prior to suspension. *Dixon* does not consider the sufficiency of the hearing, but distinguishes those prior cases which did pass upon the sufficiency of the hearing granted—all of which were in favor of the university—*with* Due v. Florida A. & M. Univ., 233 F. Supp. 396 (N.D. Fla. 1963).

9 Public education has been variously defined as a right, Brown v. Board of Educ., 347 U.S. 483 (1954); a privilege which the student may accept or reject, Hamilton v. Regents of U. of Cal., 293 U.S. 245 (1934); Steier v. New York State Educ. Comm'r., 271 F.2d 13 (2nd Cir. 1959); and a conditioned benefit, Goldberg v. Regents of Univ. of Cal., 57 Cal. Rptr. 463 (1967).

10 Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1961).

11 *Id. See also* Knight v. State Bd. of Educ., 200 F. Supp. 174 (M.D. Tenn. 1961); Madera v. Board of Educ. of City of N.Y., 267 F. Supp. 356 (S.D.N.Y. 1967). *But cf.* Hamilton v. Regents of Univ. of Cal., 293 U.S. 245 (1934); Hanauer v. Elkins, 217 Md. 213, 141 A.2d 903 (1958).

12 Tinker v. Des Moines Ind. Com. Sch. Dist., 258 F. Supp. 971, 972 (S.D. Iowa 1966); Aff'd, 383 F.2d 988 (8th Cir. 1967).

> accepted as a matter of course, but which are now a target of intense reaction that goes almost to the point of rejecting the authority of the university to make any rules at all.[13]

The subject of this paper alights upon the question of which is the most efficient forum within which the attempt to resolve the conflicts arising from imposition of the sanction of revocation of the educational benefit by the university and the countersanction by the student.

Many of the student discipline cases have become ensconced in the administrative agency concept, an involvement which seems to engender from a rule generally stated that colleges and universities should be relatively free in matters of self-determination.[14] The freedom of the campus community is abhorrent to legislative rule-making; and, therefore, colleges and universities must be free to carry on their educational prerogatives free from outside interference, a privilege which has generally been honored by the courts.[15] While schools and universities must enjoy the freedom to solve their internal affairs within the gentle limits prescribed by statute, one may question the extent to which the student must submit to purely administrative jurisdiction of the public institution in matters of disciplinary expulsion.[16] Questions, relating to the time required to complete a university administrative appeal,[17] of judicial determinations which affect admission elsewhere,[18] of

[13] Sherry, *Governance of the University: Rules, Rights, and Responsibilities*, 54 CALIF. L. REV. 23, 27 (1966).

[14] *See* note 35 *infra*. Cf. Connelly v. University of Vt. & State Agr. College, 244 F. Supp. 156 (D. Vt. 1965); Lesser v. Board of Educ. of City of N.Y., 239 N.Y.S.2d 776 (1963).

[15] *See, e.g.*, Connelly v. University of Vt. & State Agr. College, 244 F. Supp. 156 (D. Vt. 1965).

[16] Bridgehampton Sch. Dist. v. Superintendent of Pub. Instruc., 323 Mich. 615, 36 N.W.2d 166 (1949) where plaintiff claimed right to appeal under judicature act. Held: State superintendent of public instruction is not a state board, commission or agency, but is a creature of the constitution and a creature of the legislature which may provide that his acts shall be final.

[17] Woods v. Wright, 334 F.2d 369 (5th Cir. 1964).

[18] The following statements are indicative of current administrative attitude of some public institutions: "A transfer applicant under disciplinary suspension will not be considered for admission until a clearance and a statement of the reason for suspension is filed from the previous college. When it become proper to consider an application from a student under suspension, the college must take into account the fact of the previous suspension in consideration of the application. Applications granted under these circumstances will always be on probation and their admission subject to cancellation." State Coll. of Iowa Bull., 1966-68 at 35.

"Students who for... disciplinary reasons are not eligible to reregister in the college or university last attended will not be admitted to the Graduate School." Florida State U. Grad. Bull., 1967-68 at 13.

vagueness of standards,[19] of exhaustion of administrative remedies,[20] and of combination of functions,[21] interlineate the proceedings and are of concern to the student who is attempting to retain the educational benefit.

One may question the role of the agency concept in the academic:

> Perhaps we can use Dean Roscoe Pound's famous minority report for a list of these mandates, even though his notions were vigorously assailed. First, there is a problem as to hearings. The law requires a hearing in an adjudication. It requires a real hearing of both sides of an issue, not a meaningless formalism. It forbids adjudication by consultation when disputes are at issue. Next there are problems of the separation of functions. The law does not sanction the combination of the roles of prosecutor and judge in one person. There is also the problem created by the formulation of policies beyond, or even contrary to, statutes. There is also the major problem concerning findings of facts and conclusions of law. The law requires that findings of facts be upon evidence, and that conclusions of law be upon these findings. It does not countenance preconception or unsupported assumptions as substitutes for cold, hard facts spread upon the record. It forbids findings fiitted to a predetermined result or to a cause. Then there is the problem of

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[19] *See, e.g.*, Board of Supv'rs. v. Ludley, 252 F.2d 372, 374 (5th Cir. 1958). The legislature of Louisiana passed a statute requiring anyone applying to Louisiana State University to present a certificate addressed to that institution attesting that the applicant was of good moral characer. The certificate was to be signed by a parish superintendent or principal. A companion statute made it a violation of tenure for any high school principal found guilty of bringing about integration of the races. Held: the statute was void because it was an inadequate standard. "This statute reposes in two named officials, a high school principal and a parish school superintendent, the unfettered and uncontrolled power to grant or deny to a high school graduate the right to enter a college or university in Louisiana. It sets up no standards and expresses no outline of qualifications which are to guide these officials in the granting or withholding of the students' rights to go to a state supported college or university.... How much less permissible is it for a state by statute to say that a student must obtain the certificate of two named officials to entitle him to enter a tax supported educational institution where no objective standard is set by which the arbitrariness of the judgment of such officials in denying a certificate can be tested?" *Cf.* Steier v. New York State Educ. Comm'r., 161 F. Supp. 549 (E.D. N.Y. 1958) aff'd. 271 F.2d 13 (2nd Cir. 1959). The administrative standard under which Steier was suspended was "each student obey all the rules, regulations and orders of the duly established college authorities, and shall conform to the *requirements of good manners and good morals.*" (emphasis added); Packer Collegiate Inst. v. University of State of N.Y., 76 N.Y.S.2d 499, 27 App. Div. 203 (1948) reversed 298 N.Y. 184, 81 N.E.2d 80 (1948).

[20] *See* notes 61-63 *infra.*

[21] *See* text accompanying notes 44-59 *infra.*

delegation to subordinates. Agency members can no more read the

> whole of all the records that come before them than can the judges on the Court of Claims, which has the commissioner system of taking testimony. But the law requires that the result of an adjudication be reached by a system which assigns a definite role to the person who hears the evidence and another role to the person ultimately responsible for the decision. There can be no internal delegations which depart from this procedural dichotomy. Finally there is the problem of consistency. Iron-clad adherence to stare decisis is not required, but the law requires that some attention be paid to precedent. Agency heads can change their minds, but they cannot willy-nilly treat one person in one away and another in a different way.[22]

There are features within the university complex which distinguish that forum from most other state executive departments which have adopted the administrative law formula. In the university, most rule-making and administrative decisions relate only to the internal administration of the university. Ideally the students, faculty and administration are a partnership with one goal in mind. Ideally the student is a part of, and not separated from, the university. Ideally the student, faculty and administration share the same goals—an intellectual exercise toward learning. If this is the true purpose for existence, any adversary proceeding whether inside or outside the administration building within that setting seems somehow misplaced. The feature of pure intellectualism clearly distinguishes other forms of government regulation or largess, such as licensing or public welfare assistance.[23] In addition there is the question of whether or not there is any clear legislative intent to create the traditional agency machinery to handle such matters. There have been suggestions which indicate a need for isolation of the adjudicatory function because of the suspicions which accompany decision making within the university,[24] suspicions which relate closely to the human values involved in the processes.

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[22] E. PRETTYMAN, TRIAL BY AGENCY 7 (1959).

[23] *Cf.* O'Neil *Unconstitutional Conditions: Welfare Benefits with Strings Attached*, 54 CALIF. L. REV. 443 (1966).

[24] "At Berkeley these cases are referred to a faculty-student discipline committee which holds a hearing and makes a recommendation for its resolution to the Chancellor who almost without exception has followed its advise. The availability of a hearing group independent of the Dean's office is crucial for a number of reasons. First, it is capable of using more formal (and thus more protective) processes for fact-finding than is the Dean's office. , which seeks to avoid an adversary character. Second, it permits the Dean's office to maintain its supportive character—the committee, not the Dean, judges the seriousness of the case and the appropriate sanction. Third, its independence from the administration permits it to give content to general

It is not to be here assumed that public school and college administrators should not have the power or authority to impose the sanction of benefit revocation.[25] However, one may wish to weigh the options which produce the most efficient method of applying the countersanction of retaining the education benefit,[26] by asking whether the public education administrative procedures fit well into the traditional rubric for applying the administrative process, against the reasons which suggest the application of special time tested procedural devices which make the administrative process more desirable.[27]

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regulatory norms which are more consonant with campus consensus than might be the more isolated interpretations of an administrative official. Finally, it can shield student transgressors from excessive sanctions in those few cases where administrative officials are pressured to take extramural factors into account 'for the good of the university'." Heyman, *Some Thoughts on University Disciplinary Proceedings*, 54 CALIF. L. REV. 73, 76 (1966).

[25] "The Regents have the general rule-making or policy-making power in regard to the University... and are... fully empowered with respect to the organization and government of the University,... including the authority to maintain order and decorum on the campus and the enforcement of the same by all appropriate means, including suspension or dismissal from the University." Goldberg v. Regents of Univ. of Cal., 57 Cal. Rptr. 463 at 468 (1967).

[26] A basic and preliminary inquiry may be to determine whether or not the administrative procedure is merely permisive or mandatory within the meaning of the enabling act which creates the board of regents or other statutory authority, and to determine whether the statutory authority is sufficiently explicit to require adherence tothe administrative process. The former may relate to delegation of powers while the latter may raise the question of exhaustion of remedies. *Compare* Board of Supv'rs. v. Ludley, 252 F.2d 372 (5th Cir. 1958) *with* Baron v. O'Sullivan, 258 F.2d 336 (3rd Cir. 1958). *Cf.* Due v. Florida A. & M. Univ., 233 F.Supp. 396 (N.D. Fla. 1963).

[27] *See* note 22 *supra*. "Among the most compelling reasons for the original creation of administrative agencies, and as well for their expansion and proliferation, is the fact that the regularly constituted courts cannot always operate quickly where speed is essential; they do not always perform efficiently in disposing of large numbers of routine matters; and to some extent the courts do not have as richly varied a panoply of sanctions from which to choose as do the agencies. This last point might not at first seem apparent in view of the range of remedies developed in Anglo-American law through the common law forms and procedures, particularly as supplemented by the ingeniousness of equity chancellors. Yet even equity judges have been bound by the forms of law and the routines of judicial procedures, while the administrative process, from its dim beginnings in the exercise of executive discretion, has consistently proved itself capable of greater inventiveness and larger flexibility than the courts." McKay, *Sanctions in Motion: The Administrative Process*, 49 IOWA L. REV. 441, 443 (1964).

The public school and college disciplinary cases seem to be of six distinct and well-defined types:

1. Those which take place without an administrative agency setting.[28]

2. Those which have some semblance to traditional administrative law concepts, such as delegation of powers, rule-making notice and hearing.[29]

3. Those which have a semblance of the administrative concepts because of the interpretation of a statute which confers broad powers of self-determination upon the board of regents or other delegated authority.[30]

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[28] Ingersoll v. Clapp, 81 Mont. 200, 216, 263 P. 433, 437, *cert. denied*, 277 U.S. 591 (1928). Plaintiff was a young married student who was accused of serving intoxicating liquors in her home following the barister's ball (of all things). Her husband was accused of being the campus bootlegger. The Montana court noted the legislative insufficiency in providing an administrative standard and said:
"In the absence of statutory provisions or regulations adopted by a lawful governing body, the method to be pursued in determining the necessity for the suspension of a student from the university rests with the one who is charged with its immediate direction and management, i.e., the president, and the courts will not interfere therewith, in the absence of a clear showing that he has acted arbitrarily or has abused the authority vested in him."

[29] Steier v. New York State Educ. Comm'r., 271 F.2d 13 (2nd Cir. 1959). The administrative appeal procedure was provided by statute. *See* N.Y. Civ. Practice Act, (McKinney 1963). Here the record indicates that Steier was first suspended by the dean of students. He then appealed to the president of the college, then to the faculty council of the college which referred the matter to a faculty committee, after which the faculty council acted upon the committee's recommendation. He then appealed for reinstatement to the board of higher education. Upon seeking redress for his many self-imposed grievances in the courts, the federal district court dismissed on the grounds that he had not exhausted his state administrative remedies. Steier v. New York State Educ. Comm'r., 161 F. Supp. 549 (E.D. N.Y. 1958). Upon appeal to the Second Circuit, 271 F.2d 13 (2nd Cir. 1959), the district court decision was affirmed on other grounds, i.e., that education is a matter of state concern and the federal court will take no jurisdiction in the absence of a showing that there was discrimination because of race, color or creed.

Judge Moore concurred on the grounds that student conduct was a matter of administrative concern, and the court had jurisdiction, that plaintiff had exhausted his administrative remedies, but that the lower court should be sustained on the grounds that the record simply did not indicate that the plaintiff was entitled to relief.

Chief Judge Clark dissented, saying that the plaintiff's complaint alleged facts sufficient to entitle him to a hearing on the facts and that the constitutional guarantees of the Fourteenth Amendment applied to all persons, not merely those within chosen classes.

[30] *See* Due v. Florida A. & M. Univ., 233 F. Supp. 396 (N.D. Fla. 1963). A Florida statute §240.04 provided in pertinent part: "The board of

4. Those which appear to fill an administrative void by creation of an *ad hoc* committee within the university complex to hear disciplinary matters.[31]

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control has jurisdiction over and complete management and control of all the said several institutions, and each and every one of them... is invested with full power and authority to make all rules and regulations necesary for their governance... to have full management, possession and control of each and every of the said institutions and every department thereof... and to do and perform every other matter or thing requisite to the proper management, maintenance, support and control of each and every of the said institutions necessary or requisite to carry out fully the purposes of this chapter...." Pursuant to these broad powers the Board of Control adopted rules relating to disciplinary action for "misconduct while on or off the campus." The administrative rules also provided for appellate procedure to the Board of Control "on all matters which the student feels he has been aggrieved." (This section was repealed, however, by Laws, 1963, Ch. 63-204. Enacted in lieu thereof by 1963 legislation is § 240.011 & § 240.042 which describe the legislative intent and the powers and duties of the board of regents.)

Plaintiffs in the action attempted to obtain a preliminary and permanent injunction in the federal court, claiming a violation of due processs established by the Fourteenth Amendment of the United States Constitution. On appeal to the Fifth Circuit, it was held that the plaintiffs had not availed themselves of the state administrative remedies and the federal court would not impose prior restraint where the administrative process was established and was orderly. *Cf.* Woody v. Burns, 188 So.2d 56 (Fla. 1966).

[31] *See, e.g.*, Goldberg v. Regents of Univ. of Cal., 57 Cal. Rptr. 463 (1967). The California Constitution provides that "The University of California shall constitute a public trust, to be administered by the existing corporation known as 'the Regents of the University of California', with full powers of organization and government, subject only to such legislative control as may be necessary to insure compliance with the terms of the endowment of the university and the security of its funds." CAL. CONST. A. ART. IX, § 9.

Goldberg and others decided that their most effective means for social protest was by the publication of four-letter words. Whereupon he was arrested by the civil authorities. He was also brought before the disciplinary tribunal of the University of California, an *ad hoc* committee created by the university administration. The *ad hoc* committee received its authority through a resolution of the Board of Regents which read: "Implementation of disciplinary policies will continue to be delegated, as provided in the by-laws and standing orders of the Regents, to the President and Chancellors, who will seek the advice of appropriate faculty committees in indivdual cases." His action for mandate in the court, however, was in vain; the court weighed the constitutional rights of the student under the conditioned benefit approach as opposed to the administration's delegated powers to make rules respecting the conduct of the individual student. The experience of the University of California *Ad Hoc* Committee is portrayed in an empirical study reported in Heyman, *Some Thoughts on University Disciplinary Proceedings*, 54 CALIF. L. REV. 73 (1966).

5. Those federal court cases where direct relief is sought under the federal civil rights act[32] or other statutory or constitutional authority.[33]

6. Those federal court cases which require an exhaustion of state remedy in order to invoke federal court jurisdiction.[34]

The cases cited in this context indicate that by application of the administrative process to school disciplinary cases the main thrust is often focused upon questions of existence of notice and adequacy of the hearing, rather than upon the more determinative question of whether or not the student should be readmitted, a determination which might otherwise be possible by imposition of direct court action.[35] Such a direction permits the application of the familiar rule which induces the court to hold that the finding of fact of the board is conclusive in the absence of fraud, corruption, oppression or gross injustice, and the court will not substitute its judgment for that of the board.[36]

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[32] 42 U.S.C.A. § 1983. *See also* 28 U.S.C. § 1343 (conferring original jurisdiction on the federal district court for civil action arising from violation of the act.)

[33] Dixon v. Alabama State Bd. of Educ., 294 F.2d 1950 (5th Cir. 1961), *cert. denied,* 368 U.S. 930 (1961). St. John Dixon was arrested for participating in one of the civil rights sit-ins in the South. He was expelled from a state supported university and brought a direct action against the Alabama State Board of Education, claiming an infringement of his Fourteenth Amendment rights. The Fifth Circuit Court of Appeals held he was indeed entitled to notice and hearing, saying in pertinent part:

"Whenever a governmental body acts so as to injure an individual, the Constitution requires that the act be consonant with due proces of law. The minimum procedural requirements necessary to satisfy due process depends upon the circumstances and the interests of the parties involved." *Id.* at 155.

Cf. Knight v. State Bd. of Educ., 200 F. Supp. 174 (M.D. Tenn. 1961); Madera v. Board of Educ., 267 F. Supp. 356 (S.D.N.Y. 1967).

[34] *See, e.g.,* Ward v. Regents of Univ. System, 191 F. Supp. 491 (N.D. Ga. 1957). *Ward* represents an earlier attempt than Dixon to invoke federal jurisdiction. Plaintiff first applied for admission to the University of Georgia Law School in 1951. His application was denied. He ultimately appealed "through the various steps pursuant to existing regulations" and was again denied admission. He went to the service for two years, then enrolled at Northwestern, then sought to enroll at Georgia with advanced standing as a transfer student, relying, however, upon his original application. The district court required an exhaustion of the state administrative remedies before federal court injunctive jurisdiction could be invoked.

[35] It would be naive to assume that the courts are willing to assume primary jurisdiction and few cases are found which are not precipitated by a constitutionally protected right. *But see,* Tinker v. Des Moines Ind. Com. Sch. Dist., 258 F. Supp. 971 (S.D. Iowa 1966).

[36] *See* Lesser v. Board of Educ., 239 N.Y.S.2d 776 (1963); *cf.* Rudolph v. Athletic Comm., 1 Cal. Rptr. 898 (1960). Appellant was a matchmaker

The foregoing observations are important only as indications that the state legislatures, in providing for public education, have adopted a *laissez faire* attitude toward expressly providing administrative machinery to deal with student expulsion problems. Thus:

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.[37]

It is also indicated that the cases are often devoid of reciting any clear legislative standard by which school and college officials are permitted to impose sanctions upon student conduct.[38] Although this position is in keeping with a general legislative and judicial attitude toward noninterference with university administration, (an attitude which is obviously not unrequited by the university[39]) it also points out an important legislative distinction between public education benefit cases and government largess cases in other areas of concern,[40] such as public welfare assistance, where such rudimentary questions as adequacy of standards to enhance delegation of power may be raised in defense of imposition of sanctions at the administrative level.[41] However, if vagueness because of inadequate

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in California who was served with notice of revocation of his license under the California statutes. He claimed that the evidence was insufficient to sustain the findings of the board and that it was the duty of the trial judge to independently weigh the evidence and to make his own findings. Respondent claims that the athletic commission is one of those statewide agencies whose findings must be tested by the substantial evidence rule § 1094.5 (b) and (c) of the California Code. Court rejects saying: "While legislatively created statewide agencies do not have judicial powers without constitutional sanction in some form and their rulings are subject to independent weighing of the evidence by a court, that is not true of such agencies as are created by the constitution and thereby given adjudicatory power or given such power by the legislature in the exercise of a delegation of authority conferred upon it by the constitution." *Id* at—.

37 Sweezy v. State of N.H., 354 U.S. 234, 250 (1957).

38 *See* notes 40, 48, 49 *infra.*

39 *See, e.g.*, Leser v. Board of Educ., 239 N.Y.S.2d 776 (1963).

40 *Compare* statutes cited at notes 48 & 49 *with* Iowa Old Age Assist. Law, § 249.11 (1966) (specifically providing for appeal, notice and hearing upon failure of county welfare board to act upon application for old age asistance and which provides for express sanctions by a recipient whose old age assistance has been cancelled); Aid to Dependent Children Law § 239.7 (1966) (providing for appeal, notice and hearing to an applicant for aid to dependent children whose application has been denied, modified, suspended or cancelled); *cf.* ILL. PUB. AID CODE, S.H.A. ch. 23 (1958).

41 While the issue of delegation of legislative powers may have lost its importance in the federal courts following the decision in Schechter

standards is present at the legislature-administrative level, the void is not filled at the administration-student level where student rules of conduct are often defined in the most general terms in the university catalogue.[42] Nonetheless, it should be noted that such an appraisal tends to lose its validity if the question rests, not upon whether there is adequate machinery to implement state action, but upon the question of whether there is state action which ulti-

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Poultry Corp v. United States, 295 U.S. 495 (1935), it has been suggested that it is still an important issue in the state courts. 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE, § 2.07; *cf.* Board of Supv'rs. of La. St. U. of Agr. & Mech. Coll. v. Ludley, 252 F.2d 372 (5th Cir. 1958), note 19 *supra. See also* Jaffe, *An Essay on Delegation of Legislative Power*, 47 COLUM. L. REV. 359 (1947).

[42] In Goldberg v. Board of Regents, 57 Cal. Rptr. 463 (1967), the regents' resolution contained the following language: "Implementation of disciplinary policies will continue to be delegated, as provided by the by-laws and standing orders of the regents, to the president and chancellors, who will seek advice of appropriate faculty committees in individual cases." The stated policy of University of California in the Goldberg case was: "It is taken for granted that each student... will adhere to acceptable standards of personal conduct; and that all students... *will set and observe among themselves proper standards of conduct and good taste.*" (emphasis added) The University catalogue provided: "The University authorities take it for granted that a student enters the University with an earnest purpose and will so conduct himself. *Unbecoming behavior*... will result in curtailment or withdrawal of the privileges or other action of the University authorities that they deem wrranted by the student's conduct." (While no one would seriously doubt that Goldberg did not act with proper conduct and good taste, it would appear that the delegation in any other context might be suspect.)

In Steier v. New York State Educ. Comm'r., the standard that the plaintiff transgressed upon was "each student shall obey all the rules, regulations and orders of the duly established college authorities, and shall conform to the requirements of good manners and good morals."

A random sampling of college catalogues reveals the following examples:

"The university reserves the right to exclude at any time a student whose conduct is deemed improper or prejudicial to the interest of the university community." Florida St. U. Grad. Bull., 1967-1968 at 33. "Persons enrolled... are held responsible for conducting themselves in conformity with the moral and legal restraints found in any law-abiding community. They are, moreover, subject to the regulations of the student government under the honor code and the campus code." Rec. of the U. of N.C. at Chapel Hill, 1967, the N.C. Press at 55. In Due v. Florida A. & M. Univ., 233 F. Supp. 396 (N.D. Fla. 1963), plaintiff was indefinitely suspended for violation of rule six, "misconduct while on or off the campus." This includes students who may be convicted by university officials or city, county or federal police for violation of any of the criminal and/or civil laws. The plaintiff had been found guilty of contempt of court.

matly catalyzes the right of the student to resist revocation of the education benefit without reference to the administrative process.[43]

However, it cannot be gainsaid that the administrative procedures, although for the most part judicially rather than legislatively inspired, have not provided inroads to a limited definition of student rights.[44] Hence, while a court of general equity jurisdiction initially may have been wont to interfere with the purely administrative process of the school, college or university, yet once the rights have been defined, a court may be inclined to recognize more freedom in entertaining primary jurisdiction in such matters.[45] Yet, the question of the proper role of traditional administrative procedures in the school administration arena is not solved by reference to the much criticized right-privilege-benefit trichotomy,[46] for the reason that "rights" as defined are rights only within the purview of constitutional guarantees as to due process.[47] Thus the question may

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[43] *Compare* Sheldon v. Fannin, 221 F. Supp. 766 (D. Ariz. 1963), *with* Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1961).

[44] *Compare* Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1961), *with* Hamilton v. Regents of Univ. of Cal., 293 U.S. 245 (1934).

[45] *See, e.g.*, Tinker v. Des Moines Ind. Com. Sch. Dist., 258 F. Supp. 971 (S.D. Iowa 1966).

[46] Perhaps further distinctions should be made. When does a mere privilege mature into a right? *Compare* Hamtlon v. Regents of Univ. of Cal., 293 U.S. 245 (1934) *with* Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1961). Is there a distinction between granting the education benefit and revoking it after it is once granted? *Compare* Leser v. Board of Educ. of City of N.Y., 239 N.Y.S.2d 776 (1963), *with* Madera v. Board of Educ. of City of N.Y., 267 F. Supp. 356 (S.D.N.Y. 1967). Is professional education, once commenced, a "property right" for one purpose and not another. *Compare* Connelly v. University of Vt. & State Agr. College, 244 F. Supp. 156 (D. Vt. 1965), *with* State v. Hyman, 180 Tenn. 99, 171 S.W.2d 822 (1942). The author of Comment, 50 GEO. L. J. 234 (1961), states that the right-privilege-benefit fiction is reached by a conclusion without regard to an analytical process and without regard to the principles which support them. He suggests that there should be an analysis of the purpose of the regulation or law; the background of need which calls it forth; the scope and degree of the sovereign need in calling it forth; and the effect of the statute or administrative directive in furthering the state's interest. *Cf.* Note, 1962 U. OF ILL. L. F. 438, 450.

[47] The right-privilege-benefit fiction is rendered useless where petitioner can show an infringement upon a Fourteenth Amendment guarantee. McNeese V. Board of Educ., 373 U.S. 668 (1963); Brown v. Board of Educ., 347 U.S. 483 (1954); 348 U.S. 886 (1954), *per curiam*; Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1961); Madera v. Board of Educ., 267 F. Supp. 356 (S.D.N.Y. 1967); Knight v. State Bd. of Educ., 200 F. Supp. 174 (M.D. Tenn. 1961).

be asked as to whether or not the court should undertake a more supervisory role and establish a more definitive rule in cases where student conduct is motivated by drives which do not fall within the ambit of constitutional protection,[48] and whether or not proper legislative distinctions should be made to protect the student from improper expulsion by the university. Such a legislative distinction has been suggested by a recommendation that:

> A timely expression of the policy of the state would be to the effect that state college and university authorities have the power to formulate and enforce rules of student conduct which are appropriate and necessary to the maintenance of order and propriety, considering the accepted norms of social behavior in the community; but that no rules may be imposed which place restrictions on student conduct which are not reasonably necessary in furthering the school's educational goals or which unduly restrict the freedom of students to express themselves on matters of genuine social and moral significance.[49]

But few legislatures have been so specific.[50] Present legislative expression ranges from silent assignment of university discretion to the creation of more exact and identifiable standards for expulsion.[51] However, there is little ground to believe that a legislative or constitutional provision which grants to the regents the power to oversee the functions of the university would be declared unconstitutional on these grounds alone,[52] and if the view of one authority

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[48] *Compare* Hamilton v. Regents of Univ. of Cal., 293 U.S. 245 (1934) *with* Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir. 1961) *cert. denied* 368 U.S. 930 (1961).

[49] 18 Vand. L. Rev. 819 at 825 (1963).

[50] Ironically, the legislature of Arizona specifically grants to the Board of Regents of the University the power to adopt rules for the control of student traffic and parking, but is silent on the question of expulsion. *See* ARIZ. REV. STAT. § 15-724, 725 (1956).

[51] *Compare e.g.*, IND. ANN. STAT. § 28-5302 (1948), "The board of trustees of the state university shall... be a body politic... to elect... a president... and such other officers... and prescribe their duties... and to make all by-laws necessary to carry into effect the powers hereby conferred." *with* MASS. GEN. LAWS ANNO., ch. 75, § 3, (1958) "... the trustees may adopt, amend or repeal such rules and regulations for the government of the university, for the management, control and administration of its affairs, for its... students... and for the regulation of their own body, as they may deem necessary, and may impose reasonable penalties for the violation of such rules and regulations...."

[52] Goldberg v. Regents of Univ. of Cal., 57 Cal. Rptr. 463 (1967). *But see* Board of Supv'rs. v. Ludley, 252 F.2d 372 (5th Cir. 1958). This case has to do with the question of the admission of a student, based upon improper legislative enactment which required certificates from a high school principal and a parish superintendent and gave them the "unfettered and uncontrolled power to grant or deny a high school graduate the right to enter a college or university in Louisiana." *Id.* at —

is accepted, the lack of legislative standards to effect delegation is not as important as the question of whether or not there are other procedural safeguards which will prevent arbitrariness.[53]

Rather than improper delegation of powers, the problem at the college and university administration level seems rather to be one of subdelegation of rule-making and adjudicative functions and of vagueness of rules[54] which are intended to guide student conduct. Although there are few cases which dwell on either issue, a typical fact situation of both is found in *Woody v. Burns*.[55] Here the student was accused of changing a basic record of the university when he failed to enroll for an art course in the college of architecture and fine arts. His case was heard by a faculty committee, but it decided to exclude him on other grounds, that of "conduct unbecoming a University of Florida student." When he sought to reenroll, he was denied permission on grounds that his conduct was disruptive in the class. The Florida court said:

> We are not aware of the delegation by the legislature or the State Board of Education or the Board of Regents to the faculty members of any college of higher education system of this state to arbitrarily or capriciously decide who they desire to teach and should such delegation be attempted it would amount to creating a hierarchy contrary to all the fundamental concepts of a democratic society. This is not to say that those charged with the responsibility of operating our universities are not responsible for establishing basic standards of conduct and enforcing same on the campuses of our state supported colleges and universities. On the contrary it is their duty to take affirmative action to exclude from the student body those individuals not conforming to the established standards. However, the manner of enforcement must be by

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[53] "Assuming that the main objective is a workable system... which will protect against injustice or arbitrary action, the notion that protection lies in meaningful standards stated by the Legislature in advance has hardly any merit. Protection lies in procedural safeguards and in various outside checks upon discretionary power." 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE, § 2.08, at 107 (1958).

[54] The classic example of vagueness is found in a private university case where a young coed was confronted because she was not a "typical Syracuse girl." Anthony v. Syracuse Univ., 224 App. Div. 487, 231 N.Y. Supp. 435 (1928). *Cf.* Goldberg v. Regents of Univ. of Cal., 57 Cal. Rptr. 463 (1967), note 40 *supra*. It is submitted that Goldberg's conduct by its own terms is better defined than the standards to which his conduct was applied.

In Steier v. New York State Educ. Comm'r., 271 F.2d 13, 14 (2nd Cir. 1959), one of the standards by which Steier was suspended was that "each student... shall conform to the requirements of good manners and good morals."

[55] Woody v. Burns, 188 So.2d 56, (Fla. 1966).

> a duly authorized body in accordance with procedures which permit the student an opportunity to vindicate himself, if he can and so desires.[56]

A basic issue which is not raised in the *Woody* case is the one relating to the type of subdelegation which is sometimes permitted in administrative law cases, that being the subdelegation to subordinates to do merely ministerial acts and to fill in details.[57] By contrast, the subdelegation often found in education benefit revocation cases is the delegation of the power to make rules or to decide adjudicative facts.[58] By and large this type of subdelegation has gone unchallenged in the education benefit cases and the issue sometimes succombs to the general rule that the university has the duty to concern itself with a student's activities as it effects the welfare of the university as a whole and the university may make such rules as are conducive to effecting that purpose, provided that the rules are neither arbitrary nor capricious. But the void which is created by failure to adopt legislative standards is seldom filled at the administration level. It is true that disciplinary hearings must start somewhere, and for various reasons these chores are often shunted off from someone who has the primary responsibility.[59] Perhaps the reasons which underly the acquiescence of subdelegation rests upon an assumption that a committee decision is for some reason better than individual judgment, that there is a need to create the aura of fairness and that a student's rights are best protected by first submitting the matter to a university or college committee which is composed in part by the student's peers.[60] While this may be commensurate with a desire to isolate the administration from the suspicions of an activist student body or for the purpose of placating the student's demand for involvement in university administrative functions, it may be wanting of appro-

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[56] *Id.* at 59.

[57] 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE, § 9.06 (1958).

[58] *See* note 40 *supra.*

[59] *See, e.g.*, Heyman, *Some Thoughts on University Disciplinary Proceedings*, 54 CALIF. L. REV. 73 at 75-76 (1966).

[60] "When the misconduct may result in serious penalties and if the student questions the fairness of disciplinary action taken against him, he should be granted, on request, the privilege of a hearing before a regularly constituted hearing committee. The following suggested hearing committee procedures satisfy the requirements of procedural due process in situations requiring a high degree of formality. 1. The hearing committee should include faculty members or students, or, if regularly included or requested by the accused, both faculty and student members...." Joint Statement on Rights and Freedoms of Students, 53 A.A.U.P. Bull. 53 Winter 1967 at 368.

priate precedent to sustain it.[61] Neither does that assumption prove that fairness will exist because of student inclusion on the hearing committee. Nor does it escape the reality that the ultimate decision of revocation or nonrevocation must ultimately remain with the chief administrative functionary of the college or university. It is in this transition of functions where the ultimate danger lies that the decision of the superior may in fact be the decision of the subordinate.[62]

The pragmatic difficulty that a student faces, however, is to convince a court to entertain jurisdiction of his case when his status or his conduct is such that he cannot engender a question which is under the cover of the constitutional umbrella. The cases which typify the problem are of three types: those fedral court cases in which the courts have either avoided the problem as presenting questions wholly within the function of the state courts,[63] those federal court cases in which the court was not required to pass upon substantive issues because of the aggrieved party's failure to exhaust his state administrative remedies,[64] and those state court decisions which suggest that the academic community should remain sacrosanct and beyond the pale of judicial supervision.[65] With reference to the administrative law question of exhaustion of administrative remedies, there appear to be reasons which both sustain and oppose the judicial position. In those cases which have considered the matter and which have rejected jurisdiction based upon failure to exhaust, the state statutes have been reasonably specific in delegating authority to the boards in control of education.[66] In

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[61] *But cf.*, cases involving subdelegation of legislative or adjudicative functions in other administrative areas. English v. City of Long Beach, 209 P.2d 403 (Cal. 1949) (Dismissal of a policeman); State v. Rifleman, 203 Okla. 294, 220 P.2d 441 (1950) (Suspension of a dentist from practice); State v. City of Seattle, 61 Wash.2d 658, 379 P.2d 925 (1963) (Discharge of a public employee); Ledgering v. State, 63 Wash. 2d 94, 385 P.2d 522 (1963) (Suspension of driver's license).

[62] "What happens in fact is that the line between exercise of independent judgment by the superior and reliance by the superior on the judgment of the subordinate becomes impossible to locate." 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE, § 9.06 at 636 (1958). "At Berkeley these cases are referred to a faculty-student discipline committee which holds a hearing and makes a recommendation for its resolution to the Chancellor who almost without exception has followed its advise." Heyman, *Some Thoughts on University Disciplinary Proceedings*, 54 CALIF. L. REV. 73, 76 (1966).

[63] *See Steier* note 27 *supra.*

[64] *See Due* note 28 *supra.*

[65] *See* note 34 *supra.*

[66] *See* notes 27-28 *supra.*

some the boards prescribed rules which included appeal procedures. In addition, correct distinction is made between those cases which prohibit direct federal court action while applying an administrative, rather than a judicial remedy.[67] On the other hand, none of the cases distinguishes between dissent and behavior, a question which demands clarification and which could be important in determining whether or not primary jurisdiction will be assumed. In addition, the cases do not consider whether or not exhaustion would have availed the student of an adequate remedy.[68] None of the cases sufficiently considers and distinguishes the unique position of the student in relation to the university and with relation to the administrative process within the university.[69] None suggests that the typical student is without funds to sustain a long and arduous appeal from a suspension order by dean of students to the president of the college, to faculty committee, to the faculty council, to the board of education, to the commissioner of education and then through the courts.[70] None suggests that the student can afford neither an attorney to develop an adequate record at all stages of the proceedings nor that the student can seldom afford the cost of a transcript to make an adequate appellate record[71] and that failure

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[67] *Compare* Steier v. New York State Educ. Comm'r., 271 F.2d 13 (2nd Cir. 1959), *with* Baron v. O'Sullivan, 258 F.2d 336 (3rd Cir. 1958) wherein it is said, "There is no longer any doubt that where a person's federally-protected civil or constitutional rights are abridged, resort to a federal court may be had without first exhausting the judicial remedies of state courts.... If, however, the state court in fact is applying an administrative rather than a judicial remedy, resort must first be had to the state court before suit can be brought in the federal court." *Id.* at 337.

[68] *See* 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 20.07 at 99, § 2010 at 115 (1958).

[69] *See e.g.*, Schwebel v. Orrick, 153 F. Supp. 701, (D.D.C. 1957), where the plaintiff was threatened with disbarment from the Securities Exchange Commision and brought action for temporary injunction and temporary restraining order, and it was held that judicial intervention was proper where plaintiff could show "that his case does present an exceptional situation in which the court has jurisdiction to determine the purely legal question of the Commission's authority to maintain the pending disciplinary proceedings against the plaintiff, without requiring him to exhaust his administrative remedies, because of the peculiar delicacy of an attorney's good reputation, his chief asset is his profession, and the fact that some members of the public may assume guilt from disbarment proceedings despite final exoneration." *Id.* at ——.

[70] *See, e.g.*, Steier v. New York State Educ. Comm'r., 271 F.2d 13 (2nd Cir. 1959); note 27 *supra.*

[71] The cost of the transcript in the University of California proceedings was $1300.00. Obviously, this is not to be taken as usaul, or even average, but it is significant. *See* Heyman, *Some Thoughts on University Disciplinary Proceedings*, 54 CALIF. L. REV. 74, 77 (1966).

of the record may result in the sustention of the findings of fact by the administrative tribunal.[72] Few consider that the time required for appeal[73] and mootness[74] of the question to be decided are important to the student or that an adverse but unproven mark of bad conduct may reflect adversely upon the only asset that the student owns—his intellectual and behavioral integrity.[75] None of the public university discipline cases considers that the students' peculiar position within the university is also unique in that typically the student is not a person who is seeking or receiving government largess through the dole, but is oftentimes and in many states a person who is either paying for a service in the form of tuition or is in the intellectual market place bargaining a special intellectual or artistic talent for scholarship, tuition rebate or grant-in-aid which in turn adds to the creation of consortium between faculty and student within the university.[76]

Neither do the education benefit cases clearly consider the question of the separation of functions within the hearing tribunal. Paradoxically, the college or university student who faces disciplinary proceedings for engaging publicly in a spirited protest movement which to him is closely associated with a basic freedom may ponder at his leisure the dilemma he faces when summoned before an administrative tribunal which investigates, prefers and adjudicates the charges against him.[77] The activist student may well con-

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[72] *See* note 32 *supra.*

[73] *See* Woody v. Burns, 188 So.2d 56 (Fla. 1966) where the facts indicate that the student missed at least two trimesters of school because he elected to appeal through the administrative process.

[74] Woods v. Wright, 334 F.2d 369 (5th Cir. 1964). Plaintiff was accused of parading without a license and by reason thereof, she, with others, was suspended for the rest of the year and was not permitted to graduate with the class. The question was whether or not an order denying a temporary restraining order is a final decision and therefore appealable under 28 U.S.C.A., § 1291. Ordinarily such a denial is not a final order from which appeal will lie. However, the court held that the posibility of mootness and the possibility of losing her remedy prompts it to treat it as a final order. "If the suspension and expulsion order had remained in effect until an application for a preliminary injunction had been heard and acted upon, the school term would have expired. Linda Cal Woods and other of her class would not have been promoted or graduated and the claims asserted would have become nearly if not altogether moot." *Id.* at ——.

[75] *See* note 63 *supra.*

[76] It is common knowledge that colleges and universities vie for students of outstanding scholastic, artistic and athletic ability by offering scholarship grants, grants in aid or other benefits in exchange for their particular talent.

[77] *TIME*, Jan. 19, 1968 at 34. Reporting the findings of a joint student-faculty committee which was organized to study ways to avert campus

sider the issue of combination of functions[78] in its purely academic rather than its legal context and may conclude that it permits of less understanding of his predicament because of those same human values[79] which brought him there and because the forum for the college or university disciplinary hearing is found in a system where little else may be provided or available.[80]

Analysis may suggest, however, that the question of separation of functions in the university hearing becomes more complex for the same reasons that other traditional administrative concepts do not fit well into the forum. The public education benefit is executed upon broad powers of delegation and subdelegation. It sometimes lacks any statutory definition which defines the rights of the students. It has a certain internalness which distinguishes it from the other forms of largess. The university is neither created nor intended as an agency within the true meaning of the concept. It is neither primarily nor secondarily concerned with either a legislative or judicial function. It is concerned only with individuals who are infinitely associated within the university complex. While it may resemble the public welfare and public employment largess, it is yet temporary and transitory to the people whom it affects. Of all these distinctions it is the "internal" feature which best suggests the need for independent judgment of the facts. Ordinarily the traditional reasons which speak for the administrative process as an alternative means to pure judicial process may be the same reasons which permit a combination of functions at the agency level. Those motives may include combining legislative and judicial functions to effect the purpose of the administrative tribunal by permitting

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disorder on University of California campus. "On the key issue of how the university should maintain order... asuming that dialogue will not resolve all tensions—the report proposed that the chancellor should not get directly involved with administering campus discipline. Under the present system, it argued, the chancellor appears to be both prosecutor and judge, which inevitably makes him seem like the students' adversary."

78 *See In Re* Murchison, 349 U.S. 133, 136 (1955). "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case, and no man is permitted to try cases where he has an interest in the outcome."

79 "The reason for the unsoundness of any such broadside condemnation is that the principle which opposes the combination of functions has to do with individuals, not with large and complex organizations." 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE, § 13.01 at 172 (1958).

80 *See, e.g.*, Goldberg v. Regents of Univ. of Cal., 57 Cal. Rptr. 463 (1967). *Compare In Re* Schlesinger, 404 Pa. 584, 172 A.2d 835 (1961).

both the ascertainment of facts and limited policy-making. In addition, the combination of functions in its ordinary agency setting involves the questions of expertise and dispatch in handling controversies. The problem, however, is in attempting to delimit and to separate the investigative, legislative, judicial and executory functions by separating the pretense and performance of diverse personalities rather than the functions within the administrative process.[81]

While the foundation cases which invoke due process requirements as to combination of functions of an inferior tribunal involve neither the revocation of a public benefit nor the pure administrative law tribunal, they do provide the touchstone through which the ground rules for college and university disciplinary proceedings may be laid.[82]

It has been suggested, however, that the distinction is not in judging, but in advocating, and that the real test of validity is whether or not, at the time of final decision, the hearing tribunal is insulated from contamination by the advocates.[83] The difficulty,

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[81] "It is only where there is a pretense of one personality, while in fact there is the performance of another, that the action of a regulatory agency with judicial functions becomes arbitrary, capricious and unconstitutional," Atchison T. & S. F. Ry v. United States, 231 F. Supp. 422, 428 (N.D. Ill. 1964).

[82] Tumey v. Ohio, 273 U.S. 510 (1927), involving the combination of functions of a mayor who tried prohibition act violations and whose compensation was partially derived from the assessment of costs against persons convicted, in addition to his regular salary as mayor. *In Re* Murchison, 349 U.S. 133 (1955) involving the question of whether or not a one man grand jury under the Michigan statutes could sit as a trial court and hear the contempt citation charges against a person accused of contempt at a previous hearing before the same magistrate, sitting as a grand jury. Here the supreme court reversed the lower court conviction for the reason that it was a denial of due process for the trial court to try a case in which he was personally interested. It is significant that the dissenting opinion of Justice Frankfurter suggests the court has imposed a more stringent requirement on state court judges insofar as the separation of functions is concerned than it had previously imposed on federal judges over which it exercises supervisory power. This criticism is based on the fact that the court in Murchison did not cite a previous contempt case, Sacher v. United States, 343 U.S. 1 (1952) where the contempt power of a federal trial court judge was upheld. Neither case involved the separation of functions of an administrative tribunal. Sacher is a federal court case while Murchison is reviewed on certiorari from a state court. The cases are better distinguished, however, when the court in Murchison suggests that it is not considering the inherent power of a trial judge to punish for contempt in open court as it did in Sacher. In this connection, *see* McClelland v. Briscoe, 359 S.W.2d 635, 639 (Tex. Civ. 1962).

[83] 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE, § 13.02 (Supp. 1965).

however, may be in determining who is an advocate and what is advocacy at the final hearing. One state court has held that a lawyer who investigated and initiated a proceeding to suspend a physician's license to practice in a hospital and who was present at the executive determination of the board when the physician's license was suspended, did not contaminate the board's power to suspend.[84] On the other hand, a lawyer who was a member of a board of regents which inquired into the matter of terminating a tenured professor's services and who acted as its chairman and participated in the examination of the board's witness and cross examination of the respondent's witnesses, was held to have contributed to the contamination of the hearing.[85] In an "exceptional case" on the facts, it was held that a hearing examiner who was a member of the commission and who had previously served as an investigator for a division of the agency prior to his appointment and had investigated and discussed the case with the commission, had contaminated the hearing sufficiently to invoke federal jurisdiction by prior restraint.[86]

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[84] Koelling v. Board of Trustees, 146 N.W.2d 284 (Iowa 1967).

[85] State v. McPhee, 6 Wis. 2d 190, 94 N.W.2d 711 (1959). The court indicated that mere combination of functions, standing alone was insufficient to contaminate, but when taken with other objections to the proceedings, there was sufficient grounds.

[86] Amos Treat & Co. v. Securities Exch. Comm., 306 F.2d 260, (D.C. Cir. 1962). Cohen was an investigator for the corporate finance division of the defendant SEC. He made an investigation and report and then was appointed to the commission. Plaintiff attempted to have a revocation of license hearing discontinued for the fact that there was unlawful communication (*ex parte*) with regard to the case between the staff and the commission. The court said: "We are unable to accept the view that a member of an investigative or prosecuting staff may initiate an investigation, weigh its results, perhaps then recommend the filing of charges, and then thereafter become a member of that commission or angency, participate in adjudicatory proceedings, join in commission or agency rulings and ultimately pass upon the possible amenability of the respondents to the administrative orders of the commission or agency. So to hold, in our view, would be tantamount to that denial of administrative due process against which both the Congress and the courts have inveighed."
It would appear that the holding is exclusive of the provisions of the federal administrative procedure act.

Compare Securities & Exch. Comm. v. R. A. Holman & Co., 323 F.2d 284 (D.C. Cir. 1963) which distinguishes "Treat" as the "exceptional case."

In this line of federal cases, the effectual question may arise as to what happens once the hearing is contaminated by a minority of the board. For a case involving public statements as evidence of prejudging sufficient to invoke federal court jurisdiction and citing "Treat", see Texaco v. F.T.C., 336 F.2d 754, 760 (D.C. Cir. 1964), vacated and remanded on other grounds, 381 U.S. 739 (1965). The case points

Emphasis may also be placed upon the interiority of the whole administrative procedure, as well as upon the question of contamination by the advocates. This concern may be more identifiable with the university or college forum than with other statutory and sophisticated administrative agencies where there are factual and legal external checks and balances which are intended to insure toward a modicum of impartiality. The internal nature of the forum is suggested by observing the student who is, for all practical purposes, part of the university complex, informed against by a person associating with the administration as dean of students or dean of men, appearing before a committee composed of persons who, as faculty, students or administrators, are concerned with interpreting and enforcing vague rules of student conduct which have been formulated wholly within the university. Assuming some type of "right" which may at that stage be entitled to consideration,[87] the internalness of such a proceeding may be analagous to the case of a Pennsylvania lawyer whose right to practice law came into question because he was somehow associated with the Communist Party. He was cited to appear before a bar association committee on offenses, composed of lawyers who were jointly appointed by a president, judge of the court and the county bar association. The court had no difficulty in finding an objectionable combination of functions as accuser, prosecurtor and judge which would vitiate the proceedings. It said:

> The Committee, as prosecutor, called and examined its witnesses against the appellant and vigorously conducted an adversary proceeding against him before its own Subcommittee which, as judge, presided over the hearings, passed upon the creditability of witnesses, determined the inferences to be drawn from their testimony and deduced therefrom the facts which it found.[88]

This is not to presume, however, that every proceeding will be, or should be, voided simply because there is gross duality within the functions of the administrative body. The sanctity of the proceeding may relate closely to the greater question of delegation and the dilemma which may be encounterd if an invalidating com-

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out the question as to whether federal jurisdiction should be invoked when there is a denial of due process and whether the proceedings should be vitiated or whether it should be remanded to the commission for further hearings without the presence of the offending commissioner.

[87] *See* note 44 *supra*. "There is good reason now to expect that the trend of judicial decision will reject the notion that a citizen surrenders his civil rights upon enrollment as a student in the university." *See* Sherry, *Governance of the University: Rules, Rights and Responsibilities*, 54 CALIF. L. REV. 23, 26 (1966).

[88] *In Re* Schlesinger, 404 Pa. 584, 597, 172 A.2d 835, 840 (1961).

bination of functions is found. What then is to happen if the tribunal is the only one which has authority to hear the matter, a factor which is most likely in many university discipline cases?[89] Who else is to hear? The reviewing court may find that there is no alternative but to vindicate the jurisdiction of the hearing tribunal and to search the appeal record for substantial error which would require a reversal upon the record as a whole.[90] An obvious prejudice occurs if no adequate record is made at the hearing level.

The appeal may be sufficient buffer to obliterate the stigma of combined functions.[91] But when applied to the university discipline cases, the right of appeal may have to be found elsewhere than in the rules of the university itself. It would be somewhat naive to suggest that the rule making power of the university could confer appellate jurisdiction on a court of record, and unless general administrative review is provided for without reference to the agency which is affected, the right of appeal may not be available, and would, therefore, not furnish the buffer for a tribunal which has combined functions.

Statutory and other administrative rules which guarantee separation of functions have been suggested. The first Model State Administrative Procedure Act[92] did not consider the question, but it appears to be included in the Revised Model Act:

> Unless required for the disposition of *ex parte* matters authorized by law, members or employees of an agency assigned to render a

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[89] Oftentimes the board or commission is the only body which has jurisdiction to hear matters of revocation and such jurisdiction should not be vitiated merely because the statute authorizes both investigative and judicial functions. State v. Board of Med. Exam., 135 Mont. 381, 339 P.2d 981 (1959); Holt v. Raleigh City Bd. of Educ., 265 F.2d 95 (4th Cir. 1959), *cert. denied*, 361 U.S. 818 (1959). *Compare* Bandeed v. Howard, 299 S.W.2d 249 (Ky. 1956); *cert. denied* 355 U.S. 813 (1957) *with* Board of Med. Exam. v. Steward, 203 Md. 574, 102 A.2d 248 (1954). (Where a case is returned to the tribunal after appeal and the question of prior judging is raised, held: "[D]isqualification will not be permitted to destroy the only tribunal with power in the premises.") *Id.* at 582, 102 A.2d at 252. *See also* Nider v. Homan, 32 Cal. App.2d 11, 89 P.2d 135 (1939).

[90] 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE, § 13.02 (1958).

[91] "The basic idea that executive, legislative and judicial functions should to a considerable extent be separated out from each other still prevails in our dominant theoretical thinking, though in effecting it with reference to administrative agencies, we must rely in the final analysis upon the check afforded by just such judicial review as herein attains." Atchison, T. & S. F. Ry. v. United States, 231 F. Supp. 422 (N.D. Ill. 1964). *Cf.* Sacher v. United States, 343 U.S. 1 (1952); Ruse v. State Bd. of Reg. for Healing Arts, 397 S.W. 2d 570 (Mo. 1965).

[92] MODEL STATE ADMINISTRATIVE PROCEDURE ACT. There is question, however, whether the original model act would apply to university discip-

> decision or to make findings of fact and conclusions of law in a contested case shall not communicate, directly or indirectly, in connection with any issue of fact, with any person or party, nor, in connection with any issue of law, with any party or his representative, except upon notice and opportunity for all parties to participate. An agency member
> (1) may communicate with other members of the agency, and
> (2) may have the aid and advice of one or more personal assistants.[93]

Pragmatically the Model Act does not express disdain for non-separation of functions as being abhorrent to the agency concept. Instead it appears to attempt a limitation upon its application by prohibiting "communication" between agency members and parties except upon notice and opportunity to be heard. Prohibiting communication is obviously more restrictive than prohibiting participation by the advocates. When applied to the university disciplinary scene, however, the problem may be more complex when it is to be determined who is a party with whom communication is prohibited. The person whose matriculation is affected is obviously a "party" to the proceeding. His adversary is the university administration, including the body politic whose function it is to determine policy. It makes little difference whether the hearing is structured within the definition of a statute which delegates authority or whether it is merely *ad hoc*. It would be difficult to properly define, delimit and enforce a rule which prohibits communication during the investigation stage.[94] The suggestion that the real objection is improper advocacy may retain its validity within this context.

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linary hearings. The original model act defines an "agency" as: "... any state (board, commission, department, or officer), authorized by law to make rules or to adjudicate contested cases, except those in the legislative or judicial branches, and except... (here insert the names of any agencies such as the parole boards of certain states, which, though authorized to hold hearings exercise *purely discretionary functions*)." (emphasis added). *Id.* at § 1. There is considerable case law which indicates that the function of a state board of regents in disciplinary matters is purely discretionary. It has been suggested, however, that at least one state university is subject to the provisions of the model act. Linde, *Campus Law: Berkeley Viewed from Eugene*, 54 CALIF. L. REV. 40, 45 (1966).

[93] REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT, § 13.

[94] The Revised Model Act has been criticized as being both too restrictive and not restrictive enough. "Agency members, presiding officers, and members of the agency's staff should be allowed to communicate with each other, except that the Act should forbid communications between those who are participating in the decision of a contested case and staff members who in that case have participated in investigating, prosecuting or advocating. In other respects, § 13 does not go far enough. It should not only forbid insiders from improperly communicating with outsiders, but it should also forbid outsiders from improperly communicating with insiders. It must deal with communications

Other proposals are less subtle:

> The hearing committee should include faculty members or students, or, if regularly included or requested by the accused, both faculty and student members. No member of the hearing committee who is otherwise interested in the particular case should sit in judgment during the proceeding.[95]

The above joint proposal assumes that the committee is an *ad hoc* committee within the university and appears to recognize a lack of legislative or legislatively induced administrative standard which would create a hearing tribunal. It identifies combination of functions with personal "interest" which relates to the broader question of bias at the hearing level. The question again is one of definition and application of general standards to specific facts. What kind of person is "otherwise interested?" The proposal appears self-inclusive and does not exclude either all faculty or all students for that reason alone as being interested. However, some faculty may be interested and some students may be interested for varying reasons which may not be determined at the time of appointment. But this is surely not the "interest" intended. The proposal suffers from the same type of vagueness that plagues university rules of conduct in general.

Seemingly appropriate is the question of whether the courts, the legislatures and the university administrators have performed a disservice to the student by imposing the administrative agency formula for expulsion proceedings without providing adequate machinery to implement the hearings in a meaningful way. If so, the reservations of the suspect student may be well founded when he suddenly realizes that he is nowhere on the road to solving his dilemma until he is in court, and then only if there is sufficient record to sustain a finding that the authorities acted arbitrarily and

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in both directions, not just in one direction. And to protect against contamination of the judging function, something more than communication must be dealt with; those who participate in the decision must not be subordinate to those who participate in investigating, prosecuting or advocating, except that agency members must have ultimate responsibility for all functions." K. DAVIS, CASES ADMINISTRATIVE LAW, 586 (2nd Ed. 1965).

[95] A.A.U.P. Bull., 53 Winter 1967 365 at 368. The proposal is from a Joint Statement on Rights and Freedoms of Students of the American Association of University Professors, United States National Student Association, Association of American Colleges, National Association of Student Personnel Administrators, and National Association of Women Deans and Counsellors. It has been officially endorsed by the United States National Student Association and the Council of American Association of University Professors. *Cf.* 54 CALIF. L. REV. 23 at 37, 38 (1966); 18 VAND. L. REV. 819 (1965).

capriciously. Perhaps both he and the university may be prejudiced by *ad hoc* committee hearings which do not provide for a record or which do not compel the attendance of witnesses.[96]

Application of other present alternatives may be no more adequate. It has been lightly suggested that enrollment in a constitutionally appointed university is akin to the creation of a trustee-*cestui que* trust relationship for the benefit of the student.[97] While the possibilities and options of enforcing student rights under such a theory are intriguing, adherence to the suggestion quite obviously enhances the *en loco parentis* concept of student-university relations, a concept which is currently in disfavor.[98] Yet it can be

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[96] This is not to assume that an individual litigant in an administrative hearing has a right to compulsory process to compel the attendance of witnesses in the absence of a statute granting it. Misouri v. North, 271 U.S. 40 (1926). *Contra*, Jewell v. McCann, 95 Ohio St. 191, 116 N.E. 42 (1917). But it would seem that here again the internal nature of the university complex has some bearing on the subject. Witnesses, either faculty or students, as well as the parties are closely associated with the university. It is conceivable that either faculty or students might be reluctant to come forward for fear of possible recrimination. *See* State v. McPhee, 6 Wis.2d 190, 94 N.W.2d 711 (1959) where it was held that a hearing examiner is required by the duties of his office to protect the witneses from possible reprisals.

[97] The California Constitution provides that "the University of California shall constitute a public trust, to be administered by the existing corporation known as the Regents of the University of California, with full powers of organization and government, subject only to such legislative control as may be necessary to insure compliance with the terms of the endowment of the university and the security of its funds." CAL. CONST., A. art. IX, § 9. *See Goldberg* v. Board of Regents of U. of Cal., 57 Cal. Rptr. 463 (1967). This issue was raised but passed over by the Illinois court's brief but interesting language in Tinkoff v. Northwestern Uni., 333 Ill. App. 224, 232, 77 N.E.2d 345, (1948). "Plaintiff has no right based upon a trust relationship with the University. Tinkoff, Jr., did not become a beneficiary upon compliance with the entrance requirements. We think he remained at most a potential beneficiary until he was actually admitted." Quaere: Tinkoff involves pre-admission issues? Would his status as a beneficiary change after he had been admitted. *See* note 44 *supra*.

[98] It is interesting to sepculate as to how much influence the doctrine has on the administrative agency concept, or less formally, the "little family conference" within the university. It has been suggested that for constitutional purposes, the better approach as indicated in Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir. 1961); recognizes that state universities should no longer stand *en loco parentis* in relation to their students. *Cf.* 2 LAW IN TRANSITION QUARTERLY 1, 17 (1965). Quaere: Does this free the student to accept what remedies are available? With the descension of the doctrine, should not the "little family conference" go also? Does this tend toward hardening of the categories? It was made clear in Dixon that a full-dress judicial hearing with the right to cross-examine the witnesses was not re-

argued that the *en loco parentis* doctrine is encouraged by the chary attitude of the courts in their reluctance to impose judicial oversight upon university discipline. No court has seriously considered the trustee-*cestui que* trust relationship, and it is probable that the proper interpretation of the university as a trustee refers only to the operation of the facilities rather than the custody and control of matriculants.[99]

Legislative and administrative proposals have been suggested, proposals which suggest adherence to the agency concept within the university and which advocate firming up the mechanics of the hearing procedures to conform to due process.[100] Yet these proposals do not consider the unique position of the student in matters of time, transiency or the fact that the typical student is usually a person who has given a *quid pro quo* for the experiences associated

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quired, and that the attending publicity and disturbance of university activitities might be detrimental to the educational atmosphere of the university and impractical to carry out.

[99] *See* note 96 *supra.*

[100] Sherry, *Governance of the University: Rules, Rights and Responsibilities*, 54 CALIF. L. REV. 23 at 37, 38 (1966) (suggesting that rules be written with precision and without ambiguity—that they be publicized to assure that their existence and content is brought home to those affected—that enforcement proceedings be preceded by notice and statement of charges, together with information of procedures—that prompt hearings be had with the opportunity to question witnesses against the accused and to call witnesses on his own behalf—the right to counsel be provided—that a record be kept to show compliance with all the requirements of due process—that the findings and recommendations be in writing with a copy furnished to the accused); *Comment*, 18 VAND. L. REV. 819 (1965) which, in addition to those mentioned above, suggests the expression of university policy —that the college and university officials be given express power to formulate and enforce rules of student conduct which are appropriate and necessary to the maintenance of order and propriety—that no rules be imposed which place restrictions on a student's conduct which are not necessary to further the school's educational goals or which restrict the student's freedom of expression on matters of social and moral significance—an exhaustion of administrative remedies be required—that the type of hearing be judged by the gravamen of the offense—the right to appeal and the review court be limited to adequacy of hearing unless there is a showing of bad faith, in which case the court would have jurisdiction to determine the case on its merits); A.A.U.P. Bull. 53 Winter 1967 365 at 368 (which provides, in addition to those mentioned above, that the hearing committee be comprised of faculty members or students, or both—that the burden of proof be upon those officials bringing the charge—that all matters upon which the decision is based be based upon evidence introduced at the hearing—that if there is no transcript there be at least a tape recording of the hearing—that the decision of the hearing committee be final "subject only to the student's right of appeal to the president or ultimately to the governing board of the institution").

with matriculation. The latter observation gives rise to a third alternative—of fashioning the courts' analysis of the relationships between students and public universities after the contractual relationship between students and private eleemosynary institutions. Distinctions between private and public higher education should be sought elsewhere than in the relationship between the student and the university[101] and there is little reason for the courts to treat the relationship of a student to a private university as contractual[102] and to a public university as merely beneficial.[103] Public universities like private institutions contract for facilities, services, equipment and personnel, and in some cases students. While the result in a given case may not be appreciably different by seeking other means of redress, the student whose presence in the university is threatened is interested in having his rights determined in a forum which will give him final, summary, complete and impartial relief at the least expense. The obvious advantage to be gained is that the court, aided by formal means of compulsion to arrive at the truth, may be permitted to make a factual determination as to whether the conditions of continued enrollment have been performed. On the other hand, reservations imposed by the contract may limit the courts' inquiry to the question of whether or not the administrative discretion has been abused,[104] a limitation which seems to be imposed from the courts' traditional attitude toward university discipline.

As the vigor of the American public university students' concern for matters of social and national significance grows, so grows his insistence upon being included in the policy-making and administrative processes within the university. If this insistence is based upon a responsible desire to be made a partner in the total learning

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101 *But cf.* People v. Northwestern Univ., 396 Ill. 233, 71 N.E.2d 156; 333 Ill. App. 224, 77 N.E.2d 345 (1948), *cert. denied*, 335 U.S. 829 (1948).

102 *See, e.g.*, DeHaan v. Brandeis Univ., 150 F. Supp. 626 (D. Mass. 1957); Stetson Univ. v. Hunt, 88 Fla. 510, 102 So. 637 (1924); Booker v. Grand Rapids Med. Coll., 156 Mich. 95, 120 N.W. 589 (1909); State v. Lincoln Med. Coll., 81 Neb. 533, 116 N.W. 294 (1908) (A case which is very descriptive of the posible autocracy of the faculty and the need for court intervention); Carr v. St. John's U., 231 N.Y.S.2d 410 (1962); Anthony v. Syracuse Univ., 231 N.Y.S. 435, 224 App. Div. 487 (1928); Barker v. Trustees of Bryn Mawr Coll., 278 Pa. 121, 122 A. 220 (1923); State v. Milwaukee Med. Coll., 128 Wis. 7, 106 N.W. 116 (1906).

103 *See* notes 7, 9 & 44 *supra.*

104 *See* Robinson v. Univ. of Miami, 100 So.2d 442 (Fla. 1958). An older comment suggests that the contractual theory gives the colleges less absolute power, "but in practice courts interfere only where there has been a palpalable abuse of the wide discretion possessed by the authorities." *Comment*, 77 PENN. L. REV. 694, 695 (1928).

process; and if the student's attitude is that the central administration is merely functionary to that end, then it would seem that the lines of responsibility should be redrawn in more concise and exacting terms. Ideally the student will become more altruistic in his fealty toward the total educational process, and the university will assume the position that it owes the student something other than a promise of procedural safeguards which are guaranteed and enforced elsewhere. Ideally that condition would obviate the need for any adversary type hearing within the university. Pending the millenium, however, the administrative process will suffice provided legislative enactments define procedures and standards in more precise terms, terms which insure the student a fair hearing before an impartial tribunal in the shortest possible time at the least possible cost. If not, other alternatives seem somehow appropriate.