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Comment

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IN essence, Professor Beaney has taken the position that courts are loathe to intervene in educational matters, save in those instances wherein administrative action, whether in a curricular or extracurricular area, is manifestly arbitrary or capricious. He also points out, however, that the courts are not disposed toward abrogation of their responsibility to protect the constitutionally guaranteed rights of citizens, and institutional identification of a citizen as a "student" does not place him outside the law. Indeed, individuals do not discard their mantle of constitutional protection upon matriculation to the university, contrary to the belief held by some university officials. In fact, courts will render no special cognition of *where* an individual is when he has been wronged. Their only concern is with a just and equitable disposition.

In discussing the question of public versus state action, Professor Beaney has called attention to the developing trend of private institutions moving closer to the full restraints imposed on state instrumentalities. Three cases in point clearly support this contention. In *Burton v. Wilmington Parking Authority,*[1] the United States Supreme Court held that, owing to the very "largeness" of government, no readily applicable formula may be fashioned to indicate when a case falls within the purview of private as opposed to state action.

Citing the *Burton* decision, Judge J. Skelly Wright, in *Guillory v. Administrators of Tulane University,*[2] granted the motion for summary judgment by a Negro plaintiff who was refused admission to Tulane University and held that the university, a private institution, was subject to the restrictions of the fourteenth amendment. However, the judgment was subsequently vacated on the grounds that the *degree,* not just the existence, of state action determined the applicability of fourteenth amendment restrictions on private institutions.[3] On new trial of the degree issue, the court held that there was insufficient state involvement in the operation of the university to bring it within the privileges and proscriptions of the fourteenth amendment.[4] In *Evans v. Newton,*[5] the Supreme Court held that the

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[1] 365 U.S. 715 (1961).

[2] 203 F. Supp. 855 (E.D. La. 1962).

[3] 207 F. Supp. 554 (E.D. La.), *aff'd per curiam,* 306 F.2d 489 (5th Cir. 1962).

[4] 212 F. Supp. 674 (E.D. La. 1962).

[5] 382 U.S. 296 (1966).

equal protection clause of the fourteenth amendment applied to the administration of a park, even though private trustees had been appointed by a state court.

Although other sources point to an expanded concept of state action,[6] a significant distinction still remains between public and private institutions of higher education. It will not suffice for us to assume that both public and private institutions will provide equitable rules and procedures for the measurement of student welfare and conduct. Much to the discredit of higher education, the vestiges of *Anthony v. Syracuse University*[7] live on in the hearts of many private college administrators. In that case, a female student was summarily and arbitrarily dismissed from the university, without notice or a statement of charges, under a claimed right of the university officials to do so. Although the consequences of such action seem imminent to the legal scholar, it is unrealistic to assume that administrators at private institutions will rush to align their procedural policies with those of public institutions. A cursory survey of the American history of higher education documents the sanctity of private education, and the strength of this steadfast orientation does not lie within a sectarian affiliation between institution and church. The source of institutional identification, rather than ecclesiastical philosophy, is the issue.

A great number of private institutions, rather than simply those, as Professor Beaney remarked, which are "relying on . . . announced religious orientation to justify . . . rules and regulations that reflect . . . sectarian concerns,"[8] will continue to exercise arbitrary control over the experiences of students on the basis that their right to do so is unalterably founded in their private charter. To remain private means that institutions maintain the freedom to set their own course, without encumbrance from officials other than those appointed or selected as trustees of the institution. Indeed, we may speculate that many private college catalogs will continue to carry the following admonition: "We reserve the right to suspend or expel students from X University for any cause and at any time, without giving due notice or hearing." Such a statement is certain to raise the hair on the back of many an attorney's neck. To a private college adminis-

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[6] *See* Bell v. Maryland, 378 U.S. 226 (1964); Griffin v. Maryland, 378 U.S. 130 (1964); Lombard v. Louisiana, 373 U.S. 267 (1963); Peterson v. City of Greenville, 373 U.S. 244 (1963). *See generally* Silard, *A Constitutional Forecast: Demise of the "State Action" Limitation on the Equal Protection Guarantee,* 66 COLUM. L. REV. 855 (1966); Robison, *The Possibility of a Frontal Assault on the State Action Concept,* 41 NOTRE DAME LAW. 455 (1966).

[7] 130 Misc. 249, 223 N.Y.S. 796 (Sup. Ct. 1927), *rev'd,* 224 App. Div. 487, 231 N.Y.S. 435 (1928).

[8] Beaney, *Students, Higher Education, and the Law,* 45 DENVER L.J. 511, 519 (1968).

trator, however, such a statement may be intrinsic to the operational philosophy of his institution.[9]

I agree with Professor Beaney that the trend seems clearly to be toward an increased erosion of the polarized state versus private dichotomy. As Goldman has stated, "It requires no great expansion of accepted concepts of constitutional law to find that the guarantees secured by the fourteenth amendment are applicable in measuring the legality of the conduct of a private university."[10] I cannot agree, however, that it would be realistic or desirable to make *no* distinction between private and public institutions. To do so may be legally convenient, but educationally unsound.

My second point of response is an expansion of Professor Beaney's brief note on fiduciary relationships. As he has indicated, the concept that the student-university relationship should be characterized by the law of status rather than the law of contracts is an emerging one and has given rise to a recognition of fiduciary status. Specifically, a fiduciary is one whose function is to act for the benefit of another as to matters relevant to the relation between them. In civil law, this denotes one in a position of trust. Since schools exist primarily for the education of their students, it is obvious that professors and administrators act in a fiduciary capacity with reference to students.[11] Although the law permits a fiduciary relationship to exist where one party dominates the other,[12] special standards of conduct have been imposed on the fiduciary.[13] The tone of these standards implies that the highest sense of ethical behavior must characterize a fiduciary relationship. For example, the fiduciary must show that the confidence of the relationship was not betrayed, that he carried out his function conscientiously and in good faith, and that he has not obtained any undue advantage as a result of the relationship.[14]

Clearly, the elements of a fiduciary relationship may be applied to the student-university model. By providing instruction and the promise of a degree, the university sets forth academic tasks which the student is expected to undertake and discharge to the best of his

[9] *See* DeHaan v. Brandeis Univ., 150 F. Supp. 626 (D. Mass. 1957); Robinson v. University of Miami, 100 So.2d 442 (Dist. Ct. App. Fla. 1958). Both cases, involving administrative officials at private institutions, illustrate the point that private institutions have considerable leeway in determining how and for what reasons a student may be dismissed from the university.

[10] Goldman, *The University and the Liberty of its Students — A Fiduciary Theory*, 54 KY. L.J. 643, 650 (1966).

[11] Seavy, *Dismissal of Students: "Due Process,"* 70 HARV. L. REV. 1406, 1407 & n.3 (1957).

[12] Roberts v. Parsons, 195 Ky. 274, 242 S.W. 594 (1922); Cranwell v. Oglesby, 299 Mass. 148, 12 N.E.2d 81 (1937).

[13] Pepper v. Litton, 308 U.S. 295 (1939).

[14] *Id.* at 311; *In re* Cover's Estate, 188 Cal. 133, 204 P. 583 (1922); Neagle v. McMullen, 334 Ill. 168, 165 N.E. 605 (1929).

ability. Assuming that the university is discharging its obligations in good faith, the student should feel free to repose complete confidence in the integrity of the institution. When the student-university relationship is described by using the concept of fiduciary status, the frame of reference suddenly becomes one of trust and behavior founded in good faith. This model, then, places the relationship on a much higher level than that proferred by either the contract or *in loco parentis* theories. It is my hope that administrators will take cognizance of the fiduciary theory — and its attendant benefits — as they continue to develop relationships with students.

Having added a point of clarification and a point of expansion, I now close with a point of amendment to Professor Beaney's presentation. A singular legal concept may have great bearing on future litigation evolving out of the student-university relationship. This concept is the theory of delegable and nondelegable powers. All too often, the delegation of authority from the governing board of trustees to the president, and subdelegation from the president to various administrative officials, is taken for granted and not submitted to legal analysis. Not all responsibilities are delegable, and the body of literature in administrative law makes it clear that administrators in institutions of higher education must be aware of the legal parameters of delegable and nondelegable tasks.

Much of the subdelegation of administrative responsibility which takes place in public colleges and universities is done by tacit assumption. Such delegation is well documented within the framework of administrative law, and courts may be disposed to determine whether they will infer the power of the administrator to subdelegate authority, despite the absence of a statutory provision expressly permitting the practice.[15] It has been suggested that administrative authorities have the power to promulgate binding rules and procedures governing their organization, even in the absence of specific statutory authorization.[16] However, administrative authorities at public universities do not possess legislative power per se. The constitutional separation of the three branches of government and vestment of all legislative power in the legislature is the basis for the doctrine that the legislature cannot delegate its *legislative* power to an administrative authority. Operating with broad discretionary power, administrators at public colleges and universities are free to exercise *rulemaking power,* to fashion new regulations through a case-by-case interpretation of applicable statutory standards. Though critics may disclaim the case-by-case approach, the courts have indicated that restricting administrative authorities to only the rulemak-

[15] Grundstein, *Subdelegation of Administrative Authority,* 13 GEO. WASH. L. REV. 144 (1945).

[16] 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 5.03, at 299 (1958).

ing approach would make the administrative process inflexible and incapable of dealing with many of the specialized problems which arise.[17]

The rulemaking power delegated to administrative authorities, however, may not be used in an arbitrary manner. The delegation is contingent upon the development of adequate standards to guide the administrative authority. These guidelines for behavior may be established by the legislature or by the custom and practice of the particular administrative authority. As a result of inappropriate guidelines for administrative decisionmaking, several state courts have invalidated subdelegations of administrative authority.[18] Where subdelegation of administrative authority is made pursuant to express statutory provisions, no questions of any great difficulty are presented.[19] In the absence of a provision for delegation, however, questions of subdelegation frequently constitute the basis of attack upon an administrative order or regulation which is otherwise free from any doubt as to the validity of its substance — in short, the *act* of subdelegation may involve a deviation from statutory authority.[20] Thus, the authorizing statutory language must be clear with regard to the scope of delegated powers for administrative bodies.

The nondelegation issue generally centers on the adequacy of the standards limiting the granted rulemaking power. There are instances, however, in which the legislature has intended that the instructions given to a single named officer be carried out only by that officer. Subdelegation of responsibility in this situation would be inappropriate.[21] It is inappropriate to conclude, however, that every official act calling for the exercise of discretion must be performed by the one named in the statute.[22]

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

> [O]ne suspects that the courts might be especially prone to reject regulations having the force and effect of law and bearing upon the

[17] SEC v. Chenery Corp., 332 U.S. 194 (1947).

[18] State v. Traffic Telephone Workers' Fed'n, 2 N.J. 335, 66 A.2d 616 (1949); Bell Telephone Co. v. Driscoll, 343 Pa. 109, 21 A.2d 912 (1941).

[19] Robertson v. United States *ex rel.* Baff, 285 F. 911 (D.C. Cir. 1922).

[20] W. GELLHORN, ADMINISTRATIVE LAW: CASES AND COMMENTS 315-16 (1st ed. 1940).

[21] Runkle v. United States, 122 U.S. 543 (1887); Dunn v. United States, 238 F. 508 (5th Cir. 1917); *In re* Tod, 12 S.D. 386, 81 N.W. 637 (1900).

[22] United States *ex rel.* French v. Weeks, 259 U.S. 326 (1922); Hannibal Bridge Co. v. United States, 221 U.S. 194 (1911).

> rights or conduct of private citizens, when such regulations have been promulgated without the responsible head's active approval. Departmental chiefs may be shrewdly advised, therefore, to be themselves the source of the subordinate legislation which emanates from their official establishments. . . . [E]ven where courts have sanctioned sub-delegation of many important elements of regulatory authority, they have still sometimes hesitated to overlook the delegation of the actual final execution of a power conferred upon the department head.[23]

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

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[23] W. GELLHORN, *supra* note 20, at 323.